University of Minnesota Law School
Scholarship Repository

Constitutional Commentary

1992

Don't Ever Discuss Rust V. Sullivan with a Lady in a Grocery Line.

John B. Mitchell

Follow this and additional works at: https://scholarship.law.umn.edu/concomm

Part of the Law Commons

Recommended Citation
Mitchell, John B., "Don't Ever Discuss Rust V. Sullivan with a Lady in a Grocery Line." (1992). *Constitutional Commentary*. 516.
https://scholarship.law.umn.edu/concomm/516

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

DON'T EVER DISCUSS *RUST v. SULLIVAN* WITH A LADY IN A GROCERY LINE

*John B. Mitchell**

I was standing near the end of one of those very long grocery lines, where everyone ahead of you has a full cart and an out-of-state check, when the lady in front of me pointed to the newspaper and asked, "Have you seen this?" Looking closely, I saw that she was referring to an article announcing the Supreme Court's recent decision in *Rust v. Sullivan*.[1] In fact, I had read the article that morning and had even been prompted to read the slip opinion. The article had contained a fairly good summary of the essential aspects of the case. Congress had previously passed legislation, in part funding family planning clinics. The legislation had specifically stated that none of these funds were to be used in a program where abortion was employed as a method of family planning. Recently, the Secretary of Health and Human Resources had passed a series of regulations interpreting this legislation. These regulations were the subject of the case, and were held to be constitutional by a majority of justices. Specifically, the regulations prohibited family-planning clinics receiving funds under the legislation from engaging in counseling concerning, referrals for, and activities advocating abortion as a method of family planning. The regulations required such projects to maintain an objective integrity and independence from the prohibited abortion activities by the use of separate facilities, personnel, and accounting records.[2] Further, under the regulations, the programs were expressly forbidden to refer a client to an abortion provider even upon specific request. One permissible response to such an inquiry was that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion."[3]

I was, however, not about to discuss this delicate topic with a

* Visiting Professor in Constitutional Law, University of Puget Sound School of Law; J.D., Stanford, 1970. I wish to thank Annette Clark, David Skover, and Pierre Schlag for their helpful comments and insights.

1. 111 S. Ct. 1759 (1991) (considering the constitutionality of regulations interpreting § 1008 of Title X of the Public Health Service Act).

2. Id. at 1765.

3. Id., quoting 42 C.F.R. § 59.8(b)(5).

stranger, and was preparing to end the conversation when I realized that I knew this woman. Her children had graduated from the same high school as mine. So I acknowledged that I had scanned the article over morning coffee.

But don't you think the case was wrong, Mr. Mitchell?

I gave some non-committal response, which I thought would end the matter. Instead, the dialogue which follows ensued. As I recall, the discussion began with what then seemed like a naive claim to the first amendment:

But, doesn't that violate free speech, Mr. Mitchell?

No, I don't think so. Free speech isn't really the point. The point is that government should be able to pay just for what it wants and not have to pay for what it doesn't want. Look, if you buy a carpet, you can insist on receiving a blue carpet. No one can make you take a yellow one when you're the one paying. You're not telling the store that it can't sell yellow carpet to other people; it's just not what *you're* paying for. Same here. The government only wants to pay for family planning services that do not involve abortion. If someone else wants to support such services, fine. But the government does not want to pay for a "yellow carpet," and there is no reason they should have to. So, what do you hear about the high school?

But, Mr. Mitchell, the government gives money to our school. Does that mean that they can tell us that we can only have the money if our children don't study Watergate and the Iran-Contra affair, because they don't want to pay for anything that makes them look bad?

Good question, but the Court dealt with that in this case. The Justices said, and I quote, that "the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment."[4]

4. Id. at 1776. See, for example, *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). I did not mention that the Court also indicated that the government could not restrict speech on traditional public forums just because it subsidizes them. *Rust v. Sullivan*, 111 S. Ct. 1776. I did not think the point added anything to the conversation and, to tell the truth, there are hints that the Court may let the government be rather stingy with the public forum concept, leaving the government to define as not public everything but public parks and some sidewalks. See, generally, *United States v. Kokinda*, 110 S. Ct. 3115 (1990) (sidewalk leading to post office not a public forum). Compare also *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) (school a restrictive forum for speech); *FCC v. Pacifica Foundation*, 438 U.S. 726, 728 (1978) (radio broadcasts a restrictive forum for speech).

But, Mr. Mitchell, what if we're talking about high school, and not university? Would the Court think that high school is traditional, fundamental, and such, or just there to keep teens from getting into trouble and to indoctrinate them into whatever the current government thinks makes a good citizen? And even if federal funds to our school can't be conditioned on what subjects may and may not be taught, education takes place in a lot more places than formal public schools: museum tours, training programs in the workplace, even factory bulletin boards. Are you saying that if the museum gets government funds or the factory or business gets government contracts, that the government can require the tour guide to extol the virtues of the current government, the factory to post pro-government posters on the bulletin board, and all training programs to contain a unit created by the government in praise of the government?

Well, the government generally can't tell us what to say.[5]

But, Mr. Mitchell, according to this article, the family planning doctors have to say that "the project does not consider abortion an appropriate method of family planning."

That's only one permissive response to a request for abortion referral. It is not mandatory. The doctors just can't give abortion advice, because that's not what Congress is paying for. And the government has a right to get what it's paying for, and to not pay for what it doesn't want.

Ok. Even if the tour guide or the factory do not have to praise the government, can the government grant or contract require that they not criticize the government?

I think that depends. If the restriction is related to the basic objectives of the government funding so that it is part of the government getting what it is paying for, I'd say yes; otherwise, no. Let me give some examples. If the museum grant is to fund a traveling exhibit of art inspired by the recent war with Iraq, and the whole point of funding the exhibit is to reinforce a mood of unquestioning patriotism, then I think the museum guide could be restricted during the tour from criticizing the government's participation in the war. The government is paying for propaganda, and propaganda it should get. If, instead, the grant was just a general one to support the arts, I think the guides should be able to say anything they wish.

5. See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977) (citizen cannot be made to display license plate bearing motto "Live Free or Die"); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (voiding statute giving "right of reply" to candidates not favored in newspapers' articles); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974) (voiding state statute requiring loyalty oath as condition of access to state ballot); *West Virginia St. Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (school child cannot be forced to join in flag salute ceremony).

Same with the factory. A defense contract in time of war—where confidence in the quality of materials being sent to the troops is important—may well merit conditions restraining criticism of the government that a contract with a peacetime supplier of concrete for sidewalks in Washington, D.C., does not. The conditions restricting counseling of abortion in family-planning clinics is, of course, directly related to what the government has decided to pay for—a clinic offering methods of birth control, with the *specific* exclusion of abortion.

Could you condition the public entrance to this Celebration of War exhibit on not making any comments criticizing the war, and toss out any people who do?

It's possible. I'm not saying I think it would be wise, but I can think of an argument how that might be legal. The government is underwriting the cost of the opportunity to view the exhibit, and is not paying to have its expenditure undermined by anti-war protests. That's the antithesis of what they're paying for. Barring public criticism of the war in this situation would therefore be clearly related to the expenditure.

Excuse me, but I find what you're saying pretty scary, Mr. Mitchell. Federal money is everywhere—in fact, by taking a large portion of our income through taxes, the federal government in effect controls much of what we might otherwise have left over for private donations—and this "related to" notion sounds like something that smart people and lawyers could easily manipulate. So, let me get clear what you're saying. Are you saying that the National Endowment for the Arts could condition a grant on the work not being "distasteful," etc.?

I would certainly think so. Artists are free to create, but the government does not have to subsidize their private, idiosyncratic visions.

Can the grant be conditioned on the artist agreeing not to protest publicly against the censorship of art which the government finds distasteful? After all, that's related to the current government's goal of not sponsoring distasteful art.

Frankly, I do not see how. No matter what he or she says, the government still isn't paying for art it does not want, while in the family-planning situation, if the doctor speaks to the patient about abortion, the government is paying for what it doesn't want.

I'm just applying your notion that the restriction on speech must be related to the goal of the expenditure. Maybe I should explain. I'm assuming that Congress would have one or both of two reasons not to pay for "distasteful" art. One, the majority of members of

Congress themselves don't like it. Two, a significant (or, at least vocal, organized, and/or wealthy) group of people they represent—not at all necessarily a majority—would be offended, and their representatives do not feel that these constituents should have to pay their own tax dollars to be offended. In either case, an articulate artist speaking out against the restrictions, a.k.a. censorship, of his or her work by the federal government might gain majority public support to pressure Congress to lift the restriction and thereby jeopardize the interests which led to not paying for distasteful art to begin with. That's how banning the artists from speaking out against censorship is "related."

Very good. Well, for sake of argument, I'll grant that the condition on your artist's speech is "related," though I don't think Congress would ever go that far. But that does not lead to the wholesale suppression of speech that you seem to think I endorse. On his or her own time, the artist can say or do anything he or she wants. The same is true of doctors at the family-planning clinics. It's just while they're on the government's time that the government has the right to say what it is and isn't paying for.

Fine. We'll assume at this point that we are able to segment the doctor's time between time spent physically at the clinic and time spent away—further assuming that this group of doctors does not get patient calls at night, weekends and such—but when is an artist who is working on a book or sculpture working on the government's time and when is it just his or her life?

Interesting question. Are you glad you don't have to attend anymore music concerts now that your kids are out of high school?

Mr. Mitchell, if the government is entitled to pay for what it wants and not pay for what it doesn't want, can it pay us to give up our rights? For example, could it pay a woman a hundred dollars not to have an abortion and to have her child instead?

I don't see why not. It's her choice. Surely, the government can encourage certain choices, and not remain neutral on every subject. For example, the government is *pro*-literacy and *anti*-drugs. Again, it would still be the woman's choice. And that's really the essence of her right—which is not so much a matter of having or not having an abortion, but the right to be free to choose. So, in your example, you're not really paying the woman to give up her right, but trying to influence how it's exercised.

Could the government pay the woman a million dollars not to have an abortion?

That may be problematic. It would likely be viewed as so coercive as to not make the woman's choice a voluntary one.

But one hundred dollars is different?

I would think so, because of what I've already said.

Could Congress pass a resolution endorsing the Democratic candidate in a presidential election, just to try to "influence" how people will exercise their right to vote? Or, how about paying voters in a particular district five dollars not to vote? Five dollars certainly isn't enough to be coercive, is it?

The answer to both of your suggestions is no. Congress could lawfully do neither thing. Let me elaborate. Both interfere with the vote, the foundational right of our entire democracy. Abortion hardly holds this status. Further, neither of your examples is likely based on a legitimate governmental end. In contrast, encouraging various forms of birth control, but not abortion, is surely a legitimate goal of government. Finally, unlike your five dollar example, the government in the family-planning case is not paying anyone to give up their rights; Congress is paying for a program in which it only desires to pay for pre-pregnancy birth control. In your example, the whole purpose of the money was to make people give up their right to vote.

I don't understand the difference, Mr. Mitchell. It seems to me that the government is paying for the doctors not to speak freely or talk about abortion. I mean, the doctors are free to talk about anything else with the patients: kids, vacation plans, favorite sports teams—anything, except abortion.

See, I think you've missed the point again. The government is not paying for silence, it's paying for a particular program. If the clinic does not like the conditions, it doesn't have to accept the money.

I don't see it that way. What I see is the federal government looking at all the clinics that would otherwise be eligible for funding and saying we'll give money to you only if you give up what would otherwise be your first amendment right to discuss abortion with your patients.

The doctors can speak all they want. They can do all the abortion counseling they desire. They can even lobby Congress en masse. But the government is not compelled to subsidize these activities through funding.[6]

This is not a question of whether the government must subsidize the doctor's free speech. Instead, the doctors are, in effect, being paid not to speak and at the same time to give the current government's

---

6. See, e.g., *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983).

party line that "abortion [is not] an appropriate method of family planning." Maybe it makes sense that the taxpayers should not have to share your expenses for going to Congress to lobby for your private interest, but that doesn't mean that it would be all right to pay you not to lobby. Also, from what you told me, this program of funding family-planning clinics did not start with these conditions, and has been going on quite a while without them. Only now these conditions are added, which to me really makes the situation one where continuing funding depends on silence, and where money or the threat of its withdrawal is being held out as both the carrot and stick to insure that silence.

Are those frozen pizzas you have in your cart any good?

Look, up to now all we've been talking about is the doctor's free speech rights. But I hope you would agree that the woman also has speech rights that are implicated. And from what I've been hearing from you, when it comes down to it, your position is that the only way that a woman can get this family-planning service is to give up her right to speak freely about abortion with her doctor.

You're talking as if these family-planning clinics were somehow a personal, government-bestowed benefit to the women who go to the clinic, and that the government has attached a condition I assume you find unconstitutional on that benefit.[7] But, we're not dealing with any benefit, we're talking about the government funding a project like a symphony, or a dam, or health research. Of course, those projects "benefit" us, but no one would consider them personal benefits like Social Security, unemployment, or welfare.

If the government gave vouchers that were good for consultations at family-planning clinics, are you saying that it could condition use of those vouchers on the patient agreeing not to discuss abortion with her doctor?

I have no doubt that the government could limit the use of the vouchers so that they could not be used for abortion-related services, including counseling.

I can understand how the government might refuse to reimburse the clinic for the amount of time spent on abortion counseling services. But are you saying that the patient couldn't even discuss abortion with the doctor without losing the benefit of the voucher?

Well . . . discussion is different from a formal program of counseling. Anyway, there are no vouchers. These are dollars given straight to the clinic program by the federal government.

I don't see why that matters. What difference does it make

7. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972).

whether the government chooses to fund family planning by giving the money directly to the clinic in the first place, or to the clinic after the clinic redeems vouchers from individual patients? The individual patient gets the same benefit under the present method as if she were given vouchers. This is not like a "benefit" to the whole community like you were mentioning—you know, roads, museums, buildings. This is clearly individual, a woman's one-to-one relationship with her doctor. In fact, the individual nature of the relationship is what a doctor-patient relationship is all about.

I see your point, but I don't agree. Is that sugar-free hot chocolate you've bought any good?

There is one thing you said that I'd like to go back to, Mr. Mitchell. You said voting was a fundamental right. Is the right of a woman to choose to have an abortion a real constitutional right, too? Or, are some constitutional rights more important than others?

Well, the Court has at times considered whether there is a hierarchy of constitutional rights, like during the so-called "incorporation" debate,[8] and recently when it limited access on *habeas corpus* for fourth amendment violations.[9] But, is that what you're asking me?

I don't know. What I was asking was whether, at least as of today, a woman's right to choose to have an abortion was a real constitutional right.

Sure. It's a real constitutional right.

Well, what does it mean to say that women have the constitutional right to choose when at the same time women are denied the information they need to make that choice because, by conscious governmental design, the clinics are forbidden to give that information? I personally find this remarkable, when our whole "information society" is based on the premise that knowledge is power.

Initially, I wouldn't characterize all this as the clinics being "forbidden" to give certain information. They just must tell the patient that they don't give that information because that is not a service they provide. Further, I think we must be clear about what is really involved here. Realistically, the government's concern is not just about giving some information. These regulations are really meant to keep the clinics from advising, encouraging, etc.

I don't know how you can say that when the clinics aren't even allowed to give the name of someone who will perform an abortion to a patient who specifically requests the information.

---

8. See, e.g., *Palko v. Connecticut*, 302 U.S. 319 (1937).
9. *Stone v. Powell*, 428 U.S. 465 (1976).

I think we're getting off the main point. Don't you think that women in America already know about their right to have an abortion?

Maybe they do. I really don't know. I would think that most of us, through TV or otherwise, know about the Miranda warnings, but the police still have to give them. This is like instructing the police that they can't tell a suspect his or her rights, even if the officer wishes. I just think that for the government to affirmatively seek to deny information to the woman interferes with the very choice that is at the heart of what you agreed was a real constitutional right.

What if I told you that the Court has already held that neither states nor the federal government must provide free abortions to indigent women and that it is legal to refuse the use of a state facility for abortions?[10] Now surely in those cases the government has affected the woman's choice, and I think you would agree, to a far greater degree than here; yet, the Court found the state's and/or the federal government's actions legal. So you might want to give up on that point.

You mean that their past mistakes justify their present ones?

Madam, that's precedent, *stare decisis*—the backbone of our Anglo-American jurisprudence.

Well anyway, I don't know what I think about those cases you just mentioned. My first impression is that they don't quite sound right. But even if they somehow make sense, they're different from this situation. Denying a free abortion to a poor woman or access to state hospitals for the procedure certainly makes the woman's choice harder and will no doubt strongly influence, and in some cases determine, that choice. But here, by deliberately denying proper information, the government is interfering with the very process of choosing. It is one thing to add weight on one side of the scale, and quite another to tamper with the scale itself. By tampering here with the process of choosing, the government deliberately interferes with the very core of that right. Anyway, aren't people supposed to be informed of their rights?

You're thinking of a very different situation, generally in the criminal context. The concern about informing a defendant of his rights takes place where the defendant is about to intentionally give up constitutional rights (like when pleading guilty), or at least is at risk of doing so (like during police questioning). Here, you surely cannot contend that the woman will somehow give up or waive her right to an abortion during her visit at the family-planning clinic.

10. See *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

In fact, with the exception of the inherently coercive realm of police questioning, informing a defendant of his rights as a predicate to finding a "voluntary" waiver is limited to the formal court process. Thus, the Court does not require that the defendant be told of his rights prior to waiver of, for example, his fourth amendment rights when agreeing to consent to a search of his car or such.[11] In these situations, all the Court cares about is that the defendant's waiver was voluntary in the sense that, under the "totality of the circumstances," he was not coerced into giving up his rights. Surely even you cannot transform the family-planning clinic into an engine of coercion.

But why are you so confident that this is not coercion?

Excuse me, but I must be missing something. No one in the clinic is asking the woman to give up her right to abortion. No one is even supposed to discuss abortion—that's what I thought we have been debating about. After leaving the clinic, the woman can go somewhere for an abortion. She hasn't given up anything, so how has she been coerced? What right has she waived?

I don't agree. I think that as a practical matter the restrictions will cause many women to effectively give up their right to an abortion at the family-planning clinic. Here the government has consciously structured the flow of information—what can and what can't be said—so that it invariably pushes a woman towards childbearing, and in effect has disguised this propaganda machine to look like a normal medical clinic, where the doctors are just there to help you. It's a bit like having an FBI agent in a confessional, pretending to be a priest. This is particularly significant when you recognize the unique relationship of the reality of "timing" to this particular right. When a woman comes into the clinic pregnant—which is really the situation all these new regulations had in mind—and she is channeled to prenatal care, the clock keeps ticking. The limited window of time in which the woman can get a safe or legal abortion narrows and, in this passage of time, the woman's ability to exercise her right literally disappears. Not even the Supreme Court can restore this right once nature's clock has moved on. So the clinic does not have to ask the woman to give up her right to an abortion. It only needs to delay that decision, and nature and the legal time-frame for an abortion will take its course.

Wait a minute. These are just birth control clinics. Most of their time is spent advising on various matters of contraception and such, not with anti-abortion propaganda. Again, they are not even

11. See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

to discuss abortion. They do not and are not meant to deal with pre-natal care—of *any* kind, abortion or childbirth.

Come on. When they must say that abortion is not appropriate family planning? I repeat, this is a disguised government propaganda machine.

We've been through this before. Telling the patient that the project does not consider abortion appropriate family planning is a permissive, not a mandatory response. They can say it, they don't have to. They can just say that the project cannot make such referrals. But, we're getting off track again. Let me address your point about whether women must be told of their right to an abortion. Even if I were to accept your fanciful proposition that this federally-funded clinic somehow replicates the coercive atmosphere of police interrogation or a formal court hearing, you're still not talking about informing women about their rights, you're talking about giving them advice and counseling. Even under *Miranda* and the guilty plea cases, the defendant must only "know" his rights; i.e., be informed of such rights, not have the government advise and counsel him.

But don't they have to tell a defendant about the consequences of his decision—that what he says can and will be used against him in court, that if he pleads he could face such and such a sentence? Also, we do provide someone to advise and counsel the defendant who is not bound to take the government's line—an attorney.

Very good. But this still looks more like a medical clinic than the rear of a police car to me.

If you don't see how really coercive this is, it's because you aren't even considering that we're talking about all the information here coming from doctors. See, what really bothers me about all this, Mr. Mitchell, is that these regulations result in using doctors in such a way that both misleads their patients and, in the process, genuinely weakens the woman's constitutional right to choose to have an abortion.

How? This not an "all encompassing" medical service; this is just a family-planning clinic. Patients know this and do not reasonably expect that they will receive the type of comprehensive medical advice that they would get at a general medical clinic or hospital. So, how are they misled? Certainly not by the doctors as you suggest. No doctor is forced to say anything he or she does not personally or professionally believe. Quite the contrary, they are required to clarify any misunderstanding by informing the patient that abortion advice is beyond the scope of the program. Getting to the bottom line, the woman is no worse off regarding her right to choose an

abortion than if there were no federal funds and no federally supported clinics.

I don't even know where to begin—you're so wrong.

I'm all ears.

Fine, here goes. First, let's talk about the scope of care the woman is entitled to expect. If I go to an orthopedist, it is true that I don't expect advice on the measles, but I do expect consultation on every aspect and alternative related to my sprained ankle. I'd be outraged if the doctor did not even mention use of a pressure cast because he or she had some philosophical objection to its use. The same principle applies here. Women might not have reason to expect what you call "comprehensive" advice on, for example, urinary tract infections, but they sure are entitled to expect such advice when it concerns the very subject for which they are visiting the clinic—childbirth. Second, I don't understand how you can say that the regulations don't make the doctors say anything they don't believe and don't tend to make the doctors mislead their patients. Even if, as you say, the doctors don't have to mouth that phrase about abortion not being an appropriate method—although it does seem to be strongly encouraged—what's most important is that there is much that the doctors aren't allowed to say. We all know that our communication is composed of both what we say and what we don't say, and that what we don't say is often the most important. You're just wrong to think that words cannot be put into someone's mouth by taking other words out. As to being misleading, kids are experts at misleading their parents through omission. So don't tell us that omitting information about abortion won't mislead patients as to what they think their doctors believe. Third, if you stop playing lawyer and try to think in terms of day-to-day, human reality, then there's no way a woman isn't worse off in terms of exercising her constitutional rights to an abortion than if there were no federal money, no clinics, and no doctors. So, let's get real. Remember, women are seeing the doctors about the topic of potential childbirth. When the doctors then only focus on certain family-planning options and give them the company line about abortion not being "appropriate," in a real sense, a woman's capacity to now choose abortion is diminished, mostly because it is a doctor giving her this information. For most of us, a doctor is not an ordinary conveyor of information and provider of services. In our society, he or she assumes an almost unique position of authority and status, all bound together by a relationship of total trust. There's even a privilege for doctors and their patients, isn't there? Doctors play the role of both moral and medical advisors in our society, and this is reinforced through literature, media, and shared cultural ex-

perience. No, the woman is not now in the same position as if there were no clinic or doctor, because all the imagery and reality of who a doctor is has been used by the government to reinforce the dogma of a particular administration and the doctor, wittingly or otherwise, has acted as an agent of these government values. This is not like simply handing out pamphlets about birth control options that fail to mention abortion. This is using federal subsidies to make people in positions of trust abuse that trust. Why not tell parents that they cannot take their children as tax exemptions unless they agree to sign a paper that, whenever the topic of abortion is raised, they use their parental powers to make it plain that they do not consider it "appropriate"? After all, why should the government be forced to subsidize parenting that does not inspire the kind of values the government desires? Or imagine that the government pays for a program of career counseling in the schools which is specifically intended to open students to the possibility of careers in "public service." Admirable. It's just that the government interprets "public service" as not including groups who oppose the government—environmental groups, advocates for the homeless, even public defenders—and all counselors are instructed not to mention these groups and to tell students that these groups do not represent "appropriate" careers. Do you really doubt that this program will completely manipulate the ability of at least some students to choose a career? And these counselors will have nothing like the almost mystical position of doctors. Most importantly, though it is true that the schools did not have to take money for the program, that is no answer in our real world. It is the students who would suffer from a deliberately deceptive system intended to distort their ability to make meaningful choices. I think you get my point.

I'm sure I do. Well, do you think the doctors in the family-planning clinics should give their patients some kind of disclaimer as to the scope of their services?

I sure do! And the patient should have to read it first thing. Now, don't get me wrong. I don't think these disclaimers fix the real problem that the woman is being denied advice she needs and has the right to expect. I just think that given the worst of all worlds, the disclaimer would be better than nothing.

Good. Why don't you draft one someday. Is that microwave caramel corn any good?

Why don't I draft it right now? [3 minutes later, the task was completed on the back of her grocery list . . .]

NOTICE TO PATIENTS

I am a doctor, but I am only allowed to discuss pre-pregnancy birth control with you.

I am not allowed to discuss abortion with you or counsel you about abortion.

If you ask me about abortion, I am not allowed to give my personal or professional opinion.

If you ask for a referral for an abortion, I am required to repeat something like, "This project does not consider abortion an appropriate method of family planning."

Again, this does not necessarily reflect my personal or professional opinion.

If you want the name of a facility where you can get counseling to help you decide whether or not to have an abortion, I can give you a list of such places.

What do you think, Mr. Mitchell?

Interesting. But that last one looks like a direct violation of the law.

As I understand it, the regulations say that you can't refer a woman for an abortion—right?

Right.

Counseling about abortion isn't the same as an abortion, is it?

Well, no.

I mean, after counseling you could very well decide not to have an abortion, right?

Right. But there's a little problem. Part of the regulations forbid the clinic from engaging in activities that "encourage, promote, or advocate abortion as a method of family planning."[12]

Let me think. As I understand what you've said, this list of forbidden activities under the regulation include things like lobbying for abortion, creating pro-abortion materials, giving money to abortion advocacy groups, and stuff like that.[13] *In other words, real pro-abortion activity. Sending someone to a counselor who, in fact, may make the woman realize that abortion is not the right solution for her, isn't pro-anything. It's like those voters' pamphlets that explain the pros and cons of ballot issues so you can make a good choice on how to vote. The pamphlets don't tell you how to choose, and neither does referral to counseling. Unless the regulation means not only that you cannot encourage abortion, but that you must affirmatively take steps to discourage abortion—and I don't think either the regu-*

12. *Rust v. Sullivan*, 111 S. Ct. 1765.
13. Id.

lation or list of forbidden activities read that way—then, technically, giving the list of counselors is not forbidden.

I don't think it's so simple. The regulations also specifically provide that the clinic *must* refer every pregnant woman "for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of the mother and unborn child."[14] This list, in turn, may not be weighted or otherwise used to encourage abortion. So unless you're arguing that abortion promotes the "welfare" of the unborn child because the child would have been better off not born—a position on which I sincerely doubt those drafting the regulations would concur—then you can't give women your list of abortion counselors.

The regulations are clear that pregnant women must be referred to providers on this list?

Absolutely.

But, do the regulations say that when you make this mandatory referral, you are forbidden to refer for anything else, except abortion?

Well, no; but the clear spirit . . .

I mean, you could also refer them to an eye specialist or skin doctor.

Sure.

Then, technically, I'm not forbidden to refer them to a counselor, and technical is good enough for me.

I can't believe it; they're closing this line! Wait. Checkstand #6 just opened. Every person for themselves! Give my love to the family, Mr. Mitchell!

And so it ended. I left with but one thought. Justices Rehnquist, Kennedy, White, Scalia and Souter, if you're going to discuss this case, confine yourself to eminent legal scholars and jurists, practicing attorneys, and law students. Some will agree with you, some will disagree; but you will be able to hold your own. But never, ever try to discuss *Rust v. Sullivan* with a lady in a grocery line. Trust me, you won't get the best of it.

---

14. Id.