MANDATORY ULTRASOUND STATUTES AND THE FIRST AMENDMENT, SHIFTING THE CONSTITUTIONAL PERSPECTIVE.

CHERI D. SMITH*

The jurisprudence of abortion law is replete with instances in which the concerns of the woman seeking the procedure have taken a back seat. The newest battleground in abortion regulation involves mandatory ultrasound statutes touted as informed consent regulations. The analysis of courts confronting these statutes has turned on whether the mandatory disclosures violate the physician's First Amendment right to be free from compelled speech. The particular breed of statute at issue in this paper requires a physician not only to perform an ultrasound, but also to make the images visible to the woman, to make audible the heartbeat, and to provide a simultaneous description of the images that highlights certain features of the fetus. Four states have enacted these speech and display mandatory ultrasound requirements, namely Louisiana, North Carolina, Texas, and Oklahoma. I argue that the woman's right not to speak and to be free from unwanted speech are both implicated by this form of mandatory ultrasound statute, and as such, require a strict scrutiny analysis. Her body is being used as a platform for the state's message, and it is an essential component in the production of the compelled speech. Applying a strict scrutiny analysis to the types of mandatory ultrasound laws at issue in cases in both the Fifth and Fourth Circuits, I conclude that the speech and display requirements do not satisfy the state's compelling interest in protecting fetal life post-viability and promoting maternal health, nor are they narrowly tailored to achieve the legislation's stated purpose.

INTRODUCTION

Heather Kay[1] was elated to be pregnant with her first child. Eager to see how the baby was progressing and to determine the sex, she and her husband received a routine twenty-week ultrasound. Instead of learning whether they would be welcoming a he or a she into the world, Heather heard the words that no expectant

* B.A. International Studies Summa cum laude, 2007, Baylor University; J.D. Candidate, May 2014, University of Maryland Francis King Carey School of Law.

[1] Unless otherwise noted, all references to Heather Kay are taken from The Honorable Paul Stam, J.D., *Woman's Right to Know Act: A Legislative History*, 28 ISSUES L. & MED. 3, 41 (2012) [hereinafter Stam*, WRKA Legislative History*].

parent wants to hear: the fetus had a severe brain abnormality described as "devastating and incompatible with life." After careful consideration, Heather and her husband decided to abort the pregnancy rather than let the child be born only to die a painful death in Heather's arms. For Heather, although heart wrenching, the process of securing an abortion was a dignified exchange between herself and her physician.

Carolyn Jones[2] received similar devastating news when she went in for a routine ultrasound. It was then the doctor told her that her much anticipated son was severely deformed, and that if he survived until birth, he would live a life of constant pain. Carolyn also chose to terminate the pregnancy instead of choosing a short and agonizing life for her child. The difference between Carolyn and Heather is that Carolyn lives in Texas, where the state recently passed the Texas Women's Right to Know Act ("H.B. 15").[3] Unlike Heather, in order to receive an abortion, Carolyn had to receive an ultrasound twenty-four hours before the procedure. The new Texas law required that the physician display the sonogram, make audible the heartbeat, and describe the images to her.[4] On the same day that Carolyn learned her baby was going to die, she also learned that her son had a well-developed diaphragm, four functioning chambers of the heart, arms, legs, fingers, and toes.[5]

Heather told her story to North Carolina House Judiciary Subcommittee in hopes that hearing it would dissuade lawmakers from passing House Bill 854, a bill that contained nearly identical provisions to the Texas law. Nevertheless, the North Carolina Women's Right to Know Act ("H.B. 854") passed in October of 2011 with widespread support from lawmakers.[6]

On December 19, 2011, a judge for the District Court for the Middle District of North Carolina granted a preliminary injunction on the H.B. 854 provisions requiring a woman seeking an abortion to receive an ultrasound in advance of the abortion procedure.[7] While statutes requiring ultrasounds for abortions are fairly common,[8] the North Carolina statute also required the physician to display the live ultrasound to the woman, and provide a detailed, simultaneous description of the

[2] Unless otherwise noted, all references to Carolyn Jones are taken from Carolyn Jones, *'We Have No Choice': One Woman's Ordeal with Texas' New Sonogram Law*, TEXAS OBSERVER (Mar. 15, 2012), http://www.texasobserver.org/we-have-no-choice-one-womans-ordeal-with-texas-new-sonogram-law/.

[3] The Texas Woman's Right to Know Act, TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2012).

[4] *See id*.

[5] Although the Texas Women's Right to Know Act has since been clarified to not require women in Carolyn's situation to hear the verbal explanation or heartbeat, she still must receive the ultrasound. The North Carolina Women's Right to Know Act includes no such exceptions, so if Heather's situation occurred today, she would go through exactly what Carolyn went through.

[6] The North Carolina Woman's Right to Know Act, N.C. GEN. STAT. ANN. § 90-21.85 (West 2011) (validity called into doubt by *Stuart v. Huff*, 834 F. Supp. 2d 424, 427 (M.D.N.C. 2011)).

[7] *See* Stuart v. Huff, 834 F.Supp.2d 424, 427 (M.D.N.C. 2011).

[8] *See* Danielle Muoio, *Coalition Fights North Carolina Abortion Law*, THE CHRONICLE (Dec. 9, 2012), http://www.dukechronicle.com/articles/2012/12/10/coalition-fights-north-carolina-abortion-law.

images.[9] The district court granted the preliminary injunction on the grounds that the "speech-and-display requirements violate[d] the First Amendment by compelling unwilling speakers to deliver the state's message discouraging abortion."[10] On January 17 2014, the district court issued a final ruling on the merits; affirming the rationale of the preliminary injunction and finding that the physicians' First Amendment rights were violated.[11]

Also in 2011, the District Court for the Western District of Texas had reached the same conclusion with regard to its nearly identical mandatory ultrasound statute.[12] However, on appeal, a unanimous Fifth Circuit Court of Appeals vacated the district court's ruling and found that *under Planned Parenthood of Southeastern Pennsylvania v. Casey*,[13] the state's authority to regulate the medical profession surpassed the compelled speech concerns of the physician.[14]

I will argue that both the Fifth Circuit and the District Court for North Carolina erroneously ignored the compelled speech concerns of the woman who is the subject of the ultrasound. The state is using the woman's body as a platform for the state's message, and the woman's body is an essential component in the production of the compelled speech. Therefore, any mandatory ultrasound statute that requires the results to be displayed and described to a woman seeking an abortion implicates her First Amendment[15] rights. As the plaintiffs in *Texas Medical Providers Performing Abortion Services v. Lakey I and II* noted, "[w]hat makes the Act different is that it requires physicians, using information obtained from women's own bodies, to be the mouthpiece for the State's views and requires that women listen to those views."[16] With this in mind, I argue that the infringement on a woman's First Amendment right requires a strict scrutiny analysis. Even if *Casey* carved out an exception for regulating medical speech when it comes to abortions, that exception narrowly applied to medical providers and not to the women seeking the abortion.

The woman's right to not know if she so chooses is also implicated. The Supreme Court addressed the rights of an unwilling listener in the case of *Hill v. Colorado*, and noted that the "right to be let alone [is one of] the most

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9 N.C. GEN. STAT. ANN. § 90-21.85 (West 2011).

10 *See Stuart*, 834 F.Supp.2d at 428 (adopting the reasoning of the plaintiffs that H.B. 854 was subject to strict scrutiny on First Amendment grounds because it compelled the physician's speech and granted a preliminary injunction because the district court found that North Carolina had failed to articulate a legitimate compelling interest to overcome the strict scrutiny standard).

11 *See generally* Stuart v. Loomis, 2014 WL 186310 (M.D.N.C. Jan. 17, 2014).

12 *See* Tex. Med. Providers Performing Abortion Servs. v. Lakey (*Lakey I*), 806 F. Supp. 2d 942, 958-59 (W.D. Tex. 2011), vacated in part, 667 F.3d 570 (5th Cir. 2012).

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

14 *See* Tex. Med. Providers Performing Abortion Servs. v. Lakey (*Lakey II*), 667 F.3d 570, 576 (5th Cir. 2012).

15 U.S. CONST. amend. I.

16 Brief for Appellee at 21, Tex. Medical Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570 (2011)(No. 11-50814).

comprehensive of rights and the right most valued by civilized men."[17] In addition to the compelled speech argument, I also argue that as a captive audience and an unwilling listener, the First Amendment also protects the woman from having the state's message forced upon her as a requisite for receiving an abortion.

I. HISTORY OF MANDATORY ULTRASOUND STATUTES

A. Abortion Regulation and Informed Consent

The right of a woman to receive an abortion was first established in the case of *Roe v. Wade*,[18] in which the Court held that the woman's right to choose was part of her right to privacy protected by the due process clause of the Fourteenth Amendment.[19] The right was not absolute, but "at some point, state interests as to protection of health, medical standards, and prenatal life, become dominant."[20] At the outset, *Roe* identified the inherent struggle between the woman's right to privacy and the state's compelling interest in protecting life.[21] The interests of the attending physician were also given great care by the *Roe* decision. Prior to the point where the state's interest in potential life becomes compelling, "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated[; i]f that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."[22]

Informed consent laws in the abortion context trace their legacy back to the Supreme Court's rulings in the seminal cases of *Casey* and *Gonzales v. Carhart*.[23] At issue in *Casey* were several state-imposed restrictions on abortion, including a Pennsylvania abortion statute that required a physician performing an abortion to complete the following:

> [A]t least 24 hours before performing an abortion [the] physician [must] 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'[,] . . . the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of

[17] *See* Hill v. Colorado, 530 U.S. 703, 716-17 (2000) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (internal quotation marks omitted)).

[18] Roe v. Wade, 410 U.S. 113, 153 (1973)

[19] U.S. CONST. amend. XIV.

[20] *Roe*, 410 U.S. at 155 (holding modified by Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

[21] *Id*. at 155-56.

[22] *Id*. at 163.

[23] *Casey*, 505 U.S. 833; Gonzales v. Carhart, 550 U.S. 124 (2007).

> agencies which provide adoption and other services as alternatives to abortion.[24]

The Court determined the preceding informed consent requirements "may be permissible" so long as "the information the State requires to be made available to the woman is truthful and not misleading."[25] In regard to the compelled speech concerns of the physicians, the Court held that, "the physician's First Amendment rights not to speak are implicated . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the state . . . [and w]e see no constitutional infirmity in the requirement that the physician provide the information."[26] Specifically, the Court found that "[w]hatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position."[27] The Court then determined that the informed consent provisions did not run afoul of the Fourteenth Amendment because there was no evidence in the record that they placed an undue burden on a woman's ability to receive an abortion.[28]

Fifteen years later, the Supreme Court again reaffirmed the undue burden analysis of *Casey* in the case of *Gonzales v. Carhart*, where the Court analyzed the constitutionality of the Federal Partial Birth Abortion Ban.[29] Where the *Casey* ruling articulated the state interests as the protection of the health of the mother and the potential life within her, the *Carhart* Court added that the state also has an interest in promoting medical ethics in regard to abortion practices.[30] *Carhart* also expanded the scope of the state's interest in informed consent to encompass the "lack of information concerning the way in which the fetus will be killed."[31]

Post-*Casey*, several state legislatures began to pass various informed consent requirements, typically mandating the dissemination of information regarding the risks of abortion, statistics about fetal development, and the alternatives to abortion.[32] Generally, these laws have survived constitutional challenges due to

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24 *Casey*, 505 U.S. at 881.

25 *Id*. at 882.

26 *Id*. at 884 (citing Wooley v. Maynard, 430 U.S. 705 (1977))

27 *Id*.

28 The undue burden analysis is unique to abortion litigation and requires the court to determine whether the regulation places a "substantial obstacle" in the path of a woman seeking an abortion before fetal viability; if yes, then the regulation indeed places an undue burden and will be found to be an unconstitutional intrusion on the woman's right to privacy under the Fourteenth Amendment. *See Casey*, 505 U.S. at 884.

29 *See generally* Gonzalez v. Carhart, 550 U.S. 124 (2007).

30 *See id*. at 157; *see also* Robert M. Godzeno, Note, *The Role of Ultrasound Imaging in Informed Consent Legislation Post-Gonzales v. Carhart*, 27 QUINNIPIAC L. REV. 285, 296 (2009).

31 Although noting that there was no evidence before the Court, the Court nevertheless found that "it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained . . . . The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: [how the fetus died]. . ." *Carhart*, 550 U.S. at 159-60.

32 *See* Muoio, *supra* note 8.

courts' determinations that the information required by the state was truthful, relevant, and not misleading. For example, the Eighth Circuit Court of Appeals recently upheld mandatory disclosures of an increased risk of suicide in women who undergo abortion procedures.[33] The court held that:

> [W]hile the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion.[34]

B. An Overview of Mandatory Ultrasound Laws

The newest battleground over informed consent regulations involves mandatory ultrasound statutes. An ultrasound, or sonogram, is a type of imaging procedure that uses sound waves to produce an image of the fetus in utero.[35] There are two kinds of ultrasound procedures: transabdominal and transvaginal.[36] The transabdominal procedure involves the familiar technique of moving a hand-held probe across the woman's abdomen.[37] Transvaginal ultrasounds are substantially more invasive, and require the physician to insert a probe into the woman's vagina. Transvaginal ultrasounds are generally used before eight weeks gestational age due to the fact that a transabdominal ultrasound does not produce a clear image of the fetus or embryo at such an early stage in a pregnancy.[38]

Generally, there are three kinds of mandatory ultrasound statutes.[39] The first type of ultrasound law is the least invasive, and only requires that a physician performing an abortion must provide the woman with the opportunity to receive an ultrasound as part of the informed consent process for the procedure.[40] In this first category, the woman is permitted to refuse.[41] The slightly more demanding second category of ultrasound laws require a woman to receive an ultrasound regardless of her opposition to the procedure, and the physician must present her with the option to view the images.[42] The third type of statute that is at issue in this paper requires

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[33] *See* Planned Parenthood Minn., N. D., S. D. v. Rounds, 686 F.3d 889, 893 (8th Cir. 2012).

[34] *See id*. at 893.

[35] Pregnancy Ultrasound, MEDLINE PLUS (Feb. 21, 2010), http://www.nlm.nih.gov/medlineplus/ency/article/003778.htm.

[36] *Id*.

[37] *Id*.

[38] *Id*.; *see also Transvaginal Ultrasound*, MEDICINE PLUS (July 11, 2012), http://www.nlm.nih.gov/medlineplus/ency/article/003779.htm.

[39] *See* Godzeno, *supra* note 29, at 304.

[40] *Id*. (referencing ARK. CODE ANN. § 20-16-602(a) (2004); GA. CODE ANN. § 31-9A-3(4) (2006 & Supp. 2008); IDAHO CODE ANN. § 18-609(3) (2004 & Supp. 2008); IND. CODE ANN. § 16-34-2-1.1(b) (West 2006); MICH. COMP. LAWS ANN. § 333.17015(8) (West 2006); S.C. CODE ANN. § 44-41-330(A)(1) (2002 & Supp. 2007)).

[41] *See id*.

[42] *See id*. (referencing ALA. CODE § 26-23A-4(b)(4) (LexisNexis 2006); FLA. STAT. ANN. § 390.012(3)(d)(4) (West 2008); LA. REV. STAT. ANN. § 40:1299.35.2(C) (2008); MISS. CODE ANN. § 41-

a physician not only to perform an ultrasound, but also to make it visible to the woman, make audible the heartbeat, and provide a simultaneous description of the images highlighting certain features of the fetus.[43] Four states have enacted the most invasive form of mandatory ultrasound requirements, namely Louisiana, North Carolina,[44] Texas,[45] and Oklahoma.[46] According to a brief released by the Guttmacher Institute, thirty-five states currently require women to receive counseling before an abortion, twenty-seven detail the type of information women must be given, and twenty-six specify a time period that women must wait before an abortion.[47] The North Carolina, Texas, and Oklahoma statutes combine all three.[48] Because a majority of abortions occur before eight weeks, women are often subject to invasive transvaginal exams as a prerequisite for an abortion.[49]

The Oklahoma Statute, Senate Bill 1878, was struck down in state court on state law grounds.[50] In *Nova Health Systems v. Pruitt*, the District Court of Oklahoma held that the requirement violated the Oklahoma Constitution because it constituted an impermissible special law that singled out less than an entire class of similarly situated persons for different treatment.[51] Federal district courts, however, have focused on the potential First and Fourteenth Amendment violations.

C. The Woman's Right to Know Act and Lakey I & II.

The Texas Woman's Right to Know Act[52] ("H.B. 15") was originally passed in 2003, and required that physicians distribute certain state-prepared informational materials to women seeking abortions as part of the regulated practice of informed medical consent.[53] In 2011, the Act was substantially amended to include the

41-34(1) (West Supp. 2007)).

43 *See id*.

44 N.C. GEN. STAT. ANN. § 90-21.85 (West 2012).

45 TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2012).

46 OKLA. STAT. tit. 63, §§1-738.1A, 1-738.3d, & 1-738.3e (West 2012).

47 *See* Muoio, *supra* note 8.

48 *Id*.

49 *See* Nicholas Kristof, *When States Abuse Women*, N. Y. TIMES (Mar. 3, 2012), http://www.nytimes.com/2012/03/04/opinion/sunday/kristof-when-states-abuse-women.html?_r=0; *see also* Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to A Protected Choice*, 56 UCLA L. REV. 351, 391 (2008) (citing Maureen Paul et al., *The Roles of Clinical Assessment, Human Chorionic Gonadtropin Assays, and Ultrasonography in Medical Abortion Practice*, 183 AM. J. OBSTETRICS & GYNECOLOGY S34, S36 (2000); Prabha Sinha et al., *Value of Routine Transvaginal Ultrasound Scan in Women Requesting Early Termination of Pregnancy*, 24 J. OBSTETRICS & GYNAECOLOGY 426 (2004)).

50 *See* Nova Health Sys. v. Pruitt, No. 2:12-CV-00395, 2012 WL 1034022 (Okla. Dist. Ct. Okla. Cnty. Mar. 28, 2012) (enjoining statute's enforcement permanently).

51 *Id*. (citing OKLA. CONST. art. V, § 59).

52 TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2012).

53 REGULATION OF ABORTION; CREATING AN OFFENSE, 2003 TEX. SESS. LAW SERV. CH. 999 (H.B. 15) (West).

controversial ultrasound requirements at issue in *Lakey I & II*.[54] In March 2013, two proposed amendments were introduced to the Texas State Legislature, one repealing the mandatory twenty-four hour waiting period before an abortion,[55] and the other repealing the requirement that the physician who is to perform the abortion warn the patient about an increased risk of breast cancer.[56] Neither of these amendments affects the most contentious aspects of the legislation.

Specifically at issue in *Lakey I & II* were the compelled speech requirements of sections 171.012(a)(4)(B), (C), and (D); and section 171.012(a)(5), which the district court found unconstitutional.[57] The sections at issue state the following:

> 171.012(a)(4)(B), (C), (D): (B) the physician who is to perform the abortion displays the sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them; (C) the physician who is to perform the abortion provides, in a manner understandable to a layperson, a verbal explanation of the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs; and (D) the physician who is to perform the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers makes audible the heart auscultation for the pregnant woman to hear, if present, in a quality consistent with current medical practice and provides, in a manner understandable to a layperson, a simultaneous verbal explanation of the heart auscultation.[58]

The law provides for a handful of exceptions. First, a woman is exempt from the ultrasound requirement if she is facing a medical emergency that places her "in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed."[59] A woman may decline to hear the verbal explanation of the ultrasound results only if she certifies that she was:

> [P]regnan[t as] a result of a sexual assault, incest, or other violation of the Penal Code that has been reported to law enforcement authorities or that has not been reported because she] has a reason that she declines to reveal because she reasonably believes that to do so would put her at risk of retaliation resulting in serious bodily injury; or [she] is a minor and

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54 TEX. HEALTH & SAFETY CODE ANN. § 171.012.

55 H.R. 3744, 2013 Leg., 83d Cong. (Tex. 2013).

56 H.R. 2945, 2013 Leg., 83d Cong. (Tex. 2013).

57 *See* Tex. Med. Providers Performing Abortion Servs. v. Lakey (*Lakey I*), 806 F. Supp. 2d 942, 949 (W.D. Tex. 2011).

58 TEX. HEALTH & SAFETY CODE ANN. § 171.012 (a)(4)(B -D).

59 *Id*. at § 171.0124 (allowing a physician to perform an abortion without getting informed consent in the event of a "medical emergency"); *id*. at § 171.002(3) (defining "medical emergency").

> obtaining an abortion in accordance with judicial bypass procedures. . . or the fetus has an irreversible medical condition or abnormality.[60]

1. *Lakey I*

After the law's passage, a group of Texas abortion providers immediately filed suit in federal court seeking to enjoin the law, in part based on the argument that the law "compel[led] physicians to engage in government-mandated speech . . . [and] . . . requir[ed] patients to submit to such speech, regardless of whether it is wanted or medically necessary" in violation of the First and Fourteenth Amendments.[61] In *Lakey I*, the District Court for the Western District of Texas granted a preliminary injunction principally on the grounds that H.B. 15 violated the First Amendment prohibition against compelled speech, and was subject to strict scrutiny for three reasons.[62] First, the district court noted that in *Casey*, the Supreme Court addressed an informed consent requirement in light of the Fourteenth Amendment rather than the First Amendment, and therefore the undue burden test was appropriate in that limited context.[63] Second, the district court highlighted that the *Casey* Court "stop[ped] short of characterizing [the government's interest in potential life] as 'compelling'" until viability.[64] And third, the district court found that *Casey* only went as far as to say that, "[i]f the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible."[65] Therefore, *Casey* approved of making information available to women in some cases, and did not give the government a "carte blanche" to "force physicians to deliver, and force women to consider, whatever information the government deems appropriate."[66]

The district court briefly addressed the unwilling listener constitutional concerns of the woman undergoing the procedure, and determined that the plaintiffs had not provided sufficient case law in support of their argument.[67] Although the plaintiffs attempted to analogize the unwilling listener concerns of the woman to those addressed by the Supreme Court in *Hill v. Colorado*, the district court found Hill to be particularly distinguishable.[68]

In *Hill*, the State of Colorado had enacted Colorado Rev. Stat. § 18–9–122(3), which made it illegal for any person within one hundred feet of a health

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60 *Id*. at § 171.0122(d); *see also id*. at 171.012(5).

61 *Lakey I*, 806 F. Supp. 2d at 949.

62 *Id*. at 96970. Although the H.B. 15 was challenged on multiple Constitutional grounds, for the purposes of this paper I focus only on the compelled speech and unwanted listener arguments pertaining to the First Amendment analysis.

63 *Id*. at 972.

64 *Id*.

65 *Id*. (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992)) (internal quotation marks omitted) (emphasis in original).

66 *Id*.

67 *Lakey I*, 806 F. Supp. 2d at 958-59.

68 *Id*. (referencing Hill v. Colorado, 530 U.S. 703, 716–17 (2000)).

care facility's entrance to knowingly approach within eight feet of another person, without that person's consent, in order to pass "a leaflet or handbill to, displa[y] a sign to, or engag[e] in oral protest, education, or counseling with [that] person."[69] The law was passed in response to widespread harassment of women by anti-abortion protestors as the women entered or exited abortion clinics.[70]

In considering Hill, the *Lakey* district court found that the right to be left alone was not explicit, but applied narrowly to where the state imposed a restriction on speech in order to protect a private citizen's interest in being free from unwanted speech.[71] As such, the district court found that the right did not extend to situations in which the state itself imposes a message on an unwilling and captive audience.[72] However, the court did not entirely foreclose the unwilling listener argument:

> While the Court acknowledges the intuitive logic of Plaintiffs' argument, and there surely are limits to the government's power to impose whatever message it desires, on whomever it likes, under any circumstances it desires, those limits seem fairly undefined, at least as applied to this case. The most the Court can say is that *Hill* does not seem to support Plaintiffs' argument. Because Plaintiffs have not provided any case law in support of their argument, and the Court is not aware of any, it rejects Plaintiffs' second argument.[73]

In reaching its conclusion, the only First Amendment concerns that weighed on the district court's decision were those pertaining to the compelled speech of the physician.

2. *Lakey II*

On appeal, the Court of Appeals for the Fifth Circuit summarily rejected the district court's analysis and upheld H.B. 15.[74] Writing for the court, Chief Judge Edith H. Jones distilled four "rules" from the combined holdings of *Casey* and *Carhart*. First, an informed consent law is permissible so long as it requires "truthful, non-misleading, and relevant disclosures," and does not impose an undue burden on the woman seeking the abortion.[75] Second, informed consent laws are not ideological speech when they are part of the state's reasonable regulation of the medical practice, and therefore they do not require a strict scrutiny analysis.[76] In coming to this conclusion, the court reasoned that the *Casey* plurality's response to

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[69] Hill v. Colorado, 530 U.S. 703, 707 (2000).

[70] Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 32 (2003).

[71] *Lakey I*, 806 F. Supp. 2d at 958.

[72] *Id*. at 959.

[73] *Id*.

[74] Tex. Med. Providers Performing Abortion Servs. v. Lakey (*Lakey II*), 667 F.3d 570, 580 (5th Cir. 2012).

[75] *Id*. at 576.

[76] *See id*.

the compelled speech claim was not a strict scrutiny analysis, because it did not inquire into compelling interests or narrow tailoring when analyzing the First Amendment claims of the plaintiffs.[77] Therefore, the "physicians' rights not to speak are, when part of the practice of medicine, subject to reasonable licensing and regulation by the State[, and t]his applies to information that is 'truthful,' 'non-misleading,' and 'relevant . . . to the decision to undergo an abortion.'"[78] Third, informed consent in the abortion context not only encompasses disclosing the physical and psychological risks associated with the procedure, but also provides space for the state to express its profound interest in the life of the fetus.[79] The Cicuit Court found that *Carhart* served to enhance *Casey's* holding by "uph[olding] a state's 'significant role . . . in regulating the medical profession, and add[ing] that '[t]he government may use its voice and regulatory authority to show its profound respect for the life within the woman.'"[80] Lastly, informed consent laws are not unconstitutional merely because they might have the effect of causing a woman to choose childbirth over abortion.[81]

On the foregoing set of premises, the Fifth Circuit incorporated the undue burden analysis from Fourteenth Amendment jurisprudence into the First Amendment analysis of the compelled speech claims of the plaintiff physicians. From this perspective, the court compared the informed consent provisions in H.B. 15 to the printed materials at issue in *Casey*, and determined that "[t]hey are not different in kind, although more graphic and scientifically up-to-date," and therefore fall within the category of "information about fetal development [that] is 'relevant' to a woman's decision-making."[82] H.B. 15 was thus upheld, and went into effect in May of 2013.

D. The Woman's Right to Know Act and Stuart v. Huff*,* Stuart v. Loomis

Passed in 2011 over the objection of the Governor of North Carolina, the North Carolina Women's Right to Know Act ("H.B. 854") had a speech and display requirement almost identical to H.B. 15.[83] According to the North Carolina legislature, informed consent requires that at least four hours before a woman is to receive an abortion, either the physician performing the abortion or a qualified technician:

> (1) Perform an obstetric real-time view of the unborn child on the pregnant woman. (2) Provide a simultaneous explanation of what the display is

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77 *Id*. at 575 (5th Cir. 2012) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992)).

78 *Id*. (citing *Casey*, 505 U.S. at 882).

79 *Id*.

80 Lakey II, 667 F.3d at 576, (quoting Gonzalez v. Carhart, 550 U.S. 124, 128 (2007)).

81 Id.

82 *Id*. at 578.

83 *See* N.C. GEN. STAT. ANN. § 90-21.85 (West 2012).

> depicting, which shall include the presence, location, and dimensions of the unborn child within the uterus and the number of unborn children depicted. The individual performing the display shall offer the pregnant woman the opportunity to hear the fetal heart tone. The image and auscultation of fetal heart tone shall be of a quality consistent with the standard medical practice in the community. If the image indicates that fetal demise has occurred, a woman shall be informed of that fact. (3) Display the images so that the pregnant woman may view them. (4) Provide a medical description of the images, which shall include the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable. (5) Obtain a written certification from the woman, before the abortion, that the requirements of this section have been complied with, which shall indicate whether or not she availed herself of the opportunity to view the image.[84]

Originally introduced in 1981, the initial proposed legislation would have required a physician performing an abortion to provide the woman with information about adoption services and the complications and risks of an abortion procedure.[85] Although the bill passed the North Carolina Senate, it was not considered by the House.[86] Again in 1989, the restyled Abortion Control Act, H.B. 1231 (N.C. 1989), included similar provisions that mandated physicians performing abortions to make the woman aware of the associated risks and alternatives.[87] The bill did not make it out of committee, and over the next decade it was amended and reintroduced until the Women's Right to Know Act finally earned a Committee hearing and was subsequently passed in 2011.[88]

After the passage of the law, North Carolina medical providers filed suit in federal court on behalf of themselves and their patients seeking abortions, challenging the constitutionality of the law under the First and Fourteenth Amendments.[89] Like the plaintiffs in *Lakey I & II*, the North Carolina plaintiffs in the case of *Stuart v. Huff* also contended that the speech and display requirements "violate the First Amendment by compelling unwilling speakers to deliver the state's message discouraging abortion."[90]

In December of 2011, North Carolina District Court Judge Catherine C. Eagles granted the plaintiff's request for a preliminary injunction enjoining the speech and display requirements of H.B. 854. The court found that the speech and display requirements "are subject to strict scrutiny under traditional and

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84 *Id*. at (1)-(5).

85 *See* Stam, *supra* note 1, at 9.

86 *Id*. at 10.

87 *Id*. at 10-11.

88 *Id*. at 11.

89 *See generally* Stuart v. Huff, 834 F. Supp. 2d 424 (M.D.N.C. 2011); Again, for the purposes of this paper I focus only on the compelled speech Constitutional challenges raised in this case and brought under the First Amendment.

90 *Stuart*, 834 F. Supp. 2d at 428.

longstanding First Amendment principles," and that the law did not satisfy a compelling state interest, nor was it narrowly tailored.[91]

In determining whether to apply a strict scrutiny analysis, the court reasoned that *Casey* did not purport to overrule longstanding First Amendment jurisprudence but rather applied the undue burden analysis to the informed consent provisions in the context of the Fourteenth Amendment, rather than the First.[92] Where the Fifth Circuit found that the three sentences in which *Casey* dismissed the plaintiff's First Amendment argument was the "antithesis" of strict scrutiny, the District Court of North Carolina held that "[t]he Supreme Court's brief discussion of the First Amendment challenges to the Pennsylvania statute was undertaken separately and without substantial detail[; i]t seems unlikely that the Supreme Court decided by implication that long-established First Amendment law was irrelevant when speech about abortion is at issue."[93]

The district court opened the compelled speech analysis by asserting that the right to be free from engaging in government mandated speech is a tenet of First Amendment jurisprudence.[94] Further, the court noted the historically dim view taken by the Supreme Court of content-based compelled speech, and reasoned that any such imposition by the government must satisfy strict scrutiny.[95]

In December of 2012, the district court enjoined the real time speech and display requirements of the law, and a year later the case was decided on the merits. In *Stuart v. Loomis* the court found that H.B. 854's mandated disclosure went beyond the bounds of *Casey* by "requir[ing] the provider to deliver in his or her own voice information the state deems relevant during the middle of a medical procedure in the exact manner dictated by the state, a much more significant intrusion."[96]

Six months after the first *Stuart* decision, in an unrelated case, the Fourth Circuit held that when it comes to mandatory disclosures in abortion regulation, *Casey* requires intermediate level scrutiny.[97] The court noted that specifically, *Casey* dealt with "mandatory disclosures focused on the speech of licensed medical professionals. . . [and] the regulation of such professional speech was imposed incidental to the broader governmental regulation of a profession and was justified

91 *Id*. at 432.

92 *See id*. at 430.

93 *Id*. at 430.

94 *See id*. at 428 (citing Hurley v. Irish–Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc., 515 U.S. 557, 573 (1995)).

95 *Stuart*, 834 F. Supp. 2d at 429 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (finding that the state could not compel students to pledge allegiance to the U.S. flag; also citing Wooley v. Maynard, 430 U.S. 705, 713, 715 (1977) (determining that New Hampshire could not force citizens to display the state's ideological message on their vehicle license plates)).

96 *Loomis*, 2014 WL 186310 at *12.

97 Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt., 683 F.3d 539, 554 (4th Cir. 2012) *reh'g en banc granted*, 11-1111 L, 2012 WL 7855859 (4th Cir. Aug. 15, 2012) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

by this larger context."[98] If *Stuart* moves up to the Court of Appeals under the current precedent established by *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, H.B. 854 will likely be evaluated under an intermediate scrutiny standard with regard to the compelled speech of the physician.[99]

III. UNDUE BURDEN, STRICT SCRUTINY, AND SCHOLARLY DEBATE

Before 2011, a number of scholars and legal analysts wrote a great deal on whether mandatory ultrasound laws would survive as the natural progression of informed consent under the undue burden analysis and the Fourteenth Amendment.[100] Surprisingly, the Texas and North Carolina District Courts, as well as the Court of Appeals for the Fifth Circuit, all analyzed the legitimacy of the mandatory ultrasound laws under the First Amendment from the perspective of the physician's compelled speech claims. The underlying dispute between the courts is whether to apply an undue burden test or a traditional strict scrutiny analysis to compelled speech in the abortion context. Scholars have generally attempted to analyze mandatory abortion regulations from two perspectives: (1) the physician's in regard to a first amendment challenge, or (2) the woman's under a Fourteenth Amendment undue burden analysis.

A. Compelled speech and the First Amendment—the Physician's Perspective

Scott Gaylord, current law professor at Elon University School of Law, recently coauthored a law review article arguing that the "speech and display" requirements of mandatory ultrasound regulations that implicate the First Amendment should be subject to an undue burden rather than strict scrutiny analysis.[101] Gaylord proffers that *Casey* explicitly rejected a strict scrutiny analysis because the plurality failed to consider the state's compelling interests and narrow tailoring of the statute at issue.[102] Instead, the *Casey* Court looked to whether the informed consent provision placed a substantial obstacle in the path of

[98] *Id*. at 554.

[99] On rehearing *en banc*, the Fourth Circuit found that the district court improperly granted summary judgment when it concluded that the speech at issue was not commercial in nature. Instead, the court found that a city ordinance requiring crisis pregnancy centers to post signs notifying potential clients that they did not provide abortion services could target commercial speech and subject only to rational basis review, however more discovery was needed on this point. The court did not engage in any discussion of whether *Casey* requires strict or intermediate scrutiny for the compelled speech concerns of the physician, who is required to disclose a state mandated message to a patient. *See* Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt., 721 F.3d 264, 283 (4th Cir. 2013).

[100] *See generally* Godenzo, *supra* note 30, at 323; *see also* Kaitlin Moredock, *Ensuring So Grave A Choice Is Well Informed: The Use of Abortion Informed Consent Laws to Promote State Interests in Unborn Life*, 85 NOTRE DAME L. REV. 1973, 1990 (2010).

[101] Scott W. Gaylord & Thomas J. Molony, Casey and A Woman's Right to Know: Ultrasounds, Informed Consent, and the First Amendment, 45 CONN. L. REV. 595, 619 (2012).

[102] See id. at 619-20.

the woman seeking an abortion.[103] Additionally, Gaylord argues "in citing *Wooley* and *Whalen*, *Casey* expressly adopted a lower standard for compelled disclosures in the medical context, including disclosures relating to abortion."[104] The connection to *Whalen v. Roe* highlights the argument that when it comes to medical disclosures, the courts have traditionally refused to apply a strict scrutiny analysis. *Whalen* involved a New York statute that required physicians to disclose certain information about patients who had schedule II drug prescriptions.[105] Although the State was requiring the physician to disclose information they otherwise would not have, the Court's decision failed to address any potential compelled speech concerns pertaining to the physicians, turning rather on whether the mandatory disclosures violated the privacy rights of the patients.[106] Gaylord asserts that *Wooley* stands for "a lower standard for compelled disclosures in the medical context" that *Casey* then extended to abortion procedures.[107]

To conclude otherwise would cut against the Court's decision in *Casey*, and yet this is exactly what the Texas and North Carolina district courts did, albeit in different ways.[108] In *Lakey I*, Gaylord argues that the district court overlooked the underlying theme of *Casey* by narrowly distinguishing the cases based on the facts, noting that the informed consent provisions in *Casey* were limited to medically relevant information.[109] Gaylord further asserts that *Stuart* inaccurately presumed *Casey* applied strict scrutiny to the First Amendment concerns of the physicians, even though the *Stuart* court simultaneously admitted that *Casey* identified no compelling interest of the state.[110]

Because *Casey* specifically articulated that the state's interest is not compelling until after viability, Gaylord contends that by approving informed consent provisions that applied to all stages of pregnancy, the Court affirmatively rejected a strict scrutiny analysis.[111] After all, if *Casey* had applied strict scrutiny to the pre-viability informed consent provisions, the Court would have found them unconstitutional for lack of a compelling state interest.[112] Additionally, *Casey* specifically noted that the physicians' rights were derivative of the woman's rights

103 *See id*. at 619 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992)).

104 *Id*. at 620 (citing Wooley v. Maynard, 430 U.S. 705, 715 (1977) (establishing that the First Amendment also protects the right not to speak); also citing Whalen v. Roe, 429 U.S. 589, 603 (1977) (finding that a statute requiring mandatory disclosure of some patient information to state health employees did not infringe on the patient's right to privacy, nor did it inhibit the practice of medicine, but was simply a necessary part of health care regulation)).

105 *See Whalen*, 429 U.S. 589 at 591.

106 *See id*. at 607.

107 Gaylord & Molony, supra note 101, at 620 (citing Wooley, 430 U.S. at 715).

108 Id. at 620-621.

109 Id. at 621 (citing Tex. Med. Providers Performing Abortion Servs. v. Lakey (*Lakey I*), 806 F. Supp. 2d 942, 974 (W.D. Tex. 2011)).

110 Id. (citing Stuart v. Huff, 834 F. Supp. 2d 424, 429 (M.D.N.C. 2011)).

111 Id.

112 *Id*. at 624 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871, 877-78 (1992))..

in a doctor-patient relationship.[113] If a court were to apply both strict scrutiny and undue burden analysis to the same informed consent provisions, it would yield inconsistent results and is therefore unworkable as a legal standard in the abortion context.[114]

Sarah Runels, writing for the *Journal of Contemporary Law and Policy*, adopts a different view. She identifies three issues stemming from *Casey* that support a finding that mandatory informed consent provisions violate the physician's First Amendment protection against compelled speech.[115] First, although professional speech is subject to a lower level of constitutional protection, when physician's speech is not related to the practice of medicine, it is entitled to the fuller protection of the First Amendment because it falls outside the realm of professional speech.[116] Secondly, *Casey* provided no guidance on how to reconcile whether a regulation could satisfy a compelling interest while simultaneously presenting an unreasonable infringement of physician's speech.[117] Third, by not addressing what precisely constitutes a reasonable regulation of physician speech in relation to informed consent, *Casey* failed to adequately analyze the clash between the physician's First Amendment rights and the state's ability to regulate the medical profession.[118]

Runels and others[119] have argued that the courts must determine whether mandated speech falls under the category of professional speech, and therefore subject to a lower level of scrutiny, or whether it falls outside medical speech and therefore subject to strict scrutiny.[120] In essence, this would require the courts to delve into whether the state mandated abortion disclosures were medically relevant to informed consent, and if not, then the physician's compelled speech is not professional because it does not pertain to the practice of medicine.[121]

Despite scholarly analysis of the topic,[122] it remains unclear whether the Court intended to allow states a wide berth to impose mandatory abortion

113 See Gaylord & Malony, supra note 101, at 624.

114 *Id*. at 630.

115 *See* Sarah Runels, *Informed Consent Laws and the Constitution: Balancing State Interests with A Physician's First Amendment Rights and A Woman's Due Process Rights*, 26 J. CONTEMP. HEALTH L. & POL'Y 185, 197 (2009).

116 *See id*. (citing Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939 (2007) (analyzing compelled physician speech in informed consent provisions)).

117 *Id*.

118 *See id*.

119 *See generally* Post, *supra* note 116.

120 Runels, *supra* note 115, at 198.

121 Post, *supra* note 116, at 940.

122 *See generally* Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 2 (2012) (arguing that mandatory abortion disclosures require physicians to present patients with medically irrelevant information in an thinly veiled effort to present the state's moral message about abortion, thus violating medical ethical standards); *see also* Sarah E. Weber, *An Attempt to Legislate Morality: Forced Ultrasounds As the Newest Tactic in Anti-Abortion Legislation*, 45 TULSA L. REV. 359, 360 (2009) (arguing that state

disclosures as part of the legitimate regulation of the medical profession, or whether limitations exist when the disclosures exceed the realm of medically relevant information.

B. Undue burden analysis and the Fourteenth Amendment.

Generally, under an undue burden analysis, states are prohibited from placing a substantial obstacle in the path of a woman seeking an abortion before the stage of fetal viability. Although seeking to clarify the Court's position in *Roe* by rejecting a strict scrutiny, rigid trimester framework, some have argued that *Casey* did little to address the exact parameters of the undue burden analysis and that appellate courts have applied the standard in a manner that inadequately protects the right to an abortion.[123] Specifically, by neglecting to include a nexus element like those included in other constitutional standards of review,[124] *Casey* has been misapplied, "render[ing] the undue burden standard insufficient to protect women's reproductive autonomy."[125]

Emma Freeman[126] argues that *Casey* intended the undue burden analysis to be on par with intermediate scrutiny.[127] Although the Court couched the undue burden analysis in the familiar terms of rational basis review, speaking of the legitimate aim of the state and the reasonable measures taken to meet those aims, the Court still struck down the spousal notification provision as exceeding the state's legitimate aim.[128] Freeman argues that this implied nexus analysis belies *Casey's* original intent to apply an intermediate level of scrutiny when considering an undue burden analysis.[129] The undue burden standard is therefore a two-step process, whereby the court first determines whether the state has a legitimate interest that is rationally connected to the legislation, and second, whether the legislation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion pre-viability.[130]

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mandated abortion disclosures cut against the purported state aim of promoting the psychological well being of the woman, and also violate her right to refuse medical treatment).

123 *See* Emma Freeman, *Giving Casey Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARV. C.R.-C.L. L. REV. 279 (2013).

124 *See id*. at 282-84. Rational basis review, intermediate scrutiny, and strict scrutiny all require a nexus between the government legislation and a legitimate governmental aim. The undue burden analysis looks to whether a substantial obstacle has been placed in the path of the woman seeking an abortion and does not overly inquire into the nexus between the imposed regulation and the government's legitimate aim.

125 Id.

126 Emma Freeman was named one of the twenty "most impressive" students at Harvard Law by Business Insider in a 2013 article. *See* Max Rosenburg, *20 Incredibly Impressive Students at Harvard Law School Right Now*, BUSINESS INSIDER (Mar. 4, 2013), http://www.businessinsider.com/most-impressive-harvard-law-students-2013-3?op=1.

127 Freeman, supra note 122, at 295–96, 282-284.

128 *Id*. at 293-94 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 883, 885 (1992)).

129 See id. at 294 (citing Casey, 505 U.S. at 898).

130 Freeman, supra note 122, at 295–96, 301.

Applying this test to H.B. 15, Freeman argues that the Texas legislation fails to meet the state's articulated legitimate ends on two fronts.[131] First, the "opt out" provisions of the law whereby a woman can refuse to view the ultrasound or hear the heartbeat essentially thwart the state's articulated goal of providing women with complete knowledge of the abortion procedure.[132] Instead, H.B. 15 is well-tailored for an improper purpose, namely "to shame women for exercising the abortion right or make abortions more difficult to procure."[133] An improper purpose would thus render H.B. 15 invalid under an undue burden analysis, since the state's aim is for the legislation to become a substantial obstacle.[134] Without first analyzing the nexus between the regulation and the stated goal, it is unlikely that a court would strike down legislation such as H.B. 15 on a substantial obstacle analysis alone. Therefore, the nexus analysis is necessary to determine the purpose of the regulation.[135]

Similarly, Professor Jeffrey Van Detta also laments the failing of *Casey* to articulate the standard of judicial review in regard to the undue burden analysis.[136] Van Detta argues that the state has a "concomitant governmental interest (or duty) in protecting a woman's rights of choice and of reproductive autonomy," that also must be considered in undue burden jurisprudence.[137] On this ground, a showing that the motivation behind the legislation was to interfere with the woman's freedom of reproductive choice would invalidate the statute as unconstitutional discrimination against women in the exercise of that right.[138] Against this backdrop, an undue burden analysis must be wary of pre-textual claims of a legitimate interest in health or life when analyzing informed consent regulations that "morally Mirandize" women seeking an abortion.[139] If the purpose or effect of the informed consent provision is to coerce women into childbirth, then the regulation cannot survive constitutional scrutiny.[140]

When it comes to informed consent provisions, it remains unclear whether the Court will step in and elaborate on the undue burden standard, and whether mandatory abortion disclosures that remove a woman's choice to refuse the

131 See id.

132 *See id*. at 310 (citing Tex. Med. Providers Performing Abortion Servs. v. Lakey (*Lakey II*), 667 F.3d 570, 579 (5th Cir. 2012).

133 *Id*. at 311.

134 *See id*.

135 *See id*.

136 Jeffrey A. Van Detta, *Constitutionalizing Roe, Casey and Carhart: A Legislative Due-Process Anti-Discrimination Principle That Gives Constitutional Content to the "Undue Burden" Standard of Review Applied to Abortion Control Legislation*, 10 S. CAL. REV. L. & WOMEN'S STUD. 211, 215 (2001).

137 *Id*. at 216.

138 *See id*.

139 *Id*. at 259.

140 *See id*.

information constitute a substantial obstacle due to the state's purpose to limit abortions.

III. SHIFTING THE CONSTITUTIONAL PERSPECTIVE

The jurisprudence of abortion is replete with instances where the concerns of the woman seeking the procedure have taken a back seat.[141] A woman seeking an abortion is a "passive object, . . . [a] battleground on which the state and the physician stake out their interests."[142] In *Roe*, the Court noted that "the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician."[143] The Court later modified *Roe*'s holding in *Casey* to emphasize the state's interest in protecting potential life, while simultaneously casting doubt on a woman's ability to make a thoughtful and coherent decision about terminating her pregnancy.[144] Against this backdrop, it is not surprising that the legal analysis emanating from the courts surrounding the constitutional validity of mandatory ultrasound statutes has turned on the compelled speech concerns of the physician and failed to recognize the implicit First Amendment concerns of the woman seeking an abortion. Even less surprising is how legitimate Fourteenth Amendment undue burden challenges have become overshadowed by the analysis of the physician's rights.

I argue that the woman's right not to speak, and to be free from unwanted speech are both implicated by the mandatory ultrasound statutes, and as such, require a strict scrutiny analysis. Applying a strict scrutiny analysis to the types of mandatory ultrasound laws at issue in *Lakey* and *Stuart*, I conclude that the speech and display requirements do not satisfy the state's compelling interest in protecting maternal life or fetal life post-viability, nor are they narrowly tailored to achieve the legislation's stated purpose.

A. First Amendment Concerns of Women Seeking Abortions

The protection of freedom of speech is a fundamental tenet of the U.S. Constitution. The First Amendment notably states that "Congress shall make no law . . . abridging the freedom of speech."[145] The right to freedom of speech is not absolute, but subject to reasonable limitation by the state if the state regulation

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141 Paula Abrams, *The Scarlet Letter: The Supreme Court and the Language of Abortion Stigma*, 19 MICH. J. GENDER & L. 293, 294 (2013).

142 *Id*. (citing Linda Greenhouse, *How the Supreme Court Talks About Abortion: The Implications of a Shirting Discourse,* 42 SUFFOLK U. L. REV. 41, 47-8 (2008)).

143 Roe v. Wade, 410 U.S. 113, 166 (1973); *see also* Calautti v, Franklin, 49 U.S. 379, 387 (1979) ("Roe stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out.")

144 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992) ("In attempting to ensure that a woman apprehend [sic] the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.")

145 U.S. CONST. amend. I.

survives strict scrutiny.[146] The Court has interpreted freedom of speech to include both verbal and non-verbal communication.[147] Additionally, the Court has interpreted the First Amendment to include the freedom not to speak when one chooses to remain silent.[148]

A woman seeking an abortion who is subject to one of the mandatory ultrasound statutes faces two potential First Amendment violations: (1) her body is being used as the medium to create the state's ideological message, and (2) she is being forced to hear information that she would otherwise refuse to hear. Both concerns sound in First Amendment protections and require a strict scrutiny analysis.

1. Compelled Speech, the Woman's Body as a Platform for the States' Message

The mandatory ultrasound display and disclosure statutes fundamentally differ from any prior informed consent statutes that the court has dealt with by requiring complicity from the woman in the production of the state message. There is no way to extricate the role that the woman plays in the ultrasound procedure. She is required by the state to allow her body to be used to produce an image that is then interpreted in carefully crafted terms to convey the state's message. To put it bluntly, "the image—a woman's fetus—has been captured in her own gut and is offered for the very purpose of persuading her to save its life. . . there is a difference between the state providing information about the fetus in general and requiring a woman to produce an image of her own fetus."[149] In requiring a woman to submit her body to assist in the production of the state's message, the state intimately violates her First Amendment right against compelled speech.

a. Protection from Compelled Ideological Statements, and Compelled Statements of Fact

A fundamental aspect of the First Amendment is the right to be free from forced advertisement of the state's ideological message. This concept was articulated by the Court in *Wooley v. Maynard*, where a state law required New

[146] There are a few exceptions to the application of strict scrutiny in regard to compelled speech. The first arises when the government restricts or mandates certain commercial speech. Regulations pertaining to commercial speech (speech that is proposing a commercial transaction) are only subject to "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." Ohralik v. Ohio St. Bar Ass'n, 436 U.S. 447, 456 (1978). Second, the government may regulate broadcast network programming at a lower level of scrutiny due to the limited broadcast spectrum that all providers are subject to, and the government's interest in regulating frequency assignments. *See* Turner Broad. Sys. v. F.C.C, 512 U.S. 622, 637 (1994).

[147] *See e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977) (holding that displaying a motto on a license place qualified as protected speech); see also W. Va. St. Bd. Of Educ. v. Barnette, 319 U.S. 624 (1943) (finding that the act of saluting the flag constituted speech).

[148] *See generally* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988) (finding that the First Amendment also protects the right to refrain from speaking).

[149] Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to A Protected Choice*, 56 UCLA L. REV. 351, 394, 401 (2008).

Hampshire residents to display the state motto of "Live free, or Die," on their state-issued license plates or face criminal sanctions.[150] The Court struck down the requirement, and upheld the right of a private individual to be free from using his private property as a "mobile billboard for the state's ideological message."[151] In reaching its conclusion, the Court referenced the 1943 decision in *West Virginia State Board of Education v. Barnette*, where the Court held that a state could not require students to participate in a compulsory salute to the flag as a requisite for school attendance.[152] Specifically, *Barnette* highlighted that by refusing to participate in a ceremony, the plaintiffs were not infringing on the constitutional rights of others.[153] Rather, the "sole conflict is between [state] authority and rights of the individual," articulated as the "right of self-determination in matters that touch individual opinion and personal attitude."[154] When it comes to compelling speech, the government is forbidden from requiring an individual to speak or display the state's ideological message if the individual objects, including when the objection is based on individual opinion or attitude.

Ideological state-sponsored messages are not the only kind of compelled speech forbidden by the First Amendment. The state similarly cannot compel facts that the speaker would otherwise refuse to disclose. In *Riley v. National Federation of the Blind of North Carolina*, *Inc*., the Court recognized that "for First Amendment purposes, a distinction cannot be drawn between compelled statements of opinion and, as here, compelled statements of fact, since either form of compulsion burdens protected speech."[155] In *Riley*, the Court focused less on the form of the compulsion, and more on the effect or burden that it imposed on free speech.[156]

To summarize, regardless of whether the compelled speech involves a state-sponsored ideological message, or compelled statements of fact, the Supreme Court has recognized an infringement on the First Amendment right of self-determination to be free from speaking or displaying a message contrary to an individual's morals, opinions, or attitude. Such an infringement has traditionally required a strict scrutiny analysis. Regardless of whether courts interpret the mandatory speech and display requirement as reflecting the state's ideological message of preference for childbirth over abortion, or simply truthful, relevant, and non-misleading facts, the distinction is extraneous when considering the infringement on the woman's right to be free from compelled speech.

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150 *Wooley*, 430 U.S. at 715.

151 *Id*.

152 *Barnette*, 319 U.S. at 632.

153 *See id*. at 630.

154 *Id*.

155 Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 782 (1988) (internal quotation marks omitted).

156 *See id*.

b. Protecting the Full Expression

The nature of the compelled speech inherent in mandatory ultrasounds with speech and display requirements is unprecedented in that a woman's body is integral to the production process of the state's specific message. But for her complicity and the use of her body, the ultrasound images could not be produced. Even if the woman's role is characterized as smaller than that of the physician who is actually required to speak out loud, Supreme Court precedent has found that the entire expression is protected by the First Amendment, including the various stages and elements of its production.

Notably in *Riley*, the Court applied strict scrutiny to a state statute that required a charitable organization to publish certain spending information to their donors.[157] Although the case dealt primarily with the level of scrutiny to apply in cases where the regulated speech was both commercial and private in nature, the Court made an important assertion regarding how to analyze multifaceted speech:

> Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon. . . . Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression.[158]

When commercial speech is thus "inextricably intertwined" with another form of protected speech, the "mandated speech is subject to the test for fully protected expression."[159] When scrutinizing compelled speech, the Court does not analyze every element of the expression piecemeal, but rather looks to the speech taken as a whole and its effect.[160]

The woman's position in the production of the state's message is unique, but not an entirely foreign concept to the Supreme Court. The Court has often analyzed the stages and elements of production when determining the existence of a First Amendment violation. For example, in *Turner Broadcasting System Inc., v. F.C.C.*, the Court held that those who "engage in and transmit speech . . . are entitled to the protection of speech and press provisions of the First Amendment.[161] Turner recognized that "the Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny."[162]

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157 *Id*. at 784.
158 *Id*. at 796.
159 *Id*. at 782.
160 *See id*.
161 Turner Broad. Sys. v. F.C.C, 512 U.S. 622, 636 (1994).
162 *Id*. at 642.

Similarly, in *Hurley v. Irish American Gay, Lesbian, Bisexual Group of Boston* the Court overturned a state court decision that required a private council of parade organizers to admit the Gay Lesbian Bisexual Group of Boston into the procession on the grounds that denying the Group access violated a Massachusetts law that prohibited discrimination on the basis of sexual orientation in places of public accommodation.[163] The Court held that private organizers of an "expressive parade" are entitled to First Amendment protection in the selection and organization process of the parade.[164] Specifically, the Court noted that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices . . . [n]or, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication."[165]

In like manner, the components of H.B. 15 and H.B. 854 that the Lakey and Stuart petitioners argue violate the First Amendment by compelling the physician's speech also violate the free speech rights of the woman. She is an essential component in the production process, a vital element in the creation of the state's mandated expression.

Assuming *arguendo* that *Casey* exempted mandatory abortion disclosures by physicians from strict scrutiny in the same way the Court exempted commercial speech, when considering the compelled speech of the woman, as well as that of the physician, the Court should apply protection for the complete expression. As the Court highlighted in *Casey*, the "doctor-patient relation is derivative of the woman's position," therefore, the priority in consideration should be from her perspective.[166] The ultrasound procedure required by H.B. 854 and H.B. 15 depicts an image taken of the woman's body, and the woman is compelled to allow her body to be used in the production of the image. The resultant image is then displayed to her in real time, and the physician is then required to interpret it to her in the manner prescribed by the state. The various elements and aspects involved in the production of the message cannot be parceled out, with intermediate scrutiny applying to one and strict to another. As a whole, the expression must be protected.

2. Captive Audiences and Unwilling Listeners, the Right to Not Know

The second manner in which the mandatory ultrasound requirements differ from all prior, accepted forms of informed consent statutes is that the woman is required to participate in the process, instead of merely being presented with the

163 Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 561 (1995) (referencing MASS. GEN. LAWS § 272:98 (1992)).

164 *Id*. at 569.

165 *Id*. at 569–70.

166 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 838 (1992) (finding that an informed consent requirement did not infringe on the right to privacy between the woman and the physician because the physician's rights in that context were derivative of the woman's position).

opportunity to receive the information. This type of mandated disclosure infringes on the rights of an unwilling listener under the captive audience doctrine. When considering First Amendment protection, the unwilling listener/captive audience doctrine necessarily collides with the right to speak, and has therefore been more narrowly applied. However, when the clash is between a private individual's right to be free from unwanted speech and the speaker is the government, the government enjoys no First Amendment protection.[167] Therefore, I argue that in the context of mandatory abortion disclosures, the government's right to convey a message does not trump the listener's right to avoid unwanted speech.

The unwilling listener doctrine includes more variables than a free speech analysis, which typically is subjected to a simple strict scrutiny test. The right of the unwilling listener, however, must be balanced against the protected freedom of speech in carefully crafted terms so as not to condone censorship of unpopular ideas.[168] This balancing of interests is captured in the captive audience doctrine.[169] As the Supreme Court established in *Cohen v. California*, "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[170] In determining where to draw the line between the rights of the listener and the rights of the speaker, the courts consider whether the audience is captive and therefore unable to avoid the speech.[171] "[T]he First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid [the] objectionable speech . . . [or] should not have to quit the space to avoid the message."[172] The Court has expressly recognized this right in the home, on public transportation buses,[173] and while entering or exiting medical facilities.[174]

In the case of *Hill v. Colorado*, the Supreme Court recognized the fundamental right to be left alone as "the most comprehensive of rights and the

167 Sherry F. Colb, *Some Reflections on the Texas Pre-Abortion Ultrasound Law, a Year After Its Passage*, Part 2, JUSTICIA (Jun. 6, 2012), http://verdict.justia.com/2012/06/06/some-reflections-on-the-texas-pre-abortion-ultrasound-law-a-year-after-its-passage-2.

168 *See generally* Boos v. Barry, 485 U.S. 312, 322 (1988) (citing Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988)); *but see* Heffron v. Int'l Soc. For Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) (holding that "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.").

169 *See* Cohen v. California, 403 U.S. 15, 21 (1971).

170 *Id*.

171 *See* Frisby v. Schultz, 487 U.S. 474, 487 (1988).

172 Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 944 (2009) (citing Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n,447 U.S. 530, 541-42 (1980); also citing *Frisby*, 487 U.S. at 487).

173 *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 300 (1974) (finding that "the streetcar audience is a captive audience . . . [being there] is there as a matter of necessity, not of choice.").

174 *See* Hill v. Colorado, 530 U.S. 703, 717 (2000)

right most valued by civilized men."[175] In upholding the Colorado statute prohibiting unwanted speech within 100 feet of a medical facility, the Supreme Court held that the unwilling listener's "right to be left alone is most applicable in the home, but can also be protected in confrontational settings . . . [t]hus, this comment on the right to free passage in going to and from work applies equally—or perhaps with greater force—to access to a medical facility."[176]

Similarly, women in both Texas and North Carolina are subjected to unwanted, anti-abortion speech within a medical facility, during an intimate exam that they are unable to refuse if they seek an abortion. As *Roe* established, women have a right to an abortion, and therefore, should not be required to quit the space to avoid the unwanted speech in the exercise of that right. The woman both cannot avoid the speech if she is to have an abortion, and should not be required to, because the right to an abortion is constitutionally protected.

In *Lehman*, the Court recognized that passengers on public buses were a captive audience because of the need that compels them to use public transit.[177] Similarly, many women facing an abortion do so out of environmental, medical, and economic reasons beyond their control. This paper does not attempt to analyze the legitimacy of every woman's reason to abort a pregnancy; however, I would suggest that if the Court has accepted the necessity of passengers on public transit (due to economic situation, need to travel to and from work or school), then the many reasons offered by women seeking an abortion also constitute necessity.[178] As one scholar has noted, "they are captive to their medical condition."[179]

The fact that the state is the one imposing the message on the woman does not negatively distinguish *Hill*, as the district court held in *Lakey I*, but rather highlights that when the government is the one imposing the message, it should be subject to stricter scrutiny. Even if *Casey* carved out an exception to physicians' speech in relation to abortion and informed consent, it was a narrow exception: "[i]f the information the State requires to be *made available* to the woman is truthful and not misleading, the requirement *may* be permissible."[180] This narrow exception applied only to the compelled speech concerns of the physician, when merely *offering* information that the woman could refuse. Likewise, as noted by the court

175 *Id*. (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

176 *Id*.

177 *Lehman*, 418 U.S. at 302.

178 A 2004 statistical analysis by the Guttmacher Institute revealed that women seek abortions primarily for the following reasons: (1) Inability to cope with the dramatic life change, such as an interference in education, employment, or because the mother is already caring for other children, (2) inability to afford to care for the child, (3) relationship problems and fears of single motherhood, (4) already completed childrearing, and (5) health concerns. *See* Lawrence B. Finer et al., *Reasons US Women Have Abortions, Quantitative and Qualitative Perspectives*, GUTTMACHER INST., PERSPECTIVES OF SEXUAL AND REPROD. HEALTH Vol. 37(3) (Sept. 2005), *available at* http://www.guttmacher.org/pubs/journals/3711005.html.

179 Corbin, *supra* note 172, at 1002.

180 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992).

in *Hill*, "while speakers have a right to try and persuade others, 'listeners have a right to be free from persistent importunity, following and dogging after an offer to communicate has been declined.'"[181]

Women subject to mandatory ultrasound requirements meet the elements of a captive audience and deserve protection from unwanted speech. Both H.B. 15 and H.B. 854 exceed the parameters set forth by *Casey* by requiring the woman to receive the information, even if she declines the offer to communicate. Personal necessity drove the woman to elect an abortion, which she pursued in the privacy of the relationship between doctor and patient. H.B. 15 and H.B. 854 invade that relationship, and mandate an intimate and personal procedure regardless of the woman's objection. Although H.B. 15 exempts some women from various provisions of the mandated disclosures, even a victim of rape or incest or a woman whose fetus has a devastating abnormality must submit to the ultrasound procedure.[182] The North Carolina statute offers no such exceptions. Also, even though H.B. 854 allows a woman to put on blinders and plug her ears to avoid hearing the description or seeing the images, her body is nevertheless compelled to participate in the unwanted production.[183] The reality is that the woman is placed into gynecological stirrups, often given a transvaginal exam, and is required to stay until the physician is finished delivering the state sponsored speech. The government enjoys no constitutionally protected freedom of speech, therefore, under the captive audience doctrine, the woman's right as an unwilling listener must trump the right of the state to impose the message unless the state regulation satisfies strict scrutiny.

B. The Mandatory Ultrasound Statutes Fail Under a Strict Scrutiny Analysis.

Mandatory ultrasound regulations that carry speech and display requirements do not satisfy strict scrutiny because they fail to promote a compelling government interest, nor are they narrowly tailored. The Court in *Roe* first articulated the government's "important" interests in regulating abortion as "safeguarding health, in maintaining medical standards, and in protecting potential life."[184] These interests became "compelling" at various points in a woman's pregnancy according to the trimester framework.[185] *Roe*'s holding was later modified in *Casey*, in which the Court held that the state's "legitimate" interest in protecting the health of the woman and the life of the fetus begins at conception and endures throughout the

[181] Corbin, *supra* note 172, at 946 (quoting Hill, 530 U.S. at 717-18).

[182] *See* TEX. HEALTH & SAFETY CODE ANN. §171.003(3) (West 2012).

[183] *See Loomis* 2014 WL 186310 at *3.

[184] Roe v. Wade, 410 U.S. 113, 154 (1973).

[185] *Id*. at 162-63 (finding that the state's interest in maternal health is compelling at the end of the first trimester, and the interest in the life of the fetus becomes compelling at the point of viability).

pregnancy.[186] *Casey* maintained *Roe*'s holding that the state's interest in protecting fetal life becomes "compelling" post-viability.[187]

In *Stuart v. Huff*, the defendants asserted that H.B. 854 furthered the legitimate state interests of protecting women from potential psychological harm as a result of not being fully informed, reducing the possibility that women are "coerced" into abortions, and promoting childbirth over abortion.[188] The defendants in *Lakey I & II* did not articulate the compelling government interest, but instead relied on *Casey* to exempt them from defending the statute from a strict scrutiny attack.[189] Even if the state succeeded in articulating a compelling interest related to maternal health (including psychological factors), maintaining medical standards, protecting against coercion, and protecting fetal life, both H.B. 15 and H.B. 854 are not narrowly tailored to meet the alleged legitimate ends.

State-mandated "content based [speech] regulations are presumptively invalid,"[190] and "[i]t is rare that a regulation restricting speech because of its content will ever be permissible."[191] Indeed, "[t]he law is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[192] In establishing whether a limitation on the First Amendment is narrowly tailored to achieve the government's compelling interest, the government "must present more than anecdote and supposition." Specifically, in *U.S. v. Playboy*, the government argued that the least restrictive means of addressing a legitimate problem was inadequate, however there was insufficient evidence on the record to support the governments claims that the prior, less restrictive remedy, had failed to narrowly meet the government's needs. The Court noted that the government "has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban.[193] Drawing from this conclusion, the government must demonstrate that existing regulations are insufficient to meet the government's compelling interests, a requirement that both North Carolina and Texas have failed to do.

First, although *Casey* established that the state has a legitimate interest in promoting fetal life, that interest does not become compelling until after fetal viability.[194] Both H.B. 15 and H.B. 854 apply to all abortion procedures, the overwhelming majority of which occur pre-viability.[195] The state's interest in

186 *Casey*, 505 U.S. at 834.

187 *Id*. at 846.

188 Stuart v. Huff, 834 F. Supp. 2d 424, 432 (M.D.N.C. 2011).

189 Tex. Med. Providers Performing Abortion Servs. v. Lakey (*Lakey I*), 806 F. Supp. 2d 942, 969 (W.D. Tex. 2011).

190 R.A.V. v. City of St. Paul,505 U.S. 377, 382 (1992).

191 United States v. Playboy Entm't Grp. Inc., 529 U.S. 803, 818 (2000).

192 Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 579 (1995).

193 *Playboy Entm't Grp*., 529 U.S. at 823.

194 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992); *see also* Roe v. Wade, 410 U.S. 113, 163 (1973).

195 *See* Karen Pazol et al., *Abortion Surveillance, United States 2009*, CTRS. FOR DISEASE CONTROL

promoting fetal life does not supersede the First Amendment rights of the woman until after viability, therefore, both H.B. 15 and H.B. 854 are unconstitutionally over-broad and cannot survive a strict scrutiny on this front.

Second, the mandatory ultrasound and accompanying description do not further the legitimate state interests in promoting maternal health, including her psychological health. From the legislative histories of H.B. 15 and H.B. 854, it is clear that the intent of lawmakers was to humanize the fetus, causing the woman to connect with the images of her baby.[196] The stated goal was to fully inform women of the consequences of choosing an abortion, namely terminating the life of her potential child, lest she discover later with devastating psychological consequences the full impact of her choice. Lawmakers, however, offer no concrete support of this allegation save anecdotal testimony and reliance on language from *Carhart*, where the Supreme Court specifically noted a lack of evidence on the record pointing to the instance of psychological consequences for the woman.[197] Instead, the American Psychological Association has conducted extensive research and concluded that there is no per se correlation between abortion and resultant psychological problems.[198] H.B. 15 and H.B. 854 do not promote psychological health, but instead serve to undermine it by suggesting to a woman that her choice will destroy the life of her child.[199] In essence, "[f]orcing an ultrasound on a woman as a psychological weapon to discourage her from having an abortion could lead to more psychological trauma."[200] By undermining the stated goal of protecting women from psychological harm, the mandatory

& PREVENTION, (Nov. 23, 2012), http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6108a1.htm?s_cid=ss6108a1_w (noting that only 1.3% of abortions occur post viability).

196 *See* Andrew Kaspar, *Senate Panel to Consider Abortion Law Requiring Women to View Sonograms*, STATESMAN (Feb. 6, 2011), http://www.statesman.com/news/news/state-regional-govt-politics/senate-panel-to-consider-abortion-law-requiring-wo/nRXNK/ (highlighting that the author of H.B. 15, Texas Senator Dan Patrick called the bill an "emergency issue", and if the bill would cause one in five women to choose adoption over abortion because she viewed her baby, then 16,000 lives would be saved).

197 *See, e.g.*, Gonzalez v. Carhart, 550 U.S. 124, 159 (2007) ("While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.").

198 *See generally* BRENDA MAJOR ET AL., REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION, AM. PSYCHOL. ASS'N (2008), *available at* http://www.apa.org/pi/women/programs/abortion/mental-health.pdf.

199 *See* Sarah E. Weber, *An Attempt to Legislate Morality: Forced Ultrasounds As the Newest Tactic in Anti-Abortion Legislation*, 45 TULSA L. REV. 359, 369 (2009) ("A woman who views the ultrasound images and listens to her physician explain that the fetus has a heartbeat, limbs, and is approximately x weeks of age, may begin to regard the fetus as a baby. However, because of various factors, the woman proceeds with the abortion. In this scenario, it is probable that a woman viewing the fetus as a 'baby' would experience more psychological harm after the abortion than if she had not viewed the ultrasound.").

200 *See id.*; *see also* Roe v. Wade, 410 U.S. 113, 153 (1973) (noting that childbirth and motherhood in the context of unwanted pregnancy also carries the risk of "imminent" psychological harm stemming from taxed "mental and physical health," the distress on an unwanted child, and the sigma of unwed motherhood).

ultrasound and speech and display requirements of H.B. 15 and H.B. 854 fail to further the state's interest in promoting maternal health.

Third, H.B. 15 and H.B. 854 go beyond the state's interest in regulating the medical profession by exceeding the traditionally acceptable scope of state-influenced abortion informed consent provisions deemed constitutional by *Casey*. Again, it is important to highlight that the informed consent provisions in *Casey* involved making information available to women regarding alternatives to abortion, fetal development, state preference for childbirth, and possible health consequences.[201] The Pennsylvania statute also contained an exception to the mandated informed consent if the physician could demonstrate "by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient."[202] Prior to the passage of H.B. 15 and H.B. 854, both Texas and North Carolina already had informed consent provisions in place that did not run afoul of the parameters established by *Casey*. Additionally, by requiring physicians to offer patients state-created materials regarding abortion, both Texas and North Carolina sufficiently guarded against the risk that physicians would fail to disclose pertinent information regarding abortions to the patient. The increased requirements of H.B. 15 and H.B. 854 that allegedly aim to combat coercion and physician misrepresentation were enacted without any evidentiary records demonstrating that the prior informed consent regulations failed to achieve this purpose in such a manner that prompted further action by the state.[203] A state regulation requiring the physicians to make available state-sponsored materials, with the woman's option of refusal, would meet the state's goal through the least restrictive means. Because H.B. 15 and H.B. 854 exceed this boundary without any evidence that the increased regulation was necessary, the state fails to demonstrate that the regulations were narrowly tailored.

In sum, regardless of what compelling interest is offered by the state to justify mandatory ultrasound regulations with speech and display requirements, these interests are not sufficiently narrowly tailored to meet the state's alleged legitimate aims. Therefore, both H.B. 15 and H.B. 854 fail under a strict scrutiny analysis in light of the First Amendment rights of the woman whose body is being used to produce the state's message.

CONCLUSION

Although abortion is first and foremost a woman's issue, the evolving jurisprudence surrounding mandatory ultrasound regulations has placed the woman

201 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992).

202 *Id*. (citing 18 PA. CONS. STAT. § 3205 (1990)).

203 *See* Stuart v. Huff, 834 F. Supp. 2d 424, 432 (M.D.N.C. 2011) (noting that there was no evidence on the record that the increased informed consent provisions of H.B. 854 reduced coercion).

in the background, watching from a distance as the physician and the state grapple over conflicting interests. Especially striking in the recent decisions of *Lakey I & II* and *Stuart* is how the woman's involvement in such an intimate procedure can be overshadowed so as to not even warrant mention in the legal arguments. The woman's body is quite literally being transformed into an interactive, state-sponsored message with the underlying purpose of promoting childbirth over abortion. Even more, the woman is forced into producing this message whether or not she consents to the procedure. In states like Texas, and perhaps soon North Carolina, the mandatory ultrasound is a prerequisite for a woman who seeks to have an abortion. If she desires to follow through with the abortion, she must first have the ultrasound. Forced complicity in producing a state-sponsored message strikes at the very core of the First Amendment and the interests against compelled speech it was designed to protect. Similarly, courts err in ignoring the constitutional captive audience and unwilling listener concerns of women who are forced to hear verbal descriptions of their fetuses, regardless of their objection. As such, the woman's First Amendment protection against compelled speech, and against being forced to be an unwilling listener, must become part of the constitutional analysis of the validity of mandatory ultrasound regulations that include speech and display requirements.