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Robert D. Goldstein

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READING CASEY: STRUCTURING THE WOMAN'S DECISIONMAKING PROCESS

Robert D. Goldstein*

In this Article, Professor Goldstein argues that the primary concerns of Planned Parenthood v. Casey's joint opinion were expressive, not regulatory, in nature: to allow the state more leeway to structure the woman's decisionmaking process and to engage in its own speech regarding her exercise of her procreative choice. To this end, he identifies three models by which the state can engage in such structuring: the autonomy informed consent model, the dialogical model, and the government speech model. He then analyzes Casey in light of each model to understand what limits Casey places on state abortion regulation. He also develops an argument for the special speech rights of the learned professions in order to discuss the right of the physician to counter the state's message, even when the state funds the physician's speech under Rust v. Sullivan. In conclusion, he offers his own suggestions about the appropriate subjects of a state-sponsored conversation about abortion.

* * *

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* Professor of Law, UCLA School of Law. E-mail: Goldstei@law.ucla.edu. My thanks to Nancy (Ann) Davis at the Center for Philosophy and Public Policy, University of Colorado, for an opportunity to present an earlier version of this paper; to the late Carolyn Williams and to Mina Quintos for word processing; to Rick Abel, Erwin Chemerinsky, Julian Eule, Willie Forbath, Ken Karst, Diane Klein, Martha Mathews, and Jon Varat for reading drafts; to Peter Arenella, Steve Munzer and David Sklansky for advice; to the UCLA Law Librarians, Jeremy Halpern, and Kim Nguyen for research; to the UCLA Academic Senate and Dean Susan Prager for financial support; and to Wendy Schmelzer.

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I. INTRODUCTION: CASEY'S EXPRESSIVE CONCERNS

In the shock following the Supreme Court's decision in *Planned Parenthood v. Casey*,¹ both sides claimed victory, both claimed defeat: *Roe* upheld yet again, but undone. *Roe* gutted as expected, but still affirmed.

Justices Kennedy, O'Connor, and Souter, who took the unusual course of issuing a jointly authored plurality opinion,² formed a majority with Justices Stevens and Blackmun³ to reject the calls of those in the dissent to

¹ 505 U.S. 833 (1992).

² *Id.* at 843.

³ *Id.* at 911 (Stevens, J., concurring in part and dissenting in part); *id.* at 922

overrule *Roe v. Wade*.⁴ Instead, the joint opinion reaffirmed the "core" of *Roe*, while discarding the trimester scheme in favor of an undue burden test.⁵ As the narrowest opinion supporting the Court's judgment, *Casey*'s joint opinion establishes current doctrine.⁶ But what does that opinion mean?

A. Preview

On a first and early reading, the joint opinion in *Casey* appeared to some to renew the invitation extended to the states in *Webster v. Reproductive Health Services*⁷ to regulate abortion services in a multiplicity of ways. Nevertheless, according to Justice Scalia, the Court in *Casey* did so in an unprincipled and ad hoc manner, through a contentless undue burden test that could mean only what a majority of Justices happened to say it meant in a particular case.⁸ Subsequent commentary on the case has focused on the relation of the undue burden test to other constitutional doctrines, or on criticizing *Casey*'s specific holdings.⁹

This Article provides a different reading of the joint opinion and one that offers a more coherent and intellectually satisfying understanding of the law of abortion. On this reading, *Casey* strongly reaffirms *Roe* and maintains a substantial continuity with the regime *Roe* created, albeit with the undue burden test. That undue burden test, this Introduction argues, should

(Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part).

⁴ 410 U.S. 113 (1973). In *Roe*, the Court held that the decision to have an abortion is a privacy right protected by the Fourteenth Amendment. *Id.* at 152-54. Under *Roe*, during the first trimester, the decision to abort belongs exclusively to the woman and her physician. From the end of the first trimester to the point of viability, the state may regulate abortion to protect maternal health. After viability, the state may prohibit abortion except when the mother's life or health is in danger. *Id.* at 164-65.

⁵ *Casey*, 505 U.S. at 878-79.

⁶ See *Marks v. United States*, 430 U.S. 188, 193 (1977). As the narrowest of the three opinions supporting *Roe*, *Casey*'s joint opinion is understood to establish the theory and standards of the Court, because there were five Justices who were prepared to go at least as far as that opinion in limiting state restrictions on abortion choice.

⁷ 492 U.S. 490 (1989).

⁸ *Casey*, 505 U.S. at 984-92 (Scalia, J., concurring in judgment in part and dissenting in part).

⁹ See, e.g., Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867 (1994); Jane M. Cohen, *A Jurisprudence of Doubt: Deliberative Autonomy and Abortion*, 3 COLUM. J. GENDER & L. 175 (1992); Lynn D. Wardle, *Thomas Jefferson v. Casey*, HUM. LIFE REV., Summer 1994, at 49. For a review of lower court cases following *Casey*, see Sandra L. Tholen & Lisa Baird, Comment, *Con Law Is as Con Law Does: A Survey of Planned Parenthood v. Casey in the State and Federal Courts*, 28 LOY. L.A. L. REV. 971 (1995).

not be read as inviting wide-open balancing of amorphous factors in which judges freely expand or contract abortion regulation depending on their personal predilections. Instead, the joint opinion's central concern was to enhance the state's power to structure the decisionmaking process by which the woman exercises her lawful authority to terminate her pregnancy and hence to regulate her procreativity (and sexuality). The Justices apparently believed that, given *City of Akron v. Akron Center for Reproductive Health, Inc.*¹⁰ and *Thornburgh v. American College of Obstetricians & Gynecologists*,¹¹ leeway for such structuring required an alteration in *Roe*'s trimester structure in favor of their undue burden test.

Even if not central, permitting such structuring was one among several concerns of the Justices. Thus whether this Introduction successfully makes out its case that this concern was central leaves unaffected this Article's primary task—carried out in Parts II-IV—of analyzing the several ways in which a state may structure a woman's decisionmaking process. This Article will advance three models of state regulation of a decisionmaking process: (1) in Part II, the autonomy informed-consent model, wherein state regulation seeks to enhance a person's informed autonomous choice; (2) in Part III, the dialogical model, in which the state seeks to enhance a (reenvisioned) autonomy by strategically arranging dialogical opportunities for a person (with the public, her spouse, or her parents on the facts of *Casey*); and (3) in Part IV, the government speech model, in which the state, indifferent to a person's interests, seeks to persuade or reeducate her. In considering the various forms that state structuring may take, this Article will explore the limits upon state intervention that may be found in the internal logic of each of the models' rationales, in the words of the *Casey* joint opinion, and in other legal doctrines, especially those related to government speech.¹² Part IV will also sketch at length an argument for the special free speech interests of the learned professions in order to explain why the state may not constrain or decline to fund a physician's speech to his patient, even if such speech undermines the state's message.

In developing this reading of *Casey*, this Article will call upon the work of Mary Ann Glendon¹³ to emphasize the opinion's underlying expressive concerns, and then, in Parts II-IV, repeatedly enlist the aid of a foil—a

¹⁰ 462 U.S. 416 (1983), *overruled in part by Casey*, 505 U.S. at 833; see discussion *infra* note 62 and accompanying text.

¹¹ 476 U.S. 747 (1986), *overruled in part by Casey*, 505 U.S. at 833; see discussion *infra* note 62 and accompanying text.

¹² Exploration of whether the tripartite analysis employed here—of individual autonomy, dialogical communication, and government speech—may be useful in analyzing other areas of government regulation—e.g., the right to die, marriage, and divorce—must be postponed until another time.

¹³ MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* (1987).

hypothetical state attorney general—who, rather more passionately than his liberal respondent, will set forth and clarify a range of arguments on behalf of the Pennsylvania statute that *Casey* reviewed.

This is the roadmap. What of the destination? At the most practical level, this Article concludes that the statute in *Casey* reaches close to the limits of what *Casey*'s rationale permits.

At the most general level, I suggest that the joint opinion seeks to resolve the deeply divisive abortion controversy in a very interesting way: it continues to recognize the woman's ultimate control over her reproductive life, but gives expression to the values of those who oppose abortion by allowing more speech. It does so by granting leeway to the government to voice its own opposition to abortion. Responding to those abortion opponents who may doubt the rationality and independence of the approximately 1.5 million women in this country who annually decide to abort,¹⁴ the joint opinion also enables the state to try to enhance the autonomy of those women by increasing the information at their disposal and their opportunity for reflection.

Lurking within this solution of more speech are knotty philosophical issues about autonomy and our understanding of the self. As a practical legal matter, however, when a state employs its symbolic and material resources to implement a rigorous informed consent process, it risks sacrificing liberty to an elusive ideal of autonomy, and betraying autonomy in favor of its own partisan goals. To avoid this, courts need to bring practical judgment to bear on a state's regulation by considering our actual legal practices regarding informed consent and the express wishes of the individuals whose autonomy is at stake. The question must be whether the mandated procedure implements, for those affected, "autonomy-in-fact."

Quite apart from its interest in fostering the autonomy of its citizens, the state also has the authority to speak in favor of the values that its democratically elected officials seek to advance. Nevertheless, there are limits on how forcefully and under which circumstances the state may address the pregnant woman. Such limits are derived from doctrines regarding government speech and, ultimately, from the self-governance of citizens that a democratic state must not undermine.

In *Casey*, the locus of the state's efforts to speak and enhance autonomy is the doctor-patient relationship. As a general matter quite apart from the issue of abortion, the state protects autonomous choice and individual well-being in part by fostering and maintaining the autonomy of the professions and a private space for client-professional contact. In this space, the learned professions bring society's knowledge and solicitude to bear upon funda-

¹⁴ Council on Scientific Affairs, American Medical Ass'n, *Induced Termination of Pregnancy Before and After Roe v. Wade: Trends in the Mortality and Morbidity of Women*, 268 JAMA 3231, 3232 (1992) [hereinafter *Abortion Trends*].

mentally important aspects of a person's life and liberty—in this instance, a woman's bodily and psychological well-being. Because the learned professions are institutions of knowledge, Part IV will argue that their practices enjoy First Amendment protection. Thus, autonomy as well as free speech may be jeopardized when the state intrudes on this relationship.

In its general approach, the joint opinion implies that the liberal state may play a substantial role in communicating with its competent adult citizens in order to aid their autonomous choices and to convey collectively determined values. Accordingly, *Casey* affords an occasion to consider more extensively the possibilities and limits of government expression and its structuring of the individual's decisionmaking processes. This understanding, however, requires a more detailed exploration than is usually needed to explicate opinions that focus simply on state constraints upon liberty.¹⁵

¹⁵ I shall presume a familiarity with the holding in *Casey*; those interested in a quick review of the opinion may consult the following. In *Casey*, the Court considered a statute from Pennsylvania which required:

(1) That a woman obtaining an abortion must sign a statement, on pain of perjury, indicating that she had notified her husband of her intention to abort unless she also affirmed that her spouse: was not the father; could not be located after diligent effort; had impregnated her in a spousal sexual assault which she had reported to the police; or would likely inflict bodily injury upon her if notified.

(2) A 24-hour waiting period before an abortion and after the physician had orally provided the woman with the following information and received her informed consent regarding: the nature of the procedure, its risks, and alternatives that a reasonable patient would consider material; the probable gestational age of the "unborn child"; and the medical risks associated with continuing her pregnancy to term. In addition, the woman had to certify in writing that she had been offered a brochure from the state. The brochure was required to be "objective, non-judgmental and designed to convey only accurate scientific information" about: fetal development at two-week gestational increments including realistic pictures at each stage; the possibility of fetal survival; and abortion techniques and risks. Furthermore, the brochure was to contain information about social services and agencies that could assist in prenatal through neonatal care and in adoption, and information about assistance in seeking child support and other sources of support.

(3) That a minor seeking an abortion obtain the informed consent of one of her parents; although the statute provided for a judicial bypass option if the minor preferred.

(4) That emergency abortions might be performed without complying with the three consent provisions above.

(5) That abortion providers report certain data concerning patients.

See *Planned Parenthood v. Casey*, 505 U.S. 833, 902-11 (1992).

In reviewing this statute, the Justices divided as follows: largely in dissent, Chief Justice Rehnquist and Justices Scalia, Thomas, and White voted to uphold the statute in its entirety and to overrule *Roe*, thus demoting the liberty interest of women from a

fundamental right to the general interest of doing what one wants free of arbitrary state interference. *Id.* at 951-53 (Rehnquist, C.J., concurring in judgment in part and dissenting in part). That would permit the state to regulate and forbid abortion to further almost any interest that it might assert, except that a statute prohibiting abortions to protect the life of the woman presumably would be impermissible.

Adhering to *Roe* and its progeny, and applying strict scrutiny to review the state's regulation of the woman's fundamental right to terminate her pregnancy, Justice Blackmun would have struck down all these provisions. *Id.* at 934 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part).

Justice Stevens adhered to a position close to Blackmun's, but in place of an explicit doctrinal commitment to the trimester scheme, he closely scrutinized the purpose, effect, and narrow-crafting of these government infringements upon a woman's autonomy. *Id.* at 914-17 (Stevens, J., concurring in part and dissenting in part). Except as to the medical reporting provision, he voted to overturn the statute. *Id.* at 917-18 (Stevens, J., concurring in part and dissenting in part).

In a jointly written opinion, Justices O'Connor, Kennedy, and Souter voted to strike down the spousal notice provision, but to uphold the informed consent provisions for adult women, including a 24-hour waiting period and the brochure requirement. *Id.* at 882-87. In addition, they voted to uphold, in the case of minors, parental notice and consent with an alternative judicial bypass procedure. *Id.* at 899.

The joint opinion reaffirmed the "core holding" of *Roe*: that, until viability, a woman has the ultimate authority to determine whether to terminate her pregnancy. *Id.* at 879. Thereafter, the state can forbid abortion except in cases where the woman seeks to abort to protect her life or health. *Id.*

Nevertheless, Justices O'Connor, Kennedy, and Souter rejected *Roe*'s trimester structure, which they read as precluding the state from furthering its interest in the potential life of the fetus prior to viability. In place of the trimester structure, they proposed to review state regulations to determine whether they have the purpose or effect of creating a substantial obstacle to the woman's effective right to elect abortion. *Id.* at 877. If the regulation is not such an obstacle, then it does not offend their undue burden test and survives. *Id.* What this analysis permits, they assert, is the expression by the state of its concern for potential fetal life from the start of pregnancy. *Id.* at 878. (In a subsequent opinion, Justices O'Connor and Souter elaborated upon what constitutes an undue burden. See *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993).)

In so voting, both Justice O'Connor and (even more so) Justice Kennedy, retreated from positions they had previously taken that were far more hostile to *Roe*. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 517-21 (1989) (plurality); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 452-61 (1982) (O'Connor, J., dissenting), *overruled in part by Casey*, 505 U.S. at 833. In an extended discussion of the doctrine of *stare decisis*, the joint opinion explained that these Justices felt constrained to uphold *Roe*. They as much as said that all or some of them would not have voted for *Roe* had they been on the Court in 1973. Nonetheless, the opinion sympathetically explained the liberty interest *Roe* protects as:

involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy At 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. Beliefs about these matters could not

B. Glendon's Expressive Critique of Roe

Professor Mary Ann Glendon's well-known critique of the law of abortion that *Roe* established helps to clarify the concerns of the plurality opinion.¹⁶ Because her work was "in the air" in legal circles at the time of *Casey*, it is plausible that the Justices were familiar with her work, although it was not cited. In any case, her critique usefully organizes the plurality's own critique.

For Glendon, the expressive function of law is as important—and in some cases, like abortion, more important—as its social control and ordering function. Law should express the common sentiments that bind a society and regulate its social life. Furthermore, the law teaches through its expression.¹⁷ From this viewpoint, she argues, *Roe* strained the fabric of our society in several ways. First, it permitted abortions in circumstances that were inconsistent with the family values, although not necessarily the practices, of many, and perhaps a majority of Americans. Second, *Roe* offered a set of reasons for its holding that so offended the beliefs of many as to fracture the body politic. Third, by treating the matter as one of constitutional right, it made legislative compromise unavailable to aid the process of societal reintegration.¹⁸

The Wrong Message. For Glendon, by permitting abortion, *Roe* teaches a message that is not only inconsistent with dominant values, but is mistaken and hostile to family life: that relations are terminable at will, that dependence does not require care, and that self-satisfaction counts for more than duty and obligation. Thus, she claims, it reinforces the individualism and rational calculation of the marketplace that American society already takes to extremes, and does so in the very center of family life. Glendon blames

define the attributes of personhood were they formed under compulsion of the State.

The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

Casey, 505 U.S. at 851-52.

Following *Casey*, Justice White, a long time opponent of *Roe*, and then Justice Blackmun, *Roe*'s author, retired, to be replaced by Justices Ginsburg and Breyer. Although one cannot be sure, it would appear that the Court's current composition is more hospitable to *Roe* than when *Casey* was decided. Nevertheless, it is likely that, with Justice Blackmun gone, Justices Ginsburg and Breyer will in future cases subscribe to the joint opinion in order to create a working majority.

¹⁶ See GLENDON, *supra* note 13. For a review of Glendon's book, see Jane Maslow Cohen, *Comparison-Shopping in the Marketplace of Rights*, 98 YALE L.J. 1235 (1989). For a consideration of comparative West German materials, some of which Glendon considers, see Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273 (1995).

¹⁷ GLENDON, *supra* note 13, at 6-9, 140-42.

¹⁸ See *id.* at 41-47.

the sorry state of children, and especially children of divorced and single mothers, on this individualism that the law of abortion and divorce expresses.¹⁹

A Divisive Message. Far more significant for Glendon than the error of *Roe*'s message is its divisiveness: the language and ideas of the opinion are anathema to portions of the American public as to prevent their accommodation to the legal regime it adopted.²⁰ Under this view, the real problem with *Roe* is not that abortions are performed in this society—they always have been performed in large numbers; nor that the law permits abortions—some states permitted elective abortion even before *Roe*.²¹ Far more significantly, the law says that it is permitting abortions to be performed, and says so without expressing regret or concern for the fetus and without expressing restraint upon the woman's choice.²² The law fails for Glendon because it does not contain within it the expression of values that speak to the anti-choice members of society.²³ In developing this critique, Glendon advocates the French model in preference to *Roe*. According to her, French law requires a woman to be "in distress" in order to have access to an abortion, but the same law makes the pregnant woman the sole judge of whether she is in distress, during the first ten weeks of pregnancy.²⁴ Thus the law re-

¹⁹ *Id.* at 51-58. I believe that such a claim is fundamentally mistaken, and so argued in an essay that developed at the same moment in the abortion debate as Glendon's book. It is, instead, the anti-choice position that reflects a position of radical atomism and ignores the nature of our first community, that of mother and child. In contrast, a regime of abortion choice can express and embody the importance of respecting mother-love, and fostering responsible care and familial commitments. See ROBERT D. GOLDSTEIN, *MOTHER-LOVE AND ABORTION: A LEGAL INTERPRETATION* 90-100 (1988) (proposing a relational analysis of the woman and fetus and of the abortion liberty, with the pregnant woman as the dyadic representative of her pregnancy).

²⁰ GLENDON, *supra* note 13, at 40-42, 45-47.

²¹ *Id.* at 48-49.

²² Justice Blackmun in *Roe* may have thought that he was sensitive to this issue by rejecting bodily autonomy as the basis of the woman's liberty, and by describing the woman's choice as limited by the physician. See *Roe v. Wade*, 410 U.S. 113, 163-66 (1973). He and other Justices apparently saw the physician as embodying values that are life-affirming and protective of the dependent and vulnerable. Nevertheless, this view has meant little or nothing to opponents of *Roe*.

²³ GLENDON, *supra* note 13, at 46-47. As Judge Guido Calabresi similarly claimed, anti-choice citizens could have tolerated a decision that a woman's right trumps fetal right but could not abide having their valuation of the fetus read completely out of our fundamental law. It was not the outcome of *Roe* but the Court's method of excluding the fetus from all constitutional consideration, of saying, "Your metaphysics are not part of our constitution," that was the affront. GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW* 95-96 (1985).

²⁴ GLENDON, *supra* note 13, at 15-22. Furthermore, "in France, the state pays 70 percent of the cost of nontherapeutic abortions and the entire cost of those that are medically necessary." *Id.* at 17.

sponds to both sides of the debate: autonomy is preserved, while the principle is enacted that only a serious reason justifies aborting, thereby expressing concern for the fetus.²⁵ It has long been observed that hypocrisy is an essential ingredient of society, and Glendon unblinkingly embraces it because in saying one thing even while doing another, the law affirms and teaches enduring values in an imperfect world populated by persons holding a plurality of views.²⁶

Preventing Democratic Integration. As the law serves in large measure an expressive function, so democratic lawmaking serves an integrative function by enlisting conflicting groups into a common process that binds them to each other and to the state. Glendon argues that by constitutionalizing the abortion issue and allowing states so little room to maneuver under the strict scrutiny standard, the Supreme Court has denied the community the opportunity to reintegrate and heal its value fragmentation through a legislative compromise. Such compromise would minimize conflict by expressing competing values in legislation and by integrating disputants into an ongoing legislative process.²⁷

The concerns of the joint opinion in *Casey* seem to parallel Glendon's. First, by claiming to reduce the level of its scrutiny of state legislation, the joint opinion would afford the legislature greater room to bargain over out-

²⁵ *Id.* at 15-21.

²⁶ Kristin Luker's excellent book, *Abortion and the Politics of Motherhood*, makes a similar point. She shows how in the first half of the twentieth century the medical profession served to contain value conflicts by performing a number of abortions behind a professional veil that permitted physicians to claim that abortion protected the woman's life. KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 40-48 (1984). In the 1950s and 60s, however, technical advances so greatly reduced the occasions in which an abortion was life-saving that this medical justification became an implausible explanation for the large number of abortions actually performed. *Id.* at 54-58. At that point, anti-choice physicians and prosecutors were no longer willing to defer to the judgments of those physicians who held very different values from their own. As a result, physicians sought reform of abortion statutes to establish a new standard that would continue to protect them in the performance of abortions. *Id.* at 73-91. Had such reform worked, doctors might have contained the conflict even as medical practice became transformed in some states into a regime of elective abortion. This elite reform process did not manage to contain value conflict, in part because *Roe* forced the value conflict into the open and led to the enlisting of the "laity"—the citizenry—in the debate on each side of the abortion conflict. There followed a nationwide contest of grassroots politics in which individuals previously uninvolved in the matter felt conscripted into the debate by virtue of their attachments to the conflicting world views at issue. *Id.* at 90-91. For the functionalist, such public airing of irreconcilable conflict is a sociological sin.

²⁷ GLENDON, *supra* note 13, at 45-47; see also ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 344-52 (1992). Some may variously object that such compromise is on the backs of women, especially poor women, or the limbs of fetuses—but that is neither here nor there to a functionalist critique.

comes. Any move in that direction responds to the critique that *Roe* reduced the integrative work of politics. Second, any additional restrictions on abortion would in effect “express” the counter-values opposed to abortion. Presumably, were Glendon right, these changes would reduce the degree of societal fracture over abortion, a goal that the joint opinion seeks.²⁸

Yet, if the Court were to apply the undue burden test so as to defer to various legislative decisions that substantially restrict access to abortion, it would be confronted with the unanswerable criticism that it is applying an ad hoc and subjective standard without predictable content. Furthermore, such deference would produce results that are inconsistent with the plurality’s assertion that the woman retains the ultimate choice regarding abortion. Thus, it is unclear how far the three Justices are prepared to respond to a critique like Glendon’s by allowing politics to regulate abortion while still claiming to preserve the ultimate choice of the pregnant woman. Further, with respect to the law’s expressive function, what balance between words—government speech—and action—government regulation—will the plurality strike? To answer these questions, we need first to catalogue and analyze the various kinds of regulation that states can be expected to adopt in response to *Casey*’s invitation.

C. Abortion Regulations: Prohibition, Burden, and Speech

Abortion regulation may be divided into three sorts: limitations upon the reasons for abortion and its timing; burdening regulations mostly of a medical nature; and regulation of the woman’s decisionmaking process.

1. Limiting the Reasons for Abortion and Its Timing

Roe’s regime provided that a woman is the judge of her reasons and that the state may not restrict the reasons that justify a woman’s choice to have an abortion.²⁹ Because *Casey* reaffirms that the woman has ultimate deci-

²⁸ See *Planned Parenthood v. Casey*, 505 U.S. 833, 864-69 (asserting the Court’s capacity to settle fundamental questions dividing the nation). It remains to be seen whether the legislative victories that anti-choice groups have had in various states serve to reduce the political venom and stridency of abortion politics. Certainly the recent murders and shootings in abortion clinics and of medical personnel do not suggest that the societal fracture may be healed easily by politics, although these may be exceptional events.

²⁹ Thus, in *Doe v. Bolton*, 410 U.S. 179 (1973), the Court affirmed a district court judgment that effectively struck down a Georgia statute which, following the Model Penal Code, allowed physicians to perform an abortion only to protect the life and health of the woman, in cases of rape and incest, and in cases of substantial fetal deformity. *Id.* at 183.

Under *Roe*, then, it would be impermissible to forbid an abortion undertaken to harvest cells for a brain implant in a patient with Parkinson’s Disease, although *Roe*

sional control, it follows *Roe* in forbidding regulation of the reasons that permit an abortion prior to viability.³⁰ One obscure sentence in the plurality opinion, however, might be interpreted as allowing the French model that Glendon favors in which the state statute expresses guidance to women as to permissible reasons, but, having spoken, leaves the ultimate decision in each woman's hands prior to fetal viability: "Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."³¹

Casey also reaffirmed *Roe*'s holding that after viability, a state is permitted—though not required—to restrict abortion to circumstances in which the woman's life or health are in jeopardy.³² In response to *Roe*'s allocation of decisional power to the woman prior to fetal viability, some legislatures

alone would not foreclose prohibiting the subsequent operation. Equally impermissible would be a prohibition on abortion for fetal defects, such as trisomy 21 or even worse. Impermissible too would be a prohibition on abortion for sex or race selection. A prohibition on abortion as a means of birth control would also fail because of *Roe*, and because such a prohibition would be either tautological and meaningless, or a complete prohibition on abortion.

³⁰ Accordingly, since *Casey*, lower courts have struck down statutes that have forbidden abortion except to protect the woman's life, or in cases of promptly reported incest and rape. *See, e.g.,* Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992) (holding unconstitutional, on the basis of *Casey*, a Louisiana statute that restricted abortion to instances involving a threat to the woman's life, reported rape and incest, the removal of a dead fetus, or where separation is in the interest of the fetus), *cert. denied*, 507 U.S. 972 (1992); Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366 (9th Cir.) (striking down in a pre-*Casey* decision, a Guam statute that forbade all abortions except to save the woman's life), *cert. denied*, 506 U.S. 1011 (1992) (post-*Casey* denial); Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992) (striking down a statute that also prohibited abortions prior to viability), *aff'd in part, rev'd in part*, 61 F.3d 1493 (10th Cir. 1995); *see also In re Initiative Petition No. 349*, 838 P.2d 1 (Okla. 1992) (preventing vote on initiative that would restrict abortions to cases of grave impairment of physical or mental health (excluding mere stress or embarrassment), rape, incest, or grave fetal defect), *cert. denied*, 506 U.S. 1071 (1993); *cf. Wyoming Nat'l Abortion Rights Action League v. Karpan*, 881 P.2d 281 (Wyo. 1994) (declining to prevent initiative that would unconstitutionally limit reasons for abortion because other portions related to funding were presumptively valid).

³¹ *Casey*, 505 U.S. at 879.

³² Despite this interpretation of *Casey* in the text, some lower courts since *Casey* have upheld statutes that restrict post-viability abortion to occasions of grave threat to a woman's health or organ systems. *See, e.g., Jane L.*, 809 F. Supp. at 874 n.1.

Prior to *Casey*, the Court upheld a requirement that a second physician be consulted in post-viability terminations, unless compliance with the requirement would interfere with immediate emergency care required by the woman's health. *Planned Parenthood Ass'n of Kansas City, Mo., Inc., v. Ashcroft*, 462 U.S. 476 (1983). *Casey* presumably also would permit similar regulations.

sought to establish a fixed definition of viability, and to forbid elective abortion thereafter.³³ The Court rejected such legislative attempts to presume irrebuttably that a fixed point in development constitutes viability, and held that viability involved an individualized medically competent determination by the attending physician.³⁴ In reaffirming the viability line, the *Casey* plurality observed that viability only “sometimes” occurs at twenty-three to twenty-four weeks;³⁵ and it gave no hint that it was altering this previous requirement of individualized determination. To the contrary, setting such a rigid viability line would violate *Casey* by creating an absolute barrier to elective abortions.

Casey thus left untouched *Roe*’s allocation—until fetal viability—to the pregnant woman of the decision of whether to go to term or terminate her pregnancy for whatever reason.

2. *Taxing Abortions: Medical Regulations That Make Abortion More Expensive and Less Accessible*

There are, however, a variety of state regulations short of prohibition that can, intentionally or not, make abortion more expensive and daunting. These typically take the form of “medical” regulations,³⁶ although many

³³ These debates regarding pregnancies in weeks 21 to 24 are relevant to very few women—under 15,000 annually. Most often, this time frame applies to women who are carrying fetuses with substantial handicaps, who had not been properly diagnosed by a physician as pregnant, or who are very young or very troubled and had denied their pregnancies. See GOLDSTEIN, *supra* note 19, at 60-61, 175 n.60.

³⁴ See *Colautti v. Franklin*, 439 U.S. 379 (1979). In a previous case, the Court upheld a requirement of ultrasound testing after 20 weeks where medically appropriate for the determination of viability. *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989). Although a plurality of Justices used this provision as an occasion to propose overruling *Roe*, *id.* at 537 (Blackmun, J., concurring in part and dissenting in part) (observing that “the plurality and Justice Scalia would overrule *Roe* (the first silently, the other explicitly)”), in fact that requirement was entirely consistent with medical practice and provided a rational, minimally burdensome way of implementing *Roe*’s viability standard.

³⁵ See *Casey*, 505 U.S. at 860. Nonetheless, since *Casey*, Utah adopted a flat ban on all elective abortions at 23 weeks LMP (since last menstrual period or 21 weeks since ovulation), even though there are almost no fetuses that survive as babies at 23 weeks, and even fewer (perhaps none at all) that can survive unimpaired by the medical technology that will be brought to bear upon them to maintain their vital signs. This was struck down in *Jane L. v. Bangerter*, 61 F.3d 1493, 1499 (10th Cir. 1995) (reversing district court on grounds of unseverability).

³⁶ Some regulations do not take the form of medical regulation. Zoning and land use regulations that intentionally exclude abortion clinics should invariably constitute impermissible undue burdens. See, e.g., *P.L.S. Partners v. City of Cranston*, 696 F. Supp. 788, 796-97 (D.R.I. 1988) (holding that classification of an abortion facility as a hospital, thereby requiring a special use permit, impermissibly burdened a woman’s decision

have little medical justification.³⁷ Such regulations do not make any particular abortion safer. Moreover, abortion is so much safer than childbirth³⁸ that imposing these burdens creates a perverse incentive on women's health choices by making the safer choice—abortion—more difficult, or by creating a less-safe black-market in cheaper, unregulated abortions.

By virtue of its lesser standard of review, the *Casey* joint opinion appeared ready to uphold more such regulations than were permissible under *Roe*'s trimester structure: burdening regulations that have neither the purpose nor the effect of placing a substantial obstacle upon a woman's choice

to have an abortion); *West Side Women's Servs. v. City of Cleveland*, 573 F. Supp. 504, 517-24 (N.D. Ohio 1983) (holding unconstitutional a city ordinance that prevented the establishment of abortion clinics in retail business districts).

Particular aspects of the tort system also may constitute impermissible undue burdens. For example, presumed damages for violation of a statutory informed consent regulation of abortion, or excessive damage awards against abortion providers arising from systematic efforts of anti-abortion groups should both run afoul of the undue burden test and the principle, enunciated in the First Amendment context in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), that the Constitution limits the burdens the tort system may impose upon the exercise of a fundamental right. A state's failure to provide adequate tort protection to women's procreative choices, equal to the protection afforded other comparable interests, should similarly offend *Casey*. In this regard, it should be noted that Pennsylvania has done away with wrongful life suits. *See* 42 PA. CONS. STAT. ANN. § 3805(b) (Supp. 1995); *see also* Julie F. Kowitz, Note, *Not Your Garden Variety Tort Reform: Statutes Barring Claims for Wrongful Life and Wrongful Birth Are Unconstitutional Under the Purpose Prong of Planned Parenthood v. Casey*, 61 BROOK. L. REV. 235 (1995).

³⁷ Following *Roe*, the Court struck down most of the so-called medical regulations that it reviewed, including requirements that abortions be performed only in a hospital or a free-standing surgical facility that met substantial requirements concerning size and equipment; or only after consultation with a second physician; or, in the case of second trimester abortions, that only certain methods among those regularly employed by physicians be used. *See, e.g., City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (N.D. Tex. 1983), *overruled in part by Casey*, 505 U.S. at 833; *Doe v. Bolton*, 410 U.S. 179 (1973).

Before *Webster*, the Court had upheld regulations that required certain minor medical recordkeeping and a pathology lab report on the fetus, although this added approximately \$19.40 to the cost of each abortion. *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 490 (1983) (noting that the "substantial benefit" justified the "small cost"). *Casey* itself upheld one such regulation: a detailed medical reporting requirement that increased recordkeeping burdens by increasing the amount of information reported, thus increasing the risk, in the case of a breach of confidentiality, that the privacy of patient and referring doctor would be compromised. *Casey*, 505 U.S. at 900-01.

³⁸ *Abortion Trends*, *supra* note 14, at 3235 (noting that the mortality rate from legal abortions is "more than 10 times lower than the maternal mortality rate"); Donald P. Judges, *Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion*, 73 N.C. L. REV. 1323, 1410 (1995).

would survive. The joint opinion could advance one of two justifications for upholding such unnecessary and burdensome regulations: it could assert deference to the presumed rationality of the legislature's judgment about the woman's medical safety, despite medical evidence introduced in court to the contrary; or alternatively, it could find that the regulations further the state's interest in the potential life of the fetus by creating a financial or psychological disincentive to choose abortion.

This latter justification would explain the significance of the joint opinion's rejection of the trimester system so that it could embrace the proposition that a state's interest in the fetus is strong and operative prior to viability. Any burden on the pregnant woman rationally—that is, instrumentally—would further that state's interest in the fetus. Nevertheless, if such burdening regulations can thus be justified as furthering the state's interest in the fetus, also justifiable would be a sin tax on abortion, an additional exaction beyond what a well-functioning medical system requires to supply the service safely. The straightforward question then is whether *Casey* would permit the imposition of a \$100 or \$1000 tax on abortions. Although such a tax would not advance a woman's health—indeed it would harm it—such a tax would directly implement what the joint opinion treats as the state's substantial interest in protecting the potential life of the fetus.

Under one reading of *Casey*, the Court should uphold such a tax so long as it is not so high—or intended to be so high—as in the Court's judgment to constitute a substantial obstacle to abortion choice for some class of women. Better reasons, however, should lead the Court to reject this reading of *Casey* and to find that unnecessary state rules which merely burden choice cannot be justified as rational medical regulations.

First, the joint opinion indicated that the Court will reject such burdening regulations when it stated that the Court will reject "unnecessary health regulations."³⁹ "Unnecessariness" is a stricter test than "irrationality." Although the plurality's standard may involve some greater deference to legislative judgment concerning medical advisability, "unnecessariness" still involves closely reviewing regulatory impositions on abortion.

Second, the political and economic contexts in which such burdensome regulations would be adopted would make claims of legislative rationality less plausible. The principle in medicine today is cost containment. Surgery increasingly occurs in free-standing clinics or in physicians' offices.⁴⁰ Similarly, medical services are increasingly delivered by medical generalists or non-physicians.⁴¹ Congress's recent rejection of Clinton's health care re-

³⁹ *Casey*, 505 U.S. at 837.

⁴⁰ See Frederic J. Entin, *Hospital Collaboration: The Need for an Appropriate Antitrust Policy*, 29 WAKE FOREST L. REV. 107, 142 (1994).

⁴¹ Joseph Wharton, *Who Cures When the Doctor Is Out?*, A.B.A. J., Dec. 1993, at 54.

form plan appears to reflect a national choice with respect to *all* medical services for competition and regulation by private insurers (rather than by the state); this will make costly state regulation of abortion appear, appropriately so, unwarranted and irrational, even to a Court that shrinks from the strict scrutiny of *Roe*.

Finally, a tax upon the exercise of a fundamental right—a right that *Casey* reaffirmed—is sufficiently obnoxious and unfair in its distributional consequences to deserve the same treatment as the Court has accorded the poll tax for voting and license fees meant to burden speech.⁴² A regulatory tax meant to discourage the exercise of a fundamental right (in this case by enriching physicians) should simply be impermissible.

3. *Casey's Preference for More Speech: Regulating the Decisionmaking Process*

A third form of state regulation focuses on the conditions under which a woman makes her decision to have an abortion: with whom she must consult, how long she must wait, and what information she must hear. These are the central concerns of the plurality opinion.

The undue burden test should not be seen as an invitation to adopt hostile legislation provided the legislature does not go “too far” in the eyes of the Court. Rather, the joint opinion aims at an altogether different approach to abortion regulation: to authorize more leeway for the states to structure the woman’s decisionmaking process, and to open up the expressive channels of speech to the pregnant woman while she is engaged in deliberation about her choice. Thus, the opinion indicates:

[The state may take] steps to ensure that this choice is thoughtful and informed. . . . [T]he State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. . . . [The states may enact] a reasonable framework for a woman to make a decision that has such profound and lasting meaning.⁴³

⁴² See *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (holding poll tax unconstitutional); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (striking down Pennsylvania law requiring a license in order to sell religious books and pamphlets door to door).

⁴³ *Casey*, 505 U.S. at 872.

Indeed, the opinion's general discussion of undue burden is interwoven with a specific discussion of her decisional process—so interwoven as to suggest that implicit in the undue burden test is a central concern with the state's power to structure decisionmaking. For example, when the three Justices set forth "guiding principles" to implement their opinion, they began by emphasizing speech and communication, not regulation:

What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.⁴⁴

Elsewhere, the opinion indicates that the state may "show its concern for the life of the unborn"⁴⁵ by enacting "[m]easures aimed at ensuring that a woman's choice contemplates the consequences for the fetus."⁴⁶

Nevertheless, the joint opinion insists, all such regulation and speech is limited by this requirement: "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."⁴⁷ This is the key to why the opinion can assert—without falling into hopeless contradiction—that the state may realize both its interest in protecting the woman's health and the potential life of the fetus before viability, while still allowing the woman ultimate authority over her decision. The realization of these conflicting interests is possible because the central premise of the undue burden test is that the state may further its interest in the fetus before viability *only* by assuring the woman's careful choice through structuring the decisionmaking process and by expressing ideas and communicating facts to educate and influence her.⁴⁸ A

⁴⁴ *Id.* at 877 (citation omitted).

⁴⁵ *Id.* at 869.

⁴⁶ *Id.* at 873.

⁴⁷ *Id.* at 877.

⁴⁸ *Id.*

What follows, at length, places these quotations from the joint opinion in the context of an examination of the entire joint opinion, and offers a closer reading to show how its elaboration of a general undue burden test for reviewing regulations, is so tightly intertwined with its focus on the state's power to structure a decisionmaking process of informed consent, to which the state may add its own voice.

The first discussion of the opinion's approach to permissible regulation appears at

the end of its Part I, where it reaffirmed the "essential holding" of *Roe*, including "the right of the woman to choose to have an abortion before viability . . . without undue interference from the State, [because] the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Id.* at 846. The woman's right is a practical one: state regulation cannot leave her with merely a formal right; it must be one that she can effectively exercise. Strikingly, the opinion asserted that the state's two "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus . . . do not contradict one another." *Id.* How is it possible for them not to conflict? *Because the interest in the fetus justifies speech, not regulation.*

The opinion next discussed its approach to regulation in Part IV. The first paragraph announced an expressive theme:

The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.

Id. at 869. Initially, the state may "show its concern," that is, engage in *expression*. By contrast, later in fetal development, at viability, it may take effective *action* to restrict the availability of abortion.

The next paragraph announced a secondary theme, the undue burden standard, noting that "it falls to us to give some real substance to the woman's liberty to determine whether to carry her pregnancy to full term." *Id.* Shortly thereafter, the opinion noted that the trimester scheme was adopted "to ensure that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact. We do not agree . . . that the trimester approach is necessary to accomplish this objective." *Id.* at 872.

The very next paragraph, however, explains this assertion by returning to the expressive theme:

Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. "[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth." It follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning.

. . . Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe*.

Id. at 872-73 (citations omitted). *On the basis of this concern with government speech and informed consent*, the opinion next concluded that the trimester analysis must be rejected. *Id.*

To clinch its argument in favor of increased state regulation, the opinion compared

such involvement to the state's power to structure the exercise of the right to vote. *Id.* The voting analogy is telling: although the state may not tax the decision to vote or try to dissuade persons from voting, it may educate the voter.

Only after all this did the opinion turn to a more general statement of the undue burden test as a replacement for the trimester scheme. Laws that serve a valid purpose but have an "incidental effect of making it more difficult or more expensive to procure an abortion" are constitutional because they "in no real sense deprive[] women of the ultimate decision" or involve "unwarranted" intrusions on a fundamental right. *Id.* at 874. By contrast, regulations that have more than that incidental effect and create a substantial obstacle are impermissible as are laws that have the purpose of being a substantial obstacle or of "striking at the right itself." *Id.* This the opinion purported to develop from general constitutional principles.

In addition to this general claim about undue burden analysis in constitutional law, the opinion suggested a second flaw in the trimester scheme: it undervalues the state's interest in fetal life from the start of pregnancy. *Id.* at 875. What does that interest justify? The opinion again turned to the expressive and informed consent themes, observing that "before viability, *Roe* and subsequent cases treat[ed] all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy." *Id.* at 876. As previously noted in the text, such governmental influence on the woman's decision might arise either from burdensome regulation or, alternatively, from the state's speech and structuring of the decisional process. After another general statement of the undue burden test, the opinion clearly opted for the latter alternative:

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because *the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.* And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

Id. at 877 (emphasis added). This observation explains the concluding paragraph of Part I, quoted *supra*. *Roe*'s reaffirmed principles do not conflict with the state's interest in fetal life because the state can realize its interest in fetal life from the beginning of pregnancy only by informing the woman's choice, not by burdening it; because *Casey* preserves the woman's choice, educating her choice is the only means of protecting the fetus.

To clinch the point, the same paragraph notes an earlier ambiguity in Justice O'Connor's undue burden analysis in *Akron*, *id.* at 877 (citing *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 462-63 (1982) (O'Connor, J., dissenting)), where it appeared that any regulation that discouraged abortion would survive scrutiny because it would rationally further the state's interest in fetal life. The joint opinion expressly rejected this interpretation by explaining that a law is unconstitutional if it intends to impose an undue burden on a woman's choice as a means of rationally furthering its interest in fetal life. *Id.* Thus, to further its interest in fetal life, the state must work with and through the woman's own choosing, and not in derogation of it.

state, however, may not "express" its pronatalist sentiments by a regulatory taxing of abortion or the building of other barriers to choice. As such, *Casey* should be understood not as taking aim at *Roe*, but rather as a focused and measured response to the limits that *Thornburgh* and *Akron* had placed upon the state's regulation of the decisional process.⁴⁹

Such focus makes sense. In a regime in which the woman has the ultimate choice, it naturally follows that the informed consent process plays a centrally important role in protecting the woman and the integrity of her decision.⁵⁰ In addition, greater regulatory leeway here affords state officials a way to express their opposing values and thus satisfy, as Glendon urged,

Identifying "[s]ome guiding principles" from the entire opinion, the next paragraph continued the theme that the state can speak to inform the woman's decision:

What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.

Id. at 877-78.

Finally, in identifying a second guiding principle two paragraphs later, the opinion again linked the rejection of the trimester scheme to the state's interest in informed consent and expression:

We reject the rigid trimester framework of *Roe v. Wade*. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

Id. at 878.

⁴⁹ Instead of returning to the issue of *Roe* and the trimester structure, the *Casey* joint opinion might have been cast solely as overruling, in part, two more recent decisions of the Court, *Thornburgh* and *Akron*, on the grounds that they were not compelled by *Roe* and indeed had misapplied *Roe*'s twin concerns of protecting a woman's decisional autonomy and the state's power to regulate the medical profession for her safety. Had the *Casey* opinion framed the issue in terms not of *Roe* but of *Akron* and *Thornburgh*, there might have followed a more usefully focused discussion of the Justices' divergent understandings about the nature of the medical profession, the state's power to regulate the speech rights of professionals, and the limits of government speech. See *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 747, 830 (1986), *overruled in part by Casey*, 505 U.S. at 833; *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 472 n.16 (1983), *overruled in part by Casey*, 505 U.S. at 833.

⁵⁰ Indeed there is no regime—even one that prohibits all abortion—in which the state can realize any interest in the fetus except through the woman's autonomous choice to love the infant if born. See GOLDSTEIN, *supra* note 19, at 58-59.

those of the electorate who oppose *Roe*. But it permits them to do so in a straightforward and honest manner, rather than surreptitiously by means of a regulatory tax on the abortion decision, which would impose a terrible distributional inequality. Practically, for those who doubt the authenticity of a woman's choice, the state's greater focus on her decisionmaking may afford reassurance. Moreover, this focus draws our attention to the specific ways women decide to terminate their pregnancies, which in turn may foster useful and factually specific communication in our society about abortion.

Finally, to reiterate, were the plurality's "undue burden" test to apply across the board to ease judicial review of a broad range of state abortion regulations, it would be entirely amorphous and ad hoc, as courts would seek to resolve just how far the state can realize its "interest in the previable fetus" through building barriers to the provision of abortion services. By contrast, if the test is understood to apply to the decisionmaking process alone, principles about informed consent and government speech that would give some coherence to the joint opinion's standard can be applied, and thus afford subsequent guidance in implementing the undue burden test.

Clearly *Casey*'s plurality opinion was centrally concerned with structuring the woman's decisionmaking process. The question of whether that was its exclusive or primary concern may be left now (to be answered by future opinions of the Court) in favor of exploring what such structuring means. The remainder of this Article will examine this question through an elaboration of three models of how the state can structure decisionmaking: (1) in Part II, the informed consent autonomy model, in which the goal is to further the woman's exercise of her autonomy through the provision of information; (2) in Part III, the dialogical model of decisionmaking, in which the state structures a dialogue within a relevant community—such as a dialogue with her husband—to enable the woman more adequately to realize herself in relationship to her community in making her decision; and (3) in Part IV, the government speech model, in which the government speaks to persuade the woman, regardless of what she wants or is in her self-interest. In exploring these three models this Article will ask: to permit the kind of communications that *Casey* authorized, which of these models must the Court have adopted, and what limits on state power can be identified with respect to each of these models?

II. INFORMED CONSENT: THE AUTONOMY MODEL

Casey's joint opinion recognized that the state may "ensure that [the woman's] choice is thoughtful and informed."⁵¹ Within this informed consent model, three submodels may be identified: (1) a definition of informed consent employed by the medical and tort systems, based on an understand-

⁵¹ *Casey*, 505 U.S. at 872.

ing of the choosing self that is limited to its immediate interests in bodily well-being; (2) a model based on an enlarged vision of the self with various life projects and critical interests, such as "behaving ethically," that a patient may seek to further in her decisions; and (3) a state's paternalistic intervention into the decisional process to enhance the rational autonomy of the patient.

A. *Autonomy 1: The Self's Body*

This narrow autonomy model largely governs medical decisionmaking today through the doctrine of informed consent, which undergirds the law of the doctor-patient relationship. The law has imposed upon physicians an obligation to inform the voluntary patient about the nature of the proposed procedure, reasonable alternative courses of treatment, and their relevant risks and benefits to the body.⁵² In theory, the standard for judging the adequacy of the information given is whether the particular patient has the information she needs to make an informed and intelligent decision about treatment.⁵³ Nevertheless, a majority of states require only that a physician conform his degree of disclosure to the standard practice of the profession; a minority of jurisdictions instead require providing information that a reasonable patient would want in assessing the procedure.⁵⁴ As implemented by the medical profession and enforced at law, the process at its core understands the self in terms of the body: in a narrowly self-interested and instrumentally rational way. Risks that entail the infliction of pain, loss of bodily

⁵² Richard E. Shagroe, *The Practitioner's Guide to Informed Consent*, 24 CREIGHTON L. REV. 881, 903 (1991).

⁵³ See *id.* at 902-05.

⁵⁴ See BARRY R. FURROW ET AL., *HEALTH LAW*, 336-39 (2d ed. 1991). The informed consent model is sufficiently well-accepted that the Court impliedly recognized the constitutional status of the interests it protects with respect to a person's autonomous choices regarding medical treatment in *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

Typically, the extent of required disclosure is determined first by a physician's judgment. This judgment is influenced by the standards of the profession, as expressed in educational settings, journals, testimony of expert witnesses, professional associations, and the like. Next, the physician's judgment is shaped by the opportunity for the patient to raise additional questions in a personal conversation with the physician. Finally, the physician's judgment is influenced by the feedback mechanism of the tort system by which disgruntled patients who feel insufficiently informed sue, although such suits in most cases only occur if the patient was physically or emotionally injured by the procedure in addition to being insufficiently informed. See generally JAY KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* (1986); Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899 (1994); Marjorie M. Schultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219 (1985); Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705 (1992).

function, or death must be disclosed, as must benefits of reduced pain, increased bodily function, or extended life.⁵⁵

Because *Roe* provided that states could—and states do—restrict the provision of lawful abortions to licensed physicians, the entire common law corpus of informed consent doctrine became applicable to the abortion process. Three years after *Roe*, the Court in *Planned Parenthood v. Danforth*⁵⁶ recognized the constitutional appropriateness of applying the common law of informed consent to abortion services. The Court also permitted states to take the additional step of requiring that a physician evidence a woman's informed consent with a signed form.⁵⁷ After all, written informed consent is often standard in medical practice.

Some Justices believed that a state might establish regulations particularly applicable to the consent process for abortion that would take into account the special manner in which abortion services are delivered.⁵⁸ Fol-

⁵⁵ The duty to disclose information exists not only with respect to the physician's proposed treatment, but also with respect to the full range of available treatments, where a reasonable patient would consider further action warranted. *See, e.g.,* N.Y. PUB. HEALTH LAW § 2805-d (Consol. 1987); *Moore v. Preventive Medicine Medical Group, Inc.*, 223 Cal. Rptr. 859 (Ct. App. 1986) (duty to disclose risk of not seeing specialist); *Schroder v. Perkel*, 432 A.2d 834 (N.J. 1981) (duty to disclose illness of child and genetic risk of illness in future children); *Berman v. Allan*, 404 A.2d 8 (N.J. 1979) (duty to disclose availability of amniocentesis); *Scott v. Bradford*, 606 P.2d 554, 555-59 (Okla. 1979) (duty to disclose treatment options and their attendant risks); *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372 (Wis. 1975) (duty to inform pregnant woman she had rubella, which posed risk of birth defects); *see also Dunham v. Wright*, 423 F.2d 940, 943-46 (3d Cir. 1970); *Phillips v. United States*, 566 F. Supp. 1 (D.S.C. 1981); *Smith v. Cote*, 513 A.2d 341 (N.H. 1986); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Archer v. Galbraith*, 567 P.2d 1155 (Wash. Ct. App. 1977).

⁵⁶ 428 U.S. 52 (1976).

⁵⁷ *Id.* at 66-67. The Court held:

The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.

Id. at 67.

The Court continued:

[W]e are content to accept, as the meaning [of informed consent], the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.

Id. at 67 n.8; *see also id.* at 89, 90 (Stewart, J., concurring) (stating that a state may enact a provision "aimed at ensuring that the abortion decision is made in a knowing, intelligent, and voluntary fashion").

⁵⁸ *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 443-44 (1983), *overruled in part by* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

lowing *Roe*, such services were not delivered as some Justices anticipated they would be—by family physicians with long-standing relationships with families.⁵⁹ Rather, they were delivered by abortion clinics and family planning clinics that served women on an occasional basis.⁶⁰ Some on the Court feared that these were “abortion mills.”⁶¹ The fear seems to be that the physicians who work at such clinics have a financial interest that in some never-specified way differ from the financial interests most physicians—or the corporations that now employ them—have in the services they offer, and that such alleged differences uniquely interfere with the professional impartiality of the informed consent process respecting abortion. Despite the concerns of some, following *Danforth*, the Court gave the states little additional leeway in regulating the informed consent process of adult women, other than through the common law tort of malpractice.⁶²

⁵⁹ See *Doe v. Bolton*, 410 U.S. 179, 196-97 (1973).

⁶⁰ The Court itself had permitted this development in *Doe* by striking down regulations that abortions had to be performed in hospitals. *Id.* at 193-95. As a result, and because of the lack of universal health care, it quickly became clear that the relationship that *Roe* anticipated between doctor and patient did not exist for many, and that abortions would occur often in clinics in which physician-patient contact was not part of an ongoing relationship.

⁶¹ See, e.g., *Singleton v. Wulf*, 428 U.S. 106, 130 n.7 (1976) (Powell, J., concurring in part and dissenting in part) (referring to “an assembly-line type abortion clinic”).

⁶² In *Thornburgh* and *Akron*, the Court struck down restrictive regulations of the informed consent process by rejecting: (1) a requirement of statements that it deemed to be contrary to good medical treatment, as, for example, a requirement that a physician always inform a patient that the state would seek to enforce child support from the father; (2) the use of false or unsupported statements about fetal development; and (3) the state’s effort to “wedge” its message—for example, that a fetus was a living human being from the moment of conception—into the doctor-patient relationship. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759-65 (1986), *overruled in part by Casey*, 505 U.S. at 833; *Akron*, 462 U.S. at 444-45. For other informed consent provisions struck down prior to *Casey*, see, e.g., *Charles v. Daley*, 749 F.2d 452, 461-62 (7th Cir. 1984), *appeal dismissed*, 476 U.S. 54 (1986); *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980) (striking down informed consent provisions requiring that certain information be provided at least 24 hours before the abortion, that the physician inform the pregnant woman of the possibility of pain to the fetus, and that the attending physician conduct the informed consent consultation); *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D. La. 1980) (striking down informed consent provision requiring physician to tell patients certain specific information regarding fetal development, viability, emotional risks, birth control, and available social services).

The joint opinion in *Casey* asserted that it would overrule *Thornburgh* and *Akron* to the extent they were inconsistent with its opinion. *Casey*, 505 U.S. at 870. Nevertheless, the differences regarding informed consent between the *Casey* joint opinion and the majority opinions in *Akron* and *Thornburgh* are not great. *Casey*’s plurality opinion protects only truthful information; *Thornburgh* and *Akron* found certain mandated statements under review to be false. Compare *id.* at 882 with *Thornburgh*, 476 U.S. at 763

Evidence from the tort system does not disclose any significant complaints with this informed consent process as applied to the abortion procedure.⁶³ There seem to be few tort suits involving informed consent. Various

and *Akron*, 462 U.S. at 444-45. The Pennsylvania statute that was upheld in *Casey* included a therapeutic privilege exception to mandated disclosures that was absent in the laws struck down in *Thornburgh* and *Akron*, as the joint opinion noted. *Casey*, 505 U.S. at 883-84. Only the *Casey* joint opinion's willingness to allow the state to offer a brochure to the patient, that is, to wedge a truthful message into the doctor-patient relationship, departed from the non-wedging principle of *Thornburgh* and *Akron*.

⁶³ A search of the Westlaw Malpractice database (MMAL-CS) supports this assertion. A search on the word "abortion" on February 5, 1996 yielded 471 cases post-1969, of which 315 involved malpractice actions pertinent to this inquiry (with the others involving constitutional or other tangential issues). This absolute number of 315 cases is small (and represents only 1.8% of the 17,538 post-1969 cases in the database). The number is tiny in comparison with the approximately 25 million abortions performed since 1969.

Of these 315 cases, at least 61% alleged physician malpractice not in performing abortions but in interfering with a woman's reproductive liberty. This 61% consists of the following three kinds of cases. First, 31% (of the 315 relevant cases) alleged that misinformation from physicians (such as a failure to diagnose pregnancy or fetal injury or defect) interfered with a woman's opportunity to make an informed choice *in favor of* abortion. Another 24% involved "wrongful conception" or "wrongful pregnancy" cases in which malpractice (such as a faulty sterilization) led to a pregnancy. An additional 6% involved malpractice in non-reproductive medical services that led to pregnancy complications resulting in the need for an abortion or a miscarriage.

Added to this 61% of cases is another 9% that complained not about receiving an abortion but about the physician's failure to complete the abortion that was requested. As a result, these patients allegedly suffered subsequent miscarriages, the passing of fetal material without being warned of that possibility, a second, later-term abortion with its greater emotional and physical impact, or an unintended birth.

Only the remaining 30% of the 315 cases alleged any harm from having a completed abortion. About 22% (of all the cases) alleged physical harm to the plaintiff from a negligently performed abortion. At least some of these abortions may have been performed under adverse circumstances due to anti-abortion protests. The remaining 8% involved cases in which the plaintiff alleged that providers failed to obtain the proper informed consent for the abortion procedure. In many of these cases, the plaintiff lost. In the two cases that clearly alleged a failure to disclose the emotional risks of abortion, the plaintiffs lost. For cases among the 8% alleging lack of informed consent, in which plaintiff lost, see, e.g., *Abbey v. Jackson*, 483 A.2d 330 (D.C. App. 1984); *Reynier v. Delta Woman's Clinic*, 359 So. 2d 733 (La. App. 1978); *Perez v. Park Madison Prof. Labs., Inc.*, 630 N.Y.S.2d 37 (1995); *Williams v. Long Island College Hosp.*, No. 9744/83, 1993 WL 247048 (N.Y. Sup. Ct. 1993). Plaintiffs did recover when the defendants failed to obtain a consent that would have been required for any surgical procedure. See, e.g., *Petriello v. Kalman*, 576 A.2d 474 (Conn. 1990) (plaintiff under influence of Demerol at time consent given); *Cole v. Delaware League for Planned Parenthood, Inc.*, 530 A.2d 1119 (Del. 1987) (defendants failed to provide information regarding alternatives to abortion, and failed to provide proper drugs for post operative care); *Tisdale v. Pruitt*, 394 S.E.2d 857 (S.C. App. 1990) (defendant performed an undesired

abortion on the basis of a negligently formed and erroneous belief about services plaintiff required); *Wright v. Germantown Hosp.*, No. 87/5362, 1992 WL 407652 (Pa. Ct. C.P. 1992) (physician performed abortion against plaintiff's wishes and without informing her of effects of procedure); *cf. Martinez v. Long Island Jewish Hillside Medical Ctr.*, 512 N.E.2d 538 (N.Y. 1987) (permitting plaintiff to recover damages for emotional distress after she was given incorrect information regarding the condition of her fetus by genetics counselors and therefore chose to abort).

For the two cases that clearly presented a claim for failure to disclose emotional risks of abortions, see *Humes v. Clinton*, 792 P.2d 1032 (Kan. 1990); *Edison v. Reproductive Health Servs.*, 863 S.W.2d 621 (Mo. App. 1993). *But cf. Clement v. Riston*, No. B131,022, 1990 WL 466403 (Tex. Dist. Ct. Oct. 1990) (Westlaw LRP jury database).

For a contrary view as to malpractice, see Paige C. Cunningham & Clarke D. Forsythe, *Is Abortion the "First Right" for Women?: Some Consequences of Legal Abortion*, in *ABORTION, MEDICINE AND THE LAW* 100, 132 (J. Douglas Butler & David F. Walbert eds., 4th ed. 1992).

Methodological Notes: Inferences about the existence and nature of a social problem must be drawn very carefully from reported decisions. Before a lawsuit is filed, a claim must be named or understood as such; potential plaintiffs must have positive social support for suing; attorneys must believe that it is in their economic interest to sue, and the like. See William L.F. Felstiner, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 *LAW & SOC. REV.* 631 (1981). Once filed, a lawsuit's outcome may be determined by a number of factors extraneous to the primary issues at stake. For example, in the malpractice area, rules limiting recovery for emotional distress in the absence of physical injury may reduce the number of cases attorneys bring. *Cf. Carolyn A. Goodzeit*, Note, *Rethinking Emotional Distress Law: Prenatal Malpractice and Feminist Theory*, 63 *FORDHAM L. REV.* 175 (1994). Finally, the legal profession collects information about lawsuits in a haphazard manner: reported appellate cases are seldom representative. (As "repeat players" in litigation, however, abortion providers are likely to appeal adverse decisions, thus making their cases available as data). Furthermore, it might be that binding arbitration agreements preclude potential plaintiffs from suing. Because induced abortions are usually not emergency procedures, such agreements may have a greater chance of being upheld than in the case of other medical services. As a general matter, however, courts often refuse to enforce such contracts of adhesion. See *Broemmer v. Abortion Servs.*, 840 P.2d 1013 (Ariz. 1992) (holding adhesion contract unenforceable as beyond patient's reasonable expectations); *Blanton v. Womancare, Inc.*, 696 P.2d 645 (Cal. 1985); *Wheeler v. St. Joseph Hosp.*, 133 Cal. Rptr. 775 (Ct. App. 1976) (rejecting printed hospital forms as creating adhesion contract); *Curry v. Hillcrest Clinic, Inc.*, 638 A.2d 115 (Md. Ct. Spec. App. 1994) (upholding right to de novo appeal from arbitration agreement).

To check the completeness of Westlaw's malpractice database, other searches were performed on ALLCASES: Search 1: *abortion & malpractice & "informed consent" % "wrongful pregnancy" % "wrongful conception" % "wrongful life" % "wrongful birth" % sterilization % vasectomy % spontaneous*; Search 2: *115k50 & "115III(A)2" & abortion*. This crosscheck disclosed nothing of substance omitted from the MMALCS database. A search of the Westlaw's FEDCASES database for the words *malpractice and abortion* disclosed 10 additional cases, which did not alter the percentages reported above. A search of a jury verdict database, LRP-JV, for the words *abortion and malpractice and date(aft 1970)* yielded 93 cases: 38 plaintiff verdicts, 44 defense

reasons may account for this. One reason is the overall safety of abortion, itself and when compared to childbirth.⁶⁴ As to efficacy, those who want an abortion typically get what they request. Because abortion is a subject of widespread debate, and childbearing capacity so central to their experience, women are often well-informed about abortion before they arrive. Finally, because the process of abortion counseling developed early on from the women's movement,⁶⁵ some clinics may engage in extensive counseling.

B. *Autonomy 2: The Self's Critical Interests*

It will be helpful, now, to enlist the aid of an imaginary Attorney General of Pennsylvania, who will develop a range of arguments in defense of the state statute at issue in *Casey*. He might begin by objecting to this preceding benign conclusion about the informed consent process:

"This vision of informed consent is entirely too narrow an understanding of a woman's own interests. She has interests in maintaining her self-esteem, in acting in a manner consistent with her own self-conception, in furthering long-range generative goals, in behaving ethically, and, as a member of our community, in understanding how her behavior relates to what others in society think about abortion.

"Accordingly, my state of Pennsylvania has prepared a brochure with the following information: the extent of fetal development by two-week increments, along with pictures of the growing fetus; and the alternatives to abortion—childbirth and adoption—along with information about financial resources for each, including paternal child support duties.⁶⁶

"Because our goal is to foster the autonomy of the patient and not to foist our views upon her, we are requiring only that the physician offer the pamphlet to her, and that she indicate receipt in writing. We do not require her to read the brochure or to listen to a verbal description of it, as have some states. The information we require is far more limited than what we might legitimately disclose: we do not review

verdicts, and 11 settlements, with 10 cases dealing with informed consent. A search of Westlaw's Jury Verdict Database did not alter the general picture.

⁶⁴ See *Abortion Trends*, *supra* note 14, at 3235.

⁶⁵ See LAURA KAPLAN, *THE STORY OF JANE: THE LEGENDARY UNDERGROUND FEMINIST ABORTION SERVICE* (1995).

⁶⁶ See *Casey*, 505 U.S. at 882 (noting that the state may require "the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus").

the conflicting philosophical views about abortion—for example, that abortion is murder—nor do we require viewing of the *Silent Scream* video.

“There are several clinicians, admittedly not in the mainstream, who support these disclosures and who consulted with Surgeon General Koop during the Reagan Administration. They have described a post-abortion stress and a post-abortion trauma disorder in which abortion precipitates major depression, guilt, self-destructive behavior, and even psychosis.

“The informed consent process fails to inform pregnant women of these psychological risks. More generally, many pregnant women do not come to the decision with the experience, information, and independence of mind needed to make an autonomous choice. In particular, adolescents are woefully uninformed about fetal development and alternatives to abortion. These psychologists maintain that women’s ignorance makes them especially vulnerable to being pressured by their boyfriends,⁶⁷ their culture, and poverty into consenting to an abortion. Ignorant of the facts and vulnerable to coercion, these women’s autonomy is compromised. When and if some women who have aborted subsequently learn more, especially about the fetus,⁶⁸ the abortion can come to have traumatic consequences. She must be warned of that possibility now.⁶⁹

⁶⁷ Interestingly, the psychologists and groups that claim that abortion causes psychological trauma cite the evidence of domestic abuse that the *Casey* plurality used in deciding *not* to mandate spousal notice. See *id.* at 892 (citing Barbara Ryan & Eric Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 J. MARRIAGE & FAM. 41, 44 (1989)). These psychologists treat this evidence as describing typical instances of male-female relationships. They then argue that a regime of legal abortion leaves women highly vulnerable to coercion and exploitation by men who will overwhelm the autonomous reproductive choices of women.

⁶⁸ Perhaps an aborting woman may thereafter come to hold different beliefs, and then reevaluate her decision to have had an abortion, retrospectively reaching a different conclusion. For example, she may come to believe that a fetus is a person, or she may become disappointed that she has not had the child she anticipated eventually having at the time she had the abortion. At this later point, she may nonetheless accept her earlier choice as valid when made, or she may regret her choice if she believes that her earlier decisionmaking process was flawed.

Of course, a woman at the time of her abortion decision may believe that the fetus is a person, but that abortion is the best choice under her circumstances. Men have reasoned in a similar fashion about preserving a way of life that is good for them through war and about declining to help those in need of life-sustaining aid.

⁶⁹ Accordingly, *Casey* noted:

"Such clinicians explain that mainstream psychology systematically understates the sequelae of abortion in two ways: the depth of the impact on those women who suffer it, and the number of women who suffer from some form of distress.⁷⁰ We can account for this by academic psychology's typical overreliance on surface data from self-reports on psychological instruments, and by its ideological support for abortion rights. I would add, as a third reason, the psychological denial identified, for example, by Judith Herman in her book *Trauma and Recovery*: no one wants to listen to a person's trauma, and few will, unless a political movement of enfranchisement supports it.⁷¹

"The law can take an active role in trying to correct and enlarge the medical profession's understanding of the patient, including her need for additional forms of information. Moreover, the law can protect a specific subclass of patients who are presently ill-served by medical understanding. It may do so through specific regulations designed to assist the woman's decision making process, rather than relying on the after-the-fact, and less predictable, process of jury decisionmaking in tort malpractice actions."

What response may be made to these arguments defending Pennsylvania's informed consent provisions?

1. *A Departure from Medical Practice*

This enlarged vision of the patient's interests does not represent medical-legal standard practice and therefore requires careful consideration to determine whether women are being singled out for differential treatment, and a treatment that, although it purports to be, is not in their interest. For

It cannot be questioned that psychological well-being is a facet of health. . . . In attempting to ensure that a woman apprehend [sic] the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.

Casey, 505 U.S. at 882.

⁷⁰ See *Medical and Psychological Impact of Abortion: Hearing Before the Human Resources and Intergovernmental Relations Subcomm. of the House Comm. on Governmental Operations*, 101st Cong., 1st Sess. (1989) [hereinafter *Hearing*]; *id.* at 120-29 (statement of Anne Speckhard, Ph.D.); *id.* at 127 (labelling as "conjecture" Vincent Rue's prediction that 15-45% of women who have undergone abortions will develop negative sequelae, based on Rue's review of 88 studies).

⁷¹ JUDITH L. HERMAN, *TRAUMA AND RECOVERY* 32 (1992).

example, the moral appropriateness of a particular medical procedure is normally assumed to be outside the proper range of physician disclosures. One doesn't hear of discussions with a patient concerning whether his upcoming surgery could better serve a different patient or whether a scarce organ transplant would increase social utility if given to another. The costs of participation in an excessively narcissistic culture are presumably not mentioned to the patient seeking a silicone implant or liposuction. The need of long-term foster care children for adoption is not brought to the attention of patients considering *in vitro* fertilization—and certainly not to the attention of the woman who opts for childbirth in lieu of abortion *cum* adoption. Nor under case law need a physician attend to a patient's critical interests in completing his life's projects. For example, the California Supreme Court recently held that a physician's duties are limited to "protect[ing] the patient's freedom to 'exercise . . . control over [one's] own body' by directing the course of *medical treatment*."⁷² Accordingly, the court rejected a malpractice claim that the physician's failure to disclose statistical cancer survival rates prevented the patient from ordering his affairs before death.⁷³ Only a narrow, bodily centered understanding of the patient's interests governed.

2. A Lack of Empirical Evidence

If there were strong empirical evidence that the informed consent process as practiced by physicians is failing to protect patients—in this instance, those who suffer a post-abortion trauma—the legislature could compel a departure from this standard medical practice. The empirical data on which Pennsylvania purports to act is flawed, however. The dominant psychological view, embodied in the work of Professor Nancy E. Adler, and the American Psychological Association's position paper, is that abortion has few negative sequelae.⁷⁴

⁷² See *Arato v. Avedon*, 858 P.2d 598, 608 (Cal. 1993) (first alteration in original) (quoting *Cobbs v. Grant*, 502 P.2d 1, 9 (Cal. 1972)).

⁷³ *Id.* at 608-09.

⁷⁴ Nancy E. Adler et al., *Psychological Factors in Abortion: A Review*, 47 AM. PSYCHOLOGIST 1194 (1992) [hereinafter Adler et al., *Psychological Factors*]; Nancy E. Adler et al., *Psychological Responses After Abortion*, SCIENCE, Apr. 6, 1990, at 41; see also Susan J. Blumenthal, *Psychiatric Consequences of Abortion: Overview of Research Findings*, in PSYCHIATRIC ASPECTS OF ABORTION 17 (Nada L. Stotland ed., 1991); Warren B. Miller, *An Empirical Study of the Psychological Antecedents and Consequences of Induced Abortion*, J. SOC. ISSUES, Fall 1992, at 67; Nancy F. Russo, *Psychological Aspects of Unwanted Pregnancy and Its Resolution*, in ABORTION, MEDICINE, AND THE LAW 593 (J. Douglas Butler & David F. Walbert eds., 4th ed. 1992); *Abortion Trends*, *supra* note 14; Paul K.B. Dagg, *The Psychological Sequelae of Therapeutic Abortion—Denied and Completed*, 148 AM. J. PSYCHIATRY 578 (1991); D.R. Urquhart & A.A. Templeton, *Psychiatric Morbidity and Acceptability Following Medical and Surgical Methods of Induced Abortion*, 98 BRIT. J. OBSTETRICS & GYNE-

According to this view, the dominant post-abortion affect is relief, in marked contrast to pre-abortion anxiety related to the unwanted pregnancy. For those who experience guilt and sadness, these feelings tend to abate within a few months. The recurrence in some of sadness on anniversaries of the abortion is not an injury, but a normal psychological process, which may abate, especially with subsequent childbirth. If the more serious sequelae that our imaginary Attorney General describes were to exist, they would surely have shown up somewhere in the health care system, inasmuch as abortion is one of the most frequently performed surgical procedures in the country—more than 25 million in the United States since *Roe*, with, by some estimates, nearly one-fifth of American women having had an abortion.⁷⁵ Nor does evidence from the tort system support the view that the sequelae are very prevalent or serious.

COLOGY 396 (1991). See generally GOLDSTEIN, *supra* note 19, at 212-18 nn.124-28; Symposium, *Psychological Perspectives on Abortion and Its Alternatives: Research and Policy*, J. SOC. ISSUES, Fall 1992, at 1; Gregory H. Wilmoth et al., *Prevalence of Psychological Risks Following Legal Abortion in the U.S.: Limits of the Evidence*, J. SOC. ISSUES, Fall 1992, at 37.

For the contrary view, see Brief Amici Curiae of Focus on the Family, and Family Research Council of America in Support of Appellants, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (No. 88-605); DAVID C. REARDON, *ABORTED WOMEN: SILENT NO MORE* (1987); Vincent M. Rue & Anne C. Speckhard, *Counseling Informed Consent & Abortion: Issues in Medicine & Counseling*, 6 MED. & MIND 75 (1991); Anne C. Speckhard & Vincent Rue, *Complicated Mourning: Dynamics of Impacted Post Abortion Grief*, PRE- & PERINATAL PSYCHOL. J., Fall 1993, at 5; Anne Speckhard & Vincent M. Rue, *Postabortion Syndrome: An Emerging Public Health Concern*, J. SOC. ISSUES, Fall 1992, at 95. See also Dennis A. Bagarozzi, *Identification, Assessment and Treatment of Women Suffering from Post Traumatic Stress After Abortion*, J. FAM. PSYCHOTHERAPY, Issue 3, at 25 (1994). But cf. *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1333-34 (E.D. Pa. 1990) (finding Rue's testimony not credible), *aff'd in part, rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992); *Hodgson v. Minnesota*, 648 F. Supp. 756, 768 (D. Minn. 1986) (finding Rue's testimony less convincing than other expert testimony), *rev'd*, 853 F.2d 1452 (8th Cir. 1988), *aff'd*, 497 U.S. 417 (1990).

For discussions of the abortion counseling process in the legal literature, see Susan F. Appleton, *Doctors, Patients and the Constitution: A Theoretical Analysis of the Physician's Role in "Private" Reproductive Decisions*, 63 WASH. U. L.Q. 183 (1985); Susan F. Appleton, *More Thoughts on the Physician's Constitutional Role in Abortion and Related Choices*, 66 WASH. U. L.Q. 499 (1988); Andrea Asaro, *The Judicial Portrayal of the Physician in Abortion and Sterilization Decisions: The Use and Abuse of Medical Discretion*, 6 HARV. WOMEN'S L.J. 51 (1983); Thomas L. Jipping, *Informed Consent to Abortion: A Refinement*, 38 CASE W. RES. L. REV. 329 (1988); Susan O. Renfer et al., *The Woman's Right to Know: A Model Approach to the Informed Consent of Abortion*, 22 LOY. U. CHI. L.J. 409 (1991); Terry N. Steinberg, Note, *Abortion Counseling: To Benefit Maternal Health*, 15 AM. J.L. & MED. 483 (1989); Joseph W. Stuart, *Abortion and Informed Consent: A Cause of Action*, 14 OHIO N.U. L. REV. 1 (1987).

⁷⁵ See Fawn Vrazo, *Warriors in a Cause*, PHILA. INQUIRER, Jan. 26, 1992, at A1.

Surprisingly few women who self-identify as victims of abortion have sued on the grounds that a physician failed to disclose the moral risks that might follow their abortions—risks of harms, which they have claimed in marches, speak-outs, and briefs to the Supreme Court, ruined their lives.⁷⁶

Toward the end of the Reagan Administration, the office of Surgeon General Koop undertook a project to demonstrate that the sequelae of abortion were far more negative than the predominant assessment suggested.⁷⁷ Nevertheless, as his staff developed the project, partly in consultation with psychologists who asserted the existence of serious post-abortion effects, it became clear to the scrupulous Dr. Koop that the report simply could not be issued.⁷⁸ The prevailing scientific consensus was too strongly against the project's intended message, and the scientific evidence of an abortion trauma syndrome was non-existent, ambiguous, or limited to too few persons to merit a public health response.⁷⁹ Accordingly, the anti-choice Koop desisted. Unable to prevail with Koop when its proponents held power, the prospects for the abortion-trauma position becoming accepted as "common knowledge" are, and should be, severely in doubt.

3. *A Less Burdensome Means*

Even if empirical evidence were found to support state regulation, a less burdensome and more effective regulatory alternative exists than the Attorney General's proposed disclosure requirements for warning of these alleged moral risks. The mainstream psychological literature reveals that a limited number of women may experience certain psychological difficulties, some serious, with abortion.⁸⁰ Our Attorney General might urge that the informed consent process should warn all women of specific psychological risk groups. Yet a woman subjected to a long list of disclosures about the psy-

⁷⁶ See generally REARDON, *supra* note 74.

⁷⁷ See *supra* note 70.

⁷⁸ *Hearing*, *supra* note 70, at 194.

⁷⁹ See *Hearing*, *supra* note 70, at 194-200; HOUSE COMM. ON GOVERNMENT OPERATIONS, THE FEDERAL ROLE IN DETERMINING THE MEDICAL AND PSYCHOLOGICAL IMPACT OF ABORTION ON WOMEN, H.R. REP. NO. 392, 101st Cong., 1st Sess. 15 (1989).

⁸⁰ These may be divided into the following groups: (1) those aborting a wanted pregnancy, as a result of fetal injury or malformation, the loss of the father through his death or his rejection of the pregnancy or the relationship, or some other life reversal; (2) those who feel very ambivalent about or coerced into having an abortion; (3) those who believe or are influenced by others who believe that abortion is murder or otherwise wrong; (4) those who have other serious psychological problems, possibly related to earlier trauma; and (5) those who would also be susceptible to postpartum depression, possibly as a result of the abrupt reduction in hormone levels following *any* pregnancy outcome. See materials cited in GOLDSTEIN, *supra* note 19, at 212-18 nn.124-28; Brenda Major & Catherine Cozzarelli, *Psychosocial Predictors to Adjustment to Abortion*, J. SOC. ISSUES, Fall 1992, at 121; *supra* note 74.

chological risks of abortion that some face might feel not that her autonomy is being respected, but that she is being scared off. Furthermore, such warnings can only increase knowledge if they are combined with warnings about the psychological risks of giving children away in adoption,⁸¹ of having an unwanted child, of being a single mother, or of living with an abusive husband, not to mention the specific risks of pregnancy and childbirth. The effectiveness of such numerous and conflicting warnings in assisting a woman in her decision is doubtful, as so many warnings quickly can become unintelligible.

An alternative to this long list of risks exists: there are markers that permit many of these at-risk women to be identified during the process of informed consent and abortion counseling; and, once identified, these women may be further counseled. Helpful markers include prior psychiatric difficulties or ambivalence about the abortion—whether that ambivalence reflects religious scruples, an initially wanted pregnancy, present coercion from

⁸¹ Among women who have placed children for adoption, a small number have made claims remarkably similar to women who claim to have been harmed by abortion. Such women assert that they were coerced into placing a child for adoption; that they were thereby exploited by selfish professional and lay persons; that adoption violates the natural order and the nature of motherhood; and that they have been traumatized with unrelenting self-recrimination, guilt, and interference with personal and work relationships. Having experienced trauma and exploitation, some of these women seek to increase the legal regulation of adoption, restrict adoption practices, or end adoption altogether. For one source on this little-studied subject, see Tom Junod, *Someone Else's Child*, GENTLEMAN'S Q., Dec. 1994, at 258 (discussing Concerned United Birthparents); see also Sandra Evans, *Regrets and Memories*, WASH. POST, Jan. 18, 1994, at Z13; Lucinda Franks, *The War for Baby Clausen*, THE NEW YORKER, Mar. 22, 1993, at 56; Beth Seader, *Do Young Unmarried Fathers Have Rights*, USA TODAY, Apr. 26, 1993, at 13A. Such claims are also outside the mainstream of current psychological research.

For psychological studies of the psychological impact of adoption on birth parents, see, e.g., JULIA TUGENDHAT, *THE ADOPTION TRIANGLE: SEARCHING AND UNITING* (1992); Linda F. Cushman et al., *Placing an Infant for Adoption: The Experiences of Young Birthmothers*, 38 SOC. WORK 264 (1993); Eva Y. Deykin et al., *Fathers of Adopted Children: A Study of the Impact of Child Surrender on Birthfathers*, 58 AM. J. ORTHOPSYCHIATRY 240 (1988); John E. Gedo, *Unmarried Motherhood: A Paradigmatic Single Case Study*, 46 INT'L J. PSYCHOANALYSIS 352 (1965); Debra Kalmuss et al., *Short-Term Consequences of Parenting Versus Adoption Among Young Unmarried Women*, 54 J. MARRIAGE & FAMILY 80 (1992); Edward K. Rynearson, *Relinquishment and Its Maternal Complications: A Preliminary Study*, 139 AM. J. PSYCHIATRY 338 (1982); Paul Sachdev, *Achieving Openness in Adoption: Some Critical Issues in Policy Formulation*, 61 AM. J. ORTHOPSYCHIATRY 241 (1991).

The similarity between claims of women identifying both abortion and adoption as traumatic suggests that procreation may be a psychologically risky, highly meaningful activity in which one involves oneself (or refrains from involving oneself) at one's peril. At least this is the case for those who are especially "vulnerable" to procreative experiences.

parent or boyfriend, or inner longings. The search for ambivalence allows the counselor to identify those women who are themselves conflicted when it is not possible for the counselor to anticipate *a priori* just what critical interests unique to each woman might need to be addressed. Furthermore, such counseling responds to each woman's emotional needs for communication and deliberation in a way that a legislatively prescribed listing of additional risks cannot. The effectiveness of such inquiry is supported by some empirical evidence that the informed consent process is more effective when the physician is charged with implementing the *principle* of patient autonomy, rather than simply with disclosing a prescribed list of facts.⁸²

Together, these arguments against a mandatory disclosure of "moral" risks and social facts certainly justify a policy favoring the traditional disclosures made in the first, narrower model of informed consent. Nevertheless, given the claims of some women's suffering, such arguments did not persuade the Justices of the *Casey* plurality to find that Pennsylvania's information requirements were either irrational, unnecessary, or unduly burdensome, and therefore unconstitutional.⁸³ Indeed, the current Justices of the plurality might have found such arguments insufficient even under *Roe*'s trimester scheme in establishing unconstitutionality. A state under *Casey* can presumably conclude that the informed consent process as practiced has failed a subgroup of women and that the difficulty of identifying which patients belong to this subgroup warrants additional mandated advice to all.

4. *An Imposition on a Woman's Self-Conception*

Our Attorney General continues more boldly:

"Pennsylvania may even alter the usual informed consent practices of the medical profession without adducing any empirical evidence showing that its practices cause diagnosable emotional harm, fail a large group of patients, or are otherwise in need of reform. So long as it does not act arbitrarily, the state may impose an informed consent process that takes into account the state's enlarged understanding of the patient's self and her interests,⁸⁴ by disclosing facts and

⁸² See CHARLES W. LIDZ ET AL., INFORMED CONSENT: A STUDY OF DECISIONMAKING IN PSYCHIATRY 324 (1984).

⁸³ See *Planned Parenthood v. Casey*, 505 U.S. 833, 885, 887, 899 (1992).

⁸⁴ The Attorney General may here point out various ways in which state regulation affects the medical profession's conception of the patient. The law has, in effect, mandated a new diagnosis of child abuse so that the child's long-term relationships, rather than immediate physical condition, define the medical problem. See *Landeros v. Flood*, 551 P.2d 389 (Cal. 1976). Proposals that physicians query women patients about

ideas that the state believes would be considered by a rational woman.”⁸⁵

Some would respond as follows: If the information provided is not in fact in the patient’s self-interest as she understands it, mandating disclosure of that information cannot be justified under the informed consent model.⁸⁶ They might even argue that the best way to respect patient autonomy and to avoid a mismatch between mandated disclosures and a woman’s self-conception is to refocus informed consent entirely back on the core interest of bodily well-being. After all, it is the physician’s technical expertise, and the resulting disparity in power between physician and patient, that justify the disclosure and consent process. Wider concerns of the patient’s self are

spousal abuse, especially during pregnancy, might also implement a salutary change that compels the physician to expand his understanding of the patient’s interests. Finally, by mandating family practitioners as gatekeepers to special services, health care reform may reduce the fragmentation of the “person” of the patient that comes from increasing medical subspecialization. The Attorney General also might note that states have required medical counseling prior to allowing an adoption or divorce.

⁸⁵ As the joint opinion in *Casey* states:

Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. . . .

We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health. . . . [I]nformed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant.

Casey, 505 U.S. at 882-83.

The *Casey* joint opinion remains ambiguous as to whether such disclosures are justified by a concern for the woman’s autonomy or the state’s interest in protecting the fetus (which implicates the government speech but not the informed consent rationale). Thus the opinion adds:

[W]e permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion. In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to insure an informed choice, one which might cause the woman to choose childbirth over abortion.

Id. at 883.

⁸⁶ This point is to be distinguished from the fact that in any system of informed consent, there will not be a perfect fit between the mandated disclosure and the particular requirements of the patient. Some patients will be provided with more than they want, and others with less. Nevertheless, such minor departures from an ideal model of informed consent are not paternalistic interventions but the result of the imprecision that accompanies any legal regulation.

outside of the physician's technical competence. At a minimum, they would restrict an enlarged set of disclosures to those women for whom this information is relevant to their expressed interests. Implementing such a restriction, however, would be difficult. An individual physician in an ongoing relationship with a patient may be in a position to understand her and how she defines her interests. With an enlarged appreciation of the *possible* range of his patient's critical interests, he may choose to provide information that he reasonably believes may enhance her autonomous choice. In practice, clinics regularly lack particular information about a patient's self-conception. Applying a mandated, enlarged definition of the self that presupposes a particular range of critical interests, a clinic physician risks projecting upon the patient reasons that are not reasons for her, and information that is not pertinent to her interests, as she conceives them. This she may well experience as invasive.⁸⁷

In response, our Attorney General would answer:

"Surely this position admits too narrow a range of what we may safely say to each other and unnecessarily limits the physician-patient dialogue. The woman remains in control of deciding whether to have an abortion, and therefore of what count as good reasons for her. But the law need not protect her self-conception from inquiry about what the scope of her interests might be. Given the unique nature of abortion and the circumstances under which pregnant women must decide, it is no impermissible burden on pregnant women for the state to stretch medicine's conception of the patient's self solely in the context of abortion services."

Legal objection to such an expansion of the informed consent process cannot successfully be grounded in the philosophical claim that moral reasons are not external to the person and that only the decisionmaker can know her reasons.⁸⁸ Nor can it be grounded in the view that simply equates autonomy with liberty and non-coercion, and denies to the state any interest in fostering autonomy. Nor would a patient's assertion that she experiences the giving of information itself as invasive⁸⁹ suffice to narrow the informed

⁸⁷ Justice Blackmun cited, as an example of such invasive practices, compelled disclosure to a rape victim of information that the state would try to require the father to make child support payments if she gave birth. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 763 (1986), *overruled in part by Casey*, 505 U.S. at 833.

⁸⁸ See generally Connie S. Rosati, *Internalism and the Good for a Person*, 106 ETHICS 297 (1996).

⁸⁹ A physician cannot claim a therapeutic privilege against disclosure of risks to

consent process and defeat legislative support for autonomous choice. Rather, objection to the Attorney General's position should be grounded in the practical difficulties that would arise if the state were to embark upon a rigorous program of autonomy-enhancement for adults, based on a mere assertion of what a "rational woman" needs to consider. The Attorney General's position edges far down the slippery slope of paternalistic re-education. A philosopher may develop a standard rigorous in its demands regarding individual cognitive and emotional capacity and rationality, and in its range of reasons that the autonomous person should consider. Such a philosopher would no doubt seek to persuade others in non-coercive conversation as to the correctness of the standard. By contrast, if the state were to undertake such a program, it would risk excluding many women from exercising meaningful choice, and thus interfere with the liberty of women who have decided to have an abortion.⁹⁰ That no such program for adults is found in our law is suggestive of how paternalistically coercive and inconsistent with our liberal practices it would be. This difficulty is exacerbated by the divisive nature of the abortion controversy; it may well be impossible at this juncture for the state to develop a detailed brochure or other communication with a very full set of disclosures while retaining sufficient factual and emotive neutrality so as plausibly to be seen as enhancing autonomy.

Departure from such neutrality also poses an emotional risk. Informing a patient that people differ in their attitudes towards abortion and that a patient's response to her abortion may be influenced by her own attitudes, by how others react, and by what she has been taught, is quite different from a mandated statement conveying opposition to abortion. The latter may have its own harmful consequences. Indeed, the evidence shows that a woman's psychological reactions to her abortion may be affected by the attitudes of those around her; the negative attitudes of others can cause psychological difficulties.⁹¹ Such an iatrogenic warning cannot be justified by

spare a patient simple discomfort that is not injurious to health, but he can use his knowledge of the patient's critical interests to determine whether to withhold information. Thus, for example, a physician may be justified in not disclosing a patient's terminal condition when a patient has indicated that he prefers not to know: that is, the patient's critical interests include neither self-knowledge nor a sense of obligation to disclose to others. Similarly, a physician's duty to advise an HIV patient to warn others of his status when that patient has made clear that he feels no such moral duty would arise (to the extent it does) not from the physician's obligation to his patient but to others at risk. *Cf.* *Chizman v. Mackie*, 896 P.2d 196 (Alaska 1995) (permitting patient to recover emotional damages resulting from physician's disclosure of AIDS test results).

⁹⁰ See, e.g., Linda C. McClain, "Atomistic Man" Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1251-54 (1992).

⁹¹ See Adler et al., *Psychological Factors*, *supra* note 74, at 1200-01.

an appeal to the woman's *own* interests in making an informed medical choice.

To minimize these risks, a reviewing court should adopt an "autonomy-in-fact" standard that requires the state to justify empirically what it would disclose to women for their own good. The standard should require evidence that a fair number of women actually want and would use the truthful⁹² information that the state would require physicians to provide. The articulated needs of real women check the state's imaginary autonomous patient. To avoid coercion, moreover, the process of providing the information must respect the woman's choice to decline to consider information on subjects that fall outside the scope of her own definition of self-interest.⁹³

This "autonomy-in-fact" standard would not silence the state. In close cases, the state simply would be required to acknowledge that it speaks not for the woman, but in pursuit of its own interests. Such acknowledgement would enhance the accountability of public officials who favor such speech by making them "own" the message, and prevent them, so to speak, from hiding behind the skirts of women. Other principles, discussed in Part IV, of government speech would then govern.

C. *Paternalistic Intervention to Enhance the Decisionmaking Process*

Our imagined Pennsylvania Attorney General has more to say:

"We do not here presume to force our views on an unwilling woman, a subject that I will discuss later when I address government speech.

"But it is not out of bounds for the state to intervene paternalistically in the decisionmaking process, to a brief and

⁹² See *Planned Parenthood v. Casey*, 505 U.S. 833, 882 (1992) (noting that "[i]f the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible").

⁹³ Since *Casey*, several consent provisions similar to Pennsylvania's have been upheld, but solely in facial challenges, without the empirical evidence that should be adduced in an as-applied challenge. See, e.g., *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 530 (8th Cir. 1994); *Barnes v. Moore*, 970 F.2d 12, 15 (5th Cir.), *cert. denied*, 506 U.S. 1021 (1992); *Planned Parenthood v. Miller*, 860 F. Supp. 1409, 1418 (D.S.D. 1994), *aff'd*, 63 F.2d 1452 (8th Cir. 1995); *Utah Women's Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482, 1491 (D. Utah 1994), *rev'd in part, dismissed in part*, 75 F.3d 564 (10th Cir. 1995); *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570 (Ohio Ct. App. 1993). Three of the statutes reviewed in these cases—from South Dakota, Mississippi and Ohio—lacked a provision recognizing a therapeutic privilege so as to permit physicians to omit state-mandated disclosures in appropriate cases. See *Barnes*, 970 F.2d at 14; *Miller*, 860 F. Supp. at 1420; *Voinovich*, 627 N.E.2d at 591. Such an omission should have made these statutes vulnerable to an as-applied challenge.

limited degree, to enhance rather than derogate from the woman's ultimate autonomy in making her abortion choice. A woman's interest in structuring her decisionmaking process—in acting impulsively or ignorantly for example—is far less significant than her interest in making her abortion choice itself, and may not be consistent with the assumptions of rational autonomy.⁹⁴

"The state of Pennsylvania therefore requires a twenty-four hour waiting period after the mandated information is provided. Although some states permit such information to be given over the phone, and thus do not mandate more than one trip to the clinic, we think that the process will be more effective if conducted in person. It is a rare non-emergency operation, whether vasectomy, *in vitro* fertilization, sex-change, autologous bone marrow transplant, kidney donation, or elective plastic surgery, that does not de facto involve a waiting period. "Health reform" will only aggravate the problem. The state already claims to protect the woman by providing for a long waiting period in which she can withdraw her consent to an adoption, and may protect her by providing long waiting periods before a no-fault divorce becomes final.⁹⁵ Similarly, we are beginning to limit violence by imposing waiting periods on the purchase of guns.

"Contrary to Justice Stevens's suggestion, it is no slur on or outmoded view of women to take seriously the stressful circumstances in which women find themselves when pregnant.⁹⁶ Patients who suffer post-traumatic distress might

⁹⁴ The philosophical literature refers to such interventions as cases of weak paternalism, in that the intervention enhances autonomy by intervening to forestall a non-autonomous act—here one presumed to be ignorant, impulsive, unconsidered, and anxiety-driven. In such cases, interventions may be consistent with a fundamental commitment to autonomy. See JAMES F. CHILDRESS, WHO SHOULD DECIDE? PATERNALISM IN HEALTH CARE 111 (1982) (noting that "'Soft' paternalism warrants actions only when the patient's own values are threatened"); *id.* at 114 (observing that "[t]emporary interventions, designed to determine the patient's capacity to make decisions and to ascertain the probability and magnitude of harm, are often justified when long-term interventions would not be"). See generally TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS (4th ed. 1994); GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY (1988); 3 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW (1986); JOHN KLEINIG, PATERNALISM (1984); JOHN KULTGEN, AUTONOMY AND INTERVENTION: PATERNALISM IN THE CARING LIFE (1995); DONALD VAN DEVEER, PATERNALISTIC INTERVENTION: THE MORAL BOUNDS OF BENEVOLENCE (1986); Joel Feinberg, *Legal Paternalism*, 1 CANADIAN J. PHIL. 105 (1971).

⁹⁵ See GLENDON, *supra* note 13, at 107.

⁹⁶ *Casey*, 505 U.S. at 911 (Stevens, J., concurring in part and dissenting in part).

well have benefitted from an increased period of reflection. Although abortion clinics sometimes delay abortion procedures and recommend further reflection on the part of their patients, the legislature need not put its trust in a particular counselor, given the stakes."⁹⁷

It is the 24-hour waiting period that shows the real difference between *Roe* and the undue burden standard of *Casey*'s joint opinion. In *Akron*, the Court had struck down a similar waiting period because it did not further—it harmed—the state's interest in a woman's health, which was the primary interest it could legitimately assert prior to viability.⁹⁸ By contrast, using the undue burden standard and asserting that the state has a substantial interest in potential life and the woman's autonomy, the *Casey* joint opinion upheld a 24-hour waiting period.⁹⁹

Casey involved a facial challenge to the Pennsylvania abortion statute, which was enjoined before its impact was known.¹⁰⁰ But a regulation may be a substantial obstacle by virtue of not only its intent but also its effect on women's choice and *Casey* guarantees that a woman's choice must be "effective" and not merely a formal right.¹⁰¹ Accordingly, the joint opinion indicated that in a subsequent suit a party may show that, as it actually operates in a locale, a 24-hour waiting period¹⁰² constitutes a substantial obstacle to some group of women.¹⁰³

⁹⁷ The joint opinion in *Casey* found: "[t]he idea that important decisions will be more informed and deliberate if they follow some period of reflection . . . [is] not . . . unreasonable," especially given the additional information the state offers the woman. *Id.* at 885.

⁹⁸ *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 450 (1983), *overruled in part by Casey*, 505 U.S. at 833.

⁹⁹ *Casey*, 505 U.S. at 885.

¹⁰⁰ *Id.* at 845.

¹⁰¹ *Id.* at 878.

¹⁰² Surely any period beyond 24 hours for adult women should be treated as an undue burden. Because there is no duty to consult with others, see Pennsylvania statute discussed *supra* note 15, this longer waiting period would serve no informed consent purpose in facilitating the assimilation of information.

¹⁰³ Such classes might include AFDC women, poor working women, rural women living several hours from the only abortion provider, and women going to clinics besieged by protesters who invade the privacy of patients. See *Casey*, 505 U.S. at 886.

North and South Dakota, where a second visit requirement might well be held to be an undue burden because of the scarcity of abortion providers, permit the commencement of the waiting period to be triggered by a phone call in which a physician's agent provides information, including gestational age based on the date of the woman's last menstruation. This necessitates only one visit to the physician, for the certification of informed consent and the abortion itself. See *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 531 (8th Cir. 1994) (upholding on its face a statute similar to the Pennsyl-

In such subsequent litigation, plaintiff's proof of the material difficulties imposed by a waiting period and its unfair distributional consequences will be easy enough. While Pennsylvania has substantial urban centers, it must be remembered that outside our nation's major cities, abortion services simply are unavailable or only intermittently available.¹⁰⁴ Expenses mount rapidly from a second doctor visit, lost employment, distant travel, overnight lodging, and babysitting. For many, such costs are profound. Moreover, even a one-day waiting period readily results in a delay of a week or more between initial appointment and the surgery, because clinics may not perform abortions daily and because the delivery of abortion services is so maldistributed geographically.¹⁰⁵ The medical data are clear that such delay denies women abortions that are physically safer and less distressing emotionally, for morbidity and distress increase with each week's delay.¹⁰⁶ Also, for many, the earlier an abortion is performed, the less ethically problematic it is. Finally, two visits have substantial implications for a woman's interest in privacy. It is this privacy that can shield her from the coercion of anti-abortion groups at the clinic and from the physical abuse or emotional coercion of husbands, family, or friends,¹⁰⁷ as the joint opinion so clearly recognized.¹⁰⁸ As they did in cases involving African-Americans' civil rights, courts should take into account the impact of privately organized

vania statute reviewed in *Casey*); *Planned Parenthood v. Miller*, 860 F. Supp. 1409, 1420-21 (D.S.D. 1994) (upholding informed consent provision requiring certain information be provided to the patient 24 hours before the abortion *either* in person or by telephone), *aff'd*, 63 F.3d 1452 (8th Cir. 1995); *cf.* *Utah Women's Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482, 1487-91 (D. Utah 1994) (noting that the magistrate judge interpreted Utah's statute as allowing telephonic communication, and that plaintiffs did not object to such interpretation, but further noting that such an interpretation is not necessary for the law to be constitutional because two visits can be required under *Casey*), *rev'd in part and dismissed in part*, 75 F.3d 564 (10th Cir. 1995). Some Pennsylvania clinics have tried this same telephonic procedure but the state has opposed the attempts. See Kimberly L. Jackson, *Ridge Tightens Abortion Counseling; Rules Taped Messages on Phone Might Bring License Revocation*, ALLENTOWN MORNING CALL, May 24, 1995, at A3; Fawn Vrazo, *Abortion Clinics' Use of Phone Tapes Probed*, PHILA. INQUIRER, Nov. 23, 1994, at B3; Fawn Vrazo, *Clinics Find Way to Ease Abortion Law*, PHILA. INQUIRER, Sept. 23, 1994, at A1.

¹⁰⁴ *Abortion Trends*, *supra* note 14, at 3238.

¹⁰⁵ *Id.* at 3237.

¹⁰⁶ See *id.* at 3231-39; see also *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1344 (E.D. Pa. 1990), *aff'd in part, rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).

¹⁰⁷ See *A Woman's Choice-E. Side Women's Clinic v. Newman*, 904 F. Supp. 1434, 1453 (S.D. Ind. 1995); Fawn Vrazo, *A Preview of Limited Abortion*, PHIL. INQUIRER, Sept. 14, 1992, at A1.

¹⁰⁸ *Casey*, 505 U.S. at 888, 893, 899.

violence and other lesser forms of coercion in assessing whether pregnant women can effectively exercise their rights.

This much was known to the Court in *Casey*. What should be especially troublesome—indeed determinative—about the Attorney General's argument for paternalism is the absence of any data to support his claim that a delay confers a benefit on the decisionmaking process of any identifiable group of women.¹⁰⁹ Unless such data are available, the justification for a waiting period is altogether absent.¹¹⁰ Many women seem to come to clinics with their decision already made, after careful, extended consideration of the procedure.¹¹¹ State intervention thus imposes heightened anxiety, cost, and physical risk without assisting in the decisionmaking process: it is mere interference. For those who decline to receive the state's message, the delay caused by a forced second visit is completely irrational. As noted in the last section, a more narrowly tailored rule, mandating delay for women who are identified during the informed consent process as being unsure or ambiva-

¹⁰⁹ *Id.* at 920-21 (Stevens, J., concurring in part and dissenting in part).

¹¹⁰ A comparison with the very different and weak-paternalistic decisionmaking procedures in right-to-die cases is useful. For example, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990), upheld the state's rules structuring a decisionmaking process that made removing life support difficult. Essential to the Court's decision upholding the restrictive state rule was the empirical difficulty in ascertaining the comatose patient's present choices. *Id.* at 280. Here by contrast, empirical evidence is available or can be ascertained regarding women in general and each patient's expressed interests.

Oregon has recently adopted a right-to-die initiative for patients with less than six months to live which provides for the involvement of two physicians, three successive requests to die by the patient, and a 15-day waiting period. Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800-.827 (1995). The second physician requirement serves to verify the physician's estimate that the patient has only six months to live, thereby enhancing patient autonomy by augmenting the reliability of the medical prediction upon which he acts.

The euthanasia mandated delay is distinguishable in several ways from the 24-hour waiting period for abortion. First, because assisted-suicide is a new societal phenomenon, little data on physician-assisted suicide is available for judging how to implement patient autonomy. Accordingly, judicial deference to a state's exploratory technique is justified. By contrast, we have the experience of over 25 million abortions since 1973 upon which to base our practices. *See Vrazo, supra* note 75, at A1. Second, there is a theoretical and empirical basis for finding a link among a patient's terminal illness, his depression, and his wish to die that warrants mandating some delay until further investigations can clarify the relationship. Third, delay in abortion increases the physical and emotional risks to the woman as well as jeopardizes her privacy interests in maintaining her non-maternal social status. By contrast, delay in suicide for a terminally-ill patient—although possibly requiring the endurance of pain—does not increase risks to health or informational privacy in the same way.

¹¹¹ *Abortion Trends, supra* note 14, at 3237, 3241; *see also A Woman's Choice*, 904 F. Supp. at 1450; GOLDSTEIN, *supra* note 19, at 212 n.124.

lent about their choice, might better respond to the clinical data that our Attorney General puts forward.

Perhaps what troubles Pennsylvania is precisely the fact that many women exercise their autonomy before arriving at the clinic—that is, in private. What galls is that these women act independently, without involvement, outside of a state-sponsored dialogical community.

III. THE DIALOGICAL MODEL

A. *The Attorney General's Complaint*

Our Attorney General continues in a very different manner:

“My opponents’ understanding is consistently too shallow. We have already seen that they depict an autonomous self whose range of interests is quite narrow. In their constricted view, any additional facts that the woman might want to consider in reaching her abortion decision would be idiosyncratic preferences about which she may inquire, but which neither the law nor the profession of medicine should anticipate.

“But they suffer from a deeper error. All their talk of individual autonomy, narrow or broad, is legal idealism; your autonomous subject is a legal fiction. People exist only in communities and in relationships, many of them not of their own choosing. Yet *Roe* allows the woman to wall herself off from any community and in total isolation make a life-changing choice, with substantial ramifications for herself and others. The state should be able to take into account what we believe about citizens in general, or at least about citizens in our community here, and seek to establish a process through which the woman can educate herself about her fuller social identity as a generative being. For it is as generative beings that adults become themselves in our community.

“Furthermore, certain critical events in human development—the onset of puberty, marriage, the birth of a child, the death of a family member—are not atomistic events. They are social in nature. Each culture makes something of them; as it makes something of them, people are made, and in turn make something of themselves. We as a society fail our members when we collectively allow social meanings to disintegrate and our collective social involvement in these events to wane.

"The state's role in this matter is all the more critical because we live in a time of impoverished language. The attempt to develop a *lingua franca* to ease communication among many different cultures, between the two sexes, across classes, and among different age groups, in the end has only sterilized our language and removed from it its rich moral tradition in response to various claims that it had merely represented a hegemonic discourse. As a result, much of our current speech facilitates communication only on the most narcissistic and consumption-oriented terms set by the mass media, especially television. The state need not accede to this. Although in a regime of free speech it may not regulate language, the state can make available dialogical settings that afford a communicative opportunity with persons who may employ a language more adequate to the task of deciding about abortion.

"In our Anglo-American legal tradition, a woman's autonomy remains the standard. But the state has a role in structuring a dialogical process of decision so that in the course of choosing, a pregnant woman engages with those relevant members of the community who can enhance the meaningfulness of her decision and help her reflect upon her identity, rooted as it is in relationship to them."

An attorney general who spoke this way would cause quite a stir by departing from the law's individualistic presumptions that regularly disregard the actual psychological and social circumstances of decisionmakers. To explore this less-charted terrain, we need to identify a dialogical model of decisionmaking, indeed two such models: one weaker and the other stronger.

The weaker model is little different from our previously discussed model of paternalistic intervention to preserve autonomy, except that it emphasizes dialogue and language rather than pure information exchange. It recognizes that individuals often have difficulty exercising their autonomy for a number of socially determined reasons. For example, an external constraint may arise because public debate has misconceived the matter, may have employed categories or terms that were inadequate to the task, or may have induced a person unreflectively to resolve the matter individually rather than in concert with others.

Indeed, critics regularly call on us to transform the language (or its categories) that our society affords us so that we can better comprehend who we are. Thus, once feminist writers and feminist consciousness-raising groups named previously unnamed assumptions about women and women's lives, individuals could talk differently with each other and exercise their

autonomy in ways that had been unavailable before. In his recent book, James Q. Wilson makes a related point about the cultural weakening of the belief in a moral sense, and a constriction in the public language in which moral discourse is conducted.¹¹² This harm to a public good—our language of moral discourse—disables individuals from expressing and nourishing their moral sentiments. Wilson argues that, although existing in latent form in most persons, laid down in our genes and childhood, these sentiments need the cultivation of our society to gain a more potent voice.¹¹³ Robert N. Bellah's *Habits of the Heart* makes the same point: our individualistic culture undermines our finer communal sentiments.¹¹⁴

Communitarians make a stronger dialogical claim. It is not simply that the culture provides tools, such as a language, ideas, or ideals, that an individual may choose to employ to enhance her exercise of her autonomy. Rather, participation in certain social roles and collective activities is actually constitutive of the individual self.¹¹⁵ A decisionmaker is not autonomous when she disowns, ignores, or alienates socially constituted parts of herself, or when she holds herself back from that communal participation through which she can become herself. To ignore those portions of the self is to diminish one's autonomy, not express it. As to those parts that are rooted in the collectivity, the community may actually have dialogical claims upon her: in deciding she must participate and listen with respect to those aspects of her self that are communally constituted.

Thus, in *The Ethics of Authenticity*, Charles Taylor complains about the cultural debasement of the ideal of authenticity in a society that values choice for choice's sake,¹¹⁶ one in which the peculiar phrase "abortion for convenience" manages to find, among some, a referent. Our malaise, he claims, results from the increasingly flattened lives that people lead in our atomistic and individualistic culture; they fail to appreciate that their self-absorption obscures the horizons of communal significance from which an uncorrupted ideal of authenticity draws meaning. Only in dialogue with important others about joint human projects can authenticity in making choices be worth pursuing.¹¹⁷

¹¹² JAMES Q. WILSON, *THE MORAL SENSE* 244-50 (1993).

¹¹³ Wilson observes that "our intellectual culture has left ordinary men and women alone to cope They wish to make moral judgments, but their culture does not help them do it." *Id.* at x. "A moral sense is not always and in every aspect of life strong enough to withstand a pervasive and sustained attack. . . . A moral sense must compete with other senses that are natural to humans" *Id.* at 12.

¹¹⁴ See generally ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985).

¹¹⁵ See generally MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

¹¹⁶ CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 39-40, 66-69 (1991).

¹¹⁷ *Id.*

Communitarians often refer to political participation—engaging in public discourse, voting, jury service, office-holding, working—as key constitutive activities through which the self finds public completion.¹¹⁸ Surely less political roles also involve key socially constituted aspects of the self: events like marriage and parenthood. Around such events—which constitutional discourse now labels as private—complex religious and secular ceremonies have from time immemorial marked a passage from one status to another. In these new statuses, one is enlarged, in the sense that parts of the self find completion and capacities are employed that previously had remained dormant; but one is also simultaneously constrained in that certain kinds of liberty cannot thereafter be exercised, at least not without self-altering or self-alienating consequences.

How might the state structure a dialogical process so as to educate a self who depends on socially constructed tools like language, and who needs others to complete herself? How shall it construct a procedure that reflects back to the self the state's own more capacious view of her, like a trick mirror—not one that distorts, but rather one that fills out to a more comely or handsome, if thickened, form? How shall it appeal to silenced, neglected, or not yet fully constituted portions of the self?¹¹⁹

It is unlikely that our individualistic legal culture has the means or the authority for undertaking such an enterprise. Even if it did, there are enormously serious risks. In developing such a program of decision, the state risks educating a woman into a person that she is not, or not yet. Then it would not be her socially constituted autonomy that the state fosters, but a best-interest, defined externally to who she is by someone else's vision of who she should become. For this reason, if a communitarian analysis is to have relevance for our legal system, it must remain rooted in a commitment to an autonomous self, even as it elaborates a conception of that self that is partially constituted in dialogue and participation.¹²⁰ Without that commit-

¹¹⁸ See SANDEL, *supra* note 115.

¹¹⁹ One such effort occurs in Robert Burt's very fine book, *Taking Care of Strangers: The Rule of Law in Doctor-Patient Relations*. In it, Burt deals with the difficulty occasioned when deciding whether to withdraw life-sustaining treatment from incompetent, and thus silent, patients. He proposes that all "interested" parties be involved in a collective decisional process to determine whether to withdraw life supports from such an incompetent patient. Further, they must deliberate without the immunity from subsequent criminal or civil liability that courts provide when they take over such decisionmaking. Burt bases his proposal on this psychological understanding: our selves are socially constructed and maintained only in interpersonal tension and struggle with others. The notion of the autonomous self does service in every day matters, but *in extremis* of death, when the patient's self dissolves, so in effect does the self of an individual decisionmaker in the case. We can therefore only proceed collectively in making the identity-dissolving decision of death. ROBERT A. BURT, *TAKING CARE OF STRANGERS: THE RULE OF LAW IN DOCTOR-PATIENT RELATIONS* 144-73 (1979).

¹²⁰ Ascertaining whether particular legal procedures in fact further the autonomous

ment to autonomy, anything goes; any "improvement" in a citizen's character to make it better cohere with society's values and institutions would be justified. This is the risk that understandably leads liberals to warn communitarians that their program verges on totalitarian re-education.¹²¹

B. Casey's *Limits on a Dialogical Process*

Were such dialogical concerns on the minds of the Justices who decided *Casey*? Yes and no. Arguably they considered this. After all, the joint opinion observed: "What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so."¹²² But they rejected the enterprise.

Admittedly, even *Roe* had dialogical elements. In looking to physicians to mediate the abortion issue, the Court sought more than a way of protecting a woman's health. Some Justices appeared to believe that the physician-patient relationship would afford a context for meaningful dialogue in which a wise personal choice could emerge.¹²³ The physician might have been seen as embodying social convention and thus as inhibiting what a woman would seek and say; certainly Chief Justice Burger expressed the view that the medical profession would restrain the uncontrolled discretion of women to abort and that *Roe* did not allow "abortions on demand."¹²⁴ Other Justices, less concerned with inhibiting a woman's choice and more interested in fostering dialogue, might have considered that physicians are influenced by wide experience with other patients, teachers, and colleagues, all reflecting and creating a social process of judgment. In particular, obstetricians and gynecologists have daily experience with birth, adoption, the pain of infertility, and contraception. Certainly *Akron* and *Thornburgh* suggested that the majority put more faith in the dialogue between doctor and patient than in scripted disclosures mandated by the state.¹²⁵

choice of a socially constituted self may well require a different and more complex methodology than that required by the positivist inquiry about autonomy-in-fact urged *supra* part II.

¹²¹ *Introduction, in LIBERALISM AND ITS CRITICS* 7 (Michael J. Sandel ed., 1984).

¹²² *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992).

¹²³ *See Roe v. Wade*, 410 U.S. 113, 153 (1973).

¹²⁴ *Doe v. Bolton*, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring).

¹²⁵ *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 748 (1985), *overruled in part by Casey*, 505 U.S. at 833; *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 443 (1983), *overruled in part by Casey*, 505 U.S. at 833. The Justices in *Roe* may have been unaware of the fact that some nurses and counselors in family planning clinics brought with them a tradition from feminist consciousness-raising groups that in many instances turned the consent requirement into its own elaborate dialogical process. *See, e.g., NINIA BAEHR, ABORTION WITHOUT APOLOGY: A RADICAL HISTORY FOR THE 1990S* 21-30 (1990).

While *Roe* involved these dialogical intimations, *Roe* and its successor cases established three crucial limits on any dialogical process that a state might seek to implement: a requirement of privacy, a prohibition against requiring spousal or paternal notice, and a judicial bypass for minors.¹²⁶ These limits largely eliminated the dialogical model, and *Casey* strongly reaffirmed each of these limits.¹²⁷ This suggests that the Justices of the plurality are not prepared to allow states to structure such dialogues and that this is not what they had in mind in revising the trimester structure. This is hardly surprising given the law's liberal individualistic impulse.

1. *Excluding the Public: Privacy*

The dialogical model is a core strategy of some anti-abortion groups.¹²⁸ Picketing abortion clinics is used as a way of opening a dialogue with women seeking medical care. The picketers try to communicate their understanding of the fetus, of the woman's plight, and of the alternatives she has, and some offer to aid her during her pregnancy.¹²⁹ In the exercise of their First Amendment rights, protestors may address speech to a clinic patient from the streets and sidewalks, and thereby can intrude on her interest in informational privacy and her right to be let alone.

Whatever privacy is left to a woman once the protestors have talked at her, seen her face, and possibly identified her car tags, the Supreme Court in *Casey* sought to protect. As the Court had done previously, the *Casey* plurality required that information that she supplies to the medical profession be kept confidential.¹³⁰ Thus *Casey* required that the decisional process not be structured in a way that would disclose her name to the public.¹³¹ A

¹²⁶ See *Akron*, 462 U.S. at 439-42 (judicial bypass); *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976) (spousal notice); *Roe*, 410 U.S. at 152-54 (privacy).

¹²⁷ *Planned Parenthood v. Casey*, 505 U.S. 833, 897, 899-900 (1992).

¹²⁸ See, e.g., FAYE GINSBURG, *CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY* 97-100 (1989) (describing the move towards this model by pro-life protestors in Fargo, North Dakota).

¹²⁹ See *id.*

¹³⁰ See *Casey*, 505 U.S. at 900 (citing *Danforth's* requirement that state recordkeeping and reporting provisions must properly respect a patient's privacy). Under the more relaxed undue burden test, *Casey* upheld additional medical record-keeping requirements without requiring a strong state justification for the information. *Id.* at 900-01. As such, it increased the risk that the patient's and the referring physician's names may be wrongfully disclosed. See Janet Benshoof, *Planned Parenthood v. Casey, The Impact of the New Undue Burden Standard on Reproductive Health Care*, 269 JAMA 2249, 2250, 2255 (1993). Nevertheless, it did so only in deference to the state's interest in promoting health. *Casey*, 505 U.S. at 900-01.

¹³¹ Greater availability of abortions in hospital settings would permit greater privacy to women seeking reproductive health services. Nonetheless, the Court has permitted states to prohibit public hospitals from performing nontherapeutic abortions. See Poelker

particular woman's abortion decision cannot be made into a public event enabling anyone in the community to address her on this subject. Indeed, said the Justices, the risk of a breach of privacy during a 24-hour waiting period is a factor a court must consider in determining whether, as applied, a waiting period is an undue burden.¹³² Thus, in creating a buffer zone, a California court has enjoined picketers from taking pictures of patients and their license tags.¹³³ The California court reasoned that a failure to enjoin

v. Doe, 432 U.S. 519 (1977) (per curiam). Such a prohibition denies the anonymous hospital setting to physicians wishing to avoid anti-abortion pickets outside clinics. The Court allowed this prohibition by analogizing the public hospital case to the subsidy cases, such as *Maher v. Roe*, 432 U.S. 464 (1977), in which the Court argued that the state's decision not to pay for abortions in no way interfered with the private choice guaranteed by *Roe*. *Id.* at 474. Nevertheless, this analogy fails to distinguish the state as payor from the state as competitor whose operation of a hospital burdens the private sector's ability to provide the same services. Chief Justice Rehnquist paid lip service to this concern when he suggested that judicial intervention might be appropriate where the state completely socialized private medicine, *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 510 n.8 (1989), but this is an unrealistically stringent test for whether the state has interfered with the market in hospital services, which is so heavily regulated and in which barriers to entry—both legal and capital—are so high.

The growing consolidation of hospitals, in which non-religious institutions have been purchased by religiously based institutions, has also reduced the number of hospitals providing abortion services (as well as an entire range of basic sex and reproduction-related medical services for women and men). See Tamar Lewin, *With Rise in Health Unit Mergers, Catholic Standards Face Challenge*, N.Y. TIMES, Mar. 8, 1995, at B7; Shari Roan, *When the Church and Medicine Clash*, L.A. TIMES, Feb. 2, 1995, at A1. Among other reasons, the non-economic and ideological or religious motivation of these restrictions may exempt them from antitrust and tort regulation of the "tying" contracts through which these hospitals deny physicians use of their facilities for the practice of abortion procedures.

¹³² *Casey*, 505 U.S. at 885.

¹³³ See *Planned Parenthood of Shasta-Diablo, Inc. v. Williams*, 16 Cal. Rptr. 2d 540 (Ct. App. 1993), *aff'd*, 873 P.2d 1224 (Cal.), *vacated*, 115 S. Ct. 413 (1994). For other injunction cases, see *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994); *American Life League, Inc. v. Reno*, 855 F. Supp. 137 (E.D. Va. 1994), *aff'd*, 47 F.3d 642 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995); *Pro-Choice Network v. Project Rescue W. N.Y.*, 799 F. Supp. 1417, 1426, 1437-39 (W.D.N.Y. 1992), *aff'd in part, rev'd in part*, 67 F.2d 359 (2d Cir. 1994), *vacated in part*, 67 F.3d 377 (2d Cir. 1995) (en banc), *cert. granted*, 116 S. Ct. 1260 (1996); *Feminist Women's Health Ctr. v. Blythe*, 39 Cal. Rptr. 2d 189, 195, 199 (Ct. App.), *cert. denied*, 116 S. Ct. 514 (1995); *Feminist Women's Health Ctr. v. Blythe*, 22 Cal. Rptr. 2d 184 (Ct. App. 1993), *vacated sub nom. Real v. Feminist Women's Health Ctr.*, 114 S. Ct. 2776 (1994); *Planned Parenthood League of Mass., Inc. v. Blake*, 631 N.E.2d 985 (Mass.), *cert. denied*, 115 S. Ct. 188 (1994); *Robbinsdale Clinic, P.A., v. Pro-Life Action Ministries*, 515 N.W.2d 88 (Minn. Ct. App. 1994); *Horizon Health Ctr. v. Felicissimo*, 622 A.2d 891 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 638 A.2d 1260 (N.J. 1994); *Kaplan v. Prolife Action League*, 431 S.E.2d 828 (N.C. Ct. App.), *appeal dismissed*, 436 S.E.2d 379 (N.C.

the picketers from privacy-invasive practices would itself undermine the exercise of the abortion right.¹³⁴

In guaranteeing privacy from anonymous others and prohibiting the state from structuring the abortion decision as a public event—unlike marriage, divorce, and birth, which are publicly recorded—the Court has decisively affirmed that a woman making a reproductive choice may exclude the community from having its say.

2. *Excluding the Husband*

There are, however, particular persons who may be especially appropriate participants in assisting the woman in making her choice. If anyone has formed a community of reproductive interest with a woman, it is her husband, (certainly more so than her lover, her own parents, or her religious community). Of all other persons, he most likely has knowledge of her reproductive history and her reproductive interests. He is most prepared to create with her the new circumstances that are conducive to raising a child. He will have legal, financial, and psychological responsibility for the child if it is born. He has the greatest communal interest in maintaining a reproductive unit with her.

Nevertheless, *Casey* reaffirmed that the state cannot structure the decisionmaking process so as to require that the husband be notified or participate in the abortion decision.¹³⁵ In response to the husband's claim, the plurality concluded that where the reproductive unit functions as a community, a pregnant woman can and does inform her husband. The state can do nothing to enhance it, not even by expressing its support. On the other hand, in those cases where the unit is not functioning as a community, the mandated communication will not likely enhance dialogical functioning. Indeed, the requirement will most likely cause things to go badly for the married woman because it enables the male to exercise coercive power over her—by physical violence against her, her children, or other relatives; by coercive sexual practices or emotionally coercive tactics; or by a threat to violate her interest in informational privacy by disclosing the abortion to others.¹³⁶ Such concerns about coercion would seem to require only a

1993), *cert. denied*, 114 S. Ct. 2783 (1994); *cf.* *People v. Belsan*, 625 N.E.2d 913 (Ill. Ct. App. 1993); *State v. Cozzens*, 490 N.W.2d 184 (Neb. 1992); *State v. Loce*, 630 A.2d 792 (N.J. Super. Ct. App. Div.), *appeal dismissed*, 636 A.2d 520 (N.J. 1993), *cert. denied*, 114 S. Ct. 1192 (1994).

¹³⁴ *Williams*, 16 Cal. Rptr. 2d, at 546-47.

¹³⁵ *See Casey*, 505 U.S. at 887-98. As a practical matter, this holding distinguished the joint opinion from the dissenting positions of Chief Justice Rehnquist and Justices Scalia and Thomas.

¹³⁶ *See id.* at 887-98. This point again demonstrates the importance of informational privacy to the Justices.

spousal notice statute with a far broader set of exceptions than Pennsylvania provided for cases of spousal abuse.¹³⁷ Nevertheless, the joint opinion did not invite legislatures to try again with a more adept classification.¹³⁸

Instead the joint opinion framed a more general objection. Because the marriage relationship in the eyes of the law involves equally autonomous adults, the state cannot subordinate the woman's autonomy to the man's: "A husband has no enforceable right to require a wife to advise him before she exercises her personal choices."¹³⁹ To do so would be to subject a woman to a paternal dominion: "A State may not give to a man the kind of dominion over his wife that parents exercise over their children."¹⁴⁰ Such a nineteenth century model of women in marriage would, in the plurality's view, be outmoded and inconsistent with the current understanding of equal rights under law.¹⁴¹ In effect, the Court simply rejected imposing on a competent adult woman a dialogical community with her husband, and *a fortiori* with any other party, be it genetic father, grandparent, or stranger.

This is not only a matter of gender equality. It also implicates the sharp division drawn by the law between public power and private interests. The fear of the private misappropriation of public power underlies the liberal principle that the state may not put its power in the hands of private persons who are unconstrained from pursuing their private ends.¹⁴² For example, in

¹³⁷ Following Glendon's description of the French model, a statute might require a woman to notify her husband unless she affirmed that notice would cause her "distress." See GLENDON, *supra* note 13, at 15-22. The Pennsylvania statute provided that a woman could avoid the notice requirement by certifying that her husband was not the father, that he could not be located, that the pregnancy resulted from a reported spousal assault, or that notification would cause him or another to inflict bodily injury upon her. *Casey*, 505 U.S. at 887.

¹³⁸ Broader exemptions would still compel, as a condition to receiving medical services, a woman to certify to a physician, and public officials reviewing the certification, matters that are extremely private. As the opinion notes, situations of abuse, especially sexual abuse, are matters about which women remain silent for years, even for a lifetime, coerced and shamed by their husband's violence. See *Casey*, 505 U.S. at 889-91 (noting district court's findings of fact); *id.* at 893 (observing that "[i]f anything in this field is certain, it is that victims of spousal sexual assault are extremely reluctant to report the abuse to the government"). Put differently, requiring a certification of his wrongdoing from a woman coerced and shamed into silence by her husband's violence communicates the state's view of her as subordinate to the husband.

¹³⁹ *Id.* at 898.

¹⁴⁰ *Id.*

¹⁴¹ See *id.* at 896-98. Again, in developing constitutional rules, the Supreme Court properly takes into account the background conditions of private coercion against or in which the state operates. See, e.g., Kenneth L. Karst, *Private Discrimination and Public Responsibility: Patterson in Context*, 1989 SUP. CT. REV. 1, 5-28.

¹⁴² This theme takes many forms in constitutional law. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1983); *Marsh v. Alabama*, 326 U.S. 501, 506-10 (1946); *Washington ex rel. Seattle Title & Trust Co. v. Roberge*, 278 U.S. 116, 120-

Danforth, the Court held that a spousal consent provision was invalid because the state could not delegate to the spouse a veto power which the state itself could not constitutionally exercise.¹⁴³ Without speaking of delegation, the joint opinion continued in the same vein by focusing on the potential for the husband to foist his private prejudice and interests on his wife through the misuse of the public trust that a notice or consent provision involves.¹⁴⁴ The Court's rejection of spousal notice confirmed that the dialogical model is inconsistent with its understanding of the right of privacy, the atomistic "right to be let alone."¹⁴⁵

3. *Minors and the Judicial Bypass*

Children are subject to the same, or worse, physical, emotional and sexual abuse as are wives. Nevertheless, that fact did not lead the joint opinion to spare children a father's or mother's involvement.¹⁴⁶ Rather, the Court reaffirmed parental notification and consent provisions, although it also provided for a judicial bypass procedure for minors who seek abortions.¹⁴⁷ Only with respect to minors has the Court affirmed the state's power to structure a dialogical process by which parents can seek to educate the child and to create the communal conditions under which a decision for abortion or for childbirth can be supported and integrated.

Consistent with their individualistic orientation, the Justices sometimes try to portray parents as constrained by the best interest standard or as enhancing their child's informed consent by aiding her cognitive processes.¹⁴⁸ Obviously, parents go far beyond assuring informed consent and act-

23 (1928) (holding as violative of the Due Process Clause a portion of a zoning ordinance making issuance of a building permit conditional on the approval of two-thirds of the other property owners in the affected area); *Eubanks v. City of Richmond*, 226 U.S. 137, 143-45 (1912) (holding that a city ordinance requiring authorities to restrict construction on any block upon the request of two-thirds of the property owners could allow the non-assenting property owners to be deprived of their property without due process). Cf. HANNAH ARENDT, *ON REVOLUTION* 256-57 (1963) (emphasizing public/private dichotomy).

¹⁴³ *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976).

¹⁴⁴ See *Casey*, 505 U.S. at 897-98.

¹⁴⁵ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

¹⁴⁶ See *Casey*, 505 U.S. at 899-90. Earlier, in *Hodgson*, the Court declined to distinguish minor consent provisions that require consent of both parents from those requiring consent of only one. See *Hodgson v. Minnesota*, 497 U.S. 417, 450-55 (1990).

¹⁴⁷ *Casey*, 505 U.S. at 899-90; *Hodgson*, 497 U.S. at 461 (O'Connor, J., concurring in part and concurring in judgment in part); see also *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Danforth*, 428 U.S. at 52; *Barnes v. Mississippi*, 992 F.2d 1335 (5th Cir.), cert. denied, 114 S. Ct. 468 (1993).

¹⁴⁸ See, e.g., *Matheson*, 450 U.S. at 422 (Stevens, J., concurring) (justifying provi-

ing in their child's "best interests." Rather, parents are enabled to engage in a far-ranging dialogical enterprise: of bringing to bear a range of values, promising to create new conditions for their shared familial home, educating their daughter in their conceptions of who she was and who she can and should become, and calling upon her not to estrange herself from her parents' conceptions of her.¹⁴⁹ The exercise of such dialogical influence is appropriate to the family enterprise of rearing children because the law—and liberal theory—recognizes that minors are not yet competent and autonomous adults and that they require such involvement to mature.

Even in the case of minors, however, the dominant values of individuality and autonomy, and the fear that power will be misused, leads the Court to restrict the dialogical approach. Because parents can and do bring to bear the same coercive pressures that husbands can place on wives, the Court has mandated that an effective and private judicial bypass procedure be available to allow a minor to circumvent her parents by obtaining a judge's consent to an abortion. Further, the Court has restricted the dialogical process in which judges—who are strangers to the child—can engage. It has directed a judge's attention to only two questions that for the most part return the procedure to the autonomy model of the previous section: (1) is the minor mature enough to understand the abortion procedure and reach the decision by herself under the narrow autonomy model; and (2) if not, is the decision in her best interest,¹⁵⁰ which may involve a substituted judgment standard—itsself powerful evidence of the primacy of the autonomy model.¹⁵¹

Studies of the judicial bypass procedure show a very high rate of judicial approval of minors' applications for abortion.¹⁵² For the most part,

sions, such as parental notice requirements, as "state efforts intended to ensure that the decision be wisely made").

¹⁴⁹ At least one court has correctly recognized that parental notice and consent requirements cannot factually be justified by an autonomy-based rationale, or by the paternalistic goal of enhancing the minor's decisionmaking by allowing the parents to bring their wise counsel to bear. *See American Academy of Pediatrics v. Lungren*, 32 Cal. Rptr. 2d 546, 559 (Ct. App. 1994), *review granted and superseded by* 882 P.2d 247 (Cal. 1994) (en banc), *rev'd*, No. S041459, 1996 WL 155984 (Cal. Apr. 4, 1996). In the case of abortion, parents simply are not constrained by the law to act in a way that furthers either the autonomy or best interests of the child, so long as they do not violate minimum standards precluding maltreatment.

¹⁵⁰ *See Akron Ctr. for Reprod. Health*, 497 U.S. at 511 (1990); *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (plurality); *see also City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 439-40 (1983), *overruled in part by Casey*, 505 U.S. at 833.

¹⁵¹ *See MASS. R. CT., Super. Court Standing Order 5-81*, ¶ 8.

¹⁵² *See, e.g., Hodgson v. Minnesota*, 648 F. Supp. 756, 767 (D. Minn. 1986) (noting that during a five-year period, 3573 petitions for abortion were granted, six were withdrawn, and nine were denied), *rev'd*, 853 F.2d 1452 (8th Cir. 1988) (en banc), *aff'd*, 497 U.S. 417 (1990); Robert H. Mnookin, *Bellotti v. Baird: A Hard Case, in IN THE INTEREST OF CHILDREN: ADVOCACY LAW REFORM, AND PUBLIC POLICY* 149, 239-40

judges accept simple evidence that the minor has the cognitive capacities of abstract reasoning, which generally mature around age fourteen. Therefore, judges tend to find that teens have the capacity under the narrow autonomy model to consent.¹⁵³ Alternatively, judges find that an abortion is in the minor's best interest, not a difficult finding for young adolescents often pregnant as a result of statutory rape or worse, and for whom there is general medical evidence that pregnancy is inimical to their growing bodies.¹⁵⁴ In addition, at least one study found that a number of anti-choice judges recused themselves from this process.¹⁵⁵

Interestingly, when a judge is given the opportunity to engage in a more substantive dialogue with a pregnant female, he appears to have nothing to say. At least if he does not believe abortion is murder, he seems to recognize that it is a matter about which others—certainly uninvolved strangers—have nothing of consequence to offer. Based on our legal understandings, it is a choice that does not involve him as a communal participant with the aborting woman.¹⁵⁶

In summary, the dialogical model is not what the joint opinion had in mind. The lowered scrutiny of *Casey* did not lead to any additional structuring of a dialogical process with the public or with a spouse; and the parental dialogue with minors had been permitted by *Roe*'s regime for over a decade. The prevailing liberal ideals of autonomy and privacy place off-limits such compelled conversations in which, it is feared, private prejudice and private coercion may exploit state power to gain authority over individual choice.

So what were the three Justices' goals when they revised *Roe*? What state regulation—in addition to requiring physicians to employ an enlarged notion of informed consent—did they seek to authorize? Put differently:

(Robert H. Mnookin ed., 1985); Anita J. Pliner & Suzanne Yates, *Psychological and Legal Issues in Minors' Rights to Abortion*, J. SOC. ISSUES, Fall 1992, at 203; cf. *In re Anonymous*, 515 So. 2d 1254 (Ala. Civ. App. 1987) (reversing finding of immaturity); *Juvenile H. v. Crabtree*, 833 S.W.2d 766 (Ark. 1992) (reversing juvenile court's enjoining minor from having an abortion).

¹⁵³ See, e.g., MNOOKIN, *supra* note 152, at 239-40.

¹⁵⁴ See *H.L. v. Matheson*, 450 U.S. 398, 439 n.25 (1981) (Marshall, J., dissenting); ADOLESCENT ABORTION: PSYCHOLOGICAL AND LEGAL ISSUES (Gary B. Melton ed., 1986).

¹⁵⁵ MNOOKIN, *supra* note 152, at 230.

¹⁵⁶ Before *Roe*, something similar happened in the case of physicians who practiced in jurisdictions that permitted abortion to protect the health of the woman. Kristin Luker offers the example of California, in which the reform statute of 1967 rapidly evolved into a regime of elective abortion within several years. Although physicians were permitted to provide abortion only for "health reasons," they nevertheless quickly came to define a woman's health in terms of her own choice. LUKER, *supra* note 26, at 94, 134.

under *Casey*, what can the state do to a woman that her husband can't? The answer is found in the model of government speech.

IV. THE GOVERNMENT SPEECH MODEL

Upon further reflection, our imagined Attorney General might retract his last set of arguments for mandating dialogical interactions with the pregnant woman in favor of a government speech model of state intervention:

"Perhaps we could accomplish some of what we aim for under the rubric of informed consent. But it would be disingenuous to claim that we only care about her autonomy. And to talk the language of a dialogical process in which a woman can discover her true self constituted in social dialogue has a foreign sound, even to citizens of my own state of brotherly and sisterly love. They do not want the state trying to nourish the conditions necessary for realizing their true selves.

"Rather, we agree with Mary Ann Glendon. We want to give voice to other values that many of our citizens hold regarding the sanctity of fetal life. We want to show concern for the life of the unborn. We want to persuade women not to follow their own preferences—what is called their convenience—but rather to behave in the way that we think is right.

"Ronald Dworkin rightly recognized that the state can take steps to express the sacredness of life; but he simply did not make out a successful argument that fostering autonomy is the road to implementing this reverence.¹⁵⁷ If because of *Roe* we cannot stop women from aborting, at least we can do our best through speech to persuade them to desist. We will deliver our message in schools, on radio, and on TV. But the citizens of Pennsylvania will not be satisfied unless they know that this message is expressed at the clinic to the woman who is about to abort.

"Our message will turn pregnant women against choosing to abort. Some will learn facts and change their minds. Other trusting souls may be deterred simply by the weight of the government's express opposition. Still, our deeper goal is to reshape societal values at large and, thereby, the internal values of our citizens. With new values will come new emo-

¹⁵⁷ RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 12-15, 25-26, 148-51, 150-59, 237-41 (1993).

tions.¹⁵⁸ Our citizens' own horror, shame, and guilt will eventually limit their resort to abortion. As a result, controversy will diminish concerning informed consent procedures that fully inform women of abortion's emotional harms, which our educational program increasingly will have induced."

These arguments are consistent with the *Casey*'s joint opinion:

What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.¹⁵⁹

Here we are face to face with Brandeis's "omnipresent teacher of us all."¹⁶⁰ Government speech may not suffer from those problems of speech within the dialogical process insofar as the representative political process filters out private prejudice and self-interest from the government's own communications. Government speech, however, is still a very potent force. Should this teacher be quieted and tamed? Does the Constitution limit the government's power to get its message across? Scholars have discerned few constitutional limits; but even these are more than the Court has been prepared to impose. So far, George Orwell has had more to say on this matter than the Justices. Nonetheless, some limits on unrestrained government speech may be discerned in *Casey*—limits that enjoy some buttressing from certain trends in First Amendment jurisprudence.

¹⁵⁸ See NANCY SCHEPER-HUGHES, *DEATH WITHOUT WEeping: THE VIOLENCE OF EVERYDAY LIFE IN BRAZIL* 400-45 (1992).

¹⁵⁹ *Planned Parenthood v. Casey*, 505 U.S. 833, 877-78 (1992) (citation omitted); see also *id.* at 869 ("permitting the state to show its concern for the life of the unborn").

¹⁶⁰ See *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (describing the state as the "omnipresent teacher" of us all, but in the context not of government speech, but of advocating government restraint, and that the government must obey its own law).

A. *Government Speech: Limits Under Casey*

As a general matter, four kinds of limits on a government's message may be identified: limits on its content, strength, location, and accuracy. Few such limitations may be found explicitly in *Casey*.

Non-Neutrality as to the Message's Content. In *Maher v. Roe*,¹⁶¹ the Court held that the state can fund childbirth, rather than abortion, in furtherance of its interest in protecting the potential life of the fetus. In so holding, the Court rejected one interpretation of *Roe*—that the state had to be neutral with respect to a woman's choice to abort or give birth. Rather, under *Maher*, the government may promote one or the other with its funding decisions. Accordingly, because the state may create monetary inducements for live birth or for abortion, it may also, under *Casey*, employ words that advocate one over the other.¹⁶²

Strength of the Message. Because the government may act strongly and effectively when it acts legitimately, it presumably can choose to communicate with evocative and compelling language rather than with boring public service sermons. As such, the government presumably may place, for example, powerful emotionally charged advertisements against abortion.¹⁶³

Location of the Message. May the government use its power to force its message into non-public settings not open to the speech of others? Specifically, does the state have a sufficiently significant interest to force delivery of its non-neutral message to the woman while she is engaged in the decisional process with her physician? *Roe* answered that it does not. Prior to viability, and absent a claim based on the state's interest in protecting her health or her autonomous choice, the state lacked sufficient interest in the fetus to interfere at the point of woman-physician interaction.¹⁶⁴ The *Casey* joint opinion jettisoned the trimester framework in substantial part because it wished to allow the state to present arguments at the physician's office in favor of childbirth that were extraneous to the woman's autonomy and her well-being.¹⁶⁵ Yet speech at the point of decision in the doctor's office may be particularly potent speech. *Casey*'s undue burden test necessarily establishes its own limits on the state's power to speak powerfully in this

¹⁶¹ 432 U.S. 464, 478-79 (1977).

¹⁶² See note 172 and accompanying text.

¹⁶³ Although the government may enter both the advertising market and the public forum as may any other speaker, presumably there are limits on the government's power to monopolize speech opportunities and to drown out others, or otherwise to accomplish what it cannot do through regulation.

¹⁶⁴ *Roe v. Wade*, 410 U.S. 113 (1973); see also *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), *overruled in part by Casey*, 505 U.S. at 833; *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983), *overruled in part by Casey*, 505 U.S. at 833.

¹⁶⁵ *Casey*, 505 U.S. at 872-76.

setting. Under this test, the state cannot try to dissuade a woman from having an abortion if it intends the message to be, or the message in fact is, a substantial obstacle.¹⁶⁶ A too powerful, intense, or overbearing message delivered with the intent or effect of overwhelming the woman's own deliberative powers would seem to be impermissible because it would undermine the woman as the ultimate decisionmaker.

The Message's Accuracy. A false message also would be out of bounds for the state, at least when delivered at the point of decision, for the state must employ a means "calculated to inform the woman's free choice, not hinder it."¹⁶⁷ Government deception at the point of decision constitutes a substantial obstacle to a woman's choice.

In sum, *Casey* would seem to adopt a standard permitting "persuasive but not too overwhelmingly persuasive non-false speech." This standard may be unsatisfyingly vague, but it is some advance on a general undue burden test.

B. *Government Speech: Other Constitutional Limits*

In applying this vague standard, doctrines concerning government speech derived from the First Amendment and other provisions and structural components of the Constitution may provide some additional guidance and support.¹⁶⁸ These doctrines are explored in the following four subsections: limits on content, captive audiences, targeting and equality, and physician speech rights.

¹⁶⁶ *Id.* at 874-79. A message that the pregnant woman should simply defer to the state's opposition to abortion should therefore be impermissible.

¹⁶⁷ *Id.* at 877.

¹⁶⁸ See MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS*, 17-19, 141-306 (1983); Janet Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 HARV. L. REV. 1916, 1931-33 (1988); Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 835-46 (1981); Theodore C. Hirt, *Why the Government Is Not Required to Subsidize Abortion Counseling and Referral*, 101 HARV. L. REV. 1895, 1904-15 (1988); Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104, 1105-19 (1979); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 617-22 (1980); Stephen L. Carter, *Technology, Democracy, and the Manipulation of Consent*, 93 YALE L.J. 581, 585 (1984) (reviewing YUDOF, *supra*); Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373, 377-79 (1983) (same); Steven Shiffrin, *Government Speech and the Falsification of Consent*, 96 HARV. L. REV. 1745, 1749 (1983) (same).

1. *Limits on Content*

The weakest set of judicially cognizable First Amendment claims involves potential limits on the content of government speech. Without intending to suggest that any have much doctrinal bite, the sections below briefly identify some arguments that might support a judicial restriction on the content of government speech.

Viewpoint Non-Neutrality. The requirement of viewpoint neutrality in government regulation of speech disappears when the government itself speaks. Obviously the government can sponsor ads that disfavor drug use—an illegal act—and ads that disfavor cigarette smoking—a legal act. With respect to children, the state can go “very far indeed”¹⁶⁹ in educating them by setting curricula and educational goals. The abortion-funding cases eliminated any doctrinal doubt as to whether the state has to remain viewpoint neutral in its speech: the state may speak favorably of childbirth and against abortion, and indeed, as Missouri did in the preamble of a statute, may declare that life begins at conception.¹⁷⁰ Yet one can imagine state speech that so violates the respect state officials owe the citizenry and their governing responsibilities that courts should intervene, but those limits have yet to be judicially identified.

The Special Case of Religious Viewpoints. Government speech involving religion is one of the few arenas in which neutrality clearly is mandated. The state is prohibited from endorsing or employing, at least in coercive or captive settings, religious arguments against abortion.¹⁷¹ Examples of such arguments include: be fruitful and multiply; we are formed in God’s image; our bodies are a gift to us for our use to His greater glory but not ours to do with as we wish; God disapproves of abortion; those who have abortions will rot in hell; or the returning Messiah is at risk of being aborted. Rather, the government is to speak in a secular tongue when it seeks to persuade women to adopt its views of the sacredness of life—even when clearly religious reasons are also available.¹⁷² Because *Casey*’s joint opinion de-

¹⁶⁹ *Meyers v. Nebraska*, 262 U.S. 390, 401 (1923).

¹⁷⁰ *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 511-13 (1989) (holding that plaintiff lacked standing to challenge a statutory declaration that lacked operative effect).

¹⁷¹ Even if Establishment Clause doctrine were diminished to an inquiry about coercion, requiring that religiously based messages be received at the abortion clinic as a condition of consulting with a physician should be deemed inappropriately coercive.

¹⁷² If the state were to create a limited purpose public forum by developing a pamphlet in which anyone in the community could author a message to pregnant women concerning abortion, such a forum might well have to be open to religious viewpoints. See *Rosenberger v. Rector of the Univ. of Va.*, 115 S. Ct. 417 (1994). It is doubtful, though, that the state has a public purpose sufficient to compel a physician to deliver such a pamphlet containing private messages and thereby convert her office into a limit-

scribed the abortion right as having its roots deep in a woman's conscience,¹⁷³ one may expect the Justices to be especially sensitive to the risks of religiously based government speech.

Equal Protection Values. Equal protection analysis of gender discrimination depends, in part, on the concept of stereotypes—at least those that are archaic, outmoded, and unfriendly.¹⁷⁴ On these grounds, one might try to challenge a state's secular appeals to women to fulfill their "natural" or "traditional" functions as mothers. Similarly, speech urging racial pride and the propagation of one's race, though technically race-neutral, should be deemed part of an invidious tradition.¹⁷⁵

False Speech. When the government speaks through its own distributional channels or purchases advertising time, an enforceable requirement of truth-telling is no doubt quite circumscribed.¹⁷⁶ (Even defamatory statements are immune from suit except in very limited circumstances.¹⁷⁷) Thus, if the President scheduled a White House address at which he showed portions of *Silent Scream*, no forum other than the political would be available in which to challenge its accuracy. Yet if a state legislature were to require that a physician show *Silent Scream* to her aborting, first trimester patients, could the physician or patient object on the ground that it was false and deceptive government speech? When the state requires others to convey its message, when it targets a message in a way calculated to induce reliance, or when it otherwise engages in situation-altering, autonomy-reducing statements,¹⁷⁸ the government more clearly steps outside the realm of discretionary government speech. One can imagine that courts would impose at least some prospective limits on purposefully deceptive statements. Even if courts, however, were to decline altogether to regulate the content of government speech that is directed at the public at large, one would expect judicial limits in the clinic setting where the pregnant woman is captive to the government's message.

ed purpose public forum.

¹⁷³ *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992).

¹⁷⁴ *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976).

¹⁷⁵ *Cf. Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting). The 19th century physicians' campaign against abortion expressly appealed to such concerns. *See* JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGIN AND EVOLUTION OF NATIONAL POLICY, 1800-1900*, at 166-68 (1978).

¹⁷⁶ YUDOF, *supra* note 168, at 135.

¹⁷⁷ *See Paul v. Davis*, 424 U.S. 693 (1976); *Barr v. Matteo*, 360 U.S. 564 (1959) (holding that an absolute privilege protects from common law defamation actions a government official's statements made within the "outer perimeter" of his office).

¹⁷⁸ *See* KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 57-63 (1989).

2. *Captive Audiences: Limits on Making Persons Listen*

Even a non-abusing husband can bring to bear a persistent, relentless, and all-pervasive message that can undermine a wife's capacity to close her ears and make up her own mind. In rejecting spousal notice, *Casey* protected the wife from becoming her husband's captive audience. Should the state's voice also be circumscribed so that it cannot gain unencumbered access to a woman at a key emotional moment by conditioning her access to an abortion upon her first listening to the state's anti-abortion message?

When the state delivers its message in mailings, leaflets, campaign speeches, or television commercials, the unwilling listener can walk away, turn the channel, or daydream. Pennsylvania requires that, as a precondition to performing an abortion, physicians must offer their patients a pamphlet containing state speech. Still, in not requiring that the patient read the pamphlet, the state protects a patient's right to avoid the mandated message, albeit to a lesser extent than with messages delivered in less compelling circumstances. If instead Pennsylvania were to condition access to an abortion on first receiving the message, such as by viewing a videotape or reading a pamphlet, clearly this would be a captive audience issue.¹⁷⁹ Although First Amendment doctrine may do little to fetter government speech in general, it does flag for special scrutiny government speech that exploits a listener's inability to avert her eyes and ears.¹⁸⁰

The Court has held that municipal bus systems (and presumably elevators in a government office building) may impose on riders music piped in from a local radio station.¹⁸¹ The blandness or brevity of such messages

¹⁷⁹ See *Planned Parenthood v. Miller*, 860 F. Supp. 1409, 1418-19 n.14 (D.S.D. 1994) (requiring that a woman view a state's persuasive brochure is unduly burdensome), *aff'd*, 63 F.3d 1452 (8th Cir. 1995); *cf.* *New York City Unemployed & Welfare Council v. Brezenoff*, 742 F.2d 718, 722 (2d Cir. 1984) (finding that welfare recipients are a captive audience at welfare office where checks are received); *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1021-22 (1st Cir. 1981) (pre-*Casey* finding that requiring that a woman to sign a consent form, which describes the stages of fetal development, is unduly burdensome); *Charles v. Carey*, 627 F.2d 772, 784 (7th Cir. 1980) (finding unduly burdensome a requirement that the physician who performs an abortion must also conduct an informed consent consultation for his patient), *appeal dismissed*, 476 U.S. 54 (1986); *Women's Medical Ctr. of Providence, Inc. v. Roberts*, 530 F. Supp. 1136, 1153-54 (D.R.I. 1982) (finding that requiring that a physician inform a patient of the existence of state materials that describe fetal characteristics is unduly burdensome); *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 585, 591-92 (Ohio Ct. App. 1993) (Petree, J., concurring in part and dissenting in part) (finding that requiring that a woman receive a consent form that describes fetal development is unduly burdensome), *dismissed*, 68 Ohio St. 3d 1420 (1993).

¹⁸⁰ See YUDOF, *supra* note 168, at 160-70, 296-98; Charles L. Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960 (1953).

¹⁸¹ *Public Utils. Comm'n v. Pollak*, 343 U.S. 451 (1952).

make the issue one of minimal consequence for many. The Court also has permitted the government to label a foreign movie, a Canadian pro-environmental film, as "propaganda," and, thus, to condition access to the movie upon first viewing the government's momentary comment upon the filmmaker's much longer communication.¹⁸² Determined to treat the label as brief and formulaic, the Court characterized "propaganda" as a technical word without any emotive or negative connotation in the circumstance of the case.¹⁸³ Furthermore, unlike the abortion message at the clinic, the potency of the government's message was further reduced because it was shown only after persons had exercised their right to see the movie by paying to enter the theater; the message was not aimed at having the substantial impact of dissuading an uncertain audience from attending at all.

By contrast, courts have allowed the government to exploit captive-audience opportunities with messages of substantial moment, duration, and impact, when the government communicates to groups over whom it has particular regulatory powers. Such groups include children in school, government employees at work, and soldiers in the armed services.¹⁸⁴ In these settings, the government's managerial interests over its own property and institutions have been deemed sufficient to justify its speech. Even with strong managerial concerns in schools, the Court has, of course, made the captive audience problem determinative in Establishment Clause cases in which the impact of school-sponsored religious messages requires their prohibition.¹⁸⁵

A state's abortion message imposed at the clinic cannot be saved from a captivity objection by invoking either a blandness exception or an exception for the government's managerial claims over its property or institutions. On the other hand, so long as the message is non-religious, the Court's government speech precedents do not clearly condemn such a clinic-focused message. The precedents simply fail to offer finer calibrations for evaluating such government speech.

The Court, however, has seriously regulated non-religious government speech in one set of cases involving the captive audience problem. These cases involve speech that constitutes interrogation of persons in custody.¹⁸⁶ The due process voluntariness and *Miranda* standards limit communication that seeks to dominate and control government captives, that overwhelms

¹⁸² *Meese v. Keene*, 481 U.S. 465 (1987).

¹⁸³ *Id.* at 484-85.

¹⁸⁴ Parents, however, ultimately can avoid the captive audience problem by paying for private schools, and workers can avoid the problem by not accepting government employment. At present, the armed forces are also voluntary.

¹⁸⁵ *See Lee v. Weisman*, 505 U.S. 577 (1992).

¹⁸⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966); *Rhode Island v. Innis*, 446 U.S. 291, 303 (1980); *see also* *Brewer v. Williams*, 430 U.S. 387 (1977); *Spano v. New York*, 360 U.S. 315 (1959).

their autonomous choices regarding their own speech, and that dissolves the private space between the individual and state that a liberal society recognizes and preserves. Several aspects of these cases are noteworthy.

First and foremost, the Court has allowed the auditor to quiet the state. Under *Miranda v. Arizona*,¹⁸⁷ the interrogator must, except in routine administrative matters and certain emergency situations, remain silent unless and until the captive listener consents to the persuasive speech.¹⁸⁸

This is linked to a second theme, the vulnerability of the captive. Because he lacks control over the length and intensity of the government's speech, the suspect seized for questioning is vulnerable to his state interlocutor. How should the woman's vulnerability at an abortion clinic be compared, if the state conditions her access to an abortion on her first listening to the government's message? If her lack of physical control over her body is occasioned not by an arrest but by a pregnancy rapidly developing from within, is the state more free to exploit this circumstance?

Moreover, the Court has shown as much concern with governmental appeals to conscience as with appeals to self-interest. Because "conscience does make cowards of us all,"¹⁸⁹ the Court has ruled out of line an officer's efforts to persuade the arrested suspect to "do the decent thing"—unless he first consents to being addressed by waiving his right to counsel and his right against self-incrimination.¹⁹⁰ These cases evince a mistrust of the police officer as moral spokesman for the community. The suspect may mistakenly view the officer as a friend, with advice that is disinterested and accurate, only to find that he was used instrumentally and then abandoned to an adversary system once he has confessed.¹⁹¹ The Court should also be concerned when the state exploits a physician's helping relationship to deliver a message that state aid is at hand; for if such a message cannot be justified under the autonomy model—and can be justified only as government speech—it is probably not aimed at helping the woman. The reality is that the baby who may be born is hers and hers alone, and no web of societal provision exists that will adequately supply the help she may need to rear her child and care for herself.

These specific themes reflect a more general theme in the due process voluntariness cases: the search for an elusive space between state pressure and the individual self in which free will can be said to hold sway. Invasion of this space dissolves that realm of personal privacy in which the independent self can act. This is a space that the Court has traditionally understood as characterizing a liberal and free society.

¹⁸⁷ 384 U.S. 436 (1966).

¹⁸⁸ *Id.* at 440.

¹⁸⁹ WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1.

¹⁹⁰ *Brewer*, 430 U.S. at 404 (Sixth Amendment case).

¹⁹¹ See *Spano v. New York*, 360 U.S. 315, 323 (1959).

Admittedly, an additional value of non-compelled incrimination centrally shaped the Court's inquiry in these criminal cases. Yet these same concerns should be considered when the state wedges its message into the privacy of the doctor-patient relationship, in a matter that involves a different fundamental right. Perhaps these concerns add no clear additional limit to *Casey's* insistence that the state must act to aid rather than to derogate from the woman's own decision, but they do at least suggest the kind of sensitive inquiry that a court ought to make in implementing *Casey's* standards. The length, intensity, and honesty of the message will be highly relevant. Appeals to conscience will not be exempt from regulation. Most important of all, in cases of non-routine messages that aim to persuade a woman not to exercise her right, the government may offer its message but may not require her to listen.¹⁹²

3. *Equality and Targeting*

One aspect of the captive audience problem has nothing to do with coercion: the inequality in burdens that results from targeting a message on captives. Delivering a message at the abortion clinic that also is delivered more generally is quite different from the government targeting its message only at the clinic's patients. Targeting the patients alone reduces the likeli-

¹⁹² An ambiguity in the joint opinion, *see supra* note 85, might lead some, incorrectly, to believe that the state's interest in expressing its view about the fetus (as distinct from its interest in protecting the woman's autonomy), justifies forcing its speech upon an unwilling listener through a mandatory 24-hour period of delay. Although the state may add its voice to that of others, and may under *Casey* even gain access to a private relationship to speak where the public cannot, it should not be able to force its message upon an unwilling auditor through a mandatory waiting period. Not only would such a delay greatly magnify the captive audience problem, it would impose serious adverse health effects and other costs upon the woman, *see supra* text accompanying notes 104-06, solely to further the government's interest in forcing its message upon her.

If a court were tempted to permit the government to go that far, it would then need to distinguish the varying strengths of the government's interests in its own messages, in as much as not every interest in a message should be deemed sufficient to justify a waiting period. For example, its interest in speaking to protect particular persons (for example, advising a divorced parent against remarrying in circumstances that will interfere with his support obligations to a child, *cf. Zablocki v. Redhail*, 434 U.S. 374 (1978)), may be greater than its interest in speaking on behalf of potential persons (such as fetuses or future generations), which in turn may be greater than its interest in protecting itself (as in speaking to encourage women to produce future soldiers and workers for the fatherland). Furthermore, requiring a physician to deliver a message that the fatherland prefers that women give birth to future workers and soldiers sounds fascistic. This in turn raises the possibility that not all state interests favoring childbirth equally justify requiring a physician to convey this preference. This interest in soldiers and workers may suffice to justify state funding of childbirth over abortion, *see Maher v. Roe*, 432 U.S. 464, 478 n.11 (1977), but not a state-sponsored message.

hood that political processes will subject the message to debate and control. To the extent that government speech spares the general public, it spares itself from political constraint.

In evaluating the justification for such targeting, one would need to balance efficiency against the resulting lack of political accountability. On one side is the presumed economy that comes from targeting the affected population at the moment when its members have focused attention on the subject of the speech. Money is not wasted in addressing irrelevant persons, and the message has its maximum impact by virtue of its salience to the listener. Thus, cigarette packs and not candy bars warn of the risks of smoking. In *Meese v. Keene*,¹⁹³ the government did not engage in general education programs for the cinema-going public; rather, only those foreign movies deemed to be "political propaganda" carried the warning. In the abortion context, however, one might well doubt the claim of efficiency.¹⁹⁴ If the anti-abortion message is to be effective, it must be delivered at a time before men and women make their contraceptive-abstinence choices so that reliance on abortion as a back-up can, in some circumstances, be minimized.¹⁹⁵ Delivering the message only after conception is too late.

Even if it were efficient,¹⁹⁶ targeting the clinic forces only one subclass—pregnant women seeking abortion—to hear and bear the burden of the message. Although represented in court by well-organized lawyers, this group's members, by virtue of their situation, are politically vulnerable in their ability to contest more egregious elements in such messages. More broadly delivered anti-abortion messages might arouse popular opposition. Certainly, less-sequestered government speech campaigns aimed at encouraging safe sex among students have elicited deep controversy and as a result have been altered.¹⁹⁷ Government speech about cigarettes also offers instruction: not limited to cigarette packages, it is widespread enough to reach

¹⁹³ 481 U.S. 465 (1987).

¹⁹⁴ *Id.* at 470.

¹⁹⁵ Making the message generally available, as in a broader distribution of brochures, would also eliminate the two-visit requirement in the informed consent process for those women who could certify that they had access to the brochure prior to the abortion. Of course, even conscientious contraceptive use or efforts at abstinence will not eliminate the need for all abortions. Our contraceptive technologies are far from perfect, circumstances arise after conception that lead women to abort, and much sexual activity leading to conception is coercive.

¹⁹⁶ The issue is not only one of efficiency but of meaning. The act of targeting the message only on pregnant women seeking abortions is itself an additional message that informs women that the government shows diminished regard for their control over their reproductive lives. By contrast, a pre-conception message opposed to abortion—one delivered generally to women and men—expresses some respect for women's autonomous choices over their reproductive and sexual lives.

¹⁹⁷ See, e.g., Rick Badie, *On Sex Education Most Candidates Support the Status Quo*, ORLANDO SENTINEL, Aug. 13, 1994, at 1.

nonsmokers as well as smokers, allowing all to judge the appropriateness of the message.

How efficiency concerns are to be balanced against reduced political accountability concerns is certainly an open question under the amorphous calculus that a court brings to bear on government speech issues. In interpreting *Casey*, however, it should be kept in mind that federal courts have long acted to ensure that an otherwise problematic statute defines its affected class sufficiently broadly to ensure effective political accountability.¹⁹⁸

4. *Physicians' Speech Rights: Having the Last Word*

After *Casey* cleared the way for Pennsylvania's abortion statute to go into effect, a Pennsylvania Planned Parenthood clinic in Allentown distributed, as required, a state-prepared brochure on fetal development. The clinic, however, stamped on each pamphlet: "This material was prepared by the Pennsylvania Department of Health. It contains some biased and inaccurate information and is not endorsed by the Allentown Women's Center."¹⁹⁹

May the physician thus undermine the government's message, or can Pennsylvania forbid physicians from engaging in such speech?²⁰⁰ Furthermore, if negative experience with this brochure accumulates, may a physician again challenge the entire brochure (and the statute as applied) on the ground that it substantially distorts her professional communications with her patient? In other words, do the free speech rights of physicians as members of a learned profession further restrict the power of the state to speak effectively and powerfully to women at the point of decision?

Several opinions, including the *Casey* joint opinion, impliedly have rejected such a general claim for professional speech rights, and, it seems, so might prevailing First Amendment doctrine.²⁰¹ Such a free speech analysis would presumably minimize the protected status of a physician's speech by characterizing it as non-public speech: on a subject not of public or general interest, addressed to a single person in a confidential relationship.²⁰²

¹⁹⁸ See *Kassell v. Consolidated Freightways Corp.*, 450 U.S. 662, 676-77 (1981) (plurality opinion); *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring); *South Carolina Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 187 (1938); *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 333 (1819).

¹⁹⁹ *Abortion Clinics Struggle with New Pennsylvania Law*, BOSTON GLOBE, Mar. 26, 1994, at 7.

²⁰⁰ The physician's speech is, of course, subject to malpractice limitations that the physician's statements not be harmful or below standard practice.

²⁰¹ See *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion), *Whalen v. Roe*, 429 U.S. 589, 604 (1977); see also *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 802 (1986) (White, J., dissenting), *overruled in part by Casey*, 505 U.S. at 833.

²⁰² See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761-

Furthermore, as Justice White has argued, such speech occurs within a commercial relationship subject to broad regulatory powers, reviewable under the lowest level of scrutiny.²⁰³ Although the particular facts of *Casey* did not require a careful examination of this issue, the joint opinion seemed drawn to such an analysis: "To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State."²⁰⁴ Thus, in both religious and non-religious matters, the state generally may not compel an individual to adhere to a doctrinal orthodoxy and engage in prescribed speech, be it a mandatory flag salute or carrying "Live Free or Die" on a license plate.²⁰⁵ Nevertheless, 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.

Finally, to the extent the physician is employed in a public facility or with public dollars, the scope of her speech possibly may be further curtailed under *Rust v. Sullivan*,²⁰⁶ by the government's decision not to pay her to speak about the state's brochure or other abortion-related matters.

It is the task of this section to sketch a counterargument: that *Casey* and current First Amendment doctrine have underestimated the substantial individual and societal interests in the physician's free speech. Such interests should preclude the wholesale regulation of physician speech and should limit the state's own speech inside the patient-physician relationship. Indeed,

63 (1985) (plurality opinion); *Connick v. Myers*, 461 U.S. 138, 143-49 (1983).

²⁰³ See *Thornburgh*, 476 U.S. at 802-03 (White, J., dissenting) (noting that "nothing in the Constitution indicates a preference for the liberty of doctors over that of lawyers, accountants, bakers, or brickmakers").

²⁰⁴ *Casey*, 505 U.S. at 884 (citation omitted); see also *Thornburgh*, 476 U.S. at 830 (O'Connor, J., dissenting) (recognizing that requiring a physician to inform a woman of state sponsored materials "may create some possibility that the physician or counselor is being required to 'communicate [the state's] ideology'" (alteration in original)).

²⁰⁵ See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that an individual may not be prosecuted for declining for religious reasons to display state motto on state's license plate); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that a regulation that compels students to salute the American flag invades their First Amendment rights); see also *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 514-19 (1991) (outlining the constitutionally permitted standards within which a state may require that public employees contribute fees to a union); *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795-801 (1988) (holding that a state may not compel professional fundraisers to disclose to potential donors, prior to an appeal for funds, the percentage of contributions collected during the previous year that were actually turned over to charity); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) (holding that a requirement that local government employees contribute fees to union for political activities infringes the employees' First Amendment rights).

²⁰⁶ 500 U.S. 173 (1991).

Rust implicitly recognizes this argument, despite the specific holding of that case.²⁰⁷ This counterargument will first lay a lengthy, if sketchy, foundation about the nature of professions, and then address the specific questions raised above in connection with the Pennsylvania statute. Finally, the counterargument will consider *Rust*.

Developing this argument is important for several reasons. *Casey*'s focus on government speech at the point of service delivery will require courts to consider this important issue more extensively if states accept the joint opinion's invitation to regulate in this manner. Moreover, the speech rights of the learned professions were the proper doctrinal foundation for the holdings in *Thornburgh* and *Akron* that a state cannot wedge its distorting message into the privacy of the doctor-patient relationship and thereby alter, for the state's ends, the doctor and patient exchange.²⁰⁸ By locating the basis for this holding primarily in the privacy rights of the woman, these cases missed a firmer anchoring in the free speech interests of patient, physician, and society. Perhaps as a result of this doctrinal mislocation, the joint opinion in *Casey* too easily overruled this aspect of *Thornburgh* and *Akron*.

Finally, as a non-constitutional matter, the pressure for health care reform and the changing market in health services are focusing attention on the speech of professionals who are increasingly becoming government, corporate, and partnership employees. As physicians' *practices as employees* become subject to increasing constraints,²⁰⁹ their *speech as professionals*

²⁰⁷ *Id.* at 200; see also *infra* part IV.B.4.d. For other discussions of the speech rights of physicians, see Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Disclosure and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201 (1994); Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of Rust v. Sullivan and Planned Parenthood v. Casey*, 95 COLUM. L. REV. 1724 (1995); cf. *Meyer v. Massachusetts Eye & Ear Infirmary*, 330 F. Supp. 1328 (D. Mass. 1971).

²⁰⁸ See *supra* note 192.

²⁰⁹ This problem has just started to get national attention. See Rachel Kreier, *N.Y. Suit Fights Increasingly Common HMO Gag Rules*, AM. MED. NEWS, Dec. 11, 1995, at 8; Robert Pear, *Doctors Say H.M.O.s Limit What They Can Tell Patients*, N.Y. TIMES, Dec. 20, 1995, at A1; see also *U.S. Healthcare to End Limits on Doctors' Advice to Patients*, N.Y. TIMES, Feb. 6, 1996, at D2.

For one example of an HMO speech restraint, consider the following provision in a hypothetical contract between an HMO and its physician:

Philosophy

- a. Each physician must be supportive of the philosophy and concept of [the HMO]
- b. Physician shall agree not to take any action or make any communication which undermines or could undermine the confidence of enrollees, potential enrollees, their employers, their unions or the public in [the HMO] or the quality of [its] coverage.

The contract also provides that the physician agrees not to disclose the content of the

ought to remain substantially unfettered by their employers. In particular, physicians will need to inform patients of the inadequate medical treatment that health systems may be providing to them. For example, when health care systems do not offer diagnostic tests to various classes of patients, physicians must be free, without retribution, to advise their patients that they are being denied appropriate care. In turn, interactions must be free enough so that physicians will learn from patients about their interests so as to inform increasingly bureaucratic health care systems of appropriate reform.

a. *The First Amendment Protects Structures of Knowledge*

As a first step in the argument for professional speech rights, it is important to recall that the First Amendment presupposes and protects a number of institutional arrangements that facilitate the generation and diffusion of knowledge to promote individual and societal well-being and community self-governance. In identifying these several institutional arrangements that deserve First Amendment protection, I mean something more than the recent calls for sensitivity to the institutional contexts in which speech occurs, such as the Court's announcement: "We deal here with the law of bill-

agreement "to any third party, except to federal, state and local governmental authorities having jurisdiction."

A state ought to decline to enforce such a contract provision that limits physician speech to patients. The state should also decline to shield HMOs from tort actions by physicians who suffer adverse employment consequences for their professional speech. The hard constitutional question is whether the First Amendment *requires* a state to shape common law tort and contract rules to protect speech. *Compare* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) *with* Snapp v. United States, 444 U.S. 507 (1980).

For a discussion of private employee speech rights, see generally DAVID W. EWING, FREEDOM INSIDE THE ORGANIZATION: BRINGING CIVIL LIBERTIES TO THE WORKPLACE 101 (1977); Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L.J. 341 (1994); Charles A. Edwards, *Protection of the Complaining Employee: How Much is Too Much?*, 6 EMPLOYEE REL. L.J. 207 (1980); Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921 (1992); Ann M. Gill, *Public Concern and Public Policy: Freedom of Speech in the Workplace*, 28 FREE SPEECH Y.B. 93 (1990); Orlan Lee, *Freedom of Speech vs. Loyalty to the Firm and Co-workers*, 16 N.Y.U. J. INT'L L. & POL. 45 (1983); Staughton Lynd, *Employee Speech in the Private and Public Workplace: Two Doctrines or One?*, 1 INDUS. REL. L.J. 711 (1977); Jane A. Villemez, *The First Amendment and the Law Enforcement Agency: Protecting the Employee Who Blows the Whistle*, 18 LAND & WATER L. REV. 789 (1983); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992); Charles Glick, Note, *Free Speech, the Private Employee, and State Constitutions*, 91 YALE L.J. 522 (1982); George E. Stevens, Comment, *Freedom of Speech in Private Employment: Overcoming the "State Action" Problem: Rozier v. St. Mary's Hosp.*, 20 AM. BUS. L.J. 102 (1982).

boards."²¹⁰ Such sensitivity usually refers to the application of general marketplace principles to various settings with special attention in each setting to differences in the countervailing state interests, the administrability of doctrinal rules, and the alternative avenues of communication. Here my focus is on the different *institutions of knowledge* that have developed in our society and the different principles of organization that they have adopted for their knowledge practices. Although some of these institutions of knowledge provide for individual participation by any would-be speaker in a non-hierarchical setting and without *a priori* criteria for the acceptability of their speech, others do not.

The non-hierarchical institutions include two overlapping ones: the marketplace of ideas and the domain of public discourse.

Marketplace of Ideas. The dominant doctrinal description of the institution that produces and disseminates knowledge is, of course, the free market.²¹¹ In it ideas compete unencumbered by regulation, entry into the arena of communication is open to anyone with a voice (be it a pen, a mimeograph machine, or a modem); and the system of unfettered competition identifies the most popular, accurate, or useful ideas. Maximizing knowledge and information justifies this institutional arrangement.

Public Discourse. Meiklejohn identified a second institution, the domain of speech involved in democratic self-governance.²¹² Through such speech, decisions are made collectively. This domain involves openness to ideas on the public agenda, subject to impartial restraints of time, manner, and place. The speaker is for the most part presumed to be an individual citizen, or a corporate speaker that is treated as an individual. In an important contribution, Robert Post has begun to map the Court's concept of a domain of public discourse—more inclusive than Meiklejohn's—through which collective self-definition is achieved.²¹³ Distinguishing public dis-

²¹⁰ *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion).

For calls for greater institutional sensitivity, see, e.g., Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1 (1990); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

For examples of the institutional analyses urged here, see Robert M. O'Neil, *Libraries, Liberties and the First Amendment*, 42 U. CIN. L. REV. 209 (1973); David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (1990).

²¹¹ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For critiques of the market metaphor, see C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 6-24 (1989); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 48-50; Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 595-65 (1995).

²¹² See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1945); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (1960).

²¹³ ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MAN-*

course from other forms of more regulated speech in everyday life and from arenas subject to the instrumental rationality or "managerial" authority of the state, he has mapped the domain of public discourse not only physically in various fora but also in various cultural practices. This domain assumes conditions of free entry into the speech process and the absence of any *a priori* criteria or agenda for judging the acceptability of ideas or speakers. Self-definition and self-governance justify the freedoms of this regime.

There are, however, other institutions and other principles by which our free and democratic society produces, organizes, and disseminates knowledge and ideas. Some of these institutions are essential to a *democratic* society, serving to inform citizens in matters of public concern and to build the democratic character of the citizenry. Other institutions are essential to a *liberal* society, providing knowledge that enhances the enjoyment of fundamental liberties and the autonomous choices that serve individual well-being. Among these are institutions that are organized hierarchically, exclusively, through the exercise of power, and with *a priori* criteria for the acceptability of speech. The First Amendment protects such institutions as well—some explicitly, some implicitly:

Clergy. The Constitution specifically protects the organization of the clergy through the religion clauses.²¹⁴ It protects the power of different denominations to organize their clergy as they see fit; to establish training institutions with standards of admission, of progression, and of graduation; and to set standards of knowledge through governing boards, journals, and educational institutions. Thus, it should not be open to the legislature to impose principles of academic freedom on theological seminaries. The California legislature recently extended to students free speech rights vis-à-vis private educational institutions.²¹⁵ Even if this were constitutional,²¹⁶ the act does not and could not extend those rights to the faculties of religious institutions training the clergy. The First Amendment prevents a legislature from determining that a religious institution has an academic mission of free inquiry that precludes it from censoring a faculty member. Rather, clerical institutions may develop their own method of furthering their understanding of religious knowledge.²¹⁷ Accordingly, a hypothetical academic in a Cath-

AGEMENT (1995).

²¹⁴ U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

²¹⁵ CAL. EDUC. CODE §§ 48950 (West 1993), 94367 (West Supp. 1996).

²¹⁶ Professor Eule forcefully argues that it is not constitutional. See Julian N. Eule, Prescribing the Orthodoxy of the First Amendment: With Every Wish There Comes a Curse (unpublished manuscript on file with author).

²¹⁷ See generally Charles E. Curran, *Academic Freedom and Catholic Universities*, 66 TEX. L. REV. 1441 (1988); Douglas Laycock & Susan E. Waelbroeck, *Academic Freedom and the Free Exercise of Religion*, 66 TEX. L. REV. 1455 (1988); Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 LAW &

olic university who was disciplined by the school for his dissenting speech favoring abortion rights should have no free speech claim.²¹⁸

Press. The Constitution not only guarantees the speech rights of individuals but specifically identifies rights of institutions identified as the "press," such as newspapers and book publishers, that develop, organize, and disseminate information and ideas.²¹⁹ This institutional focus protects the hierarchical organization of the press from substantial interference with the non-false messages that the owners of that press choose to deliver. For example, imagine, contrary to fact, that Congress concluded that the growing concentration of media power and the homogenization of media opinion required not just far more aggressive antitrust and FCC regulation, but also a prohibition on discrimination in hiring and firing of reporters based on their ideas. Accordingly, suppose it amended Title VII of the Civil Rights Act of 1964 to forbid employment discrimination for political beliefs.²²⁰ Presumably, a court would have to think long and hard before it would apply this law to the press in favor of a reporter who was fired because of the excellence of her investigative reports that were inconsistent with the paper's political stance. A statute preventing an editor from censoring a reporter's writing would be immediately dispatched. Indeed, the Court has already struck down a requirement that newspapers open their letters to the editor columns

CONTEMP. PROBS. 303 (1990). The American Association of University Professors, however, need not respect such choices by religious institutions.

²¹⁸ See RABBAN, *supra* note 210, at 269 n.196 (citing *Curran v. Catholic Univ. of Am.*, No. 1562-87 (D.C. Super. Ct. Feb. 28, 1989)). The fired professor might have a contract claim, based on specific prior promises, but presumably enforceable only through damages and not specific performance.

²¹⁹ Certainly the holding of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is based in part on special institutional considerations of the press with respect to difficulties in fact-checking and sales across multiple jurisdictions.

Sometimes the Court has resisted explicitly recognizing the special status of the press with respect to free speech rights. *See, e.g.,* *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (affirming recovery for a newspaper's breach of a promise of confidentiality); *Leathers v. Medlock*, 499 U.S. 439 (1991) (upholding a state's extension of sales tax to cable television services while exempting print media); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (holding that a trial cannot be closed to the press because the general public's right to attend trials is implicit in the First Amendment); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (upholding the prohibition on personal interviews between the media and inmates). The Court, however, has also evidenced special concern for the press's constitutional status. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of the Revenue*, 460 U.S. 575 (1983) (holding that a special use tax on paper and ink products used for publications violates the First Amendment guarantee of freedom of the press). *See generally* C. Edwin Baker, *Press Rights and Government Power to Structure the Press*, 34 U. MIAMI L. REV. 819 (1980).

²²⁰ *Cf.* CAL. LABOR CODE § 1101 (West 1996) ("No employer shall . . . enforce any policy: (a) Forbidding . . . employees from engaging . . . in politics . . . [or] (b) . . . tending to control . . . the political activities or affiliations of employees.").

to officials exercising a “right of reply” to criticism, and a rule against editorializing imposed on recipients of public broadcasting funds.²²¹

Attorneys. Like the learned profession of the clergy, the learned profession of lawyers also enjoys some special rights in speaking—at least in speaking with clients. These rights derive in part from the client’s Sixth Amendment guarantee of effective representation and the Due Process Clause’s protection of a fair hearing. In addition, the First Amendment equally preserves the right of the attorney to proffer advice.²²² For example, imagine that a state forbade criminal defense attorneys admitted to jailhouse interviews from counseling criminal defendants about possible civil actions that they could bring against the police or the prison authorities. Because procedural rules can preclude such suits until the termination of the criminal prosecution,²²³ legal advice concerning the civil suit might be unnecessary for an effective Sixth Amendment defense. Nonetheless, such a prohibition would run afoul of the legal profession’s own conception of legal representation.²²⁴ That professional conception deserves a court’s respect as it evaluates a lawyer’s First Amendment challenge to such a prohibition.

University. The Court has long recognized the doctrine of academic freedom,²²⁵ although it is not specifically mentioned in the First Amendment. This doctrine affords some protection for the right of the individual professor, teacher, and student in a public university to speak her mind within and outside the classroom. The doctrine, however, also protects the institutional autonomy of the university to make academic decisions governing teachers and students. The university may develop standards “to determine for itself on academic grounds who may teach, what may be taught, how it shall be

²²¹ See *FCC v. League of Women Voters*, 468 U.S. 364, 397-99 (1984); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

²²² See *Railroad Trainmen v. Virginia Bar Ass’n*, 377 U.S. 1, 7-8 (1964); *NAACP v. Button*, 371 U.S. 415, 428-30 (1963) (noting that “litigation is thus a form of political expression”); *In re New Hampshire Disabilities Rights Ctr.*, 541 A.2d 208, 213 (N.H. 1988) (affirming right of nonprofit corporations to advocate the enforcement of legal rights); cf. *Gentile v. Nevada*, 501 U.S. 1030, 1065-75 (1991) (reviewing restriction on attorney’s extra-judicial speech during pending prosecution); *Student Gov’t Ass’n v. Board of Trustees*, 868 F.2d 473, 476-78 (1st Cir. 1989) (upholding termination of legal services for students); *Westchester Legal Servs. v. County of Westchester*, 607 F. Supp. 1379, 1382 (S.D.N.Y. 1985) (prohibiting firing); *Northern Pa. Legal Servs. v. County of Lackawanna*, 513 F. Supp. 678, 683 (M.D. Pa. 1981) (same).

²²³ See *Preiser v. Rodriguez*, 411 U.S. 475 (1973). For other hypotheticals related to *Rust*, see William W. Van Alstyne, *Second Thoughts on Rust v. Sullivan and the First Amendment*, 9 CONST. COMMENTARY 5, 7 (1992) (hypothetical offered by Dean Stone).

²²⁴ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1994).

²²⁵ See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (holding that state inquiry into a professor’s political convictions and the contents of his lectures invades a professor’s liberty of academic freedom and political expression).

taught, and who may be admitted to study."²²⁶ An analogous protection for public libraries has also been crafted.²²⁷

Medicine. The learned profession of medicine should enjoy professional speech rights as well. In league with clergy and lawyers, physicians formed the historical basis of the university,²²⁸ which now enjoys First Amendment protection in addition to and independent of protections enjoyed by the clergy and the bar. The lack of explicit constitutional recognition of the medical profession should not preclude judicial recognition of physician speech rights, based on that profession's important contribution to societal and individual interests in knowledge.

b. *The Nature of the Learned Professions*

Some narrowly focused economists see professions as simply rent-seeking cartels, employing the regulatory power of the state to enhance their economic power.²²⁹ Others with a more Weberian conception properly identify a broader range of status attributes.²³⁰ Certain sociologists and feminists focus instead on the profession's elite hegemonic domination over life and discourse as they control, in the service of the powers that be, our thought and behavior regarding important life functions, including access to God, to justice, and to health.

²²⁶ *Id.* at 263 (Frankfurter, J., concurring); *see also* *State v. Schmid*, 423 A.2d 615, 631 (1980), *appeal dismissed as moot*, 455 U.S. 100 (1982); *cf.* *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (observing that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge"). *See generally* *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *id.* at 277 (Stevens, J., concurring); *Board of Regents v. Bakke*, 438 U.S. 265, 312 (1978); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 507 (1969).

²²⁷ *See* *Board of Educ. v. Pico*, 457 U.S. 853, 871-72 (1982) (holding that the First Amendment limits the power of a local school board to remove library books from high school and junior high school libraries for impermissible content-based reasons); *American Council of the Blind v. Boorstin*, 644 F. Supp. 811 (D.D.C. 1986); *see also* Mark Yudof, *Library Book Selection and the Public Schools: The Quest for the Archimedean Point*, 59 *INDIANA L.J.* 529 (1984). *See generally* O'Neil, *supra* note 210, at 209.

The focus of this Article's argument is on the traditional learned professions of clergy, law, and medicine that formed the basis of the university. But the argument applies to ancillary professions as well, such as librarians who are essential to the functioning of the university and other professions. In fact, the argument applies to any practice involving specially trained persons who are governed by a code establishing a commitment to a realm of knowledge and its application.

²²⁸ RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 3-11 (1955).

²²⁹ ELIOT FREIDSON, *PROFESSIONALISM REBORN: THEORY, PROPHECY, AND POLICY* 13 (1994).

²³⁰ ELIOT FREIDSON, *PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE* 7-19 (1986).

These various positions, however, are partial or distorted as other theorists have argued. For example, one of the current leading theorists of professions, Eliot Freidson, defines a profession in terms of its status and its power to restrict the market in the services it provides; but he also understands that a *profession is a social organization of knowledge*.²³¹ Through the exercise of a professions's hierarchical and hegemonic power, knowledge is developed, organized, preserved, passed on to the next generation, and made available and applied to society and the individual. Accordingly, a theory of the professions and a theory of the First Amendment are inseparable.

One can distinguish two forms of professional knowledge and associated organizational practices: systematic formal knowledge and knowledge applied to a case.

i. *Systematic Formal Knowledge*

With their power, professions define *what* is in the corpus of the profession's knowledge: they determine what knowledge and skills their members are taught in school in order to graduate; what they must know to pass a professionally administered qualifying exam for each level of professional competence; what they must acquire through continuing education programs; and what knowledge they must possess to withstand malpractice actions. A profession's control over knowledge extends to the certification of training schools, the operation of libraries and the concomitant organization of cataloguing and data retrieval systems, the publication of textbooks and peer review journals, and the holding of annual meetings. In addition, professions affect the development of new knowledge through research, by direct funding decisions, and by influencing funding sources through advisory boards. Professions also regulate *who* possesses knowledge by controlling admission into professional training schools as well as into the profession itself, and by exercising their power to discipline members who fall below professional standards of practice.

ii. *Knowledge Applied to a Case*

Professionals may develop knowledge by following the logic of their field or their own idiosyncratic interests. As with academics, they may transmit knowledge to the public by entry into the common market of lectures, articles, and books. An additional very powerful institution exists within

²³¹ See ELIOT FREIDSON, *PROFESSIONAL DOMINANCE: THE SOCIAL STRUCTURE OF MEDICAL CARE* (1970); FREIDSON, *supra* note 229; FREIDSON, *supra* note 230; *see also* ANDREW D. ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (1988) (emphasizing jurisdiction and jurisdictional disputes regarding professional control of a problem); STEPHEN G. BRINT, *IN AN AGE OF EXPERTS: THE CHANGING ROLES OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE* (1994).

certain professions for the transmission of existing knowledge to lay persons and for the generation of new knowledge in the field. This institution, of great moment to individual lives, is "the case."

In handling a case, a professional does not speak generally into an open domain of a free market or of public discourse, but to a single person in confidence. The professional brings general knowledge to bear on the unique circumstances of a particular client in the context of a professional helping relationship. The special relationship is employed in part so that the client will speak freely because confidentiality and interest are promised and hope elicited. As a result of this confidential exchange, knowledge more accurately can be brought to bear for the client's benefit. The case is also necessary because the profession's formal knowledge is complex but partial, and the individual requires more than access to a library to enjoy its benefits: a trained professional, informed by education, practical wisdom, experience, and empathy, is required to bring the general to bear on the particular, on the client's needs.

Through the case, a professional also develops knowledge, in the sense that a specific application of general knowledge always involves elaboration and specification. Further, in a case she can test the professions's general knowledge; and she stands ready to refine or alter it, on behalf of the profession and society, through a "case report" in a professional journal. Such testing serves not only to refine existing knowledge; the case is also an essential setting for the profession's testing of hypotheses and generation of new ideas and research programs. Thus, at its best, the case involves a two-way exchange between the profession's general knowledge and an individual's particular needs.

In a case, the speech interests of the professional, in transmitting and developing knowledge, meet up with the liberty interests of the client being served.²³² These liberty interests are not amorphous and unspecified. The speech rights of the clergy join the free exercise rights of the parishioner.

²³² First Amendment theory may be divided between those who believe that the Constitution's protection of speech serves individual autonomy or identity versus those who see it as protecting communal governance or social utility arising from the maximization of knowledge. The argument here draws on each of these justifications. Nevertheless, its autonomy focus involves not individual expression, but individual access to knowledge that enhances well-being. Although the distinction, drawn by the social utility and democratic consent theorists, between public discourse and private speech is not relevant here, all speech is not equally important. Heightened protection is afforded to speech that furthers the bringing of knowledge to bear on important autonomy interests, especially in the areas of religion, justice, and health.

It may also be noted that Justice Scalia has suggested that when First Amendment guarantees operate "in conjunction" with other constitutional guarantees of rights, heightened protection may be warranted. See *Employment Div. v. Smith*, 494 U.S. 872, 881-82 (1990).

The press rights of the book publisher join the right to know of the reader. The speech rights of the lawyer join the Sixth Amendment and due process rights of the client. Finally, the physician's speech interests meet the patient's interest in bodily health and control that the Court has protected in *Cruzan v. Director, Missouri Department of Health*,²³³ *Vitek v. Jones*,²³⁴ *Youngberg v. Romeo*,²³⁵ *Roe*, and now *Casey*.

c. *The Pervasiveness of State Regulation of a Profession's Knowledge Practices*

Before identifying in the next section the limits free speech principles should place upon state regulation of professional speech, it is best to acknowledge that professions are not only strongly empowered but also heavily regulated by the law.²³⁶ Through delegations of authority, rules of organization, powers to license others,²³⁷ and exemption from antitrust and other regulations, the law organizes, empowers, and regulates a profession to enable it to function effectively as an institution of knowledge.²³⁸ Many of these general empowering regulations have only incidental effects on the specific content of a profession's knowledge practices. But some of the government's actions have a substantial and direct impact, especially those involving funding at the macro level.

Legal regulation of the case is also extensive. The common law has effectuated substantial change in the theory of the case in the last thirty years, in the direction of client autonomy. For example, the common law prohibits physician speech to third parties to protect confidentiality, compels physician speech in the nature of disclosures to assure effective client consent and understanding of his medical situation, and shapes physician speech to protect the client from harm.²³⁹ The interests of the professional in speaking as an individual without constraint are subordinated on behalf of the autonomy and welfare of the client in whose service the professional has undertaken to act. Such client-centered regulation advances and vindicates society's interest in developing, reproducing, and disseminating knowledge through the case.

The pervasiveness of the empowering regulations of a profession as a whole, and the restraining regulations of the professional-client relationship

²³³ 497 U.S. 261 (1990).

²³⁴ 445 U.S. 480 (1980).

²³⁵ 457 U.S. 307 (1982).

²³⁶ See, e.g., HEALTH CARE SOURCEBOOK: A COMPENDIUM OF FEDERAL LAWS, REGULATIONS AND DOCUMENTS RELATING TO HEALTH LAW (Wayne J. Miller ed., 1989).

²³⁷ See Symposium, *Private Accreditation in the Regulatory State*, 57 LAW & CONTEMP. PROBS. 1 (1994).

²³⁸ See FREIDSON, *supra* note 230, at 9-13.

²³⁹ See *infra* notes 244-46.

have led some, like Justice White, to believe that the First Amendment offers little constraint upon such regulation.²⁴⁰ This misses the larger picture. Regulation of the profession-at-large and of the case maintains autonomous professions with practices that preserve and spread knowledge, simultaneously benefiting society and individual well-being. Regulations that interfere with a profession's knowledge practices or seek to restrict the spectrum of knowledge are of a different and antagonistic nature.

d. *The Scope of a Profession's Speech Rights: Regulation, Subsidy, and Rust*

An affirmative free speech claim for professionals may now be stated:

Through its empowerment and regulation of the learned professions, the law advances society's interest in having knowledge organized, developed, transmitted from generation to generation, and brought to bear on behalf of individuals. To prevent the law's general regulation of a profession from intruding on its knowledge practices, the doctrine of unconstitutional conditions may be of service, as may the principle that bars regulation that intends to or has the effect of suppressing expertise or contracting "the spectrum of available knowledge."²⁴¹

With respect to the case, professional free speech rights protect communication, not on matters of public discourse or of purely private interest, but rather with respect to the professional's communication of knowledge for the client's benefit. Such protected speech advances the client's access to knowledge, especially knowledge that enhances his autonomy and well-being with respect to religious activity, access to justice, and pursuit of health.

We now turn to a more specific consideration of this claim.

i. *Regulating the Case to Protect a Client's Autonomy or Welfare*

The government may regulate the speech of professionals within a case to protect the autonomous choices of the competent client, or his best interests if he is incompetent. It may do so through the tort of malpractice

²⁴⁰ See *supra* note 203 and accompanying text.

²⁴¹ *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); see also *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983) (holding that the state must not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'").

and other such actions—that is, through a decentralized legal decisionmaking process that tailors judgment to the particular facts of each case and that intervenes only when a client claims harm. It may also prescribe regulatory rules rather than tort standards. Because such rules may diminish the discretionary power of the physician to tailor messages in furtherance of the particular patient's autonomy and well-being, some limit of reasonableness should exist with regard to such regulations. The Supreme Court's cases that address professional speech all recognize the broad power of the state to regulate professional speech to protect the interests of the client.²⁴²

ii. *Wedging the Government's Message into the Professional Relationship*

The Constitution certainly disables the state from wedging its message into a priest-penitent relationship. It probably also disables such a wedging in the counsel-client relationship other than in open court. Similarly, *Akron* and *Thornburgh* rejected the state's insertion into the doctor-patient relationship of a message that was motivated not by an interest in patient autonomy, but by hostility to abortion choice: such a message was said to distort the relationship and inhibit the speech interests of doctor and patient.²⁴³ By

²⁴² See *Florida Bar v. Went For It, Inc.* 115 S. Ct. 2371, 2376-77 (1995); *SEC v. Lowe*, 472 U.S. 181 (1985); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457-59 (1978); *In re Primus*, 436 U.S. 412 (1978); cf. *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 106-11 (1990); *Bates v. State Bar*, 433 U.S. 350, 379-81 (1977). See generally Alfred C. Aman, *SEC v. Lowe: Professional Regulation and the First Amendment*, 1985 SUP. CT. REV. 93.

²⁴³ The Court in *Akron* held that

Danforth's recognition of the State's interest in ensuring that this information be given will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth. . . . [M]uch of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether.

City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 444 (1983), *overruled in part by* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

Some of the requirements in *Akron* involved matters that were "at best speculation" (such as the "anatomical and physiological characteristics of the particular unborn child"), "dubious" (that "abortion is a major surgical procedure"), a "'parade of horrors' intended to suggest that abortion is a particularly dangerous procedure," or inconsistent with *Roe* ("that the unborn child is a human life from the moment of conception"). *Id.* at 444-45.

In addition, *Akron* held that these requirements were flawed because they are an "intrusion upon the discretion of the pregnant woman's physician" requiring him to recite information regardless of his judgment as to its relevance, such as the particular risks. *Id.* at 445. Although the government may require that the patient be informed of the "physical and emotional implications of having an abortion," *Akron's* requirement

contrast, the *Casey* joint opinion concluded that Pennsylvania's particular message—one that was neither false nor intended as a substantial obstacle—was compatible with the proper functioning of the professional relationship.

The relevant First Amendment inquiry regarding such a required message's impact on professional speech differs from the captive audience analysis discussed above. Such an inquiry requires a fact-specific analysis of whether the intrusion of the state's message distorts the case as a medium for information exchange and for effective care and research. Does the state's intervention distort the contents of the conversation or diminish the patient's trust and belief in the physician's undivided commitment to her well-being, which allows for the frank conversations that form the basis of knowledge transmission?

The common law governing physician-mandated disclosures illustrates an appropriate concern about distorting the professional relationship. It does not simply assume that more speech is always better for doctor and patient. For example, it limits access to the patient by other potential speakers by providing that the relationship be conducted in relative privacy.²⁴⁴ Tort regimes set reasonable limits on mandated disclosures in the informed consent process because too much information can overwhelm the judgment of the patient and can interfere with the reasoned application of the profession's general statistical information to an individual's own life choices.²⁴⁵ Finally, the common law recognizes a therapeutic privilege, allowing physicians to withhold information altogether for the patient's benefit.²⁴⁶ A similar sensitivity should inform the First Amendment inquiry here.

iii. *Restricting the Messages that the Physician May Impart*

After the propaganda warning in *Keene* came the movie. Similarly, after the state's brochure or videotape, the physician has her turn. May the state prohibit a physician from contradicting or commenting upon the state's message to prevent her undermining or limiting its impact? May the state

of a "lengthy and inflexible list of information . . . unreasonably has placed 'obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.'" *Id.* (alteration in original) (citation omitted).

By contrast, the Court noted in dicta that a requirement that the patient be informed of her pregnancy, the gestational age of the fetus, the availability of information on birth control and adoption, and of assistance during pregnancy and after childbirth is "not objectionable" if "accurate." *Id.* at 445-46 n.37.

²⁴⁴ See, e.g., *Humphers v. First Interstate Bank*, 696 P.2d 527, 529-33 (Or. 1985) (en banc).

²⁴⁵ *Canterbury v. Spence*, 464 F.2d 772, 789 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

²⁴⁶ *Id.* at 786.

even go so far as to prohibit the doctor from mentioning certain facts to the patient that are inconsistent with the state's message?²⁴⁷

Such a prohibition could be far more distorting of the doctor-patient relationship than the insertion of the state's own message. It would certainly interfere with the two-way information exchange between doctor and patient. In addition to inhibiting the research aspect of the case, such a prohibition would directly interfere with the patient's interest in accessing information through the institution that makes such information available. Patients look to physicians for health information and rely upon what they are told; thus, a limitation upon disclosure limits the information they actually get. Warning patients not to engage in the social practice of relying on physicians for certain information would not eliminate the problem, and would do nothing for their liberty interest. It is not altogether possible for patients to go elsewhere, because it is in the nature of the information that professionals impart to be partially unavailable in library form: professionals bring general knowledge to bear on individual cases through a combination of their education, practical wisdom, experience, and knowledge of the particular interests of the client. Moreover, a patient's emotional dependence on a physician makes this image of forum-shopping for knowledge utterly unrealistic.²⁴⁸ Finally, it is said that availability elsewhere does not negate the First Amendment harm resulting from an intentional suppression of speech.²⁴⁹ Whatever its general validity, this principle should certainly apply in the case of the best source. In this instance, the best source is a physician: she is society's repository of specialized medical knowledge and its expert in the application of this knowledge to the particular case.²⁵⁰

²⁴⁷ States via professional licensing boards have the power to silence a physician's speech as they can silence other professionals for the benefit of clients. They can remove his license to practice for cause, and then subject him to criminal and civil penalties for engaging in professional speech to a client. Yet he remains free to speak to the public at large provided he does not purport to offer individualized professional advice. See *Lowe v. SEC*, 472 U.S. 181 (1985).

²⁴⁸ "The average patient has little or no understanding of the medical arts, and ordinarily has only [her] physician to whom [she] can look for enlightenment with which to reach an intelligent decision." *Canterbury*, 464 F.2d at 780.

²⁴⁹ See *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 n.15 (1976); see also *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 n.18 (1983); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541 n.10 (1980); cf. *Board of Educ. v. Pico*, 457 U.S. 853, 913 (1982) (Rehnquist, J., dissenting) (inquiring whether an idea is "readily available from the same source in other accessible locations").

²⁵⁰ Because the state creates a monopoly in the practice of medicine on behalf of doctors, a prohibition on medical speech is especially inhibiting on the dissemination of information.

iv. *Non-Subsidy Decisions*: Rust v. Sullivan

Restrictions on speech in the case undermine it as a vehicle for information transmission and development, regardless of whether the restrictions arise from a state's regulation or its refusal to fund.²⁵¹ When the government funds a physician, it funds a constitutionally protected organized realm of knowledge. When the government declines to fund some physician speech—as distinct from practice—it unjustifiably interferes with and distorts the delivery and development of professional knowledge, as the profession has come to define it.²⁵²

To evaluate whether a profession's own definition of its knowledge practices limits what the government can decline to subsidize, consider the following hypothetical:

The Library of Congress issued a Request for Proposals (RFP) for a new computer on-line retrieval system that would replace its card catalogue with a computer system permitting searches by author, title, and subject, of all books in the library's collection. As the final plans for the project were being completed, Representative Henry Hyde appended to an appropriations bill an amendment that no money could be spent by the Library of Congress to counsel library users about abortion. Accordingly, an amended draft of the RFP provided that "abortion" could not, on public terminals, be a searchable subject in the database.

In response, a library user sued, claiming that this restriction violated her rights to receive information and constituted content-based discrimination among books. Although this non-subsidy decision eliminated no books from the library's collection, it violated the librarians' professional

²⁵¹ In the parlance of unconstitutional conditions theory, the doctor-patient relationship affords a "baseline" for judgment, see Seth F. Kreimer, *Allocational Sanctions: The Problems of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984), or provides the context for a careful First Amendment analysis without regard to the unconstitutional conditions doctrine, see Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech and Abortion)*, 70 B.U. L. REV. 593 (1990), or cannot be bifurcated into different speech components, in contrast to an organization's lobbying and educational activities, compare *Regan v. Taxation Without Representation*, 461 U.S. 540 (1983) with *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

²⁵² For an excellent discussion of *Rust* and unconstitutional conditions that bears similarities to arguments of this Part, see David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675 (1992).

standards for organizing a catalogue, and interfered with the public's access to such information—access which depends upon professional librarians doing the job their professional standards have defined. Posted warnings not to rely on the computer or any librarian would not eliminate the distortion created by the subsidy restriction.

The Solicitor General responded that the plaintiff had mischaracterized the case. The First Amendment does not require the Library of Congress to fund a computer database program at all, or to provide any particular database system. Accordingly, the government was free to organize its cataloging scheme as it wants. One hundred Ph.D. theses demonstrating the hegemonic power of knowledge classifications to suppress as much knowledge as they convey cannot lay the groundwork for a free speech claim against any particular classificatory scheme Congress might fund; indeed they would only strengthen the point that Congress can fund whatever scheme it prefers.

In this hypothetical, the Court should reject the government's position. Although the government is not foreclosed from ever making a content-based subsidy decision, it may not do so when its choice invades a socially recognized institution of knowledge for the purpose of suppressing information that prevailing professional standards would normally make available to clients.

Perhaps this example draws its force from the protections that libraries traditionally have enjoyed as repositories of society's knowledge and not from the professional status of librarians.²⁵³ As an additional example, consider the hypothetical raised at the beginning of this section:

A state chooses not to fund public defenders to initiate § 1983 actions against police or prison officials. In addition, the state determines that it will not fund public defenders to counsel, or even inform, their clients about the existence of such actions. Because of timing rules, no § 1983 action would affect the criminal proceeding for which the public defender was representing her client. As such, the § 1983 suit, formally, would be tangential to the attorney's obligation of effective representation.

²⁵³ See *Pico*, 457 U.S. at 868-69 (1982) (stating that the school library is the principal place where students may acquire knowledge); see also *supra* note 227.

Prohibiting a public defender from informing her client about a possible cause of action would violate the integrity of the lawyer-client relationship and would intrude upon the legal profession's definition of the scope of the attorney-client relationship. Such a result ought to preclude a state's non-subsidy decision, or at least require a strong justification. The legal profession's own principles should prevail, thus assuring that the lawyer remains free to discuss all potential actions, even if only explicitly to limit the scope of the attorney's representation with respect to such actions.²⁵⁴ Although this hypothetical derives some of its force from the independent effect of the Sixth Amendment, the First Amendment by itself supports the outcome.

Finally, the case of *Rust v. Sullivan* concerned a non-subsidy decision involving physicians. *Rust* upheld regulations, implementing § 1008 of Title X of the Public Health Service Act, which prevented funded physicians from mentioning abortion during patient consultation.²⁵⁵ The regulations scripted as a response to any patient question about abortion: "This program does not consider abortion to be a form of family planning"; and it also scripted a set of incomplete and inappropriate medical referrals for pregnancy.²⁵⁶ The Court wrote:

A doctor who wished to offer prenatal care to a project patient who became pregnant could properly be prohibited from doing so because such service is outside the scope of the federally funded program. The regulations prohibiting abortion counseling and referral are of the same ilk: "no funds appropriated for the project may be used in programs where abortion is a method of family planning," and a doctor employed by the project may be prohibited in the course of his project duties from counseling abortion or referring for abortion. This is not a case of the Government "suppressing a dangerous idea," but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope.²⁵⁷

The Court recognized, however, that this non-funding analysis does not apply to all funding choices of the state. It does not apply to public fora: "For example, this Court has recognized that the existence of a Government

²⁵⁴ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1983) (noting that "a lawyer may limit the objectives of his representation if the client consents after consultation").

²⁵⁵ Grants for Family Planning Services, 42 C.F.R. § 59.8(a)(1) (1995).

²⁵⁶ *Id.* § 59.8.

²⁵⁷ *Rust v. Sullivan*, 500 U.S. 173, 193-94 (1991).

‘subsidy,’ in the form of Government-owned property, does not justify the restriction of speech in areas that have ‘been traditionally open to the public for expressive activity,’ or have been ‘expressly dedicated to speech activity.’”²⁵⁸ *Rust* further recognized that this non-subsidy analysis does not apply to the university, which enjoys academic freedom:

Similarly, we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.²⁵⁹

To put this differently, the government’s non-subsidy choices are limited by the university’s autonomous jurisdiction over its own knowledge practices.

Moreover, there are hints in *Rust* that at least some Justices are open to the arguments made here.²⁶⁰ The Court explicitly recognized that it may not be a substantial extension to bring the learned professions within the same protection that universities enjoy:

It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government. We need not resolve that question here, however, because the Title X program regulations do not significantly impinge upon the doctor-patient relationship. Nothing in them requires a doctor to represent as his own any opinion that he does not in fact

²⁵⁸ *Id.* at 199-200 (quoting *United States v. Kokinda*, 497 U.S. 720, 726 (1990)).

²⁵⁹ *Id.* at 200. Surely the opinion mischaracterizes the doctrine of academic freedom when it grudgingly limits it to doctrines of vagueness and overbreadth. Although vagueness concerns apply to subsidy and non-subsidy challenges alike, a precisely defined rule of non-subsidy that interferes with academic freedom is impermissible. If the Court’s reference to overbreadth was meant to imply that a state may refuse to fund “fighting-words” or “obscene” speech on campus (by defining its subsidy limitation carefully), that may possibly be true. These two points, however, hardly exhaust the scope of the doctrine of academic freedom. See generally Symposium, *Freedom and Tenure in the Academy: The Fiftieth Anniversary of the 1940 Statement of Principles*, 53 LAW & CONTEMP. PROBS. 1 (1990).

²⁶⁰ *Rust*, 500 U.S. at 203, 215-19 (Blackmun, J., dissenting). “[T]he doctor-patient dialogue embodies a unique relationship of trust. . . . It is for this reason we have guarded so jealously the doctor-patient dialogue from governmental intrusion.” *Id.* at 218 (Blackmun, J., dissenting).

hold. Nor is the doctor-patient relationship established by the Title X program sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice. The program does not provide post-conception medical care, and therefore a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her.²⁶¹

By so carefully distinguishing the specific relationship between the poor female client and the family planning clinic from the general doctor-patient relationship, the Court acknowledged the seriousness of the constitutional claim for the protected status of a physician's speech. To reduce the constitutionally unacceptable possibility that the physician's enforced silence would mislead the patient or constitute an endorsement-by-implication of the government's message, the Court, in effect, altered the government's gag rule regulation. It did so by characterizing the gag rule as permitting the physician to dissociate herself from the government's position on abortion: "The doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program. In these circumstances, the general rule that the Government may choose not to subsidize speech applies with full force."²⁶² The *Rust* majority, or some portion of it, apparently took seriously the claim that the state cannot selectively decline to subsidize certain case-related speech when such a refusal would "significantly impinge" upon the doctor-patient relationship.²⁶³

²⁶¹ *Id.* at 200.

²⁶² *Id.* The Court seemingly modified the Health and Human Services (HHS) gag rule regulation when it interpreted the emergency provision to permit counseling for medically necessary abortions. *Id.* at 195.

²⁶³ *Id.* at 200. Far from restricting the state's discretion, the role of professional judgment and professional speech frees the state from profound difficulties. Independent professional judgment helps the state make content-based decisions, especially funding decisions, in a manner that avoids turning every decision into an ideological viewpoint-based dispute. Thus, the government funds librarians to make choices according to professional standards that apply *a priori* criteria (of quality, representativeness, interest, etc.) to choosing and cataloguing books. Congress funds National Public Radio (NPR), the Public Broadcasting System (PBS), the National Endowment for the Arts (NEA) and the National Endowment for the Humanities (NEH) because there are identifiable professional criteria regarding news and the arts that can be applied through professional judgment to the decisions these institutions make. These criteria in turn significantly insulate the political branches from political responsibility and constitutional scrutiny for the actions of each of these knowledge-generating institutions (largely, but of course not entirely, as the NEA experience shows). Similarly, in non-speech cases, professional judgment insulates a myriad of state decisions from constitutional scrutiny. For example, professional judgment insulates the state in hiring and firing decisions of publicly

Rust erred only in its specific evaluation of the client-clinic relationship, and in exempting this relationship from the protections that should be afforded to the "case." The Court did so with no justification other than what it claimed to "know" about these female clients' knowledge and attitudes.²⁶⁴ Although the application of a doctrine of professional speech requires a judgment as to what is and is not within the "case," there is an established body of common law and professional practice on this subject that the Court could have applied. Surely the Court got this aspect of *Rust* wrong.

What may have led the Court astray in *Rust* was its sense that the state regularly defines the purpose for which a professional or employee relationship is undertaken, and that the professional, therefore, merely brings technical expertise to bear on ends defined externally by the client or the subsidizer: He who pays the piper calls the tune.²⁶⁵ Indeed, most employees and many professionals possess an expertise that is solely technical; and they employ it only to attain ends that are extrinsically determined. Such persons for the most part enjoy First Amendment protection in their work only when they can contribute to public discourse.²⁶⁶ This typically occurs when they act as "whistleblowers," or, in some less dramatic way, use their technical knowledge to disclose how, in the course of their employment,

funded private schools, in nursing home transfers of Medicare patients, in the care of the mentally retarded in state schools, and in other similarly difficult decisions. See *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Youngberg v. Romeo*, 457 U.S. 307 (1982). Such professional judgment also saves the Court from what might otherwise be incoherent judicial choices in reviewing these cases. If *Rust* were not interpreted in the limited fashion suggested by the text, it would risk politicizing every choice, because every choice would ultimately be the state's own value choice and not simply the result of its legitimate deference to an "apolitical" professional judgment. For one discussion of the role of professional judgment in constitutional law, see Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639 (1992).

²⁶⁴ Dorothy Roberts has written compellingly of the plight of the women, children, and families harmed by the *Rust* decision. See Dorothy Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587 (1993). Her analysis of *Rust* focuses on a general right to know. She is, however, critical of professional power and sees professions as repressive agents of social control and spinners of hegemonic obfuscation. This ignores the role of professions as mediating and countervailing institutions that shelter and protect individual autonomy and well-being and instantiate those values in our society.

²⁶⁵ *Rust*, 500 U.S. at 192-94; see also *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992).

²⁶⁶ See *Pickering v. Board of Educ.*, 391 U.S. 563, 571-72 (1968); *id.* at 568 (noting that an employee's First Amendment protection in his work depends upon "a balance between the interest of the [employee] . . . in commenting upon matters of public concern and the interest of the state, as an employer, in promoting . . . [the] services it performs through its employees").

publicly defined ends are subverted or not achieved. For example, the public has an interest in the testimony of a NASA engineer concerning an O-Ring failure in the space shuttle, or in the speech of a teacher concerning the misuse of school revenues.²⁶⁷

By contrast, learned professions employ their expertise for purposes that are not entirely extrinsic to the profession. Professions play a part in defining the ends they seek by interpreting the animating principles of their disciplines—principles of justice, health, and faith. The needs of clients complete the definition. Consequently, a state's non-subsidy decision that restricts speech on the mistaken grounds that such speech is outside the funded "ends" of the professional relationship subverts the case as a center of knowledge transmission and development.

The distinction between employees and learned professionals also helps to clarify the physician's claim that her enforced silence amounts to compelled speech endorsing the government's position. The state often requires, as a rule of employment, that its employees adhere to accepted scripts in speaking with the public on job-related matters. Although such a script also enforces silence, this simply involves remaining "in role" for an employee whose allegiance is to the ends his employer defines, and not to a professional standard. For a professional, however, enforced silence amounts to coerced endorsement when the silence results in the breach of her allegiance to her profession's knowledge practices and to her client.

To summarize, a physician's speech rights leave her free to dispute the state's message with her patient, and to make an as-applied challenge should the state's scripted message prove disruptive of the doctor-patient relationship.

C. Self-Governance: The Special Example of Voting

Part IV has argued that when the government speaks to a woman at a clinic in a way that cannot be justified as furthering her informed consent, *Casey* requires that such speech must still be truthful and that it not undermine her deliberative powers.²⁶⁸ This standard received some elaboration from a First Amendment analysis of the captive audience problem, the targeting of pregnant women, and the speech rights of physicians. Aside from these considerations, *Casey* may be read as leaving room for the states to communicate ideas that do not enhance a woman's autonomy.

²⁶⁷ See *id.* at 568; see also *Waters v. Churchill*, 114 S. Ct. 1878, 1884 (1994); *Connick v. Myers*, 461 U.S. 138, 149 (1983); cf. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989); *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 411-17 (1979).

²⁶⁸ *Casey*, 505 U.S. at 882.

Nevertheless, one reason still remains for reading *Casey*'s joint opinion as affording less leeway to government-scripted speech than this analysis has suggested, and as restricting state partisanship in favor of a more modulated and respectful approach to the pregnant woman. That reason relates to a comparison the joint opinion made to voting. In explaining its analysis of the state's power to structure the decisionmaking process, this opinion drew an analogy to the state's power to structure the voting process, noting "we have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote."²⁶⁹

In the arena of voting, the state adheres to a principle of speech neutrality. It does so to guard against the self-interest of government officials and to further the nation's commitment to citizen self-government. Aside from the speech of a few leading political officials, the government's pre-election speech is umpireal.²⁷⁰ The state arranges the ballot in a manner that should not favor a particular outcome. When it undertakes educational efforts, it similarly endeavors to maintain a careful neutrality. For example, because of the state's multiple and complex initiatives, the California Secretary of State attempts to educate the electorate by distributing voter pamphlets long before election day.²⁷¹ The government's own speech is limited in what it says in the voter pamphlets. Aside from a brief factual account from a legislative analyst, the government merely reprints short statements from the opposing parties in the initiative process. The statements are only revised to prevent false and deceptive statements of fact.²⁷²

Furthermore, all persuasive and educative speech ends prior to the time a voter actually casts her vote. The voting booth assures privacy. Moreover, states typically establish an enlarged zone of non-persuasion by excluding "electioneering" from the polls' immediate vicinity.²⁷³ This protects autonomous choice and independence of judgment: one should not be influenced by pressure or advice brought to bear shortly before a private decision.²⁷⁴

²⁶⁹ *Id.* at 873-74.

²⁷⁰ Dean Yudof describes the core problem of state speech as its power to "falsify consent" to state power. Mark G. Yudof, *In Search of a Free Speech Principle*, 82 MICH. L. REV. 680, 702 (1984).

²⁷¹ See Carol Federighi, *Regulating Slate Mailers: Consumer Protection or First Amendment Infringement?*, 14 HASTINGS COMM. & ENT. L.J. 567 (1992).

²⁷² *Id.* at 578-79.

²⁷³ See *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (holding that Tennessee statute prohibiting solicitation of votes and display or distribution of campaign materials within 100 feet of entrance to polling place did not violate First Amendment); see also *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1396 (1994).

²⁷⁴ Voting regulations under the National Labor Relations Act have shown special sensitivity to the vulnerabilities of dependent workers and have led to even greater con-

If the Justices take their voting analogy seriously, they may require the government to speak of abortion, if not with neutrality, at least with some reticence and circumspection, and, as the joint opinion put it, in a manner "calculated to inform the woman's free choice, not hinder it."²⁷⁵ Such a constrained government speech model may be hard to distinguish from the autonomy model discussed in Part II.

The reason to believe that the *Casey* joint opinion takes this voting analogy very seriously is found in its partial reconceptualization of the abortion right. The opinion anchors the right to an abortion not only in the doctrine of privacy, but also in the principles of equal citizenship: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."²⁷⁶

Perhaps for some Justices, when a woman decides a matter that falls within the ambit of the privacy doctrine and that involves *only* her self-definition (and her familial commitments), the government may speak to her in a partisan manner and urge a particular conception of herself, especially with respect to parenthood. The joint opinion, however, links the abortion decision not only to such a private self-definition, but also to a woman's place as an equal citizen of the Republic, who participates in its market and its public life.²⁷⁷ Thus, the arguments for government neutrality gain strength, lest partisan government speech undermine the self-governance of women that is a precondition to their autonomous participation in our mutu-

straints upon employer speech near the time of the vote. See 29 U.S.C. § 159 (1994).

²⁷⁵ *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992).

²⁷⁶ See *id.* at 856; see also *id.* at 860 (noting that "an entire generation has come of age free to assume *Roe's* concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions"). The reconceptualization of abortion rights, however, occurred in the joint opinion's discussion of *stare decisis*, not in its discussion of a woman's liberty interest.

In the legal field, the preference for equality-based rather than privacy-based arguments for abortion rights arises primarily from a search for a textual basis for *Roe's* constitutional holding. The preference may also relate to the relative importance the legal mind places on the public as compared to the private side of life. Finally, it relates to the feminist concern that the concept of privacy leaves women subject to male violence and dominion within the family and leads to public disregard of the labor women contribute to the family unit. For a discussion of the equality doctrine versus the privacy doctrine, see Sarah E. Burns, *Notes From the Field: A Reply to Professor Colker*, 13 HARV. WOMEN'S L.J. 189 (1990); Ruth Colker, *Feminist Litigation: An Oxymoron?—A Study of the Briefs Filed in William L. Webster v. Reproductive Health Services*, 13 HARV. WOMEN'S L.J. 137 (1990); Ruth Colker, *Reply to Sarah Burns*, 13 HARV. WOMEN'S L.J. 207 (1990); Catharine A. MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* (Jay L. Garfield & Patrick Hennessey eds., 1984).

²⁷⁷ *Casey*, 505 U.S. at 896-98.

al governance. As with voting, the state may seek to inform her self-governance, but not to bias it.

V. CONCLUSION

A. Summary

This Article has read *Casey* as primarily authorizing states to exercise more power in structuring the decisionmaking process of pregnant women than *Akron* or *Thornburgh* allowed. It then explored three ways in which a state may seek to exercise this power, and measured these alternatives against the restrictions identified in *Casey*, in First Amendment doctrine, and in the internal logic of the alternatives' proffered justifications. Because *Casey* reaffirms women's autonomy in reproductive matters, the state can seek to "protect the fetus" only through educating and informing women about their choices. The principle of informed consent establishes one set of criteria, empirically verifiable, by which to assess government regulation. This principle also requires the state to acknowledge that when it speaks in opposition to abortion, it may not be speaking for the woman's benefit, but to further its own ends. When the state speaks to further its own ends, different doctrines, mainly of First Amendment origin, establish other, if looser, constraints on government speech.

If this reading is correct, the state's range of permissible policies is far more restricted than may have appeared upon an initial reading of *Casey*. The state may regulate the doctor-patient relationship to protect a woman's autonomy, both narrowly and broadly conceived. The state may intervene paternalistically by mandating a twenty-four hour waiting period, at least if it proves that such a period in fact contributes to a woman's decisional autonomy sufficiently to outweigh the very severe ways that the delay can derogate from it, as the evidence of hardship arising from such waiting periods incontrovertibly demonstrates. Furthermore, the state may not mandate that others participate in the doctor-patient conversation. Instead it may add only its own voice.²⁷⁸ The state, however, may speak only if it does not speak falsely, if it does not require the woman to listen, if it does not speak in a manner that undermines rational choice or doctor-patient trust, and if it does not prevent the physician from countering the government's speech. This much is permissible. Under *Casey*, however, a state should not be able to go much further than Pennsylvania has gone in regulating abortion.

²⁷⁸ States should consider using the disclosure pamphlet included in the Surgeon General's Report on Abortion, prepared under Surgeon General Koop. See 135 CONG. REC. E906-02 (1989) (extension of remarks of Rep. Weiss).

The joint opinion's political insight into the abortion controversy may prove to be remarkable. What counts for the joint opinion is what Glendon emphasizes: the expressive function of the law. More speech, in its sensible view, is the appropriate answer to this deep controversy. Women have an understandable need for informational privacy, given the extraordinarily private nature of procreative decisions and the coercion and violence of anti-abortion groups and spouses. A woman, therefore, must be free to exercise her choice in private and without accounting for it to any other member of the community. Under these circumstances, the state itself—within the constraints discussed herein—can undertake an expressive function in speaking about the facts and values that are significant to the elected branches of the political community. Through such speech, an accommodation between a woman's autonomy and the government's asserted interests may be achieved.

B. *A Different Conversation*

If the center of the Court holds with *Casey*, then the abortion liberty may have a less anxious existence than it had during the 1980s. If so, then both sides of the debate have an additional responsibility to talk and think about abortion openly and non-defensively. We shall need to attend to our language and the way we talk to others: those who agree and disagree. Although the language of rights stakes out the rules by which we live, it cannot supply the language for how we choose to live and communicate with each other. This does not mean sacrificing the hard-won understanding that women control their fertility and do so without apology. Nevertheless, if *Casey* secures those rights in *Roe*, it should be easier to speak to each other in a more inclusive language.

That includes greater attention to those women who claim to be victims of abortion choice. They might have been victims of adoption, of single motherhood, or of violent marriages; perhaps they were victims in other ways as well. Yet some may suffer simply because they believed something different from those who are pro-choice, and did not enjoy the luxury of having their beliefs about abortion conform with their responsible procreative behavior.

That also involves creating space for those who experience sadness over abortions, an experience that these women argue is essential for coping with and assimilating the abortion experience.²⁷⁹ One step in creating such a

²⁷⁹ From his study of Japan's response to abortion, Lynn Wardle advises creating such a space for sadness. See Lynn Wardle, "Crying Stones": A Comparison of Abortion in Japan and the United States, 14 N.Y. L. SCH. J. INT'L & COMP. L. 183, 185 (1993). Those who wish to follow Wardle's advice to study Japanese attitudes about abortion should consult WILLIAM R. LAFLEUR, *LIQUID LIFE: ABORTION AND BUDDHISM*

space requires anti-abortion groups to abandon their rage. Plainly, sadness will not be experienced in response to such anger.²⁸⁰

Ronald Dworkin, in his book *Life's Dominion*, suggests that in talking about abortion, we must reclaim a mutual understanding which promotes a reverence for life.²⁸¹ Although some value the biological contribution and others the social contribution to life, he movingly argues that we must build a conversation that is united over its sacredness. As powerful as his claim is, I do not think that our politics needs first and foremost an analysis based on some abstract ethic of life which unites a discussion of abortion with discussions of euthanasia, capital punishment, animal rights, war, and terrorism.²⁸² Rather, the subject of abortion is about sexuality²⁸³ and motherhood, about families and procreation, and about the care of the children we have. This is a far more pressing conversation.

Outside abortion clinics, some anti-abortion groups seek to enter a conversation with women to persuade them to continue each and every pregnancy; and some engage to support them in this latter choice throughout gestation (Others, of course, violate conditions of conversation with infliction of emotional distress, harassment, coercion, and violence, up to and including murder). The joint opinion now opens the way for the state to join this conversation at clinics. Nevertheless, there is a far better conversation that a

IN JAPAN (1992). Indeed, this excellent book is one of the essential books for anyone interested in the subject of abortion.

²⁸⁰ One suspects that reducing the rage stemming from anti-abortion groups' rhetoric would have a variety of beneficial effects on the class of women who may be at psychological risk from having an abortion. The rage itself may heighten trauma. The coercive and violent protests likely increases the stress of the procedure, reduces the number of well-trained physicians available to perform abortions, and reduces the opportunities for calm and reflective counseling. Cf. Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests*, 29 U.C. DAVIS L. REV. (forthcoming spring 1996) (describing negative medical sequelae of antiabortion demonstrations on patients); Alan E. Brownstein & Stephen M. Hankins, *Pruning Pruneyard: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services*, 24 U.C. DAVIS L. REV. 1073, 1182-85 (1991) (describing how abortion protesters affect patients seeking abortions).

²⁸¹ DWORKIN, *supra* note 157, at 14-15.

²⁸² A conversation about abortion is only partially aided by analogies drawn from the ethics and law of homicide, of good samaritan obligations, and of war. The subject of procreation, including abortion, is *sui generis*. For one discussion of terrorism, see KEVIN TOOLIS, *REBEL HEARTS: JOURNEYS WITHIN THE IRA'S SOUL* (1996).

²⁸³ In a utopian moment, West describes the elective abortion right as a contingent right, appropriate during patriarchy's reign—as if female sexuality, undistorted by male power, would be at one with female procreativity and both would be at one with female reason. See Robin L. West, *The Nature of the Right to an Abortion: A Commentary on Professor Brownstein's Analysis of Casey*, 45 HASTINGS L.J. 961, 965-67 (1994).

woman can have: a conversation within herself, and, if she chooses, as she often does, with her friends or family. This conversation involves the question of what she intends to do with her loving and generative potential, whether that includes begetting, bearing, and rearing her own children, and in addition or as an alternative, caring for others, for communities, and for ideas. These questions involve a lifetime of dialogue. They cannot be condensed nor should they be in a few minutes at a clinic door. That better conversation of how persons use their generative potential is an ethical one that broadens the focus from any one pregnancy to a way of living in a particular community. Within this context, the protection of family life and the wonders of sexuality may be understood and the character of the participants in this dialogue, how they care for their loved ones, their work, and their community, may be evaluated. The focus of this inquiry may engage adults—women and men alike—in a coequal dialogue about how all participants will actualize their particular generative caregiving potential in our society.²⁸⁴

²⁸⁴ Paragraph adapted from GOLDSTEIN, *supra* note 19, at 88-89.