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Not Your Garden Variety Tort Reform: Statutes Barring Claims for Wrongful Life and Wrongful Birth Are Unconstitutional Under the Purpose Prong of *Planned Parenthood v. Casey*

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NOT YOUR GARDEN VARIETY TORT REFORM: STATUTES BARRING CLAIMS FOR WRONGFUL LIFE AND WRONGFUL BIRTH ARE UNCONSTITUTIONAL UNDER THE PURPOSE PRONG OF *PLANNED PARENTHOOD v. CASEY*

INTRODUCTION

At the age of 36, Julie Sejpal gave birth to a daughter with Down syndrome.[1] Ms. Sejpal, a teacher of differently-abled children, had expressed concern throughout her pregnancy that she was at increased risk for fetal anomalies because of her age. Still her obstetricians discouraged her from getting amniocentesis,[2] assuring her that the test would not be necessary unless other prenatal tests suggested a problem.[3] Two months later, a routine prenatal blood test showed that Ms. Sejpal faced a greater than normal risk of giving birth to a child with Down syndrome.[4] The laboratory result specifically warned that the patient should be advised about the availability of amniocentesis and genetic counseling.[5]

Ms. Sejpal's physicians never advised her about the availability of amniocentesis, nor did they refer her for genetic counseling.[6] In fact, when a sonogram indicated that her pregnancy was not progressing normally, one of her obstetricians

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[1] Complaint at ¶¶ 11, 27, Sejpal v. Corson, No. 1991-2288-A (Pa. Ct. Comm. Pl. Mar. 4, 1992), *aff'd*, 627 A.2d 210 (Pa. Super. Ct. 1993) [hereinafter Sejpal Complaint].

[2] *See* F. GARY CUNNINGHAM, M.D. ET AL., WILLIAMS OBSTETRICS 945-48 (19th ed. 1993).

[3] *See* Petitioners' Appendix to Petition for a Writ of Certiorari at 87a-89a, Sejpal v. Corson, 637 A.2d 289 (Pa. 1993), *cert. denied*, 115 S. Ct. 30 (1994) [hereinafter Sejpal Cert. Appendix] (excerpting deposition of Julie Sejpal).

[4] Sejpal Complaint, *supra* note 1, at ¶ 12; Sejpal Cert. Appendix, *supra* note 3, at 83a.

[5] Sejpal Complaint, *supra* note 1, at ¶ 12; Sejpal Cert. Appendix, *supra* note 3, at 83a.

[6] Sejpal Complaint, *supra* note 1, at ¶ 18; Sejpal Cert. Appendix, *supra* note 3, at 88a-89a.

misinformed her that the fetus's small size suggested only that her pregnancy was less advanced than he had thought.[7] When Ms. Sejpal asked if the blood test should be repeated, he told her it was unnecessary.[8]

On August 30, 1989, Erica Sejpal was delivered by Cesarean section.[9] Julie Sejpal saw Erica only briefly before a nurse whisked the baby off under the pretext that Erica needed oxygen.[10] The medical personnel told both Julie Sejpal and her husband that Erica was fine; no one alerted them to Erica's condition.[11] The obstetrician then proceeded to sterilize Ms. Sejpal by tubal ligation, a procedure to which Ms. Sejpal had consented the week before.[12] Ms. Sejpal did not find out until hours after Erica's delivery and the sterilization that her baby had been born with Down syndrome.

Julie Sejpal and her husband sued her physicians and the hospital for wrongful birth.[13] They also sued on behalf of Erica for wrongful life.[14] The Sejpals alleged that Ms. Sejpal would have had the information necessary to decide whether to terminate her pregnancy but for the physicians' and hospital's acts.[15] They further asserted that if Ms. Sejpal had known of her fetus' condition, she would have sought an abortion and would not have consented to being sterilized.[16]

The Sejpals filed suit in Pennsylvania state court. Unfortunately for the Sejpals, Pennsylvania bars wrongful life and birth claims by statute.[17] Accordingly, the physicians and the hospital sought to dismiss these claims.[18] In response to the

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[7] Sejpal Cert. Appendix, *supra* note 3, at 87a, 90a.

[8] Sejpal Cert. Appendix, *supra* note 3, at 90a.

[9] Sejpal Complaint, *supra* note 1, at ¶ 25.

[10] Sejpal Cert. Appendix, *supra* note 3, at 91a-92a.

[11] *Id.*

[12] Sejpal Complaint, *supra* note 1, at ¶ 26; Sejpal Cert. Appendix, *supra* note 3, at 92a.

[13] Sejpal Complaint, *supra* note 1, Counts III, VI, XV, XVIII.

[14] Sejpal Complaint, *supra* note 1, Count XXI. The Sejpals also sued for medical malpractice, hospital malpractice, unfair trade practices, and fraudulent misrepresentation.

[15] Sejpal Complaint, *supra* note 1, at ¶ 40-41.

[16] Sejpal Complaint, *supra* note 1, at ¶ 36-37, 40-41; Sejpal Cert. Appendix, *supra* note 3, at 89a, 90a.

[17] 42 PA. CONS. STAT. ANN. § 8305(a), (b) (Supp. 1993).

[18] Defendants' Preliminary Objections to Plaintiffs' Complaint at ¶¶ 3-11, Sejpal v. Corson, No. 1991-2288-A (Pa. Ct. Comm. Pl. Mar. 4, 1992), *aff'd*, 627 A.2d 210 (Pa. Super. Ct. 1993).

motion, the Sejpals asserted that the statutes violated their Fourteenth Amendment right to privacy, which encompassed Julie Sejpal's right to choose abortion as established in *Roe v. Wade*.[19] The Court of Common Pleas rejected this assertion, finding that the statutes did not infringe on any Fourteenth Amendment rights, and dismissed the claims for wrongful life and wrongful birth.[20]

Whether and to what degree the Fourteenth Amendment prevents a state from restricting the right to choose abortion would soon become an issue of national debate. One month after the Court of Common Pleas' decision, in April 1992, a nation in the midst of this divisive and vitriolic debate listened anxiously to the most passionate argument before the United States Supreme Court since *Brown v. Board of Education*.[21] Two months later, the Court released its now landmark decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* [hereinafter *Planned Parenthood v. Casey*],[22] in which a plurality affirmed the "essential holding" of *Roe v. Wade* while upholding considerable restrictions on a woman's right to terminate her pregnancy.[23] Most significantly, the *Casey* plurality altered abortion jurisprudence radically with its ruling that restrictions on a woman's right to choose abortion were no longer subject to strict scrutiny,[24] but instead to a newly-

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[19] 410 U.S. 113 (1973). For discussion of the development of the right to privacy, see *infra* part I-A.

[20] Sejpal v. Corson, No. 1991-2288-A (Pa. Ct. Comm. Pl. Mar. 4, 1992), *aff'd*, 627 A.2d 210 (Pa. Super. Ct. 1993).

[21] 347 U.S. 483 (1954). The Court itself compared the magnitude of the decision facing it to that of the Warren Court in *Brown*. Justice Souter wrote, "[t]he Court is not asked to [settle a national controversy] very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*." Planned Parenthood v. Casey, 112 S. Ct. 2791, 2815 (1992). Although the country was not focused on reproductive rights issues when *Roe* legalized abortion, the decision sparked the formation of the anti-choice movement. For a discussion of the intensity of this debate, see generally LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 237-42 (1990) (noting that opposing sides of the abortion debate tend to view each other as incapable of feeling and void of rational thought). *See also* RONALD DWORKIN, LIFE'S DOMINION 4 (1993) (comparing the abortion debate to the "terrible seventeenth-century European civil wars of religion" complete with "[o]pposing armies march[ing] down streets or pack[ing] themselves into protests at abortion clinics, courthouses, and the White House, screaming at and spitting on and loathing one another").

[22] 112 S. Ct. at 2791.

[23] *Id.*

[24] See *infra* notes 31-45 for discussion of strict scrutiny analysis and its rela-

minted and less stringent "undue burden" standard of review.[25]

At the same time as the *Casey* plurality lowered the constitutional standard of review for laws that affect the right to choose abortion, *Casey* expanded the scope of legislation that would be subject to that review. The joint opinion defined an undue burden as "a state regulation [that] has the *purpose* or *effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[26] This disjunctive language—"purpose *or* effect"—provides two alternative and independent bases for review of legislation affecting reproductive choice. Prior to *Casey*, purpose was not an independent inquiry. After *Casey*, legislation affecting abortion rights is unconstitutional if it is passed with either the purpose of substantially obstructing women seeking abortions or when the legislation has that effect.

Statutes that bar wrongful life and wrongful birth claims are passed with precisely the purpose that *Casey* proscribes. The express purpose of these statutes is to remove physicians' liability for these birth-related torts. On its face, this legislation appears to be standard tort reform. The legislative history of Pennsylvania's wrongful life and birth statutes,[27] however, illustrates that the Pennsylvania legislature's actual reason for banning wrongful life and birth actions was not tort reform, but to deter women from having abortions. The legislature

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tionship to abortion rights.

[25] 112 S. Ct. at 2819-20. Although the undue burden standard had arisen in prior cases, *see ,e.g.*, Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 462 (1983) (*Akron I*) (O'Connor, J., dissenting) (stating that restriction which does not unduly burden a woman's ability to obtain an abortion should be subject to rational basis review), the *Casey* plurality explicitly stated that previous articulations of the standard "could be considered inconsistent" and therefore, to clarify any confusion, clearly defined the standard. *Casey*, 112 S. Ct. at 2820.

For other previous incarnations of the undue burden standard, see Hodgson v. Minnesota, 497 U.S. 417, 459 (1990) (O'Connor, J., concurring in part and concurring in judgment) (citing *Akron I*). *See also* Webster v. Reproductive Health Servs., 492 U.S. 490, 530 (1989) (O'Connor, J., concurring in part and concurring in judgment in part) (finding that requirement of fetal viability tests "does not impose an undue burden on a woman's abortion decision"); Ohio v. Akron Ctr. for Reprod. Health, Inc., 497 U.S. 502, 519-20 (1990) (*Akron II*) (opinion of Kennedy, J.) (holding that parental notification statute "does not impose an undue, or otherwise unconstitutional, burden on a minor seeking an abortion.").

[26] 112 S. Ct. at 2820 (emphasis added).

[27] These are the statutes that barred the Sejpals' claims.

intended to accomplish this purpose by encouraging physicians to withhold information from women about the health of their fetuses—information that might lead women to seek abortions. This legislative purpose—to prevent a woman from making an informed choice about whether to terminate her pregnancy—is proscribed by the purpose prong of *Planned Parenthood v. Casey*.

This Note argues that under the effect prong of *Casey*, statutes that bar wrongful life and wrongful birth claims have an indirect but impermissible effect on a woman's right to choose abortion. That effect may be difficult to prove, however, under the effect prong analysis that *Casey* requires. These statutes' impermissible legislative purpose, however, is eminently clear.

Part I of this Note briefly examines the history of abortion jurisprudence from *Roe v. Wade* to the *Casey* decision, and discusses how *Casey*'s departures from the reasoning of *Roe* have altered federal protection of the right to abortion dramatically. Part II surveys the history of wrongful life and wrongful birth claims and the statutes barring them. Part III applies *Casey*'s undue burden standard, both effect and purpose, to wrongful life and wrongful birth statutes. This Part argues that although these statutes have the impermissible effect of unduly burdening women's right to liberty, litigants face almost insurmountable difficulties in proving such effect. Next, this section asserts that the Pennsylvania state legislature's purpose for passing wrongful life and birth statutes is not tort reform, but to prevent women from choosing abortion. This impermissible legislative purpose constitutes an undue burden on the right to choose abortion, and as a result, statutes barring wrongful life and wrongful birth actions are unconstitutional under the purpose prong of *Casey*. Part IV concludes that the purpose prong is an essential legal construct for protecting and preserving abortion rights.

I. ABORTION RIGHTS SINCE *ROE V. WADE*

A. *Abortion as a Facet of the Fundamental Right to Privacy*

The fundamental right to privacy, a penumbral right described by Justice Douglas in *Griswold v. Connecticut*,[28] is essentially "the right to be let alone."[29] Justice Douglas found "emanations" giving rise to a "zone of privacy" in the First, Third, Fourth, Fifth, and Ninth Amendments.[30] Protections of fundamental rights provided by these amendments'apply to the states through the Due Process Clause of the Fourteenth Amendment.[31] Justice Douglas asserted that the right to privacy, particularly marital privacy, predated the Bill of Rights;[32] therefore, he argued, the Bill of Rights does not bestow new rights, but merely recognizes inherent rights enjoyed by all people.[33] These fundamental rights embodied in the Bill of Rights are particularly sacrosanct, and the state must meet

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[28] 381 U.S. 479, 484 (1965). Justice Douglas argued that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484 (Griswold held that the right to privacy encompassed married couples' right to access of contraceptives). *Id.* at 485-86. In 1972, *Eisenstadt v. Baird* extended the right to privacy to individuals. 405 U.S. 438 (1972).

[29] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[30] 381 U.S. at 483-85.

[31] The Due Process clause provides in pertinent part, "[n]o state shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . " U.S. CONST. amend. XIV. In Duncan v. Louisiana, the Supreme Court listed several rights enumerated in the Bill of Rights that apply to the states through the Due Process Clause, including: the right guaranteed by the Fifth Amendment to compensation for property taken by the State; the rights of speech, press, and religion covered by the First Amendment; the Fourth Amendment rights to be free from unreasonable searches and seizures and to have any evidence illegally seized excluded from criminal trials; the right guaranteed by the Fifth Amendment to be free from compelled self-incrimination; and the Sixth Amendment rights to counsel, to a speedy and public trial, to confrontation of opposing witnesses, and to compulsory process for obtaining witnesses. 391 U.S. 145 (1968). *See also Griswold*, 381 U.S. at 482 (noting that "the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments" and that "the same dignity is given the right to study the German language in a private school") (citations omitted).

[32] *Griswold*, 381 U.S. at 486.

[33] *Id.*

a high standard to justify an infringement on them.[34] This stringent standard seeks to minimize state infringements on fundamental rights by demanding that legislation serve a compelling state interest and that it be narrowly tailored to accomplish that objective.[35]

The Supreme Court first determined that the fundamental right to privacy encompassed the right to abortion in *Roe v. Wade*.[36] Writing for the majority, Justice Blackmun delineated the various interests at stake in the abortion context: the woman's right to privacy, the health of the woman, and the state's interest in fetal life.[37] In *Roe*, the Court balanced these interests within the framework of the "trimester system" that obstetricians use to chart a woman's pregnancy.[38] Applying strict scrutiny, the Court found that although the state's interests in the health of the mother and the life of the fetus are "legitimate" throughout a woman's pregnancy,[39] not until the third trimester does the state's interest in fetal life become compelling.[40] At this point in a woman's pregnancy, the state can prohibit abortion except when necessary to save the life or preserve the health of the woman.[41] Because the state lacks a compelling interest in the fetus in the first and second trimesters of pregnancy, the Court held that bans on abortions performed during this period violate a woman's fundamental right

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[34] *See Roe*, 410 U.S. 113, 152-53 (listing fundamental rights).

[35] *Id.* at 155-56 (describing strict scrutiny).

[36] "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. This formulation has been questioned from its inception. In his dissenting opinion, then-Justice Rehnquist disagreed that any right to privacy was at issue in *Roe*. *Id.* at 172 (Rehnquist, J., dissenting). Justice Rehnquist further objected that the right to abortion was completely unknown to the drafters of the Fourteenth Amendment and, therefore, was not protected by it. *Id.* at 174.

Feminists have also criticized the establishment of the right to abortion under the rubric of the right to privacy. Many of these critics assert that the right to abortion more aptly fits within equal protection jurisprudence. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

[37] *See Roe*, 410 U.S. at 150-55.

[38] *Id.* at 162-64.

[39] *Id.* at 150-51.

[40] According to Justice Blackmun, viability, the point at which the state's interest becomes compelling, occurs at approximately 24 weeks. *Id.* at 160, 163.

[41] *Id.* at 163-64.

to privacy and therefore are unconstitutional.[42]

For a short period after *Roe*, women enjoyed virtually unfettered access to abortion services. Gradually, however, Congress and state legislatures enacted and the Supreme Court upheld a range of measures designed to restrict abortion access. As early as 1976, Congress passed the first Hyde Amendment, which limited Medicaid funding of abortion to those abortions necessary to save the pregnant woman's life.[43] In 1980, the Court rejected an equal protection challenge to the Hyde Amendment.[44] The Court reasoned that although the state may not actively impede a woman's access to first or

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[42] *Id.* at 164.

[43] Subchapter XIX of the Social Security Act, 79 Stat. 343 (codified as amended at 42 U.S.C. § 1396) (1976)) established Medicaid, which provides health insurance for the poor. Every year since 1976, Congress has continued to prohibit funding of abortion either by amendment to its annual appropriations bill for the Departments of Labor, Health and Human Services, and Education or by joint resolution. The most restrictive version of the Hyde Amendment, in effect from 1980 to 1993, funded abortion only when necessary to save the life of the woman. *See, e.g.*, Depts. of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-394, § 203, 106 Stat. 1792, 1811 (1992).

In 1977 and 1978, Congress loosened the restrictions slightly to allow funding for abortion if the pregnancy posed a serious health risk to the woman. *See* Pub. L. No. 95-205, § 101, 91 Stat. 1460, (1977); Pub. L. No. 95-480, § 210, 92 Stat. 1586, (1978). The appropriations bill for 1994 funds abortion both to save the life of the woman and if the pregnancy is the result of rape or incest. Depts. of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-112, § 509, 107 Stat. 1113, (1993). Prior amendments with an exception for rape or incest required that the rape or incest be reported to a law enforcement agency or public health service. *See, e.g.*, Pub. L. No. 96-123, § 109, 93 Stat. 926, (1979) (providing exception for "medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly").

The American Medical Association's Council on Scientific Affairs noted that if restrictive funding regulations deter women from seeking early termination of pregnancy, "there is likely to be a small but measurable increase in mortality and morbidity among women in the United States". COUNCIL ON SCIENTIFIC AFFAIRS, AMERICAN MEDICAL ASSOC., *Induced Termination of Pregnancy Before and After Roe v. Wade: Trends in the Mortality and Morbidity of Women*, 268 JAMA 3231, 3238 (1992). [hereinafter *Trends*]. For a thorough report on the impact of abortion on women's health since 1973, *see Trends, supra.*

[44] Harris v. McRae, 448 U.S. 297 (1980). For a critical view of the often devastating effects that the Hyde Amendment wreaks on poor women's reproductive health and choice, and an argument that those effects violate equal protection guarantees, *see* Julie F. Kay, Note, *If Men Could Get Pregnant: An Equal Protection Model for Federal Funding of Abortion Under a National Health Care Plan*, 60 BROOK. L. REV. 349 (1994).

second trimester abortions, it has no obligation to remove obstacles to access, such as poverty, that are not of its own creation.[45] Then, in 1991, the Court upheld a "gag rule" that banned the expenditure of federal funds to family planning clinics providing abortion counseling or referral.[46] The Court implied that the state interest in encouraging childbirth outweighed a physician's right to free speech by holding that the ban did not implicate the First Amendment.[47]

Throughout this period, in addition to federal restrictions, the Court validated a range of state restrictions requiring parental notification[48] or consent,[49] tests to determine fetal viability,[50] informed consent provisions,[51] and mandatory de-

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[45] *Harris*, 448 U.S. at 316.

[46] Rust v. Sullivan, 500 U.S. 173 (1991). In 1970, Congress enacted Title X of the Public Health Service Act to provide for federal funding of family planning clinics. 42 U.S.C. §§ 300-300a-6 (date & Supp. 1985). Congress denied funds to "programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. The "gag rule" was a set of regulations promulgated by the Department of Health and Human Services under the Reagan and Bush Administrations that attached several additional conditions to the receipt of federal funds. In addition to preventing any abortion counseling, 42 C.F.R. 59.8(a)(1) (1988), or referrals, 42 C.F.R. 59.8(b)(5), the regulations also required that facilities which provided both family planning services and abortion services have physically separate areas where the services were provided, 42 C.F.R. 59.9, and that they have separate entrances. *Id.* *See also* 500 U.S. at 178-81. These regulations further required that these facilities maintain complete financial separation between abortion and family planning services and that they keep detailed accounting of that separation. 42 C.F.R. 59.9 (1989); *see also* 500 U.S. at 180-81.

The gag rule was opposed adamantly by pro-choice advocates as well as the medical establishment. *See* Spencer Rich, *Medical Groups Ask End to Abortion "Gag Rule,"* WASH. POST, Mar. 31, 1992, at A5. Congress also disliked the gag rule, and voted to lift the restrictions that it imposed, but only the Senate could muster the votes to override President Bush's veto. *See* Major Garrett, *House Votes to Lift Abortion "Gag Rule,"* WASH. TIMES, June 27, 1991, at A1; *see also* Joyce Price, *Senate Votes to Override Abortion Counseling Veto*, WASH. TIMES, Oct. 2, 1992, at A3. President Clinton, honoring an early and unequivocal campaign promise, repealed the gag rule during his first days in office. *See* Ann Devroy, *Clinton Cancels Abortion Restrictions of Reagan-Bush Era; "Gag Rule" on Clinics, Federal Ban On Fetal Tissue Research Are Lifted,* WASH. POST, Jan. 23, 1993 at A1.

[47] *Rust*, 500 U.S. at 192-200.

[48] H.L. v. Mathieson, 450 U.S. 398 (1981) (upholding provision requiring physicians to notify parents of a minor who wished to obtain an abortion).

[49] Bellotti v. Baird, 443 U.S. 662 (1979) (*Bellotti II*) (parental consent constitutional with judicial bypass).

[50] Webster v. Reproductive Health Servs., 492 U.S. 490 (1989). In *Webster*, the plurality found that the state had a compelling interest in preventing a viable fetus from being aborted, regardless of whether viability tests themselves were necessary or might be harmful to the pregnant women. The plurality asserted that

lay periods.[52] Additionally, in the early 1990's, the respective legislatures of Louisiana,[53] Utah,[54] and the Territory of Guam[55] passed bans on abortion that abortion rights groups swiftly challenged in lower state and federal courts.[56]

B. *The Impact of* Planned Parenthood v. Casey

When the Supreme Court granted certiorari in *Planned Parenthood* many believed the Court was poised to overrule *Roe* and retract federal protection of the right to abortion entirely.[57] Whether the right to privacy encompassed the right

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to be constitutional, abortion restrictions need only "permissibly further[ ] the State's interest in protecting potential human life." *Id.* at 519-20. The dissenters reviled the plurality for formulating a level of scrutiny that was both "circular and totally meaningless" and "nothing more than a dressed-up version of rational-basis review, [the] Court's most lenient level of scrutiny." *Id.* at 554-55 (Blackmun, J., dissenting).

Furthermore, the dissenters expressed dismay at the plurality's "implicit invitation to every State to enact more and more restrictive abortion laws." *Id.* at 556. The invitation was certainly accepted. After the *Webster* decision, federal and state legislators introduced over 600 bills designed to restrict abortion and birth control. Janet Benshoof, Planned Parenthood v Casey: *The Impact of the New Undue Burden Standard on Reproductive Health Care*, 269 JAMA 2249, 2250 (May 5, 1993). *See also The Status of a Woman's Right to Choose Abortion*, REPRODUCTIVE FREEDOM IN THE STATES (Center for Reproductive Law & Policy, New York, N.Y.), July 20, 1994 (summarizing state abortion restrictions including the District of Columbia, Guam and Puerto Rico) [hereinafter REPRODUCTIVE FREEDOM]. Restrictions on abortion cause women to delay the procedure, which can lead to increased complications, or to seek illegal abortions, which can lead to deadly results. The AMA's Council on Scientific Affairs concluded in its study of the effects of abortion on women's health that the negative impact of "[i]ncreasingly restrictive abortion laws" would "disproportionately affect young, poor, and minority women" and noted that "[b]ecause poor and low-income women are most likely to have difficulty with financial arrangements . . . they are more likely to delay . . . and are therefore at greater risk of abortion-related complications or death." *See Trends*, *supra* note 43, at 3238.

[51] *See, e.g., Casey*, 112 S. Ct. at 2791.

[52] *Id.*

[53] LA. REV. STAT. ANN. § 14:87 (1991). The statute was held unconstitutional in Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1414 (1993).

[54] UTAH CODE ANN. § 76-7-302. (1991). The ban was held unconstitutional in Jane L. v. Bangerter, 794 F. Supp. 1537 (D. Utah 1992).

[55] GUAM CODE ANN. § 31.20. (1990). The statute was struck down in Guam Soc'y of Obstetricians and Gynecologists v. Ada, 962 F.2d 1366 (9th Cir.), *cert. denied*, 113 S. Ct. 633 (1992).

[56] *See supra* notes 54-56 and authorities cited therein.

[57] So many, in fact, that 500,000 people marched in Washington, D.C. to pub-

to abortion had stirred such controversy that the issue became a virtual litmus test of nominees to the federal judiciary, including the Supreme Court.[58] Despite dire predictions to the contrary, however, a plurality of the Court surprised the nation (and the *Casey* dissenters) by affirming what it called the "essential holding" of *Roe*.[59] The *Casey* plurality maintained

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licly express their concern. *See* Karen De Wittuge, *Crowd Backs Right to Abortion in Capital March*, N.Y. TIMES, Apr. 6, 1992, at A1. Abortion supporters on the Court were worried as well. Justice Blackmun warned in his *Webster* dissent that "'not with a bang, but a whimper', the plurality . . . [had] cast[] into darkness the hopes and visions of every woman in this country who had come to believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children," 492 U.S. at 557, and that while women still had the "liberty to control their destinies . . . the signs are evident and very ominous, and a chill wind blows." *Id.* at 560.

[58] The change in personnel on the Supreme Court and lower federal courts was dramatic in the ten years before *Casey*. Between 1981 and 1991, Presidents Reagan and Bush nominated five Supreme Court Justices: Scalia, O'Connor, Kennedy, Souter and Thomas. 2 ALMANAC OF THE FEDERAL JUDICIARY (Stephen Nelson et al. eds., 1993). Justice Powell's resignation and the subsequent nomination of Judge Robert Bork of the Court of Appeals for the District of Columbia to replace him set off a maelstrom of debate. This debate culminated in the Senate Judiciary Committee's nomination hearings in September 1987, which largely focused on Judge Bork's strict, textual interpretation of the Constitution, and whether that interpretation encompassed a right to abortion. After 12 days of debate, the Committee voted 9-5 to recommend that Judge Bork be rejected; the full Senate rejected Bork's nomination 58-42. *See* Linda Greenhouse, *Bork's Nomination Is Rejected, 58-42; Reagan 'Saddened,'* N.Y. TIMES, Oct. 24, 1987, at 1.

Following the rejection of Bork's nomination, President Reagan considered nominating Judge Douglas Ginsburg, who was forced to withdraw because he admitted to having smoked marijuana. *See* Steven V. Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana 'Clamor'*, N.Y. TIMES, Nov. 8, 1987, at §1, 1. President Reagan then nominated now Justice Kennedy, whom the Senate confirmed in February 1988. Even after *Casey*, abortion remains an issue in judicial appointments, a fact Justice Blackmun predicted in *Casey* itself when he commented that "when I do step down, the confirmation process for my successor well may focus on the issue before us today." 112 S. Ct. at 2854-55.

[59] 112 S. Ct. at 2804. *See also* David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES, Sept. 25, 1994, § 6 (Magazine), at 36, 38 (noting that when the plurality circulated its joint opinion to the other Justices, "Rehnquist and Scalia were stunned. So, too, was Blackmun.") (quoting David Savage, *The Rescue of Roe v. Wade*, L.A. TIMES, Dec. 13, 1992, at A1). Justice Scalia's opinion lambasted the plurality for its "outrageous arguments" which he found "beyond human nature to leave unanswered." 112 S. Ct. at 2875. (Scalia, J., concurring in the judgment in part and dissenting in part). He viewed the joint opinion's reliance on *stare decisis* as "contrived," *id.* at 2881, and the "revised version" of *Roe* "fabricated." *Id.* at 2876. Justice Rehnquist's opinion accused the plurality of hypocrisy: "The end result of the joint opinion's paeans of praise for legitimacy is the enunciation of a brand new standard . . . which is created largely out of whole cloth by the authors of the joint opinion." *Id.* at 2866. Justice Rehnquist pointed out that the

federal protection of the right to abortion while definitively expanding the ability of the state to regulate the procedure. The joint opinion attempted to formulate a compromise that would placate both sides in the national debate.[60]

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undue burden standard espoused in the joint opinion "even today does not command the support of a majority of this Court. . . . In sum, it is a standard which is not built to last." *Id.* For thorough criticism of the *Casey* decision, see generally Elizabeth A. Schneider, *Workability of the Undue Burden Test*, 66 TEMPLE L. REV. 1003 (1993); *see also* C. Elaine Howard, Note, *The Roe'd to Confusion:* Planned Parenthood v. Casey, 30 HOUS. L. REV. 1457 (1993).

[60] *Casey* may have quelled the immediate political furor, but it left the emotions that engendered the public debate about abortion largely unresolved. The violence directed at abortion clinics and abortion providers, most tragically demonstrated by the murders of Dr. David Gunn and Dr. John Britton in Pensacola, FL, and the murders at clinics in Brookline, Massachusetts, and in addition blockades, property destruction, including arson and chemical attacks, harassment, assault and kidnapping, is shocking. From 1977 to 1993, abortion clinics were subject to 86 arsons, 37 bombings, and 62 attempts at either. THE CENTER FOR REPRODUCTIVE LAW & POLICY, *Federal Responses to Anti-Choice Violence and Harassment, Reproductive Freedom on the Hill* (1994) [hereinafter *Federal Responses*] (citing statistics compiled by the National Abortion Federation in an October 14, 1993 report). These disturbing statistics provide ample evidence that the issue of abortion is far from settled.

In response to clinic violence and its resulting intimidation of women seeking abortions, Congress passed the Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (1994) (codified at 18 U.S.C. § 248) [hereinafter "FACE"]. FACE prohibits individuals from interfering with another person's access to reproductive health services, either by intentionally injuring or intimidating that person by force, threat of force, or physical obstruction, 18 U.S.C. § 248(a)(1), and provides both civil and criminal remedies. 18 U.S.C. § 248(b),(c). FACE does not, however, implicate activities and expression protected by the First Amendment. 18 U.S.C. § 248(d)(1),(2). For a brief history of FACE, see *Federal Responses*. Enforcement of FACE has proven problematic, with clinic directors asserting that the FBI neglects to take action when clinics and their staffs are threatened. *See* Ana Puga, *Groups Decry Attacks on Abortion Providers; Urge US to Step Up Prosecutions*, BOSTON GLOBE, Jan. 20, 1995, at 12; Robert Pear, *Abortion Clinic Workers Say Law Is Being Ignored*, N.Y. TIMES, Sept. 23, 1994, at A16.

Pro-life groups have filed facial challenges to FACE's validity in several federal district courts around the country, alleging, inter alia, that FACE chills their First Amendment and other rights. *See, e.g.*, Terry v. Reno, Civ. Action No. 94-1154 (D.D.C., filed May 26, 1994); Riely v. Reno, 860 F. Supp. 693 (D.Ariz. 1994); Cook v. Reno, 859 F. Supp. 1008 (W.D. La. 1994); Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D.Cal. 1994); American Life League, Inc. v. Reno, 855 F. Supp. 137 (E.D. Va. 1994), *aff'd*, 47 F.3d 642 (4th Cir. 1995).

FACE may be ominously linked to abortion violence, as Dr. Britton was murdered by Paul Hill the morning following the Middle District of Florida's rejection of a challenge to FACE in Cheffer v. Reno, 94-0611-CIV-ORL-18 (M.D. Fl. July 26, 1994). Hill had been a regular protester at the Pensacola clinic and had advocated on national television and throughout the news media using force to protest abortion. *See* Robert D. McFadden, *Death of a Doctor: The Warnings; News Accounts*

Under *Roe*, a woman's right to privacy encompassed her right to terminate her pregnancy.[61] Significant aspects of the joint opinion in *Casey*, written by Justices Souter, O'Connor and Kennedy, departed from this position. First, the plurality reframed the right to abortion as a liberty interest deriving from the Due Process Clause.[62] The joint opinion then declined to apply strict scrutiny to a woman's newly defined liberty interest in abortion, choosing to apply an undue burden standard instead. Finally, *Casey* jettisoned the trimester framework of *Roe*,[63] and adopted fetal viability as the point at

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Presaged Trouble, N.Y. TIMES, July 30, 1994, at 26. Hill was eventually indicted and convicted under FACE. *See* Ronald Smothers, *Abortion Protester Is Guilty Under Clinic Access Law*, N.Y. TIMES, Oct. 6, 1994, at A18.

[61] *See* 410 U.S. 113 (1973) and *supra* notes 36-42 and accompanying text.

[62] Indeed, this reframing is reflected in the opening words of the plurality opinion: "Liberty finds no refuge in a jurisprudence of doubt." 112 S. Ct. at 2803. The plurality does not ignore the series of privacy cases on which *Roe* relied, but it declines to interpret *Roe* as a privacy case. *See supra* notes 28-42 and accompanying text for discussion of the privacy decisions. Instead, the plurality states that "in some critical respects the abortion decision is of the same character as the decision to use contraception, to which [the privacy cases] afford constitutional protection," and that those decisions "support the reasoning in *Roe* relating to the woman's liberty." 112 S. Ct. at 2807.

Moreover, the plurality infers that the majority in *Griswold* based its decision on liberty and not privacy. Justice Douglas's opinion in *Griswold*, however, consistently uses the term "privacy." *See, e.g.* 381 U.S. at 484 ("Various guarantees create zones of privacy."); *id.* at 485 ("The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."). In his concurrence, Justice Harlan focused his analysis on liberty. "[T]he proper constitutional inquiry . . . is whether this . . . statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.'" *Griswold*, 381 U.S. at 500 (Harlan, J., concurring in the judgment) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Unlike the *Casey* plurality, which adopted and applied the undue burden standard to a woman's liberty interest in abortion, Justice Harlan advocated strict scrutiny for laws affecting fundamental liberties. *See* Poe v. Ullman, 367 U.S. 497, 548 (1961) (arguing that the "fundamental aspect of 'liberty' . . . requires that [a statute infringing on it] be subjected to 'strict scrutiny.'") (Harlan, J., dissenting from dismissal on jurisdictional grounds).

Roe itself squarely places abortion jurisprudence within the right to privacy. "Liberty" is only one of the sources from which the privacy right derives:

> In varying contexts, the Court or individual Justices have, indeed, found at least the roots of [the right to privacy] in the First Amendment; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights; in the Ninth Amendment; *or* in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.

410 U.S. at 152 (citations omitted) (emphasis added).

[63] 112 S. Ct. at 2818.

which the state's interest in fetal life becomes compelling.[64]

When the *Casey* plurality reframed the right to choose abortion as an interest in liberty, it neglected to hold that this liberty interest is a fundamental right. Absent classification as a fundamental right, the right to abortion lost the level of protection that strict scrutiny affords. Accordingly, the Court discarded strict scrutiny and selected the "undue burden" standard to determine the constitutionality of abortion restrictions.[65] Under this standard, a law infringing on abortion rights is considered unconstitutional if it has the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion."[66] The plurality then defined an obstacle as substantial if it is "calculated [not] to inform the woman's free choice, [but to] hinder it."[67] The undue burden standard is notably less exacting than strict scrutiny, granting the state more latitude to regulate abortion.

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[64] *Id.* at 2816. Viability potentially occurs at an earlier stage of pregnancy than the third trimester. Therefore *Casey* allows the state to intrude on the abortion decision sooner than did *Roe*. In addition to its reframing of *Roe* and the analysis of the regulations at issue in *Casey*, the plurality devoted a large portion of its opinion to the principle of stare decisis, arguing that *Roe* had not become unworkable and acknowledging that a generation of women had grown up with the expectation that they would have access to abortion should the need arise. *Id.* at 2808-16.

[65] 112 S. Ct. at 2820. This level of scrutiny appears to fall somewhere below strict scrutiny, but is more rigorous than rational relationship scrutiny. The *Casey* dissenters advocated a rational relationship test for abortion regulations. *See id.* at 2867 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

[66] *Id.* at 2820.

[67] *Id.* The clarification of the term "undue burden" as a "substantial obstacle" is arguably circular, doing little to amplify the meaning of "undue burden" itself. The undue burden standard has been criticized as vague and unpredictable from the moment of its inception. Justice Scalia condemns what he sees as the joint opinion's unsuccessful "efforts at clarification," calling the standard "inherently manipulable" and "hopelessly unworkable in practice." *Id.* at 2877. (Scalia, J., concurring in the judgment in part and dissenting in part). He further denounces the definition of the undue burden for its circularity:

> *Any* regulation of abortion that is intended to advance . . . the State's "substantial" interest in protecting unborn life will be "calculated [to] hinder" a decision to have an abortion. It thus seems more accurate to say that the joint opinion would uphold . . . regulations only if they do not *unduly* hinder the woman's decision. That, of course, brings us right back to square one: Defining an "undue burden" as an "undue hindrance" (or a "substantial obstacle") hardly "clarifies" the test.

Id. Commentators have criticized the undue burden standard for similar reasons. *See, e.g.*, Schneider, *supra* note 59, at 1031 (arguing that undue burden standard is vague and subjective, and not tailored to meet individual women's needs).

At issue in *Casey* were several 1988 and 1989 amendments to Pennsylania's Abortion Control Act of 1982.[68] The informed consent provision of the Act required physicians to explain the risks of and the alternatives to abortion, the probable gestational age of the fetus (described as the "unborn child"), and the medical risks of carrying a child to term. This provision further requires that a physician or other staff person give women state-provided written materials. Both the counseling and the written materials were designed to discourage women from choosing abortion and to encourage them to choose childbirth.[69] After receiving the biased counseling and the written materials, the statute required the woman to wait twenty-four hours before she could obtain an abortion.[70] The parental consent provision required a young woman under the age of eighteen to obtain the consent of one parent, or the authorization of a state court judge, before seeking an abortion.[71] In addition, the amendments added several extensive reporting requirements[72] and a new definition of medical emergency.[73] Finally, the statute imposed a spousal notification requirement.[74]

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[68] 18 PA. CONS. STAT. ANN. §§ 3203, 3206-09, 3214 (1990).

[69] 18 PA. CONS. STAT. ANN. § 3205.

[70] *Id.*The statute requires that the written materials: describe the fetus; explain that medical benefits may be available for prenatal, childbirth and neonatal care, and; inform the woman that the father of the fetus is liable to assist in the support of the child. *Id.* Finally, this provision describes the penalties for physicians who do not provide the state-mandated information. Penalties range from misdemeanor charges to suspension or revocation of the physician's license. *Id.*

[71] 18 PA. CONS. STAT. ANN. § 3206.

[72] 18 PA. CONS. STAT. ANN. § 3214. The mandated reports included, in part: identification of the physician who performed the abortion; the county and state of the woman's residence; her age; the number of her prior pregnancies and abortions; the gestational age of the fetus; the type of procedure; the weight of the aborted fetus, and; whether the abortion was performed on a married woman, and if so, whether notice to her spouse was given. *Id.*

[73] 18 PA. CONS. STAT. ANN. § 3203. A medical emergency is defined by the statute as a:

> condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

Id.

[74] 18 PA. CONS. STAT. ANN. § 3209. This provision prohibited a physician from performing an abortion on a married woman unless she provided a signed statement indicating that she had notified her spouse that she was planning to have an abortion. *Id.* A false statement would be "punishable by law." *Id.* The notice

In applying the undue burden standard to this multitude of restrictions, the plurality focused on the effect prong of the undue burden standard: whether the restrictions had the "effect of placing a substantial obstacle in the path of a woman seeking an abortion."[75] The plurality's undue burden analysis was highly fact-based. First, the opinion analyzed each regulation's measurable effect on access to abortion. Then, the plurality evaluated the obstacle that the effect imposed.[76]

The opinion concluded that only the spousal notification requirement and its corresponding reporting provision had the requisite impermissible effect of substantially obstructing access to abortions and were, therefore, unconstitutional.[77] To reach this conclusion, the plurality reviewed extensive testimony presented to the district court as well as independent data about domestic violence[78] and rejected assertions that the percentage of women affected by the provision, an estimated one percent of all women, was so minimal that the overall burden could not be undue.[79]

Instead, the plurality proclaimed that "the analysis does

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was required to "further the Commonwealth's interest in promoting the integrity of the marriage relationship and to protect a spouse's interests in having children within marriage. . . . " *Id.* Exceptions were allowed if the spouse was not the father, could not be located, if the pregnancy was the result of spousal sexual assault, or if the woman had reason to believe that giving notice would be likely to result in either her spouse or someone else inflicting bodily injury upon her. *Id.*

[75] 112 S. Ct. at 2820.

[76] For example, in analyzing the 24-hour mandatory waiting period, 18 PA. CONS. STAT. ANN. § 3205(a)(1)-(2), the plurality reviewed the district court's findings of the distance a woman had to travel to reach an abortion provider, whether that woman would have to make at least two trips to the provider, and the increased exposure of women to anti-choice demonstrators. According to the plurality, the district court's conclusion that the regulation would have a "*particularly burdensome* effect . . . on some women" did not necessarily mean that the regulation was a substantial obstacle for those women it did burden. *Casey*, 112 S. Ct. at 2825-26 (emphasis added). Therefore, the plurality found that the regulation, although a *particular* burden, was not an *undue* burden. *Id.* at 2826.

[77] 112 S. Ct. at 2830 (invalidating spousal notification provision); *id.* at 2833 (striking down reporting provision).

[78] Data presented by the petitioners and by amici cited by the Court indicate that domestic violence occurs in two million families in the United States. This figure was found to be conservative based on the low reporting of domestic violence crimes. Additionally, the Court cited the factual finding of the district court that pregnancy itself is often a "flashpoint for battering and violence in the family." *Id.* at 2826-27 (quoting Planned Parenthood v. Casey, 744 F. Supp. 1323, 1361 (E.D. Pa. 1990)).

[79] 112 S Ct. at 2829.

not end with the one percent upon whom the statute operates; it begins there."[80] In other words, the plurality concentrated its undue burden analysis on "the group for whom the law is a restriction, not the group for whom the law is irrelevant."[81] At the same time, however, they asserted that a "particularly burdensome effect . . . on some women" did not constitute an undue burden.[82] The semantic distinction appears slight, but its effect was marked: the joint opinion held that none of the other restrictions at issue posed an undue burden under the effect prong.[83]

Although it extensively analyzed the various effects of the challenged legislation, the *Casey* plurality devoted virtually no attention to analyzing the purpose behind the Pennsylvania Abortion Control Act. The plurality eschewed this analysis despite its assertion that legislation with the "*purpose* . . . of placing a substantial obstacle in the path of a woman seeking an abortion" also poses an undue burden and is therefore unconstitutional.[84] The plurality neither examined the legislative history of the Act, nor considered the possible range of purposes the Act might have.[85] One conceivable and legitimate purpose for the Act might have been the state's interest in fetal life. Pennsylvania could have, constitutionally, attempted to persuade a woman to choose childbirth over abortion.[86] The joint opinion, however, simply presumed that the Act's purpose was to "inform" or influence a woman's decision in furtherance of this legitimate interest in fetal life.[87] As a

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[80] *Id.*

[81] *Id.*

[82] *Id.* at 2825-26. (holding that 24-hour mandatory delay is a particular but not an undue burden).

[83] *Id.* at 2822 (upholding definition of medical emergency); *id.* at 2822-26 (validating biased counseling and 24-hour mandatory delay provisions); *id.* at 2832 (upholding parental consent provision); *id.* at 2832-33 (upholding reporting and recordkeeping requirements).

[84] *Id.* at 2820 (emphasis added).

[85] *See* 112 S. Ct. 2791.

[86] *See* 112 S. Ct. at 2821. The Court has long held this interest to be valid. *See* Roe v. Wade, 410 U.S. 113, 162-64 (1973) (holding that the state's interests in the life and health of the woman and the fetus are valid at different points in a woman's pregnancy). *See also* Maher v. Roe, 432 U.S. 464, 473 (1977) (holding that *Roe* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion").

[87] 112 S. Ct. at 2823-24. The plurality followed this presumption even when the provision had little logical relationship to informing the woman's decision

consequence of this presumption, and without further investigation, the joint opinion did not invalidate any of the Act's provisions on the basis that the state's purpose was impermissible.

Subsequent lower court opinions involving challenges to abortion regulations have made similar presumptions about legislative purpose and consequently do not analyze the purpose of challenged legislation. Instead, like the *Casey* plurality, these courts have devoted their analyses to the effect of abortion legislation on a woman's liberty.[88] Because the undue burden standard was only defined recently, the *Casey* plurality's highly fact-based, case-specific effect prong analysis provided the only direction to the litigants and lower courts grappling with the standard's application.

Yet even these meager clues were limited by the nature of the undue burden analysis. Because the analysis under the effect prong is so fact-specific, the same regulation could pose an undue burden in one state and not in another. As a result, abortion regulations vary much more widely from state to state after *Casey* than under *Roe*.[89] Furthermore, unless a litigant can predict the harmful effects of a restriction fairly precisely, women adversely affected by legislation restricting access to abortion may have to await the implementation of harmful legislation before challenging it. In addition, challenging legislation that has an indirect effect on the right to choose abortion, such as statutes barring wrongful life and birth claims,

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about the abortion procedure. The informed consent provision requires that clinics or physicians give specific information to a woman regardless of its relevance to her particular circumstances. 18 PA. CONS. STAT. ANN. § 3205. For example, women must be given information about paternal child support. *Id.*

Assuming arguendo that this information has any relevance to the medical procedure of abortion, it hardly informs the decision of a woman who either does not know the identity of the father of her child, or who would not seek child support for another reason. The plurality avoids discussion of purpose entirely where provisions at issue have no relationship whatsoever to the presumed purpose of informing a woman's decision. Specifically, the joint opinion does not mention the purpose of the requirement that a doctor provide the information dictated by the Act, as opposed to another health professional. *See* 112 S. Ct. at 2824.

[88] *See, e.g.*, Fargo Women's Health Org. v. Schafer, 18 F.3d 526 (8th Cir. 1994); Utah Women's Clinic, Inc. v. Leavitt, 844 F. Supp. 1482 (D. Utah 1994).

[89] *See* REPRODUCTIVE FREEDOM, *supra* note 50 (comparing abortion restrictions state by state). For example, Kansas requires an eight-hour delay after the provision of state-mandated information, while many other states require a 24-hour delay.

has become even more difficult under *Casey*'s fact-driven effect analysis.

II. THE DEVELOPMENT OF THE WRONGFUL BIRTH AND WRONGFUL LIFE CAUSES OF ACTION

Wrongful life and wrongful birth actions arise when a physician's negligent care leads to the birth of a child that the parents[90] might have chosen to abort had they been given access to all available information earlier in the pregnancy.[91] In such suits, the physician usually fails to provide the parents with correct information about or diagnosis of a genetic aberration or developmental abnormality in the fetus.[92] Alternatively, a claim may arise when the physician fails to diagnose a parent's genetic condition properly. In this circumstance, the physician's act or omission leads to a pregnancy that otherwise could have been prevented by contraception.[93]

A wrongful life action is brought by or on behalf of the child born with congenital anomalies. The child alleges that but for the negligent diagnosis or the withheld information, he

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[90] Either one parent or both parents can bring these actions. I use the term "parents" only for simplicity.

[91] *See* RESTATEMENT (SECOND) OF TORTS § 869 (1979 & App. 1982). An action also exists for wrongful conception, which arises when a physician negligently performs sterilization or negligently provides a contraceptive that leads to the birth of an unintended child. In addition, although physicians are commonly the defendants in wrongful life, birth, or conception suits, genetic testing laboratories have also been subject to suit. *See, e.g.* Curlender v. Bio-Science Labs., 165 Cal. Rptr. 477 (Ct. App. 1980) (genetic testing laboratory sued for negligently failing to determine that parent was carrier of Tay-Sachs gene); *accord* Flickinger v. Wanczyk, 843 F. Supp. 32 (E.D. Pa. 1994) (pharmaceutical company co-defendant with obstetrician); Troppi v. Scarf, 187 N.W.2d 511 (Mich. App. 1971) (pharmacist sued for negligently filling prescription for oral contraceptives).

For criticism of *Curlender* and wrongful life suits, along with a discussion of steps a physician should take to avoid liability for any or all of these torts, see Frank H. Marsh, *Prenatal Screening and "Wrongful Life": Medicine's New "Catch-22"?*, 143 Am.J. Obs. Gyn. 745 (1982). For a thorough overview of wrongful life and birth suits, see Thomas D. Rogers, III, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C. L. REV. 713 (1982).

[92] *See, e.g.* Sejpal v. Corson, 637 A.2d 289 (W.D. Pa. 1993), *cert. denied*, 115 S. Ct. 30 (1994) (physicians negligently failed to give mother result of blood test, or to perform amniocentesis, after blood test and mother's age indicated a high risk of Down Syndrome).

[93] *See Curlender*, 165 Cal. Rptr. 477.

or she would not have been conceived or would not have been born.[94] The child sues for damages resulting from his or her birth, including pain and suffering, and for lifetime financial support.[95] Often, the parents bring a wrongful birth action on their own behalf in conjunction with the wrongful life action. They allege that the physician's failure to provide adequate medical information deprived them of the opportunity to make a meaningful decision whether to conceive or bear a differently abled child.[96] The parents typically seek damages for expenses

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[94] Wrongful life and birth suits are controversial, not only among pro-life groups, but among the disabled community as well. These causes of action come arguably close to promoting eugenics. For an acute analysis of the problems inherent in balancing a woman's right to choose abortion against the rights and interests of the differently abled community, *see* Laura Hershey, *Choosing Disability*, MS., July/August 1994 at 26. Additionally, critics of wrongful life suits often cite the moral conundrum of "measur[ing] the difference between . . . life with defects against the utter void of nonexistence." Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967). *See also* Wilson v. Kuenzi, 751 S.W.2d 741, 747 (Mo. 1988) (*en banc*) (Robertson, J., concurring) ("Wrongful life actions ask juries to tread where mortals cannot go, to weigh the *cost* of life — even handicapped life — against the *benefit* of no life at all."); Becker v. Schwartz, 46 N.Y. 2d 401, 386 N.E. 2d 807, 413 N.Y.S.2d 895 (1978) (finding that dilemma of whether not being alive is preferable to life with disability should be left to philosophers and theologians). For an argument that the moral quagmire of wrongful birth can be avoided by allowing damages only for medical expenses and not for pain and suffering, see Bonnie Steinbock, *The Logical Case for "Wrongful Life,"* HASTINGS CTR. REPORT, April 1986, at 15.

While these moral arguments initially appear persuasive, they are often superficial. These actions only arise after a child is born. Therefore they cannot encourage women to abort fetuses with disabilities. Instead, wrongful life and birth actions aim to deter the physician from withholding information from a pregnant woman about her pregnancy. While some women may terminate the pregnancy of a fetus which has a genetic disorder, many women will choose to carry to term. The decision, however, is and should be the woman's.

Moreover, contrary to the common perception and statutory presumption that women who learn of fetal genetic anomalies will choose abortion, at least one study supports the inverse proposition. Between 1974 and 1978, researchers asked 297 women who had undergone amniocentesis what they would have done if the test were not available. While 12.4% of the women surveyed said they would not have become pregnant at all or would have had an abortion, only 2% of women studied would have had an abortion had amniocentesis been available. *See* Letter to the Editor, *The Pro-Life Bonus of Amniocentesis*, 302 NEW ENG. J. MED. 925 (1980). Other commentators have noted that the increased availability of prenatal testing has led many women who would not have considered having children to get pregnant. Ruth Hubbard, *Legal and Policy Implications of Recent Advances in Prenatal Diagnosis and Fetal Therapy*, 7 WOMEN'S RTS. L. RPTR. 201 (1982).

[95] *See, e.g.*, Sejpal v. Corson, 637 A.2d 289 (W.D. Pa. 1993), *cert. denied*, 115 S. Ct. 30 (1994).

[96] *Id.*

related to the child's condition, including the extraordinary costs of the child's medical care and special educational needs.[97] The parents may also seek damages for the emotional distress which they suffer.[98]

Wrongful life and birth suits have met with varying degrees of success. Throughout the 1980's, courts nationwide began to recognize wrongful birth claims. At least one state has given the claim statutory recognition.[99] Almost universally, courts have upheld the validity of wrongful birth claims.[100] Wrongful life claims have not fared as well; only four state courts have recognized this tort.[101]

The recognition of wrongful birth and life suits prompted pro-life organizations to lobby heavily for legislation barring the claims.[102] Influenced, at least in part, by these efforts,

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[97] *See, e.g.,* Speck v. Finegold, 439 A.2d 110, 116-17 (Pa. 1981) (parents entitled to recover financial expenses for increased cost of rearing child born with neurofibromatosis).

[98] *Id. But see* Becker, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (denying recovery of damages for pain and suffering).

[99] ME. REV. STAT. ANN. tit. 24, § 2931 (West 1990).

[100] *See, e.g.,* Robak v. United States, 658 F.2d 471 (7th Cir. 1981), *aff'd in part, vacated in part,* 852 F.2d 773 (4th Cir. 1988); Gallagher v. Duke Univ., 638 F. Supp. 979 (M.D.N.C. 1986) (overridden by interpretation of N.C. Gen. Stat. § 14.45.1(e) in Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985), *cert. denied,* 479 U.S. 835)); Andalon v. Superior Court, 200 Cal. Rptr. 899, (Ct. App. 1984); Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1981); Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) (overridden by 42 Pa. Cons. Stat. § 8305); Moores v. Lucas, 405 So.2d 1022 (Fla. Dist. Ct. App. 1981); Blake v. Cruz, 698 P.2d 315 (Idaho 1984) (overridden by IDAHO CODE § 5-334); Goldberg v. Ruskin, 471 N.E.2d 530 (Ill. App. Ct. 1984), *aff'd,* 499 N.E.2d 406 (Ill. 1986); Eisbrenner v. Stanley, 308 N.W.2d 209 (Mich. Ct. App. 1981); Smith v. Cote, 513 A.2d 341 (N.H. 1986); Berman v. Allan, 404 A.2d 8 (N.J. 1979); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 815 (1978); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Naccash v. Burger, 290 S.E.2d 825 (Va. 1982); Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983); James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985); Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975).

[101] *See* Turpin v. Sortini, 643 P.2d 954 (Cal. 1982); Continental Casualty Co. v. Empire Casualty Co. 713 P.2d 384 (Colo. Ct. App. 1986); Procanik v. Cillo, 478 A.2d 755 (N.J. 1984); Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983). Courts have rejected wrongful life claims on the bases that it is impossible to compare life with non-existence and damages are therefore incalculable, or because life cannot be held to be an injury. *See supra* note 96.

[102] *See, e.g., Hearing on House Bill 1361, "Abortion Control Act" and House Bill 1362, "Wrongful Birth and Wrongful Life" Before the Judiciary Comm. of the Pennsylvania State House of Representatives,* Nov. 12, 1987 [hereinafter *Hearing on House Bill 1361*] (testimony of Pennsylvania Pro-Life Federation in support of

twenty-one states introduced legislation to prohibit wrongful birth or wrongful life actions.[103] Although the majority of these laws were not enacted, nine states have statutes barring wrongful birth claims, wrongful life claims, or both.[104] Only a handful of cases have challenged the constitutionality of these statutes, and no majority opinion has held them to be unconstitutional.[105] In four of the nine states that bar wrongful life

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H.B.1361 & H.B.1362); *id.* (testimony of Pennsylvania Catholic Conference in support of H.B.1361 & H.B.1362); *id.* (testimony of Dr. Samuel H. Henck in support of H.B.1361 & H.B.1362). *See also* Walter M. Weber, *Are Wrongful Birth Suits Unconstitutional?*, STATUS CALL (Catholic League for Religious and Civil Rights, WI), Fall 1985, at 2 (objecting that wrongful birth suits force a physician to "become an instrument in the promotion of abortion and the eugenic philosophy"); Thomas P. Monaghan & Larry Morris, *Wrongful Life: Another Absurdity*, STATUS CALL, Fall 1982, at 2 (asserting that "the wrongful life ethic is . . . part of the abortion/infanticide utilitarianism that . . . denigrates individual responsibility and respect for all human life regardless of condition").

For further discussion of pro-life groups' opposition to these suits, see Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017, 2018 n.6 (1987). The author notes that four pro-life groups filed amicus briefs in Hickman v. Group Health, Inc., 396 N.W.2d 10 (Minn. 1986), the first case to challenge (unsuccessfully) a statute barring wrongful birth suits. The four groups were: Americans United for Life Legal Defense Fund, The Catholic Health Association of the United States, The Catholic League for Religious and Civil Rights, and the National Right to Life Committee, Inc. The Catholic Health Association also proceeded with a public relations campaign, placing advertisements in national magazines. *See, e.g., Rightful or Wrongful Life?*, NEWSWEEK, Mar. 18, 1985, at 89 (paid advertisement by Catholic Health Association).

[103] *See* Memorandum from Nan Hunter, ACLU Reproductive Freedom Project, to All ACLU Affiliates and Other Interested Organizations (April 15, 1983) (discussing state legislation concerning feticide, wrongful birth and wrongful life) (on file with author).

[104] IDAHO CODE § 5-334 (1986) (barring both wrongful life and wrongful birth); IND. CODE ANN. § 34-1-1-11 (Burns 1993) (barring wrongful life); MINN. STAT. § 145.424 (1), (2) (1993) (barring wrongful life and wrongful birth, respectively); MO. REV. STAT. § 188.130 (1992) (barring both wrongful life and wrongful birth); N.C. GEN. STAT. § 14.45.1(e) (1993) (conscience clause used to bar both claims); N.D. CENT. CODE § 32-03-43 (1993) (barring wrongful life); 42 PA. CONS. STAT. § 8305 (1993) (barring both claims); S.D. CODIFIED LAWS ANN. §§ 21-55-1 & 21-55-2 (1987) (wrongful life, birth and conception claims barred); UTAH CODE ANN. § 78-11-24 (1993) (both claims barred).

[105] *See, e.g.*, Hickman v. Group Health, Inc., 396 N.W.2d 10 (Minn. 1986); Edmonds v. Western Pa. Hosp. Radiology Assocs., *appeal denied*, 607 A.2d 1083 (Pa. Super. Ct. 1992) 621 A.2d 580 (Pa. 1993), *cert. denied*, 114 S. Ct. 63 (1993). At least one court has interpreted a conscience clause statute, which allows physicians and nurses to refuse to perform abortions, as indicating legislative leaning toward disfavor of wrongful life and wrongful birth claims. *See* Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985), *cert. denied*, 479 U.S. 835 (1986) (barring wrongful life and wrongful birth claims based on conscience clause provision).

and birth claims, the statutes have never been challenged.[106]

While few cases have considered the constitutionality of the impact that statutes barring wrongful life and wrongful birth claims have on the right to abortion, those cases that have justify upholding them on two bases—because the statute's bar does not affect the right to terminate pregnancy, or because the statute's effect does not constitute state action.[107] The issue in all of these cases is whether the statute infringes the guarantees of the Fourteenth Amendment. A litigant cannot, however, seek Fourteenth Amendment protection unless the claim involves state action. The Fourteenth Amendment protects individuals against action taken by the states, not against action taken by private parties.[108] If an individual has infringed on protected Fourteenth Amendment rights, the Due Process and Equal Protection clauses provide

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The Supreme Court uniformly denied certiorari in these cases. *See, e.g., Edmonds,* 607 A.2d at 1083; *Azzolino,* 337 S.E.2d at 528; Wilson v. Kuenzi, 751 S.W.2d 741 (Mo.), *cert. denied,* 488 U.S. 893 (1988). Nor has the Court reconsidered the issue since *Casey*. The Court denied certiorari in a recent challenge brought under *Casey*'s purpose and effect prongs. *See* Sejpal v. Corson, 637 A.2d 289 (W.D. Pa. 1993), *cert. denied,* 115 S. Ct. 30 (1994).

[106] *E.g.,* Idaho, Indiana, North Dakota, and South Dakota. Utah has only one case arising under its statute. The opinion explicitly states that it does not consider the constitutionality of the statute. *See* C.S. v. Nielson, 767 P.2d 504 (Utah 1988).

[107] *See, e.g., Hickman,* 396 N.W.2d at 10 (finding lack of state action and therefore no constitutional violation); *Edmonds,* 607 A.2d at 1083 (upholding statute based on lack of state action).

[108] *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883). The state "acts" through its legislative, executive, and judicial bodies. *Ex parte* Virginia, 100 U.S. 339, 347 (1979). Indeed, "[i]t can act in no other way." *Id.* Therefore, when a state legislature enacts legislation, the legislative branch of the state acts. *See* Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court,* 18 HASTINGS CONST. L.Q. 587, 597 (1991) (legislation is a fundamental form of state action). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1688 (2d ed. 1988) (If litigants challenge validity of state statute, "state action is obvious, and no formal inquiry into the matter is needed.").

Additionally, when a state court enforces a law that allegedly infringes on constitutional rights, that enforcement constitutes state action. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (stating that state court's application of common law defamation and privacy rules constitutes state action). The Supreme Court also has held that state court enforcement of a private covenant can rise to the level of state action. *See* Shelley v. Kraemer, 334 U.S. 1, 14 (1947) (finding that state court enforcement of private, racially discriminatory covenant involving property is "action of the State within the meaning of the Fourteenth Amendment."). *Shelley,* however, has been subject to criticism from both courts and commentators. *See* TRIBE, *supra* note 109, at 1711-12, 1714-15.

redress only in limited circumstances.[109] In these circumstances, the state normally has no responsibility unless it has encouraged the behavior or exercised coercive power sufficient to render the act essentially an act of the state.[110]

Courts that have rejected challenges to statutes barring wrongful life and wrongful birth suits based on a lack of state action have reasoned that private physicians, and not the state, are the actors in the wrongful life or birth scenario.[111] Under this view, the physician who gives an incorrect diagnosis or deliberately omits to give the woman results of a prenatal test is responsible for any resulting damage—not the state.[112] Courts that subscribe to this view hold that these statutes merely bar a cause of action for damages against the physician, but do not direct the physician to act or fail to act in any way.[113] Courts also have rejected the argument that by removing physician liability, the statutes encourage physicians to withhold information.[114] Overall, these courts treat these

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[109] *See* TRIBE, *supra* note 108, at 1688-91 (court must determine if government acquiescence or inaction could be considered tacit ratification of a private act or delegation of a public responsibility to a private party). Fourteenth Amendment protections also apply when a governmental agent—whether executive, judicial or legislative—acts under color of state law. *Id.* at 1703-05.

[110] *See* Blum v. Yaretsky, 457 U.S. 991, 1003 (1982) (ruling that private action which "sufficiently receive[s] the imprimatur of the [s]tate" can be attributed to the state itself). The Supreme Court has held that determining whether state action exists is a complex process that requires a court to look at individual facts and circumstances to differentiate between private and state acts. *See* Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

[111] *See, e.g.*, Hickman v. Group Health, Inc., 396 N.W.2d 10, 13 (Minn. 1986) (finding the "relationship . . . is strictly between doctor and patient). *But see id.* at 18-19 (Amdahl, C.J., dissenting) (finding that the deprivation of information protected by a statute barring wrongful life carries the imprint of the state).

[112] *Id.* at 13.

[113] *See id.* ("The statute does not forbid the doctor to inform the patient of new tests and the risk they entail.") For criticism of the court's constitutional analysis in *Hickman*, see Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, *supra* note 102.

[114] Edmonds v. Western Pa. Hosp. Radiology Assocs., 607 A.2d 1083, 1088 (Pa. Super. Ct. 1992), *appeal denied*, 621 A.2d 580 (Pa. 1993), *cert. denied*, 114 S. Ct. 63 (1993). The *Edmonds* court found this argument to be too speculative, asserting that the statute encourages neither "intentional misrepresentations [n]or the negligent impartation of information relating to abortion rights". The court went on to note that speculation alone cannot overcome the presumption of constitutionality afforded to statutory provisions but failed to recognize that deterrence is a central purpose of virtually all tort liability. For criticism of the court's treatment of state

statutes as mere tort reform.

Courts that have surpassed the threshold state action issue to consider the merits of challenges to statutes barring wrongful life and birth claims have held that the statutes do not affect abortion rights.[115] These cases—almost all of which were decided prior to *Casey*—use the analysis developed in *Roe*.[116] They interpret *Roe* to govern only legislation that directly impacts on abortion rights and therefore reject challenges to statutes barring wrongful life and birth claims because such statutes do not regulate or affect abortion directly.[117] Analysis of these statutes under the undue burden test developed in *Casey*, however, yields a significantly different result.

III. AN ANALYSIS OF WRONGFUL LIFE AND BIRTH STATUTES UNDER *CASEY*: PURPOSE AND EFFECT

A. *The Importance of the Purpose Prong*

While *Planned Parenthood v. Casey* restricted the right to abortion by permitting broader state regulation of the procedure, *Casey*'s purpose prong generated a new, independent basis to challenge legislation that impinges on the right to choose abortion. Courts have continued to ignore the purpose prong, however, perhaps because the plurality in *Casey* did not perform a purpose analysis of the Abortion Control Act. This oversight notwithstanding, a purpose test for legislation that affects abortion rights is important in several respects.

First, purpose prong analysis is distinct from the extensive fact-based, effect prong analysis applied by the Supreme Court and lower courts post-*Casey*.[118] Under the effect prong, be-

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action in *Edmonds*, see Adam M. Silverman, Comment, *Pennsylvania's Wrongful Birth Statute's Impact on Abortion Rights: State Action and Undue Burden*, 66 TEMP. L. REV. 1087 (1993).

[115] *See, e.g. Hickman*, 396 N.W.2d at 10; *Edmonds*, 607 A.2d at 1083.

[116] The most recent case to address the merits of the constitutional challenge was Dansby v. Thomas Jefferson Univ. Hosp., 623 A.2d 816 (Pa. Super. 1993). The *Dansby* court relied almost exclusively on *Edmonds*, which itself relied on a pre-*Casey* analysis. *See id.* at 819. The decision does not cite *Casey*. *Id.*

[117] *See, e.g., Hickman*, 396 N.W.2d at 14 (stating that statute barring wrongful birth suit "does not directly interfere with the woman's right to choose a safe abortion"); *Edmonds*, 607 A.2d at 1087 (concluding that statute "neither regulates nor directly affects [abortion] rights").

[118] *See supra* notes 76-84 and accompanying text for discussion of the effect

cause only a *substantial* obstacle constitutes an undue burden, the court must ascertain not only whether an obstacle exists, but the "size" of the obstacle. The "effect" of a restriction must be calculable. Furthermore, courts must distinguish between a particular burden and an undue burden; only an undue burden is unconstitutional.[119]

This calculation becomes increasingly difficult if the challenged law is not an abortion regulation, but still affects the right to choose abortion indirectly. Statutes that bar wrongful life and birth claims fall in this category. The "effect" of such an indirect regulation of abortion can be either difficult to measure, or too conflated with other factors to satisfy a *Casey* effect prong analysis.[120] Moreover, effect prong analysis relies on highly case-specific factors; the outcome of the analysis may vary from state to state.[121] A virtually identical restriction might pose a substantial obstacle in one state and not in another.[122] These shifting, case-specific considerations, the vagueness of the term "substantial" and the difficulty of accurately measuring the effect of abortion restrictions make the effect prong of *Casey* unpredictable, difficult to prove, and highly prone to result-oriented judicial decision-making.[123] In contrast, purpose prong analysis avoids this quagmire because it does not rely on such immeasurable, case-specific, and manipulable factors.

Additionally, litigants can challenge legislation under the purpose prong immediately. To argue successfully under the effect prong, a woman must suffer harm or be able to predict it with some specificity. In some instances, a woman will not have standing to challenge legislation that will have a harmful effect on her until after the harm has occurred. Moreover, should a woman have standing, the facts necessary to satisfy

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prong of *Casey*.

[119] *See* 112 S. Ct. at 2825-26.

[120] *See infra* notes 150-51 and accompanying text.

[121] Possible factors include the number of abortion facilities in a state, the accessibility of public transportation, and the cost of the procedure.

[122] *See infra* notes 150-51 and accompanying text.

[123] *See* Benshoof, *supra* note 50, at 2252. "The 'undue burden' standard is also sufficiently vague to permit judges to interpret state statutes in an arbitrary fashion. . . . [C]ourts now have broad discretion to decide when the imposition of a law amounts to an 'undue burden'." *Id.* The author refers to challenges brought under the effect prong.

Casey's substantiality requirement may be virtually impossible to prove before the challenged legislation goes into effect. Purpose-based challenges, however, do not require a litigant to prove or predict harm.

Furthermore, inasmuch as legislators do not pass laws arbitrarily but with a desired end in mind, a finding of impermissible purpose can buttress a litigant's efforts to prove the unconstitutional effect of an abortion regulation.[124] When a competent legislature intends to place a substantial obstacle in the path of a woman seeking an abortion, one can presume that the resulting legislation will successfully effectuate that end.[125] A finding of unconstitutional legislative purpose, while not dispositive, may be indicative of that legislation's unconstitutional effect.

Finally, analysis of the legislative purpose of a statute resolves the state action problem that can arise under an effect analysis. On its face, a statute may regulate only the interaction between private individuals. The legislature may have an entirely different legislative purpose, however. When the state intends for a statute to have an impermissible impact on constitutionally protected rights, the statute no longer regulates individual conduct alone. While the conduit for the state's act may be a private individual—such as the physician in a wrong-

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[124] Ironically, under equal protection analysis, the inverse is true: purpose is dispositive and effect is only evidence of purpose. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (rejecting the argument that disparate impact alone is violative of the equal protection clause and finding discriminatory legislative purpose necessary for equal protection violation.) *See infra* notes 156-57 and accompanying text.

[125] One commentator points out that purpose analysis would be redundant if only used to examine laws that already have an impermissible effect under *Casey* — laws that place a substantial obstacle in the path of a woman seeking an abortion. *See* Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 883 n.53 (1994). He comments, "The only circumstance in which a purpose inquiry would be useful would be when a state law was intended to create a substantial obstacle to women seeking abortions, but somehow failed to further this objective." *Id.* The author does not view purpose as an independent inquiry, however. *See id.* Brownstein overlooks, however, that the undue burden standard becomes particularly difficult to meet when a law has an indirect effect on the right to choose abortion, such as in the case of statutes barring wrongful life and birth actions. These statutes achieve the unstated purpose of preventing women from obtaining abortions, while that same effect can be difficult to prove under *Casey's* fact-centered analysis. *See infra* notes 156-58 and accompanying text.

ful life or birth suit—if the state intends for that individual to violate another's constitutional rights, it is as if the state itself has acted. Passage and enforcement of such a statute therefore constitutes state action. In the case of statutes barring wrongful birth and life suits, an analysis of those statutes' purpose is essential to overcoming the state action problem.

B. *Analysis of Wrongful Birth and Life Statutes Under* Casey's *Effect Prong*

As discussed above, in *Casey*, the Supreme Court held that the Fourteenth Amendment right to liberty encompasses a woman's right to choose abortion.[126] The Fourteenth Amendment only protects a woman's right to liberty, however, against state infringement.[127] Therefore, to challenge a wrongful life or birth statute successfully, a litigant first must show that these statutes involve actions of the state, and not merely those of private individuals such as physicians.

Next, assuming that the passage or enforcement of these statutes implicates an act of the state, a litigant must show that the state's act violates his or her constitutionally protected rights. The liberty right that *Casey* carves out is not absolute: the state can regulate abortion to protect its interest in fetal life, and to maintain acceptable medical standards.[128] An acceptable regulation becomes an impermissible infringement on a woman's right to liberty only when it has the "effect of placing a substantial obstacle in the path of a woman seeking an abortion."[129] Therefore, statutes that bar wrongful birth or life suits must have the effect of substantially obstructing a woman from obtaining an abortion in order to be invalid under the effect prong of *Casey*.

Contrary to the conclusions of some courts,[130] statutes barring wrongful life and wrongful birth actions do constitute such state action. Wrongful life and wrongful birth claims are tort claims. A basic tenet of tort law is that liability deters

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[126] 112 S. Ct. at 2804.

[127] *See supra* notes 108-114 and accompanying text for general discussion of state action.

[128] *Id.* at 2817.

[129] *Id.* at 2820.

[130] *See supra* notes 108, 112-14 and accompanying text.

behavior society wants to discourage.[131] Both compensatory and punitive damages aim, to varying degrees, to dissuade the tortfeasor from repeating undesirable behavior, and to deter others from similar action.[132] The risk of medical malpractice actions, therefore, functions as a deterrent to poor medical practices.[133]

By shielding physicians from liability, statutes that bar wrongful life and birth claims remove a valuable tool for deterring physicians from withholding medically relevant information from women.[134] By removing this deterrent, the state substantially and sufficiently encourages physicians to violate women's liberty interest in abortion by permitting them to do so with impunity. Because the state encourages the physician's behavior, the violation of her liberty right carries the "imprimatur of the state" and can be attributed to the state itself.[135] Therefore, Fourteenth Amendment protections apply.[136]

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[131] RESTATEMENT (SECOND) OF TORTS § 901(C) (1979) (tort damages punish wrongdoers and deter others from similar wrongful acts); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 6-7 (5th ed. 1984).

[132] KEETON ET AL., *supra* note 131, at 9-10 (punitive damages discourage particularly egregious conduct);, *id.* at 25 (compensatory damages reduce the occurrence of undesirable behavior).

[133] *See* Peter A. Bell, *Legislative Intrusions into the Common Law of Medical Malpractice: Thoughts about the Deterrent Effect of Tort Liability*, 35 SYRACUSE L. REV. 939, 966-68 (1984) (finding that the threat of wrongful birth and other malpractice liability changes physician behavior and reduces the risk of patient injury); *see also* Robak v. United States, 658 F.2d 471, 476 (7th Cir. 1981) (finding that denial of wrongful birth cause of action would immunize physicians who provide inadequate guidance to women "who would choose to exercise their constitutional right to abort fetuses, which, if born, would suffer from genetic . . . defects") (quoting Berman v. Allan, 404 A.2d 8, 14 (N.J. 1979)).

[134] *See* Troppi v. Scarf, 187 N.W.2d 511 (Mich. Ct. App. 1971). In determining whether a wrongful life or birth claim can be brought against a pharmacist who dispenses contraceptives inaccurately, the court held that "[t]o absolve defendant of all liability here would be to remove one deterrent against the negligent dispensing of [contraceptives]." *Id.* at 517. For a discussion of why administrative sanctions are not as effective a deterrent as tort damages, see Silverman, *supra* note 116, at 1101-02.

[135] *See* Blum v. Yaretsky, 457 U.S. 991, 1003 (1982). *See also* Hickman v. Group Health Plan, Inc., 396 N.W.2d 10, 19 (Minn. 1986) (Amdahl, C.J., dissenting) ("While, facially, it is the doctor's conduct which deprives the woman of the information she needs to make an informed decision, the deprivation of the information carries with it the imprint of the state.").

[136] Furthermore, the state's actual purpose in passing these statutes is to obstruct a woman who might seek an abortion once she has learned that she is

Under *Casey*'s effect prong, statutes that bar wrongful life and birth must pose a substantial obstacle to a woman seeking an abortion to violate a woman's Fourteenth Amendment liberty interest in choosing abortion. As noted above, wrongful life and birth statutes do not regulate abortion directly, but have the indirect effect of enabling a physician, with impunity, to misrepresent or withhold critical information about a fetus' health from a pregnant woman.[137] The *Casey* plurality repeatedly emphasized that informed choice is central to a woman's right to abortion, and encouraged states to pass legislation "aimed at ensuring a decision that is mature and informed."[138] Moreover, *Casey* stressed the centrality of the doctor-patient relationship for creating the necessary forum for informed consent.[139] The Court stressed that the state-mandated information provided by physicians must be "truthful

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carrying a fetus with abnormalities. *See infra* notes 158-59 and accompanying text. The state's purpose is not merely to affect the relationship between private parties but to impact on a federally protected right. This purpose constitutes state action. *See infra* notes 158-59 and accompanying text.

[137] The physicians who are most likely to be encouraged are precisely those who already object to abortion. These statutes enable them to withhold information with no liability.

[138] 112 S. Ct. at 2824. The *Casey* plurality consistently argues that women be given more information, not less. For example, the plurality finds that state requirements that physicians provide information about the gestational age and consequences to the fetus are valid, "even when those consequences have no direct relation to [the woman's] health." *Id.* at 2823. With any medical procedure, physicians must adhere to the doctrine of informed consent: the duty to inform patients with information about all treatment options. *See* Canterbury v. Spence, 464 F.2d 772, 783 n.36 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972) ("Duty to disclose is more than a call to speak merely on the patient's request, or merely to answer the patient's questions; it is duty to volunteer . . . the information the patient needs for an intelligent decision.").

Prior to *Casey*, the Supreme Court consistently emphasized both the importance of the principle that physicians provide accurate, nonmisleading information to women seeking abortions, and the sanctity of the physician-patient relationship. *See* Akron v. Akron Reprod. Ctr. for Health, Inc., 462 U.S. 416, 445 (1983) (*Akron I*) (invalidating an ordinance which mandated a "litany of information the physician must recite" regardless of its relevance to a the woman's pregnancy); *see also* Thornburgh v. American College of Obs. and Gyn., 476 U.S. 747 (1986) (emphasizing that an unimpeded relationship between a woman and her physician protects a woman's informed choice). To the extent that *Casey* overruled prior case law and upheld state-mandated information requirements, the plurality perceived these requirements as "a reasonable means to insure that the woman's consent is informed." 112 S. Ct. at 2824-25.

[139] *See Casey*, 112 S. Ct. at 2823-25 (discussing the importance of the physician's role in the informed consent of the patient).

and not misleading"[140] as well as "calculated to inform the woman's free choice, not hinder it."[141]

A physician's failure to disclose accurate information about fetal health to a pregnant woman is as misleading as providing false information.[142] When a physician withholds information with the intent to prevent a woman from seeking an abortion, that omission certainly is calculated to hinder the woman's free choice. By encouraging this behavior on the part of physicians, statutes barring wrongful life and wrongful birth actions absolutely contradict the principles of informed consent espoused in *Casey*.[143] Moreover, the particular information withheld—the health of the fetus—is so integral to informed choice that its omission substantially obstructs a woman's right to choose abortion.[144] By posing such an obstacle, statutes barring wrongful life and birth claims unduly burden a woman's right to choose abortion and are unconstitutional.

Litigants who challenge these statutes, however, face the formidable task of proving that the statutes are not mere inconsequential hindrances, but that their effect is indeed substantial. Under *Casey*, the effect inquiry focuses on the group

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[140] *Id.* at 2823.

[141] *Id.* at 2820.

[142] The state cannot "prejudice a woman's choice . . . by limiting the information available to her." *Id.* at 2841 (Stevens, J., concurring in part and dissenting in part) (citing Bigelow v. Virginia, 421 U.S. 809 (1975)). *See also* Patricia Donovan, *Wrongful Birth and Wrongful Conception: The Legal and Moral Issues*, FAM. PLANNING PERSP., March/April 1984, at 64.

> Laws barring wrongful-birth claims not only undercut an important legal trend; they are also contrary to the widely held legal view that patients have a right to complete information about the nature and foreseeable risks of any proposed medical treatment, so they can make informed choices about how to proceed. Such laws, in effect, sanction the withholding of information that most prospective parents would consider crucial to have before deciding whether to proceed with a pregnancy.

Id. at 65, 67.

[143] *See supra* notes 137-40 and accompanying text.

[144] A particularly narrow reading of *Casey* might dictate that providing accurate, nonmisleading information is only required in circumstances where a woman actually seeks an *abortion*. A woman barred from bringing a wrongful life or birth action commonly seeks general reproductive health care at the point when her physician withholds information from her. This seeming distinction does not present a problem, however — the joint opinion makes clear that a pregnant woman needs all relevant information no matter what her final choice may be. *See Casey*, 112 S. Ct. at 2824. *See also supra* note 142 (discussing importance of informed consent).

that the restriction actually affects, not those "for whom the law is irrelevant."[145] In wrongful life and wrongful birth cases, the statutes most significantly affect women who would have terminated their pregnancies had they been aware of the information withheld by their physicians.

Although it seems clear that these statutes obstruct access to abortion for this particular group of women, *Casey* demands a highly detailed factual showing to prove substantiality.[146] Gathering the requisite evidence in these circumstances is difficult for several reasons. First, courts are likely to demand that a litigant establish that the affected group of women absolutely would have chosen to terminate their pregnancies had they known of the fetal defect. If the affected women might have carried the fetus to term, courts are likely to view the information withheld as not substantial, or perhaps as no obstacle at all. Moreover, although it is a question of fact, the average woman probably cannot predict accurately her reaction to the knowledge that she carries a child with mental or physical anomalies. Courts are apt to view women's speculations as unreliable.

Similarly, showing that the affected group chose not to abort based solely on physician omission presents equally thorny problems. The decision to abort is uncomplicated for many women, but not for all. For some women, the choice between carrying to term and terminating a pregnancy is dependant on a combination of many factors: her health, her financial resources, her desire to have a child, her relationship status, if any, and the timing of the pregnancy. Health of the fetus is only one, albeit a highly significant, factor. A court is unlikely to be inclined toward or capable of parsing out the omitted information's effect from the effect of other factors.

Furthermore, a litigant may have to prove that the statute's shield from liability motivated her physician to withhold or misrepresent the relevant information. This inquiry presents analogous difficulties. Was the statute a motivating factor for or merely incidental to the physician's act? Under

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[145] 112 S. Ct. at 2829.

[146] In *Casey*, after extensive fact-finding the Court found facts sufficient to strike down only the spousal notification provision of Pennsylvania's Abortion Control Act. *See supra* notes 75-80 and accompanying text.

Casey proving substantial obstruction of the group most directly affected by these statutes—pregnant woman who would have aborted had they known the information that their physicians withheld as a result of the statute—may be exceedingly difficult. Under *Casey*, in short, litigants may be unable to prove that statutes barring claims for wrongful life and wrongful birth are unconstitutional.

C. *Analysis of Wrongful Life and Wrongful Birth Statutes Under* Casey's *Purpose Prong*

Under the purpose prong of *Casey*, a challenge to wrongful life and birth statutes may be successful. As noted above, *Casey* forbids legislation that has the "purpose . . . of placing a substantial obstacle in the path of a woman seeking an abortion."[147] Legislation with this purpose violates a woman's Fourteenth Amendment liberty interest in abortion.[148] In the abortion context, specific legislative purposes are presumptively valid: for example, the state can attempt to discourage women from seeking abortions to further its interest in potential life.[149] When the state's purpose surpasses mere encouragement and reaches the intent to substantially obstruct a woman's abortion decision, the legislation becomes unconstitu-

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[147] 112 S. Ct. at 2820.

[148] Courts frequently consider the legislative purpose of laws impacting on individual rights, for example, when considering an equal protection challenge. Equal protection analysis requires inquiry into the purposes of legislation that classifies on the basis of race or gender, among other factors. "'Discriminatory purpose' . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 278-79 (1979).

A court will not invalidate legislation involving a suspect or quasi-suspect class on equal protection grounds if impermissible purpose is not proven. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 240 (1976) ("the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose"). The proof of this discriminatory intent usually must rely on objective factors, some of which the Supreme Court delineated in Arlington Hts. v. Metropolitan Housing. Dev. Corp., 429 U.S. 252 (1977). These factors include the historical background, "if it reveals a series of official actions taken for invidious purposes," the legislative or administrative history, including "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports" and possibly testimony from legislators, and, on occasion, evidence of disparate impact. *Id.* at 266-269.

[149] *See Casey*, 112 S. Ct. at 2821.

tional under *Casey*. Close examination of the purpose of legislation affecting abortion rights is necessary to distinguish permissible from impermissible state goals.

Legislation barring wrongful life and birth claims has the explicit, permissible purpose of barring a cause of action against physicians—standard tort reform. The underlying purpose of this legislation, however, is to place a substantial obstacle in the path of a woman seeking an abortion. Because the legislature intends to infringe on a constitutionally protected right, and not to affect the relationship between private individuals, this legislative purpose automatically constitutes state action. The legislative history of Pennsylvania's wrongful birth and life statute,[150] Title 42, section 8305 of the Pennsylvania Consolidated Statutes Annotated ("section 8305"), both exposes and exemplifies this impermissible legislative intent.

Pennsylvania passed section 8305 in 1988, four years before the Supreme Court decided *Casey*. Prior to its enactment, Pennsylvania had recognized wrongful birth claims.[151] In 1984, the state had attempted to pass Senate Bill 750, a piece of legislation almost identical to section 8305.[152] The Pennsylvania House sponsor of the 1984 bill, Representative Stephen Freind,[153] described the bill as barring, inter alia, lawsuits in which a parent claims a physician should have "suggested a test which would have made the woman decide to have an abortion."[154] In urging passage of the bill, Representative Freind asked his fellow legislators to "come down on the side of life."[155]

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[150] 42 PA. CONS. STAT. ANN. § 8305 (1988).

[151] *See* Speck v. Finegold, 439 A.2d 110 (Pa. 1984).

[152] S.B. 750, 168th Leg., 1984 Pa. Laws. One difference between the 1984 version and 1987 version in effect now as § 8305 is that the wrongful birth provision of S.B. 750 specifically bars claims alleging that "a person . . . once conceived . . . would or should have been *aborted*." *Id.* (emphasis added). Section 8305 currently bars claims that "a person once conceived would not or should not have been *born*." 42 PA. CONS. STAT. ANN. § 8305 (emphasis added).

[153] Representative Freind was also a sponsor of the Pennsylvania Abortion Control Act at issue in *Casey*.

[154] Pa. House Leg. J. 1509 (June 20, 1984). Representative Freind presumed that all women who learn that their fetuses have health problems will automatically abort. Furthermore, he did not consider fetal anomalies that can be cured by intrauterine intervention.

[155] *Id.* at 1510. Other pro-life legislators supported the bill on similar grounds. *See id.* at 1516 (statement of Representative Paul Clymer) ("[W]e put a high pre-

Opponents of the proposed bill objected to freeing physicians from the duty to provide pregnant women with vital medical information.[156] Then-Governor Thornburgh, a pro-life advocate who had signed the Pennsylvania Abortion Control Act into law, vetoed this bill, declaring that it violated principles of informed consent.[157] In his veto message, he stated that "the Supreme Court . . . has clearly held that a woman has a constitutional right to an abortion. . . . Under these circumstances, the intelligent exercise of that right should not be made to depend on the competence, diligence, integrity or philosophical views of a particular attending physician."[158]

Wrongful life and wrongful birth bills resurfaced in both the Pennsylvania House and Senate three years later, in tandem with the amendments to the Abortion Control Act that would be at issue in *Casey*.[159] The legislative history of these bills further demonstrates the Pennsylvania General Assembly's intention of substantially obstructing women from seeking abortions.[160] Furthermore, this history shows that section 8305 is calculated to hinder and not to inform a woman's choice, a legislative action *Casey* proscribes.[161]

In support of the House version, Representative Freind testified that "until *Roe* . . . is reversed, those in the pro-life movement must be as aggressive and creative as possible in drafting and passing legislation which regulates and restricts abortion as much as possible."[162] Representative Freind emphasized that the legislation was designed to protect those pro-

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mium . . . on human life, and this amendment that we are debating here this afternoon is one in which we are emphasizing again as a body of lawmakers that we indeed value human life.").

[156] *See id.* at 1513 (statement of Representative Lois Sherman Hagarty). Representative Hagarty pointed out the irony that "perhaps 2 years ago we stood here and listened to Representative Freind argue about informed consent for women. He wanted women to have informed consent before they made choices, and yet today he stands before this General Assembly and he says that women should not be informed of the availability of certain tests." *Id.*

[157] Pa. Senate Leg. J. 2674 (Sept. 17, 1984) (veto message of Governor Richard Thornburgh dated July 3, 1984).

[158] *Id.*

[159] House Bill 1362 and Senate Bill 646. The amendments to the Abortion Control Act were embodied in House Bill 1361.

[160] The Senate version passed both chambers and is now codified as section 8305.

[161] 112 S. Ct. at 2820.

[162] *Hearing on H.B. 1361, supra* note 104 (testimony of Representative Freind).

life physicians who would refuse to perform amniocentesis if they believed it would influence a woman's decision whether to carry to term or to abort.[163] One such pro-life physician, testifying to the same committee, urged passage of the House bill to protect physicians, who, like himself, would not "order tests and studies on a pregnant woman, the sole purpose of which is to destroy the unborn child."[164] This physician further testified that he would not participate in treatment that could possibly result in abortion.[165] This testimony amply shows that the bill's sponsors did not have tort reform in mind, but fully intended for the bill to obstruct women's right to abortion.

In House debate, Representative Freind argued that wrongful life and birth suits force physicians to recommend eugenic abortions.[166] He consistently reiterated that even if a physician intentionally and knowingly lied to a woman about the health of her fetus, under the proposed legislation, the woman would not have a cause of action for infringement of her right to abortion.[167] Furthermore, he argued that "no law . . . requires a doctor on any treatment for any condition to fully disclose the information to the patient."[168] Regardless of the veracity of such statements pre-*Casey*, *Casey* clearly dictates that the information physicians provide to pregnant women about their options be "truthful and not

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[163] "Frequently, these suits have been successful and have resulted in the doctor being required to pay . . . damages. . . . An example of this would be a Pro-life doctor who, because of his belief, refuses to recommend amniocentesis on the basis that the only result would be for the woman to decide whether or not to have an abortion." Memorandum from Stephen F. Freind to the Members of the Pennsylvania House of Representatives (Nov. 10, 1987).

[164] *Hearing on H.B. 1361, supra* note 104 (statement of Dr. Samuel H. Henck, family practitioner).

[165] *Id.* In House debate, an opponent of the bill pointed to this physician's testimony as particularly disturbing, and urged the House not to "meet the [physician's] requests" by passing the bill because "[i]t is wrong, fundamentally wrong, that we allow a physician to intrude his beliefs or her beliefs . . . however much they may be shared by people on the floor of [the] House, and substitute those beliefs for the beliefs and the human judgment of the parents of the child." Pa. House Leg. J. 311 (Feb. 24, 1988) (statement of Representative David W. Heckler).

[166] Pa. House Leg. J. 306 (Feb. 24, 1988), 1988 Pa. Legis. Serv. 303, 306 (Purdon).

[167] *See, e.g.*, Pa. House Leg. J. 310, 314.

[168] *Id.* at 313.

misleading."[169] Supporters of the bill bluntly advocate violations of that principle.

Supporters of the Senate bill made similar arguments to those of its House proponents. Senator Joseph Rocks, the bill's sponsor in the Senate, for example, defined the legislature's objective in barring wrongful life and birth claims as preventing physicians from being "coerced into accepting eugenic abortion as a condition for avoiding [a lawsuit]."[170] Another proponent saw the function of a statute barring wrongful life and birth suits as "a simple question [of] whether [the legislature] should or should not save the life of an unborn child."[171]

Opponents of both the House and Senate bills expressed grave concern about the detrimental effect of such legislation on a woman's informed consent. As noted above, *Casey* stresses the importance of the relationship between full and complete information and a woman's choice of whether or not to abort.[172] Senator Greenwood criticized the bill, stating:

> [I]t is ironic that the proponents of this legislation, who have argued so relentlessly about the need for informed consent for those who would have an abortion, who have argued that any woman who is about to have an abortion must be told every last detail about the risks of the abortion, about the details of the abortion, about the possible complications of an abortion, that same woman should be kept in the dark . . . and not given informed consent about some of the medical tools available to her in her pregnancy. The way this bill does that is by providing immunity from wrongful birth suits for physicians who withhold that information.[173]

Similarly, Senator Lewis argued that the purpose of the law was to promote the impermissible objective of denying women information about their pregnancies.[174] In the House, Representative Heckler criticized the bill for destroying the relationship between a woman and her doctor by allowing the doctor to deceive her based on the doctor's own philosophical beliefs.[175] The *Casey* decision echoes these legislators' concerns by emphasizing the sanctity and importance of the doctor-patient

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[169] 112 S. Ct. at 2823.
[170] Pa. Senate Leg. J. 1961 (Mar. 22, 1988).
[171] *Id.* at 1963 (statement of Senator Clarence Bell).
[172] *See supra* note 161.
[173] *Id.* at 1960 statement of Senator James C. Greenwood.
[174] *Id.* at 1962 statement of Senator Craig Lewis.
[175] Pa. House Leg. J. 311.

relationship to informed choice.[176]

This legislative history demonstrates that the legislative purpose of section 8305 is to substantially obstruct women from seeking abortions. This purpose is prohibited under the purpose prong of *Casey*. The proponents of section 8305 aim to reduce the number of abortions by allowing physicians to withhold information that might lead women to abort their fetuses. Because *Casey* insists that women be given accurate, nonmisleading information about their pregnancies, and because these statutes have the purpose of encouraging physicians to mislead women, they violate a woman's Fourteenth Amendment right to liberty.

IV. CONCLUSION

Although a woman's right to choose abortion was upheld in *Casey*, the undue burden standard of review protects abortion rights far less effectively than its predecessor, the strict scrutiny standard. Concomitant with this lowered standard is the heightened factual showing *Casey* requires. These combined factors permit significantly greater state restriction of abortion than was possible under the doctrine of *Roe*.

The emergence of statutes barring wrongful life and wrongful birth suits is one example of how opponents of reproductive freedom have capitalized on this increased judicial tolerance of hostility to abortion rights. These statutes are cleverly disguised attacks on women's right to choose abortion, couched in the guise of increasingly popular tort reform. Advocates of statutes barring wrongful life and birth suits seek to put a woman's constitutionally protected liberty interest in her physician's control. They do so with total disregard for the law as expressed in *Casey,* and with a careless disregard for the lives and health of women and their children.

Pro-choice advocates must be vigilant and innovative in their defense of a woman's right to choose abortion. The purpose prong of *Casey* is one positive development in a legislative and judicial climate in which protection of women's reproductive freedom has been substantially eroded. Challenges to statutes that impact on abortion rights, including statutes that

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[176] *See supra* note 140 and accompanying text.

bar wrongful life and birth claims, should capitalize on this development and expose the legislative history and any other factor that illuminates a statute's impermissible purpose. In addition, courts must begin to acknowledge and use the purpose prong. In the effort to protect and preserve reproductive choice, the purpose prong of *Planned Parenthood v. Casey* should not be overlooked.

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[177] The author wishes to thank Simon Heller of the Center for Reproductive Law & Policy for his assistance with this Note.