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An Exception-ally Difficult Situation: Do the Exceptions, or Lack Thereof, to the Speech-And-Display Requirements for Abortion Invalidate their Use as Informed Consent?

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**AN “EXCEPTION”-ALLY DIFFICULT SITUATION:
DO THE EXCEPTIONS, OR LACK THEREOF, TO
THE “SPEECH-AND-DISPLAY REQUIREMENTS”
FOR ABORTION INVALIDATE THEIR USE AS
INFORMED CONSENT?**

Danielle C. Le Jeune*

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INTRODUCTION

The nurse turned up the volume on a radio and the doctor spoke softly, but Carolyn Jones could still hear his words.¹ At an ultrasound only hours earlier, Carolyn learned that her “much-wanted” second child possessed a molecular flaw that meant he may not reach full term and, if he did, would suffer from the moment of his birth.² Out

1. The author of this Note received the express consent of Carolyn Jones to use her story. Carolyn Jones, *‘We Have No Choice’: One Woman’s Ordeal with Texas’ New Sonogram Law*, TEX. OBSERVER, Mar. 15 2012, available at <http://www.texasobserver.org/we-have-no-choice-one-womans-ordeal-with-texas-new-sonogram-law/>.

2. *Id.*

of compassion, Carolyn and her husband decided to abort the pregnancy.³ Upon arrival at Planned Parenthood, they learned that Texas law required Carolyn to receive an ultrasound from the doctor who would perform her abortion, listen to the doctor describe the dimensions, heartbeat, limbs, and internal organs of the child she would never have, and then wait at least twenty-four hours before returning for the procedure.⁴ Despite apologies from the doctor and nurses, and their attempts to drown out the words, Carolyn remembers sobbing while hearing the doctor say, “I see four healthy chambers of the heart.”⁵ Only later did Carolyn learn that her child’s condition qualified her for exemption from hearing this description—a closely regulated and rarely given exception.⁶

The procedure described above, and others like it, are based in the doctrine of informed consent.⁷ Informed consent serves as both a medical ethics obligation and an important concept in tort law.⁸ Although jurisdictions employ different standards for determining the proper scope of informed consent,⁹ every state imposes statutory

3. *Id.*

4. TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4)(A)–(D) (West, WestlawNext through 2013 Third Called Legis. Sess.). This statute provides, in relevant part, that a woman cannot give voluntary and informed consent to an abortion unless at least twenty-four hours before the procedure:

[T]he physician who is to perform the abortion . . . performs a sonogram on the pregnant woman . . . displays the sonogram images . . . in a manner that the pregnant woman may view them . . . [and] provides . . . 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 . . . [.]

Id.

5. Jones, *supra* note 1.

6. HEALTH & SAFETY § 171.0122(d)(3) (WestlawNext) (providing exception where the “fetus has an irreversible medical condition or abnormality”). This exemption only applies to “the verbal explanation” requirement; the ultrasound and twenty-four hour wait requirements still apply. *Id.*; Jones, *supra* note 1 (explaining the Department of Health did not issue technical guidelines until four days after her visit, a full three weeks after the procedures went into effect, accounting for the provider’s lack of knowledge on her exemption).

7. HEALTH & SAFETY § 171.012. *See generally* Rebecca Dressler, *From Double Standard to Double Bind: Informed Choice in Abortion Law*, 76 GEO. WASH. L. REV. 1599 (2008) (discussing the development of abortion informed consent law).

8. *Mohr v. Williams*, 104 N.W. 12, 14–15 (Minn. 1905) (holding operation by a physician unlawful when performed without the express or implied consent of the patient); *Informed Consent*, AM. MED. ASS’N, <http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/informed-consent.page> (last visited Sept. 11, 2013).

9. Douglas Andrew Grimm, *Informed Consent for All! No Exceptions*, 37 N.M. L. REV. 39, 41

requirements that health care professionals obtain patients' informed consent before proceeding with any type of medical treatment.¹⁰ Most states also impose additional informed consent requirements in the abortion context.¹¹

On January 22, 1973, the Supreme Court released two influential opinions concerning abortion—*Roe v. Wade*¹² and *Doe v. Bolton*.¹³ In *Roe v. Wade*, the Court held that, before a fetus reaches the point of viability, a pregnant woman possesses the right to obtain an abortion without interference from the state.¹⁴ This holding derives from a right to privacy embodied in the Constitution that “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”¹⁵ However, in arriving at its decision, the Court also emphasized that a woman’s right to terminate her pregnancy is not absolute because the state retains legitimate interests in both the health and safety of the woman undergoing the procedure and in protecting potential life.¹⁶ In *Doe v. Bolton*—intended to serve as a companion to *Roe v. Wade*—the Court upheld the provision of a Georgia abortion statute allowing a physician to exercise his best medical judgment in “light of all factors . . . relevant to the well-being of the patient” in deciding to perform an abortion.¹⁷ However, the Court found all procedural limitations in the statute unconstitutional.¹⁸ These two cases, along with subsequent others,

(2007). For example, the majority of jurisdictions use a physician-centered standard, focusing on what a reasonable physician would disclose. *Id.* Other jurisdictions use a patient-centered standard, focusing on what a reasonable patient would want to know. *Id.*

10. *Informed Consent*, *supra* note 8.

11. *See Counseling and Waiting Periods for Abortion*, GUTTMACHER INST.: ST. POLICIES BRIEF, http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf (last updated Dec. 1, 2013); *see also* discussion *infra* Part I.B.

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

13. *Doe v. Bolton*, 410 U.S. 179 (1973).

14. *Roe*, 410 U.S. at 163–64 (emphasizing both the woman’s right to choose and the importance of the medical judgment of her physician in making this decision).

15. *Id.* at 153; *see also* *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (establishing a penumbra of privacy that emanates from the Bill of Rights).

16. *Roe*, 410 U.S. at 148–50, 155 (noting that “at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant”). Because of the dominant state interests after the point of viability, this Note primarily focuses on pre-viability abortion.

17. *Doe*, 410 U.S. at 191–92.

18. *Id.* at 192–200 (invalidating requirements for hospitalization, approval by hospital abortion committee, two-physician confirmation, and in-state residency reasoning that these requirements

form the theoretical basis for evaluating heightened informed consent requirements imposed on women obtaining abortions.¹⁹

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court upheld additional informed consent requirements for abortion as long as the information provided is “truthful and not misleading” and does not impose an undue burden on the right to obtain an abortion.²⁰ Recently, a few states enacted legislation requiring a woman to obtain an ultrasound while a physician simultaneously describes various attributes of the fetus as a condition precedent to receiving an abortion.²¹ These statutory “speech-and-display requirements”²² include certain exceptions that vary by state.²³ For example, Texas provides narrow categories that qualify for exemption,²⁴ while Oklahoma and North Carolina exempt only one specific situation—medical emergency.²⁵

violated various constitutional rights).

19. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 66–67 (1976). In upholding a written informed consent requirement for abortion, the Court in *Danforth* stated:

It is true that Doe and Roe clearly establish the State may not restrict the decision of the patient and her physician regarding abortion during the first stage of pregnancy [T]he imposition . . . of such a requirement for termination of pregnancy even during the first stage, in our view, is not in itself an unconstitutional requirement.

Id. See generally Evelyn Atkinson, *Abnormal Persons or Embedded Individuals?: Tracing the Development of Informed Consent Regulations for Abortion*, 34 HARV. J.L. & GENDER 617 (2011) (examining the historical development of informed consent laws).

20. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882–83 (1992); see discussion *infra* Part II.A.

21. N.C. GEN. STAT. ANN. § 90-21.85(a)(1)–(6) (West, WestlawNext through S.L. 2013-235 of 2013 Legis. Sess.); TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4)(A)–(D) (West, WestlawNext through 2013 Third Called Legis. Sess.); OKLA. STAT. ANN. tit. 63, § 1-738.3d(B)(1)–(6) (West, WestlawNext through 2013 First Reg. Sess.). A Louisiana Session Law, passed on June 7, 2012, established the same requirements as the above listed statutes. Act of June 7, 2012, No. 685, 2012 La. Sess. Law Serv. 2873 (West) (codified at LA. REV. STAT. ANN. § 1299.35.2(D)(2)(a)–(b) (West, WestlawNext through 2012 Reg. Sess.)). However, this Note will focus only on the states where these laws have already been in effect for enough time to spawn litigation—Oklahoma, Texas, and North Carolina. See generally *Stuart v. Huff*, 834 F. Supp. 2d 424 (M.D.N.C. 2011); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 806 F. Supp. 2d 942 (W.D. Tex. 2011), *vacated in part*, 667 F.3d 570 (5th Cir. 2012); *Nova Health Sys. v. Pruitt*, No. 2:12-CV-00395, 2012 WL 1034022 (Okla. Cnty. Dist. Ct. Mar. 28, 2012).

22. *Stuart*, 834 F. Supp. 2d at 427.

23. See § 90-21.85(a) (WestlawNext); HEALTH & SAFETY § 171.0122(d)(1)–(3) (WestlawNext); tit. 63 § 1-738.3d(D) (WestlawNext); see also discussion *infra* Part I.C.2.

24. HEALTH & SAFETY § 171.0122(d)(1)–(3) (WestlawNext); see discussion *infra* Part I.C.2.

25. § 90-21.85(a) (WestlawNext); tit. 63 § 1-738.3d(D) (WestlawNext). These statutes also define medical emergency narrowly to include only imminent physical emergencies. See discussion *infra* Part I.C.2.

This Note examines the speech-and-display requirements for abortion and asks whether the exceptions, or lack thereof, to these requirements invalidate their use as informed consent. Part I discusses traditional informed consent doctrine, the additional requirements imposed in the abortion context, and the exceptions to these requirements.²⁶ Part II considers the validity of these laws as informed consent requirements in light of their exceptions by applying the undue burden standard set out in *Casey*²⁷ and comparing these requirements and their exceptions with traditional informed consent doctrine.²⁸ Finally, Part III proposes changes that recognize the state's interest in protecting potential life while taking into consideration the ability of a woman to make an autonomous decision.²⁹

I. INFORMED CONSENT, ADDITIONAL REQUIREMENTS FOR ABORTION, AND EXCEPTIONS

A. *The Traditional Doctrine of Informed Consent*

The tort doctrine of informed consent developed over the course of the twentieth century.³⁰ Though originally based in common law, every state has now codified informed consent doctrine.³¹ The American Medical Association defines informed consent as “a process of communication between a patient and physician that results in the patient's authorization or agreement to undergo a specific medical intervention.”³² The fundamental value underlying

26. See discussion *infra* Part I.

27. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); see discussion *infra* Part II.A.

28. See discussion *infra* Part II.B.

29. See discussion *infra* Part III.

30. See Grimm, *supra* note 9, at 43; Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 4–5 (2012). For example, a physician's failure to obtain informed consent originally created a cause of action for battery. See *Mohr v. Williams*, 104 N.W. 12, 16 (Minn. 1905). This changed, however, and actions for failure to obtain informed consent now lie in negligence, specifically, medical malpractice. *E.g.*, *Natanson v. Kline*, 350 P.2d 1093, 1095, 1103 (Kan. 1960).

31. See, *e.g.*, N.C. GEN. STAT. ANN. § 90-21.13 (West, WestlawNext through S.L. 2013-235 of 2013 Legis. Sess.) (codifying informed consent for healthcare treatments and procedures); Vandewalker, *supra* note 30, at 2.

32. *Informed Consent*, *supra* note 8.

informed consent doctrine is personal autonomy.³³ Giving individuals complete discretion in their medical decisions, with all information necessary to make a knowledgeable choice, effectuates this value.³⁴

In order to obtain valid informed consent, a physician must disclose the “material risks”³⁵ of the treatment or procedure and any alternatives, ensure that the patient understands this information, and receive voluntary consent.³⁶ A physician should also give the patient an opportunity to ask questions about the treatment or procedure.³⁷ This interaction forms the basis of another important value of informed consent—the physician-patient relationship.³⁸ While these traditional requirements appear fairly simple, the informed consent laws relating to abortion differ substantially and greatly complicate this process.³⁹

33. *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914). Justice Cardozo stated: “Every human being of adult years and sound mind has a right to determine what shall be done with his own body[.]” *Id.*; accord *Atkinson*, *supra* note 19, at 635 (finding “a respect for the patient’s self-determination” a basis of early informed consent law); Grimm, *supra* note 9, at 39 (indicating this statement by Cardozo “forms the backbone” of modern informed consent).

34. See *Natanson*, 350 P.2d at 1104. The court stated that every sound person can “expressly prohibit the performance of life-saving surgery, or other medical treatment. A doctor might well believe that an operation or form of treatment is desirable or necessary but the law does not permit him to substitute his own judgment for that of the patient.” *Id.*; *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972) (finding that “[t]rue consent to what happens to one’s self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and risks attendant upon each”); Grimm, *supra* note 9, at 40–41.

35. *Canterbury*, 464 F.2d at 787 (quoting Jon R. Waltz & Thomas W. Scheuneman, *Informed Consent to Therapy*, 64 NW. U. L. REV. 628, 640 (1970)). The commonly used standard for determining the materiality of a risk is “that ‘[a] risk is . . . material when a reasonable person, in what the physician knows or should know to be the patient’s position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy.’” *Id.* (alteration in original).

36. Grimm, *supra* note 9, at 40–41.

37. *Informed Consent*, *supra* note 8.

38. See, e.g., *Canterbury*, 464 F.2d at 780 (“The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision.”); see generally *Atkinson*, *supra* note 19.

39. See *Vandewalker*, *supra* note 30, at 4–13. Despite codification, many aspects of informed consent remain based in common law, while almost all abortion informed consent requirements are statutory. See *id.* at 4–6. However, the underlying principles of personal autonomy and the physician-patient relationship remain the same whether evaluating common law or statutory requirements. See *id.* at 5–6, 10, 53–54. Additionally, the common law on this topic closely aligns with statutory law as all cases analyzing the cross-section of informed consent and abortion involve judicial interpretation of statutes. See *id.* at 8–13.

B. Additional Requirements for Informed Consent Applied to Those Obtaining Abortions

The majority of states impose additional informed consent requirements on abortion that single out this procedure for more restrictive regulation.⁴⁰ Following the Supreme Court's decision in *Casey* to uphold an informed consent statute imposing heightened requirements on abortion,⁴¹ a large number of states enacted statutes modeled after the one in *Casey*.⁴² Some states' regulations push the boundaries of this policy even further.⁴³

1. Heightened Informed Consent Requirements for Abortion

Many states require that physicians provide women seeking abortions with certain types of information or discuss with them specific abortion-related risks.⁴⁴ Courts routinely uphold requirements that women sign written consent forms⁴⁵ and that minors obtain parental consent prior to an abortion.⁴⁶ Although courts do not always favorably view these attempts at persuasion,⁴⁷ a wide range of heightened requirements survive judicial scrutiny.

40. *Id.* at 2; *Counseling and Waiting Periods for Abortion*, *supra* note 11.

41. 18 PA. CONS. STAT. ANN. § 3205 (West, WestlawNext through Reg. Sess. Act 2013-72); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881 (1992) (upholding statute that requires a physician to inform a woman, "at least 24 hours before performing an abortion," of the nature and health risks of the procedure, the "probable gestational age of the unborn child," and the availability of printed information about prenatal care, fetal development, child support, and adoption services).

42. *See, e.g.*, *Summit Med. Ctr. of Ala., Inc. v. Siegelman*, 227 F. Supp. 2d 1194, 1199–1200 (M.D. Ala. 2002) ("The Woman's Right to Know Act is based largely upon the *Casey* statute."); *A Woman's Choice-E. Side Women's Clinic v. Newman*, 904 F. Supp. 1434, 1439 (S.D. Ind. 1995) ("Public Law 187 is similar to a Pennsylvania law upheld by the Supreme Court in *Planned Parenthood of Southern Pennsylvania v. Casey*."), *aff'd*, 980 F. Supp. 962 (S.D. Ind. 1997), *rev'd*, 305 F.3d 684 (7th Cir. 2002).

43. *See Dressler*, *supra* note 7, at 1609–12.

44. *Id.* at 1609–10; Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 111, 113 (2008).

45. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 65–67 (1976).

46. *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (upholding the constitutionality of these requirements as long as there exists "an alternative procedure whereby authorization for the abortion can be obtained"); *see generally* Andrew R. Willis, Note, *The Emergency Exception in Parental Involvement Laws and the Necessity of Post-Emergency Notification*, 4 AVE MARIA L. REV. 171 (2006) (examining the development and application of parental consent laws).

47. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 806 F. Supp. 2d 942, 972 (W.D. Tex. 2011), *vacated in part*, 667 F.2d 570 (5th Cir. 2012). The district court in *Lakey* stated: "*Casey* thus approved of some state regulations under which physicians are required to give pregnant women the

Many cases uphold requirements mandating physicians provide information about resources available should a woman decide not to terminate her pregnancy, for example, addresses of adoption agencies, resources for medical or financial assistance,⁴⁸ or notice of paternal support obligations.⁴⁹ States may also require medical personnel to provide graphic material about the fetus, such as informational videos⁵⁰ or enlarged, color enhanced photographs of fetal development.⁵¹ In 2011, the Eighth Circuit upheld a requirement that physicians tell abortion patients “the abortion will terminate the life of a whole, separate, unique, living human being[.]”⁵² Additionally, states may compel doctors to inform abortion patients

option of receiving certain kinds of information; it did not, however, give governments *carte blanche* to force physicians to deliver, and force women to consider, whatever information the government deems appropriate.” *Id.*; *accord* *Perez v. Park Madison Prof'l Labs., Inc.*, 630 N.Y.S.2d 37, 39, 41–42 (N.Y. App. Div. 1995) (rejecting argument that doctors should attempt to talk women out of abortions after woman sued claiming she regretted her decision reasoning that such methods are unconstitutional and doctors can rely on properly given informed consent).

48. *See, e.g.*, ALA. CODE § 26-23A-5(a)(1)-(2), (7) (West, WestlawNext through 2013 Reg. Sess.); *Summit Med. Ctr. of Ala., Inc. v. Siegelman*, 227 F. Supp. 2d 1194, 1197–98, 1206 (M.D. Ala. 2002) (detailing and upholding Alabama’s Woman’s Right to Know Act); Dressler, *supra* note 7, at 1611 (finding the purpose of this information is to “make the choice of continued pregnancy more appealing”).

49. *See, e.g.*, OKLA. STAT. ANN. tit. 63, § 1-738.2(B)(2)(b) (West, WestlawNext through 2013 First Reg. Sess.) (“[T]he father is liable to assist in the support of her child, even in instances in which the father has offered to pay for the abortion[.]”); KAN. STAT. ANN. § 65-6709(b)(3) (West, WestlawNext through Chapter 143 of 2013 Reg. Sess.); VA. CODE ANN. § 18.2-76(D)(5) (West, WestlawNext through 2013 First Sp. Sess.); W. VA. CODE § 16-2I-2(b)(2) (West, WestlawNext though 2013 First Extraordinary Session); ALA. CODE § 26-23A-5(a)(5) (WestlawNext). A small subset of states with this requirement provide for an exception when the pregnancy is a result of rape. *See, e.g.*, KAN. STAT. ANN. § 65-6709(b)(3) (“[I]n the case of rape this information may be omitted . . . [.]”).

50. *See, e.g.*, UTAH CODE ANN. § 76-7-305.5(2) (West, WestlawNext through 2013 First Sp. Sess.). In Utah, the informational video must state a preference for childbirth over abortion; describe the abortion procedure and provide descriptions of “anatomical and physiological characteristics” of the fetus at two-week increments “from fertilization to full term,” including brain function and “development of external members and internal organs”; and “show an ultrasound of the heartbeat” at each gestational increment. *Id.* § (2), (8); Dressler, *supra* note 7, at 1610–11.

51. *See, e.g.*, KAN. STAT. ANN. § 65-6710(a)(2) (West, WestlawNext through Chapter 143 of 2013 Reg. Sess.); *Eubanks v. Schmidt*, 126 F. Supp. 2d 451, 459 (W.D. Ky. 2000) (finding enlarged and color enhanced photographs of fetal development reasonable because they do not depict misleading or untruthful information).

52. *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662, 665, 667–68 (8th Cir.) (upholding this disclosure requirement in Minnesota, South Dakota, and North Dakota, *vacated in part on reh'g*, 662 F.3d 1072 (8th Cir. 2011), *rev'd*, 686 F.3d 889 (8th Cir. 2012). The South Dakota statute also contains provisions requiring the physician to tell a woman that she “has an existing relationship with that unborn human being and . . . by having an abortion, her existing relationship . . . will be terminated.” S.D. CODIFIED LAWS § 34-23A-10.1(1)(c)-(d) (West, WestlawNext through 2013 Reg. Sess.).

that the unborn child may survive outside of the womb⁵³ and that the fetus possesses the ability to feel pain.⁵⁴

Many states' laws also require that physicians disclose abortion-related risks that go beyond the physical procedure, even though most of these risks are scientifically unproven or have been proven incorrect.⁵⁵ One example is requiring physicians to inform women that abortion creates a risk of future infertility,⁵⁶ although studies find no relationship between voluntary abortion and infertility.⁵⁷ Similarly, some states mandate that physicians tell women abortion increases their risk of breast cancer⁵⁸ despite the National Cancer Institute explicitly rejecting this contention.⁵⁹ As for mental health, physicians may be required to tell women they could experience psychological harm such as depression,⁶⁰ suicide,⁶¹ or regret.⁶² While

53. See, e.g., ALA. CODE § 26-23A-4(b)(3)(a) (West, WestlawNext through 2013 Reg. Sess.); *Summit Med. Ctr. of Ala., Inc.*, 227 F. Supp. 2d at 1203.

54. See, e.g., O.C.G.A. § 31-9A-4(a)(3) (2012). Materials provided to women before an abortion must include 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." *Id.*; see also ARK. CODE ANN. § 20-16-1105(a)(1)(A) (West, WestlawNext through 2013 Reg. Sess.); MO. REV. STAT § 188.027(1)(5) (West, WestlawNext through 2013 First Reg. Sess.). *But see* Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health, 794 F. Supp. 2d 892, 920–21 (S.D. Ind. 2011) (enjoining fetal pain provision after finding information "may be false, misleading, and irrelevant"), *aff'd in part, rev'd in part*, 699 F.3d 962 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2738 (2013); Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 JAMA 947, 952 (2005) (finding that tests of cortical function show that a fetus possesses no conscious perception of pain until at least the third trimester); Tobin, *supra* note 44, at 152 (concluding fetal pain statements "are questionably accurate and clearly misleading").

55. See Vandewalker, *supra* note 30, at 13–19.

56. See, e.g., W. VA. CODE § 16-2I-2(a)(1) (West, WestlawNext through 2013 First Extraordinary Sess.); S.D. CODIFIED LAWS § 34-23A-10.1(1)(e)(iv) (WestlawNext).

57. Hani K. Atrash & Carol J. Rowland Hogue, *The Effect of Pregnancy Termination on Future Reproduction*, 4 BAILLIERE'S CLINICAL OBSTETRICS & GYNAECOLOGY 391, 402 (1990) (finding no evidence of an association between induced abortion and later infertility except in cases where infection occurs); Vandewalker, *supra* note 30, at 14.

58. See Rachel Benson Gold & Elizabeth Nash, *State Abortion Counseling Policies and the Fundamental Principles of Informed Consent*, 10 GUTTMACHER POL'Y REV. 6, 9 (2007), available at <http://www.guttmacher.org/pubs/gpr/10/4/gpr100406.html>; Dressler, *supra* note 7, at 1609.

59. *Abortion, Miscarriage, and Breast Cancer Risk*, NAT'L CANCER INST., <http://www.cancer.gov/cancertopics/factsheet/Risk/abortion-miscarriage> (last visited Oct. 7, 2013).

60. See, e.g., MICH. COMP. LAWS ANN. § 333.17015(11)(b)(iii) (West, WestlawNext through P.A. 2013, No. 108 of 2013 Reg. Sess.) (requiring provider to "[s]tate that as the result of an abortion, some women may experience depression, feelings of guilt, sleep disturbance, loss of interest in work or sex, or anger"); Vandewalker, *supra* note 30, at 15–16.

61. See, e.g., *Planned Parenthood Minn. v. Rounds*, 686 F.3d 889, 894, 906 (8th Cir. 2012) (allowing

there exists anecdotal evidence of such reactions,⁶³ the overwhelming majority of scientific evidence disagrees.⁶⁴ In fact, a task force for the American Psychological Association found the most common emotion experienced by women after an abortion is relief.⁶⁵ Nevertheless, the Fifth Circuit recently found such statements “are part of the state’s reasonable regulation of medical practice.”⁶⁶

2. *The Speech-and-Display Requirements*

Abortion providers regularly choose to perform ultrasounds on their patients.⁶⁷ Multiple states even require ultrasounds prior to an abortion.⁶⁸ The informed consent statutes enacted in Oklahoma, Texas, and North Carolina extend this requirement.⁶⁹ While these

enforcement of South Dakota abortion informed consent provision that listed “[i]ncreased risk of suicide ideation and suicide” as a known risk of abortion).

62. *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007). In upholding the Partial-Birth Abortion Ban, Justice Kennedy stated: “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.” *Id.* (citation omitted).

63. *See, e.g., A Woman’s Choice-E. Side Women’s Clinic v. Newman*, 904 F. Supp. 1434, 1449–50 (S.D. Ind. 1995) (discussing testimony of two women who regretted their abortions and now counsel others who “experience feelings of guilt, depression, and low self-esteem”), *aff’d*, 980 F. Supp. 962 (S.D. Ind. 1997), *rev’d*, 305 F.3d 684 (7th Cir. 2002).

64. *See, e.g., Anne C. Gilchrist et al., Termination of Pregnancy and Psychiatric Morbidity*, 167 BRIT. J. PSYCHIATRY 243, 243, 248 (1995) (finding no difference in the rate of psychiatric disorders between women who obtained abortions and those who did not in a study of 13,261 women experiencing unplanned pregnancy); Trine Munk-Olsen et al., *Induced First-Trimester Abortion and Risk of Mental Disorder*, 364 NEW ENG. J. MED. 332, 335 (2011) (finding no increase in women seeking psychiatric services after abortion, but observing a slight increase after childbirth).

65. BRENDA MAJOR ET AL., AM. PSYCHOLOGICAL ASS’N, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 81 (2008), available at <http://www.apa.org/pi/women/programs/abortion/mental-health.pdf> (“Women also reported feeling more relief than positive or negative emotions both immediately and 2 years after their abortion.”).

66. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012).

67. Katharine O’Connell et al., *First-Trimester Surgical Abortion Practices: A Survey of National Abortion Federation Members*, 79 CONTRACEPTION 385, 388 (2009). The primary purposes for performing an ultrasound before an abortion are to confirm a non-ectopic pregnancy, gestational age, and number of fetuses. *Id.* However, ultrasounds are not medically necessary before all abortions. *Id.*

68. *See, e.g., FLA. STAT. ANN. § 390.0111(3)(a)(1)(b)* (West, WestlawNext through 2013 First Reg. Sess.); *VA. CODE ANN. § 18.2-76(B)* (West, WestlawNext through 2013 First Sp. Sess.); *ALA. CODE § 26-23A-4(b)(4)* (West, WestlawNext through 2013 Reg. Sess.).

69. *OKLA. STAT. ANN. tit. 63, § 1-738.3d(B)(1)-(4)* (West, WestlawNext through 2013 First Reg. Sess.). The Oklahoma statute provides:

In order for the woman to make an informed decision . . . the physician, shall: 1. Perform an obstetric ultrasound on the pregnant woman, using either a vaginal transducer or an abdominal transducer, whichever would display the embryo or fetus more clearly; 2.

statutes are not identical,⁷⁰ they all require the physician to display the ultrasound and simultaneously describe certain fetal characteristics.⁷¹

All three states faced lawsuits challenging the constitutionality of these requirements.⁷² In all three cases, the courts granted injunctions

Provide a simultaneous explanation of what the ultrasound is depicting; 3. Display the ultrasound images so that the pregnant woman may view them; 4. Provide a medical description of the ultrasound images, which shall include the dimensions of the embryo or fetus, the presence of cardiac activity, if present and viewable, and the presence of external members and internal organs, if present and viewable[.]

Id.; TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4)(A)–(D) (West, WestlawNext through 2013 Third Called Legis. Sess.). The Texas statute provides:

Consent to an abortion is voluntary and informed only if: . . . (A) the physician who is to perform the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers performs a sonogram on the pregnant woman on whom the abortion is to be performed; (B) the physician who is to perform the abortion displays the sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them; (C) the physician who is to perform the abortion provides, in a manner understandable to a layperson, 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; and (D) the physician who is to perform the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers 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[.]

Id.; N.C. GEN. STAT. ANN § 90-21.85(a)(1)–(4) (West, WestlawNext through S.L. 2013-235 of 2013 Legis. Sess.). The North Carolina statute provides:

[I]n order for the woman to make an informed decision . . . the physician, shall do each of the following: (1) Perform an obstetric real-time view of the unborn child on the pregnant woman[;] (2) Provide a simultaneous explanation of what the display is depicting, which shall include the presence, location, and dimensions of the unborn child within the uterus and the number of unborn children depicted. The individual performing the display shall offer the pregnant woman the opportunity to hear the fetal heart tone. The image and auscultation of fetal heart tone shall be of a quality consistent with the standard medical practice in the community. If the image indicates that fetal demise has occurred, a woman shall be informed of that fact[;] (3) Display the images so that the pregnant woman may view them[;] (4) Provide a medical description of the images, which shall include the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable.

Id.

70. For example, Texas mandates the physician make the heartbeat audible to the woman. HEALTH & SAFETY § 171.012(a)(4)(D) (WestlawNext). By contrast, Oklahoma and North Carolina require only that the physician give the woman the opportunity to hear the heartbeat. § 90-21.85(a)(2) (WestlawNext); tit. 63, § 1-738.2(B)(1)(a)(5) (WestlawNext).

71. § 90-21.85(a)(4) (WestlawNext); HEALTH & SAFETY § 171.012(a)(4)(C) (WestlawNext); tit. 63, § 1-738.3d(B)(4) (WestlawNext).

72. See generally *Stuart v. Huff*, 834 F. Supp. 2d 424 (M.D.N.C. 2011); *Tex. Med. Providers*

preventing the enforcement of the speech-and-display procedure.⁷³ However, the Fifth Circuit later vacated the injunction in Texas,⁷⁴ and the decisions in North Carolina and Oklahoma will almost certainly be appealed.⁷⁵ These appeals will likely be grounded in constitutional issues; however, informed consent doctrine both factors into this constitutional analysis and serves as an additional independent consideration.⁷⁶

C. *Exceptions From Informed Consent Requirements*

Under certain circumstances, a physician may ignore or modify informed consent requirements and proceed with little or no consent from the patient.⁷⁷ Different concepts and situations invoke different exceptions, making the determination of whether an exception applies primarily a case-by-case inquiry.⁷⁸

Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942 (W.D. Tex. 2011), *vacated in part*, 667 F.2d 570 (5th Cir. 2012); Nova Health Sys. v. Pruitt, No. 2:12-CV-00395, 2012 WL 1034022 (Okla. Cnty. Dist. Ct. Mar. 28, 2012).

73. *Stuart*, 834 F. Supp. 2d at 429 (finding a potential First Amendment violation in that “[t]he message is required even when the provider does not want to deliver the message and even when the patients affirmatively do not wish to see it or hear it”); *Lakey*, 806 F. Supp. 2d at 975, 976–77 (finding the statute violated the First Amendment right against government mandated speech and expression because physicians must make the statements even if they do not “agree, regardless of any medical necessity, and irrespective of whether the pregnant women wish to listen”); *Nova Health Sys.*, 2012 WL 1034022, at *2 (finding the statute unconstitutional because it targets only abortion patients and physicians performing abortions).

74. *Tex. Med. Providers Performing Abortion Servs.*, 667 F.3d at 577–78 (finding these provisions did not violate the First Amendment as “the required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information”).

75. Vandewalker, *supra* note 30, at 28 n.140, 31 n.155.

76. See Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL’Y 223, 235 (2009). Finding that:

Informed consent law . . . provides a useful lens through which to critique abortion law’s treatment of women as healthcare decision-makers. . . . The Supreme Court has at times relied on the private law doctrine of informed consent as a guide in interpreting patients’ rights related to medical treatment under the Due Process Clause.

Id.; Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 972 (2007) (noting “informed consent doctrine raises First Amendment questions that are quite distinct from the ordinary regulation of physician speech”).

77. Grimm, *supra* note 9, at 65.

78. See *id.* at 65–80.

1. *Exceptions From Traditional Informed Consent Laws*

Four generally recognized exceptions exist to traditional informed consent laws—presumed consent to diagnostic procedures, emergency situations, therapeutic privilege, and waiver.⁷⁹ The first exception, presumption of consent in diagnostic procedures, arises from the concept that tests and observations do not implicate informed consent in the same manner as actual treatment, such as surgical procedures, because diagnostic procedures are minimally invasive and serve only as a precursor to actual treatment.⁸⁰ The second exception, emergency, accounts for situations where a patient cannot provide consent to an immediately necessary medical procedure, for example, if he or she is unconscious.⁸¹ The presumption underlying this exception is that failing to act will cause greater harm than the proposed treatment.⁸²

The third exception, therapeutic privilege, occurs when disclosure of a risk poses such a significant threat to the psychological health of the patient that the physician may choose to withhold the information.⁸³ This exception allows physicians to maintain conformity to both informed consent doctrine and the Hippocratic Oath.⁸⁴ However, courts caution physicians to construe this exception

79. *Id.* at 65.

80. *Morgan v. MacPhail*, 704 A.2d 617, 618 (Pa. 1997) (holding the doctrine of informed consent applies only to surgical procedures); *Grimm*, *supra* note 9, at 65–66 (“[D]rawing blood, taking a temperature, or conducting routine physical exams . . . are minimally invasive Requiring the patient’s informed consent is unnecessary in the diagnostic stage because treatment has not yet begun.”). *But see Truman v. Thomas*, 611 P.2d 902, 906–07 (Cal. 1980) (en banc) (finding physician failed to meet his informed consent burden when he did not inform patient refusing pap smear of the risks, reasoning patient did not understand the consequences of refusing this diagnostic procedure).

81. *Sekerez v. Rush Univ. Med. Ctr.*, 954 N.E.2d 383, 396 (Ill. App. Ct. 2011). Four essential elements are required for application of the emergency exception:

(1) [T]he existence of a medical emergency; (2) treatment was required to protect the patient’s health; (3) it was impossible or impractical to obtain consent from either the patient or someone authorized to consent for the patient; and (4) there was no reason to believe that the patient would decline the treatment, given the opportunity to consent.

Id.

82. *Stewart-Graves v. Vaughn*, 170 P.3d 1151, 1156 (Wash. 2007) (citing *Canterbury v. Spence*, 464 F.2d 772, 789 (D.C. Cir. 1972)).

83. *Canterbury*, 464 F.2d at 789.

84. *Grimm*, *supra* note 9, at 76 (noting that providing information to a patient that causes harm violates the Hippocratic Oath, requiring physicians to do no harm to their patients, and the therapeutic privilege exception alleviates this conflict).

narrowly to ensure they do not circumvent the disclosure rule.⁸⁵ Finally, the fourth exception, waiver, allows a patient to make “a voluntary and intentional relinquishment of a known right.”⁸⁶ The basis for this exception is the patient’s right to autonomy in decision-making.⁸⁷ While these traditional exceptions generally derive from common law, the exceptions to the speech-and-display requirements are provided for statutorily and modified by common law.⁸⁸

2. *Exceptions From the Speech-and-Display Requirements*

Roe v. Wade established that states must include a regulatory exception allowing abortions after the point of viability when “necessary to preserve the life or health of the mother.”⁸⁹ However, beyond this emergency provision, a state may decide on its own what situations justify an exception.⁹⁰ Exceptions to speech-and-display requirements vary by state.

Texas law provides for exemption from the fetal description in three situations.⁹¹ First, an exception is given if the pregnancy resulted from sexual assault, incest, or another violation of the law, as long as the incident was reported to police or remains unreported because the woman fears reporting would put her at risk of injurious retaliation.⁹² Second, an exception exists for minors obtaining an abortion pursuant to statutorily-defined judicial bypass procedures.⁹³ Third, if the fetus has a documented “irreversible medical condition or abnormality,” the woman is exempt from these requirements.⁹⁴

85. *Canterbury*, 464 F.2d at 789.

86. Grimm, *supra* note 9, at 77.

87. *See supra* notes 34–35 and accompanying text.

88. *See* discussion *infra* Part I.C.2.

89. *Roe v. Wade*, 410 U.S. 113, 163–64 (1973).

90. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992).

91. TEX. HEALTH & SAFETY CODE ANN. § 171.0122(d)(1)–(3) (West, WestlawNext through 2013 Third Called Legis. Sess.).

92. *Id.* § 171.0122(d)(1).

93. *Id.* § 171.0122(d)(2); TEX. FAMILY CODE ANN. § 33.003(i) (West, WestlawNext through 2013 Third Called Legis. Sess.). A judicial bypass allows a minor woman to obtain an abortion without notifying her parents or guardian if the court finds she “is mature and sufficiently well informed, that notification would not be in [her] best interest, or that notification may lead to physical, sexual, or emotional abuse.” *Id.*

94. HEALTH & SAFETY § 171.0122(d)(3) (WestlawNext).

These exceptions only apply to the verbal explanation; women exempt under these exceptions must still receive an ultrasound and wait twenty-four hours.⁹⁵ In a separate statute, Texas permits a physician to perform an abortion absent any informed consent in situations of medical emergency.⁹⁶

By contrast, Oklahoma and North Carolina only allow for exceptions in cases of medical emergency.⁹⁷ Both states define medical emergency in this context as only physical conditions requiring immediate abortion to prevent death or “substantial and irreversible impairment of a major bodily function.”⁹⁸ Both definitions explicitly state emotional or psychological conditions fail to meet this standard.⁹⁹ Finally, though not specifically classified as exceptions, all three states provide, in slightly different ways, that women may choose not to see or hear the ultrasound and explanation.¹⁰⁰ These exceptions, or lack thereof, demonstrate the

95. *See id.* §§ 171.012(a)(4)(A)–(D), 171.0122(d)(1)–(3).

96. *Id.* § 171.0124.

97. N.C. GEN. STAT. ANN. § 90-21.85(a) (West, WestlawNext through S.L. 2013-235 of 2013 Legis. Sess.); OKLA. STAT. ANN. tit. 63, § 1-738.3d(D) (West, WestlawNext through 2013 First Reg. Sess.).

98. tit. 63, § 1-738.1A(5) (WestlawNext). Oklahoma provides that:

“Medical emergency” means the existence of any physical condition, not including any emotional, psychological, or mental condition, which a reasonably prudent physician, with knowledge of the case and treatment possibilities with respect to the medical conditions involved, would determine necessitates the immediate abortion of the pregnancy of the female to avert her death or to avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy[.]

Id.; N.C. GEN. STAT. ANN. § 90-21.81(5) (West, WestlawNext through S.L. 2013-235 of 2013 Legis. Sess.). North Carolina provides that:

A condition which, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including any psychological or emotional conditions.

Id.

99. § 90-21.81(5) (WestlawNext); tit. 63, § 1-738.1A(5) (WestlawNext).

100. tit. 63, § 1-738.3d(C) (WestlawNext). “Nothing in this section shall be construed to prevent a pregnant woman from averting her eyes from the ultrasound images required to be provided to and reviewed with her.” *Id.*; HEATH & SAFETY § 171.0122(b)–(c) (WestlawNext). “A pregnant woman may choose not to view the sonogram images A pregnant woman may choose not to hear the heart auscultation required to be provided” *Id.*; § 90-21.85(b) (WestlawNext). “Nothing in this section shall be construed to prevent a pregnant woman from averting her eyes from the displayed images or from refusing to hear the simultaneous explanation and medical description.” *Id.*

true purpose and potentially violating nature of the speech-and-display requirements.¹⁰¹

II. APPLICATION OF *CASEY* AND COMPARISON TO TRADITIONAL INFORMED CONSENT

A. *The Casey Undue Burden Standard and its Application to the Speech-and-Display Requirements and Their Exceptions*

The Supreme Court's decision in *Casey* establishes a standard for evaluating heightened informed consent requirements for abortion.¹⁰² In *Casey*, the Court sought to recognize states' legitimate interests¹⁰³ while "ensur[ing] that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact."¹⁰⁴ To balance these competing objectives, the Court held that states may impose regulations on pre-viability abortions, as long as the regulations do not impose an undue burden.¹⁰⁵ The Court articulated that a regulation imposes an undue burden if it "has the *purpose or effect* of placing a substantial obstacle in the path of a woman seeking an abortion."¹⁰⁶ Based on this language, subsequent courts developed a two-prong test for determining whether a statutory requirement places an undue burden on a woman's right to have an abortion.¹⁰⁷ Because the *Casey* Court

101. See discussion *infra* Part II.

102. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992); Linda J. Wharton et al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317, 323 (2006) (stating that *Casey* provides "the controlling standard for evaluating all abortion restrictions").

103. *Roe v. Wade*, 410 U.S. 113, 150 (1973). In *Roe*, the Court found that, after the point of viability, the State has legitimate interests in protecting both the health of the pregnant woman and the potential human life. *Id.*; accord *Casey*, 505 U.S. at 872. In *Casey*, the Court agreed with the interests articulated in *Roe*, but concluded that these interests exist throughout the entire pregnancy, not just after the point of viability. *Id.*

104. *Casey*, 505 U.S. at 872.

105. *Id.* at 878.

106. *Id.* at 877 (emphasis added).

107. See *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 704 (7th Cir. 2002) (Coffey, J., concurring) (finding Indiana abortion informed consent statute valid because the statute both served the purpose of allowing women to make well-informed decisions and posed a substantial obstacle for only ten to thirteen percent of women obtaining abortions); Wharton et al., *supra* note 102, at 354–85 (detailing the implementation of the effects and purpose prongs in the common law since the *Casey*

only ambiguously articulated what constitutes an undue burden,¹⁰⁸ lower courts possess a great amount of discretion in their analysis of abortion related regulations.¹⁰⁹ The Court did, however, establish that these types of cases require a fact-intensive inquiry.¹¹⁰

1. Application of the Effects Prong of the Undue Burden Standard

The “effects” prong, also known as the “large fraction” test, is based on the Court’s reasoning that, if “in a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion,”¹¹¹ the reviewing courts should view the provision as an “undue burden, and therefore invalid.”¹¹² The Court did not indicate the exact percentage required for a regulation to constitute an undue burden.¹¹³ However,

decision).

108. See *Okpalobi v. Foster*, 190 F.3d 337, 354 (5th Cir. 1999) (noting the “*Casey* Court provided little, if any, instruction regarding the type of inquiry lower courts should undertake”); Sarah E. Weber, *An Attempt to Legislate Morality: Forced Ultrasounds as the Newest Tactic in Anti-Abortion Legislation*, 45 TULSA L. REV. 359, 362 (2009) (stating the Court “did not explain how to use the standard—other than the ‘substantial obstacle’ language—leaving many uncertainties for lower courts to decide”).

109. See *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 16–17 (Tenn. 2000) (finding the undue burden approach offers “no real guidance” and “allows judges to impose their own subjective views”).

110. See *Casey*, 505 U.S. at 878–79; Wharton et al., *supra* note 102, at 359. “[*Casey*’s] fact-intensive analysis protects women’s access to abortion by ensuring that regulations not deemed burdensome based on the limited record before the Court in *Casey* may still be invalidated if they prove burdensome in states with . . . other unique social, economic, and geographic circumstances.” Wharton et al., *supra* note 102, at 359.

111. *Casey*, 505 U.S. at 895.

112. *Id.* at 893–95 (finding spousal notification requirement constituted an undue burden because a significant number of women in domestically abusive marriages could not obtain abortions).

113. *Id.* at 895 (stating only “a large fraction”). Because the Court did not provide an exact number, lower courts can decide whether a given percentage constitutes an undue burden. See, e.g., *Tucson Women’s Ctr. v. Ariz. Med. Bd.*, 666 F. Supp. 2d 1091, 1105 (D. Ariz. 2009) (finding eleven out of ninety-two women facing a substantial obstacle did not constitute a large enough fraction); *A Woman’s Choice-E. Side Women’s Clinic v. Newman*, 904 F. Supp. 1434, 1457 (S.D. Ind. 1995), *aff’d*, 980 F. Supp. 962 (1997), *rev’d*, 305 F.3d 684 (7th Cir. 2002) (finding law imposed an undue burden when abortions in the state were likely to drop as much as fourteen percent after implementation). In addition to the lack of a uniform standard, problems of proof further complicate this analysis. See, e.g., *Karlin v. Foust*, 188 F.3d 446, 487 (7th Cir. 1999); *Eubanks v. Schmidt*, 126 F. Supp. 2d 451, 457 (W.D. Ky. 2000) (finding a court must distinguish between indirect and direct effects). In *Karlin*, the court stated:

[T]o prove that an abortion regulation poses an undue burden on a woman under *Casey*, it is not enough for a plaintiff to show that the number of abortions declined after the passage of a state abortion regulation because that result is entirely consistent with a state’s legitimate interest in persuading a woman to carry her child to term. The plaintiff

the Court did make clear that the proper focus of this inquiry is the women “for whom the law is a restriction, not the group for whom the law is irrelevant.”¹¹⁴

The speech-and-display requirements may prevent some women from obtaining abortions, but likely do not create an impermissible effect. Just like in *Casey*, where the analysis focused on married women who would refuse to notify their spouses, here, the focus of the inquiry is the group of women who would refuse the ultrasound and description, because the mandatory nature of these provisions do not restrict the women who would accept the offer.¹¹⁵ Though the ultrasound requirement will create an additional financial burden,¹¹⁶ courts rarely find mere increases in cost sufficient to show an impermissible effect.¹¹⁷ Additionally, heightened informed consent laws, in general, rarely lead to a decrease in abortions.¹¹⁸ Therefore, the regulations themselves likely do not create an impermissible effect.

must also explain why the law had this effect.

Karlin, 188 F.3d at 487; accord *Casey*, 505 U.S. at 925 (Blackmun, J., concurring). While difficult, using “expert testimony, empirical studies, and common sense,” courts can determine if a regulation violates the effects prong. *Casey*, 505 U.S. at 925 (Blackmun, J., concurring).

114. *Casey*, 505 U.S. at 894. In *Casey*, the State defended the spousal notification requirement by stating that, after removing unmarried women and married women who voluntarily inform their spouses, the provision affected only one percent of women obtaining abortions. *Id.* The Court disagreed with this reasoning, finding “[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.” *Id.*

115. See News Release, Okla. House of Representatives, House Votes to Override Pro-Life Vetoes (Apr. 26, 2010) (available on WestlawNext) (noting that “ultrasounds are already routinely conducted immediately prior to an abortion,” but this law expands this procedure by *requiring* physicians to provide women with the pictures and information obtained from the ultrasound).

116. H. JOURNAL, 82d Leg., Reg. Sess. S39–S40 (Tex. Mar. 3, 2011 Supp.), available at <ftp://ftp.legis.state.tx.us/journals/82R/pdf/House/82RDAY29SUPPLEMENT.PDF> (acknowledging that a woman would need to obtain the sonogram from her abortion provider, not a free entity, and that the woman would bear this cost); Weber, *supra* note 108, at 371 (finding, in Oklahoma, requiring an ultrasound would raise the cost of a first trimester abortion at a minimum approximately fifty percent).

117. See, e.g., *A Woman’s Choice-E. Side Women’s Clinic v. Newman*, 305 F.3d 684, 685, 693 (7th Cir. 2002) (validating “in the presence” provision despite recognizing that the provision required women to make two trips to the hospital, which raised the financial cost); *Karlin*, 188 F.3d at 481 (finding “courts should not focus on whether the challenged regulation merely has the effect of making abortions a little more difficult or expensive to obtain”).

118. See Tobin, *supra* note 44, at 124–25. “Anecdotal evidence from abortion providers suggests mandated disclosures have little if any effect on women’s ultimate decisions. . . . 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.” *Id.*

However, the lack of exceptions to the speech-and-display requirements could create an impermissible effect. When looking at the relevant group, logic implies that a “large fraction” of those who would refuse the ultrasound may decide to forgo the abortion in order to avoid the speech-and-display requirements.¹¹⁹ The psychological burden created by this procedure could lead women to forego an abortion simply because they cannot submit to the requirements.¹²⁰ This appears especially true in North Carolina and Oklahoma where victims of rape and incest must submit to these procedures.¹²¹ Because women may choose not to obtain an abortion to avoid undergoing this procedure, the requirements may create an impermissible effect.

2. *Application of the Purpose Prong of the Undue Burden Standard*

The “purpose” prong derives from the Court’s reasoning that any regulations imposed “must be calculated to inform the woman’s free choice, not hinder it.”¹²² Therefore, if a regulation “serve[s] no purpose other than to make abortions more difficult,” the regulation will constitute an undue burden.¹²³ Originally, courts analyzing abortion regulations struggled to define this prong and merely described what did not constitute an improper purpose.¹²⁴ However, in *Planned Parenthood Minnesota v. Rounds*, the Eighth Circuit held

119. Jeffrey Roseberry, Comment, *Undue Burden and the Law of Abortion in Arizona*, 44 ARIZ. ST. L.J. 391, 400 (2012).

120. *Id.*

121. N.C. GEN. STAT. ANN. § 90-21.85(a) (West, WestlawNext through S.L. 2013-235 of 2013 Legis. Sess.); OKLA. STAT. ANN. tit. 63, § 1-738.3d(D) (West, WestlawNext through 2013 First Reg. Sess.).

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

123. *Id.* at 901; *see also* *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042, 1049 (8th Cir. 1997) (holding law imposed an undue burden when it imposed more restrictions on clinics providing abortions than clinics that did not perform abortions).

124. *See, e.g., Mazurek v. Armstrong*, 520 U.S. 968, 973, 976 (1997) (validating physician-only requirement by rejecting claim that medical data showing non-physicians could perform abortions and evidence that anti-abortion groups lobbied for the statute sufficiently proved the legislature acted with impermissible motive); *Karlin v. Foust*, 188 F.3d 446, 493 (7th Cir. 1999) (noting purpose challenges rarely succeed “absent some sort of explicit indication from the state that it was acting in furtherance of an improper purpose”); Wharton et al., *supra* note 102, at 378 (finding lower courts defined the improper purpose test negatively).

that provisions requiring disclosure of inaccurate information serve an improper purpose.¹²⁵ Some courts now evaluate whether the true purpose of regulation is improper using a totality of the circumstances test based on such evidence as “the language of the challenged act, its legislative history, the social and historical context of the legislation, or other legislation concerning the same subject matter as the challenged measure.”¹²⁶

a. Application of the Purpose Prong to the Requirements

The purpose underlying the speech-and-display requirements is improper.¹²⁷ In two out of the three states with these requirements,¹²⁸ drafters of the legislation explicitly stated purposes bordering on improper. In a phone interview, Senator Lamb, drafter of the Oklahoma statute, explained that the purpose of the requirement was to reduce the number of abortions.¹²⁹ During a legislative debate, Representative Miller, drafter of the Texas statute, agreed that the motive behind the regulation was “to get women to not have abortions.”¹³⁰ While *Casey* allows regulations intended to preserve potential life,¹³¹ the Court also emphasized the importance of a woman’s right to choose.¹³² This emphasis implies that the Court did

125. *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662, 673 (8th Cir.), *vacated in part on reh’g*, 662 F.3d 1072 (8th Cir. 2011), *rev’d*, 686 F.3d 889 (8th Cir. 2012). The Eighth Circuit invalidated a suicide advisory provision that required physicians to describe “all known medical risks” to abortion patients, including “[i]ncreased risk of suicide ideation and suicide.” *Id.* at 670 (alteration in original). The court held this statement served as a “substantial obstacle” because it contradicted leading scientific evidence in the field and might mislead abortion patients instead of informing their decision. *Id.* at 671, 673. Though later overturned on factual grounds, this decision demonstrates that statements not meeting the “truthful and not misleading” requirement of *Casey* constitute an undue burden. *Id.* at 673.

126. *Okpalobi v. Foster*, 190 F.3d 337, 354 (5th Cir. 1999).

127. *See Wharton et al.*, *supra* note 102, at 377–85. It is important to note that the difference between legitimate state interests and improper purpose is a fine line and more of a judicial judgment call than an easily recognizable distinction. *Id.*

128. North Carolina does not publish legislative history or house news.

129. Weber, *supra* note 108, at 365 (quoting from an interview with Senator Lamb).

130. H. JOURNAL, 82d Leg., Reg. Sess. S2 (Tex. Mar. 3, 2011 Supp.), *available at* <ftp://ftp.legis.state.tx.us/journals/82R/pdf/House/82RDAY29SUPPLEMENT.PDF>.

131. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992).

132. *Id.* at 849 (“It is settled now . . . that the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood, as well as bodily integrity.” (citations omitted)).

not intend for informed consent to serve as a talismanic phrase, providing the state *carte blanche* to infuse its beliefs into the medical decisions of its citizens. Thus, the regulation must also serve another purpose in addition to this persuasion.¹³³

Aside from attempting to convince women to forego abortions, no other purpose exists for the speech-and-display requirements. First trimester abortions present extremely minimal risk, therefore, these requirements cannot be based on medical necessity.¹³⁴ The speech-and-display procedure, while emotionally charged, likely conveys truthful and not misleading statements;¹³⁵ however, none of the information provided relates to the abortion procedure itself and, thus, does not serve the purpose of informed consent.¹³⁶ When a regulation possesses neither a medical nor an informed consent purpose, “the only purpose . . . is to discourage women from having abortions.”¹³⁷ Therefore, the regulations likely possess an improper purpose.

b. Application of the Purpose Prong to the Exceptions

Unless a patient meets one of the few exceptions provided to these requirements,¹³⁸ the physician must comply with the procedure or face a large fine, mandatory disciplinary action, potential criminal penalties, or denial of licensure.¹³⁹ In Oklahoma and North Carolina,

133. *Id.* at 874 (noting that a law must serve “a valid purpose, one not designed to strike at the right itself”).

134. *Roe v. Wade*, 410 U.S. 113, 163 (1973) (acknowledging “the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth”); *Facts on Induced Abortion in the United States*, GUTTMACHER INST.: ST. POLICIES BRIEF (Oct. 2013), http://www.guttmacher.org/pubs/fb_induced_abortion.pdf (finding less than 0.5% of abortion patients experience major complications that require hospital care).

135. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577–78 (5th Cir. 2012).

136. *Stuart v. Huff*, 834 F. Supp. 2d 424, 429 n.4 (M.D.N.C. 2011) (finding one purpose of the requirements is persuading “women not to have abortions by presenting ‘compelling’ visual and personal information”).

137. Weber, *supra* note 108, at 370.

138. See discussion *supra* Part I.C.2.

139. See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 171.018 (West, WestlawNext through 2013 Third Called Legis. Sess.) (imposing a fine up to \$10,000); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 806 F. Supp. 2d 942, 948 (W.D. Tex. 2011), *vacated in part*, 667 F.2d 570 (5th Cir. 2012) (stating, if a physician violates the statute, the medical board is required to refuse a renewal of the

the only situation where a physician does not have to perform an ultrasound and describe the fetus is a medical emergency.¹⁴⁰ Texas allows for three categories of exceptions to the speech requirement, but only removes the ultrasound requirement in the emergency context.¹⁴¹

The exceptions to the speech-and-display requirements illustrate the improper purpose of the regulations. For example, the fact that Texas provides an exemption for fetuses with fatal anomalies¹⁴² demonstrates the state's desire to prevent only women with viable fetuses from obtaining abortions. Oklahoma and North Carolina's insistence that only a physical emergency can excuse a woman from these requirements ignores the fact that "general usage and modern understanding of the word 'health' . . . includes psychological as well as physical well-being."¹⁴³ These narrow exceptions demonstrate that states value fetal survival over the health of the mother, which constitutes an improper purpose.¹⁴⁴ Because the speech-and-display requirements, particularly their notable lack of exceptions, potentially create both an improper effect and improper purpose, these laws likely impose an undue burden.

B. Comparison of the Speech-and-Display Requirements and Their Exceptions and Traditional Informed Consent Doctrine

Although the state may impose heightened informed consent requirements in the abortion context,¹⁴⁵ these requirements cannot violate the very principles underlying traditional informed consent doctrine.¹⁴⁶ The "decision of whether to bear a child goes far beyond"

physician's medical license and the physician faces potential fines or criminal penalties).

140. See discussion *supra* Part I.C.2.

141. *Id.*

142. TEX. HEALTH & SAFETY CODE ANN. § 171.0122(d)(3) (West, WestlawNext through 2013 Third Called Legis. Sess.).

143. *United States v. Vuitch*, 402 U.S. 62, 72 (1971).

144. Wharton et al., *supra* note 102, at 377–86.

145. See discussion *supra* Part II.B.2.

146. See generally Grimm, *supra* note 9.

the typical medical decision; however, this does not give states the right to usurp the autonomy of the individual.¹⁴⁷

1. Comparison of Informed Consent Doctrine to the Requirements

The speech-and-display requirements do more than simply inform women of the risks and alternatives of the medical procedure.¹⁴⁸ These requirements force physicians to “physically speak and show the state’s non-medical message to patients unwilling to hear or see.”¹⁴⁹ For no other procedure must physicians provide such graphic detail on what happens to the body.¹⁵⁰ The state emphasizes that abortion differs from other procedures in its inherent irreversibility; however, many surgical procedures—the removal of a kidney or even plastic surgery—are also irreversible, but require far less disclosure.¹⁵¹ The unique nature of the speech-and-display requirements implicates even more issues.

The required ultrasound may violate traditional informed consent doctrine. Physicians must perform either a vaginal or abdominal ultrasound on the patient, “whichever depicts the fetus more clearly” to allow for a description.¹⁵² During the first trimester—when eighty-

147. Vandewalker, *supra* note 30, at 10.

148. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 806 F. Supp. 2d 942, 975 (W.D. Tex. 2011), *vacated in part*, 667 F.2d 570 (5th Cir. 2012).

149. *Stuart v. Huff*, 834 F. Supp. 2d 424, 432 (M.D.N.C. 2011).

150. *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007). Justice Kennedy noted:

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all the details, lest the usual anxiety preceding invasive medical procedures become the more intense.

Id.; Vandewalker, *supra* note 30, at 20 (noting that even heart surgery patients need not hear such a detailed description and, if they did, it would only serve to increase their anxiety). Of course, if a patient did desire such a description prior to any type of procedure, he or she could simply ask the doctor for this information. Vandewalker, *supra* note 30, at 20.

151. Response in Opposition to Defendants’ and Defendant-Intervenor’s Joint Motion for Summary Judgment on Claims 1 Through 6 and in Support of Plaintiffs’ Cross-Motion for Summary Judgment on Claims 3 and 6 at 9 n.5, *Nova Health Sys. v. Pruitt*, No. 2:12-CV-00395, 2012 WL 1034022 (Okla. Cnty. Dist. Ct. Mar. 28, 2012), 2011 WL 6442261, n.5 (finding that “[t]here are myriad medical procedures that have irreversible effects”).

152. Weber, *supra* note 108, at 379 (describing the ultrasound process).

eight percent of abortions occur¹⁵³—physicians most often use vaginal ultrasounds.¹⁵⁴ In light of this, critics of the speech-and-display requirements nickname the procedure “state rape.”¹⁵⁵ This requirement violates informed consent doctrine because it is medically unnecessary and can potentially cause physical and psychological harm.¹⁵⁶ The ultrasound violates the very notion that informed consent seeks to preserve—bodily integrity.¹⁵⁷ Further, this procedure “forces health care providers to use the body of each abortion patient to create imagery in order to deliver the State’s message about the embryo or fetus.”¹⁵⁸

The physician’s description of fetal characteristics violates informed consent because it provides no information relevant to the impending procedure.¹⁵⁹ An explanation of what the fetus looks like does not convey medical risks or alternatives, only “emotional or moral content.”¹⁶⁰ The state argues that seeing the fetus and hearing it described prevents a woman from later regretting her decision after realizing she terminated the life of her child.¹⁶¹ However, it is illogical that a woman—who learned of her pregnancy, decided to obtain an abortion, made an appointment, and followed through with the procedure—would only realize months or years later that, but for the abortion, she would have given birth to a child.¹⁶² Rather, these

153. *Facts on Induced Abortion in the United States*, *supra* note 134.

154. Weber, *supra* note 108, at 379.

155. Lynn Ardit, *Abortion Bill Requires Fetus Description*, PROVIDENCE J.-BULL., March 19, 2002, available at 2012 WLNR 5846567. Critics also refer to the transducer used to perform the ultrasound as a “shaming wand.” *Id.*

156. Weber, *supra* note 108, at 368–69, 380 (noting every abortion does not require an ultrasound, performing a procedure the patient adamantly refuses strips away her bodily integrity, and the FDA warns against medically unnecessary ultrasounds because of potential effects on human tissue).

157. Vandewalker, *supra* note 30, at 30 (stating vaginal penetration without consent violates this notion).

158. Plaintiffs’ Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 1, *Stuart v. Huff*, 834 F. Supp. 2d 424 (M.D.N.C. 2011) (No. 1:11CV804), 2011 WL 5062019.

159. Vandewalker, *supra* note 30, at 19–20.

160. *Id.* at 20–21.

161. H. JOURNAL, 82d Leg., Reg. Sess. 632–33 (Tex. 2011), available at <ftp://ftp.legis.state.tx.us/journals/82R/pdf/House/82RDAY29FINAL.pdf>.

162. Vandewalker, *supra* note 30, at 47–48; *Facts on Induced Abortion in the United States*, *supra* note 134. This is especially true given that sixty-one percent of women obtaining abortions already have one or more children. *Facts on Induced Abortion in the United States*, *supra* note 134.

procedures serve to “morally Mirandize” women obtaining abortions.¹⁶³ This undermines personal autonomy because it plays on women’s emotions as opposed to providing information to help them make an educated decision.¹⁶⁴ The fact that these requirements are mandated, rather than optional, only serves to further violate the traditional informed consent doctrine.

2. *Comparison of Informed Consent Doctrine to the Exceptions*

Exceptions exist to informed consent provisions to accommodate the fact that each patient and each situation is different.¹⁶⁵ When a statute limits the available exceptions, this may lead to violations of both important principles underlying informed consent doctrine—personal autonomy and the physician-patient relationship.¹⁶⁶

The first traditional exception, presumed consent to diagnostic procedures, does not apply to abortion informed consent as an abortion is a surgical procedure.¹⁶⁷ The second exception to informed consent doctrine, emergency, exists for these requirements in all states, but only for physical issues.¹⁶⁸ By including only physical emergencies and not psychological emergencies,¹⁶⁹ these laws do not allow physicians to properly tailor the requirements to each patient, as informed consent doctrine advocates.¹⁷⁰ This also violates the

163. Weber, *supra* note 108, at 368; accord Vandewalker, *supra* note 30, at 30 (noting that “anti-abortion activists apparently think that some women fail to understand that abortion is wrong but if that message is conveyed to them, they will not terminate their pregnancies”).

164. Vandewalker, *supra* note 30, at 30; Weber, *supra* note 108, at 368.

165. Grimm, *supra* note 9, at 65.

166. *See id.* at 65–66; Vandewalker, *supra* note 30, at 39–40.

167. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992); *see also* Weber, *supra* note 108, at 368. A strong argument exists for a requirement of informed consent to the ultrasound, as this procedure is more than minimally invasive and not medically necessary. Weber, *supra* note 108, at 368, 380–81.

168. *See* discussion *supra* Part I.C.2.

169. Grimm, *supra* note 9, at 70. Physical and psychological emergency differ temporally. Physical emergency occurs before the administration of any informed consent information and allows the physician to proceed without it. *Id.* Psychological emergency could occur after receiving the informed consent information and would allow a physician to withhold certain information to avoid psychological harm. *See id.* at 76. Because of this, psychological emergency can be considered synonymous with therapeutic privilege. *See id.*

170. Vandewalker, *supra* note 30, at 48 (finding “health care professionals may be able to predict when exposure to the results of an ultrasound will be distressing for the patient”).

emergency exception's underlying presumption that failing to act will cause greater harm because, in situations where a woman foregoes an abortion because she psychologically cannot submit to the speech-and-display requirements, courts have recognized the subsequent birth of a child may lead to even greater harm.¹⁷¹

The third exception to informed consent doctrine, therapeutic privilege, is arguably the most important in the abortion context.¹⁷² In *Doe v. Bolton*, the Supreme Court found that a physician should use his medical judgment “in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient.”¹⁷³ By refusing to allow physicians to decide not to provide patients with information they know will inflict psychological damage, physicians are forced to violate the Hippocratic Oath.¹⁷⁴ For example, in Texas, if a thirteen-year-old rape victim too traumatized to report her attack decides soon after learning of her pregnancy to obtain an abortion, a physician must administer a vaginal ultrasound against her wishes and describe to the girl the product of her rape. During legislative discussions, the author of the Texas bill vehemently refused any amendments to the medical emergency provision, stating he did not want to create any “loopholes.”¹⁷⁵ Thus, the physician no longer possesses the discretion to decide what the patient should, and psychologically can, hear.¹⁷⁶

171. *Roe v. Wade*, 410 U.S. 113, 153 (1973). The Court found:

Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

Id.

172. *See Grimm, supra* note 9, at 65, 76.

173. *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

174. *See Grimm, supra* note 9, at 76.

175. *See* H. JOURNAL, 82d Leg., Reg. Sess. S19 (Tex. Mar. 3, 2011 Supp.), available at [ftp://ftp.legis.state.tx.us/journals/82R/pdf/House/82RDAY29SUPPLEMENT.PDF](http://ftp.legis.state.tx.us/journals/82R/pdf/House/82RDAY29SUPPLEMENT.PDF).

176. *See Karlin v. Foust*, 188 F.3d 446, 490 (7th Cir. 1999). This is especially true in cases where the fetus possesses a lethal anomaly or the woman is suffering from an ectopic pregnancy. *See id.* at 489–90. Multiple courts find it unconstitutional to provide certain informed consent provisions to women

This destroys the physician-patient relationship underlying traditional informed consent because the patient can no longer assume that the physician has her best interests in mind.

Finally, the fourth exception to traditional informed consent, waiver, does not exist for the speech-and-display requirements. The failure of these statutes to provide a woman with the opportunity to decide whether she wants to receive this information violates personal autonomy—the fundamental value underlying all informed consent.¹⁷⁷ The Supreme Court has acknowledged that the state may not intimidate or bully a woman into having a child in the name of informed consent.¹⁷⁸ By refusing to allow a woman to decide that she does not want to submit to the speech-and-display requirements, the state effectively interferes with, or at least delays, her very right to choose.

III. REMEDYING THE SPEECH-AND-DISPLAY REQUIREMENTS' VIOLATIONS OF TRADITIONAL INFORMED CONSENT DOCTRINE

As previously noted, challenges to the speech-and-display requirements are likely to be made on constitutional grounds, such as First Amendment or Due Process violations.¹⁷⁹ However, the conformity of the requirements and their exceptions to informed consent doctrine is both a constitutional factor and an additional

who are obtaining abortions in these situations. *Id.* at 489 & n.16 (finding the provision of information may cause severe psychological harm and furthers no legitimate purpose); *see also* Summit Med. Ctr. of Ala., Inc. v. Siegelman, 227 F. Supp. 2d 1194, 1202 (M.D. Ala. 2002) (“As the court understands the evidence, women with ectopic pregnancies and women carrying unborn children with lethal fetal anomalies have no chance of successfully bringing a living child to term. Therefore, . . . requiring physicians to provide these women with the information called for in the Act serves neither of the state interests recognized in *Casey*.”).

177. *See* Grimm, *supra* note 9, at 77.

178. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 936 n.7 (1992) (Stevens, J., concurring in part and dissenting in part) (“[T]he measures must be designed to ensure that a woman’s choice is ‘mature and informed,’ not intimidated, imposed, or impelled. To this end, when the State requires the provision of certain information, the State may not alter the *manner* of presentation in order to inflict ‘psychological abuse,’ designed to shock or unnerve a woman seeking to exercise her liberty right.” (citations omitted)); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986), *overruled in part by Casey*, 505 U.S. 833 (1992).

179. *See* cases cited *supra* notes 73–75 and accompanying text.

argument for courts to consider.¹⁸⁰ To remedy the speech-and-display requirements' violations of informed consent doctrine, the laws must include broader exceptions. If states provide increased exceptions, however, the requirements themselves can likely remain.

A. Informed Consent Doctrine Serves as a Valid Justification for the Requirements

Although the speech-and-display requirements could potentially fail both the effects and purpose prongs of the *Casey* undue burden standard,¹⁸¹ if given broader exceptions,¹⁸² informed consent would likely provide a valid justification for these laws for three primary reasons. First, the Supreme Court in *Casey* permitted states to enact legislation designed to allow women to make a “mature and informed” decision about whether to obtain an abortion.¹⁸³ The Court declared that states can require physicians to provide information, even if it possesses no direct relation to the health of the woman or “when in so doing the State expresses a preference for childbirth over abortion[,]” as long as it furthers states’ legitimate interests.¹⁸⁴ Legislators enacting these requirements insist such procedures will “empower . . . expectant mothers by giving them as much information as possible”¹⁸⁵ and “make sure that the woman is fully informed about the medical procedure that she is about to have.”¹⁸⁶

180. See *supra* note 77 and accompanying text.

181. See discussion *supra* Part II.A.1–2.

182. See discussion *infra* Part III.B.

183. *Casey*, 505 U.S. at 883.

184. See *id.* at 872, 877, 882–83. The Supreme Court in *Casey* found that it is valid for a state to express its interest in preserving fetal life; however, this principle is not unlimited. Justice Kennedy stated:

[T]he 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 What is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.

Id. at 877 (citations omitted).

185. News Release, Okla. House of Representatives, Lawmakers Vow to Continue Pro-Life Fight (Apr. 23, 2010) (available on WestlawNext) (quoting Rep. Lisa Billy).

186. H. JOURNAL, 82d Leg., Reg. Sess. 632 (Tex. 2011), available at <ftp://ftp.legis.state.tx.us/journals/82R/pdf/House/82RDAY29FINAL.pdf>.

Given these proffered justifications, a court may view such procedures as validly informing a woman's choice.

Second, courts traditionally demonstrate a great amount of deference toward heightened abortion informed consent laws.¹⁸⁷ These requirements—with their physically invasive nature and the deeply personal, as opposed to generally applicable, information they provide—surpass the types of abortion informed consent statutes upheld in the past.¹⁸⁸ While the speech-and-display requirements may possibly serve as the “breaking point” for heightened abortion informed consent law, the current trend of judicial acceptance remains.

Third, some women may want to receive an ultrasound and hear a description of the fetus prior to receiving an abortion.¹⁸⁹ Members of the Texas and Oklahoma legislatures insist that women want to view these images¹⁹⁰ and believe such images will greatly reduce the amount of abortions.¹⁹¹ Although studies and anecdotal evidence demonstrate that ultrasounds do not alter a woman's decision to abort,¹⁹² a valid argument can be made that some women would choose to receive this information. The most important word in the previous sentence is choose. Without broader exceptions, these procedures violate both the woman's right to make an autonomous decision and the informed consent doctrine itself.

187. See Tobin, *supra* note 44, at 130–31 (“The principle of deference to legislatures is an old one . . . courts must not invade the province and duty of legislatures to decide public policy.”).

188. See discussion *supra* Part I.B.1.

189. Ellen R. Wiebe & Lisa Adams, *Women's Perceptions About Seeing the Ultrasound Picture Before an Abortion*, 14 EUR. J. CONTRACEPTION & REPROD. HEALTH CARE 97, 99 (2009). This study found that seventy-two percent of women accepted an offer to view the ultrasound picture before an abortion. *Id.*

190. H. JOURNAL 632 (stating that some women were even denied this opportunity).

191. News Release, Okla. Senate, Statement from Senate President Pro Tempore Glenn Coffee on Reproductive Services' Lawsuit (Apr. 27, 2010) (available on WestlawNext) (stating that anecdotal evidence and history show that these requirements will reduce abortions).

192. See Wiebe & Adams, *supra* note 189, at 99 (finding that none of the women in the study decided to not continue with the abortion after viewing the ultrasound); see also Kevin Sack, *In Ultrasound, Abortion Fight Has New Front*, N.Y. TIMES (May 27, 2010), <http://www.nytimes.com/2010/05/28/health/policy/28ultrasound.html>. An Alabama abortion provider stated that “about half” of the women offered pre-abortion ultrasounds chose to view them, but noted she “never had one patient get off the table because she saw what her fetus looks like.” *Id.* In fact, a woman interviewed for the article said that, “[i]t was really the picture of the ultrasound that made me feel it was O.K.” *Id.*

B. The Speech-and-Display Requirements Must Include Greater Exceptions to Validate Their Use as Informed Consent

The extremely limited nature of the existing exceptions to the speech-and-display requirements violates the principles underlying informed consent—personal autonomy and the physician-patient relationship.¹⁹³ Unless expanded, the lack of certain vital exceptions invalidates the use of these requirements as informed consent for abortion.

1. At a Minimum, the Medical Emergency Exception Must Include Provisions for Psychological Health

While exceptions to these requirements for medical emergencies exist in all states,¹⁹⁴ confinement to purely physical emergencies violates not only the principles underlying informed consent, but also the way modern society views health. Studies show increasing public recognition of mental health and the inextricable link between physical and mental health, even asserting that “[t]he bottom line is that there is no health without mental health.”¹⁹⁵ In *Casey*, the Supreme Court stated that “[i]t cannot be questioned that psychological well-being is a facet of health.”¹⁹⁶ The lack of a psychological medical emergency provision to the speech-and-display requirements does more than just ignore scientific evidence, legal precedent, and the purposes behind informed consent—it fails to recognize that the requirements themselves may cause psychological harm.

193. See discussion *supra* Part I.A.

194. See discussion *supra* Part.I.C.2.

195. WORLD FED’N FOR MENTAL HEALTH, MENTAL HEALTH AND CHRONIC PHYSICAL ILLNESSES: THE NEED FOR CONTINUED AND INTEGRATED CARE 4 (2010).

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

a. Physicians Should Possess the Discretion to Withhold Information for Psychological Reasons

While the Supreme Court never explicitly held that an express mental health exception is required,¹⁹⁷ previous cases demonstrate that courts do take psychological health into account in the abortion context. In *Casey*, the Court found the informed consent statute did not “prevent the physician from exercising his or her medical judgment” because it included an exception for preserving physical or psychological health.¹⁹⁸ In *Karlin v. Foust*, the Seventh Circuit held that a physician may choose not to provide certain abortion informed consent information, even absent express statutory authorization, where doing so “would cause a woman psychological harm sufficient to rise to the level of a medical emergency.”¹⁹⁹ Many subsequent court decisions also imply mental health justifications in medical emergency statutes.²⁰⁰

The medical emergency exception to the speech-and-display requirements disregards this precedent by expressly refusing to recognize psychological conditions as worthy of exception.²⁰¹ During the Texas legislative debate, the senator who drafted the bill opposed expanding the medical emergency exception, stating that he feared doctors would abuse their discretion by not performing the requirements in situations where a woman is “distracted” or the doctor “think[s] she’s suicidal.”²⁰² Refusing to allow a physician to

197. *Karlin v. Foust*, 188 F.3d 446, 489 (7th Cir. 1999).

198. *Casey*, 505 U.S. at 883–84. The statute allowed a physician to forego “the informed consent provisions ‘if he or she can demonstrate . . . that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.’” *Id.*

199. *Karlin*, 188 F.3d at 490. The medical emergency statute at issue defined emergencies as conditions necessitating abortion to avert death or “serious risk of substantial and irreversible impairment of one or more of the woman’s major bodily functions.” *Id.* at 459 (citation omitted). The court found this provision broad enough to encompass threats to psychological well-being, reasoning that “it would . . . seem illogical for a state to seek to protect a woman’s physical health while at the same time casting aside all concerns regarding her mental health.” *Id.* at 490.

200. *See, e.g.*, *Summit Med. Ctr. of Ala., Inc. v. Siegelman*, 227 F. Supp. 2d 1194, 1200–02 (M.D. Ala. 2002); *A Woman’s Choice-E. Side Women’s Clinic v. Newman*, 671 N.E.2d 104, 111 (Ind. 1996).

201. N.C. GEN. STAT. ANN. § 90-21.81(5) (West, WestlawNext through S.L. 2013-235 of 2013 Legis. Sess.); OKLA. STAT. ANN. tit. 63, § 1-738.1A(5) (West, WestlawNext through 2013 First Reg. Sess.).

202. H. JOURNAL, 82d Leg., Reg. Sess. S22 (Tex. Mar. 3, 2011 Supp.), available at <http://ftp.legis.state.tx.us/journals/82R/pdf/House/82RDAY29SUPPLEMENT.PDF>.

exercise discretion disregards the importance of medical judgment articulated in *Doe v. Bolton*, *Casey*, and multiple other cases.²⁰³ This also prevents the physician from making decisions based on the best interest of the patient—a violation of the Hippocratic Oath, the physician-patient relationship, and informed consent doctrine. Such violations are especially egregious in situations where the patient is a victim of rape or incest.

b. Special Exceptions Should Apply to Victims of Rape and Incest

The laws should provide an unqualified exception for all those who indicate that they are victims of rape or incest. Or, at the very least, the laws should allow a physician to decide if the woman can endure the procedure based on her psychological state. In discussions on the intersection between rape and abortion, pro-life commentators often focus on the difference between the rapist and fetus. For example, former Pennsylvania Senator and presidential candidate Rick Santorum recently stated: “The sad part [is] the United States Supreme Court said that that person who commits that rape cannot be executed . . . but that same Supreme Court says you can execute the child who is the innocent victim of the rape.”²⁰⁴ Notably, Senator Santorum’s comments do not take into account the interests of the third person in this equation—the woman—who is also an innocent victim.²⁰⁵ While neither the Supreme Court nor any federal appellate court require an exception for such situations,²⁰⁶ the nature of speech-and-display requirements may constitute a situation where an exception is needed.

203. *See, e.g., Casey*, 505 U.S. at 884 (noting both the importance of physician judgment and that the physician-patient relationship deserves the same amount of respect in the abortion context as in all other types of medicine).

204. *Erin Burnett OutFront* (CNN television broadcast Oct. 24, 2012) (interviewing Senator Rick Santorum). Senator Santorum did state, however, that he opposes execution in both instances. *Id.*

205. *See id.*

206. *See Summit Med. Ctr. of Ala., Inc. v. Siegelman*, 227 F. Supp. 2d 1194, 1201–02 (M.D. Ala. 2002) (listing cases upholding statutes absent rape and incest exceptions).

Oklahoma and North Carolina do not provide any exception for victims of rape or incest.²⁰⁷ To obtain an abortion in these states, a rape victim may be forced to submit to forcible penetration, an act that literally defines rape itself.²⁰⁸ The Governor of Oklahoma, in vetoing the bill, which the legislature quickly overrode,²⁰⁹ stated that, by not including an exception for victims of rape or incest, “the state victimizes the victim for a second time.”²¹⁰ Forcing a victim to receive an ultrasound and hear a detailed description of the product of her rape could exacerbate the psychological damage inflicted by the rape or even dissuade her from obtaining the desired abortion because she is psychologically unable to endure this process. This places the physician in a morally difficult position and deteriorates the physician-patient relationship. Additionally, this violates the value of personal autonomy and removes from the woman the very same thing that the rape itself took away from her—control.

While the Texas statute includes an exception for victims of rape or incest, this exception is too narrow to effectively protect sexual assault victims from further trauma.²¹¹ The exception requires that the rape be reported to police; however, at least two-thirds of rape victims do not report their attack.²¹² In *Casey*, the Court agreed with the district court’s finding that “many of these women may be psychologically unable to discuss or report the rape for several years after the incident.”²¹³ The only exemption from the reporting requirement is reasonable belief of retaliation resulting in serious

207. See discussion *supra* Part II.A.1.

208. *Bureau of Justice Statistics: Violent Crime*, BUREAU OF JUSTICE, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=31> (last visited Sept. 23, 2013) (defining rape as forced “vaginal, anal[,] or oral penetration by the offender” or a foreign object).

209. News Release, Okla. House of Representatives, House Votes to Override Pro-Life Vetoes (Apr. 26, 2010) (available on WestlawNext).

210. H. JOURNAL, 52d Leg., 2d Reg. Sess. 1454–55 (Okla. 2010), available at <http://www.okhouse.gov/Journals/HJ2010/2010%20Hleg%20Day49.pdf>.

211. See *supra* note 92 and accompanying text.

212. LYNN LANGTON ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006–2010 4 (2012) (finding sixty-five percent of known rape or sexual assault victimizations go unreported). These statistics come from the National Crime Victimization Survey, so it is unknown how many women refused to report even on the survey. *Id.* Additionally, this category encompasses all forms of sexual assault, meaning the number of actual rape victims who do not report could be much higher. *Id.*

213. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 890 (1992).

bodily injury;²¹⁴ however, fear of reprisal accounts for only a small portion of women who do not report their attack.²¹⁵ Additionally, this provision requires physicians to place their livelihood, wallet, and freedom on the line by relying on the patient's unconfirmed assertion that she believes retaliation will occur.²¹⁶ Thus, this exception does not resolve the informed consent violations created by the speech-and-display requirements because it benefits only a marginal number of victims and strains the physician-patient relationship.

By adopting a narrow definition of medical emergency, the legislature substitutes its judgment for that of experienced, credentialed physicians.²¹⁷ Since psychological emergency is essentially synonymous with therapeutic privilege,²¹⁸ extending this definition would simultaneously resolve the issues related to the absence of a therapeutic privilege exception. However, returning the exercise of discretion to physicians does not wholly resolve the violations of informed consent doctrine because, in creating such stringent requirements with so few exceptions, the legislature also substitutes its judgment for that of the woman—a flagrant violation of personal autonomy.

214. See *supra* note 93 and accompanying text.

215. LANGTON ET AL., *supra* note 212, at 4. Only twenty-eight percent of those who do not report their rape do so because of “fear of reprisal *or* getting [the] offender in trouble.” *Id.* (emphasis added). Since lack of reporting for fear of getting the offender in trouble does not qualify for exception from the requirements, the number of women that this provision benefits is probably even lower. *Id.*

216. Declaration of Curtis Boyd, M.D., in Support of Plaintiffs’ Motion for Preliminary Injunction at 9, *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 806 F. Supp. 2d 942 (W.D. Tex. 2011) (No. 1:11-CV-00486-SS), *vacated in part*, 667 F.2d 570 (5th Cir. 2012), 2011 WL 5902713 (“I do not know what injuries would be ‘serious’ enough, whether the woman’s view that the injury would be ‘serious’ is all that matters, or how realistic the woman’s fear has to be . . . I find it hard to believe that I am protected as long as the woman checks the line on the form.”). Similarly, Dr. Boyd expressed concern over simply “tak[ing] the patient’s word” that a fetal anomaly constitutes an “irreversible medical condition or abnormality” within the meaning of the exception. *Id.*

217. Linda P. McKenzie, *Federally Mandated Informed Consent: Has Government Gone Too Far?*, 20 J.L. & HEALTH 267, 274 (2007) (“Physicians are . . . far better equipped to inform and advise their patients.”).

218. See *supra* note 169 and accompanying text.

2. *The Speech-and-Display Requirements Should Include a Provision for Waiver*

To prevent the speech-and-display requirements from violating personal autonomy, the requirements must also provide a woman with the option to waive the procedure. Although mandatory heightened abortion informed consent requirements exist,²¹⁹ the intrusive nature of the ultrasound and the fact that the information delivered is extracted from the woman's own body create a "profound . . . intrusion . . . far more extreme than, and qualitatively different from, any abortion law enforced in this country."²²⁰ The state should not require a violation of bodily integrity that can cause physical and psychological harm.

Some legislators insist that statutory provisions prescribing that a woman need not see or hear the information function as a waiver.²²¹ It is true that a woman can avert her eyes from the screen to avoid seeing the image. However, none of these legislators can explain how a woman "lying on the table with her legs spread very far apart, in stirrups, and . . . unclothed from the waist down" can avoid hearing the words spoken by a person no more than an arm's length from her.²²² During the Texas legislative debate, a senator pointed out the only "humiliating" alternative would force the woman to say "'la la la la la,' . . . what you used to do as a kid when you didn't want to hear your parents or something."²²³ Regardless of whether the woman receives the information, she is still required to submit to the procedure. Not requiring actual visual or auditory perception does not prevent the physician from invading her body to extract non-medical, emotionally charged information without her consent. Thus, this "exception" does not remedy the violation to personal autonomy or

219. See discussion *supra* Part.I.B.1.

220. Plaintiffs' Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 1, *Stuart v. Huff*, 834 F. Supp. 2d 424 (M.D.N.C. 2011) (No. 11CV00804), 2011 WL 5062019.

221. See H. JOURNAL, 82d Leg., Reg. Sess. S35–36 (Tex. Mar. 3, 2011 Supp.), available at <ftp://ftp.legis.state.tx.us/journals/82R/pdf/House/82RDAY29SUPPLEMENT.PDF>; *supra* note 100.

222. H. JOURNAL, 82d Leg., Reg. Sess. S11 (Tex. Mar. 3, 2011 Supp.), available at <ftp://ftp.legis.state.tx.us/journals/82R/pdf/House/82RDAY29SUPPLEMENT.PDF>.

223. *Id.* at S14.

destruction of the physician-patient relationship generated by these requirements.

Finally, the state should consider that, while biologically unavoidable, these heightened requirements apply only to women,²²⁴ meaning the regulations implicitly demonstrate the state's view of a woman's ability to make autonomous healthcare decisions.²²⁵ It is offensive for legislators "to think that abortion patients have not already carefully thought about the decision to terminate their pregnancies before they visit an abortion provider."²²⁶ Additionally, a senator pointed out during the Texas legislative debate that the effect of this legislation is to "treat Texas women worse than . . . inmates," because states cannot force inmates to undergo medical intervention, but they can impose non-waivable and intrusive informed consent requirements for abortion.²²⁷ Allowing a woman to choose whether she wants to undergo the speech-and-display procedure prevents these laws from violating the two primary principles underlying informed consent law—personal autonomy and the physician-patient relationship—and reinstates the *choice* in her right to choose.

224. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 382–83 (1985). Justice Ginsburg stated:

It is not a sufficient answer to charge it all to women's anatomy . . . Society, not anatomy, "places a greater stigma on unmarried women who become pregnant than on the men who father their children." Society expects, but nature does not command, that "women take the major responsibility . . . for child care" and that they will stay with their children, bearing nurture and support burdens alone, when fathers deny paternity or otherwise refuse to provide care or financial support for unwanted offspring.

Id. (footnotes omitted).

225. See *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."); Dressler, *supra* note 7, at 1615 (finding "[a]bortion disclosure laws separate women deciding about abortion from people deciding about other kinds of medical interventions"); Vandewalker, *supra* note 31, at 13 (stating that heightened informed consent requirements for abortion "show the Court's willingness to accept the notion that women's decision-making abilities are deficient").

226. Vandewalker, *supra* note 30, at 32; Sack, *supra* note 192 (noting an abortion patient took offense to "the state's implicit suggestion that she had not fully considered her choice").

227. H. JOURNAL S14.

CONCLUSION

Since the Supreme Court's decision in *Casey*, states have continually enacted heightened informed consent requirements that they believe correspond to the legitimate interests states retain in the abortion context.²²⁸ These heightened requirements, however, must conform to the doctrine they purport to be grounded in—informed consent.²²⁹ The new speech-and-display requirements enacted in Oklahoma, Texas, and North Carolina establish a procedure more invasive, personalized, and emotionally charged than previously imposed in any state.²³⁰ Despite the extreme nature of the requirements, precedent in similar situations indicates these laws could constitute valid informed consent as long as they include expanded exceptions.²³¹

Because every situation in life does not conform to statutory ideals, exceptions to informed consent must exist.²³² Statutory speech-and-display requirements provide few, if any, exceptions, making them essentially mandatory preconditions to an abortion for every girl, woman, and physician, in every situation.²³³ This complete disregard for a woman's consent and elimination of the physician's medical discretion violates the primary principles underlying informed consent doctrine—personal autonomy and the physician-patient relationship—and informed consent doctrine itself.²³⁴ In order to remedy these violations, the requirements must, at the very least, allow physicians to tailor the information based on the psychological capacity of the patient,²³⁵ but really should include a provision allowing for a woman to waive receipt of this information entirely.²³⁶ Without such expansions, the speech-and-display

228. See discussion *supra* Part I.B., II.A.

229. See discussion *supra* Part I.A.

230. See discussion *supra* Part I.B.2, II.A.1, II.B.1.

231. See discussion *supra* Part III.A.

232. See discussion *supra* Part I.C.1.

233. See discussion *supra* Part I.C.2.

234. See discussion *supra* Part II.A.2, II.B.2.

235. See discussion *supra* Part III.B.1.

236. See discussion *supra* Part III.B.2.

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requirements do not serve as valid informed consent for a woman's medical choice; they only serve to physically, emotionally, and morally punish a woman for exercising her right to choose.

