

SEEING AND BELIEVING: MANDATORY ULTRASOUND AND THE PATH TO A PROTECTED CHOICE

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Several state legislatures now require that before a woman may consent to an abortion, she must first undergo an ultrasound and be offered the image of her fetus. The justification is that without an ultrasound, her consent will not be fully informed. Such legislation, the latest move in abortion regulation, supposes that a woman who sees the image will be less likely to abort. This Article explores how visual politics has combined with visual technology, and how law has seized upon both in a campaign to encourage women to choose against abortion. While rarely analyzed, the significance of seeing, or what one court has called “sensory and contemporaneous observance,” in fact appears throughout the law. This Article develops a “visuality of law,” focusing specially on the treatment of fetal imagery.

Drawing upon medical and ethnographic literature on sonography, this Article situates the regulatory appeal of mandatory ultrasound within a preexisting visual familiarity with the fetus. I argue that while a welcome and rewarding experience in the context of wanted pregnancies, ultrasound becomes pernicious when required by law in connection with abortion. The argument I develop is that not only is an abortion decision itself protected, but so is the deliberative path a woman takes to reach that decision.

Mandatory ultrasound intrudes upon that protected area of decisionmaking in several respects. First, simply by virtue of having an ultrasound, a pregnant woman is promoted into the category of mother and it is against this conscripted status that she must proceed. Second, unlike other compulsory forms of abortion disclosure, the statutes require the woman to use her body to produce the very information intended to dissuade her from pursuing an abortion. The resulting fetal image is intended as a self-evident statement about the meaning of human life.

But characterizing the fetus as a child, as most ultrasound statutes do, is a political description, not a scientific one. It confuses medically informed consent with what I identify as morally informed consent, that realm of personal considerations that

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are a woman's alone to determine. Imbued with indelible social meaning, the mandatory ultrasound requirement replaces consent with coercion—not about the ultimate decision, but about how a woman chooses to get there.

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INTRODUCTION

On August 29, 2005, as Hurricane Katrina approached the Gulf Coast of the United States, the National Oceanic and Atmospheric Administration (NOAA) captured the ferocity of the storm's progress in a series of memorable color satellite pictures.¹ The threatening hurricane appears as a dense swirling mass with a small eye at its center, thinning into a wispy tail that curls off at the end. Think perhaps of a fat tadpole or a pronounced paisley pattern.

Others, however, saw a very different design in the NOAA satellite image. On August 30, a group called Columbia Christians for Life (CCL) emailed a press release of sorts containing the NOAA photo of Katrina bearing down on the coast. The accompanying text explained:

[The s]atellite picture of Hurricane Katrina at NOAA.com looks like a 6-week unborn human child as it comes ashore the Gulf Coast The image of the hurricane above with its eye already ashore at 12:32 PM Monday, August 29 looks like a fetus (unborn human baby) facing to the left (west) in the womb, in the early weeks of gestation (approx. 6 weeks). Even the orange color of the image is reminiscent of a commonly

1. See Nat'l Oceanic & Atmospheric Admin., Hurricane Katrina Photos, <http://www.katrina.noaa.gov/satellite/images/katrina-08-29-2005-1615z.jpg> (last visited Aug. 28, 2008).

used pro-life picture of early prenatal development (see sign with picture of 8-week pre-born human child below). In this picture, and in another picture in today's on-line edition of USA Today, this hurricane looks like an unborn human child.²

Moreover, the resemblance between the satellite snapshot of Katrina and an unborn human child was no coincidence. According to the CCL, there was a direct relation between the storm's prenatal manifestation and the destruction wrought upon New Orleans. As the CCL press release explained, "Louisiana has 10 child-murder-by-abortion centers—FIVE are in New Orleans." The message concluded with a warning: "God's message: REPENT AMERICA!"³

I begin with a few observations about the idea and the image of a vengeful, God-sent fetus taking aim at sinful New Orleans. This explanation for Katrina is, in some respects, a familiar one. For most of human history, disasters natural and otherwise have been interpreted as divine retribution for one human failing or another. An angry God or gods have long punished the wicked by means of hailstorms, pestilence, dam bursts, and most recently AIDS.⁴ Such calamities are often accompanied by visual imagery—Satan's face visible in the dark smoke arising from the fallen World Trade Centers, for example—which operates as a divine signature of sorts just to underscore the point.

There are, of course, other explanations, not only about why disasters happen, but why when they do, the face of God or the devil is made visible, or in any event is seen. From a scientific point of view, we know that humans are programmed to construct faces from abstract designs: It enables infants to identify even primitively those who first feed and protect them.⁵ This hardwired

2. Email From Columbia Christians for Life to Columbia Christians for Life Members, <http://www.christianlifeandliberty.net/CCL05-14.doc> (last visited Aug. 28, 2008). The email was widely reported in the press and republished on websites and blogs. See, e.g., The Book of Shadow, <http://thebookofshadow.blogspot.com/2005/09/hurricane-katrina-and-god.html> (Sept. 4, 2005); Posting of T.G. to Salon.com, http://archive.salon.com/politics/war_room/2005/08/30/hurricane/index.html (Aug. 30, 2005, 19:40 EDT).

3. Email From Columbia Christians for Life to Columbia Christians for Life Members, *supra* note 2. The Columbia Christians for Life announcement made additional connections between abortion provisions and catastrophe:

Baby-murder state # 1—California (125 abortion centers)—land of earthquakes, forest fires, and mudslides

Baby-murder state # 2—New York (78 abortion centers)—9-11 Ground Zero

Baby-murder state # 3—Florida (73 abortion centers)—Hurricanes Bonnie, Charley, Frances, Ivan, Jeanne in 2004; and now, Hurricane Katrina in 2005.

Id.

4. See generally TED STEINBERG, *THE UNNATURAL HISTORY OF NATURAL DISASTER IN AMERICA* (2d ed. 2000).

5. See Elizabeth Svoboda, *Faces, Faces Everywhere*, N.Y. TIMES, Feb. 13, 2007, at F1. For a more sophisticated explanation about the tendency to attribute "humanlike characteristics, motivations,

instinct may explain why people so easily see the man in the moon or, as is reported every now and again, the face of the Virgin Mary in a highway underpass.⁶

However, no data suggests that humans are similarly programmed to see the shape of a fetus. That particular visualization is not part of the evolutionary design, at least not yet. Still, what surprised me most about the CCL email was not that a pro-life group would hold legal abortion responsible for all the misery in the world, but that I too had no trouble seeing the fetus in the satellite picture of Katrina. I could see the looming figure with its beady little eye perfectly well. I think you would recognize it also.

How are we to understand this phenomenon? Unlike face recognition, familiarity with the fetal appearance has a rather short historical pedigree.⁷ Indeed, until recently it was not only that the fetus could not be seen, but that, early scientific inquiry aside, “the invisibility of the unborn [was] protected by a widespread taboo.”⁸ To be sure, fetal specimens or corpses were occasionally on display in biology departments,⁹ museums, and scientific exhibitions, and a “graduated set of human embryos” was a popular attraction at the 1933 Chicago World’s Fair.¹⁰ There is, however, a clear distinction between the bottled fetuses of the sideshow and the familiar fetus of today. The fetuses in these exhibits were “presented as curiosities or specimens, not as, people or

intentions, or emotions” to nonhuman agents, see Nicholas Epley, Adam Waytz & John T. Cacioppo, *On Seeing Human: A Three-Factor Theory of Anthropomorphism*, 114 *PSYCHOL. REV.* 864, 864 (2007).

6. Jennifer Lebovich, *Faithful See Mary on Underpass Wall*, *CHI. TRIB.*, Apr. 19, 2005, § 2, at 1.

7. Until the seventeenth-century, fetal representations imagined fully formed miniature men and women energetically engaged in utero in a range of human activities. See KAREN NEWMAN, *FETAL POSITIONS: INDIVIDUALISM, SCIENCE, VISUALITY* 26–33 (1996). By the late eighteenth century, the fetus had pictorially taken the tucked position we know today. See *id.* at 33, 39–40. By the late nineteenth century, intricate and accurate wax models of embryos and fetuses across species were used by medical researchers in the field then known as embryology. For pictures of the wax models, it is worth looking at NICK HOPWOOD, *EMBRYOS IN WAX: MODELS FROM THE ZIEGLER STUDIO* (2002). See generally JOSEPH NEEDHAM, *A HISTORY OF EMBRYOLOGY* (2d ed. 1959).

8. BARBARA DUDEN, *DISEMBODYING WOMEN: PERSPECTIVES ON PREGNANCY AND THE UNBORN* 32 (Lee Hoinacki trans., Harvard Univ. Press 1993) (1991). The desired invisibility of the fetus in earlier times may be related to the modern phenomenon of couples who do not announce their pregnancy until it is relatively secure, usually sometime after the first trimester.

9. Lynn M. Morgan, *Materializing the Fetal Body, or, What Are Those Corpses Doing in Biology’s Basement?*, in *FETAL SUBJECTS, FEMINIST POSITIONS* 43, 43 (Lynn M. Morgan & Meredith W. Michaels eds., 1999) (reporting the discovery of eighty-seven bottled fetuses in the basement of Mount Holyoke College’s Biology Department).

10. Sara Dubow, *Ourselves Unborn: Fetal Meanings in Modern America* 54–55 (May 2003) (unpublished Ph.D. dissertation, Rutgers University) (on file with author). In 1893, the Ziegler wax models won the top prize at the World’s Columbian Fair in Chicago. HOPWOOD, *supra* note 7, at 1. It is interesting that the 1893 exhibit was a general study of embryonic development. The wax models of human embryos and fetuses were displayed alongside the models of embryonic starfish, beetles, trout, and chicks, the emphasis less on human development than Darwinism. *Id.*

babies.”¹¹ Viewing them was understood as partly creepy, partly prurient, and partly educational.¹² But there was no claim that the specimens were themselves self-evident proof of “life” or of fetal personhood.

Historically, the event that converted pregnancy into something real was quickening, fetal movement felt by the mother. This was the exciting moment. After quickening, the woman was no longer pregnant in the abstract, she was “with child;” she was expecting a baby.¹³ To be sure, the invention and obstetric use of the stethoscope brought the fetus with its now audible heartbeat a bit closer to the surface. Still, the reality of the pregnancy was marked not by sight or sound but by movement—bodily sensations felt by the mother. *Seeing* a living fetus was, at least until the mid-twentieth century, beyond imagine.

The first wide scale public look took place in 1965 when *Life* magazine published Lennart Nilsson’s color photographs of a developing fetus in utero.¹⁴ As described by German historian Barbara Duden, and as some readers may recall, the pictures were beguiling: “[T]he unfinished child looking like an astronaut in its transparent bubble, a bluish-pink figure with protruding veins sucking its thumb, the vaguely human face with closed eyes covered by a tissue veil.”¹⁵ With only a slight effort, we are again looking at the satellite snap of Katrina.

This casual familiarity with the fetus strikes me as something different than seeing saints in spaghetti (or, as I once did, Nixon in an eggplant.)¹⁶ Whether explained scientifically as the human instinct to meaningfully connect shadows and lines or as a divine sign, such sightings are understood by all concerned to

11. Dubow, *supra* note 10, at 56.

12. A present day example might be the traveling exhibits of skinned corpses from China posed in various positions. See David Barboza, *China Turns Out Mummified Bodies for Display*, N.Y. TIMES, Aug. 8, 2006, at A1; Andrew Jacobs, *Cadaver Exhibition Raises Questions Beyond Taste*, N.Y. TIMES, Nov. 18, 2005, at B1.

13. See Barbara Duden, *Quick With Child: An Experience That Has Lost Its Status*, 14 TECH. SOC’Y 335, 341–43 (1992). As Kathryn Addelson makes clear, at quickening “a child came into the family, the community, and the church, with the attendant care, responsibility, and commitment that are involved” with each. Kathryn Pyne Addelson, *The Emergence of the Fetus*, in FETAL SUBJECTS, FEMINIST POSITIONS, *supra* note 9, at 26, 29.

14. See Lennart Nilsson, *Photograph of Fetus at Fifteen Weeks*, LIFE, Apr. 30, 1965, at 54–55; George P. Hunt, Editor’s Note, *A Remarkable Photographic Feat*, LIFE, Apr. 30, 1965, at 3.

15. DUDEN, *supra* note 8, at 14. That all but one of the *Life* photos were aborted or miscarried fetuses remains an ironic aspect of these now iconic images. Contrary to the promise of the accompanying text that the pictures show “human embryos in their natural state,” all but one of the fetuses on display had been surgically removed for a variety of reasons, then backlit and suspended in special fluid to achieve their luminous floating quality. NEWMAN, *supra* note 7, at 11–14. As others have pointed out, the images most crucial to the pro-life campaign were possible only because abortion was legal in Nilsson’s home country of Sweden. See *id.* at 11, 13, 17.

16. See NixonButtons.com, <http://www.nixonbuttons.com/posters.htm> (last visited Oct. 27, 2008).

be ephemeral and extraordinary. But seeing a fetus is no longer ephemeral or extraordinary. On the contrary, the fetus is now a familiar presence, one whose image turns up in high school biology texts, in movies, advertisements (“Is Something Inside Telling You to Buy a Volvo?”),¹⁷ and in 1994 on English 25p postage stamps.¹⁸ Indeed, following the routinization of ultrasound, almost everyone has seen, and many have admired, snapshots of a particular fetus, as happily expectant parents share “baby’s first picture” with the rest of us.¹⁹ We are, as Duden has observed, “overwhelmed with fetuses.”²⁰ They are creatures of significant social and commercial stature, as well, of course, a continued source of intensely personal, and sometimes private, emotions—often some combination of delight and distress, reflection and resolution.

The fetus has become a political creature as well. Fetal imagery, or even the word fetus, alerts us to the presence of abortion politics. Not only the poster child of the pro-life movement, the fetus is now the regular subject of protective legislation as lawmakers work to save it from harm at the hands of tortfeasors, felons, and mothers as well.²¹ As Rosalind Petchesky pointed out years ago, beginning in the 1980s, pro-life strategists sought “to make foetal personhood a self-fulfilling prophecy by making the foetus a public presence [in] a visually oriented culture.”²² And the strategy has succeeded well, though there has been something of a shift in the visual tactics. Early political efforts focused on images of aborted or soon-to-be aborted fetuses, as in the 1985 pro-life film *The Silent Scream*, which purported to show an abortion from the fetus’s perspective.²³

In the last several years, however, fetal imagery has expanded to include softer, more appealing representations. Certainly gory photos are always

17. Janelle Sue Taylor, *The Public Fetus and the Family Car: From Abortion Politics to a Volvo Advertisement*, PUB. CULTURE, Spring 1992, at 67, 67; see Carol Stabile, *Shooting the Mother: Fetal Photography and the Politics of Disappearance*, in *THE VISIBLE WOMAN: IMAGING TECHNOLOGIES, GENDER, AND SCIENCE* 171, 188 (Paula A. Treichler, Lisa Cartwright & Constance Penley eds., 1988).

18. Margaret B. McNay & John E. E. Fleming, *Forty Years of Obstetric Ultrasound 1957–1997: From A-Scope to Three Dimensions*, 25 *ULTRASOUND MED. & BIOLOGY* 3, 50 fig.43 (1999).

19. See generally LISA M. MITCHELL, *BABY’S FIRST PICTURE: ULTRASOUND AND THE POLITICS OF FETAL SUBJECTS* 3 (2001) (discussing how a trip to the sonographer has become “[o]ne of the most common rituals of pregnancy”).

20. DUDEN, *supra* note 8, at 7.

21. See Unborn Victims of Violence Act of 2004, 18 U.S.C. § 1841 (2006); Born-Alive Infants Protection Act of 2002, 1 U.S.C. § 8 (2006); 151 Cong. Rec. S512-14 (daily ed. Jan. 26, 2005) (statement of Sen. Brownback).

22. Rosalind Pollack Petchesky, *Foetal Images: The Power of Visual Culture in the Politics of Reproduction*, in *REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD AND MEDICINE* 57, 58 (Michelle Stanworth ed., 1987) (emphasis omitted).

23. Stills from the film are available at *The Silent Scream*, http://silentscream.org/silent_e.htm (last visited Oct. 4, 2008).

available online and sometimes paraded on billboard trucks²⁴ or outside abortion clinics.²⁵ At the same time, mutilated fetuses have been joined by more wholesome images. That is, the current case against abortion is often made by encouraging a positive engagement with what we might think of as the “friendly fetus.” This is the imagery from ultrasounds taken in late pregnancy, the familiar and well-articulated fetus who is already a member of the family. In an era that has been characterized by both the Vatican and the White House as “the culture of life,”²⁶ there may be disagreement about just what status that life should legally claim, but there is no disagreement or confusion about what the word life refers to: the unborn child.²⁷ As a result, as Petchesky observed in 1990, “the curled-up profile with its enlarged head and finlike arms . . . had become so familiar that not even most feminists question its authenticity (as opposed to its relevance).”²⁸

In this Article I explore how this everyday familiarity with fetal presence and appearance has been incorporated into the regulation of abortion in the United States through state laws that require that all women seeking an abortion must have an ultrasound first.

The Alabama Women’s Right to Know Act provides a good example of how this works. The Act requires that:

The physician who is to perform the abortion or the referring physician . . . perform an ultrasound on the unborn child before the abortion. . . . The woman shall complete a required form to acknowledge

24. See *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 813 (6th Cir. 2007). As part of its Reproductive Choice Campaign, the Center for Bio-Ethical Reform (CBR) volunteers drive box trucks displaying “large, colorful pictures depicting graphic images of first-term aborted fetuses” throughout the United States. *Id.* The court held that CBR’s free exercise rights were not infringed by police stopping billboard trucks out of concern for public safety after receiving reports that the drivers were wearing helmets, body armor, and talking on radio. *Id.* at 814–18, 823–24. However, the court in that case did find that CBR’s Fourth Amendment rights had been violated by the length of the stop. *Id.* at 829; see also *The Center for Bio-Ethical Reform*, <http://www.abortionno.org> (last visited Oct. 2, 2008) (depicting a graphic abortion video).

25. See *Hill v. Colorado*, 530 U.S. 703, 710 n.7 (2000) (quoting *Hill v. Thomas*, 973 P.2d 1246, 1250 (Colo. 1999) (describing protestors thrusting “their bloody fetus signs” in faces of clinic patients)).

26. Pope John Paul II explained in his 1995 Papal encyclical *Evangelium Vitae*, or the *Gospel of Life*, that the modern world is facing “an enormous and dramatic clash between good and evil, death and life, the ‘culture of death’ and the ‘culture of life.’” Pope John Paul II, *EVANGELIUM VITAE* ¶ 28 (1995), available at http://sborromeo.org/docs/evang_vitae.pdf.

27. DUDEN, *supra* note 8, at 2; see also Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 801–04 (2006) (tracing how “culture of life” vocabulary migrated from its origins in Roman Catholic theology to a political home with its own plank in the Republican Party platform). Within the sphere of pro-life discourse, the meaning of the phrase has become self-evident, requiring no definition. See, e.g., Mary Ann Glendon, *From Culture Wars to Building a Culture of Life*, in *THE COST OF “CHOICE”: WOMEN EVALUATE THE IMPACT OF ABORTION 3* (Erika Bachiochi ed., 2004).

28. ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN’S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM*, at xiv (1990).

that she either saw the ultrasound image of her unborn child or that she was offered the opportunity and rejected it.²⁹

Arkansas takes a slightly different tack: Any physician who uses ultrasound equipment when performing an abortion must “inform the woman that she has the right to view the ultrasound image of her unborn child before an abortion is performed.”³⁰ Because almost all doctors now regularly use ultrasound to determine fetal age before performing an abortion, almost all women seeking an abortion in Arkansas will be informed about their “right to view,” and their decision to look or not “obtained in writing” and kept by law in their medical files for three years.³¹ The core and motivating belief is that a woman who sees her baby’s image on a screen will be less likely to abort.

The case I develop in this Article is that mandatory ultrasound—its appeal, its success, its perniciousness—results from a fortuitous combination of imagery, imagination, and ideology. As Susan Sontag explained, “[w]hat determines the possibility of being affected morally by photographs is the existence of a relevant political consciousness.”³² And while ultrasound images are not literally photographs, they are commonly read and treated as photographs. It is therefore not only that technology lets us see the fetus in real time, in skin tones, in 3-D, and—the latest development—now moving around in 4-D.³³ For the last few decades, developing alongside ever-improving fetal imagery, there also has been a highly successful campaign focusing not only on what the fetus looks like, but also on how it feels, what it wants, how it would vote, and what it wants us to do on its behalf. Fetal preferences, at least in the United States, now include Mozart, organic food, and conversation.³⁴ It pleases us—as parents and as bystanders—to imagine the fetus getting smarter, enjoying itself, and being protected at law from secondhand smoke or drive-by shootings.

And not all of what we imagine is imaginary. Better maternal nutrition during pregnancy is a good thing: Prenatal care is not a hoax. If seeing one’s baby on an ultrasound screen concretizes the pregnancy so that the likelihood of taking vitamins or giving up margaritas is enhanced, then public health

29. Woman’s Right to Know Act, ALA. CODE § 26-23A-4 (LexisNexis Supp. 2007).

30. ARK. CODE ANN. § 20-16-602(a) (2005).

31. *Id.* § 20-16-602(b), (c).

32. SUSAN SONTAG, ON PHOTOGRAPHY 19 (1977).

33. See generally Kristin Savell, *Life and Death Before Birth: 4D Ultrasound and the Shifting Frontiers of the Abortion Debate*, 15 J.L. & MED. 103 (2007) (Austl.).

34. See, e.g., SUSAN LUDINGTON-HOE & SUSAN K. GOLANT, HOW TO HAVE A SMARTER BABY 55, 96 (1985); Complete Organic Pregnancy, <http://www.pregnancy-calendars.org/articles/complete-organic-pregnancy.html> (last visited Oct. 20, 2008). See generally F. RENE VAN DE CARR ET AL., WHILE YOU ARE EXPECTING: CREATING YOUR OWN PRENATAL CLASSROOM (1996).

and public imagination may have joined up felicitously through the medium of ultrasound.³⁵ But improving fetal health through an imaginative appreciation of fetal life comes at a cost. It may be good for some expectant couples to imagine and therefore to invest in their baby, and to do so as early in the pregnancy as possible. But connection and joy are not universal responses to seeing the image of one's fetus, even for women who, at least in the first instance, welcomed their pregnancy. Indeed, some pregnancies become unwelcome precisely because an ultrasound scan reveals one or another fetal anomaly, such as anencephaly,³⁶ or disqualifying characteristic, such as the baby's female sex.³⁷ For mothers who learn during screening that their baby is not as they had hoped—sometimes because the chatty sonographer goes suddenly still—ultrasound becomes a more complicated phenomenon.³⁸

And how do women experience ultrasound when their pregnancy is unwanted from the start, not because of the characteristics of a particular fetus, but because they have thought through the consequences of this pregnancy and have decided to abort? The reasons for such decisions are not unfamiliar; they commonly include being too single or too financially insecure, planning for a future that does not yet include motherhood, and, in the case of the many women who are already mothers, deciding that they already have the right number of children.³⁹ What then is the purpose of requiring ultrasound for women who do not intend to remain pregnant? The answer seems clear: to produce a confrontation, whether actual or notional, between the pregnant woman and her fetus that will result in a change of heart regarding the abortion. It is worth remembering, of course, that this confrontation is one-sided; the fetus does not actually stare back, though as we shall see, ultrasound technicians routinely attribute responsive intentional behavior ("he's waving!") to the image on the monitor.

35. Whether ultrasound itself may cause harm to a fetus is not known. See Carol Rados, *FDA Cautions Against Ultrasound 'Keepsake' Images*, *FDA CONSUMER MAG.*, Jan.–Feb. 2004, at 12, 13 (reporting that technicians may permit "longer exposure times and at higher levels than are usually used in medical situations").

36. See Kenneth B. Schechtman et al., *Decision-Making for Termination of Pregnancies With Fetal Anomalies: Analysis of 53,000 Pregnancies*, 99 *AM. J. OBSTETRICS & GYNECOLOGY* 216, 217 tbl. 1 (2002).

37. See Associated Press, *India Tries to Stop Sex-Selective Abortions*, *N.Y. TIMES*, July 15, 2007, at A6 (reporting a new law requiring women to register their pregnancies, in a governmental effort to deter the widespread practice of aborting female fetuses following ultrasound).

38. See Lisa M. Mitchell, *Women's Experiences of Unexpected Ultrasound Findings*, 49 *J. MIDWIFERY & WOMEN'S HEALTH* 228 (2004).

39. See Rachel K. Jones, Lori F. Frohwirth & Ann M. Moore, "I Would Want to Give My Child, Like, Everything in the World": How Issues of Motherhood Influence Women Who Have Abortions, 29 *J. FAM. ISSUES* 79, 80 (2008). About 60 percent of the women who have abortions each year are already mothers. GUTTMACHER INSTITUTE, *FACTS ON INDUCED ABORTION IN THE UNITED STATES* (2008), http://www.guttmacher.org/pubs/fb_induced_abortion.pdf.

Whatever one's thoughts about abortion—and most people have thoughtful views on the subject—something about mandatory ultrasound seems intuitively unsavory, a use of state power that is somehow both too intrusive and too transparently manipulative. But while intuition may get the inquiry going, my aim in this Article is to think harder about just what exactly is wrong with requiring ultrasound as a legal prerequisite to abortion. I am not satisfied with the feint to informed consent used to justify the legislation. Women understand that abortion terminates pregnancy and that some form of life—for some a human life with full human attributes, for others, something more inchoate—is extinguished by virtue of the procedure; that is its very point. But as I shall explain, mandatory ultrasound improperly burdens the ability of women to make decisions about abortion and does so in ways that far exceed other techniques of state persuasion such as informational brochures. Mandatory ultrasound disrupts the law's traditional respect for privacy, bodily integrity, and decisional autonomy in matters of such intimacy as reproduction, pregnancy, and family formation. It is harassment masquerading as knowledge.

The language of “burden” suggests a constitutional claim, and certainly the undue burden standard announced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁴⁰ frames how legal advocates on all sides have come to think about abortion regulation. While the state may regulate the provision of abortion to further women's health or safety, “[u]nnecessary 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.”⁴¹ But while mandatory ultrasound would seem to fall outside even *Casey*'s expansive circumference, my interest is less in the legislation's unconstitutionality than in bringing to light the underlying values put at risk by this form of regulation. Just as there are grounds for criticizing legislation other than constitutional grounds, there are objections to abortion regulation other than constitutional objections. Yet while my argument is not presented as a constitutional argument, several of the concerns and considerations discussed below are useful ingredients in such an analysis. In particular, the connections between the law's respect for a protected choice and the respect that is due to the way a person arrives at that choice have important constitutional implications.

The central question posed by this Article is this: Accepting that there are certain personal choices one is entitled to make in a liberal democracy, what are the limits of what the state may do to affect how those choices are made and exercised? Another way to consider the issue is to ask when or to what

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

41. *Id.* at 878.

extent may the state persuade a person not to exercise a constitutional right? I am particularly interested in constraints imposed through the requirement of *seeing* that is inherent in and crucial to ultrasound. When in the context of an abortion decision can the law request a woman to look at something and, more crucially, under what circumstances can it require her to cooperate in the production of the very thing to be seen? When can her cooperation entail offering up the contents of her own body for inspection?

To develop these points, I consider other instances where the law takes seeing seriously and the way these examples may inform how we think about mandatory ultrasound. To be sure, there has been no considered study of the role of visibility in law. Yet there are moments when seeing—or what one court has characterized as “sensory and contemporaneous observance”⁴²—matters. Consider as a starting point, the law’s evidentiary preference for eyewitness testimony. Seeing something is understood to make the thing observed more reliable, more true, and more real. I develop this proposition and the limits the law imposes on it through three examples. The first is the significance in tort law of a mother whose child is killed before her very eyes, as in the 1968 case of *Dillon v. Legg*.⁴³ The second example concerns the Sixth Amendment’s Confrontation Clause, which provides criminal defendants with the right to be confronted by witnesses against them.⁴⁴ Finally, I examine the law’s specific treatment of fetal imagery, for when one begins to look, it turns out that pictures of fetuses both in utero and out are found across several areas of substantive law. Pictures of fetuses are introduced into evidence, broadcast on airwaves, and displayed in protest against abortion.⁴⁵ I recognize that the first two examples—witnessing an accident and confronting a witness—may not map exactly onto mandatory ultrasound, which is, after all, sensory observation of the image of a thing and not the thing itself. Moreover, their application—the death of a child, the mother as defendant—is not uncomplicated in the context of mandatory ultrasound. Yet each of the three examples helps refine our understanding of how the phenomenon of seeing operates in

42. *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968).

43. *Id.* at 914.

44. Another example might be abortion clinic protestors who claim that the First Amendment gives them the right to be seen by patients and others entering the clinics. In these cases, however, the relevant sensation might be hearing rather than sight. In *Hill v. Colorado*, 530 U.S. 703 (2000), Justice Stevens framed the discussion around statutory protections of “the unwilling listener.” *Id.* at 708. For the argument that mandated abortion counsel impermissibly intrudes upon a woman’s right to be free from compelled listening, see Caroline Mala Corbin, Comment, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. (forthcoming 2009).

45. See discussion *infra* Part III.E.

law and what its significance is understood to be. As one scholar has observed, it is visibility rather than viability that now poses special challenges for law.⁴⁶

In *On Photography*, Sontag noted that photography has “alter[ed] and enlarge[d] our notions of what is worth looking at and what we have a right to observe.”⁴⁷ While that is surely right descriptively, it does not address who—a viewer or the state—gets to decide what is worth looking at and whether the entitlement should be exercised in any particular instance. Certainly the state can require seeing in some circumstances. It can, for example, demand proof that people can in fact see before issuing them a driver’s license. To underscore the solemn responsibilities that attach to driving, the state can even require that would-be drivers look at certain things, such as films on highway fatalities. But the state’s interest in what the citizenry must see is not always a matter of public safety. Politics, or more precisely, the belief systems that politics often encompass, also plays a role, as when the state decides that certain images—coffins of soldiers killed in Iraq, for example⁴⁸—should not be made or seen, but that others, such as the ultrasound scans of some pregnant women, should.

This is then an article about visual technology and visual politics and how the law has seized upon both in the campaign to encourage women to choose against abortion. But the word encourage does not quite capture the purpose of mandatory ultrasound. Rather, the requirement is meant to bend a woman’s will once she has already made up her mind to seek an abortion. In this regard it operates as one last move in the state’s refusal to take “no” for an answer. As I shall suggest, there is a powerful connection between seeing and coercion, both the coercive production of the fetal image itself and its coercive use. My argument is that in this unique realm of fetal imagery there should be limits on the state’s ability to produce a decision from the gut.

I proceed now to develop the argument against mandatory ultrasound within the framework of a simple question: What’s so bad about requiring women to have an ultrasound before an abortion? I want to consider two versions of this question. The first presents itself as a medical one: What’s so bad about requiring ultrasound before an abortion if many doctors do it anyway? The second version takes on a more moral cast: What’s so bad about requiring ultrasound if the procedure makes women think harder about a decision as significant as abortion?

46. Savell, *supra* note 33, at 104.

47. Sontag, *supra* note 32, at 3.

48. See Sheryl Gay Stolberg, *Senate Backs Ban on Photos of G.I. Coffins*, N.Y. TIMES, June 22, 2004, at A17 (reporting a 54-39 vote in the Senate to uphold the Bush Administration policy banning news photographs of flag-draped coffins).

Both questions require a fuller understanding of the mechanics and the social meaning of ultrasound. This is the burden of Part I, which explores how the technology has become embedded in prenatal care, awaited and treasured by most expectant parents. This is the burden of Part I, which explores how the technology has become embedded in prenatal care, the experience awaited and the image itself treasured by many expectant parents.

But responses to an ultrasound scan, whether delight, mystery, or disregard, are always contextual. As anthropologists of visual practices have explained, in order to understand the meanings that people assign to an image, one must examine the circumstances both of its production and its consumption or use. These include the “intention[s] of the maker, the conditions of reception, and the needs and capacities of the viewer.”⁴⁹ While Part I explores those questions in the context of ordinary obstetric care, focusing on the role of technology and of technicians, Part II relocates the inquiry. What is the intent of lawmakers who insist on ultrasound imaging in the context of abortion? By what means are the state’s imposition of this particular image meant to affect women’s decisionmaking with regard to unwanted pregnancies? Part III introduces law into the visual and moral mix. It develops the argument that by coercing both the production of the fetal image and its consumption or use, mandatory ultrasound statutes interfere with the profoundly personal considerations that go into reaching an abortion decision. Whether to look at the ultrasound scan may be a deliberate and therefore an acceptable aspect of that decision; fetal confrontation by fiat is not.

I. THE PRACTICE OF OBSTETRIC ULTRASOUND

To understand how the ultrasonic fetal image and its production have so profoundly, openly, and permanently altered our relationship to the fetus, this Part takes a closer look at the technology. I turn first to the use of ultrasound in ordinary prenatal care, or what I shall call obstetric ultrasound. What is the purpose, experience, and significance of ultrasound for women in the familiar context of early pregnancy? I will later compare obstetric ultrasound with two other uses of the technology. The first is medical ultrasound, by which I mean the use of ultrasound by physicians for medical purposes in the context of an abortion. The second is mandatory ultrasound, the statutorily required use of the procedure at issue here. This typology helps keep track of the technology as it moves from a medical context to the familial, social, and legal contexts it now occupies.

49. JAY RUBY, *SECURE THE SHADOW: DEATH AND PHOTOGRAPHY IN AMERICA* 6 (1995).

A. The Fetus Unveiled

Originally developed to detect icebergs and submarines in the early part of the twentieth century, ultrasound technology, or sonar (sound navigation and ranging), as it was first called, works by transmitting high-frequency sound waves through a body of water to detect hidden structures. The waves bounce off the structures and are converted to electrical impulses that are processed to form an image displayed on a screen. It is, as one scholar has observed, a form of “seeing through sound.”⁵⁰

By the 1950s, ultrasound had moved from military and industrial uses to medical ones as researchers explored its potential for imaging the density of body tissues such as the heart, the breast, and the abdomen.⁵¹ Its breakthrough into obstetrics came in the mid-1950s when Scottish doctor Ian Donald produced a crude image of a fetal head while experimenting with ultrasound as a way to differentiate among abdominal tumors.⁵² Following publication of Donald’s initial findings in 1958, radiologists and obstetricians around the world began to explore the possibilities of this new form of imaging.⁵³ In these early days, the technology severely limited what could be seen or distinguished in utero. Published images showed two dimensional representations of the fetal cranium that look more like disturbances on the Richter Scale than anything anatomical. The primary value of these crude images for obstetric practice was in the basics: assessing gestational age and ruling out the possibility of twins.⁵⁴

The 1960s and 1970s brought significant developments. First, as sonographic equipment became more refined, the quality and capabilities of ultrasound screening improved. A new technology called gray scale scanning produced

50. MITCHELL, *supra* note 19, at 27, 142.

51. McNay & Fleming, *supra* note 18, at 5. For an excellent account of the technological development of the ultrasound apparatus and corporate investment in its manufacture, see STUART S. BLUME, *INSIGHT AND INDUSTRY: ON THE DYNAMICS OF TECHNOLOGICAL CHANGE IN MEDICINE* 74–118 (1992).

52. See John MacVicar & Ian Donald, *Sonar in the Diagnosis of Early Pregnancy and Its Complications*, 70 J. OBSTETRICS & GYNAECOLOGY BRITISH COMMONWEALTH 387, 387 (1963); Ian Donald et al., *Investigation of Abdominal Masses by Pulsed Ultrasound*, 1 LANCET 1188, 1192 (1958). Donald later observed, “There is not so much difference after all between a fetus in utero and a submarine at sea.” Ian Donald, *On Launching a New Diagnostic Science*, 103 AM. J. OBSTETRICS & GYNECOLOGY 609, 618 (1969). Much has been made in feminist critiques of the masculinist origins of the technology. See Petchesky, *supra* note 22, at 64–71.

53. For critical analyses of earlier forms of imaging the body such as X-rays, see LISA CARTWRIGHT, *SCREENING THE BODY: TRACING MEDICINE’S VISUAL CULTURE* (1995), and BLUME, *supra* note 51.

54. See McNay & Fleming, *supra* note 18, at 28 (describing the “notoriously poor” ability to date a pregnancy by earlier clinical means); *id.* at 39–40 (describing the importance of early detection of multiple pregnancy).

images in graduated shades of gray that corresponded to the size of the refracted echo. In contrast to the diagnostically limited two-dimensional images in black and white, the chromatic refinement of gray scale scanning produced images with depth. This meant that not only the solid fetal skull but also fetal body tissues and organs could be imaged and differentiated.⁵⁵ While the early images detected anomalies primarily related to skull size, such as hydrocephaly and anencephaly, now an increasing and more subtle range of fetal impairments could be diagnosed. To be sure, at the time few of the diagnosable conditions could be treated. Ultrasound technology was understood to improve fetal morbidity outcomes by providing patients with medical information and the opportunity to abort at an earlier point in pregnancy.⁵⁶

The second development concerned not the expanded diagnostic capabilities of the technology, but the actual production of the images. As use of ultrasound became more commonplace, the manner of obtaining measurements, such as the relation of cranium size to age, became standardized. It was no longer necessary for doctors themselves to conduct the scan to assure a reliable result: Over time trained technicians, or sonographers, could do the job just as well.⁵⁷ This development led to the current familiar practice of technicians, and not physicians, performing the ultrasound and mediating in the first instance between the woman and the image on the screen. The combination of intimacy regarding the subject matter and immediacy regarding the test's results produced a more participatory and, as we shall see, a more influential role for obstetric sonographers than for imaging technicians in other areas.

Finally, there was a significant reappraisal of the value of ultrasound as its use expanded from medical prescriptions to psychological ones. Ultrasound was understood as beneficial not only by informing decisions about termination in cases involving fetal anomalies but also by enlisting pregnant women in prenatal care. Seeing the image of one's fetus was "expected to work upon the viewer an emotional transformation, which would in turn inspire the desired behavior."⁵⁸ An early and much cited 1983 case study in the *New England Journal of Medicine* heralded the possibility of ultrasound for prequickening

55. See BLUME, *supra* note 51, at 115.

56. See McNay & Fleming, *supra* note 18, at 27 (noting ultrasound's contribution to the enormous decrease in perinatal mortality from the 1950s to the 1990s).

57. Blume suggests that the perceived loss of expertise and diagnostic control explains in part resistance to the new technology by physicians in the 1960s. BLUME, *supra* note 51, at 108.

58. Janelle S. Taylor, *Image of Contradiction: Obstetrical Ultrasound in American Culture*, in *REPRODUCING REPRODUCTION: KINSHIP, POWER, AND TECHNOLOGICAL INNOVATION* 15, 19 (Sarah Franklin & Helena Ragoné eds., 1998).

bonding.⁵⁹ The physician authors had interviewed two pregnant women postultrasound and discovered in each “feelings and thoughts clearly indicating a [maternal] bond of loyalty.”⁶⁰ The authors concluded that not only is ultrasound “likely to increase the value of the early fetus for parents who already strongly desire a child,”⁶¹ but that it might “influence the resolution of any ambivalence toward the pregnancy itself in favor of the fetus.”⁶² In an uncannily prescient bit of musing, the authors wondered whether “ultrasound [could] become a weapon in the moral struggle [over abortion].”⁶³

By the 1980s, almost all pregnant women in the United States received at least one ultrasound examination during pregnancy and many now have several as part of their routine obstetric care; ultrasound is simply part of the norm for having a baby within certain social circles.⁶⁴ The practice reflects what Sontag described as “an aesthetic consumerism to which everyone is now addicted”—the need to have reality confirmed and experience enhanced by photography.⁶⁵ Many women “approach scans not as a procedure that may reveal anomalies, but as a harmless routine procedure that allows them to see

59. John C. Fletcher & Mark I. Evans, *Maternal Bonding in Early Fetal Ultrasound Examinations*, 308 NEW ENG. J. MED. 392 (1983). The first subject commented, “I feel that it is human. It belongs to me. I couldn’t have an abortion now.” *Id.* at 392. This subject had been hospitalized because her boyfriend had beaten her in the abdomen. *Id.* This fact goes without comment in the article but suggests a more complex story about the pregnancy.

60. *Id.* When asked during the ultrasound, “How do you feel about seeing what is inside of you?” one of the women replied, “It certainly makes you think twice about abortion!” *Id.*

61. *Id.* Ultrasound is thought uniquely to engage fathers as well as mothers early in the pregnancy. In contrast to quickening or other sensations, fathers can see the fetal image at the same time and with equal authority as the mother. See Margarete Sandelowski, *Separate But Less Unequal: Fetal Ultrasonography and the Transformation of Expectant Mother/Fatherhood*, 8 GENDER & SOC’Y 230, 236–38 (1994).

62. Fletcher & Evans, *supra* note 59, at 392.

63. *Id.* at 393. The authors romantically concluded: “Perhaps a new stage of human existence, ‘prenatality,’ previously only mirrored in poets’ and mothers’ dreams about fetus, will be as real to our descendants as childhood is to us.” *Id.*

64. Margarete Sandelowski & Linda Corson Jones, *‘Healing Fictions’: Stories of Choosing in the Aftermath of the Detection of Fetal Anomalies*, 42 SOC. SCI. MED. 353, 356 (1996). I put aside the practice of parents signing up for colorized keepsake videos at commercial ultrasound studios or the celebrity turn of having one’s own ultrasound machine to use at home for on-going fun and reassurance, as did Tom Cruise, see Fran Kritz, *Doctors Not Fans of Tom Cruise’s Baby Gift*, Dec. 6, 2005, MSNBC, <http://www.msnbc.msn.com/id/10309963>. Such studios offer home theater seating as part of their services and advise women when to schedule the shoot in order to get “the cutest facial images.” Baby Insight, *Faqs*, <http://www.baby-insight.com/faq.html> (last visited Sept. 24, 2008). *But see* Rados, *supra* note 35, at 13 (reporting that technicians may permit “longer exposure times and at higher levels than are usually used in medical situations”); cf. Eric Zorn, *For Critics, Bill Is Yet Another Abortion Issue*, CHI. TRIB., Apr. 14, 2005, at C1 (describing proposed Illinois legislation to “sharply curtail non-medical uses of sonograms during pregnancy”).

65. SONTAG, *supra* note 32, at 24.

their baby and confirm that all is well.”⁶⁶ Indeed, its use has become so expected and so routinized that specific informed consent for the procedure is often dispensed with, something like a urine sample.⁶⁷ Ultrasound has been “incorporated into the script of pregnancy as itself a fact of life,”⁶⁸ an experience anticipated with pleasure. It is the moment modern mothers meet their baby.

That moment was once a matter of tactile sensation—women felt the baby move. But, as Sontag observed, the “virtually unlimited authority” of images has replaced experience as the means of knowing something for sure.⁶⁹ Quickening as an announcement of arrival now seems pokey and old-fashioned; of course there’s a baby in there; we saw it weeks ago! In the post-ultrasound world, quickening has “lost its former social relevance.”⁷⁰ Pictures rule. Simply by being photographed, a thing “becomes part of a system of information, fitted into schemes of classification and storage,” including “the crudely chronological order of snapshot sequences pasted in family albums.”⁷¹ But schemes of classification are rarely immediately apparent. If ultrasound scans are now the first snapshots in the family sequence, it is important to understand the interconnected means and processes by which they have acquired such pride of place.

B. The Interpretive Role of the Sonographer

Yet meeting one’s baby via ultrasonic image is not as straightforward a proposition as first appears. For those unfamiliar with the process, anthropologist Lisa Mitchell offers an evocative description of scanning as commonly performed:

The sonographer asks the woman to lie down on a table, then squirts her belly with a cool blue gel, moves a device over her abdomen, and taps at a keyboard. Suddenly, a greyish blur appears on a luminescent screen. Customarily during this ritual, the couple smile, laugh, and point

66. Melanie S. Watson, Sue Hall, Kate Langford & Theresa M. Marteau, *Psychological Impact of the Detection of Soft Markers on Routine Ultrasound Scanning: A Pilot Study Investigating the Modifying Role of Information*, 22 *PRENATAL DIAGNOSIS* 569, 570 (2002).

67. *Id.* at 573 (“[Most] women were not aware of the purpose of the routine anomaly scan.”); see T. Fitzgerald, *Women Are Being Given Incomplete Information*, 318 *BRIT. MED. J.* 805 (1999). Ultrasound has become “so much a part of prenatal care and parental expectations that it has become a test that does not require a decision.” Mitchell, *supra* note 38, at 232.

68. Sallie Han, *The First Picture Show: A Media Anthropology Approach to the Ultrasound* (Fall 2001) (unpublished working paper), available at <http://ceel.psc.isr.umich.edu/pubs/papers/ceel037-02.pdf>.

69. SONTAG, *supra* note 32, at 153–54.

70. DUDEN, *supra* note 8, at 80–81.

71. SONTAG, *supra* note 32, at 156.

at the screen, even though they often do not recognize anything in the blur. The sonographer taps at the keyboard again and looks closely at the grey-and-white blur. She measures parts of it and calculates its age, weight, and expected date of delivery. She observes the couple closely to see if they like the blur and show signs of “bonding” with it. The couple also look closely at the sonographer, anxious in case she finds something wrong with the blur. Sometimes, when the blur seems really pleasing, the sonographer talks to it, strokes it, and congratulates the couple. After about fifteen minutes, the blur is turned off, and the gel wiped away, and the couple are given a copy of the grayish blur to take home.⁷²

Thus without some serious guidance by a knowledgeable technician or physician, the viewer might not know exactly what she is looking at. As scholars of technology remind us, “visibility is not transparency.”⁷³ Absent an accompanying script, ultrasound images, especially in the early stages of pregnancy, are not always or immediately recognizable as that of a child, or even a human. As one unsentimental mother confessed, even after the technician had announced the presence of the baby on the monitor, what she saw was *not* a baby but rather something “[s]uggestive of the human,” something “with its oversize head and flipperlike appendages, closer to the amphibious.”⁷⁴ I suspect, however, that most happily pregnant women avoid amphibious thoughts and are instead able to identify a creature that is not only human, but theirs.

How does such clarity come about? Without question the quality of the image has improved since the early days of barely decipherable graphlike blips. There is also an underlying receptivity to the technology, the product of modern faith in what we see on monitors. As Lisa Mitchell has explained, the “cultural groundwork for visually representing the interior of the living body” was in place long before ultrasound came into routine use for ordinary pregnancies.⁷⁵ Through familiarity with both X-rays and television, black and

72. MITCHELL, *supra* note 19, at 3.

73. Paula A. Treichler et al., *Introduction: Paradoxes of Visibility*, in *THE VISIBLE WOMAN: IMAGING TECHNOLOGIES, GENDER, AND SCIENCE*, *supra* note 17, at 1, 4. This observation is true in at least two respects with regard to ultrasound: The images on the screen are themselves only partial, and elements of the larger picture—most prominently the mother’s body—are not seen.

74. Gayle Kirshenbaum, *Caught in the Act of Becoming: ‘Baby’s First Picture’ Is Now in Utero, But What If You Don’t Feel Like a Mom?*, *NEWSWEEK*, May 23, 2005, at 18. Kirshenbaum explains further that when her prenatal-yoga instructor told the class to send messages of love to their babies, Kirshenbaum’s message “immediately bounced back: there is no one here by that name. Only the other words—zygote, blastocyst, fetus, terms appropriately cosmic and necessarily clinical” seemed apt. *Id.* at 19.

75. MITCHELL, *supra* note 19, at 31.

white representations on a screen were already “accepted as part of the taken-for-granted world.”⁷⁶ Indeed, while visual technologies in general are well received, visual medical technologies are particularly welcome. Understood to “serv[e] the benign purposes of medicine, our attitude toward [them] is special, hallowed.”⁷⁷ Ultrasound capitalizes on all of this, and with an added boost. The desire for a baby may itself help in seeing it. As one woman explained while undergoing in vitro fertilization: “Before transfer, they give you a Polaroid of your embryo You look at this greenish picture of a few dividing cells, and you *will* that photo to assume life, you *will* that photo to become your baby.”⁷⁸

Yet even with such heartfelt expectations in place, ultrasound images, especially in early pregnancy, generally require interpretation to be meaningfully understood. This meaning—what viewers understand themselves or learn to see—is often influenced by the sonographer who helps parents transform the gray, grainy blob on the monitor into their baby. The transformation is accomplished through a variety of techniques and practices, none of which is necessary for ultrasound’s diagnostic purpose, but many of which have become embedded in the process. As ethnographic studies of ultrasound practices in Canada and the United States have made clear, the sonographer is key to all of this.⁷⁹ His—or most commonly her—interpretive interventions help parents see what they might not otherwise have known they saw. “She told me what it was, then I could see it. When [the technician] said, ‘That’s the head,’ I looked for a head”⁸⁰ Parents then mimetically educate grandparents and friends: “That’s the head; there’s the heart.”

During the scan sonographers often characterize fetal movement as adorable, baby-like behavior—“waving,” “clowning around,” or “hiding” when the sonographer cannot get a good image. The advent of 4-D ultrasound images, in which the fetus moves in real time, has added to the fetus’s ability to perform. As a noted British physician stated, “At 12 weeks we can see it bouncing off the uterine wall and making a stepping motion that seems to

76. *Id.* In Greece, for example, the term used for ultrasound translates as “putting the baby on television.” Lisa M. Mitchell & Eugenia Georges, *Cross-Cultural Cyborgs: Greek and Canadian Women’s Discourses on Fetal Ultrasound*, 23 *FEMINIST STUD.* 373, 386 (1997).

77. BLUME, *supra* note 51, at 3.

78. Ellen Hopkins, *Tales From the Baby Factory*, *N.Y. TIMES*, Mar. 15, 1992, § 6 (Magazine), at 40.

79. I put aside for now the screening techniques used in explicitly pro-life settings such as Crisis Pregnancy Centers or Pregnancy Care Centers staffed by sonographers who are specifically trained in pro-life rhetoric and persuasion.

80. Lynne S. Milne & Olive J. Rich, *Cognitive and Affective Aspects of the Responses of Pregnant Women to Sonography*, 10 *MATERNAL-CHILD NURSING J.* 15, 27 (1981).

anticipate the first real steps it will take a year or so after birth.”⁸¹ Sonographers may also impart personality to the fetus, described as “shy” if obscured on the monitor, or as being “a good baby” if easily visible. Physical descriptions of the baby are similarly filtered through a “cultural sieve, as [sonographers] select out those parts which they believe are most appealing and reassuring for women—the beating heart, the skull and brain, . . . the hands and feet, [and] especially the fingers and toes.”⁸² Sonographers sometimes touch or tickle the on-screen screen “so that the fetus can ‘speak’ and communicate its ‘feelings.’”⁸³ All of these practices—the sonographer’s vocabulary, deciphering skills, selections, manner, and enthusiasm—are the more authoritative because of the “presumed status of the interpreter as a medical specialist.”⁸⁴

As anthropologist Janelle Taylor observes, there is nothing inevitable about the prevailing manner of ultrasound screening:

Nothing about the physics of high-velocity sound waves, nor the medical imaging devices constructed to exploit them, *requires* that a diagnostic ultrasound procedure be performed in just the way that it has come to be in this country. Nothing about the device itself dictates, for example, that women undergoing ultrasound examinations should want and be encouraged to bring along husbands, boyfriends, or other family members or friends; that they should be shown the fetus on the screen; that seeing it should be understood as a means of effecting maternal “bonding”; that the sonographer should provide a narrative of the baby’s anatomy and activities . . . or give the pregnant women a videotape or “snapshot” image to take home.⁸⁵

As Taylor hypothesizes, the ultrasound experience and the uses to which it is put might be quite different if “an ultrasound exam were a little more like an EKG and a little less like a visit to the hospital nursery.”⁸⁶

But while not inevitable, neither are current practices a matter of mere happenstance. They result from several distinct factors that combine to produce a particular mode of screening in public hospitals and private practices alike. The story is in part a commercial one. Early marketing of ultrasound equipment by manufacturers, first to hospitals and then to private obstetricians,

81. Stuart Campbell, *The Picture That Made Me Change My Mind About Abortion*, DAILY MAIL (London), April 1, 2005, at 31 (arguing for legislation to reduce the time limit for legal abortion from twenty-four to eighteen weeks); see also McNay & Fleming, *supra* note 18, at 29 (describing Campbell’s pioneering work on ultrasound during the 1960s).

82. Mitchell & Georges, *supra* note 76, at 376.

83. Mitchell, *supra* note 19, at 132–34.

84. Taylor, *supra* note 17, at 76.

85. Janelle S. Taylor, *The Public Life of the Fetal Sonogram and the Work of the Sonographer*, 18 J. DIAGNOSTIC MED. SONOGRAPHY 367, 368–69 (2002).

86. *Id.* at 369.

emphasized the technology's ability to please women patients by offering them an earlier intimacy with their baby.⁸⁷ The aesthetic design of the machines has evolved to combine high-tech authority with friendlier consumer sensibilities, such as lighter colors and a swivel monitor that turns toward the patient.⁸⁸ In a "meet the staff" photograph for a maternity clinic in the Bronx, six smiling staff members proudly pose around what is positioned as the seventh member of the staff: a new 3-D ultrasound machine with the image of a large well-formed fetus on the monitor.⁸⁹

There are also occupational factors. In comparison to other forms of medical imaging such as X-ray and MRIs, the field of obstetric sonography strongly identifies itself as one of the helping professions, attracting people interested in personal as well as technological job satisfactions. As testimonials aimed at those considering careers in sonography explain: "Ultrasound is a wonderful career choice [but not] if you are just looking for a 'job;'" "I get to help [people] and share in their positive and negative experiences, both."⁹⁰ For obstetric sonographers, connection with their pregnant patients is regarded as central to their work.⁹¹ Women sonographers may also specially identify with their women patients, many of whom are thrilled to be pregnant.⁹²

87. See generally Pierre Coste, *An Historical Examination of the Strategic Issues Which Influenced Technologically Entrepreneurial Firms Serving the Medical Diagnostic Ultrasound Market* (1989) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with author). To be sure, this type of marketing became possible only after technological advances produced the abdominal scanning wand; the early machines involved a huge tub of water suspended above the patient through which the sound waves passed. McNay & Fleming, *supra* note 18, at 7; see also Taylor, *supra* note 85, at 372 (explaining how the nonmedical use of obstetric ultrasound helped ultrasound "[gain] a foothold within obstetrics").

88. Taylor, *supra* note 58, at 25–26.

89. Expectant Mother Care, http://www.expectantmothercare.org/meet_our_staff.html (last visited Sept. 7, 2008).

90. See Am. Registry for Diagnostic Sonography, *Sonographer Testimonials in the Field*, <http://www.ardms.org/default.asp?contentID=875> (last visited Sept. 3, 2008) [hereinafter *Sonographer Testimonials*]. This is the website of the American Registry for Diagnostic Medical Sonography, an independent, nonprofit organization that administers examinations and awards credentials in different areas of diagnostic medical sonography. Overview of ARDMS, <http://www.ardms.org/default.asp?ContentID=2> (last visited Sept. 29, 2008).

91. As another testimonial stated: "Some feel that the good results are the most rewarding, such as sharing a moment with an expectant mom, however, when I find a large complication and can then help the patient and be there for them beginning to end: that is the most rewarding for me." *Sonographer Testimonials*, *supra* note 90.

92. See Taylor, *supra* note 85, at 373–74. It has been suggested that seeing fetal imagery may influence the views of sonographers themselves regarding abortion. Miguel A. Ruiz & Kathleen Murphy, *Sonographer-Fetus Bonding*, 8 J. DIAGNOSTIC MED. SONOGRAPHY 269, 273 (1992) (reporting that sonographers who oppose abortion may tend to engage in "high-feedback sonography," such as providing parents with the fetus's sex and offering parents a scan to take home).

Ideological influences may also be in play. Certainly, self-identified pro-life ultrasound programs, such as “Windows to the Womb,” offer training techniques that accentuate any baby-like qualities of the fetus and that otherwise treat the fetus as a child, for example by calling it by a name.⁹³ For sonographers who work in pro-life Crisis Pregnancy Centers or other clinics that do not provide abortion, a guided ultrasound is crucial to the explicit task of persuading the woman not to abort.

But what about sonographers who work in facilities that offer a more complete range of reproductive services, including abortion? Over the last several years there has been a lively and on-going discussion among sonographers over the ethics of influencing ultrasound patients about a pregnancy decision.⁹⁴ One widely held view is that sonographers should never attempt to counsel a patient; as technicians, they recognize that their professional training is limited and that they have no information about a patient’s medical or personal circumstances.⁹⁵ Other sonographers distinguish counseling from the consequences of a patient of “see[ing] fetal life in real-time and [being] overwhelmed by its reality.”⁹⁶ What these viewpoints fail to capture, however, is the possibility of indirect influence. As one sonographer stated, in support of her view that any decision regarding choice was the patient’s alone to make: “I am there to show them their baby and explain what I see and allow them to choose.”⁹⁷ It is, however, the tone, manner, and vocabulary of “showing the baby,” even by nondirective sonographers, that contributes to the experience of ultrasound as a maternal practice.

All of these factors—the marketing, the mediating role of sonographers, a preexisting familiarity with the appearance and personality of fetus—have worked to produce a form of screening in which the fetus is indeed ready for its close-up. Women who undergo ultrasound perceive their baby as being

93. For information regarding Windows to the Womb, see About Sound Wave Images of the Unborn, <http://www.unborn.com/about.htm> (last visited Sept. 3, 2008).

94. See Marveen Craig, *Pro-Life/Pro-Choice: A New Dilemma for Sonographers*, 9 J. DIAGNOSTIC MED. SONOGRAPHY 152 (1993) (detailing unedited commentary by nine sonographers); Patricia A. Sullivan, *Public Perceptions and Politics: When Diagnostic Medical Ultrasound Is Employed as a Nondiagnostic Tool*, 18 J. DIAGNOSTIC MED. SONOGRAPHY 211, 216–17 (2002); Taylor, *supra* note 85, at 373–74.

95. See Craig, *supra* note 94, at 153. Ethical concerns about counseling were frequently connected to concerns about the status of sonography as an occupation rather than a profession. See John R. Pierson, Response, in Craig, *supra* note 94, at 155 (“[I]f we are going to continue to move toward professional status we, as a profession, must discourage our members from sermonizing, professing, or openly trying to inflict their personal opinions and values on patients.”); Richard Taylor, Letter to Editor, “A Few Good Men” (and Women) Looking for a Profession, 9 J. DIAGNOSTIC MED. SONOGRAPHY 209 (1993).

96. D.E. Strandness, Response, in Craig, *supra* note 94, at 154.

97. Jeanette Burlbaw, Response, in Craig, *supra* note 94, at 156.

“more real, more vivacious, more familiar, stronger and more beautiful.”⁹⁸ They are more likely to call the fetus a baby.⁹⁹ And while most of the data is anecdotal, there is certainly a great deal of it suggesting that some women who undergo ultrasound decide that they could not abort thereafter.¹⁰⁰

C. Ultrasound and Fetal Impairment

There is now general agreement that the social meaning of ultrasound “dominate[s] its medical uses.”¹⁰¹ The process functions as a sort of fetal coming-out party in which the doctor affirms, almost incidentally, that everything is just fine. But everything is *not* always just fine. Sometimes ultrasound screening detects fetal impairment or fetal demise. While such results are not common,¹⁰² the diagnosis often comes as a devastating shock. This is in part because although at some level ultrasound registers as a medical procedure—the clinical setting and the technician—the procedure has become such an ordinary feature of early pregnancy care as to have lost its diagnostic bite. Most obstetric patients in the United States understand the scan to be about “confirming that everything [is] all right” rather than looking for something wrong.¹⁰³ After all, unlike other forms of prenatal testing such as amniocentesis, for which explicit consent is always required, ultrasound is painless and relatively noninvasive. Ordered and received as a matter of course, the social meanings of ultrasound have obscured its original diagnostic purpose.¹⁰⁴

Yet, however anticipated and ordinary the procedure has become, on occasion the results are unhappy and unanticipated. In some instances—certain heart defects, for example—there is the possibility of treatment. But parents

98. K. Dykes & K. Stjernqvist, *The Importance of Ultrasound to First-Time Mothers' Thoughts About Their Unborn Child*, 19 J. REPROD. & INFANT PSYCHOL. 95 (2001); see also Milne & Rich, *supra* note 80, at 33 (noting that immediately after receiving ultrasounds, women commented that their babies seemed to be “more real” and “more there”).

99. Dykes & Stjernqvist, *supra* note 98, at 98.

100. To the extent that data on such decisions comes from pro-life Crisis Pregnancy Centers, one must be alert to the possibility of selection bias. Pregnant women and girls leaning away from abortion from the start may choose to seek guidance from counselors sympathetic to their initial inclination and so may have been unlikely to choose an abortion with or without an early ultrasound.

101. Linda Layne, “Your Child Deserves a Name”: *Possessive Individualism and the Politics of Memory in Pregnancy Loss*, in THE ANTHROPOLOGY OF NAMES AND NAMING 31 (Gabriele Vom Bruck & Barbara Bodenhorn eds., 2006).

102. Two percent of ultrasound screenings yield unfavorable test results. Sandelowski & Jones, *supra* note 64, at 356. It is important to remember that 31 percent of all pregnancies miscarry spontaneously, often so early in the pregnancy that the woman is unlikely to have had an ultrasound or even to have confirmed the pregnancy. Gina Kolata, *Study Finds 31% Rate of Miscarriage*, N.Y. TIMES, July 27, 1988, at A14.

103. Sandelowski & Jones, *supra* note 64, at 356.

104. See *id.*

who receive a negative prenatal diagnosis are more often faced with the decision of whether to continue the pregnancy or to abort.¹⁰⁵ In such cases and depending on a range of factors—the nature and severity of the diagnosis, religious or philosophical beliefs of the parents, or past reproductive history—pregnant women come to a decision about how they wish to proceed.¹⁰⁶ The process of deciding is often a deeply felt, sometimes traumatic experience; this results in part from what anthropologist Janelle Taylor has identified as the “prenatal paradox” produced by ultrasound.¹⁰⁷ The technology simultaneously promises reassurance that all is well and provides the occasion for maternal affection to kick in. But the nature of the reassurance is more complicated than first appears. It is also an assurance that if things are not fine, then the bad news comes early enough to do something about it. That aspect of reassurance is inconsistent with, or at least raises the cost of, ultrasound’s other promise regarding prenatal bonding. What seems clear is that most expectant parents have not been prepared for the possibility of a negative diagnosis and that for many women, “viewing the fetus on ultrasound had made coping with the loss more difficult.”¹⁰⁸

I draw attention to three points about the practice of obstetric ultrasound. The first is to note the medical community’s awareness of ultrasound’s potential to cause patient distress, a consequence of scanning not spread evenly across all pregnancies. Women who have miscarried an earlier pregnancy, for example, are especially anxious about undergoing ultrasound, their awareness of its diagnostic purpose acutely sharpened by their earlier experience. There is ongoing concern and a developing literature about how to reduce the anxiety resulting from the detection of fetal compromise through ultrasound.¹⁰⁹

Second, women aware that the ultrasound may produce an unfavorable diagnosis relate to their pregnancies differently than women oblivious to

105. In prenatal testing, what I have called a negative prenatal diagnosis is identified as a positive result. A positive result indicates a negative diagnostic outcome. See Nancy Press & C.H. Browner, ‘Collective Fictions’: Similarities in Reasons for Accepting Maternal Serum Alpha-Fetoprotein Screening Among Women of Diverse Ethnic and Social Class Backgrounds, 8 FETAL DIAGNOSIS & THERAPY 97, 101 (1993) (reporting that some women agree to prenatal diagnostic testing later in pregnancy without a full understanding that a negative diagnosis might result in abortion being presented as a possible option thereafter).

106. See Margarete Sandelowski & Julie Barroso, *The Travesty of Choosing After Positive Prenatal Diagnosis*, 34 J. OBSTETRIC GYNECOLOGIC & NEONATAL NURSING 307, 310 (2005).

107. Taylor, *supra* note 58, at 24–25.

108. Rita Beck Black, *Seeing the Baby: The Impact of Ultrasound Technology*, 1 J. GENETIC COUNSELING 45, 48 (1992).

109. Watson, Hall, Langford & Marteau, *supra* note 66 (recommending fuller disclosure to patients that among the purposes of ultrasound is detection of possible abnormalities and a more developed informational protocol during scan itself).

ultrasound's potential to uncover fetal impairment. As several scholars have explained, a prenatal diagnosis may well attenuate or defer a woman's connection to the fetus until further testing is completed and the results are known.¹¹⁰ The phenomenon of a tentative pregnancy is understood and understandable: Attachment of any sort may be put on hold when the pregnancy may not continue.

The final point is this: For some couples who experience unhappy outcomes—those whose baby dies in utero or after birth, or those who decide to terminate the pregnancy after receiving a particular diagnosis—the earlier ultrasound may become a source of solace. The sonographic record provides comforting proof that both the pregnancy and the baby were real.¹¹¹ For expectant parents who intend to have and raise their baby, ultrasound imaging serves as a pleasurable first step in the relationship when all goes well; it may also serve as a treasured memento mori when things do not. Each of these points—the recognition within the profession that the screening may cause anxiety; the suspension or deferral of emotional connection to a fetus; and the potential for meaning in the image itself, regardless of the pregnancy's outcome—informs our understanding of the significance of ultrasound across pregnancies.

It is therefore the moment to consider a third category of pregnant women. For in addition to happily pregnant women and those who miscarry or abort following a negative prenatal diagnosis, there are also women whose pregnancies are unwanted from the start—women who have decided, often with the support of their families, that an abortion is the better decision. We now turn to the use and experience of ultrasound for them.

II. ULTRASOUND AND ABORTION

A. Mandatory Ultrasound Statutes

Sixteen states have now enacted some form of ultrasound legislation, and similar bills have been introduced in fourteen more.¹¹² In 2007, the Ultrasound

110. See, e.g., RAYNA RAPP, TESTING WOMEN, TESTING THE FETUS: THE SOCIAL IMPACT OF AMNIOCENTESIS IN AMERICA 126 (1999); BARBARA KATZ ROTHMAN, THE TENTATIVE PREGNANCY: HOW AMNIOCENTESIS CHANGES THE EXPERIENCE OF MOTHERHOOD (1993).

111. Until recently, miscarriage and prenatal or stillborn death in the United States often went unacknowledged from a social (as opposed to personal) perspective as a source of grief. This was reflected in such ordinary administrative matters as the registration of births and deaths. For example, stillborn infants have not traditionally been issued birth certificates. Lobbying by parents to have their child's birth, as well as its death, recognized by law has prompted statutory changes in vital statistic record keeping. Tamar Lewin, *Out of Grief Grows Desire for Birth Certificates for Stillborn Babies*, N.Y. TIMES, May 22, 2007, at A16.

112. Alabama and Mississippi require all women both to have an ultrasound before an abortion and to be offered the opportunity to look at the image. Woman's Right to Know Act, ALA. CODE

Informed Consent Act was introduced in the U.S. Congress.¹¹³ To be sure, for several years there have been robust private efforts by pro-life organizations, such as Focus on the Family, to equip counseling and pregnancy crisis centers with ultrasound machines and specially trained pro-life sonographers.¹¹⁴ Mandatory ultrasound statutes move the technique from the realm of private persuasion to legal requirement. It is worth remembering that ultrasound must precede all abortions, including those chosen following the detection of fetal anomaly or as part of the reduction of surplus embryos implanted during fertility treatment. Women who consent to abortion under these circumstances may not be the targets of ultrasound legislation, but they are covered nonetheless.

§ 26-23A-4 (LexisNexis Supp. 2007); MISS. CODE ANN. § 41-41-34 (Supp. 2007). Arkansas, Georgia, Idaho, Michigan, Ohio, and South Carolina all require that a doctor who performs an ultrasound on a woman prior to an abortion must offer her the opportunity to view the fetal image. ARK. CODE ANN. § 20-16-602 (2005); GA. CODE ANN. § 31-9A-3(4) (Supp. 2008); IDAHO CODE ANN. § 18-609(3) (Supp. 2008); MICH. COMP. LAWS ANN. § 333.17015(8) (West Supp. 2008); OHIO REV. CODE ANN. § 2317.561 (West 2008); 2008 S.C. Acts 222 (to be codified at S.C. CODE ANN. § 44-41-330(A)(1), (2)). Arizona and Florida require ultrasounds for abortions to be performed after the first trimester, ARIZ. REV. STAT. ANN. § 36-449.03(D)(4) (2003); FLA. STAT. ANN. § 390.012(3)(A)(d)(4) (West Supp. 2008); Louisiana after twenty weeks, LA. REV. STAT. ANN. § 40:1299.35.2 (2008). Indiana, Louisiana, Oklahoma, South Dakota, Utah, and Wisconsin require the woman to be told prior to consenting to an abortion that she is entitled to receive and view an ultrasound. See IND. CODE ANN. § 16-34-2-1.1(a)(1)(F) (LexisNexis Supp. 2007) (describing how a woman must be told of “the availability of ultrasounds and fetal heart tone services”); LA. REV. STAT. ANN. § 40:1299.35.6(B)(1)(h) (2008) (requiring that the physician who performs the abortion inform the woman of “the option of reviewing and receiving an explanation of an obstetric ultrasound image of the unborn child”); OKLA. STAT. ANN. tit. 63, § 1-738.2(B)(1)(a)(5) (West Supp. 2008) (describing how a woman must be told of “facilities that offer [ultrasound] services at no cost”); S.D. CODIFIED LAWS § 34-23A-52 (Supp. 2008) (providing that “no facility . . . may perform an abortion . . . without first offering the pregnant woman an opportunity to view a sonogram of her unborn child”); UTAH CODE ANN. § 76-7-305(2)(b)(v) (Supp. 2007) (describing how a woman must be informed that she has “the right to view an ultrasound of the unborn child, at no expense to her, upon her request”); WIS. STAT. ANN. § 253.10(3)(g) (West Supp. 2007) (describing how a woman must be told that “services are available to enable [her] to view the image or hear the heartbeat of her unborn child” and how she may obtain these services). States in which ultrasound legislation or tougher ultrasound legislation has been introduced but not yet passed include Colorado, Florida, Georgia, Kansas, Kentucky, Missouri, New York, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, and West Virginia. See NARAL Pro-Choice America, State Bill Tracker, http://www.prochoiceamerica.org/choice-action-center/in_your_state/bill-tracker (last visited Oct. 4, 2008).

113. See Press Release, Senator Sam Brownback, Brownback Introduces Ultrasound Informed Consent Act (Sept. 20, 2007), available at <http://brownback.senate.gov/pressapp/record.cfm?id=283758>.

114. See Neela Banerjee, *Church Groups Turn to Sonogram to Turn Women From Abortions*, N.Y. TIMES, Feb. 2, 2005, at A1 (reporting on fundraising efforts for ultrasound machinery); see also David Montero, *Abortion Foes Use Ultrasound—Focus on the Family Budgets Millions for Pricely Equipment*, ROCKY MOUNTAIN NEWS, Apr. 22, 2005, at 36A (discussing Focus on the Family’s goal of distributing 800 ultrasound machines by 2010).

What are such statutes meant to do? In its Statement of Findings and Purpose—a sort of statutory preamble—the Alabama legislature patiently explains that:

The decision to abort is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The medical, emotional, and psychological consequences of an abortion are serious and can be lasting or life threatening It is [therefore] the purpose of this chapter to ensure that every woman considering an abortion receives complete information on the procedure, risks, and her alternatives and to ensure that every woman who submits to an abortion procedure does so only after giving her voluntary and informed consent to the abortion procedure.¹¹⁵

In short, mandatory ultrasound and the accompanying invitation to view the image are now included within the state's account of what it takes to achieve informed consent in the context of abortion.

And just what is the patient being informed about? I suggest two answers to the question. First, the ultrasound is meant to establish or simply to reinforce the state's position that the fetus is not just "potential life," to use the U.S. Supreme Court's phrase in *Roe v. Wade*,¹¹⁶ but "actual life," with all the ideological and emotional force that word now comprises and exerts. A number of rhetorical moves, starting with the phrase pro-life, have worked to capture the rhetorical high ground as the word life has become synonymous with unborn life. In turn, unborn life has been included within definitions of child, and childhood itself marked as starting at the moment of conception.¹¹⁷ But mandatory ultrasound goes further. It informs women not just about the life of a fetus, but more specifically about the life of *her* fetus. This particular fetus, the visible one right there on the monitor, is not just a life, it is a relative. Like the larger bundle of regulatory interventions that surround abortion, such as illustrated brochures detailing the stages of fetal development,¹¹⁸ mandatory ultrasound is also meant to persuade women against abortion. Now, however, the means of persuasion is not a brochure fetus but the woman's own son or daughter. This is who she must confront, either by looking it squarely in the eye or by signing a paper saying she has refused to do so.

115. Woman's Right to Know Act, ALA. CODE § 26-23A-2.

116. 410 U.S. 113, 150, 154, 156, 163 (1973).

117. See 42 C.F.R. § 457.10 (2006) (defining "child," for purposes of federally-funded state insurance program, to include "an individual under the age of 19 including the period from conception to birth").

118. See, e.g., 18 PA. CONS. STAT. § 3205 (2008).

There have been other attempts at law to require women to confront their own fetus before consenting to an abortion.¹¹⁹ For example, certain Alabama judges have appointed counsel to represent the fetus at bypass hearings for pregnant teenagers seeking judicial permission to consent to an abortion without involving their parents.¹²⁰ As one judge explained, a guardian ad litem gives an “unborn child” the “opportunity to have a voice, even a vicarious one, in the decision making [process].”¹²¹ This is not to say that pregnant women or girls, whether ambivalent or sure about an abortion decision, do not themselves sometimes choose to look at the image of their fetus, perhaps to clarify or commemorate their decision.¹²²

Mandatory ultrasound, however, is another matter. Although couched in the protective terms of informed consent, these statutes are unabashedly meant to transform the embryo or fetus from an abstraction to a baby in the eyes of the potentially aborting mother. And here it is useful to keep in mind the properties attributed to visual images that give them such force in our cognitive schemes. One crucial aspect concerns the relation between the image of a thing and the thing itself. As Sontag has suggested, a photograph,

119. States have also mandated forms of confrontation after an abortion. Louisiana, for example, formerly required the burial of fetal remains. See *Margaret S. v. Treen*, 597 F. Supp. 636, 668–71 (E.D. La. 1984) (holding that requiring a physician to inform the woman that her aborted fetus had to be buried impermissibly burdened her abortion decision because it equated fetal remains with a dead human being), *aff'd* 794 F.2d 994 (5th Cir. 1986); *Margaret S. v. Edwards*, 488 F. Supp. 181, 221–23 (E.D. La. 1980). However, in 1990 the Eighth Circuit upheld Minnesota’s Fetal Disposition Law, requiring hospitals and clinics to dispose of fetal remains in a “dignified and sanitary” manner, on the ground that because the law regulated only abortion facilities, and not the pregnant woman herself, the right to abort was not implicated. *Planned Parenthood of Minn. v. Minnesota*, 910 F.2d 479 (8th Cir. 1990). The Tennessee legislature is presently considering whether to require the issuance of death certificates for aborted fetuses. Erik Schelzig, *Death Certificates on Abortions Proposed: Lawmaker Wants Tenn. to Issue Death Certificates for Aborted Fetuses*, SCUM ON TOP, Feb. 14, 2007, <http://www.cpinternet.com/dwagner2/scum/scum113.htm>.

120. See *In re Anonymous*, 720 So. 2d 497 (Ala. 1998); Helena Silverstein, *In the Matter of Anonymous, a Minor: Fetal Representation in Hearings to Waive Parental Consent for Abortion*, 11 CORNELL J.L. & PUB. POL’Y 69, 70, 79–84 (2001) (discussing at length the trial in *In re Anonymous*). See generally Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT’L J.L. POL’Y & FAM. 305 (2004). In the Alabama case, the guardian for the fetus called two witnesses on behalf of his client: a doctor who testified about fetal development and an abortion alternatives counselor from SAV-A-LIFE. During the hearing, the guardian questioned the teenage petitioner: “You say that you are aware that God instructed you not to kill your own baby, but you want to do it anyway?” Silverstein, *supra*, at 81. On SAV-A-LIFE, see Sav-A-Life, <http://www.sav-a-life.org> (last visited Oct. 4, 2008).

121. Silverstein, *supra* note 120, at 80.

122. Indeed, the decision to voluntarily look at one’s ultrasound has been rewarded. In a 2000 Texas judicial bypass case, the court found that the teenage petitioner had proved her maturity in part by asking “to see the fetus on the ultrasound video, testifying that she considered it her responsibility to do so.” *In re Doe*, 19 S.W.3d 346, 361 (Tex. 2000). The judge accepted this as evidence that she had “understood the gravity of her decision.” *Id.*

unlike a painting or a sketch, is “not only like its subject . . . [but is] an extension of that subject; and [therefore] a potent means of acquiring it.”¹²³ And the methods of acquisition?

In its simplest form, we have in a photograph surrogate possession of a cherished person or thing, a possession which gives photographs some of the character of unique objects. Through photographs, we also have a consumer’s relations to events A third form of acquisition is that, through image-making . . . , we can acquire something as information (rather than experience).¹²⁴

Although the language of acquisition is not used, mandatory ultrasound statutes certainly mean for women to “own” their fetus. Although presented as though it were information pure and simple, the fetal image has the cultural force of a portrait, betokening the presence of the entity depicted. Moreover, as I develop further in Part III, the portrait-making was an event at which consumer’s presence and participation were not only necessary but obligatory.

Ultrasound thus masterfully connects the viewer to the image, not only because the woman may in fact choose to see the image, but also because whether she does or not, what the image represents is already vivid, knowable, and known. Preexisting cultural familiarity with the public fetus and its status as an independent person, patient, and consumer, has made affinity with one’s own fetus an easy and natural next step. In short, the technology and the practice of ultrasound have transformed the fetus from potential life to something that can have its picture taken, a trait which in our visual culture is perhaps as close to a marker of personhood as one can get. Whether the woman looks or declines to look at the sonogram of her fetus, she knows even before she lies down on the table what the image will look like and what it stands for, and it is against this imprint that she will have to proceed with her abortion.

B. The Medical Use of Ultrasound in Abortion

As mentioned earlier, in addition to the routine use of ultrasound in early obstetric care, it is now common practice for doctors to administer an ultrasound

123. SONTAG, *supra* note 32, at 155. Marianne Hirsch further explains that “[b]ecause the photograph gives the illusion of being a simple transcription of the real, . . . it has the effect of naturalizing cultural practices and disguising their stereotypical and coded characteristics.” MARIANNE HIRSCH, *FAMILY FRAMES: PHOTOGRAPHY, NARRATIVE, AND POSTMEMORY* 7 (1997).

124. SONTAG, *supra* note 32, at 155–56. Consider here Roland Barthes’s metaphorical description of his relation to the photographic subject: “A sort of umbilical cord links the body of the photographed thing to my gaze.” Roland Barthes, *Camera Lucida: Reflections on Photography* 81 (Richard Howard trans., Farrar, Straus & Giroux 1981) (1980).

scan on patients before performing an abortion. The scan gives the most accurate information about the date of the pregnancy; this permits doctors to determine what method of abortion is best. While the determination is primarily a medical matter, the scan also enables the doctor to gauge whether the procedure falls within the chronological limits of legality. So the question is: If doctors perform ultrasound examinations in the regular course of an abortion, what is the objection to requiring as a matter of law what is already accepted as sound medical practice?

Three distinctions between medical ultrasound and mandatory ultrasound suggest an answer. Perhaps most important is the purpose of the ultrasound. When done in preparation for an abortion, the primary purpose of the scan is diagnostic. Medical ultrasound enables the physician to choose the most appropriate medical course for the patient. Mandatory ultrasound serves a very different purpose. It is not a medical prerequisite to performing an abortion, but rather a legal prerequisite for consenting to an abortion. Unlike a medical scan which provides information to the doctor, the mandated scan is supposed to provide nonmedical information to the patient. The requirement assumes, as many mandatory ultrasound statutes announce outright, that a woman who consents to an abortion does not already understand the nature and consequences of the procedure. Alabama elaborates its suspicion on this point:

Most abortions are performed in clinics devoted solely to providing abortions and family planning services In most instances, the woman's only actual contact with the physician occurs simultaneously with the abortion procedure, with little opportunity to receive counseling concerning her decision.¹²⁵

The ultrasound screening and the compulsory invitation to view the results are meant to counteract the patient's presumed reliance on information from a physician who is necessarily (from the legislative point of view) pro-choice: After all, he or she performs abortions.¹²⁶ Mandatory ultrasound replaces a suspect source with a better informant: the fetus itself, or at least its picture. To be sure, the sonogram itself has no point of view—it is a photograph—and on this account it is offered up as an objective datum incapable of bias. But as we know, photographs are imbued with contextual meaning. Consider an example from criminal procedure: The faces of possible assailants offered to a victim in a police photo array are often read as connoting guilt; why would a person

125. Woman's Right to Know Act, ALA. CODE § 26-23A-2 (LexisNexis Supp. 2007).

126. Of course, not all doctors who perform abortions are pro-choice. Some doctors oppose abortion on moral, religious, or philosophical grounds but believe that the procedure falls within the scope of medical care they have sworn to provide.

otherwise be included on the roster?¹²⁷ The fetus, of course, falls at a different end of the moral spectrum than crime suspects. Whatever other meanings the fetus may convey, its image can in some sense be read as innocent.¹²⁸ My point here is simply that claims for the objectivity of a sonogram are incomplete. They fail to account for preexisting public and personal familiarity with and affection for fetal imagery, or for coaching or orienting by the sonographer, or for the cultural significance of having an ultrasound in the first place.

The second difference between a medical and a mandated scan concerns the viewing. When an ultrasound is done as part of the prep work for an abortion, the patient is not usually asked if she wants to see the image.¹²⁹ She may of course choose to look at the monitor or to request that it be turned toward her, but the query generally goes from patient to physician or sonographer and not the other way around. The patient has, after all, already given informed consent for an abortion. I will say more about the content of informed consent in Part III.E, but for now we can accept that it includes the patient's understanding that she is pregnant (and what pregnancy is), and that an abortion ends pregnancy before birth. As a matter of common law, "informed consent requires doctors to provide their pregnant patients seeking an abortion *only* with material medical information, including gestational stage and medical risks involved in the procedure."¹³⁰ In contrast, the point of the mandated scan is to offer the woman a good look at her fetus. The Arkansas statute, for example, directs the physician to inform his patient that she has "the right to view the ultrasound image of her unborn child before an abortion is performed."¹³¹ It is unclear if doctors must use the exact statutory language in informing patients about the opportunity on offer, but the language of unborn child is itself arresting. It is meant to reinforce the proposition that an abortion does not end a pregnancy, but kills an unborn child. Want to see its picture first?

127. See generally Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Line-Ups*, 1 PSYCHOL. PUB. POL'Y L. 765, 769 (1995) ("Eyewitnesses are fairly efficient at selecting the actual culprit when the culprit is in the lineup but have great difficulty not selecting someone when the culprit is not in the lineup.").

128. But for a terrifying fictional account of a malevolent fetus, see DORIS LESSING, *THE FIFTH CHILD* (1988).

129. Whether a patient can literally see the monitor depends in part on the configuration of the particular machine. As one sonographer explained, "I have a 19-inch monitor that is just for the patient. If the patient doesn't want to watch, she must choose not to look." Burlbaw, *supra* note 97, at 156.

130. *Acuna v. Turkish*, 930 A.2d 416, 427–28 (N.J. 2007).

131. ARK. CODE ANN. § 20-16-602(a) (2005).

The social significance of obstetric ultrasound is crucial in comprehending the power and perversity of the requirement. As discussed earlier, almost all women in the United States have and anticipate having at least one ultrasound early in their pregnancies, and many expect and have several.¹³² It is, however, not just the screening, but all the attendant activity that gives the procedure its meaning. As one woman, four months pregnant, explained about showing her ultrasound picture to friends and co-workers, "I wouldn't be a good mommy if I didn't."¹³³ And here lies the force of cultural practice. 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.

This phenomenological wallop is not lost on those who support mandatory ultrasound. At this early stage in the pregnancy, when the great majority of abortions are performed, women rarely look pregnant and many do not feel pregnant. This enables women unsure about continuing their pregnancies to deliberate with a degree of privacy, with control over who knows and who they talk to, and within an emotional framework of their own construction.¹³⁴ Even happily pregnant women often wait to tell others until their pregnancy is relatively secure, whether for religious reasons, for luck, or on account of past reproductive difficulties.

Mandatory ultrasound disrupts a woman's control over her pregnancy, at least as far as the organization of her own attitudes. While an ultrasound screening is not quite like lining up with the kids at Kinder-Photo, once her fetus has had its little mug shot taken, the woman has embarked on the social experience of motherhood. Ultrasound operates as a technological quickening, though it works through visual rather than somatic sensation. The effect of

132. One measure of enthusiasm for ultrasound is found in a recent study which reports that 37 percent of pregnant women are willing to pay for ultrasound out of pocket. See Mark B. Stephens, *Majority of Pregnant Women Want Prenatal Ultrasound*, 62 AM. FAM. PHYSICIAN 2665 (2000). Taylor describes the practice of a Chicago hospital-based ultrasound clinic where women can return for a second ultrasound if the first was vague or uninformative about the sex of the fetus. Taylor, *supra* note 58, at 15, 30.

133. Sallie Han, *Seeing the Baby in the Belly: Family and Kinship at the Ultrasound Scan*, in *THE CHANGING LANDSCAPE OF WORK AND FAMILY IN THE AMERICAN MIDDLE CLASS* 243, 250 (Elizabeth Rudd & Lara Descartes eds., 2008); see also Nancy Press & C.H. Browner, *Why Women Say Yes to Prenatal Diagnosis*, 45 SOC. SCI. MED. 979, 985 (1997) (observing that beginning prenatal care "in a timely manner . . . is a maternal responsibility").

134. See Sarah A. Leavitt, "A Private Little Revolution": *The Home Pregnancy Test in American Culture*, 80 BULL. HIST. MED. 317, 344 (2006) (describing how home pregnancy tests relocated the initial pregnancy diagnosis from the doctor's office to the privacy of a woman's home).

requiring ultrasound before an abortion is to do everything possible to shift the woman's thoughts, her experience, and her expectations from someone who has decided not to remain pregnant into the position of an ordinary mother-to-be. By requiring her to go through the very procedure she would happily go through if she wanted the baby, she is shepherded into the fold. This is an important move. Once a woman is transformed into a mother or even an expectant mother, a new and formidable set of expectations are imposed and are often assumed.¹³⁵ Some expectations take the form of legal regulation; for example, pregnant women may be cautioned not to drink or smoke. Others are constituted as a matter of cultural practice, so that fellow bar patrons feel free to caution pregnant women not to drink or smoke. But everyone knows that good mothers put their children first and do not harm them. Mandatory ultrasound is meant to solidify the idea of a child so that the norms of maternal solicitude and protection begin to take hold.

III. FACING UP TO YOUR FETUS

The second framing question posed at the outset is this: What is so bad about making women have an ultrasound and asking them to look at the image of their fetus before they abort? Even if one does not believe that life begins at conception—a position that Alabama, Georgia, and many other states have now fixed into law¹³⁶—deciding whether to have an abortion or to have a baby is a serious matter. As the Supreme Court has observed, abortion is a unique act, “fraught with consequences . . . for the woman who must live the implications of her decision.”¹³⁷ May the magnitude of the matter not be presented to women as starkly and directly as possible?

One answer is that a compulsory presentation regarding abortion's gravity is not necessary. Certainly in the United States, the subject has been a matter of intense public debate and disruption for some forty years and most women—most everyone—cannot help but be aware of moral claims that now attach to the issue. The heightened character of an abortion decision is revealed not only through public discourse—campaign rhetoric, countless online sites, judicial confirmation hearings, sermons, and talk radio—but through

135. See generally Carol Sanger, *M Is for the Many Things*, 1 S. CAL. REV. L. & WOMEN'S STUD. 15, 17 (1992).

136. ALA. CODE § 26-23A-3(10) (LexisNexis Supp. 2007); GA. CODE ANN. § 31-9a-2(7) (2006); KY. REV. STAT. ANN. § 311.720(6) (LexisNexis 2001); N.D. CENT. CODE § 12.1-17.1-01(3) (1997); OKLA. STAT. ANN. tit. 63 § 1-730(2) (West 2004); TEX. FAM. CODE ANN. § 33.001(2) (Vernon 2002).

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

the many constraints, practical and legal, now imposed on the procedure. There must be something highly suspect about a medical procedure excluded from public funding,¹³⁸ unavailable to military personnel and their dependents,¹³⁹ and whose facilities, providers, and patients are subject to unprecedented levels and modes of regulation.¹⁴⁰ There must be something deeply problematic about a common medical procedure not routinely taught in medical schools and which doctors and pharmacists in several states may decline to provide on the ground of conscientious objection.¹⁴¹ In many areas of the country doctors distance themselves from the procedure out of concern for their standing in the profession, so that in 2005, some 87 percent of counties had no abortion provider at all.¹⁴² All of this helps explain why abortion is often a hushed subject, even among friends or within a family; why the procedure is often obtained secretly; why there is great concern, and some protection, regarding

138. See *Harris v. McRae*, 448 U.S. 297, 326 (1980) (holding that states are not obligated under Title XIX to fund even medically necessary abortions).

139. See *Doe v. United States*, 419 F.3d 1058, 1060–61 (9th Cir. 2005) (upholding a regulation barring military health services from funding abortions, including an instance where a sailor's wife aborted her anencephalic fetus).

140. See *Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health & Envtl. Control*, 317 F.3d 357, 359–71 (4th Cir. 2002) (upholding various state abortion regulations). In his dissent, Judge Robert Bruce King described the effect of abortion regulations in other states: "[I]n many places, burdensome regulations have made abortions effectively unavailable, if not technically illegal. It is this type of regulation—micromanaging everything from elevator safety to countertop varnish to the location of the janitors' closets—that is challenged in this case." *Id.* at 371–72 (King, J., dissenting).

141. See GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES (2008), available at http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf. Federal law also contains provisions allowing medical providers to refuse to perform abortions on the grounds of conscience. See 42 U.S.C. § 300a-7 (1973); see also JODY FEDER, CONGRESSIONAL RESEARCH SERVICE, THE HISTORY AND EFFECT OF ABORTION CONSCIENCE CLAUSE LAWS 2 (Jan. 14, 2005), available at <http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RS2142801142005.pdf>. The Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 3163 (2004), prohibited funds from being disbursed to any government agency that discriminates against any medical provider on the grounds that the individual "does not provide, pay for, provide coverage of, or refer for abortions." The act contains no requirement that there be a religious or moral motivation for the health care entity's refusal to provide care. *Id.* For a discussion on the limits of conscientious refusal to provide medical care, see COMM. ON ETHICS, THE AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, THE LIMITS OF CONSCIENTIOUS REFUSAL IN REPRODUCTIVE MEDICINE, COMM. OPINION NO. 385 (2007), available at http://www.acog.org/from_home/publications/ethics/co385.pdf [hereinafter ACOG COMMITTEE OPINION]. Committee Opinions are sometimes issued as supplements to the 2004 ACOG publication, THE AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, ETHICS IN OBSTETRICS AND GYNECOLOGY (2d ed. 2004). In some medical programs where abortion training is provided, students are permitted to opt out of the training if they have moral or religious objections. See Angel M. Foster, Jane van Dis & Jody Steinauer, *Educational and Legislative Initiatives Affecting Residency Training in Abortion*, 290 J. AM. MED. ASS'N 1777, 1777 (2003).

142. See Rachel K. Jones et al., *Abortion in the United States: Incidence and Access to Services*, 2005, 40 PERSP. ON SEXUAL & REPROD. HEALTH 6, 10 (2008), available at <http://www.guttmacher.org/statecenter/abortion2.html>; see also Jack Hitt, *Who Will Do Abortions Here?*, N.Y. TIMES, Jan. 18, 1998, § 6 (Magazine), at 20.

the confidentiality of abortion records and the safety of patients;¹⁴³ and perhaps why the abortion rate has declined during the last decade. Certainly opposition to abortion on moral grounds has been increasing, perhaps especially among younger women.¹⁴⁴ In short, women understand the reputational implications of having an abortion.

Even so, there remains a felt need for abortion by the over one million women in the United States who terminate their pregnancies each year.¹⁴⁵ Conceding at least for now that it is legal for them to do so, pro-life advocates say that they are only asking that these women confront directly the object of their action by looking at the ultrasound image first. Without so doing, the argument goes, it is impossible for pregnant women to make an informed decision. This position parallels constraints on consent in another area of family formation, adoption. In most states a woman's consent to place her child up for adoption is invalid if given before the child is born. Legislators have decided that some experience of one's infant, if only childbirth itself, is necessary to grasp the nature of what is at stake in giving up a child.¹⁴⁶ On this account, an ultrasound is as close as a woman can come to an experiential interaction before deciding to abort. The sonogram stands in for a born child. And so mandatory ultrasound asks women before declining motherhood—not through adoption but through abortion—to step up and face the fact of their fetuses. Do you understand that the fetus is a living thing that bears some resemblance to the baby it will become? Understanding

143. See *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 928–29 (7th Cir. 2004) (holding that the probative evidentiary value of medical records of late-term abortion patients did not outweigh patients' privacy interests). As Judge Richard Posner observed, even redacted records might enable "skillful 'Googlers'" to sift through trial records and "put two and two together, 'out' the 45 women, and thereby expose them to threats, humiliation, and obloquy." *Id.* at 929. See generally Alice Clapman, Note, *Privacy Rights and Abortion Outing: A Proposal for Using Common-Law Torts to Protect Abortion Patients and Staff*, 112 *YALE L.J.* 1545 (2003).

144. See Susan Dominus, *The Mysterious Disappearance of Young Pro-Choice Women*, *GLAMOUR*, Aug. 2005, at 200, 201 ("Today's twentysomethings . . . [have] never lived through the sordid conditions of back-alley abortions, the deaths from botched procedures, the desperation of a woman trapped by her own changing body. It's ancient history to them, and about as compelling.").

145. GUTTMACHER INSTITUTE, *supra* note 39. Another fact that suggests the intricate role that abortion plays in women's lives is that one-third of all American women will have an abortion by the time they are forty-five. *Id.*

146. This is not, however, always true for surrogacy arrangements. States in which traditional surrogacy using the surrogate's own egg is legal permit women to enter surrogacy contracts before the birth of the child. See N.H. REV. STAT. ANN. § 168-B:16 (2002). In a number of states if the woman changes her mind, courts will not enforce the contract. KY. REV. STAT. ANN. § 199.590(4) (LexisNexis 1998). She may, however, enter the contract and choose to keep her promise. In California, a gestational surrogate mother who contributes no genetic material may similarly contract before birth to carry a child to term and the California courts will specifically enforce the contract. See *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993).

this fact of life, are you still willing to proceed? In this way, as I explain below, the legislation slyly merges informed consent with a particular moral position about the meaning of the information.

Mandatory ultrasound works in the realm of individual decisionmaking. That is, while abortion cannot be withheld by the state, it can be declined by the woman. So, advocates urge, ladies, just lay back and take a look at the screen. Is this really too much to ask? My answer is yes, and in this Part I explain why. In so doing, I consider a number of analogies regarding other visual cues, other body parts, and other regulatory constraints on protected choices. Each can, of course, be distinguished from the exact case at hand—that is the nature of analogy—yet each also illuminates aspects of the profoundly problematic practice of mandatory ultrasound. The heart of my argument is that certain choices that people make about the structure and content of their lives are and ought to be regarded as protected choices, and that the deliberative path to the decision as well as the decision itself is protected. Requiring ultrasound as a matter of law violates the space properly accorded such decisions.

To understand why, it is useful to keep in mind the properties attributed to visual images that give them such force in our cognitive schemes. One crucial aspect concerns the relation between the image of a thing and the thing itself. As Susan Sontag has suggested, a photograph, unlike a painting or a sketch, is “not only like its subject, [but is] a homage to the subject; and [therefore] a potent means of acquiring it.”¹⁴⁷ And the methods of acquisition?

In its simplest form, we have in a photograph surrogate possession of a cherished person or thing, a possession which gives photographs some of the character of unique objects. Through photographs, we also have a consumer’s relation to events A third form of acquisition is that, through image-making . . . , we can acquire something as information (rather than experience).¹⁴⁸

An ultrasound scan required by statute intensifies the combination. Although presented legislatively as though it were information pure and simple, the image has the cultural force of a portrait, betokening the presence of the entity depicted. Moreover, the portrait-making was an event at which consumer’s presence and participation were not only necessary but obligatory.

147. SONTAG, *supra* note 32, at 155.

148. *Id.* at 155–56.

A. The Path to a Protected Choice

It is generally accepted that in a liberal democracy certain decisions about how a person organizes his or her life reside within the special competence and authority of the person making the decision. These decisions encompass a range of deeply personal, often self-defining preferences and commitments. Whether and who to marry, whether and who to vote for, and whether and what religion to practice are the kinds of decisions that people are entitled to make for themselves. People decide to use contraception, vote in a primary, or refuse to swear an oath on a Bible. In the United States, such decisions are often framed in constitutional terms: rights of privacy, religious association, and so on. Since 1973, the decision whether or not to abort has been a similar sort of protected decision, one later characterized by the Supreme Court as involving nothing less than a choice about a woman's "destiny."¹⁴⁹

But it is not the decision alone that is protected from state interference. It is also and importantly the deliberative path a person takes to reach the decision. While the argument I develop here regarding mandatory ultrasound and the path to a decision about abortion is not primarily a constitutional one, the framework and analytical lure of related constitutional arguments points us to the deeper ideological significance of the ultrasound statutes and to the deeper misgivings we should have about them. To see how this works, I begin with two examples from other areas where choice is protected: religion and voting.

The state protects religious freedom and also protects the right of people to come to their religious convictions in their own way. Imagine, however, that before you may decline to salute the flag or to swear on a Bible, the state requires that you must first read a monograph on the compatibility of religion and patriotism, hear the Sermon on the Mount, or look at Fra Angelico's *Annunciation*. However intellectually or spiritually profitable any of the three may be, the proposal seems preposterous as a precondition to religious exercise. How one comes to a choice about religion is as important and ought to be as inviolate and deserve as much protection as the exercise of the choice itself. Indeed, arguments about religious toleration have often focused on exactly this point. Even if it is accepted that coercion cannot directly produce sincere religious belief, at certain historical moments the opponents of toleration hoped to produce such faith indirectly, for example, by compelling attendance at religious services. John Locke, who in his famous *Letter on Toleration*, showed that coercion was powerless to produce genuine faith, nevertheless confronted

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

this possibility in his *Second Letter on Toleration*.¹⁵⁰ There Locke argued that the means of arriving at one's faith were to be given as much protection as a person's basic decision to follow a particular creed.¹⁵¹ By conditioning abortion on an ultrasound, mandatory ultrasound statutes similarly seek to prescribe a route that will produce a particular result with regard to an abortion decision.

In the religious case, it seems clear that the constitutional protection of free exercise extends to the means by which people make their decisions about religion. Schools cannot require religious education on the basis of informed choice. The state cannot require nonbelievers to attend religious services in order for them to see what they are missing. The path to the belief is seen as an integral part of one's faith and there is no question of withholding constitutional protection just because the faith itself is not directly under attack. It is perhaps more difficult to be as confident about the same argument with regard to abortion, given the grudging nature of the present Supreme Court's acceptance of reproductive rights and the precarious majority by which they have been upheld. A constitutional challenge to mandatory ultrasound laws may not be politically possible.

Nevertheless, it is important to grasp the analogy to religion and to use it as a basis for understanding how close mandatory ultrasound laws come to an assault on the basic right to abortion. It is important, in other words, to see why protecting choice involves protecting a woman's control over the method and process by which her abortion decision is reached. In both cases, the same values of autonomy and control over the shape and content of one's life that underpin the protection of the ultimate decision are also crucially in play with regard to a person's chosen path to that decision. Philosophically, it makes no sense to protect one and not the other. Respect for individual autonomy requires protection of both.

My second example concerns voting. You register to vote, hopefully pay attention to the content of the campaigns, and on election day stand on line and, at least in New York, flip the appropriate switches and pull the lever. Imagine, however, that before you were permitted to vote, the state required you to read specific campaign literature on each candidate so that you would make a more informed decision at the polls. Such a regulation would strike

150. See JEREMY WALDRON, *GOD, LOCKE AND EQUALITY* 210–11 (2002). I am especially grateful to Jeremy Waldron for discussion on this point.

151. JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 38 (James H. Tully ed., 1983) (1689) ("But after all, the *principal Consideration*, and which absolutely determines this Controversie, is this: Although the Magistrate's Opinion in Religion be sound, and the way that he appoints be truly Evangelical, yet if I be not thoroughly perswaded thereof in my own mind, there will be no safety for me in following it. No way whatsoever that I shall walk in, against the Dictates of my Conscience, will ever bring me to the Mansions of the Blessed.").

us as an impermissible interference with the franchise. That is because we understand that voting encompasses not only flipping switches but also reaching the decision about which switch to flip by whatever means one chooses, whether debates, campaign literature, or endorsements from the New York Times or from Fox News. You can vote Republican without being required to watch *An Inconvenient Truth*,¹⁵² or vote Democratic without watching clips of Reagan strolling through Normandy.

Indeed, protections around the process of voting go further. To secure voters' ability to think through how to cast their ballots, the state also protects the physical space around the voting booth from electioneering.¹⁵³ This protected space—one hundred feet in Los Angeles, one hundred yards in Wyoming—suggests that there are occasions when the state recognizes a person's right not to be appealed to by partisans in a campaign. Partisans may include private supporters for a candidate or ballot measure or the state itself, which may, for example, be quite interested in persuading voters to pass a bond measure. You may of course continue to reflect on partisan arguments and change your mind anytime before you pull the lever. But the premise of the protected space is that at some point in the process of voting, you should not be intruded upon by any further manner of entreaty or appeal. The issue is a matter of timing as well as one of space. There must be some period, however brief, between having made a decision and acting upon it into which the state cannot intrude—something like a decisional no-fly zone.

Ah, you might say, but before an election I do receive printed material from the state; sometimes I read it and sometimes I toss it. When I do take a look, it seems to provide either mechanical information, such as what the ballot will look like, or balanced information, such as statements from advocates on both sides of an initiative or referendum. What then is there to complain about if the state simply offers me information that is accurate and neutral in order to improve the quality of my voting experience or the quality of my vote? Is mandatory ultrasound not analogous to electoral information which the voter can take or leave? The state makes the fetal sonogram available and the woman can look or not.

But the two circumstances—voting for a candidate and having an abortion—are not the same in several important ways. To begin, a voter is not required to listen to candidates specifically addressing her in a one-on-one

152. AN INCONVENIENT TRUTH (Paramount 2006).

153. See WYO. STAT. ANN. § 22-26-113 (2007) (defining electioneering too close to a polling place on election day as “any form of campaigning, including the display of campaign signs or distribution of campaign literature, the soliciting of signatures to any petition or the canvassing or polling of voters, except exit polling by news media”).

appeal or teach-in. There is something edging uncomfortably toward coercion in the intensely personalized quality of ultrasound information. This is not to say that a woman has “a right to be insulated from all others” in making her decision; the Supreme Court has made clear that she does not.¹⁵⁴ But I want to focus on the form of the this particular appeal and its personalized nature.

Divorce offers a useful analogy. In a number of states, before filing for divorce, parents are required to read material and sometimes meet with mediators to learn about the harms to children wrought by divorce. The idea is that parents should understand, not as an intuitive matter but from a more scientific and official position, that divorce is often hard on kids. But more to the ultrasound point, imagine that instead of reading a brochure or attending a meeting, parents had to participate in individualized sessions where their own children could express face to face how much they want Mommy and Daddy to stay married. Putting aside the dubious psychological consequences of this for the child, such a requirement would, I think, seem an unacceptable intrusion on a couple’s decision. It is not just that the technique seems to hit below the belt generally; we are all familiar with child-centered commercial and political advertising targeted at our emotions. But context matters. What is at stake is the exercise of a right, in this case to marry and to divorce. We ought to be particularly concerned about methods of argumentation by the state, sly or otherwise coercive in nature, aimed at persuading citizens not to exercise a constitutional right.

Consider, for example, prosecutorial attempts to persuade a criminal defendant to waive his right to a trial by accepting a plea bargain. The practice is familiar: The state offers a sentencing recommendation in exchange for the defendant’s guilty plea. The contractual aspect of a plea—the quid pro quo—distinguishes plea bargaining from the waiver of the right to choose an abortion, in which no trade or inducement accompanies the state’s preference that the right be relinquished. In both cases, however, the state tries to persuade the right holder through argumentation that he or she will be better off—the defendant less imprisoned, the woman less guilty—if the right is waived.¹⁵⁵

This is certainly what mandatory ultrasound is all about: a final push to persuade before the decision to abort is set. There are of course better or

154. *Casey*, 505 U.S. at 877 (“What is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so.”).

155. Indeed, a number of states want pregnant women to know that they do not have to be worse off financially either, if they decide to have a baby. Texas, for example, includes within its mandated consent disclosures a statement that “medical assistance benefits may be available for prenatal care, childbirth, and neonatal care.” TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(2)(A) (Vernon Supp. 2008). Women must also be informed that “the father is liable for assistance in the support of the child without regard to whether the father has offered to pay for the abortion.” *Id.* § 171.012(a)(2)(B).

worse ways of coming to a decision. We might, for example, disapprove of a woman throwing a dice to decide about an abortion. But if a choice is protected because of the profound significance it bears to the meaning of a person's life, then the part of life devoted to the choosing—the thinking it through—has got to be protected as well. Adults may arrive at certain decisions, including whether or not to have a child, having negotiated their own path to get there without intercession from their offspring or from God or from legislatures doing God's work.

B. Coerced Production

A second distinction between the provision of voting brochures or parenting pamphlets and mandatory ultrasound concerns the physical production of the thing to be viewed. Recommended electoral reading material is produced by the state and made available to the voter. In contrast, mandatory ultrasound requires the woman to participate in the very production of information that she is now urged to consider. There is something both creepy and unjust in using a woman's innards to make the state's case against abortion and insisting she contemplate life as defined by the state. The problem has two objectionable aspects: the required contemplation of the fetal image (coerced use) and the requirement that she cough up the scan as well (coerced production).

I start from the premise that ultrasound is intensely invasive of a woman's bodily privacy. The procedure may be admired from a diagnostic perspective for its noninvasiveness—no cutting, no punctures, no blood. Nonetheless, most civilians would regard an ultrasound screening as a profoundly intimate experience, especially when stripped of its glossy meet-the-baby production values. After all, the woman must actively participate: She must lie down on a table, partially disrobe, expose her abdomen, have lotion applied, and be stroked with a scanning wand. It is also worth noting that due to its diagnostic accuracy regarding gestational age, transvaginal ultrasound, in which a vaginal probe replaces the tummy wand, is now increasingly used in connection with early abortion.¹⁵⁶ It is unclear whether legislators are aware of this development

156. Maureen Paul et al., *The Roles of Clinical Assessment, Human Chorionic Gonadotropin Assays, and Ultrasonography in Medical Abortion Practice*, 183 AM. J. OBSTETRICS & GYNECOLOGY S34, S36 (2000) (including an image of a pregnancy at five and one-half weeks); Prabha Sinha et al., *Value of Routine Transvaginal Ultrasound Scan in Women Requesting Early Termination of Pregnancy*, 24 J. OBSTETRICS & GYNAECOLOGY 426 (2004). Because transvaginal ultrasound is commonly performed in the physician's office, its benefits include "earlier treatment, fewer referrals, and fewer errors from transmission of reports." Paul et al., *supra*, at S36. Transvaginal ultrasound also provides earlier detection of fetal sex. See M. Bronshtein et al., *Early Determination of Fetal Sex Using Transvaginal Sonography: Technique*

in medical technology and unclear whether they would find it outrageous, irrelevant, or justifiable for the state to order vaginal examinations for one million women a year.

Certainly in the context of criminal procedure, there are limits on the state's ability to secure evidence from the contents of the defendant's body—pumping a suspect's stomach, for example. As Justice Frankfurter noted in *Rochin v. California*, such methods are “too close to the rack and the screw to permit of constitutional differentiation.”¹⁵⁷ Just as an oral confession cannot be coerced, Frankfurter explained, “[i]t would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.”¹⁵⁸

There are, of course, limits to the analogy. Neither performing nor receiving an abortion is a criminal activity, despite recent legislative efforts in South Dakota to ban abortion entirely.¹⁵⁹ At the same time, women who abort are sometimes treated in ways that suggest criminality. In her history of criminal prosecutions of abortionists in the pre-*Roe* mid-twentieth century, Leslie Reagan describes how Illinois used the bodies of abortion patients as evidence against the defendant.¹⁶⁰ In one case, *State v. Stanko*,¹⁶¹ the police apprehended a woman as she left midwife-abortionist Stanko's apartment and brought her to a physician's office where the woman was given pelvic examinations that produced evidence of abortion. While abdominal ultrasounds are not pelvic in nature, they are invasive; the contents of the uterus are imaged, and the image recorded and kept on file. To the extent they are meant to cause the patient distress, they evoke more than a tinge of punishment. Indeed, as I have argued elsewhere, the process of obtaining a legal abortion itself becomes the punishment.¹⁶² Yes, the state cannot outlaw abortion, but it certainly can make women who chose them pay. Teenage girls unwilling to tell their parents have been paying for their abortions for some time now.¹⁶³ Now women too must not only wait,

and *Pitfalls*, 18 J. CLIN. ULTRASOUND 302 (1990) (Isr.). Its primary disadvantage for patients is the vaginal insertion of a probe. Paul et al., *supra*, at S36.

157. *Rochin v. California*, 342 U.S. 165, 172 (1952).

158. *Id.* at 173.

159. See David Crary, *South Dakotans Reject Tough Abortion Ban*, WASH. POST, Nov. 8, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/07/AR2006110700762.html>; Monica Davey, *South Dakota Bans Abortion, Setting Up a Battle*, N.Y. TIMES, Mar. 7, 2006, at A1.

160. LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973*, at 168–71 (1997).

161. *People v. Stanko*, 95 N.E.2d 861 (Ill. 1950).

162. See Sanger, *supra* note 120, at 310.

163. *Id.*

travel, dissemble, arrange care for their children, and lose work days, but they must also produce their bodies to help the state make its argument against abortion.

The Supreme Court and the federal circuits have upheld these many requirements as perhaps burdening the decision to abort but not unduly so. But “burden” is not the only characterization that informs our understanding of what is going on. The goal of abortion regulation is certainly to make abortion harder to get. But the regulation does more than thwart the practice. It seeks to secure that women who abort will understand by virtue of the various constraints imposed that what they have done is wrong. In this way the regulations work to humiliate and to punish pregnant women. Some forms of punishment are more subtle than others. How bad is it really to inform pregnant women that if they have their baby they don’t have to keep it, since the state offers full adoption services? Whether that sort of information is intended to help or intended to haunt may be subject to debate. But mandatory ultrasound takes the state’s punitive intentions to an impermissible length. Requiring women to produce their bodies and its contents, even under the guise of informed consent, goes far beyond the limits on indignity that the law has rightly established.

C. Coercive Use

It is not just the coercive production of the fetal image, but what I characterize as its coercive use that further complicates the practice of mandatory ultrasound. To be sure, no state pries the woman’s eyes open and forces her to at least glimpse the image. No one is compelled to look, although in 2007, the state of South Carolina came fairly close.¹⁶⁴ Nonetheless, the question put to the woman about looking is compulsory: Do you want to see your unborn child?

While no analogy is exactly apt, I offer an example that illuminates the quality of the experience of simply being asked. Imagine that before you declined to sign an organ donation card (in New York this takes place at the DMV), you were required to look at photographs of the next three people on the donor list for hearts, the next three in line for kidneys, the next three in line for corneas, and so on.¹⁶⁵ Your decision to check the “No” box means

164. In March 2007, the South Carolina House voted 91–23 to require women to have and to look at their ultrasound before an abortion. See Aaron Gould Sheinin, *Bill Clears Early Hurdle—S.C. House: View Fetal Image Prior to Abortion*, STATE (S.C.), Mar. 22, 2007, at A1. The bill was amended to remove the compulsory viewing after State Attorney General Henry McMaster stated that he thought the requirement was coercive and “unduly burdensome,” and therefore unconstitutional. See Matthew Gordon, *Recent Developments in Health Law, State Attempts to Expand Abortion Informed Consent Requirements: New Life After Gonzales v. Carhart?*, 35 J.L. MED. & ETHICS 751, 751–52 (2007).

165. I am grateful to Simon Stern for extended discussions on this point.

that some of those people are more likely to die. What might once have been decided fairly quickly becomes a decision of a different sort. The beneficiaries—or victims—of your decision are no longer faceless. Unlike the bombardier who more easily drops his load on unknown and nameless victims, the anonymity of consequence is removed. Looking at photographs of those who will suffer on account of your heedlessness is not, of course, the same as looking them in the eye. Nonetheless you will have seen their faces—possibly to forget or perhaps to remember—whether you check the box or not.

Of course, making an applicant for a driver's license look at photo albums of donees will complicate things at the DMV: The lines will be longer and the books will be in constant need of updates as donees die off, their pictures now marked with black asterisks to indicate their preventable deaths.¹⁶⁶ Recognizing these difficulties, suppose the DMV required only that the album of those awaiting transplants is offered, and looking is optional. Here I suggest that even the offer to look may cross the line of permissible influence. An image can signify even when unseen. One may not need actually to stare at the donees arrayed in the album to have their existence influence your decision.¹⁶⁷ The phenomenon may be the more intense when the image—a woman's fetus—has been captured in her own gut and is offered for the very purpose of persuading her to save its life.

What may be key here is the mechanism by which fetal imagery works. The mechanism of “merely offering” cleverly counts on the imaginative capacity of women to know what has been offered as a means of overpowering the

166. Something like this—commemoration also serving as caution—is found in the pro-life practice of planting mass crosses for aborted fetuses along highways and byways. See HOLLY EVERETT, *ROADSIDE CROSSES IN CONTEMPORARY MEMORIAL CULTURE* 5 (2002) (describing a “field of crosses” planted near Austin, Texas); see also Students for Life of America, Cemetery of the Innocents Display, <http://www.studentsforlife.org/index.php/resources/organize-an-event/cemeteryoftheinnocents> (last visited Oct. 4, 2008) (providing instructions for groups wishing to build a “Cemetery of the Innocents Display”).

167. I recognize that some readers think it is just fine to require drivers to look at organ recipients in order to bring home the consequences of a decision not to be an organ donor. However, it is not the state's cause but rather the method deployed to favor its cause that interests us here. To take another example, should cigarette smokers be required to look at an X-ray of a cancerous lung each time they buy a pack? A version of this recently went into effect in England, where photographs of the diseased lungs and rotting teeth of smokers are now found on the back of cigarette packs. See Shock Pictures on Cigarette Packs, <http://uk.news.yahoo.com/pressass/20081001/tuk-shock-pictures-on-cigarette-packets-6323e80.html>. But as unpleasant as the photographs may be, why not have smokers look at an instant X-ray of their own lung; the technology cannot be too far off. The analogy is not perfect; smoking has a public health dimension and it is not a protected choice in the same sense as voting or reproductive choice. But my opposition to mandatory ultrasound is not based wholly on my support of legal abortion. I don't smoke and am significantly happier when those around me refrain, but I don't think my smoking friends should be required to offer up their lungs for imaging every time they buy cigarettes.

decision she has reached regarding an abortion. Indeed, depending on the stage of her pregnancy, there may be no fetus to see at all; early ultrasounds reveal only the gestational sac, which appears as a small oval.¹⁶⁸ That knowledge draws in part from the cultural meanings of ultrasound as an obstetric experience; this is ultrasound as the quasi-medical initiation rite into motherhood discussed earlier. There is also the visual familiarity with fetal imagery as absorbed from the wallet photos and refrigerator magnets handed out after other people's ultrasounds and from the more photogenic representations seen in movies, commercials, and so on.

The impact of being offered a look at one's ultrasound is further intensified by the distinctive meaning of photography in the family context.¹⁶⁹ Here I mean something more than the familiar association of mothers with picture taking, picture keeping, and picture pasting. As Marianne Hirsch has observed, the affiliations that create the family are constructed through various relational, cultural, and institutional processes, and these include "'looking' and photography."¹⁷⁰ This is to say that family photographs do more than generate family memories. By creating a shared, visible record of membership they also help constitute the family. The ultrasound scan, "baby's first picture," inserts itself, notionally if not literally, into the family album because it can be read as a family photograph. It is described in the mandatory ultrasound statute as the image of the woman's unborn child: She is its mother. The scan asserts itself as proof of their affiliation, and the law means her to feel that relationship ostensibly by seeing it.

Pro-life organizations have long recognized what anthropologist Faye Ginsburg describes as the "conversion power" of fetal imagery.¹⁷¹ This is

168. The question of just what can be seen becomes more acute with regard to use of the "abortion pill," or mifepristone, which can be used up to the forty-ninth day of pregnancy. An embryo can be imaged at six weeks, but before six weeks, only the gestational sac (at four weeks) or the yolk sac (at five weeks) can be seen. Maureen Paul, Eric Schaff & Mark Nichols, *The Roles of Clinical Assessment, Human Chorionic Gonadotropin Assays, and Ultrasonography in Medical Abortion Practice*, 183 *AM. J. OBSTETRIC GYNECOLOGY* S34, S37 (2000) (showing ultrasound images in the early weeks of pregnancy); see A. Edelman et al., *Transvaginal Ultrasound and the Success of Medical Abortion*, 85 *INT'L J. GYNECOLOGY & OBSTETRICS* 62 (2004) (discussing transvaginal ultrasound's use in confirming the success of a medical abortion by imaging the now empty uterus). Mandatory ultrasound statutes are silent as to the method of abortion—surgical or by the abortion pill.

169. See generally Hirsch, *supra* note 123, at 5 (describing how "[p]hotographs, as the only material traces of an irrecoverable past, derive their power and their important cultural role from their embeddedness in the fundamental rites of family life"). For an overview, including the use of family photographs in politics, see Mary Bouquet, *The Family Photographic Condition*, 16 *VISUAL ANTHRO. REV.*, Spring/Summer 2000, at 2.

170. Hirsch, *supra* note 123, at 10.

171. FAYE D. GINSBURG, *CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY* 104 (1989).

the belief that the visible fetus reveals a certain truth and, as with the revelation of other truths, there is then “only one path to follow.”¹⁷² Certainly many women, whatever their eventual decision about their pregnancy, may be deeply moved by seeing their own ultrasound. Some may indeed be “awe-struck.” And here ultrasound technology connects with religious tradition. Religion has always strained to see the unseen, through pictorial representations in Christianity and through church architecture generally.¹⁷³ We are often awe-struck when we see something for the first time that cannot have been seen before, whether the first pictures of Earth from space, or Life magazine’s first fetus in utero. In this way, a woman seeing or being offered the sight of her own unseen fetus for the first time is being forced into something like a religious or sacred moment. Her curiosity is being attached to the unknown, just as religious faith requires a leap into the unknowable. And the newly visible in this context, encompassing aspects of profound intimacy, is taken from the woman’s own body.

It may be useful to consider—with great care and cabined applicability—an analogy with the mechanisms by which torture operates. In considering why torture, in comparison with other forms of coercion, is morally wrong, David Sussman has suggested that it is not simply a matter of indescribable pain but rather the use of the body to turn the victim against himself: “Torture forces its victim into the position of colluding against himself through his own affects and emotion.”¹⁷⁴ Sussman argues that “[t]hrough the combination of captivity, restraint, and pain, the physical and social bases of rational agency are actively turned against such agency itself.”¹⁷⁵ Of course, mandatory ultrasound does not involve physical pain, captivity, or significant restraint.¹⁷⁶ There is, however, an aspect of the requirement that is intended to turn the bases of rational agency—here the deliberative path taken to the abortion decision—against the decision. The hope is that the fetal image will overwhelm the decision to

172. *Id.* at 105. This is something different than Justice Potter Stewart’s observation regarding pornography that “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). The converse claim is that a woman knows it *because* she sees it.

173. I am deeply grateful to Robert Ferguson for this discussion.

174. David Sussman, *What’s Wrong With Torture*, 33 PHIL. PUB. AFFAIRS 1, 4 (2005).

175. *Id.* at 33.

176. In earlier times, women’s pregnant bodies have been used against them physically to change their minds. In seventeenth century Virginia, midwives were enlisted in state efforts to obtain from unwed mothers the name of the father. Unmarried pregnant women, commonly indentured servants, were bound over a midwife pending childbirth; at that time the midwives would refuse to help the woman until she revealed the name of the father. For a sobering account of a “midwife interrogation,” see JOHN RUSTON PAGAN, ANNE ORTHWOOD’S BASTARD: SEX AND LAW IN EARLY VIRGINIA 81–87 (2003). A laboring mother was told to “answer at that dreadfull Day of Judgment where all harts shall be opened and all secretts made knowne, To Speake who was the father of the Child she went with.” *Id.* at 87.

abort by triggering something like a primitive maternal instinct. The woman will then change her mind and protect her child. But, “changing her mind” may not accurately describe the process by which the ultrasound requirement is intended to work. It is less an appeal to reason than an attempt to overpower it.

D. Visually Informed Consent

Mandatory ultrasound is only one of several regulatory interventions seeking to inform a pregnant woman that her fetus is an unborn child and to persuade her on this account not to kill it. Others include defining or referring to the fetus as a person, child, or unborn child, and offering the woman detailed pictures, still and moving, on fetal development. Utah, for example, requires “truthful and nonmisleading descriptions of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, accompanied by pictures or video segments representing the development of an unborn child at those gestational increments.”¹⁷⁷ States locate such disclosures in the law of informed consent, the familiar doctrine that conditions patient consent to medical treatment on a sufficient understanding of what the treatment is and what it is for. To assure that nothing shifty is going on with these attempts to obtain truly informed consent—no smiling fetuses or teddy bear stickers on ultrasound monitors—the Utah statute provides that these materials “shall be designed to convey accurate scientific information about an unborn child at the various gestational ages”¹⁷⁸ This provision is a clever rhetorical move. Tacking “unborn child” to the end of the phrase incorporates a particular definition of fetal life—the fetus as a child—within the state’s pledge to provide accurate scientific information. In defining informed consent, the existence of an unborn child has become a fact. Unlike competing statements by advocates regarding ballot initiatives, ultrasound images of one’s own fetus are not intended as neutral information. State legislatures are in agreement on this point; that is why the statutes are enacted.

To understand how this move undermines the law’s traditional meaning of informed consent, I want to consider other attempts to stack the content of informed consent through adding required disclosure language. For example, not entirely confident that a picture is worth a thousand words, South Dakota requires that women receive not only developmental fetal pictures, but also a written statement from the abortion doctor characterizing the abortion as a

177. UTAH CODE ANN. § 76-7-305.5(1)(b) (Supp. 2007).

178. *Id.*

procedure that “will terminate the life of a whole, separate, unique, living human being.”¹⁷⁹ In *Planned Parenthood of Minnesota v. Rounds*, a three-member panel of the Eighth Circuit upheld a preliminary injunction against enforcement of the statute, stating:

Forcing [an abortion patient] not only to read, but to sign each page of a statement containing the state’s moral and philosophical objections to the procedure she has planned and intends to undergo, and forcing her doctor to certify that she “understands” these objections, does little to promote independent decision making and may actually exacerbate any adverse psychological consequences of the procedure. Such disclosure requirements are far more onerous than what federal courts have previously reviewed, and there is at least a “fair chance” that they pose an undue burden.¹⁸⁰

The New Jersey Supreme Court recently considered the contours of informed consent in the context of a malpractice action against a physician following an abortion. In the 2007 case of *Acuna v. Turkish*,¹⁸¹ Rosa Acuna sued her obstetrician-gynecologist for his failure to obtain Acuna’s informed consent before terminating her pregnancy. Acuna charged that Dr. Turkish had omitted to tell her of “the scientific and medical fact that [her six-to-eight-week old embryo] was a complete, separate, unique and irreplaceable human being” and that an abortion would result in “killing an existing human being.”¹⁸²

179. S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (Supp. 2008). The constitutionality of the requirement is now before the Eighth Circuit after an en banc court reversed a three-member panel decision finding the statute was unconstitutional. See *Planned Parenthood of Minn. v. Alpha Ctr.*, 213 F. App’x 508 (8th Cir. 2007).

180. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 467 F.3d 716, 727 (S.D. 2006), *vacated en banc*, 530 F.3d 724 (8th Cir. 2008); see also Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading Casey*, 83 WASH. L. REV. 1 (2008) (arguing that required pre-abortion disclosure statements may violate *Casey* if their message has the effect of being more persuasive than their quality objectively deserves, and therefore distracts the recipient from fully engaging in an analysis of the message).

181. 930 A.2d 416 (N.J. 2007).

182. *Id.* at 418 (brackets in original). One notes that the language of the South Dakota statute (“the abortion will terminate the life of a whole, separate, unique, living human being”) is nearly identical to the plaintiff’s desired instruction about informed consent in *Acuna*. S.D. CODIFIED LAWS § 34-23A-10.1(1)(b). The likely explanation is the role of New Jersey lawyer Harold Cassidy. Cassidy was instrumental in drafting the South Dakota statute, and represented Rose Acuna. *Acuna*, 930 A.2d at 418; see Harold Cassidy & Associates, Biographical Information, <http://www.haroldcassidy.com/bio.html> (last visited Aug. 30, 2008); Sarah Blustein, *The Right Not to Choose*, AM. PROSPECT, Apr. 13, 2007, http://www.prospect.org/cs/articles?article=the_right_not_to_choose. Cassidy also represented Mary Beth Whitehead in the famous Baby M surrogacy case and specializes in representing mothers seeking to regain custody of their children or damages for their removal. Harold Cassidy & Associates, <http://www.haroldcassidy.com> (last visited Aug. 30, 2008). On the political history of the South Dakota legislation, see Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (2007).

Acuna conceded that she had understood that “she had growing within her the beginnings of human life that would result in the birth of a living child if the pregnancy continued without complications or intervention.” She claimed, however, that Dr. Turkish had not told her that the abortion procedure was “intended to kill that family member.”¹⁸³

Reviewing the common law of informed consent, the New Jersey Supreme Court noted that a physician must indeed “disclose to the patient all medical information that a reasonably prudent patient would find material” before deciding on a medical intervention.¹⁸⁴ However, despite Acuna’s offer of expert testimony to establish that at the time of the abortion her embryo was “an existing human being,” the court held that there was “no consensus in the medical community or society” supporting that position: “On the profound issue of when life begins, this Court cannot drive public policy in one particular direction by the engine of the common law when the opposing sides, which represent so many of our citizens, are arrayed along a deep societal and philosophical divide.”¹⁸⁵

In its decision, the New Jersey Supreme Court took note of the Minnesota decision, noting that *Rounds* “addresses a statute enacted by the democratically elected representatives of a state” and therefore “is pushing the doctrine of informed consent to the edge of a new constitutional fault line.”¹⁸⁶ The fault lines include not only the First Amendment claims of physicians, but of greater interest to us here, the applicability of the undue burden standard stated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁸⁷

At first glance, the constitutional challenge to mandatory ultrasound appears a bit tricky. Recall that under *Casey*, state regulations that have “the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion” are impermissible.¹⁸⁸ With this framework, women and not the state

183. *Acuna*, 930 A.2d at 418. Acuna may have been prompted to sue Dr. Turkish by the following episode: After her abortion, Acuna was admitted to a hospital with the diagnosis “incomplete abortion.” *Id.* at 419. After undergoing a dilation and curettage, Acuna asked a nurse what had happened. The nurse replied that “the doctor had left parts of the baby inside of you.” *Id.* “At that point, plaintiff ‘started to realize that [there] was a baby and not just blood’ inside of her.” *Id.* The court noted that the pathology report following Acuna’s dilation and curettage procedure had yielded no fetal parts but “only chorionic villi,” or the lining of the uterus. *Id.* at 419 n.5.

184. *Id.* at 425.

185. *Id.* at 425, 427.

186. *Id.* at 427.

187. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). Certainly a strong case can be made that requiring physicians to tell their patients that abortion is murder would seem constitutionally impermissible. See Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939 (2007).

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

create the “substantial obstacle.” The only thing preventing the woman from having an abortion is that she changed her mind after seeing an ultrasound. The state’s intervention has been simply to persuade, not to block.¹⁸⁹ The nature of the ultrasound obstacle is therefore different than say, the cooling off periods that the Supreme Court has held are not an undue burden, or spousal notice, which the Court held is. These create logistical problems for women who want an abortion but whose access is thwarted by time, distance, or spousal interference. Here, however, the mechanism of prevention is the woman’s own decision not to abort. Moreover, unlike South Dakota’s requirement that doctors say certain things to their abortion patients, ultrasound images are understood to speak for themselves. Assuming that physicians are not required to characterize the images but only to produce and to offer them, is a sonogram not simply a more intimate and more animated form of disclosure? On this account, the state has simply disseminated useful information by high-tech means. The method of dissemination has been visual rather than verbal but when all is said and done, an ultrasound scan is just information. If so, the matter might seem settled (constitutionally at least) by *Casey* and its regulatory aftermath, in which the mandatory provision of print materials regarding fetal development have been upheld.

But here we return to the distinctive capabilities of ultrasound technology and to its distinctive product. Unlike fetal pictures in a brochure, requiring women to undergo ultrasound is meant to override her appreciation not of fetal life in general but of her own pregnancy. I suggest that on the spectrum of forms of persuasion, an ultrasound image is less like a brochure than it is like a sidewalk abortion protestor. As Justice Scalia has explained, the sidewalk protestor is hoping “to forge, in the last moments before another of her sex is to have an

189. Another way to think about this—whether mandatory ultrasound or your own children pleading with you to stay married—is to ask whether there are limits on state attempts to persuade you not to exercise a constitutional right. And here it may be that there is such a thing as too much information or information imparted in too directive a manner. This may be especially true when the information is provided by the state for the purpose of dissuading a person from exercising a constitutionally protected decision. Consider an example from criminal procedure. Since 1975, criminal defendants may waive their right to court appointed counsel, but may do so only if the waiver is voluntary and knowing and has been approved by the court. See *Faretta v. California*, 422 U.S. 806 (1975). Because waiving the right to counsel is understood as a grave decision, the federal courts have struggled with the question of the extent to which the court must make the defendant aware of the dangers and disadvantages of self-representation. In a Seventh Circuit case, Judge Easterbrook observed that “*Faretta* require[s] courts to respect a litigant’s demand for self-determination at the most critical moment in the criminal process. That right is not honored if judges must depict self-representation in such unremittingly scary terms that any reasonable person would refuse.” *United States v. Hill*, 252 F.3d 919, 928–29 (7th Cir. 2001). An ultrasound is not, of course, unremittingly scary. However, its impact is understood, or at least intended, to be so profound as to cause any reasonable woman seeking an abortion to refuse to go further.

abortion, a bond of concern and intimacy that might enable her to persuade the woman to change her mind and heart.”¹⁹⁰ So too the hope for mandatory ultrasound. The appeal is powerful, and it may cause some women to change their minds. But this is not the stuff of informed consent.

I insist again that there is a difference between the state providing information about the fetus in general and requiring a woman to produce an image of her own fetus. The image is not just more information. As anthropologist Lisa Mitchell has explained, fetal images mean different things to different parents: “For some parents, the ability to see fetal parts . . . may demonstrate that the fetus . . . has the potential for or actually possesses distinctive human consciousness and personhood. Alternatively, they may regard ultrasound simply as a diagnostic tool . . . [that] says little or nothing about the fetus as a person.”¹⁹¹ To some, the ultrasound image represents life itself; to others, it shows a form of developing life, what one pregnant columnist called an “entity in the act of becoming.”¹⁹² To still others, a sonogram may be more like an X-ray; a technological depiction of the interior physical self, an image of what was once referred to as a pregnancy. And certainly for many, the ultrasound is a precious picture of their own beloved baby. These alternative understandings of fetal life are but four examples of what Justice O’Connor identified as “the right to define one’s own concept of existence,” a decision that lies in “the heart of liberty.”¹⁹³ As Justice O’Connor explained, “[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”¹⁹⁴ To pretend that a compulsory ultrasound scan is just another piece of information is to ignore all that is known about the meaning of ultrasound to the woman whose own fetus—not a textbook fetus sketched in two-week developmental increments but her own—is being offered up for her to see. The image is being offered to prove that this fetus is your child. It is something in the order of a dare.

The common law of tort has already acknowledged the visual dimensions of the special bond between mother and child. In *Dillon v. Legg*, the California Supreme Court found that a negligent driver owed a duty of care to the mother of a child killed in a car accident.¹⁹⁵ Margery Dillon sought to recover for the emotional shock and physical injury that resulted from having witnessed the collision. Earlier courts had required the mother to have feared for her own safety

190. *Hill v. Colorado*, 530 U.S. 703, 757 (2000) (Scalia, J., dissenting).

191. MITCHELL, *supra* note 19, at 6.

192. Kirshenbaum, *supra* note 74.

193. *Casey*, 505 U.S. at 851.

194. *Id.*

195. *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

in order to recover.¹⁹⁶ But *Dillon* changed that rule, noting that to do otherwise would “frustrate[] . . . the natural justice upon which the mother’s claim rests.”¹⁹⁷ The decision bundles several assumptions about maternal love and maternal duty. Fear of fraudulent claims was overcome by the certainty that “a mother who sees her child killed will suffer physical injury from shock.”¹⁹⁸ Concerns about foreseeability were answered by strongly held assumptions about maternal presence: “[S]urely the negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant.”¹⁹⁹ The court concluded by characterizing *Dillon*’s claim against Legg as “the most egregious case of them all: the mother’s emotional trauma at the witnessed death of her child.”²⁰⁰

Mandatory ultrasound statutes are usefully located within this larger legal contemplation of maternal loss. To the extent that the law accepts that there is no greater maternal harm than to see one’s child killed, mandatory ultrasound offers the mother something like a sneak preview. The offer is meant to operate at a visceral level, to evoke an imaginative forecast of the death of this photographic subject. Characterizing the fetal image as an element of informed consent works only to the extent that consent now encompasses capitulation to a particular position on the meaning of embryonic or fetal existence.

The idea of looking at the ultrasound image of one’s own fetus also subtly engages Sixth Amendment principles, with some curious inversions. Under the Sixth Amendment, a criminal defendant has the right to confront witnesses against him. The woman who aborts is not literally in the dock, but both culture and law have created at least an air of accusation against her. The purpose of abortion regulations aimed at the patient is to cause her to interrogate her decision over and over again. Do you understand what you are about to do? Think harder, think longer: There is still time to revoke. Mandatory ultrasound raises the stakes by producing an imagined showdown between the woman and her accuser, the fetus. But here we must return to the basics. Abortion is not a crime. There is no social, moral, or medical consensus about the meaning of life as that term is now used.²⁰¹ In deciding whether or not to abort, women often confront or engage with their futures, their families, their children, and their communities. They may also choose to confront or engage on their own terms with their pregnant bodies and its vibrant contents. The

196. For the history of tort claims for harms to mothers, see generally Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).

197. *Dillon*, 441 P.2d at 914.

198. *Id.* at 917.

199. *Id.* at 921.

200. *Id.* at 925.

201. Sanger, *supra* note 27, at 805–06 (discussing the various definitions of the term “life” and the capitalization by Republican groups on the specific meaning of “culture of life”).

problem then is not the fact or the absence of confrontation, but rather the imposition of visual confrontation.

E. The Problematic Presence of Fetal Images in Existing Law

State legislatures seem to characterize the ultrasound image as a simple datum, something like the surgeon general's warning on the side of cigarette packets. But again, this is to ignore all that is known about how images work upon us. It is also not how the law generally has regarded pictures of fetuses. The power of fetal images to distort judgment has been acknowledged both in tort and criminal law, where courts have had to decide whether to admit pictures of dead fetuses into evidence.²⁰² In a case involving the murder of a pregnant woman, the court upheld the exclusion of graphic photographs, during the punishment phase of trial, as inflammatory.²⁰³ While many of the excluded fetal images have been bloody and in color, even photographs of peaceful sleeping fetuses have been found to be prejudicial. During the punishment phase in a capital murder trial, a Texas trial court admitted into evidence an eight-by-ten inch color picture of the victim and her posthumously extracted unborn child lying in a casket together at their wake.²⁰⁴ The appellate court described the picture:

the unborn child had been removed from her body, cleaned, and swaddled in white material, possibly a blanket. The unborn child was placed next

202. Tort plaintiffs have sought to introduce graphic pictures of a dead fetus "as 'your basic evidence'" in wrongful death suits. *Steele v. Atlanta Maternal-Fetal Med., P.C.*, 610 S.E.2d 546, 553 (Ga. Ct. App. 2005) (upholding the trial court's exclusion of photographs of dead fetuses because their probative value was "substantially outweighed by the danger of unfair prejudice"). In that case, the state court of appeals upheld the trial court's decision to exclude the photograph of a fetus with peeling skin as "'emotionally provocative' and inflammatory." *Id.*

203. See *Erazo v. State*, 167 S.W.3d 889 (Tex. Ct. App. 2005) (holding that admission of a fetal photograph was likely to appeal to the jury's emotions and therefore harmful error). *But see* *People v. Rios*, No. G031541, 2004 Cal. App. Unpub. LEXIS 6026 (Cal. Ct. App. Jun. 24, 2004) (upholding the inclusion of graphic photos of a bloody stillborn fetus in a rape prosecution of the father of a fetus where the probative value of the photos outweighed the danger of undue prejudice); *Rogers v. State*, Nos. 05-05-00283-CR, 05-05-00284-CR, 2006 WL 475795 (Tex. Ct. App. Mar. 1, 2006) (upholding the trial court's admission into evidence of autopsy photographs of a uterus removed from the victim's body, placenta, and an eight-to-nine-week-old fetus as relevant to issue of whether the fetus was alive at the time the victim was shot); *Hicks v. Commonwealth*, No. 0430-06-4, 2007 WL 1244558 (Va. Ct. App. May 1, 2007) (holding that the autopsy photographs of the deceased victim's fetus as relevant to proving an element of the offense).

204. *Reese v. State*, 33 S.W.3d 238, 239 (Tex. Crim. App. 2000). The appellate court also described the picture of the coffin ("a lining made of white textured material"), and the dead mother ("Her hair had been fixed with spiral curls."). *Id.* at 242.

to his mother with only his face . . . showing. The unborn child is miniature in form and his face is only a fraction of the size of his mother's hand.²⁰⁵

After the jury sentenced the defendant to death, he appealed on the ground that the picture's prejudicial effect had outweighed any probative value it might have had. The State defended the picture as relevant to show "foreseeable consequences" of his acts, as well as the defendant's "violent and vicious nature."²⁰⁶ Conceding that the photograph had "at least some relevance to the jury's decision," the Court nonetheless held that its ability "to impress the jury in some irrational yet indelible way" was improper:

The unborn child in the photograph appears tiny, innocent, and vulnerable. Society's natural inclination is to protect the innocent and the vulnerable. The contents of the photograph ha[ve] an emotional impact that suggests the jury's decision be made on an emotional basis and not on the basis of the other relevant evidence introduced at trial.²⁰⁷

Judicial concern over prejudicial evidence suggests that a jury—like a polling place—is another sort of protected deliberative space in which decisionmaking is insulated from factors that inflame or prejudice judgment. What information a jury may or may not consider and what they may or may not see is carefully and strictly policed by the rules of evidence: A jury's verdict may be overturned if improper evidence has been considered. Such limitations on decisionmaking—especially important in life or death decisions—stem from underlying jurisprudential norms regarding a fair trial. So too a woman's right to decide about abortion also stems from jurisprudential concerns, as explained in *Roe v. Wade* and again in *Casey*, here about liberty in the private domain rather than fairness in the criminal. But the impulse toward fairness in decisionmaking has application for abortion as well. Mandatory ultrasound seeks to impress the pregnant woman in an indelible visual manner. Her decision is to be taken under the literal and looming shadow of the fetus, whose image is played as trumps.

In addition to evidentiary challenges in criminal law and in tort, there have also been challenges to the public display of fetal imagery. Courts have had to decide whether pictures of mutilated fetuses constitute "fighting words,"²⁰⁸

205. *Id.* at 241 (footnote omitted).

206. *Id.* at 240.

207. *Id.* at 240, 242. The court noted the State's agreement with the defendant's argument at trial that "the only reason this [photo] is being admitted . . . is to whip the jury into a death penalty frenzy." *Id.* at 243–44.

208. *World Wide St. Preachers' Fellowship v. Owensboro*, 342 F. Supp. 2d 634 (W.D. Ky. 2004) (holding that a three-by-four foot "enlarged color photograph of a mutilated fetus" displayed during a well-attended street concert was not "fighting words" for purpose of free speech); see also *Graphic Anti-Abortion Billboard Disturbs Orlando Residents*, WFTV.COM, May 11, 2005, <http://www.wftv.com/news/>

or a public nuisance.²⁰⁹ Prison wardens have created an “aborted-fetus policy” after the display of fetal imagery provoked fights among inmates.²¹⁰ Broadcasters have been challenged for refusing to air graphic abortion footage included within political advertising on television on the ground that such imagery violates established standards of decency; such decisions have generally been upheld.²¹¹

Fetal images have also become an issue in the workplace. In *Wilson v. U.S. West Communications*, as part of a private vow taken in accordance with her Roman Catholic faith, Christine Wilson wore an anti-abortion button

4478170/detail.html (reporting on neighborhood distress caused after a Center for Bio-Ethical Reform (CBR) poster of a “fetus, torn into pieces and covered in blood” was displayed on a residential street). As a Kentucky district court held in 2004, the display of an aborted fetus on a protest sign, “no matter how gruesome or how objectionable it may be,” is constitutionally protected speech and a “powerful, albeit graphic commentary on a societal debate that divides many Americans.” *Owensboro*, 342 F. Supp. at 639.

209. *State v. Otterstad*, 734 N.W.2d 642 (Minn. 2007). In *Otterstad*, the defendants hung a four-foot high picture of an aborted fetus on a highway overpass and were arrested for endangering the public. *Id.* at 644. Their conviction was overturned on the ground that the State had not proved the public had been endangered at all. No evidence had been presented that the graphic picture of the aborted fetus would be particularly distracting to motorists. *Id.* at 646–47. Noting that “signs, of whatever type, and wherever placed, are an omnipresent feature in the life of a motorist,” the court observed that the only accident that might have resulted from the sign involved a “gawker.” *Id.* at 646 & n.2. *But see* *Claudio v. United States*, 836 F. Supp. 1230, 1232, 1237 (E.D.N.C. 1993) (upholding the revocation of an artist’s license to display work in a federal building when the work was comprised of a “larger-than-life depiction[] of a nude woman, a coat hanger, and a fetus”), *aff’d*, 28 F.3d 1208 (4th Cir. 1994).

210. *Wishnatsky v. Schuetzle*, No. 97-1130, 1998 U.S. App. LEXIS 5966 (8th Cir. Mar. 27, 1998) (per curiam) (holding that a prisoner had not met his burden of demonstrating that the warden’s policy was not reasonably related to penological interest in security). The warden of North Dakota State Penitentiary instituted an “aborted fetus policy” prohibiting prisoners from possessing pictures of aborted fetuses after the display of such pictures provoked verbal and physical confrontations among prisoners. *Id.* at *2. A prisoner objected to the policy on First Amendment grounds after prison officials screened his mail for “postcards of unborn children, both alive in the womb and dead through abortion.” *Id.* CBR offers e-cards of bloody aborted fetuses which website visitors can email as they like. See Ctr. for Bio-Ethical Reform, Ecards, <http://www.abortionno.org/Resources/ecards.html> (last visited Aug. 28, 2008).

211. The BBC’s refusal to broadcast such imagery was upheld in *R v. British Broadcasting Corporation ex parte ProLife Alliance*, [2004] 1 A.C. 185 (U.K.). The ProLife Alliance contended that the BBC’s decision not to air its authorized party election broadcast, including “aborted foetuses in a mangled and mutilated state, tiny limbs, a separated head, and the like,” violated their right to “impart information and ideas” under Article 10 of the European Convention on Human Rights. *Id.* at 223–24, 236. A majority of the House of Lords found that the BBC was entitled to determine and to apply standards of “taste and decency” in prohibiting the broadcast of “offensive material.” *Id.* at 185. For an analysis critical of the decision, see Jesse Elvin, *R v. British Broadcasting Corporation Ex Parte ProLife Alliance: The Right to Free Speech Standards of Taste and Decency, and the “Truth” About Abortions*, 1 WEB J. CURRENT LEGAL ISSUES (2004); see also *Gillett Commc’ns of Atlanta, Inc. v. Becker*, 807 F. Supp. 757 (N.D. Ga.1992) (upholding a broadcaster’s decision to channel a candidate’s campaign advertisement including footage of an actual abortion to “safe harbor hours” between midnight and 6 a.m.); see also *Milagros Rivera-Sanchez & Paul H. Gates, Jr., Abortion on the Air: Broadcasters and Indecent Political Advertising*, 46 FED. COMM. L.J. 267 (1994); *Hille von Rosenvinge Sheppard, The Federal Communications Act and the Broadcast of Aborted Fetus Advertisements*, 1993 U. CHI. LEGAL F. 393.

featuring a color photograph of a fetus to work every day.²¹² Several of Wilson's co-workers objected to her daily display of the button, not because of their position on abortion (many shared Wilson's views), but because they associated the fetal image with personal histories of infertility or miscarriage. After several employees threatened to walk off the job, the employer offered Wilson several options: keep the button in her cubicle, cover the button at work, or wear a protest button with words but no picture. Wilson rejected all of these. She was then fired, and sued her employer under Title VII on grounds of religious discrimination. The Eighth Circuit held that the employer had attempted to accommodate her religious beliefs by offering the various options.²¹³ Our interest in the case is not, however, the fine points of religious accommodation, but in the meanings attributed to the fetal photo. Wilson understood the picture as "acknowledge[ing] the sanctity of the unborn."²¹⁴ Others found the button less politically charged than emotionally so, not a celebration of life but a reminder of loss.

Concern over the impact of pictures of fetuses underscores the positional nature of fetal imagery. By positional I mean that the imagery is rarely neutral, or at least rarely received as neutral. For some it powerfully represents nothing less than life. That this power may have been constructed over the last forty years by the complex interaction of reproductive technology, reproductive politics, and reproductive desires may not matter at this point. For even those who do not themselves find an ultrasound image moving or meaningful are aware that it so signifies for others.

CONCLUSION: A LAST LOOK

Mandatory ultrasound statutes cleverly and cruelly capitalize on the socialized meaning of fetal imagery as it has migrated from medicine to marketing and from obstetric to political use. Returning to Hurricane Katrina, the fetus has indeed become the eye of the storm, a force to be reckoned with. For many pro-life advocates, fetal imagery goes to the heart of their opposition to abortion. For some, pictures of well-developed, almost pretty fetuses in utero are understood to speak for themselves, proof of the familiar motto that "It's a Child, not a Choice."²¹⁵ Others, like the Center for Bio-Ethical Reform, choose

212. *Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337, 1339 (8th Cir. 1995).

213. *Id.* at 1341-42.

214. *Id.* at 1341.

215. The motto is commonly seen on pro-life placards. See Robin Toner, *A City of Compromises Founders on Abortion*, N.Y. TIMES, May 1, 1990, at A18. The slogan is also available on buttons and

a tougher mode of visual confrontation, parading high-resolution “large format abortion imagery” (enormous photographs of hacked-up fetuses) on the side of eighteen-wheel trucks driven around the United States.²¹⁶ As an article on the Center’s website explains, “Pictures make it impossible for anyone with a shred of intellectual honesty to maintain the pretense that ‘it’s not a baby’”²¹⁷ Both approaches seek to demonstrate to pregnant women and to the rest of us exactly what and exactly who is at stake in an abortion.

Other more intimate, if less immediately decipherable, fetal pictures are also familiar to many of us. These are the early, only somewhat decipherable ultrasound images passed around by expectant mothers at social gatherings, at work, or after school. These photos are not meant to convince anyone but rather to engage family and friends. These are displayed by women who may never have considered abortion, by women who considered and rejected the possibility, and by women who, for a variety of reasons, were unable to have a desired abortion and so now await motherhood. Some women initially ambivalent about pregnancy may have been persuaded by ultrasound pictures, their own or someone else’s, not to terminate their pregnancies, but to accept or embrace motherhood. Each of these women—our own friends, relatives, and children—has her own story.

Of course for some, the imaginative appeal of fetal development need not be visual. In a recent cheerful movie on teen pregnancy, fifteen-year-old Juno was stopped in her abortion tracks on hearing from a sidewalk protester that her fetus might have fingernails: “Really? Fingernails?”²¹⁸ Women come to their

bumper stickers. See Republican National Coalition for Life, <http://www.mclife.org/order> (last visited Aug. 4, 2008).

216. Ctr. for Bio-Ethical Reform, The Matthew 28:20 Project, <http://www.abortionno.org/matt.html> (last visited Aug. 28, 2008); Ctr. for Bio-Ethical Reform, The Reproductive “Choice” Campaign, <http://www.abortionno.org/RCC.html> (last visited Aug. 28, 2008) (“The American roadway has become our chief venue”); see also Ctr. for Bio-Ethical Reform v. City of Springboro, 477 F.3d 807, 813 (6th Cir. 2007) (acknowledging that the CBR’s free exercise rights were not infringed by police stopping a billboard truck out of concern for public safety after noticing drivers wearing helmets, body armor, and talking on the radio). However, the Sixth Circuit reversed summary judgment in favor of the officers and remanded the case on the grounds that CBR’s Fourth Amendment rights may have been violated by the length of the stop. *Id.* at 824–25.

217. Gregg Cunningham, Ctr. for Bio-Ethical Reform, *Why Abortion Is Genocide*, <http://www.abortionno.org/Resources/abortion.pdf> (last visited Aug. 30, 2008). The ProLife Alliance makes a similar case. As restated by Lord Nicholls of Birkenhead, “A central part of its campaign is that if people only knew what abortion actually involves, and could see the reality for themselves, they would think again about the desirability of abortion. The disturbing nature of the pictures of mangled fetuses is a fundamental part of ProLife Alliance’s message.” *R v. British Broad. Corp. ex parte ProLife Alliance*, [2004] 1 A.C. 185, 225 (U.K.).

218. JUNO (Twentieth Century Fox 2007). When Juno later informs her parents that she is pregnant, she qualifies the information: “I don’t know anything about [the baby] yet. I only know it has fingernails, allegedly.” *Id.*

own decisions about abortion, drawing on a variety of faculties, senses, and intelligences. It is up to them to decide how to discern and how to evaluate what is at stake.

Mandatory ultrasound commandeers the process by insisting that women take a particular view of fetal existence. That insistence stems not from any innate truth about what an ultrasound picture reveals but from what the visual politics of abortion has taught us to see. French sociologist Bruno Latour has suggested that science and politics have always been intertwined, as “groups of people argue with one another using paper, signs, prints and diagrams.”²¹⁹ The recorded echoes that comprise a sonogram are another form of argumentation that has been put to use in the public debate over abortion, as groups of people continue to argue with one another. But a pregnant woman’s decision whether or not to have an abortion is unlikely to be a matter of politics for her. Deploying the image of her own fetus to argue with her confuses public debate with a protected choice and coercion with consent.

219. Bruno Latour, *Visualization and Cognition: Thinking With Eyes and Hands*, in 6 KNOWLEDGE AND SOCIETY: STUDIES IN THE SOCIOLOGY OF CULTURE PAST AND PRESENT 1, 3 (Henrika Kuklick & Elizabeth Long eds., 1986).