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ABSTRACT

The term "precession of simulacra"[1]—coined by French philosopher Jean Baudrillard to describe the postmodern phenomenon wherein "images precede reality"—accurately describes what is wrong with the pre-abortion ultrasound mandates that have recently been enacted in a number of states.[2] The term captures the idea that the traditional reality–image hierarchy has been inverted and repeatedly re-inverted to the point where the boundary between the two has become blurred. Laws that require doctors to display and describe sonograms prior to performing abortions exploit this blurring by encouraging women seeking abortions to experience fetal images more vividly than they experience the realities that lead them to their abortion decisions. Such laws are, when considered in context with other abortion regulations, quite transparent attempts to characterize fetuses as persons" and women seeking abortions as their "mothers," at a time when the women have already considered and rejected those labels as inconsistent with their own lived experience. While it is questionable whether such laws actually prevent many abortions, it is clear that the intent behind the laws—and in some cases their effect—is to impose guilt and shame on a highly vulnerable population.

This Article explains how an ultrasound alters the experience of pregnancy, how ultrasound mandates operate as pro-life initiatives, and how women and their doctors can challenge these mandates. It argues that, although the most successful challenges to date have rested on free speech grounds, courts ought to invalidate ultrasound mandates on the basis that they deprive women of "equal dignity" under the Fourteenth Amendment. After sketching this legal framework, the Article draws on postmodern theory to make both descriptive and normative claims: Descriptively, it claims that ultrasound mandates represent a "precession of simulacra" in that they attempt to render fetal images prior to women's own realities.

1. *See generally* JEAN BAUDRILLARD, SIMULACRA AND SIMULATION (Sheila Faria Glaser trans., Univ. of Mich. Press 1994) (1981); Jean Baudrillard, *The Evil Demon of Images and the Precession of Simulacra*, *in* POSTMODERNISM 194 (Thomas Docherty ed., 1993) [hereinafter Baudrillard, *The Evil Demon of Images*]. Jean Baudrillard lived from 1929 to 2007.

2. *Requirements for Ultrasound*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/requirements-ultrasound [https://perma.cc/6G6V-DBN4] (last updated Jan. 1, 2017) (noting that 25 states regulate the provision of ultrasound by abortion providers).

Normatively, it claims that ultrasound mandates ought to be abolished because our laws should not propel us into the state Baudrillard called "hyperreality," in which the distinction between the simulated and the real is irreparably lost.[3]

I. INTRODUCTION

Historically, we have thought of reality as prior to images, and images as merely reflective of reality. Yet in our postmodern era, the reality–image hierarchy has been inverted and repeatedly re-inverted to the point where the two categories have actually become blurred. It can, as any social media user knows, sometimes be difficult to identify the boundary between the real and the simulated or imagined. According to French philosopher Jean Baudrillard, images in postmodernity have "become more real than the real."[4] They have even, he wrote, become "murderers of the real."[5] To describe this phenomenon of images preceding reality, Baudrillard coined the phrase "precession of simulacra."[6] Pro-life politicians in several states have recently capitalized on this postmodern tendency to elevate fetal images—and the "personhood" those images symbolize—above reality by enacting pre-abortion ultrasound mandates.

While the specifics vary, most of the mandates require doctors not only to perform ultrasound examinations, but also to offer their patients the opportunity to view the images.[7] These are known as "offer-of-opportunity mandates." Some, however, go further and require doctors to display and describe the images and, in some cases, make audible the fetal heartbeat.[8] These are known as "display-and-describe mandates." While a few have been invalidated, most remain in place.[9] These mandates effectively exploit the "precession of simulacra" by creating a situation in which images precede, and perhaps even supersede, women's own realities.[10] They render fetuses

3. BAUDRILLARD, *supra* note 1, at 1–3.

4. *See* Baudrillard, *The Evil Demon of Images*, *supra* note 1, at 195 (positing that "images become more real than the real").

5. *Id.* at 196.

6. BAUDRILLARD, *supra* note 1, at 1.

7. *See* Clare Huntington, *Familial Norms and Normality*, 59 EMORY L.J. 1103, 1133–34 (2010) (footnote omitted).

8. *Requirements for Ultrasound*, *supra* note 2.

9. *Id.*

10. *See* Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 377 (2008) (arguing that mandatory

"children" and pregnant women their "mothers," at a time when the women have already considered and rejected those labels as inconsistent with their own lived experience.[11] They, in sum, privilege the imagined "personhood" of the fetus over the pregnant woman's reality.

This Article argues against such mandates. Part II explains how an ultrasound alters the experience of pregnancy, how ultrasound mandates operate as pro-life initiatives, and how women and their doctors can challenge—and have challenged—these mandates. It argues that the ideal legal ground for invalidating such mandates is that they violate the right of "equal dignity" protected by the Fourteenth Amendment.[12] Part III explores the complex relationship between images and reality by examining Baudrillard's theory of "precession of simulacra," and then applying it to the specific example of mandatory ultrasounds. It asserts that the clear intent, if not always the effect, of mandatory ultrasounds is to elevate fetal images over women's realities, in hopes that women will forgo abortions or experience deep shame and guilt. Part IV concludes by making the broader claim that ours laws should not propel us into the state Baudrillard called "hyperreality," in which the reality–image distinction is irreparably lost.

II. ULTRASOUND AND THE LAW

Part II explains how ultrasound alters the experience of pregnancy, how ultrasound mandates operate as pro-life initiatives, and how women and their doctors can challenge—and have challenged—these mandates. More specifically, Part II.A shows that an ultrasound alters the experience of pregnancy by personifying the fetus and thereby blurring the line between the *image* of a "child" and the *reality* of a pregnant woman whose lived experience has led her to choose abortion. Part II.B shows that ultrasound mandates further pro-life goals by undermining informed consent and attempting to manipulate decision-making by evoking guilt and shame in women seeking abortion. Part II.C shows that plaintiffs can challenge ultrasound mandates based on various constitutional provisions including the Due Process, Equal Protection, and Free Speech Clauses, and argues that more weight ought to be given to "equal dignity" arguments arising from the Supreme Court's recent decision in *Obergefell v. Hodges*.[13] Part

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ultrasound laws "establish . . . the state's position that the fetus is not just 'potential life'" and "inform[] women not just about the life of a fetus, but more specifically about the life of her fetus" (footnotes omitted)).

11. Huntington, *supra* note 7, at 1135–36 ("The laws contribute to the creation of a social norm that a fetus is a human being, that pregnant women are mothers who must conform to maternal norms, and that having an abortion is a shameful act.").

12. Obergefell v. Hodges, 135 S. Ct. 2584, 2584, 2589–90, 2608 (2015).

13. *Id.*

II concludes by examining two actual challenges, one in which the Fifth Circuit upheld Texas's display-and-describe mandate, and one in which the Fourth Circuit invalidated North Carolina's display-and-describe mandate. These challenges illustrate the intense—and, this Article argues, misguided —focus on free speech arguments.

A. Ultrasound and the Experience of Pregnancy

The first ultrasound images of fetuses were produced in the 1950s.[14] By the 1980s, it was common for women in the United States to undergo at least one ultrasound examination during pregnancy.[15] Today, it is common for women to undergo multiple examinations,[16] which unquestionably afford many important medical benefits. They enable doctors to estimate gestational age, detect potential abnormalities,[17] and measure amniotic fluid indices.[18] The use of ultrasound has, on the whole, significantly decreased perinatal mortality rates.[19] Yet, it is worth noting that most abortions occur during the first trimester,[20] when "routine ultrasound is not considered medically necessary."[21]

Where there is no medical necessity, this Article argues that individual doctors, rather than legislatures, should decide whether to perform ultrasound examinations. And when an individual doctor decides to perform an examination, this Article argues that individual patients, rather than legislatures, should decide whether to view the images. While it is undisputed that many important medical benefits flow from doctors viewing ultrasound images, it is unclear what benefits flow from pregnant women—particularly those seeking abortions—viewing those same images.

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14. Margaret B. McNay & John E. E. Fleming, *Forty Years of Obstetric Ultrasound 1957-1997: From A-Scope to Three Dimensions*, 25 ULTRASOUND MED. & BIOLOGY 3, 12 (1999).

15. Sanger, *supra* note 10, at 366.

16. *Id.*

17. McNay & Fleming, *supra* note 14, at 34.

18. *Ultrasound Exams*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (Sept. 2013), http://www.acog.org/-/media/For-Patients/faq025.pdf?dmc=1&ts=20161114T2118479872 [https:// perma.cc/U7BN-TANU].

19. McNay & Fleming, *supra* note 14, at 27.

20. *Fact Sheet: Induced Abortion in the United States*, GUTTMACHER INST. (Jan. 2017), https://www.guttmacher.org/sites/default/files/Factsheet/fb_induced_abortion_1.pdf [https:// perma.cc/TQZ5-MHRB] (noting that in 2013, eighty-nine percent of abortions occurred in the first twelve weeks).

21. *Requirements for Ultrasound*, *supra* note 2.

Indeed, one study suggests that viewing ultrasound images rarely alters a woman's abortion decision,[22] though it may inspire a variety of emotions and—the study's authors suggest—affect the patient's "sense of autonomy."[23] The study "analyzed medical records from over 15,000 abortion visits during 2011" to a provider with "a policy of offering every patient the voluntary opportunity to view her ultrasound image."[24] It found that "[o]ver 42% of incoming abortion patients chose to view their ultrasound images, and the substantial majority (99%) of all 15,000 pregnancies ended in abortion."[25] It further found the following:

> As it turns out, seeing the ultrasound images as such does little to change women's minds about abortion. What matters is how women scheduled for abortions already feel. Viewing an ultrasound can matter for women who are not fully certain about their plans to have an abortion. . . . [A]mong the small fraction (7.4%) of women who were not very certain or only moderately certain, viewing slightly increased the odds that they would forego their planned abortion and continue with their pregnancy. Nonetheless, this effect was very small and most did proceed to abortion.[26]

While the study does not answer every question, inasmuch as it examined a provider where ultrasounds were optional rather than mandatory, it does call into question—in one author's words—"the wisdom of state laws that force women scheduled to have abortions" to undergo pre-abortion ultrasounds.[27] Because abortion providers already offer patients the opportunity to view ultrasound images, and because most do not want to view those images, mandates are inappropriate.[28]

In obstetrics practice outside of the abortion context, ultrasounds have long been thought to promote prenatal bonding between the pregnant woman and the fetus.[29] Some doctors believe that the ability of a pregnant woman to "visualise motion, breathing[, and] activity . . . bring[s] reassurance,"[30] and encourages lifestyle alterations that are beneficial to the fetus—such as quitting smoking.[31] Indeed, some pregnant women seek out "prenatal

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22. Katrina Kimport, *Does Viewing Ultrasounds Affect Abortion Decisions?*, JOURNALIST'S RESOURCE, http://journalistsresource.org/studies/society/public-health/does-viewing-ultrasounds-affect-abortion-decisions-research-brief [https://perma.cc/D7LD-5G5V] (last updated July 29, 2015).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *See id.*
29. Sanger, *supra* note 10, at 365–66; Ingrid Zechmeister, *Foetal Images: The Power of Visual Technology in Antenatal Care and the Implications for Women's Reproductive Freedom*, 9 HEALTH CARE ANALYSIS 387, 389 (2001).
30. McNay & Fleming, *supra* note 14, at 39.
31. Zechmeister, *supra* note 29, at 389.

portrait studios" that will, for a fee, produce ultrasound images for entirely non-medical purposes.[32] While viewing ultrasound images is, for some women, a happy and highly positive experience, it is a negative experience for others.[33] This can be true in the context of a wanted or unwanted pregnancy. In a wanted pregnancy, an ultrasound examination may reveal a serious anomaly.[34] In an unwanted pregnancy, an ultrasound examination may create a perceived "confrontation" between the woman and fetus.[35] Professor Carol Sanger emphasizes that, in reality, this confrontation is one-sided, in that "the fetus does not actually stare back" at the pregnant woman.[36] Yet, she observes, "ultrasound technicians routinely attribute responsive intentional behavior" to the fetus—for example, describing it as waving hello.[37] Ultrasound examinations can, in sum, have powerful impacts on pregnant women. Even if they do not produce the intended guilt and shame, they may well diminish a patient's "sense of autonomy."[38]

As scholars have observed, the use of ultrasound technology can symbolically invert the woman–fetus hierarchy.[39] Prior to the advent of ultrasound technology, the woman was, at least visually, prior to the fetus. Pregnancy became "real" by virtue of the woman feeling, rather than a doctor seeing, the fetus.[40] Since the advent of ultrasound technology, however, the fetus has preceded the woman, at least visually—and perhaps otherwise. Professor Ingrid Zechmeister, an expert in health policy, argues that through ultrasound, the fetus "becomes the important object [and] the mother herself becomes less important."[41] She continues, "scientific

32. Associated Press, *FDA Warns Against Prenatal Portrait Studios*, NBC NEWS (Mar. 31, 2004, 7:48 PM), http://www.nbcnews.com/id/4609938/ns/health-womens_health/t/fda-warns-against-prenatal-portrait-studios/#.Vaa01OGGMg4 [https://perma.cc/TL8F-NXNE].

33. Sanger, *supra* note 15, at 359. *But see* Kimport, *supra* note 22. The study found "no evidence that viewing was broadly distressing." *Id.* Kimport, one of the authors, writes, "[j]ust over one in five [women] reported that viewing provoked negative reactions of guilt, depression, or sadness; 1 in 10 reported positive feelings such as happiness; and the largest group, just over a third, said they felt 'fine,' 'okay,' or even 'nothing.'" *Id.* Yet Kimport, as previously noted, warns that "[f]orcing women to view their ultrasounds could . . . affect [their] sense of autonomy." *Id.*

34. Sanger, *supra* note 15, at 359.

35. *Id.*

36. *Id.*

37. *Id.*

38. Kimport, *supra* note 22.

39. Zechmeister, *supra* note 29, at 393.

40. Sanger, *supra* note 15, at 355 ("Historically, the event that converted pregnancy into something real was quickening, fetal movement felt by the mother.").

41. Zechmeister, *supra* note 29, at 391.

photographs of the foetus . . . make the mother invisible[, thereby] bestowing a status of independence upon the foetus."[42] While ultrasound images unquestionably convey valuable medical information about the fetus, they convey little information about the fetus's relationship to the pregnant woman.[43]

This shift in focus from woman to fetus mirrors a broader shift in focus from the reality of the woman's circumstances—her health status, her family dynamics, her financial situation, her existing responsibilities, her educational and career goals, and her hopes and dreams—to the imagined status of the fetus as a "person" or "human being."[44] Women's lived experiences are dismissed as irrelevant when ultrasound technicians are required by law to describe fetuses as "whole, separate, unique, living human being[s]."[45] Their realities are, in Baudrillard's terminology, being—at least momentarily—preceded by ultrasound images.[46] And this precession is exacerbated as technology advances and ultrasound images become clearer and more detailed with 3D and even 4D imaging.[47] While some women may retain their pre-existing attitude toward the fetus after viewing the images and listening to the legally mandated descriptions, others may come to believe that that the images on the screen are more real, and more important, than their own lived experience. All will presumably understand that their government believes the latter to be true.

B. Mandatory Ultrasounds and the Pro-Life Movement

If mandatory ultrasounds, as Part II.A suggests, diminish women's sense of autonomy, they effectively undermine informed consent. While proponents of mandatory ultrasounds portray them as enhancing informed consent, Part II.B illustrates that, in reality, they do just the opposite. Rather than empowering patients by giving them the information necessary to make a fully informed and autonomous decision, mandatory ultrasounds attempt to manipulate patients in already-vulnerable positions to either carry their pregnancies to term or live with deep guilt and shame.

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42. *Id.*

43. *Id.*

44. *See, e.g.*, Kathy Seward Northern, *Procreative Torts: Enhancing the Common Law Protection for Procreative Autonomy*, 1998 U. ILL. L. REV. 489, 523 (describing some of the circumstances that might be relevant to a woman's abortion decision).

45. KAN. STAT. ANN. §§ 65-6709(b)(5), 65-6710 (West 2016).

46. *See, e.g.*, Zechmeister, *supra* note 29, at 392 ("[I]n contrast to the 'true' information on the screen, the mother's feelings are often regarded as of little importan[ce].").

47. *Id.* at 393; *see also* R. Morgan Griffin, *3D and 4D Ultrasounds*, WEB MD, http://www.webmd.com/baby/guide/3d-4d-ultrasound [https://perma.cc/KWE6-SCE9] (last reviewed May 22, 2016).

States have long required that, prior to providing treatment, doctors must give their patients the information necessary for informed consent.[48] The primary goal of informed consent is patient autonomy.[49] Historically, doctors have determined on their own what information is necessary to ensure informed consent, and allegations of incorrect determinations have been judged against either "professional standards" developed within the medical community or "prudent patient" standards, depending on the jurisdiction.[50] In the unique context of abortion, however, some states have mandated the delivery of highly specific—often pro-life leaning[51]—information.[52] This information can take the form of specific written materials that must be provided,[53] specific words that must be uttered,[54] or—our present focus—specific images that must be displayed and described.[55]

While the Supreme Court in some early cases invalidated abortion-specific informed consent requirements,[56] its 1992 decision of *Planned Parenthood v. Casey* upheld Pennsylvania's mandate that doctors offer women seeking abortions state-produced written materials—even though

48. *See, e.g.*, Schloendorff v. Soc'y of N.Y. Hosp., 211 N.Y. 125 (1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages.").

49. Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 226, 235, 240 (2009).

50. *See, e.g.*, Northern, *supra* note 44, at 512–16.

51. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 998 (2009) (noting that "most state-mandated information espouses a pro-life point of view").

52. *See id.* at 998–1000 (arguing that the information required under these statutes does "invariably above and beyond standard informed consent").

53. Pennsylvania's statute, discussed below in conjunction with *Planned Parenthood v. Casey*, provides an example. *See* 18 PA. STAT. AND CONS. STAT. ANN. §§ 3205, 3209 (West 2016); Planned Parenthood v. Casey, 505 U.S. 833, 833 (1992).

54. *See, e.g.*, S.D. CODIFIED LAWS § 34-23A-10.1 (2016) (requiring that patients be informed that the procedure "will terminate the life of a whole, separate, unique, living human being," with whom they have "an existing relationship"), *upheld in* Planned Parenthood Minn. v. Rounds, 653 F.3d 662 (8th Cir. 2011), *vacated in part on rehearing en banc sub nom.* Planned Parenthood Minn. v. Rounds, 662 F.3d 1072 (8th Cir. 2011) *and on rehearing en banc sub nom.* Planned Parenthood Minn. v. Rounds, 686 F.3d 889 (8th Cir. 2012).

55. *Requirements for Ultrasound*, *supra* note 2.

56. Manian, *supra* note 49, at 244–47 (discussing Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983)).

the materials espoused a pro-life viewpoint.[57] Justice O'Connor wrote for a plurality that "a state [may] protect[] the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion."[58] She continued, "[R]equiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion."[59]

As Professor Maya Manian observes in discussing this aspect of *Casey*, "Obviously, patients cannot be self-determining if given information biased towards one outcome."[60] Professor Manian's work illustrates that current abortion doctrine "ignores the long history of protection for patient decision-making capacity that has been well-established in informed consent law."[61] Building upon Professor Manian's work, Part II.B argues that display-and-describe statutes are at least as inconsistent with the primary goal of informed consent—promoting patient autonomy—as requiring doctors to inform patients of the availability of state-produced written materials.[62] Forcing women seeking abortions to view ultrasound images and listen to doctors recite detailed descriptions of their fetuses denies the realities that motivated their abortion decisions and, ultimately, provides evidence of a strong pro-life bias.

While ultrasound mandates may not seem inherently pro-life, and while their proponents may portray them as ensuring informed consent, a careful examination of the statutory context in which they operate belies any suggestion that they are neutral or impartial. First, ultrasound mandates often refer to the embryo or fetus as an "unborn child."[63] Some assert that "personhood begins at conception,"[64] and one requires that women be informed that the abortion procedure "will terminate the life of a whole, separate, unique, living human being[.]"[65] Others require that doctors give

57. *Id.* at 249 (discussing *Casey*, 505 U.S. 833).
58. *Casey*, 505 U.S. at 883; *see* Manian, *supra* note 49, at 250.
59. *Casey*, 505 U.S. at 883.
60. Manian, *supra* note 49, at 250.
61. *Id.* at 242.
62. *Id.* at 240.
63. *See, e.g.*, LA. STAT. ANN. § 40:1061.10(D)(2)(a) (2016); WIS. STAT. ANN. § 940.15 (West 2016).
64. Indiana, Kansas, and Texas are in this category. *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion [https://perma.cc/64HM-BRSZ] (last updated Jan. 1, 2017).
65. KAN. STAT. ANN. §§ 65-6709(b)(5), 65-6710 (West 2016).

women access to information about fetal pain,[66] risks to future fertility,[67] connections between abortion and breast cancer,[68] and data about mental health outcomes[69]—even though each of these four categories of information are contested. All these aspects of the law work together in an effort to manipulate women's decisions.[70] Yet the unique power of images makes mandatory ultrasounds one of the most powerful pro-life tactics. Indeed, at least one state—North Carolina—openly admits that the "purpose of [its ultrasound mandate] is to support the state's pro-life position."[71]

Ultrasound mandates take a variety of forms. At present, twenty-five states regulate the use of ultrasound in the context of abortion.[72] Thirteen of those twenty-five expressly mandate ultrasounds, while the rest give either the provider or the pregnant woman some discretion to decide whether an ultrasound will be performed.[73] Nine of the thirteen that expressly mandate ultrasounds require that the provider "offer the woman the *opportunity* to view the image,"[74] three require that the provider "*show and describe* the image,"[75] and one—Oklahoma—has no requirements beyond the performance of the examination.[76] This is because Oklahoma, along with North Carolina, had a display-and-describe requirement that has been

66. *See, e.g.*, OKLA. STAT. ANN. tit. 63, § 1-738.8 (West 2016); Hannah Stahle, Comment, *Fetal Pain Legislation: An Undue Burden*, 10 QUINNIPIAC HEALTH L.J. 251, 255 (2007).

67. Texas, for example, requires that women be given information that the Guttmacher Institute believes "inaccurately portrays [the] risk" to future fertility. *Counseling and Waiting Periods for Abortion*, *supra* note 64.

68. Kansas and Texas, for example, require that physicians give women information that the Guttmacher Institute believes "inaccurately asserts [a] possible link" between abortion and breast cancer. *Id.*

69. Kansas, Louisiana, and North Carolina, for example, require that physicians give women information that the Guttmacher Institute believes focuses too heavily on the "negative emotional responses" without fully describing the full "range of emotional responses." *Id.*

70. *See* Sanger, *supra* note 10.

71. Stuart v. Camnitz, 774 F.3d 238, 246 (2014).

72. *Requirements for Ultrasound*, *supra* note 2.

73. *Id.* Of those that do not expressly mandate ultrasounds, some require the provider to *offer* an ultrasound, and others require that, if the provider decides to perform an ultrasound, the woman must be offered an opportunity to view the image.

74. *Id.* (emphasis added).

75. *Id.* (emphasis added).

76. *Id.*

permanently enjoined.[77] The remainder of this section will provide an overview of both offer-of-opportunity and display-and-describe requirements.

Offer-of-opportunity requirements are in place in Alabama, Arizona, Florida, Indiana, Kansas, Mississippi, North Carolina, Ohio, and Virginia.[78] While there are variations with respect to their specifics—for example, timing requirements[79]—Indiana's statute, which is currently being challenged,[80] represents a fairly typical example of an offer-of-opportunity requirement. It begins by stating that, barring a medical emergency, a woman seeking an abortion must give informed consent.[81] While this is unremarkable because a patient must give informed consent prior to any medical procedure, the statute goes on to enumerate the specific information required to constitute informed consent. This includes, among other things, the pregnant woman's written certification that she "has been offered by the provider the opportunity to view the fetal ultrasound imaging and hear the auscultation of the fetal heart tone if the fetal heart tone is audible[.]"[82] Notably, the provider must also inform the woman that "human physical life begins when a human ovum is fertilized by a human sperm" and that the fetus can feel pain, even before twenty weeks gestational age.[83] Taken as a whole, the statute is calculated to encourage childbirth over abortion. While *Casey*, as previously discussed, allows states to promote pro-life opinions in certain contexts,[84] this manipulation of patient decision-making is inconsistent with traditional principles of informed consent.

Display-and-describe requirements are in place in Louisiana, Texas, and Wisconsin,[85] and were previously in place in North Carolina and

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77. *Id*.; N.C. GEN. STAT. § 90-21.85 (2016); OKLA. STAT. ANN. tit. 63, § 1-738.3d (West 2016); Stuart v. Loomis, 992 F. Supp. 2d 585, 607 (M.D.N.C 2014) (holding North Carolina ultrasound requirement unconstitutional); Nova Health Sys. v. Edmondson, 233 P.3d 380, 382 (Okla. 2010) (enjoining Oklahoma ultrasound requirement).

78. *Requirements for Ultrasound*, *supra* note 2.

79. *Id*.

80. Michelle D. Anderson, *ACLU of Indiana Sues State Health Department, County Prosecutors over Ultrasound Law*, REWIRE (July 8, 2016, 6:12 PM), https://rewire.news/article/2016/07/08/aclu-indiana-sues-state-health-department-county-prosecutors-ultrasound-law/ [https://perma.cc/CPG6-3HZG].

81. IND. CODE § 16-34-2-1.1(a) (2016).

82. *Id.* § 16-34-2-1.1(a)(3)(B).

83. IND. CODE § 16-34-2-1.1(a)(1)(E)–(G).

84. Planned Parenthood v. Casey, 505 U.S. 833, 833 (1992).

85. *Requirements for Ultrasound*, *supra* note 2.

These three states offer limited exceptions to their requirements. *Id*. All three allow the woman to "look away from the image" and, in certain situations, Louisiana and Texas allow her to opt out of the description. *Id.* Wisconsin waives the ultrasound requirement for women who have been sexually assaulted. *Id*.

Oklahoma.[86] All five of these statutes, of course, require abortion providers to display and describe ultrasound images prior to performing abortions,[87] though they generally contain exceptions for emergency situations.[88] Four of them leave the specifics of the "display" requirement within the patient's or provider's discretion,[89] while one—Oklahoma's now defunct statute—directs the provider to use whatever transducer will produce the clearest image, whether it be vaginal or abdominal.[90] All implement the "describe" requirement through language resembling the following—drawn from Louisiana's statute: The provider must give "a simultaneous and objectively accurate oral explanation of what the ultrasound is depicting, in a manner understandable to a layperson, which shall include the presence and location of the unborn child within the uterus and the number of unborn children depicted."[91] Louisiana's statute lifts this requirement in cases where the woman certifies that the pregnancy is the result of rape or incest,[92] and other states offer similar—but not identical—exceptions.[93]

All five display-and-describe statutes proceed, perhaps surprisingly, by stating that the woman need not actually view the images.[94] Louisiana's

86. *Id.*; N.C. GEN. STAT. § 90-21.85 (2016); OKLA. STAT. ANN. tit. 63, § 1-738.3d (West 2016); Stuart v. Loomis, 992 F. Supp. 2d 585 (M.D.N.C 2014) (holding North Carolina requirement unconstitutional); Nova Health Sys. v. Edmondson, 233 P.3d 380, 382 (Okla. 2010) (enjoining Oklahoma requirement).

87. *Requirements for Ultrasound*, *supra* note 2; *see, e.g.*, LA. STAT. ANN. § 40:1061.10(D)(2)(a)–(b) (West 2016).

88. LA. STAT. ANN. § 40:1061.10(D) (West 2016) (providing an exemption for medical emergencies); N.C. GEN. STAT. § 90-21.85(a); OKLA. STAT. ANN. tit. 63 § 1-738.3d(D) (providing an exemption for medical emergencies); TEX. HEALTH & SAFETY CODE ANN. § 171.0124 (West 2016) ("A physician may perform an abortion without obtaining informed consent under this subchapter in a medical emergency."); WIS. STAT. ANN. § 253.10(3)(c) (West 2016).

89. Wisconsin, for example, allows the patient to choose the method. WIS. STAT. ANN. § 253.10(3g)(a)(1) (West 2016). Others do not appear to specify.

90. OKLA. STAT. ANN. tit. 63, § 1-738.3d(B)(1).

91. LA. STAT. ANN. § 40:1061.10(D)(2)(b)(ii).

92. LA. STAT. ANN. § 40:1061.10(D)(2)(d)(iv)(3).

93. Texas, for example, lifts its requirement when the pregnancy is the result of a certain type of sexual violation, the woman is a minor proceeding pursuant to a judicial bypass statute, or the fetus has an "irreversible medical condition or abnormality." TEX. HEALTH & SAFETY CODE ANN. § 171.0122(d).

94. LA. STAT. ANN. § 40:1061.10(D)(2)(a)(i); N.C. GEN. STAT. § 90-21.85(b) (2016) (stating that the woman may refuse to listen to the explanation and may also avert her eyes); OKLA. STAT. ANN. tit. 63, § 1-738.3d(C) (West 2016) (stating that, although the woman must listen to the provider's explanation, she may "avert[] her eyes" from the images); TEX. HEALTH & SAFETY CODE ANN. § 171.0122.

statute, for example, expressly states that despite the display mandate, "[n]othing . . . shall be construed to prevent the pregnant woman from not . . . viewing the images[.]"[95] Thus, while the provider must display the images, the woman may avert her eyes. All five display-and-describe statutes also require that the provider locate the fetal heartbeat, if possible,[96] though only Texas absolutely requires that it be made audible.[97] Even Texas, however, does not require that the woman listen to the heartbeat,[98] though it is unclear how a woman would entirely avoid listening. The Fifth Circuit, in interpreting this provision, stated that a woman's choice not to listen "does not obviate the physician's obligations to . . . make audible the heart auscultation," but noted that "the woman may simply choose not to . . . listen."[99]

All but one of the five display-and-describe statutes—Oklahoma's—use the term "child" pervasively,[100] which along with other evidence suggests they share the goal of preventing abortion. The Wisconsin statute expressly says it is intended to further the state's interest in, among other things, "protecting . . . the life of [the] unborn child."[101] The Texas statute requires the provider to give the woman information on the services "available to assist [her] through pregnancy, childbirth, and the child's dependency[.]"[102] The Louisiana statute contains a provision that—although impacted by an agreement between the law's challengers and state officials[103]—requires the provider to offer the woman "the option of requesting an ultrasound photograph or print of her unborn child."[104] The North Carolina statute, as previously mentioned, quite openly "promote[s] a pro-life message," in the Fourth Circuit's words, "by demanding the provision of facts that all

95. LA. STAT. ANN. § 40:1061.10(D)(2)(a)(i).

96. *Id.*; N.C. GEN. STAT. § 90-21.82(1)(e) (2016) (requiring that the provider requires that the provider offer the woman "the opportunity to hear the fetal heart tone"); OKLA. STAT. ANN. tit. 63, § 1-738.3d(B)(4) (West 2016); TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4).

97. TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4).

98. TEX. HEALTH & SAFETY CODE ANN. § 171.0122(c).

99. Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 583 (5th Cir. 2012).

100. *See, e.g.*, LA. STAT. ANN. §§ 40:1061.10(D)(2)(a)(ii)–(iii) (2016); N.C. GEN. STAT. § 90-21.85(a)(1) (2016); TEX. HEALTH & SAFETY CODE ANN. § 171.012(a); WIS. STAT. ANN. § 253.10 (3g)(a)(2) (West 2016).

101. WIS. STAT. ANN. § 253.10(1)(b)(1).

102. TEX. HEALTH & SAFETY CODE ANN. § 171.012(a).

103. Press Release, Ctr. for Reprod. Rights, Parts of Louisiana Abortion Ultrasound Law Blocked (Aug. 19, 2010), http://www.reproductiverights.org/press-room/parts-of-louisiana-abortion-ultrasound-law-blocked [https://perma.cc/CS7W-ZDPP] [hereinafter Ctr. for Reprod. Rights].

104. LA. STAT. ANN. §§ 40:1061.10 (D)(2)(a)(iii).

fall on one side of the abortion debate[.]"[105] Rather than furthering patient autonomy and ensuring informed consent, these statutes deny women's realities and—when they function as intended—guilt them into continuing their pregnancies. They are, in sum, pro-life laws.

C. Challenges to Mandatory Ultrasounds

Some of the ultrasound mandates discussed in Part II.B have been challenged as violating the federal Constitution, and a few have been invalidated. Louisiana's display-and-describe statute remains in place, after a challenge was dropped following an agreement with state officials to stop enforcing certain provisions.[106] Texas's display-and-describe statute remains in place after the Fifth Circuit reversed a successful challenge at the federal district court level.[107] Wisconsin's display-and-describe statute has not been challenged, but given that other parts of the state's abortion law have been judicially invalidated, additional litigation seems likely.[108] North Carolina's display-and-describe statute is not being enforced: It was invalidated by the Fourth Circuit as compelling physician speech in violation of the First Amendment, and the Supreme Court denied certiorari.[109] Finally, Oklahoma's display-and-describe statute is also not being enforced: It was invalidated in a very brief opinion by the Oklahoma Supreme Court, citing *Casey* and the Federal Supremacy Clause.[110]

Part II.C will illustrate that ultrasound mandates have typically been attacked as burdening three sets of rights—those protected by the Due Process, Equal Protection, and Free Speech Clauses. Free speech claims have been by far the most successful, yet other claims may be available: One commentator has argued that ultrasound mandates violate the Fourth

105. Stuart v. Camnitz, 774 F.3d 238, 246 (4th Cir. 2014).

106. Complaint, Hope Med. Grp. for Women v. Caldwell, 2010 WL 3269282 (M.D. La. 2010) (3:10-CV-00511); Ctr. for Reprod. Rights, *supra* note 103.

107. Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 584 (5th Cir. 2012).

108. Glenn Kessler, *Walker's Claim that a Controversial Abortion Law Allows a Choice of Ultrasounds*, WASH. POST (June 5, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/06/05/walkers-claim-that-a-controversial-abortion-law-allows-a-choice-of-ultrasounds/ [https://perma.cc/3UL6-BFSR].

109. *Camnitz*, 774 F.3d at 250, *cert. denied sub nom.* Walker-McGill v. Stuart, 135 S. Ct. 2838, 2838 (2015).

110. Nova Health Sys. v. Pruitt, 292 P.3d 28, 28 (Okla. 2012).

Amendment right against searches and seizures,[111] and this Article will suggest that challengers ought to focus on the Fourteenth Amendment right of "equal dignity." Specifically, Part II.C.1, after explaining how the typical due process, equal protection, and free speech challenges operate, will sketch an alternative "equal dignity" approach that would more fully comprehend the harms inflicted by these statutes. Part II.C.2 will examine two actual cases—those litigated in the Fourth and Fifth Circuits—for purposes of showing the intense—and, this Article argues, misguided—focus on free speech claims.

1. Potential Challenges

a. Mandatory Ultrasounds Violate Due Process Rights

First, mandatory ultrasound statutes violate the Due Process Clause, which provides that no state shall "deprive any person of liberty . . . without due process of law."[112] The clause has long been read as securing certain rights to make decisions about procreation.[113] The Supreme Court held, in the 1972 decision of *Eisenstadt v. Baird*, that "liberty" includes the right to decide "whether to bear or beget a child."[114] The right to abortion was, of course, most strongly recognized in the 1973 decision of *Roe v. Wade*.[115] Although this right has been diluted by subsequent decisions including *Planned Parenthood v. Casey* in 1992, *Stenberg v. Carhart* in 2000, and *Gonzales v. Carhart* in 2007,[116] it persists at least to the extent necessary to invalidate ultrasound mandates. Indeed, the Court's most recent abortion decision, *Whole Woman's Health v. Hellerstedt*, reaffirmed the pre-viability standards originally set forth in *Casey's* plurality opinion: Before viability, the government may not impose an undue burden—meaning it must not pass

111. *See* Note, *Physically Intrusive Abortion Restrictions as Fourth Amendment Searches and Seizures*, 128 HARV. L. REV. 951 (2015).

112. U.S. CONST. amends. V, XIV.

113. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

114. *Id.* (recognizing the right in dicta, while invalidating Massachusetts's ban on the distribution of contraceptives to unmarried individuals as violating the Equal Protection Clause). This statement was more recently reiterated in *Lawrence v. Texas*. 539 U.S. 558, 565 (2003) (invalidating Texas's same-sex sodomy law as violating the Due Process Clause).

115. Roe v. Wade, 410 U.S. 113, 164 (1973).

116. Planned Parenthood v. Casey, 505 U.S. 833, 881 (1992) (upholding a mandatory twenty-four-hour waiting period, requiring the physician to "inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child,'" and requiring the woman to certify that she has been informed of certain materials provided by the state); Stenberg v. Carhart, 530 U.S. 914, 939 (2000) (invalidating a Nebraska law criminalizing partial birth abortions because the language was so broad that it applied to multiple procedures); Gonzales v. Carhart, 550 U.S. 124, 168 (2007) (upholding the federal Partial Birth Abortion Ban Act).

a law with the purpose or effect of placing a substantial obstacle—in a woman's path to abortion.[117] While the *Hellerstedt* Court did not address the post-viability standard set forth in *Casey* and its progeny, that standard has remained largely unchanged since *Roe*: After viability, the government may ban abortion, so long as it provides exceptions to protect the woman's life and health.[118]

Focusing on the pre-viability portion of the standard, because the vast majority of abortions occur before viability, one could argue that ultrasound mandates have the purpose—and perhaps even the effect—of placing a substantial obstacle in a woman's path to abortion, and should therefore be invalidated. That their purpose is to impose a substantial obstacle is apparent from the discussion in Part II.B, which reveals their pro-life intentions. That their effect is to impose a substantial obstacle is less clear, and depends on how effect is measured. While the study described in Part II.B suggests that viewing ultrasound images rarely alters a woman's ultimate decision,[119] ultrasound mandates may still operate as substantial obstacles, inasmuch as they express government disapproval of women who seek abortions and attempt to evoke feelings of guilt and shame. Women must overcome these substantial obstacles to proceed with the procedure. Ultimately, however, showing that a given mandate's purpose is to impose a substantial obstacle to pre-viability abortion will suffice under the plurality opinion in *Casey* and the majority opinion in *Hellerstedt*.[120]

b. Mandatory Ultrasounds Violate Equal Protection Rights

Second, mandatory ultrasound statutes violate the Equal Protection Clause, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[121] The Court, in its 1976 decision of *Craig v. Boren*, held that statutes discriminating based on sex are subject to intermediate scrutiny and must be "substantially" related to

117. *Casey*, 505 U.S. at 877; Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

118. *Roe*, 410 U.S. at 163–64; *Casey*, 505 U.S. at 879. While *Gonzales* called the health-exception requirement into question by upholding a federal "partial birth abortion" ban without a health exception, the Court did not believe the procedure in question would ever fall within that exception. *Gonzales*, 550 U.S. at 125.

119. Kimport, *supra* note 22.

120. *Casey*, 505 U.S. at 877; *Hellerstedt*, 136 S. Ct. at 2300.

121. U.S. CONST. amend. XIV, § 1.

achieving "important" government interests.[122] It held elsewhere, including in its 1996 decision of *United States v. Virginia*, that preserving sex stereotypes does not constitute an "important" government interest.[123] Justice Ginsburg, writing for the Court in *United States v. Virginia*, stated, "[G]eneralizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."[124] Mandatory ultrasound statutes rest at least in part on sex stereotypes, including the stereotypes that women should be mothers and that women are incapable of making their own medical decisions.[125]

Yet statutes only trigger intermediate scrutiny if there is actually sex discrimination, and some would argue that mandatory ultrasound statutes do not engage in sex discrimination. They do not, after all, target all women—only those who are pregnant and seeking abortions. And under decisions like *Geduldig v. Aiello* in 1974, there may not be any sex discrimination where a law disadvantages only some women.[126] In *Geduldig*, the Court upheld a disability insurance system that excluded coverage for disabilities arising from normal pregnancy, essentially saying that because neither men nor women received coverage for pregnancy-related disabilities, there was no sex discrimination.[127] Accordingly, the Court applied rational basis review and found the statute rationally related to the state's legitimate economic interests.[128] Yet even under such a relaxed standard as rational basis review, the fate of mandatory ultrasound statutes would be uncertain. While states would claim interests in protecting fetal life and ensuring informed consent, challengers might respond that the statute is not rationally related to achieving those interests. In terms of protecting fetal life, they could cite the above-discussed study showing that viewing ultrasounds has a minimal impact on women's abortion decisions.[129] In terms of ensuring informed consent, they could argue that ultrasound mandates do just the

122. Craig v. Boren, 429 U.S. 190, 197 (1976).
123. United States v. Virginia, 518 U.S. 515, 534, 549 (1996).
124. *Id.* at 550.
125. Plaintiffs made these arguments in *Lakey*. Amended Class Action Complaint at 37, Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942 (W.D. Tex. 2011) (No. 1:11-cv-00486-SS), http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/TMP%20Amended%20Class%20Action%20Complaint.pdf [https://perma.cc/57VA-AVX8]; *see also* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1047–50.
126. Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974).
127. *Id.*
128. *Id.*
129. Kimport, *supra* note 22.

opposite: They are designed to encourage a particular choice, rather than to enable informed and autonomous self-determination.[130]

Yet it is also possible that *Geduldig* is not as significant an impediment to sex discrimination claims as some would argue. Professor Reva Siegel has explained that some courts, including the Ninth Circuit, have read *Geduldig* as limited by the Court's 2003 decision in *Nevada Department of Human Resources v. Hibbs*.[131] The *Hibbs* Court, Professor Siegel writes, held that when pregnancy leaves "provide new mothers more time off than is physically needed to recover from giving birth," they "violate[] equal protection [by] discriminat[ing] between the sexes in ways that perpetuate sex stereotypes concerning the different roles and responsibilities of fathers and mothers."[132] The Ninth Circuit in 2004 wrote, "*Hibbs* strongly supports [the] argument that singling out abortion in ways unrelated to the facts distinguishing abortion from other medical procedures is an unconstitutional form of discrimination on the basis of gender."[133] Based on the discussion in Part II.B, it is clear that mandatory ultrasound statutes single out abortion by setting forth the exact actions required for informed consent when this is not done for other medical procedures.[134]

While equal protection arguments have not typically been successful in challenging mandatory ultrasound statutes, this Article contends that they ought to be. As Justice Ginsburg has famously observed, many abortion regulations can be attacked as sex discrimination.[135] She wrote, in dissent to the 2007 decision of *Gonzales v. Carhart*, about the equal protection dimensions of abortion litigation, emphasizing that limits on abortion impact "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[136] Only when women possess reproductive autonomy, in other words, can they truly be "equal citizens."[137] As Professor

130. *See supra* Part II.B.

131. Reva Siegel, *Sex Equality Arguments for Reproductive Rights*, 56 EMORY L.J. 815, 832–33 (2007) (discussing *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 531 (2003), and *Tucson Woman's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004)).

132. Siegel, *supra* note 131, at 832.

133. *Id*. at 833 (quoting *Tucson Woman's Clinic*, 379 F.3d at 548).

134. *See supra* Part II.B.

135. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 385 (1985) (quoting Harris v. McRae, 448 U.S. 297, 356–57 (1980) (Stevens, J., dissenting)).

136. Gonzales v. Carhart, 550 U.S. 124, 171–72 (2007).

137. Ginsburg, *supra* note 135, at 383 (citing Kenneth L. Karst, *Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57–59 (1977)).

Reva Siegel has similarly explained, existing equal protection doctrine does "not even remotely sanction" laws that pressure women to "make[] choices about continuing a pregnancy that reflect [their] 'inherent' or 'intrinsic' 'nature as . . . mother[s].'"[138] Mandatory ultrasound statutes arguably fall within this non-sanctioned category, and courts should require states to defend them against at least intermediate or "skeptical" scrutiny.

c. Mandatory Ultrasounds Violate Free Speech Rights

Third, mandatory ultrasound laws violate the Free Speech Clause, which provides that "Congress shall make no law . . . abridging the freedom of speech[.]"[139] They do so by requiring doctors—and, some have argued, pregnant women—to engage in compelled speech.[140] The Supreme Court has held that the First Amendment protects not only the right to speak, but also the right not to speak.[141] It stated, in *West Virginia v. Barnette*, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[142] It further stated, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, that the state "may not compel affirmance of a belief with which the speaker disagrees."[143] It continued, "'Since *all* speech inherently involves choices of what to say and what to leave unsaid,' one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"[144]

When statutes require abortion providers to display and describe ultrasound images and, in some cases, refer to the fetus as a "child," they quite clearly compel doctors to speak.[145] Some would additionally argue that, when

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138. Siegel, *supra* note 125, at 1047.

139. U.S. CONST. amend. I. While the Free Speech Clause appears in the First Amendment, which applies only to the federal government, it was deemed incorporated against the states via the Fourteenth Amendment's Due Process Clause in 1925. Gitlow v. New York, 268 U.S. 652, 666 (1925).

140. *See generally* Corbin, *supra* note 51, at 998–1000 (arguing that mandatory ultrasound laws violate a right against compelled listening); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 979–80 (arguing that mandatory ultrasound laws violate a right against compelled speech).

141. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

142. *Id.* at 642.

143. Hurley v. Irish-American Gay, Lesbian & Bisexual Grp., 515 U.S. 557, 573 (1995).

144. *Id.* (citations omitted).

145. Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 CARDOZO L. REV. 2347, 2383–84 (2013).

statutes require women to allow physicians or ultrasound technicians to use their bodies to produce images, they likewise compel patients to speak.[146] One could cite numerous free speech cases stating that laws compelling viewpoint-based—"ideological"—speech ordinarily trigger strict scrutiny.[147] Yet one could also cite the *Casey* plurality's statement that "the practice of medicine[is] subject to reasonable licensing and regulation,"[148] such that if a doctor must give a patient information that is "truthful," "nonmisleading," and "relevant . . . to the decision," no constitutional infirmity exists.[149] While this disparity creates some uncertainty as to the proper level of scrutiny, it seems clear, as the Fourth Circuit concluded, that courts should review mandatory ultrasound statutes with at least intermediate—if not strict—scrutiny. This Article will discuss the specifics of free speech claims further in Part III.C.2, which describes two litigated cases.

Beyond compelled speech arguments, which are quite strong and have been the most successful means of attack on mandatory ultrasound statutes, Professor Caroline Corbin has argued that the Supreme Court should also recognize a right against compelled listening. This would prevent states from forcibly exposing women to the legislature's views on abortion.[150] Professor Corbin suggests that this right against compelled listening flows naturally from several lines of cases, including the captive audience cases, which balance a speaker's free speech rights against a listener's privacy or equality rights.[151] This right, if it exists, clearly conflicts with mandates that require women seeking abortions to listen to doctors' descriptions of images and to fetal heart tones. Compelled listening arguments ought to carry a great deal of weight: Given their patient-focused nature, they comprehend unique harms that compelled speech arguments do not capture. And their close link with free speech rights makes them especially powerful under existing doctrine.

146. Cheri D. Smith, *Mandatory Ultrasound Statutes and the First Amendment, Shifting the Constitutional Perspective*, 20 CARDOZO J.L. & GENDER 855, 874 (2014).

147. Content-based regulations of speech generally trigger strict scrutiny. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994); RAV v. City of St. Paul, 505 U.S. 377, 395–96 (1992); Wooley v. Maynard, 430 U.S. 705, 715–16 (1977).

148. Planned Parenthood v. Casey, 505 U.S. 833, 884 (1992).

149. *Id.* at 882.

150. *See* Corbin, *supra* note 51, at 1007.

151. *Id.* at 951–52 ("The captive audience doctrine has traditionally been based on the idea that the government may curtail a speaker's free speech rights when those rights are outweighed by a listener's privacy rights.").

d. Mandatory Ultrasounds Violate the Principle of "Equal Dignity"

Finally, this Article contends that mandatory ultrasounds violate the principle of "equal dignity" recognized in a line of cases culminating in the 2015 decision of *Obergefell v. Hodges*.[152] There, the Court in an opinion by Justice Kennedy held same-sex marriage bans unconstitutional.[153] The holding rested on both due process and equal protection grounds, and the phrase "equal dignity" appears three times in the opinion—twice in reference to women, and once in reference to gays and lesbians.[154] The first reference to women's "equal dignity" comes as the Court explains that in the 1800s, "society began to understand that women have their own equal dignity [and thus abandoned] the law of coverture[.]"[155] The second reference to women's "equal dignity" comes as the Court describes the historical inequality of women within civil marriage and asserts that sex-based classifications—for example, treating husbands as heads of family—"denied the equal dignity of men and women."[156]

The Court discusses at length the close relationship between equality and liberty, describing them as "interlocking . . . constitutional safeguards" that are "connected in a profound way, though they set forth independent principles."[157] The majority, of course, ultimately concludes that same-sex marriage bans both "burden the liberty of same-sex couples" and "abridge central precepts of equality."[158] While some have critiqued the *Obergefell* opinion as doctrinally flawed,[159] others have praised it for helping to develop the concept of "equal dignity."[160] Professor Laurence Tribe, for example, has described *Obergefell's* primary contribution as "[winding] the double helix of Due Process and Equal Protection into a doctrine of equal dignity."[161] Professor Kenji Yoshino has described *Obergefell* as "a game changer for substantive due process jurisprudence" because of its new focus on "the role antisubordination concerns have played in due process

152. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).
153. *Id.* at 2585.
154. *Id.* at 2585, 2595, 2603, 2608.
155. *Id.* at 2595.
156. *Id.* at 2603.
157. *Id.* at 2590, 2602–03.
158. *Id.* at 2590.
159. *See, e.g.*, Ilya Somin, *A Great Decision on Same-Sex Marriage—But Based on Dubious Reasoning*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-on-same-sex-marriage-but-based-on-dubious-reasoning [https://perma.cc/VT8U-59PE].
160. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015); Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 148 (2015).
161. Tribe, *supra* note 160.

analysis[.]"[162] As Professor Yoshino has suggested, this aspect of *Obergefell* could have important implications for reproductive rights.[163]

Women are both subordinated and manipulated—in other words, deprived of "equal dignity"—by mandatory ultrasounds. They are subordinated by the inherent paternalism discussed in Part II.C; they are manipulated by the compromised informed consent procedure and inherent pro-life bias discussed in Part II.B. While abortion doctrine has always been unique, following a pattern different from other lines of substantive due process cases, this synthesis of liberty and equality is not entirely foreign to reproductive rights cases. Justice Ginsburg has often advised—albeit in dissent—that where due process doctrine fails equal protection doctrine can offer support.[164] The discussion of "equal citizenship" in her *Carhart* dissent resonates with and reaffirms notions of "equal dignity."[165] To reiterate her wise statement, limits on abortion inevitably impact "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[166] The concept of "equal dignity," in sum, accurately comprehends the harm caused by mandatory ultrasounds.

2. Actual Litigation

Plaintiffs have raised many of the arguments discussed above in challenging mandatory ultrasound statutes. Part III.C.2 will examine how these arguments have played out in the course of two high-profile cases—one challenging the Texas statute, which the Fifth Circuit upheld in 2012;[167] the other challenging the North Carolina statute, which the Fourth Circuit invalidated in 2014.[168] Although these two cases created a circuit split, the Supreme Court has thus far declined to resolve it.[169] However, it seems likely that, in the wake of the 2016 decision of *Whole Woman's Health v. Hellerstedt*,[170] new challenges will be initiated. The ultimate outcome for ultrasound mandates is thus, far from clear.

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162. Yoshino, *supra* note 160, at 148, 179.
163. *Id.* at 178–79.
164. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).
165. *Id.* at 171–72.
166. *Id.* at 172.
167. Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 584 (5th Cir. 2012).
168. Stuart v. Camnitz, 774 F.3d 238, 250 (4th Cir. 2014).
169. Walker-McGill v. Stuart, 135 S. Ct. 2838, 2838 (2015).
170. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

One important point illustrated by the Fourth and Fifth Circuit cases is that, where successful, challenges to mandatory ultrasound statutes have generally rested on free speech grounds. As previously discussed, although free speech doctrine is immensely powerful at present, it may not be the ideal means of attacking mandatory ultrasound statutes. Free speech claims fail to comprehend the primary harms perpetrated by such statutes, which are to the dignity and equality of pregnant women rather than to the speech rights of their doctors.

a. Texas's Statute

Texas's display-and-describe statute, discussed in Part III.B, was challenged in *Texas Medical Providers Performing Abortion Services v. Lakey*.[171] Plaintiffs raised several claims, including that it was unconstitutionally vague, compelled physician speech, compelled patient speech and listening, engaged in sex discrimination, unfairly targeted abortion providers, and violated patients' bodily integrity.[172] While the U.S. District Court for the Western District of Texas granted a partial preliminary injunction against enforcement on vagueness and compelled speech grounds,[173] the Fifth Circuit reversed.[174]

The core of the plaintiffs' compelled speech argument was that requiring doctors to display and describe the ultrasound images and to make the fetal heartbeat audible made doctors "mouthpieces" of the state.[175] This, plaintiffs claimed, infringed doctors' rights "by using them as puppets to convey government-mandated speech."[176] The district court found that the mandatory nature of the speech distinguished Texas's statute from that upheld in *Casey*, which only required doctors to "make certain materials about childbirth and the fetus '*available*' to the woman[.]"[177] Concluding that the statute did indeed compel doctors to engage in ideological speech—"with which they may not agree, regardless of any medical necessity, and irrespective of whether the pregnant women wish to listen"—the district court applied strict scrutiny and found that the statute could not survive.[178]

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171. *See Lakey*, 667 F.3d at 572–73.
172. Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942, 949 (W.D. Tex. 2011).
173. *Id*. at 975 (accepting part of the vagueness argument and the entire compelled speech argument).
174. *Lakey*, 667 F.3d at 584.
175. *Id*. at 579.
176. *Lakey*, 806 F. Supp. 2d at 969.
177. *Lakey*, 667 F.3d at 579 (emphasis added).
178. *Lakey*, 806 F. Supp. 2d at 975.

On appeal, the Fifth Circuit reversed and deemed the preliminary injunction unwarranted.[179] After examining existing doctrine with a focus on *Casey* and *Gonzales*, it stated, "[I]nformed consent laws that do not impose an undue burden on the woman's right to have an abortion are permissible if they require truthful, non-misleading, and relevant disclosures."[180] It defined "relevant disclosures" as extending beyond "physical and psychological risks to the expectant mother" to "the state's legitimate interests in 'protecting the potential life within her.'"[181] It viewed laws that comply with these principles as "part of the state's reasonable regulation of medical practice," rather than "compel[led] 'ideological' speech that triggers First Amendment strict scrutiny." Ultimately, it held that Texas's law complied with the criteria it had set forth.[182] On remand, although the district court implemented the Fifth Circuit's ruling by denying a permanent injunction, the judge observed that the decision "effectively eviscerated the protections of the First Amendment in the abortion context."[183] He further commented that the clear purpose behind Texas's statute was "to discourage women from exercising their constitutional rights by making it more difficult for caring and competent physicians to perform abortions."[184] The challengers' request for *en banc* review by the Fifth Circuit was denied.[185]

b. North Carolina's Statute

North Carolina's display-and-describe statute, discussed in Part III.B, was challenged in *Stuart v. Camnitz*.[186] Plaintiffs raised several claims, including that it compelled physician speech, was void for vagueness, and violated due process guarantees.[187] The district court granted a permanent injunction against enforcement,[188] and the Fourth Circuit affirmed.[189]

179. *Lakey*, 667 F.3d at 584.
180. *Id*. at 576.
181. *Id.*
182. *Id.*
183. Texas Med. Providers Performing Abortion Servs. v. Lakey, No. A-11-CA-486-SS, 2012 WL 373132, at *2 (W.D. Tex. Feb. 6, 2012).
184. *Id.* at *5.
185. Texas Medical Providers, et al. v. Lakey, REWIRE, https://rewire.news/legislative-tracker/legal-case/texas-medical-providers-et-al-v-lakey/ [https://perma.cc/T2V4-ZMMU] (last visited Jan. 9, 2017).
186. Stuart v. Camnitz, 774 F.3d 238, 242, 250 (4th Cir. 2014).
187. Stuart v. Loomis, 992 F. Supp. 2d 585, 588 (M.D.N.C. 2014).
188. *Id.* at 611.
189. *Camnitz*, 774 F.3d at 242.

Both courts held that the statute compelled physician speech and could not survive the requisite level of scrutiny, which was at least intermediate.[190] The challengers asked the courts to apply strict scrutiny because the statute compelled ideological speech, but the state urged them to apply only rational basis review because the statute regulated the medical profession.[191] The district court ultimately split the difference and applied intermediate scrutiny because the statute "both compelled speech and regulated the medical profession."[192] As previously stated, the district court concluded that the statute could not survive.

The Fourth Circuit, agreeing that the statute was "a content-based regulation of a medical professional's speech which must satisfy at least intermediate scrutiny,"[193] expressly declined to decide whether such statutes must ever satisfy strict scrutiny.[194] It noted that, while requiring a doctor to describe a fetus may not always be viewpoint-based or "ideological," North Carolina's requirement "explicitly promotes a pro-life message by demanding the provision of facts that all fall on one side of the abortion debate—and does so shortly before the time of decision when the intended recipient is most vulnerable."[195] Thus, while the state may certainly require doctors to provide "information sufficient for patients to give their informed consent to medical procedures,"[196] the Fourth Circuit emphasized that "*Casey* does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions."[197] In striking the statute under intermediate scrutiny, the Fourth Circuit observed that while the state's interests in protecting fetal life, promoting pregnant women's psychological health, and ensuring informed consent were unquestionably "important,"[198] the means the state had deployed were impermissible.[199] Although the state appealed the Fourth Circuit's decision to the United States Supreme Court, the Supreme Court denied certiorari.[200]

III. MANDATORY ULTRASOUNDS AS "PRECESSION OF SIMULACRA"

Part III takes a step back from the factual and legal specifics to explore the complex relationship between law, fetal images, and women's realities.

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190. *Loomis*, 992 F. Supp. 2d at 599, 609; *Camnitz*, 774 F.3d at 245.
191. *Camnitz*, 774 F.3d at 245.
192. *Id.*
193. *Id.*
194. *Id.* at 248.
195. *Id.* at 246.
196. *Id.* at 247.
197. *Id.* at 249.
198. *Id.* at 250 (quoting Roe v. Wade, 410 U.S. 113, 162 (1973).
199. *Id.* at 255.
200. Walker-McGill v. Stuart, 135 S. Ct. 2838, 2838 (2015).

Part III.A explores the relationship between images and reality and describes Baudrillard's work on the "precession of simulacra"—that is, the postmodern phenomenon of experiencing images more vividly than reality. Part III.B explores how the law interacts with fetal images and women's realities in the context of ultrasound mandates. It argues that such mandates represent a "precession of simulacra," in that they encourage women to experience fetal images more vividly than they experience the realities—for example, family dynamics, financial circumstances, and pre-existing personal and professional responsibilities—that motivated their abortion decisions in the first instance.

A. Images, Realities, and the "Precession of Simulacra"

The disjunction between images and reality has long been a source of fascination. It is cleverly portrayed in René Magritte's 1928–29 painting *The Treachery of Images*, which depicts a pipe underscored by the caption, "Ceci n'est pas une pipe"—which means, "This is not a pipe."[201] The painting is, of course, only the image of a pipe, yet our minds collapse the image and the actual object such that the caption becomes counterintuitive. Professor Rebecca Tushnet, explaining the import of Magritte's painting, writes:

> We are vulnerable to the treachery of images because we tend to read images using naïve theories of realism and representation. Unless we are primed to be wary of them and regularly reminded to maintain our skepticism, pictures appear to us to "resemble unmediated reality" more than words do—they seem to be "caused by the external world without . . . human mediation or authorial interpretation[.]"[202]

Our implicit trust of images, in other words, often obscures reality.

Baudrillard, in his 1981 publication, *Simulacra and Simulation*, goes further than Magritte and observes that, in our postmodern era, images and reality have developed a far more complex relationship.[203] He explains, by means of a fable by Jorge Luis Borges, how images have come to precede or supersede reality.[204] Borges, in *On Exactitude in Science*, described an

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201. *See* Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 689 (2012) (discussing the painting) (citing René Magritte, *The Treachery of Images* (1929), reproduced at https://collections.lacma.org/node/239578 [https://perma.cc/2EKR-629A] (last visited Jan. 9, 2017)).

202. Tushnet, *supra* note 201 ("'The caption is both true and false: this is not a pipe (it is a picture of a pipe)[.]'").

203. *See generally* BAUDRILLARD, *supra* note 1.

204. *Id.* at 1.

empire whose cartographers had created a map so detailed that it was the same size as the empire itself.[205] According to Baudrillard, "the territory no longer precedes the map, nor does it survive it[;] the map [instead] precedes the territory [and, indeed,] engenders the territory[.]"[206] This phenomenon, of images preceding or superseding reality, is what Baudrillard refers to as the "precession of simulacra."[207] Whereas images once represented reality, they now create "a real without origin or reality: a hyperreal."[208] In other words, we now inhabit a world in which images have become more real than reality, and in which the difference between "the 'real' and the 'imaginary'" has been deeply destabilized, if not entirely destroyed.[209]

Baudrillard further explains, in *The Evil Demon of Images and the Precession of Simulacra*, that "our world . . . is caught up in a mad pursuit of images [that paradoxically] describe the equal impossibility of the real and of the imaginary."[210] Baudrillard writes that media images fascinate us "not because they are sites of the production of meaning and representation[, but] because they are sites of the *disappearance* of meaning and representation, . . . in which we are caught quite apart from any judgment of reality, thus sites of a fatal strategy of denegation of the real and of the reality principle."[211] While we historically thought that "a sign could refer to the depth of meaning," signs have today become "uninterrupted circuit[s] without reference or circumference."[212] In postmodernity, we can no longer "isolate [either] the process of simulation [or] *the process of the real*[.]"[213] Even "power . . . eventually break[s] apart . . . and becom[es] a simulation of power."[214] According to Baudrillard, our postmodern world is predominantly populated by images and simulations.[215] And although Baudrillard focused primarily on media images, his ideas can be extended to other types of images, including those produced with ultrasound technology.

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205. *See* JORGE LUIS BORGES, COLLECTED FICTIONS 325 (Andrew Hurley trans., Penguin Group 1999).
206. BAUDRILLARD, *supra* note 1, at 1.
207. *Id.*
208. *Id.*
209. *Id.* at 3. Had Baudrillard lived to the present day, he might have pointed to Facebook and other social media sites where people carefully construct and regulate online identities as examples of images superseding reality.
210. Baudrillard, *The Evil Demon of Images*, *supra* note 1.
211. *Id.*
212. *Id.* at 196. The former is representation, the latter is simulation. *See id.*
213. *Id.* at 198.
214. *Id.*
215. *See id.* at 194.

B. Mandatory Ultrasounds, Fetal Images, and Women's Realities

Mandatory ultrasounds elevate fetal imagery over women's lived experiences in an effort to manipulate decision-making and achieve pro-life results. Given that we tend to privilege image-based information over other forms of information, one can understand their immense power. Professor Zechmeister, in her work on ultrasound imagery—discussed above in Part II.A—writes, "Seeing has become the most important of our senses," such that "information obtained through seeing . . . is regarded as more likely to be true than information obtained with all other senses."[216] This, of course, makes ultrasounds particularly powerful and potentially manipulative.

As Professor Clare Huntington has argued, mandatory ultrasounds are meant to evoke emotions of "motherhood," because "mothers love their children and would never harm them,"[217] as well as emotions of "guilt" and "shame," because only a bad person would consider abortion.[218] A woman who chooses abortion but then views a sonogram, the state hopes, will "feel[] guilty for rejecting motherhood."[219] She will come to understand the fetus as a "human being," and the abortion as "a shameful act no loving person would undertake."[220] Professor Huntington criticizes this legislative tactic for "privileging and emphasizing one set of emotions over another" and "manipulating the emotional context of decision making."[221] Another way of phrasing her argument is to say that the state should not deploy ultrasound images in an effort to evoke emotions that will override the realities that lead to abortion. It bears emphasizing that the women subject to ultrasound mandates have already made their decisions and are being asked to rethink them.[222] As Professor Carol Sanger has written, mandatory ultrasounds are "meant to bend a woman's will *once she has already made up her mind* to seek an abortion."[223]

While some would argue that the law should encourage women to give careful thought to their abortion decisions, there is no indication either that women do not already give careful thought to their abortion decisions

216. Zechmeister, *supra* note 29, at 392.
217. Huntington, *supra* note 11, at 1134.
218. *Id.* at 1134–36.
219. *Id.* at 1134.
220. *Id.* at 1136.
221. *Id.*
222. *See id.* at 1135.
223. Sanger, *supra* note 15, at 362 (emphasis added).

or that ultrasound mandates actually encourage careful thought.[224] On the first point, when women seeking abortions speak about their motivations, they typically cite concerns about their financial situations and the high cost of child-rearing; conflicts with work, school, or pre-existing caregiving responsibilities—or some combination of those things; and family dynamics.[225] These and other personal factors, including women's *own* emotions, represent reality and should, accordingly, drive the abortion decision. On the second point, as Professor Huntington points out, "mandatory sonogram laws may have little practical effect on a woman's decision to have an abortion."[226] It is again important to emphasize that women subject to these laws have already chosen abortion. Thus, Professor Huntington argues, the laws' primary effects may not be to alter their choices but rather to enforce social norms that "fetus[es are] human being[s]," "pregnant women are mothers," and "abortion[s are] shameful."[227]

When state legislatures force a pregnant woman to view a sonogram, they exploit fetal images in an attempt to produce an imagined, fully-formed "person." Yet in reality, most fetuses cannot survive outside of the uterus until close to twenty-four weeks of gestation—even with the best available medical interventions.[228] Given that a mere 1.3% of abortions occur after twenty-one weeks of gestation,[229] the vast majority of legally mandated ultrasounds do not depict anything close to a fully formed "person." Yet they do disrespect and deny the realities of the pregnant woman's life that motivated her to choose abortion, and this privileging of images over reality is problematic.

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224. *See* Huntington, *supra* note 11, at 1106.

225. *Fact Sheet: Induced Abortion in the United States*, *supra* note 20 ("The three most common reasons [patients gave for choosing abortion]—each cited by three-fourths of patients—were concern for or responsibility to other individuals; the inability to afford a child; and the belief that having a baby would interfere with work, school or the ability to care for dependents. Half said they did not want to be a single parent or were having problems with their husband or partner.").

226. Huntington, *supra* note 11, at 1135.

227. *Id.* at 1136.

228. Kenneth J. Ryan, *Tissue Transplantation from Aborted Fetuses, Organ Transplantation from Anencephalic Infants and Keeping Brain-Dead Pregnant Women Alive Until Fetal Viability*, 65 S. CAL. L. REV. 683, 692 (1991) ("A fetus of less than twenty-four weeks of age and six hundred grams of weight is very unlikely to survive outside of the uterus. Below this age, development of the fetal lung, skin, kidney, and other organs is insufficient to allow sustained extrauterine life, even with the most advanced medical attention. . . . Merely achieving the viability age of twenty-four weeks is however a minimalist goal because every additional week in utero increases chances for survival and greater neurological integrity."). More recently, some have placed viability at twenty-two weeks, though at that point there is "a high risk of disability and impairment." John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327, 337 (2011).

229. *Fact Sheet: Induced Abortion in the United States*, *supra* note 20.

IV. CONCLUSION

While the law's proper role in society is of course contested, this Article argues that mandatory ultrasounds should not, by privileging images over reality, force us into what Baudrillard referred to as "hyperreality." Legislatures, that is, should not require that women view emotionally evocative ultrasound images in an attempt to override the realities that led to their abortion decisions. The law should respect and—in the words of slain abortion provider George Tiller—"trust women"[230] to make their own decisions based on their own lived experiences. While ultrasound technology has many valid, and indeed invaluable, medical applications in the context of pregnancy and abortion, laws that require a provider to perform, or a patient to view, ultrasound images do not support these valid medical applications. To be clear: This Article does not argue that medical professionals should not perform, or that pregnant women should not view, ultrasounds prior to abortions, but rather that the law should not be involved in the decision whether to perform or view an ultrasound. Beyond ensuring the pregnant woman's informed consent, the law should not intervene.

This Article contends that the legal argument that best comprehends the harm inflicted by mandatory ultrasounds—the harm of elevating fetal images over women's realities—is an "equal dignity" argument. Such an argument captures both the paternalistic stereotyping and the deprivation of autonomous decision-making that mandatory ultrasounds entail. While free speech claims have been effective litigation tools, "equal dignity" claims are uniquely capable of rejecting legislatively imagined "personhood" and respecting women's lived experiences.

230. Jessica Valenti, *What Would George Tiller Do?*, THE NATION (May 31, 2012) http://www.thenation.com/blog/168157/what-would-george-tiller-do [https://perma.cc/3LR2-KSTJ] (noting that Tiller often wore a button that said "Trust Women").