ACUNA AND THE ABORTION RIGHT: CONSTRAINTS ON INFORMED CONSENT LITIGATION

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INTRODUCTION

During the first two decades after the United States Supreme Court upheld the abortion right in *Roe v. Wade*,[1] opponents of abortion mobilized to persuade federal courts to overturn the decision and introduced versions of a constitutional "Human Life Amendment" that would have prohibited legalized abortion.[2] In recent years however, antiabortion activists, frustrated by the lack of success in persuading the Court to overturn its holding in *Roe* and by the slow pace of incremental change through litigation in federal courts, have increasingly turned to malpractice litigation in state courts in an attempt to circumvent intractable constitutional precedent protecting the abortion right. In one such case, *Acuna v. Turkish*, Rosa Acuna sued her gynecologist, Dr. Sheldon Turkish, for medical malpractice under New Jersey state law for terminating her

[1] 410 U.S. 113 (1973).

[2] *See, e.g.*, Hogan Amendment, H.R.J. Res. 261, 93d Cong. (1973).

pregnancy without receiving properly informed consent.[3] Specifically, Acuna argued that her physician failed to provide her with material medical information, because he failed to state that the fetus was "a complete, separate, unique and irreplaceable human being," that the fetus may be capable of feeling pain, that she might suffer "post-abortion syndrome" following the procedure, and that "she would come to realize that she 'was responsible for killing her own child' and bear a weight of guilt for the rest of her life."[4]

Acuna is not an isolated case. During the litigation, Harold Cassidy, the plaintiff's lawyer, filed an almost identical lawsuit in Illinois alleging that a Chicago Planned Parenthood withheld material medical information. Such information included the fact that the abortion procedure "kills a living human being" and that it "subjects the mother to multiple risks," including "terminat[ing] the existing relationship with her existing offspring" and "subject[ing] her to substantial risk of severe emotional trauma."[5] Antiabortion organizations actively solicit women whom have had abortions and provide them with free legal counsel to file malpractice suits against their abortion providers for lack of informed consent.[6]

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[3] Acuna v. Turkish, 930 A.2d 416 (N.J. 2007). In her initial complaint, Acuna alleged multiple injuries, including wrongful death and survival claims on behalf of the fetus, as well as negligent infliction of emotional distress and a lack of informed consent claim on her own behalf. *Id.* at 420. The trial court granted the defendant's motion for partial summary judgment with respect to the wrongful death, survival, and emotional distress claims. An appellate panel upheld the summary judgment ruling on the wrongful death and survival claims, but reversed the trial court on the emotional distress claim. *Id.* Acuna petitioned the United States Supreme Court to review the wrongful death claim, but the Court denied certiorari. Acuna v. Turkish, 915 A.2d 1045 (N.J. 2007) *cert. denied*, 128 S. Ct. 181 (Oct. 1, 2007) (No. 06-1689). This Article focuses only on the emotional distress claim. At the time of writing, although other malpractice lawsuits were pending or expected to be filed, *Acuna* was the most recent—and thus, most instructive—case in which a court had issued a ruling.

[4] *Id.* at 420.

[5] Class Action Complaint at 12, Doe v. Planned Parenthood/Chicago Area, No. 2006-L-012858 (Ill. Cir. Ct. Dec. 8, 2006) [hereinafter *Doe* Complaint].

[6] Primary among these is Life Dynamics, founded by antiabortion activist Mark Crutcher. LifeDynamics, http://www.lifedynamics.com (last visited Dec. 5, 2007). For further discussion, see *infra* Part I.

This Article evaluates the constitutional constraints stemming from sex discrimination on the subset of abortion malpractice claims that turns on lack of informed consent ("*Acuna* claims"). In "*Acuna* claims," plaintiffs allege a lack of consent to the abortion procedure but have not been physically injured—the only injury alleged by the plaintiff is psychological or emotional harm as well as the fact that the abortion took place. In *Acuna v. Turkish* itself, the plaintiff claimed that her abortion provider breached his professional duty of care by failing to disclose material "information"—notably the fetus's status as a "complete, separate, unique and irreplaceable human being,"[7] the claim that abortion psychologically harms women, and that the patient "would come to realize that she 'was responsible for killing her own child' and bear a weight of guilt for the rest of her life"[8]—and, as a result, the provider did not receive the patient's fully informed consent prior to performing the procedure. In *Acuna*, the New Jersey Supreme Court found for the defendant physician on the grounds that "there is no consensus in the medical community or society supporting plaintiff's position that a six- to eight-week-old embryo is, as a matter of biological fact—as opposed to a moral, theological, or philosophical judgment—'a complete, separate, unique and irreplaceable human being' . . . ."[9]

While several opponents of the abortion right have advocated the use of abortion malpractice suits to decrease the availability of abortion,[10] this Article is the first to propose a constitutional challenge to *Acuna* claims that is rooted in the

[7] Acuna v. Turkish, 930 A.2d 416 (N.J. 2007).

[8] *Id.* at 420.

[9] *Id.* at 425–26.

[10] *See, e.g.*, Thomas R. Eller, *Informed Consent Civil Actions for Post-Abortion Psychological Trauma*, 71 NOTRE DAME L. REV. 639 (1996); Justin D. Heminger, *Big Abortion: What the Anti-Abortion Movement Can Learn from Big Tobacco*, 54 CATH. U. L. REV. 1273 (2005); Thomas W. Strahan, *Negligent Physical or Emotional Injury Related to Induced Abortion*, 9 REGENT U. L. REV. 149 (1997); Joseph W. Stuart, *Abortion and Informed Consent: A Cause of Action*, 14 OHIO N.U. L. REV. 1 (1987).

principles of sex equality and women's autonomy.[11] No piece of scholarship has analyzed *Acuna* in depth or written about abortion malpractice suits themselves,[12] although some scholarship has considered the impact of tort law on reproductive rights in the context of statutes regulating particular types of tort claims dealing with abortion.[13]

This Article shows that litigating tort claims in common law courts should not insulate *Acuna* claims from constitutional scrutiny or overarching public policy concerns. In fact, *Acuna* claims are constrained by both constitutional sex equality jurisprudence and public policy norms respecting women's status as equal agents. As a threshold matter, when a state common law judge renders a tort judgment in favor of a plaintiff, the court announces a rule of tort law with prospective application. This means if a state court finds that an abortion provider failed to obtain a patient's informed consent because he did not make a particular statement to the patient, then as a result providers must always make this statement to patients in the future to avoid legal liability. This judge-derived rule of tort law is subject to the Federal Constitution.

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[11] The First Amendment provides an alternative theory upon which to challenge these suits, which several commentators have discussed in the context of statutes that seek to intercede in women's decision-making processes during the abortion decision. *See, e.g.*, Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939. However, such theories may be vulnerable to challenges under the standard articulated in Planned Parenthood of Southeastern Pennsylvania. v. Casey, 505 U.S. 833 (1992) that informed consent to abortion requirements must be "truthful and not misleading."

[12] *Acuna* has been cited in the footnotes of a few articles. *See, e.g.*, Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351 n.130 (2008); Ronald Turner, Gonzales v. Carhart *and the Court's "Women's Regret" Rationale*, 43 WAKE FOREST L. REV. 1 n.230 (2008).

[13] *See generally* Kathy Seward Northern, *Procreative Torts: Enhancing the Common-Law Protection for Reproductive Autonomy*, 1998 U. ILL. L. REV. 489, 494–95; A.J. Stone III, *Consti-Tortion: Tort Law as an End-Run Around Abortion Rights After* Planned Parenthood v. Casey, *8 AM. U.J. GENDER SOC. POL'Y & L. 471 (2000).*

Judgments in favor of *Acuna* claims would establish rules of tort that are inconsistent with the Supreme Court's sex discrimination jurisprudence. This Article addresses three significant components of *Acuna* claims—(1) the statement that the fetus is a "complete, separate, unique and irreplaceable human being,"[14] (2) the claim that abortion psychologically harms women, and (3) the assertion that the patient "would come to realize that she 'was responsible for killing her own child' and bear a weight of guilt for the rest of her life"[15]—to analyze the way in which the *Acuna* claims rely on impermissible assumptions about women's roles and capabilities. The latter two claims impermissibly rely on gender-based generalizations about women's roles as wives and/or mothers because they assign a status of "motherhood" to women terminating their pregnancies and provide, without scientific basis, that this status must entail a defined set of emotional consequences for women. Moreover, all three claims characterize the decision-making capacities of women seeking to terminate their pregnancies as impaired or faulty. Such claims presume that at the time of the decision, women cannot fully appreciate the consequences of their actions, that women must be provided with information that any adult would intuitively know, or that women cannot make their own judgments regarding significant life decisions without moral guidance from the State.

Part I of this Article tracks the transformation of abortion malpractice litigation from traditional tort claims alleging that a patient suffered physical harm as a result of the abortion procedure into the current informed consent-based *Acuna* claims. This Part shows that informed consent-based claims have been brought, not in good faith by injured individuals seeking redress, but by antiabortion activists with the purpose of securing burdensome restrictions on access to abortion. Part I also demonstrates that the reasoning of plaintiffs bringing *Acuna* claims relies on assertions that women possess impaired decision-making capabilities and assumptions that all women are constrained by the social role of motherhood.

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[14] Acuna v. Turkish, 930 A.2d 416, 420 (N.J. 2007).,

[15] *Id.*

Part II of this Article discusses the constraints on these *Acuna* claims from the perspective of constitutional sex equality and substantive due process doctrine. This Article argues that, at a minimum, a state may not regulate behavior through common law judgments that it could not constitutionally regulate through legislation. Consistent with this doctrine, the Constitution requires state regulation to be consistent with a view of women as equal agents. This constraint prohibits states from relying on gender-based assumptions about women's roles as mothers or their capacities as decision makers. Common law judgments in favor of *Acuna* claims, regardless of whether they explicitly endorse the reasoning or motivations of the antiabortion advocates bringing the claims, establish rules of tort law that inherently incorporate these constitutionally impermissible gender stereotypes.

I. Tort Law as an Antiabortion Strategy

An examination of the history and context of abortion malpractice claims illustrates the way in which tort claims have both reflected and shaped strategies of the antiabortion movement over the past two decades. While the tort suits are often in the form of private law—one party suing another for damages to redress an individualized harm—the sources and social history of the abortion malpractice argument make clear that the individuals bringing these suits are interested in norm creation and the collateral impact of the suits, not individual recovery. Those involved in abortion malpractice litigation bring such suits as part of an incremental strategy to restrict exercise of the abortion right, and seek to use the opportunity as a moment for public education and reinforcement of antiabortion norms. Particular assumptions about women's capacities as decision makers and their roles as mothers characterize both the historical development of abortion malpractice suits and the norms articulated by the main actors in the litigation today.

A. The Rise of Abortion Malpractice Litigation

Antiabortion groups and individual attorneys began using medical malpractice suits against abortion providers as a strategy to restrict access to abortion in the mid-1980s. While individual clients may have personally sued their doctors for injuries

resulting from abortion procedures prior to this time, antiabortion organizations first began to utilize malpractice litigation as a component of activist strategies to oppose the practice and legal status of abortion during this period. These organizations actively searched for women who had terminated their pregnancies in order to represent these women in court and widely publicize their activities. One early prominent abortion malpractice organization, Legal Action for Women, distributed fliers directing women who have had abortions to call the organization's toll-free number, 1-800-U-CAN-SUE, for legal assistance.[16]

Abortion malpractice strategies became increasingly popular in the mid-1990s when antiabortion groups, frustrated with the negative response engendered by several highly publicized incidents of violence against abortion providers and clinics,[17] devoted increasing amounts of resources to this new legal strategy.[18] In 1994, Life Dynamics Inc., an organization founded by antiabortion activist Mark Crutcher, developed a large-scale malpractice program that encouraged patients to file malpractice suits against their abortion providers. The

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[16] Flyer, Legal Action for Women (on file with the author). *See also* Charles Rice, *The Malpractice Option*, WANDERER, Mar. 3, 1994, *available at* http://www.priestsforlife.org/articles/malpractice.html:

> Since 1988, LAW has distributed over 100,000 copies of its *Abortion Malpractice Report*, which provides reviews of malpractice cases against abortionists and details procedures that can be followed by women to obtain redress for abortion injuries. LAW . . . also has a registry of cooperating attorneys who are willing to consider taking such cases.

[17] *See* Ronald Smothers, *Roles Reverse in Pensacola Abortion Wars*, N.Y. TIMES, Oct. 2, 1994, at 122 (Vicki Conroy expressed her frustration to a journalist that as a result of the negative response to clinic violence "her side was losing and the other side, with 'a liberal President and liberal Congress in Washington' and now 'all the sympathy,' was winning).

[18] *See* Northern, *supra* note 13, at 494–95; Diane M. Gianelli, *Claiming Abortion Malpractice: Providers Say Suits Are an Attempt to Put Them out of Business*, AM. MED. NEWS, Feb. 6, 1995, at 3 (arguing that "[a] new weapon may prove more successful in decreasing the number of abortion providers than the ongoing threat of violence: the malpractice suit").

organization, well-financed by anonymous donations,[19] provided a range of services to encourage and facilitate the filing of such suits, including how-to videos, brochures proclaiming that "abortion malpractice is poised to become the most prolific litigation opportunity of a decade!,"[20] and access to a network of six hundred lawyers and five hundred experts promising to testify on a range of issues including "postabortion trauma."[21]

Organizations that facilitated and represented plaintiffs in these malpractice suits sought to drive up operating costs and thereby force abortion providers to cease operations. These organizations achieved this goal largely by the litigation itself, which also brought the prospect of increased future liability. Mike Conroy, a founder of Legal Action for Women, explained that:

> Part of the cost of doing business for the abortionist . . . is malpractice insurance, and this insurance is expensive because the insurance companies are aware of the dangers of abortion. Each time an abortionist is sued, his insurance company must be notified. When an abortionist is sued repeatedly, his insurance

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[19] Christopher John Farley, *Malpractice as a Weapon*, TIME, Mar. 13, 1995, at 65, *available at* http://www.time.com/time/magazine/article/0,9171,982658,00.html.

[20] *Id.*

[21] *Id.* The article describes "postabortion trauma" as "a form of emotional harm that L.D.I. lawsuits hope to establish in case law." *Id.* Life Dynamics also hosted a legal education conference in March of 1994 with speakers discussing issues including "actionable injuries attributable to abortion; industry practices that lead to the most common injuries; and the logistics of preparing and litigating an abortion injury case." Gianelli, *supra* note 18. To assist in the malpractice litigation, Life Dynamics boasted a "Spies for Life" program, which encouraged people to collect personal information such as license plate numbers about abortion providers, and sent out cards to abortion providers "strongly suggesting that they not perform abortions." Carol Gentry, *Anti-Abortion Cards Target Doctors*, ST. PETERSBURG TIMES, Apr. 24, 1994, at 1B; *see also* Susan Gilmore, *Sue Abortionists for Malpractice, Says Anti-Abortion Group*, SEATTLE TIMES, Oct. 8, 1993, at A1 ("The single most powerful weapon an abortion malpractice attorney can have is complete information about the abortionist he or she is suing.").

> company will drop him like a hot potato. He will then find it difficult, if not impossible, to be accepted by another insurance company at any cost.[22]

In a Life Dynamics publication, Crutcher similarly defended the utility of malpractice suits as a means to "force abortionists out of business by driving up their insurance rates."[23] Antiabortion activist Joseph Scheidler noted that he and his colleagues felt it was "great" if fear of exposure to liability prevented physicians from providing abortions: "It's effective. Why not use what's effective? . . . They've taken all our other rights away from us. They're passing all kinds of little laws about getting close to the patients . . . . So we'll just put the doctors out of business."[24] As a result of malpractice suits, abortion providers must currently pay to hire attorneys and even non-meritorious claims either cause providers' insurance rates to soar, or render providers uninsurable.[25] Without insurance coverage for performing abortions, physicians may become unable to continue providing the procedure. An abortion provider who had been subject to six malpractice claims, all of which had all been dismissed, described the effect of these suits:

> The suits he filed against me have dirtied my name. They have made me uninsurable for most insurance carriers. They made me pay legal fees to defend myself. I am committed to providing women with a service they need, but I have begun to wonder if it's worth it. You get hit about the head with a two-by-four long enough and you finally say, ouch, that hurts. . . . The problem is, even if they lose, they win . . . . Whatever happens in

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[22] Rice, *supra* note 16. Vicki Conroy, a co-founder of the group, confirms Legal Action for Women's objective: "We saw a way to put a dent in the abortion industry by targeting the motive, which was greed. We want to put the abortionists out of business by making them accountable for their own negligence." *Id.*

[23] Farley, *supra* note 19 (citing MARK CRUTCHER, FIRESTORM: A GUERRILLA STRATEGY FOR PRO-LIFE AMERICA (1992) (an underground prolife manual)).

[24] *See* Gianelli, *supra* note 18.

[25] *Id.*

court, they've had the press conference, and I've been damaged. I'm paying $25,000 a year for insurance now, and I'm not allowed to practice out of state, all because of this developing art form of legal misconduct.[26]

Since a growing number of abortion providers are unable to operate due to a lack of insurance coverage many women, particularly those living in rural areas, will have even greater difficulty obtaining abortions, despite *Roe v. Wade*'s formal protection of the abortion right. In this respect, the use of malpractice litigation to de facto restrict access to the abortion right is a significant example of the incrementalist strategy that has gained increased support within the antiabortion movement. While absolutists within the movement only advocated for overturning *Roe v. Wade* or for a Human Life Amendment to reverse the holding, incrementalists, frustrated with the lack of progress on those goals during the 1980s, have supported more gradual initiatives designed to chip away at access to abortion.[27]

Incrementalists are hoping that this strategy will mobilize public opinion in favor of pro-life policies.[28] In this vein, movement activists recognize the importance of malpractice suits, namely that they can serve both as a way to educate the public about pro-life polices and potentially drive abortion providers out of the market. Life Dynamics, for example, seeks to use malpractice litigation as an opportunity for public education by both providing marketing and advertising assistance to attorneys and distributing literature on abortion complications to women as they exit abortion clinics.[29] Frederica Mathewes-Greene recalls that pro-life activists successfully approached women outside abortion clinics by distributing material "stressing the health risks of abortion. Practitioners of

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[26] Tamar Lewin, A *New Weapon in an Old War—A Special Report; Latest Tactic Against Abortion: Accusing Doctors of Malpractice*, N.Y. TIMES, Apr. 9, 1995, at 1.

[27] For a discussion of incrementalism and absolutism in the pro-life movement, see Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1707–12 (2008).

[28] *See id.*

[29] Gianelli, *supra* note 18.

[this method] find that it gets an abortion-bound woman's attention very quickly when they hand her a list of malpractice cases against the clinic."[30]

In addition to serving as an incrementalist antiabortion strategy, abortion malpractice claims are also an early expression of the woman-protective antiabortion argument: that abortion is wrongful not only because it terminates a potential life, but also because it harms women.[31] The early malpractice suits filed by these groups primarily alleged that physical injures had been inflicted on women as a result of the abortion procedure.[32] However, by the mid-1990s suits were also claiming that abortions caused post-traumatic stress disorder[33] and other forms of emotional harm they described as "postabortion trauma."[34] Life Dynamics, for example, widely distributed a manual that

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[30] Frederica Mathewes-Green, *Unplanned Parenthood: Easing the Pain of Crisis Pregnancy*, 57 POL'Y REV. 28, 30 (1991), *available at* http://www.frederica.com/writings/unplanned-parenthood.html; *see also* Gianelli, *supra* note 18 (stating that antiabortion activists employ a strategy of handing out a "rap sheet" listing the legal claims alleged against the physician or the clinic, hoping to deter them from entering the clinic).

[31] *See* Siegel, *supra* note 27, at 118–40; *see also* Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 [hereinafter Siegel, *The Right's Reasons*]; Reva B. Siegel, *David C. Baum Memorial Lecture, The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (2007) [hereinafter Siegel, *New Politics of Abortion*].

[32] In his book, Mark Crutcher describes a wide variety of physical complications that may result from the abortion procedure and narrates "case studies" of supposed incidents in which these harms occurred. MARK CRUTCHER, LIME 5: EXPLOITED BY CHOICE (1996). Crutcher alleges that these harms include: injuries to the uterus, cervix, intestines/bowel, urinary tract, incomplete abortion or retained tissue, complications from anesthesia or other drugs, infection, hemorrhage, masking of ectopic pregnancy, misdiagnosis of fetal age, ignoring pre-existing conditions (sickle-cell anemia, obesity, asthma, high blood pressure), hysterectomy, heart failure, embolism, abscess, coma, incapacitation, amputation, aspirated vomitus, disease contraction, abortions on women who were not pregnant, failed abortion, unauthorized sterilization, unsought abortions, fetal homograph, psychological injury/suicide and disseminated intravascular coagulation. *Id.*

[33] Gianelli, *supra* note 18.

[34] Farley, *supra* note 19.

contained information intended to assist lawyers by arguing, in part, "that woman [sic] experiencing depression or conflicts after her abortion has suffered 'emotional damages'" and that abortion providers "do not obtain adequate informed consent from women who often experience the post-abortion syndrome of psychological Depression [sic]."[35] The claim that abortion harms women physically, through a variety of complications or by increasing their risk of developing breast cancer, and emotionally, by inducing "post-abortion syndrome," depression, regret, or substance abuse, had been generated and disseminated internally within the antiabortion movement by crisis pregnancy centers.[36] Malpractice claims, however, were distinct because the claims that abortion harmed women were used both internally and strategically deployed and addressed to the general public.

Early activists involved in abortion malpractice suits made direct claims that women had been harmed by abortions. Vicky Conroy of Legal Action for Women noted: "[b]abies were being saved by sidewalk and telephone counseling . . . but we were seeing women's lives destroyed also."[37] Charles Wysong, head of the American Rights Coalition, another organization founded to provide legal assistance for women who have been injured by abortion, described the work of the organization to a Christian newspaper, which wrote:

> The damages to women who have had abortions are real, but there is also a strategic component to Mr. Wysong's efforts. He explains that the pro-life movement has alleged for years that abortion injures women. "The malpractice lawsuits afford us the opportunity to prove the allegation beyond a

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[35] Rice, *supra* note 16. For further discussion of psychological harm and informed consent claims, see Part I.B.

[36] *See* Siegel, *The Right's Reasons*, *supra* note 31, at 1660 (discussing the role of CPCs in disseminating early forms of woman-protective antiabortion claims). For a discussion of the activities of CPCs and their role in the antiabortion movement, see Nancy Gibbs, *The Grassroots Abortion War*, TIME, Feb. 15, 2007, *available at* http://www.time.com/time/magazine/article/0,9171,1590444,00.html.

[37] Rice, *supra* note 16.

> shadow of a doubt. It's time we started turning the microscope on them and making them account for the way they've treated women."[38]

Activists involved in malpractice litigation sought to clarify that they believed not just that abortion injured women, but that the malpractice suits were part of a concerted effort to protect women. Crutcher expressed that malpractice suits "protect women,"[39] while one activist stated that, "they're in such an emotional state, most women are too embarrassed to bring a suit against the doctor, even though they're damaged for life. Many don't realize the impact of their abortion till years later."[40]

A. Abortion Malpractice Litigation's Shift to the Informed Consent Paradigm

Over the past decade the antiabortion movement has increasingly relied on a form of woman-protective antiabortion argument that, instead of focusing on the potential life of the fetus, claims that abortion harms women and specifically that "women are being coerced into unwanted abortions" and need measures that "guarantee[] the right of women to make free and *fully informed* decisions about abortion."[41] In addition to this shift, the rise of incrementalist antiabortion strategies, as well as the Supreme Court's approval of several of these types of

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[38] Editorial Staff, *Women Injured by Abortion Bring Action Suits Against Clinics*, FORERUNNER, Apr. 1989, *available at* http://forerunner.com/forerunner/X0495_Women_Injured_by_Abo.html. Wysong was subsequently ordered by a federal court to pay damages for distributing "Wanted" posters inciting violence against abortion providers. Sam Howe Verhovek, *Creators of Anti-Abortion Web Site Told to Pay Millions*, N.Y. TIMES, Feb. 3, 1999, at 9.

[39] Farley, *supra* note 19, at 65 (citing Crutcher's underground pro-life manual, MARK CRUTCHER, FIRESTORM: A GUERRILLA STRATEGY FOR PRO-LIFE AMERICA (1992)); *see also* Rice, *supra* note 16 (quoting Crutcher saying, "[t]he dirty little secret is how many women are getting injured out there. I believe that a lot of women are suffering in silence because they don't know they can sue").

[40] Gilmore, *supra* note 21.

[41] David Reardon, *Politically Correct v. Politically Smart*, 2 POST-ABORTION REV. 3 (2004), *available at* http://www.afterabortion.org/PAR/V2/n3/PROWOMAN.htm. For an extended analysis of the rise of women-protective forms of antiabortion arguments, see Siegel, *supra* note 27.

regulations in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[42] have enabled the passage of a number of "informed consent" statutes.[43] This type of legislation requires abortion providers to give women seeking an abortion a variety of specific, often biased, information or other forms of counseling before they may terminate their pregnancies. This trend has shaped the types of abortion malpractice suits being brought: in recent years, several claims have alleged that the abortion provider lacked the patient's informed consent to perform the abortion procedure. Antiabortion advocates continued to sue with the underlying purpose of precluding access to abortion through the threat of legal liability, but there was a rhetorical shift to vindicating a woman's rights through respect for her informed consent and freedom from coercion.[44] As the claim that women had been coerced into unwanted abortions without having given fully informed consent developed, "[t]he law of tort . . . supplied a language to allege abortions were wrongfully imposed on women."[45]

Those advancing the informed consent argument make two related claims. First, they claim that the principles of informed consent in tort law should be applied to the abortion context and that a doctor must provide a particular set of information to women in order to receive their fully informed consent prior to performing the abortion procedure. Second, they argue that abortion providers have a duty to screen women for "risk factors" prior to the procedure, reasoning that at least some women are incapable of consenting to abortion. An early, influential article that was later cited by many prominent antiabortion activists made each of these claims. In *Abortion and Informed Consent: A Cause of Action*, Joseph Stuart argued that

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[42] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[43] *See, e.g.*, David C. Reardon, *Informed Consent: The Abortion Industry's Achilles Heel*, 2 POST-ABORTION REV.,1 (Spring–Summer 1994), [hereinafter Reardon, *Informed Consent*], *available at* http://www.afterabortion.info/PAR/V2/n2/INCONSNT.htm ("Following [*Casey*'s] lead, pro-life organizations in several states have successfully lobbied for regulations on the informed consent procedures at abortion clinics.")

[44] Siegel, *supra* note 27, at 129.

[45] *Id.*

tort law provided a remedy in the abortion context "where consent is not informed."[46] If the principles of informed consent applied to the decision to have an abortion, he argued, "the physician would have the responsibility to relate every inherent and potential, material risk of physical, psychological and emotional harm, and, towards that end, the stage of fetal development and the possibility that human life is present, the nature of the procedure, and the alternatives to the therapy."[47] Stuart also questioned "whether informed consent can truly apply to the abortion decision,"[48] suggesting that it may be impossible for women, or at least some women, to freely give their informed consent to terminate their pregnancies.

Prominent activists in the antiabortion movement have attempted to deploy the informed consent argument in the context of contested scientific and social scientific claims. Vincent Rue has claimed that "[t]he two most common causes of action in abortion malpractice are: (1) negligence in evaluating/ screening a patient, pre-abortion; and (2) lack of informed consent . . . ."[49] Focusing primarily on the latter issue, Rue claims that women who have terminated their pregnancies but who claim not to be suffering from psychological trauma are simply denying or repressing their "emotional responses to the

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[46] Joseph W. Stuart, *Abortion and Informed Consent: A Cause of Action*, 14 OHIO N.U. L. REV. 1, 2 (1987).

[47] *Id.* at 15.

[48] *Id.* at 2.

[49] Vincent M. Rue, *Abortion Malpractice: When Patient Needs and Abortion Practice Collide*, 9 RES. BULL., Nov./Dec. 1995, *available at* http://www.lifeissues.net/ writers/air/air_vol9no1_1995.html.

abortion trauma."[50] Rue uses this false consciousness claim to argue that women who have not yet sued their abortion providers are merely repressing their traumatic response to abortion: "When denial breaks and painful symptoms cause significant suffering, it is far more likely at this point that a woman will consider bringing a lawsuit against her abortion provider."[51]

David Reardon, the Executive Director of the Elliot Institute, has similarly argued that doctors have a duty to inform women seeking to terminate their pregnancies of any risk factors they present because it may make them particularly susceptible to complications. In reference to the risk of emotional trauma following the procedure, Reardon states that:

> Uninformed consent may also occur when a patient is not informed of personal physical or psychological characteristics which would pre-identify the patient as being at higher risk of suffering one or more post-procedural complications. If the patient was not informed of these high risk factors because the physician failed to identify them during pre-procedure

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[50] *Id.* Moreover Rue, argues that:

> Women who are emotionally traumatized by their abortions, and perhaps physically traumatized as well, are frequently overwhelmed by the depths of emotions that the abortion experience evokes. The factors of being surprised and overwhelmed by the intensity of the emotional and physical response to the abortion-experience frequently act upon the post-abortive woman to cause her to resort to the defenses of repression and denial.

Id.

[51] *Id.*

> screening, the physician might be guilty of negligence.[52]

Reardon argued not only that physicians must inform women of any characteristic risk factors they may possess, but also that physicians must affirmatively refuse to perform the abortion procedure if, based on these risk factors, the abortion "would not

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[52] Reardon, *supra* note 41; *see also* David C. Reardon, *Abortion Decisions and the Duty to Screen: Clinical, Ethical, and Legal Implications of Predictive Risk Factors of Post-Abortion Maladjustment*, 20 J. CONTEMP. HEALTH L. & POL'Y 33, 34 (2003) [hereinafter Reardon, *Abortion Decisions*]:

> Inadequate screening is a matter of negligence in two regards. First, the failure to screen for known risk factors means that the physician has neglected to develop an informed medical recommendation based on the individual woman's unique risk factors and circumstances . . . . Second, inadequate screening is the direct cause of inadequate disclosure of risks to the woman. When women are not informed of the risk factors they possess and the negative outcomes associated with those particular factors, their consent is uninformed.

Id. Reardon also wrote an abortion malpractice manual for Life Dynamics. David C. Reardon, *Abortion Malpractice: The Book*, 2 POST-ABORTION REV. 1 (Winter 1993), *available at* http://www.afterabortion.org/PAR/V2/n1/MALPRACT.htm [hereinafter Reardon, *Abortion Malpractice*]:

> Last summer I was asked to write an introductory manual for attorneys on abortion malpractice. I have long dreamt of writing exactly such a book, so it didn't take any arm twisting to convince me to jump right into it . . . . Life Dynamics, a pro-life group spearheading education efforts for attorneys interested in abortion malpractice, has already distributed over 10,000 copies of this manual. In addition, on March 4th and 5th, Life Dynamics sponsored a conference for attorneys interested in representing plaintiffs in abortion malpractice.

Reardon's work apparently has influenced Life Dynamics's abortion malpractice claims. In his 1996 book providing instruction on how to sue abortion providers, *Lime 5: Exploited by Choice*, Crutcher includes that "[a] well established principle of medicine is that, while counseling a patient prior to surgery, the physician has a duty to screen the patient for contraindicators . . . . If he does not, he has clearly breached the minimum standard of care and is liable for whatever damage occurs to the patient." CRUTCHER, *supra* note 32, at 261.

benefit the woman's overall health needs."[53] He states that "the doctor may have an ethical, and even legal, obligation to refuse to perform the requested abortion if, in his best medical judgment, the abortion is contraindicated because (1) it is likely to cause serious harm to the woman, and/or (2) it is unlikely to produce the benefits she seeks."[54] As a result, Reardon clarifies, "[f]or the substantial number of women—perhaps the majority of women"[55] a physician's judgment about what is best for a woman would be substituted for a woman's decision whether to terminate her pregnancy.

The "risk factors" that Reardon identifies are far-reaching. In an article titled *Identifying High Risk Abortion Patients*, Reardon compiles a lengthy list of "risk factors" that he claims are predictive of post-abortion psychological effects.[56] One group of women that Reardon identifies as particularly susceptible to potential emotional trauma following abortions are those with "[c]onflicting maternal desires," which he indicates may be expressed in ways such as "[t]herapeutic abortion of wanted pregnancy due to maternal health risk, . . . [s]trong maternal orientation,. . . [b]eing married, . . . [p]rior children,. . . [and] [f]ailure to take contraceptive precautions, which may indicate an ambivalent desire to become pregnant."[57] Reardon also notes that those with "[f]eelings of shame or social stigma attached to abortion" and "[s]trong concerns about secrecy" are at risk because these concerns are symptomatic of "[d]ifficulty making the decision, ambivalence, [and] unresolved

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[53] Reardon, *Informed Consent*, *supra* note 43.

[54] Reardon, *Abortion Decisions*, *supra* note 52, at 35–36.

[55] Reardon, *Informed Consent*, *supra* note 43.

[56] David C. Reardon, *Identifying High Risk Abortion Patients*, 1 POST-ABORTION REV.,3 (1993) [hereinafter Reardon, *Identifying High Risk*], *available at* http://www.afterabortion.info/PAR/V1/n3/HI_RISK.htm.

[57] *Id.*

doubts."[58] These factors conflict in such a way which ensures that a woman in any situation will fall into one of these categories. For example, Reardon identifies women who have made the decision to terminate a pregnancy without assistance from their partners or who have a poor relationship with their partners as at risk, yet accompaniment to the clinic by a male partner, potentially indicative of a strong and supportive relationship, is also characterized as a risk factor.[59] It is therefore clear that Reardon's informed consent strategies are directed at precluding access to abortion entirely. He explicitly states that, "[e]ven if abortion remained legal, *the abortion industry can be shut down by malpractice suits alone*—but only if post-abortion

[58] *Id.* The other factors Reardon identifies as indicators of "[d]ifficulty making the decision, ambivalence, [and] unresolved doubts" are "[m]oral beliefs against abortion," including "[r]eligious or conservative values," and "[n]egative attitudes toward abortion;" other indicators of "[c]onflicting maternal desires" such as "[o]riginally wanted or planned pregnancy," "[a]bortion of wanted child due to fetal abnormalities," and "[p]reoccupation with fantasies of fetus, including sex and awareness of due date"; and "[s]econd or third trimester abortion, which generally indicates strong ambivalence or a coerced abortion of a "hidden pregnancy." *Id.* Other risk factors include "[f]eels pressured or coerced" to have an abortion by a husband or boyfriend, parents, doctor, counselor, or employer; "[f]eels decision is not her own, or is 'her only choice'"; "[f]eels pressured to choose too quickly"; and that the "[d]ecision is made with biased, inaccurate, or inadequate information." *Id.* Reardon also identifies a series of "psychological or developmental limitations," including adolescence; "[p]rior emotional or psychiatric problems," including "[p]oor use of psychological coping mechanisms," "[p]rior low self-image," "[p]oor work pattern," and "[p]rior unresolved trauma;" "history of sexual abuse or sexual assault"; "[b]lames pregnancy on her own character flaws, rather than on chance, others, or on correctable mistakes in behavior"; "[a]voidance and denial prior to abortion"; "[l]ack of social support," including "[f]ew friends; "[m]ade decision alone, without assistance from partner," "poor or unstable relationship with male partner"; "[l]ack of support from parents and family, either to have baby or to have abortion"; "[a]ccompanied to abortion by male partner"; and "[p]rior abortion(s)." *Id.*

[59] *Id.*

research is done to empower women to successfully sue their abortionists."[60]

Reardon recently sought to advance his informed consent theory by proposing a referendum in Missouri that, among other provisions, would have imposed legal liability on abortion providers if they failed to present any published information on

[60]David C. Reardon, *Ending Abortion: Learning the Truth—Telling the Truth* [hereinafter Reardon, *Ending Abortion*], *available at* http://www.afterabortion.info/strateg.html (last visited Mar. 9, 2010); *see also* Reardon, *Informed Consent*, *supra* note 43 ("A more rigorous adherence to the pre-abortion screening and informed consent standards . . . would clearly reduce the number of abortions performed. Not only would abortionists be obligated to refuse to perform contraindicated abortions, but women themselves would reconsider their request for abortion after full disclosure of the risks.").

risk factors to patients considering abortion.[61] Such a referendum would effectively require abortion providers to present the results of their own scientifically questionable findings to women seeking to terminate their pregnancies.[62] The Missouri proposal, titled the "Prevention of Coerced and Unsafe

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[61] *See Prevention of Coerced and Unsafe Abortions Act*, STOPFORCEDABORTIONS.ORG, http://www.stopforcedabortions.org/initiative.htm (last visited June 3, 2011). Reardon has proposed similar legislation in the past. In 1995, he developed a model informed consent statute that would allow a patient to sue her abortion provider for lack of informed consent by showing only non-disclosure of information. The legislation would establish an "Abortion Information Depository," to which anyone could submit information and if "there [was] something in the Depository which was not disclosed but which a reasonable patient would have found relevant to her decision," the abortion provider would be held liable for non-disclosure. *See* David C. Reardon, *Closing the Net: Beyond Informed Consent*, 3 POST-ABORTION REV., No. 1 (Winter 1995) [hereinafter Reardon, *Closing the Net*], *available at* http://www.afterabortion.info/PAR/V3/n1/MODELLAW.htm. Reardon has also proposed a "Woman's Right To Know Referenda," which would amend state constitutions to state:

> Women have a civil right to full disclosure of all risks, alternatives, or other information which a patient might reasonably consider relevant to a decision to accept or refuse a recommendation for abortion. The State may not limit a woman's right to seek recovery in civil court for any injuries related to induced abortion.

David C. Reardon, *The Woman's Right To Know Referenda*, 3 POST-ABORTION REV. No. 3 (Summer 1995) [hereinafter Reardon, *Woman's Right*], *available at* http://www.afterabortion.info/PAR/V3/n3/PETITION.htm. Among other things, Reardon argues that this statute would "clarify the legal principle that when a woman requests an abortion the decision to proceed is always the result of the physician's recommendation (patients never prescribe their own treatment)." *Id.* For a discussion of other state statutes designed to assist women in recovering damages for abortion related malpractice, see Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 TEMP. L. REV. 123 (2007); Amy R. Sobie, *New Laws Will Provide More Protection for Women*, 6 POST-ABORTION REV. (1998), available at http://www.afterabortion.info/PAR/V6/n2/LAleg.htm (discussing proposed laws in Louisiana and Missouri).

[62] *Cf.* Reardon, *Identifying High Risk*, *supra* note 56 (claiming, in his article listing "risk factors" indicating a higher likelihood of post-abortion psychological distress, that "[s]ince these high risk factors have been well established for a considerable period of time, abortion providers who fail to utilize this information in their screening and counseling procedures may incur greater liability for subsequent injuries when malpractice suits are brought on these grounds").

Abortions Act" and backed by Reardon's Elliott Institute, imposed liability on doctors unless the provider reviewed each patient for "psychological, emotional, demographic or situational" risk factors, including the presence of coercion, and certifies that the abortion was better for the woman than carrying the pregnancy to term.[63] Failure to comply with the provisions of the statute would expose abortion providers to legal liability, including a $10,000 judgment for each "risk" which the doctor failed to notify the patient of, and also allow women to sue for the wrongful death of the fetus for up to two years "after the date the woman has recovered from any psychological complications."[64] A physician would be liable for omitting the information *even if an injury did not result.* Although Reardon and his allies failed to get the proposal on the Missouri ballot in 2008, he has pledged to re-propose the measure in 2010.[65]

Several notable abortion malpractice claims were recently brought by Harold Cassidy, attorney for the plaintiffs in the infamous New Jersey surrogacy case *In re* Baby M.[66] Cassidy, who has also attempted to reopen *Roe v. Wade*[67] and its companion case *Doe v. Bolton*,[68] in recognizing the abortion to

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[63] *Prevention of Coerced and Unsafe Abortions Act, supra* note 62; *see also Abortion Foes Seek Vote in Missouri*, KANSAS CITY STAR, Nov. 29, 2007, at B1.

[64] *Prevention of Coerced and Unsafe Abortions Act, supra* note 61, at § 4(2).

[65] *Id.*

[66] *See* HAROLD J. CASSIDY & ASSOCIATES, http://www.haroldcassidy.com/ (last visited May 6, 2011).

[67] 410 U.S. at 113 (1973).

[68] 410 U.S. at 179 (1973).

present new evidence about the harmful effects of abortion,[69] has made it clear that his representation of the plaintiffs in *Acuna v. Turkish* and *Doe v. Planned Parenthood/Chicago Area* are efforts to reverse *Roe*.[70] *Acuna* and *Doe* allege, in substantially similar language, that abortion providers failed to receive informed consent to perform the procedure because they did not disclose "material information." "Material information" Reardon alleges to be, *inter alia*, that: the fetus was "a complete, separate, unique and irreplaceable human being"[71] that may be capable of feeling pain, that the patient may suffer "post-abortion syndrome" following the procedure, and that the patient would come to realize that she 'was responsible for killing her own child' and bear a weight of guilt for the rest of her life."[72]

Cassidy also participated in drafting an "informed consent" statute for South Dakota, which was recently upheld against a

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[69] *See* Brief in Support of Rule 60 Motion For Relief From Judgment at 9–11, 28–30, McCorvey v. Hill, Civil Action No. 3:03-CV-1340-N (formerly Nos. 3-3690-B and 3-3691-C), 2003 U.S. Dist. LEXIS 12986 (N.D. Tex. 2003) (seeking to reopen *Roe v. Wade*, 410 U.S. 113 (1973)). For a discussion of the reopening of the suits and their relationship to the recent Supreme Court decision in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), see Siegel, *supra* note 27, at 132 n.94.

[70] Materials prepared by Cassidy to be played on a radio program hosted by Priests for Life include statements such as: "This is a project that will help us overturn *Roe v. Wade*—what a victory that would be." EWTN, *A Challenge to Roe vs. Wade: Part I* (Eternal Word Television Network radio broadcast), *available at* http://www.ewtn.com/ vondemand/audio/file_index.asp?SeriesId=6619&pgnu (transcript on file with author) [hereinafter EWTN Radio Broadcast].

[71] Acuna v. Turkish, 930 A.2d 416, 420 (N.J. 2007) (citing complaint); *Doe* Complaint, *supra* note 5, at 11 (stating "there is a separate entire human entity or organism—a human being—living inside her").

[72] *Acuna*, 930 A.2d at 420; *Doe* Complaint, *supra* note 5, at 12:

> The procedure subjects the mother to multiple risks, which include the fact that the mother, if she has the procedure, would permanently terminate the existing relationship with her existing offspring; the procedure subjects her to substantial risk of severe emotional trauma that may adversely affect her entire life; may result in suicidal ideation, and even attempts of suicide, and numerous other physical and psychological risks.

First Amendment challenge seeking a preliminary injunction by the Eighth Circuit sitting *en banc*.[73] The South Dakota statute was clearly influenced by *Acuna* and *Doe v. Planned Parenthood/Chicago Area*: It requires physicians performing abortions to "inform" patients that the procedure "will terminate the life of a whole, separate, unique, living human being," a phrase which is nearly identical to the language in *Acuna*. The statute also requires physicians to state that "the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota."[74] The statute is supported by official legislative recognition that abortion harms women and that women's decision-making capacities are impaired when making the abortion decision:

> The Legislature finds that procedures terminating the life of an unborn child impose risks to the life and health of the pregnant woman. The Legislature further finds that a woman seeking to terminate the life of her unborn child may be subject to pressures which can cause an emotional crisis, undue reliance on the advice of others, clouded

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[73] Planned Parenthood Minn. v. Rounds, 530 F.3d 724 (8th Cir. 2008) (*en banc*).

[74] S.D. CODIFIED LAWS §§ 34-23A-10.1(1)(b), (c) and (e) (2005). The legislation also requires doctor to provide:

> A description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including: (i) Depression and related psychological distress; (ii) Increased risk of suicide ideation and suicide; . . . (iv) All other known medical risks to the physical health of the woman, including the risk of infection, hemorrhage, danger to subsequent pregnancies, and infertility.

Id. The doctor must certify that the patient understands this information as well as communicate any questions she has in writing. *Id.*

> judgment, and a willingness to violate conscience to avoid those pressures.[75]

The above findings are taken from the South Dakota Task Force Report,[76] which was produced to support a ballot initiative banning abortion that was defeated in 2004. Cassidy also participated in the hearings of the South Dakota Task Force Report.[77]

In his writing and speaking engagements, Cassidy has made clear that his "informed consent" litigation is driven by his belief in women's inability to make choices contrary to what he perceives as their true nature as mothers. Cassidy argues that there is an "*inherent* uninformed nature of the [abortion] decision, of trying to decide whether to keep one's child or surrender the child, before birth, which is an impossibility, [and] it's also inherently coercive."[78]

Cassidy identifies women's status as mothers to be the source of this confused decisional process. He consistently refers to the individuals involved in making the abortion decision not as women but as "mothers,"[79] and makes it clear that all women

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[75] H.B. 1166, 2005 Leg., 80th Sess. 3 (S.D. 2005) (cited in S.D. CODIFIED LAWS § 34-23A-1.4 (2005)), *available at* http://legis.state.sd.us/sessions/2005/1166.htm.

[76] Reva B. Siegel has described the way in which the findings in the South Dakota Task Force Report rest on impermissible gendered assumptions about women's decision-making capacities and their roles as mothers and invokes disputed medical and social science claims. *See* Siegel, *New Politics of Abortion*, *supra* note 31.

[77] Siegel, *supra* note 27, at 134 n.96 (tracing Cassidy's involvement with the 2004 South Dakota abortion ban).

[78] EWTN Radio Broadcast, *supra* note 70.

[79] For example, on his website Cassidy describes *Rounds* as involving "some of the most important factual and legal issues surrounding the protection of the rights of pregnant mothers." HAROLD J. CASSIDY & ASSOCIATES, http://www.haroldcassidy.com/ (last visited Jan. 8, 2010). In a radio interview, Cassidy repeatedly refers to women as "mothers." *See generally* EWTN Radio Broadcast, *supra* note 70.

fall into this category.[80] Cassidy's notion that women are incapable of consenting to terminate pregnancy is based on his assumption that motherhood is inherently part of women's nature. To this end Cassidy claims that motherhood itself limits women's decisional capacity. Cassidy states that abortion is more than what a woman "is really wired and capable of doing. To have a policy built on a premise that a woman can kill her own child and that it's okay is terrible."[81] As part of a set of materials Cassidy prepared for a radio program about his abortion malpractice, Sandra Cano, plaintiff in the case *Doe v. Bolton*, made the following statement about abortion using gendered language about women's nature: "Abortion is really a violation into a very deep and sacred part of a woman; our capacities to reproduce is what makes us so unique as women. And when that's been violated . . . our integrity as a woman has been stripped away and destroyed . . . ."[82] Similarly, Cassidy contends that to support legal abortion is to "think that women can deny that they are women, they can deny that they are mothers."[83]

While individuals who have suffered medical injury as a result of abortion procedures are certainly entitled to relief through the tort system, the history of these claims and the

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[80] *See* EWTN Radio Broadcast, *supra* note 70 ("There is crisis thinking. I don't care how smart a woman is, I don't care how responsible she is, how in control of her life, there's something about that particular circumstance . . . ."); *see id*:

> But to me, one of the greatest facts, or legal consequence of these facts that the mothers precious right, *and I think all women will share my belief*, and the belief of the plaintiffs, that the most important liberty interest that any woman has is her interest in her relationship with her child.

Id. (emphasis added).

[81] Sarah Blustain, *The Right Not To Choose: TAP Talks to Prominent Anti-Abortion Lawyer Harold Cassidy*, AM. PROSPECT, Apr. 13, 2007,, http://www.prospect.org/ cs/articles?article=the_right_not_to_choose.

[82] EWTN Radio Broadcast, *supra* note 70.

[83] *Id.* Cassidy adds that this belief is "not only ignorant, it's cruel." *Id.*

individuals bringing them establishes that the majority of these cases are brought for the purpose of restricting or eliminating the abortion right. Moreover, the claims of the antiabortion movement rely on assumptions about women's abilities to make choices as autonomous and self-governing adults. Such claims include those made by Reardon, that doctors must refuse to perform abortions on women who present any of an all-encompassing range of "risk factors," and Cassidy, that women are incapable of consenting to the abortion procedure. These assumptions about women's status as mothers, as we shall see, are the very ones that have been repudiated by developments in both common law and constitutional law.

II. Constitutional Constraints on *Acuna* Claims

Litigating *Acuna* informed consent claims in state common law courts may appear to be an ideal litigation strategy to restrict the abortion right while avoiding constitutional scrutiny from federal courts as well as a way of engendering state regulation with the effect of legislation without lobbying to pass a new bill. Common law tort litigation, however, does not provide a simple means of evading constitutional strictures because state tort law remains subject to the Constitution.[84] This Part explains how constitutional law places limitations on common law tort litigation in state courts and provides illustrative examples of instances where the constitutional prohibition on sex discrimination has shaped state tort law. Having established that constitutional law places significant constraints on judge-made tort law, this Part further explores the limitations placed on *Acuna* claims from sex equality and substantive due process doctrine.

States may not regulate behavior through common law judgments that they could not constitutionally enact through legislation. Accordingly, and consistent with the Supreme Court's equal protection jurisprudence, tort law judgments must

[84] Though this Article does not address this approach specifically, that such suits may also be subject to challenge on state constitutional grounds. *See, e.g.*, Brief in Support of Summary Judgment at 32–37, Acuna v. Turkish, 930 A. 2d 416 (N.J. 2007) (No. a-15-06) (relying on state constitutional grounds).

be consonant with a view of women as equal agents.[85] Yet, central elements of *Acuna* claims remain at odds with constitutionally prohibited gender-based assumptions about women's roles as mothers and their capacities as decision makers. This tension renders favorable judgments of these claims impermissible, even if they do not explicitly endorse some of the reasoning antiabortion advocates, because such judgments inherently incorporate these constitutionally proscribed gender stereotypes.

A. State Tort Judgments Must be Consistent with Constitutional Liberty and Sex Equality Jurisprudence

Judgments issued by common law courts interpreting state tort law constitute state action subject to the equality guarantee of the Fourteenth Amendment and the liberty interest developed in the Supreme Court's abortion rights jurisprudence. Any form of state law remains bound by the limitations imposed by the Supremacy Clause in the federal Constitution,[86] and common law, though judge-made, constitutes state law. The majority of commentators generally support the premise that courts, which are state actors, impose substantive tort law upon parties to litigation and as a result, this law is subject to constitutional

[85] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973).

[86] U.S. CONST. art. VI, cl. 2.

constraint.[87] Moreover, the U.S. Supreme Court has repeatedly recognized that state tort law is constrained by constitutional

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[87] *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 159 (1993):

> Under our Constitution, it is entirely correct to say that only government behavior, and not private action, is subject to constitutional constraints. . . . The lesson is that the law of contract, tort, and property is just that—law. It should be assessed the same way in which other law is assessed.

See also LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 257 (1985):

> So long as the party injured of threatened with injury by a permissive state rule sues the private injurer in state court, and that tribunal then denies relief on the basis of the state rule, *that* invocation of the rule by the state court itself becomes 'state action' reviewable on the merits by the Supreme Court.".

See generally Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENT. 361 (1993) (arguing that the Constitution is the supreme law of the land and does not specifically exclude private law from the class of laws over which the Constitution is supreme); Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 418–19 (2003) (arguing that under the Supremacy Clause, which holds that the federal Constitution trumps "any Thing in the Constitution or Laws of any State," U.S. CONST. art. VI, § 1, cl. 2, and the Supreme Court's holding in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), that state common law is part of the "Laws of any State," "[t]he common law at issue in private litigation is subject to the Constitution in precisely the same way as statutory private and public law"). While the Court's holding in *Shelley v. Kraemer*, 334 U.S. 1 (1948) that a state common law court's enforcement of a racially restrictive covenant constituted state action and therefore violated the Equal Protection Clause has received some criticism from commentators, the relevant distinction between the judicial enforcement of contract and tort law makes this point not relevant to the tort law at issue in the present case. As several commentators have recognized, the contested issue in *Shelley* is not whether the court's upholding of the covenant is state action, which it clearly is, but "whether the Constitution forbids the state's apparently neutral use of its courts to enforce contracts, including racially restrictive property agreements." SUNSTEIN, *supra* note 87, at 160. *See also* Alexander, *supra* note 87, at 365:

limitations in a number of contexts, most notably defamation law.[88]

The Supreme Court has made clear that rules of defamation law articulated by a common law court, like those enacted by a state legislature, must conform to constitutional law.[89] In *New York Times Co. v. Sullivan*, the Supreme Court reviewed Alabama's defamation law and held that the state courts applied

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> *Shelley* is usually criticized for its finding of state action in the Missouri courts' enforcement of private covenants. But on that point, *Shelley* was absolutely correct. The problem in *Shelley* was the Supreme Court's immediate jump from 'judicial enforcement of private discriminatory covenants is state action' to 'judicial enforcement of private discriminatory covenants is constitutionally tantamount to state discrimination'.

See also TRIBE, *supra* note 87, at 259–60 (arguing that "*Shelley* has typically been misread as holding that court-facilitated injury to black home-buyers from the state's neutral role of enforcing all contracts without regard to racially harmful effects is sufficient to trigger strict scrutiny under the Equal Protection Clause," when in fact the holding in *Shelley* rested on the fact that "to enforce any such restraint, a state court must find that the *substance* of the restraining covenant is reasonable and consistent with public policy."). By its nature, tort law requires application of substantive common law rules, and therefore any objections to *Shelley* involving the neutral application of contract law do not apply to the tort context.

[88] *See, e.g.*, ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 119–78 (1995) (discussing First Amendment doctrine in the context of an intentional infliction of emotional distress claim in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)); TRIBE, *supra* note 87, at 259 (discussing several cases in which "the state court invoked a state law that visited harm upon the defendants, who successfully challenged the constitutionality of that state action in the Supreme Court").

[89] *See, e.g.*, David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755 (2004) (arguing that the Supreme Court should be more reluctant to prescribe specific solutions to conflicts between state tort law and First Amendment requirements); David A. Logan, *Tort Law and the Central Meaning of the First Amendment*, 51 U. PITT. L. REV. 493 (1990) (arguing that Supreme Court defamation doctrine should be modified to only preclude liability for politically salient speech within the "central meaning" of the First Amendment); Thomas C. Galligan, Jr., *Limiting State Power to Articulate and Develop Tort Law—Defamation, Preemption, and Punitive Damages*, 74 U. CIN. L. REV. 1189 (2006); Richard D. Bernstein, Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749 (1985).

a rule of law to defamation suits that did not conform with the constitutional protections afforded by the First Amendment.[90] In this case an Alabama court instructed the jury that an advertisement sponsored by a civil rights group and published in the *New York Times* which contained false information about the actions of the Montgomery police was "libelous per se."[91] However, the Supreme Court also held that the authority of the Alabama courts to award damages under state defamation law was constrained by the First Amendment. The Court took notice of the way that constitutional principles place limitations on common law tort litigation:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.[92]

Subsequent cases have reaffirmed the principle that the Constitution places limits on judge-made state tort law. No later case, even those permitting more restrictions on speech, has challenged the premise that state defamation doctrine remains constrained by the constitutional norms expressed in the First

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[90] 376 U.S. 254, 264 (1964). While the *New York Times* argued that the Alabama Court's ruling offended both the First and Fourteenth amendments, the Court decided the case under the First Amendment's "guarantees" of freedom of speech and press and did not reach the Fourteenth Amendment issues. *Id.* at 264 n.4.

[91] *Id.* at 262.

[92] *Id.* at 265 (citations omitted).

Amendment.[93] Moreover, the Supreme Court has imposed First Amendment limitations on other areas of state tort law regulating speech. In contexts such as invasion of privacy,[94]

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[93] It is clear that in effect, *New York Times v. Sullivan* and its progeny have established an "overlay" of constitutional protections prohibiting common law judges from applying rules of law to defamation cases that conflict with first amendment principles. The Court extended the holding in *New York Times v. Sullivan* in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) to apply to all public figures, and in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 32 (1971), to apply to private individuals. After the composition of the Court changed in the early 1970s, the holding in *Gertz v. Robert Welch, Inc.*, retreated somewhat from its prior decisions and held that "[a]s long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to a private individual." Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). However, the Court did not challenge the central premise that First Amendment norms constrain defamation claims in state courts and sought to establish a balance between the protection private reputations and the promotion of publicly salient speech. In *Dun & Bradstreet Inc. v. Greenmoss Builders Inc.*, 472 U.S. 749, 759 (1985), the Court, in holding that a credit reporting agency was liable for falsely reporting that a company had filed for bankruptcy, considered the types of speech on public matters that are at "the heart of the First Amendment's protection." (quoting First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)). Subsequently in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986), the Court stated that "[o]ne can discern in [*Greenmoss* and *Hepps*] two forces that may reshape the common-law landscape to conform to the First Amendment."

[94] *See, e.g.*, Fla. Star v. BJF, 491 U.S. 524, 535–36 (1989) (holding that a rape victim's claim of invasion of privacy by public disclosure of fact against a newspaper for publishing her name was barred by the First Amendment in part because imposing liability for the publication of facts disclosed by the government provides impermissible incentives for the press to self-censor); Time, Inc. v. Hill, 385 U.S. 374 (1967) (holding that a *Life* magazine feature portraying a Broadway play as an accurate reflection of plaintiff's experiences was protected by the First Amendment because of the potential that liability could chill assiduous reporting by the media).

appropriation[95] and intentional infliction of emotional distress,[96] the Court has reversed tort verdicts because not doing so would allow state judges to effectively and unconstitutionally chill protected speech.

The principle that constitutional limitations constrain state common law applies equally in contexts beyond the First Amendment. Specifically, it requires judge-made tort law to be consistent with constitutional liberty and sex equality doctrine. As a result, common law judgments involving *Acuna* claims must be adjudicated consistent with the Supreme Court's Fourteenth Amendment jurisprudence invalidating state regulation that discriminates on the basis of sex. Aside from grounding the substantive challenge in the Fourteenth rather than the First Amendment, constitutional defenses to *Acuna* claims differ in another respect from *New York Times v. Sullivan* and its progeny: while the newspaper asserted its own First Amendment rights as a constitutional defense to the tort claim in *Sullivan*, a physician's defense to an *Acuna* claim hinges on the Fourteenth Amendment rights of her patients.[97]

Litigants have successfully defended the rights of third parties in cases where they met each of three prudential third-

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[95] *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (analyzing a claim by a "human cannonball" that a news station appropriated his property because they showed his entire routine on the news under the First and Fourteenth Amendments and determining there was no constitutional limitation on the claim because the plaintiff's property interest in his routine was sufficient to outweigh the burden on speech).

[96] *See* Hustler Mag. v. Falwell, 485 U.S. 46 (1988) (reversing a state court decision that had permitted Jerry Falwell to sue Hustler magazine for producing a parody of him for a claim of intentional infliction of emotional distress).

[97] A physician could argue, in the alternative, that imposing liability for an *Acuna* claim would infringe upon her own Fourteenth Amendment right to practice her chosen occupation. *See, e.g.*, Okpalobi v. Foster, 981 F. Supp. 977, 980 (E.D. La. 1998) (abortion providers arguing that they have standing to challenge a statute that would expose abortion providers to extensive legal liability because they will "undoubtedly be prevented from practicing their chosen profession in violation of the Fourteenth Amendment"). The success of this argument is not critical, however; as this discussion shows, a physician facing an *Acuna* claim could exercise third-party standing on behalf of her patients.

party standing requirements. The plaintiff before the court must (1) have suffered some injury, (2) demonstrate a close relationship with the absent party, and (3) establish that some hardship prevented the absent party from appearing in court on her own behalf.[98] The Court has reaffirmed that abortion providers bringing suits on behalf of their patients fulfill these conditions and concluded that "it generally is appropriate to allow a physician to assert the rights of female patients as against governmental interference with the abortion decision."[99] Note that whether a party may raise the constitutional claims of third parties does not turn on the constitutional substance of the challenge, but rather hinges on the procedural third-party standing requirements, both prudential and constitutional, established by the Supreme Court.[100]

There are two potential distinctions between challenges to conventional statutory abortion regulations, such as those at issue in *Planned Parenthood of Southeastern Pa. v. Casey*, and the interference with abortion rights imposed by state common law in the context of *Acuna* claims, but both are immaterial. With regard to the first prong of the test for third-party standing, both types of regulation cause injury to abortion providers themselves, albeit in slightly different ways. Statutory abortion

[98] *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 112–118 (1976); Robert A. Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CALIF. L. REV. 1308, 1323–35 (1982).

[99] *Singleton*, 428 U.S. at 118. The *Singleton* Court summarized that abortion providers bringing suits on behalf of their patients fulfill the three conditions of third-party standing in the following way: (1) Abortion regulations place abortion providers themselves at risk of legal liability; (2) the fact that women can only access legal abortions to which they are constitutionally entitled, with the assistance of an abortion provider forges a close relationship between the parties; and (3) the legal obstacle of mootness and practical concerns such as privacy are may prevent women from bringing claims on their own behalf to challenge abortion regulations. *Id.* at 112–18; *see also*, Planned Parenthood v. Casey, 833 U.S. 505 (1992); Doe v. Bolton, 410 U.S. 179 (1973).

[100] For example, although the Court has not yet recognized the Equal Protection Clause of the Fourteenth Amendment as a basis for the abortion right, advocates have often arguments grounded in both equal protection and due process, and the Court has never suggested that litigant's standing was contingent on or limited to their substantive due process claims. *See, e.g.*, *Doe*, 410 U.S. at 189.

regulations injure abortion providers through punitive application of the statute while the *Acuna* context personally exposes providers to civil tort liability.[101] It is also inapposite that cases involving conventional statutory abortion regulations are often brought by abortion providers as affirmative facial challenges, for the third-party standing doctrine applies to defenses as well as facial challenges.[102] For example, in *Barrows v. Jackson*, the Supreme Court allowed a constitutional defense based on third-party standing where a white property owner, subject to a racially restrictive covenant, was able to raise the equal protection rights of non-white future owners as a defense to a breach of covenant suit.[103] By analogy, it would be permissible for a physician to raise the Fourteenth Amendment rights of his patients in defense to a common law tort suit. Counter-intuitively, in the *Acuna* context it might appear that a physician is raising an equal protection claim on behalf of a patient in defense to a suit brought by that same patient, but this is not the case. In the *Acuna* context the abortion provider raises a constitutional claim not solely on behalf of the one patient acting as the plaintiff, but also on behalf of any of his patients seeking to terminate a pregnancy. A successful *Acuna* claim would make the problematic statements contained in the *Acuna* complaint a *de facto* requirement to legally terminating a pregnancy in the jurisdiction. As argued in Part II.B *infra,* this requirement would pose a clear equal protection violation that would injure any woman seeking an abortion. A physician refusing to provide such a script would be exposed to substantial

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[101] The court in *Okpalobi v. Foster* apparently accepted this argument, accepting third-party standing in a case where abortion providers argued that a statute would "force physicians in Louisiana to cease performing abortions because of the potential exposure presented in the form of civil damage remedies related to the performance of a consensual, legal abortion," and that this result would, inter alia, "place[] an undue burden on women seeking abortions." *Okpalobi*, 981 F. Supp. at 980.

[102] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) (allowing a defendant to raise the constitutional rights of third parties in defense to the violation of a state law that prohibited distribution of birth control to unmarried people); Griswold v. Conn., 381 U.S. 479 (1965) (allowing a defendant to raise the constitutional rights of third parties in defense to the violation of a state law that prohibited distribution of birth control to married couples).

[103] 346 U.S. 249 (1953).

legal liability that could compel the physician to stop performing abortions altogether, placing an undue burden on women's access to abortion.

B. *Acuna* Claims May Not Incorporate Constitutionally Prohibited Sex Discrimination

Given that state tort law constitutes state action subject to federal Constitution constraints, states may not create substantive law through common law judgments that they could not constitutionally pass through legislation. As such, common law judgments involving *Acuna* claims must be adjudicated in a manner consistent with the Supreme Court's Fourteenth Amendment jurisprudence invalidating state regulation that discriminates on the basis of sex.

1. Constitutional Equal Protection and Due Process Requirements

To be consistent with the values that animate the Constitution's guarantee of equal protection, tort law must fundamentally presuppose the equal agency of women and men. State regulation must respect the choices of individuals to determine their own family and social roles and assume that both sexes possess equal cognitive and decision-making capacities. Since 1971, when the Supreme Court first held that the Fourteenth Amendment's equal protection guarantee extended to prohibit discrimination on the basis of sex in *Reed v. Reed*,[104] the Court has firmly established that states may not regulate in ways designed to promote gendered family roles. The Court further articulated this principle in *Frontiero v. Richardson*,[105] where it invalidated a U.S. military policy distinguishing between male and female service members in the distribution of benefits.[106] States were no longer free to regulate based on considerations of conventional family roles that presumed women were dependent

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[104] 404 U.S. 71, 77 (1971) (holding that a mandatory preference for males as administrators of estates over females violated the Equal Protection Clause of the Fourteenth Amendment).

[105] Frontiero v. Richardson, 411 U.S. 677 (1973).

[106] *Id.* at 678.

on their husbands. Recognizing that the state promotion of gendered family roles reinforces women's subordination,[107] later sex equality jurisprudence has rejected the nineteenth century ideology of separate spheres and recognized that"[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[108] This principle of sex discrimination jurisprudence forbids states from regulating on the basis of assumptions that women will invariably select traditional social roles as mothers and dependent wives.

Moreover, the state may not regulate in a manner that relies on generalizations about women's capacities and abilities. The Court made this point explicit in *Mississippi University for Women v. Hogan*[109] when it stated that:

> Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.[110]

The principle respecting women's autonomy to determine their life roles without interference by the state is also vindicated by the Court's abortion jurisprudence. While the sex discrimination cases recognize that the promotion of gendered family roles reinforces group inequality, the Court's substantive due process

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[107] *See* Siegel, *New Politics of Abortion*, *supra* note 31, at 996.

[108] *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979) (citing Stanton v. Stanton, 421 U.S. 7, 14–15 (1975)).

[109] 458 U.S. 718 (1982).

[110] *Id.* at 724–25.

jurisprudence casts the same harm as an invasion of women's constitutionally protected liberty interest. In *Planned Parenthood v. Casey*,[111] the Court found the abortion right in a liberty interest in self-determination, recognizing that "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[112] Moreover, in striking down a portion of a Pennsylvania statute that required a married woman to consult with her husband prior to terminating her pregnancy, the *Casey* court explicitly repudiated the law of coverture's enforcement of women's roles as wives and mothers stating that:

> There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. In *Bradwell v. State*, three Members of this Court reaffirmed the common-law principle that "a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state . . . ." Only one generation has passed since this Court observed that 'woman is still regarded as the center of home and family life,' with attendant 'special responsibilities' that precluded full and independent legal status under the Constitution. These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.[113]

Of course, not all informed consent regulations in the abortion context are constitutionally impermissible under *Casey*. In *Casey*, the Court upheld Pennsylvania's informed consent statute, which required abortion providers to inform women undergoing the abortion procedure of: (1) details about the nature of the procedure; (2) the material medical risks; (3) the probable gestational age of the fetus; (4) the availability of printed materials discussing alternatives to abortion; and (5) the availability of child support as well as state assistance for

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[111] 505 U.S. 833 (1992).

[112] *Id.* at 851.

[113] *Id.* at 896–97 (internal citations omitted).

prenatal and neonatal medical care.[114] Although *Casey* substantially changed the landscape of permissible abortion regulation, it did not provide a blanket authorization to pass any type of informed consent regulation. Rather, the *Casey* Court found that the informed consent section of the Pennsylvania statute, to the extent that it required only "the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus"[115] constituted a reasonable form of state regulation that did not *unduly burden* access to the abortion right.

Following *Casey*, several states passed informed consent statutes modeled on the Pennsylvania standard,[116] some of which seem to genuinely enhance women's autonomy and free choice. Connecticut, California and Maine, for example, all passed informed consent laws requiring abortion providers to inform patients about the nature and consequences of the procedure without mandating the inclusion of any specific information designed to dissuade women from choosing abortion.[117]

State informed consent laws, however, vary widely in their requirements, and opponents of abortion have increasingly lobbied for and passed statutes that deviate substantially from the Pennsylvania statute upheld in *Casey*. States have now passed informed consent statutes that, among other provisions, require abortion providers to make specific, scientifically

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[114] 18 PA. CONS. STAT. § 3205 (2008).

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

[116] Given the precedent in *Casey*, many such statutes have been upheld by courts. *See, e.g.*, A Woman's Choice E. Side Women's Clinic v. Newman, 305 F. 3d 684 (7th Cir. 2002) (upholding Indiana statute); Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999) (upholding Wisconsin statute); Barnes v. Moore, 970 F.2d 12 (5th Cir. 1992), *cert. denied*, 506 U.S. 1021 (1992) (upholding Mississippi statute); *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570 (Ohio Ct. App. 1993), *appeal dismissed*, 624 N.E.2d 194 (Ohio 1993).

[117] CAL. CODE REGS. tit. 22, § 75040 (2009); CONN. GEN. STAT. §§ 19a-116, 19a-116-1(c) (2008); ME. REV. STAT. ANN. tit. 22, § 1599-A (2008).

discredited claims that abortion causes breast cancer[118] and psychological harm,[119] that fetuses are able to feel pain,[120] show patients large color photographs or videos[121] of fetuses in various developmental stages, and require that women undergo and sometimes view an ultrasound prior undergoing an abortion procedure.[122] The constitutionality of these provisions remains an open question; many present novel legal issues and have not been considered by most jurisdictions.[123] Regardless, it is clear that these new provisions raise new, complex equal protection

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[118] *See, e.g.*, MINN. STAT. §145.4242(a)(1)(i) (2008); MISS. CODE ANN. § 41-41-33(1)(a)(ii) (2008); TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(1)(b)(iii) (Vernon 2009).

[119] *See, e.g.*, ARK. CODE. ANN. § 20-16-904(a)(2)(C)(3) (2008) (requiring the state to provide printed materials that discuss the "possible detrimental psychological effects of termination of pregnancy"); NEV. REV. STAT. § 442.253(1)(c) (2009) (requiring physicians to explain the "emotional implications of having the abortion"); WIS. STAT. ANN. § 253.10(3)(c)(1)(f) (West 2008) (requiring physicians to inform abortion patients of the risk of "psychological trauma").

[120] Eight states currently require abortion providers to counsel women about fetal pain. *See* GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: COUNSELING AND WAITING PERIODS FOR ABORTION (2009), *available at* http://www.guttmacher.org/statecenter/spibs/ spib_MWPA.pdf.

[121] UTAH CODE ANN. § 76-7-305 (2007). These steps are required even in the case of medically necessary abortions (except in medical emergencies). *See* UTAH DEP'T. OF HEALTH, DIV. OF HEALTH CARE FIN., THERAPEUTIC ABORTION: INFORMED CONSENT, UTAH MEDICAID PROVIDER MANUAL (1998).

[122] Patrikk Jonsson, *Ultrasound: Latest Tool in Battle over Abortion*, CHRISTIAN-SCIENCE MONITOR, May 15, 2007, *available at* http://www.csmonitor.com/2007/ 0515/p03s03-ussc.html:

Alabama, Georgia, Mississippi, Arkansas, Idaho, and Michigan now require doctors to offer women seeking abortions an opportunity to view an ultrasound. Laws in Indiana, Oklahoma, Utah, and Wisconsin require that doctors inform women that ultrasounds are available.

For a critique of mandatory ultrasound requirements, see Sanger, *supra* note 12.

[123] The Seventh Circuit, for example, has upheld Wisconsin's informed consent statute, which requires physicians to inform women of the risk of "psychological trauma" and offer to show patients an ultrasound and fetal heartbeat monitor. Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999).

and due process issues that are not simply controlled by the Court upholding the Pennsylvania statute in *Casey*.[124]

In sum, to comply with the constitutional equal protection guarantee, state regulation must treat men and women as equal agents. States must avoid stereotypes that presume women will select particular, gender-differentiated roles in the context of marriage and caretaking. Similarly, states must presume that men and women possess equal abilities and decision-making capacity.

2. How Do Constitutional Limitations Constrain *Acuna* Claims?

Acuna claims can prevail only where a court applies rules of tort law that are fundamentally inconsistent with these principles articulated in the Court's sex discrimination cases.[125] Though the reasoning used by litigants bringing *Acuna* claims appears egregiously reliant on gender-based stereotypes, the discussion of this reasoning primarily serves to illustrate the incompatibility between the basis for relief sought and constitutional gender equality norms. A judge need not adopt this reasoning for a judgment in favor of the plaintiff to be constitutionally barred. Rather, by holding that a physician failed to procure a patient's informed consent to the abortion procedure because he did not make a specified statement to her, the court declares a substantive rule of tort law. Put differently, in order to procure informed consent to an abortion, the provider must provide the patient with the statements. Such rulings would effectively announce new, affirmative rules with which physicians would be required to comply in the future, or else be subject to legal liability. Note that these tort rules operate similarly to and achieve nearly the same effect as traditional

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[124] For further discussion of the constitutional permissibility of various forms of informed consent to abortion statutes, see Robert D. Goldstein, *Reading Casey: Structuring the Woman's Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787, 791 (1996).

[125] For an extended discussion of the ways in which woman-protecting rationales based on assumptions about women's roles as mothers and their capacities as decision makers constitute impermissible sex discrimination under the Fourteenth Amendment in the context of the failed South Dakota abortion ban, see generally Siegel, *New Politics of Abortion*, *supra* note 31.

state regulation in the form of legislation: they establish compulsory rules with the force of law that have prospective application. This Subpart considers in turn three rules of tort law requested by the plaintiff in *Acuna* and identifies the constitutional deficiencies in each rule.

First, ruling in favor of an *Acuna* claim would establish a rule of informed consent that requires physicians to tell a woman seeking an abortion that "she would come to realize that she 'was responsible for killing her own child' and bear a weight of guilt for the rest of her life,"[126] in order to obtain the patient's informed consent to the abortion procedure. Aside from the fact that this statement is factually contrary to established scientific and medical authority, such a rule is also incompatible with the Equal Protection Clause's prohibition on state regulation that relies on stereotypes about women's role in the family and their capacities as decision makers. Simply, the state may not require that physicians make statements to women that incorporate impermissible, gender-based assumptions. The *Acuna* language contains two problematic elements of this nature. First, the statement implicitly characterizes a pregnant woman seeking to terminate an unplanned pregnancy as a "mother" with a relationship to "her own child."[127] Second, the statement assumes that all women seeking to terminate a pregnancy have an existing relationship of a particular nature with their "child" that will cause them to feel guilt if they terminate their pregnancies. Statements by plaintiff's attorney Harold Cassidy, while not constitutional violations per se, further illuminate the unacceptable social meaning behind these statements. Cassidy repeatedly refers in his court filings to women, including women

[126] Acuna v. Turkish, 930 A.2d 416, 420 (N.J. 2007).

[127] *Id.*

who have terminated or intend to terminate their pregnancies, as "mothers."[128]

These two preceding assumptions both assign the social role of "motherhood" to women terminating their pregnancies and provide that this status must entail a defined set of emotional consequences for women. This renders the proposed [*Acuna*?] statement inconsistent with the Court's sex discrimination jurisprudence that forbids any state regulation relying on gender-based generalizations about women's roles as wives or mothers. Just as the regulations at issue in *Frontiero* and *Hibbs* were rooted in stereotypes that wives are financially dependent on their husbands and women are the primary caretakers of young children, the proposed *Acuna* rule would rest on the assumption that women invariably have a particular disposition towards motherhood. This premise recalls a time when women were legally defined by their familial roles as caretakers and wives, rather than as independent legal agents.[129] Like the *Frontiero* and *Hibbs* regulations, adopting the *Acuna* rule would reinforce an outdated stereotype that motherhood should be a woman's primary social role. This, in turn, would impose upon women the state's vision of motherhood and the family rather than respecting women's autonomy to determine their own social roles.

Moreover, such a rule would be impermissibly premised on the notion that women who terminate their pregnancies suffer from impaired decision-making faculties. Thus to inform a woman that "she would come to realize that she 'was responsible for killing her own child' and bear a weight of guilt

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[128] *See* Letter Submission of Plaintiff Respondent Acuna Under Rule 2:6-11(d) at 6, *Acuna*, 930 A.2d 416 (No. a-15-06) ("[W]ithholding information about the impact an abortion procedure will have on the fetus will result in the *mother* suffering 'grief more anguished' and 'sorrow more profound' when the *mother* realizes she would not have had the abortion if she was told the truth . . . .") (emphasis added); *see also* EWTN Radio Broadcast, *supra* note 70 (identifying other contexts in which Cassidy refers to women in general as "mothers").

[129] *See, e.g.*, NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 17 (1982); WILLIAM BLACKSTONE, 1 COMMENTARIES *387; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 180 (15th ed. 1826).

for the rest of her life"[130] presumes that women in this position who choose abortion fail to adequately appreciate the consequences of their actions. Under this line of thinking, a woman will regret terminating her pregnancy only after she comes to understand the full consequences of her decision. Thus, a tort rule requiring an abortion provider to make this statement to women seeking an abortion is precisely the type of regulation that the Supreme Court had in mind when it prohibited state regulation that sought to "exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior."[131] Such a tort rule endorses and promotes a viewpoint that fully functioning adult women do not have the capacity to consent to choices that will fundamentally alter their lives. Proponents of this kind of regulation seek to "protect" women from their inherent inability to appreciate the consequences of their decisions and make an informed choice. Such a rule does not treat women as equal agents with the ability to make self-determining choices equal to men and as such is not consistent with the requirements of the Equal Protection Clause.

Similarly, upholding an *Acuna* claim would result in a second rule of tort that requires physicians to tell women that they may suffer "post-abortion syndrome" following the abortion procedure. The *Acuna* plaintiff describes post-abortion syndrome as "a unique kind of post-traumatic syndrome" with symptoms that include depression and malaise.[132] Medical authority, however, has not recognized "post-abortion syndrome" or "abortion trauma syndrome" as a pathological

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[130] *Acuna*, 930 A.2d at 420.

[131] Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–25 (1982).

[132] Plaintiff's Brief in Support of Motion for Summary Judgment, at 3, *Acuna*, 930 A.2d 416 (No. a-15-06).

condition.[133] The American Psychological Association has made clear that "there is no medical diagnosis" with the name "post abortion syndrome."[134] The American Psychiatric Association similarly does not recognize the purported condition as a mental disorder.[135]

Moreover, the claim that abortion itself causes clinically significant psychological harm has been consistently refuted by

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[133] *See* Lisa Rubin & Nancy Felipe Russo, *Abortion and Mental Health: What Therapists Need To Know*, 27 WOMEN & THERAPY 69, 73 (2004) ("Antiabortion advocates allege that 'postabortion syndrome' is a type of post-traumatic stress disorder (PTSD), though no scientific basis exists for applying a PTSD framework to understand women's emotional responses to a voluntarily obtained legal abortion."); Nada Stotland, *The Myth of Abortion Trauma Syndrome: Update, 2007*, 42 PSYCHIATRIC NEWS 28, 28 (2007):

> The assertions of psychological damage made by legislatures and the Supreme Court are contrary to scientific evidence . . . . APA [American Psychological Association] invests millions of dollars and years of expert deliberation to craft the titles and definitions of psychiatric diagnoses. 'Abortion trauma syndrome' and 'post-abortion psychosis' are inventions disguised to mimic those diagnoses, and they demean the careful process . . . .

[134] AM. PSYCHOL. ASS'N, TASK FORCE: A SINGLE ABORTION IS NOT A THREAT TO WOMEN'S MENTAL HEALTH (2008), *available at* http://www.apa.org/pi/wpo/abortion-health.html:

> Some people cite 'post-abortion syndrome' as a consequence of having an abortion, although there is no medical diagnosis with this name. So-called post-abortion syndrome has been likened to post-traumatic stress disorder: a lasting depression, often resulting in substance abuse and sometimes even suicide attempts. The APA task force found that research to date does not show a direct connection between a single elective abortion and such mental health issues.

[135] *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) (4th ed. 1994) (declining to recognize post-abortion syndrome).

psychological studies.[136] Although a few studies have suggested a link between abortion and mental trauma,[137] these have largely been discredited due to methodological flaws.[138] The American Psychological Association recently convened a Task Force on Mental Health and Abortion that reviewed every peer-reviewed English language empirical study published after 1989 on the

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[136] *See, e.g.*, Nancy E. Adler et al., *Psychological Factors in Abortion: A Review*, 47 AM. PSYCHOLOGIST 1194, 1202–03 (1992) ("The best studies available on psychological responses to unwanted pregnancy terminated by abortion in the United States suggest that severe negative reactions are rare, and they parallel those following other normal life stresses."); Zoe Bradshaw & Pauline Slade, *The Effects of Induced Abortion on Emotional Experiences and Relationships: A Critical Review of the Literature*, 23 CLINICAL PSYCHOL. REV. 929, 948 (2003) ("The conclusions drawn from the recent longitudinal studies looking at long-term outcomes following abortion, as compared to childbirth, mirror those of earlier reviews with women who have abortions doing no worse psychologically than women who give birth to wanted or unwanted children."); Anne C. Gilchrist et al., *Termination of Pregnancy and Psychiatric Morbidity*, 167 BRIT. J. OF PSYCHIATRY 243, 248 (1995) ("Our study found that the total rates of psychiatric disorder occurring after termination of pregnancy and after childbirth are similar."); Nancy Felipe Russo & Jean E. Denious, *Violence in the Lives of Women Having Abortions: Implications for Practice and Public Policy*, 32 PROF. PSYCHOL. 142, 142 (2001) ("When history of abuse, partner characteristics, and background variables were controlled, abortion was not related to poorer mental health."); *see also* Siegel, *supra* note 27, at 1720 n.81; Emily Bazelon, *Is There a Post-Abortion Syndrome?*, N.Y. TIMES, Jan. 21, 2007, at 41.

[137] Many of the studies that claim to have found a link between abortion and mental distress were conducted by David Reardon, who does not have a degree in medicine or psychology, and holds a Ph.D. from an unaccredited, online university. *NOW* : Show 329 (PBS television broadcast transcript July 20, 2007), *available at* http://www.pbs.org/now/ transcript/329.html.

[138] *See, e.g.*, Jesse R. Cougle, David C. Reardon, & Priscilla K. Coleman, *Depression Associated with Abortion and Childbirth: A Long Term Analysis of the NLSY Cohort*, 9 MED. SCI. MONITOR 105 (2003); David C. Reardon et al., *Psychiatric Admissions of Low-Income Women Following Abortion and Childbirth*, 168 CANADIAN MED. ASS'N J. 1253 (2003). For methodological critiques of the above studies and others, see, for example, APA TASK FORCE ON MENTAL HEALTH & ABORTION, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 24, 31, 23–52 (2008), *available at* http://www.apa.org/pi/wpo/mental-health-abortion-report.pdf; Brenda Major, *Psychological Implications of Abortion—Highly Charged and Rife with Misleading Research*, 168 CANADIAN MED. ASS'N J. 1257, 1258 (2003).

subject.[139] Based on this research, the American Psychological Association concluded that "among adult women who have an unplanned pregnancy the relative risk of mental health problems is no greater if they have a single elective first-trimester abortion than if they deliver that pregnancy."[140] Moreover, the Task Force found that "the prevalence of mental health problems observed among women in the United States who had a single, legal, first-trimester abortion for non-therapeutic reasons was consistent with normative rates of comparable mental health problems in the general population of women in the United States."[141]

Consistent with this prevailing conclusion in the psychological community, it appears that no court has found the claim that abortion per se causes significant psychological or emotional harm to be adequately supported by legally sufficient medical authority. For example, in *Smith v. Planned Parenthood of the St. Louis Region*,[142] a case brought with the assistance of David Reardon, the plaintiff claimed emotional harm due to the abortion provider's failure to properly inform her of the physical and emotional consequences of abortion.[143] Specifically, the complaint charged that the provider failed to inform the patient of a series of "risk factors," taken directly from David Reardon's article "Identifying High Risk Abortion Patients."[144] The Missouri informed consent statute, however, required that the complaint be accompanied by an affidavit from a medical professional testifying that the defendant physician breached his duty of care. The *Smith* plaintiff was only able to attach an affidavit from Reardon, and the Court dismissed the case because it found that Reardon was not a medical professional

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[139] APA TASK FORCE ON MENTAL HEALTH & ABORTION, *supra* note 138, at 3.

[140] *Id.* at 4 (emphasis omitted).

[141] *Id.*

[142] Smith v. Planned Parenthood of the St. Louis Region, 237 F. Supp. 2d 1016 (E.D. Mo. 2005).

[143] Complaint at ¶ 27, *Smith*, 237 F. Supp. 2d 1016 (No. 4:03-CV-1727).

[144] Reardon, *Identifying High Risk*, *supra* note 56; *see supra* notes 53–61 and accompanying text.

and therefore unqualified to testify on the standard of care applicable to an abortion provider.[145] In the Supreme Court's most recent abortion decision, *Gonzales v. Carhart*, the majority reasoned that women who come to regret their decisions to terminate their pregnancy will suffer from "severe depression and loss of esteem."[146] Yet, this assertion comes without reference to a single medical authority, and the Court even concedes: "we find no reliable data to measure the phenomenon."[147] Justice Ginsburg's dissenting opinion debunks the majority's claim, citing a litany of medical studies in support of the conclusion that:

> [N]either the weight of the scientific evidence to date nor the observable reality of [thirty-three] years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long term mental health than delivering and parent a child that she did not intend to have .[148]

Some women do, of course, experience feelings of sadness or grief after terminating a pregnancy. These experiences, however, do not adequately support the claim that there is a traumatic disorder directly resulting from having an abortion. All reliable studies on the issue, as well as the varied experiences of women who have terminated pregnancies, reflect the conclusion that women experience a range of emotional responses following an abortion, similar to the aftermath of any other major life

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[145] *Smith*, 237 F. Supp. 2d 1016.

[146] Gonzales v. Carhart, 550 U.S. 124, 159 (2007).

[147] *Id.*

[148] *Carhart*, 550 U.S. at 183 n.7 (Ginsburg, J., dissenting) (quoting Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, 9 GUTTMACHER POL'Y REV. 8 (2006)).

event.[149] While some women experience feelings of sadness or loss, studies have shown that the most common emotional response to an abortion is a sense of relief and a heightened level of psychological well-being.[150]

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[149] *See, e.g.*, APA TASK FORCE ON MENTAL HEALTH & ABORTION, *supra* note 138, at 4 (citations omitted). ("Abortion is an experience often hallmarked by ambivalence, and a mix of positive and negative emotions is to be expected. Some women experience beneficial outcomes, whereas others experience sadness, grief, and feelings of loss following the elective termination of a pregnancy."). The Task Force goes on to clarify:

> In considering the psychological implications of abortion, it is important to recognize that the term abortion encompasses a diversity of experiences and means different things to different women. Women obtain abortions for a variety of reasons, at different times of gestation, via differing medical procedures, all of which may affect the experience of abortion. Women's responses after abortion do not only reflect the meaning of abortion to her; they also reflect the meaning of pregnancy and motherhood, which varies among women. Furthermore, women obtain abortions within widely different personal, social, economic, religious, and cultural contexts that shape the cultural meanings and associated stigma of abortion and motherhood as well as others' responses to women who have abortion. All of these may lead to variability in women's psychological experiences to their particular abortion experience. For these reasons, global statements about the psychological impact of abortion on women can be misleading.

Id. at 9.

[150] *See, e.g.*, David A. Grimes & Mitchell D. Creinin, *Induced Abortion: An Overview for Internists*, 140 ANNALS INTERNAL MED. 620, 624 (2004) ("The most common reaction to abortion is a profound sense of relief. In some studies, abortion has been linked with improved psychological health because the abortion resolved an intense crisis in the woman's life."); Brenda Major et al., *Personal Resilience, Cognitive Appraisals, and Coping: An Integrative Model of Adjustment to Abortion*, 74 J. PERSONALITY & SOC. PSYCHOL. 735, 741 (1998):

> Overall, our sample of women did not report high levels of psychological distress [one] month following their abortions . . . . On average women also reported relatively high levels of positive well-being (M = 4.60 on a 6-point scale, SD =.69) and very high satisfaction with their abortion decision (M = 4.05 on a 5-point scale, SD = .94).

It is inaccurate to label one possible and normal emotional response to a life event a "traumatic disorder."[151] Women with feelings of grief and loss following abortion experience an emotional response that "parallel[s] those following other normal life stresses."[152] Moreover, these negative emotions have not been linked with the abortion itself. Negative emotional reactions tend to occur in women with prior mental health problems.[153] In addition to erroneously characterizing normal feelings of sadness as disordered and pathological, it is deeply misleading to tell women seeking to terminate their pregnancies that they will experience depression, trauma, or "will bear a weight of guilt for the rest of their lives," when these feelings, at the most, reflect the experiences of only a small minority of women. Women experience a range of emotions following an abortion so it is misleading for a physician to provide only partial information about the emotional consequences of abortion and to fail to place any possible outcome in context.

Given the relative consensus in the medical community that abortions do not cause clinically significant psychological harm, it is clear that claims of post-abortion syndrome are not rooted in medicine and psychology, but rather stem from social attitudes about women and motherhood. The history of the emergence of the discourse of post-abortion syndrome illustrates the way in which the concept of post-abortion syndrome is grounded not in science, but in stereotypes about women's roles as mothers and capacities as decision makers. The idea of post-abortion syndrome was first articulated in 1981 by Vincent Rue, an antiabortion activist who testified before the U.S. Senate on the effects of abortion. At one point of his testimony Rue stated

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[151] This is, no doubt, part of the reason that both the American Psychological Association and the American Psychiatric Association have failed to recognize post-abortion syndrome as a disorder, and clearly stated that post-abortion syndrome is not a medical term. *See infra* notes 155–157 and accompanying text.

[152] Adler et al., *supra* note 136, at 1202–03.

[153] *See, e.g.*, Brenda Major et al., *Psychological Responses of Women After First-Trimester Abortion*, 57 ARCHIVES GEN. PSYCHIATRY 777, 777 (2000) ("Most women do not experience psychological problems . . . . [two] years post-abortion, but some do. Those who do tend to be women with a prior history of depression .").

that "guilt and abortion have virtually become synonymous. It is superfluous to ask whether patients experience guilt; it is axiomatic that they will."[154] Following Rue's testimony and further explication of the idea of post-abortion syndrome, various "crisis pregnancy" centers picked up on and continued to deploy the language of post-abortion syndrome throughout the 1980s,[155] well before any clinic research suggested a link between abortion and mental trauma. As the social history of *Acuna* malpractice claims discussed in Part I makes clear, claims about post-abortion syndrome and the purported guilt and depression felt by women after abortion has played an integral role in the antiabortion movement's evolving argument that abortion harms women.[156]

It is relatively clear that an *Acuna* claim alleging failure to inform a patient about post-abortion syndrome poses constitutional problems. The claim lacks scientific support and is historically and rhetorically grounded in discriminatory stereotypes about women's roles and capacities. However, more difficult counterfactuals could arise: what if reputable scientific evidence provided support for an *Acuna* claim? What if psychologists demonstrated that women considering abortion systematically underestimate the degree of guilt that they will feel after the procedure, or if reputable studies concluded that in a small percentage of cases women did suffer from a traumatic disorder following pregnancy termination? These examples present difficult counterfactuals because although scientific authority would then support the claims, they remain grounded

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[154] *Constitutional Amendments Relating to Abortion: Hearings on S.J. Res. 18, S.J. Res. 19, and S.J. Res. 110 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 329–39 (1981) (testimony of Vincent Rue).

[155] *See* text accompanying *supra* note 27; *see also* Siegel, *The Right's Reasons*, *supra* note 31, at 1657 ("[C]laims about post-abortion syndrome first appeared in the 1980s as a therapeutic, mobilizing discourse within the antiabortion movement, deployed primarily among women volunteers and clients in the 'crisis pregnancy' network.").

[156] Reva B. Siegel has traced the development of the discourse of post-abortion syndrome and its relationship with emerging forms of women-protective any abortion arguments throughout the 1980s and 1990s. *See* Siegel, *The Right's Reasons*, *supra* note 31 at 1657–82.

in sex-based stereotypes; the problematic context of post-abortion syndrome discourse as an outgrowth and medicalization of value-laden claims predicated on assumptions about women's regret and nature as mothers therefore remains unaltered.

Although the scope of the claim would vary considerably depending on the nature of the scientific findings available, an *Acuna* claim supported by reputable scientific evidence could be constitutionally permissible under the Supreme Court's current Equal Protection jurisprudence. A central theme of equal protection jurisprudence is the notion that stereotypes are injurious because they fail to treat members of protected classes as individuals and because they perpetuate false or vastly oversimplified assumptions about such groups.[157] For this reason, the Equal Protection Clause prohibits state action that is motivated solely by race or gender stereotypes.[158] Yet, the law authorizes disparate treatment of men and women in several instances that could be motivated in part by impermissible gender-based stereotypes, so long as there is an adequate scientific basis for this differential treatment. For example, the Court has upheld state action premised on the physiological differences between men and women,[159] and Title VII recognizes a "bona fide occupational qualification" exception to its prohibition of employment discrimination on account of sex, to apply in cases where the protected attribute is reasonably necessary to the normal operation of the particular business.[160] Courts treat such state regulation as if it is not premised on a

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[157] *Nev.* Dep't of Hum. Res. *v. Hibbs*, 538 U.S. 721 (2003); Frontiero v. Richardson, 411 U.S. 677 (1973).

[158] *See* sources cited *supra* note 157.

[159] *See, e.g.*, Nguyen v. INS, 533 U.S. 53 (2001) (upholding a statute that imposes different requirements for a child's acquisition of citizenship depending upon whether the citizen parent is the mother or the father); Michael M. v. Superior Court, 450 U.S. 464 (1981) (upholding a statute that limited statutory rape to sexual intercourse with females under the age of eighteen).

[160] 42 U.S.C. § 2000e-2(e)(1) (2000). Notably, courts have refused to accept proffered BFOQs that are based on stereotyped characterizations of gender differences or assumptions about the employment characteristics of women in general. *See, e.g.*, Diaz v. Pan Am. World Airways, 442 F. 2d 385 (5th Cir. 1971); *see also* 29 C. F. R. §1604.2(a)(1)(ii) (2008).

stereotype at all. Such regulation is considered to rest upon accurate and widely-accepted physiological characteristics rather than uncritical generalizations. In this sense, the law may permit gender-based regulation, even when gender-based stereotypes could have motivated the regulator in part, so long as the regulation is grounded in accepted scientific consensus.

In applying this standard to the case of "scientifically-justified warnings" directed at women considering abortion, courts should apply the "truthful and not misleading" standard announced by the Supreme Court in *Casey*.[161] First, the judge should consider whether a medical claim is supported by a valid scientific consensus. If a plaintiff's requested warning satisfies this criterion, the judge should consider whether the claim is framed in a manner that is neither misleading nor discriminatory. For example, if studies showed that .001 percent of women experienced symptoms akin to those suffered by individuals afflicted with post-traumatic stress disorder, it would be misleading to require a statement to women considering abortion such as "you will experience post-abortion syndrome." If both conditions are met, that is, the information is true and not presented in a misleading manner, then the requested warning would not pose constitutional problems and should be submitted to a jury for consideration of whether a reasonable member of the class would want to know this information.

Permitting state regulation that might otherwise be based on impermissible stereotypes when that regulation is nonetheless based on valid medical consensus raises a separate, conceptually difficult and unanswered question about point at which a claim gains sufficient acceptance in the scientific community to support gender-based regulation. In most cases it will not be possible to achieve a compete scientific consensus on any single medical hypothesis so courts will have to make difficult decisions on the type of evidence and the degree of consensus necessary to support such regulation. This issue, however, presents an issue for future study and does not pose a problem for physicians employing constitutional defenses to *Acuna* claims at present. Even though these lines are murky and unresolved, claims about post-abortion syndrome fall well

[161] Planned Parenthood v. Casey, 505 U.S. 833, 882 (1992).

outside the range of what could be considered a permissible medical claim because of the near consensus *against* its status as an official clinical illness.[162]

In light of the historical development of post-abortion syndrome discourse, and the near consensus in the scientific community that "post-abortion syndrome" is not a medical diagnosis and that abortion does not cause clinically significant psychological harm, a rule requiring an abortion provider to warn a patient that she will suffer from post-abortion syndrome rests on the same impermissible premises as a rule requiring providers to tell women that they will feel a burden of guilt following pregnancy termination. Such a rule relies on stereotypes about women's attitudes towards their unplanned pregnancies as well as generalizations about the emotional impact that terminating the pregnancy may have on them. It also presumes that women are incapable of making significant, self-governing decisions without causing serious psychological harm. As in the context of the first rule, state regulation based upon these premises is inconsistent with the Fourteenth Amendment's prohibition on sex-based discrimination. The post-abortion syndrome rule is premised on nothing but the impermissible assumptions that underlie the first claim, and therefore it suffers from the same constitutional deficiencies.

Finally, a judgment in favor of an *Acuna* claim would announce a new rule of tort requiring abortion providers to state that the fetus is "a complete, separate, unique and irreplaceable human being."[163] The potential constitutional constraints on such a rule stemming from sex discrimination are more ambiguous in this case than with the previous two rules. The rule is perhaps less overtly paternalistic because it focuses on the status of the fetus rather than the abortion procedure's harm to women. The statement itself does not explicitly invoke impairments in women's decisional faculties. Moreover, this statement cannot be proven to be factually false in the same manner as the first two rules. In the post-abortion syndrome context, for example, because the claim lacks a medical basis, the only remaining

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[162] *See supra* notes 133–141.

[163] Acuna v. Turkish, 930 A.2d 416, 422 (N.J. 2007) (citing complaint).

explanation for the regulation is sex-based stereotypes about women's attitudes towards motherhood and their emotional responses toward terminating a pregnancy. In contrast, the "human being" statement is not necessarily scientifically false, but rather is subject to ideological and philosophical dispute over the meaning of the term "human being," and in particular whether a fetus constitutes a "complete" and "separate" human being.

A recent ruling by the Eighth Circuit sitting *en banc* illustrates the way in which the technically factual nature of this statement may cause courts to overlook its social meaning. In *Rounds v. Planned Parenthood Minnesota*,[164] the Eighth Circuit held that the First Amendment challenge was an insufficient basis upon which to preliminarily enjoin the provision of the South Dakota statute that required abortion providers to say to women prior to the procedure "that the abortion will terminate the life of a whole, separate, unique, living human being."[165] The court premised its ruling on a reading of the challenged statement as simply imparting a medical fact that the fetus was "an individual living member of the species of Homo sapiens . . . during [its] embryonic [or] fetal age."[166] Although the *Rounds* holding does not disrupt or even address this Article's central claim that state regulation premised upon generalizations about women's abilities and competence, the Circuit's suspect interpretation of the relevant provision as solely medical or

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[164] Planned Parenthood Minn. v. Rounds, 530 F.3d 724 (8th Cir. 2008) (*en banc*). *See also supra* text accompanying notes 73–74 for more detailed discussion of the statute at issue in *Rounds*.

[165] *Rounds*, 530 F.3d at 746. *See also* S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (2005). The *Rounds* ruling does not address the other provisions of the statute that require a physician to discuss a woman's relationship to her fetus or the psychological harm that she may experience after the abortion procedures, and it does not address any constitutional issues beyond the compelled speech challenge. *Rounds*, 530 F.3d at 733 n.7 ("Because the district court's order addressed only the compelled speech challenge to [the 'human being' provision], we limit our en banc review to that ground.") As such, nothing in the opinion addresses or undermines the preceding analysis of the previous two rules relevant to *Acuna* claims.

[166] *Rounds*, 530 F.3d at 735 ("[T]he evidence submitted by the parties regarding the truthfulness and relevance of the disclosure . . . generates little dispute.") (citing S.D. CODIFIED LAWS § 34-23A-10.1 (2005)).

factual highlights the way in which this provision may be prone to misinterpretation. The Eighth Circuit did not consider the fact that while a statement may be technically truthful, a state regulation *requiring* an abortion provider to make that statement to women may nonetheless constitute an equal protection violation, as it would invariably rely on a set of judgments about women's capacities and decisional autonomy.

A rule requiring an abortion provider to tell a woman that the fetus is "a complete, separate, unique and irreplaceable human being" in order to receive informed consent to perform the abortion procedure must factually rely on at least one of the following presumptions. Either that a competent adult woman cannot understand that if she does not terminate her pregnancy she will give birth to a child, or the correctness of a state's moral or ideological views of personhood of women seeking to terminate their pregnancies, and the former rationale is too unlikely to be viable.[167] For the state to establish a rule that requires abortion providers to give women seeking abortions "information" that would be intuitively understood by any competent adult individual is to presume that the patient's cognitive or decision-making process is somehow impaired or insufficient. State regulation that presupposes women's incompetence in such a manner is fundamentally inconsistent with the Court's sex equality doctrine.

The second rationale, imposing the state's moral or ideological views on personhood upon women seeking abortions is similarly impermissible. Rather than respecting women's choices to determine the status of an embryo and whether it constitutes a human life, by establishing a rule of tort that requires abortion providers to refer to the fetus as a human being, the state makes a value determination for women as a whole and frames its determination as a moral absolute. Such an imposition impermissibly infringes upon women's autonomy. In *Planned Parenthood of Southeastern Pa. v. Casey*, the Court made clear that a woman enjoys the liberty to make her own moral and ethical determinations without undue imposition from

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[167] This rationale was unavailable in the *Acuna v. Turkish* litigation where the trial court found that Rosa Acuna, who had previously given birth to two children previously, understood that if she did not undergo an abortion she would give birth to a child. *See Acuna*, 930 A.2d at 419.

the state: "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[168] Though framed as a liberty interest, respect for women's decisional autonomy is fundamental to the state's recognition of women's equal citizenship.[169] The state has historically subjugated women by denying them the ability to make self-governing decisions. A rule of tort requiring physicians to inform women that a fetus is "a complete, separate, unique and irreplaceable human being"[170] is precisely the sort of regulation that demeans and infringes on the protected moral and philosophical beliefs of women by substituting their personal determinations with the moral conclusions of the paternal State.

CONCLUSION

The tort law of informed consent may be a particularly productive location in which to engage claims about women's capacities and family roles being made by the antiabortion movement. These claims disregard women's autonomy in ways that are sharply at odds with informed consent doctrine and its emphasis on respect for patient autonomy and self-determination. This incongruity may provide a forum to show that the assumptions gaining traction in antiabortion movement and, now, beginning to appear prominently in legal analysis,[171]

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[168] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

[169] *See supra* Part II.B.2.

[170] Acuna v. Turkish, 930 A.2d 416, 420 (N.J. 2007) (citing complaint).

[171] *See* Gonzales v. Carhart, 550 U.S. 124, 159 (2007) (citing an amicus brief including a group of affidavits collected by Harold Cassidy and Allan Parker of the Justice Institute to support a proposition often invoked in the abortion malpractice cases: That women should be protected from making an "uninformed" choice to terminate their pregnancy that they might later regret ("While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. See Brief for Sandra Cano et al. as Amici Curiae in No. 05-380, at 22–24. Severe depression and loss of esteem can follow.")).

are fundamentally inconsistent with our legal commitment to women's status as equal agents.