The Ultra Sound-off: The Ultrasound Mandate Debate and a Litigator's Guide to Overcoming Obstacles to a Woman's Right to Abortion

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I. INTRODUCTION

Since Roe v. Wade\(^1\) first legalized abortion on a nationwide level in 1973, many states have passed or attempted to pass laws limiting a woman’s right to terminate her pregnancy.\(^2\) Currently, many states require that an abortion be performed by a licensed physician, some states require that women seeking abortions undergo counseling or endure waiting periods, and some states require parental consent for minor patients.\(^3\) Most recently, some states have passed or attempted to pass laws requiring a woman seeking an abortion to undergo an ultrasound and be required, or at the very least be offered an opportunity, to view the image.\(^4\) These laws have been

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4. See State Policies in Brief: Requirements for Ultrasound, GUTTMACHER INSTITUTE (Feb. 1, 2014), http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf (providing ten states total require ultrasound prior to abortion as of February of 2014). Three states require that the provider display and describe the image, and two other states have similar laws that are temporarily unenforceable or permanently enjoined. Id.; see also LA. REV. STAT. ANN. § 40:1299.35.2 (2008) (requiring physician to perform ultrasound prior to abortion and show and describe image to woman); N.C. GEN. STAT. § 90-21.85 (2013) (held unconstitutional by Stuart v. Loomis, No. 1:11-CV-804, 2014 WL 186310 (M.D.N.C. Jan. 17, 2014)); OKLA. STAT. ANN. tit. 63, § 1-738.3d (West 2004) (enforcement permanently enjoined); TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2010) (requiring physician to perform ultrasound prior to abortion and show and describe image to woman); Wis. STAT. § 253.10 (2013) (same). Seven states require a physician to perform an abortion and offer the woman an opportunity to view the image, though viewing it is not mandatory. See ALA. CODE § 26-23A-4 (2009) (requiring performance of ultrasound but not requiring woman to view); ARIZ. REV. STAT. ANN. § 36-2301.02 (2009) (same); FLA. STAT. ANN. §
the source of intense legal and political controversy, and while some judges have upheld such laws, others have blocked their enforcement, leading to inconsistencies in the ways courts are handling and interpreting these laws in light of current abortion jurisprudence.

Ultrasound mandates tend to be part of informed consent provisions, and proponents of the provisions argue that requiring a woman to undergo an ultrasound prior to obtaining an abortion allows her to be fully informed about the procedure and all of the potential consequences. These laws have been attacked by women’s rights advocates, medical professionals, and legal scholars, who argue that they are unnecessary, that they infringe upon the constitutional rights of women, and that they confer too many rights to the unborn fetus. This note will explore some of the largest obstacles a litigator will likely face when trying a case for a client suing a state for violating her rights and the arguments a litigator would need to make in order to increase the likelihood of a favorable outcome.

This note will begin with a brief snapshot of the current state of the law, followed by an overview of the historical evolution of abortion jurisprudence. The historical overview will include an explanation of the history and purpose of informed consent, an overview of fetal rights in the United States and the history and evolution of the fetal rights argument, as


6 See Daniel Avila, The Right to Choose, Neutrality, and Abortion Consent in Massachusetts, 38 SUFFOLK U. L. REV. 511, 533 (2005) (“The most conscientious decisions at this point in pregnancy can be made only if a woman or girl can free her imagination to ponder what it may mean to have a child. There is much to be gained morally from helping pregnant women to learn to think this way.”); see also sources cited infra note 37 (providing examples of ultrasound mandates as informed consent provisions).


8 See infra Part IV. (explaining potential obstacles and discussing possible arguments to make against each obstacle).

9 See infra Part II. (providing overview of current state of law); infra Part III. (providing historical background of abortion jurisprudence).
well a brief history of women’s rights with respect to abortion. The analysis section of this note will attempt to present the many obstacles a litigator may face when suing a state on behalf of a woman’s right to an unburdened abortion. This note will attempt to frame arguments for a litigator to make to ensure the greatest probability of overcoming obstacles and prevailing against the State. Finally, this note will conclude with a prediction of the likelihood of a favorable outcome on each potential argument.

II. FACTS

Though Roe v. Wade made abortion legal in all states, many states currently have restrictions in place with respect to the abortion process. For example, as of February 2014, seventeen states require women to receive counseling prior to obtaining an abortion, twenty-six states require that women seeking an abortion must wait for a period of time between receiving counseling and obtaining an abortion, and thirty-nine states require parental involvement in a minor’s decision to have an abortion. Most recently, states have begun passing laws requiring women seeking abortions to undergo an ultrasound and be offered an opportunity to view the image. Proponents of such laws argue that they are predominantly intended to fully inform the woman of the very permanent and irreversible decision she is about to make. Opponents, however, argue that such laws generally appear in conservative, pro-life states and are geared at making abortion as inaccessible and difficult as possible.

10 See infra Part III. (providing historical background of abortion laws in United States).
11 See infra Part IV. (discussing potential obstacles one may face when trying such cases).
12 See infra Part IV.
13 See infra Part V. (predicting outcome of arguments).
14 Roe v. Wade, 410 U.S. 113, 164 (1973) (declaring abortion legal in all states subject to certain limitations); see also State Policies in Brief: An Overview of Abortion Laws, supra note 3 (outlining examples of some abortion restrictions by state as of February 2014); State Policies in Brief: Requirements for Ultrasound, supra note 4 (providing overview of ultrasound requirements by state as of February 2014).
15 See State Policies in Brief: An Overview of Abortion Laws, supra note 3 (detailing general pre-abortion requirements by state as of February 2014).
16 See State Policies in Brief: Requirements for Ultrasound, supra note 4 (providing overview of ultrasound mandates by state as of February 2014).
17 See Avila, supra note 6, at 556 (discussing opinion that scientifically accurate information helps women make more informed decision). The idea is that, since this is a serious medical procedure with irreversible consequences, the woman should be provided with as much information as possible so she is able to make a knowing and intelligent decision about whether or not to go through with the abortion. See id.
18 See Sahil Kapur, Indiana Republicans Advance Transvaginal Ultrasound Bill, TPM DC 2013-2014
Typically a woman has the option of choosing whether to receive the ultrasound via an transabdominal (external) transducer or via a transvaginal (internal) transducer, but some states, such as Virginia, have worded the statutory language in such a way that the provider is required to use whichever method will produce the clearest picture. Since most abortions occur at a very early stage in the pregnancy, when the fetus is still very small, a transvaginal transducer is often necessary in order to obtain a clear picture, thus rendering the woman’s choice to the contrary effectively moot.

III. HISTORICAL BACKGROUND

A. Evolution of Abortion Laws

Abortion was widely accepted as a legitimate medical procedure in the United States until the 1800s when states began passing laws criminalizing abortion. The rationale for criminalizing abortion varied from state to state, but for the most part, the motivation for the desire to outlaw abortion was related to medical safety, or was even, as some speculate, related to racist and socioeconomic fears—considerably different from the often moral and religious rationale that tends to be behind anti-abortion laws today.
Laws restricting abortion continued throughout the twentieth century until the Supreme Court decided *Griswold v. Connecticut* in 1965. In *Griswold*, the Court held that the Constitution provided for a “zone of privacy,” which prevented the government from intruding on the marital relationship in order to ban the use of contraceptives. This decision created precedent which “opened the door for a revival of fundamental rights and substantive due process review” with respect to privacy and reproductive rights. The ruling in *Griswold* was significant, but the Court was clear that the decision was narrowly tailored to the marital relationship. The Court’s later decision in *Eisenstadt v. Baird* significantly expanded the *Griswold* rule by reasoning that the “zone of privacy” existed outside of the marital relationship as well. This expansion of the right of privacy paved the immigrant population would overtake the Anglo-Saxon population with a much lower birth rate. Id. Abortions also, like most medical procedures in the 1800s, were very risky and dangerous, and this may have been a factor in the decision to outlaw abortions in some states as well. Id. Abortion was not generally thought of as immoral at this time, and the morality argument was probably not a factor in the earliest attempts to criminalize abortions in the 1800s. Id. Religious and moral arguments did not surface until much later. Id. In fact, some have pointed out that Christianity, which is often now behind many of the arguments against abortion today, originally did not teach that abortion was immoral; the Biblical interpretation that the fetus was a person or a potential life seems to be a relatively new idea. See Jonathan Dudley, *How Evangelicals Decided That Life Begins at Conception*, HUFFINGTON POST (Nov. 5, 2012), http://www.huffingtonpost.com/jonathan-dudley/how-evangelicals-decided-that-life-begins-at-conception_b_2072716.html [hereinafter Dudley I] (noting up until 1968 popular Christian opinion was life began at birth rather than conception). In a similar article, Dudley also comments that the opinion that abortion was immoral was not made widespread until the 1970s and 1980s in part by a televangelist by the name of Jerry Falwell, and his dissemination of such an opinion was largely the reason for its widespread popularity among evangelical Christians and Catholics during that time period. See Jonathan Dudley, *My Take: When Evangelicals Were Pro-Choice*, CNN BELIEF BLOG (Oct. 30, 2012), http://religion.blogs.cnn.com/2012/10/30/my-take-when-evangelicals-were-pro-choice/ [hereinafter Dudley II] (noting reasons for widespread change in Christian religious beliefs regarding abortion in 1970s and 1980s).

23 381 U.S. 479 (1965).
24 Id. at 484-86.
25 *Griswold*, 381 U.S. at 485 (holding marital relationship falls “within the zone of privacy created by several fundamental constitutional guarantees”).
27 See *Griswold*, 381 U.S. at 485-86 (holding only marital relationship included in this zone of privacy).
29 *Eisenstadt*, 405 U.S. at 453-55 (holding zone of privacy extends outside of marital relationship). Specifically, the Court said: [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, mar-
the way for the Court’s 1973 decision in Roe v. Wade, which invalidated all state laws criminalizing abortions in the first trimester of a pregnancy. In Roe, the Court also explained the fine line between the rights of the woman and the rights of the fetus and the balancing act that was required to fairly protect the rights of each. In the years following Roe, many states attempted to curtail abortion rights by imposing various requirements, limitations, and restrictions on the abortion process, and in Planned Parenthood v. Casey, the Supreme Court ultimately established that states may regulate the abortion process, but may not impose an “undue burden” on the right of a woman to obtain an abortion. This “undue burden” standard was upheld and further refined in subsequent Supreme Court decisions and remains the standard by which abortion restrictions are measured today.

The most recent challenge to abortion rights are laws that require a woman to obtain an ultrasound and be offered an opportunity (or sometimes even required) to view the image. These laws are criticized by

ried or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. at 453 (emphasis added).

30 Roe v. Wade, 410 U.S. 113, 153 (1973) (declaring right to abortion prior to fetal viability is fundamental right grounded in Fourteenth Amendment). In Roe, the court applied the expansion of the right to privacy from previous decisions and said that the right to privacy was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” Id.

31 See Roe, 410 U.S. at 150-51 (noting duality of interests between life of mother and life of fetus). The Court attempted to strike a balance between these interests by saying that a woman has the right to terminate her pregnancy, but that the right is not absolute. Id. Once the fetus reaches viability (the point at which the fetus is capable of surviving outside of the womb), the state has a legitimate interest in protecting the life of the fetus and can bar abortion at this point. Id. Prior to the point of viability, the Court held that the woman’s interest controls, and she has the right to terminate her pregnancy until the fetus is viable. Id.


33 See id. at 876-77 (establishing “undue burden” standard). The Court held that in order to simultaneously protect the right established by Roe and the state’s interest in the unborn fetus, a state may regulate abortion procedures. Id. However, state regulations cannot have the “purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” Id. The Court in Casey further went on to clarify that supplying information to a woman does not constitute an undue burden, even if that information is targeted at discouraging the woman from going through with the abortion. Id.


35 See supra note 4 and accompanying text (providing ultrasound requirements by state). Three states require that provider display and describe the image, while seven require that the provider perform the ultrasound and simply offer the woman an opportunity to view the image, though she is not required to actually view it. State Policies in Brief: Requirements for Ultra-
women’s rights proponents and legal scholars, but whether they constitute an “undue burden” is a question that remains to be answered.  

B. The History of the Doctrine of Informed Consent

Ultrasound mandates are typically included as part of informed consent provisions of regulatory statutes; therefore it is relevant to this discussion to develop the history and purpose of the doctrine of informed consent.

In medical law, the initial purpose of the doctrine of informed consent was to protect patients from unwanted medical intrusions or batteries, thus, ultimately protecting the patient’s bodily integrity. Informed consent has evolved over time and is now merged with the concept of negligence with regard to medical malpractice—a physician’s failure to inform a patient of the risks associated with a particular procedure constitutes negligence. Courts have recognized that the doctrine of informed consent is not to be applied rigidly and that doctors may sometimes use discretion in determining how to discuss the risks with the patient in order to—sometimes necessarily—protect the patient’s emotional and mental well-being. The idea is still to protect the patient’s bodily integrity—the
choice belongs to the patient, and the patient cannot make a real choice unless he or she is provided with full and accurate information about a given procedure.\textsuperscript{41} Thus, the fundamental theory underlying the doctrine of informed consent is that the patient has a protected interest in making an autonomous decision, and fully informing the patient of the risks associated with medical procedures allows the patient to make a knowing and fully autonomous choice.\textsuperscript{42} Other legal scholars point out that the right to be free from unwanted medical intrusions is part of the constitutional right to privacy, and that the right to be free from unwanted medical intrusions is also a basic human right.\textsuperscript{43}

Including ultrasound mandates in informed consent provisions creates significant debate among the legal community.\textsuperscript{44} Proponents of the ultrasound mandates argue that providing women with an opportunity to see an image of the fetus she is about to abort allows the woman to fully understand the decision she is about to make and allows her decision to be fully informed, autonomous, and free.\textsuperscript{45} However, opponents of the mandates argue that rather than “informed consent,” forcing a woman to view an ultrasound image prior to obtaining an abortion is simply “harassment masquerading as knowledge” and that forcing doctors to convey a particular message to patients also violates doctors’ First Amendment rights in a way that typical informed consent provisions do not.\textsuperscript{46} In fact, forcing a woman

\textsuperscript{41} See Vandewalker, supra note 7, at 5 (stating that under doctrine of informed consent “the decision belongs to the patient”).

\textsuperscript{42} See Vandewalker, supra note 7, at 5 (quoting Arato v. Avedon, 858 P.2d 598, 605 (Cal. 1993)).

\textsuperscript{43} See Manian, supra note 40, at 262-63 (noting right to be free from unwanted medical intrusions included in constitutional right to privacy); see also International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171, available at http://www.l.umn.edu/humanrts/instree/b3ccpr.htm (noting it is human right for individuals not to be subjected to unwanted medical treatment).

\textsuperscript{44} See infra note 46 and accompanying text (discussing opposition to ultrasound as informed consent). But see infra note 45 and accompanying text (discussing proponents’ position that ultrasound should rightfully be included in informed consent provisions).

\textsuperscript{45} See Avila, supra note 6, at 533 (explaining that helping women to think of fetus as potential life leads to better decision).

\textsuperscript{46} See Sanger, supra note 7, at 360 (arguing mandated ultrasound is not truly informed consent but rather harassment). Sanger writes that “[m]andatory ultrasound disrupts the law’s traditional respect for privacy, bodily integrity, and decisional autonomy in matters of such intimacy as reproduction, pregnancy, and family formation.” Id.; see also Robert M. Godenzo, Note, The Role of Ultrasound Imaging in Informed Consent Legislation Post-Gonzales v. Carhart, 27 QUINNIPIAC L. REV. 285, 323 (2009) (arguing abortion disclosure laws “not really informed consent”). Godenzo further argues that if the true goal of an ultrasound mandate is to inform the pa-
to undergo an ultrasound (an invasive medical procedure itself) in order to obtain an abortion does seem to directly conflict with the original purpose of informed consent—to protect patients from unwanted medical intrusions.47

C. Fetal Personhood

Ultrasound mandates, and abortions generally, also raise questions about fetal personhood (i.e., whether or not a fetus is a full human life with rights that should be protected).48 “Pro-life” measures, or measures aimed at making a woman change her mind about having an abortion in order to preserve the life of the fetus, tend to be aimed at acknowledging the fetus as a “person,” or at the very least, a potential life.49 The concept of considering a fetus a person is an idea that often stems from religious beliefs, but this idea is thought to be relatively new and thus unlikely to have been part of what the framers of the Constitution considered when they drafted the Constitution and contemplated protecting human rights.50

tient, an ultrasound image is not necessary to achieve this end. Godenzo, supra. Alternatively, doctors have other options such as describing the process to the woman, showing an artist’s rendering of a fetus, or other informative options that are less invasive and less emotionally charged than a forced ultrasound. Id. Forcing a doctor to convey “the state’s content-based message to their patients, a message they do not want to deliver” absent patient consent does not protect patients’ interests and violates doctors’ First Amendment rights. See Stuart v. Loomis, No. 1:11-CV-804, 2014 WL 186310, at *1 (M.D.N.C. Jan. 17, 2014); see also Manian, supra note 40, at 242-54 (arguing informed consent to abortion is treated differently from consent to other medical procedures). “Adults make important emotional medical decisions that may lead to regret in many situations... but the law does not interfere with those decisions on the ground that someone other than the patient knows better what life choices will lead to mentally healthy consequences.” Manian, supra note 40, at 242-54. Abortion mandates undermine patient autonomy in ways that other informed consent provisions do not, and violate the rights of both the patient and the doctor. See id.; Stuart, 2014 WL 186310, at *1.

47 See Sarah E. Weber, Comment, An Attempt to Legislate Morality: Forced Ultrasounds as the Newest Tactic in Anti-Abortion Legislation, 45 TULSA L. REV. 359, 372 (2009) (calling forced ultrasounds violation of right to refuse medical care); see also Vandewalker, supra note 7, at 8-9 (indicating choice should belong to patient with regard to medical procedures); supra notes 38-42 and accompanying text (discussing original purpose of informed consent laws as protection of bodily autonomy). But see Mailee Smith, Pre-Abortion Ultrasounds Serve Essential Purpose, JURIST (Mar. 16, 2012), http://jurist.org/hotline/2012/03/mailee-smith-abortion-ultrasound.php (arguing ultrasound part of normal medical procedure for abortion in many clinics). Smith says that ultrasounds serve an necessary medical purpose—to diagnose and predict risks and ultimately protect the health of the mother. Id. Smith also argues that ultrasounds prior to abortion are necessary to accurately determine the gestational age of the fetus, which is a vital fact to know prior to performing an abortion since abortions after a certain gestational age are not legal. Id.

48 See infra notes 63-64 and accompanying text (discussing opposing positions in fetal personhood debate).

49 See infra notes 63-64.

50 See Dudley II, supra note 22 (commenting on idea that life begins at conception not wide-
The state of the law is somewhat conflicted on the issue of whether fetuses are considered legal persons.\textsuperscript{51} With respect to abortion, \textit{Roe} recognized the tension between the rights of the mother and the rights of the fetus.\textsuperscript{52} That tension continues to create conflict today, as “pro-choice advocates claim that the mother’s rights must prevail over those of the fetus, while pro-life activists argue that the rights of the fetus are at least equal to, if not predominant over, those of the mother.”\textsuperscript{53}

While the abortion debate highlights the controversy over whether a fetus is (or should be) a person, the law itself recognizes some instances in which fetuses have rights and others in which they have few or none.\textsuperscript{54} Traditional common law originally required that the fetus be born alive in order for harm to the fetus to be considered criminal or tortious.\textsuperscript{55} This common law requirement seems consistent with the fact that abortion was also legal prior to the 1800s.\textsuperscript{56} As more rights are conferred upon unborn fetuses in modern law, the requirement that the fetus be born alive has largely been discarded.\textsuperscript{57} For example, this transition into conferring more rights to fetuses over time is illustrated in wrongful death statutes; while wrongful death statutes formerly prohibited recovery for the death of a fetus, some states now allow survivors to recover for the wrongful death of

\textsuperscript{51} See infra notes 53-55, 58-60 and accompanying text (noting conflicts in law with regard to whether fetuses should have rights of legal persons).

\textsuperscript{52} See \textit{Roe v. Wade}, 410 U.S. 113, 150-51 (1973) (discussing duality of rights at issue in abortion cases); see also supra note 31 and accompanying text (discussing balancing act between women’s rights and state’s rights to protect fetal interest).


\textsuperscript{56} See \textit{History of Abortion}, \textit{supra} note 21 (discussing trend of criminalizing abortion beginning in 1800s).

\textsuperscript{57} See \textit{infra} notes 58-60 and accompanying text (discussing instances where fetus in utero has rights).
an unborn child. The there are other instances as well which demonstrate a trend towards increasing fetal rights despite the fact that non-viable fetuses seem to have very few rights with respect to abortion—for instance many states now recognize fetal homicide as a crime but still allow abortion. One judge has even placed an unborn child in the protective custody of the state; however, the decision was later overruled on appeal. Thus, there seems to be some confusion as to whether a fetus is considered a legal person with all of the protectable human rights that such status implies, and laws which confer rights to a fetus certainly seem to be at odds with the fact that abortion is legal in every state.

While pro-life proponents argue that personhood status should be conferred upon the fetus, opponents argue that there are significant consequences that may arise from giving fetuses legal personhood status. Women’s rights advocates tend to strongly oppose such measures because conferring full personhood status upon a fetus would inevitably detract from the rights of the mother. Though courts do not currently require a person to compromise their own bodily integrity for the benefit of another, as society continues the trend of increasing fetal rights, it may begin to create a slippery slope, leading to complicated—and arguably harmful—legal, constitutional, and societal consequences.

60 See Ark. Dep’t of Human Servs. v. Collier, 95 S.W.3d 772, 781-82 (Ark. 2003) (granting certiorari to vacate lower court decision to place fetus in protective custody of state). Citing the Arkansas Juvenile Code, the lower court “declared an unborn fetus to be dependent-neglected and placed the fetus in DHS’s custody.” Id. at 773-74 (describing lower court’s finding that fetus was protected by Arkansas Juvenile Code). The Collier court ruled that the term “juvenile” could not be expanded to include a fetus and that in order to place a child in protective custody, the child would first have to be born. See id. at 781-82.
61 See Magnuson & Lederman, supra note 54, at 769 (opining fetal rights laws conflict with right to abortion).
62 See infra notes 63-64 and accompanying text (highlighting divide over fetal personhood debate).
scientific, and social consequences.\(^{64}\)

Whether ultrasound mandates actually constitute personhood measures is also debated.\(^{65}\)Seeing the image of the fetus in an ultrasound image may indeed persuade the mother that the fetus is actually a person or at the very least, a potential human life.\(^{66}\) In fact, many say that the ultimate purpose of an ultrasound mandate is to convince the mother that the fetus is a person (or potential person) and convince her to change her mind about going through with the abortion.\(^{67}\) However, a mandated ultrasound may simply be considered information provided to the mother so that she

\(^{64}\) See In re A.C., 573 A.2d 1235, 1243-44 (D.C. 1990) (“[C]ourts do not compel one person to permit a significant intrusion upon his or her bodily integrity for the benefit of another person’s health.”); see also Joseph Boven, Anti-Choice “Egg-as-Person” Initiatives Threaten the Rights of Women, RH REALITY CHECK (Nov. 12, 2009, 8:53 AM), http://www.rhrealitycheck.org/blog/2009/11/12/antichoice-eggasperson-initiatives-threaten-rights-of-women (pointing out social and scientific consequences of fetal personhood). Boven suggests that if we deem a fetus a legal person, that status could be effective even if the woman did not know she was pregnant. See Boven, supra. Therefore, acts such as drinking while pregnant could be criminally punishable, even if the woman was not yet aware of the fact that she was pregnant. Id.; see also Ed Goldman, The Conflict Between Fetal Personhood Laws and Women’s Rights, JURIST (Nov. 17, 2011), http://jurist.org/forum/2011/11/ed-goldman-personhood-laws.php (discussing fetal personhood and consequences in medical care, stem cell research, contraception, and other topics). If fetuses are granted legal personhood, parents may be entitled tax deductions for unborn children, in vitro fertilization (IVF) may be rendered illegal since unneeded embryos would not be allowed to be discarded, stem cell research would be entirely outlawed, and some birth control methods (i.e., the morning-after pill) may become illegal. See Goldman, supra. Goldman also comments that women would essentially be “transport and delivery systems” with very limited rights during a pregnancy. Id. Additionally, women who miscarry or have stillborn children could potentially be prosecuted for murder. Id.

\(^{65}\) See infra notes 66-67 and accompanying text (explaining examples of various positions regarding whether ultrasound mandates constitute personhood measures).

\(^{66}\) See Lisa M. Mitchell, Baby’s First Picture: Ultrasound and the Politics of Fetal Subjects 6 (University of Toronto Press Inc., 1st ed. 2001) (“For some parents, the ability to see the fetal parts...may demonstrate that the fetus...has the potential for or actually possesses distinctive human consciousness and personhood.”); Khiara M. Bridges, Capturing the Judiciary: Carhart and the Undue Burden Standard, 67 WASH. & LEE L. REV. 915, 972-73 (2010) (opining ultrasound is picture and morally significant persons get their picture taken); June Carbone & Naomi Cahn, Families, Fundamentalism, & The First Amendment: Embryo Fundamentalism, 18 WM. & MARY BILL RTS. J. 1015, 1024 (2010) (suggesting ultrasounds “personalize” the embryo); Justin Murray, Exposing the Underground Establishment Clause in the Supreme Court’s Abortion Cases, 23 REGENT U. L. REV. 1, 61 (2011) (commenting ultrasounds may play role in forming judgments about personhood); Kate Sheppard, Virginia Is For Zygote Personhood!, MOTHER JONES (Feb. 14, 2012, 3:47 PM), http://www.motherjones.com/mojo/2012/02/virginia-zygote-personhood (labeling Virginia’s ultrasound law as personhood measure).

\(^{67}\) See Kapur, supra note 18 (opining purpose of ultrasound mandate is to change mother’s mind or make abortion more difficult); see also Avila, supra note 6, at 533 (explaining idea that ultrasound mandates are geared at making woman consider fetus as person). If a woman considers the fetus a person or potential life, she may be more likely to change her mind and decide against going through with the abortion. See Avila, supra note 6, at 533.
can make a fully informed decision about the pending abortion procedure.\textsuperscript{68}

Critics of fetal personhood measures also point out that the judiciary should not answer the question of when life begins (and therefore should not decide whether a fetus or embryo constitutes a person), and that indeed the Court has had the opportunity to answer the question of personhood and has explicitly declined to answer this question.\textsuperscript{69} Consequently, whether a fetus should be considered a person is in a current state of conflict, and the question of whether forced ultrasounds as legal precursors to abortions constitute personhood measures also currently remains unresolved.\textsuperscript{70}

IV. ANALYSIS

A. Mandated Ultrasounds Constitute Harassment Rather Than Informed Consent

In order to succeed in having an abortion mandate invalidated, a litigator will need to make the argument that, although the ultrasound laws were created under the guise of “informed consent” provisions, they are really just unnecessary harassment “masquerading” as informed consent.\textsuperscript{71} The original purpose of informed consent was to protect patients from unwanted medical intrusions and to allow a patient to make informed, auton-

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\textsuperscript{68} See supra Part III.B. (discussing ultrasound mandates as part of informed consent provisions and purpose of consent provisions generally).

\textsuperscript{69} See Jed Rubenfeld, On the Legal Status of the Proposition that “Life Begins at Conception,” 43 STAN. L. REV. 599, 606 (1991) (observing Court has declined to determine personhood status of fetuses); see also Roe v. Wade, 410 U.S. 113, 159-60 (1973) (refusing to answer “most sensitive and difficult question” of when life begins).


\textsuperscript{71} See supra note 37 and accompanying text (indicating ultrasound mandates typically included in informed consent provisions). But see Sanger, supra note 7, at 360 (arguing mandated ultrasound is not truly informed consent but rather harassment). Sanger comments that mandatory ultrasounds invade the privacy of women in a way that contradicts the original intended purpose of informed consent laws. Id.; see also Stuart v. Loomis, No. 1:11-CV-804, 2014 WL 186310, at *15-16 (M.D.N.C. Jan. 17, 2014) (finding state’s ultrasound requirement also violates doctors’ free speech, unlike ordinary informed consent requirements).
omous decisions about what happens with her own body. However, forcing an additional medical procedure on a woman before she can undergo an abortion is directly contrary to this idea. Proponents of the laws argue that the ultrasound image allows the woman to make an informed choice about ending the pregnancy by giving her an opportunity to fully understand and contemplate the very permanent decision she is about to make, and reason that seeing the image of the fetus makes it less likely that she will abort. This antiquated logic assumes that women are not capable fully considering the consequences of their actions and reasons that showing a woman a picture of the fetus will open her eyes to the reality that she is terminating the potential for human life. Furthermore, an abortion is already an extremely difficult decision for most women to make, and forcing them to undergo an ultrasound and view an image of, and/or hear a description of the developmental status of the fetus is an unnecessarily emotionally traumatic experience. Ultrasound mandates are directly contrary to the original purpose of the doctrine of informed consent: to allow the patient to make a knowing, informed decision about the medical procedure and avoid unwanted medical intrusions.

Furthermore, while rigidity in the application of informed consent provisions has previously been rejected, application of ultrasound mandates affords little flexibility. While some ultrasound mandate laws do permit

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72 See supra note 38 and accompanying text (noting original purpose of informed consent was to protect patients’ bodily integrity); see also Vandewalker, supra note 7, at 31-32 (commenting purpose of informed consent is to ensure decision belongs to patient). Vandewalker also comments that the physician and patient together should be able to make the choice about what information the patient will receive. See Vandewalker, supra note 7, at 31.

73 See supra note 46 and accompanying text (noting forced ultrasounds contrary to purpose of informed consent); Weber, supra note 47, at 372 (arguing mandatory ultrasounds violate patient’s right to refuse medical care); see also Stuart, 2014 WL 186310, at *15-16 (holding mandatory ultrasound violates doctors’ rights).

74 See Sanger, supra note 7, at 351 (noting purpose of ultrasound mandates is to make abortion less likely); see also Avila, supra note 6, at 533 (explaining ultrasound image intended to help women make better decision regarding abortion).

75 See Sawicki, supra note 7, at 17 (arguing mandatory ultrasounds reflect “offensive and antiquated views about women”).

76 See Godenzo, supra note 46, at 321-23 (arguing ultrasound imaging unnecessary and detailing possible less invasive alternatives).

77 See Vandewalker, supra note 7, at 31-32 (arguing ultrasound mandates contrary to original purpose of informed consent); Weber, supra note 47, at 372 (commenting forced ultrasounds contrary to right to refuse medical care); see also Manian, supra note 40, at 254-55 (noting abortion is treated differently from other medical procedures in terms of informed consent). But see Smith, supra note 47 (opining ultrasounds medically necessary and thus not contrary to purpose of informed consent).

78 See Salgo v. Leland Stanford Jr. Univ. Bd. of Trs., 317 P.2d 170, 181 (Cal. Dist. Ct. App. 1957) (holding doctors should have discretion with respect to medical disclosure); Manian, supra
the woman to avert her eyes from the image, the doctor is absolutely required to perform the ultrasound, even if he or she believes that performing the ultrasound would cause unnecessary emotional distress for the patient. This lack of discretion is directly at odds with previous authority rejecting rigidity with respect to medical disclosure requirements.

B. Undue Burden Argument

Whether ultrasound requirements constitute an undue burden likely presents the largest hurdle because this has yet to be decided. Furthermore, the relevant precedent seems to lean towards ultrasound requirements not being considered an undue burden. The Court, when establishing the “undue burden” standard in *Casey*, held that supplying information to a woman prior to obtaining an abortion does not constitute an undue burden, even if the purpose of supplying that information is aimed at dissuading the woman from going through with the procedure. Thus, the state would likely argue that ultrasound mandates simply provide additional information to the woman, and as such do not constitute an “undue burden” under the *Casey* standard. Unlike the provisions in *Casey* that were

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*See supra* note 36 and accompanying text (noting courts have yet to decide whether ultrasound mandates constitute undue burden).


*See* *Casey*, 505 U.S. at 838 (holding supplying information prior to abortion is not undue burden, even if information is biased). Following the reasoning in *Casey*, although information gleaned from an ultrasound may in fact be biased in favor of a pro-life agenda, it likely will not constitute an “undue burden” for that reason alone; a more significant “burden” would need to be demonstrated. *See id.*

*See id.* Additionally, many of the laws have been titled “Right to Know Acts,” indicating that the drafters intended for them to at least be perceived as information-providing provisions.
struck down, the ultrasound mandates do not actually inhibit or prevent the woman from seeking an abortion.\textsuperscript{85} Furthermore, states like Virginia, which have included exceptions for rape, incest, and cases where the mother’s health is at risk, have positioned themselves to easily overcome an obvious “undue burden” challenge.\textsuperscript{86} Though this argument likely presents the biggest hurdle to a case against a state’s ultrasound mandate, the litigator will nevertheless want to argue that ultrasound mandates do in fact constitute an undue burden.\textsuperscript{87} Despite this significant challenge, failing to convince the court that ultrasound mandates constitute an “undue burden” will not necessarily sound the death knell for the litigator’s entire case, as there are other important constitutional and policy arguments to consider.\textsuperscript{88}

C. Ultrasound Mandates Constitute Unconstitutional Infringement of Privacy.

One of the strongest arguments against ultrasound mandates is the argument that they constitute an unconstitutional infringement of privacy contrary to the Court’s reasoning in \textit{Roe} and its progeny.\textsuperscript{89} The Court’s decisions in \textit{Griswold} and \textit{Eisenstadt} set the stage for the court’s decision in \textit{Roe} by creating a “zone of privacy” into which the government cannot extend

\textsuperscript{85} See Casey, 505 U.S. at 838-41 (defining what constitutes undue burden within challenged statute); see also, e.g., ALA. CODE § 26-23A-4 (2009) (requiring ultrasound but not inhibiting abortion); MISS. CODE ANN. § 41-41-34 (West 2007) (same); VA. CODE ANN. § 18.2-76 (2009) (same).
\textsuperscript{86} See ALA. CODE § 26-23A-4 (2009) (providing exception for medical emergency); IND. CODE 16-34-2-1.1 (West 2007) (providing medical emergency exception); VA. CODE ANN. § 18.2-76 (2009) (providing exception for rape or incest and maternal health exception); see also Byellin, supra note 20 (opining ultrasound laws with exceptions have positioned themselves to defeat “undue burden” challenge). But see MISS. CODE ANN. § 41-41-34 (West 2007) (appearing to provide no medical emergency exception).
\textsuperscript{87} See Byellin, supra note 20 (commenting “undue burden” argument difficult to make against mandates positioned similarly to Virginia’s law).
\textsuperscript{88} See supra Part IV.A. (discussing informed consent arguments against ultrasound mandates); see also infra notes 89-92 and accompanying text (analyzing constitutionally-grounded privacy arguments against ultrasound mandates); supra note 64 and accompanying text (discussing potential consequences of conferring personhood status to fetuses).
\textsuperscript{89} See Roe v. Wade, 410 U.S. 113, 153 (1973) (extending zone of privacy to decision of whether to terminate pregnancy); Eisenstadt v. Baird, 405 U.S. 438, 454-55 (1972) (“[I]t is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding marital relationship should be free from privacy invasion).
the ultrasound requirements. The language in *Eisenstadt* is particularly useful here, as the Court in its decision specifically asserted, “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Thus, one could argue that the ultrasound mandates constitute an unwarranted government intrusion (a literal intrusion in the case of transvaginal ultrasound) and infringe upon the right to privacy, granted by *Roe* and its progeny, in a way that other informed consent provisions do not. The physical medical invasion imposed on the woman during a mandated ultrasound goes beyond provisions that have previously been upheld in the past, and as such constitute an infringement on the woman’s right to be free from unwarranted governmental intrusions. This of course would require asking the court to expand the right to privacy slightly, but since the “zone of privacy” has already been established and the Court has already said that it encompasses the decision of whether or not to terminate a pregnancy, the likelihood of the Court expanding upon this right of privacy in this way is not entirely far-fetched.

D. Ultrasound Mandates Constitute Personhood Measures And Confer Too Many Rights To The Fetus At The Expense Of The Mother

Although the issue of whether ultrasound mandates constitute a fetal personhood measure is contested, there is a strong argument that they...
are in fact personhood measures aimed at granting more rights to an unborn child and inevitably detracting from the rights of the mother. The motivations behind such laws are decidedly "pro-life:” the rationale is that seeing the image of the fetus will cause the woman to consider the potential life within her and reconsider her decision to terminate her pregnancy. Additionally, the ultrasound image itself gives the fetus significance; for many potential parents the first time they see the ultrasound image is the defining moment of the pregnancy—the moment when the fetus becomes a significant human being. While some argue that the ultrasound is aimed at simply providing as much information to the woman as possible, it is difficult to deny that these laws contain elements of fetal personhood, especially given the undeniable “pro-life” motivations behind most of the laws.

Even if the litigator can convince the court that ultrasound mandates do in fact constitute fetal personhood measures, he or she still faces the uphill battle of convincing the court not to increase fetal rights. Given the inconsistencies in the law with respect to whether fetuses are considered legal persons, it is difficult to predict what precedent the Court would use to decide this matter. The current trend appears to lean towards in-

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95 See MITCHELL, supra note 66, at 6 (arguing seeing ultrasound image may convince women fetus has human qualities); see also Bridges, supra note 66, at 972-73 (arguing morally significant persons get picture taken); Murray, supra note 66, at 61 (opining ultrasound may convince some to make judgments regarding personhood of fetus). If morally significant persons only get their picture taken, then an ultrasound is thus an attempt to personalize the fetus. See Bridges, supra note 66, at 972-73; see also Carbone & Cahn, supra note 66, at 1024 (arguing ultrasounds constitute personhood measures). But see supra Part III.B. (discussing mandates as informed consent provisions rather than personhood measures).

96 See Avila, supra note 6, at 556 (concluding purpose of ultrasound mandate is to help women make “better” decisions regarding abortion); Sanger, supra note 7, at 351 (noting purpose of ultrasound mandates is to make women less likely to proceed with abortion); see also Alden, supra note 53, at 484-85 (explaining pro-life position regarding abortion).

97 See MITCHELL, supra note 66, at 6 (noting ultrasounds may persuade people that fetus is human life); Bridges, supra note 66, at 972-73 (opining only morally significant people get their picture taken); Carbone & Cahn, supra note 66, at 1024 (suggesting ultrasounds “personalize” fetus); Murray, supra note 66, at 61 (commenting ultrasounds may help people to form judgment about fetal personhood).

98 See Alden, supra note 53, at 484-85 (discussing pro-life position with respect to abortion laws).

99 See Magnuson & Lederman, supra note 54, at 769 (noting increased fetal rights at odds with abortion jurisprudence); see also Boven, supra note 64 (discussing potential social, criminal, and scientific consequences of increasing fetal rights); Goldman, supra note 64 (discussing medical and other consequences to increased fetal rights); Johnsen, supra note 63, at 600 (opining increased fetal rights burdens constitutional rights of women); Sandstad, supra note 63, at 173 (arguing increasing fetal rights is to detriment of women’s rights); sources cited supra note 59 and accompanying text (discussing states increasingly recognizing fetal homicide as crime).

100 See supra Part III.C. (introducing inconsistencies in law as to whether fetuses considered
creasing fetal rights, despite the fact that abortion is still legal in all states.\textsuperscript{101} However, increasing fetal rights and moving towards a society which embraces fetal personhood potentially has many complicated consequences.\textsuperscript{102} Though it could hardly be said that upholding ultrasound mandates would confer full legal personhood status to the fetus, one would could argue that ultrasound mandates create an unprecedented slippery slope, opening the door to further personhood measures and leading society down a road towards embracing full fetal personhood.\textsuperscript{103}

The Court’s reasoning in \textit{Roe} recognizes the need to delicately counterbalance the interests of the unborn child (and the right of the state to protect that interest) with the rights and interests of the mother.\textsuperscript{104} Therefore one would want to argue that opening the door to granting legal personhood status to fetuses not only has complicated consequences, but additionally flies in the face of the reasoning in \textit{Roe}, whereby the Court deliberately attempted to strike a delicate balance between protecting the interests of the unborn child without infringing too heavily upon the rights of the mother.\textsuperscript{105} Furthermore, conferring full personhood the fetus at the expense of the mother would create a society where women are essentially required to forgo their own bodily integrity for the benefit of another human being, which is something the court has explicitly refused to do in the past.\textsuperscript{106} But given the current trend of increasing fetal legal rights, it may be difficult to convince the court that a line should be drawn here, by striking down ultrasound mandates as potential personhood measures, when fetal rights are being expanded in many other areas of the law.\textsuperscript{107} If the court is to remain consistent with the long-standing reasoning of \textit{Roe}, a line will have to be drawn somewhere in order to prevent the tipping of the scales in favor of the fetus at the expense of the mother, and a litigator will need to convince the court that the line ought to be drawn here, by striking down ultrasound mandates.\textsuperscript{108} To continue the trend of increasing fetal rights by

\begin{itemize}
\item \textsuperscript{101} See \textit{supra} notes 58-60 and accompanying text (discussing trend of increased fetal rights in various areas of law).
\item \textsuperscript{102} See \textit{supra} note 64 and accompanying text (outlining possible consequences of increasing fetal rights).
\item \textsuperscript{103} See \textit{supra} note 64 (noting potential consequences and complications).
\item \textsuperscript{104} See \textit{Roe} v. Wade, 410 U.S. 113, 153-54 (1973) (discussing need to balance interests of the woman with state’s interest in protecting potential life).
\item \textsuperscript{105} See \textit{id.}
\item \textsuperscript{106} See \textit{In re A.C.}, 573 A.2d 1235, 1243-44 (D.C. 1990) (holding courts will not compel individual to compromise own bodily integrity for benefit of another).
\item \textsuperscript{107} See \textit{supra} Part III.C. (discussing evolution of fetal rights in various areas of law).
\item \textsuperscript{108} See, e.g., 10 U.S.C. § 919a (2012) (recognizing fetal homicide as crime on federal level); ALA. CODE § 13A-6-1 (2007) (establishing fetus is person for purpose of homicide); ARIZ. REV.
upholding ultrasound mandates upsets the delicate balance between fetal rights and women’s rights by tipping the scale too far in favor of fetal rights, and is therefore contrary to the long-standing reasoning in Roe which advocates for a delicate balancing of these two interests.\(^ {109}\)

In addition, even though the Court has had opportunities to answer questions relating to fetal personhood and when life begins, it has explicitly declined to do so.\(^ {110}\) Since the Court seemingly has asserted that issues relating to fetal personhood are not something the judiciary should decide, a litigator would want to argue that legislation in favor of such likely ought to be avoided as well.\(^ {111}\) Increasing fetal rights inevitably implies that life begins at conception, thus resolving a question that courts seem to have intentionally left open for individuals to decide.\(^ {112}\) Therefore a litigator would want to argue that in declining to answer this question, the Court ultimately reasoned that this is a decision that should be made by individuals, rather than by the judiciary or legislature.\(^ {113}\)

V. CONCLUSION

Likely the greatest challenge in the battle against ultrasound mandates will be convincing the court that such mandates constitute an “undue burden” to a woman’s right to terminate her pregnancy. Given the existing precedent and the fact that many states have poised their statutes to easily overcome an obvious undue burden challenge, it seems as though it would be difficult to convince the court that requiring a woman to receive an ultrasound prior to obtaining an abortion does in fact constitute an undue burden. However, even if the litigator loses on this argument, he or she could still prevail, given the other compelling constitutional and policy arguments to be made in favor of women’s rights. Particularly compelling are the arguments that ultrasound mandates constitute a violation of privacy that not only defeat the very purpose of informed consent—to protect bdi-
ly autonomy and privacy—but also constitute a constitutional infringement upon the “zones of privacy” previously defined by the Court. Furthermore, while increasing fetal rights is acceptable and necessary in some areas of the law, a line must be drawn somewhere in order to avoid the complicated consequences discussed earlier in this note. Therefore, despite the fact that the “undue burden” argument is likely to fail (particularly against states with statutes carefully constructed to overcome such a challenge), the remaining arguments against ultrasound mandates are so convincing that there is still a strong chance that a litigator would be able to successfully convince the court that the mandates ought not to be upheld.

_Kimberly A. Prior_