# PATERNALISTIC STATE-LEVEL ABORTION RESTRICTIONS

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## I. INTRODUCTION

Since *Roe v. Wade* found that the constitutional right to privacy extends to a woman's decision to obtain an abortion, state governments have enacted hundreds of laws to restrict access to the procedure.[1] Here we consider laws that share a common form of public justification: state regulation is needed to protect women in their decisions about abortion. That is, the types of regulations considered here have, at least as their public rationale if not the actual private motive for their creation, a *paternalistic* approach to women. By paternalism we mean those acts intended to "address a failure of judgment" by an individual and intended to "further the individual's own good."[2] For instance, in Wyoming's 2019 legislative session, Representative Tass introduced a bill that would have mandated a 48-hour waiting period prior to obtaining an abortion. Justifying his legislation, Rep. Tass said that it was important that women "consider the consequences" of abortion. Unlike a piece of clothing that does not fit, he said, "there's no returning it or taking it back."[3] After passing the House, the bill died in committee in the Senate.

Other states have proposed comparable legislation. Arkansas's Woman's Right to Know Act is both similar in its structure and language to many other states' mandatory counseling and waiting period laws, and is paternalistic in its justification. Quoting from the 2015 legislation that rewrote Arkansas's abortion laws: "Many abortion facilities or providers hire untrained and unprofessional counselors to provide pre-abortion counseling whose primary goal is to actually sell or promote abortion services." The Act itself claims its purposes are to: "ensure that every woman

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[1] *See* Keith Gunnar Bentele, Rebecca Sager & Amanda Aykanian, *Rewinding Roe V. Wade: Understanding the Accelerated Adoption of State-Level Restrictive Abortion Legislation, 2008-2014*, 73.1 J. OF WOMEN, POLITICS, & POL'Y 490, 490-17 (2018).

[2] *See* JULIAN LE GRAND & BILL NEW, GOVERNMENT PATERNALISM: NANNY STATE OR HELPFUL FRIEND? 23 (2015) ("Further the individual's own good" (quoting Julian Le Grand & Bill New)).

[3] *See* Nick Reynold, *Abortion Legislation Advances in House,* CASPER STAR TRIB., Jan. 23, 2019, at A1, A1-A9 ("There's no returning it or taking it back." (quoting Representative Richard Tass)).

considering an abortion receive complete information on abortion and its alternatives and that every woman receiving an abortion does so only after giving her voluntary and fully informed consent to the abortion procedure," and "protect unborn children from a woman's uninformed decision to have an abortion."[4] The law depicts unscrupulous abortion providers preying on women in order to convince them to abort their unborn children. Women are passive and need protection; state legislatures will provide that by mandating specific pieces of information to share, as well as by ensuring that a woman has ample time to consider her decision. This is paternalism.

Of course, there are many state-level abortion restrictions that are non-paternalistic in nature. Over a dozen states require abortion providers to have admittance privileges or a similar arrangement at hospitals within a specific radius of the clinic where abortions are performed.[5] Similarly, some states have imposed ambulatory surgical center standards on abortion providers, which has the (almost certainly intended) effect of imposing significant costs on clinics, or their being shuttered.[6] While such restrictions are important, they do not fit into the class of restrictions examined here, which are only those that are largely or entirely of a paternalistic nature. In addition, some states ban abortions after a specific point in gestation, such as 20 or 18 weeks, or even as little as six weeks.[7] While the justification for these restrictions is occasionally framed by proponents in paternalistic terms, since the claim that abortions done after that date have a higher risk of complication, the more common justification is the attribution of personhood to the fetus

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[4] H.R. 1578, 90th Gen. Assemb., (Ark. 2015).

[5] Guttmacher Inst., *Targeted Regulation of Abortion Providers*, GUTTMACHER INST. (Aug. 1, 2019), https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers.

[6] Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—and the Women They Serve—Pay the Price*, GUTTMACHER INST. (June 25, 2013), https://www.guttmacher.org/gpr/2013/06/trap-laws-gain-political-traction-while-abortion-clinics-and-women-they-serve-pay-price.

[7] Mara Gordon and Alyson Hurt, *Early Abortion Ban: Which States Have Passed Them?*, NPR: SHOTS HEALTH NEWS FROM NPR (June 5, 2019, 3:08 PM ET), https://www.npr.org/sections/health-shots/2019/06/05/729753903/early-abortion-bans-which-states-have-passed-them.

after that timeframe. As such, we do not consider this category of restrictions either. Similarly, we do not analyze the symbolic discouraging of abortions, such as the creation of "Choose Life" license plates.

Paternalism involves a substitution of judgment by the paternalist agent, such as a state government, as opposed to allowing the one targeted to use his or her own reason.[8] Sometimes the scope of substitution of judgment is limited, such as imposing a mandate that the one being acted on be given certain information or must wait a specified time in order to undertake some action. Sometimes the substitution is complete and an action is forbidden. Still, the idea that the state presumes to know one's own "good" better than its citizens, especially its adult citizens, is problematic enough that it is fair to presume that a would-be paternalist has a *burden of proof* that needs to be met. We see this burden as two-fold. First, the would-be paternalist, such as a governor or state legislator, needs to show that the state action is permissible; that is, that it would not violate core rights or otherwise deeply intrude in the realm where citizens should be left alone by the state. Second, the substance of the action needs to be shown as warranted. Sometimes people do fail to reason correctly about their own well-being. Still, it is important to show that there is reliable evidence that such "failures in judgment" are in fact occurring. In addition, the proposed remedy should be an appropriate, effective solution to that failure in judgment.

This burden of proof can be met and has often been met. For instance, in the wake of evidence about the effectiveness of seat belts, states began requiring people to buckle up when driving. Such state laws do not infringe on a fundamental liberty interest, and thus are permissible. They also have extensive, reliable data to show seatbelts save lives. It is precisely as defenders of limited state paternalistic actions that we recognize the need to critique those state actions justified via paternalism that fail either or both prongs of the burden of proof. We argue that all state-level paternalistic abortion restrictions fail at least one prong, and usually both.

Before going into an analysis of state-level abortion restrictions, however, it is useful to briefly cover some historical

[8] A good discussion of this is provided in Christian Coons & Michael Weber, Paternalism: Theory and Practice 1-24 (Cambridge Univ. Press 2013).

background into how paternalism was often employed to justify patriarchal systems. Doing so suggests continuity between the late-eighteenth and early-nineteenth centuries and the present, thus revealing that paternalistic justifications have a history in sustaining male authority over women's bodies. This provides yet another reason for skepticism of paternalistic abortion restrictions.

## II. PATERNALISM AND *COVERTURE*

At the heart of many conservative calls to limit women's access to abortion is the assumption women cannot be trusted to make informed decisions about their bodies; the state therefore, should intervene for the woman's own good. This section argues that the use of paternalistic language as a justification has a long history. It briefly explains the use of the British common law concept of *coverture* and, using examples from the colonial, revolutionary, and early republic eras in US history, shows that defenders of the *coverture* legal category often employed paternalistic language to justify women's legal and social subordination to men. While contemporary politicians who use paternalistic language may not be aware, they are employing rhetoric often used to justify patriarchal authority.

Most women in early modern England and its American colonies did not have a separate civic or legal identity apart from their fathers or husbands. Like children, servants, and slaves, a woman's identity was inseparable from that of a male property owner. She could not sue, be sued, buy or sell property, or engage in the public sphere. Her first duty was to that of her husband. Further, a woman's body was not her own. Marital rape did not exist as a culturally and legally defined crime in North America until the 1970s. The often-cited English legal scholar William Blackstone explained this legal system of *coverture* well in his 1765 *Commentaries*, "The very being or legal existence of the woman is suspended during the course of marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover she preforms every thing [sic]." English law was for women's protection and represented women's privileged status under the law. Blackstone asserted, "These are the chief legal effects of marriage during the coverture; upon which we may

observe, that even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England."[9]

Thus, early modern notions of femininity assumed that women were in a perpetual child-like state. It was a man's responsibility to oversee her work and property for her own good and protection. This version of patriarchy extended beyond women. In Early America, participation in the public sphere depended on gender and property ownership. With few exceptions, children, non-property-holding men, servants, and slaves were barred from participation within the public sphere. The late eighteenth century and the nineteenth century, however, saw challenges to the old system. The Enlightenment, the American and French Revolutions, along with the rise of industrial capitalism strained traditional patriarchal systems. White male non-property owners received recognition as citizens as the newly independent states abolished property qualifications for voting. Wage-earning men were also given a new sense of pride in the early republic and antebellum eras as skills, wages, and the rhetoric of free labor allowed for alternative pathways to achieving respectability and recognition.[10]

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[9] *See* 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 442-445 (Robert Bell ed., 1771). The original edition was published in England in four volumes from 1765-1770. We have quoted from an American edition. Not all women were under the *coverture* of a male figure (the legal term was *feme covert*). To prevent widowed women from becoming dependent on the community, English common law held that one-third of a husband's estate must go to his wife on his death (the widow's thirds). A woman then gained the legal distinction *feme sole*. She could then act within the economic realm as a man. If she were to remarry, her husband, except in a few exceptional cases, would again become *feme covert*. Not surprisingly, wealthy women in the colonial era rarely remarried, but, because of the economic reality of the era, most women did remarry. For *coverture* law see NANCY WOLOCH, WOMEN AND THE AMERICAN EXPERIENCE A CONCISE HISTORY 44-46 (1996); LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP xxiii-xxiv, 11-12 (1998); and CAROLE SHAMMAS, A HISTORY OF HOUSEHOLD GOVERNMENT IN AMERICA (2002).

[10] *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1970). PAUL E. JOHNSON, SAM PATCH, THE FAMOUS JUMPER (2003). JOHN WOOD SWEET, BODIES POLITIC:

The revolutionary era was hardly revolutionary for women and people of color, however. Slavery persisted in the southern part of the U.S., and while the North gradually abolished slavery, it also constructed a deeply segregated society.[11] A woman's legal and social status changed little. States maintained *coverture* law and the assumption that a woman's identity was tied to that of her father and husband remained. Tapping Reeve, who ran one of the most famous legal training programs in the country from his home in Litchfield, Connecticut, published an influential work on the subject of women's subordination in 1816 titled *The Law of Baron and Femme* where he made explicit that the husband's control over his wife's property is tied to his control over her body: "The right of the husband to the person of his wife… is a right guarded by the law with the utmost solicitude; if she could bind herself by her contracts, she would be liable to be arrested, taken in execution, and confined in a prison; and then the husband would be deprived of the company of his wife, which the law will not suffer." The lack of a married woman's autonomy over her property and body was not just for the benefit of men but also protected women. Reeve reasoned that because the law bound a woman to her husband so completely, a married woman could not fairly enter into a contract "as it might be the effect of coercion." Her inability to enter into contracts was thus both "for the sake of her husband" and "for her own sake." In its denial of a woman's right to enter into contracts then, the state was protecting her.[12]

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NEGOTIATING RACE IN THE AMERICAN NORTH, 1730-1830 (2003). JOHN GILBERT MCCURDY, CITIZEN BACHELORS: MANHOOD AND THE CREATION OF THE UNITED STATES (2009).

[11] *See* JOHN W. SWEET, BODIES POLITIC: NEGOTIATING RACE IN THE AMERICAN NORTH, 1730-1830 (2003). JOHN GILBERT MCCURDY, CITIZEN BACHELORS: MANHOOD AND THE CREATION OF THE UNITED STATES (N.Y. Cornell Univ. Press 2009).

[12] As a testament to its continued influence well into the nineteenth century, *The Law of Baron and Femme* was republished with updated annotations in 1846 and again in 1862. TAPPING REEVE, THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND SERVANT, AND OF THE POWERS OF THE COURTS OF CHANCERY; WITH AN ESSAY ON THE TERMS HEIR, HEIRS, HEIRS OF THE BODY 182 (William Gould, Law Pub., 3rd ed. 1862); *See also* Kerber, *supra* note 9, at 13-14.

The rhetoric of individualism and citizenship helped to challenge patriarchy and *coverture* laws throughout the nineteenth and twentieth centuries. While the challenges to patriarchy within the private and public spheres varied, conservative reactions often had two common features: (a) that women were not capable of independence; (b) male authority benefited women. There was Abigail Adams's famous 1776 letter asking her husband John, who was serving in the Continental Congress, to "Remember the Ladies" and not to "put such unlimited power into the hands of the Husbands."[13] She claimed, "Remember all Men would be tyrants if they could. If perticuliar [sic] care and attention is not paid to the Ladies we are determined to foment a Rebelion [sic], and will not hold ourselves bound by any Laws in which we have no voice, or Representation."[14] John's response was playful but dismissive, "depend upon it, We know better than to repeal our Masculine systems."[15] In a common move for those wishing to justify patriarchy, he claimed that male authority was not harsh and that women held the real power, "We dare not exert our Power in its full Latitude. We are obliged to go fair, and softly, and in Practice, you know We are the subjects."[16]

One problem for the conservative position was the fact that after the revolution, the newly independent states did recognize white women's citizenship.[17] Although women were still subordinate (legally and culturally) to their husbands, they did find spaces to act. In the 1820s and '30s, women were a ubiquitous presence in the many northern reform movements from anti-prostitution campaigns to temperance to abolitionism. Most women used contemporary notions of gender, such as the "separate spheres

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[13] Letter from Abigail Adams to John Adams (31 Mar. 1776), *as reprinted in* MASS. HIST. SO'CY: ADAMS FAMILY PAPERS, https://www.masshist.org/digitaladams/archive/letter/.

[14] *Id.*

[15] Letter from John Adams to Abigail Adams (14 April 1776), *as reprinted in* MASS. HIST. SO'CY: ADAMS FAMILY PAPERS, https://www.masshist.org/digitaladams/archive/letter/.

[16] *Id.*

[17] *See* Kerber, *supra* note 9, at 13.

ideology," to justify a public voice. That is, to adequately perform their roles as wives and mothers, women needed a public voice.[18]

Yet, some women questioned the assumption that women's sole priority was motherhood. During the revivals of the 1820s, known as the Second Great Awakening, the Scottish immigrant Francis Wright dismissed contemporary notions of femininity during her speaking tour in New York where she questioned women's inherent religiosity while advocating for free thought and full women's citizenship. Wright came under a sustained attack from ministers and religious commentators. As the historian Lori Ginzberg demonstrates, Wright's name became an epithet in nineteenth-century political discourse. A "Fanny Wright" woman was associated with licentiousness, and many clerics warned that women must be protected from the seductive rhetoric of free thinkers such as Wright.[19]

The close connection between women's public speaking and sexual deviance was at the heart of conservative reactions to women's challenges to patriarchy. We can see this connection again in the 1830s and '40s when Sarah and Angelina Grimké caught the attention of anti-slavery advocates. The sisters had migrated to Pennsylvania from South Carolina. They joined the Society of Friends and then, sponsored by the abolitionist William Lloyd Garrison, traveled around New England and the Mid-Atlantic region speaking about the horrors of slavery. By the late 1830s and into the '40s, they began to see parallels between slavery and women's subordination and became advocates for women's full participation

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[18] *See* KATHRYN KISH SKLAR, CATHARINE BEECHER: A STUDY IN AMERICAN DOMESTICITY (1976); NANCY HEWITT, WOMEN'S ACTIVISM AND SOCIAL CHANGE: ROCHESTER, NEW YORK, 1822-1872 (1984); NANCY F. COTT, THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835 (1997); LORI D. GINZBERG, WOMEN IN ANTEBELLUM REFORM (2000).

[19] Lori D. Ginzberg, *"The Hearts of Your Readers Will Shudder": Fanny Wright, Infidelity, and American Freethought* 2 AM. Q., 195-26 (1994). Ginzberg also notes that despite Wright's brief popularity in the 1820s, most male members of the small free-thinking were ambivalent regarding women's participation within the movement associating rational thought with masculinity and religiosity with femininity. Thus, in many ways we can conclude that even free thinkers, who often adopted women's rights positions, also engaged in paternalist and patriarchal rhetoric.

as citizens.[20] Unlike Wright, the sisters rooted their objections to patriarchal authority in Christian theology. The sisters' piety did not stop conservative critics from condemning the Grimkés' public activities. At the root of the conservative critique was the idea that women who left the control of a patriarchal household would spread sexual promiscuity. In response to the Grimké's speaking tour, the Massachusetts General Association of Congregational Clergy alerted their members that the sisters would cause "wide spread and permanent injury." A woman's power, they argued, "is in her dependence, flowing from the consciousness of that weakness which God has given her for her protection . . . ." While the Congregational clergy "appreciate[d] the unostentatious prayers and efforts of women, in advancing the cause of religion at home and abroad" those efforts must be private. The clergy admitted fearing that men would lose their public role if churches continued to give platforms to women speakers. When "she assumes the place and tone of a man as a public reformer, our care and protection of her seem unnecessary, we put ourselves in self-defense against her, she yields the power which God has given her for protection, and her character becomes unnatural."[21]

The Great Awakening of the 1820s, combined with the reform movements of the '30s and '40s, helped to normalize women's public speaking and collective activism thereby setting the stage for the first organized and collective challenge to patriarchy.[22] Led by New Yorker Elizabeth Cady Stanton, this early women's rights movement challenged contemporary gendered assumptions that women's sole role was selfless motherhood and demanded that

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[20] GERDA LERNER, THE GRIMKÉ SISTERS FROM SOUTH CAROLINA: REBELS AGAINST SLAVERY (1967).

[21] Quotations from *Pastoral Letter of the Massachusetts Congregationalist Clergy,* in UP FROM THE PEDESTAL: SELECTED WRITINGS IN THE HISTORY OF AMERICAN FEMINISM 50-51 (Aileen Kraditor ed., 1968). For Sarah Grimké's response see *Letter III. The Pastoral Letter of the General Association of Congregational Ministers of Massachusetts*, in SARAH GRIMKÉ, LETTERS ON THE EQUALITY OF THE SEXES AND THE CONDITION OF WOMAN 14-21 (1838).

[22] Carroll Smith-Rosenberg, *Beauty, the Beast, and the Militant Woman: A Case Study in Sex Roles and Social Stresses in Jacksonian America,* 23 AM. Q. [page number], 562-84 (1971); NANCY A. HEWITT, WOMEN'S ACTIVISM AND SOCIAL CHANGE: ROCHESTER, NEW YORK, 1822-1872 (1984).

women have full equality with men. Unlike previous calls for equality, this was a collective effort.[23]

In an early blow to *coverture* laws, Stanton successfully lobbied the New York State legislature for married women to have more control of inherited wealth in 1848. Twelve years later, the law was broadened to include some earned wealth in 1860. Throughout the nineteenth century, other states also passed their own Married Women's Property Acts. These were clear challenges to the legal system of *coverture*, but there are some important caveats: first, it was well into the twentieth century before all states allowed married women to own property apart from their husbands. Second, the motivations behind state legislators who voted in favor of these laws were rarely to provide women with equal protection and standing under the law. Often the women who campaigned for property laws framed the statutes as a moderate alternative to more radical voting rights legislation or equal rights constitutional amendments. Many legislatures viewed women's independent property ownership as a way to protect husbands from creditors.[24]

Support for married women's property laws was also framed in the language of paternalistic protection. In an early debate on a version of a New York law that would ultimately fail, the state legislator Thomas Herttell said that allowing married women to own property apart from their husbands would provide state protection for women and children from "the unprovident [sic], prodigal, intemperate, and dissolute habits and practices of their husbands."[25] During the debates over a married women's property law in Illinois, women's rights activist Hannah Tracy Cutler recognized the utility of the paternalistic language. She knew her audience well. As she lobbied for the bill, rather than frame the debate in terms of women's rights to property (as she had in the past), she highlighted women's perceived natural differences and the need for state protection

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[23] LISA TETRAULT, THE MYTH OF SENECA FALLS: MEMORY AND THE WOMEN'S SUFFRAGE MOVEMENT, 1848-1898 (2014).

[24] *See* Holly J. McCammon, Sandra C. Arch & Erin M. Bergner, *A Radical Demand Effect: Early US Feminists and the Married Women's Property Acts,* 38 SOC. SCI. HIST. 221-250 (2014). *See also* NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK (1982).

[25] *Id.* at 227.

against wayward husbands. She argued that women's "softer sympathies" and "more gentile natures" helped to counter the "stern, cold, calculating spirit" of men. She maintained that by allowing women to own property independently, the state would be offering protection from "drunken," "unfaithful," and "debauched" husbands.[26] The strategy worked. The law passed the Illinois State Legislature in 1861.[27]

Collective organization gradually produced some change. In the 1850s, much of the nation's attention became involved in the debate over issues of westward expansion and slavery. After the Civil War, however, the 1868 ratification of the Fourteenth Amendment gave women's rights activists some ammunition as it guaranteed citizenship to "all persons born or naturalized in the United States" (although the Supreme Court's interpretation of this amendment was narrow well into the twentieth century). While *coverture* as a legal system did not end by one single statute, there were enough challenges that by 1870, the legal scholar James Schouler wrote that there was "confusion and uncertainty" within domestic relations law.[28]

*Coverture's* gradual demise did not end patriarchal authority. Instead, as we document in the following sections, conservative state legislatures sought to switch the patriarchal figure from the husband to the state. The reinforcement of patriarchal power on paternalist grounds can be seen in the case of abortion, specifically, in-laws mandating counseling, waiting periods, and parental consent prior to the procedure.

## III. PATERNALISTIC STATE-LEVEL RESTRICTIONS ON ABORTION

### *A. Mandatory counseling, including state-compelled ultrasounds and heartbeat disclosure*

An interesting shift in the abortion debate has been, until very recently, the partial turn away from claims of fetal personhood

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[26] *Id*. at 231-232.

[27] See McCammon, *supra* note 24, at 227, 231-232.

[28] Kerber, *supra* note 9, at 38-39. *See also* LAURA E. FREE, SUFFRAGE RECONSTRUCTED: GENDER, RACE, AND VOTING RIGHTS IN THE CIVIL WAR ERA (2015).

to claims of needing to protect women.[29] For instance, Governor Sam Brownback of Kansas, signing his nineteenth piece of anti-abortion legislation into law, which expanded the state's mandatory counseling provisions, said: "Too often women are led to believe that abortion is their only option when it clearly, clearly is not."[30] This turn is reflected in *Gonzalez v. Carhart* and its discussion of informed consent. "In a decision so fraught with emotional consequence, some doctors may prefer not to disclose precise details of the abortion procedure to be used, confining themselves to the required statement of risks the procedure entails."[31] In making the case for mandated sharing of information, including aspects the surgical processes for the late-term abortion at issue in the case, Kennedy writes, "The State has an interest in ensuring so grave a choice is well informed."[32]

In this framework, conservatives assume that motherhood is the natural condition of women, thereby borrowing from nineteenth-century concepts of femininity. Abortion strikes at that nature. As one analysis of this perspective described, "abortion restrictions are transformed into measures that promote women's health and well-being and that protect women from the exploitation and deception of abortion providers."[33] Thus when Governor Brownback alludes to women being "led to believe" something that is "clearly" not the case, it is a reference to abortion providers and those who back them. One of Kansas' mandatory counseling laws is the Woman's Right to Know Act.[34] The state is protecting women from those who would

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[29] A good exploration of this shift is given in Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 56.6 DUKE L.J. [page number], 1641-92 (2008).

[30] *See* Katie Moore, *Gov. Sam Brownback Signs Abortion Law Requiring that Providers Distribute Biographical Information,* THE TOPEKA CAPITAL-JOURNAL (June 7, 2017, 8:58 AM), https://www.cjonline.com/news/state-government/2017-06-07/gov-sam-brownback-signs-abortion-law-requiring-providers-distribute.

[31] Gonzalez v. Carhart*,* 550 U.S. 124, 159 (2007).

[32] *Id.* ("The State has an interest in ensuring so grave a choice is well informed.").

[33] *See* Caitlin E. Borgmann, *The Meaning of 'Life': Belief and Reason in the Abortion Debate,* 18 COLUM. J. OF GENDER & THE L. 556, 550-08 (2009).

[34] KAN. STAT. ANN. § 65-6709 (2014). This is common. For instance, Texas' mandated booklet is entitled "A Woman's Right to Know."

deceive them, in addition to ensuring that they have time to make an informed decision after being given a raft of state-mandated information.

State-mandated counseling and information varies by state. After a brief discussion of the idea (and practice) of informed consent, this section considers state laws that mandate specific pieces of "information" to be given. The laws and informational pieces we cover will be those that allege a link between abortion and the chances of developing future mental health or fertility issues or developing breast cancer, and that assert that personhood begins at conception.[35] Also, we examine the requirement some states have that women undergo an ultrasound and then either be given an option to view the image or be forced to hear a description of what the image shows. This is considered under the rubric of mandated counseling since it involves mandated information sharing, including the visual information (and verbal explanation of the images by the technician or doctor) of the ultrasound. All these types of state laws, in other words, require that women receive specific pieces of information, regardless of whether they have requested or whether the information is accurate. Since most of the mandated information is either inaccurate, such as claims about abortion leading to a higher chance of mental illness, or immaterial, such as listening to a fetal heartbeat, what some state governments have constructed is *disinformed consent*.

While "informed consent" has been a standard for medical treatment for the better part of a century,[36] that standard was revised and strengthened by *Canterbury v. Spence* (1972).[37] "True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each."[38] Thus a

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[35] More could be considered. For instance, about a third of states mandate that a woman be told that she cannot be coerced into an abortion, and most states require that women be told the gestational age of the fetus. These do not raise the same kind of paternalistic issues that the main ones considered here do.

[36] Lawsuits premised on a lack of physician disclosure of risks and alternative to proposed treatment go back a century. *See* Theodore v. Ellis, 75 So. 655, 660 (1917); Hunter v. Burroughs, 96 S.E. 360, 366-68 (1918).

[37] Canterbury v. Spence*,* 464 F.2d 772, 10a-24a (D.C. Cir. 1972).

[38] *Id.* at 10a.

central question is how much information must be provided. "The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is the information material to the decision."[39] The legal standard articulated in *Canterbury* clearly assumes that the information given is accurate, or is at least the best professional knowledge at the time of the disclosure, and mandates that said information is "material." Such information sharing provides the basis for informed decision making and thus promotes autonomy. The definition of paternalism used here, developed by Le Grand and New, does not take the provision of information itself as paternalistic.[40] Those states which treat abortion as simply another medical procedure that is covered by more general informed consent rules are thus not acting paternalistically, at least on this issue. Instead, those states that *construct a decision environment* designed to dissuade women from obtaining one of the safest medical procedures are acting paternalistically.[41]

As of early 2019, about a third of the states mandate the sharing of information about possible links between abortion and emotional well-being, including mental health. Many of those are rather innocuous, describing a range of possible emotional responses to the termination of a pregnancy. Eight states, however, describe only negative reactions, often including an assertion that abortion makes future mental health issues more likely.[42] A description of only negative emotional reactions is inaccurate; a claim of increased mental health risks is unsubstantiated. Many women feel a sense of relief after an abortion.[43] An especially

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[39] *Id.* at 24a.

[40] *See* Le Grand & New, *supra* note 2, at 15 ("Simply supplying the bald fact that cigarettes are dangerous is thus not, in this interpretation, paternalistic,").

[41] *See* Patricia A. Lohr et al., *Abortion,* Brit. Med. J., Jan. 6, 2014 at 1-7.

[42] Those eight states are KS, LA, MI, NE, NC, SD, TX, and WV. *See Counseling and Waiting Periods for Abortion*, Guttmacher Inst., https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion (last visited February 1, 2019).

[43] Corinne H. Rocca, et al., *Decision Rightness and Emotional Responses to Abortion in the United States: A Longitudinal Study* 10, 13, PLoS One, (July 8, 2015), at

comprehensive review of studies focused on possible links between abortion and future mental health found that the single best predictor of mental health issues after an abortion was the presence of such issues before.[44] There was some evidence that pressure from a partner to have an abortion that the woman did not want was associated with an elevated risk of depression.[45] These patterns are also reflected in antenatal and postnatal mental health.[46] An important component of informed consent is that the patient receives information about treatment options, including the likely consequences of non-treatment. Thus it is relevant that in 2018, the U.S. Preventive Service Task Force identified carrying an unintended pregnancy as a risk factor for depression, including postpartum.[47] Therefore, those states that mandate sharing of "information" about risk to future mental violate informed consent standards in two ways. First, the information is inaccurate. Second, if the information mandate is one-sided, only discussing abortion as a mental health risk factor and not including carrying an unwanted pregnancy to term, it fails to give equal consideration to range of treatment options.

As of early 2019, most states mandate that women seeking an abortion must have either verbal or written advisement that the procedure could affect future fertility.[48] A comprehensive survey of related research evaluated these supposed risks including the influence of abortion on future infertility, ectopic pregnancy, and

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https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4496083/pdf/pone.0128832.pdf .

[44] Nat'l Collaborating Ctr. For Mental Health, Induced Abortion and Mental Health: A Systematic Review of the Mental Health Outcomes of Induced Abortion, Including Their Prevalence and Associated Factors, 122 Acad. Of Med. Royal Colleges (Dec. 2011), https://www.aomrc.org.uk/wpcontent/uploads/2016/05/Induced_Abortion_Mental_Health_1211.pdf.

[45] *Id.* at 133.

[46] *See id*.

[47] *See* the "Assessment of Risk" section in U.S. Preventative Services Task Force, Final Recommendation Statement: *Perinatal Depression: Preventive Interventions*, U.S. Preventative Services Task Force (Feb. 12, 2019), https://www.uspreventiveservicestaskforce.org/Page/Document/RecommendationStatementFinal/perinatal-depression-preventive-interventions#consider.

[48] *See Counseling and Waiting Periods for Abortion*, *supra* note 43.

possible future miscarriages.[49] The researchers concluded that future infertility, ectopic pregnancy, and midterm miscarriage "occurs so infrequently that its risk is not significantly elevated in studies capable of detecting a 2-fold rise in relative risk."[50] There is not a settled, well-established literature to justify this warning, to say the least.

In 2019, five states' informational materials describe a link between obtaining an abortion and a subsequent increased risk of developing breast cancer. Only two of those states have that provision within the relevant law, however.[51] Those who defend mandating this "information" disclosure claim that "if a woman has an abortion before her third trimester of pregnancy, her breasts are left with more undifferentiated cells that are more vulnerable to cancer than if she had never been pregnant."[52] The group Right to Life Michigan goes on to conclude that, "women should have the right to know that many worldwide studies show that abortion can increase a woman's risk of getting breast cancer later in life." In doing so, the group alludes to the belief that mandatory waiting periods, coupled with a disinformation campaign on the risks of breast cancer after receiving an abortion, could prevent a woman from undergoing the procedure, and thus have a positive effect on her future health.[53]

The evidence behind this warning of a connection to breast cancer is thin, controversial, and, at best, mixed. In 2003, the National Cancer Institute convened a workshop composed of over 100 of the world's leading experts on pregnancy and cancer risks. After an extensive review of several types of data, including clinical and

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[49]Carol J. Hogue, Willard Cates Jr. & Christopher Tietze, *The Effects of Induced Abortion on Subsequent Reproduction,* 4 Epidemiological Rev. 66-94, PubMed.gov.

[50] *See id*.

[51] The states are AK, KS, MS, OK, and TN. The two states where legislatures have taken a position on a matter of medical research are KS and TN. See *Counseling and Waiting Periods for Abortion*, *supra* note 43.

[52] *See A Risk to Avoid*, Right to Life Mich., https://rtl.org/prolife_issues/LifeNotes/AbortionsLinktoBreastCancer.html (last visited April 22, 2019).

[53] *See id*.

animal studies, they concluded that there was no connection.[54] Similarly, the Collaborative Group on Hormonal Factors in Breast Cancer conducted a comprehensive global study of epidemiological evidence to determine if there was a possible correlation between abortions (both induced and miscarriages) and an increased possibility of breast cancer.[55] The results of the study, which included a host of outside variables, stated that, "Interpretation Pregnancies that end as a spontaneous or induced abortion do not increase a woman's risk of developing breast cancer."[56] The study goes on to conclude that, "the totality of the worldwide epidemiological evidence indicates that pregnancies ending as either spontaneous or induced abortions do not have adverse effects on women's subsequent risk of developing breast cancer."[57] At best, there may be a connection for population subgroups. A recent meta-analysis concluded that there was no observed link for women who had not had children prior to obtaining an abortion, but that there "might" be a connection for those who had.[58] Mandating that women be informed of this risk based on such scant and contested evidence violates the ethical standards of informed consent.

A number of states mandate that women be told that an abortion may cause pain to the fetus. In most states this is required for all abortions twenty weeks past the last menstrual period; a few states require this for any woman seeking an abortion.[59] This has also been the topic of proposed federal legislation, in the Woman's Right to Know

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[54] *See Summary Report: Early Reproductive Events and Breast Cancer Workshop*, Nat'l Cancer Inst., https://www.cancer.gov/types/breast/abortion-miscarriage-risk#summary-report (last visited April 22, 2019).

[55] *See* Valerie Beral, et al., *Breast Cancer and Abortion: Collaborative Reanalysis of Data from 53 Epidemiological Studies, Including 83 000 Women with Breast Cancer from 16 Countries*, The Lancet, (March 27, 2004) DOI:10.1016/S0140-6736(04)15835-2.

[56] *Id.*

[57] *See* Valerie Beral et al., *Breast Cancer and Abortion: Collaborative Reanalysis of Data from 53 Epidemiological Studies, Including 83 000 Women with Breast Cancer from 16 Countries,* 363 The Lancet, Mar. 27, 2004 https://search-proquest-com.libproxy.uwyo.edu/docview/198970671?pq-origsite=summon.

[58] *See* Yongchun Deng, Hua Xu & XiaoHua Zeng, *Induced Abortion and Breast Cancer: An Updated Meta-Analysis,* 97 Med. (2018) at 7.

[59] *See Counseling and Waiting Periods for Abortion*, *supra* note 43.

Act.[60] Arguably this is not medically relevant information at any stage of pregnancy. A woman may not consider a developing fetus as having personhood or the sort of moral status that would make its feeling pain important for her.[61] Leaving that aside, however, once again this mandated piece of "information" has little scientific evidence behind it. For instance, a comprehensive report from 2005, based on a multi-disciplinary review of evidence, found that fetuses cannot feel pain prior to the twenty-ninth or thirtieth week.[62] The American College of Obstetricians and Gynecologists states that "the fetus does not even have the physiological capacity to perceive pain until at least 24 weeks of gestation" due to the lack of connections between peripheral sensory nerves to the brain."[63] While the specific timing is imprecise, clearly the mandate either occurs several weeks too early, as in the states where this mandate takes effect at twenty weeks, or it is wildly off, in those states that require all women be "informed" of this.

As of early 2019, six states mandated that persons seeking an abortion be advised that personhood begins at conception.[64] For instance, in Kansas, a woman is to be informed, in writing, that "the abortion will terminate the life of a whole, separate, unique, living human being…."[65] When 'personhood' begins is a deeply contestable and specific judgment that often relies on religious views. A state legislature taking a position on this question, including a mandate to medical or counseling personnel that they convey to women seeking a medical procedure the controversial

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[60] *See* Glenn Cohen & Sadath Sayeed, *Fetal Pain, Abortion, Viability, and the Constitution,* 39 J.L. of Law, Medicine, & Ethics 235 (2011).

[61] *See* Yusra Murad, *Conflict on Fetal Rights Lies at the Heart of America's Abortion Debate*, MORNING CONSULT (June 20, 2019, 12:01 AM), https://morningconsult.com/2019/06/20/conflict-on-fetal-rights-lies-at-the-heart-of-americas-abortion-debate/.

[62] *See* Susan J. Lee, et. al., *Fetal Pain: A Systematic Multidisciplinary Review of Evidence*, 294 JAMA, Aug. 24, 2005, 947, (specific page #?).

[63] The Am. Coll. of Obstetricians & Gynecologists, Facts Are Important: Fetal Pain, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1448057/ (last visited Jan. 12, 2020).

[64] *See Counseling and Waiting Periods for Abortion*, *supra* note 43.

[65] *See* H.R. 2253, 2013 Leg. (Kan. 2013), http://www.kslegislature.org/li_2014/b2013_14/measures/documents/hb2253_enrolled.pdf.

position that personhood begins at conception, is more akin to advising patients what moral views to adopt rather than transferring supported medical information.

Since the mid-1990s, some states have adopted a requirement that before an abortion, a woman must either receive information about the possibility of seeing an ultrasound of the fetus or requiring that an ultrasound be done. In its legally-required informational booklet, Texas law says that the doctor performing the abortion must conduct the sonogram and "allow you to see your baby…."[66] A sponsor of anti-abortion legislation in South Carolina, Representative Greg Delleney, said that an ultrasound enables a woman to "determine for herself whether she is carrying an unborn child deserving of protection or whether it's just an inconvenient, unnecessary part of her body."[67]

Ultrasounds are not routinely performed during the first trimester and one study on their utility concluded, "it is possible safely to forego routine pre-abortion sonography in order to determine women's eligibility for medical abortion."[68] The motive in requiring an ultrasound and either offering the woman the opportunity to view it, or requiring that the image be displayed in the office and described (as in Wisconsin's law), is to change the woman's mind rather than a disinterested attempt to inform her. For instance, Betsy Powell, the manager of the Sanctity of Human Life section of Focus on the Family claimed that almost 90% of women inclined to obtain an abortion changed their minds after viewing an ultrasound at a pregnancy resource clinic. For this reason, she

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[66] *See A Woman's Right to Know,* Tex. Health & Human Services, 1 (2016), https://hhs.texas.gov/sites/default/files/documents/services/health/women-children/womans-right-to-know.pdf

[67] Lawrence D. Jones, *Ky. Lawmakers Push for Requiring Ultrasound Before Abortion,* THE CHRISTIAN POST, Jan. 14, 2008, https://www.christianpost.com/news/ky-lawmakers-push-for-requiring-ultrasound-before-abortion.html.

[68] *See* Hillary Bracken et. al., *Alternatives to Routine Ultrasound for Eligibility Assessment Prior to Early Medical Abortion,* 2009 INT'L J. OF GYNECOLOGY & OBSTETRICS (2009), s133. For a meta-study reaching a similar conclusion, *see* Elizabeth G. Raymond & Hilary Bracken, *Early Medical Abortion Without Prior Ultrasound*, 92 CONTRACEPTION (2015), 212

supports mandating ultrasounds.[69] A sponsor of an Idaho mandatory ultrasound bill likewise stated that the intent of the law is to dissuade women from obtaining an abortion, which can be seen as a tactical slip of the tongue given the usual justification of simply providing more information prior to a medical procedure.[70] There is independent data that suggests that viewing an ultrasound image of a fetus does dissuade some women from obtaining an abortion, though not nearly at the rates claimed by Powell.[71]

Those states mandating ultrasounds in the first trimester, such as Alabama and Mississippi, are requiring an unnecessary and costly procedure. Just like any good or service, a higher price reduces demand and increased mandates and restrictions on abortion raises the cost.[72] This extends to all the types of abortion restrictions considered in this article. Increased information and counseling disclosures take additional time and often additional personnel. Performing an ultrasound, or checking for a fetal heartbeat, and evaluating the results with a patient requires more time and technology. Increased waiting times and legal restrictions to be followed in dealing with minors also increase costs. Of course, if medically necessary, increased costs are potentially warranted. As the review of mandated informational pieces and ultrasounds demonstrates, these mandates raise costs, are unneeded, and inaccurate. The interference has developed to the point that the American Congress of Obstetricians and Gynecologists felt the need to speak to government interference in the patient-physician relationship, stating:

Laws that require physicians to give, or withhold, specific information when counseling patients, or that mandate which tests, procedures, treatment alternatives or medicines physicians can perform, prescribe, or administer are ill-advised. Examples of such

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[69] *See* Jones, *supra* note 52 at "Ky. Lawmakers Push for Requiring Ultrasound Before Abortion."

[70] Melissa Davlin, *Abortion Bill Raises Ultrasound Cost Questions*, MCCLATCHY-TRIBUNE BUS. NEWS, Mar. 11, 2012.

[71] Ushma D. Upadhyay, et. al., *Evaluating the Impact of a Mandatory Pre-Abortion Ultrasound Viewing Law: A Mixed Methods Study,* 12 PLOS ONE, (specific page?).

[72] *See* Marshall H. Medoff, *The Spillover Effects of Restrictive Abortion Laws,* 25 Gender Issues 1-10 (2008).

problematic legislation include...laws that require medically unnecessary ultrasounds before abortion and force a patient to view the ultrasound image.[73]

In addition, viewing the ultrasound can be traumatic. In some states, doctors or imaging specialists are required to describe what the image is showing: the hands and feet, which organs are developing, etc.[74] Considering that the states requiring this often emphasize the likelihood of negative emotional reactions to an abortion, there is a bitter irony in requiring procedures more likely to cause such a reaction.[75]

The standards internal to informed consent are important. Persons need to be able to make informed decisions about their medical treatment options. By stepping into the provider-patient relationship and mandating the sharing of information of dubious accuracy, or which is immaterial to the medical procedure, or unnecessary procedures that increase costs, state governments have politicized informed consent. Indeed, by altering and marshaling those standards to their own ends, they have made it so that in many states *disinformed consent* is occurring. Best practices do not recommend mandatory counseling at all.[76] Not only have Kansas, Texas, and other states mandated counseling, but they have also included objectionable elements that are not even recommended by medical professionals.[77] What abortion-interventionist states have

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[73] American College of Obstetricians and Gynecologists, *Legislative Interference with Patient Care, Medical Decisions, and the Patient-Physician Relationship*, as amended and reaffirmed July 2019, https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2019/legislative-interference-with-patient-care-medical-decisions-and-the-patient-physician-relationship.

[74] *See Requirements for Ultrasound*, GUTTMACHER INSTITUTE, April 1, 2020, https://www.guttmacher.org/state-policy/explore/requirements-ultrasound.

[75] For a powerful account of this, see Catherine Pearson, *These Are the Absurd Barriers Women Trying to Get Abortions Face*, THE HUFFINGTON POST, October 5, 2015 https://www.huffpost.com/entry/these-are-the-absurd-barriers-women-trying-to-get-abortions-face_n_560ebbfde4b0dd85030bca9e.

[76] *See* Lohr, et. al., *supra* 31, at 1-7.

[77] For a listing of mandated counseling requirements, see *Counseling and Waiting Periods for Abortion*, GUTTMACHER INSTITUTE,

done is a form of medical malpractice. Further, policies that dissuade patients from accessing abortion information, or prevent doctors from referring patients to receive abortions, such as the domestic gag rule, interfere with patient-physician relationships and undermine the concept of informed consent because patients are not presented with a comprehensive range of healthcare options.

*B. Mandatory Waiting Periods*

Equally dubious and using similar paternalistic justifications, state legislatures have also added unnecessary costs and emotional strain by forcing women to wait a specific amount of time, generally twenty-four to seventy-two hours, before their first visit with a provider and receiving an abortion. Mandatory waiting periods before allowing women to receive an abortion have become one of the primary pieces of legislation introduced by state legislatures and have been increasing until recently.[78]

Pro-choice advocacy groups, such as the National Abortion and Reproductive Rights Action League (NARAL), and abortion practitioners often view mandatory waiting periods as an attempt to circumvent a woman's right to medical privacy established by the Supreme Court in *Roe v. Wad*e.[79] The paternalistic justification often offered by proponents of such legislation is typically direct, often claiming that a woman who is considering an abortion may be suffering from a lack of rational judgment and that such a waiting period may provide women with enough time to decide that an abortion may not be the correct option. Proponents claim that women who have an abortion may later suffer adverse mental health and even negative physical effects directly related to the procedure.[80] On examination of the evidence, however, this section

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https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion. For descriptions of mandated misinformation, *see* Nancy Berglas, et al., *State-Mandated (Mis)Information and Women's Endorsement of Common Abortion Myths*, *Women's Health Issues*, March-April 2017, 129-135, https://www.ncbi.nlm.nih.gov/pubmed/28131389.

[78] *See* Bentele, Sager & Aykanian, *supra* note 1, at 490-517.

[79] PRO-CHOICE AMERICA, https://www.prochoiceamerica.org/issue/abortion-access/

[80] Priscilla K. Colman, *Abortion and mental health: quantitative synthesis and analysis of research published 1995-2009*, 199(3) The British J. of

demonstrates that the rationalization offered by proponents of mandatory waiting periods does not "address a failure of judgment" of the individual seeking an abortion nor is there any evidence that such a restriction would "further the individual's own good."[81] Therefore, such legislation fails to meet the burden of proof described above for a paternalistic policy to be justifiable.

As of January 1, 2019, twenty-seven U.S. states required a mandatory waiting period.[82] Many states that do not currently have mandatory abortion waiting period legislation. Despite an increase in more liberal state legislators, political representatives of conservative constituents have been introducing such bills at an ever-increasing rate.[83] For instance, 2015 state legislative sessions showed a marked increase in waiting-period legislation; for example, Oklahoma, Florida, Arkansas, and Tennessee are currently enacting or adding additional time to mandatory waiting period laws.[84]

Much of the language within such legislation follows the standard justification for waiting periods as proposed in Wyoming House Bill 140 (WY H.B. 140), "Abortion-48 Hour Waiting Period," or the swath of waiting period legislation collectively known as the "Women's Right to Know Acts." [85] Wyoming H.B. 140 claims that the 48-hour mandatory waiting period before an abortion is justifiable because the requirement promotes the "health and public safety" of its pregnant citizens.[86] Other states have introduced similar laws on paternalistic grounds. For example, when speaking of her sponsorship of 2015 Arkansas legislation aimed at increasing the state's mandatory waiting period from 24 to 48 hours, Arkansas Republican Representative Robin Lundstrum stated, "a

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Psychiatry (Sept. 2011) available at: https://www.researchgate.net/publication/51608790_Abortion_and_mental_health_Quantitative_synthesis_and_analysis_of_research_published_1995-2009

[81] *See* Le Grand & New, *supra* note 2, at 23.

[82] *See Counseling and Waiting Periods for Abortion*, *supra* note 43.

[83] *See* Bentele, Sager & Aykanian, *supra* note 1, at 490-17.

[84] Olga Khazan, *Waiting Periods and the Rising Price of Abortion,* THE ATLANTIC, (May 26, 2015), https://www.theatlantic.com/health/archive/2015/05/waiting-periods-and-the-price-of-abortion/393962/.

[85] https://www.wyoleg.gov/Legislation/2019/HB0140

[86] S.J. Res. 140, 2019 Sess. (Wyo.).

woman's reproductive health is so critical and so important. I think we're worth the wait."[87] Based on these justifications, lawmakers seem to assume that women do not consider, or are unaware of, the consequences of an abortion to their mental and physical health. The intent of abortion waiting period legislation is thus to correct the patient's possible lack of reasoning through a "cooling off" period, similar to waiting periods before the issue of a no-fault divorce or before remarriage after a divorce.

Proponents of mandatory waiting periods often claim that the patient could have possible negative physical side effects such as an increased risk of substance abuse.[88] The word "health" is often used in such legislation and could be interpreted as paternalistic as it relates to the possibility of avoiding addiction if the patient carries to term, gives birth, and does not choose to proceed with an abortion after the mandatory waiting period. Much like many studies on the possible adverse mental effects of abortion, however, most studies related to the correlation between receiving an abortion and an increase in substance abuse fail to consider outside variables such as a history of substance abuse, social, economic status, or history of domestic violence. The Turnaway Study, conducted by University of California San Francisco researchers, concluded that for "those receiving abortions, drug use did not change over the following two years" and goes on to state that "women denied abortion actually had an increase in their use of drugs other than marijuana compared to those in the near-limit group."[89] When considering these variables, the Turnaway Study claimed, "this increased use may be associated with the added stress of forced parenting."[90]

Mandatory waiting periods seem to serve no purpose other than to delay the process. Adoption laws within the U.S. do not

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[87] Jennifer Ludden, *In Several States, Abortion Waiting Periods Grow Longer,* NAT'L PUB. RADIO, (June 2, 2015), https://www.npr.org/sections/itsallpolitics/2015/06/02/411479776/in-several-states-abortion-waiting-periods-grow-longer.

[88] *Elliot Institute 2004 Year End Report* (2004), http://afterabortion.org/2004/elliot-institute-2004-year-end-report/.

[89] Sarah Horvath & Courtney A. Schreiber, *Unintended Pregnancy, Induced Abortion, and Mental Health,* 19 Current Psychology Rep., (Sept. 14, 2017), https://link.springer.com/article/10.1007%2Fs11920-017-0832-4#citeas.

[90] *Id.*

require a cooling-off period before completing paperwork for putting one's newborn up for adoption.[91] A study of the effects of the implications of the 72-hour waiting period in Utah concluded that "one in five women found that making two trips to the health center, and waiting 72 hours in between, did not provide any benefits and made it harder to obtain an abortion."[92] Overall, the study concluded that "two of three women (62%) indicated the additional wait affected them negatively in some way" due to issues such as lost wages, increased expenses, and increase childcare costs.[93] In addition to having a negative impact, mandatory waiting periods did not correct an error in judgment, as many women still made the decision to obtain an abortion despite the waiting period.[94] A study on waiting periods conducted by researchers at the University of California, San Francisco found "the vast majority of women had made their decision prior to arriving for the required abortion information visit and were not conflicted about their decision and most women (86%) proceeded to have abortions after the waiting period." Researchers concluded "in short, women do not seem to need special protection to make this decision."[95]

The University of California waiting period researchers cite a *Journal of the American Medical Association* study that "shows that requiring women to make a separate trip to the clinic to receive the state-mandated information prevents between 10 and 13 percent of women from getting the abortions they seek."[96] Additionally, those who chose to proceed with an abortion incur unnecessary related financial costs as well as increase procedure-related risks the

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[91] *Adoption Laws,* ADOPTION CTR., http://adopt.org/adoption-laws (last visited May 5, 2020).

[92] Jessica N. Sanders PhD, et. al., *The Longest Wait: Examining the Impact of Utah's 72-Hour Waiting Period for Abortion,* 26 Women's Health Issues 483-87 (June 21, 2016), http://dx.doi.org/10.1016/j.whi.2016.06.004.

[93] *Id.*

[94] *Id.*

[95] Sarah C.M. Roberts & Ushma Upadhyay, *Women's Experience with a 72-Hour Waiting Period For Abortion*, Scholars Strategy Network (2016), https://scholars.org/brief/womens-experience-72-hour-waiting-period-abortion.

[96] *See Government-Mandated Delays Before Abortion,* ACLU, https://www.aclu.org/other/government-mandated-delays-abortion (last visited May 5, 2020).

longer they are forced to wait into the gestation period.[97] Therefore, while claiming that mandatory pre-abortion waiting periods are needed to provide a "cooling off period" in which the woman could presumably reflect on the information provided, detailing supposed risks, proponents are producing the opposite: increasing the burden on women financially and are being negligent toward their mental and physical health.

Based on contemporary data regarding mental and physical side effects of abortion, paternalistic legislation, such as pre-abortion mandatory waiting periods, fails to meet our definition of justifiable paternalism. Research from *Abortion and Mental Health: Findings from the National Comorbidity Survey-Replication* concluded that, "After accounting for confounding factors, abortion was not a statistically significant predictor of subsequent anxiety, mood, impulse-control, and eating disorders or suicidal ideation."[98] This research discredits the proposition of proponents of such legislation that abortion waiting periods are necessary in order to protect women from possible negative mental and physical health side effects after undergoing the procedure. The data concludes that outside variables, such as past trauma, a history of psychiatric disorders or substance abuse, coupled with the stress of an unwanted pregnancy carried to term, may cause more negative side effects than an abortion.[99] It also finds that an abortion may have positive benefits by alleviating depression, anxiety, and substance abuse among women.[100]

*C. Parental Consent*

Due to their need for protection and guidance, most philosophical and legal perspectives recognize the need for paternalistic intervention for minors. Yet, just as with adults, there is a debate about what constitutes proper paternalistic intervention and how much the state should act in the role of the parent. Early

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[97] *See id.*

[98] Julia R. Steinberg, Charles E. McColloch & Nancy E. Adler, *Abortion and Mental Health: Findings from the National Comorbidity Survey-Replication,* 123 OBSTETRICS & GYNECOLOGY 263-70, doi:10.1097/AOG.0000000000000092.

[99] *Id.*

[100] *Id*.

paternalistic policies toward children in the Western world often focused on protecting their rights. Developed during the twentieth century, these laws protected children from abuse and neglect, as well as child labor and child marriage.[101] Though academic conceptions of children's rights have evolved over time, many theorists acknowledge that basic rights should be protected for everyone, regardless of age. Still, due to children's state of dependence as well as their physiological and psychological vulnerability, a certain degree of paternalism is justified. However, some might argue that paternalism is justified towards adults, who often make uninformed and/or poor decisions as well.[102] Considering these factors, it is important that governments not only decide to what extent children's rights should be protected, but also what obligations governments and guardians have to children.[103]

Ideally, governments should balance maintaining basic rights for minors, protecting minors from harm, and, to some extent, allowing parents to decide what is best for their children. This can prove difficult. Some rights may be limited in order to protect minors from harm or based on the rationale that they are not mentally equipped to make certain decisions. The issue of parental power over children is also important to consider because not every parent has their child's best interest in mind or is capable of making important decisions on behalf of their child, due to the parent's own lack of rational decision-making skills.

In many legal matters today, minors are viewed as ineligible to make major decisions. The juvenile justice system emerged based partially on this rationale. Because minors may not have the same decision-making capacities as adults, the juvenile justice system is meant to understand psychological and sociological complexities, with the developmental process being a central focus.[104] Of course there are certainly cases where minors should be treated differently

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[101] *See* Sigal R. Ben-Porath, Tough Choices: Structured Paternalism and the Landscape of Choice (Princeton Univ. Press 2010) at 69.

[102] *See id.* at 88.

[103] *See id*. at 71.

[104] *See* Nicole Scialabba, *Should Juveniles Be Charged As Adults in the Criminal Justice System?,* ABA, (Oct. 3, 2016) https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/should-juveniles-be-charged-as-adults/.

from adults, there is a notable hypocrisy associated with how minors are treated in our legal system. For example, many states use different assumptions for minors accused of a crime than for minors seeking medical treatment.[105]

Some states try minors as adults in criminal justice matters but do not treat minors as adults when they are trying to obtain an abortion.[106] The jurisdictional bounds of juvenile court vary depending upon the state, with 41 states limiting minors being tried in juvenile criminal courts to ages 17 and under.[107] Still, seven states limit juvenile jurisdiction to 16 years of age or younger,[108] and two states limit juvenile jurisdiction to 15 years of age or younger.[109] Meanwhile, in those states where juvenile jurisdiction is limited to 16 years of age or younger, minor's abortion rights are restricted either via requiring parental consent, parental notice, and/or court-ordered enforcement if they are below the age of 17.[110] According to the ACLU, many states restrict access to abortion if the woman seeking the abortion is under 18.[111] This means minors can be tried as adults at 16, but they cannot obtain an abortion without some form of parental or judicial involvement. The state assumes they have adult decision-making capacity on criminal cases, but on decisions that affect their own bodies, they are children.

Such logical inconsistency can be seen most clearly when we study state laws that prevent minors from obtaining an abortion without parental consent or a court order. These laws restrict a minor's access to abortion by requiring healthcare professionals to obtain consent from a minor's parents prior to the procedure and/or requiring that a minor's parent, or in some cases both parents, be

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[105] *See id*.

[106] *See id*.

[107] *See id.*

[108] These states are: Georgia, Louisiana, Michigan, Missouri, South Carolina, Texas, and Wisconsin. *See id.*

[109] These states are New York and North Carolina. *See* Scialabba *supra* note 105.

[110] *See An Overview of Minors' Abortion Consent Law,* GUTTMACHER INST., (Feb. 1, 2019), https://www.guttmacher.org/state-policy/explore/overview-minors-consent-law.

[111] *Laws Restricting Teenagers' Access to Abortion*, ACLU, https://www.aclu.org/other/laws-restricting-teenagers-access-abortion (last visited May 5, 2020).

notified prior to the procedure.[112] More specifically, 21 states require one parent to consent prior to a minor's abortion.[113] Eleven states require that a parent be notified prior to a minor's abortion.[114] Five states require that the parent be notified of, and consent to, the minor's procedure.[115] Other states either have parental involvement laws that are enjoined or no policy at all, while only two states and the District of Columbia allow minors to receive abortion services without any form of parental consent.[116]

In addition to being treated hypocritically in the legal system in general, minors who are seeking abortions are subjected to even more unwarranted legal justifications. For example, many states do not require minors to have parental consent to undergo reproductive procedures that are more dangerous than abortions, such as cesarean sections.[117] If laws prohibit abortion for minors without parental consent based on paternalistic justifications, it is inconsistent to require minors have parental consent for abortion procedures, but not for more dangerous reproductive procedures. While abortion may have some health risks associated with it, pregnancy does as well. Yet, prenatal related procedures are not subjected to the same standards as abortion procedures in minors. Overall, 32 states and the District of Columbia allow minors to consent to prenatal care, without parental involvement.[118] Thirteen states allow physicians to inform a minor's parents that she is receiving prenatal care, at the physician's discretion.[119] Some states also allow the minor to be considered mature enough to undergo prenatal procedures without parental consent.[120] These standards are clearly more lenient than those set for abortion.

There is also another double standard in how minors are treated in relation to decision-making and family planning. Many states require parental consent for abortion, but not adoption. For

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[112] *See id.*
[113] *See Counseling and Waiting Periods for Abortions*, *supra* note 43.
[114] *See id.*
[115] *See id.*
[116] *See id.*
[117] *Counseling and Waiting Periods for Abortion*, *supra* note 43.
[118] *See Counseling and Waiting Periods for Abortions, supra* note 43.
[119] *See id.*
[120] *See id.*

example, in 28 states and the District of Columbia, all minors are allowed to choose where their child is placed for adoption.[121] Only five require parental involvement and five others require the involvement of legal counsel, while the remaining states have no existing case law on the issue.[122] Here, it seems clear that paternalism in regards to minors seeking abortion is not justified because the risks and costs of carrying a pregnancy to term are higher, and the decision-making process is more complicated.

Furthermore, in 30 states and the District of Columbia minor parents are able to consent to medical care on behalf of their child/children.[123] Other states lack a policy or case law on this topic.[124] Still, it does not logically follow that minors are not capable of making decisions regarding their reproductive health (as many paternalistic abortion policies insinuate), but that these minors are capable of making decisions in regards to the health of others. Therefore, it seems in states that allow both policies to exist simultaneously, that the notion that these precautions protect minors from their own poor decision-making is merely a justification to prevent minors from obtaining abortions for other reasons. Protecting a minor from making a poor or regrettable decision by providing some sort of counsel is not a priority.

State legislators who support parental consent laws seem unaware of, or not bothered by, the complexities of parental involvement in medical decisions for children. What happens when the desired outcome of the minor, or the desired outcome of the state, conflicts with the desired outcome of the minor's parent or guardian? Due to the impact of negative health outcomes in minors and health crises on large scales (such as debates regarding vaccination requirements), some states allow minors to receive certain health services without parental consent, illustrating the fact that minors can make important health-related decisions without

[121] *See id.*
[122] *See id.*
[123] *See id.*
[124] *See id.*

assistance.[125] In Oregon, minors over the age of 15 can receive hospital care, dental services, and vision services without parental consent.[126] In 18 states across the U.S., including Oregon, minors can receive immunizations without parental consent.[127] Although Oregon has a specific age (15 years) upon which minors can forego parental consent, Washington, and some other states, use a "mature minor" standard to make this distinction.[128] This standard considers the minor's age, self-sufficiency, and ability to understand the treatment they will be receiving.[129] New York makes similar exceptions for certain minors, specifically, teens who are legally emancipated, homeless, in prison, pregnant, or married, for standard vaccinations.[130] Perhaps one of the most lenient states on the on the issue of parental consent in the medical affairs of minors is California.[131] There, minors can consent to medical treatment for sexually transmitted infections, without the approval of their guardians, if they are 12 years of age or older.[132] Notably, they have access to vaccines for human papillomavirus (HPV) and hepatitis B.[133]

Though the risks associated with vaccines differ from those associated with abortion, it seems that the concept of parental consent in cases involving medical treatment for minors is already being undermined. This can be illustrated by the struggle between governments and medical experts that recommend minors be vaccinated and the parents of minors who refuse to do so. In the past few years, Washington and Oregon have both passed laws requiring parents to be educated on the benefits of, and risks of refusing to

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[125] Vaishnavi Vaidyanathan, *Can Minors Get Vaccinated Without Parental Consent?,* INT'L BUS. TIMES, (Feb. 13, 2019), https://www.ibtimes.com/can-minors-get-vaccinated-without-parental-consent-2763119.

[126] Vaishnavi Vaidyanathan, *Can Minors Get Vaccinated Without Parental Consent?,* Int'l Bus. Times, Feb. 13, 2019 at, https://www.ibtimes.com/can-minors-get-vaccinated-without-parental-consent-2763119.

[127] *Id.*

[128] *Id.*

[129] *See id.*

[130] *See id.*

[131] *See id.*

[132] *See id.*

[133] *See id.*

vaccinate their children.[134] These policies strived to balance parental autonomy with public health and welfare. However, due to the ineffectiveness of the policy and the continuation of measles outbreaks, both states are considering legislation to end non-medical exemptions.[135] New York is also currently attempting to pass a bill that would allow all minors over the age of 15 to receive vaccinations without parental consent.[136] The fact that many parents are refusing to vaccinate their children, despite the necessity of vaccinations in protecting children and society as a whole, illustrates the need for paternalistic intervention on behalf of the government over parental freedom. Not all parents can be assumed to know their children's best interests; therefore, it is necessary that, at times, the government protect children, even from their parents.

Regarding abortion and parental consent, there are many justifications that are often provided as to why paternalism may be necessary for medical procedures involving abortion, as opposed to other procedures. Some common paternalist issues are often cited with adults and minors alike. Though issues of mental and physical health are often mentioned as paternalistic justifications to limit abortion, these claims generally do not hold weight. When considering minors, however, judgment failure is often mentioned as a rationale for evoking parental consent.[137]

If the goals of paternalism are to address a failure in judgment and to further an individual's own good, requiring that minors seeking an abortion have parental consent prior to doing so does not coincide with paternalistic ideals. Many of the policies that hinder a minor's ability to access abortion procedures do not address a failure in judgment because other laws undermine the notion that minors are incapable of making their own medical decisions. As the cases of vaccines, pregnancies, and adoptions attest to, many minors can make medical and life decisions, and there are times when their guardians are not successfully capable of making these decisions on their behalf.

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[134] *See id.*
[135] *See id.*
[136] *See id*.
[137] *See* BEN-PORATH, *supra* note 102, at chapter 4.

In terms of furthering an individual's own good, it is unlikely that these policies are successful in this respect either. Mandatory consent laws can put a minor's health at risk by creating additional delays, which cause many women to seek abortions later than planned.[138] Although abortion is still safer than pregnancy, late-term abortions tend to be more dangerous than early-term abortions.[139] These delays can cause minors to undergo unplanned pregnancies and the hardships associated with them.[140] This often includes long-term financial struggles, which are harmful for teens and their children.[141] In some households, minors who reveal they are pregnant and/or plan on receiving an abortion may be harmed by their parents, whether this be physically, emotionally, or financially. If minors are impregnated by family members and forced to carry out these pregnancies, they may experience negative psychological and physiological effects. In cases of rape, victims often have post-traumatic stress disorder, which could be exacerbated by an unplanned pregnancy.[142]

Mandatory consent laws do not prevent reasoning failure in minors and do not further the minor's well-being.[143] If one can call these policies paternalistic, they surely are not effectively so. Better paternalistic policies could be enacted to prevent unwanted pregnancies in minors and would likely produce better outcomes. One of these policies could include better access to birth control, meaning minors could have more affordable birth control that would not require parental consent. Another reasonable paternalist policy would be to allow minors, who are 15 years of age or older, to obtain an abortion without parental consent as they are able to make many other medical decisions without parental consent, depending on their states of residency. Though counsel may be necessary when making their decision, to facilitate policies that protect minors, governments should prioritize the minor's psychological, physiological, and financial needs over their guardian's desires for

[138] *See* Am. Civil Liberties Union, *supra* note 97.
[139] *See id.*
[140] *See id.*
[141] *See id.*
[142] *See id.*
[143] *See id.*

parental control. This is necessary to preserve the minor's autonomy and for their own wellbeing.

## IV. THE PROPER EXTENT OF STATE PATERNALISM

The preceding section shows that state-level paternalistic restrictions on abortion fail on their own terms, such as the mandating of inaccurate or biased information in the name of "informed consent." This section turns to whether paternalistic abortion regulations are permissible. As noted in the introduction, state paternalism faces two levels of justificatory burden, one of which is showing that the intervention does not violate core rights or fundamental freedoms. This section argues that paternalistic abortion restrictions do not meet this standard and thus are impermissible.

Proponents of state paternalism recognize that limits need to be placed on its scope. The types of restrictions defended vary significantly from one position to another.[144] Here, we discuss two prominent approaches to restricting the scope of state paternalism. We show that, according to both accounts, abortion restrictions exceed the bounds of permissible state intervention.

One method of limiting paternalism used by several leading contemporary proponents of such state policies makes a distinction between a paternalism of means and one of ends.[145] "Ends" here are generally understood as those core goals or activities that give meaning and are partially definitive of one's life. In contrast, "means" are those choices about how to pursue various ends.[146] As such, they are of lesser weight or meaning for individuals. The contemporary paternalists who invoke this distinction are concerned with advocating a paternalism of means only. By forswearing intervention aimed at "ends," they are articulating a limiting principle about the scope of intervention and thus addressing concerns about autonomy. The "means paternalists" portray this

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[144] *See* Brent L. Pickett, *The New Paternalists,* 50(2) Polity 300-29 (2018).

[145] Good examples of this approach would be Le Grand & New, *supra* note 2, and SARAH CONLY, AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM (Cambridge Univ. Press 2013).

[146] Descriptions of the scope of "means" are given by Le Grand and New, *supra* note 2, pp.27-30, and Conly, *supra* note 148, ch.4.

distinction as linked to their overall theoretical approach. The results of behavioral economics and psychology over the past few decades show that people make common mental mistakes.[147] These slips, which take certain, predictable forms, thus potentially justify state intervention, but only such intervention which is aimed at correcting such failures. So while we have flawed reasoning about means to our various ends, and interference with that reasoning is permissible, our ends are sacrosanct and not to be touched.

While those advocating this approach sometimes have very broad ideas about our "ends" even as others are narrower, they agree that our "goals, projects, and life-plans" should be off-limits.[148] Thus, a state should not determine our career, but it is permissible for laws to either nudge or compel us to sign up for retirement savings plans (at a reasonable savings rate) when we start a job. Similarly, the state should not take a stand on who we should marry or how large of a family to have. Yet, it can structure mortgage laws to make it safer and easier to shop for home mortgages.[149]

Structuring the decision environment so that it is less likely for a woman to obtain an abortion clearly runs afoul of this position since the choice about carrying a pregnancy to term is a paradigmatic case of an 'end.' If anything, reproductive choices so decisively impact the shape of one's life that paternalism is particularly objectionable here. To use the terminology of this family of theorists, even gentle 'nudges' are off-limits.

To examine an alternative account, in "Avoiding Paternalism," Peter de Marneffe defends paternalistic laws as often appropriate measures while simultaneously articulating boundaries for such laws.[150] He seeks to address one of the most common criticisms of any paternalistic legislation, that interfering in a rational adult's agency is infantilizing. [151] He thus notes that, "Some

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[147] A quick survey of several important examples of such mistakes can be found in RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS Ch. 1-3 (Penguin Books 2008).

[148] JOHN KLEINIG, PATERNALISM 75 (Manchester Univ. Press 1983).

[149] THALER & SUNSTEIN, *supra* note 148, at 134-140.

[150] Peter de Marneffe, *Avoiding Paternalism,* 34 PHIL. & PUB. AFF. 68 (2006).

[151] *Id.*

liberties have a special value in symbolizing the status of adulthood within our society…."[152] These core freedoms provide "an important kind of control over the shape and direction of our lives" and they foster "important opportunities for deliberation and choice."[153] This manner of delimiting the scope of state action fits with other broadly liberal theorists.[154]

As the historical section above shows, women have been denied rights and freedoms that symbolize adulthood. The rights to vote and own property are central examples. Whether the right to choose an abortion symbolizes adulthood today is debatable, what is not up for debate is that millions of women see that right as essential to having full, equal adulthood. More importantly, reproductive freedom is essential to control over the "shape and direction" of one's life. Access to legal abortion also provides an important opportunity for "deliberation and choice." This description of our fundamental liberty interest, grounded in the Fourteenth Amendment, as justifying the legal access to abortion is at the heart of the decision in *Roe v. Wade*.[155] Given de Marneffe's line of argument, it is unsurprising that those who defend state-level abortion restrictions sometimes engage in rhetoric that appears to infantilize women. Wyoming Representative Tass's statement, quoted above, that women need to know that an abortion cannot be returned like a piece of clothing is an example of this.[156]

Most proponents of paternalistic abortion restrictions agree with the limits on state paternalism described above.[157] After all, the state legislatures passing such laws are usually opposed to stricter gun control or even measures like mandating helmets for motorcyclists, both being policies often defended in paternalistic ways. Nor would the proponents of abortion restrictions appreciate paternalism interfering with their religious views. Given this agreement on the underlying values that should limit the scope of

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[152] *See id.*

[153] *See id*.

[154] *See*, for instance, KLEINIG, *supra* note 145.

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

[156] Reynold, *supra* note 3.

[157] All the authors cited here who defend paternalism accept some version of these limits. See Le Grand and New, *supra* note 2; de Marneffe, *supra* note 153; Conly, *supra* note 148; Kleinig, *supra* note 151; Pickett, *supra* note 147.

state paternalism, they need to provide a strong case as to why reproductive choice as a policy domain does not fit within these limits, even though it seems to clearly do so.

We recognize that sponsors and supporters of the types of laws discussed here might be using their stated, paternalistic justifications as a mere pretext. As fellow citizens, however, it is important that we take these arguments seriously and evaluate them. After all, they have been used to justify hundreds of laws that have impacted millions of women and abortion providers. Such an evaluation, as the above demonstrates, shows that they often fail in their own terms, such as by giving inaccurate or immaterial information, or presuming without evidence that women have not thought sufficiently about the procedure and need an additional one to three days. These laws also exceed the bounds of what is acceptable state paternalism.

## V. CONCLUSION

When asked about abortion rights in respect to equal protection and individual autonomy, Supreme Court Justice Ruth Bader Ginsburg once stated that abortion rights were integral to both.[158] She claimed, the right to an abortion was, "central to a woman's life, to her dignity."[159] Furthermore, Justice Ginsburg warned against infantilizing women on this issue stating, "it's a decision that she must make for herself. And when Government controls that decision for her, she's being treated as less than a fully adult human responsible for her own choices."[160] This perspective supports our central issues with many paternalist policies pertaining to abortion.

The heart of any paternalist policy is meant to ensure those following said policy are doing so for their own good. A two-pronged burden of proof must be met. First, imperative to the justification of any policy, a paternalist policy must not violate the

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[158] *THE SUPREME COURT; Excerpts from Senate Hearing on the Ginsburg Nomination,* THE NEW YORK TIMES, (July 22, 1993), https://www.nytimes.com/1993/07/22/us/the-supreme-court-excerpts-from-senate-hearing-on-the-ginsburg-nomination.html.

[159] *Id.*

[160] *Id.*

core rights or liberties of its citizens. Second, to justify a substitution in judgment, a paternalist policy must demonstrate that there is, in fact, a failure in judgment in the decision-making process. We find that policies requiring mandatory counseling, waiting periods, and parental consent prior to abortion fail to meet either of these requirements. Rather than protecting women from negative health outcomes and/or making harmful decisions, these policies tend to harm women physically, mentally, and financially while assuming women are incapable of making their own personal decisions.

Ultimately, many supposedly paternalist policies regarding abortion go beyond the bounds of legitimate paternalism and are to the detriment, rather than the benefit, of women. This causes many to wonder whether these policies can be considered paternalist at all or whether they are simply being used to maintain authority over women. Historically, paternalistic justifications reinforce patriarchal social standards and male control over women's bodies. Although the coverture period of our legal history has ended, it seems patriarchal power over women has shifted from that of the husband to that of the state. It is unlikely that these policies are intended to protect women, and even if that is the intention of these policies, they fail to do so. These policies, therefore, are not truly paternalistic. At their best, these policies are patronizing, and at their worst, they are parlous.