WHAT IS AN "UNDUE BURDEN"? THE *CASEY* STANDARD AS APPLIED TO INFORMED CONSENT PROVISIONS

Lauren Paulk*

I. Introduction

The right to an abortion remains a hotly contested area of politics. However, advocates challenging laws that restrict access to abortion do not always raise all the possible challenges, which results in a mixed application of standards by the courts. This article explores the so-called "undue burden" standard handed down by the United States Supreme Court and how lower federal courts use this standard to analyze legislation related to the right to choose.

* CUNY School of Law, J.D. expected 2013. The author wishes to thank Professor Ruthann Robson for her comments, kind encouragement to publish, and inspirational scholarship and teaching; Professor Caitlin Borgmann for early guidance, continued engagement with me about reproductive justice and the law, and for leading excellent classroom discussions that provided the impetus for this piece; *UCLA Women's Law Journal* editors and staff for their thoughtful notes and edits; and my colleagues at CUNY, whose friendship and support make law school not only bearable, but enjoyable.

First, this article will outline the history of the standard, followed by a discussion of how the Supreme Court has applied it in three major cases. Next, this article will analyze how the lower federal courts use the standard by focusing on its application to "informed consent" provisions of abortion regulation. Specifically, this article will analyze court decisions that rule on the constitutionality of legislative provisions related to pre-abortion ultrasounds and fetal pain. Finally, this article will discuss what recent applications of the undue burden standard in informed consent provisions may mean for the standard itself and for abortion rights in general. I conclude that the undue burden standard should be clarified and strengthened. Advocates should always raise the standard to help ensure courts address it. As such, challenges under the standard should run parallel to any other challenges.

Specifically, in informed consent cases, advocates should argue that the analysis under the undue burden standard begins by assessing whether the provision is truthful and not misleading.[1] If the provision is found to be truthful and not misleading, advocates should argue that the next step is whether the provision has the "purpose or effect of placing a substantial obstacle in the path of a woman who seeks an abortion of a nonviable fetus."[2] In advocating under the purpose prong, advocates should cite to legislative history and statements made by politicians that could be reasonably construed to show that the provision has the "purpose" of "hinder[ing]" a woman's free choice to abort a nonviable fetus.[3] In advocating under the effects prong, advocates should attempt to show how the large fraction test proves that the restriction is a substantial obstacle

---

[1] Planned Parenthood of Se. Pa.v. Casey, 505 U.S. 833, 882 (1992).

[2] *Id*. at 877.

[3] *Id*. However, as commentators have noted, the purpose prong of *Casey* has been relatively "neglected." Note, *After* Ayotte: *The Need to Defend Abortion Rights with Renewed "Purpose,"* 119 Harv. L. Rev. 2552, 2566 (2006) [hereinafter *After* Ayotte]. Indeed, members of the Court themselves are divided in how—and whether—the purpose prong should be used. When Justice Ginsburg implied support for a disjunctive test (or the separation of "purpose" and "effect" in the *Casey* standard) in a concurrence, Justice Thomas argued back that Ginsburg's notion was "squarely inconsistent" with precedent. *See id.* at 2566-67 (quoting Stenberg v. Carhart, 530 U.S. 914, 952 (2000)). Additionally, the Court has refused to grant *certiorari* to a petition attempting to clarify how to construe the purpose prong. *See id*. at 2567 n.87 (citing Petition for Writ of Certiorari, Wood v. Univ. of Utah Med. Ctr., 540 U.S. 946 (2003) (No. 03-82), 2003 WL 22428547 (presenting the question, "[d]oes the standard for determining whether a statute has a constitutionally improper purpose under *Casey* require an examination of the entire legislative context"); *Wood*, 540 U.S. at 946 (denying certiorari)).

for a large fraction of the women for which it is relevant.[4] Finally, advocates should argue for the application of the standard to all informed consent provisions—both those already in operation in the State and those proposed in the legislation at issue—such that the provisions combined create a substantial obstacle. Even these stronger iterations of the standard, however, will only slow (at best) the introduction of new and more restrictive measures on abortion.[5]

II. A History of the Undue Burden Standard

Prior to *Roe v. Wade*, the United States Supreme Court had not grounded the right of privacy in any one constitutional provision.[6] The discussion of privacy began, however, in 1965, when *Griswold v. Connecticut* affirmed the right of married couples to use contraception.[7] A majority of the Court in *Griswold* found a "zone of privacy"[8] to exist in the marital bedroom, but placed the right in the "penumbras" that are "formed by emanations" from various constitutional provisions.[9] The *Griswold* Court did not situate this zone of privacy in any one constitutional provision; rather, Justice Douglas located it in no less than five separate constitutional amendments.[10] The Court may not have intended for its holding in

[4] *Casey*, 505 U.S. at 895.

[5] Still, in the current political climate, slowing down "the other side" is sometimes the last line of defense against retrogressive policies. It is questionable whether or not the courts are the place for this, but hopefully a strengthened standard on the Court would help withstand attacks from an increasingly virulent anti-choice legislative contingency.

[6] It is contested that a specific "right to privacy" was even articulated here. *See* Ruthann Robson, *Lesbians and Abortion*, 35 N.Y.U. Rev. L. & Soc. Change 247, 249 (2011) ("The word 'privacy' is not in the text of the Constitution and the Court in *Griswold* had a difficult time grounding the right in any specific constitutional provision. Justice Douglas famously opined that 'specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.' The first case in which a majority of the United States Supreme Court agreed that 'privacy' was grounded in the liberty guarantee of the Due Process Clause of the Fourteenth Amendment was *Roe v. Wade*, [410 U.S. 113 (1973)] the case in which the Court first held that a state statute criminalizing abortion was unconstitutional." (footnotes omitted)). *But cf.* Lackland H. Bloom, Jr., *The Legacy of* Griswold, 16 Ohio N.U. L. Rev. 511, 512 (1989) ("If *Griswold* is remembered for one thing, it is surely for having effectively given birth to the concept of an independent constitutional right of privacy.").

[7] Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

[8] *Id*. at 485.

[9] *Id*. at 484.

[10] *See id*. (finding zones of privacy in the First, Third, Fourth, Fifth, and Ninth Amendments).

Griswold to help establish a woman's right to choose an abortion.[11] Even so, after *Eisenstadt v. Baird* extended the right to contraception to unmarried individuals,[12] *Roe v. Wade* was not far behind.[13]

In establishing the right of unmarried persons to obtain contraception, *Eisenstadt* expanded the "zone of privacy" outside the sphere of the marital bedroom and into the lives of individuals. One year later, *Roe* firmly located the individual right to privacy (in the abortion context) in the Due Process Clause of the Fourteenth Amendment,[14] establishing a woman's right to have a pre-viability abortion if she chose.[15] *Roe* provided the governing standard for abortion rights until 1992, when *Planned Parenthood v. Casey* articulated a new standard by which abortion rights are now measured.[16]

Since the Court in *Roe* found that abortion fell under the fundamental right to privacy,[17] it applied a strict scrutiny analysis,[18] requiring that regulations be narrowly tailored to achieve a compelling state interest.[19] The *Roe* court decided that the government had two compelling interests: "preserving and protecting the health of the pregnant woman" and "protecting the potentiality of human life."[20] These interests, however, became compelling at different times during a woman's pregnancy. While the first trimester was to remain free of government interference,[21] a woman's health became a compelling state interest in the second trimester, and potential life became a compelling state interest at viability.[22] The Court gave

---

[11] *See* Robert M. Godzeno, Note, *The Role of Ultrasound Imaging in Informed Consent Legislation Post*-Gonzales v. Carhart, 27 Quinnipiac L. Rev. 285, 288 (2009).

[12] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[13] Roe v. Wade, 410 U.S. 113 (1973).

[14] *See* Robson, *supra* note 6, at 249.

[15] *See Roe*, 410 U.S. at 153.

[16] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

[17] *Roe*, 410 U.S. at 154.

[18] The foreshadowing of strict scrutiny can be found in the famous "footnote four" of United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). For a more complete description of strict scrutiny, see generally 16A Am. Jur. 2d *Constitutional Law* § 403 (2012).

[19] *Roe*, 410 U.S. at 155.

[20] *Id*. at 162-63.

[21] *Id*. at 163.

[22] *Id*. at 163-64. The *Roe* Court explained that viability is the point at which the fetus can potentially sustain life outside the mother's womb, which generally occurs somewhere between twenty-four to twenty-eight weeks of pregnancy. *Id*. at 160. This definition may prove problematic in the future with advances in medical technology used to keep increasingly premature infants alive outside of the womb. *See* City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting).

the states permission to ban abortion after viability due to their interest in potential life, as long as they provided a life and health exception for the mother.[23]

Therefore, the right to abortion was ensconced in the fundamental right to privacy.[24] Although in the history of Supreme Court jurisprudence all fundamental rights are typically accorded a strict scrutiny analysis,[25] abortion has since received a different standard—the "undue burden" test. In *City of Akron v. Akron Center for Reproductive Health, Inc.,*[26] Justice Sandra Day O'Connor first articulated an early version of this test. O'Connor's undue burden analysis provided that abortion regulations should only be struck down when the regulations put an "undue burden" on a woman's right to choose a pre-viability abortion.[27] This standard set the stage for *Planned Parenthood v. Casey*'s new articulation of a test for abortion restrictions.

In 1992, the *Casey* court, citing O'Connor's earlier undue burden language,[28] adopted a modified version of the undue burden standard.[29] Though *Casey* affirmed *Roe* in that it maintained that

---

[23] *Roe*, 410 U.S. at 163-64.

[24] *Id*. at 154.

[25] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (applying strict scrutiny to married couple's use of contraceptives after holding that this falls under the fundamental right to privacy).

[26] O'Connor first suggested using an undue burden standard in her dissenting opinions in *Akron Ctr. for Reprod. Health*, 462 U.S. at 461-66 (O'Connor, J., dissenting), and Planned Parenthood Ass'n of Kan. City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 505 (1983) (O'Connor, J., dissenting), and she continued to argue for its use in subsequent cases. The Court did use the term "undue burden" in some post-*Roe*, pre-*Casey* cases involving abortion, but there is debate over whether this term was used as a formal standard at the time. *See* Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 Colum. L. Rev. 2025, 2036-37 (1994).

[27] *Akron Ctr. for Reprod. Health*, 462 U.S. at 461-64 (O'Connor, J., dissenting). For a thorough discussion of O'Connor's pre-*Casey* articulation of the undue burden standard, see generally Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. Pa. L. Rev. 119 (1989); *see also* Metzger, *supra* note 26, at 2036 (noting that O'Connor's earlier articulations of the standard defined an undue burden as an "absolute obstacle."). Moreover, O'Connor's early version of the test deemed it a threshold inquiry, not a final standard—strict scrutiny would only be applied after an undue burden was found. *See id*.

[28] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (citing eight prior abortion decisions, including six that are dissenting or concurring opinions by Justice O'Connor).

[29] *Casey* states that "an undue burden is an unconstitutional burden." *Id*. at 877. *But cf. Akron Ctr. for Reprod. Health*, 462 U.S. at 463-64 (O'Connor, J., dissenting) (articulating an undue burden as an "absolute obstacle"); Metzger,

women have the right to choose an abortion pre-viability,[30] the undue burden standard gave greater deference to state legislatures by allowing restrictions on abortion throughout pregnancy.[31] Under *Casey*, a state's reasons for an abortion restriction no longer have to be "compelling," nor does the restriction's tailoring need to be "narrow." Instead, *Casey* only requires that the restrictions do not constitute an undue burden.[32] An undue burden has the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[33] Therefore, the Court created an entirely new standard by which to measure this subset of fundamental rights.[34]

In creating this standard, the Court used circular logic, leaving state and federal courts to their own devices in interpreting the

---

supra note 26, at 2036-37.

[30] *Casey*, 505 U.S. at 870; *see also* Linda J. Wharton, Susan Frietsche, & Kathryn Kolbert, *Preserving the Core of* Roe*: Reflections on* Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 329 (2006) (describing the "three central tenets" of the *Roe* decision upheld by the *Casey* Court).

[31] *Compare* Roe v. Wade, 410 U.S. 113, 163 (1973) (finding that the decision about abortion in the first trimester was between a woman and her doctor, that restrictions regarding women's health were acceptable in the second trimester, and that all other restrictions were acceptable after viability) *with Casey*, 505 U.S. at 777 (holding that restrictions throughout pregnancy are constitutional as long as they do not pose an undue burden).

[32] *Casey*, 505 U.S. at 877.

[33] *Id*.

[34] *Cf.* Turner v. Safley, 482 U.S. 78 (1987) (modifying the fundamental rights analysis in the prison context). In *Turner*, the Court ruled that, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests .... Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id*. at 89. Therefore, the *Turner* Court justifies modifying the strict scrutiny analysis because of the high security concerns that exist in the context of a prison. One could propose that the Court has changed the way it views the liberty interest of both prisoners and pregnant women, restricting one and expanding the other. In this sense, by foregoing strict scrutiny in the Due Process privacy and liberty right to choose, the Court is making the moral decision to place convicted criminals and pregnant women on the same plane when regarding the State's rights to interfere with an individual's bodily autonomy. *Cf.* Kim Shayo Buchanan, *The Sex Discount*, 57 UCLA L. REV. 1149 (2010) (arguing that the Court treats liberty interests differently when "illicit" sex is involved); Kim Shayo Buchanan, Lawrence v. Geduldig: *Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1281 (2007) (noting that many regulations involving (hetero) sex are purportedly designed to "protect women, not to harm them"). This is—at least in the case of informed consent provisions—why the Court allows the state to interfere with pregnant women's liberty interests. *See* Maya Manian,

constitutionality of abortion regulations. Instead of defining an undue burden, the Court chose to explain it by saying that a finding of 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."[35] Problematically, the court chose not to further define "substantial obstacle," which leaves lower courts with very little guidance.[36] As Neal Devins notes in his article *How* Planned Parenthood v. Casey *(Pretty Much) Settled the Abortion Wars*, for some time this vague explanation did not prove much of an issue, since many states simply modeled their abortion laws after the Pennsylvania statute analyzed in *Casey.*[37] However, as this Article later explores, in recent years some states have been pushing the boundaries of the original Pennsylvania statute.[38] They have done so not only by enacting laws that are increasingly more restrictive than and dissimilar to the regulations in *Casey*, but by flouting the "purpose" aspect of the undue burden standard.[39]

III. The Scope of Constitutional Restrictions Under the Undue Burden Standard

In *Casey*, the new undue burden standard proved quite permissive as applied to a number of abortion restrictions. Applying

The Irrational Woman: Informed Consent and Abortion Decision-Making, 16 Duke J. Gender L. & Pol'y 223, 247-49 (2009) (outlining the historical evolution and persistence of informed consent laws).

[35] *Casey*, 505 U.S. at 877. For a comprehensive explanation of the substantial obstacle/undue burden framework, *see* Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After* Casey *and* Carhart, 31 Fordham Urb. L.J. 675, 682-89 (2004). For a critique of the undue burden standard, we need look no further than *Casey* itself, where Justice Scalia pointed out the inconsistencies inherent in the standard. *See Casey*, 505 U.S. at 987-93 (Scalia, J., concurring in part and dissenting in part) (critiquing the circular nature of the standard, which is "rootless [and]…plucked out of context from our earlier abortion decisions," and bemoaning the loss of the stronger adjectives used by O'Conner in her earlier iterations of the standard and the downgrading of the state's interest from compelling to substantial).

[36] *See Casey* 505 U.S. at 987-93 (Scalia, J., concurring in the judgment in part and dissenting in part).

[37] Neal Devins, *How* Planned Parenthood v. Casey *(Pretty Much) Settled the Abortion Wars*, 118 Yale L.J. 1318, 1338-39 (2009).

[38] *See* Wharton et al., *supra* note 30, at 319-21 (discussing the type and number of restrictions states passed from 1992-2005, as compared to the pre-*Casey* years of 1985-1991).

[39] The Court declares that an undue burden has "the *purpose* or effect of placing a substantial obstacle in the path of a woman seeking an abortion," and

the undue burden analysis, the Court found that a 24-hour waiting period,[40] parental consent for minors,[41] an informed consent provision,[42] and certain reporting requirements for medical facilities[43] were all constitutionally permissible restrictions on abortion. The Court did find one restriction unconstitutional, and in doing so used yet another modification of the undue burden analysis. The restriction that required women to notify their husbands before getting an abortion was struck down as imposing an undue burden for a "large fraction" of the women to which it applied.[44] However, this was the only restriction for which the Court employed the "large fraction" test. Therefore, the Court revealed the undue burden standard to be malleable[45] by using the "large fraction" test to strike down the husband notification provision while not addressing this test in

---

"the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Casey*, 505 U.S. at 877 (emphasis added). *See also* Gonzales v. Carhart, 550 U.S. 124, 160 (2007) (rejecting the argument that the congressional purpose of the legislation was not to impose an obstacle to abortion); *but see* Caroline Burnett, *Dismantling* Roe *Brick by Brick—The Unconstitutional Purpose Behind the Federal Partial-Birth Abortion Act of 2003*, 42 U.S.F. L. Rev. 227, 251-254 (2007), for an articulation of the evidence that the legislation was enacted with the purpose of putting a substantial obstacle in the path of a woman seeking an abortion. Some commentators, however, declare this aspect of the undue burden standard to have little weight. *See, e.g.*, Caitlin E. Borgmann, *Holding Legislatures Constitutionally Accountable Through Facial Challenges*, 36 Hastings Const. L.Q. 563, 578-79 (2009). *But see* Note, *After* Ayotte, *supra* note 3, at 2566-69 (acknowledging the "agnostic" language in Mazurek toward the purpose prong, but arguing for its reinvigoration); Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 Emory L.J. 865, 892, n.124 (2007) (noting that courts recognize that the purpose prong carries a high evidentiary burden); *see also* sources cited *supra* note 3 (discussing recent evidence of laws enacted with the purpose of hindering a woman's choice to have an abortion).

[40] *Casey*, 505 U.S. at 887.

[41] *Id*. at 899. Since the effect of abortion restrictions on minors is an issue of great import, it requires its own separate analysis. Therefore, this article will focus only on restrictions in the general sense, and will not address the extra obstacles, concerns, and cases involving minors.

[42] *Id*. at 882. *See also infra* Part IV for a discussion on informed consent.

[43] *See id*. at 900-01.

[44] *Id*. at 895.

[45] *See* Borgmann, *supra* note 35, at 684-86 (discussing how the court applied the large fraction test to the husband notification provision and the concluding that the Court could have easily "defined the pool differently, to include those women for whom the requirement imposed burdens short of an insurmountable obstacle.").

other parts of their argument. Thus, the Court applied the standard in a modified way *in order to strike down the restriction*.[46]

Instead of a clear rule for lower courts to follow, the undue burden standard is one that can be shaped and molded in order to uphold or strike down a particular provision, according to the personal preferences of the Justices.[47] For instance, the *Casey* court dismissed the potential increase in the cost of an abortion *without* applying the large fraction test when it analyzed the waiting period provision.[48] The increase in cost for some women caused by the 24-hour waiting period was dismissed even though the District Court called it "particularly burdensome."[49] The plurality concluded that, "a particular burden is not of necessity a substantial obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group. And the District Court did not conclude that the waiting period is such an obstacle even for the women who are most burdened by it."[50] Rather than remanding the case for a new ruling under the large fraction test, the plurality used the fact that the District Court failed to apply this test—a test the Court had not yet invented when the District Court decided *Casey*—as a reason to uphold the 24-hour waiting period.[51]

Had the *Casey* court applied the large fraction test in a manner similar to the way it applied the test to the husband notification

---

[46] *See* Wharton et al., *supra* note 30, at 333-35 (discussing the standard's application to the husband notification restriction).

[47] *See generally* Jeannie Suk, *Is Privacy a Woman?*, 97 Geo. L.J. 485 (2009) (discussing the Court's manipulation of the privacy standard, especially in the context of the large fraction test in *Casey*).

[48] For an excellent overview of how detrimental this portion of the *Casey* decision can be to rural women, depending on how lower courts apply the large fraction test and the undue burden standard, *see generally* Lisa R. Pruitt, *Toward a Feminist Theory of the Rural*, 2007 Utah L. Rev. 421, 463-483 (2007) (discussing how rural women have been both highlighted and ignored by courts and advocates in the context of abortion laws, and proposing hypothetical scenarios that illustrate the extreme hardship provisions like waiting periods and multiple trips may cause for rural women).

[49] *Casey*, 505 U.S. at 886.

[50] *Id*. at 887.

[51] *See* Martha A. Field, *Abortion Law Today*, 14 J. Legal Med. 3, 16 (1993) ("Indeed, it is not even certain precisely how the very statutory provisions at issue in Casey will fare under the undue burden test. Most of the requirements were upheld based explicitly on the factual findings entered by the district court . . . . [which] had not found a 'substantial burden' largely because that was not yet required and therefore the court was not looking for one."); *see also* Wharton et al., *supra* note 30, at 336 (applying a similar analysis of the logical inconsistencies of the *Casey* court's application of the large fraction test).

provision, the decision may have read, "it is common sense to assume that cost would apply as a restriction amounting to a substantial obstacle for a large fraction of the women for whom cost is a concern."[52] However, the Court chose instead to apply the large fraction test as it saw fit—that is, only to the husband notification provision.[53] The Court did note that, "at some point increased cost could become a substantial obstacle,"[54] and so it is possible for future courts to use the malleability of the undue burden standard combined with the large fraction test in order to strike down such a restriction.[55]

It is worth noting that the plurality considered these restrictions singly—not as a bundle. In no part of the opinion did the Court contemplate whether multiple restrictions could combine to create an undue burden on a woman's right to choose. This may be an unexplored area that could be challenged in future cases; however, the *Casey* court's complete disregard of this reality suggests that the undue burden standard is not likely to be applied in this way.[56] Therefore, despite the onslaught of new restrictions enacted in the last decade,[57] the undue burden standard is not likely to be

---

[52] *See Casey*, 505 U.S. at 892 ("This information [about the spousal consent provision] and the District Court's finding reinforce what common sense would suggest."); *see also id*. at 894 ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."); *id*. at 895 ("[I]n a large fraction of the cases in which § 3209 is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid.").

[53] Although the Court seems to say that the standard is always applicable, stating, "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects….[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, 505 U.S. at 894. This is interesting language considering that the Court did not openly apply the standard to any other provision at issue.

[54] *Id*. at 901.

[55] *See* Jill Hamers, Note, *Reeling in the Outlier: Gonzales v. Carhart and the End of Facial Challenges to Abortion Statutes*, 89 B.U. L. Rev. 1069, 1078-79 (2009) for a similar example of the logical inconsistency of the large fraction test. *See also Casey*, 505 U.S. at 926 (Blackmun, J., concurring in part and dissenting in part) (anticipating that the Court would in fact use the standard to strike down restrictions rather than uphold them).

[56] *See* Wharton et al., *supra* note 30, at 322 n.24 (citing Dawn Johnsen, *The Outer Shell: The Hollowing Out of* Roe v. Wade, Slate, Jan. 25, 2006, http://www.slate.com/id/2134849).

[57] For a discussion of informed consent and fetal pain cases where "stacked" restrictions could be at issue in deciding constitutionality, *see infra* Parts III & IV. *See also* Borgmann, *supra* note 35, at 688-89 (discussing the Court's indifference to combined restrictions and the success of states in fashioning restrictions

applied to combined restrictions. Advocates, however, should continue to argue for its application in this way.

The next major use of the undue burden test was in the Supreme Court opinion striking down a Nebraska ban on so-called "partial birth abortions."[58] In *Stenberg v. Carhart*,[59] the Court said that not only was the ban too broad in that, "it imposes an undue burden on a woman's ability to choose a D & E abortion, thereby unduly burdening the right to choose abortion itself," but it also lacked a health exception[60] as required in both *Casey* and *Roe*.[61] The *Stenberg* court discussed extensively the different abortion procedures implicated in the ban and why doctors chose to perform them. Writing for the majority, Justice Breyer emphasized safety for the woman, but also said that Nebraska could have constructed the statute in such a way that would have permitted it to be upheld —that is, they could have constructed the statute so that it narrowly banned D & X (a type of abortion procedure similar in some respects to D & E), but included a health exception for the woman.[62]

So, while the health exception exclusion triggered invalidation under *Casey*, the majority also ruled that the statute was unconstitutional for a different reason. The Court again used the undue burden test to strike down the law on the basis that the language could be construed to include D & E procedures in the ban.[63] D & E is the most commonly used method for second trimester abortions, and therefore the Court deemed the outlawing of D & E procedures to be an undue burden on a woman's right to choose.[64] *Stenberg* was thus an interesting application of the undue burden test, in that the Court decided that the outlawing of a commonly

---

that cumulatively create substantial obstacles for women).

[58] Anti-choice activists have used this phrase to describe the dilation and extraction ("D & X") procedure, in which the doctor attempts to extract the fetus mostly intact, with as few passes of the doctor's instruments as possible (thereby eliminating various risks to the woman, *see* Stenberg v. Carhart, 530 U.S. 914, 932 (2000)), and where the fetal skull is crushed or brain contents evacuated before full extraction.

[59] *Stenberg*, 530 U.S. at 930 (citations and internal quotations omitted).

[60] *Id*.

[61] *See* Roe v. Wade, 410 U.S. 113, 164-65 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 880 (1992).

[62] *See Stenberg*, 530 U.S. at 937-38.

[63] *Id*. at 943-46.

[64] *Id*. at 945-46.

used abortion procedure was enough to constitute a substantial obstacle to a woman's choice.

However, in a disappointing turn of events, *Stenberg* was effectively overruled seven years after it was decided.[65] In *Gonzales v. Carhart*, the Court upheld the Partial Birth Abortion Ban (PBAB) enacted by Congress in 2003. The PBAB banned D & X procedures, but despite *Stenberg* upholding the need for a health exception when banning any abortion procedure, the PBAB contained no such exception.[66] Moreover, the *Gonzales* court conclusively stated that the burden was on the challenger of the law to prove that it operated as hazardous to a large fraction of the women it affected.[67] Though an as-applied challenge is allowed,[68] it seems unrealistic to ask a woman to endure such a protracted court process, especially where abortion is concerned, in order to obtain a the procedure that would be best for her health.

The *Gonzales* majority emphasized that this procedure was not a necessary one because there were alternatives,[69] despite the fact that three separate district courts held that a D & X is safer for women in at least some circumstances,[70] and despite the fact that both the *Roe* and *Casey* courts required a health exception where necessary to preserve the health of the woman.[71] The Court also found that whether or not PBAB creates significant health risks for women is a "contested factual question."[72] Particularly disturbing is the following line from Kennedy's opinion:

> Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them; and if some

---

[65] *See* Gonzales v. Carhart, 550 U.S. 124 (2007).

[66] *Id*. at 166-67.

[67] *Id*. at 167-68. Naturally, the women this provision affects are the women for whom a D & X procedure is medically recommended. Thus, the challenger would need to prove that a large fraction of these women would be at risk if they had to undergo a D & E (or some other procedure) in place of a D & X. Note that *Gonzales* departs from *Stenberg* in referring to the procedure as "intact D & E."

[68] *Id*. at 168.

[69] *Compare id*. at 164 *with Stenberg*, 530 U.S. at 937 ("The word 'necessary'…cannot refer to an absolute necessity or to absolute proof.").

[70] *Gonzales*, 550 U.S. at 162-63.

[71] *See* cases cited *supra* note 61.

[72] *Gonzales*, 550 U.S. at 161; *see also id*. at 162 ("There is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women.").

> procedures have different risks than others, it does not follow that the State is altogether barred from imposing regulations.[73]

Here, Justice Kennedy delivers several blows to abortion rights. First, he leaves a woman's safety in the hands of legislators. While this might not seem to be a cause for concern, the *Roe, Casey,* and *Stenberg* courts gave much more constitutional protection to women's safety in the context of abortion regulations than many State governments.[74] Second, Justice Kennedy precluded the courts from interfering with abortion legislation in several circumstances. By giving State legislators an incredibly low standard (rationally related to legitimate ends), Justice Kennedy implicitly reduced the constitutionality standard to rational basis review for abortion legislation. Rational basis review is a relatively easy standard to survive. Under rational basis, as long as legislators can prove their abortion legislation is rationally related to legitimate ends, the courts must uphold it. However, some commentators assert that Justice Kennedy may only be applying rational basis with respect to the "purpose" prong of *Casey*.[75] That is, Kennedy may have only been referring to the government's reasoning for acting as it did.

This is not to say that the undue burden analysis is dead, because it is not. Kennedy does include it earlier in the opinion in conjunction with the rational basis language.[76] But where health-related regulations are concerned—and abortion regulations are health-related—this rational basis language may be revived. This

---

[73] *Id*. at 166.

[74] These cases gave more protection due to their inclusion of a health exception to abortion restrictions, where a woman is allowed to get an abortion even after the restricted period providing that her life or health is threatened. One of the more recent examples of State governments passing restrictions that threaten women's health are the so-called "wrongful birth" bills appearing in legislative dockets in more than half a dozen states in 2012. Kathy Lohr, *Should Parents be Able to Sue for 'Wrongful Birth?,'* NPR Health Blog (May 15, 2012, 3:01 AM), http://www.npr.org/blogs/health/2012/05/15/152687638/should-parents-be-able-to-sue-for-wrongful-birth. These bills would ostensibly allow doctors to withhold information about fetal abnormalities from their patients in order to prevent abortions. *Id*. Legislators working on the bills are very open about the fact that they are "pro-life" measures, and yet the health and life of the women involved is effectively ignored.

[75] *See* Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 Tex. L. Rev. 277, 320-21 (2007).

[76] *Gonzales*, 550 U.S. at 158 ("Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.").

again seems like an instance of the Court modifying the standard, or supplementing it with other tests, in order to uphold what they want to uphold.[77]

Moreover, Kennedy classifies the entire decision as a consideration of "marginal safety."[78] As the *Stenberg* opinion notes,[79] the considerations here are not marginal. Though D & E is a safe procedure, when physicians are not allowed to choose the safest procedure for each individual case, the health implications for women are potentially serious.[80] Justice Kennedy's dismissive treatment of these health risks, evidenced not only by his "marginal safety" language, but also by his indication that this is an issue of mere "convenience,"[81] is highly troubling. Though there is no evidence of lower federal courts using this particular part of the *Gonzales* opinion, it has only been five years, and with the current climate surrounding abortion regulations[82] there is reason to fear it may become part of future decisions.

Nevertheless, even if the language from *Gonzales* has not yet affected the way the courts treat abortion restrictions, the case as a whole has certainly emboldened the legislature to enact more restrictive laws around abortion. In 2007, Professor Jack Balkin said,

> [*Gonzales*] might lead states to pass a wide range of new laws under the rubric of "informed consent" that would require doctors to show women the results of ultrasound imaging of the fetus before it is aborted, to describe in gruesome detail how the fetus will be terminated, dismembered and removed, to offer the state's views on the existence of any pain the fetus might feel when it

---

[77] *See* earlier discussion on the husband notification provision, *supra*, where the court creates the "large fraction test" and uses it only on this provision, ostensibly in order to strike it down.

[78] *Gonzales*, 550 U.S. at 166.

[79] *See* Stenberg v. Carhart, 530 U.S. 914, 932-36 (2000) (summarizing medical evidence supporting the Court's finding that the health benefits of a D & X procedure outweigh any potential risks).

[80] *See id*. at 929 (recounting Dr. Carhart's testimony in front of the District Court regarding the variety of circumstances under which a ban on the D & X procedure may have particularly dangerous consequences).

[81] *Gonzales*, 550 U.S. at 166.

[82] *See States Enact a Record Number of Abortion Restrictions in First Half of 2011*, Guttmacher Inst. (July 13, 2011), http://www.guttmacher.org/media/inthenews/2011/07/13/index.html.

> is destroyed; and, in general, ratchet up the emotional anxiety of women who are about to undergo abortions.[83]

As the article demonstrates in Part IV, many of these fears have come to pass.[84]

Lastly, this opinion led the Supreme Court to wade deeper into the morass of morals surrounding abortion politics. Justice Kennedy highlights that the Court is allowed to draw boundaries, "to prevent certain practices that extinguish life and are close to actions that are condemned."[85] If viewed broadly, this could be interpreted as Kennedy indicating that the Court can proscribe abortion completely, since there are many anti-choice activists who conceive of abortion as "close to" murder (while many of them believe it *is* murder[86]). Therefore, from this language, it seems that the Court is giving itself free reign to further restrict access to abortion.

Thus, the undue burden test as applied by the Supreme Court is still a relatively unclear one. Using the husband notification provision and PBAB as clear contrasting examples of its application, the test seems to hinge on Justices' subjective preferences, with the Court supplementing the standard with other tests (large fraction and rational basis) when necessary. This provides muddled guidance to lower courts. Federal courts have been divided in their application of the standard, even when focusing on one particular aspect of regulations.[87]

Therefore, the undue burden standard should be clarified and strengthened, especially regarding the propensity for the accumulation of multiple abortion restrictions to create a substantial obstacle.[88] To do this, advocates should urge courts to analyze whether or not multiple restrictions at once would be an undue burden for a large fraction of the women to whom those multiple restrictions

---

[83] Jack Balkin, *The Big News About* Gonzales v. Carhart*—It's the Informed Consent, Stupid*, BALKINIZATION (Apr. 19, 2007, 2:50 PM), http://balkin.blogspot.com/2007/04/big-news-about-gonzales-v-carhart.html.

[84] *See infra* Part IV.

[85] *Gonzales*, 550 U.S. at 158.

[86] As an example, typing in "abortion is murder" into Google.com gets 2,010,000 hits as of May 17, 2012. On the first page, six of the ten hits are anti-choice ("pro-life") websites. Three are critiques of the anti-choice "abortion is murder" stance. On Youtube.com, the same phrase gets approximately 5,460 hits. All of the videos on the first page (twenty-two) are anti-choice testimonies about why abortion is murder.

[87] *See infra* Part IV (discussing the divided application of the undue burden standard to informed consent provisions).

[88] *See* Borgmann, *supra* note 35, at 688-89 (discussing the Court's indifference to combined restrictions, and the success of states in fashioning restrictions that cumulatively create substantial obstacles for women).

apply. Further, the "purpose" prong of the undue burden standard should not be ignored,[89] in light of evidence that legislatures are passing laws with the clear purpose[90] of preventing women from obtaining abortions.[91] This is in line with *Casey's* declaration that, "the means chosen by the State to further the interest in potential

---

[89] *See supra* note 3.

[90] While many news outlets and commentators within the last few years (and beyond) include abortion restrictions under the banner of a "war on women," the clearest example of this in the abortion context happened in Mississippi in May 2012. Mississippi governor Phil Bryant signed a law, H.B. 1390, that requires anyone who performs an abortion to be a licensed obstetrician-gynecologist with admitting privileges at a local hospital. H.B. 1390, Reg. Sess. (Miss. 2012), 2012, available at http://billstatus.ls.state.ms.us/documents/2012/pdf/HB/1300-1399/HB1390SG.pdf. Upon signing the law, Bryant said, "Today you see the first step in a movement, I believe, to do what we campaigned on—to say we're going to try to end abortion in Mississippi." Emily Wagner Pettus, *Miss. Gov. Signs New Limits on Abortion Providers*, NECN.com (April 16, 2012, 12:06 PM), http://www.necn.com/04/16/12/Miss-gov-signing-new-abortion-regulation/landing.html?&apID=7b1c71f1fb8e4d5b95a235234518002f. About one month later, a representative instrumental in the bill's passage said the following,

> We have literally stopped abortion in the state of Mississippi. Three blocks from the Capitol sits the only abortion clinic in the state of Mississippi. A bill was drafted. It said, if you would perform an abortion in the state of Mississippi, you must be a certified OB/GYN and you must have admitting privileges to a hospital. Anybody here in the medical field knows how hard it is to get admitting privileges to a hospital….It's going to be challenged, of course, in the Supreme Court and all—but literally, we stopped abortion in the state of Mississippi, legally, without having to—*Roe vs. Wade*. So we've done that. I was proud of it. The governor signed it into law. And of course, there you have the other side. They're like, "Well, the poor pitiful women that can't afford to go out of state are just going to start doing them at home with a coat hanger." That's what we've heard over and over and over. But hey, you have to have moral values. You have to start somewhere, and that's what we've decided to do. This became law and the governor signed it, and I think for one time, we were first in the nation in the state of Mississippi.

Kirsten West Sivali, *Mississippi Rep on Abortion Being Illegal: "Let Women Use Coat Hangers,"* NewsOne (May 15, 2012), http://newsone.com/2015625/illegal-abortion-mississippi/.

[91] *But see* Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 Colum. J. Gender & L. 111, 126 n.85 (2008) (explaining that it is not easy to determine where the Court will fall on legislative purpose inquiries, which are often "vexing" and "controversial.").

life must be calculated to inform the woman's free choice, not hinder it."[92]

IV. Informed Consent

Though many types of abortion restrictions exist in state law,[93] one of the most widely used, after parental consent and waiting periods, is the informed consent provision first upheld in *Casey.*[94] The basic concept behind informed consent restrictions is that, to protect the woman and the potential life she carries, the woman should be as informed as possible about the procedure and about alternative options to an abortion.[95] Though regulations vary as to how much and about what the woman should be informed, fetal pain laws and pre-abortion ultrasounds are the most commonly found informed consent provisions in abortion legislation.[96]

Informed consent was first used in the verbal explanation of the nature of the procedure, risks/alternatives, the gestational age

---

[92] *See Casey*, 505 U.S. at 822. *See also* Tobin, *supra* note 91, at 126 (explaining that this elucidation of the purpose prong is in line with a rational basis review standard as articulated by the Eighth Circuit when it said, "[w]here a requirement serves no purpose other than to make abortions more difficult, it strikes at the heart of a protected right, and is an unconstitutional burden on that right." (quoting Planned Parenthood of Greater Iowa, Inc. v. Atchison, 126 F.3d 1042, 1049 (8th Cir. 1997)) (emphasis omitted)).

[93] *See State Policies in Brief: An Overview of Abortion Laws*, Guttmacher Inst. (Oct. 1, 2012), http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf [hereinafter *Overview of Abortion Laws*].

[94] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992). *See also id*. at 872 ("Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself."). The Court then quotes Webster v. Reprod. Health Servs., 492 U.S. 490, 511 (1989) in saying that it is constitutional for a state to express a preference for childbirth over abortion.

[95] *Id*. at 877. This differs from the basic medical definition of informed consent, which refers to medical alternatives rather than non-medical alternatives to a medical procedure.

[96] *See* Overview of Abortion Laws *supra* note 93 (five states require information on the scientifically disputed link between abortion and breast cancer, eight states require information on the potential long-term mental health consequences of an abortion, and eleven states require information about fetal

of the fetus, the existence of pamphlets bearing further information, the state assistance available to her in carrying her child to term, and the father's obligations.[97] More recently, informed consent has been used to justify mandatory ultrasounds and pamphlets about "fetal pain."[98]

It is important to note that informed consent in the abortion context is different from informed consent as it is used in other medical contexts. The difference exposes informed consent provisions as patronizing laws[99] that treat women who choose to abort as

---

pain. Further, twelve states require information on the availability of an ultrasound. *See State Policies in Brief: Requirements for Ultrasound*, GUTTMACHER INST. (Oct. 1, 2012), http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf [hereinafter *Requirements for Ultrasound*]. This is separate from the twenty-one states that regulate ultrasounds in one of the four ways mentioned in section IV(A), *infra*, though all ultrasound requirements are grouped under "informed consent," since that is their ultimate stated purpose. *See id*.

[97] *See Casey*, 505 U.S. at 902-903 (appendix to majority opinion).

[98] *See infra* Part IV(B) on fetal pain legislation.

[99] Consider the following text from the Wisconsin Statute on Voluntary and Informed Consent for Abortions:

> (1) Legislative findings and intent. (a) The legislature finds that:
> 1. Many women now seek or are encouraged to undergo elective abortions without full knowledge of the medical and psychological risks of abortion, development of the unborn child or of alternatives to abortion. An abortion decision is often made under stressful circumstances.
> 2. The knowledgeable exercise of a woman's decision to have an elective abortion depends on the extent to which the woman receives sufficient information to make a voluntary and informed choice between 2 alternatives of great consequence: carrying a child to birth or undergoing an abortion.
> 3. The U.S. supreme court has 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." Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 U.S. 2791, 2823 (1992).
> 4. It is essential to the psychological and physical well-being of a woman considering an elective abortion that she receive complete and accurate information on all options available to her in dealing with her pregnancy.
> 5. The vast majority of elective abortions in this state are performed in clinics that are devoted solely to providing abortions and family planning services. Women who seek elective abortions at these facilities normally do not have a prior patient-physician relationship with the physician who is to perform or induce the abortion, normally do not return to the facility for post-operative care and normally do not continue a patient-physician relation-

> ship with the physician who performed or induced the abortion. In most instances, the woman's only actual contact with the physician occurs simultaneously with the abortion procedure, with little opportunity to receive personal counseling by the physician concerning her decision. Because of this, certain safeguards are necessary to protect a woman's right to know.
> 6. A reasonable waiting period is critical to ensure that a woman has the fullest opportunity to give her voluntary and informed consent before she elects to undergo an abortion.
> (b) It is the intent of the legislature in enacting this section to further the important and compelling state interests in all of the following:
> 1. Protecting the life and health of the woman subject to an elective abortion and, to the extent constitutionally permissible, the life of her unborn child.
> 2. Fostering the development of standards of professional conduct in the practice of abortion.
> 3. Ensuring that prior to the performance or inducement of an elective abortion, the woman considering an elective abortion receive personal counseling by the physician and be given a full range of information regarding her pregnancy, her unborn child, the abortion, the medical and psychological risks of abortion and available alternatives to the abortion.
> 4. Ensuring that a woman who decides to have an elective abortion gives her voluntary and informed consent to the abortion procedure.

WIS. STAT. ANN. § 253.10(1) (West 2012), *amended* by 2011 Wis. Legis. Serv. 217 (West).

It is routine for state legislatures to frame these acts as a "woman's right." In fact, in many instances the act itself is named something along the lines of "A Woman's Right to Know Act." The language used in the acts comes right out and says that women often seek or are "encouraged" to seek abortions without knowing the full "medical and emotional" consequences of their decision, implying that women do not really know what the outcome of an abortion might be. Having worked on a hotline about options for unplanned pregnancy, I can say with confidence that many women agonize over the decision of whether or not to terminate. While unplanned pregnancy is certainly stressful, it is reminiscent of the "hysteria" argument to imply that women cannot make rational and informed decisions under stress. *See* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1033 n.169 (2007) (citing early antiabortion arguments that appealed to the notion of women as hysterical). Moreover, the framing of the argument in the statute above does not support its conclusions, but rather simply states them as though they are undisputed facts. This is especially true regarding the waiting period provision, § 253.10 (1)(a)(6). This is why I and other commentators characterize these statutes as patronizing. *Cf.* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1715 (2008) (discussing what Siegel dubs the "woman-protective antiabortion argument (WPAA), a political discourse that taps longstanding traditions of gender paternalism and is designed to persuade voters who ambivalently support abortion rights that they can help women by

less capable of understanding the potential outcomes than patients in other medical contexts.[100]

Originally formulated in common law, informed consent is largely related to notions of bodily autonomy and self-determination, and its first articulation is widely attributed to Justice Cardozo's *Schloendorff v. Society of New York Hospitals* opinion: "Every 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 assault."[101] As articulated in a later decision, informed consent must be tempered by medical discretion, and with concern for the patient's emotional wellbeing.[102] However, commentators and courts also note that to be truly informed, patients must be aware of the risks, benefits, and alternatives to a procedure.[103] Therefore, it would seem that under the traditional definition of informed consent, risks, benefits, and alternatives could be communicated at the discretion of the physician, which would include the physician's estimation of the balance between necessary information and unnecessary information that would be harmful to the patient's emotional state.

However, in abortion jurisprudence, despite earlier decisions that largely adhered to the traditional medical informed consent standard discussed above,[104] *Casey* and post-*Casey* decisions on abortion have formulated a different sort of informed consent standard premised on the state's interest in preserving life. In fact, *Casey* notes that it is explicitly departing from precedent by allowing the state to mandate informed consent provisions even when these provisions are clearly biased against abortion.[105] In discussing previous cases, the *Casey* court declared that to the extent that those cases held unconstitutional "truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus,

---

using law to restrict women's access to abortion.").

[100] *See* Manian, *supra* note 34, at 235.

[101] *Id*. (quoting Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (1914)).

[102] *See* Salgo v. Leland Stanford Jr. Univ. Bd. of Trs., 317 P.2d 170, 181 (Cal. Ct. App. 1957).

[103] *See* Manian, *supra* note 34, at 237. For a thorough breakdown of the history of Court decisions about informed consent, *see id*. at 236-239.

[104] *See id*. at 244-46. The 1986 Supreme Court even took the state to task for imposing its views on a woman and inserting itself into the physician-woman dialogue under the guise of an informed consent provision. See *id*. at 246, n. 148 (citing Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 762-63 (1986)).

[105] *See* Manian, *supra* note 34, at 250.

those cases go too far, are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled."[106] The Court goes on to say,

> It cannot be questioned that psychological well-being is a facet of health. Nor can it 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 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 State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.[107]

Therefore, these laws are ostensibly both designed and justified by the Court under the premise that an ill-considered choice to terminate a pregnancy can cause psychological damage to a woman.[108] These restrictions are also upheld under the premise that they protect the state's interest in potential life since, theoretically, some women may choose not to have an abortion after being informed more fully about the "consequences" of the procedure.[109] The standard, then, is that states may enact restrictions that are designed to ensure that "so grave a choice is well informed,"[110] so long as these restrictions are "truthful, and not misleading."[111]

The next section analyzes how federal courts are treating informed consent provisions, with a focus on the two most common informed consent provisions—pre-abortion ultrasounds and information concerning fetal pain. Ostensibly because challenges under the undue burden standard would not be legally sufficient to enjoin these specific informed consent provisions, activists have recently begun challenging some informed consent laws under First Amendment compelled speech precedent—sometimes including an undue

---

[106] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992).

[107] *Id*.

[108] *See* Gonzales v. Carhart, 550 U.S. 124, 159-160 (2007) for Kennedy's extensive litany on the potential of psychological pain due to lack of knowledge about the abortion procedure; *see also* Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, *supra* note 99, at 1715.

[109] *Casey*, 505 U.S. at 873.

[110] *Gonzales*, 550 U.S. at 159.

[111] *Casey*, 505 U.S. at 882.

burden argument and sometimes not.[112] This tactic, while a creative use of advocacy, should also be combined with challenges under the undue burden standard, with an emphasis on the purpose prong and a more consistent application of the large fraction test.

A. *Ultrasound Laws*

Ultrasound-focused informed consent laws can be grouped into four categories.[113] Group A legislation does not require the provider to perform an ultrasound, but it gives women the option to have an ultrasound and subsequently view an ultrasound image,[114] In Group B legislation, the provider is mandated to perform an ultrasound and offer the woman a chance to view the ultrasound.[115] Group C legislation mandates an ultrasound and then requires the physician to display the ultrasound image on a screen where the patient can see it (though she has the option of whether or not to look at it).[116] Group D legislation is similar to Group C with the added proviso that the provider must describe aloud what he or she

[112] *E.g.*, Stuart v. Huff, 834 F. Supp. 2d 424 (M.D.N.C. 2011); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570 (5th Cir. 2012); Planned Parenthood of the Heartland v. Heineman, 724 F. Supp. 2d 1025 (D. Neb. 2010); Eubanks v. Schmidt, 126 F. Supp. 2d 451 (W.D. Ky. 2000).

[113] I first encountered the breakdown of ultrasound laws into three groups in Godzeno's article, *supra* note 11, at 303-21. Godzeno's analysis adds clarity to a confusing set of restrictions. As such, I utilize his breakdown here with the addition of Group D legislation.

[114] *Id*. at 305.

[115] *Id*. at 310.

[116] *See id*. at 316-17 (for our purposes, I am breaking up Godzeno's Group C into two separate groups).

sees on the ultrasound screen.[117] These are typically referred to as

[117] See the following text from Texas's voluntary and informed consent statute:

> (a) Consent to an abortion is voluntary and informed only if:
> (1) the physician who is to perform the abortion informs the pregnant woman on whom the abortion is to be performed of:
> (A) the physician's name;
> (B) the particular medical risks associated with the particular abortion procedure to be employed, including, when medically accurate:
> (i) the risks of infection and hemorrhage;
> (ii) the potential danger to a subsequent pregnancy and of infertility; and
> (iii) the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer;
> (C) the probable gestational age of the unborn child at the time the abortion is to be performed; and
> (D) the medical risks associated with carrying the child to term;
> (2) the physician who is to perform the abortion or the physician's agent informs the pregnant woman that:
> (A) medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;
> (B) the father is liable for assistance in the support of the child without regard to whether the father has offered to pay for the abortion; and
> (C) public and private agencies provide pregnancy prevention counseling and medical referrals for obtaining pregnancy prevention medications or devices, including emergency contraception for victims of rape or incest;
> (3) the physician who is to perform the abortion or the physician's agent:
> (A) provides the pregnant woman with the printed materials described by Section 171.014; and
> (B) informs the pregnant woman that those materials:
> (i) have been provided by the Department of State Health Services;
> (ii) are accessible on an Internet website sponsored by the department;
> (iii) describe the unborn child and list agencies that offer alternatives to abortion; and
> (iv) include a list of agencies that offer sonogram services at no cost to the pregnant woman;
> (4) before any sedative or anesthesia is administered to the pregnant woman and at least 24 hours before the abortion or at least two hours before the abortion if the pregnant woman waives this requirement by certifying that she currently lives 100 miles or more from the nearest abortion provider that is a facility licensed under Chapter 245 or a facility that performs more than 50 abortions in any 12-month period:
> (A) the physician who is to perform the abortion or an agent of

the physician who is also a sonographer certified by a national registry of medical sonographers performs a sonogram on the pregnant woman on whom the abortion is to be performed;
(B) the physician who is to perform the abortion displays the sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them;
(C) 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; and
(D) the physician who is to perform the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers makes audible the heart auscultation for the pregnant woman to hear, if present, in a quality consistent with current medical practice and provides, in a manner understandable to a layperson, a simultaneous verbal explanation of the heart auscultation;
(5) before receiving a sonogram under Subdivision (4)(A) and before the abortion is performed and before any sedative or anesthesia is administered, the pregnant woman completes and certifies with her signature an election form that states as follows:
"ABORTION AND SONOGRAM ELECTION
(1) THE INFORMATION AND PRINTED MATERIALS DESCRIBED BY SECTIONS 171.012(A)(1)-(3), TEXAS HEALTH AND SAFETY CODE, HAVE BEEN PROVIDED AND EXPLAINED TO ME.
(2) I UNDERSTAND THE NATURE AND CONSEQUENCES OF AN ABORTION.
(3) TEXAS LAW REQUIRES THAT I RECEIVE A SONOGRAM PRIOR TO RECEIVING AN ABORTION.
(4) I UNDERSTAND THAT I HAVE THE OPTION TO VIEW THE SONOGRAM IMAGES.
(5) I UNDERSTAND THAT I HAVE THE OPTION TO HEAR THE HEARTBEAT.
(6) I UNDERSTAND THAT I AM REQUIRED BY LAW TO HEAR AN EXPLANATION OF THE SONOGRAM IMAGES UNLESS I CERTIFY IN WRITING TO ONE OF THE FOLLOWING:
_____ I AM PREGNANT AS A RESULT OF A SEXUAL ASSAULT, INCEST, OR OTHER VIOLATION OF THE TEXAS PENAL CODE THAT HAS BEEN REPORTED TO LAW ENFORCEMENT AUTHORITIES OR THAT HAS NOT BEEN REPORTED BECAUSE I REASONABLY BELIEVE THAT DOING SO WOULD PUT ME AT RISK OF RETALIATION RESULTING IN SERIOUS BODILY INJURY.
_____ I AM A MINOR AND OBTAINING AN ABORTION IN ACCORDANCE WITH JUDICIAL BYPASS PROCEDURES UNDER CHAPTER 33, TEXAS FAMILY CODE.

_____ MY FETUS HAS AN IRREVERSIBLE MEDICAL CONDITION OR ABNORMALITY, AS IDENTIFIED BY RELIABLE DIAGNOSTIC PROCEDURES AND DOCUMENTED IN MY MEDICAL FILE.
(7) I AM MAKING THIS ELECTION OF MY OWN FREE WILL AND WITHOUT COERCION.
(8) FOR A WOMAN WHO LIVES 100 MILES OR MORE FROM THE NEAREST ABORTION PROVIDER THAT IS A FACILITY LICENSED UNDER CHAPTER 245 OR A FACILITY THAT PERFORMS MORE THAN 50 ABORTIONS IN ANY 12-MONTH PERIOD ONLY:
I CERTIFY THAT, BECAUSE I CURRENTLY LIVE 100 MILES OR MORE FROM THE NEAREST ABORTION PROVIDER THAT IS A FACILITY LICENSED UNDER CHAPTER 245 OR A FACILITY THAT PERFORMS MORE THAN 50 ABORTIONS IN ANY 12-MONTH PERIOD, I WAIVE THE REQUIREMENT TO WAIT 24 HOURS AFTER THE SONOGRAM IS PERFORMED BEFORE RECEIVING THE ABORTION PROCEDURE. MY PLACE OF RESIDENCE IS: _____.

_____ | _____

SIGNATURE DATE

(6) before the abortion is performed, the physician who is to perform the abortion receives a copy of the signed, written certification required by Subdivision (5); and
(7) the pregnant woman is provided the name of each person who provides or explains the information required under this subsection .
(a-1) During a visit made to a facility to fulfill the requirements of Subsection (a), the facility and any person at the facility may not accept any form of payment, deposit, or exchange or make any financial agreement for an abortion or abortion-related services other than for payment of a service required by Subsection (a). The amount charged for a service required by Subsection (a) may not exceed the reimbursement rate established for the service by the Health and Human Services Commission for statewide medical reimbursement programs.
(b) The information required to be provided under Subsections (a)(1) and (2) may not be provided by audio or video recording and must be provided at least 24 hours before the abortion is to be performed:
(1) orally and in person in a private and confidential setting if the pregnant woman currently lives less than 100 miles from the nearest abortion provider that is a facility licensed under Chapter 245 or a facility that performs more than 50 abortions in any 12-month period; or
(2) orally by telephone or in person in a private and confidential setting if the pregnant woman certifies that the woman currently lives 100 miles or more from the nearest abortion provider that

"speech and display" requirements.[118]

Pro-choice groups argue that since ultrasounds are not typically medically necessary, these ultrasound requirements are government attempts to "personify the fetus and dissuade a woman from obtaining an abortion."[119] There are no reliable statistics as to whether this tactic actually works, but "[a]necdotal evidence from abortion providers suggests mandated disclosures have little if any effect on women's ultimate decisions."[120] In fact, many women have serious misconceptions about potential consequences from abortion and still elect the procedure.[121] This is not surprising

---

> is a facility licensed under Chapter 245 or a facility that performs more than 50 abortions in any 12-month period .
> (c) When providing the information under Subsection (a)(3) , the physician or the physician's agent must provide the pregnant woman with the address of the Internet website on which the printed materials described by Section 171.014 may be viewed as required by Section 171.014(e).
> (d) The information provided to the woman under Subsection (a)(2)(B) must include, based on information available from the Office of the Attorney General and the United States Department of Health and Human Services Office of Child Support Enforcement for the three-year period preceding the publication of the information, information regarding the statistical likelihood of collecting child support.
> (e) The department is not required to republish informational materials described by Subsection (a)(2)(B) because of a change in information described by Subsection (d) unless the statistical information in the materials changes by five percent or more.

Tex. Health & Safety Code Ann. § 171.012(a) - § 171.012(e) (West 2012). This statute, in Texas, was the only so-called "speech and display" statute to be upheld by a Circuit Court. *See Lakey*, 667 F.3d at 584; Scott W. Gaylord & Thomas J. Molony, Casey *and a Woman's Right to Know: Ultrasounds, Informed Consent, and the First Amendment* 1 (Elon Univ. Sch. of Law, Working Paper No. 2012-02, 2012), *available at* http://ssrn.com/abstract=2017041. Note: This article will not be exploring the *type* of ultrasound required by law. Recently, three states (Texas, Oklahoma, and Virginia) have attempted to pass legislation that requires a transvaginal ultrasound rather than the more common abdominal ultrasound. This type of ultrasound is normally used by physicians prior to eight weeks of pregnancy or when there is a specific issue that needs more clarity, as some doctors feel it is easier to see when a transvaginal ultrasound is used. Pro-choice activists have come out against transvaginal ultrasounds, noting implications for survivors of assault (though ostensibly women may opt out if they say they have been assaulted).

[118] Gaylord & Molony, *supra* note 117, at 3.

[119] Requirements for Ultrasound, *supra* note 96.

[120] Tobin, *supra* note 91, at 124.

[121] *Id*. at 125.

considering the pre-*Roe* evidence of women braving highly dangerous conditions to obtain an abortion.[122]

Informed consent provisions in general have been challenged many times and some of these cases also involved First Amendment challenges to physician speech.[123] The courts differ in their manner of addressing First Amendment challenges in the context of abortion regulations, leaving a split in the Circuits on how to address informed consent provisions. Only one recent case about informed consent procedures has utilized the undue burden standard—and even then, the standard was not fully analyzed.[124]

1. The Ultrasound Cases

The first case to address ultrasound requirements was *Karlin v. Foust* in 1996.[125] In *Karlin*, plaintiffs challenged Wisconsin's abortion informed consent statute on three grounds: (1) certain provisions were unconstitutionally vague; (2) the statute violated the Due Process Clause of the Fourteenth Amendment because it imposed an "undue burden" on a woman's right to an abortion; and (3) two First Amendment challenges.[126] Specifically, the plaintiffs argued that the provision requiring the physician to inform the patient that fetal auscultation[127] and imaging services (via ultrasound) were available[128] imposed an undue burden on a woman's

[122] *Id*.

[123] *See supra* note 112.

[124] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 574-77 (5th Cir. 2012) (see Part IV(A)(1), *infra*, for a full discussion of the *Lakey* court's use of the undue burden standard).

[125] Karlin v. Foust, 975 F. Supp 1177 (W.D.Wisc. 1997).

[126] *Id*. at 1201. The District Court dismissed the First Amendment challenges simply by noting that, "The Supreme Court resolved that First Amendment question against physicians in *Casey* and it cannot be reopened here." *Id*. at 1226.

[127] Auscultation is medical terminology that refers to listening to sounds within the body—specifically, the heart, lungs, and blood. *See Auscultation*, Howard Hughes Med. Inst., http://www.hhmi.org/biointeractive/vlabs/cardiology/content/dtg/ausc/ausc.html (last visited Oct. 28, 2012) (defining auscultation and demonstrating different types of aortic phenomena with sound files). Here, it specifically refers to the fetal heartbeat. *See Karlin*, 975 F. Supp. at 1218-19.

[128] See the following portion of the text of the Wisconsin statute, including the requirement in § 253.10(3)(c)(1)(g) that a fetal ultrasound be available.

> (3)(c) *Informed consent*. Except if a medical emergency exists, a woman›s consent to an abortion is informed only if all of the following first take place:
>
> 1. Except as provided in sub. (3m), at least 24 hours before the

abortion is to be performed or induced, the physician who is to perform or induce the abortion or any other qualified physician has, in person, orally informed the woman of all of the following:
a. Whether or not, according to the reasonable medical judgment of the physician, the woman is pregnant.
b. The probable gestational age of the unborn child at the time that the information is provided. The physician or other qualified physician shall also provide this information to the woman in writing at this time.
c. The particular medical risks, if any, associated with the woman's pregnancy.
d. The probable anatomical and physiological characteristics of the woman's unborn child at the time the information is given.
e. The details of the medical or surgical method that would be used in performing or inducing the abortion.
f. The medical risks associated with the particular abortion procedure that would be used, including the risks of infection, psychological trauma, hemorrhage, endometritis, perforated uterus, incomplete abortion, failed abortion, danger to subsequent pregnancies and infertility.
g. That fetal ultrasound imaging and auscultation of fetal heart tone services are available that enable a pregnant woman to view the image or hear the heartbeat of her unborn child. In so informing the woman and describing these services, the physician shall advise the woman as to how she may obtain these services if she desires to do so.
h. The recommended general medical instructions for the woman to follow after an abortion to enhance her safe recovery and the name and telephone number of a physician to call if complications arise after the abortion.
hm. If the abortion is induced by an abortion-inducing drug, that the woman must return to the abortion facility for a follow-up visit 12 to 18 days after the use of an abortion-inducing drug to confirm the termination of the pregnancy and evaluate the woman's medical condition.
i. If, in the reasonable medical judgment of the physician, the woman's unborn child has reached viability, that the physician who is to perform or induce the abortion is required to take all steps necessary under s. 940.15 to preserve and maintain the life and health of the child.
j. Any other information that a reasonable patient would consider material and relevant to a decision of whether or not to carry a child to birth or to undergo an abortion.
jm. That the woman has a right to refuse to consent to an abortion, that her consent is not voluntary if anyone is coercing her to consent to an abortion against her will, and that it is unlawful for the physician to perform or induce the abortion without her voluntary consent.
k. That the woman may withdraw her consent to have an abortion at any time before the abortion is performed or induced.

right to an abortion because it violated *Casey's* "truthful and not misleading" requirement.[129] The District Court found the plaintiffs' argument persuasive and reasoned that because a fetal heartbeat was not actually available until at least the twelfth week of pregnancy, requiring a physician to tell the patient that certain procedures were available when they were not, would be "an unconstitutional undue burden on a woman's right to choose."[130] Nevertheless, the District Court chose to sever this provision (and others it found to be unconstitutional) from the statute, while maintaining the rest of the law.[131]

On appeal, plaintiffs argued that the informed consent provision was unconstitutionally vague, which would have a chilling effect on physicians' willingness to perform abortions, thus imposing an undue burden on a woman's right to choose.[132] The Court of Appeals for the Seventh Circuit dismissed plaintiffs' vagueness challenge.[133] The court found that the law was not vague and since plaintiffs did not offer any additional arguments under the undue burden standard, the court concluded that the statute did not impose an undue burden.[134]

Defendant also appealed the District Court's severance of the auscultation provision of the statute. The Seventh Circuit performed its own undue burden analysis concerning the provision, framing the requirement such that under *Casey*, an informed consent provision must be "designed to further a legitimate state interest" and be "truthful and not misleading."[135] Accordingly, if the informed consent provision did not meet this standard, it would be an "unconstitutional burden on a woman's right to choose."[136] Therefore, the Seventh Circuit framed the "truthful and not misleading" standard as a central inquiry under the undue burden standard where informed consent provisions are concerned.

Nevertheless, unlike the District Court, the Seventh Circuit found that the provision did not impose an undue burden and was thus constitutional. The court determined that the statute provided the physician with discretion regarding whether to fully disclose the

---

Wis. Stat. Ann. § 253.10(3)(c)(1)(a-k) (West 2012), *amended by* 2011 Wis. Legis. Serv. 217 (West).

[129] *Karlin*, 975 F. Supp. at 1218.

[130] *Id*. at 1219.

[131] *Id*.

[132] Karlin v. Foust, 188 F.3d 446, 471-72 (7th Cir. 1999).

[133] *Id*. at 472, n.12.

[134] *Id*.

[135] *Id*. at 491.

[136] *Id*.

existence or non-existence of the heartbeat based on her medical knowledge.[137] Thus, the Seventh Circuit held that the provision was "truthful and not misleading," and therefore constitutional. Interestingly, the Court completely ignored the large fraction test when analyzing the informed consent provision, even though it used it in its analysis of the statute's waiting period provision.[138]

However, since the provision at issue here is not mandatory,[139] using this Article's earlier iteration of a strengthened undue burden standard would not have saved it. That is to say, a voluntary provision cannot be said to place an undue burden on a "large fraction" of the women it affects. The purpose prong analysis similarly would not have been effective here because again, the provision is voluntary. It is for forced provisions, discussed in Part IV(A)(2) below, that this reinvigorated standard will be useful.

Ultrasound provisions were not challenged again at the federal level until 2010, in *Hope Medical Group for Women v. Caldwell*.[140] In *Hope Medical,* a Fifth Circuit federal judge issued a temporary restraining order against a law that would force women to undergo and review an ultrasound before they were allowed to receive an abortion.[141] Several new laws with ultrasound requirements were introduced in 2010-2011.[142] These new laws prompted the challenge in *Hope Medical*, in addition to two other court cases: *Stuart v. Huff*

---

[137] The court determined that the statue provided the physician with discretion regarding the content of the discussion about available services depending on the length of pregnancy, and thus whether to disclose the existence or non-existence of the heartbeat based on the physician's medical knowledge.

[138] *Compare id*. at 483-88 *with id*. at 491-93.

[139] *See* Wisc. Stat. Ann. § 253.10, *amended by* 2011-2012 Wisc. Legis. Serv. Act 217 (2011 S.B. § 306) (West 2012):

> (c) *Informed consent*. Except if a medical emergency exists, a woman›s consent to an abortion is informed only if all of the following first take place:
>
> g. That fetal ultrasound imaging and auscultation of fetal heart tone services *are available* that enable a pregnant woman to view the image or hear the heartbeat of her unborn child. In so informing the woman and describing these services, the physician shall advise the woman as to how she may obtain these services *if she desires to do so*. (Emphasis added).

[140] *Clinics Win Injunction Against Louisiana Abortion Law:* Hope Med. Group for Women v. Caldwell, 18 No. 4 Westlaw J. Health Law 1 (2010).

[141] *Id*.

[142] *See Laws Affecting Reproductive Health and Rights: 2011 State Policy Review*, Guttmacher Inst., http://www.guttmacher.org/statecenter/updates/2011/statetrends42011.html (last visited Oct. 28, 2012) [hereinafter *2011 State Policy Review*].

in a North Carolina District Court, and *Texas Medical Providers Performing Abortion Services v. Lakey*, in the Fifth Circuit.

In *Stuart v. Huff,* a North Carolina District Court struck down a statute requiring a physician to perform an ultrasound at least four hours in advance of the abortion and make the images visible when describing them.[143] This is a Group D, or "speech and display" law.[144] The law was challenged under the First Amendment.[145] In their complaint, plaintiffs argued that it "compell[ed] unwilling speakers to deliver the state's message discouraging abortion."[146] Plaintiffs also argued that the law imposed an undue burden on a woman's liberty interests.[147] The defendants believed the challenge should be analyzed not under the First Amendment, but under the undue burden standard used in *Casey*.[148] The fact that supporters of the law were arguing in favor of an undue burden analysis (and against a First Amendment analysis) is a testament to the potential strength of a First Amendment challenge and indicative of the weakness of the undue burden standard.

The *Stuart* court responded to the defendants' argument by asserting that *Casey* did not combine the undue burden/liberty interest analysis with the First Amendment analysis.[149] The court noted that the undue burden standard in *Casey* was only used to evaluate the Due Process Clause challenge and that the First Amendment discussion was separate.[150] The court refused to assume that the Supreme Court in *Casey* meant to disregard the importance of First Amendment law when speech concerned abortion. Therefore, it declined to apply the undue burden analysis to the speech and display requirement.[151] Instead, the court analyzed the statute's speech

---

[143] Stuart v. Huff, 834 F. Supp. 2d 424 (M.D.N.C. 2011). The Defendants argued that women may avert their eyes and use a "technological device" to avoid hearing the description, but since they have to sign a form afterward declaring that the speech and display requirements were met, it is unclear how they would be able to tell that the women complied with the law. *Id*. at 433. *See also* N.C. GEN. STAT. ANN. § 90-21.85(a), (b) (West 2012) for the text of the statute in controversy in *Stuart*.

[144] This is terminology used to describe these laws in a succinct manner.

[145] *Stuart*, 834 F. Supp. 2d at 428.

[146] *Id*.

[147] *Id*. at 427, n.1.

[148] *Id*. at 430.

[149] *Id*.

[150] *Id*.

[151] *Id*. The court further notes that the legislation in *Casey* that most closely resembles the legislation at issue has to do with the physician informing the woman of the availability of printed materials published by the State. *Id*. at 430, n.6. The Court notes that, "[w]hat the state can say itself is very different from

and display requirement under strict scrutiny. The court found that it failed to pass strict scrutiny and struck down that portion of the Act.[152] It is unclear, however, if this means that a doctor's First Amendment right trumps a pregnant women's Fourteenth Amendment Due Process right, considering how much stronger a strict scrutiny analysis appears to be in comparison to an undue burden analysis.

However, not all courts have chosen to apply a First Amendment strict scrutiny analysis to informed consent provisions as the court did in *Stuart*. In *Texas Medical Providers Performing Abortion Services v. Lakey,* the Fifth Circuit Court of Appeals chose to analyze the state's "speech and display law" using an undue burden standard.[153] The law has similar informed consent provisions to the legislation at issue in *Stuart*, with the exception that after the ultrasound the physician is normally required to wait 24-hours before performing the abortion.[154] Nonetheless, using an undue burden analysis the court vacated the district court's grant of a preliminary injunction.[155]

The court articulated a clear rule for informed consent provisions as a whole, stating that, "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."[156] Notably, this is different from the *Karlin* court's framing of the truthful and misleading standard as central to the undue burden analysis itself. However, since the appellees did not assert that the provision at issue in *Lakey* was an undue burden, the court did not analyze the provision under the undue burden standard, but merely assumed that the provision did not constitute an undue burden.[157]

Therefore, though the court used the term, "undue burden," it did not actually perform that analysis and instead declared that if the provision at issue was not an undue burden and if it was truthful and non-misleading, a First Amendment claim "trump[ed] the balance *Casey* struck between women's rights and the states'

what the state can compel individuals to say." *Id*.

[152] *Id*. at 432-33.

[153] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570 (5th Cir. 2012).

[154] *See* Tex. Health & Safety Code Ann. § 171.012(a)(4) (West 2012).

[155] *Lakey*, 667 F.3d at 584.

[156] *Id*. at 576. The Court further declared that these laws do not fall under compelled ideological speech that would trigger First Amendment strict scrutiny. *Id*.

[157] *See id*. at 577.

prerogatives."[158] The court went on to hold that the speech and display requirements are the "epitome of truthful, non-misleading information," and are relevant to informed consent.[159] The court never gave an explanation for why it declined to actually analyze the statute under the undue burden standard when it framed this standard as a preliminary requirement. Therefore, as an example of the application of the strengthened undue burden standard, the next section is a hypothetical exploration of its application to the law at issue in *Lakey*.

2. Application of the Strengthened Undue Burden Standard to the *Lakey* Statute

If the *Lakey* court had analyzed this provision under the strengthened undue burden standard, the ultrasound issue may have been framed as: is the requirement to have an ultrasound, and hear a description of the ultrasound images, truthful and not misleading? If so, does this requirement have the purpose or effect of creating a substantial obstacle for a large fraction of the woman to whom this provision applies? If not, does the ultrasound provision, as combined with other existing restrictions on abortion in Texas law, create a substantial obstacle for a large fraction of the women to whom these restrictions apply?

The *Lakey* court was adamant that the provision at issue was the "epitome" of truth and not misleading, and thus the provision would still pass under the first prong of that analysis.[160] Therefore, the next step would be to analyze whether the restriction was enacted with the purpose of creating a substantial obstacle for women seeking an abortion or if it was intended to hinder their free choice. That may be problematic depending on how legislators have discussed the bill in public: not all legislators who oppose abortion on all grounds express their opinions publicly.[161] Additionally, pro-choice advocates may be hurting themselves under the law by noting publicly that it will not deter women from obtaining abortions.[162] However, advocating that courts go through the complete analysis

---

[158] *Id*.

[159] *Id*. at 578.

[160] *Id*.

[161] *But see supra*, note 90 to review the statement from a Mississippi representative on the legislative intent behind the state's law restricting abortion access.

[162] *See id*.

may bring to light anecdotal evidence of illegitimate purpose—that this legislation is intended to "hinder"[163] a woman's choice.

Next, the restriction should be analyzed in light of the effect it has on a large fraction of women for whom it would operate as an obstacle. This would be challenging. It may require the testimony of medical professionals regarding whether or not seeing an ultrasound and hearing the images described would actually "restrict" a woman's free choice. Moreover, there may not be a clear way to go about presenting that type of information. Lastly, courts are largely unsympathetic to emotional arguments made in opposition to abortion restrictions.[164]

Notably, one of the exceptions that applies under the statute is for survivors of sexual assault (if a *particular* pregnancy is the result of that assault). This exception only applies if a woman has reported the assault or if she "reasonably" feared "serious bodily injury" in retaliation for reporting.[165] Therefore, women who did not report because of fear of emotional abuse or non-serious bodily injury[166] are still subject to the ultrasound description. Moreover, since most survivors of assault do not report,[167] women will have to assert that they would be "reasonably" at risk of "serious bodily injury" if they were to report, thus abrogating their autonomy to make the best and safest decision for themselves regarding reporting. However, when analyzed from the perspective of a pregnant

---

[163] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

[164] *See supra* note 108.

[165] *See* Tex. Health & Safety Code Ann. § 171.012(a)(5) (West 2012). It is notable that if the abortion is at or before seven weeks, the required ultrasound is a transvaginal probe rather than the traditional abdominal ultrasound. This means that survivors of trauma, specifically those who have been raped, will be subject to the law if they cannot prove that they still have a reasonable fear of serious bodily injury.

[166] And who is defining "serious bodily injury?" It is not listed in the definitions portion of the statute. *See* Tex. Health & Safety Code Ann. § 171.002 (West 2012).

[167] *See* California Coalition Against Sexual Assault, 2008 Report: Research on Rape and Volence 6 (2008), *available at* http://www.ncdsv.org/images/CALCASA_ResearchOnRapeAndViolenceReport_2008.pdf ("Only 16 % of rapes are ever reported to the police."); *Domestic Violence Facts*, Nat'l Coalition Against Domestic Violence (July 2007), http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf ("Most cases of domestic violence are never reported to the police.") (citing Murray A. Straus, Richard J. Gelles, & Christine Smith, Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 Families 486 (1990) (concluding that "reports to police [are] the exception rather than the rule. Only 6.7% of all husband-to-wife assaults are reported to police.").

woman in a relationship wherein she is experiencing emotional abuse or non-serious bodily injury, it is possible that this provision may fail the large fraction test. In other words, a large portion of pregnant women in abusive relationships may be precluded from reporting due to this provision and therefore denied the opportunity to opt-out of the ultrasound description. In fact, advocates could potentially analogize to some of the same facts used in the *Casey* opinion when that court struck down the husband notification provision under the undue burden test.[168]

Finally, advocates should analyze the ultrasound provision in the context of other existing provisions in Texas that restrict abortion, and determine whether these combined restrictions would amount to a substantial obstacle.

B. *Fetal Pain Laws*

The second most common group of informed consent provisions are those that proscribe an abortion after 20 weeks due to studies that suggest that this is the point at which the fetus can feel pain.[169] These studies are widely contested in the medical community.[170] When making and passing these laws, legislators typically reference studies that show hyperexcitability in fetal responses to stimulus.[171] However, medical professionals cite the problem of using stimulus responses to pain as evidence of the actual feeling of pain for two reasons: (1) the fetus has not developed the necessary

---

[168] *See Casey*, 505 U.S. at 895.

[169] *See, e.g.*, Ala. Code 1975 § 26-23B-2 (West, current through end of the 2012 Regular and 1st special Sessions); Ind. Code Ann. §16-34-1-9 (West, current with all 2012 legislation); Idaho Code Ann. § 18-503 (West, current through end of 2012 2nd Regular Session of the 61st legislature); Kan. Code Ann. § 65-6722 (West, current through 2012 regular session); 2012 La. Sess. Law Serv. Act 738 (S.B. 766) (West, 2012); Neb. Rev. St. § 28-3, 104 (West, current through the 102nd Legislature Second Regular Session 2012); 63 Okl. St. Ann. § 1-745.3 (West, current through September 2012); Unborn Child Pain Awareness Act of 2006, H.R. 6099, 109th Cong. (2006) (this law was not passed, but provides an example of the discussion at the federal level). Most of these statutes are titled something along the lines of "Pain-Capable Unborn Child Protection Act," and they all seem to be modeled after each other.

[170] *See, e.g.,* Royal College of Obstetricians and Gynaecologists, Fetal Awareness: Review of Research and Recommendations for Practice (2010), *available at* http://www.rcog.org.uk/files/rcog-corp/RCOGFetalAwareness-WPR0610.pdf.

[171] *See* note 169, *supra*.

cortical structures for feeling pain and (2) pain is largely conceived as a multi-faceted response.[172]

Therefore, while anti-choice activists equate responses to stimulus as capacity to feel pain, this is a complicated assumption. The capacity to respond to stimulus exists before the brain/injury connection has happened in the fetus, and therefore it is impossible for nerve responses to physical injury to travel from the injury situs to the brain itself, communicating "pain." Moreover, analgesic practitioners conceptualize pain as "biopsychosocial," an experience informed not just by the senses, but by emotional components as well.[173] Additionally, movement of the kind cited by advocates of fetal pain statutes can also be found in patients who are in vegetative states—that is, there is proof that the body naturally reacts to certain stimulus even when the necessary pain structures no longer exist.[174]

Nonetheless, seven states have enacted laws banning abortion after 20 weeks,[175] explicitly justifying the bans based on reference to studies that indicate that the fetus can feel pain at 20 weeks.[176]

[172] *See generally* Stuart W.G. Derbyshire, 13(1) BIOETHICS 1, 16-28 (1999) (describing EEG measurements of responses to noxious stimuli throughout fetal life as compared to adult life, and concluding that the fetus lacks the necessary biological and contextual development to experience pain).

[173] *See id* at 4.

[174] *See* Tobin, *supra* note 91, at 145-46.

[175] While Arizona's codified law says twenty weeks, this state's fetal pain law actually bans abortion after twenty weeks of gestation or only eighteen weeks post-fertilization. Other states' laws are twenty weeks post-fertilization. Robin Marty, *Arizona Governor Jan Brewer Signs Country's First 20-Week Gestational Ban Into Law*, RH REALITY CHECK (April 12, 2012, 9:42 PM), http://www.rhrealitycheck.org/article/2012/04/12/arizona-governor-jan-brewer-signs-countrys-first-20-week-gestational-ban-into-law. For a list of the statutes, *see* note 169, *supra*.

[176] These states are: Alabama, Arizona, Idaho, Indiana, Kansas, Nebraska, and Oklahoma. Additionally, eleven states (Arkansas, Arizona, Georgia, Indiana, Louisiana, Minnesota, Missouri, Oklahoma, South Dakota, Texas, and Utah) require mandated counseling that includes information on fetal pain. Arizona, Oklahoma, Minnesota, and Utah only require this information after twenty weeks, and Missouri only after twenty-two weeks. *Overview of Abortion Laws*, *supra* note 93. While Oklahoma and Arizona ban abortion after twenty weeks, they still have an exception for the life and health of the mother, which means their fetal pain counseling provision doesn't go into effect unless that exception applies. Fetal pain-based informed consent statutes typically use language such as the following:

> By 20 weeks' gestation, the unborn child has the physical structures necessary to experience pain. There is evidence that by 20 weeks' gestation unborn children seek to evade certain stimuli in a manner which in an infant or an adult would be interpreted to be a response

Abortion rights advocates, however, have been reluctant to challenge legislation related to fetal pain.[177]

The first case challenging a fetal pain ban was brought in Idaho in September of 2011, and was recently decided.[178] In that case, an Idaho woman, Jennie Linn McCormack, procured a medical abortifacient over the internet.[179] She was subsequently charged by the Bannock County prosecutor in Idaho for undergoing an abortion in a manner unauthorized by statute, a felony.[180] She challenged the criminal charges and she also argued that she had standing to challenge enforcement of Idaho's fetal pain ban (dubbed the *Pain-Capable Unborn Child Protection Act,* or PUCPA), which proscribes abortions after 20 weeks.[181] The court ruled that McCormack was likely to succeed on the merits in challenging the statute that criminalized women procuring unauthorized abortions because it imposed an undue burden.[182] Though the court ruled that McCormack did not have standing to challenge PUCPA, it did indicate that PUCPA might be found to impose an undue burden if challenged by someone with standing.[183]

The only other case dealing with fetal pain in connection with informed consent came before a federal court in June of 2011. In

---

to pain. Anesthesia is routinely administered to unborn children who are 20 weeks' gestational age or older who undergo prenatal surgery.

Tobin, *supra* note 91, at 113-14 (citing GA. CODE ANN. § 31-9A-4(a)(3) (West 2006); *see also* ARK. CODE ANN. § 20-16-1105(a)(1)(A) (West 2005); OKLA. STAT. ANN. tit. 63, § 1-738.10(A) (West Supp. 2008); LA. REV. STAT. ANN. § 40:1299.35.6(D)(3)(a)(ii) (West 2001)).

[177] *See* Kathryn Smith, *Abortion-Rights Groups Absent on Fetal Pain Laws*, POLITICO (Aug. 13, 2012, 4:29PM), http://www.politico.com/news/stories/0812/79681.html.

[178] Rebecca Boone, *Idaho Doctor-Lawyer Fights Fetal Pain Law*, THE ASSOCIATED PRESS (April 17, 2012, 10:53 AM), http://www.washingtontimes.com/news/2012/apr/17/idaho-doctor-lawyer-fights-fetal-pain-abortion-law/?page=all.

[179] McCormack v. Heideman, 2012 U.S. App. LEXIS 19051 *1, *4-5.

[180] *Id*.

[181] *Id*. at *9.

[182] *Id*. at *35. The court said that this statute required women to police their providers' compliance with Idaho regulations. *Id*. at *28. The court went on to include a remarkably detailed discussion of why women choose abortion, and the existing obstacles they already face. *Id*. at *28-35. This is perhaps the most supportive language ever used by a Circuit court regarding a woman's choice to terminate a pregnancy. However, the court narrowed the preliminary injunction to only enjoin future prosecution of McCormack, but broadened it to include all sections of the law (therefore including all trimesters). *See id*. at *41, 47.

[183] *Id*. at *49-50 ("PUCPA was not enacted without controversy. Idaho's own Attorney General explained in a 17-page letter that PUCPA 'plainly

Planned Parenthood of Indiana v. Commissioner of the Indiana State Department of Health,[184] the court used only a First Amendment analysis regarding physician speech, rather than using the undue burden standard as a parallel determinative of whether "fetal pain" additions to informed consent legislation constituted an undue burden.[185] The court, however, did find that discussion of fetal pain by physicians met compelled speech standards under the First Amendment.[186]

Planned Parenthood of Indiana is similar to *Lakey*. Thus, the proposed strengthened undue burden standard should be a parallel analysis to the First Amendment challenge. In addition, advocates involved in our hypothetical Lakey case might be able to win since the science surrounding fetal pain can be "false, misleading, and irrelevant" according to the court in *Planned Parenthood of Indiana*.[187] Misleading is the very opposite of the preliminary "truthful and not misleading"[188] inquiry in the strengthened undue burden standard and statutes regarding fetal pain would thus fail.

Additionally, the Idaho fetal pain 20-week gestational ban, if challenged by someone with standing, may come out differently under the strengthened undue burden standard. The Idaho statute's 20-week gestational ban includes women who have late-term diagnoses of fetal abnormalities. A 20-week ban could be shown to pose a substantial obstacle to those women's choices. However, the hypothetical plaintiff would still have to overcome the state's ability to proscribe abortion after viability. If Idaho can show that a fetus can be viable after 20 weeks, the undue burden test becomes obsolete because the state has the right to ban abortions. On the other hand, if Idaho fails to prove that a fetus is viable after 20 weeks, the statute would likely fail under the undue burden standard, since it is clear that the purpose of the statute is to hinder a woman's choice, and it is also clear that it places a substantial obstacle in the path

---

intends to erect a substantial obstacle to the right to choose,' and 'there is strong reason to believe that [PUCPA] is unconstitutional under existing precedent."). I argue that by mentioning these facts even though they were not necessary to the standing analysis, the Court implies it would be likely to overturn PUCPA if someone with standing brought a challenge.

[184] Planned Parenthood of Ind. v. Comm'r of the Ind. State Dept. of Health, 794 F. Supp. 2d 892 (S.D. Ind. 2011).

[185] This is because the law was not challenged under the undue burden standard, but rather under the First Amendment. *See id*. at 914-21.

[186] *Id.* at 919-21.

[187] *Id*. at 920.

[188] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992).

of women seeking abortions after 20 weeks.[189] It would certainly be a concern for those litigating such a case that the court would find that a fetus can be viable after 20 weeks, setting a new precedent for 20-week bans all across the country.

V. What is Next for the Undue Burden Standard?

If courts continue down the path they have taken in recent years with the undue burden standard, it seems that there are very few abortion restrictions that would ruled unconstitutional if challenged. The pro-life movement is knowledgeable in crafting laws that simultaneously hinder a woman's choice and yet somehow escape invalidation under the standard. The increased number of restrictive statutes enacted in the last three years is a byproduct of this increased legislative savvy.[190] Moreover, the undue burden standard's weakness leaves the pro-choice movement afraid to litigate too many challenges, lest bad precedent embolden conservative legislators in other states to enact similar restrictions.

The undue burden standard is unique as a separate and more burdensome standard for challenged fundamental rights. It seems clear that the Court in *Casey* was attempting to balance public opinion on the issue, but in doing so, removed some of *Roe's* protections around the right to choose. Despite its unclear application, it is unlikely that the United States Supreme Court will completely do away with the undue burden standard. However, its inconsistent use by lower federal courts calls for clarification. The standard needs to be strengthened by re-emphasizing the purpose prong and the large fraction test as inquiries that must be included each time the standard is applied. Moreover, advocates should always raise the standard in challenges where an abortion restriction is at issue, including challenging the law on the basis that all the abortion restrictions in the given state combine to create an undue burden.

---

[189] *See* McCormack v. Heideman, 2012 U.S. App. LEXIS 19051 at *49-50 ("PUCPA was not enacted without controversy. Idaho's own Attorney General explained in a 17-page letter that PUCPA 'plainly intends to erect a substantial obstacle to the right to choose,' and 'there is strong reason to believe that [PUCPA] is unconstitutional under existing precedent.").

[190] *See* 2011 State Policy Review, *supra* note 142.