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# National Report

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## Putting the Government's Words in the Doctor's Mouth

Carol Kling had an abortion in 1982, when she was 22. Testifying before a state legislative committee in South Dakota a couple of years ago, she said she would not

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have made that choice had she understood what she was doing. "I did not realize that this fetus was a human being," Ms. Kling said. "I felt it was just tissue. It was reinforced by our culture and by the clinic, but if I had known the truth I never would have had that abortion, and I'd have a daughter today."

Ms. Kling said her abortion led her to drinking, depression, divorce and thoughts of suicide.

South Dakota, an innovator in abortion legislation, responded to testimony from Ms. Kling and others with a law that requires doctors there to tell women seeking abortions that they "will terminate the life of a whole, separate, unique, living human being."

Ms. Kling seemed sincere about her confusion, though it is a little hard to accept the idea that she did not realize she was extin-

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guishing a life or that the statement required by the law would have changed her mind.

Her testimony did fit neatly with a shift in the strategy of groups opposing abortion, which now justify efforts to limit or ban it by focusing not only on fetal life but also on the consequences for the women involved. The South Dakota law is called, tellingly, the Women's Health and Human Life Protection Act of 2005.

That new rhetoric also figured in the Supreme Court's April decision upholding the federal Partial-Birth Abortion Ban Act.

"The state has an interest in ensuring so grave a choice is well informed," Justice Anthony M. Kennedy wrote for the five-justice majority.

"While we find no reliable data to measure the phenomenon," he added, "it seems unexceptional to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow."

South Dakota's solution — to mandate a set of disclosures — stops short of Justice Kennedy's, which was to uphold a ban on an abortion procedure on the apparent theory that women cannot sort things out for themselves even with full information.

But there is, according to the federal courts that have so far blocked the South Dakota law, a constitutional flaw in how the state seeks to go about informing women of its views. The problem with the law, the courts said, is that it would hijack the doctor-patient relationship.

"The South Dakota statute," Judge Karen E. Schreier of Federal District Court in Rapid City, S.D., wrote in issuing a preliminary injunction in 2005, "requires abortion doctors to enunciate the state's viewpoint on an unsettled medical, philosophical, theological and scientific issue — that is, whether a fetus is a human being."

A divided panel of the federal appeals court in St. Louis affirmed that decision last year, and the full appeals court will soon issue its decision. Judging from the oral argument in April, which is available on the court's Web site, [www.ca8.uscourts.gov](http://www.ca8.uscourts.gov), the court may well uphold the law.

South Dakota can, of course, say what it likes about abortion. "If the state wants to have a billboard, good for the state," Timothy E. Branson, a Minneapolis lawyer who represents Planned Parenthood in its challenge to the law, said in an interview. Indeed,



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as lawyers for South Dakota said in a brief last year, the state publishes pamphlets and maintains a Web site setting out its position ([www.state.sd.us/applications/ph17abortioninfo](http://www.state.sd.us/applications/ph17abortioninfo)).

Lawyers for the state say it is also entitled to make doctors into its publicity agents, though that is not how they put it.

"The point," Lawrence E. Long, the state attorney general, wrote in a brief to the appeals court this spring, "is to require abortion providers to do a better job at what they should already be doing. That is, they should provide their patients with an accurate description of what they are aborting."

The Supreme Court has said that doctors performing abortions may be forced to convey

truthful information, and not only about medical issues. In 1992, the court upheld a Pennsylvania abortion law that required doctors to tell their patients that they might be eligible for child support if they decided to carry their pregnancies to term.

But other cases say the government cannot force anyone to disseminate ideological messages.

At the argument in April, John P. Guhin, a lawyer for the state, said doctors could paraphrase the required disclosures, which must be made in writing and signed by the patient on every page. He suggested that doctors could also express their disagreement, though the law requires them to certify that their patients have understood the disclosures. Should there be questions, doctors must answer them in writing. Failure to follow the procedures is a crime.

It is all awfully convoluted, which is probably the point. Had Ms. Kling been confronted with this disclosure process, she might well have decided to forgo her abortion. The question, though, is whether she would have done that because she had more information or because South Dakota succeeded in erecting a roadblock to a constitutional right.