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Legal Services Corp. v. Velazquez: Tightening the Noose on Patients' Rights

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Legal Services Corp. v. Velazquez: Tightening the Noose on Patients' Rights

In *Legal Services Corp. v. Velazquez*,[1] the Supreme Court struck down a law prohibiting federally-funded legal aid lawyers from challenging existing welfare law when representing indigent clients.[2] On its face, *Velazquez* stands for the premise that confidential relationships implicate First Amendment interests and should not be unduly infringed upon by the government, even when the government is funding that relationship with a subsidy.[3] To reach this result, however, the Court was required to either distinguish or overrule its decade-old decision[4] in *Rust v. Sullivan*.[5] In *Rust*, the Court upheld a law prohibiting federally-funded doctors from advising indigent patients about abortion when discussing family planning.[6] The Court chose to distinguish the *Rust* decision on the ground that the doctor-patient speech in *Rust* constituted government speech whereas the lawyer-client speech in *Velazquez* constituted private speech.[7]

This Recent Development will argue that no significant distinction exists between the type of speech involved in *Rust* and the type of speech involved in *Velazquez*; namely, doctor-to-patient speech is the same type of speech as lawyer-to-client speech. Thus, according to the parameters outlined in *Velazquez* and other federal cases,[8] both should be considered private, not government, speech. By choosing to distinguish *Rust*, rather than overrule it or limit it to circumstances involving abortion, the Court's reasoning undermines the strength of the *Velazquez* holding and invites future limitations on the scope of patients' rights.

This Recent Development will proceed by discussing the *Rust* and *Velazquez* decisions and the general status of First Amendment law regarding subsidies. Next, this Recent Development will argue that the reasoning used to distinguish the *Velazquez* decision from the

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1. 531 U.S. 533, *cert. denied*, 532 U.S. 903 (2001). Justice Kennedy delivered the opinion of the Court joined by Justices Stevens, Souter, Ginsburg, and Breyer.

2. *Id.* at 537.

3. *See id.* at 547–48.

4. *Id.* at 541–42.

5. 500 U.S. 173 (1991).

6. *Id.* at 193.

7. *Velazquez*, 531 U.S. at 540–43. For a discussion of the difference between government and private speech, see *infra* notes 40–59 and accompanying text.

8. *See infra* notes 34–66 and accompanying text.

Rust decision is erroneous primarily because physicians, like attorneys, have a professional obligation to represent the best interests of those they serve. Finally, this Recent Development will consider some of the interests served by protecting the privileged nature of doctor-patient discourse and the historical preference in both statutory and common law favoring patients' rights to unbiased medical treatment.

Both *Rust* and *Velazquez* involved government subsidies of public services.[9] *Velazquez* involved the Legal Services Corporation Act ("LSC Act" or "Act"),[10] which Congress enacted in 1974 "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance."[11] The LSC Act established the nonprofit Legal Services Corporation ("LSC") to disperse funds allocated under the Act to qualifying local grantee organizations.[12] The grantees are independent non-profit organizations, unaffiliated with the federal government.[13] Often funded by both private and public sources, these organizations employ lawyers for the purpose of offering free legal assistance to indigent clients in their communities.[14]

From the Act's inception, restrictions were placed on the use of LSC funds.[15] Initially, no restrictions were placed on the representation of clients seeking legal redress for denial of welfare benefits.[16] In 1996, during a time of intense debate regarding the value of welfare to American society,[17] Congress amended the LSC

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9. *Velazquez*, 531 U.S. at 536; *Rust*, 500 U.S. at 178.

10. Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. § 2996 (2000)).

11. 42 U.S.C. § 2996b(a) (2000); *Velazquez*, 531 U.S. at 536.

12. *See* § 2996b(a).

13. *See id.*

14. *Velazquez*, 531 U.S. at 536. Under the Act, a client must qualify as an "eligible client," which is defined as a "person financially unable to afford legal assistance." § 2996a(3).

15. *Velazquez*, 531 U.S. at 537. For example, the Act prohibits the use of program funds "in most criminal proceedings and in litigation involving nontherapeutic abortions, secondary school desegregation, military desertion, or violations of the Selective Service statute." *Id.* (citing 42 U.S.C. §§ 2996f(b)(8)–(10) (1994 and Supp. III)).

16. *Id.* at 538.

17. *See* 142 CONG. REC. H1808–04 (1996) (debating the merits of House Bill 3019, the bill containing the restrictions at issue). The Representative from Illinois, Mr. Porter, contributed to the debate over the value of welfare and the merits of House Bill 3019, which cuts money from some programs and leaves money for others, when he stated:

> Why would we want to pour more money into a failed program? It is time to reinvent the program and make it work. It is time to do that with all the spending for our Government, to make Government work better for people. Let me tell you, there are many, many programs that have failed. Title I is one.

Act to prohibit the subsidizing of any representation that "involve[d] an effort to amend or otherwise challenge existing [welfare] law . . . ."[18] While LSC-funded lawyers could challenge an agency's factual determinations regarding welfare benefits or the agency's legal interpretations of welfare laws, they could not challenge the constitutionality or overall statutory validity of welfare laws.[19]

Several LSC-funded lawyers and their clients, among others, challenged the newly-enacted restrictions as impermissible in violation of the First Amendment.[20] The Plaintiffs argued that the subsidy was unconstitutional because it discriminated based on viewpoint.[21] The Court agreed.[22] The Court distinguished *Rust*, the biggest hurdle to striking down the government restriction, by stating that the counseling activities of the doctors in *Rust* "amounted to governmental speech."[23] While both the restrictions in *Rust* and *Velazquez* were viewpoint-based, generally viewpoint-based restrictions are permissible only when government speech is involved.[24]

In *Rust*, the Court considered Title X of the Public Health Service Act ("Title X"),[25] which authorized expenditures for the purpose of " 'assist[ing] in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services.' "[26] Similar to the administrative scheme authorized under the LSC Act, the Secretary of Health and Human Services was authorized under Title X " 'to make grants to and enter into contracts with public or nonprofit private entities' " willing to implement the programs outlined in Title X.[27] The principal regulation on the subsidy in

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Welfare is another. It is time we reinvent them and make them work better for people.

Id. at H1841.

18. *Velazquez*, 531 U.S. at 538. "[G]rantees could not accept representation designed to change welfare laws, much less argue against the constitutionality or statutory validity of those laws. Even in cases where constitutional or statutory challenges became apparent after representation was well under way, LSC advised that its attorneys must withdraw." *Id.* at 539. These restrictions also prohibited lobbying and rulemaking by LSC-funded organizations. *Id.* at 538.

19. *Id.* at 538–39.

20. *Id.* at 537.

21. *Id.*

22. *Id.*

23. *Id.* at 540–41.

24. *Id.* at 541.

25. 42 U.S.C. § 300–300a-6 (2000).

26. Rust v. Sullivan, 500 U.S. 173, 178 (1991) (quoting 42 U.S.C. § 300(a) (1988)).

27. *Id.* at 178 (quoting 42 U.S.C. § 300(a) (1988)).

question in *Rust* was that no monies could be used to discuss abortion as a feasible alternative when referring pregnant women for care.[28]

The subsidy grantees and their doctors sued on behalf of themselves and their patients, arguing that the restriction on abortion counseling violated the First and Fifth Amendment rights of their patients and the First Amendment rights of the health care providers.[29] The Court stated that although subsidized speech is subject to First Amendment protection, the government is not obligated to subsidize the exercise of fundamental rights.[30] Rather, the government has the right to selectively fund a program encouraging the exercise of certain speech rights without subsidizing analogous counterpart speech rights at the same time.[31] The Court held that exercising this right does not impermissibly discriminate based on viewpoint unless the subsidy is found to "discriminate invidiously ... in such a way as to 'aim at the suppression of dangerous ideas.' "[32] In *Rust*, the Court did not find any such invidious discrimination; thus, the restriction was upheld.[33]

The Court found the circumstances in *Velazquez* distinguishable from those in *Rust*. It categorized the counseling activities of the lawyers in *Velazquez* as private speech, rather than government speech.[34] To support this speech allocation, the Court cited two characteristics of the speech.[35] First, lawyers have a professional

28. *Id.* at 179–80. Pregnancy testing was one of the services provided under the subsidy. Whenever a patient tested positive for pregnancy, the doctors were required to refer the patient for prenatal care and adoption services. If a patient asked directly about abortion as an option, the doctor or counselor was permitted to state that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." *Id.* at 180.

29. *Id.* at 181. The First Amendment argument was based on impermissible viewpoint discrimination. *Id.* at 192. The Fifth Amendment argument was based on placing undue restrictions on a woman's fundamental right to obtain an abortion. *Id.* at 201.

30. *Id.* at 192–93.

31. *Id.* In other words, the government may engage in viewpoint discrimination when it sets criteria for entities who are eligible to receive government subsidies. "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Id.* at 193 (quoting Regan v. Taxation with Representation, 461 U.S. 540, 549 (1983)).

32. *Id.* at 192–93 (quoting *Regan*, 461 U.S. at 548). Thus, a government speech right was created; however, the Court in *Rust* did not specifically characterize its holding in this light. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541, *cert. denied*, 532 U.S. 903 (2001).

33. *Rust*, 500 U.S. at 192–99.

34. *Velazquez*, 531 U.S. at 542.

35. *Id.*

obligation to act in the best interests of their clients.[36] Second, lawyers must advocate their clients' positions in a court of law.[37] In essence, the Court reasoned that when subsidized grantee speech functions to represent the interests of others, the speech is private.[38] Yet, as this Recent Development will demonstrate, the subsidized grantee speech in *Rust* also functioned to represent the interests of others.[39] Given that both lawyer-client speech and doctor-patient speech serve functions beyond the immediate interests of the speaker, it becomes apparent that the premise on which the Court bases its distinction between the speech in *Velazquez* and the speech in *Rust* is unsound.

Viewpoint-based restrictions on speech are disfavored in First Amendment law; private speech, however, is offered more constitutional protection than government speech.[40] Accordingly, viewpoint-based restrictions on private speech are subjected to heightened scrutiny, whereas viewpoint-based restrictions on government speech are not.[41] In *Velazquez*, the Court found that the restrictions on the private speech of the lawyers distorted an "existing medium of expression."[42] An existing medium of expression is a well-known and delineated area of public life that has been "traditionally open to the public for expressive activity."[43] Under heightened scrutiny, the distortion of an existing medium of expression is unconstitutional.[44] In this case, the Court held that when Congress prohibited the funding of suits challenging the validity of certain laws with its subsidy, it deprived the judiciary of its power to review the

36. *Id.* (citing Polk County v. Dodson, 454 U.S. 312, 321–22 (1981), which held that a public defender does not act "under color of state law" because he "works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client" and because there is an "assumption that counsel will be free of state control").

37. *Id.*

38. *See id.* at 543.

39. *See infra* notes 75–93 and accompanying text.

40. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828–29 (1995).

41. *See Velazquez*, 531 U.S. at 543.

42. *Id.*

43. Rust v. Sullivan, 500 U.S. 173, 200 (1991) (quoting United States v. Kokinda, 497 U.S. 720, 726 (1990)). The *Rust* Court referred to this concept as a "traditional sphere of free expression," citing to examples such as speech on a university campus and, arguably, the speech between doctors and patients. *Id.* In *Velazquez*, the existing medium of expression was the legal system with its traditional roles of lawyer as advocate and the judiciary as the interpreter of laws. *See Velazquez*, 531 U.S. at 543.

44. *See Velazquez*, 531 U.S. at 543–46.

constitutionality and validity of these laws.[45] Such a deprivation, the Court found, "threatens severe impairment of the judicial function."[46] As such, the Court held that the restrictions on private speech in *Velazquez* functioned to distort an existing medium of expression and such distortion violates the First Amendment.[47]

The introduction of minimal review under the First Amendment arose specifically in relation to government restrictions on subsidized speech. Generally, government regulations that restrict speech because of the viewpoint expressed are presumed to violate the First Amendment,[48] but an exception is found in cases involving government subsidies.[49] Viewpoint-based discrimination in subsidies were held not to implicate heightened First Amendment scrutiny because the government has a special right to discriminate based on viewpoint when it is speaking.[50] Thus, when the government uses a subsidy to speak for itself or to subsidize private speakers to transmit its message, the subsidized speech is characterized as government speech and restrictions on such speech are subject only to minimal review.[51]

A distinction between government and private speech in relation to government restrictions on subsidized speech was first made in *Rosenberger v. Rector & Visitors of the University of Virginia*.[52] In *Rosenberger*, the Court struck down a content-based restriction on university student activity funds that were designated to encourage a broad range of extracurricular student activities.[53] The Court held

45. *Id.* at 547.

46. *Id.* at 546.

47. *Id.* at 547–48.

48. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–43 (1994); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

49. *See* Rust v. Sullivan, 500 U.S. 173, 192–93 (1991); Maher v. Roe, 432 U.S. 464, 474–76 (1977); *see also* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998) (discussing the government's ability to subsidize some artistic expressions over others so long as the administration of subsidies is not aimed at eliminating certain expressions).

50. *Rust*, 500 U.S. at 192–93; Regan v. Taxation with Representation, 461 U.S. 540, 549 (1983).

51. *Velazquez*, 531 U.S. at 541–42.

52. 515 U.S. 819 (1995).

53. *Id.* at 836–37. The university withheld funding for a student newspaper because the paper "primarily promotes or manifests a belie[f] in or about a deity or an ultimate reality." *Id.* at 822–23. The First Amendment states that "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. The First Amendment is interpreted to prohibit any form of government coercion or preference about any individual religious belief. *See* JEROME A. BARRON & C. THOMAS DIENES, FIRST AMENDMENT LAW IN A NUTSHELL 423 (2d ed. 2000).

that when the government uses a subsidy to create a limited public forum,[54] it is no longer acting as a speaker, but rather as a regulator.[55] When the government acts as a regulator, the subsidized speech is characterized as private and subject once again to heightened scrutiny.[56] When the university in *Rosenberger* created a limited public forum by funding a program encouraging a broad range of student views,[57] the Court held that the public university was not permitted to discriminate against a religious student periodical based on its viewpoint.[58] Thus, a subsidy with viewpoint-based regulations was struck down because it was regulating private speech rather than government speech.[59]

Rust never referred to a "government speech" doctrine to justify its ruling; it was only in later cases that the Court characterized the medical counseling by the doctors in *Rust* as government speech.[60]

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54. A limited public forum, for the purposes of First Amendment law, exists whenever public property has been designated by the government as open to expressive speech activity. BARRON & DIENES, *supra* note 53, at 208–09. The only restriction is that speech may not be inconsistent with the normal functioning of the public property. *Id.* Thus, in *Rosenberger*, the limited public forum is the university campus, which the government has designated as open to expressive speech activity by the university's students. *Rosenberger*, 515 U.S. at 830–34; *see also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–93 (1993) (designating a school district's provision of school facilities for use by private groups for meetings as a limited public forum).

55. *See Rosenberger*, 515 U.S. at 834–35. The government acts as a speaker whenever its subsidy is seen as a form of government speech. BARRON & DIENES, *supra* note 53, at 348–49. In other words, the government is seen as an actual participant in the "marketplace of ideas." *Id.* Thus, the government was acting as a speaker when Congress chose, in the exercise of its spending power, to make a statement by subsidizing the lobbying activity of veterans organizations but not to subsidize the lobbying activity of other charitable organizations. *See Regan*, 461 U.S. at 549–51. In contrast, the government acts as a regulator whenever its subsidy controls or censors private expression. BARRON & DIENES, *supra* note 53, at 348–49. Thus, the government was acting as a regulator when it controlled the type of messages students groups could convey with student activity funds.

56. *See Velazquez*, 531 U.S. at 542–43; *Rosenberger*, 515 U.S. at 834–35.

57. *Rosenberger*, 515 U.S. at 828–32.

58. *Id.* at 837.

59. *Id.*

60. *Velazquez*, 531 U.S. at 542 ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding."). The Court in *Velazquez* cites *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), which simply cites *Rust* when stating that the government has a general right to advocate and defend its own policies through the use subsidies, *Velazquez*, 531 U.S. at 542, and cites *Rosenberger*, where the Court stated that the government used private speakers to transmit a specific message in *Rust*, *Rosenberger*, 515 U.S. at 833. *Velazquez*, 531 U.S. at 542. *But see Velazquez*, 531 U.S. at 554 (Scalia, J., dissenting) ("If the private doctors' confidential

Subsequently, several federal appellate courts developed criteria to determine whether particular subsidized speech is government or private.[61] Much of the analysis focuses on who is the literal speaker and whether the government or the private entity bears the ultimate responsibility for the content of the speech.[62] A recent example is the Fourth Circuit's determination that the mottos and decorations on state-owned license plates are private speech.[63] The primary reasons the Fourth Circuit gave for making this determination were the purpose of the special plate program (to produce revenue by allowing for private expression of various views), the lack of actual editorial control exercised by the State, and the "connection of any message on the plate to the driver or owner of the vehicle."[64] In contrast, the Eighth Circuit found that the underwriting acknowledgments announced on a public radio station constituted government speech.[65] In so holding, the Eighth Circuit cited the following factors: the central purpose of the underwriting program was not to promote the views of its donors; the public radio station exercised editorial control over the content of underwriting acknowledgments; the literal speaker was a public radio station employee; and the ultimate responsibility for the contents of the broadcast rested with the public

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advice to their patients at issue in *Rust* constituted 'government speech,' it is hard to imagine what subsidized speech would *not* be government speech.").

61. *See, e.g.*, Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 618–21 (4th Cir. 2002) (holding that special logos and decorations on state-owned license plates is private speech); Wells v. City & County of Denver, 257 F.3d 1132, 1141 (10th Cir. 2001) (holding that a sign posted by the government listing the private sponsors of a holiday display is government speech); Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1094 (8th Cir. 2000) (holding that the underwriting acknowledgements announced on a public radio station constituted government speech).

62. *See Sons of Confederate Veterans*, 288 F.3d at 621. A four-factor test emerged in several of the federal circuit courts to help determine whether speech qualifies as government speech or private speech. The test examines:

> (1) the central "purpose" of the program in which the speech in question occurs; (2) degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker;" and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech.

Id. at 618 (utilizing and citing use of the test in *Wells*, 257 F.3d at 1141 and *Knights of the Ku Klux Klan*, 203 F.3d at 1093–94). The Ninth Circuit used similar reasoning in *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1011 (9th Cir. 2000).

63. *See Sons of Confederate Veterans*, 288 F.3d at 621.

64. *Id.*

65. *See Knights of the Ku Klux Klan*, 203 F.3d at 1093 (permitting the public radio station to decline an underwriting contribution from the Ku Klux Klan to avoid announcing the organization as an underwriter on the air).

radio station.[66] As these cases demonstrate, the criteria used by these federal circuits focus heavily on the actual speaker and the connection listeners make between the speaker's message and the speaker's identity.

When considering the criteria established by the federal circuit courts, it is reasonable to conclude that lawyer-client speech should be classified as private due to the connection of the lawyer's speech to the individual lawyer and her client rather than to the government. This same connection is also reasonably made of the physician's speech to the individual physician and his patient, rather than the government. This similarity arises because the physician and the lawyer share nearly identical professional obligations to their patients and clients, respectively.[67] Because the characteristics of doctor-to-patient speech are essentially the same as the characteristics of lawyer-to-client speech, it does not make sense to distinguish the type of speech in *Rust* from the type of speech in *Velazquez*. Thus, the *Velazquez* Court erred when it failed to either overrule *Rust* or expressly limit it to abortion cases.

As acknowledged by the *Velazquez* Court, a lawyer must act with the utmost competence, diligence, and loyalty toward her client at all times.[68] Because the attorney-client relationship is fiduciary in nature,[69] the attorney has a professional obligation to act in the client's best interests.[70] Lawyers are not permitted to allow others who pay or employ them to interfere with their professional judgment when rendering legal services.[71] If a lawyer should breach any of these duties, she can be held liable civilly for professional malpractice[72] and professionally for violation of mandatory ethics regulations.[73] The Court stated that the lawyer's role as a fiduciary and advocate is the key distinguishing factor between the government speech in *Rust* and the private speech in the instant case.[74]

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66. *Id.* at 1093–94.

67. *See infra* notes 68–93 and accompanying text.

68. MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3, 1.7 (2001). By 1999, over eighty percent of the states had adopted the Model Rules, subject only to various state-specific amendments. RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1-1.5.4 (2002–2003).

69. ROTUNDA, *supra* note 68, § 3-1.1.

70. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (2000).

71. MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (2001).

72. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, §§ 48–50.

73. MODEL RULES OF PROF'L CONDUCT R. 8.5 (2001) (describing the self-regulation of lawyers, including self-imposed disciplinary rules).

74. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542–43, *cert. denied*, 532 U.S. 903 (2001).

Similarly, physicians also must meet the standards of a fiduciary and advocate to satisfy the obligations prescribed by their profession.[75] The American Medical Association has stated that the "physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice."[76] The Principles of Medical Ethics state that "[a] physician shall respect the law and also recognize a responsibility to seek changes in those requirements which are contrary to the best interests of the patient."[77] In addition, "[u]nder no circumstances may physicians place their own financial interests above the welfare of their patients."[78] Contemporary medical ethics literature assumes that a physician is "the advocate and champion of his patient, upholding the patient's interest above all others."[79] The physician's role historically is described as "an agent and trustee for the patient," acting at all times as a fiduciary or representative.[80] Thus, these professional obligations require physicians to serve as both a fiduciary and an advocate when treating patients.

In many states, fiduciary standards are strictly enforced by medical boards that are authorized to suspend or revoke physician licenses for violating the Principles of Medical Ethics.[81] In 2002, the

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75. *See* Ken Marcus Gatter, *Protecting Patient-Doctor Discourse: Informed Consent and Deliberative Autonomy*, 78 OR. L. REV. 941, 955–57 (1999) (arguing that physicians occupy a fiduciary role in their relation to patients); Halle Fine Terrion, Note, *Informed Choice: Physicians' Duty to Disclose Nonreadily Available Alternatives*, 43 CASE W. RES. L. REV. 491, 509–10 (1993) (chronicling the fiduciary obligations that physicians owe to their patients).

76. Am. Med. Ass'n, *Current Opinions of Council on Ethical and Judicial Affairs* E-8.08, http://www.ama-assn.org (last visited Jan. 19, 2003) (on file with the North Carolina Law Review) [hereinafter Am. Med. Ass'n, *Current Opinions*]. Regarding abortion, the American Medical Association has stated the following: "The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion in accordance with good medical practice and under circumstances that do not violate the law." AM. MED. ASS'N, CODE OF MEDICAL ETHICS, OPINIONS ON SOCIAL POLICY § 2.01 Abortion at 3 (2000–2001) [hereinafter AM. MED. ASS'N, CODE OF MEDICAL ETHICS].

77. AM. MED. ASS'N, CODE OF MEDICAL ETHICS, *supra* note 76, at xxv.

78. Am. Med. Ass'n, *Current Opinions*, *supra* note 76, at E-8.03.

79. Marc A. Rodwin, *Strains in the Fiduciary Metaphor: Divided Physician Loyalties and Obligations in a Changing Health Care System*, 21 AM. J.L. & MED. 241, 246 (1995) (quoting the American College of Physicians).

80. *Id.* at 247.

81. *See, e.g.*, Arlen v. Ohio, 399 N.E.2d 1251, 1252–54 (Ohio 1980) (recognizing the licensing board's prerogative to decide whether a standard of practice has been met); Kirk v. Jefferson County Med. Soc'y, 577 S.W.2d 419, 421 (Ky. Ct. App. 1978) (affirming the medical society's expulsion of a physician for breach of ethical principles). In North Carolina, the Medical Board is statutorily authorized to "deny, annul, suspend, or revoke" a medical license for "[u]nprofessional conduct, including but not limited to, departure

North Carolina Medical Board reprimanded a doctor and forbade him from recommending to his patients vitamins and supplements that he had a financial interest in promoting.[82] The board found that such a conflict of interest breached the doctor's professional obligation to act solely for the benefit of the patient.[83]

Legally, the core assumption is that physicians occupy a fiduciary role in relation to their patients.[84] Many states expressly recognize physicians as fiduciaries,[85] and all states recognize a physician's fiduciary duty in the area of informed consent.[86] Under tort law, compliance with the informed consent doctrine is required in order for doctors to meet legal standards of reasonable behavior.[87] Thus,

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from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession." N.C. GEN. STAT. § 90-14(a)(6) (2001).

82. N.C. Med. Bd., *Board Orders/Consent Orders/Other Board Actions*, at 3 (Jan.–Feb. 2002), *at* http://www.ncmedboard.org/ba30.pdf (on file with the North Carolina Law Review). In its position statements regarding various topics relating to medical ethics, the North Carolina Medical Board describes the physician-patient relationship as follows:

> The Board believes the interests and health of the people of North Carolina are best served when the physician-patient relationship, founded on patient trust, is considered sacred, and when the elements crucial to that relationship and to that trust—communication, patient primacy, confidentiality, competence, patient autonomy, compassion, selflessness, and appropriate care—are foremost in the hearts, minds, and actions of the physicians licensed by the Board.

N.C. Med. Bd., *The Physician-Patient Relationship*, http://www.ncmedboard.org/phypat.htm (last visited Feb. 9, 2003) (on file with the North Carolina Law Review).

83. N.C. Med. Bd., *Board Orders/Consent Orders/Other Board Actions*, *supra* note 82, at 3.

84. EDWARD P. RICHARDS, III & KATHARINE C. RATHBUN, MEDICAL CARE LAW 173 (1999).

85. *See, e.g.*, CAL. EVID. CODE § 994 (West 1995) (codifying the privileged physician-patient relationship); Black v. Littlejohn, 312 N.C. 626, 646, 325 S.E.2d 469, 482 (1985) ("The relationship of patient and physician is generally considered a fiduciary one, imposing upon the physician the duty of good faith and fair dealing. This special relationship envisions an expectation by both parties that the patient will rely upon the judgment and expertise of the doctor.") (citations omitted).

86. All fifty states recognize some version of the informed consent doctrine. *See* Ketchup v. Howard, 543 S.E.2d 371, 381–86 (Ga. Ct. App. 2000) (documenting the case law in forty-nine states in the appendix to the majority opinion); *see also* Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972) (noting that it is a root premise in American law that each person has the right to determine what is done with his or her body); Cobbs v. Grant, 502 P.2d. 1, 7–8 (Cal. 1972) (discussing the informed consent doctrine); Humphers v. First Interstate Bank of Or., 696 P.2d 527, 529–30 (Or. 1985) (discussing a physician's duty of confidentiality); Lockett v. Goodill, 430 P.2d 589, 591 (Wash. 1967) (discussing the fiduciary relationship between patients and physicians); Miller v. Kennedy, 522 P.2d 852, 860 (Wash. Ct. App. 1974) (discussing the informed consent doctrine).

87. *See* Logan v. Greenwich Hosp. Ass'n, 465 A.2d 294, 298–99 (Conn. 1983); Keogan v. Holy Family Hosp., 622 P.2d 1246, 1252 (Wash. 1980) (en banc). When treating a patient, this doctrine generally requires doctors to give patients information regarding the diagnosis, nature, and purpose of the treatment, the expected outcome and probability of success of the treatment, the material risks, benefits, and consequences of the treatment,

the informed consent doctrine places a legal obligation on doctors to be thorough and candid when discussing medical options with their patients. Given the strict fiduciary and legal duties that physicians must maintain, the Court's distinction between a doctor's obligations to her patients in *Rust* and a lawyer's obligations to his clients in *Velazquez* is plainly erroneous.[88]

Finally, the Title X statute itself required its program physicians to act in a fiduciary capacity. In *Planned Parenthood Federation v. Bowen*,[89] the court stated that "Congress designed Title X to combat the problem of access to family planning services for women with low incomes."[90] Another court stated that the subsidy was specifically targeted at the "poorest, most naive and ignorant women."[91] The doctors in *Rust* were given complete discretion to offer a broad range of family planning and counseling services to these underprivileged women; they were only restricted in their use of any services relating to abortion.[92] This legislative history implies that Congress intended for health providers at these clinics to represent and promote the interests of others—specifically the medical interests of "poor, naive, and ignorant" women and their unborn children.[93] Thus, the stated goals of Congress required the Title X physicians to act in the interests of the targeted group, low-income female patients, by giving

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the reasonable alternatives to the treatment, and the effect of no treatment or procedure. *See* Dorothy Duffy & Martha C. Romney, *Medicine and Law: Recent Developments in Peer Review and Informed Consent*, 26 TORT & INS. L.J. 331, 345 (1991); Nancy M.P. King, *Consent to Treatment*, *in* HOSPITAL LAW IN NORTH CAROLINA 1, 6 (Anne M. Dellinger ed., 1990). Some courts have held that a physician must inform patients of alternatives, even if those alternatives are more hazardous or if they are outside the physician's area of expertise. *See* BARRY R. FURROW ET AL., HEALTH LAW 274–75 (1995). A doctor, however, does not have to disclose alternatives that are not considered "legitimate treatment options." *See id.*

88. Chiefly, the Court states that "[t]he advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept. In this vital respect this suit is distinguishable from *Rust*." Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542–43, *cert. denied*, 532 U.S. 903 (2001).

89. 680 F. Supp. 1465 (D. Colo. 1988).

90. *Id.* at 1469. The law's goal was to provide "comprehensive voluntary family planning services" to women with incomes 150 percent below the poverty level. *See* Planned Parenthood Fed'n v. Sullivan, 913 F.2d 1492, 1499–1500 (10th Cir. 1990) (citing H.R. Rep. No. 91-1472 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5068, 5075).

91. *Sullivan*, 913 F.2d at 1500.

92. *See supra* notes 26–28 and accompanying text.

93. *See* H.R. Rep. No. 91-1472 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5068, 5075 (stating, specifically, the needs of "low income mothers and families"). Justice Scalia stated in his dissent that "[i]f the private doctors' confidential advice to their patients at issue in *Rust* constituted 'government speech,' it is hard to imagine what subsidized speech would *not* be government speech." *Velazquez*, 531 U.S. at 554 (Scalia, J., dissenting).

them medical advice and direction regarding each of their family planning needs.

In sum, both professional and legal standards indicate that the doctor-patient relationship is fiduciary in nature. Additionally, Congress implicitly recognized the fiduciary nature of this relationship when it set the goals for the Title X program in *Rust*.[94] It is thus irrational to distinguish the attorney-client speech in *Velazquez* from the doctor-patient speech in *Rust* on the basis that the attorney speech in *Velazquez* functions to represent the interests of others.[95] Like the lawyers in *Velazquez*, the physicians in *Rust* were required to represent the best interests of those they serve.[96] The specious nature of this distinction did not go unnoticed in the *Velazquez* opinion. In his dissent, Justice Scalia characterized the Court's distinction between the speech in *Velazquez* and the speech in *Rust* as "so unpersuasive it hardly needs response."[97] Indeed, under the Court's stated reasoning in *Velazquez*, the doctor-patient speech in *Rust* was private,[98] and, therefore, the later characterizations of the speech classification in *Rust* should have been overruled by the *Velazquez* Court. Continuing to classify the speech in *Rust* as governmental is simply inconsistent with the reasoning in *Velazquez*.

The Court in *Velazquez* also stated that an attorney's role as an advocate to the courts distinguishes the attorney's speech from the doctor's speech in *Rust*.[99] Citing the distortion of an existing medium of expression, the Court held that a restriction on attorney arguments before the judiciary threatened "severe impairment" of the judiciary's function to ensure the constitutionality of existing law.[100] This argument is flawed in several respects. First, non-LSC lawyers are unfettered in their right to make constitutional and statutory challenges to existing welfare law.[101] Moreover, there is nothing that

94. *See supra* notes 89–93 and accompanying text.

95. *Velazquez*, 531 U.S. at 543.

96. *See supra* notes 68–93 and accompanying text.

97. *Velazquez*, 531 U.S. at 554 (Scalia, J., dissenting) ("[T]he majority's contention that the subsidized speech in these cases is not government speech because the lawyers have a professional obligation to represent the interests of their clients founders on the reality that the doctors in *Rust* had a professional obligation to serve the interests of their patients.").

98. *See id.* at 542 ("[T]he LSC Program was designed to facilitate private speech, not to promote a governmental message.").

99. *Id.* at 545.

100. *See id.* at 545–46.

101. *Id.* at 554 (Scalia, J., dissenting). The Court has held that subsidies that are not otherwise in violation of First Amendment interests may become impermissible if they

mandates congressional subsidy of welfare litigation.[102] Finally, because judicial decisions regarding issues that are not raised are not binding, the opinions produced by LSC cases will not distort the interpretation of welfare laws.[103] Thus, there was no indication that an existing medium of expression actually was distorted.

In addition to the arguments listed above, the *Rust* Court specifically rejected an "existing medium of expression" argument levied by the petitioners in that case.[104] In *Rust*, the Court stated that there are "traditional sphere[s] of free expression so fundamental to the functioning of our society that the government's ability to control speech within that sphere" is severely limited.[105] While the doctor-patient relationship could qualify as a traditional sphere of free expression, that question was not at issue.[106] Instead, *Rust* posited that because the doctor's role was limited to pre-conception care, it was not reasonable for the patients to expect comprehensive medical advice regarding their options during pregnancy (post-conception).[107] Accordingly, the subsidy restrictions did not "significantly impinge upon the doctor-patient relationship" because the scope of the doctor's advice was limited sufficiently.[108]

The *Rust* rationale that professional representation may be limited to certain contexts is directly applicable to the lawyer's role in *Velazquez*. Because ethical rules permit lawyers to limit the scope of their representations,[109] the subsidy was permissible in that it simply limited the scope of the lawyer's counsel. Therefore, the subsidy restrictions did not significantly impinge upon the attorney-client

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"effectively prohibit[] the recipient from engaging in the protected conduct outside the scope of the federally funded program." Rust v. Sullivan, 500 U.S. 173, 197 (1991). Thus, in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), a subsidy that prohibited "all editorializing" on public broadcast stations was in violation of the First Amendment because of its sweeping scope, whereas a simple restriction on the funding of editorializing with program funds would have been permissible. *See* Rust v. Sullivan, 500 U.S. 173, 197 (1991) (citing *League of Women Voters*, 468 U.S. at 400).

102. *See Velazquez*, 531 U.S. at 548.

103. *Id.* at 557 (Scalia, J., dissenting). Any presumed statutory validity of welfare laws involved in LSC cases remains "open for full determination in later cases" seeking to challenge the law. *Id.* (Scalia, J., dissenting).

104. *See Rust*, 500 U.S. at 200.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. An attorney may limit the scope of representation of a client as long as the client consents to the limited representation. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2001).

relationship because the lawyers were able to explain the limited nature of their representations to the clients and the courts.[110]

Moreover, the *Rust* rationale that professionals may limit the scope of their representation is even more compelling under the *Velazquez* facts because the lawyers are permitted to explain to their clients their views on the legality of welfare law.[111] The doctors in *Rust* were not permitted to discuss their views regarding the option of abortion with the patient[112] or refer clients to other doctors offering abortion services, even if the patient specifically asked for a referral.[113] In contrast, the lawyers in *Velazquez* are able to refer clients to attorneys who can represent them in non-covered matters.[114]

Finally, the fact that attorneys act as advocates to the courts whereas physicians generally do not occupy a similar third-party advocacy role does not sufficiently distinguish the doctor speech in *Rust* from the attorney speech in *Velazquez*. The Court's referral to this type of advocacy role is directly related to the Court's premise that lawyers must represent the interests of others and, as such, their speech cannot be classified as governmental.[115] The fact that a physician's functional duties generally do not require her to advocate for her patients to a third party tribunal does not disparage this underlying premise. Because physicians also have strict professional and legal obligations to represent the interests of others, doctor-to-patient speech, like lawyer-to-client speech, should reasonably be classified as private. A distinction between physician speech and lawyer speech based on a lawyer's role as advocate to the courts is, thus, unfounded and illusory.

Ultimately, the Court fails to distinguish adequately the attorney-client relationship in *Velazquez* from the doctor-patient relationship in *Rust*. This failure undermines the privileged nature of doctor-patient discourse by introducing an unfounded distinction between the nature of attorney-client speech and the nature of

110. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 551, *cert. denied*, 532 U.S. 903 (2001) (Scalia, J., dissenting).

111. *See id.* (Scalia, J., dissenting).

112. *Rust*, 500 U.S. at 210 (Blackmun, J., dissenting).

113. *See id.* (Blackmun, J., dissenting).

114. *Velazquez*, 531 U.S. at 551 (Scalia, J., dissenting).

115. *Id.* at 542–43. Notably, the professional obligations of doctors do not relieve doctors of third-party advocacy functions if such a role is required for the general welfare of their patients. The hallmark standard is that the doctor must always do that which is in the best interests of his patients. *See supra* notes 75–93 and accompanying text.

doctor-patient speech into First Amendment jurisprudence.[116] This unfounded distinction, in turn, invites future limitations on the scope of confidential doctor-patient speech, particularly because the status of doctor-patient speech currently is evolving due to the Court's decision in *Velazquez*. The *Velazquez* holding can be interpreted as either confining the circumstances in *Rust* to cases involving abortion or, at worst, relegating all subsidized doctor-patient speech to that of government speech. Any classification that would permit reduced scrutiny under the First Amendment, such as a government speech classification, necessarily would reduce the amount of constitutional protection afforded to the speech of doctors and patients.

Heightened protection of doctor-patient discourse is important to the interests of patients' rights for several reasons. Justice Blackmun, in his dissent in *Rust*, concluded that regulations on doctor-patient speech tend to have the effect of "manipulating" patients.[117] This effect arises because patients are particularly vulnerable within the doctor-patient relationship due to an "essential inequality of the parties with respect to knowledge" regarding medical treatment.[118] This vulnerability is evidenced by the fact that "patients often depend on doctors to help them make decisions. Trust is an essential part of the relationship."[119] This special role of trust has been acknowledged by the Court:

> This idea of the physician as serving the whole person is a source of the high value traditionally placed on the medical relationship. Its value is surely as apparent here as in the abortion cases, for just as the decision about abortion is not directed to correcting some pathology, so the decision in which a dying patient seeks help is not so limited.[120]

Empirical data suggest that messages of state preference transmitted by private doctors are particularly vulnerable to being garbled or

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116. *See* Gatter, *supra* note 75, at 955–59 (arguing that fiduciary principles inform the view of the doctor-patient relationship). Indeed, the Court in *Rust* did not disparage the privileged nature of doctor-patient relationships. The Court recognized the possibility that "traditional relationships such as that between doctor and patient [may] enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government." *Rust*, 500 U.S. at 200. The Court, however, declined to decide the issue. *Id.*

117. *Rust*, 500 U.S. at 204 (Blackmun, J., dissenting).

118. Terrion, *supra* note 75, at 508 (citing Dale H. Cowan & Eva Bertsch, *Innovative Therapy: The Responsibility of Hospitals*, 5 J. LEGAL MED. 219, 225 (1984)).

119. Gatter, *supra* note 75, at 970.

120. Washington v. Glucksberg, 521 U.S. 702, 779 (1997) (Souter J., dissenting). In *Glucksberg*, the Court held that a Washington statute criminalizing assisted suicide did not infringe on any constitutional due process liberty right. *Id.* at 705.

misunderstood by patients.[121] Researchers have concluded that patients are much more likely to "give great weight to physicians' expressions of state preferences, not because they are persuaded by the messages, but merely because the messages are delivered by physicians."[122] Thus, the inherent trust that patients have in physicians can cause them to misunderstand messages of state preference as messages of medical advice from the physician. This misunderstanding, in turn, implicates the First Amendment interests of both the physicians and the patients to communicate without distortion.[123]

In *Thornburgh v. American College of Obstetricians & Gynecologists*[124] and *City of Akron v. Akron Center for Reproductive Health, Inc.*,[125] the Court acknowledged that citizens have a fundamental right to receive medical advice from their doctors that is not unduly restricted by the State.[126] While subsequent cases held that the doctor-patient discourse could be subject to reasonable licensing and regulation by the State,[127] the Court continued to recognize a citizen's interest in receiving "a physician's counsel and care" without undue interference from the State.[128] For example, in *Pegram v. Herdrich*,[129] the Court acknowledged that doctors have a

121. For example, in *Rust*, the message of state preference was the permitted referrals for adoption and counseling, but not abortion, for unwanted children; thus, the state preference was for childbirth over abortion. *See Rust*, 500 U.S. at 193. This message, however, could have been easily garbled in a number of ways. First, the patient could be mistaken to think that the message of state preference actually was the doctor's personal or professional preference. Second, the patient could be mistaken to believe that abortion was not a viable medical option for her.

122. Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 229 (1994). The groups that are the least likely to question doctor speech are non-white, poor, female, and elderly. *Id.*

123. *See Rust*, 500 U.S. at 200 (stating that it could be argued that "traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government").

124. 476 U.S. 747 (1986), *overruled on other grounds by* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (plurality opinion).

125. 462 U.S. 416 (1983), *overruled on other grounds by* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (plurality opinion).

126. *American Coll. of Obstetricians & Gynecologists*, 476 U.S. at 762–63; *Akron Ctr. For Reprod. Health, Inc.*, 462 U.S. at 427; *see also* Cruzan v. Dir. Mo. Dep't of Health, 497 U.S. 261, 287–92 (1990) (O'Connor, J., concurring) (emphasizing that patients have a liberty interest in determining the course of their own medical treatment).

127. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 844–69 (1992) (upholding a statute that regulated abortion procedures).

128. *See* Washington v. Glucksberg, 521 U.S. 702, 778 (1997).

129. 530 U.S. 211 (2000).

legal duty to follow the "standards of reasonable and customary medical practice," which includes acting in the best interests of the patient.[130] And yet, under *Velazquez*, the doctor's role remains relegated to that of a governmental speaker—completely separated from a patient's right to seek care that is in the patient's best interests, not the state's interests.[131]

Despite the privileged status accorded to the doctor-patient relationship, the Court has expressly allowed state intrusion into some types of doctor-patient speech, notably speech regarding abortion.[132] In *Planned Parenthood v. Casey*,[133] the Court upheld a statute requiring doctors, at the risk of losing their medical licenses, to provide scripted information conveying a state preference for childbirth over abortion to every patient seeking an abortion.[134] The Court explained that doctor-patient speech can be subject to state regulation.[135] Such regulation may extend to requiring physicians to communicate pre-scripted, viewpoint-based statements to patients that are neither false nor misleading, but nevertheless are designed to persuade the patients to choose childbirth over abortion.[136]

These types of intrusions by the State generally are unique to abortion and contraception[137] and should not operate to negate the

130. *Id.* at 235–36 (citing traditional standards of common law that require physicians to act like fiduciaries as one reason why mixed eligibility and treatment decisions made by a health maintenance organization, acting through its physicians, should not be considered fiduciary acts within the meaning of the Employee Retirement Income Security Act).

131. For example, in cases involving abortion, the state's preference against abortion will be in conflict with the interests of patients who prefer to choose abortion. As abortion prior to viability is still viewed as a fundamental constitutional right, see *Casey*, 505 U.S. at 869, and a medically reasonable treatment alternative, see *supra* note 76, it is clear that the patient's best interests may conflict with the state's interests.

132. *See Casey*, 505 U.S. at 844.

133. 505 U.S. 833 (1992).

134. *Id.* at 881–84.

135. *See id.* at 878 ("[T]he State may take measures to ensure that the woman's choice is informed, and measures designated to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.").

136. *See id.* at 882.

137. *See* 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, 175–77 (1998) (arguing that the Supreme Court permitted the erosion of doctor-patient speech rights in the abortion arena to accommodate the Court's views on the practice of abortion, as evidenced by the Court's "highly protective" free speech jurisprudence since the abortion decisions); *see also* Berg, *supra* note 122, at 219 (arguing that the eroding of the Court's First Amendment jurisprudence regarding doctor-patient speech likely is motivated by the Court's views on the issue of abortion, not on any general view that doctors and patients should be subject to less speech protection); 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) (arguing

sum of jurisprudence supporting a patient's right to unbiased medical treatment. The abortion cases are not focused on eroding the special relationship between doctors and their patients, but rather balancing the state's interest in encouraging childbirth against a woman's interest in bodily autonomy.[138] Thus, if the Court was not prepared to overrule the speech classification in the *Rust* decision, it should have expressly limited the classification to doctor-patient speech involving abortion. This would have secured the privileged nature of doctor-patient speech outside the context of abortion and would have been a more accurate classification of the fiduciary and advocatory role occupied by physicians.

Indeed, a strong societal preference favoring patients' rights to unbiased medical treatment has been prevalent in this country since the beginning of the twentieth century.[139] During the 1960s and 1970s, the courts began recognizing a liberty interest in the attainment of unbiased and fully-informed medical advice.[140] In *Moore v. Preventative Medicine Medical Group, Inc.*,[141] a California court held that a doctor had a duty to disclose to his patient the risk of not being examined by a specialist.[142] In another California case,[143] the court found that a physician's fiduciary duty to his patient prohibited the physician from extracting excised cells from that patient for research purposes without revealing "preexisting research and economic interests in the cells."[144] In *El-Amin v. Yale-New Haven Hospital*,[145] a woman who was not informed of the alternative of abortion when faced with probable health impairments in her unborn child, sued and settled with her doctor based on the premise that the doctor had a legal obligation to inform her of all reasonable alternatives to

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that the Supreme Court's hostility toward abortion motivated its departure from traditional First Amendment analysis in *Rust* and *Casey*).

138. *See, e.g.*, *Casey*, 505 U.S. at 846–47 (stating that the State has a legitimate interest in preserving fetal life and this interest must coexist with a woman's interest in bodily autonomy).

139. *See* FURROW ET AL., *supra* note 87, at 265–66. Justice Cardozo, in *Schloendorff v. Society of New York Hospital*, 105 N.E. 92 (N.Y. 1914), *overruled on other grounds by Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957), articulated the principle this way: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . . ." *Schloendorff*, 105 N.E. at 93 (citations omitted).

140. *See* RICHARDS & RATHBUN, *supra* note 84, at 209–10.

141. 223 Cal. Rptr. 859 (Cal. Ct. App. 1986).

142. *See id.* at 863–64.

143. Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990).

144. *Id.* at 480.

145. No. CV-900303287 (Conn. Super. Ct. filed Aug. 8, 1990).

proposed treatments.[146] Most recently, in *Conant v. McCaffrey*,[147] a California district court granted a preliminary injunction against federal drug enforcement officials, prohibiting them from threatening or prosecuting physicians for advising patients about the medical use of marijuana after enactment of Proposition 215, which permits the medical use of marijuana in certain circumstances.[148] The court concluded that physicians have a First Amendment right to advocate and encourage the medical use of marijuana, so long as their advocacy does not incite unlawful action.[149]

Such sentiments have also been found in federal legislation. The Patient Self-Determination Act[150] requires all hospitals, skilled nursing facilities, home health agencies, and HMOs with Medicare or Medicaid funding to provide patients with written information pertaining to their rights under state law to make decisions concerning their own medical care.[151] In 2002, by popular demand, the Bipartisan Patient Protection Act (Patient's Bill of Rights)[152] proposed prohibition of interference by managed care organizations with certain doctor-patient communications.[153] Thus, numerous

146. *Id.* *But see* Spencer v. Seikel, 742 P.2d 1126, 1129 (Okla. 1987) (holding that a physician had no duty to inform a pregnant woman with a viable fetus of the possibility of abortion).

147. 172 F.R.D. 681 (N.D. Cal. 1997).

148. *Id.* at 701. *See generally* Allison L. Bergstrom, *Medical Use of Marijuana: A Look at Federal and State Responses to California's Compassionate Use Act*, 2 DEPAUL J. HEALTH CARE L. 155, 156 (1997) (discussing *Conant*).

149. *Conant*, 172 F.R.D. at 695.

150. 42 U.S.C. § 1395cc (2000).

151. *Id.* § 1395cc(a)(1), (f)(1)(A).

152. H.R. 2563, 107th Cong. § 131 (2002). This bill ultimately failed to be enacted into law.

153. *Id.* Section 131 concerns prohibiting interference with certain medical communications:

> (a) GENERAL RULE—The provisions of any contract or agreement, or the operation of any contract or agreement, between a group health plan or health insurance issuer in relation to health insurance coverage (including any partnership, association, or other organization that enters into or administers such a contract or agreement) and a health care provider (or group of health care providers) shall not prohibit or otherwise restrict a health care professional from advising such a participant, beneficiary, or enrollee who is a patient of the professional about the health status of the individual or medical care or treatment for the individual's condition or disease, regardless of whether benefits for such care or treatment are provided under the plan or coverage, if the professional is acting within the lawful scope of practice.
>
> (b) NULLIFICATION—Any contract provision or agreement that restricts or prohibits medical communications in violation of subsection (a) shall be null and void.

Id.

examples demonstrate the strong preference in both the statutory and common law favoring a patient's right to unbiased medical treatment and care.

In conclusion, beyond the area of abortion, the common and statutory law overwhelmingly supports the existence of a special relationship of trust between doctors and their patients, a relationship that should not be tainted with conflicting interests. The Court in *Rust* was not challenging the privileged nature of this relationship, but it allowed the scope of the relationship to be limited in certain cases. The Court in *Velazquez* blurred the distinction made in *Rust* when it failed to either overrule the *Rust* speech classification later attributed to the decision or expressly limit the speech classification to its special circumstances. Unpersuasively deeming the doctor-patient speech in *Rust* as governmental, while classifying the attorney-client speech in *Velazquez* as private, is inconsistent with the reasoning used by the Court in *Velazquez*. This characterization misrepresents the privileged status of doctor-patient relationships and invites future limitation of the scope of patients' rights.

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