

How the Undue Burden Standard is Eroding Informed Consent

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I. INTRODUCTION

In *Thornburgh v. American College of Obstetricians and Gynecologists*,¹ Supreme Court Justice Harry Blackmun wrote, “[t]he States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies.”² Unfortunately, the Supreme Court took a different position in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.³ In a plurality opinion, the *Casey* Court set forth a new standard for evaluating the constitutionality of statutes that regulate abortion, known as the “undue burden” standard.⁴ One of the Court’s primary motivations for promulgating this new standard was to allow states, in their regulatory capacity, to express their preference for childbirth over abortion.⁵ The undue burden standard, however, lacks any objectively ascertainable elements, making it very easy to manipulate and very difficult for the circuit courts to apply consistently.⁶

The process of informed consent as we know it is eroding under the undue burden standard. The standard’s failure to adequately distinguish between permissible and impermissible regulations, coupled with the high level of deference to legislatures, enables states to debase informed consent statutes by improperly requiring disclosure of one-sided moral and political information, as opposed to the objective medical information of which these statutes are rightly and typically comprised.⁷

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¹ 476 U.S. 747 (1986), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

² *Id.* at 759.

³ 505 U.S. 833 (1992).

⁴ *Id.* at 877.

⁵ *Id.* at 883, 916.

⁶ *Id.* at 986; *see also infra* Part IV (discussing various circuit courts’ application of the undue burden standard).

⁷ Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 66–67 (2012) (“There is no doubt that the abortion-specific biased counseling statutes discussed fail the AMA’s ethical standards, especially since the AMA ‘opposes legislative measures that would impose procedure-specific requirements for informed consent or a waiting period for any legal medical procedure.’ The requirement that physicians present facts accurately disqualifies deceptive and misleading statements. Making statements that the patient does

As a result, what was once a private, personal, and professional dialogue between physicians and their patients concerning medically objective and relevant information is warping into a monologue of legislatively coerced recitations of anti-abortion propaganda.⁸ Therefore, contrary to Justice Blackmun's proclamation, under the undue burden standard states *are* free to intimidate women into continuing their pregnancies under the guise of protecting maternal health and potential life.⁹ The question before the circuit courts is whether states may do so by disguising their moral propaganda as medically accurate and relevant information, and by coercing physicians to deliver this ideology as a part of the process of informed consent to the abortion procedure.¹⁰

The American Medical Association ("AMA") 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."¹¹ On the AMA website, under the heading "Patient Physician Relationship Topics," the AMA lists a number of guidelines that physicians should follow in soliciting a patient's informed consent.¹² The AMA suggests that physicians discuss the diagnosis, nature, purpose, risks and benefits of the suggested

not want to hear is unethical according to the AMA, and the patient's expressed desire not to be given certain information should be respected. Finally, there is nothing that provides support for forcing patients to be exposed to the results of an ultrasound against their wishes.").

⁸ *Id.* at 70 ("Abortion opponents have attempted to co-opt the doctrine of informed consent to further their political goal of reducing the number of abortions . . . This vision should be rejected, *as should the cynical use of the banner of informed consent to disguise an anti-abortion agenda . . .* biased counseling laws . . . cannot be part of ethical informed consent practices because they are designed to make women's choices regarding ending their pregnancies less well-informed and less voluntary, all in the hope of discouraging abortions.") (emphasis added).

⁹ See generally Rachel Benson Gold & Elizabeth Nash, *State Abortion Counseling Policies and the Fundamental Principles of Informed Consent*, 10 GUTTMACHER POL'Y REV. 4 (2007), <http://www.guttmacher.org/pubs/gpr/10/4/gpr100406.pdf> (last visited Nov. 15, 2013); Joerg Dreweke & Rebecca Wind, *State Mandated Abortion Counseling Materials Often Medically Inaccurate, Biased*, GUTTMACHER INST., (Oct. 26, 2006), <http://www.guttmacher.org/media/nr/2006/10/26/index.html>. See also *infra* Part IV.

¹⁰ See, e.g., *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds III)*, 686 F.3d 889 (8th Cir. 2012); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012); *Planned Parenthood Minn. v. Rounds (Rounds II)*, 467 F.3d 716 (8th Cir. 2006); see also *Stuart v. Huff*, No. 1:11-CV-804, 2011 WL 6740400 (M.D.N.C. Dec. 22, 2011), *aff'd*, No. 12-1052, 2013 WL 265083 (4th Cir. Jan. 24, 2013).

¹¹ AM. MED. ASS'N, <https://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/informed-consent.page> (last visited Jan. 21, 2013) (emphasis added).

¹² *Id.*

treatment; the risks and benefits of alternative treatments; and the risks and benefits of refraining from treatment altogether.¹³ Nowhere does the AMA suggest that physicians should offer patients their personal moral or political opinions about a given treatment, let alone states' moral and political viewpoints.¹⁴ In fact, apart from stating that obtaining informed consent is both a legal and ethical obligation, the AMA guidelines do not suggest that states play any role in shaping the informed consent dialogue.¹⁵

While AMA guidelines govern the process of informed consent for most medical procedures, the process of informed consent to an abortion has strayed drastically from that paradigm.¹⁶ This shift is attributable to the Supreme Court's decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁷ and *Gonzalez v. Carhart*.¹⁸ Some states have argued that the holdings of these cases give them license to commandeer the physician-patient relationship in the context of abortion to ensure that "so grave a choice is well informed."¹⁹ Apparently these states do not consider the AMA's standard process of informed consent, which is both legally and ethically adequate to inform patients of all relevant information all other medical procedures, to be sufficient to ensure informed consent to the abortion procedure.²⁰ Or perhaps these states question women's ability to make informed decisions.²¹ Whatever their

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See id.*

¹⁶ *See State Policies In Brief: Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf (last updated Sept. 12, 2013). *See generally* Gold & Nash, *supra* note 9.

¹⁷ 505 U.S. 833 (1992).

¹⁸ 550 U.S. 124 (2007).

¹⁹ *Id.* at 158; *see also* cases cited *supra* note 10.

²⁰ *Casey*, 505 U.S. at 872 ("Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.").

²¹ Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 224–25 (2009) ("*Carhart's* portrayal of women evokes a century-old societal view of femininity. The *Carhart* Court's cabined view of women's decision-making capacity reflects a gender-stereotyped view of women's nature. The Court also exposed its discriminatory view of women as decision-makers by articulating a new paradigm of "informed consent" in the abortion context that controverts well-established rules of patients' right to informed consent in healthcare law.

motive, these states have reformed their informed consent statutes in the context of abortion to exploit the laxity and latitude *Casey* and *Carhart* provide.²²

These recently revised informed consent statutes have been subject to constitutional challenges on both First and Fourteenth Amendment grounds.²³ Many mandated specific disclosures have been challenged as violating physicians' First Amendment free speech rights by unconstitutionally compelling their speech.²⁴ These statutes have also been challenged as unconstitutionally violating women's Fourteenth Amendment privacy rights by imposing an undue burden upon their right to have an abortion.²⁵ Statutes regulating abortion are not evaluated under traditional First or Fourteenth Amendment principles, however.²⁶ Rather, statutes that regulate abortion are analyzed under the undue burden standard promulgated in *Casey*.²⁷ When evaluating similar statutes, some courts have held that they are constitutional under the undue burden standard, some have held that they are not, and still others have upheld or invalidated these statutes on First Amendment grounds.²⁸ Though the *Casey* Court did hold that states have the right to express their preference for childbirth and to persuade women not to have an abortion, the Court did not intend to allow states to convey their preference for childbirth by integrating mandatory disclosures of inaccurate, misleading, and irrelevant information into the informed

This article focuses on *Carhart's* disturbing reasoning—that competent adult women lack the capacity to determine for themselves what is best for their own health—and evaluates its implications in the abortion context and in other areas of medical treatment related to pregnancy.”); Vandewalker, *supra* note 7, at 13 (“These examples show the Court’s willingness to accept the notion that women’s decision-making abilities are deficient, which is supposed to justify forcing women to receive certain information, to endure mandatory waiting periods, and to have some options taken away from them altogether.”).

²² *State Policies In Brief: Counseling and Waiting Periods for Abortion*, *supra* note 16; *see also* cases cited *supra* note 10.

²³ *See* cases cited *supra* note 10.

²⁴ *See* cases cited *supra* note 10.

²⁵ *See* cases cited *supra* note 10.

²⁶ *See* cases cited *supra* note 10. *See generally* *Gonzalez v. Carhart*, 550 U.S. 124 (2007); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

²⁷ *See generally Casey*, 505 U.S. 833.

²⁸ *See* cases cited *supra* note 10.

consent process.²⁹ Yet, some courts have permitted this practice under the undue burden standard.³⁰

Part II of this Comment provides a brief background on the history and fundamental principles of informed consent. Part III reviews the Supreme Court cases that have shaped abortion jurisprudence and promulgated the standards for evaluating the constitutionality of informed consent statutes. Part IV discusses four federal circuit court opinions that have explicitly acknowledged the existence of confusion and inconsistency in courts' application of the undue burden standard,³¹ and then provides examples of confused, conflated and inconsistent application of the undue burden standard through an analysis of two recent circuit court cases.³²

Lastly, Part V provides an in depth discussion of the proposed solution, namely, that the undue burden standard should be restructured into a three-prong test that courts can apply more objectively and consistently, thereby effectuating the intent of the *Casey* Court while preserving the integrity of the informed consent process.³³ Organizing the elements of the undue burden standard into a structured, three-prong, disjunctive test would require courts to engage in a complete analysis and prevent them from manipulating the undue burden standard by emphasizing just one of the elements.³⁴ Under this proposed test, the burden would be on the plaintiff challenging the statute to demonstrate that: (1) the mandated disclosure or disclosures are (a) not truthful, (b) misleading, or (c) irrelevant to the abortion procedure; (2) the statute is

²⁹ *Casey*, 505 U.S. at 872, 878–82 (1992) (“[I]f the information the State requires to be made available to the woman is *truthful* and *not misleading*, the requirement may be permissible.”) (emphasis added).

³⁰ See generally Vandewalker, *supra* note 7; Gold & Nash, *supra* note 9.

³¹ *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456 (6th Cir. 1999); *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999); *Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999) *on reh'g en banc*, 244 F.3d 405 (5th Cir. 2001); *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002).

³² *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds III)*, 686 F.3d 889 (8th Cir. 2012); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012); *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds II)*, 530 F.3d 724, 753 (8th Cir. 2008); *Planned Parenthood Minn. v. Rounds (Rounds I)*, 467 F.3d 716, 722 (8th Cir. 2006).

³³ *Casey*, 505 U.S. at 930 (“[T]he *Roe* framework is far more administrable, and far less manipulable, than the undue burden standard adopted by the joint opinion.”) (Blackmun, J., dissenting) (internal quotation marks omitted); *id.* at 985–86 (“[I]ts efforts at clarification make clear only that the standard is inherently manipulable and will prove hopelessly unworkable in practice.”) (Scalia, J., dissenting).

³⁴ See *infra* discussion Part V.

not calculated to inform women's decision, and therefore has an improper purpose; or (3) the statute has the effect of creating a substantial obstacle for women seeking an abortion.³⁵ If a plaintiff were able to demonstrate any of the above, the statute would fail the undue burden analysis and would be struck down as an unconstitutional undue burden on women's Fourteenth Amendment privacy right to an abortion. Courts would engage in an exhaustive analysis of each prong before determining that a challenged statute is constitutional.

The proposed solution would also require each subpart of the first prong of the analysis, namely, whether the information is truthful, non-misleading, and relevant to the abortion procedure, to be evaluated independently.³⁶ Finally, this solution would decrease judicial deference to legislatures in evaluating the first and second prongs of the analysis.³⁷ Adopting a structured reformulation of the standard would permit states to further their interests in protecting potential life and expressing their preference for childbirth, more effectively protect women's Fourteenth Amendment privacy right to an abortion, and enable the circuit courts to evaluate abortion regulations impartially and consistently. This Comment concludes by briefly discussing the public policy consequences of failing to reform the problematic undue burden standard, as well as the public policy benefits of adopting the proposed solution.

II. INFORMED CONSENT TO MEDICAL PROCEDURES

The central guiding principles of informed consent are patient autonomy and self-determination.³⁸ There are five elements to informed consent: (1) disclosure; (2) understanding; (3) voluntariness; (4)

³⁵ See *infra* discussion Part V. Each of the elements of the suggested three-prong analysis is present in the *Casey* joint opinion. The solution lays both in organizing the elements in a way that is more rigid and easier to apply, and in making the additional proposed adjustments in applying the rigid version of the standard. See generally *Casey*, 505 U.S. 833.

³⁶ See *infra* discussion Part V.

³⁷ See *infra* discussion Part V; see also *Casey*, 505 U.S. at 925 (“The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant. Looking at this group, the Court inquires, based on *expert testimony, empirical studies, and common sense*, whether in a large fraction of the cases in which the restriction is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.”) (emphasis added) (internal quotation marks omitted).

³⁸ Hana Osman, *History and Development of the Doctrine of Informed Consent*, 4 INT'L ELEC. J. OF HEALTH EDUC. 41, 44–45 (2001), available at <http://js.sagamorepub.com/gjhep/article/view/4073> (last visited Nov. 15, 2013).

competence; and (5) consent.³⁹ This Comment focuses on disclosure and voluntariness, and how the undue burden standard has been used to uphold anti-abortion regulations that undermine these fundamental elements of informed consent.⁴⁰

Disclosure is the most pertinent element of informed consent for purposes of this Comment, as the majority of constitutional challenges to recent informed consent statutes focus on provisions involving mandatory informational disclosures.⁴¹ There are three different standards for the informed consent disclosure requirement.⁴² The first is the professional practice standard, which emphasizes the patients' best medical interests, as determined by the physician.⁴³ The reasonable person standard, on the other hand, places the most emphasis on patient autonomy and self-determination, and attempts to determine what the patient's best medical interests are as perceived by the patient, not the physician.⁴⁴ Finally, the subjective standard suggests that maximization of autonomy requires the quantity and quality of information to be tailored to each of the individual patients based on their needs.⁴⁵ While the subjective standard is arguably preferable, each standard has its respective strengths and weaknesses.⁴⁶

Voluntariness is also critical to obtaining informed consent.⁴⁷ Voluntary agreement to a given treatment is central to patient autonomy and self-determination because patients are only able to make educated and rational decisions if they are not being manipulated, pressured, or coerced to elect an option to which they are resistant.⁴⁸ Though physicians will inevitably influence their patients' decisions to some degree, the process of informed consent fails if physicians coerce their patients to select a given course of treatment.⁴⁹ Manipulation is considered a form of coercion in the context of informed consent because it diminishes patients' capacity to arrive at intelligent and informed

³⁹ *Id.*

⁴⁰ *See infra* discussion Part IV.

⁴¹ *See cases cited supra* notes 10, 31, and 32.

⁴² Osman, *supra* note 38, at 44.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Osman, *supra* note 38, at 41, 45 (*citing* EDMUND D. PELLEGRINO AND DAVID C. THOMASMA, *THE VIRTUES IN MED. PRACTICE*. (New York: Oxford University Press, 1993)).

⁴⁹ *Id.*

decisions.⁵⁰ Therefore, decisions that result from the use of manipulative tactics are not considered to be the result of patients' own free choice and do not meet the voluntariness requirement of informed consent.⁵¹

Before *Casey*, informed consent statutes typically required that physicians discuss certain topics with their patients, but physicians retained the discretion to decide the specific information to disclose about that topic.⁵² In line with the subjective and professional practice approaches of disclosure, physicians were free to convey information regarding each topic that, in their professional, medical opinion, was most accurate, credible, and germane to their patients' specific circumstances.⁵³ Recently revised informed consent statutes, however, force physicians to disclose specific information that states consider accurate, significant, and relevant, without regard to physicians' professional judgment.⁵⁴ These revised statutes do not fall within the parameters of any recognized standards of disclosure.

Today, most states' informed consent statutes have more stringent requirements for the abortion procedure than are required for any other medical procedure.⁵⁵ The provisions of informed consent statutes that apply to abortion are not only harsh and inflexible; some go as far as requiring that misleading statements be made to patients.⁵⁶ These

⁵⁰ See Vandewalker, *supra* note 7, at 38–40.

⁵¹ *Id.*

⁵² See Karlin v. Foust, 188 F.3d 446, 465 (7th Cir. 1999).

⁵³ *Id.*

⁵⁴ See Manian, *supra* note 21; see also *infra* note 83.

⁵⁵ See *State Policies In Brief: Counseling and Waiting Periods for Abortion*, *supra* note 16; see, e.g., cases cited *supra* notes 10, 31, and 32; see also *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976) (“Despite the fact that apparently no other Missouri statute . . . requires a patient’s prior written consent to a surgical procedure, the imposition . . . of such a requirement for termination of pregnancy even during the first stage, in our view, is not in itself an unconstitutional requirement . . . we see no constitutional defect in requiring [written consent] only for some types of surgery as, for example, an intracardiac procedure, or where the surgical risk is elevated above a specified mortality level, or, for that matter, for abortions.”). *Contra State Facts About Abortion: New Jersey, State Center*, GUTTMACHER INST., http://www.guttmacher.org/pubs/sfaa/new_jersey.html (last visited Nov. 18, 2013) (“Abortion is one of the safest surgical procedures for women in the United States.”).

⁵⁶ See Amanda McMurray Roe, *Not-So-Informed Consent: Using the Doctor-Patient Relationship to Promote State-Supported Outcomes*, 60 CASE W. RES. L. REV. 205, 206–07 (2009) (“The relatively recent development of informed consent statutes for specific procedures, however, seems to have upended the traditional notion of informed consent. Instead of promoting autonomous choice, these statutes mandate that doctors provide particular disclosures about certain procedures. In addition, rather than providing patients with objective information, some of these statutes appear to provide patients with slanted information that pushes them toward a predetermined ‘right’ choice.”); see also Chinué

statutes mandate the delivery of certain materials and information that states claim is essential to the process of obtaining women's informed consent to an abortion.⁵⁷ These so-called informed consent statutes undermine the goals of informed consent by disseminating false or incomplete information.⁵⁸ Many of the disclosures the states have mandated in these revised statutes consist of information that is disputed within the medical community or taken out of context,⁵⁹ as well as information that pertains solely to the embryo or fetus, and not the risks and benefits of the procedure itself.⁶⁰ These statutes, more accurately described as anti-abortion statutes, undermine the principle of patient autonomy and demote patient wellbeing, the primary tenets and goals of informed consent.⁶¹ Nevertheless, state legislatures are passing these anti-abortion statutes under the guise of informed consent, and some courts are upholding them under the protection of the amorphous undue burden standard.⁶²

III. EVOLUTION OF INFORMED CONSENT STATUTES FOR ABORTION PROCEDURES THROUGH SUPREME COURT JURISPRUDENCE

A. *The Road To Casey*

States' ability to regulate abortion has varied over the past forty years. In *Roe v. Wade*⁶³ the Supreme Court held that women's ability to choose whether to terminate their pregnancies is a fundamental right.⁶⁴

Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Inaccuracy of State-Developed Abortion Counseling Materials*, 9 GUTTMACHER POL'Y REV. 4, 6 (2006), available at <http://www.guttmacher.org/pubs/gpr/09/4/gpr090406.html> (last visited Nov. 15, 2013) ("In some cases, the state goes so far as to include information that is patently inaccurate or incomplete, lending credence to the charge that states' abortion counseling mandates are sometimes intended less to inform women about the abortion procedure than to discourage them from seeking abortions altogether.").

⁵⁷ Richardson & Nash, *supra* note 56, at 6.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See generally Richardson & Nash, *supra* note 56. See also *State Policies In Brief: Counseling and Waiting Periods for Abortion*, *supra* note 16.

⁶¹ Vandewalker, *supra* note 7, at 45–49.

⁶² See, e.g., *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds III)*, 686 F.3d 889 (8th Cir. 2012).

⁶³ 410 U.S. 113 (1973), holding modified by *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁶⁴ *Id.* at 169–70 ("As recently as last Term, in *Eisenstadt v. Baird*, we recognized the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear

Adhering to the traditional Fourteenth Amendment practice of applying strict scrutiny when states abridge fundamental rights, the Court balanced the competing interests; women's right to terminate their pregnancies against states' interest in protecting women's life and health and the potential life of the fetus.⁶⁵ The result was the "trimester framework," which allowed varying levels of regulation based upon the increasing strength of the states' interest as the pregnancy progressed.⁶⁶ In the first trimester, the states were not permitted to interfere with women's right to terminate their pregnancies in any way whatsoever.⁶⁷ During the second trimester, only those regulations intended to preserve the life or health of women were permitted.⁶⁸ States had broadest authority to regulate the abortion procedure in the third trimester.⁶⁹ States were permitted to enact statutes that regulated third trimester abortions if the statutes were designed to preserve the life or health of women *or* the potential life of the fetus.⁷⁰

Despite the trimester framework's alleged prohibition of states' interference during the first trimester of women's pregnancies, the Court in *Planned Parenthood of Missouri v. Danforth*⁷¹ upheld a Missouri informed consent statute for pre-viability abortion under *Roe*.⁷² The Court's decision to uphold a statute requiring women to sign an informed consent form before obtaining a first-trimester abortion was the Supreme Court's first decision upholding a regulation during the first trimester through informed consent under *Roe*'s trimester framework.⁷³ Perhaps unaware of the floodgates it was opening, the Court held that requiring written informed consent to abortion was constitutional, despite being the only medical procedure for which written informed consent was required in Missouri at the time.⁷⁴ This was the first case in which the Court

or beget a child. That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.") (citations omitted) (internal quotation marks omitted).

⁶⁵ *Id.*

⁶⁶ *Id.* at 162–66.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Roe*, 410 U.S. at 164–65.

⁷¹ 428 U.S. 52 (1976).

⁷² *Id.* at 67.

⁷³ *Id.*; see *supra* text accompanying note 55.

⁷⁴ 428 U.S. at 67.

suggested that, due to the nature of the abortion decision, the state has an interest in ensuring the decision is fully informed.⁷⁵

A few years later, in *City of Akron v. Akron Center for Reproductive Health, Inc.*,⁷⁶ the Court again acknowledged states' interest in ensuring that women's decisions are informed, as described in *Danforth*, but nevertheless struck down an informed consent provision on the grounds that it was an unconstitutional violation of women's Fourteenth Amendment right to an abortion.⁷⁷ The Court held that the informed consent provision was invalid because it did not give physicians adequate discretion to determine what information to disclose to patients, considering patients' specific, individual circumstances.⁷⁸ The Court also concluded that the statute impermissibly attempted to persuade women to continue their pregnancies.⁷⁹ The majority in *Akron* struck down the informed consent provision on Fourteenth Amendment grounds, but added that such informed consent statutes may violate the First Amendment as well.⁸⁰

⁷⁵ *Id.* (“The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.”). This was also one of the first cases dealing with an informed consent statute; previous cases typically dealt with statutes expressly and directly prohibiting or limiting access to the procedure. *See generally, e.g., Roe v. Wade*, 410 U.S. 113 (1973), *holding modified by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁷⁶ 462 U.S. 416 (1983), *overruled by Casey*, 505 U.S. 833.

⁷⁷ *Id.* at 443.

⁷⁸ *Id.* at 443–44 (“It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances. *Danforth*'s recognition of the State's interest in ensuring that this information be given will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth.”).

⁷⁹ *Id.* at 444 (holding that the statute “attempts to extend the State's interest in ensuring ‘informed consent’ beyond permissible limits” because “the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether”).

⁸⁰ *Id.* at 472 (“This is not to say that the informed consent provisions may not violate the First Amendment rights of the physician if the State requires him or her to communicate its ideology. However, it does not appear that Akron Center raised any First Amendment argument in the Court below.”) (citations omitted). This serves as an interesting point of reference because while the Court here was only beginning to consider the First Amendment implications of informed consent statutes, recent informed consent statutes are repeatedly challenged on both First Amendment and Fourteenth Amendment grounds today. *See, e.g., Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds III)*, 686 F.3d 889 (8th Cir. 2012); *Planned Parenthood Minn. v. Rounds (Rounds I)*, 467 F.3d 716 (8th Cir. 2006). *Cf. Tex. Med. Providers Performing Abortion*

The Court found another informed consent statute to be invalid in *Thornburgh v. American College of Obstetricians and Gynecologists*,⁸¹ under similar reasoning.⁸² Citing *Akron*, the Court again ruled on Fourteenth Amendment grounds, striking the informed consent provision down due to the specific and, in the Court's opinion, irrelevant disclosures that the statute required.⁸³ The dissenting opinion in *Thornburgh* also expressly addressed the potential First Amendment

Servs. v. Lakey, 667 F.3d 570 (5th Cir. 2012) (discussing undue burden under the Fourteenth Amendment although plaintiff only challenged on First Amendment grounds). While questions regarding the interaction of the First and Fourteenth Amendment analysis of informed consent statutes sprouted from the majority's dicta, the dissenting opinion seems to have planted the seed for the undue burden standard. *Akron*, 462 U.S. at 453 ("In my view, this 'unduly burdensome' standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular 'stage' of pregnancy involved. If the particular regulation does not 'unduly burden' the fundamental right, then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose.") (citations omitted). The dissent proposed the undue burden standard as a possible analytical framework for abortion cases, but also suggested that deference to legislative determinations regarding whether a given regulation is "unduly burdensome" is not appropriate. *Id.*

⁸¹ 476 U.S. 747 (1986), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

⁸² *Id.* at 764 ("The requirement . . . that the woman be informed by the physician of 'detrimental physical and psychological effects' and of all 'particular medical risks' compound the problem of medical attendance, increase the patient's anxiety, and intrude upon the physician's exercise of proper professional judgment. This type of compelled information is the antithesis of informed consent. That the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion character of the statute and its real purpose. Pennsylvania, like Akron, 'has gone far beyond merely describing the general subject matter relevant to informed consent.' In addition, the Commonwealth would require the physician to recite its litany 'regardless of whether in his judgment the information is relevant to [the patient's] personal decision.' These statutory defects cannot be saved by any facts that might be forthcoming at a subsequent hearing.") (citations omitted).

⁸³ *Id.* at 763 ("The requirements of [the statute] that the woman be advised that medical assistance benefits may be available, and that the father is responsible for financial assistance in the support of the child similarly are poorly disguised elements of discouragement for the abortion decision. Much of this would be nonmedical information beyond the physician's area of expertise and, for many patients, would be irrelevant and inappropriate. For a patient with a life-threatening pregnancy, the "information" in its very rendition may be cruel as well as destructive of the physician-patient relationship. As any experienced social worker or other counselor knows, theoretical financial responsibility often does not equate with fulfillment. And a victim of rape should not have to hear gratuitous advice that an unidentified perpetrator is liable for support if she continues the pregnancy to term. Under the guise of informed consent, the Act requires the dissemination of information that is not relevant to such consent, and, thus, it advances no legitimate state interest.").

implications of these informed consent statutes,⁸⁴ but contrary to the dissent in *Akron*, suggested that regulations should be evaluated using rational basis review under which the states are afforded a heavy dose of deference.⁸⁵

In the cases following *Roe v. Wade*, members of the Court suggested various standards for evaluating the constitutionality of statutes that regulate abortion, but it was *Webster v. Reproductive Health Services*⁸⁶ that bespoke the demise of *Roe*'s trimester framework.⁸⁷ The Court explicitly articulated the intent to abandon the trimester framework, and also suggested that states' interest in potential life begins at conception.⁸⁸ Interestingly, however, even in a case that so clearly set the stage for *Casey*, the Court took notice of the lower court's conclusion that a provision of the statute, which was akin to the speech-and-display ultrasound requirements of many recent informed consent statutes, was a content-based regulation that violated physicians' First Amendment right to free speech.⁸⁹

B. Planned Parenthood of Southeastern Pennsylvania v. Casey

The Supreme Court's opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁹⁰ began, "[l]iberty finds no refuge in a jurisprudence of doubt."⁹¹ Ironically, however, the *Casey* plurality

⁸⁴ *Id.* at 830 (O'Connor, J., dissenting) (Addressing the First Amendment issue, Justice O'Connor wrote, "I do not dismiss the possibility that requiring the physician or counselor to read aloud the State's printed materials if the woman wishes access to them but cannot read raises First Amendment concerns. Even the requirement that women who can read be informed of the availability of those materials, and furnished with them on request, may create some possibility that the physician or counselor is being required to 'communicate [the State's] ideology.'").

⁸⁵ *Id.* at 789–90.

⁸⁶ 492 U.S. 490 (1989).

⁸⁷ *See id.* at 518.

⁸⁸ *Id.* ("This Court has emphasized that *Roe* implies no limitation on a State's authority to make a value judgment favoring childbirth over abortion, and the preamble can be read simply to express that sort of value judgment . . . There is also no reason why the State's compelling interest in protecting potential human life should not extend throughout pregnancy rather than coming into existence only at the point of viability. Thus, the *Roe* trimester framework should be abandoned.") (citations omitted).

⁸⁹ *Id.* at 512 ("In a separate opinion, Judge Arnold argued that Missouri's prohibition violated the First Amendment because it 'sharply discriminate[s] between kinds of speech on the basis of their viewpoint: a physician, for example, could discourage an abortion, or counsel against it, while in a public facility, but he or she could not encourage or counsel in favor of it.'").

⁹⁰ 505 U.S. 833 (1992).

⁹¹ *Id.* at 844.

opinion introduced a standard that has created tremendous doubt and ambiguity in an already confused and controversial abortion jurisprudence.⁹² In one fell swoop, the Supreme Court: (1) manipulated the essential holdings of *Roe v. Wade* by including the word “undue,” which allowed for exponentially more regulation of abortion;⁹³ (2) disposed of the trimester framework and the application of strict scrutiny to statutes that regulate abortion;⁹⁴ and (3) overturned *Akron*⁹⁵ and *Thornburgh*,⁹⁶ which had held that abortion informed consent laws cannot intentionally influence a woman’s choice.⁹⁷

⁹² See, e.g., *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 585 (5th Cir. 2012) (“Today we abide *Casey*, whose force much of the argument here fails to acknowledge. It bears reminding that *Roe* survived *Casey* only in a recast form . . . We must and do apply today’s rules as best we can without hubris and with less sureness than we would prefer . . .”).

⁹³ *Casey*, 505 U.S. at 954 (Rehnquist, J., concurring in part, dissenting in part) (“Whatever the ‘central holding’ of *Roe* that is left after the joint opinion finishes dissecting it is surely not the result of that principle. While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality.”).

⁹⁴ *Id.* at 993 (Scalia, J., concurring in part, dissenting in part) (“It seems particularly ungrateful to carve the trimester framework out of the core of *Roe*, since its very rigidity (in sharp contrast to the utter indeterminability of the ‘undue burden’ test) is probably the only reason the Court is able to say, in urging *stare decisis*, that *Roe* ‘has in no sense proven unworkable.’”) (internal quotation marks omitted).

⁹⁵ *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

⁹⁶ *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

⁹⁷ See *Akron*, 462 U.S. at 442–49; see also *Thornburgh*, 476 U.S. at 760 (“[W]e have consistently rejected state efforts to prejudice a woman’s choice, either by limiting the information available to her, or by ‘requir[ing] the delivery of information designed ‘to influence the woman’s informed choice between abortion or childbirth.’”) (citations omitted). The Court also supplanted the *Salerno* standard for facial challenges with the undue burden standard in the abortion context. See generally *United States v. Salerno*, 481 U.S. 739 (1987). See also *Fargo Women’s Health Org. v. Schafer*, 18 F.3d 526, 529 (8th Cir. 1994) (“[T]he facial challenge standard should include a factual inquiry in abortion regulation cases. Justice O’Connor wrote: ‘In striking down the Pennsylvania law, we did not require [plaintiffs] to show that the provision would be invalid in *all* circumstances.’ Justice O’Connor, joined by Justice Souter, emphasized that a law constitutes an ‘undue burden,’ and is therefore invalid, if ‘in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion.’”) (citations omitted); *Karlin v. Foust*, 188 F.3d 446, 483 (7th Cir. 1999) (“In *Casey*, the Court appears to have tempered, if not rejected, *Salerno*’s stringent “no set of circumstances” standard in the abortion context, without expressly saying so.”).

1. The Undue Burden Standard

The undue burden standard was set forth in the plurality opinion of *Casey*.⁹⁸ In the most complete articulation of the standard, the Court explained:

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this *purpose* is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the *effect* of placing a *substantial obstacle* in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.⁹⁹

This explanation, however, is circular, as it fails to adequately define the key terms that, together, compose this standard.¹⁰⁰ Instead of offering any clear definitions or objective criteria, the plurality attempted to clarify the standard by providing hypothetical examples of what it might have considered an undue burden, and what it would not.¹⁰¹ These examples, many of which will be discussed briefly here, were offered in a disjointed, piecemeal discussion of the standard in what amounted to a disjointed and confusing seventy-page decision.¹⁰²

The undue burden standard is comprised of multiple parts. First, as stated above, a regulation poses an undue burden if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."¹⁰³ Thus, the substantial obstacle prong is itself a disjunctive test with two parts: purpose and effect.¹⁰⁴ A statute is unconstitutional if its intended purpose is to present a substantial obstacle by make it more difficult for women to obtain abortions. Even if the state did not intend to create a substantial obstacle for women seeking abortions, a statute can be deemed unconstitutional if it nevertheless has the effect of presenting such an obstacle.¹⁰⁵

⁹⁸ *Casey*, 505 U.S. at 877.

⁹⁹ *Id.* (emphasis added).

¹⁰⁰ See *Roe*, *supra* note 56 and accompanying text.

¹⁰¹ *Id.* See generally *Casey*, 505 U.S. at 876–902.

¹⁰² *Casey*, 505 U.S. 833 at 876-902.

¹⁰³ *Id.* at 877.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

a. When Does An Obstacle Become A “Substantial Obstacle?”

Statutes regulating abortion are constitutional unless they have the purpose or effect of creating a substantial obstacle for women seeking abortions.¹⁰⁶ Thus, it is important to know precisely when an obstacle becomes unconstitutionally “substantial.” The Court in *Casey* did not define “substantial obstacle” in objective terms, however, or draw any absolute line differentiating a permissible obstacle from an unconstitutionally substantial obstacle.¹⁰⁷ Rather, the Court stressed that states may persuade women to choose childbirth but may not impose an undue burden on their right to choose.¹⁰⁸ But it is almost impossible to determine whether statutes are successfully persuading women to choose childbirth or unconstitutionally hindering women from obtaining abortions. Statutes designed to persuade women to choose childbirth over abortion would measure their success in achieving that goal by the level of decrease in the rate of abortions. The Court has said, however, that a decrease in “a large fraction” of women having an abortion is evidence that the regulation was calculated to hinder, not inform the woman’s choice.¹⁰⁹ The fact that one result, a decrease in the rate of abortions, can be used to measure the success of a permissible regulation *or* to demonstrate an impermissible purpose is highly problematic.

The Court briefly explained that simply making an abortion more costly or more difficult is not, in itself, a substantial obstacle.¹¹⁰ On the other hand, the Court held that statutes that prevent a “large fraction” of women from exercising their right to an abortion do create an undue

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 965 (Rehnquist, J., concurring in part, dissenting in part) (“In evaluating abortion regulations under that standard, judges will have to decide whether they place a ‘substantial obstacle’ in the path of a woman seeking an abortion. In that this standard is based even more on a judge’s subjective determinations than was the trimester framework, the standard will do nothing to prevent ‘judges from roaming at large in the constitutional field’ guided only by their personal views. Because the undue burden standard is plucked from nowhere, the question of what is a ‘substantial obstacle’ to abortion will undoubtedly engender a variety of conflicting views.”) (citations omitted).

¹⁰⁸ *Casey*, 505 U.S. at 965.

¹⁰⁹ *Id.* at 925.

¹¹⁰ *Id.* at 874 (“Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”).

burden.¹¹¹ The Court instructed lower courts to engage in a factual analysis involving testimony and studies to determine the extent to which a regulation interferes with women's right to an abortion, but gave no explanation as to how those facts should be weighed, or what facts would transform a permissible obstacle into an unconstitutional one.¹¹² Unfortunately, lower courts are left guessing at where the Court intended the line to be drawn.¹¹³

b. Is the Statute's Purpose to Present a Substantial Obstacle?

The legitimacy of states' purpose is ascertained by evaluating whether statutes have been calculated to inform or, instead, calculated to hinder women's decisions.¹¹⁴ Statutes have an improper purpose and present an unconstitutional undue burden if the chosen measures are calculated to hinder women's free choice.¹¹⁵ When determining whether statutes are calculated to hinder women's free choice or not, the analysis must be centered on those who are actually affected by the restriction.¹¹⁶ If a statute imposes a more stringent requirement upon minors seeking an abortion, for example, the focus of the inquiry is how that particular class of minors is affected; it would not matter if the class of minors comprised only a small proportion of the total group of women seeking abortions.¹¹⁷ Again, the Supreme Court explained that lower courts should engage in an analysis led by facts, studies, testimony, and common sense to determine if, of the women affected by the statute, it would act as a substantial obstacle in a "large fraction"¹¹⁸ of those cases.¹¹⁹

¹¹¹ *Id.* at 925.

¹¹² *Id.* at 991 (Scalia, J., concurring in part, dissenting in part) ("But what is remarkable about the joint opinion's fact-intensive analysis is that it does not result in any measurable clarification of the "undue burden" standard. Rather, the approach of the joint opinion is, for the most part, simply to highlight certain facts in the record that apparently strike the three Justices as particularly significant in establishing (or refuting) the existence of an undue burden; after describing these facts, the opinion then simply announces that the provision either does or does not impose a "substantial obstacle" or an "undue burden.").

¹¹³ *See, e.g.,* Karlin v. Foust, 188 F.3d 446, 480 (7th Cir. 1999) ("When is a burden 'undue' as opposed to merely incidental?").

¹¹⁴ *Casey*, 505 U.S. at 877.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 894 ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.").

¹¹⁷ *Id.*

¹¹⁸ At least one court has struggled to determine when a group becomes a "large fraction" such that the effect of the statute would warrant invalidating the statute. *See A*

The Court gave two examples of statutes that would hinder women's free choice, and therefore have an impermissible purpose.¹²⁰ First, the Court explained, unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to women seeking an abortion impose an undue burden and are unconstitutional.¹²¹ Unfortunately, the Court did not elaborate as to what is considered an "unnecessary" health regulation, nor did it give an explanation of when or how an unnecessary health regulation could be calculated to inform a woman's choice.¹²² The Court stopped short of saying outright that if a health regulation is unnecessary, it is calculated to hinder a woman's choice, although that is arguably the only reasonable inference.¹²³

Statutes that strip women of the ability to make the decision to have an abortion before their pregnancies proceed beyond the point of viability would also fit the Court's paradigm of statutes that are calculated to hinder women's choice.¹²⁴ This implies that states may prohibit women from making the ultimate decision to terminate their pregnancies *after* viability, which was true even under *Roe*'s trimester framework.¹²⁵ This also implies, however, that states may prohibit women from making the earliest possible decision to terminate her

Woman's Choice-E. *Side Women's Clinic v. Newman*, 305 F.3d 684, 699 (7th Cir. 2002).

¹¹⁹ *Casey*, 505 U.S. at 925 ("Looking at this group, the Court inquires, based on expert testimony, empirical studies, and common sense, whether 'in a large fraction of the cases in which [the restriction] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.' 'A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.'") (citations omitted).

¹²⁰ *Id.* at 878.

¹²¹ *Id.*

¹²² *See id.*

¹²³ *See id.* This contradicts the Court's earlier comment, however, that states are free to enact measures that are intended to persuade a woman to choose childbirth over abortion, even if the measures do not further a health interest. *Id.* at 886. In other words, the Court implied that unnecessary health regulations are acceptable, so long as they do not have the effect of placing a substantial obstacle in the way of the woman seeking an abortion. *Casey*, 505 U.S. at 886.

¹²⁴ *Id.* at 879.

¹²⁵ *Id.* at 879; *see also* *Roe v. Wade*, 410 U.S. 113, 114 (1973) ("For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.") (citations omitted). Sadly, the protections of the trimester framework have been abandoned, but the ability to hinder women from choosing an abortion is the little binding precedent that has remained of the holding in *Roe*.

pregnancy, as long as the ultimate decision is theirs.¹²⁶ The Court's failure to address this inference makes it impossible to distinguish between statutes that unconstitutionally "hinder" women from obtaining abortions and those that constitutionally delay them, since "to hinder," by definition, is "to cause delay, interruption or difficulty in."¹²⁷

The Court also offered examples of statutes that would be calculated to inform women's free choice, which would therefore have a proper purpose and would not present an unconstitutional undue burden.¹²⁸ First, the Court would find statutes that require disclosure of information that is truthful, non-misleading, and relevant to the decision to have an abortion to be calculated to inform women's choice.¹²⁹ Unfortunately, the Court did not supply any real guidelines to instruct lower courts how to determine whether the given information is truthful, non-misleading, and relevant.¹³⁰ While the question of truth may seem easy to discern, it can become quite difficult in the face of disputed medical and scientific evidence.¹³¹ The Court did not discuss how the undue burden standard would apply in the event of inconclusive or

¹²⁶ *Casey*, 505 U.S. at 885–88.

¹²⁷ *Hinder Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/hinder?s=t> (last visited Mar. 1, 2013). Nevertheless, this rationale led the Court to uphold the twenty-four hour mandatory waiting period at issue in the case. *Casey*, 505 U.S. at 879. The Court opined that requiring a woman to wait at least twenty-four hours between receiving certain information and having an abortion is not a substantial obstacle. *Id.* The Plaintiffs presented the Court with evidence that the mandated twenty-four hour waiting period often resulted in a delay of a week or more before a woman could obtain the procedure. *Id.* at 921 (Stevens, J., dissenting) ("While a general requirement that a physician notify her patients about the risks of a proposed medical procedure is appropriate, a rigid requirement that all patients wait 24 hours or (what is true in practice) much longer to evaluate the significance of information that is either common knowledge or irrelevant is an irrational and, therefore, 'undue' burden."). Despite having emphasized the importance of implementing a highly factual analysis involving testimony and studies in earlier parts of the opinion, the Court failed to engage in a highly factual analysis on the real effects of the waiting period. *Id.* Instead, the Court insensitively, or perhaps unknowingly, made light of this waiting period without giving any recognition or acknowledgement to the prolonged difficulties and discomforts of pregnancy that the women were made to endure during the mandatory waiting period. *Id.*

¹²⁸ *Casey*, 505 U.S. at 882.

¹²⁹ *Id.* at 882–83 ("If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible. We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health . . . informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant.").

¹³⁰ *Id.*

¹³¹ See generally Osman, *supra* note 38.

disputed medical authority, or where states exaggerate the credibility of ill-supported studies and information.¹³² Determining when information is misleading is a question separate and apart from the issue of truthfulness, because even truthful information can be misleading when taken out of context.¹³³ The Court again neglected to address this problem, however. The Court's failure to acknowledge and provide guidance with regard to these concerns has led some lower courts to automatically conclude that if information is truthful, it is therefore non-misleading, which is certainly not always true.¹³⁴

c. Does the Statute Have the Effect of Creating A Substantial Obstacle?

While the Court spent considerable time discussing the "purpose" prong of the undue burden standard, it provided even less guidance with regard to the "effect" prong.¹³⁵ To clarify the "effect" prong, the Court merely explained that a regulation is unconstitutional if it is a substantial obstacle to the woman's exercise of the right to choose in a "large fraction" of the cases in the group for whom the law is a restriction.¹³⁶ Unfortunately, the "effect" prong suffers from the same lack of clarity and definitions as the "purpose" prong. This is concerning, since, without further guidance, there is almost unfettered discretion bestowed upon courts in deciding whether the effect of a given regulation is "substantial" or not.¹³⁷

2. The Dissenting Opinions in *Casey*

The Justices who dissented in *Casey* recognized that the standard, as promulgated, was ambiguous and would be impossible for the lower courts to apply consistently.¹³⁸ The first indication that this standard is flawed lies in the fact that it was a plurality opinion, with four independently written dissenting opinions in which six Justices

¹³² *Id.*

¹³³ *Id.*; see also Vandewalker, *supra* note 7.

¹³⁴ *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577–78 (5th Cir. 2012). See generally Osman, *supra*, note 38; Vandewalker, *supra* note 7.

¹³⁵ *Casey*, 505 U.S. at 877–79, 885–97.

¹³⁶ *Id.* at 965.; see *supra* text accompanying note 118.

¹³⁷ See *supra* text accompanying note 107.

¹³⁸ See *supra* text accompanying note 107.

partook.¹³⁹ The Justices' qualms with this amorphous standard were made very clear in their dissents.

The most vehement dissent was authored by Justice Scalia, who maintained that the joint opinion failed to sufficiently clarify the undue burden standard, and that its failed attempt only demonstrated further that the standard is unworkable and easy to manipulate.¹⁴⁰ Justice Scalia then engaged in a discussion about the problems that lower courts attempting to apply this standard would likely encounter in the future.¹⁴¹ The Justice acknowledged the incredible difficulty in determining when a burden becomes a "substantial burden," and argued that this ambiguity invites judges to draw subjective conclusions and use personal opinions to shape their analysis.¹⁴² Justice Scalia suggested that the differing conclusions of the plurality and dissenters regarding whether or not the provisions at issue were "substantial obstacles" exemplified this point.¹⁴³

C. Relevant Post-Casey Precedent

The Court in *Stenberg v. Carhart*¹⁴⁴ did not evaluate the constitutionality of informed consent statutes, but the case is important in understanding the development of abortion jurisprudence because it evinces the Court's slow but continuous shift away from deference to physicians and toward deference to legislatures.¹⁴⁵ The dissenting opinion analogized the majority's reasoning to that of *Akron*, but disapprovingly called the majority opinion physician-deferential.¹⁴⁶ The dissent also argued that the state should be able to take a position when medical authorities are in disagreement, and that the Court should defer

¹³⁹ *Casey v. Planned Parenthood of Se. Pa.*, 14 F.3d 848, 854 (3d Cir. 1994) ("The joint opinion of Justices O'Connor, Kennedy and Souter provides the narrowest grounds for the judgments in which various other Justices concurred to form majorities on different issues. Under the rule of *Marks* . . . the joint opinion is therefore cited for the holdings of the Court.") (citations omitted).

¹⁴⁰ *Casey*, 550 U.S. at 985–86 (Scalia, J., dissenting).

¹⁴¹ *Id.* at 984–93.

¹⁴² *Id.* at 992; see also *supra* text accompanying note 107.

¹⁴³ *Casey*, 550 U.S. at 985–87.

¹⁴⁴ 530 U.S. 914 (2000).

¹⁴⁵ *Id.* at 971 (discussing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) to support the proposition that there exists "beyond doubt the right of the legislature to resolve matters upon which physicians disagreed").

¹⁴⁶ *Id.* at 969 ("The Court's decision today echoes the *Akron* Court's deference to a physician's right to practice medicine in the way he or she sees fit. The Court, of course, does not wish to cite *Akron*; yet the Court's holding is indistinguishable from the reasoning in *Akron* that *Casey* repudiated. No doubt exists that today's holding is based on a physician-first view which finds its primary support in that now-discredited case.").

to the legislature's position in such cases.¹⁴⁷ The danger in adopting the dissent's position, however, is that it allows legislatures, which undeniably have a political agenda, to manipulate and misconstrue medical findings and facts.¹⁴⁸

The final relevant precedent in understanding the way abortion jurisprudence has impacted informed consent statutes is *Gonzales v. Carhart*.¹⁴⁹ The Court in *Gonzales* essentially accepted the position articulated in the *Stenberg* dissent and adopted a standard that grants deference to legislative fact-finding, as opposed to the weight of the medical evidence.¹⁵⁰ Importantly, however, the Court stopped short of granting states complete and unfettered discretion, explaining that the Court has the duty to engage in its own evaluation of both the law and the facts where fundamental constitutional rights are involved, especially where district court testimony demonstrated the falseness of legislative findings.¹⁵¹ The dissent in *Gonzales* criticized the majority for being overly deferential to the legislature.¹⁵²

¹⁴⁷ *Id.* at 970 (“The Court fails to acknowledge substantial authority allowing the State to take sides in a medical debate, even when fundamental liberty interests are at stake and even when leading members of the profession disagree with the conclusions drawn by the legislature. In *Kansas v. Hendricks*, we held that disagreements among medical professionals ‘do not tie the State’s hands in setting the bounds of . . . laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude.’ Instead, courts must exercise caution (rather than require deference to the physician’s treatment decision) when medical uncertainty is present.”) (citations omitted).

¹⁴⁸ See generally Dreweke & Wind, *supra* note 7. See also Richardson & Nash, *supra* note 56.

¹⁴⁹ 550 U.S. 124 (2007).

¹⁵⁰ *Id.* at 163 (“The question becomes whether the Act can stand when this medical uncertainty persists. The Court’s precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.”).

¹⁵¹ *Id.* at 165–66 (“Although we review congressional fact-finding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress’ findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake . . . As respondents have noted, and the District Courts recognized, some recitations in the Act are factually incorrect . . . Uncritical deference to Congress’ factual findings in these cases is inappropriate.”).

¹⁵² *Id.* at 175–79 (“The trial courts concluded, in contrast to Congress’ findings, that ‘significant medical authority supports the proposition that in some circumstances, [intact D & E] is the safest procedure . . . Today’s opinion supplies no reason to reject those findings. Nevertheless, despite the District Courts’ appraisal of the weight of the evidence, and in undisguised conflict with *Stenberg*, the Court asserts that the Partial-Birth Abortion Ban Act can survive ‘when . . . medical uncertainty persists.’ This assertion is bewildering. Not only does it defy the Court’s longstanding precedent

IV. ABORTION CONFUSION: CIRCUIT COURTS STRUGGLE WITH THE
 AMBIGUOUS UNDUE BURDEN STANDARD, FIRST AMENDMENT
 CHALLENGES, AND INCREASINGLY MANIPULATIVE INFORMED CONSENT
 STATUTES

A number of circuit courts that have applied the undue burden standard to abortion informed consent statutes have echoed Justice Scalia's concerns, demonstrating that the obscurity of the undue burden standard has presented the circuit courts with an incredible challenge.¹⁵³ For example, the Sixth Circuit, in *Memphis Planned Parenthood, Inc. v. Sundquist*,¹⁵⁴ expressly acknowledged that judges can and, in fact, do disagree regarding the point at which a burden becomes an unconstitutional undue burden.¹⁵⁵ The author of the concurrence did not seem to find this troubling, commenting that this was not surprising given the subjective nature of the standard.¹⁵⁶ The dissent in *Memphis*, on the other hand, found this uncertainty to be very troublesome and agreed with Justice Scalia that the undue burden standard was easy to manipulate.¹⁵⁷

In another case, *Karlin v. Foust*,¹⁵⁸ the court was bewildered as it attempted to distinguish between a burden that is "undue" and one that is merely "incidental."¹⁵⁹ The Seventh Circuit struggled to make sense of the undue burden standard, finally concluding that a burden that only persuades women is acceptable.¹⁶⁰ A burden is only undue, the court concluded, if it actually prevents women from obtaining an abortion that they would have otherwise had.¹⁶¹ In the *Karlin* court's opinion, incidental increase in cost or inconvenience of obtaining an abortion does not present an undue burden unless that increase rises to the level of

affirming the necessity of a health exception, with no carve-out for circumstances of medical uncertainty; it gives short shrift to the records before us, carefully canvassed by the District Courts.") (citations omitted).

¹⁵³ See cases cited *supra* note 31.

¹⁵⁴ 175 F.3d 456 (6th Cir. 1999).

¹⁵⁵ *Id.* at 467 (Nelson, J., concurring).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 468 ("The majority's outcome-driven decision today ignores the standard of review we are bound to employ in adjudicating such an appeal; perverts the law; and does violence to the constitutional rights and liberties guaranteed to every female in this country . . . to say that the minor female has the right to have an abortion without parental consent as long as she overcomes extreme logistical hurdles is to say that she has no right at all.") (Keith, J., dissenting).

¹⁵⁸ *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999).

¹⁵⁹ *Id.* at 480.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

actually preventing women from having access to an abortion.¹⁶² The court upheld the disclosure provision of the informed consent statute only after concluding that it could be construed to mandate strictly a *topic* of discussion, however, reasoning that physicians must have the ability to use their medical judgment to tailor the content of the disclosure to the particular circumstances of the woman.¹⁶³ The court cautioned against incorporating mandatory disclosures of *specific* information that limit physicians' discretion and medical judgment.¹⁶⁴

Years after *Karlin*, lower courts continue to express uncertainty and insecurity in applying the undue burden standard. The *Okpalobi v. Foster*¹⁶⁵ court was puzzled with regard to *when* courts are permitted to apply the undue burden standard.¹⁶⁶ The Fifth Circuit struggled with the "purpose" prong of the analysis, and commented that the plurality in *Casey* neglected to provide adequate guidance as to how lower courts should conduct that portion of the analysis.¹⁶⁷ In attempting to apply the undue burden standard and engage in the "purpose" prong of the analysis, the court concluded that a legislature does not have to expressly admit to an improper purpose in order for courts to find one, and that courts should consider "indicia of improper legislative purpose, such as statutory language, legislative history and context, and related legislation" in its "purpose" analysis.¹⁶⁸ The dissent agreed that the law had an impermissible purpose, and objected on other grounds.¹⁶⁹

¹⁶² *Id.* at 482.

¹⁶³ *Id.* at 473.

¹⁶⁴ *Karlin*, 188 F.3d at 473 ("While [the statute] does strictly require that physicians must provide their patients with information on a number of specific topics, the district court's interpretation of the informed consent requirements allows the physician to use his or her best medical judgment in determining the exact nature or content of that information.").

¹⁶⁵ 190 F.3d 337, 354 (5th Cir. 1999), *on reh'g en banc*, 244 F.3d 405 (5th Cir. 2001).

¹⁶⁶ *Id.* at 354.

¹⁶⁷ *Id.* ("The *Casey* Court provided little, if any, instruction regarding the type of inquiry lower courts should undertake to determine whether a regulation has the 'purpose' of imposing an undue burden on a woman's right to seek an abortion.").

¹⁶⁸ *Id.* at 355.

¹⁶⁹ *Id.* at 361 (Jolly, J., dissenting) ("I respectfully dissent because of the elementary and fundamental errors that the majority has made in its reaction to a statute plainly aimed at making medical practice more difficult for abortion doctors. The statute may well constitute an unfair legislative act, but that legislative unfairness cannot be corrected by an unconstitutional judicial act. In sum, this case presents no case or controversy under Article III of the Constitution and, consequently, we have no constitutional authority to decide its merits.").

On rehearing en banc, the court reached almost the exact opposite result.¹⁷⁰ The majority concluded that the court lacked Article III jurisdiction and that the matter extended beyond the scope of their powers.¹⁷¹ The dissent, however, argued that injunctive relief was the traditional avenue of recourse for facial challenges to abortion statutes, citing *Casey* and a number of other cases that would seem to grant circuit courts the authority to decide the case on the merits.¹⁷² Referencing the statute in question, the dissent stated that its purpose was unlawful both because it presented an undue burden that unconstitutionally infringed upon a fundamental right and also because it was crafted in a way that attempted to circumvent judicial review.¹⁷³ The fact that courts are unclear not only about *how* to apply the undue burden standard but also *when* it is applicable further demonstrates how flawed the standard is.

In light of the vague and unpredictable meaning of the undue burden standard, the Seventh Circuit interpreted the standard as it pleased in *A Woman's Choice – East Side Women's Clinic v. Newman*.¹⁷⁴ There, the court declined to even make a good-faith inquiry into what the Supreme Court intended, stating instead that, since the *Casey* Court did not give more guidance as to what exactly the term “large fraction” means, they would not “peer into the dark abyss of speculation” to figure out when the amount of women affected becomes a “large fraction.”¹⁷⁵ Instead, the majority heedlessly concluded that a statute or regulation that prevents *some*, but not all, women from having an abortion is constitutional.¹⁷⁶ The majority scoffed at the dissent’s suggestion that a statute that prevents even just one percent of women from obtaining an abortion can be an undue burden, if that regulation only affects one

¹⁷⁰ See *Okpalobi v. Foster*, 244 F.3d 405, 409 (5th Cir. 2001).

¹⁷¹ *Id.* (“Sitting as an *en banc* court, we consider whether the district court properly enjoined the ‘operation and effect’ of the Louisiana state tort statute at issue, which provides a private cause of action against medical doctors performing abortions. Although, in this facial attack on the constitutionality of the statute, consideration of the merits may have strong appeal to some, we are powerless to act except to say that we cannot act: these plaintiffs have no case or controversy with these defendants, the Governor and Attorney General of Louisiana, and consequently we lack Article III jurisdiction to decide this case.”).

¹⁷² *Id.* at 453 (Parker, J., dissenting).

¹⁷³ *Id.* at 443 (“This purpose is illegitimate not only because [the statute] unduly burdens a constitutionally protected right, but also because it seeks to evade judicial review.”).

¹⁷⁴ 305 F.3d 684, 699 (7th Cir. 2002).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

percent of women to begin with.¹⁷⁷ In response, the dissent reminded the majority that the statute should be analyzed based on the impact it has on those to which it applies,¹⁷⁸ and even submitted that the majority impermissibly applied the *Salerno* standard, instead of the appropriate undue burden standard.¹⁷⁹

More recently, in *Texas Medical Providers Performing Abortion Services v. Lakey*,¹⁸⁰ the Fifth Circuit neglected to apply the undue burden standard because the plaintiff, in a display of artful pleading, only raised compelled speech claims.¹⁸¹ The Fifth Circuit erred by failing to apply the undue burden standard, however, as the Supreme Court “established the undue burden test as the *sole* standard for assessing the constitutionality of an abortion regulation, rather than as a threshold inquiry for triggering strict scrutiny review.”¹⁸² Furthermore, the *Lakey* court stated that, under *Casey*, the manner in which physicians provide information is irrelevant.¹⁸³ In fact, however, the Court in *Casey* stated that the way in which information is delivered to patients could impact its constitutionality, particularly if it is delivered in a way that is intended to “shock” the woman or inflict psychological distress.¹⁸⁴

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 709 (Wood, J., dissenting).

¹⁷⁹ *Newman*, 305 F.3d at 706–07 (“The first question—how many women must be affected—is really another way of putting the question about facial challenges that the majority addresses. In this connection, despite its disclaimers, one is left with the strong impression that the majority is applying either *United States v. Salerno*, or something very close to it. In essence, it holds that a state statute like the one before us now would be unconstitutional only if there was no set of circumstances under which it was valid—by which it seems to mean that not a single woman in Indiana would find the law’s burdens tolerable. This is an impermissible back-door application of *Salerno*. Worse yet, it assumes the answer to the question before us: whether the system Indiana wants to put in place will unduly burden Indiana women. Since the pertinent part of the statute has never gone into force, the majority indulges in the presumption that the law imposes no burden at all. But this presumption is found nowhere in our jurisprudence, at least for laws implicating fundamental constitutional rights. Furthermore, this methodology is inconsistent with *Casey*.”).

¹⁸⁰ 667 F.3d 570 (5th Cir. 2012).

¹⁸¹ *Id.* at 577.

¹⁸² *Casey v. Planned Parenthood of Se. Pa.*, 14 F.3d 848, 854 (3d Cir. 1994).

¹⁸³ *Lakey*, 667 F.3d at 580 (“*Casey* did not analyze the doctor’s status based on how he provided ‘specific information.’”).

¹⁸⁴ *Casey*, 505 U.S. at 936 (“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. This, for example, would appear to preclude a State from requiring a woman to view graphic literature or films detailing the performance of an abortion operation. Just as a visual preview of an operation to remove an appendix plays no part in a physician’s securing informed consent to an appendectomy, a preview of scenes appurtenant to any

The *Lakey* court also misstated or misunderstood the holding in *Casey* when it wrote:

[T]he requirement that, to avoid the description of the sonogram images, a victim of rape or incest might have to certify her status as a victim, despite fearing (by the very terms of the certification) physical reprisal if she makes her status known . . . does not transgress the First Amendment. If the State could properly decline to grant any exceptions to the informed-consent requirement, it cannot create an inappropriate burden on free speech rights where it simply conditions an exception on a woman's admission that she falls within it.¹⁸⁵

The *Casey* Court, however, invalidated the spousal notification requirement precisely because of the safety issues it raised for affected women and their families.¹⁸⁶ Perhaps the *Lakey* court realized some of the flaws of its evaluation of this informed consent law when it wrote, “[w]e must and do apply today’s rules as best we can without hubris and with less sureness than we would prefer.”¹⁸⁷

The most recent cases that have grappled with the undue burden standard are a series of related cases referred to here as *Rounds I*, *Rounds II*, and *Rounds III*.¹⁸⁸ All three cases involved the same informed consent provision, and each contains a dissenting opinion.¹⁸⁹ In *Rounds I*, the majority found that the provision was unconstitutional, focusing mainly on the fact that it required physicians to orally convey specific information to patients.¹⁹⁰ The majority wrote, “[i]n no case has the

major medical intrusion into the human body does not constructively inform the decision of a woman of the State’s interest in the preservation of the woman’s health or demonstrate the State’s profound respect for the life of the unborn.”) (citations omitted) (internal quotation marks omitted).

¹⁸⁵ *Lakey*, 667 F.3d at 578.

¹⁸⁶ *Casey*, 505 U.S. at 893–94 (“The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.”).

¹⁸⁷ *Lakey*, 667 F.3d at 585.

¹⁸⁸ *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds III)*, 686 F.3d 889 (8th Cir. 2012); *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds II)*, 530 F.3d 724, 753 (8th Cir. 2008); *Planned Parenthood Minn. v. Rounds (Rounds I)*, 467 F.3d 716, 722 (8th Cir. 2006).

¹⁸⁹ See cases cited *supra* note 188.

¹⁹⁰ *Rounds I*, 467 F.3d at 722–23.

Court extended the bounds of permissible regulation to laws which force unwilling speakers themselves to express a particular ideological viewpoint about abortion.”¹⁹¹ The dissent, on the other hand, construed the undue burden standard very liberally, stating that: (1) “a statute does not constitute an undue burden unless it in a ‘real sense deprive[s] women of the ultimate decision’”¹⁹²; (2) a state’s interest in protecting fetal life implies that a state can use physicians “to inform its citizens about the ‘philosophic and social arguments’ against abortion;”¹⁹³ and (3) the patient has a limited right not to listen.¹⁹⁴ The dissent readily acknowledged that the statute used frightening terms to convey the state’s preference for childbirth over abortion.¹⁹⁵

In *Rounds II*, the majority echoed the opinion of the *Rounds I* dissent, finding that the categorization of a fetus as a “whole, separate, unique living human being”¹⁹⁶ was simply biological information that was “at least as relevant to the patient’s decision to have an abortion as the gestational age of the fetus, which was deemed to be relevant in *Casey*.”¹⁹⁷ The majority did not engage in a discussion about the legislature’s purpose in employing this definition of the word “fetus,” or the effect that this definition might have on women.¹⁹⁸ The dissent, on the other hand, stated that the disclosures the Act required went “far beyond” the mandates of informed consent laws that have been upheld by the Supreme Court and circuit courts in the past.¹⁹⁹ The dissent stated that “[r]ather than focusing on medically relevant and factually accurate information designed to assist a woman’s free choice,” which the Supreme Court and circuit courts have upheld, the statute in question “expresses ideological beliefs aimed at making it more difficult for women to choose abortions,” and that “[t]he obvious objective . . . is to use the concept of ‘informed consent’ to eliminate abortions.”²⁰⁰ The

¹⁹¹ *Id.*

¹⁹² *Id.* at 734 (Gruender, J., dissenting) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 875 (1992)).

¹⁹³ *Id.* at 734–35.

¹⁹⁴ *Id.* at 735.

¹⁹⁵ *Id.* at 738.

¹⁹⁶ *Rounds II*, 530 F.3d 724, 736 (8th Cir. 2008).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 739 (Murphy, J., dissenting).

²⁰⁰ *Id.* at 740–41. More specifically, with regard to the provision that defined a fetus as a “whole, separate, unique, living human being,” the dissent found that the state was mandating the dissemination of “metaphysical ideas unrelated to any legitimate state interest in regulating the practice of medicine,” and that, “[s]ince the state can assert no legitimate interest in defending the compulsory communication of ideological statements

dissent also disapproved of a suicide advisory, which was the focus of the Eighth Circuit's *en banc* analysis in *Rounds III*.²⁰¹

In contrast, the majority in *Rounds III* found that, “[o]n its face, the suicide advisory presents neither an undue burden on abortion rights nor a violation of physicians’ free speech rights.”²⁰² Though the majority evaluated whether the information required in the disclosure was truthful and non-misleading, that was the extent of its undue burden analysis.²⁰³ The majority opinion focused on whether the language of the provision implied that there was direct causality between abortion and suicide.²⁰⁴ Finding that it only suggested “increased risk,” not direct causality, the majority decided that despite medical uncertainty, the advisory was truthful and non-misleading.²⁰⁵ The majority neglected to engage in a discussion about the effect of the regulation or whether it placed a “substantial obstacle” in the path of the woman.²⁰⁶ The court simply concluded that since the information is truthful and non-misleading it does not create an undue burden.²⁰⁷ In fact, the majority opinion does not mention the term “substantial obstacle” a single time.²⁰⁸ The dissent criticized the majority’s analysis and proposed standard, pointing out the following evidentiary problem: “[u]nder this proposed test, so long as a causal link between abortion and suicide would be theoretically possible, an advisory is truthful, non-misleading, and relevant unless [plaintiff can prove the absence of a causal link with ‘scientifically accepted certainty.’]”²⁰⁹

The many varying interpretations of the undue burden standard that have been articulated in circuit court cases since the Supreme Court

which do not pertain to its regulation of the practice of medicine, these provisions can not withstand constitutional scrutiny.” *Id.* at 743.

²⁰¹ *Id.* at 750 (“The Act’s broad mandate about psychological distress and suicide ideation is unlike the requirements in other informed consent laws found to be constitutional, which entrusted the communication of particular medical risks to the doctor’s best professional judgment.”).

²⁰² *Rounds III*, 686 F.3d 889, 906 (8th Cir. 2012).

²⁰³ *Id.* at 905–06.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Rounds III*, 686 F.3d at 906.

²⁰⁹ *Id.* at 911 (Murphy, J., dissenting) (“Rather than recognizing this emerging consensus based on the scientific research in the record before the district court and all the subsequently submitted evidence . . . the majority theorizes about the nature of an advisory. In the end it arrived at a new test divorced from the standard established in *Casey*.”).

adopted the standard in *Casey* reveal the enormously vague and circular nature of the standard.²¹⁰ Courts are free to pick and choose which facts are relevant, how to weigh them, and where to draw the lines.²¹¹ This standard is precisely as Justice Scalia suggested—manipulable.²¹² A standard that can be so obviously manipulated to allow judges to infuse their own personal moral and political viewpoints, particularly in such a controversial area as abortion, makes the judiciary the enforcer of an improper agenda, rather than interpreter of the Constitution of the United States. If the undue burden standard is to remain the analysis for evaluating the constitutionality of abortion regulations, there must be a more consistent and uniform approach to its application, or the integrity of the judicial system, not to mention women's right to choose, may not endure.

V. RESTORING ORDER TO ABORTION JURISPRUDENCE

A. *Bringing Structure and Uniformity to the Undue Burden Standard*

Assuming that informed consent statutes were restored to their former integrity and that paternalistic justifications were abandoned, the undue burden standard would still require some structure and uniformity in order to adequately and consistently distinguish between permissible and impermissible regulations of the abortion procedure. One way to bring structure to the undue burden standard is to organize its elements into a disjunctive, three-prong, fact-intensive test. The first step would be to determine whether the information is truthful, non-misleading, and relevant to the decision to have an abortion. The second prong would be an investigation into the true purpose of the statute, as evidenced by legislative history and any other relevant evidence. Finally, courts would investigate what the actual effects of the statute are in reality, as demonstrated through concrete evidence, not theory or conjecture.

These elements are all present in the current undue burden standard, but the Court has not provided any clear structure for its application. Determining that something is an undue burden or a substantial obstacle is more of a conclusion than a test. The lack of any consistent analytical process allows courts to pick and choose what to focus on and makes the standard easy to manipulate. To help circuit

²¹⁰ See *supra* text accompanying notes 107, 112.

²¹¹ *Id.*

²¹² *Id.*

courts avoid making arbitrary, inconsistent and unsubstantiated determinations as to whether a regulation imposes an undue burden, the application of the undue burden standard should be structured into a three-prong analysis composed of the concepts disjointedly discussed in *Casey*. Circuit courts' analyses and evaluations should be heavily concentrated on: (1) whether the information is actually truthful, non-misleading, and relevant to the decision to have an abortion; (2) the true purpose of the statute or regulation; and (3) the effect of the statute or regulation. Reformulating the undue burden standard as a three-part test would force the courts to address all the aspects of the standard, thereby creating some organization and uniformity in both analysis and outcome.

Circuit courts should first engage in an analysis of whether proposed disclosures consist of information that is truthful, non-misleading, and relevant to the decision to have an abortion. In order to determine the relevance of the information, courts should consider which approach to informed consent jurisdictions have adopted; "physician-based" or "patient-based."²¹³ Furthermore, determining the veracity of the information should be a heavily factual analysis, informed by science, studies, and most importantly, physicians' medical judgment²¹⁴—not the opinions and baseless assertions of legislatures.²¹⁵ Only truthful, complete, medically relevant information should be included in informed consent statutes.²¹⁶ Medically inconclusive or

²¹³ See *supra* Part II.

²¹⁴ *Karlin v. Foust*, 188 F.3d 446, 465 (7th Cir. 1999) ("In reaching this conclusion, we are mindful of the Supreme Court's admonition that a state abortion statute should not unduly limit a physician's discretion in making medical determinations; see, e.g., *Colautti v. Franklin*, 439 U.S. 379, 396–97 (reasoning that a physician must be afforded adequate discretion in the exercise of his medical judgment); *Okpalobi v. Foster*, 190 F.3d 337, 355–56 (5th Cir. 1999), *on reh'g en banc*, 244 F.3d 405 (5th Cir. 2001) ("In *Jane L*, the Tenth Circuit held unconstitutional a Utah law that equated viability with twenty weeks gestational age as measured from conception because, *inter alia*, the law had the impermissible purpose of usurping the physician's responsibility for determining fetal viability and, thus, providing a vehicle for challenging the holding of *Roe v. Wade*. . . the court also rests its conclusion that the Utah legislature adopted the measure for a forbidden purpose on the fact that the act on its face denied physicians the discretion granted them under well-established precedent.").

²¹⁵ See *Roe*, *supra* note 56, at 208 ("The proposed standard of review will incorporate a closer examination of the scientific foundation underlying specific informed consent statutes that gives greater deference to the views of the scientific and medical communities at large, rather than deferring to legislative determinations of medical fact. Such review is imperative to maintain the integrity of informed consent given legislatures' increasing proclivity to misuse scientific or medical information to achieve a particular, typically political, end.").

²¹⁶ See generally *Roe*, *supra* note 56.

incomplete information, by its very nature of incompleteness, can be untruthful and misleading, thereby undermining the purpose of informed consent and negating the disclosure principles upon which it is based.²¹⁷

Furthermore, the information contained in all mandatory disclosures should be limited to the standards, and guidelines of the associations and authorities that govern the medical profession.²¹⁸ Such medical associations are undoubtedly better equipped to determine the credibility and relevance of medical and scientific information as it pertains to informed consent than are courts or legislatures. The content of specific disclosures in informed consent statutes, if there are to be any, should be evaluated and approved by medical professionals and researchers and should fall within the parameters of acceptable medical knowledge, standards, and guidelines. Experts in the medical field should apprise our informed consent statutes, not the other way around.

After a thorough analysis of the facts and reports from medical professionals regarding the credibility and relevance of legislatures' proposed disclosures, courts could determine whether the information is truthful, non-misleading, and relevant to the decision to have an abortion. First, if a court were to find the mandated information to be untruthful, misleading, or irrelevant, the undue burden standard should not apply. The statute should instead fall under the dominion of the First Amendment because physicians' free speech rights would be most directly implicated, not women's rights. Forcing physicians to disclose information that is not medically relevant or accurate not only offends traditional First Amendment notions of autonomy and self-expression but also forces physicians to betray the trust of their patients and their profession as a whole. Therefore, such disclosures should be treated as compelled speech under the First Amendment and reviewed under strict scrutiny.

Alternatively, if legislatures want to voice their preference for childbirth and their respect for potential life through disclosures of medically inconclusive information, they should be required to simultaneously disclose that: (1) the information is incomplete or inconclusive; (2) the state is voicing its express preference for childbirth over abortion; and (3) there are alternative perspectives regarding abortion generally. Under this alternative, legislatures could still express their preference for childbirth over abortion and make women aware of inconclusive medical information that might persuade women not to

²¹⁷ See Vandewalker, *supra* note 7 and accompanying text.

²¹⁸ See *supra* note 11.

have abortions, but they could not manipulate women into thinking the information is neutral, complete, and certain.

If courts find proposed disclosures to be truthful, non-misleading, and relevant, they should then scrutinize statutes' purpose. Courts should not simply defer to legislatures' stated purpose. Courts should consider legislatures' stated purpose, but they should also examine other factors, such as the nature and quality of the information in proposed disclosures, statutes' legislative history, states' holistic policy regarding women's reproductive health, and statutes' legal and medical importance. Though it is not courts' responsibility to evaluate states' policy decisions, it is courts' job to ensure that laws upon which those policies are built fall within the boundaries of the Constitution.

If, for example, a legislature were to pass a law that satisfies the first prong of the analysis but requires actions or disclosures that are medically and legally superfluous, then a court should conclude that the statute has an impermissible purpose; that the legislature was not attempting to protect the life and health of the mother or the potential life of the fetus. In that instance, the burden imposed by the law and its dissuasive effects should not be permissible. If, however, a court were to find that the law served some medically or legally relevant purpose, then any dissuasive effect the statute has might be permissible, and not an undue burden, because of the other legitimate accomplishments of that law.

Even statutes with honest and appropriate informational disclosures, enacted for permissible purposes, could pose an undue burden as applied. Therefore, courts should evaluate statutes' actual effects on women's ability to obtain abortions. This step of the analysis is what courts have tended to focus on up to this point.²¹⁹ Like the rest of the undue burden analysis and as Justice O'Connor suggested, statutes' effects should be evaluated using a highly factual analysis.²²⁰ Conclusions that statutes' present either mere inconvenience or undue burden should not rest on judges or legislatures baseless opinions as to statutes' effects. Rather, courts should engage in a factual analysis, informed by studies and statistics from the given state and, where applicable, testimony from women who have been impacted by the legislation.

Courts will inevitably have the most discretion during this prong of the analysis, but they should still attempt to maintain uniformity and

²¹⁹ See, e.g., *supra* note 186 and accompanying text.

²²⁰ See *supra* note 119 and accompanying text.

consistency. Implementing a fact-intensive analysis, informed by studies, testimony, and other reliable evidence, will make it more difficult for courts to ignore the realities of statutes' impact when deciding whether the effect of a statute presents an undue burden for women seeking abortions.²²¹ For example, a court should not conclude that a twenty-four hour waiting period is not an undue burden if the evidence and studies demonstrate that it actually results in a delay of a week or more for most women.²²² Nor should a court conclude that a disclosure stating that an abortion can lead to an increased risk of suicide or cancer is truthful and non-misleading, and therefore not unduly burdensome, when medical evidence does not support those claims. Rather, courts should carefully consider the evidence to determine, objectively, whether a "large fraction" of the women affected by the statute are prevented from obtaining an abortion, or are otherwise facing an undue burden, such as being restricted from the most common types of abortion.²²³ Courts should also define "large fraction" in numerical terms, as being fifty percent of women affect or more, for example. The determinations made in each step of this analysis should lead to the *conclusion* that a given regulation is a substantial obstacle or undue burden, and therefore unconstitutional, as opposed to using the term "substantial obstacle" itself as the test.

As Justice O'Connor suggested, a highly fact-intensive analysis is the only way to make the undue burden standard workable and avoid arbitrary and capricious application.²²⁴ Engaging in a factual analysis would force legislatures to stay true to the purposes of protecting the health and life of the mother and the potential life of the fetus, while still allowing them to express their preference for childbirth over abortion. It

²²¹ *Casey v. Planned Parenthood of Se. Pa.*, 14 F.3d 848, 861 (3d Cir. 1994) ("By basing its rulings on informed consent and recordkeeping 'on the record,' the Court signaled that it was not announcing a *per se* rule. At a minimum, we believe the Court meant that other state abortion laws require individualized application of the undue burden standard. Our view is bolstered by Justice O'Connor's concurring opinion denying a stay in *Fargo Women's Health Organization v. Schafer* . . . which noted: 'the joint opinion [in *Casey III*] specifically examined the record developed in the district court in determining that Pennsylvania's informed consent provision did not create an undue burden [T]he lower courts [in *Fargo*] should have undertaken the same analysis,' and '[t]he fact-bound nature of the new standard-inquiring if the law is a "substantial obstacle,"' *Casey III* suggests that a challenge after enforcement of the Pennsylvania Act might yield a different result on its constitutionality.") (citations omitted).

²²² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 969 (1992).

²²³ See *supra* note 119 and accompanying text.

²²⁴ See *supra* note 119 and accompanying text.

would also assist circuit court judges in evaluating this very personal, emotional, and controversial issue rationally, without improperly considering their own moral or political convictions. Adopting the proposed solution is the best way to truly protect women's fundamental right to terminate their pregnancies, and to control their own health and lives. Taking a structured approach is the best way to accomplish uniformity and consistency in the application of the undue burden standard, and the only way to avoid its arbitrary and capricious application.

B. Reviving the Spirit of Informed Consent: Limiting Includable Information to Medical Facts and Excluding Ideology by Denying Deference to Legislature

The greatest danger recent informed consent statutes pose is that they manipulate women, who are already in a very vulnerable position, into thinking that they are being given unbiased, complete information, when in reality *Casey* and its progeny have invited legislatures to turn informed consent statutes into covert vehicles for delivering states' ideology.²²⁵ Legislatures justify this practice by arguing that abortion is different because it involves the termination of a potential life.²²⁶ Of course, it is true that abortion is different, and perhaps this ideological information should be available to women, but it should not be surreptitiously incorporated into informed consent statutes. All people, including women, assume the information physicians disclose while obtaining patients' informed consent to abortion is straightforward, objective, medical information because for all other medical procedures it is.²²⁷

Informed consent in the abortion context should be no different than that of any other medical procedure.²²⁸ It should be limited to scientific and medical information that is supported by the weight of authority, inform the patient of any included information that is inconclusive or for which there is disagreement among medical professionals, and be free from information that is ideological or that is not directly related to the procedure.²²⁹ Allowing states to express their viewpoints covertly through mandatory disclosures in informed consent

²²⁵ See generally Vandewalker, note 7.

²²⁶ See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007).

²²⁷ See generally *supra* note 11.

²²⁸ See generally *supra* note 11.

²²⁹ See generally Vandewalker, note 7.

statutes gives states license to manipulate women and prevent them from making truly informed choices.²³⁰

The informed consent disclosure standards discussed in Part I, namely, the professional practice, reasonable person, and self-determination standards, do not currently play any role in the evaluation of the constitutionality of abortion informed consent laws.²³¹ The undue burden standard should incorporate these different standards to eliminate some of the ambiguity in deciding what is “relevant” to a woman’s decision to have an abortion. Currently, under the undue burden standard legislatures have the greatest authority to decide what is relevant.²³² If these standards were considered, however, abortion informed consent laws would begin to fall in line with states’ general informed consent laws with regard to who gets to decide the relevance and materiality of informational disclosures.²³³

C. Disallowing Paternalism as an Acceptable Justification for Informed Consent Statutes

Legislatures have justified many recent informed consent statute requirements, such as mandatory waiting periods, by arguing that women benefit by being “given” the extra time to reflect upon their options before making their decision.²³⁴ Courts have accepted different variations of this rationale as legitimate.²³⁵ This rationale perpetuates stereotypes and the paternalistic notion that women need protection and are incapable of making difficult decisions on their own.²³⁶ It also assumes that women do not spend the appropriate amount of time reflecting upon their options and circumstances before deciding to get an abortion, and that they cannot have, know, or understand their options without these mandatory disclosures and waiting periods.²³⁷ In reality, however, women are more than capable of making these decisions on their own.²³⁸ Studies have shown that “women who make the decision to

²³⁰ *Id.*

²³¹ Compare *supra* Part II, with *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

²³² Compare *supra* Part II, with *Casey*, 505 U.S. at 877.

²³³ Compare *supra* Part II, with *Casey*, 505 U.S. at 877.

²³⁴ See, e.g., *Casey*, 505 U.S. 833.

²³⁵ *Id.*; see also *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976).

²³⁶ See Manian, *supra* note 21.

²³⁷ *Id.*

²³⁸ See generally Lawrence B. Finer et. al, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, GUTTMACHER INST. (Sept. 2005), <http://www.guttmacher.org/pubs/journals/3711005.html>.

have an abortion understand the responsibilities of parenthood and family life;²³⁹ six in ten are already a parent.”²⁴⁰ More than half of women who have an abortion say they want a child or another child at a later point in their life.²⁴¹ Most cite concern or responsibility for someone else as a factor in their decision.²⁴² These and other such studies should be recognized and considered during courts’ analyses and should prevent such paternalistic notions about women from being perceived as legitimate and compelling justifications for some requirements of recent informed consent statutes.

VI. CONCLUSION

Perhaps it is true that “[l]iberty finds no refuge in a jurisprudence of doubt,”²⁴³ but Justice Scalia was right to retort that “[r]eason finds no refuge in this jurisprudence of confusion,” either.²⁴⁴ Restructuring the undue burden standard into a disjunctive, three-part test in which each prong is analyzed using objective criteria and a heavily factual analysis is a comprehensive approach to making the undue burden standard workable in practice. This approach would still allow states to further their interests in preserving potential life and persuading women to choose childbirth, but would be much more effective in protecting women’s rights than the undue burden standard in its current form. Some solution must be adopted, because as it stands the undue burden standard is too easy to manipulate and allows states to maneuver around the safeguards the Supreme Court has attempted to put into place.

Furthermore, in order to preserve the integrity of the doctrine of informed consent, the physician-patient relationship, and the medical profession in general, courts must engage in an independent analysis of the accuracy of mandated factual disclosures and refrain from the admittedly easier but ineffective practice of giving deference to legislative fact-finding.²⁴⁵ Moreover, when considering the purpose of a given statute, paternalistic notions should be abandoned as illegitimate and unacceptable justifications for any statutes that regulate abortion. By reducing unwarranted judicial deference to legislative fact-finding,

²³⁹ Heather E. Boonstra et. al, *Abortion in Women’s Lives*, GUTTMACHER INST. (May 2006), <http://www.guttmacher.org/pubs/2006/05/04/AiWL.pdf>.

²⁴⁰ *Id.* at 4, 9.

²⁴¹ *Id.* at 9.

²⁴² *Id.* at 8–9.

²⁴³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 843 (1992).

²⁴⁴ *Id.* at 993 (Scalia, J., dissenting).

²⁴⁵ *See Roe*, *supra* note 56 and accompanying text.

eliminating paternalism, and only then proceeding to a structured analysis of constitutionality under the undue burden standard, courts can finally achieve consistency in their analyses and holdings for similar statutes, increase the legitimacy of the judicial system, and more effectively protect the rights of women in this delicate and controversial area.