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The Underground Railroad to Reproductive Freedom

RESTRICTIVE ABORTION LAWS AND THE RESULTING BACKLASH

We are women whose ultimate goal is the liberation of women in society. One important way we are working toward that goal is by helping any woman who wants an abortion to get one as safely and cheaply as possible under existing conditions.¹

I. INTRODUCTION

Since almost immediately after the United States Supreme Court's landmark 1973 decision in *Roe v. Wade*,² state legislatures have continued to impose, and the Court has consistently upheld, restrictions on a woman's ability to obtain an abortion.³ In *Roe*, the Court held that, "the right of personal

¹ Chicago Women's Liberation Union Herstory Project, Abortion—A Woman's Decision, A Woman's Right, <http://www.cwluherstory.org/CWLUFeature/Janebroch.html>. The quote was taken from the original informational brochure passed out by the Abortion Counseling Service, also known as "Jane," a network of volunteers who, in the years prior to the legalization of abortion provided illegal abortions. *Id.*

² 410 U.S. 113 (1973). *See generally* SUSAN GLUCK MEZEY, ELUSIVE EQUALITY, WOMEN'S RIGHTS, PUBLIC POLICY, AND THE LAW, 224-76 (2003). Mezey describes the facts that led to the litigation in *Roe v. Wade*:

[*Roe*] arose when Norma McCorvey, an unmarried, pregnant carnival worker sought an abortion in her home state of Texas in 1969. McCorvey consulted a doctor, who informed her that abortion was illegal in Texas and suggested she might try going to another state. With no money to travel, she sought an attorney to arrange a private adoption and was referred to two . . . attorneys . . . [They] had been looking for a plaintiff to challenge the Texas abortion law in federal court. They took her case, arguing that restricting the right to abortion unconstitutionally infringed on a woman's fundamental right to privacy.

Id. at 224.

³ *See, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997) (upholding Montana's statute requiring that only licensed physicians perform abortions); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511, 519-20 (1989) (upholding provisions of a Missouri statute that prohibited use of public facilities or public personnel to perform abortions and required ultrasound tests in pregnancies of twenty weeks or more to determine viability by measuring gestational age, weight, and lung maturity); *Harris v. McRae*, 448 U.S. 297, 326 (1980) (upholding as constitutional the Hyde Amendment, which restricted federal funding of Medicaid abortions only to cases of

privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.”⁴ In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court significantly limited the constitutional right to choose to have an abortion created through *Roe*, and instead established that the states have broad authority to regulate second and third trimester abortions.⁵ The *Casey* decision emphasized that abortion is not a fundamental right that merits strict scrutiny review, but is instead a “liberty claim” that is subject to the deferential “undue burden” test.⁶ Accordingly, state legislation that restricts abortion is not surprising in light of the Supreme Court’s recent re-acknowledgement that, “subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”⁷ In response to *Roe* and *Casey*, state legislators have continually introduced and enacted numerous restrictions on the availability of abortions, while pro-choice activists have challenged such restrictions in the courts.⁸ Mandatory waiting

life endangerment); *Maher v. Roe*, 432 U.S. 464, 466, 478 (1977) (upholding a Connecticut prohibition of the use of public funds for abortions, except those that are “medically necessary”); *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (upholding a St. Louis policy against performance of abortion in public hospitals). *But cf.* *Colautti v. Franklin*, 439 U.S. 379, 390 (1979) (striking down as vague a Pennsylvania statute that required physicians to use an abortion technique that would provide best opportunity for fetus to be born alive in post-viability abortion).

⁴ *Roe*, 410 U.S. at 154.

⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837 (1992). *Casey* reaffirmed that a woman has a right “to choose to have an abortion before fetal viability and to obtain it without undue interference from the State, whose pre-viability interests are not strong enough to support an abortion prohibition or the imposition of substantial obstacles to the woman’s effective right to elect the procedure.” *Id.* at 834. Although *Casey* emphasizes that the abortion decision should be a well-informed one, the Court did not acknowledge that their decision “might have an ‘incidental effect of increasing the cost or decreasing the availability’ of abortion.” MEZEY, *supra* note 2, at 262.

⁶ See *Casey*, 505 U.S. at 846, 873-74. As one commentator notes, “The ‘undue burden’ standard [*Casey*] articulates grants the state more power of regulation than did *Roe*, undermining the ability of adult women to exercise their right to choose with absolute impunity.” Pamela S. Quinn, Note, *Preserving Minors’ Rights After Casey: The “New Battlefield” of Negligence and Strict Liability Statutes*, 49 DUKE L. J. 297, 306 (1999).

⁷ *Stenberg v. Carhart*, 530 U.S. 914, 921, 922 (2000) (striking down Nebraska’s partial-birth abortion ban as vague and for failure to provide an exception for the health of the mother).

⁸ See cases cited *supra* note 3. The *Roe* and *Casey* decisions gave the states considerable discretion to choose to enact abortion restrictions. As it is unlikely that

periods, parental consent statutes, abortion counseling bans and gag rules are all common state restrictions.⁹ Although repressive, these restrictions have been upheld under the notion that a state may legislate to protect its “interest in potential life,” so long as the laws preserve access to abortion when necessary to protect the life and health of a pregnant woman.¹⁰

Although *Roe* remains settled law, the re-election of President George W. Bush, the confirmations of conservative Supreme Court judges Chief Justice John Roberts and Justice Samuel Alito, and the possibility of Justice Stevens’s retirement and his replacement by another conservative judge have encouraged anti-choice activists to once again step up their efforts to overturn *Roe*.¹¹ Rather than merely limiting the availability of abortions through the above-mentioned restrictions, lawmakers have increasingly proposed and enacted blatantly unconstitutional legislation that fails to provide exceptions to protect the life and health of pregnant women.¹²

the Supreme Court will narrow, or overrule *Casey*, advocates and opponents of abortion rights have taken the abortion debate to the states.

⁹ See, e.g., *Casey*, 505 U.S. at 837-39 (upholding law requiring mandatory waiting periods, parental consent requirements, and state-scripted counseling requirements); *Ohio v. Akron Ctr. for Health*, 497 U.S. 502 (1990) (upholding an Ohio statute requiring minors to notify one parent or obtain a judicial waiver); *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding federal regulations prohibiting family planning clinics from receiving Title X funds for counseling or giving referrals to women regarding abortion).

¹⁰ See, e.g., *Casey*, 505 U.S. at 876-77, 900-01.

¹¹ See, e.g., Douglas McCollam, *Can “Roe” Survive the Arrival of Alito?*, LEGAL TIMES, Dec. 7, 2005, <http://www.law.com/jsp/article.jsp?id=1133863511391>; CENTER FOR REPRODUCTIVE RIGHTS, WHAT IF *ROE* FELL?—THE STATE-BY-STATE CONSEQUENCES OF OVERTURNING *ROE V. WADE* 7 (2004) [hereinafter WHAT IF *ROE* FELL] (“A Supreme Court decision overturning *Roe* most likely would not by itself make abortion illegal in the United States. Rather, such a decision would remove federal constitutional protection for the right to choose and give each state the authority to set its own abortion policy, including banning it outright.” (footnote omitted)), available at http://www.reproductiverights.org/pdf/bo_whatifroefell.pdf. Some states, aware that *Roe* might be in jeopardy, have considered laws that automatically outlaw abortion if the U.S. Supreme Court reverses *Roe*. *Id.* at 13. Such “trigger laws” are designed to ban abortion as soon as the court overturns *Roe* or the Constitution is amended to allow state regulation of abortion. *Id.* Six states currently have trigger laws on the books. *Id.*

¹² I refer to abortion laws such as the now-defeated South Dakota abortion ban as unconstitutional because they fail to include an exception to preserve the health of the woman as required under *Casey* and *Stenberg*. While South Dakota’s controversial legislation was, in a sense, an act of legislative defiance, one commentator suggests that the legislature was acting within its rights in passing a law that so obviously violates Supreme Court precedent:

Given the legitimacy, indeed the necessity, of the Supreme Court’s sometimes overruling its own precedents, legislators must be able to enact some laws that they know to be unconstitutional under existing precedent, but which

South Dakota's failed anti-abortion statute, the Women's Health and Human Life Protection Act,¹³ was the most draconian of these restrictions since the Supreme Court held that the right of privacy encompasses "a woman's decision whether or not to terminate her pregnancy."¹⁴ The law, which its backers acknowledged was designed to test *Roe v. Wade* in the courts,¹⁵ forbade abortion, even in cases where pregnancy was a result of rape or incest, or in situations in which a

would be found valid if the Court overruled those precedents. Otherwise, the Court would never have the opportunity to reverse itself—for the simple reason that no case challenging the prior rulings would make it into court. Precedents would remain in force, constraining elected officials, long after the Court was willing to overrule them. Thus, legislatures should be able to enact "test" legislation—laws designed to test the continued vitality of some established line of precedent.

Michael C. Dorf, *Does South Dakota's New Abortion Ban Cross the Line Between "Test" Legislation and Defiance of the Supreme Court?*, FINDLAW, Mar. 15, 2006, <http://writ.news.findlaw.com/dorf/20060315.html>.

¹³ H.R. B. 1215, 81st Leg. Assem., 2006 S.D. Sess. Laws ch. 119 (defeated by referendum Nov. 7, 2006).

¹⁴ *Roe v. Wade*, 410 U.S. 113, 153 (1973); see Kate Michelman, Editorial, *Reproductive Rights on the Line in South Dakota*, THE NATION, Oct. 22, 2006, available at <http://www.thenation.com/doc/20061106/michelman>. Though the South Dakota ban drew a large amount of attention in the 2006 elections, Ohio's House of Representatives, on June 13, 2006, held a hearing on a bill that would, according to the its preamble, outlaw all abortions in the state. H.R. B. 228, 126th Gen. Assem., Reg. Sess. (Ohio 2005-2006) (bill to amend, inter alia, OHIO REV. CODE ANN. § 2919.12(A) ("No person shall . . . (1) Perform or induce an abortion; (2) Transport another, or cause another to be transported, across the boundary of this state or of any county in this state in order to facilitate the other person having an abortion."); Jim Provance, *Legislators Debate Ban on Almost All Abortions*, THE BLADE (Toledo, Ohio), June 14, 2006, available at 2006 WLNR 10220639; see also Patrick Cain, *Abortion Bill Exposes Divisions in Ohio GOP—Some Say Ban Is Drastic; They Want Other States to Take on High Costs of Battling Roe v. Wade*, AKRON BEACON J., June 17, 2006, at A1; Editorial, *The Abortion Strategy*, THE BLADE (Toledo, Ohio), June 22, 2006 ("The Ohio bill would outlaw abortion even when a woman's life is in danger. As in South Dakota, no exceptions would be allowed for rape, incest, or health of the mother."), available at 2006 WLNR 10772281. Though the Ohio bill was short-lived, it succeeded in pushing the "contentious abortion debate onto the front burner in Ohio politics." *Id.*

¹⁵ In an interview on MSNBC, Governor Rounds stated:

Well, I am pro-life and I do know that my personal belief is that the best way to approach elimination of abortion is one step at a time. And I do think that this court will ultimately take apart *Roe v. Wade* one-step at a time. Personally, do I think that they're going to step in and do a frontal attack or accept a frontal attack? No, I don't. But there are a lot of people in South Dakota and across the nation that believe that it's worth a try.

The Abrams Report: South Dakota Legislature Attacks Roe v. Wade (MSNBC television broadcast Feb. 24, 2006), available at <http://www.msnbc.msn.com/id/11542260/>. The law explicitly stated, "Nothing in this Act may be construed to subject the pregnant mother upon whom any abortion is performed or attempted to any criminal conviction and penalty." S.D. H.R. 1215. Nevertheless, the South Dakota law violated existing constitutional precedent under *Roe* and *Casey* as it failed to provide an exception for risks to a woman's health.

pregnancy would be dangerous to the woman's physical and/or mental health.¹⁶ The only exception to the abortion ban was for cases in which the procedure was necessary "to prevent the death of a pregnant mother."¹⁷ The Act made the performance of an abortion a class 5 felony and set a penalty of up to five years in prison and a \$5000 fine for performing an abortion.¹⁸ The South Dakota statute was signed into law on March 6, 2006 by Governor Mike Rounds.¹⁹

Despite the Governor's claims to the contrary, not everyone in South Dakota supported the Act. The South Dakota Campaign for Healthy Families²⁰ launched a grassroots mobilization in order to overturn the controversial legislation.²¹

¹⁶ S.D. H.R. 1215; see also Monica Davey & Carolyn Marshall, *South Dakota Bans Abortion*, N.Y. TIMES, Mar. 7, 2006, at A1. For a discussion of some arguments made against exceptions in the case of rape, incest, and the health of the mother, see *infra* text accompanying notes 146-153.

¹⁷ S.D. H.R. 1215.

¹⁸ *Id.*; Amy Goodman & Juan Gonzalez, *South Dakota Votes on Most Restrictive Abortion Law in Country: A Debate*, DEMOCRACY NOW!, Nov. 3, 2006 http://www.democracynow.org/2006/11/3/south_dakota_votes_on_most_restrictive (last visited Apr. 17, 2008).

¹⁹ Chet Brokaw, *South Dakota Governor Signs Abortion Ban into Law*, ASSOC. PRESS, Mar. 6, 2006, available at <http://www.truthout.org/cgi-bin/artman/exec/view.cgi/47/18189>. The legislature rejected an effort to allow South Dakotans to decide the question in a referendum. Monica Davey, *Ban on Most Abortions Advances in South Dakota*, N.Y. TIMES, Feb. 23, 2006, at A14. The legislators chose to do so in "an effort to prevent state tax dollars from financing what is certain to be a long and expensive court battle." *Id.*

²⁰ According to the group's website, the South Dakota Campaign for Healthy Families

is a coalition of concerned citizens and groups fighting the abortion ban in South Dakota. We are a political committee registered with the South Dakota Secretary of State and the IRS and formed in an effort to repeal HB 1215, the ban on abortions. The Campaign is co-chaired by 14 prominent South Dakota leaders from all corners of the state, from both political parties, young and old, ministers, doctors, nurses, and the leader of the largest Native American tribe.

South Dakota Campaign for Healthy Families, <http://sdhealthyfamilies.org/about-us.php> (last visited Apr. 2, 2008). For press coverage of the South Dakota controversy concerning the abortion ban, see the Campaign for Healthy Families website, <http://sdhealthyfamilies.org/> (last visited Jan. 27, 2008).

²¹ See Brokaw, *supra* note 19. See generally Kristina Wilfore, *Ballot Initiatives on the Right: 2006*, PUBLIC EYE MAG., Fall 2006, at 6, available at http://www.publiceye.org/magazine/v20n3/wilfore_ballot.html (explaining that ballot initiatives, such as the one used by pro-choice activists in South Dakota, "allow citizens to push for a popular vote on a key issue in their state by gathering [a required number of] voter signatures"). A state constitutional provision dating back to 1898 allowed South Dakota voters to put a law to referendum if they gathered a sufficient number of signatures (here, petitioners needed 16,728). See S.D. CONST. art. III, § 1; S.D. CODIFIED LAWS § 12-3-1 (2007); Monica Davey, *Ripples from Law Banning Abortion Spread Through South Dakota*, N.Y. TIMES, Apr. 16, 2006, sec. 1, at 14; see also Peter

Instead of challenging the ban in the courts, and for fear of obtaining a precedent that would uphold the law, the group strategically sought to refer the state abortion ban to the November ballot.²² Although the voters of South Dakota ultimately struck down the statute,²³ it is unlikely that this will be the last time that the states attempt to enact such an extensive and oppressive ban on abortions.²⁴

This premise is evidenced by the fact that South Dakota was the first but not the only state to consider very severe abortion restrictions in 2006.²⁵ Legislators in numerous states introduced bans similar to the one overturned in South Dakota,²⁶ while other states enacted abortion restrictions such as waiting periods, parental and spousal notification laws, and prohibitions against late-term abortions.²⁷ This flurry of state

Slevin, *S. Dakota Becomes Abortion Focal Point*, WASH. POST, Aug. 28, 2006, at A1. The campaign collected more than twice the required amount of signatures by the June 19, 2006 deadline to get the issue on the ballot. See Laura Vanderkam, Op-Ed., *A Civil Abortion Debate?*, USA TODAY, Nov. 7, 2006, at 13A (“South Dakota’s referendum represents one of the few times since 1973 . . . that voters have gotten to debate the [abortion] question directly at the polls.”).

²² See Davey, *supra* note 21; Slevin, *supra* note 21; Judy Keen, *Abortion Ban Looms Large on S.D. Ballot*, USA TODAY, Oct. 26, 2006, at 3A (noting that if the ban had succeeded at the polls, Planned Parenthood planned to challenge the legislation in the courts).

²³ *Ballot Initiatives: Pay Me More, Don’t Let Them Wed*, THE ECONOMIST, Nov. 11, 2006, at 79. The voters struck down the measure 56% to 44%. *Id.*

²⁴ See *supra* note 14 (describing Ohio’s attempt to enact an abortion ban similar to the South Dakota ban).

²⁵ Evelyn Nieves, *S.D. Abortion Bill Takes Aim at ‘Roe,’* WASH. POST, Feb. 23, 2006, at A1.

²⁶ Alabama, Arkansas, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Ohio, Oklahoma, South Carolina, Tennessee, and West Virginia introduced similar bans. Lisa Casey Perry, *Attacks on Reproductive Rights Spread to 14 States*, PEOPLE’S WEEKLY WORLD, June 27, 2006. For example, Louisiana enacted legislation banning abortion if *Roe v. Wade* is overturned. SB 33, 2006 La. Sess. Law Serv. 06RS 271 (West). Further, according to the Center for Reproductive Rights, in 2006 Louisiana enacted a ban on abortions in all stages of pregnancy except to avert “substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman.” CENTER FOR REPRODUCTIVE RIGHTS, 2006 MID-YEAR REPORT, http://www.crlp.org/st_leg_summ_midyear_06.html [hereinafter 2006 MID-YEAR REPORT]. Also, Mississippi attempted unsuccessfully to outlaw all abortions, providing exceptions only to save the life of the pregnant woman or in cases of rape or incest. *Id.* Under Ohio’s proposed abortion ban, discussed *supra* note 14, pregnant women could be charged with a felony for leaving Ohio to have an abortion and doctors could face second-degree felony charges for assisting in the procedure. *Id.*

²⁷ The Center for Reproductive Rights report described legislative efforts in 2005 and 2006 as follows:

The Center also tracked fifteen bills in six states which attempt to restrict so-called ‘partial birth abortions’. . . . Since the beginning of the 2006 legislative session, the Center has monitored ninety-two biased counseling

restrictions and the contentious nature of the abortion debate heighten the likelihood that the Supreme Court could once again choose to reexamine its holding in *Roe v. Wade*.²⁸ As noted by retired Supreme Court Justice Sandra Day O'Connor, "No one, it seems, considers the Supreme Court decision in *Roe v. Wade* to have settled the issue for all time."²⁹

and/or mandatory delay bills introduced in thirty-nine states. . . . These proposed laws used many different strategies, including a mandatory 24-hour "reflection period" after counseling, written consent, coercion screening, and mandatory receipt of information on the "medical and psychological risks of abortion." Moreover, lawmakers in West Virginia introduced a law that would require medical facilities to warn women seeking an abortion of an increased risk of breast cancer. Three biased counseling and/or mandatory delay bills were enacted this legislative session and two were vetoed. . . . Fetal pain provisions account for twenty-eight of the ninety-two biased counseling/mandatory delay bills introduced this session. The majority of these bills would require that the state's informed consent materials be amended to include information that the fetus has the capacity to feel pain at a specified point in gestation. . . .

Seventy-nine bills have been introduced or carried over from the 2005 session dealing with minor's access to abortion, contraception, and health care. The Center also tracked eleven bills that would make it more difficult for minors to access contraceptives. The majority of this legislation either sought to require minors to secure parental consent before filling a prescription for contraceptives or require a pharmacist to notify a parent before filling a prescription for contraceptives. While none of these bills have been enacted at this point in the session, they were introduced in seven states and New York's bill is still pending

While many state legislatures have sought to use public money to fund crisis pregnancy centers during the 2006 session, they have also introduced legislation to further restrict the use of public money to fund abortions for low income women. At this point in the legislative session twenty-two bills have been introduced in ten states that seek to prohibit or restrict the use of state public funds to pay for abortions for low income women.

2006 MID-YEAR REPORT, *supra* note 26.

²⁸ Though it was only seven years ago when the Supreme Court invalidated Nebraska's so-called 'partial birth' abortion ban in *Stenberg v. Carhart*, Congress nevertheless enacted the Partial Birth Abortion Ban Act of 2003 ("PBABA")—a federal statute similar to that in *Stenberg*, that also failed to provide an exception for the health of the mother. David Masci & Jon Shimabukuro, *The Supreme Court Revisits the Partial Birth Abortion Issue*, *Gonzales v. Carhart and Gonzales v. Planned Parenthood*, LEGAL BACKGROUND, Pew Forum on Religion & Public Life (Nov. 2006), <http://pewforum.org/publications/reports/partial-birth-abortion.pdf>. On April 18, 2007, the Supreme Court held in a 5-4 decision that the statute does not violate the Constitution. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1638-39 (2007). Justice Kennedy wrote for the majority, which included Justices Alito, Thomas, Scalia, and Chief Justice Roberts. *Id.* at 1618. Justice Ginsburg wrote for the dissent, which included Justices Breyer, Souter, and Stevens. *Id.*

²⁹ Dennis J. Hutchinson, *Bench Press*, N.Y. TIMES, June 29, 2003, § 7 (reviewing SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* (2003)). Notably, it was Justice O'Connor who, in writing for the *Casey* plurality, articulated the more deferential "undue burden" standard. *See Casey*, 505 U.S. 833, 874-79 (1992).

In light of changes to the Supreme Court's composition and increased advocacy in opposition to abortion, it is quite possible that the Court could overturn *Roe*, or affirm even more severe state restrictions on abortion.³⁰ Consequently, it is important to examine the implications of state legislation that hinder a woman's right to obtain an abortion.³¹ Though pro-choice activists were successful in mobilizing South Dakota voters to overturn the proposed abortion ban, states can and will continue to enact legislation that curtails reproductive choice.³² Therefore, this Note will explore the effects of current state abortion laws on women seeking abortions in an effort to analyze the reemergence of the abortion "underground railroad"—the means by which women travel to other states and communities in order to obtain abortions and/or contraceptives that are either unavailable or incredibly difficult to obtain in their home states.³³ Such an "underground railroad" is frighteningly reminiscent of the pre-*Roe* years when women sought and obtained unsafe and unsanitary abortions both because of and despite their illegality.³⁴ Though a number of feminist

³⁰ See *supra* text accompanying note 11.

³¹ *Roe*'s reversal would allow states to create abortion policy as they see fit. "Given the variations in law and political climates in the 50 states, the overturning of *Roe* would result in a patchwork of rights in which women seeking abortions would be strongly protected in some states and completely denied the right in others, with different levels of protection in between." WHAT IF *ROE* FELL, *supra* note 11, at 7.

³² See *supra* notes 26-32 and accompanying text.

³³ Debbie Nathan, *The New Underground Railroad*, N.Y. MAG., Dec. 12, 2005, available at <http://nymag.com/nymetro/news/features/15249/index.html>. I refer to the "re-emergence" of the underground abortion railroad because these networks existed prior to 1973, when abortion was still illegal. During the 1960s, two underground networks emerged—the Society for Humane Abortion in California and the Jane Collective in Chicago—whereby women were able to obtain illegal abortions. See Chicago Women's Liberation Union Herstory Project Website, <http://www.cwluherstory.org/featured-history/index.php> (last visited March 19, 2008) [hereinafter CWLU Website]. See generally LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973 (1997), available at <http://ark.cdlib.org/ark:/13030/ft967nb5z5/>. In 1969, a group of women in Chicago began providing abortions through an illegal, underground network officially known as the Abortion Counseling Service of Women's Liberation, which was referred to in code as "Jane." The group, which was patterned after the Underground Railroad, provided more than 11,000 safe abortions between 1969 and 1973. See CWLU Website.

³⁴ See REAGAN, *supra* note 33, at 223. Another commentator describes the pre-*Roe* years as follows:

While the problem of unintended pregnancy spanned all strata of society, the choices available to women varied before *Roe*. At best, these choices could be demeaning and humiliating, and at worst, they could lead to injury and death. Women with financial means had some, albeit very limited, recourse to a legal abortion; less affluent women, who disproportionately were young

commentaries have discussed “underground movements” in reference to issues including abortion,³⁵ domestic violence,³⁶ and female genital mutilation,³⁷ to date no legal scholar has argued that laws which uniquely impact the lives of women often result in movements underground and that such movements therefore deserve greater attention from legislatures.

This Note will argue that women who move underground are typically reacting to gendered laws³⁸ that fail to acknowledge women’s interests in their own bodily integrity. When state legislators fail to appreciate the likelihood that their laws will result in underground movements, they relegate women to a position of second-class citizenship, placing women’s bodies and lives in danger. This Note will further argue that legislatures oftentimes deliberately ignore and/or fail to investigate the statistical, historical, and anecdotal evidence that underground movements have in the past emerged in response to newly enacted abortion restrictions, and will continue to do so in the future. The mere likelihood that a law will be evaded does not necessarily suggest that it should be subject to a validity challenge; however, laws that uniquely impact women, abortion laws in particular, deserve careful scrutiny because the evasion of such laws will result in the physical injuries and deaths of large numbers of women. Such a result violates the constitutional mandate of Equal Protection under the Fourteenth Amendment.³⁹ This Note will

and members of minority groups, had few options aside from a dangerous illegal procedure.

Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?*, in GUTTMACHER REPORT ON PUBLIC POLICY, Mar. 2003, at 8, available at <http://www.guttmacher.org/pubs/tgr/06/1/gr060108.html>.

³⁵ See generally Benson Gold, *supra* note 34; CWLU Website, *supra* note 33; LAURA KAPLAN, *THE STORY OF JANE: THE LEGENDARY UNDERGROUND FEMINIST ABORTION SERVICE* (1995).

³⁶ See generally G. Kristian Miccio, *Notes from the Underground: Battered Women, the State, and Conceptions of Accountability*, 23 HARV. WOMEN’S L.J. 133 (2000).

³⁷ See generally Karen Hughes, *The Criminalization of Female Genital Mutilation in the United States*, 4 J.L. & POL’Y 321 (1995).

³⁸ Gendered laws are laws that apply to only one sex or laws that apply differently to one sex than the other. Conversely, gender-neutral laws are laws that apply equally to men and women. Despite the differences between the two, sex discrimination can be present in either type of law.

³⁹ The Fourteenth Amendment establishes that no state may deny persons the equal protection of the laws. U.S. CONST. amend. XIV, § 1. As noted by one commentator:

The Equal Protection Clause prohibits laws that ban abortion for these reasons. First, an assertedly benign interest in protecting unborn life cannot

therefore suggest that abortion advocates will best serve their goals of making abortion safe, rare, and *available* through the introduction of evidence regarding the deaths, injuries, and frequency of abortion resulting from such movements in the United States and elsewhere. If legislatures then still proceed to enact restrictive laws, abortion advocates will have no alternative but to make underground networks more accessible and to ensure the safety of underground abortions.

Part II of this Note will describe restrictive anti-choice legislation that has been proposed in the states. An examination of the varying and increasing number of such laws will suggest that the South Dakota law was a natural progression from these types of restrictions. Part III will analyze South Dakota's failed abortion ban and will question how fully or fairly the lawmakers considered the medical, social and personal implications of the abortion ban. Though voters ultimately rejected the ban, an analysis of the legislative history of the defeated ban will illustrate the failure on the part of the legislature to explore the implications of the law and the likelihood that it would result in an underground movement. In Part IV, this Note will address the negative effects that restrictive laws have on women seeking abortions, with particular attention paid to the development of the modern-day underground railroad whereby women travel to states with more liberal laws to obtain abortions. Part V, then, will offer a brief comparative analysis of abortion laws in

save an abortion ban from claims of sex discrimination if government recites woman-protective justifications to secure the statute's enactment. Equal protection cases prohibit government from pursuing a discriminatory purpose, not only when a discriminatory purpose is the sole purpose for the challenged action, but also when that purpose is a "motivating factor" for the challenged action. . . .

Second, under the Constitution, citizens are free to embrace traditional gender-differentiated family roles, but government may no longer enforce these roles, as it did for centuries. . . .

Third, these constitutional constraints on the way government can regulate women's roles apply equally to the regulation of pregnant women, whether we treat the regulation of pregnant women as facially neutral or sex based within the Court's reasoning in *Geduldig v. Aiello*. Laws regulating pregnant women are unconstitutional if enforcing constitutionally proscribed views of women was a motivating factor in the law's enactment. If a law regulating pregnant women reflects or attempts to enforce stereotypes about women's family roles, it violates the Equal Protection Clause, as the Court recently demonstrated in *Nevada Department of Human Resources v. Hibbs*.

Reva B. Siegel, *David C. Baum Memorial Lecture: The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1040, 1042-43 (footnotes and paragraph break omitted).

other countries with particular attention paid to the rates of abortions in countries where the procedure is illegal or severely restricted. Finally, Part VI will conclude and will offer several suggestions as to how to best avoid the increasing necessity of the underground abortion movement.

II. ANTI-CHOICE LEGISLATION IN THE STATES

Abortion remains a politically divisive issue within the United States and the world, with activists on both sides of the debate advocating for legislation that supports their respective arguments. Notably, the anti-abortion movement has gained considerable support since *Roe* and *Casey* were decided by the Supreme Court. Abortion opponents, dismayed by the Court's unwillingness to overrule *Roe*, have adopted an incrementalist strategy, whereby instead of "trying to make abortion illegal" they are "trying to make it impossible."⁴⁰ Legislation has included mandatory waiting periods before an abortion may be performed, parental-consent and parental notification laws, and refusal laws that allow doctors and hospitals to decline to perform abortions.⁴¹ Other restrictions, such as requirements that abortions be performed in a hospital after a certain point in the pregnancy or that a second doctor be present for the procedure, "add to the cost and affect the availability of abortion."⁴² So too, do restrictions on public funding of abortions and on private insurance availability.⁴³ Other abortion restrictions come in the form of laws that allow doctors to refuse to perform abortions, bans on late term abortions, and post-viability restrictions.⁴⁴

The impetus to enact such an array of abortion restrictions has only increased during the past decade.⁴⁵ The rightward political shift throughout the federal bench during the Bush administration has increasingly influenced anti-abortion activists and legislators to test the staying power of

⁴⁰ Heather A. Smith, Comment, *A New Prescription for Abortion*, 73 U. COLO. L. REV. 1069, 1075 (2002).

⁴¹ See *infra* Part II.A-C.

⁴² Christine Vestal, *States Probe Limits of Abortion Policy*, STATELINE, June 11, 2007, at 15, <http://archive.stateline.org/weekly/Stateline.org-Weekly-Original-Content-2007-06-11.pdf>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See *supra* notes 11 and 27 and accompanying text.

the Supreme Court's 1973 *Roe* decision.⁴⁶ *Roe*'s reversal would clear the way for a state-by-state battle over whether, and under what circumstances, abortion could remain legal.⁴⁷ Even though *Roe* remains good law, and the right to an abortion is guaranteed, obtaining an abortion in some states is quite difficult as local laws, culture, and politics create widely varying experiences for women seeking to end their pregnancies.⁴⁸ Existing abortion restrictions such as mandatory delay laws, parental notification and consent laws, and refusal laws already may be having the effect that many women seeking abortions are forced into bearing unwanted children or resorting to the "abortion underground." The following sections will briefly explore the impact of such legislation in these states.

A. *Mandatory Delay Laws*

In *Casey*, the Supreme Court held that mandatory delay laws, though clearly designed to discourage abortions,⁴⁹ do not pose a "substantial" obstacle as they do not eliminate a woman's right to obtain an abortion.⁵⁰ One commentator

⁴⁶ See *supra* note 11. Although the recent changes in the composition of the Supreme Court have influenced state legislatures to renew and/or strengthen their efforts to enact laws that limit a woman's right to obtain an abortion, such legislation is by no means novel. In fact, "within two years after *Roe* was decided, thirty-two states enacted a total of sixty-two abortion-related laws." MEZEY, *supra* note 2, at 227.

⁴⁷ WHAT IF *ROE* FELL, *supra* note 11 at 7.

⁴⁸ See Vestal, *supra* note 42; Nadine Strossen, *Women's Rights Under Siege*, 73 N.D. L. REV. 207, 223 (1997) ("[S]tate and local governments have been imposing onerous restrictions that, for all practical purposes, make abortion unavailable to many women in our society, especially young women, poor women, and women who live far away from abortion services."); see also Benson Gold, *supra* note 34 (predicting that the pre-*Roe* cultural factors that impeded access to abortion for many women may recur should states regain regulatory authority); *supra* text accompanying notes 42-46.

⁴⁹ See Strossen, *supra* note 48, at 220-28; see also Ted Joyce & Robert Kaestner, *The Impact of Mandatory Waiting Periods and Parental Consent Laws on the Timing of Abortion and State of Occurrence Among Adolescents in Mississippi and South Carolina*, 20 J. POL'Y ANALYSIS & MGMT. 263 (2001) (finding that although the overall abortion rate declined in Mississippi after the enactment of a mandatory delay law, the proportion of procedures that were performed in the second trimester increased by fifty-three percent among women whose closest provider was in-state).

⁵⁰ *Casey*, 505 U.S. at 887. For an analysis of whether the *Casey* undue burden standard has meaningfully protected a woman's right to an abortion, see Linda J. Wharton et al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317 (2006). The authors assert that "mandatory waiting periods . . . proliferated across the United States in the years following *Casey*. Although these laws were on the books in approximately thirteen states prior to *Casey*, they were not being enforced because they had been ruled constitutionally invalid in 1983." *Id.* at 319-20 n.9 (citations omitted).

described certain members of the Court's willingness to uphold state abortion restrictions as follows: "To complain about having to wait an extra day, as the three justices saw it, was to insist upon 'abortion on demand.'"⁵¹ Accordingly, it comes as no surprise that twenty-four states currently enforce mandatory delay laws that require a woman to wait a certain number of hours or days after receiving state-mandated information drafted to discourage abortion.⁵² Such requirements do not serve any health purpose, but instead exist at the behest of legislatures that seek to discourage abortion through the creation of obstacles to access.⁵³ In fact, the American Medical Association ("AMA"), the leading national physicians organization, found that mandatory delay laws "increase the gestational age at which the induced pregnancy termination occurs, thereby also increasing the risk associated with the procedure."⁵⁴ As noted by numerous commentators and advocates, these requirements are especially harsh for low-

⁵¹ Chris Whitman, *Looking Back on Planned Parenthood v. Casey*, 100 MICH. L. REV. 1980, 1988 (2002).

⁵² GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS (Apr. 1, 2008), available at http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf [hereinafter OVERVIEW OF ABORTION LAWS]; Mandatory Delays and Biased Information Requirements (Dec. 9, 2005) (Center for Reprod. Rights, New York, N.Y.), http://www.reproductiverights.org/pub_fac_manddelay1.html.

⁵³ See Joyce & Kaestner, *supra* note 49; see also Jonathan Klick, *Mandatory Waiting Periods for Abortions and Female Mental Health*, 16 HEALTH MATRIX 183, 186, (2006). In describing the debate over mandatory delays, Klick notes that "[s]upporters of mandatory delays suggest that women who make rash, irreversible decisions about their pregnancies often regret those decisions." *Id.* They assert that "waiting periods should improve the mental health of women with unwanted pregnancies by giving them a chance to reflect on their decisions." *Id.* On the other hand, opponents of mandatory delay laws argue that such legislation causes "delays in securing an abortion" and "[i]n some cases, they argue, the delays will actually be harmful to a woman's mental health as she is forced to second-guess her decision potentially leading to depression." *Id.*

⁵⁴ Council on Scientific Affairs, American Medical Association, *Induced Termination of Pregnancy Before and After Roe v. Wade: Trends in the Mortality and Morbidity of Women*, 268 JAMA 3231, 3238 (1992); see also Chinué Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, 9 GUTTMACHER POL'Y REV. 4, 7 (2006), available at <http://www.guttmacher.org/pubs/gpr/09/4/gpr090406.pdf> (noting that the AMA "has long opposed any legislative measure that would require 'procedure-specific' informed consent"). Women who encounter mandatory-delay laws are often forced to seek later abortions. The study by Joyce and Kaestner, found that after a law requiring women to make two trips to the clinic took effect in Mississippi, the proportion of abortions performed after the first trimester increased by forty percent. This is particularly problematic considering the fact that pushing an abortion into the second trimester makes what would have been a routine procedure more complicated, risky, and expensive. See Joyce & Kaestner, *supra* note 49; ACLU, *Government-Mandated Delays Before Abortion* (Jan. 15, 2003), <http://www.aclu.org/reproductiverights/abortion/16397res20030115.html> [hereinafter ACLU, Government-Mandated Delays].

income women, underage girls, and women who live in rural areas, and they fail to address the reasons why women seek abortions.⁵⁵ Moreover, critics have argued that the mandatory counseling and waiting period legislation treats women as though they are “incapable of autonomous choice.”⁵⁶

B. Parental Involvement Laws

In addition to their decision to uphold mandatory delay laws, the Supreme Court in *Casey* also held that states have an interest in ensuring that minors are protected from making immature decisions, and affirmed states’ rights to pass certain types of regulations that foster parental involvement in a minor’s decision to have an abortion.⁵⁷ Currently, thirty-five states have laws in effect requiring either parental consent or notification,⁵⁸ while courts in nine other states have rejected

⁵⁵ See ACLU, Government-Mandated Delays, *supra* note 54; 2006 MID-YEAR REPORT, *supra* note 26; Klick, *supra* note 53; Wharton et al., *supra* note 50.

⁵⁶ John A. Robertson, *Reproductive Technology in Germany and The United States: An Essay in Comparative Law and Bioethics*, 43 COLUM. J. TRANSNAT’L L. 189, 202 (2004).

⁵⁷ See *Casey*, 505 U.S. at 895 (“[O]ur judgment that [notification restrictions for minors] are constitutional [is] based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart.”). Unlike the Court’s decision in *Planned Parenthood v. Danforth*, holding that “[a]ny independent interest the parent may have in the termination of the minor daughter’s pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant,” 428 U.S. 52, 75 (1976), *Casey* is far less lenient, reflecting the Court’s unwillingness to trust in a minor’s decision. See *id.* “[T]he Court has not wavered from its belief in these interconnected assumptions about teen decisional incapacity and the ameliorative effect of parental engagement, using this belief to justify limiting the reproductive rights of young women.” J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 BERKELEY WOMEN’S L.J. 61, 65 (2003); see Christine Vestal, *Calif., Ore. Voters to Decide Parental Notice*, STATELINE, Oct. 19, 2006, at 9, <http://archive.stateline.org/weekly/Stateline.org-Weekly-Original-Content-2006-10-16.pdf>.

⁵⁸ GUTTMACHER INSTITUTE, ST. POLICIES IN BRIEF: PARENTAL INVOLVEMENT IN MINORS’ ABORTIONS 1 (2008), available at http://www.agi-usa.org/statecenter/spibs/spib_PIMA.pdf; Teresa Stanton Collett, *Transporting Minors for Immoral Purposes: The Case for the Child Custody Protection Act & the Child Interstate Abortion Notification Act*, 16 HEALTH MATRIX 107, 113 n.18 (2006) (citing the following state laws: ALA. CODE §§ 26-21-2 to -4 (1992); ALASKA STAT. §§ 18-16.010 to -16.030 (2004); ARIZ. REV. STAT. ANN. § 36-2152 (2003); ARK. CODE ANN. §§ 20-16-801 to -804 (2000); CAL. HEALTH & SAFETY CODE § 123450 (West 1996); COLO. REV. STAT. §§ 12-37.5-101 to -108 (2004); DEL. CODE ANN. tit. 24, § 1783 (1997); FLA. STAT. § 390.01114 (2005); GA. CODE ANN. § 15-11-112 (2001); IDAHO CODE ANN. §§ 18-609, 18-609A (2004); 750 ILL. COMP. STAT. 70/15 (West 2005); IND. CODE § 16-34-2-4 (1997); IOWA CODE §§ 135L.1-L.6 (West 1997); KAN. STAT. ANN. § 65-6705 (2002); KY. REV. STAT. ANN. § 311.732 (West 2004); LA. REV. STAT. 40.1299.35 (2008); ME. REV. STAT. ANN. tit. 22, § 1597-A (2004); MD. CODE ANN. [HEALTH-GEN.] § 20-103 (LexisNexis 2005); MASS.

such statutes as violating the privacy and equal-protection clauses in their state constitutions.⁵⁹ In fact, all but five states have passed some type of parental involvement law.⁶⁰ Though judicial bypass procedures allow for mature and well-informed minors to legally circumvent parental involvement laws,⁶¹ statistical and anecdotal evidence suggest that minors often cross state lines to evade parental notification or consent requirements.⁶² Further, commentators have correctly criticized

GEN. LAWS ch. 112, § 12S (2003); MICH. COMP. LAWS ANN. §§ 722.901-.904 (West 2003); MINN. STAT. ANN. §144.343 (2005); MISS. CODE ANN. §§ 41-41-51 to -59 (West 1999); MO. REV. STAT. § 188.028 (2004); MONT. CODE ANN. §§ 50-20-202 to -212 (West 2005); NEB. REV. STAT. §§ 71-6901 to -6902 (2003); NEV. REV. STAT. § 442.255 (2004); N.H. REV. STAT. §§ 132:24-:26 (Supp. 2004) (repealed June 29, 2007); N.J. STAT. ANN. §§ 9:17A-1 to -1.6 (West 2005); N.M. STAT. ANN. § 30-5-1 (LexisNexis 2003); N.C. GEN. STAT. §§ 90-21.6 to -21.7 (2003); N.D. CENT. CODE § 14.02.1-03 (2004); OHIO REV. CODE ANN. § 2919.121 (West. Supp. 2005); OKLA. STAT. tit. 63, § 1-740; 18 PA. CONS. STAT. ANN. § 3206 (West 2000); R.I. GEN. LAWS § 23-4.7-6 (2001); S.C. CODE ANN. § 44-41-30 (2002); S.D. CODIFIED LAWS § 34-23A-7 (1994); TENN. CODE ANN. §§ 37-10-301 to -303 (2001); TEX. FAM. CODE ANN. §§ 33.001-.011 (Vernon 2002); UTAH CODE ANN. § 76-7-304(2) (2003); VA. CODE ANN. § 16.1-241 (2003); W. VA. CODE § 16- 2F-3 (2003); WIS. STAT. ANN. § 48.375 (2004); WYO. STAT. ANN. § 35-6-118 (2005)).

⁵⁹ Vestal, *supra* note 57 (identifying Alaska, California, Idaho, Illinois, Montana, Nevada, New Hampshire, New Jersey, and New Mexico); see also Stanton Collett, *supra* note 58, at 114 n.19.

⁶⁰ Stanton Collett, *supra* note 58, at 113 n.18 (noting that the only states without such laws are Hawaii, New York, Oregon, Vermont, and Washington.).

⁶¹ The Supreme Court has upheld state parental consent or notification statutes so long as the statute contains a mechanism to bypass parental involvement. See *Lambert v. Wicklund*, 520 U.S. 293 (1997); *Casey*, 505 U.S. 833 (1992); *Planned Parenthood Assoc. of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979). *But see* Adam Liptak, *On Moral Grounds, Some Judges Are Opting Out of Abortion Cases*, N.Y. TIMES, Sept. 4, 2005, at § 1 (noting that judges who morally or religiously oppose abortion are opting out of their duty to hear abortion cases in states where the law requires a minor to have parental consent or to seek a judicial bypass before she can legally obtain an abortion). Such refusals by judges are certainly problematic. It has been recognized that “[m]eaningful access to a judicial bypass protects some of [the] most vulnerable minors.” Shelia Cheaney & Laura Smith, *Staying Open: How Restricting Venue in Texas’s Judicial Bypass Cases Would Hurt Minors and Violate the Constitution*, 9 SCHOLAR 45, 47, 65 (2006) (discussing Texas law as it relates to judicial bypass procedures).

⁶² The Council on Ethical and Judicial Affairs notes:

Because the need for privacy may be compelling, minors may be driven to desperate measures to maintain the confidentiality of their pregnancies. They may run away from home, obtain a “back-alley” abortion, or resort to self-induced abortion. The desire to maintain secrecy has been one of the leading reasons for illegal abortion deaths since the U.S. Supreme Court decided the existence of a constitutional right to abortion in 1973.

Council on the Ethical and Judicial Affairs, *Mandatory Parental Consent to Abortion*, 269 JAMA 82, 83 (1993); see also Helena Silverstein & Leanne Speitel, “*Honey, I Have No Idea*”: *Court Readiness to Handle Petitions to Waive Parental Consent for Abortion*, 88 IOWA L. REV. 75, 77 (2002) (finding that Alabama’s parental consent statute and its judicial waiver process failed to secure the rights of pregnant minors). *But cf.* Cheaney & Smith, *supra* note 61, at 47 n.8 (citing a 1992 study by Stanley K. Henshaw and

such laws because they compromise the health and safety of minors seeking abortions, and they unnecessarily delay the procedure.⁶³ Numerous medical organizations—including the American Medical Association, the American Academy of Pediatrics, the Society for Adolescent Medicine, the American College of Obstetricians and Gynecologists, and the American Public Health Association—also oppose such legislation and instead support confidential health care for minors.⁶⁴ Parental consent laws unquestionably encourage minor women to seek abortions in other states without such requirements,⁶⁵ as evidenced by Congressional efforts to enact legislation prohibiting such maneuvers.⁶⁶ Such legislation will not likely deter

Kathryn Kost concluding that “in states devoid of parental involvement laws, approximately seventy-five percent of teens seeking abortions had told their parents about the pregnancy.”).

⁶³ See Layla Summers, Note, *The Future of the Abortion Right: Ayotte v. Planned Parenthood & the Roberts’ Court*, 5 WHITTIER J. CHILD & FAM. ADVOC. 669, 682-83 (2006) (arguing that parental consent/notice laws deny “the ‘reality of adolescent sexual activity,’” and, “can compromise the health and safety of a minor seeking an abortion by delaying the procedure”).

⁶⁴ 2005 *Child Interstate Abortion Notification Act: Hearing on H.R. 748 Before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 109th Cong. 8 (2005) [hereinafter *CIANA Hearing*] (opening statement of Rep. Steve Chabot, Chairman, Subcomm. on the Constitution).

⁶⁵ In Pennsylvania, where the parental consent law went into effect in March 1994, the number of teen-agers terminating pregnancies dropped from 4037 in 1992 to 3276 in 1994 according to a spokesman for the Pennsylvania Department of Health. *Teen-Agers Cross State Lines in Abortion Exodus*, N.Y. TIMES, Dec. 18, 1995, at 6. Such numbers, though, must be examined in light of the reality that many teenagers simply resorted to out-of-state abortion clinics. According to one commentator:

There are some indications that taking minors across state lines to avoid parental knowledge or consent is a significant problem. For example, after the Pennsylvania Abortion Control Act was implemented, officials at clinics in New Jersey and New York noted an increase in the number of Pennsylvania patients: “At the South Jersey Women’s Center in Cherry Hill, the percentage of patients from Pennsylvania more than tripled over [ten] months, from 7 percent in January 1995 to about 25 percent in October, said George Dainoff, the clinic’s medical director.” A significant increase was also reported by the administrator of Southern Tier Women’s Services in Vestal, New York.

Stanton Collett, *supra* note 58, at 115.

⁶⁶ See Child Custody Protection Act (“CCPA”), S. 403, 109th Cong. (2006). The CCPA would make it a federal crime to circumvent a homestate law requiring notification or consent of one or both parents prior to an abortion by transporting a minor across state lines to obtain an abortion. The Child Interstate Abortion Notification Act (“CIANA”) “would make it a federal offense to . . . circumvent . . . a valid state parental consent or notification law by knowingly transporting a minor across a state line with the intent that she obtain an abortion.” The CIANA “builds on the [CCPA] by also requiring that an abortion provider,” before performing an abortion on a minor resident of a different state, “notify a parent, or if necessary a legal guardian.” *CIANA Hearing, supra* note 64. Opponents of the CCPA have noted that laws that require parental consent could cause minors harm. Among minors who did

young women from obtaining abortions. Instead, if young women are unable to travel out of state, they will likely resort to illegal abortions.⁶⁷

C. Refusal Laws

The negative impact that mandatory delay laws and parental involvement laws have on women is further compounded by the fact that doctors and hospitals are increasingly unwilling to perform abortions.⁶⁸ In fact, eighty-seven percent of all counties in the United States do not have a single abortion provider.⁶⁹ Forty-six states currently have refusal laws, which allow doctors and healthcare providers to opt out of performing or assisting in abortions on the grounds that they conflict with the provider's religious beliefs, and which allow pharmacists to refuse to provide contraceptives to women seeking them.⁷⁰ Though such legislation varies amongst the

not tell a parent of their abortion, thirty percent had experienced violence in their family or feared violence or being forced to leave home. For example, in Idaho, a 13-year-old girl named Spring Adams was shot to death by her father after he learned that she planned to terminate a pregnancy caused by his acts of incest. Margie Boule, *An American Tragedy*, SUNDAY OREGONIAN, Aug. 27, 1989, at E1.

⁶⁷ Summers, *supra* note 63, at 686 n.126 describes one such situation where a minor, seeking to avoid a parental notice provision, had an illegal abortion:

In 1988, Indiana teenager Becky Bell, was confronted with an unplanned pregnancy. She visited a clinic where the staff told her that under Indiana law, she would need to tell her parents that she planned to have an abortion. When clinic staff explained the judicial bypass procedure to her she said, "If I can't tell my mom and dad, how can I tell a judge who doesn't even know me?" A neighboring state that did not have a parental involvement law was too far away for her to travel to. Instead, she had an illegal abortion under unsanitary conditions. Six days later, she died. Her parents believe that the parental consent law in Indiana was responsible for her death.

Id. (citations omitted). For more stories, including more about Becky Bell, see http://www.prochoice.org/about_abortion/stories/parental_involvement.html (last visited Apr. 8, 2008).

⁶⁸ Moreover, in some instances hospitals have refused to treat rape victims with the morning after pill. Strossen, *supra* note 48, at 224. Pharmacists' refusals to provide contraceptives is particularly problematic considering the reality that contraceptives and emergency contraception can dramatically reduce the number of unintended pregnancies and abortions. NARAL Pro-Choice America Foundation, *Emergency Contraception Can Help Reduce the Teen-Pregnancy Rate*, at 1 (2007), available at <http://www.prochoiceamerica.org/assets/files/Birth-Control-EC-teens.pdf>.

⁶⁹ See Guttmacher Institute, *Facts in Brief: Induced Abortion in the United States* (2006), http://www.guttmacher.org/pubs/fb_induced_abortion.pdf (last visited Apr. 8, 2008) [hereinafter *Induced Abortion*].

⁷⁰ Guttmacher Institute, *State Policies in Brief: Refusing to Provide Health Services 1* (Apr. 1, 2008), available at http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf. "All states except Alaska, New Hampshire, Vermont, and West Virginia allow doctors to refuse to perform abortions; and all states except Alaska, New

states, refusal clauses generally allow health care providers and institutions to refuse “to provide, pay for, or make referrals for reproductive health services, based on their subjective religious or personal beliefs.”⁷¹

Legislation that permits medical professionals to refuse to treat patients has already had a substantial impact on a number of women.⁷² These laws fail to protect patients’ rights because they typically do not require that a refusing healthcare provider or institution supply patients seeking abortions with notice that the reproductive health services that they seek are available elsewhere.⁷³ Such issues affect huge numbers of women and yet somehow many state legislatures still discredit these arguments and enact abortion restrictions instead.⁷⁴

D. State Legislatures Fail to Address the Ramifications of Restrictive Abortion Laws

It is noteworthy that very little time in legislative debates is spent addressing the likelihood that severe abortion restrictions will harm women’s health and will cause women to resort to underground networks where such procedures can be made available.⁷⁵ Worldwide statistics support the argument

Hampshire, Vermont, West Virginia, Connecticut, New York, and Rhode Island allow private and/or religious medical institutions to refrain from offering abortion services.” Vestal, *supra* note 42; see Claire A. Smearman, *Drawing The Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses*, 48 ARIZ. L. REV. 469, 474 (2006) (noting that the term “refusal clause,” rather than “conscience clause,” better characterizes such provisions because the laws allow doctors to refuse to perform “an otherwise legal or ethical duty”).

⁷¹ NATIONAL ABORTION FEDERATION, 2003 STATE LEGISLATIVE REPORT 5 (2004), available at http://www.prochoice.org/pubs_research/publications/downloads/public_policy/state_bill_report_2003.pdf.

⁷² See Sabrina Rubin Erdely, *Doctors’ Beliefs Can Hinder Patient Care: New Laws Shore Up Providers’ Right to Refuse Treatment Based on Values*, MSNBC, June 22, 2007, available at <http://www.msnbc.msn.com/id/19190916/> (describing the experiences of rape victims who were denied emergency contraception by doctors); Tom C.W. Lin, *Treating An Unhealthy Conscience: A Prescription for Medical Coverage*, 31 VT. L. REV. 105, 105-06 (2006) (describing the experience of a rape victim who was not offered emergency contraception even after her mother requested it because she was being treated at a Catholic hospital); The Limitations of Conscientious Refusal in Reproductive Medicine, ACOG Committee Opinion No. 385, American College of Obstetricians and Gynecologists (Nov. 2007).

⁷³ See Smearman, *supra* note 70, at 487-88; Lin, *supra* note 72, at 125 (“How can a patient grant ‘informed consent’ for a treatment when she does not receive all of the relevant information?”).

⁷⁴ See Adam Sonfield, *New Refusal Clauses Shatter Balance Between Provider ‘Conscience,’ Patient Needs*, at 2-3 (Guttmacher Rep. on Pub. Pol’y, Aug. 2004), <http://www.guttmacher.org/pubs/tgr/07/3/gr070301.pdf>.

⁷⁵ See *infra* Part V.

that if abortion is made illegal, it will not disappear. As the Center for Reproductive Rights reports:

Of the 40 to 60 million abortions that take place annually, at least 20 million are performed under unsafe, illegal conditions and up to 50% of these women require follow-up gynecological care. Millions suffer permanent physical injuries, and at least 78,000 women die. Most of these deaths are preventable, and occur in countries where access to abortion is highly restricted or illegal altogether.⁷⁶

Studies on abortion worldwide reflect the trends mentioned above and support the proposition that by legalizing abortion, countries can help reduce or eliminate the need for unsafe abortions.⁷⁷ The United States, unlike many developing countries where abortions are often illegal and unsafe, has high rates of both unplanned pregnancies and legal abortions.⁷⁸ Anti-choice activists urge that such high rates of abortion are attributable to the United States' permissive abortion policy.⁷⁹

⁷⁶ Center for Reproductive Rights, *Briefing Paper, The Bush Global Gag Rule A Violation of International Human Rights* (2000), http://www.crlp.org/pdf/pub_bp_bushggr_violation.pdf. Though the above mentioned figures do include data on developing nations where medical services and sanitary conditions are far worse than they would be in the United States, illegal abortions even in the most sanitary conditions could still cause injury and death. See Naomi Cahn & Anne T. Goldstein, *Roe and Its Global Impact*, 6 U. PA. J. CONST. L. 695, 720 (2004) ("In the United States, our focus on abortion rights fundamentally relates to women's rights and we can assume that decent health care is available.").

⁷⁷ Moreover, such statistics reflect the fact that "reproductive rights are an essential part of any larger struggle for women's human rights," and for women worldwide, "control over their own reproduction is a prerequisite for any meaningful conception of women's human rights. Symposium, *Crazy Jane Talks with the Bishop: Abortion in China, Germany, South Africa and International Human Rights Law*, 12 TEX. J. WOMEN & L. 287, 288-89 (2003); see also David Sho-Chao Hung, *Abortion Rights in the United States and Taiwan*, 4 CHI.-KENT J. INT'L & COMP. L. 2 (2004) (discussing illegal abortions in Taiwan and the need for more liberal approaches to abortion laws); Cahn & Goldstein, *supra* note 76 (describing reproductive health issues that women face in the Democratic Republic of the Congo); Fay Sliger, *Since Roe: Access to Abortion in the United States and Policy Lessons from Western Europe*, 10 NEW ENG. J. INT'L & COMP. L. 229, 264 (2004) (comparing European abortion laws to those of the United States and asserting, "By persisting in efforts to restrict abortion services, the United States will not only continue to infringe upon women's rights and place their health and lives at risk, but its aim of making abortions rare will continue to be elusive."); see *infra* Part V.

⁷⁸ GUTTMACHER INSTITUTE, *SHARING RESPONSIBILITY: WOMEN, SOCIETY AND ABORTION WORLDWIDE* 27, 42 (1999), available at <http://www.guttmacher.org/pubs/sharing.pdf> [hereinafter *Sharing Responsibility*]; see also Suzanne Delbanco et al., *Public Knowledge and Perceptions About Unplanned Pregnancy and Contraception in Three Countries*, 29 FAM. PLAN. PERSPECS. 70, 70 (1997), available at <http://www.guttmacher.org/pubs/journals/2907097.pdf> (comparing the United States, Canada and the Netherlands and noting that the United States has the highest rates of unplanned pregnancy).

⁷⁹ Cynthia Dailard, *Issues in Brief, Abortion in Context: United States and Worldwide* (May 1999), at 5, http://www.guttmacher.org/pubs/ib_0599.pdf.

They argue that states should enact even more abortion restrictions in an effort to lessen the number of abortions.⁸⁰ Such claims, however, have little merit because worldwide statistics suggest that “the key variable that accounts for the high U.S. abortion rate is not a permissive law, but a high unintended pregnancy rate.”⁸¹

Although very few states have been as bold as South Dakota in their attempt to ban abortion outright, state legislatures considering abortion restrictions should acknowledge the reality in the United States, and in the world, that when abortions are unavailable or severely restricted, women will suffer.⁸² Even if legislatures refuse to consider statistics on illegal abortions during the pre-*Roe* years,⁸³ current statistics

⁸⁰ *Id.*

⁸¹ *Id.* See generally *Sharing Responsibility*, *supra* note 78; Delbanco et al., *supra* note 78.

⁸² See generally Dailard, *supra* note 79. Dailard notes:

In this regard, understanding that the legal status of abortion correlates much more with its safety than with its incidence is critical. One need only look at the experience in many developing countries—with their high rates of maternal death and disability related to illegal, unsafe abortions—for a powerful reminder of the social and medical costs routinely borne by women when access to safe abortion is denied.

Id. at 5-6.

⁸³ There is some dispute as to number of deaths that were the result of back-alley abortions in the pre-*Roe* years. For instance, some commentators urge that proponents of abortion rights exaggerate the number of deaths. See, e.g., Jason A. Adkins, Note, *Meet Me at the (West Coast) Hotel: The Lochner Era and the Demise of Roe v. Wade*, 90 MINN. L. REV. 500, 523-24 (2005). Adkins states:

One of the major claims of abortion proponents both in 1973 and today is that if abortion is made illegal, women will have to resort to “back-alley” abortions where their lives will be in significant danger. This claim does not hold up under the weight of the facts. According to the Centers for Disease Control and Prevention’s National Center for Health Statistics, from 1940 to 1972, deaths due to illegal abortions declined from 1,313 to 41 annually. If *Roe* were overturned today, the incidences of abortion deaths from illegal abortions would most likely be drastically less than in 1972 due to developments in technology, antibiotics, and the safety procedures of medical practice. A large percentage of illegal abortions performed prior to *Roe* were by licensed physicians. There is no reason to think this would be different today.

Id. (footnotes omitted); Associated Press, *Potential Abortion Deaths in Dispute as Senate Girds for High Court Battle*, July 19, 2005 (“Abortion rights supporters argue that those figures badly underestimate how many deaths actually occurred; they say very few doctors and parents wanted to admit that their patients or daughters died from illegal procedures.”), available at <http://www.signonsandiego.com/news/nation/20050719-1258-ca-scotus-abortion.html>. But Benson Gold notes:

In 1930, abortion was listed as the official cause of death for almost 2,700 women—nearly one-fifth (18%) of maternal deaths recorded in that year. The

on illegal abortions worldwide surely can provide valuable information to state lawmakers who claim that they strive to enact laws that protect women's health. Nevertheless, there is no indication that the South Dakota legislature, or the legislatures of other states, have given serious attention to data which indicates that, "where abortion is illegal, [the procedure] is too often also unsafe—performed by unskilled providers in hidden, often hazardous circumstances."⁸⁴ The rare testimony before state legislatures that addresses the likelihood that women will seek illegal abortions often takes the form of a sentence or two where an anti-abortion advocate calls into question the reliability of statistics on illegal abortions in the United States.⁸⁵ These abortion opponents often assert that parental notification laws do not lead to an increase in illegal abortions,⁸⁶ yet they fail to acknowledge that the reason for this is because minors still have the option to travel other places to obtain abortions.⁸⁷

death toll had declined to just under 1,700 by 1940, and to just over 300 by 1950 (most likely because of the introduction of antibiotics in the 1940s, which permitted more effective treatment of the infections that frequently developed after illegal abortion). By 1965, the number of deaths due to illegal abortion had fallen to just under 200, but illegal abortion still accounted for 17% of all deaths attributed to pregnancy and childbirth that year. And these are just the number that were officially reported; *the actual number was likely much higher.*

Benson Gold, *supra* note 34 (emphasis added).

⁸⁴ Advocates for Youth, *The Facts: Adolescents and Abortion*, <http://www.advocatesforyouth.org/publications/factsheet/fsabortion.htm> (last visited Apr. 8, 2008); *see also* GUTTMACHER INSTITUTE, *PREVENTING UNSAFE ABORTION AND ITS CONSEQUENCES: PRIORITIES FOR RESEARCH AND ACTION 2* (Ina K. Warriner & Iqbal H. Shah eds., 2006) [hereinafter *PREVENTING UNSAFE ABORTION*], *available at* <http://www.guttmacher.org/pubs/2006/07/10/PreventingUnsafeAbortion.pdf>; *Sharing Responsibility*, *supra* note 78, at 32.

⁸⁵ Some abortion opponents acknowledge that if abortion were made illegal in all of the states, rates of illegal abortion might range from "25,600 to 209,600 illegal abortions (their worst projections) yearly," yet they assert that such numbers are promising for although it is "still too many," it is far fewer than the estimated 1.6 million women obtaining legal abortions each year. Physicians For Life—Abstinence, Abortion, Birth Control, *If Abortion Is Made Illegal, Will U.S. Women Return to the Back Alley?*, http://www.physiciansforlife.org/index2.php?option=com_content&do_pdf=1&id=74 (last visited Apr. 8, 2008).

⁸⁶ *Id.* *But see* Jennifer Blasdell, *Mother, May I?: Ramifications for Parental Involvement Laws for Minors Seeking Abortion Services*, 10 AM. U. J. GENDER SOC. POL'Y & L. 287, 288 (2002) (asserting that risks associated with abortions increase as the pregnancy progresses and therefore parental notification laws increase the incidence of late term abortions which are more risky medical procedures).

⁸⁷ *See* Summers, *supra* note 63 (describing one girl's death that resulted from her having an illegal abortion because she was not able to travel to a neighboring state and she was too scared to tell her parents or a court that she was pregnant and wanted to have an abortion).

Although Congressional debates have elicited ample testimony describing the effects of restricting abortion and the details of the underground movements that result both in the United States and abroad, such empirical and anecdotal data is often ignored by conservative state legislatures determined to outlaw the procedure.⁸⁸ For example, it is noteworthy that the South Dakota legislature, prior to the drafting of the now-defunct abortion ban, created a Task Force to study abortion *since* it has been legalized.⁸⁹ If the legislature had instead requested an analysis of abortion that included facts, statistics, and anecdotes detailing the high rates of illegal abortion before it was legalized, perhaps the legislatively created Task Force would have presented a more balanced picture of abortion in South Dakota.

III. SOUTH DAKOTA'S ABORTION RESTRICTIONS: TESTING THE LIMITS

Although only 780 abortions are performed each year in South Dakota (which has a population of approximately 156,116 women of childbearing age⁹⁰), the state has “becom[e] a leading national laboratory for testing the limits of state laws restricting abortion.”⁹¹ South Dakota law currently requires that a woman seeking an abortion receive state-directed counseling that includes materials of information designed to discourage her from having the procedure.⁹² The materials

⁸⁸ See *supra* note 83 and accompanying text; see, e.g., Child Custody Protection Act of 1998: Hearing on S. 1645 Before the S. Comm. on the Judiciary, 105th Cong. 24 (1998) (testimony of Rosemary J. Dempsey, Director of Washington, D.C. Office of the Center for Reproductive Law and Policy (“CRLP”).

⁸⁹ REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION (2005), at 5, http://www.voteeyesforlife.com/docs/Task_Force_Report.pdf [hereinafter TASK FORCE REPORT].

⁹⁰ Guttmacher Institute, State Facts About Abortion: South Dakota (2008), http://www.guttmacher.org/pubs/sfaa/pdf/south_dakota.pdf. “In 2005, 98% of South Dakota counties had no abortion provider. 78% of South Dakota women lived in these counties. In the Midwest census region, where South Dakota is located, 19% of women having abortions traveled at least 50 miles, and 9% traveled more than 100 miles.” *Id.*

⁹¹ Evelyn Nieves, *S.D. Makes Abortion Rare Through Laws and Stigma*, WASH. POST, Dec. 28, 2005, at A1.

⁹² See S.D. CODIFIED LAWS § 34-23A-10.1 to -10.4 (2007). The Center for Reproductive Rights reports:

In 2005, a court in South Dakota temporarily enjoined the State from enforcing an amendment to the biased counseling law, which required abortion providers to orally inform a woman that an abortion ends “the life of a whole, separate, unique, living human being,” that she has a relationship with the “unborn human being” and this relationship is protected under law,

assert that “a woman may experience suicidal thoughts or that she will suffer from what abortion foes call ‘postabortion traumatic stress syndrome.’”⁹³ The materials also state that “an unborn child may feel physical pain.”⁹⁴ After receiving these materials, the woman must then wait twenty-four hours before the procedure is provided.⁹⁵ Public funding by the state is available for abortion only in cases of life endangerment,⁹⁶ and state law requires parental notification if a minor seeks to obtain an abortion.⁹⁷ South Dakota has also enacted a ban on a method of late term abortion; proponents of such bans have dubbed the procedure “partial-birth” abortion.⁹⁸ On top of all these restrictions, there is only one health center in the entire state of South Dakota that provides abortions,⁹⁹ and its one clinic offers the procedure only once a week.¹⁰⁰

and that “the relationship and the constitutional rights she enjoys with regards to that relationship will end when she has an abortion.” The matter is currently awaiting appellate review by the U.S. Court of Appeals for the Eighth Circuit. *Planned Parenthood MN, ND, SD v. Rounds*, No. 05-3093 (D.S.D. 2005), *appeal filed* (8th Cir. Aug. 1, 2005).

CENTER FOR REPRODUCTIVE RIGHTS, MANDATORY DELAYS AND BIASED INFORMATION REQUIREMENTS: SOUTH DAKOTA, Aug. 2, 2006, http://www.crlp.org/pdf/mdbc_SouthDakota.pdf [hereinafter SOUTH DAKOTA MANDATORY DELAYS]; *see also* Chinué Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, 9 GUTTMACHER POL’Y REV. 6, 9 (2006), available at <http://www.guttmacher.org/pubs/gpr/09/4/gpr090406.pdf>.

⁹³ Richardson & Nash, *supra* note 93, at 9. *But see* Planned Parenthood Federation of America, *The Emotional Effects of Induced Abortion* (2007) <http://www.plannedparenthood.org/files/PPFA/fact-induced-abortion.pdf> (citing studies by numerous authors to support the contention that “[r]esearch studies indicate that emotional responses to legally induced abortion are largely positive. . . . [and] that emotional problems resulting from abortion are rare and less frequent than those following childbirth”).

⁹⁴ *See* Richardson & Nash, *supra* note 92, at 9-10 (describing fetal pain legislation and stressing that data on fetal pain is limited and conflicting).

⁹⁵ SOUTH DAKOTA MANDATORY DELAYS, *supra* note 92.

⁹⁶ S.D. CODIFIED LAWS § 28-6-4.5 (2007); OVERVIEW OF ABORTION LAWS, *supra* note 52.

⁹⁷ S.D. CODIFIED LAWS § 34-23A-7.

⁹⁸ *Id.* §§ 34-23A-27 to -32. Though the law has not yet been challenged in the courts, it is presumably unenforceable and “unconstitutional based on the Supreme Court’s ruling in *Stenberg v. Carhart* because it prohibits abortions prior to viability and fails to adequately protect women’s health.” Center for Reproductive Rights, *Briefing Paper: So-Called “Partial-Birth Abortion” Ban Legislation: By State*, Feb. 2004, at 3, available at http://www.crlp.org/pdf/pub_bp_pba_bystate.pdf.

⁹⁹ Nieves, *supra* note 91. Mississippi and North Dakota are the other states with only one abortion provider. *Id.*

¹⁰⁰ *Id.* The Planned Parenthood clinic in Sioux Falls is operated by four doctors who fly in from Minnesota on a rotating basis to perform abortions because no doctor in the state will provide abortions because of the heavy stigma attached. *See id.*

South Dakota provides an interesting starting point for an investigation of the underground abortion railroad. As the state already has some of the most restrictive abortion regulation schemes in the country,¹⁰¹ it is likely that a number of South Dakota women have gone and will go “underground” if legislators continue to restrict their reproductive freedom. In order to best understand South Dakota’s decision to enact such a sweeping abortion ban, it is necessary to examine the legislative history of the Women’s Health and Human Life Protection Act.

A. *The South Dakota Task Force to Study Abortion*

During its 2005 session, the South Dakota Legislature voted to create the South Dakota Task Force to Study Abortion.¹⁰² Though nominally bipartisan, the Task Force ultimately consisted of a majority of staunchly anti-abortion members, including a representative of the Catholic Diocese of Sioux Falls and a chiropractor whose wife runs the largest “crisis pregnancy center”¹⁰³ in the state.¹⁰⁴ This conservative push ensured that the Task Force would recommend legislation that represented the goals of the anti-choice legislature to enact numerous abortion restrictions until pro-life lobbyists succeeded in overturning *Roe v. Wade*.¹⁰⁵ The job of the Task

¹⁰¹ See *supra* text accompanying notes 90-100.

¹⁰² H.R. B. 1233, 80th Legis. Assem., Reg. Sess. (S.D. 2005).

¹⁰³ According to the National Abortion Federation, Crisis Pregnancy Centers (“CPCs”) are designed to discourage pregnant women from seeking abortions:

In many instances, they misinform and intimidate women to achieve their goal. Women describe being harassed, bullied, and given blatantly false information. . . . By and large, CPCs are not medical facilities, and most CPC volunteers who work directly with women are not medical professionals. Their main qualifications are a commitment to Christianity and anti-choice beliefs. Although CPCs historically have not employed medical staff, there is an emerging trend on the part of CPCs to gain validity by hiring part-time anti-choice medical providers and purchasing ultrasound equipment. . . . CPCs have a long history of engaging in deceptive advertising. For example, some CPCs intentionally choose their name to mislead women into believing that they offer a wide range of services, including family planning and abortion care.

National Abortion Federation, *Crisis Pregnancy Centers: An Affront to Choice* 11 (2006), available at http://www.prochoice.org/pubs_research/publications/downloads/public_policy/cpc_report.pdf.

¹⁰⁴ Nancy Hatch Woodward, Planned Parenthood News, *Abortion in South Dakota*, Dec. 12, 2005, <http://www.plannedparenthood.org/issues-action/abortion/sdakota-abortion-6156.htm>.

¹⁰⁵ See *id.*

Force was to study the practice of abortion since its legalization, evaluate medical evidence, report its findings, and make recommendations as to the need for additional legislation governing abortion.¹⁰⁶ Though the Task Force Report purports to be impartial and to have fully examined and evaluated evidence, a self-proclaimed pro-life doctor who chaired the Task Force admitted that, “The final report was authored by a few people on the Task Force, and it is less than completely objective and factual.”¹⁰⁷

The findings of the seventy-one page report authored by the Task Force are cited within the first clause of the now-rejected abortion ban as the scientific rationale for the statute.¹⁰⁸ The Task Force Report asserts that abortion harms

¹⁰⁶ The Task Force was directed to study:

- A. the practice of abortion since its legalization,
- B. the body of knowledge concerning the development and behavior of the unborn child which has developed because of technological advances and medical experience since the legalization of abortion,
- C. the societal, economic, and ethical impact and effects of legalized abortion,
- D. the degree to which decisions to undergo abortions are voluntary and informed,
- E. the effect and health risks that undergoing abortions has on the women, including the effects on the women’s physical and mental health, including the delayed onset of cancer, and her subsequent life and socioeconomic experiences,
- F. the nature of the relationship between a pregnant woman and her unborn child,
- G. whether abortion is a workable method for the pregnant woman to waive her rights to a relationship with the child,
- H. whether the unborn child is capable of experiencing physical pain,
- I. whether the need exists for additional protections of the rights of pregnant women contemplating abortion, and
- J. whether there is any interest of the state or the mother or the child which would justify changing the laws relative to abortion.

TASK FORCE REPORT, *supra* note 89, at 5-6.

¹⁰⁷ *South Dakota Task Force Approves Final Report on Abortion-Related Issues; Some Members Disappointed with Outcome*, Henry J. Kaiser Family Foundation Daily Women’s Health Policy Report (Washington, D.C.), Dec. 15, 2005 (quoting Task Force Chair Marty Allison, an abortion-rights opponent), available at http://www.kaisernetwork.org/Daily_reports/rep_index.cfm?DR_ID=34333.

¹⁰⁸ H.R. B. 1215, 2006 Leg., 81st Sess. (S.D. 2006).

The Legislature accepts and concurs with the conclusion of the South Dakota Task Force to Study Abortion, based upon written materials, scientific studies, and testimony of witnesses presented to the Task Force, that life begins at the time of conception, a conclusion confirmed by scientific advances since the 1973 decision of *Roe v. Wade*, including the fact that each human being is totally unique immediately at fertilization.

Id. § 1.

women, stressing that women in South Dakota have not chosen to have abortions, but instead that abortion providers, spouses and/or parents of pregnant women have misled and coerced women into obtaining abortions.¹⁰⁹ The Report further argues that a ban on abortion will help prevent the exploitation of women because abortions inflict psychological and physical harm on women.¹¹⁰ The Task Force justifies such findings by asserting that the 2000 testimonies it received from women who experienced abortions, and which described the devastating impact that abortion had on their lives, is explanation enough for such a broad ban.¹¹¹ Though the Report largely consists of many gender-based arguments to support its conclusion that abortion harms women, it also sets forth several fetal-focused anti-abortion arguments and policy considerations.¹¹²

¹⁰⁹ See TASK FORCE REPORT, *supra* note 89, at 37-39; Siegel, *supra* note 39, at 991. The Report's analysis of the coercion and pressure that women face fails to address the fact that an outright ban on abortion will result in women being coerced into pregnancy. Reva Siegel & Sarah Blustein, *Mommy Dearest?*, AM. PROSPECT, Oct. 1, 2006, at 22, available at 2006 WLNR 17116964 (quoting Kate Looby, one of the only pro-choice members of the Task Force: "The idea coming out . . . of the task force [is] that women just really aren't smart enough to figure out what they want, they need to be told.").

¹¹⁰ TASK FORCE REPORT, *supra* note 89, at 31-34. But Klick asserts:

[I]t is interesting to note, anti-abortion advocates have claimed there is a causal link between abortion and suicide arising out of this regret-based depression. Relying on some academic work on the subject, they point out that suicide rates tend to be higher among women who abort their pregnancy rather than miscarry or carry the baby to term. However, such a finding could very well be the result of a self-selection bias. That is, it could be the case that women who choose to abort their pregnancies tend to be those who are predisposed to depression, implying that the link between abortion and suicide is coincidental as opposed to causal.

Klick, *supra* note 53, at 186-87.

¹¹¹ TASK FORCE REPORT, *supra* note 89, at 48; see also Siegel, *supra* note 39, at 991. But see Klick, *supra* note 53, at 207-08 (suggesting that abortion restrictions lead women to bear significant burdens in the form of childbirth and child rearing and thus such burdens could increase stress levels and bring about a rising suicide rate).

¹¹² For a discussion of one such argument, see Siegel, *supra* note 39, at 1014-23. Siegel argues that the Task Force Report purports to protect women, yet in doing so it reinforces gender-stereotypes about women. For example, the Report asserts that women must be protected from others who will coerce them into having abortions. Such an assertion reflects the paternalistic assumption that women lack the capacity to make well-informed and responsible decisions. TASK FORCE REPORT, *supra* note 89, at 44. Though the Report does assert that the fetus should be protected, see *infra* note 114, it does so by reinforcing stereotypes about women's roles as mothers. TASK FORCE REPORT, *supra* note 89, at 47. The Report stresses the "great benefit and joys that the mother-child relationship brings to the mother," and therefore it seemingly implies that a ban on abortion can protect both a woman and her unborn child. *Id.* at 9.

The Report ultimately concludes that “the unborn child from the moment of conception is a whole separate human being . . . [and] all abortions, whether surgically or chemically induced, terminate the life of a whole, separate, unique, living human being.”¹¹³ The Task Force bases this assertion upon scientific studies that indicate that the unborn child can experience pain at twenty-four weeks post-conception.¹¹⁴ The Report goes on to explain that, although it has not been proven, an unborn child may be able to experience pain as early as seven weeks post-conception and therefore state abortion law should reflect such findings.¹¹⁵ The Task Force relied on these scientific findings and on the claim that a mother’s relationship with her child during pregnancy “has intrinsic beauty and benefit to both the mother and the child”¹¹⁶ to urge the legislature that until an outright ban on abortion can constitutionally be implemented, South Dakota state laws should aim to lessen the loss of life and harm caused by abortion.¹¹⁷

B. Task Force Recommendations for Legislation

The Task Force Report set forth fourteen legislative recommendations, including a requirement that no abortion be performed unless the pregnant mother, prior to making an appointment for an abortion, receives counseling and disclosures about the nature of the risks and the alternatives to abortion by a pregnancy care center that does not perform abortions.¹¹⁸ The Task Force also recommended more stringent informed consent requirements such as a requirement that the abortion doctor show the pregnant mother a quality ultrasound image of her unborn child before the procedure is performed, and prior to her signing a consent form indicating that she had viewed the ultrasound.¹¹⁹ The Task Force further urged that

¹¹³ TASK FORCE REPORT, *supra* note 89, at 10.

¹¹⁴ *Id.* at 58. Although research on fetal pain has produced varying results, *see* Richardson & Nash, *supra* note 92, at 9, the Task Force accepts as fact that a fetus can experience pain. TASK FORCE REPORT, *supra* note 89, at 58. Richardson & Nash note that South Dakota is one of only five states where women seeking abortions are given state-scripted information asserting that a fetus may be able to feel pain. Richardson & Nash, *supra* note 92, at 11. South Dakota requires that every woman be given such information, regardless of her stage of pregnancy. *Id.*

¹¹⁵ TASK FORCE REPORT, *supra* note 89, at 58.

¹¹⁶ *Id.* at 55.

¹¹⁷ *Id.* at 69.

¹¹⁸ *Id.* at 69-71; *see also* South Dakota Mandatory Delays, *supra* note 92.

¹¹⁹ TASK FORCE REPORT, *supra* note 89, at 70.

South Dakota “strengthen [its] child support laws including the requirement that the father of an unborn child support the mother and their unborn child during the pregnancy and thereafter . . . and strengthen state laws that provide financial and other support to pregnant women, so that lack of support no longer compels a woman to seek an abortion.”¹²⁰ Because much of the data contained within the Task Force Report will likely be used by anti-abortion lobbyists and legislators in the future around the country,¹²¹ the following section will evaluate such data in order to determine how accurately and fully it reflects the actual and scientific realities of abortion in both South Dakota and the United States.

1. A Legislative History Based on Biased Policy and Bad Science

Though the Task Force stressed that the evidence it included in its report represented a balanced viewpoint, and that testimony was divided almost equally between witnesses who opposed abortion and those who thought it should be legal,¹²² the openly anti-abortion chairwoman¹²³ of the Task Force admitted, “[T]he report does not reflect all the information that the task force gathered from experts and the public on both sides of the issue, and it does not deal with preventing unintended pregnancies and other important issues.”¹²⁴ The

¹²⁰ *Id.* But, as Siegel notes, the Report never mentions the necessity of strengthening state laws to ensure that employers do not discriminate against pregnant women. Siegel, *supra* note 39, at 1050.

¹²¹ See generally Siegel, *supra* note 39 (noting the power of the gender-based antiabortion argument and the fact that in using such arguments the pro-life movement can be both ‘pro-woman’ and yet still oppose abortion); see also Siegel & Blustain, *supra* note 109 (“[The Report is] by far the most comprehensive government account of the arguments and evidence for protecting women from abortion.”).

¹²² Lauren Bans, *Anatomy of a Bad Law*, THE NATION, Mar. 30, 2006, <http://www.thenation.com/doc/20060417/bans> (asserting that “[o]f the nine physicians who testified, eight claimed it was not medically advisable to create an environment where abortion was illegal,” yet such statements are absent from the final Report).

¹²³ Siegel & Blustain, *supra* note 109. Although Allison served as chairwoman of the Task Force, she voted against the final Report, stating that she was disappointed with the process and stressing that “minds were already made up from the very beginning. . . . There was a limited amount of discussion on a lot of the issues because of that.” *Abortion Task Force Chair Disappointed with Final Report, Process*, SIOUX CITY J., available at http://www.siouxcityjournal.com/articles/2005/12/14/news/south_dakota/bcb56c23098be88f862570d70018961b.txt (last visited Apr. 4, 2008) [hereinafter *Task Force Chair Disappointed*].

¹²⁴ See TASK FORCE REPORT, *supra* note 89, at 70-71 (recommending that “abstinence education in South Dakota is to exclude contraceptive-based sexuality education”); see also Siegel & Blustain, *supra* note 109 (noting that Dr. Allison opposed

legislature, nevertheless, relied upon the Report when they enacted the now-defunct abortion ban, and therefore it remains necessary to examine the Task Force Report, as well as the testimony that the Task Force chose to ignore or omit from its final Report.

The Report asserts as fact only those scientific findings made by doctors who oppose abortion.¹²⁵ It states that abortion causes psychological and physical harm to women despite the fact that a large number of medical professionals and third-party organizations, including the South Dakota Section of the American College of Obstetricians and Gynecologists (“ACOG”), opposed the South Dakota abortion ban and expressed very different opinions as to the medical effects of this procedure.¹²⁶ In their position statement condemning South Dakota’s measure, ACOG asserted, “[The] reproductive health ban . . . is not based on science, strips women of their legal rights, and criminalizes essential aspects of women’s health care.”¹²⁷ Such findings by medical professionals reflect the one-sided nature of the Report and the obvious lack of credible evidence to support the Task Force’s findings and recommendations.¹²⁸ Nonetheless, “South Dakota’s official endorsement of these faulty arguments gives such arguments more validity than ever and anti-abortion activists will likely urge that these arguments be employed to lobby for abortion restrictions across the nation.”¹²⁹

such recommendations); Bans, *supra* note 122; *Task Force Chair Disappointed*, *supra* note 123 (quoting Dr. Allison: “It got to the point at the end that part of the task force members, as well as the vast majority of our public audience, left the meeting because it just got so ridiculous. It was an embarrassing end . . .”).

¹²⁵ See *infra* notes 138-154 and accompanying text. As noted by Kate Looby, one of the pro-choice members of the Task Force, the Report failed to include testimony from almost every medical expert witness stating that they would not ever “want to practice in an environment in which all abortions were illegal.” Bans, *supra* note 122.

¹²⁶ South Dakota Section of the American College of Obstetricians and Gynecologists, Position Statement Opposing H.B. 1215/Referred Law 6 (Sept. 26, 2006), <http://www.sdhealthyfamilies.org/media/pdf/ACOGPositionStatementHB1215.pdf> [hereinafter ACOG Statement]. The Report explicitly rejects the research and findings of the ACOG. TASK FORCE REPORT, *supra* note 89, at 48; see Reva Siegel 2007 *Baum Lecture: Enforcing Sex Roles in South Dakota: An Equality Analysis of Abortion Restrictions*, U. ILL. L. REV. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=958254&download=yes.

¹²⁷ ACOG Statement, *supra* note 126.

¹²⁸ Siegel & Blustain, *supra* note 109; Siegel, *supra* note 39, at 1012-14. Ultimately, four members walked out of the final meeting because of the biased nature of the proceedings. *South Dakota Task Force on Abortion’s Final Report Altered, Planned Parenthood Official Says*, MED. NEWS TODAY, Jan. 19, 2006, <http://www.medicalnewstoday.com/medicalnews.php?newsid=36299> [hereinafter *South Dakota Task Force*].

¹²⁹ Siegel & Blustain, *supra* note 109.

The Task Force Report also asserts that women are coerced and misled into having abortions by their lovers, parents, and abortion doctors.¹³⁰ This is a questionable proposition considering the widely accepted acknowledgement that “women will seek abortions, whether access to the procedure is guaranteed by or prohibited by the law.”¹³¹ One must inquire why the Task Force Report neither addressed the devastating impact that illegal abortions had on many other women,¹³² nor addressed the likelihood that women may face negative physical, mental and social consequences from being coerced or pressured into bearing children.¹³³ There was, however, a minor mention made in testimony before the Task Force that rates of illegal abortion in the United States in the 1960s ranged from 200,000 to 1,200,000.¹³⁴ Lynn M. Paltrow, Executive Director of National Advocates for Pregnant Women, testified to these figures and stated, “The fact that women had abortions in the past, despite criminalization, and continue to have abortions in America today in spite of increasing barriers to that health care service makes clear that the decision to have an abortion is a voluntary decision.”¹³⁵ Although the Task Force had the discretion to reject testimony that it found problematic, their decision to omit from the Report *all* of the testimony of those who supported keeping abortion a safe and legal option illuminates the Task Force’s inability to approach their investigation objectively.¹³⁶

¹³⁰ TASK FORCE REPORT, *supra* note 89, at 56; *see* Siegel, *supra* note 39, at 991, 1009-14, 1019.

¹³¹ Douglas R. Miller, *The Alley Behind First Street, Northeast: Criminal Abortion in the Nation’s Capital, 1872-1973*, 11 WM. & MARY J. WOMEN & L. 1, 45 (2004) (describing illegal abortions during the pre-Roe years and stating that “abortion has always been a part of human experience and remains so even when prohibited”).

¹³² *See id.*; *supra* note 66; *infra* note 157 and accompanying text; *see also* Lynn M. Paltrow, Executive Director, National Advocates for Pregnant Women, Testimony Before the Task Force: Sept. 22, 2005, http://www.advocatesforpregnantwomen.org/articles/so_dak_tf.htm [hereinafter Paltrow Testimony].

¹³³ For an analysis of “coerced pregnancy” as a violation of the Thirteenth Amendment, *see* Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 487 (1990) (“When abortion is outlawed, a woman who does not want to carry her pregnancy to term must serve the fetus, and that servitude is involuntary.”).

¹³⁴ Paltrow Testimony, *supra* note 132.

¹³⁵ *Id.*

¹³⁶ *See* Siegel, *supra* note 39, at 1008-09; Bans, *supra* note 122; *Task Force Chair Disappointed*, *supra* note 123.

2. Expert Testimony Before the Task Force

The testimonies by experts and witnesses who support legalized abortions are noticeably absent from the Report, although the Task Force did hear such testimonies.¹³⁷ The Task Force instead relied solely upon studies performed by anti-choice doctors,¹³⁸ and failed to give any weight to empirical data on abortion which differed from that submitted by these doctors and anti-abortion lobbyists.¹³⁹ The Report accepts scientific findings that women who have had abortions experience post-abortion depression,¹⁴⁰ despite the fact that testimony and studies by the American Psychological Association (“APA”) and the American Psychiatric Association controvert such findings.¹⁴¹ The Report also overtly raised a question as to the biases and validity of the testimony and research offered by doctors who advocate for abortion rights.¹⁴² For example, when confronted with testimony by a doctor from the Alan Guttmacher Institute¹⁴³ stating that abortion does not cause physical and mental health problems, the Task Force explicitly questioned the credibility of the doctor’s opinions regarding the effects of abortion due to the biases and goals of the Institute and its representatives.¹⁴⁴

Apparently the Task Force chose to ignore the biases of the studies and doctors upon which it relied in recommending

¹³⁷ See *South Dakota Task Force*, *supra* note 128. Ultimately, four members of the Task Force walked out of the final meeting because of the biased nature of the proceedings and the unwillingness of the majority of the Task Force to accept any testimony from experts in favor of keeping abortion legal and available. *Id.*

¹³⁸ Commonly, these studies are by Dr. David Reardon, Director of the Elliot Institute, an Illinois-based organization that opposes abortion, and Priscilla Coleman, assistant professor in the School of Family and Consumer Sciences at Bowling Green State University. See Siegel, *supra* note 39, at 1015-47. Many of their studies claim that women are harmed physically and psychologically when they obtain abortions. *Id.* at 1011-13.

¹³⁹ See *id.* at 1034-35 (citing a variety of research studies that refute the findings of both Coleman and Reardon).

¹⁴⁰ Reardon, who “is said to have a doctorate in biomedical ethics from Pacific Western University, an unaccredited correspondence school,” uses his controversial studies to argue that women who have abortions experience depression. Emily Bazelon, *Is There a Post-Abortion Syndrome?*, N.Y. TIMES, Jan. 21, 2007, at § 6.

¹⁴¹ See Siegel, *supra* note 39, at 1011.

¹⁴² TASK FORCE REPORT, *supra* note 89, at 46, 50-51.

¹⁴³ *Id.* at 50-51. Dr. Stanley Henshaw, Fellow at the Guttmacher Institute, testified before the Task Force. The Report emphasizes that he has been “long associated with Planned Parenthood Federation of America” and used his association with the organization to justify their unwillingness to accept, as credible, his research. See *id.* at 36.

¹⁴⁴ *Id.* at 46.

the abortion ban, and never called into question the research of doctors who are activists in the anti-abortion movement. For example, Dr. David Reardon, whose testimony and research is cited numerous times within the Report, is active in the anti-abortion movement.¹⁴⁵ Dr. Reardon founded the Elliot Institute, a self-proclaimed outreach organization and ministry dedicated to the study of the effects of abortion on women, men, families and society. He has publicly asserted that he believes that abortion is “evil” and that “because abortion is morally wrong, women will suffer.”¹⁴⁶ The Elliot Institute’s publications cite oft-disputed research¹⁴⁷ and emotionally charged news stories¹⁴⁸ in support of their claim that most abortions are coerced, unwanted, or based on insufficient information.¹⁴⁹ They assert that the state, in the interest of women’s health, must protect women from abortion, a claim which necessarily suggests that women’s best interests will be promoted only through forced childbirth.¹⁵⁰

“The Report even went so far as to denigrate the need for access to abortion in cases of incest, citing evidence that 97 percent of the time such pregnancies result in healthy babies.”¹⁵¹ Instead of questioning the injustice of the state

¹⁴⁵ As noted by Siegel, *supra* note 39, at 1016-21, and Bazelon, *supra* note 140, Dr. Reardon’s research and writing has become an integral part of the anti-abortion movement. See *infra* notes 146-149 and accompanying text.

¹⁴⁶ Siegel, *supra* note 39, at 1021.

¹⁴⁷ See Siegel, *supra* note 39, at n.96 (listing numerous studies that reject or contradict the theory of post-abortion syndrome). Reardon’s studies have been criticized by several experts who have found flaws in his methodology; one noted that while “up to 10 percent of women have symptoms of depression or other psychological distress after an abortion[,] the same rates [are] experienced by women after childbirth.” Bazelon, *supra* note 140.

¹⁴⁸ Reardon’s Elliot Institute website, <http://www.afterabortion.org/>, makes reference to recent news stories to suggest that abortion is forced upon all women (whether they know it or not). For instance, one fact sheet recites:

In Jackson, MS, a judge issued a temporary restraining order against the parents of a 16-year-old girl after they allegedly tried to force her into having an abortion. The girl said she pleaded with her parents to let her have the baby but they made an appointment for her at a local abortion clinic.

Elliot Institute, *Forced Abortion in America*, <http://www.unfairchoice.info/pdf/ForcedAbortions.pdf> (last visited Apr. 8, 2008).

¹⁴⁹ See *id.*

¹⁵⁰ See Siegel, *supra* note 39, at 1018-24 (discussing the anti-choice agenda and Dr. Reardon’s approach to changing the abortion dialogue).

¹⁵¹ Paul Demko, *The Final Frontier*, CITY PAGES, Mar. 8, 2006, available at <http://citypages.com/databank/27/1318/article14169.asp>; see also TASK FORCE REPORT, *supra* note 89, at 32-33. Dr. Donald Oliver, a pediatrician in Rapid City, South Dakota testified:

requiring rape and incest victims to carry a child to term, the Task Force relied on testimony from the founder of the International Right to Life,¹⁵² who argued that women who have been victimized should report the crimes, and carrying the child to term will encourage such reporting.¹⁵³ The Report further failed to refute some of “the most scientifically dubious assertions about abortion, such as that it causes breast cancer.”¹⁵⁴ Scholars rightfully criticize the findings of the Task Force Report. For example, Reva B. Seigel, a law professor at Yale University, addressed the failure of the Task Force to investigate the reasons why women seek abortions. Seigel asserted:

I personally took care of a baby boy born to a very young teenage mother who was allegedly raped by her brother. So here we have the two scenarios brought forth most often by those on the pro-abortion side, rape and incest. This brave young lady carried her child to term and delivered a healthy normal boy. Here is an interesting fact that you may not be aware of. Just as two bad genes might pair up and lead to an unfortunate outcome, two good genes can pair up, and the infant of this incestuous relationship, may become the brightest person in the family—sometimes in the genius range of intellect.

Id. at 32.

¹⁵² “[The] International Right To Life Federation is a worldwide, non-sectarian federation of pro-life organizations from over 170 countries. [It is] dedicated to the protection of all innocent human life from conception to natural death.” Jeanie E. Head, U.N. Representative, International Right to Life Federation, Inc., Statement to the Hague Forum (Feb. 11, 1999), available at <http://www.un.org/popin/icpd/icpd5/hague/irlf.pdf>. Dr. J.C. Willke is the founder of the Right to Life organization and president of International Right to Life. TASK FORCE REPORT, *supra* note 89, at 32.

¹⁵³ TASK FORCE REPORT, *supra* note 89, at 32 (“The woman has been subjected to an ugly trauma, and she needs love, support and help. But she has been the victim of one violent act. Should we now ask her to be a party to a second violent act—that of abortion? Reporting the rape to a law enforcement agency is needed.” (quoting J.C. WILLKE & BARBARA WILLKE, WHY CAN’T WE LOVE THEM BOTH 263 (2003))).

¹⁵⁴ See Demko, *supra* note 151; see also *South Dakota Task Force*, *supra* note 128 (reporting that many Task Force members were angered by the Report’s inaccurate claim that “the reasons to suspect such a connection [are] sufficiently sound,” see TASK FORCE REPORT, *supra* note 89, at 52). Physicians for Reproductive Choice and Health states explicitly that it

objects to laws that require abortion providers to warn women of the potential risk of breast cancer. This is not informed consent—this is misinformed consent, requiring physicians to make inaccurate and misleading statements to their patients. These mandates are particularly nefarious because they prevent physicians from open and honest dialogue with patients.

Physicians for Reproductive Choice and Health, Policy Statement on the Purported Link Between Abortion and Breast Cancer (Apr. 2005), available at http://www.prch.org/assets/library/48_48breastcancer.pdf.

Criminalizing abortion would not, for instance, address the needs of women who seek an abortion because they lacked contraception or were raped or are living in abusive relationships, or will have to drop out of work or school to raise a child alone, or are stretched so thin that they cannot emotionally or financially provide for their other children.¹⁵⁵

The lack of investigation into such fundamentally important questions is significant as it suggests that the Task Force approached its investigation with the premeditated intention of eliminating all abortions, regardless of what they actually found. Instead of hearing all testimony before determining whether additional abortion laws are necessary, the Task Force approached its hearings with a clear intent to recommend additional abortion restrictions.

One must question the wisdom of abortion bans and restrictions in light of well-known horror stories about the pre-*Roe* years when abortion was illegal and women were either forced into pregnancy or subjected to “back alley abortions” that resulted in numerous deaths, injuries and even rapes.¹⁵⁶ History has proven that women will seek and ultimately obtain abortions, even if they are illegal or hard to get,¹⁵⁷ yet far too often such considerations are absent from debates over abortion bans and restrictions. The Task Force Report did not attempt to address the reasons that women seek abortions. And, in failing to question why a woman would desire to terminate a pregnancy, the Report failed to address the

¹⁵⁵ Siegel, *supra* note 39, at 1049 n.229.

¹⁵⁶ See generally Senate Comm. on Labor And Human Resources, the Freedom of Choice Act of 1992, S. Rep. No. 321, 102d Cong., 2d Sess. 4 (1992) (attempting to codify the holding of *Roe*, Congress heard testimony on the increase in illegal abortions and the burdens placed on women who were forced to travel significant distances to obtain abortions).

The report included testimony by survivors of illegal abortions. One woman testified that she was forced by the unavailability of a legal abortion to pay \$1000 in the mid-1950s for an illegal abortion with a dirty knife. Another woman related her attempts to self abort by taking a quinine and turpentine, laxatives, steaming hot baths, and eventually turning to knitting needles. Finally, a retired Marine testified that his mother had been given, illegally, a quantity of the controlled drug “ergot apiol” by a back alley abortionist on which she overdosed, went into convulsions, and died in front of her family.

Id.

¹⁵⁷ See, e.g., Naomi Cahn & Anne T. Goldstein, *Roe and Its Global Impact*, 6 U. PA. J. CONST. L. 695, 701 (2004) (arguing that “[w]omen are still dying in back alleys” and, according to World Health Organization estimates, “more than 80,000 women die each year from medically unsafe abortions in countries where abortion is restricted”).

likelihood that women will continue to obtain abortions, even if prevented from doing so by the South Dakota Legislature.

IV. THE MODERN DAY ABORTION UNDERGROUND RAILROAD

The debate over the South Dakota abortion ban demonstrates that abortion is one of the most divisive political issues that our country has confronted since the abolition of slavery.¹⁵⁸ In fact, opponents of abortion, whose activism includes, among other things, the physical obstruction of women's access to abortions clinics, have likened themselves to abolitionists who maintained the Underground Railroad.¹⁵⁹ Pro-choice activists have also seized the slavery metaphor in their assertion that forced pregnancy is, in essence, "forced labor."¹⁶⁰ Although commentators have raised valid criticism as to the problematic nature of using such a racially charged and polarizing metaphor in the context of the abortion debate,¹⁶¹ such disapproval should not preclude a pointed analysis of the underground movement as it relates to the gendered struggles that women have faced—with particular attention to their attempts to obtain abortions—when the laws of this country fail to protect their freedom and bodily integrity.

The modern-day abortion "underground railroad" is a network of volunteers and organizations that has developed in two contexts.¹⁶² First, the underground railroad provides overnight lodging for women seeking second-term abortions.¹⁶³ Second, the underground railroad contributes donated funds to subsidize abortions for low-income women.¹⁶⁴ Late-term abor-

¹⁵⁸ See Klick, *supra* note 53, at 206 (stressing that the abortion debate has "not grown any more conciliatory" since 1973 when the Supreme Court decided *Roe v. Wade*). See generally Deborah Threedy, *Slavery Rhetoric and the Abortion Debate*, 2 MICH. J. GENDER & L. 3 (1994).

¹⁵⁹ See, e.g., Charles E. Rice, *Issues Raised by the Abortion Rescue Movement*, 23 SUFFOLK U. L. REV. 15, 30 (1989).

¹⁶⁰ See generally Koppelman, *supra* note 133.

¹⁶¹ See Threedy, *supra* note 158, at 24 (arguing that the use of the slavery metaphor by proponents and opponents of abortion is problematic as it is racist and it "shuts down the dialogue between the pro-choice and anti-abortion sides of the debate").

¹⁶² See Nathan, *supra* note 33.

¹⁶³ *Id.* For a description of the services offered by one such underground network, see Haven Coalition, <http://www.havencoalition.org/> (last visited Apr. 8, 2008).

¹⁶⁴ For a description of the many abortion funds and their goals, see Nat'l Network of Abortion Funds, <http://www.nnaf.org/fundinfo.html> (last visited Apr. 8, 2008).

tions are a major point of controversy in the ongoing abortion debate, especially since the Supreme Court upheld the federal partial-birth¹⁶⁵ abortion ban in *Gonzales v. Carhart*.¹⁶⁶ Anti-abortion activists and politicians have publicized the debate over late-term abortions, urging that the procedures are the equivalent of infanticide and that they are “never medically necessary.”¹⁶⁷ They argue that abortions are typically elective and that only rarely do women have abortions for health reasons.¹⁶⁸ Abortion rights proponents counter these arguments by asserting that women seek late-term abortions for a variety of reasons, including a nonviable or severely deformed fetus, maternal health, rape or incest, failure to detect pregnancy or lateness of stage,¹⁶⁹ difficulty in arranging for and paying for an abortion, and, in the case of teenagers, fear of parental reaction.¹⁷⁰ The controversy surrounding the issue of late-term abortion is interesting in light of the fact that only one percent of all abortions take place after twenty-one weeks of pregnancy.¹⁷¹ Nevertheless, women seeking late-term abortions face significant financial and geographic obstacles, and the underground abortion railroad network has emerged to assist them.¹⁷²

¹⁶⁵ The term “partial-birth abortion,” originally coined by abortion opponents to refer to late-term abortions, is not recognized as a medical term by the AMA, see H-5.982 Late-Term Pregnancy Termination Techniques, http://www.ama-assn.org/apps/pf_new/pf_online?f_n=resultLink&doc=policyfiles/HnE/H-5.982.HTM&s_t=abortion&catg=AMA/HnE&&nth=1&&st_p=0&nth=2& (last visited Apr. 21, 2008), nor by the American College of Obstetricians and Gynecologists (“ACOG”), see Press release, ACOG, *ACOG Files Amicus Brief in Gonzales v. Carhart and Gonzales v. PPGA* (Sept. 22, 2006), http://www.acog.org/from_home/publications/press_releases/nr09-22-06.cfm (last visited Apr. 20, 2008).

¹⁶⁶ *Gonzales v. Carhart*, 127 S. Ct. 1610, 1638-39 (2007); See Masci & Shimabukuro, *supra* note 28, at 2-3.

¹⁶⁷ See Masci & Shimabukuro, *supra* note 28, at 2-3.

¹⁶⁸ Douglas Johnson, National Right to Life, *The Partial-Birth Abortion Ban Act—Misconceptions and Realities* (Nov. 5, 2003), <http://www.nrlc.org/abortion/pba/PBAall110403.html>.

¹⁶⁹ See Nathan, *supra* note 33; Guttmacher Institute, *Issues in Brief: The Limitations of U.S. Statistics on Abortion*, Jan. 1997, at 1, 3, available at <http://www.guttmacher.org/pubs/ib14.pdf>.

¹⁷⁰ See *supra* Part II.B (discussing parental involvement laws).

¹⁷¹ See Nathan, *supra* note 33.

¹⁷² *Id.* Nathan notes:

[O]ften as not, it's poverty that has pushed their bellies into the fifth or sixth month. Medicaid in most states won't cover abortions, and money for the procedure is hard to round up. Ending a seven- or eight-week pregnancy costs about \$400. . . . And the price shoots up as the weeks pass and the procedure grows more complex. At 24 weeks, the price is about \$2,000 in New York—

A. *Finding a Safe Haven in a Strange City*

Women who decide to have second-term abortions often have to travel from states where the procedure is too costly or unavailable to other states, primarily New York, to have such abortions.¹⁷³ Because late-term abortion procedures require two visits to the clinic, women who travel from other states to get this procedure must choose to absorb the cost of a hotel stay, sleep on the streets, or rely on the “underground.”¹⁷⁴ Haven Coalition is one underground volunteer network, maintaining relationships with several clinics, in which volunteers open their homes to women—and anybody who accompanies them—who travel to New York seeking second-term abortions.¹⁷⁵ Haven Coalition, though, is not truly “underground” because the women who reach out to the organization are not undergoing illegal abortions.¹⁷⁶ Instead, Haven provides a safe and confidential means by which women can obtain abortions that, although illegal or unavailable in their home states, are legal elsewhere.¹⁷⁷

much cheaper than the \$7,000 it costs in New Jersey, but still a virtually insurmountable sum.

Id.

¹⁷³ *Id.* One commentator describes New York as the “abortion capital of America,” noting:

New York has the highest abortion rate in America. In 2000, the last year for which good data are available, 39 out of every 1,000 women in the state ended a pregnancy, for a total of 164,000 abortions that year. In America, one of every ten abortions occurs in New York, and in New York, seven of every ten abortions are performed in New York City. In absolute terms, there are more abortions performed on minors, more repeat abortions, and more late abortions (over 21 weeks) in New York City than anywhere else in the country.

Ryan Lizza, *The Abortion Capital of America*, NEW YORK MAG., Dec. 4, 2005, available at <http://nymag.com/nymetro/news/features/15248/>. In addition, New York has no parental consent laws, waiting periods, or mandatory counseling laws, and the state subsidizes abortions for low-income women. See Overview of Abortion Laws, *supra* note 52. Therefore, it is not surprising that New York has become the home base for the underground abortion railroad and what one author has termed, “a late-term abortion mecca.” See Eleanor Bader, *Sisterhood Is Local*, BROOKLYN RAIL, Apr. 2006, available at <http://www.brooklynrail.org/2006/04/local/sisterhood-is-local-offering-women-an-abortion-haven>.

¹⁷⁴ Bader, *supra* note 173.

¹⁷⁵ *Id.*; Jennifer Block, *Emergency Landing*, VILLAGE VOICE, July 2, 2002, available at <http://www.villagevoice.com/news/0227,block,36211,1.html>.

¹⁷⁶ See *id.*

¹⁷⁷ Haven Coalition, <http://www.havencoalition.org/> (last visited Apr. 8, 2008).

Though yearly women have about 2000 late-term abortions in New York,¹⁷⁸ Haven Coalition has only been able to aid fewer than 150 women each year.¹⁷⁹ Such figures are indicative of the very nature of underground networks—their absence from the mainstream ensures that volunteer organizations are only able to serve the needs of a small number of women.¹⁸⁰ And in fact, it is probable that very few women are actually aware of the existence of such underground organizations. Yet it is increasingly likely that women seeking abortions will require the assistance of these networks. Presently, only seventeen states fund abortions for low-income women,¹⁸¹ 87% of United States counties have no abortion provider,¹⁸² and 16% of women have to travel between fifty and one-hundred miles to obtain first-trimester abortions.¹⁸³ Such statistics, in conjunction with the anti-abortion legislation of states like South Dakota, will likely drive many women to states such as New York that have more liberal abortion laws.

B. *The Economics of Abortion*

The second way that the underground railroad aids women seeking abortions is by providing some, if not all, of the money for the procedure.¹⁸⁴ There are a variety of funds that subsidize the cost of abortion,¹⁸⁵ including the National Network of Abortion Funds and the Women's Medical Fund.¹⁸⁶ These organizations also provide "information and support, and some provide related services such as transportation, housing,

¹⁷⁸ Nathan, *supra* note 33; Block, *supra* note 175.

¹⁷⁹ See Block, *supra* note 175. Even in the pre-*Roe* years when underground abortion networks consisted of many more volunteers, many women still were forced to carry a child to term that was unwanted or to seek out alternative and dangerous ways to terminate the pregnancy. See *supra* note 156; see also notes 33-35 and accompanying text.

¹⁸⁰ See Block, *supra* note 175; Nathan, *supra* note 33.

¹⁸¹ *Induced Abortion*, *supra* note 69.

¹⁸² *Id.*

¹⁸³ Stanley K. Henshaw & Laurence B. Finer, *The Accessibility of Abortion Services in the United States, 2001*, PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH, Jan./Feb. 2003, at 16, 18, available at <http://www.guttmacher.org/pubs/journals/3501603.pdf>; see Benson Gold, *supra* note 34 (discussing the history of impediments to abortion access).

¹⁸⁴ See National Network of Abortion Funds, <http://www.nnaf.org/fundinfo.html> (last visited Apr. 8, 2008).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*; see also Women's Medical Fund, <http://www.womensmedicalfund.org/> (last visited Apr. 8, 2008).

child care, options counseling, or funding for ultrasound, pregnancy testing, or followup care.”¹⁸⁷ These funds rely upon the donations of individuals and organizations, and consequently they, like the underground abortion network discussed above, will likely be unable to meet the needs of all of the women seeking their services.¹⁸⁸ For example, some funds only provide women with loans that they must later repay, and others are only able to serve small geographic areas.¹⁸⁹

Although abortion funds provide assistance to women seeking both first-trimester and late-term abortions, women typically require a great deal more financial assistance to pay for a late-term abortion.¹⁹⁰ While it is quite probable that poverty is one of the primary factors that causes delays that push women’s pregnancies into the second trimester,¹⁹¹ the extraordinary costs associated with late-term abortions procedures can in many instances ensure that poor women and girls who desire abortions are instead forced to carry unwanted pregnancies to term.¹⁹² Given the fact that late-term abortions can cost anywhere from \$400 to \$7000¹⁹³ and that states typically restrict the use of state funds,¹⁹⁴ if not for the existence of underground networks like the National Network of Abortion Funds, many more women would be unable to obtain abortions.¹⁹⁵

C. *Changing the Abortion Dialogue*

Underground networks should be addressed by the state legislatures considering abortion restrictions and bans because such networks provide valuable evidence of the necessity of

¹⁸⁷ National Network of Abortion Funds, <http://www.nnaf.org/fundinfo.html> (last visited Apr. 8, 2008).

¹⁸⁸ I do not mean to imply that these funds turn away women seeking help; rather, I argue that the very nature of these networks—as part of the underground—ensures that the number of women that they can help is very limited. If activists organize and develop these networks, as they did in the years when abortion was illegal, it is likely that they can increase the number of women they help. Nevertheless, the only way to ensure that abortions are available and affordable is through legislation that liberalizes abortion laws.

¹⁸⁹ See Nat’l Network of Abortion Funds, <http://www.nnaf.org/fundinfo.html> (last visited Apr. 8, 2008).

¹⁹⁰ See Block, *supra* note 175; Nathan, *supra* note 33.

¹⁹¹ Nathan, *supra* note 33.

¹⁹² Block, *supra* note 175.

¹⁹³ Nathan, *supra* note 33.

¹⁹⁴ See *supra* note 3.

¹⁹⁵ See Block, *supra* note 175; Nathan, *supra* note 33.

liberalizing, rather than criminalizing, abortions. Instead of continually seeking to eliminate abortion, legislatures should consider the major reasons why women seek abortions and why they are, in some circumstances, resigned to seeking them in late stages of pregnancy. Arguably, the very reasons that women seek late-term abortions¹⁹⁶ will, in the future, influence women to seek illegal abortions should a state legislature succeed in enacting an outright ban on abortion. The stories of the women who have had abortions and who have used the underground railroad will likely differ considerably from those of women who assert that abortions have negatively impacted their lives.¹⁹⁷ The contrasting narratives of women on both sides of the abortion debate reflect the stark reality that the decision to have an abortion or to carry a pregnancy to term, though politically charged, is a deeply personal one. Women's life experiences vary considerably and for this reason, state legislatures should listen to the narratives of women on both sides of the debate in order to understand the reasons why women seek abortions and to determine whether there is any middle ground whereby laws can ensure that abortions are both safe and rare.¹⁹⁸

A variety of studies and statistics from both the United States and abroad support the claims of pro-choice advocates that abortion laws ought to be liberalized rather than restricted.¹⁹⁹ For instance, state legislatures should recognize that women who live in states with restrictive laws seek

¹⁹⁶ See Block, *supra* note 175; Nathan, *supra* note 33.

¹⁹⁷ One of the problems in trying to get women to tell their stories about their personal experiences with abortion is that even today significant stigma attaches to the experience. Conversely, women who speak out about abortion harming them will gain support from both proponents and opponents of abortion rights.

¹⁹⁸ Proponents of a woman's right to choose to have an abortion often stress that, each year, women in the United States experience a very large number of unintended pregnancies. See, e.g., Kathryn Kolbert, *Two Steps Forward and One Step Back*, 6 U. PA. J. CONST. L. 686, 690 (2004) ("[W]e—as a movement—have an obligation to put many more of our resources into reducing the number of women who face unintended pregnancies.").

¹⁹⁹ See, e.g., Michèle Alexandre, *Dance Halls, Masquerades, Body Protest and The Law: The Female Body as a Redemptive Tool Against Trinidad's Gender-Biased Laws*, 13 DUKE J. GENDER L. & POL'Y 177, 198 (2006). Alexandre states:

Abortions are illegal in Trinidad, except to protect the life or health of the mother; those who are found guilty of procuring an abortion can be imprisoned for up to four years. Despite its being illegal, the abortion rate in Trinidad is thought to be higher than in the United States, and abortion has turned into a lucrative business for those willing to perform them.

Id.; see *supra* note 76; *infra* Part V.

abortions in other states, and women will continue to seek abortions, even when their availability is severely restricted.²⁰⁰ In 2000, a study by the Alan Guttmacher Institute documented Mississippi's abortion frequency following the enactment of a twenty-four hour mandatory delay.²⁰¹ According to the study, the overall abortion rate declined among women in the treatment group, but the percentage of second-trimester procedures increased by fifty-three percent.²⁰² Moreover, the percentage of Mississippi women traveling out of state for abortions increased by some forty percent.²⁰³ Such figures indicate that restrictive state abortion laws fail to decrease abortion rates, but they simultaneously ensure that women already facing the difficult question of whether to terminate a pregnancy are forced to travel far from their homes to get abortions or to delay the procedure until well into their pregnancy. If state legislatures examined such figures and discussed them frankly, then perhaps current state abortion laws would look quite different than they are today.

V. ABORTION AT HOME AND ABROAD—HARSH LAWS HAVE HARSH CONSEQUENCES ON WOMEN

An analysis of abortion undergrounds in other countries also provides valuable information that may aid legislatures in drafting laws that promote sound policy aimed at ensuring that “women seeking to fulfill their childbearing goals . . . are able not only to protect their lives and health should they decide to have an abortion, but to avoid unplanned pregnancies in the first place.”²⁰⁴ A comparative analysis of abortion in countries with restrictive abortion laws is particularly telling, considering that women “have relied on abortion to end unwanted pregnancies throughout history and in every region of the world, even though abortion was illegal in almost every country

²⁰⁰ See *infra* Part V.

²⁰¹ Joyce & Kaestner, *supra* note 49.

²⁰² *Id.* The authors found that the fifty-three percent increase in second-trimester procedures was among women whose closest provider was in-state. *Id.* They found, however, only an eight percent increase among women whose closest provider was out-of-state. *Id.* “And although the overall abortion rate declined among women in the treatment group over the period (from 11.3 procedures per 1000 women aged 15-44 to 9.9), the rate of second-trimester procedures increased among these women (from 0.8 per 1000 women to 1.1).” *Id.*

²⁰³ *Id.*

²⁰⁴ Dailard, *supra* note 79, at 1.

until the second half of this century.”²⁰⁵ Moreover, worldwide statistical data establishes that “the legal status of abortion correlates much more with its safety than with its incidence.”²⁰⁶ Therefore, abortion rights advocates should reference such data whenever possible during legislative debates in an effort to persuade United States lawmakers that their attempts to eliminate abortion through bans and restrictions is misguided, and will ultimately prove to be unsuccessful.

Countries such as Chile, Colombia, El Salvador, Ireland, and Nicaragua, all legally forbid abortions,²⁰⁷ while a significant number of other countries have enacted severe abortion restrictions.²⁰⁸ Poland, for example, has numerous restrictions in place, yet

[u]nderground private abortion services are robust in Poland, as is “tourism” abortion by Polish women who travel to neighbouring countries including, Austria, Belarus, Belgium, the Czech Republic, Germany, Holland, Lithuania, the Russian Federation, Slovakia and Ukraine. Rough 1996 estimates suggest there may be 50,000 underground abortions a year.²⁰⁹

Such statistics are relevant to any abortion legislation as they refute arguments that abortion, if criminalized or severely restricted, will disappear. In Ireland, for example, abortion is illegal and yet it is estimated that some 72,000 Irish women have travelled to England to obtain abortions since 1970.²¹⁰ That number continues to climb.²¹¹

Similarly, the government in El Salvador has succeeded in doing that which South Dakota failed to do—outlawing abortion in all instances, even when the pregnancy is the result of rape, incest or fetal malformation.²¹² The outright ban on

²⁰⁵ *Id.* at 2-3.

²⁰⁶ *Id.* at 5.

²⁰⁷ Stanley K. Henshaw et al., *The Incidence of Abortion Worldwide*, 25 INT’L FAMILY PLANNING PERSP. S30 (Supp. 1999), available at <http://www.guttmacher.org/pubs/journals/25s3099.html>.

²⁰⁸ Dailard, *supra* note 79, at 2-3.

²⁰⁹ UNITED NATIONS POPULATION DIVISION, ABORTION POLICIES: A GLOBAL REVIEW 40 (2001) [hereinafter U.N. ABORTION REVIEW].

²¹⁰ Maureen C. McBrien, Note, *Ireland Balancing Traditional Domestic Abortion Law with Modern Reality and International Influence*, 26 SUFFOLK TRANSNAT’L L. REV. 195, 195-96 (2002).

²¹¹ *Id.*

²¹² U.N. ABORTION REVIEW, *supra* note 209, at 136; see also David A. Grimes et al., *Unsafe Abortion: The Preventable Pandemic*, 368 LANCET 1908, 1908 (2006), available at http://cdrwww.who.int/reproductive-health/publications/articles/article_4.pdf.

abortions in El Salvador has resulted in unsafe “back-alley abortions” where women use a variety of tools including coat hangers and fertilizers to rid themselves of unwanted pregnancies.²¹³ The country also prohibits abortion in cases where the life of the mother is in danger.²¹⁴ Though many countries with abortion laws in place largely fail to enforce them, El Salvador has “an active law-enforcement apparatus—the police, investigators, medical spies, forensic vagina inspectors and a special division of the prosecutor’s office responsible for Crimes Against Minors and Women, a unit charged with capturing, trying and incarcerating” any abortion provider and women seeking the procedure.²¹⁵ Such drastic measures should provide warning enough to United States and individual state lawmakers that women’s interests will be best served by laws which protect their health, not laws that constrict their reproductive choices.

VI. CONCLUSION

Despite its illegality or near impossibility, women who live in places where abortion is illegal will seek out abortions even though they pose serious health risks as well as deep psychological trauma.²¹⁶ The high mortality rates that resulted from illegal “abortion mills” in the years prior to *Roe* influenced state legislatures to regulate the conditions for abortion in order to prevent abortion-related injuries and deaths.²¹⁷ As noted by Supreme Court Justice Harry A. Blackmun sixteen years after authoring *Roe v. Wade*, “To overthrow [*Roe*] . . . will turn thousands of American women into criminals & their MD’s too. Or [it] will return us to the back alley, and a number of these women, an unconscionable number, will die.”²¹⁸ Despite Justice Blackmun’s all too accurate prediction, some state’s laws continue to restrict the abortion right.

²¹³ Jack Hitt, *Pro-Life Nation*, N.Y. TIMES MAG., Apr. 9, 2006.

²¹⁴ U.N. ABORTION REVIEW, *supra* note 209, at 136.

²¹⁵ Hitt, *supra* note 213. The country’s penal code provides stiff penalties: the abortion provider, whether a medical doctor or a back-alley practitioner, faces six to twelve years in prison. The woman herself can get two to eight years. Anyone who helps her can get two to eight years. U.N. ABORTION REVIEW, *supra* note 209, at 137.

²¹⁶ See *supra* note 156 and accompanying text.

²¹⁷ *Id.*

²¹⁸ LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY 190 (2005).

When legislatures choose to ignore the desperate and deadly lengths to which women are willing to go to obtain abortions, they send a significant message to the citizenry that women's bodies and lives are less valuable than those of men, and that women's bodies must be controlled. Rather than allowing women to determine when and whether they are prepared to bear and rear children, these legislatures have attempted to restrict, or even eliminate, a right to abortion. They have done so under the guise of protecting women.²¹⁹ Typically, as was the case in South Dakota, lawmakers argue that a woman could never voluntarily choose to abort her child, but instead that spouses, boyfriends, parents, abortion doctors, and even society, promote and pressure women in our abortion culture.²²⁰ Such arguments, though, promote gender stereotypes of women as dependent and easily controlled. Such arguments ultimately allow for state lawmakers to control women's bodies and to determine their futures.

Excessive abortion restrictions do not prevent abortions, but instead they relegate the procedures to back-alleys and to clinics in other states.²²¹ What is worse, such laws harm poor women to a greater degree because restrictive state abortion laws ensure that these women are forced into unwanted pregnancy while "wealthy women, middle class women, and women who have some money stashed away will be able to obtain abortions in another country or across a state line or from a doctor who is a relative or friend."²²² When legislators ignore the obvious impact of state laws, they ensure that women go underground and take matters into their own hands.

The increasingly active and visible anti-abortion movement has made significant strides in recent years in politicizing abortion and gaining allies in the U.S. Congress.²²³ Their political efforts, in conjunction with medical advances that allow fetuses to survive outside of the womb at much younger ages, have in many instances silenced pro-choice lobbyists. In order to ensure that abortion bans and restrictions are not enacted,

²¹⁹ See Siegel, *supra* note 39 (examining the arguments of certain pro-life activists).

²²⁰ See *supra* notes 109-112 and accompanying text.

²²¹ See *supra* notes 109-112 and accompanying text.

²²² *Hearing on H.B. 239 Before the Ohio H. Health Comm.* (2005) (statement of Barbara Avery, Director, Ohio Religious Coalition for Reproductive Choice), available at [http://www.ohiorerc.org/assets/documents/Testimony%20opposing%20HB%20239 – November%20202,%202005.doc](http://www.ohiorerc.org/assets/documents/Testimony%20opposing%20HB%20239%20November%20202,%202005.doc).

²²³ See *supra* notes 11-12 and accompanying text.

abortion rights activists must advocate against abortion restrictions and bans by introducing into legislative debates evidence that such laws do not curb the large numbers of unintended pregnancies in our nation. They must describe the dangers and deaths that resulted from back-alley abortions, the re-emergence of the underground, and encourage women who have had abortions to speak out about their experiences, and to reject the claims by anti-abortion activists that abortions harm women.

Proponents of abortion rights, though, must tread carefully when arguing about abortion and inquiring into whether women actually suffer physical or psychological harm as a result of abortions. They must reject the impulse to deny the veracity of the narratives and the powerfulness of the experiences of women who have obtained abortions and later regretted the decision. By supporting these women and trying to understand their viewpoints, abortion proponents may gain support from many women. Like their anti-abortion counterparts, abortion proponents should show support and compassion for women who have been negatively affected by abortion.²²⁴ Such a strategy will then promote the healing of those women who have undergone the procedures while also promoting the agenda of pro-choice advocates: to ensure that abortions are safe and rare, and that there is no need for an underground abortion network.²²⁵

If, however, pro-choice activists are unsuccessful in slowing the progress of the anti-choice movement, they will ultimately be forced to retreat into the underground. Such a maneuver, though, would unquestionably prove quite daunting. Just as the Jane Collective in the pre-*Roe* years assisted women who sought abortions while also training doctors to perform the procedures safely, so too will the modern day abortion railroad activists.²²⁶

The ability of women to participate equally in the economic and social life of the nation has been facilitated by

²²⁴ For a discussion of some anti-abortion strategies, see Siegel, *supra* note 39.

²²⁵ Charlotte E. Hord, *Unsafe Abortion in the Developing World*, ProChoice Action Network (1997), <http://www.prochoiceactionnetwork-canada.org/prochoicepress/97autumn.shtml#unsafe>.

²²⁶ "Jane was the contact name for a group in Chicago officially known as the Abortion Counseling Service of Women's Liberation." KAPLAN, *supra* note 35, at ix. Organized in 1969, the group counseled women and originally only made referrals to underground abortion networks. *Id.* The group eventually had many members learn the technical skills necessary to perform abortions safely. *Id.* at x.

their ability to control their reproductive lives. In order to best ensure that women retain control over their reproductive freedom, abortion proponents must reframe the abortion debate. When attention is drawn to injuries and deaths caused by illegal abortions, activists will be more successful in lobbying for more liberal abortion laws. Until then, it seems that the underground abortion railroad will provide the means by which women resist laws that control their bodies. But as with any underground movement, many are left behind due to lack of funds, lack of volunteers, lack of knowledge about the existence of these networks, and the inability of such small organizations to provide a meaningful level of outreach. The best strategy to ensure that abortions are not made illegal or almost impossible to obtain is through the sharing of stories about illegal and unsanitary abortions that have caused death and injury to so many women throughout the world. If that tactic fails, abortion proponents will be forced to retreat underground, mobilize as many volunteers as possible, and emulate their sisters and brothers of the pre-*Roe* years who mobilized an effective and safe underground abortion railroad.²²⁷

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²²⁷ In Leslie J. Reagan's book, she aptly describes the impact of the two underground abortion networks, Society for Humane Abortion, in California, and Jane, in Chicago:

Both challenged the state in the most fundamental way and made obvious what had long been true: illegal abortions were readily available to thousands, and the state was powerless to stop them. In creating their own illegal abortion networks, the California and Chicago projects circumvented the medical establishment and hinted at the possibility of a health-care system for women run by feminists in competition with the existing medical system. These initiatives were not at first identified as women's liberation efforts—that phrase had not been coined yet. The second wave of feminism, on the verge of breaking, would follow the analysis and activism of these innovative organizers.

REAGAN, *supra* note 33, at 223. Now we find ourselves in the third wave of feminism and facing strict abortion laws throughout our country. It is likely that the underground abortion railroad will continue to develop as laws become more and more restrictive.

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