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THE BEAST OF UNDUE BURDEN: EVALUATING THE BURDEN ON THE PHYSICIAN IN *PLANNED PARENTHOOD OF THE HEARTLAND V. HEINEMAN*

Abstract: On July 14, 2010, in *Planned Parenthood of the Heartland v. Heineman*, the U.S. District Court for the District of Nebraska issued a preliminary injunction halting the implementation of a bill that would have imposed on abortion providers new requirements for obtaining informed consent. The court held that the new, more rigorous informed consent requirements would have likely placed an undue burden on women seeking abortions. In doing so, the court implied that both the burden on the physician and on the patient were relevant to the undue burden analysis. This Comment argues that to determine whether a particular informed consent requirement places an undue burden on a woman's ability to get an abortion, courts should evaluate its effect on both the woman and the doctor.

INTRODUCTION

In *Planned Parenthood of the Heartland v. Heineman*, the U.S. District Court for the District of Nebraska in 2010 issued a preliminary injunction against the enforcement of LB 594, a state legislative bill that imposed new and greater requirements on physicians for pre-abortion screening and counseling.¹ The enjoined bill sought to broaden the scope of physicians' responsibilities by providing new definitions for the "complications" and "risk factors" that physicians must discuss in order to obtain a patient's informed consent; the bill also sought to create greater incentives for women to bring suit against abortion providers.² LB 594 redefined "complications" to include any adverse reaction—physical, psychological, or emotional—reported in any peer-reviewed journal.³ Similarly, "risk factor" was expanded to mean any factor, published in any peer-reviewed journal, whether physical, psychological, emotional, demographic, or situational, associated with one or more

¹ See 724 F. Supp. 2d 1025, 1031, 1038, 1050 (D. Neb. 2010); see also Stipulation to Entry of Final Judgment and Permanent Injunction at 2, *Planned Parenthood of the Heartland*, 724 F. Supp. 2d 1025 (No. 4:10-cv-3122), 2010 WL 5758641; L.B. 594, 101st Leg. (Neb. 2009), available at <http://nebraskalegislature.gov/FloorDocs/101/PDF/Intro/LB594.pdf>.

² *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1032–34.

³ *Id.* at 1032–33; L.B. 594.

complications.⁴ Incentives to bring suit included making damages available for wrongful death of the fetus, putting the burden of proof on the physician, and allowing the woman to bring suit based on emotional suffering, injury to reputation, and even humiliation.⁵

Although the scope of LB 594 made compliance a near impossibility for doctors, ensuring its likely invalidation, the court's analysis of the burden placed on physicians represented a shift in abortion jurisprudence.⁶ The bill was similar to legislative attempts in other states to effectively prohibit abortion following the U.S. Supreme Court decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in 1992, and *Gonzales v. Carhart*, in 2007.⁷ In *Casey*, the Court held that a direct regulation on women seeking abortions—in that case, a spousal consent requirement—was unconstitutional, but changed the standard for evaluating regulations on abortion from strict scrutiny to an undue burden standard.⁸ *Gonzales* further loosened that standard, holding that a regulation limiting physicians' ability to perform intact dilations and evacuations was not an undue burden on women, even though the blanket prohibition would affect access to those procedures.⁹ In *Planned Parenthood of the Heartland*, the Nebraska court found that LB 594's restrictions would have created an undue burden for women seeking abortions, basing that determination not on direct limitations to women seeking abortions, but on limitations to physicians and practitioners.¹⁰

⁴ *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1032–33; L.B. 594.

⁵ *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1033–34; L.B. 594.

⁶ See *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1037, 1038; L.B. 594.

⁷ See *Gonzales v. Carhart*, 550 U.S. 124, 145–46 (2007); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992); *infra* notes 46–59 and accompanying text. In *Casey*, the Supreme Court stated that it was preserving the essential holding of *Roe v. Wade*, which it defined in three parts. See *Casey*, 505 U.S. at 846; *Roe v. Wade*, 410 U.S. 113 (1972). First, the Fourteenth Amendment assures the right of a woman to have an abortion before viability, and the right to obtain it without undue interference from the state. *Casey*, 505 U.S. at 846. Second, the state has the power to restrict abortions after viability provided the state makes exceptions when the woman's life or health is in danger. *Id.* Third, the state has a legitimate interest from the outset of pregnancy in both the health of the woman and the life of the unborn child. *Id.*

In *Gonzales*, the Court focused on the third part of the essential holding of *Roe*, as articulated in *Casey*, further altering the standard articulated in *Roe*. See *Gonzales*, 550 U.S. at 145–46. Although the Court reaffirmed that a state may not prohibit or impose an undue burden on a woman's right to get an abortion, it held that a substantial obstacle to a woman's right to an abortion does not exist when the state only creates "regulations which do no more than create a structural mechanism by which the state . . . may express profound respect for the life of the unborn." *Gonzales*, 550 U.S. at 146.

⁸ *Casey*, 505 U.S. at 887, 898.

⁹ See *Gonzales*, 550 U.S. at 146–47.

¹⁰ 724 F. Supp. 2d at 1032–34, 1038, 1042, 1046.

In *Planned Parenthood of the Heartland*, the court looked to the logical (rather than direct) effect of the restrictions, reasoning that legislation that puts an undue burden on physicians necessarily also creates an undue burden on women seeking abortions since such legislation would result in a loss of access to providers willing to perform the procedure.¹¹ Therefore, increased obligations on physicians, such as requirements to perform complex patient evaluations, or risks to physicians, such as the danger of crippling litigation, could be an undue burden on the right to abortion if those obligations and risks prevent access to abortions.¹² In making that determination, the court helped to close a logical gap left by previous cases and allowed for more robust judicial evaluation of abortion legislation.¹³

Part I of this Comment provides a brief summary of the provisions of the proposed statute LB 594 and the court's evaluation of its purposes and effects.¹⁴ Part II provides a brief legal history of abortion jurisprudence to contextualize the decision reached in *Planned Parenthood of the Heartland*.¹⁵ Finally, Part III examines the court's determination that LB 594 would have likely placed an undue burden on women seeking abortions, and argues that to determine whether a regulation places an undue burden on the constitutional right to abortion, courts should evaluate the effect both on the physician and on the woman.¹⁶

I. THE U.S. DISTRICT COURT'S EVALUATION OF THE PURPOSES AND EFFECTS OF LB 594

In *Planned Parenthood of the Heartland*, Planned Parenthood and its medical director brought suit against the governor on behalf of its phy-

¹¹ See *id.* at 1032–34, 1046.

¹² See *id.*

¹³ See generally Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After Casey and Carhart*, 31 *FORDHAM URB. L.J.* 675 (2004) (discussing the undue burden standard, its ambiguity, and lack of guiding principles); Sarah Runels, *Informed Consent Laws and the Constitution: Balancing State Interests with a Physician's First Amendment Rights and a Woman's Due Process Rights*, 26 *J. CONTEMP. HEALTH L. & POL'Y* 185 (2009) (criticizing courts' failure to employ proper constitutional framework and ambiguity of substantial obstacle test); Lauren R. Robbins, Comment, *Open Your Mouth and Say "Ideology": Physicians and the First Amendment*, 12 *U. PA. J. CONST. L.* 155 (2009) (discussing legislation based on ideology, lack of a clear standard on compelled physician speech, and the openness and ambiguity of the undue burden standard).

¹⁴ See *infra* notes 17–45 and accompanying text.

¹⁵ See *infra* notes 46–71 and accompanying text.

¹⁶ See *infra* notes 72–84 and accompanying text.

sicians, employees, and future patients.¹⁷ Planned Parenthood sought to enjoin LB 594 from taking effect and expanding Nebraska's existing abortion statute, which already contained an informed consent provision with thirty-six discrete requirements.¹⁸ The bill expanded the definition of a "risk factor" that a physician was required to disclose to the patient, defining it as "any factor, including any physical, psychological, emotional, demographic, or situational factor . . . published in any peer-reviewed journals indexed by the United States National Library of Medicine's search services."¹⁹ Under the bill, physicians would have been required before each abortion to make a written evaluation of the pregnant woman, identifying any risk factors applicable to that patient.²⁰ In addition, for each risk factor identified, the physician would have been required to inform the patient of the likelihood and nature of each risk in as much detail as a reasonable person would find material.²¹

The practical effect of the risk factor requirements was to place a seemingly impossible burden on physicians and abortion providers.²² To comply with LB 594, providers would have been required to identify and review thousands of articles, including those with dubious support from the medical and scientific community, published over many decades, on online databases not easily searched.²³

Beyond the vague and exacting requirements for informed consent, the bill also provided strong financial incentives for a woman who later regretted having an abortion to sue her physician.²⁴ The bill would have allowed the negligent failure of a physician to comply with informed consent standards to serve as a basis for damages, including wrongful death of the fetus, and attorneys' fees.²⁵ The bill further pro-

¹⁷ *Planned Parenthood of the Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1030 (D. Neb. 2010).

¹⁸ *Id.* at 1031, 1032.

¹⁹ *Id.* at 1032.

²⁰ *Id.* at 1032–33.

²¹ *Id.* at 1033.

²² *See id.* at 1038; First Amended Complaint at 5, *Planned Parenthood of the Heartland*, 724 F. Supp. 2d 1025 (No. 4:10-cv-3122).

²³ *See Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1038; First Amended Complaint, *supra* note 22, at 5.

²⁴ *See Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1033–34, 1045.

²⁵ *Id.* The bill's provision allowing wrongful death damages for the abortion of a fetus was consistent with Nebraska's wrongful death statute which creates an action for "the death of a person, including an unborn child in utero at any stage of gestation, . . . caused by the wrongful act, neglect, or default of any person, company, or corporation." NEB. REV. STAT. § 30–809 (2010) (emphasis added).

vided that the burden of proof would be on the physician to demonstrate that “the pregnant woman had sufficient reflection time, given her age, maturity, emotional state, and mental capacity, to comprehend and consider such information.”²⁶

The district court held that the plaintiffs were likely to prevail in their challenge of the bill under their liberty-and-privacy interest, void for vagueness, and First Amendment claims.²⁷ The court reasoned that the plaintiffs were likely to succeed in their liberty-and-privacy interest claims because the Fourteenth Amendment had long been recognized to “encompass a right to be free from undue governmental interference in matters that are intensely private”²⁸ Furthermore, although the court recognized that previous cases authorized legislation in the interest of protecting potential life, it stated that “liberty may not be interfered with, under the guise of protecting the public interest.”²⁹ The court further opined that a legislative determination is not conclusive, and that the courts’ duty is to ensure that the legislature does not impose an undue burden on a woman’s right to an abortion.³⁰ Such a burden would be created if the purpose or effect of the statute was to put in place a substantial obstacle to a woman’s ability to get an abortion.³¹

LB 594 provided that its purposes were to protect the well-being of women and to set a minimum standard for informed consent in pre-abortion screening adequate to protect the health needs of women.³² In evaluating the purpose of the bill, the court held that its likely purpose was to place a substantial obstacle before a woman seeking an abortion.³³ The court stated that the legislative purpose did not explain the vast discrepancies between consent requirements for abortion and consent requirements for other medical procedures.³⁴ The new informed consent standards for abortion procedures were significantly higher

²⁶ *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1034.

²⁷ *Id.* at 1042.

²⁸ *Id.* (citing *Paul v. Davis*, 424 U.S. 693, 713 (1976)).

²⁹ *Id.* at 1043 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); see *infra* note 62 and accompanying text (discussing the Court’s approval in *Roe* and *Casey* of the states’ interest in protecting fetal life).

³⁰ *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1043.

³¹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 876–77 (1992); *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1043, 1044–46.

³² *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1043.

³³ *Id.* at 1043–44.

³⁴ *Id.* at 1044; cf. *infra* note 81 and accompanying text (giving examples of other states’ informed consent statutes).

than those for other medical procedures, even those with greater threats to the physical, mental and emotional health of the patient.³⁵

The court determined that the legislature's primary concern was not to ensure that women have enough information to make fully-informed decisions to undergo medical procedures.³⁶ That conclusion was based, in part, on the fact that the bill offered substantial financial incentives to litigate even when the woman did not regret her decision to have an abortion, given that her regret would be presumed.³⁷ The court reasoned that the provision's purpose was to minimize the availability of abortion by incentivizing lawsuits.³⁸ The court concluded that "the only sensible construction" of the consent requirements was that the legislature "intended to place a substantial, if not insurmountable, obstacle in the path of any woman seeking an abortion in Nebraska."³⁹

Furthermore, the court stated that even if it were to assume that the *purpose* of the statute was to protect the health of women, the plaintiffs would still likely succeed on the merits of their claims because the *effect* of the statute would be to place insurmountable obstacles in the path of women seeking abortions.⁴⁰ Because the bill would have exposed physicians to a risk of crippling litigation and increased their responsibilities, fewer physicians would have been willing to perform abortions.⁴¹ The lack of access to physicians willing to perform an abortion would have formed a substantial obstacle to women seeking abortions as real as a direct prohibition on abortion.⁴²

³⁵ *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1044. In contrast to LB 594, Nebraska's Medical Liability Act defines informed consent in a mere two sentences:

Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.

NEB. REV. STAT. § 44-2816 (2009).

³⁶ See *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1044–46.

³⁷ *Id.* at 1045.

³⁸ *Id.* at 1045, 1046.

³⁹ *Id.* at 1046.

⁴⁰ *Id.*

⁴¹ See *id.* at 1038, 1046.

⁴² See *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1038.

Thus, although the vague and stringent conditions imposed by LB 594 made literal compliance an impossibility, *Planned Parenthood of the Heartland* marked an important reevaluation of the undue burden standard.⁴³ Previous cases focused on whether regulations placed a direct and substantial obstacle in the path of a woman seeking an abortion.⁴⁴ In contrast, *Planned Parenthood of the Heartland* encompassed in its analysis not only undue burden on the woman, but also on the physician.⁴⁵

II. PLANNED PARENTHOOD OF THE HEARTLAND IN THE CONTEXT OF SHIFTING ABORTION JURISPRUDENCE

By abandoning the strict scrutiny standard articulated in 1973 in *Roe v. Wade*, the U.S. Supreme Court, in the 1992 case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, allowed state legislatures to enact regulations restricting abortion indirectly.⁴⁶ Weakening the standard of scrutiny applicable to abortion rights precipitated a flurry of legislative action.⁴⁷ In light of *Casey* and subsequent decisions, such as the Court's 2007 decision in *Gonzalez v. Carhart*, states have enacted new subtle but significant restrictions on abortion, including heightened informed consent requirements like the one at issue in *Planned Parenthood of the Heartland*.⁴⁸ Although they regulate abortion only indirectly,

⁴³ See *id.* at 1032–34, 1044, 1046; see generally *Casey*, 505 U.S. 833.

⁴⁴ See *Gonzales v. Carhart*, 550 U.S. 124, 141, 147 (2007) (holding that regulations limiting physicians' practice and ability to perform the intact dilation and evacuation procedure was not an undue burden on women); *Stenberg v. Carhart*, 530 U.S. 914, 921, 930 (2000) (holding that a limit on a physician's ability to perform certain dilation and evacuation procedures was an undue burden because the lack of a health exception would have put an undue burden on women for whom that procedure was safer); *Casey*, 505 U.S. at 882, 887, 893–94 (holding that certain direct regulations on women, such as a spousal consent requirement, were an undue burden).

⁴⁵ See *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1045.

⁴⁶ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846, 878 (1992); *Roe v. Wade*, 410 U.S. 113, 170 (1973); Borgmann, *supra* note 13, at 681–85. In *Casey*, the Court changed the standard from strict scrutiny to an "undue burden" test, a doctrinal change that was met with criticism within and outside the Court. See *Casey*, 505 U.S. at 985–87 (Scalia, J., dissenting); Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2026 (1994) (proposing a new methodology for application of the *Casey* standard and underscoring the weakness of the standard).

⁴⁷ See *infra* note 48 and accompanying text.

⁴⁸ See *An Overview of Abortion Laws*, ST. POLICIES IN BRIEF (Guttmacher Inst., New York, N.Y. & Wash., D.C.), Oct. 1, 2010, at 1, 2–3, available at http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf. See generally *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Planned Parenthood of the Heartland v. Heineman*, 724 F. Supp. 2d 1025 (D. Neb. 2010); Thaddeus Mason Pope, *Legal Briefing: Informed Consent*, 21 J. CLINICAL ETHICS 72 (2010) (summarizing recent legislation on informed consent requirements in abortion statutes).

informed consent requirements are still powerful tools to advance substantive anti-abortion policy goals.⁴⁹

Originally, the idea behind informed consent was to counteract a tradition of physician paternalism whereby physicians dictated, rather than discussed, medical treatment.⁵⁰ To that end, informed consent requirements limited outside influence by requiring that physicians offer objective information on advantages and disadvantages of different treatment options.⁵¹ Typically, informed consent for a medical procedure requires three elements: first, a physician must communicate all necessary information to the patient; second, the patient must understand the information provided; and third, the patient must consent to the treatment.⁵²

Despite the anti-paternalistic purpose of informed consent statutes, legislatures have recently used consent and disclosure requirements to influence women's decisions to obtain abortions.⁵³ In addition to informed consent statutes for general medical treatment, most states have also enacted special informed consent statutes targeting abortion procedures.⁵⁴ Informed consent statutes for abortion procedures differ significantly from those for other medical procedures.⁵⁵ Abortion providers are often required to detail the procedure graphically; many states have a two-visit requirement;⁵⁶ several statutes require

⁴⁹ See Robbins, *supra* note 13, at 170, 178.

⁵⁰ Amanda McMurray Roe, Note, *Not-So-Informed Consent: Using the Doctor-Patient Relationship to Promote State-Supported Outcomes*, 60 CASE W. RES. L. REV. 205, 208 (2009).

⁵¹ *Id.* at 209–10; see *Largey v. Rothman*, 540 A.2d 504, 506 (N.J. 1988) (“[Informed consent] is essentially a negligence concept, predicated on the duty of a physician to disclose to a patient such information as will enable the patient to make an evaluation of the nature of the treatment and of any attendant substantial risks, as well as of available options in the form of alternative therapies.”).

⁵² See L.M. Cirando, Note, *Informed Choice and Population Policy: Do the Population Policies of China and the United States Respect and Ensure Women's Right to Informed Choice?*, 19 FORDHAM INT'L L.J. 611, 631 (1995).

⁵³ See, e.g., LA. REV. STAT. ANN. § 40:1299.35.6(A)(5)(b) (2008) (stating that the statute's purpose was to “[p]rotect unborn children from a woman's uninformed decision to have an abortion”); see also Robbins, *supra* note 13, at 159, 161–62, 174 (discussing the use of informed consent as a way of preventing abortion and furthering a specific ideology).

⁵⁴ See *infra* notes 55–59 and accompanying text. See generally *An Overview of Abortion Laws*, *supra* note 48; Pope, *supra* note 48.

⁵⁵ Compare *infra* notes 56–59 and accompanying text, with *infra* note 81 and accompanying text.

⁵⁶ See, e.g., LA. REV. STAT. ANN. § 40:1299.35.6(B)(1) (requiring a woman to visit a physician at least twenty-four hours before the procedure); MISS. CODE ANN. § 41-41-33(1)(a) (2009) (same).

that physicians disclose risks that are not scientifically proven;⁵⁷ some require that doctors give truthful, but manipulative, non-relevant facts;⁵⁸ and certain provisions require that physicians selectively disseminate ideological information on abortion.⁵⁹

After *Casey*, states may enact regulations promoting the health or safety of a woman seeking an abortion as long as the regulations do not place a substantial obstacle in her path to an abortion before viability.⁶⁰ Furthermore, a regulation that increases the cost or availability of medical care, as long as it has a valid purpose, will not be invalidated because it incidentally makes an abortion more difficult to obtain.⁶¹ Although the *Casey* Court purported to reaffirm the holding in *Roe*, its altered analytical approach changed the character of the rights protected by that holding.⁶² *Casey* invited legislative reactions such as the

⁵⁷ Compare, e.g., LA. REV. STAT. ANN. § 40:1299.35.6(C)(1)(a)(ii) (“By twenty weeks gestation, the unborn child has the physical structures necessary to experience pain. There is evidence that by twenty 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 to pain.”), with Stuart W.G. Derbyshire, *Can Fetuses Feel Pain?*, 332 BRIT. MED. J., 909, 912 (2006) (“The neural circuitry for pain in fetuses is immature . . . [and] the developmental processes necessary for the mindful experience of pain are not yet developed.”); compare also Miss. CODE ANN. § 41-41-33(1)(a)(ii) (requiring disclosure of the risk of breast cancer), with *Summary Report: Early Reproductive Events and Breast Cancer Workshop*, NAT’L CANCER INST., <http://www.cancer.gov/cancertopics/ere-workshop-report> (last updated Jan. 12, 2010) (stating as well-established fact that abortion is not associated with an increased risk of breast cancer).

⁵⁸ See, e.g., LA. REV. STAT. ANN. § 40:1299.35.6(C)(1)(b) (requiring state publication of “the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments . . . including color pictures or drawings.”); N.D. CENT. CODE § 14-02.1-02.1(b) (2009) (“The majority of the pictures included in the booklet must be full color photograph-style images and the pictures must contain the dimensions of the fetus and must be realistic and appropriate for the stage of pregnancy depicted.”).

⁵⁹ See, e.g., N.D. CENT. CODE § 14-02.1-02(6)(a)(2) (“The abortion will terminate the life of a whole, separate, unique, living human being”); see also Runels, *supra* note 13, at 187.

⁶⁰ 505 U.S. at 873, 874.

⁶¹ *Id.* at 874.

⁶² See *id.* at 878. In contrast to *Casey*’s undue burden test, the trimester framework in *Roe* provided that a woman has a right to an abortion during her first trimester without inference from the state. *Roe*, 410 U.S. at 162–63. During the second trimester, until viability, a state could regulate the abortion procedure to the point that it reasonably relates to the preservation of maternal health. *Id.* at 163. During the third trimester, after viability, a state could proscribe abortion except in cases when it is necessary to preserve the life of the mother. *Id.* at 163–64. Furthermore, beyond changing the standard for scrutiny, *Casey* also allowed for increased consideration of states’ interest in the protection of fetal life. See 505 U.S. at 873.

informed consent statutes because it reframed the substance and extent of the right to abortion.⁶³

The Court in *Casey* did not define its undue burden standard, nor did it give any objective parameters to help lower courts assess state regulation of abortion.⁶⁴ After finding Pennsylvania's spousal notice provision unconstitutional under the undue burden test, the Court approved that state's twenty-four hour waiting period and informed consent statute.⁶⁵ The Court held that the informed consent statute was permissible as long as its required disclosures were "truthful and not misleading."⁶⁶

More recently, in *Gonzales*, the Supreme Court held that a state prohibition on a specific abortion procedure, intact dilation and evacuation ("D&E"), passed the undue burden test.⁶⁷ *Gonzales* focused on the third part of *Casey*'s holding that the state has a legitimate interest in both the health of the pregnant woman and that of the fetus.⁶⁸ Although the Court in an earlier case, *Stenberg v. Carhart*, had struck down a blanket prohibition on D&E because the statute lacked a health exception, the Court in *Gonzales* stated that a "moral, medical, and ethical consensus" had been reached that D&E "is never medically necessary and should be prohibited."⁶⁹ After concluding that intact D&E is never needed to protect the health of a pregnant woman, the *Gonzales* Court upheld the statute without a health exception, and without overruling *Stenberg*.⁷⁰ Allowing the blanket prohibition, the Court further opened the door for states to restrict abortions by aiming legislation directly at doctors.⁷¹

III. CHANGING THE STANDARD: EVALUATING UNDUE BURDENS ON BOTH THE PHYSICIAN AND THE WOMAN

When evaluating whether a regulation places a substantial obstacle before women seeking abortions, courts should follow the path of the

⁶³ See *Gonzales*, 550 U.S. at 145–46; *Casey*, 505 U.S. at 846; Borgmann, *supra* note 13, at 681.

⁶⁴ See *Casey*, 505 U.S. at 876–77; *id.* at 985–87 (Scalia, J., dissenting).

⁶⁵ See *id.* at 882, 886, 887, 893–94.

⁶⁶ *Id.* at 882.

⁶⁷ 550 U.S. at 164, 173.

⁶⁸ *Id.* at 146.

⁶⁹ *Id.* at 141; *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000).

⁷⁰ *Gonzales*, 550 U.S. at 133, 141, 156.

⁷¹ See *id.* at 173–74, 181, 182, 186 (Ginsburg, J., dissenting) (discussing the safety benefits of intact D&E, the Act's lack of a legitimate policy interest, the Court's failure to follow precedent, and the blurring of the line for when a state can intervene).

district court in *Planned Parenthood of the Heartland* and evaluate both the burden on the woman and the burden on the physician.⁷² Doing so will help courts evaluate whether the regulation does, in fact, place a substantial obstacle in the path of obtaining an abortion.⁷³ It will also serve as an important counterbalance to ever-shifting abortion jurisprudence which has allowed more restrictive regulation without overruling previous cases.⁷⁴

First, the direct causal relationship between a woman's ability to seek an abortion and a physician's ability to provide one ensures that any statute that imposes an undue burden on a provider's ability to perform abortions will likewise put an undue burden on women.⁷⁵ To properly determine whether the purpose or effect of a regulation is to place a substantial obstacle in the path of a woman seeking an abortion, the court must look to the purpose or effect that the regulation has in limiting the physician.⁷⁶

Second, shifting the standard to evaluate both a physician's ability to perform an abortion and a woman's ability to seek an abortion is more fitting with the purpose of requiring informed consent.⁷⁷ Informed consent is meant give the patient sufficient information to make an informed decision whether to undergo a treatment; it is not meant to limit the availability of treatment.⁷⁸ By limiting the options of the patient and removing the opportunity to undergo or forgo a medical proce-

⁷² See *Planned Parenthood of the Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1032–34, 1044, 1046 (D. Neb. 2010).

⁷³ See *Stenberg v. Carhart*, 530 U.S. 914, 945–46 (2000); *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1044, 1046.

⁷⁴ See *Gonzales v. Carhart*, 550 U.S. 124, 164 (2007); *Stenberg*, 530 U.S. at 930, 936, 937.

⁷⁵ See *Stenberg*, 530 U.S. at 930, 945–46 (“All those who perform abortion procedures using [the D&E] method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision.”); *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1044, 1045, 1046.

⁷⁶ See *Stenberg*, 530 U.S. at 945–46; *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1044, 1045, 1046.

⁷⁷ See *Largey v. Rothman*, 540 A.2d 504, 507, 508 (N.J. 1988). Informed consent standards fall primarily into two categories: a “professional” standard, in which the information required is that which a reasonable physician would provide, or a “prudent patient” standard, in which the information required is that which a reasonable patient would have deemed material. *Id.* In jurisdictions employing the professional standard, physicians use their expertise to address only those risks that are appropriate. *Id.* at 507. The prudent patient standard, in contrast, defines the required disclosure of risks “not subjective as to either the physician or the patient [but] . . . objective with due regard for the patient's informational needs and with suitable leeway for the physician's situation.” *Id.* at 508 (quoting *Canterbury v. Spence*, 464 F.2d 772, 787 (D.C. Cir. 1972)).

⁷⁸ See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1989); *Largey*, 540 A.2d at 506; *Scott v. Bradford*, 606 P.2d 554, 556–57 (Okla. 1980).

dure, the legislature dictates treatment under the guise of preventing physicians from doing so.⁷⁹ Rigorous informed consent requirements that limit patient options do not remove the paternalism that informed consent was intended to counteract, but merely shift the decision even further outside the doctor-patient relationship to the legislature.⁸⁰ Evaluating informed consent provisions for whether they place an undue burden on physicians or women is therefore consistent with the purpose of informed consent requirements in medical procedures.⁸¹

Courts have interpreted the undue burden standard set forth by the U.S. Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* as a limit on the methods a legislature may use to effect substantive policy goals by placing substantial obstacles before a woman seeking an abortion.⁸² *Casey*'s undue burden standard has proved both malleable and vague, however, leading to inconsistent results and ambiguity.⁸³ To more properly safeguard the constitutional right to abortion under an undue burden standard, therefore, courts should ask whether a statute or regulation places an undue burden both on a woman seeking an abortion, and on physicians.⁸⁴

CONCLUSION

Because the burdens placed on physicians and the availability of abortion are so closely intertwined, courts should follow the lead of *Planned Parenthood of the Heartland* and evaluate undue burden on both

⁷⁹ See *Cruzan*, 497 U.S. at 269; *Largey*, 540 A.2d at 506; *Scott*, 606 P.2d at 556–57; see also *Stenberg*, 530 U.S. at 945–46 (holding that certain regulations on abortion providers would result in an undue burden on a woman's right to make an abortion decision).

⁸⁰ See Robbins, *supra* note 13, at 158–59, 161, 163, 176; Roe, *supra* note 50, at 205–07.

⁸¹ See, e.g., N.Y. PUB. HEALTH LAW § 2805-d(4)(a), (b) (McKinney 2007) (defenses to a medical malpractice action include that “the patient assured the . . . practitioner he would undergo the treatment . . . regardless of the risk involved, or the patient assured the . . . practitioner that he did not want to be informed of the matters to which he would be entitled to be informed”); N.C. GEN. STAT. § 90-21.13(a)(2) (2010) (no recovery allowed where a “reasonable person, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures”); UTAH CODE ANN. § 78B-3-406(3)(a)–(d) (LexisNexis 2008) (defenses for failure to obtain informed consent include that “the risk of the serious harm which the patient actually suffered was relatively minor”).

⁸² See *Gonzales*, 550 U.S. at 145, 146, 156; *Stenberg*, 530 U.S. at 930, 945–46. See generally *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

⁸³ See *Gonzales*, 550 U.S. at 173–74, 181, 182, 186 (Ginsburg, J., dissenting); *Casey*, 505 U.S. at 985–87 (Scalia, J., dissenting).

⁸⁴ See *Casey*, 505 U.S. at 876–77; *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1032–34, 1044–46.

physicians and women to determine whether the regulation places a substantial obstacle in the path of a woman seeking an abortion. Any burden placed on physicians will necessarily affect the availability of abortion procedures. Therefore, it is appropriate to evaluate the burden on physicians under the same standard as that for women to determine whether the purpose or effect of a legislative action is to place a substantial obstacle before a woman seeking an abortion.

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