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Abortion Distortions

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I. Introduction

Two types of distortions often arise in abortion jurisprudence. The first is distortion of scientific fact. Too often abortion opponents distort medical facts, and courts accept those distortions as true. Take, for example, the claim that abortion makes women depressed and suicidal.[1] In fact, no reputable study supports any such causal link.[2] Nonetheless, this unfounded assertion has been used to justify laws requiring that women seeking abortion be provided with certain information lest they later suffer from postabortion

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1. *Infra* notes 22–26 and accompanying text.

2. *See infra* notes 34–58 and accompanying text (describing studies that find no causal link between abortion and future mental illness).

trauma.[3] In particular, some states now require that doctors read to their abortion patients a state-scripted message describing their pregnancy as a "whole, separate, unique living human being."[4]

Equally without scientific foundation is the claim that morning after pills like Plan B act as abortifacients.[5] They do not. This is not my personal opinion but medical consensus.[6] Nonetheless, certain corporate employers who view abortion as a sin disregard the science and argue that it violates their religious beliefs to provide Plan B in their company's insurance plan.[7] Accordingly, these corporate employers argue that they should be exempted from the new requirement that health care plans provide morning after contraception without any additional charges to the employee.[8]

The second kind of distortion that occurs in abortion jurisprudence is that the normal doctrine does not apply. Whether it be substantive due process, equal protection, or the focus of this Article—the First Amendment—the rules are different when the claim involves abortion. Thus, despite the fact that compelling someone to articulate the government's ideology is anathema in free speech jurisprudence,[9] courts have upheld mandatory abortion counseling laws that force doctors to serve as mouthpieces for the state's viewpoint.[10] Similarly, despite the fact that for-profit corporations have never been held to have religious rights, several courts have stayed application of the new contraception mandate on the grounds that it might violate the corporation's "conscience."[11]

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3. *See infra* note 65 (reviewing state abortion counseling laws).

4. *Infra* note 33.

5. *Infra* notes 111–15 and accompanying text.

6. *See infra* notes 116–45 and accompanying text (describing studies on Plan B).

7. *Infra* notes 103–04 and accompanying text.

8. *See infra* notes 105–09 and accompanying text (discussing claims).

9. *See infra* notes 69–73 and accompanying text (discussing compelled speech jurisprudence).

10. *Infra* note 68.

11. *Infra* note 153.

This abortion exceptionalism[12] is problematic for women and First Amendment jurisprudence.[13] People are entitled to their own religious beliefs but not to their own facts.[14] Blatant distortions of science ought to be rejected outright. Furthermore, overlooking First Amendment values only when women's reproductive rights are at stake not only harms women but also delegitimizes the entire jurisprudence.[15]

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12. *Cf.* Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 6 n.18 (2012) ("Although I am sure I did not invent this term [abortion exceptionalism], I am not aware of any prior use of it in the legal literature.").

13. In a blog post discussing an earlier draft of this Article, *Corbin on Abortion Distortions (and What's Missing)*, PRAWFSBLAWG (Jan. 12, 2014), http://prawfsblawg.blogs.com/prawfsblawg/2014/01/corbin-on-abortion-istortions-and-whats-missing.html (last visited Mar. 4, 2014) (on file with the Washington and Lee Law Review), Paul Horwitz questions why I have not addressed the distortions of free speech jurisprudence in the other direction, particularly the complaints of Justice Scalia and others regarding Supreme Court decisions upholding limits on abortion protesters near abortion clinic entrances. *See*, *e.g.*, Hill v. Colorado, 530 U.S. 703, 718 (2000) (upholding 8-foot buffer zone and noting "our cases have repeatedly recognized the interests of unwilling listeners in situations where the degree of captivity make it impractical for the unwilling auditor . . . to avoid exposure"); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 754 (1994) (upholding injunction imposing noise restrictions and creating 36-foot buffer zone around health clinic entrance but striking other restrictions); *cf.* McCullen v. Coakley, 708 F. 3d 1 (1st Cir. 2013), *cert. granted*, 133 S. Ct. 2857 (2013) (No. 12-1168) (challenging law creating 35-foot buffer zone around clinic entrances). To the extent these regulate speech rather than conduct, I have discussed elsewhere how the Supreme Court abortion protester decisions are rooted in the First Amendment captive audience doctrine. *See* Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 BOS. U. L. REV. 939, 943–57 (2009) (explaining that the Free Speech Clause does not guarantee private speakers a right to captive audiences and that the state may regulate speakers who invade the privacy of captive audiences to an intolerable degree).

14. *See infra* note 150 (discussing the statement that people are entitled to their own beliefs).

15. These distortions are a longstanding concern. *See, e.g.*, Christina E. Wells, *Abortion Counseling As Vice Activity: The Free Speech Implications of* Rust v. Sullivan *and* Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724, 1724 (1995)

> Contrary to Scalia's suggestion ["that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion"], the First Amendment was sacrificed at the abortion altar much earlier. In its hurry to dismantle abortion rights in the area of abortion counseling, the Court also pulled apart the fundamental tenets of the First Amendment . . . [in] Rust v. Sullivan and Planned

II. The Abortion Syndrome that Wasn't There

The alleged deleterious effect of abortion on women's mental health has been invoked to justify a slew of abortion restrictions. The underlying theory is that abortion is traumatic because mothers are severing their natural bonds and killing their unborn child.[16] This view assumes that all women are naturally inclined to be mothers, that they bond with their pregnancy from the earliest stages, and that they view their pregnancy as their child rather than, for example, a collection of cells. Assuming that abortion is a traumatic experience, state legislatures have passed, and courts have upheld, various mandatory counseling laws such as laws that force women to undergo an ultrasound and listen to a detailed description of the sonographic image or laws that require doctors to inform women that abortion ends the life of a human being.[17]

In fact, the empirical studies fail to support the underlying assumption that abortion is traumatic. Abortions do not make women depressed or suicidal; Post Abortion Syndrome does not exist.[18] On the contrary, women who abort unwanted pregnancies

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Parenthood v. Casey.

Paula E. Berg, *Lost in a Doctrinal Wasteland: The Exceptionalism of Doctor-Patient Speech Within the Rehnquist Court's First Amendment Jurisprudence*, 8 HEALTH MATRIX 153, 158–59 (1998) ("Both Rust and Casey are inconsistent with traditional First Amendment jurisprudence. It is now apparent that Rust and Casey are also strikingly inconsistent with the Rehnquist Court's own free speech jurisprudence.").

16. *See* Brenda Major et al., *Abortion and Mental Health: Evaluating the Evidence*, 64 AM. PSYCHOLOGIST 863, 866 (2009) (noting that one conceptual framework is that "abortion is a uniquely traumatic experience because it involves a human death experience . . . as well as a violation of parental instinct and responsibility [and the] severing of maternal attachments to the unborn child"); *id.* ("The view of abortion as inherently traumatic is illustrated by the statement that 'once a young woman is pregnant . . . it is a choice between having a baby or having *a traumatic experience*.'" (quoting David C. Reardon, *Ending Abortion: Learning the Truth—Telling the Truth*, AFTERABORTION.ORG (Nov. 23, 1999), http://afterabortion.org/1999/a-new-strategy-for-ending-abortion/ (last visited Jan 30, 2014) (on file with the Washington and Lee Law Review))).

17. *See infra* notes 61–68 and accompanying text (discussing mandatory abortion counseling laws).

18. *See infra* notes 37–41 (discussing studies on abortion and mental health).

are at no greater mental health risk than women who do not abort their unwanted pregnancies.[19] Consequently, laws foisting unwanted information onto women in order to prevent later trauma have no basis in science.

Courts, unfortunately, accept the false allegations. Their willingness to turn a blind eye to scientific distortions is matched only by their willingness to distort First Amendment jurisprudence to uphold these abortion requirements. Among the most egregious examples are state laws that force doctors to speak the government's ideological message.[20] In any other context, including the regulation of purely commercial speech, the state compelling private speakers to recite the government's ideology would be considered a paradigmatic free speech violation.[21] In the abortion context, however, the rules are different.

A. The Scientific Distortion

The assumption that abortion tends to traumatize women, and that consequently women need protection from their decision to abort, crops up regularly. For example, in upholding a federal law that banned a certain abortion procedure, Justice Kennedy suggested that the ban advanced women's health.[22] It protected

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19. *See, e.g.*, APA TASK FORCE ON MENTAL HEALTH AND ABORTION, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION: EXECUTIVE SUMMARY 2 (2008) [hereinafter APA TASK FORCE] ("[T]he prevalence of mental health problems observed among women in the United States who had a single legal first-trimester abortion for nontherapeutic reasons was consistent with normative rates of comparable mental health problems in the general population of women in the United States.").

20. *Infra* notes 87–95 and accompanying text.

21. Note that these laws apply to all doctors, not just government funded doctors as in *Rust v. Sullivan*, 500 U.S. 173 (1991).

22. The law was challenged because it banned an abortion procedure without making any exception for women's health. Gonzales v. Carhart, 550 U.S. 124, 143 (2007). Up until this decision, the Supreme Court only allowed abortion restrictions if the law provided that the restrictions did not apply if they would jeopardize women's health. *See* Stenberg v. Carhart, 530 U.S. 914, 931 (2000) (noting that "a State may promote but not endanger a woman's health when it regulates the methods of abortion"). Here, no such exception was made. *Gonzales*, 550 U.S. at 166. The procedure was banned even if it might actually be safer than the ones still allowed. *Id.* at 161–67. How a law with no

women not because the banned procedure was physically dangerous; in fact, he acknowledged that it might actually be safer than the alternatives.[23] Rather, it advanced women's health because women might undergo the procedure without fully understanding its mental health aftermath.[24] Explaining, Justice Kennedy first assumes that pregnant women always have a strong maternal bond: "Respect for human life finds an ultimate expression in the bond of love the mother has for her child."[25] He next assumes that women may well suffer from their abortion decision: "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant they once created and sustained. Severe depression and loss of esteem can follow."[26]

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exception to protect women's health advances women's health is, of course, something of a mystery.

23. *See Gonzales*, 550 U.S. at 161–64 (noting that while some medical experts disagree, acknowledging that "[t]he District Court for the District of Nebraska concluded 'the banned procedure is, sometimes, the safest abortion procedure to preserve the health of women.' The District Court for the Northern District of California reached a similar conclusion").

24. *Id.* at 159.

25. *Id.* This assumption that all women have a natural propensity towards motherhood is echoed in the South Dakota Task Force to Study Abortion, the findings of which were incorporated into law: "The pregnant mother, in virtually every instance, considers having an abortion because she, or others in her life, believes that her circumstances render the *timing* of motherhood—*not motherhood itself*—inconvenient or undesirable." S.D. TASK FORCE TO STUDY ABORTION, REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 34 (2005) [hereinafter S.D. TASK FORCE].

26. *Gonzales*, 550 U.S. at 159. Justice Kennedy then suggests that doctors will shy away from telling women the gruesome details of this abortion procedure. *See id.* ("In a decision so fraught with emotional consequences some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails."). As a result, women, to the detriment of their mental health, may only fully understand what they have done after the fact. *See id.* at 183–84 (Ginsburg, J., dissenting) ("Because of women's fragile emotional state and because of the 'bond of love the mother has for her child,' the Court worries, doctors may withhold information about the nature of the intact D & E procedure."). In dissent, Justice Ginsburg points out that if the problem is lack of information, the solution should be providing information, not banning a potentially safer procedure. *See id.* at 184 (Ginsburg, J., dissenting) ("The solution the Court approves, then, is not to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. . . . Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety." (citation omitted)).

This passage—which explicitly concedes the lack of scientific evidence—is often cited to justify various "informed consent" requirements that would not be warranted in other medical contexts.[27]

At least Justice Kennedy admitted he did not have evidence to back up his assumptions.[28] Legislatures across the country have been more assured in declaring that these laws are needed to protect women's mental wellbeing.[29] For example, in justifying its mandatory abortion counseling law, South Dakota concluded that "a minimum of 10–20% of women experience adverse, prolonged, post-abortion reactions."[30] According to South Dakota, women who have an abortion suffer from guilt, postabortion anger and resentment, anxiety, posttraumatic stress disorder, psychological numbing, depression, suicide ideation, substance abuse, relationship problems, and parenting difficulties.[31] In short, the psychological harm of discovering after the fact that "she [has] killed her child is often devastating."[32] To stave off this parade of horribles, women must learn about the enormity of the abortion act and its attendant risks. Specifically, doctors in South Dakota must tell their abortion patients that they are about to "terminate the life of whole, separate, unique living human being" and that abortion increases their risk of suicide and suicide ideation.[33]

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27. *See infra* notes 62–68 and accompanying text (discussing mandatory abortion counseling laws).

28. *See* Gonzales v. Carhart, 550 U.S. 124, 159 (2007) ("*While we find no reliable data to measure the phenomenon*, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained." (italics added)).

29. *See* S.D. TASK FORCE, *supra* note 25, at 47–48

> The Task Force finds that it is simply unrealistic to expect that a pregnant mother is capable of being involved in the termination of the life of her own child without risk of suffering significant psychological trauma and distress. To do so is beyond the normal, natural, and healthy capability of a woman whose natural instincts are to protect and nurture her child.

30. *Id.* at 42. The study continues: "This translates into at least 130,000 to 260,000 new cases of serious mental health problems each year in the U.S." *Id.*

31. *Id.* at 43–46.

32. *Id.* at 47.

33. *Id.* at 10 (quoting S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (2013)); *id.* § 34-23A-10.1(1)(e)(ii).

The problem is that abortion does not in fact undermine women's mental health. There is no Post Abortion Syndrome.[34] Abortion does not increase women's risk of depression or suicide.[35] All the most sound studies show that in terms of mental health, women who abort unwanted pregnancies fare no worse than women who bring their unwanted pregnancies to term.[36] Every literature review of the empirical studies arrives at the same conclusion: abortion does not cause mental health problems.[37] Here's a sampling:

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34. *See* Nada L. Stotland, *The Myth of the Abortion Trauma Syndrome*, 268 J. AM. MED. ASS'N 2078, 2078 (1992) ("This is an article about a medical syndrome that does not exist.").

35. *See*, *e.g.*, *id.* at 2079 (noting a study where of the 207 women questioned, "94% reported that their mental health improved or remained the same after [having an] abortion").

36. In fact, preliminary results from one study that compared women seeking abortions who obtained them to women seeking abortions who were turned away found that the women who were denied abortions fared more poorly in terms of their physical health and economic stability. Joshua Lang, *What Happens to Women Who Are Denied Abortions?*, N.Y. TIMES (June 12, 2013), http://www.nytimes.com/2013/06/16/magazine/study-women-denied-abortions.html?pagewanted=all&_r=0 (last visited Jan. 3, 2014) (reporting on the Turnaway Study) (on file with the Washington and Lee Law Review). For example, "women denied abortion were three times as likely to end up below the federal poverty line two years later." *Id.*

37. The sole literature review to the contrary, Priscilla K. Coleman, *Abortion and Mental Health: Quantitative Synthesis and Analysis of Research Published 1995–2009*, 199 BRIT. J. PSYCHIATRY 180 (2011), has been roundly criticized in a way none of the others has been. For example, a review by the Royal College of Psychiatrists found that "[a] number of methodological problems with the meta-analysis conducted in the Coleman review have been identified, which brings into question both the results and the conclusions." NAT'L COLLABORATING CTR. FOR MENTAL HEALTH AT THE ROYAL COLL. OF PSYCHIATRISTS, INDUCED ABORTION AND MENTAL HEALTH: A SYSTEMIC REVIEW OF THE MENTAL HEALTH OUTCOMES OF INDUCED ABORTION, INCLUDING THEIR PREVALENCE AND ASSOCIATED FACTORS 18 (2011) [hereinafter ROYAL COLLEGE OF PSYCHIATRISTS REVIEW]. A review by Julia R. Steinberg et al., *Fatal Flaws in a Recent Meta-Analysis on Abortion and Mental Health*, 86 CONTRACEPTION 430 (2012), identifies some of them. One is violating the guidelines for conducting a meta-analysis, including making sure there is no conflict of interest in choosing the relevant studies. *Id.* at 431. Half the studies included in the Coleman meta-analysis were the author's own. *Id.* When deciding whether to include a study, there should have been an independent assessment. That did not occur. *Id.* A related issue was that Coleman included many studies with highly flawed methodology: "13 of the 23 studies (one paper included two studies) included by Coleman did not even merit inclusion in the [Royal College of Psychiatrists Review] because they were lower than very poor quality." *Id.* at 436. This review

- The American Psychology Association Task Force on Mental Health and Abortion concluded, after reviewing empirical studies published in English in peer review journals: "The best scientific evidence published indicates that among adult women who have an *unplanned pregnancy* the relative risk of mental health problems is no greater if they have a single elective first-trimester abortion than if they deliver that pregnancy."[38]
- Reviewing studies on the long-term mental health effects of abortion, scientists at Johns Hopkins Bloomberg School of Public Health concluded: "A clear trend emerges from this systematic review: the highest quality studies had findings that were mostly neutral, suggesting few, if any, differences between women who had abortions and their respective comparison groups in terms of mental health sequelae."[39]
- After reviewing the relevant empirical studies, a group of doctors wrote in the *Harvard Review of Psychiatry*: "The most well controlled studies continue to demonstrate that there is no convincing evidence that induced abortion of an unwanted pregnancy is per se a significant risk factor for psychiatric illness."[40]
- In their study for the U.K. Academy of Medical Royal Colleges, the National Collaborating Centre for Mental Health and the Royal College of Psychiatrists concluded that the best available evidence showed that "rates of

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then concludes that "[l]ike others, we strongly question the quality of this meta-analysis of 22 papers just as the reliability, validity, and replicability of some of the studies in the meta-analysis have been questioned." *Id.* at 430. Or, put more pointedly, "[a] meta-analysis cannot be used to make good science out of (mostly) bad science." *Id.* at 436.

38. APA TASK FORCE, *supra* note 18, at 1. The Task Force reaffirmed their finding in a published study. *See* Major et al., *supra* note 16, at 863 ("The most rigorous studies indicated that within the United States, the relative risk of mental health problems among adult women who have a single, legal, first-trimester abortion of an unwanted pregnancy is no greater than the risk among women who deliver an unwanted pregnancy.").

39. Vignetta E. Charles et al., *Abortion and Long-Term Mental Health Outcomes: A Systematic Review of the Evidence*, 78 CONTRACEPTION 436, 436 (2008).

40. Gail Erlick Robinson et al., *Is There an "Abortion Trauma Syndrome"? Critiquing the Evidence*, 17 HARV. REV. PSYCHIATRY 268, 276 (2009).

> mental health problems for women with unwanted pregnancy were the same whether they had an abortion or gave birth."[41]

Studies that find otherwise suffer from serious methodological flaws.[42] One of the most common flaws is the lack of an appropriate comparison group.[43] "Several studies compared women who had an abortion with women who carried their pregnancy to term without accounting for pregnancy intention."[44] Comparing women with unwanted pregnancies to women with wanted pregnancies is essentially comparing apples to oranges.[45] It makes it impossible to discern whether postabortion outcomes are attributable to the abortion or to the unwanted pregnancy.[46] Well-designed studies, in other words, must control for wantedness versus unwantedness.[47]

Well-designed studies also control for other co-occurring and confounding variables, such as prior mental health or exposure to violence.[48] It is impossible to conclude that an abortion caused

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41. ROYAL COLLEGE OF PSYCHIATRISTS REVIEW, *supra* note 37, at 8.

42. *See* Robinson et al., *supra* note 40, at 276 ("To date, the published studies concluding that abortion causes psychiatric illness have numerous methodological problems . . . .").

43. *See* Charles et al., *supra* note 39, at 438 ("Having an appropriate comparison group is critical to disaggregating the impact of abortion as opposed to other key factors and confounders."); Major et al., *supra* note 16, at 865 ("It is not appropriate to compare women who have had an abortion with women who have never been pregnant, or with women who have given birth to a wanted child.").

44. Charles et al., *supra* note 39, at 438; *see also* Major et al., *supra* note 16, at 870 ("Controlling for the 'wantedness' of pregnancy is particularly important.").

45. *See* Charles et al., *supra* note 39, at 438 ("Women who have an unintended pregnancy may be very different than women who have an intended pregnancy and may be predisposed to different mental health outcomes regardless of undergoing an abortion experience."); Robinson et al., *supra* note 40, at 270 ("Women with unwanted pregnancies are more likely to suffer from a number of co-occurring life stressors, including childhood adversity, relationship problems, exposure to violence, financial problems, and poor coping capacity, all of which contribute to emotional distress.").

46. *See* Robinson et al., *supra* note 40, at 272 ("The effects of abortion are often confounded with the effects of an unwanted pregnancy.").

47. *See id.* at 270 ("At a minimum, the appropriate comparison group for assessing relative risks of negative mental health outcomes of . . . abortions is women who carry *unwanted* pregnancies to term.").

48. *See* ROYAL COLLEGE OF PSYCHIATRISTS REVIEW, *supra* note 37, at 7

mental health problems without knowing whether those problems predated the abortion.[49] Yet, studies that claim to establish this link generally fail to measure pre-existing mental health issues.[50] Indeed, the single best predictor of mental health problems after an abortion is mental health problems before the abortion.[51]

In sum, "mental health problems that develop after an abortion may not be caused by the procedure itself, but instead may reflect other factors associated with having an unwanted pregnancy or antecedent factors unrelated to either pregnancy or abortion, such as . . . intimate-partner violence."[52] The failure to control for these alternate explanations "would likely result in

("Failing to properly take into account important factors (such as previous mental health problems, whether the pregnancy was wanted or not, intimate partner violence and abuse) in many studies limits our understanding of the complex relationships between unwanted pregnancy, abortion, birth, and mental health."); Major et al., *supra* note 16, at 871 ("Most studies did not adequately measure or control for co-occurring risks or confounding variables.").

49. *See* Charles et al., *supra* note 39, at 438 ("Adjusting for prepregnancy mental health, which is a major predictor of current and future mental health, is critical to isolating the effects of abortion on mental health.").

50. *See, e.g.*, Nada L. Stotland, *Induced Abortion and Adolescent Mental Health*, 23 CURRENT OPINION IN OBSTETRICS & GYNECOLOGY 340, 341 (2011) ("Prominent among the methodological flaws of studies claiming negative psychiatric effects are . . . the absence of any, or any meaningful, data on the baseline, or preabortion, mental health of the patients . . . ."); *cf.* Trine Munk-Olsen et al., *Induced First-Trimester Abortion and Risk of Mental Disorder*, 364 N. ENGL. J. MED. 332, 337 (2011) ("We found that the rate of a psychiatric contact differed appreciably between girls and women who had an abortion and girls and women who gave birth, even before the abortion or birth occurred.").

51. *See* ROYAL COLLEGE OF PSYCHIATRISTS REVIEW, *supra* note 37, at 8 (concluding that the best available evidence showed that "[t]he most reliable predictor of post-abortion mental health problems was having a history of mental health problems before the abortion"); APA TASK FORCE, *supra* note 18, at 2 ("Across studies, prior mental health emerged as the strongest predictor of postabortion mental health."); Robinson et al., *supra* note 40, at 270 ("Many studies attribute post-abortion mental states to the abortion experience without providing adequate control for pre-abortion mental states—even though the literature suggests that previous psychiatric history is the most consistent predictor of psychiatric disorders following abortion.").

52. Major et al., *supra* note 16, at 863; *see also* Robinson et al., *supra* note 40, at 270–71 ("Studies that do not take into account preexisting or co-occurring stressful circumstances in the lives of women having abortions may attribute distress to the abortion when it is actually due to those other circumstances.").

spurious associations."[53] Furthermore, it leads to ignoring the actual causes of women's mental distress.[54]

These are only a couple of methodological shortcomings that mar the studies claiming that abortion causes mental health problems. Additional ones include sampling bias,[55] poor outcome measurement,[56] and interpretation problems,[57] among others.[58]

Not surprisingly, scientists regularly urge that policy not be based on flawed science.[59] In particular, they advise that

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53. Charles et al., *supra* note 39, at 438.

54. *See* Robinson et al., *supra* note 40, at 277

> It should also be remembered that the best predictor of mental disorder after an abortion is a pre existing mental disorder, which is strongly associated with exposure to sexual abuse and intimate violence; to ignore these factors would be potentially to ignore the actual causes of women's distress following an abortion.

55. For example, selecting women who belong to post-abortion support groups. Major et al., *supra* note 16, at 871. Another example: "[i]n a country which only allows women with health problems or traumatic sexual histories to access abortion, comparing the mental health of aborting women with nonaborting women may produce spurious associations." Charles et al., *supra* note 39, at 438.

56. An example of this is the failure to use a valid, reliable, clinically relevant measure of mental health. Major et al., *supra* note 16, at 872. Alternately, many studies focus only on negative mental health outcomes: "Assessing the clinical significance of abortion, as with any medical procedure, requires asking 'What is the benefit?' as well as 'What is the harm?' of the procedure compared with relevant alternatives." *Id.* at 872.

57. *See* Major et al., *supra* note 16, at 438 ("The most frequent interpretation problem encountered was the inference of causation from correlational data."); Charles et al., *supra* note 39, at 438 (noting that conflating correlation with causation as a methodological flaw present in abortion studies).

58. *See* Charles et al., *supra* note 39, at 438, 446 (rating studies based on (1) appropriateness of comparison groups; (2) control for preabortion mental health status; (3) confounder control; (4) mental health measurement; (5) selection bias; (6) information bias; and (7) conflating correlation with causation and finding that out of 19, none were excellent, 4 were very good, 8 were fair, 8 were poor, and 1 was very poor); Major et al., *supra* note 16, at 884

> Our review revealed that major methodological problems pervade most of the literature on abortion and mental health. These include (a) use of inappropriate comparison or contrast groups; (b) inadequate control for co-occuring risk factors/potential confounders; (c) sampling bias; (d) inadequate measurement of reproductive history, underspecification of abortion context, and problems associated with underreporting; (e) attribution; (f) poor measurement of mental health outcomes and failure to consider clinical significance; (g) statistical errors; (h) interpretation errors.

59. *See* Charles et al., *supra* note 39, at 449 ("Programs and policies based

mandatory abortion counseling laws be rescinded.[60] "If the goal is to help women, we are obligated to base program and policy recommendations on the best science, rather than using science to advance a political agenda."[61]

B. The First Amendment Distortion

Despite the lack of any solid scientific evidence supporting claims that women need supplemental information to avoid abortion trauma, state after state has passed laws forcing doctors to tell women a range of information about their procedure.[62] While the doctrine of informed consent already requires doctors to tell patients about the material medical risks of a proposed

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on claims derived from flawed research should be modified to reflect the most scientifically sound literature."); Robinson et al., *supra* note 40, at 276 ("To date, the published studies concluding that abortion causes psychiatric illness have numerous methodological problems; since their conclusions are questionable, they should not be used as a basis for public policy.").

60. *See* Charles et al., *supra* note 39, at 449 ("[E]nforcement of so-called 'informed consent' laws (which often provide misinformation regarding mental health risks of abortion) is unwarranted based on the current state of the evidence.").

61. *Id.* at 449. The irony is that it may be the abortion counseling, rather than the abortion itself, which increases the risk of women's mental distress.

> In one of the few experimental studies related to abortion, Mueller and Major found that increasing a women's belief in her ability to deal with having an abortion decreased her likelihood of experiencing depressive symptoms following abortion. Such findings suggest that insofar as inaccurate "informed consent scripts" undermine a woman's belief in her ability to cope after an abortion, they may contribute to her risk for depression.

Robinson et al., *supra* note 40, at 271.

62. *See, e.g.*, GUTTMACHER INST., STATE POLICIES IN BRIEF: COUNSELING AND WAITING PERIODS FOR ABORTION (2014), http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf (providing a table of various state requirements); GUTTMACHER INST., STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND (2014) (providing a table of state ultrasound requirements). Did the scientific distortion lead to the jurisprudential distortion? In other words, would getting the science right make a difference? Perhaps not, especially if, as it appears to be the case, the real point of the laws is not to protect women but to stop abortion. But the claim that these laws are meant to inform and help women—they are usually called Women's Right to Know laws—does give cover for this goal. *See generally* Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Women-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008).

procedure and its alternatives,[63] the mandated requirements go far beyond providing that medical information. Instead, as encouraged by the Supreme Court, they are calculated to convince women to choose childbirth over abortion.[64] In South Dakota, doctors must tell any woman seeking to end her pregnancy that an abortion will "terminate the life of a whole, separate, unique living human being" and that "the pregnant woman has an existing relationship with that unborn human being."[65] Doctors have challenged these laws as violating their free speech rights.[66] Under normal free speech jurisprudence, these content-based requirements would be subject to strict

63. *See* AMA CODE OF MED. ETHICS § 8.08 (2012) ("The physician's obligation is to present the medical facts accurately to the patient . . . in accordance with good medical practice.").

64. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 883 (1992) ("[W]e permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.").

65. S.D. CODIFIED LAWS §§ 34-23A-10.1(1)(b)–(c) (2013). North Dakota has added a nearly identical requirement. *See* N.D. CENT. CODE § 14-02.1-02(11)(a)(2) (2013) (requiring that women who seek an abortion be told orally and in writing that "[t]he abortion will terminate the life of a whole, separate, unique, living human being"); *see also, e.g.*, IND. CODE § 16-34-2-1.1(a)(1)(E) (2013) (requiring that physicians inform abortion patients that "human physical life begins when a human ovum is fertilized by a human sperm"); KAN. STAT. ANN. § 65-6709(b)(5) (2013) (requiring the physician to inform the woman in writing that "the abortion will terminate the life of a whole, separate, unique, living human being"); MO. REV. STAT. § 188.027.1(2) (2013) (requiring the physician to provide printed material stating that the "life of each human being begins at conception" and that an "[a]bortion will terminate the life of a separate, unique, living human being").

66. *See* Planned Parenthood Minn. v. Rounds, 530 F.3d 724, 726–28 (8th Cir. 2008) (en banc) (challenging the requirement that doctors inform women that they are about to "terminate the life of a whole, separate, unique living human being"); *see also* Planned Parenthood Minn. v. Rounds, 686 F.3d 889, 893–94 (8th Cir. 2012) (en banc) (challenging requirement that doctors inform abortion patients of "all known medical risks of the procedure and statistically significant risk factors" including an "increased risk of suicide ideation and suicide").

scrutiny and almost certainly struck down.[67] That, however, is not what has happened.[68]

The Free Speech Clause protects the right to speak as well as the right to not speak.[69] This right against compelled speech was first established in a case challenging a state requirement that schoolchildren recite the pledge of allegiance every morning.[70] 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."[71] 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.[72] It is as anathema as the state censoring speech it disapproves.[73]

Consequently, any time the government regulates the content of a person's speech, whether by prohibiting it or

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67. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2543 (2012) (noting that content-based speech regulations are generally subject to strict scrutiny); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (same).

68. *See Rounds*, 530 F.3d at 738 ("We conclude that the district court erred in granting a preliminary injunction based on Planned Parenthood's claim that the Act violates physicians' First Amendment Rights."); *Rounds*, 686 F.3d at 906 ("On its face, the suicide advisory presents neither an undue burden on abortion rights nor a violation of physicians' free speech rights.").

69. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[F]reedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all."); *see also* Hurley v. Irish–Am. Gay, Lesbian, & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995) (explaining that the First Amendment protects the right to decide what to say and what not to say).

70. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 628–30 (1943).

71. *Id.* at 642.

72. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977) ("[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.").

73. *See* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 162 (1973) ("[I]t is anathema to the First Amendment to allow Government any role of censorship over newspapers, magazines, books, art, music, TV, radio . . . .").

compelling it, the default rule is that the regulation is unconstitutional unless it survives strict scrutiny.[74] Speech laws that control not just the subject matter but viewpoint are especially suspect, and especially unlikely to pass such exacting scrutiny.[75] Imagine, for example, a law forbidding obstetrician-gynecologists from telling their patients about various child support or social services available to pregnant or parenting women.[76] Or, imagine that the government compelled doctors to advise pregnant women with two or more children to choose abortion given the overwhelming expense of putting three children through college.

In the mandatory abortion counseling cases, however, the appeals courts have not applied strict scrutiny.[77] Instead, they

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74. *See supra* note 67 (referring to cases that require the application of strict scrutiny in content-based restrictions); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."). This does assume that the government is regulating speech as opposed to regulating conduct that incidentally affects speech. It also assumes that, as here, the government is regulating private speech and not its own speech.

75. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the [regulation].

(citations omitted); *R.A.V.*, 505 U.S. at 386 (holding that even for unprotected categories of speech, "[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed").

76. South Dakota is one of many states that require that doctors provide this type of information to their abortion patients. S.D. CODIFIED LAWS §§ 34-23A-10.1 (2)(a)–(c) (2013).

77. *See* Planned Parenthood Minn. v. Rounds, 530 F.3d 724, 734–35 (8th Cir. 2008) (en banc) (finding no need to apply strict scrutiny when physicians are "required to give truthful nonmisleading information relevant to the patient's decision to have an abortion" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992))); Planned Parenthood Minn. v. Rounds, 686 F.3d 889, 893 (8th Cir. 2012) (en banc) ("[T]o succeed under either its undue burden or compelled speech claims, [the plaintiff] must show that the disclosure at issue 'is either [sic] untruthful, misleading or not relevant to the patient's decision to have an abortion.'") (citation omitted); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 576 (5th Cir. 2012) (holding that informed consent laws "are part of the state's reasonable regulation of medical practice and do not fall under the rubric of compelling 'ideological'

dodge the doctors' free speech claims by applying the *Planned Parenthood of Southeastern Pennsylvania v. Casey*[78] undue burden test—a test designed to protect women's substantive due process right to abortion.[79] *Casey* rejected a substantive due process challenge to the requirement that doctors inform patients about probable gestational age[80] as well as the availability of printed materials on various social services[81] on the grounds that such "truthful and not misleading" information did not impose an undue burden on women's abortion rights.[82] In analyzing doctors' free speech claims, appellate courts have applied the same test and upheld informed consent requirements deemed "truthful and not misleading."[83] A doctor's right to control her speech would seem quite distinct from a patient's right to control her reproduction. Nonetheless, these physicians' free speech claims

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speech that triggers First Amendment strict scrutiny").

78. 505 U.S. 833 (1992).

79. After *Casey*, abortion regulations are not unconstitutional unless they impose an undue burden on women who wish to terminate their pregnancy. *Id.* at 876–77. It is possible (though not necessary) to read *Casey* as finding that mandatory counseling does not impose an undue burden as long as the information conveyed is "truthful and not misleading." *Id.* at 882. Information about the probable gestational age of the fetus—the information mandated in *Casey*—met those requirements. *Id.* at 967–98 (Rehnquist, J., concurring).

80. *Id.* at 881 (majority opinion).

81. *See id.* (describing "printed materials published by the State . . . providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion").

82. *See id.* at 882 ("If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.").

83. *See* Planned Parenthood Minn. v. Rounds, 686 F.3d 889, 905–06 (8th Cir. 2012) (en banc) (upholding law compelling physicians to disclose that the relative risk of suicide is higher for women who abort on the grounds that the disclosure was truthful and nonmisleading); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 574–80 (5th Cir. 2012) (applying *Casey*'s undue burden standard and then finding permissible an informed consent law compelling physicians "to take and display sonogram images of [the woman's] fetus, make audible its heartbeat, and explain to her the results of both exams"); Planned Parenthood Minn. v. Rounds, 530 F.3d 724, 734–36 (8th Cir. 2008) (en banc) (upholding a statute compelling physicians to tell patients that an abortion "terminate[s] the life of a whole, separate, unique human being" because the disclosure is truthful, nonmisleading, and relevant to the patient's decision to have an abortion).

are subject to the undue burden test rather than the more exacting scrutiny compelled speech claims usually trigger.[84]

It might be argued that physician speech merits less scrutiny than the typical compelled speech claim because mandatory abortion counseling is part and parcel of the regulation of medicine, and therefore more akin to regulating conduct than speech.[85] After all, *Casey* did note that "[t]o be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State."[86]

But in order for abortion counseling laws to be considered regulation of medicine, they have to comport with actual medical practice.[87] Most mandatory counseling does not.[88] Proper informed consent, where patients learn about the proposed procedure and its alternatives, consists of accurate, material, medical information.[89] Even apart from the inaccurate or

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84. *Supra* note 83 and accompanying text.

85. *See, e.g.*, Scott W. Gaylord & Thomas J. Molony, Casey *and A Woman's Right to Know: Ultrasounds, Informed Consent, and the First Amendment*, 45 CONN. L. REV. 595, 634–40 (2012) (arguing that it should not be surprising that a lower standard of review would be applied in the medical context because of the state's role in the regulation of the medical profession); *cf.* Katharine McCarthy, Case Note, Conant v. Walters*: A Misapplication of Free Speech Rights in the Doctor–Patient Relationship*, 56 ME. L. REV. 447, 464–65 (2004) (arguing that "the states retain the power to regulate the professional conduct of physicians, even when speech may be used to carry the conduct out" and therefore states can require physicians to provide or not provide information to patients).

86. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (citations omitted).

87. *See* Robert Post, David C. Baum Memorial Lecture, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 952–53 (arguing that although "constitutional protections accorded to professional speech differ from the constitutional protections accorded to other forms of speech . . . the category of professional [medical] speech can be determined only by reference to the legitimate practice of medicine").

88. *See id.* at 959–60 (arguing that informed consent laws such as in South Dakota do not address medical facts but instead compel ideological speech).

89. *See, e.g.*, AMA CODE OF MED. ETHICS § 8.08 (2012) (noting that "[t]he physician's obligation is to present the medical facts accurately to the patient"); Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 69 (2012) ("The professional obligation of informed consent . . . require[s] that accurate and material information about risks, benefits, and alternatives be

misleading disclosures,[90] requiring doctors to tell a patient that her unwanted pregnancy is "a whole, separate, unique living human being" and that she "has an existing relationship with that unborn human being" is not medicine but ideology.[91] The Eighth Circuit acknowledged that the language on its own "certainly may be read to make a point in the debate on the ethics of abortion," but held that it was ultimately scientific and not ideological because the statute defined "human being" as "an individual living member of the species of Homo sapiens."[92] But of

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disclosed to all patients.").

90. For example, six states (Arizona, Kansas, North Carolina, South Dakota, Texas, West Virginia) require that women be informed (incorrectly) that abortion harms future fertility while five states (Alaska, Kansas, Mississippi, Oklahoma, Texas) require that women be told (incorrectly) that abortion increases the risk of breast cancer. *See* GUTTMACHER, *supra* note 62, at 2 (providing a table of state laws). Meanwhile, South Dakota, among other states, also requires that doctors tell their abortion patients about the "increased risk of suicide and suicide ideation." S.D. CODIFIED LAWS §§ 34-23A-10.1(1)(e)(ii) (2013). As discussed above, no reputable study establishes that abortion itself increases the risk of suicide. *Supra* notes 16–46 and accompanying text. The Eighth Circuit nonetheless upheld the disclosure on the grounds that it was merely signaling correlation rather than causation. Planned Parenthood Minn. v. Rounds, 686 F.3d 889, 904–05 (8th Cir. 2012) (en banc).

91. *See, e.g.*, Planned Parenthood Minn. v. Rounds, 530 F.3d 724, 744 (8th Cir. 2008) (en banc) (Murphy, J., dissenting) (arguing that the language is "neither a medical statement nor a fact which medical doctors are trained to address, but rather an 'ideological pronouncement'"); Caitlin E. Borgmann, *Judicial Evasion and Disingenuous Legislative Appeals to Science in the Abortion Controversy*, 17 J.L. & POL'Y 15, 40 (2008) (arguing that the state is sending the message "that the embryo or fetus is morally equivalent to a child, that the pregnant woman is already the 'mother' of that child, and that to proceed with the abortion would be to murder her own child"); Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 1006–07 (2009) ("[T]he state-dictated message to pregnant women in South Dakota is not that her embryo belongs to the species Homo sapiens but that she is killing a member of the human race who deserves to live."); Post, *supra* note 87, at 956

> Whether the fetus is a 'human being' is . . . understood by all sides to the abortion controversy to be an essentially contested moral proposition. For South Dakota to require a physician to "inform" his patient that she will be terminating the life of a "human being" is consequently not innocent. It deliberately and provocatively incorporates the language of ideological controversy and forces physicians to affirm the side of those who oppose abortion.

92. *Rounds*, 530 F.3d at 735–36 (majority opinion) (quoting S.D. HB 1166 § 8(4)). Thus, the only medical information conveyed is that the woman is pregnant with a member of the species *Homo sapiens*.

course pregnant women already know they are carrying humans and not pandas.[93] Thus, the mandatory abortion counseling is not providing any material medical information. Instead, it expresses the government's view of abortion. Conveying the government's moral stance on abortion is simply not part of medical practice. To the contrary, among the doctor's professional and ethical obligations is to respect her patient's autonomous decisionmaking[94] and provide her patient with the (relevant, accurate, nonmisleading) medical information she needs to make her own decisions.[95]

In short, contrary to fundamental free speech principles, the government is permitted to force private individuals to convey its ideological message. This compulsion not only violates physicians' free speech but also results in an incoherent free speech jurisprudence. If free speech protection is supposed to do anything, it is supposed to prevent imposition of government orthodoxy. Yet mandatory abortion counseling does just that: it forces doctors to fall into line with state orthodoxy regarding abortion.

II. The Abortion that Wasn't There

While the Patient Protection and Affordable Care Act's[96] individual mandate was the center of attention during the first round of constitutional challenges to it,[97] the "contraception

93. *See* Borgmann, *supra* note 91, at 38–39 ("To accept the South Dakota legislature's findings as scientific fact is to make the absurd suggestion that pregnant women do not know that the embryo or fetus they are carrying is of the human species."); Corbin, *supra* note 91, at 1006 ("[U]nless the legislature feared that women might think they are carrying dolphins or pandas instead of Homo sapiens, the statement clearly has a moral message.").

94. *See generally* RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT (1986). The main ethical requirements of physicians towards their patients involve (1) respect for patient autonomy; (2) beneficence or non-maleficence ("do no harm"); and (3) justice. *Id.* at 5.

95. *Supra* note 89; *see also* AMA CODE OF MED. ETHICS § 8.08 (2012) (noting that "[t]he patient should make his or her own determination about treatment").

96. Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified as amended in scattered sections of 26 and 42 U.S.C.).

97. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012) (addressing the constitutionality of the Patient Protection and Affordable Care

mandate" is fast becoming the star of another round of challenges, this time on religious liberty grounds.[98] Under the landmark health care law, large employers[99] must now provide their employees with health insurance that covers basic preventive care.[100] For women, basic preventive care encompasses access to FDA-approved contraception,[101] including "morning after" pills such as Plan B and Ella.[102]

Among those bringing religious liberty claims are large, for-profit corporations and their devout owners who view abortion as equivalent to murder.[103] They argue that to facilitate this sin in any way, even by owning a corporation whose health insurance plan covers abortifacients like Plan B and Ella, contravenes their deeply held faith.[104]

Act's individual mandate).

98. Patient Protection and Affordable Care Act § 2713(a)(4), 124 Stat. 119, 131 (2010) (codified at 42 U.S.C. § 300gg-13(a)(4) (2012)).

99. *See* 26 U.S.C. § 4980H(c)(2)(A) (2012) (defining "applicable large employer" specifically as an employer with "an average of at least 50 full-time employees during the preceding calendar year").

100. *See* Patient Protection and Affordable Care Act § 2713(a)(4), 124 Stat. 119, 131 (codified at 42 U.S.C. § 300gg-13(a)(4) (2012)).

101. *See* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (to be codified at 26 C.F.R. § 54) (noting that the preventive care services included are supported by the Health Resources and Services Administration guidelines, which require coverage for all FDA-approved contraceptive methods).

102. *See Birth Control: Medicines to Help You*, FDA, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last updated Aug. 27, 2013) (last visited Sept. 15, 2013) (listing Plan B and Ella as methods of emergency contraception) (on file with the Washington and Lee Law Review); *FDA News Release: FDA Approves Ella Tablets For Prescription Emergency Contraception*, FDA, http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm222428.htm (last updated Apr. 22, 2013) (last visited Sept. 15, 2013) (approving Ella) (on file with the Washington and Lee Law Review).

103. *Infra* notes 104–15. Other plaintiffs challenging the contraception mandate oppose all contraception. This Article focuses solely on the subset of plaintiffs who object to abortion but not contraception.

104. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1120, 1125 (10th Cir. 2013), *cert. granted,* 134 S. Ct. 678 (2013) (No. 13-354) (arguing that the contraception mandate forces them to facilitate abortion in violation of religious beliefs); Conestoga Wood Specialities Corp. v. Sebelius, 724 F.3d 377, 381–82 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013) (No. 13-354) (same); Briscoe v. Sebelius, 927 F. Supp. 2d 1109, 1112 (D. Colo. 2013) (same); Sharpe Holdings, Inc. v. U.S. Dep't Health & Human Servs., No. 2:12–CV–92–DDN, 2012 WL 6738489, at *3 (E.D. Mo. Dec. 31, 2012) (same); Am. Pulverizer Co. v.

The lawsuits allege that the contraception mandate imposes a substantial burden on the employers' religious conscience and violates both the Free Exercise Clause and the Religious Freedom Restoration Act.[105] Sometimes the corporate owners claim that the requirements burden their own conscience.[106] However, aware that the mandate does not require them individually but rather their legally distinct companies to fund the health insurance plans, oftentimes they claim that the mandate burdens the religious conscience of their for-profit corporations.[107] This is a novel religious liberty claim: Never before have for-profit corporations claimed to have free exercise rights.[108]

These challenges have already resulted in a circuit split, with some appellate courts accepting the argument that the contraception mandate burdens the religious conscience of for-profit corporations.[109] For plaintiffs like Hobby Lobby Stores, this outcome depends on two distortions. First, the court must accept

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U.S. Dep't of Health & Human Servs., No. 12–3459–CV–S–RED, 2012 WL 6951316, at *2 (W.D. Mo. Dec. 20, 2012) (same); O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012) (same).

105. *See supra* note 104 (citing relevant cases).

106. *See Conestoga Wood Specialties Corp.*, 724 F.3d at 381–82 (arguing that the contraception mandate violated the religious liberty of owners of a for-profit corporation); Korte v. Sebelius, 735 F.3d 654, 658–59 (7th Cir. 2013) (same); Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1210 (D.C. Cir. 2013) (same); Autocam Corp. v. Sebelius, 730 F.3d 618, 620–21 (6th Cir. 2013) (same).

107. *See Conestoga Wood Specialties Corp.*, 724 F.3d at 381 (describing plaintiffs' argument that the contraception mandate burdened religious liberty of the for-profit corporation); *Hobby Lobby Stores*, 723 F.3d at 1122 (same); *Korte*, 735 F.3d at 658 (same); *Gilardi*, 733 F.3d at 1210 (same); *Autocam Corp.*, 730 F.3d at 621 (same).

108. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (2012) (noting that the Supreme Court has never addressed whether for-profit corporations can assert religious liberty claims).

109. *Compare Korte*, 735 F.3d at 687 (holding that the contraception mandate violates for-profit corporations religious rights under the Religious Freedom Restoration Act), *and Hobby Lobby Stores, Inc.*, 723 F.3d at 1126, 1128–29 (holding that a for-profit corporation has free exercise rights and that a for-profit corporation is a "person" under the Religious Freedom Restoration Act), *with Autocam Corp.*, 730 F.3d at 621 (holding for profit corporation was not a person who could bring a religious liberty claim), *and Conestoga Wood Specialties Corp.*, 724 F.3d at 384, 388 (holding that for-profit corporations do not have free exercise rights and have no protection under Religious Freedom Restoration Act).

the erroneous claim that Plan B and Ella are abortifacients. Second, the Free Exercise Clause, designed to protect religious individuals and their religious associations, must be distorted to reach for-profit corporations. While the Supreme Court has not yet ruled on the issue of corporate religious liberty—although it has granted certiorari—the abortion context raises the possibility in a way other contexts would not.[110]

A. The Scientific Distortion

Several lawsuits have been filed by owners who are not religiously opposed to contraception but are vehemently opposed to abortion. These plaintiffs believe that life begins at fertilization and that killing an embryo is a sin:[111] "[T]he life of a distinct human person begins at fertilization and . . . the grave wrong of abortion includes intentionally preventing the embryo's implantation."[112] For them, abortion is "an intrinsic evil and a sin against God."[113] Given that abortion is "the moral equivalent of homicide,"[114] they do not want their company's health insurance plan to provide Plan B or Ella on the grounds that they "are widely known as abortifacients in that they frequently function to

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110. *See* Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 678, 678 (2013) ("Petition for writ of certiorari . . . granted.").

111. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1120–22 (10th Cir. 2013); Verified Complaint at 12, Briscoe v. Sebelius, 927 F. Supp. 2d 1109 (D. Colo. 2013) (No. 13–cv–00285–WYD–BNB) ("One of the religious and moral teachings which Mr. Briscoe embraces, based on the Holy Bible, is that a preborn child is, from the moment of conception, *i.e.*, a fertilized embryo, a human being created in the image of God.").

112. Brief for Bart Stupak and Democrats for Life of America at 15, as Amici Curiae Supporting Plaintiffs/Appellees & Supporting Affirmance, Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No. 1:12–cv–1123–JLK); *see also* Complaint at 5, Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs., No. 12–3459–CV–S–RED, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012) ("As evangelical Christians, Plaintiffs believe in the sanctity of human life from the moment of conception.").

113. Verified Complaint at 12, Briscoe v. Sebelius, 927 F. Supp. 2d 1109 (D. Colo. 2013) (No. 13–cv–00285–WYD–BNB).

114. Pam Belluck, *Abortion Qualms on Morning-After Pill May Be Unfounded*, N.Y. TIMES, June 6, 2012, at A1 (quoting Dr. Donna Harrison, Director of Research, American Association of Pro-Life Obstetricians and Gynecologists).

destroy fertilized eggs, which Plaintiffs consider to be abortion on demand."[115]

They are wrong. An abortifacient ends a pregnancy.[116] These drugs do not end a pregnancy. In order to understand why, it is helpful to review some basic biology. Many people erroneously believe that pregnancy occurs immediately after sexual intercourse, and therefore any measure taken after intercourse works to end a pregnancy. That is not actually how our bodies work. While the lifespan of an egg does not exceed twenty-four hours, sperm can survive for five days.[117] Consequently, a woman can ovulate up to five days after sex and become pregnant.[118] In other words, there is plenty of time between sex and fertilization.

Strictly speaking, pregnancy does not begin until a fertilized egg implants in the uterus.[119] That is, the medical community does not consider a pregnancy to begin when the sperm fuses

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115. Complaint at 3, Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., No. 2:12–CV–92–DDN, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); *see also* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1120–21 (10th Cir. 2013) ("[T]hese services are drugs and devices that the plaintiffs believe to be abortifacients, the use of which is contrary to their faith."); Verified Complaint at 3, Briscoe v. Sebelius, 927 F. Supp. 2d 1109 (D. Colo. 2013) (No. 13–cv–00285–WYD–BNB)

> In the category of "FDA-approved contraceptives" included in this HHS mandate are several drugs or devices that may cause the demise of an already-conceived but not-yet-implanted human embryo, such as [Plan B and Ella] which studies show can function to kill embryos even after they have implanted in the uterus, by a mechanism similar to the abortion drug RU-486.

Complaint at 5, Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs., No. 12–3459–CV–S–RED, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012) ("Plaintiffs consider [Plan B and Ella] to be the equivalent of early abortions.").

116. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 6 (1993) (defining abortifacient as "a drug or other agent that induces abortion").

117. *See* Kristina Gemzell-Danielsson, *Review Article: Emergency Contraception—Mechanisms of Action*, 87 CONTRACEPTION 300, 301 (2013) ("[S]permatozoa can survive in the female reproductive tract for 5–6 days after intercourse.").

118. *See* Kristina Gemzell-Danielsson & Chun-Xia Meng, *Emergency Contraception: Potential Role of Ulipristal Acetate*, 2 INT'L J. OF WOMEN'S HEALTH 53, 55 (2010) (explaining that unprotected sex may result in pregnancy "from 5 days before to 1 day after ovulation").

119. *See* Rachel Benson Gold, *The Implications of Defining When a Woman Is Pregnant*, 8 GUTTMACHER REP. ON PUB. POL'Y 7, 7–8 (2005) (explaining the medical definition of pregnancy).

with the egg and creates the single-celled zygote.[120] Rather, textbook biology is that pregnancy starts several days later, once the fertilized egg travels down the fallopian tube, starts to divide, and successfully embeds itself into the lining of the woman's uterus.[121] Notably, less than one half of fertilized eggs complete this process.[122]

Even relying on the alternate understanding of "pregnancy" (pregnancy at fertilization vs. pregnancy at implantation), neither Plan B nor Ella work in the way the plaintiffs think the medicine works. In other words, even assuming pregnancy began at fertilization, morning-after pills do not stop implantation or

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120. The American College of Obstetricians and Gynecologists (ACOG), Statement on Contraceptive Methods (July 1998); *see also* Gold, *supra* note 119, at 7 ("[M]edical experts—notably the American College of Obstetricians and Gynecologists (ACOG)—agree that the establishment of a pregnancy takes several days and is not completed until a fertilized egg is implanted in the lining of a woman's uterus."). A poll of American obstetrician–gynecologists showing that fifty-seven percent believe that pregnancy starts at "conception" does not prove otherwise. *See* Grace S. Chung et al., *Obstetrician–Gynecologists' Beliefs About When Pregnancy Begins*, 206 AM. J. OBSTETRICS & GYNECOLOGY 132.e1, 132.e1 (2012) (describing poll). Why not? Ninety-two percent of those polled belong to ACOG, and, as the study itself acknowledged, ACOG equates "conception" with implantation. *Id.* at 132.e3, 132e5; E-mail from Elizabeth Sepper, Assoc. Professor of Law, Wash. Univ. Sch. of Law, to author (Oct. 23, 2013) (on file with author).

121. An amicus brief signed by the American College of Obstetricians and Gynecologists, Physicians for Reproductive Health, Association of Reproductive Health Professionals, American Society for Reproductive Medicine, and American Women's Medical Association, among others, states that "[p]regnancy is established only upon conclusion of such implantation." Brief for Physicians for Reprod. Health et al. as Amici Curiae in Support of Petitioners at 12, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (Oct. 21, 2013), *cert. granted*, 134 S. Ct. 678 (U.S. Nov. 26, 2013) (No. 13–354) [hereinafter ACOG Amicus Brief]. The ACOG Amicus Brief also notes that "[t]he scientific definition of pregnancy is also the legal definition of pregnancy, accepted by governmental agencies and all major U.S. medical organizations.". *Id.* at 13; *see also, e.g.*, 45 C.F.R. § 46.202 (2013) (recognizing pregnancy as "the period of time from implantation to delivery").

122. *See* Stephen S. Hall, *The Good Egg*, DISCOVER MAG., May 26, 2004, at 30, 30–39 ("John Opitz, a professor of pediatrics, human genetics, and obstetrics and gynecology at the University of Utah, told the President's Council on Bioethics last September that preimplantation embryo loss is 'enormous.' Estimates range all the way from 60 percent to 80 percent."); K. Diedrich et al., *The Role of the Endometrium and Embryo in Human Implantation*, 13 HUMAN REPROD. UPDATE 365, 366 (2007) (noting that even under optimal conditions, no more than 40% of blastocysts implant).

kill fertilized eggs. The evidence is particularly conclusive for Plan B (active ingredient levonorgestrel), which has been around longer and studied in more depth than Ella (active ingredient ulipristal acetate).

Every reputable scientific study to examine Plan B's mechanism has concluded that these pills prevent fertilization from occurring in the first place.[123] In their press release announcing that Plan B would be made available over the counter with no age restrictions, the FDA explained that "[t]he product contains higher levels of a hormone found in some types of daily use oral hormonal contraceptive pills and works in a similar way to these contraceptive pills by stopping ovulation and therefore preventing pregnancy."[124] In short, Plan B is contraception.

To be fair, when it first approved the drug, the FDA did require Plan B labels to mention the possibility that they prevented implantation.[125] At the time, the scientific studies focused on whether the drugs prevented pregnancy rather than on how they prevented pregnancy.[126] The label reflected that uncertainty, noting that the drug "could theoretically prevent

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123. *See, e.g.*, INT'L FED'N OF GYNECOLOGY & OBSTETRICS (FIGO) & INT'L CONSORTIUM FOR EMERGENCY CONTRACEPTION, MECHANISM OF ACTION: HOW DO LEVONORGESTREL-ONLY EMERGENCY CONTRACEPTION PILLS (LNG ECPS) PREVENT PREGNANCY 1–2 (2012), http://graphics8.nytimes.com/packages/pdf/health/contraception/ICEC_FIGO_MoA_Statement_March_2012.pdf [hereinafter FIGO SUMMARY] (summarizing studies). Indeed, this fact explains why EC is not 100% effective in preventing pregnancy, and why it becomes less effective the later it is taken. *Id.*; *see also* Julie Rovner, *Morning-After Pills Don't Cause Abortions, Studies Say*, NPR.ORG (Feb. 21, 2013, 5:04 PM), http://www.npr.org/blogs/health/2013/02/22/172595689/morning-after-pills-dont-cause-abortion-studies-say (last visited Jan. 18, 2014) ("[T]here is now fairly definitive research that shows the only way [Plan B] works is by preventing ovulation, and therefore, fertilization.") (on file with the Washington and Lee Law Review).

124. *FDA News Release: FDA Approves Plan B One Step Emergency Contraceptive for Use Without a Prescription for All Women of Child-Bearing Potential*, FDA, http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm358082.htm (last updated June 21, 2013) (last visited Jan. 18, 2014) (on file with the Washington and Lee Law Review).

125. *See* ACOG Amicus Brief, *supra* note 121, at 16 (noting that "[t]he product label has not been updated since the product was originally approved in 1999 and it does not reflect the most current research"); Belluck, *supra* note 114, at A1 ("Labels inside every box of morning-after pills . . . say they may work by blocking fertilized eggs from implanting in a woman's uterus.").

126. Belluck, *supra* note 114, at A1.

pregnancy by interfering with a number of physiological processes" including "interfering with ovulation or implantation."[127] The possibility was not supported by any particular study.[128] Again, the mechanism was still not quite clear.[129]

However, studies conducted since then have established that these pills work by preventing ovulation. In one study, for example, women who took Plan B before ovulation did not became pregnant, while women who took Plan B after ovulation became pregnant at the same rates as they would have without any medicine.[130] Summarizing the most recent research on levonorgestrel-only emergency contraception like Plan B,[131] the International Federation of Gynecology and Obstetrics (FIGO)

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127. *Id.*

128. *See id.* ("A *New York Times* review of hundreds of pages of approval process documents found no discussion of evidence supporting implantation effects."); Sandra E. Reznik, *Plan B: How It Works*, 91 HEALTH PROGRESS 59, 61 (2010) ("There are absolutely no data to support [the package's] statement [regarding implantation].").

129. *Cf.* Kevin Clarke, *The Emergency Contraception Question*, AMERICA: NAT'L CATH. REV., http://americamagazine.org/issue/emergency-contraception-question (last visited Jan. 18, 2014) (quoting Erica V. Jefferson, an FDA public affairs deputy director, as noting "[i]t is often difficult at the time the drug is approved or even afterwards to pinpoint the mechanism of action of the drug") (on file with the Washington and Lee Law Review). Experts speculated that there might have been two reasons why the possibility was included. One, daily birth control pills can alter the lining of the uterus, and some of them share the active ingredient of Plan B. Belluck, *supra* note 114, at A1. Two, "[i]mplantation also likely wound up on the label because of what [researcher] Dr. Gemzell-Danielllsson called wishful thinking by some scientists, who thought that if it could also block implantation, it would be even better at preventing pregnancy." *Id.*

130. *See* FIGO SUMMARY, *supra* note 123 (describing studies); *Catholic Journal Says Plan B Does Not Cause Abortions*, NAT'L CATH. REP., http://ncronline.org/print/news/catholic-journal-says-plan-b-does-not-cause-abortions (last visited Jan. 18, 2014) ("[S]ince it takes about a week from an egg's fertilization to its implantation, the scientific evidence that Plan B treatment is completely ineffective after five days is overwhelming: It works only by preventing fertilization, not by preventing implantation.") (on file with the Washington and Lee Law Review).

131. Besides Plan B, other levonorgestrel-only emergency contraception pills available in the United States include the generics Next Choice One Dose and My Way. *See* JAMES TRUSSELL & ELIZABETH G. RAYMOND, EMERGENCY CONTRACEPTION: A LAST CHANCE TO PREVENT UNINTENDED PREGNANCY 2 (2013), http://ec.princeton.edu/questions/ec-review.pdf (noting two generic forms of Plan B approved in 2012).

reported in 2012 that this emergency contraception works pre-fertilization.[132] In particular, "[t]he evidence shows that" Plan B pills "[i]mpair ovulation,"[133] "may affect sperm,"[134] but "do not inhibit implantation."[135] The National Institutes of Health and the Mayo Clinic have both updated their website to reflect the same conclusion.[136] FIGO concludes that Plan B inhibits or delays ovulation and that "[Plan B] cannot prevent implantation of a fertilized egg. Language on implantation should not be included

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132. FIGO SUMMARY, *supra* note 123; *see also* Reznik, *supra* note 128, at 59 ("Unlike its predecessors . . . leveonorgesterel acts to prevent pregnancy before, and only before, fertilization occurs.").

133. FIGO SUMMARY, *supra* note 123, at 1; *see also id.* ("A number of studies provide strong direct evidence that LNG ECP prevent or delay ovulation. If taken before ovulation, LNG ECP inhibit the pre-ovatory luteinizing hormone (LH) surge, impeding follicular development and maturation and/or release of the egg itself. This is the primary mechanism of action."); Reznik, *supra* note 128, at 59 ("Studies have shown that Plan B suppresses the hypothalamus and pituitary glands and thereby wipes out the so-called luteinizing hormone surge. Without that hormonal surge, ovulation does not occur.").

134. *See* FIGO SUMMARY, *supra* note 123, at 1

> Contradictory results exist regarding whether LNG taken post-coitally and in doses used for EC affects sperm function. Early studies suggested that LNG ECPs interfere with sperm motility by thickening cervical mucus. However, two in vitro studies found that LNG in doses used for EC had no direct effect on sperm.

135. *See id.*

> [In two studies], no pregnancies occurred in the women who took ECP's before ovulation; while pregnancies occurred only in women who took ECPs on or after the day of ovulation, providing evidence that ECPs were unable to prevent implantation . . . . Most studies show that LNG ECPs have no [histological or biochemical] effect on the endometrium, indicating that they have no mechanism to prevent implantation. One study showed that levonogestrel did not prevent the attachment of human embryos to a simulated (in vitro) endometrial environment. Animal studies demonstrated that LNG ECPs did not prevent implantation of the fertilized egg in the endometrium.

Reznik, *supra* note 128, at 60–61 ("[B]iological experiments involving both animal and human tissue show Plan B has no effect on the endometrium that would be compatible with decreased receptivity for implantation.").

136. Ruth Moon, *Does Plan B Cause Abortions*, CHRISTIANITY TODAY, May 2013, at 15; Pam Belluck, *New Birth Control Label Counters Lawsuit Claim*, N.Y. TIMES, Nov. 26, 2013, at A17.

in [its] product labeling."[137] Indeed, it is no longer on the label in Europe.[138]

In sum, the scientific consensus is that Plan B does not cause an abortion under anyone's definition of pregnancy.[139] Although there are fewer studies on Ella, the newest research points to the same conclusion.[140] Ella seems to be more effective than Plan B, leading some to speculate as to abortifacient qualities.[141] Published studies, however, have established that Ella's increased effectiveness is due to its greater ability to prevent ovulation. Once the lutenizing hormone (LH) that triggers ovulation starts to surge, which occurs roughly one to two days before ovulation,[142] Plan B is no longer able to forestall ovulation.[143] In contrast, Ella can prevent or postpone ovulation even after the LH rise begins.[144] In short, "the best available

137. FIGO SUMMARY, *supra* note 123.

138. *See* Belluck, *supra* note 136, at A17 (reporting that European health officials have changed labels for the European equivalent of Plan B to clarify that the pill "cannot stop a fertilized egg from attaching to the womb").

139. *Supra* notes 116–35 and accompanying text.

140. *Infra* notes 132–35 and accompanying text.

141. *See, e.g.*, Ralph P. Miech, *Immunopharmacology of Ulipristal as an Emergency Contraception*, 3 INT'L J. WOMEN'S HEALTH 391, 391–94 (2011) (presenting commentary to American Association of the Pro-Life Obstetricians and Gynecologists).

142. Joseph B. Stanford et al., *Timing Intercourse to Achieve Pregnancy: Current Evidence,* 100 OBSTETRICS & GYNECOLOGY 1333, 1337 (2002).

143. *See* CATHOLIC HEALTH ASS'N OF THE U.S., ETHICAL CURRENTS: ELLA (ULIPRISTAL ACETATE): TAKING ANOTHER LOOK 17–20 (2012), http://www.chausa.org/docs/default-source/general-files/6454ef88fd7c45af903d85a0ce3f1f811-pdf.pdf (describing studies that indicate that Ella prevents ovulation in a greater percentage of women than Plan B).

144. *See, e.g.*, ACOG Amicus Brief, *supra* note 121, at 21

> [W]hile [Plan B] is effective at preventing ovulation only when taken *before* the LH surge, [Ella] is still effective at preventing pregnancy even when taken after the LH surge has begun, but before the LH peak. . . . Although [Ella] has a wider window of effectiveness than [Plan B], it still does not prevent release of the egg, and therefore, is not effective . . . after the peak of the LH surge.

Vivian Brache et al., *Ulipristal Acetate Prevents Ovulation More Effectively Than Levonorgestrel: Analysis of Pooled Data Three Randomized Trials of Emergency Contraception Regimens*, 88 CONTRACEPTION 611, 616–17 (2013) ("[Ella] is the most effective treatment, delaying ovulation for at least 5 days in 59% of the cycles."); Gemzell-Danielsson, *supra* note 117, at 305 ("The window of action of [Ella] seems wider than that for [Plan B] since it may, in addition, prevent an ovulation after LH has started to rise.").

evidence is that the ability of levonorgestrel [Plan B] and ulipristal acetate ECPs [Ella] to prevent pregnancy can be fully accounted for by mechanisms that do not involve interference with post-fertilization events."[145]

Courts that actually take the time to examine the underlying science recognize this scientific conclusion. In his decision ordering that Plan B be made available to women of all ages, Judge Korman found that "[t]hese contraceptives have not been shown to cause a postfertilization event—a change in the uterus that could interfere with implantation of a fertilized egg."[146] Pro-life scientists who have studied the evidence likewise agree. So for example, one pro-life researcher, after noting that "[t]here's no evidence [that Plan B prevents implantation]," stated that "[o]ur claims of conscience should be based on scientific fact, and we should be willing to change our claims if facts change."[147]

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145. TRUSSELL & RAYMOND, *supra* note 131, at 7. A brief submitted on behalf of the American College of Obstetricians and Gynecologists and several other medical groups agreed: "As established by the weight of the evidence, LNG [Plan B] and UPA [Ella] function primarily, if not exclusively, by inhibiting ovulation, thereby preventing fertilization from occurring . . . . [T]here is no evidence that [Ella] affects implantation." ACOG Amicus Brief, *supra* note 121, at 15–16; *see also* Gemzell-Danielsson et al., *supra* note 117, at 305 ("In conclusion, EC with a single dose of 1.5 mg LNG [Plan B] or 30 mg UPA [Ella] acts through inhibition of or postponing ovulation but does not prevent fertilization or implantation and has no adverse effect on a pregnancy.").

146. Tummino v. Hamburg, 936 F. Supp. 2d 162, 165 (E.D.N.Y. 2013) (quoting U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-109, FOOD AND DRUG ADMINISTRATION: DECISION PROCESS TO DENY INITIAL APPLICATION FOR OVER-THE-COUNTER MARKETING OF THE EMERGENCY CONTRACEPTIVE DRUG PLAN B WAS UNUSUAL 13 (2005)); *see also id.* ("Indeed, Diana Blithe, the biochemist who supervises research on contraception at the National Institutes of Health ("NIH"), opined that the possibility of levonorgestrel-based emergency contraceptives having an effect on implantation of fertilized eggs should 'definitely' be taken off the labels for those drugs."); Reznik, *supra* note 128, at 59 (noting that studies indicated no evidence that Plan B "decreased receptiveness to implantation").

147. Moon, *supra* note 136, at 15; *see also* Clarke, *supra* note 129 ("[M]ounting evidence [shows] that levonorgestrel [a Plan B generic] has little or no effect on post-fertilization events. In other words, given the limitation of scientific certitude, they suggest that Plan B, when administered once, is not an abortifacient."); Fernando Saravi, *Comment to Article, Does Plan B Cause Abortions?,* CHRISTIANITY TODAY (Apr. 6, 2013), http://www.christianity today.com/ct/channel/comments/allreviews.html?id=104071&type=article (last visited Jan. 18, 2014)

I am a professor of physiology who has reviewed ALL the available

While the courts cannot and should not question plaintiffs' religious beliefs, the courts can and should question the accuracy of their science. Plaintiffs' opposition is based on a medical mistake. They are religiously opposed to killing fertilized eggs. Neither Plan B nor Ella kills fertilized eggs. Courts should not be deferential when they encounter obvious scientific error,[148] and plaintiffs' claims regarding morning after pills should have been dismissed.[149] To paraphrase a well-known quip, "everyone is entitled to his own [religious beliefs], but not his own facts."[150]

B. The First Amendment Distortion

The First Amendment distortions in this line of cases are not as obvious as in Part II, where courts have simply failed to apply free speech doctrine altogether. Instead, the key distortion here is that courts are much more willing to entertain the possibility of a free exercise violation than current jurisprudence supports. That is, instead of affording insufficient First Amendment protection (to those challenging limits on reproductive rights), the courts are awarding too much First Amendment protection (to those

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> evidence on levoneorgestrel [sic] used as emergency contraception (EC). It has become clear that there is no evidence that this drug,as [sic] used for EC, may avoid or inhibit implantation. This is plain scientific evaluation; I'm an Evangelical Christian with a strong stance against abortion in any form. Of course, I do have moral issues regarding the whole EC concept itself.

(on file with the Washington and Lee Law Review).

148. *See* Imani Gandy, *Plan B and Ella are Not Abortifacients, But False Claims May Hold Up in Court*, RH REALITY CHECK (Mar. 27, 2013 8:50 AM), http://rhrealitycheck.org/article/2013/03/27/plan-b-and-ella-are-not-abortifacients-but-false-claims-may-hold-up-in-court/ (last visited Feb. 28, 2014) ("People are entitled to believe all sorts of things and courts can't question that. That doesn't make those beliefs correct, and that certainly doesn't mean that those beliefs must be given the force of law.") (on file with the Washington and Lee Law Review).

149. *See id.* ("Either something is an abortifacient or it isn't. The pill, Plan B, and Ella aren't. That should be the end of the discussion.").

150. *See* CHARLES G. KOCH, THE SCIENCE OF SUCCESS: HOW MARKET-BASED MANAGEMENT BUILT THE WORLD'S LARGEST PRIVATE COMPANY 31 (2007) ("As Senator Daniel Patrick Moynihan put it: 'Everyone is entitled to his own opinion, but not his own facts.'"); *cf.* Gandy, *supra* note 148 ("Plaintiffs in these lawsuits are demanding their 'religious belief' in false information and junk science be used to trump the rights of others.").

challenging access to reproductive rights). In particular, I would argue that they are willing to extend religious liberty protection in novel ways in part because of the reproductive rights backdrop. That is, I do not think these challenges, especially the claim that for-profit corporations are entitled to a religious exemption from the contraception mandate, would have gotten as much traction in a different context. But because they arise in the context of abortion—well, the rules work differently.

A threshold issue in these cases is whether for-profit corporations even have religious liberty rights. Whether for-profit corporations are rights-holders under the Free Exercise Clause or the Religious Freedom Restoration Act (RFRA) is a question of first impression.[151] Existing religion clause jurisprudence would suggest not.[152] Nonetheless, courts ruling on contraception mandate challenges have been divided in their answer.[153] My main point is not that for-profit corporations are not entitled to religious exemptions—although they really are not.[154] Rather, my point is that courts are much more likely to accept this novel proposition when made in the abortion context.

A counterfactual example might help make this clear. Imagine a family-owned company, let's call it Hobby Bobby, which employs thirteen thousand full-time workers.[155] Hobby Bobby owns hundreds of stores that sell arts and crafts supplies.[156] The company is a for-profit corporation.[157] As a corporation, it enjoys benefits such as limited liability for its owners. Actually, the family does not directly own shares in the company. Instead, the company is in a trust with the family members as beneficiaries of the trust.[158] The family members all belong to a religion with very strong precepts against killing

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151. *Supra* note 108 and accompanying text.

152. *See generally* Caroline Mala Corbin, Corporate Religious Liberty (Oct. 23, 2013) (unpublished manuscript) (discussing the issue in greater detail) (on file with the Washington and Lee Law Review).

153. *See supra* note 109 (describing circuit split).

154. *See generally* Corbin, *supra* note 152.

155. *Cf.* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013).

156. *Id.*

157. *Id.*

158. *Id.*

animals. A new federal law mandates that companies with over fifty full-time employees provide comprehensive health insurance.[159] Grandfathered plans are exempted,[160] but most are expected to soon be extinct.[161] Thanks to the new law, Hobby Bobby's employees may receive, without cost-sharing, preventive medications, including cholesterol-lowering drugs.[162] The family, however, objects because they believe the cholesterol medicine might be made with animal by-products. (In fact, they are wrong about the cholesterol drugs.) They claim that it violates their corporation's religious rights and their own individual religious rights for Hobby Bobby to provide employees health care insurance that covers these drugs.[163]

I suspect that courts would not be as receptive to these claims as courts have been to the contraception mandate ones. Perhaps I am wrong, but it seems unlikely that the courts would ignore an amicus brief filed by the American Heart Association that the drugs do not, in fact, contain animal by-products,[164] and that consequently there is no clash between any religious and legal obligations. Nor do I see courts undertaking the doctrinal and theoretical contortions necessary to conclude that for-profit corporations have a religious right not to provide cholesterol–lowering medicine.[165] Finally, it is hard to picture courts ruling that a person's individual religious liberty is implicated when the corporation which is owned by a trust of which she is a beneficiary must include in its insurance plan cholesterol medication she (erroneously) opposes on religious grounds.

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159. 26 U.S.C. § 4980H(c)(2) (2012).

160. Patient Protection and Affordable Care Act § 1251, 124 Stat. 119, 162 (2010) (codified at 42 U.S.C. § 18011 (2012)).

161. *Infra* note 168.

162. Patient Protection and Affordable Care Act § 2713(a)(4), 124 Stat. at 131 (codified at 42 U.S.C. § 300gg-13(a)-(c) (2012)).

163. An analogous thought experiment can be done with owners whose religion opposes psychiatry or other widespread medical care.

164. *Cf.* ACOG Amicus Brief, *supra* note 121 (explaining that morning-after pills work by preventing ovulation).

165. It also seems less likely that the courts would conclude that the state government lacks a compelling interest in people's health because of exceptions to the law, see, for example, *Hobby Lobby Stores, Inc v. Sebelius*, 722 F.3d 1114, 1143 (10th Cir. 2013), or that the law is not narrowly tailored because the government could provide these medicines instead, see, for example, *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013).

Of course, the doctrinal analysis has also been distorted in various ways. In order to conclude that the contraception mandate violates the Religious Freedom Restoration Act, for example, a court must find that the mandate substantially burdens plaintiffs' religious conscience, and that the law fails strict scrutiny.[166] As discussed above, the claim that morning-after pills substantially burden those opposed to abortion should have been dismissed out of hand. The pills are contraception, not abortifacients.

Or take, for example, the claim that the contraception mandate cannot advance a compelling state interest because it does not protect all employees.[167] If the mandate's goals were truly compelling, the argument goes, there would be no (or at least fewer) exceptions; the current law, however, grandfathers certain existing health care plans[168] and exempts employers with fewer than fifty employees.[169] Accordingly, the law fails strict scrutiny. But if that were the rule—that a law cannot be deemed to advance a compelling interest unless its reach is essentially all-inclusive—then Title VII, which applies only to employers with fifteen or more full-time employees,[170] does not advance a compelling state interest. After all, it does not protect all employees from discrimination on the basis of race, color, religion, sex, and national origin.[171] In fact, the first year it was

166. *See* 42 U.S.C. § 2000bb-1 (2012) (describing requirements for a successful RFRA claim).

167. *See, e.g.*, *Hobby Lobby Stores, Inc.*, 722 F.3d at 1143 (concluding that providing access to free contraception was not a compelling state interest because law countenanced exceptions for small and grandfathered companies).

168. *See* 42 U.S.C. § 18011 (describing grandfathered plans). Grandfathered plans are those that existed on March 23, 2010, and have not substantially changed by either cutting benefits or increasing out of pocket expenses. *See What If I Have a Grandfathered Insurance Plan?*, HEALTHCARE.GOV, https://www.healthcare.gov/what-if-i-have-a-grandfathered-health-plan/ (last visited Jan. 18, 2014) (defining grandfathered plans) (on file with the Washington and Lee Law Review). A survey of American companies conducted in 2010 found that ninety percent of large businesses expected to lose their grandfathered status by 2014. *See* Jerry Geisel, *Most Health Plans to Lose Grandfathered Status: Survey*, BUS. INS. (Aug. 10, 2010, 11:05 AM), http://www.businessinsurance.com/article/20100810/NEWS/100819995# (last visited Jan. 18, 2014) (on file with the Washington and Lee Law Review).

169. *See* 26 U.S.C. § 4980H(c)(2) (defining applicable large employer).

170. *See* 42 U.S.C. § 2000e(b) (defining employer).

171. *Infra* note 172 and accompanying text.

implemented, Title VII applied only to employers with one hundred or more full-time employees, with the number lowered each successive year until it reached twenty-five or more employees in its fourth year.[172] Even today, more than eighty percent of employers are too small to be covered by Title VII.[173] Despite Title VII's incomplete coverage, it is hard to imagine that a court would conclude that ending race discrimination in employment was not a compelling state interest, and even harder to imagine that courts would contemplate exempting on religious grounds a racially discriminatory for-profit corporation.[174] Somehow, though, this reasoning becomes plausible in the context of women and their reproductive rights.[175]

In short, it is probably not an accident that the question of corporate religious liberty has presented itself in a women's reproductive rights case, as the proposition would probably not have gotten as much traction if a business enterprise were challenging cholesterol medicine, or simply a different employee insurance program.

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172. *See Milestones in EEOC History: 1965*, EEOC, http://www.eeoc.gov/eeoc/history/35th/milestones/1965.html (last visited Jan. 18, 2014) ("In its first year, Title VII applies to employers with 100 or more employees, with coverage phased in over the next three years to reach employers with as few as 25 or more employees.") (on file with the Washington and Lee Law Review). The law was subsequently amended to cover employers with fifteen or more full-time employees in 1972.

173. According to the U.S. Small Business Administration, 4,902,520 out of 5,684,424 employer firms (86.2%) had fewer than fifteen employees in 2011. *See* Robert Jay Dilger, *Small Business Size Standards: A Historical Analysis of Contemporary Issues*, CONG. RESEARCH SERV. 3 (Jan. 3, 2014) https://www.fas.org/sgp/crs/misc/R40860.pdf (noting that 79.3% of employer firms had fewer than ten employees and 89.8% of employer firms had fewer than twenty).

174. Indeed, the Court has even rejected the free exercise claim of a nonprofit school seeking an exemption from anti-discrimination law on the grounds that the states interest in ending race discrimination was a compelling state interest. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) ("The governmental interest at stake here is compelling.").

175. One would have also thought that it was no longer open to question whether eliminating sex discrimination was a compelling state interest. *See* Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. U. L. REV. 1469, 1479–83 (2013) (discussing sex equality as a compelling state interest).

IV. Conclusion

Abortion exceptionalism means the rules are different for abortion cases. Instead of rejecting baseless scientific claims, courts rely on them. Instead of applying existing First Amendment jurisprudence, courts ignore fundamental principles or distort them beyond recognition. Consequently, false claims about abortion have justified mandatory counseling laws, and mistaken claims about morning-after pills have allowed for-profit corporations to avoid the contraception mandate. These distortions not only impede women's reproductive rights but also result in highly problematic precedents. Indeed, the willingness to bend the rules when it comes to abortion may result in a jurisprudence where for-profit corporations are entitled to religious exemptions, even when the exemption burdens the corporation's (whole, separate, unique living human being) employees.