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SEQUELA: Casey, Gonzales, and State Legislatures' Unscrupulous Use of Science in Crafting Legislation to Regulate Pregnant Women and Women's Access to Reproductive Health

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SEQUELA:

Casey, Gonzales, and State Legislature's Unscrupulous Use of Science in Crafting Legislation to Regulate Pregnant Women and Women's Access to Reproductive Health Care

Samantha von Ende*

INTRODUCTION

"Justice is the first virtue of social institutions, as truth is of systems of thought." –
John Rawls¹

In an age of rapid advancement in the fields of science and technology, it is becoming increasingly important to ensure that the branches of government responsible for crafting and evaluating laws that safeguard public interests do so in

* Indiana University Maurer School of Law, J.D./M.A. (expected 2018); Kansas City University M.A. Bioethics (2012); Oglethorpe University B.S. Biopsychology (2011). I would like to extend my gratitude to Professor Dawn Johnsen for helping to nurture this thesis from its infancy, for her continued guidance and insight throughout this process, and for her model of community involvement and academic integrity. I am also immensely grateful to the *Indiana Journal of Law and Social Equality* associates and editorial team for their careful review of my work, for the time they spent improving this Note for publication, and for the speed with which they did so after the Supreme Court granted certiorari in *Whole Woman's Health v. Hellerstedt*. They helped me to develop the very best version of my Note, and for that I am deeply grateful. For lifelong editorial assistance, unparalleled support and dedication to my success in all endeavors, and for the example he sets as a Renaissance and family man, I am forever indebted to my father, Richard von Ende. For stimulating a life-long interest in and dedication to society's continued provision of quality health care, and for the strength and moral compass with which she endowed me, I am profoundly grateful to my mother, Dr. Harriet Langley. For unwavering moral, emotional, and cognitive support through this process and all others, I am immensely grateful to Katie Cullum, Glenn Drew, Judy Elliott, Joshua Goller, Walter Ricci, Jerry Stolov, Liz Thompson, and Elizabeth, Matthew, and Jennifer von Ende. I am also thankful to Professor Steve Sanders for helpful insights on earlier drafts and for research opportunities that provided continued motivation to address these fundamental constitutional issues. For enabling my legal education, I also appreciate the financial support of Indiana University and the many alumni who have contributed to scholarship programs and funded fellowship programs.

¹ JOHN RAWLS, A THEORY OF JUSTICE 3 (1971).

an informed, honest, and responsible manner. This is particularly true in the sphere of women's reproductive health. There are various areas of law in which science and technology play an important role, including environmental law, regulation of the Internet, criminal sentencing, intellectual property, and many others. Both science and law are disciplines aimed at the realization of specific values: truth and justice, respectively. The scientific method and both common and constitutional law have institutionalized features of deliberate review in order to achieve these goals. Likewise, both disciplines can claim credit for providing people across the world with the capability of enjoying greater liberties as a result of advancements in each respective field.

As important a consideration as scientific validity should be when assessing the credibility of a law aimed at protecting women's health, it is also critical to discern other social facts with heightened scrutiny when making such an analysis.² Unfortunately, abortion policymaking in the United States often fails to contemplate these social facts—and the current statistics that implicate these facts are staggering. World Health Organization reports indicate that women in the United States experience some of the worst maternal³ and infant⁴ mortality rates of any developed country. The National Institutes of Health issued a report discussing the maternal death problem in the United States, explaining, “[t]he United States has a higher ratio of maternal deaths than at least 40 other countries, even though it spends more money per capita for maternity care than any other.”⁵

The Guttmacher Institute published findings in an updated fact sheet detailing the social facts relating to pregnancy and women who seek abortions. Of particular relevance are the following figures: half of all pregnancies in the United States are unintended;⁶ three in ten American women will obtain an abortion in their lifetimes;⁷ 61% of those obtaining abortions are mothers and 34% are women

² See Caitlin E. Borgmann, *Judicial Evasion and Disingenuous Legislative Appeals to Science in the Abortion Controversy*, 17 J.L. & POL'Y 15, 16–17 (2008); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 264–65 (1992).

³ *Maternity Care in the US*, AM. C. NURSE-MIDWIVES 1, <http://www.midwife.org/acnm/files/cc/LibraryFiles/Filename/00000003784/MACPACAttachmentFinal1-6-14.pdf> (last visited Oct. 6, 2015) (the United States ranked 46th in the world in maternal mortality in 2012). Compare World Health Org., *World Health Statistics 2014*, at 86 (2014) (28 maternal deaths per 100,000 live births in the United States), with *id.* at 90 (average of seventeen maternal deaths per 100,000 live births in high income countries).

⁴ *Maternity Care in the US*, *supra* note 3, at 1 (the United States ranked 27th in the world in infant mortality).

⁵ Ina May Gaskin, *Maternal Death in the United States: A Problem Solved or a Problem Ignored?*, 17 J. PERINATAL EDUC. 9, 9 (2008).

⁶ *Fact Sheet: Unintended Pregnancy in the United States*, GUTTMACHER INST. 1 (July 2015), <http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html>.

⁷ *Fact Sheet: Induced Abortion in the United States*, GUTTMACHER INST. 1 (March 2016), http://www.guttmacher.org/pubs/FB_Induced_Abortion.html.

with more than one child;⁸ and more laws regulating women's reproductive health have been passed in the 2011–13 period than in the decade prior.⁹ Various national medical associations have published policy statements or passed resolutions demonstrating the medical profession's disapproval of many recently enacted reproductive health care restrictions.¹⁰ Furthermore, a USA Today/Gallup poll from December 2012 indicates that 53% of Americans would not like to see the Supreme Court completely overrule *Roe v. Wade*,¹¹ and over half support keeping abortion legal in all or most cases.¹²

In addition to the social facts implicated in this area of policymaking, National Advocates for Pregnant Women, a policy- and litigation-focused advocacy organization spearheaded by Lynn Paltrow, published a report detailing an emerging trend toward the criminalization of pregnant women who engage in certain acts.¹³ The report describes the forced arrest of hundreds of pregnant women for violation of laws that were either not intended to apply to pregnant women or based on junk science.¹⁴

An analysis of these social facts provides multiple insights. First, reproductive health care and access to it in the U.S. are overwhelmingly inadequate.¹⁵ Second, the anti-choice messaging around contraception, pregnancy, and abortion is both successful¹⁶ and largely misrepresentative.¹⁷ Third, it is clear

8 Rachel K. Jones, Lawrence B. Finer & Susheela Singh, *Characteristics of U.S. Abortion Patients*, 2008, GUTTMACHER INST. 3, 8 (May 2010), <https://www.guttmacher.org/pubs/US-Abortion-Patients.pdf>.

9 Elizabeth Nash, Rachel Benson Gold, Andrea Rowan, Gwendolyn Rathburn & Yana Vierboom, *Laws Affecting Reproductive Health and Rights: 2013 State Policy Review*, GUTTMACHER INST., <http://www.guttmacher.org/statecenter/updates/2013/statetrends42013.html> (last visited Oct. 2, 2015).

10 Andrea D. Friedman, *Bad Medicine: Abortion and the Battle Over for Who Speaks for Women's Health*, 20 WM. & MARY J. WOMEN & L. 45, 46–47 (2013).

11 Lydia Saad, *Majority of Americans Still Support Roe v. Wade Decision*, GALLUP (Jan. 22, 2013), <http://www.gallup.com/poll/160058/majority-americans-support-roe-wade-decision.aspx>.

12 *Data Trends: Abortion*, PEW RESEARCH CTR., <http://www.pewresearch.org/data-trend/domestic-issues/abortion/> (last updated Sept. 22, 2014); Press Release, NARAL Pro-Choice Am., Gallup Shows Support for Legal Abortion Remains Strong (May 23, 2012), http://www.prochoiceamerica.org/media/press-releases/2012/pro5232012_gallup.html.

13 LYNN M. PALTROW & JEANNE FLAVIN, *ARRESTS OF AND FORCED INTERVENTIONS ON PREGNANT WOMEN IN THE UNITED STATES, 1973–2005: IMPLICATIONS FOR WOMEN'S LEGAL STATUS AND PUBLIC HEALTH*, 38 J. HEALTH POL., POL'Y & L. 299 (2013).

14 *Id.*

15 Rachel Hansen & Rebecca Newman, *Health Care: Access After Health Care Reform*, 16 GEO. J. GENDER & L. 191, 193–94 (2015) (demonstrating that various reasons including coverage gaps, high medical costs, poor rural health care, and burdensome reproductive health restrictions lead to inadequate care).

16 See, e.g., ALESHA DOAN, *OPPOSITION AND INTIMIDATION: THE ABORTION WARS AND STRATEGIES OF POLITICAL HARASSMENT* 4 (2007); SARAH ERDREICH, *GENERATION ROE: INSIDE THE FUTURE OF THE PRO-CHOICE MOVEMENT* 179 (2013).

that state legislatures' unscrupulous use of science and pseudoscience in crafting laws to regulate pregnant women, and the courts' failure to call them on their bluff, is becoming a significant problem.¹⁸

Instead of looking at reliable, illustrative social statistics, legislatures have relied on junk science and debunked theories in order to propose and pass hundreds of morality-based laws regulating women's reproductive health.¹⁹ Moreover, courts have entertained and dismissed challenges to these laws without critically assessing the science that purportedly underpins them. These laws take several forms²⁰ and constitute an incremental strategy to make abortions unavailable—even absent a reversal of *Roe v. Wade*.²¹ Targeted regulations of abortion providers ("TRAP laws") regulate both providers and clinics that offer abortion services.²² Fetal protection laws (FPLs) are laws that purport to protect the state's interest in potential life—an interest originally recognized in *Roe*.²³ FPLs take multiple forms and can designate a pregnant woman a criminal for her current or previous drug use or for seeking addiction treatment. Other FPLs impose outright bans on abortion after a specified gestational age on the faulty premise of fetal pain. Additionally, there are informed consent laws that aim to regulate women seeking abortion services by requiring the provision of

17 Shaniqua Seth & Malika Redmond, *Billboards, Women of Color, and Politics*, NAT'L WOMEN'S HEALTH NETWORK (May/June 2012), <https://nwhn.org/newsletter/node/1402> [<http://web.archive.org/web/20121019185228/http://nwhn.org/newsletter/node/1402>].

18 Friedman, *supra* note 9, at pt. 3; see also B. Jessie Hill, *Reproductive Rights as Health Care Rights*, 18 COLUM. J. GENDER & L. 501, 501 (2009); *Medical and Social Health Benefits: Since Abortion was Made Legal in the U.S.*, PLANNED PARENTHOOD, http://www.plannedparenthood.org/files/4713/9611/5762/Abortion_Medical_and_Social_Benefits.pdf (last updated Feb. 2014).

19 Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175 (2014).

20 *Proof of the GOP War on Women*, POLITICUSUSA (May 13, 2011), <http://www.politicususa.com/proof-war-women-2>.

21 See, e.g., Irin Carmon, *The Right's Plan to Reverse Roe: Ban Abortions to 'Protect' Women*, MSNBC (Sept. 13, 2013, 8:47 AM), <http://www.msnbc.com/msnbc/the-rights-plan-reverse-roe-ban>; Amanda Marcotte & Jesse Taylor, *How States Could Ban Abortion With 'Roe' Still Standing*, NATION (July 14, 2011), <http://www.thenation.com/article/162033/how-states-could-ban-abortion-roe-still-standing>; Michael New, *Incremental Pro-Life Legislative Success Gives Future Hope*, LIFE NEWS.COM (Aug. 9, 2012, 10:16 AM), <http://www.lifenews.com/2012/08/09/incremental-pro-life-legislative-success-gives-future-hope/>; Memorandum from James Bopp, Jr. & Richard E. Coleson, Bopp, Coleson & Bostrom, *Pro-Life Strategy Issues 5* (Aug. 7, 2007), <http://operationrescue.org/pdfs/Bopp%20Mem%20ore%20State%20HLA.pdf>.

22 *State Laws Regulating Reproductive Rights*, LAW STUDENTS FOR REPRODUCTIVE JUSTICE, http://lsrj.org/documents/factsheets/13_State_Laws_Regulating_Repro_Rights.pdf (last updated Aug. 2013).

23 Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CALIF. L. REV. 781, 787 (2014); see also *Roe v. Wade*, 410 U.S. 113, 156 (1973).

unnecessary procedures like ultrasounds, counseling, and compulsory waiting periods.

The medical community largely opposes these morality-driven laws, as evidenced by the various amicus curiae filings, legislative testimonies, and publications provided by representatives of national medical organizations.²⁴ Furthermore, the validity of the claim that these laws are passed in order to promote the State's interest in women's health has been called into question by various statements made to reporters or documented in legislative records.²⁵ The effect of these laws on women's access to reproductive health services is significant and disproportionately impacts poor women, rural women, and women of color.²⁶

This Note first establishes the current trend of legislatures' unscrupulous use of science in regulating women's health and discusses the impact of these laws on individual choice, societal values and interests, and national reproductive health. This Note then examines the potential implications of a continued trend and proposes several possible ways of addressing this problem.

Part I of this Note documents the role of the federal courts in establishing a legal framework that permits the passage of onerous and medically unnecessary restrictions by state governments. Part II explores the various types of laws that have been enacted and their misleading justifications, specifically those regulating women's reproductive health under the guise of protecting the State's interest in the health of the mother and the fetus. Part II.B.i profiles TRAP laws, Part II.B.ii summarizes the criminalization of substance abuse by pregnant women, Part II.B.iii outlines the proliferation of fetal pain abortion bans, and Part II.B.iv reviews the several variations of informed consent laws. Analyses of these restrictions will illustrate the inaccuracy of their purported scientific underpinnings and the continuing opposition by medical and legal communities. Part III briefly discusses the potential technologies that may be implicated in a continued trend of legislatures basing health care restrictions on faulty science. Finally, Part IV proposes recommendations for how courts and activists can reverse this trend,

24 *E.g.*, Steven E. Weinberger, Hal C. Lawrence, III, Douglas E. Henley, Errol R. Alden, & David B. Hoyt, *Legislative Interference with the Patient-Physician Relationship*, NEW ENG. J. MED., July-Dec. 2012, at 1557, 1557-59; *Leading Medical Groups Oppose Obstacles to Abortion*, NARAL PRO-CHOICE AM. (July 10, 2002), <https://web.archive.org/web/20060117003817/http://www.naral.org/facts/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=1715>; Policy Statement, Am. Coll. of Obstetricians & Gynecologists, *Abortion Policy* (Nov. 2014), <http://acog.org/-/media/Statements-of-Policy/Public/sopo69.pdf?la=en>. The laws are also opposed by medical sociologists. *E.g.*, Policy Statement, Soc'y for Med. Anthropology (July 2014), <http://www.medanthro.net/demo/wp-content/uploads/2014/07/CAR-PS.pdf>.

25 *See, e.g.*, Tara Culp-Ressler, *Mississippi Governor: 'My Goal of Course is to Shut Down' the State's Last Abortion Clinic*, THINKPROGRESS (Jan. 11, 2013, 10:55 AM), <http://thinkprogress.org/health/2013/01/11/1434991/mississippi-governor-shut-down-clinic/>.

26 Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, 11 WOMEN'S RTS. L. REP. 15, 16-17 (1989).

suggesting three separate and complementary approaches: 1) decreased deference to legislative fact-finding, 2) the recognition of an implicit right to medical decision making, and 3) increased focus by pro-choice groups and progressive news outlets on reporting these problems and successful messaging campaigns around reproductive health as a political issue.

I. THE ROLE OF FEDERAL COURTS IN RECOGNIZING WOMEN'S INTEREST IN REPRODUCTIVE HEALTH

"I don't think the law exists to arrive at the truth. . . . There's an enormous difference between the role of truth in law and the role of truth in science. In law, truth is one among many goals." – Alan Dershowitz²⁷

A. *In Search of a Workable Doctrine*

A woman's right to an abortion is supported by several constitutional theories; for example, due process privacy rights, the Equal Protection clause,²⁸ and the Ninth Amendment²⁹ have been asserted by academics, litigators, and Supreme Court Justices alike.³⁰ The current social, legal, and political climate surrounding access to reproductive health services has been shaped by centuries of traditional cultural practices and social transformations, and, more recently, by rights movements and evolving legal doctrine.

²⁷ Kathryn Schulz, *Alan Dershowitz on Being Wrong, Part II: Error in the Law*, SLATE (May 12, 2010, 5:32 PM), http://www.slate.com/blogs/thewrongstuff/2010/05/12/alan_dershowitz_on_being_wrong_part_ii_error_in_the_law.html.

²⁸ Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 375–76 (1985).

²⁹ *Roe v. Wade*, 410 U.S. 113, 210–11 (1973) (Douglas, J., concurring).

³⁰ In this author's opinion, however, abortion jurisprudence is properly situated within the broader jurisprudential field addressing the right to medical decision-making, implicitly protected by the due process clause of the fifth and fourteenth amendments. This domain of law addresses end of life care, informed consent requirements, competence and capacity requirements in medical decision-making by minors, and the prescription and use of medicinal marijuana. Within this field of law, two doctrines have emerged, one that elevates autonomy and self-determination as primary values and another that defers to the state interest in protecting public health. B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 294–295 (2007).

B. *Pre-Roe*

Historians and legal scholars recognize that women have engaged in abortion procedures across different cultures for centuries.³¹ However, it was only beginning in the 1800s that laws across the United States began to criminalize this act.³² The history of U.S. common law demonstrates that the fetus was not considered the equivalent of a person.³³ In adjudicating disputes around individual actions that unintentionally destroyed a fetus, whether the fetus had quickened was a dispositive factor in assessing the extent of the harm imposed; specifically, in determining whether the loss of the child would be treated as a homicide or as a civil damage for which compensation would suffice.³⁴

Initially, it was the organized medical profession that led the effort to criminalize abortion.³⁵ Some historical accounts attribute the criminalization of abortion to a backlash that developed among medical professionals, state authorities, and the public in hopes of tightening control over women and in response to societal changes brought about by suffrage, birth control, and the use of midwives.³⁶ Regardless of the impetus for criminalization, it is clear that lawyers, physicians, and public health officials were instrumental in reshaping public policy to avoid the life-threatening trend of illegal and unsafe abortions.³⁷ Activists, scholars, and professionals played key roles in setting the stage for a monumental Supreme Court decision that would finally provide protections for the important personal and state interests at stake in making abortions legal and accessible.

³¹ E.g., Rochelle N. Shain, *A Cross-Cultural History of Abortion*, 13 *OBSTETRICS & GYNECOLOGY CLINICS N. AM.* 1, 1 (1986); *Medical and Social Health Benefits: Since Abortion Was Made Legal in the U.S.*, *PLANNED PARENTHOOD* 1, http://www.plannedparenthood.org/files/4713/9611/5762/Abortion_Medical_and_Social_Benefits.pdf (last updated Feb. 2014) (noting that over 200,000 abortions were performed in the United States in the 1950s and 1960s); *Timeline*, 4000 YEARS FOR CHOICE, <http://www.4000yearsforchoice.com/pages/timeline> [<https://web.archive.org/web/20140318233559/http://www.4000yearsforchoice.com/pages/timeline>].

³² Katha Pollitt, *Abortion in American History*, *ATLANTIC* (May 1997), <http://www.theatlantic.com/magazine/archive/1997/05/abortion-in-american-history/376851/>.

³³ *Roe*, 410 U.S. at 162 (recognizing that the law has never treated fetuses as whole persons).

³⁴ LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES 1867-1973*, at 8-13 (1997); see also Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 *WM. & MARY J. WOMEN & L.* 469, 519 n.306 (2009).

³⁵ LINDA GREENHOUSE & REVA B. SIEGEL, *BEFORE ROE V. WADE* 3 (2012), http://documents.law.yale.edu/sites/default/files/BeforeRoe2ndEd_1.pdf.

³⁶ *History of Abortion in the U.S.*, *OUR BODIES OURSELVES* (Mar. 28, 2014), <http://www.ourbodiesourselves.org/health-info/u-s-abortion-history/>.

³⁷ GREENHOUSE & SIEGEL, *supra* note 34, at 3-4.

C. *Recognizing a Fundamental Right: Roe v. Wade*

The right to an abortion, first recognized in the 1973 decision *Roe v. Wade*,³⁸ has evolved since the interests at play were first pronounced in that historic ruling. The majority opinion in *Roe* situated abortion within the context of the (then relatively recent) expansion of due process liberty doctrine. The Court declared that the right earlier outlined in *Griswold v. Connecticut*,³⁹ and subsequently understood as a right of privacy encompassed in the Due Process Clause of the Fourteenth Amendment, is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”⁴⁰

Roe articulated a legal balancing test to weigh the three conflicting interests that must be considered when determining which regulations of abortions are permissible and when. First, the State recognized a woman’s interest in privacy and self-determination.⁴¹ The *Roe* Court also recognized the interest of the State in protecting women’s health and the additional interest of the State in protecting potential life.⁴²

The Court theorized that these interests could be weighed differently as a pregnancy progresses.⁴³ The majority opinion proposed a trimester framework that recognized that first trimester abortions are safer than childbirth and left decisions about abortion in the first trimester up to the woman and her doctor.⁴⁴ The trimester framework only permitted those restrictions in the second trimester that had the effect of protecting women’s health.⁴⁵ The framework allowed bans on abortions after the third trimester—the time at which the feature of viability typically emerges in the fetus—if exceptions were made for the health of the mother.⁴⁶ Justice Douglas’s concurrence in *Roe* also pinpointed the Ninth Amendment’s reservation of additional rights to the people as potential bases for this outcome. *Roe* was a monumental decision because it recognized abortion as a fundamental right, deserving of strict scrutiny in the courts.⁴⁷

D. *Continued Challenges*

The Supreme Court overturned several laws from 1973 through 1992 that attempted to regulate women’s access to abortion. With only three major exceptions in rejecting dozens of laws, the Court enforced the *Roe* ruling that pre-viability regulations would survive strict scrutiny only if they served to protect the

38 410 U.S. at 154.

39 381 U.S. 479 (1965).

40 *Roe*, 410 U.S. at 153.

41 *Id.* at 153.

42 *Id.* at 155.

43 *Id.* at 163–64.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.* at 167–71 (Stewart, J., concurring).

health of the mother. In the 1979 case *Bellotti v. Baird*, the Court upheld a Massachusetts state law requiring a minor to obtain parental consent or to persuade a judge of her maturity before obtaining an abortion.⁴⁸ In the 1980 *Harris v. McRae* decision, the Court held that Medicaid was not required to cover medically necessary abortions, despite being an otherwise comprehensive health coverage plan.⁴⁹

The Court's 1989 ruling in *Webster v. Reproductive Health Services* upheld a Missouri statute that prohibited public health workers or public facilities from participating in abortion procedures when unnecessary to save the life of the mother, prohibited counseling or other encouragement to obtain an abortion, and required physicians to perform viability tests for women who were beyond their nineteenth week of pregnancy.⁵⁰ In a 5-4 decision, the Court found the Missouri statute constitutional, overturning lower court decisions that had struck the statute down. In yet another placating move, which professed deference in name only, the Court claimed to hold to the fundamental portions essential to the original holding in *Roe*. The Court proclaimed that the preamble to the restrictions in the statute, which asserted that life begins at conception, did not functionally affect the law or restrict abortion, that there was no affirmative right requiring states to enter the business of abortion, and that the viability test served the State's recognized interest in protecting potential life.

E. The Liberty Interest and Undue Burden Test: An Evolving Standard

Although the Court has continued to uphold the heart of the *Roe* holding (recognition and protection of women's interest in and ability to obtain abortions), the constitutional protection was most greatly weakened by the Court's 1992 ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁵¹ This case involved a challenge to an expansive abortion law passed in Pennsylvania with provisions that mandated informed consent, a twenty-four hour waiting period, and both parental consent (in the case of a minor) and spousal notification (with waiver options available for mitigating circumstances).⁵² A joint concurrence issued by the Court's centrist justices and the Court's conservative justices affirmed the principle that pre-viability abortions could not be banned but upheld all of the challenged provisions except the spousal notification requirement.⁵³

The *Casey* decision altered the standard of review set out by *Roe* and largely revised the trimester framework, dismantling the general protection for first trimester abortions against regulation and newly permitting any regulation that

48 443 U.S. 622, 643-44 (1979).

49 448 U.S. 297, 311 (1980).

50 492 U.S. 490, 499-501 (1989).

51 505 U.S. 833 (1992).

52 *Id.* at 844.

53 *Casey*, 505 U.S. 833.

does not have the “purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”⁵⁴ Most importantly, *Casey* established a new standard for evaluating whether regulations unconstitutionally interfered with this protected liberty interest. The Court asserted that any regulation that imposes a substantial obstacle, thereby constraining a woman from obtaining a legal abortion, is considered an “undue burden,” which violates the constitutional right of women to obtain abortions.⁵⁵ The ruling in *Casey*, however, upheld *Roe’s* reasoning, which declared that a woman’s decision to obtain an abortion implicates liberty interests that are protected from State interference by the Due Process Clauses of the Fifth and Fourteenth Amendments.⁵⁶

Casey was an impactful decision that functioned to placate activists who were nervous about the sustained legality of abortion under the law. The Court’s transformative holding in *Casey* created a malleable and vague standard, permitting increasing numbers of state regulations, the constitutionality of which is constantly being drawn into question. Unfortunately, as Andrea Friedman, the director of the National Partnership for Women and Families, explained of *Casey*,

[T]he Court [gave] little actual guidance as to how this standard was to be applied. This ambiguity of the standard became even clearer as lower courts attempted to put it into effect. The plurality of the Court in *Casey* found that the provision of “truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth” was consistent with “*Roe’s* acknowledgment of an important interest in potential life”⁵⁷

As a result, Caitlin Borgmann explains,

In *Planned Parenthood v. Casey*, the Court explicitly sanctioned the state’s reliance on morality as the basis for abortion regulation. Yet the decision, which upheld a woman’s right to abortion, placed limits on how the state could express or implement its preference for childbirth. Accepting *Casey’s* invitation, legislatures have enacted a wide variety of restrictions based on moral opposition to abortion. But, partly in response to the confusing legal standard set forth in *Casey*, they have felt compelled to disguise these moral viewpoints as scientific fact.⁵⁸

In 2000, the Supreme Court accepted the State’s appeal of a Nebraska statute that had been overturned by lower courts as in contravention of the undue burden standard.⁵⁹ The statute banned partial-birth abortions (a term that is functionally meaningless and was used as an anti-choice messaging technique) and

54 *Id.* at 877.

55 *See id.* at 874.

56 *Id.* at 853, 871, 874.

57 Friedman, *supra* note 9, at 50 (emphasis omitted).

58 Borgmann, *supra* note 2, at 16.

59 *Sternberg v. Carhart*, 530 U.S. 914 (2000).

forbade a particular abortion procedure known as Dilation and Extraction (D&E).⁶⁰ The Supreme Court rejected the statute in a 5-4 ruling that was closer than many expected, with Justice Kennedy siding with the dissent and differentiating between this restriction and others based on moral questions that the procedure raised.⁶¹

Only seven years later, in 2007, the Supreme Court accepted a case for review that challenged the newly-passed Partial Birth Abortion Ban,⁶² which had been sponsored by the Bush Administration. *Gonzales v. Carhart*⁶³ was a startling 5-4 decision that likely reflected the changing makeup of the Court more than any substantial difference between the federal law and the overturned Nebraska statute, as Justice Samuel Alito had replaced Justice Sandra Day O'Connor on the Court. The Court upheld the federal law, giving great deference to the legislative fact-finding process and not questioning the scientific underpinnings of bases for the law.⁶⁴ Justice Ginsburg's dissent decried the Court's decision, noting, among other criticisms, that the ruling represented the first time the Court had upheld a restriction that did not provide an explicit exemption for the health of the mother.⁶⁵ Most disturbingly, Kennedy's majority opinion articulated that, "[t]he Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty,"⁶⁶ fostering an environment in which shoddy science could be used to create an inappropriate impression or scientific uncertainty and to make room for laws with illegitimate scientific bases.⁶⁷

F. *Current State of the Law*

In current doctrine, the law is still bound by the undue burden standard. In reality, the state of the law is in confusion regarding the proper application of this standard. For example, the Supreme Court has employed the standard in upholding mandatory seventy-two hour delays and in rejecting spousal notification requirements, while both rejecting and upholding laws banning

60 *Id.* at 921-22.

61 *Id.* at 946, 956-79.

62 18 U.S.C. § 1531 (2012).

63 550 U.S. 124 (2007).

64 *Id.* at 165-66, 168.

65 *Id.* at 169-74 (Ginsburg, J., dissenting).

66 *Id.* at 163.

67 *Cf., e.g.,* Ames Grawert, *The Fundamental Meaning of "Medical Uncertainty": Judicial Deference to Selective Science in Gonzales v. Carhart*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 379 (2009); Sharona Coutts & Sofia Resnick, *How Shoddy Evidence Finds Its Way from State Legislatures to the U.S. Supreme Court*, RH REALITY CHECK (Nov. 13, 2014, 11:56 AM), <http://rhrealitycheck.org/article/2014/11/13/shoddy-evidence-finds-way-state-legislatures-u-s-supreme-court/>.

dilation and extraction procedures without any explicit exception for emergency circumstances which require the procedure in the interest of women's health.⁶⁸

The change in standard of review that resulted from the *Casey* ruling, from fundamental right deserving of strict scrutiny to an undue burden standard, remains troublingly unclear and has been applied differently by state and federal courts.⁶⁹ *Gonzales'* application of the new *Casey* standard to the interests articulated in *Roe* opened the door for legislatures to craft laws regulating pregnant women under the guise of protecting women's health.

II. THE LEGISLATIVE TREND OF UNSCRUPULOUS USE OF SCIENCE IN CRAFTING REPRODUCTIVE HEALTH REGULATIONS

"There is no crueller tyranny than that which is perpetuated under the shield of law and in the name of justice." – Charles de Montesquieu

The evolving framework and standard set by *Roe* and *Casey* opened the door for legislatures to craft morality laws and claim a valid medical basis and interest in the protection of women's health and fetal health.⁷⁰ The propagation of bad or questionable science and debunked theories by politicians and advocates is referred to as the use of "junk science."⁷¹ This Part will profile the four broad categories of abortion laws passed by legislatures, the specific forms these laws take and the purported scientific bases for them, and the criticisms leveled at such laws by the medical and legal communities.

A. Evidence of a Trend

A startling trend has emerged in state legislatures since the Supreme Court ruled on *Gonzales v. Carhart* in 2007. The *Gonzales* decision signaled to anti-

⁶⁸ See generally *The Undue Burden Standard: Abortion Jurisprudence After Casey*, CTR. FOR REPROD. RTS. (Mar. 22, 2013), <http://reproductiverights.org/en/document/the-undue-burden-module-updated-spring-2013> (compiling several academic articles describing the confusion with the current state of abortion law).

⁶⁹ See Jeffrey Toobin, *The Disappearing "Undue Burden" Standard for Abortion Rights*, NEW YORKER (Sept. 16, 2014), <http://www.newyorker.com/news/daily-comment/disappearing-undue-burden-standard-abortion-rights>.

⁷⁰ See Ed Kilgore, *The Inevitable SCOTUS Review of State Abortion Laws*, WASHINGTON MONTHLY (July 10, 2013 3:11 PM), http://www.washingtonmonthly.com/political-animal-a/2013_07/the_inevitable_scutus_review_0045750.php.

⁷¹ Lisa M. Corrigan, *Navigating the Junk Science of Fetal Pain*, SCIENCE PROGRESS (Apr. 29, 2013), <http://scienceprogress.org/2013/04/navigating-the-junk-science-of-fetal-pain/>; see also Jessica Mason Pieklo, *Excuse Me? There's No 'Unsettled Science' in the Contraception Challenges*, RH REALITY CHECK (Mar. 12, 2014 4:14 PM), <http://rhrealitycheck.org/article/2014/03/12/excuse-theres-unsettled-science-contraception-challenges/>.

choice activists and legislators that abortion and other reproductive health regulations would receive significantly less scrutiny under the new Roberts Court's application of the undue burden standard.⁷² As a result, since Republicans swept into state legislatures in 2010, a staggering number of regulations targeting pregnant women and choice have been proposed and passed in the states.⁷³ These restrictions are smarter⁷⁴ and stealthier in effectively diminishing access to abortion services, typically claiming the protection of women's health or fetal health as the basis for the imposition of extensive restrictions on women and providers.⁷⁵ The difficulty of challenging these restrictions in the courts has emboldened state legislatures to enact more regulations between 2011 and 2013 than in the entire previous decade. Astonishingly, 300 bills were introduced in state legislatures in 2012 alone,⁷⁶ and the trend seems poised to continue.⁷⁷

B. *Types of Laws Regulating Reproductive Health*

Reproductive health care restrictions take multiple forms⁷⁸—ranging from mandatory delays to outright bans—and regulate everyone from health care providers, to women seeking abortions, and even encompass women who want to carry their pregnancies to term. These restrictions result in decreased access to reproductive health care that has left women, families, and health care providers in the crosshairs.

⁷² See Symposium, *After Gonzales v. Carhart: The Future of Abortion Jurisprudence*, PEW RES. CTR. (June 14, 2007), <http://www.pewforum.org/2007/06/14/after-gonzales-v-carhart-the-future-of-abortion-jurisprudence/>.

⁷³ See *State Policies in Brief: An Overview of Abortion Laws*, GUTTMACHER INST., http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf (last updated Oct. 1, 2015).

⁷⁴ Amanda Marcotte, *The Anti-Abortion Laws Are Getting Smarter*, SLATE (July 9, 2014 2:07 PM),

http://www.slate.com/blogs/xx_factor/2014/07/09/guttmacher_institute_report_on_abortion_restrictions_trap_laws_are_super.html.

⁷⁵ E.g., Beth Jordan & Elisa S. Wells, *A 21st-Century Trojan Horse: The "Abortion Harms Women" Anti-Choice Argument Disguises a Harmful Movement*, 79 CONTRACEPTION 161 (2009).

⁷⁶ Von Diaz, *TRAP Laws are the New Battleground for Abortion Rights*, COLORLINES.COM (Nov. 5, 2013 6:14 PM),

http://colorlines.com/archives/2013/11/trap_laws_are_the_new_battleground_for_abortion_rights.html; Hannah Groch-Begley, *5 Facts Media Should Know About States' Unprecedented Restrictions on Abortion*, MEDIA MATTERS FOR AM. (July 5, 2013, 10:52 AM), <http://mediamatters.org/research/2013/07/05/5-facts-media-should-know-about-states-unpreced/194730>.

⁷⁷ See *Monthly States Update: Major Developments in 2014*, GUTTMACHER INST. (Dec. 2014), <http://www.guttmacher.org/statecenter/updates/december.html>.

⁷⁸ *The GOP Takes Its War on Women to the States*, PEOPLE FOR AM. WAY, <http://www.pfaw.org/media-center/publications/gop-takes-its-war-women-states> (last visited Oct. 3, 2015).

i. Targeted Regulation of Abortion Providers (TRAP)

One of the most successful forms of these new regulations are TRAP laws—laws that impose restrictions on providers and on clinics as physical spaces. These laws create “requirements that are different and more burdensome than those imposed on other medical practices.”⁷⁹ They are enacted “under the guise of protecting women’s health,”⁸⁰ on the implied and faulty premise that abortion is an inherently dangerous procedure. In reality, abortion is one of the safest surgical procedures in the United States and is fourteen times safer than childbirth.⁸¹ Reproductive rights groups and progressive news outlets (joined in their opposition to these laws by leading groups of medical professionals⁸²) have documented the proliferation and impact of these onerous restrictions. Pro-choice organizations, with the support of leading groups of medical professionals such as the American Medical Association (AMA) and American Congress of Obstetricians and Gynecologists (ACOG),⁸³ have challenged these restrictions in court claiming that such excessive regulations are representative of abortion exceptionalism and are medically unnecessary when abortion is actually a very safe procedure—⁸⁴ safer even than colonoscopies⁸⁵ and penicillin shots.⁸⁶

79 *Targeted Regulation of Abortion Providers (TRAP)*, CTR. FOR REPROD. RTS. (Aug. 28, 2015), <http://reproductiverights.org/en/project/targeted-regulation-of-abortion-providers-trap>.

80 Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—and the Women they Serve—Pay the Price*, GUTTMACHER POL’Y REV., Spring 2013, at 7.

81 Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGISTS 215, 217 (2012); Geneva Pittman, *Abortion Safer Than Giving Birth: Study*, REUTERS (Jan. 23, 2012 5:16 PM), <http://www.reuters.com/article/2012/01/23/us-abortion-idUSTRE8oM2BS20120123>.

82 *Leading Medical Groups Oppose Obstacles to Abortion*, *supra* note 23.

83 *Ob-Gyns Denounce Texas Abortion Legislation*, AM. CONG. OBSTETRICIANS & GYNECOLOGISTS (July 2, 2013), <http://www.acog.org/About-ACOG/News-Room/News-Releases/2013/Ob-Gyns-Denounce-Texas-Abortion-Legislation>. The ACOG is closely associated with the American College of Obstetrics and Gynecology with both sharing administrative teams. As such, throughout this Note, the former title will be used to identify these organizations.

84 Gold & Nash, *supra* note 79, at 7.

85 Sasha Collins, *Map: Abortion in the South: Using Admitting Privileges to Restrict Safe and Legal Access*, PLANNED PARENTHOOD (May 21, 2014 2:14 PM), <http://plannedparenthoodaction.org/elections-politics/blog/latest-tactic-restrict-safe-and-legal-abortion-admitting-privileges/>; Tara Culp-Ressler, *You’re 40 Times More Likely To Die From A Colonoscopy Than from an Abortion*, THINK PROGRESS (Aug. 8, 2014 12:57 PM), <http://thinkprogress.org/health/2014/08/08/3469232/abortion-safety-trap-laws/>.

86 Emily Bazelon, *Caught in a TRAP*, SLATE (May 26, 2014 11:45 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/05/alabama_abortion_law_access_to_abortion_through_the_entire_south_is_on_trial.html; Imani Gandy, *Why Admitting Privileges Have No Benefit*, RH REALITY CHECK (July 24, 2013 3:30 PM), <http://rhrealitycheck.org/article/2013/07/24/why-admitting-privileges-laws-have-no-medical-benefit>.

As of December 2014, TRAP laws exist in twenty-six states,⁸⁷ imposing a variety of restrictions with which it is difficult to comply. For those providers and clinics that manage compliance, additional administrative and renovation or relocation expenses drive up the cost of abortion services.⁸⁸ Unfortunately, this is not the worst-case scenario. TRAP laws contributed to the closing of fifty-four clinics from 2011 to 2013.⁸⁹ Six states, as of December 2015, were down to one public clinic still offering abortions,⁹⁰ forcing state residents to travel far out of their way in order to access reproductive health services. These laws also have the potential deleterious effect of deterring would-be providers due to fear of criminal and civil liability, burdensome administrative requirements, and hostile practice environments.⁹¹

Although it has traditionally been difficult to challenge these regulations in court,⁹² a recent ruling by a Wisconsin federal judge provides reason for hope and an example of proper judicial treatment of such restrictions. The opinion, which struck down a law involving a number of TRAP law provisions, held that the restrictions impose a substantial obstacle and do not even bear a rational relationship to the State's expressed interest, as illustrated by the State's inaction in otherwise regulating similar medical procedures.⁹³

Among the laws that regulate physical clinic facilities are facility-licensing requirements necessitating that clinics obtain state licensing (a restriction not imposed on other comparable offices or clinics) and require that clinics meet standards relating to physical construction, staffing, and procedures.⁹⁴ At times, these licensing schemes necessitate that clinics providing surgical abortions be

87 Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, GUTTMACHER POL'Y REV., Winter 2014, at 9, 10.

88 Dawn Johnsen, "TRAP"ing Roe in Indiana and a Common-Ground Alternative, 118 Yale L.J. 1356, 1362 (2009); cf. Diaz, *supra* note 75.

89 Laura Bassett, *Anti-Abortion Laws Take Dramatic Toll on Clinics Nationwide*, Huffington Post (Aug. 26, 2013, 7:30 AM), http://www.huffingtonpost.com/2013/08/26/abortion-clinic-closures_n_3804529.html.

90 Robin Marty, 'Women Will Still Find A Way': A Look Inside Missouri's Last Abortion Clinic, THINK PROGRESS (Jan. 22, 2014, 9:45 AM), <http://thinkprogress.org/health/2014/01/22/3188321/missouri-abortion-clinic-interview/>; Austin Ruse, *Missouri Joins Five States with Only One Abortion Clinic*, BREITBART (Mar. 25, 2014), <http://www.breitbart.com/Big-Government/2014/03/25/Missouri-Joins-Five-States-with-Only-One-Abortion-Clinic>.

91 See, e.g., Tara Culp-Ressler, *Doctors' Group Slams Anti-Abortion Laws for 'Imposing a Political Agenda on Medical Practice'*, THINK PROGRESS (June 10, 2013 2:45 PM), <http://thinkprogress.org/health/2013/06/10/2129831/doctors-group-anti-abortion-political-agenda/> (noting shortage of women's health care providers in states with restrictions); *Targeted Regulation of Abortion Providers (TRAP) Laws: Decreasing Access, Driving Providers Away*, NARAL PRO-CHOICE AM. (Jan. 1, 2015), <http://www.prochoiceamerica.org/media/fact-sheets/abortion-access-trap.pdf>.

92 *The GOP Takes Its War on Women to the States*, *supra* note 77.

93 See *Planned Parenthood of Wisconsin v. Van Hollen*, 963 F. Supp. 2d 858, 866 (2013).

94 *Targeted Regulation of Abortion Providers (TRAP)*, *supra* note 78.

licensed as ambulatory surgical centers (ASCs), a designation otherwise reserved for facilities that offer a range of (typically riskier⁹⁵) outpatient surgeries.⁹⁶ In order to obtain licensing, clinics are required to meet various standards. Among these standards are specified sizes of procedure rooms, minimum corridor widths, maximum set distances from a hospital, and transfer agreements with local hospitals.⁹⁷ In addition to these regulations, certain states require that abortions be performed in a hospital after the fetus has reached a specified gestational age (typically at a point during the second trimester).⁹⁸ These restrictions encroach on clinics by requiring burdensome reporting requirements and licensing agreements that permit state inspection at any time,⁹⁹ a feature of unnecessary oversight that can significantly interfere with the quality of care and the privacy and confidentiality of the physician-patient relationship.¹⁰⁰

In addition to regulations governing clinics, TRAP laws also impose unnecessary and burdensome requirements on the abortion providers, intruding significantly into providers' ability to practice medicine and effectively discouraging health care professionals from becoming or remaining abortion providers.¹⁰¹ Restrictions on providers take various forms. In thirteen states, as of December 2014, abortion providers are required to have some affiliation with a local hospital, with four states requiring that providers have hospital privileges and nine permitting an alternative agreement.¹⁰² Thirty-nine states require medication abortions to be performed by a licensed physician, with eleven states "bann[ing] the use of telemedicine . . . by requiring the physician to be present" in the room.¹⁰³ Four states require that medication providers follow outdated FDA protocols from 2000.¹⁰⁴ Additionally, thirty-nine states require abortions be performed by a physician and eighteen states "require the involvement of a second physician after a specified point in the pregnancy."¹⁰⁵

As legal and medical experts have argued, there is no basis to require admitting privileges or transfer agreements in the case of an emergency when local

95 See *supra* text accompanying notes 82–85.

96 *Targeted Regulation of Abortion Providers (TRAP)*, *supra* note 78. Twenty-two states require such onerous standards. *State Policies in Brief: Targeted Regulation of Abortion Providers*, GUTTMACHER INST., http://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf (last updated Aug. 1, 2015).

97 *State Policies in Brief: Targeted Regulation of Abortion Providers*, *supra* note 95.

98 *State Laws Regulating Reproductive Rights*, *supra* note 21.

99 *Targeted Regulation of Abortion Providers: Avoiding the "TRAP"*, CTR. FOR REPROD. RTS. 2 (Aug. 2003), http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bp_avoidingthetrap.pdf.

100 See Carole Joffe, *The Hidden Costs of Abortion Restrictions*, RH REALITY CHECK (Oct. 15, 2014, 12:57 PM), <http://rhrealitycheck.org/article/2014/10/15/hidden-costs-abortion-restrictions/>.

101 See *Targeted Regulation of Abortion Providers: Avoiding the "TRAP"*, *supra* note 98, at 1.

102 *State Policies in Brief: Targeted Regulation of Abortion Providers*, *supra* note 95.

103 *State Laws Regulating Reproductive Rights*, *supra* note 21.

104 *Id.*

105 *Id.*

emergency rooms are already required to take patients in dire medical conditions.¹⁰⁶ It is also an uncharacteristic regulation of the medical and pharmaceutical professions to require providers and prescribers to follow outdated protocols when new uses and dosages for drugs are prescribed and updated throughout the profession with great regularity.¹⁰⁷

ii. Laws Criminalizing Substance Abuse by Pregnant Women

A recent report, co-authored by Lynn Paltrow and Jeanette Flavin, documented hundreds of incidents of arrests of pregnant women.¹⁰⁸ This troubling trend stayed largely out of the public eye¹⁰⁹ until the publication of the report. The subsequent media coverage¹¹⁰ was followed by messaging campaigns over the next few years.

Most of these cases have arisen through clever prosecutorial charges out of the enforcement of statutes not originally designed to apply to pregnant women.¹¹¹ However, attempts to pass personhood legislation in various states—that is, constitutional amendments that recognize the life of a fetus as a person under the law with the intended effect of holding anyone (including mothers) criminally liable for harm to the fetus—would enshrine these despicable prosecutorial maneuvers in the law once and for all.¹¹² Fortunately, these bills have been unsuccessful thus far,¹¹³ but they certainly represent a sign of additional legislation that is sure to come.

¹⁰⁶ *ACOG and AMA File Amicus Brief in Planned Parenthood v. Abbott*, AM. CONGRESS OBSTETRICIANS & GYNECOLOGISTS (Dec. 20, 2013), http://www.acog.org/About_ACOG/News_Room/News_Releases/2013/ACOG_and_AMA_File_Amicus_Brief.

¹⁰⁷ Jessica Mason Pieklo, *Lawsuit: Oklahoma's Medication Abortion Restriction Is Unconstitutional*, RH REALITY CHECK (Oct. 1, 2014, 11:45 AM), <http://rhrealitycheck.org/article/2014/10/01/lawsuit-oklahomas-medication-abortion-restriction-unconstitutional/>; Jessica Mason Pieklo, *Medical Groups File Brief with Ninth Circuit Against Arizona Medication Abortion Restrictions*, RH REALITY CHECK (Apr. 24, 2014, 2:27 PM), <http://rhrealitycheck.org/article/2014/04/24/medical-groups-file-brief-ninth-circuit-arizona-medication-abortion-restrictions/>.

¹⁰⁸ Paltrow & Flavin, *supra* note 12.

¹⁰⁹ *But cf. Punishing Women for Their Behavior During Pregnancy*, CTR. FOR REPROD. RTS. (Sept. 2000), http://reproductiverights.org/sites/default/files/documents/pub_bp_punishingwomen.pdf (describing the attention paid to this trend within the judicial system).

¹¹⁰ *E.g.*, Lynn M. Paltrow & Jeanette Flavin, *Opinion, Pregnant, and No Civil Rights*, N.Y. TIMES (Nov. 7, 2014), <http://www.nytimes.com/2014/11/08/opinion/pregnant-and-no-civil-rights.html>.

¹¹¹ *See* Cynthia Dailard & Elizabeth Nash, *State Responses to Substance Abuse Among Pregnant Women*, GUTTMACHER POL'Y REV., Dec. 2000, at 3.

¹¹² *See* Lynn M. Paltrow, *Roe v. Wade and the New Jane Crow: Reproductive Rights in the Age of Mass Incarceration*, 103 AM. J. PUB. HEALTH 17 (2013).

¹¹³ *E.g.*, Laura Bassett, *Colorado and North Dakota Voters Reject Fetal Personhood Measures*, HUFFINGTON POST (Nov. 5, 2014, 8:59 AM), http://www.huffingtonpost.com/2014/11/04/personhood-colorado_n_6104120.html.

Recently, Tennessee earned the unenviable distinction of being the first state to pass a bill criminalizing drug use by pregnant women.¹¹⁴ Representative and specialty medical associations, including the American Academy of Pediatrics, the American Public Health Association, the AMA, and the ACOG, among many others, opposed this with near uniformity and for a variety of reasons.¹¹⁵ In July 2014, Mallory Loyola was the first woman arrested under the new law.¹¹⁶

The Tennessee law, passed in April 2014, is likely rooted in the hysteria surrounding the myth of “crack babies.” The term “crack babies” refers to infants who are born suffering from drug dependency as a result of the mother’s use of those drugs during pregnancy. In the 1980s and 1990s, when drug use and increased policing and criminalization of drug users grew exponentially, news outlets printed news pieces documenting a troubling phenomenon of babies who were being born with symptoms of addiction.¹¹⁷ Unfortunately, these reports were circulated before the long-term effects of the drugs on the babies had been studied and measured. As it turned out, there were no significant long-term effects causally connected to the ingestion of drugs by the fetus while in utero.¹¹⁸ A decades-long study debunking the myth of the crack baby has since been published, with high profile news outlets reporting on the new state of medical knowledge in this area.¹¹⁹ Regrettably, the misinformation persists.¹²⁰

¹¹⁴ E.g., Rebecca Terrell, *Tennessee 1st State to Criminalize Pregnancy Outcomes*, HEALTHY & FREE TENN. (Apr. 29, 2014, 4:10 PM), http://healthyandfreetn.org/news/tennessee_criminalizes_pregnancy_outcomes; cf. *Alabama’s War on Women: New Ruling Criminalizes Pregnancy, Threatens to Prosecute Women Who Have Abortions*, PUBLICHEALTHWATCH (Apr. 24, 2014), <http://publichealthwatch.wordpress.com/2014/04/24/alabamas-war-on-women-new-ruling-criminalizes-pregnancy-threatens-to-prosecute-women-who-have-abortions/> (explaining how Alabama’s similar policy went into effect through judicial ruling).

¹¹⁵ E.g., Press Release, Am. Civil Liberties Union, *Tenn. Governor Singles Out Pregnant Women for Discrimination* (Apr. 29, 2014), <https://www.aclu.org/news/tenn-governor-singles-out-pregnant-women-discrimination>.

¹¹⁶ Nina Liss-Schultz, *First Woman Arrested Under Tennessee Pregnancy Criminalization Law, for a Drug Not Covered Under the Law*, RH REALITY CHECK (July 10, 2014, 4:36 PM), <http://rhrealitycheck.org/article/2014/07/10/first-woman-arrested-tennessee-pregnancy-criminalization-law-drug-covered-law/>.

¹¹⁷ E.g., Clay Dillow, *How Science Got the ‘Crack Baby’ Epidemic So Wrong*, POPULAR SCI. (May 20, 2013), <http://www.popsci.com/science/article/2013-05/crack-baby-epidemic-never-happened>.

¹¹⁸ *Id.* Although there are psychological impacts measured in attachment studies, it is unclear whether these are tied to the ingestion of drugs by the fetus or by the household dynamic into which the child is born. Diana Kronstadt, *Complex Developmental Issues of Prenatal Drug Exposure*, FUTURE CHILD., Spring 1991, at 36.

¹¹⁹ E.g., Susan FitzGerald, *‘Crack Baby’ Study Ends with Unexpected but Clear Result*, PHILA. INQUIRER (July 22, 2013), http://articles.philly.com/2013-07-22/news/40709969_1_hallam-hurt-so-called-crack-babies-funded-study.

¹²⁰ The persistence is like that of the singular, flaw-ridden study that linked vaccinations of children to autism. Compare Nathan Seppa, *Journal Retracts Flawed Study Linking MMR Vaccine and Autism*, SCI. NEWS (Feb. 3, 2010, 4:27 PM), <https://www.sciencenews.org/blog/deleted->

Although Tennessee is the first state to impose criminal punishment for women convicted of using drugs while pregnant, eighteen other states characterize drug use during pregnancy as a form of child abuse under child welfare statutes, enabling that information to be used in state custody proceedings, and three states allow for the civil commitment of pregnant women who are discovered to have used illicit substances during pregnancy.¹²¹

These laws harm women and the fetuses that they seek to carry to term. In policy statements and amicus curiae, opposition by several medical groups and associations characterizes the laws as detrimental for several reasons.¹²² First and foremost, the laws interfere with addiction treatment programs that utilize methadone or other controlled substances to wean addicted mothers off potentially more harmful drugs.¹²³ Additionally, the laws create a conflict of interest for the doctor, who is forced into a choice between whether to prioritize the treatment of the woman as patient or the fetus.¹²⁴ This potentially deters women from seeking addiction therapies, prompting women to take one of two alternative and inferior routes: attempt to self-help and experience withdrawal symptoms that could cause worse harm to the fetus, or continue the use of drugs and drug-seeking behaviors that are likely detrimental to the health of the mother and the fetus.¹²⁵ The laws also disrupt the trust that is integral to a healthy physician-patient relationship¹²⁶ and heap unfair suspicion on any woman who miscarries or experiences a stillbirth. Furthermore, the prevailing consensus among medical groups is that certain aspects of incarceration can be dangerous for pregnant women.¹²⁷

scenes/journal-retracts-flawed-study-linking-mmr-vaccine-and-autism (explaining that the sole study linking vaccines with autism has since been retracted), *with Immunization: MMR Vaccine & Autism*, AM. ACAD. PEDIATRICS, <http://www2.aap.org/immunization/families/mmr.html> (last updated Apr. 29, 2014) (warning that the MMR vaccine has been linked to autism).

121 See *Pregnant, Drug-Using Women, & State Child Welfare Policies*, NAT'L ADVOC. FOR PREGNANT WOMEN (Mar. 21, 2014), http://advocatesforpregnantwomen.org/issues/in_the_states/pregnant_drugusing_women_state_child_welfare_policies.php.

122 E.g., Brief for the Southern Poverty Law Center et al. as Amicus Curiae Supporting Petitioner, *In re State of Alabama v. Amanda Helaine Kimbrough*, No. 11-10219, at 2-3 (Ala. Mar. 2012).

123 Women who are already enrolled in treatment have an affirmative defense to the law however. *Tennessee Pregnancy Criminalization Law (SB 1391)*, RH REALITY CHECK, <http://data.rhrealitycheck.org/law/tennessee-pregnancy-criminalization-law-sb-1391/> (last updated Oct. 1, 2014).

124 See Kylie Alexandra, *The Criminalization of Pregnant Women and the Illusion of Maternal-Fetal Conflict*, 8 HOHONU 39, 41 (2010).

125 Lauren Kirchner, *The Dangers of Criminalizing Pregnancy Outcomes*, PAC. STANDARD (May 13, 2014), <http://www.psmag.com/navigation/politics-and-law/dangers-criminalizing-pregnancy-outcomes-81289/>.

126 Culp-Ressler, *supra* note 90 (noting shortage of women's health care providers in states with restrictions).

127 See Audrey Quinn, Opinion, *In Labor, in Chains*, N.Y. TIMES (July 26, 2014), <http://www.nyti>

iii. Fetal Pain Abortion Bans

Even though only 12.5% of women obtain abortions after the twelfth week and only 1.5% of women obtain abortions after twenty weeks,¹²⁸ a surge in new kinds of restrictions has occurred since 2010 when Nebraska passed an abortion ban at twenty weeks on the basis of the ability of the fetus to feel pain at this point in gestation.¹²⁹ The law mirrored model legislation crafted by the National Right to Life Committee.¹³⁰ As of 2015, nineteen states had enacted pre-viability abortion bans; nine of these states have done so on the premise that the fetus has developed the necessary biological structures to experience pain.¹³¹ Citing these neurological pathways and the use of fetal sedation procedures for later-term abortions, legislators in these nine states claim fetal pain as the medical and scientific basis for the bills.¹³² Yet, even certain religious advocates who oppose abortion recognize the unstable footing of the laws.¹³³

Although *Casey* permits regulations that serve the State's interest in protecting potential life so long as they do not have the purpose or effect of imposing an undue burden on women's protected liberty interest in obtaining abortions,¹³⁴ the framework of *Roe* is still good law that forbids any complete bans on abortions pre-viability.¹³⁵ Since viability is a characteristic that varies depending on a number of factors (including sex and birth weight),¹³⁶ and most measures

mes.com/2014/07/27/opinion/sunday/the-outrageous-shackling-of-pregnant-inmates.html; *Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females*, AM. CONG. OBSTETRICIANS & GYNECOLOGISTS 3 (Nov. 2011), <http://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co511.pdf>; Briefing Paper, Am. Civil Liberties Union, *The Shackling of Pregnant Women and Girls in U.S. Prisons, Jails, and Youth Detention Centers* (Oct. 12, 2012), https://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf.

128 Eric Eckholm, *Several States Forbid Abortion After 20 Weeks*, N.Y. TIMES (June 26, 2011), <http://www.nytimes.com/2011/06/27/us/27abortion.html>.

129 *Abortion Bans at 20 Weeks: A Dangerous Restriction for Women*, NARAL PRO-CHOICE AM. 1 (Jan. 1, 2014), <http://www.prochoiceamerica.org/media/fact-sheets/abortion-bans-at-20-weeks.pdf>.

130 See Pema Levy, *Can the Myth of Fetal Pain Topple Roe v. Wade*, NEWSWEEK (Nov. 11, 2013, 3:53 PM), <http://www.newsweek.com/can-myth-fetal-pain-topple-roe-v-wade-3077>.

131 See *State Policies in Brief: State Policies on Later Abortions*, GUTTMACHER INST., http://guttma-cher.org/statecenter/spibs/spib_PLTA.pdf (last updated Oct. 1, 2015).

132 *A History of Key Abortion Rulings of the U.S. Supreme Court: Fetal Pain Laws*, PEW RES. CTR (Jan. 16, 2013), <http://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/#fetal>.

133 See Katelyn Beaty, Editorial, *The Problem with the Fetal Pain Abortion Bans*, CHRISTIANITY TODAY (Jan. 8, 2014), <http://www.christianitytoday.com/ct/2014/january-february/problem-with-fetal-pain-abortion-bans.html>.

134 See I. Glenn Cohen, Opinion, *The Flawed Basis Behind Fetal-Pain Abortion Laws*, WASH. POST (Aug. 1, 2012), http://www.washingtonpost.com/opinions/the-flawed-basis-behind-fetal-pain-abortion-laws/2012/08/01/gJQASow8PX_story.html.

135 See, e.g., *State Laws Regulating Reproductive Rights*, *supra* note 21.

136 I. Glenn Cohen & Sadath Sayeed, *Fetal Pain, Abortion, Viability, and the Constitution*, 39 J.L. MED. & ETHICS 235, 236 (2011); Lisa M. Corrigan, *Fetal Anomalies, Undue Burdens, and 20-Week*

indicate (and medical experts assert) that the likelihood of viability before twenty-four weeks is significantly diminished, the bans are likely unconstitutional without a valid scientific basis that demonstrates the necessity of the regulation in protecting the health of the woman or fetus.¹³⁷

Comprehensive studies and an exhaustive review of such studies published in the *Journal of the American Medical Association* in 2005 established that fetuses do not feel pain at twenty weeks.¹³⁸ Although the neural circuitry required for experiencing pain begins to develop at around twenty-three weeks of gestation, “the pathways are not functional and cannot transmit the noxious stimuli to the brain before 29 or 30 weeks.”¹³⁹ The science has not changed in the past decade.¹⁴⁰ Experts explain that the fetus is suspended in a continuous sleep/coma-like unconscious sedation through the end of the second trimester.¹⁴¹ Furthermore, although supporters of these bans point to automatic, reflexive responses of fetuses that occur in reaction to an amniocentesis needle or other stimulation, these reflexes are not indicators of pain or of a conscious experience of pain.¹⁴² The use of anesthesia by providers of second-trimester abortions serves the purpose of sedating the fetus so that it moves less, with an additional effect of mitigating any

Abortion Bans, SCI. PROGRESS (May 23, 2013), <http://scienceprogress.org/2013/05/fetal-anomalies-undue-burdens-and-20-week-abortion-bans/>.

¹³⁷ See, e.g., Bernice Bird, *Fetal Personhood Laws as Limits to Maternal Personhood at Any Stage of Pregnancy: Balancing Fetal and Maternal Interests at Post-Viability Among Fetal Pain and Fetal Homicide Laws*, 25 HASTINGS WOMEN’S L.J. 39, 41 (2014); *Countering Misinformation: A Discussion of “Viability”*, ANSIRH, <http://ansirh.org/research/late-abortion/countering-misinformation/viability.php> [https://web.archive.org/web/20150916182333/http://www.ansirh.org/research/late-abortion/countering-misinformation/viability.php].

¹³⁸ Susan J. Lee, Henry J. Peter Ralston, Eleanor A. Drey, John Colin. Partridge, & Mark A. Rosen, *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AM. MED. ASS’N. 947 (2005).

¹³⁹ Corrigan, *supra* note 70.

¹⁴⁰ Liz Halloran & Julie Rovner, *High Court’s Pass on ‘Fetal Pain’ Abortion Case Unlikely to Cool Debate*, NPR (Jan. 13, 2014, 4:40 PM), <http://www.npr.org/blogs/itsallpolitics/2014/01/13/262178284/high-court-wont-hear-fetal-pain-abortion-case-as-debate-rages>.

¹⁴¹ Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 23 (2012); Michelle Goldberg, *The Uncertain Science of Fetal Pain*, DAILY BEAST (June 19, 2013, 4:45 AM), <http://www.thedailybeast.com/witw/articles/2013/06/19/the-uncertain-science-of-fetal-pain.html>.

¹⁴² John A. Robertson, *Fetal Pain Laws: Scientific and Constitutional Controversy*, HARV. L. SCH.: BILL OF HEALTH (June 26, 2013), <http://blogs.law.harvard.edu/billofhealth/2013/06/26/fetal-pain-laws-scientific-and-constitutional-controversy/>.

painful sensory experiences that may exist.¹⁴³ As a result of the scientific consensus on the subject, these laws are opposed by the ACOG.¹⁴⁴

Regardless of the date of publication and the scientific consensus on the matter, proponents of these bans do not hesitate to use quotations excerpted from researchers who study pain and fetal development to the dismay and astonishment of those very researchers.¹⁴⁵ Unfortunately since there are still one or two “medical experts” who are willing to testify before legislatures and courts,¹⁴⁶ an illusion of scientific uncertainty could be interpreted to exist.¹⁴⁷

Federal judges have struck down these fetal pain abortion bans in Idaho¹⁴⁸ and Arizona;¹⁴⁹ similarly, a Georgia state court enjoined the State from enforcing such a ban.¹⁵⁰ A district court judge in Idaho similarly struck down such a provision, determining that it constituted a substantial obstacle and imposed an undue burden on women seeking abortions.¹⁵¹ A Ninth Circuit panel of judges permanently struck down the Arizona law on the grounds that any pre-viability bans were unconstitutional under *Roe v. Wade*.¹⁵² None of the three opinions utilized rational basis review to strike down the law in question, declining the opportunity to hold that the law had no real effect on the interest and purpose of the legislation as a result of the medical claims being false and unsubstantiated.

143 Pam Belluck, *Complex Science at Issue in Politics of Fetal Pain*, N.Y. TIMES (Sept. 16, 2013), <http://www.nytimes.com/2013/09/17/health/complex-science-at-issue-in-politics-of-fetal-pain.html>; Cohen, *supra* note 133.

144 Statement, Am. Cong. Of Obstetricians & Gynecologists, ACOG Statement on HR 3803 (June 18, 2012), <http://www.acog.org/~media/Departments/Government%20Relations%20and%20Outreach/20120618DCAborStmnt.pdf>.

145 *E.g.*, Belluck, *supra* note 142; Tara Culp-Ressler, *Scientists Studying ‘Fetal Pain’ Don’t Actually Want Their Research Used to Justify Abortion Bans*, THINK PROGRESS (Sept. 17, 2013, 11:46 AM), <http://thinkprogress.org/health/2013/09/17/2633271/scientists-fetal-pain/>; Jill Filipovic, *No, Science Doesn’t Back 20-Week ‘Fetal Pain’ Abortion Bans*, TPM (Sept. 20, 2013, 1:26 PM), <http://talkingpointsmemo.com/cafe/science-doesn-t-back-fetal-pain-justification-for-20-week-abortion-bans>.

146 Jodi Jacobson, *Trent Franks, Abortion Bans, and the Fetal Pain Lie*, RH REALITY CHECK (June 13, 2013, 11:35 AM), <http://rhrealitycheck.org/article/2013/06/13/trent-franks-abortion-bans-and-the-fetal-pain-lie/>.

147 Coutts & Resnick, *supra* note 66.

148 *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128 (D. Idaho 2013), *aff’d sub nom. McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015).

149 *Isacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013).

150 *Lathrop v. Deal*, No. 2012-cv-224423 (Ga. Super. Ct. Dec. 21, 2012) (order granting interlocutory injunction). Currently the parties are waiting for argument to be scheduled on a motion for summary judgment. *Recent Abortion Ban Litigation*, CTR. FOR REPROD. RTS., <http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Previability-Litigation-With-Chart-for-Sept-20-week-ban%20vote.pdf> (last updated Sept. 16, 2015).

151 *McCormack*, 900 F. Supp. 2d at 1150.

152 *Isacson*, 716 F.3d at 1217.

The Supreme Court declined the opportunity to review the Ninth Circuit's ruling, leaving decisions in the hands of the federal courts, for now.¹⁵³ Unfortunately, some states will not even face challenges to these laws since those states do not have providers who conduct abortions in the second trimester, and constitutional litigation requires legal standing and a claim of harm to the filing party.¹⁵⁴ Supporters of these bans, however, continue to propose legislation modeled after the Pain-Capable Unborn Children Act drafted by the NRLC and passed by the United States House of Representatives.¹⁵⁵ Anti-choice proponents of these measures base their hopes on the precedent set by *Gonzales v. Carhart*, in which the Supreme Court upheld a federal abortion ban¹⁵⁶ just years after striking a similar state provision down¹⁵⁷ and after federal courts had acted similarly to strike down the Partial Birth Abortion Ban Act of 2003 in the years between.¹⁵⁸ A Supreme Court ruling upholding fetal pain abortion bans would overrule the framework set up in *Roe*.

These bills are not only problematic because they are based on junk science but also because eighteen- to twenty-week gestational age is the time period when a range of fetal abnormalities can be detected for the first time.¹⁵⁹ Additional burdensome restrictions impeding speedy access to abortion services and imposing excessive stress and costs could create a situation where women find themselves in a race against the clock to obtain an abortion before running into a valid constitutional ban beginning at twenty-four weeks or soon thereafter. These laws are troublesome for additional reasons.¹⁶⁰ They impact women who wish to

153 *Horne v. Isaacson*, 134 S. Ct. 905 (2014); Tara Culp-Ressler, *Supreme Court Prevents Arizona from Enforcing Its 20-Week Abortion Ban*, THINK PROGRESS (Jan. 13, 2014, 10:16 AM), <http://thinkprogress.org/health/2014/01/13/3153241/supreme-court-arizona-abortion-ban/>.

154 Halloran & Rovner, *supra* note 139.

155 *E.g.*, Pain-Capable Unborn Child Protection Act, H.R. 1797, 113th Cong. (2013) (as passed by the House, June 18, 2013) (as referred to the S. Comm. On the Judiciary, June 19, 2013).

156 550 U.S. 124, 124 (2007).

157 *Sternberg v. Carhart*, 530 U.S. 914, 914 (2000).

158 *E.g.*, *Planned Parenthood Fed'n of Am., Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006); *Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278 (2d Cir. 2006); *see also* Cynthia Dailard, *Courts Strike 'Partial-Birth' Abortion Ban; Decisions Presage Future Debates*, GUTTMACHER INST. (Oct. 2004), <http://guttmacher.org/pubs/tgr/07/4/gro70401.pdf>.

159 DARIO PALADINI & PAOLO VOLPE, *ULTRASOUND OF CONGENITAL FETAL ANOMALIES* 20 (2nd ed. 2014); Filipovic, *supra* note 144; Darshak Sanghavi, *Who Has an Abortion After 20 Weeks?*, SLATE (July 11, 2013, 5:06 PM), http://www.slate.com/articles/health_and_science/medical_examiner/2013/07/te_xas_abortion_ban_after_20_weeks_prenatal_testing_reveals_birth_defects.html.

160 Kavita Shah Arora, *Fetal Pain Legislation*, 16 *AMA J. ETHICS* 818 (2014) (describing the logical and ethical problems with the laws).

carry their children to term but experience complications in pregnancy,¹⁶¹ and they normalize false ideas and perpetuate misinformation. Doctors have reported having conversations with patients that were extremely uncommon a decade ago and attribute this change to increased misinformation among laypersons.¹⁶² Furthermore, the framing of abortion procedures carried out after the twenty-week mark primarily as an issue of fetal pain both changes the nature of the conversation away from women's liberty interests and also likely benefits the anti-choice messaging tactics. These arguments typically achieve greater success in gaining public support for restrictions on abortions, where the discussion revolves around fetuses instead of embryos.¹⁶³

iv. Informed Consent Laws

The concept of informed consent emerged in twentieth century tort law¹⁶⁴ and was rooted in the American principle of enabling and promoting decisional autonomy.¹⁶⁵ The purpose of informed consent in the medical context is for health care providers to disclose—amongst other things—“the substantial risks and hazards inherent in the proposed...procedures.”¹⁶⁶ Though certain exceptions to informed consent exist, including patient waiver and emergency treatment,¹⁶⁷ an expectation of informed consent is the standard imposed by the law.¹⁶⁸ In modern law, most states have protected this expectation statutorily, imposing civil liability for damages on doctors who fail to adhere to legal requirements and professional standards.¹⁶⁹ Such statutes apply evenly to health care practitioners of any specialty, requiring them to disclose to the patient any risks associated with specific treatment options.¹⁷⁰ Moreover, gross neglect in meeting these standards

161 Mary Wisniewski, “Fetal pain” Anti-Abortion Laws Spur Fierce Debate, REUTERS (Apr. 6, 2011, 5:28 PM), <http://www.reuters.com/article/2011/04/06/us-abortion-pain-idUSTRE73572820110406>.

162 Halloran & Rovner, *supra* note 139.

163 Kathy Lohr, *Reframing the Abortion Debate: Focus on Fetus*, NPR (June 30, 2010, 4:34 PM), <http://www.npr.org/templates/story/story.php?storyId=128212951>; Katie McDonough, *Fetal Pain is a Lie: How Phony Science Took Over the Abortion Debate*, POPULAR SCI. (Aug. 7, 2013), <http://popsci.com/science/article/2013-08/fetal-pain-lie-how-phony-science-took-over-abortion-debate>.

164 Vandewalker, *supra* note 140, at 4.

165 Rachel Benson Gold & Elizabeth Nash, *State Abortion Counseling Policies and the Fundamental Principles of Informed Consent*, GUTTMACHER POL'Y REV., Fall 2007, at 6, 7.

166 Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 111, 112 (2008).

167 Vandewalker, *supra* note 140, at 5.

168 Cf. *Timeline of Laws Related to the Protection of Human Subjects*, NAT'L INST. HEALTH (June 2002), http://history.nih.gov/about/timelines_laws_human.html.

169 E.g., K. KAUFMAN, THE ABORTION RESOURCE HANDBOOK 22 (1997).

170 Tobin, *supra* note 165, at 112.

of the profession can lead to other penalties imposed by medical boards and associations, including being stripped of one's medical license.¹⁷¹

Nevertheless, as with other instances of abortion exceptionalism, additional informed consent laws specific to reproductive health care have proliferated.¹⁷² Appallingly, these laws mandate that doctors provide not the risks that the medical profession believes to be associated with abortion procedures but instead state-sanctioned counseling that includes: 1) inaccurate and misleading information that is scientifically unsubstantiated; 2) irrelevant material that is graphic in nature; and 3) alternative options for treatment other than those that the patient is seeking.

Abortion-specific informed consent laws are some of the most popular and problematic restrictions limiting women's ability to access abortion services. Although such restrictions have been around since the 1980s,¹⁷³ the enactment of these provisions increased dramatically after the decisions handed down in *Casey* and *Gonzales*, respectively, upheld a mandatory counseling requirement and implied both: 1) that any perception (misconstrued, overstated, or otherwise) of scientific uncertainty regarding the safety of procedures warranted paternalistic government oversight in the name of public health; and 2) that the weight of decisions to abort would or could have lasting effects on the psychological health of mothers.

Notably, in the *Casey* decision overruling *Thornburgh v. American College of Obstetricians & Gynecologists*,¹⁷⁴ Justice O'Connor's language in the majority opinion required that all informed consent disclosures be "truthful and not misleading."¹⁷⁵ Fifteen years later, Justice Kennedy's opinion in *Gonzales* upheld the Partial Birth Abortion Ban Act, while conceding that the Court could "find no reliable data to measure the phenomenon" that women would come to regret the procedure¹⁷⁶ and reasoning that *Casey* reaffirmed that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman. A central premise of the opinion was that the Court's precedents after *Roe* had 'undervalue[d] the State's interest in potential life.'¹⁷⁷

These rulings emboldened state legislatures to pass abortion-specific informed consent laws, many under the title of Women's Right to Know Act,¹⁷⁸

¹⁷¹ GEORGE D. POZGAR, *LEGAL ASPECTS OF HEALTH CARE ADMINISTRATION* 362 (2016).

¹⁷² LR Rockett, *Legal Issues Affecting Confidentiality and Informed Consent in Reproductive Health*, 55 J. AM. MED. WOMEN'S ASSOC. 257, 257 (2000); Vandewalker, *supra* note 140, at 3.

¹⁷³ Chinué Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, GUTTMACHER POL'Y REV., Fall 2006, at 6, 9.

¹⁷⁴ 476 U.S. 477 (1986).

¹⁷⁵ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 882 (1992).

¹⁷⁶ *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

¹⁷⁷ *Id.* at 157 (citing *Casey*, 505 U.S. at 873) (alteration in original).

¹⁷⁸ *E.g.*, *Women's Right to Know Act*, AM. UNITED FOR LIFE (2012), <http://www.aul.org/wp-content/uploads/2012/04/model-womens-right-to-know.pdf>; see also ELLIE LEE, *ABORTION*,

mandating disclosure of specific, State-determined information that the State deemed germane to the procedure. Often, states also impose a mandatory waiting period¹⁷⁹ for the woman to consider the information she receives in mandatory counseling, indicating, without any empirical basis to support the presumption,¹⁸⁰ that the woman needs this additional time to consider this information thoroughly in order to determine her next steps.¹⁸¹

A fact sheet published by the Guttmacher Institute reported that, as of January 2016, “[thirty-eight] states require that women receive counseling before an abortion is performed” and “[twenty-seven] of these states detail the information a woman must be given.”¹⁸² This same report detailed the specific requirements imposed by each state.¹⁸³ Remarkably, in drafting, proposing, and enacting this legislation, the states failed to enlist or depend on the testimony of medical practitioners and experts.¹⁸⁴ In her analysis of the flawed fact-finding process employed by state legislatures surrounding reproductive health legislation, Caitlin Borgmann analyzed the South Dakota Task Force.¹⁸⁵ Her research demonstrated that the task force failed to seek out and take into account the opinions and testimony of medical experts and drew conclusions about the effect of abortions on mental health care based on the testimony of an unrepresentative sample size of women.¹⁸⁶ Borgmann notes that even the pro-life committeewoman who chaired the Task Force voted against its ultimate recommendations.¹⁸⁷

There are various types of informed consent provisions that are based on junk science. Disconcertingly, these laws mandate that doctors counsel patients about risks that do not exist. These provisions¹⁸⁸ require doctors to advise women

MOTHERHOOD, AND MENTAL HEALTH: MEDICALIZING REPRODUCTION IN THE UNITED STATES AND GREAT BRITAIN 130 (2003).

179 Vandewalker, *supra* note 140, at 31–33; see also *State Policies in Brief: Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., http://guttmacher.org/statecenter/spibs/spib_MWPA.pdf (last updated Jan. 1, 2016).

180 *Biased Counseling Against Abortion*, AM. CIV. LIBERTIES UNION (Apr. 11, 2001), <https://www.aclu.org/reproductive-freedom/biased-counseling-against-abortion>.

181 Vandewalker, *supra* note 140, at 13. See generally Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL’Y 223 (2009) (noting that the Supreme Court has upheld abortion-specific waiting periods as ensuring patients’ informed consent).

182 *State Policies in Brief: Counseling and Waiting Periods for Abortion*, *supra* note 178.

183 See *id.* at 2–3.

184 In fact, at times states do not even consult their own records. See Becca Aaronson, *In State Records, Little Evidence to Back Abortion Law*, TEX. TRIB. (Sept. 15, 2013), <http://texastribune.org/2013/09/15/records-offer-little-evidence-back-new-abortion-la/>.

185 Borgmann, *supra* note, 2 at 28–29, 29 n.66.

186 See *id.* at 37–43.

187 *Id.* at 43.

188 See generally Michael Mechanic, *Are You Sure You Want An Abortion (Interactive Map)*, MOTHER JONES (Jan./Feb. 2011), <http://www.motherjones.com/politics/2011/01/state-abortion-laws-map> (summarizing restrictive state abortion provisions).

of four inaccuracies: 1) a link between abortion and breast cancer;¹⁸⁹ 2) a link between abortion and depression or decreased quality of mental health (sometimes referred to as “post-abortion syndrome”);¹⁹⁰ 3) a link between abortion and subsequent infertility;¹⁹¹ and 4) the likelihood of fetal pain.¹⁹² The purported link between abortion and breast cancer has been widely discredited,¹⁹³ as has the causal relationship between abortion and depression (studies suggest that the best indicator of mental health post-abortion is the mental health of the woman before the procedure).¹⁹⁴ There are no data that demonstrate a link between first-trimester abortions and subsequent fertility problems.¹⁹⁵ Although some evidence indicates that later-term abortions result in slightly decreased fertility,¹⁹⁶ advances in the safety of second- and third-trimester abortion procedures have drastically decreased this effect.¹⁹⁷ Counseling regarding fetal pain is also not grounded in any legitimate medical knowledge, as described and discussed in the previous section.¹⁹⁸ These various counseling requirements are at best misleading and at worst untruthful and should therefore fail under the standard established in *Casey*.

The other two forms of abortion-specific informed consent provisions are those that are graphic¹⁹⁹ and irrelevant in nature—requiring mandatory ultrasounds and the description of the gestational age and fetal development of the fetus—and those that require delivery of additional information relaying the opinions of the State²⁰⁰ and the existence of alternative options²⁰¹ that, through

189 Joyce Arthur, *How Deeply Flawed Studies on Abortion and Breast Cancer Became Anti-Choice Fodder*, RH REALITY CHECK (Jan. 9, 2014, 9:51 AM), <http://rhrefactycheck.org/article/2014/01/09/how-deeply-flawed-studies-on-abortion-and-breast-cancer-become-anti-choice-fodder/>.

190 Coutts & Resnick, *supra* note 66.

191 Vandewalker, *supra* note 140, at 14–17.

192 *See supra* Part III.C.

193 Michael Mechanic, *Susan G. Komen Causes Cancer (and Other Pro-Life Myths)*, MOTHER JONES (Jan. 20, 2011, 8:02 AM), <http://www.motherjones.com/blue-marble/2011/01/abortion-cancer-k>

omen-informed-consent.

194 Vandewalker, *supra* note 140, at 16–17.

195 *Id.* at 14.

196 *Id.*; *What to Expect with Medical and Surgical Abortion*, U. CHI., <https://abguide.uchicago.edu>

[/page/what-expect-medication-and-surgical-abortion](https://abguide.uchicago.edu/page/what-expect-medication-and-surgical-abortion) (last visited Oct. 5, 2015).

197 *What to Expect with Medical and Surgical Abortion*, *supra* note 195.

198 Vandewalker, *supra* note 140, at Part II.C.

199 *Id.* at 20.

200 *Id.* at 19–20; *see also Certification of Voluntary and Informed Consent: Abortion Instructions and Informed Consent Form*, KAN. DEP’T. HEALTH & ENV’T, http://www.kansaswomansrighttoknow.org/download/Certification_of_Informed_Consent_English.pdf (last visited Oct. 5, 2015) (describing Kansas’s legal requirement to describe a baby as a “whole, separately unique, human living being”).

201 Gold & Nash, *supra* note 164.

funding, facilitate birth of the fetus and, later, child and health care.²⁰² Although these provisions are not based on junk science, an understanding of the purpose of informed consent illustrates why use of these laws and “informational manipulation”²⁰³ are inappropriate ways to convey the State’s respect for life.²⁰⁴

Leading medical organizations oppose these abortion-specific informed consent provisions, asserting that they are often factually inaccurate or irrelevant and interfere with doctors’ abilities to use medical discretion.²⁰⁵ These restrictions also drive up the costs for women in two ways: 1) requiring unnecessary ultrasounds and increasing the time doctors must spend with patients, adding additional operating expenses;²⁰⁶ and 2) imposing mandatory delays or requirements that mandate counseling at non abortion-providing facilities requiring women to take additional time off work and to incur the costs associated with public or private transportation for additional trips to obtain an abortion.²⁰⁷ The informed consent regulations also perpetuate misinformation among women and voters.²⁰⁸

202 Within informed consent counseling regarding childbirth, however, there is no requirement to mention the various risks associated with childbirth. For a description of some of the dangers see Valerie Tarico, *How America’s Obsession with ‘Bad Birth Control’ Harms Women*, RH REALITY CHECK (Nov. 14, 2014, 9:56 AM), <http://rhrealitycheck.org/article/2014/11/14/americas-obsession-bad-birth-control-harms-women/>.

203 Gold & Nash, *supra* note 164; see also Vandewalker, *supra* note 140, at 38 n. 205; Jennifer Y. Seo, *Raising the Standard of Abortion Informed Consent: Lessons to be Learned from the Ethical and Legal Requirements for Consent to Medical Experimentation*, 21 COLUM. J. GENDER & L. 357 (2011).

204 See Vandewalker, *supra* note 140, at 10, 51. *But see* Nadia N. Sawicki, *The Abortion Informed Consent Debate: More Light, Less Heat*, 21 CORNELL J. L. & PUB. POL’Y 1 (2011).

205 *Leading Medical Groups Oppose Obstacles to Abortion*, *supra* note 23; see also *Talking Points on State Legislation*, AM. CONGRESS OBSTETRICIANS & GYNECOLOGISTS, <http://www.acog.org/~media/>

Departments/LARC/TalkingPointsonUltrasoundMandates.pdf?dmc=1&ts=20130709T0142491575 (last visited Oct. 5, 2015); Testimony Submitted for the Record by Hal C. Lawrence, Exec. Vice President & CEO, Am. Cong. of Obstetricians and Gynecologists, to the U.S. Senate Comm. on the Judiciary, Hearing on S.1696, *The Women’s Health Protection Act* (July 15, 2014), <http://www.acog.org/~media/Departments/Government-Relations-and-Outreach/20140715S1696Ttestimony.pdf>.

206 *Forced-Ultrasound Legislation is an Egregious Intrusion into Medical Care*, NARAL PRO-CHOICE AM. (Jan. 1, 2015), <http://www.prochoiceamerica.org/media/fact-sheets/abortion-mandatory-ultrasound.pdf>.

207 Boonstra & Nash, *supra* note 86; see also Vandewalker, *supra* note 140, at 32–33.

208 See *Policy Statements*, ASS’N REPROD. HEALTH PROF., <http://www.arhp.org/about-us/position-statements> (last updated June 30, 2012).

III. IMPLICATIONS FOR EVOLVING HEALTH CARE TECHNOLOGIES AND CAPABILITIES

“[L]aw and order exist for the purpose of establishing justice and . . . when they fail in this purpose they become the dangerously structured dams that block the flow of social progress.” – Martin Luther King, Jr.²⁰⁹

There are many frightening implications of state and federal legislatures’ poor understanding and unscrupulous use of science for recent and potential advancements in various areas related to women’s reproductive health.²¹⁰ Most evident and most looming is the threat of increased restrictions that have no rational basis in protecting women’s or fetal health, let alone the sufficient tailoring required to meet an important “liberty” or “privacy” interest protected by the Constitution, and that serve only to further hamper access to reproductive health services.

Advancements in assisted reproductive technologies,²¹¹ genetic and developmental testing in utero, and embryological and stem cell research abound.²¹² Increased connectivity and the ability to use robotic surgical instruments that can be operated from a distance are reshaping the way that public health innovators are thinking about increasing access to health care in rural areas.²¹³ Telemedicine²¹⁴ in this and other forms is becoming a reality and will likely soon be the source of numerous legislative regulations and restrictions.²¹⁵ Furthermore, developments in contraceptive health care, such as automatic

²⁰⁹ Martin Luther King, Jr., Letter from Birmingham Jail (Apr. 16, 1963), reprinted in 26 U.C. DAVIS L. REV. 835, 842 (1993).

²¹⁰ See Hutton Brown, Miriam Dent, L. Mark Dyer, Cherie Fuzzell, Anita Gifford, Sam Griffin, A.G. Kasselberg, Jayne Workman, & Melina L. Cooper, *Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597 (1986).

²¹¹ See *Resolve’s Policy on “Personhood” Legislation*, RESOLVE, <http://resolve.org/about/personhood-legislation.html> (last updated Apr. 2012).

²¹² John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327 (2011).

²¹³ See, e.g., Heather Slawson, Note, *Telemedicine: The Affordable Care Act’s Forgotten Frontier of Rural Health Care*, 19 HOLY CROSS J.L. & PUB. POL’Y 193 (2015).

²¹⁴ Telemedicine is defined as “the use of electronic communication and information technologies to provide or support clinical care at a distance with the goal of improving a patient’s health.” *Id.* at 194–198; see also *What is Telemedicine?*, AM. TELEMEDICINE ASS’N, <http://americantelem.org/about-telemedicine/what-is-telemedicine#.VKBFpADB> (last visited Oct. 5, 2015).

²¹⁵ See generally Daniel J. Gilman, *Physician Licensure and Telemedicine: Some Competitive Issues Raised by the Prospect of Practicing Globally while Regulating Locally*, 14 J. HEALTH CARE L. & POL’Y 87 (2011) (explaining the issues inherent to telemedicine law that make it ripe for legislative action and evaluating these issues); B. Jesse Hill, *Legislative Restrictions on Abortion*, 14 AMA J. ETHICS 133 (2012) (explaining some of the implications of legislative restrictions on telemedicine, including how it may impact abortion services).

delivery and medicinal abortion²¹⁶ that pose no danger to women's health, are expanding legal questions of insurance coverage, public funding, and prescription or over-the-counter drug availability.

Imagine, first, for instance, the existence of an automated-delivery hormonal IUD device that can sense the presence of sperm or female hormones produced during sex and releases a medicine that targets sperm and eggs before fertilization can occur. Second, imagine a rural town with only one physician's assistant (PA), but the PA is part of a network of rural health care providers who are part of a medical partnership consisting of licensed physicians who are trained abortion providers. The PA should be able to examine the female patient, share her electronic medical records with her supervising physician, and obtain a prescription for Mifeprostone for the patient without requiring the physician to ever be present or have contact with the patient. Indulge once more and imagine a third scenario in which a hypothetical third and fourth pregnant woman hoping to carry their babies to term are seeking prenatal health services. This third woman finds out, due to advancements in genomic and disease²¹⁷ mapping, that her fetus has developed significant impairments late-term that will create pain and misery for the future child and his or her family in addition to levying extensive costs associated with providing care for such a child or person. The fourth pregnant woman is a recovering addict who is enrolled in a new addiction treatment program that utilizes supervised doses of a controlled drug to manage withdrawal and monitor the health of the mother and the fetus. The hypotheticals presented by the third and fourth women described above are already realities; the others soon could be.

Although these technological developments should be regarded as promising for expanding access to and improving the quality of reproductive and prenatal health care, the trend in regulating the sphere of women's reproductive health with excessive and exceptional restrictions that do not rationally relate to any substantiated medical interest is cause for concern. Advancements in telemedicine that could reliably bring higher-quality health care to rural areas may be hampered merely because those advancements serve the specific area of reproductive health.

216 See generally, Heather D. Boonstra, *Medication Abortion Restrictions Burden Women and Providers—and Threaten U.S. Trend Toward Very Early Abortion*, GUTTMACHER POL'Y REV., Winter 2013, at 18 (explaining the procedures involved with a medical abortion).

217 The term "diseasome" refers to the study of the intersection between disease and genetics. See generally Kwang-Il Goh & In-Geol Choi, *Exploring the Human Diseasome: the Human Disease Network*, 11 BRIEFINGS IN FUNCTIONAL GENOMICS 533 (2012), <http://bfg.oxfordjournals.org/content/11/6/533> (describing the network of human genes and their interaction with various proteins as the "diseasome").

IV. PROPOSED SOLUTIONS

“[B]etween a balanced republic and a democracy, the difference is like that between order and chaos.” – Chief Justice John Marshall²¹⁸

Parts I through III have established the troubling trend of legislatures’ misuse of science to craft laws limiting women’s access to reproductive health services, outlined the ways in which these restrictions impact women and health care providers, and recognized the disturbing implications of permitting the propagation of such legislation. This Part will propose solutions to this emerging and worsening trend.

A. *Recommended Level of Deference in Court’s Treatment of Legislative Fact-Finding*

Noting the incoherent standard by which federal courts decide to defer to legislative fact-finding, several legal scholars have taken up the issue²¹⁹—differentiating between the nature of various types of facts,²²⁰ assessing relevant political principles and constitutional doctrines,²²¹ and evaluating the respective abilities of government branches to find facts²²²—in order to propose workable and rights-protecting theories of deference. Several of these scholars have examined legislative fact-finding and subsequent treatment of these facts by the courts in the context of laws restricting access to abortion.

²¹⁸ JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON* 467 (Robert Faulkner & Paul Carrese eds., spec. ed. for schools, Liberty Fund, Inc. 2000) (1838).

²¹⁹ See, e.g., DAVID L. FAIGMAN, *CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS* 129–33 (2008).

²²⁰ DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 45–51 (1977); William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, Part I.B (2013); John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69 (2008).

²²¹ See Eric Berger, *Deference Determinations and Stealth Constitutional Decision-making*, 98 IOWA L. REV. 465, 465 (2013) (“[C]ourts should examine the actual behavior and processes of the relevant governmental institution before deciding whether deference is appropriate.”); Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision-making*, 88 WASH. U. L. REV. 1 (2010) (arguing that the varying degree of deference among courts in context of the Eighth Amendment leads to careless and opaque decision-making); Borgmann, *supra* note 2 (addressing the Supreme Court’s declining standard of review in major abortion cases); David L. Faigman, Ashutosh A. Bhagwat, & Kathryn M. Davis, *Amicus Brief of Constitutional Law Professors David L. Faigman and Ashutosh A. Bhagwat, et al. in the Case of Gonzales v. Carhart*, 34 HASTINGS CONST. L.Q. 69 (2006) (urging the Supreme Court to find facts independently of legislatures in determining fundamental rights); Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575 (2013) (suggesting the abandonment of the tiered approach to scrutiny in order to avoid the strategic subversion of fundamental rights by legislatures).

²²² Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1172–77 (2007) (book review).

Notable among these analyses is the work of Caitlin Borgmann, who explains,

Justice and truth are pillars of the good society, and the courts play a vital role in ensuring both. The courts' primary responsibility is for the norms of justice, but implementing justice depends upon factual truth. Laws founded upon untruths subvert justice. Thus, when courts address laws that implicate individual rights like the right to abortion, they must ensure that these laws are based on a sound factual foundation.²²³

Borgmann argues that the Supreme Court only began applying a new standard of giving a great degree of deference to legislative fact-finding in the second *Carhart* case, *Gonzales v. Carhart*,²²⁴ and that this deference departed from the Court's typical skepticism toward provisions challenged on grounds involving individual rights, which ordinarily receive heightened scrutiny.²²⁵

Borgmann proposes a theory of deference in which the courts conduct "selective independent judicial review of social facts . . . of all legislation that curtails important individual rights protected by the federal Constitution."²²⁶ Similarly, Daniel Faigman calls for a theory of deference to facts that mirrors the skepticism associated with presumptions of constitutionality in tiers of review.²²⁷ Closer to Borgmann's proposal is William Araiza's conclusion that courts should defer in review of rights-enhancing legislation and conduct independent fact-finding when assessing constitutional challenges to rights-limiting legislation.²²⁸

Fact-finding by the legislature plays an important role in determining whether there is an issue that creates a policy interest for the State and in determining what sort of restrictions would work best to achieve the legislature's goals. If courts merely accept the stated interest as having a valid basis in social fact and determine sufficiency of tailoring by whether a regulation unnecessarily restricts unobjectionable activities and not by whether the proposed fix is sensibly related to the purported goal, then they are not taking any account of the legislative fact-finding process.²²⁹

Two prominent justifications exist for courts' deference to legislative fact-finding. The first justification is the judiciary's respect for the legislating power

²²³ Borgmann, *supra* note 2, at 15.

²²⁴ *Id.* at 17; 550 U.S. 124 (2007).

²²⁵ See Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 50 (2009).

²²⁶ *Id.* at 3.

²²⁷ See FAIGMAN, *supra* note 218.

²²⁸ See Araiza, *supra* note 219.

²²⁹ See Lauren Paulk, *What is an "Undue Burden?" The Casey Standard as Applied to Informed Consent Provisions*, 20 UCLA WOMEN'S L.J. 71, 103-05 (2013) (explaining the problematic judicial treatment of the Undue Burden standard in *Lakey*).

ascribed to Congress by the Constitution and the separation of powers.²³⁰ The second basis is that the legislature has an inherently superior ability to find facts as a result of its ability to convene committee hearings, call for testimony, and contribute substantial amounts of time to these processes.²³¹ The work of these judicial-deference scholars rebuts these presumptions, acknowledging, respectively, the courts' role as a counter-majoritarian check on democracy and the pressures that reelection, executive influence, and partisan politics have on the cognitive judgments of legislators and on legislative committees.²³² Unlike elected legislators, federal judges are appointed to life terms and insulated from the political pressures of party affiliation and accountability to voters, and are therefore less likely to be biased in fact-finding processes.²³³

Borgmann describes the particular superiority of ability that federal trial courts possess in amassing an unbiased and legitimate factual record, noting that the adversarial process brings all relevant facts to light, that the Federal Rules of Evidence prevent inflammatory and irrelevant hearsay from being considered, and that the "reactive nature of the trial courts frees them from a slavish devotion to a pre-set political agenda" in that the role of trial courts is "not to establish or revisit precedent, but to apply it."²³⁴ Furthermore, the trial process has various features "designed to optimize fairness," including the absence of bias in the number of witnesses that can be called and the court's ability to seek information and expert opinion outside of those brought before it.²³⁵ Additionally, when trial courts collect and review evidence, the same person who considers all of the information is the one making the decision. In legislatures, on the other hand, the committees that collect and distribute information cannot be sure whether elected officials will thoroughly read and examine it.²³⁶

Trial courts are already tasked with finding historical and adjudicative facts. In various circumstances, though, social facts are often dispositive in the evaluation of a statute's constitutionality. These instances include the existence of a harm meriting legislative intervention; the rationality of the proposed policy to achieve the legislature's purported goal; and the law's over-inclusion of unobjectionable, unrelated, or constitutionally-protected behaviors.

230 Borgmann, *supra* note 224, at 16–18.

231 *Id.* at 18–21.

232 *Id.* at 35–46; see also Jessica Mason Pieklo, *Why We May See Different Outcomes in the Wisconsin and Alabama TRAP Trials*, RH REALITY CHECK (June 11, 2014, 10:23 AM), <http://rhrealitycheck.org/article/2014/06/11/may-see-different-outcomes-wisconsin-alabama-trap-trials/> (citing Judge Posner's 7th circuit opinion upholding federal trial court's decision to strike down Wisconsin TRAP laws in which he makes the case for court-appointed medical experts).

233 See, e.g., Borgmann, *supra* note 224, at 6 n.28, 35–46.

234 *Id.* at 41.

235 *Id.* at 43–44.

236 *Id.* at 42–43.

Recognizing both the frequency with which state restrictions are challenged in and enjoined by federal courts and the various examples of state legislatures' inadequacies at evaluating social facts of a scientific nature,²³⁷ federal trial courts should engage in independent fact-finding when evaluating the constitutionality of laws that are rights-restricting, and federal appellate courts should consider and afford appropriate deference to the factual record amassed by the trial courts rather than to the one created by the legislature. Such a policy would promote two ends. First, it would ensure that restrictions passed in the name of public health have legitimate medical bases, thereby preventing bad science from being enshrined in the law by virtue of *stare decisis*.²³⁸ Second, it would set a standard of fact-finding that enables a clearer application of the undue burden standard by forcing courts to consider the purpose of the legislation and the contributing social factors that affect whether women are unduly burdened by reproductive health restrictions (i.e. whether the burden imposed is sufficiently counterbalanced by a legitimate, constitutional furtherance of State interests). Both of these effects of adhering to this proposed model of deference would appropriately fit the language of *Casey* that required any analysis of restrictions on abortion "to give some real substance to the woman's liberty."²³⁹

B. *Right to Medical Decision Making*

Apart from changing the standard of deference given to the legislative fact-finding process, there are other potential avenues for addressing the problem of legislatures misusing science to regulate women's ability to access adequate reproductive health care. The first and most protective option would be for courts to recognize implicit rights to (or for states to enshrine within their constitutions an explicit right to) medical decision-making. Such a right would be attractive to individuals across the political spectrum (recall "death panels"), would be based on the societal interests of autonomy²⁴⁰ and the right to contract, and could be reasonably based on any constitutional provision articulating liberty, self-determination, or privacy.²⁴¹ This right would guarantee non-interference with health care beyond regulations imposed for malpractice, informed consent, and by national medical boards,²⁴² and would be in accordance with the UN Universal

²³⁷ See *supra* Part II.

²³⁸ Borgmann, *supra* note 2, at 55.

²³⁹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 869 (1992).

²⁴⁰ See generally ERIN NELSON, LAW, POLICY, AND REPRODUCTIVE AUTONOMY 11-31 (2013) (explaining the importance of autonomy politically, philosophically, and historically).

²⁴¹ See Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy*, 16 WM. & MARY J. WOMEN & L. 291, 305-307 (2010).

²⁴² Cf. Hill, *supra* note 17, at 502 (arguing that abortions should be treated like any other medical procedure and that the right to make medical decisions should be a negative right instead of a positive right).

Declaration of Human Rights that provides a similar right and to which this country is a signatory.²⁴³

C. *Advocacy and Engagement of Media and the Populace*

Thus far, the recommended solutions for this problem of legislatures' misuse of science have focused on the first of two checks on the legislature: the court's power of judicial review. Educating the citizens who elect the legislature provides a second, democratic check. Research in political economics and sociology demonstrates that indicators of effectiveness sway voters in election determinations.²⁴⁴ Therefore, increased attention by the media to this troubling trend and more effective messaging by advocacy organizations can play a role in preventing harmful legislation from going into effect²⁴⁵ and holding legislators accountable.

One emerging campaign trying to do just this is the increasing use of the hashtag #sciencenotstigma on Twitter and other social networks to address misuse of science in various areas of the law, but specifically to challenge the "crack babies" myth and the criminalization of pregnant women who use drugs or seek rehabilitative services.²⁴⁶ This campaign, started by National Advocates for Pregnant Women, has taken off on social media and been used to promote various ends. Other reproductive health organizations have established projects with similar goals: 1) the "False Witness" reports by RH Reality Check²⁴⁷ document instances of misuse of science by politicians and advocates by profiling individuals who testify on the validity of unsubstantiated medical claims in support of anti-choice legislation; and 2) the "1 in 3" Let's Talk About Abortion Campaign facilitates conversations about abortion in order to destigmatize the procedure by sharing the stories of everyday women, thereby educating the public with statistics

243 G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

244 E.g., Gerard Padró i Miquel & James M. Snyder, Jr., *Legislative Effectiveness and Legislative Careers*, 31 LEGIS. STUD. Q. 347, 372 (2006) ("[S]uperior effectiveness yields electoral benefits for legislators in the form of higher reelection rates and higher probabilities of being unchallenged."); see also Shigeo Hirano & James M. Snyder Jr., *Primary Elections and the Quality of Elected Officials*, 9 Q.J. POL. SCI. 473 (2014).

245 For a good example of this type of advocacy, see Loren Siegel, *Reproductive Justice: A Communications Overview*, OPPORTUNITY AGENDA (Sept. 10, 2010), http://opportunityagenda.org/file_s/field_file/2010.09.10ReproductiveJustice-CommunicationsOverview.pdf.

246 E.g., *The New Moral Panic Over Drug-Dependent Babies*, NAT'L ADVOC. FOR PREGNANT WOMEN (June 24, 2014), http://advocatesforpregnantwomen.org/featured/the_new_moral_panic_over_drug_dependent_babies.php.

247 *False Witnesses*, RH REALITY CHECK, <http://rhrealitycheck.org/false-witnesses/> (last visited Oct. 5, 2015).

demonstrating the widespread use of the procedure and providing a national network of support for women.²⁴⁸

The pro-choice movement's failure to effectively engage the public and to engage the media in recent decades is a facet of this problem that cannot be ignored. A "we won" mentality fostered apathy among supporters of abortion rights for decades and allowed creeping regulations to dismantle these rights and women's access to health care. Moreover, for decades the reproductive rights movement failed to encompass the intersectional concerns of all women and has permitted privilege to corrupt the social movement. Increased attempts to form and maintain intersectional alliances will embolden the effort to realize the protection of the rights of those of all socioeconomic classes, those in prison, and those of various backgrounds.²⁴⁹ This is the essence of a true reproductive justice framework.²⁵⁰

D. Other

Other options for solutions include building on cases that apply a proper, elevated undue burden standard,²⁵¹ encouraging the passage of legislation that leads to the adoption of merit selection systems for state judicial appointments,²⁵² and the passage of the Women's Health Protection Act by the US Congress.²⁵³

²⁴⁸ Advocates for Youth, *1 in 3 Campaign*, <http://www.1in3campaign.org/en/> (last visited Oct. 5, 2015).

²⁴⁹ See *Moving in a New Direction: A Proactive State Policy Resource for Promoting Reproductive Health, Rights, and Justice*, CTR. FOR REPRODUC. RTS. (Dec. 22, 2014), <http://reproductiverights.org/sites/crr.civicactions.net/files/documents/US-PAPS-Compendium-final-SM.pdf>.

²⁵⁰ Loretta Ross, *What is Reproductive Justice*, PRO-CHOICE EDUC. PROJECT, <http://www.protectchoice.org/section.php?id=28> (last visited Oct. 5, 2015).

²⁵¹ See Emma Freeman, *Giving Casey Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARV. C.R.-C.L. L. REV. 279, Part III (2013); Paulk, *supra* note 228, at 109; Caitlin E. Borgmann, *In Abortion Litigation it's the Facts that Matter*, 127 HARV. L. REV. F. 149 (Feb. 6, 2014), <http://harvardlawreview.org/2014/02/in-abortion-litigation-its-the-facts-that-matter/>.

²⁵² See generally Dawn Johnsen, *State Court Protection of Reproductive Rights: The Past, the Perils, and the Promise*, 29 COLUM. J. GENDER & L. 41, 45-46 (explaining that anti-abortion activists have been pushing for direct elections of state judges instead of merit selection systems); Alicia Bannon, Eric Velasco, Linda Casey, & Lianna Reagan, *The New Politics of Judicial Elections 2011-12: How New Waves of Special Interest Spending Raised the Stakes for Fair Courts*, BRENNAN CTR. FOR JUST. 27-37 (Oct. 2013), <http://www.brennancenter.org/sites/default/files/publications/New%20Politics%20of%20Judicial%20Elections%202012.pdf> (describing merit selection systems and the problems states' are having with implementing such systems effectively); Joanna Shepherd & Michael S. Kang, *Skewed Justice: Citizens United, Television Advertising, and State Supreme Court Justices' Decisions in Criminal Cases*, AM. CONST. SOC'Y (2014), <http://skewedjustice.org/> (tracing the money that has flooded into state judicial elections in the wake of the *Citizens United* decision).

²⁵³ *E.g.*, Women's Health Protection Act of 2013, S. 1696, 113th Cong. (2013).

CONCLUSION

“Truth never lost ground by enquiry.” – William Penn²⁵⁴

This Note has examined the misuse of junk science by state legislators in regulating women’s reproductive health. Documenting several different forms that such provisions take—including TRAP laws, the criminalization of substance abuse by pregnant women, fetal pain abortion bans, and informed consent laws—and the opposition to such laws by leading medical organizations, along with their impact on women and physicians, this Note has also analyzed the developments in federal legal doctrine that shaped the current state of the law and both permitted and prompted the passage of anti-choice legislation. In order to illustrate further the troubling nature of this legislative trend, this paper also briefly analyzed the potential implications of permitting scientifically-challenged legislators to continue to regulate future medical technologies, treatment methodologies, and pharmaceutical developments.

This worsening trend diminishes access to reproductive health care, drives up costs of abortion services, and impinges on the medical discretion of physicians and the physician-patient relationship. With hundreds of pieces of state legislation passed in the last few years alone, it is unlikely that either the poor maternal and infant health figures or the low quality of prenatal care documented by the WHO and the National Institutes of Health will improve.²⁵⁵

Noting that the source of this problem is the oversight and misuse of science in the legislative fact-finding process and courts’ subsequent deference to this process when laws are challenged, this Note primarily recommends that courts decrease their deference to legislative fact-finding in rights-limiting legislation, in accordance with the courts’ position as a fact-finder and counter-majoritarian check on democracy, along with a variety of other potential solutions. Other recommendations include finding that state and federal constitutions implicitly protect a right to medical decision-making as an aspect of due process liberty, increasing the accuracy of reporting on failures in legislative competence, and implementing more effective messaging about the increasing efforts to restrict women’s rights to reproductive health care of their choice. Each of these measures will contribute to protecting the integrity of science and justice, while assuring women’s access to necessary and constitutionally-protected medical care.

254 WILLIAM PENN, SOME FRUITS OF SOLITUDE 141 (Headley Bros. 1905) (1682).

255 See Press Release, Ctr. for Reprod. Rights, New Report Debunks Politicians’ Disingenuous Claims about Protecting Women’s Health and Safety in Passing Abortion Restrictions (Oct. 1, 2014), <http://reproductiverights.org/en/press-room/new-report-debunks-politicians-claims-about-protecting-womens-health-safety-with-abortion-restrictions>.