2015

Picturing Moral Arguments in a Fraught Legal Arena: Fetuses, Photographic Phantoms and Ultrasounds

Jessica M. Silbey
Northeastern University, j.silbey@northeastern.edu

Follow this and additional works at: https://lsr.nellco.org/nusl_faculty

Part of the Constitutional Law Commons, and the Law and Gender Commons

Recommended Citation
https://lsr.nellco.org/nusl_faculty/14

This Article is brought to you for free and open access by the Northeastern University School of Law at NELLCO Legal Scholarship Repository. It has been accepted for inclusion in School of Law Faculty Publications by an authorized administrator of NELLCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.
Picturing Moral Arguments in a Fraught Legal Arena: Fetuses, Photographic Phantoms and Ultrasounds

By Jessica Silbey*

Abstract

This article investigates the movement in the U.S. that seeks to regulate the abortion decision by mandating ultrasounds prior to the procedure. The article argues that this reform effort is misguided not only because it is ineffective, but also because ultrasounds provide misleading information and are part of in shaming practices that degrade the dignity of women. Both of these problems violate the main tenets of Planned Parenthood of Southern Pennsylvania v. Casey (1992). Central to the article’s argument and novelty is that the pro-ultrasound movement’s mistake is both legal and cultural. It misunderstands the nature of visual technology by failing to comprehend the complex and contradictory messages that images communicate. It also misjudges the legal relevance of photographic images. By exploring cases on reproductive freedom and constitutional rights alongside aesthetic theory concerning photography and film, this article explains the legal and philosophical flaws of the mandatory-ultrasound legislation proliferating throughout the nation.

INTRODUCTION

I. A Case of Two States: Texas and Oklahoma
   A. Early Cases
   B. Fifth Circuit Approves Texas’s Mandatory Display and Description of Fetal Ultrasounds Requirements
   C. Oklahoma Supreme Court Invalidates Mandatory

* Professor of Law, Suffolk University Law School. Ph.D., J.D. University of Michigan; B.A. Stanford University. This article benefitted from participants at a conference hosted by the Legal Interdisciplinary Research Center (LIRC), Wollongong University School of Law (Wollongong, Australia) and audience members of a public lecture at Griffith University Law School (Brisbane, Australia). For helpful research assistance, I am grateful to Hannah Hastings, Evan Ward and Jared Crittenden. Thanks also to Nausicaa Renner for editorial advice, and the board members and staff at Planned Parenthood League of Massachusetts who provided information and context for this research. All opinions and errors are my own.
Display of Fetal Ultrasound

II. Competing Discourses of Choice, Consent and Information Disclosure
   A. Informed Consent and Casey
   B. Failure to Inform
   C. Impermissible Stereotypes

III. Ultrasound and the Ideology of the Image
   A. The Ideology of the Image
   B. Proof of Life? Whose? How?
   C. Historicizing Representational Practices and Applying Critical Theory to the Ultrasound Image

CONCLUSION

INTRODUCTION

Since the U.S. Supreme Court legalized abortion in the United States with Roe v. Wade in 1973,¹ individual states have legislated to restrict that right through the regulation of medical practice and speech. Recently, anti-abortion groups have been advocating for laws that compel a pregnant woman to view an ultrasound of her uterus and fetus. At their core, these mandatory ultrasound laws assume that after viewing the ultrasound, the pregnant woman will develop positive thoughts about imminently becoming a mother and decide to continue her pregnancy rather than terminate it. Or, these laws assume that women are too fearful to face the medical imagery and will therefore avoid the procedure altogether.

These assumptions rely on a misunderstanding of the ultrasound image, the circumstances of its viewing, and its female audience. This article aims to correct this mistake. It argues that these laws should be repealed, or else amended to reflect a twenty-first century understanding of how digital images create meaning. Without an updated understanding rooted in contemporary aesthetic and cultural theory of how images work on their audiences, the mandatory ultrasound laws thwart the very interests they claim to maintain: autonomy, freedom of choice and conscience, and objective, non-coercive decision-making.

Part I of this Article describes the legal framework in the United States by focusing on two recent, opposing court cases about the legality of mandatory ultrasound laws. Part II analyzes the competing discourses that animate the legal and cultural debates over reproductive choice, consent, and information disclosure. This Part exposes the inconsistencies in the mandatory ultrasound laws, many of which are built upon impermissibly archaic and overbroad stereotypes about women, rendering these laws irrational and constitutionally infirm. Part III discusses the ‘ideology of the image’ and critiques, as authoritative discourse, medical imaging generally and ultrasound imaging in particular that is intended to silence and coerce audiences. In the
context of women’s equality and reproductive liberty, this last Part draws on aesthetic theory and asks how photographs circulate and are meaningful in culture in order to interrogate how ultrasound images are relevant (if at all) to the debate concerning the morality and legality of abortion. The Article concludes by offering a final critique grounded in both constitutional and cultural theory that suggests repealing or amending the mandatory ultrasound laws. The first of its kind to analyze the abortion law from the perspective of visual images and their role in promoting or distorting justice, this Article contributes a needed perspective to the analysis of reproductive choice and U.S. constitutional law.

I. A Case of Two States: Texas and Oklahoma

From regulating the space and licensing of health clinics, to sexual education curricula, to mandating the provision of specific medical or non-medical services during clinic evaluations and procedures, anti-abortion pressures have been persistent and far-reaching since the *Roe v. Wade* decision in 1973.[^2] Mandating an ultrasound of the pregnant woman’s uterus is a recent trend in anti-

abortion politics. Its express goal is for the pregnant woman to visualize the embryo or fetus so that she contemplates her pregnancy in its visual dimension in addition to all the other ways she is experiencing it.

As of this writing, twenty-three states across the United States regulate the provision of ultrasounds by abortion providers. Ten of these states mandate that providers perform an ultrasound and offer to show it to the pregnant woman seeking an abortion. In three of the states, the woman must look at the ultrasound and the doctor must describe it to her by identifying the approximate gestational age and fetal length, pointing out organs if visible, and, in some cases, making the heartbeat audible through a microphone. In ten of the states, the ultrasound and description are mandatory, but the woman can decline to view the ultrasound. Fourteen states require that a woman be given the opportunity to view an ultrasound image if she requests it or if an

---

7 GUTTMACHER INS., supra note 3.
8 Id.
ultrasound is performed as part of the clinic’s routine medical procedure. In twelve of these twenty-three states, law mandates that during pre-procedure counseling, the pregnant woman be told about ultrasound prior to the abortion. This counseling and the ultrasound may happen several days or several hours before the procedure, depending on the mandatory state waiting periods. Because as many as eighty-seven percent of abortions in the United States terminate pregnancies that are less than twelve weeks old,⁹ mandatory ultrasounds for the purpose of visualizing the fetus are likely performed with a vaginal probe (a wand that is approximately an inch in diameter that is inserted and pressed on the woman’s cervix to get as close to the uterus as possible).¹⁰ Fetuses between five and nine weeks old (the length of the majority of aborted pregnancies) tend to be so small that abdominal ultrasounds produce less distinct images and sounds than the vaginal probe.¹¹

---

⁹ See GUTTMACHER INST., supra note 5.
¹⁰ The transvaginal ultrasound is a common procedure for early-stage pregnancies, but like all pregnancy-related treatment, it is voluntary for women. When requesting an abortion, the mandatory nature of an ultrasound, coupled with the fact that early-stage pregnancy ultrasounds are most often conducted transvaginally, makes the requirement of the ultrasound all that more invasive. See, e.g., First Trimester/Dating Ultrasound, ADVANCED WOMEN’S IMAGING, http://www.advancedwomensimaging.com.au/first-trimester-dating-ultrasound (last visited Mar. 16, 2015); Ultrasound: Sonogram, AM. PREGNANCY ASS’N (2006), http://americanpregnancy.org/prenatal-testing/ultrasound/.
¹¹ At week five, the embryonic period begins (when the spinal cord, heart and brain start to form), and the fetus is the approximate size of a pen tip. At seven weeks, the fetus is the approximate size of a pencil eraser and arm buds begin to grow. At nine
The legality of these mandatory ultrasound laws is in flux. Several courts have already held certain parts of them unconstitutional, enjoining their enforcement. Two recent cases, one from Oklahoma and another from Texas, are on opposite sides of the constitutional divide. The Oklahoma Supreme Court held in *Nova Health Systems v. Pruitt* that the mandatory ultrasound, requiring a simultaneous description of the fetus, violated the rule of *Planned Parenthood of Pennsylvania v. Casey*, the U.S. Supreme Court decision from 1992. By holding that *Casey* was the binding precedent, that court implied that the ultrasound procedure inflicted an undue burden on the woman in the exercise of her constitutional right to terminate a pregnancy of a non-viable fetus. The Texas case, *Texas Medical Performing Abortion Services v. Lakey*, also from 2012, decided by the United States Court of Appeals for the Fifth Circuit, held that a similar law, which required the projection of an audible heart beat where possible, weeks, the fetus begins to develop bones and is approximately three-quarters of an inch (or twenty millimeters) long. For more detailed medical facts, see *Fetal development: The 1st trimester*, MAYO CLINIC (July 10, 2014), http://www.mayoclinic.com/health/prenatal-care/PR00112.

---

14 *Nova Health Sys.*, 292 P.3d at 28.
did not create an undue burden on the exercise of a constitutional right and promoted informed consent for women seeking abortions.\textsuperscript{16} These cases suggest that the Supreme Court may eventually decide to grant certiorari to resolve this issue in light of \textit{Roe v. Wade} and its progeny.

\textbf{A. Early Cases}

\textit{Roe v. Wade} is primarily about the protection of the decision-making autonomy of women and their physicians as they consult over her medical treatment.\textsuperscript{17} \textit{Roe} held that the governmental interest in a nonviable fetus does not outweigh the woman’s liberty and her private relationship with a doctor concerning whether she should stay pregnant.\textsuperscript{18} The state could only justify its interference with a woman’s pregnancy during the first trimester if regulation was to preserve the woman’s health.\textsuperscript{19} Under \textit{Roe}, it is not until the fetus is viable and can live outside the woman’s body (after the second trimester) that the state can constitutionally interfere by restricting or prohibiting abortions for the purposes of protecting unborn fetuses for their own sake or

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{16}] \textit{Id.} at 576.
\item[\textsuperscript{17}] \textit{See} \textit{Roe v. Wade}, 410 U.S. 113, 156 (1973) (“Those [courts] striking down state laws have generally scrutinized the State’s interests in protecting health and potential life, and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy.”)
\item[\textsuperscript{18}] \textit{Id.} at 163–64.
\item[\textsuperscript{19}] \textit{Id.}
\end{itemize}
\end{footnotesize}
promoting childbirth.\textsuperscript{20}

Criticism of \textit{Roe} is manifold and varied. Some say it forced a decision judicially that would have been resolved state by state through the democratic process, fomenting a backlash against women and the pro-choice movement.\textsuperscript{21} Others criticize \textit{Roe} for its legislative reasoning, suggesting the opinion is highly specific and technical beyond the facts of the particular case.\textsuperscript{22} That critique says that \textit{Roe} resembles democratic lawmaking rather than the fact-dependent or more abstract decisions that courts are equipped to defend under the principle of \textit{stare decisis}.\textsuperscript{23}

Whatever the criticisms of \textit{Roe}, however, at its center is the protection of the choice that women have about how they care for their bodies in private consultation with their doctor in the early stages of pregnancy.\textsuperscript{24} The state’s interests in a woman’s pregnancy cannot be separated from the state’s interests in protecting her physical wellbeing and her individual liberty.\textsuperscript{25} Not until the fetus can potentially live

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{22} See PAUL BREST ET AL., \textit{PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS} 1405 (2006).
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{25} \textit{Id.} at 846–47, 850–51.
\end{itemize}
\end{footnotesize}
independently of the woman can the state have a compelling interest in protecting its life or its health over the woman’s reproductive freedom.\textsuperscript{26} The woman’s physical safety, however, remains paramount throughout her pregnancy, well past the fetus’s viability, which explains the exception for life and health of the woman in all laws that prohibit late-term abortions.\textsuperscript{27}

In 1992, \textit{Planned Parenthood of Pennsylvania v. Casey} blurred the focus on the private doctor-patient relationship.\textsuperscript{28} But in doing so, it reemphasized the decisional autonomy women have regarding their reproductive health before fetal viability.\textsuperscript{29} \textit{Casey} concerned several provisions of Pennsylvania law that required (1) spousal notification of the wife’s intention to terminate her pregnancy; (2) parental notification of a minor child’s intention to terminate her pregnancy; and (3) the provision of certain truthful information twenty-four hours before the abortion about the nature of the procedure, the health risks of abortion

\textsuperscript{26} \textit{Id.} at 870.
\textsuperscript{27} \textit{Id.} at 850–851.
\textsuperscript{28} \textit{Cf. id.} at 846–47, 870–71.
and childbirth, and the probable gestational age of the fetus.\textsuperscript{30} The Supreme Court struck down the spousal notification requirement, stating that it amounted to a veto by the husband over the wife’s decision, which impermissibly reflected outmoded and hierarchical relationships between marital partners.\textsuperscript{31}

The husband’s interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife . . . . A husband has no enforceable right to require a wife to advise him before she exercises her personal choices. If a husband’s interest in the potential life of the child outweighs a wife’s liberty, the State could require a married woman to notify her husband before she uses a post-fertilization contraceptive. Perhaps next in line would be a statute requiring pregnant married women to notify their husbands before engaging in conduct causing risks to the fetus. . . . A state may not give to a man the kind of dominion over his wife that parents exercise over their children. Women do not lose their constitutionally protected liberty when they marry.\textsuperscript{32}

For nearly the same reason, the parental notification provision was upheld as long as a judicial bypass was in place to protect the child against potential abuse from disapproving and violent parents.\textsuperscript{33}

Parents are guardians of their minor children, who are presumed to have diminished capacity when it comes to medical decisions about their bodies. Decisions about the health and welfare of children are

\textsuperscript{30} \textit{Casey}, 505 U.S. at 844.
\textsuperscript{31} \textit{Id.} at 898.
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Id.} at 899.
regularly delegated to (or shared with) their legal guardians. Requiring parental notification of a minor’s surgical procedure is consistent with long-standing precedent and does not violate the constitutional liberty (of privacy or decisional autonomy) of the pregnant minor.

The Court also upheld the ‘informed consent’ provision of the law by emphasizing that providing truthful, non-misleading information about the procedure to the pregnant woman ensures that a woman comprehends the full consequences of her decision.\(^34\) The Court wrote that information related to the procedure itself, risks of childbirth, and the “probable gestational age” of the fetus furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.\(^35\)

The Court further reasoned that forcing the physician to provide this information was not unconstitutional because the physician permissibly could opt out of the informed consent law in circumstances where, in the physician’s medical judgment, the provision of the information would severely and adversely affect the physical or mental health of the

\(^{34}\) Id. at 882.

\(^{35}\) Id.
Moreover, the Court found that informing the woman about the “probable gestational age of the fetus” was similar to informing kidney transplant patients about the risks and consequences of the transplant to the kidney donor. Although this kind of information may not directly relate to the health of the patient, it is relevant to the fetus (in the abortion context) and the donor (in the kidney context) and the Court said it did not unduly burden the woman’s right to terminate her pregnancy.

The Court went on to explain its ruling about the constitutionality of the provision of fetal information in this way:

A requirement that the physician make available information [about the fetus] . . . was described in [previous cases] as an outright attempt to wedge the Commonwealth’s message discouraging abortion into the privacy of the informed consent dialogue between the woman and her physician. We conclude, however, that informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant. As we have made clear, we depart from the holdings of [these other cases] to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when, in so doing, the State expresses a preference for childbirth over abortion. In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available

\[\text{Id. at 883.}\]

\[\text{Id.}\]

\[\text{Id.}\]
should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden. 39

This support for the state’s mandate of the provision of certain truthful and non-misleading information about the fetus to the pregnant woman is the foundation on which mandatory-ultrasound laws are based.

At best, the Casey Court considers the provision of this information a tool to empower women to make the right choice for themselves. Why would a doctor’s provision of truthful information be an obstacle to a woman’s exercise of her choice to terminate her pregnancy? Why would listening to truthful and non-misleading medical facts create a constitutional harm for a woman? In light of the unconstitutionality of the spousal provision in which women are presumed and constitutionally required to be independent from their spouses, this informed-consent provision imagines and presumes that women understand the information their doctor provides about their desired procedure, the risks involved in abortions and childbirth, and the fetus. Except in unusual circumstances, in which the doctor, in the exercise of her medical judgment, thinks providing the information will harm the patient, hearing truthful information about the medical

39 Id.
procedure and its various consequences is, to this Court, the hallmark of autonomy and strength.

Moreover, even if the provision of truthful and non-misleading information has the additional aim of expressing the state’s disapproval of the woman’s choice to terminate her pregnancy, the Court concludes that such motives do not render the mandated disclosures unconstitutional.\textsuperscript{40} As quoted above, the Court approves the delivery of truthful, non-misleading information that also delivers a message that childbirth is preferable, as long as the information informs the woman of her options.

This is the puzzle of informed-consent laws: we assess the information as truthful and non-misleading (a constitutional mandate if the information is required) at the same time as we tolerate the provision of the state’s own moral and subjective critique of abortion in the delivery of the information. Solving this puzzle requires us to consider which part of ultrasound technology and its information delivery is “truthful and non-misleading.” It further requires us to determine how the ultrasound image and its narration contain the state’s subjective message of moral disapproval of abortion. Finally, it requires us to consider whether either element goes beyond the line

\textsuperscript{40} Id.
Casey draws and creates an undue burden on the women’s constitutional right to privacy.

Otherwise put, do the mandatory ultrasound laws imagine and help constitute the empowered female citizen the way Casey describes? Or do they tread too far, intruding both physically and intellectually into the body and mind of the woman, both invading and degrading her independent status? Do these mandated disclosure laws impermissibly presume the woman mentally and morally incompetent in her choice to exercise a fundamental right not to become a mother? Or do they permissibly advocate on behalf of the state’s anti-abortion position to an otherwise competent woman in hopes that she will adopt the state’s choice as her own?

B. Fifth Circuit Approves Texas’s Mandatory Display and Description of Fetal Ultrasounds Requirements

One court, holding the ultrasound laws constitutional, takes the first route, approving the state law’s means and its message under Casey, presuming the woman competent but nonetheless in need of more counseling. Two other courts have held these laws unconstitutional, also presuming the woman competent but deeming the

mandatory counseling to violate the Constitution. The United States Court of Appeals for the Fifth Circuit, for instance, upheld the Texas Woman’s Right to Know Act (WRKA) in *Texas Medical Providers Performing Abortion Services v Lakey*. That law requires the physician who performs an abortion to perform and display an ultrasound of the fetus, make audible the heartbeat of the fetus for the woman to hear, explain to her the results of each procedure, and thereafter to wait twenty-four hours before performing the abortion. A woman may decline to view the images or hear the heartbeat, but she may only decline to receive the narration of the images upon certification that she falls into one of three narrow statutory exceptions.

Appellees contesting the constitutionality of the WRKA did not argue that the law inflicts an undue burden on a woman’s substantive

---

42 Nova Health Sys. v. Pruitt, 292 P.3d 28 (Okla. 2012) (citing *Casey* to hold that the ultrasound violated due process); *see also* Stuart, v. Loomis, 992 F. Supp. 2d. 585, 611 (M.D.N.C. 2014) (holding the mandatory “speech-and-display” law unconstitutional under First Amendment grounds), *aff’d* Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014).
43 667 F.3d at 579. The Texas law, *TEX. HEALTH & SAFETY CODE ANN.* § 171.012 (West, Westlaw through 2015) is reproduced in relevant part in the Appendix to this Article.
44 *TEX. HEALTH & SAFETY CODE ANN.* § 171.012(a)(4) (West, Westlaw through 2015).
45 The Texas law also requires that the physician who is to perform the abortion maintain a copy of the signed certification form for seven years and that a physician who violates the law’s provisions could lose their medical license. *Id.*
due process right to obtain an abortion. They seemed to admit without protest that a woman’s decision whether or not to terminate her pregnancy remains at all times with her and that the state has not unconstitutionally inhibited that decision. Instead, they focused on the First Amendment harm of compelled speech (and compelled listening). They also attempted to distinguish Casey by asserting the existence of “qualitatively different” disclosures required under the Texas law than those required under the Pennsylvania law at issue in Casey. To these points, the appellate court responded that conducting sonograms and detecting fetal heartbeats are routine measures in pregnancy medicine today and thus not “medically unnecessary” as appellees contended. The appellate court saw no material difference between the disclosure requirements in Casey, which require making certain information “available” to patients, and the Texas law, which requires that more detailed and more graphic disclosures be both displayed and described to the patients. Indeed, the Court of Appeals for the Fifth Circuit admitted that “the [Texas] statute’s method of delivering this information is direct and powerful, but the mode of

46 Lakey, 667 F.3d at 579.
47 Id. at 578–79.
48 Id. at 578.
49 Id.
50 Id. at 579.
delivery does not make a constitutionally significant difference from
the ‘availability’ provision in *Casey.*"\(^51\) Part III of this article will have
more to say about this mistaken assertion that the “mode of delivery”
does not make a difference. As seen in the debates surrounding cameras
in the courtroom and electronic surveillance, the medium matters.\(^52\)

As to the medical relevance of the information disclosed to the
patient, the court incorrectly stated that the provision of a sonogram
and discerning a fetal heartbeat are “medically necessary” for the
mother and fetus because they are routine measures in pregnancy
medicine today.\(^53\) The court conflated the practice of caring for a
woman who is pregnant with the treatment of a woman who seeks to
terminate her pregnancy. Imaging a pregnancy that a woman expects to
carry to term is not medically necessary except in indicated conditions
(and is often only performed approximately two or three times during
the entire pregnancy to assess the health of the growing fetus).\(^54\) And in
the case of terminating pregnancies, medical providers dispute
altogether the necessity of ultrasounds prior to terminating a

\(^{51}\) *Id.*

\(^{52}\) As Marshall McLuhan famously said, “the medium is the message.” *MARSHALL

\(^{53}\) Lakey, 667 F.3d. at 579.

\(^{54}\) Tracy Hampton, *Ultrasounds During Pregnancy—How Many and How Often?*,
*BETH ISRAEL DEACONESS MED. CTR.* (Sept. 2012),
http://www.bidmc.org/YourHealth/Health-
Notes/PrepForPregnancy/ChildbirthPrep/Ultrasounds.aspx.
pregnancy. They are certainly not universally necessary. Ultrasounds may be important for locating an embryo in the uterus or diagnosing ectopic pregnancies. For most abortions, however, ultrasounds provide redundant information.

Additionally, listening to the fetal heartbeat is irrelevant to the abortion procedure, which aims to terminate the pregnancy. Indeed, many fetal heartbeats are indiscernible at early stages of pregnancy when most abortions are conducted. Hearing or seeing the heartbeat

---


58 The embryo’s heart does not develop until week five and does not start beating regularly until weeks six and seven. Susan Storck, Fetal Development, MEDLINE PLUS, NAT’L INST. OF HEALTH (Sept. 3, 2013), http://www.nlm.nih.gov/medlineplus/ency/article/002398.htm. Most fetal heartbeats are not discernable on an ultrasound machine until after this period. See Fact Sheet: Induced Abortion in the United States, supra note 5 (stating that one-third of abortions in the U.S. are conducted within the first six weeks of pregnancy, and eighty-nine percent in the first trimester (first twelve weeks)). Famously, the Ohio Legislature failed to make audible the heartbeat of a nine week-old fetus in support of a “fetal heartbeat” bill. Aaron Marshall, Ultrasound Images of two fetuses shown to lawmakers during ‘heartbeat bill’ hearing, CLEVELAND.COM, (Mar. 2, 2011), http://www.cleveland.com/open/index.ssf/2011/03/ultrasound_images_of_two_fetus.html; see also Connie Schultz, A Full-Scale Attack on Reproductive Rights, CLEVELAND.COM (Mar. 6, 2011), http://www.cleveland.com/schultz/index.ssf/2011/03/a_full-
can help discern the relative health of the fetus, but that is irrelevant when the woman has come to her doctor to end her pregnancy. The appellate court conflated information regarding the abortion procedure as *all* being medically relevant because they further the state interest of discouraging abortions. But this confuses *moral* relevance in furthering the opinion of the state with *medical* relevance that is a matter for medical practice norms. As *Roe v. Wade* accurately describes, and *Casey* did not disturb, the medical norms of protecting private doctor-patient relationships and patient decision-making should guide constitutional evaluations of state regulations of medical practice, especially those that concern bodily autonomy and personal liberty.

The appellate court contended that “denying [a woman] up to date medical information is more of an abuse to her ability to decide than providing the information,”\(^59\) and “[o]nly if one assumes the conclusion of Appellees’ argument, that pregnancy is a condition to be terminated, can one assume that such information about the fetus is medically irrelevant.”\(^60\) The error of these assertions is that they assume as fact the legal conclusions the court eventually reached (an error of circular reasoning), which is that all information about the fetus is

\(^{59}\) Tex. Med. Providers Performing Abortion Serv. v. Lakey, 667 F.3d 570, 579 (5th Cir. 2012).

\(^{60}\) Id.
relevant to the woman’s decision whether or not she wants to be a mother imminently. In the best possible light, the appellate court assumed that there is no such thing as too much information and discussion about the fetus that could have the effect of erecting a substantial obstacle in front of the woman seeking to terminate her pregnancy. The court implied that women seeking abortions should face the consequences of their actions—and that no amount of true information can dissuade a woman who is sure of her choice. This is a view of women, as in Casey, as tough and independent. The court supported Texas’s view that if women bend or waiver in the face of truthful information, however or whenever delivered, their resolve has successfully been tested and the worst that happens is that they have submitted to guidance and persuasion regarding the state’s normative values preferring childbirth to abortion.

C. Oklahoma Supreme Court Invalidates Mandatory Display of Fetal Ultrasounds

The Oklahoma law invalidated in Nova Health Systems v. Pruitt parallels the Texas law in all respects relevant for this analysis except two: the Oklahoma law mandated a vaginal probe where it would
produce a clearer ultrasound image, and it had no exceptions to the requirement that women view the ultrasound display.\textsuperscript{61} The Oklahoma trial court struck down the Oklahoma law as violating the right of privacy and bodily autonomy protected by the Oklahoma Constitution.\textsuperscript{62} The Supreme Court of Oklahoma took the case on direct appeal and upheld the trial court’s decision on federal grounds, applying \textit{Casey}’s undue burden test. Whereas the United States Court of Appeals for the Fifth Circuit largely upheld the Texas law under a First Amendment analysis, determining the law did not unconstitutionally compel speech,\textsuperscript{63} the Supreme Court of Oklahoma applied a due process analysis, albeit in a highly conclusory fashion. In a per curiam four-paragraph opinion, the Oklahoma Supreme Court said that “[t]he challenged measure is facially unconstitutional pursuant to \textit{Casey}. The mandate of \textit{Casey} remains binding on this Court until and unless the United States Supreme Court holds to the contrary.”\textsuperscript{64}

Factual and legal justification for the Oklahoma Supreme Court’s ruling can be found in the trial court briefing. The undisputed facts provided to the court were that while gestational age is directly

\textsuperscript{61} \textsc{Okla. Stat. Ann.} tit. 63, § 1-738.1A (West, Westlaw through 2012)??. Relevant text of the Oklahoma law is in the Appendix to this article. Full text can be accessed here: [http://www.ecapitol.net/viewtext.wcs?HB2780_INT~52nd


\textsuperscript{63} \textit{Lakey}, 667 F.3d 570, 584 (rejecting First Amendment and vagueness claims).

\textsuperscript{64} \textit{Id.} at 28.
relevant to the abortion procedure and to the choice between “having a surgical abortion or a medication abortion, ultrasound imaging as a visual aid to the patient is unnecessary to provide that information . . . just as it is not necessary to use laboratory equipment as a visual aid when providing information about blood or urine results.”65 Further, the court considered the undisputed facts from experts and peer-reviewed medical literature that “seeing . . . an ultrasound image or hearing one described has no impact on a woman’s decision” to continue a pregnancy, and is therefore unhelpful and plausibly redundant, although it does cause significant distress.66 The trial court record contained evidence of women, undressed from the waist down, undergoing a vaginal ultrasound, plugging their ears and contorting their body to avoid seeing and hearing about the ultrasound display the physician was required to show and narrate.67 Also clear and undisputed at trial was the existence of a physician’s ethical duty,

65 Id. at para. 16.
66 Id. at 17.
67 “One physician testified that her patients were so disturbed by the procedure that they stuck their fingers in their ears in an attempt to avoid hearing more.” Brief for Resp’ts Nova Health Sys. in Opp’n to Pet. for Cert. at 20, Pruitt v. Nova Health Sys., 134 S.Ct. 617 (2012) available at http://sblog.s3.amazonaws.com/wp-content/uploads/2013/06/Response-by-Respondents.pdf (citing R. on Appeal: Tab 17, App. 21, at 102:11–14). More of this evidence was provided in Stuart, v. Loomis, 992 F. Supp. 2d 585, 602 (M.D.N.C. 2014) and described again by the Fourth Circuit affirming the district court. See Stuart v. Camnitz, 774 F.3d 238, 252–53 (4th Cir. 2014). It was on the strength of these facts and the irrationality of “informed consent” law, which mandates this kind of speech but also allows women to cover their eyes and block their ears, that the Stuart court held the “speech-and-display” laws unconstitutional under the First Amendment. Id.
thwarted in Oklahoma under the law in question, to avoid performing interventions that provide no medical benefit to a patient.\textsuperscript{68}

When the above facts were considered in light of \textit{Casey}’s undue burden standard, the court ruled in favor of the plaintiffs, concluding that the state law placed a substantial obstacle in the path of women seeking abortions for two main reasons. First, it posed an obstacle because it required women to submit to unwanted, unnecessary and irrelevant medical procedures in order to obtain an abortion. The state’s interest in persuading the woman to refrain from terminating her pregnancy by requiring a physically invasive vaginal or abdominal ultrasound does not override her constitutional interest in physical freedom and self-determination when being provided medical care. Second, the Oklahoma law erected an undue burden because it subjected women to demeaning and humiliating treatment as a condition of obtaining an abortion. Submitting to a vaginal ultrasound and being forced to listen to and see the results of an ultrasound while physically restrained in stirrups and undressed from the waist down is degrading. The Oklahoma statute created this physically and emotionally distressing circumstance for pregnant women only,

\textsuperscript{68} Brief of Resp’ts Nova Health Sys., supra note 67, at 10. See also Stuart v. Loomis, 992 F. Supp. 2d 585, 604 (M.D.N.C. 2014) (finding that North Carolina cannot legislate a “rigid prescription as to what a patient medically and ethically should be told.”).
strongly implying that the state believed that these women alone require coaxing and regulation of their decisions concerning their physical condition, medical treatment, and future life. The state appeared to believe that pregnant women are less fit than either men or non-pregnant women to make their own choices about their medical and emotional wellbeing. And it is this implication that violates *Casey*’s undue burden standard and its equal dignity approach to privacy jurisprudence.  

The portrayal of vulnerable pregnant woman and the harassing medical process conflicts with *Casey*’s assumption of tough, resilient women and a medical protocol that enlightens, rather than manipulates, women.  

It also conflicts with *Roe*’s focus on protecting the private doctor-patient relationship. For the state to require the provision and display of physically invasive and medically unnecessary ultrasounds, with the express purpose of convincing a woman to change her mind about her choice to terminate her pregnancy, intrudes upon the physician’s medical judgment and the patient’s bodily and decisional autonomy in response to that judgment.  

As the appellee, Nova Health Systems, wrote in opposition to Pruitt’s petition for certiorari to the 

---

70 *Cf. Casey*, 505 U.S. at 883.
71 *Stuart*, 992 F. Supp. 2d at 604.
United States Supreme Court, “[t]he burdens that the [Oklahoma] Act imposes on a woman’s right to seek an abortion are so severe that they have not just the effect, but indeed ‘the purpose . . . of presenting a substantial obstacle to a woman seeking an abortion,’” rendering them unconstitutional under Casey.\textsuperscript{72}

II. Competing Discourses of Choice, Consent and Information Disclosure

The impetus behind mandatory ultrasounds is to force a reckoning between the pregnant woman and her fetus, which will become her child absent a terminated pregnancy. Although couched as “informed consent,” the ultrasound provides no new information to the pregnant woman.\textsuperscript{73} She knows she is pregnant. She is visiting a reproductive health center precisely for that reason. She knows she has the capacity to become a mother of this child. She seeks to avoid that destiny. To be sure, there are isolated incidents in which a pregnant woman has sued her doctor and abortion provider for not stating with sufficient clarity that an abortion will kill the fetus inside her, which is

\textsuperscript{72} Br. of Resp’ts Nova Health Sys., supra note 67, at 22. The Stuart court, did not reach the undue burden or due process argument and rested its decision on First Amendment grounds.

\textsuperscript{73} Sawicki, supra note 57, at 19 (noting that physician has no obligation to disclose what is obvious to the patient).
her child. But we must assume that such cases are infrequent and rarely, if ever, succeed. Informed consent laws are meant to protect the reasonably prudent person, not the unreasonable outlier.

A. Informed Consent and Casey

Informed consent laws require the provision of information relevant to the medical procedure, which includes the reason for and the nature of the medical procedure, its likelihood of success, its material risks, any alternatives, and the consequences of doing nothing. The display of laboratory results, X-rays, or ultrasound images is rarely part of the “information” required to be provided to patients under informed consent laws. As Justice Blackmun wrote in his concurrence in Casey,

[T]his type of compelled information is the antithesis of informed consent . . . and goes far beyond merely

---

74 Acuna v. Turkish, 930 A.2d 416 (N.J., 2007). Plaintiff conceded she had understood “she had growing within her the beginnings of human life that would result in the birth of a living child if the pregnancy continued without complications or intervention.” Id. at 422. But she alleged her doctor did not tell her that the abortion procedure was “intended to kill that family member.” Id. at 403. The trial court dismissed her lawsuit and the New Jersey Supreme Court upheld the dismissal. Id.

75 See Sawicki, supra note 57, at 19. “[T]he standard physician disclosure obligation under the law may be that of a ‘reasonable physician’ or ‘reasonable patient’: the physician would be liable in tort law if, under the reasonable physician standard, she failed to disclose the information her colleagues customarily disclose, or, under the reasonable patient standard, she failed to provide the information a reasonable patient would deem material. Physicians generally have no duty to disclose information that would be obvious to the average patient.” Id. (case citations and footnotes omitted).

76 Id.
describing the general subject matter relevant to the woman's decision . . . . That the Commonwealth [of Pennsylvania] does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion character of the statute and its real purpose . . . . Just as a visual preview of an operation to remove an appendix plays no part in a physician's securing informed consent to an appendectomy, a preview of scenes appurtenant to any major medical intrusion into the human body does not constructively inform the decision of a woman of the State's interest in the preservation of [her] health . . . .

It is worth considering analogies to other forms of “visual information” that might be provided to patients but are not. We could agree that showing patients the contents of their bodies (e.g., an inflamed appendix) or a video of their impending procedure (e.g., to replace a heart valve) would be unnecessary to procure informed consent for a patient choosing to undergo an appendectomy or open-heart surgery. Indeed, it might actually be an inadvisable deterrent that causes unhealthy anguish, anxiety, and delay. Blackmun went on to say that

[T]he State's information must be ‘calculated to inform the woman's free choice, not hinder it,’ the measures must be designed to ensure that a woman's choice is ‘mature and informed,’ not intimidated, imposed, or

---

impelled. To this end, when the State requires the provision of certain information, the State may not alter the manner of presentation in order to inflict ‘psychological abuse,’ designed to shock or unnerve a woman seeking to exercise her liberty right. This, for example, would appear to preclude a State from requiring a woman to view graphic literature or films detailing the performance of an abortion operation.78

The rest of the *Casey* Court did not explicitly endorse or refute Blackmun’s specific assertion that “graphic literature” or “films detailing . . . an abortion” would be impermissible because they inflict “psychological abuse” and are designed to unnerve a pregnant woman seeking an abortion.79 The question is whether, in the case of mandatory ultrasounds, graphic details that shock are nonetheless sufficiently “informative” to counterbalance whatever burden they pose to the pregnant woman to pursue her desired course of treatment. For many reasons, they are not “informative,” gutting the rationale for the law.80 This leaves only its many burdensome and intrusive effects on women, violating the principles set forth in *Casey*.

78 *Id.* (emphasis in original).

79 I suppose the mandatory-ultrasound laws intend to achieve precisely this result: to be graphic, to be detailed, and to shock a woman by forcing her to see images of the insides of her body and specifically the fetus she does not want inside her.

80 Were states to justify mandatory-ultrasound laws as a form of persuasion rather than informed consent, there might be a rational basis for the law under ordinary deference to state legislation. *See* Rebecca Tushnet, *More than a Feeling: Emotion and the First Amendment*, 127 Harv. L. Rev. 2392, 2420 (2014) (discussing the state’s permissive use of facts and purposes under rational basis deference post-*Lochner* era). But justifying the mandatory disclosures in this way makes explicit that the state is requiring the doctors to persuade on the state’s behalf. Making clear that the doctor is a mouthpiece for the state is a step in the right direction for the appropriate legal analysis, as Part III describes in more detail.
B. Failure to Inform

The purpose of the mandatory-ultrasound laws is not to inform but to provide the state with the uniquely persuasive opportunity to speak against abortion through the woman’s physician. This should not be permitted under the First Amendment, in part because it degrades the autonomy interests of the speaker (the physician), but also because it harms the dignity interests of the listener. \(^8^1\) Some pro-ultrasound advocates argue that the requirement of “information delivery” via ultrasound images is a hindrance caused not by the state but by the pregnant woman’s moral uncertainty with her choice. Under this view, mandated ultrasounds are not state-created hurdles and are not unconstitutional under \textit{Casey} and its progeny. \(^8^2\) But this ignores the different treatment for abortions than for other medical procedures, hiding the real purpose of the laws, which is to convert and intimidate, revealing its governmental purpose achieved through forced speech. Indeed, most people on both sides of the issue would agree that

\(^{81}\) See \textit{Wooley v. Maynard}, 430 U.S. 705, 716 (1977) (“Where the state’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.”).

\(^{82}\) “The only thing preventing the woman from having an abortion is that she changed her mind after seeing an ultrasound. The state’s intervention has been simply to persuade, not to block.” Carol Sanger, \textit{Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice}, 56 UCLA L. REV. 351, 400 (2008) (rehearsing this argument but not endorsing it).
mandatory-ultrasound laws do not inform the pregnant woman of new information she did not already know or contemplate about her condition or her future. Instead, the goal of the laws is to emphasize and underscore the state’s strong interest in the woman carrying the fetus to term for its own sake, despite whatever countervailing interests the woman and physician might have.  

83 The state’s current and preferred mechanism to achieve this goal is to force women to learn about the fetus in what it perceives to be the most authoritative and influential manner: with real-time visual images of the fetus inside the uterus and as anatomically described by the performing physician or ultrasound technician. But the state “does not have a compelling interest in each marginal percentage point by which its goals are advanced.” 84 In these circumstances, the state appears to believe both that the ultrasound image simply conveys information in an unbiased and objective manner and that the ultrasound image is qualitatively different than an oral recitation of facts. Both cannot be true, revealing the lack of logic behind these mandatory-ultrasound laws.

83 The state’s interest in fetal life and the future baby is anemic given that the state does not (nor can it under current constitutional law) regulate the pregnant woman’s food intake or other lawful behavior that causes risk to the fetus, nor does it provide anything but the basic sustenance (food, shelter and basic education) for the pregnant woman or child upon birth and during the child’s minority.

As Carol Sanger writes:

The core and motivating belief is that a woman who sees her baby’s image on a screen will be less likely to abort. . . . [Compulsory-ultrasound laws force women to] interrogate her decision over and over again. Do you understand what you are about to do? Think harder, think longer: There is still time to revoke. Mandatory ultrasound raises the stakes by producing an imagined showdown between the woman and her accuser, the fetus. . . .

Most scholars and commentators agree that this is the guiding motivation behind the laws because *Casey* demands that women be audacious and stalwart in the face of the intentionally persuasive government speech.86 Despite “graphic . . . films” intending to inflict “psychological [trauma] . . . to unnerve a woman seeking to exercise her liberty right,”87 a woman must be strong enough to face the ultrasound rendering, the fetus’ cloudy image on the screen, and the fact of her unwanted pregnancy one last time before choosing to end it. But these films are qualitatively different from the oral recitation of facts of a pregnancy, as Blackmun makes clear. As Part III will discuss

86 The exception in *Casey* is when women are victims of domestic violence, which *Casey* describes as a situation that degrades and demeans women to the point of rendering them unable to exercise their autonomous choice regarding their reproductive destiny. See Planned Parenthood of Se. Pa. v. *Casey*, 505 U.S. 833, 888–93 (1992). The irony here is that the Court condones a state’s influence over a woman’s choice whether or not to become a mother but rejects a spouse’s influence. Paternalism by the state is permitted, even applauded, but a husband’s paternalism is constitutionally infirm.
87 *Casey*, 505 U.S. at 937.
in more detail, film language is unlike oral discourse in legally relevant ways.

Additionally, the mandatory speech confuses more than it clarifies. The required “information” provided by ultrasounds confuses current facts of a physical state (“you are pregnant”) with the ideology of motherhood (“you should remain pregnant and become a mother”). Women seeking an abortion are not confused about the fact of their physical state or the effect an abortion has on that physical state. Without medical utility, however, compelled ultrasounds interfere with the private and autonomous relationship between the pregnant woman and her physician and may cause confusion. Requiring doctors to speak on behalf of the state, or to comingle their advice with that of the state, may reasonably be a source of confusion for women.88 Most physicians describe mandatory disclosures concerning pre-abortion ultrasounds as onerous because they interfere with the carefully established trust and authority between doctors and patients.89 Patients trust doctors to tell them objective truths about their health and prognosis and to be neutral in the face of moral or religious components to possibilities for their care. Nonmedical information provided by a physician but on behalf of

the state distorts the doctor-patient relationship, shifting the power dynamic from one where the physician enables a patient’s free choice to one in which the physician, under threat of state sanction, persuades the patient to exercise a particular choice. In this vein, mandatory ultrasounds do not project objective information, but instead accomplish the opposite. Cloaked in the guise of a white coat and selflessness (“I am only here to help you; I have your best health interests at stake”), the forced delivery of ultrasound images from a medical professional that resemble scientific information, but that are really projections of a state’s desire for women to become mothers, confuses and misleads patients as to their doctor’s intention and interests. These laws do not provide room for (nor do they clearly allow) doctors to say, “I am obliged by law to show and describe this ultrasound to you, but I disagree with this requirement,” a stipulation that would disentangle the doctor’s counsel from the state’s speech. In other words, the state misleads women by cloaking its message in the perceived neutrality of doctor’s speech and imaging technology.

Reva Siegel writes that “[d]ignity-constraints on misleading counsel apply if the government is not open about the fact that it is engaged in advocacy or committed to inculcating a particular moral
viewpoint [through its required-ultrasound speech and display laws].”

This argument supports those supra, and brings us to the final point of this section, which is that mandatory ultrasound laws commit privacy and dignity violations by inserting the state into the abortion decision in the way that it does. If we start with the proposition that women are independent and capable decision-makers in their reproductive choices, a position equality jurisprudence requires, speech and display laws, such as mandatory ultrasounds, violate fundamental privacy rights and disrupt the autonomy the state claims to foster. They do so in several ways.

First, these laws mandate a physical intrusion via vaginal ultrasounds or trans-abdominal ultrasounds, forcing a woman to produce evidence for the state of her own pregnancy of which there is no doubt. Second, they aim to deliver emotionally intense and detailed reports about the fetus by embellishing its current biological existence, which is as an underdeveloped human being, while simultaneously gesturing toward its potential future as a healthy, born child. This kind of account preys on fears or insecurities a patient might have about her circumstance: Is she a bad person? Could she be a good

---

90 Siegel, supra note 2, at 1760.
91 As discussed supra, Casey relies on this assumption. See Casey, 505 U.S. at 883.
92 Sanger, supra note 82, at 402.
mother? Is this anyone else’s business but her own? Neither the state nor a physician should excite the emotions of patients in order to persuade them to make a particular decision. This is presumptively impermissible as a form of coercion and therefore violates central tenets of the informed-consent doctrine.  

Third, these laws mandating description and display of ultrasounds intrude intellectually into a patient’s decision-making autonomy, a form of autonomy protected through U.S. constitutional jurisprudence. Similar to the decision whether or not to engage in religious exercise, whether or not to be married or divorced, whether or not to engage in political speech, and whether or not to treat one’s own illness, making the decision whether or not to be a parent free from coercion is central to what it means to be an independent and free person with dignity in our constitutional democracy.  

Casey says “what is at stake is the woman’s

---

93 Sawicki, supra note 57, at 17.
95 U.S. CONST. amend. I.
98 Union Pacific Ry. Co. v. Botsford, 141 U.S. 250 (1891); see also Schloendorff v. Soc’y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914) (Cardozo, J.) (“Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without the patient’s consent commits an assault, for which he is liable in damages.”), abrogated by Bing v. Thunig, 143 N.E.2d 3 (N.Y. 1957).
right to make the ultimate decision, not a right to be insulated from all others in doing so.”\textsuperscript{100} But \textit{Casey} also holds that the state’s regulations “must be calculated to inform the woman’s free choice, not hinder it.”\textsuperscript{101} With mandatory fetal ultrasounds, the State deliberately intrudes into the privacy of a woman’s judgment concerning the fundamental life choice of becoming a parent with the goal and effect of encumbering her freedom of mind and conscience under the most personal of circumstances.\textsuperscript{102}

\section*{C. Impermissible Gender Stereotypes}

The rhetoric of courage, autonomy and choice implicit in the pro-ultrasound laws whiplashes women and traps them between two incompatible and unrealistic identities. By mandating an ultrasound, the state appears to say something like this:

\begin{quote}
In order to make a decision of this significant moral magnitude, you must demonstrate substantial resilience and certainty such that you shall look upon your fetus in utero and agree to kill it. Being this strong, you are free to exercise your choice under these circumstances. But if you are not this strong, you must become a mother, with all the responsibilities and strength that requires.
\end{quote}

\begin{flushright}
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{Id.}
\textsuperscript{102} “In authorizing regulation that communicates the community’s values with the aim of influencing a woman’s abortion decision, \textit{Casey} deviates from informed consent premises.” Siegel, \textit{supra} note 2, at 1758.
\end{flushright}
Embedded in this hypothetical and illogical paean to a woman’s strength and autonomy is an inconsistency concerning female gender stereotypes that otherwise renders so many laws unconstitutional under U.S. equality jurisprudence: a woman is presumed capable of being a mother—with the strength and resilience that requires—simply because she has the capacity to reproduce, whether or not she feels or is in fact ready to undertake the responsibilities and physical burden of motherhood. However, a woman is not presumed capable to make the other choice—not to become a mother—without undergoing state challenges to her decision. And this is because the first path of motherhood is her biological destiny; refusing it by terminating her pregnancy undermines accepted norms of gendered behavior.  

Otherwise put, accepting one’s maternal future in the face of the hurdles to the abortion may be noble (she has chosen life after all!), but it is also a sign of weakness: she could not stand up to the state’s proffer and persuasion. By contrast, the choice to abort having faced the state’s hurdles is immoral (she chose death after all!), but it is also a sign of determination and courage: she withstood the state’s proffer and persuasion. Should we accept laws that paint women in this bind of

103 “To the extent we believe that women requesting abortions are expressly rejecting their maternal identity, we should reject mandated disclosures that reinforce this identity against the patient’s will.” Sawicki, supra note 57, at 35.
character and fitness in the process of choosing essential features of their future? If a pregnant woman succeeds in the face of the state’s challenge, she is allowed to exercise her choice but she is immoral. If she is scared or deterred by the prerequisites to the abortion procedure, she becomes a mother. This latter path is somehow simultaneously the more moral choice as well as the path that (according to the state) weaker or indecisive women will more likely take. It is also the path the state encourages women to follow. In other words, the state hopes that women are too weak and uncertain in the face of pregnancy and the state’s obstacles such that, instead of women fortifying their will, they yield to biological destiny and the state’s preference for childbirth. This conflicts with the essential tenets of *Casey.*

In addition to presuming that women can and will be capable mothers simply by virtue of being female, these laws presume women have a diminished capacity to comprehend medical information. At the

---

104 It is no answer to say that a woman who carries her pregnancy to term is both weak and brave, because she can always give up her child for adoption. A woman who gives birth is always a biological mother, whether or not she is also the parental guardian of the child born. She lives with the experience of pregnancy and labor and the knowledge that her biological child lives in the world unknown to her and she to it. People who assert that the adoption route is an equal and viable alternative to abortion would force women to experience permanent physical and emotional upheaval that is worthy of sainthood. Perhaps that is in keeping with the image of women that these laws commend, but self-sacrifice and tribulation should not be the prerequisite for claiming basic liberties. This seems especially true when the countervailing interest of protecting early fetal life is a highly contested moral (if not also religious) proposition. Indeed, the consensus and weight of the debate lies with protecting the health and life of the pregnant woman above the life of the fetus, even after fetal viability.
heart of this presumption are the stereotypes that women lack intellectual capacity (relative to men) to understand medical and scientific information about the world or themselves and thus also the ability to make rational and informed decisions without state guidance. Further, they are believed to be more emotional and susceptible to distorting influences regarding facts and information they may not understand (especially about children). State legislative records make clear that behind the compelled speech and display laws surrounding abortion is the long-discredited and insulting stereotype of women’s limited capacity for scientific comprehension and their irrational temperament.105 Under the auspice of the “politics of protection” as Reva Siegel has written, these laws impermissibly presume women to be frail and in need of the state’s firm and guiding hand.106 Equal protection jurisprudence and the Supreme Court doctrine concerning reproductive rights have routinely struck down laws based on assumptions such as these.107

105 See Siegel, supra note 2, at 1705, 1726; but cf. Sawicki, supra note 57, at 19 (citing Reva Siegel and her references to South Dakota’s law); see also Maya Manian, The Irrational Woman: Informed Consent and Abortion Decision-Making, 16 DUKE J. GENDER L. & POL’Y 223, 225–26 (2009); Zita Lazzarini, South Dakota’s Abortion Script—Threatening the Physician-Patient Relationship, 359 NEW ENG. J. MED. 2189, 2190–91 (2008).
106 See Siegel, supra note 2, at 1726 (discussing the South Dakota legislative history at length).
III. Ultrasounds and the Ideology of the Image

A. Ideology of the Image

A primary weakness of the mandatory ultrasound debate concerns its failure to address how the ultrasound image is significant—what it means to patients, doctors and the public. How images are meaningful to their audience requires a combined study of aesthetics and culture. Judges and lawyers routinely interpret written texts of diverse varieties (legislative history, deposition transcripts, statutes, constitutions, contracts) as well as oral testimony. Increasingly, judges and advocates are called to interpret video and film footage as well, although their critical capacities with regard to the moving image remain underdeveloped.\(^\text{108}\)

Nonetheless, studying how photographic images (moving or still) are meaningful requires understanding the “ideology of the image,” a disciplinary approach to interpreting visual texts that has a long pedigree.\(^\text{109}\) An analysis of the pre-abortion ultrasound is


\(^{109}\) See generally BILL NICHOLS, *IDEOLOGY AND THE IMAGE: SOCIAL REPRESENTATION IN THE CINEMA AND OTHER MEDIA* (1981); WALTER BENJAMIN,
incomplete without situating it within the cultural history of the visual arts and of realism (in painting, photography or film) and its explanation of the construction of “reality” in diverse visual media.

To be sure, medical imagery has revolutionized patient care. It is an unusual physician who would forgo medical imaging as part of diagnosis and treatment when the benefits of diagnostic clarity and treatment outcomes outweigh the costs of the procedure. But physicians (and, more accurately, radiologists) are the first to admit that imaging is an interpretive practice, and there are images (and opinions about images) that are better than others for the purposes they serve.¹¹⁰ Central questions for medical imaging that medical professionals consider are: What is the image used for? And how does it help the patient outcome?

These appear to be very different questions than those that trigger the use of mandatory ultrasounds prior to abortions. Proponents

¹¹⁰ Neal Feigenson & Christina Spiesel, Law on Display: The Digital Transformation of Legal Persuasion and Judgment 127–30 (2009) (discussing the ambiguity of fMRIs and the need for interpretation and direct and cross-examination of experts). Although medical professionals do not call “reading” ultrasounds or other scientific visual evidence “interpreting cultural texts,” that is what they are doing. Taking images and interpreting them within the context of medical care requires attention both to biological science as well as the social sciences, including the study of culture and its production and dissemination of visual images with particular meanings for particular audiences.
of mandatory ultrasounds explain that ultrasounds demonstrate “facts” and the “truth” about fetal development, which may be ignored by or lost on women seeking abortions. Proponents of ultrasounds and opponents of abortion say that “[u]ltrasounds cut through all th[e] evasive rhetoric. They show the reality of the unborn baby.” But images themselves must be understood as rhetorical. In fact, the state itself relies on the rhetorical difference of a photographic image (as opposed to an oral statement made by a physician) by conveying another message through the photographic image to confirm facts already known.

Physicians who conduct ultrasounds prior to abortions do so either because the law requires it or because locating the tiny embryo or very small fetus in the comparatively large womb via ultrasound facilitates the procedure. Sometimes physicians will conduct an ultrasound to confirm or estimate gestational age, especially when the pregnancy is further along. But confirming gestational age via ultrasound is an inexact science with potential error ranges of four to

---

eleven days. The established medical literature describes the approval of ultrasound to “estimate gestational age.” And nowhere in the medical literature is the display of the image to the patient prescribed as part of the treatment to optimize patient outcomes for abortion.

The effect of the display of the mandatory ultrasound on the patient prior to the abortion may be analogized to the display of test results, biopsy tissue, or other imaging technology. But physicians more often describe rather than show these results to the patient, in large part because the results themselves are inscrutable or misinterpreted by the lay-patient. Most patients cannot understand with any accuracy or contextual significance the numbers and abbreviations next to blood tests, pieces of bloody tissue, or scans of a spine. They require a physician to explain and interpret the results.

Indeed, at the same time that mandatory-ultrasound laws espouse the persuasive clarity of ultrasound images for the purposes of delivering information to the patient, these same laws rely on the inscrutability of the ultrasound image for its rhetorical force. An ultrasound is a hazy picture, magnified hundreds of times. Without a

113 Id. at 172.
physician or technician’s narration, a patient would not understand what she sees on the screen except by guessing. Thus three mandatory-ultrasound laws require the physician to narrate the image for the patient, pointing out organs, limbs and estimating the gestational age.114 This narration evidences the ultrasound’s acute lack of clarity for the patient. Because of these ambiguities in ultrasounds, patients are urged not to look at ultrasound images as they are literally seen, but instead to project onto them future or potential facts and imaginary images drawn from society in order to render the images meaningful as a present image of a future baby.

Despite the haziness of the ultrasound image and the need for its narration, the political rhetoric surrounding the mandatory ultrasound laws asserts (without substantiation) that once a patient sees the image of the fetus, she will be less likely to terminate the pregnancy. We must therefore examine the relationship between the rhetoric of “truth” and “objectivity” justifying both mandatory ultrasounds and the physician narrative alongside the inherent ambiguity in all images, including medical images. Does inserting the visual image in between the patient and her doctor, in light of its inscrutability and its necessary narration, 

---

114 The Guttmacher Institute has the most up-to-date list of mandatory-ultrasound laws. As of October 2014, Louisiana, Texas and Wisconsin require narration, and these laws are enforced. North Carolina and Oklahoma also passed such laws, but they have been enjoined from enforcement. GUTTMACHER INST., supra note 3.
exacerbate the loss of autonomy, control and dignity the woman
already experiences in the treatment room because of the other
mandatory “information” disclosure many states require?

B. **Proof of Life? Whose? How?**

Those who support a mandatory-ultrasound requirement appear
to approve of the cultural movement that glorifies the fetus and idolizes
its image. 115 From the moment *Life* Magazine published Lennart
Nilsson’s photograph of an in-utero fetus on its cover in 1965 with the
caption “Drama of Life Before Birth,” the fetus has had a celebrated
and public presence. 116 As Meredith Nash writes, “the fetus comes into
‘existence’ as a newly forged technological being by consequence of its
ability to be ‘seen’ with the naked eye . . . . As a depiction of a
biological ‘reality,’ . . . ultrasonography is integral to the production of
the ideology of motherhood through consumerism and
commodification.” 117 Although visualizing the fetus contributes to its
commodification, Nash corrupts the distinction between looking upon
an image created by a machine (of an embryo or fetus) and seeing a
baby with one’s own eyes. In so doing, she commits the common error

---

116 Id. at 276.
of conflating an image of something real with the significance of the thing itself. This error goes to the core aspect of the power exercised by the state by mandating the display and narration of the ultrasound images. The irresistible conflation exposes the anticipated pressure, the subjectivity, and the bias that undergirds the use of images and their interpretation in these situations.

Beginning with the best possible case for the mandatory display of the ultrasound image, what does it show and how? How did this image galvanize a pro-life movement without any specific intention to do so? These questions do not ask what an image purports to be (what it documents) but instead what it may do (how it persuades). How does a photographic image cultivate authority to convince or generate a collective understanding?

One way it works is to create a shared vision that begins with the assertion that “this is worth seeing” and thus is worth becoming part of our memory and of who we are. On this issue, photographers and media critics are effusive. Photographic journalists describe photographs as “lift[ing] past events . . . out of obscurity” and

---


serving as “bridge[s] connecting” the photographer or viewer to the subjects photographed. The mere taking and displaying of an image appears to “warrant deep reflection” and oftentimes “transforms human apathy.” In the mandatory ultrasound context it purports to sew a connection between the doctor and the patient through the shared viewing of the fetus, pausing on an image worth considering more deeply. By creating a common experience through a shared viewing, the mandatory ultrasound is supposed to transform those who look upon it from mere women and doctors into mothers and witnesses to young life worth protecting.

Lennart Nilsson’s photograph of the fetus became iconic with its floating image visibly unconnected to any woman’s womb. But when it was first taken, Nilsson’s editors at Life demanded proof that the images were of an actual fetus because the images were so clear and so novel. Now, images of fetuses much hazier and more ambiguous are accepted as proof of life. Indeed, the image of the fetus has become

---

120 Chris Johns, Introduction to id. at 16–17.
121 Brinkley, supra note 119, at 11.
123 Nilsson remembers that the editors were initially dubious of the authenticity of the picture and “wanted to have a witness to say that this was really the case” because, as he explains, “it was a very sharp picture.” Eventually convinced, Life ran many more photos like this one. NOVA, Behind the Lens: An Interview with Lennart Nilsson, PBS.ORG, http://www.pbs.org/wgbh/nova/odyssey/nilsson.html (last visited Apr. 10, 2015).
so familiar that no one questions its authenticity anymore.\textsuperscript{124} But why? What is the connection between proof of life (if this is what the photograph is) and reproductive choice? The answer is in the way the photograph is framed and situated within the doctor/patient relationship and the political debate.

First, most ultrasound pictures, like the Nilsson photograph, contain facts lacking a context to give them meaning. The fetus floats in the picture—autonomous, unconnected, and primary—and the woman is omitted or made irrelevant by the subsequent discourse that frames the picture.\textsuperscript{125} Even though she is there, she is unseen. The doctor rarely, if ever, points to the uterine wall or her ovaries or cervix. Instead, the doctor’s description, compelled or not, contains anatomical details of the fetus alone and often omits qualifying language such as “developing” or “underdeveloped.” Doctors say instead: “here are the kidneys, the heart, the head, the legs,” not “here are the developing organs” or “here are the leg buds.” This fetal imagery, as one scholar writes, “epitomizes the distortion inherent in all photographic images: their tendency to slice up reality into tiny bits wrenched out of real space and time.”\textsuperscript{126} With the zealoustness of science and the force of

\textsuperscript{124} Petchesky, \textit{supra} note 115, at 268.
\textsuperscript{125} \textit{Id.} at 277.
\textsuperscript{126} \textit{Id.} at 268.
positivism, a truth is made from a “discrete bit[]”—an empirical data point—which in its photographic incarnation is “divorced from historical process [and] social relationships.” 127 As such, this ultrasound image (as with most images) can be made to mean almost anything. 128 “[N]one of this viewing and measuring and recording of bits of anatomical data gives [us] the slightest clue as to what value should be placed on this or any other fetus, whether it has a moral claim to heroic therapy or life at all, and who should decide.” 129 In other words, seeing the fetus in utero (observing its existence) does not necessarily help us render a fair or righteous judgment on abortion (whether the fetus should have a right to live off the woman). The use of the picture as a mechanism for judgment is political, not evidential. And it is hardly objective because it is already a statement about the hierarchy of values and persons. 130

Second, the autonomy of the fetus in the ultrasound image bolsters its status as hero and innocent victim. Without taking into account its context—its literal and necessary connection to the pregnant woman—

127 Id. at 269.
128 This is the way fetish objects work. Id. at 270.
129 Id. at 274.
130 Id. at 272. I would venture that most photographs presented as “factual” or “objective” are similarly constituted. They are floating facts that lack moral, social, or political relevance until they are situated in a story that has a point and a cause. In this vein, the ultrasound image may be harmless on its own, but the legal and cultural situation in which it is rendered meaningful is neither objective nor freedom-enhancing for most women.
and without the details of its underdeveloped biological existence, the fetus becomes a baby long before its birth. Like the famous “man on the moon” photograph of Buzz Aldrin taken only a couple years after Nilsson’s photographs, both fetus and astronaut appear to float in space, unattached and autonomous. Each represents the “Hobbesian view of . . . human beings as disconnected,” isolated, and free.131 Although Buzz Aldrin is costumed in the space suit, we see in him, as we do in the fetus, images of ourselves: our beginnings and our potential achievements. And, like Nilsson’s photograph of the fetus, the lunar photo is the only evidence we have of something we will never see with our naked eyes. Perhaps because of this, as with the fetal imagery, some people thought the photograph of the man on the moon was faked.132 But when it was embraced, it was not only evidence that President John Kennedy could fulfill his promise beyond the grave, but also evidence of the possibility of human kind. Similarly, medical imagery that reveals our insides and the potential for diagnosis and cure provides us a sense of our physical mortality and an empowering glimpse into our (hopeful) future. This kind of framing endears the photograph to us, and we resist interpretations that critique its clarity or

131 Id. at 270.
undermine its message because of the pleasurable fantasies these messages create.

Third, with the added element of a doctor’s narration of the fetal ultrasound – as with the authoritative and trusted commentary of U.S. news anchorman Walter Cronkite announcing the moon landing – the photographic image is experienced as undeniable. Rendering images authoritative through narrative is known as verbal overshadowing. It shapes perceptions and memories of ambiguous or indeterminate images. Commonly analyzed in the context of advertising images and criminal suspect identification through photographs, verbal overshadowing can affect substantive evaluation of images. One study shows that “verbalizing perceptions of a face’s attractiveness shifted subjects’ ratings toward extremes: a better-than-average face became beautiful, and a below-average face became ugly.” As applied in the mandatory-ultrasound context, the physician describes the fetus’s kidneys, heart, and limbs, and the pregnant woman is expected to watch in awe. Where, at most, the woman might have seen a black and white cloud of ovals and rods, she now sees a living person, or she thinks she

does. To some women, the redirecting of emotion and care from oneself to one’s fetus is welcome. But to many others, this experience is alienating and traumatic. Women who look upon the ultrasound of an unwanted pregnancy may not necessarily see maternity and a future baby until they are told that is what they should see. The doctor’s narration, combined with the ultrasound’s ubiquity in popular culture as the baby’s first portrait and “close-up,”\textsuperscript{135} aims to inaugurate the woman’s journey into motherhood, whether she welcomes it or not. To suggest otherwise is to deny how the ultrasound is used and what is omitted from its display (the woman) and from the narration (her choice and the fetus’ undeveloped stature).

Why narrate the ultrasound image if the image is so clear and its meaning so transparent? Is the concern that women will see different things in the pictures whereas the words from the physician will be more stable, more authoritative? Or is the narration a belt-and-suspenders approach to communicating a message, one that, despite deeply rooted ideology about maternal responsibility, is by no means assured to be received or accepted: this is your baby, it lives inside you, and it is your job to take care of it. This is an exaggeration, surely, but the point is thus made: a doctor’s narration and the culturally over-

\textsuperscript{135} Sanger, supra note 82, at 372.
determined meaning of the ultrasound image are themselves exaggerations if not also outright distortions of the relationship that exists between the pregnant woman and her insides. To assume that a woman will know her baby when she sees it—to attach and experience the gendered pull of maternal responsibility when the ultrasound image is shown to her as mandated by law—contributes to the conceited assertion of power that images provoke. Like Potter Stewart’s infamous claim to judging obscenity—“I know it when I see it”\textsuperscript{136}—mandatory ultrasound laws expect patients to succumb to the judgment of others and acquiesce in the cultural narrative of maternal obligation when viewing the ultrasound.

But image theory defies this necessary result; and its critical application to the mandatory ultrasound context would restore transparency and integrity to this legal situation. Were we to insist on truth and objectivity in the provision of medical information to women facing the choice to terminate their pregnancy (as \textit{Casey} commands), we would require critical analysis of the image and the opportunity for self-reflection about how the image and its narration manipulate its audience. The suppression of self-reflection in the display of the ultrasound image and its narration injure the autonomy and dignity of

\textsuperscript{136} Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
the woman whose free choice the law must protect. Insofar as mandatory ultrasound laws are premised on their capacity to sway a woman’s choice in non-rational ways by virtue of the furtive power of images, they are ethically impermissible under long-standing informed consent laws.\textsuperscript{137} Critical analysis and the opportunity for self-reflection in the exam room (if not before) are necessary to revive the truth, objectivity, and informed consent that these laws purport to provide.

C. \textit{Historicizing Representational Practices and Applying Critical Theory to the Ultrasound Image}

In her book \textit{The Public Life of the Fetal Sonogram}, Janelle Taylor describes how the fetal ultrasound image has, over time, meant many different things and performed very different roles for patients and doctors. Through extensive historical and sociological research, she describes the evolution of the ultrasound technology towards more clarity and personalized service.\textsuperscript{138} In response to the varying needs and

\textsuperscript{137} Sawicki, \textit{supra} note 57, at 19–25 (citing literature and statutes). Whether they are impermissible under the First Amendment is an entirely different question, as discussed in Rebecca Tushnet, \textit{More Than a Feeling: Emotion and the First Amendment}, 127 HARV. L. REV 2392, 2421 (2014) (comparing inconsistent legal treatment of mandatory disclosures in tobacco advertising with those in the abortion context). Notably, although Professor Tushnet argues that we should not fear emotional sway in mandatory disclosures to the point of suppressing them under the First Amendment, she accepts that the constitutionality of mandatory disclosures depends on the social and historical context of the particular activity being regulated and also expresses concern that the mandated ultrasound viewing may reflect sexist assumptions about women that raise constitutional problems. \textit{Id.} at 2422.

desires of doctors, technicians, and patients, today ultrasound machines can produce different “modes” of viewing, each of which produce vastly different-looking images.\footnote{Sawicki, supra note 57, at 35.} This evolution was driven in part by patients’ perceptions of the ultrasound machine and its images as irrelevant, intrusive, and annoying.\footnote{TAYLOR, supra note 138, at 33–35 (describing need to “show and sell” use of ultrasounds for pregnant women).} Moreover, Taylor describes how the ultrasound did not become more accepted in obstetric practice until the 1970s and 1980s.\footnote{Id.} Even then (as now), it was primarily a diagnostic tool for specific circumstances, not a mechanism for bonding.\footnote{Id. at 58–62.}

The potential for the ultrasound image to mean what the state urges (“this is a human life worth saving”) depends on viewers ignoring the history of ultrasound technology and the indeterminacy of images in general. Image theorists confirm our tendency to ignore the flexibility of semantic meaning in photographs. Susan Sontag writes that “photograph[y] furnish[es] evidence. Something we hear about, but doubt, seems proven when we’re shown a photograph of it.”\footnote{SONTAG, supra note 109, at 5.} Sontag’s use of the words “evidence” and “proven” situates photography as powerful rhetoric. Walter Benjamin isolates photography as unique...
among communicative media, writing that “[i]n photography, . . . one encounters something strange and new . . . something that is not to be silenced, something demanding the name of the person who had lived then, who even now is still real and will never entirely perish into art.” 144 Andre Bazin, speaking of film in particular, says that moving pictures appear to “bear[] unimpeachable witness to ‘things as they are,’” perpetuating the myth of total cinema: representing the world transparently and without distortion as close to the real as one can get within art.

These critics confirm that photography or film are particularly persuasive representational forms through which to account for a person, object or event. Roland Barthes famously wrote that “the Photograph’s essence is to ratify what it represents,” to confirm to its audience the “that-has-been.” 146 Photographs are documentary traces, in this sense. But none of these critics suggest that the “that-has-been” corresponds to an essential meaning, as the state insists with ultrasound images. The ontology of the image is just that: it does not go beyond

144 Walter Benjamin, A Short History of Photography, in ALAN TRACHTENBERG, CLASSIC ESSAYS ON PHOTOGRAPHY 202 (1980).
146 BARTHES, supra note 109, at 76–80, 85.
signifying *being* to signifying *discrete knowledge or connotation*.¹⁴⁷

Even photojournalists, who are in the business of documenting past events, echo these critics. Errol Morris says that photographs appear to present merely “ocular proof.”¹⁴⁸ Lennart Nilsson describes photography as “reproducing what you are seeing”¹⁴⁹ but not the *meaning* of what you see. Morris has argued that photographs possess “the irrational power . . . to bear away our faith.”¹⁵⁰ Indeed, he has said that the persuasion of photographs “stop[s] us from thinking, encourages *not* to think.”¹⁵¹ But neither Morris nor Nilsson assert that what is seen has any inherent or essential significance. Indeed, both Morris and Nilsson contest photography’s epistemological dominance, Morris as he mobilizes filmic images to tell counter-factual stories with them¹⁵² and Nilsson as he emphasizes the disconnect between his famously clear photographs of early-stage fetuses and the inevitable

---

¹⁴⁷ This is what Barthes meant when he said a photograph is a “message without a code.” RO兰D BARThES, THE RESPONSIBILITY OF FORMS: CRITICAL ESSAYS ON MUSIC, ART, AND REPRESENTATION 5 (1991); see also Andre Bazin, *The Ontology of the Photographic Image*, FILM Q. 4, 8 (1960) (“We are forced to accept as real the existence of the object reproduced, actually, re-presented, set before us. . .”).


¹⁵⁰ Morris & Meyer, supra note 148.

¹⁵¹ *Id.*

ambiguity surrounding the scientific, political, ethical and cultural understanding of life’s beginning.153

 Critics and scholars (and, for current purposes, medical professionals) agree that photographs require interpretation. Neutrality and accuracy, so readily assumed, are artifacts of a photograph’s history and uses as both a conjuring power and a form of documentation.154 When first introduced as a visual art, later to be followed by the filmic arts, photography was considered a ghostly practice, a mirage, and a lie.155 Over the years, concerns have been raised from arenas as diverse as news organizations, police, the courts of law and civic government over the authority of photographs. Appearing autonomous and bearing “silent witness” to some fact or event, audiences were asked to question a photograph’s referentiality and truth.156 As the history of the use of photographs in courts of law has since demonstrated, we demand “authentication” of the photographic image before it can be used as evidence.157 How do we evaluate the photograph for the facts it allegedly contains? We do so

155 Mnookin, supra note 154, at 20.
156 Id.
157 FED. R. EVID. 901 (describing the rules for identifying or authenticating an item of evidence).
with reference to the photographer (a trusted source), a verified caption (confirming information), context (situational authority), more photographs and different framing (alternative points of view), and its independent verification (human authentication). And even while we may be assured of certain facts contained in the image—this is a fetus, and it has a developing head and organs—the meaning of the facts, their relevance and significance, remain disputed and mutable depending on the story they are called to illustrate. We require debate and critique of photographs in courts of law. Other than to hide alternative facts or the image’s indeterminacy, why, when the law mandates ultrasound viewing prior to an abortion, is the same kind of critique and debate not also justified?

Image theory and the history of the photographic medium confirm the distorting heuristic of the medical image in the particular context of compelled ultrasounds. To this, there are several responses that, if applied in the mandatory-ultrasound context, might alleviate the harm these laws cause. William Mitchell has suggested that a new phase of image study must “encourage prolonged contemplation,

---

158 Of course, there are plenty of cases in which the photograph “lies,” and the information it contains are false. See Hany Farid, Digital Doctoring: How To Tell the Real from the Fake, 3 SIGNIFICANCE 162, 162–66 (2006); Hany Farid, Seeing Is Not Believing, IEEE SPECTRUM (July 31, 2009), http://spectrum.ieee.org/computing/software/seeing-is-not-believing/0.
second and third looks, reversals of perceptual fields . . . [so] that pictures might themselves be sites of theoretical discourse.”

Mitchell’s recent work asks that we attend to the nature of pictures to learn better how they captivate us. John Tagg questions whether seeing is believing as he explains how to ask different questions of the photograph: “the causative link between the pre-photographic referent and the sign . . . is . . . highly complex, irreversible, and can guarantee nothing at the level of meaning.” He says that a photograph is no phenomenological guarantee . . . . At every stage, chance effects, purposeful interventions, choices and variations produce meaning, whatever skill is applied and whatever division of labor the process is subject to . . . The photograph is not a magical ‘emanation’ but a material product of a material apparatus set to work in specific contexts, by specific forces, for more or less defined purposes. It requires therefore not an alchemy but a history.

Whereas Mitchell initially looks inward at the nature of that image and how it acts on us, Tagg focuses outward on the photograph’s material production of meaning through its making and circulation. Both approaches are central to becoming more self-aware of our tendency to

160 Id.
162 Id.
underestimate the burden and power of photographs in certain contexts. Both approaches help expose the injustice of mandatory-ultrasound laws in the terms of reproductive-rights jurisprudence that requires we protect the autonomy and dignity of women in the face of unwanted pregnancies. How might this be so?

Initially, we must consider the author of the ultrasound image, the person who authorizes the image in the first instance. The “photographer” in the ultrasound context is the technician or the physician. There is no one more trusted in that moment. Aside from the possibility of faulty machines or a hesitant doctor, the ‘source’ of the image and its situational context appears convincing and respected. Moreover, the image is made in a medical office, wrapped in its own situational objectivity, authority, and domination.

Second, the image’s physical framing similarly shapes and directs its interpretation. What is in the frame and what is not in the frame matters. For example, the absence of the woman’s body refocuses attention away from her to the fetus, signaling a hierarchy of importance: baby first, woman second. Likewise, the clarity of images changes what we see and understand. The fuzziness of the images demands narration and audience supplementation of more information and detail to make sense of what we think we see. As with photos of
the Loch Ness monster or the Zapruder film detailing the assassination of JFK, photos do not provide the whole (or even enough) of the story. As we piece it together, bringing our own perspective and understanding to the viewing, we become invested in the story that makes the most sense to us. The ultrasound is the vaguest of images, and yet when told to see organs, a beating heart, a face, hands and feet, we construct our child fully formed and resembling ourselves. For what do we really see in the fetal ultrasound image? We may possibly see a roundish head that is magnified over 100 times in order for it to be visible on the screen. With coaching, we may see a faint pulsing light, which we are told is a heart. We might see some movement on the screen, which is often narrated as “an active baby” that “kicks” or “rolls,” implying will, choice, and personality. All of this is supplementation beyond the actual image, which itself is a digital enhancement and requires professional training to interpret. In other words, the facts in the frame often come from outside it.

Third, point of view matters. Images taken from one perspective can distort or re-characterize the same image when taken from a different perspective. Consider the well-known film technique of the “zoom” or “close-up.” A shot of a person from far away is less emotionally intense and striking than is a close-up of that same
person’s face, her expression, and her facial features clear and readable. The close-up concentrates the audience’s attention and builds interest. We ‘experience’ closeness to the person, and thus we ‘feel’ close to them. Moreover, the close-up transfers the emotions we see on the face of the person to us as witnesses to those emotions. We see anxiety, fear, love, or devotion on the face in the frame and those emotions stir in us, too. Close-ups work by fueling empathy through visual alignment. The fetal sonogram is a close-up.\textsuperscript{163} The woman may not see facial expressions on the fetus, but descriptions of “kicking,” “thumb sucking,” “rolling,” “sleeping,” and “strong” or “quiet” movements imbue the magnified image with intentionality and autonomy. The significance of intentionality and autonomy derives from popular culture, which constructs fetal images as baby pictures, and from medical imaging culture, which imbues ultrasound images with moral and medical certainty. The zoom or magnified focus of the image may make a woman feel physically and emotionally closer to the fetus as a baby. A woman may not experience it as a bean-sized organism over which she has possession because it resides in her body, but instead as an autonomous and willful child whose privacy she is invading by peeking into the womb.

\textsuperscript{163} Sanger, supra note 82, at 372.
Fourth, social situations affect how the patient and the doctor interpret the ultrasound. Does the patient come to the exam room under conditions of a wanted pregnancy or an unwanted one? With a partner or without? Having had children previously or not? Is the patient a young adult or a mature woman? Consider the following analogies: Those who have lost a family member or friend to cancer may view images of patients fighting the disease differently than those who are lucky to be untouched by cancer. Someone who lost a wanted pregnancy might bring intense anxiety to the ultrasound experience, knowing that not all pregnancies end happily. Ultrasounds that uncover a healthy pregnancy one minute and an ovarian tumor the next change significance midstream, much like a film’s meaning changes as it cuts from a happy child playing outside to a truck barreling down the road toward her. Images are not self-contained in their meaning or their message. Their significance depends on what comes before, what comes after, and what experiences we bring to them. Essentializing the ultrasound image to mean only “this is a baby who will be born” or “this is my baby’s first picture” erases the heterogeneity of experiences and values that define everyday life for which the law should account,

164 *Id.* at 374.
165 In image and film theory, the contextualization of an image to mean different things depending on its sequence is called montage. GERALD MAST & BRUCE KAWIN, A SHORT HISTORY OF THE MOVIES 176 (1996).
including laws about women’s health and reproductive liberty.

Despite these critical historicizing practices that reveal photographs to be diverse in meaning and effect, mandatory ultrasound laws rely on the ultrasound images as having a unitary significance that is ideologically sustained. Ultrasounds are not factual, nor do they promote optimal information delivery. In the pseudo-medical and cultural context in which their images are communicated, they convey a particular meaning to women, which is generated by a society that glorifies expectant mothers. The proliferation of “keepsake ultrasound businesses,” which market the availability of non-medical-setting ultrasounds and commoditize ultrasound images (reproducing ultrasound images on coffee mugs, cupcakes, t-shirts, even in a 3D theater),166 is evidence of harnessing the social meaning of ultrasounds to facilitate the real purpose of these compelled viewing laws: to convert pregnant women into mothers by compelling allegiance to and identification with the fetus as precious and more valued than the woman herself.

Absent a critical or historicizing practice alongside the compelled disclosure, cognitive distortions are likely to occur precisely

---

because of the interpretive control exercised by the person or organization that frames its viewing (here, the state and the compelled medical professionals). As Professor Caroline Corbin explains, certain framing “techniques exploit a distorting heuristic embedded in people’s decision making,” and thereby impermissibly intrude on an individual’s decisional autonomy.167 As is the case with advertising, where sellers employ the technique of ‘affective priming,’ the ultrasound is used by the state to convey a specific message that celebrates maternal care over independence and unborn babies over women. Affective priming works by

mak[ing] [a] product attractive not by describing or illustrating its benefits, but by associating it with something the audience already views positively. The point is not to help the audience visualize, understand, or remember an informational claim, but to piggyback [the] product onto a pre-existing emotional connection the viewer already has to something completely unrelated.168

By harnessing the image’s ambiguity and combining it with the ideological certainty of medical imaging and the glorification of maternity and childbirth, these laws exploit this advertising technique. In the cultural context in which these laws operate, mandatory ultrasounds rely upon and promote cognitive distortions degrading

167 Corbin, supra note 89, at 1307–08.
168 Id. at 1307.
rather than enhancing the patient’s informed choice and autonomy.

When the pre-abortion ultrasound is exposed as deceptive to the patient and coercive for the health care provider, it should be rejected as a legal requirement for the legal and cultural reasons already discussed. However, if the mandatory ultrasound is a foregone conclusion as a political matter (a point I am unwilling, as of yet, to concede), we instead might urge more speech, rather than less, to counteract the manipulation and distortion created by the mandatory ultrasound under the compelled script of the state. We might follow the critical process described above. We should require the interrogation and cross-examination of the text and we should question its situational veracity.

CONCLUSION

Despite the revolution in communication technology, visual images and instantaneous messaging do not enhance all spaces and interactions. For example, the debate continues in the U.S. over cameras in the courtroom, with the U.S. Supreme Court drawing for itself a line between delayed textual transcripts and audio recordings of oral arguments, which are permitted, and the televised or filmed oral arguments, which are not. Justice Souter famously said, “I think the case [against cameras] is so strong that I can tell you that the day you
see a camera coming into our courtroom, it’s going to roll over my dead body." Concerns range from how cameras bias juries, lawyers and witnesses, whether cameras compromise the dignity of the courtroom, if cameras distort the court proceedings and perceptions of the judicial system, and how cameras might threaten the autonomy and privacy of judicial decision-makers. If cameras and visual imaging in the public courtroom remain troubling for their potential undue influence and distortion, why are they embraced without complication in the private and sensitive space of the doctor’s exam room in the context of abortion? At least, the criticism of the distorting influence and invasiveness of cameras and visual images in the courtroom should extend to the state compelled display of an ultrasound image to the patient by her doctor.

Martin Scorcese has recently called for photographic and film literacy, writing that “[w]e need to educate [audiences] to understand the difference between moving images that engage their humanity and their intelligence and moving images that are just selling them

---

169 Tony Mauro, Roll the Cameras (or Soutersaurus Rex), LEGAL TIMES, Apr. 8, 1996.

170 For a review and analysis of the arguments for cameras in the courtroom, see Nancy Marder, The Conundrum of Cameras in the Courtroom, 44 ARIZ. ST. L.J. 1489 (2012).
something.” Laws that assume or rely on unthinking and knee-jerk reactions to images and the data the images contain are laws worth repealing. We are accustomed to the critical evaluation of text and oratory as a long-standing habit in law, the sciences, and the consumption of news. But we have not yet developed a similar habit of skepticism and critique with regard to film and photographic images used demonstratively or substantively in these same settings. Leaving the ultrasound image to be narrated according to the state’s script, or to be framed by the dominant cultural expectation that the image bonds the woman with her ‘baby’ not only encourages deceptive and misleading speech about an image that is ambiguous at best, but also coerces women and their doctors to enact the state’s moral judgment for the duration of the image’s viewing.

Short of abolishing compelled viewings of ultrasounds as undermining informed consent or violating constitutional principles of equality and liberty under Casey, we should encourage critical engagement with them. This includes qualifying the accompanying narrative with accurate medical terminology about fetal size, development, and capacity. Doctors should be able to voice their disagreement with the viewing practice and be free to “depart[] the

text\textsuperscript{172} as scripted by the state, especially when it distorts or selectively describes the ‘facts’ about the pregnancy. Image and aesthetic theory have much to say about the roles of images in law and policy. We should rely on both to foment more perfect freedoms and the equality the laws purport to protect.

\textsuperscript{172} BERKELEY BREATHED, GOODNIGHT OPUS 3 (1996).
A. Texas House Bill 15, enacted as amending Tex. Health & Safety Ann. Sec. 171.001 et seq.

... Sec. 171.012. VOLUNTARY AND INFORMED CONSENT. (a) Consent to an abortion is voluntary and informed only if:

(...

(4) before any sedative or anesthesia is administered to the pregnant woman and at least 24 hours before the abortion or at least two hours before the abortion if the pregnant woman waives this requirement by certifying that she currently lives 100 miles or more from the nearest abortion provider that is a facility licensed under Chapter 245 or a facility that performs more than 50 abortions in any 12-month period:

(A) the physician who is to perform the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers performs a sonogram on the pregnant woman on whom the abortion is to be performed;

(B) the physician who is to perform the abortion displays the sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them;

(C) the physician who is to perform the abortion provides, in a manner understandable to a layperson, a verbal explanation of the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs; and

(D) the physician who is to perform the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers makes audible the heart auscultation for the pregnant woman to hear, if present, in a quality consistent with current medical practice and provides, in a manner understandable to a layperson, a simultaneous verbal explanation of the heart auscultation;
(5) before receiving a sonogram under Subdivision (4)(A) and before the abortion is performed and before any sedative or anesthesia is administered, the pregnant woman completes and certifies with her signature an election form that states as follows:

"ABORTION AND SONOGRAM ELECTION

(1) THE INFORMATION AND PRINTED MATERIALS DESCRIBED BY SECTIONS 171.012(a)(1)-(3), TEXAS HEALTH AND SAFETY CODE, HAVE BEEN PROVIDED AND EXPLAINED TO ME.

(2) I UNDERSTAND THE NATURE AND CONSEQUENCES OF AN ABORTION.

(3) TEXAS LAW REQUIRES THAT I RECEIVE A SONOGRAM PRIOR TO RECEIVING AN ABORTION.

(4) I UNDERSTAND THAT I HAVE THE OPTION TO VIEW THE SONOGRAM IMAGES.

(5) I UNDERSTAND THAT I HAVE THE OPTION TO HEAR THE HEARTBEAT.

(6) I UNDERSTAND THAT I AM REQUIRED BY LAW TO HEAR AN EXPLANATION OF THE SONOGRAM IMAGES UNLESS I CERTIFY IN WRITING TO ONE OF THE FOLLOWING:

___ I AM PREGNANT AS A RESULT OF A SEXUAL ASSAULT, INCEST, OR OTHER VIOLATION OF THE TEXAS PENAL CODE THAT HAS BEEN REPORTED TO LAW ENFORCEMENT AUTHORITIES OR THAT HAS NOT BEEN REPORTED BECAUSE I REASONABLY BELIEVE THAT DOING SO WOULD PUT ME AT RISK OF RETALIATION RESULTING IN SERIOUS BODILY INJURY.

___ I AM A MINOR AND OBTAINING AN ABORTION IN ACCORDANCE WITH JUDICIAL BYPASS PROCEDURES UNDER CHAPTER 33, TEXAS FAMILY CODE.

___ MY FETUS HAS AN IRREVERSIBLE MEDICAL CONDITION OR
ABNORMALITY, AS IDENTIFIED BY RELIABLE DIAGNOSTIC PROCEDURES AND DOCUMENTED IN MY MEDICAL FILE.

(7) I AM MAKING THIS ELECTION OF MY OWN FREE WILL AND WITHOUT COERCION.

(8) FOR A WOMAN WHO LIVES 100 MILES OR MORE FROM THE NEAREST ABORTION PROVIDER THAT IS A FACILITY LICENSED UNDER CHAPTER 245 OR A FACILITY THAT PERFORMS MORE THAN 50 ABORTIONS IN ANY 12-MONTH PERIOD ONLY:
I CERTIFY THAT, BECAUSE I CURRENTLY LIVE 100 MILES OR MORE FROM THE NEAREST ABORTION PROVIDER THAT IS A FACILITY LICENSED UNDER CHAPTER 245 OR A FACILITY THAT PERFORMS MORE THAN 50 ABORTIONS IN ANY 12-MONTH PERIOD, I WAIVE THE REQUIREMENT TO WAIT 24 HOURS AFTER THE SONOGRAM IS PERFORMED BEFORE RECEIVING THE ABORTION PROCEDURE. MY PLACE OF RESIDENCE IS:__________.

____________________
SIGNATURE                        DATE";

(6) before the abortion is performed, the physician who is to perform the abortion receives a copy of the signed, written certification required by Subdivision (5); and

(7) the pregnant woman is provided the name of each person who provides or explains the information required under this subsection.

B. Oklahoma House Bill 2780:

... B. In order for the woman to make an informed decision, at least one (1) hour prior to a woman having any part of an abortion performed or induced, and prior to the administration of any anesthetia or medication in preparation for the abortion on the woman, the physician who is to perform or induce the abortion, or the certified technician working in conjunction with the physician, shall

1. Perform an obstetric ultrasound on the pregnant woman, using either a
vaginal transducer or an abdominal transducer, whichever would display the embryo or fetus more clearly;

2. Provide a simultaneous explanation of what the ultrasound is depicting;

3. Display the ultrasound images so that the pregnant woman may view them;

4. Provide a medical description of the ultrasound images, which shall include the dimensions of the embryo or fetus, the presence of cardiac activity, if present and viewable, and the presence of external members and internal organs, if present and viewable; and

5. Obtain a written certification from the woman, prior to the abortion, that the requirements of this subsection have been complied with; and

6. Retain a copy of the written certification prescribed by paragraph 5 of this subsection. The certification shall be placed in the medical file of the woman and shall be kept by the abortion provider for a period of not less than seven (7) years. If the woman is a minor, then the certification shall be placed in the medical file of the minor and kept for at least seven (7) years or for five (5) years after the minor reaches the age of majority, whichever is greater.

C. Nothing in this section shall be construed to prevent a pregnant woman from averting her eyes from the ultrasound images required to be provided to and reviewed with her. Neither the physician nor the pregnant woman shall be subject to any penalty if she refuses to look at the presented ultrasound images.