

PREGNANCY CENTERS AND THE LIMITS OF MANDATED DISCLOSURE

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Pro-life pregnancy centers have been criticized for attracting clients through false or misleading marketing and, once clients are through the door, for presenting false or misleading—or at least incomplete—information. A common contemporary means of regulating pregnancy centers is through statutes that require pregnancy centers to give notice that their services are not comprehensive. In 2018, in National Institute of Family and Life Advocates v. Becerra, the Supreme Court held that California’s version of such a disclosure statute likely amounted to compelled speech impermissible under the First Amendment.

This Note argues that, separate from their constitutional validity, disclosure requirements are not necessarily the panacea that pro-choice advocates want them to be. Early attempts to regulate pregnancy centers relied on existing false advertising and unfair business practices statutes to prohibit pregnancy centers from engaging in misleading marketing that suggested the centers offered services they did not. When those suits were successful, the resulting injunctive relief often resembled contemporary notice regimes—and so is vulnerable to the same critiques. Both regulatory schemes are addressed primarily to pregnancy centers’ deceptive marketing practices and do little to remedy the misinformation that awaits women inside pregnancy centers’ doors. Furthermore, transparency literature teaches that even as to this narrow goal, disclosure-type regulation may be ineffective: Critiques of the efficacy of mandated disclosure as a regulatory tool generally likely apply with special force in the context of pregnancy centers.

INTRODUCTION

“A car dealer, when he’s advertising, does not list the things his auto won’t do. So why should we say we don’t do abortions?”

— Robert J. Pearson, author of *How to Start and Operate Your Own Pro-life Outreach Crisis Pregnancy Center*¹

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1. Jane Gross, *Pregnancy Centers: Anti-abortion Role Challenged*, N.Y. Times (Jan. 23, 1987), <https://www.nytimes.com/1987/01/23/nyregion/pregnancy-centers-anti-abortion-role-challenged.html> (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting “previous published interviews” with Pearson).

Robert Pearson founded one of the first pro-life pregnancy centers in the United States and went on to author a manual designed to help others do the same.² Pregnancy centers are facilities that provide faith-based pro-life counseling and support services to pregnant women, usually free of charge.³ Notably, pregnancy centers do not provide abortion services or referrals to abortion providers, and they often do not provide or refer for contraceptives.⁴ Pregnancy centers have been criticized for attracting clients through false or misleading marketing and, once clients are through the door, for presenting false or misleading—or at least incomplete—information.⁵ These tactics mean that pregnancy centers’

2. See Abortion Clinic Violence: Oversight Hearings Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 99th Cong. 300 (1986) [hereinafter Oversight Hearings] (excerpts from the Pearson brochure). Original copies of *How to Start and Operate Your Own Pro-life Outreach Crisis Pregnancy Center* are not readily available but significant sections are reproduced in the hearing record cited above.

3. See Nat’l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2368 (2018) (“Crisis pregnancy centers . . . are ‘pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center.’” (quoting Casey Watters, Meg Keane & Natalie Evans, Pub. Law Research Inst., *Pregnancy Resource Centers: Ensuring Access and Accuracy of Information* 4 (2011))); see also What Is a Pregnancy Center?, Care Net, <https://www.care-net.org/what-is-a-pregnancy-center> [<https://perma.cc/SNT4-SMTT>] (last visited Feb. 2, 2019) (describing pregnancy centers generally and listing the services that may be provided by centers affiliated with Care Net). This Note uses the term “pregnancy center” to refer to any licensed or unlicensed facility that provides pregnancy-related services intended to discourage or prevent women from seeking abortion. Cf. Care Net, *The Truth About “Crisis Pregnancy Centers”* 2 (2016), https://www.care-net.org/hubfs/Downloads/The_Truth_About_Crisis_Pregnancy_Centers.pdf [<https://perma.cc/35JX-9KSN>] (“Not all women who seek information about their options feel as though they are in a crisis. And ‘suggesting’ . . . they should feel as though they are . . . is counterproductive. Therefore, most ‘crisis pregnancy centers’ have . . . begun referring to themselves as pregnancy resource centers, pregnancy care centers, or simply pregnancy centers.”). Another note on terminology: This Note uses female pronouns and terms like “pregnant women” to refer to pregnancy centers’ clients, since most pregnant persons are female, but the analysis holds to the extent that a pregnancy center serves or markets to clients other than those who identify as women.

4. See, e.g., Care Net, *Pregnancy Center Standards of Affiliation 1* (2017) [hereinafter *Care Net, Standards*], https://cdn2.hubspot.net/hubfs/367552/Standards-of-Affiliation_2017.pdf [<https://perma.cc/8W2H-Y3TC>] (requiring each affiliated pregnancy center to affirm that it “does not perform or refer for abortion” and that it “does not recommend, provide, or refer single women for contraceptives”); *Our Commitment*, Heartbeat Int’l, <https://www.heartbeatinternational.org/about/our-commitment> [<https://perma.cc/9CDR-8SVB>] (last visited Feb. 3, 2019) (listing among its policies that the organization “does not promote abortion or abortifacients” and that it “does not promote birth control (devices or medications) for family planning, population control, or health issues, including disease prevention”); cf. *NIFLA*, 138 S. Ct. at 2368 (“[P]regnancy centers ‘are commonly affiliated with, or run by organizations whose stated goal’ is to oppose abortion” (quoting joint appendix at 85)).

5. See, e.g., Minority Staff of the H. Comm. on Gov’t Reform, 109th Cong., *False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers 1, 7–14* (2006) [hereinafter *Waxman Report*] (describing an investigation’s findings that the “vast majority” of pregnancy centers contacted “provided information . . . that was false or

clients are often unaware that they are not receiving comprehensive reproductive healthcare information or access to comprehensive services, undermining their ability to make informed and autonomous reproductive health decisions.⁶

In the late 2000s, state and local legislators began efforts to check pregnancy centers' deceptive or misleading practices by mandating that pregnancy centers disclose what services they do and do not offer.⁷ California's Reproductive FACT Act—the most recent iteration of this approach to regulating pregnancy centers, and the statute at issue in the 2018 Supreme Court case *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*)—required licensed healthcare facilities to post or distribute a notice recognizing that the state provides free or low-cost family planning services, including abortion.⁸ The FACT Act also required any nonmedical facility that counsels about reproductive health to post or distribute a notice acknowledging that it is not licensed as a medical facility by the state.⁹ Pregnancy centers and related national umbrella organizations had previously challenged similar notice requirements on free speech grounds with mixed success. In June 2018, pregnancy center proponents scored a major victory when the Supreme Court found that California's law likely amounted to compelled speech impermissible under the First Amendment.¹⁰

But separate from disclosure requirements' constitutional validity, the history of pregnancy centers and past attempts to regulate them suggest that such requirements are not necessarily the panacea that pro-choice advocates want them to be. When pregnancy centers first came under fire for deceptive practices in the 1980s, some cities and states brought enforcement actions against them alleging violations of existing false advertising or unfair business practices statutes.¹¹ When those actions succeeded, the remedies courts prescribed often looked a lot like the notice requirements in vogue today. But this regulatory activity didn't lead to a sea change in pregnancy center practices; decades later, pregnancy centers continue to engage in the same kinds of misleading marketing and still

misleading” and that pregnancy centers “often mask their pro-life mission”). The Waxman Report is more than ten years old and relied on a study of only twenty-three pregnancy centers, *id.* at i, but it remains Congress's only investigation into pregnancy centers and their practices. For additional reporting on these practices, see *infra* section I.B.

6. See Waxman Report, *supra* note 5, at 14 (concluding that pregnancy centers' failure to provide accurate medical information “denies . . . women vital health information, prevents them from making an informed decision, and is not an accepted public health practice”); see also *id.* at 7 (“A pregnant teenager who relied on the information from these federally funded centers would make her decision about whether to give birth or terminate her pregnancy based on erroneous facts and misinformation.”).

7. See *infra* section II.A.2.

8. See Cal. Health & Safety Code § 123472(a) (2019); *NIFLA*, 138 S. Ct. at 2368–69.

9. See Cal. Health & Safety Code § 123472(b); *NIFLA*, 138 S. Ct. at 2368–69.

10. *NIFLA*, 138 S. Ct. at 2378.

11. See *infra* section II.A.1.

provide less than comprehensive reproductive healthcare information and services.

This Note suggests that those early attempts at regulating pregnancy centers failed at least in part because they targeted only the threshold deception that attracts women to pregnancy centers; they did nothing to combat the misinformation that awaited women once they walked through a pregnancy center's doors. Likewise, today's mandated disclosure statutes, including California's FACT Act, target only that threshold deception and are impotent when it comes to combatting the deception women face beyond the waiting room. Moreover, transparency literature teaches that even as to this narrow goal, disclosure-type regulation is likely ineffective.

This Note argues that pro-choice policymakers interested in promoting the health and well-being of pregnant women and in protecting a woman's ability to exercise the full panoply of her constitutional rights need to do more than rebut misinformation with disclosure. Part I surveys the history of pregnancy centers in the United States and the practices that have brought them under scrutiny. Part II then compares efforts to check those practices under false advertising or deceptive business practices statutes with contemporary mandated disclosure requirements. It situates these regulatory schemes within mandated disclosure literature and explores why disclosure has not worked before and, at least in its current form, is unlikely to work in this context. Finally, Part III considers alternative approaches for policymakers committed to protecting the ability of pregnant women to make informed, autonomous decisions.

I. THE CRISIS PREGNANCY CENTER CRISIS

Pregnancy centers have been part of the United States' reproductive healthcare landscape since at least the 1970s, when states began to liberalize or repeal laws that criminalized abortion.¹² By the 1980s, pregnancy centers had "become the focus of heated criticism and legal challenge."¹³ Pregnancy centers have now been operating in this country for almost fifty

12. See Margaret H. Hartshorn, *The History of Pregnancy Help Centers in the United States*, Heartbeat Int'l, https://www.heartbeatinternational.org/pdf/History_of_Centers.pdf [<https://perma.cc/HY38-EQ6F>] (last visited Feb. 3, 2019) (providing a timeline and tracing both "efforts to change state laws" and the "[o]riginal centers" offering crisis intervention and other services to the 1960s); see also Sarah Kliff, *Charts: How Roe v. Wade Changed Abortion Rights*, Wash. Post (Jan. 22, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/01/22/charts-how-roe-v-wade-changed-abortion-rights> [<https://perma.cc/B8FV-9MUY>] ("States began liberalizing their abortion laws in the 1960s and 1970s.").

13. Gross, *supra* note 1 (describing the New York State Attorney General's investigation into three pregnancy centers, all affiliated with the Pearson Foundation, and referencing similar investigations in other states); see also Congressional Inquiry Examines Reports of Bogus Abortion Clinics, N.Y. Times (Sept. 21, 1991), <https://www.nytimes.com/1991/09/21/us/congressional-inquiry-examines-reports-of-bogus-abortion-clinics.html> (on file with the *Columbia Law Review*) (quoting a House subcommittee staff report that found pregnancy centers to be "venues for hard-sell and often abusive anti-abortion arguments and tactics aimed at unsuspecting and vulnerable consumers" (internal quotation marks omitted)).

years, but it remains an open question how legislatures can (and should) regulate them.

This Part lays the groundwork for discussing how pregnancy centers are regulated by describing where they came from and what they do. Section I.A briefly surveys the history of pregnancy centers in the United States and describes, in broad strokes, how they operate. Section I.B then spotlights the kinds of deceptive practices that the laws described in Part II were designed to combat.

A. *An Introduction to Pregnancy Centers in the United States*

There is no definitive history that systematically chronicles the emergence of pregnancy centers or tracks their operations over time. Indeed, because “[t]hey are not in anybody’s database,” it is difficult to pin down even a reliable estimate of the number of pregnancy centers currently operating in the United States.¹⁴ This section instead relies on representative examples to illustrate how pregnancy centers came to be and the role they play in the landscape of reproductive healthcare today.

1. *History.* — One of the first facilities to offer pregnancy center-like services in the United States was established in Hawaii around 1970, when that state became the first in the nation to legalize abortion “at the request of the woman”—that is, with no restriction on the reasons for seeking an abortion.¹⁵ It was founded by Robert Pearson, leader of an unsuccessful campaign against the repeal of Hawaii’s abortion restrictions and author of the quotation that began this Note.¹⁶ In March 1970, shortly before Hawaii’s liberalized abortion bill became law, Pearson announced his plan to establish a place where pregnant women who might be considering abortions could come “to think it over.”¹⁷

14. C. Eugene Emery Jr., Tallies Are Too Sketchy to Say Anti-abortion Centers Outnumber Abortion Providers 2 to 1, *PolitiFact* (May 17, 2016), <http://www.politifact.com/punditfact/statements/2016/may/17/vicki-saporta/tallies-are-too-sketchy-say-anti-abortion-centers/> [<https://perma.cc/5WRQ-S2AH>] (quoting Elizabeth Nash, a senior state issues associate at the Guttmacher Institute, a research and policy organization that studies sexual and reproductive health and rights). But see *infra* text accompanying notes 28–29 (attempting an estimate).

15. See Roy G. Smith et al., *Abortion in Hawaii: The First 124 Days*, 61 *Am. J. Pub. Health* 530, 530 (1971) (noting that Hawaii became the first state to legalize abortion “essentially at the request of the woman” on March 13, 1970); About Us, *Pregnancy Problem Ctr.*, <https://pregnancyproblemcenter.org/about-us> (on file with the *Columbia Law Review*) (last visited Feb. 3, 2019) (describing the Maui-based pregnancy center’s founding). Alaska and New York also legalized abortion in 1970. See Leslie J. Reagan, *When Abortion Was a Crime* 241 (1998).

16. 119 Cong. Rec. 16,348 (1973) (statement of Rep. Hogan); see also About Us, *supra* note 15.

17. 119 Cong. Rec. 16,348 (statement of Rep. Hogan) (“Pearson said he wanted to give women who are planning abortions a chance ‘to come to the beautiful island of Maui to think it over. No questions asked,’ he promised.” (quoting Leonard Lueras, *One Man’s Love for Life*, *Columbia*, April 1973)).

Pearson, operating out of his home, offered housing, counseling, prenatal care, and financial support to pregnant women.¹⁸ His goal in providing these services was “to let women know that they have alternatives to abortion,”¹⁹ and his plan seemed to work. By May 1970, seven pregnant women had visited Pearson’s facility, and all seven decided against abortion.²⁰ By May 1973, more than 120 pregnant women had used his services; only two chose to go through with an abortion.²¹

Pearson was part of a larger movement of faith-based groups and individuals who responded to abortion liberalization by identifying ways to intervene in a woman’s decision to end her pregnancy.²² By 1971, still two years before the Supreme Court’s decision in *Roe v. Wade*,²³ the proliferation of pregnancy centers, crisis hotlines, and pro-life adoption agencies justified the creation of a separate organization—which would become Heartbeat International—that tracked and advertised listings for “abortion alternative” service providers.²⁴ By 1993, the original catalog of seventy-five service providers had grown to about two hundred organizations.²⁵ Today, Heartbeat International counts over 2,500 affiliated institutions.²⁶

2. *Services and Structure.* — Heartbeat International is now one of several national umbrella organizations that provide pregnancy centers with training materials and other resources and that spearhead public relations and lobbying efforts.²⁷ The exact number of pregnancy centers in the United States is unknown, but the national umbrella organizations’ membership rolls provide a useful starting point. In addition to Heartbeat International’s 2,500 affiliated pregnancy centers (a number that includes some pregnancy centers located abroad), Care Net lists

18. *Id.*

19. *Id.* (quoting Leonard Lueras, *One Man’s Love for Life*, Columbia, April 1973).

20. *Id.* at 16,349.

21. *Id.*

22. Professor Karissa Haugeberg describes the pregnancy center movement’s approach to abortion politics as seeking “to narrow women’s right to abortion under the guise of saving [women] from their own shortsightedness, from ill-intentioned boyfriends, and from an unjust system that did not value motherhood.” Karissa Haugeberg, *Women Against Abortion: Inside the Largest Moral Reform Movement of the Twentieth Century* 10 (2017). This focus on the woman and her well-being differed from the conventional pro-life movement at the time, which “focused almost exclusively on the rights of fetuses.” *Id.*

23. 410 U.S. 113 (1973).

24. See *Our Story*, Heartbeat Int’l, <https://www.heartbeatinternational.org/about/our-story> [<https://perma.cc/DL9Y-9CKS>] (last visited Feb. 3, 2019) (“Hotlines grew into pregnancy help centers and medical clinics. People opening their homes to abandoned or desperate young mothers developed into maternity homes. . . . A clearinghouse was needed to track and share contact information.”).

25. *Id.*

26. *Id.*

27. See Waxman Report, *supra* note 5, at 1 (“Many pregnancy resource centers, including all the centers contacted in this investigation, are affiliated with one or more national umbrella organizations.”).

over 1,100 affiliated centers,²⁸ and the National Institute of Family and Life Advocates (NIFLA) works with over 1,400 centers, including nearly 1,100 that operate as licensed medical clinics.²⁹

Today's pregnancy centers offer a variety of services broadly related to family planning, including pregnancy tests, "options counseling" for women with unplanned pregnancies, material support (such as prenatal vitamins, diapers, cribs, and baby clothes), assistance in enrolling in Medicaid, parenting classes, abstinence counseling, housing, programming for fathers, support groups for women who have had abortions, and Bible studies.³⁰ Increasingly, pregnancy centers are moving toward hiring licensed medical professionals and becoming licensed as medical clinics.³¹ Pregnancy centers licensed as medical clinics are able to offer additional services, such as limited ultrasounds.³² Less common are pregnancy centers that also provide testing for sexually transmitted infections, pap smears, prenatal care, birthing centers, and well-baby care.³³

28. FAQ, Care Net, <https://www.care-net.org/FAQ> [<https://perma.cc/3H6P-KMZU>] (last visited Feb. 3, 2019). Care Net began as the Christian Action Council and founded its first pregnancy center in Baltimore in 1980. Family Research Council, *A Passion to Serve, a Vision for Life: Pregnancy Resource Center Service Report 2009*, at 7 (2009) [hereinafter PRC Report], <http://downloads.frc.org/EF/EF09I51.pdf> [<https://perma.cc/LC2N-G9AC>]. It changed its name to "Care Net" in 1999. *Id.*

29. History, Nat'l Inst. of Family & Life Advocates, <http://www.nifla.org/about-us/history.asp> [<https://perma.cc/QDR5-9NG2>] (last visited Feb. 3, 2019). NIFLA specializes in offering legal assistance and medical training to its affiliates, see *id.*, and was one of the petitioners that challenged the constitutionality of California's FACT Act, see *infra* note 145 and accompanying text.

30. See, e.g., PRC Report, *supra* note 28, at 24–39 (providing an overview of the kinds of services offered by pregnancy centers in the United States); *What Is a Pregnancy Center?*, *supra* note 3 (listing the services typically offered by pregnancy centers affiliated with Care Net).

31. See PRC Report, *supra* note 28, at 25 ("The growth in the number of medically oriented pregnancy centers has been impressive, and . . . center 'conversions' to medical clinic status are expected to remain high.").

32. *Id.* A "limited" ultrasound is an ultrasound performed to answer a specific question, such as determining gestational age. FAQ, The Am. Coll. of Obstetricians & Gynecologists (June 2017), <https://www.acog.org/Patients/FAQs/Ultrasound-Exams#an> [<https://perma.cc/WKA2-N5A3>]. This differs from a "standard" ultrasound, which also "checks the fetus's physical development [and] screens for major congenital anomalies." *Id.* NIFLA, which helps pregnancy centers convert to licensed medical clinics, encourages conversion because, on its account, medical services—especially ultrasounds—"offer[] a window to the womb which can impact a woman's decision to choose." About NIFLA, Nat'l Inst. of Family & Life Advocates, <https://nifla.org/about-nifla/> [<https://perma.cc/3B8N-GV3Q>] (last visited Feb. 4, 2019).

33. See, e.g., Medical Services, Heartbeat Int'l, <https://www.heartbeatinternational.org/peggy-hartshorn-responds-to-naral-government-strategy-against-pregnancy-centers/item/111-medical-services> [<https://perma.cc/H9T5-JFD6>] (last visited Feb. 3, 2019) (describing the expanding array of medical services offered by some pregnancy centers affiliated with Heartbeat International); *What Is a Pregnancy Center?*, *supra* note 3 (listing the medical services offered by some pregnancy centers affiliated with Care Net).

Pregnancy centers typically do not charge their clients for the services they provide and are funded in large part through private donations.³⁴ Increasingly, they also receive state and federal funding, and many rely on reimbursements from Medicaid.³⁵ During President George W. Bush's first term, more than \$30 million of federal funds were directed to pregnancy centers.³⁶ The Obama Administration temporarily discontinued but later revived, albeit with a smaller budget, the Community-Based Abstinence Education program that was the largest source of these federal funds,³⁷ and pregnancy centers continued to receive federal dollars through other grant programs, including President Obama's National Fatherhood Initiative.³⁸ The Trump Administration's proposed changes to Title X, a program established in 1970 "to assist in making comprehensive voluntary family planning services readily available to all persons desiring such services,"³⁹ would funnel even more federal grant funds to pregnancy centers.⁴⁰ The Administration has said that "it would prioritize grant applications to the Title X family-planning program that come from organizations with a religious background and counsel abstinence or 'natural' methods [of contraception]."⁴¹

34. See, e.g., What Is a Pregnancy Center?, *supra* note 3 ("Clients are able to obtain these services without charge at almost every center.").

35. See Haugeberg, *supra* note 22, at 51–54 (examining pregnancy center funding and connecting the proliferation of pregnancy centers to increases in government funding); Sarah McCammon, How Crisis Pregnancy Center Clients Rely on Medicaid, NPR (July 24, 2017), <https://www.npr.org/sections/health-shots/2017/07/24/538556088/crisis-pregnancy-centers-help-pregnant-women-enroll-in-medicaid> [<https://perma.cc/MX67-BY7E>].

36. See Waxman Report, *supra* note 5, at 3.

37. See Jessica Boyer, New Name, Same Harm: Rebranding Federal Abstinence-Only Programs, Guttmacher Inst. (Feb. 28, 2018), <https://www.guttmacher.org/gpr/2018/02/new-name-same-harm-rebranding-federal-abstinence-only-programs> [<https://perma.cc/2XBY-7XB6>].

38. See, e.g., Fathers in Pregnancy Centers, Nat'l Fatherhood Initiative, <https://www.fatherhood.org/fathers-in-pregnancy-centers> [<https://perma.cc/YQ7E-6PKX>] (last visited Feb. 3, 2019) ("National Fatherhood Initiative works with pregnancy centers to ensure that they have the tools and training they need to integrate fathers into their work, helping them build strong families."); see also Susan A. Cohen, The Obama Administration's First Budget Proposal Prioritizes Sex Education and Family Planning but Not Abortion Access, Guttmacher Inst. (May 28, 2009), <https://www.guttmacher.org/gpr/2009/05/obama-administrations-first-budget-proposal-prioritizes-sex-education-and-family> [<https://perma.cc/J8DW-857M>].

39. Family Planning Services & Population Research Act of 1970, Pub. L. No. 91-572, § 2, 84 Stat. 1504, 1504 (codified as amended in scattered sections of 42 U.S.C.).

40. See Michelle Hackman, Trump's Family-Planning Program to Prioritize Faith-Based Clinics, Wall St. J. (Feb. 23, 2018), <https://www.wsj.com/articles/u-s-cuts-funding-for-title-x-family-planning-program-1519433036> (on file with the *Columbia Law Review*).

41. *Id.*; see also Olga Khazan, 'More Than a Gag Rule,' Atlantic (June 4, 2018), <https://www.theatlantic.com/health/archive/2018/06/texas-trump-title-x/561905/> [<https://perma.cc/PP5F-J34H>] (describing the potential impact of the proposed Title X rule changes, especially on the low-income communities traditionally served by Title X clinics).

Further, some states funnel federal Temporary Assistance for Needy Families (TANF) welfare block grants to pregnancy centers.⁴² States also channel their own grants to pregnancy centers: Pregnancy centers are often beneficiaries of state-run abstinence-education grants,⁴³ some states have line items in their budgets to fund pregnancy centers,⁴⁴ and seventeen states donate at least a portion of the profits from the sale of specialized “Choose Life” license plates directly to pregnancy centers.⁴⁵

B. *Misleading or Deceptive Practices*

After founding his facility in Hawaii, Pearson authored the manual *How to Start and Operate Your Own Pro-life Outreach Crisis Pregnancy Center*.⁴⁶ In it, he outlined some of the most coercive tactics now associated with pregnancy centers. When discussing phone call procedures, for example, Pearson advised: “When you receive a question from a caller that you would rather not answer, such as do you do abortions, or how much do you charge for an abortion, etc., answer the caller by asking several questions in return.”⁴⁷ He included a model script:

QUESTION: Do you do the abortions there?

ANSWER: Anything you need, we do here.

QUESTION: Can my friend be with me?

ANSWER: Your friend can stay with you the whole time you’re here.

....

QUESTION: I want an abortion. Will you help me?

42. See, e.g., Krissy Clark, *Welfare’s Role in Alternative to Abortion Programs*, Marketplace (June 23, 2016), <https://www.marketplace.org/2016/06/23/wealth-poverty/how-welfare-funds-are-used-stop-abortion> (on file with the *Columbia Law Review*) (“In 2015, Governor Mike Pence authorized \$3.5 million in federal TANF funds for the support of crisis pregnancy centers.”). The use of federal TANF funds to support pregnancy centers that do not provide or refer for birth control or abortion services seems difficult to reconcile with at least one of the four core goals of TANF grants: to “prevent and reduce the incidence of out-of-wedlock pregnancies.” Professional Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, sec. 103(a)(1), § 401, 110 Stat. 2105, 2113 (codified as amended at 42 U.S.C. § 601 (2012)).

43. See Vitoria Lin & Cynthia Dailard, *Crisis Pregnancy Centers Seek to Increase Political Clout, Secure Government Subsidy*, 5 *Guttmacher Rep. on Pub. Pol’y* 4, 5–6 (2002), <https://www.guttmacher.org/sites/default/files/pdfs/pubs/tgr/05/2/gr050204.pdf> [<https://perma.cc/XG63-U2GT>].

44. See Jennifer Ludden, *States Fund Pregnancy Centers that Discourage Abortion*, NPR (Mar. 9, 2015), <https://www.npr.org/sections/health-shots/2015/03/09/391877614/states-fund-pregnancy-centers-that-discourage-abortion> [<https://perma.cc/K5NP-BAFS>] (“Texas gives the most—more than \$5 million over two fiscal years. Ohio budgeted \$250,000 in 2013, and this year abortion opponents plan to boost their request to \$1 million.”).

45. ‘Choose Life’ License Plates, Guttmacher Inst. (Jan. 1, 2019), <https://www.guttmacher.org/state-policy/explore/choose-life-license-plates> [<https://perma.cc/U92Y-FY7N>].

46. See Oversight Hearings, *supra* note 2, at 300 (excerpts from the Pearson brochure).

47. *Id.* at 307.

ANSWER: We have many ways to help a woman and will gladly help you.⁴⁸

Pearson's tactics were extreme and were not adopted by all pregnancy centers.⁴⁹ But his manual demonstrates that misleading or deceptive practices have played at least some role in the pregnancy center movement from the beginning.⁵⁰ This section explores this phenomenon by highlighting examples of deceptive practices at two stages of a woman's interaction with a pregnancy center. First, section I.B.1 examines the marketing strategies that encourage pregnant women to visit pregnancy centers. Section I.B.2 then looks at the information women receive once they're there.

1. *False or Misleading Marketing.* — Recognizing the importance of place, Pearson's manual urged pregnancy centers to find office space near the entrance to a full-service clinic—that is, a clinic that provides abortion and contraception services or referrals—and to adopt a name similar to that of the full-service clinic.⁵¹ He reasoned: “[I]f the girl who would be going to the abortion chamber sees your office first with a similar name, she will probably come into your center. The best part of this is that the abortion chamber is paying for advertising to bring that girl to you.”⁵²

In 1982, a pregnancy center in Worcester, Massachusetts, did exactly that. Approximately one month after a Planned Parenthood clinic opened on the sixth floor of a building on Main Street, Problem Pregnancy of Worcester, Inc., a pro-life pregnancy center, rented office space on the same floor.⁵³ Anyone en route to Planned Parenthood would have first passed Problem Pregnancy—and the signs on its door that read “PP” and “Free pregnancy testing and counseling, walk-in.”⁵⁴ Planned Parenthood eventually won an injunction enjoining Problem Pregnancy from using the initials “PP” on its door.⁵⁵ By that time, however, the signage had misled at least three women on their way to have either a pregnancy test or an abortion at Planned Parenthood; they entered Problem Pregnancy,

48. *Id.* at 307–08.

49. See Gross, *supra* note 1 (“Even groups vigorously opposed to abortion—including Birthright, a chain of similar counseling centers—have objected to the Pearson Foundation approach.”).

50. *Cf. id.* (noting that at least three pregnancy centers in New York City in the 1980s subscribed to the Pearson approach).

51. Oversight Hearings, *supra* note 2, at 303 (excerpts from the Pearson brochure).

52. *Id.*

53. *Planned Parenthood Fed’n of Am., Inc. v. Problem Pregnancy of Worcester, Inc.*, 498 N.E.2d 1044, 1045 (Mass. 1986).

54. *Id.*

55. *Id.* at 1047. The injunction ended up having little impact on 340 Main Street's sixth floor, though, because earlier that year the landlord won a case allowing it to evict Problem Pregnancy for engaging in “corridor counseling.” See *Ingram v. Problem Pregnancy of Worcester, Inc.*, 488 N.E.2d 408, 408–09 (Mass. 1986).

completed medical history forms, and received counseling about alternatives to abortion before realizing that they were not in the right place.⁵⁶

More recently, AAA Women for Choice, a pregnancy center in Manassas, Virginia, came under fire when it purchased a recently closed abortion clinic and then forwarded that clinic's calls to its own phones.⁵⁷ AAA Women for Choice had been "shadowing" Amethyst Health Center for Women, a full-service clinic, for more than twenty years.⁵⁸ The pregnancy center and full-service clinic were located in the same building, right next door, with similar signage and decor.⁵⁹ When the doctor who ran Amethyst Health Center for Women retired, she sold the clinic to new owners. She never met these new owners, but their lawyers represented that they were "a group of medical office investors."⁶⁰ But "[j]ust five minutes after signing the final papers at closing, the doctor called her office to check her messages. 'Triple-A Women for Choice,' a voice answered."⁶¹

A similar story is currently unfolding in South Bend, Indiana. There is an ongoing debate among South Bend city officials about whether to rezone a property for the express purpose of allowing Women's Care Center, a pregnancy center, to open a location next door to a proposed abortion clinic.⁶² Pro-choice advocates worry that this pregnancy center will be like

56. See *Planned Parenthood Fed'n of Am.*, 498 N.E.2d at 1050 ("Each woman saw signs for Planned Parenthood and proceeded down the corridor toward the clinic. They then saw the door with the name 'PP, Inc.' and thinking that 'PP' stood for Planned Parenthood, they entered the office of Problem Pregnancy.").

57. Petula Dvorak, *How Abortion Opponents Secretly Bought a Va. Abortion Clinic to Deceive Women*, Wash. Post (Feb. 4, 2016), https://www.washingtonpost.com/local/how-abortion-opponents-secretly-bought-a-virginia-abortion-clinic/2016/02/04/08a3b1c4-c4f5-11e5-8965-0607e0e265ce_story.html [<https://perma.cc/9GQ2-KZEA>] ("Nothing indicates that the abortion clinic is closed except a locked door. The clinic's Google ads still pop up, and the phone number still works. When women dial the closed abortion clinic, the call is forwarded straight to the pregnancy center.").

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Jeff Parrott, *Will Council Override South Bend Mayor's Veto of Women's Care Center Rezoning?*, South Bend Trib. (May 11, 2018), https://www.southbendtribune.com/news/local/will-council-override-south-bend-mayor-s-veto-of-women/article_3cee80f9-b399-53f6-85ea-7b317e6ebe0a.html [<https://perma.cc/87M2-QVXR>] [hereinafter Parrott, *Women's Care Center Rezoning*]. The proposed abortion clinic is part of the Whole Woman's Health Alliance network, the organization that fought Texas's anti-abortion legislation in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). See *Whole Woman's Health v. Hellerstedt*, *Whole Woman's Health*, <https://wholewomanshealth.com/wholewomanshealth-v-hellerstedt/> [<https://perma.cc/RNY4-AGCX>] (last visited Feb. 3, 2019) ("Whole Woman's Health led the fight against . . . House Bill 2 . . . , which resulted in the closure of nearly 75 percent of the clinics in the state of Texas since 2013, forcing some women to drive up to 300 miles one-way to obtain . . . safe and legal abortion care.").

The Whole Woman's Health Alliance clinic is described as "proposed" because it has yet to secure an abortion license from the Indiana State Department of Health. Its original

others in Illinois and across the nation that “locate next to abortion clinics so that they can deceive women who accidentally mistake them for abortion providers.”⁶³ A representative for Women’s Care Center replied that the center “doesn’t engage in deception, and pregnant women should see the ‘pro-life’ mission in the Women’s Care Center logo, which shows a woman holding a baby.”⁶⁴ Women’s Care Center officials have also stated that despite the availability of appropriately zoned property just across the street, “an unnamed donor will only provide the roughly \$500,000 needed for the new location if it’s located next door to the proposed abortion clinic.”⁶⁵

A uniquely twenty-first-century variant of deceptive location-based marketing involves the manipulation of Google Maps to direct women who may be considering abortions to pregnancy centers. Google Maps is “an increasingly popular way for internet searchers to discover . . . services.”⁶⁶ But an investigation found that when users asked Google “Where can I get an abortion near me?” and clicked on the resulting map, “pregnancy centers were offered up as abortion clinic options” in eighteen of the twenty cities tested.⁶⁷ These maps are produced by closely guarded Google algorithms,⁶⁸ so it might be unfair to impute intentional deception or manipulation onto the pregnancy centers that merely benefit from those ostensibly neutral algorithms. The data relied on by the algorithms, though, are user generated, so how pregnancy centers describe and categorize themselves plays some role.

Indeed, the language pregnancy centers use in their print and online advertisements can do a lot of work to mislead women considering abortion into visiting centers that counsel against it. In the pre-internet era, pregnancy centers listed their facilities under misleading headings in the

license application was denied in 2017, and Whole Woman’s Health lost its appeal of that denial in November 2018. See Ted Booker, Panel Explains Why It Denied License for Proposed South Bend Abortion Clinic, *South Bend Trib.* (Dec. 19, 2018), https://www.southbendtribune.com/news/local/panel-explains-why-it-denied-license-for-proposed-south-bend/article_76598677-1a40-5e76-8713-2f42393e756f.html [<https://perma.cc/MVP3-DLTQ>]. In January 2019, Whole Woman’s Health Alliance reapplied for a license, “hitting the reset button in a long legal fight with state health officials.” Ted Booker, Nonprofit Reapplies for License to Open Abortion Clinic in South Bend, *South Bend Trib.* (Jan. 18, 2019), https://www.southbendtribune.com/news/local/nonprofit-reapplies-for-license-to-open-abortion-clinic-in-south/article_c28aef0e-6130-5434-9525-146c8f8b24c8.html [<https://perma.cc/WH84-U8ED>].

63. See Jeff Parrott, South Bend Council Allows Anti-abortion Group to Open Site Next to Proposed Abortion Clinic, *South Bend Trib.* (Apr. 24, 2018), https://www.southbendtribune.com/news/local/south-bend-council-allows-anti-abortion-group-to-open-site/article_f516f3b8-3e60-5bd9-9889-3b6ee69e606e.html [<https://perma.cc/2CB4-XQ6F>].

64. *Id.*

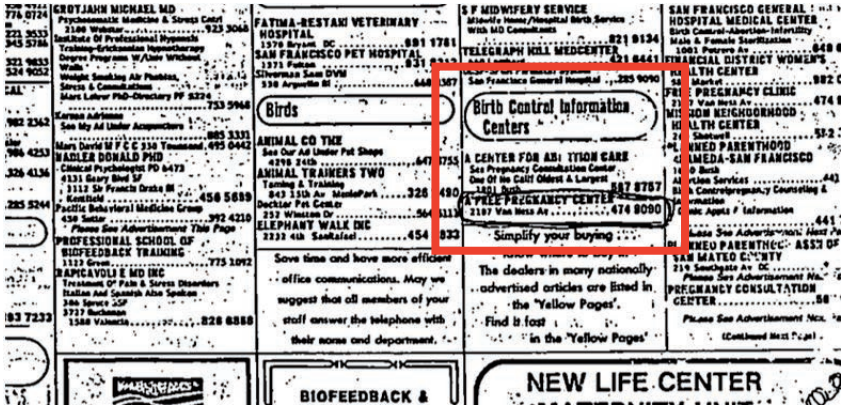
65. See Parrott, *Women’s Care Center Rezoning*, *supra* note 62.

66. Robin Marty, How Google Maps Leads Women Seeking Abortions Astray, *Gizmodo* (Feb. 12, 2018), <https://gizmodo.com/how-google-maps-leads-women-seeking-abortions-astray-1822882758> [<https://perma.cc/6FDY-TEWD>].

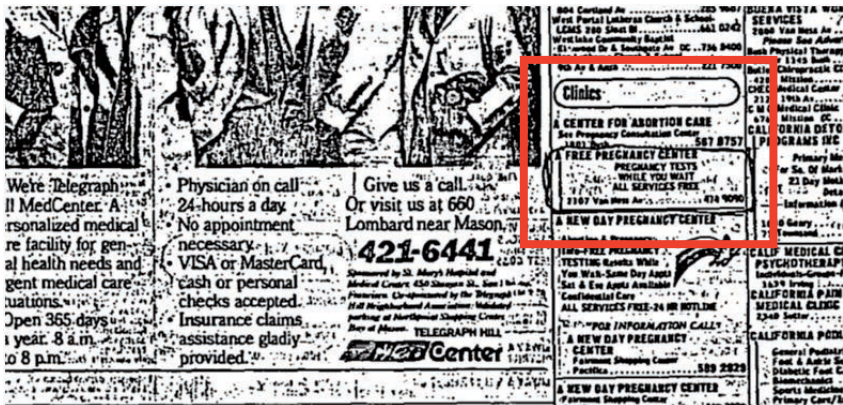
67. *Id.*

68. See *id.*

phone book.⁶⁹ In the 1985 Pacific Bell Yellow Pages, for example, A Free Pregnancy Center—a Pearson-affiliated pregnancy center in San Francisco, California, that was not a licensed medical clinic and did not offer birth control or abortion—listed its services under the headings “Clinics” and “Birth Control Information Centers.”⁷⁰ It was this practice of advertising under misleading headings in the Yellow Pages that generated many of the first lawsuits against pregnancy centers discussed in section II.A.1.



The 1985 Pacific Bell Yellow Pages, showing a listing for A Free Pregnancy Center under the heading “Birth Control Information Centers” (Source: Oversight Hearings, supra note 2, at 289).



The 1985 Pacific Bell Yellow Pages, showing A Free Pregnancy Center advertising free pregnancy tests and other services under the heading “Clinics” (Source: Oversight Hearings, supra note 2, at 290).

69. See Oversight Hearings, supra note 2, at 285 (statement of Ann E. Menasche, attorney for the Committee to Defend Reproductive Rights).

70. See id. at 284–90.

Today, savvy pregnancy centers use search engine optimization tools and buy Google ads with keywords like “abortion” and “abortion clinic,” even though they do not provide abortions and will not connect women with clinics that do.⁷¹ One ad reads: “Only you know what’s best for you Same-day appointments available. Call now!”⁷² Clicking on the ad brings the user “face-to-face with a photo of a smiling woman with a stethoscope. ‘Looking for an abortion?’ she asks in 65-point font.”⁷³ Hopefully not, as the site is a landing page for a network of pregnancy centers that do not provide or refer for abortion services. After NARAL Pro-Choice America reported this phenomenon to Google, Google took down some pregnancy center ads for failing to comply with its “strict guidelines related to ad relevance, clarity, and accuracy.”⁷⁴

2. *Medical Misinformation.* — However they find the pregnancy center, once women are through the door they are likely to encounter some degree of medical misinformation.⁷⁵ In 2011, a graduate student from Minnesota State University published an op-ed describing her firsthand

71. See, e.g., Alice Hines, Beware Google Ads for ‘Abortion Consultations,’ *Bloomberg Businessweek* (Mar. 24, 2017), <https://www.bloomberg.com/news/articles/2017-03-24/beware-google-ads-for-abortion-consultations> (on file with the *Columbia Law Review*) (describing pregnancy centers’ use of “misleading mobile tools,” including advertisements that target search keywords like “abortion” and the practice of paying to display ads on the smartphones of women inside abortion clinic waiting rooms).

72. *Id.* (internal quotation marks omitted).

73. *Id.*

74. See Hayley Tsukayama, Google Removes “Deceptive” Pregnancy Center Ads, *Wash. Post* (Apr. 28, 2014), <https://www.washingtonpost.com/news/the-switch/wp/2014/04/28/naral-successfully-lobbies-google-to-take-down-deceptive-pregnancy-center-ads/> [<https://perma.cc/MS38-5EUD>] (describing NARAL Pro-Choice America’s investigation into deceptive pregnancy center ads and Google’s response). According to NARAL’s research, “79 percent of the crisis pregnancy centers that advertised on Google indicated that they provided medical services such as abortions, when, in fact, they are focused on counseling services and on providing information about alternatives to abortion.” *Id.*

75. See, e.g., Waxman Report, *supra* note 5, at 7–14 (concluding that pregnancy centers “frequently fail to provide medically accurate information”). Women searching for information about their reproductive health options online may have the analogous experience of being misled to visit a pregnancy center’s website and then, once they are through the virtual door, being presented medical misinformation. A 2016 study in the *Journal of Pediatric and Adolescent Gynecology* found that pregnancy center websites, many of which are listed in state resource directories, provide inaccurate information about condoms, sexually transmitted infections (STIs), and how to prevent STI transmission. See Katelyn Bryant-Comstock, Amy G. Bryant, Subasri Narasimhan & Erika E. Levi, Information About Sexual Health on Crisis Pregnancy Center Web Sites: Accurate for Adolescents?, 29 *J. Pediatric & Adolescent Gynecology* 22, 22–25 (2016). A related 2014 study similarly found overwhelming rates of medical misinformation on pregnancy center websites, particularly “a declared link between abortion and mental health risks, preterm birth, breast cancer, future fertility, miscarriage and ectopic pregnancy.” Amy G. Bryant, Subasri Narasimhan, Katelyn Bryant-Comstock & Erika E. Levi, Crisis Pregnancy Center Websites: Information, Misinformation, and Disinformation, 90 *Contraception* 601, 603 (2014) [hereinafter Bryant et al., *Disinformation*]. In total, eighty percent of the pregnancy center websites surveyed—all of which were listed on state resource directories—provided at least one false or misleading statement. *Id.*

experience with pregnancy center misinformation.⁷⁶ She related being told that abortions cause breast cancer,⁷⁷ even though the National Cancer Institute had investigated the claim and concluded that having an abortion does not increase a woman's subsequent risk of developing breast cancer.⁷⁸ And she related being told that she would inevitably suffer from "post-abortion stress syndrome,"⁷⁹ despite the American Psychological Association's finding that "the best scientific evidence indicates that the relative risk of mental health problems among adult women who have an unplanned pregnancy is no greater if they have an elective first-trimester abortion than if they deliver that pregnancy."⁸⁰ This anecdotal evidence tracks the conclusions of a 2006 investigative report prepared on behalf of Representative Henry Waxman of California, which found that "87% of the [pregnancy] centers reached (20 of 23 centers) provided false or misleading information" about the health effects of abortion, including false or misleading

76. See Katie Stack, Opinion, When I Needed Help, I Got Propaganda, N.Y. Times (Oct. 5, 2011), <https://www.nytimes.com/2011/10/06/opinion/crisis-pregnancy-centers-and-propaganda.html> (on file with the *Columbia Law Review*) ("I left the center with a lot of confusion. I researched what I'd been told, [and] found out that much of it was inaccurate But I can see how easy it would be for more vulnerable women to be manipulated into feeling dependent on these centers.").

77. See *id.*

78. See Abortion, Miscarriage, and Breast Cancer Risk: 2003 Workshop, Nat'l Cancer Inst., <https://www.cancer.gov/types/breast/abortion-miscarriage-risk> [<https://perma.cc/H89Q-V9FK>] (last updated Jan. 12, 2010) (explaining how the National Cancer Institute "convened a workshop of over 100 of the world's leading experts who study pregnancy and breast cancer risk" and that "[t]hey concluded that having an abortion or miscarriage does not increase a woman's subsequent risk of developing breast cancer").

The Waxman Report describes how the National Cancer Institute came to investigate the purported links between abortions and breast cancer:

In 2002, the Bush Administration edited a National Cancer Institute website to suggest that there was still an open scientific question about whether having an abortion might lead to breast cancer. After Rep. Waxman and other members of Congress protested the change, the National Cancer Institute convened a three-day conference of experts on abortion and breast cancer. Participants reviewed all existing population-based, clinical, and animal data available. Their conclusion was that "[i]nduced abortion is not associated with an increase in breast cancer risk." The panel ranked this conclusion as "[w]ell-established."

Waxman Report, *supra* note 5, at 7–8 (alterations in original) (footnotes omitted) (quoting Summary Report: Early Reproductive Events and Breast Cancer, Nat'l Cancer Inst., <https://www.cancer.gov/types/breast/abortion-miscarriage-risk#summary-report> [<https://perma.cc/QXA8-JVL8>] (last updated Jan. 12, 2010)); see also Patricia Jasen, Breast Cancer and the Politics of Abortion in the United States, 49 *Med. Hist.* 423, 440 (2005) (exploring this history).

79. See Stack, *supra* note 76.

80. See Brenda Major et al., Am. Psychological Ass'n, Report of the APA Task Force on Mental Health and Abortion 90 (2008), <http://www.apa.org/pi/women/programs/abortion/mental-health.pdf> [<https://perma.cc/V4CP-VBEA>]. Again, this tracks the misinformation available on pregnancy center websites. Almost three-quarters of pregnancy center websites visited (186 of 254 sites) mentioned that abortion leads to a condition described as "postabortion stress." Bryant et al., *Disinformation*, *supra* note 75, at 603, 604 tbl.2.

information about abortion's purported links to breast cancer and effects on mental health.⁸¹

Pregnancy centers' mental health claims in particular are perhaps best described as "misleading" rather than "false" because they distort bona fide scientific research. For example, studies *have* found that women may experience stress after having an abortion.⁸² But there is "considerable scientific consensus" that the stress experienced after having an abortion does not cause significant long-term psychological harm,⁸³ and "[t]he best studies available on psychological responses to unwanted pregnancy terminated by abortion" suggest that those responses "parallel those following other normal life stresses."⁸⁴ In fact, one study concluded that "the effects of *being denied* an abortion may be more detrimental to women's psychological well-being than allowing women to obtain their wanted procedures."⁸⁵ Yet some pregnancy centers maintain "that having an abortion would cause a wide range of damaging and long-lasting psychological impacts."⁸⁶

Especially troubling is misinformation about the timeline of pregnancy, which can mislead women to delay seeking an abortion until it is no longer an option.⁸⁷ Pregnancy centers may encourage women to put off making a decision about abortion by recommending they return several weeks later to take a second pregnancy test to confirm their results, for example.⁸⁸ Delaying a woman's decision about whether to have an abortion

81. Waxman Report, *supra* note 5, at 7. One pregnancy center told an investigator posing as a teenager considering abortion "that women who have abortions 'are now finding out that they have breast cancer' because the development of hormones and glands in the breast tissue is abruptly stopped." *Id.* at 8 (quoting a representative from "Center K"). Some pregnancy centers quantified the alleged risks, such as the pregnancy center that told an investigator "that there is an 'extremely high, increased risk of breast cancer' that 'can be as much as an 80% increase depending upon how the risk factors fall into place.'" *Id.* (quoting a representative from "Center O").

82. See *id.* at 11.

83. *Id.*

84. *Id.* (quoting Nancy E. Adler et al., *Psychological Factors in Abortion: A Review*, 47 *Am. Psychologist* 1194, 1202–03 (1992)).

85. See M. Antonia Biggs et al., *Women's Mental Health and Well-Being 5 Years After Receiving or Being Denied an Abortion: A Prospective, Longitudinal Cohort Study*, 74 *JAMA Psychiatry* 169, 177 (2017) (emphasis added).

86. Waxman Report, *supra* note 5, at 12. These assumptions about what women may experience after having an abortion have found their way into at least one Supreme Court opinion. In *Gonzales v. Carhart*, Justice Kennedy wrote: "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort Severe depression and loss of esteem can follow." 550 U.S. 124, 159 (2007).

87. See Haugeberg, *supra* note 22, at 47 ("Women who mistakenly visited [pregnancy centers] reported that volunteers lied to them about how far along they were in their pregnancies in order to prevent them from obtaining legal abortions elsewhere.").

88. See *id.* (describing how one pregnancy center asked a woman to return three weeks later to confirm her negative pregnancy test and how it was only after a third visit to a

by a number of weeks may mean that less-invasive methods of abortion become unavailable, or that the option is no longer available at all. Misinformation, then, is concerning not only for its untruth but for its consequences: It can effectively annul a woman's constitutional right to choose abortion.

It should be noted that as the pregnancy center movement evolves and responds to public pressure, some pregnancy centers and national affiliate organizations are trying to distance themselves from the kinds of tactics outlined in the Pearson manual. Heartbeat International, for example, emphasizes that the pregnancy centers it works with “make a commitment to serve their community with honesty, integrity, and equality.”⁸⁹ Heartbeat International, Care Net, NIFLA, and ten other national groups have endorsed a “Commitment of Care and Competence,” agreeing to a list of thirteen enumerated standards, among them commitments to providing “honest and open answers,” relaying “accurate information” about pregnancy and abortion procedures, and using “truthful and honest” advertising and communications.⁹⁰ As the above examples illustrate, though, deceptive or misleading marketing and misinformation remain pervasive despite these efforts.

II. REGULATING PREGNANCY CENTERS

Almost as soon as pregnancy centers came on the scene, lawmakers and other state actors began trying to intervene against their deceptive or misleading practices. This Part examines those interventions. Section II.A briefly reviews past and present regulatory efforts to rein in the practices described in Part I. Section II.B then situates these efforts under the broader umbrella of “mandated disclosure” and questions whether mandated disclosure makes sense as a regulatory tool in the pregnancy center context.

A. *Past and Present Attempts at Regulation*

This section summarizes attempts to regulate pregnancy centers. Section II.A.1 surveys attempts to regulate pregnancy centers by either enforcing existing false advertising and unfair business practices laws or designing new false advertising laws that specifically target pregnancy centers. Section II.A.2 then explores attempts to regulate pregnancy centers by promulgating notice requirements, most notably California's Reproductive FACT Act.

1. *False Advertising and Unfair Business Practices Enforcements.* — Early attempts to regulate pregnancy centers relied on existing false advertising

different facility that she learned she was nineteen weeks pregnant, in a state that prohibited abortion after week fifteen).

89. Our Commitment, *supra* note 4.

90. PRC Report, *supra* note 28, at 67.

and unfair business practices statutes to prohibit pregnancy centers from engaging in misleading marketing that suggested the centers offered services they did not. Although a different approach to regulation than FACT Act-style notice requirements, when these antifraud or deceptive business practices enforcements succeeded, the injunctive relief courts granted in remedy often resembled a disclosure regime.⁹¹

In 1986, for example, the San Francisco District Attorney's consumer fraud department filed a complaint against A Free Pregnancy Center, the San Francisco affiliate of the Pearson Foundation that had been advertising in the local Yellow Pages under the headings "Clinics" and "Birth Control Information Centers."⁹² The complaint alleged, among other claims, that the pregnancy center engaged in unfair business practices by falsely representing the services it provided.⁹³ A judge issued an injunction prohibiting the pregnancy center from advertising in those sections of the Yellow Pages unless the advertisements clearly indicated that the center provided alternatives to abortion and did not suggest that abortion services were available.⁹⁴

Similarly, in 1992, the New York State Attorney General charged Alternative Pregnancy Center, a pregnancy center in Putnam County, New York, with violating "laws concerning the practice of medicine, operation of clinical laboratories, and consumer protection" on account of "a variety of allegedly fraudulent and deceptive practices."⁹⁵ Alternative Pregnancy Center advertised its services in local papers and phone directories under headings for "Abortion Information Services," "Health Care Services," and "Birth Control Information Centers."⁹⁶ Again, a judge issued an injunction requiring the pregnancy center "to state in its

91. These statutes were discussed during the oral argument in *NIFLA*, but they were presented as an alternative; the fact that the injunctive remedy resembled disclosure was not part of the conversation. Transcript of Oral Argument at 59–62, Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361 (2018) (No. 16-1140).

92. See *supra* note 70 and accompanying text.

93. *Comm. to Defend Reprod. Rights v. A Free Pregnancy Ctr.*, 280 Cal. Rptr. 329, 330–31 (Ct. App. 1991).

94. See *id.* at 331; *Pregnancy Center Told to Admit It Opposes Abortions*, United Press Int'l (Aug. 27, 1986), <https://www.upi.com/Archives/1986/08/27/Pregnancy-Center-told-to-admit-it-opposes-abortions/3303525499200/> [<https://perma.cc/V8B5-KB85>]. The pregnancy center made a free speech argument in its defense, but it was rejected by the court. See *Oversight Hearings*, *supra* note 2, at 287–88 (statement of Ann E. Menasche, attorney for the Committee to Defend Reproductive Rights) ("The Court rejected the defendants' argument that because 'A Free Pregnancy Center' is a quasi-religious non-profit organization with a political purpose, it is therefore immune by the First Amendment from regulation for fraud.").

95. *Carr v. Axelrod*, 798 F. Supp. 168, 170–71 (S.D.N.Y. 1992), *aff'd*, 996 F.2d 302 (2d Cir. 1993).

96. *Id.*

advertising that it is a ‘pro-life, not-for-profit corporation’ or an ‘anti-abortion, not-for-profit corporation.’”⁹⁷

Also in 1992, the Ohio Attorney General issued a substantiation request and then a cease-and-desist order to Summit County Crisis Pregnancy Center (SCCPC), a pregnancy center in Akron, Ohio, pursuant to the Ohio Consumer Sales Practices Act (OCSA).⁹⁸ SCCPC advertised in newspapers and the Yellow Pages under the headings “Abortion Services” and “Clinics.”⁹⁹ Unlike the other advertisements discussed above, though, SCCPC’s advertisement under “Abortion Services” included a disclaimer that it is “not a medical facility and does not perform abortions.”¹⁰⁰ Similarly, its advertisement under “Clinics” included notice that it “is not a medical facility.”¹⁰¹ SCCPC responded by seeking a declaration that its actions did not violate OCSA.¹⁰² When SCCPC’s countersuit survived a motion to dismiss,¹⁰³ the Attorney General agreed not to pursue further action.¹⁰⁴

The SCCPC case is perhaps the exception that proves the rule that throughout the 1980s and 1990s, states and municipalities enjoyed courtroom successes against pregnancy centers when they pursued civil actions under existing false advertising and deceptive business practices statutes. Those “successes,” though, did not put pregnancy centers out of business or result in requirements that pregnancy centers offer comprehensive care. Instead, the remedy in each case was a requirement that the centers give notice that their services were not comprehensive—in other words, the remedy was mandated disclosure.

In 2006, Congresswoman Carolyn Maloney of New York introduced the Stop Deceptive Advertising for Women’s Services Act (SDAWS), which would require the Federal Trade Commission to promulgate rules prohibiting fraudulent advertising of abortion services.¹⁰⁵ This marked a departure

97. Abrams Gets Ruling Against ‘Phony’ Abortion Clinic, *Press-Republican* (Plattsburgh, N.Y.), Mar. 13, 1993, at 2.

98. See *Summit Cty. Crisis Pregnancy Ctr., Inc. v. Fisher*, 830 F. Supp. 1029, 1030–31 (N.D. Ohio 1993). OCSA prohibits any “unfair or deceptive act or practice in connection with a consumer transaction.” Ohio Rev. Code Ann. § 1345.02(A) (2016).

99. *Summit Cty. Crisis Pregnancy Ctr., Inc.*, 830 F. Supp. at 1031.

100. *Id.*

101. *Id.*

102. *Id.* at 1030.

103. See *id.* at 1034.

104. See Profile of Stephen P. Leiby, Hanna Rasnick Evanchan Palmisano Hobson & Fox, LLC, <https://www.businessandconstructionattorneys.com/Attorney-Profiles/Stephen-P-Leiby.shtml> [<https://perma.cc/G6FR-A9YR>] (last visited Feb. 3, 2019) (describing what happened in the SCCPC case after the initial in-court back-and-forth, from the perspective of the pregnancy center’s lawyer).

105. See Stop Deceptive Advertising for Women’s Services Act, H.R. 5052, 109th Cong. (2006) (“[T]he Federal Trade Commission shall promulgate rules to prohibit any person to advertise with the intent to deceptively create the impression that such person is a provider of abortion services if such person does not provide abortion services.”).

from earlier attempts to regulate pregnancy centers under existing false advertising and deceptive practices laws in that it would have created a new false advertising law specifically targeting pregnancy centers. The bill was referred to committee and never voted on, but it has been reintroduced in almost every subsequent Congress, most recently in the 115th Congress on May 19, 2017.¹⁰⁶

In 2011, the San Francisco Board of Supervisors passed a local ordinance similar to Representative Maloney's SDAWS bill.¹⁰⁷ The ordinance, known as the Pregnancy Information Disclosure and Protection Ordinance, made it unlawful for any pregnancy center to make any representation about its services "which is untrue or misleading, whether by statement or omission."¹⁰⁸ The same day the legislation was introduced, the City Attorney sent the pregnancy center First Resort a letter "expressing his 'serious concerns' about First Resort's misleading advertisements and asking First Resort to 'correct' its advertising 'to clarify that the clinic does not offer or make referrals for abortion services.'"¹⁰⁹ First Resort had been targeting women considering abortion through Google's AdWords service, a fee-based service which ensured that a link to the center's website appeared above other results when users searched certain keywords, including "abortion" and "emergency contraception."¹¹⁰ First Resort's website also included sections for "Abortion Counseling" and "Pregnancy Services and Abortion Services" and stated that the center "offer[s] abortion information, resources, and compassionate support for women . . . considering abortion"—with "no mention . . . of its anti-abortion views or the fact that abortions and abortion referrals [were] not offered."¹¹¹

A district court upheld the ordinance, and in 2017 the Ninth Circuit affirmed the district court's ruling in favor of San Francisco.¹¹² In a separate opinion concurring in part and dubitante in part, Judge A. Wallace Tashima argued that California's False Advertising Law already prohibits "the making of misleading omissions" and that the question of whether the False Advertising Law covers the kind of advertising at issue in the *First Resort* case should be certified to the California Supreme Court.¹¹³ A resolution on that issue, he wrote, would inform whether other

106. See Stop Deceptive Advertising for Women's Healthcare Services Act, H.R. 2566, 115th Cong. (2017).

107. See S.F., Cal., Admin. Code §§ 93.1–.5 (2011). The Ninth Circuit would go on to cite SDAWS in the "Background" section of its opinion affirming the constitutionality of the ordinance. *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1268 (9th Cir. 2017).

108. S.F., Cal., Admin. Code § 93.4(a).

109. *First Resort, Inc.*, 860 F.3d at 1268.

110. *Id.*

111. *First Resort, Inc. v. Herrera*, 80 F. Supp. 3d 1043, 1046 (N.D. Cal. 2015), *aff'd*, 860 F.3d 1263 (9th Cir. 2017).

112. *First Resort, Inc.*, 860 F.3d at 1281.

113. *Id.* at 1284 (Tashima, J., concurring in part and dubitante in part).

cities and counties in the state should “copycat” the ordinance or potentially bring actions under the state’s existing False Advertising Law instead.¹¹⁴

In 2016, Oakland, California, did in fact “copycat” San Francisco’s Pregnancy Information Disclosure and Protection Ordinance, passing an ordinance that made it illegal for pregnancy centers to use misleading advertising practices and to misrepresent themselves as medical clinics or full-service healthcare providers.¹¹⁵ The law gave the City Attorney the power to sue pregnancy centers that make false, misleading, or deceptive statements designed to confuse pregnant women and to collect civil penalties and attorney’s fees.¹¹⁶ The legislation was effective immediately and can lead to fines of \$50 to \$500 per violation.¹¹⁷

2. *Notice Requirements.* — SDAWS and its progeny can perhaps be understood as an intermediary step between the actions brought under general deceptive business practices laws in the 1980s and 1990s and the targeted mandated disclosure requirements first seen in Baltimore, Maryland. In 2009, Baltimore passed a first-of-its-kind ordinance requiring pregnancy centers to disclose that they do not provide certain services. City of Baltimore Ordinance 09-252 amended the city’s health code to require what it called “limited-service pregnancy centers” to post a disclaimer “substantially to the effect that the center does not provide or make referral for abortion or birth-control services.”¹¹⁸ This disclaimer would have to be “(1) written in English and Spanish; (2) easily readable; and (3) conspicuously posted in the center’s waiting room or other area where individuals await service.”¹¹⁹ Failure to comply constituted a misdemeanor, punishable by a fine of up to \$500 for each day of noncompliance.¹²⁰

114. *Id.*

115. See Press Release, Oakland City Attorney, Oakland Adopts Ordinance Banning False Advertising by Anti-choice “Crisis Pregnancy Centers” (July 20, 2016), <http://www.oaklandcityattorney.org/News/Press%20releases/CPC%20ord%20II.html> [<https://perma.cc/X55N-6PGK>] (noting that “[t]he vote makes Oakland the second city in the nation to proactively ban false advertising by [pregnancy centers] after San Francisco passed a similar ordinance in 2011”).

116. *Id.*

117. Mark Hedin, Oakland Takes a Stand for Abortion Rights, *Mercury News* (July 28, 2016), <https://www.mercurynews.com/2016/07/28/oakland-takes-a-stand-for-abortion-rights/> [<https://perma.cc/R39T-TH4B>]. There is only one pregnancy center in Oakland, but in a letter to the Oakland City Council, members of the Alameda County Public Health Department noted that “[t]he only advertising in [the] county for prenatal services” is pregnancy center advertising and that the centers “have ads in English and Spanish in mostly low-income neighborhoods.” *Id.*

118. See Balt., Md., Health Code § 3-502(a) (2009). Ordinance 09-252 defines a “limited-service pregnancy center” as “any person (1) whose primary purpose is to provide pregnancy-related services; and (2) who: (i) for a fee or as a free service, provides information about pregnancy-related services; but (ii) does not provide or refer for: (A) abortions; or (B) nondirective and comprehensive birth-control services.” *Id.* § 3-501.

119. *Id.* § 3-502(b).

120. *Id.* § 3-506.

The City Solicitor advised the City Council that the ordinance did not violate free speech rights because it “merely requires the disclosure of truthful, non-misleading information relevant to a woman’s decision to seek services at a particular location.”¹²¹ Nonetheless, Greater Baltimore Center for Pregnancy Concerns, a Baltimore-area pregnancy center and affiliate of NIFLA, Care Net, and Heartbeat International, challenged the law on First and Fourteenth Amendment grounds.¹²² The district court enjoined the city ordinance, in part because it found that Baltimore could have used “existing regulations governing fraudulent advertising to combat [pregnancy centers’] deceptive advertising practices,” rather than creating a new law that specifically targeted those pregnancy centers.¹²³

On the heels of the Baltimore law, in 2010, Montgomery County, Maryland (part of the Washington, D.C., metropolitan area) passed Resolution 16-1252, which required unlicensed pregnancy centers to post a sign disclosing “(1) that ‘the Center does not have a licensed medical professional on staff’; and (2) that ‘the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider.’”¹²⁴ Even though the signage mandated by the Montgomery County ordinance did not mention birth control or abortion and instead focused on medical licensure, it too was challenged on First Amendment grounds.

Centro Tepeyac, a pregnancy center in Silver Spring, Maryland, filed a complaint against the county and requested an injunction.¹²⁵ The district court upheld the first prong of the ordinance, requiring disclosure about whether a pregnancy center has a licensed medical professional on staff, but enjoined enforcement of the second prong, which required the disclosure to “encourage[.]” women to seek the services of a licensed medical professional.¹²⁶ On appeal, a divided Fourth Circuit panel affirmed the district court’s decision.¹²⁷ In a dissenting opinion that would have struck down both components of the ordinance, Judge Paul Niemeyer emphasized that Montgomery County had “several available alternatives” to the mandated disclosure requirements, including “us[ing] its own resources to undertake public education campaigns addressing the alleged dangers of pregnancy centers or, more generally, promoting consultations with physicians for pregnant women,” “produc[ing] a document or website

121. See *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 721 F.3d 264, 277 (4th Cir. 2013), remanded to 2016 WL 10893970 (D. Md. Oct. 4, 2016), *aff’d*, 879 F.3d 101 (4th Cir. 2018).

122. *Id.* at 272–73.

123. *Id.* at 279. A series of appeals followed, but the Fourth Circuit ultimately affirmed the district court’s decision. *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 879 F.3d 101, 113 (4th Cir. 2018), cert. denied, 138 S. Ct. 2710 (2018) (mem.).

124. *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 186 (4th Cir. 2013).

125. *Id.* at 187.

126. *Id.* at 187–88.

127. *Id.* at 193.

listing local pregnancy centers and noting whether medical professionals are available at each,” or “prosecuting violations of laws against practicing medicine without a license or laws proscribing false or deceptive advertising.”¹²⁸

Also in 2010, Austin, Texas, passed Ordinance No. 20100408-027, which, like the Baltimore ordinance, required pregnancy centers to post a sign clearly stating that they neither provide nor refer for abortion or birth control services.¹²⁹ Pregnancy center Austin LifeCare challenged the ordinance,¹³⁰ and in 2012, before that litigation was resolved and in light of the federal courts’ decisions in the other pregnancy center disclosure cases discussed above, the city repealed the original ordinance and passed a revised version that changed the nature of the disclosure.¹³¹

The new ordinance more closely resembled the upheld prong of Montgomery County’s law, requiring unlicensed pregnancy centers to disclose only “(1) whether the center provides medical services” and, if so, “(2) . . . whether all medical services are provided under direction and supervision of a licensed health care provider; and (3) . . . whether the center is licensed by a state or federal regulatory entity to provide those services.”¹³² Austin LifeCare challenged this new ordinance, too.¹³³ This time, the district court invalidated the ordinance for being too vague without reaching the First Amendment question.¹³⁴

In 2011, New York City passed Local Law No. 17, which required certain pregnancy centers to make a series of disclosures: (1) “that the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed medical provider”;

128. *Id.* at 198–99 (Niemeyer, J., dissenting).

129. See Austin, Tex., Code ch. 10-9 (2010) (repealed 2012).

130. See Amended Verified Complaint for Declaratory, Injunctive & Other Relief at 2, *Austin LifeCare, Inc. v. City of Austin*, No. A-11-CA-875-LY, 2014 WL 12774229 (W.D. Tex. June 23, 2014), <http://www.adfmedia.org/files/AustinLifeCareComplaint.pdf> [<https://perma.cc/9MXK-9M7K>].

131. See Austin, Tex., Code ch. 10-10 (2012). During the city council meeting at which the revised ordinance was discussed, one speaker noted that “cases that have been decided in the other federal court[s] regarding ordinances like this one support the form of the ordinance that is before you today,” and another stressed that the new ordinance had “been crafted narrowly to respond to the federal courts from Baltimore and Montgomery County and New York about what is allowed.” See Transcript of Regular Meeting of the Austin City Council (Jan. 26, 2012) (on file with the *Columbia Law Review*).

132. Austin, Tex., Code § 10-10-2; see also *Austin LifeCare, Inc.*, 2014 WL 12774229, at *2 (quoting § 10-10-2).

133. See *Austin LifeCare, Inc.*, 2014 WL 12774229, at *1.

134. *Id.* at *8. At issue were two phrases: “full-time practice on site” and “medical service.” *Id.* at *3. The statute required notice to be posted only by an “unlicensed pregnancy service center,” which was defined in part by not having a licensed health care provider “maintaining a full-time practice on site.” *Id.* at *4. The court found that the meaning of “full time” was not sufficiently definite such that an ordinary person could determine what is required. *Id.* at *6. The court also found that the open-ended definition of “medical service” would allow the city too much discretion in enforcing the law. *Id.* at *7.

(2) whether the pregnancy center has “a licensed medical provider on staff who provides or directly supervises the provision of all of the services” at the facility; and (3) whether it provides referrals for abortion, emergency contraception, and prenatal care.¹³⁵ New York required these disclosures to be posted in the entrances and waiting rooms of pregnancy centers, included on advertisements promoting their services, and made on the phone or in person if a client or prospective client asked about abortion, emergency contraception, or prenatal care.¹³⁶

Several pregnancy centers sued the city in short order, alleging that the law compelled speech in violation of their free speech rights.¹³⁷ The district court agreed with the pregnancy centers.¹³⁸ During the preliminary injunction hearing, the court questioned whether the city had attempted to enforce existing antifraud laws against deceptive facilities and suggested that such enforcements offer a less restrictive alternative.¹³⁹ On appeal, the Second Circuit upheld only the provision of the statute that required disclosure of whether a center has a licensed medical provider on staff.¹⁴⁰

Finally, in 2015, California passed the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act.¹⁴¹ California enjoyed the benefit of hindsight, and the bill “was reverse-engineered to avoid some of the First Amendment pitfalls of prior versions.”¹⁴² The FACT Act requires licensed pregnancy centers to post the following notice:

California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].¹⁴³

The Act requires unlicensed pregnancy centers to post a different notice:

This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.¹⁴⁴

135. N.Y.C., N.Y. Admin. Code § 20-816(a)–(e) (2019).

136. *Id.* § 20-816(f).

137. See *Evergreen Ass’n, Inc. v. City of New York*, 801 F. Supp. 2d 197, 200 (S.D.N.Y. 2011), *aff’d in part, vacated in part*, 740 F.3d 233 (2d Cir. 2014).

138. *Id.* at 208, 211.

139. *Id.* at 209. The city’s attorney said she did not believe there had been such an enforcement at the city level but that there had been investigations at the state level. *Id.*

140. *Evergreen Ass’n, Inc.*, 740 F.3d at 237–38.

141. See 2015 Cal. Stat. 5351 (codified at Cal. Health & Safety Code §§ 123470–123473 (2019)).

142. Dahlia Lithwick, *A Woman’s Right to Know: Can California Make Crisis Pregnancy Centers Say What They Really Are?*, *Slate* (Oct. 20, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/10/california_reproductive_fact_act_challenged_by_crisis_pregnancy_centers.single.html [https://perma.cc/7GNR-29KX].

143. Cal. Health & Safety Code § 123472(a)(1).

144. *Id.* § 123472(b)(1).

Within days of its passage, several pregnancy centers and related umbrella organizations challenged the FACT Act on free speech and free exercise grounds.¹⁴⁵ The FACT Act survived each of these challenges in the district courts; judges emphasized that the Act requires covered facilities to provide “only factual and incontrovertibly true information,”¹⁴⁶ and to do so “in neutral language [without] incorporat[ing] ideological commentary or convey[ing] an opinion.”¹⁴⁷ The Ninth Circuit affirmed the lower courts’ decisions, but in June 2018 a 5-4 Supreme Court reversed the Ninth Circuit and remanded for further proceedings consistent with the conclusion that the free speech challenge was likely to succeed.¹⁴⁸

When debating the merits of the First Amendment challenge to the FACT Act, commentators are often quick to highlight the differences that set the California law apart from the earlier iterations of mandated disclosure laws targeting pregnancy centers in Baltimore, Montgomery County, Austin, and New York City.¹⁴⁹ But even if California’s disclosure regime had survived the kinds of challenges that undermined its counterparts, it does not mean the FACT Act would have achieved its stated goals.

For one, the FACT Act, like both earlier iterations of notice requirements and earlier deceptive business practices enforcements, was ultimately designed to fight only half the battle. When she introduced the SDAWS bill in 2011, Representative Maloney noted that “[i]f a woman enters a pregnancy center with full knowledge of the limited services and the center’s bias that is entirely her choice.”¹⁵⁰ Implicit in this statement is a concession that any protection offered by laws like SDAWS would stop at a pregnancy center’s front door and would not reach the misinformation being shared inside.

Moreover, it is not clear that the FACT Act and similar disclosure regimes were successful in combatting even that threshold deception. As

145. See *Nat’l Inst. of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2370 (2018).

146. See *LivingWell Med. Clinic, Inc. v. Harris*, No. C 15-04939 JSW, 2015 WL 13187682, at *10 (N.D. Cal. Dec. 18, 2015), *aff’d*, 669 F. App’x 493 (9th Cir. 2016), judgment vacated sub nom. *Livingwell Med. Clinic, Inc. v. Becerra*, 138 S. Ct. 2701 (2018), *rev’d in part*, vacated in part, 901 F.3d 1168 (9th Cir. 2018).

147. See *A Woman’s Friend Pregnancy Res. Clinic v. Harris*, 153 F. Supp. 3d 1168, 1207 (E.D. Cal. 2015), *aff’d* 669 F. App’x 495 (9th Cir. 2016), judgment vacated sub nom. *A Woman’s Friend Pregnancy Res. Clinic v. Becerra*, 138 S. Ct. 2711 (2018), *rev’d in part*, vacated in part, 901 F.3d 1166 (9th Cir. 2018).

148. See *NIFLA*, 138 S. Ct. at 2370, 2378. The Court did not grant certiorari to *NIFLA*’s religious freedom challenge. See *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 464, 464 (2017) (mem.).

149. See, e.g., Beth Holtzman, Note, *Have Crisis Pregnancy Centers Finally Met Their Match: California’s Reproductive FACT Act*, 12 *Nw. J.L. & Soc. Pol’y*, no. 3, 2017, at 78, 95–105 (comparing the Reproductive FACT Act with the Baltimore, Montgomery County, Austin, and New York City mandated disclosure ordinances); see also *supra* note 142 and accompanying text (explaining that the FACT Act was different because the drafters learned from challenges to earlier disclosure regimes).

150. 157 Cong. Rec. 11,225 (2011) (statement of Rep. Maloney).

the next section describes, transparency literature teaches that disclosure can be effective only under certain circumstances, which are not satisfied in this context.

B. *The Limits of Past and Present Attempts at Regulation*

Representative Maloney's statement about SDAWS's protection ending when "a woman enters a pregnancy center with full knowledge of the limited services and the center's bias" intimates that the front door is the *right* place for the government's intervention to stop. At that point, Maloney suggests, the onus is on the pregnant woman seeking services to make "her choice." This emphasis on choice is typical of mandated disclosure regulation. "Mandated disclosure," as it is used in this section, refers to a regulatory technique designed to help people make sound decisions by requiring that those with relevant information provide it to those who need that information to make a fully informed choice.¹⁵¹ The Reproductive FACT Act and similar notice regimes clearly operate in this vein: A pregnant woman considering her reproductive healthcare options faces an important choice about where she will seek counseling and support services. States thus require pregnancy centers to inform women about the extent of their services, to facilitate her making a fully informed choice. This Note posits that because false advertising and deceptive business practices actions have tended to result in notice regimes, their remedies can also be considered under this umbrella.¹⁵²

Despite the pervasiveness of mandated disclosure regulations, it might not be the panacea pro-choice policymakers are looking for. This section explores why, first surveying mandated disclosure regulation generally in section II.B.1 and then turning to the unique limitations of using disclosure to regulate pregnancy centers in section II.B.2.

1. *Mandated Disclosure, Generally.* — Professors Omri Ben-Shahar and Carl Schneider pull no punches in describing mandated disclosure as "the most common and least successful regulatory technique in American law."¹⁵³ Disclosure regimes are so common in part because they seem

151. See Omri Ben-Shahar & Carl E. Schneider, *More than You Wanted to Know: The Failure of Mandated Disclosure* 3 (2014) [hereinafter Ben-Shahar & Schneider, *More than You Wanted to Know*] ("[T]ruth-in-lending laws oblige your lender to describe its credit terms. Informed-consent doctrine obliges your doctor to describe treatments for prostate cancer. Contract law obliges your vendor to reveal terms like warranties and mandatory arbitration. *Miranda* obliges the police to recite your rights.").

152. See *supra* section II.A.1.

153. Ben-Shahar & Schneider, *More than You Wanted to Know*, *supra* note 151, at 3; see also *id.* at 95–99 (chronicling the incredible number and variety of disclosures an average middle-class American—"Chris Consumer"—encounters every day, from the warning on a toaster cord to the calories listed next to each item on a menu to the fine print in a credit card policy).

fundamentally reasonable: It just “makes sense” that more information would lead to better decisionmaking than less information would.¹⁵⁴

But Ben-Shahar and Schneider propose that, to be successful, mandated disclosure requires three actors—lawmakers, disclosers, and disclosees—to “play demanding parts deftly.”¹⁵⁵ *Lawmakers*, for their part, must determine what should be regulated and whether mandated disclosure is the right regulatory tool for the problem, and then what exactly should be disclosed, and how.¹⁵⁶ *Disclosers* must then obey the mandate by first interpreting and then implementing it.¹⁵⁷ Finally, *disclosees* must read and understand the information disclosed to them, and then they must use that information to make complex and consequential decisions that are in their best interests.¹⁵⁸ Only when those stars align, according to Ben-Shahar and Schneider, can mandated disclosure be an effective regulatory tool.¹⁵⁹ On their account, this doesn’t happen often.¹⁶⁰ Scholars considering various other disclosure regimes have echoed Ben-Shahar and Schneider’s critiques of the salience of disclosure.¹⁶¹

154. See *id.* at 5–6; cf. Cass R. Sunstein, On Mandatory Labeling, with Special Reference to Genetically Modified Foods, 165 U. Pa. L. Rev. 1043, 1093 (2017) (“In the abstract, the argument for labeling GM food seems appealing, perhaps even irresistible. . . . It might appear obvious that [people concerned about the risks of GM foods] should have a right to know what they are eating.”).

155. Ben-Shahar & Schneider, *More than You Wanted to Know*, *supra* note 151, at 7.

156. *Id.* (“Each step is hard; managing all four is uncommon, especially under the pressure that often drives lawmakers.”).

157. *Id.*

158. *Id.* at 8–10.

159. See *id.* at 7 (“Mandated disclosure fails because it depends on a long chain of fragile links.”).

160. See *id.*

161. See, e.g., Florencia Marotta-Wurgler, *Even More than You Wanted to Know About the Failures of Disclosure*, 11 *Jerusalem Rev. Legal Stud.* 63, 66–70 (2015) (offering evidence of the failure of disclosure in the context of End User License Agreements); Jena Martin, *Hiding in the Light: The Misuse of Disclosure to Advance the Business and Human Rights Agenda*, 56 *Colum. J. Transnat’l L.* 530, 566–78 (2018) (exploring the evidence of and reasons for the ineffectiveness of disclosure laws in curtailing corporate human rights abuses); Robert A. Prentice, *Moral Equilibrium: Stock Brokers and the Limits of Disclosure*, 2011 *Wis. L. Rev.* 1059, 1105–07 (concluding that disclosure is an inadequate tool for regulating financial and securities systems). But see Oren Bar-Gill, *Defending (Smart) Disclosure: A Comment on More than You Wanted to Know*, 11 *Jerusalem Rev. Legal Stud.* 75, 76 (2015) (agreeing that common full disclosures aimed at consumers are “basically useless” but arguing that score-type disclosures and full disclosures for sophisticated intermediaries may be effective); Kristin Madison, *Health Care Quality Reporting: A Failed Form of Mandated Disclosure?*, 13 *Ind. Health L. Rev.* 310, 311–15, 345 (2016) (expressing cautious optimism that disclosure laws may yield net gains in the context of public reporting of healthcare provider quality); Marotta-Wurgler, *supra*, at 70 (distinguishing “the newer breed of ‘smart’ disclosures,” which “seek to avoid many of the problems identified by [Ben-Shahar and Schneider]”); Margaret Jane Radin, *Less than I Wanted to Know: The Submerged Issues in More than I Wanted to Know*, 11 *Jerusalem Rev. Legal Stud.* 51, 53–55 (2015) (identifying food labeling as an example of disclosure that can be effective and valuable).

Beyond just being ineffective, disclosure regimes may actually “hurt[] the people [they] purport[] to help.”¹⁶² Professor David Pozen describes, for example, how “disclosure requirements for home loans did not in themselves assist low-income borrowers—most of whom were unable to understand their terms or to shop for a different loan—so much as insulate predatory lenders.”¹⁶³

2. *Mandated Disclosure in the Pregnancy Center Context.* — Pregnancy center disclosures provide another gloss on Ben-Shahar and Schneider’s thesis and another example of a context that calls into question the “obviousness” of disclosure’s efficacy. The problems begin with the lawmakers’ first function: determining what, exactly, should be regulated. To date, lawmakers have focused their energies on the threshold issue of pregnancy centers’ deceptive marketing practices rather than on the misinformation pregnancy centers provide.¹⁶⁴ This makes some intuitive sense: If women are no longer being misled through the pregnancy center’s doors, the misinformation that awaits them inside may be rendered irrelevant. But the inverse, of course, is also true: If pregnancy centers provided accurate and comprehensive information about women’s reproductive healthcare options, it would matter less how women were induced to visit those facilities.

As for disclosers, understanding and interpreting what is required by the FACT Act and similar pregnancy center disclosure ordinances is relatively uncomplicated.¹⁶⁵ Instead, the more serious challenge vis-à-vis disclosers is the likely resistance to disclosure. There are many legitimate reasons why disclosers may resist obeying a mandate, such as that disclosure may slow down their ability to do their job or because implementation may be costly. But the disclosers in this context—pregnancy centers and the individuals who operate them—may also choose to resist out of moral opposition to the content of the disclosures they are being required to make.

That said, although some pregnancy centers have fought disclosure requirements all the way to the Supreme Court, other umbrella organizations already require their affiliates to provide clients with a written

162. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. Pa. L. Rev. 647, 650–51 (2011).

163. David E. Pozen, *Transparency’s Ideological Drift*, 128 Yale L.J. 100, 138–39 (2018).

164. See, e.g., Gross, *supra* note 1 (“Our position is not that they can’t attempt to talk people out of abortion,” said Peter Bienstock, the chief of the Consumer Frauds and Protection Bureau in the State Attorney General’s office. “Our position is they can’t do that if they entice people by misrepresentation.”); see also *supra* section II.A; *supra* text accompanying note 150 (critiquing this approach as “fight[ing] only half the battle”).

165. See, e.g., *supra* note 119 and accompanying text (describing the Baltimore ordinance’s notice requirement); *supra* notes 143–144 and accompanying text (describing the FACT Act’s notice requirements).

disclaimer stating that they do not perform or refer for abortion services.¹⁶⁶ This practice of voluntary disclosure is not new¹⁶⁷ and can be interpreted in a number of ways. Most obviously, pregnancy centers that voluntarily disclose might just want to clarify the extent of their services. More cynically, they might be responding to changes in the law and attempting to insulate themselves from suit. Most cynically, would-be resistant disclosers are not resisting mandated disclosures because their experience instructs that the disclosures are not effective and thus not worth resisting.

As for disclosees, the kinds of disclosures required of pregnancy centers avoid some of the pitfalls of other mandated disclosure regimes. A sign in a waiting room displaying a single sentence printed in multiple languages in large, bold type is likely easier to locate, easier to read, and easier to understand than a dense paragraph of fine print buried in several pages of text attached to the back of a contract. But reading a sign on a wall nonetheless poses acquisition costs. Moreover, a disclosee's function doesn't end with reading and understanding—she must then apply what she has read and understood to the complex and stressful decision at hand. Take as an example the disclosure required by California's Reproductive FACT Act: that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services."¹⁶⁸ Without any other information, the disclosee might not have reason to think that the services offered by the state's "public programs" would be qualitatively different from the services she expects to be offered at the facility whose waiting room she is sitting in. She might even (reasonably) conclude that the services she is waiting to receive are the very services the sign describes.

Finally, and perhaps most importantly, mandated disclosure may be particularly ill-suited to the pregnancy center context because of the assumptions about choice this section opened with. Mandated disclosure is all about informed choice. And usually, there is no question that individuals should have a choice about which products or services they use. It is uncontroversial to assert that we should be able to choose which restaurants we visit, for example, or which products we buy from a grocery store. The disclosers in those contexts may use hard-sell tactics or other coercive practices in an attempt to convince us to choose their products or services over competing products and services, but they do not challenge the underlying assumption that a choice exists. Pregnancy centers,

166. See, e.g., Care Net, Standards, *supra* note 4, at 1 (listing "[t]he pregnancy center does not perform or refer for abortion and provides a written disclaimer to this effect to clients requesting services" as the fourth in a list of fifteen standards of affiliation for pregnancy centers affiliated with Care Net).

167. See *supra* notes 100–101 and accompanying text (discussing Summit County Crisis Pregnancy Center's practice of including disclaimers in its Yellow Pages advertisements in the early 1990s).

168. See Cal. Health & Safety Code § 123472(a)(1) (2019).

on the other hand, are founded on the belief that women should not be permitted to make certain choices.

Pearson summarized this idea in his manual, averring that “[i]t’s ludicrous to leave the life of a baby as a free and open ‘Choice’ for the mother.”¹⁶⁹ The “choice” he was referring to is of course the choice to have an abortion, not the choice to visit a pregnancy center instead of a full-service clinic, and this Note is limited to discussion of attempts to regulate the latter. But the two are inextricably intertwined. When the messaging from pregnancy centers and their proponents is not “Option A (the service we offer) is better than Option B (the service offered elsewhere)” but rather “Option A (the service we offer) is the only option,” it is not hard to imagine that a mere disclosure, no matter how well-worded, would have a heavy lift. Mandated disclosure presumes the existence of a choice that the regulated parties here deny.

III. RETHINKING PREGNANCY CENTER REGULATION

This Part proposes alternative regulatory approaches for jurisdictions seeking to support access to accurate and comprehensive reproductive healthcare information and services.¹⁷⁰ Section III.A considers regulatory approaches that do not abandon mandatory disclosure but rather apply the lessons from disclosure literature about when it is most effective. Section III.B then attempts to think outside the mandatory disclosure box to imagine alternative approaches to pregnancy center regulation.

A. *Disclosure, Redux*

One read of Ben-Shahar and Schneider’s critique of mandated disclosure is that the problem is not necessarily that mandated disclosure can never work but rather that it cannot work in its current form.¹⁷¹ Rather than abandon disclosure, then, policymakers might seek to refine it. Accordingly, this section explores “smarter” disclosure laws and their potential efficacy in the pregnancy center space.

1. *“Simple” Disclosures.* — Ben-Shahar and Schneider evaluate and ultimately find wanting three kinds of “simplified” mandated disclosures:

169. Oversight Hearings, *supra* note 2, at 490 (excerpts from the Pearson brochure).

170. This appears to be a minority of jurisdictions in the United States. As of 2017, “58% of American women of reproductive age lived in a state considered either hostile or extremely hostile to abortion rights . . . Only 30% of women lived in a state supportive of abortion rights.” Elizabeth Nash, Rachel Benson Gold, Lizamarie Mohammed, Zohra Ansari-Thomas & Olivia Cappello, Policy Trends in the States, 2017, Guttmacher Inst. (Jan. 2, 2018), <https://www.guttmacher.org/article/2018/01/policy-trends-states-2017> [<https://perma.cc/HSU8-CB9Y>].

171. See, e.g., Ben-Shahar & Schneider, *More than You Wanted to Know*, *supra* note 151, at 183 (“Disclosure is not always useless. Information can be vital. Mandates may sometimes help.”); Omri Ben-Shahar & Carl E. Schneider, *Coping with the Failure of Mandated Disclosure*, 11 *Jerusalem Rev. Legal Stud.* 83, 84 (2015) (“We do not imagine that mandated disclosure has never done anything useful . . .”).

simplified language,¹⁷² simplified presentation,¹⁷³ and scores.¹⁷⁴ Of these, scores receive the most attention, and they retain some loyal advocates.¹⁷⁵ Those advocates maintain that mandated disclosure can work in the right setting if the disclosure takes the form of an acutely simplified, easy-to-read and easy-to-understand scoring system—think brightly colored hygiene letter grades posted in restaurant windows.¹⁷⁶

While this may work for restaurant hygiene grades and annual percentage rates,¹⁷⁷ there are several reasons why a scoring regime would not translate well to the pregnancy center context. For one, while most would-be restaurant-goers likely agree that good hygiene practices are desirable in a commercial kitchen and would thus find a one-dimensional metric useful, women seeking reproductive healthcare services are known to possess different healthcare priorities and concerns.¹⁷⁸ Relatedly, scores are necessarily a distillation of more complex data and deciding which data to reflect in a score injects subjectivity and discretion into the system.¹⁷⁹ Given the polemical nature of pregnancy centers, this room for subjectivity could easily render any score-based disclosure regime useless. It is not hard to imagine two competing grading systems emerging: one system in which anti-abortion organizations or jurisdictions issue high scores to pregnancy centers that exclusively offer alternatives to abortion and low scores to full-service clinics, and another in which their pro-choice counterparts issue low scores to those same pregnancy centers for failing to offer comprehensive services and high scores to full-service clinics.¹⁸⁰

172. See Ben-Shahar & Schneider, *More than You Wanted to Know*, *supra* note 151, at 126–28.

173. See *id.* at 129–31.

174. See *id.* at 131–36. By scores, Ben-Shahar and Schneider mean “a number, a rating, a grade, or at least an index.” *Id.* at 131; see also Bar-Gill, *supra* note 161, at 76 (defining a score as “a one-dimensional summary of one or more product features”).

175. See Bar-Gill, *supra* note 161, at 77–81; see also *id.* at 76 (“I will try to argue that this one issue—simplification using ‘scores’—may be the key to effective disclosure in important contexts.”).

176. See *id.* at 79–80. But see Ben-Shahar & Schneider, *More than You Wanted to Know*, *supra* note 151, at 155 (noting that although the authors “once called [restaurant hygiene grades] an apparent success for disclosure,” a recent study “found that grades have no discernible health benefits, distort the allocation of inspection resources, and mislead diners”).

177. See Bar-Gill, *supra* note 161, at 78–79.

178. See, e.g., Jonna Arousell & Aje Carlbom, *Culture and Religious Beliefs in Relation to Reproductive Health, Best Prac. & Res. Clinical Obstetrics & Gynaecology*, April 2016, at 77, 77–87 (exploring the implications of culture and religion on decisions about reproductive healthcare).

179. See Bar-Gill, *supra* note 161, at 78 (describing discretion in designing score-type disclosure regimes as “inevitable”).

180. This already happens in the gun control context. See Lena Groeger, *Where Congress Stands on Guns*, ProPublica (Jan. 16, 2013), <https://projects.propublica.org/guns> [<https://perma.cc/W999-KSA4>] (rearranging members of Congress along a spectrum first according to the National Rifle Association’s “A” through “F” letter grades, in the “More

2. *“Visceral” Disclosures.* — Professor Ryan Calo suggests that disclosures might be more effective if they “leverage a consumer’s very experience of a product or service to warn or inform” rather than “rel[ying] upon text or symbols to convey information.”¹⁸¹ He describes three kinds of “visceral” notice—using familiarity with one context to warn or inform about another,¹⁸² leveraging common psychological reactions to certain kinds of cues,¹⁸³ and “showing” instead of “telling” consumers¹⁸⁴—that might avoid many of the pitfalls of more traditional notice, particularly with respect to the role of the discloser. Visceral notice means that she would not need to be literate, for example, or otherwise able to read and understand a complex disclosure.

State informed consent laws that require pregnant women to view an ultrasound image or listen to a fetal heartbeat are examples of “visceral” disclosure.¹⁸⁵ Professor Carol Sanger explains the power of fetal imagery: “The scan blends science with affection or tenderness: presented as though it were information pure and simple, the fetal image also has the cultural force of a portrait, betokening the presence of the entity depicted.”¹⁸⁶ Pregnancy center notice requirements, in contrast, currently fall firmly on the “tell” end of the show-not-tell spectrum. It is not immediately obvious how states could effectively “show” pregnant women the dangers of misleading pregnancy center marketing and misinformation; there may be a fundamental asymmetry with regard to visceral disclosures in this context. Nonetheless, policymakers looking to improve on the current regime but not prepared to abandon disclosure altogether could consider moving away from signage in waiting rooms and fine print in advertisements toward more innovative, experience-driven disclosures.

3. *Public Health Campaigns.* — Policymakers could also consider undertaking robust public education campaigns to educate women about

Gun Rights” tab, and then according to the Brady Campaign’s numerical “lifetime scores,” in the “More Gun Control” tab).

181. M. Ryan Calo, *Against Notice Skepticism in Privacy (and Elsewhere)*, 87 *Notre Dame L. Rev.* 1027, 1027 (2012). Examples of what Calo calls “visceral” notice include accentuating roadways with rumble strips instead of putting up “yet another traffic sign” to signal that a road narrows, *id.* at 1034, or adding a picture of a pair of eyes to an interface to signal that consumers may be being observed or tracked, *see id.* at 1038–39.

182. *See id.* at 1035–38.

183. *See id.* at 1038–41.

184. *See id.* at 1041–44.

185. *See generally* State Laws and Policies: Requirements for Ultrasound, Guttmacher Inst. (Jan. 1, 2019), <https://www.guttmacher.org/state-policy/explore/requirements-ultrasound> [<https://perma.cc/V7MF-9AAZ>] (noting that three states require abortion providers to show and describe ultrasound images to each woman seeking an abortion and twenty-three states require that a woman be provided with an opportunity to view an ultrasound image).

186. Carol Sanger, *About Abortion: Terminating Pregnancy in Twenty-First-Century America* 120 (2017); *see also id.* at 119–20 (“Although couched in the protective terms of informed consent, these statutes are unabashedly meant to transform the embryo from an abstraction to a baby in the eyes of the potentially aborting mother.”).

pregnancy center practices and reproductive healthcare more generally. Mass media public education campaigns have been successful in other public health contexts, especially tobacco use.¹⁸⁷ Similar campaigns targeting low-income pregnant women or women who are likely to become pregnant could call attention to the limited nature of pregnancy centers' services and the availability of more comprehensive healthcare alternatives. Indeed, this was one of the alternatives Judge Niemeyer suggested in his dissent in the Montgomery County case,¹⁸⁸ and Justice Thomas suggested a version of this approach in the majority opinion in *NIFLA*.¹⁸⁹ But public education campaigns are ultimately just another form of disclosure, of "telling" women information in the hopes of affecting their decision, and are thus vulnerable to many of the critiques of ordinary disclosure.

B. *Beyond Disclosure*

Ben-Shahar and Schneider caution that policymakers should not search for "another panacea" to replace mandated disclosure, emphasizing that "[o]ne of disclosure's faults is exactly that it has been asked to do so much that it cannot do."¹⁹⁰ But for policymakers who believe pregnancy centers' misleading marketing and misinformation warrant some kind of regulatory response, what else is there? This section tries to answer that question by imagining true alternatives to disclosure-based regulation of pregnancy centers. For those not yet willing to abandon disclosure, the approaches described below might also be considered as part of a mixed regulatory strategy, or "disclosure plus," in which mandated disclosure is not jettisoned but instead paired with some other, more substantive set of complementary regulatory measures.¹⁹¹

187. See, e.g., Jennifer C. Duke et al., Effect of a National Tobacco Public Education Campaign on Youth's Risk Perceptions and Beliefs About Smoking, 32 *Am. J. Health Promotion* 1248, 1254 (2018) ("Targeted mass media campaigns can change population-level perceptions of tobacco-related harms . . ."); see also U.S. Dep't of Health & Human Servs., The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General 12 (2014), <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf> [<https://perma.cc/T7A6-E5C5>] ("The evidence is sufficient to conclude that mass media campaigns, comprehensive community programs, and comprehensive statewide tobacco control programs prevent initiation of tobacco use and reduce the prevalence of tobacco use among youth and adults."). These campaigns may have succeeded in part because they relied on visceral disclosures (think images of emphysemic lungs). Cf. Duff Wilson, U.S. Releases Graphic Images to Deter Smokers, *N.Y. Times* (June 21, 2011), <https://www.nytimes.com/2011/06/22/health/policy/22smoke.html> (on file with the *Columbia Law Review*).

188. See *supra* note 128 and accompanying text.

189. See *Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2376 (2018) ("Most obviously, [California] could inform the women itself with a public-information campaign.").

190. Ben-Shahar & Schneider, *More than You Wanted to Know*, *supra* note 151, at 183.

191. See Pozen, *supra* note 163, at 162–63 (introducing the concept of "transparency plus").

1. *False Advertising or Deceptive Business Practices Actions, Redux.* — Even though the false advertising and deceptive business practices actions discussed in this Note tended to result in a disclosure-type remedy, there is no reason that that has to be the case. In lieu of informational disclosures, states and localities could, for example, seek monetary remedies for violations. Indeed, Oakland is already doing this: Failure to comply with its false advertising ordinance is a misdemeanor punishable by a fine of up to \$500 for each day of noncompliance.¹⁹² New York City, too, has levied fines for failure to comply with its disclosure requirements.¹⁹³

2. *Individual Tort Actions.* — Although not per se regulation, an individual cause of action exists for cases of “wrongful pregnancy”—that is, “situations in which the wrongful act of a third party . . . interfered with contraceptive or birth control measures adopted or elected by the parents so that an unintended child came into being.”¹⁹⁴ Successful suits can result in damages awards that compensate parents for the expenses and intangible losses directly related to the pregnancy and, at least in some cases, future child-rearing expenses.¹⁹⁵ Liability for wrongful pregnancy has already been recognized in cases involving negligent failure to diagnose a pregnancy within the window during which an abortion could be obtained.¹⁹⁶ A pregnant woman who was precluded from accessing lawful abortion due to misinformation provided by a pregnancy center¹⁹⁷ could consider bringing a wrongful pregnancy case under this failure-to-diagnose theory. Others have proposed additional novel applications of tort law to pregnancy center practices.¹⁹⁸

3. *Repealing State and Federal Funding.* — As discussed in section I.A.2, pregnancy centers are the recipients of (increasingly) large sums of state and federal funds; limiting these substantial government subsidies could do some work to curb pregnancy centers’ influence. There is a

192. See *supra* note 117 and accompanying text.

193. See Claire Tighe, *Two Years After Rule Change, NYC Issues First Fines Against Anti-abortion Fake Clinics*, *Rewire.News* (Feb. 20, 2018), <https://rewire.news/article/2018/02/20/two-years-rule-change-nyc-issues-first-fake-anti-abortion-clinics/> [<https://perma.cc/BJH2-CGZK>].

194. Donna K. Holt, *Wrongful Pregnancy*, 33 *S.C. L. Rev.* 759, 759 (1982).

195. See, e.g., *Cichewicz v. Salesin*, 854 N.W.2d 901, 910 (Mich. Ct. App. 2014) (finding both that wrongful pregnancy claims were actionable and that “damages related to the costs of raising the child to the age of majority may be recovered”); *Smith v. Gore*, 728 S.W.2d 738, 751 (Tenn. 1987) (delineating available damages in wrongful pregnancy cases).

196. See, e.g., *M.A. v. United States*, 951 P.2d 851, 853–54 (Alaska 1998) (finding a valid cause of action when a physician’s negligence delayed a pregnant patient’s awareness of her condition and precluded her from opting for an abortion). But see *id.* at 854–56 (limiting damages for failing to diagnose a pregnancy to injuries incurred through the time of childbirth and declining compensation for expenses or other damages related to rearing a healthy child).

197. See *supra* notes 87–88 and accompanying text.

198. See, e.g., Teneille R. Brown, *Crisis at the Pregnancy Center: Regulating Pseudo-clinics and Reclaiming Informed Consent*, 30 *Yale J.L. & Feminism* 221, 247–48 (2018) (advocating for pursuing battery lawsuits against pregnancy centers).

model for what this could look like in Dane County, Wisconsin (part of the Madison metropolitan area). In 2013, the Dane County Board of Supervisors passed an ordinance requiring the county to contract only with reproductive health services providers that provide comprehensive reproductive healthcare information and requiring any provider that has a contract with Dane County to refer county clients only to facilities that also meet that standard.¹⁹⁹

State sponsorship of pregnancy centers could also be challenged in court. Others have suggested several potential claims that could be brought, including federal constitutional challenges or state law claims related to, for example, violations of the bidding procedures required for all state-awarded contracts.²⁰⁰

4. *Improving Access to Full-Service Clinics.* — Finally, the most effective reforms might not necessarily focus on pregnancy centers at all but rather affirmatively seek to empower women in their decisionmaking well before the point at which they might walk into such a center. Policy-makers could invest in comprehensive care, creating an environment in which women, especially women with limited financial means, have greater access to robust reproductive healthcare information and full-service clinics. In such an environment, pregnancy center tactics might be much less likely to thrive.

CONCLUSION

The political and legal battles over reproductive rights in the United States are long-running and multifaceted, and they are unlikely to be resolved anytime soon. Since before *Roe*, but especially in its wake, opponents of reproductive rights have expanded and evolved their efforts to achieve pro-life policy goals, including through the establishment of pregnancy centers. If pro-choice actors want to counter these policies, they too should seek adaptive and innovative tools for use in their regulatory arsenals. This means looking beyond mandated disclosure, or at least beyond mandated disclosure as it currently exists.

199. See Dane County, Wis., Code of Ordinances § 30.03 (2013).

200. See, e.g., Brittany A. Campbell, Note, *The Crisis Inside Crisis Pregnancy Centers: How to Stop These Facilities from Depriving Women of Their Reproductive Freedom*, 37 B.C. J.L. & Soc. Just. 73, 97–99 (2017) (outlining a path to restricting state and federal funding of pregnancy centers); Meagan McElroy, Note, *Protecting Pregnant Pennsylvanians: Public Funding of Crisis Pregnancy Centers*, 76 U. Pitt. L. Rev. 451, 461–66 (2015) (discussing potential avenues for challenging Pennsylvania's direct sponsorship of pregnancy centers).

