Performative Laws and the Restriction of Abortion in the United States

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# Table of Contents

Abstract ........................................................................................................................... 4

Introduction ..................................................................................................................... 5-13

Chapter One: Literature Review .................................................................................. 14-22

Chapter Two: The Perfect Storm: Spreading Abortion Hostility ................................ 23-35

Chapter Three: The Immature Minor Seeks an Abortion .......................................... 36-53

Chapter Four: Think for Seventy-Two Hours ................................................................. 54-72

Conclusion: Returning to the Body ............................................................................... 73-76

Literature Cited .............................................................................................................. 77-86
Abstract

One in three women will have an abortion by age forty-five, yet the majority of women in the United States will not be able to simply go to their primary care doctor to have an abortion. Instead, they will have to navigate through a myriad of restrictions and regulations on access to abortion imposed by state legislatures. The majority of these legislatures working to restrict abortion access are men, as women’s reproductive functions are being regulated by men’s laws. Informed by feminist methodology and based upon a textual analysis of parental notification and consent laws and mandatory counseling and waiting period laws, this thesis explores two types of subjects produced by these laws: the pregnant minor and the adult woman who chooses to have an abortion. Central to this process is the regulation of bodies that are seen as in-between: not-child-not-adult and fertile but rejecting fertility. Drawing on feminist legal studies and insights from post-structuralist theorists, this thesis argues that through regulating bodies that do not belong to clear categories, the law not only reinforces the role of society in controlling women’s reproductive functions but also helps materialize the norms that define womanhood and recreates class and racial inequalities in the United States.
Introduction

Abortion's Legal, Yet the Back Alley Remains

In September 2015, a Tennessee woman, Anna Yocca (thirty-two) climbed into a bathtub and tried to “self-abort” her six month pregnancy using a coat hanger, causing her to bleed so profusely that she was taken to a hospital. A baby boy was delivered alive by cesarean section at the local hospital weighing one and a half pounds (Stockard 2015). According to the Rutherford County Sheriff’s Office, the baby boy had injuries and unidentified physicians were quoted blaming Ms. Yocca’s probing with the hanger as the cause of the bodily injuries. Tennessee law permits abortions after twenty-four weeks only if the woman’s life or health is at risk and requires all women who seek abortions to receive state-directed counseling and wait forty-eight hours before the procedure, requiring multiple trips to the clinic (Guttmacher Institute 2017). Only four out of ninety-five counties in Tennessee currently have abortion clinics (Guttmacher Institute 2017).

Ms. Yocca was initially charged with first degree murder, which was later reduced to multiple felony charges, including: aggravated assault, an attempt to procure a miscarriage, and an attempted criminal abortion (Stack 2017). Ms. Yocca’s attorney filed a motion to dismiss the case, “arguing that bringing her to trial makes every pregnant woman vulnerable to arrest and prosecution if she is perceived to have caused or even risked harm to a human embryo or fetus...and that the prosecution is absurd, illogical, and unconstitutional” (Stack 2017). In January 2017, Yocca pled guilty to attempted procurement of a miscarriage in an agreement reached with prosecutors.
Abortion: A Woman’s Choice, A Man’s Regulation

Ms. Yocca is one of three American women will have an abortion by age forty-five (Jones & Kavanaugh 2011: 1358). Focusing on the year 2014, the most recent statistical data available on abortion, more than half of all United States women who had abortions were in their twenties, twelve percent were adolescents (fifteen to nineteen), fifty-nine percent had had at least one birth, and seventy-five percent were poor or low-income (Guttmacher Institute 2017). According to Pew Research Center, a majority of the public says “abortion should be legal in all or most cases (fifty-nine percent), while thirty-seven percent say abortion should be illegal in at least most cases” (Fingerhut 2016). The fact is one in three women will not be able to simply go to their primary care doctor or their OBGYN to have an abortion. Instead, they will have to navigate through a myriad of restrictions and regulations on access to abortion imposed by state legislatures.

Who are the majority of these legislators fighting to restrict abortion access? To answer this question, it is important to explore the characteristics of the average state legislator in America today. As of 2015, according to the National Conference of State Legislatures, the “average” lawmaker in America was “a white, male, Protestant baby boomer, with a graduate degree and a business background” (Kurtz 2015). Of the over seven thousand three hundred legislators in the United States, approximately one thousand eight hundred of them are women, making up slightly less than a quarter of our legislators (Ziegler 2015). Thus, women in the US are currently living lives according to men’s laws. Catharine MacKinnon argues that “women’s insistence that law respond to them, too, has exposed the sex of those the law empowers as male and the gender of laws, even the law itself, as masculine” (MacKinnon 2005: 1).
It is important to note though that while 2011 marked an escalation in the hostility towards abortion access in the US, the battle over abortion has been waged since the mid 1800’s when laws were passed prohibiting “abortion at any point in pregnancy,” with narrow exceptions for therapeutic abortions to save the life of the woman (Reagan 1997: 13). By the late 1920s, some “15,000 women a year died from abortions because safe, legal procedures were nearly impossible for most women in the United States to obtain” (Nossiff 2000: 26). Starting in 1940 and continuing up until the legalization of abortion in 1973 with Roe v. Wade, hospitals explicitly “instituted new policies and police and prosecutors changed their tactics” to suppress abortion by “publicly identifying those who violated the law in the private sphere by having an illegal abortion and who needed to seek medical care in the public sphere of the hospital” (Reagan 1977: 25). The movement to legalize abortion arose in the 1950s out of the scale of the human toll of the restrictions and growing feminist demands to publicly argue for abortion access as an integral part of women’s sexual freedom.

Restricting abortion has been commonplace in the United States for over two hundred years, however one thing different in the current escalation is that these restrictions are being imposed in a context where abortion is legal in the US. Since Roe v. Wade, state lawmakers have taken the tactic of “chipping away at abortion access – law by law, state by state – and undermining Roe” (Planned Parenthood Action 2017). Here’s a brief roundup of laws as of 2017 regulating abortion in the United States to evaluate the degree of hostility: thirty-eight states impose physician and hospital requirements on the abortion procedure; forty-three states regulate the gestational limit for abortion; thirty-two states prohibit the use of state funds to pay for the cost of abortion; eleven states restrict coverage of abortion in private insurance plans; forty-five states allow individual healthcare providers to refuse to participate in an abortion; thirty-five
states require mandated counseling prior to the abortion; twenty-seven states impose mandatory
waiting periods prior to the abortion; and thirty-seven states require parental involvement in a
minor’s decision to have an abortion (Guttmacher Institute 2017).

Through a textual analysis of parental notification and consent laws and mandatory
counseling and waiting period laws, my thesis will explore the research questions: What type of
subjects are being produced by these laws? What bodies are produced by the performative power
of the law? Based upon analyzing these legal texts, this thesis argues that while these laws are
enacted under the guise of advocating for women’s health and well-being, in reality, they are a
forceful attempt to control women’s reproductive functions and reproduce norms that equate the
woman with the body. The bodies of the two types of subjects produced by these laws (pregnant
minors and adult women who choose abortion) exist in in-between positions in society, which
threaten the existing social categories. The minor, who is not-child-not-adult, and the pregnant
woman, who is fertile but rejecting fertility, are measured against norms of maturity,
responsibility, and maternal duty. The law is deployed as a regulatory and normalizing
mechanism that establishes the proper role of women and their appropriate behavior in society as
well as recreates class and racial inequalities in the United States.

**Feminist Methodology**

Both the theoretical and methodological frameworks for my thesis were greatly
influenced by feminist legal theory. Since the 1960s, women’s advocates have used a set of tools
called “feminist methods” to view social problems, including “the unmasking of patriarchy,
contextual reasoning, and consciousness-raising” (Bartlett 1990: 829). Legal feminists begin by
revealing male biases within laws that are supposed to be neutral, “unmasking and identifying
the gender-based consequences that law creates” (Levit and Verchick 2016: 41). After revealing the consequences, feminist legal theorists then demonstrate how the legal foundations are not inevitable but can be changed. Katharine Barlett argues that legal feminists must start by asking the “woman question,” which means “examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women” in order to expose how those features operate and how they might be challenged (Bartlett 1990: 837).

Bartlett’s description highlights that it is difficult to identify gender bias in the law without having knowledge of women’s personal experiences in the real world and that “the goal of understanding women’s personal experiences is to show how law’s unequal consequences might be corrected” (Bartlett 1990: 837). Correction typically entails the transfusion of women’s real world experiences into the mainstream political and legal systems. Asking the woman question leads to a series of questions examining whether particular laws consider women’s experiences, whether legal rules implicitly favor one sex over the other, and whether social practices promote illegitimate gender stereotypes (Levit and Verchick 2016: 42). Feminists attempt to then prove that the difference between men and women established by the laws is empirically false or acknowledge that a gender difference exists but then challenge the way in which the difference is used to benefit men at the expense of women.

After unmasking the gender-based consequences of the law, feminists then move to focusing on contextual reasoning and pay special attention to the “personal and social history of the parties, relative perceptions among the parties, and overall context as the personal is the political” (Matsuda 1986: 613). For quite some time, feminist have “invoked the realities of the private life to spur legislative and social change for women,” recently changing the legal
treatment of divorce and domestic violence after documenting the unfair and sometimes dire consequences experienced by women and children in these situations (Levit and Verchick 2016: 44-45). Upon acknowledging the role that context, real life, plays in impacting the law, feminist legal theorists focus on consciousness-raising, the process by which “individuals share personal experiences with others in an effort to derive collective significance or meaning from those experiences” (Bartlett 1990: 863-64).

Consciousness-raising enables women to begin to view what they might have thought of as an isolated incident as a symptom of broader, widespread societal oppression. Women’s stories and lived experiences challenge the myth that the law operates neutrally and equally, as Mari Matsuda argues that “women who are currently told that strict enforcement of the legal guarantee of equal pay for equal work has created an abstract condition called ‘equality’ look at their own experience as underpaid workers, and then redefine ‘equality’ as equal pay for work of equal value” (Matsuda 1986: 619-20). Many legal scholars employ personal stories to facilitate feminist consciousness-raising, a strategy I will adopt throughout my textual analysis to highlight the gendered stereotypes that underlie abortion restrictions.

As is the case with feminist scholarship, my thesis is both intellectual and political. Since 2013, I have been an active supporter of reproductive freedom and justice, defined as “an intersectional approach to reproductive health that looks at the impacts of race, class, gender, and sexual identity, not just reproductive rights” (SisterSong 2017). As an activist, I have spent two summers working for a legal reproductive rights non-profit, interned at Planned Parenthood, clinic escorted in New Jersey and Pennsylvania, and currently serve as a hotline counselor at an abortion access fund that assists low-income women who cannot afford the cost of their procedure in Southeastern Pennsylvania.
This activism enabled me to see access to abortion in the United States from two different spheres: the legal perspective and the reality on the ground. Feminist theory focuses on understanding how “systemic and pervasive political and cultural structures are enacted and reproduced through individual acts and practices, and how the analysis of ostensibly personal situations are clarified through situating these issues in a broader and shared cultural context” (Butler 1988: 520). Thus, the idea for my thesis is grounded in feminist legal theory and was born at the disconnect I was noticing between these two spheres; the lawmakers were arguing that they were passing laws to protect the health and safety of women, which was challenged by the legal non-profit I was working at, and I was witnessing women suffer shame and harassment for their decision to abort. I witnessed how they had to navigate through layers of barriers in order to have the procedure. I have heard countless stories of women forced to carry to term an unwanted, unplanned pregnancy. In this work, I have found myself often asking: are we living in 2017 or pre-1973?

Recognizing both the power of the law as well as the need to advocate for women’s reproductive rights, I have decided to engage existing legal codes and how they limit women’s right to terminate unwanted pregnancies. The number of laws on abortion is many, so I have decided to limit my textual analysis to two types of reproductive rights restrictions passed by state legislatures in the United States during the period of 2011-2016. I focused on this period because it is the five-year period since 1973 with the greatest number of abortion restrictions; of the over one thousand abortion restrictions enacted since 1973, twenty-seven percent were enacted in 2011-2016 (Guttmacher Institute 2016).

I have decided to focus on two types of restrictions: parental notification and consent laws and mandatory counseling and waiting period laws. These two types of laws target women
and impose the greatest burdens on women seeking abortions, instead of targeting abortion providers or regulating facilities where abortions are performed. Regarding parental notification and consent laws, I focused on the states of Kansas, Texas, Florida, Arizona, and Arkansas because these states have the most restrictive variations of parental notification and consent laws, requiring judges to use specific criteria to assess the maturity of the minor in the evaluation of her petition to waive consent for an abortion. When analyzing mandatory counseling and waiting period laws, I decided to examine the statutes in Missouri, North Carolina, Oklahoma, South Dakota, Texas, and Utah because these states either have the longest mandatory waiting periods before a woman can consent to an abortion and/or have the greatest number of mandated statements a doctor must say in the required pre-abortion counseling session with the woman.

For my textual analysis, I complied the legislative documents of these laws and then the text of any litigation associated with these laws challenged in court. I coded the texts using atlas.ti to see commonalities in the language used across the legislative texts and to see how women were portrayed through looking at how many times particular terms appeared in the documents, such as: mother, mature, intelligence, health, safety, father, pain, child, and human-being. I used the factsheets developed by the Guttmacher Institute\(^1\) on parental consent and notification laws and mandatory counseling and waiting period laws to find the states with the most severe criteria for each type of restriction. I also relied heavily on Rewire, a reproductive rights daily online publication that has a legislative tracker that tracks all reproductive rights restrictions in the United States to find direct links to each legislative record, and also used Hein Online to access documents from legal cases.

\(^1\) In the reproductive rights community, the Guttmacher Institute is known for producing statistical data on reproductive rights in the United States and around the world.
Structure

I have broken my analysis down into four sections. In Chapter One, I will review the literature on performativity and feminist scholarship on the legal system and present my framework, which couples the works of Judith Butler, Michel Foucault, Pierre Bourdieu, and Mary Douglas. In Chapter Two, I will discuss the pivotal abortion cases argued and decided by the United States Supreme Court, how they have grounded the right to abortion in terms of privacy and the undue burden test standard, and the impact of this legal framework on the state’s ability to restrict abortion access. In Chapter Three, I will present my textual analysis of parental notification and consent laws, grounding the trends exhibited across the statutes in the context of societal views of adolescent women as immature and in need of the patronizing guidance of state legislatures and court systems. In Chapter Four, I continue my analysis of abortion restrictions by focusing on mandatory counseling and waiting period laws, highlighting how the statutes depict women who have abortions as sexually promiscuous and violators of their natural instincts and maternal duties. Lastly, I will conclude by reinserting the body, the body of the woman choosing to have an abortion, back into the analysis of abortion restrictions and discuss the laws states should pass if they truly cared about the health and safety of all women and their agency over decisions involving their bodies.
Chapter One: Literature Review

Abortion is an issue that has long generated intense social, legal, political, religious, and moral debates about the right of women and the role of the state in regulating women’s access to various resources. Feminist legal scholars have entered into the debate over the legal system’s regulation of abortion access, emphasizing the importance of women “regaining control over their own bodies rather than surrendering their rights to society” (Petchesky 1990: 404). Thus, before delving into specific court cases that have established abortion jurisprudence in the United States and state level restrictions, it is important to examine feminist legal theory and the contributions of feminist legal scholars to the abortion debate.

Feminism and the Law

Feminism is an influential legal force. Nancy Levit and Robert Verchick argue that at its roots “feminism is about equal rights. One can talk philosophically about “equality” and “rights,” but for those concepts to be actualized, to be stamped onto the fabric of everyday life, feminist goals must be incorporated into law and made enforceable by government” (Levit and Verchick 2016: 2). Feminist legal theory encompasses eight approaches: equal treatment, cultural feminism, dominance, lesbian feminism, critical race feminism, postmodern feminism, pragmatic feminism, and ecofeminism (Levit and Verchick 2016: 9). While these eight approaches will be explored, the divisions between them are not discrete with some theories overlapping and many feminists arguing for defying categorization.

The development of feminist legal theory was enmeshed with the general growth of feminism. Levit and Verchick argue that all eight approaches of feminist legal theory share two
things, “first, feminists recognize that the world has been shaped by men, who for this reason possess larger shares of power and privilege” and “second, all feminists believe that women and men should have political, social, and economic equality” (Levit and Verchick 2016: 12). While feminists agree on the goal of equality, there is disagreement about what it means across the eight approaches and how to achieve it. “Equal treatment” is based on the principle of formal equality and that women are entitled to the same rights as men. This perspective drew from liberal ideals in philosophy and political science that “endorse equal citizenship, equal opportunities in the public arena, individualism, and rationality,” arguing that the law should not treat a woman differently from a similarly situated man and that the law should not base decisions about individual women on generalizations about women as a group (Levit and Verchick 2016: 12). Supporters of the equal treatment model work to achieve the goals of obtaining equivalent social and political opportunities, such as equal wages, equal employment, and equal access to government, and doing away with legislation intended to “protect women by isolating them from the public sphere” (Thomas and Boisseau 2011: 18).

Cultural feminism emerged out of the viewpoint that formal equality “does not always result in substantive equality,” criticizing the sameness model of the equal treatment approach as being male-biased, “serving women only to the extent that they could prove they were like men” (West 1988: 13). Cultural feminists emphasize the “differences between men and women, whether the differences in question are biological differences related to childbearing or cultural differences reflected in social relationships” (West 1988: 12). Stemming from the belief that men and women should not be treated the same in cases where they are relatively different and that women should not be required by society to conform to male norms, cultural feminists “urge a concept of legal equality in which laws accommodate the biological and cultural differences
between men and women” (West 1988: 20). Cultural feminism has been criticized for valuing women only if they conform to conventional social norms of motherhood and for treating women as if they need special protection, as the Supreme Court has observed that protectionist laws historically have disadvantaged women by putting them “not on a pedestal, but in a cage” (Frontiero 1973: 684).

The dominance approach both rejects the sameness/difference debate and departs from the equal treatment approach and cultural feminism, “noting that both used the male standard as the primary benchmark – with equal treatment theorists emphasizing how similar women are to men and cultural feminists celebrating how different women are from men” (Levit and Verchick 2016: 20). They argue that the goal of both equal treatment and cultural feminism is equivalence between women and men, while the dominance approach argues for women’s liberation from men, as “under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure, while under the difference standard, we are measured according to our lack of correspondence with him” (MacKinnon 1987: 30). Established by Catharine MacKinnon, the dominance approach concentrates on the power relations between men and women, arguing that the law is complicit with other social institutions in constructing women as inferior sex objects and dependent individuals (MacKinnon 1979: 20). Theorists advocating for the dominance approach “cite the lack of legal controls on pornography and sexual harassment, excessive restrictions on abortion, and inadequate responses to violence against women as examples of the ways laws contribute to the oppression of women,” particularly because most of the laws have been drafted by men and reinforce male domination (Levit and Verchick 2016: 21).
Starting in the mid- to late 1980s, a number of legal theorists, mainly women of color and lesbians, complained that feminist legal theory failed to feature their experiences and concerns (Thomas and Boisseau 2011: 24). Angela Harris, a scholar in the fields of critical race theory and feminist legal scholarship, has argued that some of the writings of feminist legal theorists, such as Catharine MacKinnon and her dominance approach rely on “feminist essentialism – the notion that a unity, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience,” which stifles the voices of lesbians and minority-race women “in the name of commonality” (Harris 1990: 585). MacKinnon has responded to Harris’ criticism by arguing that her work “is socially based to the ground and built on women’s realities, including those of women of color, from the ground up” (MacKinnon 2005: 87). Opponents of essentialism argue that discrimination must be understood from the margins, as the intersection of characteristics like sex, race, wealth, and sexual orientation suggest how one will be treated by society (Crenshaw 1989: 139). Critical race feminists believe that laws must take into account the discrimination that occurs at the intersections of these categories, rejecting formal equality as being one-dimensional.

The lesbian legal feminist approach began in the 1970s, focusing on “the legal issues confronted by persons who identify as lesbian, gay, bisexual, or transgender” (Levit and Verchick 2016: 27). Theorists using the lesbian legal feminist approach have highlighted the links between heterosexism and sexism, showing how “traditional ideas of masculinity demanded segregation of the sexes, repression of feminine traits in men, and the exclusion, harassment, and vilification of those assumed to be sexually deviant,” “promoting the supremacy of masculinity over femininity as well as the elevation of heterosexuality over all other forms of sexuality” (Levit and Verchick 2016: 27). Another perspective, ecofeminism focuses on the
complexity of women’s relationships with society and nature. Advanced in the 1970s, ecofeminism emphasizes the intersections of human oppression (such as sexism and racism) and environmental destruction with the premise that “the oppression of nature and the oppression of women are closely connected” (Birkeland 2010: 13). This view holds that “sexism and environmental destruction flow from the same problem: a false duality in Western thought that favors the human mind and spirit over the natural world and its processes” (Levit and Verchick 2016: 30).

Feminist legal pragmatists draw on the works of philosophical pragmatists, such as John Dewey and Charles Sanders Peirce, “especially their understanding that truth is inevitably plural, concrete, and provisional,” which means that pragmatists often reach tentative conclusions that are open to change (Radin 1990: 1699). They criticize the “universalism of some of the types of feminist legal theories and stress instead the importance of context and perspective,” arguing that “all observations are relative to a perspective, including the time and place where they occur... [and] the set of prior beliefs and attitudes that are held by the observing party” (Pierce Wells 2000: 347). Feminist pragmatists do not look for solutions in legal rules, but instead view legal rules as “partial explanations for outcomes of individual cases,” recognizing that many of the debates among feminists are about different visions of how to reach the goal of equality that can change based upon time and context (Levit and Verchick 2016: 34). Pragmatists have been criticized for failing to provide concrete legal solutions and instead offering more methodological suggestions that focus on the role of women’s personal experiences in building legal theories.

Postmodern legal feminists attempt to move beyond the sameness/difference distinction, arguing that the comparative approaches of equal treatment (women are like men) and cultural
feminism (women are not like men) inaccurately assume that all women are roughly the same as all men. Postmodern feminists reject the idea of single truths and instead recognize that truths are multiple and connected to individuals’ experiences in the real world. Different from anti-essentialists who “find truth in a harmony of many voices, postmodernists think harmony is impossible” (Levit and Verchick 2016: 36). Relying on the tool of deconstruction established in the 1960s and 1970s by French philosopher Jacques Derrida that takes a “hard look at the historical, artistic, or linguistic details to reveal the political messages and biases hidden within,” postmodern feminists challenge the modernist idea of an unchangeable rule of law (Levit and Verchick 2016: 36). Postmodernism believes that language, knowledge, and power work together to convey cultural norms about gender and call for a rethinking of traditional gender identities to capture their fluid, socially constructed nature.

Feminist legal scholars have been particularly interested in contributing to the discussion of the legal system’s entry into women’s reproduction, commenting on issues including abortion, contraception, genetic and prenatal testing, and surrogacy. On the issue of abortion, supporters of the equal treatment approach would argue that if men have the legal right to control their reproductive spheres, for instance by purchasing drugs that treat the symptoms of erectile dysfunction, than women should be entitled the same right. Cultural feminists would advocate that women should have access to abortion to enable them to decide if, when, and how they would like to have children with the viewpoint that women should ultimately fulfill societal norms and become mothers. Dominance theorists would argue that women should have access to abortion and be actively involved in working with state legislatures to make abortion accessible because women should neither be forced to conform to the societal norm of becoming mothers nor have to live lives under laws drafted by men.
Critical race and lesbian and legal feminist theorists would argue for applying an intersectional lens to the issue of access to abortion, making sure that abortion is accessible regardless of one’s race or sexual orientation. Ecofeminists would connect the destruction of nature through overpopulation with women’s rights to access contraception and abortion, allowing them to determine when and how many children they want to have. Many ecofeminists would take issue though with arguments connecting abortion and population control. Feminist legal pragmatists would bring their methodological suggestions to the abortion debate, advocating for the incorporation of women’s personal experiences into the formulation of laws surrounding abortion access. Based upon a belief in the ability of language to rethink cultural norms, postmodern feminists would emphasize the importance of the language of laws on abortion to challenging societal norms of the association between woman and mother. The following chapter will expand further on how feminist legal scholars have responded to Supreme Court decisions on the legalization of abortion and subsequent attempts at restricting access.

Framing the Discussion

My thesis aims to contribute to current feminist legal scholarship by bringing insights from Judith Butler, Pierre Bourdieu, Michel Foucault, and Mary Douglas. Judith Butler allows us to understand the issue of performativity² from a feminist point of view,³ creating an opportunity

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² Performativity is the production of identity through the process of the repeated enactment of norms (Anderson 1998: 22). Gender performativity in particular is "the process by which difference and identity are constructed in and through the discourse of sexuality" (Morris 1995: 567). Judith Butler, who developed the theory of gender performativity, was influenced by J.L. Austin’s concept of performatives, which focuses on ordinary utterances, also known as “speech acts,” and explores what “speech does” as opposed to “what it says” (Faulkner 2012: 2). Austin distinguished three types of utterances: locutionary (an act of stating something), illocutionary (the utterance performs the role of naming), and perlocutionary (“the utterance not only produces the warning it mentions, but also conveys a sense of a future consequence to the recipient”), the
to “reconceive the gendered body as the legacy of sedimented acts rather than a pre-determined or foreclosed structure, essence, or fact, whether natural, cultural, or linguistic” (Butler 1988: 531). From Pierre Bourdieu, I take interest in how class inequalities are embodied in the body and his notions of different forms of capital. Pierre Bourdieu states that capital can present itself in three forms: economic capital, which “is immediately and directly convertible into money;” cultural capital, which can exist in three forms: the embodied state (in the form of long-lasting dispositions of the mind and body), in the objectified state (in the form of cultural goods), and in the institutionalized state (such as education and diplomas); and social capital, “which is made up of social obligations (connections and networks)” (Bourdieu 1986: 242). These forms of capital produce specific durable dispositions that are internalized and externalized in practice.

The body, for Bourdieu, becomes the most indisputable materialization of habitus.

latter two of which are performatives (Faulkner 2012: 20). Illocutionary utterances gain their power from societal conventions. In distinguishing between illocutionary and perlocutionary speech acts, Austin separated “the generative production of a performative effect from the constitutive accomplishment of a performative action ‘taking effect’” (Lloyd 2016: 572). The ‘taking effect’ of performative actions can be interpreted as referring to the creation of a social principle, such as enacting laws or establishing rights and prohibitions.

Butler has criticized feminists for often accepting “the category of woman as a universal presupposition of cultural experience which, in its universal status, provides a false ontological promise of eventual political solidarity” (Butler 1988: 525). Butler believes that “the body becomes its gender through a series of acts which are renewed, revised, and consolidated through time” (Butler 1988: 530).

Butler deconstructs the false conception of a naturalized identity, noting that “gender is the repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, or a natural sort of being” (Butler 1990: 62). As gender attributes and acts are performative, Butler asserts that there “is no preexisting identity by which an act or attribute might be measured,” so the assertion of a true, natural gender identity “would be revealed as a regulatory fiction” (Butler 1990: 62). Essentially, Butler believes there “need not be a ‘doer behind the deed,’ but that the ‘doer’ is variably constructed in and through the deed” (Butler 1990: 71). The identity of subjects is created from socialized norms transmitted through regulatory structures such as judicial systems.
My thesis draws from Michel Foucault’s interest in how subjects are produced. Foucault argues that there are three modes of objectification by which a person becomes produced by systems of power as a subject. Taken together, the three modes of objectification of the subject, “those that categorize, distribute, and manipulate; those through which we have come to understand ourselves scientifically; and those that we have used to form ourselves into meaning-giving selves,” designate the landscape of Foucault’s inquiries into the connection between the subject, knowledge, and power (Foucault 1982: 778). From Mary Douglas, I take interest in her conceptions of purity and danger. She defines dirt as “matter out of place,” a concept she expands on by arguing that “dirt is ‘essentially disorder,’” as dirt is “ambiguous, respecting neither rules nor boundaries” and acts as “matter out of context” that no longer serves its original purpose in society (Douglas 1966: 54). In-between bodies, individuals that do not belong to clear categories, are the focus of intense social scrutiny and regulation. In Purity and Danger, Douglas (1966: 72) suggests that the “very contours of the body are established through markings that seek to establish specific codes of cultural coherence.” These codes are created by the discourse of regulatory social systems that reinforce norms and establish and naturalize taboos related to defining appropriate bodies and “separating, purifying, demarcating, and punishing transgressions” that threaten the order of the social body (Douglas 1966: 15). By drawing on insights from the different theorists, my thesis hopes to delineate the performative power of the law and its ability to create specific subjects and recreate key social inequalities.
Chapter Two: The Perfect Storm: Spreading Abortion Hostility

The Back Alley

Before focusing on the legalization of abortion in 1973 with Roe v. Wade, it is important to explore the climate of control over women’s sexuality in the years leading up to Roe and the inequities produced by the market for illegal abortions. Only in 1965 did the Supreme Court guarantee the right of married couples to acquire contraceptives in the case of Griswold v. Connecticut. Prior to this ruling, “some states still had laws, stemming from Anthony Comstock’s nineteenth-century ‘moral purity’ campaign, prohibiting the sale and distribution of contraceptives” (Kaplan 1995: XIV). In 1972, the Supreme Court in Eisenstadt v. Baird granted the right to acquire contraceptives to unmarried women. Laura Kaplan highlights the desperation of women to acquire sexual freedom and the absurdity of the requirement that marriage determined access, noting, “One woman I know went to her doctor for contraceptives just before her wedding. He told her to come back after the honeymoon” (Kaplan 1995: XV). Feminists at the time sought to free women to participate fully and equally in the workforce, calling for contraception and abortion rights that would enable women to control the timing of motherhood.

While women were able to legally purchase contraception prior to Roe, the reality is that not all means of contraception are perfect and “a woman should not have to forfeit her protected right to plan a family simply because contraception fails or has not been used” (Greenhouse and Siegel 2012: 135). If contraception failed and a woman wanted to terminate the pregnancy, access to safe abortion care was greatly restricted. In the pre-Roe period between 1965 and 1972, thirteen states expanded their statutes to allow abortion in cases of rape, incest, and fetal abnormality; four states, including New York, repealed their abortion laws, and in all other
states, abortion was illegal except when the life of the woman was in danger (Nossiff 2000: 2). Thus, unless a woman was seeking a therapeutic abortion to save her life, in reality, abortion was only available in the United States if you were a woman with social, cultural, and economic capital that enabled you to be able to pay and have access to medical professionals who were willing to secretly perform abortions. If you were a woman who lacked these forms of capital, abortion was either not available to you or only available under unsafe circumstances. In a 1960 medical journal article, Mary Steichen Calderone, a public health doctor who was the medical director of Planned Parenthood, “estimated the annual incidence of illegal abortion in the United States at 200,000 to 1.2 million and argued that a profession committed to fighting disease had an obligation to concern itself with this disease of society, illegal abortion” (Greenhouse & Siegel 2012: 271). Women without resources sought illegal abortions in secrecy, only to have their bodies ravaged by unsafe abortion practices and untrained providers, creating a strong public health argument for the liberalizing of access to abortion. While statistics can reveal the scope of illegal abortions pre-Roe, personal stories capture the true trauma and fear connected to terminating an unwanted pregnancy. The following narrative told by the granddaughter of a woman who had and died from an abortion pre-Roe, collected by Ms. Magazine’s #WeWontGoBack campaign on the 43rd anniversary of Roe, highlights the extent of the layers of trauma:

“My mom spoke of aunts and other beloved female family members who could not afford and/or could not handle another pregnancy and child. All that was available to them was ‘kitchen table’ abortions done in secret with a coat hanger. The pregnancy was aborted, but these women died horrible deaths from peritonitis due to internal punctures and infections. They felt as though they had no choice and were desperate not to have more
children. My mom was haunted by their stories and the fact they felt so trapped. It was such a loss for her and the family to lose these lively, strong women. This was in the 1930s and 40s.” – Jayne B (Hallett 2016).

For many of the most vulnerable women in society pre-\textit{Roe}, teenagers and women without financial resources, the image of a coat hanger was the last thing they saw. Amid the visceral horror of gross inequities in access to safe abortions, women came together, in secrecy, under the belief that “every woman deserved to be respected for making an active choice,” to start in Chicago in 1969, Jane: The Abortions Counseling Service of Women’s Liberation (Kaplan 1995: IX). Jane functioned by having members, who were part of the women’s liberation movement in Chicago, “find doctors who were performing abortions, screen them to determine which ones were competent, and prepare women for their abortions,” focusing on lowering the price of an abortion so that no woman would be turned away because she couldn’t afford to pay (Solinger 1998: 34). Jane provided all women with safe, affordable access to abortion, treating them as participants in the healthcare process, not passive recipients, or objects being operated on. In the four years between the founding of Jane and the decision in \textit{Roe}, Jane estimated that it performed “more than eleven thousand abortions” (Solinger 1998: 33). While the women who were able to seek medical care from Jane did not face the physical trauma suffered by women who obtained unsafe illegal abortions, these women were still forced, given the laws in Illinois, to obtain a medical procedure in secrecy and deal with the impacts of making a hidden choice.
The Case That Legalized Abortion: *Roe v. Wade*

In 1973, the U.S. Supreme Court announced its decision in *Roe v. Wade*, a challenge to a Texas statute that made it a crime to perform an abortion unless a woman’s life was at stake. The Court recognized, for the first time, that the constitutional right to privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy” (*Roe v. Wade* 1973: 205). The case was initially filed by Norma McCorvey in 1971, known in court documents as Jane Roe, against Henry Wade, the district attorney of Dallas County, who enforced the Texas law that prohibited abortion, except to save a woman’s life (Chicago Kent College of Law 2017). McCorvey was a single mother who sought to terminate her third pregnancy; her mother raised her first child and her second child was placed for adoption (Solinger 1998: 15). An earlier federal district court case declared the Texas law unconstitutional, but Wade ignored the decision and appealed to the Supreme Court. Thus, the Supreme Court had to determine whether or not the Constitution embraces the right of a woman to obtain an abortion, nullifying the Texas prohibition.

At the time of *Roe v. Wade*, abortion law was a “complex national patchwork” with four states having repealed anti-abortion laws completely and thirteen states reforming abortion laws to allow for certain circumstances beyond a danger to the health of the woman, such as rape, incest, or fetal defect (Reagan 1997: 222). The inequities in abortion laws across the United States led many women, who could afford to do so, to travel across state lines. In 1972, roughly one hundred thousand women traveled to New York, the only state that did not have a residency requirement for abortion to be performed (Chicago Kent College of Law 2017). For those who could not afford to travel to New York and who could not bare the thought of carrying their pregnancy to term, upwards of two hundred thousand women performed self Abortions per year.
in the time period leading up to the Roe decision (Chicago Kent College of Law 2017). Across the United States, whether abortion was legalized in the public sphere or relegated into the private back-alley, women were having abortions and it was time for the Supreme Court to make a ruling standardizing the legality of abortion in all states.

Roe v. Wade built on a previous case. In 1965, the Supreme Court heard the case of Griswold v. Connecticut, a challenge to a Connecticut law that “criminalized the provision of counseling and other medical treatment to married persons for purposes of preventing conception,” and established the constitutional right to privacy in its ruling against the law (Garrow 1998: 187). Griswold, the Executive Director of the Planned Parenthood League of Connecticut, gave information, instruction, and medical advice to married couples on the topic of birth control; she and her colleague were arrested and found guilty under Connecticut law. Thus, the question at issue for the Supreme Court to decide was: “Does the Constitution protect the right of marital privacy against state restrictions on a couple’s ability to be counseled in the use of contraceptives?” (Garrow 1998: 182). The Court believed that within the constitutional amendments, a new constitutional right could be created, the right to privacy in marital relations, which invalidated the Connecticut law. The Court held that a woman’s right to an abortion fell within the right to privacy protected by the Fourteenth Amendment.

Using the right to privacy developed in Griswold v. Connecticut, Roe v. Wade established two essential rulings. First, states could not regulate abortions during the first trimester, because it represented a private medical decision between a woman and her doctor, with the opinion stating that:

“Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances
have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest” (Roe v. Wade 1973: 179).

The Court grounded this judgment in the right to privacy, concluding, “The right of personal privacy includes the abortion decision, but that this right is not unqualified, and must be considered against important state interests in regulation” (Roe v. Wade 1973: 154). Second, while states could not regulate first trimester abortions, the Court ruled that states could regulate abortion later on in pregnancy to protect the health of the mother. In the viability stage, defined by the Court as “when the fetus could reasonably survive outside of the womb,” the state could regulate or prohibit abortion to preserve the life of the fetus, as the Court stated,

“In assessing the state’s interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the state may assert interests beyond the protection of the pregnant woman alone” (Roe v. Wade 1973: 159).

The Court’s decision to affirm a state’s right to regulate abortion in the viability stage can be understood through Marilyn Strathern’s notion of bodies as fields of relations. From this perspective, it appears as if the Court is viewing the body of the woman and the body of the fetus as being enmeshed in one body – a maternal body. Strathern argues that bodies comprise a field of relations as “individual bodies appear as parts rather than wholes, that is, as the implication of persons and relations in one another” (Strathern 2009: 163). The Court’s interest in protecting the unity of the maternal body, a body composed of the woman carrying the fetus and the fetus’ body, continues to drive how and when the Court draws a line between constitutional and unconstitutional abortions and restrictions.
Why Does Privacy Matter?

By establishing the right to abortion in the first trimester of pregnancy under the right to privacy, did the Court infringe on the right it was protecting? Legal scholar Kathryn Holmes Snedaker notes, as does Supreme Court Justice Ruth Bader Ginsburg, that “those who argue that woman’s right to have an abortion is the right of a woman alone to decide what to do with her body were dissatisfied with the Court’s decision because it placed restrictions on that right” (Snedaker 1987: 121). Instead of deciding in Roe v. Wade that abortion is a right because of the right to privacy, the Court could have grounded the right to abortion in an equality framework. Equal treatment legal theorists question, “whether abortion restrictions are shaped solely by the state’s interest in protecting potential life, or whether such laws might also reflect constitutionally suspect judgments about women” (Siegel 2013: 2). For instance, does the state act consistently to protect potential life outside the abortion context, for instance by providing prenatal care and job protections to women who desire to become mothers? Arguments of equal treatment theorists also focus on “the gendered impact of abortion restrictions,” asking “whether, in protecting unborn life, the state has taken steps to ameliorate the effects of compelled motherhood on women, or whether the state has proceeded with indifference to the impact of its actions on women” (Siegel 2013: 2).

Law Professor Sylvia Law argued that “the rhetoric of privacy, as opposed to equality, blunts our ability to focus on the fact that it is women who are oppressed when abortion is denied” (Law 1984: 1020). She claims that the logical reasoning of Roe v. Wade failed to “end women’s struggle for control of their bodies, [but] transformed it into debates about medical practice and moral and religious views of the personhood of the fetus... women’s lives have become distinctly secondary issues” (Law 1984: 986). Legal scholars have continued to argue
that in the legal climate following *Roe*, the privacy doctrine paved the way for political backlash on women’s access to abortion and made women powerless in their right to choose an abortion. This tendency is particularly clear when we consider the case of minors seeking access to abortion. As will be discussed in the next chapter, pregnant minors are rendered powerless by the court systems, which insist on defining consent in a limited way and deploy the notion of privacy in a restricted fashion. Supreme Court decisions on the constitutionality of restrictions on minors’ access to abortion have found that “the constitutional right to privacy encompasses minors’ reproductive decisions, including a minor’s right to certain reproductive health care such as contraceptive services and abortion; however, a minor’s right to privacy is not absolute and the state has more authority to restrict that privacy than it does with adults” (University of Chicago 2017).

**The Legal Battle Continues at the Supreme Court**

A Pennsylvania law regulating abortion brought the next Supreme Court decision, refining the *Roe v. Wade* jurisprudence in 1982. The Pennsylvania legislature passed the Pennsylvania Abortion Control Act, requiring women seeking abortion to: notify their husbands, obtain parental permission if they were under eighteen, and wait twenty-four hours between an initial consultation and the procedure (Garrow 1998: 545). The law was framed by its supporters as “protecting women’s health and safety while staying within the bounds of the Constitution as defined in *Roe v. Wade*” (Chicago Kent School of Law 2017).

The Supreme Court voted to uphold the right to abortion established by *Roe*, but changed the criteria through which state regulations on abortion must be examined by introducing the “undue burden test.” The court in the plurality opinion stated,
“A finding of an undue burden is a 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. A statute with this purpose is invalid because the means chosen by the state to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends” (Planned Parenthood of Southeastern Pennsylvania v. Casey 1982: 833).

While the undue burden framework was referred to as a “test,” the undue burden has been criticized by legal scholars and supporters of abortion access as being “fairly vague,” leaving the questions open: How much burden is undue? Is the burden qualitative, meaning it affects each woman individually too much, or quantitative, meaning it affects too many women? Would it be a burden to regulate the procedure itself, or the qualifications of the woman seeking it, or the number of clinics allowed in a state? (Chicago Kent School of Law 2017) I believe that the ambiguity of the undue burden framework established by the Supreme Court to evaluate abortions restrictions imposed by states created the ideal legal climate for conservative legislatures, opposed to women’s right to abortion, to create laws restricting minor’s access to abortion (parental consent and notification laws) and laws imposing physical, emotional, psychological, and economic burdens on women seeking abortion (mandated counseling and waiting period laws) that would still be within the constitutional amendments detailed by the Court.
Establishing Precedent for the Irrational Woman

In 2003, the federal government passed the Partial-Birth Abortion Ban Act, which banned any procedure in which the death of the fetus occurred once “the entire fetal head or any part of the fetal trunk past the navel is outside the body of the mother” (Chicago Kent School of Law 2017). Supporters of abortion have argued that “partial-birth abortion is not a medical term but a political one,” preferring the medical framing of “intact D&E” [Dilation and Evacuation] second-trimester abortions (Gorney 2004: 33). Dr. Carhart, an abortion provider in Nebraska, brought a challenge to the law, which was ultimately decided by the Supreme Court in 2007 in the case of Gonzales v. Carhart. The key issue at stake was the “amount of deference that courts are supposed to give to Congressional findings regarding medical facts,” as Congress argued that an ‘intact D&E’ procedure is never medically necessary, while many members of the medical community argued that this is the safest method of second-trimester abortions for patients (Chicago Kent School of Law 2017). Should the courts defer to Congress or doctors?

The Supreme Court voted in a 5-4 decision to uphold the federal ban, as Justice Anthony Kennedy in writing the majority opinion stated that:

“The medical uncertainty over whether the act’s prohibition creates significant health risks provides a sufficient basis to conclude this facial attack that the act does not impose an undue burden. The conclusion that the act does not impose an undue burden is also

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5 Throughout this thesis, I continue to refer to women who have abortions as “patients” in terms of their relationship to their doctor. Although Sander Gilman (2001: 5) notes that “consumer activists may urge us all to think of ourselves in relation to our doctors as clients rather than patients,” there has been a concerted effort by supporters of the right to abortion to use rhetoric that recognizes abortion as a right of women’s healthcare, a right to medical access. As part of recognizing abortion as “both healthcare and choice,” I made the decision to refer to women who have abortions as patients (Lindgren 2012: 385).
supported by other considerations. Alternatives are available to the prohibited procedure" (Gonzales v. Carhart 2007: 125).

Justice Ruth Bader Ginsburg wrote the dissent criticizing the majority opinion both for infringing on women’s rights and for violating the precedent established for regulating abortion in Casey, stating:

“Notably, the concerns expressed are untethered to any ground genuinely serving the government’s interest in preserving life. By allowing such concerns to carry the day and case, overriding fundamental rights, the Court dishonors our precedent. The Court shields the woman by denying her any choice in the matter and this way of protecting women recalls the ancient notions about women’s place in society and under the constitution ideas that have long since been discredited” (Gonzales v. Carhart 2007: 128).

Building upon Justice Ginsburg’s critique of the majority opinion’s reliance on outdated stereotypes about women’s role in society and behavior, legal scholars have argued that Gonzales v. Carhart brought the question of women’s capacity for abortion decision making into legal discussions of abortion restrictions. Maya Manian argues that in Carhart, the Court “abandoned its previous deference and respect for a woman’s right to be her own decision maker with regard to abortion and instead determined that a pregnant woman lacks capacity to make her own decisions and give informed consent to abortion related medical treatment” (Manian 2011: 118). While Roe legalized abortion and brought it into the public medical sphere, out of the back-alley, the continued attack on abortion access through restrictions and court verdicts finding these restrictions constitutional has led many women who do not have social, cultural, and economic capital (the same women vulnerable in the pre-Roe era) to resort to unsafe abortions in their private home because obtaining a safe, legal abortion is simply unfeasible. The implications
of such restrictions and the gendered stereotypes about the weak, emotional, irrational woman produced by these laws will be explored in Chapter Four with an analysis of mandatory counseling and waiting period laws.

**Changing Political Tides and Growing Abortion Hostility**

In the forty-three years since the Supreme Court’s decision in *Roe v. Wade* (1973-2016), states have enacted one thousand and seventy-four abortion restrictions (Guttmacher Institute 2015). Of these restrictions, twenty-seven percent, two hundred and eighty-eight laws, have been enacted just since 2010 (Guttmacher Institute 2015). Following the 2010 midterm election that placed many opponents of abortion into power in state capitals across the country, the climate for abortion restrictions in the United States became increasingly hostile. To briefly evaluate the degree of hostility, here’s a snapshot of the extent of the variation of abortion restrictions passed in 2015: Missouri proposed legislation requiring the would be father to give consent in writing before any abortion is performed; Alabama passed legislation allowing fetuses to be represented by court-appointed lawyers who could call witnesses to testify on the unborn’s behalf during judicial bypass hearings; and Indiana passed legislation making it a felony for providers to perform an abortion because of the sex of the fetus or a potential disability, including: a mental disability or retardation, physical disfigurement, scoliosis, dwarfism, Down syndrome, albinism, and Amelia (missing or disfigured limbs) (Zadronzy 2015).

Cecile Richards, the President of Planned Parenthood Federation America, argued that from 2010 to 2013, “a small but vocal group of extreme politicians and conservative special interest groups has helped introduce, pass, and sign a record number of bills to cut off women’s access to safe and legal abortion,” resulting in “more than half of American women of
reproductive age now living in states where access to abortion is being restricted by their state legislatures” (Richards 2013). In the following two chapters, I will break down two types of laws sweeping state legislatures across the United States, parental consent and notification laws and mandatory counseling and waiting period laws. While legislatures argue that both types of laws are enacted to “protect” women’s health and safety, I will closely analyze the text of the laws to reveal their underlying motives to control women’s reproductive functions and reproduce norms that equate the woman with the body and the stigma that comes with this association.
Chapter Three: The Immature Minor Seeks an Abortion

The Case: Alabama, 2001

“The record in this case reflects that the minor is 17 years old. At the time of the hearing of her petition, she was eight weeks pregnant. She is a senior in high school, a straight-A student, and very involved in extracurricular activities. She plans to attend college in the fall, and she has been awarded two college scholarships. She has a part time job and she puts her earnings from that job in a savings account to be used for college. The minor testified that the baby’s father is 18 years old and that he also plans to attend college in the fall. She testified that he supports her decision to have the abortion. The minor testified that her parents would react poorly to the news of her pregnancy.”

The Verdict: Petition for abortion – denied. In referring to what the interaction between the teen and the abortion clinic would look like, the judge stated,

“I’m a mother. These people [clinic staff] are interested in one thing, it appears to me, and that is getting this young lady’s money...This is a beautiful young girl with a bright future, and she does not need to have a butcher get ahold of her” (Alabama Court of Civil Appeals 2001: 806).

Introducing Parental Notification and Consent Laws and the Maturity Standard

In 1973, the U.S. Supreme Court in its decision in *Roe v. Wade* recognized that the constitutional right to privacy includes a woman’s right to make her own personal medical decisions, including the decision to have an abortion. While “*Roe v. Wade* may have granted women the legal choice to terminate a pregnancy in 1973, pregnant minors have yet to gain complete autonomy over their abortion decisions” (Bonny 2007: 313). Following the rise of Tea
Party politicians in 2010, when candidates picked up key seats across the country, legislatures in many states doubled down on attacks on women’s health care access, particularly focusing on limiting access to safe and legal abortion for adolescents.

Currently, the majority of states, thirty-seven, require minors (individuals under eighteen) to seek the approval of their parents or legal guardians when choosing to have an abortion (Guttmacher Institute 2017). Many supporters of these laws argue that abortion is a medical procedure and all medical procedures carry some risks of complications, so minors seeking access to abortion should notify their parents of their decision because “adults are in a much better position than minors to assess and deal with post-procedural complications” (Silverstein 2009: 17). Additionally, supporters advocate that parents can help their daughter through any emotional or psychological responses she has to her decision to have an abortion. While I fully agree that parents can serve as supporters to their daughters and that parents are “afforded certain rights to oversee the decision-making of their minor children,” it is important to remember that not all minors are in positions to seek consent from their parents (Silverstein 2009: 19).

According to Jane’s Due Process, a nonprofit organization whose mission is to ensure legal representation for minors in Texas, “it’s pretty common to receive calls from teens in high school who are living with their parents in abusive or neglectful homes. Many of these young women are facing enormous uphill battles to simply make it through each day” (Rooke-Ley 2016). To understand why parental consent and notification laws cannot be the only option a minor has to access abortion, it is important to examine the case of Lana (pseudonym), a college student who between her morning classes at college, called the Jane’s Due Process hotline because she was pregnant and wanted an abortion. Lana was born and raised in a dysfunctional and abusive home by parents who were rarely present and both addicted to drugs. Lana worked
hard on academics and said “I made a life for myself outside of that toxic place” (Rooke-Ley 2016). Under Texas law, Lana would be expected to return back to the troubling conditions of her parent’s home to ask them for permission to make a decision about her own reproductive healthcare, an experience that would pose a threat to her mental and physical health. However, with the option of judicial bypass, the legal system fills the place of Lana’s guardian and can determine whether or not she should be granted consent to an abortion.

Courts have continued to debate what parental consent and notification laws constitute infringements on minors’ constitutional rights. Some parental consent laws have been struck down on the grounds that “they permit an absolute and arbitrary veto of a minor’s decision to obtain an abortion” (Grevers Schmidt 1993: 597). The Supreme Court, though, has continued to uphold parental notification and consent laws that provide the minor with the option of a judicial bypass, a procedure that allows a pregnant minor to petition a court to obtain consent for her abortion instead of needing to notify and then receive the consent of her parents.

In 1979, the Supreme Court heard the case of Bellotti v. Baird, a challenge to the constitutionality of a Massachusetts statute that required parental consent before an abortion could be performed on an unmarried woman under the age of eighteen. In this case, the Supreme Court found parental consent and notification laws constitutional in the United States if they included the option to petition the court for a waiver of the parental consent requirement. Under the standards established in Bellotti v. Baird,

“A judge must grant the order if the young woman demonstrates that she is sufficiently mature to make the decision without parental intervention. If she is not mature, the judge must still grant the order if an abortion would nonetheless be in her best interests” (Grevers Schmidt 1993: 597).
Thus, the judge was invested with the power to determine who is mature and what is the best interest of the minor.

Currently in the United States, thirty-seven states require parental involvement in a minor’s decision to have an abortion with thirty-six of those states including an option for judicial bypass (Guttmacher Institute 2017). Of these thirty-six states, seven mandate that a judge must use specific criteria, such as the “minor’s intelligence or emotional stability,” in determining granting consent to the abortion (Guttmacher Institute 2017). Fifteen of the states require judges to use the “clear and convincing evidence standard” when deeming the minor mature and that the abortion is in her best interest (Guttmacher Institute 2017). The clear and convincing evidence standard requires that a party prove in a court of law that something is “substantially more likely than not that it is true” (Legal Information Institute at Cornell Law School 2017).

**In-Between: The Pregnant Teen**

In this chapter, I will explore the text of parental notification and consent laws in five states (Kansas, Texas, Florida, Arizona, and Arkansas) that require judges to evaluate a minor’s petition to waive parental notification and consent for an abortion using specific criteria assessing maturity and the clear and convincing evidence standard. After examining each statute independently, I will draw general trends across the statutes, offer interpretations of the legal texts, and evaluate the impact of the language of the statutes on normalizing minors’ bodies and reproductive choices.

Legally speaking, a minor is defined as “someone under legal age, which is generally eighteen” (Legal Information Institute at Cornell Law School 2017). When a teen seeking an
abortion enters into the courtroom, she is automatically categorized based upon her age as a minor. But for her to be a minor worthy of being granted legal permission to have an abortion, she must show the characteristics of intelligence and emotional stability. Paradoxically, a pregnant minor does not have to undergo an assessment of her intelligence/emotional stability though if she chooses to keep the baby. Thus, parental consent and notification laws, I believe, are enacted by state legislatures to prevent minors, an age group already under the scrutinizing gaze of society and the legal system, from having abortions by raising the hurdles they have to jump through in order to meet the narrowly defined classification by the state of which minors are entitled to have abortions.

Minors to start with are in a liminal state, as they are neither children nor adults. However, minors who have had sex and become pregnant turn the ambiguity of the liminal state into challenges to accepted social norms and pose serious questions such as: is the minor a child having a baby or is she a pregnant woman? Who has the right to control the body of the minor? Parental notification and consent laws performatively produce two types of opposing subjects. First, “the immature minor” who needs to be “protected” by the state, which acts as a form of a parental guardian. Second is the minor who is intellectually and emotionally stable, a quasi-adult, who is able to have an abortion. I will trace how these two subjects are constituted in several states and explore the broader economic and social forces/discourses that shape this process.

Kansas

In the 2015-2016 legislative session, the Kansas legislature amended statute 65-6705 that established the requirement of written consent before the performance of an abortion, a judicial bypass waiver of the requirement, and criteria for the court proceedings of the waiver. In
determining if a minor is mature and “well-enough informed” to make an abortion decision without parental consent, a Kansas court must take into consideration “the minor’s experience level, perspective, and judgment” (Kan. Stat § 65-6705 ({2015}). When assessing experience level, the court can consider in addition to other relevant factors: “the minor’s age, experience working outside the home, living away from home, travelling on her own, handling personal finances, and making other significant decisions” (Kan. Stat § 65-6705 ({2015}). In order to examine the minor’s perspective, she must present to the court how she explored her options and the extent to which she considered and weighed the “potential consequences of each option” (Kan. Stat § 65-6705 ({2015}). In evaluating the minor’s judgment, the court will examine the conduct of the minor since learning of the pregnancy and her intellectual abilities as an assessment of her ability to make informed decisions.

Texas

In 2015, Texas passed House Bill 3994, amending the existing law on parental notice and informed consent of abortions. In order to determine if the minor is mature and the abortion is in her best interest, the court may consider: the minor’s age, the minor’s life experiences, such as working, traveling independently, or managing her own financial affairs; the steps taken by the minor to explore her options and the consequences of them; the minor’s decision not to notify and obtain consent from a parent, managing conservator or guardian; the minor’s reasons for seeking an abortion; the degree to which the minor is informed about state-published materials on abortion; and an evaluation of the minor by a licensed mental health counselor (Tex. Stat § 3994 ({2015}). Both the lived physical and mental experiences of the minor are on display and up for evaluation in the Texas court room.
Florida

In 2016, the Florida legislature passed the Parental Notice of Abortion Act, establishing criteria for how the court should evaluate a minor’s petition for judicial bypass. As part of the “clear and convincing evidence standard,” the court should take into consideration the minor’s: age; overall intelligence, emotional development and stability; credibility and demeanor as a witness; ability to accept responsibility; ability to assess both the immediate and long-range consequences of her choice; and ability to understand and explain the medical risks of terminating her pregnancy and apply that understanding to her decision (Fla. Stat § 390.01114 ({2016}). In determining whether an abortion is in the best interest of the minor, the court should not consider “the potential financial impact on the minor or the minor’s family if the minor does not terminate the pregnancy” (Fla. Stat § 390.01114 ({2016}).

Arizona

In 2011, Arizona passed legislation on the requirement of an abortion request by a minor without parental request. As part of the requirements, the court will examine: the minor’s age and experiences working outside the home, living away from home, traveling on her own, handling personal finances and making other significant decisions, the steps the minor took to explore all her options, the extent to which the minor weighed the potential consequences of each option; the minor’s conduct since discovering she was pregnant; and the minor’s intellectual ability to process her options and make an informed decision (Ariz. Stat § 36-2152 ({2011}).
Arkansas

In 2015, Arkansas passed House Bill 1424, the Parental Involvement Enhancement Act, strengthening the parental consent requirement for minors seeking an abortion. According to the legislation, “immature minors often lack the ability to make fully informed choices that take into account both immediate and long-range consequences,” as “the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related” (Ark. Stat § 1424 (2015)). The legislation additionally states that courts and states have the duty to protect minors against their own immaturity, foster family unity and preserve the family as a viable social unit, protect the constitutional rights of parents to rear children who are members of their household, and reduce teenage pregnancy and abortion. Judicial bypass of the parental notice requirement is thus made “only in exceptional or rare circumstances,” taking into account similar standards for establishing “clear and convincing evidence” as seen in the preceding statutes (Ark. Stat § 1424 (2015)).

Contextualizing the Law – The Question of Maturity

It is clear that in the courtroom, the adolescent’s body and physical actions are subjected to the gaze of the judge; each piece of evidence that is presented enables the judge to delve deeper into an examination of the minor’s actions and beliefs. Before examining the evaluation of the minor in the legal setting, I believe it is important to first unpack the position that minors hold in society and why a pregnant minor poses a problem to societal order that the legal system attempts to regulate.

Once a female child enters into the liminal state of adolescence, she is expected to “engage with the project of mastery of adult-like responses” in private under the watchful gaze
of the parental figure in order to not fall into a trap of delinquency and instead emerge in society in the structurally stable position of a mature, adult woman (Cousin 2006: 139). The binary between child/adult, girl/woman does not allow for the existence of the position of a not-girl-not-woman, yet this is exactly the position of the pregnant adolescent body. Pregnancy makes the invisible adolescent body visible.

From the framework of Mary Douglas, the pregnant adolescent body and its visibility in society is a form of pollution that threatens societal order, as pollution “is a reaction to protect cherished principles and categories from contradiction” (Douglas 1966: 33). The law plays a key role in managing the polluting pregnant adolescent body and reinforcing social order. Its regulation of the pregnant adolescent body is a form of “biopower,” coined by Michel Foucault to refer to the system of disciplinary power in modern Western society where the government maintains order by disciplining the body in order to produce “docile bodies,” “passive, subjugated, and productive individuals” (Pylpa 1998: 21). Foucault also highlights the power of the judicial system in creating bodies that the system then represents. The subjects “regulated by such structures are, by virtue of being subjected to them, formed, defined, and reproduced in accordance with the requirements of those structures” (Butler 1990: 10). The legal system “produces and then conceals the notion of a ‘subject before the law’ in order to invoke the discursive formation as a naturalized foundational premise that subsequently legitimates that law’s own regulatory hegemony” (Butler 1990: 25). The relationship between the law and the Foucauldian notion of disciplinary power can be seen as the idea that the law operates by constructing legal subjects that it seeks to regulate (Sheldon 1993: 20).

The law helps reduce the social anxiety generated by the pregnant adolescent body. The regulatory system used to determine the fate of the minor’s pregnancy is producing more than a
mere individual judgment. It becomes part of a process of normalization in the Foucauldian sense that homogenizes and differentiates, that classifies and individualizes, and that instructs and corrects. In delineating the difference between the mature, responsible, and deserving minor and the immature, irresponsible, and underserving minor, the courts materialize important norms that mark age, gender, and class distinctions.

The five different legislative texts examined above all require minors to meet a standard of maturity. However, the reality is that no clear legal standard exists for judges to follow when assessing the maturity of an adolescent seeking judicial bypass, as “neither the Supreme Court nor state legislatures have provided judges with adequate guidance to measure maturity” (Amsden 2015: 6). When the Supreme Court issued its verdict in Bellotti v. Baird on the constitutionality of parental notification and consent laws with the option for a mature minor to seek judicial bypass, the Court explicitly stated that maturity is “difficult to define, let alone determine...The peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors” (Bellotti v. Baird 1979: 132). As the establishment of what constitutes a mature adolescent is at the discretion of individual judges based upon the factors the state legislature requires to be examined, concerns arise regarding the seepage of the private beliefs and viewpoints of judges into the public courtroom. Judges could deny a minor’s petition for judicial bypass based on “personal religious beliefs; influence regarding the minor’s race, ethnicity, or social class; or an adoption of the role of a parental figure instead of an objective legal assessor” (Bonny 2007: 323).

Analyzing the texts of the legislation in Kansas, Texas, Florida, Arizona, and Arkansas raises questions about what personal information the legislature believes judges should be examining in order to come to an “objective” decision about whether or not to grant the minor’s
decision to have an abortion. The minor has the burden to present work experiences outside the home; experiences living away from home and/or travelling on her own; experiences handling personal finances; experiences making vaguely defined significant decisions in her life; and a measure of her intellectual ability. In the case of Texas, the minor must undergo a mental assessment and present that as an objective score of maturity and whether an abortion would be in her best interest. The degree to which the minor examines all her options and the subsequent consequences is examined without any specification for the financial burden this could impose on the minor, the personal costs of hearing viewpoints the minor does not want to hear, or the psychological impact of coming up with additional lies to hide why a minor is visiting a variety of health clinics when she is already keeping the pregnancy hidden from her parents or guardian. While each of these factors can be presented to the court in terms of a concrete statistic, narrative, or fact, the judges’ interpretation and evaluation of them is solely a “subjective inquiry” that is ripe for “judicial bias” to be transmitted in the judicial bypass decision (Bonny 2007: 313). I am not trying to argue that all judges allow personal biases to enter the courtroom when evaluating minor’s claims for judicial bypass, but that the construction of a specific standard for maturity in the case of reproductive freedom raises questions about the legal system’s ability to be objective when making decisions on abortion. For instance, in the case described at the beginning of this chapter of the seventeen year old minor from Alabama who was denied her petition for judicial bypass, the judge’s use of the term “butcher” to refer to an abortion provider and insertion of her perspective as a mother into the verdict both reveal a seepage of personal values and views against abortion into the supposedly neutral courtroom.

According to Helena Silverstein (2009: 188), “judges are socialized into the view that they must remain neutral, that they should ‘interpret law’ rather than ‘make law’ in short that
they should not legislate from the bench.” Yet, an analysis of the text of the legislation from five states (Kansas, Texas, Florida, Arizona, and Arkansas) on parental consent and notification laws and the criteria for measuring maturity reveals that laws do not exist in an objective sphere, but continue to be shaped by hegemonic social, cultural, political and religious views/discourses. In the end, regardless of whether a judge is aware of how his or her rhetoric of objectivity is inextricably influenced by political, moral, economic, or religious forces and “tries to check her/his ideological baggage, there will always be at least some carry-on items that make their way into the courthouse” (Silverstein 2009: 190).

Not only could judges be bringing into the courtroom beliefs about abortion. But also the judge is filling the role of the pregnant minor’s parental guardian, which means that the judge could be performing what socially constitutes a proper parental response to a minor’s improper behavior. According to the Supreme Court’s verdict in *Bellotti v. Baird*, “The guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors” (Seymore 2013: 126). Judges are not simply applying the law but they are in effect producing notions of good/proper parenting.

**Civilizing the Child**

In *The Civilizing Process*, Norbert Elias discusses how the French and English concept of “civilization can refer to political or economic, religious or technical, moral or social facts,” referring primarily “to the form of people’s conduct or behavior” (Elias 1994: 6). When discussing the current stigma of sleeping in a shared bed with a person of the same sex, Elias notes how:
“The children necessarily encroach again and again on the adult threshold of repugnance, and—since they are not yet adapted—they infringe the taboos of society, cross the adult shame frontier, and penetrate emotional danger zones which the adults themselves can only control with difficulty” (Elias 1994: 141).

In response, children are trained by their parents “early in this distancing” of bodies, “this isolation from others, with all the habits and experiences that this brings with it” (Elias 1994: 142). According to Elias, as one approaches modernity, children are socialized to internalize restraints of taboo behaviors, so that appropriate behaviors can be reproduced when the children are separate from other individuals, such as their parents.

I believe that the concept of the civilizing of children through the internalization of appropriate norms and externalizing appropriate behaviors can be applied to how the judges use the courtroom to “parent” pregnant minors seeking abortion. While abortion in the United States raises many moral questions, the deviation from societal norms is heightened when a minor becomes pregnant and seeks an abortion, encroaching on the adult threshold of the moral acceptability/shame of abortion. Thus, a judge, who views abortion as morally reprehensible and shameful, would want to reinforce and internalize in a minor the sanctity of life, by not granting her the right to abortion, so that she as well as her peers can continue to internalize acceptable behavior in the future. While a judge’s rejection of a judicial bypass petition only directly applies to the minor seeking the petition, the judge’s reasoning communicates a message to the broader society and can influence subsequent cases and judges’ decisions.
Maturity and Class

This process is further complicated by the class dimensions of how maturation and emotional stability are defined. The factors that legislatures require pregnant minors to present to judges reinforce the notion of the family unit and require minors to have a certain level of economic, social, and cultural capital that many minors do not have. As discussed earlier in the framework for my thesis, Pierre Bourdieu believes that capital can present itself in three forms: economic capital, cultural capital, and social capital. The evidence that a minor must present to the court assumes specific forms of economic, social, or cultural capital: working outside the home, living away from home, traveling on her own, handling her own finances, displaying a level of intelligence, and making significant life decisions. For Michel Foucault, “the function of knowledge is not to identify correlations or causal chains between pre-existing entities, but to classify, regulate, and normalize” (Pratt 1977: 165). Judges ask for information from the minor, evidence she must present in court, in order to acquire knowledge that is used to classify her. Minors are also evaluated by the judge based upon the credibility of their demeanor as witnesses, an important embodiment of one’s class positionality.

These expectations echo middle class ethos and values. In 2013, the Nebraska Supreme Court denied a sixteen-year-old foster girl’s request for an abortion because she was “not sufficiently mature to make the decision herself.” The teen sought bypass from the state’s parental consent laws because her birth parents were stripped of their parental rights after physically abusing her. Because her foster parents were very religious, she worried that she would “lose her place in their home if she told them she wanted to end the pregnancy” (re Anonymous 5, 286 Neb. 640,838 N.W.2d226 (2013)). After questioning the teen and telling her “when you have the abortion, it’s going to kill the child inside you,” Judge Peter Bataillon found
that the foster teen “failed to establish by clear and convincing evidence that she is sufficiently mature and well informed” (re Anonymous 5, 286 Neb. 640, 838 N.W.2d 226 (2013)). Interestingly, when finding the pregnant minor not mature enough to have an abortion, Judge Bataillon found her mature enough to be the parent of a child.

Disregarding the bias in the judge’s statement to the pregnant teen and the role his viewpoints played in his decision to not grant judicial bypass and consent to the teen’s abortion, the fact of the matter is that the teen presented to the court that she effectively raised her younger siblings, was planning to graduate high school early, and had undergone extensive counseling related to her decision to terminate her pregnancy, yet because she was in foster care and had constrained access to economic, social, and cultural capital, she did not present to the court “persuasive” evidence to meet the narrowly defined characteristics of what the Nebraska legislature deemed was evidence of being a mature minor. While this is a particular case, the circumstances for why this pregnant teen sought judicial bypass is representative of common reasons why one would seek judicial bypass.

Many teens who seek judicial bypass come from families where such an announcement would only “exacerbate an already volatile or dysfunctional family situation,” home circumstances that might not equip them to be able to perform in the court expected notions of maturity and emotional stability (Henshaw & Kost 1992: 196). The Supreme Court argued for the inclusion of judicial bypass to protect the constitutional rights of minors, for the law to take the place of a parental guardian in order to protect marginalized teens, but the narrow criteria developed by states that is required to prove maturity for an abortion creates a paradox between the laws and the subjects they constitute. The criteria requirements blatantly assume a different minor than who is in reality seeking judicial bypass.
Logical Inconsistencies

Supporters of parental consent and notification statutes believe that these laws are justified on the basis that “the decision to terminate a pregnancy is less a medical choice than a major life decision, and minors are too immature to make such choices” (Bonny 2007:329). However, many states do not regulate minors’ ability to make other life decisions, including becoming parents. Twenty-eight states and the District of Columbia allow all minors to consent to prenatal care (Guttmacher Institute 2017). The Supreme Court in *Carey v. Population Services International* in 1977 determined statutes that prohibit the distribution of non-medical contraceptives to minors to be unconstitutional. Forty states and the District of Columbia allow minors to place their child for adoption, “either explicitly or by making no distribution between minor and adult parents” (Guttmacher Institute 2017). Similarly, thirty states and the District of Columbia allow minors to consent to medical care for their children (Guttmacher Institute 2017). The five states examined all have laws that evaluate minors to make decisions about prenatal care, adoption, and the health of the child without an evaluation of maturity.

Viewing parental notification and consent laws in the broader legal context allows one to examine the underlying assumptions of legislatures on adolescent pregnancy and the decision to have an abortion that are transmitted through the legal text. Judith Butler conceives of gender performativity as “the process by which difference and identity are constructed in and through the discourse of sexuality” (Morris 1995: 567). I believe parental notification and consent laws performatively produce and reinforce the subject of the immature adolescent. This notion can be illustrated through an examination of the 2015 Arkansas House Bill 1424, the Parental Involvement Act. Under the section of the bill, Legislative Findings and Purpose, the Arkansas General Assembly finds that:
“Immature minors often lack the ability to make fully informed choices that take into account both immediate and long-range consequences; the medical, emotional, and psychological consequences of abortion are sometimes serious and can be lasting; the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related; and parents ordinarily possess information essential to a physician’s exercise of his or her best medical judgment concerning the minor daughter” (Ark. Stat § 1424 (2015)).

Based on these findings, the General Assembly’s purpose for enacting the Parental Involvement Enhancement Act is to: protect minors against their own immaturity; foster family unity and preserve the family as a viable social unit; protect the constitutional rights of parents; and reduce teenage pregnancy and abortion (Ark. Stat § 1424 (2015)).

Throughout House Bill 1424, the minor is referred to as either a “pregnant minor” or “pregnant incompetent woman” (Ark. Stat § 1424 (2015)). Thus, in the legislative text, the Arkansas General Assembly produces the incompetent pregnant adolescent, creating a space for the legal system and parents to protect the adolescent from making hasty or poorly informed decisions. The fact that she is getting an abortion classifies her as an irrational and incompetent subject, as “abortion can be seen as one of several ‘bad choices’ about sex, contraception, or partner” (Furedi 2001: 28). The purpose of the law makes clear that the states’ interest in parental involvement moves beyond protecting minors from harm to asserting the value of the family, discouraging pre-martial sex, and reinforcing the role of the state as protector of life in Arkansas.

While the four other legislative texts examined were not nearly as explicit in asserting the value of the family unit and the goal of reducing abortion by protecting the minor from making
an immature decision, the fact that various elements of the minor’s life are subjectively dissected by a judge as proof of her maturity to have an abortion, inherently imposes a social commentary on the decision of minors. Helena Silverstein, a Professor of Government and Law, notes that if the state’s sole interest lay in “protecting minors against the detrimental effects of their own immaturity, that interest could, for the most part, be achieved through means other than a parental involvement mandate” (Silverstein 2009: 24). For example, states could “require counseling before and after abortions with a medical or psychological professional or both” (Silverstein 2009: 25). Instead of protecting minors, parental consent and notification laws limit minors’ constitutional right to access abortion, by imposing on them socially defined notions of maturity. By regulating minor’s access to abortion either through the consent of a parent, legal guardian, or the court system, state legislatures mediate the relationship between the minor, her body, family, and society at large. The law shifts the power to determine the fate of a pregnancy from the one who is carrying the fetus to a broader set of actors who are invested with the power to control the female body and its reproductive potentialities.
Introducing Mandatory Counseling and Waiting Period Laws

Starting in 1974, one year following the Supreme Court’s decision in *Roe v. Wade*, Kentucky was the first state to enact a twenty-four hour waiting period requirement for women seeking abortion. It is common practice that every state requires that a patient consent before undergoing medical treatment and that the patient is able to give informed consent. Three interrelated elements underlie “the long-standing tradition of informed consent: patients must possess the capacity to make decisions about their care; their participation in these choices must be voluntary; and they must be provided adequate and appropriate information” (Guttmacher Institute 2017). However, when it comes to the medical procedure of abortion, legislative bodies, not medical experts, determine the information that women must hear and the timing during which they must hear it. This leads to women receiving inaccurate or irrelevant information with the underlying motive of discouraging their decisions to abort.

Currently, in the United States, thirty-five states require that women receive counseling before an abortion is performed with twenty-nine of those states specifying the information a woman must be given (Guttmacher Institute 2017). Twenty-seven of these states also require a woman to wait a specified amount of time, ranging from twenty-four to seventy-two hours, between the counseling and abortion procedure (Guttmacher Institute 2017). Twenty-five states offer information about the risks of abortion, ranging from comments on future fertility, an association between abortion and breast cancer, and the negative psychological consequences of abortion (Guttmacher Institute 2017). It is routine for a woman to undergo an ultrasound prior to her abortion to determine the gestational age of the fetus; the medical logic behind this decision
is for the physician to be informed about the length of pregnancy in order to determine the safest abortion method. However, many states believe that the counseling session before an abortion procedure is not just a medical formality but also morally and socially imperative. Thirty-three states require that the woman be told the gestational age of the fetus; twenty-eight states include information on fetal development throughout pregnancy (Guttmacher Institute 2017). Thirteen states include information on the ability of a fetus to feel pain with six states requiring that the woman be told that personhood begins at conception (Guttmacher Institute 2017).

In this chapter, I will explore the text of mandatory counseling and waiting period laws in six states (Missouri, North Carolina, Oklahoma, South Dakota, Texas, and Utah) that have seventy-two hour waiting periods (except for Texas which has a twenty-four hour waiting period) and impose many requirements on the information women must hear during mandatory counseling. After examining each statute individually, I will discuss commonalities in the explicit language used in the statutes and the role the laws play in producing a specific subject, who is capable of reproducing but refuses to do so. The woman is refusing to be a docile body and the social norms that link her body to reproduction. Her subjectivity is produced through the interplay between the medical discourse and the normalizing power of the legal system.

By forcing women to hear a mandated script filled with inaccurate information and requiring that they wait up to three days after counseling before having the abortion, the legal system attempts to limit women’s defiance of societal expectations and seeks to communicate to women, both those pregnant and more broadly, the consequences of having sex for pleasure and not procreation. When a woman who has sex for pleasure and not procreation ends up conceiving a child and then chooses to abort it, the regulatory system deploys fear and then shames the woman for violating her duty to produce children.
In 2015, the Missouri Legislature passed HB 1307 and 1313, requiring that women seeking abortion wait seventy-two hours after receiving counseling regarding the procedure and available alternatives before obtaining the abortion. The physician who is to perform the abortion must inform the woman of the immediate and long-term medical risks associated with the proposed abortion method including, but not limited to: infection, hemorrhage, cervical tear or uterine perforation, harm to subsequent pregnancies or the ability to carry a subsequent fetus to term, and possible adverse psychological effects associated with abortion (Mo. Stat § 1307/1313 (2015)). Additionally, the physician must make the woman aware of information regarding alternatives to abortion and provide her with adequate materials to read prior to the abortion (Mo. Stat § 1307/1313 (2015)).

The physician must also present the woman, in person, with printed materials by the Department of Health and Senior Services that depict through images the anatomical and physiological characteristics of the fetus at two-week gestational increments from conception to full term (Mo. Stat § 1307/1313 (2015)). While presenting the images, the physician must describe information about brain and heart functions and the presence of external members and internal organs. Depending upon the type of procedure, the physician will describe the steps in the procedure at which the fetus could feel pain. While talking with the woman, the physician must:

“Prominently display the statement: there are public and private agencies willing and able to help you carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or place him or her for adoption. The state of Missouri encourages you to contact those agencies before making a final
decision about abortion” (Mo. Stat § 1307/1313 (2015)).

The law highlights the role of the father in the counseling session, requiring the woman to be told that: “The father of the unborn child is liable to assist in the support of the child, even in instances where he has offered to pay for the abortion” (Mo. Stat § 1307/1313 (2015)).

**North Carolina**

In 2015, the General Assembly of North Carolina passed HB 465, requiring informed consent for an abortion seventy-two hours before the procedure. The physician must inform the woman that: medical assistance benefits may be available for prenatal care, childbirth, and neonatal care; the father is liable to assist in the support of the child, even if the father has offered to pay for the abortion; and that the woman has other alternatives to abortion, including keeping the baby or placing the baby up for adoption (N. C. Code § 465 (2015)).

**Oklahoma**

In 2016, the Oklahoma legislature passed statute 63, prohibiting performing an abortion on a woman without voluntary and informed consent and mandating that consent to an abortion is only voluntary and informed if it occurs at least seventy-two hours before the abortion. The physician must tell the woman about the medical risks of the procedure, the probable gestational age of the fetus, and the medical risks of carrying the pregnancy to term. Additionally, the woman must undergo a “lecture,” which mentions that medical assistance benefits may be available for prenatal care, childbirth, and neonatal care and that the father is liable for child support, even if the father offered to pay for the abortion (Okla. Stat § 63 (2016)). The physician will describe pictures of the anatomical and physiological characteristics of the
“unborn child” at two-week gestational increments to the woman, including the possibility of survival (Okla. Stat § 63 ({2016}). The woman will also hear about the “possible detrimental psychological effects of abortion” and be read the statement that “abortion shall terminate the life of a whole, separate, unique, living human being” (Okla. Stat § 63 ({2016}).

South Dakota

In 2014, the South Dakota Legislature passed HB 1215, requiring that a woman seeking an abortion wait seventy-two hours and visit a crisis pregnancy center6 prior to the abortion. The legislature expressed concern over the fact that surgical and medical abortions are scheduled by someone other than a physician, “without a medical or social assessment concerning the appropriateness of such a procedure or whether the pregnant mother’s decision is truly voluntary, uncoerced, and informed” (S. D. Stat § 1215 ({2014}). The intent of the legislation is to “protect the pregnant mother’s interest in her relationship with her child and her health” (S. D. Stat § 1215 ({2014}). The physician performing the abortion is required to tell the woman:

“Abortion will terminate the life of a whole, separate, unique, living human being. The pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the US Constitution and under the laws of South Dakota. By having an abortion, her existing relational and her constitutional rights with regards to that relationship will be terminated” (S. D. Stat § 1215 ({2014}).

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6 It is hard to define crisis pregnancy centers (CPCs) and separate them from the ideological viewpoints of either side of the debate (anti-choice or pro-choice). NARAL Pro-Choice America defines CPCs as fake health-care clinics that lie to shame, and intentionally mislead women about their reproductive-health care options to block them from accessing abortion care. According to Students for Life, a CPC is a non-profit community center or clinic which: primarily serves pregnant women and mothers of infants, is not an abortion provider, and does not charge for any of its services.
The woman is required to be told about the medical risks associated with abortion, including: depression and related psychological distress, increased risk of suicide and suicide ideation, and all other known medical risks such as infection, hemorrhage, danger to subsequent pregnancies, and infertility. The physician must obtain from the pregnant mother the age or approximate age of the father of the fetus and determine “whether any disparity in the age between the mother and father is a factor in creating an undue influence or coercion” (S. D. Stat § 1215 ({2014}).

Prior to signing a consent form for an abortion, the physician must obtain from the pregnant woman a written statement that she obtained consultation from a pregnancy help center, including the date and time of the consultation and the name of the counselor she spoke with. The legislation notes that the pregnancy help center will “inform her about what education, counseling, and other assistance is available to help the pregnant mother keep and care for her child, and have a private interview to discuss her circumstances that may subject her decision to coercion” (South Dakota Legislature 2014).

**Texas**

In 2013, the Texas Legislature passed HB 2, regulating abortion procedures. Voluntary and informed consent for an abortion can only be obtained if the physician performing the abortion informs the pregnant woman of: the particular medical risks associated with the specific abortion procedure (infection and hemorrhage, subsequent infertility; increased breast cancer risk) and the probable gestational age of the fetus. Regarding alternatives to abortion, the physician will state that “medical assistance benefits may be available for perinatal care, childbirth, and neonatal care” and that “the father is liable for assistance in support of the child without regard to whether the father has offered to pay for the abortion” (Tex. Stat § 2 ({2013})).
When describing the ultrasound, the physician in “a manner understandable to a layperson,” will present a verbal explanation of the sonogram images, including the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs (Tex. Stat § 2 (2013)). The woman must also receive informational materials describing: public and private agencies and services that are able to assist her through pregnancy, the services adoption agencies offer, and a comprehensive list of agencies that offer sonograms at no cost and do not provide abortions or abortion related services (Tex. Stat § 2 (2013)). The bill states that:

“If after being provided with a sonogram and the information required, the pregnant woman chooses not to have an abortion, the physician shall provide the pregnant woman with information about paternity establishment and child support including: the steps necessary for unmarried parents to establish legal paternity; the benefits of paternity establishment for children; the steps necessary to obtain child support; the benefits of establishing a legal parenting order; and financial and legal responsibilities of parenting” (Tex. Stat § 2 (2013)).

The purposes of this bill are detailed as: “protecting the physical and psychological health and well-being of pregnant women,” “providing pregnant women access to information that would allow her to consider the impact abortion would have on her unborn child,” and “protecting the integrity and ethical standards of the medical profession” (Tex. Stat § 2 (2013)).

**Utah**

In 2012, the Utah State Legislature passed HB 461, extending the waiting period for an abortion from twenty-four to seventy-two hours. The physician must inform the woman: how the abortion procedure will affect the fetus; of the gestational stages of the fetus; and of the public
and private services and agencies available to assist her through pregnancy, at childbirth, and
when the baby is born, including private and agency adoption alternatives. The woman will also
be told that the “father of the unborn child is legally required to assist in the support of her child,
even if he has offered to pay for the abortion” (Utah Stat § 461 ({2012}). The physician will
highlight alternatives to abortion and state that “it is legal for adoptive parents to financially
assist in pregnancy and birth expenses” (Utah Stat § 461 ({2012}). When viewing the
ultrasound, the physician will describe the presence of cardiac activity in the fetus, the presence
of external body parts and internal organs, and the capacity of a fetus to experience pain.

A Woman’s Right to Know

Prior to delving into an analysis of the statutes, I think it is important to explore the text
of A Woman’s Right to Know, a 2011 booklet created by the Texas Department of Health and
Human Services that is required to be distributed to all women choosing to have an abortion. The
intent of the book is described as, “You have a right to know the truth,” as this booklet “provides
important information about the baby that is growing in your womb and the resources available
to you during and after your pregnancy” (Texas Department of Health and Human Services
2011). Under the section “Child Support Services,” a woman is told that the father is legally
required to pay to support the child and that the Texas Office of the Attorney General’s Support
Division is “very successful” in locating missing fathers, legally proving who the father is, and
initiating child support orders and collecting child support payments (Texas Department of
Health and Human Services 2011). The booklet also describes adoption services and
pregnancy/childbirth in addition to choosing to have an abortion. The section on “Adoption
Services” begins with the description:
“Another option to consider is adoption. Adoption means you, as the birth parent, are voluntarily transferring your rights as the parent of your baby to another family. Choosing adoption means you want your baby to have a good life, but right now may not be the best time for you to be a parent. Adoption is a brave, loving choice for your baby” (Texas Department of Health and Human Services 2011).

The section on “Pregnancy and Childbirth” starts off with the statement that “birth is a life changing experience and each birth brings a new and different set of experiences and feelings” (Texas Department of Health and Human Services 2011). The booklet assumes that the material and emotional effects of pregnancy, delivery, and giving up a child for adoption are less taxing than abortion. The bottom line is that with this booklet, the Texas Legislature through the Department of Health and Human Services is acting under the viewpoint that a woman, who is currently in her physician’s office to consent to have an abortion because she has made that choice, has not thought through what it means to be pregnant and the potential options that are available to her, which is very similar to the legal system’s treatment of the “immature” minor seeking an abortion Texas Department of Health and Human Services 2011).

**Contextualizing the Law – Sexual Purity and Maternal Duty**

Across the six bills, the legislatures state the reasons why they are intervening in the private lives of women’s reproductive decisions: to protect the physical and mental health and well-being of pregnant women, to provide pregnant women access to information that enables her to consider the impact abortion would have on her unborn child, and to protect the integrity and ethical standards of the medical profession. As have been repeatedly argued by feminists, we should be careful when a discourse of protection and care is used to explain projects and laws.
The patriarchy is often articulated and reproduced through positive notions such as love, care, respect, and protection. Analyzing the text of the laws and the underlying narratives they convey, it is clear that these six states have intentions beyond those explicitly stated in the laws. If these states cared about the physical and mental health of women and the integrity of the medical profession, they would mandate that physicians provide women with scientifically accurate and relevant information on the risks of abortion. Additionally, by stating that the legislatures’ intent is to provide women with enough information to understand the consequences of abortion and make the right decision, the legislatures are implying that women are irrational and unable to think through their decisions and actions on their own. When women are going to make a decision that violates their expected duty, the state steps in to remind women of their maternal obligation.

Informed consent laws require that “health care professionals provide their patients with sufficient information to allow them to make an intelligent decision as to whether to undergo a medical intervention, and that the patient’s decision determines whether the patient undergoes the intervention” (Guttmacher Institute 2017). While each state requires that all health care professionals obtain informed consent of the patient before performing a medical procedure, which I fully believe should be the case, over half of the states in the United States have enacted laws that place additional requirements on what legally constitutes informed consent for an abortion. As Ian Vandewalker notes (2012: 3), “Various justifications are offered for abortion-specific regulations, but at heart they are driven by moral opposition to abortion and legislators’ desire to come as close as possible to banning it without enacting a law that will be struck down as unconstitutional.”
Vandewalker refers to informed consent laws as “biased counseling laws” because they are “not intended to ensure that patients give their informed consent to abortion, but rather are intended to make women less likely to terminate their pregnancy” (Vandewalker 2012: 3). State legislatures argue against the rhetoric of “biased counseling laws” and believe that they are constituting “truths” that women who are seeking abortion must hear. According to Michel Foucault (1980: 35), “Truth is linked in a circular relation with systems of power which produce and sustain it, and to effects of power which it induces and which extend it. A regime of truth.” I would argue that the “truths” constituted by mandatory counseling laws are linked to and extensions of the systems of power of the patriarchy and the male dominated legislative system. Catharine MacKinnon argues that “the lives of women cast a bright critical light on laws constructed by men” and a feminist reading of the texts shines light onto the “biased counseling laws” constructed by men and the true intent behind their passage (MacKinnon 2005: 1). I will examine the underlying motives behind the discourse used to dissuade women from choosing to terminate their pregnancies through exploring the following: false or misleading statements about risks for infertility, psychological consequences following abortion, and the association between breast cancer and abortion; irrelevant and unnecessary facts about the abortion procedure, particularly those associated with the fetus and ultrasound; and ideological or moral statements about the termination of pregnancy.

If you have an abortion, you might not be able to have children in the future. If you have an abortion, you will have suicidal tendencies. If you have an abortion, you will get breast cancer in the future. Those are statements that each of the six statutes described above want a medical professional to say to a woman who has made the choice to have an abortion with the intent of providing her with information to make an informed medical decision; the interesting thing is
that the language of these laws was written by politicians, not medical professionals. Major medical organizations “from the American Medical Association (AMA) to the American College of Physicians (ACP) and the American College of Obstetricians and Gynecologists (ACOG) have all recognized that this trend of political interference in medical decision-making is detrimental to patient care” (National Partnership for Women and Families 2016: 1).

In reality, some of the statements of risk the legislature are asking physicians to tell their patients are “exaggerated, misleading, or simply false” (Vandewalker 2012: 30). Studies have found that there is no association between induced abortion and later infertility (Atrash & Rowland Hogue 1990: 235). Scientific evidence has found no causal relationship between abortion and psychological problems (Munk-Olsen et al. 2011: 333). Studies have only found an association between abortion and mental health problems, but the association is due to common causal factors, meaning that factors that make women more likely to be at a higher risk of mental problems also make them more likely to experience unintended pregnancies (Steinberg & Finer 2010: 75). When talking about pregnancy and mental health, it is much more likely that a woman will experience post-partum depression after pregnancy than a woman will experience negative psychological consequences following an abortion, yet no state legislatures require physicians to inform women about this psychological risk associated with continuing the pregnancy (Gaynes et al. 2005: 50). Lastly, legislatures require physicians to say that there is an association between having an abortion and being at an increased risk for getting breast cancer, a link that continues to be criticized in the scientific community. The studies that show an association between breast cancer and abortion have been criticized for having too small of a sample size, collecting data from subjects after breast cancer has already been diagnosed, and relying on self-reporting of abortions (National Cancer Institute 2012). Better-designed studies with larger sample sizes that
rely on medical records instead of patient disclosures about their abortion history have continued
to find no link (DeLellis Henderson et al. 2008: 392).

Not only are physicians required by mandatory or ‘biased’ counseling laws to provide
women choosing to have abortions with inaccurate information, but they are also legally
obligated to provide women with graphic and detailed information that is viewed by the court as
important to make an informed decision and consent. When I was twelve years old, I had to have
eye surgery to correct a condition that was causing me to have double vision; my parents and I
were simply told by my physician that he would be tightening the muscles in both of my eyes
and then the physician detailed to us the minimal risks involved. My physician did not
graphically describe the individual steps he would take to access my eye tissue and tighten the
muscles or show me images of what the procedure would look like. As Vandewalker states,

“Not every detail of a surgical procedure is helpful to patients in their decision making.
No law requires that heart surgery patients be told what will happen to their bodies in
graphic detail. The fact that the average person would be disgusted and disturbed by a
detailed description of heart surgery does not warrant requiring such a description as a
condition of effective consent. On the contrary, most patients would likely rather not hear
the description because it would only increase their anxiety about a procedure they know
they must undergo. Those patients who want a detailed description can always
communicate that the information is material to their consent by asking the physician for
a description” (Vandewalker 2012: 20).

Informed consent disclosures are intended to convey medical risks and benefits, but in the case
of abortion, they seem to be designed to induce fear and intimidation. For instance, the law
mandates that a woman who is five weeks pregnant and wants to undergo a medication abortion,
which does not entail surgery, must hear information in detail about what the fetus will be like at each stage of development in two-week increments. There is no medical reason to describe or show to a woman, unless she requests, what her fetus looks like throughout the stages of pregnancy; the only reason to do so is for the emotional and moral responses the images and narratives evoke in the body and mind of a woman deciding to abort.

Under the guise of making a medically informed decision, many states infuse ideological statements and gendered language into their mandatory counseling laws. The fetus is often referred to as “the child,” the pregnant woman as “the mother,” and the male partner as “the father.” Oklahoma and South Dakota both require the physician to state to his/her patient “that abortion will terminate the life of a whole, separate, unique, living human being” and South Dakota additionally requires a woman to visit a crisis-pregnancy center before having an abortion. This emphasis on “a whole, separate, unique, living being” highlights the true power of the state and its laws maintaining boundaries that separate and define bodies, including biologically connected bodies. Norbert Elias traces the development of the view of the “image of the individual as an entirely free, independent being, a ‘closed personality’ who is ‘inwardly’ quite self-sufficient and separate from all other people” (Elias 1994: 442). In seeing a separate human being inside the womb of a separate, independent human being, the state creates a conundrum that opposes the rights of the mother to the rights of the fetus. It attempts to fix this opposition, the state requires doctors to remind women of the rights of the fetus during the abortion decision-making process and allows the fetus to be represented in court and find witnesses to advocate for its rights.

After the woman has undergone her “lecture,” in each of the statues described above, she must wait at minimum of twenty-four hours and up to seventy-two hours before she can legally
consent to her abortion and undergo the procedure. Mandatory waiting period laws are plainly and simply a form of abortion exceptionalism. There is no reason to presume that an abortion patient is different than any other patient seeking medical care in that they have not already carefully and critically thought about the decision to undergo a medical procedure, a termination of pregnancy, before they visit a physician for their abortion. Requiring women to wait a set amount of time, which is determined by politicians, not medical providers, offers no additional medical benefits but only imposes additional social and economic burdens on them in terms of the number of trips they need to take to the clinic. Time after time again, legislatures continue to enact laws that reinforce the stereotype that women are irrational and Courts continue to uphold the government’s right to protect women from the consequences of their own actions.

In Planned Parenthood of Southeastern Pennsylvania v. Casey, the United States Supreme Court heard the challenge to Pennsylvania’s mandated counseling provision and twenty-four hour waiting period. The Court upheld the waiting period and counseling procedure, the disclosures about gestational age and fetal development, and used the following language to describe women’s ability to decide to terminate their pregnancy:

“[It cannot] be doubted that most women considering an abortion would deem the impact of the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed” (Planned Parenthood v. Casey 1992: 835).

This language performatively produces the subject of the irrational woman, a broad generalization about the inability of women to be autonomous decision makers and think through
the consequences of their decisions, particularly on the issue of abortion. I believe that the underlying stereotypical rhetoric that women are irrational decision makers is rooted in the assumption that women who are getting abortions after an unintended pregnancy are irresponsible and incapable of controlling their sexuality. Not only were they not channeling their sexual energy to procreation, but they were also not rational enough to ensure they would use protection to avoid pregnancy in the first place.

From Fear to Shame

According to Anuradha Kumar, Leila Hessini, and Ellen M.H. Mitchell (2009: 625), abortion stigma is “a negative attribute ascribed to women who seek to terminate a pregnancy that makes them, internally or externally, as inferior to ideals of womanhood.” Thus, a woman who seeks an abortion is “inadvertently challenging widely-held assumptions about the ‘essential nature’ of women,” such that female sexuality is solely for procreation and motherhood is the inevitable role for women (Kumar et al. 2009: 628). The notion that “motherhood and womanhood go together and that they mutually define one another has rarely been open to debate” (Lewin 1995: 109). For this reason, women who electively choose to have abortions are seen as particularly destabilizing to societal order.

Abortion, I believe, in the eyes of the state legislatures examined above, is clear evidence that “a woman has had ‘nonprocreative’ sex and is seeking to exert control over her own reproduction and sexuality, both of which threaten existing gender norms” (Norris et al. 2011: 51). State legislatures with these laws, the fear they generate, and the shame they circulate, are reproducing the social category of woman, and investing her with the task of giving birth and
becoming a mother. Any deviation from this norm has consequences that negatively mark the woman.

Informed consent takes place between the patient and his/her physician and the court, yet in the case of abortion, one other individual interestingly has a prominent role in the “lecture:” the father of the child. All six laws examined above included the statement: “The father of the unborn child is liable to assist in the support of the child, even in instances where he has offered to pay for the abortion.” The South Dakota law even requires the physician to obtain from the pregnant woman the age of the father of the unborn child in order to determine “whether any disparity in the age between the mother and father is a factor in creating undue influence or coercion” (S. D. Stat § 1215 {2014}). Thus, the “absent” father appears in the mandatory counseling narrative as an agential, influential figure who is viewed as able to be a monetary provider for the child or a source of coercion over the woman’s decision, while the woman continues to be portrayed as an irrational, and a passive vessel, who is expected to carry the child to term.

In *The Woman in The Body*, Emily Martin writes that women’s bodies are often described “as if they were mechanical factors or centralized production systems” (Martin 2001: 1). Through the medical metaphor of production, the physician can be seen as “a supervisor” and the woman “a laborer whose machine (uterus) produces the product, babies” (Martin 2001: 57). While the medical metaphor of production is not explicitly stated in the mandatory counseling laws examined above and involves interpreting the indirect meaning conveyed by the discourse, I feel that the medical metaphor of production can be aptly applied to analyzing the intent of the legislatures in implementing the mandatory counseling laws. The physician is the supervisor, who makes sure to correct the ineffective production that is occurring [the decision to have an
abortion] and turn the woman back into the effective laborer/producer she was tasked to be [have the child]. It is important though to draw a distinction between the application of the medical metaphor of production to mandatory counseling laws and Martin’s use of the metaphor. Whereas Martin views the physician as the supervisor over the woman, the product, in the case of mandatory counseling laws, politicians, judges, and lawyers become the true supervisors of both the doctors and women, dictating how the physician should supervise the woman and whether or not that supervision is constitutional.

One of the laws directly expresses the state’s view that once a woman becomes pregnant, she automatically loses her autonomy as a woman and can only be viewed by the government and legal system as a “mother.” The South Dakota law continues to treat pregnant woman and mother as synonyms; the law even explicitly states that its intention is to “protect the pregnant mother’s interest in her relation with her child” (S. D. Stat § 1215 (2014)). The conflation of pregnant woman and mother pervades the legal rhetoric on abortion restrictions, reflecting stereotypes about women’s behavior, judgments, and morality.

In 2006, the United States Supreme Court heard the case of Gonzales v. Carhart, a challenge to Congress’ passage of a ban on a method of late term abortions. In finding that the challenge did not impose an undue burden on the right to an abortion, Justice Anthony M. Kennedy in the majority opinion wrote:

“Respect for human life finds an ultimate expression in the bond of love the mother has for her child...It is self-evidence that a mother who comes to regret her choice to abort must struggle with grief...” (Gonzales v. Carhart 2007: 125).

Why does Justice Kennedy refer to a woman seeking an abortion as “mother”? What is the underlying message conveyed through this language about abortion and the woman seeking it?
In responding to the question, “Does life make law or does law make life,” Catharine MacKinnon argues that “when men make both, and you are a woman, the distinction may not count for much, except that law purports to have rules other than force and pretends to be accountable, whereas life does not” (MacKinnon 2005: 41). Throughout the past two chapters and my analysis of the discourse of parental notification and consent laws and mandatory counseling and waiting period laws, I have argued that the law takes stereotypical notions of women from life, formalizes them, and then reimposes them on women. Thus, by using the term mother, the law powerfully classifies, drawing the distinction between a woman, an individual with constitutional rights, and when this individual becomes pregnant, a mother whose private body and reproductive decisions can be controlled by the power of the law.
Conclusion: Returning to the Body

As much as American jurisprudence has continued to argue that judicial decisions ought to be objective, my thesis reveals the depth of the connection between laws, social values, and cultural meaning. Analyzing the text of parental notification and consent laws and mandatory counseling and waiting period laws shows that the state legislatures who enacted these laws do not have a neutral concern for women’s health and safety but a concern for limiting the practice of abortion and women’s right to it. The legislatures cannot ban abortion access outright without overturning Roe, but they can come close by writing laws that stigmatize women who have abortions, drawing on patriarchal notions of appropriate roles and behavior for women and reinforcing societal views that distinguish between good women, who have children and accept motherhood, and reckless women, who have sex and then seek abortion.

The performative power of the law produces specific subjects whose bodies are monitored, regulated, and controlled. In discussing challenges in combining feminist theory and the theory of gender performativity, Judith Butler notes the inability of the feminist movement to forge solidarity because of the failure to establish an identity of a singular feminist subject that accurately reflects on all the social and cultural norms imposed by regulatory systems on the identities and bodies of every feminist subject. Thus, in order though to truly comment on the connection between the law and life of women, I would be remiss if I didn’t discuss the relationship between the law and the material body, not just the law in the abstract sense, but the particular bodies most impacted by specific laws.

Judith Butler’s theory on performativity has been criticized by new materialists for “not allowing an adequate role of the materiality of the physical body in the process of its
materialization” (Jagger 2015: 321). New material feminism tries to rectify this imbalance by theorizing the connection between “the discursive and the material, the natural and the cultural, the body and its social construction in a way that is more respectful to the agency of matter” (Jagger 2015: 321). Particularly in my analysis of mandatory counseling laws and their reliance on inaccurate information about abortion side effects, I am not calling to adopt a reductionist perspective and negate the material consequences of abortion. Some women might suffer complications and physical and psychological difficulties. However, women might also experience psychological harm by being denied abortion access, as a recent study conducted by researchers at the University of California, San Francisco, found that those who were denied the abortion procedure because they were beyond the state’s legal gestational limit “experienced increased anxiety and lower-self esteem immediately after being turned away” (Biggs et al. 2017: 170). Some women might also experience postpartum depression, as the Centers for Disease Control estimates that up to twenty percent of women who give birth each year have postpartum depression symptoms (Centers for Disease Control 2017). It cannot be easy for a parent to give her child up for adoption either.

Abortion and pregnancy are biological and social processes that have real effects on the body, yet it is important to remember that each material body is unique. The impact of abortion on the material body should not be erased, but at the same time, state legislators should not use the real experiences of some women after terminating a pregnancy as a political tool to restrict women’s access to safe, legal abortion. States should instead be passing laws that ensure that all women who become pregnant are able to access all forms of healthcare they need whether they choose to have an abortion or continue the pregnancy; laws that would truly show that state
legislators see women as not only machines, vessels to reproduce society, but as full citizens with rights.

This thesis shows that the burden of getting an abortion is not equally distributed. As my discussion reveals, the laws target and regulate specific bodies. State lawmakers are separating who deserves to be an independent autonomous subject, the wealthy white woman, and who should be an object of the law’s control, poor women and women of color. This important point is supported by available statistics. In 2014, white patients accounted for thirty-nine percent of abortion procedures and women of color accounted for fifty-three percent of abortion procedures (blacks for twenty-eight percent and Hispanics for twenty-five); additionally, seventy-five percent of abortion patients were poor or low-income (Guttmacher Institute 2017). Thus, when state lawmakers mandate that women must wait seventy-two hours after their counseling session with their doctor before having their abortion, it is clear who this law will impact the most. Wealthy, typically white, women will still be able to access abortion and make the multiple trips to the clinic that this restriction entails, while low-income women, typically women of color, will be forced to figure out how to take the time off of work, how to afford childcare, and how to afford multiple transportation costs to the clinic. Similarly, when the courts ask minors to show maturity, they are using class-based criteria that make it impossible for low-income and poor minors to materialize.

A new report from the University of Buffalo based on data from the National Network of Abortion Funds confirmed what reproductive justice advocates have long argued that “abortion is already all but inaccessible for poor Americans” with “poor and black women most affected” (Ely et al. 2017: 100). Gretchen Ely, the lead researcher of the study, noted that the research shows that “what you have here is a distinct representation of the ageism, racism, classism,
sexism that follows the unintended – or intended – consequences of restrictions on abortion in certain states and on the federal level” (Winter 2017).

Following graduation from Swarthmore and seeing recent development in the political and legal systems in the United States, I will be attending law school to join the legal fight for reproductive justice. I am doing so because one’s access to healthcare should not be dictated by one’s state legislature or one’s socioeconomic status. The law does not exist in an abstract realm. I have seen and heard the depths of the stigma produced by the normalizing discourse of abortion restrictions. I choose this fight because I believe that if patients want to seek guidance on the morals of their decision to choose an abortion, they can freely seek guidance from their family, religious figures, or even their physicians if they want to. Women should not be subjected to the ideological rhetoric of lawmakers, physicians should not be forced to repeat political messaging and false information to the patients, and judges should not be using their personal views to restrict minors’ ability to access abortion. Reproductive justice, access to abortion for all women is a human right. Women are not only defined by the potentiality for motherhood. They are full-fledged citizens who should have full rights to lead the healthy and fulfilling life they aspire to and not be restricted at the whim of judges.
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