

REQUIRING A TRANSVAGINAL ULTRASOUND PRIOR TO ABORTION: AN UNDUE BURDEN ON THE FREEDOM TO CHOOSE

CHELSEY MARSH[†]

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I. INTRODUCTION

To a certain degree, citizens of the United States are granted freedom of choice concerning their decisions regarding abortion.¹ Courts interpret this freedom as a part of the U.S. Constitution, deriving from the “liberty” interest found in the Due Process Clause of the Fourteenth Amendment.² The modern-day status of this abortion right is set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which dictates that a woman has a freedom of choice prior to viability of the fetus and that states cannot inhibit this choice by imposing an “undue

[†] Associate Attorney, Miller, Canfield, Paddock, and Stone, P.L.C. B.A., University of Michigan; J.D., *magna cum laude*, Wayne State University.

1. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

2. *Id.* See generally U.S. CONST. amend. XIV, § 1.

burden.”³ What constitutes an “undue burden” is a question frequently presented before courts throughout the nation.⁴

A modern trend amongst state legislatures is to include an ultrasound provision within abortion legislation.⁵ Some states have enacted laws requiring that a woman seeking an abortion receive information on obtaining an ultrasound, where others require that the woman actually has an ultrasound prior to the abortion.⁶ The specifics of the laws regulating the ultrasound vary from state to state.⁷ Laws range from requiring a woman to view the ultrasound image to offering her the opportunity to see it.⁸

This trend is in the process of yet another transition.⁹ Now, instead of requiring an “ultrasound,” legislation has been passed to require a transvaginal ultrasound as opposed to an abdominal ultrasound.¹⁰ The implications of this transition constitute an even stronger undue burden on the woman’s freedom of choice. While many arguments against ultrasound requirements prior to an abortion are applicable to either an abdominal or transvaginal ultrasound, the focus of this Note will be on the added harm caused by transvaginal ultrasounds.

There are three primary reasons why the requirement of a transvaginal ultrasound constitutes an undue burden on a woman’s freedom to choose. First, transvaginal ultrasounds, as opposed to mere abdominal ultrasounds, are an invasion into a woman’s body that facially constitutes an undue burden on a woman’s right to choose.¹¹ Second, transvaginal ultrasounds create an additional cost for the abortion procedure.¹² Finally, transvaginal ultrasounds have the potential of

3. *Id.* at 846, 874.

4. *E.g.*, *Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999); *Stenberg v. Carhart*, 530 U.S. 914 (2000). Jurisprudence regarding abortion began with an unequivocal articulation of the fundamental right to choose. Court opinions illustrate the multiple and conflicting views pertaining to the status and dignity of both the woman and the fetus. *See also* Paula Abrams, *The Scarlet Letter: The Supreme Court and the Language of Abortion Stigma*, 19 MICH. J. GENDER & L. 293, 294 (2013).

5. *See, e.g.*, MICH. COMP. LAWS ANN. § 333.17015 (West 2014); 2012 La. Sess. Law Serv. 685 (West).

6. *State Policies in Brief: Requirements for Ultrasound*, GUTTMACHER INST. (May 1, 2014), http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf.

7. *Id.*

8. *Id.*

9. *See, e.g.*, LA. REV. STAT. ANN. § 40:1299.35.2 (2013).

10. *Id.*

11. *See Pelvic Ultrasound and Transvaginal Ultrasound*, HARVARD HEALTH PUBLICATIONS, <http://www.health.harvard.edu/diagnostic-tests/pelvic-ultrasound-and-transvaginal-ultrasound.htm> (last visited Mar. 3, 2013).

12. Sarah E. Weber, *An Attempt to Legislate Morality: Forced Ultrasounds as the Newest Tactic in Anti-Abortion Legislation*, 45 TULSA L. REV. 359, 370–72 (2009).

resulting in psychological harm that would hinder a pregnant woman's ability to make a rational decision, and therefore, become an undue burden on a woman's freedom of choice prior to viability.¹³

This new requirement is a medically unnecessary and physically intrusive procedure that imposes both additional cost and psychological harm upon a woman, and as a result, too greatly infringes upon a woman's Fourteenth Amendment freedom of choice.¹⁴

II. BACKGROUND

A. History of the Abortion Right

The Fourteenth Amendment of the U.S. Constitution, in relevant part, states: "nor shall any State deprive any person of life, liberty, or property, without due process of law."¹⁵ A woman's freedom of choice regarding abortion derives from the "liberty" interest found in the Due Process Clause of the Fourteenth Amendment.¹⁶ A woman was not always free to make this choice; however, that changed in 1973.¹⁷

13. Jack M. Valpey, *Testimony of Jack M. Valpey, MD, MPH*, PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH 2, Mar. 28, 2007, available at http://www.prch.org/files/37_valpey.pdf.

14. Abortion is socially stigmatized throughout the United States. Abrams, *supra* note 4, at 295. This stigmatization is generated through political and legal discourse. *Id.* The recent trend of anti-choice legislation in both federal and state legislatures indicates the increasing intensity of this stigma. *Id.* "Laws mandating invasive ultrasounds, biased counseling sessions, and onerous waiting periods, along with fetal 'personhood' and fetal pain laws, are intended to shame and punish women who seek abortions." *Id.*

15. U.S. CONST. amend. XIV, § 1.

16. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); see also *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–85 (1977) (stating that the liberty which encompasses those decisions "includes 'the interest in independence in making certain kinds of important decisions.' While the outer limits of this aspect of [protected liberty] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education'" (citations omitted)).

17. *Roe v. Wade*, 410 U.S. 113 (1973). The Court held that the Texas statutes criminalizing abortion were unconstitutional. *Id.* at 117–18. The statutes criminalized abortion at any stage of pregnancy (with an exception in the circumstance where the abortion was needed to save the mother's life). *Id.* at 166. The holding was divided into three parts: in the stage prior to the approximate end of the first trimester, the decision regarding abortion is to "be left to the medical judgment of the pregnant woman's attending physician"; in the stages following the first trimester, the state may regulate abortions "in ways that are reasonably related to maternal health" in order to promote "its interest in the health of the mother"; and following viability, the state may regulate or proscribe abortion (except in circumstances where it is for "the life or health of the mother") in order to promote "its interest in the potential human life." *Id.* at 164–65.

B. Current Status of Abortion Rights

Planned Parenthood of Southeastern Pennsylvania v. Casey sets forth the current status of abortion rights in the United States.¹⁸ First, the Court recognized a woman's freedom of choice prior to viability, as well as a woman's ability to obtain an abortion without undue interference by the state.¹⁹ The state did not have a strong enough interest before the point of fetal viability to restrict abortion or impose any sort of substantial obstacle before a woman's right to choose.²⁰ Second, the Court confirmed the state's power to prohibit abortions following fetal viability, as long as the law contains an exception for pregnancies endangering "the woman's life or health."²¹ Third, the Court reaffirmed the state's legitimate interest in protecting the woman's health and the life of the fetus beginning at the onset of pregnancy.²² The Court clarified the meaning of "undue burden" by articulating a standard for future courts to adhere to: an undue burden is presented when a state regulation has the *purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus*. A statute with this purpose is invalid because the means chosen by the state to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.²³

The Court further noted that, unless the regulation is a substantial burden, "a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal."²⁴

C. Abortion Laws in the Casey Decision

The *Casey* Court then proceeded to evaluate Pennsylvania law in order to determine whether it presented an "undue burden" on a woman's right to choose.²⁵ The Court found the informed consent provision,

18. *Casey*, 505 U.S. at 846 (reaffirming the three-part holding of *Roe v. Wade*).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 877 (emphasis added).

24. *Casey*, 505 U.S. at 878.

25. *Id.* at 887-901.

requiring the doctor to disclose certain facts to the woman, to be valid.²⁶ In addition, the Court upheld the provision requiring a 24-hour waiting period between the informed consent and the procedure.²⁷ Conversely, the spousal notification provision was ruled invalid.²⁸ This provision required a married woman to give a signed statement that she informed her spouse of her intent to undergo an abortion prior to the procedure.²⁹ There were numerous findings of fact presented to the Supreme Court that led to the conclusion that the provision was invalid.³⁰ Even the "limited research" presented to the lower court was sufficient to support the findings of fact.³¹ The insurmountable issue with this requirement was that it would effectively deter abortions because the notification requirement would frequently result in spousal abuse.³² Therefore,

26. *Id.* The informed consent provision required, "at least 24 hours before performing an abortion," a physician to inform the woman of: the procedure; the health risks; the probable gestational age of the fetus; and "the availability of printed materials published by the State" that describes the fetus, provides information on "medical assistance for childbirth" and child support, and lists adoption agencies along with other services that are alternatives to abortion. *Id.* at 881. The Court found this provision to be valid and reasoned that it was a way to ensure that a woman comprehended the "full consequences of her decision." *Id.* at 882. The state had a legitimate purpose here: it reduced the risk of electing an abortion only to later discover the woman's decision was not fully informed, and therefore, the woman endures psychological consequences as a result. *Id.* at 882.

27. *Casey*, 505 U.S. at 885, 887. The Court reasoned that important decisions, such as an abortion, would be more informed and properly deliberated upon if they were preceded by a period of reflection. *Id.* at 885. This provision was not unreasonable, especially given the fact that the statute explicitly directed that a doctor provide information as a background to the decision. *Id.* The Court continued by recognizing the fact that this provision may result in increased cost for women who travel from out of town to have the abortion performed. *Id.* at 886. Despite this potentially increased cost, the Court found no undue burden on a woman's right to choose. *Id.*

28. *Id.* at 895.

29. *Id.* at 887.

30. *Id.* at 888-89. (These findings of fact included the following: "281. Studies reveal that family violence occurs in two million families in the United States. This figure, however, is a conservative one"; "282. A wife may not elect to notify her husband of her intention to have an abortion for a variety of reasons, including the husband's illness, concern about her own health, the imminent failure of the marriage, or the husband's absolute opposition to the abortion"; "285. Wife-battering or abuse can take on many physical and psychological forms. The nature and scope of the battering can cover a broad range of actions and be gruesome and torturous"; and "289. Mere notification of pregnancy is frequently a flashpoint for battering and violence within the family").

31. *Id.* at 892. The research was considered "limited" because it was conducted with samples that were too small to be considered representative. The Court stated that the "District Court's findings reinforce what common sense would suggest." *Id.*

32. *Id.* at 893. "Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. Many may have justifiable fears of physical abuse, but may be no less fearful of the consequences of reporting prior abuse."

requiring notification to an abused woman's husband would present an undue burden on a woman's right to choose.³³

D. Abortion Laws in the Okpalobi Decision

In *Okpalobi v. Foster*, abortion providers brought suit alleging that the Louisiana statute making abortion providers liable in tort to a woman obtaining an abortion for any damage incurred by the abortion was an unconstitutional "undue burden" on a woman's right to choose.³⁴ The Fifth Circuit agreed and held that this statute constituted an undue burden.³⁵ The court reasoned that the plain language of the statute refuted the contention that the purpose of the act was to encourage the physician to educate a woman of all abortion risks.³⁶ Further, the act "undoubtedly would drive Louisiana's qualified and responsible abortion providers out of business, thereby imposing an undue burden on a woman's right to seek an abortion."³⁷

E. Abortion Laws in the Stenberg Decision

In *Stenberg v. Carhart*, an abortion provider brought suit challenging the constitutionality of a Nebraska statute that banned "partial birth abortion."³⁸ The Supreme Court held that the statute was unconstitutional

33. *Casey*, 505 U.S. at 895.

34. *Okpalobi v. Foster*, 190 F.3d 337, 361 (5th Cir. 1999), *on reh'g en banc*, 244 F.3d 405 (5th Cir. 2001). The statute stated: "[a]ny person who performs an abortion is liable to the mother of the unborn child for any damage occasioned or precipitated by the abortion." *Id.* at 356 (quoting LA. REV. STAT. ANN. § 9:2800.12(A) (1999)). Damage is defined as "injuries suffered or damages occasioned by the *unborn child* or mother." *Okpalobi*, 190 F.3d 337 (quoting LA. REV. STAT. ANN. § 9:2800.12(B)(12) (1999)).

35. *Okpalobi*, 190 F.3d at 357.

36. *Id.* at 356.

37. *Id.* The evidence illustrated that the plaintiffs in the action provided "approximately 80% of all abortions" in Louisiana, and their practices would have to be discontinued if the act went into effect. *Id.* at 357. The lower court found that there was an undue burden because it "sets a standard no physician can meet and creates a climate in which no provider can possibly operate, thereby significantly reducing the number of abortion providers in Louisiana." *Id.* See generally *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452 (8th Cir. 1995) (holding that criminal and civil penalties on abortions were unconstitutional because they would chill abortion provider's willingness to perform the abortion procedure).

38. *Stenberg v. Carhart*, 530 U.S. 914 (2000). A partial birth abortion is a type of late-term abortion that stops a pregnancy by removing an intact fetus from the uterus. *Abortion, partial birth*, THEFREEDICTIONARY.COM, <http://medical-dictionary.thefreedictionary.com/partial+birth+abortion> (last visited Apr. 12, 2014). The purpose of a partial birth abortion is "to end a pregnancy in the mid to late second trimester." *Id.* Typically, this procedure is performed between the 19th and 26th weeks of

and imposed an undue burden because it applied to both the dilation and evacuation (D&E) procedure and the dilation and extraction (D&X) procedure.³⁹ This imposed an unconstitutional burden on a woman's right to choose the D&E procedure.⁴⁰ Even though the statute's aim was to ban D&X abortion, its language included D&E abortions,⁴¹ which are the most common method of abortion in the second trimester pre-viability.⁴² Abortion providers using the D&E method would "fear prosecution, conviction, and imprisonment"; therefore, this would create an undue burden on a woman's right to choose.⁴³

F. Ultrasound Requirements

Today, the trend throughout the United States is to include an ultrasound provision in abortion legislation.⁴⁴ Since the mid-1990s, an aggregate analysis of U.S. legislation illustrates that many states have attempted to make an ultrasound a part of the abortion procedure and that these statutes are prevalent throughout the country.⁴⁵ Some states have enacted laws requiring that a woman seeking an abortion receive information on obtaining an ultrasound, whereas others require that the woman have an ultrasound prior to the abortion.⁴⁶ The specifics of the laws regulating the ultrasound vary from state to state, ranging from

pregnancy. *Id.* One advantage of this procedure is that the fetus is removed intact. *Id.* This allows for a more accurate evaluation and autopsy of the fetus if there was some sort of fetal abnormality. *Id.* Another such advantage is that intact removal also has "a lower risk of puncturing the uterus or damaging the cervix" throughout the procedure. *Id.* Despite this, the procedure is currently illegal in the United States. *Id.* There was controversy over this late-term abortion due to the issues in determining the point of viability. *Id.* Another controversial aspect of this procedure is that the fetal death does not take place until after a majority of the fetus "has exited the uterus." *Id.*

39. *Stenberg*, 530 U.S. at 938. The dilation and evacuation procedure involves dilating the cervix, removing "some fetal tissue using nonvacuum surgical instruments," and, potentially, the instrumental "dismemberment of the fetus" (in order "to facilitate evacuation from the uterus"). *Id.* at 925. The dilation and extraction procedure involves dilating the cervix, "instrumental conversion of the fetus to a footling breech," "breech extraction of the body excepting the head," and "partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus." *Id.* at 928.

40. *Id.* at 938.

41. *Id.*

42. *Id.* at 945.

43. *Id.* at 945-46.

44. See, e.g., MICH. COMP. LAWS ANN. § 333.17015 (West 2014); 2012 La. Sess. Law Serv. 685 (West).

45. *State Policies in Brief: Requirements for Ultrasound*, GUTTMACHER INST. (May 1, 2014), http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf.

46. *Id.*

requiring a woman to view the ultrasound image to offering her the opportunity to see it.⁴⁷

There are two types of ultrasounds: transvaginal ultrasounds and abdominal ultrasounds.⁴⁸ A transvaginal ultrasound requires the physician to physically insert a probe into the woman's vagina.⁴⁹ In contrast, an abdominal ultrasound is superficial—the physician merely applies gel to the woman's abdomen and a handheld probe is pressed against and moved over the abdomen.⁵⁰ The transvaginal ultrasound is a physically invasive procedure, whereas the abdominal ultrasound is not.⁵¹

However, recent legislation now effectively mandates that a transvaginal ultrasound, instead of a mere abdominal ultrasound, be performed on a woman before the abortion procedure.⁵² Most women

47. *Id.* As of March 2014, "12 states require verbal counseling or written materials to include information on accessing ultrasound services" and 23 states regulate the ultrasound by the abortion provider. *Id.* Of these 23 states, "3 states mandate that an abortion provider perform ultrasound [sic] on each women [sic] seeking an abortion and requires the provider to show and describe the image"; "9 states mandate that an abortion provider perform an ultrasound on each woman seeking an abortion, and require the provider to offer the woman the opportunity to view the image"; "9 states require that a woman be provided with the opportunity to view an ultrasound image if her provider performs the procedure as part of the preparation for an abortion"; and "5 states require that a woman be provided with the opportunity to view an ultrasound image." *Id.*

48. See generally Guy Slowik, *What Is an Ultrasound?*, EHEALTHMD, <http://chealthmd.com/content/what-ultrasound> (last updated Apr. 17, 2013) (explaining that an ultrasound is an imaging procedure that utilizes high-frequency sound waves to examine the internal organs of a woman's body, and in this context, the fetus).

49. *Transvaginal Ultrasound*, MEDLINEPLUS, <http://www.nlm.nih.gov/medlineplus/ency/article/003779.htm> (last updated July 11, 2012).

50. *Abdominal Ultrasound*, MEDLINEPLUS, <http://www.nlm.nih.gov/medlineplus/ency/article/003777.htm> (last updated Nov. 9, 2012).

51. See *supra* notes 49–50 and accompanying text.

52. See, e.g., LA. REV. STAT. ANN. § 40:1299.35.2 (2013). The statute requires that an ultrasound be performed at least 24 hours prior to an abortion and before "any anesthesia or medication in preparation for the abortion" is administered. *Id.* The physician is to "simultaneously display the screen which depicts the active ultrasound images so that the pregnant woman may view them; and make audible the fetal heartbeat, if present, in a quality consistent with current medical practice." *Id.* Further, the physician is to also "[p]rovide a simultaneous and objectively accurate oral explanation of what the ultrasound is depicting, in a manner understandable to a layperson." *Id.* This explanation "shall include the presence and location" of the fetus (along with the "number of unborn children depicted"), "the dimensions of the unborn child, and the presence of cardiac activity if present and viewable." *Id.* In addition to all of this, the physician must offer the woman the opportunity to obtain an ultrasound photograph "of her unborn child of a quality consistent with current standard medical practice that accurately portrays, to the extent feasible, the body of the unborn child including limbs, if present and viewable." *Id.*

undergo an abortion within 12 weeks of the onset of pregnancy.⁵³ If the woman has been pregnant for less than eight weeks, a transvaginal ultrasound is generally required in order to see or hear anything.⁵⁴ Since some statutes now require that the abortion provider make the fetal heartbeat audible, this effectively necessitates a transvaginal ultrasound for many abortions that occur in the first trimester.⁵⁵

The substantial use of ultrasound requirements prior to abortions in legislation throughout the United States,⁵⁶ combined with the forthcoming trend requiring a transvaginal ultrasound over a less-invasive abdominal ultrasound,⁵⁷ illustrates the importance of evaluating whether these provisions constitute an undue burden on a woman's right to choose. The Court in *Casey* set forth the undue burden test and demonstrated examples of valid or invalid state regulation.⁵⁸ These examples constitute a basis for evaluating future regulations and demonstrate, in combination with additional data, why a provision effectively requiring a transvaginal ultrasound is also an infringement on a woman's constitutional rights.

III. ANALYSIS

A state abortion regulation that "hinder[s]" rather than "inform[s] [a] woman's free choice" is unconstitutional.⁵⁹ The ultrasound requirement is just that: it hinders a pregnant woman's right to choose rather than informing the woman about that right.⁶⁰ Ultrasound provisions are disguised as providing informed consent to a pregnant woman prior to abortion, but in truth, they require an invasive medical procedure before a woman is able to have an abortion.⁶¹ Scholars criticize these laws, arguing their purpose is to arouse a woman's "feelings of sin, guilt and shame," alongside an unrealistic depiction of how much easier life as a

53. Kate Sheppard, *Mandatory Transvaginal Ultrasounds: Coming Soon to a State Near You*, MOTHERJONES (Mar. 5, 2012, 6:16 PM), <http://www.motherjones.com/mojo/2012/03/transvaginal-ultrasounds-coming-soon-state-near-you>.

54. *Id.*

55. Julie Rovner, *State Legislatures Stay Busy on Abortion Laws*, NPR (July 12, 2012, 3:57 PM), <http://www.npr.org/blogs/health/2012/07/12/156683431/state-legislatures-stay-busy-on-abortion-laws>.

56. *See supra* notes 44–47 and accompanying text.

57. *See supra* notes 52–55 and accompanying text.

58. *See supra* Part II.C.

59. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

60. *Id.*

61. Weber, *supra* note 12, at 367.

single mother would be.⁶² Cloaked as a law ensuring informed consent, the legislature is regulating abortion via "government-approved psychological coercion."⁶³ What is occurring is not informed consent pertaining to the medical procedure, but rather, informed consent with the purpose of "encouraging a statutorily required moral standard."⁶⁴ Laws requiring ultrasounds before an abortion are intended to force pregnant women to feel guilty for their choice.⁶⁵

There are three primary reasons why a requirement to undergo an ultrasound, and specifically a transvaginal ultrasound, prior to an abortion should be deemed unconstitutional. First, transvaginal ultrasounds are an invasion into a woman's body that constitutes an undue burden on a woman's rights to choose.⁶⁶ Second, transvaginal ultrasounds create an additional cost for the abortion procedure that becomes an undue burden on a woman's right to choose.⁶⁷ Finally, transvaginal ultrasounds could result in psychological harm that would hinder a pregnant woman's ability to make a rational decision, and therefore become an undue burden on a woman's freedom of choice prior to viability.⁶⁸ An undue burden should not be limited to discouraging women, but also should include causing harm and forcing them to pay the price for exercising their fundamental right to choose.⁶⁹ Going beyond mere discouragement and persuasion with informative and helpful information, ultrasound provisions actively discourage women at their own expense.⁷⁰

A. Transvaginal Ultrasounds Are an Invasion into a Woman's Body

Justice Cardozo, in *Schloendorff v. Society of New York Hospital*, said that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."⁷¹ The Supreme

62. *Id.* at 368.

63. *Id.*

64. *Id.* ("Rather than explaining the medical risks involved in the abortion procedure, physicians in the case of the ultrasound requirement are forced to show the woman an ultrasound image of the fetus while describing its physical and anatomical characteristics.").

65. Valpey, *supra* note 13, at 2.

66. See *supra* notes 49–50 and accompanying text.

67. Weber, *supra* note 12, at 371.

68. Valpey, *supra* note 13, at 2.

69. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

70. Weber, *supra* note 12, at 370–71.

71. 105 N.E. 92, 93 (N.Y. 1914), *abrogated by* *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957); see also *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (stating that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the

Court found a Fourteenth Amendment liberty right as a basis for the right to refuse medical care.⁷² The Court in *Cruzan v. Director, Missouri Department of Health* held that, in general, a competent person has the constitutional right to refuse medical care if they have the ability “to make an informed and voluntary choice.”⁷³

In upholding an ultrasound requirement prior to abortion, the Fifth Circuit in *Texas Medical Providers Performing Abortion Services v. Lakey* wrote that an ultrasound is “viewed as ‘medically necessary’ for the mother and fetus.”⁷⁴ This is simply not true; conducting an ultrasound prior to an abortion is *not* medically necessary.⁷⁵ Knowing that this procedure is not always medically necessary, the Food and Drug Administration warned against the use of ultrasounds since their effects are not completely understood.⁷⁶ Even though ultrasounds are generally safe when conducted at low levels, an ultrasound can have negative effects on human tissue.⁷⁷ Therefore, because effects of an ultrasound on a fetus are not completely known, there is a possibility of harm to the fetus.⁷⁸ Some doctors believe that the high-frequency sound waves of an ultrasound may affect the development of the fetus.⁷⁹

Legislation now being passed effectively mandates a transvaginal ultrasound prior to the abortion procedure, thus enlarging this issue.⁸⁰ The idea of requiring a transvaginal ultrasound over an abdominal ultrasound arose when doctors claimed the heartbeat would not be detected during the first trimester with only an abdominal ultrasound.⁸¹ This procedure is admittedly more invasive than an abdominal

right of every individual to the possession and control of his own person, free from all restraint or interference of others”).

72. See, e.g., *Washington v. Harper*, 494 U.S. 210, 221–22 (1990); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990).

73. *Cruzan*, 497 U.S. at 279–80.

74. 667 F.3d 570, 579 (5th Cir. 2012).

75. Weber, *supra* note 12, at 368 (noting that ultrasounds are normally used “to determine the gestational age of the fetus” and to identify possible issues with the pregnancy).

76. Carol Rados, *FDA Cautions Against Ultrasound ‘Keepsake’ Images*, U.S. FOOD AND DRUG ADMIN. (Jan.-Feb. 2004), <http://www.sdms.org/pdf/FDAKeepsake.pdf> (“[T]he medical community is discouraging the use of ultrasound unless it is medically necessary.”).

77. *Id.*

78. *Id.*

79. *Id.*

80. See, e.g., LA. REV. STAT. ANN. § 40:1299.35.2 (2014).

81. Ken Shepherd, *WAMU’s Michael Pope Furthers Leftist Myth Rather than Fact in Story on Va. Ultrasound Requirement*, NEWSBUSTERS (Jan. 17, 2013, 7:21 PM), <http://newsbusters.org/blogs/ken-shepherd/2013/01/17/wamus-michael-pope-furthers-leftist-myth-rather-fact-story-va-ultrasou>.

ultrasound: a transvaginal ultrasound entails physical insertion of a probe inside the pregnant woman, whereas the abdominal ultrasound is purely superficial and conducted upon the woman's abdomen.⁸² Women are now being forced to undergo two invasive procedures rather than just one (the abortion).⁸³ Further, while there is anesthesia given prior to abortion procedures, there is no such sedation prior to the invasive ultrasounds.⁸⁴ Therefore, the variation between the two ultrasounds creates a large difference when evaluating the constitutionality and public response of requiring one procedure or the other.⁸⁵ For example, legislation recently passed in Virginia requires an abdominal ultrasound prior to an abortion.⁸⁶ Initially, the legislation explicitly required a transvaginal ultrasound, but it was later amended to require only the less-invasive procedure because the "provision [was] harshly criticized by women's rights groups."⁸⁷ The "vaginal probe proposal sparked an outcry" when first proposed.⁸⁸ Therefore, the Virginia Senate only approved the "weaker" ultrasound law requiring an abdominal ultrasound.⁸⁹ These ultrasound laws are an invasion into a woman's body, and consequently, constitute an undue burden on a woman's right to choose.⁹⁰

B. Transvaginal Ultrasounds Create an Additional Cost for the Abortion Procedure

The *Casey* Court noted that, at some point, state regulations of abortion that increase the procedure's "cost[s] could become a substantial obstacle" to a woman's freedom of choice, and therefore, constitute an undue burden.⁹¹ The court in *Carhart v. Stenberg* also noted certain requirements constitute an undue burden, including using an

82. See *supra* notes 49–50 and accompanying text.

83. *Id.*

84. *First Trimester Abortion: Vacuum Aspiration (4.6–12 Weeks)*, FAMILY PLANNING SPECIALISTS MED. GROUP, <http://www.familyplanningspecialists.com/services/first-trimester-abortion.html> (last visited Mar. 12, 2014).

85. See, e.g., Shepherd, *supra* note 81.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. See generally *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 926–28 (1992).

91. *Id.* at 901.

abortion method that creates “significant emotional and physical pain and economic cost.”⁹²

One might argue that the cost of an ultrasound is not high enough to constitute an “undue burden,” but the costs go far beyond the price of the procedure.⁹³ In *Tucson Woman’s Clinic v. Eden*, the court found that there was a material issue of fact regarding whether or not the increased costs imposed by the regulations were to be considered an undue burden.⁹⁴ The court noted that an increase in abortion costs that decreases the supply of providers and clinics could constitute an undue burden.⁹⁵ Evidence and testimony demonstrated that abortion providers would “incur tens of thousands of dollars in expenses” in order to comply with the transvaginal ultrasound regulation.⁹⁶ The estimates included costs such as: the camera for the ultrasound machine, the time spent complying with the law, hiring nurses instead of medical assistants, and paying employees overtime.⁹⁷ There was even testimony that a provider may have to stop practicing altogether, and that a Planned Parenthood clinic would suffer about a two-thirds drop in its physicians.⁹⁸ This delay deters abortions and increases health risks to pregnant women.⁹⁹

Looking specifically toward the increased costs to the pregnant woman, calculations illustrate that an ultrasound requirement would more than double the cost of an abortion.¹⁰⁰ A first trimester abortion in the United States is approximately \$350 to \$500.¹⁰¹ In Oklahoma, for

92. *Carhart v. Stenberg*, 972 F. Supp. 507, 529 n.37 (D. Neb. 1997).

93. On average, the cost of an abdominal ultrasound varies greatly throughout the United States. See *Abdominal Ultrasound Procedure & Cost Information*, NEW CHOICE HEALTH

<http://www.newchoicehealth.com/Directory/Procedure/59/Abdominal%20Ultrasound> (last visited Mar. 3, 2013). The national minimum price of an abdominal ultrasound is \$290 in Wapakoneta, Ohio. *Id.* The national maximum price of an abdominal ultrasound is \$1,700 in Bishop, California. *Id.* Overall, the national average price of an abdominal ultrasound is \$390. *Id.* These prices are much lower than the cost of a transvaginal ultrasound. See *Transvaginal Ultrasound Procedure & Cost Information*, NEW CHOICE HEALTH

<http://www.newchoicehealth.com/Directory/Procedure/60/Transvaginal%20Ultrasound> (last visited Mar. 3, 2013). The national minimum price of a transvaginal ultrasound is \$390 in Harriman, Tennessee. *Id.* The national maximum price of a transvaginal ultrasound is \$2,775 in Bennettsville, South Carolina. *Id.* The overall national average price of a transvaginal ultrasound is \$525. *Id.*

94. 379 F.3d 531 (9th Cir. 2004).

95. *Id.* at 541.

96. *Id.* at 542.

97. *Id.*

98. *Id.*

99. *Id.*

100. Weber, *supra* note 12, at 371.

101. *Id.*

example, an ultrasound costs about \$200-300.¹⁰² Therefore, requiring an ultrasound would raise the price between 47% and 70%.¹⁰³ This essentially requires that every woman pay around 50% more for an unnecessary medical test.¹⁰⁴ Clearly, this requirement would significantly raise costs to obtain an abortion.¹⁰⁵

C. Transvaginal Ultrasounds Could Result in Psychological Harm

Requiring an ultrasound may constitute an undue burden because it could impose a substantial psychological burden on the woman through the pressure of previewing the “physical impact of an abortion.”¹⁰⁶ Often, pregnant women carefully consider the abortion decision and weigh factors such as responsibility to others, health issues of the fetus, financial implications, and relationship problems.¹⁰⁷

Therefore, having to undergo an ultrasound may be a mechanism by which the state forces itself into a woman’s decision.¹⁰⁸ Requiring an ultrasound when a woman would not normally choose to have one performed “is probably an actual restriction to a large fraction of those women because they would choose not to have an ultrasound, presumably for personal reasons that should be beyond the state’s purview, whether it be psychological harm or otherwise.”¹⁰⁹ Individuals who work with pregnant women considering an abortion indicate that many of these women choose to bring the child to term after viewing an ultrasound image of the fetus.¹¹⁰

102. *Id.*

103. *Id.*

104. *Id.*

105. Many restrictions are particularly burdensome for women without a large income. Abrams, *supra* note 4, at 335. These women potentially have only government-funded health care that frequently excludes abortions. *Id.* Additional costs that burden these women may include paying for resources that will enable them to travel in order to obtain an abortion as well as the cost for leave for some statutorily-required waiting period before they can go forth with the procedure. *Id.* Abortion is devolving into a procedure that is available only for upper class citizens. *Id.* Courts have ignored the economic disadvantages and access disparities imposed on low-income women. *Id.*

106. Jeffrey Roseberry, *Undue Burden and the Law of Abortion in Arizona*, 44 ARIZ. ST. L.J. 391, 400 (2012).

107. Rachel Benson Gold, *All That’s Old is New Again: The Long Campaign to Persuade Women to Forego Abortion*, 24 GUTTMACHER POL’Y REV. 19, 22 (2009), available at <http://www.guttmacher.org/pubs/gpr/12/2/gpr120219.pdf>.

108. Roseberry, *supra* note 106, at 400 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 919 (1992) (Stevens, J., concurring in part and dissenting in part)).

109. *Id.*

110. *Pre-abortion Ultrasound Requirement*, RIGHT TO LIFE OF MICHIGAN, <http://www.rtl.org/legislation/UltrasoundViewingOption.html> (last visited May 11, 2014).

In *Lakey*, the Fifth Circuit held that an ultrasound requirement prior to an abortion was constitutional because “the required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information.”¹¹¹ The court claimed that pre-abortion ultrasound disclosures were not different from the disclosures upheld in *Casey*, but conceded that the ultrasound disclosures were “more graphic and scientifically up-to-date” than the required disclosures of probable fetal gestational age and printed material showing general prenatal development stages upheld in *Casey*.¹¹² This concession by the court illustrates the notable difference between the general *Casey* disclosures and the personal and specific disclosures provided by a required transvaginal ultrasound.¹¹³

Protection encompasses both the abortion decision and “the deliberative path a woman takes to reach that decision.”¹¹⁴ A mandatory ultrasound is an unwarranted intrusion into a woman’s protected choice.¹¹⁵ First, just by having an ultrasound, a woman is categorized as a “mother” and must proceed against this status.¹¹⁶ Second, the pregnant woman is producing the ultrasound information from her own body.¹¹⁷ This information is intended to persuade the woman against having the abortion; the ultrasound image is a “statement about the meaning of human life.”¹¹⁸ “The effect of requiring ultrasound before an abortion is to do everything possible to shift the woman’s thoughts, her experience, and her expectations from someone who has decided not to remain pregnant into the position of an ordinary mother-to-be.”¹¹⁹ Now, the woman is burdened by new and large sets of expectations.¹²⁰

(“Armed with this knowledge [that women choose to bring their child to term after viewing an ultrasound image], Michigan legislators enacted the Ultrasound Viewing Option Law in 2006.”).

111. *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577–78 (5th Cir. 2012).

112. *Id.* at 578.

113. *Id.*

114. Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 351 (2008).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 382–83.

120. Sanger, *supra* note 114, at 383. Some of these expectations include legal regulation (for example, not drinking or smoking during pregnancy), cultural expectations, and social expectations of the mother to put the good of the child over all else. *Id.*

Pregnant women have been known to undergo mental torment after aborting their child.¹²¹ Ultrasound provisions completely disregard the mental health of a pregnant woman who is subjected to undergo an ultrasound before proceeding with an abortion.¹²² These women are forced to view the ultrasound image while listening to the physician explain the fetus's heartbeat, limbs, and age.¹²³ At this point, the woman will begin to perceive the fetus as a baby before proceeding with the abortion.¹²⁴ This will undoubtedly result in greater psychological harm after the abortion than if the ultrasound was not required.¹²⁵

Similarly, ultrasound provisions also impose psychological harm upon a woman who, after viewing the ultrasound and perceiving the fetus as her baby, decides against an abortion.¹²⁶ While in this heightened emotional state, it is likely that a woman might decide against the abortion and choose to raise the child.¹²⁷ Ultrasounds performed almost immediately before the abortion procedures take advantage of a woman's heightened emotional state prior to the procedure.¹²⁸ Such a condition may result in an irrational decision to keep the child despite the fact that it may not be in the woman's best interest.¹²⁹ Thus, these provisions result in psychological harm and rash decision-making.¹³⁰

Neither the "scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have."¹³¹ The Court in *Roe v. Wade* recognized the harm that would result from a woman who decides against abortion and keeps the child she did not intend to have.¹³² "There is also the distress, for all concerned, associated with the unwanted child, and there is the problem

121. Nick Hopkins et al., *Constructing Women's Psychological Health in Anti-Abortion Rhetoric*, 44 THE SOCIOLOGICAL REV. 539, 544 (1996) (explaining "Post-Abortion Syndrome" that has side-effects similar to Post-Traumatic Stress Disorder such as flashbacks, nightmares, and uncontrollable grief).

122. *Id.* at 549.

123. *Id.* at 553.

124. *Id.* at 549.

125. *Id.*

126. Valpey, *supra* note 13, at 2.

127. Weber, *supra* note 12, at 369.

128. Hopkins et al., *supra* note 121, at 552-53.

129. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

130. *See id.*

131. *Gonzales v. Carhart*, 550 U.S. 124, 183 n.7 (2007) (Ginsburg, Stevens, Souter & Breyer, JJ., dissenting) (citing Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, 9 GUTTMACHER POL'Y REV. 8 (2006)).

132. *Roe*, 410 U.S. at 153.

of bringing a child into a family already unable, psychologically and otherwise, to care for it.”¹³³ Research illustrates that the psychological harm of raising a child a woman did not intend to have (or putting the child up for adoption) is greater than the psychological harm resulting from an abortion.¹³⁴

IV. CONCLUSION

The trend towards effectively requiring that a woman endure a transvaginal ultrasound before electing to proceed with an abortion constitutes an undue burden on a woman's freedom of choice granted to her pursuant to the Fourteenth Amendment of the U.S. Constitution.¹³⁵ The legislation requires a medically unnecessary procedure.¹³⁶ In contrast to a mere abdominal ultrasound, the transvaginal ultrasound procedure is a physically intrusive, rather than superficial, procedure.¹³⁷ Further, this kind of legislation imposes additional costs on the woman attempting to proceed with an abortion,¹³⁸ hindering the woman's ability to go forth with the procedure if she is financially unable to afford it.¹³⁹ In addition, it also imposes costs upon the doctors performing the procedure.¹⁴⁰ It forces them to purchase expensive medical equipment for the procedure, and it takes up the paid time of their staff and personnel,¹⁴¹ resulting in fewer available doctors to perform the abortion. Additional medical costs are another burden set in the way of the woman attempting to receive an abortion.¹⁴² Finally, there is evidence that a procedure such as a transvaginal ultrasound will place psychological harm upon the woman who has weighed her options and found it in the best interest of all parties to go forth with the abortion.¹⁴³ These three attributes of the

133. *Id.*

134. Cohen, *supra* note 131, at 8.

135. Weber, *supra* note 12, at 380–81.

136. *Id.* at 368.

137. *Pelvic Ultrasound and Transvaginal Ultrasound*, HARVARD HEALTH PUBLICATIONS, <http://www.health.harvard.edu/diagnostic-tests/pelvic-ultrasound-and-transvaginal-ultrasound.htm> (last visited Apr. 12, 2014).

138. Weber, *supra* note 12, at 371.

139. *Id.*

140. *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 542 (9th Cir. 2004).

141. *Id.*

142. *Id.* at 541.

143. Hopkins et al., *supra* note 121, at 549. The stigma attached to an abortion reflects both social and political efforts to shame the woman who chooses to have an abortion. Abrams, *supra* note 4, at 334. Data suggests that there is an underreporting of abortions and fear of social ostracism. *Id.* Shame was associated with abortion both prior to *Roe v. Wade*, and it remains today. *Id.* “Shaming today is an overt political goal with the passage of highly intrusive laws that mandate physically invasive ultrasounds prior to an abortion

forthcoming legislation combine to constitute an undue burden upon a woman's freedom of choice that is unconstitutional under the laws of our nation.¹⁴⁴ These laws allow governmental intrusion into the constitutionally protected choice of a woman, thereby hindering a woman's ability to determine the course of her life.¹⁴⁵

or question a woman's judgment by forcing her to listen to a demeaning state-designed lecture on why she should reconsider her decision." *Id.*

144. Weber, *supra* note 12, at 383.

145. *Id.*