The Fourth Amendment, a Woman's Right: An Inquiry into Whether State-Implemented Transvaginal Ultrasounds Violate the Fourth Amendment's Reasonable Search Provision

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INTRODUCTION

Virginia's Governor Bob McDonnel once explained that his decision to call for amendments to Virginia's pre-abortion transvaginal ultrasound bill was based on advice from his attorney that "mandatory invasive requirements might run afoul of [the] Fourth Amendment."[1]

Within the past few years, legislation has been enacted in several states, including Texas, which requires women to undergo an ultrasound before they are able to receive an abortion.[2] Though some have been repealed, amended, or enjoined from enforcement,[3] a common thread within these

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1 Lucy Madison, *McDonnel Says He Had Legal Concerns About Virginia Ultrasound Bill*, CBS NEWS (Feb. 24, 2012, 6:02 PM), http://www.cbsnews.com/news/mcdonnell-says-he-had-legal-concerns-about-virginia-ultrasound-bill/.

2 *See* TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2014) (effective Sept. 1, 2011); VA. CODE ANN. § 18.2-76 (2014) (effective July 1, 2012); OKLA. STAT. tit. 63, § 1-738.3d (2014), *invalidated by* Nova Health Sys. v. Pruitt, 292 P.3d 28 (Okla. 2012), *cert. denied*, 134 S. Ct. 617 (2013); S. 1387, 61st Leg., 2nd Reg. Sess. (Idaho 2012) (as passed by Senate, Mar. 19, 2012) (withdrawn Mar. 28, 2012), *available at* http://www.legislature.idaho.gov/legislation/2012/S1387.pdf; N.C. GEN. STAT. § 90-21.85 (2014) (effective Oct. 28, 2011), *invalidated by* Stuart v. Loomis, 992 F. Supp. 2d 585, 609 (M.D.N.C. 2014) (holding the act violated the First Amendment); *see also* Joseph Serna, *Legal Attacks on Abortion Getting Some Victories but Losses Too*, L.A. TIMES (Mar. 15, 2014, 7:18 PM), http://www.latimes.com/nation/nationnow/la-na-nn-abortion-laws-2014 0315-story.html ("22 states enacted 70 abortion restrictions in 2013.").

3 *See* Beth Kropf, Comment, *What's Harm Got to Do with It? The Unintended Consequences of Texas's Ultrasound Law*, 13 HOUS. J. HEALTH L. & POL'Y 353, 367 (2013) ("[T]he laws in Oklahoma and North Carolina are temporarily enjoined from enforcement."); Nicholas D. Kristof, *When States Abuse Women*, N.Y. TIMES, Mar. 4, 2012, at SR11, *available at* http://www.nytimes.com/2012/03/04/opinion/sunday/kristof-when-states-abuse-women.html (noting that Virginia's "proposal that would have required vaginal ultrasounds before an abortion was modified to require only abdominal ultrasounds").

statutes requires an abortion physician to perform an ultrasound prior to the abortion, whereby the image, heartbeat, physical characteristics, and dimensions of the fetus are relayed back to the female patient.[4]

Many of these same statutes commonly require physicians to not only present, but also expound upon the readings derived from the ultrasound; for these reasons, the statutes have been challenged on First and Fifth Amendment grounds thus far.[5] Yet no one has formally questioned whether the method of administering the ultrasound, executed in an attempt to comply with the given statute, constitutes an unreasonable search under the Fourth Amendment.

The Fourth Amendment typically protects individuals[6] from unreasonable searches administered by the State.[7] Here, since the statutes mentioned have explicitly mandated the pre-abortion ultrasounds be transvaginal, while others have been ambiguous as to what method must be applied in conducting the ultrasonography,[8] the method used for the transvaginal ultrasounds—that is, inserting a probe into a woman's vagina—could be viewed as constituting an unreasonable search. Texas' current statute is among the more ambiguous of these new, invasive abortion statutes in that it fails to explicitly define what kind of ultrasound the physician is to administer in order to

4 *See* GUTTMACHER INST., STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND (2014), *available at* https://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf.

5 *See, e.g.*, Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 580 (5th Cir. 2012) (holding the challenged provisions did not violate the First Amendment since Texas' abortion statute was "sustainable under *Casey*" and was "within the State's power to regulate the practice of medicine"); *Pruitt*, 292 P.3d 28 (holding Oklahoma's challenged abortion provision was facially unconstitutional); *Stuart*, 992 F. Supp. 2d at 609 (holding provisions of North Carolina's "Right to Know Act," that mandated physicians describe fetal images for a woman seeking an abortion, was unconstitutional under the First Amendment).

6 *See* Katz v. United States, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places.").

7 U.S. CONST. amend. IV.

8 *Compare* VA. CODE ANN. § 18.2-76 (2014) (effective July 1, 2012) (explicitly requiring the physician to perform a "fetal transabdominal ultrasound" image on the patient), *and* OKLA. STAT. tit. 63, § 1-738.3d (2014) (allowing the physician and patient a choice between either an abdominal or a transvaginal ultrasound), *invalidated by* Nova Health Sys. v. Pruitt, 292 P.3d 28 (Okla. 2012), *cert. denied,* 134 S. Ct. 617 (2013), *with* N.C. GEN. STAT. § 90-21.85 (2014) (noting only that the physician provide an "obstetric real-time view" of the fetus), *invalidated by* Stuart v. Loomis, 992 F. Supp. 2d 585, 609 (M.D.N.C. 2014), *and* S. 1387, 61st Leg., 2nd Reg. Sess. (Idaho 2012) (as passed by Senate, Mar. 19, 2012) (withdrawn Mar. 28, 2012), *available at* http://www.legislature.idaho.gov/legislation/2012/S1387.pdf (presenting ambiguity as to which method of ultrasound should be utilized by the physician).

comply with the statute—transvaginal or abdominal.[9] Texas' statute merely mandates that a licensed physician perform an ultrasound on the patient, in a way that will display "the sonogram images in a quality consistent with current medical practice," whereby the dimensions of the embryo or fetus can be described, the presence of internal organs can be determined, and the fetus' heartbeat can be amplified to become audible.[10]

However, a more thorough investigation of the effect of Texas' statute in practice reveals transvaginal ultrasounds are actually being utilized by abortion clinics as a result of physicians' attempts to comply with the statute.[11] This is because during the time at which most abortions are administered (during a woman's first trimester), transvaginal ultrasounds are usually used; transvaginal ultrasounds are the most accurate and acute method for detecting the fetus' heartbeat, determining viability, and providing images of the fetus, early in pregnancy.[12] These details, difficult to clearly obtain through an abdominal ultrasound at such an early stage of pregnancy, are exactly what the statute requires be provided to the patient before her abortion.[13] Thus, Texas' statute forces an abortion physician to

9 *See* TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2014) (effective Sept. 1, 2011).

10 *Id.*

11 *See* Kristof, *supra* note 3 ("[S]he first must typically endure an ultrasound probe inserted into her vagina. Then she listens to the audio thumping of the fetal heartbeat and watches the fetus on an ultrasound screen.").

12 *See Ultrasound: Sonogram*, AM. PREGNANCY ASS'N, http://americanpregnancy.org/prenataltesting/ultrasound.html (last updated Mar. 2006) (explaining that there are "basically seven different ultrasound exams, but the principle [sic] process is the same). "The different types of procedures include: transvaginal scans . . . [whereby] [s]pecially designed probe transducers are used inside the vagina to generate sonogram images . . . [m]ost often used during the early stages of pregnancy." *Id.*; Erik Eckholm, *Ultrasound: A Pawn in the Abortion Wars*, N.Y. TIMES, Feb. 24, 2012, at SR4, *available at* http://www.nytimes.com/2012/02/26/sunday-review/ultrasound-a-pawn-in-the-abortion-wars.html?pagewanted=all ("In the first trimester, when most abortions take place, that requires a vaginal probe, not the 'jelly on the belly' abdominal scans done later in the pregnancy, when the fetus is larger."); Kropf, *supra* note 3, at 377 (explaining that transabdominal ultrasounds are less sensitive, and as a result one more week is usually needed in order to show features that are normally visible with a transvaginal ultrasound at that time).

13 *See* HEALTH & SAFETY § 171.012; *see also Ultrasound: Sonogram, supra* note 12 ("Heartbeats are best detected with transvaginal ultrasounds early in pregnancy."); DANIELLE MAZZA, WOMEN'S HEALTH IN GENERAL PRACTICE 95–96 (2d ed. 2011) (concluding that a transvaginal ultrasound is often undertaken to date the pregnancy correctly); Kate Sheppard, *Mandatory Transvaginal Ultrasounds: Coming Soon to a State Near You*, MOTHER JONES (Mar. 5, 2012), www.motherjones.com/mojo/2012/03/transvaginal-ultrasounds-coming-soon-state-near-you ("Most abortions take place within 12 weeks after a woman becomes pregnant. And if the woman has been pregnant for eight weeks or less, conducting an ultrasound generally requires the doctor to insert a probe in a woman's vagina in order to actually see or hear anything.").

adhere to legislation that requires the collection of details during a time in pregnancy when successful compliance with the statute would require transvaginal ultrasounds to be utilized.

It only seems natural that such intrusive legislation would create concern regarding whether the State is overstepping its boundaries by implementing a law that essentially requires a physical State intrusion into the developing womb of a patient.[14] As seen most clearly within the statutes themselves, states with this type of legislation have argued that the purpose of the statute is to provide the patient with adequate informed consent.[15] In other words, by giving the patient as much accurate and detailed information as possible through the procedure, the State's argument is that a patient is receiving the most information the State can provide, through the use of the ultrasound, in order to facilitate a patient's complete understanding of the abortion procedure and its consequences. The question posed for consideration here is, given the State's argument that the statute is aimed at providing informed consent, if challenged on Fourth Amendment grounds for the invasive method with which the ultrasounds are being performed, would the United States Supreme Court find Texas' statute violates the Fourth Amendment? That is, does it impose an unreasonable search on the patient when a transvaginal ultrasound is administered? Considering the legal framework governing Fourth Amendment inquiries, as well as the significant interests involved in particular searches performed on individuals, if an individual were to fight state authority and

14 *See* John W. Whitehead, *There Is Nothing Constitutional About State-Mandated Transvaginal Ultrasounds*, HUFF. POST (Feb. 24, 2012, 10:36 AM), http://www.huffington post.com/john-w-whitehead/transvaginal-ultrasounds_b_1293645.html ("[R]equiring doctors to carry out such invasive probes on a woman without her consent, thereby intruding upon the physician-patient relationship and reducing doctors to agents of the state, violates the Fourth Amendment's prohibition against searches by government agents."); *see also* Danielle C. Le Jeune, Comment, *An "Exception"-Ally Difficult Situation: Do the Exceptions, or Lack Thereof, to the "Speech-and-Display Requirements" for Abortion Invalidate Their Use as Informed Consent?*, 30 GA. ST. U. L. REV. 521, 544 (2014) ("The speech-and-display requirements do more than simply inform women of the risks and alternatives of the [abortion]. These requirements force physicians to 'physically speak and show the state's non-medical message to patients unwilling to hear or see.' [In] no other procedure must physicians provide such graphic detail on what happens to the body.").

15 *See generally* HEALTH & SAFETY § 171.012; VA. CODE ANN. § 18.2-76 (2014) (effective July 1, 2012); OKLA. STAT. tit. 63, § 1-738.3d (2014), *invalidated by* Nova Health Sys. v. Pruitt, 292 P.3d 28 (Okla. 2012), *cert. denied,* 134 S. Ct. 617 (2013); S. 1387, 61st Leg., 2nd Reg. Sess. (Idaho 2012) (as passed by Senate, Mar. 19, 2012) (withdrawn Mar. 28, 2012), *available at* http://www.legislature. idaho.gov/legislation/2012/S1387.pdf; N.C. GEN. STAT. § 90-21.85 (2014) (effective Oct. 28, 2011), *invalidated by* Stuart v. Loomis, 992 F. Supp. 2d 585, 609 (M.D.N.C. 2014) (holding the act violated the First Amendment).

challenge Texas' statute, it is not immediately clear whether state authority would triumph in the debate. This Comment will explore that uncertainty.

Part I of this Comment will address key precedent for abortion cases and the rationale used by the Court to justify physical state intrusion in some instances. The specific legislation in question, and the constitutional challenges that it has been assailed with to date, will follow. Finally, the section will conclude that the Fourth Amendment is indeed implicated by Texas' legislation, even though the statute does not contain evidentiary aims for criminal investigatory purposes.

Part II will explore the Fourth Amendment and how it has been applied to bodily intrusions in the past. This illustration will begin by explaining how the Court engages possible Fourth Amendment violations in deciding whether or not the governmental action is unreasonable. Part II will also detail how the "reasonableness" inquiry requires a balancing test in weighing the State's interests in the procedure constituting a "search" against the privacy interests of the individual undergoing the search.

With this jurisprudence guiding the way, Part III will further explore the reasonableness inquiry in connection with arguments the Court could consider in weighing the State's interests in the legislation against the individual's privacy interests. Finally, Part IV will conclude as to whether or not Texas' legislation might run afoul of the Fourth Amendment.

Importantly, this is not a "pro-life" or "pro-choice" centered article. This Comment does not aim to advocate for either result to the question posed, but simply to explore the procedural history, case law, and arguments the Court is likely to consider if presented with a Fourth Amendment challenge in this area of law.

I. A HISTORY OF AMERICA'S ABORTION LAWS

Before a discussion concerning the actual language of Texas' statute takes place, it is important to consider two foundational cases that have set the framework for challenges to state abortion laws.

A. Influential Court Precedent

In *Roe v. Wade*, the Court considered a challenge to Texas criminal abortion laws that disallowed an abortion except when done on medical advice for the purposes of saving the mother's

life.[16] There, the issue was whether a woman could terminate her pregnancy on her own choice, even though her decision may not be based on an attempt to save her life.[17] The Court held Texas' criminal abortion statute, which failed to take into account the pregnancy stage of the mother or "other interests involved," was unconstitutional under the Due Process Clause of the Fourteenth Amendment.[18] The Court reasoned only "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in [a] guarantee of personal privacy," and that this right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[19] Importantly, in its reasoning the Court acknowledged some state regulation is justified in areas that are normally protected by the right to personal privacy; for instance, "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."[20] The Court reasoned that at some point, "these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute,"[21] and the State's interests can become dominant. Thus, out of *Roe v. Wade* came at least two pertinent principles: a woman has a right to obtain an abortion without undue governmental interference, and the State has a legitimate interest in protecting both the health of a woman who seeks an abortion and the life of her unborn child.[22] The holding of *Roe v. Wade* not only set precedent that provided significant guidance to the next major abortion decision, but also provided a template to other courts in deciding abortion-related cases when the cases involved the right of the mother balanced against other state interests.[23]

The next foundational abortion case that the Supreme Court reviewed followed nineteen years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. There, the Court was faced

16 Roe v. Wade, 410 U.S. 113, 117–18 (1973).

17 *Id.* at 118, 120, 153.

18 *Id.* at 164.

19 *Id.* at 152–53.

20 *Id.* at 154.

21 *Id.*

22 Michael P. Vargo, *The Right to Informed Choice: A Defense of the Texas Sonogram Law*, 16 MICH. ST. U. J. MED. & L. 457, 461 (2012) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (plurality opinion)).

23 *See infra* note 31. For general examples of other cases using *Roe v. Wade*, see *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000), *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), *McCormack v. Hiedeman*, 694 F.3d 1004 (9th Cir. 2012), and *Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997).

with a Due Process challenge to Pennsylvania's Abortion Control Act of 1982.[24] The Act was concerned with obtaining proper informed consent from a woman before she underwent an abortion. Specifically, it required physicians to provide certain information to women seeking abortions at least twenty-four hours prior to the procedure.[25] Prior to the Act taking effect, five abortion clinics and one physician who provided abortions sought injunctive and declaratory relief against it.[26] In a plurality opinion, the Court partially affirmed the lower court's validation of the statute and simultaneously employed an analysis "for evaluating abortion regulation" in a way that reaffirmed *Roe v. Wade*.[27]

The Court in *Casey* looked to the principles in *Roe* and reasoned that while the decision in *Roe* respected a woman's choice in her right to an abortion, the Court in *Roe* had also made specific mention of the "'State's important and legitimate interest in the protection of potential [human] life.'"[28] From this reasoning, the Court in *Casey* emphasized the State had an interest in promoting well-informed abortion choices "[i]n attempting to ensure that a woman [understands] the full consequences of her decision . . . [while] further[ing] its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed."[29] Thus, in reaching its holding that the Pennsylvania act was in part unconstitutional, the Court made sure to note the correct analysis to use in approaching abortion rights issues was to acknowledge that a "woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but [that] States may regulate abortion procedures in ways rationally related to a legitimate state interest."[30]

With this kind of reasoning guiding much of the abortion debate throughout the years, *Casey* and *Roe* aided courts in determining many, if not all, of the First and Fifth Amendment

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24 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992) (plurality opinion).

25 Vargo, *supra* note 22, at 460 (citing *Casey*, 505 U.S. at 844).

26 *Id.* at 461 (citing *Casey*, 505 U.S. at 845).

27 *Id.* at 462 ("[The Court in *Casey*] rejected Roe's [sic] rigid trimester framework, which prevented nearly all regulation during the first three months of pregnancy. In doing so, the Court emphasized that the State may, even at the earliest stages of pregnancy, protect fetal life by expressing its preference that women avoid abortion.").

28 *Id.* at 462 (quoting *Casey*, 505 U.S. at 871).

29 *Casey*, 505 U.S. at 882–83.

30 *Id.* at 840.

challenges that have assailed recent abortion statutes.[31] So far, *Roe* and *Casey* have both stood the test of time, remain good law, and will likely continue to provide significant and informative guidance for future abortion debates. In fact, in 2013 one court in Oklahoma applied *Roe* in a case concerning transvaginal ultrasounds and concluded a mandatory transvaginal ultrasound would put an undue burden on a woman's right to an abortion.[32]

This case did more than simply illustrate continued reliance on *Roe* among courts, however. The Oklahoma court's conclusion had the effect of suggesting that if mandatory transvaginal ultrasounds have already been found to place an undue burden on a woman's right to an abortion, then there may be a significant issue with the State influencing a woman's right to reject a transvaginal ultrasound before she can receive an abortion. That is, if a woman's only choice is to submit to a transvaginal ultrasound in order to take advantage of her right to receive an abortion, the effect of such circumstances may cause her to be the subject of a state-mandated search under the Fourth Amendment since her consent in permitting the state intrusion is only obtained through influencing her eligibility to undergo the procedure.

B. The Abortion Law in Texas

Before delving into a deeper discussion regarding whether Texas' abortion statute, as written, could be held unconstitutional on Fourth Amendment grounds, it is necessary to introduce the actual language effectively mandating the potential "state searches" on abortion patients. Texas Health and

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31 *See* Gonzales v. Carhart, 550 U.S. 124, 168 (2007) (holding a due process challenge to Nebraska's partial birth abortion statute failed since it was not void for vagueness, did not impose an undue burden on a woman's right to abortion, and therefore did not violate *Roe* or *Casey*); Stuart v. Huff, 834 F. Supp. 2d 424, 424, 432 (M.D.N.C. 2011), *aff'd*, 706 F.3d 345 (4th Cir. 2014) (invalidating the Women's Right to Know Act, which required providers to "perform an ultrasound in advance of [an] abortion procedure, to make such ultrasound images visible to the patient, and to describe the images to the patient," because it was not narrowly tailored to meet state interests of promoting life or protecting abortion patients from coerced abortions). *See generally* David Zucchino, *North Carolina Abortion Rules Struck Down by Federal Judge*, L.A. TIMES (Jan. 17, 2014, 5:17 PM), http://www.latimes.com/nation/nationnow/la-na-nn-north-carolina-abortion-law-20140117-story.html (reporting a federal judge's invalidation of a North Carolina law "that require[d] abortion providers to show women seeking abortions an ultrasound and to describe the fetus").

32 David G. Savage, *Supreme Court Decision Disappoints Abortion Foes*, L.A. TIMES, Nov. 13, 2013, at A10, *available at* http://articles.latimes.com/2013/nov/12/nation/la-na-scotus-abortion-20131113 (noting that the Oklahoma Supreme Court struck down an Oklahoma law requiring mandatory ultrasounds via a transvaginal probe since it put an undue burden on a woman's right to an abortion).

Safety Code section 171.012 states that before an abortion can occur, in order for the patient undergoing the abortion to give informed consent, either the physician performing the abortion, or the agent of such physician who is a certified sonographer, must perform "a sonogram on the pregnant woman . . . [and display] the sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them."[33] The physician must then provide a "verbal explanation . . . of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs."[34] Lastly, the physician must make "audible the heart auscultation for the pregnant woman to hear . . . [with a] simultaneous verbal explanation of the heart auscultation."[35]

On its face, the overly descriptive nature of the information to be provided causes some pause as to Texas' true motivation behind implementing these ultrasound requirements. Ultimately, however, Texas' true motivation behind implementing the statute is speculative, and its legislation has, to this date, been attacked on First and Fifth Amendment grounds only.

In *Texas Medical Providers Performing Abortion Services v. Lakey*, physicians challenged Texas' statute—then referred to as House Bill 15—on First Amendment grounds, since the statute: (1) compelled the physician to take and display sonogram images while explaining the results to the pregnant woman; and (2) required the woman to certify the physician's compliance with the procedures.[36] There, the court held the provisions did not violate the First Amendment since the provisions were "sustainable under *Casey*" and were "within the State's power to regulate the practice of medicine."[37] The court relied heavily on *Casey* and reasoned the only fair reading of that case was that the "physicians' rights not to speak are . . . 'subject to reasonable licensing and regulation by the State.'"[38] The court further reasoned "'[t]he government may use its voice and regulatory authority to show its profound respect for the life within the woman'"[39] and thus, while the State cannot force a physician to

33 TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2014) (effective Sept. 1, 2011).

34 *Id.*

35 *Id.*

36 Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 573 (5th Cir. 2012).

37 *Id.* at 580.

38 *Id.* at 575 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (plurality opinion)).

39 *Id.* at 576 (quoting Gonzales v. Carhart, 550 U.S. 124, 168 (2007)).

speak the State's ideologies, it can use its "regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, *even if that information might also encourage the patient to choose childbirth over abortion*."[40] Furthermore, since the provisions of Texas' legislation were meant to obtain adequate informed consent prior to the abortion procedure, the court recognized that "[t]he point of informed consent laws is to allow the patient to evaluate her condition and render her best decision under difficult circumstances."[41] As a result, "[d]enying her up to date medical information [would be] more of an abuse to her ability to decide than providing the information."[42] The court concluded since the material was to secure informed consent, the Texas statute was valid under *Casey*, as that case allowed the State "to regulate medical practice by deciding that information about fetal development is 'relevant' to a woman's decision making."[43]

Though *Lakey* concerned a First Amendment challenge to Texas' statute, the case is informative of Texas' interests in enacting such legislation—that is, to obtain the most accurate, current, and detailed information possible in order to provide an abortion patient with true informed consent before she makes a major, life-altering decision. However, as previously stated, this seemingly legitimate state interest begins to look suspect when one inquires into the method of the ultrasound procedure currently being used in Texas.

C. Implication of the Fourth Amendment

When considering that many ultrasounds performed during the abortion period (the first trimester) are done with a transvaginal probe, the new question becomes whether this state intrusion, that essentially creates a search within the body of the patient, is legitimate enough to outweigh the patient's right to personal privacy and refusal of the ultrasound. It appears many in the political and public sphere have begun to view statutes such as Texas', which implicitly mandate invasive procedures, with disdain, or at least with grave concern. For instance, these

40 *Id.* at 576–77 (quoting Planned Parenthood Minn. v. Rounds, 530 F.3d 724, 735 (8th Cir. 2008) (en banc)).

41 *Id.* at 579.

42 *Id.*; *see* Mary Jean Geroulo, *Health Care Law*, 66 SMU L. REV. 929, 948 (2013) (noting one of the primary conclusions in *Lakey* was the informed consent laws could not "impose an undue burden on . . . women's right to have an abortion").

43 *Lakey,* 667 F.3d at 578 (quoting *Casey*, 505 U.S. at 846).

statutes have been called everything from state-mandated rape,[44] to potential violations of the Fourth Amendment.[45]

In line with many of the concerns expressed in the public, private, and political spheres, a Fourth Amendment inquiry is not only relevant, but likely imminent. Texas' current statute concerns the State's interests of informed consent versus the individual's interests in privacy and bodily integrity. It implicitly requires transvaginal ultrasounds that, in effect, search the womb of a pregnant woman in a way that compromises, and potentially violates, her right to privacy. Thus, the reality of Texas' statute is that it might currently be causing abortion physicians to commit a violation of a female patient's Fourth Amendment rights each time a transvaginal ultrasound is utilized in order to comply with the state's statute.[46] Beyond that, not only is the legislation in Texas still operative and impacting the lives of women who currently seek abortions, it could be a contributor to the beginnings of a national rippling effect based on state-wide reaction and concern for the effect of the law, ultimately causing states to take action in opposition to similar laws.[47] Thus, there is a fair chance a Fourth Amendment challenge could appear before the Supreme Court in the future. If it does, the resulting decision could cause significant changes and new additions to abortion arguments and policies. For this reason, it is imperative to be informed of the history surrounding the Court's treatment of Fourth Amendment jurisprudence in relation to bodily intrusions by the State.

II. FOURTH AMENDMENT JURISPRUDENCE

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers,

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44 *See* Carole Joffe, *Crying Rape: Pro-choice Advocates Should Quit Calling Ultrasounds Rape*, SLATE (Feb. 29, 2012, 12:30 PM), http://www.slate.com/articles/double_x/doublex/2012/02/transvaginal_ultrasounds_why_pro_choice_advocates_shouldn_t_call_them_rape_.html. *See generally* Kelsey Anne Green, Comment, *Humiliation, Degradation, Penetration: What Legislatively Required Pre-abortion Transvaginal Ultrasounds and Rape Have in Common*, 103 J. CRIM. L. & CRIMINOLOGY 1171 (2013).

45 *See* Whitehead, *supra* note 14; *see also* Le Jeune, *supra* note 14.

46 *See generally* TEX. HEALTH & SAFETY CODE ANN. §§ 171.012–171.0122 (West 2014) (effective Sept. 2011). *See also* Kropf, *supra* note 3 (noting similar laws in "Oklahoma and North Carolina are temporarily enjoined from enforcement").

47 Natalie Villacorta, *Shifting Strategies for State Abortion Battles in 2014*, POLITICO (Jan. 6, 2014, 11:27 PM), http://www.politico.com/story/2014/01/abortion-battles-shifting-strategy-101811.html (noting twenty-four states implemented abortion restrictions during 2013, which may be the reason why other states have responded by directly combating restrictions that limit abortion availability—California has acted by passing laws that "expand[] access to abortion[s]").

> and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[48]

Traditionally, the Fourth Amendment has been applied in challenges to criminal law investigations, whereby warrant requirements and evidence gathering are not only pertinent, but are the object of an allegedly unreasonable search. This is not, however, the only context wherein the Fourth Amendment has been applied. In actuality, Fourth Amendment inquiries do not come into play solely in criminal investigations, or where evidence gathering is the primary purpose of the search administered. Instead, Fourth Amendment inquiries have also been analyzed in cases involving inventory searches, special needs searches, and administrative searches; there, the "probable-cause approach [to the Fourth Amendment inquiry] is unhelpful when [the] analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations."[49] This being true, when considered in light of the current issue, the Fourth Amendment is in fact applicable to Texas' statute even though the statute is lacking any purpose for evidence gathering in connection to criminal investigations. However, acknowledgment that the Court could review a Fourth Amendment challenge, even without criminal issues being involved, only determines whether there is a possibility the Supreme Court would agree to decide the validity of Texas' statute on Fourth Amendment grounds. It is only after this initial step that the Court will look to a variety of factors and inquiries to determine the statute's constitutional vitality.

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48 U.S. CONST. amend. IV.

49 South Dakota v. Opperman, 428 U.S. 364, 370 n.5 (1976); *see* Ferguson v. City of Charleston, 532 U.S. 67, 88 (2001) (Kennedy, J., concurring) ("The traditional warrant and probable-cause requirements are waived . . . [where] the evidence obtained in the search is not intended to be used for law enforcement purposes."); Colorado v. Bertine, 479 U.S. 367, 371 (1987) (detailing that the "policies behind the warrant requirement are not implicated in an inventory search . . . nor is the related concept of probable cause"); Illinois v. Lafayette, 462 U.S. 640, 643–44 (1983) (explaining that inventory searches constitute a "well-defined exception to the warrant requirement," in which the reasonableness of such is "determined on other bases" such as a balancing of the search's intrusion on the individual's interests against the governmental interests in the search); Camara v. Mun. Court of S.F., 387 U.S. 523, 530 (1967) (reasoning it is "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior"); *see also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 761, 801 (1994) (arguing the text of the Fourth Amendment does not require warrants or even probable cause; it simply requires that searches and seizures be reasonable).

A. State Action and Use of State Agents

In determining whether there is a legitimate Fourth Amendment issue to any action against an individual, the Court will first ask whether there was a search; next, the Court will determine whether the search was the product of government action.[50]

In the present case involving Texas, one might argue that while the answer to the first question is clearly "yes," the answer to the second question is "no." That is, the physician, not the State, is the actor performing the ultrasound, and thus the government is not taking action against the individual patient. This contention is flawed, however, since Texas physicians are acting under a government statute when they attempt to comply with the ultrasound requirements provided by the state abortion law.[51] Thus, the physicians can be viewed as agents of the State, acting pursuant to governmental direction. This is supported by the fact that "private action [has been considered to] amount[] to government action when the totality of the circumstances indicates that the private actor was acting as an instrument or agent of the government."[52] Here, because physicians are performing transvaginal ultrasounds in order to comply with mandatory state statutory provisions, it is reasonable to conclude that the action of individual physicians, in administering the ultrasound, constitutes government action.

This analysis is similar to the approach taken in *Ferguson v. City of Charleston*, where the Court held a hospital staff's practice of testing the urine of pregnant patients to determine whether the urine would test positive for drug use was an unreasonable search under the Fourth Amendment.[53] In determining whether the Fourth Amendment was applicable to the case, the Court reasoned that members of the hospital's staff were "government actors, and [thus] subject to the strictures of the Fourth Amendment."[54] Similarly, the physicians of abortion clinics in Texas are also likely subject to the Fourth Amendment assuming they are state agents, acting on behalf of a state-mandated statute.

50 *See generally* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

51 *See* TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2014) (effective Sept. 1, 2011).

52 DAVID BENEMAN & KATLYN DAVIDSON, ME. FED. DEFENDER'S OFFICE, FOURTH AMENDMENT: A PRIMER ON SEARCH & SEIZURE LAW 1 (2010), *available at* http://ne.fd.org/cja_forms/Fourth%20Amendment%20Primer%20-%20Final.pdf.

53 *Ferguson*, 532 U.S. at 76, 85–86.

54 *Id.* at 76.

However, even assuming Texas physicians performing the ultrasounds are acting as state agents, a Fourth Amendment challenge could still be rejected by the Court if it is determined there was no reasonable expectation of privacy on the part of the female patient at the time of the transvaginal ultrasound.[55]

B. Did the Person Hold a Reasonable Expectation of Privacy?

In determining whether or not a search has occurred, the Court will look to whether the individual had a reasonable expectation of privacy in the item or place that was searched.[56] This is a "twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[57] With regard to Texas patients undergoing transvaginal ultrasounds for purposes of the state's abortion law, it is doubtful anyone, including the Court, would argue a woman has no subjective expectation of privacy in her person or bodily integrity, or that such expectation of privacy in her reproductive organs is one that society would deem unreasonable. However, while one could safely argue abortion patients have a reasonable expectation of privacy in their persons, it is imperative to remember the "mere fact that the government has intruded upon a reasonable expectation of privacy merely tells us that the Fourth Amendment is implicated. It does not tell us whether the government violated the Fourth Amendment";[58] for that, the Court will look to whether the search was reasonable overall.

C. Was the Search Reasonable?

Whether a search is reasonable is a fact-specific inquiry.[59] Determination of such inquiry requires a balancing test whereby the State's interests in the procedure constituting a search are weighed against the privacy interests of the individual undergoing the search.[60] If the individual's privacy interests

55 *See* Katz v. United States, 389 U.S. 347, 353 (1967) (reasoning not only was the Fourth Amendment applicable, but it was violated, since the individual standing in the phone booth subject to the search had a reasonable expectation of privacy that his conversations in the phone booth would be kept private).

56 *Id.*

57 *Id.* at 361 (Harlan, J., concurring).

58 Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1172 (2012).

59 *See* Cady v. Dombrowski, 413 U.S. 433, 440 (1973) (stating that whether or not a search "is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case").

60 *See* Wyoming v. Houghton, 526 U.S. 295, 300 (1999) (noting courts assess the reasonableness of a search by weighing "the degree to which it intrudes upon an

outweigh the State's interests in the procedure, the Court will find that the search is unreasonable and violates the Fourth Amendment.[61] A note important for consideration, however, is just because the search could have been "accomplished by 'less intrusive' means" does not automatically invalidate the search on reasonableness grounds.[62] Therefore, here, simply because information required by the statute might be able to be viewed via an abdominal ultrasound does not mean Texas' current practice is in compliance with the Fourth Amendment. This leads to the ultimate inquiry concerning what arguments the State might use to support the validation of its statute, and what arguments the individual might offer to illustrate the statute's invalidity.

III. BALANCING OF STATE VS. INDIVIDUAL INTERESTS: WHO WINS?

There remains little guidance in determining "what makes a search or seizure reasonable," probably since each inquiry is so fact specific.[63] Nevertheless, the balancing test the Court will engage in to determine the reasonableness of transvaginal ultrasonography searches will likely concern a plethora of arguments that weigh in favor of both state and individual privacy interests. Any inquiry the Court considers, however, will first focus on precedent.

A. Bodily Intrusions and the Fourth Amendment

The Supreme Court has indicated the reasonableness of a search depends on weighing the individual's privacy interests intruded upon against the degree to which the State requires the search in order to promote its governmental interests.[64] This balancing approach has been applied to bodily intrusions before, albeit for evidence gathering purposes.

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individual's privacy and . . . the degree to which it is needed for the promotion of legitimate governmental interests").

61 *See* Winston v. Lee, 470 U.S. 753, 766 (1985) (holding there was a violation of the Fourth Amendment because, while a surgery forcefully performed on a suspect to retrieve possible evidence may be "useful" in prosecuting him, its incredibly intrusive nature weighs heavily on the suspect's privacy interests, and therefore outweighs the State's interests in the procedure); *see also* Delaware v. Prouse, 440 U.S. 648, 653–54 (1979) ("The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials [so as to] 'safeguard the privacy and security of individuals against arbitrary invasions . . . .'").

62 *Dombrowski*, 413 U.S. at 447.

63 Lee, *supra* note 58, at 1135.

64 *Houghton*, 526 U.S. at 300; *see Prouse*, 440 U.S. at 654 (declaring that the permissibility of a particular law enforcement or governmental procedure that involves a search "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests").

For example, the Court indicated as much in *Schmerber v. California*. Though this case involved a search incident to arrest, whereby a sample of the defendant's blood was forcibly taken at a hospital after an automobile accident in order to determine his blood alcohol content,[65] it was the first time the Court made clear that intrusions into the body could be found unreasonable under the Fourth Amendment. In balancing the petitioner's privacy interests against the State's interests—that is, in maintaining safe highways and prosecuting those who endanger others via drunk driving—the Court held there was no violation of the petitioner's Fourth Amendment rights, given the facts and circumstances.[66] Significantly, however, the Court made sure to acknowledge in its reasoning that the "integrity of an individual's person is a cherished value of our society . . . . [T]hat the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions" under other circumstances.[67]

Nineteen years later in *Winston v. Lee*, the Court upheld the reasoning in *Schmerber* and expanded on the Fourth Amendment reasonableness inquiry concerning bodily intrusions.[68] In *Lee*, the petitioner, suspected of attempted robbery, was wounded when his victim shot him.[69] The victim later identified the petitioner as his assailant; at that point, a court order directed the petitioner to undergo surgery in order to extract a bullet from his person, in hopes of matching the bullet with that of the victim's gun and connecting the petitioner to the robbery.[70] The Court held the surgery violated the petitioner's Fourth Amendment rights and was an "example of the 'more substantial intrusion' cautioned against in *Schmerber*," as it "violate[d] [the] respondent's right to be secure in his person."[71] The Court looked to the magnitude of the intrusion and reasoned that one significant factor to consider was "the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity."[72] Thus, the surgical intrusion beneath the petitioner's skin to remove a bullet

65 Schmerber v. California, 384 U.S. 757, 758–59 (1966).
66 *Id.* at 772.
67 *Id.*
68 Winston v. Lee, 470 U.S. 753, 755 (1985).
69 *Id.*
70 *Id.* at 756.
71 *Id.* at 755.
72 *Id.* at 761.

from his body, involuntarily, was held to violate his personal privacy and bodily integrity.[73]

The analysis used in these cases is quite relevant to the procedure being applied as a result of Texas' abortion statute. Here, the Court could find that, similar to the petitioner in *Lee*, a woman's dignity and rights to privacy are severely compromised when undergoing transvaginal ultrasounds as a result of Texas' statute. That is, if it is a violation of one's privacy to undergo involuntary surgery, it may be just as much a violation to cause a woman to undergo an invasive procedure whereby a foreign object is inserted into an intimate body cavity in order to make her eligible to receive an abortion.

B. Does the State Have an Interest that Outweighs an Individual's Right to Privacy?

It must be remembered that Texas' stated justification for its statute is that it ensures adequate informed consent from a woman before she undergoes any abortion procedure.[74] After all, as a preliminary matter, one need only look to Texas' statute, which is labeled "Voluntary and Informed Consent," to discover this intent.[75] Due to this, Texas would likely assert the ultrasound law "furthers the State's interests in protecting life by providing many women with information about their pregnancy they may not otherwise access,"[76] including the specific details of the fetus.[77] Texas might argue the law is essential to protecting its interest in the life of the fetus since many women do not understand medical options or consequences, and could be too embarrassed to inquire further.[78] Additionally, *Casey* provides that even though a woman has a right to decide whether she wants to end her pregnancy, "it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed."[79] The State could soundly support its argument by noting society that would not wish to have a rule where the State is prohibited from informing patients of the potential health risks that may accompany their surgeries—or other possibly life-altering procedures. For instance, if one were to be diagnosed with cancer, society would likely expect, if not

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73 *Id.* at 766.

74 *See* TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2014).

75 *Id.*

76 Vargo, *supra* note 22, at 471.

77 *See* HEALTH & SAFETY § 171.012.

78 Vargo, *supra* note 22, at 474.

79 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872 (1992) (plurality opinion).

demand, that the physician(s) supervising the patient's health provide the patient with all the information, alternative methods, procedures, and bodily statistical analysis gleaned from the examination of the patient so as to allow the patient to make the most informed decision with how they would like to proceed in treatment.[80] Additionally, society has already experienced regulations that curb individual decisions through state implementation of mandated vaccinations, for instance.[81] Though there has been some recent resistance to this kind of state action, in Texas in particular, mandated vaccinations are yet another example of a state's intervention into the healthcare of individuals, where patients demand information about the risks, benefits, and alternatives to vaccines.[82] With this as a backdrop, scholars have already reasoned laws like Texas' could be found generally valid under an informed consent justification for the following reasons: (1) "the Supreme Court in *Casey* permitted states to enact legislation designed to allow women to make a 'mature and informed' decision about whether to obtain an abortion";[83] (2) courts have "demonstrate[d] a great amount of deference toward heightened abortion informed consent laws";[84] and lastly, (3) it is understandable that some women would "choose to receive this information"[85] and therefore is a well-reasoned condition under the informed consent requirements. It follows that society already recognizes it is reasonable for the State to curb our decisions in some respects when it comes to medical treatment.[86]

Abortions are recognizably a sensitive subject, but again, as Texas would argue, the State has a woman's best interests at heart in providing her with full disclosure in gaining her informed consent, even when those interests may require

80 *See* Vargo, *supra* note 22, at 472–73 ("Today, we need not look far to see the State's influence over how we treat our bodies: from controlling cancer patients' access to medicine to the way we dry our hair.").

81 *See* Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) (explaining there are certain times when a state is allowed to exercise its police power in a "way to safeguard the public health and the public safety"). "The mode or manner in which those results are to be accomplished" is subject to the rule that the state's statute or regulation cannot "contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument." *Id.*

82 *See* Alexander Burns, *Rick Perry's HPV Mandate Returns to Haunt Him*, POLITICO (Sept. 13, 2011, 5:40 PM), http://www.politico.com/news/stories/0911/63441.html (detailing the reaction to the suggestion of mandating HPV vaccines as an infringement on "parental," and possibly personal, rights).

83 Le Jeune, *supra* note 14, at 549.

84 *Id.* at 550.

85 *Id.*

86 *See* Vargo, *supra* note 22, at 472–73.

invasive medical procedures. As the State would likely acknowledge, when a woman becomes pregnant, not only does she often have little information to base an abortion decision on, but she may frequently face cultural and interpersonal pressures from family, friends, and those around her.[87] What the abortion law seeks to do is set those pressures aside, if not momentarily, in order to give an objective education of the abortion procedure.

In addition to this, the State may insist that the abortion law provides an added caution to women once they are inside of the abortion clinic. For many abortion clinics, the setting the women are placed in is highly influential in their decision to abort, and if the women have little education on the subject, at least showing them the ultrasounds attempts to give the women neutral and accurate information as to the fetus when she may initially feel "all of the individuals around her have an expectation of acquiescence."[88] Thus, it could be argued the "Texas Sonogram Law," which ultimately requires transvaginal ultrasounds, is "useful because [it] respect[s] a woman's abortion decision, while also ensuring that such decision is based on medical facts and knowledge of the procedure."[89] Though courts have usually been deferential to the State when Fourth Amendment issues involving "reasonable" bodily searches present themselves, this deference is usually afforded in the criminal law context.[90] Regardless of the law or crime, however, courts have been willing to recognize when a search has gone too far.[91] Thus, despite the State's interests, there are significant and compelling arguments against the State, ones that also have been recognized and supported by the Supreme Court in the past, that can be viewed as going to the heart of basic human rights to privacy.

C. A Woman's Privacy Interests

The foregoing principles related to the policy behind "informed choice" in the abortion setting appear to weigh heavily in favor of the State's interests in the reasonableness inquiry involving the constitutionality of the use of transvaginal

87 *Id.* at 490.

88 ELIZABETH RING-CASSIDY & IAN GENTLES, WOMEN'S HEALTH AFTER ABORTION: THE MEDICAL AND PSYCHOLOGICAL EVIDENCE 273 (2d ed. 2003), *available at* http://www.deveber.org/text/chapters/Chap18.pdf.

89 Vargo, *supra* note 22, at 495.

90 Lee, *supra* note 58, at 1147 (explaining that in the criminal law context, "reasonableness review as currently applied in the Fourth Amendment context is highly deferential, resulting in decisions that usually uphold the challenged governmental action").

91 *See, e.g.*, Winston v. Lee, 470 U.S. 753 (1985).

ultrasounds. Nevertheless, some women have attacked Texas' sonogram law, claiming the true purpose behind the law is to allow the State to force its own ideologies of protecting fetal life onto the decisions of the mother.[92] This sentiment can be linked to why a woman might desire to refuse the state-mandated ultrasound. However, if a woman wants to refuse the procedure, but cannot refuse it without jeopardizing the abortion, the woman's right to refuse the ultrasound becomes somewhat manipulated by the need for "informed consent." Regardless of concerns that the State is spreading its ideological message, the notion that a woman must first submit to a body-cavity search can be viewed as offending traditional notions of privacy, bodily integrity, and self-autonomy.

This argument weighs heavily against the State's interests in the reasonableness analysis of the transvaginal ultrasounds. In fact, in *Winston v. Lee*, the Court had factored into its reasonableness inquiry the "extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity."[93] Remember, there the Court suggested significant intrusions upon the individual's bodily integrity—like surgically removing a bullet from the petitioner's person in order to connect him to a crime—degraded one's entitlement to personal privacy and were thus subject to challenges under the Fourth Amendment.[94] This is likely the strongest argument for women who oppose undergoing the transvaginal ultrasounds. Courts have recognized that the right to consent to treatment has little meaning if the patient cannot refuse any or all treatment, despite the consequences.[95] Thus, despite the State's asserted interest in providing informed consent, the State's apparent "disregard for a woman's [actual] consent and [the] elimination of the physician's medical discretion violates the primary principles underlying

92 *See "We Have No Choice": A Story of the Texas Sonogram Law*, NPR (Jan. 22, 2013), www.npr.org/2013/01/22/169059701/we-have-no-choice-a-story-of-the-texas-sonogram-law (interview with Carolyn Jones) (noting some critics claim the true intent of the regulations is to eventually, and "systematically," end abortions); *see also* Villacorta, *supra* note 47.

93 Winston v. Lee, 470 U.S. 753, 761 (1985).

94 *Id.* at 762; *see also* Wolf v. Colorado, 338 U.S. 25, 27–28 (1994), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' . . . .").

95 Christyne L. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE J.L. & FEMINISM 327, 342 (1991) ("The potency of bodily integrity law is made manifest here when the state's interest in, among other things, the 'sanctity of life' does not succeed in overriding the individual's interest in bodily integrity.").

informed consent doctrine—personal autonomy[, bodily integrity,] and the physician-patient relationship."[96]

Autonomy "presumes that no other person or social institution ought to overrule a person's choice, whether or not that choice is 'right' from an external perspective."[97] This could be interpreted to mean that the principle of self-autonomy disallows Texas, or any state, from overriding an abortion patient's choice not to undergo a transvaginal ultrasound, by implementing a statute mandating the use of the ultrasound prior to the patient's choice to have an abortion. Indeed, critics have opined Texas' statute "undermines the core philosophy of autonomy, because it evidences a disrespect for the choice of the woman . . . by forcing her to have an unwanted, physically intrusive and medically unnecessary ultrasound."[98] This begins to present a question of whether the State is truly concerned with educating and obtaining informed consent from the patient, or whether it is putting the interests of the fetus first.[99] If the latter, it could be argued that regardless of the State's interests in informed consent, the right to self-autonomy "extends to the right to accept or reject the continuation of a pregnancy."[100] Therefore, any woman is entitled to "accept or reject an ultrasound as a part of her pregnancy treatment, whether or not she has chosen to continue" through the completion of her pregnancy.[101] If this right is compromised, then a woman's right to bodily integrity is negatively impacted. Thus, there is an inherent conflict between the State's interest in disclosure and a woman's fundamental right to bodily integrity and choice. The two interests are directly opposed and cannot coexist without one impairing the other. This will remain true regardless of policy decisions by the State to the contrary. Texas' statute causes women to rely on the abortion physician and the administration of an unwelcome, invasive ultrasound in order to effectuate the State's assurance of informed consent.

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96 Le Jeune, *supra* note 14, at 558; *see* Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body."), *abrogated on other grounds by* Bing v. Thunig, 143 N.E.2d 3 (N.Y. 1957).

97 Aimee Furdyna, *Undermining Patient Autonomy by Regulating Informed Consent for Abortion*, 6 ALBANY GOV'T L. REV. 638, 658 (2013) (citing BARRY R. FURROW ET AL., BIOETHICS: HEALTH CARE LAW AND ETHICS 257 (6th ed. 2008)).

98 *Id.*

99 *Id.*

100 *Id.* at 569–60.

101 *Id.*

As will likely be argued by Texas, and as critics of Texas' abortion law will have to concede, states have been allowed to regulate certain personal medical decisions in the past, such as in the context of abortions and vaccinations,[102] and thus, the right to bodily integrity and self-autonomy is not always dominant. Despite this, what may prove to be significantly persuasive to the Court is that "in the past, [bodily integrity has] prevailed over the competing state interests involved . . . in the abortion debate, including the interest in 'potential life.'"[103]

Certainly, the water becomes murky when considering that informed consent is a multi-faceted concept, with sometimes competing end goals. On the one hand, one primary purpose of informed consent is to require full physician disclosure of material information, which in this case is provided by the abortion physician. However, another primary aspect of informed consent concerns respecting the bodily integrity and self-autonomy of the patient by allowing them the right to self-determination.[104] In superficial terms, it can be defined as "a process of communication between a patient and physician that results in the patient's authorization or agreement to undergo a specific medical intervention."[105] However, again, a more accurate reflection of informed consent is the "fundamental value . . . [of] personal autonomy."[106] Thus, the principles of self-autonomy, bodily integrity, and self-determination could be enough in themselves to cause the Court to lean against Texas' statute and in favor of a Fourth Amendment challenge. After all, notions of self-autonomy and bodily integrity are incorporated directly into our nation's legal principles,[107] and can be considered "inalienable."[108] For these reasons, considering the significance of the personal interests involved, as opposed to the equally valid state interests in maintaining the statute's validity, the Court may have to decide a difficult case if a Fourth

102 *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 573 (5th Cir. 2012); Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) (vaccines); *see also* Burns, *supra* note 82.

103 Neff, *supra* note 95, at 329.

104 *See generally Casey*, 505 U.S. 833. *See also* Rust v. Sullivan, 500 U.S. 173, 216 (1991) (noting that *Roe*, and the cases that followed *Roe*, were fundamentally concerned with a woman's "right to self-determination"). "Those cases serve to vindicate the idea that 'liberty,' if it means anything, must entail freedom from governmental domination in making the most intimate and personal of decisions." *Id.*

105 Le Jeune, *supra* note 14, at 526–27 (citing the American Medical Association).

106 *Id.*

107 Neff, *supra* note 95, at 328–29.

108 *See* State v. Brown, 364 A.2d 27, 29 (N.J. 1976) ("The right to life and security is not only sacred in the estimation of the common law, but it is inalienable.").

Amendment issue were to arise in relation to Texas' statute. Essentially the question comes down to which interest, supported both by policy and the law, is more significant when considering the goal of the Fourth Amendment and its jurisprudence.

CONCLUSION

Given the arguments on both sides, and the significant importance of maintaining principles of self-autonomy, bodily integrity, and personal privacy, it is fair to say a definite answer as to whether or not Texas' statute would violate the Fourth Amendment cannot be proclaimed.

Not only is the law slightly ambiguous as to which interest may outweigh the other, but the political and social intensity surrounding the issue of abortion could cause additional ramifications for consideration. That is, if the Court decides in favor of the State, what will be the new parameters for determining how significant the interests in bodily integrity and self-determination are, and how will these new parameters and precedent affect women and other individuals in society in the future? If the Court rejects a Fourth Amendment challenge in this context, and essentially pronounces that the State's interest in monitoring the abortion decision reaches so far as to give it authority to force a transvaginal ultrasound as a condition for a desired medical procedure, what other significantly invasive procedures might the Court start to view as reasonable? There are also concerns for the State, however, if the Court decides against a Fourth Amendment challenge. That is, will the State experience a significant degree of backlash like that which it has similarly experienced regarding mandated vaccinations?[109] Though the Court is not required to consolidate possible conflicts such as these when determining constitutional challenges, the ramifications of a successful or unsuccessful Fourth Amendment challenge to Texas' abortion statute are nonetheless very real and will inevitably demand future attention if a Fourth Amendment challenge to Texas' abortion law is made and accepted for review by the Court.

109 *See* Burns, *supra* note 82.