MARY DOE EX REL. SATAN?: PARODY, RELIGIOUS LIBERTY, & REPRODUCTIVE RIGHTS

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Abstract

In 2015, a woman known as "Mary Doe" challenged a Missouri abortion restriction requiring her to wait seventy-two hours after receiving certain "informed consent" materials before she could obtain an abortion. Mary Doe challenged the restrictions in federal and state court on religious grounds as a member of the Satanic Temple. This paper examines the Satanic Temple's litigation through the lens of *parody*—a literary technique that involves repeating another text's form or content in order to critique it. Mary Doe's litigation mirrored that of *Hobby Lobby v. Burwell*, in which a for-profit corporation claimed a religious accommodation from the ACA's contraceptive mandate. The litigation forces two comparisons—between mainstream religious beliefs and other strongly held matters of conscience, and between abortion and other constitutional claims—and illuminates the "distortions" that often appear in reproductive rights litigation.

INTRODUCTION

In 2015, a woman known as Mary Doe challenged an amendment to Missouri's statute governing informed consent for abortion. The amendment instituted a seventy-two-hour waiting period and required providers to distribute printed materials stating that "the life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being."[1]

Doe's lawsuit took a unique approach to challenging Missouri's abortion restrictions. Instead of alleging that the law violated Equal Protection or constituted an "undue burden" under *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[2] Doe argued that the law violated the federal Constitution's Establishment Clause, and impermissibly

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[1] H.B. 1307 & 1313, 97th Gen. Assemb., 2nd Reg. Sess. (Mo. 2014).

[2] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

burdened her free exercise rights under the First Amendment and the Religious Freedom Restoration Act because of her religious beliefs as a member of the Satanic Temple.

The Satanic Temple is a non-theistic religion founded in 2012. Its purported mission is to "encourage benevolence and empathy among all people, reject tyrannical authority, advocate practical common sense and justice, and be directed by the human conscience to undertake noble pursuits guided by the individual will."[3] Temple members do not "believe" in Satan. Instead, they appreciate "the literary Satan best exemplified by Milton and the Romantic Satanists" as a "symbol of the Eternal Rebel in opposition to arbitrary authority, forever defending personal sovereignty even in the face of insurmountable odds."[4] The Temple holds regular services in Salem, Massachusetts, and members sometimes perform rituals to express their values, like Black Masses and "unbaptisms" meant, respectively, to celebrate personal liberty and "renounce superstitions that may have been imposed upon them without their consent as a child [sic]."[5] The Temple specifically rejects the notions that "religion belongs to supernaturalists" and that "only the superstitious are rightful recipients of religious exemption and privilege."[6]

This principle is perhaps best demonstrated by the Temple's reaction to the 2014 Supreme Court case *Burwell v. Hobby Lobby Stores*, in which the Supreme Court granted a religious accommodation from the Affordable Care Act's contraceptive mandate to a for-profit company.[7] When the opinion was released, the Temple set up an online system for women to apply for religious "exemptions" from laws that require abortion providers to give patients inaccurate information as part of the "informed consent" process.[8]

The Temple's legal advocacy, including Mary Doe's challenge to Missouri's abortion restrictions, operates in a strange cultural place. On one hand, their legal challenges are

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[3] *About Us*, THE SATANIC TEMPLE, https://thesatanictemple.com/pages/about-us [https://perma.cc/B684-L4CT]. The Satanic Temple is distinct from the Church of Satan, which was founded by Anton LeVey in 1966 and counts The Satanic Bible as its guiding text. Peter H. Gilmore, *Overture*, *in* THE SATANIC SCRIPTURES (2007).

[4] *FAQ*, THE SATANIC TEMPLE, https://thesatanictemple.com/pages/faq [https://perma.cc/UM8M-TBFY].

[5] *Id.*

[6] *Id.*

[7] Burwell v. Hobby Lobby Stores, 573 U.S. 682 (2014).

[8] Emma Green, *Satanists Troll Hobby Lobby*, THE ATLANTIC (July 30, 2014), https://bit.ly/2tnVvV3 [https://perma.cc/MED2-UG6L].

funny. To someone in favor of abortion access without unnecessary constraints, there is something gratifying about imagining former Missouri Attorney General Joshua Hawley—a conservative Evangelical Christian who represented the plaintiffs in *Hobby Lobby v. Burwell*—defending against a claim that religious commitment to Satanic ideals dictates a religious accommodation from laws restricting abortion access.[9]

On the other hand, though, their claims are not preposterous. The Religious Freedom Restoration Act (RFRA) was originally intended to protect small, unpopular religious groups, and the Supreme Court has often deferred to plaintiffs in assessing the "sincerity" of their religious beliefs, even in the face of inconsistencies.[10] Although the Temple's federal and state cases were ultimately dismissed, the litigation has resulted in two major victories thus far.[11] First, a Missouri state appeals court ruled in favor of Mary Doe in 2017, holding that the case "raises real and substantial constitutional claims" and thus should not have been dismissed for failure to state a claim.[12] This illustrates that, at the very least, Mary Doe's claims pass the "giggle test" that separates reasonable from unreasonable claim.[13] Second, in oral arguments before the Missouri Supreme Court, the Attorney General admitted that "mandatory" ultrasounds for abortion patients are, in fact, optional.[14]

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[9] Kurt Erickson, *Josh Hawley and the Fight for Religious Freedom*, ST. LOUIS POST-DISPATCH (Aug. 11, 2018), https://bit.ly/2MyGOdR [https://perma.cc/YDD8-LT6H]; Amended Brief of Respondent, Doe v. Greitens, 530 S.W.3d 625 (Mo. Ct. App. 2017) (No. WD80387) (listing Joshua D. Hawley as Missouri Attorney General and one of the "Attorneys for Respondents").

[10] *See* 42 U.S.C. § 2000bb (2018); *see generally* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act.*, 73 TEX. L. REV. 209 (1994); A.A. v. Needville Indep. Sch. Dist., 611 F.3d 248, 261 (5th. Cir. 2010) (holding for a Native American student whose religious beliefs compelled him to wear his hair "visibly long" and noting that "the sincerity of a religious belief is not often challenged. . . . When sincerity is challenged, though, courts are reticent to draw the sort of line the [defendant school district] now requests" (internal citations omitted)); *see also* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981) ("[The plaintiff] drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.").

[11] Doe v. Parson, 567 S.W.3d 625 (Mo. 2019); Satanic Temple v. Parson, 735 F. App'x 900 (8th Cir. 2018).

[12] *Greitens*, 530 S.W.3d at 574.

[13] Jim McElhaney, *No Laughing Matter: Failing the Giggle Test Might Leave You Crying*, A.B.A. J. (Nov. 1, 2011), https://bit.ly/2EdeCYa [https://perma.cc/5R3W-2VWM].

[14] Oral Argument at 15:20–15:29, *Parson*, 567 S.W.3d 625, https://www.courts.mo.gov/page.jsp?id=119842 (on file with author).

Few scholars have chosen to examine the Temple's litigation and advocacy work, perhaps reflecting a general unwillingness to take Satanists seriously as a religious group with cognizable constitutional or RFRA-based claims. This, I argue, is a mistake. Especially given the Temple's (brief) victory in the Missouri appeals court, it seems clear that Satanists have potentially found a workable legal strategy to challenge abortion restrictions. Nevertheless, a serious, single-minded analysis of the Temple's legal claims does not fully capture a crucial element of its broader rhetorical strategy and its implications for conceptualizing religious and reproductive freedom. To remedy this, this paper reads the Satanic Temple's litigation through the lens of parody—defined as a critical repetition of another text that is often (but not always) humorous and polemical. This perspective can account for the rhetorical impact of the Temple's litigation while leaving room to seriously consider its substantive claims.

Part I surveys parody as a literary and rhetorical strategy and considers parody's potential as a political and legal strategy. Part II discusses the lawsuits' legal contexts, including the historical relationship between First Amendment religious claims and abortion, as well as the trend of mandating ultrasounds as part of "informed consent" to have an abortion. Part III examines and expands on the procedural and substantive claims made by the Satanic Temple and argues that parody is a crucial element of the Temple's success. By effectively "repeating" religious liberty claims like those made by the *Hobby Lobby* plaintiffs in the abortion context, the Temple's challenges change the focus of the legal conversation from abortion rights (which are often insufficiently protected by courts) to religious accommodation (to which courts have been overly deferential even in the face of scientific error).[15] By overcoming "abortion exceptionalism"[16] that often proliferates both culturally and in lower court decisions, the Temple's parody helps get abortion litigation "unstuck" from *Casey*'s undue burden test and opens up space for creative legal arguments against abortion restrictions, which go beyond pure questions of access.[17]

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[15] Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175, 1205 (2014) [hereinafter Corbin, *Abortion Distortions*].

[16] The term "abortion exceptionalism" has been used by many scholars to describe how abortion gets treated differently by both lawmakers and courts. *See, e.g.*, Ian Vandewalker, *Abortion & Informed Consent: How Biased Counseling Laws Mandate Violates of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 3 (2012).

[17] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court articulated the "undue burden" standard, which has governed abortion jurisprudence for the last three decades. *Casey* disposed of *Roe v. Wade*'s trimester framework and opened up a space for states to regulate abortion in the name of women's health and safety as long as those regulations did not present an "undue burden" on the fundamental abortion right. *Casey*'s "undue burden" test was apparently strengthened by the Supreme Court decision *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). This Note primarily

I. Parody And/In/Of the Law

This section considers parody as a literary technique that operates politically and legally. As disciplines, law and literature intersect and overlap in both study and practice. Dating back to the 1970s, the "law and literature" movement is one of the "most enduring sites of interdisciplinary" approaches to the legal field.[18] Indeed, the two disciplines complement each other: law "give[s] literature praxis" while literature "give[s] law humanity and critical edge."[19] Law is a constant theme of literary works, and emerging fields like "applied legal storytelling" reflect the value of using narratives such as victim impact statements and mitigation testimony to advance justice.[20] This paper takes a descriptive approach to the Satanic Temple's litigation, which uses parody as a strategy to strengthen its rhetorical and legal arguments. Specifically, I examine the Satanic Temple's litigation challenging Missouri's informed consent for abortion statute as parody. The question answered here is not "Should the Satanic Temple use the justice system to make this rhetorical point?" but rather "What does it mean that such a claim has been seriously considered by courts, and what are the implications for both reproductive rights and religious liberty?" Before answering those questions, this section briefly surveys "parody" as a literary and political technique.

A. Parody: What It Is and What It Isn't

The parameters of what constitutes parody are a frequent topic of literary scholarship. In common parlance, parody often brings to mind jokes that derive their humor from imitation of something else, like the *Scary Movie* franchise's invocation of horror film

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refers to the "undue burden" test as it relates to *Casey*, because 1) most of the mandatory ultrasound and biased counseling laws were challenged prior to *Whole Woman's Health*, and 2) *Whole Woman's Health* was primarily concerned with concrete barriers to abortion access, not the intangible burdens alleged in the *Mary Doe* litigation.

[18] NEW DIRECTIONS IN LAW & LITERATURE, at introduction (Elizabeth S. Anker & Bernadette Meyler eds., 2017); Julie Stone Peters, *Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion*, 120 PMLA 442 (2005).

[19] Peters, *supra* note 18, at 448.

[20] *See, e.g.*, Jeanne M. Kaiser, *When the Truth & the Story Collide: What Legal Writers Can Learn from the Experience of Non-Fiction Writers About the Limits of Legal Storytelling*, 16 J. LEGAL WRITING INST. 163 (2010).

tropes or rewrites of classic novels like *Pride and Prejudice* to include zombies.[21] In Ancient Greece, parody (a word created from roots *para*, meaning "alongside" or "counter," and *odos*, meaning "song"[22]) was part of a broad practice of citation and allusion.[23] Some of the earliest incarnations of parody were mock-heroic poems that imitated Homer for comedic purposes.[24] Some scholars argue that parody is inherently polemical,[25] while others take care to distinguish between parody and other related formal techniques like satire and pastiche.[26] Parody can be general (*The Colbert Report*'s send-up of conservative talk show hosts) or specific (Alec Baldwin's portrayal of Donald Trump on *Saturday Night Live*) and is often humorous. This humor derives from "extreme distance" between a sacred or important topic and its parodic repetition.[27] In other words, part of the "work" parody performs comes from comparing two different subjects (e.g., genres, poems, or people) and examining unexpected differences or similarities. Irony, parody's "major rhetorical strategy," refers to an "incongruity between what is expected and what happens."[28] For the purposes of this paper, I define parody as a humorous, formal doubling that uses irony as a tool to provoke comparison and critique.[29]

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[21] SCARY MOVIE (Wayans Bros. Entertainment 2000); SETH GRAHAME-SMITH, PRIDE AND PREJUDICE AND ZOMBIES (2009).

[22] *Parody*, *in* PRINCETON ENCYCLOPEDIA OF POETRY AND POETICS (Ronald Greene ed., 4th ed. 2012).

[23] SIMON DENTITH, PARODY: THE NEW CRITICAL IDIOM 2–3, 10 (2000).

[24] *Id.* at 11.

[25] LINDA HUTCHEON, A THEORY OF PARODY 4–5 (2000) (discussing previous definitions of parody as "parasitic and derivative" with a "target . . . to be mocked or ridiculed").

[26] These distinctions often rely on specific formal features, for example whether the transformation between original text and the parody is "playful or satirical" (parody/travesty) or "imitation rather than direct transformation" (pastiche/parody). Following Dentith's lead in concluding that "the value of this kind of distinction . . . is ultimately limited," this paper is not concerned with the minute differences between these literary forms. DENTITH, *supra* note 23, at 14. Thus, this paper focuses less on the specific formal features of parody and more on the "social and historical ground in which th[e] interaction [between original and parodied texts] occurs, and the evaluative and ideological work performed by parody." *Id.*

[27] *Id.* at 11.

[28] *Parody*, *supra* note 22; *Irony*, OXFORD COMPANION TO THE ENGLISH LANGUAGE (Tom McArthur ed., 2d ed. 2018).

[29] This definition is drawn from the work of a number of different scholars. *See, e.g.*, DENTITH, *supra* note 23, at 6 (defining parody as "part of a range of cultural practices which allude, with deliberate evaluative intonation, to precursor texts"); HUTCHEON, *supra* note 25, at 6 (defining parody as "repetition with critical distance, which marks difference rather than similarity").

Importantly, this definition leaves room for humor and serious critique to coexist. So, for example, when I refer to the Satanic Temple's litigation as "parody" (or go so far as to label the Temple a "parody religion"), I do not mean to suggest that its members' religious beliefs should not be taken seriously or that their claims are purely rhetorical and have no legal merit. Instead, I classify the Temple's legal efforts as "parody" in an attempt to capture the conscious and critical comparisons that its litigation provokes.

B. The Cultural Politics of Parody

Parody often functions in explicitly political ways. One famous example is the Comedy Central late-night lineup from the late 1990s to 2015, which included nighttime "news" shows *The Daily Show* and *The Colbert Report*, which parodied conservative talk show hosts. Whether parody is fundamentally conservative or subversive presents one of the most contentious issues in scholarly examinations of parody. Because parody necessarily *repeats* (and therefore, on some level, reinforces) its target text, some have argued that it is a fundamentally conservative technique.[30] In the literary context, for example, new "literary and social innovation" is often mocked in order to "polic[e] the boundaries of the sayable in the interests of those who wish to continue to say what has always been said."[31]

I argue that parody—like most formal techniques—is inherently neutral and can be used either to prop up existing power structures by lampooning radical ideas or cut against authority by making it a subject of laughter. Although parody is frequently employed by people and groups aligned with progressive or liberal viewpoints, there is nothing about parody that is *necessarily* progressive or liberal. For example, the *Babylon Bee* describes itself as "your trusted source for Christian news satire" and includes both explicitly political content (an article called "Horrified Nation Suddenly Realizes Ocasio-Cortez Will Probably Be President In Six Years") and playful jokes about Christian culture ("Church Bassist Admits He Just Plays Journey Riff For Every Worship Song").[32] Shortly after *Obergefell v. Hodges*, a Utah man filed a lawsuit seeking the right to marry

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[30] HUTCHEON, *supra* note 25, at xii ("Because parody always implicitly reinforces even as it ironically debunks, it will always be ideologically suspect to some."). Scholars do not mean *politically* conservative, but reinforcement of the status quo.

[31] DENTITH, *supra* note 23, at 20.

[32] *Church Bassist Just Admits He Plays Journey Riff for Every Worship Song*, THE BABYLON BEE (Feb. 8, 2019), https://bit.ly/2Nv8pKf [https://perma.cc/74RG-BW4B]; *Horrified Nation Suddenly Realizes Ocasio-Cortez Will Probably Be President in Six Years*, THE BABYLON BEE (Feb. 8, 2019), https://bit.ly/2VlodBS [https://perma.cc/Z4A4-3YXN].

his laptop.[33] The plaintiff in that case likely thought he was subverting the power of the Supreme Court by extending its ruling to an absurd position. Members of the LGBT+ community, on the other hand, would probably classify that lawsuit as a fundamentally conservative effort to preserve "traditional" marriage. Thus, depending on whom one perceives to be authoritative, the same parodic text might be aligned with stasis or subversion.

When parody targets political institutions—regardless of who controls them—it can have a disruptive effect on structures of government like the legislature and judiciary. Giamario argues that the parodies performed by parodists like Stewart and Colbert "generate laughing bodies politic," a phrase Hobbes used to describe the impact of laughter on democracy.[34] At its core, democracy substitutes a "political body" for one's "natural body" and authorizes the former to "ensure its benefit and protection."[35] According to Hobbes, then, power depends on both "the willingness of subjects to honor their promises not to interfere" and "the good behavior and faith of subjects."[36] Sometimes, though, a democratic system of government produces laws with intolerable consequences for its citizens—especially those who feel as though they have not been adequately represented in the process. Laughter, then, is a way of "express[ing] an illusory sense of power that disrupts and confuses the processes by which power relations are deciphered on a broader social scale."[37] When ordinary citizens feel empowered to laugh at government action, "[p]owerful figures and institutions feel threatened because they can no longer safely count on those who laugh at them to maintain ordinary levels of deference and submission."[38] Such a "rebellious moment" reminds those in power that their legitimacy comes from the voluntary submission of their constituency.[39]

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[33] Complaint, Sevier v. Thompson, No. 2:16-cv-00659 DN-EFJ (D. Utah June 20, 2016), ECF No. 1.

[34] Patrick T. Giamario, *The Laughing Body Politic: The Counter-Sovereign Politics of Hobbes's Theory of Laughter*, 69 POL. RES. Q. 309, 316 (2016). Hobbes used this phrase negatively, but Giamario argues for its positive democratic potential.

[35] *Id.* at 315 (internal citations and quotations omitted).

[36] *Id.*

[37] *Id.* at 316.

[38] *Id.*

[39] *Id.*

While parody often targets politics generally, it is especially interesting in the "official" legal context. For example, state representatives have pushed back on abortion restrictions by filing their own bills subjecting, for example, vasectomies and masturbatory emissions to state regulation. A Texas lawmaker introduced a "Man's Right to Know" act, which proposed a similar "informed consent" booklet for vasectomies.[40] A Kentucky lawmaker would require a man hoping to get a Viagra prescription to "make a sworn statement…on the Bible that he will only use [a drug for erectile dysfunction] when having sexual relations with his current spouse."[41] The Democratic state representative explicitly said that she was filing the bill as a "response to measures against abortion in the current legislative session, including…[a twenty-four-hour counseling] bill."[42] Similarly, Oklahoma Representative Constance Johnson introduced an amendment to Senate Bill No. 1433, entitled the "Personhood Act." Her amendment proposed adding the following language: "provided, however, any action in which a man ejaculates or otherwise deposits semen anywhere but in a woman's vagina shall be interpreted and construed as an action against an unborn child."[43]

A Georgia lawmaker proposed H.B. 116 to "prohibit the performance of vasectomies in Georgia."[44] The bill included the following "factual" findings: "(1) Thousands of children are deprived of birth in this state every year because of the lack of state regulation over vasectomies" and "(2) There is substantial evidence that unregulated vasectomies result in fewer unwanted pregnancies and, by extension, fewer births."[45] The bill's legislative purpose—"[T]o assert an invasive state interest in the reproductive habits of men in this state and substitute the will of the government over the will of adult men"—was more obviously pointed.[46]

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[40] H.B. 4260, 85th Leg., Reg. Sess. (Tex. 2017).

[41] Deborah Yetter, *Ky. Bill Forces Men to Get Wife's OK Before Getting Viagra*, USA TODAY (Feb. 17, 2016), https://www.usatoday.com/story/news/politics/2016/02/17/viagra-bill-abortion-debate/80502870/ [https://perma.cc/H5GE-J6B6].

[42] *Id.*

[43] Constance Johnson, Proposed Amendment to S.B. No. 1433, 53rd Leg., Reg. Sess. (Okla. 2012).

[44] H.B. 1116, 151st Leg., Reg. Sess., at 1 (Ga. 2012).

[45] *Id.*

[46] *Id.*; *see also* Christopher Quinn, *Vasectomy Bill Goes Viral*, ATLANTA J.-CONST. (Feb. 23, 2012), https://www.ajc.com/news/state--regional-govt--politics/vasectomy-bill-goes-viral/uBYaCmINnOiBmgKVClAMqO/ [https://perma.cc/78FW-BQ73].

These parodies accomplish by comparison what critiques of the individual bills could not. After all, state restrictions on abortion like enhanced "informed consent" and extreme requirements for abortion facilities often seem mundane and bureaucratic on their own. By repeating these regulations in a less fraught context (e.g., a vasectomy, which is typically perceived as a safe and reasonable procedure), these parodic bills invite crucial comparison and criticism. That comparison, in turn, provokes a critical question: Why do courts allow abortion—and abortion patients' decision-making—to be regulated in this way? Is there a secular reason for the distinction?

II. Abortion, Religion, and Informed Consent

Two distinct fields of law intersect in Mary Doe's challenge: religious liberty and reproductive rights. Although religion and abortion are deeply culturally entangled, using the First Amendment's Religion Clauses as tools to challenge abortion restrictions has largely been abandoned as a legal strategy since *Casey* was decided.[47] This section orients Mary Doe's claims in the broader historical development of both legal fields and concludes that Mary Doe's litigation largely tracks the original purpose of the Religious Freedom Restoration Act, and highlights the gaps and complications in reproductive rights jurisprudence.

A. The First Amendment & Abortion: A History Lesson

The First Amendment's freedom of religion guarantee includes both positive and negative religious liberty—freedom *to* worship (or not) without interference by the state (known as the Free Exercise Clause), and freedom *from* an established religion by the state (known as the Establishment Clause).[48] Together, these prohibitions on establishing

[47] *See, e.g.*, ACLU of Mass. v. Sebelius, 821 F. Supp. 2d 474 (D. Mass. 2012), *rev'd on other grounds by* ACLU of Mass. v. U.S. Conf. Catholic Bishops, 705 F.3d 44 (1st Cir. 2013) (finding case moot because contract was expired). The most recent cases cited by the District Court in that case that discussed abortion in the First Amendment religious context were *Bowen v. Kendrick*, 487 U.S. 589 (1988), and *Harris v. McRae*, 448 U.S. 297 (1980). Similarly, academic writing about the relationship between abortion and religion—with the exception of writing on *Hobby Lobby*—has died down since the early 1990s. Yale Law School's Linda Greenhouse recently called the religious freedom argument a "non-starter [that] judges just don't want to hear." Stephanie Russell-Kraft, *The Right to Abortion—and Religious Freedom*, THE ATLANTIC (Mar. 3, 2016), https://www.theatlantic.com/politics/archive/2016/03/abortion-rights-a-matter-of-religious-freedom/471891/ [https://perma.cc/8E2V-VZRP].

[48] U.S. CONST. amend. I, cls. 1, 2 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .").

an official religion or limiting the free exercise of religious belief are known as the "Religion Clauses."

There are two First Amendment arguments against abortion restrictions as violation of the Free Exercise and the Establishment Clause, respectively. The first is that having an abortion is either permitted or compelled by one's religious beliefs, and that making the decision to have an abortion should not be subject to state interference.[49] The other is that restrictions on pre-viability abortions are rooted in (and motivated by) religious beliefs specific to Catholic and evangelical Protestants and thus establish or endorse that religious ideology.[50] In the years leading up to *Casey*, the Court either ignored or soundly dismissed claims that restrictions on abortion could be interpreted as endorsing religions that believe life begins at conception or inhibiting an abortion patient's belief that abortion is necessary.[51]

1. *Harris v. McRae* (1980)

In *Harris v. McRae*, plaintiffs alleged that the Hyde Amendment—which restricted Medicaid funds from being used for abortions—violated both the Free Exercise and Establishment Clauses.[52] The free exercise claim was different from the Temple's in that it generally distinguished between "pro-choice" and "anti-abortion" faiths but did not allege any specific religious belief impacted by the Hyde Amendment.[53] The plaintiffs argued that abortion, although not a "religious rite or ritual," still "ranks as a paramount concern in all major religions"—either a "grave sin" for the anti-abortion faiths, or a "consideration of questions of the preservation of the health and well-being of existing life and of responsible parenthood [that] likewise rank among the highest obligations of

[49] *See, e.g.*, Brief of Appellees, Harris v. McRae, 448 U.S. 297, 156–66 (1980) (No. 79-1268).

[50] *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 501 (1989).

[51] *See generally, e.g.*, *id.*; *Harris*, 448 U.S. 297; *see also* Paul D. Simmons, *Religious Liberty & Abortion Policy:* Casey *as Catch-22*, 42 J. CHURCH & ST. 69 (2000).

[52] Brief of Appellees, *Harris*, No. 79-1268, 1980 WL 338642, at *151–86. The case was argued and decided before both *Smith* and RFRA.

[53] The plaintiffs also argued that the Hyde Amendment discriminated against those who do not believe that life begins at conception. For those who *do* hold that belief, they can continue their pregnancy according to the dictates of their conscience. Women of the "pro-choice persuasion," on the other hand, "are hindered or precluded . . . in the exercise of their religious and conscientious scruples." *Id.* at *160.

human beings toward one another and toward God."[54] The plaintiffs quoted the district court as holding that terminating a pregnancy is already an "exercise of the most fundamental of rights" but is "doubly protected when the liberty is exercised in conformity with religious belief and teaching protected by the First Amendment."[55] The plaintiffs also analogized the abortion decision to case law regarding non-religious conscientious objectors. In those cases, the Court recognized that a non-religious belief could "occup[y] in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for exemption."[56] Thus, the plaintiff's argument was essentially that the abortion decision is a "matter of such ultimate dimension" that it should only be made by the person according to their own private notion of morality and conscience—whether religious or not.[57]

The plaintiffs also argued that the Hyde Amendment violated the Establishment Clause by "enact[ing] a distinctly religious belief in response to intense pressure from a religiously based and motivated constituency."[58] To avoid an Establishment Clause violation, laws must "reflect a clearly secular purpose," "have a primary effect that neither advances not [sic] inhibits religion," and "avoid excessive government entanglement with religion."[59] That a secular law's purpose overlaps with some religious value does not automatically violate the Establishment Clause. For example, some religious values have clear secular value, like prohibitions against stealing.[60] Other laws, originally "motivated by religious forces," take on secular value after "having undergone extensive [changes]," e.g., a prohibition on Sunday labor that was upheld as a secular recognition that people deserve a day off each week despite its original "religious

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[54] *Id.* at *153.

[55] *Id.* at *152–53 (quoting McRae v. Califano, 491 F. Supp. 630, 742 (E.D.N.Y. 1980)).

[56] *Id.* (quoting United States v. Seeger, 380 U.S. 163, 176 (1965)).

[57] *Id.* at *152–55 ("Pregnancy ineluctably requires immediate, direct, intimate and profound confrontation with questions of life and death. The response may be immediate and instinctive or the result of a long, soul-searching process. For some women, the fetus is inviolable, and conscience precludes consideration of abortion even at tremendous risk to life and health. For others, pregnancy requires balancing the potential of human life against questions of survival, purpose, lifelong responsibility, and ultimately the meaning of human existence and fulfillment. For these women, conscience may dictate the necessity of terminating an unwanted and health-threatening pregnancy.").

[58] *Id.* at *167.

[59] *Id.* at *168 (quoting Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 773 (1973)).

[60] Harris v. McRae, 448 U.S. 297, 319 (1980).

character."[61] The *Harris* plaintiffs noted that, to the contrary, "laws restricting abortion which historically served a panoply of secular concerns, are today the product of a single, religious concern for the life of the fetus."[62] Instead of evincing *Roe*'s permissible concern for *potential* fetal life, the Hyde Amendment promoted "concern for the fetus as an *actual* human life," a proposition "too religiously determined to support valid civil enactments."[63]

Nearly half of the plaintiffs' brief was devoted to the Religion Clauses, but the Supreme Court dismissed the Establishment Clause argument in a single paragraph.[64] Regarding the free exercise claim, the Court reversed the district court and held that the individual plaintiffs did not allege or prove that they "sought an abortion under compulsion of religious belief" and thus held they did not have standing.[65] The Supreme Court also rejected the Establishment Clause claim, holding simply that "the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause."[66]

2. *Webster v. Reproductive Health Services* (1989)

Similarly, in *Webster v. Reproductive Health Services*, the Court declined to review legislative findings by the state of Missouri that "the life of each human being begins at conception" and "unborn children have protectable interests in life, health, and well-being."[67] The Eighth Circuit held that the legislative findings were "an impermissible

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[61] McGowan v. Maryland, 366 U.S. 420, 431 (1961).

[62] Brief of Appellees, *Harris*, No. 79-1268, 1980 WL 338642, at *173.

[63] *Id.* at *176–77.

[64] *Harris*, 448 U.S. at 319–20.

[65] *Id.* at 299. The district court decision, *McRae v. Califano*, 491 F. Supp. 630 (E.D.N.Y. 1980), held that the law did impermissibly interfere with the individual decision to terminate a pregnancy based on religious conscience, but that it did not establish religion.

[66] *Harris*, 448 U.S. at 298–99 n.3.

[67] Webster v. Reprod. Health Servs., 492 U.S. 490, 505–06 (1989). The Missouri statute also required that "all Missouri laws be interpreted to provide unborn children with the same rights enjoyed by other persons" and prohibited any public funding, employees, or facilities from being used to perform, encourage, or counsel abortion. *Id.* at 501.

state adoption of a theory of when life begins to justify its abortion regulations."[68] However, because the preamble did not "regulate abortion or any other aspect of appellees' medical practice," the Supreme Court held that the preamble was a mere "value judgment," valid under *Roe*.[69]

Justice Stevens dissented from the majority's opinion on the grounds that the preamble clearly violated the Establishment Clause of the Federal Constitution and the right to privacy found in "*Griswold* and its progeny."[70] To both points, Justice Stevens wrote that defining "life" as beginning at conception would limit *Griswold*'s holding to contraception that only operates pre-fertilization, and that there was no "secular basis for differentiating between contraceptive procedures that are effective immediately before and those that are effective immediately after fertilization."[71] There was, however, a "theological basis for such an argument."[72] Regarding the Establishment Clause, Justice Stevens wrote further:

> I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization make the relevant portion of the preamble invalid under the Establishment Clause . . . . This conclusion does not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions . . . , or on the fact that the legislators who voted to enact it may have been motivated by religious considerations . . . . Rather, it rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause.[73]

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[68] Reprod. Health Servs. v. Webster, 851 F.2d 1071, 1076 (8th Cir. 1988) (quoted in *Webster*, 492 U.S. at 503).

[69] *Webster*, 492 U.S. at 506 (citing Maher v. Roe, 432 U.S. 464, 474 (1977), and discussing Roe v. Wade, 410 U.S. 113 (1973)).

[70] *Id.* at 566 (Stevens, J., concurring in part and dissenting in part).

[71] *Id.*

[72] *Id.* at 565–66.

[73] *Id*. at 566–67 (internal citations omitted).

Since Justice Stevens' dissent, no Supreme Court opinion—majority or otherwise—has made such a strong statement equating statutory "personhood" language with an Establishment Clause violation. Indeed, in order to sustain Missouri's preamble, Justice Stevens would have shifted the burden onto the state to "identify[] the secular interests" that differentiate a newly-fertilized zygote from pre-conception reproductive materials.[74]

Justice Stevens' willingness to draw a connection between Missouri's preamble and Christian theology is unique, but perhaps shouldn't be. He writes, "Bolstering my conclusion . . . is the fact that the intensely divisive character of much of the national debate over the abortion issue reflects the deeply held religious convictions of many participants in this debate."[75] In light of the deep connection between certain religious groups and the pro-life movement, dismissing the overlap between value statements about pre-viability fetal life and the religious belief that life begins at conception as "coincidence" seems disingenuous. While fifty-eight percent of Americans believe abortion should be legal in all or most cases, sixty-one percent of white evangelical Protestants believe it should be *illegal* in all or most cases.[76] In comparison, seventy-four percent of people who are religiously unaffiliated support legal abortion.[77]

B. Federal & State Religious Freedom Restoration Acts

Prior to 1990, the Supreme Court applied strict scrutiny to all free exercise claims.[78] Under that test, when an otherwise neutral law burdened a religious practice, the government had to show both a "compelling state interest in the regulation of a subject

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[74] *Id.* at 568–69.

[75] *Id.* at 571.

[76] Hannah Hartig, *Nearly Six-in-Ten Americans Say Abortion Should be Legal in All or Most Cases*, PEW RES. CTR. (Oct. 17, 2018), https://www.pewresearch.org/fact-tank/2018/10/17/nearly-six-in-ten-americans-say-abortion-should-be-legal/ [https://perma.cc/7Z7W-WAZP].

[77] *Id.*

[78] Sherbert v. Verner, 374 U.S. 398 (1963) (holding that a worker's compensation regulation requiring employees to make themselves available for Saturday work violated a Seventh Day Adventist's free exercise rights); *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that applying a truancy law to Amish children violated the First Amendment). Although RFRA and free exercise claims are conceptually related, the Supreme Court has noted that "[b]y enacting RFRA, Congress went far beyond what this Court has held is constitutionally required." Burwell v. Hobby Lobby Stores, 573 U.S. 682, 706 (2014). Thus, free exercise claims are still evaluated under *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), and other Supreme Court precedent, while RFRA claims undergo a distinct test with its own case law, discussed *infra* at Part I.B.

within the State's constitutional power to regulate" and that the law was narrowly tailored to meet that objective.[79] In 1990, the Supreme Court decided that applying strict scrutiny to all free exercise claims was inappropriate, and instead applied rational basis to a claim that denying unemployment benefits because of "misconduct" related to religious ingestion of peyote was a violation of free exercise.[80]

In response to this ruling, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993. The Congressional findings include a provision stating that "in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[81] The purposes of RFRA were to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened," and to "provide a claim or defense to persons whose religious exercise is substantially burdened by government."[82] RFRA was the result of a broad coalition of Republicans and Democrats who saw government encroachment on religious expression as a problem for all religions, big and small.[83] RFRA immediately sparked litigation not only from individuals claiming their religious rights were being violated, but also from states and localities arguing that the statute was an unconstitutional use of federal power.[84] In *City of Boerne v. Flores*, the Supreme Court decided that Congress could only use its enforcement power under Section Five of the Fourteenth Amendment for protecting rights as interpreted by the judiciary.[85] Because RFRA went beyond the religious protections guaranteed by the Constitution as interpreted by the Supreme Court, RFRA was unconstitutional as applied

[79] *Sherbert*, 374 U.S. at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

[80] *Smith*, 494 U.S. 872.

[81] 42 U.S.C. § 2000bb(a)(4) (2018).

[82] *Id.* § 2000bb(b)(1).

[83] Laycock & Thomas, *supra* note 10, at 210–12.

[84] James A. Hanson, *Missouri's Religious Freedom Restoration Act: A New Approach to the Cause of Conscience*, 69 MO. L. REV. 853, 854–55, 854 nn.8–13 (2004) (citing both academic and judicial perspectives on RFRA's constitutionality).

[85] 521 U.S. 507 (1997).

to the states.[86] Post-*Boerne*, twenty-one states enacted their own versions of RFRA.[87] Some explicitly adopted the federal language, while others expanded free exercise protections (e.g., by lowering the standard for violations from "substantial burden" to "simple burden").[88] Missouri's RFRA—under which Mary Doe brought one of her claims in state court—was passed in 2003.[89] The language of Missouri's RFRA is similar in effect to the federal statute. It states that "a governmental authority may not restrict a person's free exercise of religion" unless the government meets two conditions:

> (1) The restriction is in the form of a rule of general applicability, and does not discriminate against religion, or among religions; and
> (2) The governmental authority demonstrates that application of the restriction to the person is essential to further a compelling governmental interest, and is not unduly restrictive considering the relevant circumstances.[90]

The statute goes on to define "exercise of religion" as "an act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief."[91] That language operates in reaction to different state judicial interpretations of RFRA as requiring religious activities to be compulsory or central to be protected, rather than merely discussing whether the religious belief is "sincere."[92]

Pro-life coalition members were initially hesitant to support the federal RFRA's "free exercise" language because they thought it might create a statutory right to abortion if

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[86] *Id.*

[87] *State Religious Freedom Restoration Acts*, NAT'L CONF. OF ST. LEGISLATURES (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/758A-4NGP]. Alabama amended its state constitution to include language similar to the federal RFRA. Hanson, *supra* note 84, at 862.

[88] Hanson, *supra* note 84, at 863.

[89] *Id.* at 870. Missouri's RFRA was codified at MO. REV. STAT. § 1.302.

[90] MO. REV. STAT. § 1.302.1.

[91] *Id.* § 1.302.2.

[92] Hanson, *supra* note 84, at 875.

Roe v. Wade were eventually overruled.[93] That fear depended on a larger philosophical question: whether abortion can be considered a "religious choice."[94] If abortion can be considered a matter of religious liberty (or even a matter of religious duty, as when the mother's life is at stake), then government restrictions on abortion might be considered a violation of the patient's First Amendment rights. This might be because "different faiths disagree about the permissibility of abortion" or because "there is a duty to act conscientiously."[95]

Ultimately, RFRA included language that satisfied both sides of the abortion debate. The final bill insisted that "the abortion debate will be resolved in contexts other than this legislation. . . . To be absolutely clear, the bill does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with free exercise jurisprudence, including Supreme Court jurisprudence [i.e., *Casey*], under the compelling governmental interest test prior to Smith."[96] Missouri's version of RFRA does not include similar language. Ironically, the concern now is that RFRA is being used to restrict third-party rights and privileges implicated by RFRA accommodations, especially in the reproductive rights context. Some scholars have expressed concern that state RFRAs could be used to either challenge antidiscrimination laws meant to protect people from discrimination based on sexual orientation or to refuse health care to transgender patients.[97] The most obvious examples are the *Hobby Lobby* and *Zubik* cases, in which plaintiffs claimed that even facilitating coverage of certain contraceptives made them complicit in the sin of abortion.[98] Although the *Hobby Lobby* decision largely shifted costs and responsibilities to insurers and administrators, recent rules promulgated by the

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[93] Laycock & Thomas, *supra* note 10, at 230–31 ("Pro-life witnesses opposed to the bill urged an amendment that would restrict coverage to conduct 'compelled' by religion. But witnesses supporting the bill successfully opposed such an amendment.").

[94] *Id.*

[95] *Id.*

[96] *Id.* at 237–38 (citing House Comm. on the Judiciary, Religious Freedom Restoration Act of 1993, H.R. Rep. No. 88, 103d Cong., 1st Sess. 9 (1993) (explanatory bracket added)).

[97] Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2553–66 (2015).

[98] The plaintiffs in these cases were challenging the "contraceptive mandate" of the Patient Protection and Affordable Care Act, which required employers to offer insurance plans covering all "essential" benefits, including all FDA-approved contraception. The plaintiffs objected specifically to "morning-after pills" because they considered them to be abortifacients. Burwell v. Hobby Lobby Stores, 573 U.S. 682, 691 (2014).

Trump administration and upheld by the Supreme Court exempt anyone with a religious or moral objection to contraception from the ACA's mandate—leaving employees to pay for their own contraception.[99]

C. "Distortions" in Reproductive Rights Jurisprudence

The *Mary Doe* litigation exists at the intersection of two trends in the legal landscape of reproductive health: informed consent laws designed to dissuade pregnant people from obtaining abortions, and the controversy surrounding the Affordable Care Act's contraceptive mandate and its impact on religious organizations that object to certain birth control methods. In her article *Abortion Distortions*, Caroline Corbin discusses these two legal phenomena as examples of "distortions" that develop in cases involving abortion. In the context of religious accommodations, Corbin argues that courts have been overly deferential to bad science in religious accommodation cases.[100] On the other end of the spectrum are "informed consent" laws for abortion that mandate biased, inaccurate counseling—in particular, the idea that abortion causes mental health problems and higher rates of suicide.[101] Despite evidence that these laws are based on bad science, courts have routinely upheld them because they do not present an "undue burden" under *Casey*.[102] This section reviews these scientific and legal distortions in turn.

1. Burwell v. Hobby Lobby Stores

In 2010, the Obama administration set about implementing the recently-passed Patient Protection and Affordable Care Act (ACA). The statute included a provision requiring all insurance plans to provide "minimum essential benefits," including preventive care, with no cost-sharing.[103] The administrative agency charged with deciding what constituted an "essential benefit" determined that all contraceptive devices cleared by the FDA—including emergency contraception and intrauterine devices—should be

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[99] Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 149 S. Ct. 2367 (2020) (upholding Trump administration rules exempting employers with "moral" or "religious" objections from the ACA's contraceptive mandate).

[100] Corbin, *Abortion Distortions*, *supra* note 15, at 1205–06.

[101] *Id.* at 1178.

[102] *Id.* at 1191–92.

[103] 42 U.S.C. § 300gg–13(a) (2018).

covered.[104] Knowing that certain religious organizations would object to covering contraceptives, the Obama administration set up an accommodation process that would allow insurers or third-party administrators to provide contraceptive coverage without requiring the religious institution or non-profit to be involved.[105] On the other hand, for-profit corporations with more than fifty employees are required to offer employer-sponsored insurance plans that cover minimum essential benefits, including contraceptive coverage.[106]

Hobby Lobby Stores, Inc.—a closely-held for-profit corporation that operates over 500 arts and crafts stores and employs over 13,000 people—challenged the contraceptive mandate under RFRA and the Free Exercise Clause.[107] Hobby Lobby's owners claimed that being required to provide certain "abortion-causing drugs and devices" substantially burdened their religious liberty and could not survive strict scrutiny.[108] In 2014, the case made its way to the Supreme Court, which held that a closely-held for-profit corporation qualified as a "person" under RFRA and that the contraceptive mandate did indeed substantially burden their religious liberty.[109]

As Corbin points out, the *Hobby Lobby* decision allowed those plaintiffs to assert not only their religious beliefs but their own set of *facts* about how specific contraceptive devices operate.[110] The Hobby Lobby plaintiffs announced a "belie[f] that human beings deserve protection from the moment of conception, and that providing insurance coverage for items that risk killing an embryo makes them complicit in abortion."[111] Thus, in order for an insurance plan to conform to their religious beliefs, it would have to exclude not only abortifacients, but "drugs or devices that can prevent an embryo from implanting in the womb—namely, Plan B, Ella, and two types of intrauterine devices"

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[104] Burwell v. Hobby Lobby Stores, 573 U.S. 682, 697, 701–02 (2014).

[105] *Id.* at 698–99.

[106] *Id.* at 696–97.

[107] Hobby Lobby Stores v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012).

[108] *Id.* at 1285.

[109] *Hobby Lobby*, 573 U.S. at 706.

[110] Corbin, *Abortion Distortions*, *supra* note 15, at 1205.

[111] Brief for Respondents at 9, *Hobby Lobby*, 573 U.S. 682 (No. 13-354).

that can "end life after conception."[112] In one of the consolidated cases, the plaintiffs referred to morning-after pills as "widely known . . . abortifacients in that they frequently function to destroy fertilized eggs, which Plaintiff considers to be abortion on demand."[113]

The problem with this argument, as Corbin succinctly argues, is that "they are wrong."[114] Pregnancy does not begin until a fertilized egg implants in the uterus, not when sperm first meets egg.[115] Indeed, less than one-half of zygotes (the sperm and egg pair) make it through the fallopian tubes to the uterus.[116] Morning-after pills do not "kill" fertilized eggs or prevent them from implanting; like other forms of birth control, they merely stop fertilization from occurring in the first place, albeit at a higher dose than most daily pills.[117] The controversy over the mechanisms of emergency contraception came from a preliminary label printed in the early days of the morning-after pill, indicating that the medications might prevent implantation.[118] Because the mechanism was unclear at that point, the FDA required that disclosure. Now, however, "[e]very reputable scientific study to examine Plan B's mechanism has concluded that these pills prevent fertilization from occurring in the first place."[119]

Although courts have been rightfully hesitant to question whether a plaintiff's religious belief is sincere, the courts "can and should question the accuracy of their science."[120] Thus, the courts should have dismissed the plaintiff's claims: If the medications in question do not kill fertilized eggs, then courts should not seriously

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[112] *Id.* at 9, 14.

[113] Corbin, *Abortion Distortions*, *supra* note 15, at 1197–98 (quoting Complaint, Sharpe Holdings v. U.S. Dep't of Health & Hum. Servs., No. 2:12-CV-92-DDN (E.D. Mo. Dec. 31, 2012), 2012 WL 6738489).

[114] *Id.* at 1198.

[115] *Id.* at 1198–99 (discussing Brief for Physicians for Reprod. Health et al. as Amici Curiae Supporting Petitioners, Hobby Lobby Stores v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (No. 12-6294), *affirmed sub. nom. Hobby Lobby*, 573 U.S. 682 (2013) (No. 13-354)).

[116] *Id.* at 1199.

[117] *Id.* at 1200.

[118] *Id.*

[119] *Id.* at 1200.

[120] *Id.* at 1205.

entertain a claim that covering those drugs on an insurance plan equals complicity in killing fertilized eggs.[121] Corbin argues that allowing a religious liberty claim to proceed based on "obvious scientific error" is a distortion of First Amendment jurisprudence that only developed because of abortion exceptionalism.[122] Corbin makes this point through her own kind of parody—an analogy to a fictional chain of "Hobby Bobby" stores owned by a family that holds "very strong precepts against killing animals."[123] Would a claim that providing cholesterol medication that the family *mistakenly believes* is made from animal by-products get any traction as a religious liberty claim? Corbin thinks not, but "[s]omehow . . . this reasoning becomes plausible in the context of women and their reproductive rights."[124]

2. "Woman's Right to Know" Acts & Compelled Speech

The same year that *Hobby Lobby* was decided, Missouri passed a statute extending their mandatory abortion "reflection period" from twenty-four to seventy-two hours—the longest in the country, tied only with Utah and South Dakota. The bill called the "Woman's Right to Know Act," requires abortion providers to offer patients a booklet of "informed consent" materials and the opportunity to view an ultrasound.[125] The booklet includes the following statement: "The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being."[126] The booklet

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[121] *Id.*

[122] *Id.* at 1206.

[123] *Id.* at 1206–07.

[124] *Id.* at 1209.

[125] MO. H.B. 1307, 1313 (codified as MO. REV. STAT. § 188.027 (2014)); MO. DEP'T OF HEALTH & SENIOR SERVS., INFORMED CONSENT BOOKLET (Oct. 2017), https://health.mo.gov/living/families/womenshealth/pregnancyassistance/pdf/Mo.InformedConsentBooklet-Revisedpgs.12-15August2019jkOGCReviewed.pdf [https://perma.cc/M5AQ-6WL6] [hereinafter "IC Booklet"]. The Missouri law challenged in the *Mary Doe* litigation is far from unique. As of the writing of this Note, twenty-six states have enacted mandatory ultrasound requirements for pregnant patients seeking an abortion as a result of pro-life groups writing and lobbying for specific legislation. Guttmacher Inst., State Laws & Policies: Requirements of Ultrasound (Aug. 1, 2020), https://www.guttmacher.org/state-policy/explore/requirements-ultrasound# [https://perma.cc/8E9G-9EVF]; *see also* Americans United for Life ("AUL"), Defending Life (2019) (on file with author).

[126] IC Booklet at 1. This language is identical to "informed consent" language mandated by South Dakota, North Dakota, Kansas, and Oklahoma. Ams. United for Life, Defending Life from Conception to Natural Death (2019) [hereinafter "Defending Life"] (on file with author).

also purports to provide abortion patients with "basic facts" to aid them in their decision. These "facts" include definitions for terms like "embryo" and "fetus," information about child support and state agencies that facilitate adoption, as well as visual depictions of the pregnancy at each stage of development.[127] In addition, the same physician who performs the abortion "shall provide the woman with the opportunity to view . . . an active ultrasound of the embryo or fetus, and to hear the heartbeat if it is audible."[128] After the patients have reviewed this information, they must wait seventy-two hours to obtain an abortion.[129]

Although abortion providers in Missouri declined to challenge the law, providers in other states have argued that forcing abortion providers to make ideological, non-medical statements (e.g., abortion terminates the "life of a separate, unique, living human being") violates their First Amendment rights against compelled speech.[130] The other First Amendment "distortion" comes in part from what Borgmann calls "undue burden preemption": the erroneous tendency of lower courts to allow *Casey*'s "undue burden" standard to preempt other constitutional claims, just because they involve abortion.[131] In *Casey*, the Supreme Court created a sort of heightened scrutiny applicable *only* to abortion restrictions. Rather than applying strict scrutiny or rational basis, the *Casey* court determined that abortion regulations that have "the purpose or effect of placing a

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[127] IC Booklet at 1.

[128] *Id.* at 2.

[129] Crucially, this bill requires that patients receive the informed consent materials and ultrasound in person at the *same* clinic that ultimately performs the procedure. Because Missouri only has one abortion provider in St. Louis, patients coming from outside the city often have to make multiple long trips and pay for hotel rooms, which presents serious obstacles for low-income women and women with children or inflexible work schedules. Nadja Popovich, *72 Hours and Counting: Missouri's Last Clinic Confronts New Abortion Reality*, THE GUARDIAN (June 22, 2015), https://bit.ly/2SXqiGO [https://perma.cc/8AYM-ARPZ].

[130] *See, e.g.*, Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014); Planned Parenthood of Minn. v. Rounds, 530 F.3d 724, 735–36 (8th Cir. 2008); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570 (5th Cir. 2012).

[131] The tendency is erroneous because the Court has explicitly held that a plaintiff alleging multiple constitutional claims should be heard on each claim separately. The exception to this interpretive rule is found in *Graham v. Connor*, 490 U.S. 386 (1989), which allows a "more specific constitutional provision" to preempt substantive due process claims. Borgmann points out that allowing the undue burden standard (which is rooted in the substantive due process right to privacy) effectively allows "an unenumerated, substantive due process right [to] preempt[] either a textually grounded constitutional claim or another unenumerated right." Caitlin E. Borgmann, *Abortion Exceptionalism & Undue Burden Preemption*, 71 WASH. & LEE L. REV. 1047, 1054 (2014).

substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" constitute "undue burdens" on the patient's right to privacy.[132]

The undue burden standard is unique to abortion jurisprudence and distinct from the Constitution's other guarantees, including the right to free speech guaranteed by the First Amendment. The First Amendment right to freedom of speech has been interpreted to include a right against being compelled to speak by the government.[133] Of course, the compelled speech doctrine is limited in the commercial context: The government can, for example, require companies to include certain warnings about a product.[134] And, indeed, state governments can dictate that every medical procedure is done only after securing "informed consent" from a patient.[135] Normally, informed consent involves going through the relevant and important risks and benefits of the treatment and any alternatives.[136] According to the American Medical Association Code of Medical Ethics, the "physician's obligation is to present the medical facts accurately to the patient."[137] Physicians who have challenged informed consent laws like Missouri's have argued, to the contrary, the laws require them to present medically *inaccurate* information and force them to promote ideology rather than facts.

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[132] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992). Borgmann calls *Casey*'s undue burden standard the "most obvious[]" example of abortion exceptionalism—the Court "jettisoned strict scrutiny for a new constitutional test, custom made for abortion restrictions." Borgmann, *supra* note 131, at 1086.

[133] U.S. CONST. amend. I, cl. 3; Corbin, *Abortion Distortions*, *supra* note 15, at 1189 ("The Free Speech clause protects the right to speak as well as the right not to speak. This right against compelled speech was first established in a case challenging a state requirement that schoolchildren recite the pledge of allegiance every morning. In striking down the law, the Supreme Court famously observed: 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, shall prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or action their faith therein.' In other words, the government cannot compel anyone to express agreement with government ideology. Such compulsion would violate the freedom of conscience the Free Speech Clause was designed to protect. It is as anathema as the state censoring speech it disapproves.") (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 642 (1943)).

[134] Rebecca Tushnet, *More than a Feeling: Emotion & the First Amendment*, 127 HARV. L. REV. 2392, 2404 (2014).

[135] See, for example, Pennsylvania's "informed consent" statute, which states that "a physician owes a duty to a patient to obtain the informed consent of the patient or the patient's authorized representative prior to conducting the following procedures." 40 PA. STAT. § 1303.504.

[136] *See* Vandewalker, *supra* note 16, at 5.

[137] AMA Code of Med. Ethics. S. 8.08 (2012) (cited in Corbin, *Abortion Distortions*, *supra* note 15 at 1188).

As Corbin notes, the "default rule" for compelled speech claims is that the regulation is "unconstitutional unless it survives strict scrutiny."[138] However, providers who have challenged these "informed consent laws" have had their distinct, First Amendment speech-based claims effectively swallowed up by the undue burden standard.[139] As Corbin points out, "[u]nder normal free speech jurisprudence, these content-based requirements would be subject to strict scrutiny and almost certainly struck down."[140] Lower courts considering providers' compelled speech claims have attempted to fit these First Amendment challenges into the undue burden framework. In *Casey*, the Court held that requiring abortion providers to offer certain "truthful, non-misleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus" to their patients "cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden."[141]

The Fifth and Eighth Circuits have taken this to mean that mandatory ultrasounds are fair game. The Fifth Circuit found that an ultrasound and a fetal heartbeat display was "medically accurate," "factual," and that "truthful, non-misleading" information of that kind did not violate *Casey*.[142] Similarly, the Eighth Circuit has held that an informed consent requirement stating that "abortion will terminate the life of a whole separate, unique, living human being" was simply "biological information about the fetus . . . relevant to the patient's decision to have an abortion."[143] This statement was "factual," said the Eighth Circuit, because "human being" was defined in South Dakota's code as merely being a member of the species *homo sapiens*—a definition that apparently erased any ideological content and did not present a substantial obstacle to obtaining an abortion.[144]

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[138] Corbin, *Abortion Distortions*, *supra* note 15, at 1189–90 (discussing a South Dakota law that included language identical to Missouri's "Woman's Right to Know Act").

[139] Borgmann, *supra* note 131, at 1077–78.

[140] Corbin, *Abortion Distortions*, *supra* note 15, at 1188–89.

[141] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882–83 (1992).

[142] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 577 (5th Cir. 2012).

[143] Planned Parenthood of Minn. v. Rounds, 530 F.3d 724, 735–36 (8th Cir. 2008).

[144] *Id.*

Caitlin Borgmann argues that using *Casey*'s "undue burden" standard to analyze First Amendment compelled speech claims made by abortion providers makes no sense.[145] Although many abortion restrictions specifically impact access, "abortion restrictions . . . implic[ate] other distinct rights," like the right to refuse medical treatment or the right to bodily autonomy.[146] A doctor's claim that the government is compelling ideological speech exists "independently of whether the requirement hampers or prevents her [patient's] access to abortion" and should thus be subject to strict scrutiny.[147]

The Fourth Circuit opinion striking down a mandatory ultrasound law reflected this assessment, holding that a North Carolina statute requiring abortion providers to display and describe a "real-time view" of fetal ultrasound images to patients constituted compelled speech and violated the First Amendment.[148] As for *Casey*, the Fourth Circuit concluded that the Fifth and Eighth Circuits "read too much into" its holding that the *Casey* Court saw "'no constitutional infirmity in the requirement that the physician provide the information mandated by the State'" in that case.[149] This "particularized finding hardly announces a guiding standard of scrutiny for use in every subsequent compelled speech case involving abortion" and certainly did not "hold sweepingly that all regulation of speech in the medical context merely receives rational basis review."[150] Thus, instead of looking to *Casey* to determine whether "abortion regulations that compel speech to the extraordinary extent present here" presented an undue burden, the Fourth Circuit analyzed the requirement as a "content-based regulation of a medical professional's speech which must satisfy at least intermediate scrutiny to survive."[151]

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[145] Borgmann, *supra* note 131, at 1070.

[146] *Id.* at 1084.

[147] *Id.*

[148] Stuart v. Camnitz, 774 F.3d 238, 238 (4th Cir. 2014).

[149] *Id.* at 249 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992)). The Court also found the Fifth and Eighth Circuits' discussion of *Gonzales v. Carhart*, 550 U.S. 124 (2007), "inapposite." Although that case provided "valuable insight into the relationship between the state and the medical profession and the role the state may play in ensuring that women are properly informed," *Gonzales* was not a First Amendment case and therefore said "nothing about the level of scrutiny courts should apply when reviewing a claim that a regulation compelling speech in the abortion context violates physicians' First Amendment free speech rights." *Stuart*, 774 F.3d at 249.

[150] *Stuart*, 774 F.3d at 249.

[151] *Id.* at 245.

D. Mary Doe's "Right to Know"?

Federal appeals courts are currently split on whether mandatory ultrasound and biased counseling laws are unconstitutional as applied to *providers*. For abortion patients, however, the argument is more complex. In other states with similar waiting period statutes, litigants have focused on the "undue burden" posed by long waiting periods, particularly for low-income patients who live far away from abortion providers.[152] Without considering the waiting period, however, it is difficult to argue that undergoing an ultrasound (even if it is unwanted) and receiving certain information (even if it is inaccurate) presents a substantial obstacle to an abortion patient. For those who believe the abortion decision is deeply personal, however, there is something wrong with the government forcing patients to hear inaccurate information as part of the "informed consent" process. The question for advocates, then, is how to frame these objections as judicially cognizable claims.

1. Images and Ideology

The Fifth and the Eighth Circuits both insist that the informed consent documents and mandatory ultrasounds are part of a normal, medically-appropriate informed consent process in line with *Casey*'s approval of "truthful, non-misleading information."[153] In other words, these courts have held that sonographic depiction of a fetus and description of its physical characteristics are neutral medical information. Indeed, the Fifth Circuit wrote that ultrasound images are "the purest conceivable expression of factual information."[154] As the Fourth Circuit pointed out, however, simply because the "words the state puts into the doctor's mouth are factual" does not "divorce the speech from its moral or ideological implications."[155] Requiring a "real-time view" of the fetus "explicitly promotes a pro-life message by demanding the provision of facts that all fall

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[152] *See, e.g.*, Planned Parenthood of the Heartland v. Reynolds, 915 N.W.2d 206 (Iowa 2018) (crediting a poverty expert who illustrated, through two hypotheticals, how a seventy-two-hour waiting period would pose particular difficulties for low-income patients, victims of domestic violence, and other patients with inflexible jobs or childcare arrangements).

[153] *Casey*, 505 U.S. at 882.

[154] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 570, 577 n.4 (5th Cir. 2012).

[155] *Stuart*, 774 F.3d at 246.

on one side of the abortion debate—and does so shortly before the time of decision when the intended recipient is most vulnerable."[156]

Scholars have gone even further than the Fourth Circuit's ruling to deconstruct the ideological content of mandatory ultrasound and informed consent requirements. Carol Sanger traces ultrasound technology from a diagnostic tool to a social practice that often produces "baby's first picture."[157] As anyone who has tried in vain to find a tiny head or foot that a family member insists is *right there* knows that ultrasounds nearly always require interpretation by a medical professional. Very early images of pregnancy "are not always recognizable as that of a baby, or even as a human," so viewing an ultrasound becomes a form of "assisted seeing" in which sonographers "help transform the grainy splotches on the monitor into [a] baby."[158] Similarly, physical descriptions are "filtered through a cultural sieve" that depends on the language the sonographer chooses and the qualities she ascribes to the fetal image.[159]

Sanger points out that there is no medical reason for showing a patient her own sonogram; if informed consent about the size and features of a fetus is truly the goal, why "replac[e] an accurate drawing or generic photo with an image of a particular fetus that is the woman's very own?"[160] Similarly, Borgmann interrogates why the state needs to inform patients that an abortion will "terminate the life of a separate, unique, living *human being*," since, presumably, patients know that their pregnancy will not eventually result in, for example, a dolphin being born.[161]

The answer, of course, is that the requirements are meant to interpolate pregnant patients into the social experience of motherhood. This is not "truthful, non-misleading" information about the respective risks of abortion and childbirth. Instead, it is ideological messaging meant to dissuade the patient from choosing to go forward with the abortion. Should the state be allowed to interfere with the abortion decision in this way? Unlike

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[156] *Id.*

[157] CAROL SANGER, ABOUT ABORTION 115 (2017).

[158] *Id.*

[159] *Id.*

[160] *Id.* at 110.

[161] Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 1002 (2009) [hereinafter Corbin, *The First Amendment Right*].

reading a pamphlet about how many inches long your fetus might be on a given week of pregnancy, mandatory ultrasounds ask women to "cooperate in the production of the very thing to be seen—coerced production."[162] States thus force pregnant patients to "offer up the content of their bodies in the form of an image for inspection before the law permits them to end a pregnancy," effectively forcing the patient to participate in her own persuasion.[163]

Carol Sanger analogizes biased counseling and mandatory ultrasound laws to those that implicate First Amendment religious freedom—a comparison that Mary Doe's claim makes literal.[164] Religious *belief* itself is not the exclusive subject of constitutional protection; the process of coming to a decision about religious belief is also insulated from government action. So, for example, the government cannot force a citizen to read a pamphlet about a certain religion or attend religious services, even if "belief" is not technically mandated.[165] Because abortion is a deeply personal, "self-defining" decision, Sanger argues that the "deliberative path a person takes to reach the decision" should also be protected.[166]

2. Compelled Listening

Casey held that certain informed consent provisions were "related to the State's informed consent interest" and that such information "furthers the State's interest in preserving unborn life," even if it "persuad[ed] some women to forgo abortions."[167] This holding is now used to uphold biased counseling laws that provide patients with inaccurate information,[168] like "disclosing" a nonexistent link between abortion and

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[162] SANGER, *supra* note 157, at 118.

[163] *Id.*

[164] Carol Sanger, *Seeing & Believing: Mandatory Ultrasound & the Path to a Protected Choice*, 56 UCLA L. REV. 351, 387 (2008).

[165] *Id.* at 387–88.

[166] *Id.* at 387.

[167] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 840 (1992).

[168] Borgmann, *supra* note 131, at 1069.

breast cancer,[169] or between abortion and an increased risk of suicide.[170] Caroline Corbin offers a potential claim to challenge these "disclosures" from the patient's point of view: a right against compelled *listening*. Although First Amendment jurisprudence does not currently recognize this right, Corbin argues that it naturally completes the matrix of First Amendment free speech rights, which includes the rights to speak, not to speak, and to listen.[171] In some circumstances, courts have found that "a listener's right to not hear speech trumps a private speaker's right to convey speech."[172] This "captive audience" doctrine is applied when the audience cannot escape the speech, and, as a privacy matter, they "should not have to quit the space to avoid the message."[173]

This interest in *not* hearing ideological government speech is particularly salient in the medical context, where information asymmetry, informed consent laws, and the doctor-patient relationship combine to create a unique power dynamic. Courts have applied the captive audience doctrine in upholding "buffer zone" laws that restrict protesters' ability to heckle patients as they enter clinics.[174] In *Madsen v. Women's Health Center*, the Court analogized "residential privacy" to "medical privacy," holding that the "targeted picketing of a hospital or clinic threatens not only the psychological, but also physical, well-being of the patient held 'captive' by medical circumstances."[175]

Corbin argues that this analysis should be taken a step further to include a right against compelled listening to ideological speech when used by the government to persuade patients against abortion.[176] In general, the right not to listen has to be balanced against the right to free speech. When physicians—the ones technically doing the speaking—are *also* opposed to the speech in question, that rationale disappears.

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[169] AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, COMM. OP. NO. 484: INDUCED ABORTION & BREAST CANCER RISK (June 2009), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2009/06/induced-abortion-and-breast-cancer-risk.pdf [https://perma.cc/M8VN-L3A5].

[170] Corbin, *Abortion Distortions*, *supra* note 15, at 1181–83.

[171] Corbin, *The First Amendment Right*, *supra* note 161, at 941.

[172] *Id.* at 943.

[173] *Id.* at 943–44.

[174] *Id.* at 948.

[175] *Id.* (discussing Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994)).

[176] *Id.* at 1007–08.

Furthermore, a constitutional right against compelled listening would limit the *government*'s ability to persuade, so it would not implicate the free speech rights of private parties.[177] Indeed, the individual autonomy interest in a right against compelled listening is strong—and similar to Sanger's proposed protections of abortion decision-making. Being forced to listen to ideological speech about abortion "interferes with the decision-making process by not allowing adults to choose what information to consider in developing their thoughts and making up their minds" and can "unduly influence the ultimate decision being made."[178] Of course, the government has an interest in ensuring that patients have adequate information before making medical decisions; traditional informed consent is clearly constitutional. However, this government interest should be structured to *promote* patient autonomy, not to diminish it. Corbin argues that this requirement can only be met if the message is "factual, secular, and . . . incontrovertibly autonomy-enhancing."[179] Thus, forcing abortion patients to adopt "the state's *moral* views . . . with strong religious overtones" fails the requirements of a proposed right against compelled listening.[180]

III. Mary Doe's Claims, Novel & Parodic

A. Parody: The Satanic Temple's Tool of Choice

The Satanic Temple regularly garners media attention for its creativity and litigiousness, leading many to conclude that the whole thing is a joke.[181] The Temple directly addresses these suspicions on their website's Frequently Asked Questions page, asking, "Is TST a media stunt/hoax/trolling etc.?" and maintaining that their religious beliefs are both sincere and serious:

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[177] *Id.* at 980.

[178] *Id.* at 982.

[179] *Id.* at 992.

[180] *Id.*

[181] *See, e.g.*, Jack Cashill, *Judges Cast Out Satanic Temple Plaintiff, Uphold Missouri Abortion Law*, KAN. CITY SENTINEL (Aug. 30, 2018), https://bit.ly/2IgZFbx [https://perma.cc/HEQ9-R7AF]; Anna Merlan, *Trolling Hell: Is the Satanic Temple a Prank, the Start of a New Religious Movement—or Both?*, VILLAGE VOICE (July 22, 2014), https://bit.ly/2X1RQtI [https://perma.cc/6XQ5-5AWB]; Mark Oppenheimer, *A Mischievous Thorn in the Side of Conservative Christianity*, N.Y. TIMES (July 10, 2015), https://nyti.ms/2H3M7Ov [https://perma.cc/Z84J-DEX9] ("When [Temple leaders] sit down in an organic food cafe and order plates of fettuccini Alfredo, it's hard to take them seriously as worshipers of the Dark Lord of the Underworld.").

> Some have conveniently concluded, upon observing The Satanic Temple's media coverage, that attention is the primary objective of our activities. While media outreach has helped to raise awareness of the campaigns we have initiated, these campaigns have articulated goals related [to] issues that are important to us and our membership. So inured is the general public to the idea that there is only one monolithic voice of "the" religious agenda that any attempt at a counter-balance—or assertion of a minority voice—is often viewed as a targeted provocation against those who enjoy traditional religious privilege."[182]

It seems clear that the Temple's leadership, at least, does not think of humor and sincerity as mutually exclusive. In an interview with the *New York Times*, Doug Mesner (a.k.a. "Lucien Greaves") said, "We've been talking a lot of comedy . . . but I genuinely feel this is every bit a religion—this cultural identity, this narrative that contextualizes your life, your works, your goals. And you have these deeply held beliefs, that if they are violated, it compromises your very self."[183]

Their "campaigns" reflect this dual strategy. In particular, the Temple often reacts to political and judicial decisions about religion and free speech. When Rick Scott, former governor of Florida, promoted a bill to allow voluntary prayer in public schools, the Temple created a "mock rally" to support the bill and "say how happy we were because now our Satanic children could pray to Satan in school."[184] The Temple also organized a "pink mass" at the funeral of former Westboro Baptist Church leader Fred Phelps, a response to the Supreme Court case *Snyder v. Phelps*, which held that the First Amendment shielded the Westboro Baptist Church from tort liability after they picketed a deceased soldier's funeral.[185] Relying on *Good News Club v. Milford Central School*, the Temple created a program called "After School Satan" (complete with Satan-themed coloring books and a sexual education curriculum called "Sex Educatin' with Satan"),

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[182] *FAQ*, THE SATANIC TEMPLE, *supra* note 4.

[183] Oppenheimer, *supra* note 181.

[184] *Id.*

[185] Josh Feldman, *NY Satanic Temple Wants to Posthumously Make Fred Phelps Gay*, MEDIAITE (Mar. 18, 2014), https://bit.ly/2X5uovH [https://perma.cc/C4XX-HMF2]; 562 U.S. 443, 460 (2011).

which operates in elementary schools that host evangelical-sponsored Good News Clubs.[186]

The Satanic Temple's Missouri litigation was a similarly targeted response to the 2014 decision by the United States Supreme Court to extend RFRA protection to closely-held for-profit corporations in the context of the Affordable Care Act's contraceptive mandate.[187] Shortly after that decision, the Temple posted a letter that women could, purportedly, take to an abortion provider to "waive" their obligations to comply with informed consent laws.[188]

Then Mary Doe came forward. Mary Doe learned she was pregnant in February 2015 and started making plans to terminate her pregnancy in March 2015.[189] When she arrived at a Planned Parenthood health center in St. Louis, she presented the center with the letter indicating that she had reviewed the Missouri informed consent documents and "absolve[d]" the center of "any responsibility . . . to deliver the Booklet to me [or] to wait seventy-two hours before performing an abortion."[190] The letter also included a recitation of the "sincerely held religious beliefs" relevant to the abortion decision:

- My body is inviolable and subject to my will alone.
- I make any decision regarding my health based on the best scientific understanding of the world, even if the science does not comport with the religious or political beliefs of others.

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[186] Daniel Cutler, *Not Today, Satan: Re-Examining Viewpoint Discrimination in the Limited Public Forum*, 26 WM. & MARY BILL RTS. J. 1241, 1242 (2017); Listing for "The Satanic Children's Big Book of Activities," THE SATANIC TEMPLE, https://bit.ly/2X6Ol56 [https://perma.cc/6CS5-HXAW].

[187] Press Release, The Satanic Temple, The Satanic Temple Leverages Hobby Lobby Ruling to Claim Exemption from State-Mandated Pro-Life Materials as First Initiative in Ambitious Women's Health Campaign (July 28, 2014), [https://perma.cc/XA5C-K2N2]; Interview with W. James MacNaughton, Attorney for Plaintiff Mary Doe (Feb. 22, 2019) ("Our case is no different than *Hobby Lobby.* Our case is the flip-side of *Hobby Lobby*.").

[188] Mary Emily O'Hara, *The Satanic Temple Wants to Use Hobby Lobby Against 'Informed Consent' Abortion Laws*, VICE NEWS (July 28, 2014), https://news.vice.com/en_us/article/438pv3/the-satanic-temple-wants-to-use-hobby-lobby-against-informed-consent-abortion-laws [https://perma.cc/SAX9-63KE].

[189] Judgment at 2, Doe v. Nixon, Case No. 15AC-CC00205 (Mo. Cir. Ct. Dec. 12, 2016).

[190] Ex. B, Complaint at 2, *Doe*, Case No. 15AC-CC00205 (Mo. Cir. Ct. May 8, 2015).

- My inviolable body includes any fetal or embryonic tissue I carry as long as that tissue is unable to survive outside my body as an independent human being.
- I—and I alone—decide whether my inviolable body remains pregnancy and I may, in good conscience, disregard the current or future condition of any fetal or embryonic tissue I carry in making that decision.[191]

The Planned Parenthood health center indicated that they still had to comply with the law—which required Mary Doe to acknowledge receipt of the materials and wait seventy-two hours—so Mary Doe waited (and paid for) three days in a St. Louis motel before receiving her abortion.[192] While she was waiting, she filed a lawsuit requesting that the laws be temporarily enjoined.[193] The lawsuit alleged that the Missouri informed consent statute substantially burdened Mary Doe's ability to exercise control over her own body (a tenet of her religion and thus an "exercise of religion") and that the state had no compelling reason to do so—a clear violation of RFRA and the Free Exercise Clause.[194]

Most of the response to the lawsuit (some delighted, some disturbed) focused on its rhetorical power. As Anna Merlan of *Jezebel* writes, in order to mean anything, RFRA "has to protect fans of Satan too," which she characterizes as "sweet irony."[195] One journalist wrote that the challenge sounds like "the epitome of a frivolous, if not blasphemous, lawsuit."[196] Another indicated that this case was not "the first time . . . the Satanic Temple [has] piggybacked on a Christian legal victory to make a point about equality of conviction."[197] Kara Loewentheil, one of the few scholars to have written

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[191] *Id.* at 1.

[192] Judgment at 4, *Doe*, Case No. 15AC-CC00205.

[193] Plaintiff's Memorandum of Law in Support of a Temporary Restraining Order, *Doe*, Case No. 15AC-CC00205 (Mo. Cir. Ct. May 8, 2015).

[194] *Id.* at 3–4.

[195] Anna Merlan, *The Satanic Temple is Suing Missouri Over Anti-Abortion Legislation*, JEZEBEL (May 11, 2015), https://bit.ly/2Eg9ukY [https://perma.cc/JMF2-XK5T].

[196] Joseph P. Williams, *Satanic Temple Sues Missouri Over Abortion Rights—And Could Win*, U.S. NEWS (Jan. 16, 2018), https://bit.ly/2tbtTp8 [https://perma.cc/7NSW-TLSN].

[197] O'Hara, *supra* note 188.

about the Temple in legal academia, says that their "waiver" campaign was "seemingly facetious," meant merely to prove the point that "conservatives do not have a monopoly on [religious] accommodation" and that "progressives, too, can look to religious objection claims under RFRA as a means of effecting change in the legal system."[198] Loewentheil further argues that the Temple "reads [*Hobby Lobby*] too broadly" by neglecting to consider the impact of other federal and state protections for contraceptive access on religious exemptions.[199]

Indeed, the Temple's own spokespeople seemed to view the litigation as at least partially symbolic. The lawsuit works primarily by drawing comparisons to *Hobby Lobby* and other uses of religious liberty protections in order to promote mainstream Christian ideology. Lucien Greaves, a spokesperson for the national Satanic Temple, wrote that RFRA is "popular among Christian conservatives who endorse it as essential to preserving the spiritual innocence of pious bakers who might otherwise be forced to bake cakes for Godless homosexuals."[200] The Satanic Temple's motivating principle is thus fundamentally comparative—that "the same conviction cited in the SCOTUS Hobby Lobby decision should apply regardless of where that conviction came from."[201]

B. Ironic Oppositions in the Mary Doe Litigation

The idea that Mary Doe's challenge was *solely* meant to draw attention feels incomplete—after all, a four-year lawsuit is a significant investment of both time and money. However, Loewentheil's serious-minded analysis of their exemption strategy as an "overreading" of *Hobby Lobby*'s holding also does not capture the full impact of Mary Doe's claims. Applying the lens of parody (i.e., reading the Temple's legal challenges as a serious polemical doubling of *Hobby Lobby*) might lead us to re-categorize this "overreading" as intentional, meant to put the Court's opinion "on display for collective reflection."[202] As a logical strategy, parody is not so far afield from the normal process of legal reasoning through analogy, which can demonstrate that two scenarios are

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[198] Kara Loewentheil, *The Satanic Temple, Scott Walker, and Contraception: A Partial Account of Hobby Lobby's Implications for State Law*, 9 HARV. LAW & POL'Y REV. 89, 90 (2015). Loewentheil's argument was written before the *Mary Doe* lawsuit was filed.

[199] *Id.*

[200] Merlan, *supra* note 195.

[201] O'Hara, *supra* note 188.

[202] Robert Hariman, *Political Parody & Public Culture*, 94 Q. J. SPEECH 247, 251 (2008).

sufficiently similar to warrant application of the same legal rule, *or* that two scenarios are actually so distinct that applying the same rule would lead to an absurd result.

Here, the two "scenarios" that Mary Doe's litigation purports to link by legal analogy rely on ironic opposition.[203] First, Mary Doe's claim replaces "sacred" Christian religious belief with a "profane" association with Satan and abortion and argues that the two beliefs are sufficiently similar to warrant a similar religious accommodation. Second, the "free exercise of religion" she claims is violated—usually a burden on *faith*—is replaced by Satanic tenets incorporating *scientific* accuracy as a religious belief. Mary Doe purposefully confuses the cultural associations between religion and abortion by likening Missouri's biased counseling to a church service, and by arguing that making the abortion decision without interference is compelled by her religion.

1. The Sacred and the Profane

The first parodic move the Temple's litigation makes is to swap out the *Hobby Lobby* plaintiffs—who alleged "sacred," evangelical Christian beliefs—for a plaintiff with "profane" connections to Satan and abortion. This is a classic strategy that marshals parody to critique state-sanctioned, organized religion.[204] Both rhetorically and legally, Mary Doe's argument goes further than the plaintiffs' arguments in *Harris* and *Webster*. The fact that previous cases alleging free exercise violations have only argued that abortion is *permitted* by their religions absent an emergency reflects the deep one-sidedness of the abortion morality debate. In some sense, Mary Doe is asserting a right not to care about her abortion decision, and a compulsion to make a personal medical decision with as much or little thought as she chooses.

Mary Doe's claims are identical in kind to that of the *Hobby Lobby* plaintiffs: She argues that the statute requires her to participate in a process that forces her to compromise her religious beliefs, and that they have no good reason to do so. The

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[203] Perhaps one of the most "fun" ironic elements of the Temple's claim is that Josh Hawley, former Missouri Attorney General and now-Senator, represented the *Hobby Lobby* plaintiffs and had to defend against the Temple's claims. When he was running for Senator, he ran on a platform of strengthening RFRA and was interviewed as saying, "'I think it needs to be defended and protected,' . . . adding that the Constitution will dictate how far Congress can go in when it comes to adding new religious freedom laws." Erickson, *supra* note 9. Josh Hawley was not Missouri's Attorney General when the case was first filed, so it seems unlikely that the Temple targeted Missouri for this reason. Sometimes, though, parodies write themselves.

[204] *See, e.g.*, Bob Scribner, *Reformation, Carnival & the World Turned Upside-Down*, 3 SOC. HIST. 303 (1978) (discussing parodic carnivals as playing a part in the German Reformation); RYAN D. GILES, THE LAUGHTER OF THE SAINTS: PARODIES OF HOLINESS IN LATE MEDIEVAL AND RENAISSANCE SPAIN (2009).

irony—and thus the shock value of the litigation—lies in its cultural associations. Mary Doe's lawsuit doubles the form and content of the *Hobby Lobby* lawsuit but adds critical distance through the irony of invoking Satan. Invoking Satan specifically—instead of just, for example, arguing that science is your religion—reinforces the doubled nature of the claim. After all, Satan is a key character in Christian belief, and hell (where Lucifer landed after his rebellion) is often conceptualized as "the farthest distan[ce] from heaven."[205] Thus, this extreme opposition invites direct comparison between the two claims in a way that instituting and arguing on behalf of a "Church of Autonomy" would not.

When the *Hobby Lobby* plaintiffs alleged a deeply-held religious belief that prohibited them from even facilitating insurance coverage of certain contraceptives, the courts did not question their sincerity. The Department of Health and Human Services argued that it would be difficult to determine the "sincerity" of a for-profit corporation's belief."[206] In response, the Court insisted on Congress's "confiden[ce] of the ability of the federal courts to weed out insincere claims."[207] The Court similarly held that there was "no dispute" that the plaintiffs' claims were sincere, but also that "it is not for us to say that their religious beliefs are mistaken or insubstantial."[208] Indeed, this cursory analysis on the issue of sincerity is a common tack for courts to take when evaluating religious beliefs.[209]

The same deference was not given to Mary Doe's claims at the trial court level, even on a motion to dismiss where the court is supposed to "assume that all of the plaintiff's averments are true, and liberally grant[] to plaintiffs all reasonable inferences therefrom."[210] Instead of analyzing the claims to see if they represented an "honest conviction," the trial court issued a scathing reprimand when it dismissed the claims:

> Plaintiff is merely cloaking her political beliefs in the mantle of religious faith in order to avoid laws of general applicability she finds imprudent

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[205] JOHN ROBINSON, A THEOLOGICAL, BIBLICAL, AND ECCLESIASTICAL DICTIONARY 489 (1815).

[206] Burwell v. Hobby Lobby Stores, 573 U.S. 682, 717 (2014).

[207] *Id.* at 718.

[208] *Id.* at 725.

[209] *See supra* cases in note 10.

[210] Judgment at 4, Doe v. Nixon, Case No. 15AC-CC00205 (Mo. Cir. Ct. Dec. 12, 2016).

> or offensive. Instead of being a safety hatch to protect minority religious beliefs from the tyranny of the majority, Plaintiff's interpretation of RFRA would establish a faith-based "Get Out of Jail Free" card.[211]

In another instance of irony, the judge articulated exactly the objection that Justice Ginsburg (and many progressives) made to the *Hobby Lobby* majority opinion: that corporations "can opt out of any law . . . they judge incompatible with their sincerely held religious beliefs."[212] At no point did the trial court judge say *why* Mary Doe's religious beliefs should be scrutinized more aggressively than those of the *Hobby Lobby* plaintiffs.

2. Science-as-Religion and Religion-as-Science

Mary Doe takes advantage of another opposition: the science/faith binary. In *Hobby Lobby*, the "faith" aspect was clearly aligned with the petitioner, while the contraception "science" aspect, as reflected in the Institute of Medicine's list of covered products, was clearly aligned with the government. Mary Doe's claim flips this opposition by incorporating scientific principles into her religious beliefs and highlighting the religious message inherent in the state's counseling materials. Because science and faith are so often set against one another, Mary Doe's incorporation of science into her "tenets" also reinforces the alignment of Missouri's statute with religious ideology.

Furthermore, most of Mary Doe's Establishment Clause argument is made implicitly, by using religious language to allege facts in her federal complaint. For example, she refers to specific language in Missouri's informed consent document, that "[t]he life of each human being begins at conception" and "[a]bortion will terminate the life of a separate, unique, living human being" as the Missouri "Tenets." A "tenet" is equivalent to a "doctrine, dogma, principle, or opinion" often associated with religion, philosophy, or politics.[213] According to Doe, the Missouri Tenets communicate a "religious belief," implicit in which is "the belief . . . that the destruction of Human Tissue is morally wrong."[214] As a whole, Doe calls the "The Booklet, the Ultrasound Opportunity, the 72

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[211] *Id.* at 8.

[212] *Hobby Lobby*, 573 U.S. at 739–40 (Ginsburg, J., dissenting).

[213] *Tenet*, OXFORD ENGLISH DICTIONARY (2019).

[214] Complaint at 3, Satanic Temple v. Nixon, Case No. 4:15CV986 HEA (E.D. Mo. June 23, 2015), ECF No. 1.

Hour Waiting Period, . . . and Certification Requirement" the "Missouri Lectionary."[215] The term "lectionary" is a "a book containing 'lessons' or portions of Scripture appointed to be read at divine service; also, the list of passages appointed to be so read."[216] When described in these terms, the "opportunity" to read the informed consent documents and see an ultrasound figures like a church service where Mary Doe must sit and be proselytized at, followed by a three-day reflection period. This language makes concrete Sanger's comparison between religious and abortion-related decision-making.

Rhetorically speaking, given the medicalization of abortion restrictions (that is, the use of medical discourse and procedure to normalize a certain ideology), aligning Missouri's informed consent process with a religious ceremony becomes particularly powerful. For the most part, the restrictions at issue in *Casey* were "demand-side" restrictions, as they focused on convincing abortion patients to "choose life" instead of completing the procedure. In the last two decades, however, anti-abortion advocates have instead focused on "supply-side" restrictions meant to curtail providers' ability to treat their patients.[217] The justification used most often for these restrictions is not an interest in potential fetal life, but rather in "women's health."[218] Only recently, in *Whole Woman's Health v. Hellerstedt*, did the Supreme Court hold that the interest in women's health has to actually produce a health or safety benefit for abortion patients.

Biased counseling and waiting periods represent a mix of supply- and demand-side restrictions, but they are both reflective of the medicalization of abortion restrictions: that is, the use of medical discourse and procedure to normalize a certain ideology. Mary Doe's own religious tenets incorporate science. As a matter of religion, she "makes decisions regarding her health based on the best scientific understanding of the world, even if the science does not comport with the religious or political beliefs of others."[219] By ironically incorporating "objective" science into her claims about faith, Mary Doe encourages the reader to deconstruct this binary opposition. This, in turn, leads the reader to question whether Missouri's "lectionary"—presented as an example of banal, medicalized informed consent—might also be incorporating religion into its "science."

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[215] *Id.* at 4.

[216] *Lectionary*, OXFORD ENGLISH DICTIONARY (2019).

[217] Theodore Joyce, *The Supply-Side Economics of Abortion*, 365 NEW ENG. J. MED. 1466 (2011).

[218] Reva Siegel & Linda Greenhouse, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428 (2016).

[219] Complaint at ¶ 31, *Satanic Temple*, Case No. 4:15CV986 HEA.

C. The *Mary Doe* Litigation: A Reproductive Rights Wishlist

The aim of this section is not a comprehensive review of all the doctrines and case law behind every claim presented in litigation. Instead, this section presents each element of the Mary Doe litigation as part-playbook and part-inspiration for creative claims in abortion rights advocacy. Even though the Satanic Temple has yet to secure a legal remedy for the harm Mary Doe alleges, the case did manage to temporarily open up mental space in abortion litigation for non-access related claims. Under the tyranny of *Casey*'s undue burden standard, it is much more efficient to focus on whether a regulation actually stops patients from obtaining the procedure they need or want. While this is certainly a way to mitigate the most harm with the fewest lawsuits, the Satanic Temple's lawsuit invites advocates to dream of the broadest judicial remedies they want and brainstorm creative claims to get there.

1. Standing, Stigmatic Harm, & "Substantial Burdens"

The Missouri trial court dismissed Mary Doe's claim, holding that she had failed to allege an "act or failure to act" that would constitute an "exercise of religion" under Missouri's RFRA or the First Amendment's Free Exercise Clause.[220] Doe alleged that "[i]t is antithetical to her belief that the condition of the Tissue is determined by the best scientific understanding of the world" and that [t]here is no scientific evidence that the Tissue is a 'human being' that has a 'unique' life 'separate' from Mary Doe's body."[221] Thus, the decision to terminate her pregnancy was a decision about her own body, which had to be made by her alone, according to the tenets of the Satanic Temple. Mary Doe argued that acknowledging receipt of the booklet by signing a form, undergoing an ultrasound, and waiting seventy-two hours prevented her from freely exercising her religious belief that required her to come to the abortion decision a certain way.[222]

The trial court disagreed, holding that the statute did not require Mary Doe to "accept or even read about any particular religious belief . . . to obtain her abortion" and that "her abortion [was not] conditioned on her rejection of any particular religious belief."[223] Indeed, the trial court found, the only "act" required of the plaintiff was "to be present

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[220] Judgment at 7, Doe v. Nixon, Case No. 15AC-CC00205 (Mo. Cir. Ct. Dec. 12, 2016).

[221] Plaintiff's Memorandum of Law in Support of a Temporary Restraining Order at 5, *Doe*, Case No. 15AC-CC00205 (Mo. Cir. Ct. May 8, 2015).

[222] *Id.* at 2.

[223] *Id.* at 7.

when a third party made certain information available to her."[224] Thus, "at worst," the state "created an opportunity—but not an obligation—for Plaintiff to hear State speech regarding abortion."[225]

Although the trial court characterized the informed consent process as an "opportunity," that interpretation was in dispute until oral arguments before the Missouri Supreme Court. When Mary Doe visited Planned Parenthood for her abortion, the health center interpreted the law as requiring an ultrasound, especially because the provider would not know if a fetal heartbeat was audible until an ultrasound was performed. During oral arguments, Missouri's Solicitor General clarified that the ultrasound was, in fact, optional:

> [Supreme Court Justice]: The provider understandably wants to be careful not to contravene the statute, particularly because of a somewhat antagonistic historical relationship between the state and Planned Parenthood, I would imagine. So is this an official position of the state, that it's not required?
> [Attorney General, Deputy General Counsel]: I think the official position of the state is that the plain language of the statute [is that] an opportunity must be offered.[226]

The federal district court dismissed Mary Doe's claim for a similar reason. Mary Doe sued in federal court to enjoin the law as applied to herself and other abortion patients with similar deeply-held beliefs about the abortion decision. The district court dismissed Mary Doe's claim based on a lack of standing; in other words, Mary Doe did not present an ongoing "case or controversy," as required by Article III, that could be remedied by a federal court.[227] The Eighth Circuit affirmed the district court's dismissal for lack of standing because she was not pregnant when the case was brought and was thus only

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[224] *Id.*

[225] *Id.*

[226] Oral Argument at 15:36–16:13, Doe v. Parson, 567 S.W.3d 625 (Mo. 2019), https://www.courts.mo.gov/page.jsp?id=119842 (on file with author).

[227] U.S. CONST. art. III.

seeking "prospective relief."[228] Although the Eighth Circuit did recognize Mary Doe's claim as based in the Religion Clauses, the harm they recognized was classically *Casey*: Because she had already obtained her abortion, there was no ongoing injury for which she could sue.

The "irreducible constitutional minimum" for standing doctrine has three parts.[229] The first is that the plaintiff has suffered an "injury-in-fact," defined as an "invasion of a legally protected interest which is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[230] The plaintiff must also be able to trace this harm from the defendant's conduct, and it must be likely (and not "speculative") that a favorable decision by the court will redress the harm.[231] In Mary Doe's case, the court's analysis rested on the first and third parts. Because Mary Doe had already obtained her abortion, she was not experiencing an ongoing harm that could be remedied by the court.[232] What constitutes "harm" in standing doctrine is often controversial and confusing. The injury must be *concrete* (i.e., "real"), but it "need not be tangible."[233] Thus, a recreational interest in fishing at a local pond or an aesthetic interest in preserving an endangered species can support standing, as long as the harm is personal to the individual claimant.[234]

The type of harm that Mary Doe alleges here is *stigmatic harm*—the notion that government action impermissibly reflects disapproval of a plaintiff's choice or reinforces private discrimination.[235] Stigma is a "social phenomenon that is constructed and

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[228] Satanic Temple v. Parson, 735 F. App'x 900, 901 (8th Cir. 2018). Although pregnancy typically "provides a classic justification for a conclusion of nonmootness," the Eighth Circuit concluded that because Mary Doe did not establish standing first, she could not make that mootness argument. *Id.* at 902.

[229] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

[230] *Id.*

[231] *Id.*

[232] Mary Doe could have alleged that the cost of her motel room in St. Louis for three days constituted economic harm, but presumably this would have raised qualified immunity problems.

[233] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1543 (2016), *as revised* (May 24, 2016).

[234] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 169 (2000).

[235] Thomas Healy, *Stigmatic Harm & Standing*, 92 IOWA L. REV. 417, 421 (2007).

reproduced locally through various pathways," not a "universal truth."[236] In the context of abortion, society "ascribe[s] [a] negative attribute . . . to women who seek to terminate a pregnancy that marks them, internally or externally, as inferior to ideals of womanhood."[237] This stigma is frequently invoked in public advocacy campaigns, but is rarely the focus of abortion litigation.[238]

Alleging this kind of harm for standing purposes in constitutional claims is, in some sense, wishful thinking. In non-standing cases, however, courts have regularly counted "expressive" harms as both real and judicially cognizable. Indeed, courts have historically struck down laws that send a "message . . . of racial, gender, or religious inferiority expressed by government action" in some of our country's most important cases.[239] In *Allen v. Wright*, the Court rejected stigmatic harm as a basis for challenging government support of private discrimination (in that case, private schools that segregated).[240] As Thomas Healy points out, however, recent court decisions, including *Lawrence v. Texas*, have "suggest[ed] that stigma is a judicially cognizable injury."[241] In *Lawrence*, the Court could have resolved the plaintiff's harms on equal protection grounds (i.e., that treating different kinds of sex differently for criminal purposes was arbitrary). Instead, the Court chose to analyze the claims through a substantive due

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[236] Anuradha Kumar et al., *Conceptualising Abortion Stigma*, 11(6) CULTURE HEALTH & SEXUALITY 625, 628 (2009).

[237] *Id.*

[238] *See, e.g.*, Barbara Rodriguez, *Planned Parenthood to Feature Billboards around Iowa Asking People to "Say Abortion*," DES MOINES REG. (Jan. 4, 2019), https://www.desmoinesregister.com/story/news/politics/2019/01/04/planned-parenthood-heartland-iowa-billboard-abortion-women-ban-legislature-lawsuit-cities-des-moines/2485968002/ [https://perma.cc/NEK4-G26E].

[239] *See* Note, *Expressive Harms & Standing*, 112 HARV. L. REV. 1313, 1314 (1999) (discussing the expressive harms in *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982)).

[240] Allen v. Wright, 468 U.S. 737 (1984), *abrogated on other grounds by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

[241] Healy, *supra* note 235, at 421; *see* Lawrence v. Texas, 539 U.S. 558 (2003).

process lens because "the Court felt obligated to eliminate the stigmatic harm" the Texas law imposed on gays and lesbians.[242]

Mary Doe's harm was primarily articulated in emotional terms. She alleged that on multiple occasions, she felt "doubt, guilt, and shame" because of Missouri's messaging.[243] Her counsel argued that the messaging made her feel like an "outsider" who was making the wrong decision.[244] When considered under the "undue burden" standard, perhaps the "opportunity" to hear a fetal heartbeat or read that the fetus is a unique human being cannot rise to the level of a cognizable harm. After all, as every judge in the federal and state cases were quick to point out, Mary Doe got her abortion. But considering the "harm" done to Mary Doe as expressive or stigmatic highlights the exceptional way judges treat claims related to abortion, and how ill-equipped the undue burden standard is to deal with the expressive and stigmatic harms of abortion regulation. Whether Doe has pled a "burden" sufficient to support a free exercise or RFRA claim is primarily a symbolic question. Indeed, that is likely the reason why the Satanic Temple brought that kind of claim: to highlight the wide berth the *Hobby Lobby* plaintiffs were given and how quick judges have been to dismiss a minority religious belief.

The "act" of signing a sheet of paper acknowledging receipt of certain materials is often a mundane action taken multiple times over the course of a medical procedure. But given the content of the Booklet, even signing one's name takes on additional significance.[245] In some sense, the signer must acknowledge the state of Missouri's ideological point of view in continuing with her decision to have an abortion. When the materials' purpose is to "persuade women that the 'unborn child' they carry is a 'human being' who will be murdered by an abortion," as Doe alleges the Missouri informed consent materials do, the abortion decision is compromised, and the harm that results

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[242] *Id.*; *see also Lawrence*, 539 U.S. at 575 ("If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.").

[243] Complaint at ¶ 49, Satanic Temple v. Nixon, Case No. 4:15CV986 HEA (E.D. Mo. June 23, 2015), ECF No. 1.

[244] Oral Argument at 3:00–3:22, Doe v. Parson, 567 S.W.3d 625 (Mo. 2019), https://www.courts.mo.gov/page.jsp?id=119842 (on file with author).

[245] This argument parodically repeats the argument made by plaintiffs in *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016), that even signing a sheet of paper stating their intention to take advantage of an accommodation would force them to participate in something they found to be morally repugnant.

continues as long as the patient continues to be a person who had an abortion. [246] When the decision is religious, as Mary Doe alleges hers was, that kind of interference becomes unconstitutionally intolerable.

2. Compelling Government Interest

If a plaintiff can make a preliminary showing that her rights are substantially burdened by government action, RFRA dictates a burden-shifting scheme that requires the government to 1) present a compelling interest for the burden and 2) demonstrate that burdening the plaintiff is the "least restrictive means" of fulfilling that interest.[247] None of the decisions regarding ultrasound and bias counseling regulations have applied strict scrutiny. Importantly, general benefits that might arise from the government's regulation are not sufficient to meet this high standard. Instead, the government "must show by specific evidence that the adherent's religious practices jeopardize its stated interests."[248]

Although determining legislative intent is always a difficult task, Missouri state representatives who were interviewed during the process seemed mostly preoccupied by questions of fetal life and religion. For example, one of the bill's sponsors indicated that the bill is "about the life and death of the unborn child," and further personalized the fetal interest by saying that "the unborn child probably would like to see an extra forty-eight hours for the mother to decide on whether or not to have the abortion done."[249] Another sponsor explicitly invoked God's will to explain why he did not include an exception for rape and incest. Representative Elmer said, "The crux of it is for me when does life begin, and how do you value it? For me, even though that tragic situation may occur, I still believe that God is at work in this world and that he'll let bad things happen and he doesn't cause it."[250] While Representative Elmer's statements might not be reflective of every vote in the Missouri General Assembly, his words illuminate a potentially

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[246] Judgment at 6, Doe v. Nixon, Case No. 15AC-CC00205 (Mo. Cir. Ct. Dec. 12, 2016).

[247] 42 U.S.C. § 2000bb-1 (2018).

[248] A.A. v. Needville Indep. Sch. Dist., 611 F.3d 248, 268 (5th. Cir. 2010).

[249] John Eligon, *Missouri Enacts 72-Hour Wait for Abortion*, N.Y. TIMES (Sept. 9, 2014), https://www.nytimes.com/2014/09/12/us/72-hour-wait-for-abortion-is-enacted-in-missouri.html [https://perma.cc/DQW5-QJUU].

[250] Johnathan Shormanb, *Mo. Lawmakers Pass 3-Day Abortion Wait Period*, USA TODAY (May 14, 2014), https://www.usatoday.com/story/news/nation/2014/05/14/missouri-abortion-wait-period/9111267/ [https://perma.cc/FS7L-6KL5].

impermissible motive for a law that was touted as mitigating a purely secular concern for medical ethics and informed consent.

The official explanation for the bill in Missouri House reports was as follows: "What we are trying to do is get information to these women, we are trying to give them healthy choices and we are trying to lessen the suicide rate of women that are in turmoil."[251] To pass strict scrutiny, the government must show that these interests are compelling and that the means of fulfilling them are narrowly tailored to restrict a burden on the plaintiff's religious liberty. At first glance, these secular reasons seem compelling: No one would argue that information before a medical procedure or lowering suicide rates is *not* compelling. The *Casey* Court approved the idea that "psychological well-being is a facet of health," and that health could be regulated by states.[252] However, the idea that an ultrasound or seventy-two-hour waiting period will reduce suicide rates is a classic solution in search of a problem. Numerous studies and reviews have confirmed that there is no causal link between abortion and increased rates of suicide.[253] Other studies have demonstrated that abortion patients with "high decision certainty" do not change their minds about the procedure after being shown the ultrasound, so this "means" does not fit either "end" of promoting fetal life or women's health.[254]

In Mary Doe's case, she had already made up her mind, and Missouri's "lectionary" was not going to sway her. Indeed, she had already read the Missouri informed consent booklet on her own and was apprised of all the risks and benefits of abortion.[255] In that case, what is Missouri's compelling interest in going beyond traditional informed consent to tell Mary Doe that the fetus she was planning to terminate was "separate" or "unique"?

CONCLUSION

Mary Doe's parodic strategy is meant to lead us to this question, and although the courts have yet to reach it, one can imagine two potential results, each representing

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[251] Jonathan Lorenz, MO House Sends Abortion Waiting Period Extension to Governor (May 16, 2014) (quoting Jeanie Riddle, R-Mokane) (on file with author).

[252] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992).

[253] Corbin, *Abortion Distortions*, *supra* note 15, at 1178.

[254] Mary Gatter, et al., *Relationship Between Ultrasound Viewing and Proceeding to Abortion*, 123 OBSTETRICS & GYNECOLOGY 81 (2014).

[255] Ex. B, Complaint, Doe v. Nixon, Case No. 15AC-CC00205 (Mo. Cir. Ct. May 8, 2015).

different kinds of success. The first is that a court agrees that Mary Doe's deeply-held, conscientious belief about the tissue in her uterus would be burdened by Missouri's abortion messaging, and that the various justifications Missouri might offer are not sufficiently compelling to justify that burden—an obvious legal victory that clears the path for other claims. The other option is that courts will continue to dismiss her claims, on either preliminary motions or the merits, but will offer less-than-satisfactory reasons for distinguishing her claims from those of the plaintiff in *Hobby Lobby*. The distortions that plague abortion regulation and jurisprudence are still present in the *Mary Doe* cases, but the litigation's parodic qualities illuminate the faulty logic that appears whenever abortion and religion meet.