

UNDERMINING PATIENT AUTONOMY BY REGULATING INFORMED CONSENT FOR ABORTION

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INTRODUCTION

In 1973, the United States Supreme Court decided the seminal case *Roe v. Wade*¹—arguably the most important decision in the field of abortion rights, and one of the most controversial cases in the history of the Court. In that decision, the Court held that a woman’s constitutional right to privacy afforded her the right to terminate a pregnancy within the first trimester.² Furthermore, as a fundamental right guaranteed by the Constitution, any laws restricting the right to abortion would be subject to strict scrutiny, the highest standard of judicial review.³ This first Supreme Court decision regarding abortion imposed a broad, sweeping protection for abortion rights.⁴ However, subsequent litigation and state legislation have served to chip away at this fundamental right.⁵ The fight to overturn *Roe* remains strong.

Ten years later, the Court reaffirmed its decision in *Roe* when it decided *City of Akron v. Akron Center for Reproductive Health, Inc.*,⁶ which concerned an Akron, Ohio ordinance that heavily regulated the performance of abortions.⁷ In addition to provisions regarding the location of the abortion procedure (in a hospital after the first trimester), parental notification and consent, and the disposal of fetal remains, the ordinance regulated the informed consent doctors were to obtain from patients prior to the abortion, and imposed a twenty-four hour waiting period.⁸ Information that physicians were mandated to provide under the ordinance included “[t]hat the unborn child is a human life,” information regarding anatomical and physiological development at the instant gestational age, that her abortion “may worsen any existing psychological problems she may have, and can result in severe emotional disturbances,” and information regarding agencies and services available to her so that she may continue her pregnancy.⁹

The Court reversed the portion of the judgment of the Court of Appeals that upheld the hospitalization requirement, but

¹ 410 U.S. 113 (1973).

² *Id.* at 153–54, 164.

³ *Id.* at 155–56.

⁴ *Id.* at 164–65.

⁵ *See infra* notes 6–29.

⁶ 462 U.S. 416 (1983).

⁷ *Id.* at 420, 422–24.

⁸ *Id.* at 422–25.

⁹ *Id.* at 423–24 n.5 (citing Akron Codified Ordinance § 1870.06).

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otherwise affirmed the decision, which invalidated the remaining provisions of the ordinance as unconstitutional.¹⁰ Regarding the informed consent provision, the Court stated its belief that the provision “attempts to extend the State’s interest in ensuring ‘informed consent’ beyond permissible limits[,]” and that ensuring informed consent does “not justify abortion regulations designed to influence the woman’s informed choice between abortion or childbirth.”¹¹ The Court further stated that rather than ensuring truly informed consent, the information seemed designed to dissuade the woman from having an abortion at all.¹²

The Court reached a similar decision in *Thornburgh v. American College of Obstetricians and Gynecologists*,¹³ decided in 1986. Once again, a statute was enacted by the state, which imposed sweeping regulations on multiple aspects of abortion services, and, again, the Court affirmed its decision in *Roe*.¹⁴ The statute included an informed consent provision similar to that in *City of Akron*, mandating that certain information be provided to patients regarding potential physical and psychological effects of the abortion, benefits and assistance available for prenatal care and childbirth, and financial liability of the father.¹⁵ The statute also regulated the information to be included in written materials, requiring specific text and information.¹⁶ In holding that the provisions were unconstitutional, the Court stated that “[u]nder the guise of informed consent, the Act requires the dissemination of information that is not relevant to such consent, and, thus, it advances no legitimate state interest.”¹⁷ Justice Blackmun aggressively underscored this point, adding that “[t]his type of compelled information is the antithesis of informed consent. That the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion character of the statute and its real purpose.”¹⁸

In 1992, the Court decided *Planned Parenthood v. Casey*,¹⁹ and

¹⁰ *Id.* at 452.

¹¹ *Id.* at 444.

¹² *Id.*

¹³ 476 U.S. 747 (1986).

¹⁴ *Id.* at 759.

¹⁵ *Id.* at 760–61.

¹⁶ *Id.* at 761.

¹⁷ *Id.* at 763.

¹⁸ *Id.* at 764.

¹⁹ 505 U.S. 833 (1992).

with that decision overturned both *City of Akron* and *Thornburgh* and set a new standard of review for statutes that restrict abortion access, including informed consent regulations.²⁰ At issue was a Pennsylvania statute which imposed, among other restrictive provisions—most notably a requirement that married women seeking to terminate a pregnancy notify their spouses—a provision regulating informed consent and requiring that women be provided with certain information before undergoing an abortion.²¹ The Court held that the Pennsylvania legislation was valid except for the provision requiring spousal notification, and set out a new standard of judicial review for laws restricting abortion access.²² The Court replaced the strict scrutiny standard of review with an “undue burden” test.²³ Under the test, “a law restricting abortions constitutes an undue burden, and hence is invalid, if, ‘in a large fraction of the cases in which the law is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion.’”²⁴ The Court also gave significant consideration to the state’s legitimate interest in preserving human life.²⁵ This contentious plurality decision constituted a large step in eroding the protections of *Roe*, upholding the majority of a statute that restricted access to abortion, and lowering the standard for scrutinizing any potential restrictions on abortion rights.

The next landmark decision came in 2007, when the Court decided *Gonzales v. Carhart*.²⁶ This case diminished the protections of *Roe*, perhaps even more than *Casey*. In its decision, the Court upheld the Partial Birth Abortion Act of 2003, holding that barring this abortion procedure did not impose an undue burden on a woman’s right to obtain an abortion.²⁷ Furthermore, this decision represents a striking shift in the Court’s approach to restrictive abortion legislation, with the majority taking a breathtakingly paternalistic turn.²⁸ Rather than confining its

²⁰ *Id.* at 876.

²¹ *Id.* at 844.

²² *Id.* at 876, 895.

²³ *Id.* at 876.

²⁴ *Fargo Women’s Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (O’Connor, J., concurring) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992)).

²⁵ *Casey*, 505 U.S. at 876.

²⁶ 550 U.S. 124 (2007).

²⁷ *Id.* at 165.

²⁸ See Rebecca E. Ivey, *Destabilizing Discourses: Blocking and Exploiting a New Discourse at Work in Gonzales v. Carhart*, 94 VA. L. REV. 1451, 1464 (2008).

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opinion to the constitutionality of the law and the rights of women, the majority stated, the Act recognizes that “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . Whether to have an abortion requires a difficult and painful moral decision . . . [which] some women come to regret[.]”²⁹

This change in discourse has opened the floodgates for an avalanche of new restrictive legislation concerning abortion.³⁰ This article argues that states are taking advantage of the Court’s change in discourse and are advancing new legislation that further restricts abortion access, knowing that any constitutional challenge to such legislation will fail before the current Court.

Specifically, this article will consider two recent pieces of legislation that impose restrictive provisions on abortion rights—South Dakota House Bill 1217,³¹ and Texas House Bill 15.³² The South Dakota law requires women seeking abortion services to first receive counseling at a registered Pregnancy Help Center at a minimum of seventy-two hours before the abortion.³³ The Texas law mandates that women receive an ultrasound at least twenty-four hours before undergoing an abortion, and that the doctor must display the image and make audible the heartbeat, and further describe the images to the patient.³⁴

This paper will first examine the constitutional challenges brought in response to the South Dakota legislation and analyze them under an undue burden analysis as outlined in *Casey*, and analyze the constitutional challenges to the Texas legislation under a strict scrutiny analysis. Then, in keeping with the Court’s moral and ethical approach under *Gonzales* and the

²⁹ *Gonzales*, 550 U.S. at 159. The Court admitted, however, that they have “no reliable data to measure the phenomenon[.]” *Id.*; see also Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL’Y 223, 224 (2009) (arguing that there is no precedent for the rationale employed in *Gonzales*).

³⁰ Robin Abcarian, *Abortion is the Hot Topic; Since GOP Gains Last Fall, Bills to Restrict the Procedure Have Inundated Statehouses*, L.A. TIMES, May 8, 2011, at A1; see also Nancy Folbre, *Raising the Price of Reproductive Rights*, N.Y. TIMES: ECONOMIX (Feb. 13, 2012, 6:00 AM), <http://economix.blogs.nytimes.com/2012/02/13/raising-the-price-of-reproductive-rights/> (discussing legislation that imposes economic barriers to abortion in order to restrict access).

³¹ H.B. 1217, 86th Legis. Assemb., Reg. Sess. (S.D. 2011).

³² H.B. 15, 2011 Leg., 82d Sess. (Tex. 2011).

³³ H.B. 1217, 86th Legis. Assemb., Reg. Sess. (S.D. 2011).

³⁴ TEX. HEALTH & SAFETY CODE ANN. §§ 171.012(a)(4)(B), (C), (D) (West 2011).

majority's concern for such ramifications, this article will examine both the South Dakota and Texas laws from a bioethical standpoint. Namely, this paper will consider the principle of autonomy in medical decision-making and analyze the laws under the scope of this principle. This article argues that the laws are not only unconstitutional by violating the Due Process Clause of the Fourteenth Amendment and the Free Speech Clause of the First Amendment, but also fail to uphold the principles of bioethics. In conclusion, this paper will suggest ways to amend the legislation at issue so that the laws are constitutional and ethically sound.

I. CURRENT LEGISLATION—SCOPE AND DEFINITIONS

A. *South Dakota*

In 2011, South Dakota passed House Bill 1217 (S.D. HB 1217). The stated purpose of the Act is

to establish certain legislative findings pertaining to the decision of a pregnant mother considering termination of her relationship with her child by an abortion, *to establish certain procedures to better insure that such decisions are voluntary, uncoerced, and informed*, and to revise certain causes of action for professional negligence relating to performance of an abortion.³⁵

The Act is composed of the following four parts.

1. Pregnancy Help Center Requirement

The first part of the Act requires that a pregnant woman seeking an abortion consult with a registered Pregnancy Help Center before she is permitted to undergo the abortion procedure.³⁶ A Pregnancy Help Center is defined by the Act as:

[A]ny entity . . . that has as one of its principal missions to provide education, counseling, and other assistance to help a pregnant mother maintain her relationship with her unborn child and care for her unborn child, which entity has a medical director who is licensed to practice medicine in the state of South Dakota, or that it has a collaborative agreement with a physician licensed in South Dakota to practice medicine to whom women can be referred, which entity does not perform abortions and is not affiliated with any physician or entity that performs abortions, and does not now refer pregnant mothers

³⁵ H.B. 1217, 86th Legis. Assemb., Reg. Sess. (S.D. 2011) (emphasis added).

³⁶ *Id.*

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for abortions, and has not referred any pregnant mother for abortions for the three-year period immediately preceding July 1, 2011[.]³⁷

During the required consultation, the pregnant mother must be interviewed to determine whether she was coerced into choosing abortion and informed about education and assistance available to her so that she may continue her pregnancy and parent.³⁸

2. Seventy-Two Hour Waiting Period Requirement

The second part of the Act mandates a seventy-two hour waiting period between the required Pregnancy Help Center consultation and the actual abortion procedure.³⁹ The Act reads,

[n]o surgical or medical abortion may be scheduled except by a licensed physician and only after the physician physically and personally meets with the pregnant mother, consults with her, and performs an assessment of her medical and personal circumstances. Only after the physician completes the consultation and assessment complying with the provisions of this Act, may the physician schedule a surgical or medical abortion, but in no instance may the physician schedule such surgical or medical abortion to take place in less than seventy-two hours from the completion of such consultation and assessment except in a medical emergency⁴⁰

3. Coercion Provision

The third part of the Act requires physicians to certify that the woman has not been coerced into undergoing an abortion.⁴¹ The Act reads,

[d]uring the initial consultation between the physician and the pregnant mother, prior to scheduling a surgical or medical abortion, the physician shall [d]o an assessment of the pregnant mother's circumstances to make a reasonable determination whether the pregnant mother's decision to submit to an abortion is the result of any coercion, subtle or otherwise. In conducting that assessment, the physician shall obtain from the pregnant mother the age or approximate age of the father of the unborn child, and the physician shall determine whether any disparity in the age

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

between the mother and father is a factor in creating an undue influence or coercion.⁴²

Furthermore, the Pregnancy Help Center may voluntarily forward information to the abortion provider (whose name the patient is required to provide) if the Pregnancy Help Center has reason to believe that the woman has been coerced, or that her consent to an abortion is not entirely voluntary or informed.⁴³

4. Risk Factors Requirement

Finally, the fourth part of the Act requires physicians to “[c]onduct an assessment of the pregnant mother’s health and circumstances to determine if any of the risk factors associated with abortion are present in her case . . . [and d]iscuss with the pregnant mother the results of the assessment[.]”⁴⁴ Under the Act, “[r]isk factor associated with abortion” is defined as “any factor, including any physical, psychological, emotional, demographic, or situational factor, for which there is a statistical association with an increased risk of one or more complications associated with abortion[.]”⁴⁵

This paper will focus its analysis on the constitutionality and ethicality of the Pregnancy Help Center consultation requirement of the South Dakota legislation.

B. TEXAS

In May 2011, the Texas legislature passed House Bill 15 (the Act).⁴⁶ The Act contained several significant amendments to the 2003 Texas Woman’s Right to Know Act (WRKA), a law that regulates the informed consent required prior to an abortion.⁴⁷

1. Sonogram and Waiting Period

The Act mandates that women seeking abortion services receive a sonogram before they are permitted to undergo the abortion procedure.⁴⁸ Specifically, the woman must receive the sonogram “at least 24 hours before the abortion or at least two

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ H.B. 15, 2011 Leg., 82d Sess. (Tex. 2011).

⁴⁷ TEX. HEALTH & SAFETY CODE ANN. §§ 171.001, .011 (West 2003).

⁴⁸ HEALTH & SAFETY § 171.012(a)(4)(A).

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hours before the abortion if the pregnant woman waives this requirement by certifying that she currently lives 100 miles or more from the nearest abortion provider[.]”⁴⁹ The sonogram must be performed by “the physician who is to perform the abortion or an agent of the physician who is also a sonographer[.]”⁵⁰

2. Display of Sonogram

The Act requires that the physician or sonographer “displays the sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them[.]”⁵¹

3. Verbal Explanation of Sonogram

In addition to performing and displaying the sonogram, the Act requires that the physician who is to perform the abortion explain the sonogram to the pregnant woman.⁵² The physician must provide “a verbal explanation of the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs[.]”⁵³

4. Heartbeat

The Act requires that the physician who is to perform the abortion or a certified sonographer “makes audible the heart auscultation for the pregnant woman to hear, if present, in a quality consistent with current medical practice and provides, in a manner understandable to a layperson, a simultaneous verbal explanation of the heart auscultation[.]”⁵⁴

5. Signed Certification

Before the pregnant woman undergoes her mandated sonogram, the abortion procedure, or receives any sedative or

⁴⁹ HEALTH & SAFETY § 171.012(a)(4).

⁵⁰ HEALTH & SAFETY § 171.012(a)(4)(A).

⁵¹ HEALTH & SAFETY § 171.012(a)(4)(B).

⁵² HEALTH & SAFETY § 171.012(a)(4)(C).

⁵³ *Id.*

⁵⁴ HEALTH & SAFETY § 171.012(a)(4)(D).

anesthesia, she must sign a certification form, which reads as follows:

ABORTION AND SONOGRAM ELECTION

(1) THE INFORMATION AND PRINTED MATERIALS DESCRIBED BY SECTIONS 171.012(a)(1) – (3), TEXAS HEALTH AND SAFETY CODE, HAVE BEEN PROVIDED AND EXPLAINED TO ME.

(2) I UNDERSTAND THE NATURE AND CONSEQUENCES OF AN ABORTION.

(3) TEXAS LAW REQUIRES THAT I RECEIVE A SONOGRAM PRIOR TO RECEIVING AN ABORTION.

(4) I UNDERSTAND THAT I HAVE THE OPTION TO VIEW THE SONOGRAM IMAGES.

(5) I UNDERSTAND THAT I HAVE THE OPTION TO HEAR THE HEARTBEAT.

(6) I UNDERSTAND THAT I AM REQUIRED BY LAW TO HEAR AN EXPLANATION OF THE SONOGRAM IMAGES UNLESS I CERTIFY IN WRITING TO ONE OF THE FOLLOWING:

___ I AM PREGNANT AS A RESULT OF A SEXUAL ASSAULT, INCEST, OR OTHER VIOLATION OF THE TEXAS PENAL CODE THAT HAS BEEN REPORTED TO LAW ENFORCEMENT AUTHORITIES OR THAT HAS NOT BEEN REPORTED BECAUSE I REASONABLY BELIEVE THAT DOING SO WOULD PUT ME AT RISK OF RETALIATION RESULTING IN SERIOUS BODILY INJURY.

___ I AM A MINOR AND OBTAINING AN ABORTION IN ACCORDANCE WITH JUDICIAL BYPASS PROCEDURES UNDER CHAPTER 33, TEXAS FAMILY CODE.

___ MY FETUS HAS AN IRREVERSIBLE MEDICAL CONDITION OR ABNORMALITY, AS IDENTIFIED BY RELIABLE DIAGNOSTIC PROCEDURES AND DOCUMENTED IN MY MEDICAL FILE.

(7) I AM MAKING THIS ELECTION OF MY OWN FREE WILL AND WITHOUT COERCION.

(8) FOR A WOMAN WHO LIVES 100 MILES OR MORE FROM THE NEAREST ABORTION PROVIDER THAT IS A FACILITY LICENSED UNDER CHAPTER 245 OR A FACILITY THAT PERFORMS MORE THAN 50 ABORTIONS IN ANY 12-MONTH PERIOD ONLY:

I CERTIFY THAT, BECAUSE I CURRENTLY LIVE 100 MILES OR MORE FROM THE NEAREST ABORTION PROVIDER THAT IS A FACILITY LICENSED UNDER CHAPTER 245 OR A FACILITY THAT PERFORMS MORE THAN 50 ABORTIONS IN ANY 12-MONTH PERIOD, I WAIVE THE REQUIREMENT TO WAIT 24 HOURS AFTER THE SONOGRAM IS PERFORMED

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BEFORE RECEIVING THE ABORTION PROCEDURE. MY PLACE OF RESIDENCE IS: _____.⁵⁵

This form must be signed and dated by the patient, and must be retained in her medical file for a period of seven years.⁵⁶

II. CONSTITUTIONAL ANALYSIS OF THE LEGISLATION

A. *South Dakota*

The constitutionality of S.D. HB 1217 is currently being challenged in *Planned Parenthood Minnesota v. Daugaard*.⁵⁷ The plaintiffs argue, *inter alia*, that the application of the undue burden analysis set forth in *Planned Parenthood v. Casey* necessarily renders the required Pregnancy Help Center consultation unconstitutional.⁵⁸ Under the *Casey* standard, “[i]f the law will operate as a substantial obstacle to a woman’s choice to undergo an abortion ‘in a large fraction of the cases in which [it] is relevant . . . [i]t is an undue burden, and therefore invalid.’”⁵⁹ Application of the *Casey* standard thus entails a three-part test, the “large fraction” test:⁶⁰ first, “in what cases are the requirements ‘relevant’”; second, where the requirement is relevant, does it place a “substantial obstacle” in the path of a woman seeking an abortion; and third, “is the substantial obstacle present in a ‘large fraction’ of the ‘relevant’ cases?”⁶¹ A “large fraction” was interpreted in *Casey* to mean “a significant number” of women seeking an abortion.⁶²

On June 30, 2011, an initial decision was made by the trial court in *Daugaard*.⁶³ Applying the *Casey* standard, the District Court found that the Pregnancy Help Center Requirement creates an undue burden on a woman’s choice to undergo an abortion and is therefore unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment, and granted the plaintiffs’ motion for a preliminary injunction.⁶⁴

⁵⁵ HEALTH & SAFETY § 171.012(a)(5).

⁵⁶ HEALTH & SAFETY § 171.0121(b)(1).

⁵⁷ 799 F. Supp. 2d 1048 (D.S.D. 2011).

⁵⁸ *Id.* at 1058.

⁵⁹ *Id.* at 1059 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992)).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Casey*, 505 U.S. 833, 893–94 (1992).

⁶³ 799 F. Supp. 2d at 1077.

⁶⁴ *Id.* at 1063, 1077.

In regard to the relevance of the requirement, the District Court determined it would be relevant only in cases where a woman has already chosen abortion but has not chosen to seek the services of a Pregnancy Help Center.⁶⁵ This is because women who have not yet decided on abortion are not covered by the Act, nor are pregnant women who are not considering abortion.⁶⁶

Second, the court determined that this requirement clearly presents a substantial obstacle between a woman and the abortion procedure.⁶⁷ A woman who has chosen an abortion *must* consult with a Pregnancy Help Center before she is permitted to undergo an abortion.⁶⁸ This may not be so significant were it not for the charged and biased nature of a Pregnancy Help Center. The Act permits the Pregnancy Help Center staff to interview the woman, forcing her to disclose her decision to have an abortion to someone who is strongly opposed to her decision.⁶⁹ She faces the significant possibility that she will be “ridiculed, labeled a murderer, [and] subjected to anti-abortion ideology[.]”⁷⁰ Furthermore, the very nature of a compulsory interview with a stranger who is ideologically opposed to her choice “humiliates and degrades [the woman] as a human being” and “suggest[s] that she has made the ‘wrong’ decision, has not really ‘thought’ about her decision to undergo an abortion, or is ‘not intelligent enough’ to make the decision with the advice of a physician.”⁷¹

Finally, the court concluded that this substantial obstacle is present in a “large fraction” of the cases due to the fact that it is highly likely that the prospect of facing such a degrading and humiliating experience will push nearly every woman who has chosen abortion to delay her required consultation, to the point that it may keep her from ultimately having an abortion at all.⁷² Many other women may abandon their abortion choices by refraining from the Pregnancy Help Center Requirement altogether, and thus they would not be permitted to have abortions and would “be forced to remain pregnant.”⁷³ Therefore, the court concluded that this requirement does create a

⁶⁵ *Id.* at 1059.

⁶⁶ *Id.* at 1052.

⁶⁷ *Id.* at 1061.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1060.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 1063.

⁷³ *Id.* at 1060.

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substantial obstacle in a large fraction of the relevant cases.⁷⁴

In addition to the Due Process challenge, the plaintiffs challenged the Pregnancy Help Center Requirement as a violation of the First Amendment Free Speech Clause.⁷⁵ The First Amendment protects “both the right to speak freely and the right to refrain from speaking at all.”⁷⁶ With regard to compelled speech, the Supreme Court concluded in *Riley v. National Federation of the Blind of North Carolina, Inc.*⁷⁷ that the First Amendment protects both statements of fact and of opinion, stating “either form of compulsion burdens protected speech.”⁷⁸ The Court later reaffirmed its decision that compelled statements of fact are protected under the First Amendment in *McIntyre v. Ohio Elections Commission*,⁷⁹ in which it determined that “an author’s decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment.”⁸⁰ In sum, the Court stated in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*⁸¹ that the First Amendment protections extend “not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid[.]”⁸²

The Eighth Circuit Court of Appeals had occasion to interpret the protections afforded under the First Amendment when it decided *United States v. Sindel*.⁸³ The court stated that a protection against compelled speech only exists “in the context of governmental compulsion to disseminate a particular political or ideological message[.]” therefore inferring that compelled statements of fact are not protected.⁸⁴ However, the court did not take the opportunity to completely define the boundaries of the protection afforded to compelled speech; instead, it narrowly held that “[t]here is no right to refrain from speaking when ‘essential operations of government may require it for the preservation of an orderly society,—as in the case of compulsion to give evidence

⁷⁴ *Id.* at 1061.

⁷⁵ *Id.* at 1054.

⁷⁶ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

⁷⁷ 487 U.S. 781 (1988).

⁷⁸ *Id.* at 797–98 (emphasis added).

⁷⁹ 514 U.S. 334 (1995).

⁸⁰ *Id.* at 342.

⁸¹ 515 U.S. 557 (1995).

⁸² *Id.* at 573 (citing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–42 (1995)).

⁸³ 53 F.3d 874, 875 (8th Cir. 1995).

⁸⁴ *Id.* at 878.

in court.”⁸⁵

In analyzing the First Amendment challenges brought in this case, the court first applied the rule under *Sindel*.⁸⁶ It quickly determined that the compelled speech under the Act involves statements made to a private entity, and does not involve any “essential operations of government’ that ‘require’ the information ‘for preservation of an orderly society[,]” and therefore the rule under *Sindel* does not compel patients seeking abortion services to speak to Pregnancy Help Center staff.⁸⁷ Furthermore, the court acknowledged that because *Hurley* was decided after *Sindel*, the *Hurley* decision would squelch any possible broader application of *Sindel*.⁸⁸

Given the nature of the requirement—that the Pregnancy Help Center staff is permitted to interview patients—the court next rejected the defendant’s argument that patients’ right to refrain from speaking under the First Amendment was not implicated because of the limited nature of the compelled speech.⁸⁹ Although defendants argued that the women are barely required to speak, only having to disclose that they are pregnant and seeking an abortion, the court stated that the interview format “necessarily requires questions *and* answers” and challenged the defendants to explain how this could occur without compelling the patient to speak further.⁹⁰ However, even if the patient were not required to answer any questions, her First Amendment rights are still violated by the fact that she must also disclose the name of her abortion doctor.⁹¹ The court stated that although the information the patient is required to disclose (her pregnancy, her choice to have an abortion, and the name of her abortion provider) is limited, still such “compelled disclosures implicate the protection afforded by the *First Amendment’s Free Speech Clause*.”⁹²

⁸⁵ *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring)).

⁸⁶ *Planned Parenthood Minn. v. Daugaard*, 799 F. Supp. 2d 1048, 1055 (D.S.D. 2011).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 1055–56.

⁹⁰ *Id.* at 1056.

⁹¹ *Id.*

⁹² *Id.* at 1056 (emphasis added).

B. Texas

Opponents of the Act responded swiftly, challenging the constitutionality of the law in *Texas Medical Providers Performing Abortion Services v. Lakey*.⁹³ The plaintiffs did not argue that the Act imposes an undue burden on a woman's right to obtain an abortion, failing under the *Casey* standard and violating the Due Process Clause of the Fourteenth Amendment. Rather, the plaintiffs argued that the law was unconstitutional as a violation of the Free Speech Clause of the First Amendment by compelling both physicians and patients to engage in speech.⁹⁴ As such, the plaintiffs argued that the appropriate standard of review was strict scrutiny.⁹⁵ Under a strict scrutiny review, the defendants bear the burden of proving that "the compelled speech portions of the Act further a compelling government interest and are narrowly tailored to achieve that interest."⁹⁶ The defendants argued that *Casey* foreclosed any compelled speech challenge under the First Amendment, and thus a strict scrutiny analysis was moot.⁹⁷

The first decision in the *Lakey* case was made on August 30, 2011.⁹⁸ The District Court rejected the defendant's heavy reliance on *Casey*, stating several reasons for its position.⁹⁹ First, the court pointed out that the compelled speech discussion in *Casey* was in the context of a Due Process challenge under the Fourteenth Amendment, not a First Amendment challenge as in the current case.¹⁰⁰ Therefore, the court found that "while the Court's statements may be *instructive* on the *First Amendment* issue, they are not dispositive."¹⁰¹ Second, the court noted that in *Casey*, the Court indicated that "[i]f the information the State requires to be *made available* to the woman is truthful and not misleading, the requirement *may* be permissible[;]"¹⁰² thus the

⁹³ 806 F. Supp. 2d 942, 947 (W.D. Tex. 2011).

⁹⁴ *Id.* at 969.

⁹⁵ *Id.* at 970.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 942.

⁹⁹ *Id.* at 971–72.

¹⁰⁰ *Id.* at 972.

¹⁰¹ *Id.* (emphasis added).

¹⁰² *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992)).

Court did not give state governments the unrestricted authority to mandate what physicians must say and patients must hear.¹⁰³ The court also stated its belief that the requirements of the Act at issue were far more onerous, burdensome, and “less medically relevant” than those at issue in *Casey*.¹⁰⁴ Finally, the court rejected the defendant’s contention that the government’s power to regulate the medical profession forecloses all First Amendment-compelled speech challenges with regard to physicians.¹⁰⁵ The court specifically noted that the defendants failed to recognize that the Court’s ruling was narrowed to those challenges to the Pennsylvania statute at issue, and that the Court dismissed the First Amendment challenge because it was “meritless . . . under the facts of that case.”¹⁰⁶

In contrast, the District Court found merit in the plaintiff’s First Amendment challenges to the Texas legislation and thus applied a strict scrutiny review.¹⁰⁷ In distinguishing this compelled speech from that in *Casey*, the court noted that the Act not only forced physicians to make legitimate disclosures related to the risks of and alternatives to abortion, but also forced them to disclose additional descriptive information about the fetus or embryo.¹⁰⁸ The court stated that it did not find the additional disclosures “particularly relevant to any compelling government interest,” especially in light of the fact that many of the disclosures are already required under Texas law.¹⁰⁹ Also of importance was the fact that the patients, too, were subjected to compelled speech under the Act in the form of the signed certification.¹¹⁰ Citing the troubling language of the certification, which requires, *inter alia*, the disclosure of sexual assault or incest, the court stated that “[t]here is no sufficiently powerful government interest to justify compelling speech of this sort, nor is the Act sufficiently tailored to advance such an interest.”¹¹¹ The court therefore found that the defendants failed to establish that “the Act furthers a

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 973.

¹⁰⁶ *Id.* at 974.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 974.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

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compelling government interest, or that it is narrowly tailored to advance that interest”[,] and thus held that the Act’s compelled speech provisions constituted a violation of the Free Speech Clause of the First Amendment.¹¹² Accordingly, the court granted the plaintiff’s motion for a preliminary injunction.¹¹³

An appeal was sought, and, on January 10, 2012, the Fifth Circuit vacated the preliminary injunction granted by the District Court.¹¹⁴ The court concluded that the appellees had failed to meet the standard for a preliminary injunction—specifically, that they had failed to establish “a substantial likelihood that [they] will prevail on the merits[.]”¹¹⁵ The court came to this conclusion by relying heavily on both *Casey* and *Gonzales*, noting that *Casey* did not apply a strict scrutiny analysis to the plaintiff’s compelled speech claim.¹¹⁶ From the two cases, the court distilled four rules:

First, informed consent laws that do not impose an undue burden on a woman’s right to have an abortion are permissible if they require truthful, nonmisleading, and relevant disclosures. Second, such laws are part of the state’s reasonable regulation of medical practice and do not fall under the rubric of compelling “ideological” speech that triggers *First Amendment* strict scrutiny. Third, “relevant” informed consent may entail not only the physical and psychological risks to the expectant mother facing this “difficult moral decision,” but also the state’s legitimate interests in “protecting the potential life within her” Finally, the possibility that such information “might cause the woman to choose childbirth over abortion” does not render the provisions

¹¹² *Id.* at 975.

¹¹³ *Id.* at 977.

¹¹⁴ *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 572 (5th Cir. 2012).

¹¹⁵ *Id.* at 572, 574.

¹¹⁶ *Id.* at 575. By refusing to apply the strict scrutiny analysis to the First Amendment claims, the appellate court conflated the right to free speech and the right to an abortion, and “effectively eviscerated the protections of the First Amendment in the abortion context[,]” inferring that “within the abortion context, the doctor’s right to speak, or not to speak, is wholly dependent on the contours of a woman’s right to an abortion.” *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, No. A-11-CA-486-SS, 2012 U.S. Dist. LEXIS 14721, at *6, *7 (W.D. Tex. Feb. 6, 2012); *see also* *Stuart v. Huff*, No. 1:11CV804, 2011 U.S. Dist. LEXIS 147434, at *4 (D.N.C. Dec. 22, 2011) (applying strict scrutiny analysis to a First Amendment challenge of a North Carolina statute mandating ultrasounds and verbal descriptions of the images by the physician).

unconstitutional.¹¹⁷

The court therefore accepted the same position as the appellants—that the reasonable regulation of medical practice, permitted under *Casey*, forecloses any First Amendment compelled speech claims.

Applying this reasoning to the compelled speech provisions of the Act and rejecting a strict scrutiny analysis, the court upheld both provisions as constitutional.¹¹⁸ Declaring information such as “the required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information[,]” the court found these disclosures sustainable under *Casey*.¹¹⁹ As for the signed certification of the woman: the court found that too was sustainable under *Casey*.¹²⁰ As compared to the District Court, the Fifth Circuit did not find as troubling the requirement that, in order to qualify for the exception to avoid hearing the description of the sonogram, the pregnant woman must sign a certification stating that she is a victim of sexual assault and/or incest.¹²¹ Rather, the court reasoned that a written consent form such as the signed certification under the Act should not be subject to a strict scrutiny analysis, lest the validity of other informed consent requirements come under such scrutiny as well.¹²² Though it acknowledged the exception requirement as a “debatable choice of policy,” the court determined that “[b]ecause the general requirement is valid, we see no constitutional objection to the certification required for an exception.”¹²³

The court rejected the appellee’s further argument that in spite of the facial application of *Casey*, the disclosure requirements were “qualitatively different” from those in *Casey* and thus unconstitutional.¹²⁴ The appellees contended that the disclosure of the sonogram image and heart auscultation were medically unnecessary; as such, the information is irrelevant to obtaining informed consent and therefore beyond the power of the state to regulate the

¹¹⁷ *Lakey*, 667 F.3d at 576 (citations omitted) (emphasis added).

¹¹⁸ *Id.* at 577, 578.

¹¹⁹ *Id.* at 577–78.

¹²⁰ *Id.* at 578.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 578, 579.

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practice of medicine.¹²⁵ Second, the appellees distinguished the Act requirement that physicians verbally convey information to the patient from *Casey*, which only required that the physicians make informational materials available to the pregnant woman.¹²⁶ In rejecting these contentions, the court first noted that the standard set in *Casey* did not “represent a constitutional ceiling for informed consent to abortion[.]”¹²⁷

As to the appellees’ argument that the information was medically unnecessary, the court stated that the information was only medically unnecessary if one assumed that the pregnancy would end in termination.¹²⁸ Further, the intent of providing such information is to ensure that the woman makes an informed decision about her pregnancy, which may lead her to choose childbirth rather than abortion.¹²⁹ Finally, the court rejected the distinction between verbal relay of information and availability of materials, again falling back on *Casey* and noting that the court in *Casey* did not analyze how the information was provided as a significant factor.¹³⁰

III. BIOETHICAL PERSPECTIVE

In *Gonzales v. Carhart*, the Court voiced concern from a moral and ethical standpoint, fearing for a woman’s “difficult and painful moral decision[.]” and concluding (absent evidence in support) that, “some women come to regret their choice to abort the infant life they once created and sustained.”¹³¹ In keeping with such concern, the very factors that make both the Pregnancy Help Center and the ultrasound requirements unconstitutional are the very factors that also make the laws unethical from a bioethical perspective. The laws are unethical in that both fail to uphold the bioethical principle of autonomy in medical decision-making. Anything that places such a substantial obstacle between a patient and her decision for treatment undermines her autonomy by limiting her access to treatment options and decreasing her control over the decision-making process. By

¹²⁵ *Id.* at 579.

¹²⁶ *Id.* at 579.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 579, 580.

¹³⁰ *Id.* at 579–80.

¹³¹ *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

imposing the Pregnancy Help Center Requirement, the state has literally taken the choice of consulting such a group completely out of the hands of the patient. Furthermore, the patient doesn't even have a choice as to the information she discloses to the Pregnancy Help Center Staff. By imposing the mandatory ultrasound requirement, the state has overtaken a decision that should be made by the patient and her physician as to her treatment. The physician is left without the power to determine, in a professional capacity, the information necessary for the patient to give her informed consent, and the patient is unable to determine what type or amount of information she wishes to receive. In enacting these pieces of legislation, the states have prescribed the exact process by which a patient may terminate a pregnancy, and have left the patient without any choice in the matter of her own care.

The principle of autonomy, "in its purest form, presumes that no other person or social institution ought to overrule a person's choice, whether or not that choice is 'right' from an external perspective."¹³² In practice, this means that a physician should respect the choice of a Jehovah's Witness to refuse a life-saving blood transfusion,¹³³ or the choice of Christian Scientists to refuse professional medical treatment for their child in favor of religious remedies,¹³⁴ or simply the choice of a patient to choose comfort care over further chemotherapy. Therefore, in the case of abortion, autonomy values the choice of the mother to terminate her pregnancy regardless of what the state considers the "right" choice.

The principle of autonomy does not consider the path by which a woman reaches her choice; it only values the choice itself, and the right of a woman to reach that choice on her own. Both Acts, however, regulate the means by which a woman reaches her ultimate choice by forcing her to consult with a Pregnancy Help Center and to undergo an ultrasound before she is permitted to exercise her right to choose an abortion.¹³⁵ The Pregnancy Help

¹³² BARRY R. FURROW ET AL., *BIOETHICS: HEALTH CARE LAW AND ETHICS* 257 (6th ed. 2008).

¹³³ *Pub. Health Trust of Dade Cnty. v. Wons*, 541 So. 2d 96, 97, 98 (Fla. 1989) (holding state interest in protecting innocent third parties not sufficient to override constitutional rights of religion and privacy).

¹³⁴ *Newmark v. Williams*, 588 A.2d 1108, 1109–10, 1120 (Del. 1991) (concluding parents not negligent for refusing chemotherapy for son on religious grounds).

¹³⁵ H.B. 1217, 86th Legis. Assemb., Reg. Sess. (S.D. 2011).

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Center regulation effectively communicates to the woman that the state values her choice regarding her pregnancy as an autonomous individual, and does not care what factors influenced her decision—unless she has chosen abortion. Then she requires the help of the Pregnancy Help Center, a group whose sole purpose is, by statutory definition, “to help a pregnant mother maintain her relationship with her unborn child and care for her unborn child.”¹³⁶

As for the Texas requirement, the decision to undergo an ultrasound is one made by the physician and the patient, and based upon medical necessity and professional discretion—unless she has chosen abortion. Then she is forced to undergo an ultrasound, whether recommended by her physician or not, and must listen to a prescribed verbal description. The state has conceded that the purpose of this requirement is to “persuad[e] pregnant women to opt for childbirth over abortion.”¹³⁷ This undermines the core philosophy of autonomy, because it evidences a disrespect for the choice of the woman—either by forcing her to consult with a group whose purpose is to discourage her from the choice she has already made, or by forcing her to have an unwanted, physically intrusive and medically unnecessary ultrasound.

In addition to devaluing the choice, and therefore the autonomy of the mother, the state is placing greater importance on the rights of the fetus. In placing a substantial obstacle in front of a woman seeking abortion (in the form of the required Pregnancy Help Center consultation or ultrasound), the state is placing the autonomy of the fetus above the autonomy of the mother.¹³⁸ As she loses control over the choice to terminate her pregnancy, the mother as an autonomous self is diminished, and the autonomy of the fetus grows.¹³⁹ The mother’s choice to have an abortion is necessarily at odds with the “rights” of the fetus, which include the right to healthcare (prenatal care) and, above all else, the right to life.¹⁴⁰ Furthermore, as the pregnancy continues and the

¹³⁶ *Id.*

¹³⁷ Brief for Respondents at *19, *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2011) (No. 11-50814), 2011 WL 6074007 (quoting Trial Docket 94 at 65).

¹³⁸ Carl F. Stychin, *Body Talk: Rethinking Autonomy, Commodification and The Embodied Legal Self*, in *FEMINIST PERSPECTIVES ON HEALTH CARE LAW* 211, 224 (Sally Sheldon & Michael Thomson eds., 1998).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 223–24.

fetus approaches viability, its rights as an autonomous being only intensify as it moves closer toward legal “personhood” and the rights associated with that status (namely the right to life).

As the fetus is obviously incapable of communicating its choice, the mother’s physician is often considered the agent of the fetus, exercising its right of autonomous medical decision-making and thereby deciding upon sound medical care to ensure a live, healthy fetus is delivered.¹⁴¹ In South Dakota, however, the Pregnancy Help Center staff functions as the agent of the fetus. The role of the staff is to try and convince the mother seeking abortion to relinquish her autonomy and opt instead for the choice of the fetus, which is for her to continue the pregnancy. In Texas, the influence is more subtle, with the ideological message of the state communicated through the presumably neutral sonographer, who is forced to describe the images and heart auscultation to the patient over her objection; therefore, the sonographer is acting as the agent of the fetus and asserting its rights. However, as the woman is a living human being with a societal role and obligations, it is *her* rights as an autonomous individual that should be respected and valued.

The negative ramifications of revoking a woman’s control over her body and her medical decision-making power are more palpable than those of the fetus. Given her usual family role, the negative impact on a woman has a very real possibility of rippling outward and affecting the rest of her family, as well as herself as an individual. Although the right to life is hugely significant, the effect of revoking the autonomous rights of the fetus only has the potential to impact the fetus alone. Therefore, if a straightforward balancing test is applied, the right of a woman to implement control over her own medical decision-making must be valued over that of the fetus.

Complete autonomy for women necessarily includes the right to say “no” to potential life.¹⁴² The principle of autonomy incorporates the right to both accept *and* deny treatment. This right logically extends to the right to accept or reject the continuation of a pregnancy, as the woman is either accepting prenatal care and rejecting abortion as treatment, or vice versa. Therefore, the woman has a right, as an autonomous being, to

¹⁴¹ *Id.*

¹⁴² ROSEMARIE TONG, FEMINIST APPROACHES TO BIOETHICS 129 (1997) (qualifying women’s “complete autonomy” as that being equal to the degree of autonomy possessed by men).

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accept abortion as the treatment for her pregnancy and to reject prenatal care. It also means that she has the right to accept or reject an ultrasound as a part of her pregnancy treatment, whether or not she has chosen to continue or terminate the pregnancy. The Pregnancy Help Center staff, however, wishes to push the woman towards accepting prenatal care as treatment and to reject abortion as treatment. By statutory definition, the Pregnancy Help Centers must not be affiliated with abortion providers, nor can they refer pregnant mothers to abortion providers,¹⁴³ so it can therefore be assumed that such centers are ideologically opposed to abortion as a legitimate treatment option.

Because it is the state that is requiring women to consult with such centers before obtaining an abortion, the Pregnancy Help Centers and their staff are effectively acting as agents for the state, and are disseminating the message of the state in this situation. Therefore, when Pregnancy Help Center staff tries to dissuade a woman from choosing abortion, in reality the *state* is advising that woman that it does not support her choice to abort as a rational treatment option. In Texas, the fact that it is the state disseminating the message is clearer, as it is not being communicated by a biased group such as a Pregnancy Help Center.

In any case, it is not for the state to consider whether or not her treatment decision is rational.¹⁴⁴ As long as the woman has been informed of and understands the risks, benefits, and alternatives to abortion, she is legally competent to consent to abortion as her treatment.¹⁴⁵ This is undoubtedly a conversation that the woman would have with her abortion provider, so regulating the means by which a woman is informed for adequate informed consent is nothing more than a transparent way for the state to inject its opinion on the matter and to advise the woman that it disagrees with her decision.

If a woman feels she needs further information before she is ready to choose abortion as a treatment option, then it is her prerogative as an autonomous being to seek out the information provided by a Pregnancy Help Center, or to schedule an abortion and accompanying explanation with her physician. Autonomy in medical decision-making extends to all parts of the process, so choosing whom to seek information from or what procedures to

¹⁴³ H.B. 1217, 86th Legis. Assemb., Reg. Sess. (S.D. 2011).

¹⁴⁴ Lane v. Candura, 376 N.E.2d 1232, 1233 (Mass. App. Ct. 1978).

¹⁴⁵ *Id.*

undergo is entirely the decision of the woman and *not* the state. In sum, when the state attempts to eliminate her option to say “no” to potential life, it is undermining a woman’s autonomy by not allowing her to refuse a treatment option.

IV. POTENTIAL SOLUTION

In passing South Dakota House Bill 1217 and Texas House Bill 15, the respective legislatures made clear an intention to restrict access to abortion services, even if this goal is achieved through excessive requirements that stretch to the boundaries of constitutionality. It is therefore safe to assume that if the legislation were eliminated completely, the legislatures would simply find another way to create similar hurdles for women seeking abortion. To those who are anti-choice, it is the end goal, rather than the means, that is most important: restricting access to abortion and eliminating choice. Rather than fight constant legal battles in response to a stream of new and restrictive legislation—and leave the women of South Dakota and Texas in a constant state of limbo as to their abortion rights—it is more prudent to amend these Acts so that they preserve the rights of the woman and do not impose an undue burden on her right to choose an abortion.

A potential solution to preserve these pieces of legislation can be found in the way the Fifth Circuit dealt with a similar informed consent provision in a Mississippi statute. In *Barnes v. Moore*,¹⁴⁶ the court examined the constitutionality of Mississippi’s Informed Consent to Abortion Act, an act strikingly similar to the informed consent statute at issue in *Casey*.¹⁴⁷ Under the Mississippi statute, physicians were required to provide women with certain information, including risks of the abortion procedure and of carrying a pregnancy to term, probable gestational age, medical assistance available to the mother, liability of the father, and pregnancy prevention counseling and assistance.¹⁴⁸ Physicians were also obligated to inform the woman that she had the “right to review printed materials provided by the State which describe the stages of fetal development and list agencies that offer alternatives to abortion.”¹⁴⁹ According to the

¹⁴⁶ *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992).

¹⁴⁷ *Id.* at 14.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

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statute, these materials were to be “objective, nonjudgmental, and designed to convey only accurate information[.]”¹⁵⁰ In finding the Act did not impose an undue burden and was therefore constitutional, the court decision implies that the pregnant woman has the right to *not* review the printed materials.¹⁵¹

The South Dakota Act could be amended in just such a way, preserving the constitutional and common law rights of women seeking abortion services. Rather than mandating consultation with a Pregnancy Help Center, the state could prepare printed materials, including a list of Pregnancy Help Centers, which physicians could offer to their patients. The materials should present bare information, without bias, so as not to influence the woman’s decision regarding her pregnancy treatment. Women could then choose to accept or refuse the materials. Each woman would make the decision for herself, choosing what information she needed to make the choice that was right for her in selecting treatment.

The Texas Act could be similarly amended. The physician could be mandated to offer the ultrasound, rather than mandated to perform it, and the patient could decline for any reason without having to sign a statement that she fits into a statutorily-allowed exception as is currently required. The information that is currently required to be verbally conveyed to the patient could be prepared as printed material, which the patient could also choose to decline. Under this approach the state would still have an opportunity to disseminate its message without mandating a physical procedure.

Such an approach, in both cases, appropriately balances the state’s interest in preserving life with a woman’s right to autonomy in medical decision-making. The information regarding continuing the pregnancy would be more readily available, satisfying the state’s interest, and the woman would have the choice to refuse the material, thereby putting her back in control.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 14, 15.