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AN ATTEMPT TO LEGISLATE MORALITY: FORCED ULTRASOUNDS AS THE NEWEST TACTIC IN ANTI- ABORTION LEGISLATION

I. INTRODUCTION

As the United States Supreme Court seemingly becomes more conservative, states are beginning to enact legislation to test the boundaries of the Court's stance on abortion rights.¹ In April of 2008, the Oklahoma legislature passed Senate Bill 1878, which required, in part: (i) an ultrasound prior to any abortion performed in the state of Oklahoma; and (ii) that the method of ultrasound, whether with a vaginal or an abdominal transducer, be determined by whichever method would depict the fetus more clearly.² While a few other states require a physician to perform an ultrasound prior to an abortion, Oklahoma's legislation is the first and only law that compels a physician to turn the monitor toward the woman while performing the ultrasound and to describe the images on the screen.³

On October 9, 2008, the Center for Reproductive Rights filed a lawsuit in the District Court of Oklahoma County seeking injunctive relief and claiming a constitutional right to privacy.⁴ Oklahoma District Court Judge Vicki L. Robertson issued a declaratory judgment against Senate Bill 1878 on August 17, 2009, ruling that the law violated a provision of the Oklahoma Constitution that requires legislation to concern a single subject.⁵ The Oklahoma Supreme Court affirmed Judge Robertson's decision on March 1, 2010.⁶ The Oklahoma House of Representatives, however, has proposed and overwhelmingly passed House Bill 2780, which is nearly identical to the ultrasound requirement in Senate Bill 1878.⁷ This law should be deemed unconstitutional

1. Jeffrey A. Van Datta, *Constitutionalizing Roe, Casey and Carhart: A Legislative Due-Process Anti-Discrimination Principle that Gives Constitutional Content to the "Undue Burden" Standard of Review Applied to Abortion Control Legislation*, 10 S. Cal. Rev. L. & Women's Stud. 211, 243 (2001).

The legislative agenda set by the self-described "redemptive constitutionalists" effectively promotes a program of pretextual legislation whose principal goal is to goad the Supreme Court into continually re-considering *Roe's* recognition of a woman's rights to chose [sic] and to reproductive autonomy until, one day, the Court might abrogate those rights.

Id. at 243-244.

2. Okla. Stat. tit. 63, § 1-738.3b.

3. Ron Jenkins, *Oklahoma Sued over New Abortion Ultrasound Law*, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/10/11/MN4O13F09F.DTL> (accessed Mar. 17, 2010).

4. *Nova Health Sys. v. Brad Henry*, No. CJ-2008-9119 (Okla. Co. Dist. Ct. filed Oct. 9, 2008); Ron Jenkins, *supra* n. 3.

5. *Nova Health Sys.*, No. CJ-2008-9119 (Okla. Co. Dist. Ct. Aug. 17, 2009).

6. Disposition Or. (Mar. 1, 2010) (available at <http://jurist.law.pitt.edu/pdf/oklasupctruling.pdf>).

7. News Channel 8, *House Passes Abortion Bill*, <http://www.ktul.com/news/stories/0310/711780.html> (accessed Mar. 16, 2010).

because it is an undue burden on a woman's right to an abortion.⁸ Furthermore, it violates a competent pregnant woman's right to refuse medical treatment, and this right outweighs the state's interest in protecting the potential life of a fetus.⁹

Part II of this paper focuses on the pertinent abortion cases expanding the right to privacy to encompass a woman's right to obtain an abortion.¹⁰ This section explains how the United States Supreme Court initially examined a woman's right to an abortion under the Fourteenth Amendment of the Constitution and how, as the years progressed, the Supreme Court allowed various restrictions on that right.¹¹ Next, the section explains the undue burden standard—the current standard courts must use in determining whether a restriction on a woman's right to an abortion is constitutional.¹²

Part III describes the ultrasound requirement and its effects on women and their doctors.¹³ This section discusses the legislative history regarding how the provision came into effect, and explains the legislative intent. Part III(A) applies the undue burden standard to the ultrasound requirement.¹⁴ This section also examines the inadequacies of the legislative purposes of the ultrasound requirement—namely, informed consent and the promotion of psychological well-being. Part III(B) describes a person's right to refuse medical care. The section contains relevant cases in which the Supreme Court first found a right to refuse medical care and then explicitly referred to a competent person's right to refuse medical care.¹⁵ The section explains that the right to refuse medical care is not absolute. Furthermore, this section describes the *Youngberg* balancing test and explains how it determines whether a restriction violates a person's right to refuse medical care.¹⁶ The section then describes the four general exceptions to a person's right to refuse medical care, and how the relevant exceptions should not apply to the ultrasound requirement.¹⁷ Finally, the section applies the *Youngberg* balancing test to weigh the state's interest against the interest of a woman refusing medical care—specifically, an ultrasound prior to an abortion.¹⁸ The comment concludes in Part IV that the ultrasound requirement should be found unconstitutional because it violates a woman's right to an abortion without a substantial obstacle and a woman's right to refuse medical treatment.

8. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 874 (1992).

9. *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 278 (1990); *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982) (explaining that to determine whether a person's constitutional rights have been violated, a balancing test must be done weighing "his liberty interests against relevant state interests").

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

11. *Id.*; *Casey*, 505 U.S. 833.

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

13. Okla. Stat. tit. 63, § 1-738.3b.

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

15. See e.g. *Wash. v. Harper*, 494 U.S. 210, 221–222 (1990); *Cruzan*, 497 U.S. at 278.

16. *Youngberg*, 457 U.S. at 321.

17. *In re Guardianship of Browning*, 568 So. 2d 4, 14 (Fla. 1990).

18. *Youngberg*, 457 U.S. at 321.

II. HISTORY OF RELEVANT ABORTION LEGISLATION

A. *Roe v. Wade*

In *Roe v. Wade*,¹⁹ the United States Supreme Court held that a woman had a Constitutional right to terminate her pregnancy under the right to privacy within the liberty interest of the Fourteenth Amendment.²⁰ The Court in *Roe* held that a pregnant woman's right to an abortion was a fundamental right and that violations of that right were subject to the strict scrutiny test.²¹ To survive a strict scrutiny assessment, the burden is on the state to prove that the statute serves a compelling state interest and that it is narrowly tailored to achieve that compelling interest.²² While the Court specifically held that a woman does not have an absolute right to privacy,²³ during the first trimester at least, the decision of whether to obtain an abortion rested solely with the pregnant woman and her doctor.²⁴ During the first trimester, the State could make no regulations restricting abortions because the State's interest of "protecting the potentiality of human life"²⁵ was not yet "compelling,"²⁶ as the fetus, during the first trimester, would never be able to sustain independent life outside the mother's womb.²⁷

The *Roe* Court based the trimester distinction on the concept of viability.²⁸ Doctors have determined that the point of fetal viability is approximately 28 weeks, or possibly less, at which point a fetus would be able to live outside the mother's womb with medical aid.²⁹ During the second trimester, states could regulate abortions in such a manner that would protect a mother's health.³⁰ After viability, states were allowed to regulate, or even ban, a woman's right to an abortion—with exceptions for the preservation of the mother's health and life—because a state's interest in protecting human life became compelling.³¹

B. *Planned Parenthood of Southeastern Pennsylvania v. Casey*

With the resignation of two liberal Supreme Court Justices, Justices Marshall and Brennan, and the appointment of Justice Thomas, many believed the Supreme Court would overturn *Roe v. Wade*.³² However, in *Planned Parenthood of Southeastern*

19. *Roe*, 410 U.S. 113.

20. *Id.* at 153.

21. *Id.* at 155.

22. See e.g. *Regents of U. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978); *Lange-Kessler v. Dept. of Educ. of the St. of N.Y.*, 109 F.3d 137, 141 (2d Cir. 1997); *Troyer v. Town of Babylon*, 483 F. Supp. 1135, 1141 (E.D.N.Y. 1980).

23. *Roe*, 410 U.S. at 154.

24. *Id.* at 163.

25. *Id.* at 162.

26. *Id.* at 163.

27. *Id.*

28. *Roe*, 410 U.S. at 160.

29. *Id.*

30. *Id.* at 163.

31. *Id.* at 163–165.

32. Erwin Chemerinsky, *Constitutional Law* 867 (2d ed., Aspen Publishers 2005).

Pennsylvania v. Casey,³³ the Court upheld the premise in *Roe* that a woman had the right to an abortion prior to fetus viability.³⁴ In *Casey*, Planned Parenthood challenged a Pennsylvania statute because it placed restrictions on pre-viability abortions.³⁵ The provisions of the statute required a physician to give a woman seeking an abortion information that advocated childbirth over abortion in order to obtain informed consent and to wait at least twenty-four hours after the information was given before an abortion was performed. The statute further required physicians to obtain parental consent for minors seeking an abortion, to ensure a married woman notified her husband of her decision to obtain an abortion, and to record specific information regarding every abortion.³⁶

While the *Casey* Court ultimately upheld the major premise in *Roe* that a woman had the right to obtain an abortion, the Court rejected certain themes of *Roe* and added various restrictions to a woman's right to obtain an abortion.³⁷ *Casey* effectively did away with *Roe*'s strict scrutiny standard of review regarding a state's interest prior to viability.³⁸ While the Court in *Roe* held that states could regulate abortions only in certain trimesters, the Court in *Casey* rejected the "rigid"³⁹ trimester framework and modified the concept of viability established in *Roe*.⁴⁰ Finally, the *Casey* Court rejected *Roe*'s decision that a state could not implement regulations prior to viability, holding that states may enact regulations to ensure that a woman's decision is "thoughtful and informed."⁴¹ The Court adopted the undue burden standard, under which a pre-viability state regulation on abortion would be upheld if it did not "ha[ve] the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion"⁴² Along with the new undue burden standard, the *Casey* Court also placed the burden of proving the new standard on those challenging the law rather than on the government, as required by *Roe*.⁴³ While the Court in *Casey* created this new undue burden standard, it did not explain how to use the standard—other than the "substantial obstacle"⁴⁴ language—leaving many uncertainties for lower courts to decide.⁴⁵

The Court held that the provision in the Pennsylvania law requiring a woman to notify her husband of her intention to obtain an abortion was an undue burden and, therefore, unconstitutional.⁴⁶ The Court reasoned that this provision would "not merely make abortions a little more difficult"⁴⁷ for a small number of women; the provision

33. *Casey*, 505 U.S. 833.

34. Caroline Burnett, Student Author, *Dismantling Roe Brick by Brick—The Unconstitutional Purpose Behind the Federal Partial-Birth Abortion Act of 2003*, 42 U.S.F. L. Rev. 227, 238 (2007).

35. *Casey*, 505 U.S. at 844.

36. *Id.*

37. Burnett, *supra* n. 34, at 238.

38. *Casey*, 505 U.S. at 840.

39. *Id.* at 872.

40. *Id.* at 870.

41. *Id.* at 872.

42. *Id.* at 877.

43. Laurence H. Tribe, *Abortion: The Clash of Absolutes* 247 (2d ed., W.W. Norton & Co. 1992).

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

45. Van Detta, *supra* n. 1, at 213.

46. *Casey*, 505 U.S. at 893–894.

47. *Id.* at 893.

would likely prevent that group of women—namely, those in domestic violence situations—from obtaining an abortion, thus preventing their right to choose.⁴⁸ The *Casey* Court upheld the provision requiring an unemancipated girl, under eighteen-years-old, to have a parent or guardian's consent prior to any abortion.⁴⁹ The Court reasoned that because the statute contained a judicial-bypass provision permitting a girl to petition the court to allow her to give her own informed consent, it did not create a substantial obstacle to obtaining an abortion.⁵⁰

The Court also upheld the statute's recordkeeping and reporting provisions that required physicians to file reports containing each woman's abortion facts and information concerning the physician performing the abortion.⁵¹ The information required to be recorded included the type of abortion procedure, date of abortion, number of prior abortions, etc.⁵² The Court reasoned that recording this type of information serves a purpose "other than to make abortions more difficult"⁵³ because the records of abortions were imperative for medical research.⁵⁴

Similarly, the Court applied the undue burden analysis on the provisions for informed consent and a mandatory waiting period in the same Pennsylvania law. The Court found the provisions to be constitutional, as they were not an undue burden on a woman's right to choose.⁵⁵ These provisions required a physician to wait twenty-four hours before performing an abortion and to provide the woman with information regarding the procedure itself.⁵⁶ The physician was required to inform the woman of the risks of an abortion and information about the fetus.⁵⁷ The woman also had to certify that the physician or qualified abortion provider had informed her of her right to view state-offered material regarding alternatives to abortion.⁵⁸ The Court held that if a state "enact[s] legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion,"⁵⁹ it would not be an undue burden, as the state would be merely promoting its interest in potential life.⁶⁰ Applying the undue burden analysis to the Pennsylvania statute, the *Casey* Court held that even though a provision affected the cost or made it more difficult to obtain an abortion, it did not necessarily create an undue burden.⁶¹ However, at some point, an increased cost could create an undue burden on a woman's right to an abortion and a court could use an increased cost in its undue burden analysis.⁶²

In support of its decision to uphold the informed consent and mandatory waiting

48. *Id.* at 893–894.

49. *Id.* at 899.

50. *Id.*

51. *Casey*, 505 U.S. at 900.

52. *Id.*

53. *Id.* at 901.

54. *Id.* at 900–901.

55. *Id.* at 881.

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

57. *Id.*

58. *Id.*

59. *Id.* at 883.

60. *Id.*

61. *Casey*, 505 U.S. at 874.

62. *Id.* at 901.

period provisions, the Court added that the statute allowed a physician to use his or her judgment to determine whether to withhold the information if it would cause a serious physical or emotional strain on the woman.⁶³ While the *Casey* Court determined that the informed consent and mandatory waiting period provisions were not undue burdens, Professor Tribe suggests the Court was “hypertechnical” in its decision.⁶⁴ Because the undue burden standard had not yet become the standard of review for abortion regulations, the District Court determined the waiting period provision to be “particularly burdensome.”⁶⁵ The Supreme Court in *Casey* determined that “particularly burdensome” did not qualify as unduly burdensome and upheld the provision.⁶⁶

Effectively, the Court in *Casey*, while rejecting various tenets of *Roe*, upheld the general concept that women have the right to choose whether to have an abortion.⁶⁷ The *Casey* Court also upheld the general standard in *Roe* that “ensure[s] that the woman’s right to choose not become so subordinate to the State’s interest in promoting fetal life that her choice exists in theory but not in fact.”⁶⁸ Nevertheless, the Court held that states do have an interest in the fetus a woman is carrying, as it is potential life. The Court further held that states might regulate pre-viability abortions as long as the restriction’s purpose or effect did not place a substantial obstacle before a woman’s right to choose an abortion.⁶⁹

III. OKLAHOMA STATUTES TITLE 63, SECTION 1-738.3B

Section 1-738.3b, which became effective on November 1, 2008 requires, in pertinent part:

B. In order for the woman to make an informed decision, at least one (1) hour prior to a woman having any part of an abortion performed or induced . . . the physician who is to perform or induce the abortion . . . shall:

1. Perform an obstetric ultrasound on the pregnant woman, using either a vaginal transducer or an abdominal transducer, whichever would display the embryo or fetus more clearly;
2. Provide a simultaneous explanation of what the ultrasound is depicting;
3. Display the ultrasound images so that the pregnant woman may view them;
4. Provide a medical description of the ultrasound images, which shall include the dimensions of the embryo or fetus, the presence of cardiac activity . . . and the presence of external members and internal organs

C. Nothing in this section shall be construed to prevent a pregnant woman from averting her eyes from the ultrasound images required to be provided to and reviewed with her⁷⁰

63. *Id.* at 883–884.

64. Tribe, *supra* n. 43, at 249.

65. *Casey*, 505 U.S. at 886.

66. *Id.* at 886–887; Tribe, *supra* n. 43, at 249.

67. *Casey*, 505 U.S. at 869.

68. *Id.* at 872.

69. *Id.* at 877.

70. Okla. Stat. tit. 63, § 1-738.3b.

Senator Todd Lamb introduced Senate Bill 1878 on February 4, 2008.⁷¹ The bill passed the Senate and was introduced into the House of Representatives on March 12, 2008, where it passed and was signed by both the Senate and the House.⁷² Congress sent the bill to Oklahoma Governor Brad Henry on April 10, 2008. The Governor then vetoed it on April 16, 2008.⁷³ Governor Henry, in his veto memorandum, explained that the bill did not contain an exemption for women who were victims of rape or incest from the forced ultrasound and that requiring these victims to submit to an ultrasound would essentially allow the state to “victimize[] the victim for a second time.”⁷⁴

The Oklahoma Legislature effectively overrode the Governor’s veto on April 17, 2008 with a 37-11 vote in the Senate and an 81-15 vote in the House.⁷⁵ In a Senate News Release on April 17, 2008, Senator Lamb explained that he believed the Governor’s veto memorandum was inaccurate because those victims would not be “force[d] . . . to view an ultrasound of their unborn baby.”⁷⁶ Senator Lamb was referring to a provision of Senate Bill 1878 that allows a woman to avert her eyes during the ultrasound; however, victims of rape and incest are still required to comply with the overall ultrasound procedure.⁷⁷

In a telephone interview with Senator Lamb, he explained that the purpose of the ultrasound requirement was to reduce the number of abortions by requiring ultrasounds.⁷⁸ He contended that an ultrasound would allow a doctor to disclose fully the information regarding the woman’s pregnancy and the development of her unborn child, which would allow the woman to give her informed consent prior to obtaining an abortion.⁷⁹ Senator Lamb explained that the requirement that a woman have an ultrasound prior to an abortion might also aid the mental health of mothers contemplating an abortion, preventing them from later regretting the taking of a human life.⁸⁰

Prior to the passage of the ultrasound requirement, Oklahoma already had an informed consent statute regarding ultrasounds and abortions.⁸¹ This Act, appropriately called “Voluntary and Informed Consent—Compliance by Physicians—Confirmation of Receipt of Medical Risk Information,” requires a physician, or a physician’s agent, to provide a woman seeking an abortion with certain information to ensure informed

71. Okla. Sen. 1878 History, 51st Leg., 2d Sess. § 12 (2008) (available in Westlaw, OK-LH database).

72. *Id.*

73. *Id.*

74. Gov. Brad Henry, *Bill Veto Message*, <http://www.ok.gov/governor/billtrack/index.php?veto=2591&year=2008> (last accessed Mar. 17, 2010).

75. Oklahoma Senate, *Senate Press Release*, “State Legislature Overrides Henry Veto of Bipartisan Pro-Life Legislation,” http://oksenate.gov/news/press_releases/press_releases_2008/pr20080417b.html (last accessed Mar. 17, 2010).

76. *Id.* (emphasis added).

77. Okla. Stat. tit. 63, § 1-738.3b.

78. Telephone Interview with Todd Lamb, Okla. Sen. (Sept. 19, 2008) (notes on file with Author); *see also* Guttmacher Inst., *State Policies in Brief: Requirements for Ultrasounds*, http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf (last accessed Mar. 17, 2010) [hereinafter *State Policies in Brief*] (indicating that laws that require ultrasounds prior to abortions are “a veiled attempt to personify the fetus and dissuade a woman from obtaining an abortion”).

79. *Id.*

80. *Id.*

81. Okla. Stat. tit. 63, § 1-738.2 (2006).

consent.⁸² This information includes the name of the physician performing the abortion,⁸³ the potential medical risks of an abortion,⁸⁴ the likely gestational age of the fetus,⁸⁵ the risks of carrying a fetus to term,⁸⁶ and that an ultrasound is available to her, including contact information for facilities that provide ultrasounds at no cost.⁸⁷ In addition, the Act requires doctors to give these women information regarding assistance that they could receive if she carried her child to term,⁸⁸ such as monetary support from the child's biological father,⁸⁹ assistance with medical costs relating to pregnancy and childbirth,⁹⁰ and alternatives to abortion.⁹¹ Therefore, Oklahoma already had a thorough informed consent statute in effect prior to the passing of the ultrasound requirement.⁹²

A. Section 1-738.3b is an Undue Burden to a Woman's Right to an Abortion

The intention of *Roe*, reaffirmed by *Casey*, was to prevent the states from so thoroughly restricting a woman's right to an abortion that the right to choose essentially became nonexistent.⁹³ A state's abortion regulation that allegedly promotes its interest in the *possible* life of a nonviable fetus that "hinder[s]"⁹⁴ rather than "inform[s] [a] woman's free choice"⁹⁵ would not be a constitutional regulation.⁹⁶ The ultrasound requirement does just that; it hinders a woman's right to free choice rather than informing the woman about that right.⁹⁷

To determine whether a state regulation unduly burdens a woman's right to choose, the courts must examine the facts on a case-by-case basis.⁹⁸ The *Casey* Court's opinion made it very clear that the decisions the Court made regarding the individual provisions of the Pennsylvania statute were based on the record before them, and were not to be applied automatically to all similar state laws.⁹⁹ In determining whether the recordkeeping provision in the Pennsylvania statute was an undue burden, the Court in *Casey* noted that keeping records of abortions is essential to medical research.¹⁰⁰ This led the Court to conclude that the provision "cannot be said [to] . . . serve no purpose

82. *Id.*

83. *Id.* at § 1-738.2(B)(1)(a)(1).

84. *Id.* at § 1-738.2(B)(1)(a)(2).

85. *Id.* at § 1-738.2(B)(1)(a)(3).

86. Okla. Stat. tit. 63, § 1-738.2(B)(1)(a)(4).

87. *Id.* at § 1-738.2(B)(1)(a)(5).

88. *Id.* at § 1-738.2(B)(2).

89. *Id.* at § 1-738.2(B)(2)(b).

90. *Id.* at § 1-738.2(B)(2)(a).

91. Okla. Stat. tit. 63, § 1-738.2(B)(2)(c)(3).

92. *Id.* at § 1-738.2.

93. *Casey*, 505 U.S. at 872.

94. *Id.* at 877.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Casey*, 505 U.S. at 886 (explaining that the District Court found mandatory waiting periods to be "particularly burdensome," but did so under *Roe*'s trimester framework and did not deduce that the waiting period would create a substantial obstacle to a woman's right to choose an abortion).

99. *Id.* at 887 (explaining that "on the record before us, and in the context of this facial challenge . . .") (emphasis added); Tribe, *supra* n. 43, at 249.

100. *Casey*, 505 U.S. at 900-901.

other than to make abortions more difficult.”¹⁰¹ Because the decision in *Casey* was so fact-based, this language would seem to suggest that a regulation, which had the sole purpose of making abortions more difficult to obtain, would be constitutionally questionable.¹⁰² In the application of the undue burden standard, a court must examine whether the proposed regulation “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion”¹⁰³ The “purpose”¹⁰⁴ prong of the undue burden test allows for a facial challenge of the statute, while the “effect[s]”¹⁰⁵ prong allows for an as-applied challenge.¹⁰⁶

While the ultrasound requirement masquerades as a statute whose purpose arguably provides for a woman’s informed consent prior to an abortion, it requires that a woman undergo a potentially invasive¹⁰⁷ medical procedure before she may exercise her constitutional right to obtain an abortion in the state of Oklahoma.¹⁰⁸ While the legislators argue that an ultrasound will allow a woman to understand fully the ramifications of an abortion—that abortion kills a potential human being—there is no informed consent for the ultrasound procedure itself.¹⁰⁹ Under the Oklahoma Voluntary and Informed Consent Act, a woman seeking an abortion is given information regarding an optional ultrasound prior to her abortion, but is not required to have the ultrasound performed.¹¹⁰ The ultrasound requirement does not allow a woman to opt out of the ultrasound.¹¹¹ Nor does the provision allow a physician to use his or her discretion.¹¹² If the physician does use his or her discretion and decides not to perform the ultrasound, he or she will be subject to a fine between \$10,000 and \$100,000,¹¹³ with an exception for a medical emergency.¹¹⁴

Informed consent pertaining to abortion regulations is very different from informed consent for less morally controversial medical procedures.¹¹⁵ Because courts have upheld various informed consent laws as being legitimate and constitutional, legislators have used the concept of informed consent to disguise otherwise constitutionally

101. *Id.* at 901.

102. Linda J. Wharton, Susan Frietsche & Kathryn Kolbert, *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 *Yale J.L. & Feminism* 317, 377 (2006).

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

104. *Id.*

105. *Id.*

106. Wharton et al., *supra* n. 102, at 377.

107. “Potentially invasive” refers to the manner in which the ultrasound is performed. While an abdominal ultrasound may not be physically invasive, a vaginal ultrasound (as required in Okla. Stat. tit. 63, § 1-738.3b(B)(1)) could be considered physically invasive.

108. Okla. Stat. tit. 63, § 1-738.3b; *see also* Rachel Benson Gold, *All That’s Old is New Again: The Long Campaign to Persuade Women to Forego Abortion*, 12 *Guttmacher Policy Rev.* 19, 21 (2009) (available at <http://www.guttmacher.org/pubs/gpr/12/2/gpr120219.pdf>) (explaining that legislation that attempts to dissuade women from obtaining an abortion is “a perversion of medical ethics in general and the informed consent process in particular”).

109. Telephone Interview, Lamb, *supra* n. 78.

110. Okla. Stat. tit. 63, § 1-738.2.

111. Okla. Stat. tit. 63, § 1-738.3b(B).

112. *Id.*

113. *Id.* at § 1-738.3c(C).

114. *Id.* at § 1-738.3b(D).

115. Van Detta, *supra* n. 1, at 257 (explaining how the health care industry has largely been allowed to create its own rules regarding informed consent for most medical procedures).

questionable abortion regulations.¹¹⁶ In general, medical professional standards and ethics rather than state legislators determine the measures needed for informed consent for most medical procedures.¹¹⁷ However, courts have consistently allowed the legislature—traditionally comprised of non-physicians—to determine the scope of informed consent for abortion laws.¹¹⁸ Effectively, the legislature “singl[es] out”¹¹⁹ abortion procedures and subjects them to regulations unheard of for other medical procedures.¹²⁰

These laws, disguised as informed consent, are created to “ ‘morally Mirandize’ the woman in an effort to arouse in her feelings of sin, guilt and shame, as well as unrealistic portraiture of how much easier life as a (frequently single) mother can be.”¹²¹ Under the guise of informed consent, the courts have allowed the legislature to regulate abortion through government-approved psychological coercion.¹²² Rather than explaining the medical risks involved in the abortion procedure, physicians in the case of the ultrasound requirement are forced to show the woman an ultrasound image of the fetus while describing its physical and anatomical characteristics.¹²³ That is not informed consent for a medical procedure; it is informed consent for purposes of encouraging a statutorily required moral standard.¹²⁴

In *Casey*, the majority reasoned that, “as with any medical procedure, the State may require a woman to give her written informed consent to an abortion.”¹²⁵ An ultrasound is a medical procedure, and yet the Oklahoma state legislature requires a physician to perform an ultrasound on a pregnant woman seeking an abortion even if the woman adamantly refuses to consent.¹²⁶ Furthermore, Oklahoma already has a very detailed and comprehensive informed consent statute.¹²⁷ Because the ultrasound requirement renders valueless a woman’s informed consent regarding whether or not to have an ultrasound after given the option to have one, § 1-738.3b’s purpose could not possibly be one of informed consent.¹²⁸

An ultrasound prior to every abortion is a medically unnecessary test.¹²⁹ Doctors typically use ultrasounds to determine the gestational age of the fetus and to recognize any potential pregnancy problems.¹³⁰ Dr. Dana Stone, OB-GYN, explained that a

116. *Id.* at 258–259.

117. *Id.* at 257.

118. *Id.* at 246.

119. *Id.*

120. Van Detta, *supra* n. 1, at 246.

121. *Id.* at 259.

122. *Id.* at 234.

123. Okla. Stat. tit. 63, § 1-738.3b(B)(3)–(4).

124. Van Detta, *supra* n. 1, at 234.

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

126. Okla. Stat. tit. 63, § 1-738.3b(A) (stating “[a]ny abortion provider who knowingly performs an abortion shall comply with the requirements in this section” (emphasis added)).

127. Okla. Stat. tit. 63, § 1-738.2.

128. Okla. Stat. tit. 63, § 1-738.3b.

129. Telephone Interview with Dana Stone, OB-GYN (Oct. 3, 2008) (notes on file with Author); Jack M. Valpey, *Physicians for Reproductive Choice and Health* 2, http://www.prch.org/files/37_valpey.pdf (last accessed Mar. 17, 2010); *State Policies in Brief*, *supra* n. 78.

130. Telephone Interview, Stone, *supra* n. 129 (explaining that some problems such as ectopic pregnancies and certain gynecological problems can be found using an ultrasound).

capable physician, in most cases, would be able to determine the required information to perform an abortion by doing a pelvic exam and that no ultrasound would be necessary.¹³¹ Prior to the ultrasound requirement, if a physician, using his or her medical judgment, determined that an ultrasound was necessary prior to an abortion, the situation would be explained to the patient, consent would be given, and an ultrasound would be performed.¹³² The ultrasound requirement does not allow a physician to use his or her medical expertise and judgment to determine whether an ultrasound is necessary.¹³³

Senator Lamb explained that the ultrasound requirement would also promote a woman's mental health by allowing her to see her unborn child.¹³⁴ He described the mental torment that some women go through after aborting their child.¹³⁵ The ultrasound requirement seems to disregard the mental health of the women who are required to have an ultrasound, without their consent, and who proceed with the abortion.¹³⁶ A woman who views the ultrasound images and listens to her physician explain that the fetus has a heartbeat, limbs, and is approximately *x* weeks of age, may begin to regard the fetus as a baby.¹³⁷ However, because of various factors, the woman proceeds with the abortion.¹³⁸ In this scenario, it is probable that a woman viewing the fetus as a "baby" would experience more psychological harm after the abortion than if she had not viewed the ultrasound.¹³⁹

Finally, the ultrasound requirement appears to disregard the psychological harm to a woman who, after viewing the ultrasound and adopting the view that the fetus is her baby, refuses the abortion.¹⁴⁰ After viewing the ultrasound, a woman, while in a heightened emotional state, might choose to carry the fetus to term and raise the child.¹⁴¹

131. *Id.*; see also *State Policies in Brief*, *supra* n. 78 (indicating that "routine ultrasound[s] [are] not considered medically necessary as a component of first-trimester abortion[s]").

132. Telephone Interview, Stone, *supra* n. 129.

133. *Id.*; Valpey, *supra* n. 129, at 2 (arguing that laws that require ultrasounds prior to every abortion "allow non-physicians to dictate medical practice").

134. Telephone Interview, Lamb, *supra* n. 78.

135. Nick Hopkins, Steve Reicher & Jannat Saleem, *Constructing Women's Psychological Health in Anti-Abortion Rhetoric*, 44 *Sociological Rev.* 539, 544 (Aug. 1996) (explaining how anti-abortion psychologists have created a disorder called Post-Abortion Syndrome that has similar side-effects of Post-Traumatic Stress Disorder including flashbacks, nightmares, and uncontrollable grief); see also Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, 9 *Guttmacher Policy Rev.* 8, 8 (2006) (available at <http://www.guttmacher.org/pubs/gpr/09/3/gpr090308.pdf>) (explaining that the post-abortion syndrome that antiabortion activists argue is so prevalent is not recognized by the American Psychological Association or the American Psychiatric Association).

136. Hopkins et al., *supra* n. 135, at 549 (explaining that the rhetorical language used by individuals in the context of abortion makes a difference; for example, a woman feeling extraordinary grief after an abortion is likely evidence that she "construct[ed] the foetus as a person").

137. *Id.* at 553 ("they will hear the baby's heart beating, then they know it's a baby, then they think differently" (emphasis deleted)).

138. *Roe*, 410 U.S. at 153 (explaining "[m]aternity, or additional offspring, may force upon the woman a distressful life and future").

139. Hopkins et al., *supra* n. 135, at 549.

140. Valpey, *supra* n. 129, at 2 (arguing that the only purpose of an ultrasound requirement "is to force women to feel guilty for choosing a specific healthcare option").

141. *Gonzales v. Carhart*, 550 U.S. 124, 184, n. 7 (2007) (Ginsburg, Stevens, Souter & Breyer, JJ., dissenting).

[N]either the weight of the scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and

The majority in *Roe* recognized the psychological harm to a woman who has a child she did not intend to have.¹⁴² Forcing an ultrasound on a woman as a psychological weapon to discourage her from having an abortion could lead to more psychological trauma.¹⁴³ This psychological trauma on the woman who views the ultrasound and proceeds with the abortion, or the woman who views the ultrasound and carries and raises the unintended child, is a substantial obstacle in the path of their right to seek an abortion.¹⁴⁴

While the *Casey* Court upheld mandatory waiting periods as giving a woman time to reflect and make a thoughtful decision, the ultrasound requirement encourages just the opposite.¹⁴⁵ An ultrasound at least one hour prior to an abortion could cause a woman to be in a heightened emotional state while making the ultimate decision.¹⁴⁶ Such an emotional condition might cause some women to decide against the abortion when an abortion would clearly be in their best interest.¹⁴⁷ Therefore, while the purpose of the ultrasound requirement is claimed to be conducive to women's mental health and well-being,¹⁴⁸ the provision actually facilitates psychological harm and rash, emotional decisions.¹⁴⁹

In addition, the provision allows the legislature to make medical decisions regarding the most private and intimate procedure a woman could have, effectively taking the decision out of the hands of the woman and her physician.¹⁵⁰ Because the ultrasound provision has neither an informed consent purpose nor a medical purpose, the only purpose remaining is to discourage women from having abortions.¹⁵¹ This purpose, under the prevailing standard of *Casey*, would constitute an undue burden because it "serve[s] no purpose other than to make abortions more difficult."¹⁵²

Because the regulation has been enacted, the effects prong of the undue burden standard may be used to determine whether the additional cost of an ultrasound would create an undue burden on a woman's right to choose an abortion.¹⁵³ The *Casey* Court

parenting a child that she did not intend to have

Id. (quoting Cohen, *supra* n. 135, at 8).

142. *Roe*, 410 U.S. at 153 (explaining that "[t]here is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it").

143. Cohen, *supra* n. 135, at 8 (arguing that research indicates that the psychological trauma of raising an unintended child or placing an unintended child for adoption is greater than the psychological trauma of an abortion); Valpey, *supra* n. 129, at 2 (arguing that laws requiring ultrasounds prior to abortions are "only intended . . . to force women to feel guilty for choosing a specific healthcare option . . .").

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

145. *Id.* at 885.

146. Hopkins et al., *supra* n. 135, at 552–553 (explaining that ultrasounds may be used as a tool of "direct experience" that changes a woman's perception from "foetus" to "baby").

147. *Roe*, 410 U.S. at 153 (explaining the psychological and physical detriments of raising an unintended child).

148. Telephone Interview, Lamb, *supra* n. 78.

149. *Roe*, 410 U.S. at 153; Cohen, *supra* n. 135 at 8.

150. Telephone Interview, Stone, *supra* n. 129; Sigrid Fry-Revere, *When an Ultrasound Becomes Political*, http://www.cato.org/pub_display.php?pub_id=8248 (accessed Mar. 17, 2010).

151. Telephone Interview, Lamb, *supra* n. 78 (explaining the purposes the ultrasound requirement are informed consent and to discourage women from having abortions to secure a child's right to life).

152. *Casey*, 505 U.S. at 901.

153. *Id.* at 877.

conceded that, “at some point,”¹⁵⁴ state regulations that increase the cost of an abortion could have the effect of creating a substantial obstacle to a woman’s right to choose and could be an undue burden.¹⁵⁵ In the United States, a first trimester abortion costs approximately \$350-\$500.¹⁵⁶ In the state of Oklahoma, an ultrasound costs approximately \$200-\$300 at an OB-GYN’s office.¹⁵⁷ Using these figures, requiring an ultrasound prior to a first trimester abortion would raise the cost of the abortion between forty-seven percent and seventy percent.¹⁵⁸ While the *Casey* Court did not indicate at what point an increase in the cost of an abortion becomes an undue burden, requiring every woman seeking an abortion to pay approximately fifty percent more for a medically unnecessary test¹⁵⁹ should be considered a substantial obstacle to a woman’s right to choose an abortion.¹⁶⁰

Senator Todd Lamb explained that the woman is not required to view the ultrasound images.¹⁶¹ The statute includes a provision that allows the woman to “avert[] her eyes from the ultrasound images”¹⁶² during the procedure.¹⁶³ Even so, the section requires a doctor to describe the images on the screen orally.¹⁶⁴ Logically, this would force a woman who prefers not to consider the ultrasound images to avert or close her eyes and cover her ears while the physician performs the ultrasound procedure.¹⁶⁵ While this is not only demeaning to the woman, who is reduced to covering her ears and eyes in her physician’s office, it also interferes with the integrity of the doctor-patient relationship.¹⁶⁶ This law does not allow a physician to tailor the information about the abortion process given to his or her patient.¹⁶⁷ Instead, the law requires the physician to force a medically unnecessary procedure on his or her patient, with or without her consent, to facilitate the legislature’s moral agenda.¹⁶⁸

154. *Id.* at 901.

155. *Id.*

156. Telephone Interview, Stone, *supra* n. 129; National Abortion Federation, *Economics of Abortion*, http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/economics_of_abortion.pdf (last accessed Mar. 17, 2010).

157. Telephone Interview, Stone, *supra* n. 129.

158. Calculations were computed by dividing 200 by 425 (the average of \$350 and \$500), equaling 47.06%, then dividing 300 by 425, and getting 70.59%.

159. Valpey, *supra* n. 129, at 2.

160. Wharton et al., *supra* n. 102, at 363 (quoting Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. Pa. L. Rev. 119, 136–137 (1989)).

It is not simply a matter of a man’s perspective versus a woman’s or, all too often, a girl’s. Unwanted pregnancies strike harder at the poor and the young than at comfortable adults. Inadequate health care, incomplete birth control information, and violence and abuse, are far more common realities for poor and young women than for middle class adults. Moreover, while a \$50 difference in cost may appear modest to most members of the Supreme Court, whose families are insured in any event, it is a lifetime’s savings for a teenage girl. To forget her perspective could, quite literally, cost her life.

Id.

161. Telephone Interview, Lamb, *supra* n. 78.

162. Okla. Stat. tit. 63, § 1-738.3b(C).

163. *Id.*

164. *Id.* at §§ 12(B)(2), (B)(4).

165. *Id.* at §§ 12(B)(2), (B)(4), (C).

166. Valpey, *supra* n. 129, at 1.

167. *Id.* at 2.

168. *Id.* at 2.

The ultrasound requirement is an undue burden on a woman's right to obtain an abortion.¹⁶⁹ Proponents of the forced ultrasounds argue that the purpose of the law is to obtain informed consent, promote a woman's psychological well-being, and discourage women from having abortions.¹⁷⁰ While informed consent and promoting psychological well-being could be legitimate state interests, the ultrasound requirement could not logically have either purpose.¹⁷¹ This requirement shamelessly disregards consent to the ultrasound—a medical procedure—by mandating an ultrasound prior to every abortion.¹⁷² The provision also disregards the psychological harm that requiring an ultrasound might induce.¹⁷³ Therefore, the only purpose remaining is to discourage women from obtaining an abortion, which the *Casey* Court held would be an undue burden.¹⁷⁴ Finally, the excessive increase in the cost of an abortion when an ultrasound is required should also be considered an undue burden.¹⁷⁵ Because the ultrasound requirement is unquestionably a substantial obstacle to a woman's ability to obtain an abortion, the provision should be declared unconstitutional.¹⁷⁶

B. Section 1-738.3b is a Violation of an Adult's Right to Refuse Medical Care

The United States Supreme Court has consistently found that a person has a right to refuse medical care.¹⁷⁷ Traditionally, courts upheld this right through the common law doctrines of battery, informed consent, and bodily integrity.¹⁷⁸ Following these doctrines, Justice Cardozo, in *Schloendorff v. Society of New York Hospital*, found that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body”¹⁷⁹ Although many courts relied on common law as the basis for the right to refuse medical care, the Supreme Court has found a liberty right under the Fourteenth Amendment of the United States Constitution as a basis for the right to refuse medical care.¹⁸⁰

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

170. Telephone Interview, Lamb, *supra* n. 78.

171. *Casey*, 505 U.S. at 881–882 (explaining how the Court may uphold abortion regulations that promote informed consent and psychological well-being); *but see* Cohen, *supra* n. 135, at 8–11 (arguing that the psychological trauma of abortion is over exaggerated and based on inaccurate studies); Gold, *supra* n. 108, at 21 (arguing that state regulations that attempt to discourage women from obtaining an abortion are a “perversion of . . . the informed consent process in particular”).

172. Okla. Stat. tit. 63, § 1738.3b(B).

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

174. *Casey*, 505 U.S. at 901.

175. *Id.*

176. *Id.* at 877.

177. *See e.g. Jacobson v. Mass.*, 197 U.S. 11, 24–30 (1905) (balancing an individual's liberty interest in refusing a mandatory smallpox vaccination against the state's interest in public health and safety); *Harper*, 494 U.S. at 221–222 (balancing an individual's liberty interest in refusing medication against the state's interest in prison safety and security); *Cruzan*, 497 U.S. at 278 (providing that a competent person has the constitutional right to refuse medical treatment).

178. *Cruzan*, 497 U.S. at 269–270 (explaining the common law doctrines of battery and informed consent justified the right to make one's own medical decisions).

179. 105 N.E. 92, 93 (N.Y. 1914); *see also Union P. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (holding that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others”).

180. *See e.g. Harper*, 494 U.S. at 221–222; *Cruzan*, 497 U.S. at 278.

In *Youngberg v. Romeo*,¹⁸¹ the United States Supreme Court discussed the test used to determine whether a person's liberty interest has been violated.¹⁸² The United States Supreme Court has since used this test to determine whether a statute violates a person's liberty interest in the right to refuse medical care.¹⁸³ In *Youngberg*, Romeo, who suffered from severe mental retardation, was placed in the care of a Pennsylvania institution when his mother was unable to care for him.¹⁸⁴ Because of Romeo's own violence and the violence of the other residents, Romeo was injured over sixty-three times during his time at the institution.¹⁸⁵ His mother filed an initial complaint against the institution, alleging that the facility knew Romeo was being injured and did nothing to prevent the injuries.¹⁸⁶ After the initial complaint was filed, the facility admitted Romeo to the infirmary for a broken arm.¹⁸⁷ During Romeo's stay in the infirmary, his doctor ordered the staff to keep him in physical restraints for portions of each day.¹⁸⁸ Romeo's mother filed a second amended complaint alleging that the facility restrained Romeo on a daily basis.¹⁸⁹ A jury returned a verdict in favor of the institution and the Court of Appeals for the Third Circuit reversed.¹⁹⁰

The United States Supreme Court granted certiorari to determine whether the institution had violated Romeo's liberty interest under the Due Process Clause.¹⁹¹ The *Youngberg* Court held that Romeo had a liberty interest "in safety and freedom from bodily restraint,"¹⁹² but that the liberty right was not absolute.¹⁹³ To determine if his liberty right was violated, the *Youngberg* Court required a balancing test of " 'the liberty of the individual' and 'the demands of an organized society.' "¹⁹⁴ The *Youngberg* Court ultimately vacated the decision of the Court of Appeals and remanded the case because of an erroneous jury instruction at the trial.¹⁹⁵

In *Washington v. Harper*,¹⁹⁶ the issue before the United States Supreme Court was whether the state violated an inmate's Due Process and Equal Protection rights under the Fourteenth Amendment when it required the inmate to take antipsychotic medications against his will.¹⁹⁷ The *Harper* Court reasoned that Harper had a liberty interest to refuse unwanted antipsychotic medication under the Due Process Clause of the Fourteenth Amendment.¹⁹⁸ However, because Harper was an inmate in a state correctional facility,

181. 457 U.S. 307 (1982).

182. *Id.* at 320.

183. *Youngberg* standard used in *Cruzan*, 497 U.S. at 279–280.

184. *Youngberg*, 457 U.S. at 309.

185. *Id.* at 310.

186. *Id.*

187. *Id.*

188. *Id.* at 310–311.

189. *Youngberg*, 457 U.S. at 311.

190. *Id.* at 312.

191. *Id.* at 316.

192. *Id.* at 319.

193. *Id.* at 319–320.

194. *Youngberg*, 457 U.S. at 320 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

195. *Id.* at 325.

196. 494 U.S. 210 (1990).

197. *Id.* at 217.

198. *Id.* at 221–222.

his liberty interest had to be weighed against the interests of the correctional facility.¹⁹⁹ In this case, the interest of the state's prison security outweighed Harper's liberty interest to refuse unwanted medication.²⁰⁰

While the right to make one's own medical decisions is not absolute, the Court in *Cruzan v. Director of Missouri Department of Health*²⁰¹ found that competent individuals have a liberty interest to refuse medical care under the Fourteenth Amendment.²⁰² In *Cruzan*, Nancy Cruzan was severely injured in an automobile accident.²⁰³ The accident left Cruzan brain-dead and artificial feeding and hydration were keeping her physically alive.²⁰⁴ Cruzan's doctors believed she would never regain any cognitive functioning, and her parents petitioned the court to allow the doctors to remove the artificial apparatuses keeping her alive.²⁰⁵ The trial court granted the parents' request, but the Supreme Court of Missouri reversed the trial court's decision.²⁰⁶

The Missouri Supreme Court held that the Missouri Living Will statute²⁰⁷ favored the "preservation of life"²⁰⁸ and required a showing of clear and convincing evidence that the incompetent person would want to be removed from life support.²⁰⁹ The Court also held that a conversation with a friend, in which Cruzan had previously stated she would not want to live if she could not live a relatively normal life, was not enough to establish her intent by clear and convincing evidence.²¹⁰ The Court concluded that Cruzan's parents could not make the decision to terminate her life without the required paperwork stating Cruzan's intent that would satisfy the Missouri statute.²¹¹

The United States Supreme Court granted certiorari to determine whether there was a constitutional right to remove life support.²¹² The *Cruzan* Court described the common law notion of bodily integrity, how physicians obtained informed consent for medical treatments, and how people had a right to not consent to medical care.²¹³ As explained by the *Cruzan* Court, this case was the first to ask whether the United States Constitution allowed the right to die.²¹⁴ Other cases implied that the right to refuse medical care as a liberty interest, but the right was not absolute.²¹⁵ To determine whether a state statute violated a person's constitutional right to refuse medical care, the *Cruzan* Court used the *Youngberg* test to "balanc[e] [a person's] liberty interests against the

199. *Id.* at 222.

200. *Id.* at 225–227.

201. Chemerinsky, *supra* n. 32, at 906 (explaining that the *Cruzan* case is argued as “the most important case . . . concerning the right to refuse medical care . . .”).

202. *Cruzan*, 497 U.S. at 279.

203. *Id.* at 265.

204. *Id.*

205. *Id.* at 267.

206. *Id.* at 268.

207. Mo. Rev. Stat. § 459.010 (1986).

208. *Cruzan*, 497 U.S. at 268.

209. *Id.* at 269.

210. *Id.* at 268.

211. *Id.* at 268–269.

212. *Id.* at 269.

213. *Cruzan*, 497 U.S. at 269–270.

214. *Id.* at 277.

215. *Id.* at 279.

relevant state interests.”²¹⁶ The *Cruzan* Court held that, generally, a “competent”²¹⁷ person would have the constitutional right to refuse medical care, as he or she could make “an informed and voluntary choice” to exercise that right.²¹⁸ Under the facts of this case, however, *Cruzan* was held to be incompetent and unable to make the choice as to whether she wanted the life support machines removed.²¹⁹ Without clear and convincing evidence of *Cruzan*’s wishes to terminate her artificial life, the Court held that her parents could not remove the life support.²²⁰

As explained above, the *Cruzan* Court held that a competent person has a constitutional right to make his or her own medical decisions as part of their liberty interest under the Fourteenth Amendment.²²¹ Because this liberty interest is not absolute, courts must use the *Youngberg* balancing test to determine whether a person’s Due Process rights have been infringed when he or she is not allowed to refuse medical care.²²² Various courts on the state and federal level have recognized legitimate interests states may use in the balancing test.²²³ These exceptions to the general right to refuse medical care include the “preservation of human life,”²²⁴ the perpetuation of the “integrity and ethics of the medical profession,”²²⁵ the protection of innocent third parties,²²⁶ and the prevention of suicide.²²⁷

When applying the *Youngberg* balancing test to the ultrasound requirement, the liberty interest at stake would be a pregnant woman’s right to refuse a medically unnecessary ultrasound being used solely to discourage her from exercising her constitutional right to obtain an abortion.²²⁸ Oklahoma will likely argue that it has legitimate state interests of preserving life, protecting innocent third parties, and maintaining the ethical integrity of the medical profession in a case questioning the constitutionality of the ultrasound requirement.²²⁹ These legitimate state interests, however, are not relevant to the ultrasound requirement, and the court should not use them in its balancing test.²³⁰

It is undeniable that states have the right to preserve human life.²³¹ While this is an exception to the general rule that a person has the right to refuse medical care, there is little case law to suggest that this exception includes potential life.²³² The District of

216. *Id.* (quoting *Youngberg*, 457 U.S. at 321).

217. *Id.* at 279.

218. *Cruzan*, 497 U.S. at 279–280.

219. *Id.* at 280.

220. *Id.* at 286–287.

221. *Id.* at 279.

222. *Youngberg*, 457 U.S. at 320.

223. See e.g. *Wash. v. Glucksberg*, 521 U.S. 702, 728–733 (1997); *In re E.G.*, 549 N.E.2d 322, 328 (Ill. 1989); *In re Guardianship of Browning*, 568 So. 2d 4, 14 (Fla. 1990).

224. *Glucksberg*, 521 U.S. at 728–731.

225. *Id.* at 731–733.

226. *Browning*, 568 So. 2d at 14.

227. *Id.*

228. *Youngberg*, 457 U.S. at 320; *Cruzan*, 497 U.S. at 279; *State Policies in Brief*, *supra* n. 78.

229. *Glucksberg*, 521 U.S. at 728–732; *Browning*, 568 So. 2d at 14.

230. *Youngberg*, 457 U.S. at 320.

231. *Cruzan*, 497 U.S. at 280–281; *Glucksberg*, 521 U.S. at 728–731.

232. For a discussion of instances and rationales of states’ use of force to compel non-consensual medical treatment on pregnant women, see April Cherry, *The Free Exercise Rights of Pregnant Women Who Refuse*

Columbia Superior Court held in *In re Madyun*²³³ that a court could compel a woman to have a caesarean section against her will in order to save a viable fetus because the state had a compelling interest in preserving the life of the viable fetus.²³⁴ In this case, Madyun's pregnancy was full-term and forty-eight hours prior to admittance to the hospital, Madyun's water broke.²³⁵ Once Madyun's doctors determined that labor was not progressing as it should, they sought consent to perform a caesarean section to prevent harm to the viable fetus.²³⁶ Based on her religious beliefs, Madyun denied consent for the caesarean section and stated that she wanted to deliver the fetus naturally.²³⁷ At the court hearing to compel the physicians to perform the caesarean section, the *Madyun* Court recognized the general right to refuse medical care, but that the state had a compelling interest in preserving the fetus's life because it was full-term and viable.²³⁸ The *Madyun* Court weighed the potential harm to the fetus against the potential harm to the mother, and concluded the risk of harm to the fetus was significant, while risk of harm to the mother was minimal.²³⁹

On the other hand, four years later in *In re A.C.*,²⁴⁰ the District of Columbia Court of Appeals vehemently disagreed with the decision in *Madyun*.²⁴¹ The *A.C.* Court agreed with A.C.'s counsel that the decision in *Madyun* "was [an] error for the trial court to weigh the state's interest in preserving the potential life of a viable fetus against" the pregnant woman's right to refuse medical care.²⁴² The *A.C.* Court had to determine who had the right to determine medical care for a woman pregnant with a viable fetus.²⁴⁴ A.C., who had been battling cancer since the age of thirteen, complained to her doctor about pain and shortness of breath.²⁴⁵ When her doctor discovered an inoperable tumor on her lung, the doctor discussed A.C.'s future and the future of her 26-week-old fetus.²⁴⁶

While death was imminent for A.C., the doctor informed her that if she would consent to "palliative treatment,"²⁴⁷ there was a possibility of extending her life for two more weeks in order to improve her fetus's chance of survival.²⁴⁸ A.C. consented to this course of action, but when her condition worsened, she was heavily sedated and unable to communicate.²⁴⁹ Her physicians petitioned the court to order a caesarean section to be

Medical Treatment, 69 Tenn. L. Rev. 563, 588–608 (2002).

233. *In re A.C.*, 573 A.2d 1235, 1259–1264 (D.C. 1990) (*Madyun* opinion can be found in the appendix of *In re A.C.*).

234. *Id.* at 1264.

235. *Id.* at 1260.

236. *Id.*

237. *Id.*

238. *A.C.*, 573 A.2d at 1262.

239. *Id.* at 1264.

240. 573 A.2d 1235.

241. *Id.* at 1252.

242. *Id.* at 1238.

243. *Id.*

244. *Id.* at 1237.

245. *A.C.*, 573 A.2d at 1238.

246. *Id.*

247. *Id.*

248. *Id.* at 1238–1239.

249. *Id.*

performed, and the judge, relying heavily on *Madyun*, signed an order allowing the caesarean section to be performed.²⁵⁰ Both mother and child died within two days after the caesarean section.²⁵¹ The Court of Appeals heard this case, despite the deaths that made the issue moot, because “collateral consequences [would] flow from any decision”²⁵² it rendered.²⁵³ In rejecting the holding in *Madyun*, the A.C. Court held that if a pregnant woman is competent, “her wishes will control in virtually all cases.”²⁵⁴ Thus, a state would be allowed to override a competent woman’s right to refuse medical care only in extraordinary situations.²⁵⁵

In *Hughes v. State*,²⁵⁶ the Oklahoma Criminal Court of Appeals rejected the common law “born alive”²⁵⁷ doctrine that gave the legal right to life to a fetus only after it had been delivered and could live independently.²⁵⁸ In this case, the defendant caused an accident, while driving under the influence, in which the result of the impact caused the driver of the second car to miscarry the full-term fetus she was carrying.²⁵⁹ In rejecting the born alive doctrine, the *Hughes* Court adopted a new standard, holding that a fetus is a person under the law once it becomes viable.²⁶⁰ This standard gave a viable fetus the legal right to life, allowing the prosecution of persons causing the death of a viable, yet unborn, fetus.²⁶¹

Because of the limited case law exploring the preservation of potential human life exception, Oklahoma might attempt to use *Madyun* or similar cases as persuasive authority to argue that the preservation of human life exception should be used in the court’s balancing test.²⁶² A court should reject this argument and hold that the preservation of human life exception would not be applicable to the ultrasound requirement.²⁶³ First, the exception seeks to preserve human life; it does not mention the preservation of potential life.²⁶⁴ In addition, even if examined under the strict *Madyun* standard, a standard which is no longer “good law”²⁶⁵ in its own jurisdiction, the exception would fail to apply to the ultrasound requirement because in *Madyun* and similar cases compelling non-consensual medical treatment, the fetuses were full-term and viable.²⁶⁶ Customarily, cases that find a state’s interest in preserving potential life that override a woman’s right to refuse medical treatment involve viable fetuses.²⁶⁷

250. *A.C.*, 573 A.2d at 1238.

251. *Id.*

252. *Id.* at 1241.

253. *Id.*

254. *Id.* at 1252.

255. *A.C.*, 573 A.2d at 1252.

256. 868 P.2d 730 (Okla. Crim. App. 1994).

257. *Id.* at 732.

258. *Id.*

259. *Id.* at 731.

260. *Id.* at 733.

261. *Hughes*, 868 P.2d at 733.

262. *Glucksberg*, 521 U.S. at 728–731.

263. *Id.*

264. *Id.*

265. George J. Annas, *At Law: Foreclosing the Use of Force: A.C. Reversed*, 20 *Hastings Ctr. Rpt.* 27, 28 (July-Aug. 1990).

266. *A.C.*, 573 A.2d at 1263–1264.

267. See e.g. *Jefferson v. Griffin Spalding Co. Hosp. Auth.*, 274 S.E.2d 457, 460 (Ga. 1981).

Similarly, Oklahoma gives a fetus the right to life only after viability.²⁶⁸ The ultrasound requirement applies *only* to non-viable fetuses because Oklahoma proscribes abortion once a fetus becomes viable.²⁶⁹ The ultrasound requirement allows the state to override a woman's right to refuse medical care on the chance that an ultrasound would preserve a nonviable fetus.²⁷⁰ This provision effectively allows the state to value the rights of a nonviable fetus above those of a competent, adult woman.²⁷¹

The second exception arguably applicable to the ultrasound requirement is the protection of innocent third parties.²⁷² Applying this exception to the abortion context seems incompatible with a woman's constitutional right to obtain an abortion and is directly contradictory to the law laid out in both *Roe* and *Casey*.²⁷³ If a court applied this exception to the abortion context at all, it would essentially give the legislature a pass to ban abortion as the unborn, viable or nonviable, are arguably the ultimate innocent third parties.²⁷⁴ However, to apply this exception to the ultrasound requirement as a way for Oklahoma to override a person's right to refuse medical care would be ludicrous because an ultrasound, by its very nature, is not used as a life-protecting treatment but as a diagnostic tool.²⁷⁵ The state wants to use the ultrasound to discourage abortions, but an ultrasound itself will not save the life of an innocent third party.²⁷⁶

Typically, the exception for the protection of innocent third parties is limited.²⁷⁷ The protection of innocent third parties as an exception to the right to refuse medical care is typically "limited to situations in which the interests of the patient's dependents may be adversely affected"²⁷⁸ or instances of "epidemics and other major public health problems."²⁷⁹ In relation to the ultrasound requirement, the fetus has no legal right to life until viability.²⁸⁰ Therefore, supporters of the ultrasound requirement could not logically argue that a non-viable fetus is a dependent, if the law does not even legally recognize it as a person.²⁸¹ In addition, compelled nonconsensual medical treatment of pregnant women is not "sufficiently public" for this exception to be relevant to the ultrasound requirement.²⁸²

268. *Hughes*, 868 P.2d at 734.

269. Okla. Stat. tit. 63, § 1-732 (1999).

270. Okla. Stat. tit. 63, § 1-738.3b(B) (the provision requires ultrasounds to be performed prior to every abortion, regardless of consent).

271. *Id.*; *Casey* permits state intervention on behalf of a nonviable fetus only if it does not establish an undue burden on a woman's right to obtain an abortion. 505 U.S. at 877.

272. *Glucksberg*, 521 U.S. at 731-733.

273. *Casey*, 505 U.S. at 849 (reasoning "[i]t is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood . . .").

274. *Browning*, 568 So. 2d at 14; Gold, *supra* n. 108, at 20 (describing the narrative in the film *The Silent Scream*, "the image of the fetus as having its 'mouth wide open in . . . the silent scream of a child threatened imminently with extinction'").

275. Telephone Interview, Stone, *supra* n. 129 (explaining that an ultrasound is used as a diagnostic tool).

276. *Id.*

277. Amanda Moore & Hunter Tzovarras, *2005-2006 National Health Law Moot Court Competition: Best Brief*, 27 J. Leg. Med. 395, 415 (Dec. 2006).

278. *Gray v. Romeo*, 697 F. Supp. 580, 589 (D.R.I. 1988) (quoting *Tune v. Walter Reed Army Med. Hosp.*, 602 F. Supp. 1452, 1455 at n. 8 (D.D.C. 1985)).

279. Cherry, *supra* n. 232, at 592, n. 164.

280. *Hughes*, 868 P.2d at 734.

281. *Id.*

282. Cherry, *supra* n. 232, at 592, n. 164.

Finally, protecting the ethics and integrity of the medical profession is a legitimate state interest in restricting the right to refuse medical care.²⁸³ In the application of the ultrasound requirement, the provision appears to go directly against the interest of protecting the integrity of the medical profession.²⁸⁴ During their training as doctors and nurses, these individuals are taught that touching a patient without his or her consent constitutes battery.²⁸⁵ Therefore, prior to any medical procedure or treatment, a physician must know that his or her patient consents to the treatment.²⁸⁶ The law requiring a physician to perform an ultrasound—a medical procedure—while the patient is saying “no” would constitute a battery at common law.²⁸⁷ This leaves the physician with one of two options: force an ultrasound on a nonconsenting patient, as required by law, and commit a battery against his or her patient, or not perform the ultrasound and risk a fine of \$10,000 for the physician’s first offense, \$50,000 for the second offense, and \$100,000 for the third.²⁸⁸ The ultrasound requirement creates an ethical dilemma for physicians.²⁸⁹ In essence, rather than promoting ethical integrity in the medical profession by restricting the right to refuse medical care, the state is hindering the integrity.²⁹⁰ Therefore, the state’s interest in promoting ethical integrity in the medical profession should not be used, in this instance, in the *Youngberg* balancing test.²⁹¹

The ultrasound requirement compels either a vaginal ultrasound or an abdominal ultrasound, whichever depicts the fetus more clearly.²⁹² During the first trimester, physicians rarely use abdominal ultrasounds, as they do not allow a clear depiction of the fetus; therefore, physicians most commonly use vaginal ultrasounds during this period.²⁹³ Vaginal ultrasounds are commonly used in obstetric and gynecological care and can be used to diagnose many early pregnancy or gynecological problems.²⁹⁴ A physician performs a vaginal ultrasound using a transducer, roughly the size of a speculum, which is covered with a condom and inserted as far into the vagina as possible.²⁹⁵ First trimester abortions account for eighty-nine percent of the abortions performed in the United States.²⁹⁶ Using this logic, the Oklahoma legislature is mandating that most women seeking an abortion have a medical instrument inserted into their vagina, with or without their consent.²⁹⁷

Supporters of the ultrasound requirement might claim that any abortion requires medical instruments inserted into the vagina, so a vaginal ultrasound could not be any

283. *Glucksberg*, 521 U.S. at 731; *Browning*, 568 So. 2d at 14.

284. *Glucksberg*, 521 U.S. at 731; *Browning*, 568 So. 2d at 14.

285. Telephone Interview, Stone, *supra* n. 129.

286. *Id.*

287. *Id.*

288. Okla. Stat. tit. 63, § 1-738.3c(C).

289. *Browning*, 568 So. 2d at 14.

290. *Id.*

291. *Youngberg*, 457 U.S. at 321.

292. Okla. Stat. tit. 63, § 1-738.3b(B)(1).

293. Telephone Interview, Stone, *supra* n. 129.

294. *Id.*

295. *Id.*

296. Guttmacher Institute, *Facts on Induced Abortion in the United States 2*, http://www.guttmacher.org/pubs/fb_induced_abortion.pdf (accessed Mar. 17, 2010).

297. Telephone Interview, Stone, *supra* n. 129.

more invasive than the abortion itself.²⁹⁸ This argument is fatally flawed due to the lack of consent.²⁹⁹ Consent is the backbone of the medical profession in the United States, and requiring a physician to insert a medical instrument into a woman's vagina, while she adamantly refuses, strips her of her bodily integrity.³⁰⁰

Furthermore, while supporters of the ultrasound requirements might argue that ultrasounds are harmless medical procedures, the FDA has warned against ultrasounds when not medically necessary.³⁰¹ Specifically, the FDA warns that because the effects of an ultrasound are not completely understood, "having a prenatal ultrasound for non-medical reasons is not a good idea."³⁰² While ultrasounds generally are considered safe at low levels, the procedure involves energy in the form of high-frequency sound waves that can have physical effects on human tissue.³⁰³ The effects of ultrasounds on the development of fetuses are not fully understood, especially since the "embryonic period is known to be particularly sensitive to any external influences."³⁰⁴ The entire purpose behind requiring a woman to have an ultrasound prior to an abortion is to discourage her from having an abortion.³⁰⁵ If the tactic succeeds, the effect of a medically unnecessary ultrasound could be harmful to the fetus.³⁰⁶ While research in this area is particularly difficult, some doctors believe that exposure to ultrasounds could affect the fetus's development.³⁰⁷ Therefore, if the state's purpose of abortion discouragement were satisfied, the state would be gambling with a fetus's development by requiring a medically unnecessary ultrasound.³⁰⁸

As explained in *Cruzan*, a competent person has a liberty interest under the Fourteenth Amendment in the right to refuse medical care,³⁰⁹ but that interest must be balanced with the state's interest.³¹⁰ In the case of the ultrasound requirement, the woman's liberty right that is invoked is the right to refuse a medically unnecessary ultrasound.³¹¹ The woman may not have the means to pay for an unnecessary test that would increase the cost of an abortion by approximately fifty percent,³¹² or perhaps the woman is a victim of a rape or incest and may not want to add even more trauma to an already excruciating decision.³¹³ Alternatively, perhaps a woman would rather remain

298. *Stenberg v. Carhart*, 530 U.S. 914, 923 (2000) (explaining that most first trimester abortions are performed using vacuum aspiration where a tube is inserted into the uterus through the vagina to vacuum out the contents of the uterus).

299. Telephone Interview, Stone, *supra* n. 129.

300. *Id.* (explaining that if a doctor touches a patient without his or her consent, he or she has committed a battery).

301. Carol Rados, *U.S. Food and Drug Administration*, "FDA Cautions Against Ultrasound 'Keepsake' Images," <http://www.sdms.org/pdf/FDAKeepsake.pdf> (accessed Mar. 17, 2010).

302. *Id.*

303. *Id.*

304. *Id.*

305. Telephone Interview, Lamb, *supra* n. 78.

306. Rados, *supra* n. 301.

307. *Id.*

308. *Id.*

309. *Cruzan*, 497 U.S. at 279.

310. *Id.* (quoting *Youngberg*, 457 U.S. at 321).

311. Telephone Interview, Stone, *supra* n. 129; Valpey, *supra* n. 129, at 2.

312. Valpey, *supra* n. 129, at 2.

313. Gov. Henry, *supra* n. 74.

unaware of the more difficult details of the abortion than what she deems necessary.³¹⁴ Any reason that a competent, adult woman used to refuse an ultrasound prior to an abortion of a non-viable fetus would outweigh a state's interest in preserving a non-viable fetus.³¹⁵ Therefore, the ultrasound requirement, unquestionably, should be declared unconstitutional, as it denies a woman's liberty interest in the right to refuse medical care.³¹⁶

IV. CONCLUSION

Although the right to an abortion is not absolute, a woman has a constitutional right to obtain an abortion.³¹⁷ To determine whether a statute infringes on the right to an abortion, the undue burden standard is utilized.³¹⁸ A statute is an undue burden on a woman's right to obtain an abortion if it "has the purpose or effect of placing a substantial obstacle in [her] path"³¹⁹ The ultrasound requirement has both the "purpose [and] effect of placing a substantial obstacle"³²⁰ before a woman's right to an abortion.³²¹ The supporters of the bill argue that its purpose is to inform women of the choice they are about to make and to aid in the psychological well-being of women unsure about the abortion decision.³²²

Oklahoma already had a comprehensive informed consent statute that required physicians to advocate the state's preference in choosing life over abortion.³²³ Allowing the legislature to require a medically unnecessary test to guilt and shame a woman into childbirth is blatantly unconstitutional and a shameful move by the legislature.³²⁴ The ultrasound requirement does not merely advocate a state's preference for life over abortion,³²⁵ it seeks to punish women economically and psychologically for exercising their right to a valid medical procedure.³²⁶ The legislature has taken a valid medical requirement—informed consent—and molded it into a tool that severely limits a woman's constitutional right to seek an abortion.³²⁷

An ultrasound is a medical procedure.³²⁸ Consent is required for any doctor to perform a medical procedure on another human being.³²⁹ By requiring a physician to perform a medical procedure on all pregnant women seeking an abortion, the Oklahoma legislature blatantly disregards the purported purpose of informed consent.³³⁰ Oklahoma

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

315. *Id.* at 160.

316. *Cruzan*, 497 U.S. at 278.

317. *Casey*, 505 U.S. at 869.

318. *Id.* at 874.

319. *Id.* at 877.

320. *Id.*

321. *Id.*

322. Telephone Interview, Lamb, *supra* n. 78.

323. Okla. Stat. tit. 63, § 1-738.2.

324. Van Detta, *supra* n. 1, at 259.

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

326. Van Detta, *supra* n. 1, at 259.

327. *Id.*

328. Telephone Interview, Stone, *supra* n. 129.

329. *Id.*; Fry-Revere, *supra* n. 150.

330. Telephone Interview, Stone, *supra* n. 129; Dana Stone, *Oklahoma's Anti-Abortion Bill a Set-Back for*

is requiring most women seeking an abortion to have a transducer inserted into their vagina, with or without their consent.³³¹ This law is the “antithesis of informed consent.”³³²

Requiring an ultrasound prior to every abortion is a psychological, “substantial obstacle”³³³ to a woman’s right to choose an abortion.³³⁴ The Oklahoma legislature is attempting to use a medically unnecessary ultrasound to psychologically guilt a woman into carrying a child she did not intend to have.³³⁵ The law was passed in the hope that once a woman saw an ultrasound image of the fetus and heard her physician explaining its physical characteristics, she would forget the reasons she wanted the abortion and make an emotional decision to carry the fetus to term.³³⁶ It is conceded that some women regret having an abortion, that perhaps a required ultrasound would have changed their mind regarding the abortion, and that the ultrasound requirement would have encouraged their psychological well-being.³³⁷ The ultrasound requirement, however, could potentially harm the psychological well-being of even larger groups of women: those who see the ultrasound image and proceed with the abortion and those who see the ultrasound image, cancel the abortion, and have a child they cannot physically, emotionally, mentally, or economically care for.³³⁸

While informed consent and protecting a person’s psychological well-being might be legitimate state interests, neither is a legitimate purpose for the ultrasound requirement.³³⁹ The only purpose remaining for the enactment of the ultrasound provision is to discourage women from having abortions.³⁴⁰ A law that “serve[s] no purpose other than to make abortions more difficult”³⁴¹ should be declared unconstitutional.³⁴² A state should not be allowed to “further its interests [in protecting potential life] by simply wearing down the ability of the pregnant woman to exercise her constitutional right.”³⁴³ Abortion is a legal and constitutional medical procedure for a pregnant woman, and such women should not be forced to jump through unnecessary

Both Pro-Choice and Pro-Life Advocates, http://www.huffingtonpost.com/dr-dana-stone/oklahomas-anti-abortion-b_b_97672.html (accessed Mar. 17, 2010) [hereinafter Stone, *Oklahoma Bill*].

331. Stone, *Oklahoma Bill*, *supra* n. 330; See *supra* pt. III(B) explaining how most abortions are performed in the first trimester and how vaginal ultrasounds are used during this period, as abdominal ultrasounds rarely give a clear picture early in the pregnancy.

332. *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 764 (1986); Fry-Revere, *supra* n. 150 (explaining that “[f]orcing a woman to have and watch a medically unnecessary ultrasound is an unsettling distortion of the informed consent process, eerily reminiscent of that haunting scene in *A Clockwork Orange*, in which the protagonist’s eyes are forcibly propped open as he is shown images intended to recondition his behavior”).

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

334. *Id.*

335. Van Detta, *supra* n. 1, at 259.

336. Hopkins et al, *supra* n. 135, at 553.

337. *Id.* at 544.

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

339. *Casey*, 505 U.S. at 881–882.

340. Telephone Interview, Lamb, *supra* n. 78 (explaining a purpose of the ultrasound requirement is to discourage women from aborting their babies).

341. *Casey*, 505 U.S. at 901.

342. *Id.* at 877 (explaining that if a law “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus,” it is an undue burden and unconstitutional).

343. *Id.* at 918 (Stevens, J., dissenting).

and arbitrary legal hoops in order to obtain such a medical procedure.³⁴⁴

Not only is the ultrasound requirement an undue burden on women seeking an abortion, it is also contrary to the notion that a competent person has the right to refuse medical care.³⁴⁵ While lower courts have often held four exceptions to this general rule—preservation of human life, protection of innocent third parties, prevention of suicide, and protection of the ethical integrity of the medical profession—none of the exceptions should apply to the ultrasound requirement.³⁴⁶ Oklahoma is weighing the rights of a nonviable fetus over the rights of a competent, adult woman.³⁴⁷ Not only does this ultrasound requirement allow the state to require a medically unnecessary test to brazenly shame and guilt a woman into changing her mind, but it also strips her of her bodily integrity.³⁴⁸

Finally, the ultrasound requirement questions a woman's mental capacity.³⁴⁹ Oklahoma has enacted this law with the presumption that after the woman sees the ultrasound image, she will realize that termination of the pregnancy is morally wrong.³⁵⁰ However, as the plurality explained in *Casey*, “[the Court’s] obligation is to define the liberty of all, not to mandate [its] own moral code.”³⁵¹ Oklahoma is attempting to mandate its own moral code and is unduly burdening a pregnant woman's ability to obtain an abortion.³⁵² Through the addition of an exorbitant increase in the cost of an abortion for a medically unnecessary ultrasound, the potential psychological impacts and physical battery,³⁵³ and the overriding of a competent woman's right to refuse medical care,³⁵⁴ Oklahoma places a substantial obstacle in the path of a woman seeking an abortion.³⁵⁵ Therefore, the ultrasound requirement should be declared unconstitutional.³⁵⁶

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344. Van Detta, *supra* n. 1, at 259.

345. *Cruzan*, 497 U.S. at 279.

346. *Glucksberg*, 521 U.S. at 728–733; *Browning*, 568 So. 2d at 14.

347. *Youngberg*, 457 U.S. at 321.

348. Van Detta, *supra* n. 1, at 259.

349. *Casey*, 505 U.S. at 918 (Stevens, J., dissenting) (explaining that the mandatory waiting periods “[appear] to rest on outmoded and unacceptable assumptions about the decisionmaking capacity of women”).

350. *Id.* at 919 (describing how the waiting period “requirement may be premised on the belief that the decision to terminate a pregnancy is presumptively wrong. This premise is illegitimate”).

351. *Id.* at 850.

352. *Id.* at 877.

353. Telephone Interview, Stone, *supra* n. 129; Valpey, *supra* n. 129, at 2.

354. *Cruzan*, 497 U.S. at 279.

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

356. *Id.*

