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ABORTION, PERSUASION, AND EMOTION: IMPLICATIONS OF SOCIAL SCIENCE RESEARCH ON EMOTION FOR READING *CASEY*

Jeremy A. Blumenthal*

Abstract: Although abortion jurisprudence under *Planned Parenthood of Southeastern Pennsylvania v. Casey* condones State efforts to persuade a woman to forego an abortion in favor of childbirth, the opinion’s “truthful and not misleading” language can be read more broadly than it traditionally has. Specifically, even a truthful message may mislead when it inappropriately takes advantage of emotional influence to bias an individual’s decision away from the decision that would be made in a non-emotional, fully informed state. Drawing on empirical research in the social sciences, I suggest that the sort of emotional information that many states now provide in their “informed consent” statutes can lead to such inappropriate emotional influence and thus should be examined more closely than heretofore. This broader reading, taking into account empirical research that gives a better idea of individual decision-making, suggests that states’ informed consent statutes have the potential to be an impermissible burden on the exercise of a woman’s autonomous decision-making about an abortion precisely because they bias a woman’s free choice, not inform it.

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INTRODUCTION

In 1981, the U.S. Court of Appeals for the First Circuit reviewed a Massachusetts statute that required a woman seeking an abortion to sign a standardized informed consent form that included, among other specified elements, “a description of the stage of development of the fetus.”¹ Relying in part on uncontradicted expert testimony heard in by the court below, the Court held that such information, even though factually accurate,² could cause many women emotional distress, anxiety, and guilt, and was, moreover, not “directly material to any medically relevant fact.”³ As such, the First Circuit held that this information’s potential to cause emotional distress and consequently to burden a woman’s decision-making constituted an impermissible obstacle to her efforts to seek an abortion; therefore, the court ruled the requirement unconstitutional.⁴

Before the U.S. Supreme Court’s 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁵ such a holding was not atypical. Previous federal courts had so ruled when evaluating statutes requiring that more graphic or detailed information be presented.⁶ And the Supreme Court had twice held similarly, in *City of*

1. *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1008 (1st Cir. 1981).

2. *Id.* at 1021–22 & n.29 (stating that plaintiffs/appellants did not contend that the information was “factually inaccurate in any material respect”).

3. *Id.* at 1021.

4. *See id.* at 1022–23. More precisely, the Court ruled that a preliminary injunction against the requirement was appropriate because plaintiffs had made the requisite showing that the statute would likely be ruled unconstitutional. *Id.*

5. 505 U.S. 833 (1992).

6. *See, e.g., Planned Parenthood Ass’n of Kansas City, Mo., Inc. v. Ashcroft*, 655 F.2d 848, 866–68 (8th Cir. 1981) (striking down the requirement that women be told of “[t]he probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed” and “[t]he immediate and long-term physical dangers of abortion and psychological trauma resulting from abortion and any increased incidence of premature births, tubal pregnancies and stillbirths following abortion”); *Charles v. Carey*, 627 F.2d 772, 784 (7th Cir. 1980) (striking down the requirement that a woman be informed of any reasonable medical possibility of the fetus experiencing “organic pain”); *Women’s Med. Ctr. of Providence, Inc. v. Roberts*, 530 F. Supp. 1136, 1153–54 (D.R.I. 1982) (striking down the requirement that a woman be told of the fetus’s characteristics at the various gestational ages at which an abortion might be performed); *Leigh v. Olson*, 497 F. Supp. 1340, 1345 (D.N.D. 1980) (striking down the requirement that a woman be told of the “probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed”).

*Akron v. Akron Center for Reproductive Health*⁷ and *Thornburgh v. American College of Obstetricians and Gynecologists*,⁸ characterizing such information as involving a “parade of horrors” and, citing the First Circuit’s opinion approvingly, as “inflammatory.”⁹

Casey, however, changed this approach. In *Casey*, the State of Pennsylvania had mandated that a doctor provide, at least twenty-four hours before performing an abortion, particular information regarding “the nature of the procedure, the health risks of the abortion and of childbirth, and the ‘probable gestational age of the unborn child.’”¹⁰ Further, the Pennsylvania statute required that the doctor make additional printed material available that, in part, described the fetus.¹¹ No abortion could be performed unless a woman acknowledged in writing that she had been informed that these materials were available.¹² The goal of this information was, ostensibly, to further the State’s interest in obtaining a woman’s fully informed consent,¹³ and the Court approved Pennsylvania’s approach. In this way, *Casey* condoned a state’s requirement of the “informed consent” of a woman seeking an abortion.¹⁴

Of course, *Casey* made evident Pennsylvania’s effort in this context to use such information to encourage women not to pursue the decision to abort,¹⁵ a politicized effort that *Akron* and *Thornburgh* had rejected.¹⁶

7. 462 U.S. 416 (1983).

8. 476 U.S. 747 (1986).

9. *Akron*, 462 U.S. at 445 (characterizing as “parade of horrors”); *Thornburgh*, 476 U.S. at 762 n.10 (noting “inflammatory impact” of fetal-description requirements); *cf. id.* at 762 (stating that fetal description “may serve only to confuse and punish [a woman] and to heighten her anxiety”); *id.* at 764 (stating that compelled information regarding “detrimental physical and psychological effects” was “the antithesis of informed consent”). These decisions have also been characterized as focusing on the imposition on the physician and his flexibility in providing information to the woman seeking abortion, rather than on the woman’s decision-making process itself. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 968–69 (2000) (Kennedy, J., dissenting) (characterizing *Akron* in this way); *Casey*, 505 U.S. at 883 (discussing treatment of physician-patient relationship in *Thornburgh*).

10. *Casey*, 505 U.S. at 881.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 887 (holding that Pennsylvania’s informed consent requirement did not constitute an “undue burden” on the right to decide to terminate a pregnancy); *cf. Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 67 (1976) (finding that the State may require prior written informed consent before a woman undergoes abortion).

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

Casey overruled those cases' holdings that the State could not provide "specific information 'designed to influence the woman's informed choice between abortion or childbirth.'"¹⁷ Thus, *Casey* condoned a state's use of the informed consent requirement as a vehicle for "express[ing] a preference for childbirth over abortion."¹⁸ This approval both echoed precedent¹⁹ and presaged further development along the same lines eight years later.²⁰

What animated the Court's focus on informed consent was, in part, its expressed concern over the woman's psychological health:

[Previous decisions] recognize a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth. It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is *truthful and not misleading*, the requirement may be permissible.²¹

Thus, focusing on the State's previously acknowledged authority to further a consciously partisan viewpoint, the Court held that where statutorily mandated information is factually accurate and is "truthful and not misleading," a requirement that a woman be exposed to the information when seeking her abortion could be allowed.²²

16. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 443–44 & n.33 (1983); *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986).

17. *Casey*, 505 U.S. at 881 (quoting *Akron*, 462 U.S. at 444). This overruling of prior case law occurred despite the obvious similarities between the regulations struck down in the former cases and the one at issue in *Casey*. *E.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1328 (E.D. Pa. 1990) (noting that the legislation at issue in *Casey* was "similar, if not identical" to the provisions struck down in *Thornburgh*).

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

19. *See, e.g.*, *Maher v. Roe*, 432 U.S. 464, 479–80 (1977) (holding that the State may express preference by funding childbirth, rather than abortion).

20. *See Stenberg v. Carhart*, 530 U.S. 914, 961 (2000) (Kennedy, J., dissenting).

21. *Casey*, 505 U.S. at 882 (emphasis added and internal citations omitted).

22. *Id.* at 882–83.

Consequently, *Casey* is typically read as narrowly upholding a woman's right to an abortion, but also as giving more flexibility to the State in its effort to persuade her not to exercise that right.²³ But, recent research in the social sciences involving how individuals experience emotion, as well as the influence of emotion on individuals' thinking, can suggest a more expansive reading of the case. Such a reading can suggest that despite *Casey*'s express reversal of *Thornburgh* and *Akron*, *Casey* nevertheless can be read as still maintaining those cases' rejection of certain required information, *even when that information is factually accurate and is "truthful and not misleading."* That is, even the sort of information approved of in *Casey* may nevertheless constitute an impermissible, undue burden on a woman seeking an abortion when it inappropriately takes advantage of potential emotional influences on her decision-making.²⁴ Under this reading, despite *Casey*'s effort to allow a State to further its political message of favoring childbirth over abortion by requiring a woman's informed consent, the message and its medium could be evaluated more closely than commonly believed. This closer reading might (but by no means must) lead to a finding that a particular statute or requirement so interferes with a woman's decision-making that it is inappropriately burdensome.

This focus is consistent with *Casey*'s emphasis on *truthful* communications—and echoes a long line of commentators pointing out that the moral wrong in lying is the interference with, or limiting of, a person's autonomy and opportunity to choose.²⁵ It is also consistent with more recent scholarship suggesting not only that even truthful messages can easily be misleading, but also that when they are, they should, perhaps, be punished more severely than outright deception.²⁶ And, it is

23. See, e.g., Robert D. Goldstein, *Reading Casey: Structuring the Woman's Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787, 790 (1996) (stating that *Casey*'s "central concern was to enhance the state's power to structure the decisionmaking process by which the woman exercises her lawful authority to terminate her pregnancy").

24. PETER W. ENGLISH & BRUCE D. SALES, MORE THAN THE LAW: BEHAVIORAL AND SOCIAL FACTS IN LEGAL DECISION MAKING 53 (2005) (stating that "depending on what information is presented and how it is presented, even truthful information can be misleading"); see also Kathy Seward Northern, *Procreative Torts: Enhancing the Common-Law Protection for Reproductive Autonomy*, 1998 U. ILL. L. REV. 489, 541–42 ("While the statutes purport to protect the woman's right to make an informed choice, the general thrust of the information they require would dissuade a woman from going through with an abortion."). This manipulation may be deliberate or not, which is one factor to be considered in evaluating it.

25. See, e.g., SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 18–22 (1978).

26. See Frederick Schauer & Richard Zeckhauser, *Paltering*, 4 (Harv. John F. Kennedy Sch. of Gov't Faculty Working Paper Series, Paper No. RWP07-006, 2007), *available at*

consistent with scholarly efforts to refine the substance of the informed consent doctrine, such as those efforts that call for a focus not on the injury caused by the provision of (or the failure to provide) certain information, but rather on “the *decision rights* of the plaintiff which the defendant destroyed” in providing (or failing to provide) particular information.²⁷ This approach also has the benefit of not requiring a reworking of abortion doctrine generally; rather, it reflects a more thoroughly informed interpretation of existing case law, one that considers existing empirical data from the social sciences—some of which did not exist when *Casey* was decided.

In sketching this broader reading of *Casey*, I proceed in three parts. Section I reviews the content of the informed consent statutes developed in the wake of *Roe v. Wade*²⁸ and identifies the constitutional standard by which courts are to evaluate those statutes. Section II documents the substantial empirical research in psychology that demonstrates the impact of an emotional message on how easily a listener is persuaded by that message. There, I describe research on “fear appeals,” identifying those features of an emotionally laden message that are most likely to effectively bias a listener toward being persuaded. Section II closes by demonstrating that the informed consent statutes largely reflect those features. Section III addresses potential objections to the broader reading of *Casey*, and the Conclusion emphasizes the importance of developing and applying further empirical research to the questions raised in this article.

I. CASEY’S APPROVAL OF “TRUTHFUL AND NOT MISLEADING” SPEECH

After *Roe v. Wade*, Pennsylvania was just one of many states to enact abortion legislation containing informed consent requirements, requirements subsequently upheld in *Casey*.²⁹ As of February 2008,

<http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP07-006>.

27. Aaron D. Twerski & Neil B. Cohen, *Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation*, 1988 U. ILL. L. REV. 607, 609 (emphasis added). Of course, such analysis arises in the context of a suit against a particular physician or other health care provider, rather than in a constitutional challenge.

28. 410 U.S. 113 (1973).

29. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882–83 (1992) (holding that informed consent provisions requiring the giving of “truthful, nonmisleading information” about the nature of the procedure, attendant health risks, fetal development, and the existence of alternatives to abortion, did not impose an undue burden on a woman’s right to have an abortion).

thirty-three states had informed consent abortion laws in effect.³⁰ The laws of twenty-nine of these states can reasonably be interpreted as requiring the provision of information aimed at discouraging women from obtaining abortions.³¹

Most states with informed consent abortion laws require the provision of information related to, among other things, the nature and associated medical risks of the procedure, the medical risks of carrying the pregnancy to term, the availability of medical assistance benefits, and the support obligations of the father. Many states also require that women be informed of the probable gestational age of the fetus,³² as well as of the anatomical and physiological characteristics of the fetus.³³ In

30. See *Mandatory Counseling and Waiting Periods for Abortion*, STATE POLICIES IN BRIEF (Guttmacher Inst.), Feb. 1, 2008, at 1, http://www.gutmacher.org/statecenter/spibs/spib_MWPA.pdf.

31. *Id.* See ALA. CODE §§ 26-23A-4, 26-23A-5 (2006); ALASKA STAT. §§ 18.05.032, 18.16.060 (2006); ARK. CODE ANN. §§ 20-16-903, 20-16-904 (2007); DEL. CODE ANN. tit. 24, § 1794 (2006); GA. CODE ANN. §§ 31-9A-3, 31-9A-4 (2007); IDAHO CODE ANN. § 18-609 (2007); IND. CODE ANN. § 16-34-2-1.1 (LexisNexis 2007); KAN. STAT. ANN. §§ 65-6709, 65-6710 (2006); KY. REV. STAT. ANN. § 311.725 (West 2006); LA. REV. STAT. ANN. § 40:1299.35.6 (2001); MICH. COMP. LAWS ANN. § 333.17015 (West 2007); MINN. STAT. ANN. §§ 145.4242, 145.4243 (West 2007); MISS. CODE ANN. §§ 41-41-33, 41-41-35 (2007); MO. ANN. STAT. § 188.039 (West 2004); MONT. CODE ANN. §§ 50-20-104, 50-20-106, 50-20-304 (2007); NEB. REV. STAT. §§ 28-327, 28-327.01 (2003); NEV. REV. STAT. § 442.253 (2007); N.D. CENT. CODE §§ 14-02.1-02, 14-02.1-03 (2004); OHIO REV. CODE ANN. § 2317.56 (LexisNexis 2005); OKLA. STAT. ANN. tit. 63, §§ 1-738.2, 1-738.1-1-738.3 (West 2007); 18 PA. CONS. STAT. ANN. §§ 3205, 3208 (West 2000); R.I. GEN. LAWS § 23-4.7-3 (2001); S.C. CODE ANN. §§ 44-41-330, 44-41-340 (2002); S.D. CODIFIED LAWS §§ 34-23A-10.1, 34-23A-10.3 (2007); TENN. CODE ANN. § 39-15-202 (2006); TEX. HEALTH & SAFETY CODE ANN. §§ 171.012, 171.014 (Vernon 2007); UTAH CODE ANN. §§ 76-7-305, 76-7-305.5 (2007); VA. CODE ANN. § 18.2-76 (2004); W. VA. CODE ANN. §§ 16-2I-2, 16-2I-3 (LexisNexis 2006); WIS. STAT. ANN. § 253.10(3) (West 2006). The California, Connecticut, and Maine laws require that only information related to the risks associated with the medical procedure be made available; these requirements are not unique to abortion procedures in those states but apply to other “risky” procedures as well. See CAL. HEALTH & SAFETY CODE § 1363.02 (West 2007); CONN. GEN. STAT. § 19a-116 (2003); ME. REV. STAT. ANN. tit. 22, § 1599-A (2004).

32. ARK. CODE ANN. §§ 20-16-903, 20-16-904; GA. CODE ANN. §§ 31-9A-3, 31-9A-4; IND. CODE ANN. § 16-34-2-1.1; KAN. STAT. ANN. §§ 65-6709, 65-6710; KY. REV. STAT. ANN. § 311.725; LA. REV. STAT. ANN. § 40:1299.35.6; MICH. COMP. LAWS ANN. § 333.17015; MINN. STAT. ANN. §§ 145.4242, 145.4243; MISS. CODE ANN. §§ 41-41-33, 41-41-35; MONT. CODE ANN. §§ 50-20-104, 50-20-106, 50-20-304; NEB. REV. STAT. §§ 28-327, 28-327.01; N.D. CENT. CODE §§ 14-02.1-02, 14-02.1-03; OHIO REV. CODE ANN. § 2317.56; OKLA. STAT. ANN. tit. 63, §§ 1-738.2, 1-738.3; 18 PA. CONS. STAT. ANN. §§ 3205, 3208; R.I. GEN. LAWS § 23-4.7-3; S.C. CODE ANN. §§ 44-41-330, 44-41-340; S.D. CODIFIED LAWS §§ 34-23A-10.1, 34-23A-10.3; TENN. CODE ANN. § 39-15-202; TEX. HEALTH & SAFETY CODE ANN. §§ 171.012, 171.014; UTAH CODE ANN. §§ 76-7-305, 76-7-305.5; VA. CODE ANN. § 18.2-76 (2004); W. VA. CODE ANN. §§ 16-2I-2, 16-2I-3; WIS. STAT. ANN. § 253.10(3).

33. ALA. CODE §§ 26-23A-4, 26-23A-5; ALASKA STAT. §§ 18.16.032, 18.05.060; GA. CODE ANN. §§ 31-9A-3, 31-9A-4; IDAHO CODE ANN. § 18-609; KAN. STAT. ANN. §§ 65-6709, 65-6710;

addition, some states require that women be provided with illustrations or color photographs depicting a fetus at various stages during the pregnancy.³⁴ Utah is unique in that it requires that women be provided with a video in addition to printed materials.³⁵ Moreover, the Utah law specifically requires that the video include brain and heart function and the presence of external members and internal organs, and present adoption as the preferred choice to abortion.³⁶ Utah law further requires physicians to encourage women to view the video at the clinic as opposed to viewing it elsewhere.³⁷

Some informed consent abortion laws require a practitioner to give information related to the potential medical and psychological effects that, according to the state, an elective abortion might elicit. For example, Minnesota, Mississippi, and Texas require that women be informed of the risk of developing breast cancer, of the danger to subsequent pregnancies, and of the risks of infertility,³⁸ and Wisconsin requires that women be informed of risks of endometritis, perforated uterus, incomplete abortion, failed abortion, danger to subsequent pregnancies, and infertility.³⁹ A number of states require that women be informed of potential adverse emotional or psychological trauma that may occur as a result of having an abortion.⁴⁰ Prior to being enjoined by a court order,⁴¹ South Dakota's informed consent law required that

LA. REV. STAT. ANN. § 40:1299.35.6; OHIO REV. CODE ANN. § 2317.56; UTAH CODE ANN. §§ 76-7-305, 76-7-305.5; WIS. STAT. ANN. § 253.10(3). These state laws require that this information be given to women; many other states' laws only require that such information be made available (usually in the form of printed materials).

34. *E.g.*, KY. REV. STAT. ANN. § 311.725(2)(b); MICH. COMP. LAWS ANN. § 333.17015(3)(d); N.D. CENT. CODE § 14-02.1-02.1(1)(b).

35. UTAH CODE ANN. §§ 76-7-305, 76-7-305.5.

36. *Id.* § 76-7-305.5(1)(b).

37. *Id.* § 76-7-305(4).

38. MINN. STAT. ANN. §§ 145.4242, 145.4243; MISS. CODE ANN. §§ 41-41-33; TEX. HEALTH & SAFETY CODE ANN. §§ 171.011, 171.012. Although some authors have described the evidence as inconsistent or mixed, medical studies suggest little such relationship between abortions and subsequent medical problems. *E.g.*, Karin B. Michels et al., *Induced and Spontaneous Abortion and Incidence of Breast Cancer Among Young Women: A Prospective Cohort Study*, 167 ARCH. INTERN. MED. 814 (2007); Mads Melbye et al., *Induced Abortion and the Risk of Breast Cancer*, 336 N.E. J. MED. 81 (1997); Chinué Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, 9 GUTTMACHER POL'Y REV. 6, 7-8 (2006) (reviewing studies).

39. WIS. STAT. ANN. § 253.10(3) (West 2006).

40. *See, e.g.*, NEV. REV. STAT. ANN. § 442.253(1)(c); WIS. STAT. ANN. § 253.10(3)(c)(1)(a)(f).

41. *See* Planned Parenthood Minn. v. Rounds, 375 F. Supp. 2d 881, 889 (D.S.D. 2005).

women be informed of increased risk of depression, psychological distress, suicidal ideation, and suicide.⁴²

The professed goal of these statutes was to protect a woman's autonomous decision-making, and this was a substantial factor motivating the *Casey* Court.⁴³ The Court was concerned with the state's efforts to expose women seeking abortions to speech that was patently false, imposing on their autonomous decision-making process by providing information that might mislead them about their decision.⁴⁴ To the Court, such an imposition was clearly inappropriate.⁴⁵ But, the Court's focus quickly shifted from whether a particular statement was true or false—recall that the courts in *Casey* and *Bellotti* had acknowledged that the prescribed statements were accurate and truthful⁴⁶—to whether a statement unduly affected or influenced a woman's autonomous decision-making.⁴⁷

Ostensibly, the way to avoid such influence was for a state to provide information about all of the factors, positive and negative, that might enter into a woman's abortion decision, thus assuring that consent is as “informed” as possible and that the decision is truly autonomous.⁴⁸ This concern might motivate the State to emphasize potential negative

42. S.D. CODIFIED LAWS §§ 34-23A-10.1, 34-23A-10.3. This law also required that women be told that a fetus is a whole, separate, unique, living being and that the woman's relationship to the fetus enjoys protection under the United States Constitution and the laws of South Dakota.

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

44. *Id.* at 968.

45. *Id.*

46. *See, e.g.*, *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1022 n.29 (1st Cir. 1981) (plaintiffs/appellants did not dispute factual accuracy of information); *cf. Casey*, 505 U.S. at 968 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (“[P]etitioners do not claim that the information required to be disclosed by statute is in any way false or inaccurate; indeed, the Court of Appeals found it to be ‘relevant, accurate, and non-inflammatory.’”). The Chief Justice's language, deliberate or not, is telling: information may in fact be accurate but also be quite inflammatory.

47. *Casey*, 505 U.S. at 877 (noting that “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”).

48. Of course, simply providing information, especially too much information, is likely to be unhelpful: people are “boundedly rational” and thus have difficulty processing and considering excessive information. As commentators are suggesting, it is better to determine the appropriate amount and kind of information to be provided. *E.g.*, Chris Guthrie, *Law, Information, and Choice: Capitalizing on Heuristic Habits of Thought*, in *HEURISTICS AND THE LAW* 425 (Gerd Gigerenzer & Christoph Engel eds., 2006); Jeremy A. Blumenthal, *Emotional Paternalism*, 35 *FLA. ST. U. L. REV.* 1 (2007). Although behavioral law and economics research shows that people will not use “all relevant information”—even if it could be provided—my point here concerns the provision of specific, potentially biasing information.

physical, psychological, and social consequences of pursuing the decision to abort. In particular, the State might argue, “When and if some women who have aborted subsequently learn more, especially about the fetus, the abortion can come to have traumatic consequences. She [sic] must be warned of that possibility now.”⁴⁹

Indeed, despite clear scientific findings that such negative consequences are not as common as abortion opponents once claimed,⁵⁰ neither is it entirely outside the scientific “mainstream” to suggest that certain women are more at risk of such negative abortion sequelae.⁵¹ Women generally experience positive emotions after abortion; indeed, positive emotions are clearly more prevalent than negative emotions.⁵² Nevertheless, some women *are* more at risk than others to negative psychological sequelae: those who pursue abortion for reasons of birth defects in the fetus;⁵³ younger women; unmarried women without children;⁵⁴ women who lack social support;⁵⁵ and women who had previously suffered some sort of emotional disturbance or psychological

49. Goldstein, *supra* note 23, at 814 (providing the argument of a hypothetical state attorney general as to justifications for mandating such information) (internal citations omitted); *see supra* note 21 and accompanying text.

50. Nancy E. Adler et al., *Psychological Factors in Abortion*, 47 AM. PSYCHOL. 1194, 1198–99 (1992).

51. Goldstein, *supra* note 23, at 818 (“The mainstream psychological literature reveals that a limited number of women may experience certain psychological difficulties, some serious, with abortion.”). For a good recent review of the literature related to post-abortion psychological health, including directions for future research, see Priscilla K. Coleman et al., *The Psychology of Abortion: A Review and Suggestions for Future Research*, 20 PSYCHOL. & HEALTH 237 (2005).

52. Adler et al., *supra* note 50, at 1198.

53. Bruce D. Blumberg et al., *Psychological Sequelae of Abortion Performed for a Genetic Indication*, 122 AM. J. OBSTETRICS & GYNECOLOGY 799 (1975); Cornelia M. Friedman et al., *The Decision-Making Process and the Outcome of the Therapeutic Abortion*, 131 AM. J. PSYCHIATRY 1332, 1335–36 (1974).

54. Adler et al., *supra* note 50, at 1200; David M. Fergusson, *Abortion in Young Women and Subsequent Mental Health*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 16 (2006) (showing increased levels of post-abortion mental health problems in women under twenty-five years old). *But cf.* Linda M. Pope et al., *Postabortion Psychological Adjustment: Are Minors at Increased Risk?*, 29 J. ADOLESCENT HEALTH 2 (2001) (finding that fourteen- to eighteen-year olds are no more likely than eighteen- to twenty-one year olds to exhibit post-abortion psychological dysfunction).

55. *See* Adler et al., *supra* note 50, at 1201; Jeanette Martucci, *Meta-Analysis: Psychosocial Predictors of Psychological Sequelae of Induced Abortion* 57 (Apr. 1998) (lack of perceived social support associated with poorer psychosocial adjustment) (unpublished dissertation, Miami Institute of Psychology of the Caribbean Center for the Advanced Studies) (on file with author). *But see* Adler et al., *supra* note 50 at 1201 (also reviewing studies, however, showing that link between social support and post-abortion emotions may be less clear than thought).

dysfunction.⁵⁶ In some instances, these populations are in fact the ones more likely to pursue abortions.⁵⁷ Thus, although it is clear that most women experience positive emotional responses after abortion,⁵⁸ it is not unreasonable for a State to seek to provide information about the alternatives, regardless of its political motivations for doing so.⁵⁹

In sum, *Casey* allows the State to mandate the provision of certain information about the abortion decision, including explicitly negative information about physical, psychological, and social consequences of the decision to abort. According to the Court, this is to facilitate a woman's autonomous decision-making by ensuring her fully informed consent, to inform women about potential negative sequelae, and to help further the State's constitutional interest in encouraging childbirth over abortion.⁶⁰

But again, at bottom, the State's provision of information must *inform*, and not unreasonably *hinder*, a woman's decision-making in order for it to avoid presenting an unconstitutional undue burden.⁶¹

56. Nancy Felipe Russo, *Psychological Aspects of Unwanted Pregnancy and Its Resolution*, in *ABORTION, MEDICINE, AND THE LAW* 593, 615 (J. Douglas Butler & David F. Walbert eds., 4th ed. 1992) (noting that "history of emotional disturbance" is a "risk facto[r] for negative emotional responses after abortion").

57. *E.g.*, Adler et al., *supra* note 50, at 1196 (noting that far more unmarried women are abortion patients than married women, and that abortion patients tend to be younger, most commonly twenty- to twenty-four years old); GUTTMACHER INST., AN OVERVIEW OF ABORTION IN THE UNITED STATES 23–25 (2008), http://www.guttmacher.org/presentations/abort_slides.pdf (showing that women age twenty- to twenty-four have the highest abortion rates, and that approximately sixty-seven percent of abortion patients were never married).

58. Adler et al., *supra* note 50, at 1198, 1202; Martucci, *supra* note 55, at 58–59 (reporting lower depression and anxiety in women who had abortions relative to control groups).

59. See Blumenthal, *supra* note 48, for further discussion of this point. Of course, when the number of abortions is high, even a small percentage of women suffering such negative reactions can reflect a large absolute number. *E.g.*, Susan C. Turell et al., *Emotional Response to Abortion: A Critical Review of the Literature*, 9 *WOMEN & THERAPY* 49, 65 (1990).

60. *Planned Parenthood of Se. Pa v. Casey*, 505 U.S. 833, 968 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (noting such multiple goals and stating that "this required presentation of 'balanced information' is rationally related to the State's legitimate interest in ensuring that the woman's consent is truly informed, and in addition furthers the State's interest in preserving unborn life") (citation omitted); Richard Stith, *Location and Life: How Stenberg v. Carhart Undercut Roe v. Wade*, 9 *WM. & MARY J. WOMEN & L.* 255, 265 n.43 (2002) (noting that "although *Casey* definitely permits the state to take the pro-life side in seeking to dissuade people from abortion, the three-Justice opinion assumes that all informed consent materials will be 'truthful and not misleading' and 'aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion'" (citation omitted)).

61. *Casey*, 505 U.S. at 877 (stating that "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").

Casey, therefore, condones an effort to persuade a woman not to have an abortion, but that effort must be communicated through a truthful and non-misleading message. More specifically, there is a line the State may not cross in its efforts to persuade. Consistent with *Roe v. Wade*, of course, the State may not physically coerce a woman into not having an abortion, in the sense that it may not invade her bodily autonomy.⁶² But neither may the State psychologically coerce—that is, a State must also stop short of establishing procedures that place a substantial obstacle in the path of a woman’s decision-making process.⁶³ When such State action “imposes an undue burden on a woman’s *ability to make [the abortion] decision*,” the State’s conduct crosses that line, invading “the heart of the liberty protected by the Due Process Clause.”⁶⁴ This focus on a woman’s ability to make her decision is important: when the State constrains that ability, that constraint serves as an obstacle to her decision-making process.⁶⁵ Accordingly, *Casey* seems “to adopt a standard permitting ‘persuasive but not too overwhelmingly persuasive non-false speech.’”⁶⁶

But how could a message be *too* persuasive? At the most extreme, of course, the decision might simply be taken away from a woman; this literal replacement of a woman’s decision-making with the State’s is the strongest example of an overpowering, overly “persuasive” message.⁶⁷ Or the message might be simply false. Or, as in some earlier cases, the language used in the communication might be so *explicitly* one-sided that the clear intent is for a woman to withhold her consent to an abortion, rather than even to pay lip service to the notion of encouraging a fully informed, reasoned, decision-making process.⁶⁸

62. See *Roe v. Wade*, 410 U.S. 113, 154 (1973). In one sense, the State is in fact permitted to take that step, when it prohibits most post-viability abortions. See also *Casey*, 505 U.S. at 879 (“reaffirm[ing]” the “central holding” of *Roe* that “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability”). The present discussion, of course, addresses choices at the earlier stage.

63. Cf. *infra* note 180 and accompanying text.

64. *Casey*, 505 U.S. at 874 (emphasis added).

65. Whether it is a “substantial” obstacle, of course, is another question, the answer to which depends on the substance of the message.

66. Goldstein, *supra* note 23, at 844.

67. But see *supra* note 62.

68. See, e.g., *Eubanks v. Brown*, 604 F. Supp. 141 (W.D. Ky. 1984). *Eubanks* relied on the Akron Court’s disapprobation of a State providing information “designed to influence the woman’s informed choice between abortion or childbirth.” *Id.* at 146. After *Casey*, therefore, the *Eubanks* approach is less tenable. Cf. *supra* note 17 and accompanying text.

The focus of the next Section is empirical research that suggests another, more subtle way in which a communication might be “too” persuasive: by taking advantage of irrelevant aspects of the message, the communicator, or the listener. That is, a message might have the effect of being more persuasive than its quality objectively deserves because of cues to which the listener is exposed—or because of personal aspects of the listener herself—that enhance the message’s strength or distract the listener from fully considering and analyzing the message’s quality.⁶⁹ My focus is one such irrelevant cue—the emotional state in which the listener finds herself while being exposed to the message.

II. PERSUASION AND “AFFECT”⁷⁰

A. Background

Substantial empirical research in the social sciences has investigated what sort of extraneous or irrelevant cues might unduly or inappropriately influence a listener.⁷¹ Particularly relevant in this context

69. ENGLISH & SALES, *supra* note 24, at 53.

70. The psychological term “affect” is an umbrella term, subsuming both “emotion” and “mood,” which are distinguished in the psychological literature. *E.g.*, Jeremy A. Blumenthal, *Does Mood Influence Moral Judgment? An Empirical Test with Legal and Policy Implications*, 29 LAW & PSYCHOL. REV. 1, 4 (2005); Peter H. Huang, *Moody Investing and the Supreme Court: Rethinking the Materiality of Information and the Reasonableness of Investors*, 13 SUP. CT. ECON. REV. 99, 101 (2005) (defining “affect,” “emotion,” and “mood”); Joseph P. Forgas, *Mood and Judgment: The Affect Infusion Model (AIM)*, 117 PSYCHOL. BULL. 39, 41 (1995) (same). As these sources note, “emotions” tend to be more stable, focused, and attributable to a particular source; “moods” tend to be more transient, diffuse, and less attributable to particular sources. *E.g.*, Blumenthal, *supra*, at 3. Below, I distinguish between the two concepts, both because of definitional reasons and, more importantly, because the two effects on persuasion are quite different. *See infra* notes 80–82.

71. For a useful review, see, among others, Richard E. Petty & Duane T. Wegener, *Attitude Change: Multiple Roles for Persuasion Variables*, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 323, 343–66 (Daniel T. Gilbert et al., eds.) (4th ed. 1998). Such extraneous, irrelevant, or “peripheral” cues include a speaker’s *expertise*, *e.g.*, Richard E. Petty et al., *Personal Involvement as a Determinant of Argument-Based Persuasion*, 41 J. PERSONALITY & SOC. PSYCHOL. 847 (1981); Shelley Chaiken & D. Maheswaran, *Heuristic Processing Can Bias Systematic Processing: Effects of Source Credibility, Argument Ambiguity, and Task Importance on Attitude Judgment*, 66 J. PERSONALITY & SOC. PSYCHOL. 460 (1994); or a speaker’s *attractiveness*, *e.g.*, Shelley Chaiken, *The Heuristic Model of Persuasion*, in 5 SOCIAL INFLUENCE: THE ONTARIO SYMPOSIUM 3 (M.P. Zanna et al. eds., 1987); Sharon Shavitt et al., *The Interaction of Endorser Attractiveness and Involvement in Persuasion Depends on the Goal That Guides Message Processing*, 3 J. CONSUMER PSYCHOL. 137 (1994); or a speaker’s *sex*, *e.g.*, Phillip Goldberg, *Are Women Prejudiced Against Women?*, 5 TRANSACTION 28 (1968) (finding an article written by “John McKay” more persuasive than the same article written by “Joan McKay”). Peripheral aspects of the *message* itself can also

is empirical research over several decades examining whether emotion influences how easily an individual can be persuaded. One of the earliest empirical studies examining emotional influences on a person's susceptibility to persuasion, for instance, presented college students with political slogans either while they ate a free lunch or while noxious smells were released into the experiment room.⁷² Results showed that subjects exposed to the slogans while eating the free lunch (and thus in a more positive mood than those exposed to the noxious odors) tended to agree more with the slogans they heard.⁷³ Building from that original work, a robust body of research has developed over the last several decades that supports the important general finding that individuals in positive moods tend to be more susceptible to persuasion than those in neutral or negative moods.⁷⁴

lead to more persuasion. *E.g.*, Stephen M. Smith & David R. Shaffer, *Speed of Speech and Persuasion: Evidence for Multiple Effects*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1051 (1995) (faster speech can be more persuasive depending on the message's level of personal relevance); Beth E. Meyerowitz & Shelley Chaiken, *The Effect of Message Framing on Breast Self-Examination Attitudes, Intentions, and Behavior*, 52 J. PERSONALITY & SOC. PSYCHOL. 500 (1987) (noting that negatively framed messages can be more persuasive than comparable positively framed messages). And, irrelevant characteristics of the listener can affect the persuasiveness of a communication, such as a listener's *sex, age, intelligence, or need for cognition*. *See, e.g.*, Alice H. Eagly & Wendy Wood, *Explaining Sex Differences in Social Behavior: A Meta-analytic Perspective*, 17 PERSONALITY & SOC. PSYCHOL. BULL. 306, 307 (1991) (noting the small tendency for women to be more persuadable than men); Stephen J. Ceci & Maggie Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 PSYCHOL. BULL. 403 (1993) (noting increased suggestibility of younger children); Nancy Rhodes & Wendy Wood, *Self-Esteem and Intelligence Affect Influenceability: The Mediating Role of Message Reception*, 111 PSYCHOL. BULL. 156 (1992) (noting that the listener's increased intelligence is generally associated with decreased persuasion); Curtis P. Haugtvedt et al., *Need for Cognition and Advertising: Understanding the Role of Personality Variables in Consumer Behavior*, 1 J. CONSUMER PSYCHOL. 239 (1992) (noting that those high in need for cognition tend to be less influenced by simple peripheral cues).

72. G.H.S. Razran, *Conditioned Response Changes in Rating and Appraising Sociopolitical Slogans*, 37 PSYCHOL. BULL. 481 (1940).

73. *Id.*

74. *E.g.*, Blumenthal, *supra* note 70, at 6 (noting tendency); Richard E. Petty et al., *Positive Mood and Persuasion: Different Roles for Affect Under High- and Low-Elaboration Conditions*, 64 J. PERSONALITY & SOC. PSYCHOL. 5 (1993); Joseph P. Forgas, *Affect and Social Judgments: An Introductory Review*, in EMOTION AND SOCIAL JUDGMENTS 3, 17 (Joseph P. Forgas ed. 1991) (noting "considerable experimental evidence for the beneficial effects of positive mood on the acceptance of persuasive messages"); Diane M. Mackie & Leila T. Worth, *Feeling Good, But Not Thinking Straight: The Impact of Positive Mood on Persuasion*, in EMOTION AND SOCIAL JUDGMENTS 201-02 (Joseph P. Forgas ed. 1991); Gerd Bohner et al., *Affect and Persuasion: Mood Effects on the Processing of Message Content and Context Cues and on Subsequent Behaviour*, 22 EUROPEAN J. SOC. PSYCHOL. 511, 513 (1990); Herbert Bless et al., *Mood and Persuasion: A Cognitive Response Analysis*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 331 (1990) (noting that

One traditional explanation for such findings relies on a “mood-regulation” hypothesis, which suggests that someone in a positive mood is motivated not to process incoming stimuli or information too deeply, lest such analysis take her out of that good mood.⁷⁵ Someone in a negative mood, however, is likely to process incoming stimuli or information relatively more deeply.⁷⁶ According to this approach, positive mood involves looser, more superficial, heuristic cognitive processing of a message or communication—that is, less processing and in less depth—relative to someone in a neutral or negative mood.⁷⁷ Though this model has recently been refined somewhat,⁷⁸ the finding that positive and negative moods have different effects on such cognitive information processing is a robust phenomenon.

Why, then, do statements such as the following appear in the legal literature: “when people are anxious and fearful, they are *less likely* to engage in systematic processing”?⁷⁹ On the face of it, this directly contradicts the substantial research showing that *positive* mood elicits a more heuristic, less systematic analysis of a communication.

The most important reason, qualified somewhat below, involves the distinction made above between *mood* and *emotion*.⁸⁰ Most of the

happy subjects are more persuadable than sad subjects).

75. See Blumenthal, *supra* note 70, at 5 n.27 (citing sources).

76. See *id.*

77. See Joseph P. Forgas, *Feeling and Doing: Affective Influences on Interpersonal Behavior*, 13 PSYCHOL. INQUIRY 1 (2002); Jaihyun Park & Mahzarin R. Banaji, *Mood and Heuristics: The Influence of Happy and Sad States on Sensitivity and Bias in Stereotyping*, 78 J. PERSONALITY & SOC. PSYCHOL. 1005 (2000); Norbert Schwarz et al., *Mood and Persuasion: Affective States Influence the Processing of Persuasive Communications*, 24 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 161 (1991); Mackie & Worth, *supra* note 74; Herbert Bless et al., *supra* note 74; NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 240 (2000).

78. E.g., Joseph P. Forgas, *Introduction: The Role of Affect in Social Cognition*, in FEELING AND THINKING: THE ROLE OF AFFECT IN SOCIAL COGNITION 1, 15–17 (Joseph P. Forgas ed., 2000) (noting traditional perspective that positive mood leads to more superficial processing and negative mood to more systematic processing, but also noting refinements of these perspectives); Dolores Albarracín & G. Tarcan Kumkale, *Affect as Information in Persuasion: A Model of Affect Identification and Discounting*, 84 J. PERSONALITY & SOC. PSYCHOL. 453 (2003) (identifying curvilinear effect of mood on such processing); Petty & Wegener, *supra* note 71, at 364–65 (identifying and explaining experiments showing that “happy people do not universally process information less than neutral or sad people”); cf. Blumenthal, *supra* note 48, at 29–30 (noting importance of distinguishing among different emotions).

79. Cass R. Sunstein, Book Review, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 771 (2003) (emphasis added); Cass R. Sunstein, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV. 1556, 1565 (2004) (emphasis added).

80. See *supra* note 70.

research demonstrating debilities in processing that result from positive affect—and that result in increased persuasion—involve the effect of *mood*. In these studies, the affect experienced by individuals hearing a communication was unrelated to the content of the message in question. In contrast, negative emotion—such as anxiety or fear—that *stems from the message itself* can lead to increased susceptibility to persuasion.⁸¹ Specifically, “fear-based appeals,” where the induced emotion stems from the message rather than from an unrelated stimulus, and the sort of politicized message that is likely to be conveyed in this context, are focal in the present discussion. Indeed, “perhaps the most notable instances in which negative moods have produced more favorable attitudes reside in the vast literature on fear appeals.”⁸²

B. *Fear Appeals and Persuasion*

Hundreds of empirical studies on the effect of fear (or threat) appeals have appeared since the early 1950s, when the paradigm was first extensively developed.⁸³ Most simply, a “fear appeal” is a fear-arousing persuasive message. More specifically, it is a message or argument that usually (1) suggests to the listener that he or she is vulnerable to a specific threat and (2) urges the listener to undertake specific actions to reduce his or her vulnerability to that threat.⁸⁴ One leading fear appeals researcher, Professor Kim Witte, defines fear appeals similarly: “persuasive messages designed to scare people by describing the terrible things that will happen to them if they do not do what the message recommends.”⁸⁵

Professor Witte further explains fear appeals in terms of three central concepts: threat, fear, and efficacy.⁸⁶ *Threat* is the external stimulus that

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

82. Richard E. Petty et al., *Multiple Roles for Affect in Persuasion*, in EMOTION AND SOCIAL JUDGMENTS 181, 183 (Joseph P. Forgas ed., 1991).

83. See James Price Dillard & Jason W. Anderson, *The Role of Fear in Persuasion*, 21 PSYCHOL. & MARKETING 909 (2004).

84. Franklin J. Bolster & Paul Mongeau, *Fear-Arousing Persuasive Messages*, in COMMUNICATION YEARBOOK 8 330, 371 n.1 (Robert N. Bostrom ed. 1984) (“A fear appeal is an argument of the following form: (1) You (the listener) are vulnerable to a threat. (2) If you are vulnerable, then you should take action to reduce your vulnerability. (3) If you are to reduce your vulnerability, then you must accept the recommendations contained in this message. (4) Therefore you should accept the recommendations contained in this message.”).

85. Kim Witte, *Putting the Fear Back into Fear Appeals: The Extended Parallel Process Model*, 59 COMM. MONOGRAPHS 329, 329 (1992).

86. *Id.* at 330–32.

exists outside of the listener's perception, which, if perceived by the listener as significant and likely to affect him or her, elicits fear. *Fear* is defined as a "negatively-valenced emotion, accompanied by a high level of arousal," and is the listener's subjective emotional reaction to the threat.⁸⁷ Finally, *efficacy* relates to the part of the message that conveys the availability and effectiveness of the recommended action and the listener's subjective perceptions with respect to this part of the message.⁸⁸ As with the concept of threat, the concept of efficacy incorporates both objective and subjective elements of fear appeals.

Professor Witte has synthesized much of the previous research on fear appeals, combining earlier studies' discrepant results into a more coherent framework: the Extended Parallel Process Model (EPPM).⁸⁹ Professor Witte's major concern in developing this new theory was that fear had been de-emphasized in fear appeals research.⁹⁰ Drawing on previous influential (but ultimately incomplete) models, Professor Witte suggested that fear appeals engender two processes, or appraisals, in the minds of listeners: (1) appraisal of the threat, and (2) appraisal of the efficacy of the recommended response.⁹¹ These appraisal processes occur successively, rather than simultaneously; that is, after exposure to the message, a listener will first internally appraise the threat as she perceives it by assessing the severity of the threat and her susceptibility to that threat.⁹² If the listener does not perceive the threat to be at least moderate, or does not believe that she is particularly susceptible to the threat, then she will not be motivated to appraise or undertake any recommended response, and the fear appeal fails.⁹³ If the listener perceives both severity and susceptibility as high, then fear is elicited and she will be motivated to undergo an internal appraisal of the efficacy

87. *Id.* at 331.

88. *Id.* at 332.

89. *Id.* at 337.

90. *Id.*

91. Kim Witte, *Fear as Motivator, Fear as Inhibitor: Using the Extended Parallel Process Model to Explain Fear Appeal Successes and Failures*, in HANDBOOK OF COMMUNICATION AND EMOTION: RESEARCH, THEORY, APPLICATIONS, AND CONTEXTS 423, 428 (Peter A. Andersen & Laura K. Guerrero eds. 1998) [hereinafter *Fear as Motivator*]; Witte, *supra* note 85, at 337–38.

92. Witte, *Fear as Motivator*, *supra* note 91; Witte, *supra* note 85, at 337–39; see Enny H.H.J. Das et al., *Fear Appeals Motivate Acceptance of Action Recommendations: Evidence for a Positive Bias in the Processing of Persuasive Messages*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 650, 654 (2003) (demonstrating that listeners who perceived themselves to be highly vulnerable to a health threat were more easily persuaded to adopt recommended responses).

93. Witte, *Fear as Motivator*, *supra* note 91; Witte, *supra* note 85, at 337–39.

of the recommended response.⁹⁴ In appraising the efficacy of that response, the listener determines whether such a response will effectively assuage the perceived threat and whether she has the ability to perform that action.⁹⁵

At this stage, depending on the perceived levels of efficacy, other processes take over. If perceived efficacy is high (i.e., the listener believes that the recommended response will effectively assuage the threat), the listener engages in the danger control process, focusing on averting the threat conveyed in the fear appeal.⁹⁶ In this case, listeners generally adopt the recommended response. However, if the perceived efficacy is low (i.e., the listener does not believe the recommended response will effectively assuage the threat), then the listener engages in a fear control process, focusing not on averting the threat but rather on ways to cope with the fear itself.⁹⁷ In this case, listeners generally reject the recommended response and either deny the existence of the threat or attribute manipulative intent to the source of the message.⁹⁸

In sum, the EPPM suggests a sequence of perceived threat, fear, perceived efficacy, and acceptance of recommended responses or persuasion. More specifically, the EPPM suggests the following: the higher the perceived threat, the more fear elicited; the more fear elicited, the more likely a listener is to appraise the efficacy of the recommended responses; the higher the perceived efficacy, the more likely a listener is to adopt the recommended responses. Where perceived efficacy is low, however, it is less likely a listener will adopt recommended responses due to defensive avoidance. In other words, where threat and efficacy are perceived to be high, recommended responses are usually followed.

The EPPM thus predicts that if the perceived efficacy of the recommended response is low, fear is less likely to lead to persuasion. Rather, the fear-control process is engaged—denial, perceived manipulation—and the recommended response is not adopted. Other

94. Witte, *Fear as Motivator*, *supra* note 91; Witte, *supra* note 85, at 337–39. As Witte notes, experiencing fear may elevate perception of the threat, which may elevate fear, continuing in a cycle. *Id.* at 338.

95. *See* Witte, *Fear as Motivator*, *supra* note 91, at 428–29.

96. Witte, *supra* note 85, at 340.

97. *Id.* at 340–41.

98. *Id.* Of course, individual differences, including background, personality traits, personal experiences, etc., influence a listener's appraisal of threat and efficacy, thereby indirectly affecting the ultimate decision to respond in an adaptive or maladaptive manner. *Id.* at 338; Witte, *Fear as Motivator*, *supra* note 91, at 430–31. Thus, the same fear appeal may affect people differently depending on these variables.

empirical research, however, may qualify that prediction in ways directly relevant to the abortion decision-making process. In particular, engagement of the fear-control process—and thus the likelihood of adopting the recommended response—may depend on the perceived credibility of the party recommending that response.⁹⁹ Specifically, when listeners hear a fear message from a credible source, they are less likely to engage in a fear-control process whereby they perceive manipulation, engage in counter-argumentation, or use other defensive avoidance tactics.¹⁰⁰ Rather, listeners are more likely to engage in a danger-control process and accept the recommended responses.¹⁰¹ Thus, when listeners perceive the source of a fear appeal to have high credibility, they are generally more persuaded to comply with the recommended responses.

Finally, research indicates that whether a health message is *framed* positively or negatively can affect the perceived risk of not following the relevant suggestions, the perceived costs of doing so, and the persuasiveness of the message itself.¹⁰² That is, when a message is framed in a way that presents the outcome as a *gain*—e.g., by making a particular choice, you will be physically and psychologically healthy—individuals in a negative mood will be more likely to see

99. Brian Sternthal & C. Samuel Craig, *Fear Appeals: Revisited and Revised*, 1 J. CONSUMER RES. 22, 26–27 (1974) (noting studies that indicate a correlation between high source credibility and message acceptance); cf. Murray A. Hewgill & Gerald R. Miller, *Source Credibility and Response to Fear-Arousing Communications*, 32 SPEECH MONOGRAPHS 95, 99 (1965) (suggesting that a highly credible source with value to a listener presenting a strong fear appeal leads to more persuasion).

100. Sternthal & Craig, *supra* note 99, at 27.

101. *Id.*

102. Punam Anand Keller et al., *Affect, Framing, and Persuasion*, 40 J. MARKETING RES. 54 (2003) (positing that those in positive moods are more persuaded by loss-framed messages, whereas those in negative moods are more persuaded by gain-framed messages). Others report somewhat discrepant findings. For instance, for individuals high in “need-for-cognition,” a negative mood (sadness) led to more agreement with a message counseling particular action when the message was framed in terms of loss (if you don’t do X, bad things will happen). When framed in terms of gains (if you do X, good things will happen), however, positive mood (happiness) led to more agreement with the message. Duane T. Wegener et al., *Effects of Mood on High Elaboration Attitude Change: The Mediating Role of Likelihood Judgments*, 24 EUR. J. SOC. PSYCHOL. 25 (1994). More generally, the framing effect may relate to whether a health message is framed in terms of prevention or detection; gain-framed prevention messages and loss-framed detection messages seem to be most persuasive. Susan E. Rivers et al., *Message Framing and Pap Test Utilization among Women Attending a Community Health Clinic*, 10 J. HEALTH PSYCHOL. 65 (2005).

increased risks, lowered costs, and to be persuaded into accepting the recommendations.¹⁰³

In sum, 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).¹⁰⁴

C. *Application to Informed Consent Statutes*

Many of the informed consent abortion statutes include these three elements. Many states require that women seeking abortions at the very least be informed of the general nature and associated medical risks of the procedure. Some states, however, require that women be informed of specific risks, such as hemorrhaging, endometritis, perforated uterus, danger to subsequent pregnancies, and infertility.¹⁰⁵ Most women are likely to view such threats as severe, and most certainly as relevant. Similarly, informing women of an increased risk of breast cancer, or of the risks of incomplete or failed abortion, or of potential emotional and psychological trauma, would likely have the same effect: women would justifiably perceive these risks as severe and relevant threats (the second element above). Information about “risks” to the fetus would also be seen as relevant threats. Such information might be explicit, such as regarding an incomplete abortion. It might be more subtle, such as information about the fetus’s gestational age, its anatomical and physiological characteristics, or its brain and heart function—all information that implies the results that an abortion would have on a fetus with those physical characteristics.

Finally, such informed consent laws suggest effective and feasible means by which women can avoid the risks or threats identified (the

103. When the message is framed as a *loss*—e.g., “you will suffer such physical or psychological dysfunction”—individuals in a positive mood are more persuaded. Keller et al., *supra* note 102.

104. Professor Richard Perloff gives a similar summary of what “works” for fear appeals. RICHARD M. PERLOFF, *THE DYNAMICS OF PERSUASION: COMMUNICATION AND ATTITUDES IN THE 21ST CENTURY* 195–96 (2d ed. 2003) (noting the following four “practical suggestions”: “Communicators must scare the heck out of recipients”; “Persuaders must discuss solutions, as well as problems”; “Efficacy recommendations should emphasize costs of not taking precautionary actions, as well as benefits of undertaking the activity”; and “Threats and recommendations should be salient—or relevant—to the target audience”) (emphasis omitted). Each of these features, of course, is emphasized in the informed consent information being discussed.

105. *See supra* notes 38–39.

third element above). Currently, seventeen states require that women be informed that there are alternatives to abortion.¹⁰⁶ Again, Utah is the most explicit as to the preference for adoption, but most of these states require that women be given a list of adoption agencies with a description of their services and their contact information,¹⁰⁷ thereby providing an alternative response to the pregnancy that would effectively remove the risks or threats associated with abortion. Moreover, providing a list of adoption agencies and contact information makes the alternative response of adoption seem more feasible.

Many states also require that women be informed of the availability of medical assistance benefits and of the father's support obligations.¹⁰⁸ This information implicitly advocates childbirth and child-rearing as an alternative response to the pregnancy, which would also effectively remove any risk or threat associated with abortion. Moreover, the states represent this alternative response to pregnancy as feasible by including information aimed at making women feel that they will be able to afford this alternative response. Thus, the recommended response to the situation—*not* aborting—is presented as an effective way of combating the presented threats or risks of abortion.

According to the EPPM, however, if a woman is not persuaded that these alternatives are effective, then she may engage in fear control processing (defensive avoidance, attribution of manipulation, etc.). If, however, the source of the message is seen as highly credible, this tendency to engage in fear control processing may be overcome. In particular, every state with an informed consent abortion law requires that the physician or other health care professionals responsible for performing the procedure provide the various required information to women seeking abortions. In addition, many states require that women

106. ALA. CODE §§ 26-23A-4, 26-23A-5 (2006); ALASKA STAT. §§ 18.16.060, 18.05.032 (2006); ARK. CODE ANN. §§ 20-16-903, 20-16-904 (2007); DEL. CODE ANN. tit. 24, § 1794 (2006); IDAHO CODE § 18-609 (2007); KAN. STAT. ANN. §§ 65-6709, 65-6710 (2006); KY. REV. STAT. ANN. § 311.725 (West 2006); LA. REV. STAT. ANN. § 1299.35.6 (2001); MO. ANN. STAT. § 188.039 (2004); OHIO REV. CODE ANN. § 2317.56 (LexisNexis 2005); OKLA. STAT. ANN. §§ 1-738.2, 1-738.3 (West 2007); 18 PA. CONS. STAT. ANN. §§ 3205, 3208 (West 2000); S.C. CODE ANN. §§ 44-41-330, 44-41-340 (2002); TENN. CODE ANN. § 39-15-202 (2006); TEX. HEALTH & SAFETY CODE ANN. §§ 171.012, 171.014 (Vernon 2007); UTAH CODE ANN. §§ 76-7-305, 76-7-305.5 (2007); VA. CODE ANN. § 18.2-76 (2004).

107. *See supra* note 106.

108. *E.g.*, ALA. CODE § 26-23A-4(a); ALASKA STAT. § 18.05.032(a)(5); ARK. CODE ANN. § 20-16-903(b)(3)(B); GA. CODE ANN. § 31-9A-3(2)(B); IND. CODE ANN. § 16-34-2-1.1(a)(2)(B); KAN. STAT. ANN. § 65-6709(b)(3); LA. REV. STAT. ANN. § 1299.35.6(B)(2)(a)(iii).

either be given or informed of the availability of printed or video materials published by the state.¹⁰⁹ Here, women must be verbally informed that the materials were published by the state.¹¹⁰ Therefore, the two sources of the message containing the threat are health care professionals and state governments. Health care professionals are typically seen as highly credible (the first element above);¹¹¹ and trust in state government, though it varies considerably, can be strong as well.¹¹²

There is little question that the goal of many of these informed consent laws *is* dissuading women from pursuing abortions, and they are likely somewhat successful.¹¹³ But although some research (primarily in the form of surveys and interviews) has investigated factors influencing

109. *E.g.*, ARK. CODE ANN. § 20-16-903; GA. CODE ANN. § 31-9A-3; IDAHO CODE § 18-609.

110. *E.g.*, ARK. CODE ANN. § 20-16-903; GA. CODE ANN. § 31-9A-3; IDAHO CODE § 18-609.

111. *E.g.*, PollingReport.com Values, <http://www.pollingreport.com/values.htm> (last visited Jan. 31, 2008) (reporting Harris Poll results from 1998, 2002, and 2006, showing that doctors are consistently rated as “generally trust[worthy]”). *See also* Brief for the American Psychological Association as Amicus Curiae Supporting Petitioners, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902) 1992 WL 12006399 at *23 (arguing that when a health care provider offers information to a patient, “that offer carries the weight of a recommendation. A patient may justifiably conclude that a health care provider would not offer her material that was not relevant and meaningful to her medical procedure. In practice and effect, [requiring the provision of information can] [exploit] the trust critical to the health care provider-patient relationship”).

112. *E.g.*, Pew Research Center for the People & the Press, *A Partisan Public Agenda* (Jan. 16, 1997), available at <http://people-press.org/reports/display.php3?PageID=544> (noting that seventy percent of Pennsylvania respondents have “a great deal” or “a fair amount” of trust in state government); Public Policy Institute of California, *Special Survey of Orange County* (Dec. 2003), available at <http://data.lib.uci.edu/ocs/2003/report/03attitudestowstategov.html> (noting a January 2002 survey showing that forty-seven percent of California respondents believe state government does “what is right just about always or most of the time”).

113. Antony B. Kolenc, *Easing Abortion’s Pain: Can Fetal Pain Legislation Survive the New Judicial Scrutiny of Legislative Fact-Finding?*, 10 TEX. REV. L. & POL. 171, 178 n.32 (2005) (stating that “it is likely that some women will change their minds about procuring an abortion when they discover that the living being growing inside of them is capable of experiencing pain”); April L. Cherry, *Roe’s Legacy: The Nonconsensual Medical Treatment of Pregnant Women and Implications for Female Citizenship*, 6 U. PA. J. CONST. L. 723, 751 n.119 (2004) (noting “‘informed consent’ stipulations meant to change women’s minds about abortion”); David C. Reardon, Ph.D., *Abortion Decisions and the Duty to Screen: Clinical, Ethical, and Legal Implications of Predictive Risk Factors of Post-Abortion Maladjustment*, 20 J. CONTEMP. HEALTH L. & POL’Y 33, 67 (2003) (suggesting that clinics’ “identification of risks might cause some women to change their minds”); Daniel Avila, *The Right to Choose, Neutrality, and Abortion Consent in Massachusetts*, 38 SUFFOLK U. L. REV. 511, 513–14 (2005) (quoting abortion provider Dr. Philip G. Stubblefield, testifying in *Planned Parenthood League of Mass. v. Bellotti*, 499 F. Supp. 215 (D. Mass. 1980), that “a small percentage [of women seeking abortions], 1–3%, might change their minds” if they read a consent form “describing the embryo in terms of size and mass at certain times, and relating times at which heart beat, movement and full development is reached”).

women's abortion decisions,¹¹⁴ there is surprisingly little empirical research on the influence of anti-abortion information on women's abortion decisions. One study examined the effect of explicitly informing women that the center they were visiting was a pro-life center, that the counselors and staff advocated a pro-life philosophy, that they might be shown a "graphic videotape" of an abortion during their visit, and that most staff members were trained volunteers as opposed to professional counselors.¹¹⁵ A comparison group was not told this information. Both groups then met with center staff and were asked afterward about their "intent to abort," but no significant differences emerged between the two groups.¹¹⁶ There was also no difference between groups as to whether women chose to view the abortion videotape.¹¹⁷

The authors suggested that based on their findings, "providing open, informed consent prior to initiation of services does not bias the client in favor of pro-abortion decisions"; in fact, it helps "facilitat[e] client autonomy and self-determination."¹¹⁸ It is not clear, however, how much to make of the findings. The more important constitutional question, for instance, would be whether the "graphic videotape portraying an abortion" had an effect on the women's decision-making, rather than information about the center's philosophical orientation or that they *might* see such a videotape. The authors did not report this information, though (and the number of women who chose to view the tape was too small to generalize from in any case).¹¹⁹ Similarly, those in the "enhanced informed consent" condition were explicitly told that "the principal goal of the center was to try to stop abortions."¹²⁰ But as the

114. E.g., S. Marie Harvey et al., *The Relationship of Contextual Factors to Women's Perceptions of Medical Abortion*, 23 HEALTH CARE FOR WOMEN INT'L 654 (2002); Roni Gagin et al., *The Decision-Making Process for Requests for Late Termination of Pregnancy in Israel*, 26 HEALTH & SOC. WORK 98 (2001); Myrna L. Friedlander et al., *Abortion: Predicting the Complexity of the Decision-Making Process*, 9 WOMEN & HEALTH 43 (1984).

115. Kathryn Mardirosian et al., *The Effects of Enhanced Informed Consent in a Pro-Life Pregnancy Counseling Center*, 69 J. COUNSELING & DEVELOPMENT 39, 40 (1990).

116. *Id.* at 40, 41 tbl.1. There was a non-statistically significant finding that women in the "enhanced informed consent" were slightly more likely to report an intent to abort (mean = 4.13, standard deviation = 1.31 for enhanced condition; mean = 3.83, standard deviation = 1.32 for standard condition).

117. *Id.* at 40. Three out of thirty chose to view the video in the "enhanced informed consent" group; five out of thirty chose to in the standard condition. *Id.*

118. *Id.* at 41.

119. *Id.* at 40.

120. *Id.*

authors pointed out, women may already have been aware of this “basic philosophy or bias prior to their arrival for services.”¹²¹ Thus, although it is a clear benefit that the center did not engage in “explicit misleading advertising (e.g., suggesting it that was an abortion clinic),”¹²² as the authors suggested some centers might, it is not as clear whether their findings in fact address the question raised here.

Anecdotal evidence, however, does suggest that the sort of information that might be provided under the statutes can have a profound effect on women seeking abortions. Abortion-rights advocates have long criticized the sort of “fake abortion clinics” that the researchers above disavowed—centers that advertise abortion counseling and related services, but which in fact promote a pro-life philosophy and seek to discourage women from pursuing abortions.¹²³ Abortion-rights advocates have sought federal legislation prohibiting such practices, and one such bill was introduced in Congress in early 2006.¹²⁴ Stories from such centers suggest not only strong emotional impacts on women but also changes in their decision-making about the abortion.

Professor Julie Mertus, for instance, identifies one woman who “was told that the doctor would make her touch her dismembered baby, that the pain would be the most horrible she could imagine, and that she might, after an abortion, never be able to have children.”¹²⁵ Another woman was told, after asking for pregnancy test results, that she

would have to see a slide-show about abortion first. It started with nice music and pictures of women walking through fields. Then you saw a wastebasket full of dead fetuses. And then there was a slide of what they said was a dead woman lying under a sheet . . . They kept saying that you were going to die.¹²⁶

121. *Id.* at 41.

122. *Id.*

123. *E.g.*, Julie A. Mertus, *Challenging Fake Abortion Clinics: Protecting Women’s Privacy Interests Without Violating the First Amendment*, 15 N.Y.U. REV. L. & SOC. CHANGE 547 (1986–1987); Michael Alison Chandler, *Antiabortion Centers Offer Sonograms to Further Cause*, WASH. POST, Sept. 9, 2006, at A1.

124. For the text of the House bill introduced in the 109th Congress that would allow Federal Trade Commission regulation of “deceptive” practices intended to suggest that a center provides abortion services if it does not, see H.R. 5052, 109th Cong. (2d Sess. 2006), available at <http://maloney.house.gov/documents/reproductivechoice/033006CPCbill.pdf> (last visited Jan. 31, 2008).

125. Mertus, *supra* note 123, at 554 (citation omitted).

126. *Id.* at 554–55 (citation omitted).

Not all centers are so extreme. Nor is the information provided under State auspices always—or even typically—of this sort (though some states may approach such graphic detail). Many centers, however, both private and State-sponsored, suggest the possibility of negative long-term psychological effects to their patients.¹²⁷ Both suggest the possibility of increased risk for breast cancer after abortion.¹²⁸ And, both provide ultrasound services; in many instances, simply being given a sonogram seems to change a woman’s mind about pursuing an abortion.¹²⁹ This is, of course, not the same as graphic videotapes and warnings of health risks,¹³⁰ but it does illustrate the real possibility of susceptibility to decision-changing information. Indeed, South Carolina’s legislature recently introduced a bill that would require a woman seeking an abortion to view an ultrasound image before undergoing the procedure.¹³¹ Proponents view the bill as a “natural addition to the state’s informed-consent law;” however, critics object that it is “an attempt to restrict abortion by scaring and intimidating women.”¹³²

Of course, non-deceptive influences—that is, “truthful and not misleading” influences—on decision-making can be appropriate, but in

127. See *supra* notes 40–41 (Nevada and Wisconsin statutes); Rockville Pregnancy Center, <http://www.rpc.org/checklist.html> (suggesting that “abortion carries possible emotional, mental and psychological trauma and/or stress”) (last visited Jan. 31, 2008).

128. See *supra* note 38 (Minnesota, Mississippi, and Texas statutes); Rockville Pregnancy Center, *supra* note 127 (noting the “risk” of “breast cancer linkage (especially if your family history involves breast cancer)”). The weight of scientific evidence finds no such link. See *supra* note 38.

129. See Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 145 n. 121 (1992) (noting that one amicus brief in *Casey* mentioned “women who were contemplating having abortions who decided against doing so after an ultrasound procedure, since ‘seeing what was inside of them changed their mind’”); Chandler, *supra* note 123 (“A 2005 survey by Care Net, a Sterling-based network of about 1,000 antiabortion pregnancy centers in the United States and Canada, found that 72 percent of women who were initially ‘strongly leaning’ toward abortion decided to carry their pregnancies to term after seeing a sonogram. Fifty percent made the same choice after counseling alone.”).

130. But see Dena S. Davis, *The Puzzle of IVF*, 6 HOUS. J. HEALTH L. & POL’Y 275, 291 (2006) (noting that anti-abortion activists have incorporated fetal imagery techniques into their advocacy). Indeed, increasingly, parents are being given the option to obtain three-dimensional ultrasounds, an opportunity such activists seek to take advantage of to support their position. *Id.* Even four-dimensional ultrasounds—essentially “animated,” real-time, three-dimensional recordings of a fetus’s movements—are now available. *E.g.*, Jennifer M. Uhles, Comment, *Unsound Ultrasounds?*, 28 J. LEGAL MED. 263, 265 (2007).

131. Seanna Adcox, *S.C. Bill Would Require Ultrasounds Before Abortion*, CHARLESTON GAZETTE, Mar. 17, 2007, at A6.

132. *Id.*

deciding their constitutionality, the influence of emotional factors must be taken into account.¹³³ Twenty years ago Professor Mertus suggested, though without empirical support, that “[e]xposure to such treatment, without consent and *while in a stressful and anxious state*, jeopardizes women’s ability to weigh their options rationally and make independent, informed decisions regarding abortion.”¹³⁴ I make an analogous point here, and provide the empirical basis.

I do *not* mean that state clinics providing statutorily prescribed information must be subject to tort liability of the sort that Professor Mertus suggested. Nor do I mean that the simple act of conducting an ultrasound constitutes some “undue burden” under *Casey*. But, the sort of information provided by the fake abortion clinics at times does mirror the sort provided by the State. More important, in light of what we now know about the effect of fear appeals and persuasion under the influence of anxiety, there is a legitimate case for closer scrutiny under *Casey* of the effect such State-provided information has on the decision-making of women seeking abortion—even when such information is truthful.

D. Summary

Empirical research demonstrates that people tend to be more easily persuaded in negative emotional states, particularly when they are anxious or fearful. When an individual feels vulnerable to a particular health risk, she is more persuaded by an argument in favor of how to manage it, regardless of the argument’s strength—that is, the emotion and vulnerability are more influential than the message.¹³⁵ Those who feel vulnerable experience significantly more negative emotions as a result of hearing the communications, which leads to increased persuasion.¹³⁶ Indeed, perhaps the most effective means of obtaining compliance in the context of a fear appeal is to augment a listener’s

133. For an analogous approach see Huang, *supra* note 70 (suggesting that courts should pay greater attention to the emotional impact of stock prospectuses on investment decision-making).

134. Mertus, *supra* note 123, at 555 (emphasis added).

135. Das et al., *supra* note 92. Das and colleagues show that when a person feels vulnerable, her focus goes toward “positive aspects of the action recommendation,” and vulnerability biases her “evaluation of the evidence presented in support of the recommended action.” *Id.* at 661. For instance, vulnerability can increase the desire to get more information about how to deal with a threat, which can increase perceived efficacy (ability to deal with threat); thus, both vulnerability and perceived efficacy can lead to more compliance with recommended action. *See also* Bolster & Mongeau, *supra* note 84 (defining fear appeals consistent with this approach).

136. *See* Das et al., *supra* note 92, at 654, 658, 661.

perceived efficacy, i.e., to make clear that an individual has a specific way to deal with the perceived danger.¹³⁷ Applying this research to the abortion context illustrates the potential for an informed consent statute to be an impermissible burden on the exercise of a woman’s autonomous decision-making about an abortion precisely because it is calculated to bias a woman’s free choice, not inform it.

III. POTENTIAL OBJECTIONS

I suggest that although *Casey* condones State efforts to persuade a woman to forego an abortion in favor of childbirth, the opinion’s “truthful and not misleading” language can be read more broadly than it traditionally has. Specifically, even a truthful message may be misleading when it inappropriately takes advantage of emotional influence to bias an individual’s decision away from the decision that would be made in a non-emotional, fully informed state.¹³⁸ Drawing on the insights of empirical research, I suggest that the sort of emotional information that many States now provide in their “informed consent” statutes can lead to such inappropriate emotional influence and thus should be examined more closely than heretofore.

One gap in this argument is the lack of empirical investigation of the particular effect I suggest. Despite the anecdotes related above, some surveys, and at least tangentially related empirical studies such as that by Kathryn Mardirosian and colleagues,¹³⁹ I have not found direct empirical tests of the effect.¹⁴⁰ Although my analysis would be further informed by such research, it is nevertheless grounded in the language of *Casey* and is supported by the empirical evidence on fear appeals and on the impact of negative emotion, vulnerability, source credibility, and perceived efficacy on persuasion.¹⁴¹ Thus, the logical basis for the effect is set out here; further research can test that hypothesis.

137. See *supra* notes 89–98.

138. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1991) (noting that when such State action “imposes an undue burden on a woman’s *ability to make [the abortion] decision*,” the State’s conduct invades “the heart of the liberty protected by the Due Process Clause”) (emphasis added).

139. Mardirosian et al., *supra* note 115.

140. Even a recent review of “the psychology of abortion” focused primarily on *post*-abortion issues, rather than pre-abortion decision-making. See Coleman et al., *supra* note 51.

141. Other empirical research supports the idea that truthful statements can be misleading, in particular through its emotional effects. See Huang, *supra* note 70, at 115 n.89 (reviewing sources).

Other concerns or criticisms might also be levied at this approach. Some have traction, though none, ultimately, are fatal.

A. *Paternalism*

First, the suggestion that women might be subject to emotional factors that bias their decision-making about abortion may be viewed as classically paternalistic, suggesting that women are unable to make their own decisions and need protection against manipulation.¹⁴² It is true that such an approach implies the possibility of manipulation. The approach also suggests that women's abortion decisions under emotional stress may not reflect the decisions they would make in a less emotional state. But both of these suggestions might be accurate without implying any defect in women's actual decision-making. States may, and do, attempt to influence women's decisions about abortion, and the impact of emotion on decision-making indicates the potential for manipulation—just as with conventional advertising efforts to manipulate consumers' decisions through influencing emotional states.¹⁴³ It may simply be the case that women in this context—like other people in other contexts—are susceptible to others taking advantage of their emotional state to manipulate their decisions.¹⁴⁴ If so,

142. Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 489 (1995) (framing *Casey* as a “paternalis[ti]c [decision that] undermines the independence of women as decisionmakers and furthers the stereotype that women are emotional and irrational decisionmakers, easily swayed by authority figures”); Paula E. Berg, *Lost in a Doctrinal Wasteland: The Exceptionalism of Doctor-Patient Speech Within the Rehnquist Court's First Amendment Jurisprudence*, 8 HEALTH MATRIX 153, 171–72 (1998); see also Samuel R. Bagenstos, *Disability, Life, Death, and Choice*, 29 HARV. J. L. & GENDER 425, 456 (2006) (suggesting that for some, “the ‘informed consent’ requirements in *Casey* [may] reflect a gender-based paternalism toward women”); McClain, *supra* note 129, at 144 (“The Court’s analysis of informed consent and women’s health is patronizing, selective, and in part contrary to fact.”); Heather A. Smith, Comment, *A New Prescription for Abortion*, 73 U. COLO. L. REV. 1069, 1079 (2002) (“*Casey* . . . legalizes society’s historically paternalistic approach to women.”).

143. See Blumenthal, *supra* note 48, at 47–48; Neal Roese, *Counterfactual Thinking and Marketing: Introduction to the Special Issue*, 17 PSYCHOL. & MARKETING 277, 278–79 (2000) (“The manipulation of consumer emotions by marketers has long been a staple of successful advertising.”); Jon Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 732–33 (1999) (noting use by marketers of positive affect to influence and manipulate consumers’ perceptions); Scot Silverglate, Comment, *Subliminal Perception and the First Amendment: Yelling Fire in a Crowded Mind?*, 44 U. MIAMI L. REV. 1243, 1262 (1990) (“Clever advertising executives appeal to a consumer’s emotional or psychological needs . . .”).

144. See generally Blumenthal, *supra* note 48 (noting several examples of people’s susceptibility to emotional factors that may warrant intervention when that bias leads to bad decision-making).

then, like persons in other contexts, women should have every resource to avoid manipulation, including, as relevant here, a broader basis for a constitutional challenge.

B. The Slippery Slope

A second objection might be in the “slippery slope” vein, suggesting that this approach over-expands the concept of “misleading,” thereby making its application possible in an inappropriate range of contexts. That is, if truthful communication can be held unconstitutional in the abortion context because of the potential for emotional bias, why should the same potential not lead to truthful communications being considered unlawful in any (or every) other context?

Of course, this objection rests on the presumption that such expansion *would* in fact be inappropriate. Wholesale expansion would be overbroad, but it may be apt to apply the perspective that emotion influences decision-making to more areas of legal doctrine. In particular, we might consider both the potential for manipulation and the potential that even truthful messages can inappropriately make use of emotional factors.

For instance, one commentator has recently suggested protecting investors by revising the defenses afforded to those involved in securities litigation—in particular, the defense of “puffery” and the “total mix” and “bespeaks caution” doctrines—to better reflect investors’ actual decision-making.¹⁴⁵ Specifically, Professor Peter Huang suggests that courts consider not only the *cognitive* impact that prospectuses or other informational material might have on potential investors and on shareholders, but also the *emotional* impact.¹⁴⁶ He notes that the positive mood induced by “puffery” can lead to more superficial processing of a prospectus containing such puffery¹⁴⁷ and recommends that the affect induced by positive material be considered in evaluating how a “reasonable” reader might interpret that material. Similarly, he suggests modifying the current “total mix” approach to evaluating the materiality of information presented in investment material by including evaluation of the “total affect” induced by that information.¹⁴⁸

145. Huang, *supra* note 70.

146. *Id.*

147. *Cf.* Blumenthal, *supra* note 48, at 3 n.5 (citing sources).

148. Huang, *supra* note 70, at 122.

In another context, Professor Paul Marrow highlights the potential for manipulation in one-sided liquidated damages clauses in contracts for the provision of emergency services, emphasizing the “experiential” or affective and emotional influences that tend to “impede sound [rational] reasoning.”¹⁴⁹ He accordingly encourages courts to expand the unconscionability doctrine by developing the tort of Consequential Procedural Unconscionability,¹⁵⁰ which could include efforts by a seller or provider who takes deliberate advantage of known emotional biases to manipulate a potential buyer. Relatedly, Professors Jon Hanson and Douglas Kysar have developed an extensive grounding for applying enterprise liability in the context of deliberate manipulation by industry and/or advertisers.¹⁵¹

But even to the extent such suggestions are incorporated into legal doctrine, consideration of emotional influences need not be unconstrained. The slippery slope argument presumes that courts, legislators, and policy-makers will be unable to draw a line between those contexts in which applying the emotional manipulation approach is appropriate and those where it is not. Of course, this is a difficult presumption with which to begin: “the existence of difficult cases does not negate the importance of protecting [a] right; reasonable boundaries can be drawn to demarcate its scope.”¹⁵² And I, as well as others, have suggested, broadly, some such lines: drawing from the surrogate motherhood and frozen embryo examples, for instance, one approach would be to focus on the substantive aspects of the decision.¹⁵³ The personal importance of the abortion decision and the far greater involvement of emotional factors might plausibly lead to more serious consideration of emotional bias and manipulation than in the context of an ordinary business contract.¹⁵⁴

149. Paul Bennett Marrow, *Crafting a Remedy for the Naughtiness of Procedural Unconscionability*, 34 CUMB. L. REV. 11, 49 n.68 (2003–2004).

150. *Id.* at 38 (identifying tort and defining its elements).

151. Hanson & Kysar, *supra* note 143.

152. Jack M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1, 29 (1986). I acknowledge objections to this approach. *E.g.*, Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1034 (2003) (suggesting that “[s]lippery slopes may occur even when a principled distinction can be drawn between decisions A and B”).

153. *See, e.g.*, Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 214 (2005) (discussing approach of focusing on substance of the contract or decision).

154. *Cf.* Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 98–99 (1999).

Moreover, as elaborated below, even a strong version of these approaches does not entail some sort of strict liability, where bias and manipulation are presumed any time that emotion is present. As discussed in more detail below, causation will be an important factor to establish: not everyone may be susceptible to particular emotional manipulation, and not every decision made under an emotional state is contrary to that which the decision-maker might otherwise make. Causal links must be demonstrated, regardless of whether any of these perspectives are applied or whether the approach is broadened.

C. *Casey Means What It Says*

Third, I do not mean that finding that a statement is influential necessarily means that it is an undue burden—that simply because a communication works to change a woman’s mind it is therefore inappropriate.¹⁵⁵ My suggestion is that under *Casey*’s “truthful and not misleading” standard, a communication designed to influence a woman’s decision whether to abort *may* be considered an undue burden when it is inappropriately manipulative (deliberately or not) by inducing fear or anxiety, or when it inappropriately affects her ability to decide, leading to a decision that she would not have made when not under the influence of such an emotion.¹⁵⁶

Casey might nevertheless be seen as condoning even such manipulation, so long as the message is truthful and accurate.¹⁵⁷ That is, even such emotional loading might be seen as permissible as long as the statements are accurate because such emotional persuasion is simply

Nor do I mean that government efforts to use fear appeals in other contexts—health and safety public service advertising, for instance—are necessarily inappropriate. A more detailed discussion of the extent to which government may and should justifiably interfere in individuals’ behavior and decision-making would be necessary to address such points. That discussion has begun to develop in the legal literature; elsewhere I (like others) emphasize that in evaluating such intervention, a balancing of the relevant costs and benefits is crucial. *See* Blumenthal, *supra* note 48.

155. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 968 (1991) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (“That the information might create some uncertainty and persuade some women to forgo abortions does not lead to the conclusion that the Constitution forbids the provision of such information.”); *see also id.* at 874 (stating that the fact that a regulation simply “has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.”).

156. *See id.* at 874 (noting that when such State action “imposes an undue burden on a woman’s ability to make [the abortion] decision,” the State’s conduct invades “the heart of the liberty protected by the Due Process Clause”) (emphasis added).

157. This was Chief Justice Rehnquist’s point. *See id.* at 968.

another way of encouraging a woman to pursue a particular line of conduct—encouragement that *Casey* expressly allows.¹⁵⁸ Under this approach, *Casey* might be seen as simply prohibiting false speech.

For at least two reasons, though, this reading of *Casey* may be too strict. First, actual manipulation is still inappropriate under *Casey*.¹⁵⁹ There is no question that a State may require the provision of information designed to persuade a woman to pursue childbirth rather than abortion. What a State may *not* do, however, is unduly interfere with a woman's decision about whether to do so.¹⁶⁰ Again, under *Casey*, information designed to bias a woman's decision or that has the effect of doing so may constitute an impermissible burden.¹⁶¹ Inappropriately biasing a woman's free choice is precisely the sort of burden on a woman's *ability to make her decision* that impermissibly "reach[es] into the heart of the liberty protected by the Due Process Clause."¹⁶² Second, the empirical evidence described above—not considered in *Casey*, and developed extensively since that time—encourages a reconsideration of *Casey*'s implications. The substantial literature on fear appeals and the influence of negative emotions such as fear and anxiety induced by a particular communication shows the potential for a change in an individual's decision away from what it might have been in a non-emotional state.¹⁶³ As the First Circuit recognized in *Bellotti* and the Supreme Court did in *Akron* and *Thornburgh*, even true information may be inappropriate for someone to hear because of the potential for undue influence and for the information to mislead.¹⁶⁴ *Casey*'s overruling of the

158. *Casey*, 505 U.S. at 878.

159. *Id.* at 876–78.

160. *See Rust v. Sullivan*, 500 U.S. 173, 216 (1991) (Blackmun, J., dissenting) (“‘[L]iberty,’ if it means anything, must entail freedom from governmental domination in making the most intimate and personal of decisions.”); *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 705 (7th Cir. 2002) (Wood, J., dissenting) (stating that state-mandated procedures that increase the cost of obtaining an abortion are unconstitutional if they have “the purpose or effect of *forcing* some women to give up their constitutional right to an abortion”); *cf. Coleman v. DeWitt*, 282 F.3d 908, 911–12 n.1 (6th Cir. 2002) (noting that State may not “place an undue burden on the *execution* of the woman's decision”) (emphasis added) (citing *Casey*, 505 U.S. at 876–78)).

161. *See Casey*, 505 U.S. at 877 (stating that “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”).

162. *See id.* at 874.

163. Again, this is the important point, that the emotion impels the change in decision, not simply that a woman changes her mind. This is an issue of proof, the burden of which is properly placed on the plaintiff. *See infra* Part III.D.

164. *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1022 & n.29 (1st Cir. 1981); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 444 (1983); *Thornburgh v.*

latter two cases failed to take this into account; had the plurality done so, it may have reached a holding consistent with constitutional mandates and closer to the approach suggested here.

D. Issues of Proof

Again, Chief Justice Rehnquist stressed that the simple fact that a woman changes her mind about pursuing an abortion does not imply that what prompted her to do so was necessarily improper.¹⁶⁵ The key, of course, would be to show some link between the communication and the generated emotion, and between the generated emotion and the decision. That is, “the important judicial analysis will be ascertaining causality, both in the link between the defendant’s conduct and the experience of the particular biasing emotion or mood, and between the emotion or mood and the decision”¹⁶⁶ These links would need to be shown either prospectively, under a challenge to particular statutory language, or retrospectively, in the context of a woman’s tort or other legal claim alleging the manipulation of her abortion decision.

At least two responses might be appropriate. First, an explicit focus on decision and injury causation reflects causes of action sounding in tort, in particular, negligence-based informed consent suits against a health-care provider for failing to provide particular information that would be material to a patient’s decision.¹⁶⁷ The discussion here, however, implicates an effort to explore the effect particular informed consent regulations have on not only the constitutional rights involved in pursuing the abortion decision, but also on the decision-making process itself. Thus, the inquiry focuses on whether such a regulation places an undue burden on a woman seeking an abortion. Of course, this inquiry may arise retrospectively, where a particular woman is exposed to a particular State-mandated communication and as a result of such exposure changes her mind about an abortion.¹⁶⁸ But, it also may arise

Am. College of Obstetricians & Gynecologists, 476 U.S. 747, 762–63 (1986).

165. See *Casey*, 505 U.S. at 968.

166. See Blumenthal, *supra* note 48, at 68. A third point might be to show that the decision not to have an abortion in fact constituted some injury. This is essentially ascertaining “decision causation” and “injury causation.” See, e.g., Robert Gatter, *Informed Consent Law and the Forgotten Duty of Physician Inquiry*, 31 LOY. U. CHI. L.J. 557, 562 n.36 (2000) (explaining the distinction).

167. See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* 654 (2000).

168. Indeed, a preference for this as-applied approach seems to be one point of the Supreme

prospectively, in an effort to determine whether a particular regulation in fact might create an undue burden in a broader range of cases.

Where that is so, *Casey* and the more recent *Gonzales v. Carhart*¹⁶⁹ give some guidance for prospective challenges. If a prospective challenge were brought, the Court's apparent preference is for an as-applied challenge, where a court can focus on "discrete and well-defined instances" in which a "particular condition" would occur that might make a provision unduly burdensome.¹⁷⁰ The necessary proof would involve whether a "large fraction" of women are susceptible to the emotional impact of the specific sort of information the statutes require.¹⁷¹

Court's recent abortion decision. *See Gonzales v. Carhart*, 550 U.S. ___ (Apr. 2007) 127 S. Ct. 1610, 1638–39 (2007) (disapproving of facial challenge); *id.* at 1650–51 (Ginsburg, J., dissenting) (criticizing majority's apparent assertion that facial challenges to abortion regulations should not be entertained where medical uncertainty exists).

169. 550 U.S. ___ (Apr. 2007), 127 S. Ct. 1610 (2007).

170. *See id.* at 550 U.S. ___, 127 S. Ct. at 1638. Typically, plaintiffs raising a facial statutory challenge have significant hurdles to overcome. *See, e.g., United States v. Salerno*, 481 U.S. 739, 745 (1987). In the abortion context, though, the stringent requirements for raising a successful facial constitutional challenge seem to be slightly relaxed. Specifically, the *Casey* majority established that a law restricting abortions constitutes an undue burden, and hence is invalid, if, "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Casey*, 505 U.S. at 895. Focusing on the statute's "impact on those whose conduct it affects," the Court emphasized that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* at 894. This focus was repeated one year later, when Justice O'Connor (with Justice Souter joining) concurred in an order denying a stay while plaintiffs challenging aspects of a State's abortion-regulation statute appealed an adverse ruling. *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor & Souter, JJ., concurring in denial of stay pending appeal). Justice O'Connor explicitly noted that the lower court's approach there, requiring challengers to "show that no set of circumstances exists under which the [challenged provisions] would be valid" was inconsistent with the "large fraction" approach set down in *Casey*. *Id.* (quoting *Fargo Women's Health Org. v. Skinner*, No. A3-91-95 (D.N.D. Feb. 19, 1993)). Most recently, *Carhart* addressed the issue, noting that there was debate over the proper standard but declined to articulate exactly the "heavy burden" standard a plaintiff must meet in raising a facial challenge to an abortion statute. *Carhart*, 550 U.S. ___, 127 S. Ct. at 1639 (quoting *Rust v. Sullivan*, 500 U.S. 173, 183 (1991)). *Casey*'s language seems to control the difficulty placed in the way of women seeking an abortion must unduly burden that "large fraction of the cases in which [the statute] is relevant." *Id.* (citing *Casey*, 505 U.S. at 895.) In determining whether that large fraction is burdened, *Casey* emphasizes the "relevance" aspect; that is, as Justice Ginsburg pointed out in her *Carhart* dissent, *Casey* provides that a potentially burdensome statute must be judged in terms of those women for whom it is an "actual," not an "irrelevant" restriction. *Carhart*, 550 U.S. ___, 127 S. Ct. at 1651 (Ginsburg, J., dissenting) (quoting *Casey*, 505 U.S. at 895).

171. *See Casey*, 505 U.S. at 895. As I note above, this is the sort of empirical research absent from the literature. *See supra* notes 140–141 and accompanying text. It would also be important to investigate whether specific groups of women may be more or less susceptible.

Second, to the extent that the injury causation analysis *is* undertaken, courts might analogize to the similar approach proposed in the context of securities regulation, as informed by recent research.¹⁷² In particular, both securities regulation and abortion statutes seek to facilitate full disclosure of information presumed to be relevant to making fully “informed” decisions.¹⁷³ Both securities regulation and informed consent doctrine focus on “material” information, and both deal with how a “reasonable” individual would react and decide in particular circumstances, when exposed to certain information.¹⁷⁴ But, as Professor Huang has pointed out, traditional securities doctrine—like traditional informed consent doctrine—rarely considers *emotional* responses to such information (e.g., proxy statements or physician communication) in determining materiality and reasonableness.¹⁷⁵ Professor Huang emphasizes the possibility that the mood induced by investment-related communications might influence decisions just as easily as does the actual information, and suggests broadening securities law to recognize that possibility.¹⁷⁶ Importantly, Professor Huang implies that analysis of materiality and reasonableness can proceed in the same formal way as it has under existing doctrine, but should incorporate considerations of potential affective influence.¹⁷⁷ Equally, traditional undue burden

172. See Huang, *supra* note 70, at 129 (noting that not only the discussion of reasonableness and materiality in particular, but of affective influences on decision-making in general, “have broader implications for many other legal and policy areas”).

173. See, e.g., SEC v. Ralston Purina Co., 346 U.S. 119, 124 (1953) (purpose of SEC’s mandatory disclosure requirement is “promoting full disclosure of information thought necessary to informed investment decisions”); Section I, *supra*.

174. See, e.g., 17 C.F.R. § 230.405 (2007) (explaining that “material” information is that “to which there is a substantial likelihood that a reasonable investor would attach importance” in making purchasing decisions); see *Canterbury v. Spence*, 464 F.2d 772, 791 (D.C. Cir. 1972) (stating a preference for an “objective” standard for decision causation in the informed consent context, focusing alliteratively on what a “prudent person in the patient’s position would have decided if suitably informed,” and looking at whether adequate disclosure might “reasonably be expected” to cause a patient to decline treatment); see also John Kindley, Comment, *The Fit Between the Elements for an Informed Consent Cause of Action and the Scientific Evidence Linking Induced Abortion with Increased Breast Cancer Risk*, 1998 WIS. L. REV. 1595, 1640 (footnotes omitted) (“A material risk is by definition one which a reasonable patient would consider significant in deciding whether to forego the procedure. A finding of materiality therefore implies that the risk has the potential to actually change the patient’s decision, either alone or in combination with other factors.”).

175. See Huang, *supra* note 70, at 111 (noting that traditional framing of reasonable investor does not take into account affective decision-making factors).

176. See *id.* at 112.

177. See *id.* (stating that “determinations of reasonableness would and should depend not just on the cognitive nature and quality of information processing, but also upon the affective nature and

analysis can proceed in the same formal way, simply taking into account the possibility that the State-mandated communication might unduly affect a woman's decision-making by subjecting her to emotional bias.

CONCLUSION

Under existing abortion doctrine, States are permitted to mandate that women seeking abortion be presented with a variety of information, including information about their health and that of their fetus, and both immediate and longer-term risks to such health. Such a mandate is permissible even when its clear intent is to dissuade women from pursuing the abortion. The Supreme Court condones this approach—provided the information is “truthful and not misleading”—under the rationale of ensuring that women receive all relevant information about the abortion process so that they can make the most autonomous, fully informed decision. In light of substantial empirical literature in psychology and persuasion studies, however, I have suggested here that even “truthful” information may nevertheless be misleading when it takes advantage of individuals' likelihood to be inappropriately persuaded by emotional biases. That is, empirical research demonstrates that individuals tend to be more easily persuaded when in a fearful or anxious emotional state—the emotional state most likely to be elicited by the information provided.

Much of that research has developed since the *Casey* decision. Nevertheless, there are hints of the approach I develop here in the plurality opinion and in Justice Blackmun's partial concurrence. For instance, the Court's emphasis on “truthful and not misleading” communication suggests on its face that the Court's concern was to prevent States from presenting patently false information to women. But as noted above, that concern moved quickly to the emphasis on autonomous decision-making.¹⁷⁸ Thus, perhaps the emphasis on “truthful and not misleading” language was a continuation of earlier recognition (e.g., in *Bellotti*) that a communication can be factually accurate but nevertheless still inappropriate. Even if this is the better reading, however, the Court's rationale was not the explanation set forth here—the likelihood of influencing, through emotional manipulation, someone's ability to be persuaded.

quality of information processing”).

178. See *supra* notes 46–47 and accompanying text.

A closer link, perhaps, may be found in Justice Blackmun’s partial concurrence. First, he too emphasized the continuing vitality of the “truthful and not misleading” criterion.¹⁷⁹ Second, though, he also emphasized that

[b]ecause the State’s information must be “calculated to inform the woman’s free choice, not hinder it,” the measures must be designed to ensure that a woman’s choice is “mature and informed,” *not intimidated, imposed, or impelled*. To this end, *when the State requires the provision of certain information, the State may not alter the manner of presentation in order to inflict “psychological abuse,” designed to shock or unnerve a woman seeking to exercise her liberty right.*¹⁸⁰

Justice Blackmun sought to ensure that the State be prevented from manipulating a woman’s decision-making process—“abusing” her psychologically, “shocking” or “unnerving” her in the *manner* of presentation.¹⁸¹ He worried about such manipulation not only in the abortion cases but in a broader liberty context,¹⁸² and he recognized the ability for subtle influence in not only the content but also the “manner” by which even truthful information was presented.

In *Casey*, Justice Blackmun continued,

This, for example, would appear to preclude a State from requiring a woman to view graphic literature or films detailing the performance of an abortion operation.[¹⁸³] Just as a visual preview of an operation to remove an appendix plays no part in a physician’s securing informed consent to an appendectomy, a preview of scenes appurtenant to any major medical intrusion into the human body does not constructively inform the decision of a woman of the State’s interest in the preservation of the

179. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 922 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

180. *Id.* at 936 n.7 (emphasis added and internal citations omitted) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

181. *See id.*

182. Randall P. Bezanson, *Self-Reliance*, 71 N.D. L. REV. 29, 34 (1995) (noting Justice Blackmun’s concern about “government paternalism that takes the form of shaping the information upon which individuals make personal and moral choices, thereby intruding government’s moral preferences on the otherwise ‘free’ choices of individuals”).

183. As evidenced by Utah’s statute, Justice Blackmun was here over-optimistic. *See supra* notes 35–37

woman's health or demonstrate the State's "profound respect for the life of the unborn."¹⁸⁴

Justice Blackmun recognized the power of such visual images in influencing, even biasing, an individual's decisions,¹⁸⁵ and recognized that the influence of such images, *even when accurate*, might in some instances be inappropriate.

In summary, to the extent women are led to make a decision they would otherwise not have made as a result of emotionally induced biases, they are unable to make the sort of autonomous decision lauded by the Court and mandated by *Casey*. To the extent that women are prevented from making such decisions, the information provided places an undue burden on their decision-making, and as such may be impermissible under *Casey*, despite that case's approval of politicized or even one-sided information.¹⁸⁶ Substantial additional research will be crucial in determining whether, how, and how often such undue influence occurs. Such research will help inform legal and policy discussions about the propriety, and proper form and content, of such informed consent statutes.¹⁸⁷

184. *Casey*, 505 U.S. at 936 n.7 (internal citations omitted) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice Blackmun did find it "unobjectionable for the Commonwealth to require that the patient be informed of the nature of the procedure, the health risks of the abortion and of childbirth, and the probable gestational age of the unborn child." *Id.* at 935. Providing the health risk information may not appear to be intimidating or imposing—after all, it is simply a factual communication. However, recall that the effectiveness of a fear appeal depends heavily on the degree it can instill in a listener a sense of self-relevant and severe threat. *See supra* notes 91–95. Explicitly presenting dire health risks is precisely the sort of approach that might produce an effective fear appeal.

185. *Cf.* Richard K. Sherwin, Neal Feigenson & Christina Spiesel, *Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. J. SCI. & TECH. L. 227, 241–42 (2006).

186. Recognizing such an influence on a woman's decision-making might also give physicians a basis on which to refuse to provide such information, on the grounds that it would likely affect the woman's "physical or mental health." *See Casey*, 505 U.S. at 883–84 (noting that under the statute at issue there, a physician could exercise his or her medical judgment and refuse to provide the mandated informed consent information if "he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.") (quoting 18 PA. CONS. STAT. § 3205 (1990)).

187. Again, further empirical research may or may not support the idea that the specific sort of information currently provided induces emotionally biased decision-making. Even if it does, there may be legal and policy reasons for not accepting such findings as dispositive. *See* Jeremy A. Blumenthal, *Law and Social Science in the Twenty-First Century*, 12 S. CAL. INTERDISC. L.J. 1, 50–51 (2002). Nevertheless, incorporating empirical findings into the constitutional discussion can elicit a more informed, more transparent, richer policy discussion. *Id.*