

# WHAT'S OLD IS NEW AGAIN: HOW STATE ATTORNEYS GENERAL CAN REINVIGORATE UDAP ENFORCEMENT TO COMBAT CRISIS PREGNANCY CENTER DECEPTION

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## INTRODUCTION

For as long as public health and women's rights advocates have fought to expand access to abortion services, opponents of abortion have tried to stop women from choosing this option—whether by taking aim at the procedure's legal status or by steering women away from abortion even as it remains legal. Crisis pregnancy centers (CPCs) are proponents of this second approach. These anti-abortion centers are often set up to resemble legitimate reproductive health clinics but exist to dissuade women from obtaining abortions. Today, there are fewer than 1,000 abortion clinics nationwide<sup>1</sup> but as many as 3,500 CPCs.<sup>2</sup> In some states, CPCs outnumber abortion providers ten to one.<sup>3</sup> The problem with CPCs, however, is not that they advance an anti-abortion perspective. It is that many rely on deception to achieve their desired ends.

In 1991 the medical director of a network of abortion providers testified before Congress during a hearing on CPC fraud and relayed the story of a patient he had spoken to in North Dakota a few weeks prior.<sup>4</sup> A young woman in her early twenties had gone to a crisis pregnancy center for a pregnancy test and was told the results were negative: She

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<sup>1</sup> Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2014*, 49 PERSP. ON SEXUAL & REPROD. HEALTH 17, 20 tbl. 4 (2017).

<sup>2</sup> NARAL PRO-CHOICE AMERICA, THE TRUTH ABOUT CRISIS PREGNANCY CENTERS (2017), <https://www.prochoiceamerica.org/wp-content/uploads/2016/12/6.-The-Truth-About-Crisis-Pregnancy-Centers.pdf> [<https://perma.cc/9SBS-RATT>].

<sup>3</sup> Teddy Wilson, 'Completely Intentional': Fake Clinics Outnumber Abortion Providers 10 to 1 in Texas, REWIRE NEWS (May 24, 2018, 5:23 PM), <https://rewire.news/article/2018/05/24/completely-intentional-fake-clinics-outnumber-abortion-providers-10-1-texas/> [<https://perma.cc/8X38-NVZH>].

<sup>4</sup> *Consumer Prot. & Patient Safety Issues Involving Bogus Abortion Clinics: Hearing Before the Subcomm. on Regulation, Bus. Opportunities & Energy of the H. Comm. on Small Bus.*, 102d Cong. 11 (1991) (statement of Ron Fitzsimmons, Exec. Dir, Nat'l Coal. of Abortion Providers).

wasn't pregnant.<sup>5</sup> After several weeks, she sought a second opinion at another facility that revealed she was nineteen weeks pregnant.<sup>6</sup>

They computed that the first time she went to the [CPC] she was actually fourteen weeks pregnant. You wonder why [the CPC] would lie to her like this. Well, the answer is very simple. There are no abortion providers in that State that perform abortions after fifteen weeks. The idea was to prolong the pregnancy so the woman could not get an abortion in that State, and to that extent they succeeded, but the woman is still going to have an abortion; the only difference is, she is going to have to travel to another State at great cost.<sup>7</sup>

In 2018, an emergency room physician in Connecticut recounted a similar tale of a young woman who faced deception-driven delays in accessing an abortion, this time with more severe consequences:

She revealed to me that she was hiding her pregnancy from her family and had been seeing a women's center, a crisis pregnancy center, in Hartford because she wanted a termination. She told me she had gone every few weeks for [the] last few months, but was not given any instructions on how to have an abortion yet. Performing her ultrasound, I was able to determine her fetus was [twenty-five] weeks and [four] days, past the legal limit for abortion. I had to tell her that even though she had clearly indicated her desire to terminate . . . months prior, now she had no choice in the matter[.]<sup>8</sup>

These women sought time-sensitive reproductive health care from what they thought were legitimate medical providers. Instead, they were lied to about their bodies and misled about the laws in their states. The harm they suffered was pronounced—potentially life-altering. And it risks repetition any time a woman, tricked into thinking

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> NARAL PRO-CHOICE CONN. FOUND., CRISIS PREGNANCY CENTERS: A THREAT TO REPRODUCTIVE FREEDOM 35 (2018), <https://connecticut.prochoiceamericaaffiliates.org/wp-content/uploads/sites/17/2018/03/2018-CPC-Report.pdf> [<https://perma.cc/WK7C-6BKQ>] [hereinafter NARAL, CT REPT.].

she is entering an abortion clinic, ends up at one of the nation's crisis pregnancy centers instead.

As the span of these stories demonstrates, the problem of CPC fraud has persisted for decades. Over the years, governmental response to this deception has proceeded at a low hum with two key periods of activity. One was centered primarily in the 1980s and 1990s, when a handful of state attorneys general (AGs) used all-purpose consumer protection laws to launch investigations and lawsuits to uncover and enjoin CPCs' harmful tactics.<sup>9</sup> The other ran from 2009 to 2018, when interest in CPC-specific legislation eclipsed AG activity, and multiple city councils and state legislatures passed laws requiring CPCs to warn clients about the true nature of their services.<sup>10</sup>

But in 2018, the Supreme Court dealt a blow to these more recent efforts to protect women from CPC fraud in *National Institute of Family & Life Advocates v. Becerra*, when it struck down California's law requiring CPCs to post disclaimers in their waiting rooms and on their advertisements.<sup>11</sup> In the wake of that decision, most regulations specifically aimed at CPCs are now invalid, leaving states and localities in need of new solutions to address the ongoing deception and delays in access to care that CPCs can cause.

This Article argues that such a solution can be found by looking back to an existing set of consumer protection laws: state Unfair and Deceptive Acts and Practices statutes—UDAP statutes for short—which have been on the books for decades. Designed to combat deceptive practices in the sale or offer of goods and services, it was to these laws

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<sup>9</sup> See, e.g., Carr v. Axelrod, 798 F. Supp. 168, 176 (S.D.N.Y. 1992) (upholding the use of a UDAP statute to enjoin deceptive CPC practices); Mother & Unborn Baby Care, Inc. v. State, 749 S.W.2d 533, 540, 542 (Tex. App. 1988); Fargo Women's Health Org. v. Larson, 391 N.W.2d 627, 629 (N.D. 1986); Jane Gross, *Pregnancy Centers: Anti-Abortion Role Challenged*, N.Y. TIMES (Jan. 23, 1987), <https://www.nytimes.com/1987/01/23/nyregion/pregnancy-centers-anti-abortion-role-challenged.html> [<https://perma.cc/TW2M-7Y8K>]; Alan Johnson, *Fisher Targets "Crisis Pregnancy Centers"*, COLUMBUS DISPATCH, Feb. 25, 1993, at 5C; Sheryl Harris, *Agency Fights Altering of Ads: Akron Pregnancy Services is Told by Ohio Attorney General to Stop Calling Itself "Abortion Service."* Agency Sues Lee Fisher's Office, Citing a Limit to Free Speech, BEACON J., June 9, 1993, at D1; Alan Johnson, *Fisher, Pregnancy Center Coalition Claim Victory*, COLUMBUS DISPATCH, Dec. 2, 1993, at 8C [hereinafter Johnson, *Victory*]; *State, Agency Settle Abortion Ad Dispute*, CLEVELAND PLAIN DEALER, Nov. 19, 1993, at 1B; see also *infra* Part II.B.

<sup>10</sup> See, e.g., CARENET, NAT'L INST. OF FAMILY & LIFE ADVOCATES & HEARTBEAT INT'L, A PRO-ACTIVE STRATEGY TO DEFEND YOUR PREGNANCY CENTER AGAINST LEGISLATIVE ATTACKS 13–18 (2008), [https://www.heartbeatinternational.org/pdf/A\\_Pro-Active\\_Strategy.pdf](https://www.heartbeatinternational.org/pdf/A_Pro-Active_Strategy.pdf) [<https://perma.cc/Z5PM-MN2Y>] [hereinafter CPC LEGISLATIVE REPORT]; see also *infra* Part II.B.

<sup>11</sup> Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361 (2018).

that states first turned to curb CPCs' deceptive tactics, almost always without constitutional impediment. Even though UDAP statutes cast state AGs in an active enforcement role and equipped them with powerful legal tools, public UDAP enforcement actions never reached their full potential. Rather, state UDAP investigations of and enforcements against deceptive CPCs were limited to a handful of states and fell out of favor in the 2000s as CPC disclaimer efforts took center stage.<sup>12</sup>

Now, as state AGs rise to prominence on the nationwide policymaking scene, states should reinvigorate and update these all-purpose consumer protection tools. Through a coordinated campaign of AG enforcement that advances broad readings of current UDAP language, along with legislative amendments that clarify and expand the scope of UDAP statutes, states can press forward with tackling CPC fraud while avoiding the constraints imposed by the Supreme Court's recent decision.

Section I defines CPCs, describes some of their most dishonest tactics, and summarizes the impact of the Supreme Court's recent ruling on legislation designed to curb CPC harm. Section II recommends UDAP statutes as an alternative tool for responding to CPC deception and reviews the advantages of a UDAP enforcement strategy led by state attorneys general. Section III grapples with and proposes arguments for overcoming the imperfect fit between UDAP laws, which typically apply to commercial actors, and the regulation of not-for-profit CPCs. Section IV explores whether a robust UDAP enforcement campaign can adequately address deception that robs individuals of critical decision-making opportunities and proposes a UDAP amendment that recognizes decision-making harms. Finally, the Article concludes by updating readers on recent CPC-related developments and by suggesting a wrap-around campaign of community partnerships and communications efforts to supplement AGs' legal enforcement activities.

Methodologically, this Article focuses on UDAP statutes and case law in the six states where governments have legislated to curb CPC deception, as these are the venues

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<sup>12</sup> Several municipalities and states began passing disclaimer legislation at this time. *See, e.g.*, BALT., MD., HEALTH CODE §§ 3-501–3-506 (2009); MONTGOMERY CTY., MD., COUNCIL RES. § 16-1252 (2010); N.Y.C. ADMIN. CODE §§ 20-815–20-816 (2011); AUSTIN, TEX., CITY CODE CH. § 10-10 (2012); S.F., CAL, ADMIN. CODE CH. §§ 93.1–93.5 (2011); CAL. HEALTH & SAFETY CODE §§ 123470–123473 (West 2015); OAKLAND ADMIN. CODE § 5.06.110 (2016); HAW. REV. STAT. § 321-561(b)–(c) (2018); HARTFORD, CONN. CODE §§ 17.161–17.166 (2017).

where state or local officials are likely to be in search of alternatives to disclosure laws.<sup>13</sup> At the same time, state courts also look to UDAP decisions outside their own jurisdictions in light of many UDAP statutes' common origins in the Federal Trade Commission (FTC) Act and other model legislation.<sup>14</sup> Thus this Article draws from UDAP jurisprudence more broadly when other states offer relevant examples. Although UDAP statutes vary considerably across jurisdictions, states that have not yet tackled CPC fraud will also find this Article of use.

## I. Crisis Pregnancy Centers and Efforts to Curb their Deception

### A. CPCs and Their Deceptive Practices

CPCs are anti-abortion centers that often pose as reproductive health clinics but offer limited, if any, medical services. They frequently advertise free pregnancy tests, ultrasounds, and abortion-related services, but then try to prevent the women who visit from obtaining abortion care. Instead, CPC staff and volunteers use a variety of tactics to convince women to carry their pregnancies to term. While some CPCs may make their anti-abortion stance clear and provide appropriate assistance to women facing unintended pregnancies, many do not. In fact, one famous CPC advocate was recorded advising CPC operators to rely on concealment and misdirection: "We want to appear neutral on the outside. The best call, the best client you ever get is one that thinks they're walking into an abortion clinic."<sup>15</sup>

Ninety percent of counties in the United States lack an abortion provider, and in some states CPCs outnumber abortion clinics ten to one.<sup>16</sup> With free services that appeal to

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<sup>13</sup> For more thorough treatment of the power of local—as opposed to state-wide—authorities to enforce their state's UDAP regimes, see Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 *FORDHAM URB. L.J.* 1903 (2013).

<sup>14</sup> See, e.g., *Citaramanis v. Hallowell*, 328 Md. 142, 155 (1992) (referring to consumer protection law in Massachusetts and Connecticut); ANDREW SERWIN ET AL., *CAL. ANTI. & UNFAIR COMP. L.* § 19.02, Westlaw (Thomas S. Hixson ed., 2017) ("[S]ince these statutes were largely derived from a common source, appellate decisions discussing such statutes may provide support for the interpretation of other similar statutory schemes . . . Most notable in terms of its extensive interpretative case law is the Texas [UDAP statute].").

<sup>15</sup> Irin Carmon, *Caught on Tape: Antiabortion Center Resorts to Scary, Dangerous Lies*, SALON (June 25, 2013, 8:45 PM), [https://www.salon.com/2013/06/25/caught\\_on\\_tape\\_crisis\\_pregnancy\\_centers\\_false\\_dangerous\\_advice/](https://www.salon.com/2013/06/25/caught_on_tape_crisis_pregnancy_centers_false_dangerous_advice/) [https://perma.cc/LMZ5-B4DD].

<sup>16</sup> Jones & Jerman, *supra* note 1, at 20; Wilson, *supra* note 3.

marginalized populations uninitiated to the health systems they are navigating,<sup>17</sup> and a track record of tricking clients about the services they will receive, deceptive CPCs can impose significant health- and autonomy-related costs on unwitting consumers.

This Section summarizes findings from more than a decade's worth of investigative reports, academic studies, news accounts, and law review articles, which suggest that a significant number of CPCs engage in some form of deception as part of their operational models. For example, in 2006 Congress produced a report detailing the misinformation that CPCs distributed about abortion and birth control; it found that eighty-seven percent of surveyed centers provided false or misleading information.<sup>18</sup> Abortion-rights organizations have conducted undercover investigations of CPCs across the country and, since 2008, have released comprehensive reports of their findings in at least eleven states: From North Carolina to Ohio and New York to California, majorities or significant pluralities of CPCs were shown to have lied about abortion risks or the legal and medical constraints on abortion access.<sup>19</sup> Public health scholars have also surveyed the landscape, finding in Georgia, for instance, that fifty-eight percent of the state's CPCs implied that they provided abortions but failed to disclose that this was not the case, and fifty-three percent made at least one false or misleading health statement on their websites.<sup>20</sup>

Collectively, this body of evidence indicates that CPCs engage in multiple types of deception and misdirection. These centers often advertise to look like abortion clinics, concealing their anti-abortion agenda and the limited nature of their services for as long as possible during a patient's visit.<sup>21</sup> Typically, volunteer counselors distribute

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<sup>17</sup> See Laura S. Hussey, *Crisis Pregnancy Centers, Poverty, and the Expanding Frontiers of American Abortion Politics*, 41 POL. & POL'Y 985, 986 (2013).

<sup>18</sup> MINORITY STAFF OF H.R. COMM. ON GOV'T REFORM SPECIAL INVESTIGATIONS DIV., 109TH CONG., FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS (2006) (prepared for Rep. Henry Waxman).

<sup>19</sup> States with these reports are California, Connecticut, Maryland, Massachusetts, Minnesota, Missouri, Montana, New York, North Carolina, Ohio, and Virginia. See NARAL PRO-CHOICE AM., CRISIS PREGNANCY CENTERS LIE: THE INSIDIOUS THREAT TO REPRODUCTIVE FREEDOM (2015), <https://www.prochoiceamerica.org/wp-content/uploads/2017/04/cpc-report-2015.pdf> [<https://perma.cc/LRM7-EJ4N>] [hereinafter NARAL, CPCS LIE]; NARAL, CT REPT., *supra* note 8, at 2.

<sup>20</sup> Andrea Swartzendruber et al., *Sexual and Reproductive Health Services and Related Health Information on Pregnancy Resource Center Websites: A Statewide Content Analysis*, 28 WOMEN'S HEALTH ISSUES 14, 16, 17 tbl.2 (2018); see also Amy G. Bryant & Erika E. Levi, *Abortion Misinformation from Crisis Pregnancy Centers in North Carolina*, 86 CONTRACEPTION 752, 753 (2012).

<sup>21</sup> See, e.g., NARAL, CPCS LIE, *supra* note 19, at 4–6.

misinformation about the risks of abortion and the efficacy of birth control to scare women out of considering either.<sup>22</sup> Many CPCs are not staffed by medical professionals, although centers increasingly offer keepsake-style ultrasounds to clients as a way of conferring legitimacy on their operations and as a means of influencing women's decisions.<sup>23</sup> And some CPCs use these ultrasounds to downplay the necessity of taking medical action by deceiving women about how far along they are in their pregnancies and when abortion is available in their state.<sup>24</sup>

While these acts cannot all be said to be "lies" in the traditional sense of the word, nearly all of them fall somewhere along the deception spectrum. The range of deceptive practices embraced by CPCs includes falsehoods by implication, presenting discredited scientific opinion as fact, and outright lies.<sup>25</sup> Of this array of practices, this Article concerns itself primarily with three types: (1) misrepresentations about which services CPCs offer (that abortions are available at CPCs when they are not); (2) lies about the state of a client's own body (that she is not pregnant when in fact she is,<sup>26</sup> or that she is

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<sup>22</sup> See, e.g., *id.* at 8–11.

<sup>23</sup> See, e.g., *id.* at 15.

<sup>24</sup> See Part I.A.3. Journalists have corroborated these findings in interviews with women and clinicians. See, e.g., Meaghan Winter, "I Felt Set Up": Why More Women Seeking Abortions Are Ending Up at Anti-Abortion Pregnancy Centers, *COSMOPOLITAN* (Dec. 17, 2015), <https://www.cosmopolitan.com/politics/news/a50961/medical-crisis-pregnancy-centers/> [<https://perma.cc/J245-6YMS>]. Congress has also conducted a hearing detailing CPCs' deceptive tactics. *Consumer Prot. & Patient Safety Issues Involving Bogus Abortion Clinics*, *supra* note 7.

<sup>25</sup> See Molly Duane, *The Disclaimer Dichotomy: A First Amendment Analysis of Compelled Speech in Disclosure Ordinances Governing Crisis Pregnancy Centers and Laws Mandating Biased Physician Counseling*, 35 *CARDOZO L. REV.* 349, 355–58 (2013) (describing health-related claims that are entirely unsubstantiated or that rely on discredited studies); Beth Holtzman, *Have Crisis Pregnancy Centers Finally Met Their Match: California's Reproductive FACT Act*, 12 *NW. J.L. & SOC. POL'Y* 78, 84–87 (2017) (listing misinformation about abortion risks and efficacy of contraception, as well as co-location and branding strategies that conflate CPCs with abortion clinics). Other falsehoods include inaccurate claims of health risks relating to abortion and birth control (that abortion causes breast cancer, infertility, or mental illness or that birth control is ineffective and leads to cancer), inaccurate fetal development models, and scare tactics involving gory photos and films. See Duane, *supra* note 25, at 355–58.

<sup>26</sup> See *Consumer Prot. & Patient Safety Issues Involving Bogus Abortion Clinics*, *supra* note 7, at 251–52 (declaration of Terri Byrne) (declaring that a CPC told her she was not pregnant when in fact she was); see also *id.* at 384 (statement of Luther Sheets, Dir. Pub. Affairs, Family Health Council, Inc.) ("Of far more serious concern to us are those patients, usually young women or teens, who have been told they are not pregnant based on the test 'results' from a pregnancy test at a fake clinic. They come to one of our clinics thinking they have a gynecological problem only to discover that they are, in fact, pregnant and have delayed seeking pregnancy care based on their contact with a 'crisis pregnancy center.'").

only a few weeks pregnant rather than many);<sup>27</sup> and (3) distortions of the legal and medical contexts that affect the timing of health care decisions (that abortion is legal until very late in pregnancy, or that miscarriage is a likely outcome that should be awaited in lieu of medical intervention).<sup>28</sup>

These three types of practices were chosen because they do not consist of matters of opinion or ideological perspectives likely to be protected on free speech or free exercise grounds. Rather, they represent an operational model of outright and implied falsehoods, deployed to attract customers and adversely affect their decisions—the very types of practices UDAP laws were designed to address.

### 1. Misrepresentations About What Services CPCs Offer

A typical CPC advertisement is not literally false but implies a meaning that is not true. For example, the website of a CPC in Maryland features an image of a woman superimposed with the following text: “Pregnant? Don’t Want to be? Make an appointment.”<sup>29</sup> The ad appears below an on-screen menu featuring such options as

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<sup>27</sup> See Winter, *supra* note 24. This article gives a real life example of this kind of deception:

When her ultrasound wasn’t conclusive, [CPC] staff did not refer her to a physician or another provider, Alison says. Instead, they scheduled her for a second appointment the following week . . . Alison came back for two more appointments, until she says center staff told her the fetus was older than they had first anticipated.

*Id.* Because of the misdating and delay, Alison was unable to receive the medication-based, nonsurgical abortion she had hoped for. *Id.* Rather, once she reached a legitimate abortion provider, her only resort was a more expensive and more invasive surgical procedure. *Id.*

<sup>28</sup> See Swartzendruber et al., *supra* note 20, at 18 (“What do you mean that I ‘may not need an abortion’? How can you tell? Many women can avoid having to decide what to do with their unintended pregnancy, because 1 in 5 of all pregnancies end naturally. Pregnancies that end naturally are not viable, and result in what are called miscarriages. Who wants to go through the pain, cost and risk of an abortion if it’s not necessary?”).

<sup>29</sup> ROCKVILLE WOMEN’S CTR., <https://rockvillewomenscenter.com> [<https://perma.cc/7AT9-5HYU>]. Note also that during a recent legal challenge to a CPC ordinance in Maryland, lawyers presented evidence that at least fifteen women were confused by a Baltimore CPC’s ad campaign and called the center seeking abortion services. Petition for Writ of Certiorari at 3–5, Mayor of Balt. v. Greater Balt. Ctr. for Pregnancy Concerns, Inc., 138 S. Ct. 2710 (2018) (No. 17-1369). Describing consumers’ confusion, a CPC staffer said they “were under the impression from the bus advertisements that we assisted in paying for abortions.” *Id.* at 11. This staffer gave the example of a client who did not seem to understand “abortion alternatives” and wanted to schedule an abortion. *Id.* Not wanting to disabuse women of their misimpressions about the services CPCs offer, the CPC director admitted that such advertising was “purposely vague.” *Id.* at 4, 11.



“Considering abortion?,” “Abortion costs,” “Abortion Pill,” and a list of “Medical Services” that includes “Complete Pregnancy and Abortion Options Consultation.”<sup>30</sup> In context, the ad invites the reader to fill in the gaps: Don’t want to be pregnant, medical services, abortion options and costs? This must be an abortion clinic.

## 2. Lies About Whether a Woman is Pregnant

This Article opens with the story of a woman who was told by a CPC that she was not pregnant when, in fact, she was.<sup>31</sup> Numerous other women and medical professionals have recounted the lies CPCs have told clients about whether they were pregnant and by how many weeks.<sup>32</sup> Among other accounts is a documentary that shows a woman learning that she is several weeks further into her pregnancy than the CPC’s ultrasound operator had reported. The director of a legitimate abortion clinic gives her an accurate gestational reading and explains that the CPC frequently underestimates the dates of women’s pregnancies; the director suspects the CPC does this to delay women past the point when abortion is available in their county or state.<sup>33</sup>

## 3. Lies About the Decision-Making Context

CPCs have also been shown to lie about the legal and medical context in which a woman must make her abortion decision. Some CPCs lie about abortion laws and availability: At a CPC in New York City, an investigator posing as a pregnant client was told that “in this country you can get an abortion up to nine months” so “you’ve got time to think about it.”<sup>34</sup> A CPC staffer in Maryland advised a woman not to panic because “[a]bortion is legal through all nine months of pregnancy, so you have plenty of time to make a decision.”<sup>35</sup> But abortion is legal in New York only through the twenty-fourth

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<sup>30</sup> ROCKVILLE WOMEN’S CTR., *supra* note 29.

<sup>31</sup> *See supra* notes 4–7 and accompanying text.

<sup>32</sup> *See Consumer Prot. & Patient Safety Issues Involving Bogus Abortion Clinics*, *supra* note 7, at 251–52 (declaration of Terri Byrne) (declaring that CPC told her she was not pregnant when in fact she was); *see also supra* note 26.

<sup>33</sup> 12TH & DELAWARE (HBO Films 2010) at 1:03–1:06, <https://vimeo.com/38508436> [<https://perma.cc/YK44-RGW6>].

<sup>34</sup> NARAL, CPCs LIE, *supra* note 19, at 12.

<sup>35</sup> *Id.*

week of pregnancy,<sup>36</sup> and nationwide, abortion access is protected only up to the point of viability with rare exceptions for the health of the pregnant woman.<sup>37</sup>

Other CPCs have misstated the likelihood of miscarriage and the necessity of returning for repeat visits, giving women a false impression of the medical reality they are confronting. Many CPCs use exaggerated statistics about miscarriage, with some citing it as affecting as many as thirty or forty percent of pregnancies;<sup>38</sup> the true rate is just ten percent.<sup>39</sup> For example, a CPC in Nevada reassures potential clients that “you may not need an abortion!” and encourages them to wait and “see if you are a candidate for a natural pregnancy termination,”<sup>40</sup> while a CPC in Maryland promises “if the pregnancy isn’t viable, you do not need to go to the expense of the medical procedure.”<sup>41</sup> Finally, by telling women to return for repeat appointments over the course of weeks and months, CPCs misrepresent the necessity of these visits while isolating clients from legitimate medical help where they might learn the truth about abortion laws and miscarriage rates.<sup>42</sup>

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<sup>36</sup> N.Y. PENAL LAW § 125.05(3) (McKinney 2018).

<sup>37</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (affirming states’ “power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health”).

<sup>38</sup> See NARAL, CPCs LIE, *supra* note 19, at 12 (claiming a thirty percent miscarriage rate); WOMEN’S CARE CENTER, <http://www.womenscarecenter.org> [<https://perma.cc/T58T-6MLD>] (claiming a forty percent miscarriage rate).

<sup>39</sup> See AMER. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, NO. 200, ACOG PRACTICE BULLETIN: EARLY PREGNANCY LOSS e197 (2018), <https://www.acog.org/-/media/Practice-Bulletins/Committee-on-Practice-Bulletins---Gynecology/Public/pb200.pdf?dmc=1&ts=20181207T1637252429> [<https://perma.cc/32WV-PC9D>] [hereinafter ACOG PRACTICE BULLETIN].

<sup>40</sup> *Questions*, FIRST CHOICE PREGNANCY SERV., <http://www.firstchoicelv.org/questions/abortion/> [<https://perma.cc/AV6U-ABJX>].

<sup>41</sup> *Gestational Age Determination*, ROCKVILLE WOMEN’S CTR., <https://rockvillewomenscenter.com/gestational-age-determination/> [<https://perma.cc/GQ2C-3RJ2>]. This is yet another falsehood given that incomplete miscarriages often require medical intervention. See ACOG PRACTICE BULLETIN, *supra* note 39, at e197–e202.

<sup>42</sup> See NARAL, CT REPT., *supra* note 8, at 35 (telling the story of a woman who returned to a CPC for appointments over several months before visiting a hospital for help); Bill Wallace, S.F. ‘Birth-Control Agency’ Probed in Teenager’s Case, S.F. CHRON., June 23, 1986, at 1, NEWSBANK, INC. [hereinafter Wallace, *Agency Probed*] (noting that a teenager was scheduled for repeat appointments over several months); NARAL, CPCs LIE, *supra* note 19, at 13 (describing an investigation of CPCs in Minnesota that found that

## B. Thwarted Attempts to Use Disclosure Laws to Prevent Deception

Advocates of reproductive rights and women's autonomy for years have tried to curb the harmful practices of CPCs. One approach popularized in the past decade has been CPC disclosure laws. Enacted mostly at the city or county level, disclosure laws require CPCs to post signs in their waiting rooms or include disclaimers in their advertisements warning clients that CPCs do not offer abortion services or are not licensed medical providers. While some scholars have questioned the efficacy of mandating disclosures in other consumer settings,<sup>43</sup> seven municipalities and two states have passed some type of CPC disclosure legislation: Baltimore City and Montgomery County, Maryland; New York, New York; Austin, Texas; San Francisco and Oakland, California; Hartford, Connecticut; Hawaii; and California.<sup>44</sup>

All of these laws have faced legal opposition from CPCs and affiliated organizations, and most have been enjoined.<sup>45</sup> Most prominent among them is California's Reproductive Freedom, Accountability, Comprehensive Care, and Transparency (FACT) Act. Enacted in 2015, the FACT Act required any CPC in California that operated under a medical license to post a sign declaring that the state offers free medical services including abortion and any unlicensed CPC had to disclose its lack of licensure.<sup>46</sup> A CPC trade association known as the National Institute of Family and Life Advocacy (NIFLA)

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fifty-three percent of CPCs investigated used tactics like advising women to wait a month before taking another pregnancy test).

<sup>43</sup> See Omri Ben-Shahar & Carl Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 709 (2011) (“[M]andated disclosure cannot reliably improve people’s decisions and thus cannot be a dependable regulatory mechanism.”). The authors’ critiques of consumers’ difficulties with spotting and heeding fine-print disclosures may hold in some settings, but it seems these informational challenges would not extend to a simple sign warning women that no trained medical professionals are on staff at the CPC.

<sup>44</sup> BALT., MD., HEALTH CODE §§ 3-501–3-506 (2009); MONTGOMERY CTY., MD., COUNCIL RES. § 16-1252 (2010); N.Y.C. ADMIN. CODE §§ 20-815–20-816 (2011); AUSTIN, TEX., CITY CODE CH. § 10-10 (2012); S.F., CAL, ADMIN. CODE CH. §§ 93.1–93.5 (2011); CAL. HEALTH & SAFETY CODE §§ 123470–123473 (West 2015); OAKLAND ADMIN. CODE § 5.06.110 (2016); HAW. REV. STAT. § 321-561(b)–(c) (2018); HARTFORD, CONN. CODE §§ 17.161–17.166 (2017).

<sup>45</sup> See, e.g., *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Coun. of Balt.*, 879 F.3d 101, 113 (4th Cir. 2018). Notably, however, San Francisco’s law has withstood challenge because it imposes disclosure requirements only remedially if a particular center has been found to violate the ordinance. See *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1276 (9th Cir. 2017). Oakland’s ordinance is similarly patterned and thus resistant to challenge. OAKLAND ADMIN. CODE § 5.06.110(3) (2016).

<sup>46</sup> CAL. HEALTH & SAFETY CODE §§ 123470–73 (West 2015).

challenged these disclosure requirements, and in 2018 the Supreme Court ruled them unconstitutional in *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*).<sup>47</sup> The *NIFLA* Court held 5–4 that the FACT Act’s disclosures violated the First Amendment by compelling speech on content-based grounds.<sup>48</sup> The majority decided that the waiting-room disclosures for licensed CPCs impermissibly altered the content of the centers’ usual abortion-related communications, and that the advertising disclosures for unlicensed centers unduly burdened speech because the state-mandated text threatened to drown out CPCs’ own messages.<sup>49</sup> The dissent pointed out that the Court historically has upheld speech regulations on public health grounds—including laws that compel abortion providers to deliver state-scripted patient counseling<sup>50</sup>—but the majority distinguished CPCs as occupying a space that was neither truly commercial nor fully medical, meaning the state had to clear a higher bar if it wanted to categorically regulate CPC speech.<sup>51</sup>

*NIFLA*’s consequences have rippled through the regulatory landscape. California’s FACT Act is halted in its tracks. Two days after issuing the *NIFLA* decision, the Court declined to hear a similar case out of Baltimore, thereby cementing the permanent injunction of that city’s disclosure ordinance.<sup>52</sup> And Hawaii has agreed to a permanent injunction of its CPC disclosure law in light of *NIFLA*.<sup>53</sup> It seems safe to say that disclosure ordinances will no longer be the weapon of choice for most advocates seeking to combat confusion about reproductive health services.<sup>54</sup>

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<sup>47</sup> Nat’l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361 (2018).

<sup>48</sup> *Id.* at 2378.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 2385 (Breyer, J., dissenting), 2372.

<sup>51</sup> *Id.* at 2371.

<sup>52</sup> Mayor of Balt. v. Greater Balt. Ctr. for Pregnancy Concerns, Inc., 879 F.3d 101 (2018), *cert. denied*, 138 S. Ct. 2710 (2018).

<sup>53</sup> Calvary Chapel Pearl Harbor v. Suzuki, No. 17-00326-DKW-KSC (D. Haw. Sept. 20, 2018) (“In light of the United States Supreme Court’s decision in *Nat’l Inst. of Family & Life Advocates v. Becerra* and the parties’ Stipulation For Entry of Permanent Injunction and Final Judgment in Favor of Plaintiffs, it is hereby ORDERED [that Hawaii’s CPC statute be permanently enjoined.]”).

<sup>54</sup> Notable exceptions to this assertion are the San Francisco and Oakland laws, the former of which has withstood challenge due to its distinctive formulation and the latter of which is similarly patterned and thus resistant to free speech claims. These ordinances escape the reach of *NIFLA*’s reasoning because, rather than requiring all CPCs to post signs, they mandate disclosure only as a remedy for centers found in violation of

## II. UDAP Statutes and Attorneys General: The Case for Public Enforcement of Longstanding Consumer Protection Law in the CPC Context

Because deception is key to many CPCs' business models, it makes sense to respond with UDAP statutes—laws explicitly designed to fight deception. And since UDAP statutes were initially designed with state attorneys general as their primary enforcers and still come with significant enforcement advantages for these officials, AGs in states with thwarted CPC disclosure laws should now consider UDAP actions instead. Although a robust constitutional analysis of public UDAP enforcement is outside the scope of this Article, it is important to mention from the outset that a significant advantage of UDAP laws as a solution to CPC fraud is their avoidance of the types of constitutional objections raised by the *NIFLA* Court. Indeed, many AGs who pursued UDAP cases when responding to CPC fraud in the 1980s and 90s prevailed in the face of First Amendment and Due Process challenges.<sup>55</sup> For instance, a New York CPC facing an AG-initiated UDAP action claimed that the UDAP statute was “overbroad, vague, improperly applied and unrelated to any valid legislative purpose.”<sup>56</sup> The CPC operator also sought compensation for the “chilling effect” the enforcement had on his First Amendment rights.<sup>57</sup> The federal court dismissed the First Amendment claim, noting the lack of any evidence that “the enforcement action[] is motivated . . . by a purpose to retaliate against or deter the plaintiff’s exercise of his right to speak against abortion.”<sup>58</sup> The case was

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the law’s truth-in-advertising provisions. This model resembles a local UDAP ordinance that penalizes CPCs only if they run afoul of non-deceptive activity laws. *See* *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1276 (9th Cir. 2017); S.F. ADMIN. CODE § 93.5(b)(2) (2011); OAKLAND ADMIN. CODE § 5.06.110(3) (2016).

<sup>55</sup> *Carr v. Axelrod*, 798 F. Supp. 168, 176 (S.D.N.Y. 1992); *Mother & Unborn Baby Care, Inc. v. State*, 749 S.W.2d 533, 540, 542 (Tex. App. 1988) (finding Texas’s UDAP statute “was not applied to appellants specifically to penalize any speech or conduct protected by the [F]irst [A]mendment,” and that “[p]rotecting the innocent public from those deliberately engaging in deceptive practices is a justifiable compelling state interest”); *Fargo Women’s Health Org. v. Larson*, 391 N.W.2d 627, 629 (N.D. 1986) (“We further concluded that the preliminary injunction did not unconstitutionally infringe upon the Help Clinic’s First Amendment rights.”).

<sup>56</sup> *Carr*, 798 F. Supp. at 174.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 174–76 (“Indeed, the correspondence between the plaintiff and the Assistant Attorney General . . . indicate that the State was attempting to modify how the clinics solicited and conducted business and did not intend to interfere with any speech.”). However, in 2017, a New York court placed some limits on the AG’s powers to investigate CPC misconduct, deciding that that AG could subpoena only those CPC records reasonably related to the charges brought as opposed to the wide array of documents the AG originally sought. *Evergreen Ass’n, Inc. v. Schneiderman*, 153 A.D.3d 87, 98 (N.Y. App. Div. 2017).

remanded to state court,<sup>59</sup> where ultimately the AG's office won an injunction prohibiting the deceptive behavior.<sup>60</sup> Similar results were obtained in Texas and North Dakota.<sup>61</sup>

The hope and expectation are that the enforcement of UDAP laws against CPCs will fare differently than the disclosure requirement struck down in *NIFLA*. First, the challenged disclosure law at issue in *NIFLA* regulated all CPCs *ex ante* without regard to whether their advertisements or other speech were false.<sup>62</sup> In contrast, UDAP statutes' penalties are imposed *ex post*, based on particularized findings that an organization has engaged in deception. Second, although constitutional jurisprudence has granted more protections to false speech in the years since AGs first took on CPC fraud, the Supreme Court's 2012 decision in *United States v. Alvarez* has established the centrality of harm to the analysis of whether falsehoods are protected.<sup>63</sup> This suggests that, where cognizable harm can be demonstrated, protection is diminished. Thus, whereas the *NIFLA* Court objected that disclosures were required of every CPC without adequate substantiation that harm had occurred,<sup>64</sup> a UDAP action based on evidence that a CPC's lies have caused confusion and delays constitutes permissible regulation of false, harmful—and therefore unprotected—speech.<sup>65</sup>

This Section introduces UDAP statutes and describes attributes of these laws that could be brought to bear on deceptive CPCs. It then explores the central role of state AGs

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<sup>59</sup> *Carr*, 798 F. Supp. at 176.

<sup>60</sup> According to an AG representative, the CPC was required “to stop soliciting women for counseling through fraud and to make clear to potential clients that [the CPC was] an anti-abortion advocacy group.” Molly Maeve Eagan, *Like a Prayer: God & Abortion at the Pregnancy Support Center*, CHRONOGRAM (June 1, 2004), <https://www.chronogram.com/hudsonvalley/like-a-prayer-god-and-abortion-at-the-pregnancy-support-center/Content?oid=2172410&showFullText=true> [<https://perma.cc/7WNH-PFXR>].

<sup>61</sup> *Fargo Women's Health Org. v. Larson*, 391 N.W.2d 627, 629 (N.D. 1986); *Mother & Unborn Baby Care, Inc. v. State*, 749 S.W.2d 533, 540, 542 (Tex. App. 1988).

<sup>62</sup> *NIFLA*, 138 S. Ct. at 2377 (critiquing the requirement of disclosures for CPCs “no matter what the facilities say on site or in their advertisement”).

<sup>63</sup> 567 U.S. 709, 719 (2012).

<sup>64</sup> *NIFLA*, 138 S. Ct. at 2377 (“California has not demonstrated any justification for the unlicensed notice that is more than “purely hypothetical.””).

<sup>65</sup> *Alvarez*, 567 U.S. at 719. Further, because UDAP laws are not viewpoint-specific, applying instead to a broad range of deceptive practices that affect consumers, an AG's enforcement efforts would not be vulnerable to the same type of sweeping facial challenge as was launched in *NIFLA*.

in UDAP enforcement and the powerful tools that UDAP statutes offer to state officials before reviewing major AG UDAP actions from the first wave of response to CPC fraud as a means of demonstrating the potential these laws hold for combatting CPC deception today.

### A. Unfair and Deceptive Practices as They Apply to CPCs

UDAP statutes are state laws that define and prohibit unfair or deceptive practices and provide for enforcement and remedies.<sup>66</sup> These statutes vary in form and scope. Some include detailed lists of prohibited practices, while others use broader language, leaving courts or state agencies (or both) to flesh out their meaning. Some define false advertising as a type of deceptive practice while others have adjunct statutes that ban false advertising as a separate offense. All statutory schemes provide for public enforcement, often through the state attorney general.<sup>67</sup>

In understanding how UDAP statutes apply to CPCs, as with any project in statutory construction, the text itself is the primary guide. And, because of their common origins in the federal FTC Act, most UDAP laws can be interpreted with reference to one another.<sup>68</sup> Courts have also looked to policy concerns that informed the adoption of UDAP legislation or engrafted common law elements onto these statutes.<sup>69</sup>

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<sup>66</sup> This Article refers to state consumer protection laws as Unfair and Deceptive Acts or Practices laws or UDAP laws, even if the statute bears a different title in that state. Most states' UDAP provisions cover unfair and deceptive trade practices including false advertising within a single chapter in the state's code and provide public and private remedies under the same chapter. But in a few states—most notably New York and California—relevant provisions are spread across multiple articles of the code. Unfair practices may be prohibited in one chapter and false advertising in another. Private remedies might be codified in the consumer law code while public enforcement is authorized in the business code. Nevertheless, these multiple statutes have been treated as falling under the singular UDAP umbrella.

<sup>67</sup> See Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911, 915 (2017).

<sup>68</sup> In fact, California, Hawaii, Maryland, and Texas (as well as twenty-nine other states and the District of Columbia) share the approach of enumerating specific practices by way of defining what is “deceptive.” See SERWIN ET AL., *supra* note 14, at § 19.02.

<sup>69</sup> See the following sources for examples of courts reading into UDAP statutes elements not enumerated in the text: James P. Nehf, *Textualism in the Lower Courts: Lessons From Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1, 38–39 (1994); DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 3.2 (2019) (“A few courts seem to read a requirement of intent to deceive or something like it into their consumer protection statutes.”); *id.* at 3.5 (“A number of courts still cling to the old notions of justifiable reliance.”); *id.* at 3.6 (“In many states, consumers may not bring a private suit unless

A typical UDAP statute reads: “False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful” and goes on to define the prohibited acts either categorically or with a laundry list approach.<sup>70</sup> California, Hawaii, Maryland, and Texas share the approach of enumerating a laundry list of deceptive practices rather than attempting a conceptual definition of “deceptive.”<sup>71</sup> New York’s UDAP statute broadly outlaws “deceptive practices” without much additional elaboration, and Connecticut leaves it to its regulatory authority and the courts to interpret what constitutes deception.<sup>72</sup> But no matter how these terms are defined, some aspect of CPC conduct is bound to satisfy the deceptive or unfair element of the statute.

Whether spelled out in the text or interpreted by agencies and courts, UDAP-prohibited practices that would reach a CPC’s conduct include: (1) making false representations about the quality or nature of services, (2) making false or misleading statements in any advertisement, and (3) withholding relevant information if the nondisclosure is designed to influence the transaction.<sup>73</sup> California, Texas, and Hawaii’s laundry list UDAP laws proscribe representing that services have characteristics or benefits that they do not have or are of a standard or quality that they are not.<sup>74</sup> As to false advertising, Connecticut prohibits advertisements that contain misrepresentations about a service’s “nature, characteristics, . . . benefits, . . . or qualities,”<sup>75</sup> while other states like New York and California ban deceptive advertising more broadly.<sup>76</sup> Hawaii also includes a catch-all category for activity likely to create confusion or

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they show they have been injured . . . In effect, this requires private plaintiffs to prove that they actually relied on the alleged misrepresentation.”).

<sup>70</sup> See, e.g., TEX. BUS. & COM. CODE ANN. § 17.46 (West 2019); KY. REV. STAT. ANN. § 367.170 (West 2020).

<sup>71</sup> SERWIN ET AL., *supra* note 14, at § 19.02.

<sup>72</sup> N.Y. PENAL LAW § 190.20 (McKinney 2018); CONN. GEN. STAT. § 42-110b (2019).

<sup>73</sup> See, e.g., TEX. BUS. & COM. CODE ANN. § 17.46(24) (West 2019); N.Y. PENAL LAW § 190.20 (McKinney 2018).

<sup>74</sup> CAL. CIV. CODE § 1770 (West 2018) (defining transaction as the making of and performance pursuant to an agreement, whether or not it is a contract); TEX. BUS. & COM. CODE ANN. § 17.46(5), (7) (West 2018); HAW. REV. STAT. § 481A-3 (2018).

<sup>75</sup> CONN. AGENCIES REGS. 42-110b-18 (1989).

<sup>76</sup> N.Y. PENAL LAW § 190.20 (McKinney 2018); CAL. BUS. & PROF. CODE § 17500 (West 2018).



misunderstanding.<sup>77</sup> And in a very loose reading of deceptive acts and practices, California’s courts have proclaimed that, to bring a UDAP claim, “one need only show that ‘members of the public are likely to be deceived.’”<sup>78</sup>

That UDAP laws often extend to failure to disclose and implied misrepresentations is particularly apt in the CPC context. Texas includes as a deceptive practice the failure to disclose information about a service if that failure is intended to induce a transaction the consumer otherwise would have avoided.<sup>79</sup> And California’s UDAP statute has been found to apply to “a perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information.”<sup>80</sup>

Some courts have found that a UDAP violation for failure to disclose occurs as soon as a consumer is led by a deceptive advertisement to contact an organization—even if subsequent curative disclosures are made and even if no sale or exchange occurs.<sup>81</sup> Take for instance, the following discussion of a misleading ad run by a car dealership:

The theory . . . is that the consumer, supplied with sufficient and accurate information . . . [can] make an intelligent, rational decision and that the advertiser should supply the information . . . . If the consumer must go to the business premises of the dealer for the [omitted information], the consumer is put in a position in which the retailer may exert pressure, . . . and the consumer cannot reflect or make comparisons.<sup>82</sup>

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<sup>77</sup> HAW. REV. STAT. § 481A-3 (2018).

<sup>78</sup> *Bank of the West v. Superior Court*, 833 P.2d 545, 553 (Cal. 1992).

<sup>79</sup> TEX. BUS. & COM. CODE ANN. § 17.46(24) (West 2018).

<sup>80</sup> A UDAP action “may be based on representations to the public which are untrue, and also those which may be accurate on some level, but will nonetheless tend to mislead or deceive . . . . A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under the UCL.” *Paduano v. Am. Honda Motor Co.*, 88 Cal. Rptr. 3d 90, 103–04 (Ct. App. 2009) (quoting *Linear Technology Corp. v. Applied Materials, Inc.*, 61 Cal. Rptr. 3d 221, 236 (Ct. App. 2007)) (internal citations omitted).

<sup>81</sup> *State v. Amoco Oil Co.*, 293 N.W.2d 487, 493 (Wis. 1980) (citing *Ohralik v. Ohio Bar Assn.*, 436 U.S. 447, 457 (1978)).

<sup>82</sup> *Id.*

Whether or not this theory's premise is accurate—that consumers will see and read disclaimers—its underlying rationale applies equally to a woman seeking to secure abortion services as it does to someone looking to buy a new car. If the consumer initially does not have “sufficient and accurate information” about the nature of the business she is patronizing, learning the truth upon reaching the CPC will not cure the decision-making harm. Instead, the “consumer is put in a position in which the [CPC] may exert pressure” and she “cannot reflect or make comparisons” about her options.<sup>83</sup>

Finally, where UDAP laws refer to unfair or unconscionable practices, courts will deem the behavior a UDAP violation if an individual or a business unfairly takes advantage of a client. This includes abusing a position of trust to influence a consumer's decisions. For example, a Texas attorney who represented two clients with conflicting interests was found in violation of that state's UDAP statute because he used this position of trust to unfairly persuade one client to settle her claim for less than she otherwise would have.<sup>84</sup>

Given the examples of misleading promotional materials that imply that CPCs provide abortion services, the lies about a woman's pregnancy status and duration, and the falsehoods about abortion laws and miscarriage rates, UDAP statutes seem a natural place to start curbing deception.

### **B. The Role and History of Attorneys General in Enforcing UDAP Laws to Fight CPC Deception**

Existing consumer protection law and state AGs go hand in hand. Section II.B. argues that the immense legal and logistical enforcement advantages that UDAP statutes afford AGs uniquely position these officials to tackle the problem of CPC deception, a problem that might go unaddressed if consumers had to bring suits on their own. Further, the recent ascendance of state AGs as arbiters of national policy priorities offers those interested in combatting CPC fraud the opportunity to put this problem and its once-popular solution back on the agenda.

Finally, Section II.B. traces the history of AGs' response to CPC fraud using various powers granted by UDAP laws—including investigations, settlement agreements, and lawsuits—to demonstrate a viable path forward for combatting deceptive interference with women's health care decisions. The bulk of public UDAP enforcement against

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<sup>83</sup> *Id.*

<sup>84</sup> *Bellows v. San Miguel*, No. 14-00-00071-CV, 2002 WL 835667 (Tex. App. May 2, 2002).

deceptive CPCs was concentrated in the 1980s and mid-90s, when states ranging from California to Texas and Ohio to New York brought consumer protection suits in relatively quick succession.<sup>85</sup> Part of this coincidence of timing was surely tied to the proliferation of CPCs during that period as the anti-abortion movement formalized its operations.<sup>86</sup> And some was likely attributable to pro-choice organizations' coordinated campaigns to spur AG action.<sup>87</sup> But part of this clustering of UDAP action is no doubt due to state-to-state transmission of a viable legal solution for tackling a very public and politicized problem. Although it is not entirely clear why states pivoted away from enforcing UDAP statutes, evidence suggests that abortion rights groups began encouraging states to introduce CPC disclosure requirements as early as 2000, and by the mid-2000s, CPC-specific legislation seems to have eclipsed UDAP statute enforcement as the predominant remedy for CPC fraud.<sup>88</sup>

This rise and fall of UDAP statute enforcement as the preferred response to deceptive CPCs suggests that state policy makers—whether in the legislative, executive, or, as some might argue, judicial branch—are not immune to policy zeitgeists.<sup>89</sup> This is why

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<sup>85</sup> See, e.g., *Carr v. Axelrod*, 798 F. Supp. 168, 176 (S.D.N.Y. 1992); *Mother & Unborn Baby Care, Inc. v. State*, 749 S.W.2d 533, 540, 542 (Tex App. 1988); *Fargo Women's Health Org. v. Larson*, 391 N.W.2d 627, 629 (N.D. 1986).

<sup>86</sup> See Holtzman, *supra* note 25, at 81 (“Throughout the 1980s and 1990s, CPCs continued to grow, due in part to financial support from pro-life institutions, including the Christian Action Council (now known as ‘Care Net’) and NIFLA.”).

<sup>87</sup> See *Consumer Prot. & Patient Safety Issues Involving Bogus Abortion Clinics*, *supra* note 7, at 365–66 (statement of Betty Menear, State Coordinator, Ohio Religious Coal. for Abortion Rights) (“[W]e worked with a coalition of pro-choice organizations, continuing to collect affidavits and testimony from women all over Ohio who had gone to these bogus clinics.”); *id.* at 35 (statement of Deanna DUBY, Deputy Legal Dir., People for the Am. Way) (“Our investigation culminated with the filing of a complaint in July 1991 with the Consumer Protection Division of the office of the Maryland attorney general. We alleged numerous violations of the State’s Consumer Protection Act.”).

<sup>88</sup> By way of example, a 2008 report issued by three national CPC organizations indicates that abortion rights group NARAL Pro-Choice America suggested in a toolkit published in 2000 that states introduce “anti-pregnancy center” legislation. CPC LEGISLATIVE REPORT, *supra* note 10, at 13–18. The CPC organizations’ report also asserts that least five states considered bills regulating CPCs in 2006 and 2007, and the report advised continued vigilance to defeat CPC legislation in the future. *Id.* In contrast, the report’s treatment of attorneys general investigations suggested that CPCs considered ongoing UDAP statute enforcement to be a realistic possibility only in New York. *Id.*

<sup>89</sup> Political scientist John Kingdon offers a model that explains how an issue’s time arises based on the convergence of three agenda-setting processes: (1) problem recognition, (2) policy proposals, and (3) political forces. When all three align, the confluence creates a policy window—a moment of opportunity when

now, as AGs are collectively establishing themselves as the “fourth branch of government,” an intentional project of renewed UDAP enforcement could set off a chain reaction, inspiring other states to join the effort.<sup>90</sup> Ultimately, by bringing CPC fraud into national focus, these actions might inspire legislators and judges to assist in the effort of updating UDAP statutes to address ongoing harms (as discussed in Sections III.B. & III.D.).

### 1. Why Attorneys General?

Consumer protection law has long cast state attorneys general as its central figures. Congress authorized the FTC to enforce consumer protection laws at the federal level, but this lone agency lacked the capacity to tackle the full breadth of fraudulent and harmful activity. When states took up the charge and created their own versions of the FTC Act, or UDAP laws, they relied almost exclusively on public agents, typically the AG, to carry them out.

As such, these statutes often grant AGs powerful and effective enforcement tools unavailable to any other party. As one state’s high court put it: “The very purpose of the Attorney General’s involvement is to provide an efficient, inexpensive, prompt and broad solution to the alleged wrong.”<sup>91</sup> For instance, the early UDAP powers of Massachusetts’ AG “were sweeping, including the right to issue regulations defining unfair and deceptive practices.”<sup>92</sup> Many AGs were also empowered to bring class actions on behalf of consumers. Despite the addition of citizen’s suit provisions in subsequent years, state attorneys general still enjoy legal, practical, and symbolic advantages in enforcing these laws that were originally designed with their offices in mind. The following sections address these three types of advantages—legal, practical, and symbolic—in turn.

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government focuses its attention on the issue. When these forces are out of alignment, the idea fails to catch on in the first place or retain its hold if it ever achieved prominence. JOHN KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICY* 165–72 (2d ed. 1995).

<sup>90</sup> See Alexander Burns, *How Attorneys General Became Democrats’ Bulwark Against Trump*, N.Y. TIMES (Feb. 6, 2017), <https://www.nytimes.com/2017/02/06/us/attorneys-general-democrats-trump-travel-ban.html> [<https://perma.cc/6EGW-XN3M>].

<sup>91</sup> Pridgen, *supra* note 67, at 916.

<sup>92</sup> *Id.*

### a. Legal Advantages

AGs can avoid many of the procedural barriers that keep private plaintiffs out of court. The first such barrier is standing. As in any civil suit, courts often find that private UDAP plaintiffs who are unable to demonstrate injury-in-fact lack standing and cannot sue.<sup>93</sup> Second, even though UDAP legislation was designed to eliminate the constraints of common law torts,<sup>94</sup> in some states, elements such as intent to deceive and justifiable reliance have crept back into private plaintiffs' proceedings. Consumer law expert Dee Pridgen has collected multiple examples of private consumer protection actions where courts have engrafted tort elements onto the UDAP statute.<sup>95</sup> In Maryland, for instance, it appears that as the case law has evolved, consumers bringing private enforcement actions often must prove reliance.<sup>96</sup>

Third, some states, such as California, restrict private enforcement action to consumers who have "lost money or property."<sup>97</sup> As the National Consumer Law Center puts it, under UDAP laws like these "consumers who have suffered an intangible injury such as invasion of privacy or who seek injunctive relief to prevent threatened harm are left out."<sup>98</sup> Similar issues plague the citizen enforcement provisions in Connecticut.<sup>99</sup> As discussed below, clients who are lured to CPCs under false pretenses may be able to show at least nominal financial harm for misspent bus fare or a few hours' lost wages, but it is more direct and comprehensive for AGs to bring suits for injunctive relief and to

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<sup>93</sup> In *Kjolsrud v. MKB Mgmt. Corp.*, 669 N.W.2d 82 (N.D. 2003), an anti-abortion advocate sued an abortion clinic under North Dakota's UDAP law for distributing brochures that she saw as deceptive because they rejected a long-debunked link between abortion and breast cancer. The court dismissed her suit for lack of standing because the woman had not actually read the brochures before filing suit and therefore had suffered no injury in fact. *Id.*; see also Daniel J. Faria, *Advertising for Life: CPC Posting Laws and the Case of Baltimore City Ordinance 09-252*, 45 COLUM. J.L. & SOC. PROBS. 379 (2012) (providing further discussion of barriers to private citizen suits).

<sup>94</sup> Pridgen, *supra* note 67, at 917.

<sup>95</sup> See, e.g., PRIDGEN & ALDERMAN, *supra* note 69.

<sup>96</sup> See CAROLYN L. CARTER ET AL., NAT'L CONSUMER LAW CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS 17 (2018), <https://www.nclc.org/issues/how-well-do-states-protect-consumers.html> [<https://perma.cc/B5G4-LGN3>] [hereinafter CARTER OVERVIEW].

<sup>97</sup> CAL. BUS. & PROF. CODE § 17535 (West 2018).

<sup>98</sup> CARTER OVERVIEW, *supra* note 96, at 54.

<sup>99</sup> See *id.*

punish harm to the public than for individual plaintiffs to use these minimal financial damages as a foot in the courtroom door.

AGs, in distinction, do not need to prove standing and, most importantly for putting a stop to CPC deception, face less demanding thresholds for enjoining harmful behavior. An AG can obtain a court injunction by showing that it is needed to protect the public interest, a standard more easily met than the demonstration of irreparable harm required of private plaintiffs.<sup>100</sup> The divergent outcomes of two lawsuits against the same Texas CPC—one brought in 1985 by women who had been misled and the other brought by the state AG shortly after the first suit failed—demonstrate the consequences of these different standards. In the private enforcement action in 1985, *Mother & Unborn Baby Care, Inc. v. Doe*, three women brought UDAP claims against a CPC in Fort Worth that advertised in the phonebook as a medical clinic offering abortion information and services.<sup>101</sup> The women visited the CPC expecting to terminate their pregnancies but were instead given pregnancy tests, questioned about their sexual histories, and subjected to a film about the dangers of abortion.<sup>102</sup> Although a lower court issued a temporary injunction that barred the CPC from advertising abortion services, a Texas appellate court reversed, holding that the women did not face an ongoing threat of irreparable injury from the CPC (what damage had been done was done) and thus could not satisfy the legal standard for an injunction. The appeals court stated that although they sympathized with the women's plight, "that cannot change our opinion that . . . appellees have no standing."<sup>103</sup> In contrast, in the public enforcement action that followed and survived appeal in 1988, *Mother & Unborn Baby Care, Inc. v. State*, the Texas AG's office sued under the same UDAP provisions, obtaining a judgment against the CPC for multiple violations.<sup>104</sup> The appeals court upheld the lower court's remedies, which included mandating disclosures in future CPC advertising, assessing civil penalties for violations of the UDAP and the temporary injunction, and levying of attorney's fees.<sup>105</sup>

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<sup>100</sup> See Pridgen, *supra* note 67, at 920 n.44.

<sup>101</sup> 689 S.W.2d 336 (Tex. App. 1985).

<sup>102</sup> *Id.* at 337.

<sup>103</sup> *Id.* at 339 ("There is no question that appellant's employees purposefully attracted pregnant women to their facility by disseminating information which could lead these women to believe that abortions were available there.").

<sup>104</sup> 749 S.W.2d 533, 536 (Tex. App. 1988).

<sup>105</sup> *Id.*

### b. Practical Advantages

Besides the advantageous legal standards, AGs are preferred UDAP enforcers for a number of practical and logistical reasons. Costs and intimidation mean that chances are slim that any individual woman who is tricked by a CPC will independently bring a lawsuit. Many individuals in need of the free services CPCs promise are teenagers or low-income people unfamiliar with navigating the legal system and unable to afford expert legal advice.<sup>106</sup> On top of that, a woman who has sought a sensitive health service may hesitate to expose herself to public scrutiny as the named plaintiff in a lawsuit. AGs, in contrast, offer the power of the state and the ability to bring action on behalf of multiple individuals. They can address standalone complaints backed by the power of the state but are also positioned to identify patterns of violations and build stronger cases with evidence gathered from multiple consumer perspectives.

### c. Symbolic Advantages

In this moment, state AGs are a true locus of power in modern civil rights causes, and their collective enforcement of UDAP statutes to combat CPC deception would send a powerful message. Scholars have documented the increasing prominence of state AGs as policy makers, with AG activity markedly intensifying in 2017 after having already risen sharply during the Obama presidency.<sup>107</sup> In one famous recent example, numerous attorneys general challenged the Trump administration's travel ban that closed our borders to individuals from Muslim-majority countries. AGs in New York, Massachusetts, and Virginia intervened on behalf of individuals stopped at airports, and the AGs of Washington, Minnesota, and Hawaii sued on their states' behalves.<sup>108</sup> Many more filed amicus briefs.<sup>109</sup> New Mexico's attorney general observed of this coordinated effort that AGs "are becoming, potentially, the fourth branch of government."<sup>110</sup>

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<sup>106</sup> Upfront legal costs are prohibitive even if attorney's fees might be recouped should the plaintiff prevail. Of course, reproductive rights and consumer protection legal advocacy organizations might be willing to take on such cases but connecting plaintiffs with these organizations is likely more easily accomplished through a public, state-wide effort.

<sup>107</sup> See Paul Nolette & Colin Provost, *Change and Continuity in the Role of State Attorneys General, in the Obama and Trump Administrations*, 48 PUBLIUS 469, 470 (2018).

<sup>108</sup> See Burns, *supra* note 90.

<sup>109</sup> See *id.*

<sup>110</sup> *Id.*

Just as some attorneys general fought to overturn a Department of Education rule granting transgender students access to school bathrooms and others are now banding together to regulate fossil fuels and protect health insurance coverage,<sup>111</sup> so too could they place a spotlight on UDAP enforcement efforts against CPCs. When dozens of state AGs joined forces to bring UDAP cases against tobacco companies and opioid manufacturers, these efforts became a national focal point.<sup>112</sup> Granted, there are significant differences between the central issues and defendants in those cases as compared to CPCs—not nearly as many states would join an effort connected to abortion, and CPC enforcement actions could not be combined into a single multistate suit as was done against Big Tobacco and Purdue Pharma.<sup>113</sup> But at least among states with the political appetite to tackle CPC fraud post-*NIFLA*,<sup>114</sup> a coordinated UDAP enforcement campaign launched by five states' AGs could send a powerful message about the importance of combatting deception in reproductive health care and reinvigorate a viable legal option that has lain dormant for many years.

## 2. AGs' UDAP Arsenal: Enforcement History Offers a Playbook for Today

Perhaps the most significant advantage is the wide array of enforcement tools available to AGs. In most states, these include investigating consumer complaints complete with subpoena power, negotiating voluntary assurances of compliance, seeking injunctions, and obtaining restitution both in and out of court.<sup>115</sup> In about half of all states, attorneys general or partner agencies can issue regulations or interpretive opinions specifying which activities qualify as deceptive or unfair.

This Section explores the history of state AGs' UDAP enforcement choices in response to CPC deception to offer a roadmap of what has worked in the past and to suggest what is possible today under state UDAP laws as they are currently drafted. Later

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<sup>111</sup> See Rachel M. Cohen, *The Hour of the Attorneys General*, AMER. PROSPECT (Mar. 22, 2017), <http://prospect.org/article/hour-attorneys-general> [https://perma.cc/4KVA-4LAV].

<sup>112</sup> See Colin Provost, *State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism*, 33 PUBLIUS 37, 44 (2003); Pridgen, *supra* note 67, at 922–23.

<sup>113</sup> See Provost, *supra* note 112, at 44; Pridgen, *supra* note 67, at 922–23.

<sup>114</sup> The political nature of high-profile consumer protection cases has been shown to correlate with AGs' decisions to undertake certain litigation. See Provost, *supra* note 112, at 42.

<sup>115</sup> See Pridgen, *supra* note 67, at 915–16.



sections discuss the possibility of amending these laws to better empower AGs. Starting in the 1980s, states like New York and Ohio conducted robust investigations of crisis pregnancy centers and used their subpoena power to leverage settlement agreements with offending CPCs.<sup>116</sup> Around the same time, states' attorneys in California and Texas pursued UDAP complaints in court and achieved significant court-ordered injunctions of harmful behavior as well as a hefty fee against the CPC and its owner/operator in the Texas case.<sup>117</sup> And while no AGs appear to have used their rulemaking powers to rein in CPCs' deceptive practices, regulatory action in this space could be a powerful adjunct to these other approaches.

### a. Investigations and Compliance Negotiations

State AGs' offices and consumer protection agencies can use the investigative powers granted to them by most UDAP statutes to subpoena evidence or issue civil investigative demands.<sup>118</sup> Not only does this approach help identify wrongdoing in the first place, but it also opens the door to negotiations with entities to change their practices. While these investigations may lead to the courtroom, they need not; settlement agreements can often achieve desired results extrajudicially. New York and Ohio's AGs have translated UDAP investigations into settlements that curbed CPC deception.<sup>119</sup>

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<sup>116</sup> See Jane Gross, *Pregnancy Centers: Anti-Abortion Role Challenged*, N.Y. TIMES (Jan. 23, 1987), <https://www.nytimes.com/1987/01/23/nyregion/pregnancy-centers-anti-abortion-role-challenged.html> [<https://perma.cc/TW2M-7Y8KJ>]; Alan Johnson, *Fisher Targets "Crisis Pregnancy Centers,"* COLUMBUS DISPATCH, Feb. 25, 1993, at 5C; Sheryl Harris, *Agency Fights Altering of Ads: Akron Pregnancy Services is Told by Ohio Attorney General to Stop Calling Itself "Abortion Service." Agency Sues Lee Fisher's Office, Citing a Limit to Free Speech*, BEACON J., June 9, 1993, at D1; Alan Johnson, *Fisher, Pregnancy Center Coalition Claim Victory*, COLUMBUS DISPATCH, Dec. 2, 1993, at 8C [hereinafter Johnson Victory]; *State, Agency Settle Abortion Ad Dispute*, CLEVELAND PLAIN DEALER, Nov. 19, 1993, at 1B.

<sup>117</sup> See Gross, *supra* note 116; *District Attorney Sues Anti-Abortion Center*, ASSOCIATED PRESS, July 18, 1986, LEXISNEXIS; Wallace, *Agency Probed, supra* note 42; Bill Wallace, *S.F. Sues Abortion Foes for Arranging Adoption*, S.F. CHRON., July 18, 1986, at 1, NEWSBANK, INC. [hereinafter Wallace, *Adoption*]; *Halt Ploy, Abortion Foes Told*, SAN JOSE MERCURY NEWS, Dec. 8, 1988, at 1A; *Mother & Unborn Baby Care*, 689 S.W.2d at 337; *Mother & Unborn Baby Care*, 749 S.W.2d at 536.

<sup>118</sup> See PRIDGEN & ALDERMAN, *supra* note 69, at § 7.1.

<sup>119</sup> Other states have dabbled in investigation but produced few results. See, e.g., *New Illinois Attorney General Targets Crisis Pregnancy Centers*, PRO-LIFE ACTION LEAGUE (Dec. 14, 2002), <https://proliferaction.org/2002/2002v21n3madigan/> [<https://perma.cc/6NJS-JN37>] (explaining newly elected Attorney General Lisa Madigan's campaign promise to crack down on "phony" clinics); CPC LEGISLATIVE REPORT, *supra* note 10, at 15, 17 (noting that the Illinois and Maryland Attorney Generals' offices instituted informal investigations and inquiries into pregnancy centers during this time).

New York has been a leader in Attorney General enforcement of consumer protection law against CPCs' deceptive practices. As early as 1987, the state AG began investigating three New York City CPCs based on affidavits from unwitting consumers and volunteer investigators from abortion-rights groups.<sup>120</sup> Describing the AG's enforcement approach, a representative of the office explained: "Our position is not that they can't attempt to talk people out of abortion. Our position is they can't do that if they entice people by misrepresentation."<sup>121</sup> Following investigations of other CPCs in the state, the AG issued consent letters that addressed the centers' advertising as well as internal activities like administering pregnancy tests and screening graphic anti-abortion slide shows; one letter even asked a CPC to change its name.<sup>122</sup> Although the AG achieved consent agreements in some instances,<sup>123</sup> he ultimately sued a Dutchess County CPC that refused to fully comply with the AG's terms. Notably, this UDAP enforcement action survived a First Amendment challenge.<sup>124</sup>

A decade later, then-Attorney General Elliot Spitzer launched another CPC investigation, issuing subpoenas based on concerns that certain CPCs' advertising and

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<sup>120</sup> See Gross, *supra* note 116.

<sup>121</sup> *Id.*

<sup>122</sup> See Carr v. Axelrod, 798 F. Supp. 168, 176 (S.D.N.Y. 1992) (noting that in a letter, a clinic agreed to advise clients that they may refuse to see or may stop watching an anti-abortion slide show at any time).

<sup>123</sup> See, e.g., *New York Attorney General Subpoenas Crisis Pregnancy Center Leader*, LIFE SITE NEWS (May 29, 2013, 8:05 PM), <https://www.lifesitenews.com/news/crisis-pregnancy-center-liberals-want-to-get-the-christians-out-of-health-c> [<https://perma.cc/3LQ6-LXD7>] [hereinafter LIFE SITE].

<sup>124</sup> Carr, 798 F. Supp. at 171, 176. The court explained the events leading up to the suit against the Dutchess County CPC:

On November 27, 1991, the Attorney General, as required by state statute, mailed a 'Notice of Proposed Litigation' to APC charging it with a variety of allegedly fraudulent and deceptive practices in connection with their operation of the pregnancy center . . . . A meeting took place on December 17, 1991 . . . . APC responded, by letter, on December 31, 1991, agreeing to alter some of its practices as suggested by the Attorney General's office but refused to change the name of its organization or the content of its advertising, and declined to pay any civil penalties.

Carr, 798 F. Supp. at 171, 176. Note that the original case may be found at this citation by contacting the court clerk's office: *People v. N. Westchester Putnam Assistance to Mother & Unborn Child*, No. 92-135 (Sup. Ct. Dutchess Co.).

business practices could mislead women about the nature of the centers' services.<sup>125</sup> The subpoenas spurred at least one consent decree with a CPC that agreed to "clearly inform[] persons who inquire about abortion or birth control that it does not provide those services."<sup>126</sup> The subpoenas also encouraged settlement discussions with several other CPCs.<sup>127</sup> Years later, in 2013, the state AG's office again leveraged its subpoena power to hold a CPC accountable for violating a consent decree obtained in the first round of investigations in the 1980s.<sup>128</sup>

Ohio, a state now known for its repeated attempts to ban abortion as early as six weeks, was also an early enforcer of its UDAP law to curb CPC deception. In the 1990s Ohio's Attorney General Lee Fisher used investigative powers granted him under Ohio's UDAP statute<sup>129</sup> to issue substantiation requests to CPCs that advertised under phonebook headings like "Clinic" and "Abortion Services."<sup>130</sup> Recipients of a substantiation request must submit to the AG "documentation, tests, studies, reports, or other data" to show that there were adequate grounds for the representations made in their advertisements.<sup>131</sup> Upon reviewing the substantiation submissions, the AG concluded that five CPCs had "violate[d] the law by advertising themselves as clinics when they are not medical facilities, provide no medical services and have no doctors on staff."<sup>132</sup> He ordered them to stop advertising under inappropriate phonebook headings and to inform clients that the CPCs do not provide abortions or other medical services.<sup>133</sup> After a CPC

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<sup>125</sup> See NARAL PRO-CHOICE N.Y. FOUND. & NAT'L INST. FOR REPROD. HEALTH, "SHE SAID ABORTION COULD CAUSE BREAST CANCER:" A REPORT ON THE LIES, MANIPULATIONS, AND PRIVACY VIOLATIONS OF CRISIS PREGNANCY CENTERS 3 (2010), <https://www.scribd.com/document/39342502/Cpc-Report-2010> [<https://perma.cc/QW8N-246U>].

<sup>126</sup> Press Release, N.Y. Att'y Gen., Spitzer Reaches Agreement with Upstate Crisis Pregnancy Center (Feb. 28, 2002), <https://web.archive.org/web/20160914212822/https://ag.ny.gov/press-release/spitzer-reaches-agreement-upstate-crisis-pregnancy-center> [<https://perma.cc/5WDA-YAAL>].

<sup>127</sup> See *id.*

<sup>128</sup> See LIFE SITE, *supra* note 123.

<sup>129</sup> OHIO ADMIN. CODE § 109:4-3-10 (2018).

<sup>130</sup> See *Ohio Summit Cty. Crisis Pregnancy Ctr. v. Fisher*, 830 F. Supp. 1029, 1031 (D. Ohio 1993).

<sup>131</sup> OHIO ADMIN. CODE § 109:4-3-10 (2018).

<sup>132</sup> Johnson, *Fisher Targets "Crisis Pregnancy Centers," supra* note 9.

<sup>133</sup> See Harris, *supra* note 9; Johnson *Fisher Targets "Crisis Pregnancy Centers," supra* note 9.

in Akron filed a suit challenging this compliance request on First Amendment and due process grounds, the Attorney General settled, requiring the CPC to disclose in its advertising that it was not a medical facility and did not provide abortions.<sup>134</sup> The other CPCs not party to the suit agreed to similar terms.<sup>135</sup>

Of course, a successful UDAP enforcement strategy requires a level of institutional commitment and resources that may not be present in every office. Attorneys General in states like Illinois<sup>136</sup> and Maryland<sup>137</sup> have undertaken at least informal investigations, but there is limited evidence of their having achieved compliance agreements or settlements. In other states, AGs have declined to investigate complaints altogether.<sup>138</sup> In Kentucky, a consumer complained to the state AG's office about a misleading CPC ad, but was told that Consumer Fraud division did not have enough staff to investigate.<sup>139</sup> And in Missouri, a patient seeking an abortion who unwittingly contacted a CPC alleged that "despite receiving complaints about the methods of fake abortion clinics" including the one she visited, "the Missouri Attorney General encouraged [the CPCs] by publicly announcing that their advertising did not constitute misrepresentation" and by "refusing

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<sup>134</sup> See Johnson, *Victory*, *supra* note 9; *State, Agency Settle Abortion Ad Dispute*, *supra* note 9.

<sup>135</sup> See Johnson, *Victory*, *supra* note 9.

<sup>136</sup> In 2002, crisis pregnancy centers in Illinois braced for investigations promised by newly elected Attorney General Lisa Madigan, following her campaign promise to crack down on "phony" clinics. See *New Illinois Attorney General Targets Crisis Pregnancy Centers*, *supra* note 119. A 2008 report by three national CPC networks suggests there was at least some follow through, noting "[i]n prior years, the Illinois Attorney General's office has instituted informal investigations and inquiries into pregnancy centers." CPC LEGISLATIVE REPORT, *supra* note 10, at 17.

<sup>137</sup> "In 2002 and 1991, the Maryland Attorney General initiated informal investigations into Maryland centers by requesting information on the centers. A response was provided and no formal investigation ensued." CPC LEGISLATIVE REPORT, *supra* note 10, at 15; see also Kate Shatzkin, *Inquiry Sought for Pregnancy Crisis Sites*, BALT. SUN (Aug. 17, 2002), [http://articles.baltimoresun.com/2002-08-17/news/0208170017\\_1\\_crisis-pregnancy-centers-abortion-attorney-general-office](http://articles.baltimoresun.com/2002-08-17/news/0208170017_1_crisis-pregnancy-centers-abortion-attorney-general-office) [<https://perma.cc/79BC-MJKG>].

<sup>138</sup> In Minnesota, the Attorney General declined to investigate multiple complaints from women in 2005, instead issuing letters that claimed "such issues are in the jurisdiction of state agencies and not [the AG's] office." Rachel E. Stassen-Berger, *More Than a Street Divides Clinic, Center*, ST. PAUL PIONEER PRESS, Apr. 10, 2005, at A11. The state's Department of Health promised a review following the release of a new investigative report issued seven years later, but it is unclear whether a state inquiry came to pass. See Jeremy Olson, *Pregnancy Centers Come Under Fire for Abortion Info*, STAR TRIBUNE (Jan. 18, 2012), <http://www.startribune.com/pregnancy-centers-come-under-fire-for-abortion-info/137538788/> [<https://perma.cc/3TNC-FHYB>].

<sup>139</sup> See *Consumer Prot. & Patient Safety Issues Involving Bogus Abortion Clinics*, *supra* note 7, at 136–37.

to invoke broad state statutory and common law remedies available to prevent the use of deceptive advertising practices.”<sup>140</sup>

### **b. Public Enforcement Lawsuits and Injunctive Relief**

State AGs can also sue to secure injunctive relief from deceptive practices, restitution for injured parties, or the imposition of civil penalties that punish and deter future bad conduct. “Usually these injunctions are broad, to not only put an end to current unfair or deceptive activities but also to prevent future similar violations. Such injunctions can be quite creative and far-reaching.”<sup>141</sup> While the traditional concept of restitution—depriving the deceptive party of ill-gotten gains<sup>142</sup>—may not apply directly to CPCs offering free services, compensating victims for financial harm is highly relevant and might be awarded as equitable relief even if not statutorily specified. Further, levying civil penalties against UDAP violators acts as a deterrent and sends a message about behaviors the state finds particularly intolerable.<sup>143</sup> For these reasons, judicial remedies might be preferable to out-of-court compliance agreements.

California and Texas are among the states whose attorneys have used UDAP laws to achieve court-ordered remedies to CPC deception and thus provide strong examples for other states to follow. In California, where city and county attorneys have UDAP-enforcement power, San Francisco’s District Attorney brought UDAP charges against a CPC that posed as a medical center and conducted repeated consultations with a fourteen-year-old girl, delaying her access to a legitimate health care provider for so long that she could no longer obtain an abortion.<sup>144</sup> The District Attorney won a temporary restraining order that barred the CPC from purchasing misleading ads in an upcoming version of the phonebook<sup>145</sup> and secured a permanent injunction prohibiting the center from engaging in “any conduct likely to deceive the public regarding abortions,” including CPC names,

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<sup>140</sup> *Lewis v. Pearson Found., Inc.*, 908 F.2d 318, 319–20 (8th Cir. 1990).

<sup>141</sup> Pridgen, *supra* note 67, at 920.

<sup>142</sup> See PRIDGEN & ALDERMAN, *supra* note 69, at § 7:13.

<sup>143</sup> See Monica Schurtman & Monique Lillard, *Remedial and Preventive Responses to the Unauthorized Practice of Immigration Law*, 20 TEX. HISP. J.L. & POL’Y 47, 79 (2014).

<sup>144</sup> *District Attorney Sues Anti-Abortion Center*, *supra* note 117; Wallace, *Agency Probed*, *supra* note 42.

<sup>145</sup> See Wallace, *Adoption*, *supra* note 117, at 1.

advertising, and statements to clients.<sup>146</sup> The injunction further restricted the CPC from showing an anti-abortion slide show unless it included medically accurate information like the fact that abortion has few physical or psychological side effects.<sup>147</sup>

In *Mother & Unborn Baby Care, Inc. v. State*, Texas's AG brought a UDAP lawsuit to obtain injunctive relief and financial judgment against a CPC after a private enforcement action failed.<sup>148</sup> The CPC advertised as a medical clinic offering abortion information and services, but never provided—and never intended to provide—the abortion services it advertised.<sup>149</sup> Instead staff questioned clients about their sexual histories, subjected them to a film about the dangers of abortion, and repeatedly contacted the clients after they left the facility.<sup>150</sup> Through the suit, the AG secured an injunction against the CPC's false advertising along with other remedies, including mandatory disclosures in future advertising, civil penalties for violating the UDAP and the temporary injunction, and attorney's fees—all of which the appellate court affirmed in the face of a constitutional challenge.<sup>151</sup>

These investigations and enforcement actions, together with the advocacy campaigns of women's rights groups, formed the centerpiece of a congressional hearing in 1991 that brought national attention to the issue.<sup>152</sup> Nonetheless, efforts to curb problematic CPC tactics have remained the purview of the police powers of state and local government—as demonstrated by the proliferation of disclosure laws of the type at issue in *NIFLA*.<sup>153</sup>

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<sup>146</sup> *Halt Ploy, Abortion Foes Told*, *supra* note 117, at 1A.

<sup>147</sup> *See id.*

<sup>148</sup> *Mother & Unborn Baby Care*, 749 S.W.2d at 536 (pursuing claims against a CPC after a private claim failed in *Mother & Unborn Baby Care*, 689 S.W.2d at 337).

<sup>149</sup> *Mother & Unborn Baby Care*, 689 S.W.2d at 337.

<sup>150</sup> *Id.*

<sup>151</sup> *Mother & Unborn Baby Care*, 749 S.W.2d at 536.

<sup>152</sup> *Consumer Prot. & Patient Safety Issues Involving Bogus Abortion Clinics*, *supra* note 4.

<sup>153</sup> 138 S. Ct. 2361 (2018).

### c. Rulemaking Authority

Although the majority of UDAP statutes grant rulemaking authority to state AGs,<sup>154</sup> only half of this Article's six focal states have delegated such powers. In Maryland a subdivision of the Attorney General's office has rulemaking authority,<sup>155</sup> and in Connecticut<sup>156</sup> and Hawaii<sup>157</sup> consumer protection agencies closely allied with the AG have such authority. There is no grant of rulemaking powers in California,<sup>158</sup> New York,<sup>159</sup> or Texas.<sup>160</sup>

Regulations enable "the state to target emerging or persistent unfair and deceptive acts and practices and develop state-based solutions."<sup>161</sup> They allow states to "add bright-line rules to their general prohibitions so that there is no question that a certain practice is unfair or deceptive."<sup>162</sup> For states where rulemaking is an option, the Massachusetts AG's office stands as an exemplar. In the 1990s, Massachusetts' AG was the first in the country to use his UDAP rulemaking authority to define the sale of guns without

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<sup>154</sup> See Pridgen, *supra* note 67, at 921.

<sup>155</sup> MD. CODE ANN., COM. LAW § 13-101(e) (West 2018) ("'Division' means the Division of Consumer Protection of the Office of the Attorney General."); *id.* at § 13-205 ("[T]he Division may adopt reasonable rules, regulations, and standards appropriate to effectuate the purposes of this subtitle, including rules, regulations, or standards which further define specific unfair or deceptive trade practices. These rules, regulations, and standards may not modify, expand or conflict with the definitions or standards set forth in this title.").

<sup>156</sup> CONN. GEN. STAT. §§ 42-110a, 42-110b (2012).

<sup>157</sup> HAW. REV. STAT. § 487-5 (2002); *see also* CARTER OVERVIEW, *supra* note 96, at 16.

<sup>158</sup> CAROLYN L. CARTER, NAT'L CONSUMER LAW CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS APPENDIX C: STATE-BY-STATE SUMMARIES OF STATE UDAP STATUTES 9 (2018), <https://www.nclc.org/images/pdf/udap/udap-appC.pdf> [<https://perma.cc/R46M-KT4Y>].

<sup>159</sup> CARTER OVERVIEW, *supra* note 96, at 54 ("[California's] statute would also be enhanced by . . . giving a state agency authority to adopt rules prohibiting emerging scams."); *id.* at 60 ("Nor does New York give a state agency the authority to adopt rules addressing emerging scams.").

<sup>160</sup> *Id.* at 63 ("The statute would be enhanced by giving a state agency the authority to adopt regulations prohibiting emerging forms of unfairness and deception.").

<sup>161</sup> *Id.* at 16.

<sup>162</sup> *Id.*

adequate safety features to be unfair or unconscionable,<sup>163</sup> a move the state's high court later upheld as consistent with the statute.<sup>164</sup>

Though it does not appear that any state has issued UDAP regulations of CPCs' activity, AGs and partner agencies might consider promulgating rules that clarify how UDAP statutes apply to nonprofit organizations. Connecticut's consumer protection agency, for instance, has the authority to issue regulations defining what constitutes a violation of the state's UDAP statute.<sup>165</sup> Connecticut courts have already found that the statute applies to nonprofit organizations in certain situations such that a clarifying regulation similar to the legislative amendment proposed in Section IV.B. might well be within the bounds of existing regulatory authority.<sup>166</sup>

That said, if the activity the AG seeks to cover is entirely outside the sweep of existing UDAP provisions, such a change might not be possible via regulatory means. Maryland's rulemaking delegation cautions that the "rules, regulations, and standards may not modify, expand or conflict with the definitions or standards set forth in this title."<sup>167</sup> And Michigan's grant of rulemaking authority prevents the Attorney General from promulgating rules that create additional unfair trade practices not already enumerated.<sup>168</sup> In states where such limitations apply, new regulations would not permit the AG's office to reach specific CPC behaviors or remedy the general types of wrongs

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<sup>163</sup> See LAINIE RUTKOW & STEPHEN TERET, THE POTENTIAL FOR STATE ATTORNEYS GENERAL TO PROMOTE THE PUBLIC'S HEALTH: THEORY, EVIDENCE, AND PRACTICE 18 (2010), <http://publichealthlawresearch.org/sites/default/files/downloads/product/The%20Potential%20for%20State%20Attorneys%20General%20to%20Promote%20the%20Public%27s%20Health.pdf> [<https://perma.cc/k8f4-kmky>].

<sup>164</sup> See *Am. Shooting Sports Council, Inc. v. Att'y Gen.*, 429 Mass. 871, 904–05 (1999) (holding that although questions of whether a product can be sold should primarily be under the purview of the legislature, the AG may "regulate in an area not otherwise withheld from his consideration, even if the regulation may affect the ability of the vendor to sell its product, if he can establish that the regulations define acts or practices which violate" the UDAP law).

<sup>165</sup> CONN. GEN. STAT. § 42-110b(d) (2012).

<sup>166</sup> See Robert Langer et al., 12 CONN. PRAC. *Unfair Trade Practices* § 3.5 (2018).

<sup>167</sup> MD. CODE ANN., COM. LAW § 13-205 (West 2018).

<sup>168</sup> MICH. COMP. LAWS § 445.903(2) (2018).



CPCs perpetrate if those practices are clearly off limits based on statutory language and court decisions.<sup>169</sup>

### **III. The Commercial Impediment to Using UDAP Laws to Remedy CPC Deception**

Despite AGs' successful history of deploying UDAP laws to curb CPCs' deceptive activities and the ready availability of effective tools to continue doing so today, there remain several challenges with applying UDAP statutes to CPCs. The two main problems are (1) overcoming the commercial language that in many statutes threatens to foreclose UDAP action against not-for-profit CPCs, and (2) adapting these laws to more squarely countenance the non-financial harms that CPCs cause. This Section explores the commercial language problem and how it might be overcome while Section IV does the same for the question of non-financial harm.

Specifically, some states' UDAP statutes clearly apply even when no financial exchange occurs, while other states' UDAP language is more restrictive. Where needed, fixes to the commercial impediment could take the form of (1) amending the text of a state's UDAP statute, (2) relying on the undisputedly commercial advertising provisions of the UDAP regime to reach other conduct, and (3) advancing broader judicial interpretations of UDAP laws consistent with their remedial purposes.

#### **A. The "In Trade or Commerce" Impediment**

At its most basic, a UDAP action requires a showing of deceptive or unfair conduct on the part of a provider of consumer goods or services. Under most statutes, this breaks down into two main elements: (1) deception and (2) selling or offering goods or services. As discussed earlier, the deception element is easily met when it comes to CPCs. But because most UDAP statutes include the phrase "trade or commerce" or similar limiting terms, the challenge with satisfying this second element is pronounced. CPCs have argued, and some authorities have accepted, that because CPCs give their services away, their activities are noncommercial and fall outside UDAP statutes' scope.

Trade or commerce is defined differently in each state, and in some statutes, it is not referenced at all. Sometimes the concept of trade or commerce is construed so broadly that CPCs' activities could easily fit within this class of conduct. But in other instances,

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<sup>169</sup> AGs will also have to be sensitive to the fact that prescriptive rulemaking might shift the regulatory model back to the *ex ante* approach that raised First Amendment concerns in *NIFLA*. See *supra* note 62 and accompanying text.

satisfying the commercial element when CPCs do not in fact sell their services poses a major stumbling block for UDAP enforcement against them. Trade and commerce have infused many UDAP statutes and informed the types of practices courts understand as falling within their reach. Indeed, some courts have refused to apply these laws when consumers were misled or treated unfairly but had not paid for any of the services in question. A Washington court ruled that a website providing free comparative ratings of attorneys was not part of “trade or commerce” and thus not subject to suit under the state’s UDAP law,<sup>170</sup> and a UDAP claim against Facebook failed in California because complaining plaintiffs had not paid to use the website.<sup>171</sup>

Some AGs’ offices and state courts have used this same kind of reading to deem UDAP statutes inapplicable to CPCs. A Missouri woman who reported a deceptive CPC encounter to both the Better Business Bureau and the Missouri AG was told by both entities that “[she] hadn’t paid any money to the center, so they could not file charges of consumer fraud.”<sup>172</sup> The Massachusetts Supreme Court also read “trade” and “commerce” to limit the state’s seemingly otherwise applicable UDAP from applying to CPCs in *Planned Parenthood Federation of America v. Problem Pregnancy of Worcester*.<sup>173</sup> There the court decided that the UDAP’s definition of trade or commerce did not apply to CPCs because, even though it included “distribution of any services,” that phrase appeared near words like “sale” and “lease.”<sup>174</sup> Relying on the constructive canon of *noscitur a sociis* (a word is known by its associates), the court held that “services [must] be distributed in exchange for some consideration” if the UDAP’s protections were to attach.<sup>175</sup>

While such a narrow reading of a state’s UDAP law is possible, it is not inevitable. Language relating to profit and commercialism need not so tightly confine the statute’s reach as to exempt CPCs. For instance, despite its financial connotation in common

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<sup>170</sup> *Browne v. Avvo Inv.*, 525 F. Supp. 2d 1249 (W.D. Wash 2007).

<sup>171</sup> *In re: Facebook Privacy Litigation*, 791 F. Supp. 2d 705 (N.D. Cal. 2011).

<sup>172</sup> *Consumer Prot. & Patient Safety Issues Involving Bogus Abortion Clinics*, *supra* note 4, at 364 (letter from Jennifer Kraeger).

<sup>173</sup> 498 N.E.2d 1044, 1051–52 (Mass. 1986).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

parlance, the term “transaction” also refers to transfer of services,<sup>176</sup> and California’s UDAP law defines a transaction as an agreement between two parties which need not be a contract.<sup>177</sup> These more flexible understandings could very well extend to a CPC’s activities. The following discussion explores whether UDAP text in the six CPC disclosure states might require AGs to demonstrate a commercial nexus and suggests that AGs might overcome such a requirement by relying on false advertising provisions or by encouraging a flexible interpretation consistent with UDAP statutes’ broad language and remedial purpose.

### 1. Statutes with More Favorable Language

UDAP language in New York, Connecticut, Texas, and Hawaii should apply to CPCs without the need to show that a financial exchange occurred. New York’s UDAP statute offers the clearest instance where there should be no commercial impediment to reaching CPC activity under existing consumer law. It prohibits “[d]eceptive acts or practices in the conduct of any business, trade or commerce *or* in the furnishing of any service.”<sup>178</sup> The disjunctive makes clear that the furnishing of a service is distinct from business, trade, or commerce. That commercial activity and furnishing services are distinct but equally covered categories is reiterated in the statute’s false advertising provisions.<sup>179</sup> On top of that, the term “business” may not be the impediment it initially appears. A state court recognized that the AG’s subpoena power to respond to repeated or “persistent fraud . . . in the carrying on . . . of business” was valid as applied to a CPC because the CPC was “‘carrying on, conducting or transact[ing] business,’ regardless of whether it [wa]s doing so for a commercial purpose or profiting financially.”<sup>180</sup>

Somewhat similar to New York’s “furnishing of any services,” Connecticut’s UDAP scheme defines “trade” and “commerce” to include the distribution of services and thus does not impose a financial element that would exclude CPCs’ free services

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<sup>176</sup> TRANSACTION, <https://www.merriam-webster.com/dictionary/transaction> [<https://perma.cc/Z2LM-JWS6>] (“*especially*: an exchange or transfer of goods, services, or funds”).

<sup>177</sup> CAL. CIV. CODE § 1770 (West 2018) (defining transaction as the making of and performance pursuant to an agreement, whether or not it is a contract).

<sup>178</sup> N.Y. GEN. BUS. LAW § 350 (McKinney 2018) (emphasis added).

<sup>179</sup> N.Y. GEN. BUS. LAW § 349 (McKinney 2018).

<sup>180</sup> Evergreen Ass’n, Inc. v. Schneiderman, 153 A.D.3d 87, 97 (N.Y. App. Div. 2017).

from coverage.<sup>181</sup> And like Connecticut, Texas’s law includes offering a service for distribution within its trade and commerce definition.<sup>182</sup> Further, in Texas a consumer includes an individual who “seeks” any service.<sup>183</sup> Together, “offering . . . for distribution” (rather than sale) and “seeks” (rather than buys) make clear that a financial transaction is not necessary for Texas’s UDAP protections to attach.<sup>184</sup> In fact, when confronted with the question of whether the state’s UDAP applied to CPCs, a Texas appeals court put it simply: “It is immaterial whether [the CPC] provided a service in exchange for money; the statute as a whole supports the conclusion that transfer of valuable consideration is not necessary.”<sup>185</sup>

Finally, rather than relying on “trade” or “commerce,” Hawaii focuses on actions undertaken as part of a person’s “business, vocation, or occupation.”<sup>186</sup> So long as operating a CPC can be understood as a vocation or occupation (a term which is not defined but almost certainly extends to paid staff and may even reach volunteers), Hawaii’s UDAP statute should cover CPCs’ misleading or deceptive practices.

## 2. Statutes with More Restrictive Language

On the other hand, based on statutory text alone, it appears that California and Maryland might be foreclosed from applying their UDAP laws to CPCs. Rather than referring to trade or commerce, California uses the phrase “unfair competition,” which means any unlawful, unfair, or fraudulent business practice.<sup>187</sup> Whether these three categories of practices are in fact proscribed by the UDAP law’s operative provision hinges on whether they “can properly be called a business practice”<sup>188</sup> or are undertaken

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<sup>181</sup> CONN. GEN. STAT. § 42-110a (2012).

<sup>182</sup> TEX. BUS. & COM. CODE ANN. § 17.45 (West 2018).

<sup>183</sup> *Id.* at § 17.45(2), (4) (“‘Consumer’ means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services.”).

<sup>184</sup> *Id.* at § 17.45.

<sup>185</sup> *Mother & Unborn Baby Care*, 749 S.W.2d 533, 538 (Tex. App. 1988).

<sup>186</sup> HAW. REV. STAT. § 481A-3 (2018).

<sup>187</sup> CAL. BUS. & PROF. CODE § 17200 (West 2018).

<sup>188</sup> *Prescott v. Rady Children’s Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1102 (S.D. Cal. 2017) (quoting *Cel-Tech Commc’ns v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 560 (Cal. 1999)).

“in a transaction intended to . . . result in the sale” of services.<sup>189</sup> It is not clear whether the distributor’s intent or the consumer’s controls. If the consumer’s intent controls, then a client’s agreement to undergo an ultrasound at a CPC might constitute a transaction that she intends to result in a sale (of abortion services) such that the UDAP statute applies. But if the intent of the service provider controls, because CPCs give away their services not intending to make a sale, a CPC’s practices may well qualify as unfair or deceptive but not unlawful under the statute. However, given that California’s UDAP regime prohibits as an “unlawful” practice any business activity that is proscribed elsewhere in the code,<sup>190</sup> violations of California’s standalone false advertising law will also constitute UDAP violations so long as advertising is understood as a business activity and, as discussed in Section III.C., it often is.

Maryland’s UDAP law poses similar problems in clearing the commercial hurdle. The statute does not refer to “trade” or “commerce” but rather defines a collection of unfair or deceptive practices<sup>191</sup> which it then bans only in “the sale” or “offer for sale” of consumer goods or services.<sup>192</sup> As such, a CPC’s activities might qualify as deceptive practices, but nevertheless not be forbidden if its services are given away freely and never offered for sale. There might be an escape hatch from this conundrum, given that “sale” is defined to include “any offer for service.”<sup>193</sup> But this definition renders superfluous and somewhat circular the operational section of the statute that prohibits misrepresentation in both the “sale” and the “offer for sale” of consumer services.<sup>194</sup> Instead of contorting the statutory language to such a degree, advocates of applying Maryland’s UDAP law to CPCs would be well served to wage their arguments on purposive and policy grounds. Section III.D.2. explores this approach.

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<sup>189</sup> CAL. CIV. CODE § 1770 (West 2018) (defining transaction to mean the making of and performance pursuant to an agreement, whether or not it is a contract).

<sup>190</sup> *Prescott*, 265 F. Supp. 3d at 1102.

<sup>191</sup> MD. CODE ANN., COM. LAW § 13-101 (West 2018).

<sup>192</sup> *Id.* at § 13-303.

<sup>193</sup> *Id.* at § 13-101.

<sup>194</sup> *Id.* at § 13-303.

## B. A Legislative Solution

Otherwise, if legislators in California, Maryland, or other states with commercially confined UDAP statutes want to better empower their AGs to combat CPC fraud, they could remove language limiting the laws to financial transactions. In place of the “trade or commerce” formulation, lawmakers might substitute the words “offer or distribution.” Another option would be to simply append New York’s “or in the furnishing of any service” phrase to the existing operational or definitional language.<sup>195</sup> If concerns arose that such changes might render purely private non-financial exchanges vulnerable to government regulation, language could be added referring to services held out to the public or offered in facilities open to the public akin to the public accommodations definition in the Americans with Disabilities Act.<sup>196</sup>

## C. Advertising Often Qualifies as Commercial, Even if Underlying Services Do Not

Even where some UDAP laws’ “trade or commerce” or “offer for sale” language appears to shield CPC practices, advertising will almost always be within reach. In fact, at least two federal district courts that rejected local CPC disclosure ordinances have suggested applying UDAP statutes to CPCs’ advertising instead.<sup>197</sup> Even some CPCs have conceded that such enforcement would be valid. A CPC that challenged the constitutionality of New York City’s CPC disclosure ordinance argued that in lieu of the arguably unconstitutional ordinance, “the City could . . . prosecute fraud [or] false advertising . . . under current law.”<sup>198</sup> That is not to say that those same CPCs would not object if UDAP laws were brought to bear on them, but this concession acknowledges the obvious authority that UDAP schemes have over advertisements for services.

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<sup>195</sup> N.Y. GEN. BUS. LAW § 350 (McKinney 2018) (“Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.”).

<sup>196</sup> See WHAT IS TITLE III?, <https://adata.org/what-title-iii> [<https://perma.cc/6T22-2GF5>] (“Public accommodations include . . . professional offices of health care providers”); see also *infra* notes 231–33 and accompanying text.

<sup>197</sup> See *O’Brien v. Mayor of Balt.*, 768 F. Supp. 2d 804, 817 (D. Md. 2011) (“In lieu of the disclaimer mandate of the Ordinance, Defendants could use or modify existing regulations governing fraudulent advertising to combat deceptive advertising practices by limited-service pregnancy centers.”); *Evergreen Ass’n v. City of N.Y.*, 801 F. Supp. 2d 197, 209 (S.D.N.Y. 2011) (“Such prosecutions offer a less restrictive alternative.”), *aff’d in relevant part*, 740 F.3d 233, 247 (2d Cir. 2014).

<sup>198</sup> *Evergreen Ass’n v. City of N.Y.*, 740 F.3d 233, 247 (2d Cir. 2014).

For example, Connecticut's UDAP regulations define as a deceptive practice any advertising that misrepresents "the nature, characteristics, . . . benefits, . . . or qualities" of merchandise or services.<sup>199</sup> No sale or intent to profit is needed. Similarly, no separate commercial element is necessary under California's false advertising prohibition, which applies so long as an individual or entity intending to "perform services, professional or otherwise" makes "untrue or misleading" public statements about those services.<sup>200</sup> North Dakota's UDAP law contains an almost identical prohibition on false advertising, which the North Dakota Supreme Court held to apply to CPC ads, emphasizing that advertising takes place in the commercial realm regardless of whether a CPC charges for its services.<sup>201</sup>

The Ninth Circuit relied heavily on this North Dakota ruling in upholding San Francisco's CPC ordinance governing advertising.<sup>202</sup> And a concurring opinion recognized that there is "no explicit requirement that those services be 'offered for sale'" in order for California's false advertising UDAP law to apply to CPCs.<sup>203</sup> The court also pointed out that advertisements are inherently commercial when they are "designed to attract a patient base in a competitive marketplace for commercially valuable services."<sup>204</sup>

California has in fact applied its UDAP law to CPC ads in the past. As mentioned in Section II.B.2.b., after a CPC delayed a pregnant teen from getting an abortion and engaged in an elaborate plot to hide her from her parents until her baby was placed for

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<sup>199</sup> CONN. AGENCIES REGS. 42-110b-18 (1989).

<sup>200</sup> CAL. BUS. & PROF. CODE § 17500 (West 2018); *see also Prescott*, 265 F. Supp. 3d at 1104 (holding that a health practitioner's assurances to a mother about the type of care her child would receive were not covered under UDAP, but the hospital's advertisements on its website as to the manner in which care would be delivered were covered).

<sup>201</sup> *Fargo Women's Health*, 391 N.W.2d at 629–30.

<sup>202</sup> *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1273 (9th Cir. 2017).

<sup>203</sup> *Id.* at 1283 (Tashima, J., concurring) (noting that while the false advertising law mentions sales in another clause, that clause is independent).

<sup>204</sup> *Id.* at 1274. In enjoining Baltimore's CPC disclosure ordinance, the Fourth Circuit also differentiated between what it saw as the impermissible regulation of arguably noncommercial speech inside a CPC and the permissible regulation of presumably commercial advertisements placed outside the CPC. *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 879 F.3d 101, 108–09 (4th Cir. 2018). The court pointed out that CPCs in California and North Dakota lost their constitutional challenges to those states' UDAP statutes because those laws "directly regulated misleading advertising" whereas the disclosure ordinance "applie[d] to pregnancy centers regardless of whether they advertise at all." *Id.*

adoption, the court granted a restraining order under the state's UDAP law barring the CPC from taking out further misleading ads.<sup>205</sup> Another California court issued a permanent injunction in a UDAP action ordering a CPC not to "deceive the public regarding abortions" in its advertising.<sup>206</sup> Taken together, these cases demonstrate the application of UDAP laws even where CPCs' services are offered free of charge.

What's more, UDAP advertising enforcement can often be a foot in the door for reaching other deceptive activities. A California UDAP case brought on advertising grounds resulted in an injunction that barred the CPC from engaging in "any conduct likely to deceive the public regarding abortions," extending to permissible names for the CPC and statements made to clients.<sup>207</sup> And a North Dakota court not only enjoined a CPC from deceptively advertising but also ordered the CPC to take "no action or inaction which would lull people into believing that they are dealing with the [legitimate abortion provider] when they are in fact dealing with [the CPC]."<sup>208</sup> That broad injunction was upheld by the state's high court, which found that limited disclaimer statements were not enough to cure the deception.<sup>209</sup> Rather, the court scrutinized conduct inside the CPC, including advice given in phone conversations, and found their content to violate the lower court's injunction:

[T]he tenor of the advertisements, the taped telephone conversations . . . , and their counseling of [a potential client] established that the [CPC] led others to believe that it . . . performed abortions . . . . Although isolated segments of the taped telephone conversations may support the [CPC's] assertion that it attempted to comply with the court order [not to mislead or deceptively advertise], *we believe the conversations, as a whole, established a violation.*<sup>210</sup>

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<sup>205</sup> See Wallace, *Adoption*, *supra* note 117.

<sup>206</sup> Bob Egelko, *Operations of Clinic Restricted- Anti-Abortion Group had Ties to Facility*, DAILY NEWS OF L.A., Dec. 8, 1988, NEWSBANK, INC.; see also *Roe v. San Diego Pregnancy Servs., Inc.*, No. 657592, 1994 WL 498012, at \*1 (Cal. App. Dep't Super. Ct. June 10, 1994) (enjoining advertising under misleading directory headings, prohibiting the use of certain phrases, and requiring that disclaimers be used in advertisements and other communications with consumers).

<sup>207</sup> Egelko, *supra* note 206; see also *Halt Ploy, Abortion Foes Told*, *supra* note 117.

<sup>208</sup> *Fargo Women's Health*, 391 N.W.2d at 629.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* (emphasis added).



If a deceptive ad leads to a deceptive conversation such that the entire interaction can be dubbed a violation of UDAP requirements, this renders vastly more harmful conduct susceptible to punishment and thus provides greater incentives for CPCs to ensure interactions inside the CPC conform to nondeceptive standards.

#### **D. UDAP Statutes Should be Interpreted Consistent with their Broad Language and Remedial Purpose**

AGs should push aggressive readings of UDAP laws in all aspects of their CPC work. Although there are certainly grounds to argue that the original purpose of UDAP laws was to address financial exploitation of consumers by unscrupulous businessmen, a more expansive purposive reading is also possible. These statutes were designed to remedy an ever-evolving set of wrongs visited upon consumers. Adopting this second purpose, which is suggested not only in legislative history but in the text and design of the UDAP statutes themselves, overcomes the commercial barrier and enables these laws to adapt to threats of the type posed by CPCs.

Many UDAP statutes inherited the FTC Act's "commerce" hook not because it was an essential provision but because they were patterned after the federal law. The FTC Act relied on the Commerce Clause as the source of its constitutional authority, but states have inherent police power and can ban harmful behavior without reference to commerce or finance. Thus, the "trade or commerce" language does not play the essential role for UDAP laws that it does for the federal statute; it could even be seen as an unnecessary vestige.

Admittedly, much of the initial legislative discussion of state UDAP proposals centered on business owners swindling consumers out of their money. But numerous states and individual consumers have successfully brought action under UDAP regimes for violations where no sale occurred.<sup>211</sup> Addressing these two perspectives in turn, this Section adopts the second construction and argues that UDAP statutes should be read to apply to CPCs consistent with states' inherent authority over goods and services distributed in the public sphere, whether distribution involves a traditional commercial element or not.

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<sup>211</sup> See PRIDGEN & ALDERMAN, *supra* note 69, at § 4.15.

### 1. Some Courts Have Narrowed the UDAP Scope to Salesmen and Creditors

Even though, as demonstrated above, trade or commerce have been broadly defined in many UDAP statutes such that their text can reach CPCs, some courts have adopted narrowing constructions and refused to apply UDAP laws to these centers. For instance, Massachusetts' law defines "trade or commerce" to include not only the sale of services, but also "the distribution of services."<sup>212</sup> Nonetheless, the Massachusetts Supreme Court held that CPCs were not engaged in activities of the sort contemplated in the *purpose* of the legislation, which was "to improve the commercial relationship between consumers and businessmen."<sup>213</sup>

This reading is not without basis. Shortly after Texas's UDAP statute was enacted, the consumer protection chief in the AG's office explained the circumstances that motivated the legislature's action, referring to debt collectors harassing debtors, landlords withholding security deposits, and door-to-door salesmen pressing unwanted purchases.<sup>214</sup> These were all transactions that involved money. Similarly, the legislative findings section of Maryland's UDAP law explains concerns about an "increase [in] deceptive practices in connection with sales . . . and the extension of credit."<sup>215</sup>

At the same time, other states have taken a broader reading of the legislative intent behind their UDAP statutes. Hawaii's Supreme Court deemed that there was "no discernible reason why a consumer should be required to actually purchase any goods or

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<sup>212</sup> See *Planned Parenthood Fed'n of Am. v. Problem Pregnancy of Worcester*, 498 N.E.2d 1044, 1051 (Mass. 1986).

<sup>213</sup> *Id.* This interpretation of purpose as overriding the text had a ripple effect when Washington State's Attorney General interpreted the "trade or commerce" language in its own UDAP in light of Massachusetts' case law and declined to pursue consumer complaints of a CPC's deceptive practices. See *Consumer Prot. & Patient Safety Issues Involving Bogus Abortion Clinics*, *supra* note 4, at 138–40 (letter from Kathleen D. Spong, Wash. Assistant Att'y Gen., Consumer & Bus. Fair Practices Div.) ("[W]ith Washington State's comparatively narrow definition of trade or commerce, and with the only current persuasive authority (Massachusetts) holding adversely on the trade or commerce issue, it is doubtful a Washington court would find anti-abortion clinics in our state to be in trade or commerce for purposes of applying the Consumer Protection Act. This office will not, therefore, be able to take enforcement action under the Consumer Protection Act.").

<sup>214</sup> See Philip K. Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices—Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 618 (1976–77).

<sup>215</sup> MD. CODE ANN., COM. LAW § 13-102(a)(1) (West 2018).

services as a precondition to bringing” a UDAP action.<sup>216</sup> Rather, the “plain language of the [UDAP law] reflects that the legislature intended not only to protect persons who actually purchased goods or services . . . but also those who attempted . . . to do so.”<sup>217</sup> By this logic, there should be no barrier to a UDAP action for a woman who is lured to a CPC, but does not—and cannot—purchase the abortion service she sought there. And even if the original legislation was designed to address financial harm from coerced or ill-informed purchases, that does not foreclose UDAP enforcement against emerging threats to consumers’ wellbeing.

## 2. The Broader Purpose of UDAP Statutes is to Remedy a Wide and Evolving Array of Consumer Injuries

AGs should push for expansive interpretations of UDAP statutes consistent with their remedial purposes, both stated and implied, to better match these laws to the problem of CPC deception. Many UDAP statutes contain a “construction clause” calling for a broad reading consistent with the legislation’s remedial purposes. Such a clause might read something like: “this chapter shall be liberally construed that its beneficial purposes may be subserved.”<sup>218</sup> In states where statutory text, legislative history, or judicial precedent makes clear that public health was one of those “beneficial” aims, AGs can argue on that basis that these laws should extend to service providers like CPCs that operate in a healthcare space, regardless of whether they do so commercially. But even where no obvious health-related purpose can be deduced from the statute, AGs should wage bold arguments interpreting UDAP laws in light of the underlying policy justifications that motivated their enactment: the need for adaptability and the desire to remedy imbalances in consumer power with regards to information and decision-making. In arguing for expansive UDAP readings whenever possible, and accreting successes wherever they can be won, state AGs can mold UDAP laws to meet the CPC fraud threat.

In a few instances, either the statutory text or a court decision announces that one of the purposes of UDAP laws is the promotion and protection of public health. Maryland’s UDAP statute contains a provision announcing its purpose as “maintain[ing] the health and welfare of the citizens of the State,”<sup>219</sup> a fact which Maryland’s courts have

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<sup>216</sup> Pridgen, *supra* note 67, at 936.

<sup>217</sup> Zanakis-Pico v. Cutter Dodge, Inc., 98 Haw. 309, 316 (2002).

<sup>218</sup> See, e.g., CAL. BUS. & PROF. CODE ANN. § 17002 (West 2018).

<sup>219</sup> MD. CODE ANN., COM. LAW § 13-102(b)(3) (West 2018).

recognized in other UDAP jurisprudence.<sup>220</sup> And New York's highest court announced that UDAP statutes have "long been powerful tools aiding the Attorney General's efforts to combat fraud in the health care and medical services areas," citing approvingly to a case the AG brought against a CPC.<sup>221</sup> Thus, AGs in places like Maryland—where UDAP text is less obviously accommodating of non-sales-based interactions—could either leverage their own state's UDAP text suggestive of a health-oriented purpose or marshal a collection of cases endorsing the use of UDAP laws to tackle public health problems.

But beyond any one word or phrase in their text, it is clear from their breadth that UDAP laws are intended to be flexible, and the general legislative thrust has been to make them even more so. New York's high court commended the flexibility and adaptability inherent in New York's UDAP law, which "provide[s] needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State."<sup>222</sup> The Massachusetts Supreme Court declared that: "The purpose of an open-ended legislative use of the words 'unfair' and 'deceptive' was to allow for the regulation of future, as-yet-undevised" schemes.<sup>223</sup> Texas courts have recognized that their state's "laundry list" approach to the UDAP statute "shows how many possible ways there are to defraud the public, and the need for a rule protecting consumers."<sup>224</sup> And California's statute was said to be "intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable 'new schemes which the fertility of man's invention would contrive.'"<sup>225</sup> Unlike rules, which leave little discretion as to their application, principles such as those encompassed in the capacious and flexible terms "unfair" and "deceptive" grant "broad discretion to the enforcer (and ultimately, to the courts). As a result, UDAP enforcers can respond to ever-changing practices that may harm consumers without returning to the legislature

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<sup>220</sup> *Citaramanis v. Hallowell*, 613 A.2d 964, 968 (Md. 1992) (citing MD. CODE ANN., COM. LAW §§ 13-102(b)(3), 13-102(a)(2)).

<sup>221</sup> *Karlin v. IVF Am., Inc.*, 712 N.E.2d 662, 666 (N.Y. 1999) (citing *People v. Northern Westchester Putnam Assistance to Mother & Unborn Child*, No. 92-135 (Sup. Ct. Dutchess Co.)).

<sup>222</sup> *Id.* at 665 (quoting N.Y. Dep't of Law, Mem. to Gov., 1963 N.Y. Legis. Ann., at 105).

<sup>223</sup> *Purity Supreme v. Attorney Gen.*, 407 N.E.2d 297, 303 (Mass. 1980).

<sup>224</sup> *Mother & Unborn Baby Care*, 749 S.W.2d at 542.

<sup>225</sup> *Barquis v. Merchs. Collection Ass'n of Oakland, Inc.*, 7 Cal. 3d 94, 112 (1972) (citation omitted).

every time a new scheme hatches.”<sup>226</sup> The use of “unfair or deceptive” and similarly encompassing phrases invites judicial interpretation guided by norms and policy concerns.<sup>227</sup> As such, AGs can and should use UDAP enforcement suits to encourage courts to tailor the law to the modern threat posed by CPCs.

Indeed, over the years, states have taken steps to cover more entities and types of consumers including businesses.<sup>228</sup> A California court observed of this adaptability that “whenever the Legislature has acted to amend [its UDAP law], it has done so only to *expand* its scope, never to narrow it.”<sup>229</sup> When courts have hesitated to apply UDAP laws to nonmerchants, they have done so out of an understanding of the policy goals of these statutes as consisting of (1) addressing a power differential between consumers and purveyors of goods and services and (2) curbing recurring threats to the public. Deciding that a private homeowner was outside the UDAP statute’s scope, the Massachusetts Supreme Court held that, because a homeowner “who decides to sell his residence stands in no better bargaining position than the individual consumer . . . arming the ‘consumer’ in this circumstance does not serve to equalize the positions of buyer and seller.”<sup>230</sup> A Georgia court decided that these private transactions are not covered because “a homeowner who misrepresents the facts in the course of selling his residence is not likely to present a recurring threat to the public” as UDAP statutes contemplate.<sup>231</sup>

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<sup>226</sup> Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. LEGIS. 37, 45 (2018).

<sup>227</sup> *Id.* at 54 (“[P]rinciple-based enforcement occurs where the legislature has provided a broad standard . . . This type of delegation, by its nature, is a conscious choice of the legislature to rely substantially on the enforcer’s discretion.”).

<sup>228</sup> For instance, the expansion of UDAP laws to include businesses in need of protection shows the broadening scope of individuals and entities protected by those statutes. See PRIDGEN & ALDERMAN, *supra* note 69, at § 4.3 (citing Alaska, Florida, Illinois, Massachusetts, New Jersey, North Carolina, Texas, and Tennessee as examples of states whose UDAP laws extend to businesses); J. R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive*, 32 SANTA CLARA L. REV. 347 (1992) (concluding that expansions of the scope of UDAP statutes are grounded in legislative will rather than untethered judicial activism).

<sup>229</sup> *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1097 (Cal. 1998) (emphasis in original).

<sup>230</sup> *Lanter v. Caron*, 373 N.E. 2d 973, 977 (Mass. 1978); see also PRIDGEN & ALDERMAN, *supra* note 69, at § 2:9 (“Many policymakers in state government felt that, while the forces of competition and the existing legal actions were sufficient for handling disputes between businesses, consumers were not on an equal footing with the business entities with whom they had to deal. Consumers needed an extra edge in court to compensate for their relative inequality in the marketplace.”).

<sup>231</sup> PRIDGEN & ALDERMAN, *supra* note 69, at § 4:6.

Though homeowners are decidedly different from CPCs, these cases enumerate the very policy rationales that justify applying UDAP laws to fake clinics. First, women who seek abortion services are not on equal footing with the CPCs they turn to. They are often navigating unfamiliar territory and are at an informational and financial disadvantage relative to CPCs. Abortion is not often discussed publicly, and unbiased sources of information are hard to come by, especially with CPCs' camouflaged websites lurking on the internet. Given the taboo around abortion, women may not have discussed their situation with friends or loved ones and are looking to CPCs for help at a vulnerable time. These are the very types of consumers who need to be "arm[ed]" with the protection that UDAP laws afford.<sup>232</sup>

Second, CPCs are repeat players, guaranteed to pose a recurring threat to the public so long as unwitting consumers are delayed in or dissuaded from obtaining legitimate health care. Even if their transactions with women do not qualify as classically mercantile, CPCs are not like private homeowners, immune from regulation in their sporadic transactions with others. Rather, at least one reproductive rights lawyer has suggested that CPCs should in fact be understood as public accommodations.<sup>233</sup> To that point, CPCs are service facilities open to the public; they solicit patronage through websites, paid advertising, and window signs inviting women to come in for free pregnancy tests. They compete for clientele with medical clinics that are clearly public accommodations.<sup>234</sup> And a fair share of CPCs receive state and federal grants for some of their programming, which brings them under the purview of a number of public accommodations non-discrimination laws.<sup>235</sup>

Whether these centers are treated as public accommodations or simply as service providers in an otherwise regulated field, it is ultimately consistent with UDAP laws' purposes as remedial statutes designed to protect the public (and sometimes public health) from recurring threats and inequities in bargaining power to apply these laws to

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<sup>232</sup> See *Lanter*, 373 N.E. 2d at 977.

<sup>233</sup> See Meagan Burrows, Note, *The Cubbyhole Conundrum: First Amendment Doctrine in the Face of Deceptive Crisis Pregnancy Center Speech*, 45 COLUM. HUM. RTS. L. REV. 896, 902 (2014).

<sup>234</sup> See WHAT IS TITLE III?, *supra* note 196.

<sup>235</sup> Of the CPC disclosure states, only Texas provides such grants to CPCs. Otherwise, this would also be a fruitful point of intervention for states concerned with curbing CPC deception. See FAKE HEALTH CENTERS, <https://www.prochoiceamerica.org/issue/fake-health-centers/> [<https://perma.cc/3BPT-58CM>]; see also Amy G. Bryant & Jonas J. Swartz, *Why Crisis Pregnancy Centers Are Legal but Unethical*, 20 AMA J. ETHICS 269 (2018), <https://journalofethics.ama-assn.org/article/why-crisis-pregnancy-centers-are-legal-unethical/2018-03> [<https://perma.cc/K9UH-5V9Q>].

CPCs. At bottom, UDAP statutes originated “with a goal of protecting consumers who would otherwise be inadequately protected under then-existing law.”<sup>236</sup> Applying UDAP statutes to CPCs’ deceptive practices will do just that.

#### **IV. Addressing Deception that Inflicts Non-Financial Harm**

AGs who succeed in deploying the previous Section’s arguments to apply UDAP statutes to CPCs may clear one hurdle only to face a second, more symbolic problem. To argue and succeed on the UDAP’s commercial terms is to gloss over the profound, non-financial nature of the harms a CPC visit has on women who turn to them for help. While many women who visit CPCs will have suffered at least some nominal financial loss, the more fundamental harm is to women’s personal autonomy. Consumers who unwittingly interact with CPCs suffer interference with their ability to make informed decisions about their own lives. And some are tricked and detoured for so long that they forfeit their right to abortion altogether. A UDAP law that might not even apply where deception causes significant harm but no money changes hands is not designed to address such injuries.

One way to more closely tailor these statutes to the reality of deception in the abortion services arena without resorting to abortion-specific legislation would be an amendment that names this decision-making harm as a basis for the law’s application or as an enhancement for its civil penalties. This Section draws parallels between CPCs and another area of service provision where deception affects not just victims’ bank accounts but their life outcomes and where a harm-based approach to UDAP coverage would recognize the full extent of these injuries.

##### **A. CPC Harms Extend Beyond Financial Loss**

UDAP statutes are designed to compensate for ascertainable financial losses. And some degree of financial loss is inherent in an unwitting encounter with a CPC, whether it be bus fare to reach the CPC, wages forgone to attend a bogus appointment, the increased cost of an abortion postponed by several weeks, or the lifelong cost of raising a child when an abortion is so long delayed it becomes unavailable. But no matter the magnitude of the financial harm, CPC deception imposes a harm that extends beyond one’s finances. What is at stake when a CPC lies is a woman’s ability to make important life decisions without manipulation, deception, or coercion.

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<sup>236</sup> Pridgen, *supra* note 67, at 943.

Take the earlier referenced story of the fourteen-year-old girl who, fearing she was pregnant and seeking an abortion, ended up at a San Francisco CPC that advertised “free pregnancy tests while you wait.”<sup>237</sup> The CPC had her return for follow-up appointments at least ten times,<sup>238</sup> after which point the CPC counselor “told [her] it was too late” to get an abortion.<sup>239</sup> The CPC then devised an elaborate scheme to prevent the girl’s parents from learning of and potentially intervening in the situation, sending a letter claiming the girl had won an “overseas scholarship” and requesting the parents sign a release form for her travel.<sup>240</sup> Once the parents uncovered the scam, the girl was so far along in her pregnancy that she was forced to carry to term and place the baby up for adoption.<sup>241</sup> The District Attorney brought false advertising charges under California’s UDAP.<sup>242</sup>

The girl had been clear on her choice from the beginning; she wanted to end her pregnancy. She testified: “I wouldn’t have gone there if I didn’t think they’d help me get an abortion. I only decided to have the baby after it was too late.”<sup>243</sup> The CPC had not changed her mind; it had robbed her of her options and her agency.

Pursuing a false advertising claim in this instance is a bit like citing a robbery getaway driver for speeding or prosecuting an organized crime boss for tax fraud. It may be simpler to punish these subsidiary infractions, and perhaps these are the only legally cognizable claims, but doing so does not get to the heart of the principal wrong. UDAP statutes as currently written may penalize the falsehood and may even be the basis for enjoining future deception, but they do not name or show public disapprobation for the fundamental decision-making harm that deception in certain services can produce.

The parallels between CPCs and unlicensed immigration consultants or “notarios” demonstrate the non-abortion-specific nature of the deception that can occur in service provision to vulnerable consumers. This comparison also suggests a basis for a harm-based UDAP amendment that grapples head-on with what is at stake when deception

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<sup>237</sup> Maitland Zane, *Patient Testifies About Pro-Life Clinic*, S.F. CHRON., Aug. 27, 1988, at A4.

<sup>238</sup> See *District Attorney Sues Anti-Abortion Center*, *supra* note 117.

<sup>239</sup> Zane, *supra* note 237, at A4.

<sup>240</sup> See *id.*

<sup>241</sup> See *id.*

<sup>242</sup> See Wallace, *Agency Probed*, *supra* note 42, at 1.

<sup>243</sup> Zane, *supra* note 237, at A4.



permeates service areas like health care and legal advice. Both CPCs and notarios rely on misrepresentations to attract customers, and both forms of fake service providers pose harms that extend beyond the financial realm. Like CPCs that present as abortion clinics, notarios set up shop as notaries public (which are untrained administrative clerks) but advertise using the Spanish translation “notario” (which in many Latin American countries refers to a learned professional who can assist with complex legal matters).<sup>244</sup> Notarios take advantage of this double meaning to lure immigrants who need help obtaining legal status, then collect fees often without the ability or intent to perform the work requested.<sup>245</sup> Just as relying on a CPC’s counsel may cost a woman her ability to make a choice about her pregnancy, trusting in a notario’s advice can result in the lost opportunity to work,<sup>246</sup> time spent in detention,<sup>247</sup> and forfeiture of the chance to become a citizen.<sup>248</sup>

Simply put, the deception wrought by either can alter a consumer’s entire life trajectory, but UDAP actions are grounded in financial loss. And though some notarios have been prosecuted under state UDAP statutes and ordered to repay unearned fees,<sup>249</sup> as with applying a UDAP law to a CPC, the financial component contemplates only part of the harm. Pursuing a UDAP action because a notario robbed an immigrant of several

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<sup>244</sup> See Anne Langford, *What’s in a Name: Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 HARV. LATINO L. REV. 115, 121 (2004) (“In numerous Latin American countries, including Mexico, Argentina, Peru, and Honduras, having a law degree is a prerequisite for becoming a notario.”); Bianca Carvajal, Note, *Combating California’s Notario Fraud*, 35 CHICANA/O LATINA/O L. REV. 1, 4–5 (2017).

<sup>245</sup> See Langford, *supra* note 244; Carvajal, *supra* note 244.

<sup>246</sup> See Rachel Kurzius, *Immigrants Will Be Reimbursed For Notario Fraud Under D.C. AG Settlement*, DCIST (Apr. 18, 2017, 2:08 PM), <https://dcist.com/story/17/04/18/notario-settlement/> [<https://perma.cc/2D7N-YC8S>] (mentioning a notario in DC who caused one client to “los[e] out on more than a year of work over incorrectly filed documents”).

<sup>247</sup> See Langford, *supra* note 244, at 124–25 for a description of the multiple nonfinancial harms notario victims have suffered.

<sup>248</sup> See NOTARIO FRAUD, <https://portal.ct.gov/DCP/Education-and-Outreach/Education/Notario-Fraud> [<https://perma.cc/P4NP-DARK>]. Similarly, the Maryland AG’s website says: “Many noncitizens who might otherwise gain legal status and qualify for immigration benefits find they are permanently unable to obtain United States citizenship because of the illegal actions of an unlicensed immigration consultant.” BEWARE OF IMMIGRATION FRAUD, <http://www.marylandattorneygeneral.gov/Pages/CPD/immFraud/default.aspx>. [<https://perma.cc/7W7W-8H3H>].

<sup>249</sup> See Kurzius, *supra* note 246.

hundred dollars ignores that he may also have thwarted that person's chance at citizenship or permanently barred her from reentering the country to be with her family.

### **B. A Legislative Solution**

A solution suggested by examining CPCs' deceptive practices alongside notario fraud is to identify deceptive interference with a person's major life decisions as a basis for UDAP coverage. Given the severity of these harms and the specific vulnerabilities of clients targeted by deceptive CPCs and notarios, rather than asking judges to apply or extend UDAP statutes under their current language, it might be more effective and certainly more symbolically meaningful to amend UDAP laws to reflect these losses. The core idea would be a legislative amendment aimed at public accommodation deception that interferes with a fundamental life decision.

One option is to use the imposition of this kind of harm as the hook for a UDAP law's application. Legislatures could amend their UDAP statutes to define as a prohibited deceptive practice the offer or provision of services to the public that include falsehoods or misrepresentations that interfere in a major life decision or that otherwise deprive an individual of a legal right or benefit. Of course, the specific language would have to be worked out with legislative counsel to calibrate the appropriate scope of liability while avoiding constitutional vagueness concerns.<sup>250</sup> It might also be necessary to limit the amendment to intentional or reckless falsehoods, so as not to impose unnecessary liability on physicians, lawyers, and other service providers whose business models do not rely on deception and whose opposition to expanded grounds for UDAP liability might be triggered without this modified language.<sup>251</sup>

Deceptive interference of this sort could also be the basis for enhanced civil penalties for violations of the UDAP statute. Civil penalties are levied by and paid to the state as a

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<sup>250</sup> It will also be important to provide enough specificity to avoid vagueness and overbreadth challenges. But if the amendment is understood to apply only to false public accommodations speech that causes harm, such a challenge might be analyzed similarly to the vagueness and overbreadth issues dispensed with by Texas's appellate court in *Mother & Unborn Baby Care*, 749 S.W.2d at 540.

<sup>251</sup> Some professionals are already exempt from UDAP liability. See Debra D. Burke, *The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?*, 15 CAMPBELL L. REV. 223, 241–250 (1993), for a discussion of exemptions for professionals. It is unlikely that any of these exemptions would include CPCs or notarios because they are decidedly non-learned, untrained individuals. To the extent any of the practitioners at a CPC were medically trained, they might be disciplined for malpractice instead.

form of additional punishment.<sup>252</sup> Although these fines are capped at relatively low amounts in the six CPC disclosure states,<sup>253</sup> many UDAP regimes impose heightened penalties for defrauding seniors or people with disabilities. For example, the civil penalty for a violation of the UDAP law doubles to \$5,000 in California for fraud perpetrated “against one or more senior citizens or disabled persons.”<sup>254</sup> In Texas, penalties increase more than tenfold to \$250,000 for deceiving someone over the age of sixty-five.<sup>255</sup> Given these precedents, such a UDAP amendment might take the form of establishing enhanced penalties for fraud that deprives someone of a constitutional right (like the right to abortion) or adversely affects the course of a legal proceeding (like the naturalization process). An alternative in keeping with the identity-based enhanced penalties for the elderly and disabled could be enhanced penalties for deceiving pregnant people.

The added benefit of either of these legislative amendments is that they look more like traditional UDAP provisions that have withstood First Amendment challenges than the CPC disclosure requirement at issue in *NIFLA*. Ultimately, naming the exact mechanism by which harm is imposed on victims of public accommodations fraud would carry symbolic weight as a marker of the rights and opportunities the state seeks to protect and of the behaviors the state will not tolerate.<sup>256</sup>

## CONCLUSION

CPCs that falsely advertise as abortion clinics and then lie to women about whether or not they are pregnant, how long abortion is legal, and how quickly—if at all—they should seek medical assistance have been a problem for decades. State and local officials

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<sup>252</sup> See Schurtman & Lillard, *supra* note 143, at 79.

<sup>253</sup> The range is from a low of \$2,500 per violation in California to \$25,000 per violation in Connecticut. CAL. BUS. & PROF. CODE § 17206 (West 2018); CONN. GEN. STAT. § 42-110o (2018); N.Y. GEN. BUS. LAW § 350-d (McKinney 2018) (instituting a penalty not more than \$5,000 per violation); HAW. REV. STAT. § 480-3.1 (2018) (instituting a penalty between \$500 and \$10,000 per violation); MD. CODE ANN., COM. LAW § 13-410 (West 2018) (instituting a penalty of up to \$10,000 per violation or \$25,000 for repeat violations); TEX. BUS. & COM. CODE ANN. § 17.47 (West 2018) (instituting a penalty of no more than \$10,000).

<sup>254</sup> CAL. BUS. & PROF. CODE § 17206.1 (West 2018).

<sup>255</sup> TEX. BUS. & COM. CODE ANN. § 17.47 (West 2018).

<sup>256</sup> It might even generate a pool of state money that could fund services for low-income individuals facing unplanned pregnancies or unexpected parenting costs. In Massachusetts, a false advertising UDAP case was settled by requiring the mattress company defendant to provide \$100,000 worth of bedding to local homeless shelters, and in California, the court mandated a UDAP defendant seller to pay into a recovery fund that would benefit people similarly situated to plaintiffs. See Schurtman & Lillard, *supra* note 143, at 79.

have responded with varied tactics, starting with consumer protection lawsuits in the 1980s and ending most recently with statutes requiring CPCs to post disclosures about their services. Although it has been many years since a state attorney general initiated a major UDAP action against a deceptive CPC, in the wake of the *NIFLA* decision invalidating CPC disclosure laws, UDAP statutes offer new promise. After all, UDAP statutes are designed to combat deception and have been successfully applied to CPCs with limited constitutional impediment. UDAP actions also fit within the trend of state AGs embracing the power of coordinated action to set national priorities.

The need for these efforts is ongoing. For instance, a suit challenging Hartford, Connecticut's CPC disclosure ordinance was filed last April.<sup>257</sup> In the face of a possible injunction, a UDAP-based approach offers an immediate alternative. In Virginia, too, recent developments invite UDAP enforcement. At the end of September, a federal district court judge relied in part on the prevalence of CPCs to uphold one of Virginia's abortion restrictions.<sup>258</sup> In *Falls Church Medical Center, LLC v. Oliver*, abortion rights advocates argued that a state law that imposed a mandatory delay and required women to make at least two separate trips—one to receive an ultrasound and another at least 24 hours later for the abortion—erected significant geographic, financial, and temporal barriers to the right to abortion when clinics are so few and far between.<sup>259</sup> The court, however, pointed to “the multiple free ultrasound providers located throughout the Commonwealth” as one reason that a separate trip was not unduly burdensome.<sup>260</sup> Yet, the cited list of “free ultrasound providers” overlapped almost entirely with a directory of Virginia's CPCs.<sup>261</sup> It is possible these particular CPCs do not engage in the problematic practices discussed in this Article, but given widespread patterns of dissemblance and misleading tactics, reliance on these centers as care providers for women who have already decided to obtain an abortion seems ill-considered—at least without further verification. Thus, the state AGs' office has ample reason to ensure that these CPCs comply with Virginia's UDAP statute.

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<sup>257</sup> *Caring Families Pregnancy Servs., Inc. v. Hartford*, No. 3:19-cv-00584 (D. Conn. filed Apr. 18, 2019).

<sup>258</sup> *Falls Church Med. Ctr., LLC v. Oliver*, No. 3:18-cv-00428-HEH, slip op. (E.D. Va. Sept. 30, 2019).

<sup>259</sup> *Id.* at 50–52.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*; FIND A PREGNANCY CENTER, <https://www.care-net.org/find-a-pregnancy-center> (search “Virginia”) [<https://perma.cc/N898-74P2>].

UDAP laws, however, are not without their drawbacks. First, many contain language that limits their application to businesses that sell or consumers who buy a good or service. This can place nonprofit CPCs that give away (rather than sell) their services outside the statute's reach. Second, with their financial focus, UDAP laws often fail to countenance the full extent of the harms that a deceptive service provider can inflict on victims. But possible solutions emerge in the form of more expansive interpretations of existing UDAP statutes and legislative amendments that eliminate commerce-related constraints or treat deception that results in decision-making harm as a basis for UDAP enforcement.

Overall, this Article has argued for a strategy that combines AGs' investigation and litigation powers with their increasing centrality in national policymaking. In embracing this collective project of renewed UDAP enforcement, AGs can urge courts to consider the remedial purpose of this legislation while also inviting the legislature to update the law.

There is also plenty that AGs can do to amplify their efforts without waiting on the judicial or legislative branches in their states. For instance, AGs' activities to combat notario fraud demonstrate the importance of partnerships with community organizations and the benefits of coordinated communications efforts. Collaborations between AGs, immigrant advocacy groups, and professional legal associations have helped identify victims of notario fraud through public education campaigns and centralized complaint collection. The American Bar Association has established a working group to combat immigration-services fraud and has built an online action hub that centralizes the consumer complaint process with a hyperlinked map that connects to each state's AG's office or consumer protection division.<sup>262</sup> As with immigrant victims who hesitate to report notarios out of a lack of familiarity with the legal system or a fear of exposing their tenuous legal status, it is likely that the documented complaints from women misled by CPCs represent only a portion of the consumers affected. Surely there are other women who were too busy or too ashamed to come forward, and others still who would not have known where to file a complaint if they wanted to. Overcoming barriers to reporting could help AGs target their enforcement efforts at the most problematic CPC actors and tailor injunction requests to the falsehoods that most interfere with women's choices.

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<sup>262</sup> STOP NOTARIO FRAUD, <https://web.archive.org/web/20180501103036/http://www.stopnotariofraud.org/get-help.php> [<https://perma.cc/26T7-W683>]; Am. Bar Ass'n Comm'n on Immigr., *Resources for Victims of Notario Fraud*, AM. BAR ASS'N (July 19, 2018), [https://www.americanbar.org/groups/public\\_services/immigration/projects\\_initiatives/fight-notario-fraud/victimresources/](https://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fight-notario-fraud/victimresources/) [<https://perma.cc/9PE5-X3HD>].

As such, AGs could benefit from partnerships with abortion clinics and women's groups. In fact, it appears that such partnerships were once the norm at the height of UDAP enforcement against deceptive CPCs in the 1980s and 90s.<sup>263</sup> A more modern twist might come in the form of connecting with web-based groups to ease CPC complaint reporting. The website [www.exposefakeclinics.com](http://www.exposefakeclinics.com) is hosted by a grassroots storytelling movement that aims to spread the word about CPC deception but is disconnected from any governmental reporting mechanism.<sup>264</sup> AGs' offices might build on the reach of this campaign by requesting that the site point consumers to AGs' websites and online complaint forms. For those consumer protection divisions that lack an online reporting process, as many do, state and city attorneys could partner with Code for America, which has collectives of volunteer coders who work with state and local officials to smooth citizen-government interactions through the design of centralized benefits hubs and other streamlined online interfaces.<sup>265</sup>

Finally, AGs could use their own websites to promote their CPC enforcement efforts. Many AG websites feature a dedicated section on notario fraud, for example. Maryland's has an entire subsite on notarios, with printable flyers and brochures that warn of notarios' deceptive practices and advise on reporting options for those who have been harmed.<sup>266</sup> Spotlighting CPC deception and providing dedicated information for pregnant women could be helpful, if not from a prophylactic perspective, then to ensure a clear

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<sup>263</sup> In the 1980s and 90s, counselors at abortion clinics in California and Iowa began documenting the experiences of women who came to the clinic after having visited a CPC. *See Consumer Prot. & Patient Safety Issues Involving Bogus Abortion Clinics*, *supra* note 4, at 316–17 (statement of Leslie Thomas, Special Projects Coordinator, Planned Parenthood of San Diego & Riverside Ctys.). In Ohio, a religiously affiliated abortion rights group collected stories from women across the state and identified clergy who “had counseled many women traumatized by deceptive [CPC] volunteer[s]” and were willing to testify to these experiences. *Id.* (“In addition, attached are summaries prepared by Planned Parenthood counselors, documenting the experiences of women who came to Planned Parenthood after visiting various San Diego County bogus clinics.”); *id.* at 387, 392–403 (statement of Judith Rutledge, Dir. Pub. Affairs, Iowa Planned Parenthood Affiliate League) (referring to patients' CPC reports collected at abortion clinics); *id.* at 365–66 (statement of Betty Menear, State Coordinator, Ohio Religious Coal. for Abortion Rights).

<sup>264</sup> EXPOSE FAKE CLINICS, <https://www.exposefakeclinics.com/> [<https://perma.cc/PF24-BVBM>].

<sup>265</sup> INTEGRATED BENEFITS INITIATIVE, <https://www.codeforamerica.org/programs/integrated-benefits> [<https://perma.cc/GG2C-WMUP>].

<sup>266</sup> BROCHURES, [http://www.marylandattorneygeneral.gov/Pages/CPD/immFraud/immFraud\\_brochure.aspx](http://www.marylandattorneygeneral.gov/Pages/CPD/immFraud/immFraud_brochure.aspx) [<https://perma.cc/MB79-MGQD>]. California's AG's website also features a page that collects consumer information for frequently targeted populations like immigrants and the elderly. COMMONLY TARGETED GROUPS, <https://oag.ca.gov/consumers/commonly-targeted-groups> [<https://perma.cc/FZ4X-N2M2>].

complaint portal pops up when fraud victims, abortion clinic counselors, and other professionals who serve pregnant women go online to search for help.

Each of these non-legal approaches would complement and build upon the foundation established by a robust AG enforcement campaign by allowing AGs to better collect data on the problem, better target their investigative efforts, and better prove their cases. Together with judicial cooperation in expansive UDAP interpretation and legislative tweaks to broaden UDAP language where necessary, these collective efforts might just make UDAP statutes the next frontier in combatting CPC deception.