40th Anniversary of Roe v. Wade:
Reflections Past, Present and Future

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"The issue of abortion is one of the most contentious and controversial in contemporary American society."

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I. INTRODUCTION

On January 22, 1973, the Supreme Court of the United States issued its opinion in Roe v. Wade,2 and held that a woman has a fundamental right

under the United States Constitution to decide whether to end her pregnancy.3 The Roe opinion has generated scores of articles, given rise to major political movements, become the touchstone for debates about the role of the Supreme Court in American society and questions of stare decisis, and has provided a lightning rod for deciding who is qualified to sit as a federal judge.4

Although the Supreme Court’s ruling surprised some,5 others foresaw the opinion given the history of the Court’s treatment of both the Due Process Clause of the Fourteenth Amendment, and an implied “right to privacy” in family matters.6 Whatever the legal ramifications of Roe v. Wade, it changed women’s lives.7 Women are changed in ways that the United States Supreme Court did not articulate or expect when abortion became legal, widespread, and on demand.8 Because studies have shown that abortion hurts women, state legislatures have enacted laws in an effort to protect women and minors until Roe is overturned.9

This Article addresses the historical developments leading to the Roe decision, reviews the cases that continue to challenge the Court’s holding in Roe, and makes recommendations to protect women and minors as long as Roe remains in effect. Part II reflects the historical legal foundations that

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3. Id. at 153-54 (concluding that while the abortion decision is included in “the right of personal privacy” it is not unqualified).
5. Laurence H. Tribe, Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 HARV. L. REV. 1, 2 (1973) (stating the Court carried substantive due process “to lengths few observers had expected”).
6. See NORMAN REEDER, JOHN ATTANASIO, & JOEL K. GOLDSTEIN, UNDERSTANDING CONSTITUTIONAL LAW 219 (3d ed. 1999) (tracing the development of the liberty interest and stating that Roe was critical to the Court’s modern substantive due process jurisprudence). See generally Randy Beck, Fueling Controversy, 95 MARQ. L. REV. 735, 735 (2012) (critiquing the Greenhouse & Siegel analysis and its lack of emphasis on the Roe decision itself and suggesting the Court should have taken a minimalist approach); Lolita Buckner Inniss, Bridging the Great Divide – A Response to Linda Greenhouse and Reva B. Siegel’s Before (and after) Roe v. Wade: New Questions about Backlash, 89 WASH. U. L. REV. 963, 963 (2012) (commenting on the Greenhouse & Siegel article but suggesting factors are implicated in the politics of abortion and how they to social, political, and cultural conflicts both before and after Roe); Linda Greenhouse & Reva B. Siegel, Before (and after) Roe v. Wade: New Questions about Backlash, 120 YALE L.J. 2028, 2028 (2011) (discussing how the abortion conflict started a decade before Roe).
7. See generally MICHAELLE FREEDMUND, CHANGED MAKING SENSE OF YOUR OWN OR A LOVED ONE’S ABORTION EXPERIENCE 13 (2008) (recounting women’s abortion experiences and stating “although each story is unique, a common thread moves through them all — abortion changes you.”).
protected life and the shift in emphasis to a liberty interest that lead to the Roe decision. Part III analyzes the factual and legal background of Roe v. Wade and its companion case of Doe v. Bolton, reveals their basis in lies and deception, and exposes that the Supreme Court's underlying assumptions that are now proven to be incorrect. Part IV assesses how the states have protected women and minors within the constitutional boundaries of Roe and its progeny. Part V provides recommendations for greater protection of women and minors. Part VI concludes that Roe is no longer valid and should be overturned.

II. PAST REFLECTIONS: THE GENESIS—SUPREME COURT CASES AND ANALYSES LEADING TO ROE V. WADE

A. A Foundation Based on Life

Natural law has had a significant impact on the American belief system and law. Sir William Blackstone, famous for his Commentaries on the Laws of England, which included numerous references to natural law, also had a great influence on American law. This influence is particularly strong in the Declaration of Independence, which established the concept that man was endowed by his Creator with certain inalienable rights, including the right to life. This was the view of natural law from which so many of our civil and criminal laws emanated. Likewise, the belief that life is precious, sacred, and inviolable is derived from natural law.

10. See infra Part II.
12. See infra Part II.
13. See infra Part IV.
14. See infra Part V.
15. See infra Part VI.
17. Rick Brainard, William Blackstone and His Contributions to American Law, 18TH CENTURY HISTORY, http://www.history1700s.com/index.php/articles/22-regions/53-william-blackstone-and-his-contributions-to-american-law.html (last visited Jan. 1, 2014) (stating that Blackstone was the 18th century jurist who wrote a four-volume work known as the Commentaries on the Laws of England, which 'had a substantial influence in American law.') For example, “American and British colleges used his commentaries for years after his death in 1780.” Id. Additionally, the founders were influenced by him in writing the Declaration of Independence and the Constitution, and the Supreme Court and lower courts cited his work in cases such as the landmark case of Marbury v. Madison. Id (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803)); see also Sir William Blackstone, BLACKSTONE LEGAL FELLOWSHIP, http://www.blackstonelegalfellowship.org/About/Blackstone (last visited Oct. 14, 2013) ("Blackstone's influence on American law was pervasive and profound.").
18. See supra note 17 and accompanying text.
19. For example, the biblical passages were the basis of laws pertaining to murder (Exodus 20:13), adultery (Exodus 20:14), property (Exodus 20:15, 17), and marriage (Genesis 2:24). See, e.g.,
In the Declaration of Independence, the Congress of the thirteen states unanimously proclaimed on July 4, 1776 that: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." [21] The right to life was the first right mentioned, and the others could only be enjoyed if the first was protected. [22]

Nowhere in the United States Constitution is there an expressly stated right to abortion. [23] In fact, laws expressly forbidding abortion began to appear in the 1820s in the United States. [24] Most abortions were forbidden in the United States by 1900. [25] Interestingly, some of the early female reformers, such as Susan B. Anthony, opposed abortion. [26]


20. Based on Scripture, "Christian writers from the first-century author of the Didache to Pope John Paul II in his encyclical Evangelium Vitae ("The Gospel of Life") have maintained that the Bible forbids abortion, just as it forbids murder." [Tracts: Abortion, CATHOLIC, http://www.catholic.com/tracts/abortion (last visited Oct. 14, 2013) (providing the historical basis and examples of these consistent writings of the Fathers of the Church)]. The teaching of the church is that "human life is sacred and inviolable." See Pope John Paul II, The Gospel of Life: On the Value and Inviolability of Human Life 121 (1995). Furthermore, "‘In accordance with the precept of the teaching: you shall not kill ... you shall not put a child to death by abortion nor kill it once it is born.’" Id. at 124.


22. Thomas Jefferson surmised that "The God who gave us life gave us liberty at the same time; the hand of force may destroy, but cannot disjoin them." [Thomas Jefferson, A Summary of the Rights of British America (1774), http://www.history.org/almanack/life/politics/sumview.cfm.]

23. The founders envisioned a small federal government with expressly defined powers. "The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite." [The Federalist No. 45 (James Madison)].


25. Id.

26. Id. She blamed men, laws, and the "double standard" for driving women to abortion because they had no other options. See id. She wrote in 1869, "‘When a woman destroys the life of her unborn child, it is a sign that, by education or circumstances, she has been greatly wronged.’" Jane Johnson Lewis, Susan B. Anthony, [http://womenshistory.about.com/od/anthonyresearch/anthony.htm (last visited Jan. 1, 2014)]. She believed that only the achievement of women's equality and freedom would end the need for abortion. Id. Today, there are other options for women in the United States. For example, in forty-nine states and Puerto Rico there are laws to completely relieve the burden of raising "unwanted children" for all women. See Infant Safe Haven Laws, CHILD WELFARE INFORMATION GATEWAY (Feb. 2013), http://www.childwelfare.gov/systemwide/laws_policies/statutes/safehaven.cfm. These laws have been called "Baby Moses" or "safe haven" laws. See id. In 1999, Texas pioneered this legislation and now a woman can simply leave an "unwanted" child at a hospital, clinic, or emergency room within sixty days of birth without questions asked and no threat of criminal prosecution for abandoning the child. See Tex. Fam. Code § 262.302 (West 2013). Women also have other options, such as adoption, and each state has adoption laws. See generally Agency Adoption - An Overview, ADOPTION 101.COM, http://www.adoption101.com/agency_adoption.html (last visited Oct. 20, 2013).
By 1965, all fifty states expressly banned abortion. The states provided for some exceptions, which varied by state. Abortion was only permitted to save the life of the mother, or in cases of rape or incest. Historically, Texas has had statutory provisions against abortion except to save the life of the mother dating back to 1854.

By 1973, however, there was a shift to emphasize the liberty interest over the protection of life. In the landmark case of Roe v. Wade, the Supreme Court established a trimester framework for abortion. In Roe’s companion case, Doe v. Bolton, the Court provided the health exception for abortion, and, in effect, abortion became available upon demand.

B. A Shift in Emphasis to Liberty Interests: The Rise of Substantive Due Process and the Right to Privacy

To better understand Roe v. Wade, it is important to first briefly examine the underpinnings of that decision. As will be discussed below, the Court rested its decision, at least in part, on the Fourteenth Amendment.

1. The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution

The Constitution has two provisions providing for due process of law. The Bill of Rights, consisting of ten amendments, was added to the Constitution in 1791. The Fifth Amendment provides that “No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .” The Fifth Amendment was designed to ensure protections against what some feared would be a strong and uncontrollable national government. The United States Supreme Court has held that the

27. Lewis, Abortion History, supra note 24.
28. Id.
29. Id.
30. See Jacobs v. Theimer, 19 S.W.2d 846, 851 (Tex. 1917) (Pope, J., dissenting and contending Texas had a longstanding rule against abortion which had “stood since 1854”).
31. See generally A History of Key Abortion Rulings of the U.S. Supreme Court, PEW RESEARCH (Jan. 16, 2013), http://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-u-s-supreme-court/.
32. See Roe v. Wade, 410 U.S. at 163.
33. See id. at 219.
34. See infra Part III.C.1-4.
35. See infra notes 38, 43 and accompanying text.
38. Munn v. Illinois, 94 U.S. 113, 124 (1876) (stating the Fifth Amendment was introduced into the Constitution as “a limitation on the powers of the national government”). Historically, the concept of due process originated under English law as part of ancient English liberties that were contained in the Magna Carta, as demonstrated by Chapter 39, which stated: “No free man shall be seized or imprisoned,
provisions in the Bill of Rights indeed act as a limit on the national
government.39

The Fourteenth Amendment was added in 1868, following the Civil
War.40 It was originally designed to insure that state governments did not
deny basic civil rights to freed African-American slaves.41 Section 1
provides:

All persons born or naturalized in the United States, and subject to
the jurisdiction thereof, are citizens of the United States and of the
State wherein they reside. No state shall make or enforce any law
which shall abridge the privileges or immunities of citizens of the
United States, nor shall any State deprive any person of life, liberty,
or property without due process of law; nor deny any person within
its jurisdiction the equal protection of the laws.42

The plain wording of the amendment provides several key protections
for both citizens and non-citizens of the United States against encroachment
by state governments.43 It is now settled law that the term “State” also
applies to any governmental structure within the state.44 Thus, the
Fourteenth Amendment also binds cities, towns, parishes, and county
governments.45 If a person believes that these rights have been violated, he
or she may seek judicial remedies in the form of injunctions, and even
damages.46
American courts have found two different components, or facets, of the Fifth and Fourteenth Amendments' Due Process clauses. First, before the government may deprive a person of life, liberty, or property, it must provide basic "procedural due process." The amount of due process provided—procedurally speaking—depends greatly on the extent of the deprivation. For example, a person denied a driver's license is probably entitled only to the most basic protections—notice and an opportunity to be heard. On the other hand, a defendant facing a lengthy prison sentence is entitled to greater procedural protections—appointment of legal counsel, a full-blown adversarial trial, and appellate rights.

The second facet of due process is referred to as "substantive due process," and scholars debate whether this facet was intended by the original drafters. Therefore, the "history of substantive due process 'counsels caution and restraint.'" Substantive due process focuses on whether there is any rational basis for the government action that has resulted in the deprivation of life, liberty, or property.

As a general rule, substantive due process "protects those fundamental rights and liberties which are deeply rooted in this nation's history and tradition and so implicit in the concept of ordered liberties, such that neither ...."
liberty nor justice would exist if they were sacrificed.” The Supreme Court has been reluctant to expand substantive due process, and, therefore, it is generally limited to fundamental rights such as marriage, family, procreation, and the right to bodily integrity.

A person claiming denial of due process may make both procedural and substantive due process arguments. That is, he or she may claim that the underlying statute or governmental action (which includes judicial and executive decisions) has no rational basis, and that any procedures used to accomplish the deprivation were unfair, inadequate, or nonexistent. The “substantive” due process facet of the Fourteenth Amendment has generated the most controversy.

2. The Economic Substantive Due Process Era: Precursor to Roe?

The early Supreme Court decisions applying substantive due process focused on what some refer to as “economic due process” because these decisions addressed the fairness of state and local laws that attempted to regulate economic matters. Although the Supreme Court initially rejected attempts to find a substantive component of the due process clauses, it first applied these principles in 1897 when it held that Louisiana unconstitutionally prohibited foreign insurance companies from doing business in the state.

Over the next forty years, the Court routinely struck down state economic laws if it believed there was no rational reason for the laws.

55. Peterson, 240 F. Supp. 2d at 1062 (citing Singleton, 176 F.3d at 425).
57. See generally Due Process and Equal Protection, supra note 50.
58. See generally id.
59. NOWAK & ROTUNDA, supra note 48, at 427 (“The Court’s ability to determine the constitutionality of state or federal laws or executive actions under the due process and equal protection clauses, however, is subject to much greater criticism.”).
61. See Murray v. Hoboken Land & Improvement Co., 59 U.S. 272, 279-80 (1855) (rejecting the challenge to federal government’s collection of delinquent taxes and stating that due process is found whenever the government’s procedures are in accordance with law).
63. Id. at 588; see also Roe, 410 U.S. at 173 (Rehnquist, J., dissenting) (“The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to some end which the state may constitutionally seek.”) (citing Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955)).
The Court stated its intention to no longer implement substantive due process in economic matters by judicial review of legislatures' judgments. The Court invalidated laws dealing with such topics as safe working conditions and wages. Critics charged that, by striking down these laws, the Court had, either directly or indirectly, established national economic policy. Needless to say, the decisions raised real concerns about the Court's role in national economic matters.

Following President Franklin Roosevelt's landslide re-election in 1936, he proposed a plan to expand the Supreme Court's membership which would allow him to add six new Justices, thereby gaining a majority on the Court. Although the proposal was not adopted, Justice Owen Roberts changed his position which provided the fifth vote to uphold state economic laws. This has been called "the switch in time that saved nine." Finally, in a series of opinions beginning in 1937, the Court became much more deferential to state economic decisions. It began applying what has become known as the "rational basis" test: if there is any legitimate government reason for the law, and the means used to affect the law are rationally related to that purpose, the Court will find that substantive due process has been satisfied. Since then, the Court has rarely struck

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65. Lochner v. New York, 198 U.S. 45, 53 (1905) (finding the statute interfering with freedom to contract on hours that employee was permitted or required to work). See generally NOWAK & ROTUNDA, supra note 48, at 485-86.

66. Carolene Products, 304 U.S. at 152 ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis." (citing Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935))).

67. Lochner, 198 U.S. at 53 (recognizing that the state had certain police powers relating to safety, health, morals, and general welfare of the public and "the Fourteenth Amendment was not designed to interfere" with those).

68. Compare Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 559 (1923) (holding minimum wage law was unconstitutional) with West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (overruling Adkins and holding minimum wage laws were reasonable).

69. See, e.g., Ray A. Brown, Due Process of Law, Police Power, and the Supreme Court, 40 HARV. L. REV. 943, 944 (1927) (finding it "shocking" that the Supreme Court declared social and economic legislation unconstitutional under the due process clauses of either the Fifth or the Fourteenth Amendments); Thomas Reed Powell, The Judiciality of Minimum Wage Legislation, 37 HARV. L. REV. 545 (1924) (criticizing the Court's position of invalidating minimum wage laws for women and minors).

70. See supra note 70.

71. CHEMERINSKY, supra note 60, at 260.

72. Id. at 261.

73. Id.

74. See, e.g., West Coast Hotel, 300 U.S. at 399 (upholding minimum wage law for women); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) (upholding steel industry regulations and stating the "cardinal principle of statutory construction is to save and not to destroy").

down a federal or state law dealing with fiscal or economic matters. Instead, the Court generally takes a posture of deference, especially to legislative action.

Thus, the Supreme Court repudiated what was called “deviant economic due process cases.” Since these deviant economic due process cases were repudiated, the Court “has steered away from 'laws [concerning] economic problems, business affairs, or social conditions'” It has focused on cases centering on “'matters relating to marriage, procreation, contraception, family relationships, child rearing and education.'”

Justice Black wrote a fitting epitaph to those cases:

We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, “We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.” Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to ‘subject the state to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.”

It is now settled that States “have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.”

The key point is that the Court expressed a willingness to consider challenges to the underlying reasons for federal and state laws. In doing


77. See Rational Basis Test, supra note 75.


80. Id. at 3101 (quoting Paul v. Davis, 424 U.S. 693, 713 (1976)).


82. See Roe, 410 U.S. at 166. This was exemplified by the Court permitting consideration of the reason for a state statute that is supposed to protect a state interest. Id.
so, it took on the role of establishing national policy on matters typically left for legislative—not judicial—action.\textsuperscript{83}

3. Recognizing Fundamental Rights: Another Precursor to Roe?

a. In General

The Supreme Court has recognized that certain civil liberties or rights are so important that they are deemed "fundamental."\textsuperscript{84} The Court defines a "fundamental right" as one that is either explicitly mentioned in the Constitution itself or "is deeply rooted in this Nation’s history and tradition."\textsuperscript{85} Defining a particular right as "fundamental" engenders debate about the extent of the Court’s authority to "find" rights and liberties not expressly stated in the text of the Constitution.\textsuperscript{86}

Historically, most of the rights that are now considered fundamental rights that bind the States through the Fourteenth Amendment were considered natural rights by the founding fathers.\textsuperscript{87} For example, freedom of religion and freedom of assembly and association "were recognized as natural rights before they became constitutional rights."\textsuperscript{88} In the area of family autonomy, the natural affection between parents and their children is recognized as an inherent, natural right that should be protected.\textsuperscript{89}

The question is, to what extent is the Court free to find non-textual support for these un-enumerated fundamental rights? In defining fundamental rights, there is a wide range of views, even within the two main categories of originalism and non-originalism.\textsuperscript{90} Originalists generally believe the Constitution should be interpreted by its text or the framers clear

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item McDonald, 130 S. Ct. at 3031 (reviewing the Court’s definitions of fundamental rights and its application in various amendments in the Bill of Rights); Glucksberg, 521 U.S. at 726, 278 (recognizing that the Due Process Clause protects certain fundamental rights and personal decisions “relating to marriage, procreation, contraception, family relationships, child rearing, and education” but did not include assisted suicide); M.L.B. v. S.L.J., 519 U.S. 102, 119 (1996) (stating parental interest in their relationship with their children is fundamental and protected by the Fourteenth Amendment); Hunted v. California, 110 U.S. 516, 539 (1884) (Heron, J., dissenting) (stating government could not “rightfully impair or destroy, certain guaranties of the rights of life and liberty, and property, which had long been deemed fundamental in Anglo-Saxon institutions”).
\item CHEMERINSKY, supra at 936.
\item 16A AM. JUR. 2d Constitutional Law § 405 (2009).
\item Id.
\item Hawk v. Hawk, 855 S.W.2d 573, 578 (Tenn. 1993) (stating parental rights constitute a “fundamental liberty interest”); A.W. v. Dept of Children & Families, 969 So. 2d 498 (Fla. App. 2007) (finding “the State must demonstrate a compelling interest” through the “least intrusive and restrictive means” before depriving a fundamental right such as the right to parent). See generally 16A AM. JUR. 2d Constitutional Law § 406 (2009).
\item CHEMERINSKY, supra at 936-37.
\end{enumerate}
\end{footnotesize}
intent. Thus, “the Court acts impermissibly and usurps the democratic process if it finds other rights to be fundamental.” On the other hand, non-originalists believe “it is permissible for the Court to protect fundamental rights that are not enumerated in the Constitution or intended by its drafters.”

Generally, the courts have used a two-step approach. First, there must be a careful description of the right. Second, the court must determine whether the right is in the text of the Constitution, or “deeply rooted in this Nation’s history and tradition.”

Whatever the source, once the Court identifies a right as “fundamental,” the government may not infringe upon that right without showing that it has a compelling interest for its actions, and that the means used to regulate the activity are necessary and narrowly tailored to fit the stated purpose. This test, usually referred to as “strict scrutiny,” places a very heavy burden upon the state and, therefore, it is usually fatal to government regulations.

For the purpose of this Article, two areas of fundamental rights analysis are relevant: family, and reproductive autonomy.

b. Protecting Family Autonomy

As noted above, the Supreme Court has recognized a substantive component of the due process clauses. Amid those early decisions focusing on economic matters, the Court also applied this reasoning to other

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92. CHEMERINSKY, supra note 60, at 936-37.
93. Id.
95. Id.
96. See (quoting Moore, 431 U.S. at 503); Williams v. Attorney Gen. of Ala., 378 F.3d 1232 (11th Cir. 2004).
97. See generally 16A AM. JUR. 2d Constitutional Law § 405.
98. Rodriguez, 411 U.S. at 16 (stating the state “must carry a heavy burden of justification”) (quoting Dunn v. Blumstein, 405 U.S. 330, 343 (1972)).
facets of human relationships—in particular, parental autonomy.\textsuperscript{101} The Court stated that the "care, custody, and control of their children" is the oldest fundamental interest recognized by the Court.\textsuperscript{102} In \textit{Meyer v. Nebraska},\textsuperscript{103} the Court, adopting a broad definition of "liberty," held that parents have a fundamental "liberty" interest in deciding how their children will be educated.\textsuperscript{104}

Without doubt, [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.\textsuperscript{105}

The Court has extended this rationale, in a series of decisions, to the following areas:

- The right to marry;\textsuperscript{106}
- The right to custody of one's own children;\textsuperscript{107}
- The right of the family to live together;\textsuperscript{108} and
- The right to control the upbringing of one's children.\textsuperscript{109}

c. Protecting Reproductive Autonomy

When first faced with the issue, the Supreme Court held that a state had the authority to order the sterilization of someone who was considered "feeble-minded."\textsuperscript{110} But in \textit{Skinner v. Oklahoma},\textsuperscript{111} the Court struck down a state law that allowed courts to order sterilization for persons that had been


\textsuperscript{102} Trotell, 530 U.S. at 65 (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

\textsuperscript{103} Id. at 400.

\textsuperscript{104} Id. at 399.

\textsuperscript{105} Id. at 399.


\textsuperscript{108} See Moore, 431 U.S. at 505-06


\textsuperscript{110} See Buck v. Bell, 274 U.S. 200, 205 (1927).

\textsuperscript{111} 316 U.S. 535 (1942).
convicted two or more times for crimes involving moral turpitude.\footnote{112}{Id. at 543.}

Finding that procreation was a fundamental right, the Court stated:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, farreaching [sic] and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to whither and disappear. There is no redemption for the individual whom the law touches . . . . He is forever deprived of a basic liberty.\footnote{113}{Id. at 541. See generally K.S. Krohn, Annotation, \textit{Legality of Voluntary Nontherapeutic Sterilization}, 35 A.L.R.3d 1444 (1971); 1 A.M. JUR. 3d Abortion and Birth Control § 23 (2005).}

Approximately twenty years later, in \textit{Griswold v. Connecticut},\footnote{114}{381 U.S. 479 (1965).} the Court addressed the constitutionality of a state law that barred the sale of contraceptive devices to married couples.\footnote{115}{Id. at 480.} But instead of relying on earlier cases that had identified the decision to procreate as a fundamental right, the Court found a new right, the right to "privacy" \textit{implied} in the Constitution.\footnote{116}{Id. at 484 ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").} Writing for the Court, Justice Douglas alluded to the Court’s activism in deciding economic due process cases, and rejected the argument that this case involved a due process deprivation of liberty.\footnote{117}{See id. at 482.} Instead, he found the right of privacy implicit in other provisions of the Bill of Rights: The First Amendment (free speech), the Third Amendment (freedom from having soldiers boarded in homes), the Fourth Amendment (freedom from unreasonable searches and seizures), and the Fifth Amendment (freedom from self-incrimination).\footnote{118}{Id. at 484.} These protections, he said, "have penumbras, formed by emanations from those guarantees that help give them life and substance."\footnote{119}{Griswold v. Connecticut, 381 U.S. at 484.} In other words, the shadowy areas surrounding those protections demonstrated a right to privacy.\footnote{120}{See id.} Justice Douglas then concluded that the Connecticut law violated a married couple’s privacy right.\footnote{121}{Id. at 486.}
Concurring in the opinion, Justice Goldberg opined that the right violated here was protected under the Ninth Amendment. Justice Harlan also concurred, but argued that the right to privacy was found in the due process clause of the Fourteenth Amendment.

In subsequent cases involving procreation choices, the Court labeled various state laws unconstitutional because they denied contraceptive devices to unmarried persons, or because they made it a crime to sell contraceptive devices to minors. These cases solidified the view that decisions on whether to procreate are protected by the Constitution because they involve a fundamental right.

III. BACKGROUND ON ROE V. WADE AND DOE V. BOLTON

A. Personal Background: The Original Plaintiffs

Every case has a personal story behind the legal facts and issues. So it is in Roe v. Wade and Doe v. Bolton. Norma McCorvey was the “Roe” of Roe v. Wade. Sandra Cano was the “Doe” of Doe v. Bolton. It has only been in recent years that their true stories have been revealed.

In 1970, Norma McCorvey had a hard life. She found herself pregnant and scared, and believed that an abortion would help her. To justify her desire to have an abortion, she claimed that she had been raped; however, that was not the case. No one told her about the physical, emotional, or

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122. Id. at 487 (Goldberg, J., concurring). The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. Const. amend. IX. The argument goes that there are rights that have been considered inviolate by civilized peoples and the fact that they are not explicitly listed in the Constitution or the Bill of Rights does not mean that they do not exist.

123. See Griswold, 381 U.S. at 500 (Harlan, J., concurring).


126. See id. at 685 (stating that among decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education); Eisenstadt, 405 U.S. at 453 (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).

127. See infra note 130.

128. See infra note 137.

129. See infra notes 130 & 137.


131. Id. ("Abortion is a shameful and secret thing. I wanted to justify my desire for an abortion in my own mind, as almost every woman who participates in the killing of her own child must also do. I made up the story that I had been raped to help justify my abortion. Why would I make up a lie to justify my conduct? Abortion itself is a lie and it is based on lies.").
psychological consequences of having an abortion. 132 But by 1973, when the Supreme Court originally decided her case, she had given birth and placed her baby up for adoption. 133 Consequently, Norma never had an abortion, and, thus, like many supporters of abortion, she had no first-hand experience. 134 Subsequently, she worked in several abortion facilities and saw abortion first-hand—the crying women, baby parts, inadequate counseling, lack of informed consent, and the absence of any real doctor-patient relationship. 135 She came to understand what the testimony of post-abortive women confirms, that abortion usually does not help women, but actually hurts them. 136

In 1970, Sandra Cano was also pregnant. 137 She went to an attorney, seeking a divorce and custody of her children. 138 She never wanted an abortion and even fled from Georgia to Oklahoma to avoid an abortion that her attorney had scheduled for her. 139 Thus, like Norma, Sandra never had an abortion. 140 The tragic fact of her original case was that it was based on deception. 141 The tragic result is that Doe v. Bolton established a “health” exception which led to abortion on demand and partial-birth abortion. 142

Thirty-two years later on June 23, 2005, Sandra Cano testified before the Senate Judiciary Committee’s Subcommittee on the Constitution:

Using my name and life, Doe v. Bolton falsely created the health exception that led to abortion on demand and partial birth abortion. How it got there is still pretty much a mystery to me. I only sought legal assistance to get a divorce from my husband and to get my children from foster care. I was very vulnerable: poor and pregnant with my fourth child, but abortion never crossed my mind.

132. Id.
133. Id. (“I gave my baby up for adoption since the baby was born before the legal case was over. I am glad today that that child is alive and that I did not elect to abort.”).
134. Id. (stating she had no actual experience with abortion until she started working in abortion clinics).
135. Hearing, supra note 130.
136. Id. referencing her own and the affidavits of 1,500 post-abortive women, she stated, “The Supreme Court has hurt me and millions of women and children.”.
138. Id.
139. Id.
140. Id.
141. Id. Sandra Cano has testified before a Senate subcommittee about the lies and deception presented to the Supreme Court in Doe. See id. See generally SYBIL FLETCHER LASH, SUPREME DECEPTION (2002).
142. Roe legalized abortion, but only through the second “trimester,” and even then was only unfettered through the first. Roe, 410 U.S. at 163-64. The Court in Doe held that a physician may consider several factors in determining whether an abortion is necessary for the woman’s health, including her emotional, psychological, and familial issues. Doe, 410 U.S. at 192.
Although it apparently was utmost in the mind of the attorney from whom I sought help. At one point during the legal proceedings, it was necessary for me to flee to Oklahoma to avoid the pressure being applied to have the abortion scheduled for me by this same attorney. Please understand even though I have lived what many would consider an unstable life and overcome many devastating circumstances, at NO TIME did I ever have an abortion. I did not seek an abortion nor do I believe in abortion. Yet my name and life is now forever linked with the slaughter of 40-50 million babies.

Thus, the “facts” that gave rise to the cases of Roe v. Wade and Doe v. Bolton were based on lies and deception. Both women now live with the “slaughter” of millions of babies that resulted from their cases.

B. Legal Background of Roe and Doe

Prior to 1973, the regulation of abortion, like other medical issues, was left to the fifty states. Abortion was illegal in most states, except when necessary to save the life of the mother.

However, Norma McCorvey, filed a lawsuit under the name of “Jane Roe,” because she was unable to obtain a legal abortion in Texas. At that time, Texas law prohibited all abortions except when necessary to save the mother’s life. At the same time, Sandra Cano, filing under the name of “Mary Doe,” filed a lawsuit in Georgia when she was allegedly denied an abortion. Her case, Doe v. Bolton, addressed a Georgia statute that prohibited abortions unless a doctor certified either (a) continuing the pregnancy would endanger a woman’s life or health; (b) the fetus would

143. Judiciary, supra note 137.
144. See id.
145. See id.; see also Hearing, supra note 130.
146. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 204 (1824) (recognizing that under what was later called the state’s “police power,” the states could regulate “health laws of every description”).
147. Roe, 410 U.S. at 117 & n.2 (listing statutes from twenty-nine states that proscribed abortion).
148. Norma McCorvey was Jane Roe. The pseudonym was used to protect her identity. See Hearing, supra note 130.
150. VERNON’S ANN. PENAL CODE arts. 1191-1194 and 1196 were the Texas statutes concerning abortion. See Roe, 410 U.S. at 117.
151. Sandra Cano was Mary Doe. The pseudonym was used to protect her identity. See Judiciary, supra note 137.
152. Sandra has testified that she never sought an abortion. Sandra Cano has testified before a Senate subcommittee about the lies and deception presented to the Supreme Court in Doe. See Judiciary, supra note 137. In addition, a book was written about her experience. See generally LASH, supra note 141.
likely be born with a serious birth defect, or (c) the pregnancy had resulted from rape.\textsuperscript{154}

By 1973, these two cases had made their way to the United States Supreme Court and changed the legal landscape.\textsuperscript{155} In effect, abortion became available upon demand.\textsuperscript{156} This was not based on precedent such as the Declaration of Independence that respected life—the inalienable right to life.\textsuperscript{157} Nor was it expressly in the United States Constitution.\textsuperscript{158} It was a right created by the Supreme Court of the United States.\textsuperscript{159}

Furthermore, these two cases in essence legalized abortion, and established a constitutional right to decide.\textsuperscript{160} Therefore, only the Supreme Court can re-evaluate or change its precedent.\textsuperscript{161} Instead of dealing with abortion as any other medical procedure, the Court constitutionalized the issue so that only it can examine changes in scientific and medical evidence, or correct a misinterpretation or misapplication of \textit{Roe}.\textsuperscript{162} This has been called a "perverse result,"\textsuperscript{163} and indeed, it is a perverse result and an area of law in which the Court should not be involved.\textsuperscript{164}

\section*{C. The Court's Decisions in Roe}

\subsection*{1. Overview}

In \textit{Roe}, the Supreme Court held—for the first time—that the right to privacy includes a woman's right to decide whether to terminate her
pregnancy. The Court, however, recognized that this right is not absolute because the “State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life.”

Justice Blackmun, writing for seven of the nine justices in Roe, dedicated a large portion of the opinion to the history of abortion practices—starting in ancient times, through English law, and into American law. He also analyzed the medical questions involved, concluded that abortion had not always been viewed as criminal, and demonstrated that the medical history was mixed whether performing an abortion was prohibited by medical ethics. Citing medical statistics, Justice Blackmun sought to show that an abortion was, at least in the early stages of pregnancy, less dangerous to the woman than carrying the child to full term and giving birth.

This section analyzes how the Court found that there is a fundamental right to decide whether to terminate a pregnancy in the Constitution, Roe’s trimester approach, and the arguments by the dissenting Justices. It is certainly an understatement to say that the decision generated controversy; one Justice surmised this is because it “ventured too far” and “presented an incomplete justification.”

166. Id. at 154. See generally Jared H. Jones, Annotation, Women’s Reproductive Rights Concerning Abortion, and Government Regulation Thereof, 20 A.L.R. FED. 2d 1 (2007) (stating “while a woman has a right to determine whether or not to terminate her pregnancy under the U.S. Constitution, the right is not absolute, and may be encumbered in certain manners by governmental regulation.” Therefore, the Court tries to balance a woman’s right to bodily autonomy with the State’s valid interests in protecting the health of its citizens, in maintaining medical standards, and in protecting life.).
168. Id. at 140-44. It is interesting to note that Justice Blackmun had been associated with the Mayo Medical Clinic in Minnesota, and there is anecdotal evidence that he spent time at the Clinic researching the medical issues. See generally Nan D. Hunter, Justice Blackmun, Abortion, and the Myth of Medical Independence, 72 BROOK. L. REV. 147 (2006).
169. Id. at 130-32.
170. Id at 149. Now it is known abortions are not safer than childbirth. See JOHN C. WILLKE & BARBARA H. WILLKE, ABORTION: QUESTIONS AND ANSWERS 183 (2003) (“Abortions may be legal but they are not always safe.”); Affidavit of Dr. David Reardon in support of Norma McCorvey’s Rule 60 Motion [hereinafter Affidavit of Dr. David Reardon] at 7 (stating the best research shows that “death rates associated with abortion are higher than death rates associated with childbirth,” and, therefore, what the Court stated as fact “has been proven to be false by subsequent scientific research.”).
171. See infra Part III.C.2-4.
172. Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. REV. 375, 376 (1985) (stating Roe “became and remains a storm center” and it “sparked public opposition and academic criticism, in part, I believe, because the Court ventured too far in the change it ordered and presented an incomplete justification for its action”).
2. Finding the Right to Decide in the Constitution

After exploring the legal and medical history of abortion, the Court traced the development of cases in which the Supreme Court had recognized family autonomy as a protected fundamental right, concluding:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.  

The Court believed that prohibiting a woman from having an abortion affected her privacy rights in several ways. First, maternity or additional offspring might force a woman into "a distressful life and future," second, psychological harm might result, and third, the pregnancy might tax the physical and mental health of a woman forced to provide child care, especially for an "unwanted child."

The Court rejected the argument "that a fetus is a person within the meaning of the Fourteenth Amendment," concluding that the term "does not include the unborn." Consequently, the prenatal child is outside the protections of the due process clause. Noting the "wide divergence of thinking on this most sensitive and difficult question," the Court declined to state when life begins.

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

The Court declared that this right to an abortion was not absolute, but, because privacy is a constitutionally protected fundamental right, the government may regulate abortions only if it has a compelling interest, and

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174. Roe, 410 U.S. at 153. One commentator has noted that significantly, the Court did not find that the right to abortion was found in the penumbral rights in the Constitution, as it did in Griswold, supra, note 61. CHEMERINSKY, supra note 61, at 840.
175. See Roe, 410 U.S. at 153.
176. Id.
177. Id.
178. Id.
179. Id. at 157-58.
180. Id. at 157.
181. Id. at 160.
182. Id. at 159.
183. Id.
the means used to regulate abortions are necessary to promote that interest.\textsuperscript{184} In other words, the regulation must pass strict scrutiny.\textsuperscript{185}

3. The Trimester Approach

Instead of using the traditional strict scrutiny test, however, the Court created a trimester approach.\textsuperscript{186} Until the end of the first trimester of the pregnancy, the government could not regulate abortions in any manner—its interest in preserving the health of the mother was not deemed “compelling” until that time.\textsuperscript{187} According to the Court, this was the point at which the medical risks associated with abortion might exceed the medical risk of bearing the child.\textsuperscript{188}

In addition, the Court recognized that the state may promulgate reasonable regulations.\textsuperscript{189} For example, the Court gave examples of permissible regulations stating:

Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion, as to the licensure of that person, as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status, as to the licensing of the facility, and the like.\textsuperscript{190}

At the end of the second trimester, when viability likely occurred, the Court held that the government now had a compelling interest in preserving the life of the child.\textsuperscript{191} After that point, it could constitutionally regulate, or even ban, abortions, except where the procedure was necessary to preserve “the life or health of the mother.”\textsuperscript{192}

4. The Dissents in Roe

Both Justices White\textsuperscript{193} and Rehnquist wrote separate dissents\textsuperscript{194} Justice White criticized the Court because he found nothing in the language or

\begin{itemize}
  \item \textsuperscript{184} Id. at 162–63.
  \item \textsuperscript{185} Roe, 410 U.S. at 165–66.
  \item \textsuperscript{186} See id. at 164–65.
  \item \textsuperscript{187} Id. at 163.
  \item \textsuperscript{188} Id.
  \item \textsuperscript{189} See id.
  \item \textsuperscript{190} Roe, 410 U.S. at 163.
  \item \textsuperscript{191} Id. at 164–65.
  \item \textsuperscript{192} Id.
  \item \textsuperscript{193} Justice White's dissenting opinion, in which Justice Rehnquist joined, Roe, 410 U.S. at 211 (White, J., dissenting).
  \item \textsuperscript{194} Justice Rehnquist's separate dissenting opinion, Roe, 410 U.S. at 171 (Rehnquist, J., dissenting).
\end{itemize}
history of the Constitution to support the Court's judgment. He further criticized the Court for taking on a national issue that was best left for legislative bodies:

As an exercise of raw judicial power, the Court perhaps has authority to do what it does today, but in my view its judgment is an improvident and extravagant exercise of the power of judicial review. Whether to protect human life should be left with the people and to the political processes the people have devised to govern their affairs.

Justice Rehnquist took issue with both the creation of the abortion right and the test devised to evaluate government regulation of abortions. Noting that some thirty-six state or territorial legislatures had enacted laws against abortion at the time of the Fourteenth Amendment's adoption, Justice Rehnquist believed such a "right" was unknown to the amendment's drafters. Thus, "The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter." Justice Rehnquist stated further that the trimester test "partakes more of judicial legislation than" constitutional interpretation.

D. Doe v. Bolton and the Health Exception

1. Doe Broadly Defining the Health Exception

In Roe's companion case, Doe v. Bolton, the Court held that the three procedural conditions of the Georgia statute regulating abortions violated the Fourteenth Amendment's right to privacy. Specifically, a requirement that abortion facilities be accredited by the Joint Commission on the Accreditation of Hospitals was invalid because Georgia had not shown that only hospitals could fully protect the pregnant woman's interests. Additionally, interposing the review of a hospital committee on

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195. Roe, 410 U.S. at 221 (White, J., dissenting).
196. Id. at 222.
197. See id. at 171-72 (Rehnquist, J., dissenting).
198. Id. at 174-75.
199. Id. at 177.
201. Doe, 410 U.S. at 192. The three procedural requirements were: (1) that the abortion be performed in an accredited hospital; (2) that the procedure be approved by the hospital staff abortion committee; and, (3) that the performing physician's judgment be confirmed by the independent examinations of the patient by two other licensed physicians. Id.
202. Id. at 194-95.
abortion was unduly restrictive. And finally, the Court held that the statute’s requirement that the woman obtain the acquiescence of two co-practitioners had no rational connection to her needs, and was unduly restrictive of the doctor’s right to practice medicine.

Doe’s attorney argued that the statutory language referring to the “health” of the mother was unconstitutionally vague. The Court rejected that argument, noting that in an earlier case, United States v. Vuitch, it had addressed that issue and concluded that the term “health” was not vague. In Vuitch, the Supreme Court had an opportunity to evaluate the word “health” as it was used in the District of Columbia abortion statute. Writing for the Court, Justice Black stated that “the general usage and modern understanding of the term ‘health’ . . . includes psychological as well as physical well-being.” The Court opined that it would permit abortions “for mental health reasons whether or not the patient had a previous history of mental defects.”

In deciding Doe v. Bolton, the Court used a broad definition of “health” and stated:

We agree with the [lower court] that the medical judgment may be exercised in the light of all factors-physical, emotional, psychological, familial, and the woman’s age-relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

Chief Justice Burger concurred in the decision, but recognized that the term health was used “in its broadest medical context.” At the time, however, he believed that the decision would not have the sweeping effect
that the dissenting Justices\textsuperscript{214} forewarned, confident that physicians would “observe the standards of their profession, and act only [after] careful deliberation concerning judgments related to life and health.”\textsuperscript{215} He also emphasized that the Court rejected “any claim that the Constitution requires abortions on demand.”\textsuperscript{216}

“Unfortunately, Chief Justice Burger’s assumptions have not been realized in the . . . real life experiences of post-abortive women.”\textsuperscript{217} Because the Court so broadly defined “health,” its meaning in any given case is determined solely by the woman and the abortionist who has a financial incentive to perform the abortion.\textsuperscript{218} The result is that in America, abortion on demand—including partial-birth abortion—became a reality.\textsuperscript{219} Furthermore, the lack of a careful or narrow definition of “health” coupled with the lack of a normal doctor-patient relationship between the abortionist and woman considering an abortion, only adds to the harm done.\textsuperscript{220}

This broad interpretation of “health” is certainly evident in Justice Douglas’ concurring opinion:\textsuperscript{221} “Elaborate argument is hardly necessary to demonstrate that childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future.”\textsuperscript{222} He went on to expand the definition of “health” to include “hardships.”

The vicissitudes of life produce pregnancies which may be unwanted, or which may impair “health” in the broad Vuitch sense of the term, or which may imperil the life of the mother, or which in the full setting of the case may create such suffering, dislocations, misery, or tragedy as to make an early abortion the only civilized step to take. These hardships may be properly embraced in the “health” factor of the mother as appraised by a person of insight.\textsuperscript{223}

\textsuperscript{214} Justice White dissented and Justice Rehnquist joined the dissent. \textit{Id.} at 221 (White, J., dissenting). Justice White stated:

\textit{Id.}

\textsuperscript{215} Id. at 208 (Burger, C.J., concurring).

\textsuperscript{216} Id.

\textsuperscript{217} Brief for Sandra Cano et al., supra note 156, at 7, 2006 WL 1436684 at *7.

\textsuperscript{218} Id., 2006 WL 1436684 at *7.

\textsuperscript{219} Id., 2006 WL 1436684 at *7.

\textsuperscript{220} Id., 2006 WL 1436684 at *7.

\textsuperscript{221} Doe, 410 U.S. at 209 (Douglas, J., concurring).

\textsuperscript{222} Id. at 214.

\textsuperscript{223} Id. at 215-16.
Although most people refer to Roe v. Wade, it is Doe v. Bolton that has had a profound impact on the legal landscape by broadly defining the health exception. Doe established the health exception that must be included in any legislation designed to regulate abortion. This exception was defined so broadly that it allows abortion on demand, including the partial-birth abortion procedure which Congress has defined as "gruesome and inhumane."

The Court did not focus on the health exception in Roe as it did in Doe. However, the Court did make the following observation: "Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent."

2. Subsequent Decisions Defining the Health Exception

Nineteen years later, Justice O'Connor, writing for three justices in Planned Parenthood of Southeastern Pennsylvania v. Casey, stated "that psychological well-being is a facet of health." She acknowledged that there could be "devastating psychological consequences" if a woman's decision was not fully informed, based on truthful, and not misleading information. Justice O'Connor correctly stated that it is important for a woman to have full and accurate information due to the psychological consequences that may result from realizing that she did not have the information to know the truth. She stated:

In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the

225. Doe, 410 U.S. at 192 (agreeing with the lower court that several factors may be considered in evaluating "health." These included "physical, emotional, psychological, familial, and the woman's age-relevant to the well-being of the patient. All these factors may relate to health.").
227. See Roe, 410 U.S. at 166.
228. Id at 153.
229. 505 U.S. 833.
230. Id at 882 (joint opinion).
231. Id.
232. Id.
State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.\textsuperscript{233}

The warning which Justice O'Connor expressed is the reality that post-abortive women face.\textsuperscript{234} In the Women's Affidavits,\textsuperscript{235} post-abortive women attest to the physical, psychological, and spiritual consequences they experienced because they were not fully informed of the consequences of an abortion.\textsuperscript{236} The information they were given, by the abortionist or the abortion facility staff, was, in fact, misleading.\textsuperscript{237}

Subsequently, a lower court held that the information given by a physician was, in fact, misleading.\textsuperscript{238} In \textit{Acuna v. Turkish},\textsuperscript{239} Rosa Acuna specifically asked her physician if her eight-week-old unborn child was a...
baby. He said, “don’t be stupid, it’s only blood.” It cannot be disputed that this information—that her eight-week-old unborn child was merely "blood"—was clearly false. After being taken to the emergency room because of massive hemorrhaging, she was told that parts of the baby were left inside her due to an incomplete abortion. Upon doing research, she learned the truth about the gestational development of her baby, which led to psychological problems and a diagnosis of post-traumatic stress syndrome.

There are significant physical and psychological risks in all abortions, as government agencies have warned. Thus, the State is actually endangering most women's health by allowing any method of abortion, particularly partial-birth abortion. In other elective medical situations, a woman and her doctor are prohibited from choosing a particular surgery due to the risks involved. For example, silicone breast implantation is no longer allowed because the federal Food and Drug Administration ("FDA") placed a moratorium on the device due to the health risks involved. Women should not be able to "choose" abortion without full, accurate, and

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240. Id. at 419.
241. Id.
242. For example, the Texas “Woman’s Right to Know” booklet describes an eight-week-old unborn child as having all essential organs beginning to form; elbows and toes are visible; the fingers have grown to the first joint; facial features—the eyes, nose, lips, and tongue—continue to develop; the outer ears begin to take shape; organs begin to be controlled by the brain, and the baby's length is about 1/2 to 3/4 inch. TEX. DEP'T OF HEALTH, A WOMAN'S RIGHT TO KNOW 3 (2003), http://www.dshs.state.tx.us/wrtk/pdf/booklet.pdf.
243. Acuna, 930 A.2d at 419.
244. Id. at 419-20.
245. For example, the Texas Department of Health booklet entitled “A Woman’s Right to Know” outlines the physical and emotional risks of abortion of the different kinds of abortions as compared to pregnancy and childbirth. See TEX. DEP’T OF HEALTH, supra note 242, at 10-16.
246. See id.
248. On January 6, 1992, the FDA called for a moratorium on the use of silicone gel-filled breast implants. See FDA, BREAST IMPLANT CONSUMER HANDBOOK (2004), http://www.fda.gov/cdrh/breastimplants/handbook2004. The FDA found that the implants caused problems such as fibrous capsular contracture, silicone gel leakage and migration, infection, interference with early tumor detection, human carcinogenicity, and autoimmune disease. See id. In 2006, the fourteen-year moratorium was lifted for two California manufacturers, Inamed Corp.—now part of Allergan Inc.—and Mentor Corp., but there were additional safety requirements and studies. See Andrew Bridges, Ban on Silicone Breast Implants Lifted, USA TODAY (Nov. 18, 2006), http://www.usatoday.com/news/health/2006-11-17-silicone_x.htm. However, the FDA recognized that the implants still had risks. See id. Saline implants offer a safer alternative. See Saline-Filled Breast Implants, http://www.fda.gov/medicalDevices/ProductsandMedicalProcedures/ImplantsandProsthetics/BreastImplantsAcm257554.htm (last visited Oct. 3, 2013) (“There is no apparent association between saline-filled breast implants and connective tissue disease, breast cancer, or reproductive problems.”).
truthful disclosure of the risks because the abortion procedure is even more dangerous than a silicone implant. 249

In a 2006 decision concerning the health exception, the Court of Appeals for the Sixth Circuit found that the health exception is not a per se requirement. 250 In that case, an Ohio statute prohibited the use of RU-486 for the purpose of inducing an abortion unless certain criteria were met. 251 The statute was challenged on various grounds, including that it lacked the constitutionally mandated health exception. 252 The district court held that the health exception was constitutionally required, thus imposing a per se requirement. 253 The Court of Appeals for the Sixth Circuit, however, held "that no such blanket requirement has been imposed." 254 The court concluded that the "[health] exception is constitutionally necessary where substantial medical authority indicates that a banned procedure would be safer than the other available procedures, not just when banning the procedure subjects a woman to risks from the pregnancy itself." 255

The Supreme Court’s broad definition of health led to abortion on demand and partial birth abortion. 256 The health exception should not be a requirement in legislation, and the definition of health should be narrowed to include only physical health to save the life of the mother, not emotional or psychological health.

E. A Profound Decision by the Original Plaintiffs in Roe and Doe

It is highly unusual for two successful parties to return to court and ask that their landmark cases be overturned. "The reality of abortion practice[, however,] can change the mind of anyone willing to look at the evidence, as it did for [Norma] McCorvey." 257 Thus, in June 2003, a Rule 60 Motion was filed on behalf of Norma McCorvey. 258 Two months later, a similar Rule 60 Motion was filed on behalf of Sandra Cano. 259


250. See Planned Parenthood v. Taft, 444 F.3d 502, 506-09 (6th Cir. 2006).

251. Id. at 506 (quoting OHIO REV. CODE ANN. § 2912.123(A) (LexisNexis 2013)).

252. Id. at 506-07.

253. Id. at 507.

254. Id. at 507-08. The appellate court noted that the district court "offered little analysis to support" its position. Id.

255. Taft, 444 F.3d at 511 (citing Gonzales, 530 U.S. at 931).

256. See Brief for Sandra Cano et al., supra note 156, at 7, 2006 WL 1436684 at *7.


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The Motions were based on *Agostini v. Felton* where the Supreme Court found that *stare decisis* does not preclude the Court from recognizing that there has been a change in law, and, therefore, that application of the prior decision would work a "‘manifest injustice.'" When considering a Rule 60 Motion, the Court said that the threshold issue to be decided is "whether the factual or legal landscape has changed . . . ." The Motions on behalf of Norma McCorvey and Sandra Cano documented significant changes in legal conditions in both decisional and statutory law, as well as changes in the factual conditions due to the explosion of medical and scientific knowledge, the non-evidence-based assumption that there would be a normal doctor-patient relationship, and the new factual evidence regarding the physical and mental consequences of abortion. Therefore, the Motions argued, it was no longer equitable to give prospective application to the judgments.

To support the Rule 60 Motions for Norma and Sandra, over 1,000 affidavits from post-abortive women ("Women’s Affidavits") were collected and attached to the Motions because the women who have experienced the reality of aborting a pregnancy know the truth: abortion hurts women physically, psychologically, and spiritually. In total, over 5,000 pages of affidavits from Norma, Sandra, medical and scientific experts, and post-abortive women were filed. The post-abortive women attested to the reality that abortion is not simply a ten minute procedure as

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259. See Cano v. Bolton, No. 1:70-cv-13676-JOF, 2005 WL 3881370, at *1 (N.D. Ga. Feb. 23, 2005). Although *Doe* was based on deception, the motion was not based upon fraud on the Court, but rather on *Federal Rule of Civil Procedure 60*. *Id.*


261. *Id.* at 236 (quoting *Arizona v. California*, 460 U.S. 605, 618, n.8 (1983)).

262. *Id.* at 216.


264. *Cf. FED R. CIV. P. 60(b) (2013).*

265. In the Women's Affidavits, the women repeatedly explained how abortion hurt them. For example, L.C. (Miss.) states, "that women deserve to know the truth! That abortion kills babies, that it hurts women physically and emotionally!" (Bate stamp number 000296). Karen H. (Ariz.) states, "First, I experienced relief, then deep grief, guilt, nightmares, anger, sadness, a feeling of worthlessness, depression, crying. I felt alone and lonely for I could tell no one." (Bate stamp number 000562). Debra M. (Mich.) states "Think about the physical consequences, the emotional pain of losing your child, and the spiritual death you will go through." (Bate stamp number 000823).

266. See Women's Affidavits, supra note 235.
abortionists claim—it is a lifetime of pain and suffering, which may begin immediately, or may begin years later. 268

Both of the Rule 60 Motions were denied at the trial level. 269 McCorvey’s case was deemed untimely as a thirty-year delay was too long and unreasonable. 270 Upon appeal to the Court of Appeals for the Fifth Circuit, the three-judge panel took a different position and said that the case was moot because the statute was no longer in effect, but rejected the district court’s analysis on the timeliness issue. 271

Judge Edith Jones wrote a concurring opinion stating she agreed that the case was moot, and surmised that it was ironic that the doctrine of mootness bars further litigation because the case was “born in an exception to mootness” and “an ‘exercise of raw judicial power.’” 272 Even more ironic, she stated that the “serious and substantial evidence [McCorvey] offered could have generated an important debate over factual premises that underlay Roe.” 273 She also opined that McCorvey had presented evidence

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267. See, e.g., Scherrie S. (Mo.) states, “Twenty-five years later, I still cannot talk about it without tears and pain in my heart . . . . It all looks simple on paper and seems like an easy way out of a bad spot, but no one tells you that the easy way out will cost you later in emotional damage and physical problems.” (Bate stamp number 001351). Nora C. (Ga.) says, “It never goes away and you will always think of what could have been and the anger of how the government allows this hideous procedure.” (Bate stamp number 000314). M.J.H. (Tenn.) states “I had ten years of depression, anxiety, and panic attacks that I had trouble understanding. . . . Those ten years of my life were spent in anguish due to a decision that I made based upon misinformation.” (Bate stamp number 000539). Beverly G. (Minn.) states “It’s not a quick and easy solution . . . . It will haunt you the rest of your life.” (Bate stamp number 000514). Women’s Affidavits, supra note 235. See generally MELINDA TANKARD REIST, GIVING SORROW WORDS: WOMEN’S STORIES OF GRIEF AFTER ABORTION 10 (2000) (“A woman never forgets a pregnancy and the baby that might have been.”).

268. See generally WILKE & WILKE, supra note 171, at 50 (“5 years is common, 10 or 20 not unusual.”); Abortion Complications, ELIOT INST., http://afterabortion.org/1990/abortion-complications/ (last visited Oct. 12, 2015) (“The best available data indicates that on average there is a five to ten year period of denial during which a woman who was traumatized by her abortion will repress her feelings.”). In the Women’s Affidavits, the women attest to the years of suffering. See, e.g., B.A.C. (Ala.): states, “I was told it would be fast and painless and it was neither.” (Bate Stamp number 000261). E.L.C. (Mo.) states, “It does not end when you leave the clinic.” (Bate Stamp number 000296). M.A.C. (Ark.) states, “. . . there is not a day goes by I don’t think about how I murdered my baby.” (Bate Stamp number 000315). Beverly Green (Mn.) states, “It’s not a quick and easy solution . . . . It will haunt you the rest of your life.” (Bate Stamp number 000508). Gwen E. Gregory (N.C.) states “It can affect you the rest of your life.” (Bate Stamp number 000514). R.G. (Fla.) states, “Even though it seems like an easy out, the pain will be with you for the rest of your life.” (Bate Stamp number 000521). Melanie L. Mills (Mn.) states, “It is the worst mistake because you will have to live with it every single day.” (Bate Stamp number 000822). Women’s Affidavits, supra note 235.


271. Id at 850 (Jones, J., concurring) (quoting Doe, 410 U.S. at 222).

272. Id.
that “goes to the heart of the balance Roe struck between the choice of a mother and the life of her unborn child,” citing the Women’s Affidavits, scientific studies, the assumption of a normal doctor-patient relationship, the changed sociological landscape, and the neonatal and medical science that graphically portrays what could not been seen in 1973.274 She summarized her analysis by stating that “if courts were to delve into the facts underlying Roe’s balancing scheme with present-day knowledge, they might conclude that the woman’s ‘choice’ is far more risky and less beneficial, and the child’s sentience far more advanced, than the Roe Court knew.”275

Judge Jones correctly articulated the problem that the United States Supreme Court had constitutionalized the issue.276 She concluded that placing the issue beyond political debate was a “perverse result” of the Court’s ruling.277 Judge Jones stated:

At the same time, because the Court’s rulings have rendered basic abortion policy beyond the power of our legislative bodies, the arms of representative government may not meaningfully debate McCorvey’s evidence. The perverse result of the Court’s having determined through constitutional adjudication this fundamental social policy, which affects over a million women and unborn babies each year, is that the facts no longer matter.278

She expressed confidence that hard science and social science will progress, and that there would be medical consensus on women’s mental and physical health after an abortion and advancement in neonatal science.279 It was her fervent hope that

[T]he Court will someday acknowledge such developments and re-evaluate Roe and Casey accordingly. That the Court’s constitutional decisionmaking leaves our nation in a position of willful blindness to evolving knowledge should trouble any dispassionate observer not only about the abortion decisions, but about a number of other areas in which the Court unhesitatingly steps into the realm of social policy under the guise of constitutional adjudication.280

274. Id. at 851-52.
275. Id. at 852.
276. See McCorvey, 385 F.2d at 852 (Jones, J., concurring).
277. Id.
278. Id.
279. See id. at 852-53.
280. Id. at 853.
In the appeal on Sandra Cano’s Rule 60 Motion, the Court of Appeals for the Eleventh Circuit noted how unusual it was for a prevailing litigant to subsequently ask the court to relieve her from the relief she originally sought. The court said that it had found no case like it. The court said that the trial court has broad discretion on a Rule 60 Motion and did not find that the trial court had abused its discretion. It also contended that the Supreme Court had not granted authority in Agostini for the lower court to overturn one of its decisions. Therefore, the court affirmed the trial court’s decision.

A Rule 60 Motion based on Agostini seems like a reasonable means to Supreme Court review of its precedent in light of changed factual and legal conditions. However, because of the “perverse result” of the Court constitutionalizing the abortion issue, the nation is left in “willful blindness” to the evolving scientific and medical advancements which would allow the Court to re-evaluate Roe.

F. Forty Years of Widespread Legalized Abortion Demonstrates That the Foundational Assumptions in Roe Were Incorrect

1. Abortion Would Be Beneficial for Women

In 1973, abortion was illegal in most states and relatively rare. The Supreme Court assumed abortion was like any other medical procedure and was as safe as, or safer than, childbirth because the long-term effects of abortion were unknown at the time. No evidence existed regarding the effect that widespread, legalized abortion would have on women. At the time, the Court simply assumed that abortion would benefit women.

282. Id.
283. Id at 1342.
284. Id (quoting Agostini, 521 U.S. at 237).
285. Id at 1343.
286. Agostini, 521 U.S. at 215-16.
288. Roe, 410 U.S. at 118 n.2 (stating that in a majority of states there were statutes similar to the Texas statute).
289. See id. at 149-50. Today, it is known that childbirth is safer than abortion. See William Saunders & Mary Novick, Study Confirms Childbirth Is Safer for Women than Abortion (Sept. 13, 2012), http://www.lifenews.com/2012/09/13/study-confirms-childbirth-is-safer-for-women-than-abortion/. A study in Denmark of almost half a million women complements similar data from Chile and Ireland that confirms legalizing abortion does not decrease maternal mortality rates. Id.
291. See Roe, 410 U.S. at 138.
The Court's assumptions in Roe are incorrect. First, abortion is not like any other medical procedure. Justice Stewart correctly recognized that "Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." Second, the Supreme Court assumed that in the first trimester abortion was "relatively safe" although the Court recognized that it was "not without its risk." Therefore, the Court concluded that "any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared." But the Court recognized the important state interests in health and medical standards, and, therefore, the "State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient."

Abortion, however, is not as safe as or safer than childbirth. For example, "[t]he best research available today shows that death rates associated with abortion are significantly higher than death rates associated with childbirth." Furthermore, the further along the woman is in her pregnancy, the "greater the chance of serious complications and the greater the risk of dying from the abortion procedure." Abortion is inherently unsafe. Therefore, the State has a legitimate interest in reducing the number of abortions, particularly in the later stages of pregnancy, and in promulgating regulations that ensure the maximum safety for women considering abortion.

Third, there is no evidence to support the assumption that abortion would be beneficial to women. Even assuming arguendo that women were not hurt by abortion, "there is no logical basis for assuming that lack of harm correlates to positive benefit." . . . it should never be presumed

293. Id.
294. Roe, 410 U.S. at 149.
295. Id. at 149-50.
296. Id. at 149-50.
297. Affidavit of Dr. David Reardon, supra note 171 (submitted in support of the Rule 60 Motions at 34, stating "There is no medical evidence demonstrating with any statistical significance that abortion is ever safer than childbirth").
298. Id. at 7.
299. TEX DEP'T OF HEALTH, supra note 242, at 10.
300. Affidavit of Dr. David Reardon, supra note 171, at 95 ("Legalizing abortion is not an effective way of protecting women from 'unsafe' illegal abortions since abortion itself is inherently unsafe.").
301. Today, it is known that "There is no statistically validated medical evidence that abortion is ever more likely to be beneficial to any group (sic) woman in any given circumstance." Affidavit of Dr. David Reardon, supra note 171, at 89 (citing various studies).
302. Id.
that abortion automatically confers benefit upon women. It certainly changes the courses of their lives, as does childbirth, but it has never been scientifically established when, if ever, the change is likely to be beneficial.\textsuperscript{303} Conversely, there are serious risk factors with abortion “that predict negative outcomes from abortion. Abortion is associated with subsequent increased rates of suicide, substance abuse, and psychiatric hospitalization.”\textsuperscript{304}

Abortion is not beneficial to women as the Supreme Court presupposed.\textsuperscript{305} The evidence now shows that abortion is merely a short-term “solution” with long-term negative and harmful consequences.\textsuperscript{306} Even the Supreme Court has come to this conclusion, stating that “[t]he medical, emotional, and psychological consequences of an abortion are serious and can be lasting . . . .”\textsuperscript{307}

a. Abortion Has Negative Psychological Effects on Women

In \textit{Women’s Medical Center of Northwest Houston v. Bell},\textsuperscript{308} the Court of Appeals for the Fifth Circuit concluded that “abortion is almost always a negative experience for the patient . . . .”\textsuperscript{309} In 2007, the Supreme Court recognized that “it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”\textsuperscript{310} “Severe depression and loss of esteem can follow.”\textsuperscript{311} Contrary to the non-evidence-based assumption made by the Supreme Court

\begin{footnotesize}
\begin{enumerate}
\item[{303}] Id. at 93.
\item[{304}] Id.
\item[{306}] For example, L.M.C. (Miss.) says, “[I]t hurts women physically and emotionally! That it does not end when you leave the clinic.” (Bate stamp number 000305). Diane D. (Ga.) says, “I didn’t know that the hurt would never go away.” (Bate stamp number 000398). Nicole C. (Ky.) says, “Abortion is so devastating that I would never do it again—even at the cost of my own life.” (Bate stamp number 00281).
\item[{307}] See \textit{Matheson}, 450 U.S. at 411. The Court also referenced “the potentially grave emotional and psychological consequences of the decision to abort.” Id. at 412-13. \textit{See also} Planned Parenthood v. Danforth, 428 U.S. 52, 67 (1976) (“The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences.”).
\item[{308}] 248 F.3d 411 (5th Cir. 2001).
\item[{309}] Id. at 418. Accordingly, the district court found it unrealistic for Texas to require abortion providers to care for a patient “in a manner that maintains and enhances her self-esteem and self-worth” and enjoined enforcement of this licensing regulation provision. Id. (quoting TEX ADMIN. CODE § 25.139 (West 2013)).
\item[{310}] Gonzales, 550 U.S. at 159 (citing Brief for Sandra Cano et al., supra note 156, at 22-24, 2006 WL 1436684, at *22-24).
\item[{311}] Id. (citing Brief for Sandra Cano et al., supra note 156, at 22-24, 2006 WL 1436684, at *22-24).
\end{enumerate}
\end{footnotesize}
in *Roe*, abortion does not enhance female dignity, self-esteem, or autonomy.\textsuperscript{312} In addition, women are overwhelmed with guilt and depression for years after having an abortion.\textsuperscript{313} In the Women's Affidavits, post-abortive women were asked, "How has your abortion affected you?"\textsuperscript{314} The responses are replete with heartbreaking statements about the devastation caused by the abortions.\textsuperscript{315} Certainly the women who have had abortions know far better than anyone else how the abortions affected them.\textsuperscript{316} But scientific evidence also confirms how abortion hurts women both physically and psychologically.\textsuperscript{317}

Since *Roe*, state legislatures have passed legislation that would inform and protect women.\textsuperscript{318} These have generally been called "A Woman's Right to Know" statutes, although the legislation may simply be found in an informed consent provision.\textsuperscript{319} For example, the Texas Department of Health ("TDH") produced a booklet entitled "A Woman's Right to Know" after extensive hearings by the medical board.\textsuperscript{320} Most importantly, it outlines the side effects and risks that may occur as a result of the abortion, listing reported, serious psychological effects of abortion, which include "depression, grief, anxiety, lowered self-esteem, regret, suicidal thoughts and behavior, sexual dysfunction, avoidance of emotional attachment, flashbacks, and substance abuse."\textsuperscript{321}

\textsuperscript{312} The Supreme Court had good intentions to help women like Norma McCorvey. See *Roe*, 410 U.S. at 120 (discussing the hardships that Norma was experiencing). Furthermore, the Court expressed concern about the consequences of denying a woman the choice because of the medical, psychological, and financial problems as well as the stigma of being an unwed mother that may lead to a "distressful life and future." *Id.* at 153. But no matter how good the intentions were, the Court was misguided on the effects of abortion and that the "distressful life" was actually caused by the abortion and not carrying the child to term. See *id.*

\textsuperscript{313} See Women's Affidavits, supra note 235.

\textsuperscript{314} See *id.* In support of the Rule 60 Motions that were filed on behalf of Norma McCorvey and Sandra Cano in 2003 when they wanted their cases reassessed, Affidavits were collected concerning the abortion experiences of post-abortive women. They have been used with the Rule 60 Motions, amicus briefs, and at legislative hearings. A more detailed Affidavit was created by the Trinity Legal Center and is available at www.trinitylegalcenter.org.

\textsuperscript{315} See Women's Affidavits, supra note 235. For example, Amy Marie (Ga.) states, "It devastated me. I had nightmares, flashbacks, fits of rage, uncontrollable crying, trouble sleeping, and could not look at pregnant women or children without feeling hurt, anger, and guilt." (Bate stamp number 001302).

\textsuperscript{316} See *id.*

\textsuperscript{317} See *id.* See also Affidavit of Dr. David Reardon, Ph.D., Dr. Reardon, one of the medical experts for the Rule 60 Motion, cited over three hundred medical and scientific articles or studies concerning abortion, and discusses the physical and psychological effects of abortion.

\textsuperscript{318} See supra notes 235-36 and accompanying text.

\textsuperscript{319} See supra notes 235-36 and accompanying text.

\textsuperscript{320} See generally TEX. DEPT OF HEALTH, supra note 242.

\textsuperscript{321} See *id.* at 16. Various abortion procedures and their attendant risks, as well as general risks associated with having an abortion are listed on pages nine through seventeen. *Id.* at 9-17. In addition, the booklet explains that at fertilization, "the unborn child has his or her own unique set of DNA
Therefore, medical experts, post-abortive women, courts, and state legislatures all concur that women can experience negative psychological effects. 322 Although the Supreme Court had good intentions to help women, the distressful life that the Court was attempting to alleviate has become the reality of abortion 333

b. Abortion Also Has Had Negative Physical Effects on Women

As the scientific and medical evidence demonstrates, there are many physical complications that can result from abortion. 324 The most common major complications which can occur at the time of the abortion include, but are not limited to: "infection, excessive bleeding, embolism, ripping or perforation of the uterus, anesthesia complications, convulsions, hemorrhage, cervical injury, and endotoxic shock." 325 The most common minor complications include: "infection, bleeding, fever, second degree burns, chronic abdominal pain, vomiting, gastrointestinal disturbances, and Rh sensitization." 326

These complications are not only hazardous to the immediate well being of the mother, they can also have long term or lasting effects on her physical health 327 and the health of her subsequent children. 328 Some of these risks include placenta previa, subsequent pre-term deliveries and other labor

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322 See supra Part III.F.1.(a).
323 See supra Part III.F.1.(a).
324 See 1 GALE ENCYC'IA OF MEDICINE 12 (2d ed. 2002). Complications from all types of abortions include "uncontrolled bleeding, infection, blood clots accumulating in the uterus, a tear in the cervix or uterus, missed abortion where the pregnancy continues, and incomplete abortion where some material from the pregnancy remains in the uterus." See also Abortion Risks: A List of Major Physical Complications Related to Abortion, ELLIOT INSTITUTE, http://afterabortion.org/1999/abortion-risks-a-list-of-major-physical-complications-related-to-abortion (last visited Oct. 13, 2013).
325 Id (listing complications and stating "(approximately) 10% of women undergoing elective abortion will suffer immediate complications, of which approximately one-fifth (2%) are considered life threatening.").
326 Id.
327 See TEX DEP’T OF HEALTH, supra note 242, at 15-17. These may include such problems as difficulty in carrying a pregnancy to term, infertility, or a greater risk of breast cancer. Id. In addition, there is an increasing risk of death the later the abortion. Id. ("The risks are fewer when an abortion is done in the early weeks of pregnancy. The further along in the pregnancy, the greater the chance of serious complications and the greater the risk of dying from the abortion procedure. For example: One death per every 530,000 abortions if you are at eight weeks or less. One death per 17,000 abortions for pregnancies at 16–20 weeks. One death per 6,000 abortions at 21 weeks and more."). Id at 10.
328 See TEX DEP’T OF HEALTH, supra note 242. There is a risk of premature births of subsequent children. Premature babies have a greater risk of death and lasting disabilities such as mental retardation, cerebral palsy, lung and gastrointestinal problems, and vision or hearing loss. Id.
complications, handicapped newborns in later pregnancies where there have been reproductive complications, ectopic pregnancy, and pelvic inflammatory disease ("PID").

The Women's Affidavits that were submitted with the Rule 60 Motions on behalf of Norma McCorvey and Sandra Cano reveal devastating effects of abortion, but they are only the tip of the abortion iceberg. It is estimated that there are more than one million abortions each year. Care Net, one of the largest pregnancy resource centers, as well as other pregnancy resource centers, attest that their organizations had over 100,000 women in post-abortion recovery programs in 2004 alone.

After forty years of abortion experience, both scientific research and the personal experience of women who actually aborted a pregnancy show that abortion hurts women. The serious physical and psychological effects make abortion merely a short-term "solution" with long-term negative consequences.

2. A Normal Doctor-Patient Relationship Would Exist

At the heart of Roe is the assumption that the abortion decision should be between a woman and her doctor. Abortion practice, however, does not usually involve a normal doctor-patient relationship, nor is it a voluntary, informed private decision between a woman and her doctor. Usually women do not see their abortionists until the procedure is being performed.

Women at the Planned Parenthood center in South Dakota are not adequately informed of the nature of abortion, or the scientific and factual information necessary to make an informed decision. In addition,
Planned Parenthood does not make accurate disclosures about the risks of abortion.\textsuperscript{339}

3. Abortion Would Be a Voluntary Choice

It is hard to believe that any woman truly wants an abortion for its own sake; she may simply feel as if she has no other choice.\textsuperscript{340} "[W]hile many women believe they need an abortion, very few, if any, want an abortion."\textsuperscript{341} This is not a free choice but a desperate choice.\textsuperscript{342}

In Roe and its progeny, the Supreme Court assumed that abortion would be a voluntary, dignity-enhancing, and individual choice made by the woman.\textsuperscript{343} Ironically, abortion is usually the result of coercion rather than a voluntary choice.\textsuperscript{344} The pressure may come from a variety of sources, including relatives, sexual partners, abortion facility workers, abortionists, or personal and individual circumstances.\textsuperscript{345} This pressure "can be subtle or overt."\textsuperscript{346} The irony is that the "abortion choice" gave freedom to others to pressure women into something they do not want, and later deeply regret.\textsuperscript{347}

To address the issue of coercion, at least eleven states in 2012 considered measures either prohibiting the use of coercion on the abortion decision or informing women that no one may use coercion to compel a decision about abortion.\textsuperscript{348} For example, Wisconsin amended its informed consent requirements to mandate that an abortion provider determine

\textsuperscript{339} Id. at 18.

\textsuperscript{340} See \textsc{Theresa Burke \\& David C. Reardon}, \textsc{Forbidden Grief: The Unspoken Pain of Abortion} 223 (2002).

\textsuperscript{341} Id.

\textsuperscript{342} See id. (quoting feminist Frederica Mathews-Green who said: "'No woman wants an abortion as she wants an ice cream cone or a Porsche . . . Abortion is a tragic attempt to escape a desperate situation by an act of violence and self-loss. Abortion is not a sign that women are free, but a sign that they are desperate')."

\textsuperscript{343} See Roe, 410 U.S. at 153 (discussing how denying this choice could lead to harm); Casey, 505 U.S. at 851, 877 (stating it is a woman's free choice; these intimate and personal choices are central to personal dignity and autonomy and are central to the liberty protected by the Fourteenth Amendment).

\textsuperscript{344} See \textsl{Forced Abortion in America: A Special Report}, ELID, 1981, http://www.unfairchoice.info/pdf/FactSheets/ForcedAbortions.pdf ("64% of women reported feeling pressured to abort."). See also REARDON, supra note 346, at 49 ("'Abortion on demand' was someone else's demand.").

\textsuperscript{345} \textit{Forced Abortion in America}, supra note 344, http://www.unfairchoice.info/pdf/FactSheets/ForcedAbortions.pdf

\textsuperscript{346} BURKE \& REARDON, supra note 340, at 226-27.

\textsuperscript{347} See Affidavit of Dr. David Reardon, supra note 171 at 49 ("[L]egalization of abortion has exposed women to a greater risk of feeling pressure by others to undergo 'unwanted' abortion."); Gonzalez, 550 U.S. at 159 (recognizing that some women regret their abortion).

whether a woman is being coerced into the abortion.\footnote{349} In Arizona, a sign must be posted indicating that it is unlawful to force a woman to have an abortion.\footnote{350} In South Dakota, there was a 2012 amendment to require interviews at a Pregnancy Help Center the day before an abortion for counseling and to determine if there is coercion and that the abortionist must \"[d]o an assessment of the pregnant mother's circumstances to make a reasonable determination whether the pregnant mother's decision to submit to an abortion is the result of any coercion or pressure from other persons.\"\footnote{351}

In trying to make this \"choice,\" a factor that the women consider is that abortion is legal.\footnote{352} Many women attest that they would never have considered an abortion if it were not legal.\footnote{353} The fact that abortion is legal gives it the appearance of being safe and beneficial.\footnote{354} However, abortion is fraught with negative physical and psychological consequences.\footnote{355}

\footnote{349} WIS. STAT. § 253.10(3)(b) (West 2013) (emphasis added). The statute was amended to provide:

Consent under this section to an abortion is voluntary only if the consent is given freely and without coercion by any person. The physician who is to perform or induce the abortion shall determine whether the woman's consent is, in fact, voluntary. Notwithstanding par. (c) 3., the physician shall make the determination by speaking to the woman in person, out of the presence of anyone other than a person working for or with the physician. If the physician has reason to suspect that the woman is in danger of being physically harmed by anyone who is coercing the woman to consent to an abortion against her will, the physician shall inform the woman of services for victims or individuals at risk of domestic abuse and provide her with private access to a telephone.

\footnote{353} ARIZ. REV. STAT. ANN § 36-2153(G) (2013). The statute was amended to provide that:

An abortion clinic . . . shall conspicuously post signs that are visible to all who enter the abortion clinic, that are clearly readable and that state it is unlawful for any person to force a woman to have an abortion and a woman who is being forced to have an abortion has the right to contact any local or state law enforcement or social service agency to receive protection from any actual or threatened physical, emotional or psychological abuse. The signs shall be posted in the waiting room, consultation rooms and procedure rooms.

\footnote{355} S.D. CODIFIED LAWS § 34-23A-56(1) (2013).

\footnote{353} Affidavit of Dr. David Reardon, supra note 235. In the Womens' Affidavits, many women specifically state that they would not have had an abortion if it were not legal. For example, Terri B. (Colo.) states \"If it was legal it must be O.K. – why would something wrong be legalized?\" (Bate stamp number 000088). Karen H. (Ariz.) states \"I chose abortion not because I wanted to end a life, rather in my mind during the crisis I kept thinking \'It's legal, it must be okay.\' If it was illegal I would not have considered it nor would that option been considered by myself or my husband.\" (Bate stamp number 000562). Kathy M. (Ala.) states \"I would have never considered abortion if it had not been legal.\" (Bate stamp number 000782). Debra M. (Mich.) states \"If abortion had not been legal I would not have been advised the way I was.\" (Bate stamp number 000823).

\footnote{355} See id Part III.F.1.a-b.

\footnote{354} See Womens' Affidavits, supra note 235.
G. When Does Life Begin?: A Question Now Settled

In Roe v. Wade, the State of Texas argued that “life begins at conception . . . therefore, the State has a compelling interest in protecting that life from and after conception.”\(^{356}\) The Supreme Court said that it did not need to resolve “the difficult question of when life begins.”\(^{357}\) The Court reasoned that when “those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”\(^{358}\) But the Court recognized that the case for abortion would collapse if it were established when life begins.\(^{359}\)

Now, forty years later, science and medicine have been able to determine with certainty when life begins.\(^{360}\) Medical science confirms that life begins at conception.\(^{361}\)

Biologic human life is defined by examining the scientific facts of human development. This is a field where there is no controversy, no disagreement. There is only one set of facts, only one embryology book is studied in medical school. The more scientific knowledge of fetal development that has been learned, the more science has confirmed that the beginning of any one human individual’s life, biologically speaking, begins at the completion of the union of his father’s sperm and his mother’s ovum, a process called “conception,” “fertilization” or “fecundation.” This is so because this being, from fertilization, is alive, human, sexed, complete and growing.\(^{362}\)

This “is not debatable, not questioned. It is a universally accepted scientific fact.”\(^{363}\) Thus there has been a movement to recognize the

\(^{356}\) Roe, 410 U.S. at 159.
\(^{357}\) Id.
\(^{358}\) Id.
\(^{359}\) Id at 156-57.
\(^{361}\) See generally John Ankerberg & John Weldon, What Does Science Reveal about When Life Begins? (2005), http://www.ankerberg.com/Articles/PDFArchives/apologetics/AP3W0805.pdf ("What modern science has concluded is crystal clear: Human life begins at conception. This is a matter of scientific fact, not philosophy, speculation, opinion, conjecture, or theory. Today, the evidence that human life begins at conception is a fact so well documented that no intellectually honest and informed scientist or physician can deny it."); WILLKE & WILLKE, supra note 171, at 63.\(^{362}\) WILLKE & WILLKE, supra note 171, at 63.\(^{363}\) Id.
personhood of every human being from conception but it has not been without controversy. Protection of the unborn and recognition of the personhood of the unborn child has been at both the federal and state level.

State legislatures have also made the determination that life begins at conception. This has usually followed the enactment of a Woman’s Right to Know law, and the state’s medical board’s development of a Woman’s

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365. Compare Dunaway, supra note 364, at 327-28, 358 (proposing a personhood bill), Charles I. Lugos, Beyond Personhood: Abortion, Child Abuse, and Equal Protection, 30 OREA. CITY U. L. REV. 271 (2005) (contending unborn child is a constitutional person under the Fourteenth Amendment and suggesting the Equal Protection Clause imposes a fiduciary relationship on federal and state officials to protect all unborn persons from abortion); Alec Walen, The Constitutionality of States Extending Personhood to the Unborn, 22 CONST. COMMENT. 161, 163 (2005) (criticizing Dworkin’s premise and opining Roe is vulnerable when states can demonstrate that they treat the unborn as persons prior to viability and have a compelling interest in the life of the unborn); T.J. McCre, The New Biology and the Question of Personhood: Implications for Abortion, 9 AM. J.L. & MED. 31 (1983) (reviewing the impact of biology on the views concerning abortion); Agota Peterfy, Fetal Viability as a Threshold to Personhood, 16 J. LEGAL MED. 607, 608 (1995) (discussing the certainty of when life begins but the uncertainty in law for granting the rights of the unborn and suggesting the inconsistency could be avoided if states were allowed to make all decisions regarding the treatment of fetuses).


367. See infra notes 369-71 and accompanying text.

368. See infra Part III G.
Right to Know booklet. Many state statutes define an unborn child from conception or indicate that an abortion terminates the "life of a whole, separate, unique, living human being."

In the largest government study on abortion since Roe v. Wade, the South Dakota Legislature created the South Dakota Task Force to Study Abortion ("Task Force"). The Task Force was specifically charged to study ten aspects of abortion, including when life begins. The Task Force was also charged with preparing a report that detailed its findings along with any proposals for additional legislation that the Task Force would deem advisable.

In compliance with its charge the Task Force scheduled "four full days of hearings." The Task Force heard live testimony of approximately fifty-five witnesses, including thirty-two experts, and considered the written reports and testimony from another fifteen experts. The "live testimony was divided almost equally between witnesses who support the position that abortion is harmful to women and should be illegal and those who think it

369. See TX. DEP'T. OF HEALTH, supra note 242. For example, in Texas, the booklet was produced by the Texas Department of Health ("TDH") after medical board hearings. Id. The booklet explains that at fertilization, "the unborn child has his or her own unique set of DNA material." Id. at 2. The baby's unique DNA certainly contradicts arguments that this is merely a blob of tissue or solely the woman's body. See id. Pictures in the booklet show the baby from four weeks to thirty-eight weeks gestation. Id. Most importantly, it outlines the effects and risks that may occur as a result of abortion. Id. The booklet also substantiates the serious psychological effects of abortion including "depression, grief, anxiety, lowered self-esteem, regret, suicidal thoughts and behavior, sexual dysfunction, avoidance of emotional attachment, flashbacks, and substance abuse." Id. at 16.


372. S.D. TASK FORCE, supra note 237. The Task Force was created before H.B. 1233 was enacted. Id. at 5.

373. See id. at 5. The Task Force was to study (1) "the practice of abortion since its legalization;" (2) "the body of knowledge concerning the development and behavior of the unborn child which has developed because of technological advances and medical experience since the legalization of abortion;" (3) "the societal, economic, and ethical impact and effects of legalized abortion;" (4) "the degree to which decisions to undergo abortions are voluntary and informed;" (5) "the effect and health risks that undergoing abortions has on the woman, including the effects on the woman's physical and mental health, including the delayed onset of cancer, and her subsequent life and socioeconomic experiences;" (6) "the nature of the relationship between a pregnant woman and her unborn child;" (7) "whether abortion is a workable method for the pregnant woman to waive her rights to a relationship with the child;" (8) "whether the unborn child is capable of experiencing physical pain;" (9) "whether the need exists for additional protections of the rights of pregnant women contemplating abortion;" and (10) "whether there is any interest of the state or the mother or the child which would justify changing the law relative to abortion." Id. at 5-6.

374. Id. at 6.

375. Id.

376. Id.
should be legal.” In addition, “[t]he Task Force . . . received approximately 3,500 pages of written materials, studies, reports, and testimony . . .” The Task Force noted that of particular significance were the affidavits of almost 2,000 post-abortive women who provided statements about their real life experiences. The Task Force stated that “Of these post abortive women, over 99% of them testified that abortion is destructive of the rights, interests, and health of women and that abortion should not be legal.”

Following the extensive hearings from both sides of the abortion issue, the Task Force issued its seventy-one page report in December 2005. The Task Force reviewed the assumptions made by the Roe Court, and heard expert testimony on the question of when life begins. After hearing from medical and scientific experts, the Task Force Report stated that “[i]t can no longer be doubted that the unborn child from the moment of conception is a whole separate human being.”

The Task Force heard testimony from Dr. Bernard Nathanson, a board certified obstetrician and gynecologist who was personally responsible for approximately 75,000 abortions, and one of the original founders of the National Association for the Repeal of the Abortion Laws (NARAL) in the United States. Dr. Nathanson testified that it is generally known among obstetricians and scientists that abortion terminates the life of a living human being, but abortionists often deny this fact for strategic reasons.

378. Id at 7.
379. Id. The author testified before the Task Force and entered into evidence the affidavits of post-abortive women.
380. Id (emphasis added).
381. Id at 4.
382. S.D. TASK FORCE, supra note 237, at 8-11; Roe, 410 U.S. at 149-59.
385. S.D. TASK FORCE, supra note 237, at 12. Dr. Nathanson’s testimony included the following:

[Abortion doctors and operators of abortion clinics often deny this fact for strategic reasons. He testified that he and other strategists for NARAL, for instance, adopted certain tactics to win the public perception that all forms of abortion should be and remain legal. Dr. Nathanson stated that one tactic was to suppress and denigrate all scientific evidence that supported the conclusions that a human embryo or fetus was a separate human being. He stated that he and others denied what they knew was true: “The abortion industry would routinely deny the undeniable, that is, that the human embryo and fetus is, as a matter of biological fact, a human being.”

Id.
The nature of the procedure is to terminate the life of the unborn child. Withholding these facts from the pregnant mother deprives her of the ability to make an informed decision for herself. Such informed written consent fails to meet the reasonable patient standard of disclosure and deprives the mother of her rights of self determination.386

After hearing all of the evidence, the Task Force Report concluded that “[n]o credible evidence was presented that challenged [the] scientific [fact that life begins at conception]. In fact, when witnesses supporting abortion were asked when life begins, not one would answer the question, stating that it would only be their personal opinion.”387 Thus, one of the Task Force’s conclusions was “[t]hat abortion terminates the life of a unique, whole, living human being.”388 Consequently, during the 2005 session the South Dakota Legislature passed House Bill 1166 finding that “all abortions, whether surgically or chemically induced, terminate the life of a whole, separate, unique, living human being.”389 This Act amended section 34-23A-10.1 of the South Dakota Code to require written disclosure by a physician, to a pregnant mother, “that the abortion will terminate the life of a whole, separate, unique, living human being.”390 Planned Parenthood filed suit to challenge the statute on First Amendment freedom of speech grounds, but the measure has been upheld.391

If life begins at conception, then should a guardian be appointed to protect the interest of the unborn child? Although a guardian should be appointed, the courts have not done so, primarily because the unborn child has not been considered a person.392 In In re Guardianship of J.D.S.,393 a petition was filed for a guardian for an adult who was mentally incapacitated and in a group home where she was pregnant due to a sexual

386. Id. at 12.
387. Id.
388. Id. at 13.
389. S.D. CODIFIED LAWS § 34-23A-1.2.
391. Planned Parenthood v. Rounds, 653 F.3d 662, 667, 669 (8th Cir. 2011) (holding that a provision requiring doctors to advise a woman seeking an abortion that “the abortion will terminate the life of a whole, separate, unique, living human being” did not facially violate doctors’ First Amendment rights) (quoting S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (2013)); Planned Parenthood v. Rounds, 530 F.3d 724, 738 (8th Cir. 2008) (upholding statutory language).
392. See, e.g., McGarvey v. Magee-Women’s Hosp., 340 F. Supp. 751, 753 (W.D. Pa. 1972) (discussing that guardians had been appointed in a variety of cases but not in abortion context); In re Guardianship of J.D.S., 864 So. 2d 534 (Fla. App. 2004) (denying the appointment of a guardian for the fetus).
battery. A subsequent petition was filed for a guardian for her unborn child. In the meantime, the child was born but the appellate court decided to hear the case on the merits "notwithstanding its mootness, because we consider this issue to be of great public importance and capable of recurring." The court affirmed the trial court’s decision to deny the petition for several reasons. First, the statutory provision for guardianships did not provide for guardian of a fetus using the plain language of the statute. Second, a guardian is appointed on behalf of a ward and "ward" is a person. Therefore, a fetus would have to be defined as a person and the court did not find a Florida statute that did so. Third, there would have to be certain statutory steps before the guardian of the mother and the child could consent to a medical procedure. Therefore, the court of appeals denied the appointment of a guardian for the fetus.

However, Justice Pleus dissented. He stated: "a trial court has full authority to appoint a plenary guardian for an unborn child because the child is a 'minor' as the term is used in the statute . . . . The State has a compelling interest in the health, welfare and life of the unborn child." Furthermore, the "[a]ppointment of a guardian for the unborn baby is not an undue burden and is the only means to ensure that the State's compelling interest in the health, welfare and life of an unborn child is protected." He opined that in Casey, the United States Supreme Court ruled that a state

394. In re J.D.S., 864 So. 2d at 536.
395. Id.
396. Id at 537.
397. Id at 539.
398. Id at 538.
399. In re J.D.S., 864 So. 2d at 538.
400. Id.
401. See id. at 539. The court stated: "Florida law provides safeguards to assure that a guardian does not act capriciously or cavalierly when considering the health of the incapacitated mother and fetus." Id. Relevant Florida statutes mandate that: (1) "no abortion [could] be performed . . . unless two physicians certify in writing that 'to a reasonable degree of medical probability, the termination of pregnancy is necessary to save the life or preserve the health of the pregnant woman,'" (2) "the guardian must . . . consent to the medical procedure," (3) "the guardian must [obtain] specific authority from the court," (4) before the court can grant that extraordinary authority, it must appoint an attorney to represent the ward, receive independent evidence from experts, and find by clear and convincing evidence that the incapacitated person cannot make the decision and that the requested extraordinary authority is in the best interest of the incapacitated person,

and (5) "the court may also appoint a court monitor to conduct an investigation, collect evidence, and report its findings to the court." Id.
has a legitimate interest at the outset of a pregnancy in protecting the health of a woman and the life of a fetus that may become a child, and that the interest certainly becomes compelling after the unborn child is a viable life, which it was in this case.  

In states where there is recognition that life begins at conception, and that an unborn child is a person, a guardian could and should be appointed. This is a means of protecting the State interest in health, welfare, and life of the unborn and does not impose an undue burden on the mother.

H. An Assessment of Roe

As Justice Ginsburg recognized, Roe has been severely criticized and continues to be a "storm center" because Roe "ventured too far" and gave an "incomplete justification." As one author phrased it, Roe is "a symbol of conflict." The conflict over Roe continues because Roe was wrongly decided and has had legal and moral ramifications. Therefore, there is a legal basis for overturning Roe.

Roe was wrongly decided for a number of reasons. First, the Court's role, as Justice Marshall emphasized, is "to say what the law is," not to set national policy on an issue that should be left to the legislative process. When the Supreme Court constitutionalized the abortion decision, it took a medical issue that had traditionally been left to the state legislative process and made it one that only the Supreme Court could decide. In so doing, it led to a "perverse result" because it could not keep

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407. Id. at 546.
408. See supra Part III.G.
409. See supra Part III.G.
411. Id.
413. See Casey, 505 U.S. at 833-34 (White & Rehnquist, JJ., concurring in part and dissenting in part).
414. See generally Raymond B. Marcin, God's Littlest Children and the Right to Live: The Case for a Positivist Pro-Life Overturning of Roe, 25 J. CONTEMP. HEALTH L. & POL'Y 38, 45-46 (2008) (stating two categories for the overturning of Roe v. Wade: (1) the positivist 'federalism' argument that Justice Scalia currently favors—the recognition that, contrary to the assertions in the Roe decision, nothing in the Constitution protects the right to privacy in the abortion decision . . . [or] (2) the mixed positivist-and-natural-law argument [which Marcin suggests] that a developing prenatal child has a fundamental and unalienable right to life.
415. Marbury, 5 U.S. (1 Cranch) at 177. Justice Marshall wrote: "It is emphatically the province and duty of the judicial department to say what the law is." Id.
pace with medical science and technology.\footnote{418} The Supreme Court should not be setting the national policy on abortion.\footnote{419}

Second, a fundamental right is defined as one that is either explicitly mentioned in the Constitution itself or “is deeply rooted in this Nation’s history and tradition.”\footnote{430} Abortion is neither expressly stated in the Constitution nor is it deeply rooted in the Nation’s history and tradition, as there had been a respect for life beginning in the Declaration of Independence.\footnote{421} When the Court ventures beyond what is expressly stated in the Constitution, “the Court has done nothing more than impose its own controversial choices of value upon the people.”\footnote{422}

Third, the Court did not respect and protect the life of the unborn child.\footnote{423} Even assuming \textit{arguendo} that the Court considered the unborn child only potential life, it did not strike an appropriate balance between a woman’s right to terminate a pregnancy and the right of the state to protect life.\footnote{424} The State of Texas correctly argued in \textit{Roe}, as medical science now confirms,\footnote{425} that life begins at conception, and, therefore the State had an interest in protecting that life.\footnote{426}

Fourth, the Court improperly based its decision on assumptions, rather than dealing with facts and the law.\footnote{427} Courts should not be making decisions based on assumptions and speculation.\footnote{428} Furthermore, these assumptions have now been proven to be incorrect as discussed in Part III.F.\footnote{429}

Despite numerous attempts to overrule \textit{Roe}, the Court has been content to let the core decision stand.\footnote{430} Medical issues are state issues.\footnote{431} Abortion is a medical issue and should not be constitutionalized, allowing only the Supreme Court to make changes.\footnote{432} This has been called a “perverse result.”\footnote{433} There have been significant changes in both scientific knowledge

\footnote{418} McCorvey, 385 F.3d at 850-53 (Jones, J., concurring).
\footnote{419} See id.
\footnote{420} Moore, 431 U.S. at 503 & n.12. See generally CHEMERINSKY, supra note 60, at 815.
\footnote{421} See Webster v. Reprod. Health Servs., 492 U.S. 490, 518 (1989); Casey, 505 U.S. at 951-53 (Rehnquist, C.J., concurring in part and dissenting in part); see also generally \textit{THE DECLARATION OF INDIP}.
\footnote{422} Thornburgh, 476 U.S. at 790 White & Rehnquist, JJ., dissenting).
\footnote{423} See Roe, 410 U.S. at 157-58.
\footnote{424} See id.
\footnote{425} See supra notes 360-361 and accompanying text.
\footnote{426} Roe, 410 U.S. at 150.
\footnote{427} See infra Part III.F.
\footnote{428} See infra Part III.F.
\footnote{429} See supra Part III.F.
\footnote{430} See Danforth, 428 U.S. at 60-63; Webster, 492 U.S. at 521.
\footnote{431} See Gonzalez, 550 U.S. at 157.
\footnote{432} See McCorvey, 385 F.3d at 850-53 (Jones, J., concurring).
\footnote{433} Id.
and the law, which would deem Roe no longer appropriate or just for prospective application.434

IV. PRESENT REFLECTIONS: ROE'S PROGENY CHANGES THE ABORTION LANDSCAPE

A. Protecting Women and Minors within the Constitutional Framework: Regulating Abortions

1. Overview

After the Roe decision, certain questions still remained.435 The Supreme Court stated that Planned Parenthood of Central Missouri v. Danforth436 "is a logical and anticipated corollary to Roe v. Wade and Doe v. Bolton, for it raises issues secondary to those that were then before the Court. Indeed, some of the questions now presented were forecast and reserved in Roe and Doe."437 The Court reiterated that Roe had "emphatically rejected" the argument "that [a] woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses."438 The Court emphasized that the right "must be considered against important state interests in regulation."439

Thus, the question became what regulations for protecting women and minors are within the constitutional framework?440 Following the Court's "trimester" template in Roe, state and local governments began devising a variety of abortion regulations.441 The Court addressed most of these issues in Danforth,442 but the Court again addressed the issue of regulations in subsequent cases.443

In 1989, the Supreme Court addressed the issue of regulations in Webster v. Reproductive Health Services.444 A Missouri law, stating that life begins at conception, prohibited the use of public employees and

434. See id.
435. See Danforth, 428 U.S. at 56.
436. 428 U.S. 52.
437. Id. at 56 (citations omitted).
438. Id. at 60 (quoting Roe, 410 U.S. at 153).
439. Id. (quoting Roe, 410 U.S. at 153).
440. See id. at 80-81.
441. See Danforth, 428 U.S. at 56, Webster, 492 U.S. at 500-01.
442. See Danforth, 428 U.S. at 64-81.
444. 492 U.S. 490.
facilities to perform abortions. It further provided that abortions after twenty weeks could not be performed without a showing that the fetus was not viable. The Court upheld the law, but without a majority opinion.

Chief Justice Rehnquist, writing for a plurality, criticized Roe, especially its trimester approach. He noted that the rigid trimester approach was inconsistent with the more general terms of the Constitution, and that the key components of viability and trimesters were not found in the Constitution. Justice O'Connor provided the necessary fifth vote, but focused only on the specific provisions of the state law, and not on the broader question of whether Roe should be overruled. Justice O'Connor, thought by many to be a vote against abortion, wrote that it was not necessary to decide whether Roe was still viable because the Missouri law did not ban abortions entirely. She noted that there would be time to carefully reexamine Roe when it is "absolutely necessary to a decision of the case."

Three justices joined the dissent. Justice Blackmun, who authored the majority opinion in Roe, disagreed and recognized that Roe's constitutional right survived but was "not secure." He understood that the plurality would overrule Roe and return "unfettered authority" to the States. In particularly sharp language, he stated:

Although today, no less than yesterday, the Constitution and the decisions of this Court prohibit a State from enacting laws that inhibit women from the meaningful exercise of that right, a plurality of this Court implicitly invites every state legislature to enact more and more restrictive abortion regulations in order to provoke more and more test cases, in the hope that sometime down the line the Court will return the law of procreative freedom to the severe limitations that generally prevailed in this country before January 22, 1973. Never in my memory has a plurality announced a
judgment of this Court that so foments disregard for the law and for our standing decisions.457

Justice Blackmun seemed to take the decision very personally and an attack on the argument he crafted in Roe.458 He opined that:

With feigned restraint, the plurality announces that its analysis leaves Roe “undisturbed,” albeit “modified” and “narrowed.” But this disclaimer is totally meaningless. The plurality opinion is filled with winks, and nods, and knowing glances to those who would do away with Roe explicitly, but turns a stone face to anyone in search of what the plurality conceives as the scope of a woman’s right under the Due Process Clause to terminate a pregnancy free from the coercive and brooding influence of the State. The simple truth is that Roe would not survive the plurality’s analysis, and that the plurality provides no substitute for Roe’s protective umbrella.459

Justice Blackmun then expressed his concern for the future.460 He stated: “I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the . . . 16 years since Roe was decided. I fear for the integrity of, and public esteem for, this Court.”461

Justice Blackmun addressed the issue of stare decisis and criticized the Court for failing to abide by the Court’s precedent.462 He stated:

The doctrine of stare decisis “permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.” Today’s decision involves the most politically divisive domestic legal issue of our time. By refusing to explain or to justify its proposed revolutionary revision in the law of abortion, and by refusing to abide not only by our precedents, but also by our canons for reconsidering those precedents, the plurality invites charges of cowardice and illegitimacy to our door. I cannot say that these would be undeserved.463

457. Webster, 492 U.S. at 538 (Blackmun, J., concurring in part and dissenting in part).
458. See id.
459. Id.
460. See id.
461. Id.
462. Webster, 492 U.S. at 559-60 (Blackmun, J., concurring in part and dissenting in part).
463. Id. (quoting Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986)).
Attacking the Court for failing to abide by precedent seems disingenuous considering that Roe created a new right to abortion that was neither expressly allowed in the Constitution or in prior case law. The result, as Justice Blackmun correctly stated, became "the most politically divisive domestic issue of our time." He concluded that: "For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows." Indeed, state and local governments began devising a variety of abortion regulations to protect women and children. The most common ones are discussed below.

2. Fetal Viability and Viability Tests

a. Fetal Viability

The viability of an unborn child is a medical issue, and therefore, the State must leave the determination of the viability to the physician's professional judgment. This is necessary "because viability may differ with each pregnancy." In Danforth, a Missouri statute was challenged that defined "viability as that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." The Court said that viability was a medical concept, and, therefore, the Court purposefully left flexible the point of viability for professional determination in Roe.

"It is not the proper function of [either the courts or] the legislature . . . to place viability . . . at a specific . . . gestation period." The Court stated: "[t]he time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a

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464. See id. at 518 (majority opinion).
465. Id. at 559 (Blackmun, J., concurring in part and dissenting in part).
466. Id. at 560. See generally Paul Benjamin Linton, The Legal Status of Abortion in the States If Roe v. Wade is Overruled, 27 ISSUES L. & MED. 181 (2012) (exploring a state-by-state assessment if Roe were overruled and suggesting that abortion would be legal in most states because their pre-Roe laws would not be revived).
468. See infra Part IV.A.2-7.
469. See Colautti, 439 U.S. at 388, Danforth, 428 U.S. at 61 (citing Roe, 410 U.S. at 163-65). See generally Jones, supra note 166 (discussing fetal viability cases in §§ 36 and 37).
470. 1 A.M. JUR. 2D Abortion and Birth Control § 11 (2013), see also Colautti, 439 U.S. at 388 (quoting Roe, 410 U.S. at 192).
471. Danforth, 428 U.S. at 63.
472. Id. at 64.
473. Id.
matter for the judgment of the responsible attending physician.

The Court concluded that the statute's definition of viability merely reflected this fact. Therefore, the Court held that the Act's definition of 'viability' comports with Roe and withstands the constitutional attack.

Although the attending physician determines whether a fetus is viable under the abortion statutes, this determination may be challenged. For example:

an interested party, such as the father of the fetus or the parent or legal guardian of a pregnant minor, may challenge the attending physician's determination that the fetus is not viable in court based on competent evidence, namely the opposing testimony of a doctor who has examined the mother and found the fetus to be viable.

It has also been questioned whether viability is the proper analysis for the Court's abortion framework. The Supreme Court has not met its obligation to explain the significance of fetal viability in its abortion jurisprudence in Roe or Casey, and "Gonzales makes such a justification even harder to envision" because a pre-viable baby is "a second life with an existence independent of the mother.

It has also been argued that the language in Casey expressing that the abortion right extends to the point of fetal viability was merely dicta and, therefore, was irrelevant to the Court's resolution of the issues presented. In either case, the Court has not provided an appropriate rationale for the viability framework, particularly in light of the scientific fact that life begins at conception, and the historical view of the unborn child.

474. Id.
475. Id.
476. Danforth, 428 U.S. at 65.
477. 1 A.M. JUR. 2D Abortion and Birth Control § 11.
479. See Randy Beck, Gonzales, Casey, and the Viability Rule, 103 NW. U. L. REV. 249, 249 (2009). The author concludes that "No date, the Court has failed to offer any theory showing why the Constitution prevents a legislature from protecting fetal life until the fetus can survive outside the womb." Id. at 280.
480. Id. at 252.
481. Id. at 253.
482. See Beck at 253.
483. See supra notes 360-361 and accompanying text.
484. For a historical assessment, see Charles I. Lugosi, When Abortion was a Crime: A Historical Perspective, 83 U. DET. MERCY L. REV. 51, 51-53 (2006) (stating the modern view that fetuses and embryos are not human beings or persons is contrary to both the common law and the early history of the United States as killing a fetus was a crime).
b. Viability Tests

In 1979, the Supreme Court struck down a Pennsylvania statute that required doctors to perform fetal viability tests to determine if the baby was viable.\(^485\) Section 5 of the Act required that a physician determine whether the baby is viable.\(^486\) Section 6 of the Act prohibited an abortion subsequent to the baby's viability, except when it was necessary "to preserve the life or health of the mother."\(^487\) The Court concluded that the statute was vague,\(^488\) and failed to adequately identify the doctor's duty of care to the mother.\(^489\) The Court held that viability determinations are to be left to the physician's medical judgment, skill, and technical ability.\(^490\)

Ten years later in *Webster*, the Court again had the opportunity to determine the constitutionality of viability tests.\(^491\) The Missouri statute required that:

prior to performing an abortion on any woman whom a physician has reason to believe is twenty or more weeks pregnant, the physician must ascertain whether the fetus is viable by performing "such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child."\(^492\)

The Court upheld the Missouri law requiring doctors to perform fetal viability tests on all fetuses more than twenty weeks old.\(^493\) Justice O'Connor, in her concurring opinion, did not see the requirement as an undue burden on the mother's decision to have an abortion.\(^494\) This has had an impact in future testing, such as having an ultrasound or sonogram prior to an abortion, which will be discussed under recommendations.\(^495\)

Thus, "[t]he . . . Supreme Court has held that the State may require physicians to conduct reasonable tests to determine whether [the baby] is

\(^{485}\) *Colautti*, 439 U.S. at 381, 401.
\(^{486}\) Id at 391.
\(^{487}\) Id at 382.
\(^{488}\) Id at 391–94.
\(^{489}\) Id at 397–401.
\(^{490}\) *Colautti*, 439 U.S. at 388.
\(^{491}\) *Webster*, 492 U.S. at 501.
\(^{492}\) Id (quoting MO. ANN. STAT. § 188.029 (1986)).
\(^{493}\) Id at 519–20. Chief Justice Rehnquist authored this part of the opinion, joined by Justices White and Kennedy. Id at 498. Justices O'Connor and Scalia concurred in the judgment. Id at 522, 532.
\(^{494}\) See id at 530 (O'Connor, J., concurring).
\(^{495}\) See infra Part V.A.1.
viable prior to performing an abortion procedure.\textsuperscript{496} In addition, at least one appellate court has upheld the requirement to do an ultrasound prior to an abortion.\textsuperscript{497}

3. Waiting Periods

Prior to \textit{Casey}, the Supreme Court had struck down waiting periods for adult women seeking abortions.\textsuperscript{498} In \textit{City of Akron v. Akron Center for Reproductive Health, Inc. ("Akron I")},\textsuperscript{499} the Court applied strict scrutiny and concluded that the regulation was invalid—affirming the appellate court’s judgment that there was no medical basis for such a waiting period and that the government could not require a woman to carefully consider her decision.\textsuperscript{500}

In \textit{Casey}, however, the Supreme Court reversed course and applied the “undue burden” test instead of strict scrutiny.\textsuperscript{501} The Court determined that a requirement for important decisions must be informed, and therefore, a decision made after a period of reflection and thought was not unreasonable.\textsuperscript{502} Thus, a waiting period was not an undue burden on a woman.\textsuperscript{503}

Twenty-six states now require a waiting period after counseling and before an abortion.\textsuperscript{504} Facial challenges to a waiting period requirement that are substantially similar to the one upheld in \textit{Casey} are constitutional.\textsuperscript{505} Provisions that are unlike \textit{Casey} have not passed constitutional muster.\textsuperscript{506}

\textsuperscript{496} Jones, \textit{supra} 166 (discussing fetal viability cases in §§ 36 and 37); \textit{see also} Webster, 492 U.S. at 490.

\textsuperscript{497} See Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 573, 584 (5th Cir. 2012).

\textsuperscript{498} \textit{Akron I}, 462 U.S. at 449-51.

\textsuperscript{499} 462 U.S. 416.

\textsuperscript{500} Id. at 450-51.

\textsuperscript{501} \textit{Casey}, 505 U.S. at 876-77.

\textsuperscript{502} Id. at 885-87.

\textsuperscript{503} \textit{See generally} Jones, \textit{supra} 166 (discussing \textit{Casey} and the waiting period in § 18).


\textsuperscript{505} \textit{See, e.g.}, Karlin v. Foust, 188 F.3d 446, 490 (7th Cir. 1999) (upholding Wisconsin’s twenty-four hour waiting period); Planned Parenthood v. Miller, 63 F.3d 1452, 1467-68 (8th Cir. 1995) (upholding South Dakota’s twenty-four hour waiting period that would require one visit to an abortion provider); Fargo Women’s Health Org. v. Schafer, 18 F.3d 526, 530-32 (8th Cir. 1994) (upholding similar requirement contained in North Dakota statute); Barnes v. Moore, 970 F.2d 12, 13-15 (9th Cir. 1992) (upholding Mississippi’s twenty-four hour waiting period that required two trips to an abortion provider); Utah Women’s Clinic, Inc. v. Leavitt, 844 F. Supp. 1462, 1491-94 (D. Utah 1994) (upholding Utah’s twenty-four hour waiting period that required two trips to an abortion facility), \textit{rev’d on other grounds}, 75 F.3d 564 (10th Cir. 1995).

\textsuperscript{506} Planned Parenthood v. Sundquist, 38 S.W.3d 1, 19-24 (Tenn. 2000) (finding the two-day waiting period did not pass constitutional muster).
In Zbaraz v. Hartigan,\textsuperscript{507} the Court of Appeals for the Seventh Circuit held that a mandatory twenty-four hour waiting period after parental notification was unconstitutional because it burdened a minor's abortion choice.\textsuperscript{508} The court noted, however, that states have a significant interest in regulating minors' conduct because of their presumed inability to make informed decisions.\textsuperscript{509}

4. Regulating Medical Procedures

Prior to Casey, the Supreme Court of the United States, for the most part, concluded that state laws focusing specifically on how and where abortions could be performed were not constitutional.\textsuperscript{510} For example, in Danforth the Court invalidated a state law that barred doctors from using saline amniocentesis for abortions after the first trimester, concluding that the procedure was medically accepted.\textsuperscript{511} Furthermore, requiring the use of other methods might pose greater dangers to the woman.\textsuperscript{512}

The Supreme Court in Casey clarified which regulations would meet constitutional muster.\textsuperscript{513} It recognized that only some regulations are unwarranted because "the State has a substantial interest in potential life."\textsuperscript{514} The Court stated that the undue burden test "is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty"\textsuperscript{515} and concluded that "[n]ot all burdens on the right to decide whether to terminate a pregnancy will be undue."\textsuperscript{516} Therefore, "[r]egulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden."\textsuperscript{517}

In recent years, the Supreme Court has been more willing to find that there is an intersection of a life interest and the regulation of medical

\textsuperscript{507} 763 F.2d 1532 (7th Cir. 1985), aff'd 484 U.S. 171 (1987) (by an equally divided Court).
\textsuperscript{509} Zbaraz v. Hartigan, 763 F.2d at 1536.
\textsuperscript{511} Danforth, 428 U.S. at 75-79.
\textsuperscript{512} Id.
\textsuperscript{513} See Casey, 505 U.S. at 833.
\textsuperscript{514} Id at 876.
\textsuperscript{515} Id.
\textsuperscript{516} Id.
\textsuperscript{517} Id at 878.
practice. In *Washington v. Glucksberg,* a Washington statute prohibited physicians from assisting terminally ill patients in committing suicide. The plaintiffs asserted that there was a liberty interest under the Fourteenth Amendment for adults who were mentally competent and terminally ill to commit physician-assisted suicide. The Supreme Court, however, held that the government had a legitimate interest in prohibiting the medical practice and, therefore, the statute prohibiting physician-assisted suicide was constitutional. It reasoned that physician-assisted suicide was not a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment and that the state's prohibition was rationally related to a legitimate government interest of preserving life.

In *Gonzales v. Carhart,* the Supreme Court reviewed the federal statute banning partial birth abortion. The Court gave deference to Congress and found that the government had a legitimate interest in regulating partial birth abortions and that prohibiting the procedure did not pose a substantial obstacle to a woman choosing to have an abortion. It stated that there "can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" Therefore, a state or federal statute should pass constitutional muster if it is rationally related to a legitimate government interest, such as the State's interest in preserving life. The Court has recognized the State's interest and followed its precedent in *Casey.*

5. Reporting Requirements

The states have developed reporting laws that vary from state-to-state. For example, "[forty-six] states require hospitals, facilities, and physicians providing abortions to provide regular and confidential reports to the states."
These laws have generally been upheld. For example, in Danforth the statute required physicians who perform abortions to complete forms, maintain records for seven years, and allow inspection of the records by state health department officials. The Court found that such requirements were "reasonably directed to . . . preserving the mother's health [as well as] respecting a patient's confidentiality and privacy," and therefore the statute was constitutional.

In Casey, the statute required that a report be filed for each abortion. Specifically, the report was to include the name of the physician, the woman's age, the number of prior pregnancies and abortions that the woman had, any medical complications from the abortion, the weight of the unborn child, and whether the woman was married. The Court concluded that these reporting requirements served an important purpose without being an undue burden on the woman. The Court stated that "[t]he collection of information with respect to actual patients is a vital element of medical research, and so it cannot be said that the requirements serve no purpose other than to make abortion more difficult."

Reporting requirements are unconstitutional if they do not preserve confidentiality. In Thornburgh, the reporting law required that information be given as to the method of payment, the woman's personal history, and the bases for medical judgment. The Court concluded: "[a]lthough the statute does not specifically require the reporting of the woman's name, the amount of information about her and the circumstances under which she had an abortion are so detailed that identification is likely. Identification is the obvious purpose of these extreme reporting requirements."

The Court has generally approved state laws requiring doctors to create and maintain records of their abortion activity. Where, however, the required reports fail to protect confidential information such as the woman's identity, the laws are vulnerable.

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532. See Casey, 505 U.S. at 900-01; Danforth, 428 U.S. at 83-84.
534. Id. at 80.
535. Casey, 505 U.S. at 900-01.
536. Id. at 900.
537. Id. at 900-01.
538. Id.
540. Id. at 766.
541. Id. at 75-67.
542. See Casey, 505 U.S. at 833; Danforth, 428 U.S. at 83-84.
543. See Thornburgh, 476 U.S. at 75-67.
6. Informed Consent

Informed consent is an ancient doctrine and has long been a part of the doctor-patient relationship in the United States through the common law, legislation, and professional norms. In the landmark case of Schloendorff v. Society of New York Hospital, Justice Benjamin Cardozo concluded: "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body, and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." It was not until 1957 that the phrase "informed consent" was used.

The groundwork for informed consent in abortion cases was laid in Danforth. The Court concluded that requiring a pregnant woman to execute a written consent form, similar to those used in other surgical procedures, was permissible. However, the Court invalidated provisions where the required information was not to inform the woman to gain her consent but to persuade her to withhold it.

There was a major shift with the Casey decision. The Court found that the government may present "truthful, nonmisleading, information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus .... To that extent, the Court overruled Akron I and Thornburgh which had invalidated certain information, because they were inconsistent with Roe's acknowledgment that the State has "an important interest in potential life."

The Court further stated:

[W]e permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a

545. See Lakey, 667 F.3d at 585 (Haggard, J., concurring).
549. See Danforth, 428 U.S. at 66-67.
550. Id.
551. See Akron I, 462 U.S. at 444-45 (invalidating requirement of specific information that was lengthy and inflexible); Thornburgh, 476 U.S. at 762 (explaining that the Akron I requirements were wrong in dissuading abortion and imposing "a rigid requirement" regardless of patient needs).
552. See Casey, 505 U.S. at 833.
553. Id at 882.
554. Id.
decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion. In short, requiring that a woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.555

Following the Casey decision, state legislatures began to implement laws to provide women with accurate and truthful information so that they could make informed decisions.556 Generally these laws were part of the state’s informed consent laws or they were legislation called “A Woman’s Right to Know” law.557 The laws are usually accompanied by a “Woman’s Right to Know” booklet that explains the medical facts and follows the Casey guidelines of the nature of the abortion procedure, the physical and psychological risks of abortion and those of childbirth, and the probable gestational age and development of the unborn child.558

555. Id. at 883.
For example, in Texas, the booklet was produced by the Texas Department of Health ("TDH") after medical board hearings. On page two, it explains that "the unborn child has his or her own unique set of DNA material . . . " at fertilization. The baby's unique DNA certainly contradicts arguments that this is merely a blob of tissue or solely the woman's body. Pictures in the booklet show the baby from four weeks to thirty-eight weeks gestation. Most importantly, it outlines the effects and risks that may occur as a result of abortion, pregnancy, and childbirth. On page sixteen, it also substantiates the serious psychological effects of abortion including "depression, grief, anxiety, lowered self-esteem, regret, suicidal thoughts and behavior, sexual dysfunction, avoidance of emotional attachment, flashbacks, and substance abuse."

7. Spousal or Parental Notification and Consent Laws

a. Spousal Notification and Consent Laws

The first major Supreme Court case to consider spousal consent was Danforth. The Court reviewed a Missouri statute that required the prior written consent of a married woman's spouse. The Missouri General Assembly perceived that marriage is an institution, and therefore, any major changes in the family's status should be made jointly by the marriage partners.

The Court noted that it had reserved the question of whether a requirement for consent by either the spouse, father of the unborn child, or the parents if the girl was a minor could be constitutionally imposed in Roe and Doe. The Court held that the State may not constitutionally require...
the consent of the spouse because it cannot delegate veto power which it did not have during the first trimester of pregnancy. The Court stated:

We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife’s pregnancy and in the growth and development of the fetus she is carrying. Neither has this Court failed to appreciate the importance of the marital relationship in our society.

The Court also recognized that the abortion decision “may have profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious.” Despite these recognitions, the Court held that the State did not have the constitutional authority “to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right.” The Court recognized that it, in essence, gave the wife the unilateral right to decide and weighed in favor of the wife because she is the one who “physically bears the child and who is the more directly and immediately affected by the pregnancy . . . .”

The Supreme Court in *Casey* reaffirmed the principle that spousal notification would “impose a substantial obstacle.” The Court recognized that only limited research had been conducted concerning notifying the husband about an abortion and the samples were too small to be representative. Yet the Court said that the district court’s findings of fact were supported.

The Supreme Court stated that the “vast majority of women notify their male partners of their decision to obtain an abortion.” The Court surmised that where married women do not notify their husbands, “the pregnancy is the result of an extramarital affair” in many cases. But where the husband is the father, “the primary reason women do not notify their husbands is that the husband and wife are experiencing marital difficulties, often accompanied by incidents of violence.”

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569. See id. at 69.
570. Id. (citing *Griswold*, 381 U.S. at 479).
571. *Danforth*, 428 U.S. at 70.
572. Id.
573. Id. at 71.
574. See *Casey*, 505 U.S. at 893-94.
575. Id. at 892.
576. Id.
577. Id.
578. Id.
discussed how "millions of women in this country . . . are the victims of regular physical and psychological abuse at the hands of their husbands." 580 Therefore, the Court concluded that a "spousal notification requirement is . . . likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle." 581 The Court did not provide any legal or scientific support for these conclusions. 582

In fact, evidence at the trial level refuted this contention and then-Circuit Judge Samuel Alito addressed this issue. 583 He stated that the district court found that the "'vast majority' of married women voluntarily inform their husbands before seeking an abortion," and that the evidence at trial was that "95% of married women notify their husbands." 584 In addition, seventy to eighty percent of abortions are by unmarried women. 585 Therefore, five percent or fewer of all women desiring an abortion would be affected, 586 and the statute provided exceptions to protect them. 587

Judge Alito concluded "plaintiffs did not even roughly substantiate how many women might be inhibited from obtaining an abortion or otherwise harmed by Section 3209" nor did they show "the impact of Section 3209

580. See id. at 893.
581. See id. at 893-94. At the appellate level, then Circuit Judge Alito addressed the issue and stated:

the plaintiffs, who made a facial attack on Section 3209, did not prove that this provision would impose an undue burden. Section 3209 does not create an 'absolute obstacle' or give a husband 'veto power.' Rather, this provision merely requires a married woman desiring an abortion to certify that she has notified her husband or to claim one of the statutory exceptions.


582. See Casey, 505 U.S. at 833.
583. Casey, 947 F.2d at 721-22 (Alito, J., concurring in part and dissenting in part).
584. Id. at 722.
585. Id. at 722 n.3.
586. Id. at 722.
587. Id.

These exceptions apply if a woman certifies that she has not notified her husband because she believes that (1) he is not the father of the child, (2) he cannot be found after diligent effort, (3) the pregnancy is the result of a spousal sexual assault that has been reported to the authorities, or (4) she has reason to believe that notification is likely to result in the infliction of bodily injury upon her. If Section 3209 were allowed to take effect, it seems safe to assume that some percentage of the married women seeking abortions without notifying their husbands would qualify for and invoke these exceptions. The record, however, is devoid of evidence showing how many women could or could not invoke an exception.

Id
would be any greater or any different from the impact of the notice requirement upheld in *Matheson*. Consequently, the plaintiffs failed to prove that Section 3209 would impose an undue burden." 588 Judge Alito also stated that the father’s interest "may be legitimately furthered by state legislation . . ." as domestic relation issues have "long been regarded as a virtually exclusive province of the States." 589 The father’s rights are too important to be dismissed without proof of serious harm to the women. 590 Even in these cases, the legislature in *Casey* provided exceptions that would protect her. 591

In *Scheinberg v. Smith*, 592 abortionists brought a class action challenging constitutionality of provisions of Florida’s Medical Practice Act. 593 The State argued that there were state interests: "maintaining and promoting the marital relationship, and protecting a husband’s interest in the procreative potential of the marriage." 594 The court held "that these interests, weighed together . . . [further] the integrity of the state-created and regulated institutions of marriage and the family, are 'sufficiently weighty,' to justify the burden on a woman’s abortion decision imposed by the spousal notification requirement." 595 The court recognized that both marriage and the family are "central to our society." 596 "It is . . . because of the "cultural centrality of these institutions" that they receive heightened protection under the Constitution." 597 The court also said that "Both the creation and protection of the marital entity, as well as of the legally recognized family, are primarily a matter of state concern." 598 The court reasoned that "It is apparent, moreover, that notice and consultation does, in general, further the integrity of marital and familial life:"

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588. *Casey*, 947 F.2d at 723 (Alito, J., concurring in part and dissenting in part).
589. Id. at 725-26.
590. See id.
591. See id. at 709-10.
592. 659 F.2d 476 (5th Cir. 1981). See generally Brian D. Shore, Comment, Marital Secrets: The Emerging Issue of Abortion Spousal Notification Laws, 3 J. LEGAL MED. 461, 469-70 (1982) (discussing *Scheinberg v. Smith* and concluding that it used a balancing analysis, but suggesting that the weight of authority supports using the three-step mode of strict scrutiny analysis); Recent Decisions, supra note 565, at 158 ("*Scheinberg* was significant in its development of the constitutionality of spousal notification and consultation"); Debbie Wiemers, Note, Spousal Notification and Consent in Abortion Situations: *Scheinberg v. Smith*, 19 HOUS. L. REV. 1025, 1026 (1982) (stating the Florida spousal notification statute established the husband’s right in the abortion decision and provided "a well-defined framework for constitutional analysis").
594. Id. at 483.
595. Id. (citations omitted).
596. Id.
597. Id.
598. *Scheinberg*, 659 F.2d at 483.
599. Id. at 484 (quoting *Scheinberg v. Smith*, 482 F. Supp. 529, 537 (S.D. Fla. 1979)).
The testimony revealed that experts from the disciplines of psychiatry, gynecology, psychology and obstetrics, as well as counselors and social workers, uniformly encourage married couples to consult on particularly important decisions such as whether to terminate a pregnancy. By definition, a good or sound relationship is one in which mutual communication on sensitive and difficult topics like sex, childbirth and abortion is commonplace.600

The court also recognized that there are two compelling interests that must be weighed: "a married woman's right to privacy in the abortion decision and the state's interest in ensuring that the institution of marriage maintains its authenticity."601 The court stated that it did not know of any way to approach the balancing of these interests other than to consider "'the basic values that underlie our society.'"602 The court distinguished the statute in Danforth and said that it gave the spouse the unilateral ability to prevent the abortion.603 In contrast, the Florida statute required notice but not consent.604

The court reasoned:

By creating marriage as the vehicle for legally safeguarded family life, the state has made the marital partners entirely dependent on each other for fulfillment of familial aspirations. If either partner is to enjoy one of the primary purposes of marriage, the bringing forth and nurturing of children, each partner must cooperate in matters of childbirth. Most assuredly the state does not have the right to require, as an incident of marriage, the fulfillment of each spouse's procreative desires. The state does, however, have a substantial interest in attempting to ensure that the state-created vehicle for procreation, marriage, not be abused through one spouse perpetually and secretly frustrating the other's desire for offspring.605

The court also discussed the husband's contractual relationship and aspirations for children.606 The court said:

Her husband has legally committed himself to a contractual relationship that prohibits the extra-marital creation of children. If

600. Id. (quoting Scheinberg, 482 F. Supp. at 537).
601. Id.
602. Id (quoting Moore, 431 U.S. at 503).
603. Scheinberg, 659 F.2d at 484.
604. Id at 485.
605. Id (citations omitted).
606. See id.
his aspirations include a desire for children, it is a small concession for him to have the right to know that his wife is considering an abortion. The marital relationship is the only legitimate vehicle the husband presently has for realizing his procreative rights. The husband’s ability to procreate, moreover, is entitled to constitutional protection. The state, therefore, has a compelling interest in requiring a wife to inform her husband when she is contemplating termination of a pregnancy. Absent such a right the marital relationship between a couple could be maintained without a husband ever discovering why or how his aspirations for a family have been frustrated. This is surely a perversion of the institution of marriage, as conceived in our society and as instituted by the state.607

In denying a father’s right of notice and consent to the abortion, the Supreme Court made several major errors in analysis.608 First, the Court presupposed that a father’s right emanates from the State, and, therefore, the State could not grant an interest that it did not have.609 A father’s right or interest does not emanate from the State.610 It is an inherent, natural right of fathers.611 This fundamental right is recognized in the Declaration of

607. Id (citations omitted).
608. See Scheinberg, 659 F.2d at 485.
609. See id.
611. The courts have recognized the inherent right of fathers in a variety of family law issues. See, e.g., Schutz v. Schutz, 581 So. 2d 1290, 1293 (Fla. 1991) (“The court also properly considered the father’s constitutionally protected ‘inherent right’ to a meaningful relationship with his children, a personal interest which in this case is consistent with the state’s interest in promoting meaningful family relationships.”), In re Adoption of Scragg, 532 N.E.2d 244, 247 (Ill. 1988) (“[A]t the natural father he has an inherent right to the society of his child.”), Locke, 399 A.2d at 965 (“To deny all visitation rights to the child and the plaintiff, as the mother requests, is fair to neither the child nor the father, unless there are unusual circumstances, the existence of which is a matter for determination by the trial court. Absent such circumstances, the right of the child and the father to a continuing relationship should not depend upon legislative enactment. It is a right that has its foundation among those ‘natural essential and inherent rights’... [Its protection is not dependent upon legislative enactment or grant of authority to the judiciary.”), State v. Robert H., 393 A.2d 1387, 1389 (N.H. 1978) (“The family and the rights of parents over it are held to be natural, essential and inherent rights within the meaning of [the New Hampshire Constitution.]”) New Hampshire Constitution, part I, article 2; Childers, 136 N.W.2d at 273 (“Thornton & Stuart, J., dissenting) (“Is this enough to offset not only the inherent right of a father to live with his children but of the children’s inherent right to live with their father? I think not. It should be remembered that God placed these children with the father and we should not, except for a compelling reason, change such plan. Wealth and position are not sufficient reasons to deny parent and child the inherent right to live together. If they are, we are all in danger of losing our children.”), Scott v. Ashcraft, 95 N.E.2d 122, 124 (Ill. App. Ct. 1950) (“Legal precedent in this state has always recognized the inherent right of a father to the custody of his motherless children and will even presume the father to be capable of caring for them until the contrary is clearly established.”), Frazier v. Frazier, 147 So. 464, 466 (Fla. 1933) (“The inherent rights of parents to enjoy the society and association of their offspring, with reasonable opportunity to impress upon them a father’s or a mother’s love and affection in their upbringing, must be regarded as being of an equally important, if not controlling,
Independence and the Fourteenth Amendment. The biological fact is that pregnancy would not occur without his participation and DNA. Therefore, he is an equal partner in the procreation process and has inherent rights.

Second, the Court erred in basing its decision on speculation rather than fact. The Court assumed that a woman would not tell her spouse because he was abusive. Certainly, women who are victims of abuse should be protected. But a court must make a factual determination that there has been abuse, as evidenced by police reports, investigations, and action. It should not be based on a court's speculation or the woman's unsupported accusation. A father's right is too important to be denied on mere conjecture or unsupported accusations.

Third, the Court recognized how the secrecy of the abortion would hinder the relationship and the institution of marriage, but dismissed it as a reason for providing notice and consent. The physical and psychological harm of abortion is well documented in studies in the United States and abroad, as discussed above. It is damaging to the relationship where the father would not know or understand why his spouse is going through such harms as depression, suicidal thoughts, the lack of intimacy, or bonding consideration in adjusting the right of custody as between parents in ordinary cases. No relationship in life should be regarded as more sublime, nor should any inherent right of an individual be esteemed more highly, than that which arises out of the natural relationship of love and affection which normally exists between parent and child, regardless of what may be the private individual code of morals, or the race, color, creed, or station in life of the father or mother.

612. See Black v. Wisconsin, 89 N.W. 522, 529-30 (Wis. 1902) (Marshall, J., concurring) ("General language was used in the fundamental declaration of right, which formed the basis for every constitutional declaration in that regard that followed and is found in the various state constitutions. It was designed to be broad enough to cover every principle of natural right, of abstract justice. 'All men are created equal. They are endowed by their Creator with certain unalienable rights. Among these are life, liberty and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed'. . . It seems that within those broad and comprehensive words is [sic] plainly lodged protection for the citizen as to every natural right and every principle of justice that is deemed essential to the consummation of the legitimate objects of human existence.").


614. See Childers, 136 N.W.2d at 273 (Thorton & Stuart, JJ., dissenting).

615. See Casey, 505 U.S. at 833.

616. See id. at 892.


619. See Wilker v. Wilker, 630 N.W.2d 590, 596 (Iowa 2001) (noting that because factual determinations are required, it should not be made without facts).

620. See Ashcroft, 95 N.E.2d at 134 (citing Vannunzick v. Hoff, 56 N.E.2d 324 (Ill. App. Ct. 1944)).

621. See Danforth, 428 U.S. at 70.

622. See supra Part III.F.1.
with other children.\textsuperscript{623} The woman is also deprived of her spouse’s comfort and assistance in helping her through a difficult time.\textsuperscript{624} Furthermore, one of the risks of abortion is that a woman may not be able to have another child because of the abortion.\textsuperscript{625} Short of dying because of the abortion, there could not be a more heartbreaking scenario than aborting the only child she will ever have.\textsuperscript{626} This is devastating to both the woman and her spouse, and frustrates the procreative role of her spouse.\textsuperscript{627}

Fourth, denying a father any input on the abortion issue simply because he is male and cannot carry the child to term is sex discrimination.\textsuperscript{628} In \textit{Casey}, the Court reasoned that the mother carries the child to term, and therefore, she may experience anxieties, physical constraint, and pain.\textsuperscript{629} According to the Court, her suffering is too intimate and personal for the state to insist on the woman’s role.\textsuperscript{630} The Court did not consider the father’s suffering which is also personal and intimate when he learns that his child has been aborted.\textsuperscript{631} The Court only recognized that after the birth of the child the father and mother have equal interests.\textsuperscript{632}

It is also discriminatory to say that a father has no rights to determine the life or death of his unborn child, but to require that he has financial obligations once the child is born.\textsuperscript{633} Fathers are required to pay child support whether or not they wanted the child.\textsuperscript{634} There is not an opt-out provision, but potential jail time if he fails to pay.\textsuperscript{635} If the law requires him to pay, he should have a say.\textsuperscript{636} In addition, he cannot opt-out of

\textsuperscript{623} See Danforth, 428 U.S. at 70.
\textsuperscript{626} For example, one woman named Jackie Bullard testified: “We were in our thirties when we started trying to have a baby, but something was wrong. After unsuccessful fertility treatments, a test revealed scar tissue damage from the complications of my incomplete abortion. When the doctor told me I could never have children, I was devastated. That day I knew I had taken the life of the only child I would ever carry.”\textsuperscript{Id}
\textsuperscript{627} See id., Tex. Dep’t of Health, supra note 242, at 2, 9 (showing that a child is created by a male and a female and is terminated by abortion).
\textsuperscript{628} See Howard Sherain, \textit{Beyond Roe and Doe: The Rights of the Father}, 50 Notre Dame L. Rev. 483, 494 (1975) (“This exclusivity of the mother’s decision and total disregard for the claims of the father is a fundamentally sexist expression.”).
\textsuperscript{629} \textit{Casey}, 505 U.S. at 852.
\textsuperscript{630} Id.
\textsuperscript{631} See id.
\textsuperscript{632} See id. at 896.
\textsuperscript{634} Id.
\textsuperscript{636} See Casimir, supra note 633, at 24-25.
parenthood even though the mother can by having the abortion. Fathers should financially support their children. 637 This is good social policy and in the best interests of the child. 638 But the law is not consistent in its reasoning and application of fathers' rights and responsibilities. 639 Denying a father input in the abortion decision is discrimination, and not a constitutional principle. 640

Fifth, fathers are denied due process and equal protection as guaranteed in the Constitution 641 It is well established that individuals have basic due process rights. 642 However, the more substantial the harm, the greater the due process protections that must be attached. 643 In the case of abortion, the harm is irreparable because it is the death of the child 644 In addition, the father is denied equal protection of his interests and rights in the child. It is ironic that "a father cannot stop an abortion if he wants his child, nor can he insist upon an abortion if he doesn't want his child." 645 As equal members of society, fathers should have a voice in the decision that is made. 646 Failure to provide any notice or consent deprives him of his interests and rights without any consideration, input, or due process and equal protection. 647

638. Roe and its progeny send a wrong social message to fathers that they do not count and have no responsibility. As one author states, "men have been empowered by Roe v. Wade to have sex and run. They've been forced out of their crucial role by perpetual welfare and today’s brand of liberal feminism." Teresa Collett, Abortion, Paternity, and Fathers’ Rights, UNIV. FACULTY FOR LIFE BLOG: ABORTION, PATERNITY & FATHERS' RIGHTS (Oct. 5, 2011, 11:40 AM), http://www.uffl.org/blog/2011/10/05/abortion-paternity-and-fathers-rights/.
639. See Steven D. Hales, Abortion and Fathers’ Rights in BIOMEDICAL ETICS REVIEWS: REPRODUCTION, TECHNOLOGY, AND RIGHTS, at 5 (James M. Humber & Robert F. Almeder eds. 1996) (arguing that “three widely accepted principles regarding abortion and parental rights are prima facie jointly inconsistent.”).
640. Chief Justice Rehnquist was critical of the joint opinion’s distinction between parental consent and spousal consent because the Court reasoned that parents will have the best interests of their children at heart, but this may not be true of husbands. He stated that this “may or may not be a correct judgment, but it is quintessentially a legislative one.” Casey, 505 U.S. at 965-66 (Rehnquist, C.J., concurring in part and dissenting in part). He opined that “‘under the guise of the Constitution, this Court will still impart its own preferences on the States in the form of a complex abortion code.’” Id at 966.
641. See U.S. CONST amend. XIV.
642. See U.S. CONST. amend. V.
645. Id. The author also cites Justice Ginsburg and states, “the emphasis is not abortion, rather an individual’s right to control his own reproduction. If we protect such a right for women, can we constitutionally deny it to men?” Id.
646. See supra Part IV A.7.
Sixth, the right to privacy is not an absolute right. Although it was argued in an amicus brief in Roe that there should be an absolute right to privacy, the Court rejected this argument. The Court stated, "[t]he privacy right involved, therefore, cannot be said to be absolute . . . . The Court has refused to recognize an unlimited right of this kind in the past . . . . this right is not unqualified . . . ." The Court only considers the right to bodily privacy to be relative. Therefore, the initial presumption should favor the woman's interest, but the father should be able to rebut the presumption.

Unwed fathers are also entitled to protection of their parental rights. In Stanley v. Illinois, the State attempted to make the children wards of the state because the mother died and the father was presumed to be unfit because he was an unwed father. Mr. Stanley's fitness was deemed irrelevant. The Supreme Court rejected this position indicating that it was a violation of his due process and equal protection rights under the Fourteenth Amendment. In coming to this conclusion, the Court stated that it had "frequently emphasized the importance of the family" and that "integrity of the family unit" was protected under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment. Stanley established that a father's rights are fundamental rights that cannot be summarily denied by the State, and he was therefore entitled to a hearing to determine his fitness as a parent. Subsequent cases have followed this line of reasoning in custody disputes with the mother, as well.

Spousal notification and consent have been contested issues, and the father has lost the legal battle. His legal status concerning his unborn child, as one author has stated, "is that of a helpless bystander." The

648. See Roe, 410 U.S. at 154.
649. Id.
650. Id.
651. Id. (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905)).
652. See Sherain, supra note 628, at 486.
653. See id.
654. Stanley, 405 U.S. at 651.
655. 405 U.S. 645.
656. Id. at 646.
657. Id. at 647.
658. Id. at 658.
659. Id. at 651.
660. Sherain, supra note 628, at 487.
662. Id. (analyzing abortion from contract, tort, and criminal law perspectives, as well as equitable policy, and concluding there should be a paternal veto).
husband, however, has a substantial interest in his unborn child. The institution of marriage must be based on trust and honesty, which are broken when the husband later learns that his wife aborted their baby without his knowledge or consent. The issue of spousal notification and consent will be discussed in the recommendation section.664

b. Parental Consent or Notification Laws

In the years since Roe v. Wade, the controversy has continued, particularly in the area of minors.665 At the heart of the controversy has been the balancing of policy issues.666 On the one hand, it is recognized that the minor has the right to choose, assuming that she has the maturity to make the decision and it is in her best interests.667

On the other hand, parental involvement plays an important role.668 The Supreme Court has recognized that “States . . . have . . . [a] ‘strong and legitimate interest in the welfare of [their] young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.’”669

Several policy considerations have been long-standing. First, parental authority is one of the oldest fundamental rights.670 Justice Marshall stated that the Supreme Court “has recognized that the ‘primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition.’”671 In fact, “[f]or centuries it has been a canon of the common law that parents speak for their minor children.”672 The rationale was that parents have the “maturity, experience, and capacity for judgment required for making life’s difficult decisions.”673 Furthermore, there are “natural bonds of affection lead parents to act in the best interests of their children.”674

Second, the State has an interest in protecting minors from their own immature judgment.675 Chief Justice Burger surmised that “[t]here is no logical relationship between the capacity to become pregnant and the

664. See infra Part V.
666. See id. at 957.
667. See id. at 957, 959.
668. See id. at 957.
671. Id. (quoting Yoder, 406 U.S. at 222).
673. Id. at 602 (majority opinion).
674. Id.
675. See Frame, supra note 665, at 959.
capacity for mature judgment concerning the wisdom of an abortion. 676

One might opine that the fact that she was impregnated demonstrates her immature judgment. 677 In addition, he stated that "[t]he medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature." 678 Parents can help the physician in various ways; they can "provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data." 679

Third, the State has an interest in preserving family integrity. 680 "[T]he family . . . does not simply co-exist with our constitutional system; it is an integral part of it." 681 Furthermore, "the family has historically been a fundamental unit of our society for such purposes as socialization and nurture, and . . . ranks in importance with the individual as a unit of economic and political decision making." 682 because "it is in the family that children are expected to learn the values and beliefs that democratic institutions later draw on to determine group directions." 683 Thus, the family has an important role, not only for the child, but also for the nation. 684

Parental consent requirements are not new; minors had to obtain parental consent for any medical treatment under the common law. 685 The rationale was that minors "lack [the] experience, knowledge, and maturity . . . to give [any kind of] meaningful[, informed] consent . . . ." 686 In addition, the courts have recognized parental rights as fundamental rights, and, therefore, have been reluctant to interfere with those rights. 687 Parental rights, however, are not absolute, and there have been exceptions both at common law and statutory law. 688 Although more limited than for adults,
minors have certain constitutional rights, including the right to decide whether to have an abortion. Parental consent or notification laws have existed since 1976. They have been contested, but upheld. Currently, most states have parental consent or notification laws.
notification laws that require parental involvement in a minor’s decision to have an abortion.\textsuperscript{694} In addition, most states that have parental involvement provisions also have a judicial bypass procedure whereby a minor can petition the court to allow an abortion without her parents’ knowledge or consent.\textsuperscript{695} Judicial bypass will be discussed in greater detail in the section on "Greater Protection of Minors."\textsuperscript{696}

It is estimated that over 200,000 teenage girls have abortions each year.\textsuperscript{697} Most minors\textsuperscript{698} who are considering an abortion will turn to their parents for the advice, love, and support that are needed at this difficult time.\textsuperscript{699} Likewise, the parents will respond with love and understanding and provide the guidance that is needed.\textsuperscript{700} For these minors, the parental notification requirements do not impose a burden.\textsuperscript{701} For those that do not want to notify their parents, the judicial bypass is available, but certain reforms are needed, as discussed later.\textsuperscript{702}

Parental notification and consent laws serve important state interests and recognize the distinction between adults and minors.\textsuperscript{703} Any added burden on a minor’s abortion decision is therefore justified.\textsuperscript{704}
8. Government Funding of Abortions

Once the Supreme Court established that the right to an abortion was fundamental, the argument was advanced that women were entitled to have abortions paid for with government funds.\(^{705}\) To date, both Congress and the Supreme Court have rejected this argument.\(^{706}\)

In 1976, Congress passed the Hyde Amendment,\(^{707}\) preventing an abortion from being covered in comprehensive health care services provided by the federal government through Medicaid.\(^{708}\) The Hyde Amendment is a rider to the annual Health and Human Services ("HHS") appropriations bill.\(^{709}\) Over the years, Congress has made some exceptions, such as in cases of rape and incest, or when the mother's life is endangered.\(^{710}\)

The Supreme Court upheld the Hyde Amendment, and rejected various arguments to support government funding of abortion.\(^{711}\) Three cases in 1977 demonstrate the point.\(^{712}\) In \textit{Beal v. Doe},\(^{713}\) the Court rejected the argument that women were entitled, under the federal Medicaid Act, to state funding of permissible non-therapeutic abortions.\(^{714}\) In \textit{Maher v. Roe},\(^{715}\) an equal protection challenge to a Connecticut law was rejected that denied Medicaid funds to first trimester non-therapeutic abortions, even though such funding was available for expenses incident to pregnancy and childbirth.\(^{716}\) In \textit{Poelker v. Doe},\(^{717}\) the Court held that a city could refuse to fund non-therapeutic abortions in a public hospital, while providing funds for childbirth.\(^{718}\)

Three years later, in \textit{Harris v. McRae},\(^{719}\) the Court held that a federal law denying funding for abortions, except where the mother's life was endangered, or where the pregnancy was the result of rape or incest, was

\footnotesize{\textit{\(^{705}\) See generally Jones, supra note 166.}\n
\textit{\(^{706}\) Id. (stating in § 43 that the State has no affirmative duty under the Equal Protection Clause of the United States Constitution to fund abortions).}\n
\textit{\(^{708}\) See Harris, 448 U.S. at 326-27.}\n
\textit{\(^{710}\) See Harris, 448 U.S. at 302-03.}\n
\textit{\(^{711}\) See id.; Jones, supra note 166.}\n
\textit{\(^{713}\) 432 U.S. 438.}\n
\textit{\(^{714}\) Id. at 446 (reiterating that states have a "strong and legitimate interest" in promoting childbirth).}\n
\textit{\(^{715}\) 432 U.S. 464.}\n
\textit{\(^{716}\) Id. at 474 (finding the regulation was not an obstacle to abortion).}\n
\textit{\(^{717}\) 432 U.S. 519.}\n
\textit{\(^{718}\) Id. at 521 (finding the city's policy choice to promote childbirth was not unconstitutional).}\n
\textit{\(^{719}\) 448 U.S. 297.}
constitutional. In *Williams v. Zbaraz*, the Court upheld the denial of abortion funding except where the woman’s life was in danger. Again in 1989, in *Webster v. Reproductive Health Services*, the Court rejected a constitutional attack on a state law that prohibited public employees and facilities from performing abortions unless the mother’s life was in danger.

In all of these cases the Court’s rationale was generally the same. First, it rejected the argument that the right to an abortion includes a government duty to fund abortions. For example, in *Harris*, the Court said that just because the government cannot prohibit a liberty interest does not mean that it “has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools.”

Second, the denial of government funding does not create an obstacle to an abortion. The Court stated:

Although . . . the Due Process Clause [protects] against unwarranted government interference with the freedom of choice . . . it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution.

The government does not have an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain an abortion, contraceptives, or other liberty interests.

Third, the government—in making value judgments—is free to favor childbirth over abortion and to “implement that judgment [in] the allocation of public funds” and “allocation of . . . public resources [for such things] as hospitals and medical staff.”

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720. Id. at 326 (holding that the Hyde Amendment did not violate either the First or Fifth Amendments).
722. See id. at 359.
723. See *Webster*, 492 U.S. at 510.
724. See infra notes 726-731 and accompanying text.
725. See, e.g., *Harris*, 448 U.S. at 318.
726. See id.
727. See *Webster*, 492 U.S. at 509.
729. Id. Therefore, the Court concluded that the “Hyde Amendment does not impinge on the due process liberty recognized in *Wade*.” *Id.*
731. *Id.*; *Maher*, 432 U.S. at 474.
States have also placed restrictions on taxpayer funding for abortions.\(^{733}\) For example, in *Bell v. Low Income Women of Texas*,\(^{734}\) three physicians and three clinics that provide abortions filed suit on behalf of themselves and their Medicaid patients to declare the Texas Medical Assistance Program's ("TMAP") abortion funding restrictions for indigent women violated their constitutional rights.\(^{735}\) The Texas Supreme Court held that the funding restrictions did not discriminate on the basis of sex, and were rationally related to a legitimate governmental purpose.\(^{736}\) The court rejected all three of the plaintiffs' arguments and held that TMAP's funding restrictions did not violate the Equal Rights Amendment and that the restrictions violated neither the constitutional right to privacy nor the Equal Protection Clause.\(^{737}\)

In 2012, the issue of taxpayer funding of abortion again arose with the Medicaid Women's Health Program ("WHP").\(^{738}\) The program provides preventative health care to over 100,000 low-income Texas women annually,\(^{739}\) but the Obama Administration rejected the State's waiver application and was refusing to fund the program in Texas because Planned Parenthood was excluded.\(^{740}\) Under state law,\(^{741}\) however, the State was prohibited from contracting with providers that "perform or promote elective abortions or affiliate with entities" that do.\(^{742}\) In addition, there would be no violation for federal law.\(^{743}\)

Following the Obama Administration's decision to not provide funds, Governor Rick Perry directed the Health and Human Services Commission to establish the Texas Women's Health Program ("TWHP") to continue...
providing the services that WHP provided.\footnote{\textit{Fighting for Women's Health}, supra note 740.} Texas women are receiving comprehensive health care through more than 2,500 qualified providers in the WHP.\footnote{\textit{Id}.} Planned Parenthood represents less than two percent of providers in the WHP at a forty-three percent higher cost than most other providers, and nearly eighty percent of women served received WHP services from providers other than Planned Parenthood in 2010.\footnote{\textit{Id}.}

Although the United States Supreme Court recognizes a liberty interest, the government does not have an affirmative duty to provide funding to ensure that all women can obtain an abortion.\footnote{\textit{Harris}, 448 U.S. at 318.} Not using taxpayer money to fund abortions is a proper public policy decision, particularly where there is so much controversy surrounding \textit{Roe v. Wade} and the right to have an abortion.\footnote{\textit{Webster}, 492 U.S. at 510.}

\section*{B. The Future of Roe: Planned Parenthood v. Casey}

Justice Blackmun’s concerns about the future of \textit{Roe} were to some extent realized in \textit{Casey},\footnote{\textit{Casey}, 505 U.S. at 899-901.} decided three years after \textit{Webster}.\footnote{\textit{Id}.} In \textit{Casey}, the Court addressed the constitutionality of a Pennsylvania statute that included a variety of regulations governing abortions.\footnote{\textit{Webster}, 492 U.S. at 844.} Justice O’Connor, who had seemed to signal in \textit{Webster} that she might be inclined to overrule \textit{Roe}, authored a joint opinion\footnote{\textit{Webster}, 492 U.S. at 522 (joint opinion). Justices Kennedy and Souter joined Justice O’Connor. All nine justices concurred in at least some part of the judgment or opinion. \textit{See id}.} that began by addressing \textit{Roe}:

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman’s right to terminate her pregnancy in its early stages... that definition of liberty is still questioned. Joining the respondents as \textit{amicus curiae}, the United States, as it has done in five other cases in the last decade, again asks us to overrule \textit{Roe}.\footnote{\textit{Id}.}

Instead of overturning \textit{Roe}, \textit{Casey} reaffirmed that a woman has a constitutionally protected liberty interest to decide to terminate her pregnancy.\footnote{\textit{Id}. at 844.} The Court referenced its precedents that respected the “‘private realm of family life’” and stated that these personal choices are
central to personal dignity and autonomy and the liberty protected by the Fourteenth Amendment. The Court surmised that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." 

The Court recognized that, because the abortion decision originates "within the zone of conscience and belief," it is a "unique act" that is "fraught with consequences for . . . the woman who must live with the implications of her decision," as well as her spouse, family, those who perform and assist with the abortion, and society as a whole.

The decision dramatically modified how this liberty was to be protected, because the woman who "carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." Although there is a "bond of love" that a mother has with her child, it alone cannot be grounds for the State to insist that "she make the sacrifice" to carry the child to term. The Court further opined that the woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture." The Court surmised that "[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."

Therefore, the Court concluded that "the reservations any of us may have in reaffirming the central holding of Roe are outweighed by the explication of individual liberty we have given combined with the force of stare decisis."
The joint opinion jettisoned the trimester approach and its strict scrutiny test as being unworkable, and adopted the "undue burden" test. Under this new test, the government may regulate abortions prior to viability, unless such regulation "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." To promote its "profound interest in potential life," the government may ensure that a woman's choice is informed, and may use measures designed "to persuade the woman to choose childbirth over abortion," so long as the measures employed do not create an undue burden on her right to have an abortion.

Applying that test to the Pennsylvania statute, the Court concluded that:

- a medical emergency definition in the State statute was broad enough and did not impose an undue burden;
- the statute's informed consent requirements did not impose an undue burden;
- the law's twenty-four hour waiting period was not an undue burden;
- a parental consent provision was not an undue burden;
- the statute's requirement that facilities providing abortions report their activities and maintain records did not impose an undue burden; and
- a requirement that spouses be notified of a pending abortion was an undue burden on a woman's decision to have an abortion.

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764. Id. at 872-73.
765. Id. at 874-79.
766. Id. at 877.
767. Id. at 878.
768. Casey, 505 U.S. at 878.
769. Id.
770. Id. at 879-80.
771. Id. at 881-87.
772. Id.
773. Casey, 505 U.S. at 899-900.
774. Id. at 900-01. One reporting provision — the reasons why a woman had not informed her spouse about her decision to abort — was held to be an undue burden. Id.
775. Id. at 893-95.
Justice Blackmun concurred in part and dissented in part in the decision. He expressed concern that "four Members of this Court appeared poised to 'cast into darkness the hopes and visions of every woman in this country' who had come to believe that the Constitution guaranteed her the right to reproductive choice." He stated that "[a]ll that remained between the promise of Roe and the darkness of the plurality was a single, flickering flame. Decisions since Webster gave little reason to hope that this flame would cast much light."

Justice Blackmun was cautiously optimistic about the future of Roe. He stated, "just when so many expected the darkness to fall, the flame has grown bright." He explained that he did not “underestimate the significance of today’s joint opinion” and emphasized that the joint opinion of Justices O’Connor, Kennedy, and Souter was “an act of personal courage and constitutional principle.” Although he was concerned that there would be a single vote to overturn the decision, he remained “steadfast in [his] belief that the right to reproductive choice is entitled to the full protection afforded by this Court before Webster.”

Concurring in the judgment in part and dissenting in part, Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, explicitly stated that he would overrule Roe. Justice Scalia wrote separately that state governments can control abortion for the same reason that they can prohibit bigamy—because neither is a constitutionally protected right. His conclusion is based on “two simple facts.” the Constitution does not address either issue, and “the longstanding traditions of American society have permitted [both] to be legally proscribed.”

C. Partial Birth Abortion: Stenberg and Gonzales

One area of great interest in the abortion debate has been the attempt to regulate what many refer to as “partial birth” abortions. These typically very late-term abortions involve aborting a viable baby through a medical

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776. Id. at 922 (Blackmun, J., concurring).
777. Id. (quoting Webster, 492 U.S. at 557 (Blackmun, J., dissenting)).
778. Casey, 505 U.S. at 922.
779. See id. at 922-23 (Blackmun, J., concurring).
780. Id. at 922.
781. Id. at 923.
782. Id.
783. Casey, 505 U.S. at 944 (Rehnquist, C.J., dissenting).
784. Id. at 950 (Scalia, J., dissenting).
785. Id.
786. See, e.g., David Masci & Ira C. Lupu, A History of Key Abortion Rulings of the U.S. Supreme Court, PEW RESEARCH RELIGION & PUBLIC LIFE PROJECT (Jan. 16, 2013), http://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/#pda.
procedure called Dilation and Evacuation ("D & E"). There are several variations of the method, including Dilation and Extraction ("D & X"), which can involve actually beginning delivery through the vaginal opening before piercing the baby's skull, and then completing delivery of the now-dead child.

By 1999, thirty states had enacted statutes restricting partial birth abortions. Most of the statutes were held unconstitutional because they (1) were void for vagueness, (2) placed an undue burden on a woman’s right to terminate her pregnancy, (3) did not have a health exception, or (4) required the consent of the father or maternal grandparents of the unborn child. However, some state and federal statutes restricting partial birth abortions were applied in a constitutional manner.

Twenty-seven years after Roe and Doe, the Supreme Court in Stenberg v. Carhart had the opportunity to review the partial birth abortion procedure. The Court addressed the constitutionality of a Nebraska state statute that provided: "'No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.'"

The statute defined "partial birth abortion" as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." It further defined "partially delivers vaginally a living unborn child before killing the unborn child" to mean "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that...

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787. See Stenberg, 530 U.S. at 924-25 (quoting an AMA Report describing this technique for aborting a pregnancy from twelve to twenty weeks); see also Gail Glidewell, "Partial Birth" Abortion and the "Health Exception": Protecting Maternal Health or Risking Abortion on Demand?, 28 FORDHAM L. REV. 1089, 1095-97 (2000) (exploring the implications of Stenberg and discussing partial birth abortion procedures).


790. Id. § 2(a).


792. Stenberg, 530 U.S. at 920-21.

793. Id. at 921-22.

794. Id. at 922.
the person performing such procedure knows will kill the unborn child and
does kill the unborn child."795

The Supreme Court held that the Nebraska statute criminalizing partial
birth abortion violated the Constitution because it lacked the health
exception.796 But the Court "made clear that a State may promote, but not
endanger, a woman’s health when it regulates the methods of abortion."797
The Court stated that it had "invalidated statutes that in the process of
regulating the methods of abortion, imposed significant health risks"798

In addition, the Court stated that "[t]he law classifies violation of the
statute as a ‘Class III felony’ carrying a prison term of up to 20 years, and a
fine of up to $25,000 . . . . It also provided for the automatic revocation of a
doctor’s license to practice medicine in Nebraska."799

In finding the law unconstitutional,800 the Court reviewed the three key
principles established in Casey: "First, before viability . . . the woman has a
right to choose to terminate her pregnancy."801

Second, "a law designed to further the State’s interest in fetal life
which imposes an undue burden on the woman’s decision before
fetal viability” is unconstitutional. An “undue burden is . . . shorthand for the conclusion that a state regulation has the purpose
or effect of placing a substantial obstacle in the path of a woman
seeking an abortion of a nonviable fetus."802

"Third, ‘subsequent to viability, the State in promoting its interest in the
potentiality of human life may, if it chooses, regulate, and even proscribe,
abortion except where it is necessary, in appropriate medical judgment, for
the preservation of the life or health of the mother.’"803

Writing for a majority of five justices, Justice Breyer declined to review
further the legal principles involved, and simply applied them to the
Nebraska statute.804 He concluded that the statute was unconstitutional for
two reasons: the law failed to include an exception for preserving the
mother’s health, and, by restricting the choice of a D & E abortion, the law
“unduly burden[ed] the right to choose abortion itself.”805 Because the trial

795. Id.
796. Id. at 929-30.
797. Stenberg, 530 U.S. at 931.
798. Id.
799. Id. at 922 (citations omitted).
800. Id. at 921.
801. Id (quoting Casey, 505 U.S. at 870).
802. Stenberg, 530 U.S. at 921 (quoting Casey, 505 U.S. at 877).
803. Id (quoting Roe, 410 U.S. at 164-65).
804. Id. at 920-21.
805. Id at 929-30 (quoting Casey, 505 U.S. at 879).
court had concluded that the banned procedures were safer for the pregnant woman than other alternatives, and Nebraska failed to show a health exception was "never necessary" with this procedure, the Court believed the absence of the exception actually created a health risk.806 Because the language of the statute encompassed "the most commonly used method for performing previability second trimester abortions,"807 it unconstitutionally placed an undue burden on the "woman's right to make an abortion decision."808

Justice Scalia joined Justice Thomas' dissent,809 but wrote separately to emphasize that the Court's decision was, if fact, the "logical and entirely predictable consequence"810 of Casey. He concluded that Casey nonetheless does not support the Court's result, because the undue burden test is nothing more than a value judgment and cannot yield more than a "policy-judgment-couched-as-law."811 Furthermore, he expressed disdain for this type of abortion stating, "The method of killing a human child . . . proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion."812 He also expressed concern that the health exception "is to give live-birth abortion free rein."813 He contended that:

The notion that the Constitution of the United States, designed, among other things, "to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity," prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd.814

Significantly Justice Kennedy, who had provided a crucial swing vote in Casey, also dissented, arguing that the States must not be denied their right to protect the unborn.815 He recognized that the "States retain a critical and legitimate role in legislating on the subject of abortion."816 He further stated that "[t]he political processes of the State are not to be foreclosed

806. Id. at 936–38.
807. Stenberg, 530 U.S. at 945.
808. Id. at 946. Justice O'Connor concurred, reiterating the majority opinion in noting that she found the law unconstitutional because it did not include an exception for the health of the woman and that the law had the effect of banning a common type of pre-viability abortions. Id. at 947-50 (O'Connor, J., concurring).
809. Id. at 980 (Thomas, J., dissenting).
810. Id. at 954 (Scalia, J., dissenting).
811. Id. at 955.
812. Stenberg, 530 U.S. at 953 (Scalia, J., dissenting).
813 Id
814. Id (Kennedy, J., dissenting).
815. Id at 956-57.
816. Id at 956-57 (citations omitted).
from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential.”817 In essence, the “State’s constitutional authority is a vital means for citizens to address these grave and serious issues”818. He concluded that “[t]he legislation is well within the State’s competence to enact” and survives the scrutiny mandated by Casey, and therefore dissented from invalidating it.819

Following the Supreme Court’s decision in Stenberg, the United States Congress conducted hearings and made extensive findings concerning the partial birth abortion procedure.820 Congress found that (1) partial birth abortion “is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.”821 (2) “partial birth abortion remains a disfavored procedure that is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long-term health of women and in some circumstances, their lives;”822 (3) the overwhelming evidence after extensive congressional hearings “demonstrates that a partial birth abortion is never necessary to preserve the health of a woman, poses significant health risks to a woman upon whom the procedure is performed and is outside the standard of medical care;”823 and, (4) Congress had substantial evidence to conclude that “a ban on partial birth abortion is not required to contain a ‘health’ exception, because the facts indicate that a partial birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman’s health, and lies outside the standard of medical care.”824

Congress passed the ban on partial birth abortion825. It provided for money damages for all injuries, including both psychological and physical injuries, and also statutory damages equal to three times the cost of the partial birth abortion.826

It is not, however, the method of abortion that creates the health risk, it is the abortion itself. In passing the Partial Birth Abortion Act (“PBAA”), which bans partial-birth abortion,827 Congress found that “partial-birth abortion is never necessary to preserve the health of a woman” but “poses
significant health risks to a woman.\(^828\) Furthermore, the findings show that the procedure “in fact poses serious risks to the long-term health of women and in some circumstances, their lives.”\(^829\)

The statute was immediately challenged, but the United States Supreme Court in *Gonzales v. Carhart* ultimately upheld the provision.\(^830\) Four physicians challenged the constitutionality of the Partial-Birth Abortion Ban Act of 2003 on its face.\(^831\) Specifically, they claimed that it did not provide for a health exception and it included both the intact D & E procedure but also certain other D & E procedures.\(^832\) The Court of Appeals for the Eighth Circuit held that it was unconstitutional because it failed to provide a health exception, concluded that the Act placed an undue burden on a woman’s ability to obtain a second trimester abortion, and determined that the Act was void for vagueness.\(^833\)

The Supreme Court concluded that “the Act is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face.”\(^834\) Unlike the provision in *Stenberg*, the Act was not vague, because it provided doctors an “‘opportunity to know what is prohibited,’” as well as “‘clear guidelines as to prohibited conduct’ and ‘objective criteria’ to evaluate whether a doctor has performed a prohibited procedure.”\(^835\) In addition, there was an intent requirement before liability could be imposed.\(^836\) The Act was not an undue burden because it defined the limits of an intact D & E procedure.\(^837\)

The Supreme Court recognized that “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well.”\(^838\) The Court also recognized that the decision to have an abortion “requires a difficult and painful moral decision.”\(^839\) Significantly, the Court recognized that “it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained” and that “severe depression and loss of esteem can follow.”\(^840\)

\(^828\) *Id.*

\(^829\) *Id* § 2(2).

\(^830\) *Gonzales*, 550 U.S. at 133.

\(^831\) *Ashcroft*, 331 F. Supp. 2d at 814.

\(^832\) *Gonzales*, 550 U.S. at 143.

\(^833\) *Id.*

\(^834\) *Id.* at 147.

\(^835\) *Id.* at 149 (quoting *Grayned v. Rockford*, 408 U.S. 104, 108 (1972)).

\(^836\) *Id.*

\(^837\) *Gonzales*, 550 U.S. at 150 (citations omitted).

\(^838\) *Id.* at 159 (citing *Casey*, 505 U.S. at 852-53).

\(^839\) *Id.* (citing *Casey*, 505 U.S. at 852-53).

\(^840\) *Id.* (citing Brief of Sandra Cano et al., *supra* note 156, at 22-24, 2006 WL 1436684 at **22-24.**
The Court also discussed the “penumbra” resulting from physicians’ failure to disclose the details of the procedures, I State’s concern that a woman is not provided information. The Court stated:

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails.

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

The Supreme Court’s decision in Gonzales v. Carhart was significant in several respects. First, it gave deference to Congress’s findings and legislative enactments and demonstrated that a state or federal legislature can draft legislation banning partial birth abortion within constitutional limits. Second, it recognized that this is a difficult decision for a woman that is fraught with regret and physical and psychological consequences.

V. Future Reflections: Defending Life in the 21st Century

A. Accurate and Truthful Information Is Necessary Because Abortion Hurts Women

1. Consequences of Not Having Accurate and Truthful Information

In Roe v. Wade and its progeny, the Supreme Court found that a woman has a right to decide whether to have an abortion. The Supreme Court has also stated that the decision needs to be fully informed, because abortion

841. See id. at 159-60.
842. Gonzales, 559 U.S. at 159-60 (citation omitted).
843. See id. at 166-67.
844. Id. at 159.
845. See, e.g., Casey, 505 U.S. at 852; Roe, 410 U.S. at 154.
846. Roe, 410 U.S. at 154; Casey, 505 U.S. at 852.
is an act fraught with consequences for others: for the woman who
must live with the implications of her decision, for the persons who
perform and assist in the procedure, for the spouse, family, and
society which must confront the knowledge that these procedures
exist, procedures some deem nothing short of an act of violence
against innocent human life, and, depending on one's beliefs, for
the life or potential life that is aborted.847

A recent case demonstrates the problem that arises when the abortionist
does not give a woman accurate and truthful information.848 When Rosa
Acuna specifically asked her physician if her six to eight-week old unborn
child was a baby, she recalls him saying, "don't be stupid, it's only
blood."849 It cannot be disputed that this characterization was clearly
false.850 After being taken to the emergency room because of vaginal
bleeding, Rosa was told that she had suffered an incomplete abortion and
parts of the baby were left inside her.851 Following some research, Rosa
finally learned the truth about the gestational development of her baby,
which led to psychological problems and a diagnosis of post traumatic stress
syndrome.852 The failure to provide complete and accurate information on
which a woman can base her decision directly harms that woman.853

Rosa Acuna has had to live with the consequences and implications of
her decision—one that she made based on false and misleading
information.854 The Supreme Court has recognized that depression, regret,
and a loss of self-esteem are some of the consequences suffered by post-
abortive women.855 This is particularly true when she later learns the truth
about her baby.856

847. Casey, 505 U.S. at 852.
848. See Acuna, 894 A.2d at 1210-12.
849. Id. at 419. Dr. Turkish did not remember what his response was, but conceded that he
probably would have told her she was carrying "just tissue" and "not a living human being." Id.
850. See, e.g., TEX. DEPT. OF HEALTH, supra note 242, at 3. A Woman's Right to Know
describes an eight-week-old unborn child as having all its "essential organs beginning to form, elbows
and toes are visible, fingers have grown to the first joint, facial features—the eyes, nose, lips, and
tongue—continue to develop; outer ears begin to take shape, organs begin to be controlled by the brain,
and the baby's length is about 1/2 to 3/4 inch." Id.
851. Acuna, 930 A.2d at 419.
852. Id. at 419-20.
853. See id.
854. Id. Dr. Coleman, a leading national and international expert, testified to "the psychological
problems post-abortive women can have including depression, thoughts of suicide, anxiety, feelings of
regret, shame, guilt, bereavement/loss, and lowered self-esteem." Brief of Sandra Cano et al. as Amici
Curiae Supporting Petitioner, at 9, Acuna, 555 U.S. 813 (No. 07-1328), 2008 WL 2185717 at *9
[bake matter Acuna Brief of Sandra Cano].
855. See Gonzales, 550 U.S. at 159.
856. See, e.g., Acuna, 930 A.2d at 419-20; Casey, 505 U.S. at 882. In Casey, Justice O'Connor
correctly recognized that most women would consider the impact on the fetus 'relevant, if not
In deciding *Roe* and its progeny, the Court assumed that a woman’s decision to abort her pregnancy would be made after consultation with her physician.\(^{857}\) This presumes that the physician’s advice and counsel will be based on sound medical advice concerning the gestational age of the unborn child, the health risks associated with an abortion, and the nature of the medical procedure.\(^ {858}\) The Court expected physicians to give “truthful, nonmisleading information.”\(^{859}\) This unfulfilled expectation resulted in Rosa, and others like her, basing consent to an abortion on false information about the characteristics and development of the unborn child.\(^ {860}\)

*Roe* recognized that, at a minimum, a pregnancy evidences potential life—something more than simply a collection of cells, blood, tissue, or body fluids.\(^ {862}\) Forty years after *Roe*, through the advancement of medical technology, it is well recognized that life begins at conception.\(^ {863}\) The Court has also recognized the State’s interest in promoting life.\(^ {864}\) While the State has an obligation to avoid placing an undue burden on a woman’s decision, it has an equally compelling obligation to ensure that the information given to a woman comports with sound medical judgment and current medical knowledge—to ensure a woman’s decision is fully informed.\(^ {865}\)

False or misleading information obviously impacts a decision, which infringes on the constitutional right to decide.\(^ {866}\) This was certainly true for Rosa, who specifically asked if the life within her was a baby.\(^ {867}\) The answer to that question was the ultimate factor in her decision-making process.\(^ {868}\) Rosa’s experience is not an isolated event.\(^ {869}\) Abortionists are

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\(^{857}\) See *Roe*, 410 U.S. at 163.
\(^{858}\) See *Casey*, 505 U.S. at 882.
\(^{859}\) Id.
\(^{860}\) See *Acuna*, 894 A.2d at 1210-12.
\(^{861}\) See *Roe*, 410 U.S. at 163.
\(^{862}\) See *TEX. DEP’T OF HEALTH*, supra note 242, at 3.
\(^{863}\) See infra Part III.G (discussing the differing authorities on when life begins).
\(^{864}\) See *Akron I*, 462 U.S. at 443-44.
\(^{865}\) See *Roe*, 410 U.S. at 150.
\(^{866}\) See also supra note 850 and accompanying text.
\(^{867}\) See supra note 850 and accompanying text.  Dr. Bernard Nathanson testified before the South Dakota Task Force that it is generally known among obstetricians and scientists that abortion terminates the life of a living human being, but that abortionists often deny this fact for strategic reasons.
\(^{868}\) See *Roe*, 930 A.2d at 404-06.
\(^{869}\) See id.; see also supra note 237, at 11-12.
\(^{870}\) See *S.D. TASK FORCE*, supra note 237, at 37. Dr. Bernard Nathanson testified before the South Dakota Task Force that it is generally known among obstetricians and scientists that abortion terminates the life of a living human being, but that abortionists often deny this fact for strategic reasons.
\(^{871}\) Id. at 13. “He testified that he and other strategists for NARAL, for instance, adopted certain tactics to win the public perception that all forms of abortion should be and remain legal.” Id. “Dr. Nathanson stated that one tactic was to suppress and denigrate all scientific evidence that supported the conclusion that a human embryo or fetus was a separate human being.” Id. “He stated that he and others denied
not giving women full, accurate, and truthful information,\textsuperscript{870} as anticipated by \textit{Roe} and \textit{Casey}.\textsuperscript{871}

In the largest government study since \textit{Roe}, the South Dakota Task Force to Study Abortion stated that “virtually all of the credible objective evidence” compelled the conclusion that abortions performed in South Dakota were not based on informed consent.\textsuperscript{872} The Report found that:

(a) The abortion providers fail to disclose the essential nature of the procedure—that it terminates the life of the woman’s existing child;

(b) When they do discuss the procedure, they provide misleading information in misleading terms;

(c) The abortion providers give misleading information about the psychological and physical risks to the mother, and do not disclose the direct injury to the child that leads to its death;

(d) The abortion providers assume the woman has made her decision before she reaches the facility, and,

(e) The abortion providers place the burden to discover material facts on the pregnant woman.\textsuperscript{873}

Obviously, unless a woman is given full, accurate, and truthful information—as the Court expected—her constitutionally protected right to decide whether to abort her child is meaningless.\textsuperscript{874}

As with other constitutional rights, a person can either waive or invoke the right.\textsuperscript{875} In other contexts, however, the Court has recognized that certain constitutional rights are so important, and the concomitant risks so high, that the government must \textit{ensure} that those rights are exercised or waived only after receiving competent advice—including a warning about potential negative effects.\textsuperscript{876} For example, \textit{Miranda}\textsuperscript{877} warnings are designed to ensure that a criminal suspect’s privilege against self-

\begin{itemize}
  \item what they knew was true: “The abortion industry would routinely deny the undeniable, that is, that the human embryo and fetus is, as a matter of biological fact, a human being.” \textit{Id.}
  \item \textit{See id.} at 11-12.
  \item \textit{See Roe}, 410 U.S. at 165-66 (stating legal remedies are available for practitioners who abuse the privilege of exercising their judgment); \textit{Casey}, 505 U.S. at 882-83 (defining the state’s interest in ensuring a woman is informed about her decision to have an abortion).
  \item \textit{S.D. Task Force, supra note 237, at 37.}
  \item \textit{Id.}
  \item \textit{Id.} (stating that without information, mothers are often coerced by outside pressure and therefore are denied their constitutionally protected rights).
  \item \textit{See id.} at 444.
  \item \textit{See id.}
\end{itemize}
incrimination is protected. Similarly, there are several decisions that a criminal defendant must make that entitle him to the assistance of counsel, such as whether to speak to the police, take the stand, waive a jury trial, or plead guilty.

The decision whether to abort a pregnancy has physical and psychological risks, negative effects for the mother, and is a matter of life or death for the unborn child. These factors make the abortion decision certainly as important as whether to speak to the police, waive a jury trial, or plead guilty. The role of the physician, arguably in the best position to provide sound medical advice to the woman, should be to provide her with accurate medical facts. In Acuna v. Turkish, however, the New Jersey Supreme Court stated that a doctor is not compelled to give information when he has “a different scientific, moral, or philosophical viewpoint.” Even assuming, arguendo, that the physician’s moral or philosophical viewpoint is different from current medical science, he should provide known medical facts, such as the physical characteristics of an eight-week old unborn child. In other words, the physician need not violate his beliefs simply by providing the woman medically accurate information. She is then better able to decide for herself if the life within her is in fact a “baby.” As Justice Ginsburg wrote in Gonzales v. Carhart, The Court is surely correct that, for most women, abortion is a painfully difficult decision. At this most difficult time in a woman’s life, she should have full, accurate, and truthful information to effectively exercise her constitutional right to decide whether to abort her unborn child.

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878. Id.
879. See id. (warnings to ensure protections associated with Fifth Amendment privilege against self-incrimination); Boykin v. Alabama, 395 U.S. 238, 243 (1969) (valid guilty plea requires an intentional relinquishment or abandonment of a known right or privilege); Henderson v. Morgan, 426 U.S. 637, 647 (1976) (guilty plea is not valid unless the defendant knows the nature of the offense to which he or she pleads); Patterson v. Illinois, 487 U.S. 285, 293 (1988) (Miranda warnings sufficient to apprise defendant of Sixth Amendment right to counsel before post-indictment interrogation); Godinez v. Moran, 509 U.S. 389, 400 (1993) (judge must be satisfied that defendant’s waiver of his constitutional right to assistance of counsel at trial is knowing and voluntary); Marone v. United States, 10 F.3d 65, 67 (2d Cir. 1993) (setting out procedures for trial judges to use in accepting waiver of jury trial in federal court); see also FED. R. CRIM. P. 11 (providing detailed guidelines for judges conducting plea inquiries before accepting a guilty plea from a defendant).
880. See Casey, 505 U.S. at 882-84.
881. See id. at 882-84.
882. See Acuna, 930 A.2d at 428.
883. Id.
884. See id. at 404-06; see also TEX. DEP’T OF HEALTH, supra note 242, at 3.
885. See Casey, 505 U.S. at 882.
887. Id. at 184 n.7 (Ginsburg, J., dissenting).
888. See id. at 129 (majority opinion).
In summary, the United States Supreme Court has recognized, "whether to have an abortion requires a difficult and painful moral decision" and is "fraught with emotional consequence." The Court has also noted that "severe depression and loss of esteem can follow" an abortion. Therefore, having accurate and truthful information is essential.

2. Experts Provide Medical Evidence about Abortion

Prior to Roe and Doe, health issues like abortion were decided by the states, where hearings could be held to determine whether the medical and scientific knowledge had advanced sufficiently to warrant a different legal conclusion. In the forty years since, state legislatures have determined that there are physical and psychological health risks resulting from abortion, which women should be informed of prior to deciding whether to have an abortion.

For example, Texas passed the "Woman's Right to Know" Act in 2003. As a result, the medical board of the Texas Department of Health

889. Id. at 159 (citing Casey, 505 U.S. at 852-53).
890. Id.
892. See id. at 129.
893. Gibbons, 22 U.S. (9 Wheat.) at 205 (recognizing that under what was later called the state's "police power," the states could regulate "health laws of every description").
896. See Gonzales, 550 U.S. at 159-60.
held hearings, medical experts testified, and ultimately the board produced a booklet entitled “A Woman’s Right to Know,”999 which is required to be given to women who are considering an abortion.999 The booklet provides information concerning the baby’s unique DNA,900 refers to the baby as an “unborn child,”901 shows the growth and development of the “unborn child” from four to thirty-eight weeks gestation,902 describes the various abortion procedures903 and explains the physical, emotional, and psychological risks to women.904 In discussing the “emotional side of an abortion,” the booklet warns:

Some women may feel guilty, sad, or empty, while others may feel relief that the procedure is over. Some women have reported serious psychological effects after their abortion, including depression, grief, anxiety, lowered self-esteem, regret, suicidal thoughts and behavior, sexual dysfunction, avoidance of emotional attachment, flashbacks, and substance abuse. These emotions may appear immediately after an abortion, or gradually over a longer period of time. These feelings may recur or be felt stronger at the time of another abortion, or a normal birth, or on the anniversary of the abortion.905

A number of state legislatures have considered removing, or in some other way limiting, the health exception.906 A notable example is South Dakota, which has made substantial and detailed findings following extensive hearings that led to a statewide ban on abortion, except when necessary to save the life of the mother.907 The Task Force found that:

[T]he pre-abortion counseling provided often does not prepare women who have abortions for the psychological outcomes they may experience after their abortions. In addition, women who

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898. Id. § 171.014(F). The booklet is available through the Texas Department of Health. See generally TEX. DEP’T OF HEALTH, supra note 242.
899. TEX. HEALTH & SAFETY COD EX ANN § 171.014(C).
901. Id.
902. Id. at 3-8.
903. Id. at 14-15.
904. Id. at 15-17.
905. TEX. DEP’T OF HEALTH, supra note 242, at 16.
receive little or no information about possible emotional health risks of this procedure may significantly compromise their mental health and the quality of their lives for years to come. Due to the very limited information disclosed by abortion providers, women are not fully aware that abortion carries with it the potential to damage their physical, emotional, interpersonal, and spiritual well-being.\textsuperscript{908}

The Task Force also addressed the psychological consequences of terminating the life of the child, stating:

Perhaps worse, the pregnant mother is not told prior to her abortion that the procedure will terminate the life of a human being. The psychological consequences can be devastating when that woman learns, subsequent to the abortion, that this information was withheld—information that would have resulted in her declining to submit to an abortion. Her anger at being deceived and being prevented from making an informed decision for herself is exacerbated by her realization that she was implicated in the killing of her own child in utero. Aside from the injustice of her being deprived of making her own informed decision (see Section II-D), the psychological harm of knowing she killed her child is often devastating.\textsuperscript{909}

The Task Force made certain findings. In particular, the Task Force discussed the relationship of a mother with her child and stated:

The Task Force finds that it is simply unrealistic to expect that a pregnant mother is capable of being involved in the termination of the life of her own child without risk of suffering significant psychological trauma and distress. To do so is beyond the normal, natural, and healthy capability of a woman whose natural instincts are to protect and nurture her child.\textsuperscript{910}

Dr. Vincent Rue, Ph.D. is a psychotherapist and professor who was special consultant to then U.S. Surgeon General Dr. C. Everett Koop on abortion morbidity.\textsuperscript{911} In 1981, Dr. Rue gave congressional testimony and presented “the first clinical evidence of post-abortion trauma, identifying this psychological condition as ‘Post-abortion Syndrome.’”\textsuperscript{912} Dr. Rue

\textsuperscript{908} See S.D. TASK FORCE, supra note 237, at 47.
\textsuperscript{909} Id.
\textsuperscript{910} Id at 47-48.
\textsuperscript{911} Id.
\textsuperscript{912} Id at 53. Early information on Post-Traumatic Stress Disorder (PTSD) came from studies of veterans, particularly Vietnam veterans. But researchers later studied the effects of sexual assault and
testified before the Task Force that individuals with Post-abortion Syndrome "experience symptoms of avoidance (efforts to escape from reminders of the event), intrusion (unwanted thoughts, nightmares, and flashbacks related to the event), and arousal (exaggerated startle reflex, sleep disturbance, irritability) for a month or more following exposure to a traumatic event."913 Although for some women the initial response is one of relief, many women later evade the issue through repression and denial, usually for years—"5 years is common, 10 or 20 is not unusual."914

Dr. Priscilla Coleman915 stated that abortion is a significant contributing factor in mental health problems, and a minimum of twenty to thirty percent of post-abortive women suffer from serious negative psychological complications.916 Thus, with more than 1.3 million abortions per year in the United States, and using a conservative twenty percent, there would be over 260,000 new cases of mental health problems each year.917 She provided evidence that post-abortive women are at an increased risk for depression, suicidal ideation, suicide, and death.918 Other well-established psychological difficulties experienced by these women include anxiety, substance abuse, unrelenting feelings of regret, shame, guilt, bereavement, loss, and lowered self-esteem.919

Dr. David Reardon920 stated that there are "[o]ver one hundred potential complications [that] have been associated with induced abortion,"921

found that women who experienced such trauma had reactions similar to male combat veterans, and therefore, the term PTSD has also been used. Women, Trauma and PTSD, U.S. DEP’T OF VETERANS AFFAIRS: NAT’L CTR. FOR PTSD (Jan 1, 2007), http://www.ptsd.va.gov/public/pages/women-trauma-and-ptsd.asp. Dr. Reardon found that abortion can cause the same type of trauma, and therefore, identified this psychological condition as Post-abortion Syndrome in his testimony before the United States Congress. S.D. TASK FORCE, supra note 237, at 54. 913. S.D. TASK FORCE, supra note 237, at 44.

914. WILLKE & WILLKE, supra note 171, at 50.

915. S.D. TASK FORCE, supra note 237, at 41-43 ("Dr. Priscilla Coleman is an Associate Professor of Human Development & Family Studies at Bowling Green State University in Ohio. She is a nationally and internationally recognized expert in the mental health risks of induced abortion.") Id at 41. Moreover, Dr. Coleman has also published over fifty peer-reviewed scientific articles, of which thirty are on the psychology of abortion. WORLD EXPERT CONSORTIUM FOR ABORTION RESEARCH AND EDUCATION, Priscilla K. Coleman, Ph.D., Director, http://www.wecareexperts.org/content/priscilla-k-coleman-phd-director. She has served as an expert and testified before legislatures in the United States and abroad. Priscilla K. Coleman, Ph.D., Director, WORLD EXPERT CONSORTIUM FOR ABORTION RESEARCH & EDUC., http://www.wecareexperts.org/content/priscilla-k-coleman-phd-director (last visited Oct 20, 2013). The South Dakota Task Force found the testimony she provided "informative, comprehensive, and credible." S.D. TASK FORCE, supra note 237, at 41.

916. See S.D. TASK FORCE, supra note 237, at 41-44.

917. See id at 51.

918. See id at 44, 49.

919. See id at 43-45.

920. David C. Reardon, Biographical Sketch, AFTERABORTION.ORG http://www.afterabortion.org/1999/david-c-reardon-biographical-sketch/ (last visited Oct. 6 2013). David C. Reardon, Ph.D. is the Director of the Elliot Institute. Id. Since 1983, he has specialized in aftereffects of abortion, conducted research studies, and published numerous scholarly articles and books.
including what might be considered minor complications, such as "minor infections, bleeding, fevers, chronic abdominal pain, gastrointestinal disturbances, vomiting, and Rh sensitization." The most common major complications include "infection, excessive bleeding, embolism, ripping or perforation of the uterus, anesthesia complications, convulsions, hemorrhage, cervical injury, and endotoxic shock." Dr. Reardon also discusses the psychological effects of abortion. He states that the "Temporary feelings of relief are frequently followed by a period psychiatrists identify as emotional 'paralysis,' or post-abortion 'numbness.'" He analogizes it to shell-shocked soldiers and states that "these aborted women are unable to express or even feel their own emotions. Their focus is primarily on having survived the ordeal, and they are at least temporarily out of touch with their feelings." Some of the psychological effects of abortion include 

[D]epression, loss of self-esteem, self-destructive behavior, sleep disorders, memory loss, sexual dysfunction, chronic problems with relationships, dramatic personality changes, anxiety attacks, guilt and remorse, difficulty grieving, increased tendency toward violence, chronic crying, difficulty concentrating, flashbacks, loss of interest in previously enjoyed activities and people, and difficulty bonding with later children.

The nature of current pre-abortion counseling and the lack of fully informed consent are key factors in post-abortion difficulties. Referring to the unborn child using terms like "tissue," "blood," "content of the uterus," or "a clump of cells" encourages consent, but is based on false and misleading information—since the same woman may not give consent if she is told the truth about fetal development. Furthermore, "devastating psychological consequences become more probable" when a woman later obtains truthful information concerning fetal development.

on the subject and "is widely recognized as one of the leading experts on the aftereffects of abortion on women."
In summary, there are serious physical and psychological consequences of abortion. After hearings, the legislative Task Force and medical boards have confirmed how abortion hurts women. Medical experts have testified to the consequences of abortion and the psychological trauma is greater when a woman later learns the truth about her unborn child. Thus, the Supreme Court correctly recognized that women are entitled to accurate and truthful information to make informed decisions.

B. Recommendations for Protecting Women and Minors

1. Stronger Informed Consent Laws

   a. Accurate and factual information for informed consent

   The abortionist should give a woman accurate and factual information. The purpose of "[i]nformed consent provisions serve not only to communicate information that would not necessarily be known to the patient, but also help the woman to make a fully informed decision." The Supreme Court recognized in *Casey* that "Requiring that the woman be informed of the availability of information relating to fetal development—is a reasonable measure to ensure an informed choice." Even in *Doe v. Bolton*, the Supreme Court recognized that medical knowledge advances and changes. The Court cited Appellant's admission that "a century ago medical knowledge was not so advanced as it is today." The State has the right to "readjust its views and emphases in the light of the advanced knowledge and techniques of the day."

   The State is entitled to provide medical and scientific information that would help a woman make an informed decision. The following information is recommended:

931. Reardon, supra note 921.
933. See Acuna, 930 A.2d at 419-20, S.D. TASK FORCE, supra note 237, at 41, 47.
934. See Casey, 505 U.S. at 882.
935. Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dep't of Health, 794 F. Supp. 2d 892, 918 (S.D. Ind. 2011), rev'd in part, 699 F.3d 962 (7th Cir. 2012) (upholding the Indiana law and concluding 'mandated statement states only a biological fact relating to the development of the living organism; therefore, it may be reasonably read to provide accurate, non-misleading information to the patient').
936. Id. at 833.
937. Casey, 505 U.S. at 833.
938. See Doe, 410 U.S. at 190-91.
939. Id at 190.
940. Id at 191.
941. See Casey, 505 U.S. at 882.
1. Accurate and scientific information: To provide accurate medical and scientific information for an informed consent, many states have enacted the “Woman’s Right to Know” laws. A “Woman’s Right to Know” booklet that explains the medical facts usually accompanies these laws. Information such as contained in the Woman’s Right to Know laws should be available in all fifty states. Currently, these booklets are not available in every state. Furthermore, abortionists should be required to give the booklets to women considering an abortion option. She should sign a statement stating she has received the booklet which should be placed in her medical records and confirmed by the state department of health during inspections. These booklets should be revised as medical knowledge advances so that women are given the most accurate and current information.

2. Malpractice Insurance: Women should be informed whether the abortionist and the abortion facility have malpractice insurance. Abortionists should be required to carry the same type and amount of malpractice insurance as any other obstetrician. Malpractice insurance will be discussed in more detail below.

3. Hospital Privileges: Women should be informed whether the abortionist has hospital privileges at local hospitals. Due to the serious physical complications that can be life threatening, abortionists should be required to have hospital privileges within thirty miles of the abortion facility. Hospital privileges will be discussed in more detail below.

4. Financial Responsibility: Abortionists should inform women of their responsibility for any medical and/or hospital bills incurred because of physical and psychological problems resulting from the abortion. As discussed, the physical and psychological risks of abortion are well-established.

942. See supra note 557 and accompanying text.
943. See supra note 895 and accompanying text.
945. See, e.g., TEX. HEALTH & SAFETY CODE ANN § 171.012.
946. See supra Part V.A.3.
947. See infra Part V.A.3.
948. See infra Part V.A.3.
949. See infra Part V.A.3.
950. See infra Part V.A.3.
5. Others Present: Women should be told that they can have someone present during the abortion. This could help prevent unwanted, coerced abortions. For example, if a woman changes her mind, the person could speak up for her or be a witness if the abortionist or other personnel forces her to have the abortion after she changes her mind. In addition, if a woman wants her boyfriend there, and he refuses, it may cause her to reconsider her decision. If a parent were there, the parent might change his or her mind about coercing an abortion or at least understand what their daughter experienced.

6. Other Options: Appropriate counseling would include discussing other options. Women and minors who find themselves in an unexpected pregnancy may be scared and believe that abortion is the only option. However, other options are available. First, a mother can make a loving choice by placing her baby up for adoption. Second, most states have enacted what are called “Baby Moses” Laws or “Safe Haven” Laws. Texas was the first state to enact a Baby Moses Law in 1999. This option allows the mother to leave the baby at a designated place such as a fire station or hospital within a certain amount of time with no fear of abandonment charges. Third, Pregnancy Care Centers and other resource centers help mothers who have decided to keep their baby by providing necessary items such as diapers, clothes, and strollers. There are life affirming choices that can be made, and women need to be informed of them. Just because abortion is legal, it does not mean that it is a good choice, or the best choice. In fact, post-abortive women attest in the Women’s Affidavits that they would not have chosen abortion if it were not legal.

951. See id. at 37.
952. See MO. DEP’T OF HEALTH & SENIOR SERVS., supra note 895, at 23.
953. S.D. TASK FORCE, supra note 237, at 37.
954. See MO. DEP’T OF HEALTH & SENIOR SERVS., supra note 895, at 23. MISSOURI’S INFORMED CONSENT BOOKLET 23.
956. Id.
957. Id.
958. See MO. DEP’T OF HEALTH & SENIOR SERVS., supra note 895, at 23.
959. For example, Tinya E. Harper (Or.) states: “Just because it is legal doesn’t mean it is O.K. and safe.” (Bate Stamp number 000551); Karen Ruth Hartman (Ariz.) stated: “I kept thinking ‘It’s legal, it must be okay.’ If it was illegal I would not have considered it nor would that option been considered.
7. Penalties: Informed consent laws should be enacted with monetary penalty provisions.\footnote{See, e.g., ALA. CODE § 26-23a-9 (2013).} For example, an abortionist who either intentionally or recklessly performs an abortion in violation of the informed consent laws commits an offense.\footnote{See id.}\footnote{See id.} An offense is a misdemeanor punishable by a fine of $10,000 per occurrence.\footnote{See, e.g., TEX. PENAL CODE ANN. § 6.03 (West 2013): (a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. (b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. (c) A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.} The definition of “intentionally” and “recklessly” has the meaning that is defined in the penal code.\footnote{See id.}

8. Medical Licenses: Under its police powers, a State may revoke a medical license.\footnote{See id.} This is for the protection of the public, not the punishment of the physician.\footnote{See id.} Revocation of a license is justified where there is improper or unlawful conduct.\footnote{See id.} Therefore, there should be a mandatory loss of license for the abortionists and abortion facilities that intentionally or recklessly fail repeatedly to comply with informed consent law. The “three strikes and you are out”\footnote{See Three Strikes Laws, FREE LEGAL DICTIONARY, http://legal-dictionary.thefreedictionary.com/Three+Strikes+Laws (last visited Oct. 11, 2013).} principle should apply.

b. Ultrasounds or Sonograms

Advancements in medical knowledge and technology have impacted the State’s interest in protecting life. Even the Supreme Court recognized this advancement in *Doe v. Bolton* in 1973. The Court stated, “a century ago medical knowledge was not so advanced as it is today,” and, therefore, the State has “the right to readjust its views and emphases in the light of the advanced knowledge and techniques of the day.” This is certainly true of ultrasound technology.

Ultrasound technology has developed where the mother and her doctor can see images of her unborn child. An ultrasound is an imaging technique that uses high frequency sound waves to produce images of the unborn child. It shows the baby’s size and position. It can also show if there are any problems.

Since the 1990s, many states have enacted sonogram or ultrasound laws, which require an ultrasound prior to an abortion so that women can make informed decisions. The requirements for these laws, however, vary from state to state.

Ultrasounds, or sonograms as they are sometimes called, are helpful diagnostic tools during each trimester. During the first trimester, they are used to confirm viable pregnancy, confirm the baby’s heartbeat, measure the baby’s length or gestational age, confirm a molar or ectopic pregnancy, and assess if there is an abnormal gestation. During the second trimester, ultrasounds are used to diagnose fetal malformation such as congenital malformations or potential Down syndrome, any structural abnormalities,

970. See *Doe*, 410 U.S. at 190-91.
971. *Id.*
974. *Id.*
975. *Id.*
976. *Id.*
977. See *State Policies in Brief: Requirements for Ultrasound*, supranote 972.
978. *Id.*
979. *Id.*
981. *Id.*
confirm if there is a multiple pregnancy, verify dates and growth of the baby, confirm intrauterine death, identify excessive or reduced levels of amniotic fluid, and evaluation of fetal well-being. During the third trimester, ultrasounds can identify the placental location, confirm intrauterine death, observe fetal presentation, observe fetal movements, and identify uterine and pelvic abnormalities of the mother. All of this is helpful, accurate information; therefore, a woman should have the right to have an ultrasound prior to an abortion so that she can make an informed decision.

Twenty-three states have ultrasound laws. There have been three court challenges concerning state laws requiring an ultrasound or sonogram before an abortion. The United States Court of Appeals for the Fifth Circuit upheld the Texas sonogram law in a strongly worded opinion. In 2011, the Texas Legislature passed H.B. 15 which amended the Texas Woman's Right to Know Act to include the provision that physicians must perform and display a sonogram, make audible the baby's heartbeat for the woman to hear, explain the results of the procedure, and to wait for twenty-four hours before the abortion unless the woman lived more than 100 miles away. The law provided that a woman could decline to view the images or hear the heartbeat. The law also provided that she must complete a form indicating that she had received the required materials, and understands her rights to view the sonogram and hear the heartbeat.

Almost immediately, abortion providers filed suit claiming First Amendment violations and that the provision was unconstitutionally vague.

982. See id.
983. See id.
986. See Lakey, 667 F.3d at 577.
987. H.B. 15 was codified at TEX. HEALTH & SAFETY CODE § 171.012(a)(4) (2013).
988. See id § 171.012(2)(a)(5) (giving an example of an abortion certification election form).
989. See id.
seeking a preliminary injunction, which the district court granted. The State of Texas filed an appeal. The Court of Appeals for the Fifth Circuit rejected the First Amendment compelled speech argument stating that Casey had upheld an informed consent statute “over precisely the same ‘compelled speech’ challenges made here,” as did a subsequent Eighth Circuit case. The court summarized the guiding principle of these decisions as follows:

First, informed consent laws that do not impose an undue burden on the woman’s right to have an abortion are permissible if they require truthful, nonmisleading, and relevant disclosures. Second, such laws are part of the state’s reasonable regulation of medical practice and do not fall under the rubric of compelling “ideological” speech that triggers First Amendment strict scrutiny. Third, “relevant” informed consent may entail not only the physical and psychological risks to the expectant mother facing this “difficult moral decision,” but also the state’s legitimate interests in “protecting the potential life within her.” Finally, the possibility that such information “might cause the woman to choose childbirth over abortion” does not render the provisions unconstitutional.

Abortion providers also raised several constitutional challenges claiming that the provisions were void for vagueness. There were three provisions that the district court enjoined for vagueness, but the court of appeals rejected all three arguments as “trivial.” Therefore, the court of appeals vacated the district court’s preliminary injunction, remanded the cases for further proceedings consistent with its opinion, and warned that the same panel would hear any further appeals in this case.

Judge Higginbotham concurred in the decision but addressed the First Amendment issue as it relates to informed consent. He stated that under the common law, legislation, and professional norms, doctors had long been required to provide informed consent of the risks involved with the medical procedures. He stated that “[t]he doctrine itself rests on settled

990. Lakey, 667 F.3d at 573.
991. Id.
992. Id at 573-74 (citing Casey, 505 U.S. 833).
993. Rounds, 653 F.3d at 669-70, 673.
994. Lakey, 667 F.3d at 576 (citations omitted).
995. See id at 580.
996. Id at 581.
997. Id at 584.
998. Id.
999. Lakey, 667 F.3d at 584-85 (Higginbotham, J., concurring).
1000. See id.
principles of personal autonomy, protected by a reticulated pattern of tort law, overlaid by both self- and state-imposed regulation. Speech incident to securing informed consent submits to the long history of this regulatory pattern.”

Riterating that Casey had “accented the state’s interest in potential life,” Judge Higginbotham stated that the Supreme Court had upheld the State’s right to insist that a woman be informed of the baby’s development. Then he insightfully stated, “Significantly, the Court held that the fact that such truthful, accurate information may cause a woman to choose not to abort her pregnancy only reinforces its relevance to an informed decision.”

A woman should have accurate information to give an informed consent to an abortion. Prior to that decision, a woman should be given the written materials provided by the State’s medical board, have an opportunity to see the ultrasound and hear the baby’s heartbeat, and have a waiting period to understand the information and think about the decision. Each state should enact such laws to protect women and minors before making such an important decision.

2. Greater Protection of Minors

Courts have determined that minors have a right to obtain an abortion. However, because the woman seeking an abortion is a minor, the State may have additional interests that may justify regulation. As discussed below, there are a variety of ways statutory and regulatory provisions can protect minors as long as they do not create an undue burden on the abortion decision.

a. Age of Maturity and Parental Involvement

In most states, the age of majority is eighteen years of age. Depending on the activity, however, the age may vary. For example, the voting age in some states may be eighteen, but people cannot purchase...

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1001. Id. at 585.
1002. Id.
1003. Id.
1004. See Lakey, 667 F.3d at 579.
1006. See Wasden, 376 F.3d at 922.
1007. See Casey, 505 U.S. at 878 (establishing the undue burden test).
1009. Id.
alcohol until they are twenty-one. 1010 Traditionally, the law deemed that children were “legally incapable of consenting to their own medical care or treatment.” 1011 By statute, there were exceptions to this requirement such as in cases where a child is “emancipated, married, pregnant, or a parent.” 1012

Parental involvement is important due to the lack of maturity and judgment of minors 1013 “The decision to terminate a pregnancy is, of course, an extremely serious one, and minors will often lack the maturity and judgment necessary to reach a sound decision on their own.” 1014 Although they may have cognitive ability and capacity to reason similar to an adult, “adolescents may lack the moral responsibility, judgment, and experience to understand the outcome of their actions and decisions. They may have more volatile emotions and may look only at short-term consequences.” 1015 These factors are particularly significant in the area of abortion due to the physical, psychological, and spiritual consequences of abortion 1016 In addition, abortion has both short-term and long-term consequences, which minors may not be able to accurately and appropriately assess. 1017

Physicians have an ethical duty to encourage parental involvement. 1018 Therefore, the Council on Ethical and Judicial Affairs recommends that:

[P]hysicians should strongly encourage minors to discuss their pregnancy and their reproductive options with their parents. Physicians should explain how parental involvement can be helpful and that parents are generally very understanding and supportive. . . . [I]f a minor expresses concerns about parental involvement, the physician should try to ensure that the minor’s reluctance is not based upon any misperceptions about the likely consequences of parental involvement.

1010. Id.
1012. Id.
1014. Id.
1017. See id.
1018. See id. at 3.
1019. See id. at 5. The Council gives the following example: “For example, physicians should try to ensure that the minor is not underestimating parental supportiveness, overestimating parental anger, or
If the parents are not involved, the court must determine that the minor has the maturity and judgment to make such a decision.\textsuperscript{1020} The law should consider numerous factors in determining the minor’s ability to make the abortion decision. Determination of a minor’s competence for medical decision making should include evidence that the minor has the ability to understand the purpose of treatments, risks, both long and short-term consequences, benefits, and alternatives to treatments.\textsuperscript{1021} It should also be determined if the minor is able to make an informed decision without coercion.\textsuperscript{1022}

Because abortion is a life changing event with the potential for serious physical, psychological, and spiritual consequences for the mother,\textsuperscript{1023} and the death of the unborn child, the age of majority should be twenty-one when the minor has greater mental and emotional development to make such an important decision. Until that time, parental involvement can help the minor in making this decision and assessing the short-term and long-term consequences of the decision.\textsuperscript{1024}

b. Medical Records

There should also be greater protection of and access to medical records.\textsuperscript{1025} The medical records of minors should be maintained and available to minors when they reach majority. But, this is not sufficient in the case of abortion due to physical and psychological trauma, which may not surface for years or decades after the abortion.\textsuperscript{1026}

State requirements safeguard medical records against loss or destruction.\textsuperscript{1027} In addition, state requirements determine how a physician or facility is to maintain the records.\textsuperscript{1028} For example, adult medical records in Texas are kept for seven years past the last date on which service was failing to appreciate that initial parental disappointment, however profound, will likely moderate.” \textit{Id.} at 3.

\textsuperscript{1021} See \textit{Mandatory Parental Consent to Abortion}, supra note 1013 , at 1-2.
\textsuperscript{1022} See id. at 3.
\textsuperscript{1023} See \textit{Teens & Abortion: Why Parents Should Know}, supra note 1016.
\textsuperscript{1024} See id.
\textsuperscript{1025} See, e.g., \textit{STATE REGULATIONS PERTAINING TO CLINICAL RECORDS, FEDERAL REGULATIONS} 84 (Jan. 2011).
\textsuperscript{1026} See generally \textit{WILLKE & WILLKE, A BORTION} 50 (“5 years is common, 10 or 20 not unusual.”); \textit{Abortion Complications}, supra note 268 (“The best available data indicates that on average there is a five to ten year period of denial during which a woman who was traumatized by her abortion will repress her feelings.”).
\textsuperscript{1027} See generally \textit{STATE REGULATIONS PERTAINING TO CLINICAL RECORDS}, supra note 1025 (providing both a state-by-state listing of laws). For an extensive listing of federal laws, see \textit{STATE BAR OF MICHIGAN, HEALTH CARE RECORDS RETENTION MANUAL} (June 2013), http://www.michbar.org/files/healthpdfs/retentionmanual.pdf.
\textsuperscript{1028} See generally \textit{STATE REGULATIONS PERTAINING TO CLINICAL RECORDS}, supra note 1025.
given and for minors until her twenty-first birthday. At a minimum, the medical provider should maintain medical records for at least eleven years or until the minor reaches the age of majority plus six years, whichever is longer.

c. Reforming Judicial Bypass Laws

Parental consent laws include a judicial bypass provision. It allows a minor to have an abortion without the parent, or, in relevant situations, the legal guardian, being notified or giving consent. There is a hearing to determine if: (1) the minor is mature and sufficiently well informed to make the decision, (2) it is not in the minor's best interest for the parent or legal guardian to be notified, and, (3) notifying the parent or legal guardian could lead to physical, sexual, or emotional abuse. There should be an in-depth inquiry to determine each of these issues.

The entire process is completely confidential and even Child Protective Services ("CPS") cannot be called to either check if any complaints had previously been filed, or to verify the minor's allegation during the judicial bypass process. If the allegation is true, the minor should be protected. If the allegation is false, the parents' fundamental rights should not be denied.

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1030. For example, AmeriHealth, which is a leading health provider, has established standards requiring records to be maintained for at least eleven years or until the minor reaches majority plus six years whichever is longer. Medical Record Keeping Standards, AMERIHEALTH, http://www.amerihealth.com/members/quality_management/medical_record_standards.html (last visited Oct. 6, 2013).
1031. ABA, FAMILY LEGAL GUIDE 61 (3d ed. 2004), http://public.findlaw.com/abaflg/flg-17-4b-5.html. See generally Tina Williams, Planned Parenthood v. Lawall: Judicial Bypass Procedures Lacking Time Limits Violates a Minor's Constitutional Right to an Abortion, 23 AM. J. TRIAL ADVOC. 431 (2000) (stating that parental notification laws are constitutional according to Bellotti if there is a judicial bypass provision and listing state codes); Jones, supra note 166, at 2 (discussing judicial bypass cases in § 24); Danne, supra note 691, at 3 (discussing judicial bypass cases in various sections).
1033. Id.
1034. For a thorough and excellent analysis, see Teresa Stanton Collett, Seeking Solomon's Wisdom: Judicial Bypass of Parental Involvement in A Minor's Abortion Decision, 52 BAYLOR L. REV. 513, 588-901 (2000) (suggesting questions for each of these issues). But see Satsie Veith, Note, The Judicial Bypass Procedure and Adolescents' Abortion Rights: The Fallacy of the "Maturity" Standard, 23 HOFSTRA L. REV. 453, 457 (1994) (disputing the "maturity issue" and contending "the only prerequisite for the right to choose abortion should be the condition of pregnancy").
1035. See Judicial Bypass, supra note 1032.
1036. See id.
1037. See Collett, supra note 1034, at 569.
But central to our judicial system are three fundamental interests that must be properly balanced. First, a woman has limited right to terminate her pregnancy. The second interest, and one of the earliest ones, is the constitutional protection of parents' fundamental rights to raise and control their children. The third interest is each state's important interest in protecting its citizens, including the mother and unborn child.

The judicial bypass is a process that needs reform. It does properly balance these three fundamental interests. Furthermore, it is completely contrary to our judicial system. Since In re Gault, "most commentators now agree that children benefit from independent representation in any proceeding adjudicating their personal interests." In addition, the judicial bypass procedure compromises the fundamental rights of parents to direct the upbringing and education of their children. The vast majority of parents are loving parents who care for their children, and therefore, should be notified and give consent for an abortion. The law, however, should protect minors in proven cases of abuse or violence.

1039. See id.
1040. See id.
1041. See id. at 619-20.
1042. See id. at 620 (discussing the issues of judicial bypass).
1043. See Schueneman, supra note 1038, at 620 (contending that "in theory and in practice our judicial bypass mechanism heavily favors minors, at the expense of parental interests . . . [Most state parental involvement statutes do not adequately protect parental rights]."
1044. The American system is based on open courts where the truth can be determined through parties being heard, witnesses called, and evidence presented. The judicial bypass system is contrary to our adversarial system. One of the hallmarks of the system is having effective and vigorous representation. See United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 147 (2006) (quoting Strickland v. Washington, 466 U.S. 668 (1984)) (finding effective counsel "is critical to the ability of the adversarial system to produce just results") (internal quotation marks omitted); Smith v. Robbins, 528 U.S. 259, 294 (2000) (quoting Penson v. Ohio, 488 U.S. 75, 84 (1988)) ("The paramount importance of vigorous representation follows from the nature of our adversarial system of justice."); Georgia v. McCollum, 505 U.S. 4, 65 (1992) ("Thus, the defense's freedom from state authority is not just empirically true, but is a constitutionally mandated attribute of our adversarial system."); Strickland, 466 U.S. at 694 ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisages counsel's playing a role that is critical to the ability of the adversarial system to produce just results"); Lockhart v. Fretwell, 506 U.S. 364, 377 (1993) (Stevens, J., dissenting) (citing United States v. Cronic, 466 U.S. 646, 656 (1984)) ("Absent competent counsel, ready and able to subject the prosecution's case to the 'crucible of meaningful adversarial testing,' there can be no guarantee that the adversarial system will function properly to produce just and reliable results.").
1046. See id. at 593.
1047. See Mandatory Parental Consent to Abortion, supra note 1013, at 2.
1048. See Collett, supra note 1034, at 585.
Parents should be involved in the abortion decision of their children for several reasons. 1049 First, minors must have parental notice and consent before having other surgical or medical procedures. 1050 Abortion has greater physical, psychological, and spiritual consequences than other procedures, therefore, parents should be involved. 1051 Second, adolescents develop physically before they are fully mature psychologically and socially, and may therefore react emotionally rather than rationally to all of their options and the long-term consequences of abortion. 1052 Third, "[t]here are physical, social and psychological consequences of abortion, and these may be worse for teens." 1053 For example, there may be subsequent preterm births, inability to bear a child in the future, an increased risk of breast cancer, higher risk for psychological and social problems, and a higher risk of suicide. 1054 Fourth, parents can provide emotional and material support for their daughter regardless of her abortion decision. 1055

Unfortunately, in some cases, minors can be in abusive situations, and the law should provide protection for those minors. 1056 However, there should be verification that this is, in fact, the case. CPS should verify allegations of abuse and protect the minor in such cases. In addition, police records should be checked to determine if there has been any violence in the home.

If a minor claims abuse, the appropriate authorities should be notified and the situation investigated. A claim of abuse or fear of abuse should not be sufficient to grant a judicial bypass without evidence. 1057 In addition, if abuse exists, the State should protect the minor from further abuse. 1058

Furthermore, the court should determine if the pregnancy resulted from an adult having sex with a minor. 1059 If this is the case, the court should make a report to the appropriate authorities for investigation and prosecution of statutory rape. 1060

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1049. See infra notes 1050-1055 and accompanying text.
1050. See Collett, supra note 1034, at 515.
1051. See id. at 571-72.
1053. Id.
1054. Id.
1055. Id.
1056. See Collett, supra note 1034, at 585.
1057. See Schuerman, supra note 1038, at 643-44.
1058. See Hodgson, 497 U.S. at 494.
1059. See Manning v. Hunt, 119 F.3d 254, 272 (4th Cir. 1994) (upholding a North Carolina statute requiring that rape be reported and investigated).
1060. See id.
As in other cases, judges should be assigned on a rotational basis, not based on their predisposition to granting an abortion. Judges who are pro-life often either do not want to take judicial bypass cases, or are not assigned such cases because of their views. In fact, there are questions whether a pro-life judge can ethically take a judicial bypass case.

The lawyer who undertakes such a representation with knowledge of the crime and the canonical penalty, incurs the *latae sententiae* (automatic) excommunication of Canon 1398 because he is a necessary accomplice to the abortion act. Morally, he is assisting another person to commit a violation of a fundamental, moral belief of the Catholic faith. "Whether for pay or *pro bono*, such cases should be declined by the lawyer."  

The State should be entitled to report information as in other abortion cases. Confidentiality is maintained as specific information would not

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1062. See id. at 694-95. Placey notes that some judges "hear more than [their] fair share of bypass petitions because some of [their] colleagues refuse to consider them." Id. (citing Bill Dries, *Abortion Law Throws Fill-In Judges for Loop*, COM. APPEAL, June 19, 2005, at A1. Dries notes that certain judges on a Tennessee court "heard a disproportionate number of bypass cases because two judges on the court had categorically recused themselves." Id. n.13. In Pennsylvania, Alabama, and Tennessee, "judges have publicly announced their refusal to hear any case in which a girl seeks judicial bypass." Id. at 696 (citing Adam Liptak, *On Moral Grounds, Some Judges are Opting Out of Abortion Cases*, N.Y. TIMES, Sept. 4, 2005, at 21). Placey continues by stating:

This compromise forces state judges to make reproduction decisions that are not only distasteful but also illogical, probably unconstitutional, and almost impossible to reverse. Hence, although the categorical recusals may damage the public image of the judiciary as impartial decision makers and invite further politicization of state judicial elections, they are also true to the Supreme Court's holding that no third party should be granted arbitrary veto power over any woman's right to choose abortion.


1064. See Cunningham, supra note 1063, at 408.

be given concerning the minor.\textsuperscript{1066} For example, the State should collect statistical data concerning the number of judicial bypasses that are granted per county, the number granted by specific judges, and the number of cases reported to CPS and the police for investigation of sex with a minor.\textsuperscript{1067} The State should also collect other statistical data about the minor such as patient’s demographic characteristics (e.g., age, race, ethnicity, marital status, and number of previous live births) and the gestational age of the unborn child.\textsuperscript{1068} Data concerning the baby’s father should also be collected such as the father’s age, race, ethnicity, and marital status.

In addition, the court should appoint both a guardian ad litem and an attorney ad litem.\textsuperscript{1069} These should be two different individuals to provide greater protection for the minor in judicial bypass cases.\textsuperscript{1070} Their duties would be different\textsuperscript{1071} and a checklist should be used and given to the judge ensuring that each duty has been completed.\textsuperscript{1072} Recommendations for the best interest of the minor can be based on the assessment in completing the duties and conveyed to the judge.\textsuperscript{1073}

The duties of a guardian ad litem are necessary because the guardian ad litem may personally feel it is always in the minor’s best interest to have an abortion. State statutes generally outline the duties and any penalties for failure to fulfill their duties.\textsuperscript{1074} The State legislature should review and strengthen measures as indicated below.\textsuperscript{1075}

d. Duties of a Guardian ad Litem for a Judicial Bypass

The duties of the guardian ad litem representing a minor seeking an abortion through a judicial bypass should include but not be limited to the following items:

To determine what is in the minor’s best interest, the guardian ad litem shall:

1. Accompany the minor while she has a sonogram and ensure she has seen it and understands it.

\textsuperscript{1066} See Jones, supra note 166, at 2.
\textsuperscript{1067} See State Policies in Brief: Abortion Reporting Requirements, supra note 1065.
\textsuperscript{1068} This type of information is currently being reported in abortion cases. See id.
\textsuperscript{1069} See Graybill, supra note 1045, at 594-95.
\textsuperscript{1070} See id.
\textsuperscript{1071} Id. at 593 (advocating for two individuals fulfilling two different roles).
\textsuperscript{1072} See id. at 597-98.
\textsuperscript{1073} See id.
\textsuperscript{1074} See, e.g., TEX. FAM. CODE §§ 107.003, 107.004 (concerning duties), and § 107.0045 (concerning potential disciplinary proceedings for failure to do duties).
\textsuperscript{1075} During the 2011 Texas legislative session, the author testified and recommended duties for a guardian ad litem and an attorney ad litem.
2. Review the Department of Health’s Women’s Right to Know booklet with the minor and discuss with the minor what action the minor might take if she experiences complications following an abortion.

3. Determine if there is reason to believe that child sexual assault or statutory rape has occurred and report to authorities as required by the state code.

4. Determine if a police report has been made if child sexual assault, rape, or incest has occurred.

5. Determine the age of the father of the minor’s baby.

6. Determine if the minor is living with her parents, a parent, a relative, a guardian, or other person or persons that are unrelated.

7. Determine if the minor is being coerced to have an abortion, and if so, by whom. The guardian ad litem should make sure the minor understands that she has a right to not be coerced into an abortion.

8. Inform the minor of resources available to her and provide a copy of Department of Health’s Pregnancy Resource Directory, if one has been produced by the State.

9. Determine who is paying for the abortion.

10. Inform the minor of child support laws.

11. Screen the minor for risk factors, such as but not limited to depression, suicidal ideation, and/or a desire to keep the baby that could result in the minor experiencing mental health problems following the abortion.

12. If the minor has stated a fear of physical harm if a parent or guardian is informed that she is seeking an abortion, the guardian ad litem shall ask the minor if she has experienced or is experiencing any abuse from a parent or guardian and explore any history of family violence. If the guardian ad litem suspects that such abuse or harm has occurred, the guardian ad litem shall make a report to CPS and the police. If the minor recants her statement that abuse or harm has occurred, the guardian ad litem shall consider that is assessing her maturity.
13. The guardian ad litem shall make a detailed record of the discussions and actions taken regarding his or her recommendation to the court regarding the best interest of the minor who is seeking an abortion. This record shall become part of the sealed court record, which the minor may access at age eighteen.

e. Duties of an Attorney ad Litem for a Judicial Bypass

At the time of appointment, the court should give the attorney ad litem a hardcopy of the duties. The duties of the attorney ad litem representing a minor seeking an abortion through a judicial bypass should include but not limited to the following items:

To determine what is in the minor’s best interest and represent the minor, the attorney ad litem shall:

1. Ensure that the minor has seen and understands the “Women’s Right to Know Booklet.” Review with the minor the potential benefits and risks of pregnancy and an abortion as stated in the “Women’s Right to Know” Booklet.

2. Determine whether the minor has understood those benefits and risks.

3. Review the requirements and findings of the guardian ad litem.

4. Determine if there is reason to believe that child sexual assault or statutory rape has occurred, and whether a report was made to authorities and take appropriate action if it has not.

5. Determine if a police report has been made if child sexual assault, rape, or incest has occurred, and take appropriate action if it has not. The police report shall become part of the court record.

6. Interview the minor in person to determine her age and maturity. Meetings with the minor by telephone, teleconferencing, or other such electronic means do not meet the requirement of “in person.”

7. Complete an independent evaluation as to the qualifications for a judicial bypass and requirements to determine if it is in the minor’s best interest.

8. Represent the wishes of the minor if it has been determined that the minor is competent and mature enough to understand the
attorney-client relationship, the benefits and risks of pregnancy and abortion, the nature of the abortion procedure, and the materials that the guardian ad litem is required to provide.

9. The attorney ad litem must present to the court the findings and recommendations based on the above requirements.

10. An attorney ad litem who fails to perform the required duties is subject to disciplinary action under the state code.

An individual who might serve as an attorney ad litem or guardian ad litem is disqualified if that individual:

- Has a business relationship or is affiliated in the last ten years with an abortionist, an abortion facility, and/or an entity that refers for abortion.
- Has represented or is currently representing an abortionist, an abortion facility or any individual or facility that refers for an abortion.
- Has personally made or whose law firm has made contributions to entities that provide or refer for abortion, such as Planned Parenthood.
- Does pro bono work for an abortion facility or one that refers for an abortion.
- Has any other relationship that would create a conflict of interest.

There should also be greater protection for the unborn child just as there is for the minor. As discussed above, medical and scientific evidence is conclusive that life begins at conception.\textsuperscript{1076} Although the courts are divided, the court should consider the unborn child's interest for life and appoint a guardian ad litem for the unborn child.\textsuperscript{1077}

\textsuperscript{1076} See supra notes 360-362 and accompanying text.

\textsuperscript{1077} Compare Ex parte Anonymous, 810 So. 2d 786, 795 (Ala. 2001), and In re Anonymous, 720 So. 2d 497, 499 (Ala. 1998), with In re T.W., 551 So. 2d 1186, 1190 (Fla. 1989). See also generally Babbs, supra note 1063, at 479-80.
f. Greater Protection against Statutory Rape

Statutory rape is illegal in all fifty states. These laws require that health care workers report the crime to designated law enforcement CPS. Once an individual reports, then that agency has a duty to investigate to determine if statutory rape has occurred. Thus, it is the responsibility of the health care worker simply to report, and the responsibility of law enforcement or CPS to investigate.

Statutory rape is a crime that violates the most innocent and vulnerable in our society. Thus, the law needs to protect these children, and the crime needs to be reported, investigated, and prosecuted. Yet research by various groups has demonstrated that Planned Parenthood repeatedly violates mandatory reporting laws for statutory rape. In fact, research also shows that girls were coached on how to avoid detection, to circumvent parental involvement, and what to say or not say when they arrived at the abortion facility.

Abortion facilities need to be accountable for reporting statutory rape to the proper authorities. The state department of health needs to make an item on its inspection report whether statutory rape is reported, and to whom the report is made. The department of health needs to verify the information and determine whether there was an investigation and prosecution of the crime.

Currently, there does not appear to be a way to delineate statutory rape from other sexual assaults. Statutory rape needs to be a specific category. In addition, there needs to be greater prosecution of statutory

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1079. See id.
1080. See id.
1081. See id.
1083. See id. (doing video tape interviews at Planned Parenthood facilities across the nation). Life Dynamics made 800 phone calls to abortion facilities and most calls resulted in actions designed to get the abortion even if it was something that should have been reported to the State for investigation. See id.; Crutcher, supra note 1078. This report was confirmed by WTIC-TV and reported in an article on their website. Statutory Rape and Reporting, ROCHESTER AREA RIGHT TO LIFE (last visited Oct. 3, 2013), http://www.righttoliferoch.org/statutoryrape.htm.
1084. See Crutcher, supra note 1078.
1085. See id.
rape. Statistical data is not being collected concerning the report, investigation, prosecution, and conviction of this crime. Thus, there need to be changes in the statistical data collection systems that reflect this information.

The law should define the age of consent to be at least eighteen years of age. Currently, all states set the age of consent between sixteen and eighteen years of age.

3. Malpractice Insurance and Hospital Privileges

Plaintiffs have been able to bring medical malpractice claims against abortionists. These lawsuits are generally treated as a variant of malpractice claims. Problems may arise, however, where the abortionist does not have malpractice insurance.

To provide the same level of professional responsibility, physician abortion providers should (1) be board certified in obstetrics and gynecology in the State where the abortionist is providing abortion services; (2) be required to carry ten million dollars or more in malpractice


1091. See Vroman, supra note 1090, at § 2[a].
insurance, and, (3) have privileges at a local hospital. These requirements would protect women injured by the abortion by obtaining immediate care at a hospital and compensating them for injuries they have sustained and the medical bills incurred. Frequently, Medicaid does not cover the woman’s medical bills for injuries during an abortion.

a. Hospital Privileges

Fifteen states require physicians who perform abortions to maintain an affiliation with a local hospital such as admitting privileges or an arrangement with another physician who has admitting privileges. These states include Alabama, Arizona, Florida, Illinois, Indiana, Kansas, Louisiana, Mississippi, Missouri, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, and Utah. The purpose of these laws is to protect the health and safety of women. The Guttmacher Institute admits that it is a standard that “may be impossible for providers to meet.” Yet women deserve standards that protect their health and safety, particularly when their lives are in jeopardy if things go wrong.

In 2012, Mississippi passed House Bill 1390 to amend section 41-75-1 to provide that physicians are licensed in Mississippi, board certified in obstetrics and gynecology, and have hospital privileges. A federal judge issued a temporary restraining order blocking enforcement of the law, but then decided to see if the clinic could comply with the law, which it has not. For their health and safety, women in Mississippi deserve this kind of protection.


1094. See Andrusko, supra note 1093; Life Dynamics, Inc., supra note 1092; Williams, supra note 1093.


1097. Id.

1098. See id.

1099. Id.


1101. Id.

The distance from a hospital is another important issue. Nine states have requirements as to the maximum distance to the hospital.\textsuperscript{1103} There is not a uniform standard as some states use miles, others use minutes, and still others state an adjacent county.\textsuperscript{1104} Whatever the standard, it needs to be close enough to save a woman’s life if it is in jeopardy.

b. Malpractice Insurance

Abortionists may not have malpractice insurance, and therefore, plaintiffs may not be able to recover their damages.\textsuperscript{1105} For example, James Pendergraft owns “five abortion facilities in Florida and a late-term clinic in D.C. [that specializes] in abortions past the 24th week of pregnancy.”\textsuperscript{1106} According to an article by Steven Ertelt, “[h]e has had his medical license suspended four times for botched abortions, illegal late-term abortions, and dispensing drugs without a license.”\textsuperscript{1107} Carol Howard sought damages for her daughter who survived an abortion but “has cerebral palsy, no function on the left side of her body, strokes and brain damage, physical, emotional and cognitive delays, lung damage, chronic lung disease and seizure disorders.”\textsuperscript{1108} The court found Pendergraft liable for damages, and the court ordered him “to pay Howard $18,255,000 in punitive damages, $18,000,000 in compensatory damages and over $400,000 in court costs.”\textsuperscript{1109} Although Howard won a judgment, the abortion practitioner does not have malpractice insurance to cover the damages.\textsuperscript{1110}

Women and minors deserve better protection against abortion malpractice. A woman has a right to know whether the provider has malpractice insurance in case she is injured or killed.\textsuperscript{1111} A woman should never sign a document that waives any liability by the abortionist or abortion facility.\textsuperscript{1112}

Legislation should be enacted in all fifty states for abortionists to carry adequate malpractice insurance.\textsuperscript{1113} Abortionists should be required to inform their patients whether they carry malpractice insurance.\textsuperscript{1114} If they...

\textsuperscript{1103} State Policies in Brief: Targeted Regulation of Abortion Providers, supra note 1096.
\textsuperscript{1104} Id.
\textsuperscript{1105} See supra notes 1106-1110 and accompanying text.
\textsuperscript{1107} Id.
\textsuperscript{1108} Id.
\textsuperscript{1109} Id.
\textsuperscript{1110} Id.
\textsuperscript{1111} See N.C. GEN. STAT. § 90-21.82(1)f (2013).
\textsuperscript{1112} See Collett, supra note 1090, at 16.
\textsuperscript{1113} See \textit{A Contract with American Women}, supra note 1092.
\textsuperscript{1114} See N.C. GEN. STAT. § 90-21.82(1)f.
currently do not carry such insurance, or at the woman's choice, the woman should be able to purchase a one-time insurance policy similar to the way that travelers can purchase trip insurance for a particular trip.\textsuperscript{1115} Abortion has greater risks than an airplane flight,\textsuperscript{1116} and women should know those risks and be protected when things go wrong just as any other plaintiff would be.

4. Penalties for Abortionists Failing to Comply with the Law

As in other areas of the law, there should be penalties for failing to comply with the law. The following are some proposed penalties:

- Physicians, nurses, or other medical personnel responsible for providing informed consent information are guilty of a Class B misdemeanor for gross negligence, reckless, knowing, or intentional violation of informed consent laws under an objective standard of reasonable medical judgment.\textsuperscript{1117}

- The abortion facility would be liable for civil penalties of $10,000 per occurrence under an objective standard of reasonable medical judgment.\textsuperscript{1118} If there are more than three such violations per year, then the abortion facility is liable for treble damages. An exception would be for a proven medical emergency.\textsuperscript{1119} The law has defined a "medical emergency" as "that condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate an immediate abortion to avert the death of the mother or for which a twenty-four hour delay will create grave peril of immediate and irreversible loss of major bodily function."\textsuperscript{1120} Scienter mitigates vagueness.\textsuperscript{1121}

\begin{itemize}
  \item \textsuperscript{1115} See A Contract with American Women, supra note 1092.
  \item \textsuperscript{1116} Compare David Ropeik, \textit{How Risky is Flying}, PBS: Nova (Oct. 17, 2006), http://www.pbs.org/wgbh/nova/space/how-risky-is-flying.html, with Abortion Risks: A List of Major Physical Complications Related to Abortion, supra note 324.
  \item \textsuperscript{1117} See S.D. CODIFIED LAWS § 34-23A-10.2.
  \item \textsuperscript{1118} The reasonable medical judgment standard was approved in \textit{Karlin}, 188 F.3d at 459. Such a standard is necessary to “avoid a finding of vagueness in the abortion context” because “a statute that imposes liability for violations of its provisions must provide an explicit standard for those who enforce or apply the statute’s provisions so as to prevent them from engaging in arbitrary and discriminatory enforcement.” \textit{Id} at 465 (citing \textit{Colautti}, 439 U.S. at 390-94).
  \item \textsuperscript{1119} See N.D. CENT. CODE § 14-02.1-02(12).
  \item \textsuperscript{1120} \textit{Id}. The definition of medical emergency is constitutional. \textit{Fargo Women's Health Org.}, 18 F.3d at 535.
\end{itemize}
• Physicians who either personally or as supervising other medical personnel commit gross negligence, willfully, knowingly, or intentionally violate informed consent laws should have their professional license revoked and subject to three years in prison per occurrence.

• Physicians must insure that the woman's decision was a voluntary and informed decision. The abortionist who is to perform the abortion must counsel the woman in person at least twenty-four hours prior to the abortion unless there is a medical emergency. There should be an assessment of whether (1) the abortionist explained in person all steps of treatments and procedures; (2) the abortionist informed the woman of abortion alternatives; (3) the abortionist advised the woman of the risks and benefits of an abortion versus other alternatives that are available; and, (4) the abortionist gave the woman written material produced by the state's department of health such as the "Woman's Right to Know" Booklet. There should be written documentation of each aspect and kept in the woman's file as evidence that there was voluntary and informed decision. In addition, the abortionist should give the woman a duplicate copy of the consent form that she signed. The state's department of health should verify these records during its inspection. Any person who violates the informed consent requirements is liable for $10,000 per occurrence, and is subject to civil liability by the woman who had the abortion. Evidence of repeated violations should include penalties of three years in prison per occurrence, and the loss of their professional licenses.

• The woman's choice should be voluntary and without any coercion from anyone. A sign with lettering

1122. See State Policies in Brief: Counseling and Waiting Periods for Abortion, supra note 504.
1123. See id.
1124. See Gold & Nash, supra note 944, at 9-10, 12.
1126. See ARIZ. REV. STAT. ANN. § 36-2156 (2012).
1127. See Gold & Nash, supra note 944, at 7.
that is legible, and in Arial font of at least 40-point boldface type should be posted in a conspicuous place including the waiting room and patient consultation room.\textsuperscript{1128} The sign should state:

\begin{quote}
Notice: It is against the law for anyone, regardless of the person's relationship to you, to coerce you into having, or to force you to have an abortion. By law, we cannot perform an abortion on you unless we have your freely given and voluntary consent. It is against the law to perform an abortion on you against your will. You have the right to contact any local or state law enforcement agency to receive protection from any actual or threatened criminal offense to coerce an abortion.\textsuperscript{1129}
\end{quote}

Violation of this provision should carry a penalty of $2,500 per day until compliance.\textsuperscript{1130}

- Only abortionists licensed in the state and having local hospital privileges should perform abortions within the state.\textsuperscript{1131} An abortionist who violates this provision should be criminally liable for $2,500 fine per occurrence, five years in prison, and civilly liable to the woman for medical malpractice.

- State legislatures should enact ultrasound and fetal heartbeat laws with penalty provisions.\textsuperscript{1132} Abortionists who violate the law should have their licenses revoked and be assessed a $2,500 fine per occurrence.\textsuperscript{1133} Women should also have the right to bring a civil lawsuit.

As with any other type of case, the law is ineffective if there are no enforcement provisions.\textsuperscript{1134} The law must protect women and minors by

\begin{footnotes}
\textsuperscript{1129} See id. § 39-15-202(2)(a).
\textsuperscript{1130} See id. § 39-15-202(a)(3)(A) (providing for the $2,500 penalty).
\textsuperscript{1131} Andrusko, supra note 1093.
\textsuperscript{1132} See Gold & Nash, supra note 944.
\textsuperscript{1134} See Williams, supra note 1093.
\end{footnotes}
providing administrative, civil, and criminal penalties for violations. This is particularly important in the abortion context where there are serious physical and psychological harm to women that can last a lifetime.\footnote{1135}

5. Better Oversight by the States’ Departments of Health

The states’ departments of health need to do a far better job with oversight. These departments of health are the first lines of defense to protect women. Their job is to audit hospitals and outpatient medical facilities to make sure that they follow the rules and provide safe medical care.\footnote{1136} The Kermit Gosnell case\footnote{1137} is an excellent example of the failure of a state department of health to protect women. The following proposals are recommended:

- Inspections—The departments of health need to do at least one annual unannounced inspection of abortion facilities.\footnote{1138} In Kermit Gosnell’s case, the department of health had not inspected what prosecutors called a “house of horrors” for seventeen years.\footnote{1139} This is totally unacceptable.\footnote{1140} Furthermore, if there are violations, then the departments of health need to have a subsequent unannounced inspection to determine if the problems have been corrected.

- Qualifications—The departments of health need to review the qualifications of everyone working in the

1137. The Grand Jury Report is very insightful of the failures of the Pennsylvania Department of Health. See Williams, supra note 1093. See generally Clarke D. Forsythe & Bradley N. Kehr, Invited Response: A Roadmap through the Supreme Court’s Back Alley, 57 VILL. L. REV. 45, 45 (2012) (responding to Prof. Calhoun’s article and stating that prevention of “‘future Gosnells’ is a worthy goal, [however] . . . [t]he aim should be effective protection for women’s physical and psychological health . . . [but] [t]he main obstacle . . . is . . . the Supreme Court’s abortion doctrine, which was misguided in its inception and contradictory in its application.”); See Samuel W. Calhoun, Stopping Philadelphia Abortion Provider Kermit Gosnell and Preventing Others Like Him: An Outcome that Both Pro-choicers and Pro-lifers Should Support, 57 VILL. L. REV. 1, 3-4 (2012) (wanting to prevent future Gosnells and discussing the horrible conditions, the endangerment to women, the killing of “born-alive babies,” and “performing illegal post-viability abortions”).
1138. See Andrusko, supra note 1093.
1139. Calhoun, supra note 1137, at 5.
1140. Williams, supra note 1093, at 8.
abortion facility to ensure that personnel have the proper qualifications for the functions that they are performing.1141

- Sanitation—The departments of health must strictly scrutinize cleanliness standards in the abortion facility.1142 The Grand Jury in the Kermit Gosnell case stated: “The clinic reeked of animal urine, courtesy of the cats that were allowed to roam (and defecate) freely. Furniture and blankets were stained with blood. Instruments were not properly sterilized. Disposable medical supplies were not disposed of; they were reused, over and over again. Medical equipment – such as the defibrillator, the EKG, the pulse oximeter, the blood pressure cuff – was generally broken; even when it worked, it wasn’t used. The emergency exit was padlocked shut. And scattered throughout, in cabinets, in the basement, in a freezer, in jars and bags and plastic jugs, were fetal remains. It was a baby charnel house.”1143

- Complaints—The departments of health should take any complaints about an abortion facility seriously and thoroughly investigate the complaint with appropriate follow-up.1144 The complaint process should have various avenues for filing the complaint including by letter, internet, or telephone.1145 The departments of health should assure patients of confidentiality and they should receive a response when the investigation is completed.1146 The department should not dismiss a complaint until there is a review of any prior complaints, which must be duly considered.1147 The departments of health should examine malpractice databases.1148 Reports about abortionists should be

1143. See Williams, supra note 1093, at 2.
1144. See id. at 9-10.
1145. See id. at 16.
1146. See id.
1147. See id.
1148. See Williams, supra note 1093, at 16.
cross-checked against reports about the medical offices where they have previously worked.  

- Second trimester abortions should be performed by physicians board certified in obstetrics and gynecology. These abortions pose greater physical risks for women, therefore, a qualified doctor should perform them. If such laws have not been enacted in the state, then the legislature should do so. 

- The state departments of health should ensure that infectious medical waste is properly disposed. 

- Each state governor should appoint an oversight task force to ensure that the department of health is actually performing its duties. Gosnell’s facility would not have gone seventeen years without an inspection if the state department of health had been doing its duties, and there had been an oversight task force to insure that it was done.

The proposals are basic good medicine, which many women are not receiving in some abortion facilities like Kermit Gosnell. Assistant District Attorney Ed Cameron made this point in his closing argument. He told the jury about taking his sick dog to the veterinarian to be put to sleep, with a shot to induce sleep first. He stated, “These babies didn’t even get that . . . . My dog was treated better than he treated babies and women, . . . [a]nd that’s because he didn’t care. He created an assembly line, with no regard for these women whatsoever.” Women deserve better.

1149. See id.  
1150. See id.  
1152. See Williams, supra note 1093, at 17.  
1153. See id. at 258-59.  
1154. See id. at 2.  
1156. Id.  
1157. Id.
6. No Aspect of Abortion Should Be Coerced

The abortion decision was intended to be a free and voluntary choice.\textsuperscript{1158} But the reality is that the "abortion choice" gave freedom to others to pressure women into something they do not want,\textsuperscript{1159} and later deeply regret.\textsuperscript{1160} No aspect of abortion should be coerced—pregnant mothers should not be coerced into having abortions, taxpayers should not be coerced into paying for abortions, and doctors, medical personnel, and pharmacists should not be coerced into violating their rights of conscience to provide abortion services.\textsuperscript{1161}

a. Pregnant Mothers

As discussed above, the Supreme Court in Roe assumed that abortion would be a voluntary choice.\textsuperscript{1162} But that has not been the reality of abortion practice.\textsuperscript{1163} The decision simply opened the door for women to be coerced into having an abortion.\textsuperscript{1164} The coercion may be by husbands, boyfriends, parents, abortion workers, or the circumstances.\textsuperscript{1165} In a decision that has such major physical and psychological ramifications for the woman,\textsuperscript{1166} she should be able to make a voluntary and informed decision.

To protect women, the court should apply a broad definition of coercion such as the proposed definition:

The court must apply a broad definition of coercion which should include — but is not limited to — the following: a person commits coercion by threatening, intimidating, pressuring, or engaging in any actions or speech which either influences, or attempts to influence, a pregnant woman's decision to obtain an abortion or takes an undue advantage of her physical or emotional condition such that she is deprived of her voluntary and free choice.

\textsuperscript{1158} See Gold & Nash, supra note 944.
\textsuperscript{1159} Affidavit of Dr. David Reardon, supra note 171 ("Legalization of abortion has exposed women to a greater risk of feeling pressure by others to undergo 'unwanted' abortion.").
\textsuperscript{1160} See Gonzales, 550 U.S. at 159-60 (recognizing that some women regret their abortion).
\textsuperscript{1161} See infra Part V.A.6.
\textsuperscript{1162} See supra Part III.F.3; see also Roe, 410 U.S. at 169-70.
\textsuperscript{1164} See id.
\textsuperscript{1165} See id.
\textsuperscript{1166} See Alcorn, supra note 1135.
Anyone who coerces a woman to have an abortion may be subject to civil or criminal liability.\footnote{1167} For example, many states have fetal homicide laws,\footnote{1168} or at the federal level, someone may be prosecuted under the Federal Unborn Victims of Violence Act of 2004.\footnote{1169} Civil liability may include such actions as intentional infliction of emotional distress.\footnote{1170} There are numerous other potential causes of action.\footnote{1171}

Life Dynamics has prepared a letter that women can send to an abortion facility if she feels she has been the victim of coercion.\footnote{1172} She should advise them that she desires to continue her pregnancy to term, that she is aware that state and federal law protects her free and voluntary choice, and that there is potential civil and criminal liability for violation of her wishes.\footnote{1173} Such a letter should be sent to the abortion facilities where she may be taken, as well as to law enforcement agencies such as police, sheriff, and district attorney where she resides and where the abortion may be performed.\footnote{1174} If she is a minor, she can also notify Child Protective Services where she resides, and where the abortion may be performed.\footnote{1175}

b. Taxpayers

Taxpayers should not be forced to pay for abortions. As a public policy matter, the government should not use taxpayer funds to pay for abortions. There has been much discussion about defunding abortion providers at both the federal and state level.\footnote{1176} The individual seeking an abortion should pay for those services and private donations or funding should supplement the cost for low-income women instead of taxpayer funds.

\footnote{1167. See Forced Abortions, supra note 1163.}
\footnote{1170. See generally Strahan, supra note 1090, at 216 ("Recovery for emotional distress was made in cases when the woman felt coerced, compromised, or fearful to a significant degree.").}
\footnote{1171. Life Dynamics, Inc. suggests that liability may include: "aggravated assault, child abuse, failure to report suspected child abuse, wrongful death, kidnapping, failure to obtain informed consent, injury to a child, fraudulent representation, interference with parental relation, sexual assault, wrongful imprisonment, [and] medical license violations." Sample Letter from Life Dynamics, Inc., to Facility Director and All Staff Involved in Abortion Provision, http://thejusticestation.org/wp-content/uploads/2011/05/Life-Dynamics-Fax-to-Abortionist.pdf [hereinafter Letter]. See generally Northern, supra note 1090, at 494-96; Strahan, supra note 1090, at 216; Vroman, supra note 1090, at § 24; Collett, supra note 1090, at 249; Roe, supra note 1090, at 281.}
\footnote{1172. See Letter, supra note 1171. Life Dynamics, Inc. can be contacted at (940) 380-3800 or via mail at P.O. Box 2226, Denton, Texas 76202.}
\footnote{1173. See id.}
\footnote{1174. See id.}
\footnote{1175. See id.}
\footnote{1176. See, e.g., infranotes 1177-1189 and accompanying text.}
At the federal level, Congress first passed the Hyde Amendment\textsuperscript{1177} in 1976, which prevented the federal government through Medicaid from covering abortion in comprehensive health care services.\textsuperscript{1178} "The Hyde Amendment is a rider to the annual . . . Health and Human Services (HHS) . . . appropriations bill . . . ."\textsuperscript{1179} In 1980, the United States Supreme Court upheld the Hyde Amendment in\textit{Harris v. McRae}.\textsuperscript{1180} Over the years, Congress has made some exceptions such as in cases of rape and incest or when the mother’s life is endangered.\textsuperscript{1181}

In addition to federal legislation, some states are taking their own initiatives in defunding abortion providers such as Planned Parenthood. In 2007, Texas implemented the Texas Women’s Health Program, which provides comprehensive preventative health care to approximately 100,000 low-income Texas women.\textsuperscript{1182} The services include screenings for breast and cervical cancer, diabetes, hypertension, and other services.\textsuperscript{1183}

Texas Governor Rick Perry requested that the Obama Administration grant a waiver so that the state could comply with state law, which prohibited funding to abortion providers or those referring for abortions.\textsuperscript{1184} However, the Obama Administration intended to phase out the program because the Texas Legislature had excluded abortion providers.\textsuperscript{1185} The Obama Administration denied the waiver and federal funding ended on December 31, 2012.\textsuperscript{1186}

This was in spite of the fact that there are over 2,500 providers across the state and Planned Parenthood represented fewer than two percent of the providers in the Women’s Health Program.\textsuperscript{1187} In addition, the Texas Health and Human Services Commission determined Planned Parenthood’s cost per client is forty-three percent higher than for most other providers.\textsuperscript{1188}

To provide these services, the state initiated a new Texas Women’s Health

\textsuperscript{1180}.\textit{ Harris}, 448 U.S. at 326.
\textsuperscript{1182}. Fighting for Women’s Health, supra note 740.
\textsuperscript{1183}. Id.
\textsuperscript{1184}. Id.
\textsuperscript{1185}. See id.
\textsuperscript{1187}. Fighting for Women’s Health, supra note 740.
\textsuperscript{1188}. Id.
Program that is state funded, complies with state law, and provides better preventative health care at a lower cost. Other states should follow the example of Texas.

c. Doctors, Medical Personnel, and Pharmacist

Doctors, medical personnel, and pharmacists should not be forced to provide abortion services. This has historically been called “the right of conscience.” The right of conscience is the right of an individual to refuse to do something requested by another based on his or her own conscience or religious beliefs. This is a right recognized during the Enlightenment, which was articulated by American founders such as Thomas Paine, Thomas Jefferson, and James Madison. In medicine, it became particularly important with respect to abortion. In recent years, doctors, nurses, and pharmacists have exercised their rights of conscience to refuse to provide abortion services. The consensus, however, is that this right is under attack.

Following Roe v. Wade, the law provided protections for healthcare professionals’ right of conscience. Congress enacted the Church Amendment in 1973, which prohibited the government from imposing


1192. See generally Mark L. Rienzi, The Constitutional Right Not to Participate in Abortions: Roe, Casey, and the Fourteenth Amendment Rights of Healthcare Providers, 57 NORE DAME L. REV. 1, 4-10 (2011) (discussing the right of conscience and how the healthcare providers should not be forced to provide abortions but be protected under the Fourteenth Amendment).


requirements contrary to an individual’s religious or moral beliefs. Subdivision (b) prohibits any court, public official, or other public authority to require for any grant, contract, loan, or loan guarantee under various programs to violate the person’s conscience. Subdivision (b)(1) protects an individual who is asked to perform or assist in a sterilization procedure or abortion if it is contrary to his religious beliefs or moral convictions.

By 1978, virtually all state legislatures had enacted a right of conscience legislation in some form. Congress has continued to speak on the right of conscience issue. In 1988, Congress enacted the Civil Rights Restoration Act, and the Danforth Amendment, which mandated neutrality concerning abortion. In 1996, Congress enacted the Omnibus Consolidated Rescissions and Appropriations Act, which prohibited any federal, state, or local government from discriminating against health care entities refusing to do abortion training, to provide abortions, or to refer for

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1197. See 42 U.S.C. § 300a-7 (concerning sterilization or abortion).
1198. Id.
1199. Id.
1200. Id., supra note 1196, at 2.
1201. See infra notes 1205-1211 and accompanying text.
1203. Id., supra note 1196, at 2.
abortion training or abortions. In 1997, Congress enacted the Balanced Budget Act, which in effect extended the right of conscience to the companies that pay for care under the Medicaid and Medicare programs. In 2004, Representatives Henry Hyde and Dave Weldon introduced the Hyde/Weldon Conscience Protection Amendment, which Congress enacted in the Fiscal Year 2005 Omnibus Appropriations Bill.

In 2007, the American College of Obstetricians and Gynecologists ("ACOG") issued an ethical statement entitled "Committee Opinion #385—Limits of Conscience Refusal," which suggests that the patient's autonomy supersedes the healthcare provider's moral objection. In 2008, "[t]he American Board of Obstetrics and Gynecology ("ABOG") issued a new policy . . . which stated that physician's certification would be contingent on compliance with ACOG ethical principles." Both ACOG and ABOG faced opposition concerning these positions.

The right of conscience is an important issue. Doctors, nurses, medical personnel, and pharmacists have historically had the right of conscience, and Congress and state legislatures need to continue to protect those rights.

7. Better Education on What Abortion Is and Its Effects on Women and Families

When abortion providers discuss abortion and the procedure, it is generally in very ambiguous terms that do not accurately reflect what abortion really is. For example, abortionists use terms such as "it's just blood," or "it's just tissue," or "it's just the contents of the uterus." However, these terms are not an accurate scientific description of the unborn child or abortion procedure. As discussed earlier, life begins at conception. In the states that have the "Woman's Right to Know" booklets, the baby's development is shown at two week intervals. Clearly, the unborn child is not just blood or tissue.

1205. Feder, supra note 1196, at 2-3.
1207. Feder, supra note 1196, at 3.
1210. Id.
1211. Id.
1212. See Acuna, 930 A.2d at 420.
1213. See id.
1214. See supra Part III.G.
1215. See TEX. DEP'T OF HEALTH, supra note 242, at 2.
1216. See id. at 1-5.
It is important that pregnant women have accurate and scientific information to make informed decisions because of the psychological impact that the decision to abort may have on her when she finally learns the truth. If a woman obtains subsequent information, contradicting that provided by the abortion facility and used as the basis of her earlier abortion decision, adverse psychological consequences become more probable. Each state must enact legislation that would afford women accurate and scientific information such a “Woman’s Right to Know” booklet, provide an opportunity for the woman to see her sonogram and hear the heartbeat of her unborn child. Women have a right to know the truth about their pregnancies and their unborn children so that she can make informed decisions.

Families, churches, and schools need to do a better job of explaining what abortion is and how it affects women, and provide the scientific information about the unborn child. For example, in sex education classes, schools should use the “Woman’s Right to Know” booklet, which are prepared by state medical boards, and provide accurate information. In Texas, for example, the booklet states that the fetus is an unborn child, explains that the child has its own separate DNA, shows the development of the unborn child at two week intervals, and discusses the risks of both carrying the child to term and abortion. Parents and churches should have this information to advise minors when they talk about pregnancy and risks of abortion. Being well informed is critical to the abortion decision and the only way that there can be voluntary and informed consent.

8. Father’s Rights

As discussed above, cases subsequent to Roe v. Wade have held that the government cannot require either spousal notification or consent. In the joint opinion in Casey, the Justices recognized that a husband has an interest in terminating the pregnancy or carrying the pregnancy to term. The Justices reasoned that there is a greater impact on the woman carrying the child, and not requiring spousal notification or consent could prevent a

1217. For example, Rosa Acuna suffered tremendous psychological harm after she asked the abortionist if it was a baby and he said it was “blood,” but she later learned that parts of the baby had been left within her. See Acuna, 930 A.2d at 420; see also Acuna Brief of Sandra Cano, supra note 854, at 26, 2008 WL 2185717 at *20 (explaining that women experience devastating psychological harm when they later learn the truth).


1220. See TEX. DEPT. OF HEALTH, supra note 242, at 3-8.

1221. See Gold & Nash, supra note 944.

1222. See, e.g., Casey, 505 U.S. at 887-99; Danforth, 428 U.S. at 67-68.

1223. Casey, 505 U.S. at 895-96.
significant number of women from physical and psychological abuse. However, this rationale is overbroad and legislatures could and should establish relevant criteria through legislation and regulations.

In the forty years since Roe, there have been significant movements to increase a father’s rights, whether married or unmarried, and to create greater fairness in the area of family law generally. Although progress has been made, fathers still suffer from inequality in the area of abortion.

a. Recognition of How Abortion Affects Fathers

The effects of abortion on men have not been as thoroughly studied as the effects on women. There are some enlightening revelations, however, on the impact on men. Dr. Arthur B. Shostak is Professor Emeritus of Sociology at Drexel University in Philadelphia. In the 1970s, he accompanied his partner to an abortion facility after agreeing that abortion was the best choice for them. After sitting in the waiting room, however, he described the experience as a “bruising experience,” and he was shocked about how “deeply disturbed” he became. Over the next ten years, he studied the abortion experience of 1,000 men who went to abortion facilities with their wives or girlfriends. Although there were limitations to the study, such as evaluating only short-term reactions, and only evaluating men who accompanied the women to the abortion, it is considered the benchmark study.

1224. Id. at 892-95.
1226. HISTORICAL AND MULTICULTURAL ENCYCLOPEDIA OF WOMEN’S REPRODUCTIVE RIGHTS IN THE UNITED STATES 17 (Judith A. Baer ed., 2002)
1227. Dr. Catherine Coyle, RN, Ph.D., is one of the researchers who has studied the effects of abortion on men. In an article, she states that there were only thirty-one published studies including a few clinical observations or case studies written by psychotherapists; some quantitative studies involving surveys and numerical data; others are qualitative studies, which used interviews; and, some have combined research methods. Catherine T. Coyle, Men and Abortion: Psychological Effects, MEN & ABORTION NETWORK (Sept. 2008), http://www.menandabortion.net/MAN/pdf/men_abortion_summary_table.pdf. But she cautions that much of the research involved only small sample sizes and did not determine long-term effects. Id.
1229. See id.
1230. See id.
1231. See id. Dr. Shostak writes that since its publication, he has conducted three more surveys that provide longitudinal data from over 3,000 males in scores of abortion facilities coast-to-coast. Arthur Shostak, Bringing Men In from the Cold: Abortion Clinics and Male Services, REALITYCHECK.ORG (Nov. 15, 2006, 6:58 AM), http://therealitycheck.org/article/2006/11/15/bringing-men-in-from-the-cold-abortion-clinics-and-male-services/.
1232. Reardon, Forgotten Fathers, supra note 1228.
Even with a limited number of studies, it is clear that men “may suffer intense grief after abortion as well as regret, helplessness, guilt, anxiety, anger, and emasculation.”1233 Because abortion is a death experience and irreversible, “[g]rief and regret may be profound among men as abortion often involves multiple losses including loss of the child, of the relationship, and of hopes for the future.”1234

In addition to psychological problems, men may also face relationship issues.1235 “Many relationships between men and women deteriorate and ultimately fail after abortion. Relationships with family and friends may also be strained if men deliberately isolate themselves or if their abortion related grief is minimized or unacknowledged by others.”1236

Abortion hurts men as well as women, and more studies are needed to understand what they experience and how they can heal after abortion.1237 In addition, men need counseling programs designed specifically for them.1238 Dr. Theresa Burke, founder of Rachel’s Vineyard, encourages men to attend Rachel’s Vineyard retreats and produced a book entitled Redeeming a Father’s Heart to help men understand post-abortion pain, and that healing is possible.1239

b. Better Balancing of the Interests

Over the years, there has not been an appropriate balancing of the interests of the parents.1240 At common law, the father had exclusive rights and the mother was only entitled to reverence and respect.1241 However, under more modern law, the husband and wife had joint and equal parental rights.1242 There was an exception in the case of illegitimate children where the mother’s rights were considered preeminent.1243 In terms of abortion, the courts have only considered the mother’s rights, and have disregarded the rights of fathers and the unborn child.1244

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1233. Coyle, supra note 1227.
1234. Id.
1235. Id.
1236. Id.
1237. MICHAEL Y. SIMON, MALE PARTNERS AND THE PSYCHOLOGICAL SEQUELAE OF ABORTION: A PSYCHOODYNAMIC-RELATIONAL VIEW ch. 5 (1997), http://www.afterabortion.com/mens_react.html (“This paper has argued that abortion constitutes a traumatic . . . event for men and women, and calls for the examination of the long-term psychological sequelae in male partners.”).
1238. See id. at chs. 2, 5.
1241. Id.
1242. Id.
1243. Id.
1244. See id. at 1098.
In abortion cases, there needs to be a recognition and proper balancing of the three major interests—the mother’s interest in her bodily integrity but with a recognition of the unborn child’s separate and unique DNA, the father’s interests in the procreation and support of his children, and the child’s interest to be born alive.\textsuperscript{1245} An improper balance causes the death of the child, potential physical and psychological harm to the parents, and a deterioration of the integrity of the family.\textsuperscript{1246} The courts balance the interests of the parties in other family law situations, and should in the abortion context, as well. For example, in adoption cases, both birth parents must give consent\textsuperscript{1247} The rationale is “to prevent uninformed, hurried, or coerced decisions.”\textsuperscript{1248} Abortion law should mirror adoption law where both parents must consent before an abortion is performed.\textsuperscript{1249}

c. Fathers Are Entitled to Basic Due Process and Equal Protection

An essential part of our judicial system is procedural and substantive due process, and equal protection under the law.\textsuperscript{1250} The greater the deprivation of liberty interest, the greater the due process protection should be.\textsuperscript{1251} In the case of abortion, the abortionist aborts the child and this harm is irreparable. Therefore, the father should have substantial due process protections.

At a minimum, a father should have notice and a hearing to resolve any differences between the mother and father.\textsuperscript{1252} The court could conduct a hearing quickly and efficiently in the same manner as in judicial bypass cases.\textsuperscript{1253} Where the father wants to raise the child, but the mother does not, the father can assume financial and legal responsibility for the child. The short-term burden of nine months may be minor compared to the physical

\textsuperscript{1245} See Albright, 510 U.S. at 271-72 (illustrating the current interests protected under the concept of substantive due process).


\textsuperscript{1247} Id.

\textsuperscript{1248} Id.


\textsuperscript{1250} See Casey, 505 U.S. at 844-47.

\textsuperscript{1251} Id.

\textsuperscript{1252} See id. at §48.


and psychological risks of abortion that can last for years or a lifetime for both the mother and the father.\textsuperscript{1254}

Fathers should have equal protection under the law.\textsuperscript{1255} Fathers should not be treated differently from mothers and married fathers should not be treated differently from unwed fathers.\textsuperscript{1256} A father's fundamental interest in his children is the same under these circumstances, unless proven to the contrary.\textsuperscript{1257} As the Supreme Court has stated, denial of the father's rights is "inescapably contrary to the Equal Protection Clause."\textsuperscript{1258}

9. Limiting Use of RU-486 and Other "Morning After" Drugs

a. Limiting RU-486

The RU-486 regimen poses a substantial risk to the physical and psychological health of women, including the risk of death.\textsuperscript{1259} This is particularly true for the off-label use of RU-486.\textsuperscript{1260} Therefore, this drug should only be rarely used under greater supervision than what is currently occurring.\textsuperscript{1261}

Both the FDA\textsuperscript{1262} and Danco, the drug manufacturer,\textsuperscript{1263} have acknowledged that RU-486 poses health risks for women. The Mifeprex drug label acknowledges that "[n]early all of the women who receive Mifeprex and misoprostol [the RU-486 regimen] will report adverse reactions, and many can be expected to report more than one such reaction."\textsuperscript{1264} These adverse reactions include abdominal pain, uterine cramping, nausea, vomiting, diarrhea, pelvic pain, fainting, headache, dizziness, and asthenia.\textsuperscript{1265}

The Congressional Staff Report on RU-486 cited FDA findings concerning the physical risks to women taking RU-486 regimen.\textsuperscript{1266} These

\begin{itemize}
  \item \textsuperscript{1254} SIMON, supra note 1237, at ch. 2.
  \item \textsuperscript{1255} See Stanley, 405 U.S. at 658.
  \item \textsuperscript{1256} See id.
  \item \textsuperscript{1257} See id. (stating that an unwed father is entitled to a hearing before his children are taken away because he has the same right as married parents, divorced parents, and unmarried mothers under the Equal Protection Clause).
  \item \textsuperscript{1258} See id.
  \item \textsuperscript{1260} See id. at 4.
  \item \textsuperscript{1261} See id. at 8.
  \item \textsuperscript{1262} Id. at 30 (citing FDA findings and reporting adverse reactions).
  \item \textsuperscript{1264} See id.; \textit{STAFF REPORT}, supra note 1259, at 30.
  \item \textsuperscript{1265} Mifeprex (mifepristone) Tablets \textit{Label}, supra 1263.
  \item \textsuperscript{1266} \textit{STAFF REPORT}, supra note 1259, at 30.
\end{itemize}
included: "abdominal pain; uterine cramping; nausea; headache; vomiting; diarrhea; dizziness; fatigue; back pain; uterine hemorrhage; fever; viral infections; vaginitis; rigors (chills/shaking); dyspepsia; insomnia; asthenia; leg pain; anxiety; anemia; leucorrhea; sinusitis; syncope; endometritis / salpingitis / pelvic inflammatory disease; decrease in hemoglobin greater than 2g/dL; pelvic pain; and fainting." 1267

The FDA’s Medical Officer’s review indicated that, “[m]ore than one adverse event was reported for most patients . . . [] Approximately 23% of the adverse events in each gestational age group were judged to be severe.” 1268 The Congressional Staff Report calls these “startling adverse effects,” which the FDA knew “during the RU-486 FDA review . . . process.” 1269

Also of concern was “the incredibly high failure rate of the drug.” 1270 The FDA knew the failure rate was averaging “14.6% in the U.S. trial testing the drug through 63 days gestation.” 1271 The findings were that 27% had ongoing pregnancies, 43% had incomplete abortions, 10% requested and had surgical terminations, and the remaining 20% of patients “had surgical terminations performed because of medical indications directly related to the medical procedure.” 1272

The Report stated “the ‘best’ outcome was in the patient group . . . [where the] pregnancies were less than or equal to 49 days.” 1273 In this group, the Report stated that “7.9% of patients required surgical intervention after taking RU-486.” 1274 The Report also stated that “[a]s the gestational age increases, the failure rate of RU-486 increases rapidly, to 17% in the 50-56 days gestation group, and 23% in the 57-63 days gestation group.” 1275 The Congressional Staff Report concluded: “By any objective standard, a failure rate approaching eight percent and requiring subsequent surgical intervention as the ‘best’ outcome is a dismal result.” 1276 Indeed, this is a dismal result.

1267. Id.
1269. Id
1270. Id
1271. STAFF REPORT, supra note 1259, at 30.
1272. Id at 31.
1273. Id
1274. Id
1275. Id
1276. STAFF REPORT, supra note 1259, at 31.
In 2011, the FDA issued a report on the post-marketing events of RU-486.1277 The FDA reported that there were 2,207 adverse events (complications) in the United States related to the use of RU-486, including hemorrhaging, blood loss requiring transfusions, serious infections, and death.1278 Among the 2,207 adverse events were 14 deaths, 612 hospitalizations, 339 blood transfusions, and 256 infections (including 48 "severe infections").1279

The risks of RU-486 are not only with the current pregnancy, but may also be transgenerational.1280 Dr. Bernard Nathanson, co-founder of the National Association for the Repeal of Abortion Laws (NARAL), who has presided over thousands of abortions, warned that if a woman starts taking the regimen, but then changes her mind and wants to carry the baby to term, the newborn may have serious deformities.1281 In addition, Dr. Nathanson warned there may be a possibility that disorders could be passed down to surviving offspring of women who have taken the drug.1282 "RU-486 is the drug which acts on the female reproductive system, and anything that does that we have to be keenly aware of what are called transgenerational effects."1283

The physical effects of RU-486 are serious, but the psychological trauma can be even worse.1284 In fact, there are at least five major reasons why women are at greater risk of more severe psychological trauma with the RU-486 regimen than with a surgical abortion.1285 First, the woman has a participatory role with a RU-486 medical abortion1286 unlike in a surgical abortion. Because the woman administers the drug herself, plays an active role in the abortion, and is conscious each step of the way, she is more likely to suffer psychological consequences.1287

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1278. Id.
1279. Id.
1281. Id.
1283. Id.
1285. Id.
1286. See id. at 18, 2013 WL 1450985 at *18.
1287. See What is RU-486, supra note 1282.
Second, medical abortion requires the woman to be more alert and involved during the process. Psychologically, it is impossible for her to distance herself from the abortion.

Third, there is a greater potential for the woman to see her expelled unborn child. Therefore, there is no doubt in her mind that she has taken the life of her unborn child.

Fourth, women generally say they choose medical abortions because they take place in the privacy of their homes, but that privacy can also lead to greater trauma. This is because the woman is more likely at home alone, and without emotional support at the time of the abortion.

Fifth, the woman’s home, which should be a place of refuge, actually becomes a daily trigger point for negative emotions. Being home in her bedroom and bathroom becomes associated with the graphic abortion in which she participated. Thus, she is confronted with the abortion each day and faces greater psychological trauma. There is no refuge from an RU-486 medical abortion.

For these physical and psychological reasons, the RU-486 regimen poses a substantial risk to women. Therefore, this drug should be rarely used and under greater supervision by medical personnel than is currently occurring. At a minimum, women should be given accurate and truthful information about the risks of the drug regimen when they are considering it as an abortion choice. In addition, women are entitled to be assured that RU-486 is dispensed in accordance with FDA guidelines instead of off-label use which creates greater harm.

1288. See Affidavit of Dr. Priscilla Coleman for amicus brief filed by this author on behalf of women and families hurt by RU-486, Oklahoma Coal. for Reprod. Justice, 133 S. Ct. 2887 (U.S. 2013) (No. 12-1094) at ¶ 14 [Hereinafter Coleman Affidavit].

1289. See id.

1290. See id. at ¶ 15.

1291. See id.

1292. See id.

1293. See id. at ¶ 16.

1294. See Coleman Affidavit, supra note 1291, at ¶ 17.

1295. See id.

1296. See id.

1297. See id.

1298. See supra text accompanying notes 1284-1297.

1299. See STAFF REPORT, supra note 1259, at 8.

1300. See supra text accompanying notes 1284-1297 (listing the five factors of psychological harm that women are not given an accurate and truthful warning of when considering it as an abortion choice).

1301. Some state legislatures are prohibiting off-label use of RU-486. For example, Oklahoma passed legislation, which is being litigated. See Oklahoma Coal for Reprod. Justice v. Cline, 292 P.3d 27 (Okla. 2012), cert. granted, 133 S. Ct. 2887 (2013). Texas enacted H.B. 2 during its 2013 special session and it was signed by the Governor on July 17, 2013. H.B. 2, 83rd Leg., 2d Spec. Sess. (Tex. 2013).
b. Limiting “Morning After” Drugs

Initially, the manufacturer produced Plan B as a two-dose regimen to be taken twelve hours apart.\footnote{See Medical Officer Safety Review, FDA, http://www.fda.gov/ohrms/dockets/ac/03/briefing/4015B1_12_FDA-MedicalOfficerSafetyReview.doc (last visited Dec. 17, 2013).} It was a synthetic hormone to prevent pregnancy.\footnote{See id.} Later, the manufacturer produced Plan B One-Step\textsuperscript{®} (levonorgestrel), which is a higher dose of the hormone that only requires one pill.\footnote{See Highlights of Prescribing Information, PLAN B ONE STEP (Aug. 2009), http://www.planbonestep.com/pdf/PlanBOneStepFullProductInformation.pdf.} It is not the same as RU-486, the abortion pill.\footnote{Plan B One Step, WEBMD, http://women.webmd.com/guide/plan-b (last visited Oct. 4, 2013).}

Teva, the manufacturer of Plan B One-Step, says that it “is intended to prevent pregnancy after known or suspected contraceptive failure or unprotected intercourse.”\footnote{Office of Population Research at Princeton Univ. & Ass’n of Reprod. Health Prof’ls, Plan B, EMERGENCY CONTRACEPTION WEBSITE, http://ec.princeton.edu/pills/PlanBLABELING.pdf.} Furthermore, the drug must be taken as soon as possible within seventy-two hours (three days) to be effective.\footnote{Highlights of Prescribing Information, PLAN B ONE STEP (Aug. 2009), http://www.planbonestep.com/pdf/PlanBOneStepFullProductInformation.pdf.} Under the safety information, the manufacturer warns that it should not be used if a woman is already pregnant, is ineffective as “routine contraceptive,” and does not protect against HIV and other sexually transmitted diseases (“STDs”).\footnote{Id.} The manufacturer states that side effects may include changes in your period, nausea, lower abdominal pain, fatigue, headache, dizziness, and if you have severe abdominal pain, you may have an ectopic pregnancy, and should get immediate medical help.\footnote{Id.}

Prior to 1999, Plan B was only available by prescription.\footnote{See Erin Brodwin, White House Limits on Plan B Put Science in Backseat, SCI. AM. (May 13, 2013), http://www.scientificamerican.com/article.cfm?id=white-house-limits-plan-b-put-science-backseat.} In 2006, the Food and Drug Administration (FDA) lifted the prescription requirement, but still maintained the age limitation of eighteen years of age or over.\footnote{See id.} In 2009, the FDA reduced the age limit from eighteen to seventeen years of age.\footnote{See id.} On April 30, 2013, the FDA ruled that Plan B One-Step should be available to children fifteen years of age without a
prescription. In addition, pharmacies can display the pill on pharmacy shelves instead of behind the counter.

On April 5, 2013, United States District Judge Edward Korman ruled that all age restrictions should be stricken on the pill. This could make the pill available in pharmacies, as well as college campuses. The FDA appealed the ruling to the Court of Appeals for the Second Circuit.

A study was conducted and found that girls from the ages of eleven to nineteen had taken Plan B. Young children having access to Plan B or Plan B One-Step is a serious problem. First, it is an avenue to cover-up statutory rape. As discussed above, the law must protect children against statutory rape. Such abusive and unlawful conduct must not be made easier by covering up the conduct.

Second, it infringes on parental rights. The United States Supreme Court has recognized for almost a century the right of parents to direct the upbringing and education of their children as a fundamental right. Protecting the health and safety of their children is most basic to this right, and parents should know about and have input on whether their children take this drug. To do otherwise is a violation of parental rights. In addition, school nurses' offices and independent clinics operating in schools should not dispense Plan B One-Step or emergency contraceptives without parental notification and confirmed consent. Opt-out forms are not


1314. See id.


1316. Id.


1318. See Brodwin, supra note 1310.

1319. See id.


1321. See supra text accompanying notes 1078-1089.


1323. See Hellmich & Healy, supra note 1320.

1324. Troxell, 530 U.S. at 65; Pierce, 268 U.S. at 534-35; Meyer, 262 U.S. at 400.

1325. See Troxell, 530 U.S. at 65.

1326. See Troxell, 530 U.S. at 65.

1327. For example, New York schools are dispensing emergency contraceptives upon request of students in over fifty high schools with about 5,500 girls receiving them at least once in academic year 2011-12. Anemona Hartocollis & Michelle Bond, Ready Access to Plan B Pills in City Schools,
sufficient and can be overlooked by parents. A child’s sexual activity and health is an important issue, and parents should be notified and give their consent.

Third, there are serious physical problems that can occur with Plan B. The American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG") is a special interest group of the American College of Obstetricians and Gynecologists ("ACOG"). AAPLOG stated that studies have shown that the drug has not fulfilled its purposes of reducing either the abortion rate or the unintended pregnancy rate.

Based on the scientific literature, AAPLOG has warned of potential problems with Plan B if it is made an over-the-counter drug. The studies demonstrate that twenty percent of Plan B individuals “did not understand the . . . seriousness of severe abdominal pain that may occur after using Plan B,” which is a symptom of ectopic pregnancy. The rate of ectopic pregnancies after taking Plan B can be as high as six percent, which is three times the normal rate in the United States and the United Kingdom. Ectopic pregnancy can be a life-threatening medical condition; therefore, proper warnings are required so that minors and women can understand the risks of taking Plan B. Furthermore, the manufacturer should warn “women who have had a previous ectopic pregnancy, Fallopian tube surgery, [or] pelvic inflammatory disease” of the dangers, and advise them to only take the drug under a physician’s careful monitoring.

Fourth, safety data on the morning after pill concerning young teenage girls is scarce. Before the Plan B or Plan B One-Step is available to minors, there need to be more studies on how the drug affects children. The FDA should not put children at risk without adequate scientific evidence that the drug is safe for their use.

In summary, the Supreme Court’s decisions in Casey and Gonzales provide that the safety of drugs and medical procedures are within the
legitimate function of the State. Therefore, the use of these abortion and "morning after" drugs should be limited and under strict supervision. A woman should not be alone at home to deal with the severe physical and psychological devastation of these drugs. Minors should not have access to the "morning after" drug as an over-the-counter means of preventing a pregnancy.

10. Mandatory Minimum Requirements as for Ambulatory Surgical Centers

Ambulatory care facilities are commonly called "day surgery centers" because they provide surgical services on an out-patient basis. The State establishes the minimum standards for ambulatory centers including licensing procedures, operation requirements, and requirements for the design, construction, and safety of the facility. Women considering an abortion should be entitled to the same protections as any other person having an out-patient surgical procedure.

The following is a sample of the five major areas where minimum standards for ambulatory surgical centers are necessary to protect women:

- There should be appropriate standards for the "construction and design [of the facilities,] including plumbing, heating, lighting, ventilation, and other design standards . . . " These are necessary to ensure the health and safety of surgical patients.

- "[T]he qualifications of the professional staff and other personnel" should be appropriate for the surgical procedure. Women are entitled to competent medical care for all surgical procedures.

- The facility should have and maintain the necessary "equipment [that is] essential to the health and welfare of patients." This should include the emergency equipment that is necessary if there are problems and complications with the abortion.

1338. Each state can regulate these centers. See, e.g., Ambulatory Surgical Centers, TEX DEPT OF STATE HEALTH SERVS, http://www.dshs.state.tx.us/hfp/asc.shtm (last updated May 9, 2013). In 1985, the Texas Ambulatory Surgical Center Licensing Act was first enacted. Id.

1339. See id.

1340. See TEX HEALTH & SAFETY CODE ANN. § 243.010(a)(1).

1341. See id.

1342. See id.

1343. See id.
• "[T]he sanitary and hygienic conditions [of] the center and its surroundings" should meet the minimum requirements of other ambulatory surgical centers. Women are entitled to clean facilities and instruments to prevent infection, which may lead to illness or death.

• There must be "a quality assurance program for patient care." There should also be a complaint procedure whereby women can complain if the ambulatory center standards are not met. A notice should be posted in a prominent place in the facility, and information should also be provided in any written material advising women where she may file a complaint. Complaints should be investigated with an on-site inspection, appropriate action taken, and a response given to the woman with the findings and action taken including what follow-up measures will be taken.

Although any other surgical patients have the protection of state regulations concerning these five areas of health care standards, women typically are not protected because most abortion facilities do not meet these standards. Women deserve better health care. States should require all abortion facilities to meet the same standards as any other ambulatory surgical center.

VI. CONCLUSION

Roe v. Wade is one of the most controversial decisions in the history of the United States Supreme Court. Since 1973, it has been a lightning rod of controversy and divisiveness in America. It was not based on the express language of the Constitution, but rather on assumptions by the Court that have now been proven false. Equally disturbing, the case was not based on facts, but instead was based on lies and deception.

1344. See id.
1345. See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 243.010(a)(5).
1346. See id.
1348. See supra notes 2-9 and accompanying text.
1349. See supra notes 2-9 and accompanying text.
1350. See supra Part III.F.
1351. See supra Part III.A.
Historically, states have been able to decide medical and scientific issues. The United States Supreme Court, however, constitutionalized the issue so that only it can examine changes in scientific and medical evidence or correct a misinterpretation or misapplication of Roe. This has led to a "perverse result." Since Roe, state legislatures have attempted to protect women and minors within the constitutional boundaries established by the Supreme Court. But all states need to provide better protections and ten recommendations are suggested for improvement. Ultimately, Roe v. Wade and its companion case of Doe v. Bolton need to be overturned and the issue needs to be returned to the states where the law can keep pace with medical and scientific evidence.

Abortion has serious consequences for all concerned. Babies die—sometimes in a brutal and painful way. Women risk serious physical and psychological harm. Men are hurt psychologically, and are denied their inherent rights as fathers. Society as a whole is harmed when activist judges find fundamental rights that are not in the Constitution, which hurt the integrity and fabric of the family. America deserves better.

1352. See supra note 146 and accompanying text.
1353. See supra notes 163-164 and accompanying text.
1354. See supra notes 163-164 and accompanying text.
1355. See supra notes 320-321 and accompanying text.
1356. See supra Part V.A.1-10.
1357. See supra notes 1154-1157 and accompanying text.
1358. See supra Part III.F.1.(a)-(b)
1359. See supra Part V.A.8.
1360. See supra notes 21-30 and accompanying text.