NOTES

"ENSURING SO GRAVE A CHOICE IS WELL INFORMED": THE USE OF ABORTION INFORMED CONSENT LAWS TO PROMOTE STATE INTERESTS IN UNBORN LIFE

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Introduction

With its 2007 decision in *Gonzales v. Carhart*,[1] the Supreme Court essentially invited states to regulate abortion through informed consent statutes.[2] Noting the power that informed consent statutes have to persuade a woman to choose childbirth over abortion, Justice Kennedy, writing for the Court, stated that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman."[3] Kennedy addressed the importance of informed consent laws directly, stating that "some doctors may prefer not to disclose precise details of the means that will be used," particularly in abortion procedures.[4] "[The] lack of information concerning the way in which the fetus will be killed . . . is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed."[5] Kennedy encouraged states to craft informed consent laws as a way to regulate abortion procedures and bear witness to their respect for the life of the fetus.

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1 550 U.S. 124 (2007).

2 *See id.* at 156–60.

3 *Id.* at 157.

4 *Id.* at 159.

5 *Id.* (citation omitted).

Two years before *Gonzales*, South Dakota did just that, enacting an informed consent provision to further its interest in protecting unborn life. The statute required the physician to inform the pregnant woman "[t]hat the abortion will terminate the life of a whole, separate, unique, living human being[,][6] . . . [t]hat the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota,"[7] and "[t]hat by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated."[8] The statute also required the physician to provide the pregnant woman with "[a] description of all medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including . . . increased risk of suicide ideation and suicide."[9]

But Planned Parenthood Minnesota, North Dakota, South Dakota and its director, Dr. Carol E. Ball, filed suit, arguing that the disclosures required by the statute were facially unconstitutional.[10] The plaintiffs asserted that the informed consent provisions violated the First and Fourteenth Amendment rights of pregnant women to be free from forced indoctrination of the state's ideology, the Fourteenth Amendment liberty interest of pregnant women to choose an abortion, and the First and Fourteenth Amendment rights of the physicians to be free from being compelled to articulate the state's ideology.[11] The trial court granted the motion for a preliminary injunction, finding that the disclosures "violate[d] the First Amendment rights of abortion providers by compelling them to espouse the State's ideology."[12] The Eighth Circuit reversed the district court's decision and remanded the case.[13]

On remand, the district court upheld the provision referred to as the "biological disclosure"—"[t]hat the abortion will terminate the life of a whole, separate, unique, living human being"[14]—because the

6 S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (Supp. 2009).

7 *Id.* § 34-23A-10.1(1)(c).

8 *Id.* § 34-23A-10.1(1)(d).

9 *Id.* § 34-23A-10.1(1)(e).

10 Planned Parenthood Minn., N.D., S.D. v. Rounds, 375 F. Supp. 2d 881, 975 (D.S.D. 2005), *vacated and remanded*, 530 F.3d 724 (8th Cir. 2008) (en banc).

11 Complaint at 2, *Rounds*, 375 F. Supp. 2d 881 (No. Civ. 05-4077).

12 *Rounds*, 375 F. Supp. 2d at 886–87.

13 Planned Parenthood Minn., S.D., N.D., v. Rounds (*Rounds III*), 530 F.3d 724, 738 (8th Cir. 2008) (en banc).

14 S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (Supp. 2009).

disclosure was not "untruthful, misleading, or not relevant to the patient's decision to have an abortion."[15] Yet the district court found the "relationship disclosures"[16] untruthful and misleading and therefore unconstitutional.[17] The "medical risk disclosures"[18] were found to be unconstitutionally vague, as well as untruthful and misleading.[19] With regard to the mandate to inform women of increased suicide risk, the court used *Webster's Dictionary* to define a "known" risk as one that is generally recognized.[20] Though there were five studies presented by the defendants showing an association between suicide ideation and abortions, the court found that the risk was not "known" and therefore disclosure of such a link was untruthful and misleading.[21]

The juxtaposition of Justice Kennedy's invitation to state legislatures to craft informed consent statutes to regulate abortions and the decision of the federal district court in South Dakota to strike down such provisions provides an opportunity to question the limits of what states may accomplish with abortion informed consent statutes. Abortion informed consent statutes are viable avenues for states to further their interests in patient autonomy, women's health, and protection of unborn life. Neutrality toward abortion is not constitutionally required for informed consent legislation; states can use such statutes to persuade women to choose childbirth over abortion in addition to informing them about the nature of the abortion procedure. This Note explores the extent to which informed consent statutes can be used by states to promulgate such preferences and delineates what can be included in such provisions. It delves into the question of whether "relationship disclosures" are fundamentally different from "biological disclosures" such that a state may not require physicians to

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15 *See* Planned Parenthood Minn., N.D., S.D. v. Rounds, 650 F. Supp. 2d 972, 976 (D.S.D. 2009).

16 *See* S.D. CODIFIED LAWS § 34-23A-10.1(1)(c) ("[T]he pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota."); *id.* § 34-23A-10.1(1)(d) ("[B]y having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated.").

17 *Rounds*, 650 F. Supp. 2d at 977–79.

18 *See* S.D. CODIFIED LAWS § 34-23A-10.1(1)(e) (mandating "[a] description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including . . . [i]ncreased risk of suicide ideation and suicide").

19 *Rounds*, 650 F. Supp. 2d at 983.

20 *Id.*

21 *See id.*

disclose to their patients that such patients have any type of relationship with the unborn child. Part I gives a brief history of the right to abortion and the current state of abortion jurisprudence. Part II addresses the differing content of informed consent statutes that states have used, drawing a distinction between substantive informed consent provisions and procedural informed consent provisions. Part III explores the Supreme Court's test for evaluating the constitutionality of informed consent statutes and the treatment of that test in lower courts, emphasizing how First Amendment concerns have become conflated with the Fourteenth Amendment standard for evaluation. Part IV examines the District of South Dakota's recent application of the Supreme Court's test in *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*.[22] This Note elucidates what legislatures should be able to include in abortion informed consent statutes under the Supreme Court guidelines. Namely, courts should recognize that unless a provision places an undue burden on the woman's right to choose abortion—by being untruthful, misleading, or not relevant—it should be upheld.[23]

I. Abortion Jurisprudence

A. Roe*,* Doe*, and* Casey*: Defining the Right to Choose*

In *Roe v. Wade*,[24] the Supreme Court famously made abortion a fundamental right flowing from the Fourteenth Amendment right to privacy and announced that laws curtailing abortion were subject to strict scrutiny.[25] A seven-to-two majority held that the concept of privacy guaranteed by the Fourteenth Amendment implicitly encompassed a pregnant woman's right to terminate her pregnancy.[26] The *Roe* Court implemented the trimester framework, which in principle allowed varying levels of state regulation of abortion after the first trimester of pregnancy.[27] *Roe* and its companion case, *Doe v. Bolton*,[28]

22 *Id.* at 972.

23 *See infra* Part III (discussing the application of the Supreme Court standard for evaluating the constitutionality of informed consent statues).

24 410 U.S. 113 (1973).

25 *See id.* at 155; Thomas R. Eller, *Informed Consent Civil Actions for Post-Abortion Psychological Trauma*, 71 NOTRE DAME L. REV. 639, 652 (1996).

26 *See Roe*, 410 U.S. at 155–56; Eller, *supra* note 25, at 651.

27 *Roe*, 410 U.S. at 154. Under this framework, the state could not intervene in the woman's decision to have an abortion during the first trimester. During the second trimester, a state could intervene only under the condition that it was acting in the interest of the health of the woman. During the third trimester, the state could ban abortion except when it was necessary to preserve the life or health of the mother. *Id.* at 163–64.

conceded that states are protectors of human life, but required any restriction on abortion to have an exception for the life and health of the mother.[29] *Doe* further explained that "health" could mean any physical, psychological, familial, or emotional factor, as determined by the woman's physician.[30] Because of the required health exception, states were nearly powerless to effectively regulate abortions.

But in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[31] the Court shifted the right to an abortion to a liberty-based theory under the Fourteenth Amendment and upheld portions of an abortion informed consent statute.[32] The Court downgraded abortion from a fundamental right subject to strict scrutiny to a protected liberty interest.[33] *Casey* rejected the trimester framework, yet claimed to reaffirm the central holding of *Roe*, which the *Casey* Court elucidated as the assertion "that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[34]

A plurality of the Court reaffirmed the view that, subsequent to fetal viability, the state could promote its interest in the potentiality of human life by regulating or even proscribing abortion, except where it is necessary for the preservation of the life or health of the mother.[35] Previability, any restrictions enacted by the state must not amount to an undue burden on the right of a woman to choose an abortion.[36] On the other hand,

> [r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.[37]

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28 410 U.S. 179 (1973).

29 *Id.* at 195; *see also* Eller, *supra* note 25, at 651–52 (discussing *Roe*'s role in the constitutional history of abortion consent).

30 *Doe*, 410 U.S. at 192.

31 505 U.S. 833 (1992).

32 The Court upheld the informed consent, parental notification, and facility reporting requirements, but found the spousal notification provision to be unconstitutional. *Id.* at 844–45, 900.

33 *See id.* at 846–53.

34 *Id.* at 860.

35 *Id.* at 877–79. "Health" still referred to the definition in *Doe*, namely, any physical, psychological, familial, or emotional factor, with the woman's physician holding the sole power of determining what constituted a factor related to her health. *Doe*, 410 U.S. at 192.

36 *Casey*, 505 U.S. at 876.

37 *Id.* at 877.

The Court upheld Pennsylvania's informed consent statute because "the information the State requires to be made available to the woman is truthful and not misleading."[38] The Court found that the statute did not create a substantial obstacle to a woman seeking an abortion, and was thus not an undue burden.[39] The Court upheld the provision as a reasonable means to ensure that a woman's choice was informed.[40] Furthermore, the Court held that the Constitution does not forbid a State from "expressing a preference for normal childbirth."[41] But the Court also confirmed that "the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health."[42]

B. Stenberg *and* Gonzales*: State Attempts to Regulate Abortion Procedures*

Keeping with *Casey*, in *Stenberg v. Carhart*[43] the Court held that abortion regulations must contain an exception providing for the health of the mother. Like *Doe*'s broad health exception requirement, the Court stated that regulations must allow abortion when it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[44] Though thirty states had enacted

38 *Id.* at 882. The Court's holding overturned its previous decision in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), which struck down informed consent statutes on the grounds that the information was "designed to influence the woman's informed choice between abortion or childbirth." *Id.* at 444. The *Casey* holding also overturned the holding in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), which invalidated an informed consent statute when it was found to be "an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." *Id.* at 762.

39 *Casey*, 505 U.S. at 884–85.

40 *Id.* at 885; *see also id.* at 873 ("States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning.").

41 *Id.* (quoting Webster v. Reprod. Health Servs., 492 U.S. 490, 511 (1989)); *see also* Kathleen G. Chewning, Note, Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*: The Journey to Protect Women's Mental Health with Relevant, Truthful and Not Misleading Information in Informed Consent Abortion Statutes*, 3 CHARLESTON L. REV. 601, 606 (2009) (explaining that the *Casey* holding means that "a state may further its interest in protecting potential life by ensuring that a woman's choice is informed, but it must avoid hindering that choice through the imposition of an undue burden on a woman's ability to obtain an abortion").

42 *Casey*, 505 U.S. at 880.

43 530 U.S. 914 (2000).

44 *Id.* at 936–38.

statutes banning partial-birth abortion—a particularly gruesome form of abortion[45]—the Court struck down Nebraska's partial-birth abortion statute for not providing such an exception.[46] Though not conclusively demonstrated,[47] the Court speculated that the procedure might be necessary to preserve the health of the mother in some situations.[48] In dissent, Justice Kennedy argued that such a broad exception essentially allows an individual abortion physician to make the decision on whether a particular abortion procedure was preferable, and thus constitutionally protected.[49] But the Court disagreed, explaining that "where substantial medical authority supports the proposition that banning a particular abortion procedure *could* endanger women's health," the exception must be provided.[50] The Court did not address the underlying point that the *Doe* exception grants physicians ultimate control over when the exception will actually come into play in an individual case.

In *Gonzales*, however, the Court upheld the federal Partial-Birth Abortion Ban Act of 2003,[51] concluding that the Act does not require

45 For a description of partial-birth abortion techniques, see James Bopp, Jr. & Curtis R. Cook, *Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 ISSUES L. & MED. 3, 7–25 (1998). Bopp and Cook distinguish between Dilation and Extraction (D&X) and Dilation and Evacuation (D&E). *Id.* D&X involves delivering the fetus feet-first up to the shoulders. As the head is in the opening of the uterus, the surgeon inserts scissors into the base of the skull and evacuates its contents. The surgeon then removes the intact fetus completely from the patient. *Id.* at 8. D&E involves dismembering the fetus in-utero. *Id.* at 16. Bopp and Cook also note the potential overlap and blurriness between these definitions, particularly when used in statutes. *See id.* at 20–22.

46 *Stenberg*, 530 U.S. at 936–38.

47 *See id.* at 937; *see also id.* at 966 (Kennedy, J., dissenting) (stating that no studies concluded that the banned procedure was safer than other abortion methods).

48 *See id.* at 937 (majority opinion) ("[T]he division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence."); *see also* Peter M. Ladwein, Note, *Discerning the Meaning of* Gonzales v. Carhart*: The End of the Physician Veto and the Resulting Change in Abortion Jurisprudence*, 83 NOTRE DAME L. REV. 1847, 1872–73 (2008) (asserting that the *Stenberg* majority engaged in an "undue burden"-like calculus to argue that Nebraska's law required a health exception).

49 *See Stenberg*, 530 U.S. at 968 (Kennedy, J., dissenting).

50 *Id.* at 938 (majority opinion).

51 18 U.S.C. § 1531 (2006) (outlawing the abortion procedure in which the doctor "deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and performs the overt act . . . that kills the partially delivered living fetus").

a health exception.[52] Justice Kennedy, writing for the majority, noted that "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child,"[53] and stated that "the State may use its regulatory power to bar certain procedures . . . in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life."[54] Absent from this decision was the "judicial deference and solicitude to the privacy of a physician's choices, a physician's autonomy, and a physician's judgment, inaugurated in *Roe*."[55] The Supreme Court found the Act constitutional even in the face of medical and scientific uncertainty about whether the Act's prohibition on partial-birth abortion would ever impose significant health risks on women.[56]

In the *Gonzales* decision, Justice Kennedy opined on the necessity of providing sufficient information to a woman considering an abortion:

> It is . . . this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.[57]

While *Gonzales* did not specifically address informed consent statutes, the Court made clear that women needed to be fully informed in their choices concerning abortion.[58]

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52 Gonzales v. Carhart, 550 U.S. 124, 165–67 (2007) (concluding that the Act was not invalid on its face even though there was medical uncertainty over whether the barred procedure was ever necessary to preserve a woman's health).

53 *Id.* at 159.

54 *Id.* at 158.

55 Ladwein, *supra* note 48, at 1886.

56 *See Gonzales*, 550 U.S. at 162–63.

57 *Id.* at 159–60 (citation omitted).

58 *See* Chewning, *supra* note 41, at 608 (noting that though there were no reliable data at the time to measure the phenomenon, the Court concluded that some women come to regret their choice to abort their babies); *see also* Rebecca E. Ivey, Note, *Destabilizing Discourses: Blocking and Exploiting a New Discourse at Work in* Gonzales v. Carhart, 94 VA. L. REV 1451, 1482 (2008) (noting that because "*Gonzales* ignores the woman's rights discourse and weaves the woman's health discourse and woman-protective discourse together," it allows the undue burden framework to give much more room to the fetus than to the woman).

To conclude, women are currently allowed to obtain abortions. States are allowed to regulate abortions previability in order to promulgate the interest in the life or health of the mother. States are allowed to regulate abortions postviability in order to promulgate either the interest in the life or health of the mother or the interest of the fetus. As seen in *Gonzales*, such regulations need not always have an exception for the health of the mother. According to *Casey*, any previability regulation must not be an undue burden on the woman seeking an abortion. As applied to informed consent statutes, the undue burden standard means that, in order to be upheld under the Fourteenth Amendment,[59] any disseminated information must be truthful, not misleading, and relevant to the decision to have an abortion.

II. Content of Informed Consent Statutes

Since *Roe*, states have used informed consent statutes to persuade women to choose childbirth, and thus reduce the overall number of abortions.[60] This Part will explore the theory behind informed consent requirements in general, the distinction between substantive and procedural informed consent regulations, and the spectrum of informed consent statutes enacted by state legislatures.

A. *Informed Consent Theory*

Respect for autonomy and self-determination is an animating principle of modern biomedical ethics.[61] Informed consent is one avenue by which the field of biomedical ethics has balanced patient autonomy and physician responsibility in such a way as to minimize

59 It is worth noting that courts seem to incorporate First Amendment concerns into their Fourteenth Amendment analyses for informed consent provisions. *See* discussion *infra* Part III.

60 *See* Whitney D. Pile, *The Right to Remain Silent: A First Amendment Analysis of Abortion Informed Consent Laws*, 73 Mo. L. Rev. 243, 245–47 (2008) (discussing the early compelled speech cases that laid the groundwork for informed consent laws); *see also* Rebecca Dresser, *From Double Standard to Double Bind: Informed Choice in Abortion Law*, 76 Geo. Wash. L. Rev. 1599, 1617–20 (2008) (arguing that abortion informed consent statutes often depart from traditional informed consent laws in that they are enacted to discourage women from choosing abortion in a paternalistic manner and sometimes require physicians to warn patients of health risks that are not generally recognized).

61 O. Carter Snead, *The (Surprising) Truth About* Schiavo*: A Defeat for the Cause of Autonomy*, 22 Const. Comment. 383, 387 (2005).

paternalism.[62] Under this doctrine, the default rule is that "no medical intervention may be undertaken without the intelligent and voluntary consent of the patient."[63] Informed consent to medical treatment consists of three essential elements: communication of necessary information, comprehension of that information by the patient, and subsequent consent to treatment.[64] The risks of the proposed treatment, viable alternative treatments, and likely outcomes in the absence of treatment must be communicated.[65] Only through full disclosure can the patient undertake "an autonomous action . . . that authorizes a professional . . . to initiate a medical plan for the patient."[66] These principles, which have been long recognized by the common law, have been codified in state statutes that require doctors to inform patients of risks of treatment, alternatives, and outcomes in areas as diverse as breast cancer and psychiatric treatment.[67]

B. Substantive vs. Procedural Informed Consent Categories

Information contained in informed consent statutes can be divided into two general categories. I refer to the first as "substantive" informed consent statutes. In these regulations, states mandate specific information (or a category of information) that a physician must disseminate to a woman seeking an abortion. This information regularly would pertain to the nature, type, and risks of the abortion procedure in contrast to childbirth. This category also includes information regarding characteristics of the fetus such as age, viability, and ability to perceive pain.[68]

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62 W. NOEL KEYES, BIOETHICAL AND EVOLUTIONARY APPROACHES TO MEDICINE AND THE LAW 213 (2007).

63 *See* Snead, *supra* note 61, at 388. Of course, exceptions may be made in emergency situations where the patient cannot consent to treatment.

64 Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 111, 111 (2008) (citing NAT'L COMM'N FOR THE PROT. OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH (1979), *available at* http://ohsr.od.nih.gov/guidelines/belmont.html).

65 *Id.*

66 RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 278 (1986).

67 *See* Tobin, *supra* note 64, at 111–12.

68 *See, e.g.*, MISS. CODE ANN. § 41-41-33 (West 2007) (requiring physicians to inform the patients of the medical risks of abortion, probable gestational age of the fetus, medical risks of carrying child to term, medical assistance benefits available for prenatal care, childbirth, and neonatal care, that the father is liable to assist in the support of the child, that public and private services exist for pregnancy prevention

The second category consists of "procedural" informed consent provisions, which are included in informed consent statutes but do not deal with specific information that must be disseminated. Rather, they regulate the process for deciding to obtain an abortion, often encouraging waiting, thoughtful reflection, or for an authoritative person to provide abortion counseling.[69] Examples of procedural provisions include a requirement of a waiting period of either eighteen or twenty-four hours before an abortion may be performed and a requirement that only a physician may disseminate the substantive information to the woman considering an abortion.[70] These procedural provisions facilitate comprehension of the informed consent information to ensure that the consent given is meaningful and the woman is truly informed about the abortion procedure. Although procedural provisions are important to informed consent legislation, this Note focuses on substantive informed consent provisions.

C. The Spectrum of Substantive Provisions

The content of informed consent statutes differs from state to state. As of March 1, 2010, thirty-four states require that women receive counseling before an abortion is performed; twenty-three of those states detail the information that a woman must be given.[71] Substantive provisions in these statutes require that the pregnant

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counseling, and that the woman has the right to review materials provided by the state that describe the states of fetal development and a list of agencies that offer alternatives to abortions).

69 *See, e.g.*, S.C. CODE ANN. § 44-41-330(A)(1) (Supp. 2009) (requiring the physician who is to perform the abortion, or an allied professional working with the physician, to disseminate information to the woman and prohibiting an abortion from being performed sooner than sixty minutes following completion of an ultrasound, if one is performed).

70 Chewning, *supra* note 41, at 605.

71 *See, e.g.*, ARK. CODE ANN. § 20-16-903 (Supp. 2009); IDAHO CODE ANN. § 18-609(2)–(3) (Supp. 2008); IND. CODE § 16-34-2-1.1 (2008); KAN. STAT. ANN. § 65-6709 (2002); KY. REV. STAT. ANN. § 311.725(1) (West 2006); LA. REV. STAT. ANN. § 40:1299.35.6(B) (2008); ME. REV. STAT. ANN. tit. 22, § 1599-A (2004); MASS. ANN. GEN. LAWS ch. 112, § 12S (LexisNexis 2000); MINN. STAT. ANN. § 145.4242 (West 2005); MISS. CODE ANN. § 41-41-33(1) (2007); MONT. CODE ANN. § 50-20-104(5) (2009); NEB. REV. STAT. § 28-327(1) (2008); NEV. REV. STAT. ANN. § 442.253(1) (LexisNexis 2005); N.D. CENT. CODE §14-02.1-02(6) (2009); 18 PA. CONS. STAT. ANN. § 3205 (West 2000); R.I. GEN. LAWS § 23-4.7-3(a) (2008); S.C. CODE ANN. § 44-41-330 (A) (2002 & Supp. 2009); S.D. CODIFIED LAWS § 34-23A-10.1 (2008); TENN. CODE ANN. § 39-15-202(b) (2006); UTAH CODE ANN. § 76-7-305 (2008); VA. CODE ANN. § 18.2-76(B) (2009); WIS. STAT. ANN. § 253.10(1)(a)(3) (West Supp. 2010); *see also* GUTTMACHER INST., STATE POLICIES IN BRIEF: COUNSELING AND WAITING PERIODS FOR ABORTION 1 (2010), http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf.

woman be given enumerated, but not exhaustive, information regarding the procedure and its sequelae.[72] This substantive information can range from strictly biological and medical information to relational or legal information, such as information about state laws providing for the support of the woman if she chooses childbirth.[73] An example of medical information that the abortion provider must tell the woman is as follows: that with advancing gestational age, her risk for complications such as pelvic infections, incomplete abortions, blood clots in the uterus, hemorrhage, cut or torn cervix, perforation of the uterus wall, anesthesia-related complications, and breast cancer increases.[74]

Eighteen states require physicians to disseminate information on the psychological effects of abortion.[75] The scope of information given on psychological effects varies: some states mandate that physicians tell women that it is common to experience emotions that are simultaneously positive and negative after an abortion.[76] Other states focus on negative psychological reactions, such as anxiety, guilt, and regret.[77] West Virginia, for example, issues materials that claim that "after abortion many women suffer from symptoms including eating disorders, sexual dysfunction, suicidal thoughts and drug abuse."[78] Five states require the physician to include information on a possible

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72 *See, e.g.*, IND. CODE § 16-34-2-1.1(a); *see also* Chewning, *supra* note 41, at 605.

73 The Supreme Court has even condoned a preamble to a Missouri statute that did not specifically deal with informed consent but rather governed abortion procedures, which read "'(1) The life of each human being begins at conception; (2) Unborn children have protectable interests in life, health, and well-being; (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.'" Webster v. Reprod. Health Servs., 492 U.S. 490, 504 n.4 (1989) (quoting MO. REV. STAT. § 1.205.1 (1986)). According to the Court, the preamble was acceptable because it can be read simply to express a value judgment, and it did not by its terms regulate abortion or any other aspect of medical practice. *Id.* at 506. Were this language included in a substantive disclosure informed consent provision, it would be considered a moral disclosure on the far end of the spectrum.

74 *See* W. VA. DEP'T OF HEALTH & HUMAN RES., INFORMATION ON FETAL DEVELOPMENT, ABORTION, AND ADOPTION 10–11 (2003), *available at* http://www.wvdhhr.org/wrtk/wrtkbooklet.pdf.

75 *See* Chinué Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, GUTTMACHER POL'Y REV., Fall 2006, at 6, 8.

76 *Id.*

77 *Id.*

78 *Id.* at 9.

link between breast cancer and abortion.[79] As of July 2006, the health departments of twenty-two states, under the direction of their legislatures, had developed materials to be distributed to women seeking an abortion.[80]

Further towards a relational disclosure on the spectrum of substantive informed consent provisions is information on the ability of the fetus to experience pain. In both 2006 and 2007, the Unborn Child Pain Awareness Act was introduced into Congress, seeking to "ensure that women seeking an abortion are fully informed regarding the pain experienced by their unborn child."[81] If enacted, the bill would have required that the abortion provider impart certain medical and scientific information to a woman considering abortion after twenty weeks of gestation, including the age of the unborn child, information on the use of pain-preventing drugs that could be administered directly to the unborn child, a description of the risks of the use of anesthesia, and information on the evidence that the unborn child has the physical structures to experience pain and could possibly feel pain during the abortion procedure.[82] Though the bill did not become law, several states responded by enacting similar legislation.[83] Informed consent statutes in five states include information on the ability of a fetus to feel pain.[84] Additionally, states have recently

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79 *Id.* at 8. Minnesota mandates that the physician tell the woman that there is no link between abortion and breast cancer. *Id.*

80 *Id.* at 7.

81 *See* Unborn Child Pain Awareness Act of 2006, H.R. 6099, 109th Cong. (2006); Unborn Child Pain Awareness Act of 2007, S. 356, 110th Cong.

82 Katherine E. Engelman, *Fetal Pain Legislation: Protection Against Pain Is Not an Undue Burden*, 10 QUINNIPIAC HEALTH L.J. 279, 307–08 (2007). *See generally* Antony B. Kolenc, *Easing Abortion's Pain: Can Fetal Pain Legislation Survive the New Judicial Scrutiny of Legislative Fact-Finding?*, 10 TEX. REV. L. & POL. 171 (2005) (theorizing that fetal pain legislation should survive judicial scrutiny since medical and scientific data underlie the legislative fact-finding regarding fetal pain and the level of division in medical opinion about fetal pain is relatively low). *But see* Hannah Stahle, *Fetal Pain Legislation: An Undue Burden*, 10 QUINNIPIAC HEALTH L.J. 251, 264–65 (2007) (arguing that fetal pain information is false and misleading and that fetal pain statutes are vague and should thus be struck down by courts).

83 Engelman, *supra* note 82, at 309–10 (noting that Arkansas, Georgia, Minnesota, and Oklahoma have passed legislation requiring physicians to inform women seeking abortions that fetuses feel pain and noting that these statutes could be held unconstitutional if they have an improper state purpose, lack a medical emergency exemption, or are vague).

84 *See* Richardson & Nash, *supra* note 75, at 9. Arkansas, Georgia, and Minnesota identify twenty weeks as the point at which the fetus may begin to feel pain. South Dakota materials state that an "unborn child may feel physical pain." *Id.* Texas materials suggest that pain can be felt by a twelve-week-old fetus, but that "some

begun including laws requiring an ultrasound or providing the option of viewing the ultrasound of the fetus.[85] Though such information can be considered biological or medical, it does not directly pertain to the health of the *woman*; rather, the physician is disseminating information pertaining to the biological and medical status of the *fetus*.

But informed consent provisions are not simply limited to biological and medical information about the woman or fetus. States include information on legal and social resources surrounding the choice to have an abortion. Twenty states require that the physician provide referral resources for crisis pregnancy centers; thirteen require referral resources for family planning services.[86] Arkansas mandates that the physician tell the woman "[t]hat a spouse, boyfriend, parent, friend, or other person cannot force her to have an abortion," "[t]hat medical assistance benefits may be available for . . . childbirth," and "[t]hat the father is liable to assist in the support of her child."[87] Indiana requires that the woman be informed "[t]hat adoption alternatives are available and that adoptive parents may legally pay the costs of prenatal care, childbirth, and neonatal care."[88] Kansas requires clinics where abortions are performed to post a statement that it is against the law for anyone to force a woman to have an abortion.[89] Louisiana law requires a physician to give the patient materials with the following statement included:

> There are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or to place her or him for adoption. The state of Louisiana strongly urges you to contact them before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion.[90]

States may require the physician to inform the woman about the effect of the procedure on the fetus as well. And a state may require

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experts have concluded that the unborn child is probably able to feel pain at 20 weeks." *Id.*

85 Robert M. Godzeno, Note, *The Role of Ultrasound Imaging in Informed Consent Legislation Post-*Gonzales v. Carhart, 27 QUINNIPIAC L. REV. 285, 303–04 (2009) (discussing the different categories of recent legislation requiring ultrasound and the lack of controversy surrounding these requirements).

86 Richardson & Nash, *supra* note 75, at 8.

87 ARK. CODE ANN. § 20-16-903(b) (Supp. 2009).

88 IND. CODE § 16-34-2-1.1(a)(2)(C) (2008).

89 KAN. STAT. ANN. § 65-6709 (2002).

90 LA. REV. STAT. ANN. § 40:1299.35.6(C)(1)(a)(i) (2008).

the physician to inform the woman about laws that pertain to abortion context, like the availability of child support, laws preventing others from forcing a woman to have an abortion, and a state preference that the woman contact agencies willing to assist the woman in carrying the child to term.

III. The Supreme Court Standard for Informed Consent Statutes

This Part elucidates the Supreme Court standard for evaluating the constitutionality of informed consent statutes. It then goes on to explore the application of this standard by inferior federal and state courts.

A. The Casey *Undue Burden Standard*

In *Casey*, the Supreme Court gave a binding standard for evaluating the constitutionality of abortion informed consent statutes. The *Casey* Court articulated a new test for reconciling the state's interest in protecting fetal life with the liberty interest of the woman: the undue burden standard.[91] The line is drawn at viability: previability, a state regulation violates the Fourteenth Amendment liberty interest of the woman if it is an undue burden on her right to choose abortion.[92] Justice Kennedy explained that a state regulation may not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a previable fetus.[93] With respect to informed consent statutes, "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."[94]

Yet the opinion hedged this standard by noting that it aimed to protect the woman's right to make the ultimate decision, not the right to be insulated from all other options in doing so; if a state measure designed to persuade a woman to choose childbirth over abortion did not have an undue burden on her right to choose, it would be upheld.[95] In other words, "[i]f the information the State requires to

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91 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992).

92 *Id.* at 870–74. "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Id.* at 874.

93 *Id.* at 877; *see also* Chewning, *supra* note 41, at 606 (explaining the *Casey* undue burden test as holding that "states may regulate pre-viability abortions so long as they do not impose an undue burden on a woman's right to choose an abortion").

94 *Casey*, 505 U.S. at 877.

95 *Id.*

be made available to the woman is truthful and not misleading, the requirement may be permissible."[96] Indeed, the Court conceded that the state does not need to be neutral in informing the woman's choice; it can express a preference for childbirth over abortion.[97] The Court permitted a state "to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion."[98]

The informed consent requirement at issue in *Casey* required that, except in a medical emergency, a physician must inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the probable gestational age of the unborn child at least twenty-four hours before performing an abortion.[99] The Court concluded that informing women of the nature of the procedure, the attendant health risks of the procedure and those of childbirth, and the probable gestational age of the fetus was relevant to the woman's decision and would not amount to a substantial obstacle if the information was truthful and not misleading.[100] The Court also found it constitutional for the state to require doctors to inform a woman of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health.[101]

The Court dismissed the argument that physicians have a First Amendment right not to provide state-mandated medical information.[102] Reasoning that the speech at issue was "part of the practice of medicine, subject to reasonable licensing and regulation by the State," the Court made it clear that compelled speech was not at issue with regard to informed consent statutes.[103] The requirement that a doc-

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96 *Id.* at 882.

97 *Id.* at 883.

98 *Id.*

99 *Id.* at 881 (citing 18 PA. CONS. STAT. § 3205 (1990)).

100 *Id.* at 882.

101 *Id.* at 883 ("We conclude . . . that informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant."). Such materials included information on fetal development and resources for assistance should the woman decide to carry her pregnancy to term. *Id.*

102 *See* Pile, *supra* note 60, at 252.

103 *Casey*, 505 U.S. at 884. *But see* Pile, *supra* note 60, at 258 (discussing abortion informed consent laws from a First Amendment perspective and arguing that "when an informed consent law compels physicians to deliver the State's moral or ideological messages, rather than scientific facts, that informed consent law exceeds constitutional limits"); Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of* Rust v. Sullivan *and* Planned Parenthood v. Casey, 95 COLUM. L. REV.

tor give a patient certain information in obtaining her consent for abortion is constitutionally the same as the requirement that a doctor give certain specific information about any medical procedure.[104]

Casey thus established that an abortion informed consent statute may only require a physician to disseminate information that is truthful, not misleading, and relevant to a woman's decision of whether or not to have an abortion.[105] If a regulation creating a structural mechanism by which the state expresses profound respect for the life of the unborn satisfies those three criteria, it is not a substantial obstacle to the woman's right to choose and is permissible under the Fourteenth Amendment.[106] If those three criteria are not met, however, then the statute imposes an undue burden on a woman's right to choose to have an abortion and is unconstitutional.[107] Yet *Casey* gave lower courts little guidance to aid them in the determination of what should be considered truthful, not misleading, and relevant.

B. What Is an Undue Burden in the Context of Informed Consent?

Several cases at the inferior federal court and state court levels have attempted to apply this test. Though the test seems like a straightforward method of evaluating how a provision will affect the Fourteenth Amendment liberty interest of the woman, courts seem to have imported First Amendment concerns on behalf of physicians into their analysis of informed consent statutes.

In *Eubanks v. Schmidt*,[108] the statute at issue was essentially the same as the Pennsylvania statute in *Casey*, so the Western District of Kentucky used a similar evaluation.[109] The statute itself required that the descriptive materials provided by the physicians be "objective and nonjudgmental, and shall include only accurate scientific information."[110] Even though some of the fetal development photographs included in the pamphlet were color-enhanced and others were enlarged, the court found the materials to be "truthful and not mis-

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1724, 1764 (1995) (arguing that the *Casey* court erred when it disregarded the First Amendment's implications on abortion counseling, weakening the decision).

104 *Casey*, 505 U.S. at 884.

105 *See* Chewning, *supra* note 41, at 609.

106 *Casey*, 505 U.S. at 877.

107 *Id.*

108 126 F. Supp. 2d 451 (W.D. Ky. 2000).

109 *Id.* at 454, 460.

110 *Id.* at 459. It is important to note that the "objective and nonjudgmental" standard came from the statute itself, not from an interpretation of *Casey*.

leading."[111] Though the physicians were required to give a woman considering abortion a list of agencies available to assist her, the court found the materials fair and balanced; therefore, they were not misleading and did not violate the Fourteenth Amendment Due Process rights of the women considering abortion.[112]

With regard to the physicians' First Amendment rights, the *Eubanks* court held that "[i]t is possible to convey information about ideologically charged subjects without communicating another's ideology, particularly in the context of the reasonable regulation of medical practice."[113] Even though the legislature passed the statute to further its preference for childbirth over abortion, the pamphlets did not "overtly trumpet that preference," so the court did not consider them compelled ideological speech.[114] Though this analysis was ostensibly distinct from the analysis of the undue burden on the woman, the court seemed comfortable with allowing the provisions to stand because "[t]hey provide information from which a woman might naturally select the choice favored by the legislature."[115] It seems as if principles from the undue burden analysis crept into the court's First Amendment analysis.

The Eighth Circuit utilized *Casey*'s undue burden test in upholding an informed consent provision in *Fargo Women's Health Organization v. Schafer*.[116] The statute at issue required the abortion provider to tell the woman the name of the physician who would perform the procedure, the medical risks of abortion, the probable gestational age of the fetus, and the medical risks of pregnancy.[117] The court reasoned that this substantive information was similar to that involved in the Pennsylvania statute in *Casey*, so those particular provisions of the statute could not be considered an undue burden for women in North Dakota.[118]

The statute at issue in *Fargo Women's Health Organization* also required the physician to advise the woman that medical assistance

111 *Id.* (emphasizing that the pictures provided an accurate rendition of the fetus at various stages of development, and that the plaintiffs did not seriously challenge any of the other scientific and medical information contained in the packet).

112 *Id.*

113 *Id.* at 458 n.11; *see also* Chewning, *supra* note 41, at 611 (recognizing that it is possible for information that is controversial or ideological in nature to still satisfy the truthful and not misleading standard).

114 *Eubanks*, 126 F. Supp. 2d at 458 n.11.

115 *Id.*

116 18 F.3d 526 (8th Cir. 1994).

117 *Id.* at 531.

118 *Id.* at 532–33.

benefits may be available and the father is liable for child support.[119] Since the provision did not require that the physician definitively state that medical benefits were available and the statement that the father is liable for child support finds support in other North Dakota statutes, these statements were not considered misleading or false.[120] The court upheld these provisions, noting that the physicians could disassociate themselves from the printed materials and could also comment on the father's medical assistance liability provisions.[121] Thus, though the court did not mention the First Amendment, it seems as if the ability of the physicians to distance themselves from the information that they provided alleviated concerns about compelled speech and may have been a factor in enabling the provisions to remain constitutional. In other words, the court seemed to import a First Amendment–type analysis into its Fourteenth Amendment undue burden analysis. Also, the fact that the court upheld these provisions, even though they were further away from the medical or biological end of the disclosure spectrum, speaks to the range of material that can be included in an informed consent statute.

In *Karlin v. Foust*,[122] the Seventh Circuit explained that the undue burden test is best understood by examining the Court's application of it in *Casey*. According to the *Karlin* court, in using the undue burden standard "courts should not focus on whether the challenged regulation merely has the effect of making abortions a little more difficult or expensive to obtain."[123] Courts should instead focus on "the practical impact of the challenged regulation and whether it will have the likely effect of preventing a significant number of women for whom the regulation is relevant from obtaining abortions."[124] Rather than simply making abortions more difficult to obtain, a challenged regulation must have a strong likelihood of preventing women from obtaining abortions in order to be found unconstitutional:

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119 *Id.* at 533–34.

120 *Id.*

121 *Id.* *But see* Acuna v. Turkish, 930 A.2d 416, 428 (N.J. 2007) (refusing to import a common law duty to a physician to tell a pregnant patient that an embryo is an existing, living human being and that an abortion results in the killing of a family member). The common law doctrine of informed consent in that jurisdiction requires doctors to provide women seeking abortions only with what the court referred to as "material medical information, including gestational stage and medical risks involved in the procedure." *Id.*

122 188 F.3d 446 (7th Cir. 1999).

123 *Id.* at 481.

124 *Id.*

> By drawing the constitutional line at persuasion, the undue burden standard should not invalidate those state regulations designed to persuade a woman to carry her fetus to term, even though those regulations may incidentally burden the woman's abortion right by making an abortion more expensive or inconvenient to obtain; however, when those regulations actually prevent women from having abortions they would otherwise choose to have, then they pose an unconstitutional undue burden.[125]

In addition to finding some procedural provisions constitutional,[126] the *Karlin* court upheld a provision requiring the physician to inform her patient that fetal heartbeat auscultation services were available over objections that the disclosure was false and misleading because technology cannot discern a fetal heartbeat before ten weeks of pregnancy.[127] The court found that the information to be conveyed was neither false nor misleading: the services were available to all women, yet would only render useful results after a certain point in pregnancy.[128] Also, the court found it persuasive that the exact content of the discussion was left to the discretion of the physician.[129] Though the court resolved this inquiry under the "false and misleading" standard, First Amendment concerns on the behalf of the physicians again crept into the analysis, but the court was alleviated of these concerns by the ability of the physician to further explain her own medical opinion.

In *Summit Medical Center of Alabama, Inc. v. Riley*,[130] a federal district court in Alabama specifically noted that the truthful, not misleading, and relevant standard articulated in *Casey* does not require that information be ideologically neutral. The *Riley* court held that the

125 *Id.* at 482.

126 The *Karlin* court concluded that a waiting period did not constitute an undue burden since it did not prevent women from having abortions they would otherwise choose to have. The court also noted that it was not enough for a plaintiff to show that the number of abortions declined after the passage of a state abortion regulation because "that result is entirely consistent with a state's legitimate interest in persuading a woman to carry her child to term"; the plaintiff must also explain that this effect was due to the preventative nature of the law for the regulation to be found unconstitutional. *Id.* at 485–87.

127 *Id.* at 491–92.

128 *Id.* at 492.

129 *Id.* ("Like the informed consent provision that requires a physician to discuss the risk of psychological trauma, a physician is required to inform the woman that fetal heartbeat services are generally available, but consistent with our interpretation of the former provision, if the physician believes that such services are not specifically available to a patient because her fetus has not reached a particular gestational age, then that is what the physician must disclose.").

130 274 F. Supp. 2d 1262 (M.D. Ala. 2003).

First Amendment rights of physicians were not violated by an informed consent statute requiring them to disseminate pro-childbirth materials.[131] The truthfulness of the materials was not at issue; the argument of the physicians that they were being required to distribute materials that they did not agree with was unsuccessful.[132]

The Tennessee Supreme Court struck down an abortion informed consent provision under a standard other than the *Casey* undue burden standard; Tennessee precedent requires strict scrutiny of all laws restricting fundamental rights, procreative rights among them.[133] The majority in *Planned Parenthood of Middle Tennessee v. Sundquist* criticized the undue burden standard as being so subjective as to be "essentially no standard at all."[134] Physician-only counseling requirements, as well as mandatory waiting period requirements, were struck down under the Tennessee Constitution.[135]

Based upon the treatment of *Casey* by these courts in general, it seems as if "truthful, not misleading, and relevant" is a workable test by which to evaluate the constitutionality of abortion informed consent statutes. Courts have responded affirmatively, albeit inconsistently, to the reasoning behind the *Casey* decision: women have a right to make an informed decision regarding an abortion and states can further their interest in the fetal life through informed consent statutes so long as physicians are required to disseminate only truthful, not misleading, and relevant material. Substantive provisions can even include information fairly far removed from medical or biological disclosures involving the mother's health; physicians may even be required to disclose information on the availability of a fetal ultrasound or liability of the father for child support. Disclosures need not be cabined to the mother's health to satisfy the "truthful, not misleading, and relevant" standard.

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131 *Id.* at 1271. The court found the portion of the statute that required the physicians to pay for the dissemination of such materials unconstitutional under the First Amendment doctrine that the expression that the plaintiffs are required to support must be "germane to a purpose related to an association independent from the speech itself." *Id.* at 1277.

132 *Id.* at 1271.

133 Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 15 (Tenn. 2000).

134 *Id.* at 16.

135 *Id.* at 22.

IV. Misapplication of the "Truthful, Not Misleading, and Relevant" Standard in *Rounds*

On remand from the Eighth Circuit, the District of South Dakota misapplied *Casey*'s "truthful, not misleading, and relevant" standard. Under the court's reading of South Dakota's informed consent law, the physician must tell the woman that the abortion will terminate the life of a whole, separate, unique, living human being, but the physician cannot be required to tell the woman that she has any relationship with that human being or that any relationship that she has with that human being is entitled to legal protection. The court side-stepped prior cases allowing disclosures about legal or social issues, focusing on the fact that one of the required disclosures regarded relationships rather than biological or medical facts. Yet under the "truthful, not misleading, and relevant" standard, the relationship disclosure should have been upheld. Additionally, the court erred in striking down the medical risk provisions by employing too strict of a standard of review.

A. *Biological Disclosure*

Judge Schreier of the District of South Dakota upheld the provision referred to as the "biological disclosure": "That the abortion will terminate the life of a whole, separate, unique, living human being."[136] The district court followed the Eighth Circuit's determination that Planned Parenthood "[could not] succeed on the merits of its claim that [the biological disclosure] violates a physician's right not to speak unless it can show that the disclosure is either untruthful, misleading, or not relevant to the patient's decision to have an abortion."[137] Because the statute mandated that the physician tell the woman that the abortion will terminate the life of a whole, separate, unique, living human being, and "human being" in this case means an individual living member of the species of *Homo sapiens* during its embryonic or fetal age (and Planned Parenthood submitted no evidence to oppose that conclusion), the district court followed the Eighth Circuit's prompt and upheld that portion of the statute.[138] In no way was the information that the woman would be terminating the

136 Planned Parenthood Minn., N.D., S.D. v. Rounds, 650 F. Supp. 2d 972, 976 (D.S.D. 2009) (alteration in original) (quoting S.D. Codified Laws § 34-23A-10.1(1)(b) (Supp. 2009)).

137 *Id.* (second alteration in original) (quoting Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 735 (8th Cir. 2008)).

138 *Id.* The Eighth Circuit relied on the testimony of a physician and geneticist in the legislative record, who stated:

life of a human being untruthful, misleading, or irrelevant to her decision; consequently, the statute was not an undue burden on her right to choose to have an abortion and was constitutionally acceptable.

B. Relationship Disclosures

The district court found the "relationship disclosures"[139] untruthful and misleading and therefore unconstitutional, even after reiterating that the Eighth Circuit noted that "while the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion."[140] Citing *Black's Law Dictionary*,[141] the court determined that a relationship is the nature and association between two or more people.[142] The court dismissed a volume of Supreme Court cases that supported a finding of a relationship between a mother and a child by stating that all of those cases involved the relationship between a parent and a born child.[143]

The court failed to recognize that *Roe* itself created a relationship between a pregnant woman and her unborn child: the mother is the sole arbiter of the child's fate. Under *Roe*, the mother is the only person allowed to determine if the child will be carried to term or will be

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> Becoming a member of our species is conferred immediately upon conception. At the moment of conception a human being with 46 chromosomes comes into existence. These chromosomes, the organization, the chromosomal pattern is specifically human. The RNA, the messenger protein, the proteins are distinctly human proteins. So this new human being is a member of our species, and humanity is not acquired sometime along the path, it occurs right at conception.

Rounds III, 530 F.3d at 728.

139 *Rounds*, 650 F. Supp. 2d at 977 ("[T]he pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota." (quoting S.D. Codified Laws § 34-23A-10.1(1)(c) (Supp. 2009))); *id.* (stating "[t]hat by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated" (quoting S.D. Codified Laws § 34-23A-10.1(1)(d))).

140 *Id.* (citing *Rounds III*, 530 F.3d at 734–35).

141 Black's Law Dictionary 1314 (8th ed. 2004).

142 *Rounds*, 650 F. Supp. 2d at 977 ("In the legal context, 'relationship' is defined as 'the nature and association between two or more people; esp. a legally recognized association that makes a difference in the participants' legal rights and duties of care." (emphasis omitted)).

143 *Id.* at 978.

terminated.[144] No other actor is allowed to make this determination, and the state may not place an undue burden on the woman's right to make this decision. Also, viability is the line of demarcation with regard to state involvement. Before viability, states can only intervene to promote their interest in the life and health of the woman. After viability, states can intervene to promote their interest in the life and health of the fetus.[145] Viability itself is a measure of the unborn child's dependency on the mother; viability means that the child could survive outside of the mother's womb.[146] The constitutionality of state action depends on the biological and developmental relationship between the pregnant woman and the unborn child. In that respect, there is a very clear constitutional relationship between the pregnant woman and the unborn human being that will be ended once the pregnant woman undergoes an abortion.

In addition, the court disregarded the fact that unborn children have been treated as "persons" in federal statutes such as the Unborn Victims of Violence Act (UVVA).[147] The UVVA indicates that "unborn children, whether viable or not, will be considered as human beings and therefore, whole persons as victims of crime."[148] The court also did not recognize any ethical problem with distinguishing between human beings and constitutional persons. In *Alexander v. Whitman*,[149] the Third Circuit determined that New Jersey could extend protections to fetuses through wrongful death statutes, but was not obligated to do so.[150] The *Alexander* court, reasoning that "the issue is not whether the unborn are human beings, but whether the unborn are constitutional persons," drew a distinction between per-

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144 *See* discussion *supra* notes 24–28.

145 *See* discussion *supra* notes 31–36.

146 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2548 (1986).

147 Unborn Victims of Violence Act of 2004, 18 U.S.C. § 1841 (2006) (punishing the killing of an unborn child or the termination of a wanted pregnancy); *see also* Robert Steinbuch, *The Butterfly Effect of Politics over Principle: The Debate over the Unborn Victims of Violence Act and the Motherhood Protection Act*, 12 QUINNIPIAC HEALTH L.J. 223, 231–32 (2009) (discussing how political concerns surrounding abortion resulted in "murky lawmaking").

148 Amanda K. Bruchs, Note, *Clash of Competing Interests: Can the Unborn Victims of Violence Act and over Thirty Years of Settled Abortion Law Co-Exist Peacefully?*, 55 SYRACUSE L. REV. 133, 151–52 (2004). Bruchs characterizes the UVVA as the first federal legal recognition of personhood for the unborn and places heavy emphasis on the fact that the UVVA draws no distinction between previable and viable fetuses. *Id.* at 147–53.

149 114 F.3d 1392 (3d Cir. 1997).

150 *Id.* at 1406.

sonhood and human beings.[151] Then-Judge Alito recognized a problem with this distinction in his concurrence, stating:

> I think that the court's suggestion that there could be "human beings" who are not "constitutional persons" is unfortunate. I agree with the essential point that the court is making: that the Supreme Court has held that a fetus is not a "person" within the meaning of the Fourteenth Amendment. However, the reference to constitutional non-persons, taken out of context, is capable of misuse.[152]

The *Rounds* court gave no consideration to any problems that could arise from treating human beings as distinct from constitutional persons; the ethical implications that could follow from creating a subclass of human beings that are not constitutional persons were not enough reason for the court to uphold the relationship disclosures.

Similarly, the court dismissed South Dakota statutes including unborn children in the definition of "person" since none of those statutes addressed whether there is a protected legal relationship between a pregnant mother and an unborn child.[153] Also unpersuasive to the court were several South Dakota cases finding a cause of action for the wrongful death of both viable and nonviable children.[154] Since "South Dakota has not recognized that the relationship between a parent and an unborn embryo or fetus is a legal relationship protected by state laws," the court found the relationship disclosure untruthful and misleading.[155]

Reasoning that she could not find a statute that directly spoke of the unborn child as a person, capable of a legal relationship with the mother, Judge Schreier deemed this portion of the statute to be untruthful and misleading.[156] Under the *Casey* evaluation, that find-

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151 *Id.* at 1402.

152 *Id.* at 1409 (Alito, J., concurring) (citation omitted).

153 Planned Parenthood Minn., N.D., S.D. v. Rounds, 650 F. Supp. 2d 972, 978–79 (D.S.D. 2009) (citing S.D. CODIFIED LAWS § 21-5-1 (stating that any person, including an unborn child, can bring a wrongful death cause of action); *id.* § 22-16-4 (stating that first degree murder is the premeditated killing of any other human being, including an unborn child); *id.* § 59-7-2.8 (stating that artificial nutrition and hydration for pregnant women to allow the continuing development and live birth of the unborn child in certain circumstances is required); *id.* § 25-7-19 (stating that the child neglect statutes apply to an unborn child that has been conceived); *id.* § 22-16-7 (stating that second degree murder is a killing perpetuated by an act imminently dangerous to others and without regard for human life of another person, including an unborn child)).

154 *Id.* at 979 (citing Wiersma v. Maple Leaf Farms, 543 N.W.2d 787 (S.D. 1996); Farley v. Mount Marty Hosp. Ass'n, 387 N.W.2d 42 (S.D. 1986)).

155 *Id.*

156 *Id.*

ing necessarily means that the regulation places a substantial obstacle in the way of women seeking abortions and is an undue burden on their right to abortions; as such, it was struck down. Yet the court's application of the standard was misguided. The court used a legal dictionary's definition of "relationship" and a narrow understanding of "personhood" to deem it "untruthful" to tell a woman that she has a legally protected relationship with the fetus. Interestingly enough, the opinion cited three South Dakota statutes that included an unborn child in the definition of "person."[157] Yet those statutes were not enough for the court to conclude that an unborn child was capable of a relationship as defined in the legal dictionary.

By cabining the definition of "relationship" and "person" in such a manner, the court itself imported a misleading meaning to the statute. Properly understood, telling a pregnant woman that she has an existing relationship with an unborn human being and that abortion will terminate that relationship is truthful, not misleading, and relevant to her decision. It should thus stand. Just because this disclosure does not strictly pertain to the medical consequences of the procedure to the woman does not mean that it should be held to a higher standard of constitutional scrutiny. Like laws in other states that require a physician to inform the woman that the father could be liable for child support or that the state urges the woman to contact an organization that would give her support through pregnancy and birth, this provision does not prove problematic under the First or Fourteenth Amendments.

C. *Medical Risk Disclosures*

The "medical risk disclosures"[158] were found to be unconstitutionally vague.[159] According to the court, because the term "risk factors" was not defined in the statute, it did not provide adequate notice to physicians as to what should be disclosed.[160] With regard to the

157 *Id.* at 978–79.

158 *Id.* at 979 (stating that "[a] description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including . . . [i]ncreased risk of suicide ideation and suicide") (quoting S.D. CODIFIED LAWS § 34-23A-10.1(1)(e) (Supp. 2009)).

159 *Id.* at 981. ("Because a 'risk factor' refers to a predisposing condition that a patient has before a procedure, it is improperly used in the same clause as 'medical risk,' which is something that a patient is subject to during or after a procedure. As the statute reads, physicians are required to disclose 'risk factors to which the pregnant woman would be subjected to,' which is confusing and actually impossible.").

160 *Id.* Judge Schreier cited only one authority in her discussion of this issue: *Schmitt v. Nord*, 27 N.W.2d 910, 913 (S.D. 1947). *Rounds*, 650 F. Supp. 2d at 981

mandate to inform women of increased suicide risk, the court used the *Merriam-Webster Dictionary* to define a "known" risk as one that is generally recognized.[161] Though there were five studies presented by the defendants showing an association between suicide ideation and abortions, the court found that the risk was not "known" and therefore disclosure of such a link was untruthful and misleading.[162] The court gave no reasoning as to why a dictionary should be the sole determinant of what information a woman should be given before she makes a decision with the potential to have a profound impact on her health. Waiting until a risk is "generally recognized" could have a detrimental effect on a woman's health, particularly if several peer-reviewed studies show causality between abortion and negative long-term sequelae. Peer-reviewed studies have shown a significantly higher age-adjusted risk of death from suicide for women who aborted compared with women who delivered.[163] Yet the court disregarded all legislative fact-finding on that particular issue and determined that women were not entitled to information on the medical risks of abortion until such risks have reached the "generally recognized" status.[164]

The court also failed to speak to the Eighth Circuit precedent of *Fargo Women's Health Organization v. Schafer*,[165] which upheld a North Dakota statute requiring the physician to inform the patient of the

("[S]tating that a statute 'must be construed, and the intent and meaning of the Legislature ascertained, from the language of the act, and words used therein are to be given their ordinary meaning unless the context shows that they are differently used.'" (quoting *Schmitt*, 27 N.W.2d at 913)).

161 *Id.* at 983.

162 *Id.*

163 *See, e.g.*, David M. Fergusson et al., *Abortion in Young Women and Subsequent Mental Health*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 16, 17–18, 22 (2006) (finding that those women who had an abortion before age twenty-five had elevated rates of subsequent mental health problems including depression, anxiety, suicidal behaviors, and substance use disorders); Mika Gissler et al., *Injury Deaths, Suicides and Homicides Associated with Pregnancy, Finland 1987–2000*, 15 EUR. J. PUB. HEALTH 459, 462 (2005) (finding that owing to elevated suicide and homicide rates an increased risk of death was observed for women after abortions); David C. Reardon et al., *Deaths Associated with Pregnancy Outcome: A Record Linkage Study of Low Income Women*, 95 SO. MED. J. 834, 834 (2002) (finding that those women who aborted had a 2.54 times higher risk of death from suicide than those who delivered).

164 *See* Kolenc, *supra* note 82, at 182–95 (noting that, in general, courts will defer to legislative fact-finding unless the issue involves a constitutional fact, particularly when there is a thorough legislative record and not a significant amount of medical or scientific division surrounding the facts). *But see* Tobin, *supra* note 64, at 130–40 (concluding that, although the *Gonzales* court left to the legislature considerations of marginal safety, including balancing risks, courts will not apply a deference principle to legislative findings in abortion informed consent cases).

165 18 F.3d 526 (8th Cir. 1994).

medical risks of childbirth and of abortion.[166] Though the statute at issue in *Rounds* differed from the *Schafer* statute in that it specified certain risks that the physician must mention, it should have still been upheld since, just as in *Schafer*, the physician would be able to distance herself and explain that the risks were those that the legislature had found relevant, removing from it the possibility of being a Fourteenth Amendment undue burden, which has become conflated with First Amendment concerns.

To conclude, the *Rounds* court misapplied the *Casey* "truthful, not misleading, and relevant" standard to invalidate several substantive abortion informed consent provisions. By ignoring precedents speaking to the constitutionality of informed consent provisions regarding legal or social issues, particularly when the physician can distance herself from the information or supplement it with her own professional judgment, the *Rounds* court essentially employed a higher standard of scrutiny than the Supreme Court dictates for substantive informed consent statutes.

Conclusion

The recent decision in *Rounds* provides good cause to examine what states can include in abortion informed consent statutes, particularly after the Supreme Court, in *Gonzales*, invited states to enact such statutes to ensure that women are fully informed before they make such a grave decision and to witness their respect for the sanctity of unborn life. *Casey* set the standard for evaluation of such statutes at "undue burden." That standard comports well with informed consent theory, which looks to balance patient interests in autonomy with the paternalistic practice of medicine.[167] An informed consent provision should not unduly burden the choice of a patient as to childbirth or abortion; it should ensure that the woman is fully aware of all of the risks and outcomes of that procedure as compared to alternatives. As lower courts have grappled with what "undue burden" means, there seems to be a difference between informed consent provisions that mandate specific content be given to women considering abortion and informed consent provisions that specify procedures to be followed in the consent process.[168]

Statutes requiring physicians (or abortion providers) to disseminate substantive information to women considering abortion should be evaluated under a "truthful, not misleading, and relevant" stan-

166 *Id.* at 536.

167 *See* discussion *supra* notes 61–67.

168 *See* discussion *supra* Part II.

dard. This standard also fits in well with informed consent theory, which fosters communication of necessary information, comprehension of that information by the patient, and subsequent consent to treatment.[169] The woman will only be able to consent effectively to the "treatment" of abortion if the information that she is given is truthful, not misleading, and relevant; otherwise, she is consenting without fully understanding what she will undergo. Information about the risks of the procedure to the woman's health, including the long-term effects of the procedure, as well as information regarding the fetus would be included in this category. Details such as the age of the fetus, viability, stage of development, and pictures of fetal development could be provided by the physician to the patient. Another possibility is requiring the physician to tell the woman about the ability of the fetus to feel pain; under the truthful, not misleading, and relevant standard, this provision would be upheld as long as the fetus was past the developmental stage at which pain-sensing structures form.

As the *Rounds* court held, the truthful, not misleading, and relevant standard does not prevent the state from mandating the physician to tell the woman that the abortion is terminating the life of a whole, separate, unique, living human being. Since "human being" is statutorily defined as a biological member of the human species, there is nothing untruthful or misleading about this statement. No scientific or medical research will contradict this statement. Therefore, states should be able to enact a similar provision without concern for violating the First Amendment rights of the physician or the Due Process rights of the woman.

A requirement that the physician tell the woman that she has a relationship with the unborn child that will be terminated by abortion should be subject to the same level of scrutiny as biological disclosures. The *Rounds* district court misapplied the truthful, not misleading, and relevant test by using a dictionary to define a relationship as requiring two people and disregarding the constitutional relationship between a pregnant woman and a fetus created in *Roe* as well as all of the South Dakota and federal statutes including unborn children in the category of "people." Notwithstanding the *Rounds* district court decision, relationship provisions should be upheld provided that the reviewing court uses the appropriate construction of "relationship" and "personhood". No precedent requires a relationship to be between two people. *Roe* even creates a legal relationship between a pregnant woman and her fetus in that she is the sole arbiter of the fate of the fetus. Furthermore, even if a relationship was required to

169 *See* discussion *supra* note 64.

consist of two people, an unborn child is considered a "person" for the purpose of at least one federal statute, as well as in laws providing a wrongful death cause of action for killing a viable fetus in the majority of states.[170] Courts should not use the fact that an unborn child is not considered a "person" for the purposes of the Fourteenth Amendment in the context of abortion to negate the unborn child's "personhood" for a variety of other purposes, like wrongful death causes of action, first and second degree murder charges, life sustaining measures, and child neglect statutes. Even though such relationship disclosures are further down the spectrum than a medical disclosure about the effect of the procedure on the fetus, it should still be upheld under the truthful, not misleading, and relevant standard.

Information about the long-term effects of the procedure, both physical and psychological, should also be upheld under this standard, provided that it is supported by peer-reviewed studies and shows statistical significance. The *Rounds* district court misapplied the standard by disregarding much of the legislative fact-finding on medical risks and instead using a dictionary to support the proclamation that before a legislature can mandate a physician to tell her patient about risks, such risks must be "generally accepted." For a provision about long-term effects to be upheld, the legislative record should reflect the sound basis for requiring a physician to tell her patient about a risk accompanying the abortion procedure.[171] Since a principle concern of the doctrine of informed consent is to provide for the autonomy of patients and prevent overly paternalistic decisionmaking, it seems to be within the state's interest to provide for the woman's autonomy and ensure that her physician does not withhold information about risks that could drastically affect her life in the future. Also, allowing the physician to distance herself from the risks by stating that the legislature has deemed them important seems to alleviate any First Amendment concerns that creep into the Fourteenth Amendment undue burden analysis.

State legislatures should take heed of possible misapplications of the Supreme Court standard like those that occurred in *Rounds* and recognize that preliminary injunctions may delay the effectiveness of their informed consent statutes. Yet informed consent statutes will still be a viable way for states to further their interests in patient autonomy, women's health, and the protection of unborn lives.

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170 *See* discussion *supra* notes 147, 153–57; *see also* Steinbuch, *supra* note 147, at 231.

171 *See* discussion *supra* note 164.