

Pace University

DigitalCommons@Pace

Elisabeth Haub School of Law Faculty
Publications

School of Law

2024

Gender Regrets: Banning Abortion and Gender-Affirming Care

Margot J. Pollans

Noa Ben-Asher

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Civil Rights and Discrimination Commons](#), [Health Law and Policy Commons](#), and the [Law and Gender Commons](#)

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Elisabeth Haub School of Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

GENDER REGRETS: BANNING ABORTION AND GENDER-AFFIRMING CARE

Noa Ben-Asher* & Margot J. Pollans**

TABLE OF CONTENTS

INTRODUCTION	763
I. BANNING GENDER-AFFIRMING CARE	767
A. <i>Preventing Future Regret: A State Interest in Restricting GAC</i>	769
B. <i>GAC Regret as Actionable Injury</i>	773
II. BANNING ABORTION	776
A. <i>Preventing Future Regret: A State Interest in Restricting Abortion</i>	776
B. <i>Abortion Regret as Actionable Injury</i>	783
1. <i>Tort Liability</i>	783
2. <i>Standing</i>	786
III. GENDER REGRETS AND TRADITIONAL “FAMILY VALUES”	788
A. <i>A Fight for the “Soul of America”</i>	789
B. <i>Using “Regret” in a Crusade for “Traditional Family Values”</i>	792
1. <i>Natalism, Regretting Children, Regretting Childlessness</i>	794
2. <i>The Male-Female Binary</i>	799
C. <i>The Perils of Using Regret in Political Projects</i>	801
CONCLUSION	805

INTRODUCTION

In the spring of 2023, the *New York Times* published a piece entitled “How a Few Stories of Regret Fuel the Push to Restrict Gender Transition Care.”¹ It features Chloe Cole, who lived as a transgender boy for several years but now identifies as a cisgender woman. Cole has become a poster child for the idea that gender-affirming care (“GAC”) for minors may lead to later regret and should therefore be restricted by the state. Cole, who has been travelling the country as part of a conservative lawmaking effort to ban GAC, received a standing ovation after Florida Governor Ron DeSantis told her story in his State of the State address.² Cole and a few others

* © 2024 Noa Ben-Asher. Professor of Law at St. John’s University School of Law.

** © 2024 Margot J. Pollans. Professor of Law at the Elisabeth Haub School of Law at Pace University.

¹ Maggie Astor, *How a Few Stories of Regret Fuel the Push to Restrict Gender Transition Care*, N.Y. TIMES (May 16, 2023), <https://www.nytimes.com/2023/05/16/us/politics/transgender-care-detransitioners.html> [<https://perma.cc/8H64-B5TE>].

² Cole helped organize a “Detransition Awareness Day” rally in Sacramento, but only about forty people participated. *Id.*

have been invited by conservative politicians and lawmakers in several states to testify about the perils of providing GAC to children and youth.³

These politicians and lawmakers have generated a national moral panic about transgender children and youth that has resulted, as of early 2024, in restrictions or bans on GAC for minors in twenty-three states.⁴ Three core beliefs drive this moral panic. First, many children and youth who identify as transgender are only following a social-media amplified fad, a “social contagion.”⁵ Second, gender dysphoria is the result of childhood trauma and should therefore be treated via psychological therapy only.⁶ Third, cisgender children and adults are a preferable social outcome (over transgender children and adults).⁷ Based on these three convictions, gender-

³ A Wyoming bill to ban transition care for minors was named “Chloe’s Law.” *Id.* See also Jesse Singal, *When Children Say They’re Trans*, THE ATLANTIC, (July-Aug. 2018), <https://www.theatlantic.com/magazine/archive/2018/07/when-a-child-says-shes-trans/561749/> [<https://perma.cc/7D2Z-URWT>] (highlighting people who have come to regret their gender-affirming care); Rikki Schlott, ‘I Literally Lost Organs:’ Why Detransition Teens Regret Changing Genders, N.Y. POST, (June 19, 2022, 10:50 AM), <https://nypost.com/2022/06/18/detransitioned-teens-explain-why-they-regret-changing-genders/> [<https://perma.cc/P3XL-VR3Z>] (“[T]he politicization of the issue was shutting down proper clinical rigor. That meant quite vulnerable kids were in danger of being put on a medical path for treatment that they may well regret.”). As a director at the Heritage Foundation has professed, “We are glad to work with individuals who are willing to stand up to the corrosive effects of gender ideology, especially when it is being pushed on children.” Astor, *supra* note 1.

⁴ See *infra* note 30 (citing statutes); Nikolas Lanum, *Detransitioners Slams Clinics, Media for Politicizing ‘Gender Affirming Care’: ‘They do Everything for Profit,’* FOX NEWS, (Apr. 8, 2023, 3:54 PM), <https://www.foxnews.com/media/detransitioner-clinics-media-politicizing-gender-affirming-care-everything-for-profit> [<https://perma.cc/7AMZ-GTAA>] (discussing Walt Heyer, an outspoken anti-transgender rights advocate, attributing transgender identification to “social contagion,” social media outlets such as TikTok, and adverse childhood experiences that are potentially traumatic). See also Hannah Grossman, ‘Tomboy’ Who Regretted Gender Transition Breaks Down Crying Describing Difficulty of Breast Removal Surgery, FOX NEWS, (Dec. 4, 2023, 5:00 AM), <https://www.foxnews.com/media/detransitioner-breaks-down-describing-difficulty-breast-removal-surgery-something-wrong-me> [<https://perma.cc/Y3J7-E22F>] (telling the story of an individual who had previously identified as transgender man but now identifies as a ciswoman, who “broke down” twice during the interview: “The first time, she discussed a point in her teenage years when her father left the family. She was devastated, and around that same time she began to experience gender dysphoric symptoms. During the second time, Teran described the challenging experience with complications from her breast removal surgery – a double mastectomy.”).

⁵ Lanum, *supra* note 4.

⁶ *Id.*

⁷ See also Noa Ben-Asher, *Transforming Legal Sex*, 102 N.C. L. REV. 335, 392 (2024) (“The underlying rationale of the current voluminous laws and policies against transgender children and youth . . . is that transgender children and adults are *not* desirable social outcomes.”) [hereinafter Ben-Asher, *Transforming Legal Sex*]; Deborah L. Brake, *Title IX’s Trans Panic*, 29 WM. & MARY J. RACE, GENDER & SOC. JUST. 41, 43 (2022) (“The new

affirming care for minors is presented as harmful, ideological, unnecessary, and likely to lead to future regret. The Supreme Court recently granted an emergency stay of a Ninth Circuit preliminary injunction against Idaho's GAC ban for minors.⁸ In his concurrence, Justice Gorsuch echoed these sentiments when he quoted extensively from Idaho's application for stay, including language as to how the law seeks to block "surgeries that sterilize or mutilate a child's genitals," and protect children from "lasting harm and irreversible damage."⁹

The role of regret in the movement to ban GAC parallels the role of regret in the ongoing conservative campaign to ban abortion. In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court held that pregnant people have no constitutional right to terminate an unwanted pregnancy.¹⁰ The decision overturned *Roe v. Wade*¹¹ and *Planned Parenthood v. Casey*.¹² In the years between *Roe* (1973) and *Dobbs* (2022), advocates, politicians, and lawmakers repeatedly promoted the idea that pregnant people may come to regret the decision to end a pregnancy, and that laws should protect them from that decision.¹³

This Article analyzes the use of "regret" in the campaigns to ban GAC and abortion. It identifies two overlapping threads. First, both campaigns against medical care point to protection of patients from future regret as a legitimate state interest justifying restrictions on providing medical care. Second, both rely on concerns about regret to redefine the legal meaning of "informed consent" and make it easier for potential future plaintiffs to prevail in civil suits against providers of medical care. In doing so, both treat the emotion of regret as a distinct injury that may give rise to a range of legal rights and liabilities. The Article reveals a strategic conservative legal movement that has used "regret" as a disciplinary tool to promote

trans-exclusion bills that have recently swept through state legislatures overtly draw on the legacy and logic of Title IX to press a right-wing gender agenda, in sport and beyond. The result is a perfect storm for ushering in a new gender panic now playing out in sports."); Farhad Manjoo, *America Is Being Consumed by a Moral Panic over Trans People*, N.Y. TIMES (Sept. 1, 2022), <https://www.nytimes.com/2022/09/01/opinion/america-is-being-consumed-by-a-moral-panic-over-trans-people.html>. [<https://perma.cc/8MGM-L7C5>].

⁸ *Labrador v. Poe*, 2024 WL 1625724 (Apr. 15, 2024) (granting stay "except as to the provision to the plaintiffs of the treatments they sought").

⁹ *Id.* (Gorsuch, J., concurring).

¹⁰ 142 S. Ct. 2228 (2022).

¹¹ 410 U.S. 113 (1973).

¹² 505 U.S. 833 (1992).

¹³ See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007) (upholding the constitutionality of the Partial Birth Abortion Ban Act of 2003, and reflecting that "It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.").

“traditional family values,” especially those of natalism and “biological” sex difference.¹⁴

The rise of anti-abortion legislation and restrictions on GAC are not isolated occurrences. These policies are closely linked within conservative political movements, legislative agendas, and court rulings.¹⁵ A manifestation of this interconnection is found in the Eleventh Circuit’s decision in *Eknes-Tucker v. Governor of Alabama* where transgender teens, their parents, and healthcare providers challenged Alabama’s ban on GAC for minors.¹⁶ In assessing whether parents have a Due Process right to consent to medical treatment of minors, the court turned to *Dobbs*: “To determine whether a right at issue is one of the substantive rights guaranteed by the Due Process Clause, courts must look to whether the right is deeply rooted in [our] history and tradition and essential to our Nation’s scheme of ordered liberty.”¹⁷ The Eleventh Circuit concluded—as the Supreme Court did vis-à-vis abortion in *Dobbs*—that “the use of these medications in general—let alone for children—almost certainly is not ‘deeply rooted’ in our nation’s history and tradition.”¹⁸ Accordingly, “[n]either the record nor any binding authority establishes that the ‘right to treat [one’s] children with transitioning medications subject to medically accepted standards’ is a fundamental right protected by the Constitution.”¹⁹ The Sixth Circuit (relying on *Dobbs*) similarly rejected the parental Due Process right to consent to medical care of transgender minors.²⁰ This

¹⁴ For an analysis of the resistance of conservative lawmakers and courts to the concept of “sex assigned at birth” and the promotion of “biological sex,” see Jessica Clarke, *Sex Assigned at Birth*, 122 COLUMB. L. REV. 1821 (2022). For an analysis of the backlash against the concept of “gender identity” in law and broader culture, see Ben-Asher, *Transforming Legal Sex*, *supra* note 7. For an analysis of the shifting classifications of sex in official state documents, see Ido Katri, *Transitions in Sex Reclassification Law*, 70 UCLA L. REV. 636 (2023).

¹⁵ For example, Nebraska recently passed, in combined legislation “relating to public health and welfare,” prohibitions on abortion (“Preborn Child Protection Act”) and GAC for minors (“Let Them Grow Act”). Legis. B. 574, 108th Leg., 1st Sess. (Neb. 2023).

¹⁶ *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1210 (11th Cir. 2023). See Alabama’s Vulnerable Child Compassion and Protection Act for its ban. Ala. Code § 26-26-4(a) (“no person shall engage in or cause” the prescription or administration of puberty blocking medication or cross-sex hormone treatment to a minor “for the purpose of attempting to alter the appearance of or affirm the minor’s perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor’s sex.”).

¹⁷ *Eknes-Tucker*, 80 F.4th at 1220 (internal quotation marks omitted) (quoting *Dobbs*, 597 U.S. 215, 237–38 (2022)).

¹⁸ *Id.*

¹⁹ *Id.* at 1226 (applying rational basis review and concluding the district court erroneously reviewed the statute with heightened scrutiny and that the Parent Plaintiffs’ likelihood of success does not justify a preliminary injunction).

²⁰ *L.W. ex rel. Williams v. Skrametti*, 83 F.4th 460, 473 (6th Cir.) (“This country does not have a ‘deeply rooted’ tradition of preventing governments from regulating the medical profession in general or certain treatments in particular, whether for adults or their children.”), *cert. dismissed in part sub nom. Doe v. Kentucky*, 144 S. Ct. 389 (2023).

interpretation of “ordered liberty” undermines the rights of pregnant people to bodily autonomy and of parents to support a minor’s gender identity.

A few words on terminology. First, regret can be a vague concept subject to a variety of definitions. We define it simply as the backward-looking preference that “things should have been otherwise.”²¹ Regret can also be understood by contrast to its inverse, “affirmation.”²² To affirm a decision or event “is to prefer on balance that [the past] should have the features it actually had.”²³ Second, although conservative media, politicians, and lawmakers often refer to individuals who decide to discontinue GAC as “detransitioners,” this Article refers to them as those who decided to desist gender-affirming care.

The Article proceeds in three main parts. Part I explores the role of regret in state laws that restrict or ban access to GAC for minors, and the judicial treatment of those laws. Part II considers state abortion restrictions and bans, and the judicial treatment of those laws. Part III analyzes how the concept of regret is used by conservative thinktanks, politicians, and lawmakers to promote “traditional family values,” especially involving natalism, traditional gender norms, and “biological” sexual difference. This Part also considers two other choices—the choice to have children and the choice to be childless. It contrasts regret narratives in these two contexts with those in the GAC and abortion contexts to reveal the work that regret is doing for anti-GAC and anti-abortion movements.

I. BANNING GENDER-AFFIRMING CARE

It is unusual for individuals to regret GAC. Available data from medical experts reveals two key findings. First, the phenomenon of desisting GAC among transgender teen and youth is infrequent.²⁴ Second, when it occurs, it often involves

²¹ R. JAY WALLACE, *THE VIEW FROM HERE: ON AFFIRMATION, ATTACHMENT, AND THE LIMITS OF REGRET* 6 (2013). We focus almost exclusively on what philosophers call “agent-regret,” meaning regret about decisions and actions over which the regretter had control. See Bernard Williams, *Moral Luck*, *MORAL LUCK PHILOSOPHICAL PAPERS 1973–1980* 20, 27 (1981). This definition excludes a broad range of regret feelings that may relate general to the state of the world or past events that the regretter wishes did not occur but had no control over. *Id.*

²² WALLACE, *supra* note 21, at 5.

²³ *Id.*

²⁴ See Marci L. Bowers, *Opinion, What Decades of Providing Trans Health Care Have Taught Me*, N.Y. TIMES (April 1, 2023), <https://www.nytimes.com/2023/04/01/opinion/trans-healthcare-law.html> [<https://perma.cc/7ULU-7NZ4>]; Jen Christensen, *Transgender and Nonbinary Patients Have No Regrets About Top Surgery, Small Study Finds*, CNN (Aug. 9, 2023, 3:48 PM), <https://www.cnn.com/2023/08/09/health/top-surgery-no-regrets-transgender-nonbinarystudy/index.html> [<https://perma.cc/4VQW-BCH9>] (discussing Lauren Bruce, Alexander N. Khouri, Andrew Bolze, Maria Ibarra, Blair Richards, Shokoufeh Khalatbari, Gaines Blasdel, Jennifer B. Hamill, Jessica J. Hsu, Edwin G. Wilkins, Shane D. Morrison and Megan Lane); *Long-Term Regret and Satisfaction with Decision Following Gender-Affirming Mastectomy*, JAMA SURGERY, Oct. 2023, at 1070–77 (“Of the

a range of complicated factors that cannot be easily reduced to regret.²⁵ According to Dr. Marci Bowers, a gynecologic and reconstructive surgeon and the president of the World Professional Association for Transgender Health (“WPATH”), there is a consensus among experts that gender-affirming care, including hormones and surgeries “improves the well-being of transgender people,” and that “regret — a decision to either stop treatment or express unhappiness about one’s decision to transition socially, medically or surgically — became even less common as surgical quality and social support improved.”²⁶ A 2021 study reveals that “fewer than 1 percent of those who have received gender-affirming surgery say they regret their decision to do so, a much lower rate than has been reported for more common medical interventions like plastic surgery and orthopedic care.”²⁷

Conservative politicians and lawmakers have questioned the credibility of these studies, positing that they rely too heavily on self-reports without attention to those

participants, 139 – nearly 60% – answered the survey accurately and returned it to the researchers. Their median Satisfaction With Decision Scale score was 5 on a 5-point scale, indicating the highest possible level of satisfaction. The median Decision Regret Scale score was 0 on a 100-point scale, meaning not a single patient regretted their choice to have the surgery.”); Lindsey Tanner, *How Common Is Transgender Treatment Regret, Detransitioning?*, AP NEWS (Mar. 5, 2023, 6:55 AM), <https://apnews.com/article/transgender-treatment-regret-detransition-371e927ec6e7a24cd9c77b5371c6ba2b> [<https://perma.cc/R8X4-PJWH>] (“Some studies suggest that rates of regret have declined over the years as patient selection and treatment methods have improved. In a review of 27 studies involving almost 8,000 teens and adults who had transgender surgeries, mostly in Europe, the U.S and Canada, 1% on average expressed regret.”); K.R. MacKinnon, F. Ashley, H. Kia, J.S.H. Lam, Y. Krakowsky & L.E. Ross, *Preventing Transition “Regret”: An Institutional Ethnography of Gender-Affirming Medical Care Assessment Practices in Canada*, SOC. SCI. & MED., Oct. 2021, at 1, 7–8 (“[D]issatisfaction with surgical results, transition regret, and detransition are all conceptually and materially discrete outcomes”—“regret is an ‘exceedingly rare’ outcome . . . [and] evidence suggests that many people who detransition do so only temporarily and their trans identities often persist even whilst discontinuing gender transition (or their gender identities may shift dynamically).”).

²⁵ See Bowers, *supra* note 24.

²⁶ *Id.*

²⁷ *Id.* Bowers also mentions a separate survey of over 27,000 adults that found that those who stop gender-affirming care do so for a range of factors (family pressure, financial reasons, loss of access to care, etc.), and “not because they had been misdiagnosed or their gender identities had changed.” *Id.* See also Kristina R. Olson, Lily Durwood, Rachel Horton, Natalie M. Gallagher & Aaron Devor, *Gender Identity 5 Years After Social Transition*, PEDIATRICS, Aug. 2022, at 1, 3–6 (tracking the gender identities of youth—317 in total—an average of five years after their initial social transitions). The Olson et al. study found that “most youth identified as binary transgender youth (94%), including 1.3% who retransitioned to another identity before returning to their binary transgender identity. A total of 2.5% of youth identified as cisgender and 3.5% as nonbinary.” *Id.* The researchers also found that a later cisgender identification was more common amongst those whose initial social transition was before the age of six, and that in those cases the retransition often occurred before the age of ten. *Id.*

who may choose not to report regret.²⁸ These politicians and lawmakers have cited instead anecdotal regret stories to justify restrictions on access to care. This Part begins by investigating those restrictions, showing how they rest on prevention of future regret. Next, it considers how these laws expand potential tort liability of medical health professionals who provide gender affirming care.

A. Preventing Future Regret: A State Interest in Restricting GAC

In 2023, state legislatures introduced 185 bills aiming to restrict transgender healthcare access, with many imposing stringent guidelines or outright bans on GAC for minors.²⁹ As of January of 2024, twenty-three states have enacted laws or policies limiting youth access to GAC.³⁰ Regret is a central theme in a national legislative campaign to ban GAC for minors. Advocates for the Missouri Save Adolescents from Experimentation (“SAFE”) Act, for instance, cited regret testimonies from individuals like Chloe Cole, who had desisted GAC.³¹

²⁸ See, e.g., Pamela Paul, *As Kids, They Thought They Were Trans. They No Longer Do*, N.Y. TIMES (Feb. 2, 2024), <https://www.nytimes.com/2024/02/02/opinion/transgender-children-gender-dysphoria.html> [<https://perma.cc/CH8M-QXBQ>].

²⁹ See *Tracking the Rise of Anti-Trans Bills in the U.S.*, TRANS LEGISLATION TRACKER, <https://translegislation.com/learn> [<https://perma.cc/2RKW-22MP>] (last visited Feb. 27, 2024).

³⁰ See, e.g., S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022); H.B. 1570, 2022 Leg., Reg. Sess. (Ark. 2021); S.B. 1238, 2022 Leg., Reg. Sess. (Ariz. 2022); S.B. 254, 2022 Leg., Reg. Sess. (Fla. 2022) (temporarily blocked in part); S.B. 140, 2022 Leg., Reg. Sess. (Ga. 2023) (in effect) (stating that the following “irreversible procedures or therapies” shall not be performed in a licensed institution “on a minor for the treatment of gender dysphoria”: “Sex reassignment surgeries, or any other surgical procedures, that are performed for the purpose of altering primary or secondary sexual characteristics”); S.B. 14, 2022 Leg., Reg. Sess. (Tex. 2022) (prohibiting physicians and healthcare providers from providing gender-affirming care to youth, including puberty blockers, hormone therapy, and surgeries); S.B. 49, 102nd Gen. Assemb., Reg. Sess. (Mo. 2023) (“[N]o health care provider shall perform gender transition surgeries on any minor. . . . no health care provider shall prescribe or administer cross-sex hormones or puberty-blocking drugs to a minor for a gender transition”); H.B. 1570, 2021 Leg., Reg. Sess. (Ark. 2021). For a tracker of these bans, see Lindsey Dawson & Jennifer Kates, *Policy Tracker: Youth Access to Gender Affirming Care and State Policy Restrictions* KFF, (Jan. 31, 2024), <https://www.kff.org/other/dashboard/gender-affirming-care-policy-tracker/> [<https://perma.cc/X856-C794>].

³¹ Jill Carter, *Senator Jill Carter’s Capitol Report #4*, MO. SEN., <https://www.senate.mo.gov/Media/NewsDetails/755> [<https://perma.cc/6Z6T-Q87P>] (“I presented Senate Bill 164, the Save Adolescents from Experimentation (S.A.F.E.) Act, to the Senate Emerging Issues Committee on Feb. 14. . . . Senate Bill 164 would prevent children from being subjected to hormone therapy or life-altering sex change surgical procedures before the age of 18. My colleagues and I held a press conference with 18-year-old Chloe Cole and 21-year-old Luka Hein Chloe and Luka’s stories are incredibly moving. As minors, Chloe and Luka both endured double mastectomy surgeries and hormone treatment. [They] both regretted these decisions, detransitioned and are still suffering from the harm these surgeries and hormones caused.”).

Interestingly, Georgia's legislature acknowledges the absence of comprehensive studies tracking the long-term satisfaction or regret among those who underwent gender-related medical care as children.³² Nonetheless, it cites rising anecdotal evidence of regret and permanent physical harm associated with such treatments to support a ban on GAC for minors.³³

Pointing to the lack of evidence, several courts have rejected arguments justifying bans on regret-prevention grounds. For example, in *Koe v. Noggle*, a district court in Georgia imposed a preliminary injunction blocking legislation that had relied on the risk of future regret as an incentive to ban GAC.³⁴ The court reasoned that the state demonstrated "little in the way of reliable evidence of desistance or regret in those who would qualify for hormone therapy pursuant to the applicable standard of care."³⁵ Another court blocked an Arkansas ban on GAC for minors after lawmakers cited "detransitioner" testimony that Christian spiritual awakening sparked their regret.³⁶ The court found the ban likely unconstitutional and dismissed the state's reliance on the risk of future regret as baseless speculation.³⁷ A federal district court in Florida also dismissed reliance on regret in

³² S.B. 140, 157th Gen. Assemb., Reg. Sess. (Ga. 2023) (banning performing any procedures on a minor, including surgeries and hormone replacement therapy). The bill states: "No large-scale studies have tracked people who received gender-related medical care as children to determine how many remained satisfied with their treatment as they aged and how many eventually regretted transitioning." *Id.* § 1(5).

³³ *Id.* ("[T]he General Assembly is aware of statistics showing a rising number of such individuals who, as adults, have regretted undergoing such treatment and the permanent physical harm it caused . . .").

³⁴ *Koe v. Noggle*, No. 1:23-CV-2904-SEG, 2023 WL 5339281 (N.D. Ga. Aug. 20, 2023). This case was decided one day prior to the Eleventh Circuit's judgment in *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205 (11th Cir. 2023), which allowed Alabama's ban to go into effect.

³⁵ *Koe*, 2023 WL 5339281, at *20 (the court added that "when gender-affirming care involving hormone therapy is provided in accordance with the WPATH standards of care, rates of regret are low.").

³⁶ Arkansas Code § 20-9-1502 provides that "physician or other healthcare professional shall not provide gender transition procedures to any individual under eighteen (18) years of age." See also Tess Vrbin, *Federal Judge Strikes Down Arkansas Ban of Gender-Affirming Health Care for Transgender Youth*, ARK. ADVOCATE (June 20, 2023, 7:46 AM), <https://arkansasadvocate.com/2023/06/20/judge-strikes-down-arkansas-ban-on-gender-affirming-health-care-for-transgender-youth/> [https://perma.cc/Y8AG-CCXS].

³⁷ See *Brandt v. Rutledge*, No. 4:21CV00450 JM, 2023 WL 4073727, at *36–*38 (E.D. Ark. June 20, 2023) (issuing permanent injunction was warranted because the act violated equal protection, parents' rights to substantive due process, and the First Amendment). See *id.* at *34 (internal citations omitted) ("The State argues that minors with gender dysphoria will desist with age. They contend that there is a significant risk of harm to a minor who elects to undergo gender hormone therapy or surgery because they will eventually identify with their sex assigned at birth and regret the treatment they sought as a minor . . . To the contrary, the evidence proved that there is broad consensus in the field that once adolescents reach the early stages of puberty and experience gender dysphoria, it is very unlikely they

laws that prohibit Medicaid payment for GAC.³⁸ These courts did not reject the premise that preventing regret might be a legitimate state interest. Instead, all three focused on the state's failure to establish adequate evidence of the potential for regret. And, as discussed in the introduction, as of this writing the Supreme Court, in Labrador, and two circuit courts, the Eleventh, in *Ecknes-Tuckner*, and the Sixth, in *Skrmetti*, have allowed GAC bans to go into effect.³⁹

Among other areas of alleged concern, regret about future infertility is frequently raised in support of GAC bans. In Tennessee's ban on GAC for minors,⁴⁰ the ban at issue in *Skrmetti*,⁴¹ the legislature warned that GAC "can lead to the minor becoming irreversibly sterile, having increased risk of disease and illness, or suffering adverse and sometimes fatal psychological consequences."⁴² The Alabama Vulnerable Child Compassion and Protection Act ("V-Cap"), at issue in *Ecknes-Tucker*, states a similar concern: "minors, and often their parents, are unable to

will subsequently identify as cisgender or desist. The testimony confirmed that for most people gender identity is stable over their lifetime.").

³⁸ See *Dekker v. Weida*, No. 4:22CV325-RH-MAF, 2023 WL 4102243, at *18 (N.D. Fla. June 21, 2023) (holding that rule and statute were subject to intermediate scrutiny and motivated by discriminatory purposes in violation of the Equal Protection Clause; that risks attendant to using blockers and cross-sex hormones were not rational bases for enacting rule and statute); *Doe v. Ladapo*, No. 4:23CV114-RH-MAF, 2023 WL 3833848, at *14 (N.D. Fla. June 6, 2023) ("Fluidity is common prior to puberty but not thereafter. Regret is rare; indeed, the defendants have offered no evidence of any Florida resident who regrets being treated with GnRH agonists or cross-sex hormones.").

³⁹ See *supra* notes 8–9, 16–20 and accompanying text; *Labrador v. Poe*, 2024 WL 1625724 (Apr. 15, 2024) (granting stay "except as to the provision to the plaintiffs of the treatments they sought"); *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 491 (6th Cir.) (holding that challenges to GAC bans in Kentucky and Tennessee likely would not succeed; transgender individuals were not a suspect class, rational basis review applied; and factor related to harm largely favored states opposing preliminary injunction.), *cert. dismissed in part sub nom. Doe v. Kentucky*, 144 S. Ct. 389 (2023); *Ecknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1231 (11th Cir. 2023) (similarly staying a district court preliminary injunction and allowing Alabama's Vulnerable Child Compassion and Protection Act). Neither of these decisions engage directly with questions of regret.

⁴⁰ TENN. CODE § 68-33-101.

⁴¹ *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 468 (6th Cir.), *cert. dismissed in part sub nom* (holding that plaintiff's due process and equal protection challenge likely would not succeed; transgender individuals were not a suspect class, and factor related to harm largely favored states opposing preliminary injunction). *Doe v. Kentucky*, 144 S. Ct. 389 (2023); *but see Doe v. Ladapo*, No. 4:23CV114-RH-MAF, 2023 WL 3833848, at *12–*13 (N.D. Fla. June 6, 2023) ("There are legitimate concerns about fertility and sexuality that a child entering puberty is not well-equipped to evaluate and for which parents may be less-than-perfect decisionmakers. . . . There is a risk that a child later confronted with the bias that is part of our world will come to believe it would have been better to try to pass as cisgender. Risks attend many kinds of medical treatment, perhaps most . . . That there are risks of the kind presented here is not a rational basis for denying patients the option to choose this treatment.").

⁴² *Id.* § 68-33-101(b).

comprehend and fully appreciate the risk and life implications, including permanent sterility, that result from the use of puberty blockers, cross-sex hormones, and surgical procedures.”⁴³ Clinics treating transgender youth are, however, well-aware of the fertility risks involved in GAC, and conversations about fertility effects are a regular part of GAC for minors and adults.⁴⁴

Conservative lawmakers in Congress have also cited potential future regret as a justification for proposed bans or restrictions on GAC for minors. On May 18, 2023, Senator J.D. Vance announced his intent to introduce legislation that would criminalize providing GAC to minors as a federal Class C felony, punishable by ten to twenty-five years in prison. The *Protect Children’s Innocence Act* would block taxpayer funding for GAC procedures, ban coverage of the treatments from Affordable Care Act insurance plans, stop universities from providing instruction on GAC, and deem noncitizens who have performed GAC on a minor ineligible to receive visas or admittance to the United States. Vance declared, “With this legislation, we have an opportunity to save countless young Americans from a lifetime of suffering and regret.”⁴⁵ Republican Congresswoman Marjorie Taylor Greene proposed a similar bill that “will make it illegal to perform any gender-affirming care on minors. This includes puberty blockers, hormone therapy, and sex-change surgeries.”⁴⁶ As Greene explained, “Children who are not allowed to drive,

⁴³ S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022).

⁴⁴ See, e.g., Joshua Sterling & Maurice M. Garcia, *Fertility Preservation Options for Transgender Individuals*, 9 TRANSLATIONAL ANDROLOGY & UROLOGY S215, S215 (2020) (“Options for transwomen at any point in their transition range from simply providing a semen sample to be used with assistive reproductive techniques to experimental techniques involving testicular cryopreservation followed by *in vitro* initiation of spermatogenesis. Transmen before and after starting hormone therapy can pursue any assistive reproductive techniques available for ciswomen.”); Jensen Reckhow, Hakan Kula & Samir Babayev, *Fertility Preservation Options for Transgender and Nonbinary Individuals*, 14 THERAPEUTIC ADVANCES IN ENDOCRINOLOGY & METABOLISM 1, 1 (2023) (“The methods available for fertility preservation depend on the patient’s pubertal status and utilization of gender-affirming therapies, and counseling and delivery of these services are complex and require a multidisciplinary approach. . . . Fertility preservation is an active and exciting area of scientific discovery and offers a wealth of opportunities to improve the care of transgender and nonbinary individuals.”). See also Beth A. Clark, *Narratives of Regret: Resisting Cisnormative and Bionormative Biases in Fertility and Family Creation Counseling for Transgender Youth*, 14 INT’L J. OF FEMINIST APPROACHES TO BIOETHICS 157, 158 (2021) (identifying “bionormativity,” or the preference for parentage via genetics and gestation, as a concerning bias in transgender care). For additional discussion of fertility and GAC, see *infra* Part III.B.1 (arguing that one function of GAC bans is to promote natalism and traditional gender roles).

⁴⁵ Sabrina Eaton, *JD Vance Proposes Federal Ban on Gender Transition Care for Minors*, CLEVELAND NEWS (July 18, 2023, 1:15 PM), <https://www.cleveland.com/news/2023/07/jd-vance-proposes-federal-ban-on-gender-transition-care-for-minors.html> [https://perma.cc/GY4A-2VVH].

⁴⁶ *Congresswoman Marjorie Taylor Greene’s Protect Children’s Innocence Act Included in RSC Budget* (June 14, 2023), <https://greene.house.gov/news/documentsingle.aspx?DocumentID=469> [https://perma.cc/5MQH-XKEM].

vote, or see an R-rated movie should not be allowed to make life-altering decisions that will forever alter their precious bodies.”⁴⁷

B. GAC Regret as Actionable Injury

Many of the GAC-restricting laws create future tort liability for GAC providers in the event that patients report regret about receiving medical care. These laws extend statutes of limitations for torts claims (sometimes for decades), recognize emotional harm as actionable in-and-of-itself, eliminate consent as a possible defense for physicians, or establish future negligence per-se claims against physicians based on statutory violations. For example, on March 2, 2023, several Republican senators introduced a bill that provides that a practitioner “who performs a gender-transition procedure on an individual who is less than 18 years of age shall . . . be liable to the individual if injured (including any physical, *psychological*, *emotional*, or physiological harms) by such procedure, related treatment, or the aftereffects of the procedure or treatment.”⁴⁸ Furthermore,

An individual covered by subsection (a) who receives a gender-transition procedure from a medical practitioner . . . may, not later than the day that is *30 years after the date* on which the individual turns 18 years of age, bring a civil action against such medical practitioner in a court of competent jurisdiction for—(1) declaratory or injunctive relief; (2) compensatory damages; (3) punitive damages; and (4) attorney’s fees and costs.⁴⁹

Senator Tom Cotton cited the risk of future regret as justification for this expansion of potential tort liability. He explained, “radical doctors in the United States perform dangerous, experimental, and even sterilizing gender-transition procedures on young kids, who cannot even provide informed consent. Our bill allows *children who grow up to regret these procedures to sue for damages*. Any doctor who performs these irresponsible procedures on kids should pay.”⁵⁰

Another example is Louisiana’s ban, which went into effect in July 2023. This law provides that “a person who has been harmed as a result of [GAC] *with or without consent*, shall have a cause of action for damages in a court of competent jurisdiction.”⁵¹ It also clarifies that “Consent shall not operate as defense to a

⁴⁷ *Id.*

⁴⁸ The Protecting Minor from Medical Malpractice Act of 2023, H.R. 1276, 118th Cong. (2023) (emphasis added).

⁴⁹ *Id.* (emphasis added).

⁵⁰ Rubio, Cotton, Colleagues Introduce Legislation to Protect Minors from “Gender Reassignment” Surgery, MARCO RUBIO U.S. SENATOR FOR FLORIDA (June 23, 2022), <https://www.rubio.senate.gov/rubio-cotton-colleagues-introduce-legislation-to-protect-minors-from-gender-reassignment-surgery/> [<https://perma.cc/K8T3-BBGC>] (emphasis added).

⁵¹ H.B. 648, 2023 Reg. Sess. (La. 2023) (emphasis added) (adding, “If a court finds that a person is entitled judgment pursuant to this Section, the court shall award damages,

petitioner's claim that is filed pursuant to this Section,"⁵² establishes a long statute of limitations,⁵³ and recognizes a broad range of injuries for which damages would be available.⁵⁴ Other state legislatures have adopted similar strategies. Arkansas's SAFE Act provides that "a person may assert an actual or threatened violation of this subchapter as a claim or a defense in a judicial or administrative proceeding and obtain compensatory damages, injunctive relief, declaratory relief, or any other appropriate relief."⁵⁵ Those under eighteen may "bring an action throughout their minority . . . and may bring an action in their own name upon reaching majority at any time from that point until twenty years after reaching the age of majority."⁵⁶ The statute does not mention *any injury* that a plaintiff is required to show to recover from a medical provider. Real or alleged regret would seem to be enough to trigger liability even decades after medical treatment.⁵⁷ Indiana's GAC statute similarly establishes a private right of action for teens or their parents to "assert an actual or threatened violation of this chapter as a claim or defense in a judicial or administrative proceeding and may seek to obtain compensatory damages, injunctive relief, declaratory relief, or any other appropriate relief."⁵⁸ And

attorney fees, and all costs of the proceeding against the defendant for violation of this Part." *Id.* at §1098.5.D(1). The law of informed consent "is intended to ensure that patients are not just the objects of medical practice but also free and willing participants." Pamela Laufer-Ukeles, *Reproductive Choices and Informed Consent: Fetal Interests, Women's Identity, and Relational Autonomy*, 37 AM. J.L. & MED 567, 577 (2011). Medical malpractice claims raising issues of informed consent can sound in either battery or negligence claims. *Id.* at 575–78 (describing the evolution and permutations of informed consent doctrine).

⁵² H.B. 648, 2023 Reg. Sess. §1098.5.E (La. 2023).

⁵³ *Id.* §1098.5.B ("The cause of action for damages shall be commenced before the later of either of the following: (1) The lapse of a twelve-year liberative prescription once the minor reaches the age of majority. (2) Within three years from the time the person discovered or reasonably should have discovered that the injury or damages were caused by the violation.").

⁵⁴ *Id.* §1098.5.D(2) ("Damages awarded by the court pursuant to this Section may include but is not to be limited to damages for infertility or sterility that is suffered by the minor as a result of the acts prohibited by this Part.").

⁵⁵ ARK. CODE § 20-9-1504(b); *but see* Brandt v. Rutledge, No. 4:21CV00450 JM, 2023 WL 4073727, at *36–*38 (E.D. Ark. June 20, 2023) (holding that a permanent injunction was warranted because the act discriminated based on sex and violated equal protection, violated parents' rights to substantive due process and the First Amendment).

⁵⁶ ARK. CODE § 20-9-1504(c)(2).

⁵⁷ In addition, a private plaintiff under this statute is not required to exhaust available administrative remedies and is entitled to recover "reasonable attorneys' fees." *Id.* § 20-9-1504(d)–(e).

⁵⁸ IND. CODE § 25-1-22-16. The statute extends the time to sue for ten years after minority. *Id.* § 25-1-22-17 ("If an individual was less than eighteen (18) years of age when the cause of action for a violation of this chapter accrued, when the individual is eighteen (18) years of age or older, the individual may bring a cause of action at any time until the individual reaches twenty-eight (28) years of age."). The law does not require plaintiff to demonstrate an injury or exhaust administrative remedies. *Id.* § 25-1-22-18. A preliminary

Nebraska's ban provides that "an individual that received [GAC] while they were younger than nineteen years of age, or the parent or guardian of such individual, may bring a civil action for appropriate relief against the healthcare practitioner who performed the gender altering procedure."⁵⁹ This ban also does not clarify what damages would qualify for a successful lawsuit.⁶⁰

Overall, these laws replace existing medical standards of care, establishing new standards for care of gender dysphoria (in minors) that strongly deter any provision of care at all.⁶¹ The combination of new statutory presumptions of negligence or battery, broad definitions of injury (including emotional and psychological harm), long statutes of limitations, and the absence of a consent defense means that medical professionals who violate these laws can potentially be liable for battery or negligence *per se* or both.⁶² These laws have already had a chilling effect on

injunction against this law was issued in *K. C. v. Individual Members of Med. Licensing Bd. of Indiana*, No. 1:23-CV-00595-JPH-KMB, 2023 WL 4054086 (S.D. Ind. June 16, 2023) (holding that plaintiffs were likely to succeed on merits of equal protection claim, physicians were likely to succeed on First Amendment claim, plaintiffs demonstrated irreparable harm in absence of preliminary injunction, and balance of harms favored issuance of preliminary injunction.).

⁵⁹ Legis. B. 574, 108th Leg., 1st Sess. § 20 (Neb. 2023) (adding that "[a]ppropriate relief under this Section includes actual damages and reasonable attorney's fees [and the action shall] be brought within two years after discovery of damages.").

⁶⁰ See also S.B. 538, 19th Gen. Assemb., 2023 Sess. (Iowa 2023) ("[A]n action under this Section may be commenced, and relief may be granted, in a judicial proceeding without regard to whether the person commencing the action has sought or exhausted available administrative remedies."); S.B. 150, 2023 Leg., Reg. Sess. (Ky. 2023) ("Any civil action to recover damages for injury suffered as a result of [providing GAC] may be commenced before the later of: (a) The date on which the person reaches the age of thirty years; or (b) Within three years from the time the person discovered or reasonably should have discovered that the injury or damages were caused by the violation . . .").

⁶¹ See generally WPATH, THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH: STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE (7th ed. 2012), <https://www.wpath.org/publications/soc> [<https://perma.cc/69ZH-5GCZ>] (outlining contemporary medical treatment standards). In medical malpractice actions, "[t]he applicable standard of care is that employed by the medical profession generally and not what one individual doctor thought was advisable and would have done under the circumstances." *McNabb v. Landis*, 479 S.E.2d 194, 196 (Ga. Ct. App. 1996). See *Mayo v. McClung*, 64 S.E.2d 330 (Ga. Ct. App. 1951) (the standard of care is "not a question of what one individual doctor thought was advisable."); *Slack v. Moorhead*, 262 S.E.2d 186, 188 (Ga. Ct. App. 1979) (the standard of care is "not what a particular doctor would do in the circumstances"); 15 GA. JUR. § 36:37 (2024).

⁶² The doctrine of negligence *per se* allows a plaintiff to prove the duty and breach elements of a negligence claim by simply showing that the defendant committed or omitted a specific act that is prohibited or required by law. See, e.g., *Jacobs v. Great S. Shopping Ctr., LLC*, 2024-Ohio-1180. Not all violations of a statute or ordinance will constitute negligence *per se*, however. Courts will consider factors such as whether the injured person

medical providers who can no longer support their young patients without threat of significant tort liability.⁶³

II. BANNING ABORTION

Data suggests that abortion regret rates are quite low. A 2020 study tracking people from the time of an abortion over five years found that the vast majority of abortion recipients affirmed their choice.⁶⁴ Nevertheless, anti-abortion advocates have repeatedly and successfully sought to give regret legal and political meaning. This Part turns to that effort, tracing abortion regret narratives from *Roe v. Wade* (1973) to *Dobbs v. Jackson Women's Health Org.* (2022) and beyond, underscoring stark parallels in legal rhetoric and strategy between anti-abortion and anti-GAC campaigns.

A. Preventing Future Regret: A State Interest in Restricting Abortion

Adopting a core argument of the post-*Roe* anti-abortion movement, the Supreme Court in *Gonzales v. Carhart* (2007) recognized preventing potential future regret as a legitimate state interest justifying abortion regulation.⁶⁵ In *Carhart*, the Court upheld the constitutionality of a federal law banning intact dilation and extraction (“D&E”), a form of late term abortion. In the majority opinion, Justice Kennedy justified the decision in part on the ground that the ban protected those who

falls within the class of persons the statute was intended to protect, and whether the harm complained of was the harm the statute was intended to guard against. A plaintiff must also demonstrate a causal connection between the negligence per se and the injury. *Mercy Hous. Ga. III, L.P. v. Kaapa*, 888 S.E.2d 346 (Ga. Ct. App. 2023).

⁶³ See, e.g., Jim Salter & Geoff Mulvihill, *Some Providers Are Dropping Gender-Affirming Care for Kids Even in Cases Where It's Legal*, AP NEWS (Sept. 23, 2023), <https://apnews.com/article/genderaffirming-care-providers-treatment-parents-liability-45012ee33f078eeea7871e622a5eee1d> [<https://perma.cc/HG3T-NHBY>].

⁶⁴ Corinne H. Rocca, Goleen Samari, Diana G. Foster, Heather Gould & Katrina Kimport, *Emotions and Decision Rightness over Five Years Following an Abortion: An Examination of Decision Difficulty and Abortion Stigma*, 248 SOCIAL SCI. & MED. 1, 4 (2020) (finding that while about half of the participants found that it was difficult to choose an abortion only about six percent had negative feelings about the abortion five years later). These researchers found that one week after an abortion seventeen percent of study participants felt mostly negative emotions about the abortion (including some combination of sadness, anger, guilt, and regret), but less than three percent felt it was the wrong decision. *Id.* at 3, 6.

⁶⁵ *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding the constitutionality of the Partial Birth Abortion Ban Act of 2003). For a history of the regret narrative in the anti-abortion movement, see J. SHOSHANNA EHRLICH & ALESHA E. DOAN, *ABORTION REGRET: THE NEW ATTACK ON REPRODUCTIVE FREEDOM* (2019) (tracing the narrative back to the nineteenth century anti-abortion movement and citing the role of “Crisis Pregnancy Centers,” religious quasi-medical pregnancy-related service providers, in entrenching the narrative in the modern anti-abortion movement).

might later come to regret the decision to end a pregnancy. Justice Kennedy offered two interrelated arguments about the potential for abortion regret. The first relates to the abortion itself:

[R]espect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.⁶⁶

To support this statement, Justice Kennedy relied on an amicus brief, submitted by Sandra Cano, the named plaintiff in *Doe v. Bolton*, the companion case to *Roe v. Wade*. Although Cano never received an abortion, she lamented her role in *Roe*, claiming that she was pressured to pursue an abortion that she did not want and that she was manipulated into serving as the named plaintiff in the case.⁶⁷ Cano, joining with 180 women “injured by abortion,” argued that abortion has serious psychological consequences and that those signing on to the brief experienced “depression, suicidal thoughts, flashbacks, alcohol and/or drug use, promiscuity, guilt, and secrecy. Each of them made the ‘choice’ to abort their baby, and they have regretted their ‘choices.’”⁶⁸ Cano estimated that around one in ten women receiving abortions experience some or all these negative psychological consequences.⁶⁹

⁶⁶ *Id.* at 159 (citations omitted).

⁶⁷ See generally Affidavit of Sandra Cano, *Cano v. Bolton*, 2005 WL 3881370 (N.D. Ga. 2005) (No. 13676).

⁶⁸ Brief of Sandra Cano et al. as Amicus Curiae Supporting Petition, *Gonzales v. Carhart*, 550 U.S. 124, at 22–24 (2007).

⁶⁹ *Id.* at 25. Norma McCorvey, who was Jane Roe in *Roe v. Wade*, also became an anti-abortion activist and filed a lawsuit seeking to reopen the case on the ground that many women, years after their abortions, were finally reckoning with the psychological harm that they caused. See Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1231–32 (2010) (describing this history). These legal efforts by Cano and McCorvey were part of a broader shift in the anti-abortion movement to situate abortion restrictions as protective of women. See Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1688 (2008) (tracing this history, focusing in particular on anti-abortion legislation in South Dakota in 2006 and 2008 that relied on an investigation of post-abortion regret and trauma). See also Khiara M. Bridges, *Capturing the Judiciary: Carhart and the Undue Burden Standard*, 67 WASH. & LEE L. REV. 915, 930 (2010) (observing that “the Court’s citation to the ‘self-evident’ fact that a woman will suffer more if she learns that her abortus resembled a child reveals that, also a part of this metaphysics, is the belief that the more the woman approximates motherhood, the more damage the procedure inflicts on her. Conversely, the less the object of the procedure approximates a child, the less the woman approximates motherhood, and as a result, the less the damage that is inflicted by the abortion.”).

Justice Kennedy's second use of regret was more narrowly related to the subject of *Carhart*, the intact D&E procedure. He explained,

It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.⁷⁰

He posited that “[i]n a decision so fraught with emotional consequence some doctors may prefer not to disclose details of the means that will be used, confining themselves to the required statement of risks the procedure entails.”⁷¹ Justice Kennedy concluded that many pregnant people will not understand the nature of the procedure at the time it is performed and expressed concern that they will later be disturbed by it.⁷² Under *Carhart*, the potential for future regret justifies narrowing the range of procedures available for late term abortions.⁷³

Carhart broadened what the Court had previously considered legitimate state interest in regulating abortion. While *Casey* and *Roe* identified state interest in

⁷⁰ *Carhart*, 550 U.S. at 159–60.

⁷¹ *Id.* at 159.

⁷² Although *Casey* did not speak overtly of regret, the plurality decision foreshadows this rationale. See *Planned Parenthood v. Casey*, 505 U.S. 833, 1002 (1992). In *Casey*, the court upheld a Pennsylvania law mandating disclosure, among other things, of the gestational age of the embryo or fetus. The plurality concluded that “women considering an abortion would deem the impact on the fetus relevant, if not dispositive of the decision.” *Id.* at 882. To the plurality then, the disclosure “ensure[d] that a woman apprehend the full consequences of her decision, . . . further[ing] a 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.” *Id.* For critiques of this use of regret, focusing on its misogyny and paternalism, see Susan Frelich Appleton, *Reproduction and Regret*, 23 YALE J.L. & FEMINISM 255, 268 (2011) (arguing that this view of regret relies on gender stereotypes about women as “ignorant, naïve, and unable to elicit pertinent information from health care providers, as well as emotionally fragile if not psychologically unfit” (internal quotation marks omitted)). Justice Ginsburg also makes this same argument in her dissent to *Carhart*. See *Carhart*, 550 U.S. at 183–85 (Ginsburg, J., dissenting).

⁷³ For other scholarly critiques of the use of regret in *Carhart*, see, e.g., Siegel, *supra* note 69, at 1688; Rebecca Dresser, *From Double Standard to Double Bind: Informed Choice in Abortion Law*, 76 GEO. WASH. L. REV. 1559 (2008); Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL’Y 223 (2009); Chris Guthrie, *Carhart, Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877 (2008) (arguing that *Carhart* misunderstands the fundamental nature of regret and its role in human decision-making); Jody Lyneé Madeira, *Aborted Emotions: Regret, Relationality, and Regulation*, 21 MICH. J. GENDER & L. 1 (2014).

protecting maternal health, including mental health,⁷⁴ and “potential life,” *Carhart* introduced considerations related to “the integrity and ethics of the medical profession” and the “ethical and moral concerns” of society.⁷⁵ Justice Kennedy justified invocation of both by reference to regret that those who choose abortion may experience. Regret, in *Carhart*, demonstrates the grave moral risk associated with abortion generally and intact D&E in particular.⁷⁶ *Carhart*’s logic intertwines concerns over future regret with concerns over the immorality of abortion. In *Dobbs*, the Supreme Court did not expressly invoke regret.⁷⁷ Chief Justice Roberts’ concurrence, however, relied heavily on *Carhart*. Roberts cited the three-page passage of *Carhart* in which the regret argument is laid out. He observed that *Carhart* expanded the legitimate grounds for state regulation of abortion to include a “broader array of interests, such as . . . maintaining societal ethics, and preserving the integrity of the medical profession.”⁷⁸ The majority also repeated a similar list of legitimate state interests, citing *Carhart*.⁷⁹

Since *Dobbs*, the risk of future regret has continued to play a meaningful role in shaping anti-abortion laws and policies. For instance, following Florida’s 2023

⁷⁴ In *Roe*, the Supreme Court cited to mental health concerns as a reason to prohibit outright abortion bans, reasoning that “Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent.” *Roe v. Wade*, 410 U.S. 113, 153 (1973). See Suk, *supra* note 69, at 1214–23 (describing this reasoning as a precursor to *Carhart* because, although it reaches the opposite result, it establishes precedent for the idea that “women’s psychological trauma is a distinct danger in which the state is interested”).

⁷⁵ *Carhart*, 550 U.S. at 157–58.

⁷⁶ *Id.* at 160 (“The State’s interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.”).

⁷⁷ See generally *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022). A number of amicus briefs relied heavily on regret arguments, including numerous anecdotes from individuals expressing regret about their own abortions. Brief for Advancing American Freedom, Inc. et. al. as Amici Curiae Supporting Petitioners, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (No. 19-1392) at *20–21; Brief for Priests for Life as Amicus Curiae Supporting Petitioners, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (No. 19-1392) at *11–12; Brief for 375 Women Injured by Second and Third Trimester Late Term Abortions and Abortion Recovery Leaders as Amici Curiae Supporting Petitioners, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (No. 19-1392) at *14–15.

⁷⁸ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 350–52 (2022) (Roberts, C.J. concurring) (citing *Gonzales v. Carhart*, 550 U.S. 124, 157–60 (2007)); see *supra* notes 66–76 (analyzing and quoting from this three-page passage of *Carhart*).

⁷⁹ Although the majority rejects Chief Justice Roberts’s preferred disposition of the case, they seem to agree with his assessment of the legitimate state interests at stake. *Dobbs*, 550 U.S. at 301 (citing *Carhart*, 550 U.S. at 157–58, which includes the discussion of legitimate state interests). The majority neither discusses regret nor cites directly to the passage of *Carhart* discussing regret but given that the regret narrative was fundamental to *Carhart*’s conclusions regarding what qualified as legitimate state interests, the majority’s reliance on *Carhart* is meaningful.

passage of a law criminalizing abortion after fifteen weeks, the state posted the following passage on its website:

“The bill that the Governor is signing will save babies. This bill will save mothers and fathers from the lifetime of pain that I have suffered, and for that I am so grateful,” said Pro-Life Advocate Heather Grall Barwick. “I made a mistake [to get an abortion] at 21 years old that I cannot change but I can let others learn from my mistake. I choose to share my story for my 6-year-old daughter and my 19 nieces and nephews. I chose to speak up for the women who say abortion does not cause mental distress and the women in their 70s who had abortions who just now are able to testify on the regret they have held for 40 years.”⁸⁰

Barwick implies that statements from women who claim not to regret their abortions should not be taken seriously.⁸¹ Instead, these women are not yet willing or able to speak of their regret.⁸² Here, the State of Florida identifies the desire to protect pregnant people from potential regret as a key function of a legislation that limits abortion in the state.

The risk of future regret is a key component of informed consent laws that anti-abortion advocates have promoted over several decades. At the time *Carhart* was decided, twenty-three states had already passed laws containing abortion-unique informed consent requirements.⁸³ These requirements serve at least two roles in the

⁸⁰ *What They Are Saying: Governor Ron DeSantis Signs Bill to Protect the Lives of Florida's Most Vulnerable*, RON DESANTIS (Apr. 14, 2022), <https://www.flgov.com/2022/04/14/what-they-are-saying-governor-ron-desantis-signs-bill-to-protect-the-lives-of-florida-as-most-vulnerable/> [<https://perma.cc/659Q-MVAM>] (quoting a pro-life advocate in support of Florida's fifteen-week abortion ban).

⁸¹ *Id.*

⁸² See Suk, *supra* note 69, at 1232 (recounting a very similar story from other anti-abortion activists); see *infra* note 153 and accompanying text (elaborating on the rhetorical use of this phenomenon).

⁸³ Rachel Benson Gold & Elizabeth Nash, *State Abortion Counseling Policies and the Fundamental Principles of Informed Consent*, GUTTMACHER INST. (Nov. 8, 2007), <https://www.guttmacher.org/gpr/2007/11/state-abortion-counseling-policies-and-fundamental-principles-informed-consent> [<https://perma.cc/WE9Q-8LYS>]. Legal scholars have criticized these laws on a number of grounds, including as a form of “abortion exceptionalism,” special legal treatment for abortion by contrast to other types of medical care. Manian, *supra* note 73, at 227 (describing the divergence of informed consent law in the abortion context). Legal Scholar Ian Vandewalker has referred to this type of disclosure law as “biased counseling,” “placing requirements on providers and patients that are more demanding than for another medical procedure [in order to] discourage women from choosing to terminate their pregnancies.” Ian Vanderwalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. OF GENDER & L. 1, 13 (2012). See also *id.* (identifying a range of laws including those that require specific statements, often false or misleading, on a broader range of topics from

anti-abortion movement. First, they seek to dissuade those seeking abortions from going through with them.⁸⁴ Second, they have long served as part of a broader incrementalist strategy to undermine the right to an abortion.⁸⁵ Many informed consent laws were modeled on the Pennsylvania statute that the Supreme Court upheld in *Casey*, which included abortion-specific informed consent requirements such as a twenty-four-hour waiting period.⁸⁶ These laws included features such as waiting periods,⁸⁷ mandatory descriptions of all common abortion procedures (not just the procedure sought), descriptions of fetal development throughout pregnancy, and either a requirement to provide an ultrasound or to direct the pregnant person to where they might get an ultrasound.⁸⁸

A common feature of anti-abortion informed consent laws is the mandate to disclose the risk of psychological harm.⁸⁹ Psychological harm is a stand in for

including the mental health risks of abortion to fetal pain). For another example of malpractice-related abortion exceptionalism, see *K.P. v. LeBlanc*, 729 F.3d 427, 442–43 (5th Cir. 2013) (upholding a Louisiana law excluding abortion providers from a state malpractice insurance fund).

⁸⁴ See Katarzyna Kordas, *A Hurdle Too High: The Unconstitutionality of Mandatory Ultrasounds Under Casey's Undue Burden Standard*, 23 CARDOZO J. GENDER & L. 367, 371–74 (2017) (exploring the purposes behind mandatory ultrasound laws).

⁸⁵ Danielle Lang, *Truthful but Misleading? The Precarious Balance of Autonomy and State Interests in Casey and Second-Generation Doctor-Patient Regulation*, 16 U. PA. J. CONST. L. 1353, 1376–83 (2014); Kathryn A. Eidmann, *Acuna and the Abortion Right: Constraints on Informed Consent Litigation*, 20 COLUM. J. GENDER & L. 262, 271–74 (2011).

⁸⁶ *Planned Parenthood v. Casey*, 505 U.S. 833, 1002 (1992). *Casey* established the undue burden test that governed review of abortion restrictions until the case was overturned by *Dobbs* in 2022. Manian, *supra* note 73, at 247–49 (characterizing *Casey* as a deviation from earlier Supreme Court precedent that was far more skeptical of abortion-specific informed consent mandates).

⁸⁷ A waiting period is the duration of time after the patient has received mandated disclosures and before the procedure can be performed. Many states require that the initial disclosure be given in person, meaning that the waiting period necessitates a second visit to the doctor. *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (Aug. 30, 2023), <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion> [<https://perma.cc/8GVP-ZWWJ>] [hereinafter GUTTMACHER INST., *Counseling and Waiting Periods for Abortion*].

⁸⁸ *State Policy on Informed Consent for Abortion*, GUTTMACHER INST. (2007), <https://www.guttmacher.org/sites/default/files/graphics/gpr1004/gpr100406t1.pdf> [<https://perma.cc/37CN-DHLZ>] [hereinafter GUTTMACHER INST., *State Policy*]; Nadia N. Sawicki, *Tort Law Implications of Compelled Physician Speech*, 97 IND. L.J. 939, 942–47 (2022) (summarizing these laws and explaining how they are different from traditional common law informed consent doctrine).

⁸⁹ Katherine Shaw & Alex Stein, *Abortion, Informed Consent, and Regulatory Spillover*, 92 IND. L.J. 1, 11 (2016). See also GUTTMACHER INST., *State Policy*, *supra* note 88.

regret.⁹⁰ Laws mandating disclosure often force the spread of what many have characterized as misinformation about the nature of the psychological risks.⁹¹ Others have pointed out that these disclosure requirements could cause actual regret by increasing abortion recipient perceptions of abortion stigma.⁹² Together, *Casey* and *Carhart* enabled state legislatures to rely on risks of coercion and psychological trauma to constrain abortion access.⁹³ Preventing abortion regret is a legislative interest prevalent in informed consent laws, and courts have regularly upheld them.⁹⁴

⁹⁰ Alesha Doan, Carolina Costa Candal & Steven Sylvester, “*We Are the Visible Proof*”: Legitimizing Abortion Regret Misinformation Through Activists’ Experiential Knowledge, 40 LAW & POL’Y 33, 33 (2017) (describing how these laws “conceptualize [regret] as a form of posttraumatic stress disorder”).

⁹¹ *Id.* at 35–37 (tracking the use of regret misinformation in state abortion disclosure laws).

⁹² Appleton, *supra* note 72, at 316–17 (identifying a variety of ways in which public policy might generate regret of adoption and abortion decisions); see Rocca et al., *supra* note 64 (finding that regret increases with perception of abortion stigma).

⁹³ In *Carhart*, Justice Ginsburg, dissenting, proposed that any true concern regarding consent should be addressed not by banning the procedure but by mandating additional disclosures to patients. See Suk, *supra* note 69, at 1236–37 (positing that this remedy was unsatisfying to Justice Kennedy because the risk of trauma was too high to be bearable). Since *Carhart*, six more states have passed such laws and many states have added additional requirements to laws already on the books. GUTTMACHER INST., *Counseling and Waiting Periods for Abortion*, *supra* note 87.

⁹⁴ See, e.g., Bristol Reg’l Women’s Ctr., P.C. v. Slatery, 7 F.4th 478, 481 (6th Cir. 2021), *abrogated by* Dobbs v. Jackson Women’s Health Org., 597 U.S. 215 (2022) (finding a rational basis for the law grounded in Tennessee’s interest in “protecting the life of the unborn” and ensuring that a “woman’s consent is informed and deliberate”) (internal quotation marks omitted). Tennessee defended the law explicitly on regret grounds, relying in the District Court on expert testimony about rates about post-abortion regret, but the District Court, which found the law unconstitutional, found the evidence not credible and determined that it instead established the low incidence of post-abortion regret. See *id.* at 517–20 (Moore, J., dissenting) (concluding that “there is no evidence whatsoever that a waiting period improves decisional certainty or causes a woman not to have an abortion that she would have regretted”). When Indiana passed a similar law in 1995, with an eighteen-hour waiting period, concern about regret featured heavily in the legislative debate. A Woman’s Choice—E. Side Women’s Clinic v. Newman, 305 F.3d 684, 701–02 (7th Cir. 2002) (Coffee, J., concurring) (describing the legislative hearing).

*B. Abortion Regret as Actionable Injury**1. Tort Liability*

Shortly after *Roe*, anti-abortion activists began using medical malpractice litigation strategically, seeking to dissuade abortion providers by increasing liability costs.⁹⁵ State legislatures have also taken up this strategy, passing strategic liability laws that create causes of action for recipients of abortions.⁹⁶ In some states, these laws are directly tied to informed consent, creating strict liability for doctors who violate statutory mandates.⁹⁷ Strategic abortion liability laws deviate from traditional medical malpractice standards, making it easier to prevail in lawsuits against medical practitioners.⁹⁸ Even in states without an express civil liability provision, the informed consent provisions may themselves create an implied right of action.⁹⁹

Without identifying regret expressly, many of these strategic liability laws allow abortion recipients to seek recovery based on emotional injuries. *Carhart's* equation of regret and psychological harm makes mention of regret unnecessary.¹⁰⁰ Justice

⁹⁵ See Eidmann, *supra* note 85, at 267; Kathy Seward Northern, *Procreative Torts: Enhancing the Common-Law Protection for Reproductive Autonomy*, 1998 U. ILL. L. REV. 489, 494–96 (describing this history). Legal scholars dispute whether these laws expose doctors to more liability or narrower potential liability. Compare *id.* at 540–45 (arguing that many of these right to know statutes have the effect of insulating doctors from common law liability standards by creating exclusive causes of action based on violation of the statutes) with Sawicki, *supra* note 88 (arguing that these statutes relax liability standards and make it easier to sue abortion providers for malpractice related to informed consent).

⁹⁶ See Sawicki, *supra* note 88, at 941–55 (citing and discussing numerous examples).

⁹⁷ See, e.g., Wis. Stat. § 253.10(6); see also *Karlin v. Foust*, 188 F.3d 446, 446 (7th Cir. 1999) (reading the Wisconsin law to establish strict liability where a physician omits any of the required disclosures).

⁹⁸ See generally Sawicki, *supra* note 88 (arguing that these statutes relax liability standards and make it easier to sue abortion providers for malpractice related to informed consent); but see Northern, *supra* note 95, at 540–45 (arguing that many of these right to know statutes have the effect of insulating doctors from common law liability standards by creating exclusive causes of action based on violation of the statutes).

⁹⁹ See Shaw & Stein, *supra* note 89, at 4 n.16 (explaining that violation of informed consent is a tort in every jurisdiction, that health and safety statutes typically create duties toward their beneficiaries, and that patients receiving abortions are typically the designated beneficiaries of informed consent laws).

¹⁰⁰ Commenting on *Carhart*, Jeannie Suk Gersen reflected that what was then the “newly prominent legal discourse of abortion regret” did not, as some critics had argued, come out of nowhere. Instead, “the reasoning continues a . . . feminist discourse of trauma around women’s bodies and sexuality.” Suk, *supra* note 69, at 1197; see also Noa Ben-Asher, *Trauma-Centered Social Justice*, 95 TUL. L. REV. 95 (2020) [hereinafter Ben-Asher, *Trauma-Centered Social Justice*]. Reading *Carhart* closely, Suk Gersen viewed the psychological harm described as “more elaborate than regret.” Suk, *supra* note 69, at 1234. Arguably, what it is more elaborate than run-of-the-mill regret, that is relatively easily processed. Guthrie, *supra* note 73 (explaining how *Carhart* misunderstands the way in which

Kennedy emphasized how the later revealed information about the nature of the procedure could change the abortion recipient's understanding of the event, rendering it psychologically harmful and generating regret after the fact.¹⁰¹ Other kinds of revelations, for instance religious conversions, could have the same result.

In the anti-abortion movement, regret and psychological harm have become synonymous. Consider some examples. In 1993, South Dakota amended its abortion laws to provide for both civil and criminal liability where an abortion is performed in violation of the informed consent requirements.¹⁰² The provision provided for punitive damages in the amount of \$10,000 and treble damages.¹⁰³ The Eighth Circuit read the provision to create strict liability and, applying *Casey's* undue burden test, struck it down on the ground that "[t]he potential civil liability for even good-faith, reasonable mistakes is more than enough to chill the willingness of physicians to perform abortions in South Dakota."¹⁰⁴ This law would have allowed a person experiencing abortion regret to prevail if they could find any violation, however small or unintentional, of South Dakota's informed consent requirements.

A 1997 Louisiana law created even broader liability, establishing a cause of action based on harm to either the mother or the fetus resulting from the abortion.¹⁰⁵ Defenders of the statute argued that the law was necessary to protect women who might experience psychological side-effects from the abortion.¹⁰⁶ The scope of statutory liability was vague, creating the possibility that an abortion recipient might successfully sue even in the absence of physical harm and even where a doctor had complied fully with any relevant standards of care.¹⁰⁷ A District Court found the law unconstitutional, expressing concern about "the removal of the cause of action from the realm of medical malpractice," and observing that the broad catchall provision directly contradicted the states informed consent law, which established compliance

most people learn from and move on from feelings of regret). Central to the trauma narrative is the implication of *coercion*, that the abortion itself was not the result of free choice. Suk, *supra* note 69, at 1246–49 (tracing this thread in the anti-abortion rhetoric and tracing it to feminist arguments about coercion in sexual relationships). For parallel arguments about the choice to become a mother, *see infra* note 179 and accompanying text.

¹⁰¹ Suk, *supra* note 69, at 1234. This interpretation of *Carhart* potentially explains why the Justice Kennedy's apparent definition of regret is out of step with that of many philosophers, who emphasize that regret occurs when a person evaluates a past decision using knowledge that was not available to them at the time. *See* Appleton, *supra* note 72, at 267 (pointing out that in *Carhart*, the regret occurs instead when a woman evaluates the decision to get an abortion applying knowledge she has acquired later about the nature of the procedure that would have been available at the time of the decision).

¹⁰² S.D. CODIFIED LAWS § 34-23A-22 (1993).

¹⁰³ *See id.* (also providing for fee shifting for successful plaintiffs).

¹⁰⁴ *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1467 (8th Cir. 1995).

¹⁰⁵ LA. STAT. § 9:2800.12 (establishing that compliance with informed consent requirements only reduces but does not eliminate liability).

¹⁰⁶ *Okpalobi v. Foster*, 981 F. Supp. 977, 983 (E.D. La. 1998), *aff'd*, 190 F.3d 337 (5th Cir. 1999), and *rev'd en banc*, 244 F.3d 405 (5th Cir. 2001).

¹⁰⁷ *Id.* at 983–94.

with disclosure obligations as an affirmative defense to tort suits alleging inadequate warning.¹⁰⁸ Further, the court observed that because the statute included harm to the “unborn child,” any abortion would, by definition, give rise to liability.¹⁰⁹ This decision was reversed by the Fifth Circuit, sitting *en banc*, on jurisdictional grounds.¹¹⁰ The civil liability provision in Louisiana remains on the books.

One final example illustrates how broad civil liability laws make regret an actionable injury. A 2010 Nebraska law established a variety of specific disclosure and informed consent requirements and provided that “failure to comply with [those] requirements shall create a rebuttable presumption that the pregnant woman would not have undergone the recommended abortion had the [disclosure requirements] been complied with by the physician.”¹¹¹ Criticizing the bill, a federal court observed:

For the woman who comes to regret having had an abortion, LB 594 provides her with a target to blame—a physician stripped of the usual statutory and common law defenses, and made civilly liable for the most extensive damages, by way of an “informed consent” mandate that is either impossible to satisfy, or so vague that the physician (and a jury) are left to speculate about its meaning. LB 594 also provides the remorseful woman and her lawyer with a very substantial financial incentive to initiate such litigation, whether or not she truly does regret her decision to obtain an abortion—her regret is presumed. Although this presumption is “rebuttable,” it is difficult to conceive how any defendant could effectively rebut such as assertion.¹¹²

As the District Court explains, regret, in this (and similar) legislation, was weaponized against doctors. Regret functionally makes what was a consensual medical procedure nonconsensual *in hindsight*. Applying *Casey*, the court refused to treat regret differently in the abortion context. The court observed that some degree of abortion regret is inevitable “because any major decision will lead to regret in some percentage of cases. The most important choices have consequences, and

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 986.

¹¹⁰ See generally *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001).

¹¹¹ *Planned Parenthood of the Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1034 (D. Neb. 2010) (granting a preliminary injunction against the bill after determining it was likely unconstitutional). The disclosures included detailed descriptions of the risks associated with the abortion procedure and the gestational age of the child. Under traditional tort principles, a plaintiff bringing an action based on failure to provide informed consent would need to prove that they would not have undergone the procedure if they had been better informed. See, e.g., *Reynier v. Delta Women’s Clinic, Inc.*, 359 So. 2d 733 (La. Ct. App. 1978) (applying this principle in the abortion context).

¹¹² *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1045 (internal citations omitted).

no matter how well-reasoned and fully deliberated, those decisions can lead to remorse. That is part of the price we pay for our freedom.”¹¹³

Medical malpractice litigation is always a possible outcome of providing medical care, but for the most part, regret—absent physical harm or absent lack of consent—generates no physician liability.¹¹⁴ A patient who changes their mind after a medical procedure has no recourse. Strategic abortion liability laws bypass this central common law principle, making regret alone actionable.

2. *Standing*

More recently, the North District of Texas and the Fifth Circuit have recognized regret as a distinct injury that might give rise to Article III standing. Typically, to establish standing to bring an action in federal court, a plaintiff must demonstrate, among other things, “an injury in fact.”¹¹⁵ In *Alliance for Hippocratic Medicine v. FDA*, Judge Matthew Kascmaryk of the Northern District of Texas relied on abortion regret to conclude that an association of doctors had standing to challenge FDA approval of Mifeprestone, a drug approved for early-term abortion.¹¹⁶ The plaintiffs

¹¹³ *Id.* at 1045 & n.12 (concluding, parenthetically, “Only Edith Piaf was without regret. Had she been sober, she, too, might have had second-thoughts.”). The state consequently entered into a settlement agreement with the plaintiffs, agreeing not to enforce the provisions of the new law. *See generally* *Planned Parenthood of the Heartland v. Heineman*, Case no. 4:10CV3122 (D. Neb. 2010) (Order and Final Judgement). Nebraska currently enforces an older version of the law, which makes violation of the disclosure requirements “prima facie evidence of professional negligence,” but establishes a “rebuttable presumption of full compliance” where the person upon whom an abortion has been performed signed, at the time of the procedure, a written certification that they received all the necessary disclosures. NEB. REV. STAT. § 28-327.04 (the current evidentiary rule); NEB. REV. STAT. § 28-327(7) (requiring the written certification as part of the informed consent process).

¹¹⁴ Most states apply an objective causation standard in informed consent malpractice claims, requiring that a plaintiff establish that a reasonable person would not have undergone the procedure had they been adequately informed. Explaining the choice of an objective standard over a subjective approach, the D.C. Circuit explained, “[i]n our view, [the subjective approach] of dealing with the issue of causation comes in second-best. It places the physician in jeopardy of the patient’s hindsight and bitterness.” *Canterbury v. Spence*, 464 F.2d 772, 790–791 (D.C. Cir. 1972). In the medical malpractice negligence context, regret alone would not form the basis for a cause of action even in jurisdictions recognizing emotional harms, plaintiffs must still establish breach of the duty of care. *Elements of Malpractice or Negligence in General*, AM. L. REP. § 611 (2024); RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 47 cmt. f (AM. L. INST. 2012) (observing that some jurisdictions allow recovery for the emotional harm to the parent flowing from the negligent caused loss of a fetus or newborn).

¹¹⁵ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (defining injury as the “invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical”).

¹¹⁶ *All. for Hippocratic Med. v. FDA*, 668 F. Supp. 3d 507, 524 (N.D. Tex. Apr. 7, 2023) (analyzing plaintiffs’ standing for a preliminary injunction on FDA’s approval of mifeprestone and relaxation of regulations).

asserted standing on behalf of member doctors and on behalf of patients. Judge Kasmaryk accepted both, explaining that inadequacies in the FDA approval process meant that doctors could not adequately inform their patients about “potential negative emotional reactions like fear, uncertainty, sadness, regret, and pain.”¹¹⁷ In support of the conclusion that doctors have third-party standing on behalf of patients, Judge Kasmaryk observed, “Women who have aborted a child — especially through chemical abortion drugs that necessitate the woman seeing her aborted child once it passes — often experience shame, regret, anxiety, depression, drug abuse, and suicidal thoughts because of the abortion.”¹¹⁸ Judge Kasmaryk concluded that the plaintiff doctors “— rather than their patients — are most likely the ‘least awkward challenger[s]’ to Defendants’ [FDA] actions.”¹¹⁹ The Fifth Circuit upheld these conclusions on appeal, agreeing that “treating mifepristone patients imposes considerable mental and emotional stress on emergency-room doctors. This is due to the unique nature of chemical abortions, which, according to the plaintiff-doctors, frequently cause ‘regret’ or ‘trauma’ for the patients and, by extension, the physicians.”¹²⁰

This case—which focuses on regret potentially experienced by those receiving chemical abortions and by the doctors administering them or treating recipients if something goes wrong—recognizes the validity of regret as a distinct injury.¹²¹ Although regret is not the sole injury on which plaintiffs rely,¹²² the attention to it is

¹¹⁷ *Id.* This is not the first time that regret has come up in the context of an abortion-related standing decision. In several pre-*Dobbs* cases, state defendants unsuccessfully contested the standing of medical associations who were challenging abortion restrictions, arguing that because of the possibility of future abortion decision regret, doctors had a conflict of interest with abortion patients and could not represent them on third-party standing theory. See *Little Rock Fam. Plan. Servs. v. Rutledge*, 398 F. Supp. 3d 330, 372 (E.D. Ark. 2019) (relying on abortion informed consent laws to conclude that the possibility of regret did not create a conflict of interest). See also *Singleton v. Wulff*, 428 U.S. 106, 113 (1976) (finding doctors have third-party standing to challenge abortion restrictions).

¹¹⁸ *All. for Hippocratic Med.*, 668 F. Supp. 3d at 526 (finding that “women who have already obtained abortions may be more hindered than women who challenge restrictions on abortion”).

¹¹⁹ *Id.*

¹²⁰ *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210, 232 (5th Cir. 2023), *cert. granted sub nom.* *Danco Lab’ys, L.L.C. v. All. Hippocratic Med.*, No. 23-236, 2023 WL 8605744 (U.S. Dec. 13, 2023), and *cert. granted sub nom.* *FDA v. All. Hippocratic Med.*, No. 23-235, 2023 WL 8605746 (U.S. Dec. 13, 2023), and *cert. denied sub nom.* *All. Hippocratic Med. v. FDA*, No. 23-395, 2023 WL 8605749 (U.S. Dec. 13, 2023).

¹²¹ Regret does not carry this same legal significance in all contexts. See generally *Appleton*, *supra* note 72 (comparing the legal significance of regret in the abortion context with a variety of other contexts involving reproduction, including adoption, where the regret of the birth mother, even in the face of strong evidence of manipulation by the adoptive parents, was not persuasive in establishing a standard more protective of birth mothers).

¹²² *All. for Hippocratic Med.*, 668 F. Supp. 3d at 524 (discussing potential physical side effects of mifepristone among other related injuries).

significant. Mere regret has historically not been enough to justify standing,¹²³ but courts have previously acknowledged the possibility that emotional trauma could be sufficient injury, so long as it is particularized to plaintiffs.¹²⁴ The Supreme Court has also been hesitant to accept arguments that standing flows from fear or anxiety of future events, especially where there is not a “real and immediate future threat.”¹²⁵ Lower courts have frequently relied on tort law to determine whether a particular claim of emotional harm constitutes an injury, tying the federal law of standing to state tort law.¹²⁶

In recognizing regret as an injury, the Northern District of Texas and the Fifth Circuit make two significant moves.¹²⁷ First, they implicitly accept the gravity of the regret concern—that regret is a serious harm to be avoided. Second, they further entrench the state’s interest in preventing future regret by allowing litigants to use federal courts to vindicate an interest in regret avoidance.

III. GENDER REGRETS AND TRADITIONAL “FAMILY VALUES”

There are striking parallels between the use of regret in the movements to ban GAC and abortion. In both, advocates cite a hypothetical risk of future regret to support bans on medical care. Those seeking GAC or abortions must allegedly be protected from these procedures, the doctors who would perform them, and the parents who support them. This Part explores the ideological threads that tie these two movements together. Section A uses the writings of two conservative leaders—Pat Buchanan and Phyllis Schlafly—to illuminate the values underlying both

¹²³ See, e.g., *Eike v. Allergan, Inc.*, 850 F.3d 315, 318 (7th Cir. 2017) (rejecting standing in a class action suit against a manufacturer where standing was based on “a regret or disappointment” with the product).

¹²⁴ See Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 BROOK. L. REV. 1555, 1578 (2016).

¹²⁵ *Id.* at 1578–80 (describing this jurisprudence).

¹²⁶ See *id.* at 1590–92 (describing this trend); see *supra* notes 124–25 and accompanying text (discussing principles of emotional harm in tort law).

¹²⁷ As of this writing, this case has been fully briefed and argued before the Supreme Court, but the Court has yet to issue a decision. In its brief in opposition to certiorari, the Alliance for Hippocratic Medicine repeated these arguments but emphasized the emotional harm to doctors themselves rather than the emotional harm to abortion recipients. *FDA v. All. Hippocratic Med.*, 2023 WL 9643014, at *34–*35 (Nov. 9, 2023) (Respondents’ Brief in Opposition); see also Transcript of Oral Argument at 62, *FDA v. All. for Hippocratic Med.*, (2024) (No. 23-235, No. 23-236), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-235_q811.pdf [<https://perma.cc/7JXT-5ZNP>]. Numerous amici repeat the argument. Some to support standing analysis. See, e.g., *FDA v. All. Hippocratic Med.*, 2024 WL 948009, at *22 (Feb. 29, 2024) (Brief of Missouri, Idaho, & Kansas in Support of Alliance for Hippocratic Medicine). Some to support the claim, on the merits, that FDA approval of abortion-inducing drugs was flawed because the safety analysis did not adequately consider the harm of potential regret. See, e.g., Brief of Amici Curiae Family Policy Alliance and State Family Policy Councils in Support of Respondents, *FDA v. All. Hippocratic Med.*, 2024 WL 945351, at *13–*14 (Feb. 28, 2024).

movements. Section B demonstrates how both movements use regret as a disciplining tool to pursue conservative values, including natalism, traditional gender roles, and the male-female binary. Section C reflects on the use of regret to justify government action, calling for caution.

A. *A Fight for the “Soul of America”*

In a passionate speech in the summer of 1992 at the Republican National Convention in Houston, Patrick J. Buchanan declared a “cultural war” for the “soul of America.”¹²⁸ “George Bush is a defender of right-to-life, and a champion of the Judeo-Christian values and beliefs upon which America was founded,” he said, following, “Mr. Clinton, however, has a different agenda. At its top is unrestricted abortion on demand.”¹²⁹ Buchanan warned Republicans:

The agenda that Clinton & Clinton would impose on America – abortion on demand, a litmus test for the Supreme Court, homosexual rights, discrimination against religious schools, women in combat units – that’s change, all right. But it is not the kind of change America needs. It is not the kind of change America wants. And it is not the kind of change we can abide in a nation that we still call God’s country.¹³⁰

The “cultural war,” declared over three decades ago at the Republican convention that nominated George H.W. Bush, portrayed reproductive freedoms and gay rights as an attack on “God’s country” and on “Judeo-Christian values.”¹³¹ Four years later, with President Bill Clinton in the White House, the Supreme Court in *Romer v. Evans* held that an amendment to Colorado’s Constitution that denied antidiscrimination protections for gays and lesbians violated the Equal Protection Clause.¹³² Justice Scalia dissented, with a dramatic exclamation: “The Court has mistaken a *Kulturkampf* [culture war] for a fit of spite.”¹³³ Coloradans, according to

¹²⁸ Patrick Joseph Buchanan, Culture War Speech: Address to the Republican National Convention (Aug. 17, 1992), <https://voicesofdemocracy.umd.edu/buchanan-culture-war-speech-speech-text/> [<https://perma.cc/Q469-K572>] (“It is a cultural war, as critical to the kind of nation we shall be as was the Cold War itself, for this war is for the soul of America. And in that struggle for the soul of America, Clinton & Clinton are on the other side, and George Bush is on our side. And so, to the Buchanan Brigades out there, we have to come home and stand beside George Bush.”). See also Adam Nagourney, ‘Cultural War’ of 1992 Moves in from the Fringe, N.Y. TIMES (Aug. 29, 2012), <https://www.nytimes.com/2012/08/30/us/politics/from-the-fringe-in-1992-patrick-j-buchanans-words-now-seem-mainstream.html> [<https://perma.cc/P7KD-G2D7>].

¹²⁹ Buchanan, *supra* note 128 (adding, “a militant leader of the homosexual rights movement could rise at that same convention and say: ‘Bill Clinton and Al Gore represent the most pro-lesbian and pro-gay ticket in history.’ And so they do.”).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Romer v. Evans*, 517 U.S. 620 (1996).

¹³³ *Id.* at 636 (Scalia, J. dissenting) (emphasis added).

Justice Scalia, discriminated against gays and lesbians not out of animus but due to a desire to “preserve traditional sexual mores.”¹³⁴ Justice Scalia resisted an “elite class” that would impose its view that “‘animosity’ toward homosexuality is evil” on the rest of America.¹³⁵

The GAC regulations examined here—like abortion regulations—often have overt Judeo-Christian grounding. For instance, Oklahoma titled its GAC ban the *Millstone Act*, referring to Matthew 18:6: “but whoever causes one of these little ones who believe in Me to sin, it is better for him that a heavy millstone be hung around his neck, and that he be drowned in the depths of the sea.”¹³⁶ The Millstone Act is about disciplining sinners. The ban sets up heavy millstones—civil and criminal liability—to be hung on the necks of medical providers and parents who cause “these little ones” to sin by pursuing their gender identity. What is at stake here is not a dispute with medical science or, even, psychological regret. It is conservative Christian morality *defending against* transgender existence.

Phyllis Schlafly was a well-known critic of feminism and what she called the “equality principle.” Her advocacy for “traditional family values” foreshadows and sheds light on twenty-first century campaigns to ban abortion and GAC.¹³⁷ From the 1960s and on, Schlafly was an influential conservative activist, a national leader and spokesperson of the conservative movement, and an anti-feminist.¹³⁸ In a representative piece published in 1994, Schlafly attacked the newly appointed associate justice of the Supreme Court, Ruth Bader Ginsburg (who, for Schlafly, represented feminism itself) for attempting “to induce changes in cultural stereotypes, social mores, and relationships between men and women.”¹³⁹ Schlafly warned,

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ S.B. 129, 2023 Leg., Gen. Sess. (Okla. 2023) (prohibiting gender transition procedures or referral services relating to such procedures to anyone under the age of 26, authorizing the state’s attorney general to enforce the act and those found guilty of violating it would be guilty of a felony and subject to license revocation).

¹³⁷ Phyllis Schlafly, *How the Feminists Want to Change Our Laws*, 5 STAN. L. & POL’Y REV. 65, 66–67 (1994).

¹³⁸ See, e.g., Valerie J. Nelson, ‘Don’t Call Me Ms. . . . It Means Misery: Phyllis Schlafly, Anti-feminist and Conservative Activist, Dies at 92’, LA TIMES (Sept. 5, 2016, 6:20 PM), <https://www.latimes.com/local/obituaries/la-me-phyllis-schlaflly-snap-story.html> [<https://perma.cc/54UV-NJZN>].

¹³⁹ Schlafly, *supra* note 137, at 66 (“To her and to other feminists, any route to that goal was acceptable: activist judicial re-interpretation of the Fourteenth Amendment to the U.S. Constitution (which she used for her winning Supreme Court cases), or ratification of the then-pending Equal Rights Amendment.”). For an analysis of Justice Ruth Bader Ginsburg’s approach to sex discrimination, see generally Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010); Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187 (2016).

*Sex Bias*¹⁴⁰ stands today as a textbook on how Ruth Bader Ginsburg and the feminists want to change our laws, our institutions, and our attitudes, in order to conform them to the “equality principle” and convert America into a “gender-neutral” society. It documents the radical and extremist goals of the feminists and how they seek to restructure our laws and society.¹⁴¹

As a thought leader for the conservative movement, Schlafly expressed pro-natalist views, most explicitly apparent in opposition to abortion and reproductive rights. She was also concerned with preserving traditional gender norms and was a fierce opponent of same-sex marriage.¹⁴²

Twenty-first century policies and laws involving GAC and abortion echo Schlafly’s agenda of traditional family values and a rigid system of binary sexual difference. Schlafly viewed gender equality *in all its manifestations* as an attack on the traditional American family because equality (as she saw it) upsets traditional gender roles of men as breadwinners and women as caregivers.¹⁴³ She associated Justice Ginsburg with “the typical 1970s feminist attitude that women’s liberation and equality in the workforce required liberation from marriage, that is, easy divorce”¹⁴⁴ She was hostile to the no-fault divorce reforms that feminists had promoted as a tool to liberate women from oppressive marriages.¹⁴⁵ The primary role of woman, claimed Schlafly, was a homemaker and a mother.¹⁴⁶ Like conservative policymakers and lawmakers today, she underscored the role of women as birth-

¹⁴⁰ U.S. COMM’N ON C.R., SEX BIAS IN THE U.S. CODE: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, v (1977).

¹⁴¹ Schlafly, *supra* note 137, at 66–67.

¹⁴² The Phyllis Schlafly Report, *Feminists Psychoanalyze Themselves Again*, 43 EAGLE FORUM 4 (2009), <https://eagleforum.org/psr/2009/nov09/psmov09.html> [<https://perma.cc/LRE2-K2XU>] (“Attacks on the definition of marriage as the union of one man and one woman come from the gay lobby seeking social recognition of their lifestyle, from the feminist movement that opposes what they call the patriarchy (that supposedly makes women second-class citizens), and also from some libertarians . . .”).

¹⁴³ Schlafly, *supra* note 137, at 67 (criticizing Justice Ginsburg for allegedly proposing “that the traditional family concept of husband as breadwinner and wife as homemaker must be eliminated.”).

¹⁴⁴ *Id.*

¹⁴⁵ Eliminating no-fault divorce is now part of the Republican Party platform in two states. See Kimberly Wehle, *The Coming Attack on an Essential Element of Women’s Freedom*, THE ATLANTIC (Sept. 26, 2023), <https://www.theatlantic.com/ideas/archive/2023/09/no-fault-divorce-laws-republicans-repeal/675371/> [<https://perma.cc/6A27-48BU>]; AJ Willingham, *What Is No-Fault Divorce, and Why Do Some Conservatives Want to Get Rid of It?*, CNN (Nov. 27, 2023, 9:49 AM), <https://edition.cnn.com/2023/11/27/us/no-fault-divorce-explained-history-wellness-cec/index.html> [<https://perma.cc/D9AG-VU2X>].

¹⁴⁶ *Anniversary: Roe v. Wade with Phyllis Schlafly*, WASH. POST (Jan. 18, 2002, 3:00 PM), https://www.washingtonpost.com/wp-srv/liveonline/02/nation/nation_schlafly011802.htm [<https://perma.cc/U7TT-EF75>] (arguing that invalidating laws that favor wives and mothers ought to be seen as an attack on women).

givers. She characterized *Roe v. Wade* as “the worst decision in the history of the U.S. Supreme Court” because it is “responsible for the killing of millions of unborn babies.”¹⁴⁷ And she condemned Ginsburg’s claim that “government has an affirmative duty to fund abortions for poor women [and that] anti-abortion laws interfere with a woman’s ability ‘to participate equally in the economic and social life of the Nation.’”¹⁴⁸

Schlaflly asserted that Ginsburg’s positions on traditional gender roles, no-fault divorce, and access to abortion for poor people, “betray her as a radical, doctrinaire feminist, far out of the mainstream . . . [who] shares the chip-on-the-shoulder radical feminist view that American women have endured centuries of oppression and mistreatment from men.”¹⁴⁹ Schlaflly concludes,

Feminists are split by a curious dichotomy. Do they really want a totally gender-neutral society in which we are all forced to pretend there is no difference between men and women? . . . Or, on the other hand, do they want special privileges for women, conveniently resting this demand on the theory that such privileges are needed to remedy centuries of discrimination? Does “equality” mean forever playing the role of victim and demanding affirmative action, protection against sexual harassment, and expensive employer and government benefits (such as family leave and daycare) to accommodate women’s traditional family responsibilities?¹⁵⁰

It is evident from Parts I and II of this Article that by 2024, Buchanan and Schlaflly’s conservative and traditionalist approaches to gender, sexuality, and the family are shaping state laws, policies and jurisprudence. In the twenty-three states that have so far passed laws restricting GAC, and the twenty-five states that have so far restricted or eliminated abortion access, natalism, a male-female sex binary, and traditional gender roles are legislative priorities.

B. Using “Regret” in a Crusade for “Traditional Family Values”

Regret has become an effective tool in a conservative campaign against reproductive justice and LGBTQ rights. Political and legal debates about GAC and abortion typically play out between anecdotal evidence (about individual regret) and statistical evidence (revealing low incidence of regret). In *Carhart*, for example, Justice Kennedy invoked the risk of regret while acknowledging the absence of

¹⁴⁷ Schlaflly also bashed Justice Ginsburg for “clearly believ[ing] that her ‘equality principle’ demands that taxpayer funding of abortions be written into the U.S. Constitution in order to give women ‘equality’ in the workplace.” *Id.* at 70.

¹⁴⁸ *Id.* at 71.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* For critique of this conservative approach, see Mary Anne Case, *After Gender: The Destruction of Man? The Vatican’s Nightmare Vision of the “Gender Agenda” for Law*, 31 PACE L. REV. 802 (2011).

“reliable evidence.”¹⁵¹ Dissenting, Justice Ginsburg critically observed that “the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence”¹⁵² Ginsburg objected that “neither the weight of the scientific evidence to date nor the observable reality of [thirty-three] years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman’s long-term mental health than delivering and parenting a child that she did not intend to have.”¹⁵³

A similar pattern has emerged in the legislative, political, and public debates over GAC. A small group of former GAC recipients regularly participates in legislative hearings offering testimony about their regret and suffering,¹⁵⁴ while advocates for transgender individuals rely on scientific studies that reveal that incidence of regret is extremely low.¹⁵⁵

These encounters between individual anecdotes and scientific data raise interesting questions about the task of lawmakers as truth seekers.¹⁵⁶ But legal and political struggles over GAC and abortion are part of a bigger national drama. At stake are traditional values, sexual morality,¹⁵⁷ and the so-called “soul of America.”¹⁵⁸ Current bans on GAC and abortion are calculated ideological attempts

¹⁵¹ Kennedy cited to a brief recounting the experiences of 180 women describing their experiences with abortion regret. *See supra* notes 67–69 and accompanying text (citing and discussing these briefs); *see also* Doan et al., *supra* note 90 (exploring how anti-abortion advocates have relied on personal stories of regret to establish credibility).

¹⁵² *Gonzales v. Carhart*, 550 U.S. 124, 183 (2007) (Ginsburg, J., dissenting).

¹⁵³ *Id.* at 183 n.7 (internal quotation marks omitted). Anti-abortionists often dismiss such scientific studies, alleging that many individuals do not feel comfortable telling their regret stories. *See supra* notes 80–82 and accompanying text. *See also* Siegel, *supra* note 69, at 1658–59 (citing anti-abortion literature making the argument that most, if not all, women experience regret and guilt but do not have safe spaces to talk about it). Prominent abortion opponent, Vincent Rue, has argued that those who claim not to be suffering from post-abortion trauma are simply repressing their emotions. Eidmann, *supra* note 85, at 276–77 (describing Rue’s role in the anti-abortion movement). Rue explains that “The factors of being surprised and overwhelmed by the intensity of the emotional and physical response to the abortion-experience frequently act upon the post-abortive woman to cause her to resort to the defenses of repression and denial.” *Id.* at 277 n.50.

¹⁵⁴ *See supra* notes 1–3 and accompanying text (offering examples of this phenomenon).

¹⁵⁵ Supporters of bans criticize the data primarily on the ground that it fails to consider the numbers of people who never report their regret. *See supra* note 28 and accompanying text.

¹⁵⁶ The relationship between science, morality, and democracy has long plagued policymakers. *See generally* Dov Fox, *Subversive Science*, 124 PENN ST. L. REV. 153 (2019) (exploring the legal implications of scientific findings that conflict with widely held ideals); FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (2005) (critiquing the use of cost-benefit analysis in policymaking).

¹⁵⁷ *See, e.g.*, Ben-Asher, *Transforming Legal Sex*, *supra* note 7.

¹⁵⁸ *See supra* notes 128–31 and accompanying text.

to promote natalism and preserve the male-female binary as a way of defending against a perceived liberal and LGBTQ attack on conservative and Christian values.

1. Natalism, Regretting Children, Regretting Childlessness

Campaigns against abortion and GAC reflect, among other things, cultural anxiety about childbearing, reproduction, and fertility. In *Carhart*, for instance, Justice Kennedy observed that “Respect for human life finds an ultimate expression in the bond of love the mother has for her child.”¹⁵⁹ Indeed, natalism is a fundamental feature of all abortion restrictions that force pregnant people to carry unwanted pregnancies.¹⁶⁰ It is also expressed in biased counseling laws that require providers to warn about future fertility consequences of abortion.¹⁶¹

Natalism is also predominant in GAC bans, many of which warn that “sterility” is an inevitable consequence of GAC.¹⁶² Despite evidence that fertility of transgender teens and youth can be (and often is) preserved in clinical settings,¹⁶³ the risk of infertility is high on the list of justifications for these bans. Arkansas’s 2021 statute is representative on this point. It warns that “[i]t is of grave concern to the General Assembly that the medical community is allowing individuals who

¹⁵⁹ *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

¹⁶⁰ Natalism, sometimes referred to as pro-natalism, is “an attitude or policy favoring or encouraging population growth.” *Natalism*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/natalism> [https://perma.cc/5LRX-96MU] (last visited Mar. 7, 2024).

¹⁶¹ Twenty-three states have laws with specific disclosure requirements related to risks of abortion for future fertility, and three of these states include misleading information in these disclosures. GUTTMACHER INST., *Counseling and Waiting Periods for Abortion*, *supra* note 87.

¹⁶² See, e.g., S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022) (“Introducing cross-sex hormones to children with immature gonads as a direct result of pubertal blockade is expected to cause irreversible sterility. Sterilization is also permanent for those who undergo surgery to remove reproductive organs . . .”); H.B. 1570, 2022 Leg., Reg. Sess. (Ark. 2021) § 2(8)(A)(vii), (B)(viii) (identifying “irreversible infertility” as a risk of cross-sex hormone therapy); H.B. 71, 2023 Leg., Reg. Sess. (Idaho 2023) § 10(c), (d) (expressing concern that healthcare providers administer puberty-blockers and cross-sex hormones despite “scientific evidence that children who remain on puberty blockers may never recover lost development”).

¹⁶³ See, e.g., T.H.R. Stolk, J.D. Asseler, J.A.F. Huirne, E. van den Boogaard, & N.M. van Mello, *Desire for Children and Fertility Preservation in Transgender and Gender-Diverse People: A Systematic Review*, 87 BEST PRAC. & RSCH. CLINICAL OBSTETRICS & GYNAECOLOGY (2023) (finding that for transmasculine people oocyte retrieval rates parallel those of cis people even with prior testosterone use and recommending semen preservation prior to hormone treatment in transfeminine people); Philip J. Cheng, Alexander W. Pastuszak, Jeremy B. Meyers, Isak A. Goodwin, & James M. Hotaling, *Fertility Concerns of the Transgender Patient*, 8 TRANSLATIONAL ANDROLOGY & UROLOGY, 209 (2019) (describing broad range of fertility preservation options and identifying discrimination, costs, and dearth of facilities as some of the main barriers to fertility preservation). See also Clark, *supra* note 44.

experience distress at identifying with their biological sex to be subjects of . . . irreversible, permanently sterilizing genital gender reassignment surgery.”¹⁶⁴ These bans and the politics that surround them communicate one central untruth: GAC is necessarily a path to future childlessness and should thus be banned.

A different yet related set of issues illuminates the interaction of regret, natalism, and gender roles. Consider the contrast between individuals who are childless by choice and those who have children and later come to regret it. The former are presumed to live with deep regrets and are often warned: “[D]o not make this decision [childlessness], you will come to regret it.”¹⁶⁵ The latter are presumed to affirm parenthood. Their regret stories often lack a platform or an audience. Although studies suggest that those who are childless by choice report similar levels of satisfaction to those who are not, they are often perceived to be less fulfilled.¹⁶⁶

¹⁶⁴ S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022). These statutes universally ignore the possibility of gamete preservation. They also typically inflate the evidence of the risk that puberty blockers and cross-hormone therapies pose to fertility. See Stolk et al., *supra* note 163; Cheng et al., *supra* note 163.

¹⁶⁵ ORNA DONATH, REGRETTING MOTHERHOOD: A STUDY 58 (2017) (observing that “regret is used as a threat to push women who do not wish to be mothers into motherhood”); Kate Greasley, *Abortion and Regret*, 38 J. MED. ETHICS 705, 710 (2012) (arguing that this type of reasoning is persuasive when it “derives from the belief that the regret will reflect justification. What is really meant by ‘don’t go out in the rain, you’ll regret it,’ is ‘you will regret it *because* it is imprudent’”). Brittany Wong, *If You’re Afraid You’ll Regret Not Having Kids, Read This*, HUFFPOST (Oct. 31, 2023, 5:49 PM), https://www.huffpost.com/entry/unsure-if-you-want-to-have-kids-read-this_1_65402c65e4b0a78a26a470f4 [<https://perma.cc/HS46-S997>] (quoting a psychotherapist who reports regularly hearing fear of future regret from patients considering the possibility of not having children); Elmo Keep, *I Am So Sick of Being Asked If I Regret Not Having Children*, THE GUARDIAN (Feb. 9, 2021), <https://www.theguardian.com/commentisfree/2021/feb/09/i-am-so-sick-of-being-asked-if-i-regret-not-having-children> [<https://perma.cc/QB7D-56P9>]. See, e.g., Barton Goldsmith, *Why I Regret Not Having Children*, PSYCH. TODAY (July 28, 2021), <https://www.psychologytoday.com/us/blog/emotional-fitness/202107/why-i-regret-not-having-children> [<https://perma.cc/J8HV-VZQT>]; *Child-Free People over 40 Are Sharing Whether or Not They Regret Not Having Kids, and It’s Super Insightful*, BUZZFEED (Aug. 30, 2023), <https://www.buzzfeed.com/victoriavouloumanos/older-people-who-are-childfree-share-how-life-is-now> [<https://perma.cc/GL7M-REQQ>] (“We do not have kids by choice and certainly don’t have regrets. I can tell you firsthand the problem is not that you personally regret the decision; it’s dealing with parents” (quoting a Reddit user)).

¹⁶⁶ See Leslie Ashburn-Nardo, *Parenthood as Moral Imperative? Moral Outrage and the Stigmatization of Voluntarily Childfree Women and Men*, 76 SEX ROLES 393, 398 (2017).

Parenting is the presumed preferable path,¹⁶⁷ and motherhood, the “ultimate femininity.”¹⁶⁸

The narrative of regret in the context of childlessness, especially for those assigned female at birth, serves as a disciplining tool, threatening those who deviate from the norm of natalism. Those who choose not to have children often become subjects of “moral outrage.”¹⁶⁹ As sociologist Orna Donath observed, “Regretting having behaved otherwise than socially expected wins respect, and thus regret can be utilized to maintain society’s values. From this angle, regret becomes hegemony’s watchdog, a normalizing mechanism aimed to restore each of us to the good graces of society.”¹⁷⁰

Prospective warnings of anticipated regret are notably absent for a larger group of individuals—those who become mothers.¹⁷¹ A large percentage of mothers who

¹⁶⁷ See DONATH, *supra* note 165, at 10 (“The American feminist philosopher Diana Tietjens Meyers refers to this as the colonization of our imagination, whereby we absorb the notion that motherhood is the only path to the point that we cannot conceive of other available options, making the only decision that can be imagined appear to have come from a ‘pure space.’”).

¹⁶⁸ DONATH, *supra* note 165, at 103; Rebecca Harrington, *Childless*, 29 PSYCHOANALYTIC DIALOGUES 35, 48 (2019) (describing how she and her patient both experienced themselves as outsiders for failing to become mothers and observing that “male gender identity does not seem to be nearly as tied to fatherhood as female gender identity is to motherhood”);

¹⁶⁹ Ashburn-Nardo, *supra* note 166, at 398 (finding that participants in the study responded to childless by choice adults with “anger, disgust, and disapproval”); see also DONATH, *supra* note 165, at 9 (quoting Pope Francis, who claimed, in 2015, that choosing not to have children was “selfish”). Discussing societal denigration of women who remain childless by choice, psychoanalyst Katie Gentile observes that “Women without children, unlike men in the same position, are considered selfish, emotionally unavailable, aggressive, or just sublimating their ‘natural’ ‘maternal instincts’ into their jobs, animals (‘furbabies’), or other activities that automatically lose their legitimacy when seen in this light.” Katie Gentile, “*Dying for a Baby*” and Other “*Confusions of Tongues*”: A Discussion of “*Childless*,” 29 PSYCHOANALYTIC DIALOGUES 51, 54 (2019).

¹⁷⁰ DONATH, *supra* note 165, at 57.

¹⁷¹ Today over 86% of women in the United States give birth to a child before they are 49. PEW RSCH. CTR., THEY’RE WAITING LONGER, BUT U.S. WOMEN TODAY MORE LIKELY TO HAVE CHILDREN THAN A DECADE AGO 3 (Jan. 18, 2018), <https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2018/01/Pew-Motherhood-report-FINAL.pdf> [<https://perma.cc/3GNM-KG8Y>]. This suggests that the total percentage of women who become mothers is higher than 86% because the statistic includes only those who have given birth thus excluding those who become mothers via adoption or stepparenting. *Id.* at 2 (noting that about 6% of children in the U.S. live with either an adoptive parent or a stepparent). By contrast, one recent study of Michigan adults found that 21.35% were childless by choice (as opposed to undecided or childless due to infertility issues or life circumstances). Jennifer Watling Neal & Zachary P. Neal, *Prevalence, Age of Decision, and Interpersonal Warmth Judgments of Childfree Adults: Replication and Extensions*, 18 PLOS ONE at 6, 9 (2023) (noting that one shortcoming of the data is that it is a snapshot in time and thus cannot account

participated in a 2023 study claimed to find parenting to be a source of joy and fulfillment.¹⁷² Many reported, however, that mothering is harder, more stressful, and more tiring than expected.¹⁷³ Although data is limited, preliminary research suggests that around seven percent of parents regret the choice and would not have children again if they could do things over.¹⁷⁴

Until recently, however, public dialogue about regretting motherhood was scarce.¹⁷⁵ In a groundbreaking book, *Regretting Motherhood: A Study*, Donath argued that “we fail to recognize the possibility of regretting motherhood.”¹⁷⁶ She interviewed mothers who self-identified as regretting having children and found that while they all claimed to love their children, they viewed the decision to have a child

for the possibility that some people will change their minds, but finding that the percentage of adults identifying as childfree by choice is about the same among those over forty as under); James L. McQuivey, *To Have Kids or Not: Which Decision Do Americans Regret More?*, INST. FOR FAM. STUD. BLOG (June 10, 2021), <https://ifstudies.org/blog/to-have-kids-or-not-which-decision-do-americans-regret-more> [https://perma.cc/25MX-YTNF] (including statistics from the US Adult Sexual Behaviors and Attitudes study from 2021 finding that 19% of Americans do not have and do not want children and 10% have children and wish they had fewer or none).

¹⁷² Katherine Schaeffer & Carolina Aragão, *Key Facts About Moms in the U.S.*, PEW RSCH. CTR. (May 9, 2023), <https://www.pewresearch.org/short-reads/2023/05/09/facts-about-u-s-mothers/> [https://perma.cc/JS7L-TSPW] (reporting survey results finding that 83% of moms say that being a parent is “enjoyable for them most (56%) or all of the time (27%)” and 80% say it is “rewarding most or all of the time”).

¹⁷³ *Id.* (reporting survey results finding that 66% of mothers say “being a parent is a lot or somewhat harder than they thought it would be,” 47% of mothers reporting that being a parent is tiring all or most of the time, and 33% of mothers saying that is stressful all or most of the time).

¹⁷⁴ Konrad Piotrowski, *How Many Parents Regret Having Children and How It Is Linked to Their Personality and Health: Two Studies with National Samples in Poland*, 16 PLOS ONE at 2–3 (2021) (citing data from a 2013 Gallup poll, not distinguishing participants by gender, in which 7% of respondents with children said that if they had it do over again they would have zero children). See also Eir Nolsoe, *One in Twelve Parents Say They Regret Having Children*, YOUTOV (June 24, 2021, 2:53 AM), <https://yougov.co.uk/society/articles/36590-one-twelve-parents-say-they-regret-having-children> [https://perma.cc/9CL5-9E92] (finding, based on a YouGov survey, that 8% of parents expressed regret at the time of the study and another 6% said that they had previously experienced regret but no longer did); Anne Kingston, *‘I Regret Having Children’: In Pushing the Boundaries of Accepted Maternal Response, Women Are Challenging an Explosive Taboo—and Reframing Motherhood in the Process*, MACLEAN’S, <https://macleans.ca/regretful-mothers/> [https://perma.cc/RE9D-R77M] (describing a 1975 poll by advice columnist Ann Landers in which 70% of respondents said they would not have children if they had it to do over again).

¹⁷⁵ See Hillary Grill, *What Women Want: A Discussion of “Childless,”* 29 PSYCHOANALYTIC DIALOGUES 59 (2019) (observing that widespread pronatalist assumptions prevent serious inquiry into what individual women actually want, arguing that “[t]he conflation of feminine, woman, and motherhood serve to negate female subjectivity”).

¹⁷⁶ DONATH, *supra* note 165, at 48.

as a mistake.¹⁷⁷ For many, it was traumatic.¹⁷⁸ Many women in the study reported experiencing coercion, suggesting that while they consented to have children, they never wanted them.¹⁷⁹ In the years since Donath's study, the topic has received more attention.¹⁸⁰

One factor explaining the dearth of public dialogue on regretting motherhood is the children themselves. Philosopher R. Jay Wallace argues that many mothers do not have access to what he calls "all-in regret" because they form attachments to their children, so even if they continue to believe that the choice to have a child was the wrong choice, they may nevertheless affirm it.¹⁸¹ Thus for women who may in fact have preferred not to become mothers, the language of regret is unavailable. This hypothesis is consistent with the findings of Donath's interviews, in which many of the respondents emphasized that they did not regret "the existence of their children in the world," but rather they regretted "becoming their mothers and being responsible for their [children's] lives."¹⁸² This confirms that these mothers were not experiencing "all-in" regret, which by definition, includes comprehensive regret of everything flowing from the initial decision.¹⁸³

¹⁷⁷ See *id.* at 71–76 (distinguishing between regretting motherhood and regretting the children).

¹⁷⁸ See *id.* at 106–10.

¹⁷⁹ See *id.* at 21–27. See also Raymond Shih Ray Ku, *Free Speech & Abortion: The First Amendment Case Against Compelled Motherhood*, 43 CARDOZO L. REV. 2105, 2138 (2022) (characterizing abortion bans as a form of compelled motherhood that force the identity of mother and the expressions of pregnancy onto individuals who would otherwise seek abortions); Katharine Silbaugh, *Family Needs, Family Leave in 2023*, 53 SETON HALL L. REV. 1609, 1610, 1613–18 (2023) (also characterizing post-*Dobbs* abortion restrictions as forced parenthood). On reproductive coercion more generally, see Jessica E. Moulton, Martha Isela Vazquez Corona, Cathy Vaughan, & Meghan A Bohren, *Women's Perceptions and Experiences of Reproductive Coercion and Abuse: A Qualitative Evidence Synthesis*, 16 PLOS ONE (2021); A. Rachel Camp, *Coercing Pregnancy*, 21 WM. & MARY J. WOMEN & L. 275 (2015).

¹⁸⁰ Kingston, *supra* note 174 (identifying a number of recent books and articles on the topic); Valerie Heffernan & Katherine Stone, *International Responses to Regretting Motherhood*, in WOMEN'S LIVED EXPERIENCES OF THE GENDER GAP: GENDER INEQUALITIES FROM MULTIPLE GLOBAL PERSPECTIVES 121 (Angela Fitzgerald ed., 2021) (crediting Donath's study with "open[ing] conversation about regret," and concluding based on a study of responses to the book that the conversation is "perceived as a further step toward destabilizing traditional attitudes towards gender roles").

¹⁸¹ WALLACE, *supra* note 21, at 98. Wallace himself imagines only the possibility that the mistake was to have children too early and not that the mistake was to have children at all. *Id.* at 118–31.

¹⁸² DONATH, *supra* note 165, at 75. For another narrative describing a personal experience with this phenomenon, see Merritt Tierce, *The Abortion I Didn't Have*, N.Y. TIMES (Dec. 2, 2021), <https://www.nytimes.com/2021/12/02/magazine/abortion-parent-mother-child.html> [<https://perma.cc/7WU5-546U>].

¹⁸³ WALLACE, *supra* note 21, at 98.

Contrasting the data about regretting motherhood with data about those who regret having received GAC (around one percent)¹⁸⁴ and those who regret receiving abortions (under three percent)¹⁸⁵ reveals much about the politics and ideology of regret narratives.¹⁸⁶ Post-2020s abortion and GAC bans hinge on intertwined ideologies of natalism and rigid gender roles, particularly those defining women as mothers and caregivers. Warnings about future regret are also directed at those who choose to remain childfree. Ironically, political and legislative focus bypasses the most common regret: motherhood.

2. *The Male-Female Binary*

The rise of transgender visibility since the 2000s, and the increasing numbers of transgender and non-binary identifying youth and adults have generated a new dread for conservatives: *sex is mutable!* An increasing number of men in America were assigned female at birth, and an increasing number of women were assigned male at birth. In addition, more young Americans are identifying as non-binary.¹⁸⁷ Younger generations are apparently less bound by traditional convictions about sex as binary and immutable. This new reality has generated anxiety, violence, and a national moral panic, all of which are reflected in legislative campaigns against transgender children and youth.

Conservative *New York Times* opinion columnist Ross Douthat has expressed this moral panic, calling it a *New LGBTQ Culture War*.¹⁸⁸ Douthat reported with alarm that “[c]omparing the Generation Z to the baby boom generation, the percentage of people identifying as transgender, in particular, has risen twentyfold.”¹⁸⁹ He warned, “we have been running an experiment on trans-identifying youth without good or certain evidence, *inspired by ideological motive* rather than scientific rigor, in a way that future generations will regard as a grave medical-political scandal.”¹⁹⁰ Douthat predicted that liberals will regret this moment

¹⁸⁴ See, e.g., Valeria Bustos, Samyd Bustos, Andres Mascaro, Gabriel Del Corral, Antonio Forte, Pedro Cuidad, Esther Kim, Howard Langstein, & Oscar Manrique, *Regret After Gender-Affirmation Surgery: A Systematic Review and Meta-Analysis of Prevalence*, J. AM. SOC. PLASTIC SURGEONS 1 (2021).

¹⁸⁵ See *supra* note 64 and accompanying text.

¹⁸⁶ Imagine advocating bans on parenting based on these levels of future regret!

¹⁸⁷ Anna Brown, *About 5% of Young Adults in the U.S. Say Their Gender Is Different from Their Sex Assigned at Birth*, PEW RSCH. CTR. (June 7, 2022), <https://www.pewresearch.org/short-reads/2022/06/07/about-5-of-young-adults-in-the-u-s-say-their-gender-is-different-from-their-sex-assigned-at-birth/> [https://perma.cc/722A-9L92].

¹⁸⁸ Ross Douthat, *Opinion, How to Make Sense of the New L.G.B.T.Q. Culture War*, N.Y. TIMES (Apr. 13, 2022), <https://www.nytimes.com/2022/04/13/opinion/transgender-culture-war.html> [https://perma.cc/T9TC-57PC] (“Almost twenty-one percent of Generation Z—meaning, for the purposes of the survey, young adults born between 1997 and 2003—identifies as L.G.B.T., as against about 10 percent of the millennial generation, just over 4 percent of my own Generation X and less than 3 percent of baby boomers . . .”).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* (emphasis added).

in which they supported the trans-identified youth in gender transitions, arguing “if you are a liberal who believes [that there is no evidence to support gender-affirming care for youth] but you don’t feel comfortable saying it, *your silence will eventually become your regret*.”¹⁹¹

This anxiety fuels GAC bans for minors, which are designed to *preserve the male-female binary* (as assigned at birth) and are justified as regret-preventative. The bans contain two features to this end. First, they typically define sex strictly as “biological sex,”¹⁹² while excluding or ignoring *gender identity* as a core characteristic of sex.¹⁹³ This is a striking feature that unites these laws. This definition explicitly and intentionally contradicts many current legal rules and most leading sex, medical, psychiatric and pediatric guidelines that view gender identity (an internal sense of being male, female, or non-binary) as a key factor in determining an individual’s sex.¹⁹⁴ For instance, the Diagnostic and Statistical Manual of Mental Disorders (“DSM-5”) of the American Psychiatric Association (“APA”) includes a diagnosis of “gender dysphoria,” a condition defined as a “distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender.”¹⁹⁵

¹⁹¹ *Id.* (emphasis added).

¹⁹² See, e.g., S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022) § 2(1) (“the sex of a person is the biological state of being male or female, based on sex organs, chromosomes, endogenous hormone profiles, and is genetically encoded into a person at the moment of conception, and it cannot be changed”); H.B. 1570, 2022 Leg., Reg. Sess. (Ark. 2021) (“‘Biological Sex’ means the biological indication of male and female in the context of reproductive potential or capacity, such as sex chromosomes, naturally occurring sex hormones, gonads, and nonambiguous internal and external genitalia present at birth, without regard to an individual’s psychological, chosen, or subjective experience of gender.”).

¹⁹³ This reverses a trend in medical literature and in courts to define sex by reference to gender identity. See Ben-Asher, *Transforming Legal Sex*, *supra* note 7 (identifying a backlash against the increasing legal acceptance of the concept of “gender identity”).

¹⁹⁴ See, e.g., GLAAD, GLAAD MEDIA REFERENCE GUIDE (10th ed. 2016), https://publicwebuploads.uwec.edu/documents/GLAAD_Media_Reference_Guide.pdf [<https://perma.cc/N9L3-F52G>] (“Gender Identity: A person’s internal, deeply held sense of their gender. For transgender people, their own internal gender identity does not match the sex they were assigned at birth. Most people have a gender identity of man or woman (or boy or girl). For some people, their gender identity does not fit neatly into one of those two choices . . .”).

¹⁹⁵ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013); see also Jack Turban, *What Is Gender Dysphoria?*, AM. PSYCHIATRIC ASS’N (Aug. 2022), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-genderdysphoria> [<https://perma.cc/FP5P-XY5V>] (defining dysphoria as “clinically significant distress or impairment in social, occupational, or other important areas of functioning”).

Second, bans on gender-affirming care include an exception for provision of care to a child born with intersex conditions, sometimes known as DSD.¹⁹⁶ According to DSM-5, “Disorders of sex development (DSD) refers to a group of medical conditions (e.g., XXY/Klinefelter Syndrome, 45XO/Turner Syndrome, or Androgen Insensitivity Syndrome) in which anatomical, chromosomal, or gonadal sex varies in some way from what would be typically considered male or female.”¹⁹⁷ Current exceptions in the GAC bans allow for surgery and hormone treatment when a child is diagnosed with a DSD condition. They allow doctors to assign a child a sex, and for parents to consent to medical procedures that would conform the assignment with the child’s body. Despite vast literature on the actual and real regret of intersex individuals who undergo sex assignment surgery as children or infants, current GAC bans allow for such surgeries and medical care to continue.¹⁹⁸ Only an ideology of preserving the male-female binary as it is traditionally understood explains why these bans would *deny* gender affirming care to those who seek it (transgender teens and youth) and *allow* it to be imposed on those who do not (intersex infants and children).

C. *The Perils of Using Regret in Political Projects*

After *Carhart*, legal scholar Chris Guthrie warned that legislatures might follow *Carhart*’s logic to use presumed future regret to justify constraints on autonomy.¹⁹⁹ Part I, *supra*, suggests that there is good reason to take this warning seriously—legislatures have relied in part on regret to constrain the autonomy of children seeking GAC and their parents. In addition, two phenomena suggest that regret is a permanent fixture in the legal landscape. First, as discussed in Part III.B, *supra*, regret often serves as proxy for traditional morality, and morality plays an

¹⁹⁶ See *Policy Tracker: Youth Access to Gender Affirming Care and State Policy Restrictions*, KFF (last updated Jan. 31, 2024), <https://www.kff.org/other/dashboard/gender-affirming-care-policy-tracker/> [<https://perma.cc/5AVM-MKXU>] (finding that twenty-three of twenty-three statutes “permit[] Rx and Surgical Care Used in GAC for Other (non-GAC) Medical Purposes”). See S.B. 14, 2022 Leg., Reg. Sess. (Tex. 2022).

¹⁹⁷ *Gender Dysphoria Diagnosis*, AM. PSYCHIATRIC ASS’N (Nov. 2017), <https://www.psychiatry.org/psychiatrists/diversity/education/transgender-and-gender-non-conforming-patients/gender-dysphoria-diagnosis> [<https://perma.cc/62ER-JQLM>] (“Some individuals with such conditions prefer the term ‘intersex’”).

¹⁹⁸ See, e.g., SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED 4–7 (1998); SHARON PREVES, INTERSEX AND IDENTITY: THE CONTESTED SELF 32–36 (2003); KATRINA KARKAZIS, FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE 49–62 (2008). See also Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 55 (2006) (arguing for liberty of intersex infants and children from unnecessary medical intervention, and for a positive liberty of transgender individuals to pursue gender identity and gender affirming care).

¹⁹⁹ Guthrie, *supra* note 73, at 880–81 (observing that “as an analytical matter, if the state is deemed to have a legitimate interest in protecting citizens from experiencing regret associated with the exercise of one right, the state should also have an interest in protecting citizens from experiencing regret associated with the exercise of other rights”).

increasingly important role in contemporary courts and legislatures. Second, rapid developments of science and technology open up new realms for self-realization and exploration. More choices. More to regret.

When, if at all, is preventing regret a legitimate state interest? Two interventions may help clarify and streamline policy debates around regret. First, policymakers should not treat regret as a monolith (as did the lawmakers in Parts I and II). Political debates around regret often conflate a variety of emotional states: trauma, disappointment, repentance.²⁰⁰ As Jeannie Suk Gersen observed, stories of regret are often, in fact, stories of trauma.²⁰¹ Whereas regret is an emotional experience—usually defined simply as the preference that something in the past had gone differently—trauma is both an emotional and physical experience.²⁰² To the extent regret is a stand in for trauma, preventative legislation is a fraught endeavor. Any medical procedure including abortion, childbirth, mastectomy, or rhinoplasty, can cause trauma. But denial of medical treatment can also cause trauma.

Trauma-prevention is, unquestionably, a legitimate state interest, but the difficulty of distinguishing, *ex ante*, between medical treatment that will cause trauma and that which will not, complicates potential legislation and counsels in favor of caution. Standard medical malpractice law navigates this quagmire through

²⁰⁰ In the GAC context, commentators often also conflate regret with the choice to cease care. A recent study of youth that discontinued gender-affirming care offers a more complex understanding of detransition and regret. *See* Annie Pullen Sansfaçon, Ello Gravel, Morgane Gelly, Tommy Planchat, August Paradis & Denise Medico, *A Retrospective Analysis of the Gender Trajectories of Youth Who Have Discontinued a Transition*, INTL. J. OF TRANSGENDER HEALTH (2023). The authors observe that

The idea of detransition is often conflated with experiences of regret after a gender transition However, negative transition experiences may only be a subcategory within experiences of detransition Although regret may accompany a detransition, other feelings can be presenting such positive one or ambivalence and can evolve over time.

Id. The researchers of this study, which included twenty youth participants (most of them assigned female at birth) who discontinued transition (“YDT”) concluded that

YDT undergo diverse gender journeys and changes in various aspects of their experiences [O]ur study revealed nuances and evolving perspectives in youth, challenging previous research that simplified discontinuation as a single set of factors outcome. This insight encourages providers to critically assess narratives as presented in the media and refine their practice to better support youth, regardless of their gender journey direction.

Id.

²⁰¹ *See* Suk, *supra* note 69.

²⁰² Greasley, *supra* note 165, at 710 (distinguishing between psychological trauma and regret); Ben-Asher, *Trauma-Centered Social Justice*, *supra* note 100 (defining trauma and exploring how it is used in social justice movements); WALLACE, *supra* note 21, at 6 (defining regret).

the doctrine of informed consent—seeking to ensure that patients choose whether or not to receive medical care on the basis of accurate and sufficiently thorough information about risks, including psychological risks, and effectiveness of treatment. In the cases of abortion and GAC—where reported rates of trauma are quite low—potential regret does not provide adequate justification for legislative action.

Alternative versions of regret—regret as disappointment and regret as moral judgment—further undermine the legitimacy of regret as the basis for state action. Stories of regret can often be stories of disappointment. The decision did not generate the desired result. This is particularly true in the context of GAC, where regret can follow from medical care that does not successfully allow a trans person to “pass.”²⁰³ In such cases, a person may lament the current state of things, the consequences of seeking care, but might nevertheless not do anything differently if they could make the decision again knowing what they know now. Regret might also be a “retrospective *judgment* about the wrongness of the . . . decision.”²⁰⁴ Anti-abortion advocacy groups highlight, and perhaps encourage, this variation of regret through post-abortion counseling services that emphasize “forgiveness” and “redemption.”²⁰⁵

These alternative permutations of regret point to a second critical consideration for lawmakers. Drawing on the philosophical literature unpacking the meaning and experience of regret, it may be helpful to understand “regret” in relation to “affirmation,” and to contextualize both. Neither regret nor affirmation follow inevitably from a particular decision. Instead, according to philosopher R. Jay Wallace, whether an individual eventually comes to regret or affirm a decision depends, in large part, on the attachments that they form (or fail to form) as a result of that decision.²⁰⁶ Wallace reasons from this observation that it is necessary to

²⁰³ See Marci L. Bowers, *What Decades of Providing Trans Health Care Have Taught Me*, N.Y. Times (Apr. 1, 2023), <https://www.nytimes.com/2023/04/01/opinion/trans-healthcare-law.html> [<https://perma.cc/7ULU-7NZ4>] (disentangling the many different reasons that people who sought GAC might experience some kind of regret).

²⁰⁴ Greasley, *supra* note 165, at 706.

²⁰⁵ See *Post Abortive Recovery Services*, FOCUS ON THE FAM. (last visited Feb. 27, 2024), <https://www.focusonthefamily.com/get-help/post-abortive-recovery-resources/> [<https://perma.cc/57FJ-G3NF>]; see also *Post Abortion Support*, LIFE CLINIC: CMTY. RESOURCES (last visited Feb. 27, 2024), <https://lifeclinic.org/trauma-services/post-abortion-support/> [<https://perma.cc/57FJ-G3NF>] (describing emotional effects of abortion including “mild to severe grief, anger, and shame”); *Hope and Healing*, SISTERS OF LIFE, <https://sistersoflife.org/healing-after-abortion/> [<https://perma.cc/LQ6M-GPWF>] (last visited Feb. 27, 2024) (describing the feelings of “deep guilt, shame, pain, anxiety, depression, fear, and feelings of isolation from God and others” that can follow abortion); Greasley, *supra* note 165, at 706 (arguing that what these anti-abortion services are doing is treating all regret as “regret that, once pregnant, she decided to end the life of the fetus” and ignoring the wide variety of other aspects of the abortion that a woman might regret, such as regret that she got pregnant in the first place, or regret that the abortion was necessary).

²⁰⁶ See PAUL J. GRIFFITHS, *REGRET: A THEOLOGY* 24–27 (2021) (offering a Christian theological account differentiating mistakes).

consider regret independently from the normative desirability of the initial decision.²⁰⁷

Legal scholar Kate Greasley draws on this literature to debunk what she calls the “moral justification thesis” in anti-abortion advocacy. The core (false) premise, she explains, is that “postabortion regret renders abortion morally unjustified.”²⁰⁸ Applying Wallace’s theory of regret to abortion regrets, she concludes that just as the absence of regret in having a child does not tell us that having the child was the morally desirable choice, the “*presence* of regret in the abortion scenario does not therefore take on justificatory significance simply because, had she kept the pregnancy, she would eventually have to affirm her decision.”²⁰⁹ In other words, the normative assessment of a reproductive choice (was it morally desirable or not?) in hindsight cannot be assessed through the lens of regret or affirmation because those are determined by later attachments (or their absence).

Similarly, a person who receives gender-affirming care and loses (or fails to gain) access to a school, a job, a close relationship with a parent, sibling, partner, or friend, may regret receiving gender-affirming care. In this hypothetical, the regret flows from the *traumatic loss* of (or an inability to form) a desired attachment. Thus, the regret in this hypothetical does *not* indicate that the decision to receive gender-affirming care was normatively or morally undesirable.

Disentangling regret from normative assessment helps illuminate the ways in which regret can be socially and politically constructed.²¹⁰ If, as Wallace posits, whether a person come to regret a choice depends on how that choice affects their attachments, then, to understand potential for regret, lawmakers must evaluate what those effects might be. But such analysis is contingent on unpredictable future events. For instance, a study in the 1970s of post-sterilization regret found that one of the populations most likely to regret the decision were those who ultimately separated from their current partners and entered a new relationship in which they desired to “bear children to a new partner.”²¹¹ These effects are also subject to manipulation. In the abortion context, laws requiring an ultrasound prior to abortion can hasten regret by causing a pregnant person to develop an attachment to a fetus that they may not otherwise have had.²¹² Social influence is also an important factor. For instance, the widespread availability of post-abortion counseling provides

²⁰⁷ See WALLACE, *supra* note 21, at 6–7.

²⁰⁸ Greasley, *supra* note 165, at 707–08.

²⁰⁹ *Id.* at 710.

²¹⁰ Appleton, *supra* note 72, at 316–17 (identifying a variety of ways in which public policy might generate regret of adoption and abortion decisions).

²¹¹ Brian Alderman, *Women Who Regret Sterilization*, 2 BRIT. MED. J. 766, 766 (1977).

²¹² Appleton, *supra* note 72, at 316–17; see also Katrina Kimport, *(Mis)Understanding Abortion Regret*, 35 SYMBOLIC INTERACTION 105, 106 (2012) (identifying “seeing an ultrasound” as one of many experiences that can increase a person’s attachment to pregnancy).

individuals with a vocabulary and a framework through which to understand a broad range of complicated feelings that they may have after an abortion.²¹³

Policymakers and courts should be skeptical of regret-prevention as a state interest, and instead strive to deconstruct the normativities driving regret in the first place. Removing regret from the conversation forces a more honest reckoning with what is at stake in these decisions—bodily autonomy, religious freedom, and the rights to self-identification and expression.

CONCLUSION

Regret is a fundamental part of the human experience, and it can be generative, even “transformative.”²¹⁴ In a provocative piece entitled, *My New Vagina Won’t Make Me Happy: And It Shouldn’t Have To*, transgender activist and public intellectual, Andrea Long Chu, reflected on her own gender dysphoria and transition. She wrote,

I’m telling you now: I still want this, all of it. I want the tears; I want the pain. Transition doesn’t have to make me happy for me to want it. . . . Desire and happiness are independent agents. . . . Nothing, not even surgery, will grant me the mute simplicity of having always been a woman. I will live with this, or I won’t. That’s fine. The negative passions — grief, self-loathing, shame, regret — are as much a human right as universal health care, or food. There are no good outcomes in transition. There are only people, begging to be taken seriously.²¹⁵

Many states have restricted access to abortion and gender-affirming care, ostensibly to protect individuals from decisions they may later regret. But the well-being of these individuals is not, and never was, the motivation behind this legislation. Rather, these laws are emblematic of a conservative agenda seeking to regress the nation to an era when women and LGBTQ+ people had no rights. Conservative lawmakers cite anecdotal cases of people discontinuing gender-affirming care or regretting abortions to justify denying these medical services

²¹³ Greasley, *supra* note 165, at 706–07 (observing that “women who do undergo abortions may be culturally conditioned or required to fit their subsequent reflections into a certain expressive framework, typically packaged in the language of regret”); Kimport, *supra* note 212, at 110–12 (identifying social disapproval of friends and family as an important factor in shaping post-abortion emotional experiences).

²¹⁴ BRIAN PRICE, *A THEORY OF REGRET* 134 (2017) (arguing that “turmoil, anxiety, and disarray are not only devastating . . . but also productive of thought itself, which rarely happens, when it happens, with immediate clarity, ease and indications of self-assurance”); Guthrie, *supra* note 73, at 898–902 (describing the way that regret can function as a learning tool that improves decision-making going forward).

²¹⁵ Andrea Long Chu, *My New Vagina Won’t Make Me Happy: And It Shouldn’t Have To*, *NY TIMES* (Nov. 24, 2018), <https://www.nytimes.com/2018/11/24/opinion/Sunday/vag-inoplasty-transgender-medicine.html> [<https://perma.cc/LD47-6NJQ>].

broadly. Yet, available research suggests regret is extremely uncommon for transgender youth receiving gender-affirming care, and the vast majority affirm their decision to have an abortion. The general public should be skeptical of these regret stories. Judges, likewise, should scrutinize regret-prevention rationales and treat them as what they are: foot soldiers in the ongoing battle over the “soul of America.”