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UNDUE BURDENS IN TEXAS

Jennifer S. Hendricks

In 2007 and 2008, I spent about six weeks living on a visitor's chair in my mother's hospital room, where she was being treated for cancer. Her treatment was overseen by at least five different doctors simultaneously, none of whom, so far as I could tell, ever spoke to each other about her. They communicated through me and regularly countermanded each other; each time a doctor scribbled something on the chart and departed, I was left to negotiate with the nurses how to integrate the new dictates into the old. My mother was well-off and had excellent health insurance, but that didn't prevent her sickness and its treatment from being carved into pieces and distributed by specialty. Despite having the same five doctors over the course of most of her stay, she did not have continuity of care.

In fighting tooth and nail against Obamacare, the State of Texas is on the front lines in the defense of the American people's right to some of the worst health care practices in the developed world, including the lack of continuity of care that people less well-off than my mother experience more acutely as they are shuffled through the health care bureaucracy.

Except, of course, when it comes to abortion, where states like Texas are all about raising the standard of care, at least if doing so increases cost and decreases access. Hence the Texas legislature's sudden interest in continuity of care for women who have abortions, embodied in its new rule that any doctor performing an abortion must have admitting privileges at a hospital within thirty miles of where the abortion is performed. Everything's bigger — and farther away — in Texas, but only women having abortions have been singled out with such concern, purportedly aimed at making sure the doctor who performed the abortion will be available for follow-up if there are complications.

Of course, we all know the real motivation for the new law, a type of law so common there's an acronym for it — a TRAP, or Targeted Regulation of Abortion Providers. The purpose of a TRAP is to make abortion more expensive and more difficult to obtain or provide. Some TRAPs are aimed at the internal workings of an abortion clinic, such as special rules for how the building is constructed or maintained. Others directly regulate patient care, usually by requiring medically unnecessary procedures such as STD tests or, more recently, an ultrasound twenty-four hours before the abortion. In addition to increasing the cost of providing abortions, TRAPs increase opportunities for state oversight and inspection of clinics. While Texas's thirty-mile law had the most dramatic effect — numerous clinics closing abruptly when

the law went into effect — TRAPs have gradually eaten away at abortion access for the last two decades. One anti-abortion group claims that 72% of the nation's abortion clinics have closed since 1991, the year before *Planned Parenthood v. Casey* replaced strict scrutiny of abortion restrictions with the “undue burden” standard.

Speaking of *Casey*: One might say that the purpose of TRAPs is to place substantial obstacles in the path of women who are seeking abortions. And there is no doubt that this is the effect. Why then are they not struck down under *Casey*, which purports to proscribe exactly that purpose and exactly that effect?

The Fifth Circuit is currently reviewing the thirty-mile rule in *Planned Parenthood of Greater Texas v. Abbott*, but both that court and the Supreme Court have already tipped their hands in the course of ruling on whether the law could go into effect despite a district court's conclusion that it is unconstitutional. The Fifth Circuit entered a stay pending appeal, thereby allowing the law to take effect, holding that the State was likely to prevail on the merits; the Supreme Court affirmed, brushing aside concerns about the status quo and triggering the closure of at least a dozen Texas clinics.

The Fifth Circuit's opinion is a case study in how the courts have turned the undue burden standard into carte blanche to chip away at women's access to abortion, first by effectively eliminating the “purpose” prong and second by analyzing the “effects” of abortion restrictions in a narrow, abstract way instead of by looking at actual effects on women's lives.

First, even though the undue burden test refers to both “purpose” and “effect,” the Fifth Circuit looked at the law's purpose only through the lens of rational basis review, invoking a generous version of that standard: the legislature's claimed purpose for the law was not to be subjected to “courtroom factfinding” and could be based on “rational speculation unsupported by evidence or empirical data.” The court thus accepted without question that Texas's only concern was to prevent “patient abandonment” by irresponsible abortionists who direct their patients to emergency rooms, rather than back to the clinic, to deal with complications. This vision of the doctor-patient relationship evokes *Roe* itself, which imagined the woman in deep consultation with a personal physician, who knew enough about not only her physical health but also her entire life circumstances to make the abortion decision for her. It is a remarkably unrealistic description of the health care experienced by the vast majority of women in the U.S. and could not plausibly have explained the law, let alone outweighed the law's practical effects, if the “purpose” prong of the undue burden standard were taken seriously.

Second, turning to the “effects” of the Texas law, the Fifth Circuit's opinion in *Abbott* is typical of post-*Casey* analyses of abortion restrictions in its utter lack of empathy for poor and rural women. This dis-

regard for practicalities appears to be enabled by a background understanding about the state action doctrine: despite the practical-sounding text of the undue burden test, whether a burden is “undue” is assessed with the assumption that background realities like poverty or distance from a hospital can be ignored. This framework allows the “purpose and effect” of state action to be judged only according to its impact on the most privileged members of society. The need to travel long distances for an abortion is a problem only if one has a problem like lack of money for a hotel room, lack of a car or gas to put in it, or a job that does not let you take a few days off whenever you need to. Courts like the Fifth Circuit look at such a scenario and blame the inability to get an abortion on poverty rather than on the law that exploits poverty to limit access to abortion.

Third, although lower courts occasionally mention that the cumulative effects of multiple TRAPs could eventually become an undue burden, they have yet to articulate how to know when that point has been reached. In Texas, the Fifth Circuit not only failed to examine the thirty-mile rule in light of how difficult it already was to get an abortion in Texas; the judges actually used that fact to help justify upholding the law. When the plaintiffs pointed out that women in twenty-four counties in the Rio Grande Valley would be cut off from access to abortion by the law, the court responded that abortion was only available in thirteen out of 254 counties in Texas anyway, so what did it matter?

Although disagreeing with particular applications, the liberals on the Supreme Court have not attacked the fundamental flaws in the undue burden standard and how it is applied in cases like *Abbott*. In *Abbott*, the Supreme Court voted 5–4 to let the law to go into effect. Justice Breyer wrote the dissent, joined by his three female colleagues, and had this to say about Texas’s chances of prevailing on the merits: whether the thirty-mile rule is constitutional, he said, is “a difficult question.” As Justice Scalia pointed out, that wasn’t enough to justify reversal of the Fifth Circuit’s order. More importantly, the only way to make this a difficult question is to ignore the “purpose” prong of the undue burden test and to acquiesce to the Fifth Circuit’s anemic “effect” analysis.

The only time the Supreme Court has found a TRAP to be unconstitutional was the husband-notification struck down in *Casey*, which may well be the least substantial obstacle, in practical terms, that the Court has ever considered. Obnoxious, condescending, and sexist? Yes. But insurmountable? Not nearly so much as parental notification, waiting periods, or long-distance travel. Meanwhile, the Guttmacher Institute recently announced that more restrictions on abortion were enacted in 2011–2013 than in the entire previous decade. This is not surprising. The culture war alternates between two overlapping fronts — women and gays. Right and left are rapidly reaching

détente over same-sex marriage: suddenly, everybody loves to be in love, especially if it's married love. It's been lovely. But women, watch out.