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A New Approach to Abortion Informed Consent Laws: How An Evidence Law Framework Can Clarify *Casey's* Truthful, Non-Misleading Standard

Veneeta Jaswal

University of San Diego School of Law, 5998 Alcala Park, San Diego, CA 92110-2492, USA; vjaswal@sandiego.edu; Tel.: +1-408-784-5235

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Abstract: United States Supreme Court doctrine has, for a quarter century, permitted regulations designed—through facts or nudges, but not force—to persuade pregnant women to choose childbirth over abortion. States have increasingly exceeded the bounds of this persuasive power by subjecting women to emotive and potentially distressing ‘information’ like real-time fetal images, heart beat recordings, or state-mandated directives by their doctors that abortion would “terminate the life of a whole, separate, unique, living human being.” This article advances a novel approach to informed consent in abortion that draws on established principles in the U.S. Federal Rules of Evidence (FRE). Evidentiary rules requiring “completeness”, exempting “common knowledge”, and prohibiting evidence that is “more prejudicial than probative” provide a sounder way for courts to determine which informed consent regulations on abortion mislead and demean a woman in ways that violate her constitutional right to make the ultimate decision about whether to continue a pregnancy. This evidence law framework would resolve conflicts between a woman’s right and the state’s interest by forbidding mandatory disclosures of incomplete, unnecessary, and emotionally charged information designed to promote childbirth over abortion.

Keywords: abortion; informed consent; reproductive rights; constitutional law

1. Introduction

In 1992, the Supreme Court drastically changed the contours of permissible informed consent requirements for abortion procedures. For the first time, states were authorized to provide purely persuasive information to dissuade women from terminating their pregnancies.¹ However, the Court recognized the profoundly life-defining nature of such a decision and implemented limits on the extent of persuasion the state can use: information must be truthful, not misleading, and cannot pose a substantial burden on women’s ability to exercise their reproductive right to abortion.² The sanction of persuasive informed consent materials confined by the truthful, non-misleading (T/NM) standard was the Court’s attempt at reconciling the two conflicting interests implicated in an abortion decision: a “realm of [a woman’s] personal liberty which the government may not enter”³ and the state’s interest in protecting potential life.⁴

Despite the balance sought, the Court’s failure to provide guidance as to how “misleading” should be applied resulted in discernable harm to women. Specifically, under the veil of scientifically

¹ *Planned Parenthood of S. Pa. v. Casey*. 505 U.S. 833 (1992).

² *Id.* at 880.

³ *Id.* at 847.

⁴ *Id.* at 871.

accurate information, states enacted controversial legislation (known as Right to Know or mandatory disclosure laws) that mandate disclosure of prejudicial informed consent material that has the effect of distorting women's decision-making process. The use of misleading information to influence women into a particular decision not only decreases their ability to make voluntary decisions conforming to their life plan, sense of self, and personal values, but also deems women as incapable of making sound reproductive decisions (Manian 2009).

This Article suggests drawing upon the analytical methods prescribed in the Federal Rules of Evidence (FRE) to establish an alternate, simpler framework for assessing, screening, and conveying state-mandated informed consent disclosures. Specifically, the FRE can provide a novel perspective that courts can use to decipher whether truthful information intended to allow a woman to make an informed decision can nonetheless have a misleading effect. The current failure of lower courts to recognize the harmful effect of some mandatory disclosure laws on a woman's capacity to make an independent reproductive choice has arguably diminished her autonomous liberty, a liberty the Supreme Court sought to protect.⁵ While disclosure laws may seem facially constitutionally sound, applying evidence law in the abortion context can make obvious the underlying values jeopardized by such laws. The FRE recognizes the character of evidence and anticipates its effect on the plaintiff, defendant, and trier of fact before it is admitted. While the rules themselves operate to ensure objectivity, they are merely a vehicle to facilitate fairness, ascertain the truth, control the power of the state, and prevent unwarranted intrusion into the lives of the parties involved (Leonard 1992).⁶ Applying this approach, which has been scrutinized and refined over time, can provide guidance to resolve disparities in the relatively new area of abortion jurisprudence. To help achieve the balance envisioned by the Supreme Court, three evidence rules can be used to create an analytical framework: (1) FRE 106 rule of completeness; (2) FRE 702 common knowledge exception to expert testimony; and (3) FRE 403 balancing test. These rules are flexible, allowing application to a wide range of disclosure laws, including future questionable abortion disclosure legislation. It is important to develop a framework that not only applies to current Right to Know laws, but one that can be of relevant value for future generations of laws.⁷ Though scholarship in abortion law contains cursory references to the body of evidence law, the application of a FRE-based framework to inform how courts might think about disclosure laws has not been a considered (Sanger 2008; Sawicki 2014).

The proposed use of FRE to interpret Right to Know laws and analyze their constitutionality is not free of possible criticisms. One such objection pertains to the way each body of law views persuasive information. Where evidence law revolves around ensuring an objective evaluation of evidence that is not skewed in favor of either party, the Supreme Court explicitly authorized the use of persuasive information aimed at dissuading women from undergoing abortion procedures.⁸ While it is true that states can mandate information purely to urge childbirth that need not further any particular health interest,⁹ the Court introduced limitations to protect women's bodily integrity, their ability to exercise decisional autonomy from undue government interference, and ensure informed consent. Shy of a complete ban, the Supreme Court did not prescribe how these limitations should be implemented, engendering legislation mandating the use of sensationalized, graphic information that fails to encourage informed consent and restricts viable options. Creating the illusion that certain choices are off the table can mislead women into a choice she may otherwise not have made. Without a prescription for applying the Court's limitations, a woman's autonomy interest is given little to no

⁵ See generally, *Casey*. 505 U.S. 833 (1992).

⁶ FRE 102. Purpose.

⁷ *Casey's* failure to uphold the spousal consent portion of the Pennsylvania disclosure law in question was a direct reflection of the social climate at the time *Casey* was held. As the body of woman's rights and equality has changed, so too will abortion laws. Designing a framework of analysis that can adapt to these changing concerns will be beneficial in the event a new generation of Right to Know laws are enacted and courts again find themselves struggling to apply the *Casey* test.

⁸ *Casey*. 505 U.S. 833 (1992).

⁹ *Id.* at 886.

consideration, unfairly skewing the scales toward protection of potential life. The objective perspective of the FRE rules can bring the balance of interests closer to that envisioned by the Supreme Court. While evidence law is not analogous to abortion jurisprudence, nor does it have any controlling authority on Right to Know laws, the three examples of FRE can provide courts perspective and insight in determining how to apply the misleading prong of the T/NM standard.

2. An Overview of the *Casey* Opinion

In *Planned Parenthood of Southern Pennsylvania v. Casey*, the Supreme Court reviewed a Pennsylvania law that required a physician to disclose (1) the nature of the abortion procedure; (2) the health risks associated with abortion and childbirth; and (3) the gestational age of the fetus.¹⁰ A 24-h waiting period was required between disclosure of information and the abortion procedure.¹¹ In addition, physicians were to make printed materials available that described consequences to the fetus, listed alternatives to abortion, and provided a list of public and private agencies available for financial and other related assistance.¹² The procedure could not be performed unless the woman provided written acknowledgement that she was informed of these resources and, if she was married, obtained signed consent from her spouse.¹³ Of the provisions in question, the Court only found the spousal consent requirement unconstitutional,^{14,15} holding the remaining required information ensured a woman's decision is informed and did not constitute a substantial obstacle.¹⁶

The Court took this opportunity to revisit *Roe v. Wade*. Where *Roe* recognized the right to abortion stemmed from privacy interests, *Casey* reframed the right as also incorporating the principals of autonomy, bodily integrity, and gender equality protected by the 14th Amendment (Siegal 2008; Manian 2009, p. 242).^{17,18,19,20} *Casey* also observed that *Roe's* analysis centered too heavily on the woman's interests in the abortion decision. While affirming the central holding, the right to terminate a pregnancy, *Casey* overruled *Roe's* trimester framework, reasoning that *Roe* did not give sufficient weight to the government's interest in protecting potential life in the first trimester of pregnancy.²¹ To remedy the imbalance, the Court granted states the ability to use persuasive information as a part of informed consent if the information was truthful, not misleading, and did not impose an undue burden on a woman's ability to exercise her reproductive liberty.²² Before *Casey*, information intended to inform a woman about the risks associated with abortion was distinguished

¹⁰ *Id.* at 881.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 887.

¹⁴ *Id.* at 897 (describing the possible use of economic, physical or psychological coercion to prevent a wife from abortion as "tantamount to the veto found unconstitutional in *Danforth*. Women...who most reasonably fear the consequences of notifying their husbands they are pregnant, are in the gravest danger").

¹⁵ See also, *Planned Parenthood of Central Missouri v. Danforth*. 428 U.S. 52, 69 (1976) (holding "the State may not constitutionally require the consent of the spouse as a condition for abortion... the State cannot delegate to a spouse a veto power which the state itself if absolutely and totally prohibited from exercising...").

¹⁶ *Casey*. 505 U.S. at 881.

¹⁷ Manian, describing the *Roe* court as "grounding its decision in a line of privacy cases" and the right to privacy in family life "encompassed the right of a woman to decide whether to carry her pregnancy to term."

¹⁸ *Roe v. Wade*. 410 U.S. 113 (1973) (stating the government may not regulate abortions unless it has a compelling interest and any means used by the government to regulate abortions must promote that interest).

¹⁹ *Casey*. 505 U.S. at 851 ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment").

²⁰ *Roe* at 153 ("Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision").

²¹ *Casey*. 505 U.S. at 871 (1992).

²² *Id.* at 872.

from information intended to influence her decision (Suter 2013).^{23,24,25} *Casey*, however, obscured this distinction by sanctioning the use of truthful persuasive information while failing to provide a framework to determine whether any particular information is misleading. Additionally, the Court's definition of an undue burden (any law that has the "specific purpose or effect of causing a substantial obstacle" for women who opt to terminate a pregnancy)²⁶ further muddled the water because no clarity was provided to interpret "substantial obstacle".²⁷ This lack of guidance has specifically enabled states to enact legislation testing the constitutional limits of *Casey*'s standards (Suter 2013, p. 19²⁸; Dresser 2008, p. 1602),²⁹ including aggressively persuasive laws designed to induce women into continuing their pregnancy rather than inform their choice (Sanger 2008, p. 396).³⁰

3. Current (Mis)Balance of Interests

Autonomy, in the broadest sense, can be defined as independence and freedom to act in a way one chooses (Merriam-Webster Online Dictionary 2015). The ability to make decisions voluntarily allows individuals to shape their character and personality in light of their values, life expectations, and societal circumstances. In the medical context, autonomy relates to a patient's capacity to make decisions about his or her health and medical treatments (Suter 2013, pp. 11–17). Informed consent jurisprudence is defined by the duty to ensure patients retain autonomous control over their medical decisions (Manian 2009, p. 240).³¹ Yet, autonomy in the abortion context seems to embody more. In *Casey*, Justice Kennedy described the decision to terminate a pregnancy as "involving the most intimate and personal choices a person may make in a lifetime" and "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."³² Scholar Sonia Suter describes reproductive decisions as "so deeply intertwined with [a woman's] identity" because such decisions are "dependent on deeply personal considerations" (Suter 2013, p. 17). Unlike other medical procedures, the decision to terminate a pregnancy is a defining moment for a woman because it is made based on many non-medical factors, including how she perceives her relationship with her family, finances, career, the father of the unborn, and the community.³³ A woman's ability to choose pursuit of her career instead of rearing children based on her understanding of her purpose in life seems embodied in Justice Kennedy's notion of autonomy. In advocating for the unconstitutionality of information clearly aimed at dissuading abortion unconstitutional, Justice Stevens stated, "the

²³ *Thornburgh v. American Coll. Of Obst. & Gyn.*, 476 U.S. 747, 762 (1986) ("It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances. *Danforth's* recognition of the State's interest in ensuring that this information be given will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth" (citing *Akron*, 462 U.S. at 443–44)).

²⁴ *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1021 (1st Cir. 1981) (defining informational information as "directly material to any medically relevant fact").

²⁵ *Thornburgh*, 476 U.S. at 762 (describing influential information as that which "may serve only to confuse or punish her and to heighten her anxiety").

²⁶ *Casey*, 505 U.S. at 877(1992) ("[A] statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends").

²⁷ To be clear, *Casey* did find a twenty-four hour waiting period did not constitute an undue burden because inquiries into substantial obstacle is judged based on the group of women as a whole, not on an individual basis. Though the required waiting period may create a burden for some within the class of pregnant women seeking to terminate their pregnancies, it did not create an undue burden for the majority of women.

²⁸ This shift significantly opened the door to broad informed consent requirements, leading some state legislatures to draft ever more extreme forms of such laws.

²⁹ After *Casey* affirmed that states could require physicians to supply pregnant women with material designed to encourage childbirth as a means of ensuring that women's choices were 'matured and informed,' states legislatures moved to do just that.

³⁰ Stating mandatory ultra sounds are "less an appeal to reason than an attempt to overpower it."

³¹ Although a number of different rationales have been proposed in support of informed consent rules, informed consent law primarily serves to protect patient dignity and autonomy.

³² *Casey*, 505 U.S. at 851.

³³ *Id.* (describing a sense of relational autonomy as defining who we are based on how we understand ourselves in relation to family, friends, and the community we live in).

authority to make such traumatic and yet empowering decisions is an element of basic human dignity.”³⁴ The right to choose is the essence of dignity in American culture, and respect for a particular choice generates societal worth and stature (Eberle 1997, pp. 1033–34). It seems autonomy’s importance lies in dignity that stems from societal respect afforded to autonomous control over empowering, life-defining decisions. Constitutional scholar Reva Siegal analyzed precedent to uncover three forms of human dignity protected by the Constitution: life, liberty, and equality (Siegal 2008, p. 1736). Siegal interprets respect of dignity to mean “honor the intrinsic value of life...secure the autonomy of individuals, and...treat all members of the community with equal respect” (Siegal 2008, p. 1750). The T/NM and undue burden standard set forth in *Casey* attempted to respect all three aspects of dignity by prohibiting regulation on behalf of potential life that greatly infringes on women’s dignity or restricts their decisional autonomy (Siegal 2008, p. 1750). “Government may ‘persuade’ a woman to carry a pregnancy to term; it may not, however, manipulate, trick, or coerce her into continuing the pregnancy” (Siegal 2008, p. 1752). If *Casey*’s intention was to reconcile these conflicting constitutional liberties, aggressively persuasive state regulations that subject women to emotive and potentially distressing information should not pass constitutional muster.

3.1. Right to Know Laws

After *Casey*, states enacted legislation comparable to Pennsylvania’s informed consent requirements for abortion procedures.³⁵ Today’s Right to Know laws encompass a range of information conveyed in various manners including real-time fetal images, heart beat recordings, and state-mandated directives by doctors that abortion would “terminate the life of a whole, separate, unique, living human being.”³⁶ Current laws not only include information similar to the Pennsylvania statute, but also have stretched the boundaries with the advancement and accessibility of technology (Alexander 2007).³⁷ For example, 26 states currently regulate ultrasound for abortion procedures (Guttmacher Institute 2017).³⁸ With 3D and 4D ultrasound technology already in use, even more realistic and graphic depictions of fetal development may be incorporated into informed consent laws in the near future.³⁹

Nadia Sawicki grouped disclosure laws into seven categories: (1) information about abortion alternatives; (2) social support programs; (3) mandatory waiting periods; (4) specific risk factors; (5) gestational age & fetal development; (6) ultrasounds (fetal image) & sonograms (heartbeat); (7) standardized language for physicians to read (Sawicki 2011). Sawicki’s characterization is helpful to illustrate the broad range of information currently mandated as a part of informed consent for abortion procedures. To provide clarity, Right to Know laws can be viewed on a spectrum that ranges from persuasiveness to essentially manipulative. Though all are persuasive in nature, it is important to note some types of information, or the form in which they are conveyed, are not as objectionable as others. Some persuasive information can provide valuable options or considerations the woman was unaware of. For example, she may not know of state financial support programs, such as Temporary Assistance for Needy Families (Sawicki 2011, p. 8), which may have been a determining factor in her decision. Furthermore, as we live in an era inundated with information, information in itself is not wrong.⁴⁰ However, the manner in which information is presented, the extreme measures taken to limit women’s autonomy, and the effect of undermining women’s dignity are objectionable. By categorizing

³⁴ *Casey*, 505 U.S. at 916 (1992).

³⁵ *Infra* Part I.

³⁶ For a comprehensive overview of current state abortion informed consent requirements, see (Guttmacher Institute 2017).

³⁷ Estimating the market for ultrasound technology in 2003 “at 1.27 billion U.S. dollars” and in 2007 at “1.5 billion dollars.”

³⁸ “Of those, three states require ultrasounds for each woman seeking to undergo an abortion procedure and the physician must show and describe the image to the woman. Another ten require an ultrasound, but the physician only has to provide the woman an opportunity to view the image.”

³⁹ See e.g., The Ultrasound Experience, offering 3D and 4D technology to see “a glimpse of movement that you do not feel” and describing the differences between 2D, 3D and 4D ultrasounds: 2D is “a typical black and white image;” 3D provides a more realistic still surface image; whereas 4D provides a more realistic moving video.

⁴⁰ *Contra*, (Lang 2014, p. 1388) “[A]n overload of information and complexity can lead to poor decision-making.”

laws on a spectrum, it becomes possible to draw a line differentiating between permissible regulations comporting with informed consent from those that ought to be impermissible due to the aggressively persuasive, misleading, or manipulative effect on women that far exceeds any informational purposes of the law.

3.2. Truthful, Non-Misleading (T/NM) Information:

The decision to terminate a pregnancy is made in relation to a woman's individual beliefs, values and life circumstances beyond merely medical considerations (Suter 2013, p. 18).⁴¹ Family planning decisions, whether to begin a family or maintain the current size, not only impact the remainder of one's physical, emotional, economic, and social life, but also the lives of her family and of those in her community. To be clear, the substantial implication of terminating a pregnancy does warrant the need to ensure abortion decisions are carefully made and as informed as possible. If applied in an equitable manner, the T/NM standard can significantly guide the decision making process. Similarly, the need to respect individual autonomy is also greater given the uniquely individual and personal nature of the decision. Legislative officials cannot be aware of all factors a woman contemplates in making her decision or of what is in her best interest in light of those factors. While it is possible the decision was not made in light of all relevant information, this only warrants space for truly informative materials regarding risks, options, and alternatives. "...[T]he means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, *not hinder it*."⁴² Using incomplete, irrelevant, or distorted information as a tool to manipulate the situation and convince women to continue a pregnancy goes beyond the intended purpose of informed consent.⁴³

Among the founding principles of The United States is the protection of the pursuit of happiness,⁴⁴ however, how one is to achieve happiness is not delineated. This is left to individuals to decide, and in some circumstances, with legislative guidance. Enforcing a legislative regime with strictly pro-life motives and undertones is unworkable in the highly pluralistic American society (Eberle 1997, p. 1049).⁴⁵ The variation in core values results in each person living a very different life than others. Implementing a one-size-fits-all approach to abortion informed consent ignores this diversity in value structures. Strongly urging a woman to continue her pregnancy while simultaneously denying her the ability to freely decide based on the summation of all her values and circumstances strips away her right to self-determination and imposes an ideal that may not be in line with her values.

However, the Supreme Court adamantly declared that government's considerable interest in protecting lives of the unborn entitles states to enact laws with the specific purpose to persuade women to choose childbirth over abortion.⁴⁶ Recent challenges to seemingly manipulative laws have failed because lower courts characterized any scientifically or medically accurate information as not misleading (Lang 2014).^{47,48} Many scholars believe the government has masked its political biases in the form of mandatory information disclosures in an attempt to abrogate the right to terminate a pregnancy

⁴¹ Describing the decision to terminate a pregnancy as "deeply tied to relational circumstances, beliefs, and values in a way that decisions about whether to remove a gall bladder are not."

⁴² *Casey*, 505 U.S. at 877 (1992).

⁴³ See (Suter 2013, pp. 11–17) for a cogent discussion of the doctrine of informed consent.

⁴⁴ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁴⁵ Contrasting the homogenous German society with the pluralistic American society.

⁴⁶ *Casey*, 505 U.S. at 878 (1992).

⁴⁷ *Planned Parenthood of Minnesota v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008).

⁴⁸ "The court's reading implies that the question of what is 'misleading' entirely rises and falls with the question of what is 'truthful'."

recognized in *Roe v. Wade* (Vandewalker 2012, p. 6;⁴⁹ Sanger 2008, p. 397;⁵⁰ Devins 2009, p. 1341)⁵¹. These critics claim such laws stop just shy of banning abortion by using a pro-life agenda to dissuade woman from going through with the abortion (Vandewalker 2012, p. 64). The government's ability to pursue its pro-life agenda (though with limitations) while trampling over a woman's decisional autonomy can be attributed to the inadequate application of the T/NM standard. As *Casey* left open the question of how to analyze whether any particular information is misleading, the vagueness has rendered it ineffective as protection of women's interests or as a limitation on state's regulatory power. Lang notes this lack of guidance allows a state to limit a woman's decisional ability by way of "abuse, confusion and manipulation" which "threatens to undermine the value of decisional autonomy" that *Casey* sought to protect (Lang 2014, p. 1376).

Before illustrating how medically accurate and truthful information can be used as a manipulative tool to influence decisions, a distinction between persuasion and manipulation is necessary. Beauchamp and Childress explain that informational manipulation, a key form of manipulation, is the "deliberate act of managing information that non-persuasively alters a person's understanding of a situation and thereby motivates [her] to do what the agent of influence intends" (Beauchamp and Childress 2001). Forms of manipulation include "deception that involves lying, withholding information, and misleading exaggeration to lead persons to believe what is false" (Beauchamp and Childress 2001). In the medical context, information manipulation pertains to the "manner in which a health care professional presents information... affect[ing] [a patient's] understanding and voluntariness" (Beauchamp and Childress 2001, p. 91). Fear appeals are another form of manipulation where information is used to evoke fear in an effort to induce a specific action (Blumenthal 2008). Blumenthal asserts that "people are most persuaded by fear appeals that (1) come from a credible source (such as a doctor or health care professional); (2) convey severe and relevant threats (such as the physical or psychological risks to a mother and/or the risks to a fetus); and (3) provide effective and feasible responses (such as choosing not to abort)" (Blumenthal 2008, p. 17). The use of sensationalized information, such as ultrasound depictions, fetal pain descriptions, and required disclosure of severe risks unlikely to occur, exploits a woman's fears. When operating in negative, stressed, and anxious emotional states, people are often more easily persuaded, reducing their ability to rationally make a well-informed, voluntary decision (Blumenthal 2007, p. 46).

Persuasion, on the other hand, allows "a person to come to believe in something through the merit of reasons another person advances" (Blumenthal 2007, p. 46). Beauchamp and Childress note that forceful persuasion that entails the use of misleading information is not persuasion, but is a form of manipulation (Beauchamp and Childress 2001, p. 69). The distinction between persuasion and manipulation lies in one's ability to make the ultimate decision in light of information presented. Where persuasion allows one to retain complete autonomy, forceful persuasion and manipulation involve altering the type and presentation of information in a manner that affects one's understanding, misleading one to make a particular decision. Thus, decisions made in light of inaccurate, incomplete, or emotionally charged information cannot foster a true expression of decisional autonomy, even if the patient makes the ultimate decision. To further illustrate how forcefully persuasive Right to Know laws can infringe on women's liberties, I turn to the Federal Rules of Evidence (FRE).

⁴⁹ Describing the concept of abortion exceptionalism as "anti-abortion legislator's strategy to decrease the number of abortions by placing onerous regulations on abortion where similar procedures are unregulated, making abortions more difficult and expensive to provide."

⁵⁰ Arguing "the core and motivating belief is that a woman who sees her baby's image on a screen will be less likely to abort."

⁵¹ "[M]andatory ultrasound laws seek to 'personify the fetus' and, in so doing, 'dissuade the woman from obtaining an abortion.'"

4. Applying Evidence Law to Restore a Fair Balance of Interests

After *Casey* upheld Pennsylvania's mandatory disclosure of fetal gestational age, states enacted laws requiring ultrasound and heart auscultation procedures to *show* the fetus's gestational age. To explain how biologically accurate information can be presented in a way that can infringe on women's autonomous liberty, I draw upon three Federal Rules of Evidence (FRE): (1) FRE 106, the rule of completeness; (2) FRE 702, judge's authority to deem common knowledge inadmissible; and (3) FRE 403 balancing test.⁵² The FRE treats each rule as mutually exclusive—any piece of evidence must pass each rule to be deemed admissible. By treating FRE 106, 702, and 403 as separate hurdles disclosure laws must overcome, courts can be more thorough in analyzing whether a law is truly misleading. Collectively, these three rules can be of value when applied to Right to Know laws by providing a basis for defining misleading. As Right to Know laws are criticized for infringing upon women's autonomy in various ways, it is important to define misleading in a way that can address each one of those objections (Sawicki 2011, p. 54; Siegal 2008, p. 25; Vandewalker 2012, p. 64).

4.1. FRE 106: The Rule of Completeness

FRE 106 serves to limit a biased presentation of evidence by allowing one party to request his adversary, who has introduced a writing, or portion of a writing, to also introduce any other portion of the same writing, or additional writings that “in fairness ought to be considered at the same time.”⁵³ In other words, one party can require other parts of evidence be admitted to provide context to the portion already introduced. Rule 106 generally applies when a portion of a document is offered in such a way that is misleading and prejudicial. The Advisory Committee notes to FRE 106 describes two justification for this rule: (1) “the misleading impression created by taking matters out of context,” and (2) “inadequacy of repair work when delayed to a point later in trial.”⁵⁴ The Advisory Committee's second reason describes the damaging effect a biased representation of evidence can have on a party and recognizes any subsequent measures taken to abate the prejudicial effect is likely to be ineffective. Once the jury hears information in a skewed manner and formulates an opinion, it becomes difficult, if not impossible, to convince the jury otherwise (Crawford 1991).

The rule of completeness can be applied to Right to Know laws that provide medically accurate information in a distorted manner. Take, for example, a Texas law that mandates a physician provide a heart auscultation of the fetus for the pregnant woman to hear.⁵⁵ The fact that the fetus has a detectible heartbeat is scientifically accurate and would pass the truthful prong of the *Casey* test; however, there seems to be something misleading, if not manipulative, about subjecting a woman to hear the heartbeat of a life she is about to terminate. As Corbin argues, “although an embryo may have a heartbeat at six weeks, it is only approximately half an inch long, and weighs less than an aspirin. At this stage, it has no bones, eye and ear structures are just beginning, and many organs have not even started to grow, it has no digestive [or respiratory system]” (Corbin 2014, pp. 1331–33).⁵⁶ Viewed from this perspective, the law becomes obviously misleading because it exaggerates the extent of the fetal development. Though there is a detectible heartbeat, a woman can easily infer (quite mistakenly) the fetus is much further along in development than anticipated. This can potentially result in women foregoing the

⁵² FRE 106, 702 and 403 are not the only FRE that may be relevant in defining “misleading.” These three, however, are ones I feel can provide the best guidance.

⁵³ FRE 106. Remainder of or Related Writings or Recorded Statements.

⁵⁴ *Id.*

⁵⁵ TEX. HEALTH & SAFETY CODE §171.012.

⁵⁶ Further describing the disclosure requirement as misleading because of “the social meanings associated with heartbeat and ultrasound images... The heartbeat, for example, often symbolizes life... [I]n America, people have learned to make the connection: just as the heartbeat is shorthand for alive, an ultrasound image is shorthand for a wanted baby. Consequently, when a woman looks at an ultrasound image, rather than notice the scientific details, she is likely to see an image of a future baby. Although presented as though it were information pure and simple, the fetal image has the cultural force of a portrait, betokening the presence of the entity depicted.”

abortion procedure solely based on an inaccurate inference. Even if a physician provides a verbal description of the ultrasound image or provides a brochure detailing fetal development, ultrasounds go further by forcing a woman to face the life she is about to terminate. Sanger points out the ultrasound image “is not just a life, it is a relative,” and “the means of persuasion is... the woman’s own son or daughter” (Sanger 2008, p. 377). The Supreme Court could not have intended this manipulative outcome when it sanctioned the use of persuasive information pertaining to the gestational age of the fetus. Disclosure of incomplete information is essentially an attempt to trick a woman by distorting her decision-making process, thus compromising her autonomous liberty and failing to facilitate voluntariness (Siegal 2008, p. 1758). To curtail, if not prevent, this effect, the rule of completeness can help a court understand how providing a small snippet of the big developmental picture has the potential to mislead women, even where the information presented is biologically accurate. The rule should operate merely as a tool for the court to use in determining whether disclosing information out of context misleads women into carrying the fetus to term. FRE 106 can also be implemented in remedying the distorted nature of biased laws. By first understanding how disclosure of information out-of-context is misleading, courts can then require states to provide additional relevant information to paint the complete picture to facilitate decisional autonomy. After all, the purpose of informed consent is to provide the patient with a *complete* understanding of the risks and consequences of the medical procedure (Sawicki 2011, p. 54).

4.2. FRE 702: Judge’s Authority to Deem Common Knowledge Inadmissible

FRE 702 contemplates testimony by expert witnesses. Generally, a witness qualifies as an expert based on his or her knowledge, skill, experience, training, or education and may testify to specific knowledge to help the jury or judge understand evidence.⁵⁷ The scope of an expert’s testimony is confined to specialized information that would not otherwise be within the jury’s common knowledge. If an expert testifies to a matter that is regarded as common knowledge, the judge has discretion to deem the testimony inadmissible. One rationale for this rule is that the jury is prone to regarding expert testimony as more credible than testimony from other sources.⁵⁸

In the abortion jurisprudence context, FRE 702 can provide perspective on how Right to Know laws mandating physicians to read a prepared script are potentially misleading. In 2008, the Eighth Circuit, sitting en banc, upheld a provision of South Dakota law requiring physicians to state that an abortion “will terminate the life of a whole, separate, unique, living human being.”⁵⁹ Though *Casey* authorized state-compelled physician speech for abortion informed consent, the South Dakota provision is criticized for “do[ing] little to promote independent decision making” (Sanger 2008, p. 398).⁶⁰ FRE 702’s common knowledge exception can operate to expose the unnecessary nature and potentially misleading effect of scripted physician disclosures similar to the South Dakota provision. A court can use FRE 702 to analyze the usefulness of any portion of a Right to Know law to a woman’s independent decision-making process. Where the information provided is merely common knowledge known by the general public and does little to aid autonomous decision making, the information should not be included with mandatory informed consent disclosures. Requiring a physician to explicitly state an abortion will end fetal life merely reinforces the onerous nature of the decision and runs the risk of misleading women by use of fear appeals. Any woman, adolescent or adult, who elects

⁵⁷ FRE 702. Testimony by Expert Witness.

⁵⁸ *United States v. Snipes*, 18 M.J. 172, 180 (C.M.A. 1984) (Everett, C.J., concurring) (“[H]earing a purported expert give his opinion about the credibility of a witness may hinder the fact finder by distracting him from using his own experience and common sense”).

⁵⁹ *Rounds*, 530 F.3d 724, 726 (8th Cir. 2008) (On appeal, the court considered this statement with another provision that defined human being as “an individual living member of the species *Homo sapiens*, including the unborn human being during the entire embryonic and fetal ages...” and concluded the informed consent provision was truthful and not misleading. On remand and subsequent appeal, only the suicide ideation provision of the mandatory disclose was at issue).

⁶⁰ *Casey*. 505 U.S. 833 (1992).

to terminate her pregnancy, is aware that she is choosing to end the life of the fetus growing inside of her and it is unreasonable to assume she does not understand this implication. “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” (Post 2007, p. 954). As physicians are considered experts in their field of practice, patients are likely to assume all information conveyed by the doctor is relevant and important to their decision (Lang 2014, p. 1388).⁶¹ Omitting common knowledge from mandatory disclosure laws decreases the risk women will attribute undue weight to unnecessary information provided by the physician.

Mandatory scripted disclosures are also degrading to women because they imply women are unable to make truly autonomous decisions and that they are ignorantly opting to terminate a pregnancy without understanding pro-life arguments (Manian 2009, p. 251). The concept of “common knowledge objections” can reduce the demeaning effect by limiting disclosures to only information outside the scope of common knowledge that may aid women in making a sound, truly informed decision. Limiting the scope of information disclosed can restore a woman’s sense of dignity and autonomous liberty to define her life’s purpose as she wishes. By applying FRE 702 to abortion jurisprudence, Right to Know laws can be harmonized with *Casey*’s rationale for implementing the T/NM standard: “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.”⁶²

4.3. FRE 403: Balancing Test

To weigh the prejudicial effect of any piece of evidence against its usefulness, two types of balancing tests are found in the FRE. The ‘standard’ FRE 403 balancing test allows the judge to exclude any evidence, though relevant, if its probative value is substantially outweighed by its prejudicial effect.⁶³ The standard balancing test assumes a piece of evidence is admissible unless the party against whom it is offered can show that it is substantially prejudicial. The second balancing test is the ‘inverse’ 403 test, which deems extremely harmful information inadmissible unless the party proffering it can demonstrate the probative value substantially outweighs any prejudicial effect.⁶⁴ Stated another way, the inverse or reverse 403 test assumes inadmissibility unless the proponent can establish that any beneficial use of the evidence is substantially greater than all potential adverse effects it has on the person against whom it is offered. If a form of evidence is deemed prejudicial, but has probative value, the judge has authority to request the information be presented in an alternate, less prejudicial manner. For example, where a party seeks to introduce murder scene photographs that are in color, extremely gory, or have other sensationalizing effects, the judge can request the photos be presented in black and white or limit the amount presented to minimize the potential prejudicial impact on the jury (Sawicki 2014, pp. 483–85).

The standard and inverse balancing tests can be used by courts to not only shed light on any misleading effects a Right to Know law may have, but can also be an additional tool to address claims of bias, coerciveness, and manipulation. FRE 403 is colloquially referred to as the universal fallback rule because though a piece of evidence has passed through the hurdles of the other rules, a party can always object on prejudice or bias grounds. The balancing tests provide another way to recognize the potentially detrimental effect any particular disclosure provision has on a woman’s decision-making process.

Section 3.2 described the Right to Know laws on a continuum that varies in persuasiveness. For laws that are persuasive, but provide information that is relevant and necessary to make

⁶¹ Describing a patient’s assumption that physicians would not provide them with information that was not important.

⁶² *Casey*. 505 U.S. at 877 (1992).

⁶³ FRE 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time or Other Reasons.

⁶⁴ FRE 412(b)(12) Rape Shield Statute—Use of a victim’s predisposition or sexual behavior in a civil case; FRE 609(b)(1) prior convictions which occurred 10 or more years ago.

an informed decision to abort, the standard balancing test can be used to review any claims of bias. The following types of disclosure laws can be considered permissibly persuasive: (1) information regarding abortion alternatives; (2) social support programs; (3) mandatory waiting period; and (4) specific, relevant risk factors. Information embodied in these four categories is directly related to the abortion procedure and are factors a woman considers when making the decision, such as whether she is in a financial position to raise a child. Under the standard 403 balancing test, the usefulness of these disclosures outweighs the potential prejudicial effect of diminishing a woman's autonomous decision-making capacity. If, however, the manner in which these types of information are provided seems aggressively persuasive or is otherwise objectionable, they can be subjected to the other evidence rules first. Though the mandatory waiting period seems to be an obstacle to women in seeking an abortion, in light of government's interest in protecting the life of the unborn and the fact that the woman's decision implicates potential life, its purpose seems to ensure the woman is not making a rash decision. Moreover, the Supreme Court explicitly held that a 24-h waiting period does not constitute an undue burden, even if some women are particularly burdened by the requirement.⁶⁵ Stated in terms of the FRE 403 balancing test, the use of mandatory waiting periods as a means of obtaining an informed decision outweighs its delaying effect on women's access to abortion procedures. However, any *extent* of time beyond 24 h required for the waiting period may subject to the balancing test.

For more controversial disclosures that seem to fuel the arguments against abortion informed consent laws, the inverse balancing test should be utilized. The inverse balancing test is used when information is especially detrimental to a person, such as in murder cases. In these instances, evidence of prior convictions that are similar to the one the defendant is currently charged with can cause the jury to make unsubstantiated inferences of guilt in the subsequent trial. The jury may unjustifiably conclude that since the defendant committed this type of crime in the past, he or she is likely to have committed it again. Mandatory ultrasounds (including those that are accompanied with a physician's narrative), sonograms, heart auscultations, and standardized language seem to fall under the more aggressive end of the persuasive spectrum and should be treated as prejudicial. These types of laws seem more misleading and potentially manipulative because they, under the guise of informed consent, have the ability to reach a woman's emotions in a way that can beguile her into making unsubstantiated inferences that alter her choice. As Suter asserts, "even if the information that must be disclosed is balanced and truthful, it can function like 'fear appeals,' i.e., emotionally laden messages that are most likely to effectively bias a listener toward being persuaded" (Suter 2013, p. 37).⁶⁶ By scrutinizing aggressively persuasive Right to Know laws under the inverse balancing test, it becomes clear that the usefulness of these procedures is far outweighed by the prejudicial effect it can have on women, their dignity, and their right to make independent decisions. If a court finds a particular law or provision more prejudicial than useful, rather than regarding it as impermissible, the court can request the information be presented in a less prejudicial matter. Instead of a live ultrasound, physicians can be required to show black and white pictures or textbook images that depict the gestational age of the fetus, or provide scaled images to accurately compare the current size of the fetus to a fully developed one.

Keeping with the spirit of evidence law, one may object under FRE 1002, the best evidence rule, requiring production of the original "writing, recording, or photograph to prove its contents."⁶⁷ The best evidence rule can be used to justify mandated ultrasound procedures on the basis it is the original method to display an image of the fetus, as opposed to describing the development verbally or through pictures. Though this is a valid objection, it is also subject to the fallback-balancing test. FRE 403 represents the last hurdle any information must overcome to be admissible. Though the

⁶⁵ *Casey*. 505 U.S. at 887 (1992).

⁶⁶ Further describing fear appeals as "powerfully persuasive when the information comes from a 'credible source'."

⁶⁷ FRE 1002. Requirement of the Original.

ultrasound image is subject to the best evidence rule and is relevant in determining the gestational age of the fetus, it can nonetheless be impermissible because of its highly prejudicial effect on women.

5. Conclusions

The Supreme Court's quest to fairly balance women's individual rights against the government's interest in potential life resulted in the sanction of truthful, not misleading state-mandated persuasive information as long as it does not create a substantial burden to women. However, the truthful, non-misleading standard is inadequate as a constitutional limit on government conduct due to a lack of guidance as to how misleading should be applied. Currently, courts consider truthful information, though biased, as not misleading if it is scientifically accurate. However, the failure to recognize the misleading effect even truthful information can have gravely minimizes a woman's interest in defining her future, forcing upon her a path that may be contrary to her best interests. Aggressively persuasive disclosure laws greatly diminish a woman's right to make voluntary decisions conforming to her life plans. Analyzing how the Federal Rules of Evidence values a piece of evidence based on the potential effect it can have on the parties to the case, witnesses, and the trier of fact, provides a framework that addresses both the truthful and misleading prongs of the *Casey* test. The rule of completeness can be used to show how information that is provided out-of-context can mislead women into believing the fetus is more developed than it really is. Finding a physician's conveyance of common knowledge as impermissible can help screen out disclosures that are designed to pull at a woman's heartstrings, rather than inform her decision. Furthermore, generally known information conveyed by a physician can mislead her to attribute unwarranted weight to such information because doctors are perceived as an honest source of authority. The standard and inverse balancing tests can shed light on the prejudicial, misleading effect truthful information can have on women. Courts can use these borrowed evidence tools to not only understand how truthful information, though not misleading on its face, can have a misleading and biased effect on women, but also to correct this injustice. By more accurately recognizing this devastating effect on women's liberties, lower courts can help restore the effectiveness of the truthful, non-misleading standard the highest court of our nation envisioned. In the long run, vindicating the standard's purpose can aid in restoring the dignity with which women should be afforded in such life-defining decisions.

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