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## Bad Medicine: Abortion and the Battle Over Who Speaks for Women's Health

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# BAD MEDICINE: ABORTION AND THE BATTLE OVER WHO SPEAKS FOR WOMEN'S HEALTH

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## INTRODUCTION

Reproductive health and rights are under threat from political ideologues attempting to redefine women's health in ways that are

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anti-scientific and rejected by the medical establishment.<sup>1</sup> In recent years, the question of who speaks for women's health has become a central issue in the abortion debate.<sup>2</sup> While the use of women's health as an argument to restrict access to abortion is not new, it has taken on a fresh sense of urgency.<sup>3</sup> The Supreme Court's jurisprudence since *Roe* has allowed lower courts to effectively delegate to the political branch the definition of what is good for women's health while reducing the level of scrutiny given to laws restricting abortion.<sup>4</sup> Opponents of abortion have found significant success in passing restrictions on abortion, such as biased counseling, mandatory ultrasounds, and targeted regulations of abortion providers, all based on the premise that they are protecting women's physical and mental health.<sup>5</sup> The real effect these laws have had is to create significant barriers for women seeking an abortion.<sup>6</sup>

The convergence of legal and political calculations led those who oppose abortion rights to appropriate the language of protecting women's health, both physical and mental, to promote legislation with the purpose of making abortion less accessible.<sup>7</sup> They have pushed through medically unnecessary clinic regulations under the guise of protecting women's safety that have made it impossible for many abortion providers to operate by making conditions too expensive to renovate or stay open.<sup>8</sup> They have used protecting women's mental health as an argument to push through laws that put up significant logistical barriers.<sup>9</sup> While it is clear that this argument was revealed as a façade for criminalization of abortion, the courts often do not care.

Some of the strongest evidence that these laws are not in the interest of women's health is the growing outcry from the medical community. Numerous major medical organizations have issued statements or passed resolutions, including the American Medical Association, the American College of Physicians, the American Congress of Obstetricians and Gynecologists, the American Osteopathic

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1. See B. Jessie Hill, *Reproductive Rights as Health Care Rights*, 18 COLUM. J. GENDER & L. 501, 511 (2009).

2. See Sarah Kliff, *In 2012 Campaign, Women's Health Plays a Role Like Never Before*, WASH. POST (Sept. 5, 2012, 9:21 AM), <http://www.washingtonpost.com/blogs/wonk-blog/wp/2012/09/05/in-2012-campaign-womens-health-plays-a-role-like-never-before/>.

3. See Hill, *supra* note 1, at 502, 549.

4. See *infra* Part I.B–C.

5. See *infra* Part II.A.

6. See, e.g., Tom Jackman, *Fairfax City Abortion Clinic, Busiest in Virginia, Closes*, WASH. POST (July 14, 2013), available at [http://articles.washingtonpost.com/2013-07-14/local/40575401\\_1\\_troy-newman-abortion-debate-abortion-providers](http://articles.washingtonpost.com/2013-07-14/local/40575401_1_troy-newman-abortion-debate-abortion-providers).

7. See *infra* Part II.

8. See Jackman, *supra* note 6.

9. See *id.*

Association, and many more.<sup>10</sup> Five major medical groups published a piece in the 2012 *New England Journal of Medicine*: the American Academy of Family Physicians, the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, the American College of Physicians, and the American College of Surgeons. This piece states:

Increasingly in recent years, legislators in the United States have been overstepping the proper limits of their role in the health care of Americans to dictate the nature and content of patients' interactions with their physicians. Some recent laws and proposed legislation inappropriately infringe on clinical practice and patient-physician relationships, crossing traditional boundaries and intruding into the realm of medical professionalism.

....

Examples of inappropriate legislative interference with this relationship are proliferating, as lawmakers increasingly intrude into the realm of medical practice, often to satisfy political agendas without regard to established, evidence-based guidelines for care.<sup>11</sup>

The pro-choice movement has been challenged on its own turf by a counter movement that is fearless, creative, and dangerous to women's health. Yet in 2012, the women's health frame also provided a powerful political response to these restrictions. Women's health advocates successfully accused the Republican party of waging a "war on women" and women's health took center stage in the Presidential election between Barack Obama and Mitt Romney.<sup>12</sup> President Obama strongly defended Planned Parenthood and women's right to determine their own health care.<sup>13</sup> Comments by candidates and politicians about rape and attacks on Planned Parenthood provided political fuel to those supporting abortion rights, who in turn have been successful in framing the anti-choice politicians and leadership as anti-women's health.<sup>14</sup>

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10. See, e.g., AM. CONGR. OF OBSTETRICIANS AND GYNECOLOGISTS, *Ob-Gyns Denounce Texas Abortion Legislation* (July 2, 2013), [http://www.acog.org/About\\_ACOG/News\\_Room/News\\_Releases/2013/Ob-Gyns\\_Denounce\\_Texas\\_Abortion\\_Legislation](http://www.acog.org/About_ACOG/News_Room/News_Releases/2013/Ob-Gyns_Denounce_Texas_Abortion_Legislation); AM. MED. ASS'N, HEALTH AND ETHICS POLICIES OF THE AMA HOUSE OF DELEGATES 1–2, available at <http://www.ama-assn.org/ad-com/polfind/Hlth-Ethics.pdf>; AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION (2009), available at <http://www.apa.org/pi/women/programs/abortion/index.aspx>.

11. Steven E. Weinberger et al., *Legislative Interference with the Patient-Physician Relationship*, 367 N. ENGL. J. MED. 1557, 1557 (2012).

12. See Kliff, *supra* note 2 (describing the central role women's health issues have taken in the 2012 presidential campaign).

13. See *id.*

14. See *id.*

In this lecture, I will demonstrate first how the Supreme Court's jurisprudence since *Roe v. Wade* has paved the way for abuse of the argument that the law is protecting women's health as a pretense to limit access to abortion. In Part II, I will discuss the convergence of the political and legal strategies that motivated the co-option of the women's health frame. In Part III, I will look at three specific types of laws that are putting medically unnecessary restrictions on women's health in order to restrict access to abortion. And in Part IV, I will talk about how women's health advocates have begun to gain ground as the extreme nature of the restrictions became clear and the reality of the war on women's health became popularly understood.

### I. THE SUPREME COURT SETS THE STAGE FOR THE ABUSE OF THE STATE'S INTEREST IN PROTECTING WOMEN'S HEALTH

The Supreme Court paved the way for women's health to be used as an excuse to restrict access to abortion. Through a series of cases, the Court established that the state had an interest in protecting women's health (*Roe*), lowered the standard of review for restrictions on abortion (*Casey*), and then determined that legislatures were best positioned to determine what was best for women's health (*Gonzales*).<sup>15</sup>

#### A. *Roe Safeguards Abortion as a Fundamental Right*

Prior to *Roe v. Wade*, protecting women's health was a catalyst for liberalization of abortion laws. Doctors saw women dying or permanently injured from unsafe back-alley abortions and were a catalyst for change.<sup>16</sup> In *Roe*, the Supreme Court took women's health into account in multiple aspects of the decision. This included the interests of the woman and her doctor in controlling her own health care, as well as the state's interest in regulating health care and protecting health.<sup>17</sup> While finding that "the right of personal privacy includes the abortion decision" the Court also makes it clear that "this right is not

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15. See *Gonzales v. Carhart*, 550 U.S. 124, 130 (2007); *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992); *Roe v. Wade*, 410 U.S. 113, 154 (1973).

16. See LINDA GREENHOUSE & REVA SIEGEL, *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING* 281 (2d. ed. 2012) (stating that regarding public health and abortion, "[a]rguments for abortion reform on the public health model struck a responsive chord with Americans in diverse regions of the country. By 1967, states were beginning to enact abortion reform laws on the medical or 'therapeutic' model recommended by the [American Law Institute], authorizing medical committees to review women's petitions for abortion and allow the procedure if needed for reasons of health, sexual assault, or concern about birth defects.").

17. See *Roe*, 410 U.S. at 154.

unqualified and must be considered against important state interests in regulation.”<sup>18</sup> The Court asserts the state’s interest “in safeguarding health, in maintaining medical standards, and in protecting potential life.”<sup>19</sup>

In balancing these interests, the Court explains that the state’s interest increases throughout the trimesters. During the first trimester, the Court defers to the doctor’s medical judgment.<sup>20</sup> The state’s ability to regulate it is very limited, if at all.<sup>21</sup> As of the second trimester, however, the state’s interest in regulation kicks in “to the extent that the regulation reasonably relates to the preservation and protection of maternal health.”<sup>22</sup> This includes

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.<sup>23</sup>

In the third trimester, once the fetus is viable, the state’s interest in potential life eclipses the pregnant woman’s rights and states can proscribe abortion completely; however, there must always be an exception for women’s health.<sup>24</sup>

Critically in *Roe*, although it is clear that the state can regulate abortion, strict scrutiny applies because the abortion decision is found to be a fundamental right.<sup>25</sup> This standard of review limits what the states can do and protects access to abortion.<sup>26</sup> And it seems unlikely that the Court, when deciding *Roe*, imagined that something as seemingly apolitical as the licensing of a facility would become a political tool to shut down abortion clinics.

### *B. Casey Opens the Door to Restrictions*

These protections changed significantly when the Court decided *Planned Parenthood v. Casey*. The Court elevates the state’s “important and legitimate interest in potential life,” thus necessarily reducing

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18. *Id.*

19. *Id.*

20. *Id.* at 164.

21. *Id.*

22. *Id.* at 163.

23. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

24. *Id.* at 164–65.

25. *Id.* at 153.

26. *Id.* at 155–56.

the expanse of the woman's right to abortion.<sup>27</sup> Under this expanded understanding of the state's interest, the Court rejects the trimester framework and lowers the level of scrutiny from the strict scrutiny usually applied to fundamental rights to a new, ambiguous standard of "undue burden."<sup>28</sup> An undue burden is described as a regulation that has the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."<sup>29</sup>

In the analysis of the specific laws in question in *Casey*—laws requiring informed consent, parental consent and spousal consent, the Court gives little actual guidance as to how this standard was to be applied.<sup>30</sup> This ambiguity of the standard became even clearer as lower courts attempted to put it into effect. The plurality of the Court in *Casey* found that the provision of "truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth" was consistent with "*Roe*'s acknowledgment of an important interest in potential life . . . ."<sup>31</sup>

As noted above, under the strict scrutiny applied to laws restricting access to fundamental rights, including the right to abortion, the state's ability to exercise this interest in protecting women's health was in check.<sup>32</sup> Undue burden in *Casey* was an invitation to states that were hostile to abortion rights to implement restrictions.<sup>33</sup> These restrictions were not limited to the second trimester.<sup>34</sup>

The movement to criminalize abortion accepted this invitation with increasing boldness and creativity. Through model legislation and advocacy, Americans United for Life (AUL)<sup>35</sup> has been the author and promoter of many laws restricting access to abortion being enacted around the country.<sup>36</sup> While disappointed that the Court upheld *Roe*, AUL recognized the opportunity *Casey* presented. From their website:

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27. *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992) (citing *Roe*, 410 U.S. at 163).

28. *See id.* at 876–77.

29. *Id.* at 877.

30. *See id.* at 877–78.

31. *Id.* at 882 (emphasis added).

32. *See Roe v. Wade*, 410 U.S. 113, 155–56 (1973).

33. *See Planned Parenthood v. Casey*, 505 U.S. 833, 872–73 (1992).

34. *See id.*

35. *See* AMS. UNITED FOR LIFE, *About*, <http://www.aul.org/about-aul> (last visited Nov. 3, 2013) ("[T]he nation's premier pro-life legal team, works through the law and legislative process to one end: Achieving comprehensive legal protection for human life from conception to natural death. The nonprofit, public-interest law and policy organization holds the unique distinction of being the first national pro-life organization in America—incorporated in 1971, before the infamous *Roe v. Wade* decision.").

36. *See* Julie Hirschfeld Davis, *Abortion Foes Guide States in Pushing New Restrictions*, BLOOMBERG BUSINESSWEEK (July 9, 2013, 10:50 AM), <http://www.businessweek.com/news/2013-07-09/abortion-foes-guide-states-in-pushing-new-restrictions.html>.

In 1992 the Supreme Court clearly opened the door for states to put legal limits on abortion in the decision *Planned Parenthood v. Casey*. Since that time, AUL has focused on helping state legislators to pass the best pro-life laws they can . . . We are continually working to help legislators enact new pro-life laws that will go into effect and not be unnecessarily tied up in court so they can save lives today while continuing to roll back *Roe v. Wade* in the courts.<sup>37</sup>

AUL leader Charmaine Yoest says it best, “I don’t need a constitutional amendment to overturn *Roe* . . . Clinic regulations do actually challenge *Roe*.”<sup>38</sup>

*C. Gonzales Gives the Green Light on Using Women’s Health as an Excuse to Restrict Access to Abortion*

The strategy discussed by AUL that began after *Casey* was given a green light by the Court in *Gonzales*, which upheld a national ban on a second trimester abortion procedure without a health exception and gave the states’ even more power in deciding what was good for women’s health.<sup>39</sup>

Unlike *Roe*, where the court attempted to base the decision on medically accurate and accepted science, the Court in *Gonzales* takes the “truthful and nonmisleading” requirement in *Casey* and opens it up to abuse and misuse. The Court determines that there was “documented medical disagreement whether the Act’s prohibition would ever impose significant health risks on women.”<sup>40</sup> Instead of erring on the side of women’s safety and deferring to doctors, it errs on the side of the states’ interest and gives deference to the legislature.<sup>41</sup> After *Gonzales*, a couple of pseudo-scientific studies, whether they are credible or not, may be all a court needs to be able to find uncertainty and defer to the legislature.<sup>42</sup> The Supreme Court in *Gonzales* calls into question who are the arbiters of what is best for women’s health.<sup>43</sup> The Court appears to preference not science, not doctors, and certainly not women themselves, but politicians.<sup>44</sup> This shift combined with the

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37. See AMS, UNITED FOR LIFE, *Legislation*, <http://www.aul.org/legislative-resources/> (last visited Nov. 3, 2013).

38. Louise Radnofsky & Ashby Jones, *Support Grows for Roe v. Wade*, WALL ST. J. (Jan. 22, 2013, 9:35 AM), <http://online.wsj.com/article/SB10001424127887323301104578255831504582200.html>.

39. See *Gonzales v. Carhart*, 550 U.S. 124, 166–67 (2007).

40. *Id.* at 162.

41. See *id.* at 164.

42. See *id.*

43. See *id.*

44. See *id.* at 191 (Ginsburg, J. dissenting) (“Although Congress’ findings could not withstand the crucible of trial, the Court defers to the legislative override of our Constitution-based rulings.”).

loss of strict scrutiny review and the heightened deference to the state's interests leads us toward states having the ability to nullify in practice access to a fundamental right.

## II. APPROPRIATION OF WOMEN'S HEALTH: THE CONVERGENCE OF THE LEGAL AND POLITICAL STRATEGIES TO LIMIT ACCESS TO ABORTION

The recent ramping up of women's health as a rationale to pass legislation that limits access to abortion marks a convergence of a legal and political strategy. After the Court declined to overturn *Roe* in *Casey*, opponents of legal abortion needed a long-term legal strategy.<sup>45</sup> The legal strategy based on *Casey* and *Gonzales* converged with a communications and political strategy as anti-choice leaders saw that voters and the general public were concerned not only with the fetus, but harm to women as well.<sup>46</sup>

Reva Siegel talks about this shift through the lens of "woman-protective laws" and notes that "[w]ith the abortion debate in a stalemate over the last several decades, a growing contingent of antiabortion activists have been working to revise their movement's message so that it would appeal to voters concerned about protecting women as well as the unborn."<sup>47</sup>

And in her piece *Protecting Them from Themselves*, Jill Hasday describes this as a "mutual benefits" argument:

[T]he antiabortion movement has recognized in increasingly explicit terms that many Americans are unwilling to criminalize abortion if doing so will harm women. The movement and its government allies have turned more and more to the language of aligned interests rather than competing rights, insisting that both women seeking abortions and people opposed to abortion are better off if the law restricts or prohibits abortion.<sup>48</sup>

The evidence of this political strategy is manifold and at every level. For example, the Republican platform has included opposition

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45. See Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 3 U. ILL. L. REV. 991, 992–93 (2007) [hereinafter *New Politics*].

46. See *id.* at 1023.

47. *Id.* at 992; see also Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1649 (2008) [hereinafter *Right's Reasons*] (describing the rise and spread of woman-protective abortion arguments or WPAA).

48. Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 N.Y.U. L. REV. 1464, 1466 (2009).

to abortion during numerous election cycles.<sup>49</sup> In 2012, however, the Republican Platform included new language:

We, however, affirm the dignity of women by protecting the sanctity of human life. Numerous studies have shown that abortion endangers the health and well-being of women, and we stand firmly against it.<sup>50</sup>

AUL's Yoest said, in reference to the new language in the Republican Platform:

[w]hen you think about the political context of the discussion of women's health that we're engaged in . . . it's very important to establish, for the Republican party, this foundational argument that there really are harms for women . . . . It rounds out the pro-life position by putting a marker down to say, here's why being pro-life is a pro-woman position.<sup>51</sup>

Yet AUL goes to great lengths to promote laws based on inaccurate information and requiring medically unnecessary procedures. In the Legislative Victories section, AUL highlights "[i]nformed consent enhancements enacted in North Dakota including an ultrasound requirement, counseling on fetal pain, and a requirement that abortion providers inform women that abortion ends the life of a 'whole, separate human being.'"<sup>52</sup> They are celebrating requiring women to undergo a potentially unnecessary medical procedure and learn inaccurate medical information, while arguing they are protecting women's health.

A July 2013 fight over last minute abortion regulations passed by the North Carolina legislature typifies the back and forth over women's health. The measure passed by the North Carolina legislature would allow the state's Department of Health and Human Services to "apply any requirement" that applies to ambulatory surgical centers to abortion clinics, require a physician to be present while

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49. See, e.g., REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 2008, available at <http://www.presidency.ucsb.edu/ws/?pid=78545>; REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 2004, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25850>.

50. REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 2012, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=101961>.

51. Sarah Kliff, *GOP Platform: Abortion is Bad for Women's 'Health and Well-Being,'* WASH. POST (Aug. 23, 2013, 2:50 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/08/23/gop-platform-abortion-is-bad-for-womens-health-and-well-being/>.

52. AMS. UNITED FOR LIFE, *Legislative Victories*, <http://www.aul.org/issue/abortion/> (last visited Nov. 3, 2013).

the first drug used in a medication abortion is administered as well as impose restrictions on insurance coverage of abortion.<sup>53</sup> In the debate leading up to the consideration of the bill, supporters and opponents argued over who was protecting women's health. State Rep. Ruth Samuelson (R), the bill's sponsor, said the legislation, "is really all about protecting the health and safety of women."<sup>54</sup> State Rep. Rick Glazier (D) said, "[t]o an extreme legislative majority bent on eliminating the right to choice, everything looks like a health regulation, ready to be used and abused to dismantle access to that choice."<sup>55</sup>

#### *A. Protecting Women from Themselves: Mental Health*

Despite claims by anti-abortion activists, according to the leaders in the medical field there is no such thing as post-abortion syndrome.<sup>56</sup> In 1989, the American Psychological Association convened a panel of psychologists who reviewed the top studies on the subject and found no evidence of "post-abortion syndrome."<sup>57</sup> The "syndrome" is not scientifically or medically recognized.<sup>58</sup> Yet by arguing that abortion is harmful to women's mental health, anti-choice advocates have found a legally and politically potent argument.<sup>59</sup> Focusing on abortion and women's mental health and the "inevitable" regret a woman will feel after having an abortion has been a successful strategy for winning over legislators, judges, and the public.<sup>60</sup>

The majority in *Casey* bought into the idea that abortion necessarily posed a risk to the woman's mental health and thus the state had a legitimate interest in protecting women from that harm (as Siegel and others note, protecting women from their own bad decision making).<sup>61</sup> The Court in *Casey* asserts that it cannot be doubted that

most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers a legitimate purpose of reducing the risk

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53. See Alan Blinder, *North Carolina House Passes New Restrictions on Abortion*, N.Y. TIMES (July 11, 2013), available at <http://www.nytimes.com/2013/07/12/us/north-carolina-house-passes-new-restrictions-on-abortion.html>.

54. *Id.*

55. *Id.*

56. See NAT'L ABORTION FED'N, *Abortion Myths: Post-Abortion Syndrome*, [http://www.prochoice.org/about\\_abortion/myths/post\\_abortion\\_syndrome.html](http://www.prochoice.org/about_abortion/myths/post_abortion_syndrome.html) (last visited Nov. 3, 2013).

57. *See id.*

58. *See id.*

59. *See New Politics*, *supra* note 45, at 991.

60. *See id.* at 1023–29.

61. *See id.* at 1030.

that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.<sup>62</sup>

The Court in *Gonzales* goes even further, finding that some women will necessarily regret their choice without any data on the issue. “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”<sup>63</sup> Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, calls this out in the dissent and note the connection to the anti-choice strategy. “[T]he Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from ‘[s]evere depression and loss of esteem.’”<sup>64</sup>

#### *B. Providing Validity to Discredited Science: The South Dakota Task Force on Abortion*

The Task Force on Abortion in South Dakota provides an example of how legislatures aiming to discourage abortion can “create” the scientific backing they need and perpetuate discredited science. In 2005, South Dakota passed H.B. 1166—companion bill is H.B. 1233—requiring that doctors specifically advise patients seeking an abortion that there is a causal link between abortion and suicide, despite a lack of evidence to that effect.<sup>65</sup> The legislation also created a task force to study abortion, which would subsequently issue a report summarizing its findings and recommending that the abortion be banned.<sup>66</sup>

The task force held four days of public hearings and received testimony from almost 2,000 women who had an abortion.<sup>67</sup> This testimony, however, was organized by Operation Outcry, an anti-abortion, religious organization “that seeks to end the pain of abortion in America and around the world by mobilizing women and men hurt by abortion who share their true stories of the devastating effects of

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62. See *Planned Parenthood v. Casey*, 505 U.S. 833, 882 (1992).

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

64. *Id.* at 183 (Ginsburg, J., dissenting) (quoting majority opinion at 159).

65. See H.B. 1166, 2005 Leg., 80th Sess. (S.D. 2005); GUTTMACHER INST., *Spurious Science Trumps as U.S. Court Upholds South Dakota “Suicide Advisory” Law* (July 27, 2012), <http://www.guttmacher.org/media/inthenews/2012/07/27/index.html>.

66. See H.B. 1233, 2005 Leg., 80th Sess. (S.D. 2005).

67. See S.D. TASK FORCE TO STUDY ABORTION, REPORT OF THE S.D. TASK FORCE TO STUDY ABORTION 6–7 (2005), available at <http://www.dakotavoices.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf>.

abortion.”<sup>68</sup> (Operation Outcry also filed the amicus brief that influenced the Supreme Court in *Gonzales*.)<sup>69</sup> The Report notes that the decision in *Roe*, among other things, fails to take into account “the devastating loss and distress incurred by the mother who loses her child to abortion.”<sup>70</sup> The Report focuses on building up bad science and testimony as valid, believable, and important evidence on the record, while discrediting opinions, consensus, and testimony on behalf of entire communities of scientists and medical doctors. Despite a lack of scientific evidence to the point, the report tries to bolster the link between the “lack of informed consent” and the possible negative emotional side effects, blaming the lack of a proper warning for causing women to experience mental health problems and a reduced “quality of life” for years to come.<sup>71</sup>

The task force also reviewed testimony from researchers and doctors, many of whose work has been strongly criticized and is not accepted by the majority of the medical community. The Report devotes a substantial section to affirming the psychological harm research of Priscilla Coleman, who has been repeatedly criticized for exaggerating her research’s findings, flawed methodologies, and self-referencing her own disputed work.<sup>72</sup> Coleman’s 2009 article on mental health impacts of abortion, published in the *Journal of Psychiatric Research*, was later refuted by the journal’s editors.<sup>73</sup> They acknowledged that her research was “flawed” and that her analysis does not support her conclusions.<sup>74</sup> Coleman testified that studies show many young women have difficulty making a reasoned decision when facing an unplanned pregnancy, and are therefore influenced by outside forces.<sup>75</sup> Later this

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68. OPERATION OUTCRY, *Who We Are*, <http://www.operationoutcristories.org/about/who-we-are/> (last visited Nov. 3, 2013).

69. For an in-depth discussion of Operation Outcry and the impact on the courts, see *Right’s Reasons*, *supra* note 47, at 1641.

70. S.D. TASK FORCE TO STUDY ABORTION, *supra* note 67, at 9.

71. *Id.* at 47.

72. See Julia R. Steinberg & Lawrence B. Finer, *Coleman, Coyle, Shuping, and Rue Make False Statements and Draw Erroneous Conclusions in Analyses of Abortion and Mental Health Using the National Comorbidity Survey*, 46 J. OF PSYCHIATRIC RES. 407 (2012), available at <http://www.guttmacher.org/pubs/journals/jjpsychires.2012.01.019.pdf>; see also Rob Stein, *Study Disputes Link Between Abortion and Mental Health Problems*, WASH. POST (Dec. 13, 2010, 10:05 AM), [http://voices.washingtonpost.com/checkup/2010/12/study\\_disputes\\_abortion\\_mental.html](http://voices.washingtonpost.com/checkup/2010/12/study_disputes_abortion_mental.html); ROYAL COLL. OF OBSTETRICIANS AND GYNAECOLOGISTS, *RCOG Statement on BJPsych Paper on Mental Health Risks and Abortion* (Jan. 9, 2011), <http://www.rcog.org.uk/what-we-do/campaigning-and-opinions/statement/rcog-statement-bjpsych-paper-mental-health-risks-and-a>.

73. GUTTMACHER INST., *Study Purporting to Show Link Between Abortion and Mental Health Outcomes Decisively Debunked* (Mar. 5, 2012), <http://www.guttmacher.org/media/nr/2012/03/05/>.

74. See *id.*

75. See S.D. TASK FORCE TO STUDY ABORTION, *supra* note 67, at 41.

theory is used to argue that the state/legislature needs to help women make the right decision, thus influencing them in the “moral” direction.<sup>76</sup> The Report lists the extensive harms to women’s health that Coleman and Reardon have studied, including PTSD, relationship problems, suicidal ideations, and many others.<sup>77</sup>

The Report authors reveal their underlying bias when they dismiss the possibility of any neutral or positive post-abortion feelings, relying on the same conclusion as the Supreme Court in *Gonzales*—that a woman will necessarily regret having an abortion because it is against her nature.<sup>78</sup>

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.<sup>79</sup>

The Task Force’s seventy-page report on abortion was replete with invalidated claims and anti-choice rhetoric. For example, the task force explicitly rejects the conclusion by both the American Congress of Obstetricians and Gynecologists and the Centers for Disease Control that abortion is significantly safer than childbirth.<sup>80</sup> Some of this determination is not clearly explained and some of it is credited in part to the failure of the Centers for Disease Control to take into account deaths from suicide and cancer caused by abortion.<sup>81</sup> This is despite the medical evidence that abortion does not cause suicidal tendencies nor cancer.<sup>82</sup> Through its conclusions the Report provides support, scientifically inaccurate as it may be, for many of the arguments on the harms of abortion that are the basis for these laws.

### *C. Politicization of Boards of Health*

Regulating abortion clinics out of existence by passing requirements that have no medical necessity depends on legislatures willing to pass the laws—and governors to sign them, courts willing to accept

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76. *See id.* at 34.

77. *See id.* at 43–46.

78. *See id.* at 41–42.

79. *See id.* at 47–48.

80. *See id.* at 48–51.

81. *See S.D. TASK FORCE TO STUDY ABORTION, supra* note 67, at 48–49.

82. *See NAT’L CANCER INST., Abortion, Miscarriage and Breast Cancer Risk* (Jan. 12, 2010), <http://www.cancer.gov/cancertopics/factsheet/Risk/abortion-miscarriage>.

these regulations, and no other independent checks. The politicizing of boards of health and other somewhat independent bodies has been part of this effort.

In Virginia, when the legislature passed a law regulating abortion clinics, called Targeted Restrictions of Abortion Providers (TRAP), that threatened to shut down the majority of abortion clinics in the state by requiring them to meet the same standards as hospitals, the Board of Health determined that, according to the law the existing clinics were grandfathered into the preexisting regulations.<sup>83</sup> Attorney General Ken Cuccinelli threatened the Board of Health members that they could be denied state legal counsel and have to pay for their own defense if they did not follow his interpretation of the law and apply it to existing clinics.<sup>84</sup> The regulations were brought back to the Board, which voted to allow them to move forward. Dr. Karen Remley, the state health commissioner, resigned in response.<sup>85</sup> She opposed Cuccinelli's interpretation of the law, which she thought was incorrect in saying that standards should be set for designing and constructing *new* facilities somehow enables the Board to regulate *existing* facilities.<sup>86</sup>

### III. THE STRATEGY AT WORK IN THE STATES: STATE LAWS AND THEIR STATUS IN THE COURTS

Over the last three years there has been a proliferation of laws regulating and reducing access to abortion. According to the Guttmacher Institute, in 2011 a record-breaking ninety-two abortion restrictions were enacted.<sup>87</sup> In 2012, states enacted forty-three provisions that sought to restrict access to abortion services and in the first half of 2013 states had already matched the previous year, with

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83. See Laura Vozzella & Anita Kumar, *Va. Board of Health Pushes to Give Abortion Clinics Surprise Reprieve*, WASH. POST (June 15, 2012), available at [http://articles.washingtonpost.com/2012-06-15/local/35462408\\_1\\_abortion-clinic-hallways-and-doorways-first-trimester-abortions](http://articles.washingtonpost.com/2012-06-15/local/35462408_1_abortion-clinic-hallways-and-doorways-first-trimester-abortions).

84. See Julian Walker, *Cuccinelli Issues Warning over Abortion Rules*, VIRGINIAN-PILOT (Sept. 13, 2012), available at <http://hamptonroads.com/2012/09/cuccinelli-issues-warning-over-abortion-rules>.

85. Olympia Meola, *Va. Health Commissioner Resigns, Citing Abortion Clinic Rules*, RICHMOND TIMES-DISPATCH (Oct. 18, 2012, 4:21 PM), [http://www.timesdispatch.com/news/va-health-commissioner-resigns-citing-abortion-clinic-rules/article\\_099db45c-4a2e-5b4b-82e2-56544518789d.html?mode=image&photo=0](http://www.timesdispatch.com/news/va-health-commissioner-resigns-citing-abortion-clinic-rules/article_099db45c-4a2e-5b4b-82e2-56544518789d.html?mode=image&photo=0).

86. See *id.*; see also Shelby Brown & Nick Dutton, *Cuccinelli: Va. Health Commissioner's Resignation is Political Statement* (Oct. 19, 2012, 1:29 PM), <http://wtvr.com/2012/10/19/cuccinelli-weighs-in-on-va-health-commissioners-resignation>.

87. GUTTMACHER INST., *Laws Affecting Reproductive Health and Rights: 2012 State Policy Review*, <http://www.guttmacher.org/statecenter/updates/2012/statetrends42012.html> (last visited Nov. 3, 2013).

forty-three restrictions on access to abortion, the second-highest number ever at the mid-year mark.<sup>88</sup>

There are numerous examples of laws passed under the rubric of protecting women's health that limit access to abortion. Despite hesitation about weighing into the abortion debate, the medical community more and more is speaking out against these laws, that flout medical evidence, and mandate doctors violate their ethics and ignore best practices, infringing on their ability to practice. The strategy of using women's health as a cover to pass laws restricting access to abortion appears to have gone too far and the medical community can't stay quiet any longer. In addition, the practice has spread beyond abortion, with legislatures passing laws infringing on medical practice based on ideology in areas of gun violence, end of life, and others.<sup>89</sup>

The onslaught of new laws has been met with a flurry of lawsuits aiming to stop these laws from going into effect. There are currently over thirty cases being litigated based on challenges to state laws restricting access to abortion.<sup>90</sup> Many of the laws are being enjoined, but others are going into force. Just as in the political conversation, both sides of the legal debate claim women's health as justification for their position. The states' claims that they speak for women's health are frequently accepted, based on the precedent set by *Casey* and *Gonzales*.<sup>91</sup>

The following subsections address three examples of laws passed under the guise of protecting women's physical or mental health: a) mandatory counseling; b) mandatory ultrasounds; and c) Targeted Regulations of Abortion Providers or TRAP laws. Each subsection considers the status of these laws in the states and the opposition by the medical community, as well as the litigation challenging these laws.

### A. Mandatory Counseling

Mandatory Counseling laws require health care providers to give their patients specific information, some of it inaccurate, including that abortion can cause fertility issues in the future, that women are more likely to get breast cancer, and that there is a link between abortion and suicide.<sup>92</sup>

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88. GUTTMACHER INST., *State-Level Assault on Abortion Rights Continues in First Half of 2013* (July 8, 2013), <http://www.guttmacher.org/media/inthenews/2013/07/08>.

89. See Weinberger et al., *supra* note 11, at 1557–58.

90. NAT'L P'SHIP FOR WOMEN AND FAMILIES, *In the Courts*, REPROD. HEALTH WATCH, [http://go.nationalpartnership.org/site/PageNavigator/RHW\\_courts.html](http://go.nationalpartnership.org/site/PageNavigator/RHW_courts.html) (last visited Nov. 3, 2013).

91. See *supra* Parts I.B–C.

92. See Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 14–31 (2012).

Informed consent, as generally defined and accepted by the medical community, is already in operation in every state.<sup>93</sup> Yet thirty-five states have put into place additional mandatory counseling provisions for abortion.<sup>94</sup> Of these, twenty-seven detail the information that must be given to a woman seeking an abortion.<sup>95</sup> Twenty-seven states direct the state health agency to develop written materials.<sup>96</sup> Of the twenty-seven states, ten require the materials be given to a woman seeking an abortion and seventeen require the materials be offered to her.<sup>97</sup>

In the majority of states with these requirements the information is not meant to help women, but to carry the state's message discouraging abortion. Some of the information does not apply to the individual woman's situation. Even more concerning, some states require women be given inaccurate information that has no basis in medical evidence.

- In six states, women must be given inaccurate information about the impact of abortion on their future fertility.<sup>98</sup>
- In five states, women will be told that having an abortion means they are more likely to get breast cancer, despite the fact this has been definitively refuted by the National Cancer Institute of the National Institutes of Health.<sup>99</sup>
- In eight of the twenty-two states that require providers to talk about the psychological response and how a woman is likely to feel after the abortion, she will only be told about the possible negative responses, despite evidence that many women actually feel relief.<sup>100</sup>

### *1. Medical Community Response*

The medical community has been clear that mandatory counseling laws infringe on the doctor-patient relationship and impose on good health care.

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93. *See id.* at 4–6.

94. GUTTMACHER INST., STATE POLICIES IN BRIEF: COUNSELING AND WAITING PERIODS FOR ABORTION (2013) [hereinafter COUNSELING AND WAITING PERIODS FOR ABORTION], available at [http://www.guttmacher.org/statecenter/spibs/spib\\_MWPA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf).

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.*

100. *See* COUNSELING AND WAITING PERIODS FOR ABORTION, *supra* note 94.

*Laws should not interfere . . . with the patient's right to be counseled by a physician according to the best currently available medical evidence and the physician's professional medical judgment.*

—American Congress of Obstetricians and Gynecologists,  
Statement of Policy May 2013<sup>101</sup>

*RESOLVED, That our American Medical Association oppose any government regulation or legislative action on the content of the individual clinical encounter between a patient and physician without a compelling and evidence-based benefit to the patient, a substantial public health justification, or both . . . .*

—American Medical Association House of Delegates,  
Resolution: 717.<sup>102</sup>

The American Medical Association and the American Congress of Obstetricians and Gynecologists have been joined by numerous other medical societies in their critique.<sup>103</sup> These groups argue that the legislature should not be telling doctors what they must or must not say to their patients. Medical care should be based on evidence and the doctor's judgment as well as the desires, needs, and interests of the patient.<sup>104</sup>

## 2. Mandatory Counseling in the Courts

In recent years there have been two cases challenging mandatory counseling laws, one in Kansas and another in South Dakota.<sup>105</sup> The Supreme Court in *Casey* upheld a mandatory counseling law as constitutional under the undue burden standard, noting that the information

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101. *Legislative Interference with Patient Care, Medical Decisions, and the Patient-Physical Relationship*, AM. CONGR. OF OBSTETRICIANS & GYNECOLOGISTS (May 2013), available at [http://www.acog.org/About\\_ACOG/Announcements/Legislative\\_Interference\\_Statement\\_of\\_Policy](http://www.acog.org/About_ACOG/Announcements/Legislative_Interference_Statement_of_Policy).

102. *Government Interference in the Patient-Physician Relationship: Resolution 717*, AM. MED. ASS'N (May 7, 2013), available at <http://134.147.247.42/han/JAMA/www.ama-assn.org/assets/meeting/2013a/a13-717.pdf>.

103. See Weinberger et al., *supra* note 11, at 1557–59.

104. See *id.*

105. See NAT'L P'SHIP FOR WOMEN AND FAMILIES, *Mandatory Counseling: In the News*, REPROD. HEALTH WATCH, [http://go.nationalpartnership.org/site/PageNavigator/RHW\\_issues.html?id=3322&issue=Abortion:%3Cbr%3E+Mandatory+Counseling](http://go.nationalpartnership.org/site/PageNavigator/RHW_issues.html?id=3322&issue=Abortion:%3Cbr%3E+Mandatory+Counseling) (last visited Nov. 3, 2013).

had to be “truthful and nonmisleading.”<sup>106</sup> In *Gonzales*, although addressing a different type of restriction, the Court dispensed with the “truthful, nonmisleading” requirement in *Casey* by finding scientific inconsistency where very little existed and then giving deference to the legislature.<sup>107</sup> Thus, under *Gonzales*, if an advocacy group wants to help a legislature pass a law that will restrict access to abortion and still have a chance to pass constitutional muster, it simply needs to create scientific controversy or disagreement—even if this controversy doesn’t actually exist within the unbiased medical community. Thus, after *Gonzales*, those who wish to use the pretext of protecting women’s health as a means to restrict access to abortion can argue that interpretation of “truthful and nonmisleading” is up to the legislature. Unfortunately, the parties taking advantage of this includes judges.

For example, this occurs in *Planned Parenthood Minnesota v. Rounds*.<sup>108</sup> In *Rounds*, the 8th Circuit upholds H.B. 1166, the South Dakota mandatory counseling law that requires disclosure to patients seeking abortions of an “[i]ncreased risk of suicide ideation and suicide.”<sup>109</sup> To reach this conclusion, the court notes the state’s reliance on scientific research—however, this research is the refuted work by Coleman, discussed above.<sup>110</sup> To meet the *Casey* standard that information be “truthful and nonmisleading,” the court in *Rounds* relies on *Gonzales*. “Indeed, the Supreme Court ‘has given state and federal legislatures wide discretion to pass legislation where there is medical and scientific uncertainty,’ and ‘[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.’”<sup>111</sup>

### B. Ultrasound Requirements

Mandatory ultrasound laws require a woman to have an ultrasound prior to having an abortion, whether or not the doctor believes

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106. See *Planned Parenthood v. Casey*, 505 U.S. 883, 882–83 (1992).

107. See *Gonzales v. Carhart*, 550 U.S. 124, 162–69 (2007).

108. See *Planned Parenthood Minn. v. Rounds*, 653 F.3d 622 (2011).

109. See H.B. 1166, 2005 Leg., 80th Sess. (S.D. 2005) § 6(1)(e)(ii). The law requires distribution to women seeking an abortion information stating that “the abortion will terminate the life of a whole, separate, unique, living human being” and “[a] description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including: (i) [d]epression and related psychological distress; (ii) [i]ncreased risk of suicide ideation and suicide.” *Id.* § 6(4)(1).

110. Steinberg & Feiner, *supra* note 72, at 407; see also Vignetta E. Charles et al., *Abortion and Long-Term Mental Health Outcomes: A Systematic Review of the Evidence*, 78 *CONTRACEPTION* 436 (2008), available at [http://www.jhsph.edusebin/o/a/Charles\\_2008\\_Contraception.pdf](http://www.jhsph.edusebin/o/a/Charles_2008_Contraception.pdf).

111. *Rounds*, 653 F.3d at 678 (citing *Gonzales v. Carhart*, 550 U.S. 124, 164 (2007)).

it is medically necessary.<sup>112</sup> As of the writing of this article, ten states require a woman to have an ultrasound before an abortion.<sup>113</sup> Three mandate that a woman seeking an abortion obtain an ultrasound before the abortion, and in Texas, the law specifically requires *the provider* to show and describe the image.<sup>114</sup> Another seven states mandate that a woman have an ultrasound before an abortion and require that she be offered the *opportunity* to view the image.<sup>115</sup>

As in Texas, the purported purpose of these laws includes protecting women's health.

Section 12.[:] The purposes of this Act include, but are not limited to: (1) protecting the physical and psychological health and well-being of pregnant women; (2) providing pregnant women access to information that would allow her to consider the impact an abortion would have on her unborn child; and (3) protecting the integrity and ethical standards of the medical profession.<sup>116</sup>

### 1. *Medical Community Response*

The medical community has spoken out strongly against these laws. The Texas Medical Association statement on Senate Bill (S.B.) 16:

[t]he Legislature's role should not be to dictate how physicians and patients communicate with one another or what procedures and diagnostic tests must be performed on a given patient.

Physician members of the [Texas Medical Association] agree to be bound by the American Medical Association (AMA) Principles of Medical Ethics. SB 16, as filed, is contrary to established ethics principles pertaining to the patient-physician relationship and informed consent.

...  
TMA is concerned that SB 16 not only sets a dangerous precedent of legislation prescribing the details of the practice of medicine, but it also clearly mandates that physicians practice in a manner inconsistent with medical ethics.<sup>117</sup>

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112. See GUTTMACHER INST., STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND (2013), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_RFU.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf).

113. See *id.*

114. See *id.*

115. See *id.*

116. H.B. 15, 2011 Leg., 82nd Sess. (Tex. 2011).

117. Letter from Tex. Med. Ass'n to the Hon. Robert Duncan on S.B. 16 (Feb. 8, 2011), available at <http://www.texmed.org/Template.aspx?id=20416>.

Opposing a mandatory ultrasound in Virginia, a medical society representing internal medicine doctors states:

[o]n behalf of the Governor's Council of the American College of Physicians, Virginia Chapter, comprising about 3000 physicians and medical students in the Commonwealth of Virginia, we write to voice our strong opposition to SB279/HB 642, requiring that an ultrasound be performed as part of informed consent for abortion. We urge you to veto this legislation.

There is no scientific evidence that an ultrasound is either medically indicated or reflects the standard of care for the purpose of performing an abortion.

We believe that this legislation represents a dangerous and unprecedented intrusion by the Commonwealth of Virginia into patient privacy and that it encroaches on the doctor-patient relationship. This legislation interferes with physicians' ability to make sound clinical judgments based on medical reasoning and in the best interest of our patients.<sup>118</sup>

Again, the medical community is clear that the legislature should not be determining what procedures a patient should receive. Health care providers are being forced to decide between their ethical obligation to do what is right for the patient and their need to follow the law.

## 2. *The Courts on Mandatory Ultrasounds*

At least three mandatory ultrasound laws—Texas, Oklahoma and North Carolina—have been challenged in court. The Fifth Circuit upheld the Texas law (allowing Louisiana, also in the Fifth Circuit, to quickly follow suit in passing the same law).<sup>119</sup> The mandatory ultrasound law in Oklahoma, however, was permanently enjoined by the Supreme Court of Oklahoma in a brief decision relying on *Casey*.<sup>120</sup> The U.S. Supreme Court granted a petition for certiorari on June 27, 2013.<sup>121</sup> The U.S. District Court for the Middle District of North Carolina enjoined two provisions in the North Carolina law—the provision requiring the provider to describe the image and the provision requiring the provider to offer to the woman to hear fetal heartbeat.<sup>122</sup>

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118. Letter from Am. Coll. Physicians Va. Chapter to Governor McDonnell (Feb. 21, 2012), available at [http://www.acponline.org/about\\_acp/chapters/va/2-24-12.pdf](http://www.acponline.org/about_acp/chapters/va/2-24-12.pdf).

119. *See* *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 584 (5th Cir. 2012); *see also* Heidi Miller, *New Pre-Abortion Law in Louisiana*, LIVE ACTION NEWS (June 17, 2012, 2:10 PM), <http://liveactionnews.org/new-pre-abortion-ultrasound-law-in-louisiana/>.

120. *Okla. Coal. for Reprod. Justice v. Cline*, 292 P.3d 27, 27–28 (Okla. 2012), *cert. granted*, 133 S. Ct. 2887 (2013) (No. 12-1094).

121. *See id.*

122. *See* *Stuart v. Huff*, 834 F. Supp. 2d 424, 437 (M.D.N.C. 2011).

Given the differing outcomes in the circuit courts, mandatory ultrasounds may be the next major abortion case to be heard by the Supreme Court.

The *Gonzales* deference to the legislature allowed states to see how far they could push the concept of “informed consent.” As Jack Balkin notes in his 2007 blog, Justice Kennedy’s language in *Gonzales* encourages the passage of mandatory ultrasound laws and other extreme laws.<sup>123</sup> These laws were the logical extension of the opportunity given to states to restrict abortion under the rubric of informed consent without any requirement of neutrality.<sup>124</sup>

The Texas law, S.B. 16/H.B. 15, requires the same physician “who is to perform an abortion” to perform and display a sonogram of the fetus and describe the images to her, make the heart auscultation (heartbeat) of the fetus audible for the woman and describe the sound to her, and then to wait at least twenty-four hours (unless she lives more than 100 miles away) before performing the abortion.<sup>125</sup> H.B. 15 states:

the physician who is to perform the abortion provides, in a manner understandable to a layperson, a verbal explanation of the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs . . . .<sup>126</sup>

This law was challenged in federal court in *Texas Medical Providers Performing Abortion Services v. Lakey*. The Fifth Circuit dismisses concerns about medical necessity or deference to the doctor’s medical judgment.<sup>127</sup> The court relies on *Casey* and the findings that the practice of medicine is “subject to reasonable licensing and regulation by the state”<sup>128</sup> and relies on *Gonzales* that “[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman.”<sup>129</sup> The court is not concerned that “the disclosure of the sonogram and fetal heartbeat are ‘medically unnecessary’ to the woman.”<sup>130</sup>

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123. See Jack M. Balkin, *The Big News About Gonzales v. Carhart—It’s the Informed Consent, Stupid*, BALKINIZATION (Apr. 19, 2007), <http://balkin.blogspot.com/2007/04/big-news-about-gonzales-v-carhart.html>.

124. See *id.*

125. See H.B. 15, 2011 Leg., 82nd Sess. (Tex. 2011).

126. *Id.*

127. See *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 579–80 (5th Cir. 2012).

128. *Id.* at 575 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992)).

129. *Id.* (citing *Gonzales v. Carhart*, 550 U.S. 124, 128 (2007)).

130. *Id.* at 578.

### C. Targeted Restrictions on Abortion Providers (TRAP)

The state's interest in regulating medicine as well as in safeguarding women's health established in *Roe*, combined with the lowered standard of review of abortion restrictions in *Casey*, has led to what are arguably the most damaging restrictions on abortion—Targeted Restrictions on Abortion Providers or TRAP laws. TRAP laws put significant structural requirements on abortion clinics that are medically unnecessary and designed to make it too expensive to operate and shut them down.<sup>131</sup>

TRAP requirements are now in place in twenty-seven states, where 60 percent of women of reproductive age live.<sup>132</sup> According to the Guttmacher Institute, twenty-six states require facilities where abortion services are provided to meet standards intended for ambulatory surgical centers.<sup>133</sup> The Guttmacher Institute data includes details of these laws, such as:

- Twelve states specify the size of the procedure rooms.
- Twelve states specify corridor width.
- Nine states require abortion facilities to be within a set distance from a hospital.
- Nine states require each abortion facility to have an agreement with a local hospital in order to transfer patients in the event complications arise. (Including requirements on clinicians a total of twenty-two states require a provider to have a relationship with a hospital.)
- Fifteen states place unnecessary requirements on clinicians that perform abortions.
- Fifteen states require abortion providers to have some affiliation with a local hospital.
- Three states require that providers have admitting privileges.
- Twelve states require providers to have either admitting privileges or an alternative arrangement, such as an agreement with another physician who has admitting privileges.

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131. Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—and the Women They Serve—Pay the Price*, 16 GUTTMACHER POL'Y REV. 7, 7 (2013).

132. *Id.* at 8.

133. GUTTMACHER INST., STATE POLICIES IN BRIEF: TARGETED REGULATION OF ABORTION PROVIDERS (2013), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_TRAP.pdf](http://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf).

- One state requires the clinician to be either a board-certified obstetrician-gynecologist or eligible for certification.<sup>134</sup>

### 1. *Medical Community on TRAP Laws*

Some of the most damaging TRAP laws have been those requiring abortion clinics to meet the standards of ambulatory surgical centers, which provide much riskier and more invasive procedures, and those requiring admitting privileges at a nearby hospital. Both of these requirements, medical and hospital groups argue, are not medically necessary and impose significant unnecessary burdens on doctors and the medical community.

The Texas Hospital Association opposed the Texas TRAP law that would require abortion providers to have admitting privileges at a hospital within thirty miles of the clinic.<sup>135</sup> These laws, framed as protecting women's safety, are unnecessary and burdensome and contrary to medical practice according to medical societies:

[Texas Hospital Association] agrees that women should receive high-quality care and that physicians should be held accountable for acts that violate their license. However, a requirement that physicians who perform one particular outpatient procedure, abortion, be privileged at a hospital is not the appropriate way to accomplish these goals . . . Requiring a hospital to grant admitting privileges to physicians who do not provide services inside the hospital is time-consuming and expensive for the hospital and does not serve the purpose for which privileges were intended . . .<sup>136</sup>

It is rare for a hospital association to speak out on an abortion restriction. But these laws implicate not just abortion providers but a major part of the health care system, using hospitals' organizing structures in ways they were not intended to be used. These laws are passed without regard for how the health care system is meant to work or the actual health care needs of women.

### 2. *The Courts on TRAP*

There have been about ten court cases brought challenging state TRAP laws, and this number is increasing with regularity as new laws

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134. *Id.*

135. Glenn Hegar, *Statement of Opposition to Section 2 of the Committee Substitute for Senate Bill 5*, TEXAS HOSP. ASS'N, available at <http://www.tha.org/HealthCareProviders/Advocacy/CommentLetters/THA%20Testimony%20in%20opposition%20to%20SB%205%20%28special%20session%29.pdf>.

136. *Id.*

are passed.<sup>137</sup> Much of this litigation has just begun, so it is still too early to know how the cases will be resolved. While many TRAP laws have gone into effect with serious consequences for access to abortion, a number of laws have been halted by a temporary restraining order or preliminary injunction.<sup>138</sup>

The litigation over the TRAP law in Mississippi shows that the TRAP laws may finally have found the floor for the undue burden to be significant enough to stop a law—the elimination of abortion providers in the entire state. H.B. 1390, the Mississippi TRAP law, requires that “all physicians associated with abortion clinics have admitting and staff privileges at a local hospital and be board certified in obstetrics and gynecology.”<sup>139</sup>

In *Jackson Women’s Health Organization v. Currier*, the U.S. District Court for the Southern District of Mississippi grants a preliminary injunction to the Jackson Women’s Health Clinic against H.B. 1390.<sup>140</sup> However, the court still requires Jackson Women’s Health to try and meet the requirements of the law.<sup>141</sup> It is only after it is clear that the clinic cannot comply with the law and its closure would eliminate access to abortion in the state of Mississippi, that the Court grants the preliminary injunction, finding that the law is likely to be found to be an undue burden.<sup>142</sup> The court rejects the state’s argument that traveling to a different state is no more than a “minor inconvenience” and finds that Jackson Women’s Health is likely to succeed on the merits.<sup>143</sup>

#### IV. THE 2012 ELECTION AND THE EMERGENCE OF WOMEN’S HEALTH AS A TOOL FOR POLITICAL MOBILIZATION IN DEFENSE OF REPRODUCTIVE HEALTH AND RIGHTS

As an increasing number of states pass laws restricting access to abortion under the pretense of protecting women’s health, the actions and rhetoric of legislators looking to restrict access to abortion have demonstrated to the American public what women’s health advocates had been saying all along: women’s health is under attack. When the

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137. See Tara Culp-Ressler, *Four States That Have Tried, and Failed, to Shut Down Abortion Clinics*, THINK PROGRESS (July 9, 2013 11:15 AM), <http://thinkprogress.org/health/2013/07/09/2269791/four-states-failed-shut-down-abortion-clinics/>.

138. *Id.*

139. *Jackson Women’s Health Org. v. Currier*, 878 F. Supp. 2d 714, 715 (S.D. Miss. 2012).

140. *Id.*

141. See *id.* at 715, 717.

142. See *id.* at 720.

143. See *id.* at 717–18.

conversation expanded to contraception, the extreme nature of these efforts was even clearer and the efforts rightly became known as the war on women's health.

The women's health and rights community didn't even have to tell the public how extreme many of these legislators were—the legislators did it for them with their comments and actions. All that was necessary was to make sure the information was disseminated widely. This was made possible by the internet and heightened by the media attention of a presidential election year.

A key moment took place in February 2012, when Georgetown University law student Sandra Fluke was denied a spot as the minority witness on a panel about access to contraception.<sup>144</sup> Chairman of the House Oversight Committee, Daryl Issa, who was leading the hearing, stated that she was not qualified to testify.<sup>145</sup> Democratic women Representatives walked out in protest and the panel went on—with five men.<sup>146</sup> A picture was taken of the all-male panel and posted on Facebook. The picture went viral within hours, visually capturing the hypocrisy of the situation—a group of men discussing women's access to birth control—and driving women's anger and frustration.<sup>147</sup> Sandra Fluke became an almost instant celebrity, receiving a call from President Obama and speaking during a prime spot at the Democratic National Convention.<sup>148</sup>

Also in February 2012, the war on women began to be centered around egregious restrictions on abortion care when the Virginia legislature debated a mandatory ultrasound law. The Virginia legislation required the woman to hear the fetal heartbeat.<sup>149</sup> However, early in pregnancy, the only way to make the heartbeat audible is through a transvaginal ultrasound (where a wand is inserted into the woman's vagina).<sup>150</sup> So the law in effect was requiring a transvaginal ultrasound, whether or not the doctor believed it was necessary. Women in

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144. Jim Abrams, *Sandra Fluke, Witness Snubbed by GOP, Speaks to Democrats About Birth Control*, HUFFINGTON POST (Feb. 23, 2012, 1:58 PM), [http://www.huffingtonpost.com/2012/02/23/sandra-fluke-birth-control-democrats\\_n\\_1297110.html](http://www.huffingtonpost.com/2012/02/23/sandra-fluke-birth-control-democrats_n_1297110.html).

145. *See id.*

146. *See* Laura Bassett & Amanda Terkel, *House Democrats Walk Out of One-Sided Hearing on Contraception, Calling it an 'Autocratic Regime'*, HUFFINGTON POST (Feb. 16, 2012, 2:00 PM), [http://www.huffingtonpost.com/2012/02/16/contraception-hearing-house-democrats-walk-out\\_n\\_1281730.html](http://www.huffingtonpost.com/2012/02/16/contraception-hearing-house-democrats-walk-out_n_1281730.html).

147. *See* Irin Carmon, *From 'Slut' to Speaker*, SALON (Sept. 5, 2012, 11:20 PM), [http://www.salon.com/2012/09/06/from\\_slut\\_to\\_speaker/](http://www.salon.com/2012/09/06/from_slut_to_speaker/).

148. *See* Penny Starr, *Sandra Fluke to Speak at Democratic Convention*, CNSNEWS (Aug. 22, 2012, 4:08 PM), <http://cnsnews.com/news/article/sandra-fluke-speak-democratic-convention>.

149. Sabrina Tavernise & Erik Eckholm, *Ultrasound Abortion Bill Nears Vote in Virginia*, N.Y. TIMES, Feb. 20, 2012, at A10.

150. *See id.*

Virginia and around the country were outraged, calling the law state sponsored rape. Women took to the streets and the national media picked up the story.<sup>151</sup>

Notably, similar ultrasound laws had passed in Texas and Oklahoma; however, they received virtually no national attention.<sup>152</sup> But by the time the effort had spread to Virginia, women and the media were paying attention. The war on women's health was a rallying cry against these laws and women were paying attention and engaged. As a result of the outcry, the legislation was amended slightly—it still required an ultrasound but specified that it would not be transvaginal.<sup>153</sup> For women's rights activists, it was arguably a messaging victory but a policy loss.

Then in August, Missouri Senate candidate Todd Aiken responded to a question about the need for abortion in cases of rape by stating, “[i]f it's a legitimate rape, the female body has ways to try to shut the whole thing down.”<sup>154</sup> The statement created a national uproar and is widely believed to have cost him the Senate seat.<sup>155</sup> Reporters asked other politicians questions that led to more outrageous statements. Illinois Rep. Joe Walsh stated that abortion was never necessary to save a woman's life (a statement quickly refuted by the medical community) and Richard Mourdock, a candidate for Senate in Indiana stated that pregnancy resulting from rape was something that “God intended to happen.”<sup>156</sup> Women's rights advocates once again only had to make sure the public was aware as legislators and candidates revealed what they really believed.

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151. See Amanda Peterson Beadle, *Virginia Governor Backs Off “State-Sponsored Rape” Ultrasound Bill, Promised to “Review” Measure*, THINK PROGRESS (Feb. 22, 2012, 10:00 AM), <http://thinkprogress.org/health/2012/02/22/430032/virginia-governor-backs-off-state-sponsored-rape-ultrasound-bill-promises-review-measure/>.

152. See Erik Eckholm & Kim Severson, *Virginia Senate Passes Ultrasound Bill as Other States Take Notice*, N.Y. TIMES (Feb. 28, 2012), available at [http://www.nytimes.com/2012/02/29/us/virginia-senate-passes-revised-ultrasound-bill.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/02/29/us/virginia-senate-passes-revised-ultrasound-bill.html?pagewanted=all&_r=0).

153. See Anita Kumar, *Virginia House Amends Abortion Bill to Say No Woman Will Have to Undergo Involuntary Internal Ultrasound*, WASH. POST (Feb. 22, 2012), available at [http://www.washingtonpost.com/blogs/virginia-politics/post/mcdonnell-no-need-for-women-to-undergo-invasive-ultrasounds-before-abortion/2012/02/22/gIQA6CniTR\\_blog.html](http://www.washingtonpost.com/blogs/virginia-politics/post/mcdonnell-no-need-for-women-to-undergo-invasive-ultrasounds-before-abortion/2012/02/22/gIQA6CniTR_blog.html).

154. Lori Moore, *Rep. Todd Akin: The Statement and the Reaction*, N.Y. TIMES (Aug. 20, 2012), available at [http://www.nytimes.com/2012/08/21/us/politics/rep-todd-akin-legitimate-rape-statement-and-reaction.html?\\_r=0](http://www.nytimes.com/2012/08/21/us/politics/rep-todd-akin-legitimate-rape-statement-and-reaction.html?_r=0).

155. See Dave Helling, *Analysis: Todd Akin Can Blame His Own Words for Senate Race Loss*, KAN. CITY STAR (Nov. 7, 2012), available at <http://www.kansascity.com/2012/11/07/3904730/analysis-todd-akin-can-blame-his.html>.

156. William Saletan, *The Party of Rape*, SLATE (Jan. 14, 2013, 7:45 AM), [http://www.slate.com/articles/health\\_and\\_science/human\\_nature/2013/01/phil\\_gingrey\\_todd\\_akin\\_and\\_richard\\_mourdock\\_the\\_gop\\_s\\_rape\\_problem\\_is\\_spreading.html](http://www.slate.com/articles/health_and_science/human_nature/2013/01/phil_gingrey_todd_akin_and_richard_mourdock_the_gop_s_rape_problem_is_spreading.html).

The outrage at the war on women's health made a difference in the 2012 Presidential election. In particular for unmarried women, the message resonated that women's health is under attack by restrictions on abortion and contraception and attacks on Planned Parenthood.<sup>157</sup> Thirty-three percent of unmarried women said the most important reasons not to vote for Mitt Romney included the attacks on Planned Parenthood and women's preventative health services.<sup>158</sup> Thirty percent of unmarried women voted for Obama because of his views on Planned Parenthood, preventative health care, and pay equity for women.<sup>159</sup> A majority, 52 percent, of voters (and 55 percent of women) said Romney's position to overturn *Roe* made him out of step and extreme<sup>160</sup> and voters preferred Obama's stance on Planned Parenthood to Romney's, 51 percent to 33 percent.<sup>161</sup> In addition, 21 percent of unmarried women thought that protecting Planned Parenthood and women's health care choices, including the right to choose to have an abortion, should be the first priority of Congress and the President.<sup>162</sup> After the election, President Obama became the first sitting president to address Planned Parenthood.<sup>163</sup>

After the election, the political conversation has continued and women's health leaders and Democrats continue to be pushing the war on women message.

*Voters sent politicians a very clear message in last month's election: stay out of women's health care decisions. [Michigan] Governor Snyder should remember that politicians who interfere with women's health were ousted last month.*

—Cecile Richards,  
President of Planned Parenthood Action Fund<sup>164</sup>

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157. DEMOCRACY CORPS, *The Role of the Rising American Electorate in the 2012 Election* (Nov. 14, 2012), <http://www.democracycorps.com/National-Surveys/the-role-of-the-rising-american-electorate-in-the-2012-election/>.

158. *Id.*

159. *Id.*

160. Memorandum from Hart Research Assocs. et al. on Post-Election Analysis of Voter's View on the Presidential Race and Women's Health Issues to Interested Parties (Dec. 5, 2012), available at <http://www.womenarewatching.org/resources/pdf/file-2012-1204232827.pdf> (last visited Aug. 25, 2013).

161. *Id.*

162. See DEMOCRACY CORPS, *supra* note 157.

163. See *President Obama Becomes First Sitting President to Address Planned Parenthood*, PLANNED PARENTHOOD (Apr. 26, 2013), <http://www.plannedparenthood.org/about-us/newsroom/press-releases/obamas-historic-speech-41247.htm>.

164. See *Michigan Governor Signs Abortion Ban Despite Clear Message in November*, PLANNED PARENTHOOD (Dec. 18, 2012), <http://www.plannedparenthoodaction.org/elections-politics/newsroom/press-releases/michigan-governor-signs-abortion-ban-despite-clear-message-n/>.

### CONCLUSION: WOMEN RECLAIMING WOMEN'S HEALTH

As evidenced by the extensive new restrictions on access to abortion being imposed in the name of women's health, those who aim to restrict access to abortion will be hard to deter. This debate will continue to play out through the state and national political processes, legislatures, and in the courts. Although women's health advocates may be winning the argument in the court of public opinion, they are losing ground in the legislatures and in the courts.

At the same time, the reality of the war on women's health has been brought to the forefront. Hopefully, this will bring about a shift in which courts and legislators acknowledge the real intent of these restrictions and the actual negative effect on women's health and lives. If we are to get there, women's health advocates and health care providers must continue to speak out, pointing out the hypocrisy of these efforts and reinforcing that if you really want to protect women's health, you must leave health care decisions to the real experts—women and their doctors.