



South Dakota's Abortion Script — Threatening the Physician–Patient Relationship

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Under a law that went into effect in July, physicians in South Dakota must tell any woman seeking an abortion that she is terminating the life of “a whole, separate, unique, living human being”

with whom she has an “existing relationship,” that her relationship “enjoys protection under the United States Constitution and under the laws of South Dakota,” and that abortion terminates that relationship along with “her existing constitutional rights with regards to that relationship.”¹

The “informed-consent” law (see box) was passed in 2005 but was immediately suspended by an injunction sought by Planned Parenthood, which operates the only South Dakota clinic providing abortions. On June 27, 2008, in *Planned Parenthood Minnesota v. Rounds*, a divided Eighth Circuit Court of Appeals lifted the injunction, clearing the way for implementation.²

The law also requires that doctors give pregnant women a description of medical and “statistically significant” risks of abortion,

among which it includes depression and other psychological distress, suicide, danger to subsequent pregnancies, and death. Physicians must tell women the approximate gestational age of the fetus and describe its state of development. All disclosures must be made in writing, and the woman must sign each page of the document. The physician must answer all the woman's questions in writing and enter them into her medical record. The physician must also certify in writing that the woman received the information and that she understood it, as far as the physician could ascertain. Physicians who do not satisfy the statute are subject to license suspension or revocation and may be charged with a class 2 misdemeanor.

In the U.S. Supreme Court's

most recent abortion case in 2007, *Gonzales v. Carhart*, Justice Anthony Kennedy noted that “some women come to regret their choice to abort the infant life they once created and sustained.”³ Had these women been better informed, he suggested, they might have chosen not to abort and thus been spared the “grief more anguished and sorrow more profound” caused by discovering how their pregnancy had been terminated.³ Many commentators interpreted Kennedy's words as an invitation to state legislatures to amend abortion statutes to add informed-consent requirements. South Dakota appears to have answered this invitation.

The South Dakota requirements, referred to as “the script” by the media, signal a new step in states' efforts to restrict abortion. The law is unique in ways that should cause concern to physicians, patients, and protectors of the physician–patient relationship. As part of an ongoing challenge to abortion, it has import far beyond the borders of South Dakota.

Provisions of South Dakota's 2005 "Informed-Consent" Law for Abortion.

The law includes the following provisions among disclosures that must be made to any pregnant woman before an abortion is performed:

- That the abortion will terminate the life of a whole, separate, unique, living human being;
- That the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota;
- That by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated;
- A description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including:
 - Depression and related psychological distress;
 - Increased risk of suicide ideation and suicide;
- A statement setting forth an accurate rate of deaths due to abortions, including all deaths in which the abortion procedure was a substantial contributing factor;
- All other known medical risks to the physical health of the woman, including the risk of infection, hemorrhage, danger to subsequent pregnancies, and infertility;
- The probable gestational age of the unborn child at the time the abortion is to be performed, and a scientifically accurate statement describing the development of the unborn child at that age; and
- The statistically significant medical risks associated with carrying her child to term compared to undergoing an induced abortion.

In challenging the law, Planned Parenthood argued that it violates physicians' First Amendment rights, first by compelling them to deliver the state's ideological message — that "the abortion will terminate the life of a whole, separate, unique, living human being" — and then by keeping them from disassociating themselves from that message by requiring them to certify that the woman has read and understood the scripted information. In the 1992 decision in *Planned Parenthood v. Casey*, the Supreme Court established that states may require physicians to give pregnant women information that "a reasonable patient would consider material to the decision of whether or not to undergo the abortion" — informing them of the relevant medical risks, alternatives to the procedure, the gestational age and developmental stage of the fetus, and the existence of organizations that can provide alternatives to abortion and help in obtaining medical care and child support. Previous state informed-consent statutes were closely modeled on the provisions of *Casey*.²

The South Dakota law's substantial departures from those provisions have led legal scholar Robert Post to conclude that its "obvious objective . . . is to use the concept of 'informed consent' to eliminate abortions."⁴

Although, as *Casey* established, the state's powers of "reasonable licensing and regulation" give it the authority to require doctors to provide women with specific information in order to protect their health and the potential life of the fetus, the state may not, as the Supreme Court stated in a 1977 case, *Wooley v. Maynard*, use mandated speech to "disseminate an ideology, no matter how acceptable to some." When required speech serves the state's ideological interests, the state's authority cannot "outweigh an individual's First Amendment right to avoid becoming the courier for such message."

The majority in *Rounds* dismissed the First Amendment argument by focusing on the statute's inclusion of a definition of "human being" as "an individual living member of the species of *Homo sapiens*, including the unborn hu-

man being during the entire embryonic and fetal ages from fertilization to full gestation."¹ The reference to this definition, the court found, makes the description of the fetus as "a whole, separate, unique, living human being" a biologic, rather than ideological, one.

But although state legislatures have substantial discretion to define terms used in their laws, they cannot merely use the iteration of definitions to cloak religious, philosophical, or metaphysical language in statutory garments and call it "scientific" or "biologic." The dissent in *Rounds* noted that "human being" has no specific scientific or medical meaning and that its meaning varies with the context. Although it may refer to purely biologic characteristics, especially when distinguishing humans from other species, "it also may be a value judgment, indicating entitlement to the moral or political rights shared by all persons."² Post notes that the question of "whether the fetus is a human being is thus understood by all sides to the abortion controversy to be an essentially contested moral proposition."⁴ In its abortion cases, the Supreme Court has shied away from making value judgments related to the term "human being," when life begins, or whether the fetus is a "human life." The Eighth Circuit's position that the use of the definition resolves the ideology question is overly simplistic, at best.

The sections of the statute referring to a woman's "relationship" with the fetus, the protection that such a relationship enjoys, and the rights "terminated" by having an abortion are so vague as to defy explanation. Is a woman who has an abortion violating constitutionally protected rights of her fetus? Could she be punished for doing so? Since physicians must certify

that women understand the mandated information, could a physician who cannot correctly explain the meaning of the “relationship” be prosecuted? Neither the U.S. Constitution nor the South Dakota Constitution explicitly mentions any such “relationship,” nor is there evidence in constitutions, statutes, or legal cases indicating that abortion terminates a pregnant woman’s “constitutional rights.” Rather than supplying information that a reasonable person would find necessary to make a medical decision, the language about “relationships” and the termination of “rights” can reasonably be interpreted only as intended to intimidate pregnant women with vaguely described and legal-sounding consequences.

In addition, the statute’s complex requirements for certification of informed consent far exceed those in other statutes. Arguably, the statute seriously discourages physicians from providing alternative or more accurate information by inducing fear that adding contradictory information would either render them unable to “certify” the woman’s comprehension of the state’s information or expose them to liability — and effectively prevents them from disassociating themselves from the compelled speech. The requirement that women sign each page of the disclosure document allows them no latitude to decide for themselves how much or little detail they wish to have about the procedure. The requirements of certification and for writing and recording of questions and answers in the medical record will have a chilling effect on open discussions between physicians and patients and are likely to “compel a woman to conform her speech to the state’s chosen messages.”²

But South Dakota’s script also threatens the physician–patient relationship in ways that may resonate far beyond the issue of abortion. Patients have a right to expect that physicians will provide them with accurate and complete medical information that will guide them in making medical decisions.⁴ The purported increased risks of psychological distress, depression, and suicide that physicians are required to warn women about are not supported by the bulk of the scientific literature.³ By requiring physicians to deliver such misinformation and discouraging them from providing alternative accurate information, the statute forces physicians to violate their obligation to solicit truly informed consent — and thereby detracts from the essential trust between patients and their physicians. If legislatures can mandate that physicians provide women with ideological, vague, intimidating, and false information about abortion, what is to stop them from intruding further into physician–patient discussions regarding end-of-life decisions, the use of future stem-cell–based therapeutics, the efficacy of birth control, or the role of condoms in preventing sexually transmitted infections?

Finally, the script statute should be read in the context of repeated efforts in South Dakota and other states to eliminate abortion, either through increased restrictions or outright bans. South Dakota has tried and failed three times in recent years — the third time through a referendum defeated earlier this month — to implement broad bans on abortion. Each would have violated the “undue burden” standard in *Casey* and directly challenged *Roe v. Wade*. Several states require pregnant women seeking an abortion to undergo an ultrasound before the procedure. Proposed federal

regulations would deny federal funding to health care facilities that did not enforce “conscience clauses” — provisions protecting health care workers who refuse to deliver any care they find morally or religiously objectionable.⁵ But even laws that appear to leave the central tenet of *Roe* and *Casey* intact can chip away at *Roe* incrementally, as the script provisions demonstrate. By assuming that women are incapable of making decisions about abortion as competent adults in consultation with their physicians, these statutes tend to reduce women to their reproductive capacity and suggest that they need the paternalistic protection of legislatures and society.

The Supreme Court’s decision in *Gonzales v. Carhart* indicates that a majority of the justices are willing to permit greater restrictions on abortion rights. With future retirements from the Court, that margin may grow. Although some may view South Dakota’s restrictive abortion provisions as affecting only the 700 or so women who seek an abortion in that state each year, such complacency may be misplaced. These provisions mark a substantial inroad into the physician–patient relationship that ought to worry any practicing physician.

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1. S.D. Codified Laws, § 34-23A-10.1 (2006).
2. *Planned Parenthood Minnesota v. Rounds*, 530 F.3d 724 (2008).
3. *Gonzales v. Carhart*, 550 U.S. 124 (2007).
4. Post R. Informed consent to abortion: a First Amendment analysis of compelled physician speech. *Univ Ill Law Rev* 2007;3:939.
5. 45 C.F.R. pt. 88 (RIN 0991-AB48), *Fed. Reg.* 73(166): 50274. August 26, 2008.

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