COMPELLED DISCLOSURES

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ABSTRACT

Courts have faced a wave of compelled disclosure cases recently. By government mandate, tobacco manufacturers must include graphic warnings on their cigarette packages, doctors must show and describe ultrasound images of fetuses to women seeking to abort them, and crisis pregnancy centers must disclose that they do not provide contraception or abortion services. Although applying the same compelled speech doctrine to similar issues, appeals courts have reached very different results in challenges to these laws. Drawing from First Amendment theory, this Article first identifies why compelled disclosures undermine free speech values. It then applies those insights to the specific examples above. In doing so, it examines not only compelled text but the new phenomenon of compelled images, particularly compelled images designed to provoke an emotional response. The Article concludes that court decisions often have it backwards: it is mandatory abortion counseling laws that offend free speech principles, not laws requiring cigarette warnings or crisis pregnancy center disclosures.

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INTRODUCTION

"Warning: Smoking can kill you."

"You are about to terminate the life of a whole, separate, unique, living human being."

"This Center does not offer contraception or abortion counseling or services."

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May the government force a corporation to criticize its own product? May it compel a doctor to convey information with the goal of persuading patients to adopt one course of medical treatment over another, even if the doctor disagrees with that recommendation? May the government require crisis pregnancy centers to disclose their qualifications and the nature of their services?

These are all examples of compelled speech—that is, speech the government forces a private entity to say—that courts have recently confronted. Although addressing analogous (if not the same) issues and applying the same compelled speech doctrine, appeals courts have reached very different conclusions in challenges to these compelled disclosures. They have struck down new federal warnings requiring graphic, and often gruesome, depictions of the harms caused by smoking.[1] They have upheld state laws forcing physicians to read a state-scripted message or describe the fetal heartbeat and ultrasound to women who have decided to terminate their pregnancy.[2] Meanwhile, some but not other courts have invalidated municipal regulations compelling crisis pregnancy centers to reveal

1. *See infra* notes 201–217 and accompanying text.
2. *See infra* notes 300–316 and accompanying text.

whether their staff is medically licensed and whether they offer abortion or contraception services.[3]

There is no shortage of articles examining specific examples of compelled disclosures.[4] What is missing, however, is a broader look at the topic, and in particular, one that draws from free speech theory to identify exactly what it is about compelled disclosures that undermines free speech principles. This Article attempts to fill that gap.[5] This comprehensive look examines not only compelled text, but also the new phenomenon of compelled images, particularly compelled images designed to provoke an emotional response.

Part I outlines existing compelled speech doctrine and its limits. Current doctrine provides different levels of free speech protection depending on whether the compelled speech is commercial or noncommercial, and within commercial speech, whether it compels statements of fact or statements of opinion. Speech, however, does not always fit neatly into these categories.

Part II turns to the reasons why compelled disclosures risk undermining free speech goals. First, compelled disclosures might *chill* speech, so that they have the practical effect of censoring speech. Second, compelled disclosures might also *distort* the discourse if they are false or if audiences are unaware that the message is mandated by the state. Third, compelled speech might intrude upon the *autonomy* of the speaker or the listener. By overriding the ability to control what she says, compelled disclosures may undermine the speaker's autonomy. If paternalistic or manipulative, the compelled disclosures may insult the audience's autonomy. In thinking about manipulative speech, I reject the assumption that appeals to emotion are automatically manipulative; instead, I argue that emotional persuasion is manipulative only if it intentionally takes advantage of common cognitive heuristics—cognitive shortcuts that are both helpful and distorting—that we all fall prey to.

Part III applies the insights of the previous Parts to three real-world compelled speech challenges: (1) the new graphic tobacco warnings; (2)

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3. *See infra* notes 442–449 and accompanying text.

4. *See, e.g.*, Clay Calvert et al., *Playing Politics or Protecting Children? Congressional Action & A First Amendment Analysis of the Family Smoking Prevention and Tobacco Control Act*, 36 J. LEGIS. 201, 210 (2010); Scott W. Gaylord & Thomas J. Molony, Casey *and a Woman's Right to Know: Ultrasounds, Informed Consent, and the First Amendment*, 45 CONN. L. REV. 595, 598 (2012); Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL'Y 159, 161 (2009); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 944; Mark L. Rienzi, *The History and Constitutionality of Maryland's Pregnancy Speech Regulations*, 26 J. CONTEMP. HEALTH L. & POL'Y 223, 224 (2010).

5. Larry Alexander's *Compelled Speech*, 23 CONST. COMMENT. 147 (2006), starts the analysis but is a short comment.

mandatory abortion counseling; and (3) crisis pregnancy center disclosures. Besides being ripe for Supreme Court review,[6] these examples provide an opportunity to analyze the new trend of compelled visual speech, where the government requires the private speaker to display images, whether of diseased lungs or a developing fetus.[7] In addition, the inconsistent treatment of similar laws (two compel images and two involve abortion) invites a closer and more methodical examination.[8] This Part concludes that court of appeals decisions have generally gotten it backwards: it is the mandatory abortion counseling laws that offend free speech principles, not the laws requiring cigarette warnings or crisis pregnancy center disclosures.

Despite their attempt to persuade viewers to eschew smoking, the accurate, fact-based tobacco warnings do not chill speech, distort the discourse, or insult the autonomy of any speakers or listeners. The disclosures do not insult the autonomy of the compelled corporations because it makes no sense to talk about the freedom of conscience and dignity of nonsentient entities. As for audiences, the government's anti-addiction goals are not paternalistic and its means—graphic images that provoke an emotional response—are not manipulative because most do not exploit any cognitive heuristic.

In contrast, mandatory abortion counseling raises all the concerns that underlie the constitutional ban against compelled speech. Forcing physicians to read the government's pro-life script or describe an ultrasound image may chill their speech. The often false or misleading disclosures distort the general discourse as well as the professional discourse between physician and patient. And by forcing physicians to deliver an ideological message to an unwilling captive audience, the compelled speech offends the autonomy of both speaker and audience. Unlike avoiding addiction, foregoing an abortion is not necessarily autonomy-enhancing, making the government's goal of persuading women to change their minds about having one suspect in a way that its anti-smoking goal is not. Furthermore, the government's reliance on inaccurate

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6. *See*, *e.g.*, Michelle Olsen, *Circuit Split Watch: A New Abortion Battleground*, APPELLATE DAILY (May 1, 2012, 10:03 A.M.), http://appellatedaily.blogspot.com/2012/05/circuit-split-watch-new-abortion.html (discussing possible Supreme Court review of mandatory ultrasound laws); Jessica Mason Pieklo, Supreme Court Asked to Review NYC Law Regulating Crisis Pregnancy Centers, RH Reality Check, June 6, 2014. http://rhrealitycheck.org/article/2014/06/09/supreme-court-asked-review-nyc-law-regulating-crisis-pregnancy-centers/

7. *Cf.* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 528 (6th Cir. 2012) ("The requirement imposed by [the new tobacco law]—that a product manufacturer place a large scale color graphic on a product warning label—is simply unprecedented."); Jennifer Corbett Dooren, *U.S. Court Hears Case on Graphic Tobacco Ads*, WALL ST. J., Apr. 10, 2012, at B9 ("On the constitutional issue involving the graphic images, the judge said, 'We are in new territory.'").

8. Compelled campaign disclosures, which do not raise these issues, are therefore outside the focus of this Article. Nonetheless, the Article's approach for analyzing compelled speech would still apply.

assertions and misleading cognitive associations is manipulative. Thus, as opposed to the smoking disclosures, these abortion disclosures are constitutionally problematic in both their ends and their means.

For the most part, compelled factual disclosures by crisis pregnancy centers about their services and qualifications pass constitutional muster. There seems to be little risk of problematic chill or distortion of the discourse when centers make clear their mission and the medical background of their staff. Nor do these factual disclosures compromise the autonomy of the centers or their clients. On the contrary, the factual text raises no concerns about manipulation, and clarifying the ambiguous or outright false claims made by these centers actually improves the autonomous decision making of their intended audience.

I. COMPELLED SPEECH DOCTRINE TODAY

Just as the government can violate the Free Speech Clause when it silences someone who wishes to speak, the government can violate the Free Speech Clause when it forces someone to speak who would rather remain silent.[9] *West Virginia State Board of Education v. Barnette*[10] presents a paradigmatic example of unconstitutional compelled speech. West Virginia required schoolchildren to salute the United States flag and recite the Pledge of Allegiance each morning or face expulsion.[11] Several Jehovah's Witnesses objected on religious grounds.[12] Despite the religious implications of the mandatory flag salute, the Supreme Court's holding did not turn on them.[13] Instead, in declaring the law unconstitutional, the Court emphasized that coercing students "to utter what is not in [their] mind[s]" violates the freedom of conscience the First Amendment was designed to protect[14]: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein*."[15]

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9. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) (stating that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all").

10. *Id*. at 624.

11. *Id*. at 629.

12. *Id*. (explaining that Jehovah's Witnesses equated flag salute to bowing down to graven images).

13. *Id*. at 634 ("Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held.").

14. *Id*.

15. *Id*. at 642 (emphasis added); *see also* Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2327 (2013) ("The government may not ... compel the endorsement of ideas that it approves.").

For the most part, government attempts to force individuals to affirm beliefs contrary to their own, as in *Barnette*, are subject to strict scrutiny and struck down.[16] But the Supreme Court has been less clear and less consistent when dealing with compelled speech that deviates from that paradigm. There are myriad ways in which compelled speech may diverge from the archetypical case. The compelled speaker may be an organizational entity like a corporation or nonprofit rather than a person, or the compelled speech may be commercial rather than noncommercial. In addition, the compelled speech may range from ideology to persuasive facts to facts meant to clarify otherwise misleading content. Nor are these the only distinctions.[17]

While all these factors may inform a compelled speech case, current doctrine specifically takes into account two of them. The default rule is that as a content-based regulation, compelled speech must pass strict scrutiny.[18] Nonetheless, the Supreme Court differentiates between commercial speech (such as advertising) and noncommercial speech, and subjects the former to intermediate scrutiny.[19] And if the compelled commercial speech discloses facts that will help inform consumers' decision making, it may merit even less rigorous review.[20] Thus, the Supreme Court distinguishes first between commercial and noncommercial speech and second, within commercial speech, between compelled statements of fact and compelled statements of beliefs and opinions.

In the end, these rules provide limited guidance. Part of the reason they are insufficient is that they are not applied consistently.[21] More fundamentally, though, speech really exists along a continuum rather than in two distinct categories. Speech designated as commercial or political is often really a mixture of the two, and although speech can be clearly factual or clearly opinion, some simply defies easy categorization.

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16. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 717 (1977) (holding that state cannot force Jehovah Witnesses to display state motto "Live Free or Die" on their automobiles); *see also* Keller v. State Bar of Cal., 496 U.S. 1, 17 (1990) (holding that state cannot compel bar members to pay for bar's ideological programs as opposed to bar-related activities); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241–42 (1977) (holding that state cannot compel nonunion members to pay for union's ideological messages as opposed to union-related activities).

17. Other permutations are outside the scope of this Article, which focuses on compelled speech (versus compelled funding) of the government's message (versus a third party's) in unrestricted media (versus limited broadcast media).

18. *See*, *e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2543 (2012).

19. *See infra* Part I.A (discussing commercial speech); *see also* Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 SUP. CT. REV. 123, 126–27 (noting that regulations of commercial speech are subject to intermediate rather than strict review).

20. *See infra* Part I.A (discussing commercial speech).

21. *See infra* Part I.C (discussing inconsistent application).

A. Commercial Versus Noncommercial Speech

Commercial speech was originally treated as commerce outside the protection of the Free Speech Clause.[22] The Supreme Court began to reconsider its position when confronted with advertising that contained both commercial and noncommercial elements.[23] Finally, in a challenge to a ban on advertising the price of pharmaceuticals,[24] the Court acknowledged that while not deserving of the same level of protection as noncommercial speech, even pure commercial speech has free speech value.[25] Specifically, commercial speech, if truthful and nonmisleading, may help consumers with their commercial decision making[26] and their political decision making.[27]

Despite its acknowledged value, commercial speech is not protected to the same degree as noncommercial speech because it is considered more hardy and more verifiable than noncommercial speech.[28] First, the strong profit motive behind commercial speech like advertising, "the *sine qua non* of commercial profits,"[29] makes it less susceptible to chill than noncommercial speech. Second, commercial speakers, who are usually describing their own products or services in their commercial speech, are well positioned to verify the accuracy of their claims and therefore need less breathing space for error.[30] Although these propositions have been

22. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) ("[T]he Constitution imposes no such restraint on government as respects purely commercial advertising.").

23. Bigelow v. Virginia, 421 U.S. 809, 829 (1975) (striking down statute banning abortion advertisement on the ground that advertisements also contained noncommercial information).

24. Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 773 (1976) (allowing pharmacists to advertise drug prices).

25. *Id*. at 762.

26. *Id*. at 763 (observing that a consumer's interest in commercial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate").

27. *Id*. at 764–65; *see also id*. at 765 ("Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.").

28. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 n.6 (1980).

29. *See*, *e.g*., *Va. State Bd. of Pharm*., 425 U.S. at 771 n.24.

30. *Id*. ("The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else.").

challenged,[31] they explain the lower level of protection afforded commercial speech.[32]

The *Central Hudson* test, named after the case that established it,[33] is the controlling standard at this time.[34] Under *Central Hudson*, regulations of commercial speech are generally subject to intermediate scrutiny unless the commercial speech is false, misleading, or related to illegal conduct, in which case it is not protected.[35]

A common definition of commercial speech is that which "does no more than propose a commercial transaction."[36] The Supreme Court has also considered whether the speech is an advertisement, whether it refers to a product or service, and whether it is economically motivated.[37] When all three factors are present, as is usually the case with advertising and product labels, the speech qualifies as commercial speech.[38] It is when speech satisfies only one or two factors that the line between commercial and noncommercial begins to blur.

The distinction between commercial speech and noncommercial speech would be easier to spot if it mapped neatly onto the identity of the speaker, but it does not. When corporations advertise their products, the advertisements are undoubtedly commercial speech.[39] But when they speak on matters of public interest, their speech is political and afforded the full protection of the Free Speech Clause.[40] Complicating matters is the fact

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31. Justice Thomas questioned the distinctions in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 n.4 (1996) (Thomas, J., concurring) (citing Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 634–38 (1990)).

32. Another factor that may be informing the lower level of scrutiny is that commercial speech is simply not considered as important as noncommercial speech. Because making distinctions based on subject matter is anathema, the Court generally does not admit as much. *But see* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 439 (1993) (Rehnquist, J., dissenting) ("Commercial speech is also 'less central to the interests of the First Amendment' than other types of speech, such as political expression."). Nonetheless, given commercial speech's former status as unworthy of any free speech protection, this attitude may well linger.

33. *Cent. Hudson*, 447 U.S. 557.

34. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001) (applying *Central Hudson* test). *But see infra* note 65 and accompanying text (discussing inconsistent application).

35. *Cent. Hudson*, 447 U.S. at 566 (establishing four-part intermediate scrutiny test for commercial speech).

36. Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976) (internal quotation marks omitted).

37. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983); *see also* Pomeranz, *supra* note 4, at 168 (discussing definition of commercial speech).

38. *Bolger*, 463 U.S. at 67.

39. *See generally* Pomeranz, *supra* note 4, at 168.

40. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978) (holding that the government cannot restrict political speech based on speaker's corporate identity); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 349 (2010) (noting that political speech is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual").

that some speech by corporations has components of both commercial and political speech.[41]

Just as speech by corporations may be political, commercial, or a combination thereof, the same is true for speech by individuals. While speech by individuals is usually noncommercial, individuals, like companies, can sell goods and services. Private professionals such as doctors, attorneys, and accountants regularly advertise and solicit clients. The Supreme Court has held that such communications constitute commercial speech, and as a result, the state can compel disclosures to ensure that they are not misleading.[42] On the other hand, the solicitation of clients by an attorney at a nonprofit organization has been considered noncommercial speech,[43] as has fundraising by nonprofits,[44] so that any regulation of those acts must pass strict scrutiny.

It is not clear how far the commercial speech designation extends for for-profit professionals, or the noncommercial one extends for nonprofits. Is speech by professionals to actual rather than potential clients also commercial? In other words, should a doctor's medical consultation with her patient be considered commercial or noncommercial speech?[45] And what happens when a nonprofit engages in false or misleading advertising—should it be given more latitude to deceive the public than a for-profit entity? Clearly, the commercial–noncommercial dichotomy overlooks speech that falls in between, including speech by individual professionals and advertising by nonprofit entities.

B. Fact Versus Opinion/Ideology

In the commercial context, a different standard of review may apply depending upon the nature of the compelled speech. Compelled

41. The speech in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), defies easy classification. After Nike was accused of mistreating its workers, it launched a public relations campaign claiming otherwise in press releases, letters to the editors, and other communications. *Id*. at 656. The speech was challenged as false and misleading. *Id*. The Supreme Court had originally granted certiorari to decide whether statements made in a public debate by a corporation worried about losing goodwill counted as commercial speech or not but later dismissed the petition as improvidently granted. *Id*. at 657.

42. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (upholding requirement that attorneys who advertised contingency fees make clear that clients would be responsible for costs even if claims were unsuccessful).

43. *Compare* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (upholding ban on in-person solicitations by attorneys), *with In re* Primus, 436 U.S. 412 (1978) (invalidating bar rule, almost identical to Ohio's, as applied to solicitation of client by ACLU attorney offering free legal representation).

44. Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796 (1988) (holding that even when performed by paid professionals, fundraising by nonprofits is nonetheless noncommercial on the ground that the commercial component was "inextricably intertwined with otherwise fully protected speech").

45. Or should the possible fiduciary relationship between professional and client mean the speech should be something else entirely, like "professional speech"?

commercial disclosures that are relevant and purely factual generally need pass only rational basis scrutiny, especially if they clarify potentially misleading speech.[46] In contrast, regulations that compel ideological speech are treated with more suspicion.[47] Yet, as with the division between commercial and noncommercial speech, it is not always a simple matter to distinguish between fact and opinion. In particular, factual speech that attempts to persuade or appeals to emotion does not fit perfectly into either category.

1. Common Meaning or Statutory Meaning

The difference between a fact and an opinion is often obvious. A law requiring food companies to list ingredients on their labels compels the disclosure of facts. A law requiring companies to affix the phrase "Empty Calories" on their packages would likely be considered a compelled disclosure of opinion. But what if the statute had defined "empty calories" as food containing less than 2% of the recommended daily allowance for certain nutrients? Would that still be an opinion, or does it become a fact? In *Meese v. Keene*,[48] the Supreme Court suggested, counterintuitively, that it might be a fact. There, the government required that films produced by foreign governments be classified as "political propaganda."[49] Although the Court acknowledged that "propaganda" is commonly understood to mean slanted half-truths,[50] it upheld the requirement as a neutral statement of fact because the statute defined propaganda in a supposedly non-pejorative manner.[51]

46. Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 248–50 (2010) (applying rational basis scrutiny to compelled factual disclosure meant to combat misleading advertisement); *Zauderer*, 471 U.S. at 651 (same). While both Supreme Court decisions have involved compelled disclosures designed to correct an otherwise misleading advertisement, lower courts have not found confusion to be a necessary component. *See, e.g.*, Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 114–15 (2d Cir. 2001) (applying rational basis scrutiny to a disclosure regarding the existence of mercury in a product even though nothing suggested otherwise). *But see* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1213–14 (D.C. Cir. 2012) (holding that absent potential deception, intermediate scrutiny applies to compelled commercial disclosures).

47. *See, e.g.*, Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 966–67 (9th Cir. 2009) (striking mandatory "18" label on violent video games in part because it was not purely factual and uncontroversial); Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006) (striking "18" label requirement on sexually explicit video games, asserting that "[t]he sticker ultimately communicates a subjective and highly controversial message—that the game's content is sexually explicit").

48. 481 U.S. 465 (1987).

49. *Id.* at 465.

50. *Id.* at 477.

51. *Id.* at 481.

2. Facts Meant to Inform Versus Facts Meant to Persuade

The state may require the disclosure of facts not simply in order to inform decision making but to encourage a particular decision. When the government mandates that food companies list ingredients, it is not necessarily trying to encourage people to favor one soup over another or to refrain from eating soup. But what happens if the government's compelled disclosures seek a certain outcome?

Take warnings on legal but disfavored products like tobacco. Currently, every single cigarette advertisement and cigarette package must bear a warning such as "Cigarettes cause fatal lung cancer" or "Cigarettes are addictive."[52] All these statements are true and amply supported by numerous scientific studies.[53] Yet the state plainly intends to convey a particular opinion about smoking, namely that it is unhealthy and should be avoided. The intent of the disclosures is not simply to inform people of the negative repercussions of smoking, but to persuade people not to do it.[54]

The same might be said about certain mandatory abortion counseling laws.[55] Standard informed consent requirements are neutral as to what decision the patient makes. They are designed to ensure that patients understand the proposed procedure, its physical risks and benefits, and the risks and benefits of the alternatives.[56] In contrast, the mandatory abortion counseling laws are aimed at convincing women to continue rather than abort their unwanted pregnancies. For example, some laws require that doctors tell women about various child support laws and social services available to new mothers;[57] others require that doctors list all possible physical and psychological harms of abortion without addressing the negative consequences of pregnancy.[58] Even assuming the compelled disclosures are completely accurate,[59] they seek to persuade women to change their minds about abortion.[60] Do the mandatory cigarette warnings

52. *See infra* note 202. Warnings are also required on other tobacco products such as cigars and chewing tobacco.

53. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL (May 27, 2004), *available at* http://www.surgeongeneral.gov/library/reports/50-years-of-progress/index.html (summarizing thousands of peer-reviewed scientific studies).

54. *See infra* notes 57–58 and accompanying text.

55. The precise categorization of mandatory abortion counseling (commercial? political? new category of professional speech?) is uncertain.

56. *See infra* notes 376–377 and accompanying text (discussing informed consent).

57. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(2)(A)–(B) (West 2011).

58. *See, e.g.*, MICH. COMP. LAWS ANN. § 333.17015(11)(b)(iii) (West 2006) (requiring doctor to inform patients that "as the result of an abortion, some women may experience depression, feelings of guilt, sleep disturbance, loss of interest in work or sex, or anger").

59. In fact, the required disclosures are often inaccurate. *See infra* Part III.B.2.a.

60. *See infra* notes 344–372 and accompanying text.

and compelled abortion counseling represent compelled disclosures of fact or compelled disclosures of opinion?

3. Facts Meant to Persuade Through Emotion

A further dimension to consider is whether the compelled disclosures attempt to elicit an emotional response. Under new federal law, tobacco manufacturers must place large graphic illustrations of the harms of smoking on their cigarette packages.[61] The newest trend in mandatory abortion counseling is to require that doctors make their patients view ultrasounds or listen to the heartbeat of their unwanted fetus.[62] Not only do these compelled images—factual though they may be—advocate a particular position, but they also do it in a manner that appeals to emotion.

It is not surprising that the state would want to trigger an emotional response. Studies have shown that information linked to emotion is more persuasive than the information alone.[63] Yet the justification for allowing the state to force commercial speakers to disclose certain facts is to ensure that consumers have the information necessary to make a rational, informed decision. Given this framework, may the state compel speech that appeals to emotion rather than reason in order to persuade? The appeals courts have not provided a consistent answer: mandatory cigarette graphics have been struck but mandatory abortion ultrasounds have been upheld.[64]

In short, it is not always apparent when contested compelled speech is commercial rather than political, or when it is an acceptable compelled statement of fact as opposed to a problematic compelled statement of opinion. Particularly unclear is the constitutionality of compelled emotional images.

C. The Abortion Exception

Separate and apart from the challenge of placing speech into different doctrinal categories is the inconsistent application of the doctrine. On the one hand, although intermediate scrutiny is the stated rule for commercial

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61. *See infra* notes 205–208.

62. *See infra* notes 307–314. Strictly speaking, there is no "fetus" until the eleventh week of pregnancy, after it has been a zygote, blastocyst, and embryo. *Fetal Development: The First Trimester*, MAYO CLINIC (July 23, 2011), http://www.mayoclinic.com/health/prenatal-care/PR00112/NSECTIONGROUP=2 [hereinafter MAYO CLINIC]. For the sake of simplicity, I will use the term fetus for all stages.

63. Ellen Peters et al., *The Impact and Acceptability of Canadian-style Cigarette Warning Labels Among U.S. Smokers and Nonsmokers*, 9 NICOTINE & TOBACCO RES. 473, 479 (2007) (explaining that perception of risk is more effectively communicated with information that arouses emotional associations).

64. The Supreme Court has not yet addressed the question.

speech regulations, recent Supreme Court decisions suggest a more rigorous review.[65] On the other hand, despite the doctrinal requirement of heightened scrutiny for viewpoint-based regulations, only minimal review seems to govern statutes that dictate what doctors must tell abortion patients.[66]

When first confronted with mandatory abortion counseling laws, the Supreme Court struck them down,[67] holding that they "[were] designed not to inform the woman's consent but rather to persuade her to withhold it altogether."[68] After all, the questions of when life begins and how to view an early pregnancy are particularly controversial in the United States. Hence, taking a position on whether pregnant women should abort or carry to term necessarily involves ideological speech.

The Supreme Court has since backpedalled and now permits the state to use informed consent to promote the life of the unborn: "[T]he government may use its . . . regulatory authority to show its profound respect for the life within the woman."[69] In fact, the state may "express[] [a] preference for childbirth over abortion"[70] by forcing doctors to convey—via "truthful, nonmisleading information"[71]—the state's view that women should continue their unwanted pregnancy rather than end it. Notably, no other type of content-based (and indeed, viewpoint-based) regulation of protected speech is subject to such a minimal level of scrutiny.[72]

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65. In *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011), for example, the Supreme Court suggested that "heightened scrutiny" should apply to content based regulations of commercial speech.

66. "Abortion exceptionalism" is one term used to describe this phenomenon. Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 6 (2012).

67. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 760–63 (1986) (striking requirement that women be told about adoption agencies and father's child support obligations); City of Akron v. Akron Ctr. of Reprod. Health, Inc., 462 U.S. 416, 444–45 (1983) (striking down law requiring informed consent to include the statement "the unborn child is a human life from the moment of conception" and a description of "the anatomical and physiological characteristics of the particular unborn child").

68. *Akron Ctr. of Reprod. Health*, 462 U.S. at 444–45; *see also Thornburgh*, 476 U.S. at 760 ("[T]he State may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.'").

69. Gonzalez v. Carhart, 550 U.S. 124, 157 (2007); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (holding that the government regulations "may express profound respect for the life of the unborn").

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

71. *Id.* at 838.

72. *See, e.g.*, Leslie Gielow Jacobs, *What Abortion Disclosure Cases Say About the Constitutionality of Persuasive Government Speech on Product Labels*, 87 DENV. U. L. REV. 855, 885–86 (2010) (criticizing the inconsistent treatment of abortion and commercial disclosures).

If the abortion exception seems out of step with prevailing free speech jurisprudence,[73] then it sticks out like a sore thumb when compared to the treatment of speech on a related topic—pregnancy counseling by crisis pregnancy centers. The primary goal of these avowed pro-life nonprofits, which offer free pregnancy testing and counseling, is to convince pregnant women not to have an abortion.[74] In order to get women planning to abort through their doors, the crisis pregnancy centers usually do not reveal their ideological position about abortion in their advertising or waiting rooms, and often mislead consumers about the medical background of their employees.[75] To counter this deception, several jurisdictions have passed laws mandating that centers disclose whether they offer abortion services and whether their staff is licensed.[76] Unlike mandatory abortion counseling laws, these disclosure laws have been subject to strict scrutiny and declared unconstitutional by most lower courts.[77]

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Under current free speech doctrine, compelled speech, which is a content-based regulation, is subject to strict scrutiny unless it is commercial. Intermediate scrutiny generally applies to compelled commercial speech unless the speech is comprised of accurate, nonmisleading facts, in which case rational basis scrutiny may apply. But this simple summary is bedeviled by unsettled doctrine, inconsistent application, and issues that have not been explicitly considered. Part II steps away from the doctrine to examine the reasons why compelled speech offends free speech values so that compelled speech claims can be analyzed using fundamental principles rather than rigid categories.

II. WHY COMPELLED SPEECH VIOLATES THE FREE SPEECH CLAUSE

This Part examines exactly why compelled disclosures might undermine the values and goals embodied in the Free Speech Clause. To do so, it is first necessary to understand the justifications for protecting free speech. The three most commonly articulated ones are (1) to encourage a diverse marketplace of ideas; (2) to facilitate participatory democracy; and (3) to promote individual autonomy, self-expression, and self-realization.

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73. *Cf.* Rebecca Tushnet, *More Than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392, 2418 (2014) ("Perhaps it's too much to hope that abortion jurisprudence will bear any relationship to the rest of First Amendment law.").

74. *See infra* note 418 and accompanying text.

75. *See infra* notes 422–434 and accompanying text.

76. *See infra* notes 442–445 and accompanying text.

77. *See infra* notes 446–449 and accompanying text.

According to the first theory, which is rooted in the philosophies of John Milton and John Stuart Mill, government control of speech risks driving certain ideas out of the marketplace, thereby impeding the search for truth and knowledge.[78] The second explains why political speech is often described as lying at the core of the First Amendment:[79] in order for our democracy "of the people, by the people, for the people" to work, the people need the ability to shape political debate[80] and to make informed political decisions.[81] The value of free speech to individual autonomy[82]—the third rationale—is the one that most directly relies on the inherent dignity of human beings.[83] Finally, distrust of government, while not technically a value or goal, is a consistent theme running through free speech jurisprudence.[84]

While people tend to focus on the free speech rights of speakers, the free speech rights of audiences are equally important. After all, the purpose of a marketplace of ideas is to ensure that listeners have access to the widest possible array of knowledge, ideas, and opinions. "It would be a barren marketplace of ideas that had only sellers and no buyers."[85] The audience's ability to receive information is also crucial to participatory democracy, since citizens need complete and accurate information in order to vote wisely.[86] As James Madison wrote, "[A] people who mean to be

78. *See, e.g.*, JOHN STUART MILL, ON LIBERTY AND OTHER WRITINGS 14–15 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859); Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd., 502 U.S. 105, 116 (1991). Even a false idea can be useful: "it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" United States v. Alvarez, 132 S. Ct. 2537, 2564 (2012) (Breyer, J., concurring) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964)).

79. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 403 (2007).

80. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2368 (2000).

81. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE 26 (1965).

82. *See, e.g.*, C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 980 (1997) ("Speech can relate to autonomy in two ways: as itself an exercise of autonomy or as an informational resource arguably essential for meaningful exercise of autonomy.").

83. The classic account of human dignity derives from Kant. Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1320 (1998) (quoting IMMANUEL KANT, THE METAPHYSICS OF MORALS 434–35 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797)) ("As an autonomous being, . . . man 'is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a *dignity* (an absolute inner worth).'"); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1423 (2000) ("From Kant to Rawls, a central strand of Western philosophical tradition emphasizes respect for the fundamental dignity of persons . . . .").

84. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 85–86 (1982).

85. Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

86. Alexander Meiklejohn would actually privilege the right to receive information over the right to speak: "What is essential is not that everyone shall speak, but that everything worth saying shall be said." ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (3d prtg. 2004).

their own Governors, must arm themselves with the power knowledge gives."[87] In short, the free flow of information that results when speech is protected ensures people have access to the full range of ideas and information for their political and personal decision making.

Just as free speech can help realize these goals, compelled speech can compromise them. First, compelled speech might actually *chill speech*; for example, a speaker may decide not to speak at all if her speech must include the state's compelled message. Second, untrue or confusing speech might *distort* the discourse, even causing professionals to engage in unethical speech. Third, compelled speech might *insult the autonomy* of both speaker and audience. Compelling someone to deliver the government's message may intrude upon the speaker's autonomy and dignity. Government-compelled speech may insult the autonomy of audiences by evidencing unacceptable paternalism or manipulation.

A. Chill

The fear that compelling speech might chill speech is closely linked with the traditional concern of government censorship. In *Talley v. California*, for example, the Supreme Court invalidated a city ordinance requiring that pamphleteers disclose their names and addresses.[88] Noting the historical importance of anonymous pamphleteering in U.S. history,[89] the Court pointed out that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."[90]

Chilling speech undermines some of the core speaker-centered goals of the Free Speech Clause. It stifles the self-expression of the speaker. It also limits people's ability to participate in political discourse, and what makes the nation a democracy is not just that everyone gets to vote for policymakers, but that everyone gets to put in their two cents worth on what those policies should be. As Robert Post argues, crucial to democratic

87. *Letter from James Madison to W. T. Barry*, THE FOUNDERS' CONSTITUTION, Aug. 4, 1822, *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html.

88. Talley v. California, 362 U.S. 60, 60–61 (1960) (striking requirement that pamphleteers disclose the names and addresses of those who wrote, distributed, or sponsored the pamphlets); *see also* McIntrye v. Ohio Elections Comm'n, 514 U.S. 334, 343–47 (1995) (applying *Talley* to pamphleteering in the election context). *But see* John Doe v. Reed, 561 U.S. 186 (2010) (allowing compelled disclosure of names and addresses of people signing referendum petition on ground that state has compelling interest in preserving the integrity of electoral process).

89. *Talley*, 362 U.S. at 65 (pointing out that the Federalist Papers were published under fictitious names).

90. *Id*. at 64.

self-determination is "the ability of individual citizens to participate in the formation of public opinion."[91]

Audiences who now will never hear what that speaker might have said suffer as well. The potential loss of speech led the Supreme Court to invalidate a right of reply law in *Miami Herald Publishing Co. v. Tornillo*.[92] Trying to ensure balanced coverage, a Florida statute provided that after a newspaper attacked a political candidate, it must allow the criticized candidate to respond.[93] The Court worried that rather than be forced to let others use their pages, the newspapers might temper their political criticisms, thereby dampening the vigor of public debate.[94] Consequently, compelling speech may unintentionally undermine rather than advance the free speech goal of more information, opinions, and views.

B. Distortion

Compelled speech may also distort the marketplace of ideas and democratic or personal decision making. By distortion, I do not mean the presence or absence, or under-representation or over-representation, of certain knowledge or viewpoints in the discourse. Such a claim depends on an uncontested ideal, which would be difficult if not impossible to identify. Instead, by distortion I mainly mean the introduction of error into the general discourse. Compelled speech can lead to error if its content is inaccurate or misleading or if its context fails to make clear whether the message is the government's or the compelled speaker's. Compelled speech may also distort professional discourse if it causes a breach of professional obligations.

Compelled speech does not inevitably distort the discourse. Quite the contrary: a compelled disclosure may clarify otherwise misleading speech. For example, in *Zauderer v. Office of Disciplinary Counsel*,[95] an attorney had advertised that "[i]f there is no recovery, no legal fees are owed by our clients."[96] This statement was literally true. Nonetheless, most readers would probably not realize that there is a difference between fees (due only

91. *See* Post, *supra* note 80, at 2368; *see also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982) ("[T]he First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican form of self-government."); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 35 (2004) ("What makes a culture democratic . . . is not democratic *governance* but democratic *participation*.") (emphasis added).

92. 418 U.S. 241 (1974) (striking right to reply statute on free press grounds).

93. *Id*. at 244.

94. *Id*. at 257.

95. 471 U.S. 626 (1985).

96. *Id*. at 631.

if the client won) and costs (which the client is responsible for regardless of the outcome). As a result, the advertisement as written was misleading, if not deceptive, insofar as it left readers with the impression that they would owe nothing if they lost.[97] Thus, the Supreme Court upheld a state bar rule mandating that the advertisement explain that clients would be liable for costs, as opposed to legal fees, for unsuccessful claims.[98]

In contrast, compelled speech that is itself false or misleading distorts the discourse. The government could also distort the discourse by misrepresenting the true views of speakers. For example, if the government forces speakers to convey an opinion they disagree with, and if an audience believes that the message is the private speakers' rather than the government's, the audience may erroneously conclude that the message is more widespread than it really is. This mistaken view will make audiences credit it more than they would have otherwise, as studies show that the perceived popularity of a message can increase its persuasiveness.[99] In such cases, the government uses its coercive power to persuade not by virtue of the underlying worthiness of its message, but by taking advantage of misattribution and a heuristic.

A heuristic is a cognitive shortcut. Most researchers today subscribe to a dual-process model of decision making[100] comprised of (1) "intentional, conscious, explicit thought" and (2) "unintentional, nonconscious, 'implicit' thought."[101] The first, deliberative cognitive process focuses on the message's content and argument and often requires the expenditure of significant time and energy.[102] Because our minds are overwhelmed by information, not all of it can be carefully and consciously considered in this

97. *Id*. at 652.

98. *Id*. at 633. Compelled disclosures might also clarify deliberate attempts to obfuscate the speaker's identity. Proponents of campaign finance disclosures often tout this benefit; *see, e.g*., Helen Norton, *Secrets, Lies, and Disclosure*, 27 J. L. & POL. 641 (2012).

99. *See* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 668–69 (2008); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1010 (2005) ("The phenomenon of popular influence is well-established in the social science literature, which shows that ideas perceived to have achieved broad acceptance are generally more persuasive."); *see also* Lee, note 101, at 1011–13 (citing studies).

100. Andras Sajo, *Emotions in Constitutional Design*, 8 INT'L J. CONST. L. 354, 357 (2010) ("The prevailing accounts of reasoning rely on a dual-process model."); *see also* Pat Croskerry, *Clinical Cognition and Diagnostic Error: Applications of Dual Process Model of Reasoning*, 14 ADVANCES HEALTH SCI. EDUC. 27, 28 (2009); Jonathan Evans, *Dual-Processing Accounts of Reasoning, Judgment, and Social Cognition*, 59 ANN. REV. PSYCHOL. 255, 256 (2008).

101. David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for Law and Legal Theory*, 2008 B.Y.U. L. REV. 1275, 1298; *see also* Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 747 (2008) (describing one system as "slower, serial, effortful, and deliberately controlled" and the other as as "fast, automatic, effortless, associative, and often emotionally charged").

102. *See, e.g*., Shelly Chaiken & Durairaj 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, 460 (1994).

manner.[103] As a result, our minds have developed a second, faster, easier method to help process information. This cognitive process relies on heuristics—rules of thumb—and "more accessible information such as the source's identity or other non-content cues."[104] Heuristics are often accurate[105] and have "the economic advantage of requiring a minimum of cognitive effort."[106] At the same time, they can lead to errors in some predictable ways.[107] For example, the "popular-opinion-is-correct" heuristic can be unduly influential and wrong. Scientists are still probing the relationship between the two types of cognitive processing,[108] but research shows that we all depend on cognitive shortcuts,[109] our reliance on them is extensive,[110] and they can "operate even when the stakes are large."[111] Indeed, our decision making is riddled with cognitive shortcuts that regularly distort how we gather and process information.[112] Just as compelled speech that attempts to exploit factual errors is distorting, compelled speech that intentionally exploits predictable cognitive errors can be considered distortion of the discourse.[113]

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103. Peter Lee, *Patent Law and the Two Cultures*, 120 YALE L.J. 2, 21 (2010) ("[P]eople function as 'cognitive misers' who are limited in their capacity to process information and often seek shortcuts to reduce mental burdens.").

104. Shelly Chaiken, *Heuristic Versus Systematic Information Processing and the Use of Source Versus Message Cues in Persuasion*, 39 J. PERSONALITY & SOC. PSYCHOL. 752, 752 (1980).

105. Arkush, *supra* note 101, at 1302 ("We often make fairly reliable judgments about complex matters without conscious deliberation.").

106. Chaiken, *supra* note 104, at 753.

107. *See*, *e.g.*, Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1168 (2003) (noting that people regularly "use heuristics that can lead them to make systematic blunders").

108. Studies suggest that the two are interactive and interdependent and that heuristic processing may be less likely when the decision is more important and when the message is unambiguous. *See* Chaiken & Maheswaran, *supra* note 102, at 469.

109. Tamara R. Piety, *"Merchants of Discontent": An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE U. L. REV. 377, 404 (2001) ("[R]esearch demonstrates that they apply to *all* of us, not just a benighted, unfortunate few.") (emphasis in original).

110. *See, e.g.*, Sajo, *supra* note 100, at 357 ("Most cognitive activities . . . are primarily nonconscious and thus about 95 percent of our acts are taken on autopilot.").

111. Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 757 (2003).

112. Kahan, *supra* note 101, at 747–48 ("[H]euristic reasoning furnishes guidance when lack of time, information, and cognitive ability make more systemic forms of reasoning infeasible—but it remains obviously 'error-prone.'"). Other well-known heuristics or biases include the optimism bias (*see infra* notes 258–260 and accompanying text), availability bias (*see infra* notes 255–256 and accompanying text), cognitive dissonance (*see infra* note 127), the confirmation bias (tendency to notice and remember information in a way that confirms pre-existing views), representation bias (tendency to make assessment of one thing by asking the extent it resembles another), and anchoring effect (where initial value or "anchor" has undue influence when making an estimate). *See* Sunstein, *supra* note 111, at 752–53.

113. *Cf.* Jon D. Hanson & Douglas A. Kysar, *Taking Behaviorialism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 637 (1999) ("This is what we mean by manipulation—the utilization of cognitive biases to influence peoples' perceptions and, in turn, behavior.").

Speaker confusion invites exploitation of another common heuristic: the "defer-to-trusted-expert" heuristic.[114] By compelling an authority figure to speak its message, the government can "add a patina of trustworthiness and expertise to its message."[115] Thus, the government can manipulate the discourse by, for example, forcing a scientist to claim that the evidence of global warming is inconclusive[116] or compelling doctors to convey to patients the state's ideological viewpoint about a contested moral issue,[117] instead of making the same points through its own less trusted and less prestigious communications.

Confusion is not the only distortion concern if the compelled speaker bears heightened responsibility towards her audience, as with fiduciaries.[118] In certain relationships, one person owes special obligations to those who rely on her expert knowledge and skills.[119] "[A] fiduciary . . . is subject to duties that 'go beyond mere fairness and honesty; they oblige him to act to further the beneficiary's best interests.'"[120] Courts have held that trustees, brokers, attorneys, and doctors all owe fiduciary duties to their clients.[121] In fact, certain professions have codified the obligation to act in the best interests of their clients: an attorney must "zealously assert[] the client's position" and "seek[] a result advantageous to the client";[122] and a doctor must "regard responsibility to the patient as paramount."[123] These legal, ethical, and professional duties usually include the obligation to provide

114. Lee, *supra* note 103, at 22.

115. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 979; Lee, *supra* note 99, at 1001–02 (citing studies showing that the more credible the speaker, the more persuasive the speaker's message).

116. *See* Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 385–86 (2008) (arguing that listeners are far more likely to be persuaded that the government's position is correct if it forces a scientist to espouse the government's partisan message).

117. *See infra* Part III.B.

118. Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463, 489 (2002) ("[T]rust and vulnerability are classic incidents of fiduciary status."); Norman S. Poser, *Liability of Broker-Dealers for Unsuitable Recommendations to Institutional Investors*, 2001 B.Y.U. L. REV. 1493, 1555 ("In general, a fiduciary relationship exists where one person reposes trust and confidence in another and where the other person encourages or accepts the trust and confidence.").

119. *See, e.g.*, Anonymous v. CVS Corp., 728 N.Y.S.2d 333, 337 (N.Y. Sup. Ct. 2001) ("[A] fiduciary duty arises, even in a commercial transaction, where one party reposed trust and confidence in another who . . . possesses superior expertise on which the party relied.").

120. *See* NORMAN S. POSER, BROKER-DEALER LAW AND REGULATION § 2.01 (3d ed. 1999) (quoting Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 882).

121. *See* Conway v. Icahn & Co., 16 F.3d 504, 510 (2d Cir. 1994) ("The relationship between a stockbroker and its customer is that of principal and agent and is fiduciary in nature, according to New York law."); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1400 (2002) ("Courts routinely impose fiduciary duties in myriad relationships, including trustee-beneficiary, employee-employer, director-shareholder, attorney-client, and physician-patient.").

122. MODEL CODE OF PROF'L CONDUCT PREAMBLE: A LAWYER'S RESPONSIBILITIES (2006).

123. AM. MED. ASS'N, *Principles of Medical Ethics*, *in* CODE OF MEDICAL ETHICS xiv (2002–2003 ed.).

clear and accurate information in dealings with their beneficiaries.[124] Government-compelled disclosures might undermine these duties if the fiduciary must convey a message that is inaccurate, confusing, or contrary to the client's interests. Rather than distort the general discourse, the compelled speech might distort the duty-laden discourse between professionals (often fiduciaries) and those who trust them.

C. Autonomy of the Speaker

Free speech promotes speaker autonomy by ensuring that the individual rather than the government controls what she says and what she thinks: "[A]t the heart of the First Amendment is the notion . . . that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[125] Thus, freedom of speech protects not only outward speech, but the inner life that it expresses: "To be free in a full sense, a person must be free not only externally, in his body and his relation to the external world, but also internally, with regard to his own inner life of thought and feeling, and in the expression of that inner life."[126] A person cannot be said to be autonomous in body if forced to speak when she would rather stay silent. Nor is she autonomous in thought if forced to state a belief with which she disagrees. This insult to the speaker's dignity is compounded if listeners misattribute the government's opinion to the speaker.[127]

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124. *Cf.* Moore v. Regents of Univ. of Cal., 793 P.2d 479, 483 (Cal. 1990) ("[I]n soliciting the patient's consent, a physician has a fiduciary duty to disclose all information material to the patient's decision.").

125. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977).

126. Steven J. Heyman, *Righting the Balance: An Inquiry into Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1326 (1998).

127. While speakers with strongly held views are less susceptible (and nonhuman ones impervious), making this particular concern inapposite for this Article's examples, compelled speech might change the speaker's thinking about an issue. Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association*, 99 NW. U. L. REV. 839, 840 (2005). Compelled speech "may come to exert an influence on the thoughts . . . of the speaker in a way that surreptitiously bypasses the agent's conscious consideration and does not reflect her sincere deliberation about the matter." *Id.* at 859. Even if the words are spoken without conviction, the cognitive dissonance that results may exert a subtle pressure on the speaker to conform her thoughts and utterances. *Id.* People feel uncomfortable entertaining two contradictory thoughts at the same time or acting in a way contrary to their beliefs. To eliminate that discomfort, people might either change their behavior or their beliefs. Leon Festinger & James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. ABNORMAL & SOC. PSYCHOL. 203, 203–211 (1959) (describing classic experiments in cognitive dissonance). Although it may be legitimate for the state to try and persuade people to its views, it is not legitimate to intentionally exploit cognitive heuristics—like the well-known reaction to cognitive dissonance—in order to do so.

1. Physical Autonomy

At the most basic level, free speech autonomy means being able to decide what one says: compelled speech "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[128] For the speaker, this loss of autonomy becomes particularly grating when the government commandeers not only one's speech, but one's body as well. It is for this reason that the Supreme Court acknowledged that the compelled speech in *Barnette*,[129] where the state demanded a compelled recitation, was more problematic than the compelled speech in *Wooley v. Maynard*,[130] which involved displaying the state's message: "Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate . . . ."[131] Nonetheless, the Court concluded that "the difference is essentially one of degree."[132]

2. Ideology and Autonomy

Compelled speech is doubly offensive when the message represents an opinion or ideology contrary to one's own beliefs. In protesting the license plate motto, Maynard testified in his deposition: "I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent."[133] People cannot be considered autonomous in thought or speech if forced to express viewpoints anathema to them. As the Supreme Court has emphasized, "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[134]

3. Attribution and Autonomy

That others believe that the compelled speaker supports the government's message further compounds the insult to autonomy. As Larry

128. Hurley v. Irish–Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995).
129. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
130. 430 U.S. 705 (1977).
131. *Id*. at 715.
132. *Id*.
133. Wooley v. Maynard, 430 U.S. 705, 713 (1977).
134. *Id*. at 717. As discussed earlier, application of this principle has been uneven. *See supra* Part I.C.

Alexander wrote, "[P]eople do not want to be misperceived by others."[135] It is precisely to avoid this type of mistake that the Supreme Court allowed Saint Patrick's Day Parade organizers to exclude a contingent whose participation in the parade might mislead viewers about the organizers' personal views.[136]

Some believe that the insult to autonomy is mitigated if the message is not attributed to the speaker.[137] This was certainly a significant factor in a decision involving a law granting handbillers access to a privately-owned shopping mall.[138] In upholding the law, the Court emphasized that no one would attribute the speech to the mall owners, especially since they had the ability to disavow any association with the speech.[139] Of course, even if no one misunderstands the speaker's personal views, being forced to speak against one's will is still an insult to personal autonomy.

D. Autonomy of the Audience

Undermining the audience's autonomy is the final potential harm that flows from compelled speech. A very strong strain of anti-paternalism underlies our free speech jurisprudence. The presumption is that the government should not be deciding what information audiences can or cannot access. "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[140] Accordingly, the Supreme Court has repeatedly struck limits on information regarding activities that, although legal, the state frowns upon, such as gambling,[141] drinking,[142] and

135. *See* Alexander, *supra* note 5, at 153.

136. Hurley v. Irish–Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 574 (1995) (allowing parade organizers to exclude a gay and lesbian Irish contingent lest its presence suggest that the organizers supported or condoned homosexuality).

137. *See, e.g.*, Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 483 (1995) (arguing that *Wooley v. Maynard* was wrongly decided because the Maynards were not actually forced to say anything, and no one would attribute the speech to them in any case).

138. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

139. *Id.* at 88 (noting that owners were "free to publicly dissociate themselves from the views of the speakers or handbillers"). The Court also emphasized the speaker's ability to dissociate from the compelled speech in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006).

140. Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2671 (2011) (quoting 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996)).

141. Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) (striking law banning broadcast advertising of lotteries and casino gambling).

142. Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (striking prohibition against listing alcohol content in order to reduce strength wars); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (plurality opinion) (striking ban on advertising liquor prices in order to promote temperance).

smoking.[143] In short, justifications for speech regulations "based on the benefits of public ignorance" are "dubious."[144]

At first glance, compelled speech seems to escape this particular concern since the government is not restricting information but providing more of it. Furthermore, the Supreme Court has often noted that compelled disclosures are preferable to censorship as "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information."[145] At the same time, government-compelled speech may threaten its listeners' autonomy both by its means and by its ends. The government may use its coercive power for illegitimately paternalistic ends. Alternatively, the way the information is conveyed may be manipulative, which would clearly undermine the ideal of the autonomous decision maker at the heart of free speech jurisprudence.

1. Paternalistic Ends

There may be paternalistic overtones to government-mandated disclosures. Paternalistic laws are designed to benefit the regulated rather than third parties.[146] Protective laws become suspect when they interfere with the beneficiary's autonomy to an unacceptable degree. The challenge is drawing the line between acceptable protection and unacceptable paternalism. Compelled disclosures that consist of clarifying information or information not otherwise available should not be considered problematic. Compelled disclosures meant to persuade rather than just inform the listener, on the other hand, may veer into objectionable paternalism.

a. Compelled Disclosures Meant to Inform

Decision making involves at least two stages: choosing what information to review to make a decision and the ultimate decision itself. Those with the strongest sense of autonomy and/or the most distrust of government may resent any state interference with either stage. For these

143. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (striking limits on cigarette billboard and indoor point-of-sale advertisements). The Court has also rejected the FDA's attempt to curtail advertising for compound drugs lest they lead to inappropriate requests for them. Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002).

144. Bates v. State Bar of Ariz., 433 U.S. 350, 375 (1977); *see also Thompson*, 535 U.S. at 374.

145. Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 142 (1994) (quoting Peel v. Att'y Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 110 (1990)).

146. For purposes of the discussion on free speech implications for audiences, the "regulated" refers to the audience intended to receive a disclosure rather than the actual entity that is compelled to disclose information. So the mandatory counseling laws are paternalistic if intended to protect the women receiving the information and not paternalistic if intended to stop the abortion of the third-party fetus.

people, the government should play no role in their decision making, not even suggesting information to consider in making a decision. They would agree with Justice Scalia that "it is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them."[147]

Even those possessing this strong sense of autonomy, however, would probably agree that compelling additional information that corrected the speaker's false or misleading speech does not illegitimately interfere with the intended beneficiary's autonomy.[148] The same should hold true when the additional information is accurate, relevant, and not otherwise available to audiences. Only food manufacturers know what goes into their products, and listing ingredients on packages can help consumers, for example, avoid foods that cause allergic reactions. Without labeling requirements, it is unlikely that most consumers would be able to obtain such information.[149]

b. Compelled Disclosures Meant to Persuade

Perhaps, then, the government crosses the line when it compels disclosures not to inform, but to persuade. It is one thing to use the coercive power of the state to provide information, especially clarifying information or information in the exclusive possession of the speaker,[150] but quite another to compel disclosures in order to convince the audience to do what the state thinks is right. Yet, if it is legitimate for the state to run its own advocacy campaigns[151]—a proposition few would deny[152]—why must it

147. Riley v. Nat'l Fed'n of the Blind of N.C, Inc., 487 U.S. 781, 804 (1988).

148. *See supra* notes 96–99 and accompanying text.

149. The identity of those sponsoring political advertisements might be another example of information otherwise unavailable without mandatory disclosures.

150. Mandating additional information that is accurate and nonmisleading but does not correct a misapprehension or is elsewhere available presents a more difficult question.

151. *See, e.g.*, Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 41–42 (2000) (arguing that persuasive government speech is perfectly constitutional).

152. Furthermore, the argument that the government should never attempt to direct behavior assumes that a position of perfect neutrality is always possible. It is not altogether clear that it is. For example, Cass Sunstein and Richard Thaler argue that default rules are unavoidable, and the default rules often influence people in one direction. Sunstein & Thaler, *supra* note 107, at 1174. For example, a 401(k) plan must be either opt-in or opt-out, which will affect participation in the plan. Since government influence is inevitable, Sunstein & Thaler continue, the government might as well structure the default rules to encourage welfare-promoting behaviors. So, for example, since more people participate in opt-out 401(k) plans, and the state has to set default rules one way or the other, why not have the state choose the default that will promote retirement savings? *Id.* at 1161–62, 1172–73. It could be argued that no analogy can be drawn in the compelled speech context because the neutral default rule is always government silence, and government silence exerts no influence. Both propositions are contestable. It becomes harder to assume that government silence in the face of say, advertisements, is natural and prepolitical when the ability for companies to advertise in the first place is made possible by government laws about corporations, property, etc. In addition, government failure to provide information may certainly influence decisions.

refrain from doing so through others (at least from the audience's perspective)?[153] Arguably, the listener's decision-making autonomy remains intact since she retains absolute control over the ultimate decision. She simply has another view available to her before making her decision.[154]

Even under this view, not every state attempt to persuade sufficiently respects the audience's autonomy. The government's goal makes a difference.[155] Most suspect is when the state urges a course of action that actually detracts from the audience's autonomy. Urging people not to vote, for example, would seem to undermine rather than enhance people's autonomy.

Less obviously, government attempts to change the audience's mind on a contested question fail to respect decisional autonomy. The ultimate goal might be contested: while it is hard to imagine that people would not support voting or good health, the same cannot be said about, for example, prayer.[156] Or the particular action recommended to achieve that goal might be contested: even assuming consensus about the ultimate goal (e.g., good health), there's a difference between the government trying to persuade people to improve their health by eating vegetables (for which there is voluminous scientific support)[157] and trying to persuade people to improve their health by fasting (for which there is not).[158] Consequently, attempting to persuade you to eat more vegetables is not troublesome in the way a don't-eat-at-all government campaign is. In other words, however acceptable it might be for the government to urge a scientifically supported path (e.g., eat vegetables) to a universally recognized goal (e.g., good health), the state's persuasion becomes problematic when it takes sides on a controversial issue (e.g., prayer) and presumes to know better than the individual what is best.

In sum, not all government involvement in individual decision making is illegitimately paternalistic. State-compelled speech definitely starts to raise questions when it attempts to persuade rather than just inform.

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153. Recall that this Subpart focuses on the free speech concerns of the audience, not the speaker.

154. The calculus may shift if the audience is captive rather than just exposed to the government's message.

155. As discussed in the next Subpart, the means matter, as well.

156. PEW RESEARCH CTR., "NONES" ON THE RISE: ONE-IN-FIVE ADULTS HAVE NO RELIGIOUS AFFILIATION 9 (Oct. 9, 2012) (noting that in the U.S., there are now "more than 13 million self-described atheists and agnostics (nearly 6% of the U.S. public), as well as nearly 33 million people who say they have no particular religious affiliation (14%)."), *available at* http://www.pewforum.org/files/2012/10/ NonesOnTheRise-full.pdf.

157. *Nutrition for Everyone*, *Fruits and Vegetables*, CTRS. FOR DISEASE CONTROL & PREVENTION ("Research shows [that] . . . [f]ruits and vegetables also provide essential vitamins and minerals, fiber, and other substances that are important for good health."), http://www.cdc.gov/nutrition/everyone/fruitsvegetables/index.html.

158. *Is Fasting Healthy?*, WEBMD ("Whether fasting can help rid the body of waste buildup is a matter of controversy."), http://www.webmd.com/diet/features/is_fasting_healthy?page=2.

Compelled speech that tries to convince its audience to do something that all would agree ultimately enhances autonomy does not cross the line into unacceptable paternalism. On the other hand, compelled speech that attempts to advance its view of an issue where no such consensus exists, does.

2. Manipulative Means

Even where the government's end is justified, compelled speech might nevertheless undermine the free speech goal of autonomous decision making by relying on illegitimate and manipulative means.[159] Deceptive speech clearly fails to respect the autonomy of audiences. The tougher question is whether and when appeals to emotion rise to the level of "manipulation."

Intentionally deceiving audiences is manipulative. Consequently, the government manipulates audiences when it compels false or misleading speech. Alternatively or additionally, the government may manipulate audiences when it compels speech without making it clear that the message represents the government's viewpoint and not the compelled speaker's. This type of deception amounts to a "denial of autonomy" because it "interfere[s] with a person's control over her own reasoning processes."[160]

Speech that appeals to emotion rather than pure reason, however, is not manipulative in all cases. Although such appeals can often be more persuasive, increased persuasiveness does not automatically amount to manipulation. The argument that equates appeals to emotion with manipulation assumes that the truly autonomous individual makes all decisions by dispassionately examining the available information and logically weighing the pros and cons of competing arguments.[161] To encourage any other kind of decision making, the argument continues, is to short circuit this ideal and undercut the audience's autonomous decision making.[162]

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159. The government may manipulate listeners with its own speech as well. *See, e.g.*, Greene, *supra* note 151, at 49–52 (condemning ventriloquism in government speech). However, the focus of this Article is on government-compelled speech rather than government speech. It is also worth remembering that as part of the Bill of Rights, the Free Speech Clause limits state action, not private action. Consequently, the Free Speech Clause does not bar private speakers from deceiving or manipulating their audiences, and in fact protects their right to do so. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537 (2012) (striking on free speech grounds a law that proscribed lying about receiving a Congressional Medal of Honor). Of course, as with all rights, this right is not absolute, as evidenced by laws banning fraud and misrepresentation.

160. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 354 (1991).

161. *Id.* at 366.

162. *Id.*

This ideal, however, assumes that emotional decision making is necessarily irrational decision making.[163] This assumption, that "emotion is the opposite of reason, an untrustworthy force that cripples judgment,"[164] is long-standing in Western thought.[165] It stems from the Western tendency to construct ideas around pairs of binary oppositions, which are inevitably hierarchical.[166] That is, in any binary opposition, one term is always considered superior or privileged over the other.[167] In the reason/emotion pairing, reason is valued and emotion distrusted.[168] This is especially true in law.[169] As Susan Bandes has observed, "[t]he term [emotion] is often used in the legal context to communicate opprobrium and to describe and denigrate influences that are thought to interfere with decision making. It is a category defined chiefly in terms of the irrational, the impetuous, and the unreasonable . . . ."[170]

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163. The claim is not that courts have failed to recognize the emotional impact of certain speech. On the contrary, the Supreme Court has noted that "much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force." Cohen v. California, 403 U.S. 15, 26 (1971). Nonetheless, the rational decision-maker remains the ideal.

164. Arkush, *supra* note 101, at 1279.

165. Susan A. Bandes, *Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty*, 33 VT. L. REV. 489, 507 (2009) [hereinafter Bandes, *Repellent Crimes*] (noting that assumption goes back "at least as far as the ancient Greeks"); R. George Wright, *An Emotion-Based Approach to Freedom of Speech*, 34 LOY. U. CHI. L.J. 429, 457 (2003) ("The radical distinction between reason and emotion, and the subordination of emotion to the control of reason, is famously argued for in Plato and Aristotle, but is widely held throughout intellectual history, from the Stoics to Spinoza . . . .").

166. Jacques Derrida pointed out that much of Western thought is constructed around pairs of binary oppositions and that these binaries are hierarchical: male/female, reason/emotion, mind/body, active/passive, strong/weak, public/private, presence/absence, self/other. *See generally* JACQUES DERRIDA, OF GRAMMATOLOGY 141–64 (Gayatri Chakravorty Spivak trans., 1976). Derrida also "deconstructed," that is, criticized and destabilized, these oppositions, asking, for example, whether the opposite of man was really a woman or a nonhuman. *Id*.

167. Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2527 (1992).

168. These binary hierarchies are also gendered. Reason, the mind, activeness, strength, and the public sphere, for example, are superior and masculine, while emotion, the body, passivity, weakness, and the private sphere are inferior and feminine. Thus, the ideal of the unemotional rational decision maker is a legacy of some troubling gender binaries.

169. One recent exception is represented by the cultural evaluator theory, advocated by Martha Nussbaum. According to this approach, emotion "orient[s] a person who values some good, endowing her with the attitude that appropriately expresses her regard for that good in the face of a contingency that either threatens or advances it." Kahan, *supra* note 101, at 749. Another strand takes a more agnostic view. *See*, *e.g.*, Susan Bandes, *Emotions, Values, and the Construction of Risk*, 156 U. PA. L. REV. PENNUMBRA 421, 428–29 (2008) [hereinafter Bandes, *Emotions*] ("Emotion gives rise to irrationality in some circumstances but performs an important role in others.").

170. Bandes, *Repellent Crimes*, *supra* note 165, at 507 (citation omitted); *see also* Richard L. Wiener et al., *Emotion and the Law: A Framework for Inquiry*, 30 LAW. & HUM. BEHAV. 231, 232 (2006) ("[M]ost studies of legal decision making treat emotion . . . as unwanted intruders in the objective world of weighing inputs and throughputs . . . .").

As with many binaries,[171] the reason/emotion binary represents a false dichotomy.[172] In reality, emotion and reason are linked in our decision making[173]: "Contrary to the rationalist model of reasoning and decision making that prevails in law, emotions are quite often present and decisive in those mental activities that are described as reason based."[174] In fact, studies show that emotion is necessary for decision making.[175] One famous case study involved a man who, after a brain tumor, remained as intelligent and articulate as ever[176] but lost the ability to feel emotion.[177] Although he could think logically and list options, he was unable to actually make a decision.[178] It turns out that the ability to decide depends upon the ability to feel.[179] "[E]motions help us to interpret, organize, and prioritize the information that bombards us. . . . [And it is] essential to the continuing task of information processing."[180] As an empirical matter, then, the reason versus emotion dichotomy is false: "Freedom from emotion does not beget good choices, as we typically assume; it begets an inability to choose."[181]

Moreover, the binary opposition was always susceptible to deconstruction. The opposite of rational is irrational, yet a decision that incorporates emotion does not mean that it is "utterly illogical," or "deprived of normal mental clarity or sound judgment."[182] Indeed, as a normative matter, emotion should inform many decisions. After all, should we really choose our mates without regard for emotion?[183] One scholar suggested this thought experiment: Imagine that you have no emotions. "[I]magine the effect on your decisions. Perhaps . . . you would make

171. *See generally* DERRIDA, *supra* note 166 (deconstructing the speech/writing binary).

172. Bandes, *Repellent Crimes*, *supra* note 165, at 505 ("[T]his conception of a sharp separation between emotion and cognition has rapidly fallen out of favor in every discipline that has studied the matter.").

173. Sajó, *supra* note 100, at 354 ("The scientific evidence indicates that reason and emotion operate interactively in human decision making . . . .").

174. *Id*. at 357.

175. One theory postulates that nonconscious affective responses to possibilities help winnow them down and make the preferable ones salient. Arkush, *supra* note 101, at 1308. "When this ability to emotionally experience potential outcomes is impaired, we can spend hours on even the simplest decisions." *Id*. at 1308; *see also* Sajó, *supra* note 100, at 357 (describing how emotions help us process overwhelming amounts of information by adding salience).

176. He measured between average and superior on intelligence; perceptual ability; memory; arithmetic; language; and ability to learn, sort, and make estimates. Arkush, *supra* note 101, at 1306.

177. His affect remained flat when viewing traumatic images. He knew they were emotional, but he felt nothing. *Id*. at 1306–07.

178. For example, he "could spend an entire afternoon contemplating which principle of organization he should use to file a paper—date, size, relationship to other matters . . . ." *Id*. at 1305–06.

179. *Id*. at 1307 ("Emotion and decision making appeared to be linked fundamentally in the brain.").

180. Bandes, *Emotions*, *supra* note 169, at 422–23.

181. Arkush, *supra* note 101, at 1308.

182. IRRATIONAL, http://dictionary.reference.com/browse/irrational (last visited Mar. 8, 2014).

183. Arkush, *supra* note 101, at 1354.

better, even perfect, decisions to maximize your . . . your what? What would be your goals? Why would anything be good or bad? How would you decide anything?" If we are at our most autonomous when we fulfill our decision-making potential, it no longer makes sense to idealize an emotionless decision maker. It is more autonomy-affirming to acknowledge that we are emotional as well as logical,[184] and our ideal decision maker should reflect that.

This does not mean that all compelled speech that triggers an emotional reaction is unproblematic. There are different ways that the government may mobilize emotion in its attempt to persuade. Take the use of images, which often have an emotional impact in ways that words do not.[185] On the one hand, attempts to underscore a fact with an emotional and visual representation of it seem justified as making information more salient.[186]

On the other hand are well-known advertising techniques like affective priming,[187] where the seller attempts to make its product attractive not by making its best features more salient, but by associating it with something the audience already views positively.[188] The point is not to help the audience visualize, understand, or remember an informational claim, but to piggyback their own product onto a pre-existing emotional connection the viewer already has to something completely unrelated.[189] "'By pairing [the product] with stimuli that naturally elicit positive emotional responses from people, over many repetitions, consumers learn to associate the [product] with positive emotions.'"[190] These techniques exploit a distorting heuristic

184. As Martha Nussbaum has noted, "both the capacity to reason and the capacity to have emotions and form attachments to other persons" are basic human capacities. Hilliard Aronovitch, *The Role of Emotions in the Rule of Law*, 57 U. TORONTO L.J. 781, 782 (2007).

185. As any great novel will make plain, this is not to say that words lack emotional impact. But an image can often trigger emotions more easily than words. Think of the phrase "A picture is worth a thousand words." Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 690 (2012).

186. Bandes, *Emotions*, *supra* note 169, at 423 ("We cannot function without creating markers of saliency and value, and our emotions aid us in identifying which information is especially salient, valuable, or urgent . . . .").

187. Another affect heuristic advertisers regularly exploit is the "mere exposure effect": "Simply being exposed to something will cause you to like it more . . . ." Arkush, *supra* note 101, at 1310. Furthermore, people are generally unaware of this effect. *Id*.

188. *Id*. at 1311 ("A most basic example of priming is a person's tendency to like something better when primed with something pleasant."); *see also* Wiener et al., *supra* note 170, at 234 ("Affective priming occurs when affect influences attention . . . or associative processes."). In a standard study, people reacted more positively to an object paired with a smiling face compared to the object presented alone and reacted more negatively to an object paired with a frowning face compared to the object presented alone. Arkush, *supra* note 101, at 1311.

189. *Cf*. Wiener et al., *supra* note 170, at 235 (noting that individuals might confuse their pre-existing feelings for their feelings towards something else).

190. Piety, *supra* note 109, at 410 (quoting ROBERT B. SETTLE & PAMELA L. ALRECK, *Helping Consumers Learn*, *in* WHY THEY BUY: AMERICAN CONSUMERS INSIDE AND OUT 38 (1986)); *see also id*. at 412 ("[A]dvertising, through a variety of methods, is intended to *create* an association that did not

embedded in people's decision making.[191] It is the difference between trying to convince you to want a coffeemaker by showing a beautiful picture of the machine and trying to convince you to want a coffeemaker by posing a beautiful man (or more likely a woman) next to it.[192] The question that must be asked, then, is not whether the compelled speech appeals to emotion, but whether the persuasive impact is due to the merits of the argument or to the intentional exploitation of a cognitive shortcut.

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With a better grasp of why compelled speech might undermine the values and goals of free speech, it becomes possible to formulate a list of questions to ask when determining whether any particular compelled disclosure violates the Free Speech Clause:

1. Does the compelled disclosure risk chilling speech?
2. Does the compelled disclosure distort the discourse in some way?
3. Does the compelled disclosure infringe on the autonomy of the speaker?
4. Does the compelled disclosure infringe on the autonomy of the audience?

III. COMPELLED SPEECH LIMITS APPLIED

With the questions about chill, distortion, and autonomy in mind, this Part will examine three increasingly litigated areas of compelled disclosures. Two involve images, and two involve abortion. The first is compelled tobacco warnings that include graphic images. The second concerns compelled abortion counseling, including the requirement that doctors show and describe an ultrasound of the woman's fetus before an abortion. Mandatory disclosures that some jurisdictions have required crisis pregnancy centers to display in their advertisements or waiting rooms comprise the third.

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previously exist in the consumer's mind between the pre-existing desirable image or concept and the product or service advertised.").

191. Indeed, Hanson and Kysar have recognized that "[c]onsumers are subject to a host of cognitive biases which, particularly when taken together, appear to render them vulnerable to manipulation" and have offered empirical evidence that advertisers routinely exploit these imperfections in order to manipulate consumer perceptions and decision making. Hanson & Kysar, *supra* note 113, at 723; *see also* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1466 (1999) [hereinafter Hanson & Kysar, *Evidence of Market Manipulation*].

192. I am setting aside for this example the fact that people sometimes buy an item like a car not simply for its mechanical excellence but also for its image. In other words, I am assuming a purchase made for its ability to make coffee, not its ability to enhance self-worth or appeal to the opposite sex.

A. Compelled Commercial Speech: Tobacco Warnings

The Centers for Disease Control and Prevention (CDC) reports that smoking is the leading cause of preventable death in the United States, claiming approximately 480,000 lives every year.[193] In fact, smoking causes more deaths than alcohol, cocaine, heroin, homicide, suicide, car accidents, and fires combined.[194] Close to 20% of American adults, 43 million people, smoke.[195] Smoking shortens the average lifespan about 13 to 14 years[196] and costs the United States more than $193 billion each year.[197]

Most people start smoking as children or teenagers. Over eighty percent of adult smokers started before they were eighteen, the legal age for buying tobacco.[198] Nicotine, the active ingredient in tobacco, is as addictive as cocaine or heroin,[199] making smoking one of the hardest addictions to break. In any given year, most smokers want to quit and try to do so; most fail.[200]

The Family Smoking Prevention and Control Act of 2009 (Smoking Prevention Act) revamps the warnings on tobacco products and advertisements.[201] Previous laws required cigarette packages and advertisements to bear the Surgeon General's warnings on the ill effects of

193. *Smoking & Tobacco Use Fact Sheet: Fast Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 7, 2012), *available at* http://www.cdc.gov/Tobacco/data_statistics/fact_sheets/fast_facts/index.htm [hereinafter *Fast Facts*].

194. *Tobacco*, AM. LUNG ASS'N., http://www.lung.org/associations/states/colorado/tobacco/ (last visited Mar. 11, 2014).

195. *Fast Facts*, *supra* note 193.

196. *Tobacco*, *supra* note 195.

197. *Id*. (noting that the country loses roughly $97 billion in lost productivity and $96 billion in health care expenditures).

198. *Smoking & Tobacco Use Fact Sheet*: *Youth and Young Adult Data*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 14, 2012), *available at* http://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm ("Each day in the United States, more than 3,200 people younger than 18 years of age smoke their first cigarette, and an estimated 2,100 youth and young adults who have been occasional smokers become daily cigarette smokers."); MEG RIORDAN, CAMPAIGN FOR TOBACCO-FREE KIDS, THE PATH TO SMOKING ADDICTION STARTS AT VERY YOUNG AGES 1 (2009).

199. *See, e.g*., Martin Tolchin, *Surgeon General Asserts Smoking Is an Addiction*, N.Y. TIMES (May 17, 1988), http://www.nytimes.com/1988/05/17/us/surgeon-general-asserts-smoking-is-an-addiction.html; *see also* U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION 9 (1988).

200. *MMWR*, *Quitting Smoking Among Adults—United States*, *2001–2010*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 11, 2011), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6044a2.htm (noting that 68.8% of adult smokers report that they would like to quit, 52.4% of all adult smokers stopped smoking for more than one day in 2010 because they were trying to quit, and that 6.2% had successfully stopped smoking for a year).

201. Tobacco Regulation, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended in scattered sections of 15 U.S.C. and 21 U.S.C.).

smoking.[202] The Smoking Prevention Act makes those warnings starker, larger, and graphic.[203] It mandates nine blunter-than-ever Surgeon General Warnings. "Smoking can kill you" and "Cigarettes are addictive" are typical examples.[204] To increase their impact, the warnings must, for the first time in the United States,[205] be accompanied by full color graphics "depicting the negative health consequences of smoking."[206] For example, "Smoking can kill you" is paired with a photograph of a post-autopsy corpse with chest staples, and the image for "Cigarettes are addictive" depicts a man holding a cigarette with smoke coming out of a hole in his throat—presumably illustrating someone who continues his habit despite having had a smoking-induced laryngectomy.[207] These warnings and images must cover at least half of the front and back of cigarette packages and at least twenty percent of all cigarette advertisements.[208]

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202. *See, e.g.*, Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 72 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331–1341 (1996)) (introducing tobacco warnings); Comprehensive Smoking Education Act of 1984, Pub. L. No. 98-474, 98 Stat. 2200 (codified as amended at 15 U.S.C. § 1341 (1996)) (modifying tobacco warnings).

203. *See* Smoking Prevention Act § 201 (codified as amended at 15 U.S.C. §§ 1333(a)(2), (d) (2009)).

204. Smoking Prevention Act § 201 (codified as amended at 15 U.S.C. § 1333(a)(1) (2009)).

205. Other countries have long had graphic warnings on their tobacco products. Canada, for example, started requiring graphic health warnings that take up half the cigarette package back in 2000. *Picture-Based Cigarette Warnings*, PHYSICIANS FOR A SMOKE-FREE CANADA, http://www.smoke-free.ca/warnings/canada-warnings.htm (last visited July 21, 2012). Over forty countries have followed suit.

206. Smoking Prevention Act § 201 (codified as amended at 15 U.S.C. § 1333(d) (2009)). The other pairings of warning and color images are as follows:

> "Cigarettes cause fatal lung disease": side by side photographs of healthy lungs next to diseased ones;
>
> "Cigarettes cause cancer": photograph of diseased mouth with rotting teeth and cancerous lesions;
>
> "Cigarettes cause strokes and heart disease": photograph of a middle-aged man with an oxygen mask;
>
> "Tobacco smoke can harm your children": photograph of smoke wafting next to a baby;
>
> "Smoking during pregnancy can harm your baby": illustration of a crying baby in an incubator;
>
> "Tobacco smoke causes fatal lung disease in nonsmokers": photograph of a woman weeping.

FDA Unveils New Cigarette Health Warnings, U.S. FOOD & DRUG ADMIN. (Sept. 24, 2013), http://www.fda.gov/forconsumers/consumerupdates/ucm259624.htm; *Cigarette Health Warnings*, U.S. FOOD & DRUG ADMIN. (June 3, 2013), http://www.fda.gov/TobaccoProducts/Labeling/Labeling/CigaretteWarningLabels/ucm257774.htm.

207. A total laryngectomy is the removal of the entire larynx (voice box). A total laryngectomy requires the use of a tracheostomy in order to breathe. Nat'l Insts. Health, *Laryngectomy*, MEDLINEPLUS ENCYCLOPEDIA (Feb. 28, 2011), http://www.nlm.nih.gov/medlineplus/ency/article/007398.htm. A laryngectomy is a treatment for cancer of the larynx, a cancer for which smoking is a risk factor. *Id.*

208. Smoking Prevention Act § 201 (codified as amended at 15 U.S.C. §§ 1333 (a)(2), (b)(2) (2009)).

So far, tobacco companies have filed two free speech challenges to the new images—one facial challenge brought before the FDA chose the images[209] and one as-applied challenge.[210] Although all parties and courts agree that the compelled images comprise commercial speech, they were upheld in one case[211] and struck in the other.[212] The Sixth Circuit rejected the facial challenge, ruling that graphic images could be factual,[213] and applying rational basis scrutiny on the grounds that accurate cigarette warnings were designed "to prevent consumers from being misled about the health risks of using tobacco."[214] In contrast, in the as-applied challenge, the D.C. Circuit held that the actual images selected by the FDA were not purely factual and uncontroversial,[215] should be subject to intermediate scrutiny,[216] and failed to pass that scrutiny.[217] Because the government chose not to seek Supreme Court review, the D.C. Circuit's decision stands, and tobacco products do not bear the graphic images.[218]

The D.C. Circuit was too quick in striking down the Smoking Prevention Act. For the most part, as explained below, the images mandated by the federal law do not chill speech, distort the discourse, or infringe on anyone's autonomy.

1. Chill

One of the main concerns with compelled speech is that it might result in a net loss of speech. For example, if forced to reveal their identity, some anonymous pamphleteers might simply not speak at all.[219] Or if compelled to allow political candidates a right of reply to a searing editorial, some newspapers might decide to tone down their political criticisms.[220]

However, the risk of chilled speech is generally believed to be mitigated in the commercial context. "[C]ommercial speech, the offspring

209. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 553 (6th Cir. 2012) ("Without any specific graphic images to challenge, Plaintiffs' argument is and must necessarily be that the graphic-warning requirement on its face violates the First Amendment.").

210. R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin., 696 F.3d 1205 (D.C. Cir. 2012).

211. *Disc. Tobacco*, 674 F.3d 509.

212. *R.J. Reynolds*, 696 F.3d at 1221–22.

213. *Disc. Tobacco*, 674 F.3d at 560–61.

214. *Id.* at 561.

215. *R.J. Reynolds*, 696 F.3d at 1216.

216. *Id.* at 1217.

217. *Id.* at 1218–19.

218. Brady Dennis, *Government Quits Legal Battle Over Graphic Warnings for Cigarettes*, WASH. POST, Mar. 19, 2013.

219. S*ee supra* notes 88–90 and accompanying text.

220. *See supra* notes 92–94 and accompanying text.

of economic self-interest, is a hardy breed of expression . . . ."[221] Tobacco exemplifies this fact. Despite decades of government-mandated warnings, tobacco remains one of the most heavily advertised products in the United States. In 2006 alone, tobacco companies spent over $12 billion—or $34 million a day—advertising and otherwise promoting cigarettes.[222] The tobacco corporations depend on advertising to ensure their customer base. Consequently, cigarette advertising has proven extremely resilient and is unlikely to be chilled by the government's compelled speech.

Nevertheless, the tobacco companies have argued that because the compelled images occupy half of the front and back of a cigarette package and twenty percent of all other advertising, their speech has not just been chilled, but frozen out.[223] In other words, by virtue of the government's confiscation of large portions of their branding and advertising space, the amount of their speech has necessarily been diminished. While this may be true, there is little reason to fear that tobacco advertising will disappear,[224] as with the anonymous pamphleteer, or be tempered, as with newspaper editorials. Even assuming there was half as much tobacco advertising as before, no views or opinions are lost to the marketplace of ideas, and there is no risk that consumers will miss out on the tobacco companies' messages.

2. Distortion

None of the three distortion risks seem to apply here.[225] The textual warnings are true, and while a few of the photographs have been technologically manipulated,[226] the FDA insists that they are, "in fact, accurate depictions of the effects of sickness and disease caused by smoking."[227] Without details on which photographs have been altered and in what way, it is difficult to conclude that any of them rise to the level of

221. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 n.6 (1980) (citations omitted); *see also* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976) ("[S]ince advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled . . . .").

222. FED. TRADE COMM'N, FEDERAL TRADE COMMISSION CIGARETTE REPORT FOR 2006 at 2, *available at* http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-cigarette-report-2006/090812cigarettereport.pdf (last visited Mar. 11, 2014).

223. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 524 (6th Cir. 2012).

224. Moreover, as the Sixth Circuit pointed out, even with large portions of advertising and packaging space dedicated to health warnings, there is still room for brand names, logos, and other product differentiating information. *Id*. at 531.

225. *See supra* Part II.B (describing distortion caused by false or misleading speech, misattribution, or disruption of professional obligations).

226. R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin., 845 F. Supp. 2d 266, 270 n.8 (D.D.C. 2012).

227. *Id*.

"inaccurate or misleading." Take the photograph of a plume of smoke wafting right next to a plump baby, which accompanies the warning "Tobacco smoke can harm your children."[228] Even if the baby has been photoshopped to look more adorable, or the smoke digitally enhanced, these are details unrelated to the underlying argument.[229] Of course, if photographs of body parts were so doctored that they did not in fact resemble diseased lungs or diseased mouths, then the claim of misleading alterations might have some traction, but there is no evidence to that effect.

The D.C. Court of Appeals thought some of the images were misleading not because of technological modifications but because consumers might misinterpret them.[230] Specifically, the court argued that the photograph of a man smoking through a tracheotomy hole might lead viewers to conclude, erroneously, that this condition was a common consequence of smoking.[231] Yet as the dissent points out, this objection is based on the image alone.[232] The accompanying text, "Cigarettes are addictive," clarifies that the image of someone still smoking after a tracheotomy illustrates the "the tenacity of nicotine addiction."[233] While there is no guarantee that people will not misread the images, when combined with the text, the risk does not seem particularly high.[234]

In sum, although the images are not an exact reproduction of reality,[235] they are unlikely to mislead viewers about the consequences of smoking. Nor is an audience likely to misattribute the state's message to the compelled speaker, since it is doubtful that anyone would believe that the tobacco manufacturers endorse the warnings about the dangers of their products.[236] Finally, tobacco companies occupy no special position of trust, so there is no risk of distorting fiduciary communications. In sum, the images do not distort the general discourse or any professional discourse.

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228. *Id*. at 269.

229. Rare is the advertisement whose photograph has not been digitally altered or enhanced in some way. To argue that all modifications equate to factually inaccurate or misleading information would radically change the law on advertising and commercial speech.

230. *R.J. Reynolds*, 696 F.3d at 1216.

231. *Id*.

232. *Id*. at 1231 (Rogers, J., dissenting).

233. *Id*.

234. Of course, if it turns out that people are drawing mistaken conclusions from the compelled warnings, then distortion does become a problem.

235. Arguably, no photographic image is an exact replica of reality. *See, e.g.*, Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1, 20–21 (1998) ("Emphasizing the inherent distortions of photography [and] the human agency involved in producing images . . . some commentators highlighted the myriad ways in which the photograph was not simply the literal truth, perfectly rendered." (emphasis omitted)).

236. Furthermore, any confusion can be addressed by putting "SURGEON GENERAL'S WARNING" back on cigarette packages.

3. Autonomy of Tobacco Companies

Compelled speech risks offending speakers' personal dignity and autonomy. The insult is even greater if the speaker has to utter the words or convey a viewpoint that the speaker does not share, especially if an audience attributes that viewpoint to the speaker.[237] The tobacco companies clearly do not share the government's view that tobacco should be avoided. Hence, if the tobacco companies were people, the compelled speech might raise speaker autonomy concerns. Nevertheless, there are two independent reasons why commercial speech by corporations does not, in fact, trigger these concerns. First, while technically "persons" in certain circumstances, corporations are not actual people. Second, commercial speech is protected primarily for the sake of audiences, not speakers.[238]

Forcing people to speak risks treating them as a means, not an end in themselves, and may fail to respect their autonomy and their inherent dignity as human beings. "This dignity gives man an intrinsic worth, a value *sui generis* that is 'above all price and admits of no equivalent.'"[239] Tobacco companies, however, are not human beings.[240] They do not have a personal interest in being able to speak only what is in their hearts and minds because they do not have a heart or mind.[241] They cannot complain about their treatment as a means to an end because, unlike people, they are not an end in themselves. On the contrary, corporations are the embodiment of an instrumental entity.

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237. *See supra* Part II.C.

238. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. Rev. 939, 973–74 (2009); Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 J. OF CONST. L. 539, 544 (2012)

239. John Ladd, *Introduction* to IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE ix, ix (John Ladd trans. & ed., Library of Liberal Arts 1965) (1797) ("The key to Kant's moral and political philosophy is his conception of the dignity of the individual.").

240. This holds true regardless of what theory of the corporation one favors. *See, e.g.*, Darrell A.H. Miller, *Guns, Inc.:* Citizens United, McDonald, *and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 915 (2011) (describing the three theories of corporate personhood as the artificial, aggregate, or real entity theories).

241. *Cf.* Calvert et al., *supra* note 4, at 237–38 (noting that corporations lack a conscience or the capacity for thought). While the aggregate theory—where the rights and duties of the corporation are essentially the rights and duties of the people who compose it, Susanna Kim Ripkin, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 221 (2011)—might suggest that the heart and mind of the corporation is comprised of the hearts and mind of its individual members, the aggregate theory no longer makes sense given corporations' limited liability, the separation of managers from owners, and the rise of mega-corporations with thousands of shareholders. Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1008, 1010–11, 1018.

Granted, corporations are sometimes legally recognized as "persons"—such as a "person" with a right to contract[242]—when "personhood" enables them to fulfill their economic purpose.[243] But constitutional law should not confuse a helpful construct with reality. "[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. . . . [T]heir 'personhood' often serves as a useful legal fiction. But they are not themselves members of 'We the People' by whom and for whom our Constitution was established."[244] Consequently, it is illogical to extend to corporations rights designed to protect the dignity and autonomy of actual people—such as the right against compelled speech.[245] As Justice Rehnquist argues in dissent: "Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality."[246] Unfortunately, many decisions fail to recognize that logic and its natural conclusion—that it does not make sense to worry about the conscience or dignity of an entity that has neither.[247]

Concern about the autonomy and dignity of the corporate speaker is especially misguided when dealing with commercial disclosures since commercial speech is protected in order to benefit audiences. "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [the speaker's] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[248]

In sum, tobacco companies have no freedom of conscience or personal autonomy that needs to be taken into free speech consideration. This

242. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819) (recognizing corporations' right to contract); *see also* Santa Clara v. S. Pac. R. Co., 118 U.S. 394 (1886) (recognizing corporations' right to protection under the Fourteenth Amendment).

243. Ripkin, *supra* note 241, at 214 (noting that the right to hold property, sue and be sued, and carry on business in the corporate name also facilitate commerce).

244. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 466 (2010) (Steven, J., concurring in part and dissenting in part).

245. Other than stating that "purely personal" rights are reserved for people, *see, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978), the Supreme Court has not yet articulated principles for deciding what counts as a purely personal guarantee. *See, e.g.*, Miller, *supra* note 240, at 909 ("No unified theory governs when or to what extent the Constitution protects a corporation."). The Supreme Court has, however, declined to grant corporations a Fifth Amendment right against self-incrimination, Braswell v. United States, 487 U.S. 99, 116 (1988), and full privacy rights, *see, e.g.*, Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 65–67 (1974) ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy.").

246. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 32–33 (1986) (Rehnquist, J., dissenting).

247. *See, e.g.*, R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin., 823 F. Supp. 2d 36, 45 (D.D.C. 2011) (discussing speaker autonomy).

248. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985); *see also* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249–50 (2010).

conclusion is not at odds with the Supreme Court's holding in *Bellotti* and *Citizens United*, which struck government limits on corporations' noncommercial speech on the ground that all political speech, regardless of the speaker, contributes to the political discourse.[249] In other words, the Court was concerned about the free flow of information, not speaker autonomy. In any case, those cases dealt with political speech not commercial speech. To the extent corporations' commercial speech is protected, it is for the benefit of consumers, not their own benefit. Citing the freedom of conscience cases to argue that mandatory warnings violate corporations' right to speak or not speak is simply an unfortunate example of applying doctrine unmoored from its theoretical justifications.

4. Autonomy of Consumers

The tobacco companies' best argument is that the mandatory warnings violate the free speech rights of its audience—the consumer. By using too heavy a hand, the government could undermine the autonomy of consumers with a message that is paternalistic, manipulative, or both. Some mandated images may be problematic for these reasons, but most are not.

a. Paternalistic Ends

The government compelled warnings would not be paternalistic if the mandated information consisted of accurate facts meant to inform, rather than influence, the audience's decision making, especially if the information cured a potentially misleading or deceptive advertisement, or if the information were not otherwise available.[250] Explaining the difference between legal fees and legal costs on an attorney's advertisement trumpeting "no fees without a legal victory," is a good example of the former, since without the disclosure most reasonable people would conclude that they would not owe any money if they lost.[251] Mandatory

249. *Citizens United*, 558 U.S. at 313 ("Political speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'" (quoting *Bellotti*, 435 U.S. at 777)). In other words, the speech was protected because of the free speech rights of audiences, not the free speech rights of corporate speakers. *See also Pac. Gas & Elec. Co.*, 475 U.S. at 33 (Rehnquist, J., dissenting) (observing that Court protects corporations not "because corporations, like individuals, have any interest in self-expression" but because "such rights are recognized as an instrumental means of furthering the First Amendment purpose of fostering a broad forum of information to facilitate self-government"). In fact, the Court specifically shied away from holding that corporate speakers have free speech rights when, after observing "[t]he Constitution often protects interests broader than those of the party seeking their vindication," it wrote: "The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect." *Bellotti*, 435 U.S. at 776.

250. *See supra* Part II.D.1.

251. *See, e.g.*, *Zauderer*, 471 U.S. at 652–53.

disclosure of calories at chain restaurants exemplifies the latter, since consumers have no way of knowing the nutritional content of the food they order unless the restaurants reveal that information.[252]

The tobacco warnings do not fall obviously into either category. Cigarette advertisements make no explicit false claims about the health benefits of their products that need to be counteracted. Nor are the harms of smoking information solely within the province of the compelled speaker, as is the case with calories and restaurants. On the contrary, it is widely known that smoking is dangerous and addictive. As a result, it may well be paternalistic to insist that people read information that is already available to them and that they already know. As the tobacco companies have argued: "[S]ince the public already appreciates the health risks associated with using tobacco products, the government's goal must be to browbeat potential tobacco consumers . . . over the head with its anti-tobacco message at the manufacturer's expense."[253]

Under a more nuanced analysis, however, the warnings can be seen as correcting the misleading impression created by cigarette advertisements that smoking is not so harmful.[254] People are bombarded with images of happy smokers presumably puffing away with no ill effect. Because of the availability heuristic, people evaluate probability based on the examples that most easily come to mind.[255] As a result, "a class whose instances are easily retrieved will appear more numerous than a class of equal frequency whose instances are less retrievable."[256] Thanks to ubiquitous tobacco advertisements, the most available image of smokers is one of happy, active people, which will influence people's calculation of the risk of smoking.[257]

In addition, this one-sided presentation exacerbates what is known as optimism bias, which also distorts the evaluation of risk.[258] Optimism bias

252. *See, e.g.*, New York State Rest. Ass'n v. New York City Bd. of Health, 556 F.3d 114 (2d Cir. 2009).

253. Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 530 (W.D. Ky. 2010).

254. Admittedly, advertisers are allowed some leeway for "puffery," which can be wildly exaggerated claims beyond the point of believability ("best coffee in the world"), or simply the universal expectation that sellers would make only favorable comments about their products. *See generally* David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395 (2006). This tolerant approach towards puffery, however, does not factor in the cognitive heuristics that affect people's evaluation of risk.

255. *See* Sunstein, *supra* note 111, at 752; Jeffrey J. Rachlinski, *Selling Heuristics*, 64 ALA. L. REV. 389, 392 (2012).

256. Cass R. Sunstein, *Precautions Against What? The Availability Heuristic and Cross-Cultural Risk Perception*, 57 ALA. L. REV. 75, 88 (2005).

257. *See* Hanson & Kysar, *Taking Behavioralism Seriously*, *supra* note 113, at 731 ("[T]he availability heuristic can be easily tapped into by simply maximizing the frequency and intensity of advertisements.").

258. This optimism bias is compounded by yet another heuristic that cigarette advertisers go to great lengths to cultivate: people who have a positive affect towards a product tend to underestimate the

is the tendency for people to assume that risks that they may well understand, or even overestimate, do not apply with equal force to themselves.[259] For example, about ninety percent of drivers think they are safer than average and less likely to be involved in a serious accident.[260] Although people know in theory that smoking is harmful, studies confirm that smokers grossly underestimate their personal vulnerability.[261] As Jon Hanson and Douglas Kysar conclude in their article documenting market manipulation, "the case is quite strong that consumers do tend to underestimate the risks of smoking and that they do so in ways that are unsurprising in light of consumer biases and manufacturers' efforts to tap into them."[262]

With these considerations in mind, the mandated cigarette disclosures are more akin to the mandated attorney disclosures than they may seem at first blush. The non-paternalistic assumption behind the attorney disclosure is that consumers do not understand that hiring a contingency-fee attorney is not free, not because they are dimwits, but because the technical difference between legal fees and legal costs is neither obvious nor common knowledge.[263] Likewise, the assumption behind the cigarette disclosures is that consumers do not appreciate how dangerous smoking is, not because they are fools, but because of widespread heuristics that tobacco advertisements exploit by never depicting the potential consequences.[264] Consequently, there is at least a basis to claim that the warnings correct a misleading impression intentionally created by tobacco advertisements.[265]

The analogy is imperfect: in the case of the attorney advertisement, the state was not trying to persuade readers to adopt one course of conduct over

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risks of that product. *See* Hanson & Kysar, *Evidence of Market Manipulation*, *supra* note 191, at 1445 ("[D]eveloping *positive affect* within consumers with respect to a particular product . . . can greatly enhance [its] perceived utility—and significantly lower [its] perceived risk . . . .").

259. *See* Hanson & Kysar, *Evidence of Market Manipulation*, *supra* note 191, at 1511.

260. *See* Sunstein, *supra* note 111, at 773.

261. Hanson & Kysar, *Evidence of Market Manipulation*, *supra* note 191, at 1512–14 (describing studies); *see also* Hanson & Kysar, *Taking Behavioralism Seriously*, *supra* note 113, at 720 (noting that "even if people overestimate generalized risks, they might still underestimate their own personal incidence of that risk").

262. Hanson & Kysar, *Evidence of Market Manipulation*, *supra* note 191, at 1469.

263. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 652–53 (1985).

264. *See* Hanson & Kysar, *Taking Behavioralism Seriously*, *supra* note 113, at 726 (noting that advertisers' manipulation of cognitive biases is not only possible, but "an inevitable result of the competitive market").

265. *Cf.* Cipollone v. Liggett Grp. Inc., 505 U.S. 504, 527 (1992) (upholding proposition that "[t]o avoid giving a false impression that smoking [is] innocuous, the cigarette manufacturer who represents the alleged pleasures or satisfactions of cigarette smoking in his advertising must also disclose the serious risks to life that smoking involves" (second alteration in original) (citation omitted)). Because the state cannot possibly match the tobacco companies' advertising expenditures, the only way to successfully counter the misleading impression is to require corrective warnings on all advertisements.

another, whereas with tobacco warnings the government is clearly trying to dissuade consumers from smoking. In fact, one component of the compelled speech is the phone number for a smoking cessation hotline.[266] This raises the earlier question of whether it is ever legitimate for the government to use its coercive power to persuade rather than just inform. In particular, is it unconstitutionally paternalistic for the government to attempt to coax people away from smoking?[267] Setting aside for the moment the means the government uses to pursue that goal, is the goal itself permissible under the Free Speech Clause, which insists on respecting the autonomy of people's decision making?[268]

If government advocacy were as a rule unconstitutionally paternalistic, then all warnings on cigarette packages would violate free speech. This does not seem right, in part because the line between informing and advocating can be extremely elusive.[269] Despite the D.C. Circuit's claim that the warnings were "admonitions" rather than "purely factual and accurate commercial disclosures" meant to inform,[270] the two are not so readily distinguishable in this context. Indeed, one might argue that any fact about the long-term effects of smoking could be construed as persuasive since they are basically all negative.[271]

In any event, government advocacy is not problematic under all conceptions of autonomy. Under one view, assuming the government's means are not manipulative[272], it does not undercut a listener's autonomy if, for example, it promotes an incontrovertibly autonomy-affirming goal.[273] In

266. Pursuant to the authority granted by § 906(d) of the Federal Food, Drug, and Cosmetic Act (codified at 21 U.S.C. § 387f(d) (2009)), the FDA requires cigarette manufacturers to list the national smoking cessation hotline 1-800-QUIT NOW. Required Warnings for Cigarette Packages and Advertisements, 21 C.F.R. Part 1141 (2011).

267. The *R.J. Reynolds* district court certainly thought so. *See* R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin., 845 F. Supp. 2d 266, 275 n.14 (D.D.C. 2012) ("[A]lthough the Government may want to convince consumers to stop smoking to protect their health . . . [the tobacco] industry should not 'serve as the government's unwilling spokesman in that paternalistic endeavor.'").

268. One might argue that the government's regulation is not paternalistic because its advocacy is actually for the benefit of third-party nonsmokers. After all, when smokers fall ill, they cost the country billions of dollars in health care expenses and lost productivity. *See supra* note 197. Their second-hand smoke also directly harms others. *Deadly Second-Hand Smoke*, ILL. DEPT. OF HEALTH 1, 1 http://www.idph.state.il.us/TobaccoWebSite/factsheets/shs.pdf (last visited July 21, 2012) (finding that non-smokers who breathe second-hand smoke suffer many of the same diseases as regular smokers, including heart disease, and lung and nasal cancers). Yet even if the main goal of the state's anti-smoking advocacy were to benefit third-party nonsmokers, which is unlikely, the means used to accomplish it is to change the behavior of the targeted smokers.

269. *See supra* Part I.B.2.

270. R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin., 696 F.3d 1205, 1211–12 (D.C. Cir. 2012).

271. *Cf. id.* at 1230–31 (Rogers, J., dissenting) ("Comprehending the facts about the actual harms resulting from smoking is likely . . . to discourage the use of cigarettes.").

272. That is, the mandated information is not inaccurate, misleading, or otherwise deceptive.

273. *See supra* Part II.D.1.

that case, the government is not trying to change the listener's beliefs on a contested issue, and if she follows its advice, she has actually enhanced her autonomy in some way. The conclusion might be different, however, if the government foisted an opinion onto someone who disagrees with it or advocated a course of action that would actually undermine rather than advance autonomy.

For tobacco warnings, the question then becomes whether the message that smoking is harmful and people should desist is controversial or undermines autonomy. Although a handful might quibble, the answer seems to be no.[274] Few would argue against good health. No one, certainly not smokers, disputes that smoking is addictive and detrimental to good health. As mentioned above, countless studies establish the various ill effects of smoking.[275] Thus, the view that smoking harms one's health is based on irrefutable facts. Furthermore, avoiding or shaking a harmful addiction enhances autonomy.[276] As mentioned above, most smokers would prefer to be nonsmokers. In fact, over ninety percent willingly admit they wish they had never started.[277] Given this near consensus, the goals of the warnings are not paternalistic.[278]

The claim is not unassailable. At least eight percent of smokers do not report regretting their habit.[279] Rather than opposing good health, perhaps they are focusing on the short-term pleasures of smoking compared to the long-term benefits of cessation.[280] On the other hand, maybe some smokers view addiction as a way of asserting a rebellious identity. For them, the addiction (perhaps perversely) enhances their autonomy. As a consequence, for this small subset, the government's warnings may seem paternalistic. In sum, while a few may experience the government's urging as paternalistic, most probably do not.

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274. *See, e.g.*, Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 75.

275. *See infra* notes 193–200 and accompanying text.

276. Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 32 ("[O]ur autonomy may be undermined when we are dominated by others, [or] when we are the slaves of addiction or impulse . . . .").

277. *See, e.g.*, Geoffrey T. Fong et al., *The Near-Universal Experience of Regret Among Smokers in Four Countries: Findings from the International Tobacco Control Policy Evaluation Survey*, 6 NICOTINE & TOBACCO RESEARCH S341, S344–45 (2004) (finding that 91.2% of smokers said that if they had to do it over again, they would not have started smoking).

278. *See, e.g.*, Kagan, *supra* note 274, at 75 (noting society's shared consensus that smoking is harmful).

279. Plus, there may be some who find any government persuasion intrusive, but then they would consider all warnings paternalistic.

280. Note that some decisions might be autonomy-enhancing in the long term, but not necessarily in the short term. *Cf.* Hanson & Kysar, *supra* note 113, at 735 (noting "the marked tendency for individuals to seek immediate gratification . . . despite a recognition that such practices can lead to a net loss of utility"). Is true autonomy defined by the long rather than short view? Perhaps it ought to be, especially if the main short-term benefit is appeasing an addiction.

b. Manipulative Means

Compelled speech may manipulate audiences if it is false or misleading, or if it intentionally exploits decision-making heuristics. Notably, this does not mean all emotional appeals are problematic, as not all emotional speech exploits cognitive errors. For the most part, the mandated images are neither false nor take advantage of any affect heuristics.

i. Manipulation via Deception

None of the warning statements are inaccurate, and the tobacco companies do not claim otherwise.[281] And as discussed above, despite the D.C. Circuit's misgivings, the images cannot fairly be described as false or misleading either. Again, the claim is not airtight, but it would be a stretch.

ii. Manipulation via Emotion

The D.C. Circuit was troubled not only because the disclosures were persuasive "admonitions" instead of just plain facts, but also because they were "inflammatory" ones at that: "Moreover, the graphic warnings are not 'purely' factual because . . . they are primarily intended to evoke an emotional response . . . ."[282] In so arguing, the court seemed to assume that, (1) emotional images cannot be factual, and (2) for free speech purposes, the ideal decision maker is completely dispassionate, and any attempt by the government to appeal to something other than reason is illegitimate.[283] The government may compel "cold hard facts," but nothing else.[284]

The first assumption relies on an unsupportable binary opposition. The court envisioned only two types of information: unemotional facts or emotional opinions.[285] According to the court, the compelled disclosures' "unabashed attempts to evoke emotion" cannot qualify as "purely factual."[286] Instead, these "shocking" images convey the "state's subjective—and perhaps even ideological—view" that consumers should reject smoking.[287] But as the Sixth Circuit pointed out in upholding

281. *See, e.g.*, R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin., 696 F.3d 1205, 1211 (D.C. Cir. 2012).

282. *Id.* at 1216.

283. *See id.*

284. Note that just as fact/emotion readily maps onto masculine/feminine, so too does hard/soft. If you think about it, describing a fact as "hard" does not really make any sense. Only when hard is understood as another way of saying "masculine," does it become an emphasizer for masculine "facts."

285. *See id.* at 1216–17.

286. *Id.*

287. *Id.* at 1211–12.

compelled graphic images (albeit the concept of using images rather than the FDA images), "Facts can disconcert, displease, [and] provoke an emotional response . . . but that does not magically turn such facts into opinions."[288]

The second assumption—the ideal of a dispassionate decision maker—is flawed, not only because as a descriptive matter emotion does inform decision making,[289] but also because as a normative matter emotion should not be entirely eliminated from it.[290] Of course, just as logical arguments can be manipulated, so can emotional ones. In particular, emotional arguments that exploit affect heuristics to persuade based on error-prone cognitive shortcuts rather than the merits raise autonomy concerns. There is no dispute that the FDA chose the tobacco images in part because of their perceived emotional impact.[291] The challenge is deciding whether this use of emotion is legitimate or illegitimate.

Provocative images like the one accompanying "Cigarettes cause fatal lung disease"—which juxtaposes a pair of healthy lungs with a pair of diseased lungs—fall on the legitimate side.[292] This (accurate) depiction of smokers' lungs is disturbing if not "shocking," and intentionally so, given the research showing that "risk information is most readily communicated by messages that arouse emotional reactions."[293] First, as studies establish, by increasing the warning's salience, it makes it more likely that the viewer will actually read and think about the government's message.[294] The current warnings are regularly overlooked,[295] and ignored warnings cannot be effective warnings.[296] Second, it makes it more likely that the viewer will consider the consequences to herself. The vividness of the image makes the personal risk more immediate, thus deploying the availability heuristic in a way that counteracts optimism bias and other heuristics that have worked

288. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 569 (6th Cir. 2012); *see also R.J. Reynolds*, 696 F.3d at 1230 (Rogers, J., dissenting) ("[F]actually accurate, emotive, and persuasive are not mutually exclusive descriptions . . . .").

289. *See supra* notes 173–181 and accompanying text.

290. *See supra* notes 183–184 and accompanying text.

291. *See* R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin., 845 F. Supp. 2d 266, 270 (D.D.C. 2012) (noting that the FDA concedes that images were chosen based on their ability to evoke emotion).

292. *Id*. at 269–70.

293. *Id*. at 270 n.9 (emphasis omitted).

294. Research indicates that "smokers who report greater negative emotional reactions in response to cigarette warnings are significantly more likely to have read and thought about the warnings." *Id*. (summarizing research).

295. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 563 (6th Cir. 2012) (noting that "empirical studies consistently indicate that these 'warnings are given little attention or consideration by viewers'").

296. *Id*. (describing Institute of Medicine report that concluded "the basic problem with the U.S. warnings are that they are unnoticed and stale, and they fail to convey relevant information in an effective way") (internal quotations omitted).

against smokers' appreciation of the risks of smoking.[297] Although relying on emotion, neither of these methods seems to undercut the decision-making autonomy of the viewer.

There is, however, another use of emotion that is potentially troubling: "[W]arnings that generate an immediate emotional response from viewers can result in viewers attaching a negative affect to smoking . . . thus undermining the appeal and attractiveness of smoking."[298] Here, the government is taking advantage of a particular cognitive heuristic. It is the reverse process of what advertisers do when they link their product with something that triggers a positive emotional response. Instead, the government links smoking with something that triggers a negative emotional response, hoping that negative emotion will then be transferred to smoking itself. If the image is in fact illustrating the harms warned of in the text, then the negative impression seems justified. But if the emotional trigger is unrelated to the warning, then the government is taking advantage of a heuristic. In other words, while it is one thing to trigger a negative emotion with a picture of a diseased lung, it would be quite another to use an image of a dead [insert your favorite cuddly animal here].

Most of the compelled images fall into the former category: the diseased lungs illustrate "Cigarettes cause fatal lung disease"; the cancer-ridden mouth illustrates "Cigarettes cause cancer"; the man on life support illustrates "Cigarettes cause strokes and heart disease"; and the corpse illustrates "Smoking can kill you." A few of them, however, may stray into the territory of exploitation that advertising often does. For example, the image of a woman weeping uncontrollably is likely to trigger a negative emotion. Yet its connection with "Tobacco smoke causes fatal lung disease in nonsmokers" is much more tenuous than the other text and image combinations. Here, then, the government may be attempting to persuade by reliance on a cognitive shortcut rather than the merits of its claim.

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For the most part, compelling tobacco manufacturers to post warnings on their advertisements and cigarette packages does not create free speech problems. The warnings do not chill speech, so there is no loss of ideas or viewpoints in the marketplace of ideas. Despite some qualms about potential misreadings, they do not really distort the discourse on tobacco. They also do not intrude on the freedom of conscience of tobacco corporations, since corporations are not people with consciences. As for the

297. *See* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 210 (2006) (noting that concrete images of the harms of smoking can help counter optimism bias).

298. *R.J. Reynolds*, 845 F. Supp. 2d at 270 n.9.

autonomy of viewers, while the warnings can be fairly characterized as attempting to persuade rather than inform, most would concede that the government's goals are grounded in fact and autonomy-affirming. Finally, triggering an emotional reaction should not automatically equate to unconstitutional manipulation of the decision-making process, and for the most part, the emotion triggered by the mandated images does not cross the line into deliberate exploitation of cognitive shortcuts. The same cannot be said for the compelled speech required by mandatory abortion counseling laws.

B. Compelled Medical Advice: Mandatory Abortion Counseling

Informed consent, required by medical ethics and tort law, means that doctors must inform their patients about the material medical risks and benefits of any proposed procedure and the alternatives.[299] Typically, states do not tell doctors exactly what to say. In the abortion context, however, many states now dictate the content of "informed consent."[300] South Dakota requires that doctors tell women seeking to terminate their pregnancies that her abortion will "terminate the life of a whole, separate, unique, living human being",[301] and that "the pregnant woman has an existing relationship with that unborn human being."[302] The doctor must also explain "all known medical risks" of abortion, including the "[i]ncreased risk of suicide ideation and suicide."[303] Both doctor and patient must certify that the patient has understood the state's message.[304] En banc panels of the Eighth Circuit have upheld the "human being" script[305] and the suicide advisory.[306]

Mandatory ultrasounds are another trend in "informed consent."[307] North Carolina's Women's Right to Know Act requires that the abortion

299. *See infra* notes 373-374 (discussing informed consent).

300. I use quotation marks because these requirements go beyond traditional informed consent.

301. S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (2011). North Dakota has added an identical requirement. *See* N.D. CENT. CODE § 14-02.1-02(8)(a)(2) (2011).

302. S.D. CODIFIED LAWS § 34-23A-10.1(1)(c) (2011).

303. *Id.* § 34-23A-10.1(1)(e)(ii).

304. *Id.* § 34-23A-10.1.

305. Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 738 (8th Cir. 2008) (en banc) (vacating preliminary injunction); *see also* Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health, 794 F. Supp. 2d 892, 916 (S.D. Ind. 2011) (upholding requirement that physicians inform abortion patients that "human physical life begins when a human ovum is fertilized by a human sperm").

306. Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 906 (8th Cir. 2012).

307. Texas, North Carolina, Oklahoma, Louisiana, and Wisconsin have all passed laws requiring doctors to perform an ultrasound and to display and describe the image to the woman seeking an abortion. *State Policies in Brief: Requirements for Ultrasound*, GUTTMACHER INST. 2 (June 1, 2014), *available at* http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf (the laws in Texas, Louisiana and Wisconsin allow the woman to look away from the image). Mandating medically unnecessary ultrasounds raises a host of constitutional questions. *See* Caroline Mala Corbin, *The First Amendment*

provider perform an ultrasound, show the image to her patient, and give "a simultaneous explanation of what the display is depicting."[308] This description must include "the presence, location, and dimensions of the unborn child within the uterus,"[309] as well as details about limbs and organs.[310] In addition to those requirements,[311] abortion providers in Texas must describe and make audible the heartbeat.[312] Some of these statutes, often termed "speech and display" laws, exempt women whose pregnancy is the result of rape or has severe abnormalities;[313] others do not.[314]

While district courts have struck down these ultrasound and auscultation requirements on compelled speech grounds,[315] the Fifth Circuit, the first appeals court to hear a "speech and display" claim, upheld Texas's law.[316] The Fifth Circuit relied on Supreme Court decisions upholding and encouraging abortion disclosures.[317] Although recognizing that doctors' free speech rights were implicated, these decisions held that there was "no constitutional infirmity" in forcing doctors to provide "truthful [and] nonmisleading" information about the probable gestational age of the fetus.[318] Moreover, the Supreme Court has more than once

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Right Against Compelled Listening, 89 B.U. L. REV. 939, 999 n.392 (2009) [hereinafter Corbin, *Compelled Listening*]. This Article focuses solely on the compelled speech questions.

308. N.C. GEN. STAT. ANN. § 90-21.85(a)(2) (West 2011).

309. *Id*.

310. *Id*. § 90-21.85(a)(4) (requiring description of "the presence of external members and internal organs, if present and viewable").

311. TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4)(C) (West 2011). The description must detail "in a manner understandable to a layperson, a verbal explanation of the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs." *Id*.

312. *Id*. § 171.012(a)(4)(D) (requiring doctor to "make[] audible the heart auscultation for the pregnant woman to hear"). Louisiana's Hear a Heartbeat Act has a similar auscultation requirement. LA. REV. STAT. ANN. § 1299.35.2(D)(2)(a) (2012).

313. TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(5)(6) (West 2011).

314. 63 OKLA. STAT. ANN. § 1-738.3 (2006).

315. *See* Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942 (W.D. Tex. 2011); Stuart v. Huff, 834 F. Supp. 2d 424 (M.D.N.C. 2011); Stuart v. Loomis, No. 1:11-cv-804, 2014 WL 186310 (M.D.N.C. Jan. 17, 2014). The Oklahoma Supreme Court has also struck Oklahoma's mandatory speech-and-display ultrasound law, but on alternate grounds. *See* Nova Health Sys. v. Pruitt, 292 P.3d 28 (Okla. 2012).

316. Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 576 (5th Cir. 2012).

317. *See supra* notes 67–70 and accompanying text (describing Supreme Court rulings supporting persuasive informed consent).

318. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884, 838 (1992). The mandatory disclosures in *Casey* are readily distinguished from the mandatory ultrasound ones. First, gestational age is arguably at least related to the health risks of the medical procedure as it will influence the type of procedure used. Second, the statute in *Casey* excuses the doctor from the informed consent provisions if she believes it will harm her patient. *Id*. at 883–84. Third, the statute does not force the doctor herself to utter the state's message. Fourth, it requires doctors to inform women of the risks of childbirth as well as abortion. *Id*. at 881; *see also* Jennifer M. Keighley, *Physician Speech and*

suggested that women might regret an ill-informed decision to abort, providing more support for expansive informed consent laws.[319] Unlike the mandatory cigarette warnings, these mandatory abortion disclosures trigger every single compelled speech concern: chill, distortion, intrusion on autonomy of the speaker, and intrusion on autonomy of the audience.

1. Chill

Mandatory abortion counseling might chill doctors' speech. Although the statutes do not explicitly forbid physicians from supplementing or disagreeing with the compelled speech, none of them explicitly countenance it either, in contrast to earlier abortion counseling laws.[320] The first appellate panel to consider the South Dakota law believed it implicitly barred criticism because the doctor must certify that the patient has understood the state's message, which is less likely if the doctor attacks it.[321] Uncertainty about whether the statutes permit criticism may well dissuade doctors from discussing with patients their own views on the state's message.[322]

2. Distortion

Compelled speech might distort the discourse if it (1) is inaccurate or misleading; (2) advocates a point of view without clarifying that the compelled speech represents the government's opinion rather than the compelled speaker's; or (3) prevents a fiduciary from communicating in a way that furthers the best interests of her client.[323] Both the South Dakota script and the "speech and display" laws raise one or more of these concerns.

Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech, 34 CARDOZO L. REV. 2347, 2353–54 (2013).

319. *See infra* notes 399–403 and accompanying text (criticizing courts' assumption that women will regret their decision to abort).

320. Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 737 n.10 (8th Cir. 2008) (en banc) (noting that unlike earlier abortion counseling laws, the one at issue did not expressly allow doctors to dissociate from the compelled speech).

321. Planned Parenthood Minn., N.D., S.D. v. Rounds, 467 F.3d 716, 725 (8th Cir. 2006) ("These [certification] requirements would likely diminish both the ability of a physician to disassociate herself and the effect of any communication of her own views."); *see also* Post, *supra* note 4, at 953 (arguing that the language and structure of the South Dakota law makes clear that "physicians must endorse the substance of these disclosures").

322. *See*, *e.g.*, Carolyn Bardoff, *The Right NOT to Know*, TEX. OBSERVER, Apr. 1, 2012, at 8, *available at* 2012 WLNR 9582543 (describing how doctors erred on the side of caution when rules were unsettled).

323. *See supra* Part II.B.

a. Inaccurate or Misleading Information

Some of the speech mandated by abortion counseling laws is flat-out false, or at best, misleading.[324] The South Dakota law requires that doctors tell patients "all known medical risks of the procedure . . . , including . . . [the i]ncreased risk of suicide ideation and suicide."[325] Abortion, however, does not in fact make women suicidal.[326] No reputable study supports this claim or the existence of any "post-abortion syndrome;"[327] on the contrary, multiple careful analyses refute it.[328] For example, after an exhaustive review of the literature, the American Psychological Association concluded that there was no evidence that women who terminate an unwanted pregnancy have greater mental health issues than women who carry such pregnancies to term.[329] Nonetheless, the Eighth Circuit en banc upheld the suicide advisory, claiming that doctors were not required to lie to their patients and tell them that abortion *causes* an increased risk of suicide because the statute referred only to correlation, not causation.[330] As Rebecca Tushnet points out, "It would have been just as 'true' to mandate a disclosure that people who take advil have an increased risk of headaches."[331]And of course the Eighth Circuit's strained reading is still misleading, as most people would reasonably understand the advisory to mean that abortion *causes*

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324. Several states require abortion providers to relay that abortions increase the risk of breast cancer, infertility, or depression, despite the fact that such claims are scientifically false. A few states, perhaps aware of the shaky scientific foundations of their mandated speech, have added a qualifier. For example, the Texas law states that the doctor must disclose "when medically accurate," the risks associated with abortion including the risks of infection, hemorrhage, breast cancer, and infertility. TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2009).

325. S.D. CODIFIED LAWS § 34-23A-10.1(1)(e)(ii) (2011).

326. *See* Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175, 1178–87 (2014) (examining scientific evidence regarding mental health effects of abortion).

327. *See*, *e.g.*, Gail Erlick Robinson et al., *Is There an "Abortion Trauma Syndrome"? Critiquing the Evidence*, 17 HARV. REV. PSYCHIATRY 268, 269–72 (2009) (noting that recent studies asserting causal connection between abortion and subsequent mental disorders are rife with methodological problems).

328. *See*, *e.g.*, Vignetta E. Charles et al., *Abortion and Long-Term Mental Health Outcomes: A Systematic Review of the Evidence*, 78 CONTRACEPTION 436, 436 (2008) ("Despite claims of emotional harm, the existence of such an abortion-related syndrome has yet to be established empirically."); Trine Munk-Olsen et al., *Induced First-Trimester Abortion and Risk of Mental Disorder*, 364 NEW ENG. J. MED. 332, 338 (2011) ("In conclusion, our study shows that the rates of a first-time psychiatric contact before and after a first-trimester induced abortion are similar. This finding does not support the hypothesis that there is an overall increased risk of mental disorders after first-trimester induced abortion."); Nada L. Stotland, *The Myth of the Abortion Trauma Syndrome*, 268 JAMA 2078, 2078 (1992) ("This is an article about a medical syndrome that does not exist.").

329. BRENDA MAJOR ET AL., AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 68 (2008).

330. In other words, the majority claimed the statute merely alerted women to a correlation between abortion and suicide, not that abortion causes an increased risk of suicide. Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 897–98 (8th Cir. 2012).

331. Tushnet, *supra* note 73, at 2416.

psychological problems.[332] Furthermore, requiring doctors to list every possible harm caused by abortion, regardless of how remote, without requiring them to advise their patients about the negative consequences of continuing the pregnancy[333] could easily leave patients with the impression that abortion is more dangerous than childbirth, when in fact the reverse is true.[334]

Information provided via mandatory ultrasound and auscultation is not untrue in the way that claims about the increased risk of suicide are. Ultrasounds show the fetus as it exists at the time the image is shown, and auscultation makes audible the sound of an actual beating heart.[335] Nonetheless, this speech too can be misleading. Most obviously, the ultrasound image has been magnified and the heartbeat amplified.[336] Unlike the technological modifications made to the cigarette warnings, these alterations change the message of the compelled speech: as a result, women might conclude that the fetus is larger, stronger, and more developed than it actually is. In addition, the social meaning attached to the heartbeat and ultrasound image (discussed further below)[337] can exacerbate that misimpression.

b. Misattributing Ideological Statements

Even where compulsory speech is not false or misleading, distortion may still occur if the message advocates a viewpoint and the audience

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332. *Id*. at 908 (Murphy, J., dissenting) (arguing that plain meaning of advisory is that abortion causes suicide). Just as the D.C. Circuit ignored the most natural reading of the cigarette disclosures to argue that they were misleading, the Eighth Circuit ignored the most natural reading of the abortion disclosures to claim they were not false.

333. *See*, *e.g*., S.D. CODIFIED LAWS § 34-23A-10.1(1)(e)(iii) (2011) (requiring disclosure of death rates due to abortion but not death rates due to childbirth).

334. David A. Grimes & Elizabeth G. Raymond, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 215 (2012) (finding that U.S. women are fourteen times more likely to die in childbirth than from complications of an abortion); *cf*. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 764 (1986) ("That the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion character of the statute and its real purpose.").

335. Furthermore, in providing the mandated description, the physician presumably will not misrepresent the existence or attributes of the limbs, organs or heartbeat.

336. Medical professionals agree that fetal sonograms at, for example, seven to ten weeks, will be magnified. *See*, *e.g*., E-mail from Marjorie Greenfield, M.D., Professor of Obstetrics & Gynecology, Univ. Hosps. Med. Grp., to author (Apr. 16, 2012) (on file with author) ("[T]he answer is yes, it is magnified on the screen."); E-mail from Arthur Haney, M.D., Chairman & Professor of Obstetrics & Gynecology, Univ. of Chi. Pritzker Sch. of Med., to author (Apr. 11, 2012) (on file with author) ("I suspect [the image will generally be magnified at least several times its actual size] as . . . the heart is very small at that gestational age."); e-mail from George Macones, M.D., Dir. of Maternal-Fetal Med. & Ultrasound Div., Wash. Univ. Sch. of Med., to author (Apr. 12, 2012) (on file with author) ("I would guess [probably 5–10 times the actual size] . . . but it really depends.").

337. *See infra* notes 364–372 and accompanying text.

misattributes it to the speaker. As explained in the next Subpart, that the point of these laws is to convince women with unwanted pregnancies to decide against abortion is not really in question. The question is whether the patient will understand that this pro-life message is the government's and not her doctor's. If not, the listener might give too much weight to the government's viewpoint. To start, confusion about who is speaking could cause the listener to overestimate the popularity of the government's message, thereby increasing its persuasiveness.[338] In addition, the distortion may be magnified due to the tendency to defer to respected authority figures such as doctors.[339]

The answer depends on whether the doctor may dissociate herself from the speech.[340] That is, may the doctor tell her patient, "I completely disagree, but I am required by law to read you this script"? If so, confusion is less likely. If not,[341] and the patient believes the speech to be her physician's, who presumably is an expert on matters of life and death, there is a risk the patient will accord it undue weight.

c. Distortion of Fiduciary Communications

By insisting that doctors serve as mouthpieces for the state's ideological viewpoint,[342] mandatory compelled counseling distorts the discourse between a doctor and her patient and interferes with the doctor's ethical obligations towards her patient.[343]

The goal of these mandatory counseling laws is clear: to persuade women to choose childbirth over abortion—a goal the Supreme Court has explicitly approved.[344] Both South Dakota's script and the "speech and display" laws express an ideological position—disapproval of abortion—on a controversial subject. South Dakota disputed this, arguing that its compelled script amounted to accurate and nonmisleading facts and not a pro-life commentary about when life begins because the statute defines

338. *See supra* note 99 and accompanying text.

339. *See supra* notes 114–120 and accompanying text.

340. Thus, the physician's ability to disagree affects both chill and distortion. *See supra* Part III.B.1.

341. *Cf.* Zita Lazzarini, *Perspective: South Dakota's Abortion Script—Threatening the Physician–Patient Relationship*, 359 NEW ENG. J. MED. 2189, 2190 (2008) (arguing that the complex certification requirements "effectively prevent[] [physicians] from disassociating themselves from the compelled speech").

342. Gregory D. Curfman et al., *Editorial: Physicians and the First Amendment*, 359 NEW ENG. J. MED. 2484, 2485 (2008) ("Patients should not accept, and our profession should not allow, physicians to become a mouthpiece of state-sponsored ideology.").

343. *See id*.

344. *See supra* notes 69–71 and accompanying text.

"human being" as a "member of the species Homo Sapiens."[345] In other words, telling a woman that she was about to "terminate the life of a whole, separate, unique, living human being"[346] was not making an argument that the fetus was a living person "whose life possesses dignity and warrants respect"[347] in the way that a baby is a living person. Rather, it was merely explaining that the fetus was a human fetus.

Although the Eighth Circuit agreed with the state,[348] many commentators have correctly pointed out how implausible this claim is.[349] First, given the backdrop of the abortion debate in the United States, most reasonable people would understand the statement to be making an ideological point.[350] Second, the state performs an unseemly sleight of hand when it invokes a statutory definition—and a statutory definition that is not part of the script—to transform a plainly ideological statement into a neutral fact.[351] Third, the idea that there is any need to explain that the fetus was a human one rather than a panda or dolphin one is preposterous.[352] If that were not enough, the legislative history makes clear the pro-life agenda behind it. For example, the senate sponsor of South Dakota's law is widely quoted as saying, "[I]t is the time for the South Dakota Legislature to . . . protect the lives and rights of unborn children . . . ."[353]

While the "speech and display" requirements have a stronger grounding in fact, accurate facts can still argue a viewpoint. The (accurate) compelled cigarette disclosures are clearly designed to convey the message that smoking is bad. Likewise, the (accurate) display and description of the heartbeat, limbs, and organs aim to draw an equivalence between the still developing fetus and the body parts of a fully formed person and thereby provoke the reaction that the fetus is a living being just like us whose life

345. S.D. CODIFIED LAWS § 34-23A-1(4) (2011) (defining human being as "an individual living member of the species of Homo sapiens").

346. *Id*. § 34-23A-10.1(1)(b).

347. Post, *supra* note 4, at 954–55.

348. Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 735–37 (8th Cir. 2008) (en banc) (internal citation omitted) (acknowledging that "[t]aken in isolation" the language "certainly may be read to make a point . . . about the ethics of abortion" but that "where a term is defined by statute, the statutory definition is controlling").

349. *See generally* Post, *supra* note 4; Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351 (2008).

350. *See Planned Parenthood Minn*., 530 F.3d at 742 (Murphy, J., dissenting) ("In the context of abortion, the term 'human being' has an overwhelmingly subjective, normative meaning, in some sense encompassing the whole philosophical debate about the procedure.").

351. *See supra* Part I.B.1 (criticizing reliance on statutory meaning instead of common meaning).

352. *Eighth Circuit to Pregnant Women: You're Not Carrying a Dolphin!*, REPROD. RIGHTS PROF BLOG (June 27, 2008), http://lawprofessors.typepad.com/reproductive_rights/2008/week26/index.html (mocking the Eighth Circuit's en banc decision by imagining "all those scores of women who have flocked to abortion clinics under the sad misimpression that they were carrying developing dolphins").

353. Steve Ertelt, *South Dakota State Senate Approves Ban on Virtually All Abortions*, LIFENEWS.COM (Feb. 22, 2006), http://archive.lifenews.com/state1433.html.

should not be ended. The hope, as one advocate explained, is that the mandated disclosures will "transform[] a confused customer into a mother willing to rise off the table, walk out of the abortion mill, and choose Life."[354] As with South Dakota's law, the sponsors of mandatory ultrasound laws do not deny their pro-life goals.[355] In fact, many of these laws are based on a model drafted by Americans United for Life,[356] a pro-life organization whose attorneys, according to its website, "work tirelessly across the country to help legislators write common-sense laws that protect human life at every stage."[357]

Furthermore, the social meanings associated with heartbeats and ultrasound images means that doctors impart more than just facts about what the fetus looks and sounds like. The heartbeat, for example, often symbolizes life: "In many cultures the beating, and life itself, is assumed to be located in the heart (thus facilitating the metonymic understanding of the heart being the person)."[358] Yet, although an embryo may have a heartbeat at six weeks,[359] it is only approximately half an inch long, and weighs less than an aspirin.[360] At this stage, it has no bones; eye and ear structures are just beginning;[361] and many organs have not even started to grow,[362] so that

354. Steven Ertelt, *Victory: Appeals Court Upholds Texas' Ultrasound Abortion Law*, LIFENEWS.COM (Jan. 1, 2012), http://www.lifenews.com/2012/01/10/victory-appeals-court-upholds-texas-ultrasound-abortion-law/ (quoting Texas Right to Life Director Elizabeth Graham); *see also* Keighley, *supra* note 318, at 2398 ("While there is little actual evidence to support the theory that a pregnant women who sees her ultrasound will decide to carry the pregnancy to term, this belief is widely held throughout the pro-life movement.").

355. *See, e.g.*, Sarah E. Weber, *An Attempt to Legislate Morality: Forced Ultrasounds as the Newest Tactic in Anti-Abortion Legislation*, 45 TULSA L. REV. 359, 365 (2009) (reporting that the Senate sponsor of Oklahoma's ultrasound law explained in a telephone interview that the purpose of the ultrasound requirement was to reduce the number of abortions). That lawmakers want to improve women's informed consent to abortion is belied by a law—passed on the same day as the ultrasound requirement—which allows doctors to keep from women the fact that their fetus suffers from birth defects. *See* Sue H. Abreu, *The Doctor's Dilemma with the Oklahoma Abortion Law Ultrasound Requirement*, 37 OKLA. CITY U. L. REV. 253, 285 (2012).

356. *See* Ryan Sibley, *Virginia Ultrasound Law Is the Image of a Few Others*, SUNLIGHT FOUND. REPORTING GRP. (March 7, 2012), http://reporting.sunlightfoundation.com/2012/virginia-ultrasound-law-image-few-others/.

357. *About A.U.L.*, AM. UNITED FOR LIFE, http://www.aul.org/about-aul/ (last visited Aug. 4, 2012).

358. *See* Toril Swan, *Metaphors of Body and Mind in the History of English*, 90 ENG. STUD. 460, 474 (2009); *see also* Diane Yale, *The Heart Connection*, 11 MEDIATION Q. 13, 15 (referring to heart as a "symbol of life and death through the ages").

359. Nat'l Insts. of Health, *Fetal Development*, MEDLINEPLUS ENCYCLOPEDIA (Sept. 12, 2011), http://www.nlm.nih.gov/medlineplus/ency/article/002398.htm [hereinafter MEDLINEPLUS ENCYCLOPEDIA]; *Fetal Development: First Trimester*, AM. PREGNANCY ASS'N. (Aug. 2007), http://www.americanpregnancy.org/duringpregnancy/fetaldevelopment1.htm [hereinafter AM. PREGNANCY ASSOC.].

360. *See* AM. PREGNANCY ASS'N., *supra* note 359.

361. *See*, *e.g.*, MAYO CLINIC, *supra* note 62.

362. It is not until the ninth week of pregnancy that all of the essential organs have begun to form. *See* MEDLINEPLUS ENCYCLOPEDIA, *supra* note 359.

it has no digestive system, no respiratory system.[363] Nevertheless, because we associate the heartbeat with life, emphasizing the heartbeat endeavors to create the impression of a fully formed life when it is actually still in the early stages of development.[364]

The ultrasound images likewise draw on common cultural understandings. The sonographic image of the fetus has become "socially ubiquitous."[365] It appears on holiday cards, Facebook pages, and refrigerators, and "[i]t is hard to remember a time when baby books did not have a page for 'My photo inside my mommy's tummy.'"[366] "[E]veryone has seen, and many have admired, snapshots of a particular fetus, as happily expectant parents share 'baby's first picture' with the rest of us."[367] The ultrasound image has also taken on a very specific meaning in the United States. As Carol Sanger has argued, because the ultrasound has become a ritual for today's expectant parents—the moment they meet their baby and the means by which they show their newest family member to the world—the current social meaning of an ultrasound image is that of a wanted baby.[368] This reading of an ultrasound image is neither inevitable nor universal. First-term ultrasounds do not much look like babies: even today, several studies demonstrate that most expectant couples need help interpreting the fetal image.[369] And the image does not have the same connotations in other countries.[370] Yet in America, people have learned to make the connection: just as the heartbeat is shorthand for alive, an ultrasound image is shorthand for a wanted baby. Consequently, when a woman looks at an ultrasound image, rather than notice the scientific details, she is likely to see an image of a future baby.[371] "Although presented as though it were information pure and simple, the fetal image has the cultural force of a portrait, betokening the presence of the entity

363. Lungs do not begin functioning until the twenty-fifth week. *See id*.

364. In addition, because the heart symbolizes love in our culture (just think of I ♥ NY), to highlight the fetus's heart is to try and forge an emotional connection between the patient and fetus.

365. Christine H. Morton, *Book Review: Lisa M. Mitchell's Baby's First Picture: Ultrasound and the Politics of Fetal Subjects*, 29 J. HEALTH POL. POL'Y & L. 156, 156 (2004); *see also* Sanger, *supra* note 349, at 356 ("[T]he fetus is now a familiar presence, one whose image turns up in high school biology texts, in movies, advertisements ('Is Something Inside Telling You to Buy a Volvo?'), and in 1994 on English 25p postage stamps.").

366. Morton, *supra* note 365, at 156.

367. Sanger, *supra* note 349, at 356.

368. *Id*. at 367; *see also* LISA M. MITCHELL, BABY'S FIRST PICTURE: ULTRASOUND AND THE POLITICS OF FETAL SUBJECTS 188 (2001) (noting that the "collections of echoes" are now understood and read as "baby's first picture" in Canada and U.S.).

369. Mitchell, *supra* note 368, at 5.

370. *Id*. at 189–94 (describing how other cultures read the ultrasound quite differently).

371. Sanger, *supra* note 349, at 378 ("[T]hese statutes are unabashedly meant to transform the embryo or fetus from an abstraction to a baby in the eyes of the potentially aborting mother.").

depicted."[372] Essentially, the state is forcing doctors to tell women that their unwanted pregnancy should really be viewed as a wanted child. Conveying this ideological message to women seeking to terminate their pregnancies clashes with physicians' professional responsibilities.

Whether they are termed fiduciaries or not[373]—and they often are[374]—doctors legally and ethically owe certain duties to their patients.[375] Among them is the obligation to provide their patients the medical information necessary for informed consent.[376] That is, doctors must disclose the material risks and alternatives of any medical procedure.[377] The state's ideological opinions masquerading as facts do not qualify. Nor does false or misleading information. On the contrary, providing misinformation precludes true informed consent.[378]

Furthermore, forcing physicians to tell their patients false or unwanted information may clash with their ethical obligation to "do no harm."[379] Doctors are sworn to help their patients, yet imposing this information onto women who cannot afford another child,[380] or whose pregnancy suffers from fatal anomalies or results from rape, is professionally unethical, if not cruel.[381] As the district court noted in striking down North Carolina's mandatory ultrasound law, it was "likely to harm the psychological health

372. *Id*. at 379; *see also id*. ("[T]he technology and the practice of ultrasound have transformed the fetus from potential life to something that can have its picture taken, a trait which in our visual culture is perhaps as close to a marker of personhood as one can get."); *see also* Mitchell, *supra* note 368, at 191 ("[W]hat is seen during an ultrasound . . . emerges out of particular configurations of culture, history, technology, and power.").

373. *See supra* notes 118–124 and accompanying text (discussing fiduciaries).

374. *See*, *e.g*., Lockett v. Goodill, 430 P.2d 589, 591 (Wash. 1967) ("The relationship of patient and physician is a fiduciary one of the highest degree. It involves every element of trust, confidence and good faith."); Hall, *supra* note 118, at 489 ("[N]umerous courts and commentators have classified physicians as fiduciaries and imposed on them a variety of obligations and liabilities.").

375. The main ethical requirements involve (1) respect for patient autonomy; (2) beneficence or non-maleficence ("do no harm"); and (3) justice. *See* RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 13 (1986).

376. *Informed Consent*, AM. MED. ASS'N (AMA), http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/informed-consent.page# (last visited July 16, 2012), *available at* http://archive.is/6d4aU [hereinafter AMA, *Informed Consent*] (noting that "[p]roviding the patient relevant information has long been a physician's ethical obligation").

377. *See*, *e.g*., *id*.; Canterbury v. Spence, 464 F.2d 772, 782–83 (D.C. Cir. 1972); Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 5 (2012).

378. Lazzarini, *supra* note 341, at 2191. It also violates the ethical obligation to "be honest in all professional interactions." *Principles of Medical Ethics*, AM. MED. ASS'N, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page?# (last visited July 16, 2012).

379. *See* FADEN & BEAUCHAMP, *supra* note 375, at 13 (noting doctors' main ethical obligations).

380. Most women who have an abortion are already mothers. *See infra* note 401.

381. *See* Kevin Sack, *In Ultrasound, Abortion Fight Has New Front*, N.Y. TIMES, May 28, 2010, at A1 (describing how speech and display requirements changed no patient's mind, but caused many to cry).

of the very group the state purports to protect."[382] Indeed, these laws risk ruining the doctor–patient relationship by undermining a patient's trust in her doctor.[383] The last time the Supreme Court found that a speech regulation distorted a profession by altering the professionals' traditional role, it struck it down.[384] Speech regulations that distort the medical profession by interfering with physicians' traditional obligations are likewise unconstitutional.[385]

3. Autonomy of Doctors

Besides upsetting the doctor–patient relationship, the compelled speech obviously raises speaker autonomy concerns.[386] Coercing doctors to speak in a way that violates their professional code of conduct undermines their individual dignity and autonomy. To add insult to injury, all the factors that exacerbate the affront to speaker autonomy are present here.[387] First, the compelled abortion counseling conscripts the doctors' physical self and forces them to utter words that they would rather not.

Second, doctors must convey beliefs antithetical to their own, and "[t]he concept that the government may make puppets out of doctors . . . is not one [that] is consistent with the Constitution."[388] Despite claims to the contrary, the government script mandated by South Dakota takes a position on a highly contested moral proposition about when life begins, as do the ultrasounds and heartbeat requirements.[389] As Justice O'Connor once noted, informed consent provisions may "violate the First Amendment rights of the physician if the State requires him or her to communicate its

382. Stuart v. Huff, 834 F. Supp. 2d 424, 432 (M.D.N.C. 2011).

383. *See* Curfman et al., *supra* note 342, at 2485 (arguing that trust is an essential component of a successful doctor–patient relationship); *see also* Lauren R. Robbins, *Open Your Mouth and Say 'Ideology': Physicians and the First Amendment*, 12 U. PA. J. CONST. L. 155, 193 (2009) (noting that patients' trust can be destroyed "if patients believe that the advice given to them comes not from the sphere of medicine but from the halls of the legislature").

384. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 544 (2001) (striking law because "[r]estricting . . . [the speech of] attorneys . . . distorts the legal system by altering the attorneys' traditional role . . . .").

385. *See* Vandewalker, *supra* note 377, at 69 ("[T]he worst features of these laws are condemned as unethical on every account of informed consent that I am aware of. Their utter failure to be ethically justified according to a diversity of theories shows how far outside the bounds of medical ethics these laws are.").

386. *See* Poe v. Ullman, 367 U.S. 497, 513 (1961) (Douglas, J., dissenting) ("The right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion.").

387. *See supra* Part II.C.

388. Tex. Med. Providers Performing Abortion Servs. v. Lakey, No. A-11-CA-486-SS, 2012 WL 373132, at *3 (W.D. Tex. Feb. 6, 2012).

389. *See supra* notes 350–372 and accompanying text.

ideology."[390] The coercion is particularly troubling in this case because the view that abortion should always be disfavored is so closely linked to religious belief: opposition to abortion regardless of the circumstances more often than not stems from the religious view that life begins at conception.[391] Compelling physicians to advance an ideological position, especially one with religious overtones, on pain of criminal sanction, infringes on the doctors' freedom of conscience.[392]

Third, there is a risk of misattribution,[393] especially if physicians cannot dissociate from the messages. Although a patient is not likely to think a doctor willing to perform abortion is pro-life, one can be pro-choice generally yet think abortion in particular circumstances is inappropriate.[394] A key component to personal autonomy is not just deciding what one does or does not say, but controlling one's presentation to others; mandatory abortion counseling overrides that control.

4. Autonomy of Patients

These abortion disclosures fail to respect audience autonomy by imposing—on a captive audience no less[395]—the state's ideological viewpoint on a hotly contested subject.[396] In addition, the mandated disclosures also attempt to manipulate women in ways that are fundamentally inconsistent with our notions of an autonomous decision maker.

a. Paternalistic Ends

As discussed earlier, where one draws the line between acceptable government involvement in people's decision making and unacceptable paternalism varies. Yet on the wrong side of everyone's line are

390. City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 472 n.16 (1983) (O'Connor, J., dissenting).

391. *See*, *e.g.*, RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 154–59 (1993) (arguing that beliefs about abortion and euthanasia are inherently religious).

392. To allow the state to coerce recitation of a religious belief would be unimaginable in almost any other context. *See supra* notes 9–16 and accompanying text (discussing *Barnette* and *Wooley*).

393. *See supra* Part II.C.3.

394. *See, e.g.*, Calvin TerBeek, *Empiricizing the Equal Protection Approach to Abortion*, 38 MCGEORGE L. REV. 775, 796 (2007) (noting that support or opposition to abortion is often contextual).

395. Women seeking to terminate an unwanted pregnancy cannot avoid the government's message. In fact, the statutes often require these women to certify that they have received and understood the state's information. *See*, *e.g.*, S.D. CODIFIED LAWS § 34-23A-10.1 (2011); TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(5) (West 2011); N.C. GEN. STAT. ANN. § 90-21.85(a)(5) (2011). Women who avert their eyes, if allowed, may have it noted in their certification. *See*, *e.g.*, *id.* § 90-21.85(a)(5)–(6).

396. *See supra* notes 344–357 and accompanying text.

government attempts to force its viewpoint on a controversial moral issue. That is exactly, however, what the mandatory counseling laws do. These compulsory disclosures are not providing clarifying or otherwise unavailable factual information, or even encouraging autonomy-enhancing behavior. Instead, these disclosures are ideological and undermine rather than enhance women's autonomy and autonomous decision making.

Unlike the case of tobacco warnings, there is no plausible argument that the state's message is incontrovertibly autonomy-affirming. This may be due to the fact that while the goal of avoiding smoking was grounded in uncontested facts, the goal of stopping abortion is grounded in a contested moral proposition. That smoking is harmful because it can lead to illness and addiction is not in question. That abortion is harmful because it kills an unborn baby, on the other hand, is a moral and religious viewpoint over which the country is deeply divided.

In any event, on most accounts, freedom from addiction is definitely autonomy-enhancing.[397] Having a child is not. On the contrary, as feminists have been arguing for decades, it is precisely the ability to control procreation—an ability made possible by the legality and accessibility of abortion—that contributes to women's autonomy.[398] By trying to persuade women to continue a pregnancy they prefer to end, the state either displays contempt for women's autonomy by pressuring women to choose the option that works against it, or at the very least disregards women's autonomy by presumptuously assuming that it knows best.

Requiring women to hear the government's moral argument also works against their autonomous decisionmaking. The abortion counseling laws paternalistically assume that women are unaware of the moral repercussions of abortion and therefore may later regret their decision. *Casey*'s justification for mandatory counseling exemplifies this conviction: "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."[399] The notion that women are like impulsive children who abort without thinking, thereby requiring the state to intervene and properly "inform" them for their own good, clearly does not credit women's decision-making

397. MARK A. HALL, MAKING DECISIONS: THE LAW, ETHICS, AND ECONOMICS OF RATIONING MECHANISMS 147 (1997).

398. TerBeek, *supra* note 394, at 812 (noting that "the empirical evidence shows that, on balance, abortion has given women an equal chance at the full and unfettered participation in all facets of life").

399. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992); *see also* Gonzales v. Carhart, 550 U.S. 124, 159 (2007) ("While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.").

capacity.[400] It is particularly absurd to claim that women do not fully comprehend the moral dimensions of pregnancy when the majority of women who have abortions in the United States are already mothers, and understand exactly what pregnancy entails.[401] This mindset, which permeates abortion jurisprudence,[402] fails to respect women as autonomous moral agents, capable of making their own moral evaluations.[403]

Mandatory counseling laws are especially insulting to decisional autonomy because, as a rule, a state's attempts to impose its own ideology on an unwilling audience are considered anathema and quickly struck down.[404] For no other medical procedure does the state force patients to hear the moral ramifications of their decision and the state's disapproval of one option.[405] Free speech principles are abandoned and the state is permitted to lecture a captive audience on its moral position only when women decide to terminate an unwanted pregnancy.

In sum, instead of promoting women's self-determination and autonomy[406]—the main goal behind informed consent[407]—the paternalistic counseling undercuts it. As the Supreme Court noted during the era it struck down earlier versions of these laws, "[t]his type of compelled information is the antithesis of informed consent."[408]

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400. *Cf. Casey*, 505 U.S. at 918 (Stevens, J., dissenting) (arguing that the mandatory counseling law upheld in *Casey* "rest[s] on outmoded and unacceptable assumptions about the decisionmaking capacity of women"). In any event, every single credible study shows that having an abortion after an unwanted pregnancy causes no more mental ills than bearing a child after an unwanted pregnancy. *See supra* notes 327–329 and accompanying text.

401. Sixty-one percent of women who have an abortion in the United States have already had a child. RACHEL K. JONES ET AL., GUTTMACHER INST., *Characteristics of U.S. Abortion Patients 2008*, at 8 (2010), *available at* http://www.guttmacher.org/pubs/US-Abortion-Patients.pdf.

402. The same paternalistic assumption that women need to think more about the decision to terminate motivates mandatory waiting periods.

403. Furthermore, the state's moral viewpoint that the fetus is a person who deserves to live is for the most part a religious one. *See supra* notes 391–392 and accompanying text. As a result, the state is essentially preaching religious beliefs to women who likely do not share them. By compelling women to hear its religious argument, the state also fails to respect women's religious identity.

404. One exception is children's educational experiences at school. Public schools may regulate student speech if related to a legitimate pedagogical interest. *See*, *e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988). Women, however, are not children in school. And even schoolchildren are exempted from ideological compelled speech. *See supra* notes 9–15 and accompanying text (discussing *Barnette*).

405. *See supra* note 334 (noting the uniqueness of informed consent for abortion compared to other medical procedures).

406. In claiming that informed consent is their goal, supporters of these laws overlook two points. First, informed consent is about providing relevant medical information. Second, informed consent can be achieved by making information available, rather than foisting it on patients.

407. *See* Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 226 (2009); *see also id*. at 235 (noting that informed consent "embodie[d] a model recognizing that competent adult patients have the capacity to make their own medical treatment decisions").

408. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 764 (1986).

b. Manipulative Means

The mandatory abortion counseling laws also fail to respect women's autonomy by attempting to manipulate their decision making. Many of the same characteristics that distort the discourse also amount to manipulation. And while not every use of emotion is manipulative, the manner in which the counseling laws attempt to exploit cognitive heuristics is.

Forcing women to hear inaccurate or misleading information and creating confusion about the source of the ideological message both distort the discourse. As discussed above, "through misleading and selective disclosures," these laws "endeavor to trick women . . . into rejecting abortion."[409] They may also hope to mislead women into attributing the state's message to their doctors. Because of the doctor's expertise and well-known ethical responsibilities, patients are apt to trust their doctor's opinions.[410] Women who believe that their doctor either endorses the view that the fetus is a "whole, separate, unique, living human being," or thinks it important that they see and hear a detailed description of their fetus may not evaluate that information in the same way as those aware that these are government-mandated messages. Thus, coercing the women's physician into presenting the state's ideological message exploits the "defer-to-trusted-expert" heuristic.

In a similar vein, exposing women to images and sounds with pre-existing emotional connotations exploits affective priming.[411] Because all the same information can be imparted without the auditory and visual embellishment, the heartbeat and ultrasound images and descriptions are added to provoke a particular emotional reaction.[412] The point of auscultation is not simply to establish that the heart is developed enough to beat. Rather, because the heart represents life and love in our culture, the point is to imbue the fetus with these attributes. Likewise, the point of an ultrasound is not simply to illustrate the physiological development of the growing fetus, as a picture of a coffee machine might illustrate its features. Instead, the goal is to associate the fetus with a wanted child, the current cultural meaning of an ultrasound.[413] It is more like an advertisement of a

409. Caitlin E. Borgmann, *Judicial Evasion and Disingenuous Legislative Appeals to Science in the Abortion Controversy*, 17 J. L. & POL'Y 15, 34 (2008).

410. *See* REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AM. MED, ASS'N, *The Patient-Physician Relationship*, 2 (2001), *available at* http://www.ama-assn.org/resources/doc/code-medical-ethics/10015a.pdf.

411. *See supra* notes 187–191 and accompanying text.

412. *See* John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327, 342 (2011) ("Behind the anti-abortion enchantment with sonograms is the idea that if a woman would just look and see what is there, she will see that it is a little tiny baby and will be incapable of killing it.").

413. *See supra* notes 365–372 and accompanying text. Having the doctor describe the arms and legs only cements this link.

coffee machine with a fetching woman. Granted, the relationship between a fetus and a living, wanted baby is tighter than that between a coffee machine and a sexy model. But the cognitive mechanism of transferring the emotions aroused by one onto the other is the same. In both cases, the state is trying to persuade you to its own point of view by manipulating associations rather than with arguments on the merits. Furthermore, while people may be well aware of this kind of manipulation when they see advertisements on billboards or TV, they probably do not expect to encounter it in their doctor's office.[414]

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In summary, compelling doctors to deliver the ideological message that abortion is killing an unborn baby, and that the state disapproves, is problematic for many reasons. It risks chilling doctors' speech. It might also distort that discourse if listeners attribute the government's message to the physicians forced to convey it. It certainly distorts the doctor–patient relationship. Furthermore, by compelling doctors to voice ideological positions contrary to their own, and contrary to what their professional ethics would have them say, the compelled speech undermines their autonomy. Finally, in treating women as incompetent moral decision makers, and trying to manipulate their emotions, mandatory counseling violates women's autonomy.

C. Compelled Nonprofit Speech: Crisis Pregnancy Center Disclosures

Abortion in the United States has given rise to more than one compelled speech controversy. Several jurisdictions have passed laws forcing "limited-service pregnancy center[s]," also known as "crisis pregnancy centers," to disclose certain information to their patients.[415] Statutes generally define them as facilities whose primary purpose is to provide services such as pregnancy tests or ultrasounds to women, but do not provide or refer for abortions or contraception.[416] The crisis pregnancy centers (Centers) are usually nonprofit and offer their services free of charge.[417] Their ultimate goal, as the Centers themselves will acknowledge,

414. Notably, studies show that even people who are aware of particular heuristics still fall prey to them. *Cf.* Hanson & Kysar, *Taking Behavioralism Seriously*, *supra* note 113, at 667–68 (recounting study where subjects knew an anchor was randomly generated, yet the anchoring bias was still significant).

415. *See infra* notes 442–445 and accompanying text.

416. *See*, *e.g.*, N.Y.C. ADMIN. CODE § 20-815(g) (2011); BALT., MD., HEALTH CODE § 3-501(1)–(2) (2009).

417. *See* Susan Lund, *Crisis Pregnancy Centers Should Be Regulated by Consumer Protection Statute in Wisconsin*, 27 WIS. J.L. GENDER & SOC'Y 37, 38 (2012).

is to persuade women seeking abortions to change their minds.[418] Almost all of them are linked to a religiously-based umbrella organization or a church.[419] For example, The Greater Baltimore Center for Pregnancy, one of three Centers that have recently challenged mandatory disclosures, operates on property owned by the Archbishop of Baltimore and requires its employees to sign a statement affirming their Christian faith and the belief that abortion is immoral.[420] Nationwide, there are an estimated 4,000 Centers, compared with only 2,000 abortion providers/clinics.[421]

Centers have been widely criticized for intentionally misleading women about the services they offer.[422] As reported in a congressional investigation, Centers "often mask their pro-life mission in order to attract abortion-vulnerable clients."[423] Centers usually carry neutral names, such as "EMC Frontline Pregnancy Centers," or "Women's Resource Center,"[424] or names that mimic established health clinics.[425] Most do not explain their anti-abortion position on their websites or in their advertisements,[426]

418. Roughly 90% of Centers in the United States are associated with one of three umbrella organizations: National Institute of Family and Life Advocates (NIFLA) (about 1,200 affiliates), CareNet (1,100), and Heartbeat International (900). NARAL PRO-CHOICE CAL. FOUND., UNMASKING FAKE CLINICS: THE TRUTH ABOUT CRISIS PREGNANCY CENTERS IN CALIFORNIA 5 (2010) [hereinafter UNMASKING FAKE CLINICS], *available at* http://www.prochoicecalifornia.org/assets/files/cpcreport 2010-revisenov2010.pdf. NIFLA describes its goal as "developing a network of life-affirming ministries in every community across the nation in order to achieve an abortion-free America." *See Mission and Vision*, NAT'L INST. FAM. & LIFE ADVOCS., http://www.nifla.org/about-us-mission-and-vision.asp. (last visited Jan. 23, 2013). CareNet's vision is "a culture where lives are transformed by the Gospel of Jesus Christ and every woman chooses life for herself and her unborn child." *Mission/Vision*, CARENET, https://www.care-net.org/aboutus/mission.php (last visited July 28, 2013). Meanwhile, Heartbeat International describes its mission as "work[ing] to inspire and equip Christian communities worldwide to rescue women and couples from abortion." HEARTBEAT INT'L, http://www.heartbeatinternational.org/ (last visited July 28, 2012).

419. The vast majority are Christian enterprises, often self-described as ministries. *See, e.g.*, *supra* note 418.

420. O'Brien v. Mayor of Balt., 768 F. Supp. 2d 804, 807–08 & 808 n.1 (D. Md. 2011).

421. NAT'L ABORTION FED'N (NAF), CRISIS PREGNANCY CENTERS: AN AFFRONT TO CHOICE 2 (2006) [hereinafter NAF Report], *available at* http://prochoice.org/pubs_research/publications/downloads/public_policy/cpc_report.pdf.

422. *See*, *e.g.*, NARAL PRO-CHOICE N.Y. FOUND., "SHE SAID ABORTION COULD CAUSE BREAST CANCER" 2 (2010), *available at* http://www.prochoiceny.org/assets/bin/pdfs/cpcreport2010.pdf ("CPCs often claim to offer the full range of information on reproductive options, but actually use a number of deceptive tactics to discourage women from choosing abortion.") [hereinafter NARAL Report].

423. STAFF OF H. COMM. ON GOV'T REFORM, 109TH CONG., FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERAL FUNDED PREGNANCY RESOURCE CENTERS 1 (Comm. Print 2006) (internal quotations omitted) [hereinafter House Report].

424. NAF Report, *supra* note 421, at 3 (noting that the Family Research Council investigated which names would appeal to pro-choice women, and recommended "Women's Resource Center" as most likely to reach women "at risk for abortion").

425. NARAL Report, *supra* note 422, at 2; *see also* Fargo Women's Health Org. v. Larson, 381 N.W.2d 176 (N.D. 1986) (finding that crisis pregnancy center named Fargo's Women's Help Organization was deceptively similar to Fargo's Women's Health Organization).

426. NARAL Report, *supra* note 422, at 6 (explaining that only 25% of Centers in their study clearly identify themselves as pro-life on their websites); UNMASKING FAKE CLINICS, *supra* note 418, at

instead publishing copy that suggests they counsel about the full range of options.[427] Advertisements are strategically placed to reach women seeking abortions. For example, Centers list themselves under "abortion services" and "health services" in the yellow pages,[428] and they pay for their advertisements to appear when someone searches for "abortion" or "abortion clinic" on the Internet.[429]

The Centers' attempts to deceive women into thinking they are bona fide medical clinics offering comprehensive services extend to their physical facilities. Besides having similar names, Centers are placed near existing family planning clinics in the hope that women planning to abort will accidentally enter.[430] Problem Pregnancy of Worcester, which abbreviated its name to "PP, Inc." on its door, was located in the same building and on the same floor as a Planned Parenthood clinic.[431] Centers that do not offer medical services and have no trained medical providers on staff attempt to recreate the environment of a medical clinic or doctor's office. They have waiting rooms, ask clients to sign in, provide forms to fill out—all the steps one would expect in an actual medical facility.[432] The people who work there, even those who are not medical professionals, wear scrubs or white lab coats, just like doctors and nurses.[433] They offer "medical quality" pregnancy tests, even if the tests are the self-administered ones that can be found at any drugstore.[434]

12, http://prochoicecalifornia.org/assets/files/cpcreport2010-revisenov2010.pdf (finding that "nearly 70 percent of CPCs advertised that they provide nonbiased counseling").

427. House Report, *supra* note 423, at 1 (noting that center advertisements "obscur[e] the fact that the center does not provide referrals to abortions"); *see also* UNMASKING FAKE CLINICS, *supra* note 418, at 6 (describing "Pregnant? Need Help? You have options" as a typically vague advertisement); Deb Berry, *Choose Lies*, ORLANDO WKLY., April 17, 2003, http://www2.orlandoweekly.com/news/story.asp?id=3042 (describing "Pregnant? Let us help you!" and "Considering [a]bortion? Your health and safety are important to us" advertisements).

428. House Report, *supra* note 423, at 1; *see also* NARAL Report, *supra* note 422, at 2 ("Their efforts to deceive women include . . . advertising under the Abortion or Medical categories in the Yellow Pages . . . .").

429. House Report, *supra* note 423, at 1–2. In fact, "Care Net has got[ten] into bidding wars with abortion providers over who would receive top placement in the sponsored-links sections on Yahoo! and Google when someone searches for abortion." Nancy Gibbs, *The Grass-Roots Abortion War*, TIME MAGAZINE, (Feb. 15, 2007), http://www.time.com/time/magazine/article/0,9171,1590444,00.html.

430. NAF Report, *supra* note 421, at 4 ("They typically locate themselves near clinics that offer abortions in a deliberate attempt to . . . lure potential patients away from receiving abortion care . . . ."); NARAL Report, *supra* note 422, at 7 ("In an effort to target women seeking legitimate medical facilities, CPCs often locate themselves near clinics that offer abortion services.").

431. Planned Parenthood Fed'n of Am. v. Problem Pregnancy of Worcester, Inc., 498 N.E.2d 1044, 1049 (Mass. 1986). The clinic only desisted after plaintiffs successfully sued for trademark infringement. *Id*. at 1045.

432. NAF Report, *supra* note 421, at 4 ("CPCs often design their facilities to look like actual health care facilities with a waiting room, a partitioned check-in desk, and an ultrasound machine.").

433. *See*, *e.g.*, Katie Stack, *When I Needed Help, I Got Propaganda*, N.Y. TIMES, Oct. 6, 2011, at A35 (noting that counselors wore scrubs even though none were medical professionals).

434. NARAL Report, *supra* note 422, at 8.

"Counseling" usually occurs while women await the result of their pregnancy tests.[435] In fact, women report that Centers have refused to give them their test results until they have undergone counseling.[436] Counseling varies, but most versions would violate medical ethics, as the goal is not to fully and accurately inform women of their medical options but to convince them to forgo abortion by any means necessary.[437] Information about abortion is usually false and calculated to portray it in as negative a light as possible.[438] In addition, in a deliberate attempt to make women delay past the point of legal abortion, some counselors have lied to women about either the time period in which they may legally obtain an abortion or their stage of pregnancy.[439] One undercover investigator who had asked how long she had to make a decision was told "in this country you can get an abortion up to nine months."[440] Another young woman, not an investigator, was falsely told she was not pregnant at all.[441]

As a result of these practices, several municipal authorities have passed laws requiring Centers to disclose the nature of their services and the qualifications of their personnel. Baltimore passed an ordinance requiring Centers to conspicuously post in their waiting rooms a disclaimer explaining that the Center does not provide or make referrals for abortion or birth control services.[442] Montgomery County, also in Maryland, required Center waiting rooms to display a sign declaring "the Center does not have a licensed medical professional on staff" and "the Montgomery County Health Officer encourages women who are or may be pregnant to

435. NAF Report, *supra* note 421, at 7 ("CPCs have been known to extend the waiting period for pregnancy test results to expose women to their anti-choice or religious propaganda.").

436. *See*, *e.g.*, Boes v. Deschu, 768 S.W.2d 205, 208 (Mo. Ct. App. 1989).

437. One young woman recounts how she was shown videos on "fetal pain" and told, among other things, that if she murdered her baby she would go to hell. *Sandra's Story*, CRISIS PREGNANCY CTR. WATCH, https://web.archive.org/web/20111101144447/http://www.cpcwatch.org/ws_sandra.php (last visited July 28, 2012). Another woman received a pamphlet informing her that, post-abortion, "[y]our next baby will be twice as likely to die in the first few months of life." Gibbs, *supra* note 429, at 8.

438. *See* UNMASKING FAKE CLINICS, *supra* note 418, at 9 (noting that 85% of clinics in their California study relayed false or misleading information); *see also* House Report, *supra* note 423, at i (finding that 87% "grossly misrepresented the medical risks of abortion," claiming, falsely, that abortion increased the risk of breast cancer, that it could result in sterility, and that it would lead to so-called post-abortion stress disorder).

439. *See* NAF Report, *supra* note 421, at 10; NARAL Report, *supra* note 422, at 11.

440. NARAL Report, *supra* note 422, at 11 (describing an experience at the EMC Pregnancy Center in the Bronx); *see also* Berry, *supra* note 427 (describing a similar experience at two Centers in Florida).

441. *The Ultimate Delay Tactic: Terri's Story*, CRISIS PREGNANCY CTR. WATCH, https://web.archive.org/web/20120127203820/http://cpcwatch.org/ws_terri.php (last visited July 28, 2012).

442. BALT., MD., HEALTH CODE § 3-502(a)–(b) (2009).

consult with a licensed health care provider."[443] A New York City regulation required Centers to, in their advertisements and facilities, make similar disclosures about their services and staff.[444] In addition, Centers must post, "[T]he New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed medical provider."[445]

All three regulations have at some point been struck down in their entirety as violating the free speech rights of the crisis pregnancy centers, although litigation is still ongoing.[446] The courts usually found that the speech was not commercial speech,[447] and that the regulations were content-based and thus subject to strict scrutiny.[448] A Fourth Circuit panel, for example, has held that the requirement that Centers disclose that they do not provide or make referrals for abortion or birth control was speech based, "at least in part, on disagreement with the viewpoint of the speaker."[449] A closer look, however, reveals that these laws do not trigger the problems usually associated with compelled speech.

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443. MONTGOMERY CNTY., MD. COUNCIL RES. 16-1252(b)(1) (2010), http://ww6.montgomerycountymd.gov/content/council/pdf/res/2010/2010002_16-1252.pdf.

444. N.Y.C. ADMIN. CODE § 20–816(b)–(f)(1)(iii) (2011) (requiring disclosures on whether Centers provide referrals for abortion, emergency contraception, and prenatal care and whether they have a licensed medical provider on staff).

445. *Id*. § 20–816(a).

446. Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 721 F.3d 264 (4th Cir. 2013) (en banc) (reversing and remanding for reconsideration due to procedural errors district court's decision declaring unconstitutional compelled disclaimers regarding lack of abortion and contraception services); Centro Tepeyac v. Montgomery Cnty., 722 F.3d 184 (4th Cir. 2013) (en banc) (affirming district court's preliminary injunction decision enjoining requirement that centers post signs advising women to consult a licensed health care provider but allowing requirement that centers post signs disclosing whether licensed medical professional on staff). *But see* Evergreen Ass'n v. City of N.Y., 740 F.3d 233 (2d Cir. 2014) (upholding licensed medical provider disclosure but striking abortion/contraception disclosure and health advise disclosure); Centro Tepeyac v. Montgomery County, No. DKC 10-1259, 2014 WL 923230 (D. Md. Mar. 7, 2014) (finding that as applied to Centro Tepeyac licensed medical professional disclosure failed strict scrutiny).

447. Although some courts have contemplated treating it as professional speech. *See*, *e.g*., Evergreen Ass'n v. City of N.Y., 801 F. Supp. 2d 197, 206 (S.D.N.Y. 2011), *aff'd* 740 F.3d 233 (2d Cir. 2014); Centro Tepeyac v. Montgomery County, No. DKC 10-1259, 2014 WL 923230, at *14–15 (D. Md. Mar. 7, 2014). Meanwhile, the Fourth Circuit en banc ordered a district court to reevaluate its conclusion that the compelled disclosures do not amount to commercial speech. *Greater Balt. Ctr. for Pregnancy Concerns*, 721 F.3d at 284-88 (en banc).

448. Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 683 F.3d 539, 555 n.4 (4th Cir. 2012), *vacated en banc*, 2012 U.S. App. LEXIS 26897; *see also id*. at 594; *Tepeyac*, 722 F.3d at 189; *Evergreen Ass'n*, 740 F.3d at 244; *Evergreen Ass'n*, 801 F. Supp. 2d at 203.

449. *Greater Balt. Ctr. for Pregnancy Concerns*, 683 F.3d at 548, *vacated en banc*, 2012 U.S. App. LEXIS 26897.

1. Chill

If compelling speech actually chills speech instead, then it may deprive interested audiences of a marketplace with all possible points of view. Requiring Centers to reveal in their advertisements and waiting rooms whether they offer abortion or contraception services or whether they have licensed medical care providers does not run the risk of chilling the pro-life speech of these organizations. Their viewpoint will be as available to willing audiences as before.

Unlike tobacco advertisements, the need for profit does not inure Centers' advertising from potential chill.[450] It is possible that some Centers may decide to curtail their advertisements if forced to disclose their pro-life point of view. However, since they had not highlighted these pro-life beliefs in their advertisements in the first place, no viewpoint will disappear from the marketplace of ideas.

The requirement that Centers post in their waiting rooms the fact that they have no medical professionals on staff and do not offer abortion or contraception might mean that some women seeking those services would walk out, thereby depriving Centers of the opportunity to convey their messages to those lost clients. But the Free Speech Clause protects the right to speak, not the right to a particular audience who does not want to hear your message.[451] In other words, the concern with chill is that compelled speech will make the compelled speaker think twice about voicing her opinion;[452] it is not the concern that compelled speech will make it more difficult for speakers to trick unwilling audiences into hearing it.

2. Distortion

The laws compelling the Centers to speak do not distort the discourse, either generally or with respect to a special relationship.

a. Distortion of the General Discourse

Because none of the compelled statements are inaccurate or misleading, they do not distort the discourse by disseminating untruths the way that mandatory abortion counseling often does.[453] Even if a listener were unclear about who was behind the disclosures about staff

450. On the other hand, perhaps their ideological dedication is as strong as any profit motive.

451. *Cf.* Corbin, *Compelled Listening*, *supra* note 307, at 943–51 (discussing captive audience doctrine).

452. The worry is that those who are interested will no longer have access to the opinions, thoughts, and theories of the anonymous pamphleteer or the critical newspaper.

453. *See supra* notes 324–334 and accompanying text.

qualifications and services offered, because they are purely factual statements—and purely factual statements with no intent to persuade—there is no risk that the misattribution will result in a listener giving undue weight to a point of view.

Of course, proponents claimed that the mandated script in South Dakota and the mandated ultrasound image and auscultation were "purely factual," when a more careful examination revealed otherwise.[454] Perhaps the same analysis applies here. A Fourth Circuit panel seemed to think so.[455] It held that compelling Centers to declare that they do not counsel about abortion forces Centers to propagate the state's message that abortion is "morally acceptable."[456]

This claim about ideological bent does not pass muster. Instead, it contributes to an *Alice in Wonderland* free speech jurisprudence where telling women that their unwanted pregnancy is "a living human being" is not ideological speech but disclosing the fact that a pro-life facility does not offer abortion is.[457] Unlike South Dakota, the municipalities are not relying on the statutory definition of terms to circumvent the common understanding of them, and the common understanding of the mandated speech does not take a position on a controversial moral issue.[458] Unlike the ultrasound and auscultation laws, the compelled speech does not encompass any symbols or images with more complex social meaning. Indeed, the compelled speech is purely textual. Finally, unlike the anti-abortion ideology that permeates mandatory counseling laws, nothing in the language or history of the laws regulating Centers suggests that the municipalities were interested in women's ultimate decision about whether or not they should or would have an abortion.[459] The municipalities only interest appears to be ensuring that women understand the credentials and services of organizations that have a record of intentionally obfuscating both.[460]

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454. *See* Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 CARDOZO L. REV. 2347, 2387–89 (2013).

455. *See* Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 683 F.3d 539 (4th Cir. 2012). While this panel's decision was vacated, it was on alternate grounds. *Cf*. Evergreen Ass'n v. City of N.Y., 740 F.3d 233 (2d Cir. 2014) (affirming the decision to enjoin the requirement that centers disclose that they do not provide abortion or contraception referrals).

456. *Id*. at 552.

457. *See* Wooley v. Maynard, 430 U.S. 705, 717 (1977)

458. There is no background controversy about what it means to be licensed or to offer certain counseling services in the way there is over what it means to be a living human being.

459. *Greater Balt. Ctr. for Pregnancy Concerns, Inc*., 683 F.3d at 570 (King, J., dissenting) ("The disclaimer simply does not speak to what is or may be morally acceptable.").

460. *Id*. at 573 (King, J., dissenting) ("[T]he record validates the City's uncontradicted contention that the Ordinance was enacted to curtail deceptive advertising, not because the City disagreed with or wanted to suppress the Center's speech. And the majority has failed to identify any aspects of the record

The last type of disclosure, however, where the "Montgomery County Health Officer" or the "New York City Department of Health and Mental Hygiene" "encourages women who are or who may be pregnant to consult with a licensed provider,"[461] is not factual. Rather, it expresses the opinion that pregnant women should seek care from a licensed medical professional. Nonetheless, the wording makes clear that this is government advice, precluding any possible distortion due to confusion about who is speaking.

b. Distortion of Professional Communications

Compelled speech might prevent professionals from fulfilling their fiduciary responsibilities, thus distorting the type of conversation that ought to take place between professionals and the people they are supposed to help. Here, clarifying what one's professional status is and what kind of services one offers would seem part and parcel of ethical, professional behavior rather than in opposition to it. Even the compelled statement urging women to consult with a licensed medical professional does not undermine any ethical obligations of pregnancy counselors.

3. Autonomy of Centers

The compelled disclosures may raise speaker autonomy issues. An argument that this compulsion is an insult to autonomy presumes that an organization is like a natural person whose dignity and conscience can be compromised. But is it? Even if artificial entities had dignity, a Center's is not undermined by factual disclosures that do not contradict its pro-life viewpoint. However, compelling a Center to post an opinion that implicitly denigrates its services may be problematic.

Speech is protected in part to respect the inner conscience that is influenced and reflected by speech. Like for-profit corporations, nonprofit organizations are not endowed with dignity or a conscience because they are artificial entities, not natural people. Thus, it does not really make sense to talk about the autonomy concerns of a non-person. Nonetheless, the Supreme Court has extended free speech protection to expressive associations, which are defined as nonprofit organizations with an expressive component.[462] Expressive associations further free speech by allowing like-minded people to come together to amplify their voice or

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that show otherwise."); *see also id*. at 573 n.12 ("Indeed, the record shows conclusively that the animus assertion has been created from whole cloth.").

461. N.Y.C. ADMIN. CODE § 20–816(a) (2013); MONTGOMERY CNTY., MD. COUNCIL RES. 16–1252(b)(1)(b) (2010).

462. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 (1981).

message.[463] The Court has held that it violates the Free Speech Clause to force an expressive association to accept a member whose presence would undermine the association's messages—for example, by requiring an association that condemns homosexuality to accept a gay leader.[464] Compelling an association to speak a message antagonistic to its own views raises the same problem but even more directly.

There might be two ways this protection for expressive associations is due to concerns about speaker autonomy rather than the free flow of information, which is addressed by chill and distortion. First, individual autonomy may be implicated because expressive associations serve to some degree as an alter ego for their individual members.[465] Although the autonomy implications of simply forcing an expressive association to speak is not akin to forcing one of its members to speak, the implications are stronger if an exacerbating factor is present, such as articulating a contradictory viewpoint or misattribution of that viewpoint.[466] In other words, if an association stands in for its members, the members' autonomy might be at stake when the expressive association is forced to convey a message contrary to its beliefs.

Alternatively, perhaps the autonomy of an expressive association is protected for instrumental reasons. Just as corporations have rights (e.g., the right to contract) to ensure that they can accomplish their economic ends, perhaps expressive associations need free speech protection to accomplish their expressive ends.[467] That is, the autonomy of the expressive organization is protected not because an expressive organization has inherent worth and dignity, either in itself or via its members. Rather, it is protected as a means to an end. What are those ends? In the narrowest sense, they are to advance certain viewpoints—after all, expressive associations by definition communicate a message. In a broader sense, associations, whose views and opinions vary enormously, serve as a helpful buffer against government tyranny, in part because of their diversity.[468]

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463. *See id*. ("[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost.").

464. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express.").

465. *Cf*. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) ("[F]urtherance of the autonomy of religious organizations often furthers individual religious freedom as well."). This would be an aggregate theory of the entity.

466. *See supra* Part II.C.

467. That expression is a defining feature of expressive organizations is one reason why its autonomy vis-à-vis speech needs protection in a way that corporations do not.

468. Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984) (noting that associations "foster diversity and act as critical buffers between the individual and the power of the State"). These mediating institutions obviously also ensure a diverse marketplace of ideas. *See* Citizens United v. Fed. Election

Thus, autonomy protects the ability to convey their particular expressive message. But even assuming speaker autonomy interests (derived either from the autonomy of its members or from its instrumental value), they are not triggered unless the compelled speech undermines a message of the expressive association.

At least with regard to the disclosures about Center services and staff qualifications, the government-compelled speech does not contradict any associational messages. These are factual statements meant to inform, not persuade. Consequently, the disclosures do not undermine the pro-life messages central to the Centers' mission.[469] They might make a Center's ideology more apparent, but it would be an odd claim that clarifying one's viewpoint was an affront to dignity. Since these factual statements do not advance any viewpoint, the risk that viewers would misread the compelled opinion as the organization's own is moot.[470] In any case, nothing precludes the Centers from making clear that the state requires these particular disclosures.[471]

The analysis differs with regard to the government's exhortation to consult a licensed medical professional. There is no problem of misattribution, since the disclosure expressly identifies the government speaker.[472] But the compelled speech is not a mere factual statement; it is advice. Furthermore, that advice suggests that the information provided by the Center is inferior and inadequate.[473] To the extent that a Center must post a critique of its own messages,[474] one could argue that the state infringes on the Center's autonomy and dignity. Or more simply, one could argue that this compelled speech does in fact undermine the message the Center is trying to convey.

Though a similar claim may be levied against the factual statements, it would not succeed. The compelled disclosures may undercut the aura of neutral medical professionalism cultivated by the Centers, with their waiting rooms, medical forms, and white lab coats. While this may weaken

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Comm'n, 558 U.S. 310, 343 (2010) ("[A]ssociations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster.").

469. On the contrary, the nature of pro-life Centers is in fact that they do not offer counseling on contraception and abortion.

470. Nor does the compelled speech coerce the body of any individual speaker, as it is conveyed by advertisements or signs. *But see infra* note 474 (noting New York City exception).

471. In contrast, it was uncertain whether the compelled doctors could dissociate from the state's mandatory abortion counseling. *See supra* Part III.B.1.

472. *See supra* notes 443, 445 and accompanying text.

473. *See* Tepeyac v. Montgomery Cnty., 683 F.3d 591, 594 (4th Cir. 2012) (arguing that medical advice disclosure "suggests to potential clients that the center is not to be trusted and that a pregnancy center's services . . . will usually be inferior to those offered by medical professionals").

474. Or worse: in New York City, a counselor must convey the state's opinion if a client or prospective client asks about abortion, contraception, or prenatal care. N.Y.C. ADMIN. CODE § 20-816(f)(2) (2013).

the effectiveness of the center's pro-life messages, the reduced effectiveness stems not from the state forcing the Center to articulate pro-choice messages but rather from forcing them to be honest about their pro-life beliefs and medical credentials. Although people may have a First Amendment right to lie and deceive in general,[475] it strains credulity to argue that people should have a right to pretend to be impartial medical professionals in dealings with clients when they are not.[476]

4. Autonomy of Clients

The last concern with compelled speech is that it may infringe on the autonomy of the recipients of the state's message, either by treating them paternalistically or by attempting to manipulate their decision making. Neither occurs with the state's mandated factual disclosures. On the contrary, they further the decisional autonomy of their audience by preventing potential deception. While the state may exhibit some paternalism in advising women to seek professional care, it does not compare to the state urging patients to forgo abortion.

a. Paternalistic Ends

Truthful disclosures that are designed to inform (rather than persuade) are unlikely to cross over into unacceptable paternalism, especially if the information is not otherwise accessible or the disclosures prevent deception.[477] The accurate speech regarding whether Centers employ licensed medical professionals or offer abortion and contraception services meets this criteria. As discussed earlier, rather than persuade, preach, or exhort, these factual statements provide information that is clarifying and not readily available; indeed, many Centers take pains to disguise their goals and qualifications. Thus, these disclosures mirror the requirement that restaurants list ingredients, because they require speakers to disclose information that they alone possess so that potential consumers understand exactly what is being offered. They do not presume to tell consumers what to make of that information, and certainly not what course of conduct to pursue. Instead, in response to well-documented attempts to dissemble and deceive, the compelled disclosures simply make inaccessible information available.

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475. *Cf.* United States v. Alvarez, 132 S. Ct. 2537, 2545 (2012) (stating that Supreme Court "has never endorsed the categorical rule . . . that false statements receive no First Amendment protection").

476. *Cf. id.* at 2554 (Breyer, J., concurring) (acknowledging the constitutionality of prohibitions of false statements in cases of "specific harm to identifiable victims," or "in contexts in which a tangible harm to others is especially likely to occur").

477. *See supra* Part II.D.1.

The state's recommendation that pregnant women consult a licensed health care provider does, however, raise the specter of paternalism. With this statement, the government is not providing information with no interest in influencing pregnant women's medical care decisions.[478] Instead, the government is unabashedly advocating specific behavior it deems to be in the best interest of its audience. While the same might be true with the compelled tobacco disclosures, at least in that case the government's warnings were counteracting misperceptions about the harms of tobacco.[479] Here, however, there is no evidence that women are unaware of the benefits of medical care in helping them navigate their pregnancy. As a result, the advice to consult a licensed medical provider, with its suggestion that women cannot understand the importance of impartial medical care on their own, seems patronizing. On the other hand, at least the government, in encouraging women to consult someone who is obligated to inform them of all their options, advocates a course of conduct that is incontrovertibly autonomy-affirming. This stands in stark contrast to the government message in the mandatory abortion counseling that women should carry their unwanted pregnancy to term.

b. Manipulative Means

These disclosures do not mislead, confuse, or exploit any cognitive heuristics. The mandated disclosures convey purely factual information through text with no emotional punch. Moreover, the disclosures are intended to counteract manipulation on the part of the Centers. The Centers' tactics often border on, and sometimes veer into, the fraudulent.[480] Women who respond to "Pregnant? Need Help? You have options"[481] advertisements and are administered pregnancy tests by people in white lab coats are led to believe that medical professionals will give them accurate and impartial medical advice. Instead, they are tricked into hearing false information and an ideological message. This type of deception can amount to fraud.[482] At the very least, the deception undercuts the autonomous

478. *See Alvarez*, 132 S. Ct. 2537 (2012).

479. *See* Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended in scattered sections of 15 U.S.C. and 21 U.S.C.).

480. Fraud often requires proof of misrepresentation of a material fact, intent to deceive, reasonable reliance, and injury. *See* RESTATEMENT (SECOND) OF TORTS § 525 (1977). Because of the injury requirement, common law fraud is an after-the-fact claim and not a prophylactic one. Also, some states limit their consumer fraud statutes to paid goods and services. *Cf.* Planned Parenthood Fed'n of Am. v. Problem Pregnancy of Worcester, Inc., 498 N.E.2d 1044, 1052–53 (Mass. 1986) (holding that crisis pregnancy center was not subject to unfair and deceptive business practices statutes).

481. *See supra* note 427 and accompanying text.

482. *See, e.g.*, Mother & Unborn Baby Care of N. Tex., Inc. v. State, 749 S.W.2d 533, 544 (Tex. App. 1988) (holding that an anti-abortion group violated the Texas Deceptive Trade Practices Act); Tamar Lewin, *Anti-Abortion Center's Ads Ruled Misleading*, N.Y. TIMES, Apr. 22, 1994, at A15.

decision making of women who come to the Centers expecting ethical medical care. Because deception and autonomy are simply incompatible, it is the lack of these disclosures, and the failure to forestall the Centers' manipulation, that compromise women's autonomy. In short, the compelled factual disclosures further the autonomy of their intended audience rather than undermine it.

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The compelled disclosures do not chill or distort the discourse on abortion or reproductive services. As for speaker autonomy concerns, it is not clear that an organizational entity, as opposed to a natural person, can really be said to suffer from autonomy injuries. In any event, the disclosures on services offered and staff qualifications are factual and therefore do not force Centers to articulate an ideological position. In addition, because this factual information is meant to clarify potential misperceptions, the compelled speech enhances the autonomy of its recipients. The advisory disclosure, however, which explicitly recommends a particular course of action, might raise autonomy concerns.

CONCLUSION

Compelled speech may undermine free speech goals and values by chilling speech, distorting the discourse, or intruding upon the autonomy of speakers or audiences. Furthermore, while government persuasion does not always infringe on audience autonomy, it does when the government's goal represents one side of an ideological debate, or when the government's means involve emotional appeals that take advantage of affect heuristics. Viewed through this lens, recent lower court decisions on compelled speech have it backwards. The mandatory abortion counseling, not the tobacco warnings or the crisis pregnancy center disclosures, raises the most First Amendment concerns. Pro-choice viewpoints are the ones likely to be chilled in the marketplace of ideas, not pro-tobacco or pro-life ones. False and misleading claims about the fetus and abortion distort the discourse, not the corrective cigarette warnings or Center disclosures. The autonomy of doctors is undermined, not the nonexistent conscience of tobacco companies, or the expressive messages of Centers. Finally, only the mandatory abortion counseling treats its audience as incapable of moral decision making, and only the mandatory abortion counseling seeks to persuade by emotional images that exploit cognitive shortcuts.