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Upholding a 40-Year-Old Promise: Why the Texas Sonogram Act is Unlawful According to *Planned Parenthood v. Casey*

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I. Introduction

Since 2003, a woman seeking an abortion in Texas must undergo one additional medical procedure at least 24 hours prior to receiving an abortion in order for the woman's consent to an abortion to be considered "voluntary and informed" under the law.[1] Although this medical procedure may not be deemed medically necessary by physicians, the state has declared it necessary for all women seeking an abortion.[2] In the early stages of pregnancy, this procedure often requires the insertion of a large probe into the vagina of the pregnant woman, even against her will.[3]

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1. TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2013). The law does contain exceptions to the 24-hour requirement in the event that there is a medical emergency requiring an immediate abortion or if the pregnant woman certifies that she lives more than 100 miles away from the nearest abortion provider. *Id.* §§ 171.012(4), 171.0124.

2. *Id.* § 171.011. An abortion can only be performed with the woman's voluntary and informed consent. *Id.*

3. In early pregnancy, transvaginal ultrasounds may be needed to create a clear image and over 85% of pregnancies are aborted in the first trimester. *See In Brief: Fact Sheet: Facts on Induced Abortion in the United States*, GUTTMACHER INST., 1-2 (Dec. 2013), http://www.guttmacher.org/pubs/fb_induced_abortion.html [hereinafter *Induced Abortion*].

The medical procedure is a sonogram, done for the purposes of viewing the fetus. Texas is not alone in requiring sonograms prior to abortion—as of January 2014, at least seven other states require non-medically necessary sonograms prior to abortion.[4] In addition to the states that require women to receive sonograms prior to having an abortion, at least nine other states require that if a sonogram is to be performed as part of the preparation for abortion, then the pregnant woman must be offered the opportunity to view the sonogram images.[5] Five other states require that women be offered the opportunity by their provider to have a sonogram before abortion.[6]

However, Texas has taken this requirement a step further. Now, as women may be forcibly probed, they will also have a screen displaying the sonogram images pointed toward their face (although they may shut their eyes or turn their heads away) and the fetal heartbeat, if one can be heard, will be played for them.[7] Meanwhile, state law mandates that the physician describe the sonogram images to the pregnant woman, including the dimensions of the fetus, the existence of cardiac activity, and the existence of external members and internal organs.[8] Three other states have passed sonogram laws similar to the one in Texas.[9]

This scenario brings to mind the iconic scene from "A

4. *See State Policies in Brief: Requirements for Ultrasound*, GUTTMACHER INST. 1-2 (Jan. 1, 2014), http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf [hereinafter *Requirements for Ultrasound*].

5. *Id.*

6. *Id.*

7. *See* John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, U. PA. J. CONST. L. 327, 347 & n.59 (2011).

8. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 171.012, 171.0122 (West 2013). Unless they fit into a qualified exception: victims of sexual assault, minors using the judicial bypass option, or if the fetus has been diagnosed with a medical condition or abnormality. *Id.* § 171.0122.

9. Courts have blocked these sonogram regulations from going into effect in North Carolina (Stuart v. Huff, 834 F. Supp. 2d 424 (M.D.N.C. 2011)) and Oklahoma (Nova Health Sys. v. Edmondson, 233 P.3d 380 (Okla. 2010)). As of March 2014, Louisiana's law was still in effect. *See* LA. REV. STAT. ANN. § 40:1299.35.2(C)-(D) (2013).

Clockwork Orange," in which a prisoner has his eyes forcibly pinned open so he may be forced to watch videos that have been deemed useful in modifying his criminal behavior.[10] Although the state of Texas has not mandated that women's eyes be pinned open in order to view the sonogram images, the justification for forcing women to receive a sonogram, be shown the viewing screen, and be presented with a description thereof is the same as that given in "A Clockwork Orange"—it is for the good of the patient.[11]

The Texas Sonogram Act[12] was initially blocked by a district court, which found that it violated the First Amendment rights of physicians.[13] Nonetheless, the Fifth Circuit Court of Appeals overruled this decision and determined that this new requirement does not violate either the First Amendment rights of physicians or women's constitutional rights to reproductive decision-making.[14] Although the U.S. Supreme Court recognized a woman's right to have an abortion as a fundamental right when it decided *Roe v. Wade*[15] 40 years ago, the Court has decided a number of cases since that time, which have impacted both the right of women to obtain an abortion and the ability of states to regulate abortion. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[16] the Supreme Court upheld certain state abortion regulations that purported to advance the informed consent of the pregnant woman.[17] Today, it is unclear

10. *See generally* A CLOCKWORK ORANGE (Warner Bros. 1971).

11. *Id.*

12. Texas passed an Act "relating to informed consent to abortion," in which the main portion of the law requires the performance of a sonogram. 2011 Tex. Sess. Law Serv. Ch. 73 (West) (codified as amended at TEX. HEALTH & SAFETY CODE ANN. §§ 171.002, 171.012, 171.0121-171.0124, 171.013, 171.015, 241.007, 243.017, 245.006, 245.024 & TEX. OCC. §§ 164.055, 164.0551 (West 2013)). References to the Texas Sonogram Act are to TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2013).

13. Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942, 947-48 (W.D. Tex. 2011), *vacated in part*, 667 F.3d 570 (5th Cir. 2012).

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

15. 410 U.S. 113 (1973).

16. 505 U.S. 833 (1992).

17. *Id.* at 882-883.

which regulations states may impose constitutionally on abortion with the supposed purpose of enhancing women's informed consent. The most recent and revealing Supreme Court case, *Gonzales v. Carhart*,[18] went so far as to allow a complete ban on one type of abortion procedure, for the supposed purpose of protecting women's informed consent.[19]

Further confusion lies in the claim made in *Casey* that state abortion regulations for the purpose of protecting fetal life may be constitutional even prior to viability.[20] That case presented twin goals of protecting potential life and enhancing women's autonomy as co-existent.[21] *Gonzales v. Carhart*, however, upheld a statute that clearly limits women's autonomy by proscribing partial-birth abortion, regardless of any determinations of the patient and her physician regarding the patient's medical needs.[22] Although the Court tried to relate the ban on partial-birth abortion to enhancing the informed consent of pregnant women seeking an abortion, the majority opinion identified two purposes of the ban: to send a message about the value of fetal life and to regulate medical ethics.[23]

The Supreme Court's rulings in *Casey* and *Gonzales* have led to a massive number of new regulations regarding abortion in recent years.[24] Aside from new sonogram requirements, many states now require disclosures regarding the possibility of the fetus feeling pain as early as twenty weeks and the purported associations between abortion and increased risks of suicide, breast cancer, infertility, and negative emotional health.[25] The link between these regulations and the goals of

18. 550 U.S. 124 (2007).
19. *Id.*
20. *Casey*, 505 U.S. at 882-83.
21. *Id.* at 833.
22. *Gonzales*, 550 U.S. at 133.
23. *Id.* at 157.
24. *See News in Context: More State Abortion Restrictions Were Enacted in 2011-2013 Than in the Entire Previous Decade*, GUTTMACHER INST. (Jan. 2, 2014), *https://guttmacher.org/media/inthenews/print/2014/01/02/index.html* (noting that North Dakota, Texas, Arkansas, and North Carolina were "key to th[e] increase" in 2013.
25. *See* Harper Jean Tobin, *Confronting Misinformation on Abortion:*

protecting potential life and enhancing informed consent are unclear. Many of these claims are scientifically dubious,[26] and it is unlikely that any of them will significantly affect a woman's choice to abort, as this is driven by many non-negotiable and powerful factors.[27]

The Supreme Court has yet to review this new generation of regulations on abortion, but such review is both timely and necessary. The extent to which these regulations have invaded women's bodily integrity, have violated women's dignity, and have moved from persuasion to manipulation in an attempt to protect potential life is unprecedented. It is necessary that we return to the constitutional "undue burden" test adopted in *Casey*[28] in order to reassess what limitations that opinion is best understood as creating with regard to these state

Informed Consent, Deference, and Fetal Pain Laws, 17 COLUM. J. GENDER & L. 111, 140-51 (2008); Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 13-26 (2012). *See also* Rachel Benson Gold & Elizabeth Nash, *State Abortion Counseling Policies and the Fundamental Principles of Informed Consent*, 10 GUTTMACHER POL'Y REV. 6, 6-13 (2007).

26. *See, e.g.*, Hani K. Atrash & Carol J. Rowland Hogue, *The Effect of Pregnancy Termination on Future Reproduction*, 4 BALLIERE'S CLINICAL OBSTETRICS & GYNECOLOGY 391, 391-92 (1990); Gold & Nash, *supra* note 25, at 6-13 (determining that, of the 23 states studied that mandate information be provided to women seeking abortions, many mandate the provision of information that not only violates the tenets of informed consent, but is scientifically inaccurate); Katherine DeLellis Henderson et al., *Incomplete Pregnancy is not Associated with Breast Cancer Risk: The California Teachers Study*, 77 CONTRACEPTION 391 (2008) (study concludes that there is "no relationship between incomplete pregnancy and breast cancer risk."); Trine Munk-Olsen et al., *Induced First-Trimester Abortion and Risk of Mental Disorder,* 364 NEW ENG. J. MED. 332, 332 (2011) (finding no association between abortion and likelihood of contact with psychiatric services for mental disorder); Tobin, *supra* note 25, at 143-48 (regarding claims of fetal pain during early stages of pregnancy).

27. *See Induced Abortion, supra* note 3 ("The reasons women give for having an abortion underscore their understanding of the responsibilities of parenthood and family life. Three-fourths of women cite concern for or responsibility to other individuals; three-fourths say they cannot afford a child; three-fourths say that having a baby would interfere with work, school or the ability to care for dependents; and half say they do not want to be a single parent or are having problems with their husband or partner.") (footnote omitted). Additionally commentators have noted that women historically have been willing to face high levels of medical risk to obtain abortions. *See* Tobin, *supra* note 25, at 125.

28. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877-79 (1992).

regulations on abortion. Through the years many theorists and Courts have attempted to interpret the undue burden test in *Casey*.[29] Many of these interpretations have overlooked the requirement that women's decision-making processes must be free from manipulation and coercion, and thus have misunderstood the balance struck in *Casey*. To truly advance the twin goals being discussed in *Casey*—protection of potential life and enhancing women's informed consent—courts must recognize that state abortion regulations that interfere with a woman's decision-making liberty in an attempt to protect potential life impose an undue burden on a women's right to choose an abortion.

Additionally, some theorists have recently attempted to apply the standards created in *Casey* to the Texas Sonogram Act, or laws like it, to determine whether such laws are constitutional.[30] In so doing, however, parts of their analyses were limited by a rather restrictive understanding of what is rightfully said to create an undue burden and what is rightfully said to be misleading information. By applying a different

29. *See* Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights after* Casey *and* Carhart*,* 31 FORDHAM URB. L.J. 675, 682-89 (2004); Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 242-63 (2009); 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, 243 (2001); Linda J. Wharton, et al., *Preserving the Core of* Roe*: Reflections on* Planned Parenthood v. Casey*,* 18 YALE J.L. & FEMINISM 317, 323-385 (2006) (discussing various cases); Chris Whitman, *Looking Back on* Planned Parenthood v. Casey, 100 MICH. L. REV. 1980 1985-91 (2002); Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025 (1994); Kaitlyn Moredock, Note, *"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 (2010).

30. *See* Robertson, *supra* note 7, at 349-57 (2011); Tobin, *supra* note 25, at 140-51; Vandewalker, *supra* note 25, at 13-33; Robert M. Godzeno, Note, *The Role of Ultrasound Imaging in Informed Consent Legislation Post-*Gonzales v. Carhart*,* 27 QUINNIPIAC L. REV. 285, 303-21 (2009); Jeffrey Roseberry, *Undue Burden and the Law of Abortion in Arizona,* 44 ARIZ. ST. L.J. 391, 397-418 (2012); Sarah E. Weber, Comment, *An Attempt to Legislate Morality: Forced Ultrasounds as the Newest Tactic in Anti-Abortion Legislation,* 45 TULSA L. REV. 359, 364-81 (2009).

interpretation of the undue burden standard in *Casey*, one that best represents the balance that the Supreme Court created in *Casey*, we conclude that the Texas Sonogram Act and all other laws like it constitute an unconstitutional infringement on women's due process rights with respect to abortion.[31]

This Article begins with a brief review in Part II of the three crucial Supreme Court cases on abortion rights: *Roe v. Wade*,[32] *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[33] and *Gonzalez v. Carhart*.[34] Based on these cases, Part III formulates a constitutional test that courts should be using to determine whether an abortion regulation is constitutional that includes all of the factors identified by the Supreme Court as part of the "undue burden" analysis, factors that have been overlooked by many courts. Finally, Part IV applies this constitutional test to the Texas Sonogram Act, concluding that the act is unconstitutional because it: (1) requires the delivery of misleading, untruthful and irrelevant information; (2) unconstitutionally hinders women's decision-making liberty; and (3) poses a substantial obstacle for a large fraction of the relevant group of women affected by the regulation.

II. The Evolution of Abortion Law

In order to analyze the legal implications of the Texas Sonogram Act, we must first understand three benchmark U.S. Supreme Court cases that establish the current legal landscape regarding state abortion regulations: *Roe v. Wade*,[35] *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[36] and

31. This is not to suggest that there are not also other independent constitutional grounds that may support finding these forced sonogram laws unconstitutional. Physicians' first amendment rights, for example, are also obviously implicated. *See, e.g.*, Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech,* 2007 U. ILL. L. REV. 939, 959 (2007); Lauren R. Robbins, Comment, *Open Your Mouth and Say 'Ideology': Physicians and the First Amendment*, 12 U. PA. J. CONST. L. 155, 155 (2009).

32. 410 U.S. 113 (1973).

33. 505 U.S. 833 (1992).

34. 550 U.S. 124 (2007).

35. 410 U.S. 113 (1973).

36. 505 U.S. 833 (1992).

Gonzales v. Carhart.[37] Taken together, these cases explain why a requirement that forces a woman to undergo a sonogram, potentially transvaginal, and to listen to a medical description of the fetus with no medical necessity could appear to be legally justified despite its unconstitutional intrusion upon a woman's right to privacy.

A. Roe v. Wade[38]

Decided in 1973, the *Roe* decision is based upon the notion of an individual's fundamental right to privacy with regard to reproductive decisions.[39] In *Roe,* the Court found that "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[40] The Court also based a woman's right to abortion, in part, upon the autonomy of medical professionals, stating:

> The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.[41]

Although the Court found that women have a fundamental right to have an abortion, at least prior to viability of the fetus,

37. 550 U.S. 124 (2007).

38. 410 U.S. 113 (1973).

39. 410 U.S. at 154. The Supreme Court had explicated the privacy right regarding reproductive decisions. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

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

41. *Id.* at 165-66. Described by some scholars as a "medical model of abortion," this model has been present since the first right-to-life movement began in 1850. B. Jessie Hill, *Reproductive Rights as Health Care Rights*, 18 COLUM. J. GENDER & L. 501, 507 (2009); *see generally* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984).

this right was grounded in women's relationships with their physicians. Additionally, the Supreme Court in *Roe* found that this right to privacy was not absolute.[42] The Court determined that during the first trimester of pregnancy, there were no state interests sufficiently strong to override a woman's right to abort and thus, no state regulations would be constitutional at that time.[43] During the second trimester, only the state's interest in regulating abortion for the protection of the woman's health would be allowed.[44] Finally, during the third trimester, the state's interest in potential life is sufficiently strong to justify the complete prohibition of abortion except where it is necessary to protect the life or the health of the pregnant woman.[45] The relevance of the third trimester was its association with the notion of fetal viability—the point in time when the fetus could, theoretically, survive on its own outside the womb.[46] The Court seemed to indicate that if the point of viability were pushed forward in time due to scientific advances, then the state's interest in potential life would also be pushed forward along with it.[47] Thus, the Court in *Roe* created a legal framework that balanced the fundamental right of privacy afforded to pregnant women against the state's interest in potential life.[48] Ultimately, however, the Court in *Roe* gave women the right to make their own decisions regarding abortion prior to viability.[49] As we shall see, this crucial promise made in *Roe* was not intended to be disturbed by the decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[50]

42. *Roe*, 410 U.S. at 153-54.
43. *Id.* at 162-64.
44. *Id.* at 163-65.
45. *Id.*
46. *Id.* at 160, 163.
47. *Id.* at 163-65.
48. *Id.* at 159.
49. *Id.* at 163.
50. *See* 505 U.S. 833, 871 (1992) ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe* v. *Wade*. It is a rule of law and a component of liberty we cannot renounce.").

B. Planned Parenthood of Southeastern Pennsylvania v. Casey[51]

Planned Parenthood of Southeastern Pennsylvania v. Casey is an important turning point in the development of abortion law because, although it did not alter the *Roe* determination that women are the ultimate decision-makers regarding abortion pre-viability, it did significantly alter the framework used to determine the constitutionality of abortion regulations.[52]

Turning to the substance of the decision, the justices who co-authored the plurality opinion recognized that, in addition to protecting the health of the pregnant woman, states have a legitimate interest in protecting the life of the fetus from the point of conception.[53] Prior to viability, the states' interest in protecting the life of the fetus is not strong enough either to allow a total ban on abortion or to create regulations that impose an undue burden on a woman's right to choose abortion.[54] The Court explained that an undue burden is "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[55] Thus, "[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."[56] After a fetus reaches viability, however, states are free to prohibit abortion unless the abortion is necessary to protect the life or health of the mother, in accordance with *Roe*.[57]

But at what point does a regulation present a substantial

51. *Id.* at 833.
52. *Id.* at 871-72.
53. *Id.* at 869.
54. *Id.* at 878-79.
55. *Id.* at 877.
56. *Id.*
57. *Id.* at 879 (citing *Roe*, 410 U.S. at 164-65). *See* Wharton, et al., *supra* note 29, at 330-31.

obstacle to a woman seeking an abortion?[58] In applying the new "undue burden" standard, the *Casey* Court upheld a regulation requiring that: (a) at least 24 hours before performing an abortion, the physician inform the pregnant woman of the nature of the procedure, the health risks of both the abortion and of childbirth, and the "probable gestational age of the unborn child" (except in a medical emergency), and (b) the pregnant woman give her written consent to the procedure.[59] Prior to *Casey,* this type of law requiring specific counseling information and a 24-hour waiting period had been struck down by the Court.[60] In *Casey*, however, the Court recognized that a state may "further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion."[61] For the first time, the Supreme Court recognized a state right to create mechanisms designed to impact the decision-making processes of women choosing abortion.

Determining what precedent *Casey* set here poses a challenge, however, even for legal scholars, because of the nature of the plurality decision.[62] Three justices (O'Connor, Kennedy, and Souter) co-authored the *Casey* opinion, and certain sections of that opinion were joined in by two additional justices (Stevens and Blackmun), and are therefore legally binding.[63] Both Stevens and Blackmun dissented from the portion of the decision establishing the undue burden standard and both rejected the claim that the regulations did anything to advance informed consent.[64] The precedential value of these

58. *See infra* Parts III and IV for analysis regarding the meaning of a "substantial obstacle" and its application to the Texas Sonogram Act.

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

60. *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists 476 U.S. 747, 759-60 (1986); City of Akron v. Akron Ctr. for Reprod. Health Inc. (*Akron I*), 462 U.S. 416, 426 (1983).

61. *Casey*, 505 U.S. at 883.

62. Since *Casey* was decided, however, a majority of the Supreme Court used this standard. *See* Gonzales v. Carhart, 550 U.S. 124, 146 (2007); Stenberg v. Carhart, 530 U.S. 914, 920 (2000); Mazurek v. Armstrong, 520 U.S. 968, 971 (1997).

63. *Casey*, 505 U.S. 843, 922 (1992)

64. *Id.* at 914-22 (Stevens, J., concurring in part and dissenting in part); *id.* at 922-40 (Blackmun, J., concurring in part and dissenting in part).

sections is ambiguous at best, a fact that many seem to have ignored as abortion law has evolved during the 15 years since *Casey*.[65]

Since the decision in *Casey*, the constitutional protection afforded the right to choose abortion is not as clear as it once was under *Roe*. Under *Roe*, abortion was protected as a fundamental privacy right afforded by the Fourteenth Amendment Due Process Clause.[66] The constitutional analysis in *Roe* regarding the fundamental right of privacy with respect to abortion dovetailed with other decisions involving the protection of fundamental rights in general.[67] Specifically, states may not infringe upon a fundamental right in the absence of a compelling government interest, and, even then, states must use the least restrictive means to achieve such interest (the strict scrutiny test).[68] In *Roe*, the court found that the protection of potential life is not a compelling government interest until the point of viability and, thus, it would follow that any regulation of abortion for the sole purpose of protecting potential life prior to viability would be unconstitutional.[69] Although states could enact regulations protecting the fetus post-viability, that right would be subordinate to a woman's right to protect her own life and health where the two rights conflict.[70]

Following *Casey,* however, abortion regulations that take

65. Lower courts appear to be adopting this as the new constitutional test for abortion regulations. *See, e.g.*, Cincinnati Women's Servs., Inc. v. Taft, 468 F.3d 361, 367-74 (6th Cir. 2006); A Woman's Choice-East Side Women's Clinic v. Newman, 305 F.3d 684, 690-93 (7th Cir. 2002); Fargo Women's Health Org. v. Schafer, 18 F.3d 526, 530-36 (8th Cir. 1994); Eubanks v. Schmidt, 126 F. Supp. 2d 451, 452-461 (W.D. Ky. 2000). Also, one recent Note has even claimed that *Casey* created "a binding standard for evaluating the constitutionality of abortion informed consent statutes" even though only three justices actually supported that standard in the case. Moredock, *supra* note 29, at 1987.

66. Roe v. Wade, 410 U.S. 113, 153-54 (1973).

67. *See* City of Akron v. Akron Ctr. for Reprod. Health Inc. (*Akron I*), 462 U.S. 416, 427 (1983); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972); Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

68. *Casey,* 505 U.S. at 871.

69. *See supra* Part II.A.

70. *Id.*

effect prior to the viability of the fetus are no longer subject to strict scrutiny.[71] Instead, regulations that serve a permissible government interest may be upheld so long as they do not pose an "undue burden" on a woman's ability to choose abortion.[72] Thus, although *Casey* clearly still meant to afford women the right to choose abortion prior to viability, determining exactly what this new undue burden standard means from a constitutional perspective is extremely difficult given the fact that only three of nine Supreme Court justices created an entirely new framework of constitutional analysis.[73]

Of further interest, five of the justices joined in a discussion in *Casey* that suggests a significantly different constitutional grounding for the right to abortion compared to *Roe*. The Court said:

> Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in

71. *See supra* note 54 and accompanying text.
72. *See supra* note 55 and accompanying text.
73. *See supra* notes 62-65 and accompanying text.

society.[74]

The language suggests something that feminists have long supported regarding abortion: that abortion is not just about "privacy" as *Roe* had maintained, but that without the right to choose abortion, women do not have rights to equal citizenship.[75] The notion in *Roe* that abortion should be seen merely as another medical decision made between patient and doctor appears to be giving way to a view of abortion as central to women's liberty and equality. On the face of it, this would appear to be an important victory for those who argue for reproductive rights.[76] But, while *Casey* reframed a woman's decision to terminate a pregnancy in a way that no longer views doctors as primary actors in the abortion decision, many states have used this as a way to further burden both the abortion decision and those doctors who remain willing to perform abortions.[77] This consequence of *Casey* becomes much more apparent when examined in light of *Gonzales v. Carhart*,[78] discussed below.

C. Gonzales v. Carhart[79]

Gonzales v. Carhart addresses the constitutionality of the

74. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992).

75. *See e.g.*, Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 994, 1011 & n.92 (2007).

76. Some commentators have suggested that the Court may have intentionally used such strong language in recognition of the ultimate weakening that they were about to do with regard to constitutional protection of the abortion right. *See* Borgmann, *supra* note 29, at 679. *But see* Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1696-97 (2008) (arguing that the strong language reflects the majority's concern with a multi-dimensional aspect of dignity, including the dignity of protecting life of the unborn, liberty, and the equality of women) [hereinafter Siegel, *Dignity and the Politics of Protection*].

77. *See* Wharton, et al., *supra* note 29, at 319-21. During the time between 1985 and 1991, states enacted sixty-eight laws restricting abortion, while from 1992 to 2005 states enacted 299 laws restricting abortion. *See id.* at 319 n.8 (citing Memorandum from Elizabeth Nash, Pub. Policy Assoc. Alan Guttmacher Inst. (Apr. 26, 2006) (on file with authors)).

78. Gonzales v. Carhart, 550 U.S. 124 (2007).

79. *Id.*

Partial-Birth Abortion Act of 2003, a federal law banning the use of intact D&E (dilation and evacuation) or intact D&X (dilation and extraction), popularly known as "partial-birth abortion."[80] A brief discussion of various types of abortion procedures will be helpful to understand the issues addressed in *Gonzales*. Between 85-90% of abortions occur in the first trimester and utilize either vacuum aspiration, wherein the contents of the uterus are removed via suction, or medical abortion, which consists of a pill often taken at home.[81] In the large majority of second and third trimester abortions, doctors perform a procedure known as D&E (herein called "standard D&E"), which requires the physician to dilate the cervix and then insert surgical instruments through the cervix to evacuate the fetus.[82] This requires several passes, as the fetal remains are removed in stages.[83] Intact D&E or D&X, the procedure at issue here, differs from standard D&E in that the physician evacuates the fetus from the uterus with only one pass.[84] Because intact D&E ensures complete evacuation of the fetus, it reduces the likelihood of medical complications that are present in a standard D&E.[85] This is due to the failure to fully evacuate the fetus despite several passes, the higher risk of perforation or damage to the pregnant woman's body due to multiple insertions of surgical instruments, and the potential exposure of the pregnant woman to sharp bony fragments.[86] An oft-cited study of the incidence of so-called partial-term abortion conducted prior to the passage of the Partial-Birth

80. *Id.* at 132, 136-37; 18 U.S.C. § 1531(a) (2012).

81. Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence & Services In the United States in 2000*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 6, 12-13 (2003); David K. Turok et al., *Second Trimester Termination of Pregnancy: A Review by Site and Procedure Type*, 77 CONTRACEPTION 155, 155 (2008).

82. *See* Phillip G. Stubblefield et al., *Methods for Induced Abortion*, 104 AM. C. OBSTETRICS & GYNECOLOGISTS 174, 179 (2004); *see also* Stephen T. Chasen et al., *Dilation and Evacuation at ≥ 20 weeks: Comparison of Operative Techniques*, 190 AM. J. OBSTETRICS & GYNECOLOGY 1180, 1180 (2004).

83. *See* Stenberg v. Carhart, 530 U.S. 914, 925-26 (2000).

84. *See id.* at 927-28 (2000) (describing such procedures); *see also* Stubblefield et al., *supra* note 82, at 179.

85. *See* Gonzales v. Carhart, 550 U.S. 124, 161-62 (2007).

86. *Id* at 177-78 (Ginsburg, J., dissenting).

Abortion Act estimated that intact D&E was quite rare, accounting for only 0.03%-0.05% of all abortions that occurred in the United States in 1996.[87]

Specifically, the Partial-Birth Abortion Act bans any doctor from knowingly performing a "partial-birth" abortion unless it is necessary to save the life of the pregnant woman.[88] "Partial-birth" abortion was described as occurring when the person performing the abortion:

> deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.[89]

Interestingly, a very similar law passed in Nebraska was found to be unconstitutional by the Supreme Court in 2000 in *Stenberg v. Carhart*.[90] One main difference between the Nebraska law and the Partial-Birth Abortion Act, according to the *Gonzales* Court, is that the description of "partial-birth" abortion in the federal law was more precise and could not be interpreted to include standard D&E procedures.[91] The Court believed this allowed physicians more precise notice regarding banned procedures and left the practice of standard D&E

87. *See* Stanley K. Henshaw, *Abortion Incidence and Services in the United States, 1995-1996*, 30 FAM. PLAN. PERSP. 263, 287 (1998), *available at* http://sparky.guttmacher.org/pubs/journals/3026398.html (last visited Jan. 7, 2014).

88. 18 U.S.C. § 1531(a) (2012).

89. *See id.* § 1531(b)(1)(A)–(B).

90. Stenberg v. Carhart, 530 U.S. 914, 922 (2000).

91. *See Gonzales*, 550 U.S. at 148-50 (majority opinion); *cf. Stenberg,* 530 U.S. at 941-46.

undisturbed.[92] Nonetheless, many doctors disagreed with this conclusion by the Court.[93]

The statute also included a provision which allowed a doctor who performed such an abortion to mount a legal defense based on the claim that, "the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."[94] The availability of a legal defense is markedly different from an outright exception from the ban in cases where the mother's life is in danger. It is crucial to note that, since *Roe,* all post-viability abortions may be banned so long as there is an exception allowing for an abortion necessary to protect the life or the health of the pregnant woman (a "health exception").[95] Here, although the ban on post-viability intact D&E on its face seems constitutional since the government is free to ban all abortions post-viability in general, the fact that this statute does not contain a health exception places it out of touch with the requirements in *Roe* and *Casey*. In fact, this was one of the main reasons why the Nebraska statute was found to be unconstitutional in the 2000 case.[96] The other important thing to note here is that this ban is actually being imposed not only on post-viability abortions but on pre-viability abortions as well.[97] Thus, to be found constitutional following *Casey*, the Court also had to determine whether this ban created an undue burden for women seeking a second term pre-viability abortion.

In a five-to-four opinion, the Supreme Court upheld this act as constitutional.[98] Most importantly for our purposes, the Court found that this Act does not pose an undue burden on a woman's right to abortion, even with the lack of a health

92. *See Gonzales*, 550 U.S. at 151-56.

93. *See* Michael F. Greene, *The Intimidation of American Physicians – Banning Partial-Birth Abortion*, 356 NEW ENG. J. MED. 2128, 2128 (2007).

94. 18 U.S.C. § 1531(d)(1).

95. *Stenberg,* 530 U.S. at 937-38; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992).

96. *Stenberg*, 530 U.S. at 937-38.

97. *Casey*, 505 U.S. at 876-77.

98. Gonzales v. Carhart, 550 U.S. 124, 168 (2007).

exception.[99] To begin its analysis of this statute, the majority opinion claimed that *Casey* supported the proposition, among other things, "that the government has a legitimate and substantial interest in preserving and promoting fetal life."[100] The majority declared that, "we must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child."[101] Thus, the majority starts their constitutional analysis of this statute by assuming that a regulation on abortion, which applies even pre-viability, may still be found constitutional if its sole purpose is simply to protect the life of the fetus.[102] Of course, the regulation still cannot have the purpose or effect of placing a substantial obstacle in the path of the pregnant woman seeking an abortion.[103] The Court said:

> Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.[104]

Further, the majority found that the statute in question did in fact further its purported purposes.[105] The Court recognized that even standard D&E could be seen as devaluing life, but that by banning the intact D&E procedure, Congress had "additional ethical and moral concerns that justify a special prohibition."[106] The Court argued that this procedure's similarity to infanticide raised the need to create a bright line between the two acts, which this ban accomplished.[107] In

99. *Id.* at 164-68.
100. *Id.* at 145.
101. *Id.* at 146.
102. *Id.*
103. *Id.*
104. *Id.* at 158.
105. *Id.*
106. *Id.*
107. *Id.*

addition, the Court argued that the statute recognizes the reality that, "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child."[108] The Court then explained that abortion may lead to negative psychological consequences for many women.[109] From this, the Court declared that due to the emotionally charged situation involving abortion, some doctors may not provide precise details regarding the abortion procedure that they plan to perform.[110] The Court concluded that this lack of detail regarding the manner in which the fetus will be "killed" is a legitimate state concern for two reasons: (1) to preserve and protect the mental and emotional health of the mother, who may suffer even more intense emotional pain and suffering and ultimately regret the decision that she made to abort the fetus after she comes to find out about the manner in which the fetus was killed, and (2) to preserve fetal life because of the "reasonable inference that a necessary effect of the regulation . . . will be to encourage some women to carry the infant to full term."[111] Thus, the Court concluded that the purpose of the ban was not to create a substantial obstacle in the path of the woman seeking an abortion, but instead to achieve the legitimate purpose of protecting and preserving maternal health and fetal life.[112]

The majority recognized, however, that this was not the end of the inquiry and also examined whether the statute has the effect of placing a substantial obstacle in the path of the woman seeking an abortion.[113] Specifically, the Court spent some time discussing whether the lack of a health exception

108. *Id.* at 159.

109. *Id. (*"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. Severe depression and loss of esteem can follow.") (citations omitted).

110. *Id.* (noting, however, that this is a common occurrence with many types of surgical procedures).

111. *Id.* at 159-60. Although the reason for this is not stated directly by the Court, the majority seems to be suggesting that this ban serves as a way to educate people regarding late term abortion in general, and is done in a way that will encourage women to choose against such abortions once they learn about the ban.

112. *Id.*

113. *Id.*at 158-61.

created an undue burden.[114] Here, the Court acknowledged that if this ban of a particular abortion procedure did create significant health risks for women seeking abortions then the lack of a health exception would, in fact, pose an undue burden.[115] The Court concluded, however, that since medical experts disagreed as to whether the ban of partial-birth abortion would give rise to significant health risks for women, this uncertainty in and of itself could justify the Court's determination that the Act did not impose an undue burden.[116]

The dissent written by Ruth Bader Ginsburg argued directly against a number of the arguments made by the majority and argued that the majority's reasoning distorted the Court's holdings in *Casey*.[117] Many commentators agree with Ginsburg that the majority incorrectly applied the law to these issues.[118] Ginsburg's dissent takes aim at the majority's claim that this law may stand even without a health exception.[119] Ginsburg argued that "a State must avoid subjecting women to health risks not only where the pregnancy itself creates danger, but also where state regulation forces women to resort to less safe methods of abortion."[120] Where a division of medical opinion exists regarding the necessity of a certain abortion procedure, the division itself should be understood to signal risk and the State must err on the side of safeguarding women's health.[121] Ultimately, she argued that the majority

114. *Id.* at 161-67.

115. *Id.* at 161.

116. *Id.* at 163-64.

117. *See generally id.* at 169-91 (Ginsburg, J., dissenting).

118. *See, e.g.*, Rebecca Dresser, *From Double Standard to Double Bind: Informed Choice in Abortion Law*, 76 GEO. WASH. L. REV. 1599, 1601-02 (2008); Manian, *supra* note 29, at 234, 262-63; Martha K. Plante, *"Protecting" Women's Health: How* Gonzales v. Carhart *Endangers Women's Health and Women's Equal Right to Personhood Under the Constitution*, 16 AM. U. J. GENDER SOC. POL'Y & L. 389, 405-09 (2007); Siegel, *Dignity and the Politics of Protection*, *supra* note 76, at 1734-35, 1779-80; Ronald Turner, Gonzales v. Carhart *and the Court's "Women's Regret" Rationale*, 43 WAKE FOREST L. REV. 1, 18-21 (2008); *see also* Cass R. Sunstein, Op-Ed., *Ginsburg's Dissent May Yet Prevail*, L.A. TIMES, Apr. 20, 2007, at A31, *available at* http://articles.latimes.com/2007/apr/20/opinion/oe-sunstein20.

119. *Gonzales*, 550 U.S. at 170-71 (Ginsburg, J., dissenting).

120. *Id.* at 172.

121. *Id.* at 173-74

has carved out an unprecedented exception to the long-standing requirement that all abortion regulations must first and foremost safeguard women's health.[122]

Ginsburg also addressed the majority's claim that the Partial-Birth Abortion Act somehow furthers a legitimate government purpose.[123] In response to the majority's claim that this statute furthers the legitimate purpose of protecting fetal life, she pointed out that the statute does not save even one fetal life from destruction since other abortion methods remain available even if the ban persists.[124] Additionally, the ban is obviously not designed for the purpose of protecting women's health either.[125] She said,

> the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from [s]evere depression and loss of esteem. Because of women's fragile emotional state . . . the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.[126]

In a full-page footnote she examined the weight of the scientific evidence that suggests that abortion is no more dangerous to women's mental health than is bearing an unwanted child.[127] She then argued that this idea cannot even be seen as a legitimate purpose of a statute as it rests on "ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."[128]

Gonzales is a Supreme Court case and therefore does have bearing regarding how to analyze abortion regulations from a

122. *Id.* at 179.
123. *Id.* at 181-86
124. *Id.* at 181.
125. *See id.* at 177-80.
126. *Id.* at 183-84 (citations omitted) (internal quotation marks omitted).
127. *Id.* at 183 n.7.
128. *Id.* at 185 (citations omitted).

constitutional perspective.[129] However, it should be noted that *Gonzales* merely purported to apply *Casey* and not to change the nature of the undue burden test. The important question for our purposes then is: what insight does *Gonzales* add to *Casey*'s analysis? There are really two important aspects of this case to note for our discussion. First, *Gonzales* suggests that after *Casey*, states need only have a legitimate government interest to regulate abortion so long as the regulation does not impose an undue burden.[130] Second, *Gonzales* seems to accept that women's regret and other emotional problems after receiving an abortion are problems that may legitimately motivate a state regulation on abortion.[131] These two claims will be further discussed in Part III and Part IV respectively.

III. Understanding *Casey*'s Test

Many theorists have argued that the undue burden standard and the way it is to be applied as explained in *Casey* is unclear, malleable, and even potentially contradictory.[132] Others have argued that *Casey* only outlaws abortion regulations that act as a complete bar to women's ability to receive an abortion, or, at least, actively prevent a large fraction of women affected by the regulation from being able to receive an abortion.[133] Another misconception regarding *Casey* is that an undue burden is coextensive with a finding that a regulation is requiring information that is untruthful,

129. *See generally id.* at 132 (majority opinion).

130. *Id.* at 146, 150.

131. *Id.* at 159.

132. *See e.g.* Borgmann, *supra* note 29, at 681 ("Casey's standard lacks content, which makes it both difficult to apply and susceptible to manipulation."); C. Elaine Howard, *The* Roe*'d to Confusion:* Planned Parenthood v. Casey*,* 30 HOUS. L. REV. 1457, 1458-59 (1993). It is interesting to note that the Justices joining in the *Casey* joint opinion noted that the Court and individual members thereof had inconsistently applied the undue burden standard in prior decisions. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992). The joint opinion then goes on to attempt to clarify what is meant by the "undue burden" standard as applied to abortion regulations. *See id.* at 876-79.

133. *See* Whitman, *supra* note 29, at 1985-91; Metzger, *supra* note 29, at 2030-38; James M. Oleske, Jr., Note, *Undue Burdens and the Free Exercise of Religion: Reworking a "Jurisprudence of Doubt,"* 85 GEO. L.J. 751, 768 (1997).

misleading, or irrelevant.[134]

Ultimately, very few theorists examining *Casey* have fully appreciated the level of protection it affords to women's decision-making liberty.[135] The only reasonable way to read *Casey* is to understand it as safeguarding a woman's decision-making process as strongly as it protects women's ability to effectuate their decisions regarding abortion. This aspect of *Casey* seems to be universally undervalued, and yet it is this aspect of *Casey* that most definitively shows why Texas's sonogram law is unconstitutional.

The most concrete "test" created in *Casey*, as we saw above, is the requirement that all state regulations on abortion enacted prior to viability cannot pose an undue burden.[136] This was defined as a regulation that has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[137] From this statement, it seems clear that any state regulation on abortion must be examined to see whether its purpose or effect is to place a substantial obstacle in the path of a pregnant woman. This "test" raises many important questions when trying to determine whether a state regulation of abortion prior to viability is constitutional.

A. *Standard of Review*

In order to best understand the undue burden test in *Casey,* it helps to examine prior development of that standard. The Supreme Court first applied the undue burden standard to abortion law in 1983.[138] In *Akron I*, Justice O'Connor addressed the concept of an undue burden in the dissent, defining as undue any regulations that act as "absolute obstacles or severe

134. *See* Moredock, *supra* note 29, at 1976.

135. *But see* Siegel, *Dignity and the Politics of Protection supra* note 76, at 1753 ("[U]nder the undue burden framework, dignity-respecting regulation of women's decisions can neither manipulate nor coerce women . . . .").

136. *Casey*, 505 U.S. at 846

137. *Id*. at 877.

138. *See* City of Akron v. Akron Ctr. for Reprod. Health Inc. (*Akron I*), 462 U.S. 416, 463-66 (1983) (O'Connor J., dissenting).

limitations on the abortion decision."[139] She suggested that if a state abortion regulation does not create an undue burden, then it is not unconstitutional.[140] If such a regulation created an undue burden, however, it could nevertheless be upheld as constitutional if the state was able to show that the regulation serves a compelling government interest.[141]

The Supreme Court explicitly rejected this *Akron I* articulation of the undue burden standard[142] by holding that any abortion regulation creating an undue burden is unconstitutional without the need for further examination.[143] Indeed, the state cannot rehabilitate an unconstitutional abortion regulation by demonstrating that it serves a compelling government interest. One issue not fully explicated by *Casey*, however, is what type of government interest must a state have to pass any abortion regulation, regardless of whether the regulation poses an undue burden.[144] Can a state interfere with a woman's right to privacy based solely upon the fact that it has a legitimate government purpose to which the law is rationally related? Or, must states show something more to justify the intrusion upon a fundamental right?

Some, including the majority in *Gonzales*, have interpreted *Casey* to stand for the proposition that any abortion regulation that is rationally related to a legitimate government purpose is permissible so long as such regulation does not pose an undue burden.[145] To understand *Casey* this way is to understand it as offering the least amount of constitutional protection, since this

139. *Id.* at 464.

140. *Id.* at 461-63.

141. *See id.* at 472-74 (regarding the 24-hour waiting period requirement).

142. *See Casey*, 505 U.S. at 877 ("To the extent that the opinions of the Court or of individual Justices use the undue burden standard in a manner that is inconsistent with this analysis, we set out what in our view should be the controlling standard.") (citations omitted).

143. *Id.*

144. *Id.* at 877-79

145. *See* Gonzales v. Carhart, 550 U.S. 124, 158 (2007) ("Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn"); *see also* Tobin, *supra* note 25, at 125-27; Metzger, *supra* note 29, at 2032-33.

would mean that a state only needs the same basic purpose to pass an abortion regulation as it would need to pass any other regulation that does not touch on a constitutionally protected right. Of course, reading *Casey* this way does not undo the requirement that the regulation cannot pose an undue burden, but it does allow for a requirement easily met regarding what purpose the state regulation must serve. Although we disagree with the framing of the test created in *Casey* this way, as it gives short shrift to a woman's fundamental right to liberty in choosing abortion, we accept this as the correct test for the purpose of this Article. If we can show that the Texas Sonogram Law cannot even pass this easiest of constitutional burdens in terms of the permissible purposes of the law, then we have certainly shown it would fail if *Casey* is understood to require more than this.

B. *When is a Burden "Undue"?*

In *Casey*, an undue burden was defined as, "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[146] This represents a significant change from Justice O'Connor's language in *Akron I* of, "absolute obstacles or severe limitations on the abortion decision."[147] This changed language demonstrates the error of those who interpreted *Casey* to mean that an undue burden exists only when a regulation actually bars women from obtaining abortions. The burden clearly does not have to pose an absolute bar against abortion to be undue. Indeed, the *Casey* Court's use of the language "substantial obstacle,"[148] as opposed to "severe limitations,"[149] certainly contemplates that a burden that does not serve as a full bar against abortion may nevertheless be "undue."

Additionally, there is an even stronger argument that shows why the interpretation of "undue burden" as requiring

146. *Casey*, 505 U.S. at 877.

147. City of Akron v. Akron Ctr. for Reprod. Health Inc. (*Akron I*), 462 U.S. 416, 464 (1983) (O'Connor, J., dissenting).

148. *Casey*, 505 U.S. at 877.

149. *Akron I*, 462 U.S. at 464.

an absolute prohibition on certain women's ability to get an abortion is setting the bar too high for a finding of an undue burden. The Court itself declared that certain kinds of information are unconstitutional based on the way that information interferes with women's decision-making process.[150] This is true regardless of whether this information actually prevents women from having or choosing abortions. To see this more clearly, we must examine what *Casey* said regarding specific information that may be required for informed consent statutes regulating abortion.

Advancing the informed consent of women deciding on abortion is clearly a permissible purpose for state regulations on abortion after *Casey*. The Court stated, "[t]hough the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed."[151] In further explaining this statement, the Court added that certain pieces of information unrelated to medical risks or other medical aspects of abortion may be included as part of the state regulation of information prior to obtaining an abortion.[152]

> Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [the pregnant woman seeking an abortion] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. . . . It follows that States are free to

150. *Casey*, 505 U.S. at 878, 881-85.

151. *Id.* at 872.

152. *Id.* at 882-83. The AMA recognizes, generally, the risks and benefits of treatment. *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, 186 (2009).

> enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning.[153]

Casey also held that the government's interest in protecting potential life is a permissible purpose for which states may create regulations under certain circumstances.[154] However, where state regulations require women to receive certain information prior to an abortion, those regulations cannot hinder her choice.[155] Indeed, "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."[156] Nonetheless, the joint opinion even went so far as to say that a regulation designed to persuade a woman to choose childbirth over abortion may be permissible.[157] In order to promote its interest in potential life, "the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion."[158]

In keeping with their claim that regulations cannot hinder a woman's free choice, the joint opinion determined that not all information designed to persuade women to choose childbirth may be included as part of a valid state regulation of abortion.[159] The Court stated 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."[160] The Justices also suggested that the information must be relevant to the decision being made by concluding that, "informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made

153. *Casey*, 505 U.S. at 872-73.
154. *Id.* at 875-78.
155. *Id.* at 877.
156. *Id.*
157. *Id.* at 877-78.
158. *Id.* at 878.
159. *Id.* at 882-83.
160. *Id.* at 882.

irrelevant."[161] Thus, states may constitutionally require abortion providers to inform pregnant women of more than just the normal medical risks of abortion, provided that such information is truthful, non-misleading, and relevant.[162]

It is in looking at the way the Court spoke of these dual purposes—the protection of potential life and of women's right to informed consent—that we see what so many people have missed when examining *Casey*. Information that a state mandates to be provided to a pregnant woman seeking an abortion may constitute an undue burden not only if it substantially interferes with a woman's ability to effectuate her choice to have an abortion, but also if it interferes in a substantial way with *the decision-making process itself*. The Court's own language bears repeating: "the means chosen by the State to further the interest in potential life must be *calculated to inform the woman's free choice, not hinder it*."[163]

First, states may affect a woman's decision-making process by providing persuasive information meant to influence a woman's ultimate decision whether to terminate a pregnancy without violating her rights.[164] However, if a state interferes with a woman's decision-making process by providing her with false, misleading, or irrelevant information, it imposes an undue burden upon her decision-making ability and is, thus, unconstitutional.[165]

Second, *Casey* shows that interference with a woman's decision-making process may be unconstitutional even if it does not fully impede her ability to choose.[166] By barring absolutely information that is untruthful, misleading, or irrelevant, the Court suggested that information that does not ultimately affect a woman's choice could nevertheless constitute an undue burden.[167] A woman does not, for example, have to prove that misleading information directly affected her decision. Rather, the very fact that the information is misleading renders it

161. *Id.* at 883.
162. *Id.* at 883.
163. *Id.* at 877 (emphasis added).
164. *Id.* at 878.
165. *Id.* at 878, 882.
166. *Id.* at 882-84.
167. *Id.* at 882.

impermissible. Thus, untruthful, misleading, or irrelevant information is a substantial obstacle to a woman's ability to make a reasoned and well-informed decision—simply put, it hinders her free choice.

The above standard cannot be understood as applying only to information that is untruthful, misleading, or irrelevant in a narrow sense. This same result applies to any information required by states that unduly interferes with a woman's decision-making process and hinders her free choice. As discussed in Part IV, this understanding of *Casey's* holding is consistent with a general understanding of informed consent.[168] Further, the conclusion that *Casey's* undue burden standard must be understood as placing an absolute ban on information that is untruthful, misleading, irrelevant or otherwise hinders a woman's free choice is supported by both Blackmun's concurrence and issues raised in Scalia's dissent.

First, Blackmun's concurrence recognized that the joint opinion must be read as a general prohibition on states' attempts to unduly interfere with women's decisions. As he said, "[b]ecause the State's information must be 'calculated to inform the woman's free choice, not hinder it,' the measures must be designed to ensure that a woman's choice is 'mature and informed,' not intimidated, imposed, or impelled."[169] He went on to argue that this would outlaw not only untruthful, misleading, or irrelevant information, but also the State must be careful of the manner of presentation it uses and cannot pick a mode "in order to inflict 'psychological abuse,' designed to shock or unnerve a woman seeking to exercise her liberty right."[170] This would prohibit the showing of "graphic literature or films," for example, "detailing the performance of an abortion [procedure]" according to Blackmun.[171] Thus, Blackmun explicitly recognized that information designed to hinder a woman's decision-making process is unconstitutional even under the lesser protection afforded by the *Casey* joint opinion and in the absence of any showing that the information

168. *See infra* Part IV.

169. *Casey*, 505 U.S. at 936 n.7 (Blackmun, J., concurring) (citations omitted).

170. *Id.* (citations omitted).

171. *Id.*

acted as a complete prohibition on her ability to seek an abortion.[172]

Second, Scalia's dissent in *Casey* generally blasted the undue burden standard as being inherently unworkable and clearly not found in the constitution.[173] He also argued that the undue burden standard seems to stand for the proposition that any regulation that works too well, in other words which significantly reduces the number of abortions, must be an undue burden.[174] The example he gave to demonstrate this is if a state required women to read a pamphlet detailing the facts of fetal development and this reduced the number of abortions, then this could be found to be an undue burden.[175] However, take another example of the same type of reasoning he employed here. What if a state decided to fully fund pregnancy, childbirth, and all childcare needed after birth including daycare for women who are in difficult financial circumstances and the state required all women be given this information before having an abortion? This might significantly decrease the abortion rates in that state so this too would be an undue

172. *Id.* at 935.
173. *Id.* at 985 (Scalia, J., dissenting).
174. *Id.* at 992.
175. *Id.* Justice Scalia stated,

> If, for example, a State required a woman to read a pamphlet describing, with illustrations, the facts of fetal development before she could obtain an abortion, the effect of such legislation might be to "deter" a "significant number of women" from procuring abortions, thereby seemingly allowing a district judge to invalidate it as an undue burden. Thus, despite flowery rhetoric about the State's "substantial" and "profound" interest in "potential human life," and criticism of *Roe* for undervaluing that interest, the joint opinion permits the State to pursue that interest only so long as it is not too successful. As Justice B[lackmun] recognizes (with evident hope), the "undue burden" standard may ultimately require the invalidation of each provision upheld today if it can be shown, on a better record, that the State is too effectively "express[ing] a preference for childbirth over abortion." Reason finds no refuge in this jurisprudence of confusion.

Id. (second alteration in original) (citations omitted).

burden under Scalia's reasoning. However, this is quite obviously an incorrect interpretation of what the Court meant by an undue burden.

Scalia's mistake here is to suggest that any regulation that successfully decreases abortion rates must be an undue burden. The joint opinion in *Casey*, though, clearly was not arguing for this position. This highlights the point above that attempts to persuade women to choose childbirth, no matter how successful, are not undue burdens. However, when these attempts take the form of hindering women's free choice by interfering in the decision-making and reasoning process of the woman, then an undue burden is found. This mistake made by Scalia actually shows that the joint opinion in *Casey* obviously understood the difference between regulations that worked to change women's minds legitimately and ones that worked to change women's minds in an unconstitutional way.

The above explanation of *Casey* shows that abortion regulations requiring doctors to provide specific information to women seeking an abortion are constitutional only if that information: (1) is truthful, non-misleading, and relevant, and (2) does not unduly interfere with a woman's decision-making process.[176] The undue burden standard also can be used to invalidate state provisions beyond these cases as well. The undue burden standard created two "prongs" of analysis in assessing state regulations: purpose and effect.

C. *Constitutional Purpose and Effect of the Law*

First, the undue burden test itself makes clear that the purpose of "placing a substantial obstacle in the path of the woman seeking an abortion" is not a permissible government purpose.[177] Proving that the legislature has acted with an

176. *Casey,* 505 U.S. at 882.

177. *Id.* at 878. Following *Mazurek v. Armstrong,* 520 U.S. 968 (1997), some say this "prong" of the test has been written out, but *Mazurek* itself did not hold this directly and does not overturn the plain wording of *Casey* here. *See* Note, *After* Ayotte*: The Need to Defend Abortion Rights with Renewed "Purpose"*, 119 HARV. L. REV. 2552, 2566-67 (2006); *see also* Wharton, et al., *supra* note 29, at 346 (arguing *Mazurek* is not the death of the purpose prong); Whitman, *supra* note 29, at 1982.

impermissible purpose can be extremely difficult, however. Further, since many have interpreted *Casey* to require that a state only show that a regulation is rationally related to a legitimate government purpose,[178] it is relatively easy for legislatures to be able to pass this test. Finally, even the notion of a legitimate purpose has been expanded to include questionable government purposes. Specifically, in *Casey* the Court held that a state regulation with the purpose of protecting women's health or safety is permissible, but the State cannot create unnecessary health regulations that do no more than pose an undue burden in the name of women's health.[179] After *Gonzales*, however, state regulations designed to prevent women from having emotional problems after abortions they come to regret are also seen to legitimately serve this interest.[180] Thus, *Gonzales* sanctioned states to create regulations on abortion with the purpose of, in effect, protecting women from themselves. This prong then appears to be a rather weak mechanism for invalidating legislation.

The *Casey* joint opinion also analyzed whether a state regulation has the effect of placing a substantial obstacle in the path of a woman seeking an abortion in a way that goes beyond requiring the information provided to be truthful, non-misleading, and relevant.[181] The Court took up the issue of whether a regulation has the effect of placing a substantial obstacle in a woman's path when it considered the various provisions of the law under review in *Casey*.[182] First, the three-justice opinion concluded that the twenty-four hour waiting period and counseling provisions did not have the effect of creating a substantial obstacle for women seeking abortions.[183] Although they accepted the findings of the District Court, which concluded that the waiting period might increase the

178. *See supra* note 145 and accompanying text.

179. *Casey*, 505 U.S. at 878 ("[T]he State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.").

180. *See* Gonzales v. Carhart, 550 U.S. 124, 159-60 (2007).

181. *Casey*, 505 U.S. at 877-78, 883.

182. *Id.* at 879-901.

183. *Id.* at 881-99.

cost and create a risk of delay for abortions, the justices concluded this was not enough to pose a substantial obstacle.[184] They said, "[a] particular burden is not of necessity a substantial obstacle."[185] In explaining what an undue burden is and is not, the opinion here added, "[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."[186]

However, in reviewing the requirement that a woman must notify her spouse that she is having an abortion except in certain proscribed circumstances prior to obtaining an abortion, the opinion here declared this to have the effect of being a substantial obstacle.[187] The opinion focused on the incidence of domestic violence in marriages and concluded that due to the abuse and intimidation that sometimes occurs in marriage, "[t]he spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion."[188] Importantly, the opinion did make clear here that even on a facial challenge like this one, the Court should not be looking at the impact on all women seeking abortions, nor even all women who might have to notify their spouses about abortion.[189] Instead, when determining whether a regulation has the effect of placing a substantial obstacle, the Court says, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."[190] Using this standard then, the opinion defines as the target class, "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions."[191] Looking at this group, the Court concluded, "in a large fraction of cases in which [the spousal notification provision] is relevant, it will

184. *Id.* at 887.
185. *Id.*
186. *Id.* at 874.
187. *Id.* at 893-94.
188. *Id.* at 893.
189. *Id.* at 893-94.
190. *Id.* at 894.
191. *Id.* at 895.

operate as a substantial obstacle to a woman's choice to undergo an abortion."[192] Thus, to determine whether a regulation has the effect of creating a substantial obstacle for a facial challenge after *Casey*, the Court must examine how it affects the large fraction of relevant women who will be affected by the regulation.[193]

The standards one should use to determine whether an abortion regulation places a substantial obstacle in the path of the woman have not been fully elucidated by the Court; nonetheless, a few clear principles emerge.[194] First, even if a large number of women are slightly inconvenienced by a certain state abortion regulation, this alone does not constitute an undue burden.[195] Second, even if a regulation operates in a way that it creates a substantial obstacle for a large fraction of only a small group of women, if those affected women are the ones that are restricted by the regulation, then the regulation does pose an undue burden.[196] Third, if a state regulation has the effect of deterring women from having abortions, then it poses an undue burden.[197] Fourth, if a state regulation only slightly increases costs and adds inconveniences, then it does not pose an undue burden.[198] Finally, the *Casey* Court observed that "at some point increased cost could become a substantial obstacle."[199] This last point, although rather vague, certainly suggests that a regulation which increases costs significantly

192. *Id.*

193. *See* Gonzales v. Carhart, 550 U.S. 124, 188-89 (2007) (Ginsburg, J., dissenting).

194. *See* Borgmann, *supra* note 29, at 683.

195. *Casey,* 505 U.S. at 876.

196. Even for facial attacks of federal statutes, it appears the *Casey* Court did not use the stricter test of constitutionality developed in *United States v. Salerno*, 481 U.S. 739 (1987), and instead determined that facial challenges of abortions statutes may succeed if a large fraction of relevant women are affected. *Salerno*, 481 U.S. at 745; *see also* John Christopher Ford, Note, *The* Casey *Standard for Evaluating Facial Attacks on Abortion Statutes*, 95 MICH. L. REV. 1443, 1445-46 (1997). The vast majority of federal circuits have rejected application of the so-called "*Salerno* test" to facial challenges of abortion regulations. *See* Wharton, et al., *supra* note 29, at 354 & n.206.

197. *Casey,* 505 U.S. at 894.

198. *Id.* at 886.

199. *Id.* at 901.

may also constitute an undue burden.[200] Whether a substantial obstacle exists in cases other than these remains open to reasonable interpretation and will be discussed in more detail below.

In sum, any regulation on abortion must first be rationally related to a legitimate government interest including protecting women's health and protecting fetal life.[201] Next, any regulation that requires women to be given specific information prior to abortion is permissible so long as the information is truthful, non-misleading, relevant, and does not unduly hinder a woman's decision-making process.[202] Finally, any such regulation cannot have the effect of posing a substantial obstacle for a large fraction of the relevant group of women affected by the regulation in effectuating their choice.[203] A substantial obstacle exists, at least, where women are deterred from having abortions by the regulation and where costs are made significantly higher, but not where costs and inconvenience are only slightly increased.[204]

IV. Why the Texas Sonogram Act fails *Casey*'s Test for Constitutionality

To begin, we must first ask whether the purpose of the Texas Sonogram Act is to serve a legitimate government purpose or, in the alternative, to place a substantial obstacle in the path of the woman seeking an abortion.[205] Legal scholars have explored whether the United States Supreme Court would

200. *But see* Cincinnati Women's Servs., Inc. v. Taft, 466 F. Supp. 2d 934, 946 (S.D. Ohio 2005) (holding that a $100 increase in the cost of abortion, which equaled up to a 25% increase in the overall cost of the procedure, did not constitute an undue burden on the right to obtain an abortion), *aff'd in part*, *rev'd in part*, 468 F.3d 361 (6th Cir. 2006).

201. Again, *Casey* may be interpreted to require a higher standard than this. *See* Tobin, *supra* note 25, at 125-26. But following *Gonzales* and other interpretations, we will assume that this is the standard for the purposes of this argument.

202. *Casey*, 505 U.S. at 882-83.

203. *Id.* at 895.

204. *Id.* at 886.

205. *See supra* Part III.B. (noting that abortion regulations that take effect prior to viability are no longer subject to strict scrutiny).

declare unconstitutional legislation regulating abortion that has an illegitimate purpose, even in circumstances when such legislation does not, in effect, create a substantial obstacle.[206] The Texas Sonogram Act does not present a case in which the purpose of the legislation is difficult to determine. To the contrary, the caption of the Texas Sonogram Act reads, "Voluntary and Informed Consent."[207] Proponents of this Act would argue that requiring a woman to undergo a sonogram and requiring her doctor to describe the images on the sonogram simply gives women information germane to their decisions. The sound of the heart auscultation and the sight of the fetal sonogram image are pieces of information that some women may indeed consider as part of the decision-making process, and thus the Act could be deemed rationally related to the legitimate government purpose of informed consent. We will therefore examine the next set of questions under *Casey*: (1) whether this information is relevant to the decision to have an abortion; (2) whether it is truthful and non-misleading; (3) whether it unduly hinders women's decision-making process; and (4) whether it poses a substantial obstacle to the right to choose an abortion.[208]

A. *Relevant to Her Decision*

There are cases where information garnered by a sonogram may be quite relevant to a woman's decisions regarding her pregnancy. For example, a sonogram could reveal fetal abnormalities or ectopic pregnancies. In addition, doctors may conclude for other reasons that a sonogram is medically necessary prior to administering an abortion.[209] The Texas Sonogram Act, however, requires a woman to undergo a

206. *See* Wharton, et al., *supra* note 29, at 346 ("[L]ower courts have misread *Mazurek* in precisely this manner, misconstruing it as the death of the purpose prong.") (footnote omitted); *see also* Amy E. Crawford, Comment, *Under Siege: Freedom of Choice and the Statutory Ban on Abortions on Military Bases*, 71 U. CHI. L. REV. 1549, 1566 & n.98 (2004).

207. TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2013).

208. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877, 882-84 (1992).

209. *See* Robertson, *supra* note 7, at 346; *see also* Vandewalker, *supra* note 25, at 28.

sonogram and hear the description of its image in every case, regardless whether the sonogram is medically necessary.[210] The issue, therefore, is whether states may determine that information proffered by a forced description of a sonogram is relevant to a woman who has chosen to have an abortion even in those cases in which the sonogram is not deemed medically necessary.

The United States Court of Appeals for the Fifth Circuit Court examined the relevancy of the sonogram requirement in 2012. The Circuit Court stated,

> [T]he provision of sonograms and the fetal heartbeat are routine measures in pregnancy medicine today. They are viewed as 'medically necessary' for the mother and fetus. Only if one assumes the conclusion of Appellees' argument, that pregnancy is a condition to be terminated, can one assume that such information about the fetus is medically irrelevant. The point of informed consent laws is to allow the patient to evaluate her condition and render her best decision under difficult circumstances. Denying her up to date medical information is more of an abuse to her ability to decide than providing the information.[211]

The extraordinary aspect of this statement is that the court of appeals made this claim while reviewing a regulation that is triggered only when a woman has presented herself for an abortion.[212] Thus, she has already decided that her pregnancy is a condition to be terminated when she is forced to undergo a sonogram. To describe the Texas sonogram requirement as being about "routine measures in pregnancy medicine"[213] is to completely distort the situation for women to whom this

210. § 171.012.

211. Tex. Med. Providers Performing Abortions Servs. v. Lakey, 667 F.3d 570, 579 (5th Cir. 2012).

212. *See id.* at 573.

213. *Id.* at 579.

legislation applies. Further, although this statement by the court of appeals suggests that a woman cannot truly decide to have an abortion without first having access to the information proffered by the sonogram, the court of appeals never makes clear why this would be so.

Obviously the information garnered by a sonogram is not necessary for a woman to understand the effect of an abortion on a fetus; every competent woman seeking an abortion understands that abortion results in the destruction of the fetus. Perhaps the court of appeals is saying that states may determine that a woman cannot truly understand what abortion is without seeing or hearing a description of the fetus in her uterus at that moment. Why this would be the case is, again, never fully elucidated by the court. The court of appeals does, however, rely on the Supreme Court's determination in *Casey* that, in the context of abortion, the concept of informed consent is "broad enough to include the potential impact on the fetus."[214] Understanding *Casey's* determination of what is relevant to a woman's decision for abortion then is important to determining whether the Act would fail the requirement of relevance here.

The *Casey* Court concluded that the information doctors were required to provide to women seeking abortions, including the "probable gestational age of the unborn child," could not be said to be entirely irrelevant to the woman's decision to abort.[215] The rationale to support this claim is rather surprising and merits examination. The Supreme Court stated,

> It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a

214. *Id.* at 580 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 883 (1992)).

215. *Casey*, 505 U.S. at 882-83.

> woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.[216]

This language suggests that the Supreme Court believed that some women undergoing abortions might not understand the consequences of an abortion for the fetus and will be psychologically damaged when they later learn the truth. However, this makes no sense if interpreted literally to mean that women don't know abortion ends in the destruction of the fetus. Therefore, the Court must be relying on the notion that knowing the age of the fetus somehow relates to understanding what abortion is in another way.

The Court deciding *Casey* also suggested that information regarding the gestational age of the fetus is relevant to informed consent for the purpose of protecting the health of the woman.[217] This idea was relied on heavily in *Gonzales*, as we saw, as a basis for removing a woman's decision regarding an abortion procedure altogether.[218] It is important to note, however, that the Court in *Casey* does not, in fact, rely on the claim that information regarding the consequences of abortion for the fetus is related to informed consent by protecting women's psychological well-being. The Court seemed to recognize the possibility that this kind of information may not, ultimately, truly be found to relate to women's health outcomes when they say that information about consequences to the fetus when one is having an abortion may be allowed "even when those consequences have no direct relation to her health."[219]

Nonetheless, the Court stated in *Casey* that information relating to the impact of an abortion upon a fetus may be relevant for other reasons.[220] To support this view, the Court relied upon the example of a person undergoing a kidney

216. *Id.*
217. *Id.* at 881-82.
218. *See supra* Part III.C.
219. *Casey*, 505 U.S. at 882.
220. *Id.* at 882-83

transplant, stating that information regarding health risks to the organ donor would be relevant to the transplant patient's decision to undergo the procedure.[221] This analogy further confuses the issue. Obviously a pregnant woman knows the "risks" of abortion for the fetus; the sole purpose of an abortion is to terminate the pregnancy. This analogy of the transplant patient taking into consideration the risks that the organ donor would be facing does not apply. Nonetheless, the *Casey* Court concluded that all of the required information including the information regarding the age of the fetus is relevant to a woman's decision to abort.[222]

Under the reasoning described above then, when applying *Casey's* holding to the Texas Sonogram Act, are sonogram images (either described or viewed) relevant to a woman's decision to abort such that they may be required as an aspect of informed consent? Requiring a woman to undergo a sonogram and either hear or see the results of this intrusive procedure is quite different from simply being told the approximate age of the fetus. First, in *Casey*, women were being given information about the approximate stage of fetal development of their pregnancies and this information could not likely be accurately obtained in another way.[223] Other cases after *Casey* have held that states can even go so far as to include color pictures of fetal development at various stages to further women's understanding of fetal development.[224] So precisely what information does a sonogram image and the explanation thereof provide that cannot be obtain by these less intrusive means?

It may be true that a woman who requests such information would find it relevant to her decision, but the argument that no woman can make a truly informed decision about abortion without seeing or hearing about the sonogram

221. *Id.*
222. *Id.*
223. *Id.*
224. *See* Eubanks v. Schmidt, 126 F. Supp. 2d 451, 459 (W.D. Ky. 2000); *see also* Moredock, *supra* note 29, at 1989 ("Even though some of the fetal development photographs included in the pamphlet [in *Eubanks*] were color-enhanced and others were enlarged, the court found the materials to be 'truthful and not misleading.'").

image of her fetus is seriously problematic. As discussed further below, a sonogram image is not an unqualified true fact, but an image that fails to disclose the full reality of pregnancy.[225] Further, forcing women to have to view or hear about their own "individual" fetus is an obvious attempt to "personify the fetus."[226] If all the sonogram is meant to show is the stage of fetal development of the pregnancy, this information is already being provided in other ways. Thus, the sonogram is redundant and provides no new relevant information.

Finally, this line of argument that no woman can give informed consent to an abortion without reviewing her sonogram information suggests that all women who choose abortion must not take the existence of the fetus seriously. It suggests that women cannot on their own make the connection between the fetus growing in their womb and the fact that it exists, that it will grow and develop, and that it may even become a newborn baby—their newborn baby. This claim diminishes the dignity of women who are sometimes put in the difficult position of choosing between a human organism starting to grow within them and all of the other commitments they already have, whether they be to children, jobs, schooling, or something else. To accept that viewing a sonogram is necessary for a woman to make an informed decision to abort is to accept unquestioningly a stereotypical pro-life view about women; that a woman would not choose to abort, but for the fact that she either does not know what abortion truly is or does not understand what she is truly doing when she has one.[227] Taking this line of reasoning one step further provides a basis for states to ban abortions in order to protect women from themselves.[228]

225. *See infra* Part IV.B.

226. Neal Devins, *How* Planned Parenthood v. Casey *(Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1341 (2009) (quoting *Requirements for Ultrasound*, *supra* note 4, at 1).

227. *See generally* Caroline Morris, *Technology and the Legal Discourse of Fetal Autonomy*, 8 UCLA WOMEN'S L.J. 47, 65-67 (1997) (discussing the use of fetal imagery by pro-life proponents in the abortion debate).

228. Some commentators have suggested that *Gonzales* has already set us down this road by accepting the belief that women need to be protected from their own decision to abort. *See, e.g.*, Dresser, *supra* note 118, at 1617

B. *Truthful and Non-misleading*

Regarding the Texas Sonogram Act, the Court of Appeals for the Fifth Circuit declared that, "required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information."[229] Yet, even this seemingly non-controversial claim is arguable when examined in more depth. To begin, theorists have discussed the misleading nature of sonogram pictures in general; especially ones that are taken later in pregnancy and are often enhanced for the public eye.[230] Sonograms produce images that are created rather than captured.[231] The images popularly shown depict fetuses as small, baby-like entities, floating freely through what appears to be empty space.[232] In fact, one description of the first widely-disseminated image of the developing fetus described it as, "[t]he unfinished child looking like an astronaut in its transparent bubble."[233] These visual images create the false picture that the fetus is a fully developed and independent entity, like a little baby trapped in a hostile environment. The relationship of the fetus to the pregnant woman disappears, and the role of the pregnant woman in fetal development is glaringly absent. In effect, these popularly disseminated sonogram images create an entity that simply does not exist—a fetus that is physically independent

("With *Gonzales v. Carhart* came a double bind: neither the traditional disclosure standard nor a heightened one offered an adequate means of protecting women's interests. Put differently, the Supreme Court has gone from saying that the government may not require, as part of informed consent, information that is designed to discourage the abortion choice, to saying that the government may require such material so that women will make 'mature and informed' decisions and will be protected from later regret, to saying that the government may simply eliminate an abortion choice so that women are protected both from the anxiety that adequate information could provoke and from the regret that could come if later they were to learn that information.") (footnotes omitted).

229. Tex. Med. Providers Performing Abortions Servs. v. Lakey, 667 F.3d 570, 577-78 (5th Cir. 2012).

230. *See* Rosalind Pollack Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction,* 13 FEMINIST STUD. 263, 280-83 (1987).

231. Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice,* 56 UCLA L. REV. 351, 378-79 (2008).

232. Petchesky, *supra* note 230, at 270.

233. Sanger, *supra* note 231, at 355 (footnote omitted).

from the pregnant woman. To present the fetus as a separate entity is to obfuscate the reality of the pregnancy itself—the dependence of the fetus upon the pregnant woman's body. Surely, this type of sonogram image can be said to be misleading then in that the pregnant woman and her experience of the pregnancy literally disappears from view.

No doubt proponents of the Texas Sonogram Act would try to distinguish the sonogram image being described above from the one that a pregnant woman is forced to hear about and encouraged to see in Texas. Such proponents might argue that the sonogram image does not show a "created" baby-like fetus, but instead depicts the fetus as it exists at the moment when the woman carrying that fetus is deciding whether to terminate her pregnancy. Because most abortions are performed during the early stages of pregnancy, the images captured by a sonogram are not likely to be so compellingly baby-like and may, in fact, appear to be more blob-like than baby-like.[234] Regardless, the image of the fetus depicted by these sonograms remains totally divorced from its true context: one of complete embeddedness in the pregnant woman's womb. In addition, sonographers often contribute to the "creation" of the fetal image in actual practice.[235] What might appear to be a blob to the uneducated eye can be transformed into a head or an arm with the sonographer's guidance.[236] Some sonographers even ascribe meaning to movements beyond what can possibly be true, such as in descriptions of the fetus as "waving" or "hiding."[237]

The fact that this sonogram is of the pregnant woman's actual fetus may make it more misleading in some ways rather than less. Not only does a sonogram perpetuate the false image of the fetus as an independent entity, but it also invites a significantly higher emotional response among women because it personifies the fetus.[238] As one commentator has said, "even a

234. *Id.* at 369, 382-83.
235. *Id.* at 368-70.
236. *Id.*
237. *Id.* at 369.
238. Devins, *supra* note 226, at 1341 (citing *Requirements for Ultrasound*, *supra* note 4, at 1). Although this may be true, it is important to emphasize that this does not suggest that women are more emotional than

truthful message may be misleading when it inappropriately takes advantage of emotional influence to bias an individual's decision away from the decision that would be made in a non-emotional, fully informed state."[239] All relevant information regarding fetal development can be provided to pregnant women by legal means free of emotional influence and bias.[240] The Texas legislature, however, mandates a means that creates and then preys upon the heightened emotional state of the pregnant woman, thus misleading her.[241]

Perhaps most misunderstood and overlooked in this discussion, however, is the meaning of the experience of a woman forced by the State to have a sonogram. As one theorist has noted:

> Mandatory ultrasound laws require women to participate physically in what has become a rite of full-term pregnancy: the first ultrasound. It now operates as an early step in prenatal care. By virtue of having the screening at all, women are scooped into the social category of pregnant women, however brief they intend that status to be.[242]

The fact that it is the intrusive use of her own body, by capturing the sonogram image against her will, which transforms her experience of the pregnancy itself without her consent makes this violation even more egregious.[243] This socially-conditioned response to having an ultrasound, the feeling that one has, even momentarily, been transformed into

men in general or that women need to be protected from their own emotional vulnerability. This interpretation is problematic and must be overtly renounced. *See* Nadia N. Sawicki, *The Abortion Informed Consent Debate: More Light, Less Heat,* 21 CORNELL J.L. & PUB. POL'Y 1, 33-36 (2011).

239. Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading* Casey, 83 WASH. L. REV. 1, 27 (2008).

240. *Id.* at 30.

241. This problematic aspect of the required sonogram information is further discussed below. *See infra* Part IV.C.

242. Sanger, *supra* note 231, at 382.

243. *Id.* at 360.

a mother-to-be, robs women of the ability to make their own choices, free of bias, regarding how to view their state of pregnancy.[244] Regardless whether this aspect of sonograms was a motivating factor for proponents of the Texas Sonogram Act, the requirement that all women seeking an abortion must first undergo the often emotionally intense first rite of passage into actual motherhood certainly can be misleading to women who do not see themselves as mothers.

Therefore, not only is the image captured by the ultrasound misleading, but the social context of ultrasounds actually transforms pregnant women into would-be-mothers against their will, even if only temporarily. This entire process, as well as the images captured therein, does not appear to be the "epitome of truthful, non-misleading information" but, in fact, the exact opposite.[245]

C. *An Undue Burden on Women's Decision-making Liberty*

Regardless of whether courts deem state-mandated information provided to women seeking abortions to be truthful, non-misleading, or relevant, courts may deem such information unconstitutional if it unduly hinders a woman's decision-making process.[246] Obviously, although these are separate grounds for determining the constitutionality of an abortion regulation, there is some overlap between the various grounds. A showing that a regulation requires the delivery of information that is untruthful, misleading or irrelevant may also be part of showing that such regulation unduly hinders a woman's decision-making liberty.[247] However, even information that is truthful, non-misleading, and relevant in a narrow sense may pose an undue burden to women's decision-making liberty if it otherwise unduly hinders her ability to choose freely.[248] Thus, a court reviewing Texas's sonogram law could

244. *Id*. at 360, 373.

245. Tex. Med. Providers Performing Abortions Servs. v. Lakey, 667 F.3d 570, 578 (5th Cir. 2012).

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

247. *Id.* at 875-76.

248. *Id.* at 878.

reject the claim that the information it requires is misleading, but accept nonetheless the claim that the law violates women's decision-making liberty protected by *Casey*.

Precisely what type of interference with a woman's decision-making process constitutes an undue burden? The Court has ruled that a mandate requiring the delivery of untruthful, misleading, and/or irrelevant information hinders a woman's free choice, regardless whether such information significantly affected any woman's decision.[249] So, the crucial factor is not whether the required information actually succeeds in interfering with a woman's decision-making process. Instead, the issue of an undue burden turns on the nature of the interference itself and the method by which it interferes with a woman's decision. Information meant to persuade a woman to choose childbirth over abortion is constitutional.[250] Information that manipulates, coerces, or otherwise disrupts a woman's reasoning process presents an undue burden on her decisional liberty.[251]

To understand why this is so, we will examine the philosophical underpinnings of the doctrine of informed consent. Although the legal doctrine of informed consent may not be fully illuminating regarding the Texas Sonogram Act,[252] the philosophical examination of informed consent concepts provide a rich theoretical framework to help assess *Casey's* concern regarding burdens that interfere with a woman's free choice. In this context, where we are dealing with statutes that relate to medical decision-making, the examination of informed consent from a philosophical perspective establishes clear concepts regarding what renders a choice "free." These concepts help give content to the requirement that states may not create an undue burden on a woman's free choice in terms of interferences with her reasoning process itself. Thus, the following analysis of what information may be impermissible for true informed consent is not relying on the legal doctrine of informed consent to argue that states cannot legally require

249. *See supra* Part III.C.
250. *See supra* notes 152-58 and accompanying text.
251. *See supra* Part III.C.
252. Sawicki, *supra* note 238, at 5-6.

certain impermissible information. Instead, the informed consent doctrine, which specifies what is necessary for "free choice," is binding on states due to the constitutional requirement laid down in *Casey* that states may not unduly hinder a woman's free choice.

In addition, the purported purpose of the Texas Sonogram Act is to advance informed consent.[253] Indeed, *Casey* explicitly relates the informational requirements in that case to the state's asserted interest in "ensuring a decision that is mature and informed" and "to ensure an informed choice."[254] It therefore becomes necessary to examine both the legal and philosophical doctrines of informed consent in order to understand how far states may go in requiring information before they may be said to violate a woman's decisional liberty.

In the legal context, informed consent has its roots in the common law rule that any unwanted touching, even for the purpose of medical treatment, is a battery.[255] Thus, only by receiving the consent of a person seeking medical treatment will a doctor have the right to treat him or her. This approach emphasizes an "individual's right to control what happens to her body and to be protected from unwanted physical intrusions."[256] Interestingly, the Supreme Court has relied on this doctrine of consent prior to medical treatment as a foundation for a patient's constitutional right to refuse medical treatment under the Due Process Clause,[257] demonstrating a nexus between informed consent and individual liberty via the Due Process Clause. Around the 1950's, the legal and ethical concept of mere consent gave way to a requirement of informed consent.[258] Consent is "informed" when the person in question has the capacity to make decisions about his medical care, is participating voluntarily in the decision-making, and has information adequate and appropriate to such decision.[259]

253. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2013).

254. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 883 (1992).

255. *See* Manian, *supra* note 29, at 235-37.

256. *See* Dresser, *supra* note 118, at 1602-03 (citation omitted).

257. *See* Manian, *supra* note 29, at 237 (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990)).

258. *See* Gold & Nash, *supra* note 25, at 6.

259. *See id.* at 6-7 (citing 1 PRESIDENT'S COMM'N FOR THE STUDY OF

Further, many statutes suggest that the necessary information required for medical treatment must provide patients with "a general understanding of the procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedures."[260] Informed consent statutes are animated by concepts that are deeply entrenched within the biomedical ethics scholarship. The paternalistic model of medicine, where doctors are seen as the one empowered to make decisions for the welfare of their patients, has been slowly replaced by the idea that competent patients must be the ones authorized to make their own decisions.[261] *Canterbury v. Spence*, one of the leading cases discussing informed consent, recognized the underlying purpose of the informed consent doctrine was to show respect for a patient's decision-making capacity.[262] The recognition of the importance of this concept within a doctor-patient relationship has been the basis for one of the main bioethical principles—that of respect for autonomy.[263] The bioethical principle of respect for autonomy is the idea that patients are "free to choose and act without controlling constraints imposed by others."[264] Autonomy requires that decision-making be "free from both controlling interference by others and from certain limitations such as inadequate understanding that prevents meaningful choice."[265] This principle is based upon the belief that "each mature

ETHICAL PROBLEMS IN MED. AND BIOMEDICAL RESEARCH, MAKING HEALTH CARE DECISIONS: A REPORT ON THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT- PRACTITIONER RELATIONSHIP 63 (1982) [hereinafter MAKING HEALTH CARE DECISIONS]).

260. *See* Tobin, *supra* note 25, at 112 (quoting FLA STAT. § 766.103(3)(a) (2005)); *see also* Dresser, *supra* note 118, at 1602-04; Runels, *supra* note 152, at 185-88.

261. *See* Manian, *supra* note 29, at 235.

262. *See* Canterbury v. Spence, 464 F.2d 772, 781 (D.C. Cir. 1972); *see also* Manian, *supra* note 29, at 238.

263. *See* Manian, *supra* note 29, at 240 n.112; Vandewalker, *supra* note 25, at 5.

264. RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 8 (1986).

265. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 99 (6th ed. 2009). Autonomy is part of the basic standards of important medical organizations including the AMA and ACOG. *See* Gold & Nash, *supra* note 25, at 7; *see also* Vandewalker, *supra* note 25, at 67-69.

individual has a right to make the basic choices that affect her life prospects,"[266] which brings to mind the Court's determination in *Casey* that abortion regulations should "inform the woman's free choice, not hinder it."[267]

The concept of autonomy in biomedical principles, however, is not absolute. The principle of beneficence, the promotion of the welfare of others, is another central value of the doctor-patient relationship.[268] These two principles may conflict with one another in cases where, for example, a patient chooses to forego a treatment necessary for her health. The doctrine of informed consent, and the Supreme Court in *Cruzan v. Director, Missouri Department of Health*, however, support the claim that, for competent individuals, when the two principles conflict the right to autonomy trumps the principle of beneficence.[269] At other times, however, these two principles do work hand-in-hand. In fact, the doctrine of informed consent recognizes not only that the patient should be the ultimate decision-maker regarding her fate, but also that she may be the one in the best position to protect her own interests, including health outcomes, when given the proper information to decide.[270]

The doctrine of informed consent also contains a well-defined exception that allows for patients to opt out of receiving certain information even when it is relevant to and necessary for fully informed consent. The patient waiver exception, which allows patients to refuse to receive certain pieces of information, is widely recognized as valid.[271] This exception is patently consistent with the principle of autonomy. If a patient chooses not to receive certain information, then the doctor

266. Manian, *supra* note 29, at 240.

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

268. *See* Vandewalker, *supra* note 25, at 34-35.

269. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

270. *See* President's Comm'n for the Study of Ethical Problems in Med. and Biomedical and Behavioral Research, *The Values Underlying Informed Consent*, *in* BIOMEDICAL ETHICS 120-22 (David DeGrazia, Thomas A. Mappes, & Jeffrey Brand Ballard eds., 7th ed. 2011).

271. *See* Manian, *supra* note 29, at 241 n.116; Vandewalker, *supra* note 25, at 67-68 (citing Am. Coll. of Obstetricians & Gynecologists, Committee on Ethics Opinion No. 439, Informed Consent 1, 3 (2009)); *see also* Sawicki, *supra* note 238, at 34-35.

should respect that patient's autonomy so long as the patient understands the consequences of his refusal.[272]

An application of these principles of informed consent to abortion regulations demonstrates that some disclosures could violate the requirements of informed consent even if they are truthful, non-misleading, and relevant. Take, for example, a statute that requires all women who are contemplating a second trimester but pre-viability abortion to view the fetal remains after an abortion of a fetus near the same age as the one they are carrying. Or, for a less controversial example, imagine a statute that required all men planning to undergo prostate surgery, a surgery that many patients often claim to regret,[273] to watch the surgery being performed live before they could give their informed consent to the surgery. In each example, the information delivered to the patient is truthful, but the graphic nature of the information could violate respect for autonomy by unduly influencing that person's decision.[274] How exactly does it do that, and what kind of graphic information might have this effect?

One idea central to informed consent is that "[a] choice that has been coerced, or that resulted from serious manipulation of a person's ability to make an intelligent and informed decision, is not . . . the person's own free choice."[275] The principle that people have the right to make their own decisions about medical care free from coercion and manipulation is part of the basic standards of many important

272. *See* Manian, *supra* note 29, at 241; Vandewalker, *supra* note 25, at 68.

273. *See* Manian, *supra* note 29, at 257 (discussing the results of a study concluding that a number of men regret prostate surgery because they experienced reduced sexual function afterwards).

274. Another independent ground for invalidating such statutes is the First Amendment right of physicians. As the district court said regarding the Fifth Circuit's decision to uphold the Texas Sonogram Act, "The concept that the government may make puppets out of doctors, provided it does not step on their patients' rights, is not one this Court believes is consistent with the Constitution, in the abortion context or otherwise." Tex. Med. Providers Performing Abortion Servs. v. Lakey, 2012 U.S. Dist. LEXIS 14721, at *12-13 (W.D. Tex. Feb. 6, 2012). Thus, the First Amendment right of doctors also needs to be addressed in conjunction with women's due process arguments.

275. *See* Gold & Nash, *supra* note 25, at 7 (quoting MAKING HEALTH CARE DECISIONS *supra* note 259, at 63).

medical organizations including the American Medical Association, and the American College of Obstetrics and Gynecologists.[276]

In *Casey,* the Court was concerned enough with regulations designed to manipulate a woman's choice that it banned outright any state from requiring that misleading, untruthful, or irrelevant information be provided to women seeking an abortion.[277] Some commentators have suggested that regulations which manipulate women's free choice violate *Casey* as well.[278] One theorist expressed his belief that:

> [A] communication designed to influence a woman's decision whether to abort *may* be considered an undue burden when it is inappropriately manipulative (deliberately or not) by inducing fear or anxiety, or when it inappropriately affects her ability to decide, leading to a decision that she would not have made when not under the influence of such an emotion.[279]

According to Reva Siegel, "[u]nder the undue burden framework, dignity-respecting regulation of women's decisions can neither manipulate nor coerce women."[280]

Biomedical ethicists have studied when information manipulates choice so as to undermine informed consent by interfering with a patient's ability to fully understand his or her options.[281] This can occur by providing false or misleading information,[282] by "framing" decisions in such a way that a choice or risk seems better or worse than it is,[283] and by

276. S*ee id.*; Vandewalker, *supra* note 25, at 68.

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

278. *See, e.g.*, Blumenthal, *supra* note 239, at 31-32.

279. *Id.* at 31 (emphasis added) (footnote omitted).

280. *See* Siegel, *Dignity and the Politics of Protection*, *supra* note 76, at 1753.

281. *See* FADEN & BEAUCHAMP, *supra* note 264, at 365-66; *see also* BEAUCHAMP & CHILDRESS, *supra* note 265, at 130, 134.

282. *See* Vandewalker, *supra* note 25, at 13-20.

283. *Id.* at 38 (citing FADEN & BEAUCHAMP, *supra* note 264, at 320-21;

engaging in "psychological manipulation."[284] Psychological manipulation, which is the use of information to unduly influence a person's decision, involves "appeals to emotional weaknesses, and the inducing of guilt or feelings of obligation."[285] This form of manipulation may not affect the patient's understanding, but may nonetheless interfere with free choice by creating a heightened emotional state in the patient and then requiring the patient to decide while in such emotional state.[286] This is exactly what the Texas Sonogram Act does.[287]

The Texas Sonogram Act's requirements that medical providers display a sonogram image of the fetus and present the fetal heartbeat to a woman seeking an abortion constitutes the provision of graphic information that manipulates a woman's choice by appealing directly to her emotions.[288] For those women who would choose to have the sonogram and/or hear the heartbeat, regardless whether it is mandated by the State, that information could be relevant to their decision and thus not manipulative of their choice. But, for all those women who would refuse a non-medically necessary sonogram and/or choose not to hear the results, requiring them to undergo such procedures against their will is an obvious attempt to manipulate their emotions in such a way as to influence their choice.[289] It is simply an undue burden on a woman's "free choice" when considering abortion.

Proponents of the Texas Sonogram Act might argue that its purpose merely is to persuade a woman to decide against an abortion rather than to manipulate her decision.[290] As discussed earlier, however, the sonogram itself and the description of the fetus both personify the fetus and transform the pregnant woman into a would-be mother.[291] Such

BEAUCHAMP & CHILDRESS, *supra* note 265, at 130, 134).

284. *See id.* at 39.
285. FADEN & BEAUCHAMP, *supra* note 264, at 366.
286. *See* Vandewalker, *supra* note 25, at 42-44.
287. TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2013).
288. *Id.* § 171.012(a)(4).
289. Vandewalker, *supra* note 25, at 43-44.
290. *Id.* at 29-30.
291. *See supra* Part IV.A.

information does not appeal to the process of reasoning in order to persuade; it appeals to her emotions in order to manipulate. It is true that not all emotional influences affecting a person's decision are unduly manipulative, since people make decisions based on their own emotional experiences.[292] Nonetheless, requiring the provision of information that attempts to encourage a certain decision by completely circumventing reasoned deliberation and instead inducing a certain emotional response is quite a different matter. This is where persuasion ends and manipulation begins in the context of decision-making and informed consent.

It is important to note that such manipulation creates a constitutionally-defined undue burden even if it does not actually affect the outcome of a woman's decision.[293] Although people making a decision during a heightened emotional state may make choices they otherwise would not,[294] some emotional manipulation does not have the desired effect. Accordingly, some women continue to choose abortion.[295] Nonetheless, just as the Court in *Casey* declared that untruthful, misleading and/or irrelevant information acts as an undue burden on a

292. *See, e.g.*, Sawicki, *supra* note 238, at 33.

293. *Cf.* Vandewalker, *supra* note 25, at 44 ("If this emotional reaction were actually impossible for the patient to resist as she attempts to decide, it would cause her to fail the condition of noncontrol necessary for autonomous action. This is because an individual who acts in accord with an emotion that is irresistible does not make a choice at all. Unlike being rationally persuaded of prudential or moral considerations, an irresistible emotion unavoidably compels an action and prevents the exercise of autonomy."). We argue above that attempted manipulation is all that is needed to pose an undue burden and this extra finding—that the emotional reaction is irresistible—is not necessary to prove the unconstitutionality of potentially manipulative information, even if it is necessary to show that the information actually did manipulate an individual's decision in any particular case. *See supra* Part IV.C.

294. *See* Blumenthal, *supra* note 239, at 4-5, 25-26 (discussing how truthful and non-misleading information that preys on the emotional vulnerabilities of a woman seeking an abortion can limit her autonomy); Sanger, *supra* note 231, at 396-97 (describing the sonogram requirement as an attempt to overpower reason rather than appeal to it); Sawicki, *supra* note 238, at 16-17.

295. *See* Robertson, *supra* note 7, at 351-52 (citing studies in British Columba and Alabama determining that women who chose to view a sonogram prior to abortion thereafter decided not to abort their fetus in a few cases); Vandewalker, *supra* note 25, at 30 & n.149.

woman's right to choose by unduly interfering with the decision-making process itself regardless of any showing that the information actually affected a woman's eventual decision, so information that manipulates a woman's decision is an undue burden regardless of outcome.[296]

D. *Other Substantial Obstacles Posed by the Texas Sonogram Act*

Other aspects of the Texas Sonogram Act constitute a substantial obstacle in the path of women seeking abortions in Texas. In *Casey*, the Court recognized that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."[297] Here, the relevant group is the women who would not otherwise have chosen to have this procedure or hear this information. The question, therefore, is whether the Texas Sonogram Act places a substantial obstacle in the path of a large fraction of that relevant group of women. One important aspect of this law, as it is written, is that it may require transvaginal ultrasounds to be performed in a large proportion of cases.[298] Although some commentators have argued that ultrasounds are non-invasive procedures,[299] this is not the case when performed transvaginally. This procedure is not only invasive, but it is invasive in a way that can only be described as demeaning. To force a woman to remain still while a probe is inserted into her vagina against her will is to require a procedure that is tantamount to rape. If forcing women to submit to forced vaginal probes against their will is not a substantial obstacle, it is quite difficult to imagine anything short of an absolute bar to choice qualifying as a substantial obstacle. Yet, *Casey* clearly did not set so high a bar.[300] To

296. *See* Robertson, *supra* note 7, at 352 ("[G]oing ahead with the abortion [after viewing a sonogram] shows that the requirement did not constitute an obstacle, but it does not show that the woman was not burdened by it.").

297. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 894 (1992).

298. *See supra* Part I; *see also supra* note 3 and accompanying text.

299. *See, e.g.*, Roseberry, *supra* note 30, at 399.

300. *See supra* Part II.B.

require a woman to undergo such a personal violation in the absence of any clear medical benefit[301] places a substantial obstacle in her path of choice.

Many commentators have described the other aspects of this law that place a substantial obstacle in the path of women seeking abortions in Texas. Since these arguments have been made convincingly and extensively elsewhere, the main points are only briefly summarized below.

First, the Texas Sonogram Act denies women their constitutionally protected right to refuse treatment for reasons that fit none of the usual circumscribed exceptions.[302] Is an obstacle that requires women to waive one of their basic constitutional rights before they may have an abortion an undue burden then? It certainly seems reasonable to conclude that this could be so interpreted by the Court.

Second, by requiring all women to have an ultrasound, the Texas Sonogram Act is likely to increase the costs associated with having abortions. As one analysis of Oklahoma's abortion law examined, requiring an ultrasound in that state could increase costs of abortion "between forty-seven percent and seventy percent."[303] Such cost increase, if similarly exhibited in Texas, may constitute an undue burden under *Casey*.

Third, some commentators believe that laws like this one could pose a substantial obstacle by creating psychological burdens for women forced to receive a sonogram and hear the information detailed therein against their will.[304] The psychological burden could be created in either one of two ways. First, a woman forced to undergo a sonogram and hear it described may not change her mind regarding her decision to have an abortion, but she may experience more grief or psychological trauma as a result of that experience.[305] Second, a woman who, in the midst of this heightened emotional state, chooses not to have an abortion and instead gives birth to a

301. *See supra* Part IV.A.

302. *See* Weber, *supra* note 30, at 368, 381.

303. *Id.* at 371.

304. *See* Roseberry, *supra* note 30, at 399-400; Weber, *supra* note 30, at 382.

305. *See* Robertson, *supra* note 7, at 352 (describing anecdotal evidence of potential emotional upset).

child for whom she is not in a good position to care also may also experience psychological trauma.[306] The question is whether this kind of psychological trauma would rise to the level of creating a substantial obstacle in a large fraction of cases where women chose not to have or see the sonogram but were forced to anyway. Analyzing this type of argument would require empirical research, which may help to assess further the true psychological burdens that laws like this may cause women seeking abortions.

V. Conclusion

There is much at stake when the Supreme Court next addresses abortion regulations. *Casey's* constitutional requirements have been significantly misread by many. Although the joint opinion in *Casey* did recognize that protecting fetal life may be a permissible state interest, the protection of potential life cannot be achieved through violation of a woman's right to make an informed decision. Thus, the joint opinion in *Casey* clearly set the requirement that no regulation prior to viability may unduly interfere with a woman's decision-making process. The Justices who comprised the majority in *Gonzales* missed this crucial element of *Casey* and therefore failed to protect women's full constitutional rights.

This Article has implications for many state abortion regulations in addition to the Texas Sonogram Act. The arguments herein may be used to show that any state law that forces women to have medically unnecessary sonograms prior to abortion is unconstitutional regardless of whether such law requires that medical practitioners describe the images to the patient. In addition, this Article provides ammunition to those seeking to invalidate state regulations that require the delivery of inaccurate information to women seeking abortion. Lastly, and more generally, this Article shows why it is

306. *See* Weber, *supra* note 30, at 369-71, 382 (discussing the argument that women being manipulated to carry to term may have psychological trauma). This psychological trauma challenges proponents' claims that such abortion regulations serve the purpose of protecting women's health.

unconstitutional to allow any kind of state regulation of abortion that purports to protect women from themselves in terms of their decision-making processes.

The joint opinion in *Casey* acknowledged that women are equal citizens entitled to the same liberties of thought, choice, and action as other members of society. It also protected women's rights to make reproductive decisions by declaring unconstitutional not only those state regulations that have the purpose or effect of barring women from choosing an abortion but also those regulations that manipulate women's decision-making processes, even if manipulation is justified as being in a woman's best interest. Forty years after *Roe* first declared abortion to be a fundamental right, courts must uphold that promise and recognize that women's liberty requires the right to make an informed choice, free from regulations that treat women as less than full persons under law.