

Wrongful Abortion: A Wrong in Search of a Remedy

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INTRODUCTION

“Wrongful abortion” is an abortion that a pregnant woman is induced to undergo by negligent conduct (usually a medical misrepresentation).¹ As an example, early in her pregnancy a woman is told by her physician that a medication that she had taken will cause her baby to be born with a severe birth defect. Based on the expert opinion, she decides to undergo an abortion. Only after the abortion does she learn that the advice regarding the baby’s health was a negligent misrepresentation and that the termination of the pregnancy was unnecessary.²

In this Article, we argue that the law does not currently provide adequate incentives to avoid wrongful abortions, the consequences of which are often devastating. We suggest that the best solution to this problem may be built on the distinctive characteristics of the wrongful abortion setting. Validating the intuition that the status quo does not adequately respond to wrongful abortions requires a systematic and comprehensive analysis of existing law, and justifying our novel solution entails a thorough theoretical inquiry.

Accordingly, this Article addresses two interrelated questions. First, how is

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1. As we shall see below, the term “wrongful abortion” may be used in a much broader sense, but we shall focus on its narrowly defined meaning for reasons also set out below.

2. See *Martinez v. Long Island Jewish Hillside Med. Ctr.*, 512 N.E.2d 538, 538 (N.Y. 1987).

existing law likely to respond to wrongful abortions? We intentionally ask how the law is “likely to respond” and not how it actually responds. The problem of wrongful abortion has been the subject of judicial opinion only in a few sporadic cases, making it practically impossible to generate a comprehensive analysis of case law directly on this point. Our effort will therefore focus on identifying the legal issues involved and resolving them within existing (and relevant) legal frameworks.

Second, how *should* the law respond to wrongful abortions? Wrongful abortions raise a unique problem to which current law does not provide an appropriate solution. Our objective is to discuss the various alternatives that policymakers might consider in response to this peculiar disparity.

As there are only a handful of cases on the subject, and since our topic has not been discussed in any detail in the academic literature,³ we find it almost unavoidable to open this Article with an analysis of the factual settings in which wrongful abortions occur and a systematic itemization of their consequences. In Section I.A, we define more accurately the term “wrongful abortion” and explain through contrast and analogy the settings in which wrongful abortion cases arise. In Section I.B, we survey the social costs of wrongful abortions within two distinct categories: (a) parental losses, and (b) “loss of potential life,” i.e., any loss that may be attributed to the destruction of potential human life. We point out where these two categories overlap and explain why they nonetheless merit separate discussion.

Parts II and III discuss the anticipated legal response to wrongful abortions. In Part II we demonstrate that the law may respond quite effectively (although somewhat imperfectly) to parental losses within the traditional framework of tort law. In contrast, we show in Part III that nationwide, all branches of the law currently leave the loss of potential life (except for any overlap with parental losses) unaccounted for in most cases of wrongful abortion. We believe this is a significant and disturbing anomaly in American law, given that states’ important and legitimate interest in preserving potential life has been well established in American legal thought.

Finally, in Part IV we endeavor to find an appropriate legal means to rectify this inconsistency. We introduce and critically evaluate three possible legal paths of resolution: extending criminal liability to cover negligent inducement of abortion; expanding civil liability to cover the elements of the loss of potential life not currently compensable under tort law; and a discretionary civil fine,

3. The topic was mentioned only once, and rather briefly, in an American legal periodical. See Kathy Seward Northern, *Procreative Torts: Enhancing the Common-Law Protection for Reproductive Autonomy*, 1998 U. ILL. L. REV. 489, 527-29. Northern’s article is mainly concerned with the violation of pregnant women’s procreative autonomy.

which we find the most attractive legal solution to the problem.

At the outset, we emphasize that we take no stand concerning the fierce ongoing battle between the pro-life and pro-choice movements. We have no desire to provide either side with academic ammunition. We hope that both sides will support our effort: The proposed solution enhances the legal protection of states' interest in preserving potential life and at the same time improves the legal protection of the pregnant woman's right to privacy. It should be remembered that prevention of a wrongful abortion fulfills the prospective mother's true will. Therefore, our endeavor to strengthen the legal protection of the public interest in preserving potential life does not weaken the pregnant woman's procreative autonomy. On the contrary, since in cases of wrongful abortion the public interest in preserving potential life and the prospective mother's will coincide, our proposal simultaneously reinforces both without taking a stance on the appropriate scope of the abortion right.

Supporters of abortion rights may argue that enhancement of the legal protection of potential life in various contexts may eventually undermine the mother's procreative autonomy. However, our proposal does not consider the unborn child to be a legal person.⁴ It is possible to protect a public interest in preserving certain life forms without recognizing their legal personhood. Legal protection of animals and plants serve as good examples. As adopting our proposal does not necessitate recognition of legal personhood in a fetus, it poses no risk to the mother's right to privacy (as long as and to the extent that it is recognized under the Constitution).

Moreover, even if we based our proposal on the assumption that the fetus were a legal person, this would not necessarily turn the non-viable fetus into a *constitutional* person. In American jurisprudence, the idea that a legal person may not have all the rights of a constitutional person is well-established. Since only the interests of a constitutional person might be strong enough to overcome the pregnant woman's constitutional rights, recognizing the legal personhood of a fetus (at any stage of development) would not directly affect the pregnant woman's right to choose abortion.⁵ There is, however, the real possibility that a sweeping recognition of the legal personhood of fetuses in cases of wrongful abortion and their like may lead the Supreme Court to reevaluate its prior decisions on abortion rights. For those who fear this result, our proposal may be

4. However, several criminal statutes do consider the unborn child to be a legal person. *See, e.g.,* Unborn Victims of Violence Act, 18 U.S.C.A. § 1841(a)(2)(C), (d) (West Supp. 2004) (stating that a fetus is a human being at any stage of gestation).

5. *Cf. Jeffrey Rosen, A Viable Solution: Why It Makes Sense To Permit Abortions and Punish Those Who Kill Fetuses*, LEGAL AFF., Sept.-Oct. 2003, at 20, 21.

preferable to at least one of the alternatives.⁶

I. WRONGFUL ABORTION AND ITS SOCIAL COSTS

A. *The Factual Setting*

“Wrongful abortion” will be used in this Article to describe an abortion *instigated* by wrongful conduct, as opposed to an abortion which is *performed* in a wrongful manner,⁷ although this term may be construed to embrace both types of cases.⁸ We further limit the scope of the term “wrongful abortion” to negligent inducement of abortion,⁹ as opposed to intentional inducement. Negligently induced abortions seem to us more interesting from a theoretical standpoint.

To epitomize the various settings in which we believe an abortion is negligently induced, we use the seminal decision of the Supreme Court in *Roe v. Wade*¹⁰ as our starting point. This ruling articulated the scope of states’ authority to regulate abortions. The guidelines were set in Justice Blackmun’s opinion as follows:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal

6. See *infra* Subsection IV.D.1.a.

7. See, e.g., *Williams v. Robinson*, 512 So. 2d 58 (Ala. 1987) (failure to diagnose ectopic pregnancy, leading to the utilization of an improper method of abortion); *Perguson v. Tamis*, 937 P.2d 347 (Ariz. Ct. App. 1996) (death of pregnant woman due to negligent performance of abortion); *Vuitch v. Furr*, 482 A.2d 811 (D.C. 1984) (improper treatment of laceration of uterine wall after abortion); *Shirk v. Kelsey*, 617 N.E.2d 152 (Ill. App. Ct. 1993) (incomplete abortion); *Ganapolskaya v. V.I.P. Med. Assocs.*, 644 N.Y.S.2d 735 (N.Y. App. Div. 1996) (perforated uterus caused by abortion procedure); see also Margaret E. Vroman, Annotation, *Medical Malpractice in Performance of Legal Abortion*, 69 A.L.R.4th 875 (1989) (analyzing various cases in which tort liability was imposed on physicians who negligently performed legal abortions).

8. *But see* *Collins v. Thakkar*, 552 N.E.2d 507, 509 (Ind. Ct. App. 1990), where the term “wrongful abortion” was used to describe a malicious and intentional termination of pregnancy without the expectant mother’s consent.

9. In this Article, the term “negligence” refers to ordinary negligence only and not to gross negligence, unless otherwise stated.

10. 410 U.S. 113 (1973).

health.

(c) For the stage subsequent to viability,¹¹ the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.¹²

In *Planned Parenthood v. Casey*, a plurality of the Court rejected the “rigid trimester framework,”¹³ but the Court affirmed the “essential holding” of *Roe*: a woman’s right to have an abortion prior to viability, states’ rights to regulate or proscribe abortions subsequent to viability in order to protect their interest in the potentiality of human life, and the states’ interests from the beginning of the pregnancy in protecting the health of the woman and the life of the fetus.¹⁴

Although *Roe* limited states’ power to regulate abortions, the statutory regulation of the subject in various states before this case was decided might shed some light on the circumstances in which wrongful abortion cases may arise. Until the late 1950s, most states proscribed any abortion (unless required to preserve the life of the mother).¹⁵ Yet prior to *Roe* and following the release of the Model Penal Code (drafted in 1962),¹⁶ several states had revised their abortion statutes to permit abortion in three types of cases: (1) where there was a substantial risk that continuance of the pregnancy would threaten the life or gravely impair the physical or mental health of the mother; (2) where there was a substantial risk that the child would be born with grave physical or mental defect; and (3) where the pregnancy resulted from rape, incest, or other felonious intercourse.¹⁷

Following *Roe*, all states must permit abortion even after viability in cases of the first type.¹⁸ Some sanction abortion after viability in one or two of the other

11. I.e., the stage when the fetus is capable of existing independently outside the mother’s womb. The Supreme Court held that viability occurs at twenty-four to twenty-eight weeks of gestation. *Id.* at 160.

12. *Id.* at 164-65.

13. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878 (1992).

14. *Id.* at 846.

15. Christopher P. Keleher, *Double Standards: The Suppression of Abortion Protesters’ Free Speech Rights*, 51 DEPAUL L. REV. 825, 834-35 (2002).

16. MODEL PENAL CODE § 230.3(2) (Proposed Official Draft 1962).

17. See Jeffrey L. Lenow, *The Fetus as a Patient: Emerging Rights as a Person?*, 9 AM. J.L. & MED. 1, 5 (1983); Tom Ginsburg, Book Note, 85 CAL. L. REV. 749, 755 (1997) (reviewing NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES* (1996)); see also, e.g., *Doe v. Bolton*, 410 U.S. 179, 202-05 (quoting the Georgia statute).

18. See, e.g., ALA. CODE § 26-22-3 (2004); ARIZ. REV. STAT. § 36-2301.01 (2004); CONN. GEN.

types of cases as well.¹⁹ Prior to viability, abortion is no longer limited to predetermined categories.²⁰ But even though cases of the three types mentioned above currently constitute a relatively small fraction of the various cases in which abortions are carried out in the United States,²¹ these three settings have a unique feature that makes them especially susceptible to the negligent instigation of abortion.

In all of them, the pregnant woman's decision regarding the continuance of her pregnancy is substantially dependent on *external* information provided by a qualified *professional* and is not a purely independent decision (as in other settings). If the woman receives inaccurate information, she may be induced to abort a fetus that she would otherwise wish to give birth to. If the inaccuracy stems from negligence, the abortion is "wrongful." Accordingly, we have detected at least two archetypal cases of wrongful abortion. In a case of the first type, a pregnant woman (with or without a companion) seeks medical counseling regarding the possible perils related to the continuance of her pregnancy. The adviser mistakenly maintains that the pregnancy is fraught with substantial risks for the woman, and she consequently decides to undergo an abortion. Later it is found that the information given by the adviser was wrong.²² In a case of the second type, the woman seeks advice concerning the health and bodily integrity of her fetus, and decides to undergo an abortion after being told that the fetus is deformed or disabled. Here, too, it is eventually realized that the information was wrong.²³ One may also consider a third type of case in which a woman is raped

STAT. § 19a-602 (2004); DEL. CODE ANN. tit. 11, § 651 (2004); FLA. STAT. ANN. § 390.0111 (West 2003); GA. CODE ANN. § 16-12-141 (2004); IND. CODE ANN. § 16-34-2-1 (2004); KAN. STAT. ANN. § 65-6703 (2003); LA. REV. STAT. ANN. § 14:87(B)(2) (West 2004).

19. See, e.g., ARK. CODE ANN. § 20-16-705 (2003) (allowing abortion of viable fetus in cases (1) and (3)); MISS. CODE ANN. § 97-3-3 (2004) (same); see also COLO. REV. STAT. § 18-6-101 (2003) (allowing abortion of viable fetus in cases (1) and (2)); UTAH CODE ANN. § 76-7-302(2), (3) (2004) (same). Lastly, see N.M. STAT. ANN. § 30-5-1 (Michie 2004) (allowing abortion of viable fetus in all three cases).

20. Interestingly, at least one state statute enumerates the aforementioned cases as factors that should be considered as justifying abortion before viability. See IDAHO CODE § 18-608 (Michie 2004).

21. See Nikki Katz, Abortion Statistics, <http://womensissues.about.com/cs/abortionstats/a/aaabortionstats.htm> (last visited Mar. 31, 2005).

22. *Baker v. Gordon*, 759 S.W.2d 87 (Mo. Ct. App. 1988). In that case, the doctor recommended an abortion in order to treat the mother's dysplasia. Later it was found that she had no dysplasia. The court held that the doctor was not negligent in recommending an abortion.

23. *Martinez v. Long Island Jewish Hillside Med. Ctr.*, 512 N.E.2d 538, 538 (N.Y. 1987). The facts of this case were outlined in the Introduction. See also *Johnson v. United States*, 810 F. Supp. 7 (D.D.C. 1993) (resolving a dispute where a pregnant woman was informed that she had HIV, and that consequently her baby would be born with AIDS; after she had an abortion it was discovered

shortly after having consensual sex with another and then discovers that she is pregnant.²⁴ After being told by her physician that her partner is not the father of the fetus, she chooses to terminate her pregnancy, only to discover that the physician was wrong. It seems to us that cases of this type would be rather rare, albeit not completely impossible.

We now attempt to further the understanding of our topic through contrast and analogy with other types of birth-related claims (BRC). One category of BRC consists of cases in which negligence by the defendant resulted in the birth of a healthy yet unwanted child. The negligence may manifest itself in the manufacture, provision, or installation of contraceptives;²⁵ in the performance of vasectomy²⁶ or tubal ligation;²⁷ or in the carrying out of an abortion.²⁸ These cases are frequently dealt with under the label of *wrongful pregnancy* (or *wrongful conception* in the appropriate cases).²⁹ In a way, they represent a mirror image of wrongful abortion cases, although they are not exact reflections. In

that she did not have HIV); *Breyne v. Potter*, 574 S.E.2d 916 (Ga. Ct. App. 2002) (resolving a dispute where a pregnant woman was informed that her fetus had Down's syndrome; after she had an abortion she discovered that the lab results were misinterpreted by her doctor); *Kupat Holim v. Dayan*, 55(1) P.D. 765 (1999) (Isr.) (resolving a dispute where a pregnant woman was told by her doctors that the fetus she was carrying was a male with severe bodily abnormalities, and urged her to terminate the pregnancy; after the abortion the woman saw that the fetus was a normal female).

24. We added a "shortly after having consensual sex" qualification because if the victim of rape were not involved in some kind of consensual sexual activity immediately before the occurrence of the crime, there would be no doubt with regard to the identity of the father. Theoretically, the identity of the father may also be uncertain where the victim of rape is involved in a consensual intercourse shortly after the rape. But this scenario seems to us unlikely given the psychological implications of rape.

25. See, e.g., *Yasar v. Cohen*, 483 So. 2d 1099 (La. Ct. App. 1986) (inserting negligently an intrauterine device); *Tropi v. Scarf*, 187 N.W.2d 511 (Mich. Ct. App. 1971) (misfilling of a prescription for birth control pills); *Jackson v. Bumgardner*, 347 S.E.2d 743 (N.C. 1986) (failing to replace an intrauterine device after surgery); *J.P.M. v. Schmid Labs., Inc.*, 428 A.2d 515 (N.J. Super. Ct. App. Div. 1981) (manufacturing a defective condom).

26. See, e.g., *Univ. of Ariz. Health Sci. Ctr. v. County of Maricopa Super. Ct.*, 667 P.2d 1294 (Ariz. 1983); *McFarlane v. Tayside Health Board*, [1999] 4 All E.R. 961 (Eng. H.L.).

27. See, e.g., *Coleman v. Garrison*, 327 A.2d 757 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975); *Flowers v. District of Columbia*, 478 A.2d 1073 (D.C. 1984); *Fulton-DeKalb Hosp. Auth. v. Graves*, 314 S.E.2d 653 (Ga. 1984); *Betancourt v. Gaylor*, 344 A.2d 336 (N.J. Super. Ct. Law. Div. 1975); *Mason v. W. Pa. Hosp.*, 453 A.2d 974 (Pa. 1982); *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987); *C.S. v. Nielson*, 767 P.2d 504 (Utah 1988); *James G. v. Caserta*, 332 S.E.2d 872 (W. Va. 1985); *Beardsley v. Wierdsma*, 650 P.2d 288 (Wyo. 1982).

28. See, e.g., *Stills v. Grarton*, 127 Cal. Rptr. 652 (Cal. Ct. App. 1976).

29. See *Anthony Jackson, Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England*, 17 LOY. L.A. INT'L & COMP. L.J. 535, 583 (1995).

cases of wrongful pregnancy, practitioner negligence makes the fulfillment of the parents' will impossible, while in wrongful abortion cases practitioner negligence instigates, but does not necessitate, a decision that turns out to be inconsistent with such will.

Another category of BRC, more closely related to wrongful abortion, consists of cases in which a woman (with or without a companion) seeks medical advice regarding the health of her fetus; and decides to conceive or to continue her pregnancy once the adviser maintains that the child will not be born with congenital disabilities, a statement that is later found to be incorrect. The parents' cause of action for their resulting losses is labeled *wrongful birth*, while the infant's cause of action for his own losses is termed *wrongful life*.³⁰ Wrongful birth actions are recognized in most common law jurisdictions,³¹ although they are barred in some.³² On the other hand, most jurisdictions do not allow recovery on wrongful life theory.³³

30. For more elaborate discussions of these topics, see, for example, Alexander Morgan Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618 (1979); Constance Frisby Fain, *Wrongful Life: Legal and Medical Aspects*, 75 KY. L.J. 585 (1987); Jackson, *supra* note 29; Thomas Keasler Foutz, "*Wrongful Life*": *The Right Not To Be Born*, 54 TUL. L. REV. 480 (1980); Kurtis J. Kearl, Turpin v. Sortini: *Recognizing the Unsupportable Cause of Action for Wrongful Life*, 71 CAL. L. REV. 1278 (1983); Douglas Edward Peck, *Azzolino v. Dingfelder: North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims*, 63 N.C. L. REV. 1329 (1985); Carel J.J.M. Stolker, *Wrongful Life: The Limits of Liability and Beyond*, 43 INT'L & COMP. L.Q. 521 (1994); Mark Strasser, *Wrongful Life, Wrongful Birth, Wrongful Death, and the Right To Refuse Treatment: Can Reasonable Jurisdictions Recognize All But One?*, 64 MO. L. REV. 29 (1999); Harvey Teff, *The Action for "Wrongful Life" in England and the United States*, 34 INT'L & COMP. L.Q. 423 (1985); Michael A. Berenson, Comment, *The Wrongful Life Claim—The Legal Dilemma of Existence Versus Nonexistence: "To Be or Not To Be,"* 64 TUL. L. REV. 895 (1990); Timothy J. Dawe, Note, *Wrongful Life: Time for a "Day in Court,"* 51 OHIO ST. L.J. 473 (1990); and James M. Parker, Comment, *Wrongful Life: The Child's Cause of Action for Negligent Genetic Counseling in Texas*, 16 ST. MARY'S L.J. 639 (1985).

31. *Berman v. Allan*, 404 A.2d 8 (N.J. 1979); *Karlsons v. Guerinot*, 394 N.Y.S.2d 933 (App. Div. 1977); *Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assoc.*, 802 N.E.2d 723 (Ohio Ct. App. 2003); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372 (Wis. 1975); C.A. 512/81 *Zeitsov v. Katz*, 40(2) P.D. 85 (Isr.); Berenson, *supra* note 30, at 899 n.14. This cause of action is also recognized in continental jurisdictions. See, e.g., BGHZ 76, 249 (F.R.G.).

32. See, e.g., MINN. STAT. § 145.424(2) (2004); 42 PA. CONS. STAT. § 8305(a) (2004). In both statutes wrongful birth actions are barred only to the extent that they are based on a claim that but for the wrongful act or omission of the defendant, the child would have been aborted.

33. See, e.g., *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992); *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691 (Ill. 1987); *Kassama v. Magat*, 792 A.2d 1102 (Md. 2002); *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984). In several jurisdictions, wrongful life claims are prohibited (in whole or in

Wrongful birth is a more accurate mirror image of wrongful abortion. The former (just like wrongful pregnancy) deals with the *non-prevention* of the birth of an *unwanted* child, whereas the latter deals with the *prevention* of the birth of a *wanted* child. In both cases the defendant's negligence does not make the fulfillment of the parent's will physically impossible, but instigates a decision that turns out to be inconsistent with such will. This parallelism is useful in determining the expected legal response to wrongful abortions and in explaining why it is insufficient.

B. The Social Costs

The social costs of wrongful abortion generally consist of two components: parental losses and the loss of potential human life. These two ingredients overlap to a certain extent, but we have decided to discuss them separately for two reasons, which will become more obvious below. First, some of the parental loss is clearly independent of the loss of potential life and must be dealt with accordingly. In other words, despite a possible overlap between the two components, they have separate independent spheres that merit appropriate legal response. Recognizing this, we thought it would be somewhat artificial to discuss parental losses twice—once under the heading of “parental losses independent of the loss of the fetus,” and once within our discussion of the loss of potential life.

Second, and more importantly, while the law seems to respond quite effectively to parental losses, it leaves the loss of potential life (exclusive of any overlap with the parental loss) unaccounted for in most (and in certain jurisdictions—all) cases of wrongful abortion. The separation of these two components helps to clarify the exact problem that this Article attempts to address, i.e., the problem of unaccountability for the loss of potential life, which may result in under-deterrence of medical advisers and an overly lenient retribution for negligent violation of an important public interest. In this Section, we analyze the various elements of each component and explain where they overlap.

As regards parental losses, one may distinguish between pecuniary and non-pecuniary losses. Both include direct and relational losses. Direct parental losses are those incurred by the parents regardless of any harm done to their potential offspring. Relational losses are those incurred by a parent on account of the

part) by statute. In some, a person cannot base an action on the claim that but for the conduct of another he or she would have been aborted. *See, e.g.*, UTAH CODE ANN. § 78-11-24 (2004). Yet in others, a person cannot base an action on the claim that but for the conduct of another he or she would not have been conceived or, once conceived, would have been aborted. *See, e.g.*, S.D. CODIFIED LAWS § 21-55-1 (Michie 2003).

damage caused to the fetus or to the other parent.³⁴ We do not (and in fact cannot, as will be seen below) assume that the fetus may claim compensation for its “own” damage. At this stage we only use the damage caused to the fetus as a determinant for of the extent of the parental loss. The various types of parental losses are summarized in the following table.

	<i>PECUNIARY LOSSES</i>	<i>NON-PECUNIARY LOSSES</i>
<i>DIRECT LOSSES</i>	<p>Costs of unnecessary abortion, and any medical treatment consequent upon the abortion.</p> <p>Lost wages during abortion and post-operational recovery.</p>	<p>Maternal pain and suffering during the surgical intervention and post-operational recovery.</p> <p>Chronic pain and suffering related to the abortion.³⁵</p> <p>Psychological reactions to the aforementioned pain.³⁶</p>
<i>RELATIONAL LOSSES</i>	<p>Loss of child’s contribution to parents from anticipated earning capacity.</p> <p>Loss of potential child’s services.³⁷</p> <p>Costs of medical/psychological treatment related to the loss of a child.</p>	<p>Mental anguish resulting from the unnecessary loss of a wanted child (maternal/paternal).</p> <p>Paternal grief over maternal pain.</p> <p>Loss of the child’s companionship and affection.³⁸</p>

34. See Ronen Perry, *Relational Economic Loss: An Integrated Economic Justification for the Exclusionary Rule*, 56 RUTGERS L. REV. 711, 712 (2004) (defining relational economic loss).

35. An abortion may result in serious pelvic and abdominal pain. See, e.g., Genie M. Smith et al., *Pain of First Trimester Abortion: Its Quantification and Relations with Other Variables*, 133 AM. J. OBSTETRICS & GYNECOLOGY 489 (1979); Nancy Wells, *Pain and Distress During Abortion*, 12 HEALTH CARE FOR WOMEN INT’L 293 (1991).

36. See, e.g., E.A. Walker et al., *Dissociation in Women with Chronic Pelvic Pain*, 149 AM. J. PSYCHIATRY 534 (1992).

37. As will be seen below, childrearing costs and efforts usually exceed any possible financial benefit that a child may bestow upon her parents.

38. This loss may be mitigated if the parents can have the same number of children they initially planned regardless of the abortion.

The second component of the social costs of a wrongful abortion is the loss of potential human life, which has two aspects: (1) the loss of any net benefit the child herself would have had if she had not been aborted (“the fetal loss”), and (2) any detrimental effect the loss of potential life had on the well-being of others (“the relational loss”). The fetal loss includes a pecuniary element, i.e., the value of the assets that the child could acquire during her lifetime, and a non-pecuniary element, i.e., the value of her joy of life (taking into account the vicissitudes of life).

The relational loss includes the *net* pecuniary and non-pecuniary benefit that other people could have obtained if the fetus had not been aborted. It may comprise the loss of expected taxes minus expected social welfare (which is a state relational loss); the loss of expected profits from supplying groceries, housing, commodities, and services to the unborn; the loss of expected profit from employing the unborn; and the loss of the unborn child’s love, companionship, and other net non-pecuniary contributions to the world. The relational loss also includes mental anguish incurred by any person attributable to the loss of potential life and the outrage of the public at large. One can easily observe that the relational aspect of the loss of potential life overlaps (to a certain extent) the parental relational loss. We emphasize this here since any legal response to wrongful abortion must not take double account of a single loss.

II. THE LEGAL RESPONSE TO PARENTAL LOSSES

In this Part, we shall investigate whether and to what extent the law is responsive to the first ingredient of the social costs of wrongful abortions. At the outset, we assume that in cases of wrongful abortion all jurisdictions will recognize the parents’ cause of action in tort, at least if the abortion is legal. A wrongful abortion is a mere variant of medical malpractice, and as such entitles the patient to sue her (or his) physician. Only a few American courts have tackled the issue so far, and none of them denied the parents’ right of action.³⁹ We have restricted our assumption of liability to legal abortions, given that in several jurisdictions a woman who undergoes an illegal abortion may be deprived of any right of action for abortion-related losses.⁴⁰ Nonetheless, as we noted in Section I.A, an abortion can hardly ever be considered illegal in the archetypal cases of wrongful abortion.

39. See *supra* notes 22-23.

40. Gail D. Hollister, *Tort Suits for Injuries Sustained During Illegal Abortions: The Effects of Judicial Bias*, 45 VILL. L. REV. 387, 407-47 (2000) (analyzing court decisions that denied claims by women injured during the negligent performance of illegal abortions).

The more important question is what types of damages are compensable in a “wrongful abortion” tort action. As seen in Section I.B, parental losses are partly direct and partly relational. We shall discuss tort law’s expected response to parental losses using this dichotomy. Since there is no clear indication about the legal attitude to the various parental losses in wrongful abortion cases, we shall analogize from similar factual settings.

Direct pecuniary losses include the costs of the unnecessary abortion, plus any other medical treatment related to the abortion, and lost wages during the abortion and the post-operational recovery. Here we can analogize from the judicial treatment of wrongful pregnancy and wrongful birth actions. The costs of the unnecessary abortion and any consequent treatment are parallel to the medical costs related to continued pregnancy and delivery in wrongful pregnancy and wrongful birth cases. To the same extent that medical costs that were directly necessitated by the wrongful act are recoverable by the parents in wrongful pregnancy and wrongful birth actions,⁴¹ they should be recoverable in wrongful abortion actions brought by the parents.⁴² Similarly, as the mother in wrongful pregnancy and wrongful birth cases can recover for lost wages during pregnancy, delivery, and postnatal convalescence,⁴³ the mother in a wrongful abortion case should be allowed to recover for lost wages incurred during the abortion and the post-operational recovery (both physical and mental).

Direct non-pecuniary losses include maternal pain and suffering during the surgical intervention and post-operational recovery, chronic pain and suffering related to the abortion and any related treatment, and psychological reactions to the pain. Pain and suffering resulting directly from the negligent conduct, and their psychological aftermath are clearly recoverable.⁴⁴ Accordingly, in cases of wrongful pregnancy, courts allow the mother to recover for the pain and suffering related to the unwanted pregnancy, delivery, and postnatal recovery.⁴⁵

41. See, e.g., *Flowers v. District of Columbia*, 478 A.2d 1073, 1074 (D.C. 1984) (allowing parents to recover medical expenses incurred as a result of wife’s unwanted pregnancy); *Fulton-DeKalb Hosp. Auth. v. Graves*, 314 S.E.2d 653, 654 (Ga. 1984) (same); *Smith v. Gore*, 728 S.W.2d 738, 751-52 (Tenn. 1987) (same); *C.S. v. Nielson*, 767 P.2d 504, 509-10 (Utah 1988) (same); *Beardsley v. Wierdsma*, 650 P.2d 288, 292 (Wyo. 1982) (same).

42. They should be recoverable at least to the extent that they exceed the medical expenses that were saved on account of the abortion.

43. See, e.g., *Flowers*, 478 A.2d at 1074 (finding lost wages during pregnancy and recovery from delivery to be recoverable); *Graves*, 314 S.E.2d at 654 (same); *Smith*, 728 S.W.2d at 751 (same); *C.S.*, 767 P.2d at 510 (same); *James G. v. Caserta*, 332 S.E.2d 872, 877 (W. Va. 1985) (same); *Beardsley*, 650 P.2d at 292 (same).

44. 2 DAN B. DOBBS, *LAW OF REMEDIES* § 8.1(4) (2d ed. 1993).

45. See, e.g., *Flowers*, 478 A.2d at 1074 (compensating mother for pain, suffering, and discomfort resulting from unwanted pregnancy and delivery); *Graves*, 314 S.E.2d at 654 (same);

Similarly, the mother should recover for the pain and suffering and consequent psychological effects related to the unwanted surgical intervention, and following recovery in cases of wrongful abortion.

We now turn to parental relational losses. According to the traditional common law view, the death of one human being could not give rise to a cause of action for the benefit of others.⁴⁶ Moreover, the common law did not allow recovery for relational losses even when they were not related to death (subject to a few narrowly defined exceptions).⁴⁷ However, both principles were superceded to a limited extent by wrongful death legislation, which entitles certain enumerated relatives of victims of fatal injuries—including their parents—to seek legal redress.⁴⁸ The inadequacy of this legislation as a legal response to wrongful abortions will be discussed thoroughly below. At this stage suffice it to say that in many states a wrongful death action is never available in cases of wrongful abortion; that in nearly all other states it is not available in the vast majority of wrongful abortions cases; and that in any case a wrongful death action does not normally cover the mental anguish related to the loss of a prospective child.

It may well be that the unavailability of a wrongful death cause of action in cases of wrongful abortion does not have a serious impact on the parents' economic well-being. Damages under wrongful death legislation typically include lost financial support and lost services. Theoretically, the parents of an unborn child may also lose her support and services. However, since in nearly all cases childrearing costs and efforts significantly exceed any possible financial benefit that the child may bestow upon her parents, it is highly unlikely that

Smith, 728 S.W.2d at 751 (same); *C.S.*, 767 P.2d at 510 (same); *James G.*, 332 S.E.2d at 877 (same); *Beardsley*, 650 P.2d at 292 (same).

46. *Baker v. Bolton*, 170 Eng. Rep. 1033 (1808). This rule was also followed in the United States. *See, e.g.*, *The Harrisburg*, 119 U.S. 199, 213 (1886); *Ins. Co. v. Brame*, 95 U.S. 754, 757 (1877). Note, however, that in 1970 the Supreme Court recognized a limited exception to the old rule, which was supposed to fill in an obvious gap in state and federal legislation. *Moragne v. States Marine Lines Inc.*, 398 U.S. 375, 402-03, 408-09 (1969).

47. Liability for relational economic loss was and is generally excluded in the United States. *See Perry, supra* note 34, at 725-26. Liability for relational emotional harm was once excluded, *see, e.g.*, *S. Ry. Co. v. Jackson*, 91 S.E. 28, 28 (1916), and is extremely exceptional even today, *see Dale Joseph Gilsinger, Annotation, Recovery Under State Law for Negligent Infliction of Emotional Distress Under Rule of Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968), or *Refinements Thereof*, 96 A.L.R.5th 107 (2002); *Dale Joseph Gilsinger, Annotation, Relationship Between Victim and Plaintiff-Witness as Affecting Right To Recover Under State Law for Negligent Infliction of Emotional Distress Due to Witnessing Injury to Another Where Bystander Plaintiff Is Not Member of Victim's Immediate Family*, 98 A.L.R.5th 609 (2002).

48. *See infra* Section III.B.

parental pecuniary relational loss in fact exists.⁴⁹

Non-pecuniary losses pose more acute problems. First, the parents lose their potential child's companionship and affection. Usually, this non-pecuniary benefit outweighs any non-pecuniary detriment related to parenthood.⁵⁰ Many jurisdictions allow recovery for the net-benefit under wrongful death legislation where the victim is a minor child. Where wrongful death actions are not available in cases of wrongful abortion, and where they are available but do not cover non-pecuniary losses, a significant loss thus remains uncompensated.

Second, losing a wanted child may quite clearly result in severe emotional distress to both parents. An abortion may lead to negative psychological reactions even if it was not induced by a negligent misrepresentation (and was not performed negligently).⁵¹ Conceivably, such reactions would be intensified whenever it became clear that the abortion was induced by a negligent misrepresentation, i.e., the abortion was undergone by mistake.⁵²

We have already said that wrongful death statutes are not applicable to wrongful abortion cases in several jurisdictions, and that in other jurisdictions these statutes do not apply to the vast majority of wrongful abortion cases. But even where these statutes apply, they do not always allow recovery for the mental grief consequent on the loss of a child (or any other relative). In some states, the wrongful death statutes specifically provide for recovery for the mental anguish of a few close relatives,⁵³ while the courts in other states have allowed such damages as a matter of judicial interpretation of the relevant statute.⁵⁴ Yet in

49. Andrew Jay McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 NOTRE DAME L. REV. 57, 59, 64 (1990); see also *infra* notes 117-118 and accompanying text.

50. See, however, *supra* note 38, regarding the possibility of loss mitigation.

51. See E. Joanne Angelo, *Psychiatric Sequelae of Abortion: The Many Faces of Post-Abortion Grief*, 59 LINACRE Q. 69 (1992); Aliza Kolker & B. Meredith Burke, *Grieving the Wanted Child: Ramifications of Abortion After Parental Diagnosis of Abnormality*, 14 HEALTH CARE FOR WOMEN INT'L 513, 516-23 (1993); Terry Nicole Steinberg, Note, *Abortion Counseling: To Benefit Maternal Health*, 15 AM. J. L. & MED. 483, 488-92 (1989).

52. We found no reference to support this intuition, but it seems to us self-evident.

53. ARK. CODE ANN. § 16-62-102(f) (Michie 2003); COLO. REV. STAT. § 13-21-203(1)(a) (2003); DEL. CODE ANN. tit. 10, § 3724(d)(5) (2004); FLA. STAT. ANN. § 768.21(2)-(3) (2003); KAN. STAT. ANN. § 60-1904(a)(1) (2003); ME. REV. STAT. tit. 18-A, § 2-804(B) (West 2003); MD. CODE ANN., CTS. & JUD. PROC. § 3-904(d) (2003); NEV. REV. STAT. § 41.085(4) (2004); OHIO REV. CODE ANN. § 2125.02(B)(5) (West 2004); OKLA. STAT. ANN. tit. 12, § 1053(B) (2004); VA. CODE ANN. § 8.01-52(1) (Michie 2004); W. VA. CODE § 55-7-6(c)(1) (2003).

54. See, e.g., *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038, 1047-48 (Alaska 1986); *Mullen v. Posada Del Sol Health Care Ctr.*, 819 P.2d 985, 986 (Ariz. Ct. App. 1991); *Hopkins v. McBane*, 427 N.W.2d 85, 94 (N.D. 1988); *Sanchez v. Schindler*, 651 S.W.2d 249, 251

other jurisdictions, damages for mental anguish may not be recovered in wrongful death actions.⁵⁵ Surprisingly, this does not necessarily leave the parents without redress for their loss.

A remedy may be found in the common law of torts. We are familiar with the traditional reluctance to allow recovery for emotional distress, especially where such loss is consequent on an injury to another.⁵⁶ Nevertheless, it appears that in factual settings similar to those discussed here, courts have been more willing to permit recovery. For example, in cases of wrongful pregnancy, a few courts have awarded the parents damages for the mental anguish related to the upbringing of an unwanted child.⁵⁷ This, of course, is a highly controversial head of damages, given the common belief that the joy associated with nurturing a normal child usually outweighs the sorrows.⁵⁸ In wrongful birth cases, parents are sometimes allowed to recover for mental anguish suffered on account of their child's condition.⁵⁹

More relevant in the current context are cases of prenatal injuries resulting in stillbirth. In such cases it can hardly be said that the ensuing parental grief is overshadowed by some kind of joy (i.e., the avoidance of distress related to childrearing). In many jurisdictions, it is well established that where the *mother* was *physically injured*, and thereby lost her fetus, she can recover for mental anguish resulting from the death of the unborn child.⁶⁰ Moreover, a trend seems to exist toward abandoning the requirement that the mother suffer physical injury other than the injuries sustained by the fetus. For example, the New York Court

(Tex. 1983); *Hartnett v. Union Mut. Fire Ins. Co.*, 569 A.2d 486, 488 (Vt. 1989); *Wilson v. Lund*, 491 P.2d 1287, 1290 (Wash. 1971).

55. *See, e.g.*, *Krouse v. Graham*, 562 P.2d 1022, 1028 (Cal. 1977); *OB-GYN Assocs. of Albany v. Littleton*, 386 S.E.2d 146, 147 (Ga. 1989); *Bullard v. Barnes*, 468 N.E.2d 1228, 1232-33 (Ill. 1984); *Wardlow v. City of Keokuk*, 190 N.W.2d 439, 448 (Iowa 1971); *MacCuish v. Volkswagenwerk, A.G.*, 494 N.E.2d 390, 401 (Mass. App. Ct. 1986), *aff'd*, 400 Mass. 1003 (1987); *Williams v. Monarch Transp., Inc.*, 470 N.W.2d 751, 756 (Neb. 1991); *Small v. McKennan Hosp.*, 437 N.W.2d 194, 204 (S.D. 1989).

56. *See supra* note 47.

57. *Betancourt v. Gaylor*, 344 A.2d 336, 340 (N.J. Super. Ct. Law Div. 1975).

58. *See Mason v. Western Pa. Hosp.*, 453 A.2d 974, 976 (Pa. 1982).

59. *Berman v. Allan*, 404 A.2d 8, 15 (N.J. 1979) (holding that parents are entitled to be recompensed for the mental and emotional anguish they have suffered and will continue to suffer on account of their child's condition); *Schroeder v. Perkel*, 432 A.2d 834, 838-39 (N.J. 1981) (same); *Speck v. Finegold*, 439 A.2d 110, 112-15 (Pa. 1981) (same).

60. *See, e.g.*, *Snow v. Allen*, 151 So. 468, 470-71 (Ala. 1933); *Thomas v. Carter*, 506 S.E.2d 377, 379-80 (Ga. Ct. App. 1998); *Smith v. Borello*, 804 A.2d 1151, 1162-63 (Md. 2002); *Occhipinti v. Rheem Mfg. Co.*, 172 So.2d 186, 190 (Miss. 1965); *Graf v. Taggart*, 204 A.2d 140, 146 (N.J. 1964); *Endresz v. Friedberg*, 24 N.Y.2d 478, 484 (1969).

of Appeals very recently held:

Although, in treating a pregnancy, medical professionals owe a duty of care to the developing fetus . . . they surely owe a duty of reasonable care to the expectant mother, who is, after all, the patient. Because the health of the mother and fetus are linked, we will not force them into legalistic pigeonholes.

We therefore hold that, even in the absence of an independent injury, medical malpractice resulting in miscarriage or stillbirth should be construed as a violation of a duty of care to the expectant mother, entitling her to damages for emotional distress.⁶¹

The Court of Appeals held, however, that the physician owed no duty of care to the expecting father.⁶² On the other hand, it was held in several states that medical malpractice causing an infant stillbirth constitutes a tort against both parents and that they may recover compensatory damages for their emotional distress and mental suffering.⁶³ The Texas Court of Appeals stated that there is

[N]o compelling state interest in a gender-based denial of a father's right to recover damages for his own mental anguish from the negligently caused loss of his viable fetus, a denial which "perpetuates the myth that only a woman grieves and suffers the mental anguish caused by the loss of a baby in the womb."⁶⁴

Finally, it should be noted that in the very few wrongful abortion cases tried so far, courts recognized the mother's cause of action for her mental grief.⁶⁵

61. *Broadnax v. Gonzalez*, 809 N.E.2d 645, 648-49 (N.Y. 2004) (citations and footnotes omitted).

62. *Id.* at 649 n.3.

63. *See, e.g.*, *Tanner v. Hartog*, 696 So. 2d 705, 708 (Fla. 1997); *Giardina v. Bennett*, 545 A.2d 139, 139, 143 (N.J. 1988); *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 395 S.E.2d 85, 86, 98 (N.C. 1990).

64. *Parvin v. Dean*, 7 S.W.3d 264, 279 (Tex. Ct. App. 1999) (quoting *Krishnan v. Sepulveda*, 916 S.W.2d 478, 483 (Tex. 1995) (Gonzales, J., dissenting)). *But cf.* *Sosebee v. Hillcrest Baptist Med. Ctr.*, 8 S.W.3d 427, 436 (Tex. Ct. App. 1999) (rejecting gender-discrimination argument following *Krishnan*, 916 S.W.2d at 482).

65. *Marie v. McGreevey*, 314 F.3d 136, 140 (3d Cir. 2002); *Martinez v. Long Island Jewish Hillside Med. Ctr.*, 512 N.E.2d 538, 538-39 (N.Y. 1987). In *Martinez*, the court held that the plaintiff's claim for emotional distress, derived from agreeing to an act that was contrary to her religious beliefs, was actionable. But it was later interpreted as stating that "the breach of duty owed directly to plaintiff leading to her emotional distress is plainly compensable." *Ferrara v. Bernstein*, 81 N.Y.2d 895, 898 (1993). In the Israeli case of *Dayan*, the court held that both parents could recover for their direct non-pecuniary loss. *Kupat Holim v. Dayan*, 55(1) P.D. 765 (1999).

In conclusion, the legal response to parental losses seems reasonable, although somewhat imperfect.⁶⁶ As we shall contend below, such is not the case with the other ingredient of the social costs of wrongful abortion.

III. THE LEGAL PROTECTION OF THE PUBLIC INTEREST IN PRESERVING POTENTIAL LIFE

A. Legal Recognition of the Public Interest

In this Section, we explore whether and to what extent the law is responsive to the second ingredient of the social costs of wrongful abortions—the loss of a potential life. The state’s “important and legitimate interest in preserving and protecting . . . the potentiality of human life” was recognized by the Supreme Court in *Roe v. Wade*.⁶⁷ In *Planned Parenthood v. Casey*, the Court explained that this interest merits protection from the very beginning of the pregnancy, that is, from the moment of fertilization.⁶⁸ Yet the *Roe* and *Casey* Courts sought to balance such interest (together with the state’s interest in protecting the pregnant woman’s health) against the pregnant woman’s right to privacy. They concluded that viability marks the earliest point at which the state’s interest in fetal life is constitutionally adequate to justify a legislative ban on non-therapeutic abortions.⁶⁹ These cases demonstrate that if there were no legally recognized public interest in the protection of fetuses, there would be no legal justification for allowing state regulation of abortions, subject perhaps to the need to guarantee adequate conditions for their performance. It is also clear that the public interest in preserving potential life may be fully protected where this protection does not violate the mother’s constitutional right to privacy.⁷⁰ That is

66. The parents may not be compensated for the loss of love and society of the unborn child.

67. 410 U.S. 113, 162 (1972).

68. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992).

69. *Casey*, 505 U.S. at 846. We do not accept the interpretation of the Supreme Court of Arkansas that “the state’s interest in protecting the life of a fetus begins at viability.” *Aka v. Jefferson Hosp. Ass’n*, 42 S.W.3d 508, 517-18 (Ark. 2001). Viability only determines the turning point with regard to the balance between the state interest and the right to privacy.

70. Cf. Cari L. Leventhal, *The Crimes Against the Unborn Child Act: Recognizing Potential Human Life in Pennsylvania Criminal Law*, 103 DICK. L. REV. 173, 185-90 (1998) (arguing that the Supreme Court’s decision in *Roe* forbids the state’s protection of the unborn’s interest only when it conflicts with the protected interest of the mother); Mamta K. Shah, *Inconsistencies in the Legal Status of an Unborn Child: Recognition of a Fetus as Potential Life*, 29 HOFSTRA L. REV. 931, 966 (2001). This perception is manifested, for example, in ARK. CONST. amend. LXVIII, § 2, which declares that “[t]he policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution.”

exactly why the states can prohibit the killing of a fetus, at any stage after conception, outside the realm of legal consensual abortions.⁷¹ The same reasoning must be applied in wrongful abortion settings. In cases of this type, there is no need to balance the societal interest against the private right since they coincide. The woman would very likely have chosen not to abort had she been given accurate information. The inaccuracy of the information given by the adviser induced her to make a decision that she would otherwise not have made.⁷² Imposing a legal sanction on the negligent adviser is thus compatible with the public's interest in protecting potential life *and* the mother's right to privacy.

A legal sanction is thus required to ensure that professional advisers have an adequate incentive to abstain from giving inaccurate information that may result in loss of potential life, and that negligent advisers receive their just desert (in the retributive sense). In the following Sections, we attempt to show that the law does not currently provide such a sanction. Note that our concern is with the inadequate protection of the public interest in preserving potential life, and not with the possible failure of the law in vindicating private interests. Therefore, our analysis of private rights of action in the next Section is merely an attempt to discern whether existing tort law might ensure adequate protection of the *public* interest. Although one may conclude from our analysis that tort law does not afford adequate *compensation* to interested parties,⁷³ the lack of coverage for some of the social costs of wrongful abortion is only relevant in this Part to the extent that it may result in under-deterrence or overly lenient retribution.⁷⁴

B. Protection of the Public Interest in Civil Law

We shall assume (although it is not always the case)⁷⁵ that a fetus cannot

71. See *infra* notes 136-138 and accompanying text.

72. Cf. Daniel S. Meade, *Wrongful Death and the Unborn Child: Should Viability Be a Prerequisite for a Cause of Action?*, 14 J. CONTEMP. HEALTH L. & POL'Y 421, 445 (1998) ("If someone causes the death of a woman's unborn child . . . that person has infringed upon the woman's choice to have a baby, thus violating her right to privacy.")

73. This conclusion may become problematic if one argues that the *fetus* (through its representative) is also "under-compensated." A conclusion of this type is founded on the assumption that a fetus is a legal person (because non-persons have no right to compensation). As indicated in the Introduction, we prefer to avoid such controversial assumptions. This point will also be discussed in Subsection IV.D.1.

74. We assume that under-compensation may result in under-deterrence. This point will be discussed in detail in Section III.E.

75. In the Israeli *Dayan* case, the child lived for fifteen minutes after abortion. *Kupat Holim v. Dayan*, 55(1) P.D. 765 (1999). But this is a peculiar case.

survive an abortion. Abortion terminates the potentiality of life. Whenever a “person” dies most state legislatures recognize two types of civil actions:⁷⁶ (1) an action brought by the personal representative of the deceased for the loss suffered by the latter prior to her death (a “survival action”). The proceeds in this action are recovered for the benefit of the estate and subsequently distributed among the heirs; and (2) an action brought for the benefit of the deceased’s dependants (i.e., certain statutorily enumerated relatives) with regard to their own loss (a “wrongful death action”). The proceeds of this action accrue directly to the dependants.⁷⁷

In cases where a fetus injured *in utero* survives delivery and dies shortly

76. ALA. CODE §§ 6-5-391, -410, -462 (2004); ALASKA STAT. §§ 09.55.570, .580 (2004); ARIZ. REV. STAT. §§ 12-611 to -613 (2004); ARK. CODE ANN. §§ 16-62-101, -102 (Michie 2003); CAL. CIV. PROC. CODE §§ 377.20, .30, .34, .60-.62 (West 2004); COLO. REV. STAT. §§ 13-20-101, -21-201 to -203 (2003); CONN. GEN. STAT. §§ 52-555, -599 (2003); DEL. CODE ANN. tit. 10, §§ 3701, 3707, 3721-3725 (2004); D.C. CODE ANN. §§ 12-101, 16-2701 to -2703 (2004); FLA. STAT. chs. 46.021, 768.16-.26 (2004); GA. CODE ANN. §§ 9-2-41, 51-4-1 to -5 (2004); HAW. REV. STAT. §§ 663-3 to -8 (2003); IDAHO CODE §§ 5-311, -319 (Michie 2004); 740 ILL. COMP. STAT. 180/2 (2004); 755 ILL. COMP. STAT. ANN. 5/27-6 (2004); IND. CODE §§ 34-9-3-1, -11-7-1, -23-1-1, -23-1-2, -23-2-1 (2004); IOWA CODE §§ 611.20, 633.336 (2003); KAN. STAT. ANN. §§ 60-1801, -1901 to -1905 (2003); KY. REV. STAT. ANN. §§ 411.130, 411.140 (Banks-Baldwin 2004); LA. CIV. CODE ANN. arts. 2315.1-.2 (West 2004); ME. REV. STAT. tit 18-A, §§ 2-804, 3-817 (West 2004); MD. CODE ANN., CTS. & JUD. PROC. §§ 3-901 to -904, 6-401 (2003); MASS. GEN. LAWS ANN. ch. 228, § 1, ch. 229, §§ 2, 6 (West 2004); MICH. COMP. LAWS §§ 600.2921-.2922 (2004); MINN. STAT. § 573.02 (2003); MISS. CODE ANN. §§ 11-7-13, 91-7-233 (2004); MO. REV. STAT. §§ 537.020, .080, .090 (2004); MONT. CODE ANN. §§ 27-1-323, -501, -513 (2003); NEB. REV. STAT. §§ 25-1401, 30-809, -810 (2003); NEV. REV. STAT. §§ 41.085, .100 (2004); N.H. REV. STAT. ANN. §§ 556:7, :9, :12 to :14 (2003); N.J. STAT. ANN. §§ 2A:15-3, :31-1 to -6 (2004); N.M. STAT. ANN. §§ 37-2-1, 41-2-1 to -4 (Michie 2004); N.Y. EST. POWERS & TRUSTS LAW §§ 5-4.1, 11-3.2 (McKinney 2004); N.C. GEN. STAT. §§ 28A-18-1 to -2 (2004); N.D. CENT. CODE §§ 28-01-26.1, 32-21 (2003); OHIO REV. CODE ANN. §§ 2125.01-.02, 2305.21 (West 2004); OKLA. STAT. tit. 12, §§ 1051-1055 (2004); OR. REV. STAT. §§ 30.020, 30.075 (2003); 42 PA. CONS. STAT. §§ 8301-8302 (2004); R.I. GEN. LAWS §§ 9-1-6, 10-7-1 to -13 (2004); S.C. CODE ANN. §§ 15-51-10 to -20, -40 to -42, -60 (West 2003); S.D. CODIFIED LAWS §§ 15-4-1, -2, 21-5-1 to -9 (Michie 2003); TENN. CODE ANN. §§ 20-5-101 to -113 (2004); TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.001 to -.011, -.021 (Vernon 2004); UTAH CODE ANN. §§ 78-11-6, -7, -12 (2004); VT. STAT. ANN. tit. 14, §§ 1452-53, 1491-1492 (2003); VA. CODE ANN. §§ 8.01-25, 8.01-50 to -56 (2004); WASH. REV. CODE §§ 4.20.005, .010, .020, .046, .050, .060 (2004); W. VA. CODE §§ 55-7-5 to -8a (2003); WIS. STAT. §§ 895.01, .03, .04 (2003). These two types of actions are also available in other common law jurisdictions. *See, e.g.*, Fatal Injuries Act, R.S.N.S., ch. 163 (1989) (Can.); Survival of Actions Act, R.S.N.S., ch. 453 (1989) (Can.).

77. Such actions are usually brought by the personal representative of the deceased. *See, e.g.*, *Brewer v. Lacefield*, 784 S.W.2d 156 (Ark. 1990) (finding that the personal representative in bringing suit for wrongful death acts only as a trustee or conduit, and any proceeds recovered are for the benefit of the beneficiaries and not for the estate).

thereafter due to its injuries, all jurisdictions that have considered the issue allow both actions against the injurer, given that live birth turns the fetus into a legal person.⁷⁸ The question that must be addressed here is twofold. First, are these actions also available in cases of wrongful abortion under the aforementioned assumption (i.e., a fetus cannot survive an abortion)? Second, do these actions (where available) impose a sanction that is roughly equivalent to the loss of potential life?

1. Availability of Actions

Until 1949, no jurisdiction permitted wrongful death proceedings for a stillborn infant.⁷⁹ The unborn child was not regarded as an independent legal person whose "death" may give rise to a wrongful death action, mainly because a fetus was not thought to be an independent biological entity.⁸⁰ Since the decision of the Supreme Court of Minnesota in *Verkennes v. Corniea*,⁸¹ however, there seems to be a trend in favor of allowing such claims via statutory revision or judicial interpretation, subject to certain restrictions that will be discussed below.⁸² In nearly all jurisdictions where the expansion originated in judicial interpretation, the interpretative conclusions regarding the wrongful death statute were applied or are equally applicable to the survival statute.⁸³

In spite of this development, it cannot be said that survival and wrongful

78. See, e.g., *Wolfe v. Isbell*, 280 So. 2d 758 (Ala. 1973); *Callahan v. Slavsky*, 385 P.2d 674 (Colo. 1963); *Amann v. Faigy*, 114 N.E.2d 412 (Ill. 1953); *Torigian v. Watertown News Co.*, 225 N.E.2d 926 (Mass. 1967); *Stegall v. Morris*, 258 S.W.2d 577 (Mo. 1953); *Jasinsky v. Potts*, 92 N.E.2d 809 (Ohio 1950); *Hall v. Murphy*, 113 S.E.2d 790 (S.C. 1960); *Shousha v. Matthews Drivurself Serv., Inc.*, 358 S.W.2d 471 (Tenn. 1962); *Leal v. C.C. Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820 (Tex. 1967); *Kalafut v. Gruver*, 389 S.E.2d 681 (Va. 1990); see also RESTATEMENT (SECOND) OF TORTS § 869(1) (1977); Timothy Stoltzfus Jost, *Rights of Embryo and Fetus in Private Law*, 50 AM. J. COMP. L. 633, 642 (2002). Note, however, that this is a relatively recent development in the common law of torts. Until 1946, American courts did not allow recovery for prenatal injuries, even in cases of live birth. *Bonbrest v. Kotz*, 65 F. Supp. 138, 140 (D.D.C. 1946), marks the turning point.

79. Robert J. Del Tufo, *Recovery for Prenatal Torts: Actions for Wrongful Death*, 15 RUTGERS L. REV. 61, 73 (1960).

80. Jost, *supra* note 78, at 642; Shah, *supra* note 70, at 934.

81. 38 N.W.2d 838 (Minn. 1949).

82. See *infra* note 98.

83. See, e.g., *Gorke v. Le Clerc*, 181 A.2d 448, 451 (Conn. Super. Ct. 1962); *Greater Southeast Cmty. Hosp. v. Williams*, 482 A.2d 394, 398 (D.C. 1984); *Amadio v. Levin*, 501 A.2d 1085, 1087 (Pa. 1985); *Cavazos v. Franklin*, 867 P.2d 674, 676-77 (Wash. Ct. App. 1994). The survival statute and the wrongful death statute are usually interwoven, so their similar interpretation is not surprising.

death actions are generally applicable to wrongful abortion cases. On the contrary, in most jurisdictions at least one of them—and usually both—will not be available in all or most cases of wrongful abortion. There are a few noteworthy reasons for this. First, although the *majority* of jurisdictions allow wrongful death actions in cases of fetal death, others (among them California, New York, and Florida) adhere to the traditional view that survival and wrongful death actions are not maintainable unless the child is born alive.⁸⁴ In those jurisdictions, a fetus not yet born is not a legal “person,” and therefore no “personal” cause of action can survive its “death.” Additionally, a wrongful death action is considered to be a derivative action, which cannot be brought unless the immediate victim had a cause of action prior to his or her death. Clearly, then, in these jurisdictions wrongful death acts do not permit recovery attributable to the wrongful “death” of a fetus before birth.⁸⁵ An attempt to challenge the constitutionality of this viewpoint failed. The Third Circuit held that wrongful death statutes that discriminate against mothers of fetuses that do not survive birth, including aborted fetuses, do not violate the Equal Protection Clause.⁸⁶ It should be noted that the traditional view is also adhered to in common law jurisdictions outside the United States.⁸⁷

Second, in at least two jurisdictions that generally allow wrongful death actions in cases of fetal death (Arkansas and Illinois), a medical adviser cannot be held liable for the wrongful abortion of a fetus. This is because the wrongful death statute mandates either that: (1) *no person* shall be liable under the statute when the death of the fetus results from a legal abortion;⁸⁸ or (2) there shall be no cause of action against a physician or a medical institution for the wrongful death of a fetus caused by a legal and consented abortion.⁸⁹

84. *Justus v. Atchison*, 565 P.2d 122, 131 (Cal. 1977); *Tanner v. Hartog*, 696 So. 2d 705, 707 (Fla. 1997); *Tebbutt v. Virostek*, 483 N.E.2d 1142 (N.Y. 1985); *see also Bolin v. Wingert*, 764 N.E.2d 201, 207 (Ind. 2002); *Shaw v. Jendzejec*, 717 A.2d 367, 368 (Me. 1998); *Giardina v. Bennett*, 545 A.2d 139, 139, 147 (N.J. 1988); *Nelson v. Peterson*, 542 P.2d 1075, 1077 (Utah 1975); *Lawrence v. Craven Tire Co.*, 169 S.E.2d 440 (Va. 1969). Texas and Nebraska very recently left this group. *See infra* notes 95-97 and accompanying text.

85. *See, e.g., Marie v. McGreevey*, 314 F.3d 136, 140 (3d Cir. 2002); *Giardina*, 545 A.2d at 143-44; *Graf v. Taggart*, 204 A.2d 140 (N.J. 1964).

86. *Marie*, 314 F.3d at 141-42; *see also Alexander v. Whitman*, 114 F.3d 1392, 1400 (3d Cir. 1997).

87. *See JOHN SEYMOUR, CHILDBIRTH AND THE LAW* 103, 119 (2000) (noting that in England and Canada, the courts have indicated that they will not depart from the traditional view, and in Australia, although the issue has not arisen, the courts would be likely to adopt the same view).

88. ARK. CODE ANN. § 16-62-102(a)(3) (Michie 2003).

89. 740 ILL. COMP. STAT. ANN. 180/2.2 (2004). It was held that in cases of legal abortion no liability can be imposed, not only on the physician who performed the abortion but on any other

Likewise, in Texas the wrongful death statute excludes imposition of liability for fetal death upon “a physician or other health care provider licensed in this state, if the death directly or indirectly is caused by, associated with, arises out of, or relates to a lawful medical or health care practice or procedure of the physician or the health care provider.”⁹⁰ Given that the wrongful death statute includes another provision exempting physicians who perform lawful abortions,⁹¹ it is arguable that the Texas legislature intended to exempt from liability not only physicians who perform abortions, but also any physician or health care provider whose conduct resulted (directly or indirectly) in fetal death.⁹² Consequently, it seems that the above-cited paragraph applies to negligent medical advisers in wrongful abortion cases.

The underlying rationale of these broad exemptions is not clear to us. We believe that exemption from liability for an intentional or negligent causation of harm may be granted only where there is legal justification for the harmful conduct that annuls its *prima facie* wrongfulness. We thus find a limited exemption of any physician who performs a consented legal abortion (as exists in Michigan and Nebraska) far more understandable.⁹³ Nonetheless, the fact remains that wrongful abortion is not actionable in a few jurisdictions that generally allow recovery in cases of fetal death.

Third, several jurisdictions differentiate between wrongful death and survival actions. In cases of fetal death, they allow the former but exclude the latter. In Louisiana and Iowa, this distinction was explicitly proclaimed by the judiciary.⁹⁴ In Nebraska and Texas, the legislature very recently amended the

person who proximately caused the abortion. *Light v. Proctor Cmty. Hosp.*, 538 N.E.2d 828, 829 (Ill. App. Ct. 1989).

90. TEX. CIV. PRAC. & REM. CODE ANN. § 71.003(c)(4) (Vernon 2004).

91. *Id.* § 71.003(c)(2).

92. However, there is no case law on the subject.

93. MICH. COMP. LAWS § 600.2922a(2)(b) (2004) (person who performs a consented abortion is not liable); NEB. REV. STAT. § 30-809(2)(b) (2003) (“No action for damages for the death of a person who is an unborn child shall be brought under this section against . . . [a] physician or other licensed health care provider if the death was the intended result of a medical procedure performed by the physician or health care provider and the requisite consent was given . . .”). As noted above, a similar provision exists in Texas, but it is accompanied by a general and very broad exemption for physicians who cause fetal death.

94. *See, e.g., Wartelle v. Women’s & Children’s Hosp.*, 704 So. 2d 778, 781 (La. 1997) (holding that an unborn child is a person for the purposes of wrongful death statute but not for the purposes of bringing a survival action); *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830, 832-33 (Iowa 1983) (finding that a “wrongful death” civil procedure rule applies to fetal death, but a fetus is not a “person” for the purposes of survival-wrongful death hybrid statute). The discrepancy merits explanation. Wrongful death actions are the product of specific statutory provisions, which are not

wrongful death statute to encompass fetal death,⁹⁵ superseding long and well established authorities denying both wrongful death and survival actions in cases of this sort.⁹⁶ We believe that in doing so (i.e., amending only the wrongful death statute), the legislature in both states intended to uphold the application of the old rule to survival actions.⁹⁷

Fourth and most significant, in the vast majority of jurisdictions that allow survival and wrongful death actions in cases of fetal death, these actions are maintainable only where the fetus was *viable* at time of its death.⁹⁸ In Georgia

identical in all common law jurisdictions. Whenever the courts conclude that an unborn child is a "person" whose death entitles its dependants to claim for their own loss, they do so through interpretation of the local wrongful death statute. Such interpretation of a *sui generis* act does not have to alter the status (more accurately non-status) of the unborn fetus for other legal purposes, unless otherwise stated by the legislature. The survival statute may thus be interpreted differently from the wrongful death statute, although in most states it is not.

95. NEB. REV. STAT. § 30-809 (2003); TEX. CIV. PRAC. & REM. CODE ANN. § 71.001 (Vernon 2004).

96. See, e.g., *Egbert v. Wenzl*, 260 N.W.2d 480, 481-82 (Neb. 1977) (holding that a child born dead cannot maintain an action at common law for injuries received by it while in its mother's womb, and consequently the personal representative cannot maintain the action under a wrongful death statute); *Krishnan v. Sepulveda*, 916 S.W.2d 478, 481 (Tex. 1995) (same).

97. NEB. REV. STAT. § 25-1401 (2003); TEX. CIV. PRAC. & REM. CODE ANN. § 71.021 (Vernon 2004). In our opinion, although the Texas wrongful death statute applies generally to fetal death it does not apply to wrongful abortions. This means that in Texas neither wrongful death nor survival actions are currently available in cases of wrongful abortion.

98. *Espadero v. Feld*, 649 F. Supp. 1480, 1484 (D. Colo. 1986) (applying Colorado law); *Wade v. United States*, 745 F. Supp. 1573, 1579 (D. Haw. 1990) (applying Hawaii law); *Gentry v. Gilmore*, 613 So. 2d 1241, 1244 (Ala. 1993); *Summerfield v. County of Maricopa Super. Ct.*, 698 P.2d 712 (Ariz. 1985); *Aka v. Jefferson Hosp. Ass'n*, 42 S.W.3d 508 (Ark. 2001); *Gorke v. Le Clerc*, 181 A.2d 448, 451 (Conn. Super. Ct. 1962); *Worgan v. Greggo & Ferrara, Inc.*, 128 A.2d 557 (Del. Super. Ct. 1956); *Volk v. Baldazo*, 651 P.2d 11 (Idaho 1982); *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830 (Iowa 1983); *Shelton v. DeWitte*, 26 P.3d 650 (Kan. 2001); *Rice v. Rizk*, 453 S.W.2d 732, 735 (Ky. 1970); *Kandel v. White*, 663 A.2d 1264, 1268 (Md. 1995); *Remy v. MacDonald*, 801 N.E.2d 260, 265 (Mass. 2004); *Pehrson v. Kistner*, 222 N.W.2d 334 (Minn. 1974); *Strzelczyk v. Jett*, 870 P.2d 730, 733 (Mont. 1994); *White v. Yup*, 458 P.2d 617, 623-24 (Nev. 1969); *Wallace v. Wallace*, 421 A.2d 134, 137 (N.H. 1980); *Miller v. Kirk*, 905 P.2d 194, 197 (N.M. 1995); *DiDonato v. Wortman*, 358 S.E.2d 489 (N.C. 1987); *Hopkins v. McBane*, 359 N.W.2d 862, 865 (N.D. 1984); *Werling v. Sandy*, 476 N.E.2d 1053, 1056 (Ohio 1985); *Evans v. Olson*, 550 P.2d 924, 925 (Okla. 1976); *Libbee v. Permanente Clinic*, 520 P.2d 361 (Or. 1974); *Coveleski v. Bubnis*, 634 A.2d 608, 610 (Pa. 1993); *Miccolis v. AMICA Mut. Ins., Co.*, 587 A.2d 67, 71 (R.I. 1991); *Crosby v. Glasscock Trucking Co.*, 532 S.E.2d 856, 857 (S.C. 2000); *Vaillancourt v. Med. Ctr. Hosp., Inc.*, 425 A.2d 92, 94-95 (Vt. 1980); *Moen v. Hanson*, 537 P.2d 266, 267-68 (Wash. 1975); *Kwaterski v. State Farm Mut. Auto. Ins. Co.* 148 N.W. 2d 107, 111-12 (Wis. 1967); see also TENN. CODE ANN. § 20-5-106(c) (2004); Joseph McReynolds, *Childhood's*

and Mississippi, they are maintainable only if the fetus was either viable or quick.⁹⁹ Only a handful of jurisdictions allow the action for an injury caused at any point during gestation.¹⁰⁰ The viability requirement is indeed very significant in the current context: It means that any negligently instigated abortion of a non-viable fetus will not lead to liability. Since pre-viability abortions constitute the majority of legal abortions, the viability requirement weakens the protection of the public interest in the potentiality of life to a very considerable extent, although its protection would not violate any constitutional right.¹⁰¹

2. Extent of Liability

We now turn to the extent of liability in those jurisdictions that allow wrongful death and survival actions in cases of fetal death. Theoretically, wrongful death statutes apply to relational losses whereas survival statutes apply to the personal losses of the decedent (here the fetus), although in some states this distinction is not clear. The dichotomy of wrongful death/survival statutes therefore parallels our dichotomy of relational/fetal losses, and may be useful in

End: Wrongful Death of a Fetus, 42 LA. L. REV. 1411, 1412 (1982) (discussing the viability requirement in the early 1980s). Some of the cases cited herein do not explicitly hold that wrongful death and survival actions cannot be maintained where the fetus was non-viable at the time of death. However, in light of the historical background discussed above, holding—as these cases do—that the death of a fetus may yield rights of action if the fetus was viable, and emphasizing the fact of viability, is equivalent to maintaining the traditional rule with regard to non-viable fetuses, at least for the time being.

99. *Citron v. Ghaffari*, 542 S.E.2d 555 (Ga. Ct. App. 2000); 66 Fed. Credit Union v. Tucker, 853 So. 2d 104, 114 (Miss. 2003) (“Quickening is the period prior to viability when the mother first feels the fetus move in the womb, normally between the sixteenth and eighteenth week of pregnancy.”); Sandra L. Smith, Note, *Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application*, 41 WM. & MARY L. REV. 1845, 1855 (2000).

100. 740 ILL. COMP. STAT. ANN. 180/2.2 (2004); MICH. COMP. LAWS § 600.2922a (2004); NEB. REV. STAT. § 30-809 (2003); S.D. CODIFIED LAWS § 21-5-1 (Michie 2003), interpreted in *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787, 791 (S.D. 1996); TEX. CIV. PRAC. & REM. CODE ANN. § 71.001 (Vernon 2004); *Danos v. St. Pierre*, 402 So. 2d 633, 638-39 (La. 1981); *Connor v. Monkem Co.*, 898 S.W.2d 89, 92 (Mo. 1995) (en banc); *Farley v. Sartin*, 466 S.E.2d 522, 533 (W. Va. 1995). According to our foregoing analysis, Illinois and Texas do not allow wrongful death or survival actions in cases of wrongful abortion, whereas Louisiana and Nebraska do not allow survival actions. This leaves only four jurisdictions that allow both types of actions in cases of a wrongful abortion of a non-viable and non-quick fetus (Michigan, Missouri, South Dakota, and West Virginia).

101. Eighty-eight percent of all abortions performed in the United States occur during the first six to twelve weeks of pregnancy, i.e., before viability and quickening. See Katz, *supra* note 21.

determining whether these statutes constitute an adequate legal response to wrongful abortions.

We start with recovery for *relational* pecuniary losses in *wrongful death* actions. The primary head of damages in wrongful death actions is “loss of support.” The exact method employed to calculate and distribute damages for such loss depends on the specific wording of each statute. However, the various methods of calculation may be subsumed under two general categories.¹⁰²

The loss-to-survivors method (which is employed by most jurisdictions) measures economic loss by the loss of support to recognized dependants.¹⁰³ Most states that use this method also recognize as an element of damages the loss of a prospective inheritance based on the probability that the decedent would have accumulated an estate out of her earnings and would have left it to her surviving beneficiaries.¹⁰⁴ This method does not guarantee an appropriate response to the loss of potential life. In principle, the legally recognized dependants of the unborn child may recover for loss of support based on his or her anticipated earning power and probable contribution to existing legally-recognized dependants.¹⁰⁵ However, it can hardly be said that an unborn child would have supported any of her existing legally-recognized dependants or that any of them would have inherited her assets. Consequently, damages for loss of support constitute only a small fraction of the economic ingredient of the loss of potential life, i.e., some of the relational economic losses (those actually incurred by recognized dependants) plus a very small portion, if any, of the fetal loss (where it can be proved that the survivors are likely to inherit the unborn child).

The loss-to-the-estate method (which is employed by very few jurisdictions) bases the measurement of economic loss on the projected lifetime earnings of the

102. DOBBS, *supra* note 44, § 8.3(3); STUART M. SPEISER ET AL., RECOVERY FOR WRONGFUL DEATH AND INJURY § 1:9 (3d ed. 1992); Cindy Domingue-Hendrickson, Note, *New Mexico Adopts Hedonic Damages in the Context of Wrongful Death Actions: Sears v. Nissan (Romero v. Byers)*, 25 N.M. L. REV. 385, 388 (1995).

103. See *infra* note 106 for exceptions.

104. See, e.g., *Kulawik v. ERA Jet Alaska*, 820 P.2d 627, 634 (Alaska 1991) (including prospective inheritance as element of loss-to-the-beneficiary); *Denver & R.G.R. Co. v. Spencer*, 61 P. 606, 609 (Colo. 1900) (same); *Reynolds v. Willis*, 209 A.2d 760, 762 (Del. 1965) (same); *Gonzalez v. N.Y. City Hous. Auth.*, 572 N.E.2d 598, 600-01 (N.Y. 1991) (same); *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630, 632-33 (Tex. 1986) (same).

105. See, e.g., *Carey v. Lovett*, 622 A.2d 1279, 1291 (N.J. 1993) (“When parents sue for the wrongful death of a child, their damages may include the pecuniary value of the child’s help with household chores, the pecuniary value of the child’s anticipated financial contributions, and the pecuniary value of the child’s companionship, including his or her advice and guidance, as the parents grow older.”). Note, however, that under New Jersey law wrongful death actions are not permitted in cases of fetal death.

deceased.¹⁰⁶ Under loss-to-the-estate statutes, the fact that there are no beneficiaries who have sustained a pecuniary loss does not preclude recovery. There are three variations of the loss-to-the-estate method.

In the net earnings method, loss-to-the-estate is calculated by determining the deceased's probable lifetime earnings and then deducting the expenses the decedent would have had in maintaining herself,¹⁰⁷ and in some states also income tax.¹⁰⁸ Amounts that would have been expended to support other family members are not deducted. In that case, damages cover a portion of the aggregate relational pecuniary loss, and, quite surprisingly,¹⁰⁹ the pecuniary element of the fetal loss.

For the net savings method, loss-to-the-estate is measured by the present value of the amount the decedent would have saved and left as an estate had he or she survived to a normal life expectancy.¹¹⁰ Unlike the net earnings method, this formula requires deduction of amounts the decedent would have expended to support her dependents (and, of course, income tax).¹¹¹ Under this method, wrongful death proceeds are equal to the pecuniary element of the fetal loss. Income-based relational economic losses (familial, business, etc.) are not redressed at all.¹¹²

Next, in the gross income method, loss-to-the-estate is measured by the present value of the decedent's gross future earnings. Under this theory, no deductions are made for either the decedent's personal living expenses or the amount that would have been expended to support her dependents.¹¹³ The proceeds in those jurisdictions are equal to any income-based relational loss, plus the pecuniary element of the fetal loss.¹¹⁴

106. GA. CODE ANN. §§ 51-4-1, -2 (2004), *construed in* *W. & Atl. R.R. Co. v. Michael*, 165 S.E. 37, 41 (Ga. 1932); IOWA CODE § 633.336 (2003); KY. REV. STAT. § 411.130 (2004), *construed in* *Luttrell v. Wood*, 902 S.W.2d 817, 819 (Ky. 1995); N.H. REV. STAT. ANN. § 556:12 (2003); R.I. GEN. LAWS § 10-7-1.1 (2004).

107. DOBBS, *supra* note 44, § 8.3(4); *see also, e.g.*; R.I. GEN. LAWS § 10-7-1.1 (2004); *Kennett v. Delta Air Lines, Inc.*, 560 F.2d 456, 458, 461 (1st Cir. 1977) (applying New Hampshire law); *Varney v. Taylor*, 448 P.2d 164, 167 (N.M. 1968).

108. *See, e.g.*, *Turcotte v. Ford Motor Co.*, 494 F.2d 173, 185-86 (1st Cir. 1974) (applying Rhode Island law).

109. Given that wrongful death statutes were historically intended to provide compensation for relational losses only.

110. *See, e.g.*, *Pagel v. Notbohm*, 188 N.W.2d 314, 315 (Iowa 1971).

111. *Adams v. Deur*, 173 N.W.2d 100, 105 (Iowa 1969).

112. *See supra* note 109 and accompanying text.

113. *Brock v. Wedincamp*, 558 S.E.2d 836, 839-41 (Ga. Ct. App. 2002); *Miller v. Jenkins*, 412 S.E.2d 555, 556 (Ga. Ct. App. 1991).

114. *See supra* note 109 and accompanying text.

In addition to loss of support, several jurisdictions have statutorily provided for recovery for loss of services to a few enumerated relatives.¹¹⁵ In other jurisdictions, courts have interpreted more general damages provisions in their wrongful-death statutes as allowing such recovery.¹¹⁶ Note, however, that only a few existing relatives are entitled to recover for loss of support and services, and it is very likely that the financial support and services lost by those relatives in cases of wrongful abortion are overshadowed by the maintenance costs and services that they would have bestowed upon the child had she been born alive.¹¹⁷ One court held that damages for loss of support and services are not available at all in cases of a wrongful death of a viable fetus because of their speculative nature.¹¹⁸

Relational, non-pecuniary losses pose an even more serious problem from the deterrence standpoint. These losses may consist of (1) loss of companionship and affection and (2) mental anguish and grief. Most jurisdictions permit recovery for the loss of companionship, society, love, and affection incurred by the statutory dependants. In several states, these heads of damages are explicitly recognized in the wrongful death statute,¹¹⁹ while in others they were recognized by the courts through statutory interpretation.¹²⁰ Whenever a minor child is

115. *E.g.*, ALASKA STAT. § 09.55.580(c)(3) (2004); DEL. CODE ANN. tit. 10, § 3724(d)(3) (2004); FLA. STAT. ch. 768.21(1) (2004); MASS. GEN. LAWS ANN. ch. 229, § 2 (2004); MO. REV. STAT. § 537.090 (2004); N.C. GEN. STAT. § 28A-18-2(b)(4)(b) (2004); OHIO REV. CODE ANN. § 2125.02(B)(2) (West 2004); OR. REV. STAT. § 30.020(2)(d) (2003); R.I. GEN. LAWS § 10-7-1.1 (2004); VA. CODE ANN. § 8.01-52(2) (2004); W. VA. CODE § 55-7-6(c)(1) (2003).

116. *E.g.*, *Muckler v. Buchl*, 150 N.W.2d 689, 697-98 (Minn. 1967).

117. *McClurg*, *supra* note 49, at 57-60 (1990) (noting that as childrearing expenses are usually higher than the pecuniary benefits bestowed by a child, the relational pecuniary loss is usually negative).

118. *DiDonato v. Wortman*, 358 S.E.2d 489, 494 (N.C. 1987); *Greer v. Parsons*, 416 S.E.2d 174, 174, 176 (N.C. 1992).

119. *E.g.*, ALASKA STAT. § 09.55.580(c)(4) (Michie 2004); ARK. CODE ANN. § 16-62-102(f) (Michie 2003); COLO. REV. STAT. § 13-21-203(1)(a) (2003); FLA. STAT. ch. 768.21(2)-(3) (2004); HAW. REV. STAT. § 663-3 (2003); KAN. STAT. ANN. § 60-1904(a)(2) (2003); KY. REV. STAT. ANN. § 411.135 (Banks-Baldwin 2004); ME. REV. STAT. tit. 18-A, § 2-804(b) (West 2004); MD. CODE ANN., CTS. & JUD. PROC. § 3-904(d) (2003); MASS. GEN. LAWS ANN. ch. 229, § 2 (West 2004); MICH. COMP. LAWS § 600.2922(6) (2004); MO. REV. STAT. § 537.090 (2004); NEV. REV. STAT. § 41.085(4) (2004); N.C. GEN. STAT. § 28A-18-2(b) (2004); OHIO REV. CODE ANN. § 2125.02(B)(3) (West 2004); OKLA. STAT. tit. 12, § 1053(B) (2004); OR. REV. STAT. § 30.020(2)(d) (2003); R.I. GEN. LAWS § 10-7-1.2 (2004); VA. CODE ANN. § 8.01-52(1) (2004); W. VA. CODE ANN. § 55-7-6(c)(1) (Michie 2003); WIS. STAT. § 895.04(4) (2003); WYO. STAT. ANN. § 1-38-102(c) (Michie 2003).

120. *E.g.*, *Krouse v. Graham*, 562 P.2d 1022, 1025-28 (Cal. 1977); *Elliott v. Willis*, 442 N.E.2d 163, 167-68 (Ill. 1982); *Gravley v. Sea Gull Marine, Inc.*, 269 N.W.2d 896, 901 (Minn. 1978);

killed, these losses are probably more significant than pecuniary losses, given that in our times a child confers upon her family non-pecuniary rather than pecuniary benefits. The same is true in cases of fetal death, including wrongful abortion cases. Most jurisdictions that allow wrongful death actions in cases of fetal death permit recovery for the loss of companionship and affection of the unborn child.¹²¹ However, at least one state supreme court held that these losses are irrecoverable in cases of a wrongful death of a fetus due to their speculative nature.¹²² More importantly, while a living human being may bestow non-pecuniary benefits upon various persons (relatives, neighbors, friends, colleagues, etc.), only a small fraction of the aggregate loss—that incurred by a few existing and legally-recognized dependants—is covered.

As mentioned above, a few states have adopted legislation that specifically authorizes recovery of damages for mental anguish or grief arising from the death of a loved one; in others, the statute has been construed to include compensation for such loss.¹²³ Yet in many states, the wrongful death statute either specifically restricts recovery to pecuniary losses or has been construed to exclude liability for mental anguish.¹²⁴ Moreover, assuming that wrongful abortion may aggrieve many people apart from the statutory dependants, the aggregate distress will not be accounted for even if wrongful death statutes are interpreted to encompass mental anguish.¹²⁵

In sum, the damages claimable under the wrongful death statutes reflect merely a fraction of actual relational losses. Wrongful death statutes compensate a few relatives for *certain* losses. Even if the legally recognized dependants were

Dickey v. Parham, 331 So. 2d 917, 918 (Miss. 1976); Swanson v. Champion Int'l Corp., 646 P.2d 1166, 1170 (Mont. 1982); Spangler v. Helm's N.Y.-Pittsburgh Motor Express, 153 A.2d 490, 492 (Pa. 1959); Flagtwet v. Smith, 367 N.W.2d 188, 189-91 (S.D. 1985).

121. See, e.g., Burnham v. Miller, 972 P.2d 645, 647 (Ariz. Ct. App. 1998); Volk v. Baldazo, 651 P.2d 11, 14 (Idaho 1982); Seef v. Sutkus, 583 N.E.2d 510, 511-12 (Ill. 1991); Dunn v. Rose Way, Inc., 333 N.W.2d 810, 831-32 (Iowa 1983); Hopkins v. McBane, 427 N.W.2d 85, 92 (N.D. 1988). However, according to our foregoing analysis, although Illinois allows wrongful death actions in cases of fetal death, it excludes liability in cases of wrongful abortion. Cf. Fraternal Order of Eagles v. Ill. Cas. Co., 364 N.W.2d 218, 221 n.2 (Iowa 1985) (finding that when parents sue for the wrongful death of a child, loss of society, companionship, etc. is recoverable); Williams v. Monarch Transp., Inc., 470 N.W.2d 751, 755 (Neb. 1991) (same); Sanchez v. Schindler, 651 S.W.2d 249, 251 (Tex. 1983) (same); Clymer v. Webster, 596 A.2d 905, 914-15 (Vt. 1991) (same).

122. DiDonato, 358 S.E.2d at 494; Greer, 416 S.E.2d at 176.

123. See *supra* notes 53-54.

124. See *supra* note 55.

125. The law governing negligent infliction of emotional harm usually sets very restrictive guidelines regarding liability for emotional harm resulting from an injury to another. See *supra* note 47.

compensated for their entire loss, the wrongdoer would not bear relational losses incurred by those who were not legally recognized dependants (e.g., the state, purveyors of goods and services, potential friends, potential neighbors, potential spouses and cohabitants, and the public at large).¹²⁶ Moreover, even those jurisdictions that allow wrongful death actions for fetal deaths do not necessarily compensate legally recognized dependants for their entire loss.

Similarly, most survival statutes do not cover the entire *fetal* loss. Theoretically, a survival action, being an action inherited by the deceased, should cover any loss incurred by her, including pecuniary and non-pecuniary losses. We saw in Section I.B that an important component of the social costs of wrongful abortion is the value of the assets that the unborn child could have acquired during her lifetime. This element equals the loss of the child's earning power minus her costs of maintenance and any contribution made by her to other persons (who may sometimes recover for their loss in a wrongful death action). Most jurisdictions allow the estate in a survival action to recover for such loss.¹²⁷ However, in several states no recovery is allowed for future lost earnings in a survival action.¹²⁸ In those states, the pecuniary element of the fetal loss remains unaccounted for.

The non-pecuniary element once again raises a more acute problem. Most jurisdictions do not allow compensation for the loss of the ability to enjoy life in cases of wrongful death (either in a survival action or in a loss-to-the-estate based wrongful death action).¹²⁹ This seems to be the majority view, subject to only a

126. Relational losses are generally irrecoverable at common law, subject to the wrongful death statutory exception, and a few common law exceptions that are inapplicable here. *See supra* note 47.

127. *See, e.g.,* Weil v. Seltzer, 873 F.2d 1453, 1462 (D.C. Cir. 1989); Loden v. Getty Oil Co., 359 A.2d 161, 163-64 (Del. 1976); Payne v. Eighth Judicial Dist. Ct., 60 P.3d 469, 472 (Mont. 2002); Amadio v. Levin, 501 A.2d 1085, 1088 (Pa. 1985); Cavazos v. Franklin, 867 P.2d 674, 678 (Wash. Ct. App. 1994).

128. DOBBS, *supra* note 44, § 8.3(2) n.1; *see, e.g.,* Greene v. Texeira, 505 P.2d 1169, 1172-73 (Haw. 1973); Flowers v. Marshall, 494 P.2d 1184, 1190-91 (Kan. 1972); Jones v. Flood, 716 A.2d 285, 290 (Md. 1998); Prunty v. Schwantes, 162 N.W.2d 34, 38 (Wis. 1968).

129. Domingue-Hendrickson, *supra* note 102, at 386-87 (noting that courts generally have not held tortfeasors liable for the value of the decedent's life in wrongful death actions); Erin A. O'Hara, Note, *Hedonic Damages for Wrongful Death: Are Tortfeasors Getting Away with Murder?*, 78 GEO. L.J. 1687, 1691-92 (1990) (stating that in most jurisdictions the tortfeasor is not held liable for depriving the victim of the enjoyment of life); *see also, e.g.,* Sterner v. Wesley Coll., Inc., 747 F. Supp. 263, 272-74 (D. Del. 1990) (applying Delaware law); Nichols v. Estabrook, 741 F. Supp. 325, 328-29 (D.N.H. 1989) (applying New Hampshire law); O'Leary v. U.S. Lines, 111 F. Supp. 745, 747 (D. Mass. 1953) (applying Massachusetts law); Phillips v. E. Me. Med. Ctr., 565 A.2d 306, 309 (Me. 1989); Smallwood v. Bradford, 720 A.2d 586, 594-95 (Md. 1998); Smith v. Whitaker, 734 A.2d 243, 251 (N.J. 1999); Willinger v. Mercy Catholic Med. Ctr., 393 A.2d 1188,

few deviations.¹³⁰ An important element of the fetal loss thus remains uncompensated.

In conclusion, tort law is not responsive to the lion's share of the loss of potential human life. In many states, wrongful death and survival statutes are not applicable to cases of wrongful abortion; in others, they are not applicable to the vast majority of wrongful abortions (i.e., wrongful abortions of non-viable fetuses). Even where applicable, they do not make the tortfeasor accountable for the entire social costs of the wrongful abortion. We acknowledge that the gap between the social cost of human death and the scope of civil liability imposed under wrongful death and survival legislation is not distinctive of fetal death:¹³¹ It arises whenever a person is wrongfully killed. However, it seems more acute where the immediate victim is a fetus or a minor child.¹³² More importantly, the

1190-91 (Pa. 1978); *Spencer v. A-1 Crane Serv., Inc.*, 880 S.W.2d 938, 943-44 (Tenn. 1994); *Otani ex rel. Shigaki v. Broudi*, 92 P.3d 192, 198 (Wash. 2004); *Schwantes*, 162 N.W.2d at 38. In other states, it was held that loss of enjoyment of life is a component of pain and suffering, for which compensation depends on the awareness of the victim. *See, e.g.*, *Pitman v. Thorndike*, 762 F. Supp. 870, 872-73 (D. Nev. 1991); *Poyzer v. McGraw*, 360 N.W.2d 748, 753 (Iowa 1985); *Leiker ex rel. Leiker v. Gafford*, 778 P.2d 823 (Kan. 1989); *Anderson v. Neb. Dep't of Soc. Servs.*, 538 N.W.2d 732, 740-41 (Neb. 1995); *Nussbaum v. Gibstein*, 536 N.E.2d 618 (N.Y. 1989); *First Trust Co. v. Scheels Hardware & Sports Shop, Inc.*, 429 N.W.2d 5, 13-14 (N.D. 1988); *Mo. Pac. R.R. v. Lane*, 720 S.W.2d 830, 834 (Tex. Ct. App. 1986); *Bulala v. Boyd*, 389 S.E.2d 670, 677-78 (Va. 1990). Obviously, the decedent's loss of enjoyment of life cannot be recovered under a loss-to-survivors wrongful death statute. *See, e.g.*, *Russell, Inc. v. Trento*, 445 So. 2d 390, 392 (Fla. Dist. Ct. App. 1984); *Southlake Limousine & Coach, Inc. v. Brock*, 578 N.E.2d 677, 679-80 (Ind. Ct. App. 1991).

130. A few states allow recovery for loss of enjoyment of life (LOEL) under a loss-to-the-estate wrongful death statute. *See Choctaw Maid Farms, Inc. v. Hailey*, 822 So. 2d 911, 922-23 (Miss. 2002) (finding right to recover for LOEL); *Romero v. Byers*, 872 P.2d 840, 846 (N.M. 1994) (same). Two states permit recovery in a survival action. *See* ARK. CODE ANN. § 16-62-101(b) (Michie 2003) ("In addition to all other elements of damages provided by law, a decedent's estate may recover for the decedent's loss of life as an independent element of damages."); *Durham v. Marberry*, No. CV-2002-24, 2004 Ark. LEXIS 179, at *17-18 (Mar. 25, 2004); *Ozaki v. Ass'n of Apartment Owners*, 954 P.2d 652, 667-68 (Haw. Ct. App. 1998). Loss-of-life damages are also available in survival actions brought under 42 U.S.C. § 1983 (2000) in cases of constitutional deprivation resulting in death. *See, e.g.*, *Lewis ex rel. Bass v. Wallenstein*, 769 F.2d 1173, 1190 (7th Cir. 1985).

131. As opposed to the possibility of no liability at all for the lost value of life that is distinctive of fetal death or at least fetal death through wrongful abortion.

132. A fetus, like a minor child, does not normally have dependants. "Future dependants" cannot sue for their own loss (since they are not yet dependants or are not in existence at the time of death). Yet the prospects of marriage and procreation may reduce the immediate victim's compensation for loss of earnings. Consequently, the loss of potential relational advantages is not internalized by the injurer.

gap between the social cost and actual liability (where liability is imposed) clearly intensifies the problem of under-deterrence discussed in this article. In a comprehensive analysis of the inability of tort law to make a negligent adviser accountable for the social costs of wrongful abortion, it simply cannot be ignored. Whether and to what extent this gap should be dealt with in other contexts is a question that lies outside the scope of this article.¹³³

C. Protection of the Public Interest in Criminal Law

Criminal law is another possible avenue for the protection of potential life. In earlier times, the killing of a fetus was not in itself a criminal offense, given that the fetus was not regarded as an independent human being entitled to legal protection.¹³⁴ The courts in the United States, England, Canada, and Australia have generally held that a person who injured a fetus (resulting in a stillbirth) could not be guilty of murder or manslaughter.¹³⁵ In the modern era, however, criminal law has been modified in several jurisdictions to protect fetuses. This was done in three different ways. In most states where a revision took place, a new criminal offense (usually termed "feticide," "homicide of unborn child," "murder of an unborn child," "manslaughter of an unborn child," or the like) was established by the legislature.¹³⁶ A small number of state legislatures, along with the federal government, have expanded the definition of traditional homicide offenses to encompass the killing of a fetus.¹³⁷ In a few other states, the courts

133. On the one hand, it may be argued that by not imposing the social cost of taking life on the person whose conduct caused death, tort law does not adequately protect living persons. On the other hand, in most jurisdictions living persons are better protected by criminal law than the unborn.

134. Tara Kole & Laura Kadetsky, *The Unborn Victims of Violence Act*, 39 HARV. J. ON LEGIS. 215, 216 (2002); Mary Lynn Kime, *Hughes v. State: The "Born Alive" Rule Dies a Timely Death*, 30 TULSA L.J. 539, 539-41 (1995); Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 571 (1987).

135. SEYMOUR, *supra* note 87, at 137.

136. ARIZ. REV. STAT. § 13-1103(A)(5) (2004); FLA. STAT. ch. 782.09 (2004); GA. CODE ANN. § 16-5-80 (2004); 720 ILL. COMP. STAT. ANN. 5/9-1.2, -2.1, -3.2, 5/12-3.1, -4.4 (2004); IND. CODE §§ 35-42-1-1(4), -42-1-6 (2004); LA. REV. STAT. ANN. §§ 14:2(7), (11), 14:32.5-8 (West 2004); MICH. COMP. LAWS § 750.322 (2004); MINN. STAT. ANN. §§ 609.2661-.2665, .268 (2003); MISS. CODE ANN. § 97-3-37 (2004); NEV. REV. STAT. § 200.210 (2004); N.D. CENT. CODE §§ 12.1-17.1-01 to -06 (2003); OHIO REV. CODE ANN. § 2903.09(A) (West 2004); 18 PA. CONS. STAT. §§ 2601-2607 (2004); R.I. GEN. LAWS § 11-23-5 (2004); S.D. CODIFIED LAWS §§ 22-16-1, -1.1 (Michie 2003); WASH. REV. CODE § 9A.32.060(1)(b) (2004); WIS. STAT. §§ 940.01, .02, .04 to .06 (2003).

137. ARK. CODE ANN. § 5-1-102(13)(B) (Michie 2003); CAL. PENAL CODE § 187 (West 2004); MISS. CODE ANN. § 97-3-37(1) (2004); MO. REV. STAT. § 1.205.2 (2004), *construed in State v. Holcomb*, 956 S.W.2d 286 (Mo. Ct. App. 1997); OHIO REV. CODE ANN. § 2901.01(B)(1)(a)(ii)

modified the time-honored “born alive” rule of the common law to make the third-party killing of a viable fetus a crime under general homicide statutes.¹³⁸ Nonetheless, criminal law currently seems incapable of dealing with the societal problem of wrongful abortions. At this stage, we do not contend that it should, only that at present it does not.

First, many jurisdictions still adhere to the traditional view that the killing of a fetus does not constitute a criminal offense.¹³⁹ In some of these jurisdictions, the criminal statute explicitly defines “person,” “individual,” or “human being” as one who is born and alive.¹⁴⁰ In others, where no explicit statutory exclusion of the fetus is present, courts have held that the aforementioned terms do not encompass fetuses. The number of jurisdictions that have not criminalized fetal homicide is much larger than the number of jurisdictions that do not allow wrongful death actions in cases of fetal death. The former group consists of nearly all jurisdictions that do not allow wrongful death actions (California being an exception),¹⁴¹ plus many others that do.¹⁴²

Second, although several jurisdictions have criminalized the killing of a fetus at any stage of gestation,¹⁴³ many others did not go this far. In most

(West 2004); TENN. CODE ANN. § 39-13-214 (2004); TEX. PENAL CODE ANN. § 1.07(26) (Vernon 2004); UTAH CODE ANN. § 76-5-201 (2004). A similar reform took place on the federal level. The Unborn Victims of Violence Act, 18 U.S.C.A. § 1841 (West Supp. 2004), provides that if a person intentionally kills or attempts to kill an unborn child, that person shall be punished for intentionally killing or attempting to kill a human being. The same act provides that whoever engages in conduct that violates any of the provisions of law listed therein and thereby causes (unintentionally) the death of or bodily injury to a child, who is in utero at the time the conduct takes place, is guilty of a separate offense.

138. *Commonwealth v. Morris*, 142 S.W.3d 654, 660 (Ky. 2004); *Commonwealth v. Cass*, 467 N.E.2d 1324, 1329 (Mass. 1984); *Hughes v. State*, 868 P.2d 730, 734 (Okla. Crim. App. 1994); *State v. Home*, 319 S.E.2d 703, 704 (S.C. 1984).

139. SEYMOUR, *supra* note 87, at 140 (noting that the “born alive” rule remains part of homicide law in many jurisdictions).

140. ALA. CODE § 13A-6-1(2) (2004); ALASKA STAT. § 11.41.140 (Michie 2004); COLO. REV. STAT. § 18-3-101(2) (2003); HAW. REV. STAT. ANN. § 707-700 (Michie 2003); MONT. CODE ANN. § 45-2-101(28) (2003); NEB. REV. STAT. § 28-302(2) (2003); OR. REV. STAT. § 163.005(3) (2003).

141. *See, e.g., In re A.W.S.*, 440 A.2d 1144, 1145 (N.J. Super. Ct. 1981); *People v. Vercelletto*, 514 N.Y.S.2d 177, 179 (Ulster County Ct. 1987); *People v. Joseph*, 496 N.Y.S.2d 328, 328-29 (Orange County Ct. 1985).

142. *See, e.g., State v. Anonymous*, 516 A.2d 156, 157 (Conn. Super. Ct. 1986); *State v. Green*, 781 P.2d 678, 682 (Kan. 1989); *Williams v. State*, 550 A.2d 722, 726 (Md. 1988); *State v. Beale*, 376 S.E.2d 1, 4 (N.C. 1989); *State v. Oliver*, 563 A.2d 1002, 1003-05 (Vt. 1989); *State ex rel. Atkinson v. Wilson*, 332 S.E.2d 807, 809-10 (W. Va. 1984).

143. 18 U.S.C.A. § 1841(d) (West Supp. 2004); ARIZ. REV. STAT. § 13-1103(A)(5) (2004); 720 ILL. COMP. STAT. ANN. 5/9-1.2(b), -3.2(c) (West 2004); LA. REV. STAT. ANN. §§ 14:2(7), (11)

jurisdictions that have abandoned the “born alive” rule, either through explicit legislation or judicial interpretation, the killing of a fetus is a criminal offense only if the fetus was viable¹⁴⁴ or quick,¹⁴⁵ or has reached a certain stage of development prior to quickening.¹⁴⁶

Third, in some of the states that have criminalized fetal homicide, the killing of a fetus constitutes a criminal offense only when committed with intent to kill the fetus.¹⁴⁷ In California, malice aforethought is required.¹⁴⁸ Only a few states have criminalized negligent causation of fetal death.¹⁴⁹ An intention to kill the fetus is usually absent in the paradigmatic wrongful abortion case discussed here. The adviser usually intends to convey information to the prospective parents, not kill their potential offspring.

Fourth, and closely related to the previous point, in some states fetal homicide leads to criminal liability only if caused by a physical injury to the mother, which would be murder if the death of the mother had occurred.¹⁵⁰ In other words, the fatal injury to the fetus must be inflicted with intent to kill the mother. Of course, the act of the adviser in a wrongful abortion setting is not an intentional attempt to kill the pregnant woman.

(2004); MINN. STAT. ANN. § 609.266 (West 2003); MISS. CODE ANN. § 97-3-37 (2004) (as amended recently); MO. ANN. STAT. § 1.205.1 (West 2004); 18 PA. CONS. STAT. ANN. § 3203 (West 2004); S.D. CODIFIED LAWS § 22-1-2(50A) (Michie 2003); TEX. PENAL CODE ANN. § 1.07 (26) (Vernon 2004); UTAH CODE ANN. § 76-5-201 (2004); WIS. STAT. § 940.04 (2003).

144. See, e.g., OHIO REV. CODE ANN. § 2901.01(B)(1)(a)(ii) (West 2004); TENN. CODE ANN. § 39-13-214 (2004); *Commonwealth v. Cass*, 467 N.E.2d 1324, 1329 (Mass. 1984); *Hughes v. State*, 868 P.2d 730, 734 (Okla. Crim. App. 1994); *State v. Home*, 319 S.E.2d 703, 704 (S.C. 1984).

145. FLA. STAT. ch. 782.09 (2004); GA. CODE ANN. § 16-5-80 (Michie 2004); MICH. COMP. LAWS § 750.322 (2004); NEV. REV. STAT. § 200.210 (2004); R.I. GEN. LAWS § 11-23-5 (2004); WASH. REV. CODE ANN. § 9A.32.060(1)(b) (West 2004).

146. ARK. CODE ANN. § 5-1-102(13)(B) (Michie 2003) (twelve weeks gestation); *People v. Davis*, 872 P.2d 591, 599 (Cal. 1994) (seven to eight weeks).

147. FLA. STAT. ch. 782.09 (2004); GA. CODE ANN. 16-5-80 (2004); IND. CODE § 35-42-1-6 (West 2004); MICH. COMP. LAWS § 750.322; NEV. REV. STAT. § 200.210 (2004); R.I. GEN. LAWS § 11-23-5 (2004); WASH. REV. CODE § 9A.32.060(1)(b) (2004); WIS. STAT. § 940.04 (2003).

Under 18 U.S.C.A. § 1841 (West Supp. 2004), there are two types of crimes against unborn children, neither of which is relevant in our context. The first type focuses on unintentional killing or injuring a fetus while committing a violent crime against its mother. *Id.* § 1841(a)(1). The second type focuses on *intentional* killing or attempting to kill a fetus. *Id.* § 1841(a)(2)(C).

148. CAL. PENAL CODE § 187 (West 2004).

149. See, e.g., 18 PA. CONS. STAT. ANN. §§ 2603, 2605 (West 2004); N.D. CENT. CODE § 12.1-17.1-04 (2003).

150. ARIZ. REV. STAT. § 13-1103(A)(5) (2004); FLA. STAT. ANN. § 782.09 (West 2004); GA. CODE ANN. § 16-5-80 (2004); MICH. COMP. LAWS § 750.322 (2004); MISS. CODE ANN. § 97-3-37 (2004); S.D. CODIFIED LAWS § 22-16-1.1 (Michie 2003).

Fifth, it can hardly be said that the adviser in a wrongful abortion case actually “kills” or “terminates the life” of the fetus for the purposes of criminal law. The adviser does not perform the act that terminates the pregnancy. The act of “killing” is usually performed by another person, who cannot be regarded as the adviser’s agent.¹⁵¹ Even if we could attribute the act to the adviser (which we do not believe is possible), most fetal homicide statutes explicitly grant immunity from any criminal liability to medical staff involved in a consented abortion (at least where the abortion is legal).¹⁵² This bars the possibility of any legal reaction to wrongful abortions on the criminal level.

Sixth, even where the killing of a fetus may constitute a criminal offense, “prosecutors are reluctant to charge individuals with these crimes.”¹⁵³ Such reluctance is present even in the most outrageous cases of fetal homicide.¹⁵⁴ It would thus be unrealistic to expect criminal law to make a significant contribution to the prevention of unintentional and indirect “killing” of fetuses, as in wrongful abortion settings, even if it formally applied to such cases (an evidently dubious assumption).

D. Protection of the Public Interest Through Disciplinary Proceedings

As we have just shown, criminal legislation in most states does not generally cover liability for a negligent professional misrepresentation leading to an unwanted and unnecessary abortion. Another possible response to this kind of medical malpractice is a disciplinary action. Professional codes grant state medical boards the authority to regulate and discipline physicians, nurses, and other persons involved in the practice of medicine, *inter alia* by imposing sanctions for professional misbehavior.¹⁵⁵ Is this legal channel effective and

151. It is quite probable that the adviser whose advice induces the woman to undergo an abortion is not the physician who actually performs the abortion.

152. 18 U.S.C.A. § 1841(c)(1) (West Supp. 2004); ARK. CODE ANN. § 5-1-102(13)(B) (Michie 2003); CAL. PENAL CODE § 187(b) (West 2004); 720 ILL. COMP. STAT. ANN. 5/9-1.2(c), -3.2(d) (West 2004); IND. CODE ANN. § 35-42-1-6 (West 2004); LA. REV. STAT. ANN. § 14:32.5(A) (West 2004); MISS. CODE ANN. § 97-3-37(3) (2004); N.D. CENT. CODE § 12.1-17.1-07 (2003); OHIO REV. CODE ANN. §§ 2901.01(B)(2)(a), 2903.09(C)(1) (West 2004); 18 PA. CONS. STAT. ANN. § 2608(a) (West 2004); S.D. CODIFIED LAWS § 22-16-1.1 (Michie 2003); TENN. CODE ANN. § 39-13-214 (2004); UTAH CODE ANN. § 76-5-201(1)(b) (2004).

153. JEAN REITH SCHROEDEL, *IS THE FETUS A PERSON? A COMPARISON OF POLICIES ACROSS THE FIFTY STATES* 132-33 (2000).

154. *Id.*

155. For a general survey of the main characteristics of disciplinary proceedings in the State of New York, see Paul Bennett Marrow, *Professional Misconduct: New York's Unified System for Professional Misconduct*, 29 WESTCHESTER COUNTY B. J. 15 (2002).

adequate as a deterrent against wrongful abortions?

We think that here too the answer is in the negative. First, the aim of disciplinary proceedings, in the context of medical malpractice as elsewhere, is usually thought to be one of protecting the public from incompetent professionals, rather than directly punishing improper professional behavior for the sake of deterrence or retribution.¹⁵⁶ The boards do not view their role as replacing or even complementing the more direct forms of controlling medical malpractice, i.e., criminal and civil law.¹⁵⁷ This view of the role of disciplinary actions is reflected in the provisions of most professional codes and in the actual practice of medical boards. Many codes do not authorize the imposition of fines at all (not to mention imprisonment), and the ones that do allow them only in relatively small sums.¹⁵⁸ In addition, fines are typically available for more

156. This common view is reflected in materials on the Federation of State Medical Boards website. Fed'n of State Med. Bds., What Is a State Medical Board?, at <http://www.fsmb.org/consumer.htm> (last visited Aug. 31, 2004) [hereinafter FSMB website] ("Medical boards may review malpractice reports to proactively identify practitioners who may be a hazard to the public by detecting a pattern of inappropriate actions. . . . Medical boards focus on protecting the public, not on punishing physicians."); see also N.C. Med. Bd. (NCMB), Topics of Interest About the Board and Its Work, at <http://www.ncmedboard.org/Clients/NCBOM/Public/PublicMedia/topics.htm> (last visited Apr. 6, 2005) ("Disciplinary action by the Board is primarily intended to protect the public by preventing a practitioner from doing harm (or further harm) to patients. The Board does not focus on punishing problem practitioners, though that may certainly be one effect of its action when a practitioner loses his or her license or is otherwise sanctioned by the Board."). The distinction between punishment and protection has been emphasized by the courts in similar contexts. See, e.g., *Attorney Grievance Comm'n v. Ashwarth*, 851 A.2d 527, 536 (Md. 2004); *Bar Ass'n v. Marshall*, 307 A.2d 677, 682 (Md. 1973); see also *In re Bennethum*, 161 A.2d 229, 236 (Del. 1960); *In re Sabath*, 662 S.W.2d 511, 512 (Mo. 1984) (en banc); *Nardi's Case*, 444 A.2d 512, 513 (N.H. 1982); *In re Willis* 552 A.2d 979, 982 (N.J. 1989); *Cleveland Bar Ass'n v. Feneli*, 712 N.E.2d 119, 121 (Ohio 1999).

157. See, e.g., NCMB, An Introduction to the North Carolina Medical Board, at <http://www.ncmedboard.org/Clients/NCBOM/Public/PublicMedia/intbro.htm> (last visited Apr. 6, 2005) ("Complaints to the Board should not be seen as an alternative to appropriate legal action when that is called for.").

158. The fines are comparatively small, the typical sum being \$1,000, \$5,000, or \$10,000 at most. For example, CAL. BUS. & PROF. CODE § 2670 (West 2004) authorizes the board to impose a maximum penalty of \$1,000 or six months' imprisonment for any violation of its provisions. N.Y. PUB. HEALTH LAW § 230-a(7) (McKinney 2004) permits the imposition of fines up to \$10,000 for each act of misconduct as defined by the statute. TEX. OCC. CODE ANN. § 165.003 (Vernon 2004) limits the fine (termed "administrative penalty") to \$5,000. However, there is one notable exception. CAL. BUS. & PROF. CODE § 2242.1 allows a medical board to impose a civil fine of not more than \$25,000 for each offense of illegally providing prescriptions for dangerous drugs. On February 10, 2003, the California medical board imposed an unprecedented total amount of \$48

“technical” offenses such as practicing without a valid license or outside the jurisdiction, rather than for providing deficient services. Finally, fines are rarely imposed in disciplinary proceedings, even where possible.¹⁵⁹ These facts echo the general view that a disciplinary action is directed against the physician’s license, not his or her pocket.¹⁶⁰

Even more important, disciplinary actions are generally unavailable, and, even where available, not regularly taken in cases of ordinary or one-time negligence, such as the medical negligence discussed in this Article. Rather, an action would usually be taken only against a physician whose conduct raises serious doubts as to his or her competence or personal integrity.¹⁶¹

A further limitation on the deterrent effect of disciplinary actions is of a more pragmatic nature, but nevertheless serious. Medical boards have limited resources and staff and consequently lack the power to create sufficient

million against six doctors who were found guilty of such conduct. Damon Adams, *California Fines Out-of-State Doctors for Prescribing*, AMNEWS, Mar. 3, 2003, at <http://www.ama-assn.org/amednews/2003/03/03/prsb0303.htm>.

159. For instance, in 2004 the NCMB imposed nine different kinds of sanctions against 154 defendants (130 of which were physicians), with not one judgment including a fine. NCMB, ANNUAL BOARD ACTION REPORT 2004 §§ 1, 3 (2005), <http://www.ncmedboard.org/Clients/NCBOM/Public/Board/2004annualreport.pdf> (last visited Apr. 6, 2005). The minor role of fines in disciplinary proceedings is also manifest in the fact that in the list of sanctions recommended by the FSMB it appears almost at the end, after ten other sanctions. A GUIDE TO THE ESSENTIALS OF A MODERN MEDICAL PRACTICE ACT § 9.A (10th ed., 2003), http://www.fsmb.org/Policy Documents and White Papers/tenth_edition_essentials.htm.

160. Position of Federation of State Medical Boards on Partial-Birth Abortion Ban Acts, <http://www.fsmb.org/Policy Documents and White Papers/partial birth acts.htm> (last visited Aug. 31, 2004) (“The purpose of a medical board hearing is to determine whether a violation of the Medical Practice Act has occurred that indicates the need for disciplinary action against a physician’s license in the interest of public protection.”); see also FSMB website, *supra* note 156 (“The board is charged with the responsibility of evaluating when a physician’s professional conduct or ability to practice medicine warrants modification, suspension or revocation of the license to practice medicine.”).

161. *E.g.*, N.Y. EDUC. LAW § 6530 (McKinney 2004), which defines in length the various forms of professional misconduct, does not mention ordinary negligence as a form of professional misbehavior, but refers only to aggravated forms of negligence such as “gross negligence on a particular occasion” or “negligence on more than one occasion.” Similarly, CAL. BUS. & PROF. CODE § 2234 (West 2004) defines “unprofessional conduct” as including “gross negligence” or “repeated negligent acts” but not ordinary negligence. See also Kara M. McCarthy, *Doing Time for Clinical Crime: The Prosecution of Incompetent Physicians as an Additional Mechanism To Assure Quality Health Care*, 28 SETON HALL L. REV. 569, 584 (1997); Gregory G. Peters, *Reallocating Liability to Medical Staff Review Committee Members: A Response to the Hospital Corporate Liability Doctrine*, 10 AM. J.L. & MED. 115, 119 (1984).

incentives against malpractice.¹⁶² Due to budget restraints, and possibly lack of zeal in the members of medical boards to investigate and prosecute their colleagues, even grossly negligent practitioners may escape board sanctions.¹⁶³ According to a report by the Health Research Group of Public Citizen, a national non-profit public interest organization, only 2864 serious disciplinary actions were taken in 2002 by medical boards nationwide.¹⁶⁴ Given that in the same year a total of 805,372 licensed physicians practiced medicine in the United States, it is doubtful that this channel can be relied on as a means to prevent wrongful abortions, even if it were more attuned to the needs of punishment and deterrence.

In sum, although at first glance disciplinary proceedings might seem a promising means for deterrence of medical advisers, the problems identified above make them practically ineffective in this regard.¹⁶⁵

E. Interim Conclusion: An Interest in Search of Protection

The preceding analysis reveals a significant and disturbing anomaly in American law. On the one hand, wrongful abortions infringe the states' eminent interest in the preservation of potential life without any constitutional justification or necessity. On the other hand, the law in most jurisdictions does little (if anything) to prevent the loss of potential life in wrongful abortions and to punish those responsible for such loss. The legal response to the loss of potential life in wrongful abortions is at best scarce, and quite often absent.

We have shown that, at least in the context of wrongful abortion, tort law does not effectively protect the state interest in preserving potential life.¹⁶⁶ First, a wrongful abortion will *not* give rise to a civil action for the loss of potential life in most cases. This is because: (1) in some jurisdictions a fetus is not a "person" whose death gives rise to wrongful death and survival actions (or at least to

162. See, e.g., Ethics and Quality of Care: Report of the American Medical Association and the Federation of State Medical Boards, http://www.fsmb.org/Policy Documents and White Papers/ethics_&_quality_care.htm (last visited Aug. 31, 2004).

163. Cf. McCarthy, *supra* note 161, at 584 ("The reality is, however, that the revocation, or the suspension, of medical licenses for incompetence is extremely rare."); Peters, *supra* note 161, at 119 ("Possibly because of a lack of funds and personnel, incompetent or negligent physicians escape board sanctions.").

164. The Health Research Group, Pub. Citizen, Ranking of State Medical Board Serious Disciplinary Actions in 2002 (HRG Publication #1658), <http://www.citizen.org/publications/release.cfm?ID=7234> (last visited Aug. 31, 2004).

165. Cf. McCarthy, *supra* note 161, at 588-89 ("[S]tate licensing boards do little to assure the optimal level of quality care for patients.").

166. See *supra* Section III.B.

survival actions); (2) in others, liability is explicitly precluded in cases of abortion or death caused by medical treatment; and (3) in nearly all jurisdictions where liability is allowed, it depends on the viability of the fetus in time of its wrongful death (a serious limitation where the death is caused by a legal—albeit negligently instigated—abortion). Secondly, even if all jurisdictions allowed wrongful death and survival actions in cases of wrongful abortion, the extent of damages would not correspond to the societal value of potential life.¹⁶⁷ As we saw above, these deficiencies of tort law¹⁶⁸ are not corrected by criminal law (which is inapplicable to cases of wrongful abortion)¹⁶⁹ or disciplinary proceedings (which have an insignificant deterrent effect, at least in our context).¹⁷⁰

We have seen that tort law protects, somewhat imperfectly, the interest of the parents in not being given incorrect professional information that may lead to abortion. One may argue that the parents' right of action—standing alone—provides a good incentive for the prevention of wrongful abortions and a fair sanction upon negligent inducers of abortions, and that further penalties are not required to achieve the goals of deterrence and retribution. However, we find this argument unconvincing for at least four reasons.

First, the parents' claim is at most for their *own* personal loss, not for the full value lost to society on account of the professional negligence. A significant consequence of the wrongful act remains unaccounted for. According to traditional economic theory, efficient deterrence requires full internalization of the social costs of one's conduct, and this usually means full compensation to all victims.¹⁷¹ Although in certain cases liability for a mere fraction of the social costs of a negligent conduct, coupled with extra-legal sanctions,¹⁷² may provide an efficient incentive for potential wrongdoers, this cannot be assumed where the social cost significantly outweighs the expected liability, as is currently the case with wrongful abortions. It is quite probable that liability for a relatively small fraction of the social costs of negligent conduct will not guarantee efficient deterrence, even with the help of extra-legal sanctions.¹⁷³ We cannot say with

167. This deficiency is not special to cases of fetal death.

168. The aforementioned characteristics of the law of torts may be regarded as "deficiencies," at least from an efficient deterrence standpoint.

169. See *supra* Section III.C.

170. See *supra* Section III.D.

171. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 127-28 (1987).

172. E.g., reputational harm.

173. As indicated above, efficient deterrence requires full internalization, and this usually means full compensation. Partial compensation where extra-legal sanctions exist may be economically justified only to the extent that these extra-legal sanctions create or transfer value to people other than the wrongdoer. See Robert Cooter & Ariel Porat, *Should Courts Deduct Nonlegal Sanctions*

certainty that this would be true in all cases of wrongful abortion, but we are convinced that in many cases it would, given the gap between the social costs of wrongful abortion and the extent of tort liability under contemporary law.

Second, in considering the actual effect of potential tort liability toward the parents in cases of wrongful abortion, one cannot ignore significant “counter-incentives.” These exist at least in two paradigmatic cases of wrongful abortion. Whenever an adviser provides the mother with information regarding the possible perils related to the continuance of the pregnancy, he knows that one kind of mistake is a lot more costly than another: If he mistakenly tells the mother that there is no risk, and the mother is seriously or fatally injured, he may expect an onerous personal injury action by the mother (and perhaps a loss of consortium claim by the father), or survival and wrongful death actions by *her* estate. If, on the other hand, he mistakenly tells the mother that the pregnancy is fraught with substantial risks, and the pregnancy is terminated, he may expect some liability for pain due to the abortion, mental anguish, and relatively limited pecuniary losses. In many cases, the adviser would rather make a mistake of the second type, which is usually a lot cheaper than the first. The protection of the state interest in the preservation of potential life is thereby enervated even more. Similarly, where advice is sought regarding the possibility of congenital disabilities, a mistaken diagnosis of the non-existence of disabilities may result in an onerous wrongful birth action (and in a few jurisdictions an additional wrongful life action). The adviser will have to bear not only losses related to pregnancy and delivery (pecuniary and non-pecuniary) but also damages associated with the disease, defect, or handicap suffered by the child,¹⁷⁴ and sometimes even for ordinary childrearing expenses.¹⁷⁵ Once again, the rival

from Damages?, 30 J. LEGAL STUD. 401, 405, 409 (2001).

174. *See, e.g.*, ME. REV. STAT. ANN. tit. 24, § 2931 (West 2004), *construed in* Thibeault v. Larson, 666 A.2d 112, 115 (Me. 1995) (allowing damages associated with disease, defect, or handicap); Keel v. Banach, 624 So. 2d 1022, 1030 (Ala. 1993) (holding that parents are entitled to recover for the extraordinary expenses they incur because of the child’s unhealthy condition, including: (1) hospital and medical costs, (2) costs of medication, and (3) costs of education and therapy for the child); Turpin v. Sortini, 643 P.2d 954, 965-66 (Cal. 1982) (same); Ramey v. Fassoulas, 414 So. 2d 198, 200-01 (Dist. Ct. App. Fla. 1981) (same); Blake v. Cruz, 698 P.2d 315, 320 (Idaho 1984) (same); Schroeder v. Perkel, 432 A.2d 834, 841-42 (N.J. 1981) (same); Jacobs v. Theimer, 519 S.W.2d 846, 849-50 (Tex. 1975) (same); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 492-93 (Wash. 1983) (same); James G. v. Caserta, 332 S.E.2d 872, 882-83 (W. Va. 1985) (same).

175. *Cf.* Ochs v. Borrelli, 445 A.2d 883, 885 (Conn. 1982) (allowing recovery for ordinary childrearing expenses in a wrongful pregnancy case); Burke v. Rivo, 551 N.E.2d 1, 5-6 (Mass. 1990) (same); Girdley v. Coats, No. 17117, 1991 Mo. App. LEXIS 1065, at *7-8 (Mo. Ct. App. July 3, 1991); Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 611-12 (N.M. 1991) (same);

incentives are not balanced.¹⁷⁶

Third, we strongly believe that the occurrence of wrongful abortions is extremely hard for the parents to detect. Detection of a wrong requires both suspicion by an interested party and availability of some evidence to the same interested party. Wrongful abortion cases raise severe problems on both levels. With regard to suspicion, we assume that if the parents had no reason to suspect that the adviser's statement was incorrect when they decided to have an abortion, they would not normally start suspecting after the abortion was carried out. Their decision implies that they utterly trusted their adviser. And if they did, something exceptional must occur before they infer that anything went wrong. After all, there is no apparent external manifestation of the wrong committed. With regard to the availability of evidence, the parents may face a serious obstacle at least in one of the paradigmatic wrongful abortion cases. Whenever the abortion is instigated by advice concerning the bodily integrity and health of the fetus, it may be very hard to test its accuracy given that the primary evidence, the fetus itself, is disposed of shortly after the abortion.¹⁷⁷ The fact that only a small percentage of wrongful abortions may be accounted for diminishes whatever deterrent effect the parents' right of action might have had.¹⁷⁸

Marciniak v. Lundborg, 450 N.W.2d 243, 245 (Wis. 1990) (same).

176. It is clear that the financial burden that may be imposed on an adviser that mistakenly informs the pregnant woman that the fetus is healthy (causing the birth of an unwanted child) is much more onerous than the one currently imposed on an adviser that erroneously advises the woman that the fetus is disabled (causing an unnecessary abortion). We suspect that advisers may consequently prefer to make an error of the second type (at least in cases of uncertainty).

177. *See, e.g.*, ARK. CODE ANN. § 20-17-802(a) (Michie 2003) (ordering the disposition of fetal remains and all parts thereof after an abortion); FLA. STAT. ch. 390.0111(7) (2004) (same); GA. CODE ANN. § 16-12-141.1 (2004) (same); MASS. GEN. LAWS ANN. ch. 111, § 202 (West 2004) (same); MINN. STAT. ANN. § 145.1621(4) (2003 West) (same); N.D. CENT. CODE § 14-02.1-09 (2003) (same). *But cf.* ARIZ. REV. STAT. § 36-2152(G)(1) (2004) (stating that fetal tissues should be preserved in cases of pregnancy resulting from incest to assist criminal investigation); MINN. STAT. § 145.1621(4) (2003) (allowing laboratory tests of fetal tissues for purposes of criminal investigation).

178. One may argue that allowing the parents to recover for their own loss in cases of wrongful abortion gives them an incentive to inquire whether their adviser was negligent, and makes detection fairly probable. However, an incentive to inquire may be effective only if there is an initial suspicion. We strongly believe that if a pregnant woman decided to undergo an abortion following negligent medical advice (believed to be accurate), she would not become suspicious after the termination of the pregnancy unless something exceptional happened. Again, if she suspected that the adviser's statement was false, she would not have undergone an abortion based on this statement in the first place. The fact that she may sue a negligent adviser would not, by itself, undermine her trust in her doctor after the abortion. In addition, an incentive to inquire does not solve the evidentiary problem mentioned above.

Moreover, even if an adviser whose statement was found to be incorrect had to bear the aggregate social costs of his or her conduct, and not merely parental losses, this might not be sufficient to guarantee efficient deterrence given that the problems of absence of suspicion and non-availability of a primary evidence would still exist. Lastly, the “counter-incentives” (e.g., personal injury and wrongful birth actions) do not raise similar problems: Personal injuries and congenital disabilities are obvious and easy to prove. This important dissimilarity strengthens the imbalance (which would have existed even without it) between the rival incentives that may affect the adviser’s statement.

Fourth, from a *retributive* perspective, the sanction provided by the parents’ claim does not match the wrong committed by the adviser on a qualitative level, and perhaps not on a quantitative level either. On the qualitative level, the sanction provided by the parents’ claim is imposed for the wrong committed against them and not for the infringement of the state interest in protecting potential life. This sends a disturbing message to the general public: The law recognizes valuable interests, but does not protect them fully and directly. It only aims at rectifying a few incidental side-effects of their infringement. On the quantitative level, the sums obtainable in the parents’ action are rather small compared with the societal value of the interest that has been negligently destroyed. It is thus probable (although not preordained) that the severity of the monetary sanction will not accord with the gravity of the wrong committed.¹⁷⁹

IV. RETHINKING THE LEGAL RESPONSE TO WRONGFUL ABORTION

A. Introduction

From our analysis of the special problems raised in the paradigmatic cases of wrongful abortion and of the current status of the law in this area we conclude that the incentives to avoid negligence are probably insufficient to guarantee the required level of deterrence. At present, in most American states a negligent physician or counselor may induce an unjustified and unwanted abortion without

179. Retributive justice does not require that the sanction imposed on the wrongdoer be equivalent to the harm she caused (as in the ancient *lex talionis*). It merely insists on proportionality between the gravity of the wrong and the severity of the sanction in light of the various features of the wrong (including the wrongdoer’s state of mind). See, e.g., Tony Honoré, *The Morality of Tort Law—Questions and Answers*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 87 (David G. Owen ed., 1995). Consequently, from a retributive perspective, the sanction imposed on the negligent adviser does not have to equal the social costs incurred by her conduct. However, imposing a rather lenient sanction for a wrong that resulted in harsh consequences seems inconsistent with the idea of proportionality.

being exposed to any substantial risk of being held accountable for causing the loss of potential life, which is a significant component of the costs that such negligence inflicts upon society: not by civil law, not by criminal law, nor by disciplinary action. This reality poses a significant concern for those who recognize the need to prevent through deterrence (*ex ante*) and impose a fair sanction (*ex post*) for the considerable harm caused to society by a wrongful abortion.¹⁸⁰

In the remainder of this Article, we examine and evaluate three possible legal solutions to these concerns. After introducing the distinction between attaining deterrence through criminal punishment and attaining it through civil compensation, we first discuss the possibility of extending criminal liability to cover negligent inducement of abortion. Pointing to the problems this suggestion raises, we move on to examine the prospect of enhancing deterrence by expanding civil liability to cover the elements of the loss of potential life not currently compensable under tort law. After discussing the conceptual obstacles and pragmatic difficulties this possibility entails, we finally present our proposal for reform: a discretionary civil fine, which we find the most attractive legal solution to our problem, in terms of both fairness and efficiency.

Although we believe our recommendation is superior to the two other solutions discussed, we do not consider any of them totally implausible. Hence the critical analysis of all three solutions should not be viewed merely as a means to justify the concrete law reform we propose here. It is rather an attempt to provide decision-makers of varying ideological inclinations with a theoretical framework upon which they may debate and evaluate the appropriate solution to be adopted in their jurisdiction. Any concrete solution to the problem identified in this article should, and probably will be influenced by public opinion and the views of judges and legislators in any jurisdiction in which the matter may be subject to examination. This does not reduce the value of our framework, which we believe is applicable and relevant to any legal system that values the potentiality of human life and seeks reasonable means to ensure that it receives meaningful protection.

B. Two Deterrence Techniques: Punishment v. Compensation

According to the great utilitarians of the eighteenth and nineteenth centuries,

180. As explained above, we believe this claim to be valid even after taking into account the risk to the physician of being held liable for parental losses caused by the wrongful abortion. *See supra* Section III.E. Another possible concern may be the lack of compensation to the various victims of wrongful abortions, and perhaps even the fetus itself. However, as stated above, this article does not focus on this concern and does not attempt to resolve it. *See supra* notes 73-74 and accompanying text.

as well as their contemporary predecessors in the law and economics school, the essential purpose of criminal law and tort law is the same: to discourage undesirable forms of conduct that are detrimental to society in terms of the aggregate welfare.¹⁸¹ However, it is undeniable that even though both legal regimes impose burdens on wrongdoers and offenders, the typical technique employed by each of them is different. Generally, criminal punishment addresses wrongful conduct directly, by focusing on the defendant's acts and reacting to their inherent anti-social nature, while tort liability addresses wrongful conduct by reacting to the actual harm caused by it in the specific case. In the context of the criminal law, once a pattern of conduct defined as wrongful is identified, it is punished. The degree of the punishment is typically determined with reference to the gravity of the risk created by the defendant's act and to his or her mental state of mind, rather than to the extent of the actual injuries any specific individual has suffered as a result.¹⁸² By contrast, in the context of a civil action, once a conduct defined as wrongful or tortious is detected, it is reacted to indirectly by means of forcing the wrongdoer to repair any loss of welfare suffered by legally-recognized victims.

Which of the two traditional methods—direct punishment or compensation—is a more appropriate means to resolve the problem of inadequate protection of the public interest in preserving potential life in the context of wrongful abortions? Through which enforcement mechanism—private or public—should the law strive to secure the appropriate level of deterrence (and just retribution)? In the following Subsections we focus our inquiry on these two questions.

181. Jeremy Bentham argued that any legal sanction, be it defined as “compensation” or as “punishment,” is an evil inflicted upon the defendant and therefore belongs to the “penal law.” JEREMY BENTHAM, *THE LIMITS OF JURISPRUDENCE DEFINED* (Charles Warren Everett ed., 1945), reprinted in CLARENCE MORRIS, *THE GREAT LEGAL PHILOSOPHERS* 274-77 (1959). His disciple, John Austin, completely rejected the distinction between the purposes of the criminal and the civil law, and provocatively claimed that “the difference between civil injuries and crimes, can hardly be found in any difference between the ends or purposes of the corresponding sanctions.” JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* 520 (photo. reprint 1998) (Robert Cambell ed., 1879). The idea that civil law is no less aimed at promoting the goal of deterrence than criminal law is a fundamental tenet of mainstream law and economics scholarship today. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 209, 220 (5th ed. 1998). However, it is widely recognized by the judiciary as well. See, e.g., *Consorti v. Armstrong World Indus.*, 72 F.3d 1003, 1010 (2d Cir. 1995) (“[I]t is an aim of tort law to deter wrongful conduct”); *Wash. Metro. Area Transit Auth. v. Johnson*, 726 A.2d 172, 176 (D.C. 1999) (“[O]ne aim of tort law is to deter negligent (and certainly reckless) behavior”).

182. This is not to say that in determining the reaction to criminal offenses criminal law ignores the specific consequences of the offense in the case at hand.

C. Deterrence Through Criminal Punishment

Criminal law is no doubt the most powerful legal means of shaping human behavior. With its typical threats of harsh stigma and incarceration, it creates significant incentives to refrain from certain acts defined by it as offenses. As shown in Section III.C above, in most jurisdictions medical advisers are not exposed to the risk of being held criminally liable for negligently causing the loss of potential life. Should this situation change? Should criminal legislation be amended the better to protect society's interest in preventing the pointless destruction of the potentiality of human life?

On the one hand, an argument in support of criminalizing such conduct should not strike us as wholly implausible. The majority of American jurisdictions recognize the value of potential human life as deserving the fierce protection of criminal law against intentional and unjustified interference, at least from viability onwards.¹⁸³ Moreover, in several jurisdictions, criminal law protects fetuses even from negligence, and sometimes even prior to viability,¹⁸⁴ although as explained above this protection does not encompass the possibility of wrongful abortion. Indeed, by penalizing acts of violence that result in the death of or bodily injury to an unborn child at any stage of development, as if the injury or death occurred to its mother, the Unborn Victims of Violence Act seems to represent a tendency to expand the legal protection of unborn children via criminal law.¹⁸⁵

If fetal life is such a valuable public interest, equivalent or almost equivalent to the public interest in protecting actual human life, may it not be argued that it deserves protection even from negligent interference, and even before viability? If negligent destruction of human life *after* birth can be criminalized, why can it not be justified to criminalize negligence when for some reason the potentiality of human life has been destroyed or endangered *before* the moment of birth?¹⁸⁶ Even under the assumption that the preservation of fetal life is of somewhat less importance to society than preserving human life after birth,¹⁸⁷ this difference

183. See *supra* Section III.C.

184. See *supra* notes 143, 149.

185. See 18 U.S.C.A. § 1841(a)(2), (d) (West Supp. 2004).

186. The arbitrariness of drawing the line between liability and non-liability based only upon the moment of birth has been recognized in case law as a reason to abandon the "born alive rule" in the context of civil liability for wrongful death. See, e.g., *Baldwin v. Butcher* 184 S.E.2d 428, 434-45 (W. Va. 1971).

187. This assumption seems to be in line with criminal statutes that set more lenient sanctions for the killing of fetuses, than those imposed for the killing of living persons. See, e.g., 18 U.S.C.A. § 1841(a)(2)(D) (West Supp. 2004) ("Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.").

could be addressed by making the punishment for involuntary feticide more lenient than that for involuntary homicide. For example, instead of incarceration, a criminal fine may be imposed on the negligent offender so as to avoid disproportionate punishment that could lead to over-deterrence. In light of the problem of under-deterrence identified in Part III, it may seem appropriate to reconsider the traditional reluctance to criminalize wrongful abortions.¹⁸⁸ Denouncing ordinary negligence leading to a needless abortion as criminal would no doubt exert strong pressure on medical advisers to avoid negligence and would raise their level of care.¹⁸⁹

On the other hand, difficulties arise that we believe make the proposal of criminalization unwarranted. First, criminalizing negligent conduct is clearly problematic in terms of retributive justice. The negligent adviser has not advertently decided to disregard the rights and autonomy of the patient and her fetus. Therefore, at least according to subjectivist theories of criminal liability, she does not deserve to be convicted and punished as a criminal.¹⁹⁰ Criminalizing negligent inducement of abortion would expose physicians and genetic counselors acting in good faith and for (what they perceive as) the benefit of the biological mother (and sometimes of the unborn child as well) to the risk of being incarcerated, or at least severely stigmatized by the criminal conviction, even when their fault was only a one-time act of ordinary negligence.¹⁹¹

Second, from a social welfare perspective, and without underestimating the social value of potential human life (at any stage of development), there may be valid reasons for society to deny the life of a fetus the same protection afforded to actual human life, especially prior to viability.¹⁹² And if the social value of

188. Indeed, concerns of under-enforcement in the field of medical malpractice have led at least one scholar to argue that criminal liability should be imposed on physicians for negligent conduct resulting in death. See McCarthy, *supra* note 161, at 619.

189. See Leslie Yalof Garfield, *A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature*, 65 TENN. L. REV. 875, 914 (1998) ("While there is little retributive effect at the criminal level for defendants whose conduct involves ordinary negligence, punishment will communicate clearly to the community that such conduct is intolerable.").

190. A clear proponent of this view is Alan Brudner, who believes that "true crimes" (crimes against personality) should depend on a subjective state of mind. Alan Brudner, *Agency and Welfare in the Penal Law*, in ACTION AND VALUE IN CRIMINAL LAW 21 (Stephen Shute et al. eds., 1993). For a recent attempt to justify criminalizing negligence, see Kyron Huigens, *Virtue and Criminal Negligence*, 1 BUFF. CRIM. L. REV. 431 (1998).

191. As mentioned in Section III.D, this kind of negligence would not usually attract even a disciplinary action.

192. The fact that society does not view fetal life as equal in importance to human life, especially before viability, is apparent from the very recognition in *Roe* of the woman's right to abort her fetus at will in the early stages of her pregnancy. It is also evident in the relatively weak

potential life is indeed lower than the social value of actual life, it may be inefficient for society to criminalize wrongful abortions, even if imposing criminal liability for negligent manslaughter is justified. In the end, such a criminal reform would produce a sharp rise in the costs of providing medical or genetic advice to pregnant women and drastically reduce the supply of these services.¹⁹³ Imposing criminal liability might also have an adverse effect on the quality and quantity of medical services provided by pregnancy counselors. This could happen if advisers, in order to minimize the risk of negligent misrepresentation, communicated less frequently with their patients, and in vaguer and less meaningful terms. Assuming the services given by advisers to be a legitimate and valuable service to potential parents and society as a whole, this steep reduction might lead to a net social loss.¹⁹⁴

Unfortunately, these two problems do not seem solvable by means of reducing the criminal penalty imposed on the medical adviser for his or her negligence to only a comparatively moderate fine. The reason lies in a general weakness of the criminal sanctioning system, namely the inflexibility of criminal punishment. This inflexibility originates in the harsh and enduring stigma attached to any criminal conviction and, to a lesser extent, even to a mere indictment. A criminal record may prejudice the employment prospects of an

protection of fetuses in criminal law. *See supra* notes 140-146 and accompanying text. The attempt to provide a rational basis for this discrimination between fetal life and human life has occupied the minds of many able scholars in recent decades. *See, e.g.*, TRACIE MARTIN, INTERESTS IN ABORTION: A NEW PERSPECTIVE ON FOETAL POTENTIAL AND THE ABORTION DEBATE 59 (2000) (concluding that “the morally relevant positive causal factors for personhood are an appropriate genetic structure, sentience, consciousness, and a capacity to interact with the social world”); MICHAEL TOOLEY, ABORTION AND INFANTICIDE 87-157, 419-20 (1983) (arguing that what makes something a “person” is the fact of its being a subject of non-momentary interests, which in turn requires possessing, *inter alia*, a sense of time and a capacity for consciousness); L.W. SUMNER, ABORTION AND MORAL THEORY 142-54 (1981) (suggesting that sentience—the ability to feel and suffer harm—constitutes the most appropriate criterion according to which society’s moral attitude to fetuses and to abortions should be determined).

193. Genetic counselors and physicians specializing in gynecology and obstetrics are much more exposed to the risk of negligently causing fetal death than other potential injurers by the nature of their occupation. This fact would make a criminal prohibition on involuntary feticide a much stronger threat for advisers than for any other class of potential offenders, who may only occasionally negligently endanger a woman’s pregnancy (such as negligent drivers, burglars, violent people, etc.).

194. A borderline case would be the one for criminalizing grossly negligent wrongful abortions. Here the same considerations against criminalization apply, but with less force—the need for deterrence is significantly stronger. In any event, the analysis of such cases is outside the scope of this Article, mainly because the reactions of civil law, criminal law, and disciplinary law to gross negligence are entirely different.

offender for many years, and may alienate him from relatives, friends and society in general. It may lead to the revocation of certain civil rights such as the right to sit in a jury or participate in the democratic process, and in the case of a physician, may severely injure one's reputation and status within the profession.¹⁹⁵ A mere conviction would therefore impose on the negligent adviser a very significant burden, even when it is not coupled with imprisonment or a substantial fine. Such a heavy burden that may be justified in cases of intentional wrongdoing is much less deserved (in terms of retribution) and much less needed (in terms of deterrence) in cases of unintentional wrongdoing, especially those of ordinary negligence.¹⁹⁶

Moreover, any criminal liability would be imposed on the negligent adviser not instead of, but in addition to his or her civil liability toward the parents of the unborn child.¹⁹⁷ This fact only exacerbates the problems discussed above, since a threat additional to the risk of being held criminally liable would exist in the form of a damages award. As pointed out earlier, this financial threat, which is accompanied by the moderate social stigma attached to any finding of negligence, especially in the field of medical practice, may not in itself guarantee sufficient incentives to take due care and may be too lenient from a retributive perspective.¹⁹⁸ However, criminalization of wrongful abortions would increase the burden imposed on negligent advisers to an extent that would probably transform the legal response to wrongful abortions from one that is too weak to one that is too strong in terms of both fairness and social welfare.¹⁹⁹

Lastly, criminalization of wrongful abortions would be inconsistent with prevailing principles of criminal law. According to a well established common law doctrine, criminal negligence (as opposed to negligence in tort law) refers to gross negligence, and not merely ordinary negligence.²⁰⁰ Since "wrongful"

195. Commentators seem to be in agreement regarding the harshness of the criminal stigma. See, e.g., Abbe Smith, *Promoting Justice Through Interdisciplinary Teaching, Practice, and Scholarship: The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 112 (2003).

196. Again, we set aside cases of grossly negligent wrongful abortions. See *supra* note 194.

197. In some states, additional claims may be brought by the estate of the unborn child, or its dependants, to recover some elements of the loss of potential life. However, as demonstrated above, these claims cover only a part of this loss, and are usually inapplicable to cases of fetal death before viability.

198. See *supra* Section III.E.

199. Theoretically, these concerns exist whenever a criminal act unlawfully injures a private interest protected by civil law. However, since criminal liability is usually based on intentional wrongdoing, the fear of over-deterrence and unfair penalty is much less significant in most of these cases.

200. *State v. Weiner*, 194 A.2d 467, 470 (N.J. 1963) (defining criminal negligence as involving

abortions are typically induced by acts of ordinary negligence, criminalizing them would amount to a radical reform that may produce instability and incoherence within the criminal law.²⁰¹

D. Deterrence Through Compensation

Having rejected the proposal to increase deterrence directly through expansion of criminal responsibility, we may now proceed to examine the other most common legal vehicle for behavior control, namely tort law's traditional compensation mechanism. It may be argued that the best way to resolve the problem of under-deterrence exposed in this Article would simply be to make the negligent adviser accountable for the entire loss he or she has caused. This would consist not only of parental losses but any social loss originating in the wrongful abortion, including all the elements of the loss of potential life which at present are non-compensable under most tort law regimes.²⁰² Put differently, the adviser would be forced to internalize, through damage awards to his or her victims, any externality his or her negligence has imposed on society.²⁰³ Such a move would presumably remove the existing disproportion between the social costs of wrongful abortions and the legal burden imposed in reaction to them. It would also eliminate, or at least considerably reduce, the imbalance between the legal reaction to wrongful abortions on the one hand, and the legal reactions to personal injuries or wrongful birth on the other.

Unfortunately, as will be demonstrated below, tort law's compensation mechanism cannot provide an adequate solution to the problem. This is mainly because as opposed to a criminal sanction, which is *defendant-oriented*, civil law's typical sanction of compensatory damages is *plaintiff-oriented*.²⁰⁴ This

utter disregard for the safety of others); see also Garfield, *supra* note 189, at 890 n.56.

201. This does not preclude the possibility of imposing an administrative fine outside the realm of criminal law. This possibility is discussed in Section IV.E.

202. For a discussion of these elements, see *supra* Part I.

203. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 290 (3d ed. 2000) ("The economic purpose of tort liability is to induce injurers to *internalize* [externalities that are not internalized through private agreements] . . . by making the injurer compensate the victim.')

204. This basic difference between the two sanctions derives from the fact that criminal law technique responds to anti-social conduct independently of its detrimental consequences, while tort law responds to those very consequences, and attempts to repair the harm actually suffered. See *supra* Section IV.B. A sanction is "plaintiff-oriented" if it is designed with an eye to its effects on the plaintiff, and "defendant-oriented" if it is designed with an eye to its effects on the defendant. For a similar use of these terms see, for example, David W. Leebron, *The Right to Privacy's Place in the Intellectual History of Tort Law*, 41 *CASE W. RES. L. REV.* 769, 809 (1991) (distinguishing between "the plaintiff-oriented goal of compensation and the defendant-oriented goal of deterrence").

characteristic of the civil sanction is manifested in the two most basic principles governing its award. The first principle is that the availability of damages depends on—and is limited by—the existence of a recognized victim, i.e., an aggrieved party who has suffered compensable loss through the defendant's wrongful conduct. The second principle is that the scope of compensatory damages is determined—hence limited—by the extent of the actual injury the wrongdoer has inflicted on his or her victims.²⁰⁵ In the following Subsections, we shall argue that each of these two limiting principles poses serious difficulties, which in our context make the expansion of civil liability problematic as a vehicle for securing appropriate levels of deterrence.

1. Lack of a Recognized Victim

Any proposal to expand the civil liability of negligent advisers to cover additional elements of the loss of potential life not at present compensable faces a major obstacle: the lack of a recognized legal entity that could be viewed as the sufferer of these losses.

Unlike losses suffered by the unborn child's parents (which we labeled "parental losses"), other losses ensuing from wrongful abortions are suffered by a variety of entities (the fetus, the state, businesses, and other persons) none of which is generally recognized by the law as a victim deserving of compensation. As we shall show shortly, this fact may impede traditional tort law's ability to force the negligent physician to fully internalize the social costs of his or her conduct.

a. Fetal Loss

In Section I.B we defined fetal loss as the social cost caused by preventing a healthy and desired fetus from being born, and thus denying it the ability to acquire pecuniary and non-pecuniary benefits from birth to death. However, as pointed out, under most tort law regimes the typical fetus in a wrongful abortion case is not considered a legal person at the time of its wrongful death. Hence, it

205. Many tort law scholars view these principles as reflecting the principle of corrective justice, while others view them as mere means to achieve desired social goals such as compensation, deterrence, economic efficiency, distributive justice, loss spreading, or any combination of them. Whatever the correct view, the fact that these principles govern and limit the operation of positive tort law is rarely disputed by contemporary scholars. See, e.g., COOTER & ULEN, *supra* note 203, at 291 ("We discuss the traditional theory [of tort law] because the essential elements of a tort as stipulated by it [i.e., harm to the plaintiff, breach of duty on the part of the defendant, and causal link between the breach and the harm] serve as building blocks in the economic model of tort liability.").

may not recover any damages for the loss of life it would have enjoyed had it not been wrongfully aborted. Surely, no other entity may be entitled to claim damages for this very loss, since no one other than the fetus has suffered it. If that is the case, and no person in the legal sense has suffered this fetal loss, how can civil law possibly assist in forcing the negligent adviser to internalize it? At first sight this may seem an insurmountable obstacle. But we can think of at least two distinct ways whereby a legal system may bypass this doctrinal obstacle, and thus force injurers to internalize fetal losses.

First, the law may adopt a straightforward technique and explicitly recognize the fetus at any stage of gestation as a legal person for the sake of extracting compensatory damages from a wrongdoer (other than the biological mother) for the loss of its potential life.²⁰⁶ As we have seen, many jurisdictions allow the estate of an unborn child to bring suit in its own name (a survival action) for the losses it suffered prior to and upon its death.²⁰⁷ True, in the majority of jurisdictions that recognize such claims, they are limited to the death of viable fetuses, and even then, as demonstrated above, not all elements of the fetal loss are compensable.²⁰⁸ However, a system keen to making a negligent person who wrongfully caused fetal death accountable for the social costs of his or her undesirable conduct may seek to abandon, or at least relax these traditional limitations. It might allow a non-viable fetus to recover for the loss of its life potential either by legislative reform or by a more liberal judicial approach to interpreting the term "person" in the relevant statutory provisions.

Changes in this direction have been evinced in recent years in several jurisdictions in which an unborn child has been declared, either through legislative action or by means of judicial interpretation, a legal "person" from the very moment of its conception.²⁰⁹ Could such a move affect the constitutional

206. It is beyond the scope of this Article to discuss the doctrinal problems that may arise in a damages claim for the loss of fetal life due to a wrongful abortion. We are quite confident that most of these problems (mainly estimation of the pecuniary and non-pecuniary value of lost life, and legal causation) are not unique to our context, and may be addressed by reference to the same principles that are applied in other claims originating in wrongful death, wrongful life, and wrongful birth.

207. See *supra* Subsection III.B.1.

208. See *supra* notes 98, 129 and accompanying text.

209. In South Dakota, for example, in the context of a claim for wrongful death, the Supreme Court ruled in 1996 that S.D. CODIFIED LAWS § 21-5-1 clearly meant to include non-viable children in the term "unborn child." Furthermore, the majority of the Court expressed their view that the very concept of viability was outmoded in tort law and was a purely arbitrary milestone from which to reckon a child's legal existence. *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787, 791 (S.D. 1996). For another sharp judicial criticism of the viability test see, for example, *Farley v. Sartin*, 466 S.E.2d 522, 533 (W. Va. 1995):

right of pregnant women to choose abortion at the early stages of their pregnancy? On the one hand, it may be submitted that the call to relax the viability requirement in tort law may be seriously considered even by states in which a comparatively liberal abortion regime prevails. The argument would probably be that recognition of a non-viable fetus as a person for the purpose of granting it the protection of tort law against interference by third parties would not undermine the right to abort, as recognized in *Roe* and its progeny. That is so mainly because protecting the fetus from being killed (or injured) by third parties, not in the course of a consented abortion, fulfills the mother's true will (i.e., to give birth) and thereby reinforces her procreative autonomy. Recognizing the *legal* personhood of a fetus for the sake of its protection by tort law does not amount to recognizing its *constitutional* personhood, and therefore cannot affect the mother's constitutional right.²¹⁰ As for the third party, her constitutional rights are not violated by obliging her to refrain from wrongfully causing fetal death.²¹¹ Not recognizing the duty of a negligent third party to the non-viable fetus would grant that party unjustified immunity from civil liability for negligently harming a fetus, an immunity that only the mother of the fetus should possess.²¹² Even if such immunity were justified in the context of our discussion

In our judgment, justice is denied when a tortfeasor is permitted to walk away with impunity because of the happenstance that the unborn child had not yet reached viability at the time of death. The societal and parental loss is egregious regardless of the state of fetal development. Our concern reflects the fundamental value determination of our society that life—old, young, and prospective—should not be wrongfully taken away.

See also *Gentry v. Gilmore*, 613 So. 2d 1241, 1246 (Ala. 1993) (Maddox, J., dissenting). In Missouri, MO. REV. STAT. § 1.205.2 (2004) explicitly provides that “the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state.” This legislation is wide in its scope and applies both to criminal and civil law. In California, a fetus is considered a “person” for the purpose of homicide offenses from the end of the embryonic stage, *People v. Davis*, 872 P.2d 591 (Cal. 1994), but not for the purpose of a civil action, *Justus v. Atchison*, 565 P.2d 122 (Cal. 1977).

210. This point is eloquently explained by Rosen, *supra* note 5.

211. A similar point is made by Meade, *supra* note 72, at 444-45. Indeed, the same separation had been actually implemented in the context of the criminal law. As we have seen, many states have criminalized the intentional or even negligent killing of a fetus when committed by a third party, but not when committed by the biological mother of the fetus or on her behalf, during a legal abortion procedure or other medical treatment intended to protect the mother's life. See, e.g., CAL. PENAL CODE § 187(b)(1)-(3) (West 2004); TEX. PENAL CODE ANN. § 19.06(1)-(4) (Vernon 2004).

212. This logic is echoed in the majority opinion in *Wiersma*, 543 N.W.2d at 791 (“If we accept [the defendant's] argument, someone could fatally injure an unborn child by a nonconsensual, wrongful act and still avoid civil liability because the child was not yet viable. This would, ironically, give the tortfeasor the same civil rights as the mother to terminate a pregnancy.”).

with respect to criminal proceedings,²¹³ we believe that it should not extend to the civil sphere.

On the other hand, although a distinction between *legal* personhood and *constitutional* personhood may be drawn, it might be difficult to maintain in the specific context discussed here. It may be argued that a widespread recognition of the legal personhood of fetuses at any stage of development reflects a change of value in American society that necessitates a reassessment of the delicate constitutional balance established in *Roe* and modified by *Casey*. This is a possibility that supporters of abortion-rights might be concerned about.

Assuming now that certain legal systems would be reluctant to assign legal personhood to the unborn child at any stage of gestation, a different technique should be considered for better internalization of the social costs of wrongful abortions. Such a goal may be achieved through recognition of the state as the sufferer of the fetal loss, and accordingly granting it the right to bring a civil suit for the pecuniary and non-pecuniary elements of that loss.²¹⁴ For any person who is interested in improving the legal protection of potential human life without supplying ammunition to either side of the abortion debate, this solution may seem preferable to the one discussed above, since it does not grant legal personhood to the unborn child.

However, such a proposition raises two major difficulties. Both originate in the fact that, unlike the ordinary context in which the state claims damages in a civil suit, here it would be demanding compensation for the loss caused neither to an asset in its possession nor to its legally recognized economic interest (such as a contractual or other obligatory right). Rather, it would be seeking indemnification for the social loss manifest in the destruction of a fetus, whose existence has never before been recognized as the state's private or personal interest. It may therefore be argued that notwithstanding society's undisputed interest in preserving the potentiality of life latent in a fetus, this interest is a pure public interest. As such, it should be protected exclusively through public law devices (criminal law, administrative law) rather than through a private action in torts, which by definition requires the plaintiff to prove that his or her *private* right has been violated.²¹⁵ Furthermore, leaving this formal line of argument

213. See *supra* Section IV.C.

214. The various elements of fetal loss are discussed *supra* Section I.B.

215. JOSEPH CHITTY, A TREATISE ON PLEADING AND PARTIES TO ACTIONS 1 (1867), cited with approval by *In re African-American Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1045 (N.D. Ill. 2004) ("The action for a tort must in general be brought in the name of the person whose *legal* right has been affected, and who was *legally* interested in the property at the time the injury thereto was committed; for he is impliedly the party injured by the tort, and whoever has sustained the loss is the proper person to call for compensation from the wrongdoer."); see also *Tyler v. Judges of Ct. of Registration*, 179 U.S. 405, 407 (1900).

aside, it may be claimed that no theoretical or moral basis exists that is capable of justifying such an extension of the existing rights of the state.

While both objections seem to be valid, we do not view them as insurmountable obstacles to the adoption of the aforementioned proposal. Let us start with the more substantive objection. We submit that the theoretical basis of the state's claim for compensation in this case lies in both the necessity to vindicate the social value of potential life and deter wrongful interference with it, and in the state's unique position as the classic representative of the public interest. Under the assumption that a non-viable fetus is not a legal person, the loss of fetal life caused by a wrongful abortion may not be attributed to the fetus itself. Nor may it be attributed to the unborn child's parents, who as private individuals maintain the right to claim damages only for their own private losses. The state, being the ultimate representative of the public interest, differs in this context from any other individual, including the parents. From a moral point of view, society as a whole (the state being merely its legal representative) may, in certain cases, rightfully demand recognition as the residual victim of any wrongful injury which cannot be viewed as the private and personal loss of any specific individual. As such, the state should be regarded as a direct, rather than an indirect victim of such losses, and should be entitled to compensation for them, as if it were their direct bearer. Fetal loss, which denies the unborn child the benefits and pleasures of life without enabling it to recover anything, is a clear example of such a case. The recognition of the state's right to be compensated for this loss would force the negligent adviser to take into account not only the risk of causing harm to the fetus's parents, but the loss to the fetus itself as well.²¹⁶

It may still be contended that the task of responding to anti-social conduct has in modern times traditionally been assigned mainly to criminal law. However, not every moral or social wrong should attract criminal liability. Some wrongs, especially those committed unintentionally, do not usually justify the imposition of a criminal sanction. Assuming negligence causing fetal death to be one such wrong, the social value of fetal life may not be vindicated at all, absent the possibility to impose civil liability on the party negligently causing it.²¹⁷

216. Arguably, this construction may also apply to certain relational losses originating in the loss of the fetus, as long as these losses are not attributable to any specific person in the legal sense. However, to recover damages for any such loss, the extent of the loss must be approximately calculable. As we shall see, most relational losses originating in the loss of potential life do not lend themselves to any such calculation. *See infra* note 238 and accompanying text.

217. As one court once put it in another context, "[i]f a child . . . has no right of action . . . we have a wrong inflicted for which there is no remedy." *Montreal Tramways v. Leveille*, [1933] 4 D.L.R. 337, 345 (Can.), *cited with approval in Bonbrest v. Kotz*, 65 F. Supp. 138, 141 (D.D.C. 1946). These words were said in support of recognizing the right of a child born with physical

Indeed, although comparatively rare, a number of contexts exist in which the law in modern times, in order to solve a unique enforcement problem, grants a private cause of action to an entity which is not the actual victim of the wrong complained of. A famous example is the common law doctrine of *parens patriae* (literally “parent of the country”), under which the government may represent all of its citizens and act on their behalf as a trustee of the public in a private suit involving a matter of sovereign interest.²¹⁸ This old doctrine has been utilized in modern times to allow the state to file civil suits for infringement of social interests that would otherwise remain unprotected.²¹⁹ It may be argued that this

defects to claim compensation for prenatal injury that had caused these defects. Although different, this situation resembles ours in that when the case was tried it was not clear whether an act injuring a fetus could be considered negligent for the sake of a damage claim filed by the child subsequent to her birth. By upholding this possibility, the court constructed a new cause of action, and established a new wrong, in order to vindicate society’s need to deter acts injurious to it. Disciplinary action is another possible legal response to medical malpractice, but as shown earlier, it is doubtful whether it can be relied upon in the paradigmatic cases on which this Article focuses. See *supra* Section III.D. The possibility of a wholly new administrative enforcement mechanism is considered in Section IV.E.

218. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890) (“This prerogative of *parens patriae* is inherent in the supreme power of every State [I]t is a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.”). In the past, the doctrine has been applied mainly for the protection of juveniles and incompetent persons. See, e.g., Neil Howard Cogan, *Juvenile Law, Before and After the Entrance of “Parens Patriae,”* 22 S.C. L. REV. 147 (1970). For a general survey of the historical origins and modern development of the doctrine, see George Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895 (1976).

219. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982), the Commonwealth of Puerto Rico brought suit in its capacity as *parens patriae* against a number of private American employers for discriminating against Puerto Rican migrant farmworkers by subjecting them to burdensome working conditions and improperly terminating their employment. These acts allegedly violated the relevant federal statutes and regulations and injured the Puerto Rican economy. Recognizing the right of Puerto Rico to demand a declaratory judgment and an injunction, the Supreme Court clarified that the “concept does not involve the State stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves . . . if the State is only a nominal party without a real interest of its own—then it will not have standing under the *parens patriae* doctrine.” *Id.* at 600. However, when the state seeks to protect a “quasi-sovereign” interest, i.e., an interest “that the State has in the [physical or economic] well-being of its populace,” as had been the case at hand, the court may, in appropriate cases, apply the doctrine of *parens patriae* to vindicate that interest. *Id.* at 601. Further guidelines for the implementation of the *parens patriae* doctrine were developed by lower courts. For an elaborate analysis and a useful survey of cases where this doctrine was applied, see *Massachusetts v. Bull HN Info. Sys., Inc.*, 16 F. Supp. 2d 90, 96-98 (D. Mass. 1998).

doctrine enables the courts to recognize the state's right to protect the social interest in preserving potential life through a civil action in torts.

Another judicial technique implemented at times to overcome problems of insufficient protection of an important social value is the somewhat artificial expansion of the category of victims recognized as entitled to compensation under a given statute. A good example in this context is the judicial recognition of employees as victims of anti-trust violations when they were wrongfully discharged by their employers because of their cooperation with the anti-trust authorities. The language of the relevant provision of the federal anti-trust legislation limits the right to recover treble damages under the statute to persons "injured in their business or property" by anti-trust violations.²²⁰ Yet some courts have adopted an extremely liberal interpretation of this provision, and have extended it to include these "indirect victims" in order to improve enforcement in this field.²²¹ Admittedly, this technique does not apply directly to our situation, since in our case no general statutory cause of action allows victims of acts injuring fetuses to be compensated. However, these examples may serve as a source of inspiration to the legislature when contemplating the creation of a new civil cause of action to the state.

The public interest in preserving and vindicating potential life may indeed receive recognition through a specific legislative effort, which will grant the state the right to claim compensation for fetal loss in cases where no other legal entity may do so. In recent years, this vehicle has been increasingly adopted in the context of environmental law in order to protect natural resources.²²² For instance, in order to remedy a serious problem of under-enforcement in this field,

220. 15 U.S.C. § 15 (2000).

221. For a comparative survey of a line of relevant cases, see Sean P. Gates, *California Antitrust: Standing Room for the Wrongfully Discharged Employee?*, 47 HASTINGS L.J. 509 (1996). Other examples of this sort exist in other contexts as well. In *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), the Supreme Court recognized the right of a white resident of an apartment complex to sue the owner for loss of interracial associations under Title VII of the Civil Rights Act of 1968, even though the discriminatory rental practices were not directed at him, and were not alleged to have caused him any economic loss. In recent years, this liberal approach to the interpretation of the Civil Rights Act has been applied in the context of discrimination in the workplace to allow white claimants to sue employers for discriminating against their black co-workers. See Joseph C. Feldman, *Standing and Delivering on Title VII's Promises: White Employees' Ability To Sue Employers for Discrimination Against Nonwhites*, 25 N.Y.U. REV. L. & SOC. CHANGE 569 (1999).

222. See, e.g., Scott Kerin, *Alaska Sport Fishing Association v. Exxon Corporation Highlights the Need To Take a Hard Look at the Doctrine of Parens Patriae when Applied in Natural Resource Damage Litigation*, 25 ENVTL. L. 897 (1995).

the federal Oil Pollution Act (OPA)²²³ created new civil causes of action that would have been hard to construct under ordinary principles of tort law. Under OPA, a person in charge of a facility from which oil is discharged is liable in damages for various social costs caused by such discharge to natural resources.²²⁴ Inter alia, the statute nominates public trustees and grants them unique standing to recover damages from the polluter for any “injury to, destruction of, loss of, or loss of use of, natural resources.”²²⁵ The nature of the interest protected by the OPA is obviously different from the interest in preserving fetal life. However, its enforcement technique and rationale bear a striking resemblance to those suggested with regard to fetal death. In both cases, a public authority is allowed to recover, in the name of the public interest, damages for an injury caused not to its own property or even to its own economic welfare, but to an object (a natural resource in one case, a fetus in the other) in which the public holds no recognized proprietary interest, but which nevertheless is regarded by the legal system as valuable and deserving legal protection.²²⁶

To conclude, either by extending the concept of a “direct victim” under the conventional analysis of tort law (thus making the negligent adviser liable for having violated a duty of care towards the state) or by creating a specific

223. 33 U.S.C. §§ 2701-2761 (2000).

224. *Id.* § 2702(a)-(b).

225. 33 U.S.C. § 2702(b)(2)(A). Section 2702(b)(2)(C) goes even further, allowing any person injured by the harm to a natural resource to recover damages for loss of subsistence use of that resource, “without regard to the ownership or management of the resources.” Section 2702(b)(2)(E) even allows damages for loss of profits and earning capacity. For comprehensive surveys of the OPA legislation and case law see, for example, J.T. Smith II, *Natural Resource Damages Under CERCLA and OPA: Some Basics for Maritime Operators*, 18 TUL. MAR. L.J. 1 (1993); and Steven R. Swanson, *OPA 90 + 10: The Oil Pollution Act of 1990 After Ten Years*, 32 J. MAR. L. & COM. 135 (2001).

226. One may contemplate a similar development in the field of animal rights. To date, unlawful infliction of pain on an animal is not considered a violation of a private right of any person. Therefore, no one is entitled to compensation for the pain and suffering experienced by the animal. In our view, it is not unimaginable to acknowledge the right of a public authority nominated by statute to demand compensation for such “private” losses in cases where absent such recognition society’s interest in protecting the autonomy and the bodily integrity of certain animals would not be sufficiently vindicated. See, e.g., Robert Garner, *Political Ideology and the Legal Status of Animals*, 8 ANIMAL L. 77, 87 (2002) (“If we accept an animal welfare position, whereby animals matter morally but not as much as humans, the harm principle can be adapted to take into account the fact that harm inflicted on animals which can be shown to serve significant human benefits, is regarded as legitimate, but that harm which is unnecessary to further human interests is ruled out.”). Similar views were expressed in a recent symposium concerning the legal status of chimpanzees. Symposium, *Ten Years of Animal Law at Lewis & Clark Law School: The Evolving Legal Status of Chimpanzees*, 9 ANIMAL L. 1 (2003).

statutory cause of action, recognition of the state's right to receive compensation for the loss of welfare manifested in the wrongful prevention of the realization of potential human life does not seem to us theoretically impossible.²²⁷ Whether such techniques will guarantee an efficient level of deterrence is a different question, to be examined in Subsection IV.D.2 below.²²⁸

Regardless of everything said so far, we admit that one major theoretical obstacle might still inhibit some jurisdictions from adopting any of the propositions offered above. Traditionally, and to a great extent even today, judges and commentators have viewed tort law not only as a vehicle to promote deterrence, but also, if not primarily, as a means to provide compensation to real people for real losses they have suffered through the commission of a wrong.²²⁹ If a legal system does not genuinely accept the idea that a fetus—viable or non-viable—actually suffers loss by being wrongfully denied the opportunity to be born or, alternatively, that the state actually suffers loss by being deprived of one of its future members, it is doubtful that such a legal system will be keen to use the legal phenomenon known as “tort law” or even other civil law mechanisms (such as a statutory cause of action for compensation) when there is no perceived real victim that will truly benefit from such a compensatory award. Therefore, notwithstanding our efforts to overcome the major obstacle discussed in this Subsection (i.e., the lack of a recognized legal entity that could be viewed as the sufferer of the fetal loss), for some jurisdictions it may simply be too high.

227. We assume here that an estimation of the pecuniary and non-pecuniary losses of the potential life of a person, though difficult, is a task the civil courts are capable of carrying out in this context, as well as in other contexts where damages are awarded for this loss (in survival and wrongful death actions).

228. A final remark concerns the interrelations between this action for compensation and the one discussed in the previous Subsection (the fetus as a victim). As we have seen, most states recognize a fetus as a “person” in the context of wrongful death and survival statutes only after reaching viability. On the other hand, the suit in the name of the public interest discussed here is independent of the fetus's stage of development. This is so because society's loss of welfare reflected in the loss of potential life exists independently of whether the fetus is viewed by society as human enough to suffer its own loss of potential life. The scope of application of this cause of action is therefore much wider than the first. However, in cases of overlap, it should be clear that the private action of the fetus should bar the private or public action of the state for repairing the same loss, so as not to allow double recovery.

229. *Bennis v. Michigan*, 516 U.S. 442, 469 n.216 (1996) (Stevens, J., dissenting) (“Tort law is tied to the goal of compensation (punitive damages being the notable exception.)”); *Oden v. Chemung County Indus. Dev. Agency*, 661 N.E.2d 142, 145 (N.Y. 1995) (supporting the proposition that “just compensation is the main end toward which tort law is directed”).

b. Relational Losses

As pointed out earlier, apart from fetal losses, which are the direct consequence of a wrongful abortion, many people may suffer pecuniary and non-pecuniary losses following fetal death.²³⁰ First, close relatives may incur various losses. As we saw above, some of the parental relational loss is compensable under traditional principles of tort law, whereas the recoverability of other parental relational losses and relational losses incurred by other existing relatives (siblings, grandparents, etc.) depends on the availability of a wrongful death action and its statutory scope. At present, the inapplicability of most wrongful death statutes to deaths of non-viable fetuses (or any fetal death), together with the very modest list of recognized dependants, and the fact that not all types of relational losses are covered, make these statutes ineffective as means to internalize familial relational losses.

As stated above, an argument could be made for recognizing a fetus as a legal person for the sake of bringing suit against the negligent adviser for fetal loss. If this recognition of the fetus as a "person" from the start of the pregnancy is applied to wrongful death statutes as well, an action may be brought by its statutory dependants against the negligent adviser.²³¹ Furthermore, even if the fetus is not recognized as a legal person, it is possible to allow its existing legally recognized dependants to sue for their losses. After all, wrongful death statutes were intended to compensate certain relatives for the loss of a valuable relation. The losses that these statutes were intended to redress do not depend on the legal status of the direct victim of the wrong, but on its value to the survivors.²³² If they can prove this value, we see no reason to deny them the right to be compensated for its loss. Just as a person should be entitled to compensation for the wrongful destruction of her property (e.g., objects, plants, animals), she should be allowed to claim compensation for the loss of a relationship, as long as her relationship is recognized by society as important enough to deserve legal protection. True, the common law has been traditionally hostile to the idea of compensating relational losses.²³³ However, just as this hostility has not prevented the enactment of wrongful death statutes, it should not necessarily bar the legislature from granting the dependants of a wrongfully aborted fetus the

230. See *supra* Section I.B.

231. For an endorsement of such an argument, see Meade, *supra* note 72.

232. For example, let us assume a brother or sister of the fetus would benefit economically and mentally from the birth of the fetus in due time. It is hard to see why the decision of whether to compensate the sibling for this loss should depend on whether or not the fetus had reached viability on its death.

233. See *supra* note 47.

right to bring suit, even in cases where the fetus was not viable on its death.²³⁴

The two other features of wrongful death statutes that diminish their ability to effectuate internalization of familial relational losses (the limited statutory list of recognized dependants and imperfect compensation) are not unique to cases of fetal death. They must be dealt with, if at all, within a broader consideration of statutory reform.

Fetal death may also give rise to many other relational losses. These include: (1) loss of income to the state (and other governmental authorities) from future taxation of the revenues and other taxable activities of the unborn child during a normal lifespan, minus any benefit that would have been directly conferred by the state upon that child; (2) widespread losses of economic and non-economic benefits to various persons and economic bodies that could have interacted with the unborn child during her lifetime, had she not been wrongfully aborted; and (3) widespread outrage and sorrow suffered by people who learn about the occurrence of wrongful abortions.²³⁵ Can civil liability be expanded to guarantee internalization of these categories of relational loss?

In answering this question, we think that the first loss (of taxes) is distinguishable from the two other groups of relational loss. This loss may be incurred by a few specific entities, namely the state or other tax authorities. In addition, assuming that a civil court may reach a reasonable estimate of the prospective revenues of an unborn child during her lifetime, calculating the state relational loss should seem equally possible, at least with regard to income tax. Given these two characteristics of the loss of future income tax to the state, the fear of unlimited and indeterminate liability, which is one of the primary policy arguments against tort liability for pure economic loss,²³⁶ does not seem to apply. Hence, it does not seem farfetched to contemplate a statutory provision or even a judicial decision recognizing the right of the state's treasury to be compensated for this loss in a case of wrongful abortion (as in any other case of personal injury or wrongful death). Just like the right of existing dependants to recover damages in cases of wrongful death of a non-viable fetus, the right of the state in this case should not depend on the legal status of the fetus itself. Whether the fetus is a legal person or not, the dependants and the state alike deserve compensation for the loss *they* have suffered due to its wrongful death, as long as such loss may be proved with reasonable certainty.

234. Technically, this could be done by amending wrongful death statutes so as to make compensation available for the death of a fetus at any stage of gestation.

235. We mentioned these various losses in Section I.B.

236. See, e.g., *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931) (allowing claims for pure economic loss may expose the wrongdoer to liability "in an indeterminate amount for an indeterminate time to an indeterminate class").

In any case, the fact that the state relational loss is not currently compensable under tort law does not necessarily undermine tort law's ability to effectuate its internalization. An internalization of this loss will be achieved if the estate of the unborn child is compensated for her loss of income without the deduction of expected taxes.²³⁷ Allowing the estate to recover lost income measured by gross earnings is therefore an alternative means for internalization of state relational loss by the tortfeasor. From an economic perspective, it does not matter who receives the award. What matters is that the injurer bears the cost.

However, the situation with regard to the two other types of relational loss mentioned above is wholly different. Although the occurrence of these widespread losses is most probable, the range and identity of persons suffering them is unknown and therefore their extent is also impossible to estimate, even roughly.²³⁸ Given the speculative nature of these relational losses, their estimation would be wholly arbitrary, thus useless in terms of internalizing the social costs of wrongful abortions. Therefore, although in theory one may contemplate granting the state a right to recover for such unidentified relational losses, it is doubtful that in practice such right could or should be recognized.

2. The Inability of Civil Law To Warrant Accurate Internalization

Having discussed the problems arising from the need to identify a recognized legal victim, and having offered some initial guidelines for their solution, we may now examine whether expanding civil liability according to the guidelines offered in the previous Subsection would provide a satisfactory solution to the current lack of sufficient legal protection of the public interest in preserving potential life.

Our answer to this question is, unfortunately, negative. Expanding civil liability to cover fetal loss and other measurable relational losses (such as loss to dependants other than the parents) will certainly raise the level of deterrence exerted on potential negligent advisers. However, as we shall contend below, there is no reason to assume that this rise will provide, even approximately, the required amount of deterrence.

237. When the tax is not deducted, the injurer is forced by the legal system to internalize this social cost, in addition to the cost reflected in the plaintiff's private loss. For a survey of the different approaches applied by case law in this context, see John E. Theuman, Annotation, *Propriety of Taking Income Tax into Consideration in Fixing Damages in Personal Injury or Death Action*, 16 A.L.R.4th 589 (1982).

238. This derives from the fact that except for a small number of close relatives, no person can prove with reasonable certainty either that he or she would have interacted with the unborn child had it not been wrongfully aborted, or the extent to which he or she would have benefited from such interaction.

According to the classical economic theory of civil deterrence, the goal of civil liability rules is to oblige injurers to pay *ex post* for the entire social costs of their acts, thereby making them internalize *ex ante* the risks inherent in their behavior. Thus, it is argued, the right to receive compensatory damages for a wrong committed maintains an optimal level of deterrence and prevents injurers from acting inefficiently.²³⁹ However, many scholars, among them legal economists, have pointed out the unrealistic assumptions underlying this theoretically ideal model.²⁴⁰ In the context of our discussion, it is enough to point out a few important obstacles that undermine the ability of the courts, in assessing compensatory damages for fetal losses and relational losses, to internalize properly the social costs of wrongful abortions.

First, due to problems of information, a court's ability to estimate with reasonable proximity the extent of the losses caused by any wrongful act is in many cases fairly limited.²⁴¹ The problems of information and assessment are

239. Although refined by an extensive legal literature, this assumption is still adhered to by many contemporary law and economics scholars. See, e.g., Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 16 (2000) (stating that "deterrence typically requires the injurer to internalize the harm that he caused"); Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 421 (1998) (same); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 870, 873 (1998) (same). The principle is assumed to be valid under the liability regimes of both negligence and strict liability. However, its validity under the former is subject to a few conditions. Polinsky & Shavell, *supra*, at 878-87. For a more technical presentation, see Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

240. For powerful criticisms see, for example, Robert L. Rabin, *Deterrence and the Tort System*, in SANCTIONS AND REWARDS IN THE LEGAL SYSTEM: A MULTIDISCIPLINARY APPROACH 79, 94 (M. L. Friedland ed., 1989) ("[T]he efficacy of tort law as a deterrence strategy is open to serious question . . . [T]he system almost certainly needs to be broadly reassessed."); Israel Gilead, *Tort Law and Internalization: The Gap Between Private Loss and Social Cost*, 17 INT'L REV. L & ECON. 589 (1997) (arguing that the gap between private loss and the social cost of unintentional wrongdoing prevents tort law from assuring proper internalization); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985) (arguing that the costs of the tort system outweigh its benefits in monetary terms); Izhak Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 56 (1980) ("[A]ttempt[ing] to achieve a pure economic goal within the traditional framework of tort law . . . appears a hopeless endeavor").

241. Coase observed in his writings that proposals suggesting the creation of systems of internalization "are the stuff that dreams are made of." R. H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 185 (1988). In addition, it is most unclear whether, and to what extent, potential wrongdoers are able to estimate the scope and extent of the risks created by their behavior. For an analysis of this problem see, for example, Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677, 682-88 (1985); Sugarman, *supra* note 240, at 565-69.

most acute with regard to non-pecuniary losses and relational losses in general, many of which are indeterminate in scope and size. In the context of our discussion, this concern is most manifest with regard to the non-pecuniary elements of the fetal loss (loss of enjoyment of life) and to the widespread relational losses deriving from fetal death. This concern makes the prospect of internalization problematic. In some cases it may lead to over-deterrence, while in others it may lead to under-deterrence, due to either under-estimation or over-estimation of the monetary value of the loss sustained by every victim (the fetus, the state, a dependant, etc.).

Second, under most tort law regimes there will always remain injuries (mainly widespread relational injuries, and sometimes direct non-pecuniary injuries as well) that will not be compensated by the legal system. While part of this problem (such as judicial reluctance to award compensation for some non-pecuniary losses) may be soluble to some extent, a major part of it may not be resolved, due to the problems of information discussed above. This reality may result in under-deterrence of potential wrongdoers.²⁴²

Third, in its original form, the model of economic deterrence ignores problems of under-enforcement, which enable many wrongdoers totally or partially to escape liability. As pointed out earlier, in the context of wrongful abortion this problem is most acute due to problems of detection, which clearly lead to under-deterrence.²⁴³ The common solution to this problem offered by the law and economics literature is to multiply the damage award reflecting the full loss caused by the defendant by the reciprocal of the probability of liability.²⁴⁴ However, at least in the context of a wrongful abortion, this solution may be unsatisfactory since the ratio of undiscovered wrongful abortions is unknown and very difficult to assess. Absent an empirical study of the frequency of wrongful abortions, implementing the multiplier method would require a "guess," leading once again to under-deterrence or over-deterrence. Furthermore, this solution totally ignores the fact that under prevailing judicial practices, the defendant's civil liability (as well as the plaintiff's right to compensation) must be based on

242. This insight seems to have been first developed in the law and economics literature in an attempt to justify the award of punitive damages. See Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 28-31 (1982).

243. See *supra* Section III.E. In addition, in some cases the plaintiffs (the parents, the fetus's estate, or the state) may fail to prove that the abortion was negligent, even when it actually was.

244. For example, if the loss equals \$1 million, and if the probability of liability is 1:4 (0.25), the original award of \$1 million must be multiplied by the reciprocal of 0.25, i.e., four, to reflect the fact that only one out of four times are wrongdoers brought to justice and found liable. Hence, the appropriate damage award should be fixed at \$4 million. This model was first introduced in Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1146, 1148 (1989). It was adopted and elaborated further in Polinsky & Shavell, *supra* note 239, at 874.

hard evidence rather than on mere speculation about the probability of other wrongs committed in other cases (and not proven before the court). Therefore, we do not see how courts can implement such a recommendation, without revolutionizing the basic principles of civil liability.²⁴⁵

Fourth, the phenomenon of liability insurance, common in cases of medical malpractice, significantly reduces the deterrent effect of civil liability and undermines the ability of compensatory damage awards to guarantee complete internalization.²⁴⁶ Disregarding other factors, the problem of insurance will clearly lead to under-deterrence of wrongful abortion claims.

Fifth, the traditional economic theory of internalization does not take into account the extra-legal incentives operating on potential wrongdoers to avoid negligence, such as inner morality and public censure.²⁴⁷ Given these incentives, which in the case of a physician who provides medical services are significant²⁴⁸ (though not in themselves sufficient), it is reasonable to assume that an award of damages covering the full social cost of the negligent act would eventually provide at least in some cases—more deterrence than is actually needed.²⁴⁹ However, once again, the monetary equivalent of such informal incentives is very hard for a court to assess, and therefore this concern of under-/over-deterrence may not be easily resolved.²⁵⁰

245. Indeed, to the best of our knowledge, no civil court has yet agreed to implement this suggestion or even seriously considered it.

246. John G. Fleming, *Is There a Future for Tort?*, 44 LA. L. REV. 1193, 1197 (1984) (“[T]he admonitory effect of an adverse judgment is today largely diffused by liability insurance which protects the injurer from having to pay the accident cost . . .”). The “bonus-malus” system of adjusting premiums to the insured’s liability record may reduce this problem to a certain extent, but there is no reason to assume that it totally cures it. For an analysis of the influence of insurance on the ability of the tort system to deter wrongdoing, see Sugarman, *supra* note 240, at 573-81.

247. For an attempt to analyze these factors and their possible impact on the economic theory of deterrence see Cooter, *supra* note 239. An extensive inquiry into the influence of social norms on human conduct and the need to use legal enforcement mechanisms has been undertaken in ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

248. The legal incentive for a physician to refrain from acting negligently is significant because doctors (like many other professionals) are usually very sensitive to the stigma of an adverse judgment and because they are assumed to have a moral obligation to their patients.

249. This point has been made by Robert Cooter and Ariel Porat, who argued that “deducting nonlegal sanctions typically reduces social costs by improving the incentives of wrongdoers and victims.” Cooter & Porat, *supra* note 173, at 420.

250. Robert Cooter and Ariel Porat suggested that in order to take into account this factor courts should ideally deduct the monetary value of non-legal sanctions from any award of compensatory damages. However, they admitted that “[t]he precise extent of the typical deduction is unknown because so little research measures nonlegal sanctions.” *Id.* Moreover, established principles of tort law require the tortfeasor to pay full compensation to his victim, regardless of any incentive

In our view, these major difficulties make it presumptuous, if not naïve, to assume that expanding the scope of civil liability of negligent advisers to cover fetal loss, as well as some of the relational losses discussed above, will provide, even approximately, the right additional amount of deterrence needed to correct the deterrence failure and the incentive imbalance identified in Part III. Some of the problems identified above enhance the probability of under-deterrence (the second, third, and fourth); the others either enhance the probability of over-deterrence (the fifth) or equally enhance the probability of both (the first). So it would be very hard to speculate in advance about whether, on average, expanding the civil liability of a negligent adviser who has induced a wrongful abortion will lead to more or to less than the required amount of deterrence.

These problems are serious. Yet they could be resolved, or at least significantly relaxed, if the civil courts had the flexibility to adjust the size of the compensatory award to the need (or lack of need) for deterrence, the existence of which would be determined in the specific circumstances of the case adjudicated. However, under entrenched principles of civil liability, the extent of the defendant's liability is determined solely with reference to the plaintiff's legally recognized loss. If such loss has been proven, the defendant is liable for the full extent of it and the court holds no power to either remit or augment the damage award in order to achieve better the goal of deterrence (or punishment).²⁵¹ This characteristic of civil liability creates a problem of inflexibility, different from the one characterizing the criminal sanction. While the latter's inflexibility lies in its harsh stigmatizing effect,²⁵² the former's inflexibility lies in its complete subordination to the compensatory measure.²⁵³ This traditional mode of reaction,

operating on him or her (legal or non-legal). Therefore, similar to the concern of under-enforcement, we can hardly envisage a court deducting non-legal sanctions from damages awards for the sake of improving deterrence, as Cooter and Porat proposed.

251. Nevertheless, many years ago one commentator argued that civil courts actually do take into account the need to admonish the defendant (or the plaintiff) while assessing compensatory damages. Ralph S. Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586 (1933); see also Ralph S. Bauer, *The Degree of Defendant's Fault as Affecting the Administration of the Law of Excessive Compensatory Damages*, 82 U. PA. L. REV. 583 (1934). Recently, a similar contention has been sounded with regard to the award of restitutionary remedies. Andrew Kull, *Restitution's Outlaws*, 78 CHI.-KENT L. REV. 17, 18 (2003) ("[R]estitution does punish, but it punishes negatively: not by imposing liability on disfavored parties. . . but by denying a restitutionary claim (or counterclaim) to which the disfavored party would otherwise be entitled.").

252. See *supra* note 195 and accompanying text.

253. This subordination is usually taken for granted in the law and economics literature analyzing the deterrent effect of compensatory damages. When economists have put forward recommendations that contradict this subordination (a good example being the reciprocal principle,

being *plaintiff oriented* rather than *defendant oriented*,²⁵⁴ prevents standard civil liability regimes from properly adjusting their remedial response to the need to maintain efficient levels of deterrence.²⁵⁵

To conclude, even if the proposal to expand civil liability of negligent advisers is adopted, it is submitted that such an expansion may not provide the legal response required to maintain the desired level of deterrence.

E. The Proposed Solution: A Discretionary Civil Fine

Is there any legal mechanism that may resolve the problem of under-deterrence of wrongful abortions in a better way than either the criminal law or the civil law? Our answer is simple: Yes. A statutory discretionary civil fine, imposed within the framework of a civil suit brought by a parent of the wrongfully aborted fetus, will do the job. The authority to impose this civil penalty, and the maximum and minimum sums to be imposed, would be specifically provided by statute. The monies of the fine should in our view be divided, according to the provisions of the statute, between the parent(s) and the state's treasury. The fine would be imposed only after it had been proven before the court, by clear and convincing evidence, that the defendant's negligent misrepresentation to the unborn child's mother led to its wrongful abortion, and only after the defendant had been given a reasonable opportunity to convince the court that the imposition of the fine was inappropriate in the circumstances.

A number of guidelines directed us to this solution. First, we were looking for a sanction whose recognition and implementation would provide the public interest in preserving the potentiality of human life, at every stage of the pregnancy, with *much greater protection* than the one currently available in most American legal jurisdictions.

Second, we were looking for a sanction which although punitive and deterrent, would be considerably *less severe than any criminal sanction*, including a criminal fine, so as to relieve us from the concerns of over-detering and unduly punishing physicians.²⁵⁶

Third, and most important, we were looking for a sanction which, unlike the traditional criminal and civil sanctions, would be *flexible and adjustable* to the

discussed *supra* note 244), their suggestions have been usually ignored by judicial practice.

254. See *supra* note 204 and accompanying text.

255. Indeed, law and economics scholars today explicitly admit that "Internalization . . . is not the proper goal when perfect compensation is impossible in principle or in practice . . . or when enforcement errors systematically undermine liability. In these circumstances, law's proper goal is deterrence . . . punishments are calibrated to deter those actors who prefer to do the act in spite of its price." COOTER & ULEN, *supra* note 203, at 434.

256. In this regard see *supra* Section IV.C.

concrete circumstances of any case in which it might be imposed. Such flexibility should manifest itself in the ability to influence the extent of the burden imposed on the negligent adviser and the very decision on whether or not in the specific circumstances its imposition is required at all (given the deterrent effect of other sanctions imposed for the same act).

Fourth, we were looking for a sanction that would meet directly and expressly, rather than indirectly and implicitly, society's need for symbolic vindication of the value of potential life (rather than other interests, such as the parents' physical and emotional integrity) from interference by third parties other than the fetus' biological mother.

Fifth, we prefer a legal strategy that would not give academic ammunition to either of the opposing camps in the abortion debate, and that might be acceptable to both.

Sixth, and finally, we were looking for a legal mechanism whose administration would be comparatively cheap and efficient, but that at the same time would not violate the defendant's constitutional right to "due process of law."

Given these guidelines, we believe it is not difficult to see the advantages of our proposal. In the following Subsections, we wish to emphasize these advantages and to address some possible objections and concerns our proposal may raise. Structurally, we shall start the discussion by pointing out the significant advantages of a civil fine over the two solutions examined in the two previous sections of this part. Next, having discussed the possible drawbacks of the civil fine, we examine the possibility of overcoming these weaknesses with the aid of a parallel public enforcement mechanism (civil or administrative). After showing the pros and cons of this suggestion, we explain why we think it should be rejected. However, towards the end of this section we put forward the possibility of expanding disciplinary law—one form of an administrative enforcement mechanism—to make possible the imposition of disciplinary fines on medical advisers whose negligence resulted in unwarranted abortions.

1. The Advantages of a Discretionary Civil Fine

The use of civil penalties in different common-law and statutory formats to achieve the goal of deterrence is far from new in American jurisprudence, and its constitutionality had been affirmed many times by the Supreme Court.²⁵⁷

257. See, e.g., *Tull v. United States*, 481 U.S. 412, 423 (1987) (holding that the district court may aim to deter violations of the Clean Water Act by basing penalties on economic impact). Well-known examples of federal legislation providing for civil penalties are the anti-trust statute known as the Clayton Act, the Racketeer Influenced and Corrupt Organizations Act (RICO), and the False

Nonetheless, our proposal is innovative mainly because it advocates implementing a statutory civil penalty upon a finding of a violation not of a public-statutory norm, but of a private law duty, namely the duty of care imposed by tort law on the physician towards the pregnant woman (and her partner).²⁵⁸

A discretionary civil fine possesses several characteristics that in our view make it superior to the proposals hitherto examined. First, granting a court adjudicating the parents' case against the negligent adviser the authority to impose a civil penalty would enable it, in the appropriate cases, to couple the standard compensatory award (for causing parental losses), which in many cases would not provide sufficient deterrent incentives,²⁵⁹ with an additional punitive sanction. This additional sanction would impose on the negligent adviser a significant monetary burden, whose full deterrent and retributive effects would not be diminished by the prospect of liability insurance. Contrary to ordinary compensatory judgments, such insurance should be—and usually is—disallowed with respect to civil (as well as criminal) penalties.²⁶⁰ In addition, the civil fine

Claims Act (FCA). The Clayton Act allows any person allegedly injured in his or her business or property from a violation of anti-trust laws to claim treble damages for his or her loss plus litigation costs. 15 U.S.C. § 15(a) (2000). RICO includes a similar provision. 18 U.S.C. § 1964(c) (2000). Under the *qui tam* provisions of the FCA, 31 U.S.C. §§ 3729-3730 (2000), a private citizen can recover treble damages in a civil action brought on behalf of the government against a party that allegedly made a false claim for payment against the United States. The lion's share of the penalty is paid to the government, but the plaintiff is entitled to a share of twenty-five to thirty percent of the proceeds, or, if the action was proceeded by the state, to a share of fifteen to twenty-five percent. Punitive damages are a judge-made civil penalty. Unlike most statutory fines, they are not subject to a stringent cap. "However, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). Note that punitive damages are imposed only for "conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *RESTATEMENT (SECOND) OF TORTS* § 908 (1977). As such, they do not apply to wrongful abortions, as defined in Section I.A.

258. The reform proposed here is also unusual because it will enable the courts to impose a punishment for an act of negligence (as opposed to intentional misconduct). Punishing negligence is unusual not only in criminal law but also in the realm of civil fines. However, the imposition of penalties—criminal or civil—for acts of negligence is not unprecedented in American law and has resisted constitutional attacks in various contexts. For a useful survey of this area, see A. Dale Ibric III, Comment, *Parental Delinquency: Should Parents Be Criminally Liable for Failing To Supervise Their Children?*, 74 U. DET. MERCY L. REV. 93, 106-10 (1996).

259. See *supra* Section III.E.

260. Many liability insurance policies exclude coverage for civil fines. This is done in order to prevent the phenomenon of "moral hazard," which is most acute where the conduct leading to liability is intentional. Even if insurance companies allowed coverage for civil fines, such coverage would probably be deemed contrary to public policy, because it would mitigate the punitive effect

proposed would impose on the adviser a non-monetary burden in the form of a moderate stigma, which necessarily attaches to any civil fine or penalty.

Second, though not at all insignificant, the stigma attached to a civil fine is far less severe and harmful to the negligent physician than the one attached to a criminal fine imposed following a criminal conviction.²⁶¹ Hence, the specter of an exaggerated chilling effect on pregnancy advisers and genetic counselors, as well as a disproportionate punishment in terms of just desert, would be avoided.²⁶²

Third, and quite important, the discretionary nature of the civil fine proposed would enable the civil court to use it if, *and only if*, the court was convinced that the need to vindicate the social worth of potential life and to deter its wrongful termination in the future would be frustrated absent its imposition. Put differently, unlike the traditional civil and criminal sanctions, the imposition of a civil fine would not automatically attach to a finding of liability, but would be

of the sanction, and frustrate, at least to some extent, the goals of deterrence and retribution. *See, e.g.*, I.R.C. § 6672(a) (2000) (civil fine provision); *Mortenson v. Nat'l Union Fire Ins. Co.*, 249 F.3d 667, 672 (7th Cir. 2001) (“[I]nsurance against the section 6672(a) penalty, by encouraging the nonpayment of payroll taxes, is against public policy, so falling . . . under the rule in Illinois as elsewhere that forbids certain types of insurance as being against public policy because of the acute moral hazard that the insurance creates.”); *see also In re Tex. E. Transmission Corp.*, 870 F. Supp. 1293, 1338 (E.D. Pa. 1992) (“[T]he inability to enforce its laws by the assessment of civil penalties may well hamper its ability to force compliance without resorting to criminal or other more severe sanctions.”); *Blair v. Anik Liquors*, 510 A.2d 314 (N.J. Super. Ct. Law Div. 1986) (holding that indemnification for fines resulting from violation of Alcoholic Beverage Control laws violates public policy).

261. *See supra* note 195 and accompanying text; *cf.* Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 411 (1967) (“The money judgment assessed against the punitive damages defendant hardly seems comparable in effect to the criminal sanctions . . . [T]he [criminal] fine, unlike punitive damages, still carries the full weight of stigma associated with criminal conviction.”).

262. One may argue that given the exceptional use of civil fines as a legal response to negligence, the negligent adviser will be hit with an excessive stigma that may lead to over-deterrence. However, we do not believe that allowing courts to impose civil fines for negligent inducement of abortion may result in over-deterrence due to the resulting stigma. First, it is reasonable to assume that the stigma attached to any fine imposed for an act of negligence would, by the very nature of the act, be much weaker than the one attached to any fine imposed for intentional wrongdoing (e.g., punitive damages). Second, if the court in a specific case believes the fine might lead to over-deterrence or undue punishment (due to the consequent stigma) it may legitimately decide to refrain from imposing it. After all, the proposed fine is discretionary. Even if this happens frequently, the awareness among professionals of the risk of being punished with a civil fine may be sufficient to raise their level of care.

subject to the wide discretion of the court.²⁶³ This feature is most important as it enables the court to refrain from complementing the parent's damage award with any additional sanction, when such a supplement seems unnecessary given the extent of the defendant's liability towards the parents. Similarly, the court may decide not to resort to a civil fine if the defendant's deviation from the standard of care was slight. Special attention should also be paid to any other liabilities incurred (or expected to be incurred) by the physician for the same act following any criminal, disciplinary, or civil action.²⁶⁴

Fourth, and closely related to the previous point, like other criminal and civil fines, but unlike the award of civil damages, the amount of the civil penalty we propose would be flexibly determinable by the court *ad hoc* (subject, perhaps, to a statutory cap and some general legislative guidelines). It would be fixed with direct reference to the goals of deterrence and retribution, taking into account all considerations that may be relevant for the realization of these two goals.²⁶⁵ Central considerations would be the degree of the physician's negligence; the extent to which the physician's overall conduct reflects serious attempts to minimize error; any evidence of prior medical malpractice; the stage of gestation at which the negligence occurred; the physician's economic situation, her reputation and professional status; and any other legal sanction (civil, criminal, administrative, or disciplinary) that was or may be imposed for the same act.²⁶⁶

263. *Cf.* *United States v. Reader's Digest Ass'n.*, 662 F.2d 955, 967 (3d Cir. 1981) ("[A]ny penalty actually imposed by a district court would be subject to the limitation of judicial discretion."); *AFL-CIO v. FEC*, 628 F.2d 97, 100 (D.C. Cir. 1980) ("[T]he District Court is vested with discretionary authority in the imposition of civil penalties.")

264. As argued in the previous parts of this Article, in most cases of wrongful abortion we believe that none of these procedures would be available. However, they may become available if any of the proposals examined in this article is adopted. For example, the extent of tort liability depends, *inter alia*, on the reach of wrongful death and survival actions in the relevant jurisdiction. Naturally, if the ideas discussed in Section IV.D (regarding the possible extension of tort law to cover most of the social cost of wrongful abortion) are implemented in the future, the need for a civil fine may abate.

265. Concerns of just desert (retribution) may legitimately influence the court's decision, and in the paradigmatic case of wrongful abortion would probably reduce, rather than enhance, the final size of the penalty. *See supra* notes 190-191 and accompanying text. As in other contexts where punishment is inflicted, this result seems to us not only inevitable, but perfectly legitimate, as long as deterrence concerns are given their due weight, side by side with concerns of just retribution.

266. A legislative attempt to outline the relevant considerations in the award of a civil penalty was made by Congress in 33 U.S.C. § 1319(d) (2000), which provides:

In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters

Another important factor would be the probability of detecting the adviser's negligence. Although the relevant data may not be available to the courts, it may be collected on behalf of the legislature, and taken into account in determining the upper limit of the fine or the statutory guidelines for its imposition. The size of the fine to be imposed in a concrete case, as well as the maximum penalty to be defined by the statute authorizing its imposition, need not be very high. This follows from the fact that in the paradigmatic wrongful abortion case the defendant's fault reflects ordinary negligence, and is perpetrated with no bad faith on his or her part.²⁶⁷ Given the adverse effect of the stigma attached to both the finding of civil liability toward the parents and to the imposition of the extra-compensatory civil fine, the sum needed to deter potential wrongdoers from encouraging wrongful abortions should be relatively low, especially if the compensatory award imposed on the physician is not trivial.²⁶⁸

Fifth, like the typical sanctions of the criminal law, the fine proposed here would satisfy the social need to vindicate the value of potential life more directly and more explicitly, hence more effectively. Rather than influencing the behavior of negligent advisers indirectly, as would the expansion of ordinary civil liability for compensatory damages discussed in Section IV.D, the imposition of the fine proposed, or merely enactment of the statute allowing its use in cases of wrongful abortion, would have a significant symbolic value, which in and of itself may have an educational value and thus a preventive effect.²⁶⁹

as justice may require.

For a survey of case law implementing this provision, see Erin Belka & Sarah Kern, *Assessing Civil Penalties in Clean Water Act Citizen Suit Cases*, 10 HASTINGS W.-NW. J. ENV. L. & POL'Y 71 (2003).

267. As noted earlier, in cases of gross negligence the imposition of the fine would probably be unnecessary, given the possibility of awarding punitive damages against the physician for his or her reckless indifference to the safety of the pregnant woman and her fetus. In addition, the prospect of being exposed to suspension or even revocation through disciplinary proceedings is much higher in this case, as well as that of being charged with involuntary manslaughter (or even homicide) in jurisdictions where such offenses are applicable to wrongful abortion cases.

268. The exact size of the penalty needed to achieve an optimal level of deterrence with regard to a certain type of misconduct is always a puzzle. We do not pretend to solve this well-known difficulty in this Article, or to point out the way for legislators and judges to do so. We only assert our belief that a flexible system of penalties which is defendant-oriented (focusing on the gravity of the wrong from a wide social perspective) is generally a better means for attaining the "correct result" in terms of deterrence and retribution than a relatively inflexible system of penalties that is plaintiff-oriented (focusing only on the negative effects of the wrong on the welfare of an individual).

269. Although frequently neglected in the academic literature, education is one of the most important goals of punishment. See, e.g., ALFRED C. EWING, *THE MORALITY OF PUNISHMENT* 73-125 (1970); WALTER H. MOBERLY, *THE ETHICS OF PUNISHMENT* 78 (1968); Jean Hampton, *The Moral*

Sixth, compared with the two other solutions presented above, the costs of administering this new sanction would be minimal. Unlike a *criminal* fine, the proposed method would not necessitate the instigation of a wholly separate and costly legal process by the state, either criminal or administrative.²⁷⁰ The imposition of the civil fine would be considered within the context of an already existing civil suit, and only after a finding of negligence on the part of the defendant. This factor makes the proposed mechanism much more economic even compared with the alternative examined in Section IV.D (expanding civil liability), since the adoption of the latter would similarly necessitate the instigation of separate civil proceedings (by the unborn child's estate, by the state, and/or by other persons).²⁷¹ The most significant extra cost required in order to employ the proposed sanction would be the additional effort by the parties to convince the court that the defendant's negligence had or had not been proven with the more stringent evidentiary standard of clear and convincing evidence, which we regard as required in light of the punitive character of the proposed sanction.²⁷² However, it is submitted that in most litigated cases, parties are willing to make the best effort to prove their case, so this additional burden should not be too substantial. Moreover, the additional procedure would most probably take place during the presentation of the parties' claim for damages, so it would not ordinarily require a significant extension of the proceedings.

Seventh, as opposed to punitive damages and several statutory civil penalties that go entirely to the plaintiff's pocket, if our proposal is adopted, a substantial part of the fine would be paid to the state's treasury.²⁷³ Given that the interest to be protected and vindicated by this penalty (namely society's interest in

Education Theory of Punishment, 13 PHIL. & PUB. AFF. 208, 212 (1984).

270. The fact the fine is imposed within a civil suit instigated and conducted by a private party is also useful because it relieves the legal system of the need to provide for procedural guarantees that are typical of a criminal process. Nevertheless, being punitive in nature, the proposed procedure requires certain procedural guarantees. *See infra* Subsection IV.E.2.a.

271. In addition, unlike a typical civil process, the assessment of a fine does not require any technical work of calculating and proving the various heads of damage.

272. This evidentiary standard is usually applied in cases where the alleged wrongful conduct was fraudulent. *See, e.g.*, 19 U.S.C. § 1592(e)(2) (2000) (“[I]f the monetary penalty is based on fraud, the United States shall have the burden of proof to establish the alleged violation by clear and convincing evidence.”); *Fairchild v. Comm’r*, 462 F.2d 462, 463 (3d Cir. 1972) (same). In cases of negligence, the ordinary standard of “preponderance of the evidence” is usually applied. Nevertheless, we think that the punitive character of most civil penalties justifies a more stringent evidentiary standard.

273. The exact division of the fine between the state and the plaintiffs does not seem essential to us, as long as it achieves its underlying goals.

preserving potential life) is mainly a public interest,²⁷⁴ this arrangement seems only natural and will avoid the undesirable consequences of bestowing too large a windfall on the parents.²⁷⁵ However, to encourage the parents of the unborn child to bring suit, and to make the extra effort to prove the adviser's fault with clear and convincing evidence, it is submitted that a reasonable part of the award should go into the parents' pockets if they succeed in providing such evidence. This allocation is crucial if the statute does not give the parents, as "private attorney[s] general," an explicit right—similar to that given in other private enforcement statutes—to recover for the full legal costs of bringing and conducting the suit.²⁷⁶

However, granting the parents the right to share the proceeds of the fine may be justified even if they are indemnified for their legal costs (including attorneys' fees) when they succeed in proving the defendant's fault with clear and convincing evidence. On the level of efficiency, expected legal expenses in case of failure plus other costs and burdens (monetary and non-monetary) that are not regarded as "legal expenses," and are thus non-recoverable, may outweigh the expected liability. This is especially true where, as in our case, non-recoverable detection costs are high, litigation is an extremely harrowing experience for the plaintiffs, and there is reasonable likelihood that the action will either fail or result in partial compensation and a relatively small award. These factors may eliminate or reduce the parents' incentive to bring suit in the first place. We do not ignore the parents' non-monetary incentive to bring those responsible for the loss of their future offspring to justice, and to see them punished by the official authorities of the state. This incentive may in some cases encourage the parents to put time and effort into establishing their civil cause of action, even if the expected monetary benefit is lower than the expected cost and trouble. However, in other cases, the parents' drive to retaliate will not be strong enough to outweigh the totality of the abovementioned factors, so without an additional pecuniary reward for their effort the public interest may be frustrated.

274. This does not mean that it is impossible to recognize private interests (of the fetus itself, the state, or others) in the materialization of the life potential of the fetus. The appropriate legal means for vindicating those interests would be a civil action. This possibility was discussed in Section IV.D.

275. The concerns over the creation of windfalls to plaintiffs have usually been dealt with in the context of punitive damages, where the plaintiff is normally entitled to receive the entire punitive award. These concerns have led several states to adopt legislation that curtails the plaintiff's share, and allocates parts of the punitive award to the state, or to another nominated public authority.

276. The FCA, for example, provides that "[a]ny such person [substantially contributing to the prosecution of the Act] shall also [apart from his share in the fine] receive an amount for reasonable expenses . . . plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant." 31 U.S.C. § 3730(d)(1) (2000).

Moreover, under the proposed method the parents are those responsible for the vindication of the public interest in preserving potential life. Their efforts may save a substantial amount of public resources that would have otherwise been spent in an alternative public procedure. In terms of fairness, it does not seem counter-intuitive or farfetched to suggest that they are entitled to a substantial reward for the public service they rendered society.²⁷⁷

Eighth, and finally, our proposal attempts to protect the public interest in preserving potential life without recognizing or making use of private rights (other than those of the parents). In particular, it is not based on the assumption that a fetus is a legal person, and therefore may not be used to question the relatively entrenched opinion of the Supreme Court that a fetus is not a constitutional person prior to viability. Consequently, the proposed scheme does not jeopardize pregnant women's right to terminate their pregnancies, to the extent that it is recognized under the Constitution. At the same time, this Article does not express any opinion about the appropriate boundaries of the right-to-abort. After all, prevention of *wrongful* abortions seems to be a mutual interest of both the pro-life and pro-choice movements.

2. Drawbacks of the Proposal and Possible Ways To Resolve Them

Like any other legal tool, the civil fine is not a perfect mechanism and has its own points of weakness. What are they? Is there a way to prevent them or at least reduce their negative influence?

a. The Conceptual Problem

First, we should consider the general conceptual problem of civil punishment. Is it legitimate to punish a defendant within the context of a civil action, without affording her the procedural safeguards available to the criminal defendant? We believe this first concern should not be given much weight, and in any event should not lead to the rejection of our proposal. Since the days of Blackstone, the role of punishment, at least in theory, seems to have been allocated to the criminal law and excluded from private law.²⁷⁸ However, time-honored exceptions to this principle are recognized in the form of punitive

277. A similar argument was used, quite convincingly in our view, to justify the award of the punitive damages to the plaintiff. *See, e.g., Neal v. Newburger Co.*, 123 So. 861, 863-64 (Miss. 1929); Gregory S. Pipe, *Exemplary Damages After Camelford*, 57 MOD. L. REV. 91, 99 (1994).

278. 3 WILLIAM BLACKSTONE, COMMENTARIES *2 ("Wrongs are divisible into two sorts or species: *private wrongs*, and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals . . . the latter are a breach and violation of public rights and duties, which affect the whole community . . .").

damages, multiple damages, civil penalties, forfeitures, and other forms of civil and administrative punishment.²⁷⁹ To be sure, the question of what exact procedural safeguards a defendant facing a punitive-civil sanction should be granted has never been easy.²⁸⁰ It should be addressed in our context, as in others, so as not to violate the constitutional rights of defendants.²⁸¹ Yet such difficulties have generally been found to justify neither the complete abolition of most forms of civil punishment, nor an automatic incorporation of any procedural safeguard employed in criminal law into the civil punitive mechanism.²⁸² In our case, while the punitive character of the legal response we propose is undeniable, we believe that the fact of its being administered in a civil action brought by a private party militates against applying most of the stringent procedural safeguards of the criminal process.

Still, we do believe that at least two procedural guarantees should be granted to the defendant in a wrongful abortion case once the possibility of a civil fine is introduced. First, the defendant must be explicitly warned, either by the plaintiff

279. For critical surveys of the development of American civil law to incorporate and enhance the scope of such sanctions, see Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1844-61 (1992); and Franklin E. Zimring, *The Multiple Middlegrounds Between Civil and Criminal Law*, 101 YALE L.J. 1901 (1992).

280. For illuminating analyses of the distinction between civil and criminal sanctions and procedures see Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679 (1999); and Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991).

281. In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), and *United States v. Ward*, 448 U.S. 242 (1980), the Supreme Court made it clear that the procedural safeguards of the criminal process may apply to an administrative action, if the purpose of such action is punitive. In *United States v. Halper*, 490 U.S. 435 (1989), the Court held that the Double Jeopardy Clause of the Fifth Amendment applies to a civil-punitive process instigated by the state and prevents the imposition of a civil penalty whenever a prior criminal fine has been imposed for the same act. However, to date, these precedents have not been interpreted to apply when the punitive sanction is imposed in a civil procedure instigated by a private party (e.g., an action for punitive damages). Assuming our conclusions in Sections III.C and III.D are valid, the risk of double jeopardy does not usually exist in a case of wrongful abortion since no other punitive process (criminal or administrative) is available against the negligent defendant.

282. The question of what constitutional safeguards should apply to a punitive-civil action has been largely debated in the context of punitive damages. For detailed accounts see Joseph J. Chambers, In Re Exxon Valdez: *Application of Due Process Constraints on Punitive Damages Awards*, 20 ALASKA L. REV. 195 (2003) (concluding that the Supreme Court's jurisprudence will require additional guidelines in order to settle various due process issues); and Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983).

in her statement of claim, or by the court itself (if the initiative to impose the fine comes from the court), of any intention to consider the imposition of a fine, and must accordingly be given a fair opportunity to convince the court that its imposition would be inappropriate or unnecessary in the circumstances of the case. Second, as mentioned above, the plaintiffs should be required to prove the defendant's negligence by a higher evidential standard than the ordinary "preponderance of evidence" standard. While there is no justification to require a standard of beyond reasonable doubt, the demand that the evidence be "clear and convincing" seems to us apposite, given the punitive nature of the fine and the detrimental effect of the judicial condemnation latent in its imposition.²⁸³

b. The Pragmatic Problem

A second and seemingly more disturbing difficulty concerns the fact that the imposition of the proposed fine wholly depends on the initiation of a civil action by the unborn child's parents against the negligent physician and its continuation to a successful end. This seems to undermine the public interest in responding to wrongful abortions in a significant number of cases. These are of two main types: (1) cases where the parents' financial, physical or mental condition cause them to avoid filing a suit in the first place and (2) cases where the parents have reached a settlement with the physician or the medical institution in which he or she is employed whereby they refrain from filing a lawsuit, or withdraw an existing one. In each of these cases, society's interest in vindicating the value of potential life seems to be left unanswered.

These concerns seem to us more apparent than real and, in any case, not insoluble. To begin with, we do not believe that the proposed method's dependence on the initiation and continuation of a civil suit by the parents would seriously reduce its deterrent effect. First, even if the proposed civil fine were not imposed in many cases, its very enactment and its implementation—though in a small number of cases—would send an important symbolic and deterrent message to professionals. It would significantly enhance their awareness of the importance of the social value at stake, and increase their level of care. Second, we believe that in most cases the parents' monetary and non-monetary incentives to claim damages would ensure a level of enforcement sufficient to preserve the required awareness and incentive.²⁸⁴

283. For a similar view expressed in another context, see Frank LaSalle, *The Civil False Claims Act: The Need for a Heightened Burden of Proof as a Prerequisite for Forfeiture*, 28 AKRON L. REV. 497 (1995) (recommending an evidentiary standard of "clear and convincing evidence" in claims for forfeitures and civil penalties under the FCA).

284. The parents' monetary incentive would derive from their willingness to win their share in the civil penalty and to receive compensation for their legal expenses (which should be available

Third, one must remember that even where a settlement is reached between the parties, society's need of deterrence is not necessarily left unanswered. Given the monetary reward awaiting the parents if they succeed in proving their case with clear evidence, it is only reasonable to assume that any settlement would reflect, at least partially, the extra-compensatory burden that would have been imposed on the physician in the absence of a settlement. Presumably, this extra-compensatory burden would be internalized by the negligent adviser, or by the medical institution that employed him or her, thereby influencing the future behavior of professionals, as well as officers at the managerial levels of medical institutions. Hence, as in other legal contexts (including plea bargaining), the prospect of settlement would not eliminate or significantly diminish the deterrent effect of the applicable sanction.²⁸⁵

In any case, various solutions may be suggested for this pragmatic problem. A first possible solution is that in addition to the parents' private claim, the very statute authorizing the imposition of the civil fine would recognize a parallel cause of action to the government, or any other nominated authority. Such a public authority would be entitled at any stage to file a separate suit (civil or administrative) in order to vindicate the same public value for whose sake the ability to make the adviser incur an extra burden is granted to the parents.²⁸⁶ This prerogative may be used where a wrongful abortion is detected and the parents decide not to claim damages or where they settle their claim against the negligent adviser. In the latter case, the public authority should take the settlement into account in deciding whether the public interest still justifies the instigation of a separate procedure.²⁸⁷

However, this simple solution clearly creates new problems. First, such a

only upon success in proving the defendant's negligence with clear and convincing evidence). The non-monetary incentive exists where the parents feel indignant at the negligence that caused the loss of their potential offspring. In some cases, this incentive may be even stronger than the financial incentive to bring suit.

285. Another possible way to alleviate the pragmatic concern discussed in this Subsection may be to prohibit an out-of-court settlement without the court's approval. *See, e.g.*, Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55 (1999). However, this solution could be applied only where a settlement was reached after the filing of the parents' suit.

286. Parallel causes of action are very often recognized in Federal statutes that provide for civil penalties. *See, e.g.*, 31 U.S.C. § 3730(a)-(b) (2000) (FCA); 18 U.S.C. § 1964(b)-(c) (2000) (RICO); 15 U.S.C. § 15(a)-(c) (2000) (Clayton Act).

287. Some settlements may reflect the parents' interest in extracting an extra-compensatory payment from the physician or the medical institution. When such is the case, the public interest in deterring wrongdoers is vindicated indirectly, although usually to a lesser extent, since the details of most settlement agreements do not come to the attention of the general public.

process may require establishing, funding, and administering a new governmental agency able to handle such a punitive claim professionally. Even if such a task were assigned to an existing department of the district attorney's office, it would increase the government's expenditure on enforcement. Contrary to the proposed private process, it would entail the instigation of a wholly separate civil or administrative action against the defendant for the same offense. The advantage of our proposal in terms of efficient administration would be immediately reduced.²⁸⁸

Second, the parallel process would be instigated and conducted by the state's prosecutorial bodies for the exclusive goal of inflicting punishment on the adviser, and as such would strikingly resemble a criminal process in which the problem of power imbalance between the parties is immanent. The quasi-criminal nature of the process may entail the use of more stringent procedural safeguards and would thereby complicate and prolong the proceedings, making them even more expensive.

We consequently believe that recognizing a parallel public cause of action for wrongful abortions is undesirable. The primary target of the legal response we have been seeking throughout this Article is, after all, an act of ordinary negligence, committed by a competent physician in an attempt to provide medical care in good faith. Moreover, the adviser's liability toward the parents already provides a certain incentive for prudent behavior. That is why we have contended that solving the current problem of under-deterrence does not necessarily entail a dramatic rise in the adviser's expected sanction. A moderate response might suffice to increase the potential wrongdoer's awareness of the risks of negligent inducement of abortions and motivate professional improvement. The possibility of a civil fine proposed herein enhances any deterrent effect created by tort law, making the marginal benefit of a parallel public cause of action rather trivial. The amount of public resources invested in an attempt to prevent wrongdoing and punish wrongdoers should be proportionate to the societal benefit derived from such efforts. It seems, therefore, that the creation and maintenance of a wholly new public enforcement system to handle the proposed mechanism's slight deficiencies would be unjustified from a social welfare standpoint.

We wish to conclude this Part by suggesting a more plausible means to back

288. Moreover, the information required in order to open a public investigation in a case of wrongful abortion would in many cases depend on the parents' readiness to file a complaint to the relevant public authority. At least in some cases in which the parents were reluctant to bring a private suit, they would undoubtedly be reluctant to forward a public complaint either. The societal loss from the lack of a public procedure would not always be recovered by the creation of a parallel cause of action.

up the incentives created by the civil fine proposed, namely a limited reform in disciplinary law. An expansion of the authority of medical boards to enable them, in cases of wrongful abortion, to impose monetary penalties for acts of ordinary negligence may reinforce the deterrent effect of the punitive-civil action proposed above, without adding a significant burden in terms of enforcement cost. As the reader may recall, in Section III.D we explained why the typical disciplinary causes of action, as well as the typical sanctions of revocation, suspension, and the like, are unavailable in wrongful abortion cases. Allowing a medical board to consider the imposition of a monetary fine as an additional means of enforcement might meaningfully add to the preservation of the potential wrongdoers' awareness of the need to avoid negligence in this field.

True, the prospect of such a parallel administrative form of enforcement raises similar problems to those we mentioned as justifying the rejection of the proposal to create a parallel public cause of action. However, a disciplinary proceeding differs from an ordinary public process at least in three important respects. First, in a disciplinary action the professional is indicted and judged not by a representative of the public, to whom he is a stranger, but by the very professional group to which he belongs. Not only does this diminish to some extent the power imbalance between the parties, it also enhances the possibility of a more sympathetic attitude to the defendant, especially in cases of ordinary one-time negligence, which is the focus of our discussion. This may justify relaxing some of the procedural safeguards that would need to be introduced into an ordinary public procedure and thus would make our proposal more attractive in terms of administrative efficiency. Second, the medical boards are professional bodies, which in their very nature are competent to consider and decide whether an act leading to wrongful abortion had been negligent. Third, a disciplinary process is an administrative procedure, hence far less costly than a judicial-legal process.

To conclude, with or without the aid of the disciplinary process, we believe that under the enforcement mechanism proposed in this Article the need to prevent wrongful abortions and to vindicate the public interest in preserving the potentiality of human life would be satisfied more effectively than it is today.

CONCLUSION

In this Article we have endeavored to rectify a disturbing anomaly in American law. On the one hand, the potentiality of human life embodied in the living cells of a fetus is a well-recognized social value. On the other hand, as our inquiry into the intricacies of existing law has demonstrated, the legal protection of this value, at least in cases of wrongful abortion, is to date relatively feeble, despite its supreme importance. We argued that the poor reaction to wrongful abortions may suffice to deter negligent advisers once in a while, but may not

render the required level of deterrence in most cases.

In searching for a balanced legal response to medical malpractice leading to unwarranted abortions, we started from the classical defender of public interests, the criminal law. Recognizing the shortcomings of this harsh mechanism in the context of an act of ordinary negligence such as the one discussed in this Article, we moved on to examine an apparently more moderate solution, that of expanding the civil liability of the negligent adviser. Struggling with the theoretical complexities of this proposal, we argued that such an extension of liability, though at first sight very problematic, is not theoretically impossible to justify. Nevertheless, given the drawbacks of the traditional remedial mechanism of civil law in terms of the ability to guarantee sufficient but not exaggerated levels of deterrence and retribution, we had to reject this proposal as well.

Finally, recognizing the vices and virtues of the traditional deterrence mechanisms of both the criminal and the civil law, we concluded the article by pointing out what seems to us the way out of this legal labyrinth. We proposed the enactment of a statutory provision as follows. A civil court adjudicating a wrongful abortion case, upon a finding by clear and convincing evidence of negligence on the part of the defendant that led to the loss of potential life, would be allowed to impose on the defendant an extra-compensatory civil fine. The court would do so if and only if it was convinced that such an additional sanction could improve the legal protection of potential life in terms of efficient deterrence and just desert. The amount of the fine would be determined with reference to all the circumstances of the case, and its monies would be divided between the parents of the unborn child and the state. In our view, this original solution, providing for a flexible and adjustable civil penalty upon a finding of a private wrong committed by the defendant against the parents, would best serve society's need in affording protection to the value of potential life. It would do so without imposing undue burdens or unjustified punishments on negligent physicians and without imposing a significant economic burden on the legal system.

As we mentioned at the very outset of this Article, we do not presume to claim with any scientific certainty that the other solutions examined above, or any other solution that has not been discussed, are impossible to defend. As the late Justice Frankfurter illuminatingly clarified many years ago:

How to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice. Judgment on the deterrent effect of the various weapons in the armory of the law can lay little claim to scientific basis. Such

judgment as yet is largely a prophecy based on meager and uninterpreted experience.²⁸⁹

Our modest hope is that this Article has succeeded in making the point that regardless of the ongoing disagreement about the exact meaning and weight of potential life, any community interested in the preservation of potential life should pay careful attention to the way its legal system reacts to wrongful abortions.

289. *Tigner v. Texas*, 310 U.S. 141, 148 (1940).