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Restricting Doctor–Patient Conversations in Federally Funded Clinics

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To the Editor: In reference to Mr. Phillips' enlightening foray into pedal nomenclature using a porcine paradigm, I should like to address a degree of ambiguity in his position. The rendering with which I am familiar regarding the least toe (*aut dexter aut sinister*) is as follows: ". . . and this little piggy went wee, wee, wee, all the way home" (*auctor incertus*).

Mr. Phillips has concluded that this refers to the condition of stress lacrimation. However, it could equally well be considered to refer to stress incontinence.

If so, I suggest a revised naming of the fifth digit of the foot as *porcellus micturens domum*, or piglet urinating homeward.

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The above letters were referred to Mr. Phillips, who offers the following reply:

To the Editor: I appreciate the thoughtful responses from Drs. Berner and Sovine. Dr. Berner may note that the intriguing title of the original letter, "Higgledy, Piggledy," was determined by the *Journal*'s editorial staff.

Dr. Sovine reminds us all of the fine line between grammar, literature, and urology.

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LEGAL ISSUES IN MEDICINE

RESTRICTING DOCTOR–PATIENT CONVERSATIONS IN FEDERALLY FUNDED CLINICS

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WE have come to accept, as a matter of both law and medical ethics, that open and honest discussion is crucial to the doctor–patient relationship. We accordingly deplore the practice in Plato's Greece whereby, for slaves, "verbal communication between healer and patient was reduced to a minimum."[1] But restricting conversation between doctor and patient has now become a matter of government policy, again distinguishing patients according to economic class.

In 1988 the Department of Health and Human Services (HHS) announced radically revised regulations governing the 4000 family-planning clinics that had been receiving federal funding under Title X of the Public Health Service Act since 1970.[2] These clinics serve approximately 4 million poor women and girls, mostly teenagers. The announced purpose of the regulations was to redefine what Congress meant in 1970 by Section 1008 of the act: "None of the funds appropriated under this title [Title X] shall be used in programs where abortion is a method of family planning."[2] Title X does not fund abortions, but the Reagan administration also wanted to prohibit these clinics from referring clients elsewhere for abortions and from discussing abortion at all. Although it was not alleged that the clinics were promoting or encouraging abortion, HHS said that a 1982 audit of 14 such clinics had revealed "practice variations."[2] Specifically, in one clinic, if the woman said she had already decided to have an abortion, she was counseled only about that option; four clinics provided women with brochures prepared by abortion clinics; and at two clinics women seeking abortions were allowed to use the telephone to make appointments for abortions elsewhere.

The 1988 revisions stated, among other things, that "a Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning."[2] As an example of this provision, sometimes called the "gag rule," the regulations state that if a pregnant woman herself requests information on abortion, it is permissible to "tell her that the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." The program is required to refer the pregnant patient "for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of the mother and unborn child."[2]

The regulations were almost immediately declared unconstitutional by two U.S. circuit courts of appeal.[3,4] Another circuit court, however, found them constitutionally acceptable,[5] and in May 1991 the U.S. Supreme Court, in the five-to-four decision in *Rust* v. *Sullivan*, agreed.[6] The case involved a claim that the regulations were invalid as written rather than as actually applied. Two basic questions were presented to the Court: Did the regulations reflect a plausible construction of congressional intent? and Were the regulations constitutional?

THE MAJORITY OPINION

Writing for the five-to-four majority, Chief Justice William Rehnquist made the decision look straightforward. As to statutory interpretation, he noted that the language of Section 1008 was very broad and thus provided HHS with almost unlimited authority to construe its meaning. Furthermore, he found (as other courts had) that the legislative history was "ambiguous and fail[ed] to shed light on relevant [1970] congressional intent." In such circumstances, the Court usually defers to the agency's expertise. Even though the 1988 revisions marked a drastic departure from past HHS interpretation of the 1970 act, the Court concluded that the agency's "reasoned analysis" (based in large part on the 1982 audit) provided a sufficient justification for its change of policy.

The constitutional issues were treated as equally

straightforward. The Court had previously held that the government may not erect a "barrier" to prevent citizens from exercising their constitutional rights.[7] On the other hand, according to this earlier decision, the government may fund one constitutionally protected activity (such as childbirth) and not fund another constitutionally protected activity (such as abortion).[7] In *Rust*, Justice Rehnquist used an inept analogy: the constitutional right of Congress to establish a National Endowment for Democracy to encourage other countries to adopt democratic principles without having to fund a program to encourage communism and fascism. Without debating which form of government would be most likely to restrict conversation among its citizens, it is clear that the central question in this case is whether the government could restrict conversations in the context of a doctor–patient relationship because that relationship is partially subsidized by the government.

The Court conceded that it was possible that the doctor–patient relationship in general might be a "traditional relationship" that "should enjoy protection under the First Amendment from government regulation, even when subsidized by the Government."[6] But the Court decided that it need not determine the constitutional status of the doctor–patient relationship in this case because other doctors are available who are not legally constrained in what they can tell patients, and

> because the Title X program regulations do not significantly impinge upon the doctor–patient relationship. Nothing in them requires a doctor to represent as his own any opinion that he does not in fact hold. Nor is the doctor–patient relationship established by the Title X program sufficiently all-encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice. The program does not provide post-conception medical care, and therefore a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her.[6]

In the Court's view of the limited doctor–patient relationship in the Title X–funded clinic, Rehnquist wrote, "the general rule that the Government may choose not to subsidize speech applies with full force."[6] According to the Court, poor women who are not able to receive full medical information elsewhere are in this position because of their poverty, not because of any obstacle raised by the government's Title X regulations. Poor women merely remain as ignorant about options as they would have been if the government had not funded Title X clinics at all.

The Dissents

Four justices dissented; all agreed that there was no need to deal with the constitutional issues because Section 1008 could reasonably be interpreted as having been intended simply to prohibit the use of federal funds to perform abortions, rather than also to prohibit talking about abortion. Justice Harry Blackmun, in an opinion joined by Justices Thurgood Marshall and John Paul Stevens, also argued that the majority was wrong on the constitutional issues. In his view, the regulations were "the type of intrusive, ideologically based regulation of speech" that violates the First Amendment and cannot be justified simply by the fact of federal funding.[6] In addition, he stated, the regulations violated the Fifth Amendment rights of pregnant women to make decisions about their pregnancies free of government interference in the form of a ban on speech about abortion and the simultaneous requirement of referral for prenatal care. Thereby, Justice Blackmun wrote, "the Government places formidable obstacles in the path of Title X clients' freedom of choice."[6] He also considered the doctor–patient relationship constitutionally protected on the grounds that it "embodies a unique relationship of trust," in which doctors provide patients with "guidance, professional judgment, and emotional support," involving not only their health but "often their very lives."[6]

The Scope of the *Rust* Decision

Since this case is part of the continuing political debate about the government's role in limiting abortion, it could be comforting to the medical community to think that it applies only to doctor–patient conversations about abortion. Unfortunately, legal decisions cannot be so easily limited, and the case provides precedent for Congress to limit what doctors can say to their patients about any subject when the encounter is at least partially paid for by federal funds. Physicians should therefore be more concerned about the Court's current views on the nature of the doctor–patient relationship and on poverty than about the Court's view on abortion. There are obvious reasons to be concerned about this decision quite apart from one's views about abortion.

Poverty does not define a "suspect class," and thus laws that affect only the poor have never been subjected to the "strict scrutiny" standard that applies to laws that affect particular races, religious groups, or nationalities. On the other hand, as Justice Marshall argued passionately and persuasively in the past, the Court cannot legitimately use the lower "rational relationship to a legitimate state interest" standard of review to ignore completely what is happening in the real world. In his words, "It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live."[8] The *Rust* decision, based as it is largely on the assumption that poor women have access to helpful physicians outside family-planning clinics, is untenable in its application to the real world. In this sense it provides strong judicial support for the perpetuation of a two-tiered health care system in which poor people and minorities occupy the lower tier. The fact that such a system is not unconstitutional does not excuse the fact that this de-

cision by the Supreme Court will affect almost exclusively the constitutionally protected choices of poor women.

The Court's description of the doctor–patient relationship, quoted above in part, is equally abstract and unrealistic. Physicians see their patients one by one in the real world, and each patient is unique. What does it mean to tell physicians that they cannot convey medically relevant information to their patients, but that this restriction does not "significantly impinge" on their relationship with their patients? And whose "expectation . . . of comprehensive medical advice" is the Court talking about? The regulations themselves were adopted because pregnant patients were coming to Title X clinics and inquiring about abortion; it was certainly their expectation that they would be given the appropriate information. Moreover, physicians can mislead patients as much by silence as by direct advice. In the doctor–patient context, a half-truth is the same as a lie, and it violates both medical ethics and the doctrine of informed consent. By legally approving inherently unethical behavior, the Court's opinion in *Rust* is a direct attack on medical ethics in the doctor–patient relationship.[9]

The Implications of the Decision

It cannot be too strongly emphasized that this decision is not primarily about abortion but, rather, about the doctor–patient relationship and the care of the poor in the United States. Some of the constitutional questions it raises are these: How much control over conversations between doctors and patients can the federal government now claim for health care it funds through Medicare and Medicaid? To help control the costs of health care, could HHS limit the information physicians could give such patients about alternative treatments? Under a system of national health insurance, could we have "state medicine," with the content of the doctor–patient dialogue prescribed by federal regulations, at least as long as some private physicians were available for those who could pay for them? And how could such regulations be enforced? Could videotapes of all doctor–patient contacts be required to monitor compliance? Could the government use agents posing as patients to check on what a physician actually says?

Although the Supreme Court's opinion in this case would permit affirmative answers to all of these questions in principle, I think even the five justices in the majority would try to answer them in the negative. *Rust* differs from the other scenarios just outlined in that it applies almost exclusively to poor people. If these regulations applied to white, middle-class Americans, they would almost certainly be seen as intolerable not only by the Congress and the Court, but by the executive branch as well. The philosophy underlying the *Rust* decision is that the poor should be grateful that the government spends any money on them at all. In this sense the Court seems to view Title X funding as a charitable act rather than a government obligation. Recipients are free to take it or leave it, but they cannot expect to have any voice in determining what care is given or any right to know what is left out.

The Title X regulations thus seem to be viewed by the Court's majority not as rules that regulate doctors, but as rules that regulate the poor. Since physicians cannot practice medicine without patients, however, the final message of this decision is that the Court devalues not only the poor, but also physicians who care for them. Doctors can have no higher constitutional status than their patients do.

Organized medicine has not been fooled, however. The 483-member House of Delegates of the American Medical Association voted unanimously on June 25 to condemn the *Rust* decision and to denounce any laws or regulations that "restrict communication between physicians and their patients."[10]

The current American tragedy is that so many Americans have no health insurance and little access to health care. Only Congress and the President can change that. After the decision in this case, only Congress and the President can restore free-speech rights to physicians who care for the poor in clinics funded under Title X. Congress has begun to act. As of July 18 both the House and Senate had already passed similar measures to prohibit enforcement of the regulations, but whether there are sufficient votes to override a threatened presidential veto remains uncertain. To prevent further governmental intrusions into conversations between doctors and patients, all future health care appropriations must include language specifically barring HHS and other agencies from restricting speech in the doctor–patient relationship, regardless of the funding of health care.

During his last day on the bench, Justice Marshall warned that "power, not reason" has been the driving force behind recent Supreme Court decisions and that tomorrow's victims of the Court's new majority are likely to be "minorities, women, [and] the indigent."[11] The *Rust* decision announces that for federally funded physicians and their patients, tomorrow is already here.

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