CONFRONTING MISINFORMATION ON ABORTION: INFORMED CONSENT, DEFERENCE, AND FETAL PAIN LAWS

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In the last few years, the topic of "fetal pain" has become a hot one in many state legislatures. Five states now require that some women seeking abortions be told that their fetus may experience pain, with similar bills cropping up around the country.[1] Even Congress has gotten involved, with the outgoing House of Representatives nearly passing a national fetal pain bill in late 2006.[2] These measures are the latest in a growing body of specific informational requirements for abortion procedures, many steeped in scientific controversy. Nearly all of these measures are titled "Woman's Right to Know Acts."[3] These laws abandon well-settled principles of informed consent—which give discretion to medical professionals to determine what information is crucial for patients—in favor of legislative judgments about what particular facts should be told to patients and how these facts should be shared.

Informed consent to medical treatment consists of three essential elements: communication of necessary information, comprehension of that information by the patient, and subsequent consent to treatment.[4] The

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[1] Arkansas, Georgia, Oklahoma, Louisiana, and Minnesota all require that women seeking abortions receive information about fetal pain. *See infra* Part III.A.

[2] Unborn Child Pain Awareness Act of 2006, H.R. 6099, 109th Cong. (2006).

[3] For examples of mandated information, see GA. DEP'T OF HUM. RES., ABORTION: A WOMAN'S RIGHT TO KNOW (N.D.), *available at* http://health.state.ga.us/pdfs/wrtk/PatientEducationBookEN.pdf; TEX. DEP'T OF HEALTH, A WOMAN'S RIGHT TO KNOW (2003), *available at* http://www.dshs.state.tx.us/wrtk/pdf/booklet.pdf.

[4] NAT'L COMM'N FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL SUBJECTS RESEARCH, THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH (1979), *available at* http://ohsr.od.nih.gov/guidelines/belmont.html.

information that must be communicated includes three key elements: the risks of the proposed treatment, viable alternative treatments, and likely outcomes in the absence of treatment.[5] In every doctor-patient relationship, doctors are bound by law to apply these principles on the basis of their best medical judgment:

> Of necessity, the content of the disclosure rests in the first instance with the physician. Ordinarily, it is only he who is in position to identify particular dangers; always he must make a judgment, in terms of materiality, as to whether and to what extent revelation to the patient is called for.[6]

These principles, long recognized by the common law,[7] have been codified in state statutes typically requiring that, for any medical treatment, patients be provided with "a general understanding of the procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedures."[8] Some states have informed consent laws addressing areas as diverse as breast cancer and psychiatric treatment,[9] but the most commonly regulated procedure is abortion. At least thirty-two states have specific informed consent

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[5] *E.g.*, Canterbury v. Spence, 464 F.2d 772, 787-88 (D.C. Cir. 1972). Some have added the elements of the general nature of the procedure, and the prospects of success, although arguably these are subsumed within the first three. *See, e.g.*, Ashley H. Wiltbank, *Informed Consent and Physician Inexperience: A Prescription for Liability?*, 42 WILLAMETTE L. REV. 563, 565 (2006) (quoting a legal brief of the American Association of Nurse Anesthetists). For an example of a standard consent form used by hospitals for common surgeries, see Exempla Healthcare, Consent to Surgery (Form), *available at* http://www.exempla.org/documents/ELMC/surgical_consent.pdf (addressing common complications, alternatives, and specifics relating to anesthesia and blood transfusions).

[6] *Canterbury*, 464 F.2d at 787.

[7] *See, e.g.*, Reproductive Health Serv. of Planned Parenthood of St. Louis Region, Inc. v. Nixon, 185 S.W.3d 685, 689 (Mo. 2006) (reviewing common law and construing abortion provision to impose identical standard).

[8] FLA. STAT. § 766.103(3)(a) (2005).

[9] *See, e.g.*, State v. Presidential Women's Ctr., 937 So. 2d 114, 118 (Fla. 2006) (citing Florida statutes).

requirements for abortion,[10] and similar provisions have been proposed in other states.[11]

While most abortion-specific informed consent laws simply track common law principles, some do more. In a handful of states, these laws require that specific risks be discussed with patients; some specify statements that must be made, including controversial statements about fetal pain, breast cancer risk, and psychological harms.[12] In many more states, doctor-patient conversations must be supplemented with literature discussing possible risks in terms mandated by the state.[13] Most recently, states have begun requiring statements like the following, which appears in the statutes of four states:

> By 20 weeks' gestation, the unborn child has the physical structures necessary to experience pain. There is evidence that by 20 weeks' gestation unborn children seek to evade certain stimuli in a manner which in an infant or an adult would be interpreted to be a response to pain. Anesthesia is routinely administered to

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[10] GUTTMACHER INST., STATE POLICIES IN BRIEF: MANDATORY COUNSELING AND WAITING PERIODS FOR ABORTION 1 (2006), http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf.

[11] *See* NAT'L ABORTION FED'N, REPRODUCTIVE CHOICE IN THE STATES IN 2005, at 3-6 (2006), http://www.prochoice.org/pubs_research/publications/downloads/public_policy/state_bill_report_2005.pdf (summarizing proposed enactments or amendments in thirty-three states in 2005, including one vetoed in Wisconsin).

[12] Chinué Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, 9 GUTTMACHER POL'Y REV. 4 (2006) (citing statutory language and charting states with disclosure requirements on potential fetal pain and alleged risks of breast cancer and psychological harm).

[13] *Id.* According to the report, of eighteen states whose state-mandated printed materials discuss psychological effects, seven assert only negative emotional responses, such as risk of suicide or "postabortion traumatic stress syndrome," neglecting data which shows that women frequently report feeling "relief or happiness" after the procedure. *Id.* at 8-9. Similarly, the report names three states requiring by law that materials address breast cancer risk (Minnesota, Mississippi, Texas) and three others that also include such information (Alaska, Kansas, West Virginia). Of these, five present the relationship between breast cancer and abortion as a topic of serious scientific debate, with only Minnesota's materials reflecting the mainstream consensus that no such connection exists. *Id.* at 7-8.

> unborn children who are 20 weeks' gestational age or older who undergo prenatal surgery.[14]

As will be discussed, each of these statements misrepresents current medical knowledge.[15] Reproductive rights advocates have criticized these provisions, and at times challenged them in court, for removing the discretion traditionally given to doctors and for potentially misleading women.[16] To date, however, litigation on mandated abortion information has been sparse. A few requirements have been invalidated, and others saved by narrowing constructions; across these cases, judicial opinions have been short on clear analysis. New provisions relating to fetal pain have yet to be challenged in court.

This Article argues that, to the extent these laws go beyond flagging topics that should be discussed by health care providers and prescribe specific factual claims that must be conveyed to patients, they should be subject to non-deferential judicial review of their accuracy and fairness. Part I provides an overview of abortion informed consent jurisprudence since *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[17] Part II suggests a framework for analyzing challenges to specific informed consent provisions. Part II.A argues that false or misleading statements are unconstitutional under either the undue burden or rational basis standards. Part II.B proposes false advertising cases as an instructive analogue, arguing that the accuracy of informed consent provisions should be analyzed similarly. Part II.C considers the principle of judicial deference to legislative fact-finding from several angles, and argues that it should be applied in weak form, or not at all, in the informed consent context. Part III analyzes several states' mandated information on fetal pain within this framework and concludes that they are unconstitutional.

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[14] GA. CODE ANN. § 31-9A-4(a)(3) (2006); *see also* ARK. CODE ANN. § 20-16-1105(a)(1)(A) (2005); 63 OKLA. STAT. ANN. § 1-738.10(A) (Supp. 2008); LA. REV. STAT. ANN. § 40:1299.35.6(C)(1)(a)(ii) (2001).

[15] *See infra* Part III.

[16] *See, e.g.*, Richardson & Nash, *supra* note 12, at 11; Ashley A. Wenger, *Fetal Pain Legislation: Subordinating Sound Medical Findings to Moral and Political Agendas*, 27 J. LEGAL MED. 459, 472-75 (2006) (arguing that requirements such as mandating communication of fetal pain information interfere with good medical practice and deny women's moral agency).

[17] 505 U.S. 833 (1992).

I. BACKGROUND

A. Truthful and Not Misleading Disclosures Are Not an Undue Burden

The plurality in *Casey* upheld a typical informed consent law, which required that providers inform patients of the nature of the procedure, the health risks of the procedure, and the "probable gestational age of the unborn child," as well as the availability of printed information about fetal development, prenatal care, child support, and adoption services.[18] The Court regarded these requirements as "no different from a requirement that a doctor give certain specific information about any medical procedure."[19] Overruling prior decisions,[20] the plurality found it of no consequence that some of the provisions did not concern the patient's health but instead served to "express[] a preference for childbirth over abortion."[21] As will be discussed below, however, the plurality also indicated that the required disclosure should be "truthful and not misleading."[22]

Subsequent challenges to informed consent laws have largely centered on the burdens imposed by their procedural requirements, such as twenty-four or forty-eight hour waiting periods or requirements that information be given in person by a physician.[23] Post-*Casey*, such challenges have generally failed,[24] except where a state constitution imposed strict scrutiny[25] or the statute failed to provide a health exception.[26]

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[18] *Id.* at 881 (summarizing 18 PA. CONS. STAT. § 3205 (1990)).

[19] *Id.* at 884.

[20] *Id.* at 838 ("To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information . . . those cases go too far, are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled.").

[21] *Id.* at 883.

[22] *Id.* at 882. *See infra* Part II.A.

[23] *See, e.g.*, Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1 (Tenn. 2000); Cincinnati Women's Servs., Inc. v. Taft, 466 F. Supp. 2d 934 (S.D. Ohio 2005). At present, twenty-one states have twenty-four-hour waiting periods in force; Arkansas and Indiana have slightly shorter periods. GUTTMACHER INST., *supra* note 10, at 2.

[24] *See, e.g.*, Eubanks v. Schmidt, 126 F. Supp. 2d 451 (W.D. Ky. 2000); Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999).

[25] *See, e.g.*, *Sundquist*, 38 S.W.3d 1 (holding waiting period invalid under state right to privacy).

B. Construing Informed Consent Laws to Avoid Constitutional Violations

Where plaintiffs have challenged the substance of informed consent provisions, courts have most often construed those provisions in such a way as to avoid any constitutional problems. In so doing, courts have avoided deciding what it would take to find such provisions unconstitutional.[27] In a recent case, a Missouri clinic challenged the state's law requiring physicians to discuss with patients "the indicators and contraindicators, and risk factors including any physical, psychological, or situational factors for the proposed procedure."[28] Missouri's Supreme Court held that the state's abortion statute permits physicians to "exercise [their] professional judgment" in discussing risk factors, and thus "imposes no duty regarding the extent of consultation between a physician and a patient seeking an abortion additional to that already required by common law."[29] Rejecting challenges to a requirement to discuss risks "that a reasonable patient would consider material," Florida's high court similarly read in the words "under the circumstances" from the state's general informed consent law, rendering the provision "a neutral informed consent statute . . . comparable to the common law and to [statutes applicable to other procedures]."[30]

Wisconsin's law went beyond covering general topics such as medical risks and gestational age; it also specified discussion of "the risks of infection, psychological trauma, hemorrhage, endometritis, perforated uterus, incomplete abortion, failed abortion, danger to subsequent pregnancies and infertility."[31] However, the Seventh Circuit construed

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[26] *See, e.g.*, Planned Parenthood of Del. v. Brady, 250 F. Supp. 2d 405 (D. Del. 2003) (enjoining waiting period).

[27] *See, e.g.*, *Sundquist*, 38 S.W.3d at 22 (noting that invalidation of the in-the-presence requirement makes analysis of substantive provisions unnecessary, but stating in dicta that "some" provisions are narrowly tailored to state interest in maternal health).

[28] Reproductive Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon, 185 S.W.3d 685, 687 (Mo. 2006) (quoting MO. REV. STAT. § 188.039(2) (Supp. 2003)).

[29] *Id.* at 689-90.

[30] State v. Presidential Women's Ctr., 937 So. 2d 114, 120 (Fla. 2006). *But see id.* at 121 (Pariente, C.J., concurring) (arguing that had the state not conceded that disclosures may be tailored to patients and need only concern medical risks, the statute would be void for vagueness).

[31] Karlin v. Foust, 188 F.3d 446, 455 n.3 (7th Cir. 1999), (quoting WIS. STAT. § 253.10(3)(c)(1)(f) (1997)).

Wisconsin's law to allow each physician to "rely on his or her 'best medical judgment' in determining the content of the information that needs to be disclosed."[32] Additionally, in upholding state-mandated printed materials, courts have emphasized that clinicians "may dissociate themselves from the materials and may, or may not, comment on them as they choose."[33]

In perhaps the most interesting such case, the district court asked "whether it is truthful and not misleading to inform a woman that a nonviable unborn child at more than nineteen week gestation 'may be able to survive' outside the womb."[34] Faced with a complex and conflicting factual record, the court could only conclude that "the definition of the term survive varies among practitioners and medical situations."[35] To avoid any misleading effect, the court construed the statute to require:

> 1) a full and complete definition of the term "survive" in accordance with the physician's good faith clinical judgment; 2) the nature of any survival; 3) survival is merely a possibility; 4) survival will or may be of extremely limited duration.[36]

The court noted that this interpretation was supported by the declared statutory purpose of providing complete information.[37]

C. Compelled Speech Claims

In addition to due process claims, informed consent laws have been challenged by abortion providers on their own behalf as a form of

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[32] *Id.* at 473.

[33] Fargo Women's Health Ctr. v. Schafer, 18 F.3d 526, 534 (8th Cir. 1994).

[34] Summit Medical Ctr. of Ala., Inc. v. Siegelman, 227 F. Supp. 2d 1194, 1203 (M.D. Ala. 2002).

[35] *Id.*

[36] *Id.*

[37] *Id.* The subsequent settlement in the case provided that physicians could omit any otherwise required information they deemed false or misleading in light of a determination that a pregnancy was non-viable. Stipulation and Partial Settlement Agreement, Summit Medical Ctr. of Ala., Inc. v. Riley, Case 2:02-cv-01064, at 3 (M.D. Ala. Jan. 8, 2004) (retrieved from PACER system Nov. 20, 2006).

compelled speech.[38] The *Casey* plurality breezily dismissed such a claim on the grounds that Pennsylvania's requirements were part of reasonable state regulation of medicine.[39] Plaintiffs have been unsuccessful in distinguishing *Casey*, with courts emphasizing that "no provision of the [law] prohibits a physician from explaining, criticizing or disavowing the State's information."[40]

In *Planned Parenthood Minnesota v. Rounds*, a South Dakota statute required that patients be told that "the abortion will terminate the life of a whole, separate, unique, living human being," that she "has an existing relationship with that unborn human being" protected by the Constitution; and that an abortion would terminate that relationship and those protections.[41] The district court stated that the plaintiffs had been impermissibly required to "enunciate the State's viewpoint on an unsettled medical, philosophical, theological, and scientific issue, that is, whether a fetus is a human being."[42] An Eighth Circuit panel affirmed, and rehearing en banc was granted in January 2007.[43]

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[38] *See generally* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939 (discussing these cases in the context of First Amendment protection of professional speech, and arguing for a First Amendment interest in the integrity of the physician-patient relationship).

[39] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992).

[40] Summit Medical Ctr. of Ala., Inc. v. Riley, 274 F. Supp. 2d 1262, 1272 (M.D. Ala. 2003); *accord* Eubanks v. Schmidt, 126 F. Supp. 2d 451, 458 n.12 (W.D. Ky. 2000); Clinic for Women, Inc. v. Brizzi, 814 N.E.2d 1042, 1053-57 (Ind. Ct. App. 2004), *aff'd*, 837 N.E.2d 973 (Ind. 2005) (rejecting compelled speech claim under state constitution). Courts have, however, disagreed on whether a violation results from compelling providers to also *pay* for mandated state materials. *Compare Eubanks*, 126 F. Supp. 2d at 461 (reasonable if limited to costs) *with Riley*, 274 F. Supp. 2d at 1277 (invalid).

[41] Planned Parenthood Minn., S.D., N.D. v. Rounds, 375 F. Supp. 2d 881, 884 (D.S.D. 2005) (quoting S.D. CODIFIED LAWS § 34-23A-10.1(1)(b-d) (2005)).

[42] *Id.* at 887 (citing *Roe v. Wade* and *Casey* for proposition that fetus is not a legal person). Interestingly, courts *rejecting* speech claims have disagreed on whether more typical informed consent requirements were "ideologically neutral." *Compare Eubanks*, 126 F. Supp. 2d at 451 (reading *Casey* as treating requirements as "ideologically neutral" while recognizing arguable point) *with Riley*, 274 F. Supp. 2d at 1270 ("*Casey* expressly rejected the notion that a state may require only ideologically neutral information regarding abortion.").

[43] Planned Parenthood of Minn. v. Rounds, 467 F.3d 716, 723-25 (8th Cir. 2006), *reh'g granted*, No. 05-3093 (Jan. 9, 2007). At the time of publication, the en banc opinion is pending.

D. Rulings on Substantive Provisions

Courts have shown little willingness to find truthful printed materials misleading. A Kentucky federal district court held with little discussion that the use of enlarged and color enhanced photographs of fetal development was not misleading.[44] One Alabama district court did enjoin that state's mandated-materials provision pending further consideration of whether some information was misleading.[45] While noting that "credible experts presented conflicting testimony as to the truthfulness and accuracy of factual data in the materials," the court gave no indication of what analytical approach it would apply.[46] The suit was ultimately settled with the state agreeing to various modifications in the materials, including removal of a mention of the alleged abortion-breast cancer link, much touted by opponents of abortion access but unsubstantiated by evidence.[47]

Courts have, however, invalidated the application of some requirements to groups of women for whom certain information would be utterly irrelevant. In an early case, the Eighth Circuit found a law requiring that women be told that their parental rights would be terminated if their abortions resulted in live births would never be relevant to early pregnancies which could not result in live births.[48] Similarly, a court recently invalidated mandated disclosures relating to adoption and early childhood care as applied to women with ectopic pregnancies or lethal fetal

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[44] *Eubanks*, 126 F. Supp. 2d at 459. The court did note that "[d]istortions or lies spread by one agency listed on [a state] pamphlet could invalidate the legitimacy of the materials if the distortions amounted to a circumvention of the statutory requirements of accuracy." *Id.* It concluded, however, that since the materials in *Casey* listed several "crisis pregnancy centers" alleged to spread misinformation, the presence of one such agency in Kentucky's pamphlet was "too tenuous a connection between false statements and state pamphlets to render the pamphlets unconstitutional." *Id.* at 460.

[45] Summit Medical Ctr. of Ala., Inc. v. Siegelman, 227 F. Supp. 2d 1194, 1205 (M.D. Ala. 2002).

[46] *Id.*

[47] Partial Settlement Agreement on Materials, Summit Medical Ctr. of Ala., Inc. v. Riley, Case 2:02-cv-01064, at 4 (M.D. Ala. Jan. 8, 2004) (retrieved from PACER system Nov. 20, 2006). For an overview and comprehensive bibliography of the abortion-breast cancer debate, albeit from an interested source, see PLANNED PARENTHOOD FED'N OF AM., INC., ANTI-CHOICE CLAIMS ABOUT ABORTION AND BREAST CANCER (2004), http://www.plannedparenthood.org/files/PPFA/fact-breast-cancer.pdf.

[48] Freiman v. Ashcroft, 584 F.2d 247, 251 (8th Cir. 1978).

anomalies.[49] Both decisions recognized that, for some women, this information would serve no purpose other than to distress and thus, the legislation was irrational.[50]

Finally, in the *Rounds* case discussed previously, the trial court failed to reach the claim that the South Dakota law violated the Fourteenth Amendment by "forcing women to receive untrue, misleading information."[51] The Eighth Circuit affirmed on this alternative ground as well, finding "at least a 'fair chance' that [the challenged provisions] pose an undue burden" for essentially the same reasons that they likely violated the First Amendment.[52]

E. Informed Consent in *Gonzales v. Carhart*

Much has been made of Justice Kennedy's statements about informed consent in *Gonzales v. Carhart* (*Carhart II*),[53] which upheld not an informed consent statute, but a ban on a particular abortion procedure. Kennedy, writing for the Court, rested the validity of the Partial-Birth Abortion Ban Act on "the knowledge it conveys" to pregnant women about "shocking methods" of abortion, which might encourage women to forego abortion, and doctors to rethink their methods.[54] "The State," the Court wrote, "has an interest in ensuring so grave a choice [as abortion, and particularly abortion of this type] is well-informed."[55] The Court elaborated that

> [t]he State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the

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[49] *Riley*, 318 F. Supp. 2d 1109.

[50] *But see* Fargo Women's Health Org. v. Schafer, 18 F.3d 526, 534 (8th Cir. 1994) ("If in certain cases [the statement that the father of a child is liable for child support] would be false or misleading, it would undoubtedly be because of unique and personal background facts that would be at least suspected if not known to the woman.").

[51] Planned Parenthood of Minn. v. Rounds, 375 F. Supp. 2d 881, 885 (D.S.D. 2005).

[52] Planned Parenthood of Minn. v. Rounds, 467 F.3d 716, 727 (8th Cir. 2006), *reh'g granted*, No. 05-3093 (Jan. 9, 2007).

[53] Gonzales v. Carhart (*Carhart II*), 127 S. Ct. 1610 (2007).

[54] *Id.* at 1634.

[55] *Id.*

> medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.[56]

In dissent, Justice Ginsburg complained that the majority's talk of "conveying knowledge" was a *non sequitur* since the issue at hand was not more information but a flat prohibition.[57] Moreover, Ginsburg objected to the Court's statement, admittedly based on "no reliable data," that full disclosure was important because abortion could lead to "[s]evere depression and loss of esteem."[58] Ginsburg charged that resting constitutional analysis on such speculation "reflects ancient notions about women's place in the family and under the Constitution . . . that have long since been discredited."[59] Justice Kennedy's citation for these arguments to an amicus brief describing the discredited "post-abortion syndrome"[60] does suggest sympathy with a growing strain of anti-abortion rhetoric that describes abortion as by its nature harmful to women.[61]

Professor Jack Balkin has speculated that Kennedy's statements might impact state informed consent laws:

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[56] *Id.*

[57] *Id.* at 1648-49 (Ginsburg, J., dissenting) ("The solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks . . . . Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.").

[58] *Id.* at 1634.

[59] *Id.* at 1649 (Ginsburg, J., dissenting).

[60] *Id.* at 1634 (citing Brief for Sandra Cano et al. as Amici Curiae Supporting Respondents, Gonzales v. Carhart, 127 S. Ct. 1610 (2007) (No. 05-380) 2006 WL 1436684).

[61] *See generally* Riva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (examining legislative history of South Dakota abortion ban, tracing it to emerging, scientifically unfounded antiabortion rhetoric that abortion is inherently coercive and harmful to women, and arguing that such legislation violates Equal Protection because it is based on demeaning assumptions about the natural role and abilities of women); Emily Bazelon, *Is There a Post-Abortion Syndrome?*, N.Y. TIMES, Jan. 21, 2007, § 6 (Magazine), at 44 (exploring this rhetoric, noting that the idea that abortion is at the root of women's psychological ills is not supported by the bulk of the research, and describing the scientific evidence that strongly shows that abortion does not increase the risk of depression, drug abuse, or any other psychological problem any more than having an unwanted pregnancy or giving birth).

> [*Carhart II*] might lead states to pass a wide range of new laws under the rubric of "informed consent" that would require doctors to show women the results of ultrasound imaging of the fetus before it is aborted, to describe in gruesome detail how the fetus will be terminated, dismembered and removed, to offer the state's views on the existence of any pain the fetus might feel when it is destroyed; and, in general, ratchet up the emotional anxiety of women who are about to undergo abortions.[62]

The Court's language may indeed embolden state legislators, leading to new legislation and litigation in this area. Yet, if taken at face value, it is questionable whether *Carhart II* signifies any real change in doctrine with regard to informed consent. The interests identified by the Court—"respect for life" and "ensuring so grave a choice is well-informed"[63]—are the same ones described in *Casey*.[64] The position that informed consent requirements may include not just matters affecting the pregnant woman's health but also information about the fetus and the procedure, is also found in *Casey*.[65] Even the concern that *uninformed consent* to abortion may have "devastating psychological consequences" comes straight from *Casey*.[66] While the rhetoric of *Carhart II* may suggest sympathy for assertions of harmful effects from abortion itself, it gives no indication of altering the "truthful and not misleading" standard central in *Casey*; indeed, the very use of the phrase "well-informed" reinforces that standard.

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[62] Balkinization, *The Big News About* Gonzales v. Carhart—*It's the Informed Consent, Stupid*, http://balkin.blogspot.com/2007/04/big-news-about-gonzales-v-carhart.html (Apr. 19, 2007 2:50 PM).

[63] *Carhart II*, 127 S. Ct. at 1634.

[64] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 883 (1992) (holding that "a State [may] 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").

[65] *Id.* at 882 (finding "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").

[66] *Id.*

II. A FRAMEWORK FOR ANALYZING INFORMED CONSENT CHALLENGES

A. The Relationship Between "Undue Burden" and "Truthful and Not Misleading"

1. False or Misleading Statements as Per Se Undue Burden

In upholding Pennsylvania's informed consent requirements, the *Casey* plurality held that a state may seek to ensure "that a woman be apprised of the health risks of abortion and childbirth," and may even provide information that "expresses a preference for childbirth over abortion."[67] Significantly, the plurality also stated: "If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible."[68] It is not immediately clear how this statement figures into the "undue burden" analysis that *Casey* establishes. The use of "may" suggests that mandated disclosure of truthful and not misleading information may also be *impermissible* for other, independent reasons. But would mandated statements that are untrue or misleading necessarily constitute an undue burden?

At least one Circuit Court of Appeals panel has proceeded on the apparent assumption that a false or misleading statement would be a *per se* undue burden. In *Rounds*, the court held that, "[u]nder *Casey*'s teaching, the district court was required to make a preliminary determination about the objective scientific and medical accuracy of the statements in the required disclosures."[69] The court went on to say that "[d]isclosure requirements which hinder a woman's free and informed choice rather than assist it would violate *Casey*."[70] Because the challenged "information" requirements in *Rounds* were not in fact accurate and relevant information, but rather bare ideological statements, the court found them "far more onerous than what federal courts have previously reviewed," and stated that "there is at least a 'fair chance' that they pose an undue burden."[71] Having considered

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[67] *Id.* at 882-83.

[68] *Id.* at 882.

[69] Planned Parenthood of Minn. v. Rounds, 467 F.3d 716, 723 (8th Cir. 2006), *reh'g granted*, No. 05-3093 (Jan. 9, 2007).

[70] *Id.* at 726.

[71] *Id.* at 727 (citing standard for preliminary injunction).

the question of accuracy, the court looked no further, apparently concluding that inaccuracy itself constitutes an undue burden.[72]

2. A "Substantial Obstacle"?

While the *Rounds* decision represents a reasonable reading of the informed consent discussion in *Casey*, it seems to clash with the explanation of the undue burden standard elsewhere in the *Casey* joint opinion. The plurality defines the standard thusly: "A finding of an undue burden is 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."[73] This definition is, of course, "arguably circular."[74] More clarity is provided by the plurality's statement, in invalidating Pennsylvania's spousal notification provision, that, "in a large fraction of the cases in which § 3209 is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[75] Lower courts have thus understood the crucial test under *Casey* to be whether "a large fraction" of affected women will be obstructed from obtaining an abortion.[76]

Even if clearly false or misleading, mandated disclosures might stand under the "large fraction" test. Anecdotal evidence from abortion providers suggests mandated disclosures have little if any effect on women's ultimate decisions.[77] The latter phenomenon may be accounted for

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[72] *See id.*; *cf.* Karlin v. Foust, 188 F.3d 446, 472 n.12 (7th Cir. 1999) ("*Casey* held that as long as the information required to be conveyed . . . is 'truthful and not misleading,' [it] will not be found to impose an undue burden." (citing *Casey*, 505 U.S. at 882)).

[73] *Casey*, 505 U.S. at 877.

[74] 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, 248 n.67 (1995); *cf. Casey*, 505 U.S. at 987 (Scalia, J., dissenting) ("Defining an 'undue burden' as an 'undue hindrance' (or a 'substantial obstacle') hardly 'clarifies' the test.").

[75] *Casey*, 505 U.S. at 895.

[76] *See, e.g.*, Cincinnati Women's Servs., Inc. v. Taft, 468 F.3d 361, 367-69 (6th Cir. 2006) (describing test and collecting cases).

[77] *See* A Woman's Choice-E. Side Women's Clinic v. Newman, 904 F. Supp. 1434, 1450 (S.D. Ind. 1995), *rev'd*, 305 F.3d 684 (7th Cir. 2002) (noting, in challenge to informed consent and waiting period law, testimony of clinic director that "[t]he vast majority of women have no questions about the information" and "[n]o patient has ever told

in part by providers' practices of qualifying, clarifying, and otherwise commenting upon the mandated information so as to minimize any fears they may cause. However, providers routinely encounter women who have grossly exaggerated perceptions of the medical risks of abortion and yet are unflagging in their choice.[78] Historical evidence also demonstrates the willingness of many women to face high levels of medical risk to obtain abortions in the pre-*Roe* era.[79] Taken together, the foregoing considerations suggest that even where mandated disclosures are plainly inaccurate and calculated to dissuade, it is far from clear that a significant number of women will actually forego abortions as a result.[80] The harm of such requirements most likely lies less in scaring women into not getting abortions, but in elevating the fear and anxiety women experience when they do have abortions.

3. No Legitimate Purpose

The large fraction test does not exhaust limits on abortion laws under *Casey*. Inaccurate or misleading information may be challenged under what has been termed the "neglected purpose prong" of *Casey*'s undue burden standard,[81] which states that an undue burden exists where "a

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[clinic staff] that she was cancelling her plans or changing her decision because of the mandated information").

[78] Interview with Lee McKeever, Shaker Clinic Coordinator, Planned Parenthood of Greater Cleveland, in Cleveland Heights, Oh. (Oct. 4, 2006). That exaggerated notions of the dangers of abortion may be prevalent is suggested by the dogged efforts of organizations such as Planned Parenthood to dispel such myths. *See, e.g.*, PLANNED PARENTHOOD FED'N OF AM., ABORTION: RISKS AND SIDE EFFECTS, http://www.plannedparenthood.org/birth-control-pregnancy/abortion/risks-and-side-effects.htm (last visited Nov. 29, 2006) (listing effects abortion *will not* have on future fertility; stating that abortion *does not* cause breast cancer or psychological problems).

[79] *See, e.g.*, LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE AND LAW IN THE UNITED STATES 1867-1973, at 193-215 (1997).

[80] Problems of proof also make it unlikely that a substantial obstacle could be established. Prior cases demonstrate not only the difficulty of showing that any change in abortion rates is attributable to the passage of a law, but also the difficulty of separating out the effect of burdensome procedural requirements, such as waiting periods, from the power of the information itself to dissuade. *See, e.g.*, Karlin v. Foust, 188 F.3d 446, 486 (7th Cir. 1999) (rejecting statistical evidence on these grounds in challenge to waiting period); *A Woman's Choice*, 305 F.3d 1434 (same).

[81] Note, *After* Ayotte: *The Need to Defend Abortion Rights with Renewed "Purpose"*, 119 HARV. L. REV. 2552, 2565 (2006).

state regulation has the *purpose* or effect of placing a substantial obstacle in the path of a woman seeking an abortion."[82] While subsequent elucidation of the purpose prong has been scant,[83] the purpose prong at least bars laws clearly *intended* to illegitimately prevent women from exercising the right to choose.[84] If a showing of clear illicit purpose is required, however, legislatures are likely to claim, perhaps legitimately, that they acted in good faith to promote informed consent and happened to get their facts wrong.[85]

Another view of the purpose prong—that, in the words of one federal circuit, an undue burden exists "[w]here a requirement *serves no purpose* other than to make abortions more difficult, it strikes at the heart of a protected right, and is an unconstitutional burden on that right"[86]—would seem to amount to the same thing as rational basis review. This approach is not necessarily incompatible with the first,[87] and it is in line with *Casey*'s explanation that purpose matters 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."[88]

Prior to co-authoring the *Casey* opinion, Justice O'Connor stated clearly that abortion regulations are subject to both undue burden and

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[82] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (emphasis added).

[83] *See* Note, *supra* note 81, at 2566-68 (reviewing cases).

[84] *See* Jane L. v. Bangerter, 102 F.3d 1112 (10th Cir. 1996) (striking restrictions for impermissible purpose), *cert. denied*, 520 U.S. 1274 (1997).

[85] Inquiries into legislative purpose are, of course, both vexing and controversial. For example, in 2005's Ten Commandments decisions, Justice Breyer's minute analysis of different histories of similar monuments carried the day. *See* Van Orden v. Perry, 545 U.S. 677 (2005) (upholding Texas monument); McCreary County v. ACLU of Ky., 545 U.S. 844 (2005) (rejecting Kentucky monument). In other areas, the Supreme Court has been wary of undertaking such "hazardous" and "elusive" inquiries at all. Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 470-71 (1981) (quoting United States v. O'Brien, 391 U.S. 367, 383-84 (1968), and declining to invalidate gender-specific statutory rape law on the basis of sexist motive where some evidence of a valid motive existed).

[86] Planned Parenthood of Greater Iowa, Inc. v. Atchison, 126 F.3d 1042, 1049 (8th Cir. 1997) (emphasis added).

[87] That is to say, it is possible that some laws will fail because they serve *no* legitimate purpose, while others might pass rational basis review but still fail because a clear illicit purpose can be shown.

[88] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

rational basis review.[89] Under the latter standard, false or misleading disclosures would surely fail. While there is no doubt as to the "substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth,"[90] the provision of *false or misleading* information is not rationally related to such an interest. Thus, regardless of whether the accuracy question fits analytically under the undue burden standard or under rational basis review, false or misleading statements will always be impermissible.

B. Truthful and Not Misleading in Private Speech Contexts

1. The "ABC Link" Cases

The "truthful and not misleading" standard is familiar from the First Amendment context, where the Supreme Court has long held that "false or misleading" commercial speech is not protected.[91] In the famous case of *Century Hudson Gas & Electric Corp. v. Public Service Commission*, this rule was set out as part of a four-prong test for evaluating commercial speech regulations.[92] Pursuant to this constitutional rule, state and federal law provide for legal action against advertising that is "untrue or misleading."[93]

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[89] City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting) ("If the particular regulation does not 'unduly burden[]' the fundamental right [to choose], then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose.").

[90] *Casey*, 505 U.S. at 882.

[91] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (citing earlier cases and noting that "much commercial speech is not provably false, or even wholly false, but only deceptive or misleading").

[92] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980) (holding that only speech that is "neither misleading nor related to unlawful activity" is protected). While Justice Blackmun differed on the proper overall test to be applied, his pairing of "truthful" and "nonmisleading," *id.* at 573 (Blackmun, J., concurring in judgment), became the standard phrasing. *See, e.g.*, Edenfield v. Fane, 507 U.S. 761, 768-69 (1993) (subjecting ban affecting "truthful and nonmisleading expression" to intermediate scrutiny); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 496 (1996) ("It was not until the 1970's, however, that this Court held that the First Amendment protected the dissemination of truthful and nonmisleading commercial messages about lawful products and services.").

[93] *See, e.g.*, N.D. CENT. CODE § 51-12-08 (2007) (typical state language); Lanham Act, 15 U.S.C. § 1125(a)(1) (2000) ("false or misleading").

In two recent cases, false advertising claims were brought against abortion providers, thus bringing the science of the medical risks of abortion into the courts. Both cases involved the alleged link between abortion and breast cancer (the "ABC link"). In North Dakota, an individual anti-abortion activist asserted that brochures distributed by that state's sole abortion provider falsely claimed that no scientific evidence supported the ABC link.[94] The trial court found that "[t]here is no direct link to show that . . . abortion . . . increases the risk of cancer or changes it."[95] Since "the current body of science" did not support such a link, the challenged brochures were found to be "not untrue or misleading in any way."[96] The Supreme Court of North Dakota affirmed without reaching the merits, holding that the plaintiff lacked standing.[97]

A similar suit was also filed in California against the local and national Planned Parenthood organizations, based upon discussions of the ABC link on their websites.[98] These sites characterized the ABC link as a "theory [that] has not been borne out by research," and stated that according to reliable medical authorities, "the most reliable studies show no increased risk" of breast cancer from abortion.[99] The trial court held that the statements were not commercial speech.[100] Even assuming they were, the trial court struck the complaint because the plaintiff was unlikely to show fraud.[101] Affirming, the appellate court criticized the suit's "unsupported premise that the claimed ABC link was an established scientific fact."[102] In light of the research and expert testimony presented, the plaintiff "[did] not show[], and [could] not show, that members of the public [were] likely to

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[94] Kjolsrud v. MKB Mgmt. Corp., 669 N.W.2d 82, 83 (N.D. 2006).

[95] Brief for Defendant-Appellee/Cross-Appellant, Kjolsrud v. MKB Mgmt. Corp., 669 N.W.2d 82 (N.D. 2006) (No. 20030023), 2003 WL 23695631 (quoting trial court transcript).

[96] *Id.* (quoting trial court transcript).

[97] *Kjolsrud,* 669 N.W.2d at 88.

[98] Bernardo v. Planned Parenthood Fed'n of Am., 115 Cal. App. 4th 322, 327-28 (Ct. App. 2004), *cert. denied,* 543 U.S. 942 (2004) (describing case).

[99] *Id.* at 331-32 (quoting Planned Parenthood Fed'n of Am. Anti-Choice Claims webpage).

[100] *Id.* at 338.

[101] *Id.*

[102] *Id.* at 342.

be deceived into procuring an abortion or any other service" from Planned Parenthood, the standard under California law.[103]

While the North Dakota trial court emphasized the truth of the challenged statements and the California court on the potential to mislead, both engaged in essentially the same analysis.[104] Each court examined the scientific literature and expert testimony to decide whether the statements in question were factually supported, and whether, even if true, they were framed in such a way as to lead the lay reader to draw unsupported inferences.

2. From Private Speech to Government Speech

In the "ABC link" cases, as in many other false advertising cases, the courts weighed scientific evidence presented by both parties to decide whether defendants' statements were materially false or likely to mislead.[105] In the informed consent context, the speaker-defendant is the state, but the task of the courts should be no different.[106] Free speech concerns are replaced by concern for important state interests; if the challenged speech is untrue or misleading, neither is implicated. The fact-finding process itself remains the same, as does the burden of proof, which remains with the plaintiff. What may change, if anything, is the *standard* of proof, inasmuch as the familiar principle of deference to legislative fact-finding is applicable.

To illustrate, consider a hypothetical analogous to the ABC link cases: a state statute requiring clinics to tell patients seeking an abortion about "the possibility of increased risk of breast cancer following an

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[103] *Id.* at 355; *see also* CAL. BUS. & PROF. CODE § 17200 (2007) (defining unfair competition to include "untrue or misleading advertising").

[104] This lack of clarity is typical of the analytic sloppiness courts sometimes exhibit when they view the outcome of their analysis as overwhelmingly clear.

[105] *E.g.*, *Bernardo*, 115 Cal. App. 4th at 355.

[106] To be clear, the analogy here is to false advertising-type cases, where the private speaker is the defendant, and not to First Amendment challenges to advertising regulations, where the private speaker is the plaintiff. In the latter situation, the government must rebut a presumption of unconstitutionality by showing that the regulated speech is inherently misleading. *See, e.g.*, Biorganic Safety Brands, Inc. v. Ament, 174 F. Supp. 2d 1168, 1180-81 (D. Colo. 2001) (citing Revo v. Disciplinary Bd. of the Supreme Ct., 106 F.3d 929, 932-33 (10th Cir. 1997)).

induced abortion."[107] If the analytical framework is identical to the private speech context, then a court facing a challenge to this law would consider essentially the same evidence as in the previous cases and would almost certainly conclude that such a statement is misleading. But if, as some suggest, the court were required to give substantial deference to the legislative fact-finding behind the law, the analysis would be more complex and the result, perhaps, different. The deference principle is frequently invoked by the Supreme Court, and has often proved decisive, yet there is a notable lack of clarity surrounding its application. Consequently, this Article will consider three potential approaches to deference—the non-deferential approach indicated by the Supreme Court's decision in *Stenberg v. Carhart* (*Carhart I*);[108] a proposed exception to the deference principle in relation to individual rights; and an approach focused on the underlying purposes of deference—to determine what role, if any, it should play in relation to informed consent provisions.

C. The Puzzle of Deference

1. A Muddled Principle

In enacting the Partial Birth Abortion Ban Act of 2003 (PBABA), Congress argued explicitly that the courts should defer to its rejection of a health exception as unnecessary, as did the Solicitor General in defending the Act.[109] Similar appeals to deference are to be expected in any controversy over abortion and medical science; not surprisingly, the deference principle has been relied on to defend fetal pain legislation.[110]

The principle of deference to legislatures[111] is an old one, grounded in separation of powers concerns.[112] Vested with "the province and duty . . .

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[107] *Adapted from* TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(1)(B)(iii) (2007). The actual Texas statute, like most state provisions addressing the medical risks of abortion, is in reality saved from such a challenge by the proviso, "when medically accurate." *Id.*

[108] 530 U.S. 914 (2000).

[109] *See infra* note 126 and accompanying text.

[110] Antony B. Kolenc, *Easing Abortion's Pain: Can Fetal Pain Legislation Survive the New Judicial Scrutiny of Legislative Factfinding?*, 10 TEX. REV. L. & POL. 171 (2005); *see also* Katherine E. Engelman, *Fetal Pain Legislation: Protection Against Pain Is Not an Undue Burden*, 10 QUINNIPIAC HEALTH L.J. 279, 312 (2007) (also invoking deference).

[111] For the purposes of this paper, "deference" refers to matters of legislative fact-finding and *not* to statutory construction by administrative agencies, where different

to say what the law is,"[113] courts must not invade the province and duty of legislatures to decide public policy. Thus, in evaluating the ban on women in combat, the Supreme Court stated that "we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own view of the evidence for a reasonable evaluation by the Legislative Branch."[114]

While, in the same breath, the Court noted that, "we do not abdicate our ultimate responsibility to decide the constitutional question,"[115] courts have often been accused of employing deference to do just that.[116] As the Ninth Circuit recently noted:

> [T]he Court's treatment of the level of deference to be applied to [legislative] findings that bear on the constitutionality of statutes has been less than clear. In some cases, the Court has expressly applied the substantial evidence standard described in *Turner* and related decisions . . . . In others, the Court, without mentioning *Turner* or substantial evidence, and without identifying the standard of review it is applying, has reviewed congressional findings of fact with considerably less deference . . . . Considered together, these cases make it difficult to identify the proper standard to be applied to congressional findings that bear on the constitutionality of certain statutes; in fact, they suggest that no single standard exists.[117]

The lack of a single standard allows for inconsistent application of the principle, blurring the line between deference and abdication.

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concerns arise. *See* Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 476 U.S. 837, 842-44 (1984).

[112] For an historical examination, see Daniele J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 970-1003 (1999).

[113] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[114] Rostker v. Goldberg, 453 U.S. 57, 68 (1981).

[115] *Id.* at 67.

[116] *See* Solove, *supra* note 112, at 944-45 (citing opinions on deference by Justices and commentators); *id.* at 1009-20 (detailing the critique of deference).

[117] Planned Parenthood Fed'n of Am. v. Gonzales, 435 F.3d 1163, 1174 (9th Cir. 2006) (citing Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994)).

2. Deference in the Carhart *Cases*

The majority in *Carhart I* faced an intense factual dispute over whether health risks sometimes required using a specific late-term abortion procedure banned by statute. Rejecting a variety of arguments by Nebraska and amici,[118] it concluded that the state law required a health exception because "significant medical authority supports the proposition that in some circumstances, D & X would be the safest procedure."[119] Despite noting "a division of opinion among some medical experts . . . and an absence of controlled medical studies,"[120] the Court did not invoke or even mention the deference principle.[121]

The dissenters chastised the majority for failing to "defer to the legislative judgment,"[122] noting the "superior factfinding capabilities" of state legislatures.[123] Justice Kennedy invoked what he considered "substantial authority allowing the State to take sides in a medical debate, even when fundamental liberty interests were at stake and even when leading members of the profession disagree with the conclusions drawn by the legislature."[124] In the dissenters' view, the majority had turned matters upside down by effectively requiring the legislature to defer to individual physicians' judgments.[125]

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[118] *Id.* at 933-35.

[119] *Id.* at 932.

[120] *Id.* at 936.

[121] One conceivable explanation for the omission of any discussion of deference in *Carhart I* is that the Court simply does not offer the same deference to fact-finding by state legislatures, whose fact-finding resources are considerably more modest. Such a distinction has never been made explicit by the Court, which might regard it as an affront to federalism.

[122] Stenberg v. Carhart (*Carhart I*), 530 U.S. 914, 1017 (2000) (Thomas, J., dissenting).

[123] *Id.* at 968 (Kennedy, J., dissenting).

[124] *Id.* at 970 (Kennedy, J., dissenting) (citing cases). Although it is arguable that the cases Justice Kennedy cites here collectively stand for the robust proposition he asserts, this particular inquiry is beyond the scope of this paper.

[125] *Id.* at 965 (Kennedy, J., dissenting) ("[I]t is now Dr. Leroy Carhart who sets abortion policy for the State of Nebraska . . . ."); *id.* at 1012 (Thomas, J., dissenting) (arguing that under majority's reasoning "no regulation of abortion procedures is permitted because there will always be *some* support for a procedure and there will always be some doctors who conclude that the procedure is preferable").

In passing the PBABA, Congress adopted extensive factual findings in an explicit attempt to invoke the deference principle.[126] It characterized the outcome in *Stenberg* as having been dictated by deference to the district court's fact-finding,[127] and discussed cases in which the Court had explicitly given deference to Congressional fact-finding.[128] Congress then provided a long list of factual findings to establish that the banned procedure has no health benefits and might be dangerous.[129] Congress's gambit fared poorly in the lower courts. While the *Stenberg* majority had not addressed the deference question directly, the federal circuits read *Stenberg* as mandating a non-deferential approach to legislative fact-finding, at least with regard to health exceptions, and accordingly proceeded to evaluate Congressional findings in light of independent medical authority.[130]

In reversing the lower court judgments against PBABA, the *Carhart II* majority sent another muddled message about deference. Although stating that "we review congressional factfinding under a deferential standard," the Court stated that it would not "*in the circumstances here* place dispositive weight on Congress' findings."[131] The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.[132] The Court then agreed with the lower courts that "some recitations in the [PBABA] are factually incorrect,"

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[126] Partial-Birth Abortion Ban Act of 2003, Pub. L. 108-105 § 2 (2003).

[127] *Id.* at § 2(6)-(8).

[128] *Id.* at § 2(9)-(12).

[129] *Id.* at § 2(14)(A)-(O).

[130] *See* Carhart v. Gonzales, 413 F.3d 791, 796-99 (8th Cir. 2005) (reading *Stenberg* to apply a "*per se* constitutional rule" on health exceptions so long as "substantial medical authority" favored the banned procedure in some cases, and treating Congress's findings as "irrelevant"); Richmond Med. Ctr. for Women v. Hicks, 409 F.3d 619, 625-27 (4th Cir. 2005) (same analysis applies to state abortion law); Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 287 (2d Cir. 2006) (finding Congress's legal citations unavailing in view of *Stenberg*'s "authoritative guidance" on health exceptions); Planned Parenthood Fed'n of Am. v. Gonzales, 435 F.3d 1163, 1174-76 (9th Cir. 2006) (noting ambiguous precedent on deference question, and holding that, even assuming highly deferential review, "Congress' very findings contradict its assertion that there is a [medical] consensus" on the banned procedure—the crucial question under *Stenberg*).

[131] Gonzales v. Carhart (*Carhart II*), 127 S. Ct. 1610, 1637 (2007) (emphasis added).

[132] *Id.*at 1637 (citing Crowell v. Benson, 285 U.S. 22, 60 (1932)).

and that "[u]ncritical deference to Congress' factual findings *in these cases* is inappropriate."[133] At the same time, Justice Kennedy, citing the same precedents relied upon in his *Stenberg* dissent, concluded that "[t]he medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis" for leaving out a health exception.[134] For the Court, then, the question was not so much one of whether particular findings were correct, but of leaving to the legislature "[c]onsiderations of marginal safety, including the balance of risks."[135]

While perhaps sufficient for the decision before it, the Court's treatment of the deference principle provides little if any meaningful guidance applicable to informed consent cases. Most significantly, the Court failed to specify what it was about "these cases" and "the circumstances here" that, in contrast to the *Turner* cases, relegated deference to the background. One explanation is that the Court viewed the accuracy of Congress's fact-finding as more relevant to an as-applied challenge, in which case it might soon be revisited.[136] Another is simply that the Court was in fact being more deferential than it admitted. But at least if taken at its word, *Carhart II* appears to have little direct bearing on informed consent challenges, leaving in place the non-deferential approach of *Stenberg* where legislative findings conflict with "substantial medical authority."

3. Deference and Rights

Another potential approach to the deference question centers on the implication of constitutional rights. In *Katzenbach v. Morgan* (cited by Congress in PBABA), the Court was highly deferential to Congress's factual judgments regarding the necessity of the extraordinary remedies of the Voting Rights Act.[137] Several commentators distinguish *Katzenbach* from the PBABA litigation on the ground that "the Voting Rights Act was

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[133] *Id.* at 1637-38 (emphasis added).

[134] *Id.* at 1637.

[135] *Id.* at 1638.

[136] I am indebted to Professor Jessie Hill for this suggestion.

[137] Katzenbach v. Morgan, 384 U.S. 641, 653 (1966) ("It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations. . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."). This passage was quoted in the Congressional findings. Pub. L. 108-105 § 2(9) (2003).

an attempt by Congress to enforce a constitutional right[, whereas] PBABA represents a congressional effort to limit a constitutional right."[138] This distinction is supported by the Court's own statement in *Katzenbach* that "the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights . . . is inapplicable [to the VRA]."[139] It also accounts for the non-deferential approach in *Stenberg*, and for the language of "independent constitutional duty" in *Carhart II*.

Nevertheless, the Court's *Turner* decisions,[140] also relied on by Congress,[141] are not so easily distinguished; they reject First Amendment challenges to certain FCC regulations, and thus exemplify deference to Congress where its action touched an important constitutional right.[142] Similarly, although purporting to apply "strict scrutiny" to racial classifications, the Court at times has been extremely deferential to the empirical judgments of expert decision makers in the military and in universities.[143] Thus, despite some intuitive appeal, this "rights approach" to deference neither has the explicit endorsement of the Supreme Court nor adequately explains the Court's behavior, and thus is of little help in answering the deference question.[144]

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[138] Melissa C. Holsinger, *The Partial-Birth Abortion Ban Act of 2003: The Congressional Reaction to* Stenberg v. Carhart, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 603, 611 (2002-2003); *accord* Tamara F. Kushnir, *It's My Body, It's My Choice: The Partial-Birth Abortion Ban Act of 2003*, 35 LOY. U. CHI. L.J. 1117, 1179-80 (2004); Alissa Schechter, *Choosing Balance: Congressional Powers and the Partial Birth Abortion Ban Act of 2003*, 73 FORDHAM L. REV. 1987, 2022 (2005).

[139] *Katzenbach*, 384 U.S. at 657.

[140] Turner Broad. Sys. v. Fed. Commc'ns Comm'n (*Turner II*), 520 U.S. 180, 185 (1997); Turner Broad. Sys. v. Fed. Commc'ns Comm'n (*Turner I*), 512 U.S. 622, 626 (1994).

[141] *See* Partial Birth Abortion Ban Act of 2003, Pub. L. 108-105 § 2(11)-(12).

[142] Commentators have noted this, and still distinguished *Turner I* and *II* from the PBABA cases on the ground that PBABA essentially seeks to subvert a decision of the Supreme Court. *See* Holsinger, *supra* note 138, at 611-12; Kushnir, *supra* note 138, at 1180 (comparing PBABA to overruled Religious Freedom Restoration Act in Boerne v. Flores, 521 U.S. 507 (1997)).

[143] *See* Korematsu v. United States, 323 U.S. 214, 217-24 (1944) (deferring to military judgment about necessity of interning Japanese-Americans); Grutter v. Bollinger, 539 U.S. 306, 328-29 (2003) (deferring to educational judgment of public university about necessity of race-conscious admissions policy).

[144] Related to this approach is the theory of "constitutional facts," which holds that appellate courts should review constitutional questions without deference to other fact

4. Purposes of Deference

A better approach examines the *purpose* of deferring to fact-finding by the body enacting the law or regulation under scrutiny. Several closely related purposes exist, which apply to different kinds of cases.[145] The primary justification for deference to *legislative* fact-finding centers upon legislature's need to make relative judgments about the best course of action in the face of information that is often complex, conflicting and incomplete.[146] This concern—the desire not to "substitute [the court's] judgment of what is *desirable*" for the legislature's[147]—lies at the heart of the separation of powers.

Thus, the court has twice deferred to legislative judgments about the adequacy of criteria for civil commitment; despite considerable uncertainty in the psychiatric field about the proper classification and treatment of persons affected by the laws, the Court held that the laws set

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finders. *See* Kolenc, *supra*, note 110, at 186-87. The Supreme Court has stated unequivocally that it will review such "constitutional facts" in the First Amendment context without deference to lower court or agency findings. *See, e.g.*, Bose Corp. v. Consumers Union of U.S., 466 U.S. 485, 508 n.27 (1984) (citing cases). Following this approach, lower courts have applied the "constitutional fact" doctrine in recent abortion decisions, applying it both to lower courts, *Women's Medical Professional Corp. v. Taft*, 353 F.3d 436, 442 (6th Cir. 2003), and more significantly, to Congress, see National Abortion Federation v. Ashcroft, 330 F. Supp. 2d 436, 485 (S.D.N.Y. 2004) (rejecting deference to legislature on constitutional facts behind PBABA); Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1012-13 (N.D. Cal. 2004). This approach might seem to be supported by the *Carhart II* court's citation to *Crowell v. Benson*, 285 U.S. 22, 60 (1932), which stated that, "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." The Supreme Court has not, however, explicitly embraced this theory—not surprising, since it would seem to eliminate deference entirely in constitutional cases. Rather, the citation to *Crowell* appears simply to underscore that there is some limit to deference, not that it does not apply.

[145] *See generally* Solove, *supra* note 112, at 1003-09.

[146] Justifications involving the need of government agencies to act quickly to avert negative consequences, or the special expertise of particular agencies with regard to the programs they administer, *see id.* at 1003-06, 1008-09, are often invoked with regard to executive agencies but are largely inapplicable to legislatures and have no apparent application in the informed consent context. While it might be argued that state departments of health should receive deference under the special-expertise justification in drafting abortion-related informational materials, it is far from clear that these departments possess special expertise with regard to the contested, often cutting-edge questions of medical science that may arise in informed consent disputes.

[147] Rostker v. Goldberg, 453 U.S. 57, 68 (1981) (emphasis added).

sufficient standards to establish an individual's dangerousness to satisfy the Due Process Clause.[148] Similarly, the Court deferred to Congress's judgment about military need and flexibility in excluding women from Selective Service regulation.[149] Such evaluative judgments, about whether sufficient evidence exists to support one choice of means over another, or about, as in *Carhart II*, "the balance of risks,"[150] are the essence of policymaking.[151]

But the situation appears different where informed consent laws are concerned, especially when the state moves from requiring discussion of certain topics with patients to requiring the communication of specific factual claims. There, the factual question for the court is no longer whether the facts sufficiently support a particular policy; the adoption and dissemination of a particular claim *as fact* is the policy itself. To put it another way, whether certain issues are serious enough to be brought to patients' attention is a matter of judgment, but whether a particular assertion about that issue is *accurate* is nothing more than a matter of fact. This is the difference between policy judgment and simple fact-finding; while courts should generally avoid the former, they are actually designed to do the latter.

On the question of fact-finding itself, appeals are often made to the concept of "institutional competence."[152] It is often argued that legislatures

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[148] Jones v. United States, 463 U.S. 354 (1983); Kansas v. Hendricks, 521 U.S. 346 (1997).

[149] *Rostker*, 453 U.S. at 78-83 (reviewing evidence before Congress and concluding that the trial court "was quite wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of *Congress'* evaluation of that evidence").

[150] Gonzales v. Carhart (*Carhart II*), 127 S. Ct. 1610, 1638 (2007).

[151] *See Jones*, 463 U.S. at 364 n.13 ("The lesson we have drawn is not that government may not act in the face of [scientific] uncertainty, but rather that the courts should pay particular deference to reasonable legislative judgments."); *Hendricks*, 521 U.S. at 360 n.3; *cf.* Marshall v. United States, 414 U.S. 417 (1974) ("[W]hen [a legislature] undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation . . . .").

[152] *See, e.g.*, Metro Broad., Inc. v. FCC, 497 U.S. 547, 563 (1990) (framing deference in terms of "Congress' institutional competence as the National Legislature"), *overruled on other grounds by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). *See generally* Solove, *supra* note 112, at 1010-11 (discussing "institutional competence" and legal process jurisprudence).

are better situated to engage in certain kinds of complex fact-finding than courts are. Among the supposed advantages enjoyed by legislatures—and especially by the Congress—are the variety of legislators' personal expertise,[153] extensive funds, staff and procedures for research and hearings,[154] and absence of the legal constraints faced by courts in framing issues, deciding cases, and engaging in informal communications.[155] At least one commentator supporting fetal pain laws relies heavily on these arguments.[156]

While these arguments provide much to consider, they do not necessarily establish that legislatures will always do a better job than courts of determining relevant facts. Some commentators have argued that legislators "ha[ve] the tools but may lack the incentives to take factfinding seriously," which may lead them to engage in fact-finding processes that are cursory or skewed towards a desired result.[157] Congress has been accused of lax or biased fact-finding especially in the fields of federalism,[158] affirmative action,[159] and—in enacting the PBABA—abortion.[160] To the

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[153] *See, e.g.*, Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1179 (2001) (summarizing traditional arguments for deference).

[154] *See, e.g.*, Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1737-40 (2002) (summarizing roles of committee reports, committee oversight, and support agencies in congressional fact-finding).

[155] *See, e.g.*, Devins, *supra* note 153, at 1179-81.

[156] *See* Teresa Stanton Collett, *Fetal Pain Legislation: Is It Viable?*, 30 PEPP. L. REV. 161, 188-90, 216 (2003) (arguing that fetal pain laws "play to legislative strengths" and should trigger deference).

[157] Devins, *supra* note 153, at 1187.

[158] *See id.* at 1194-1200 (discussing Gun-Free School Zones Act and Religious Freedom Restoration Act).

[159] *See id.* at 1200-05 (discussing federal set-aside and preference programs of the 1970s and 1980s).

[160] *See, e.g.*, Brief of 52 Members of Congress as Amici Curiae Supporting Respondents, Gonzales v. Planned Parenthood Fed'n of Am., Inc., 127 S. Ct. 1610 (2007) (Nos. 05-1382, 05-380), 2006 WL 2736635, at 9-10 (contending that congressional majority drafted PBABA "Findings" to achieve predetermined result and then pursued "politically biased and transparently partisan" fact-finding to support them); *Carhart II*, 127 S. Ct. at 1637-38 (2007) (recognizing that "some recitations in the Act are factually incorrect," and specifically that the banned procedure is taught at medical schools, and that there is no medical consensus that it is never necessary).

extent that fact-finding on sharply contested political issues is inevitably politicized, perhaps heavy judicial deference is misguided.

Even putting aside the question of legislative motives, legislatures are not demonstrably more competent to determine the correctness of a mandated statement than courts. As noted above, courts already make similar factual determinations in the context of false advertising claims.[161] This is in contrast to the sorts of factual disputes that are central to most constitutional cases; it would be difficult to imagine a suit against a private individual or group in which a court would have to consider questions of military necessity or penology, or factual justification for some other policy choice. While this distinction may not be absolute, informed consent requirements nevertheless appear different in kind from those laws in regard to which the Court has found deference necessary.

Inasmuch as the reasons supporting judicial deference are not strongly implicated in evaluations of the truth of mandated disclosures, the deference principle—whatever it may mean elsewhere—should not be applied when the substance of abortion informed consent laws are challenged. At most, the deference principle should be applied in such cases only when the central factual issues are, upon the record, close ones.

5. No Mention of Deference in Informed Consent Cases

The conclusion that deference is not triggered in informed consent cases is bolstered by courts' actual treatment of those cases. Courts upholding informed consent laws as "truthful and not misleading," from *Casey* to the present, have never mentioned the deference principle, appearing to base their rulings on independent fact determinations.[162] The one reported decision entering a preliminary injunction "pending further consideration" of the accuracy questions did not mention deference either.[163] Neither did the district or appellate court mention deference in deeming South Dakota's provisions ideological, not factual, statements.[164]

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[161] *See supra* Part III.B (discussing "ABC link" cases).

[162] *See* Eubanks v. Schmidt, 126 F. Supp. 2d 451 (W.D. Ky. 2000).

[163] Summit Med. Ctr. of Ala., Inc. v. Sigelman, 227 F. Supp. 2d 1194, 1205 (M.D. Ala. 2002).

[164] Planned Parenthood of Minn. v. Rounds, 375 F. Supp. 2d 881 (D.S.D. 2005), *aff'd*, 467 F.3d 716 (8th Cir. 2006), *reh'g granted*, No. 05-3093 (Jan. 9, 2007). Moreover, the Eighth Circuit panel rejected the state's argument that "the challenged disclosures are not ideological, but are supported by an objective scientific and medical consensus because of the Act's definition of a 'human being' in § 8, as a 'living member of the species Homo

In these cases neither the courts, nor the plaintiffs, nor even the states' lawyers regarded the deference principle as applicable, let alone determinative.[165]

6. Truthful Versus Misleading

As a matter of political reality, legislatures are less likely to present false or contested "facts" than they are to present relatively undisputed facts in a misleading way. When determining whether something is misleading, deference is clearly inapplicable. While a "misleading-ness" analysis requires a baseline of fact—that is, the court must first decide whether a particular statement is truthful—it then asks only what conclusions a reasonable person would draw from a given statement. This is not a factual question, but a legal one classically within the competence of courts.

III. APPLYING THE FRAMEWORK: FETAL PAIN PROVISIONS

A. State-mandated Fetal Pain Information

At present, five states have laws requiring information about "fetal pain" for women seeking abortions at twenty-two weeks or later.[166] Similar

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sapiens.'" *Rounds*, 467 F.3d at 723. Noting the district court's duty under *Casey* to determine whether the statements were accurate, the panel observed that "[t]his inquiry would be foreclosed if the legislature had the right to define the most important term in any way it desired, no matter how misleading." *Rounds*, 467 F.3d at 723.

[165] *See, e.g.*, Defendant's Memorandum in Opposition to Motion for Preliminary Injunction, Planned Parenthood of Minn. v. Rounds, 2005 WL 1792244 (D.S.D. 2005) (recounting state's medical evidence in the case without invoking deference).

[166] ARK. CODE ANN. § 20-16-1105 (2005); GA. CODE ANN. § 31-9A-4 (2006); OKLA. STAT. ANN. tit. 63 § 1-738.10 (Supp. 2008); LA. REV. STAT. ANN. § 40:1299.35.6 (2001); MINN. STAT. § 145.4243(a)(3) (2005). A sixth state, Illinois, also has a fetal pain law on the books, apparently the nation's first. This law was enjoined a generation ago:

> This section, which also applies regardless of the stage of pregnancy, requires the physician to inform the pregnant woman of the possibility of "organic pain" to the fetus when there exists a "reasonable medical certainty" that the particular method of abortion to be used will cause such pain, and of available methods of alleviating or abolishing such pain . . . . The uncontroverted medical testimony in the record at this stage describes this information as "medically meaningless, confusing, medically unjustified, and contraindicated, causing cruel and harmful stress to . . . patients." The defendants have submitted no evidence to rebut the plaintiffs' characterization of this information as false and unwarranted. Even assuming, therefore, that the State may further at all

legislation was proposed in eight other states in 2007.[167] Of those five, Georgia, Arkansas, Oklahoma, and Louisiana require that patients seeking an abortion receive materials including the following statement:

> By 20 weeks' gestation, the unborn child has the physical structures necessary to experience pain. There is evidence that by 20 weeks' gestation unborn children seek to evade certain stimuli in a manner which in an infant or an adult would be interpreted to be a response to pain. Anesthesia is routinely administered to unborn children who are 20 weeks' gestational age or older who undergo prenatal surgery.[168]

An unsuccessful bill in the 109th Congress, the Unborn Child Pain Awareness Act, used almost identical language but prefaced each statement with the words, "There is substantial evidence that . . . ."[169]

> stages of pregnancy its asserted interest in "humane disposition of the fetus," a question we do not decide, the record now before us indicates that this particular informational requirement furthers no such purpose.

Charles v. Carey, 627 F.2d 772, 784 (7th Cir. 1980), *proceedings on remand,* 579 F. Supp. 464 (C.D. Ill. 1983). As one commentator has noted, "[t]he continuing viability of this decision . . . is suspect in light of advances in medical knowledge regarding fetal pain and the Supreme Court's repudiation of much of the reasoning and the holding of *Akron I* [upon which the Sixth Circuit had relied] in *Planned Parenthood v. Casey.*" Collett, *supra* note 156, at 174.

[167] GUTTMACHER INST., MONTHLY STATE UPDATE: MAJOR DEVELOPMENTS IN 2007, http://www.guttmacher.org/statecenter/updates/index.html#FetalPain (last visited November 17, 2007).

[168] ARK. CODE § 20-16-1105(a)(1)(A) (2005); GA. CODE § 31-9A-4(a)(3) (2006); OKLA. STAT. ANN. tit. 63 § 1-738.10(A) (Supp. 2008); LA. REV. STAT. ANN. § 40:1299.35.6(C)(1)(a)(ii) (2001). Note that the statutory language is not necessarily reflected in current state materials, as responsible agencies are often slow to implement their requirements. For example, the online version of Texas's booklet does not feature this exact language, but does state that at 20 weeks' gestation, "[s]ome experts have concluded that the unborn child is probably able to feel pain." TEX. DEP'T OF HEALTH, *supra* note 3, at 5.

[169] Unborn Child Pain Awareness Act of 2006, H.R. 6099, 109th Cong. The full language is:

> There is a significant body of evidence that unborn children at 20 weeks after fertilization have the physical structures necessary to experience pain. There is substantial evidence that at least by this point, unborn children draw away from surgical instruments in a manner which in an infant or an adult would be interpreted as a response to pain. There is substantial evidence that the process of being killed in an abortion will

The Arkansas and Oklahoma statutes additionally provide that clinic staff inform the patient whether "an anaesthetic of analgesic would eliminate or alleviate organic pain to the unborn child," and about the potential risks of fetal anesthesia.[170] Minnesota requires that the materials contain information regarding:

> (i) the development of the nervous system of the unborn child; (ii) fetal responsiveness to adverse stimuli and other indications of capacity to experience organic pain; and (iii) the impact on fetal organic pain of each of the methods of abortion procedures commonly employed at this stage of pregnancy.[171]

The materials ultimately produced in Minnesota also refer to the twenty-week benchmark, but state that experts differ on whether fetal pain is possible this early or only later.[172]

Additionally, while fetal pain information is not mandated by law in Texas or South Dakota, both states' departments of health have included such information in materials that must be provided to patients.[173] The South Dakota materials state without specifics that an "unborn child may feel physical pain,"[174] while Texas's cites the twenty-week benchmark and further states that pain perception may be possible as early as twelve weeks.[175]

> cause the unborn child pain, even though you receive a pain-reducing drug or drugs.

Id. § 3(c)(1)(B).

[170] ARK. CODE ANN. § 20-16-1104(a)(2005); OKLA. STAT. ANN. tit. 63 § 1-738.9 (Supp. 2008).

[171] MINN. STAT. § 145.4243(a)(3) (2005).

[172] Richardson & Nash, *supra* note 12, at 9; MINN. DEP'T OF HEALTH, IF YOU ARE PREGNANT: INFORMATION ON FETAL DEVELOPMENT, ABORTION AND ALTERNATIVES 22 (2005), *available at* http://www.health.state.mn.us/wrtk/wrtk-handbook.pdf.

[173] Richardson & Nash, *supra* note 12, at 9.

[174] *Id.*

[175] *Id.*

B. Possibly Truthful, Definitely Misleading

Since four of the five state laws require that the same, specific statements be conveyed verbatim, it will be useful to examine those particular statements one at a time. A careful comparison to recent scientific literature on fetal pain shows that two out of three of these statements are questionable on the issue of truthfulness, and all are misleading.

1. "By 20 weeks' gestation, the unborn child has the physical structures necessary to experience pain."[176]

The limited literature on fetal pain reveals considerable uncertainty about the minimum anatomical thresholds necessary to experience pain.[177] One literature review often cited by proponents of fetal pain legislation states that "the full anatomical system for nocioception has been formed" by twenty-six weeks' gestation, but more rudimentary anatomical development makes pain "possible" from twenty weeks.[178] It also notes that the first neurons to link to the cortex do so at sixteen weeks,[179] and characterizes this as an "early limit" on any possible sensory awareness.[180] A more recent review in the *Journal of the American Medical Association* notes evidence of thalamocortical pathways appearing between twenty-three and thirty weeks (with the caveat that the particular pathways involved in pain were not specifically examined).[181] A number of recent

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[176] GA. CODE ANN. § 31-9A-4(a)(3) (2006); *see also* ARK. CODE ANN. § 20-16-1105(a)(1)(A) (2005); 63 OKLA. STAT. ANN. § 1-738.10(A) (Supp. 2008); LA. REV. STAT. ANN. § 40:1299.35.6(C)(1)(a)(ii) (2001).

[177] The medical literature summarized *infra* represents all English-language articles on the subject retrievable through MEDLINE from 2000, including literature reviews summarizing earlier research.

[178] Vivette Glover & Nicholas M. Fisk, *Fetal Pain: Implications for Research and Practice*, 106 BRIT. J. OBSTETRICS & GYNAECOLOGY 881, 885 (1999). The standard American spelling is "nociception." BLACK'S MEDICAL DICTIONARY 436 (40th ed. 2004).

[179] Glover and Fisk, *supra* note 178, at 885.

[180] *Id.* at 882.

[181] Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AM. MED. ASS'N 947, 952 (2005). Advocates of fetal pain legislation have criticized this paper because of its methodology and authorship; its lead author and at least one co-author are former and current staffers of abortion-rights organizations. *See* NAT'L RIGHT TO LIFE COMM., GULLIBLE TREATMENT OF TRUMPED-UP "STUDY" ON FETAL PAIN ISSUE SHOULD EMBARRASS J.A.M.A. AND SOME JOURNALISTS (2005),

articles estimate the anatomical threshold at twenty-six weeks,[182] while another cites the broader range of twenty-four to twenty-eight weeks for appearance of "the final critical cortico-thalamic connections."[183]

This first factual statement, then, appears to be based on the assumption that the speculated "early limit" for pain perception is the actual threshold. This is not an established fact, but even if it were, it would be misleading. The reasonable lay reader would be likely to infer that when "the necessary structures" are in place, pain perception can occur. But "[w]hile the presence of thalamocortical fibers is necessary for pain perception, their mere presence is insufficient—this pathway must also be functional."[184] In fact, in research on actual neural activity, "arrival of sensory impulses at the cortical level cannot be detected before twenty-nine weeks."[185] Thus, it appears that these structures are not meaningfully functional until the start of the third trimester, about twenty-nine to thirty weeks' gestational age.[186]

In addition to whether anatomical structures are present and can function, there remains the difficult question of whether the fetus is actually *aware* of any noxious stimuli the body may process.[187] Some would dismiss this as an unanswerable (and therefore unimportant) "philosophical question."[188] Much of the "awareness" debate has indeed focused on the

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http://www.nrlc.org/abortion/Fetal_Pain/NRLCrebuttalJAMA.html; Michelle C. White & Andrew R. Wolf, *Pain and Stress in the Human Fetus*, 18 BEST PRACTICE & RES. CLINICAL ANESTHESIOLOGY 205, 206-08 (2004) (briefly summarizing some of the same research).

[182] Marc Van de Velde et al., *Fetal Pain Perception and Pain Management*, 11 SEMINARS IN FETAL & NEONATAL MED. 232, 233 (2006); Sampsa Vanhatalo & Onno van Nieuwenhuizen, *Fetal Pain?*, 22 BRAIN & DEV. 145, 149 (2000); Stuart W.G. Derbyshire, *Can Fetuses Feel Pain?*, 332 BRIT. MED. J. 909, 910 (2006).

[183] David J. Mellor et al., *The Importance of 'Awareness' for Understanding Fetal Pain*, 49 BRAIN RES. REVS. 455, 456 (2005).

[184] Lee et al., *supra* note 181, at 952.

[185] White & Wolf, *supra* note 181, at 207.

[186] Vanhatalo & van Nieuwenhuizen, *supra* note 182, at 147; *see also* David Benatar & Michael Benatar, *A Pain in the Fetus: Toward Ending Confusion About Fetal Pain*, 15 BIOETHICS 57, 64 (2001).

[187] *See generally* Mellor et al., *supra* note 183; Derbyshire, *supra* note 182.

[188] Kolenc, *supra* note 110, at 202-03, 228.

abstract business of defining the concepts of pain and awareness.[189] There is also, however, an empirical side to this discussion, including some data suggesting that "the fetus exists in a continuous sleep-like state" and hence "cannot experience nocioceptive inputs as pain."[190]

In light of considerable scientific uncertainty about just what is "necessary" to experience pain, it is not clear whether any unqualified chronological estimate could at present be regarded as truthful; the twenty weeks figure looks particularly doubtful. But even if the state could claim the benefit of deference as to truthfulness, this statement is clearly misleading because even if the "physical structures necessary to experience pain"[191] were developed at such an early point, they would not be functional. Uncertainty about actual fetal consciousness of bodily responses at any point during pregnancy makes the statement even more misleading.

2. "There is evidence that by twenty weeks' gestation unborn children seek to evade certain stimuli in a manner which in an infant or an adult would be interpreted to be a response to pain."[192]

Ambiguous and inconsistent data mean that "any attempt to quantify pain responses in neonates, let alone fetuses, using behavioural measurements is extremely difficult."[193] While fetuses show motor reflex movements throughout the body as early as fourteen weeks, early reactions

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[189] *See, e.g.*, Benatar & Benatar, *supra* note 186 (arguing that pain experience requires only minimal consciousness, not self-awareness or emotion); Derbyshire, *supra* note 182, at 911 (arguing that pain requires a combination of "cognitive, affective, and evaluative experiences" impossible in light of limited neural development and the isolated in utero environment); *cf.* Glover & Fisk, *supra* note 178, at 882 (discussing whether previous experience and self-awareness are prerequisites).

[190] Mellor et al., *supra* note 183, at 461. While some point to fetal electroencephalogram (EEG) data that are *not inconsistent* with pain experience, Benatar & Benatar, *supra* note 186, at 65, these "wakeful" EEG outputs also occur in individuals in a persistent vegetative state. Lee et al., *supra* note 181, at 950.

[191] GA. CODE ANN. § 31-9A-4(a)(3) (2006); *see also* ARK. CODE ANN. § 20-16-1105(a)(1)(A) (2005); OKLA. STAT. ANN. tit. 63, § 1-738.10(A) (Supp. 2008); LA. REV. STAT. ANN. § 40:1299.35.6(C)(1)(a)(ii) (2001).

[192] GA. CODE ANN. § 31-9A-4(a)(3) (2006);. *see also* ARK. CODE ANN. § 20-16-1105(a)(1)(A) (2005); OKLA. STAT. ANN. tit. 63, § 1-738.10(A) (Supp. 2008); LA. REV. STAT. ANN. § 40:1299.35.6(C)(1)(a)(ii) (2001).

[193] White & Wolf, *supra* note 181, at 209.

are purely reflexive and do not differentiate between types of stimulus.[194] The data behind this second assertion comes largely from studies of facial responses in preterm babies twenty-six weeks and later, not from in utero studies.[195] Assuming these findings are actually applicable to fetuses, it remains unclear whether they signify pain; while some strongly contend that they do,[196] some findings suggest that these early facial movements may not be controlled by the cerebral cortex.[197] Findings of withdrawal reflexes—which is what the statement actually refers to—present similar problems. While these may seem consonant with pain to the observer, Lee et al. point out that "flexion withdrawal from tactile stimuli is a noncortical spinal reflex exhibited by infants with anencephaly [absence of the forebrain], and by individuals in a persistent vegetative state who lack cortical function."[198]

This evidence may imply, but does not clearly establish, that evasive responses superficially suggestive of pain occur in fetuses as early as twenty weeks' gestation. But once again, even if it were established as truthful, the statement would still be misleading. Despite the paucity of evidence, and the considerable debate about the significance of these findings, the statement—without more—suggests to the lay reader that pain is actually experienced.

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[194] Vanhatalo & van Nieuwenhuizen, *supra* note 182, at 149.

[195] *Id.* at 148-49 (twenty-six weeks and later); Lee et al., *supra* note 181, at 950 (discussing a variety of studies, twenty-five to thirty-two weeks).

[196] Glover & Fisk, *supra* note 178, at 882 (arguing that these distinct reactions are indistinguishable from those we recognize as showing pain in infants and animals); Vanhatalo & van Nieuwenhuizen, *supra* note 182, at 147 ("Unlike other motor reflexes facial expressions may specifically reflect the emotions of pain."); Benatar & Benatar, *supra* note 186, at 71 (arguing that "the complex and coordinated nature of this behavior makes it hard [] to dismiss as a mere reflex").

[197] Lee et al., *supra* note 181, at 950.

[198] *Id.* (citing studies).

3. "Anesthesia is routinely administered to unborn children who are twenty weeks' gestational age or older who undergo prenatal surgery."[199]

This last statement is both the least contested[200] and the most misleading. Fetal anesthesia is now widely recommended for late-term prenatal surgery. Yet contrary to the claims of some anti-abortion advocates,[201] this practice is not evidence of a clear recognition of fetal pain. On the contrary,

> [w]hen long-term fetal well-being is a central consideration, evidence of fetal pain is unnecessary to justify fetal anesthesia and analgesia because they serve other purposes unrelated to pain reduction, including (1) inhibiting fetal movement during a procedure; (2) achieving uterine atony to improve surfical access to the fetus and to prevent contractions and placental separation; (3) preventing hormonal stress responses associated with poor surgical outcomes; and (4) preventing possible adverse effects on long-term neurodevelopment and behavioral responses to pain.[202]

Doctors are particularly concerned that "noxious stimulation might not need to penetrate consciousness to substantially alter the course of sensory development."[203] For all these reasons, medical experts consider pain-related concerns in fetal surgery and the treatment of preterm babies to be

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[199] GA. CODE ANN. § 31-9A-4(a)(3) (2006); *see also* ARK. CODE ANN. § 20-16-1105(a)(1)(A) (2005); OKLA. STAT. ANN. tit. 63, § 1-738.10(A) (Supp. 2008); LA. REV. STAT. ANN. § 40:1299.35.6(C)(1)(a)(ii) (2001).

[200] Kolenc, *supra* note 110, at 208 (characterizing this finding as "non-controversial" and "undisputed").

[201] *See, e.g.*, Note, *The Science, Law, and Politics of Fetal Pain Legislation*, 115 HARV. L. REV. 2010, 2016 (2002) (arguing based on the practice that "it is clear that fetal pain matters to women and to physicians who perform surgical procedures involving fetuses").

[202] Lee et al., *supra* note 181, at 951; *see also* Van de Velde, *supra* note 182, at 234 (noting that "immobilization of the fetus is required to prevent accidental fetal movements complicating" prenatal surgeries).

[203] Van de Velde, *supra* note 182, at 233; *see also* Vanhatalo & van Nieuwenhuizen, *supra* note 182, at 149 ("[E]specially in fetuses, noxious stimuli may have adverse effects on the developing individual regardless of the quality or level of processing in the brain."); White & Wolf, *supra* note 181, at 211-16 (detailing developmental effects of the fetal stress response, and development of anesthetic methods to prevent these effects).

"completely different" from the abortion context,[204] and "fetal anaesthesia may be medically indicated regardless of whether fetal pain exists."[205]

While anti-abortion advocates may try to characterize anesthesia for fetal surgeries as a telling inconsistency in medical practice, it simply is not. In the face of several clear clinical indications unrelated to concerns about inflicting pain, it would be unreasonable to infer a medical recognition of fetal pain from this practice. Yet given its wording and context, this inference is clearly what the drafters intended, and what reasonable but uninformed lay persons would naturally assume.

C. The Harm of Fetal Pain Provisions

Fetal pain provisions are purportedly aimed at encouraging women to request anesthetic to make the procedure more humane.[206] However, legislative histories and the laws' proponents suggest another purpose: to shock women choosing abortion into abandoning that choice.[207] Even if their aim is not actually to frighten and discourage, false or misleading fetal pain provisions are just as objectionable as those addressing, for example, breast cancer risk. They may unnecessarily exacerbate the anxiety women feel during and after the abortion and anesthetic measures carry a real risk of complications for the patient.[208] Thus, while some have said that in the

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[204] H.P. Simons & Dick Tibboel, *Pain Perception Development and Maturation*, 11 SEMINARS IN FETAL & NEONATAL MED. 227, 230 (2006) (citing favorably to Lee et al., *supra* note 181).

[205] Lee et al., *supra* note 181, at 952; *see also* Derbyshire, *supra* note 182, at 911 ("Should anaesthetists return to a view that neonates cannot feel pain, the clinical benefits of anaesthetic intervention will remain.").

[206] *See, e.g.*, LA. REV. STAT. ANN. § 40:1299.35.6(B)(1)(g) (2001) (providing that consent to abortion is only deemed voluntary if the patient is informed orally of "[t]he availability of anesthesia or analgesics to alleviate or eliminate organic pain to the unborn child that could be caused by the method of abortion to be employed").

[207] *See generally* Siegel, *supra* note 61, at 1023 (arguing that "[a]dvocating for such laws provides the antiabortion movement an opportunity to assert that abortions are the product of misinformation and coercion, and to advance the argument that abortions hurt women as well as the unborn," and showing how in South Dakota bills to expand informed consent requirements and to ban abortion outright were part of a single legislative campaign, supported by the same questionable legislative findings). In addition, promoting special anesthetic measures may be another of many ways to indirectly increase the cost of abortion and thus, discourage it. *See* Hannah Stahle, *Fetal Pain Legislation: An Undue Burden*, 10 QUINNIPIAC HEALTH L.J. 251, 268-69 (2007).

[208] Lee et al., *supra* note 181, at 952; *see also* Simons & Tibboel, *supra* note 204, at 230 (noting "risks to the mother of analgesic therapy to treat fetal pain" in abortion).

absence of conclusive evidence medicine should "err on the safe side" by addressing potential pain,[209] the reality is a situation in which "the possible but unknown fetal benefit must be balanced with inevitable and potentially unacceptable risk to the woman."[210] It does not necessarily follow that any mandated information on fetal pain is impermissible in the absence of more conclusive scientific data, but the state's information must not disguise scientific uncertainty, as current laws clearly do.

Most informed consent laws, whether general or abortion-specific, simply identify kinds or topics of information that must be conveyed to the patient, such as the medical risks of the procedure or the probable gestational age of the embryo or fetus. These requirements generally will not pose accuracy problems because they do not require specific assertions of fact, but leave it to clinicians to formulate the facts according to their medical knowledge and judgment. By contrast, fetal pain laws—like the "whole, separate, unique, living human being" provision enjoined in *Rounds*—include specific facts that must be conveyed with specific wording. The preceding analysis of these statements suggests that the more specific mandated disclosure requirements are, the more problematic they will be. Such specific statements may require complex qualifications or clarifications to render them truthful and not misleading. Moreover, specific factual claims in statutes, or even printed materials, are likely to become dated and inaccurate in light of continuing medical research.[211]

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[209] Vivette Glover & Nicholas M. Fisk, *Do Fetuses Feel Pain? We Don't Know; Better to Err on the Safe Side*, 313 BRIT. MED. J. 796 (1996), *cited in* Laura B. Myers et al., *Fetal Pain: To the Editor*, 295 J. AM. MED. ASS'N 159 (2006) (letter in reply to Lee et al.).

[210] Susan J. Lee et al., *Fetal Pain: In Reply*, 295 J. AM. MED. ASS'N 160 (2006) (authors' reply to letters). *But see* Collett, *supra* note 156, at 2018 (arguing that "[p]eople undergoing surgical procedures of all sorts routinely expose themselves to similar minor risks, and there is no reason to expect women seeking late-term abortions to act any differently").

[211] The Court in *Carhart II* recognized that "[w]hether or not accurate at the time, some of the important findings [in the PBABA] have been superseded." Gonzales v. Carhart (*Carhart II*), 127 S. Ct. 1610, 1638 (2007). That the Court may have been giving Congress the benefit of the doubt against accusations that it ignored or distorted facts in the first place does not diminish its recognition of this risk, which, although not decisive in *Carhart II*, has special significance for informed consent laws. This problem is exacerbated because state actors may have little incentive, save the threat of litigation, to periodically review and update these statements. *But see* Kolenc, *supra* note 110, at 216 (arguing that "legislators are better-situated to 'change their mind' since they are not bound by stare decisis like the courts").

But while fetal pain provisions in Arkansas, Georgia, and Oklahoma make this problem of specificity explicit by placing mandatory language within the law itself, statements formulated by state agencies in Texas and South Dakota, pursuant to much less specific statutory language, present the same problems. Indeed, similar problems exist in other states, where without an explicit legislative mandate, state agencies have included in mandated materials false and misleading statements about breast cancer and the psychological impact of abortion.[212] Thus, while most existing abortion informed consent laws provide enough discretion to physicians to avoid accuracy challenges, fetal pain laws may represent the tip of a largely unchallenged iceberg in states' mandated materials.

The *Casey* plurality recognized that "most women considering an abortion would deem the impact on the fetus relevant . . . to the decision."[213] Information on such matters is thus an appropriate aspect of informed consent in the abortion context. But as with the risks and contraindications of abortion procedures for the patient, it is doctors who have both the knowledge and the incentive to provide information that is current, accurate, and appropriate to the patient. Doctors' incentives in this regard are underscored by the New Jersey Supreme Court's decision in *Acuna v. Turkish*, which recognized that a claim for medical negligence would arise where "a physician withheld medical information that a reasonably prudent pregnant woman in [the plaintiff's] circumstances would have considered material before consenting to a termination of pregnancy."[214] Doctors are

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[212] Richardson & Nash, *supra* note 12, at 7-9.

[213] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992).

[214] Acuna v. Turkish, 930 A.2d 416, 425 (N.J. 2007). In this unusual case, Acuna needed an abortion for medical reasons, and asked the physician "whether 'the baby was already there,'" to which Dr. Turkish (incredibly) replied, "Don't be stupid, it's only blood." *Id.* at 419. While the New Jersey Supreme Court acknowledged that "material medical information" in this context includes information about the pregnancy's "gestational stage," *id.* at 428, the court rejected Acuna's assertion that this requires doctors to inform patients that an abortion will "terminate the life of a living . . . human being." *Id.* at 412. Drawing on the panel opinion in *Rounds,* the court concluded that this was simply not "medical information." *Id.* at 425-28.

As noted by plaintiffs' counsel in the *Rounds* case, *Acuna* was brought by the same prominent anti-abortion attorney defending South Dakota's law in *Rounds*, who argued in *Acuna* for an informed consent standard "striking[ly] similar[]" in its language to the law struck down in *Rounds*. Plaintiffs' Motion in Support of Motions to Amend Complaint and Terminate Intervention, Planned Parenthood of Minn. v. Rounds, 2006 WL 1354823, (D.S.D. 2006). While intervenors in *Rounds* seemed to believe that *Acuna*'s result strengthened South Dakota's position, see Reply Brief on Appeal of Intervenors, Planned Parenthood of Minn., S.D., N.D. v. Rounds, 2005 WL 3657919, at *18-22 (8th Cir. 2005), it

thus in a much better position than legislatures or health departments to translate informed consent principles into concrete statements, especially when the science involved is controversial or rapidly developing.

The federal fetal pain bill mustered a majority of votes in the House of Representatives, but did not survive a filibuster.[215] The federal language may be less vulnerable to attack, inasmuch as it asserts only "substantial evidence" for the claims rather than conclusively stating them as fact. Nevertheless, the foregoing discussion makes clear that, even with slightly less declarative language, these claims are vulnerable to attack. Although the measure's prospects may be dim in a Democrat-controlled Congress—and it remains to be whether its language will catch on—the dogged reintroduction of the federal bill,[216] along with the invocation of informed consent in *Carhart II*, will help keep this issue alive in the states.

IV. CONCLUSION

The scant analysis of informed consent provisions in *Casey* and its lower court progeny exemplifies the legal confusion engendered by the murky "undue burden" standard. Language from the *Casey* opinion gives conflicting indications as to how to analyze these provisions. But whatever the proper analysis, false or misleading mandated statements would clearly fail, and false advertising cases against private actors provide a model for making those dual determinations.

The principle of judicial deference to legislative fact-finding might provide a basis on which to treat informed consent challenges differently from advertising suits. But while this much-lauded principle has appeared crucial in some Supreme Court decisions, the standards for applying it remain unclear. Moreover, there are compelling reasons to apply deference in weak form or not at all in informed consent challenges, including the implication of constitutional rights; the non-implication of evaluative policy judgments; and courts' practice in making virtually identical fact determinations in private disputes. Additionally, any deference that may

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may in fact cut against it, since doctors' incentives under a general informed consent duty like that articulated in *Acuna* may render such specific statutes unnecessary. *Cf.* Post, *supra* note 38, at 979 (contrasting, for purposes of First Amendment analysis, the "implicit danger of conscripting physicians [by legislation] to speak falsehoods" with "[o]rdinary tort litigation," which "actually enhances" physicians' role as experts).

[215] 109th Cong. Rec. H8856 (daily ed. Dec. 6, 2006).

[216] The bill was reintroduced in 2007 as S. 356 and H.R. 3442, but failed to emerge from committee.

apply to determinations of truthfulness is inapplicable to determining whether mandated statements are misleading.

Examination of some states' informational requirements regarding potential fetal pain demonstrates that, under the above framework, specific mandated statements on controversial topics may frequently fail. Statements about fetal pain currently in place in several states are questionably accurate and clearly misleading. Rejection of these troublesome provisions, which may influence women to take on additional costs and medical risks, suggests a broader swath of problematic mandated information, much of it not explicit in statute, but spelled out in mandatory printed materials. Language about informed consent in the recent *Gonzales v. Carhart* decision may spur a new wave of such requirements, some of them ripe for constitutional challenge.

As indicated in *Casey*, states have considerable leeway in ensuring that women seeking abortions are well-informed.[217] Simply requiring that certain subjects be discussed will always be permissible, except in cases where a particular woman's situation makes a particular topic irrelevant and needlessly upsetting.[218] Requirements that doctors communicate specific factual claims—and, more often, the inclusion of controversial factual claims in state printed materials—are considerably more problematic. Bold claims will need to be qualified, making clear the persistence of scientific division. If denied *cartes blanches* to manipulate science, states may prefer simply to return to the traditional informed consent approach: ensuring that the doctor-patient conversation is a complete one, and leaving "the content of the disclosure . . . in the first instance with the physician."[219]

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[217] *See supra* Part I.A.

[218] *See supra* notes 48-50 and accompanying text.

[219] Canterbury v. Spence, 464 F.2d 772, 787 (D.C. Cir. 1972).

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