

**TRUTHFUL BUT MISLEADING?
THE PRECARIOUS BALANCE OF AUTONOMY AND STATE
INTERESTS IN CASEY AND SECOND-GENERATION DOCTOR-
PATIENT REGULATION**

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ABSTRACT

In recent years, state legislatures have passed a record number of abortion restrictions, many of which regulate the dialogue between doctor and patient before a woman can access abortion. As increasingly aggressive doctor-patient regulations are challenged, the courts are struggling to determine what constraints, if any, Casey placed on the state's ability to regulate abortion in the interest of protecting potential life, short of outright abortion bans. This Article revisits the compromise struck in Casey, tracing its attempt to accommodate two constitutional goals in tension—the state's interest in protecting potential life and the woman's liberty interest in autonomously determining her reproductive future—through the undue burden framework. The Article argues that the truthful and nonmisleading standard for informed consent regulations in Casey is pivotal to implementing the balance the Court sought to strike. It seeks to uncover the standard's roots in prior informed consent case law in order to provide a context for lower courts implementing the standard. It demonstrates that the nonmisleading standard, at least in part, arises from the Court's opinion in Akron.

This analysis is particularly important given the trajectory of state regulation of the doctor-patient dialogue. In Akron, the Court struck down a regulation where the state required the doctor to impart a number of disclosures that raised an inference that the state was seeking to mislead a woman's decision-making. In Thornburgh, the Court struck down an informed consent law that sought to persuade women to continue their pregnancy but through nonmisleading means. In Casey, the Court reversed course and approved of regulations similar to those in Thornburgh but imposed a nonmisleading constraint on such regulation. Twenty years later, doctor-patient regulation more closely resembles the disclosures challenged in Akron than Thornburgh and Casey. Therefore, a close analysis of the nonmisleading standard from Akron to Casey can aid courts in implementing the standard to maintain the balance of constitutional interests that Casey sought to strike.

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INTRODUCTION

In recent years, state legislatures have passed a record number of abortion restrictions. Many of these restrictions focus on crafting and regulating the content of the dialogue between doctor and patient before a woman can access an abortion. As increasingly aggressive doctor-patient regulations are challenged, the courts are struggling to determine what constraints, if any, the Supreme Court’s decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹ placed on the states’ ability to regulate abortion in the interest of protecting potential life, short of outright abortion bans. This Article contributes to the scholarly dialogue regarding where courts should draw the constitutional line on abortion regulation under *Casey* by analyzing *Casey*’s “truthful and nonmisleading” standard for regulations concerning doctor-patient dialogue.² It revisits the compromise struck in *Casey*, tracing its attempt to accommodate two constitutional goals in tension—the state’s interest in protecting potential life and the woman’s liberty interest in autonomously determining her reproductive future—through the undue burden framework. The Article argues that the truthful and nonmisleading standard for doctor-patient dialogue regulation in *Casey*, particularly the nonmisleading component, is pivotal to implementing the balance the Court sought to strike by protecting a woman’s ultimate autonomy in making the decision whether or not to terminate her pregnancy.

Nonmisleading in this context must mean something beyond technical truthfulness. This Article demonstrates that it does; it re-

¹ 505 U.S. 833 (1992).

² *Id.* at 882.

flects the autonomy-protecting principle within *Casey*. The Article uncovers the nonmisleading standard's roots in prior informed consent case law in order to provide a context for lower courts implementing the standard. It demonstrates that the nonmisleading standard, at least in part, arises from the Court's opinion in *City of Akron v. Akron Center for Reproductive Health, Inc.*³ This analysis is particularly important given the trajectory of state regulation of the doctor-patient dialogue. In *Akron*, the Court struck down a regulation which required the doctor to recite disclosures that raised an inference that the state was seeking to mislead a woman's decision-making.⁴ In *Thornburgh v. American College of Obstetricians and Gynecologists*,⁵ the Court struck down an informed consent law that sought to persuade a woman to continue her pregnancy, but through nonmisleading means. In *Casey*, the Court reversed course and approved of regulations similar to those in *Thornburgh* but at the same time imposed a nonmisleading constraint on such regulation.⁶

Twenty years later, doctor-patient regulations more closely resemble the disclosures challenged in *Akron* than in *Thornburgh* and *Casey*. The new generation of doctor-patient dialogue regulation departs too far from traditional informed consent principles to be properly so-termed. Instead, this Article will refer to the new generation of these regulations as "dissuasion laws" because the laws seek to dissuade women from having abortions by means that do not align with the principle of autonomy inherent in the informed consent model. However, as of yet, lower courts—focusing on the state deference aspect of the *Casey* balance—have failed to give force to the nonmisleading component of the truthful and nonmisleading standard. These courts have problematically used optional doctor commentary to "assuage" constitutional concerns, required doctors to give convoluted explanations to cure facially false disclosures without consideration of the misleading results, and reduced the truthful and nonmisleading requirement to technical truthfulness only. Given that the new generation of dissuasion laws closely tracks the statute struck down as misleading in *Akron*, a close analysis of the nonmisleading standard from *Akron* to *Casey* can aid courts in implementing the standard to maintain the balance of constitutional interests that *Casey* sought to strike.

³ 462 U.S. 416 (1983).

⁴ *Id.* at 451–52.

⁵ 476 U.S. 747 (1986).

⁶ *Casey*, 505 U.S. at 882.

This Article proceeds in four parts. Part I discusses the *Casey* decision, the compromise embedded in it, and the truthful and nonmisleading standard within this framework. Part II discusses two main strategies of the antiabortion movement in the years after *Casey*: incrementalism and the women-protective antiabortion argument. It conducts an inventory of the new generation of compulsory dissuasion laws from ideological disclosures to ultrasound laws. Part III reviews the post-*Casey* federal law addressing doctor-patient dialogue regulation and implementing the nonmisleading standard. Until recently, courts have been deferential to states in recognition of *Casey*'s permissive stance towards abortion regulation, but inattentive to the constraints *Casey* placed on such regulation. Therefore, the doctrine currently lacks a robust conception of what misleading means in the *Casey* context.

Part IV turns to the nonmisleading standard. It draws on *Akron* and *Thornburgh* to trace a doctrinal and stare decisis argument for a more robust conception of the nonmisleading standard that can implement the autonomy-protecting aspect of the *Casey* compromise. It argues that the nonmisleading standard can serve important constitutional goals—protecting autonomy, smoking out unconstitutional purposes, and striking down women-protective statutes that are based on gender stereotypes and violate equality norms—while still preserving significant space for state regulation. Finally, it applies the nonmisleading standard to three pieces of compulsory dissuasion legislation, demonstrating the standard's importance, but also its limitations as only part of the larger undue burden framework: (1) the “whole, separate, unique, living human being” disclosure; (2) the 2011 South Dakota law, requiring overwhelming disclosures and a visit to a “crisis pregnancy center”; and (3) the mandatory ultrasound with mandatory description law. Given the constitutional values it serves and its doctrinal support, I argue that the nonmisleading standard is a fruitful place for courts to start recalibrating the enforcement of *Casey* to more accurately preserve the balance *Casey* sought to strike.

In recent years, a number of scholars have commented on the various ways in which the lower courts have eroded the autonomy-protecting aspects of *Casey*. Linda Wharton, Susan Frietsche, and Kathryn Kolbert have comprehensively documented the lower courts' imposition of nearly impossible evidentiary requirements for proving an undue burden where regulations increase the cost and accessibility of abortion services as well as their re-

jection of nearly all claims based on improper purpose.⁷ Priscilla Smith has noted the lower courts' failure to attend to the legitimacy of state interests in abortion regulation.⁸ Caitlin Borgmann has argued that the undue burden standard's lax application has undermined key rights of privacy inherent in the right to choose.⁹

Concerns about the underenforcement of *Casey*'s autonomy-preserving principle have also generated significant scholarly work on how to revive the undue burden standard's force. Smith has argued that litigators should introduce traditional sex equality arguments in challenges to abortion regulation.¹⁰ Khiara Bridges has argued that the lower courts must "unburden" the undue burden standard of its acceptance of the moral significance of the fetus, which she argues overdetermines every undue burden evaluation, and apply a morally agnostic undue burden standard.¹¹ Less optimistic scholars have proposed a look to the state constitutions and courts for constitutional protections no longer enforced in federal courts.¹²

This Article contributes to this literature by suggesting analytical tools for applying the nonmisleading standard to more faithfully enforce the compromise struck in *Casey*. This Article is the first to closely analyze the truthful and nonmisleading principle within the overarching framework of the undue burden standard and its guiding purpose: protecting women's autonomy while respecting the state's interest in regulating to promote childbirth over abortion. It is also the first to systematically track how the lower courts have applied this standard as challenges to dissuasion laws mount. Most importantly, this Article contributes to the dialogue around the constitutionality of dissuasion laws—a major component of contemporary abortion litigation—by focusing on the history of the nonmisleading standard. It

7 Linda J. Wharton, Susan Frietsche & Kathryn Kolbert, *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317, 353 (2006).

8 Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 HARV. J.L. & GENDER 377, 389 (2011).

9 Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy*, 16 WM. & MARY J. WOMEN & L. 291, 291, 324 (2010).

10 Smith, *supra* note 8, at 378.

11 Khiara M. Bridges, *Capturing the Judiciary: Carhart and the Undue Burden Standard*, 67 WASH. & LEE L. REV. 915, 916 (2010).

12 See Scott A. Moss & Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U. L. REV. 175, 177 (2008) (noting that state constitutions may provide abortion right protections as the "federal right declines"); Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469, 469–70 (2009) (concluding that "state constitutions are playing an important role in safeguarding abortion rights in individual states in an era of diminished federal constitutional protection . . . at the federal level").

uncovers a history of the nonmisleading requirement from *Akron* to *Thornburgh* to *Casey* that gives content to its purpose and meaning by connecting it to the overarching purposes of the *Casey* compromise, confirms its centrality to the *Casey* balance, and enhances its legitimacy in constitutional jurisprudence. In fact, the importance of barring misleading regulation was supported by Justice Byron White, an original *Roe* dissenter. Scholars have previously discarded all of *Akron* and *Thornburgh* as relics of pre-*Casey* jurisprudence. This Article challenges that assumption; a close reading of these cases suggests that parts of *Akron* should still inform the courts' thinking about what is misleading after *Casey*. In fact, *Casey* standardized the concerns about misleading regulation that were first articulated in *Akron*. The truthful and nonmisleading standard is only a component of the undue burden framework. However, it is a central one that is growing in importance as dissuasion laws mount and become increasingly aggressive. This Article provides the first systematic account of its history, an analysis of its implementation, and a path forward.

I. DECIPHERING THE CONTOURS OF THE *CASEY* COMPROMISE

A. *Tension in the Undue Burden Standard: Respecting the State's Interest in Potential Life and Preserving Women's Autonomy*

Twenty years ago, *Planned Parenthood v. Casey*¹³ worked a radical change in the constitutional law of abortion. This section traces the goals of *Casey* and the contours of the *Casey* doctrine in implementing those goals. In doing so, it seeks to discover the tools that are available in the doctrine for determining what types of state regulation of abortion the decision opened the door for and what limits it placed on that regulation.

1. *A New Direction in Abortion Jurisprudence: The Trimester Framework to the Undue Burden Standard*

In *Roe v. Wade*,¹⁴ about twenty years prior to *Casey*, the Court recognized a constitutional right to privacy that encompassed the abortion decision.¹⁵ To effectuate the right, the Court constructed the

¹³ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

¹⁴ 410 U.S. 113, (1973).

¹⁵ *Roe*, 410 U.S. at 153. The *Roe* decision built on the prior right to privacy cases protecting the use of contraception, first for married couples, then for all individuals. *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

well-known trimester framework.¹⁶ During the first trimester, the state could not regulate access to abortion because it lacked a compelling interest in either the health of the mother or the potential life of the fetus.¹⁷ During the second trimester, the state could regulate the abortion procedure in the interest of the health of the mother.¹⁸ Only after viability (roughly coinciding with the third trimester of pregnancy) did the state have a compelling interest in the potential life of the fetus, thus allowing it to regulate and/or proscribe abortion, “except where it is necessary . . . for the preservation of the life or health of the mother.”¹⁹ From 1973 to 1992, the constitutional law on state regulation of abortion remained relatively stable.²⁰ Over those years, the Court struck down numerous abortion regulations, including bans on particular procedures,²¹ hospitalization requirements,²² and informed consent laws designed to influence a woman’s decision.²³ In 1989, in *Webster v. Reproductive Health Services*, the Court indicated that it might reconsider its position on the abortion right and showed willingness to apply a significantly lower standard in

16 *Roe*, 410 U.S. at 164–65.

17 *Id.* at 164.

18 *Id.*

19 *Id.* at 164–65.

20 This is not to say that there was no significant development in this area of the law or with regard to limitations placed upon the principles of *Roe*, only that the basic *Roe* framework remained intact. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 317–18 (1980) (upholding the ban on the use of federal Medicaid funds for most abortions); *Bellotti v. Baird*, 443 U.S. 622, 643–44 (1979) (holding that states can impose parental consent provisions for minors as long as those states provide adequate judicial bypass mechanisms).

21 *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67–71 (1976) (concluding that a state law requiring spousal consent for an abortion is unconstitutional).

22 *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 452 (1983) (striking down “Akron’s requirement that all second-trimester abortions be performed in a hospital”); *Planned Parenthood Ass’n of Kansas City v. Ashcroft*, 462 U.S. 476, 478, 482 (1983) (holding that the Missouri statute “requir[ing] that abortions after 12 weeks of pregnancy be performed in a hospital” is unconstitutional).

23 *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 760 (1986) (holding that a state statute mandating that a doctor provide specific disclosures to a pregnant woman is unconstitutional); *Akron*, 462 U.S. at 442–49 (holding the same in an earlier case). However, as this Article discusses in length, the required disclosures in *Akron* and *Thornburgh* were different in both kind and scope.

evaluating abortion regulations.²⁴ Nonetheless, it refrained from addressing the core holdings of *Roe* or its implementation framework.²⁵

Casey was a challenge to Pennsylvania's Abortion Control Act. In 1988 and 1989, the Pennsylvania Legislature amended the law to include new informed consent disclosures, a twenty-four-hour waiting period, a parental consent provision, a spousal notification requirement, and various other reporting requirements for clinics.²⁶ The law included numerous provisions similar to those struck down by recent prior Supreme Court cases such as *Akron*²⁷ and *Thornburgh*²⁸—including provisions drawn directly from its predecessor law, invalidated in *Thornburgh* in 1986²⁹—and thus presented a straightforward vehicle to challenge *Roe*.

The *Casey* Court did not entirely overturn *Roe*, as many expected. However, the *Casey* plurality—composed of Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter—did upend *Roe*'s clean rules on abortion regulation and reflected the tensions within the national debate. It eliminated the trimester framework, upheld the state's right to significantly regulate abortion throughout pregnancy, and reworked the constitutional underpinnings of a woman's ultimate right to make the decision to terminate her pregnancy. The Court introduced the undue burden framework, opening the door to

24 492 U.S. 490, 518 (1989) (“*Stare decisis* . . . has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes. . . . We have not refrained from reconsideration of a prior construction of the Constitution that has proved ‘unsound in principle and unworkable in practice.’ . . . We think the *Roe* trimester framework falls into that category.” (internal citations omitted)).

25 *Id.* at 521. (“This case . . . affords us no occasion to revisit the holding of *Roe* . . .”). Even though this case elided the *Roe* question, the possibility of *Roe*'s demise was widely speculated. Due to recent changes in the composition of the Court, only two known supporters of the *Roe* decision remained on the bench: Justice Harry Blackmun and Justice John Paul Stevens. The other Justices were either known opponents or recent Republican nominees presumed to oppose *Roe*. Linda Greenhouse, *Both Sides in Abortion Argument Look Past Court to Political Battle*, N.Y. TIMES, Apr. 20, 1992, at A1. Even pro-choice groups seemed resigned to the belief that the Court was poised to overturn *Roe*. Nonetheless, pro-choice advocates chose to challenge a Pennsylvania abortion regulation, seeking a reaffirmation of *Roe* in the Supreme Court against the odds: “The litigation strategy is,” explained the president of the Women’s Legal Defense Fund, “[i]f indeed we don’t have *Roe*, American women ought to know about it and the Court shouldn’t be duplicitous.” Ruth Marcus, *Abortion-Rights Groups Expect to Lose*, WASH. POST, Apr. 22, 1992, at A1. She continued, “I don’t think we have anything to lose.” *Id.* It was in this setting that the *Casey* challenge arrived in the Court in 1992.

26 18 PA. CONS. STAT. §§ 3205–06, 3209, 3214 (1990).

27 462 U.S. 416, 422–24, 448 (1983).

28 476 U.S. 747, 750, 764 (1986).

29 *Compare Thornburgh*, 476 U.S. at 759–71 (describing the provisions challenged in *Thornburgh*) with *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 879–901 (1992) (analyzing the various provisions challenged in *Casey*).

significant state regulation of abortion, but placing constitutional limits on the state to respect women's autonomy in the ultimate decision-making.

The Court found that *Roe's* "rigid prohibition" on nearly all regulation in the first trimester of pregnancy "undervalue[d] the State's interest in potential life."³⁰ Thus, recognition and respect for the state's interest in legislating to protect potential life was central to the *Casey* decision and its holdings. But at the same time, the Court upheld the "essential holding" of *Roe*: the right of a woman, before viability, to choose to have an abortion and obtain it "without undue interference from the State."³¹ It reaffirmed the root principle that a woman should have the autonomy to decide whether or not to continue her pregnancy and that state action must be limited to ensure that the right exists not only in theory, but also in fact.³² Nonetheless, in recognition of countervailing state interests, how and to what extent state action must be limited changed. Under *Casey*, the state only violates the liberty protected by the Due Process Clause when it unduly burdens a woman's ability to decide to terminate her pregnancy, irrespective of when during pregnancy the regulation operates.³³ The Court defined an undue burden as any regulation that has the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."³⁴

The breadth of the change in the standard is demonstrated by the Court's holdings. Whereas only six years earlier, the Court had struck down nearly all of the provisions of a practically identical statute, the Court now upheld all the regulations except one. The informed consent provisions, including disclosures about gestational age and development, the waiting period, and the reporting requirements all passed constitutional muster under the new standard.³⁵ However, the Court held that the spousal notification requirement, which required all married women to inform their spouses of their intents before they could access abortion services, presented an undue burden and therefore failed even under the lower bar of *Casey*.³⁶ Sensitive to the realities of spousal abuse in some marriages, the Court concluded that the notification requirements would represent

30 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 873 (1992).

31 *Id.* at 846.

32 *Id.* at 872.

33 *Id.* at 876.

34 *Id.* at 877.

35 *Id.* at 884.

36 *Id.* at 898.

a “substantial obstacle” for women in these relationships.³⁷ In cases of domestic abuse, the law would essentially result in the state granting a husband an “effective veto over his wife’s decision” in violation of the core liberty that both *Roe* and *Casey* aimed to protect.³⁸ In the wake of *Casey*, it was clear that there had been a sea change in the constitutional jurisprudence of abortion. However, the contours of the change were less clear. The Court replaced a bright line rule barring state interference with a fundamental right with a standard meant to vindicate conflicting constitutional interests and principles. Outside of the particular provisions upheld or struck down in *Casey*, the constitutionality of various possible abortion regulations became an open question.

2. *Goals in Tension: Respecting the State Interest in Potential Life and Women’s Autonomy*

The *Casey* decision has been widely described, both positively and negatively, as the Court’s attempt at a compromise in the abortion debate. Professor Neal Devins describes the *Casey* decision as a “split-the-difference” approach, which, he argues, largely “settled the abortion wars.”³⁹ However, the description of *Casey* as nothing more than a political choice to “split-the-difference” and broker a compromise on abortion, while convincing, does not sufficiently engage with the internal dialogue of *Casey*. The puzzle of *Casey* is that it attempted to vindicate both the state’s interest in protecting potential life and the woman’s liberty interest in autonomous control over her reproductive life. This Subpart analyzes how the Court’s opinion demonstrates deep engagement with this set of conflicting constitutional values and how the Court sought to use the undue burden standard to set the constitutional balance. The Court’s opinion reflected an understanding of the rights in conflict at issue in the case before them, unlike the *Roe* decision, which no longer reflected the values embedded in the debate over a woman’s right to choose. As scholars Reva Siegel and Robert Post argue, the Court in *Casey* seriously engaged with “the ideals of both proponents and opponents of abortion” and thus “accord[ed] great respect to both sides of the abortion controversy.”⁴⁰

37 *Id.* at 893–94.

38 *Id.* at 897.

39 Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1322 (2009).

40 Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 428–29 (2007).

The Court's reflection of the ongoing constitutional clash in our society over abortion, they argue, epitomizes their theory of "democratic constitutionalism," wherein constitutional law repeatedly interacts with the polity in shaping rights and constitutional structure.⁴¹

The *Casey* Court gave far greater weight than *Roe* to the views expressed by abortion opponents and the states that seek to regulate (or eliminate) abortion to vindicate the rights of the unborn. In *Roe*, the Court simply concluded that Texas, "by adopting one theory of life," could not override the rights of pregnant women (an opinion shared by the *Casey* Court) without seriously appraising the state's concerns.⁴² While the Court cursorily recognized the state's interest in "protecting the potentiality of human life,"⁴³ it did not consider it a valid purpose for any regulation whatsoever until viability.⁴⁴

Thus, the sea change in *Casey* primarily came from the Court's reversal on how much weight the state is allowed to assign to the fetus in the regulation of abortion. In *Roe*, the Court focused on the impact of the abortion right on medical providers and their patients.⁴⁵ But *Casey* recognized the broader ramifications of the abortion right in a society torn about its moral implications:

It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.⁴⁶

The Court recognized the "substantial" and "profound" state interest in protecting potential life.⁴⁷ Indeed, the plurality opinion stressed the weightiness of this interest even as measured against the woman's liberty and equality rights, deferring the question of how the Justices would have resolved the question of these conflicting interests in the first instance:

41 *Id.* at 376.

42 *Roe v. Wade*, 410 U.S. 113, 162 (1973).

43 *Id.*

44 *Id.* at 163; see also Sylvia A. Law, *Abortion Compromise—Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 929 (1992) (characterizing the *Roe* Court's treatment of the state interest in potential life as "lip service").

45 See, e.g., Betty Friedan, *Abortion: A Woman's Civil Right*, in LINDA GREENHOUSE & REVA B. SIEGEL, *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 255* (2010) ("[T]he Court figured the doctor as the agent responsible for abortion decisions and the criteria guiding those decisions as medical.").

46 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 852 (1992).

47 *Id.* at 878.

The weight to be given this state interest . . . was the difficult question faced in *Roe*. We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* Court did⁴⁸

Eschewing the original question, the Court held that it would be inappropriate twenty years later to overturn *Roe* in its entirety. However, it also determined that the *Roe* trimester framework failed to properly value the state's interest and held that regulations that "express profound respect for the life of the unborn are permitted" throughout pregnancy, as long as they do not impose an undue burden on the woman's ultimate decision.⁴⁹

Even as it cut back significantly on the absolute protections of a woman's right to abortion, the *Casey* Court also engaged more directly with the woman's position in the abortion decision than the *Roe* Court. The *Roe* decision paid little heed to the women's rights arguments articulated before it⁵⁰ and that, at that time, were just beginning to animate the public debate.⁵¹ Instead, the Court focused primarily on doctors and the patient-doctor relationship:⁵²

The decision vindicates the right of the physician to administer medical treatment according to his professional judgment [T]he abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.⁵³

Roe's lack of attention to women and the equality arguments at the heart of the abortion issue is a main source of liberal critiques of the decision. Perhaps most famously, Justice Ruth Bader Ginsburg (then a judge on the D.C. Circuit) wrote:

[I]n the balance is a woman's autonomous charge of her full life's course—as Professor Karst put it, her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen. . . . Overall, the Court's *Roe* position is weakened, I believe, by the

48 *Id.* at 871.

49 *Id.* at 875–78.

50 *See* Motion for Permission to File Brief and Brief Amicus Curiae on Behalf of New Women Lawyers, et al. at 6–7 *Roe v. Wade*, 410 U.S. 113 (1973) (Nos. 70-18, 70-40), 1971 WL 134283, at *6–7 (summarizing several reasons why the Georgia and Texas statutes at issue violated various women's rights).

51 *See, e.g.*, Friedan, *supra* note 45, at 8; *see also id.* at 256 (noting that while *Roe*'s holding "decriminalized abortion along the lines that the feminists and others advocated," its reasoning "gave only blurry and indistinct expression to the values feminists argued were at stake in protecting women's choices").

52 *Id.* at 255 ("[T]he Court figured the doctor as the agent responsible for abortion decisions and the criteria guiding those decisions as medical.").

53 *Roe*, 410 U.S. at 165–66.

opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective.⁵⁴

Casey's discussion of the abortion right recognized in *Roe* focused more specifically on the woman in the decision, recognizing the various intertwined liberty *and* equality rights at stake for her in the right to her reproductive freedom. In explaining why the state cannot mandate that a woman continue her pregnancy against her wishes, the Court explained: "[A woman's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role"⁵⁵ The Court's analysis of the spousal notification provision further recognized the intersection between a woman's liberty interest in the decision and her right to equal respect. The Court held that the spousal notification law reflected antiquated views of the family and women's role in marriage that the state is no longer constitutionally permitted to enforce:

[The spousal notification requirement] embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry.⁵⁶

These passages not only recognize the important liberty interest in the abortion decision—a woman's "destiny . . . must be shaped to a large extent on her own conception of her spiritual imperatives"⁵⁷—but also tie the right to the sex equality argument that reproductive rights accord women equal respect and dignity by not allowing the state to enforce "its own vision of the woman's role," motherhood, upon her.⁵⁸

Casey also acknowledged the practical intersection between women's liberty to control whether and when to have children and women's ability to achieve equality in society more generally. The Court

54 Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 383, 386 (1985); see also WHAT ROE V. WADE SHOULD HAVE SAID (J.M. Balkin ed., 2005) (compiling liberal critiques of *Roe* from prominent constitutional scholars).

55 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 852 (1992).

56 *Id.* at 898.

57 *Id.* at 852.

58 Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 816 (2007); see, e.g., *id.* at 819 ("Control over whether and when to give birth is also of crucial dignitary importance to women. Vesting women with control over whether and when to give birth breaks with the customary assumption that women exist to care for others. It recognizes women as self-governing agents who are competent to make decisions for themselves In a symbolic as well as a practical sense, then, reproductive rights repudiate customary assumptions about women's agency and women's roles.").

considered how women's equality gains in the past twenty years built upon the Court's recognition of the abortion right: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."⁵⁹ This recognition from the Court reflects the argument, developed by women's rights advocates and scholars, that without control over their reproductive lives, women cannot reach any level of practical equality in our society. This view recognizes the immense effects of pregnancy on a woman's life, from her health to her earning potential and economic security⁶⁰ to her control over her intimate relationships. As a member of the Society for Human Abortions, an early feminist abortion rights organization, put it,

[W]e can get all the rights in the world . . . and none of them means a doggone thing if we . . . can't control what happens to us, if the whole course of our lives can be changed by somebody else that can get us pregnant by accident, or by deceit, or by force.⁶¹

This is particularly true in a world where institutions are still "organized on the basis of traditional sex-role assumptions that this society no longer believes fair to enforce, yet is unwilling institutionally to redress."⁶²

In sum, the Court's analysis recognized the intersection of women's equality and liberty rights imbedded in the right to abortion in a manner that prior constitutional jurisprudence had not. It is perhaps unsurprising that *Casey* spoke in a constitutional register more focused on women's rights than *Roe*. Indeed, it would have been near impossible for the Court at the time of *Roe* to speak such strong sex equality talk; the very first sex equality case was decided only the year before.⁶³ Even if the right was diluted after *Casey*, the stated constitutional underpinnings of the abortion right now more closely align with the societal significance of the abortion right for women.

⁵⁹ *Casey*, 505 U.S. at 856.

⁶⁰ See, e.g., Deborah J. Anderson, Melissa Binder & Kate Krause, *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort, and Work-Schedule Flexibility*, 56 INDUS. & LAB. REL. REV. 273, 273 (2003) ("It is well documented that mothers earn less than women without children."); Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 205, 219 (2001) (reviewing numerous studies finding a wage penalty for motherhood and finding a seven percent wage penalty for motherhood per child among young American women).

⁶¹ KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 97 (1984); see also FLORA DAVIS, MOVING THE MOUNTAIN: THE WOMEN'S MOVEMENT IN AMERICA SINCE 1960, at 166 (1991) (referencing Kristin Luker's statement).

⁶² Siegel, *supra* note 58, at 819.

⁶³ *Reed v. Reed*, 404 U.S. 71 (1971).

B. *The Compromise Illustrated: The Undue Burden Standard and the Truthful and Not Misleading Standard*

1. *The Content of the Undue Burden Standard*

Having established that the *Casey* court sought to respect both the state's interest in protecting potential life and a woman's liberty right in controlling her reproductive life, the remaining question is where the Court drew the line in effectuating the compromise between these two seemingly irreconcilable values. The undue burden standard has an inherent tension built within it. What tools did it provide courts for negotiating this tension in evaluating abortion regulations?

Professor Neal Devins suggests that the undue burden standard is essentially lacking in any substantive content to guide courts in negotiating the interests in conflict in abortion cases: "*Casey* is a sufficiently malleable standard that it can be applied to either uphold or invalidate nearly any law that a state is likely to pass."⁶⁴ He labels it a "[s]uper-[p]recedent,"⁶⁵ but its stable status, according to Devins, relies upon its hollowness: If Justices disagree with *Casey*, rather than overruling it, they will "manipulate the *Casey* precedent to support favored policy positions."⁶⁶ If Devins' description is correct, then *Casey* effaces any prior content of the constitutional law on abortion, leaving nothing but opaque space where states can legislate on abortion aggressively, but at the risk of the preferences of the judges that will adjudicate challenges.

Meanwhile, numerous scholars and women's rights advocates have argued that the undue burden standard does not, in reality, protect both sets of constitutional values, but rather sacrifices the ultimate decision-making autonomy of the woman to the state's interest in regulation to protect the unborn. National Abortion and Reproductive Rights Action League (NARAL) President Kate Michaelman called it a "smoke screen . . . devastating for women."⁶⁷ Professor Caitlin Borgmann called the *Casey* compromise "untenable," arguing that, "[i]n trying to strike an impossible compromise on abortion, the Court in *Casey* opened the door to physical, familial, and spiritual invasions of women's privacy that serve little purpose but public shaming and humiliation."⁶⁸ And Professor Maya Manian argued that *Ca-*

64 Devins, *supra* note 39, at 1322.

65 *Id.* at 1330.

66 *Id.* at 1333–34.

67 *Id.* at 1329 (citation omitted) (internal quotation marks omitted).

68 Borgmann, *supra* note 9, at 291–92.

sey's own holdings "failed to deliver on the promise of its rhetoric and to apply the law consistently."⁶⁹

As a descriptive matter of how *Casey* has sometimes been applied in the lower courts, either of these accounts might be true.⁷⁰ However, this Article seeks to take *Casey* seriously on its own terms. A close account of *Casey* illustrates that the Court's description and application of the undue burden standard does provide guidance to states as to how they can regulate abortion, and how they cannot, in order to safeguard a woman's ultimate choice. Siegel describes *Casey*'s limits on state regulation as "dignity constraints" on the state's ability to regulate abortion; the state can regulate abortion expressively but the dignity constraints ensure that the state cannot do so in ways that violate a woman's dignity by "restrict[ing] the autonomy of the pregnant woman or treat[ing] her instrumentally, as a means to an end."⁷¹ In negotiating the tension in these two sets of constitutional claims, the Court chose not to adopt a pure balancing test where courts balance the state's interest in protecting potential life against a woman's liberty interest in each case. Previous iterations of the undue burden standard did create such a balancing test. In prior dissents, Justice O'Connor argued that the undue burden standard should be a "threshold inquiry," after which the state would have to justify the regulation with a compelling state interest.⁷² The Court rejected this approach.⁷³ Instead, it erected an autonomy-protecting limit on otherwise permissible state regulation. The state can regulate in the interest of unborn life in many ways—the woman has no right to be "insulated from all others"⁷⁴ when making her decision—but regulations that pose a substantial obstacle to a woman's ultimate decision are always unconstitutional under *Casey*, regardless of the strength of the state's countervailing interest. The Court articulated both a purpose and ef-

69 Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 250 (2009).

70 See, e.g., Wharton, Frietsche & Kolbert, *supra* note 7, at 353 ("With several significant exceptions that reflect the potential vigor and strength of the *Casey* standard, many lower federal courts have not been faithful to *Casey*'s promise.").

71 Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1752 (2008).

72 *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 463 (1983) (O'Connor, J., dissenting); see also *id.* ("The 'undue burden' required in the abortion cases represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting 'compelling state interest' standard.").

73 See Wharton, Frietsche & Kolbert, *supra* note 7, at 332 (noting that this approach was "explicitly reject[ed]" in *Casey*).

74 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992).

fect test for determining the validity of state abortion regulation: state laws can have neither the *purpose* nor the *effect* of hindering a woman's ability to make this choice freely.⁷⁵ The space for state expression of its profound respect for potential life is limited to forms of expression that are respectful of a woman's decision-making capacity: "A statute with this purpose [of creating a substantial obstacle] 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."⁷⁶

After *Casey*, there is no doubt that states can regulate to express their interest in unborn life in a manner that *Roe* never previously allowed, creating space for political contestation and democratic churn. But *Casey* did not also give carte blanche to states for any regulation of abortion whatsoever. To the contrary, the space for state action is policed by the boundaries of the undue burden standard, which is why locating its contours is key to implementing the *Casey* compromise. The undue burden standard was designed to "replace the *Roe* framework with a rigorous standard that carefully examines both the actual impact of restrictions on the women they affect and the governmental purpose underlying them."⁷⁷ The Court's analysis of the spousal notification requirement reflects this approach. It was "sensitive to the specific social context in which forced husband-notification would operate," and given the findings of fact regarding the intersection of domestic violence and reproductive freedom, invalidated the law.⁷⁸ Both *Casey*'s description and application of the undue burden standard indicate that states have wide discretion to regulate abortion, but that autonomy-protecting restraints limit that power when it invades the woman's ultimate right to autonomous decision-making.⁷⁹

2. *The Compromise in Informed Consent: Truthful and Not Misleading*

The Court's doctrinal shift on the acceptability of various informed consent regulations also elucidates the compromise struck in *Casey*. In 1976, in *Planned Parenthood of Central Missouri v. Danforth*, the Court upheld a written informed consent requirement, which re-

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Wharton, Frietsche & Kolbert, *supra* note 7, at 331.

⁷⁸ *Id.* at 334.

⁷⁹ *See* Siegel, *supra* note 71, at 1752 ("Women's decisional autonomy is a core value the undue burden framework vindicates.").

quired a woman to certify “that her consent is informed and freely given and is not the result of coercion.”⁸⁰ However, in 1983 and 1986, in *City of Akron v. Akron Center for Reproductive Health, Inc.* and *Thornburgh v. American College of Obstetricians & Gynecologists*, the Court struck down all state-scripted informed consent disclosures and rejected the state’s interest in regulating through informed consent except to vindicate traditional medical informed consent principles of patient autonomy. The Court’s decisions in *Akron* and *Thornburgh* developed *three* different rationales for invalidating an abortion informed consent regulation. First, in *Akron* and *Thornburgh*, the Court held that the state was not permitted to place a doctor in an “undesired and uncomfortable straitjacket.”⁸¹ This holding closely aligns with *Roe*’s doctor-centered view of the abortion right. Second, in both cases, the Court held unequivocally that the state could not use informed consent laws, regardless of their content, in order to “influence the woman’s informed choice between abortion or childbirth.”⁸²

Third, in *Akron* (but not *Thornburgh*), the Court was equally concerned with the fact that the state was using misleading disclosures as it was with the fact that the state was attempting to persuade women to choose childbirth. For example, the Court labeled the disclosure that “abortion is a major surgical procedure” as “dubious.”⁸³ Further, the Court wrote, the provision that “proceeds to describe numerous possible physical and psychological complications of abortion, is a ‘parade of horrors’ intended to suggest that abortion is a particularly dangerous procedure.”⁸⁴ In his dissent in *Thornburgh*, Justice White reaffirmed the view that *Akron* was a case about ensuring that informed consent provisions do not manipulate or mislead women: “I have no quarrel with the general proposition, for which I read *Akron* to stand, that a campaign of state-promulgated disinformation cannot be justified in the name of ‘informed consent’ or ‘freedom of choice.’”⁸⁵ Thus, *Akron* stands for the proposition that informed consent disclosures, at a minimum, cannot seek to manipulate or mislead a woman making her constitutionally-protected choice. The nonmisleading standard, first remarked upon in *Akron*, protects a woman’s autonomy by ensur-

80 428 U.S. 52, 65–67 (1976) (internal quotation marks omitted).

81 *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 762 (1986) (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67 n.8 (1976) (internal quotation marks omitted)); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 443 (1983) (quoting *Danforth*, 428 U.S. at 67 n.8).

82 *Thornburgh*, 476 U.S. at 760 (quoting *Akron*, 462 U.S. at 443–44).

83 *Akron*, 462 U.S. at 444.

84 *Id.* at 444–45 (emphasis added).

85 *Thornburgh*, 476 U.S. at 800 (White, J., dissenting).

ing that her decisional process is not inappropriately manipulated by the state, a right more prominently featured in *Casey* than in *Roe*. The concern regarding misleading and manipulative disclosures, however, dropped out of the analysis in *Thornburgh* because the requirements, although intended to dissuade, did not use the same misleading tactics to do so.⁸⁶

Thus, the Court's prior informed consent law relied on three principles: (1) the state cannot place the doctor in an "uncomfortable straightjacket"⁸⁷; (2) the state cannot use informed consent disclosure to seek to persuade women to continue their pregnancies⁸⁸; and (3) the state cannot use misleading information in informed consent to manipulate women's choices⁸⁹. The way that the Court approached the informed consent question in *Casey* is representative of the *Casey* compromise overall. It rejected the two prior absolutist rationales derived from *Roe*'s fundamental right/trimester framework and therefore created significant space for expressive informed consent regulation. However, it implemented the third rationale, the nonmisleading standard of *Akron*, to protect women's autonomy. The Court made clear that the doctor receives no special constitutional protection in the abortion context:

The doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy. On its own, the doctor-patient relation here is entitled to the same solicitude it receives in other contexts.⁹⁰

Further, *Casey* made clear that the state is no longer prohibited from expressing a preference for childbirth through informed consent

⁸⁶ *Thornburgh*, 476 U.S. at 760–61 (Seven explicit kinds of information must be delivered to the woman at least twenty-four hours before her consent is given, and five of these must be presented by the woman's physician. The five are: (a) the name of the physician who will perform the abortion, (b) the "fact that there may be detrimental physical and psychological effects which are not accurately foreseeable," (c) the "particular medical risks associated with the particular abortion procedure to be employed," (d) the probable gestational age, and (e) the "medical risks associated with carrying her child to term." The remaining two categories are (f) the "fact that medical assistance benefits may be available for prenatal care, childbirth and neonatal care," and (g) the "fact that the father is liable to assist" in the child's support, "even in instances where the father has offered to pay for the abortion." 18 PA. CONS. STAT. § 3205(a)(1)-(2) (1988). The woman also must be informed that materials printed and supplied by the Commonwealth that describe the fetus and that list agencies offering alternatives to abortion are available for her review.)

⁸⁷ *Thornburgh*, 476 U.S. at 762 (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67 n.8 (1976)) (internal quotation marks omitted).

⁸⁸ *Id.*

⁸⁹ *Akron*, 462 U.S. at 444–45.

⁹⁰ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992).

regulations: “[W]e permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.”⁹¹ Nonetheless, the Court maintained and elucidated the nonmisleading requirement that originated in *Akron*: “If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.”⁹² The opinion is explicit in explaining that it was overruling *Akron* and *Thornburgh* only insofar as those cases struck down informed consent provisions that mandated the dissemination of *truthful and nonmisleading* information.⁹³ The truthful and nonmisleading requirement reinforced the Court’s earlier holding that regulations must be designed to “inform . . . , not hinder,” a woman’s decision-making.⁹⁴ Thus, the truthful and nonmisleading standard is part and parcel with, and acts to implement, the undue burden standard’s underlying principle: the protection of women’s autonomy.

The compromise is also made visible by the ways in which *Casey*’s standard on informed consent deviates from, but also tacks back to, traditional informed consent principles. In both medical ethics and common law, informed consent’s primary goal is to provide patients with sufficient information to enable the patients to make their own medical decisions;⁹⁵ patient autonomy is the central principle from which informed consent doctrine proceeds.⁹⁶ In contrast, the abortion informed consent regulations have at least the additional goal of expressing the state’s preference for childbirth over abortion; this is a

91 *Id.* at 883.

92 *Id.* at 882.

93 *See id.* (“To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus, those cases go too far, are inconsistent with *Roe*’s acknowledgment of an important interest in potential life, and are overruled.”).

94 *Id.* at 877.

95 *See* Robert D. Goldstein, *Reading Casey: Structuring the Woman’s Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787, 808 (1996) (“In theory, the standard for judging the adequacy of the information given is whether the particular patient has the information she needs to make an informed and intelligent decision about treatment.”).

96 *See id.* (“This narrow autonomy model largely governs medical decisionmaking today through the doctrine of informed consent, which undergirds the law of the doctor-patient relationship.”); *see also* SHEILA A. M. MCLEAN, *AUTONOMY, CONSENT, AND THE LAW* 42 (2010) (arguing that informed consent requires providing patients with relevant and sufficient information for decision-making purposes, and that this obligation is a hallmark of the shift towards greater respect for patient autonomy).

purpose inherently distinct from enabling patient autonomy. Further, the form of the regulations approved in *Casey* differs from ordinary informed consent law. Typical informed consent law for a medical procedure is governed by the common law doctrine, which requires disclosure that conforms to the standard of the profession (or, in a minority of jurisdictions, that provides the information a reasonable patient would want), and not by specific disclosures mandated by the state.⁹⁷ Finally, the scope of the mandated disclosures reaches beyond the ordinary scope of informed consent. Ordinary informed consent law is narrowly focused on the patient's understanding of the risks and consequences of the medical procedure to the patient's body and rarely addresses social or personal context.⁹⁸

Critics argue that this deviation from conventional informed consent principles, sanctioned by *Casey*, treats women "as decision-makers less capable than other competent adults," in need of state assistance and guidance in ascertaining the appropriate advice from their physicians that other adults do not require.⁹⁹ To some extent, the fact that the Court approved special informed consent procedures for abortion that do not exist for any other medical procedures could be said to "perpetuate[] the stereotypical notion of the indecisiveness of women . . . [and reflect] stereotypical assumptions that women choose to obtain abortions carelessly."¹⁰⁰ However, the extent to which a regulation reflects these sex stereotypes will depend on the manner in which the regulation seeks to structure the informed consent process. Where the regulation truly provides for detailed but evenhanded and non-manipulative disclosures regarding the risks, consequences, and alternatives to abortion, the affront to women's decision-making capacity is far less than where the state seeks to use any means, however coercive or manipulative, to "correct" a woman's choice to seek an abortion.

This is where the Court's intervention—by only allowing truthful, nonmisleading disclosures designed to inform, not hinder, a woman's decision—is central to preserving the integrity of a woman's right to choose even while allowing for pro-life legislation. The nonmisleading standard also returns abortion informed consent provisions at

97 Goldstein, *supra* note 95, at 808.

98 *See id.* at 815 ("This enlarged vision of the patient's interests does not represent medical-legal standard practice . . .").

99 Manian, *supra* note 69, at 252.

100 *Id.* (alterations in original) (quoting David H. Gans, *Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875, 1902 (1995)).

least partially to traditional informed consent principles. The state can deviate from the norm by having the goal of expressing a preference for childbirth but *only* where it *also* has the goal of informing and enabling patient autonomy.

How, Professor Maya Manian asks, can a disclosure be “nonmisleading” but also “biased in one direction?”¹⁰¹ Her question is rhetorical, but actually has an answer in *Casey*. The disclosures in *Casey* demonstrate the type of pro-life informed consent legislation that does not violate the nonmisleading requirement by misdirecting a woman’s dialogue with her doctor. With respect to the medical risks of abortion, the Pennsylvania law required disclosure of the risks of *both* abortion and childbirth.¹⁰² The Pennsylvania law also required disclosure of the gestational age of the fetus and information about child support and adoption options.¹⁰³ While mandating these types of disclosures about abortion alternatives channels the expression of a state preference for childbirth, the *Casey* disclosures do not inherently mislead a woman’s decision-making process. Presumably, a woman is already informed about the option of abortion at this stage in the process (and the regulations require further disclosures about the nature of the procedures), so disclosure of other options is not misleading. Further, it is unclear what other information should fairly “counterbalance” the disclosure of the gestational age of the fetus. Thus, while the Court did approve the expression of a state preference for childbirth in informed consent regulation, it importantly did *not* condone disclosures that would mislead and manipulate a woman’s decision-making. Read in light of the overarching aims of the *Casey* opinion—respecting the state’s interest in regulating abortion and maintaining women’s ultimate autonomy—the truthful and nonmisleading requirement plays a key role in limiting informed consent regulation to those disclosures that do not impair the goal of protecting autonomous decision-making.

This Subpart has traced the limits *Casey* imposes on informed consent regulation and demonstrated that they are pivotal to negotiating the tension between the competing goals of the undue burden standard. As Robert Goldstein writes, “[i]n a regime in which the woman has the ultimate choice, it naturally follows that the informed consent process plays a centrally important role in protecting the woman and the integrity of her decision.”¹⁰⁴ *Casey* threaded the needle in its ap-

101 Manian, *supra* note 69, at 251.

102 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 881 (1992).

103 *Id.*

104 Goldstein, *supra* note 95, at 806.

proach to informed consent regulation. Arguably, informed consent regulation expressing a preference for childbirth is more respectful of women's autonomy than other forms of pro-life legislation. Goldstein explains that the Court's holding required opponents of *Roe* to regulate "in a straightforward and honest manner, rather than surreptitiously by means of a regulatory tax on the abortion decision."¹⁰⁵ However, by allowing the state to insert itself into a woman's decision-making process, the dangers of abuse, confusion, and manipulation threaten to undermine the value of decisional autonomy within the *Casey* compromise more so than any administrative hurdle to abortion the state could impose. Seen in this light, the truthful and non-misleading requirement is the lynchpin to any coherent protection for women's decisional autonomy in *Casey*. The next Part outlines the most recent forms of abortion regulation in the post-*Casey* era; in particular, it focuses on a new generation of doctor-patient dialogue regulations, different in kind than those approved in *Casey*, and thus deserving of close scrutiny under the above framework.

II. TWENTY-FIRST CENTURY ABORTION REGULATION

Part I established that *Casey* imposed autonomy (and equality) preserving constraints on the state's newfound ability to regulate abortion to express respect for potential life prior to viability. However, since 1992, states have passed increasingly aggressive antiabortion regulation, different in kind from the regulations approved in *Casey*, and thus requiring close constitutional scrutiny. First, this Part outlines in broad scope the antiabortion strategies that have emerged in designing antiabortion regulations and their effects on the constitutional landscape of abortion regulation today. Next, it provides a comprehensive review of the new forms of doctor-patient dialogue regulation, which this Article terms "dissuasion laws."

A. Incrementalism and the Women-Protective Antiabortion Argument

After the failed efforts in the 1980s to pass a Human Life constitutional amendment, the mainstream pro-life movement—most notably the National Right to Life Committee (NRLC)—shifted strategies.¹⁰⁶

¹⁰⁵ *Id.* at 806–07.

¹⁰⁶ See generally Memorandum from James Bopp, Jr. & Richard E. Coleson to Whom it May Concern (Aug. 7, 2007), available at <http://americanrtl.org/files/Documents/nrtlbopp20070807memo.pdf> (outlining the advantages and disadvantages of various nationwide pro-life arguments and proposing a general pro-life strategy).

Instead of seeking the immediate overturning of *Roe*, either in the Court or through a constitutional amendment, pro-life advocates focused on an incrementalist strategy for eliminating the abortion right.¹⁰⁷ The incrementalist strategy involves the passage of a wide array of abortion restrictions short of abortion bans, serving a number of purposes. First, they serve an expressive purpose; through these restrictions the pro-life community expresses its disapproval of the legality of abortion. Further, the regulations—from mandatory counseling to ultrasound requirements to specific procedure bans—make access to abortion more difficult. Finally, the incrementalist strategy seeks to use these incremental regulations to slowly undermine the legal foundations of the abortion right.¹⁰⁸ Victor Rosenblum and Thomas Marzen, in an article titled *Strategies for Reversing Roe v. Wade Through the Courts*, suggest that incremental regulation can be used to expand the Court's recognition of the state interest in the unborn and widen the state's interest in maternal health at all stages of pregnancy, and thus slowly eliminate the underlying rationales for *Roe*.¹⁰⁹

By upholding significant incrementalist regulation for the first time, *Casey* self-consciously gave the pro-life community a greater opportunity to pursue this type of legislation. The National Right to Life Committee remains committed to this approach and has rejected

Alongside the incrementalist strategy, some antiabortion advocates have refocused their energies on challenging *Roe* directly by passing abortion bans. In 2012 and 2013, five states passed abortion bans in direct contradiction to *Roe*: Arkansas passed a twelve-week ban, North Dakota passed a six-week ban, and three other states passed twenty-week bans. See GUTTMACHER INST., STATE LEGISLATION AND POLICIES ENACTED IN 2013 RELATED TO REPRODUCTIVE HEALTH (Dec. 31, 2013), available at <http://www.guttmacher.org/statecenter/updates/2013Newlaws.pdf>; *Laws Affecting Reproductive Health and Rights: 2012 State Policy Review*, GUTTMACHER INST., <http://www.guttmacher.org/statecenter/updates/2012/statetrends42012.html> (last visited Apr. 22, 2014). But challenges to these laws in the lower courts have been, predictably in light of *Roe* and *Casey*, successful. The Supreme Court recently declined the opportunity to reconsider *Casey* by denying Arizona's petition for certiorari in *Horne v. Isaacson*, a Ninth Circuit case striking down Arizona's twenty-week ban. 134 S. Ct. 905 (2014). Thus, commentators have predicted that mainstream advocates will continue to focus primarily on an incrementalist approach. See Natalie Villacorta, *Shifting Strategies for State Abortion Battles in 2014*, POLITICO (Jan. 7, 2014), <http://www.politico.com/story/2014/01/abortion-battles-shifting-strategy-101811.html>.

¹⁰⁷ See Bopp & Coleson, *supra* note 106, at 6 (noting that incrementalist efforts will “not only keep the abortion issue alive and change hearts and minds for long-term benefit, but they also translate into more disfavor for all abortions, which in turn reduces abortions”); see also Victor G. Rosenblum & Thomas J. Marzen, *Strategies for Reversing Roe v. Wade Through the Courts* in ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS 195, 195–96 (Dennis J. Horan, Edward R. Grant & Paige C. Cunningham eds., 1987); Siegel, *supra* note 71, at 1706–13; Smith, *supra* note 8, at 389–93.

¹⁰⁸ Rosenblum & Marzen, *supra* note 107, at 195–96.

¹⁰⁹ *Id.*

more absolutist approaches espoused by organizations like PersonhoodUSA¹¹⁰—which advocates for personhood initiatives and abortion bans, designed to prompt an outright *Roe* challenge—as premature.¹¹¹ The forthcoming survey of recently enacted abortion legislation, and the limited judicial reaction to regulation thus far, demonstrates that this has been a “remarkably consistent and successful strategy”¹¹² on behalf of the pro-life community. In 2011, anti-abortion legislators passed a record number ninety-two abortion restrictions in the states.¹¹³ In 2013, seventy abortion restrictions were enacted, the second most in any year.¹¹⁴ In sum, more antiabortion laws were passed between 2011 and 2013 than in the entire previous decade.¹¹⁵

In addition to pursuing an incrementalist approach, the pro-life movement has adopted new rhetoric; it has developed a “women-protective” discourse for describing the harms of abortion. As Siegel comprehensively illustrates in her recent work, antiabortion advocates no longer solely focus on the protection of the unborn, but rather, in response to decades of dialogue with the women’s rights movement, also focus on how the restriction of abortion supposedly protects women.¹¹⁶ “[I]n a straight-up battle between fetal interests and women’s interests,” pro-life advocates concluded, “the woman would win”;¹¹⁷ so they reimagined the terms of the argument. The crux of their position is that abortion is necessarily harmful to women, and thus, restriction of abortion is necessary to protect women. The antiabortion community has sought to sweep in medical, as well as philosophical, arguments to support its claim by proving the existence of “post-abortion syndrome” (PAS), severe psychological effects

110 PersonhoodUSA has led the efforts to pass “personhood” statutes, amendments, and ballot initiatives that define personhood as beginning at fertilization and thus directly challenge *Roe*. See *What is Personhood?*, PERSONHOODUSA, <http://www.personhoodusa.com/about-us/what-is-personhood> (last visited Jan. 10, 2012).

111 Bopp & Coleson, *supra* note 106, at 6 (expressing concern that entertaining more extreme positions would be “would undermine public support for the pro-life position”).

112 Smith, *supra* note 8, at 389.

113 *States Enact Record Number of Abortion Restrictions in 2011*, GUTTMACHER INST. (Jan. 5, 2012), <http://www.guttmacher.org/media/inthenews/2012/01/05/endofyear.html>.

114 *More State Abortion Restrictions Were Enacted in 2011-2013 Than in the Entire Previous Decade*, GUTTMACHER INST. (Jan. 2, 2014), <http://www.guttmacher.org/media/inthenews/2014/01/02/index.html>.

115 *Id.*

116 See Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1649–50 (2008).

117 Smith, *supra* note 8, at 393.

following abortion, as well as other detrimental physical effects of abortion (such as a link between abortion and breast cancer).¹¹⁸

Generally, the mainstream medical community has rejected these claims. For example, in the late 1980s, antiabortion leaders asked Ronald Reagan's Surgeon General, C. Everett Koop, a strong opponent of abortion, to document PAS and other negative physical effects of abortion.¹¹⁹ He refused based on the lack of medical evidence.¹²⁰

Despite the dearth of established medical evidence, the fruits of this effort can be seen in many informed consent statutes discussed below, which often assert unsupported medical claims about the risks of abortion. The early success of the joining of the strategies of incrementalism and the women-protective antiabortion argument can be seen in *Gonzales v. Carhart*.¹²¹ Although *Carhart* did not change the basic test or underlying principles of *Casey*,¹²² the opinion includes passages that clearly reflect the women-protective argument.¹²³

The shift in pro-life reasoning not only changes the political calculus of legislative moves but might also affect the constitutional landscape of abortion regulation. Unpacking the logic of the women-protective antiabortion argument, Siegel has demonstrated that the argument rests on sex-stereotypes and assumptions about women's "natural role" in the family that our constitutional order has long rejected.¹²⁴ The logic of the women-protective argument proceeds as

118 See Siegel, *The Right's Reasons*, *supra* note 116, at 1657–64 (discussing the history of the idea of "post-abortion syndrome").

119 *Id.* at 1662.

120 *Id.* at 1663.

121 550 U.S. 124, 145 (2007) (upholding the federal Partial-Birth Abortion Ban Act of 2003, in part relying on the women-protective arguments against abortion).

122 See David J. Garrow, *Significant Risks: Gonzales v. Carhart and the Future of Abortion Law*, 2007 SUP. CT. REV. 1, 22 (noting that *Carhart* "reaffirmed the continuing validity and applicability of *Casey*'s decisive undue burden test"); Priscilla J. Smith, *Is the Glass Half-Full?: Gonzales v. Carhart and the Future of Abortion Jurisprudence*, 2 HARV. L. & POL'Y REV. (Online) 1, 13 (Apr. 9, 2008), available at <http://ssrn.com/abstract=1357506> ("There is nothing in the [*Carhart*] opinion renouncing two of the important limitations the plurality in *Casey* placed on the Court's approval of statutes mandating that women receive certain information before they obtain an abortion.").

123 *E.g.*, *Carhart*, 550 U.S. at 159 ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. . . . While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.").

124 See Siegel, *supra* note 116, at 1688 ("The claim is that by restricting all women, government can free women to be the mothers they naturally are. Woman-protective antiabortion argument is gender-paternalist in just the sense that the old sex-based protective la-

follows: (1) abortion is *always* harmful to women; (2) thus, when women have abortions it is not because of their free choice but rather because they have been manipulated, misled, and coerced; therefore, (3) restriction of abortion will protect women.¹²⁵ Constitutionally suspect assumptions about women, Siegel argues, underlie each step in the analysis. First, the assumptions that women are unable to make choices in their own interests, and further, that the solution is to restrict their choice (steps two and three), contemplate women as objects of limited capacity.¹²⁶ As Siegel writes, it is reminiscent of “the classic form of protection the common-law tradition offered women, in which restricting women’s agency was the means chosen to protect and free them: ‘an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage’”¹²⁷—a common law tradition that our modern equal protection jurisprudence has rejected.¹²⁸

Moreover, the prior assumption (step one), that abortion always harms women, is also rooted in constitutionally problematic gender assumptions. As discussed above, the medical community has rejected most claims regarding the harmful effects, both psychological and physical, of abortion. Thus, the assumption that abortion harms women is primarily rooted in the antiabortion community’s normative priors about the place of women in our society.¹²⁹ David Reardon, a leader of the women-protective argument, states, “While the research we are doing is necessary to document abortion’s harm, good moral reasoning helps us to anticipate the results.”¹³⁰ As Siegel’s work demonstrates, the argument relies on the belief that abortion *must* always harm women because a woman’s natural role is mother. Reardon argues, “If there is a single principle, then, which lies at the

bor legislation was. It restricts women’s choices to free them to perform their natural role as mothers.” (emphasis omitted); Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1036–38 (2007) [hereinafter Siegel, *New Politics*] (“Woman-protectionist arguments for regulating abortion draw persuasive force from familiar stereotypes about women’s agency. . . . [I]t continues to reason from stereotypes about women’s roles.”).

¹²⁵ Siegel, *New Politics*, *supra* note 124, at 1017–22.

¹²⁶ *Id.* at 1031–36.

¹²⁷ Siegel, *supra* note 71, at 1778–79 (emphasis omitted) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

¹²⁸ Siegel, *supra* note 71, at 1778–79.

¹²⁹ Siegel, *New Politics*, *supra* note 124, at 1036–40.

¹³⁰ *Id.* at 1021 (citing Tracking the Effects of Abortion on Women: Interview with David Reardon of the Elliot Institute, ZENIT (May 12, 2003), available at <http://www.zenit.org/english/visualizza.phtml?sid=35425>).

heart of the pro-women/pro-life agenda, it would have to be this: the best interests of the child and the mother are always joined.”¹³¹

The foregoing sets the political stage for understanding the proliferation of state abortion regulation in the twenty years since *Casey*. States have passed wide-ranging incrementalist abortion regulations. They have passed limited prohibitions: from bans on the “partial-birth” abortion procedure,¹³² to late-term bans that precede the viability line,¹³³ to bans on abortions sought for race or sex-selective reasons.¹³⁴ States have imposed lengthy waiting periods with two-trip requirements,¹³⁵ required physician presence for the administration of a

131 *Id.* at 1019 (emphasis omitted) (quoting DAVID C. REARDON, MAKING ABORTION RARE: A HEALING STRATEGY FOR A DIVIDED NATION 5–6 (1996)).

132 Partial-birth abortion is now banned federally alongside thirty-two state bans, although only nineteen state bans are currently in effect. GUTTMACHER INST., STATE POLICIES IN BRIEF: BANS ON “PARTIAL-BIRTH” ABORTION (2014), available at http://www.guttmacher.org/statecenter/spibs/spib_BPBA.pdf (last visited Apr. 22, 2014).

The partial birth abortion ban is credited as a significant rhetorical success for pro-life politics. The ban focused the popular abortion debate on late-term abortions. Jenny Westberg’s graphic cartoon illustrations of the procedure were “front and center” in the ongoing debate. Jenny Westberg, *D & X: Grim Technology for Abortion’s Older Victims*, LIFE ADVOCATE, <http://lifeadvocate.org/arc/dx.htm>; see also SARAH DUBOW, OURSELVES, UNBORN 169 (2011) (discussing the controversial Westberg cartoons).

133 In 2010, Nebraska passed an abortion ban beginning at twenty weeks’ gestation based on the assertion that a fetus can feel pain at this point in the pregnancy, a point far earlier than commonly accepted notions of viability. NEB. REV. STAT. § 28-3,106 (2011). Since then, eleven other states have followed suit; three of those laws have been enjoined. GUTTMACHER INST., STATE POLICIES IN BRIEF: STATE POLICIES ON LATER ABORTIONS (Feb. 1, 2014), available at http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf.

134 In 2010, Oklahoma, Pennsylvania, and Illinois all passed laws barring the practice of sex-selective abortion. See *Arizona Abortion Law: Requiring an Affidavit Excluding Race or Sex as Reasons*, CONSTITUTIONAL LAW PROF BLOG (Mar. 30, 2011), <http://lawprofessors.typepad.com/conlaw/2011/03/arizona-abortion-law-requiring-an-affidavit-excluding-race-or-sex-as-reasons.html>. In March 2011, Arizona passed legislation prohibiting providers from performing abortions sought for sex-selective or race-selective reasons. *Id.* Recently, a court dismissed a lawsuit challenging Arizona’s law, holding that the groups did not have standing to bring the challenge. Katie McDonough, *Court Dismisses Lawsuit Over Arizona’s “Race- and Sex-Selective” Abortion Ban*, SALON (Oct. 4, 2013, 9:54 PM), http://www.salon.com/2013/10/04/court_dismisses_lawsuit_over_arizonas_race_and_sex_selective_abortion_ban/. In 2013, North Dakota and Kansas also passed legislation prohibiting sex-selective abortions. Bob Christie, *Arizona Race and Sex-Selective Abortion Ban Draws ACLU Lawsuit*, HUFFINGTON POST (May 29, 2013 5:51 PM), http://www.huffingtonpost.com/2013/05/29/arizona-abortion-ban-race-sex_n_3355493.html.

135 Twenty-six states have twenty-four-hour (or shorter) waiting periods, which require women to receive counseling regarding abortion one full day before the procedure. GUTTMACHER INST., STATE POLICIES IN BRIEF: COUNSELING AND WAITING PERIODS FOR ABORTION (Feb. 1, 2014), available at http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf. South Dakota’s and Utah’s waiting periods are seventy-two hours. *Id.*; H.B. 1217, 2011 Leg., 86th Sess. (S.D. 2011). Ten states’ informed consent laws require in-person counseling as well as a waiting period and therefore require patients to make two trips to the clinic. GUTTMACHER INST., *supra* note 135.

medication abortion,¹³⁶ and subjected clinics to onerous technical regulations¹³⁷ (sometimes threatening to close down all the abortion clinics in a state).¹³⁸ For minors, most states have parental notification or consent laws.¹³⁹ Further, states shape access to abortion through public welfare and private insurance regulations: many states (and the federal government) limit Medicaid access to abortion to cases of rape, incest, or life endangerment,¹⁴⁰ impose “gag rules” that bar public organizations from providing abortion counseling or referrals,¹⁴¹ and restrict the private market for abortion insurance.¹⁴²

As the non-exhaustive list above demonstrates, the ways in which the states intervene in matters of abortion access are diverse. All of these regulations must be analyzed under *Casey*’s undue burden framework to ensure that the balance between interests is maintained. For the purposes of this Article, I focus on the most recent generation of doctor-patient dialogue regulations, which I term dissuasion laws. These laws, which regulate the content of this dialogue, directly implicate the truthful and nonmisleading standard (which

136 See GUTTMACHER INST., STATE POLICIES IN BRIEF: MEDICATION ABORTION (Feb. 1, 2014), available at http://www.guttmacher.org/statecenter/spibs/spib_MA.pdf (“[Fourteen] states require that the clinician providing a medication abortion be physically present during the procedure, thereby prohibiting the use of telemedicine to prescribe medication for abortion remotely.”).

137 For example, at least twenty-five states currently restrict abortion care to hospitals or other specialized facilities. *Targeted Regulation of Abortion Providers (TRAP)*, NARAL PRO-CHOICE AMERICA, <http://www.prochoiceamerica.org/what-is-choice/abortion/trap-laws.html> (last visited Feb. 8, 2014).

138 There is an ongoing court battle to keep Mississippi’s last remaining abortion clinic open, which Mississippi’s 2012 regulation threatens to shut down. Emily Crockett, *Mississippi Gov. Phil Bryant: ‘My Goal is to End Abortion in Mississippi,’* RH REALITY CHECK (Jan. 31, 2014, 5:25 PM), <http://rhrealitycheck.org/article/2014/01/31/mississippi-gov-phil-bryant-goal-end-abortion-mississippi/>. Similarly, in 2011, Kansas passed a TRAP law, the restrictions of which threatened to close down nearly every abortion provider in the state; however, the law was enjoined before it went into effect. Kate Sheppard, *Kansas to Shut Down All But One Abortion Clinic Friday*, MOTHER JONES (June 30, 2011, 12:43 PM), <http://motherjones.com/mojo/2011/06/kansas-shut-down-all-abortion-clinics-friday>; *Hodes & Nauser v. Moser*, No. 11-02365, 2011 WL 4553061, at *1 (D. Kan. Sept. 29, 2011).

139 GUTTMACHER INST., STATE POLICIES IN BRIEF: PARENTAL INVOLVEMENT IN MINORS’ ABORTIONS (Mar. 1, 2014), available at http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf.

140 GUTTMACHER INST., STATE FUNDING OF ABORTION UNDER MEDICAID (Feb. 1, 2014), available at http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf; Hyde Amendment to the Omnibus Appropriations Act, Pub. L. No. 111-8, §§ 507–08, 802–03, 123 Stat. 595 (2009).

141 *Counseling Bans & Gag Rules*, NARAL PRO-CHOICE AMERICA, http://www.prochoiceamerica.org/what-is-choice/fast-facts/gag_rules.html (last visited Feb. 8, 2014).

142 GUTTMACHER INST., STATE POLICIES IN BRIEF: RESTRICTING INSURANCE COVERAGE OF ABORTION (Feb. 1, 2014), available at http://www.guttmacher.org/statecenter/spibs/spib_RICA.pdf.

implements *in part* the undue burden framework) that is the focus of this Article. Different in kind than the content regulations involved in *Casey*, these dissuasion laws require close scrutiny under the truthful and nonmisleading standard to preserve *Casey*'s compromise.

B. The First and Second Generations of Doctor-Patient Dialogue Regulations: Informed Consent and Dissuasion

The preceding Subpart provides the landscape of abortion regulation in which laws regulating doctor-patient counseling arise. *Casey* upheld a number of doctor-patient mandated disclosures. The Pennsylvania law in *Casey* required doctors to inform women of (1) the nature of the procedure, (2) the health risks of abortion *and* childbirth, and (3) the probable gestational age of the fetus.¹⁴³ The doctor was also required to *offer* the woman state-created materials with information about medical assistance for childbirth, child support, and adoption agencies.¹⁴⁴ In the years directly after *Casey*, many states unexceptionally adopted laws mirroring the Pennsylvania law. Pro-choice advocates object to this type of scripted disclosure, which focuses on the fetus and abortion alternatives, on several grounds: it forces doctors outside their area of expertise, intrudes in the doctor-patient relationship, and introduces the state's ideological position into a woman's private choice. However, as discussed above in Subpart I.B.2, the disclosures required by this first generation of doctor-patient counseling regulation pose little risk of manipulating the informed consent process to disrupt a woman's autonomous decision-making by misleading, confusing, or overwhelming her. After all, in *Casey*, the doctor was required to discuss the health risks of *both* abortion and childbirth and only had to offer material about alternative options.

Since then, states have passed laws regulating doctor-patient counseling that differ in kind from those approved in *Casey*. This Article labels the new generation of regulation "dissuasion" laws because, while they share the goal of dissuasion with the first generation, they no longer necessarily incorporate the respect for patient autonomy central to any law properly called an informed consent regulation. Dissuasion laws carry the risk of undermining the second goal of *Casey*—protection of a woman's ultimate autonomy in decision-making. While this Article refers to these laws as "second-generation," they often bear a striking resemblance to the old law in *Akron*, which the

¹⁴³ Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 881 (1992).

¹⁴⁴ *Id.*

Court deemed misleading, analyzed more closely in Part IV. Therefore, these laws require close scrutiny under the undue burden framework, and particularly the truthful and nonmisleading standard that the Court implemented to protect women's autonomy. The remainder of this Subpart describes the variety of dissuasion laws now operative in many states.

1. Medically Incorrect and Misleading Risk Disclosures

States have passed laws that go far beyond the Pennsylvania law's requirement that a doctor discuss the general risks of abortion. States have mandated very specific risk disclosures by physicians and/or included discussion of specific risks in state-created and mandatorily distributed materials. In many cases the laws clearly misrepresent the risks of abortion. At least five states inaccurately assert a link between abortion and breast cancer, despite general agreement in the medical literature that no such link exists.¹⁴⁵ Likewise, six states inaccurately portray the risk of an effect on a woman's future fertility.¹⁴⁶ Other states raise the specter of infertility in their materials, although the small type accurately states that there is no proven appreciable risk.¹⁴⁷ Where states misrepresent, or misleadingly present, the risks of abortion, the disclosures can disrupt the ability of women to properly assess her choices and make an autonomous, informed decision. The core principle of informed consent is to provide the appropriate information in order to enable patient autonomy.¹⁴⁸ When the information is untruthful or misleading, it cannot be properly so-termed.

a. PATSD and Negative Mental Health Effects Disclosures

The women-protective argument hinges on the idea that abortion harms women psychologically. As discussed above, this belief is primarily premised on the intuition that a woman's best interests will al-

¹⁴⁵ GUTTMACHER INST., *supra* note 135.

¹⁴⁶ *Id.*

¹⁴⁷ See, e.g., IND. STATE DEP'T OF HEALTH, ABORTION INFORMED CONSENT BROCHURE 10 (2013), available at http://www.state.in.us/isdh/files/Abortion_Informed_Consent_Brochure.pdf (containing the header "POTENTIAL DANGER TO A SUBSEQUENT PREGNANCY AND INFERTILITY").

¹⁴⁸ Goldstein, *supra* note 95, at 808 ("This narrow autonomy model largely governs medical decisionmaking today through the doctrine of informed consent, which undergirds the law of the doctor-patient relationship."); see also MCLEAN, *supra* note 96, at 42 (2010) (arguing that informed consent requires providing patients with relevant and sufficient information for decision-making purposes).

ways be aligned with those of her unborn child.¹⁴⁹ However, psychological studies have consistently refuted the concept of “post abortion traumatic stress syndrome” (PATSD). For example, a recent comprehensive review by the National Collaborating Centre for Mental Health of previous peer-reviewed studies concluded that abortion does not raise a woman’s mental health risk.¹⁵⁰

Nonetheless, at least eight states still inform women in their mandated materials of exclusively negative psychological consequences of abortion.¹⁵¹ For example, the West Virginia materials state:

Many women suffer from Post-Traumatic Stress Disorder [Syndrome] following abortion. PTSD is a psychological dysfunction resulting from a traumatic experience. Symptoms of PTSD include: guilt[,] depression[,] nightmares[,] fear and anxiety[,] alcohol and drug abuse[,] flashbacks[,] grief[,] suicidal thoughts or acts[,] sexual dysfunction[,] eating disorders[,] low self-esteem[,] and] chronic relationship problems.¹⁵²

These laws have largely either been approved in litigation or gone unchallenged. South Dakota’s dissuasion law goes further; it requires physicians to inform women of an increased risk of suicide.¹⁵³ A panel of the Eighth Circuit initially enjoined that requirement;¹⁵⁴ however, the Circuit took the case en banc and reversed, upholding the suicide risk disclosure.¹⁵⁵

b. Fetal Pain and Survival Laws

Twelve states now either require a physician to disclose information about a fetus’s ability to feel pain or include such information in the state-mandated materials.¹⁵⁶ The number of states providing such information to women seeking abortions has more than doubled in the past five years.¹⁵⁷ The laws among these states vary in their

149 See *supra* notes 130–31 and accompanying text.

150 NAT’L COLLABORATING CTR. FOR MENTAL HEALTH, INDUCED ABORTION AND MENTAL HEALTH (2011), available at http://www.nccmh.org.uk/reports/ABORTION_REPORT_WEB%20FINAL.pdf.

151 GUTTMACHER INST., *supra* note 135.

152 *Abortion Methods & Medical Risks*, W.V. DEPT. OF HEALTH & HUMAN RES., http://www.wvdhhr.org/wrtk/abortioninformation.asp#Abortion_Risks (last visited Feb. 8, 2014).

153 S.D. CODIFIED LAWS § 34-23A-10.1 (1) (e) (ii) (2013).

154 *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 653 F.3d 662 (8th Cir. 2011).

155 *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (en banc).

156 GUTTMACHER INST., *supra* note 135.

157 *Compare id.* (noting that twelve states require including “information” that the fetus can feel pain), with Chinué Turner Richardson & Elizabeth Nash, *Misinformed Consent: The*

particulars. However, none convey the generally accepted medical consensus on the issue. A 2005 American Medical Association report indicates that the structures necessary to feel pain develop between twenty-three and thirty weeks gestation.¹⁵⁸ However, even when these structures develop, a fetus will not feel pain until the structures can transmit information and the fetus can interpret it. Based on the little data available, it is likely this does not occur until thirty weeks.¹⁵⁹

Fetal pain laws do not reflect this general consensus. For example, Georgia's materials state,

By 20 weeks gestation, the unborn child has the physical structures necessary to experience pain. There is evidence that by 20 weeks gestation unborn children evade certain stimuli in a manner which in an infant or an adult would be interpreted to be a response to pain. Anesthesia is routinely administered to unborn children who are 20 weeks gestational age or older who undergo prenatal surgery.¹⁶⁰

Not only does the above not reflect medical consensus, but it may also insert a red herring in a woman's analysis of the facts of fetal pain. Medical evidence shows that the anesthesia during the procedure is used for reasons entirely unrelated to fetal pain.¹⁶¹ In South Dakota, the materials do not indicate the advanced age required for fetuses to feel pain, implicitly suggesting that a fetus can feel pain at any stage of pregnancy: "Findings from some studies suggest that the unborn fetus may feel physical pain."¹⁶² The Texas materials suggest ability to feel pain may occur as early as twelve weeks gestation.¹⁶³

Along similar lines, some states require disclosures that inaccurately portray the point at which a fetus becomes viable. In Alabama, after nineteen weeks, a doctor must inform a woman seeking an abortion that (1) the child may be able to survive, (2) she has "the right to request the physician to use the method of abortion that is most likely to preserve the life of the unborn child," and (3) if the child is born

Medical Accuracy of State-Developed Abortion Counseling Materials 9 GUTTMACHER POL'Y REV. 6, 8-9 (2006), available at <http://www.guttmacher.org/pubs/gpr/09/4/gpr090406.html> (noting that five states had such a requirement as of September 2006).

158 Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, J. AM. MED. ASSOC., 947, 947 (2005), available at <http://jama.ama-assn.org/content/294/8/947.full.pdf+html>.

159 *Id.* at 952.

160 GA. DEP'T OF HUMAN RES. DIV. OF PUB. HEALTH, ABORTION: A WOMAN'S RIGHT TO KNOW, available at http://dph.georgia.gov/sites/dph.georgia.gov/files/related_files/document/PatientEducationBookEN.pdf (last visited Feb. 8, 2014).

161 Lee et al., *supra* note 158, at 947.

162 *Induced Abortion Methods & Risks*, S.D. DEP'T OF HEALTH, <http://doh.sd.gov/abortion/induced-abortion-methods-risks.aspx?#Risks> (last visited Feb. 8, 2014).

163 TEX. DEPT. OF STATE HEALTH SERVS., A WOMAN'S RIGHT TO KNOW (2003), available at <http://www.dshs.state.tx.us/wrtk/pdf/booklet.pdf>.

alive, the attending physician is legally required to take all steps to save the life of the child.¹⁶⁴ Despite serious questions regarding the medical validity of these statements, this provision was upheld in federal court.¹⁶⁵

The purpose of the fetal pain laws is to encourage women to reconsider their choice to have an abortion based on the possibility that the fetus can feel pain. If these laws reflected the accepted medical consensus, they would mirror the *Casey* regulation and pass muster under the undue burden standard even though their purpose is dissuasive. However, when the laws misrepresent, or misleadingly present, medical evidence, they can disrupt patient autonomy. Thus, fetal pain laws demonstrate the importance of enforcing *Casey*'s truthful and nonmisleading standard to ensure that states respect patient autonomy while furthering the goal of protecting unborn life.

2. *Overwhelming Disclosures: The Endless Disclosure Strategy*

Dissuasion laws passed in Nebraska in 2010 and South Dakota in 2011 would have required doctors to disclose to patients an enormous amount of information related to the risks of abortion, above and beyond any ordinary informed consent dialogue. The Nebraska law, read literally, required doctors to screen women for every "risk factor," defined broadly, ever reported to be associated with abortion and ever published in any peer-reviewed study anywhere at any time, and disclose any "complications" associated with those risk factors.¹⁶⁶ Because the law did not impose any limitations on these disclosures, it would have required disclosures of studies even where the findings were irrelevant to the patient, outdated, or medically disproved by subsequent research. The District Court of Nebraska granted a preliminary injunction, finding that the law was impossible to comply with and its purpose was to ban abortion in violation of *Casey*.¹⁶⁷ The Attorney General agreed to settle the case and a permanent injunction issued.¹⁶⁸

The 2011 South Dakota law enacted nearly identical requirements to the Nebraska bill except it limited the studies to those published in

164 ALA. CODE § 26-23A-4 (2010).

165 *Summit Med. Ctr. of Ala., Inc. v. Siegelman*, 227 F. Supp. 2d 1194 (M.D. Ala. 2002).

166 L.B. 594, 101st Leg., 2nd Sess. (Neb. 2010).

167 *Planned Parenthood of Heartland v. Heineman*, 724 F. Supp. 2d 1025 (D. Neb. 2010).

168 *Stipulation to Entry of Final Judgment and Permanent Injunction, Planned Parenthood of Heartland v. Heineman*, 724 F. Supp. 2d 1025 (D. Neb. 2010) (No. 10CV03122), 2010 WL 5758641.

English after 1972.¹⁶⁹ Those changes likely rebut the “impossibility” claim Planned Parenthood made in Nebraska, but the law continues to require disclosure of an overwhelming amount of information, much of which may be unnecessary or misleading. The District Court of South Dakota enjoined the provision on those grounds.¹⁷⁰

The Nebraska and South Dakota laws demonstrate how dissuasion laws can possibly mislead patients even without providing factually incorrect information. Even if the laws are tailored to ensure that no medically disproven or outdated studies must be disclosed, such laws may still mislead patients and undermine the autonomy principle of *Casey*. Psychological studies demonstrate that our “overall capacity for mental effort is limited”¹⁷¹ and that an overload of information and complexity can lead to poor decision-making. In the informed consent context, research shows that the more information that is provided to the patient, the less she will retain.¹⁷² Part of the goal of informed consent is to enable patients to make decisions by “select[ing] the information that is most material to the patient, and distill[ing] it into a form that the patient is able to digest and understand.”¹⁷³ Therefore, at some critical point, the amount of information that the Nebraska and South Dakota dissuasion laws would have required would have likely disrupted the patient’s ability to make an autonomous and informed assessment of her options. Moreover, it is likely that patients would use other informed consent dialogues with doctors as a baseline for evaluating the abortion counseling and “assume that their physician . . . would not give them information unless the physician thought [it] was important.”¹⁷⁴ Since other informed consent dialogues involve vastly less extensive disclosure of risks, patients would likely draw the incorrect inference that abortion is a particularly risky procedure.

169 H.B. 1217, 2011 Leg., 86th Sess. (S.D. 2011).

170 *Planned Parenthood Minnesota, North Dakota, South Dakota v. Daugaard*, 799 F. Supp. 2d 1048, 1073–75 (D.S.D. 2011). In 2012, South Dakota amended this portion of the law, removing the challenged risk factor provision and replacing it with a provision requiring a more specific assessment of “preexisting risk factors associated with adverse psychological outcomes.” H.B. 1254, 2012 Leg., 87th Sess. (S.D. 2012).

171 Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1451 (2003).

172 Declaration of Paul S. Appelbaum, M.D. at 10, *Planned Parenthood of Heartland v. Heineman*, 724 F. Supp. 2d 1025 (D. Neb. 2010) (No. 4:10-cv-3122).

173 *Id.* at 9.

174 *Id.* at 15–16.

3. “Coerced Abortion Prevention” Screening Requirements

In accordance with the rhetoric of the women-protection argument, several states have passed pro-life laws focused on preventing coerced abortions. For example, in 2010, both Oklahoma and Tennessee passed laws requiring abortion clinics to post signs indicating that women cannot be coerced into having an abortion against their wills.¹⁷⁵ Other states have repeatedly considered laws that would require abortion providers to inform or counsel women on coercion; others have passed laws specifically prohibiting or criminalizing the coercion of abortion (although there is little doubt that this activity was already prohibited).¹⁷⁶

Most of these laws, of course, pose no significant threat to women seeking abortions. However, some states have gone beyond requiring women to be informed of their right not to be coerced and have passed coercion screening requirements. The 2010 Nebraska screening requirement required a physician to “[e]valuate[] the pregnant woman to identify if the pregnant woman ha[s] the perception of feeling pressured or coerced into seeking or consenting to an abortion.”¹⁷⁷ Along with the other provisions of this law, the screening requirement has been permanently enjoined.¹⁷⁸ South Dakota now has a similar coercion screening provision requiring a physician to

[d]o an assessment of the pregnant mother’s circumstances to make a reasonable determination whether the pregnant mother’s decision to submit to an abortion is the result of any coercion or pressure from other persons. In conducting that assessment, the physician shall obtain from the pregnant mother the age or approximate age of the father of the unborn child, and the physician shall consider whether any disparity in age between the mother and father is a factor when determining whether the pregnant mother has been subjected to pressure, undue influence, or coercion.¹⁷⁹

¹⁷⁵ AMERICANS UNITED FOR LIFE, 2010 STATE LEGISLATIVE SESSION REPORT 8 (2010), *available at* <http://www.aul.org/2010/12/2010-state-legislative-session-report/>.

¹⁷⁶ *Id.*; AMERICANS UNITED FOR LIFE, 2012 STATE LEGISLATIVE SESSION REPORT 2, 12–13 (2012), *available at* http://www.aul.org/wp-content/uploads/2012/08/2012-Session-Report_FINAL_-2_.pdf [hereinafter AMERICANS UNITED, 2012 REPORT]; AMERICANS UNITED FOR LIFE, 2013 STATE LEGISLATIVE SESSION REPORT 14, 20–21 (2013), *available at* <http://www.aul.org/wp-content/uploads/2013/09/2013-State-Session-Report.pdf> [hereinafter AMERICANS UNITED, 2013 REPORT]; Mailee R. Smith, *2011 State Legislative Report*, AMS. UNITED FOR LIFE 63, 71 (2011), <http://www.aul.org/wp-content/uploads/2012/04/state-legislative.pdf>.

¹⁷⁷ *Heineman*, 742 F. Supp. 2d at 1033.

¹⁷⁸ Stipulation to Entry of Final Judgment and Permanent Injunction, *supra* note 168.

¹⁷⁹ H.B. 1254, 2012 Leg., 87th Sess. (S.D. 2012); S.D. CODIFIED LAWS § 34-23A-56 (1). A very similar provision in this law’s predecessor bill, H.B. 1217, was initially enjoined. H.B. 1217, 2011 Leg., 86th Sess. (S.D. 2011); Planned Parenthood Minnesota, North Dakota,

Beyond the statute's guidance on considering age difference, the statute provides little guidance on how physicians can make an objective determination as to coercion. Further, it is unclear what the physician should or must do should she find "pressure, undue influence, or coercion." Depending on how the law is interpreted, the screening laws threaten to allow (or arguably force) the physician to veto the patient's decision to have an abortion should the physician believe that pressure or coercion is at play.

4. Crisis Pregnancy Center Counseling

Crisis pregnancy centers (CPCs) are (often religious) antiabortion organizations that offer pregnancy tests, ultrasounds, and adoption services. Numerous reports have chronicled CPCs' use of both misleading and coercive tactics in their efforts to ensure that a woman will not choose to have an abortion.¹⁸⁰ Over the past decade, the visibility of CPCs has increased and states have incorporated them into their pro-life legislative schemes. A number of states now directly fund pregnancy care centers and other similar organizations.¹⁸¹ In fifteen of the twenty-nine states that allow production of "Choose Life" license plates, the proceeds go to CPCs or other antiabortion organizations.¹⁸² In recent years, state legislatures have repeatedly adopted resolutions commending CPCs and their work.¹⁸³ For example, in

South Dakota v. Daugaard, 799 F. Supp. 2d 1048, 1069 (D.S.D. 2011) (holding that plaintiffs were likely to succeed on the merits of their claim that the coercion requirement was unconstitutionally vague). Pursuant to a joint stipulation, the slightly revised coercion provision was permitted to go into effect in July 2012. See *Judge Lets Part of South Dakota Abortion Law Take Effect*, ASSOCIATED PRESS (July 4, 2012, 3:00 PM), <http://www.ksfy.com/story/18895959/judge-lets-part-of-south-dakota-abortion-law-take-effect>.

180 See, e.g., Kathryn Joyce, *Shotgun Adoption*, THE NATION (Aug. 26, 2009), <http://www.thenation.com/article/shotgun-adoption> (chronicling the deceptive and coercive tactics of some CPCs pushing women to give their children up for adoption); Marc Kaufman, *Pregnancy Centers Found to Give False Information on Abortion*, WASH. POST (July 18, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/07/17/AR20060717_01145.html ("The report said that 20 of 23 federally funded centers contacted by staff investigators requesting information about an unintended pregnancy were told false or misleading information about the potential risks of an abortion."); Julia Silverman, *States React to Crisis Pregnancy Centers*, WASH. POST (May 9, 2007, 7:23 AM), http://www.washingtonpost.com/wp-dyn/content/article/2007/05/09/.AR20070509_00291.html ("Some states, like Oregon and New York, are trying to increase oversight of the crisis pregnancy centers out of concern that the information they provide about abortion may be biased or simply wrong.");

181 AMERICANS UNITED FOR LIFE, 2012 REPORT, *supra* note 176.

182 GUTTMACHER INST., STATE POLICIES IN BRIEF: 'CHOOSE LIFE' LICENSE PLATES (2014), available at http://www.guttmacher.org/statecenter/spibs/spib_CLLP.pdf.

183 AMERICANS UNITED FOR LIFE, 2012 REPORT, *supra* note 176.

2013, these resolutions were passed in Kansas, Texas, and West Virginia.¹⁸⁴

Most importantly, the 2011 South Dakota informed consent law *requires* a woman to consult with a pregnancy center between her first mandatory counseling session with her physician and the performance of the abortion.¹⁸⁵ That pregnancy center is authorized to discuss alternative options and do its own independent assessment of whether or not the woman is being coerced. As with other elements of this law, it is currently preliminarily enjoined pending ongoing litigation.¹⁸⁶

5. *Ultrasound Laws*

An increasingly popular form of dissuasion law in this generation of doctor-patient regulation is the ultrasound requirement. Nineteen ultrasound measures were introduced in state legislatures in 2011 alone.¹⁸⁷ Twenty-three states have laws that regulate the provision of ultrasounds for women seeking abortions (although two of the laws are permanently enjoined by court order).¹⁸⁸ Most of these laws only require that the provider offer to perform an ultrasound or, if an ultrasound is provided, that the provider offer the woman the opportunity to view the image.¹⁸⁹ But thirteen states have laws requiring that all women seeking abortions, no matter the stage of their pregnancy, undergo an ultrasound (although, once again, two are enjoined).¹⁹⁰ Five of those states have ultrasound laws that not only require all women to have an ultrasound, but also state that the provider *must* show each woman the image and describe it to her regardless of her wishes.¹⁹¹ The Oklahoma and North Carolina laws are permanently enjoined;¹⁹² however, the Texas law is currently in force after the Fifth Circuit reversed the district court's holding that the

184 AMERICANS UNITED FOR LIFE, 2013 REPORT, *supra* note 176, at 27.

185 S.D. CODIFIED LAWS § 34-23A-56 (3)(a) (2013).

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

187 FRC ACTION, STATE PRO-FAMILY LEGISLATIVE REPORT FOR 2011 12 (2011), *available at* <http://downloads.frcaction.org/EF/EF11F15.pdf>.

188 GUTTMACHER INST., STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND (2014), *available at* http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf.

189 *Id.*

190 *Id.*

191 LA. REV. STAT. ANN. § 40:1299.35.2(D) (2013); N.C. GEN. STAT. § 90-21.85(a)(4) (2012); OKLA. STAT. tit. 63 § 63-1-738.3d (2011); TEX. HEALTH & SAFETY CODE ANN. §§ 171.012(4)-(5), 171.0122 (2012); WIS. STAT. § 253.10 (2014).

192 GUTTMACHER INST., *supra* note 188.

law violated the physician's First Amendment rights,¹⁹³ as are the Louisiana and Wisconsin laws.¹⁹⁴

6. *Purely Ideological Disclosures: "Whole, Separate, Unique, Living Human Being"*

In 2005, South Dakota passed a law requiring doctors to inform women seeking abortions that an abortion ends the life of a "whole, separate, unique, living human being."¹⁹⁵ The Eighth Circuit upheld this requirement against both *Casey* and First Amendment claims.¹⁹⁶ Since the disclosure was upheld in 2008, the law has been replicated in North Dakota, Missouri, and Kansas.¹⁹⁷ Therefore, in four states, doctors must now tell women seeking abortions that abortions end the lives of whole, separate, unique, living human beings, a statement that essentially assumes the answer to the normative question underlying the abortion debate.

The foregoing (nearly) exhaustive discussion of the new generation of dissuasion regulation of the doctor-patient relationship demonstrates that (1) the antiabortion groups have taken the opportunity of *Casey* to drastically expand the reaches of state legislation and (2) the second generation of doctor-patient regulation is different in kind than the legislation permitted in *Casey* and, therefore, requires close scrutiny to ensure fidelity to the constraints imposed on state regulation in *Casey*.

III. THE TRUTHFUL AND NONMISLEADING STANDARD IN FEDERAL COURTS

As Part I demonstrates, the truthful and nonmisleading standard is an important component of the undue burden framework's autonomy-protecting constraints on the newly approved state regulation of abortion. However, a review of the lower courts' implementation of

¹⁹³ *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 580 (5th Cir. 2012).

¹⁹⁴ LA. REV. STAT. ANN. § 40:1299.35.2(D) (2013); N.C. GEN. STAT. § 90-21.85(a)(4) (2012); OKLA. STAT. tit. 63 § 63-1-738.3d (2011); TEX. HEALTH & SAFETY CODE ANN. §§ 171.012(4)-(5), 171.0122 (2012); WIS. STAT. § 253.10 (2014).

¹⁹⁵ S.D. CODIFIED LAWS § 34-23A-10.1 (2010).

¹⁹⁶ *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 733 (8th Cir. 2008) (en banc).

¹⁹⁷ N.D. CENT. CODE § 14-02.1-02 (2009); MO. REV. STAT. § 188.039 (2010); KAN. STAT. ANN. § 65-6709 (2009). A similar provision in Indiana requires a doctor to disclose that "human physical life begins when a human ovum is fertilized by a human sperm." IND. CODE § 16-34-2-1.1(a)(1)(E) (2013).

the truthful and nonmisleading standard—particularly the nonmisleading component—demonstrates that the lower courts have not developed the analytical tools for determining what types of disclosures violate the standard.

Initially, the lower courts were mostly faced with challenges to first-generation informed consent laws, which they approved solely by analogy to the Pennsylvania law approved in *Casey*. And as challenges to second-generation dissuasion laws mount, lower courts appear to be deferring to *Casey*'s goal of enabling state regulation of abortion, often to the detriment of close analysis of autonomy-protecting constraints of *Casey*. In doing so, the courts often either use the doctor's ability to comment on the disclosures to "assuag[e]"¹⁹⁸ concerns regarding the misleading nature of the required disclosures or require doctors to provide additional information not outlined in the statute to cure the defect in the statute's disclosures. These holdings fundamentally misunderstand the imposition of the nonmisleading requirement on the state itself, not the doctor, and lead to odd results requiring doctors to give paradoxical and confusing disclosures. Moreover, several lower courts' analyses focus solely on technical truthfulness and allow the nonmisleading component of the standard to drop out altogether. Some recent challenges to the more aggressive dissuasion laws appear to have caught the courts' attentions, but the case law is still bereft of clear analysis of what misleading means in the *Casey* context. Without further elaboration, the standard could dissolve into solely a smell test for technical accuracy that cannot perform the autonomy-protecting function it was developed to perform.

The courts have used a doctor's ability to comment or elaborate on the required disclosures in two distinct ways to bypass "truthful and nonmisleading" challenges to dissuasion laws. First, in numerous cases, the courts point to the fact that doctors *can* elaborate on or further explain required disclosures to "assuag[e]"¹⁹⁹ any constitutional concerns that the required disclosure is misleading. Courts have particularly relied on this reasoning to approve father liability and medical assistance provisions. In *Karlin v. Foust*, the district court wrote,

When women are told that fathers are liable for assistance, some women may be misled into believing that they will be able to obtain child support. But there is nothing in the statute that prevents a physician from

198 *Karlin v. Foust*, 188 F.3d 446, 492 (7th Cir. 1999).

199 *Id.*

informing women that although the law makes the father liable for assistance, obtaining that assistance may be difficult.²⁰⁰

The Seventh Circuit upheld this reasoning.²⁰¹ The Eight Circuit followed suit in *Fargo Women's Health Organization v. Schafer*, bolstering its decision that the medical assistance and father liability provisions were not misleading by construing the statute to *allow* the physician or agent to comment on the information.²⁰² Likewise, in *A Woman's Choice—East Side Women's Clinic v. Newman*, the district court relied on the doctor's ability to comment to dismiss claims that the law's required disclosures—“‘medical assistance benefits *may* be available’ and . . . the father of the unborn fetus is ‘*legally required* to assist in the support of the child’”²⁰³—was misleading: “No one claims that this information provides a complete picture of relevant facts on either of these issues. However, the law does not forbid anyone from providing additional information about either the eligibility criteria for medical assistance or the practical realities of collecting child support from fathers.”²⁰⁴

The reasoning in these cases makes a critical error in interpreting *Casey* and thus erodes the protection of the truthful and nonmisleading standard. *Casey* imposes limits directly on the state. The state must not require disclosures that, standing alone, are misleading; it is not relevant to the constitutional standard if individual doctors may remedy the state's misleading guidance with their own explanations. In these cases, the elaboration is not required of doctors, thus the assurance of constitutional state-required informed consent dialogue (a dialogue that will not mislead a woman's decision making) will be left to the discretion of the woman's doctor; this is not the result *Casey* demands. In *Karlin*, the court recognized that the state-required disclosure might mislead women, but found it sufficient that the statute did not prevent physicians from remedying this with their own statements.²⁰⁵ This reasoning inverts the *Casey* standard, requiring only that the statute not prohibit a doctor from curing the state's misleading disclosure rather than affirmatively requiring the disclosure not to be misleading itself.

200 *Karlin v. Foust*, 975 F. Supp. 1177, 1218 (W.D. Wis. 1997), *rev'd in part on other grounds*, 188 F.3d 446 (7th Cir. 1999).

201 *Karlin*, 188 F.3d at 492.

202 18 F.3d 526, 534 (8th Cir. 1994).

203 904 F. Supp. 1434, 1451 (S.D. Ind. 1995) (citation omitted).

204 *Id.*

205 *Karlin*, 975 F. Supp. at 1218.

In other cases, the courts have *required* doctors to elaborate on the state-mandated disclosures in order to remedy their misleading character. In *Karlin v. Foust*, the challenged statute also required a physician to inform any woman seeking an abortion that “auscultation of fetal heart tone services *are available* that enable a pregnant woman to hear her unborn child’s heartbeat.”²⁰⁶ Plaintiffs challenged the provision as misleading because the majority of women seek abortions before ten to twelve weeks of pregnancy, the point at which a fetal heartbeat can be detected. While the district court agreed that the provision was misleading, the Seventh Circuit reversed. The court required individual physicians, without the direction of the text of the statute, to fill in the gaps in the misleading statutory text: “[T]he language of the provision is not so narrow as to preclude a physician from being able to fully explain the availability of the identified services. Indeed, we see no reason why the provision would not also necessitate a physician to fully explain these services at issue.”²⁰⁷ Likewise, the court construed the statute, which provided an extensive list of risks—including “risks” rejected by the mainstream medical community such as psychological trauma, danger to subsequent pregnancies, and infertility—to be disclosed to patients, to require doctors to use their best medical judgment in characterizing those risks. Indeed, the doctor would, if it was in his best medical judgment, be required to discuss the “risk” of psychological trauma even if only to discount it: “This means that if a physician believes that no psychological trauma is associated with the abortion procedure to be used, that is what the statute requires him or her to tell the patient.”²⁰⁸

The district court in Alabama took the same approach to another second-generation regulation. In 2002, Alabama passed a law that, among other requirements, requires a physician to tell a woman seeking an abortion after nineteen weeks gestational age that

- a. The unborn child may be able to survive outside the womb[,] b. The woman has the right to request the physician to use the method of abortion that is most likely to preserve the life of the unborn child, provided such abortion is not otherwise prohibited by law[,] c. If the unborn child is born alive, the attending physician has the legal obligation to take all reasonable steps necessary to maintain the life and health of the child.²⁰⁹

206 *Karlin*, 188 F.3d at 491 (emphasis added).

207 *Id.* at 492.

208 *Karlin v. Foust*, 975 F. Supp. 1177, 1227 (W.D. Wis. 1997), *rev'd in part on other grounds*, 188 F.3d 446 (7th Cir. 1999).

209 *Summit Med. Ctr. of Ala., Inc. v. Siegelman*, 227 F. Supp. 2d 1194, 1198 (M.D. Ala. 2002).

Plaintiffs argued that such a statement is likely medically incorrect and at minimum misleading. Therefore, “in order to construe the Act as in compliance with *Casey*’s truthful or not misleading standard,” the court held:

[P]hysicians and qualified persons must go beyond a simple mechanical reading of the provision and provide the woman with the following information: 1) a full and complete definition of the term ‘survive’ in accordance with the physician’s good faith clinical judgment; 2) the nature of any survival; 3) survival is merely a possibility; 4) survival will or may be of extremely limited duration.²¹⁰

These holdings escape some of the criticisms above with respect to cases where the courts only mention the *ability* of doctors to comment. However, by requiring doctors to use their medical judgments to cure facially false disclosures requirement, the courts create strange results that may solve the “truthfulness” problem but ignore the heart of the nonmisleading standard. For example, after the decision in *Karlin*, many doctors are required to make disclosures like “I am required to tell you that auscultation services are available to enable you to hear the heartbeat of your unborn child. However, since you are only *x* weeks pregnant, you will not be able to hear a heartbeat.” And “I should warn you of the risk of psychological trauma; I believe there is none.” The court did not consider how the patient is likely to interpret these statements or react to the specter of psychological trauma or detectable fetal heartbeats. It is unclear what purpose these disclosures can further except to confuse the patient.

The court’s interpretation of the survival clause in the Alabama statute stretches the bounds of constitutional avoidance. The avoidance doctrine is meant only as a tool for choosing among reasonably available interpretations of the statute. The requirements the court imposed on doctors are nowhere to be found within the four corners of the text. But more importantly, the court’s interpretation does not solve the misleading problem. For the many physicians (perhaps all who perform abortions) who believe that the survival statement is medically false, the result of the court’s holding will be similar to that in *Karlin*. The physician would be forced to say something that reduces to, “Your unborn child may be able to survive outside the womb. However I do not think that your unborn child would be able to survive outside the womb in any meaningful sense.” While the court may once again have solved the easier problem of ensuring that

210 *Id.* at 1203.

a disclosure is not false, the court did not truly engage in considering what may be misleading to patients.²¹¹

Other doctor-patient regulation challenges demonstrate the lower courts' limited engagement thus far with the meaning of the nonmisleading standard and nearly complete deference to the state interest in regulation recognized in *Casey*. In *Eubanks v. Schmidt*, a district court declared ipso facto that color-enhanced and enlarged photos were not misleading without any discussion of its reasoning.²¹² The court also upheld state-created and mandatorily distributed materials despite evidence at trial that proved that an agency listed in the state materials provided misleading information to patients.²¹³ The court held that the misleading character of the agency's actions did not affect the character of the materials themselves: "*Casey* does not require, however, that every statement made by every agency identified be truthful and nonmisleading, merely that the pamphlets themselves meet those requirements."²¹⁴ The result may be that the state can use its materials to guide women to crisis pregnancy centers and other organizations that have a documented practice of providing misleading information. Such a ruling opens up the possibility for the state to do by proxy what it cannot do directly; the court did not analyze how this squares with the purposes behind the nonmisleading standard. Moreover, in *Fargo Women's Health*, despite *Casey's* guidance, the court focused on the likely effect on all patients rather than those affected by the provision.²¹⁵ While analyzing a provision that required doctors to tell women about the availability of medical assistance and father liability for child support (information that was only included in the optional state materials in *Casey*), the Eighth Circuit reasoned "[i]f in certain cases such a statement would be misleading or false, it

211 The court did temporarily enjoin the promulgation of the state materials on the ground that some of the information "may" have violated *Casey's* truthful and not misleading requirement. *Id.* at 1204–05. However, its holding was at best ambivalent. The court based its decision to preliminarily enjoin the materials on three factors: 1) they may not have complied with the statute itself, 2) some experts presented conflicting testimony on the factual accuracy of the materials, and 3) the legislature's directive indicated that the materials were not essential to the Act's taking effect. *Id.* at 1205. One interesting note, however, on the portion of the opinion is the court's recognition of how false or misleading materials may interact with and hinder the right; "[i]n indeed, these concerns are bolstered by the magnitude of the decision to have an abortion as well as the potential persuasiveness that state approved materials may have in this context." *Id.*

212 126 F. Supp. 2d 451, 459 (W.D. Ky. 2000).

213 *Id.* at 458.

214 *Id.* at 459.

215 *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 533 (1994).

would undoubtedly be because of unique and personal background facts that would be at least suspected if not known to the woman.²¹⁶

The Eighth Circuit *Rounds* decisions²¹⁷ demonstrate how consideration of what is misleading in informed consent regulations has dropped out entirely in many courts' analyses of abortion restrictions. First, in 2008, the Eighth Circuit court held en banc that South Dakota's informed consent law, which required physicians to inform women that the abortion will terminate the life of a "whole, separate, unique, living human being," is true, not misleading, and constitutionally permissible.²¹⁸ While the court recognized that "[t]aken in isolation," such a statement "may be read to make a point in the debate about the ethics of abortion,"²¹⁹ the court considered the statutory definition of "human being," provided in a separate section of the statute, sufficient to remedy any constitutional problems. The statute defined "human being" as "an individual living member of the species of *Homo sapiens*, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation."²²⁰ Reasoning that, by this definition of human being, the statement that an abortion terminates a member of the species *Homo sapiens* is scientifically true, the court concluded that the disclosure was permissible.²²¹

The court's reading implies that the question of what is "misleading" entirely rises and falls with the question of what is "truthful." Many of the depositions and affidavits in the case focused on whether it was "true" that a fetus is a "member of the species *Homo sapiens*."²²² The court relied on this evidence to summarily conclude that the statement was true and, thus, also not misleading. As the dissent explained, the court did not consider the effect of the modifiers "whole," "separate," "unique," or "living," but rather accepted wholesale the defense's explanation of why the state considered that state-

216 *Id.* at 534.

217 See *supra* notes 154–55 and accompanying text.

218 *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 735, 738 (8th Cir. 2008) (citation omitted).

219 *Id.* at 735.

220 *Id.* at 727 (citation omitted) (internal quotation marks omitted).

221 *Id.* at 736.

222 See, e.g., Declaration of Dr. David Fu-Chi Mark at 2 *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (No. 05-4007), 2005 WL 3531296 (explaining that South Dakota House Bill 1166's definition of a "human being" as an "individual living member of the species *Homo sapiens*,' including human beings living in utero, makes it clear that the statement under [§ 7(1)(b)] is stated as a scientific fact and nothing more").

ment to be true.²²³ In one sentence, the court dismissed Planned Parenthood's argument regarding the inherently misleading, if not factually untrue, nature of the disclosure: "Planned Parenthood's evidence and argument rely on the supposition that, in practice, the patient will not receive or understand the narrow, species-based definition of 'human being' in § 8(4) of the Act, but we are not persuaded that this is so."²²⁴

The court provided no explanation for why it is persuasive that women will understand this as a purely factual scientific disclosure despite its natural reading as a moral and philosophical one. It seems fair to assume that the question of whether this statement is misleading—in the sense that it uses the authority of the state and the physician to make an unsettled moral assertion as if it were a factual and settled one—is at least a colorable one to be substantively addressed. The court's failure to explain how it thinks women will understand this statement, and how that bears on whether it is misleading, is particularly troublesome, because it is difficult to imagine what reasonable other meaning or purpose could be assigned to the disclosure. As Robert Post argues, "[i]t hardly seems plausible that a woman could be confused about whether she is carrying the biological fetus of a zebra, a raccoon, or a bat."²²⁵

When this case returned to the district court, the court struck down the provision requiring doctors to inform women of "all known medical risks . . . including an [i]ncreased risk of suicide ideation and suicide" and the requirement that doctors advise a woman that she "has an existing relationship" with the fetus that "enjoys protection under the United States Constitution and under the laws of South Dakota."²²⁶ But even though the lower court found the latter provision to be untruthful and misleading because it could find no basis in South Dakota or United States constitutional law for it,²²⁷ the Eighth Circuit panel accepted the strained construction that this disclosure only requires a woman to be informed that she "is legally and constitutionally protected against being forced to have an abortion."²²⁸

²²³ *Rounds*, 530 F.3d at 744–45 (Murphy, J., dissenting).

²²⁴ *Id.* at 735 (majority opinion).

²²⁵ Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 954 (2007).

²²⁶ *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 650 F. Supp. 2d 972, 977–79, 982–83 (D.S.D. 2009) (alteration in original) (citations omitted) (internal quotation marks omitted).

²²⁷ *Id.* at 978–79.

²²⁸ *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 653 F.3d 662, 669 (8th Cir. 2011).

Once again, the court failed to consider how this provision would be interpreted by the patient when analyzing the possibly misleading nature of the required disclosure.

Finally, although both the district court and the Eighth Circuit panel found the suicide ideation and suicide disclosure to be not only misleading, but also false,²²⁹ the Eighth Circuit took the case en banc and reversed this holding.²³⁰ In holding the disclosure “truthful,” the en banc court did somersaults to construe the term “increased risk” not to imply any causal relationship. For example, the court explained: “There is a very real difference between (1) a statement that an action places an individual at an increased risk for an adverse outcome, and (2) a statement that, if the individual experiences the adverse outcome, the action will have been the direct cause.”²³¹ But it is questionable whether, to a layperson receiving medical advice on a procedure, there is a “very real difference” between those statements. And in any event, the question in determining the truthfulness of the disclosure is not whether the term “increased risk” implies that “the action will have been the *direct cause*” but rather if the term implies any causal relationship at all (because there is no medical evidence that adequately demonstrates *any* causal relationship between abortion and suicide or suicide ideation). The en banc court concluded that it does not.²³² Therefore, it concluded that correlative evidence was sufficient to support the required disclosure.

In analyzing the disclosure under the nonmisleading standard, the en banc court seemingly acknowledged that, without any proof of causation, the disclosure would be misleading or irrelevant. But then, the court turned the nonmisleading standard on its head. The question was no longer whether the disclosure misleadingly suggests to the patient an unproven causal link between abortion and suicidal ideation or suicide. The court did not consider whether the patient would assume at least some proof of causation in light of the required disclosure. Rather, the court held that the disclosure, which it admitted is only relevant to the extent it suggests causation, is not misleading unless “Planned Parenthood . . . show[s] that abortion has been ruled out, to a degree of scientifically accepted certainty, as a statistically significant causal factor in post-abortion suicides.”²³³ In other

229 *Rounds*, 650 F. Supp. 2d at 982–83; *Rounds*, 653 F.3d at 670–73.

230 *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 686 F.3d 889, 906 (8th Cir. 2012) (en banc).

231 *Id.* at 896.

232 *Id.* at 889.

233 *Id.* at 900.

words, the state has no affirmative obligation to ensure that its required disclosures do not misleadingly imply unproven inferences; a state-required disclosure is only unconstitutional if a plaintiff can demonstrate, with absolute certainty, that the implied inferences of a disclosure are false. With this impossibly high standard in place, the court rejected Planned Parenthood's evidence rebutting any causal link.

The en banc court's analysis essentially eliminated *Casey*'s affirmative requirement that informed consent disclosures "must be calculated to inform the woman's free choice, not hinder it."²³⁴ In Part I, this Article established that the purpose of the truthful and nonmisleading standard is to preserve a woman's autonomy in her decision-making process. But the court's analysis in *Rounds* entirely ignored the effect of the challenged disclosure on a woman's autonomy. The court never considered the way in which such a disclosure, unsupported by medical evidence, might manipulate a woman's autonomous decision-making.

The foregoing analysis demonstrates the lower courts' reluctance to rigorously apply the truthful and nonmisleading standard in light of the autonomy principle in *Casey*. Until recently, no opinion had ever declared a state's informed consent law misleading. However, a few recent decisions demonstrate that the lower courts are still willing to consider such challenges but lack the analytical tools to analyze what is misleading under *Casey*. In July 2010 and June 2011, district court decisions in Nebraska and South Dakota, respectively, temporarily enjoined the laws requiring doctors to discuss every recorded "risk factor" for abortion, discussed above in Subpart II.B.2.²³⁵ Both courts held that, because the literal language of the bills would certainly require doctors to discuss invalid and outdated medical studies asserting refuted claims such as the breast cancer link, the laws required the dissemination of untruthful and misleading information. These opinions represent a step towards recognizing the importance of this standard to maintaining the balance of *Casey*. But perhaps because the information required in these cases was so blatantly untruthful, the cases still do not provide much structure for future analysis under the nonmisleading standard.

²³⁴ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992).

²³⁵ *Planned Parenthood of Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1046, 1048–49 (D. Neb. 2010); *Planned Parenthood Minnesota, North Dakota, South Dakota v. Daugaard*, 799 F. Supp. 2d 1048, 1072 (D.S.D. 2011).

Recently, in *Stuart v. Loomis*,²³⁶ a district court recognized and applied the autonomy-protecting principle within *Casey*'s informed consent holdings. The court found North Carolina's ultrasound law—which required a doctor to display and explain an ultrasound image to a patient even if the woman refused to look or listen—irrelevant to any proper informed consent dialogue, and therefore unconstitutional under *Casey*. The court explained,

Instead of a “reasonable framework” within which a woman makes the decision about terminating a pregnancy, the speech-and-display provision is more like an unyielding straightjacket. It goes well beyond “encourag[ing] the pregnant woman] 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 “taking steps to ensure that [her] choice is thoughtful and informed.” By requiring providers to deliver this information to a woman who takes steps not to hear it or would be harmed by hearing it, the state has erected an obstacle and has moved from “encouraging” to lecturing, using health care providers as its mouthpiece. As discussed above, there is no health reason for requiring the disclosure to women who take steps not to hear it or would be harmed by hearing it, making this an “unnecessary health regulation[]” which is not allowed under *Casey*.²³⁷

The court's reasoning in *Loomis* takes *Casey*'s truthful, nonmisleading, and relevant requirement seriously and applies the relevance prong in a manner that effectuates *Casey*'s purpose: preserving a woman's autonomous decision-making. The following part fleshes out a theory by which courts can consistently apply the nonmisleading requirement to the same end.

IV. REVIVING THE NONMISLEADING REQUIREMENT: A RENEWED ANALYSIS OF AKRON, THORNBURGH, AND CASEY

As discussed above, a number of scholars have commented on the various ways in which the principles of *Casey* have eroded and proposed strategies for rebuilding the decision's foundation.²³⁸ Further, a look at the case law suggests a possible resurgence of First Amendment compelled speech claims. Plaintiffs were successful in the district courts in both Texas and North Carolina in challenging the forced ultrasounds with physician explanations on compelled speech grounds (although the Texas decision was reversed by the Fifth Cir-

²³⁶ No. 1:11-CV-804, 2014 WL 186310 (M.D.N.C. Jan. 17, 2014).

²³⁷ *Id.* at *38 (alterations in original) (citations omitted).

²³⁸ *See supra* notes 7–12 and accompanying text.

cuit).²³⁹ This Article contributes to this literature by focusing on the content and enforcement mechanisms for the truthful and nonmisleading standard, as a part of the overarching undue burden framework governing abortion restrictions.

For the reasons outlined in Parts I and II, this Article suggests that a better understanding of the truthful and nonmisleading standard is an important contribution to any discussion regarding the revival of the autonomy-protecting principle in *Casey*. Abortion restrictions act on women in a variety of ways, but dissuasion laws are increasingly common and the focus of significant constitutional litigation. The truthful and nonmisleading standard was designed to regulate these laws in particular. Although *Casey* overruled portions of *Thornburgh* and *Akron*, it was careful to limit its holding:

*To the extent Akron I and Thornburgh find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the ‘probable gestation age’ of the fetus, those cases go too far, are inconsistent with Roe’s acknowledgement of an important interest in potential life, and are overruled.*²⁴⁰

As discussed above, a close reading of *Akron*, *Thornburgh*, and *Casey* together demonstrates that the truthful and nonmisleading standard derives from concerns regarding women’s autonomy first outlined in *Akron*. By reexamining the origins of the standard, it becomes clear that much of *Akron* is still good law and provides a useful starting point for determining how courts should approach the nonmisleading standard to faithfully implement the autonomy-protecting constraints in *Casey*. A more robust understanding of the nonmisleading standard will have the benefits of (1) protecting the autonomy central to *Casey*; (2) uncovering impermissible purposes in state regulation; and (3) providing a framework for challenging statutes that are based solely on impermissible gender stereotypes.

A. Retracing Akron — The Origins of the Nonmisleading Standard

In 1983, the Court considered a challenge to an Ohio statute that regulated abortions in a manner remarkably similar to today’s second-generation dissuasion laws.²⁴¹ The law limited the performance

²³⁹ *Stuart*, 2014 WL 186310, at *38, *42; *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 806 F. Supp. 2d 942, 976–78 (W.D. Tex. 2011), *vacated by Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 584 (5th Cir. 2012).

²⁴⁰ *Planned Parenthood of South Eastern Pennsylvania v. Casey*, 505 U.S. 833, 882 (1992) (emphasis added).

²⁴¹ *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

of abortions to hospitals and imposed specific disclosures and a twenty-four-hour waiting period before a woman could certify her informed consent to an abortion. The informed consent disclosures included, (1) that according to the physician's best judgment, the woman is pregnant; (2) the number of weeks since the probable conception; (3) "that the unborn child is a human life from the moment of conception" and a detailed description of the anatomical and physiological characteristics of the unborn child of that pregnancy "including, but not limited to, appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart function, the presence of internal organs and the presence of external members"; (4) if after 22 weeks, that the child may be viable and capable of surviving outside the womb, and that "her attending physician has a legal obligation to take all reasonable steps to preserve the life and health of her viable unborn child during the abortion"; (5) that abortion is "a major surgical procedure which can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies; and that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances"; (6) the availability of public and private agencies that can provide birth control information; and (7) the availability of public and private agencies to assist her during pregnancy and after birth, including adoption options.²⁴² Further, the physician was required to disclose the particular risks attendant to the specific pregnancy and the abortion technique to be employed.

Since the law challenged in *Akron* is more akin to the second-generation informed consent laws than the law challenged in *Casey*, the Court's approach to the law in *Akron*, to the extent we can determine it was not overruled in *Casey*, should be helpful to lower courts in determining the constitutionality of today's similar regulations. Since *Casey*, it appears that both scholars and courts alike have mistakenly considered all of *Akron* to be overruled and irrelevant. Therefore, consideration of how its remaining holdings may inform the *Casey* decision has been under-theorized.

As Part I established, parts of *Akron* focused on the right of the doctor not to be placed in an "undesired and uncomfortable strait-jacket" and suggested that the State could not seek to dissuade wom-

242 *Id.* at 423 n.5.

en through informed consent laws from seeking an abortion.²⁴³ In those two respects—special solicitude for the rights of the doctor and the absolute prohibition on expressing a preference for childbirth—*Akron* is no longer reliable law.

However, a close reading of the Court's evaluation of the informed consent provisions demonstrates that its primary concern was the misleading nature of the disclosures. As to the requirement to disclose that "the unborn child is a human life," the Court indicated that such a statement was directly inconsistent with *Roe* and therefore could not be adopted by a state in an informed consent regulation.²⁴⁴ Further, the Court indicated that a detailed description of the specific fetus's development would involve "at best speculation."²⁴⁵ The Court was clearly concerned about the accuracy of the information and its likelihood to confuse or misinform a patient during her decision-making process. In particular, the Court was concerned with the statute's attempt to create the misleading impression that abortion is excessively risky to one's health. The Court labeled the statement "abortion is a major surgical procedure" as "dubious."²⁴⁶ Finally, the Court described the risk disclosures as a "*parade of horrors' intended to suggest that abortion is a particularly dangerous procedure.*"²⁴⁷

Thus, it was primarily to the misleading nature of the aggressive informed consent disclosures that the Court objected. In fact, in a footnote the Court indicated that it saw no problem *per se* with the pregnancy, gestational age, or adoption agency disclosures.²⁴⁸ Those provisions were struck down on an entirely different ground.²⁴⁹ These are precisely the disclosures that the *Akron* statute had in common with the statute in *Casey*. The Court only found impermissible, in and

243 *Id.* at 443–44 (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67 n.8 (1976)).

244 *Id.* at 444 (internal quotation marks omitted).

245 *Id.*

246 *Id.* (internal quotation marks omitted).

247 *Id.* at 445 (emphasis added).

248 *Id.* at 445 n.37 ("These four subsections require that the patient be informed by the attending physician of the fact that she is pregnant, § 1870.06(B) (1), the gestational age of the fetus, § 1870.06(B) (2), the availability of information on birth control and adoption, § 1870.06(B) (6), and the availability of assistance during pregnancy and after childbirth, § 1870.06(B) (7). This information, to the extent it is accurate, certainly is not objectionable, and probably is routinely made available to the patient.").

249 *Id.* ("We are not persuaded, however, to sever these provisions from the remainder of § 1870.06(B). They require that all of the information be given orally by the attending physician when much, if not all of it, could be given by a qualified person assisting the physician.").

of themselves, those disclosures that the Court determined were misleading, giving an unfair impression of the procedure.

Thus, the *Casey* Court's limitation of its overruling of *Akron* and *Thornburgh* only to the extent that they struck down "truthful and nonmisleading disclosures" can be read to specifically retain the portions of *Akron* concerned with misleading and manipulative disclosures by incorporation.

A comparison of *Thornburgh* and *Akron* supports this proposition and suggests that *Casey* was primarily overruling *Thornburgh*, not *Akron*, with respect to the content of disclosures. Unlike the statute in *Akron*, the statute in *Thornburgh* bore significant resemblance to the statute approved in *Casey*. In fact, the statute in *Casey* was a reincarnation of the *Thornburgh* statute. It required the disclosure of seven pieces of information:

- (a) the name of the physician . . . ,
- (b) the "fact that there may be detrimental physical and psychological effects which are not accurately foreseeable,"
- (c) the "particular medical risks associated with the particular abortion procedure to be employed,"
- (d) the probable gestational age, . . .
- (e) the "medical risks associated with carrying her child to term" . . . [,]
- (f) the "fact that medical assistance benefits may be available for prenatal care, childbirth and neonatal care," and
- (g) the "fact that the father is liable to assist" in the child's support²⁵⁰

The law also mandated the provision of state-mandated materials that would describe the development of the fetus and provide information about alternatives to abortion.²⁵¹ Unlike *Akron*, where the Court focused on the problematic content of the disclosures, the Court in *Thornburgh* relied only on the two propositions that *Casey* later overruled. First, the provisions were unconstitutionally designed to persuade a woman not to seek an abortion.²⁵² Second, the regulation placed the doctor in an "undesired and uncomfortable straitjacket," thus imposing "state medicine" on the woman and barring the professional guidance she would ordinarily expect from her physician.²⁵³ The Court did not consider whether the disclosures were "dubious," misleading, or similarly problematic; with the exception perhaps of section (b), the disclosures were far too straightforward to support such an assertion.

Justice White's dissent in *Thornburgh* affirms this interpretation of *Akron*. In fact, the truthful and nonmisleading standard in *Casey* was

²⁵⁰ *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 760-61 (1986).

²⁵¹ *Id.*

²⁵² *Id.* at 762.

²⁵³ *Id.* at 762-63.

likely lifted from his discussion of *Akron* in the *Thornburgh* dissent. Justice White wrote,

I have no quarrel with the general proposition, for which I read *Akron* to stand, that a campaign of state-promulgated disinformation cannot be justified in the name of ‘informed consent’ or ‘freedom of choice.’ But the Pennsylvania statute before us cannot be accused of sharing the flaws of the ordinance at issue in *Akron*.²⁵⁴

Two paragraphs later, Justice White outlined precisely the “truthful and nonmisleading” standard articulated in the plurality opinion in *Casey*: “It is in the very nature of informed-consent provisions that they may produce some anxiety in the patient and influence her in her choice. This is in fact their reason for existence, and—*provided that the information required is accurate and nonmisleading*—it is an entirely salutary reason.”²⁵⁵ In other words, informed consent provisions will, by their nature, always tend to either support or not support the decision to have an abortion. But providing a woman with truthful and nonmisleading information that is pertinent and “may affect her choice” is constitutionally acceptable.

Given the close relationship between the law in *Thornburgh* and the nearly identical law the Pennsylvania legislature passed just a few years later resulting in the *Casey* decision, it is likely that the truthful and nonmisleading standard articulated in Justice White’s dissent is an important antecedent of the *Casey* standard.²⁵⁶ Therefore, his stark comparison of what he describes as the “campaign of state-promulgated disinformation” in the *Akron* provisions with the *Thornburgh* provisions should provide a starting point for any *Casey* nonmisleading analysis.

What is notable is that the disclosures that Justice White labels “state-promulgated disinformation” are nearly identical to many provisions in current dissuasion regulations. The requirement that a doctor inform a woman “that the unborn child is a human life from the moment of conception” is a precursor to the “whole, separate, unique, living human being” disclosures.²⁵⁷ Since the Court applied the nonmisleading standard in *Akron* to strike down that provision,

²⁵⁴ *Id.* at 800 (White, J., dissenting).

²⁵⁵ *Id.* at 801 (White, J., dissenting) (emphasis added).

²⁵⁶ The standard can also be found in the First Amendment commercial speech context, which was addressed in the Third Circuit opinion in *Casey*, and therefore likely influenced the Court’s decision. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682, 705–06 (3d Cir. 1991). Nonetheless, the nonmisleading strand traced from *Akron* to *Thornburgh* to *Casey* more closely aligns with the underlying principles of *Casey* as outlined in Part I.

²⁵⁷ *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 423 n.5 (1983).

the history of the nonmisleading standard casts doubt on the South Dakota provision upheld in *Rounds*. Likewise, the survival disclosures disapproved of in *Akron* bear a close resemblance to the disclosure upheld in *Summit Medical Center*.²⁵⁸ Finally, the risk disclosures that Justice Lewis Powell described as a disingenuous “parade of horrors” match many current mandatory dissuasion regulations, as discussed above in Part II.

The nonmisleading analysis in *Akron* did not concern itself with whether any particular statement could be defended as truthful as a technical matter, but instead considered what the overall effect of the disclosures would be on the patient and whether it would create a misleading impression. Justice White approved of this analysis in his *Thornburgh* dissent, indicating that informed consent regulations should be limited to those that are neither untruthful nor misleading; that analysis was borrowed by the *Casey* majority.²⁵⁹ Tracing the history of the truthful and nonmisleading standard demonstrates that (1) the Court has consistently been concerned with misleading disclosures, not only technically untruthful disclosures, in order to safeguard the autonomy of a woman’s decision that is at the core of the abortion right and (2) much of *Akron* is still good law and provides a useful starting point for any analysis of whether an informed consent regulation is misleading, and thus, unconstitutional under *Casey*.

B. The Nonmisleading Standard: Protecting the Autonomy Value in Casey in Application

1. The Nonmisleading Standard in Multiple Roles: Serving Multiple Constitutional Purposes

As the foregoing Parts have established, a more robust vision of the nonmisleading requirement in light of *Casey*’s goals should aid courts in enforcing the autonomy-protecting principle within *Casey*. The question that can be gleaned from *Akron* is whether the required disclosures, and their presentation to the patients, give an honest and fair portrayal of relevant information or if, instead, the disclosures are likely to manipulate, mislead, or confuse women in the informed consent process and/or create a warped vision of the procedure. The latter would dangerously threaten a woman’s autonomous decision-making in the most direct way by inserting misleading considerations into her thought process. In this way, informed consent disclo-

²⁵⁸ *Summit Med. Ctr. of Ala., Inc. v. Siegelman*, 227 F. Supp. 2d 1194, 1198 (M.D. Ala. 2002).

²⁵⁹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 882 (1992).

asures are more dangerous to the core of *Roe* than logistical barriers. But the nonmisleading standard can act as a dyke against such dangers.

At the same time, the nonmisleading standard can also serve other constitutional functions as well. The nonmisleading requirement can act as a proxy for the purpose prong of *Casey*, which requires that state regulation have the purpose of informing, not hindering, a woman's choice.²⁶⁰ State regulation must not have the purpose of creating a substantial obstacle for a woman seeking an abortion. However, purpose evaluations are notoriously difficult to make. For example, the discriminatory purpose test for race or sex discrimination under the Fourteenth Amendment, where the statute itself is race or sex "neutral," has raised prohibitive barriers to challenging acts with discriminatory effects.²⁶¹ Unless a statute inscribes its unconstitutional purpose into the text, the Court is hesitant to ascribe unconstitutional purposes to the state where constitutional purposes might explain the statute instead.

Scholars have noted that it has been particularly difficult to prove an unconstitutional purpose in the *Casey* context.²⁶² In *Mazurek v. Armstrong*, the Supreme Court suggested that it is possible that an impermissible purpose can never be found without an impermissible effect. However, it did not directly so hold.²⁶³ Nonetheless, lower courts have often ignored the purpose prong entirely or, when they have addressed it, "define[d] the test negatively, describing the type of evidence that is insufficient to establish improper purpose but never indicating what evidence, short of a defendant's outright admission on the record, might suffice."²⁶⁴ Only a few cases have ever found an unconstitutional purpose under *Casey*.²⁶⁵

A robust application of the nonmisleading standard can help to mollify the effects of a weak purpose prong and identify statutes with

²⁶⁰ *Id.* at 877.

²⁶¹ See generally Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136 (1997).

²⁶² See, e.g., Wharton, Frietsche & Kolbert, *supra* note 7, at 378.

²⁶³ 520 U.S. 968, 972 (1997).

²⁶⁴ Wharton, Frietsche & Kolbert, *supra* note 7, at 378.

²⁶⁵ E.g., *Planned Parenthood of Greater Iowa v. Atchison*, 126 F.3d 1042 (8th Cir. 1997) (holding that the state requirement that a director obtain a certificate of need in order to build an abortion clinic was unconstitutional); *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996) (holding that a state provision that only allowed abortions after twenty weeks with only narrow exceptions was unconstitutional); *Okpalobi v. Foster*, 981 F. Supp. 977 (E.D. La. 1998), *aff'd*, 190 F.3d 337 (5th Cir. 1999), *rev'd on other grounds*, 244 F.3d 405 (5th Cir. 2001) (en banc) (holding that a state statute that rendered the doctor providing an abortion liable in tort for any derivative injury to the mother was unconstitutional).

unconstitutional purposes as well as effects. In further explaining the purpose prong, the Court in *Casey* explained that “[a] statute with this purpose [of placing a substantial obstacle] 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.”²⁶⁶ Where the regulations run afoul of a robust nonmisleading inquiry, meaning that the information is calculated to manipulate or confuse a woman’s decision-making process, then the statute does not meet the requirement that it be calculated to inform, not hinder, a woman’s decision.

Finally, as discussed above, the women-protective antiabortion argument, which underlies many second-generation dissuasion regulations, is premised on impermissible assumptions about women’s role in society and their capacity to make independent decisions. Based on these impermissible assumptions, antiabortion advocates support regulations that insist that abortion harms women, both physically and psychologically, despite the lack of medical evidence supporting these claims. Further, these impermissible assumptions support an argument that any and all restrictions on abortion, regardless of the veracity of their claims or the legitimacy of their medical motives, are acceptable because they “protect” women from their own choices to seek abortions.

The nonmisleading inquiry will invalidate regulations based on such impermissible assumptions about women. Again, the nonmisleading inquiry will only allow disclosures that present a fair and accurate impression of the abortion procedure as well as a woman’s alternative options. Therefore, regulations that (1) require disclosures regarding harms to women from abortion that are not medically supported or (2) seek to restrict abortion in any manner possible on the theory that “abortion always harms women” will be rejected. These regulations can be exposed as impermissibly supported by gender stereotypes since their content is misleading. The content of such disclosures clearly seeks to hinder, not inform, women’s decisions on the basis that (1) women lack the capacity to make these choices and (2) the natural role for every woman is mother. Therefore, in addition to promoting the autonomy of women’s decisions and identifying statutes with the unconstitutional purpose of creating a substantial obstacle to abortion access, the nonmisleading inquiry can identify statutes supported by impermissible assumptions about women. The following Subpart applies the nonmisleading standard to three of the

266 *Casey*, 505 U.S. at 877 (emphasis added).

dissuasion laws discussed above to illustrate how it can aid courts in applying the autonomy-protecting principle within the undue burden standard and the limits of the standard as an analytic tool.

2. *The Nonmisleading Standard As Applied*

a. *The “Whole, Separate, Unique, Living Human Being” Disclosure*

As outlined in subpart II.B.6, several states now require doctors to tell women that abortion ends the life of a “whole, separate, unique, living human being.” The Eighth Circuit—relying on the technical statutory definition of “human being” and depositions from scientists stating that accepting such a definition would be scientifically accurate—upheld the requirement against a *Casey* challenge.²⁶⁷ This dissuasion law most clearly demonstrates how the application of the nonmisleading standard, in line with its application in *Akron* and the autonomy principle in *Casey*, would drastically change the legal analysis. The Eighth Circuit relied on evidence in the record to conclude that at least one reading of the language of the disclosure, although divergent from common parlance, was not inaccurate and, on that basis, upheld the disclosure.²⁶⁸ Under a proper nonmisleading analysis, the court’s task is *not* to determine whether there is an available, technically accurate interpretation of the disclosure. Rather, the court must place itself in the position of the reasonable woman and determine whether her likely understanding of the disclosure is one that would accurately inform her decision or mislead or manipulate her decision-making process.

From this perspective, the “whole, separate, unique, living human being” disclosure almost certainly fails. The reasonable woman will certainly interpret the disclosure as an assertion of the moral status of the fetus as a human being: that the fetus is a human being not in the biological sense of being a member of the species *Homo sapiens* but in a “second and distinct sense” that it is a “member of the community of human persons whose life possesses dignity and warrants respect.”²⁶⁹ As Robert Post argues, “It hardly seems plausible that a woman could be confused about whether she is carrying the biological fetus of a zebra, a raccoon, or a bat.”²⁷⁰

267 *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 738 (8th Cir. 2008).

268 *Id.* at 735–36.

269 Post, *supra* note 225, at 954–55.

270 *Id.* at 954.

Understood as portraying this message, it is clear that the state is using its power to regulate the doctor-patient relationship to convey as fact an answer to the unsettled moral question that underlies the entire abortion conflict. It is precisely because the Court held in *Roe*, and again in *Casey*, that the state cannot dictate how a woman answers the question of whether the fetus constitutes human life that the woman has the right to decide whether to terminate her pregnancy. If the woman truly accepted this statement as fact, in all but perhaps the rarest circumstances, her decision would be entirely short-circuited. Referring back to *Akron* confirms that this disclosure would fail a more robust nonmisleading test. In *Akron*, the law required doctors to tell women “the unborn child is a human life from the moment of conception.”²⁷¹ The Court rejected the disclosure as “inconsistent with the Court’s holding in *Roe v. Wade* that a State may not adopt one theory of when life begins to justify its regulation of abortions.”²⁷² The state could not lead a woman to believe that an unsettled question constitutionally left to the individual woman was indeed settled. Indeed, even the Eighth Circuit recognized that to the extent that the statement was read to make a “point in the debate about the ethics of abortion,” it would be improper under the truthful and nonmisleading standard.²⁷³ Therefore, under a more comprehensive understanding of the nonmisleading standard, the “whole, separate, unique, living human being disclosure” would fail.

b. The 2011 South Dakota Dissuasion Law: Risk Disclosures and Crisis Pregnancy Center Counseling

The 2011 South Dakota dissuasion law included many components. This Subpart applies the nonmisleading standard to its risk disclosure and crisis pregnancy center sections to demonstrate the more complex ways that the standard can change the manner in which courts analyze these laws. Subpart II.B.2. outlined South Dakota’s new risk disclosure law, which would require doctors to screen for every “risk factor,” defined broadly, ever reported to be associated with abortion ever published in an English peer-reviewed study anywhere since 1972, and disclose any “complications” associated with those risk factors.²⁷⁴ Even under the weaker standard courts are cur-

²⁷¹ *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 423 n.5 (1983).

²⁷² *Id.* at 444.

²⁷³ *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 735 (8th Cir. 2008).

²⁷⁴ H.B. 1217, 2011 Leg., 86th Sess. (S.D. 2011).

rently enforcing, the district court held that the statute did not provide sufficient safeguards to ensure that the risks required to be disclosed under the law would not be false or patently misleading. For example, the law could require disclosure of an abortion-breast cancer link, which has been firmly rejected by the medical literature.²⁷⁵

However, as discussed above, one could imagine a version of the South Dakota law that ensured that the law only covered medically accurate studies, but would still require such an abundance of information that it would likely severely disrupt the informed consent process and the woman's ability to make an intelligent assessment of her options.²⁷⁶ The nonmisleading analysis provides a vehicle for the courts to determine whether the dissuasion law disrupts autonomy in this manner, regardless of the technical truthfulness of the disclosures. Again, the question for the courts is whether the risk disclosures, from the perspective of the patient, will provide an accurate portrayal of relevant information or disrupt her ability to make a competent decision. Like the disclosure in *Akron*, the South Dakota law would force women to listen to a "parade of horrors" that would incorrectly "suggest that abortion is a particularly dangerous procedure."²⁷⁷ Furthermore, the nonmisleading standard would allow the courts to take cognizance of the psychological studies and informed consent literature that suggests that the disclosure required by this law would create the type of cognitive overload that would disrupt a patient's ability to make an informed choice.

The 2011 South Dakota law also required women to visit crisis pregnancy centers for independent counseling before accessing an abortion. The court struck this provision down on the separate First Amendment ground of a woman's right against compelled speech.²⁷⁸ The nonmisleading standard provides another way of evaluating this provision. Under current case law, the courts would not necessarily analyze the content of the possible misleading effects of the provision since the counseling is provided by a third party, not the state, and the state does not dictate the disclosures the pregnancy center must give. However, under the nonmisleading standard, the question is not just whether the state dictates factually inaccurate disclosures. Rather, the inquiry is whether the state forces the woman into a position where her decision-making will be disrupted by disclosures that

²⁷⁵ *Planned Parenthood Minnesota, North Dakota, South Dakota v. Daugaard*, 799 F. Supp. 2d 1048, 1071–72 (D.S.D. 2011).

²⁷⁶ See *supra* Subpart II.B.2.

²⁷⁷ *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 445 (1983).

²⁷⁸ *Daugaard*, 799 F. Supp. 2d at 1054–55, 1077.

create false impressions about her options. Seen in this light, the state should not be permitted under the nonmisleading standard to delegate the mandatory disclosure process to a third party unless it dictates the content of the disclosures. This is not to suggest that the state must dictate the disclosures given by a woman's doctor, since she freely chooses which doctor to approach. But when the state requires a woman to enter a counseling session in order to access abortion, it must ensure that the content of that discussion is nonmisleading. In other words, the nonmisleading standard will not allow the state to do by proxy what it cannot do directly.

c. The Mandatory Ultrasound with Mandatory Descriptions

Analysis of the mandatory ultrasound laws, in particular those that require not only that all women have an ultrasound, but also that every woman's provider show her the image and describe it to her regardless of her wishes,²⁷⁹ demonstrates the limitation of the nonmisleading standard as a tool for analyzing abortion regulation under the broader undue burden framework. The mandatory ultrasound does not appear to carry the danger most prominent in *Akron* and that the nonmisleading standard was developed to counter: the use of the informed consent dialogue to create false impressions of abortion and its alternatives and the manipulation of a woman's ability to make a competent and knowing decision. The ultrasound image does not introduce misleading information into the informed consent dialogue in the conventional sense. One could argue that mandatory ultrasounds seek to emotionally manipulate the decision-making process and in that sense violate the nonmisleading standard. Ultrasound requirements seek to force women to confront an unwanted image, powerfully symbolic of motherhood, in the hopes that the emotional impact will compel her to continue her pregnancy. As Carol Sanger writes, it "is meant to bend a woman's will once she has already made up her mind to seek an abortion."²⁸⁰

However, because the ultrasound image and the doctor's script do not contain the types of confusing or misleading information paradigmatic of the standard as elaborated in *Akron*, the nonmisleading standard does not seem like the most appropriate tool for analyzing these provisions. Thus, the mandatory ultrasound law illustrates the limitations of the nonmisleading standard. The standard is only one

²⁷⁹ See *supra* Subpart II.B.5.

²⁸⁰ Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 362 (2008).

tool for implementing the broader undue burden framework that *Casey* implemented to place autonomy-protecting constraints on the State's right to regulate abortion throughout pregnancy. Ultrasound requirements may be more appropriately analyzed directly under the undue burden framework; courts must determine whether the laws have the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."²⁸¹ As Sanger argues, the distinctiveness of the ultrasound requirement and its use of a woman's own body to produce a powerfully symbolic image of motherhood for the woman to confront may pose such a substantial obstacle.²⁸² It is beyond the scope of this Article to analyze how the undue burden framework applies to mandatory ultrasound requirements. However, the application of the nonmisleading standard to these regulations demonstrates the limits of the standard in protecting women's autonomy and reminds us that the standard is only part and parcel of the larger undue burden framework erected in *Casey*.

CONCLUSION

Casey sought to strike a balance through the undue burden framework between the state's interest in regulating to protect potential life and the woman's liberty interest in autonomously deciding whether to continue her pregnancy. The truthful and nonmisleading standard was one of the autonomy-protecting constraints that *Casey* placed on the states as it opened up the space for the state to regulate abortion. A close reading of *Akron*, *Thornburgh*, and *Casey* together demonstrates that the nonmisleading standard, at least in part, has its roots in the *Akron* decision. Doctor-patient dialogue regulation has come full circle since the *Akron* decision. The Court in *Akron* struck down the challenged statute because it sought to convince women to continue their pregnancy through misleading disclosures. The regulations in *Thornburgh* and *Casey* sought to persuade women but through nonmisleading means. However, the new generation of doctor-patient regulations, which this Article has termed dissuasion laws, more closely resembles the misleading disclosures of the statute in *Akron* than the disclosures approved in *Casey*. Recent case law demonstrates that lower courts are seeking to respond to this increasingly aggressive generation of regulations to enforce the balance of

²⁸¹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992).

²⁸² Sanger, *supra* note 280, at 361.

interests recognized in *Casey* but lack the analytical tools for determining what is misleading under *Casey*. A close reading of *Akron* can provide the starting point for a more robust nonmisleading standard that will faithfully implement the principles of *Casey*.