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Sex, Lies, and Ultrasound

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SEX, LIES, AND ULTRASOUND

B. JESSIE HILL*

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INTRODUCTION

People trust their doctors. Indeed, polls indicate that doctors—along with nurses—consistently rank among the most trusted professionals in the United States based on their reputation for honesty and ethical conduct.¹ This high level of trust is critical to effective health care delivery.² Why, then,

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1. *Honesty/Ethics in Professions*, GALLUP, <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx> (last visited Aug. 15, 2017) [<https://perma.cc/DB92-2GBD>]. Every year since 1990, Gallup has conducted a poll of Americans' views regarding the honesty and ethics of various professions. The three highest-ranked professions in 2016 were nurses, pharmacists, and doctors (in that order). *Id.* This finding is relatively consistent with findings in prior years. See Rebecca Rifkin, *Americans Rate Nurses Highest on Honesty, Ethical Standards*, GALLUP, <http://www.gallup.com/poll/180260/americans-rate-nurses-highest-honesty-ethical-standards.aspx> (last visited Aug. 17, 2017) [<https://perma.cc/SG53-CTC3>]. Lawyers, sadly, rank rather low, but significantly above members of Congress. *Honesty/Ethics in Professions*, *supra* (finding only 18 percent of Americans rank lawyers “very high” or “high” in honesty and ethics, compared with 8 percent for members of Congress).

2. See, e.g., Audiey C. Kao et al., *The Relationship Between Method of*

would the government ever require doctors to provide false or misleading medical information to their patients? And what would be the impact of such a requirement? Those are the questions at the heart of this Article.

State-mandated falsehoods are rampant in the context of abortion regulation. State legislatures have required doctors, before performing abortions, to provide scientifically unsupported information to women, such as that having an abortion increases the risk of breast cancer or that it has negative mental health effects.³ Given the lack of evidence to sustain these sorts of claims, it seems reasonable to refer to such statements as government-mandated lies.⁴ However, these lies are different in many respects from the sorts of lies that have been studied in the growing literature on the legal regulation of lies, both private and governmental.⁵ The goal of this Article is to consider the unique problems raised by the misleading statements that the government mandates in the abortion context and to suggest a doctrinal framework for analyzing the constitutionality of such lies.

This Article argues that government-mandated lies in the abortion context are unique in several ways that make them unlikely to be found unconstitutional despite the fact that they obviously hinder patients' interest in access to information and to a constitutionally protected procedure. First, it is often difficult to categorize the kind of speech in which the lie occurs;

Physician Payment and Patient Trust, 280 J. AM. MED. ASS'N 1708, 1708, 1713 (1998).

3. See, e.g., S.D. Codified Laws § 34-23A-10.1(e)(ii) (2017). As another example, Arizona passed a law in 2015 requiring women to be informed that a nonsurgical abortion is reversible after it has begun. 2015 ARIZ. LEGIS. SERV. CH. 87. This law was repealed after the state failed to produce any credible evidence to support the law's claim. See 2016 ARIZ. LEGIS. SERV. CH. 267 (repealing 2015 ARIZ. LEGIS. SERV. CH. 87).

4. See, e.g., Andrew Beck, *Why Is Arizona Forcing Doctors to Lie to Women Who Need Abortions?*, ACLU (June 4, 2015), <https://www.aclu.org/blog/speak-freely/why-arizona-forcing-doctors-lie-women-who-need-abortions> [https://perma.cc/PX9Y-N5KP].

5. See, e.g., SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS* 3 (2014) (predominately discussing legal regulation of private lies); Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. 73, 99–107 (2015) [hereinafter Norton, *The Government's Lies*] (exploring government lies that threaten personal liberties protected by the First Amendment and the Due Process Clause); Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161 (arguing that the First Amendment prohibits government regulation of some but not all types of private lies).

this difficulty hinders the First Amendment analysis. Second, although it is rhetorically effective to call these misleading statements “lies,” it is in fact somewhat difficult to say whether that label properly applies.⁶ Finally, the sorts of harms imposed by the government’s lies in this context are in many respects distinct from those created by governmental lies in other contexts. The uniqueness of the harm makes these lies a poor fit with existing doctrinal tests. Ultimately, this article concludes that the primary harm caused by governmental falsehoods in the abortion context is a form of expressive injury. Analogizing to the harm caused by violations of the Establishment Clause or by racist speech, I argue that under the revised framework established by the Supreme Court in the 2016 case *Whole Woman’s Health v. Hellerstedt*,⁷ such expressive harms can and should be recognized as imposing an unconstitutional undue burden on the abortion right.

Part I of this Article gives an overview of the kinds of lies that state governments promulgate in the abortion context. These lies include falsehoods that come in the form of government-sponsored speech as well as in the form of untrue or misleading statements that health care providers are legally required to share with patients. Part I also considers a different kind of governmental lie, which is represented by laws that impose a false narrative on women about the meaning of abortion and pregnancy. Next, Part II considers some of the ways in which such lies are unique, as compared to the sorts of government lies considered by other scholars. Part II argues that false or misleading government-mandated disclosures in the abortion context are difficult to categorize for purposes of First Amendment doctrine. In fact, it may even be difficult to call them outright lies, unlike—for example—government officials’ falsehoods about military activities or knowing lies told by a prosecutor to secure a criminal conviction.⁸ In addition, Part II proposes that the predominantly expressive nature of the harm caused by government lies in the abortion context is a unique feature of

6. As I discuss further in Section II.B, the definition of a “lie” is debatable, and indeed has been the subject of extensive scholarly commentary. See, e.g., SHIFFRIN, *supra* note 5, at 12–15 & nn.16–25 (discussing the author’s definition of lying and contrasting it with other philosophers’ definitions).

7. 136 S. Ct. 2292 (2016).

8. See Norton, *The Government’s Lies*, *supra* note 5, at 73–74, 79 & n.28.

those lies. Finally, Part III considers how misleading disclosure requirements in the abortion context should be analyzed under the Constitution, proposing that even if such requirements are constitutional under the First Amendment, they raise significant problems under the Fourteenth Amendment.

I. THE LIES STATES TELL

This Part discusses the various kinds of misleading statements that are required by state law abortion restrictions and briefly explains the doctrinal framework that applies to each. States have generally introduced falsehoods into the abortion context through informed consent requirements. These laws statutorily mandate that specific information be given in order to meet the requirements of informed consent that apply to all medical and surgical procedures. For example, state laws often provide that consent will not be considered informed—and therefore civil or criminal liability may attach—if particular information is not provided.⁹

Sometimes, this information must be provided in government-created literature—in other words, through government speech.¹⁰ Section I.A describes the laws that mandate these sorts of lies, here called “direct government lies.” Other statutes require abortion providers themselves to give particular information. As discussed in Section I.B, these requirements—which I call “compelled private lies”—commandeer private speakers for the government’s message and may pose greater First Amendment problems than those that come directly from the government.¹¹ For both types of informed-consent requirements, however, state laws often provide a sort of escape hatch by which physicians may distance themselves from the message by giving further context or explaining that they disagree with the statement that they are required by law to provide.¹²

9. See, e.g., OHIO REV. CODE ANN. § 2317.56(B), (G) (2017) (subjecting a physician to civil liability for failure to provide a woman with certain information twenty-four hours before performing an abortion); *id.* § 2919.192 (imposing criminal penalties for failure to inform a woman of the existence of a fetal heartbeat).

10. See *infra* Section I.A.

11. See *infra* Section I.B.

12. See, e.g., *Planned Parenthood Minn. v. Rounds*, 686 F.3d 889, 905 n.8 (8th Cir. 2012); TEX. HEALTH & SAFETY CODE ANN. § 171.013(c) (2017); *cf.* *Rumsfeld v.*

Also considered in this Part is a different form of falsehood. Specifically, Section I.C discusses regulations that are aimed at creating a particular narrative about pregnancy that is false and misleading in that it takes one possible perspective among many and treats it as the one true perspective. This category of “false narratives” includes requirements that physicians provide an ultrasound to women seeking abortions, accompanied by a requirement that the woman must view the ultrasound or listen to a narrated description of the ultrasound.¹³ It also includes the recent wave of laws that require burial or cremation of fetal remains.¹⁴ This Section explains that these laws are aimed at imposing a particular understanding of pregnancy on the woman—one that generally conflicts with the woman’s understanding. They are considered together with more typical, obviously misleading statements because, as discussed in Section II.C, they impose similar types of harms.

A. *Direct Government Lies*

In this Article, I use the term “direct government lies” to refer to falsehoods or misleading statements that are articulated by the government and provided to the patient in the form of direct government speech. For example, some states require certain abortion-related information be given in state-created brochures or materials, which are then provided to the woman by the abortion clinic. Although the abortion provider plays a role in conveying this information to the patient, it is obvious with respect to such government-produced materials that the source of the speech is the state.

Some such state-produced materials contain false or misleading scientific information. For instance, Texas law requires physicians to provide certain printed materials to

Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 69–70 (2006) (rejecting a claim that a requirement to allow military recruiters on campus violated students’ and faculty members’ freedom of association, in part because those individuals remained free to associate “to voice their disapproval of the military’s message”).

13. *E.g.*, N.C. GEN. STAT. ANN. § 90-21.85 (2017), held unconstitutional by *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014).

14. *E.g.*, 25 TEX. ADMIN. CODE § 1.132-1.136 (2017); IND. CODE ANN. § 16-34-3-4(a) (2017).

women seeking abortions.¹⁵ Those materials describe the risks of abortion in ways that are lacking in context and likely to confuse the reader.¹⁶ To take one example, the brochure published by the Texas Department of Health and Human Services, called *A Woman's Right to Know*, references an increased risk of future infertility from abortion without explaining the extremely small likelihood of such an outcome.¹⁷ In fact, the overall risk of serious complications is very low, and future infertility is not even a risk that is specifically recognized by the medical literature.¹⁸ Thus, though the brochure's statement is not false in a strict sense, it is presented in a highly misleading manner and likely to be misconstrued by a reader who is not well versed in the scientific literature.

Another example of state-sanctioned misinformation involves the purported link between abortion and breast cancer. The same Texas brochure contains the following paragraph regarding breast cancer as a risk of induced abortion:

Your pregnancy history affects your chances of getting breast cancer. If you give birth to your baby, you are less likely to develop breast cancer in the future. Research indicates that having an abortion will not provide you this increased protection against breast cancer. In addition, doctors and scientists are actively studying the complex biology of breast cancer to understand whether abortion may affect the risk of breast cancer. If you have a family

15. TEX. HEALTH & SAFETY CODE ANN. § 171.013(a) (2017).

16. TEX. DEPT' OF HEALTH & HUMAN SERVS., *A WOMAN'S RIGHT TO KNOW* 9 (2016).

17. *Id.* Although the statements in the brochure that infertility is a risk of abortion and that “[t]he further along you are in your pregnancy, the greater the chance of serious complications that can cause you to be infertile” are technically true, they may suggest to someone unversed in the medical literature that the risks associated with abortion are substantial. *Id.*

18. Ushma D. Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 *OBSTETRICS & GYNECOLOGY* 175, 175 (2015) (finding, based on a study of California Medicaid patients, that the overall complication rate for abortion is 2.1 percent and that the rate of major complications, such as the kind that can lead to infertility, is only 0.23 percent); see also Hani K. Atrash & Carol J. Rowland Hogue, *The Effect of Pregnancy Termination on Future Reproduction*, 4 *BAILLIÈRE'S CLINICAL OBSTETRICS & GYNAECOLOGY* 391 (1990) (finding no significant risk of reproductive problems following abortion).

history of breast cancer or breast disease, ask your doctor how your pregnancy will affect your risk of breast cancer.¹⁹

This paragraph implies that there is a medical link between choosing abortion and an elevated risk of breast cancer or, at the very least, it suggests that the jury is still out on this question. However, the National Cancer Institute—which is a division of the National Institutes of Health and “the federal government’s principal agency for cancer research”²⁰—has found that “[i]nduced abortion is not associated with an increase in breast cancer risk.”²¹ Moreover, it has indicated that that finding is supported by the strongest scientific evidence.²²

In a similar vein, the Alaska Department of Health and Social Services, in its online materials, presents information on the purported abortion-breast cancer link in a highly misleading manner. First, it provides the view of the American College of Obstetricians and Gynecologists (ACOG) disputing any link between abortion and breast cancer.²³ ACOG is the principal membership organization for physicians in that specialty area.²⁴ Directly after this, it describes the view of the

19. TEX. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 16, at 9.

20. *National Cancer Institute Overview and Mission*, NAT’L CANCER INST., <https://www.cancer.gov/about-nci/overview> (last visited July 11, 2017) [<https://perma.cc/J4VE-TXV7>].

21. *Abortion, Miscarriage, and Breast Cancer Risk: 2003 Workshop*, NAT’L CANCER INST., <https://www.cancer.gov/types/breast/abortion-miscarriage-risk> (last visited June 16, 2017) [<https://perma.cc/K5ZX-G8GF>].

22. *Id.*

23. ALASKA DEP’T OF HEALTH & SOC. SERVS., MAKING A DECISION ABOUT YOUR PREGNANCY, (2010), <http://dhss.alaska.gov/dph/wcfh/documents/informed-consent/assets/abortion.pdf> [<https://perma.cc/K78B-HUPA>]. Alaska law gives the physician the option of either providing this internet information to the woman or informing her of “the nature and risks of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a voluntary and informed decision of whether to undergo the procedure.” ALASKA STAT. ANN. § 18.16.060(b) (2017). Given the official statements quoted above on the subject of breast cancer risk, it is probably not entirely clear, as a matter of Alaska law, whether a “reasonable patient” would consider that information “material” to her abortion decision. It is therefore logical to assume that a prudent physician would simply opt to provide the state-sponsored message to the patient in order to avoid the risk of liability.

24. *About Us*, AM. CONG. OF OBSTETRICIANS AND GYNECOLOGISTS (ACOG), <https://www.acog.org/About-ACOG/About-Us> (last visited Aug. 15, 2017) [<https://perma.cc/T7E8-7MKL>]. The American College of Obstetricians and Gynecologists is associated with, but distinct from, the American Congress of Obstetricians and Gynecologists, which is dedicated to advocacy on behalf of

American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG)—an advocacy organization dedicated to “encourag[ing] and equip[ping] its members and other concerned medical practitioners to provide an evidence-based rationale for defending the lives of both the pregnant mother and her unborn child.”²⁵ Unsurprisingly, the AAPLOG quote asserts that such a link exists.²⁶ This juxtaposition of the two sources, without further commentary, appears to put the two sources on equal footing, although one source is an objective medical source and the other comes from a political advocacy organization. The Texas and Alaska materials do not provide any actual statistics or reference the National Cancer Institute’s finding, which might allow the reader to put these two opposing viewpoints into context.

Despite their obviously misleading nature, such statements are unlikely to raise First Amendment concerns because they involve government speech.²⁷ The government is generally unconstrained by the First Amendment when it expresses its own message.²⁸ It need not observe the standards of content or viewpoint neutrality.²⁹ In addition, there is little danger that the patient will mistake the state-sponsored brochure for the physician’s own message, and the physician is entitled in any case to provide additional context for the information in the state’s materials.³⁰ There is, therefore, no concern about the speech being misattributed to a private

ob/gyns. The two organizations share a website.

25. *Our Mission Statement*, AAPLOG, <http://aaplog.org/about-us/our-mission-statement/> (last visited Aug. 15, 2017) [<https://perma.cc/7VCC-XV8R>].

26. ALASKA DEP’T OF HEALTH & SOC. SERVS., *supra* note 23 (“The American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) supports the view that there is a causal relationship between breast cancer and the termination of pregnancy.”).

27. *See infra* Part II.

28. Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1262 (2010) (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009)) (noting that the First Amendment does not constrain government speech). Helen Norton has argued, however, that governmental lies ought to be understood to violate the Free Speech Clause of the First Amendment in some circumstances. Norton, *The Government’s Lies*, *supra* note 5, at 99–107.

29. *Summum*, 555 U.S. at 479–80.

30. *Cf.* Abner S. Greene, *(Mis)attribution*, 87 DENV. U. L. REV. 833, 844 (2010) (arguing that constitutional problems may arise when government speech can be mistakenly attributed to individuals, but that the ability to distance oneself from the government speech may be relevant).

speaker and no damage to the speaker's own interests. As explained at greater length in Part III, however, such requirements may violate the Due Process Clause by imposing an undue burden on abortion rights.

B. Compelled Private Lies

Even more troubling than misleading statements in government publications are compelled private lies. These are government-mandated falsehoods that physicians are required to provide directly to women seeking abortions within the context of a doctor-patient counseling session. I refer to these statements as “compelled private lies” because they are misleading or false statements that the government forces private speakers to pronounce. For example, South Dakota requires doctors to inform women that abortion carries an “[i]ncreased risk of suicide ideation and suicide.”³¹ According to the Eighth Circuit Court of Appeals—which considered a challenge to this requirement—some studies had in fact indicated that the risk of suicide was greater among women who had had abortions than among women who had not, but there was no evidence to support the notion that the greater risk was *caused by* the abortion (as opposed to being caused by the unplanned pregnancy itself or other mental health issues that may correlate with unplanned pregnancy).³² The Eighth Circuit nonetheless upheld the provision, explaining that it was true that women who have had abortions have a greater *relative* risk of suicide than women who have not, regardless of the cause, and that relative risk is often synonymous with *increased* risk.³³ There was, therefore, a possible reading according to which the required disclosure was true and, for this reason, the appeals court vacated the lower court's order enjoining the law.³⁴

From a free speech perspective, requirements that turn abortion providers into mouthpieces for the state are

31. *Planned Parenthood Minn. v. Rounds*, 686 F.3d 889, 894 (8th Cir. 2012) (quoting S.D. CODIFIED LAWS § 34-23A-10.1(e)(ii)(2017)).

32. *Rounds*, 686 F.3d at 900–02; *see also* Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175, 1182–85 (2014) (explaining, based on scientific studies, that “abortion does not in fact undermine women's mental health”).

33. *Rounds*, 686 F.3d at 895.

34. *Id.* at 905–06.

considerably more problematic than government speech. Because they compel private speech, the First Amendment applies.³⁵ There is a risk, of course, of misattribution—that is, that the woman will think that the speech reflects the doctor’s views rather than those of the state.³⁶ In addition, some such speech requirements are almost blatantly ideological. The commandeering of an individual’s body and mind to require a political or ideological utterance with which the individual disagrees usually violates the right to freedom of expression.³⁷

The caselaw on compelled speech divides the speech to be compelled into different categories, which correspond to different levels of scrutiny. Compelled speech is generally subject to strict scrutiny when it is ideological in nature.³⁸ Thus, in *Comprehensive Health of Planned Parenthood v. Templeton*, the district court found that Planned Parenthood was likely to succeed in its challenge to a Kansas law requiring the clinic to include a hyperlink to a government internet site containing inaccurate and biased information about abortion.³⁹ For example, the government site asserted that pregnancy begins with fertilization, whereas the medical consensus is that pregnancy begins with implantation; it understated the number of pregnancies that end naturally in miscarriage; and it stated that “[a]bortion terminates the life of a whole, separate, unique, living human being.”⁴⁰ Under the statute, Planned Parenthood was required to refer to this information as being “objective, nonjudgmental, [and] scientifically accurate.”⁴¹ Ultimately, the court did not clearly hold that this requirement violated Planned Parenthood’s free speech rights

35. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”).

36. Abner S. Greene, *The Concept of the Speech Platform: Walker v. Texas Division*, 68 ALA. L. REV. 337, 370 (2016) (“The right against compelled speech is best understood as a right not to foster a message one does not wish to foster, but sometimes the Court focuses on the concern with being improperly tagged with a message with which one does not want to be associated.”).

37. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631–34 (1943); Greene, *supra* note 36, at 370.

38. *Wooley*, 430 U.S. 705 at 713; Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 957 (2007).

39. *Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Templeton*, 954 F. Supp. 2d 1205, 1219 (D. Kan. 2013).

40. *Id.* at 1219 n.16.

41. *Id.* at 1212.

but instead, after declaring the case to be a close one, stated that the provision “appears overbroad,” at least with respect to non-patients who may view Planned Parenthood’s website.⁴²

When the speech is considered either commercial or professional in nature, the level of scrutiny applied is lower.⁴³ Although the free-speech doctrine pertaining to professional speech is relatively undeveloped,⁴⁴ it is clear that the state is permitted to mandate a wider range of factual disclosures in the context of the doctor-patient relationship—particularly in the form of informed consent requirements—than in other private speech contexts.⁴⁵ The regulation of private speech in the form of informed consent law may be considered an aspect of the regulation of the medical profession itself.⁴⁶ As such, constitutional doctrine in this context is concerned primarily with the protection of the patient rather than with the expressive interests of the speaker.⁴⁷

42. *Id.* at 1221. It appears that the case settled before trial. Order Administratively Closing Case, Dkt. 56, 954 F. Supp. 2d 1205, 13-CV-02302 (administratively closing the case and ordering the parties to submit a stipulation of dismissal).

43. *Templeton*, 954 F. Supp. 2d at 1220 n.17; Post, *supra* note 38, at 949 (“When a physician speaks to the public, his opinions cannot be censored and suppressed, even if they are at odds with preponderant opinion within the medical establishment. But when a physician speaks to a patient in the course of medical treatment, his opinions are normally regulated on the theory that they are inseparable from the practice of medicine.”); Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 786–88 (1999); see also Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1246–68 (2016) (defining professional speech and distinguishing it from other kinds of speech).

44. For example, the Third Circuit applied intermediate scrutiny in a case involving a state law ban on licensed counselors engaging in a form of therapy known as sexual orientation change efforts (SOCE). *King v. Governor of N.J.*, 767 F.3d 216, 233 (3d Cir. 2014) (“[P]rohibitions of professional speech are constitutional only if they directly advance the State’s interest in protecting its citizens from harmful or ineffective professional practices and are no more extensive than necessary to serve that interest.”). In so doing, it followed the lead of the Fourth and Eleventh Circuits. *Id.* at 232 (citing *Wollschlaeger v. Florida*, 760 F.3d 1195, 1217–26 (11th Cir. 2014); *Moore–King v. Cty. of Chesterfield, Va.*, 708 F.3d 560, 568–70 (4th Cir. 2013)). However, other courts have suggested that professional speech restrictions should receive more deferential review (*e.g.*, *Pickup v. Brown*, 740 F.3d 1208, 1231 (9th Cir. 2014)), or that *compelled* speech in a professional or commercial context requires only rational-basis scrutiny (*see, e.g.*, *Conn. Bar Ass’n v. United States*, 620 F.3d 81, 95–96 (2d Cir. 2010)).

45. Haupt, *supra* note 43, at 1258; B. Jessie Hill, *Casey Meets the Crisis Pregnancy Centers*, 43 J.L. MED. & ETHICS 59, 60 (2015).

46. Hill, *supra* note 45, at 60.

47. *Id.* at 62.

One of the most important cases dealing with professional speech arose in the abortion context. In the seminal case *Planned Parenthood v. Casey*, the Supreme Court considered a claim that Pennsylvania's informed consent requirements for abortion violated the physician's First Amendment rights by requiring her to provide specific state-mandated information to the patient.⁴⁸ The state-mandated information included "the nature of the procedure, the health risks of abortion and of childbirth, and the 'probable gestational age of the unborn child,'" as well as "the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion."⁴⁹ Of course, none of these statements was false or even misleading.

In a very brief passage, the Court rejected the free-speech claim out of hand:

To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.⁵⁰

The Court's language of reasonableness, along with its dismissive treatment of the claim, suggest something like rational basis review was applied to the physician's free speech claim.

The Court also considered whether the informed consent requirements imposed an undue burden on abortion rights, applying the standard that the *Casey* plurality had just adopted for analyzing abortion restrictions.⁵¹ After a somewhat lengthier analysis, the Court also held that relevant, truthful, and nonmisleading informed consent requirements did not

48. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992).

49. *Id.* at 881.

50. *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705 (1977); *Whalen v. Roe*, 429 U.S. 589, 603 (1977)).

51. *Id.* at 874.

constitute an undue burden.⁵² Concluding that the state had a legitimate interest in ensuring that the woman's choice was well-informed and that both psychological risks of abortion and "impact on the fetus" were relevant to her decision, the Court upheld the Pennsylvania requirements.⁵³

As an added twist, some courts simply decline to apply First Amendment doctrine at all to compelled-speech challenges arising in the abortion context.⁵⁴ For example, the same South Dakota law requiring that women be informed of their increased suicide risk also required doctors to tell them that they were about to "terminate the life of a whole, separate, unique, living human being."⁵⁵ Rather than consider whether such a compelled ideological statement met the First Amendment standard of strict scrutiny, the Eighth Circuit simply merged the First Amendment analysis with the "undue burden" standard laid out in *Casey* for identifying violations of the Due Process right to abortion.⁵⁶ The court explained:

[T]he [Supreme] Court found no violation of the physician's right not to speak, without need for further analysis of whether the requirements were narrowly tailored to serve a compelling state interest, . . . where physicians merely were required to give 'truthful, nonmisleading information' relevant to the patient's decision to have an abortion.⁵⁷

Thus, compelled private lies fall in a sort of no-man's-land of First Amendment doctrine, in which it is unclear which free-speech analysis applies—if any applies at all.

52. *Id.* at 882.

53. *Id.* at 881–84.

54. See Corbin, *supra* note 32, at 1191–92; Caitlin E. Borgmann, *Abortion Exceptionalism and Undue Burden Preemption*, 71 WASH. & LEE L. REV. 1047, 1068–83 (2014).

55. *Planned Parenthood of Minn. v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008).

56. *Id.* at 734; see also *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) (merging the undue burden and First Amendment analyses, and finding that informed consent requirements "do not fall under the rubric of compelling 'ideological' speech that triggers First Amendment strict scrutiny").

57. *Rounds*, 530 F.3d at 734.

C. *False Narratives*

A recent wave of legislation imposes requirements on abortion providers that seem, at first glance, to have little or nothing to do with speech. However, these laws have an expressive function, and this expressive function is, in fact, one of the laws' most important features.⁵⁸ For example, both Texas and Indiana have recently passed laws requiring that fetal tissue be buried or cremated, as if it were a human corpse rather than tissue removed during a medical procedure.⁵⁹ As another example, in 2011, North Carolina passed a law requiring every patient to receive an ultrasound before an abortion.⁶⁰ In the course of the ultrasound, the provider was required to give the following narration:

a simultaneous explanation of what the display is depicting, which shall include the presence, location, and dimensions of the unborn child within the uterus and the number of unborn children depicted. The individual performing the display shall offer the pregnant woman the opportunity to hear the fetal heart tone. . . . [d]isplay the images so that the pregnant woman may view them[, and] [p]rovide a medical description of the images, which shall include the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable.⁶¹

If she wished, the woman could cover her ears and avert her eyes, but the provider would still be required to give the above-described narration.⁶² In other words, the state was requiring the provider to delineate the human features of the fetus, whether or not the woman wanted to hear about them. Thus, the North Carolina law forced the provider to parrot the state's narrative of fetal personhood and to do so regardless of any possible impact of the narrative on the patient herself. The

58. For a general overview of expressivism in law, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000).

59. *E.g.*, 25 TEX. ADMIN. CODE § 1.132-1.136; IND. CODE § 16-34-3-4(a).

60. N.C. GEN. STAT. ANN. § 90-21.85 (2017).

61. *Id.*

62. *Id.* at § 90-21.85(b); *Stuart v. Camnitz*, 774 F.3d 238, 252–53 (4th Cir. 2014).

narrative might have been psychologically traumatizing in some circumstances, or it might have had no impact at all if a particular woman chose to plug her ears and look away. False-narrative laws may therefore be understood as a form of symbolic government speech (and as such are related to the category of direct government lies discussed above). They convey a message to patients and to the public at large through requiring particular conduct, rather than through speech.

States justify these false-narrative laws on various grounds. North Carolina claimed that its ultrasound requirement was a measure to ensure that the woman's consent was fully informed.⁶³ Indiana asserted that its law regarding burial or cremation of fetal remains served to protect the dignity of fetal life.⁶⁴ However, these laws clearly impose on the woman, and perhaps on the public, a particular conception of the fetus and pregnancy.⁶⁵ They encourage, and are likely intended to encourage, or even force, women to think of fetuses *in utero* as babies and to put themselves in a mothering role with respect to that fetus.⁶⁶ They force both the woman and the abortion provider to go through the motions of prenatal care (in the case of ultrasound laws) or of stillbirth (in the case of burial/cremation laws), thus coercing the woman to contemplate a very different setting from that of intentional pregnancy termination. Of course, many women who choose to abort either do not view or wish to view the fetus in the same way that they would view a wanted pregnancy.⁶⁷

Moreover, these laws, by their very enactment (often accompanied by a great deal of publicity), send the same

63. *Stuart*, 774 F.3d at 251.

64. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r*, 265 F. Supp. 3d 859, 870–71 (S.D. Ind. 2017) (describing the state's asserted interests).

65. Fetal tissue disposal laws may also be intended to impose heavy financial burdens on abortion clinics that may, in some cases, force them to close, or they may be intended to give funeral homes and crematoria the power to prevent abortion clinics from operating by refusing to accept fetal remains. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 231 F. Supp. 3d 218, 230–32 (W.D. Tex. 2017).

66. *Cf.* Carol Sanger, "The Birth of Death": *Stillborn Birth Certificates and the Problem for Law*, 100 CAL. L. REV. 269, 307 (2012) (discussing laws allowing the issuance of birth certificates for stillborns and "the implicit relationship between acknowledging birth and establishing fetal personhood"); Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 401 (2008) [hereinafter Sanger, *Seeing and Believing*] ("The image is being offered to prove that this fetus is your child. It is something in the order of a dare.").

67. Sanger, *Seeing and Believing*, *supra* note 66, at 401.

messages to the public at large, thus increasing the stigma surrounding the abortion procedure and perhaps magnifying any guilt or shame the woman might feel about her decision. It is not uncommon for the legislation to contain colorful and politically charged language, such as referring to the fetus as an “unborn child.”⁶⁸ Such language furthers the narrative that the pregnant woman is already a mother, and that her pregnancy termination is murder. This kind of legislation, by telegraphing a denigrating message about abortion and by forcing the provider and the woman to participate in enacting a narrative of motherhood and fetal personhood that the state has imposed upon them, stigmatizes both patients and providers.

Although such laws have expressive content, they implicate “speech,” if at all, only indirectly. Therefore, they are usually not found to violate the First Amendment.⁶⁹ Instead, a few of these laws have been challenged under the Fourteenth Amendment. For example, the Indiana law regulating disposal of fetal tissue was found to run afoul of substantive due process because it lacked any legitimate purpose.⁷⁰ This holding applied the fundamental principle that all laws must have a legitimate purpose, which is not a requirement that is specific to abortion restrictions.⁷¹ Faced with a similar law from Texas, the Fifth Circuit issued a preliminary injunction on grounds of vagueness and undue burden, finding that the difficulty of complying with the law substantially outweighed the claimed benefit of respecting fetal dignity.⁷² In contrast, in considering an ultrasound requirement, the Fifth Circuit merged the First

68. *E.g.*, N.C. GEN. STAT. ANN. § 90-21.85 (2017); ALA. CODE § 26-23A-4 (2017). Fetal tissue legislation recently proposed (but not enacted) in Ohio used the derogatory term “abortionist” to refer to physicians who perform abortions. H.R. 149, 132nd Gen. Assemb., Reg. Sess. (Ohio 2017).

69. Ultrasound and, especially, required ultrasound narration are forms of speech and have been analyzed under the First Amendment. Indeed, in *Stuart v. Camnitz*, the Fourth Circuit applied intermediate scrutiny to a claim that an ultrasound requirement violated the First Amendment. 774 F.3d 238, 249 (4th Cir. 2014). However, I argue here that the constitutional problems with false-narrative laws do not arise from the content of the ultrasound or the speech accompanying it, which is factual; instead, they arise from the expressive content of the required *conduct*.

70. *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r*, 265 F. Supp. 3d 859, 870 (S.D. Ind. 2017).

71. *Id.*

72. *Whole Woman’s Health v. Hellerstedt*, 231 F. Supp. 3d 218, 232 (W.D. Tex. 2017).

Amendment and “undue burden” analyses and found that, because the information provided by the ultrasound was relevant, truthful, and nonmisleading, the law was constitutional.⁷³ None of these cases, however, explicitly considered the expressive harm wrought by the restrictions.

II. HOW THE PROBLEM OF LIES IN THE ABORTION CONTEXT IS UNIQUE

The abortion context is legally unique in many respects. This Part focuses on the particular ways in which state-compelled, misleading abortion-related disclosures pose special problems for constitutional law. In particular, such requirements are resistant to challenge under the First Amendment. Direct government lies, as explained above, generally constitute government speech and are therefore immune to First Amendment challenges. Section II.A further explains that compelled private lies, which are a form of compelled speech, could be subject to free-speech challenges in theory, but they are often difficult to categorize for First Amendment purposes. As a result, some courts engage in a highly deferential analysis of those falsehoods. Second, as Section II.B discusses, the falsehoods contained in both direct government lies and compelled private lies may be difficult to identify, as they are often a product of the particular way in which factual information is presented. Third, Section II.C suggests that the primary harm resulting from lies in the abortion disclosure context—whether direct government lies, compelled private lies, or false narratives—differs from the sort of harm usually associated in the legal literature with government falsehoods in that it is primarily expressive in nature. The unusual nature of this harm makes these lies difficult to challenge under the First Amendment, as well as under the Fourteenth Amendment undue-burden standard, as it has been understood in the years leading up to the U.S. Supreme Court’s 2016 decision in *Whole Woman’s Health v. Hellerstedt*.

73. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 580 (5th Cir. 2012).

A. *Categorizing the Speech*

As explained above, under the First Amendment different degrees of scrutiny apply to compelled speech mandates, depending on the nature of the speech being compelled.⁷⁴ Although some uncertainty remains about the appropriate treatment of compelled professional speech, it is generally subjected to rational-basis review so long as the regulation is part and parcel of the regulation of the underlying profession itself.⁷⁵ Thus, informed consent requirements must actually be pertinent to the medical treatment and further the goals of that treatment.⁷⁶ If they simply further unrelated goals or contain irrelevant information, they would be scrutinized more strictly. For example, requiring physicians to inform patients of the medical risks of a particular surgery would be within the scope of medical treatment, but requiring them to endorse a particular political candidate would not.⁷⁷ Thus, compelled statements that are categorized as ideological speech will be subjected to strict scrutiny, whereas compelled statements that are categorized as professional speech and within the scope of medical relevance will be subjected to a lower level of scrutiny.

When compelled private lies are challenged under the First Amendment, however, courts have a particularly difficult time categorizing them.⁷⁸ Though many courts implicitly identify them as professional speech, thus subjecting them to minimal First Amendment scrutiny, some courts recognize that the speech being compelled is in some instances ideological in nature and therefore must be subject to stricter scrutiny.⁷⁹ As I

74. See *supra* Section I.B.

75. *Id.* But see *supra* note 44 (explaining that some courts apply intermediate scrutiny when professional speech is affected).

76. Post, *supra* note 38, at 952.

77. *Id.*

78. Similarly, courts have difficulty categorizing misleading or false speech by crisis pregnancy centers, which also pertains to abortion. Hill, *supra* note 45, at 69 (citing *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 245 (2d Cir. 2014), *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 192 (4th Cir. 2013), and *O'Brien v. Mayor & City Council of Baltimore*, 768 F. Supp. 2d 804, 814 (D. Md. 2011), *aff'd sub nom.* *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 683 F.3d 539 (4th Cir. 2012), *on reh'g en banc*, 721 F.3d 264 (4th Cir. 2013), and *aff'd in part, vacated in part, remanded sub nom.* *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264 (4th Cir. 2013)).

79. Compare *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724 (8th Cir. 2008), and *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d

have argued elsewhere, this confusion may be explained, in part, by the deeply contested nature of abortion itself.⁸⁰ Some judges implicitly frame abortion as a moral or ideological matter, whereas others view it as a medical procedure and fundamentally a matter of health care decision-making.⁸¹ Ironically, however, when judges view the procedure as primarily a moral choice, rather than subjecting the compelled speech to a heightened level of scrutiny, they view a wider range of topics as being pertinent to the professional speech that takes place between the doctor and the patient.⁸² They therefore treat requirements such as telling women that the fetus or embryo is a “whole, separate, unique, and living” human being as relevant, truthful, and nonmisleading.⁸³ By contrast, when the judge’s understanding of the nature of the abortion procedure is more medical, he or she is more likely to characterize such mandatory disclosures as ideological in nature and scrutinize them carefully.⁸⁴ In sum, significant confusion lingers in the caselaw.

B. Identifying the Lies

Mandatory disclosures in the abortion context are often misleading or likely to confuse, but not actually or entirely false.⁸⁵ This may be true whether the disclosure is a direct government lie or a compelled private lie. The “suicide advisory” required by South Dakota (discussed in Section I.B) is one example. Similarly, some states require statements regarding fetal pain—such as that the fetus has certain “structures” in place by a certain gestational age that are “necessary” for pain perception.⁸⁶ Such statements may be factually true in a narrow sense but are likely to be understood

570 (5th Cir. 2012), *with* *Stuart v. Camnitz*, 774 F.3d 238, 249 (4th Cir. 2014), *and* *Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Templeton*, 954 F. Supp. 2d 1205, 1219–21 (D. Kan. 2013).

80. Hill, *supra* note 45, at 66.

81. *Id.*

82. *Id.* at 66–67.

83. *Rounds*, 530 F.3d at 736.

84. Hill, *supra* note 45, at 66.

85. See, e.g., Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 111, 143 (2008).

86. E.g., MO. REV. STAT. § 188.027.1(5) (2017); GA. CODE ANN. § 31-9A-4(a)(3) (2017).

as implying that the fetus actually does feel pain, which is not the meaning of the statement.⁸⁷ Instead, the statement that the fetus has the necessary anatomical structures in place ignores the question whether the fetus is sufficiently conscious to perceive pain—a complex issue mired in scientific uncertainty.⁸⁸

Though it is rhetorically powerful to refer to these statements as “lies,” the problem is often that they simply lack context or that they rely on existing but highly unreliable or even disreputable evidence.⁸⁹ Thus, it is not clear that they should be labeled as lies. The term “lie” is a highly charged one, and scholars have put forward various definitions. Professor Helen Norton, for example, defines a lie as “a false assertion of fact known by the speaker to be untrue and made with the intention that the listener understand it to be true.”⁹⁰ Professor Seana Shiffrin, by contrast, emphasizes two elements in her definition of lying: that the speaker does not *believe* her own statement to be true; and that the speaker makes the statement in a *context* in which the speaker intends her statement to be taken as true.⁹¹ And the philosopher Thomas L. Carson defines a lie as “a deliberate false statement that the speaker warrants to be true.”⁹² All of these definitions are difficult to apply to the sorts of misleading statements required in the abortion context. First, Norton’s and Shiffrin’s definitions rely on the speaker’s subjective intent, knowledge, or belief about the statement. However, in the case of a false statement promulgated by a state legislature—a multi-member body whose individual members may act with differing intentions and beliefs—the relevant intent or state of mind is difficult to identify. Moreover, it is not clear whether the individuals who vote for the sorts of measures discussed in this article are aware the mandated disclosures are false.⁹³ Finally,

87. Tobin, *supra* note 85, at 143–46.

88. *Id.* at 144–45.

89. Indeed, Caroline Corbin uses the term “distortion” instead of “lie.” Corbin, *supra* note 32, at 1175.

90. Norton, *The Government’s Lies*, *supra* note 5, at 77.

91. SHIFFRIN, *supra* note 5, at 12.

92. THOMAS L. CARSON, LYING AND DECEPTION: THEORY AND PRACTICE 15 (2010).

93. However, Seana Shiffrin’s definition allows for reckless statements made without knowledge of whether they are true or false to meet her definition of lies. SHIFFRIN, *supra* note 5, at 13. If someone makes a statement without knowing

it is not entirely clear that all of the problematic disclosures are actually false, as is required by Carson's and Norton's definitions. Rather, they are misleading or deceptive in their presentation in that they are presented as truthful but aimed at producing false beliefs about abortion.⁹⁴

Where compelled private lies are concerned, moreover, there may be another complicating factor, in that the setting of a live doctor-patient interaction presumably allows the provider some flexibility in how the state's information is conveyed. For example, the provider can add context to misleading assertions about particular medical risks. Moreover, legislation mandating such disclosures in the form of compelled private lies sometimes simply requires doctors to *discuss* particular topics—such as the link between abortion and breast cancer—rather than requiring particular statements.⁹⁵ Thus, the laws arguably allow doctors to modify the required information by adding their own accurate and nonmisleading information. Nonetheless, the deceptive effect arises from the mere fact that the doctor is required to discuss a purported risk that he or she believes to be nonexistent and that he or she would not bring up but for the legal requirement. By raising and then downplaying a particular purported risk, the physician may nonetheless draw more attention to the risk than is medically warranted. Yet, if the physician chooses to ignore discussion of the risk altogether, even when the law specifically calls it out, she may be inviting a lawsuit. Compelled private speech thus puts abortion providers in a sort of catch-22: they violate the law if they avoid the state-mandated subjects of informed consent, but at the same time, they are arguably providing an inaccurate impression to patients merely by addressing them.

whether it is true, it still meets Shiffrin's requirement that the speaker does not *believe* it to be true. *Id.*

94. As such, they are perhaps better understood as "deceptions" rather than "lies." "Deception" may be defined to include statements that are intended to lead the listener to a false belief or confirm a false belief, whether or not the speaker believes the statements to be true. *Id.* at 19–20; CARSON, *supra* note 92, at 46.

95. See, e.g., MISS. CODE ANN. § 41-41-33 (2017) (requiring informed consent to abortion to include "the particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage and breast cancer, and the danger to subsequent pregnancies and infertility").

C. *Describing the Harm*

Finally, government-sponsored lies in the abortion context are particularly challenging to analyze under the standard First Amendment doctrinal framework because the principal type of harm that they cause is distinct from the type of harm that government-sponsored lies cause in other contexts. Unlike the harm caused by governmental lies aimed at the public on more obviously political subjects, these lies are more targeted at a specific individual or group, and the harm is primarily expressive in nature.⁹⁶ This is true of all three kinds of lies I have identified here: direct government lies, compelled private lies, and false narratives.

Some of the harms that are uniquely caused by government lies include injury to the listener's dignity that arise from the deceptive and manipulative nature of the lies—sometimes rising to the level of coercion or government-sponsored deprivation of individuals' liberty—and breach of trust that violates the government's duty to its citizens and undermines public confidence in government.⁹⁷ Moreover, various values served by the First Amendment are undermined when the government causes these harms by lying to its citizens. Government lies undermine individual autonomy and democratic self-governance.⁹⁸ They also obstruct the search for truth, which is an important end served by the First Amendment.⁹⁹ Recognizing that governmental lies may not be easy to challenge under existing First Amendment doctrine, however, Norton focuses on coercion as a possible touchstone of unconstitutionality, finding that lies may sometimes coerce individuals by directly interfering with their ability to exercise their constitutional rights.¹⁰⁰

96. As noted below, the harm may be more like the harm that arises from defamatory lies about a particular individual or statements that bring a particular, identifiable group into disrepute.

97. Norton, *The Government's Lies*, *supra* note 5, at 79–83. Norton cites several examples of government lies, including false justifications for military engagement, false statements to cover up illegal activity by government officials, and concealing the existence of a covert program or identity of an undercover officer. *Id.* at 73–75. I argue here that such prototypical lies are less targeted at a particular group than lies in the abortion context, and they do not create the same kind of stigma.

98. *Id.* at 101.

99. *Id.* at 102.

100. *Id.* at 102–07.

Coercion is certainly a concern when the government mandates false information in the abortion context. In the name of ensuring that a woman's decision is fully informed and therefore autonomous, states have engaged in deceptive behavior and even required abortion providers to serve as mouthpieces for misleading information.¹⁰¹ Even when factually true, there is a great danger that the information—such as information pertaining to the physical and mental health risks of abortion—will be misunderstood by the woman and deter her from proceeding with the abortion. Moreover, the risk of misattribution accompanies compelled private lies, which force abortion providers to promote the state's message. Because the state is deploying the provider to further its own message, the woman may assume that the false or misleading information is coming from her physician and accord the state-mandated information more weight than she should.

Nonetheless, there is reason to doubt that coercion is the biggest problem—or even a very real problem—with such misstatements in the abortion context. Although misleading statements have been found to reduce women's knowledge about abortion,¹⁰² there is little evidence to suggest that the informed consent process actually leads women to change their minds. Indeed, researchers have demonstrated that ultrasound viewing, which is sometimes state-mandated as part of the informed consent process, has virtually no effect on a woman's decision to continue with the abortion.¹⁰³ Similarly, a review of the social science literature on mandatory counseling and waiting period laws found that state-required counseling, with or without a mandatory waiting period, likely had no effect on the abortion decision.¹⁰⁴ Waiting periods accompanied by an *in-*

101. See *supra* Section I.B.

102. N.F. Berglas et al., *State-Mandated (Mis)Information and Women's Endorsement of Common Abortion Myths*, 27 WOMEN'S HEALTH ISSUES 129 (2017).

103. Mary Gatter et al., *Relationship Between Ultrasound Viewing and Proceeding to Abortion*, 123 OBSTETRICS & GYNECOLOGY 81 (2014) (finding that 98.4 percent of women who view the ultrasound proceed to terminate the pregnancy, as compared to 99 percent of women who do not view the ultrasound). The impact is slightly greater for the small minority of women who come into the clinic with "low decision certainty." *Id.*

104. THEODORE J. JOYCE ET AL., GUTTMACHER INST., THE IMPACT OF STATE MANDATORY COUNSELING AND WAITING PERIOD LAWS ON ABORTION: A LITERATURE REVIEW 15 (Guttmacher Inst. 2009) https://www.guttmacher.org/sites/default/files/report_pdf/mandatorycounseling.pdf [<https://perma.cc/C4R3->

person counseling requirement, which force women to make two trips to the abortion provider, were, however, “associated with a decline in the abortion rate, a rise in abortions obtained out of state and an increase in the proportion of second-trimester abortions.”¹⁰⁵ This suggests that the expense and difficulty of making multiple trips to an abortion provider may cause women to forgo or delay an abortion, but the information given in counseling does not.

In view of this empirical evidence, I contend that the primary harm caused by governmental misinformation about abortion arises not from the deception, but rather from the stigmatizing or even traumatizing impact of the particular information conveyed. The likely outcome of providing the sorts of misinformation about abortion described in this article is not that the woman will carry to term. Rather, the more likely outcome is that she will terminate the pregnancy anyway, while experiencing fear, guilt, and shame as a result of the false and stigmatizing information that she is given.¹⁰⁶

Researchers have studied the emotional impact of ultrasound viewing on women seeking abortion in order to test the hypothesis that seeing the image of the fetus causes the woman to form a bond with the fetus.¹⁰⁷ They found no evidence of such an effect.¹⁰⁸ They found that the most common

2PGC].

105. *Id.*

106. Seana Shiffrin identifies the primary harm of lying as impeding the listener’s ability “to construct a reliable picture of our world, so that we can navigate through it and understand who we are and where we are situated”—an understanding that is necessary to forming moral beliefs and fulfilling moral duties. SHIFFRIN, *supra* note 5, at 9–10. This description resonates in some ways with my description of the expressive harm that arises from government-sponsored falsehoods in the abortion context. I argue that the expressive injury consists of imposing a particular moral valence on abortion. As such, like other lies, the government-sponsored falsehoods distort—and are aimed at distorting—the woman’s moral understanding of her own conduct.

107. Katrina Kimport et al., *Beyond Political Claims: Women’s Interest in and Emotional Response to Viewing Their Ultrasound Image in Abortion Care*, 46 PERSPECTIVES ON SEXUAL & REPROD. HEALTH 185, 185 (2014). This study relied on data from the Turnaway Study, a large-scale project in which over 700 women from thirty abortion clinics across the country were interviewed for approximately forty-five minutes one week after their abortion. The women were asked whether they viewed an ultrasound and how it made them feel, and they were also asked how difficult the decision was for them. The researchers then performed qualitative analysis on the women’s narrative answers, as well as logistic regression analysis to control for various factors. *Id.*

108. *Id.* at 190. However, they found that women who sought abortions in

emotion experienced by women after ultrasound viewing was neutral.¹⁰⁹ The next most commonly reported emotions, out of nine possible emotions identified by the researchers, were negative ones—sadness or depression (49 of 212 women), guilt or second-guessing (30 women), or feeling upset or bad (29 women).¹¹⁰ Thus, the three negative emotions combined significantly outweighed the neutral (77 women) or positive emotions (48 women).¹¹¹ These findings, together with the conclusion that ultrasound viewing does not actually affect the woman’s ultimate decision, strongly suggest that the primary impact of ultrasound laws is to cause women to experience negative emotions about their already firm decision to abort. It is reasonable to conclude, moreover, that ideological information casting abortion in a negative light or falsely inflating the risks of the procedure would lead to similar negative emotions.¹¹²

Extrapolating a bit from these studies, the available evidence on the actual, real-life effects of misleading abortion disclosures appears to be as follows. First, women generally believe the misleading information, so it reduces their knowledge about the procedure and makes their decisions less informed. Second, state-mandated disclosures do not have an effect on whether the woman carries out her decision to terminate her pregnancy (unless the law mandating the disclosures also imposes other burdens that may have a stronger deterrent effect, such as requiring two or more trips to the clinic).¹¹³ Third, at least some such requirements cause distress and emotional suffering for a large subset of the women subjected to them. Of course, not every type of government lie related to abortion has been carefully examined

states with laws requiring they be offered ultrasounds were more likely to choose to view the ultrasound—“suggest[ing] the possibility that viewing ‘offers’ are experienced more as ‘recommendations’ by patients.” *Id.*

109. *Id.* at 188.

110. *Id.*

111. *Id.*

112. The emotional impact of such misleading statements has not, to my knowledge, been systematically studied.

113. In one study, 36 percent to 70 percent of women undergoing pre-abortion counseling did not know or were unsure about several basic facts regarding abortion, such as whether it is safer than childbirth or whether it increases the risk of infertility; nonetheless, “the overwhelming majority” of women in that study stated that they were certain about their decision, and 86 percent had an abortion. Berglas et al., *supra* note 102, at 133.

in the social science literature, and the emotional impact on women of these legally mandated lies has not been thoroughly studied. These conclusions nonetheless suggest that the misleading nature of the information, while obviously troubling, is only part of the story. The expressive harm that is caused by the stigmatizing nature of the message is the other essential facet.

III. EXPRESSIVE HARM AND THE UNDUE BURDEN FRAMEWORK

I argued in Section II.C that the primary harm wrought by government-sponsored falsehoods in the abortion context is not that they foster misconceptions (though they certainly do that) or that they injure individuals' autonomy by dissuading them from a particular course of action through the use of false pretenses (though they may sometimes do that as well). Rather, the primary harm in such cases is the targeted emotional impact caused by the stigmatizing content of the message. I argue here that this harm is akin to other sorts of "expressive harm," such as when the government sponsors religious messages that violate the Establishment Clause or when it otherwise embraces a message that casts one group as inferior to another.

A well-developed body of legal scholarship has explored the idea that government actions may sometimes carry a message that is stigmatizing to a particular group, implying that that group does not share equal status with other members of society.¹¹⁴ The paradigm example of this is when the government endorses a particular set of religious beliefs by promoting messages or symbols associated with only one religion or subset of religions.¹¹⁵ However, some scholars have suggested that the concept of expressive harm may extend to other constitutional contexts and forbid government actions that stigmatize individuals based on other characteristics such

114. See, e.g., Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2013) (arguing that official religious speech, as well as other forms of official speech that expressively denigrate particular groups, violates the constitution); Note, *Expressive Harms and Standing*, 112 HARV. L. REV. 1313 (1999) (discussing expressive harms); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506–07 (1993).

115. *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 602 (1989).

as race, sex, or sexual orientation.¹¹⁶ I contend here that, more than coercion or direct threats to autonomy, the harm of government-mandated lies of all sorts in the abortion context is that they stigmatize women seeking abortions by casting abortion in an extremely negative light, causing emotional injury and distress.

In addition, while government-mandated lies have long been resistant to constitutional challenge under the First Amendment and under the undue burden standard of the Fourteenth Amendment, I argue that the Supreme Court's 2016 decision in *Whole Woman's Health v. Hellerstedt* suggests a new way to challenge such misinformation. In *Whole Woman's Health*, the Supreme Court struck down two Texas regulations that imposed onerous requirements on abortion clinics, threatening to shutter roughly three-quarters of the state's existing providers.¹¹⁷ Although the regulations at issue in that case did not involve informed consent or state-mandated misinformation, the Court, in the course of its analysis, revisited the meaning of *Casey's* "undue burden" framework in ways that may prove helpful to plaintiffs seeking to challenge misleading abortion informed consent requirements.

Before *Whole Woman's Health*, under *Casey*, an undue burden was understood by many courts to exist only when a state abortion restriction was so onerous that a large fraction of women was actually prevented from accessing the abortions they sought.¹¹⁸ This framework did not provide much room for challenging informed consent requirements—even blatantly misleading ones—because it simply could not be shown that women were actually deterred by this information.¹¹⁹

116. Tebbe, *supra* note 114, at 650; Note, *supra* note 114, at 1314–18.

117. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2301 (2016).

118. See, e.g., *Whole Woman's Health v. Lakey*, 769 F.3d 285, 300 (5th Cir. 2014), *vacated in part*, 135 S. Ct. 399 (2014); *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 370 (6th Cir. 2006) (interpreting *Casey* to "require[] courts to determine whether a large fraction of the women 'for whom the law is a restriction' will be 'deterred from procuring an abortion as surely as if the [government] has outlawed abortion in all cases'" (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992)); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 167–72 (4th Cir. 2000).

119. See, e.g., *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002) (rejecting a challenge to an in-person informed consent and waiting-period requirement because the plaintiff could not prove that the falling number of abortions in the state was the result of the law's requirements).

Moreover, in some cases, as explained above, courts have bent over backwards to characterize state-mandated information in such a way as to hold that it was truthful, nonmisleading, and relevant.¹²⁰

However, the undue burden test, as newly explained in *Whole Woman's Health*, requires courts to balance the benefits and burdens of a law, thereby refocusing the inquiry on the evidence supporting the law's purported effects.¹²¹ If a law imposes a significant burden on a woman's abortion access while conferring minimal benefit, that burden must be considered "undue."¹²² *Whole Woman's Health* also appears to place at least some burden on states to articulate a meaningful benefit resulting from the law and to produce evidence supporting that claimed benefit.¹²³

This reading suggests a new line of attack on misleading state-mandated information in the abortion context. Those wishing to challenge the constitutionality of misleading abortion disclosure requirements can argue—and demonstrate—that there is no actual benefit conferred by such requirements. As such, in the total absence of any benefit, any burden that the requirements impose on women seeking abortions must be considered "undue."

To the extent that state-mandated lies of all three sorts are justified in the name of informing a woman's choice, it must be pointed out that misleading or deceptive information cannot meaningfully serve the purpose of informing a woman's choice. And indeed, the available empirical evidence confirms that a woman's knowledge about the actual risks of abortion is decreased rather than increased by the sorts of misleading information provided by the most recent spate of informed consent laws.¹²⁴

Whole Woman's Health may also call into question whether laws such as ultrasound requirements actually advance any state interests unrelated to health and safety, such as protecting fetal life and encouraging women to choose

120. See, e.g., *Planned Parenthood Minn. v. Rounds*, 686 F.3d 889, 894 (8th Cir. 2012); *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724 (8th Cir. 2008).

121. *Whole Woman's Health*, 136 S. Ct. at 2309–10.

122. *Id.* at 2310, 2318.

123. *Id.* at 2310.

124. Berglas et al., *supra* note 102, at 129.

childbirth over abortion.¹²⁵ As discussed above, the available evidence simply does not support the notion that women are susceptible to changing their mind about the abortion upon receiving this information in the clinic setting, after an abortion decision has been made.¹²⁶ Most women who seek an abortion are certain of their decision, and disclosure requirements appear to do little to change that.¹²⁷ Rather, ultrasound requirements and misleading informed consent laws stigmatize women and cause them emotional distress, with minimal to no offsetting benefits. At a minimum, in advancing a particular interest such as protecting fetal life, the state should bear the burden under *Whole Woman's Health* of putting forth some evidence to support the notion that the law does in fact serve that interest.

Finally, one can question, after *Whole Woman's Health*, whether laws requiring burial or cremation of fetal tissue meaningfully advance any state interest at all. Although states have claimed that such provisions serve the state's interest in the dignity of potential life, courts may reasonably question whether this interest in potential life continues to exist after an abortion is completed and there is no longer a potential life.¹²⁸ And with respect to both fetal burial-or-cremation laws and ultrasound laws, it is also worth pointing out that the state does not have a legitimate interest in imposing its own narrative of pregnancy and motherhood upon women seeking abortions. As the Supreme Court explained in *Casey*, “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”¹²⁹ Similarly, one lower federal court dealing with a

125. See, e.g., *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577 (5th Cir. 2012).

126. See *supra* text accompanying notes 103–106.

127. Berglas et al., *supra* note 102, at 134; D.G. Foster et al., *Attitudes and Decision Making Among Women Seeking Abortions at One U.S. Clinic*, 44 PERSPECTIVES ON SEXUAL & REPROD. HEALTH 117 (2012) (finding 87 percent decisional certainty in a study of women at one clinic).

128. *Hopkins v. Jegley*, No. 4:17-CV-00404-KGB, 2017 WL 3220445, at *63 (E.D. Ark. July 28, 2017); *Whole Woman's Health v. Hellerstedt*, 231 F. Supp. 3d 218, 229–30 (W.D. Tex. 2017); *Planned Parenthood of Ind. & Ky. v. Comm'r*, 265 F. Supp. 3d 859, 871–72 (S.D. Ind. 2017).

129. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

burial-or-cremation law has recognized that the law “inferentially establish[ed] the beginning of human life as conception, potentially undermining the constitutional protection afforded to personal beliefs and central to the liberty protected by the Fourteenth Amendment.”¹³⁰ In addition to shedding doubt upon the state’s interest in fetal burial or cremation, this recognition also demonstrates that the sort of harm caused by such requirements is similar to the harm caused by violations of the Establishment Clause. In both cases, the government places its imprimatur on one set of religiously identified beliefs and implies that other beliefs are not of equal value.¹³¹

Moreover, it is fair to read *Whole Woman’s Health* as expanding the types of harm that courts can weigh against a law’s purported benefits. In particular, the Court did not suggest that the only relevant burden is one that prevents a large fraction of women from obtaining an abortion at all. Instead, the Court gave short shrift to this concept, which was derived from *Casey* and embraced by courts that adopted a narrow interpretation of “undue burden.”¹³² Rather, the Court took into account the increased distances women would have to travel, reduced quality of care, and other intangible forms of harm resulting from the Texas restrictions.¹³³ The version of the undue-burden test articulated in *Whole Woman’s Health* thus allows courts to take into account the expressive harm and stigma imposed by all three types of government-sponsored lies, and to weigh them against the essentially nonexistent health benefits, to find such requirements unconstitutional.

There are, of course, limitations to this new avenue for challenging state-mandated lies in the abortion context. First,

130. *Whole Woman’s Health*, 231 F. Supp. 3d at 229 (citing *Casey*, 505 U.S. at 846, 851).

131. Cf. SHIFFRIN, *supra* note 5, at 111–12 (suggesting an affiliation between the interests served by truthful free speech and other autonomy rights).

132. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016) (discussing the “large fraction” test in only one brief paragraph); sources cited *supra* note 118 (describing the narrow understanding of “undue burden,” which requires a law to prevent a large fraction of women from obtaining an abortion before it will be found unconstitutional).

133. *Whole Woman’s Health*, 136 S. Ct. at 2318 (“Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered.”).

expressive harm is not easily amenable to challenge under existing constitutional doctrine. For example, it is not clear what theory of standing would allow a plaintiff to challenge a government action that imposes only expressive harm.¹³⁴ Second, the expressive meaning of non-expressive government conduct may be difficult to discern, or at least subject to dispute in many cases.¹³⁵ Finally, *Whole Woman's Health* focused primarily on the material burdens and obstacles to abortion access imposed by the Texas regulations that threatened to close three-quarters of the state's abortion clinics—a very concrete harm that is arguably quite distinguishable from the stigmatic harm described here. Nonetheless, as discussed above, *Whole Woman's Health* clearly considered less severe and more intangible harms to be relevant to its analysis. Therefore, in some circumstances—particularly those in which a material harm accompanies a stigmatic harm—*Whole Woman's Health* offers intriguing possibilities. Such circumstances may occur with respect to laws that combine misleading informed consent requirements with onerous waiting-period and in-person counseling requirements that necessitate two or more trips to the abortion clinic. Concrete harm may also accompany stigmatic harm with respect to fetal burial-or-cremation laws if the law's legal requirements are prohibitively expensive to comply with. In many cases, such laws may effectively shut down some or all of the abortion clinics in the state.¹³⁶ Thus, while not a panacea, *Whole Woman's Health* may well offer a promising way forward for challenging all types of state-mandated lies in the abortion context.

134. NAACP v. Horne, 626 F. App'x 200, 201 (9th Cir. 2015) (affirming dismissal of a challenge to an Arizona law banning abortion for reasons of the sex or race of the fetus, holding that the “stigmatizing effect of the statutes” was insufficient injury to support standing); see also Note, *supra* note 114, at 1323–25 (identifying the lack of consistency with respect to standing in cases involving expressive harm).

135. Pildes & Niemi, *supra* note 114, at 507–08; see generally Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 276–301 (1987).

136. Hopkins v. Jegley, No. 4:17-CV-00404-KGB, 2017 WL 3220445, at *61 (E.D. Ark. July 28, 2017); *Whole Woman's Health v. Hellerstedt*, 231 F. Supp. 3d 218, 230–32 (W.D. Tex. 2017) (noting the Texas fetal burial-or-cremation law would “pose significant logistical challenges for healthcare providers in terms of sorting procedure, storage, transportation, and ultimate disposal” and may prove impossible to comply with).

CONCLUSION

This article has described the various forms of misleading statements that states mandate for women seeking abortions. It argues that the harm arising from the lies in this particular interaction are unique and that they are distinct in several ways from the harms brought about by governmental lies in other contexts. These unique qualities render such requirements particularly unsuited to challenge under the First Amendment and under the “undue burden” standard of the Fourteenth Amendment as it was understood by many courts until recently. This article proposes, however, that the undue burden framework as articulated in *Whole Woman’s Health v. Hellerstedt* may provide the most viable avenue for future challenges to the constitutionality of government-mandated misinformation in the abortion context.