

Targeted Regulation of Abortion Providers: Avoiding the “TRAP”

Executive Summary

"TRAP" stands for Targeted Regulation of Abortion Providers. TRAP laws regulate the medical practices of doctors who provide abortions by imposing burdensome requirements that are different and more stringent than regulations applied to comparable medical practices. These excessive and unnecessary government regulations ultimately harm women's health and inhibit their reproductive choices. The real purpose of TRAP laws is to make it harder for women to exercise their constitutional right to choose abortion.

Anti-choice legislators and government officials claim they target abortion providers in order to make abortion safer. However, legal abortion is one of the safest surgical procedures in this country. Singling out abortion with discriminatory TRAP measures serves only the anti-choice goal of making abortion prohibitively expensive and increasingly difficult to obtain.

TRAP laws do not fill any alleged "loophole." Instead, they take abortion providers outside of the existing regulatory schemes applicable to other physicians and subject them to more burdensome and unnecessary requirements.

TRAP laws have a number of negative effects. They deter physicians from becoming or remaining abortion providers by subjecting physicians who provide abortions to criminal and civil penalties, exposing them to harassment, and intruding significantly into their practice of medicine. As a result, TRAP laws reduce women's access to abortions services. In addition, TRAP laws significantly raise the cost of providing and obtaining abortions, and thereby cause some women to delay or even forego desired abortions.

TRAP laws raise a variety of constitutional concerns. By burdening and marginalizing abortion provisions, TRAP laws may violate women's rights to choose abortion and to equal protection of the laws. To the extent TRAP schemes threaten abortion patients' confidentiality, they may also violate women's right to informational privacy. TRAP laws may also violate the constitutional rights of abortion providers in three ways: by subjecting them to vague criminal laws; by forcing them to comply with unreasonable searches; and by violating their right to equal protection of the laws.

I. WHAT ARE TRAP LAWS?

"TRAP" refers to laws that single out physicians' offices and outpatient clinics in which abortions are performed and subject them to purported health requirements that are not imposed on comparable medical facilities. TRAP laws are different from other abortion specific laws (such as mandatory delay and parental involvement requirements) which attempt to influence the pregnant woman's decision in an alleged effort to promote the state's interest in potential life. TRAP laws do not aim to inform the woman's decision or protect potential life; they regulate the medical aspects of the abortion procedure in a purported effort to safeguard the pregnant woman's health. Because TRAP laws address the medical, rather than decisional, aspects of the abortion procedure, they target the aspects of abortion that are just like many other medical procedures.

For information on which states have TRAP laws, see the Center for Reproductive Right's factsheet titled "Targeted Regulation of Abortion Providers: Prevalence of TRAP Laws."

II. WHAT TYPES OF REQUIREMENTS DO TRAP LAWS IMPOSE?

As a general rule, TRAP laws require the licensing of facilities that provide abortions and then authorize the state health department to inspect those facilities and to ensure compliance with a range of statutory or regulatory requirements.¹ These requirements generally fall into seven categories.

First, although state health departments do not generally require licensing of the offices and clinics of physicians, TRAP laws carve out an exception to this rule in the case of physicians that provide abortions. TRAP laws typically authorize the state's health department to license abortion providers, and to impose criminal and civil penalties on facilities not in compliance with state licensing and other laws. For example:

Although the Health Department is empowered to license and regulate health clinics, that authority does not extend to "the residence, office, or clinic of a physician or association of physicians . . . unless ten or more abortions are performed in any one calendar week in such residence, office, or clinic." Neb. Rev. Stat. §§ 71-2017.01(9)

"A person is guilty of a class 3 misdemeanor who . . . [e]stablishes, operates or maintains [an abortion clinic] unless the person holds a current and valid license . . . each day that a violation continues shall constitute a separate violation" and is punishable by up to 30 days imprisonment and a fine of up to \$500. Ariz. Rev. Stat. §§ 36-431(A); 13-707(A)(3), 13-802(C)

Targeted Regulation of Abortion Providers: Avoiding the “TRAP”

Second, TRAP laws often explicitly authorize the state health department to search the offices and medical records of physicians subject to the schemes. For example:

"[Health] Department inspectors shall have access to all properties and areas, objects, records and reports [of the abortion facility], and shall have the authority to make photocopies of those documents required in the course of inspections or investigations." S.C. Reg. 61-12 § 102-F

An abortion facility licensee must "[e]nsure that the [Health] Department's director or director's designee is allowed access to the abortion clinic during the hours of operation." Ariz. Admin. Code R9-10-1503(B)(4)

Third, TRAP schemes frequently impose administrative burdens by requiring written practices, policies and procedures that otherwise might not be in place or might exist only in an informal manner. The following are two examples of such burdensome requirements:

Licensed facilities must establish and maintain a written "quality assurance program," run by a quality assurance committee of at least four staff members, who must meet at least quarterly. 25 Tex. Admin. Code § 139.8(a)

"Written policies and procedures shall include, but not be limited to: 1. Safety rules and practices pertaining to personnel, equipment, gases, liquids, drugs, supplies and services; 2. Provisions for reporting and investigating accidental events regarding patients, visitors and personnel and corrective action taken; 3. Provisions for disseminating safety-related information to employees and users of the facility . . ." S.C. Reg. 61-12 § 501

Fourth, TRAP schemes regularly include requirements as to the training and qualifications of staff members. For example, Missouri requires the following:

"The abortion facility nursing service shall be under the direction of a legally and professionally qualified registered nurse." Missouri Min. Stds. of Operation for Abortion Facilities § 301.3

"Physicians performing abortions at the facility shall have staff privileges at a hospital within fifteen (15) minutes travel time from the facility or the facility shall show proof there is a working arrangement between the facility and a hospital within fifteen (15) minutes travel time from the facility granting the admittance of patients for emergency treatment whenever necessary." 19 CSR 30-30.060(1)(c)(4) (Missouri)

Fifth, some TRAP laws require testing of patients or employees that may not otherwise be performed. For example:

"[E]ach employee shall have a pre-employment health examination by a physician. The examination is to be repeated annually and more frequently if indicated to ascertain freedom from communicable diseases." Missouri Min. Stds. of Operation for Abortion Facilities § 203.2

"Prior to the [abortion] procedure, laboratory tests shall include...[d]etermination of Rh factor (including the Du variant when the patient is Rh negative) and . . . [t]esting for Chlamydia and gonorrhea. . ." S.C. Reg. 61-12 § 304-C

Sixth, TRAP laws frequently impose requirements as to the physical design and function of the regulated facility. The following examples illustrate these types of requirements:

Abortion procedure and recovery rooms shall have a minimum of six air changes per hour, and "all air supplied to procedure rooms shall be delivered at or near the ceiling" and must pass through "a minimum of one filter bed with a minimum filter efficiency of 80 percent." 10 N.C. Admin. Code 3E.0206

"All outside areas, grounds and/or adjacent buildings shall be kept free of rubbish, grass, and weeds that may serve as a fire hazard or as a haven for insects, rodents and other pests." S.C. Reg. 61-12 § 606

Finally, some TRAP schemes also include a variety of other requirements that may be difficult to interpret and impossible to comply with. Among these are the following:

Licensed facilities must ensure that all patients are cared for in a manner that "enhances [the patient's] self-esteem and self-worth." 25 Texas Admin. Code § 139.51

Licensed facilities may be fined not only for violating the explicit provisions of the regulatory scheme but also for taking any other actions which "are against the best practices as interpreted by the [Health] Department." S.C. Reg. 61-12 § 103-C

III. WHAT IS WRONG WITH TRAP LAWS?

While TRAP laws may seem innocuous or well-meaning at first glance, they severely threaten women's ability to choose an abortion in a number of ways. First, by treating abortion differently from all other comparable medical procedures and subjecting it to a unique level of micro-management and governmental oversight, TRAP laws segregate abortion providers and patients from the rest of medical practice and relegate abortion services to a status below other health care. Second, by subjecting abortion providers to criminal and civil penalties, exposing them to harassment, and intruding significantly into their practice of medicine, TRAP laws deter physicians from becoming or remaining

Targeted Regulation of Abortion Providers: Avoiding the “TRAP”

abortion providers. Thus, TRAP laws threaten to reduce the number of abortion providers, particularly in private practices, resulting in less access for women to abortion services. Third, by imposing requirements that significantly raise the cost of providing abortions, TRAP laws increase abortion prices, causing some women to delay or even forego desired abortions. Fourth, by imposing medically unnecessary, and at times inappropriate, requirements on abortion provision, TRAP laws interfere with physicians’ ability to exercise their medical judgment in the best interests of their patients.

IV. ARE TRAP LAWS CONSTITUTIONAL?

Some TRAP laws might be struck down as unconstitutional if challenged in court. The likelihood of winning such a challenge depends in part on the degree of burdens the TRAP scheme imposes and the extent to which it is actually tailored to the nature and safety of abortion procedures. A number of TRAP laws were successfully challenged in federal court prior to the Supreme Court's decision in *Planned Parenthood v. Casey* in 1992.² However, the *Casey* decision adopted a new, lower standard of review that makes it more difficult to challenge abortion restrictions. Since *Casey*, only a few legal challenges have been brought to TRAP laws, and thus far, those suits have met with only limited success or, at times, even failure.³

TRAP laws potentially violate a number of constitutional guarantees:

The Rights of the Women Seeking an Abortion:

- To Equal Protection of the Laws
- To Choose an Abortion
- To Informational Privacy

The Rights of the Abortion Provider:

- To Equal Protection of the Laws
- To be Free from Unreasonable Searches
- Not to be Subjected to Vague Criminal Laws

A. EQUAL PROTECTION

First, some TRAP laws should be found to violate the rights of abortion providers and their patients to equal protection of the laws. As a medical or health matter, abortion is no different from many other outpatient procedures that do not trigger state regulation. Specifically, depending on gestational age and abortion method, the procedures' risks, complications, complexity, duration, etc. are comparable to, or less significant than,

those for many other medical procedures, such as completion of spontaneous abortion, minor breast biopsies, and removal of subcutaneous lymphomas from various body parts. As a general principle, the equal protection clause requires treating similarly situated groups similarly.⁴ In most circumstances, the states have a significant amount of flexibility to draw lines between groups and to enforce laws that have unequal application. Where constitutional rights are at stake, however, the states must craft their laws with precision and be able to justify burdening the constitutional rights of a singled out group.⁵ TRAP laws infringe on a woman's right to choose an abortion and should therefore be upheld only if they are narrowly drawn to serve legitimate purposes. Some TRAP laws may not be able to meet this test because there simply is no legitimate reason for singling out abortion from all other medical procedures for the imposition of purported health regulations.

Unfortunately, these equal protection arguments have been rejected by two federal courts in post-*Casey* decisions, which held that abortion is unique and may therefore be treated differently than other medical procedures.⁶ In both decisions, the courts failed to recognize that TRAP laws have nothing to do with the aspect of abortion that is unique – namely, its termination of potential life – and instead addressed only the medical aspects of abortion, which are comparable to numerous other medical procedures performed by physicians. By upholding TRAP laws on the basis of the state's unrelated interest in potential life, these two courts erroneously subjected the TRAP laws to the lowest possible level of constitutional scrutiny.

B. UNREASONABLE SEARCHES AND SEIZURES

Some TRAP laws may also violate abortion providers' right to be free from unreasonable search and seizures. Many TRAP schemes provide for inspection of regulated facilities and require that providers give the state health department access to their facilities essentially whenever the department chooses. To the extent that these schemes require providers to consent to searches without a search warrant, without a showing of a possible legal violation and regardless of whether patients are in the facility at the time, they may violate the Fourth Amendment.⁷ Thus, federal district courts in Arizona and Louisiana both have held that schemes authorizing such searches of abortion facilities were unconstitutional.⁸

C. INFORMATIONAL PRIVACY

Some TRAP schemes permit review and even copying of patient medical records during searches by the state health department. Such provisions create a serious threat to patient confidentiality and are likely to deter some women from safely seeking abortion services. They may also be found to violate the right of abortion patients to privacy in their personal medical information. Thus, a federal court struck down such a law in Louisiana, recognizing that: "Communications with patients, including records, are privileged and may not be disclosed to any third party without the patient's express consent. . . . A patient feels free to reveal data to a doctor only because she knows that it will not be revealed to anyone without her permission. Absent such a guarantee of privacy, doctors and their patients cannot realize the desired result of consultation: a discussion free of restraint."⁹ A federal court in Arizona also recently held that allowing the state health department access to abortion patients' medical records violated those patients' right to informational privacy.¹⁰

Targeted Regulation of Abortion Providers: Avoiding the “TRAP”

D. RIGHT TO DUE PROCESS

TRAP laws often contain very vague provisions that are difficult for providers to comply with. Such TRAP laws may violate the principle of due process that a law defining a crime must give fair notice of the conduct prohibited. If it does not, then the law is void for vagueness.¹¹ Pursuant to this principle, a federal appeals court recently struck down portions of a Texas TRAP law, including the requirement that abortion providers care for patients in a manner that "enhances [the patient's] self-esteem and self-worth."¹²

E. RIGHT TO PRIVACY

Finally, TRAP laws may violate women's right to choose an abortion. Under both *Roe* and *Casey*, purported health regulations can only be enforced if they serve the state's interest in promoting the health of abortion patients and if they have neither the purpose or effect of unduly burdening the woman's ability to exercise her decision to have an abortion.¹³ TRAP laws may violate women's right to privacy with respect to both of these limitations. First, TRAP laws may impose unnecessary, costly requirements that will not improve abortion safety, and will instead only reduce access to the procedure. To the extent they do so, they harm rather than promote patient health. Second, to the extent TRAP schemes significantly raise the price of abortions or decrease the availability of abortion providers, they may significantly impair the woman's ability to obtain a desired abortion. Either could have the effect of unduly burdening the woman's choice. Moreover, if a TRAP law is passed or enforced with the purpose of burdening the provision of abortions, rather than promoting maternal health, it may also be found unconstitutional.

Endnotes

1. A number of exceptions exist. Wisconsin, for example, does not require facility licensing or inspections and imposes relatively minimal requirements that do not include any physical plant specifications. See Wis. Admin. Code § 11.04.
2. See, e.g., *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). See also, e.g., *Ragsdale v. Turnock*, 841 F.2d 1358, 1372-74 (7th Cir. 1988); *Mahoning Women's Ctr. v. Hunter*, 610 F.2d 456 (6th Cir. 1979), vacated on other grounds, 447 U.S. 918 (1980), *Friendship Med. Ctr., Ltd. v. Chicago Bd. of Health*, 505 F.2d 1141 (7th Cir. 1974).
3. See, e.g., *Tucson Woman's Clinic v. Eden*, No. CV 00-141-TUC-RCC, slip op. (D. Ariz. Oct. 1, 2002) (striking down portions of Arizona's TRAP scheme as violative of abortion patients' right to informational privacy and abortion providers' right to be free from unreasonable searches); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000) (upholding TRAP scheme as consistent with abortion patients' rights to privacy and equal protection).
4. See, e.g., *Romer v. Evans*, 517 U.S. 620, 623 (1996); *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 439 (1985).
5. See *Shapiro v. Thompson*, 394 U.S. 618 (1969).
6. *Tucson Woman's Clinic*, No. CV 00-141-TUC-RCC, slip op. at 5-6; *Greenville Women's Clinic*, 222 F.3d at 172-75.
7. See U.S. Const. amend. IV; *New Jersey v. T.L.O.*, 469 U.S. 339, 340-41 (1985); *Michigan v. Tyler*, 436 U.S. 499, 504-05 (1978).
8. *Tucson Woman's Clinic*, No. CV 00-141-TUC-RCC, slip op. at 7-9; *Margaret S. v. Edwards*, 488 F. Supp. 181, 244 (E.D. La 1980).
9. *Margaret S.*, 488 F. Supp. at 244.
10. *Tucson Woman's Clinic*, No. CV 00-141-TUC-RCC, slip op. at 9-11.
11. See *Grayned v. City of Rockford*, 408 U.S. 104, 107-09 (1972).
12. *Women's Med. Ctr. v. Bell*, 248 F.3d 411, 422 (5th Cir. 2001).
13. See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 877 (1992) (joint opinion).