

## COMMENTS

### OPEN YOUR MOUTH AND SAY ‘IDEOLOGY’: PHYSICIANS AND THE FIRST AMENDMENT

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#### I. INTRODUCTION

Puppets—those creatures of the theater which are manipulated by the puppeteer’s artful hands—have the great potential to communicate ideologies. In the Middle Ages, puppets were used in churches to bring religious lessons to life.<sup>1</sup> Bread and Puppet Theater, a puppet troupe established in the 1960s, was known for its protestations of American involvement in the Vietnam War and support of causes like voter registration and peace.<sup>2</sup> Just like puppeteers of the stage who communicate ideologies through marionettes and hand puppets, some governments attempt to communicate ideologies through their citizens. Physicians, though under state control in some aspects of their work, are not puppets of the State. But some abortion providers are used for just this purpose. These physicians are coming into conflict with state governments which are attempting to gain ideological control over their speech. With the state as the puppeteer and ideology as the script, physicians’ First Amendment rights are being swept into the collateral damage of the abortion war.

#### A. *Misinformed Consent*

A South Dakota statute requires all doctors, under threat of criminal punishment, to tell patients seeking an abortion that an “abor-

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<sup>1</sup> GEORGE LATSHAW, *THE COMPLETE BOOK OF PUPPETRY* 16 (2000).

<sup>2</sup> See *A Short View of American Puppetry*, Lowell Swortzell in *AMERICAN PUPPETRY* 30 (Phyllis T. Dircks ed., 2004); Holland Cotter, *Spectacle for the Heart and Soul*, N.Y. TIMES, Aug. 5, 2007, at 1.

tion will terminate the life of a whole, separate, unique, living human being.”<sup>3</sup> This forced communication of the term “human being” is a statement on when life begins and it goes well beyond the informed consent regime that was upheld as constitutional in the Supreme Court’s landmark decision of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>4</sup> This Comment examines whether a State can require that a doctor communicate to a pregnant patient that her developing fetus is a “human being,” or whether such a law violates the basic tenets of the First Amendment.

The Eighth Circuit, in *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*,<sup>5</sup> lifted an injunction on South Dakota’s informed consent to abortion statute in 2008, siding with the State and thus compelling abortion providers to use the term “human being” as included in the script. The State maintained that its definition of “human being” (found in the section of the statute *not* conveyed to the patient) is a scientific one. But this is not so. The statute defines “human being” as “an individual living member of the species of *Homo sapiens*, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation.”<sup>6</sup> South Dakota’s position was that the use of the term “*Homo sapiens*” to define “human being” “establishes the legislative command that the information to be given to the woman is ‘scientific’ and not philosophical, moral or theological.”<sup>7</sup> But just as calling something blue does not make it blue, calling something “science” does not automatically make it scientific.

The law in South Dakota is unique in ways that raise concerns for both physicians and patients and it has import well beyond its own

3 S.D. CODIFIED LAWS § 34-23A-10.1 (2009). The South Dakota statute is controversial for a number of different reasons, but this Comment only focuses on the language that conveys human being status upon the fetus. For broad criticisms of the statute, see Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, and Reva B. Siegal, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (arguing that the growing use of a woman-protective anti-abortion argument reflects a shift from fetal-focused to gender-based justifications for abortion regulations).

4 505 U.S. 833 (1992). Interestingly, the South Dakota informed consent statute was originally virtually the same as that upheld in *Casey*, but it was later amended to include the language at issue in this Comment. See S.D. CODIFIED LAWS § 34-23A-10.1 (2003).

5 *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc). The court stated that the term refers to purely “biology-based” characteristics and does not require a physician to address whether a fetus is a “‘whole, separate, unique’ ‘human life’ in the metaphysical sense,” citing the statutory definition as justification for the conclusion. *Id.* at 736 n.9.

6 S.D. CODIFIED LAWS § 34-23A-1(4) (2009).

7 Appellants’ Brief at 24, *Rounds*, 530 F.3d 724 (No. 05-3093).

state's borders. South Dakota may only have one abortion clinic and a mere four doctors who will perform the procedure,<sup>8</sup> but the impact of its law cannot be understated. Though the statute ostensibly only violates the speech rights of these physicians (which is still significant), the effects are much broader and pernicious. "Although some may view South Dakota's restrictive abortion provisions as affecting only the 700 or so women who seek an abortion in that state each year, such complacency is misplaced," warns one commentator in the *New England Journal of Medicine*.<sup>9</sup> This provision "mark[s] a substantial inroad into the physician-patient relationship"<sup>10</sup> and ought to raise significant concerns for physicians' speech rights.

### B. Unconstitutional Scripts

The Eighth Circuit's ruling in *Rounds* has already encouraged other States to create statutes with similarly problematic requirements.<sup>11</sup> I argue that when informed consent statutes use subjective, non-scientifically proven terms to describe the fetus and require doctors to convey such terms to their patients, the state compels speech that is not only misleading, but ideological. This ideological speech is a clear violation of the First Amendment.

In Part II, I examine the purpose behind the doctrine of informed consent and the extent to which the State may use its police power to regulate the practice of medicine in this area. States do not typically have the power to compel individuals to adhere to an ideology,<sup>12</sup> but in the context of medicine, reasonable regulation may diminish or even eliminate a doctor's right not to be required to endorse prescribed speech.<sup>13</sup> In Part III, I detail the progression of cases through the courts which have led to the current state of the doctrine and re-

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8 See Evelyn Nieves, *S.D. Makes Abortion Rare Through Laws and Stigma; Out-of-State Doctors Come Weekly to 1 Clinic*, WASH. POST, Dec. 27, 2005, at A1 [hereinafter, Nieves, *S.D. Makes Abortion Rare*]; Evelyn Nieves, *S.D. Abortion Bill Takes Aim at 'Roe'; Senate Ban Does Not Except Rape, Incest*, WASH. POST, Feb. 23, 2006, at A1. In fact, these four doctors are not even residents of the state; they are flown in from Minnesota on a rotating basis because no doctor within state lines will perform an abortion. See Nieves, *S.D. Makes Abortion Rare*, *supra*.

9 Zita Lazzarini, *South Dakota's Abortion Script—Threatening the Physician-Patient Relationship*, 359 NEW ENG. J. MED. 2189, 2191 (2008).

10 *Id.*

11 See *infra* Part VI.

12 This free speech right applies not only to expressions of value or opinion, but also to statements of fact the speaker would rather avoid. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

13 See *infra* Part III.B.3–5 (discussing the implications of the *Casey* decision).

cent legislative actions.<sup>14</sup> Though rarely the focal point of such cases, the doctor plays a major character in the jurisprudence because so often the laws regulate what she can and cannot do.

The question of when life begins is central to the dispute over the term “human being,” and, in Part IV, I look at how both science and the law have approached the issue. Based on this analysis, I conclude that the term “human being” is not scientific and that debate over the beginning of life appropriately belongs to such realms as religion and moral belief; not that of the clinic. In Part V, I turn to the informed consent statutes that have presented conflicts with the First Amendment because of their inclusion of the term “human being.” Even with the inclusion of a specific definition for the term, this is essentially a linguistic artifice that allows the State’s ideology into the doctor’s medical dealings.

Finally, in Part VI, I highlight just some of the implications that the language in the South Dakota statute raises for the practice of medicine in general and abortion access in particular. Physician speech rights are not often the focus of the debate around abortion but they absolutely cannot be neglected or wrongly seen as peripheral to the main dispute. Indeed, ignoring the issue is antithetical to the principles of liberty upon which this country was founded and which Justice Kennedy has affirmed includes “the right to define one’s own concept of existence.”<sup>15</sup> Doctors cannot and must not be stripped of this right.

## II. REGULATING INFORMED CONSENT

Thirty-three states currently have laws or policies that require heightened forms of informed consent before a woman may get an abortion.<sup>16</sup> But in twenty-three of these states, provisions include at least some information that does not align with the fundamental

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14 See Mark G. Kuczewski, *Can Communitarianism End the Shrill and Interminable Public Debates? Abortion as a Case-in-Point*, in *BIOETHICS: ANCIENT THEMES IN CONTEMPORARY ISSUES* 180 (Mark G. Kuczewski & Ronald Polansky eds., 2002) (“[B]eginning with *Roe* and following upon each new subtlety that the Court adds . . . a new round of shrill public chatter begins, seemingly gaining impetus for its hostile tone from the subtle reasoning of the Justices.”) (citations to subsequent cases omitted). This “shrill public chatter” is no doubt part of what leads state legislators to amend their informed consent laws.

15 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

16 Rachel Benson Gold & Elizabeth Nash, *State Abortion Counseling Policies and the Fundamental Principles of Informed Consent*, 10 *GUTTMACHER POLY REV.* 6, 7–8, (2007), available at <http://www.guttmacher.org/pubs/gpr/10/4/gpr100406.pdf> (detailing the multiple requirements of states’ statutes in a comprehensive chart). In all other states, general common law informed consent requirements apply.

purpose of the medical doctrine.<sup>17</sup> The central premise of informed consent is that in order to respect a patient's autonomy, a physician has certain communicative responsibilities.<sup>18</sup> To adhere to the doctrine and avoid malpractice, a physician should instruct a patient about his or her diagnosis, the recommended intervention and alternatives, the benefits and risks of such actions, and the implications should no intervention be attempted.<sup>19</sup> The doctrine of informed consent was developed to increase the flow of important information from physicians to patients so as to "decrease the imbalance in knowledge and power [between them] and protect patients from physician coercion."<sup>20</sup> But some doctors, at the behest of the state, are forced to go beyond their job descriptions and onto a stage that is scripted by ideology.

#### A. *The Development of Informed Consent*

The doctrine of informed consent might be assumed by many to be a founding precept of medicine, but it is actually more of a recent creation. Less than 200 years ago, Oliver Wendell Holmes, Sr., warned physicians that "[y]our patient has no more right to all the truth you know than he has to all the medicine in your saddlebags . . . . He should get only as much as is good for him."<sup>21</sup> Non-disclosure, it would seem, was the best medicine. Even the American Medical Association's first Code of Ethics cautioned physicians to "avoid all things which have a tendency to discourage the patient and to depress his spirits."<sup>22</sup> As is clear by the web of statutes and professional requirements in place today, much has changed with respect to

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<sup>17</sup> *Id.*

<sup>18</sup> For more on the history and the evolution of informed consent, see generally JESSICA W. BERG ET AL., *INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE* (2d ed. 2001); RUTH R. FADEN & TOM L. BEAUCHAMP, *A HISTORY AND THEORY OF INFORMED CONSENT* (1986); JAY KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT*, ch. I, 1 (2d ed., the Johns Hopkins Univ. Press 2002) (1984); STEPHEN WEAR, *INFORMED CONSENT: PATIENT AUTONOMY AND CLINICIAN BENEFICENCE WITHIN HEALTH CARE* (2d ed. 1998).

<sup>19</sup> See WEAR, *supra* note 18, at 10.

<sup>20</sup> Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 230 (1994).

<sup>21</sup> Ben A. Rich, *Prognostication in Clinical Medicine: Prophecy or Professional Responsibility?*, 23 J. LEGAL MED. 297, 317 (2002) (quoting Oliver Wendell Holmes, Sr., *The Young Practitioner*, in *MEDICAL ESSAYS*, 1842–1882, 370, 388 (Classics Med. Library ed. 1987)).

<sup>22</sup> W. John Thomas, *Informed Consent, the Placebo Effect, and the Revenge of Thomas Percival*, 22 J. LEGAL MED. 313, 315 (2001) (quoting Code of Ethics (1847) Art. I(4), reprinted in *AMERICAN MEDICAL ETHICS REVOLUTION: HOW THE AMA'S CODE OF ETHICS HAS TRANSFORMED PHYSICIANS' RELATIONSHIPS TO PATIENTS, PROFESSIONALS, AND SOCIETY* 324, 325 (Robert B. Baker et al. eds., 1999)).

what information the patient should expect to receive so that he or she can give informed consent.

Change began in 1905, when an Illinois court of appeals stated that “the right to the inviolability of his person” is a citizen’s greatest right and “necessarily forbids a physician or surgeon . . . to violate without permission the bodily integrity of his patient.”<sup>23</sup> This recognition of a patient’s autonomy and right to control what happens to his or her body was a key step towards increasing the amount of information given to a patient before a medical procedure. That same year, the Minnesota Supreme Court held that a patient “must be consulted, and his consent given, before a physician may operate upon him.”<sup>24</sup> Change was afoot in medicine; however, the major decision on informed consent did not come until over half a century later.

*Canterbury v. Spence*,<sup>25</sup> decided in 1972, changed the face of the jurisprudence on this issue. Judge Robinson, of the D.C. Circuit Court, called for the law to set a disclosure standard for doctors. On the issue of informed consent, the court stated that “[t]he root premise [in the doctrine] is the concept, fundamental in American jurisprudence, that ‘[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.’”<sup>26</sup> This respect for a patient’s right to self-determination, said the court, “demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves.”<sup>27</sup>

The laws of informed consent today vary across jurisdictions but always rest on three unchanging elements: capacity, voluntariness, and disclosure. That is, patients must (1) possess the capacity to make decisions about their care, (2) participate voluntarily in these decisions, and (3) be provided with adequate, appropriate information to facilitate decision making.<sup>28</sup> Central to the doctrine is that coercion, misrepresentation, and manipulation all negate the element of free choice required for medical procedures.<sup>29</sup>

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23 *Pratt v. Davis*, 118 Ill. App. 161, 166 (Ill. App. Ct. 1905) (concerning a doctor who performed a hysterectomy on a patient without fully informing her beforehand).

24 *Mohr v. Williams*, 104 N.W. 12, 14 (Minn. 1905).

25 464 F.2d 772, 780 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972) (involving the failure of a surgeon to advise his patient of the risk of potential paralysis for a medical procedure).

26 *Id.* at 780 (quoting *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914)).

27 *Id.* at 784.

28 *See* Gold & Nash, *supra* note 16, at 7.

29 *See* PRESIDENT’S COMM’N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, MAKING HEALTH CARE DECISIONS 63 (1982) (“A choice that has been coerced, or that resulted from serious manipulation of a person’s ability to make an intelligent and informed decision, is not the person’s own free

*B. Informed Consent to Abortion Statutes*

In many states, informed consent to abortion is different from informed consent to other medical procedures. Shortly after *Roe v. Wade*<sup>30</sup> was decided, the Supreme Court held that a State may require that a woman give her voluntary and informed consent to an abortion procedure even if such stringent consent is not required for other types of procedures.<sup>31</sup> Later, in *Casey*, the Court seemed to dismiss the idea that consent to the abortion procedure was constitutionally unique and that it would warrant different consent requirements.<sup>32</sup> Though on the surface this would seem to imply equal treatment for all medical procedures, the problem was that it did not consider the strong disagreement over what constitutes scientific fact and what constitutes ideology in the context of abortion counseling specifically. Abortion providers, such as those in South Dakota, are therefore placed squarely into a maelstrom of conflicting opinions and charged debate.

Though courts have held that a doctor is not obligated to communicate dangers “of which persons of average sophistication are aware,”<sup>33</sup> it seems that with abortion statutes in particular, a physician is required to share, in increasing detail, information which the woman of average sophistication would already know: that pregnancy, if not terminated or miscarried, eventually results in the birth of a baby. These required communications may in fact stem from some states’ desires to encourage continuation of pregnancies and discourage abortions. Although states may discourage abortions, such disclosures result in a breed of informed consent statute that glaringly stands out from all others.

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choice”); see also Robert E. Powell, *Consent to Operative Procedures*, 21 MD. L. REV. 181, 203 (1961).

30 410 U.S. 113 (1973) (finding that the right of privacy found in the Constitution is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy).

31 *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976) (“[W]e see no constitutional defect in requiring [informed consent] only for some types of surgery as, for example, an intracardiac procedure, or where the surgical risk is elevated above a specified mortality level, or, for that matter, for abortions.”).

32 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (“[A] requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.”).

33 *Canterbury v. Spence*, 464 F.2d 772, 788 (D.C. Cir. 1972).

### C. Statutory Interpretation

The problem in South Dakota is that an ideological term has been cleverly cloaked in scientific language by means of statutory definition. The statute defines “human being” as “an individual living member of the species of *Homo sapiens*, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation.”<sup>34</sup> The Eighth Circuit in *Rounds* cited South Dakota’s “well-settled canon of statutory interpretation”<sup>35</sup> that as long as a term is defined by statute, that statutory definition is controlling.<sup>36</sup> The court of appeals also noted that the Supreme Court itself has emphasized the controlling nature of statutory definitions, citing *Stenberg v. Carhart*, in which the Court stated that “when a statute includes an explicit definition, we must follow that definition, even if it varies from that term’s ordinary meaning.”<sup>37</sup>

There is, of course, a crucial difference between a court’s following a statutory definition of a term and a doctor being forced to convey a term which, on its own, is undoubtedly laden with multiple interpretations. Just because a state defines a controversial term in the buried fine print of a statute does not make it any less ideological. When the term is lifted from its glossary context and placed into the mouth of a physician, it loses its supposedly scientific couching. If a state truly wants the patient to understand that a human fetus is an “individual living member of the species *Homo sapiens*,”<sup>38</sup> then that should be the language in the doctor’s script.<sup>39</sup> To mandate otherwise is potentially manipulative of a woman’s understanding of the term and undeniably misleading. The State’s contention that use of

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<sup>34</sup> S.D. CODIFIED LAWS § 34-23A-1 (2009).

<sup>35</sup> *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 735 (8th Cir. 2008).

<sup>36</sup> The South Dakota Supreme Court has explicitly stated that “statutes mean what they say and that legislators have said what they meant.” *Gloe v. Union Ins. Co.*, 694 N.W.2d 252, 260 (S.D. 2005) (citation omitted).

<sup>37</sup> 530 U.S. 914, 942 (2000). This case cites *Meese v. Keene*, 481 U.S. 465, 484–85 (1987) (“It is axiomatic that the statutory definition of the term excludes unstated meanings of that term.”) and *Colautti v. Franklin*, 439 U.S. 379, 392–93, n.10 (1979) (“As a rule, ‘a definition which declares what a term ‘means’ . . . excludes any meaning that is not stated.”). It is noteworthy that these chosen citations note only what must be *excluded* from interpretation; not what must be included.

<sup>38</sup> S.D. CODIFIED LAWS § 34-23A-1 (2009).

<sup>39</sup> After all, to determine a compelled disclosure’s constitutionality, “the meaning of the disclosure must be ascertained in light of how it would be understood by a reasonable person, not in terms of how a state legislature might arbitrarily stipulate its meaning.” *Post*, *supra* note 3, at 957.

the definition resolves any dispute over ideology is “overly simplistic, at best.”<sup>40</sup>

#### D. *The Doctor’s Role in Informed Consent*

Regulation of informed consent essentially controls the dissemination of knowledge. Patients expect that medical counseling will help them make judgments that are scientifically accurate and independent of external interference.<sup>41</sup> They visit their doctors with the anticipation that if preference is given to some procedures, it stems from medicine alone, not the state’s political or ideological preference. This perspective promotes a patient-centered approach to medicine and facilitates treatment, protects the patient’s medical decision making from governmental coercion, ensures that physicians fulfill professional standards according to their best judgment, and protects the integrity of medicine from the “potentially corrupting effects of a State agenda.”<sup>42</sup>

Much like other professional fiduciary relationships, such as those between attorney and client, the physician-patient relationship is founded on trust. “Candor is the hallmark of such a relationship because one cannot have trust and confidence that another is acting responsibly on one’s behalf without regular, candid disclosure of pertinent information.”<sup>43</sup> And much like other professional relationships founded on trust, physician-patient discourse is protected through multiple legal frameworks. In the law of evidence, for example, the physician-patient testimonial privilege reflects the idea that protecting the integrity of physician-patient communication and preserving patients’ privacy trumps the discovery of potentially probative evidence.<sup>44</sup> This demonstrates the concern that without recognition of the importance of trust, relationships which are important for society to function might be negatively affected.

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<sup>40</sup> Lazzarini, *supra* note 9, at 2190.

<sup>41</sup> See Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 174 (1996) (arguing that the First Amendment prohibits viewpoint-based regulation of medical counseling because “patients expect the independent judgment of physicians to trump inconsistent managerial demands”).

<sup>42</sup> Paula E. Berg, *Lost in a Doctrinal Wasteland: The Exceptionalism of Doctor-Patient Speech Within the Rehnquist Court’s First Amendment Jurisprudence*, 8 HEALTH MATRIX 153, 173 (1998).

<sup>43</sup> BEN A. RICH, STRANGE BEDFELLOWS: HOW MEDICAL JURISPRUDENCE HAS INFLUENCED MEDICAL ETHICS AND MEDICAL PRACTICE 50 (2001).

<sup>44</sup> See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 759–60 (6th ed. 2008). Though the Federal Rules of Evidence do not recognize physician-patient privilege, states may protect the communication with their own statutes. *Id.* at 818.

Studies of the relationship show that there is indeed a differential power dynamic between physicians and their patients. One of the problems is the lack of a shared discourse;<sup>45</sup> this can lead to a patient's deference to her physician because of medical and scientific-sounding language. Despite a desire for information, patients are unlikely to engage in many information-seeking behaviors when communicating with their physicians.<sup>46</sup> It is unsurprising, therefore, that communication between the two tends to be dominated by the doctor.<sup>47</sup> Patients are also inclined to trust their doctors because their medical knowledge extends beyond that possessed by laypeople.<sup>48</sup> As a result, a patient can give great weight to a physician's statements, not necessarily because the message itself is persuasive but because the message comes from the trusted medical authority.

Evidence like this demonstrates the absolute importance of truthful, non-judgmental, non-misleading information on the part of the physician. As such, "the physician has a duty to distance himself as much as possible from his personal preferences and values and to present information in a manner that reflects an objective assessment of the interests at stake for the patient."<sup>49</sup> The physician should not only create distance from his or her personal values but from the State's values as well.<sup>50</sup> This is the only way to avoid the danger of un-

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45 See ELIOT FREIDSON, *PROFESSIONAL DOMINANCE: THE SOCIAL STRUCTURE OF MEDICAL CARE* 109 (1970) ("[L]ay clients are by definition lacking in the educational or experiential prerequisites that would allow them to decide, on grounds shared with the professional, whether to accept any particular piece of professional advice.").

46 See, e.g., Analee Beisecker & Thomas Beisecker, *Patient Information-Seeking Behaviors When Communicating with Doctors*, 28 *MED. CARE* 19, 27 (1990) ("[E]ven though patients expressed a strong desire for medical information, they showed little communication behavior designed to elicit this information."); Richard Frankel, *Talking in Interviews: A Dispreference for Patient-Initiated Questions in Physician-Patient Encounters*, in *INTERACTION COMPETENCE* 231, 239 (George Psathas ed., 1990) (finding that patients initiated only 30 of 3517 utterances during 10 medical interviews).

47 See Debra L. Roter et al., *Communication Patterns of Primary Care Physicians*, 277 *JAMA* 350, 355 (1997) (reporting that 66% of physician visits studied were dominated by the physician, narrowly focused on biomedical concerns, and characterized by low levels of patient control over communication).

48 See J. Steven Svoboda et al., *Informed Consent for Neonatal Circumcision: An Ethical and Legal Conundrum*, 17 *J. CONTEMP. HEALTH L. & POL'Y* 61, 71-72 (2000) (noting that patients' understanding of medical procedures can often be limited more by a doctor's inability to convey information than by the patients' inherent inability to understand).

49 *Id.*

50 Conscience objector clauses, which allow medical providers to opt out of providing certain procedures and prescriptions to patients, present some similar ethical issues. See *infra* note 197 for a comparison of informed consent statutes with conscience objection clauses in medicine.

due influence and ensure that patients give the most informed consent possible.

*E. The State's Ability to Regulate Physician Speech*

All of this is not to say that doctor-patient speech has a special immunity from regulation. States may certainly use their police powers to protect the public's health and safety.<sup>51</sup> The government and medical associations take it upon themselves to regulate, in part, what doctors can and cannot say to their patients.<sup>52</sup> For example, a doctor can and should be required to tell a patient the risks of a given surgical procedure but he or she cannot be required to advise treatment because of the belief that all those who listen to their doctors are better people. This is clearly ideological (if also far-fetched). Further, the state cannot compel ideological speech with the understanding that a professional can simply disclaim the message after it is spoken. Though this qualification might mitigate the effect of the state's message on the listener, it "does not diminish the distortion of the speaker's mental process, or autonomy in determining the content of his or her expression."<sup>53</sup>

The government's goal in regulating doctors' speech is to prevent the expression of opinions that are inconsistent with accepted standards of the medical profession and to ensure the integrity of the communication. To the extent that such communication is important for informed medical treatment, the state has leeway to ensure that physicians are practicing medicine within the profession's standards. The difficulty lies in drawing the line between what is acceptable to require in the name of professional regulation and what goes too far into the realm of what must remain protected speech.

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51 *See* *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926) ("[T]here is no right to practice medicine which is not subordinate to the police power of the States . . ."); *Dent v. West Virginia*, 129 U.S. 114, 122 (1889) ("The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud.").

52 *See, e.g.,* *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring) ("The power of government to regulate the professions is not lost whenever the practice of a profession entails speech."). *See generally* Randall P. Bezanson, *Speaking Through Others' Voices: Authorship, Originality, and Free Speech*, 38 WAKE FOREST L. REV. 983, 1053 (2003) (observing that as professional speech, physician communication is "rigorously confined by external, and usually governmentally supported, limitations"); Gregory D. Curfman et al., *Physicians and the First Amendment*, 359 NEW ENG. J. MED. 2484, 2484 (2008) ("Under their authority to regulate the practice of medicine, states can legally set standards for communication between physicians and patients.").

53 Berg, *supra* note 42, at 167–68.

Justice Blackmun's opinion in *Roe v. Wade* placed considerable emphasis on respect for the physician's role and his or her professional judgment. In fact, Linda Greenhouse, former *New York Times* Supreme Court Correspondent, likened the decision to a "doctor's bill of rights."<sup>54</sup> In many ways, it could be argued that *Roe* demonstrated how the 1973 Court saw medicine as a "mythically independent, parallel realm to the state."<sup>55</sup> Yet through the years, emphasis on the doctor has slowly faded and regulation of this sphere of medicine has become increasingly stricter. Greenhouse observed that "[w]hile in *Roe* physicians were all-knowing professionals whose judgment was not to be questioned, the doctors depicted in [*Gonzales v.*] *Carhart* [in 2007] were so untrustworthy that the Court [had to] permit Congress to come between them and their hapless patients."<sup>56</sup> This change in perspective reflects a trend throughout the country of tighter restrictions on the practice of medicine, which in some states cross the fine line into physicians' First Amendment rights.

A big part of the problem is that no well developed doctrine exists to test for ideology-based regulations of physicians' speech. Robert Post argues that any such restrictions must, at a minimum, have a "substantial justification" in order to be constitutional.<sup>57</sup> The challenge is to construct those regulations that advance patients' receipt of truthful information while avoiding those that silence or compel speech for purposes outside the practice of medicine. After all, the doctor's duty to exercise independent judgment is rooted in the overriding concern for the patient's best interests. Though regulation may infiltrate the relationship to some degree, the important in-

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<sup>54</sup> Linda Greenhouse, *How the Supreme Court Talks About Abortion: The Implications of a Shifting Discourse*, 42 SUFFOLK U. L. REV. 41, 42 (2008). Greenhouse cites to an amicus brief in which the Texas statute was labeled a "serious obstacle to good medical practice," imposing restrictions that "interfere with the physician-patient relationship and with the ability of physicians to practice medicine in accordance with the highest professional standards." *Id.* at 48 (citing Brief of American College of Obstetricians & Gynecologists et al. as Amici Curiae Supporting Appellants at 2, *Roe v. Wade*, 410 U.S. 113 (1973) (Nos. 70-18, 70-14)).

<sup>55</sup> Nan D. Hunter, *Justice Blackmun, Abortion, and the Myth of Medical Independence*, 72 BROOK. L. REV. 147, 151 (2006). Hunter argues that the authority given to the physicians in *Roe* was based on the assumption that "medicine constitutes a private realm apart from the state which can therefore function as a buffer between the individual and the state." *Id.* at 195.

<sup>56</sup> Greenhouse, *supra* note 54, at 44. See Part III.B.6 for further discussion on the *Carhart* opinion.

<sup>57</sup> Post, *supra* note 41, at 175; see also Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 772 (1999) (arguing that current First Amendment analysis lacks any coherent view of professional speech regulation).

formational role that the profession serves must not be overshadowed. Physicians grant people “access to a realm of shared knowledge that is neither state propaganda nor private fancy”<sup>58</sup> and it is thus crucial that their First Amendment rights not be violated with forced ideological statements.

### III. THE FIRST AMENDMENT STEPS INTO THE EXAMINING ROOM

#### A. *Applying the First Amendment to the Practice of Medicine*

Doctor-patient discourse has a special place in First Amendment jurisprudence because of the uniqueness of the doctor-patient relationship in society and because of its role in “protecting and preserving personal liberty and the discovery of truth.”<sup>59</sup> When a physician’s speech is regulated through a state’s viewpoint-based filter, it distorts patients’ decision making and trespasses on their constitutionally protected right to determine the destiny of their bodies. The Supreme Court has consistently held that States cannot compel an individual to adhere to an ideology or doctrinal orthodoxy.<sup>60</sup> In *Wooley v. Maynard*, one of its seminal speech cases, the Court ruled that “the right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all.”<sup>61</sup> This is a crucial right, but it is much more difficult to apply a standard for it in the field of medicine than in the field of a public park.

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58 Halberstam, *supra* note 57, at 773.

59 Berg, *supra* note 20, at 243. *But see* Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 802–03 (1986) (White, J., dissenting) (“[N]othing in the Constitution indicates a preference for the liberty of doctors over that of lawyers, accountants, bakers, or brickmakers.”).

60 *See, e.g.*, *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994) (“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. . . . Government action that . . . requires the utterance of a particular message favored by the Government[] contravenes this essential right.”); *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 514–19 (1991) (outlining the standards by which a state may constitutionally require that public employees contribute fees to unions); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977) (“[I]n a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.”); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that the government cannot require newspapers to run certain editorials); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

61 *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

Those on the receiving end of the information are undoubtedly affected by these regulations but so too are the physicians who are compelled to deliver the message. Justice Douglas wrote in 1961 that “[t]he right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion.”<sup>62</sup> Yet extended discussion *has* occurred.<sup>63</sup> Perhaps back in 1961 Justice Douglas could not foresee the onslaught of abortion-related litigation that would come as a result of the disagreement over the newly articulated right of privacy. Even if he could have looked into the future, would he have been able to make sense of the Court’s rulings? There has been inconsistency, or at the very least, a lack of clarity, over how the state can regulate physician speech in the context of informed consent to perform an abortion.<sup>64</sup> This is no doubt provoked in part by the polarized nature of the political debate and the argument over what exactly constitutes scientific fact.

The following discussion provides a roadmap of important cases that have shifted and shaped the landscape of physicians’ First Amendment rights. I begin in 1977 with *Wooley v. Maynard* and end in 2007 with *Carhart v. Gonzales*. In just over thirty years, the Supreme Court unmistakably tightened restraints on physicians and, in doing so, increased the state’s ability to script the practice of medicine.

## B. *Thirty Years of Cases: Shifting and Shaping the Landscape*

### 1. *Initial Challenges*

“Live Free or Die.” This New Hampshire motto, stamped for decades upon its state license plates, was embraced by many of its citizens for its promotion of state pride and individualism. Others, however, protested the obligatory fixture as unwelcome ideological speech. *Wooley v. Maynard*<sup>65</sup> affirmed that all citizens had the right to avoid

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62 *Poe v. Ullman*, 367 U.S. 497, 513 (1961) (Douglas, J., dissenting). “[T]he First Amendment and other parts of the law erect a fence inside which men can talk. The law-makers, legislators and officials stay on the outside of that fence.” *Id.* at 514 (quoting ZECHARIAH CHAFEE, JR., *THE BLESSINGS OF LIBERTY* 108 (1956)).

63 For an in-depth discussion about physician speech and abortion, see Berg, *supra* note 20 (writing on how most courts use privacy rather than First Amendment grounds to strike down statutes that criminalize physician speech about contraception and abortion).

64 Christina E. Wells, for example, has argued that the Court has incorrectly treated abortion counseling as “a form of activity rather than [as] a form of speech.” *Abortion Counseling as Vice Activity: The Free Speech Implications of Rust v. Sullivan and Planned Parenthood v. Casey*, 95 COLUM. L. REV. 1724, 1725 (1995).

65 430 U.S. 705.

becoming conduits for a state's message (via car or otherwise). Chief Justice Burger wrote that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."<sup>66</sup> Though not in the context of abortion or even medicine, this articulation of individuals' rights *and* of state limitations has served as a cornerstone of First Amendment jurisprudence. It is interesting too that this decision came four years after *Roe v. Wade* was decided; even if this was not a response to the ruling or even imagined to be somehow related to abortion, Justice Burger's sweeping enunciation of limits on the state could clearly be read in 1977 to apply to much more than license plates.

Six years after *Wooley* came a case that directly addressed the conflict between mandated informed consent to abortion and the First Amendment: *City of Akron v. Akron Center for Reproductive Health*.<sup>67</sup> In this case, the Supreme Court would have a chance to rule on the issue directly. The Akron ordinance in question compelled physicians, among other things, to tell patients seeking to terminate their pregnancies that "the unborn child is a human life from the moment of conception."<sup>68</sup> This requirement, remarkably similar in language to South Dakota's script, essentially forced physicians to make statements that personified fetuses.

The Court affirmed the judgment of the Sixth Circuit, which had invalidated the informed consent section of the Akron abortion ordinance.<sup>69</sup> The Court explained that the informed consent requirement was "inconsistent with the Court's holding in *Roe v. Wade* that a State may not adopt one theory of when life begins to justify its regulation of abortions."<sup>70</sup> Justice O'Connor, who dissented, still made sure to articulate that despite her disagreement with the majority's opinion, "[it was] not to say that the informed consent provisions may not violate the First Amendment rights of the physician if the State requires him or her to communicate its ideology."<sup>71</sup> Thus, even

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66 *Id.* at 717.

67 462 U.S. 416 (1983), *overruled by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

68 AKRON CODIFIED ORDINANCES 160-1978 § 1870.06, *quoted in Akron*, 462 U.S. at 423-24. One of the findings that led to the enactment of the statute was that "there is no point in time between . . . the blastocyst stage and the birth of the infant at which point we can say the unborn child is not a human life." *Id.*, *quoted in Akron*, 462 U.S. at 421.

69 In addition to invalidating the informed consent provision, the Court held that the provisions dealing with parental consent, a 24-hour waiting period, and the disposal of fetal remains were unconstitutional. *See Akron*, 462 U.S. at 452.

70 *Id.* at 444 (citing *Roe v. Wade*, 410 U.S. 113, 159-62 (1973)).

71 *Id.* at 472 n.16 (O'Connor, J., dissenting).

though ideological communication was not an issue raised by the parties in this case, Justice O'Connor's interpretation of the question was clear.

As the Ohio federal district court ruled before *Akron* reached the Supreme Court, the state could constitutionally require abortion counseling but it could not go farther to "specify what each patient must be told. That determination," explained the lower court, "must be left to the individual counselor based upon the needs of the particular patient. Otherwise, the physician is being placed in the 'undesired and uncomfortable straightjacket' warned against by the Supreme Court."<sup>72</sup> When the case reached Washington, this aspect of the district court's decision was affirmed; the Court saw it as an intrusion upon the discretion of physicians.<sup>73</sup> But despite this victory for physicians (and patients), the relative freedom that the *Akron* decision gave doctors would not be long-lived.

## 2. *Narrowing the Playing Field*

Just three years after *Akron* came *Thornburgh v. American College of Obstetricians and Gynecologists*.<sup>74</sup> This case invalidated a Pennsylvania informed consent statute which required that a pregnant woman be informed by her physician of detrimental physical and psychological effects and of the medical risks of abortion.<sup>75</sup> The Supreme Court firmly stated that "[t]his type of compelled information is the antithesis of informed consent. That the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion character of the statute and its real purpose."<sup>76</sup> By analyzing the statute in this way, the Court recognized that Pennsylvania's motive fell outside the sphere of acceptable medical regulation. No ideology per se was required to be conveyed, but the medical facts included were not deemed necessary to the true spirit of informed consent. Even if true, listing every possible thing that could ever go wrong is simply not part of the doctrine. This ruling was the same physician-friendly

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<sup>72</sup> *Akron Ctr. for Reprod. Health, Inc. v. City of Akron*, 479 F. Supp. 1172, 1203 (N.D. Ohio 1979) (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 n.8 (1976)).

<sup>73</sup> *Akron*, 462 U.S. at 445.

<sup>74</sup> 476 U.S. 747 (1986), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>75</sup> *Thornburgh*, 476 U.S. at 750.

<sup>76</sup> *Id.* at 764. The Court also noted that such compelled disclosure increases the patient's anxiety and intrudes upon the physician's exercise of proper professional judgment. *Id.*

approach taken in *Akron*, but both cases would only control for a few more years.

The 1991 Supreme Court decision in *Rust v. Sullivan*<sup>77</sup> concerned the constitutionality of the Department of Health and Human Services' regulations on the use of federal funds spent to promote family planning through Title X of the Public Health Service Act.<sup>78</sup> Through this Act, Congress prohibited any of the federal government's funds from being used in programs in which abortion was a method of family planning. From a First Amendment perspective, the issue was the constitutionality of the speech-related regulations in the Act, which prohibited doctors from talking to their patients about abortion as an option and from providing referrals to any woman who sought an abortion.<sup>79</sup>

The Court held that these regulations did not violate the First Amendment but it explicitly declined to resolve the question of whether, in general, the traditional doctor-patient relationship should enjoy protection from government regulation under the First Amendment.<sup>80</sup> The Court suggested that a viewpoint-based regulation which censored the speech of publicly funded physicians *would* be unconstitutional if physicians were required to represent the government's opinions as their own, or if their relationships with patients were such that an expectation of receiving complete medical advice was justified.<sup>81</sup>

Title X's requisite omission placed an unprecedented restriction on physician speech or, now, a lack thereof. Yet the decision also left the door wide open for future litigation over government regulation of speech activities.<sup>82</sup>

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77 500 U.S. 173 (1991).

78 42 U.S.C. §§ 300-300a-6 (2006).

79 42 C.F.R. § 59.8(b)(5) (1997). If a woman requested a referral, the regulations recommended the pre-scripted response that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." *Id.*

80 *Rust*, 500 U.S. at 200.

81 *Id.*

82 For example, in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), the Court held that Congress had violated the First Amendment when it forbade lawyers working for the Legal Services Corporation from challenging the constitutionality or statutory validity of welfare laws. *Id.* at 548-49. This holding is in conflict with *Rust*. The *Rust* Court stated that unconstitutional conditions only arise if there is a condition on the recipient of a government subsidy which prevents the recipient from engaging in conduct *outside the scope* of the program; it is not unconstitutional when the condition is on the program itself. *Rust*, 500 U.S. at 197. *Velazquez* departed from this First Amendment precedent in ruling that the government, in regulating professional speech, cannot prohibit (or presumably require) speech which is inconsistent with an established and legitimate under-

### 3. *Casey Comes to Bat*

And then there came *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>83</sup> In the history of abortion regulation, one could say that there is B.C.—Before Casey—and After. The effects of the decision on this field of law have been significant. The case dealt with a Pennsylvania informed consent to abortion statute and, though widely known for its rejection of *Roe*'s trimester framework and replacement with an “undue burden” standard, it also addressed, if only briefly, physicians’ First Amendment rights. Under the *Casey* plurality, viewpoint-based regulations of doctor-patient speech were unreasonable if physicians were compelled to make statements that were false or misleading.<sup>84</sup>

The health care provider petitioners in *Casey* challenged the Pennsylvania law as violating the First Amendment, arguing that it compelled them to act as mouthpieces for the State in discouraging abortion.<sup>85</sup> They relied heavily on *Wooley*, which at the time seemed a logical thing to do, given the precedent in the Court’s First Amendment jurisprudence. Their argument was that the statute directly regulated physicians’ speech for the purpose of influencing patients to make decisions that conformed to the state’s ideology and that this was a clear violation of the Constitution.<sup>86</sup>

The State grounded its defense of the statute in First Amendment principles by arguing that the law was a permissible regulation of *commercial speech*.<sup>87</sup> Regulation of commercial speech must be “no[] more extensive than . . . necessary” to serve a substantial government interest.<sup>88</sup> But speech in the medical realm had never been held to the same standards as speech in the commercial sphere; this was a line of reasoning that was ungrounded in precedent. The strange-

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standing of a profession. Just as lawyers cannot be restricted from making the best legal arguments available for their clients, doctors cannot be restricted to communicating ideas that are not medically established.

83 505 U.S. 833 (1992).

84 *Id.* at 882.

85 See Brief for Petitioners and Cross-Respondents at 53–55, *Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902).

86 *Id.*

87 See Brief for Respondents at 70–71, *Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902). The Supreme Court has defined commercial speech as “speech which does ‘no more than propose a commercial transaction.’” *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)).

88 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 569–70 (1980).

ness of the State's commercial speech argument was not lost on the Justices. At oral argument they questioned whether a physician's dispensing of professional advice was commercial in nature and seemed skeptical of arguments on behalf of the State that said this speech could be described as such.<sup>89</sup> Despite attention paid to the commercial speech issue during oral argument, the Court failed to address this specific issue in the written opinion.

In fact, the attention the Court gave to the First Amendment argument as a whole was fairly fleeting. With regard to the physician's asserted right not to provide certain information in the manner mandated by the State, the opinion stated:

To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard*, 430 U.S. 705 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe*, 429 U.S. 589, 603 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.<sup>90</sup>

Through this short section, the Justices grounded the power of government to impose viewpoint regulations on doctor-patient speech in the State's police power to license and regulate physicians.<sup>91</sup> The Court seemed to look at the conflict as one involving simply two parties' rights: the physician's right to speak and the State's right to regulate. Totally ignored, however, was a third party's interest: the patient's right to receive objective medical information.

The Court made reference to *Wooley*, but ultimately the decision rested upon the legislature's discretion to regulate general activity in the business and professional contexts.<sup>92</sup> Herein lies the inherent

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<sup>89</sup> The Justices questioned counsel for respondents as follows:

Question: . . . When the doctor is giving professional advice to the patient, you think that is commercial?

Mr. Preate: That is commercial. The petitioners already do that right now. They already tell their patients, the physicians and the counselors that there are medical risks associated with this procedure.

Question: I wouldn't have thought that was commercial speech. What do you rely on?

Mr. Preate: In *Zauderer*.

Question: But that is advertising, that is different.

Transcript of Oral Argument at 37-38, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902).

<sup>90</sup> *Casey*, 505 U.S. at 884.

<sup>91</sup> Paula Berg observed that "[w]hile the Court tipped its hat to the idea that the challenged regulations implicated physicians' speech rights, it summarily dismissed this concern, stating that advising patients is merely a 'part of the practice of medicine, subject to reasonable licensing and regulation by the State.'" Berg, *supra* note 42, at 158 (quoting *Casey*, 505 U.S. at 884).

<sup>92</sup> See, for example, Wells, *supra* note 64, at 1738-39, observing that the *Casey* Court cited the professional regulation cases of *Whalen v. Roe*, 429 U.S. 589, 598 (1977) (holding that it was a reasonable exercise of New York's police powers to enact a statute which required

tension: though the state may generally not compel individuals to adhere to any doctrine or engage in prescribed speech, “when that same individual assumes a professional or other work role, *Casey* suggests that reasonable regulation may diminish or eliminate this right not to be required to endorse—by words or silence—prescribed speech.”<sup>93</sup> Speech restrictions regulated solely as “part of the practice of medicine” place them in the context of a world that most people assume is characterized by scientific facts. Even in medicine, however, there are fuzzy lines between facts and ideas. This can therefore present a conflict for regulation of speech.

#### 4. *Truthful and Nonmisleading Information*

*Casey* did not give the state an *absolute power* to dictate the content of physicians’ statements to patients. New standards were set though, and in reconfiguring the criteria, the Supreme Court overruled portions of *Akron* and *Thornburgh*. “To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information . . . those cases go too far [and] are inconsistent with *Roe*’s acknowledgment of an important interest in potential life,” stated the plurality.<sup>94</sup> In other words, regulations were unconstitutional if they required physicians to make false or misleading statements to their patients.

The critical aspect of this section of the decision is that though the Court overruled the two cases, its decision only narrowly applied *to the extent that information delivered remains truthful and non-misleading*. As such, the section of *Akron* that addressed use of the term “human life,” held to be unconstitutional, may *not* have been intended to be overruled in *Casey*. Even in her *Akron* dissent, Justice O’Connor stated that informed consent provisions may violate physicians’ First Amendment rights if they are required to communicate “[the State’s] ideology.”<sup>95</sup> The reason I believe we saw none of this reasoning from

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certain information about potentially harmful drugs to be filed with a state agency) and *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 486–91 (1955) (holding that various regulations of optometrists were consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment) as basis for its decision.

93 Robert D. Goldstein, *Reading Casey: Structuring the Woman’s Decisionmaking Process*, 4 WM. & MARY BILL OF RTS. J. 787, 853 (1996).

94 *Casey*, 505 U.S. at 882. The Court approved that information could be given about “the nature of the procedure, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus.” *Id.*

95 *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. at 472 n.16 (1983) (O’Connor, J., dissenting).

Justice O'Connor in *Casey* is that the Court interpreted the Pennsylvania statute as addressing only truthful, non-misleading facts; Justice O'Connor's concern in *Akron* about the forced communication of ideology was not implicated in the *Casey* decision.<sup>96</sup> The difference between these two decisions is crucial because it shows that *Casey* was not overruling the Court's previous decisions in whole; the parts of *Akron* and *Thornburgh* that addressed ideology and even personhood were still good law.

The Court did not expand on its statement to articulate what sort of information might fall outside of the "truthful [and] nonmisleading" boundaries, perhaps because this categorization is intrinsically difficult. For example, viewpoints in the medical community are usually sanctioned as false when measured against the "knowledge . . . ordinarily possessed and exercised by physicians in good standing."<sup>97</sup> But there are some issues over which even physicians in good standing strongly disagree.<sup>98</sup> To just classify something as true or false is not enough.<sup>99</sup> This, presumably, is why the Court required that statements be not only truthful but also not misleading. "Misleading" can certainly be taken in many ways, but statements that capitalize on a patient's fear, cite as fact that which is disputed in the medical community, and present the State's ideology as science can, I argue, comfortably fall under this broad heading.

##### 5. Criticism of *Casey* and Later Interpretations

Justices Stevens and Blackmun strongly dissented from the ruling in *Casey* that government could impose such restrictions on physicians' speech. Justice Stevens expressed concern that compelling persuasive speech by physicians may be unduly influential in light of the fact that many patients have a heightened vulnerability when

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<sup>96</sup> See Appellees' Brief at 18, *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (No. 05-3093) ("Because *Casey* addressed truthful, non-misleading factual statements, Justice O'Connor's concern in *Akron I* with respect to forced communication of ideology was not implicated in *Casey*."). Notable, too, is that Justice O'Connor cited *Wooley* in her *Akron* reasoning regarding the unconstitutionality of forcing ideological speech. *Akron*, 462 U.S. at 472 n.16 (O'Connor, J., dissenting).

<sup>97</sup> *Larsen v. Yelle*, 246 N.W.2d 841, 844 (Minn. 1976).

<sup>98</sup> See *infra* Part IV.D (addressing the lack of scientific consensus over when life begins).

<sup>99</sup> This limited inquiry "would not prevent government from forcing physicians to make statements that are plainly intended to capitalize on patients' fear and vulnerability within the structure of the doctor-patient relationship." Berg, *supra* note 20, at 224.

faced with important medical decisions and procedures.<sup>100</sup> He also expressed a desire to remain true to the still very recent holdings of *Akron* and *Thornburgh*.<sup>101</sup>

Justice Blackmun's dissent expressed sentiments similar to Justice Stevens's, warning of the danger of indoctrination when a government is permitted to compel physicians to express ideological messages to patients.<sup>102</sup> He argued that the plurality authorized the substitution of "state medicine" for dialogue driven by patients' needs and interests.<sup>103</sup> This warning was an astute one. In opening the door to broader state regulation of physician speech, the Court was also essentially welcoming regulation that placed the state's interests before those of the patient.

*Casey* left courts in a curious wake; despite the guidance it offered on the application of the First Amendment, the ruling was still open enough to allow for various interpretations.<sup>104</sup> *Eubanks v. Schmidt*<sup>105</sup> offered one such opportunity. There, the Kentucky federal district court wrote that "[t]he Supreme Court has consistently invalidated schemes which compel ideological speech. Presumably, had Justice O'Connor thought that the state sponsored materials in *Casey* were

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100 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 916 (1992) (Stevens, J., concurring in part and dissenting in part) ("Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best.").

101 *Id.* at 917.

102 *Id.* at 935–36 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice Blackmun also expressed frustration that the plurality opinion overruled what had so recently been held constitutional in *Thornburgh*, stating that that case "invalidated biased patient-counseling requirements virtually identical to the one at issue here. What we said of those requirements fully applies in these cases." *Id.*

103 *Id.* (citing *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 763 (1986)).

104 Many scholars have criticized *Casey*, and *Rust* as well, as being inconsistent with the Court's traditional First Amendment jurisprudence; they contend that the importance of physicians' free speech was substantially underestimated by the decision. See Janet Ben-shoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 HARV. L. REV. 1916, 1931–33 (1988) (arguing that biased, government-sponsored presentations of one side of pregnancy options violate the First Amendment); Berg, *supra* note 20, at 219 (observing that in the doctor-patient speech context, the Rehnquist Court has mysteriously not stuck to the First Amendment principle that speech regulations may not favor certain viewpoints over others); Wells, *supra* note 64, at 1744–51 (discussing how the Court has strayed from traditional First Amendment analysis in the *Rust* and *Casey* decisions); Michael Fitzpatrick, Note, *Rust Corrodes: The First Amendment Implications of Rust v. Sullivan*, 45 STAN. L. REV. 185, 200–01 (1992) (explaining how *Rust* is an outlier opinion that does not comport with the Supreme Court's general intolerance of viewpoint-based restrictions).

105 126 F. Supp. 2d 451 (W.D. Ky. 2000) (upholding Kentucky's informed consent to abortion statute).

an ideological statement, she would have said so.”<sup>106</sup> The court observed that instead of expressing this view, Justice O’Connor only classified the Pennsylvania pamphlets as “little more than the requirement that the physician provide certain medical facts and agency information to patients as part of a comprehensive medical regulatory scheme.”<sup>107</sup> This interpretation of *Casey* is consistent with the idea that though the state can regulate some aspects of physician speech, it may not regulate ideology.

#### 6. *Carhart’s Marginalization of Roe and Invitation to States*

No case has yet come to the Supreme Court that has directly challenged this issue or caused the Justices to articulate a clearer standard for physician speech. Even in *Gonzales v. Carhart*,<sup>108</sup> one of the latest abortion decisions to come to the Court, the question of First Amendment rights as related to ideology was not directly raised anywhere in the opinion.<sup>109</sup> But the case still managed to bring the issue of informed consent to the forefront of the abortion debate. In it, the Supreme Court upheld the Partial-Birth Abortion Ban Act of 2003 and ruled that the Act did not impose an undue burden on the due process right of a woman to obtain an abortion.<sup>110</sup> Applying the reasoning put forth in *Casey*, the Court stated that the Government had a legitimate, substantial interest in preserving and promoting fetal life.<sup>111</sup> More so than in any of its earlier abortion decisions, the Court seemed to set up the relationship between physician and patient as one characterized by inherent tension. Why, it seemed to ask, were physicians withholding information from women? The critical question that lingered under the surface was this: what could states do to make sure these women *were* informed?

The First Amendment was not addressed in the text of the *Carhart* decision but this hardly means that the case did not and will not have a profound impact on physician speech rights. Justice Kennedy’s

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106 *Id.* at 458 (citations omitted). The court also noted that *Casey* contained no further discussion of whether the compelled speech at issue in Pennsylvania was ideological. *Id.*

107 *Id.*

108 550 U.S. 124, 146 (2007).

109 The dissent in *Rounds* likewise noted that *Carhart* did not make any dramatic changes in the state of abortion regulations and the First Amendment, explaining that although “a state may use its own voice to ‘show its profound respect’ for fetal life, nowhere did the Supreme Court authorize a state to commandeer the voice of a physician to disseminate its ideological message.” *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 743 (8th Cir. 2008) (Murphy, J., dissenting) (citing *Carhart*, 550 U.S. at 157).

110 *Carhart*, 550 U.S. at 147.

111 *Id.* at 145.

opinion, replete with multiple references to the infant life, was seen by many as an invitation to states to rethink their informed consent policies.<sup>112</sup> Legislation has since been introduced in this post-*Carhart* era that is threatening a physician's ability to convey non-political, non-ideological information to patients.<sup>113</sup> After all, "if Congress [through the Partial-Birth Abortion Act] can make it a crime for doctors to perform a medically accepted procedure," warned Linda Greenhouse, "states can expect increased leeway for conscripting doctors as agents for conveying an official anti-abortion message."<sup>114</sup> This is the present danger and the latest trend in challenges to the underlying premises of *Roe*.

### 7. *A Void in the Doctrine*

Reflecting on the Supreme Court's history with respect to application of the First Amendment to physician speech is critical to understanding how the Court might deal with physician speech issues in the future. *Casey* set a standard that has encouraged states to create more detailed informed consent statutes, *Carhart* framed the potential conflict as one between women and their doctors, and some states are now starting to stretch the boundaries of what has been deemed constitutional.<sup>115</sup> With the practice of medicine increasingly regulated by the state, more defined lines are clearly needed between what is truly factual and nonmisleading and what is state ideology. I turn now to examining where this line can be drawn.

## IV. THE IDEOLOGICAL ENTERPRISE OF DEFINING WHEN LIFE BEGINS

"Human being" is a socially ascriptive term for an entity that many would argue only has the *potential* to be a human life. Deciding when a "human being" comes into existence is subjective. For those who believe there is a "human being" present from the moment of conception, abortion is unlikely to ever be anything less than murder.<sup>116</sup>

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112 See, e.g., Gold & Nash, *supra* note 16 (discussing the *Carhart* Court's emphasis on informed consent and its effect on the abortion debate in the states).

113 See *infra*, Part VI.

114 Greenhouse, *supra* note 54, at 57–58.

115 See *infra*, Part VI.

116 Margaret Olivia Little, *The Moral Permissibility of Abortion*, in CONTEMPORARY DEBATES IN APPLIED ETHICS 27–28 (Andrew I. Cohen & Christopher Heath Wellman eds., 2005) ("The fetus, it's claimed, is a *person*—not just a life (a frog is a life), or an organism worthy of special regard, but a creature of full moral status imbued with fundamental rights. Abortion, in turn, constitutes a gross violation of one of that person's central-most such rights: namely, its right to life.").

But, as I will argue, such a belief is just that—belief and not fact, ideology and not science.

In attempting to decide when “human beings” begin, the problems that arise suggest that no position can rely on science alone to be either proved or disproved. There is no consensus in religious doctrine either; just as Americans differ on this issue, so too do organized religions.<sup>117</sup> Even if there was agreement, the First Amendment’s Establishment Clause<sup>118</sup> would prohibit any attempt to refashion such a belief into law.<sup>119</sup>

The way one approaches the question of the origin of life is inevitably a function of “one’s way of looking at reality, one’s moral policy, the values and rights one believes need balancing, and the type of questions one thinks need to be asked.”<sup>120</sup> In this Section, by looking at philosophical, legal, and scientific approaches to when life begins, I will argue that there is ultimately no scientific consensus and, as such, any statement which claims to definitively classify a fetus as a human being is based on ideology and not fact.

#### A. To ‘Being’ or Not to ‘Being’: The Central Dispute

In her seminal article, *A Defense of Abortion*, philosopher Judith Jarvis Thompson wrote that most of the opposition to abortion rests firmly on the premise that “the fetus is a human being, a person, from the moment of conception.”<sup>121</sup> This places the question of human embryo status at the center of the abortion debate.<sup>122</sup> Though

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117 For an in-depth look at different religions’ approaches to both abortion and contraception, see DANIEL C. MAGUIRE, *SACRED CHOICES: THE RIGHT TO CONTRACEPTION AND ABORTION IN TEN WORLD RELIGIONS* (2001); see also Paul D. Simmons, *Personhood, the Bible, and the Abortion Debate*, EDUC. SERIES NO. 3 (Religious Coal. for Reprod. Choice, D.C.), 1987, at 1.

118 U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . . .”) (applied to the states through U.S. CONST. amend. XIV § 1).

119 See Simmons, *supra* note 117, at 10 (explaining that definitions of the fetus as a person under the Constitution are based on religious understanding and not public policy); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 932 (1992) (Blackmun, J., concurring) (noting that the state’s interest in protecting fetal life is not grounded in the Constitution and that, consistent with the Establishment Clause, it also cannot be a theological or sectarian interest).

120 Daniel Callahan, *Abortion Decisions: Personal Morality*, in *ABORTION: LAW, CHOICE AND MORALITY* 493 (1970).

121 Judith Jarvis Thompson, *A Defense of Abortion*, 1 *PHIL. & PUB. AFF.* 47, 47 (1971); see also Norman C. Gillespie, *Abortion and Human Rights*, 87 *ETHICS* 237, 237 (1977).

122 In one of the main texts in the field of bioethics, Tom L. Beauchamp and James F. Childress explain that “[h]uman embryos and fetuses are often the centerpiece of [moral status] discussion because they are developing individuals with the potential for, without yet having acquired, cognitive properties, moral agency, and social relationships. . . . [T]he

written before *Roe* made its journey from Texas to the nation's highest court, Thompson's premise was then and is still now the issue around which so much conflict arises.

The primary argument against abortion relies on two premises that lead to a single conclusion: it is wrong to kill an innocent human being, a human fetus is an innocent human being, therefore it is wrong to kill a human fetus.<sup>123</sup> The central dispute hinges on the second premise: whether or not the fetus is a human being. If "human being" is interpreted as the equivalent of "person," then the second premise of the argument is clearly false because there is no plausible argument that a fetus is either rational or self-conscious, as persons are.<sup>124</sup> This argument is evidence that the fight over the term "human being" is not just a quarrel over semantics; it is the critical element to the dispute over when life begins.

### B. What is a "Human Being"?

The problem with the term "human being" is that it seems to purposely play on that ambiguity which is pivotal to the entire abortion controversy.<sup>125</sup> As the members of the *Rounds* dissent observed, when you place the term "human being" in the context of abortion, "[it] has an overwhelmingly subjective, normative meaning, in some sense encompassing the whole philosophical debate."<sup>126</sup> This calls into question whether a term that has a meaning in one context may be fairly used for a different purpose in another.

Robert Post, in criticizing South Dakota's statutory definition of "human being" as a "biological entity that belongs to the species *Homo sapiens*," asserted that "it is not at all obvious that the fetus is a 'human being' in a second and distinct sense, which is whether the fetus is a member of the community of human persons whose life possesses dignity and warrants respect."<sup>127</sup> This second sense of the

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idea is that it is morally wrong to intentionally cause a being with the potential to develop status-conferring properties to lose or fail to realize that potential." PRINCIPLES OF BIOMEDICAL ETHICS 83 (6th ed. 2009). Key to this articulation of the debate is the term "potential" to describe the properties of the fetus.

123 PETER SINGER, PRACTICAL ETHICS 138 (2d ed. 1993).

124 Post, *supra* note 3, at 955 n.83 (explaining Peter Singer's philosophical argument in *Abortion*, in THE OXFORD COMPANION TO PHILOSOPHY 1-2 (Ted Honderich ed., 1995)).

125 See Post, *supra* note 3, at 955 n.83.

126 Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 742 (8th Cir. 2008) (Murphy, J., dissenting).

127 Post, *supra* note 3, at 954-55. But see Singer, *supra* note 123, at 150 ("[W]hether a being is or is not a member of our species is, in itself no more relevant to the wrongness of killing it than whether it is or is not a member of our race. The belief that mere membership of

term, he argues, is the critical one when it comes to the context of abortion.<sup>128</sup>

A “human being” or “human” is commonly understood in the United States to mean “person” and vice versa, as is apparent by dictionary definitions that present the two as almost interchangeable.<sup>129</sup> When these terms are used to define one another as essential equivalents, a State’s attempt to redefine one of them in different, scientific terms looks contrived and, at the very least, linguistically questionable. More importantly, to a *patient*, who is expected to have only a layman’s understanding of scientific terminology, the word “human being” is one that is essentially interchangeable with “person.” Use of the term is not automatically justified simply because a complicated definition for the phrase is buried within the statutory definitions section of a law. Mandated communication of the words in this sense is misleading and this is a violation of the standard for informed consent set forth in *Casey*.<sup>130</sup>

### C. *How the Law Has Approached the Question of When Life Begins*

For the courts, the question of when life begins has largely been centered around the question of whether the fetus can be viewed as a person for purposes of constitutional protection. “The suggestion that states are free to declare a fetus a person . . . assumes that a state can curtail some persons’ constitutional rights by adding new persons to the constitutional population.”<sup>131</sup> Such a declaration would also pose problems in trying to apply constitutional rights to intrauterine entities.

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our species, irrespective of other characteristics, makes a great difference to the wrongness of killing a being is a legacy of religious doctrines . . .”).

128 Post, *supra* note 3, at 954–55.

129 See, e.g., RANDOM HOUSE COMPACT UNABRIDGED DICTIONARY 931, 1445 (Special 2d ed. 1996) (defining “human being” as “a person, esp. as distinguished from other animals or as representing the human species” and a “person” as “a human being, whether man, woman, or child”).

130 See Appellees’ Brief at 35–36, *Rounds*, 530 F.3d 724 (No. 05-3093) (“Reasonable patient understanding informs whether mandated informed consent language is misleading, and reasonable patient understanding confirms, at minimum, that the subject language here is misleading.”).

131 Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381, 400–01 (1992) (explaining that one citizen’s constitutional rights are affected by who else has such rights “because the rights of others may compete or conflict with his. So any power to increase the constitutional population by unilateral decision would be, in effect, a power to decrease rights the national Constitution grants to others”).

*Roe v. Wade*, though undoubtedly most renowned for what it did do (hold that abortion was within the scope of the personal liberty guaranteed by the Due Process Clause of the Fourteenth Amendment),<sup>132</sup> is also crucial for what it *refused* to do—specifically, classify when life begins.<sup>133</sup> “When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer,”<sup>134</sup> stated Justice Blackmun. Though many have tried to argue that we have come to the point at which the answer *is* attainable, there is still no general consensus or federal judicial ruling on the question.<sup>135</sup>

Even the *Casey* decision did not pretend to judge when life might begin. The language in the Pennsylvania statute did not directly address this issue,<sup>136</sup> but the court still made sure to clarify that what it had said about the question in *Roe* still rang true almost twenty years later. Justice Kennedy wrote that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>137</sup> On this particular issue, *Roe* still stands strong in its refusal to let the State create its own definition.<sup>138</sup> This point, though certainly not the bedrock of the *Casey* decision, is crucial to the interpretation of later statutes that purport to align with the one at issue in *Casey*. Justice Stevens’ concurrence in *Casey* further emphasized that the Court had never ruled that a de-

132 *Roe v. Wade*, 410 U.S. 113, 153 (1973).

133 *Id.* at 159 (“We need not resolve the difficult question of when life begins.”)

134 *Id.* There was, notably, no dissent from this part of the holding. *See id.* at 173.

135 *See, e.g.*, Appellees’ Brief at 7, *Rounds*, 530 F.3d 724 (No. 05-3093) (observing that even though courts have received arguments from both sides of the debate, no federal court has “altered or retreated from [*Roe*’s] finding of the state of man’s knowledge on the question of when human life begins”).

136 *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881-87 (1992) (citing 18 PA. CONS. STAT. ANN. 3205 (Supp. 1995) (Pennsylvania’s informed consent requirement)).

137 *Id.* at 851 (1992). Even though this was in reference to the Fourteenth Amendment, it is still telling for First Amendment rights since it is further proof that in the plurality’s view, the question of defining when life begins was not at issue in *Casey*.

138 *See* Transcript of Oral Argument at 41–43, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902). The Justices began with a “basic question,” asking Kenneth Starr, of the U.S. Department of Justice, about the Department’s position “on the question whether a fetus is a person within the meaning of the Fourteenth Amendment?” *Id.* at 41–42. Starr started to reply that the Department “[did] not have a position on that question and this Court has not addressed, or at least there is no Justice at this Court” but was interrupted and told that “[i]t’s addressed in *Roe*.” *Id.* at 42. To this, Starr admitted “[t]hat, that, that is correct. And it does seem to me that ultimately that is an extraordinarily difficult question which this Court need not address, and it need not address it in this case.” *Id.* This excerpt of the transcript illustrates that the question of when life begins was *not* up for debate in the Court that morning.

veloping fetus is a person under the Constitution; “indeed,” he wrote, “no Member of the Court has ever questioned this fundamental proposition.”<sup>139</sup>

One final point is that the language the Court has used in reference to the developing fetus has been neutral. In both *Casey* and fifteen years later in *Carhart*, the Court repeatedly referred to the state’s “interest in potential life” when speaking of the fetus or embryo and avoided describing it as an existing human being.<sup>140</sup> Though there are certainly conflicting opinions about a great deal in abortion jurisprudence, this much is clear: the judiciary refuses to define when life begins and the fact that it has never once referred to the fetus as a “human being” is evidence of this commitment.

#### D. *How Science Has Approached the Question of When Life Begins*

Law *refuses* to define when human life begins. Science *tries* to reach a definition but is unable to answer the arguably impossible question.<sup>141</sup> Does a “human being” come into existence at conception?<sup>142</sup> At some point before birth? Or at birth itself? The question

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139 *Casey*, 505 U.S. at 913 (Stevens, J., concurring in part and dissenting in part). As if to clarify for those States that would, in the future, attempt to create more restricting informed consent statutes, Justice Stevens was explicit in his emphasis that “as a matter of federal constitutional law, a developing organism that is not yet a ‘person’ does not have what is sometimes described as a ‘right to life.’ This has been and, by the Court’s holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy.” *Id.* at 913–14 (footnote omitted). Justice Scalia too, even in expressing dissatisfaction with the *Roe* opinion, acknowledged that there is no way to determine whether “the human fetus is in some critical sense merely potentially human . . . as a legal matter; it is in fact a value judgment.” *Id.* at 982 (Scalia, J., concurring in part). A narrow reading of *Roe* though could make it seem that the Court refused to let states define when life begins only for the purposes of criminal law. It could be argued by opponents that the Court did not rule on whether the state is still allowed to define when life begins for other purposes such as, in this case, advocacy.

140 *Id.* at 875–76 (plurality opinion); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (referencing “the State’s interest in potential life”).

141 Some scholars argue that stages of development are crucial to the distinction of when life begins. See Michael J. Sandel, Perspective, *Embryo Ethics—The Moral Logic of Stem-Cell Research*, 351 NEW ENG. J. MED. 207, 208 (2004) (“[A]lthough every oak tree was once an acorn, it does not follow that acorns are oak trees, or that I should treat the loss of an acorn eaten by a squirrel in my front yard as the same kind of loss as the death of an oak tree felled by a storm.”). But see Robert P. George & Patrick Lee, *Acorns and Embryos*, THE NEW ATLANTIS, Fall 2004/Winter 2005, at 90 (arguing that “[e]ach of us developed by a gradual, unified, and self-directed process . . . into adulthood, with his or her determinateness, unity, and identity fully intact”).

142 Paul Copland and Grant Gillett delve into this question and argue that calling the genome of a species a human being is going too far, *The Bioethical Structure of a Human Being*, 20 J. OF APPLIED PHIL. 123 (2003) (supporting a gradualist position on the structure of a human being, whereby the embryo takes on the form and ethical significance of a human

is no more easily answered today than it was in 1973 when the Court decided *Roe*. Though technology and biological knowledge have both advanced, science is still unable to pinpoint the moment at which a “human being” comes into existence.<sup>143</sup>

Scientists, such as a large number of those who filed amicus briefs in *Webster v. Reproductive Health Services*, concede that the only true scientific consensus to be reached is that science alone cannot answer this question.<sup>144</sup> Instead, individuals need to look to their own values and beliefs. “Individual scientists,” they acknowledge, “will have individual answers . . . . These answers do not represent any ‘scientific’ truth, because they are based upon values and beliefs, not upon science alone.”<sup>145</sup> Yet included in the opposing party’s amici briefs are the claims that “[m]edical and scientific data establish the fact that the preborn child is a human being”<sup>146</sup> and that “those trained in medicine and biology do not disagree on when human life begins when one uses only objective criteria to determine the beginnings of human life.”<sup>147</sup> Even more recently, appellants in *Rounds* asserted, as if to prove their point, that “[p]laintiffs produced no scientific evidence that an unborn child who is to be aborted is *not* a ‘human being.’”<sup>148</sup> Never do they acknowledge that perhaps the reason such evidence was not presented was because it could not be presented; it does not fall within the realm of scientific proof.

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being progressively). “[I]t is wrong to assume,” they state, “that the genome of a species defines the kernel or essence of a species in terms of its wider properties and to reduce the identity concerned to genetic identity.” *Id.* at 128.

143 See, e.g., Brief of 167 Distinguished Scientists and Physicians, Including 11 Nobel Laureates, as Amici Curiae Supporting Appellees at 6, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605) (“[T]he question of when a human life truly begins calls for a conclusion as to which characteristics define the essence of human life. While science can tell us when certain biological attributes can be detected, science cannot tell us which biological attributes establish the existence of a human being.”).

144 *Id.* at 2 (“There is no scientific consensus that a human life begins at conception, at a given stage in fetal development, or at birth. The question of ‘when a human life begins’ cannot be answered by reference to scientific principles . . . . The answer to that question will depend on each individual’s social, religious, philosophical, ethical and moral beliefs and values.”).

145 *Id.* at 4.

146 Brief for the Southwest Life and Law Center, Inc. as Amicus Curiae Supporting Appellants at 6, *Webster*, 492 U.S. 490 (No. 88-605).

147 Brief for Larry Joyce as Amicus Curiae Supporting Appellants at 30, *Webster*, 492 U.S. 490 (No. 88-605).

148 Appellants’ Brief at 16, *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (No. 05-3093) (emphasis added). The state’s physician witness also made the bold assertion that “[t]he statement that the fetus or embryo is a ‘whole, separate, unique, living human being’ is generally accepted in the medical community as accurate.” See Appellees’ Brief at 11, *Rounds*, 530 F.3d 724 (No. 05-3093).

This question of scientific proof hinges the debate. In hearings before the Senate on the Human Life Bill, Dr. Leon Rosenberg explained that the scientific method just does not lend itself to the job of classifying when life begins.<sup>149</sup> The scientific method depends on having both an idea and a means of testing that idea; a method for experimentation. Dr. Rosenberg maintained that “concepts such as humanness are beyond the purview of science because no idea about them can be tested experimentally.”<sup>150</sup> The Supreme Court has come to the similar conclusion that in order to classify something as scientific knowledge, it must be based on a scientifically valid process or theory.<sup>151</sup> “General acceptance” by the scientific community and whether or not the hypothesis can be tested can also influence whether evidence is admissible as scientific fact.<sup>152</sup>

Just as there is no consensus as to when life begins, there is also no scientific consensus for the term “human being.”<sup>153</sup> Professor Paul Wolpe, then President of the American Society for Bioethics and Humanities, testified in *Rounds* that “it is not a statement of scientific or medical fact to designate the embryo or fetus as a ‘whole, separate,

149 See *Leon Rosenberg on the “Human Life” Bill*, SCIENCE, May 22, 1981, at 907. Dr. Leon Rosenberg, Chairman of the Department of Human Genetics at Yale University Medical School, offered this testimony on the Human Life Bill in 1981 before the Subcommittee on the Separation of Powers of the Senate Judiciary Committee. See Constance Holden, *Senate Commences Hearings on “Human Life,”* SCIENCE, May 8, 1981, at 648–49; see also Leon E. Rosenberg, *Clinical Implications*, SOCIETY, May/June 1982, at 60 (“Scientists have been able to determine . . . that the earth is round or that genes are composed of DNA because, and only because, experiments could be performed to test these ideas. Without experiments there is no science, no way to prove or disprove any idea.”).

150 *Leon Rosenberg on the “Human Life” Bill*, *supra* note 149, at 907.

151 *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 593 (1993) (“Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.”) (quoting ERIC D. GREEN & CHARLES R. NESSON, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 645 (1983)). The Court pointed to four non-exclusive factors to be considered: (1) whether the hypothesis had been tested, (2) whether the theory had been subjected to peer review and publication, (3) whether there had been testing to show the rate of error, and (4) whether the theory was generally accepted in the scientific community. *Id.* at 593–94.

152 *Id.*

153 A search of multiple medical dictionaries turned up no entries for the term “human being.” See, e.g., THE AMERICAN HERITAGE STEDMAN’S MEDICAL DICTIONARY 380 (1995); DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 779 (27th ed. 1988). The Online medical dictionary similarly has no entry for human being, see <http://cancerweb.ncl.ac.uk/cgi-bin/omd?action=Search+OMD&query=human+being>, but its definitions for “person” are “[t]he bodily form of a human being” and “[a] human being spoken of indefinitely; one; a man; as, any person present.” See <http://cancerweb.ncl.ac.uk/cgi-bin/omd?action=Search+OMD&query=person>.

unique, living human being.”<sup>154</sup> It is, instead, “a question left for philosophical, religious, moral, and ethical discourse.”<sup>155</sup> Doctors, or in the case of the law, States, cannot therefore just define a word in whichever way they want in order for it to qualify as scientific. This is not how science works.

Given the range of perspectives and beliefs about the beginning of life, a definition of “human being” or when life actually begins is ideological in nature. The implications of this conclusion are discussed in Part VI.

## V. STATE STATUTES AND QUESTIONABLE DEFINITIONS

### A. Challenges to Statutes That Define When Life Begins

The Eighth Circuit’s decision in *Rounds* which lifted the injunction on South Dakota’s informed consent statute was surprising, given the fact that federal courts have consistently struck down statutes that attempt to define when human life begins. Even as early as 1980, courts used *Roe* to strike down states’ informed consent statutes if they included definitions of human life. In *Margaret S. v. Edwards*,<sup>156</sup> a Louisiana district court struck down a statute which required a doctor to tell his patient that “the unborn child is a human life from the moment of conception.”<sup>157</sup> The court deemed this requirement unconstitutional in light of *Roe*’s conclusion that this morally complicated determination was not the State’s to ascertain.<sup>158</sup>

A similar opportunity was given to an Illinois district court that same year in *Charles v. Carey*. The court entered a preliminary injunction on certain sections of the Illinois Abortion Law of 1975. The Act would have required physicians to deliver a written statement to patients that included the statement that “the State of Illinois wants you to know that in its view the child you are carrying is a living human being whose life should be preserved. Illinois strongly encourages you not to have an abortion but to go through to childbirth.”<sup>159</sup> When the case went to the Seventh Circuit, parts of the Act, including

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154 See Appellees’ Brief at 30, *Rounds*, 530 F.3d 724 (No. 05-3093). Dr. Wolpe is the Director of the Center for Ethics at Emory University and serves as the first Chief of Bioethics for the National Aeronautics and Space Administration (NASA).

155 *Id.* at 31.

156 488 F. Supp. 181 (E.D. La. 1980).

157 *Id.* at 205 n.76 (citing LA. REV. STAT. § 40:1299.35.6(B)(3)).

158 *Id.* at 209 (“This statement disregards *Roe*’s finding that the state may not make a determination that life begins at the moment of conception . . .”).

159 S.B. 47 § 3.5(2).

this one, were held unconstitutional, but the court of appeals did not mention the First Amendment at all in the decision.<sup>160</sup>

The Supreme Court had its own chance to rule on ideological language in an informed consent statute in *City of Akron v. Akron Center for Reproductive Health, Inc.*<sup>161</sup> The Court held that the requirement that physicians inform their patients that “the unborn child is a human life from the moment of conception”<sup>162</sup> was inconsistent with *Roe*’s holding that “a State may not adopt one theory of when life begins to justify its regulation of abortions.”<sup>163</sup> This case was later overruled, but the unconstitutionality of this particular section of the statute remains debatable.<sup>164</sup>

The ensuing years did not offer much opportunity for any courts to hear challenges to such statutes because states did not enact them. Though informed consent regulations were challenged on other fronts, statutes simply were not written that attempted to personify the fetus. Eventually, in 2007, a case came that did not challenge the language in a statute but rather the lack thereof. The New Jersey state case *Acuna v. Turkish*<sup>165</sup> directly addressed the question of whether doctors could be forced to define when life begins. A patient brought the proceeding and alleged that her doctor should have told her, when seeking her consent to the abortion, that her embryo “was a complete, separate, unique and irreplaceable human being.”<sup>166</sup> The New Jersey Supreme Court ruled against her and found that because there is no consensus on the issue of when life begins, a doctor does not have to tell a woman considering an abortion that an embryo is an existing, living human being.<sup>167</sup> Although the Court did not address the potential violation of physicians’ First

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160 *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980). *But see Berg, supra* note 42, at 176 n.97 (proposing that under the new standard established by *Casey*, this statute could survive constitutional review today).

161 *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

162 *Akron Ctr. for Reprod. Health, Inc. v. City of Akron*, 479 F. Supp. 1172, 1186 (1979) (citing Akron Codified Ordinances 160-1978 § 1870.06).

163 *Akron*, 462 U.S. at 444.

164 *See supra* Part III.B.1 for a more extended discussion of this case.

165 930 A.2d 416 (N.J. 2007) (finding that there was support in neither New Jersey nor federal law for imposing a legal duty on doctors to communicate to patients that an embryo is a human being).

166 *Id.* at 420.

167 *Id.* at 418 (“There is not even remotely a consensus among New Jersey’s medical community or citizenry that the plaintiff’s assertions are medical facts, as opposed to firmly held moral, philosophical, and religious beliefs, to support the establishment of the duty she would impose on all physicians.”).

Amendment rights in such a statement, it did find that the proposed language reflected a value judgment—not a medical fact.<sup>168</sup>

This line of cases supports the argument that the term “human being” does not belong in any informed consent to abortion statute. Though it is true that South Dakota did not use the term “person,” the buzzword which would immediately raise red flags given *Roe*’s clear holding that this is not for the courts to define, using the term “human being” in its place conveys essentially the same idea. Even South Dakota conceded that “whether or not the prospective patient understands the difference between the scientific term ‘human being’ versus the legal term ‘person,’ is of significance only if the statement actually given is found to be false and misleading.”<sup>169</sup> According to *Casey*, however, the statement only need be false *or* misleading for it to be unconstitutional. The misleading nature of South Dakota’s statutory language is discussed in the following section.

### B. A Linguistic Ruse

As in the abortion debate as a whole, language choice in statutes is crucial. Language about abortion spans the spectrum from scathing,<sup>170</sup> to more neutral,<sup>171</sup> to reassuring,<sup>172</sup> to everything in between. Advocates on both sides of the debate place importance on words used to craft their messages. In fact, there are websites that offer ex-

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168 *Id.* at 422. *But see* Tina Kelley, *New Jersey Top Court Rejects Woman’s Malpractice Suit on Abortion*, N.Y. TIMES, Sept. 13, 2007, at B3, in which Marie Tasy, executive director of New Jersey Right to Life, strongly disagreed with the decision and stated that “[o]nce again the court relies upon an outdated, schizophrenic mentality to the detriment of women, and they are indulging in a game of semantic gymnastics to avoid the indisputable fact that a child in the womb is a human being.”

169 Appellants’ Brief at 27, *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (No. 05-3093).

170 *See, e.g.*, *Abortion is Murder!*, [http://www.jesus-issavior.com/Evils%20in%20America/Abortion%20is%20Murder/abortion\\_is\\_murder.htm](http://www.jesus-issavior.com/Evils%20in%20America/Abortion%20is%20Murder/abortion_is_murder.htm) (last visited Oct. 3, 2009) (“Upon seeing these [graphic] signs, an angry pro-choice mother asked, ‘How can you allow little children to see those horrible pictures?’ The pro-life mother wisely responded, ‘How can you allow little children to be those horrible pictures?’”). Sites like this also speak to the fact that imagery, paired with strong language, is a tool used by the anti-choice movement to convey its message. It is largely for this reason that many states are currently trying to enact ultrasound statutes, as a means of forcing women to view images of fetuses. *See infra* notes 200–01 and accompanying text.

171 *See, e.g.*, Little, *supra* note 116, at 36 (explaining that Professor Barbara Katz Rothman represents that sometimes a “decision[] to abort . . . [is] not a decision to destroy, but a refusal to create”).

172 *See, e.g.*, National Abortion Federation, [http://www.prochoice.org/about\\_abortion/index.html](http://www.prochoice.org/about_abortion/index.html) (last visited Oct. 3, 2009) (“Abortion is one of the safest medical procedures provided in the United States and Canada today.”).

PLICIT instructions for language to use that will counter the other side's arguments.<sup>173</sup> The purposeful construction of "the Fetus as a Human Person" rhetoric is a recognized and studied goal of those who oppose abortion.<sup>174</sup> If this is a strategy used to gain supporters generally, why should tactics be any different in the legislative context?

There is nothing in South Dakota's statutory description of the "unique, whole, living human being" that is unique to the fetal life form. A baby, a child, and even an adult could easily be described using this broad phrase. This is semantic manipulation.<sup>175</sup> The description can be equally applied to both what is in the womb and what is walking around on the street, yet these are different entities that deserve to be recognized as such in the eyes of the law.<sup>176</sup> This modification of the term "human being" by the preceding adjectives makes it clear that the State is trying to convince a woman that the entity grow-

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173 See, e.g., American Life League, *Talk the Talk*, [http://www.all.org/action\\_talkthetalk.php](http://www.all.org/action_talkthetalk.php) (last visited Oct. 3, 2009) (explaining that "[i]f you want to speak up for the babies, you've got to know the language"); National Right to Life, *What is the Pro-life Response to Abortionists' Arguments?*, <http://www.nrlc.org/abortion/facts/abortionresponses.html> (last visited Oct. 3, 2009) (providing "pro-life" responses to five main pro-choice arguments); National Abortion Federation, *Speaking Positively about Abortion*, [http://www.prochoice.org/get\\_involved/pro\\_choice\\_proud.html](http://www.prochoice.org/get_involved/pro_choice_proud.html) (last visited Oct. 3, 2009) ("It is important for those who understand the importance of keeping abortion safe, legal, and accessible to speak out about the importance of this critical reproductive health option . . .").

174 Nick Hopkins & Steve Reicher, *Social Movement Rhetoric and the Social Psychology of Collective Action: A Case Study of Anti-Abortion Mobilization*, 50 HUM. REL. 261, 273 (1997).

175 But see Patrick Lee & Robert P. George, *The Wrong of Abortion*, in CONTEMPORARY DEBATES IN APPLIED ETHICS, *supra* note 116, at 13, 14 (defending the notion that a human embryo is unique, human, and whole by describing it in terms that are unique to a developing organism). Lee and George write:

[I]t is from the start *distinct* from any cell of the mother of the father. This is clear because it is growing in its own distinct direction. Its growth is internally directed to its own survival and maturation. Second, the embryo is *human*: it has the genetic makeup characteristic of human beings. Third, and most importantly, the embryo is a *complete* or *whole* organism, though immature. The human embryo, from conception onward, is fully programmed actively to develop himself or herself to the mature stage of a human being, and, *unless prevented by disease of violence, will actually do so, despite possibly significant variation in environment* . . .

*Id.*

176 Many states, however, continue to try to personify the fetus as much as is possible. Written materials provided to women in North Dakota, for example, communicate that "fetus is 'a Latin word meaning young one or offspring,'" and that "at 10 weeks' gestation, the fetus 'now has a distinct human appearance.'" Gold & Nash, *supra* note 16, at 10. Though the state may include this language in its own written materials, which the doctor is not required to communicate, messages are held to a different standard when speech rights are at stake.

ing inside of her is a little person, which is more than a little unconstitutional.<sup>177</sup>

In defense of its language, South Dakota contended that those who would exclude application of the terms “human being” and “Homo sapien” to the fetus aim to “effectively preclude frank discussion, in scientific terms, of the implications of abortion. Such a result,” the State boldly claimed, “is surely inconsistent with the principles of the First Amendment.”<sup>178</sup> This logic is intensely flawed and turns the First Amendment on its head. A doctor remains free to say whatever he or she deems medically necessary, even if the words are not scripted and compelled by the State; preclusion of purported “frank discussion,”<sup>179</sup> as the State puts it, assumes that doctors will only convey information required by law. Indeed, what would seem the greater impediment to frank discussion is South Dakota’s requirement that all of a physician’s answers to a woman’s questions be put in writing and kept in her medical file.<sup>180</sup> Knowing that all questions one has about a sensitive medical procedure are documented could keep a woman from speaking frankly with her doctor. Simply not including the term “human being” in the informed consent script does not violate the First Amendment at all; to suggest otherwise indicates a poor understanding of the Constitution.

### C. *Unnecessary to the Practice of Medicine*

The bigger question that remains to be answered is whether inclusion of the term “human being” is necessary to the practice of medicine. States may use their police powers in the medical field to protect the public and ensure that they are not harmed but this power is limited to the regulation of health and safety.<sup>181</sup> In its standard formulation, informed consent does not require disclosure of a risk that “is either known to the patient or is so obvious as to justify presump-

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177 Robert Post, *supra* note 3, at 959, argues that the adjectives “do not even purport to have biological or scientific content. Their meaning comes entirely from the moral debate that surrounds abortion, because they emphasize the status of the fetus as a distinct and independent member of the human community.” He also points out that biologically, “a nonviable fetus is neither ‘whole’ nor ‘separate,’ because it cannot survive outside its relationship with its mother.” *Id.* (footnotes omitted).

178 Appellants’ Brief at 37, *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (No. 05-3093).

179 *Id.*

180 S.D. CODIFIED LAWS § 34-23A-10.1 (2009).

181 *See supra* Part II.E.

tion of such knowledge.”<sup>182</sup> As defined in the statute, it may appear true that “abortion will terminate the life of a whole, separate, unique, living human being.”<sup>183</sup> But why is such information necessary for securing a patient’s informed consent? Does use of this term really protect a patient’s health and safety?

The sole purpose of an abortion is to terminate a pregnancy, yet the South Dakota Task Force to Study Abortion<sup>184</sup> made it seem like a woman who voluntarily goes to a clinic to get this procedure has no clue about the purpose of her visit. The Task Force stated that Planned Parenthood “fails to inform the pregnant mother in any language that her unborn child is in existence,”<sup>185</sup> and that therefore “[i]t is impossible for a woman to give informed consent to an abortion if she does not fully understand that her child is in existence and that she is consenting to the termination of the life of her child.”<sup>186</sup>

That the Task Force felt compelled to explain that a developing fetus is actually a “human being” assumes that women do not understand the basic elements of reproduction.<sup>187</sup> The utter absurdity of this “disclosure” is not lost on legal scholars. Robert Post observes, tongue in cheek, that “[i]t hardly seems plausible that a woman could be confused about whether she is carrying the biological fetus of a zebra, a raccoon, or a bat.”<sup>188</sup> “Just think of all those scores of women who have flocked to abortion clinics under the sad misimpression that they were carrying developing dolphins,” mused another com-

182 *Sard v. Hardy*, 379 A.2d 1014, 1022 (Md. 1977); *see also* *Canterbury v. Spence*, 464 F.2d 772, 788 (D.C. Cir 1972) (“[T]here is no obligation to communicate those [dangers] of which persons of average sophistication are aware.”).

183 S.D. CODIFIED LAWS § 34-23A-10.1 (2009).

184 REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION (2005), [http://www.voteeyesforlife.com/docs/Task\\_Force\\_Report.pdf](http://www.voteeyesforlife.com/docs/Task_Force_Report.pdf) (established by H.B. 1233, 2005 Leg., 80th Sess. (S.D. 2005)) [hereinafter Task Force Report]. The Task Force also concluded that “the mother has an existing and important and beneficial relationship with her child that is irrevocably terminated by the abortion procedure.” *Id.* at 13.

185 *Id.* at 16.

186 *Id.*

187 In 2003, there were 819 abortions performed in South Dakota and out of the 819 women who filled out the requisite state information forms, only five requested that additional written information be mailed to them. *Id.* at 14 (citing S.D. DEP’T OF HEALTH, SOUTH DAKOTA VITAL STATISTICS REPORT 71 (2003), *available at* <http://internetdev.state.sd.us/SDWebInfo/DOH/doh/Stats/2003VitalStats/index.htm>). The Task Force interpreted this ratio to mean that 99.4% of the women “received *no information* about the development of the unborn child except the information required by [the statute].” *Id.* (emphasis added). Such an interpretation not only assumes that these women would have no other methods of accessing information, it also assumes that doctors would not communicate information outside of a state mandate. This is a paternalistic view of both women and their physicians.

188 Post, *supra* note 3, at 954.

mentator.<sup>189</sup> “The women of South Dakota can rest safely in the knowledge that, thanks to their wise legislators, they will at last understand the mystery of their pregnancy . . . .”<sup>190</sup>

This paternalistic Task Force report ushered in a paternalistic law with what was essentially “linguistic smoke and mirrors.”<sup>191</sup> As a result, the statute now conveys a misleading state ideology through a medium—the physician—whose constitutional right takes an apparent back seat to South Dakota’s ideology-driven excursion.

## VI. DOCTORS AS PUPPETS OF THE STATE: IMPLICATIONS

Imitation may be the sincerest form of flattery, but in the case of the South Dakota statute, it is a dangerous trend. Other states have already begun to follow South Dakota’s lead and introduce legislation that includes language mimicking word for word that found in South Dakota’s informed consent to abortion statute. A North Dakota bill was introduced in early 2009 and has already been enacted into law.<sup>192</sup> Kansas followed suit in March 2009; its House passed a nearly identical bill with a vote of 82–40.<sup>193</sup> Both of these require that physicians inform patients that abortion will “terminate the life of a whole, separate, unique, living human being” and they define “human being” exactly the same way the South Dakota legislature did.<sup>194</sup> Based on the quick responses of these two states, it is easy to imagine that other states will continue to introduce similar legislation in their own regions. No longer will the effect of this constitutional violation be felt solely among South Dakota practitioners and patients.

Besides creating this statutory ripple effect of sorts on physician speech, South Dakota’s statute has broader consequences for the

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189 Posting of Caitlin E. Borgmann to Reproductive Rights Prof Blog, [http://lawprofessors.typepad.com/reproductive\\_rights/2008/06/eighth-circui-1.html](http://lawprofessors.typepad.com/reproductive_rights/2008/06/eighth-circui-1.html) (June 28, 2008) (last visited Oct. 3, 2009).

190 *Id.*

191 Appellees’ Brief at 34–35, *Planned Parenthood of Minn., N.D., S.D. v. Rounds* 530 F.3d 724 (8th Cir. 2008) (No. 05-3093).

192 Abortion Control Act, H.B. 1445, 61st Leg., Reg. Sess. (N.D. 2009), *amending* N.D. CODE 14-02.1-02. Tom Freier of the North Dakota Family Alliance explained his support for the Bill, stating that “[a]s obvious as this disclosure is, it is necessary for the woman to be fully informed before giving her ‘informed consent’ to this procedure which will terminate the life of this unborn little boy or girl.” Steven Ertelt, *North Dakota House Backs Bill Telling Women Abortion Kills a Human Being*, LIFENEWS.COM, Feb. 16, 2009, <http://www.lifenews.com/state3856.html>.

193 H.B. 2206 (Kan. 2009), *amending* K.S.A. § 65-6709; KAN. J. OF THE HOUSE, Mar. 4, 2009, 262.

194 N.D. H.B. 1445; Kan. H.B. 2206. Neither of these state’s bills have been voted on in their respective Senates to date.

field of medicine. Most directly, it threatens the relationships between doctors and their patients. This relationship must be founded on trust, but such dependence could be hard to come by if patients believe that the advice given to them comes not from the sphere of medicine but from the halls of the legislature.<sup>195</sup> “Patients should not accept, and [the medical] profession should not allow, physicians to become a mouthpiece of state-sponsored ideology,”<sup>196</sup> asserted four doctors in a *New England Journal of Medicine* editorial. Sanctioning this practice would jeopardize the integrity of physician-patient relationships well beyond the confines of any abortion clinic.

The danger of inserting state ideology in abortion scripts extends towards other medical procedures. If states can get away with mandating ideological speech about conceptions of life, it is quite possible that they could do the same in areas such as contraception,<sup>197</sup> end-of-life decisions,<sup>198</sup> and stem cell research.<sup>199</sup> Also troubling is the potential to pair scripts requiring the identification of the fetus as a “human being” with mandatory ultrasound viewing requirements.<sup>200</sup>

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195 See Curfman, *supra* note 52, at 2485 (“[C]an a patient trust any interaction with his or her physician knowing that the physician’s very words have been mandated by the state?”).

196 *Id.*

197 See 45 C.F.R. § 88 (2008) (“The purpose of this Part is to . . . protect the rights of health care entities/entities . . . to refuse to perform health care services and research activities to which they may object for religious, moral, ethical, or other reasons.”). Though later overturned, this Department of Health and Human Services regulation empowered federal officials to cut off federal funding for any state or local government, hospital, health plan, clinic or other entity that did not abide by existing federal laws requiring them to accommodate doctors, nurses, pharmacists and other employees who refused to participate in any care they considered objectionable on ethical, moral or religious grounds. *Id.* See generally Rob Stein, *Lawsuits Filed Over Rule That Lets Health Workers Deny Care*, WASH. POST, Jan. 16, 2009, at A04; David Stout, *Medical ‘Conscience Rule’ Is Issued*, N.Y. TIMES, Dec. 19, 2008, <http://www.nytimes.com/2008/12/19/washington/19rule.html>. For a comparison of the “Conscience Rule” with the South Dakota Informed Consent statute, see Dahlia Lithwick, *Nursing Grudges*, SLATE, Dec. 6, 2008, <http://www.slate.com/id/2206042/>. Lithwick inquires why the United States only seems to protect the moral convictions of some health workers as opposed to all and observes that though “[t]he freedom and autonomy of doctors who oppose abortion are to be protected[,] those willing to provide abortions can be forced to deliver a state message with which they completely disagree.” *Id.*

198 See generally RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993) (discussing abortion in the context of “the edges of life” and “dying and living”).

199 See, e.g., Lazzarini, *supra* note 9, at 2191 (“If legislatures can mandate that physicians provide women with ideological, vague, intimidating and false information about abortion, what is to stop them from intruding further into physician-patient discussing regarding . . . the use of future stem-cell-based therapeutics . . .”).

200 For an analysis of state ultrasound statutes, see Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 375–79 (2008) (dis-

As of March 2009, twelve states regulated the provision of ultrasounds by abortion providers and six States required verbal counseling or written materials to include information on accessing ultrasound services.<sup>201</sup> If a State were to require that a physician not only present a viewing of the ultrasound but also identify the image up on the screen as a “human being,” the effect on the woman would be that much more pronounced and ideologically misleading. Though the First Amendment principles of the compelled physician speech would not change with the addition of this intrauterine screening, the moral objective of the state would become that much more crystallized. If only the legislature would provide some popcorn along with this cinematic lesson in ideology for the patient.

The Eighth Circuit might have already had its say on this issue, but with the emergence of identical statutes in other states, it is very possible that a new challenge might materialize in a different region soon. If this happens, another circuit might get the chance to rule that forced communication of the term “human being” in informed consent provisions does in fact violate the First Amendment. Until then, the medical community at large needs to recognize the assault on its speech rights that statutes like this pose. Whether or not they approve of abortion, they must realize the broader implications such statutes have for their profession. Legislatures should not be able to make up their own definitions of science, nor should they be able to impose their own ideologies onto medical practitioners’ communication. It is important that those individuals who realize the unconstitutionality of these requirements work towards defeating similar measures in other states. The Eighth Circuit’s failure to recognize the ideological components of the term “human being” ignores Supreme Court precedent and implicitly condones turning doctors into state puppets. But ideology must not be scripted and the First Amendment must not be overridden by state puppeteers. This is not the show that should be staged under our Constitution.

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cussing the importance of imagery and arguing that mandatory ultrasounds improperly burden a woman’s ability to make a decisions about abortion).

201 See GUTTMACHER INST., STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND 1 (2009), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_RFU.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf) (stating information about various states’ requirements for ultrasounds in relation to abortions).