The Undue Burden Standard in Abortion Law

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POL 497

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**Introduction:**

The climate of abortion rights in the United States has markedly changed since 1973. Since its initial ruling in Roe v. Wade declaring the right to privacy under the fourteenth amendment to be “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”, the Court’s view on that ‘right’ has evolved, balancing it with a “legitimate state interest in protecting potential life.”[[1]](#footnote-1)

In 1992, the Supreme Court handed down Planned Parenthood of Western Pennsylvania v. Casey, which while reaffirming the heart of *Roe*, declared that abortion should not be considered a qualified and fundamental right and established a lower constitutional standard for review of abortion regulations. In response to a perceived weakness in the constitutional right to abortion; legislatures across the country, particularly in the past decade, have enacted a creative array of restrictions and regulations on abortion access. In just the three-year period between 2011 and 2013, state legislatures passed 205 various restrictions.[[2]](#footnote-2) As of November of 2015, twenty-eight states have waiting periods of at least 24 hours between a woman’s consultation with a doctor and her abortion.[[3]](#footnote-3) Seventeen states require state-mandated ‘counseling’ by doctors, including statements about fetal pain and the unsubstantiated link between abortion and suicide or breast cancer.[[4]](#footnote-4) Twenty-five states have parental consent laws and another thirteen have parental notification laws.[[5]](#footnote-5) Additionally, eleven states ban private insurance companies from covering abortion in their plans and thirty-two ban state Medicaid funding.[[6]](#footnote-6) In many states, these restrictions compound and create a complex legal and medical system for women to navigate. On top of legislating the behavior of the woman and her doctor, twenty two states have laws regulating abortion clinics at the level of ambulatory surgical centers. Another thirteen states require abortion doctors to have admitting privileges or some type of admitting agreement with a nearby hospital.[[7]](#footnote-7)

The shockingly efficient onslaught of legislative action regarding abortion in the past several years and the resulting legal patchwork across the country have created the important judicial duty of correctly reviewing these regulations. The current standard for examining if abortion regulations are unconstitutional is now the ‘undue burden’ test, as established by the Supreme Court in *Casey.[[8]](#footnote-8)*

 Despite being a lower constitutional standard than first established in *Roe*, the Undue Burden Test is a viable option for protecting abortion rights, as it was intended to be by the *Casey* Court. The problem lies within the interpretation of an undue burden in subsequent cases. The lives of the judges presiding over abortion litigation and the lives of women seeking abortion are often markedly different; separated by gender, race, socioeconomic status, and geography. I argue that the lower courts since *Casey* have applied their own personal experiences and beliefs to the law and therefore reached incorrect rulings regarding the undue burden imposed by litigated regulations.

**Overview**

This paper involves the undue burden standard as established in *Casey.* It is not meant to question if the undue burden test is the *correct* standard in abortion jurisprudence; but is instead an examination of how the standard available has been interpreted.

 The first section will be an examination of the conceptualization of ‘undue burden’ and its accompanying constitutional test, starting with Justice Sandra Day O’Connor’s conceptualization of undue burden in her dissent of *Akron v. Akron* and its final form in the joint opinion of *Casey.* After this, I will examine how courts since *Casey* have interpreted its meaning of undue burden. Because of the scope and diversity of this century’s abortion regulations, I have selected two cases to study more in depth. The first section will examine *Whole Woman’s Health v. Cole,* a 5th circuit decision allowing Texas to implement hospital admitting privilege provision and Ambulatory Surgical Center (ASC) requirements. The second section will examine *Hope Clinic for Women, Ltd. v. Flores,* a decision from the Illinois State Supreme Court allowing for the activation of the state’s 1995 Parental Notification Act. Each section will contain an examination of the law, an explanation of how the lower courts have interpreted and ruled on challenges to those laws, and an analysis of the correctness of such rulings in face of the realities of women seeking abortions.

**From Roe to Casey**

1973 marked the beginning of the modern American era in abortion jurisprudence. The release of Roe v. Wade was landmark, bringing sweeping changes to state laws through out the country. In a 7-2 majority, the Supreme Court ruled that a woman had the constitutionally protected right to seek an abortion and that state abortion bans violated this under her right to privacy established by the due process clause of the Fourteenth amendment.[[9]](#footnote-9) The Court acknowledged that the state had a legitimate interest in both the health of the woman and potential human life, but set up a trimester framework to police that balance. It held that the decision belonged to only the woman and her doctor during the first trimester; but in the second, the state had an interest in promoting the health of the woman and could enact regulations pertaining to that end. In the third trimester, the Court allowed that states could express their interest in potential life by regulating or prohibiting abortion. *Roe* also applied the strict scrutiny standard to challenges of abortion restrictions. Strict scrutiny is the highest level of constitutional review, applying to those rights that are considered fundamental; and placing the burden of proof on the government to prove its law is tailored to fit a compelling state interest.[[10]](#footnote-10)

The undue burden standard came to its current form in *Planned Parenthood v. Casey,* a case meant to challenge several regulations imposed by the Pennsylvania state legislature. The regulations in question were informed consent, spousal notice, parental consent, clinic reporting requirements, and the definition of ‘medical emergency’. [[11]](#footnote-11)

The Pennsylvania Abortion Control Act required that a woman seeking an abortion hear state-determined information and give informed consent 24 hours before her abortion, requiring her to make two trips. It required married women to give a signed statement saying that she had informed her husband of the procedure as well as required minor girls to obtain the consent of at least one parent or obtain a judicial bypass. After a District court ruled all the requirements invalid and the Third Circuit Court of Appeals reversed part of that decision, the Supreme Court took up the case.[[12]](#footnote-12)

The joint opinion, written by Justice O’Connor, Kennedy and Souter, first reaffirms the promise of *Roe* to protect the right of a woman to end her pregnancy before the viability of the fetus; as well as the state’s interest in “protecting the health of the woman and the life of the fetus that may become a child.” [[13]](#footnote-13) By emphasizing the role of the state in promoting childbirth, the Court downgraded the constitutional standard used in reviewing abortion restrictions. It abandoned *strict scrutiny,* which had been in place since Roe by stating that “Roe did not declare an unqualified right to an abortion” and that states had a legitimate interest in protecting the well-being of women and expressing preference for childbirth.[[14]](#footnote-14) Instead, the justices applied the undue burden standard to regulations, protecting women from state action that imposes “unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.”[[15]](#footnote-15) Essentially, the Court declared, that a woman had the right to seek an abortion before the viability of the fetus and states had a right to regulate those procedures if that regulation did not hinder that freedom of choice to a substantial extent. The Undue Burden standard is two-pronged, taking into account both the purpose and effect of a regulation. If the law has the effect of creating an undue burden, then it is unconstitutional. However, the Court presents the idea that a law could also be invalid if its only purpose was to make the process of obtaining an abortion more difficult, not to promote the health and safety of women.[[16]](#footnote-16) The purpose prong recognizes the importance that legislative intent has on law, particularly in regards to abortion.

 The Court used the undue burden test to rule that the spousal notification requirement was unconstitutional, citing the District Court’s comprehensive analysis of domestic violence in the United States.[[17]](#footnote-17) The record states not only the prevalence of physical abuse, but emotional and psychological abuse and marital rape as well.[[18]](#footnote-18) It lists numerous studies detailing the plight of battered women to aid its assertion that the additional factors of poverty, motherhood, and violence all work to create a burden on some women more than others.

In addition, despite the state’s assertion that only one percent of women seeking abortions would be effected by the law, the Court declared it unconstitutional, saying that “the analysis does not end with the one percent of women upon whom the statute operates, it begins there” because a constitutional standard could not actually be constitutional if “it permitted states to enact restrictions that wholly precluded choice for some women merely because those restrictions would not constitute an “undue burden” for other, more fortunate women.”[[19]](#footnote-19)

By doing this, the Court cautions against a clouded judicial vision, in which the privilege of some remedies the extreme hardship faced by others. The justices emphasized that a constitutional test is to be applied to the part of the population that the law effects, and that the spousal notification law was unconstitutional because “in a large faction of the cases in which the legislation is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion.”[[20]](#footnote-20)

 Despite its eloquent analysis of the spousal notification, the court ruled that all other parts of the contested legislation did not constitute an undue burden, even parental consent. However, the court also makes clear the possibility that lower courts or the Supreme Court itself could declare those same restrictions unconstitutional if given a more complete factual record.[[21]](#footnote-21) In its justification for declining to invalidate each other provision, the Court repeatedly spells out that it must rely on the evidence presented by the Plaintiffs, and that the factual records for the effects of these provisions did not hold up to the District court’s analysis of the spousal notification. The constitutionality of the mandatory waiting period was upheld by the majority opinion “on the record before the Court, and in the context of this facial challenge”; while the state-scripted counseling was allowed because “there is no evidence on this record that the provision would amount in practical terms to a substantial obstacle” while the Plaintiff’s assertion of increased cost resulting from recordkeeping and reporting provisions rejected because, again, “there is no such showing on the record before us.”[[22]](#footnote-22)

 Members of the Court not represented by the joint opinion also express in their opinions the idea that Casey’s strength was only restricted by the facts at hand. Justice Blackmun, the author of *Roe*, in his dissent of the joint opinion’s validation of the Pennsylvania statutes, states that it “makes clear that its specific holdings are based on the insufficiency of the record before it” and expresses confidence in the possibility of “future evidence” being used to declare the specific provisions in *Casey* actually unconstitutional.[[23]](#footnote-23) And notable abortion opponent Justice Scalia acknowledged the future possibilities of the purpose prong while criticizing what he viewed as the majority opinion’s downgrade of state interest in unborn life; stating that it “may ultimately require the invalidation of each provision upheld today if it can be shown, on a better record, that the State is too effectively ‘expressing a preference for childbirth over abortion.”[[24]](#footnote-24)

Despite the frequent and legitimate criticism of the court’s vagueness in defining the undue burden test and its contradictory rulings on the regulations besides spousal notification, there are bold statements throughout Casey to indicate its strength in defending reproductive autonomy. In particular, the court is vigilant against ideological government interference, declaring undue burden to “be shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”[[25]](#footnote-25) It also does not make a state’s interest in promoting childbirth all-powerful, with Justice O’Connor saying that even with regulations “women’s choice should not be subordinate to state interest that her choice exists in theory but not in fact.”[[26]](#footnote-26)

Additionally, in its rejection of the state of Pennsylvania’s ‘one percent’ claim, the Court suggests the importance of the need to take into account the lives of *all* women possibly affected when analyzing legislation. This is where the health of the undue burden standard lies, in the real lives of the women affected by abortion restrictions. The majority opinion in *Casey* emphasizes that its inability to determine the Pennsylvania provisions unconstitutional came from the lack of a factual analysis before it. In doing so, the Court provides a framework for lower courts to build from in interpreting undue burden; but it does not present its ruling as the solidified jurisprudence, emphasizing the job of the lower courts in analyzing the legislation in the context of the specific state and reviewing the unique factual record before it.

**Whole Woman’s Health v. Cole**

An increasingly popular move by state legislatures is the Targeted Regulation of Abortion Providers, or TRAP laws. These regulations, specifically singling out abortion providers for rules and regulations not required for other out-patient clinics, are purported to promote the health and safety of women. Despite first-trimester abortions being an outpatient procedure with a complication rate less than colonoscopies and outpatient oral surgery, twenty-two states currently have restrictions on providers that do not apply to similar out patient clinics.[[27]](#footnote-27)

In 2013, Texas joined that list with H.B. 2, a law that contained numerous TRAP provisions; including requiring doctors to obtain hospital admitting privileges within thirty miles of the facility where abortions are performed, and requiring all abortion facilities to meet the standards of an ambulatory surgical center, or ASC.[[28]](#footnote-28) In April 2013, before the law was passed, Texas had forty-one abortion providers; by the time of the ASC requirements were supposed to be implemented in September of 2014, only eighteen clinics remained.[[29]](#footnote-29)

Four Texas clinics and three doctors sued the state of Texas shortly after its passage, finding fault with both the purpose and effect of the H.B. 2 on claims of equal protection violations, unlawful delegation, and unreasonable state action, in addition to claiming the substantial burden it would place on Texas women.[[30]](#footnote-30) The resulting case, *Woman’s Whole Health v. Cole,* provided challenges to the hospital admittance provisions and ASC requirements as-applied to *Woman’s Whole Health* in McAllen and *Reproductive Services* in El Paso; as well as a facial challenge to the ASC requirements. A facial challenge purports that the statue is always unconstitutional and should therefore be generally voided. The as-applied challenge seeks to find the statue unconstitutional in the specific situation being raised and to remedy that situation, without necessarily scraping the entire statue.[[31]](#footnote-31)

The case has bounced its way through the court system, and has reached the Supreme Court itself more than once. While the Western District Court of Texas rejected the Plaintiff’s purpose assertions in *Woman’s Whole Health v. Cole,* it did grant an injunction against the enforcement of the two provisions statewide, declaring that the stated purpose of improving women’s health was unlikely and that the ensuing effect on the availability and geography of abortion providers would place a substantial obstacle in the path of women seeking an abortion.[[32]](#footnote-32) During its appeal process, the 5th Circuit of the appellate court issued a stay, allowing the two laws to be enforced during the litigation process. However, only twelve days later, the United State Supreme Court lifted that order and prohibited the statewide enforcement of ASC requirements and the enforcement of admitting privileges in McAllen and El Paso specifically while awaiting the 5th Circuit’s ruling.[[33]](#footnote-33) Several months after the Supreme Court’s foray into the case, a three-judge panel on the 5th Circuit Court of Appeals reversed the district court’s injunctions in *Cole*, declaring that the plaintiffs had not shown that the regulations would impose a substantial burden on a woman seeking an abortion.

 First, the Circuit judges take at face value the health and safety assertion of the Texas legislature, stating that “there is no question that this is a legitimate purpose” and refusing to investigate beyond that.[[34]](#footnote-34) Second, the Circuit judges reject all the facial challenges to the provisions regarding their effect, only upholding the District court’s injunction of enforcement against the two specific clinics in McAllen and El Paso, in appeasement to the Supreme Court. The decision promotes the constitutionality of both the hospital admitting privileges and the ASC requirement on the basis of a lack of contrary evidence, while simultaneously ruling that they both constituted a substantial enough burden on women in two specific situations. The decision of the 5th Circuit to uphold the ASC and admitting privileges was enough to keep the attention of the Supreme Court, who granted another stay of enforcement pending its review shortly after its ruling. In November of 2015, the United States Supreme Court granted the petition of the Plaintiffs to review the 5th Circuit’s decision.[[35]](#footnote-35)

 If the Supreme Court had not intervened and stayed the enforcement of ASC requirements, the 5th Circuit’s decision would have left Texas and its 5.4 million women of reproductive age with eight abortion clinics.[[36]](#footnote-36) Instead, in the months before H.B. 2’s day in the Court, eighteen clinics provide for these women; whose lives often look starkly different than the judges deciding their fate.

In 2014, the year the 5th circuit decided *Cole,* each judge was making a salary of $211,200. [[37]](#footnote-37) This puts all three in the ninety-five percentile for income in the entire United States, and in the ninety-seventh percentile for rural parts of Texas.[[38]](#footnote-38) In contrast, the median income for full-time female workers in Texas was $35,363, which translates to seventy-nine percent of the median male income, and putting them in the nationwide bottom thirty-one percent. In addition, women account for sixty three percent of Texas’s minimum wage workers, jobs which are traditionally hourly and rarely provide flexible and paid time off.[[39]](#footnote-39) The result is that women in Texas are twice as likely to live in poverty than a man is.[[40]](#footnote-40) Put in another context, 17.8% of reproductive-age women in Texas are living under the poverty line, two points higher than the national average.[[41]](#footnote-41) Some of these women are single, surviving on under $11,173 a year.[[42]](#footnote-42) But its single mothers who have the highest levels of poverty, surviving under $18,769 for a parent and two children. They make up forty one percent of family types in poverty and female-headed households also make up the majority of impoverished households across the state.[[43]](#footnote-43)

 The importance of the task of reflecting the reality of the lives of Texan women comes to light when looking at the demographics of who obtains abortions. Forty-two percent of the more than one million American women seeking abortions each year live below the poverty line, and an additional twenty-seven percent live between 100 and 199 percent of the line.[[44]](#footnote-44) Furthermore, mothers with one or more children make up sixty-one percent of the women seeking abortions.[[45]](#footnote-45) In other words, women, and mothers in particular, are more likely to have low incomes compared to the men in their state and in comparison to women in many other parts of the country; and these women will most likely make up the majority of the those seeking abortions. Therefore, this segment of women will be the ones most effected by the regulations, both because they make up a majority of those seeking abortions and because the circumstances surrounding having children and finite resources compound the obstacles the woman must navigate. Because of the realities surrounding abortion care, the judges examining the Texas provisions should have take into particular consideration the actual life circumstances of women; including the cost of childcare and other additional expenses in comparison to a woman’s realistic income when determining whether it creates too much of a burden. However, the Circuit judges in *Cole* did the bare minimum to interpret and apply the *Casey* standard, rejecting expert testimony in favor of applying its own views and affirming its own precedent.

 The plaintiffs in *Cole* challenged the closures resulting from the Texas provisions by suggesting that the increased distance to abortion providers provided a substantial obstacle. Both the District court and the 5th Circuit court rely on the circuit’s precedent in *Abbott* declaring “an increase in travel of less than 150 miles for some women is not an undue burden under *Casey”[[46]](#footnote-46)* In doing so, it simply regurgitates the decision of *Casey,* without viewing the provision’s effect in the context of Texas. Even further, the panel suggests that the *Casey “*permitted even farther distances than 150 miles because it involved a 24 hour-waiting period”, in reference to Texas’s H.B. 15, the 2011 law that created a twenty-four waiting period for abortions.[[47]](#footnote-47) Instead of recognizing that women would have to make the trip twice or stay in the place they traveled to because of the waiting period, creating additional costs and more burden than if the distance existed alone; the judges toy with the idea of the extra restriction as a way to extend the distance threshold. The judges also fail to make mention of the extra days of childcare, missed days of work, and gas and lodging expenditures that will additionally top the cost of abortion. In doing so, the judges both ignore and condone the extra burdens placed by the compounding restrictions, legislative and circumstantial.

In addition, in further rejecting the lower court’s ruling, the judges reasoned that the 1/13 of all reproductive-age women who would have to travel more than 150 miles after the admitting privileges provision and the 1/6 of all reproductive-age women after the ASC requirements was not enough to meet the ‘large faction test’ established by *Casey.[[48]](#footnote-48)*

 The 5th Circuit also rejected the Plaintiff’s testimony that existing ASC clinics would not be able to adapt to the loss of coverage created by the closure of non-ASC clinics, creating an undue burden on women utilizing those clinics. It admonished the Plaintiff’s testimony regarding the capacity of ASC clinics to meet demand, stating that the increase of 14,000 annual abortions to about 70,000 abortions for the eight ASC clinics was an assumption. In the next sentence, the panel assumes that “there does not appear to be any evidence in the record that the current ASCs are operating at full capacity or that they cannot increase capacity.”[[49]](#footnote-49) By outright rejecting the expert testimony and replacing it with literal non-evidence, the panel avoids a true inquiry into the effect of the proposed law.

However, if it had ventured such an inquiry, it might have found real evidence that such a small number of permittable clinics would not be able to take on the seventy-eight percent of abortions currently performed at non-ASC clinics in Texas; and that the current number of abortion providers cut in half by the hospital admittance provisions in 2013 were already struggling to provide for the women they served.[[50]](#footnote-50) A study by the Texas Policy Evaluation Project, run by the University of Texas sought to examine the effect of clinic closures across the state on wait times to the first consultation appointment. It found that in Austin and Forth Worth, cities with two providers each, wait times regularly reached twenty to twenty three days, and averaging around ten to thirteen days. In Dallas, it recorded the drastic change after one of three providers closed; wait times of 5 days or less before closure increasing to as much as 20 days.[[51]](#footnote-51) In contrast, Houston, with six open clinics, consistently averages less than five days. This evidence shows that the lack of providers resulting from the H.B. 2 closures puts a strain on the remaining clinics and puts an obstacle in the path of the women who desires an abortion.

 The longer a woman waits to obtain an abortion, the closer she is pushed into the second trimester. This increases the danger to her health, substantially increases the cost of the abortion, or prevents her from having an abortion all together. In 2011, an abortion at ten weeks averaged around $450, but the cost steadily increases as time goes on; and the average cost of an abortion at 20 weeks was $1,500.[[52]](#footnote-52) However, if a woman in Texas was forced to wait too long and was pushed to twenty weeks, she would be unable to seek a legal procedure at all as Texas bans abortions after twenty weeks.

Ultimately, the 5th Circuit avoids the topic of the women at hand in *Cole*, spending most of its decision providing legal invalidations for the Plaintiff’s claims and actions and nit-picking the rules of facial and as-applied challenges, using its own decisions and loose interpretations of *Casey.* Butwhen actually examining the two provisions, the panel spends the majority of its pages questioning the expert testimony of the Plaintiffs and replacing it with its own assumptions; while failing to take into account the compounding effects of the provisions at hand and existing Texas abortion provisions. Not only does the Court attempt to view the provisions as individual void of the restriction-dense legislative context they exist in; it provides only one acknowledgement of the quantifying effects and results of increased driving distances. The Circuit court’s dismissal of socioeconomic circumstances as a legitimate factor is odd; particularly in face of the facts that Texas has an above-average poverty rate, that women are more likely to live in poverty, and that low-income women seek abortions more often, while being the ones most effected by regulations. In ignoring the differences that make the burden more substantial for some women than others, the judges fail to provide an accurate analysis of the law’s effect.

**Hope Clinic for Women, Ltd. v. Flores**

A little over six percent of those seeking abortions each year in the United States are girls under the age of eighteen.[[53]](#footnote-53) In the majority of states, these minor girls face parental notification or consent laws. Twenty-one states require at least one parent to consent, and three more require both parents. Another twelve require the parent to be notified of the procedure before hand; while another five states require both notification and consent.[[54]](#footnote-54)

The *Casey* court ruled that a parental consent law did not constitute an undue burden if it provided a judicial bypass procedure. If a parent refuses to provide consent, “a court may authorize that the young woman is mature and capable of giving informed consent and has in fact given her informed consent, or that an abortion would be in her best interests.”[[55]](#footnote-55) The Supreme Court has touched on parental notification again since upholding it in *Casey,* but it has avoided making a full ruling on the issue. The 2006 case *Ayotte v. Planned Parenthood for Northern New England* challenged a law requiring doctors to notify at least one parent 48 hours before a minor’s abortion, on the basis that it lacked a “medical emergency exception.”[[56]](#footnote-56) The Plaintiffs did not attempt to challenge the constitutionality posed by parental involvement laws in general. Both the District Court and the First Circuit Court of Appeals held that an absence of the exception made the statute unconstitutional, rejecting the state’s suggestion that the Plaintiffs had no grounds to a facial challenge because the law had not been applied yet. After the New Hampshire Attorney General appealed to it, the Supreme Court held first that the Plaintiffs did have a right to a facial challenge and that the lack of exception created unconstitutionality in a small number of cases. However, the Court refuses to strike down the entire statute on that basis, with the rationale that “lower courts may be able to render narrower declaratory and injunctive relief" when only one segment of the law is deemed unconstitutional.[[57]](#footnote-57) The Court remanded the case back down to the lower courts with the task of finding a possible judicial relief; however the New Hampshire repealed the entire statue on its own before the courts could attempt such an inquiry.

In 2013, a clinic in Illinois filed a lawsuit against the state, questioning the constitutionality of the Parental Notice of Abortion Act of 1995. It required minor girls seeing an abortion to disclose their plan forty-eight hours before the procedure to an adult family member. It allowed exceptions to be granted under judicial bypass or with a written statement by the girl disclosing sexual, physical abuse or neglect.[[58]](#footnote-58) In its ruling, The Illinois State Supreme Court held the Act to be constitutional. Its rationale was that the state had a legitimate interest in “encouraging an unmarried, pregnant minor to seek the help and advice of a parent or other adult family member in making the very important decision whether or not to bear a child” and that the impact on the minor’s privacy was not enough to constitute an undue burden.[[59]](#footnote-59)

First, the Court erred in calling the Illinois Act an ‘encouragement’ and downplaying the coercion involved in the Act. The Act does not simply suggest that minors disclose their abortion to their parents or guardians, it forces them to. Second, the Court errs in assuming that it would be in the girls’ best interest to disclose her abortion to the adults in her life and that the decision needed to be made in collusion with others. The Court repeatedly relies on subjective assumptions regarding women who obtain abortions in its justification of the need for parental involvement, calling it a choice with potentially serious consequences, more so than carrying a child to term.[[60]](#footnote-60) The ruling sees abortion as a difficult and severe decision with life-long consequences that requires a certain level of maturity; yet declines to admit the life-long consequences associating with childbirth. It even includes an ideologically heavy quote from a 1981 Supreme Court case upholding Utah’s notification law as precedent, that “if the pregnant girl elects to carry her child to term, the medical decisions to be made entail few-perhaps none-of the potentially grave emotional and psychological consequences of the decision to abort.”[[61]](#footnote-61) The Court does not quote studies that find that the overwhelmingly most common reaction following an abortion was relief.[[62]](#footnote-62) Nor does it cite evidence that abortion is fourteen times safer than childbirth.[[63]](#footnote-63)

Further, it fails to recognize the legitimate reasons why the law would constitute an undue burden for the minors affected by it. Studies have shown that even without parental involvement laws, about sixty percent of those minors involve at least one parent in their decision.[[64]](#footnote-64) But it is the ones who don’t engage their parents on their own, the ones who must be compelled, that mark the start of a constitutional analysis. This type of examination comes from *Casey’s* invalidation of the spousal notification; in which the Court ruled that for the ninety-five percent of married women seeking abortions who voluntarily tell their husbands, the provision is not relevant and therefore, those women should not be included in the analysis.[[65]](#footnote-65) And as *Casey* rationalized with the spousal notification, it is those who are most affected by the law that “are in the gravest danger”. The *Casey* Court acknowledged that children are often subject to domestic violence. In fact, half of pregnant teens who have been abused in the past report being assaulted during pregnancy. Another study found that thirty percent of girls who forego telling a parent about their abortion had experienced violence in their home.[[66]](#footnote-66)

Lastly, the court fails to see how seeking a judicial bypass may be a substantial obstacle for a minor. Girls have to find transportation and time to reach a court in secret, and once there they are subjected to the arbitrary decisions of a judge. The law requires that the judge decide on one of two points, that the girl is mature enough to make the abortion decision on her own or that it is in her best interest in forego telling her parent or guardian. While purporting to provide girls relief from potentially abusive or dangerous situations that would restrict their choice, the judicial bypass still imposes the will of someone else on the girl’s decision. As *Casey* mentions, “secrecy typically shrouds abusive families.”[[67]](#footnote-67) It rejected the bypass given to married women, saying that it forced them to disclose their most intimate details. The parental notification law works the same way, girls must disclose their abuse to a stranger in order to be granted a bypass. Why the courts have found this to not resemble the rules of the unconstitutional spousal notification is troublesome. Even judges in Illinois have questioned the fairness of these petitions, calling them “demeaning and difficult for the young women.”[[68]](#footnote-68)

**Conclusion**

 As shown by the 5th Circuit and the Illinois State Supreme Court, judges do not always understand the lives of the women their ruling will affect. In ruling on the constitutionality of regulations, judges sometimes forget the unique circumstances that make an inconvenience for some a life-threatening burden to others. Judges must look beyond their own privileged scope of the world and recognize that a regulation must be evaluated on how it will effect those most vulnerable to it, not those with the resources and means to avoid it.

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