Viewpoint

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The Politics of Informed Consent and the Limits of the First Amendment

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Physicians are accustomed to disclosing the risks and benefits of treatment as part of their ethical and legal duty to secure informed consent. Generally, physicians have the freedom to decide how to communicate this information, and to tailor their disclosures to the needs of individual patients. However, in today's highly politicized climate, some state legislatures are eliminating this opportunity for professional discretion. Physicians are increasingly being compelled to communicate state-mandated messaging that may be at odds with their professional judgment, violating their ethical duty to secure informed consent by "present[ing] relevant information accurately and sensitively, in keeping with the patient's preferences for receiving medical information."[1]

Even though physicians and patient advocates have argued that these targeted disclosure laws are unconstitutional, the First Amendment sets few restrictions on the government's ability to compel physician speech. This Viewpoint discusses the expansion of politically motivated informed consent laws and identifies opportunities for the medical profession to challenge them.

Informed Consent Legislation for Individual States

It should come as no surprise that targeted informed consent laws are introduced only in the context of health care services that are politically controversial, like abortion and gender-affirming care. For example, Arkansas legislators introduced a bill on February 6, 2023, that codifies the process for securing consent to "gender transition procedures"[2] for minors. The proposed law includes a list of disclosures that physicians must make verbatim (both verbally and in written form) at least 30 days before initiation of treatment and at every subsequent medical visit for 6 months. Physicians are

required to tell parents that treatment may exacerbate a child's gender discordance, which may in turn necessitate "surgery to remove some of your child's body parts."[2] Physicians must state that puberty blockers may "increase the risk of your child being sterilized" and may "prevent your child from ever being able to engage in sexual activity or achieve orgasm for the rest of your child's life."[2] And they must warn parents of the financial consequences of consenting to gender-affirming care, which, according to the legislators who drafted the bill, "may exceed one hundred thousand dollars."[2] In January, Utah passed a similar law,[3] albeit one that does not require physicians to read from a script.

Physicians who provide abortion services have already had decades of experience balancing their own professional ethics against the risk of liability for violating state speech mandates. Many states have laws requiring physicians to tell patients seeking abortion that life begins at conception, that fetuses are able to feel pain, that abortion is linked with an increased risk of suicide, or to describe ultrasound images. Some clinicians, in an effort to disconnect themselves from these disclosures while technically complying with the law, preface the counseling script with qualifiers, disclaimers, and apologies explaining that the government-mandated messages they are communicating do not reflect their own medical judgment.[4]

Constitutional Limits

In courts across the country, health care providers have argued that politically motivated informed consent statutes violate their First Amendment right to freedom of speech. Lawsuits challenging dozens of abortion disclosure laws have had mixed results in large part because the US Supreme Court has provided little concrete guidance regarding the government's authority to compel physician speech.

In *Planned Parenthood of Southeastern Pennsylvania v Casey*,[5] the Supreme Court dismissed a First Amendment challenge to Pennsylvania's informed consent law that required physicians to disclose the medical risks of abortion and childbirth, the probable gestational age of the fetus, and the availability of state-published materials providing addition information about fetal development and social support services available to those who choose to continue with a pregnancy. In a mere 2 sentences, the Supreme Court acknowledged that physicians have First Amendment rights "not to speak,"[5] but upheld the law as an exercise of the state's authority to reasonably regulate the practice of medicine. Notably, while the 2022 decision in *Dobbs v Jackson Women's Health Organization*[6] struck down the Fourteenth Amendment right to abortion affirmed in *Casey*,[5] it did not speak to the First Amendment holding in *Casey*,[5] which stands on its own.

In 2018, the Supreme Court in *National Institute of Family and Life Advocates v Becerra* reaffirmed the principle that states may enact reasonable regulations of "professional conduct" even if those regulations "incidentally burden speech"[7]—just as Pennsylvania did with the abortion disclosure law challenged in *Casey*.[5] The Supreme Court also held that states are permitted to require disclosure of "factual,

noncontroversial information"[7] in commercial contexts, including the giving of professional advice. However, the Supreme Court declined to recognize professional speech as a separate category of speech entitled to greater (or lesser) First Amendment protection. In doing so, it effectively rejected more rigorous standards of review that state and federal courts had previously applied to laws restricting physician speech relating to assisted suicide, medical marijuana, and gun ownership.

Notably, the Supreme Court in *National Institute of Family and Life Advocates*[7] did not resolve the question of when a state's informed consent mandate would be viewed as a reasonable regulation of professional conduct, as opposed to a more than incidental speech restriction subject to a higher level of constitutional scrutiny. In *National Institute of Family and Life Advocates*,[7] the Supreme Court cited *Casey's* holding[5] approvingly, noting that "the requirement that a doctor obtain informed consent to perform an operation is 'firmly entrenched' in American tort law." However, in a curious passage of dicta, the Supreme Court left open the possibility that some state incursions into the communication between physician and patient might go too far. Although reaffirming the state's authority to regulate medical practice, the Supreme Court acknowledged that state manipulation of professional speech poses significant risks, including censorship of unpopular ideas, suppression of racial and ethnic minority groups, and harm to public health. It recognized that health care professionals may reasonably disagree on a number of topics (the Supreme Court cited assisted suicide and medical marijuana as examples) and wrote that "the people lose when the government is the one deciding which ideas should prevail."[7]

It seems difficult to reconcile the Supreme Court's description of informed consent as being "firmly entrenched" as a permissible regulation of medical practice with its concern that states might inappropriately rely on professional licensure as an exercise of "unfettered power to reduce a group's First Amendment rights."[7] And indeed, new informed consent laws applicable only to reproductive and sexual health care services bring this tension to the forefront.

Future Opportunities

As legislative efforts to compel physician speech on topics of political controversy proliferate, it is difficult to predict how courts will rule. But health care professionals and medical associations working with attorneys have continued opportunities to contest these laws by taking advantage of the jurisprudential ambiguities described above.

First, because state-compelled disclosures must be "factual,"[7] the medical community has a responsibility to educate judges about the validity of information presented by state legislatures in support of these laws. For example, Arkansas' gender-affirming therapy bill describes the compelled disclosures as "facts" grounded in "systematic reviews of evidence,"[2] and if such a bill is passed into law and challenged, the amicus briefs filed on behalf of medical associations should present courts with the extensive research findings that gender-affirming treatment improves outcomes for those with gender dysphoria. Pro-choice advocates have already been successful in challenging

laws requiring physicians to disclose that medication abortion is reversible on the grounds that the state-mandated disclosures are scientifically inaccurate.

Second, the medical community can emphasize that many biased informed consent laws do not fall within the reasonable regulation of medicine as required by *Casey*[5] and *National Institute of Family and Life Advocates*.[7] Courts need to be educated about the ethical principles behind the practice of informed consent, and reminded that the traditional scope of disclosure legally required in all other medical contexts is limited to the medical risks and benefits of a treatment and its alternatives. In support of these arguments, physician and patient advocates can highlight that the Supreme Court itself in *National Institute of Family and Life Advocates* expressed concern that state regulation of the content of professional speech may inappropriately "suppress unpopular ideas or information" rather than "advance legitimate regulatory goal[s]."[7]

There is no guarantee that these strategies will be successful because US courts have consistently demonstrated a willingness to apply exceptionalist legal standards in cases relating to reproductive and sexual health. However, to the extent that health care practitioners wish to resist governmental intrusion into patient-physician communications, persuading judges through litigation and amicus briefs is a necessary step.

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