PHYSICALLY INTRUSIVE ABORTION RESTRICTIONS AS FOURTH AMENDMENT SEARCHES AND SEIZURES

Successful challenges to abortion restrictions have typically been brought under the Fourteenth Amendment's Due Process Clause and considered within a right-to-privacy framework.[1] However, legal scholars have criticized that approach, citing its limitations and its poor fit with abortion.[2] While those scholars have offered a sex-equality framework as an alternative,[3] challenges under the Equal Protection Clause have been unsuccessful in the context of pregnancy-related claims.[4] As anti-abortion advocates and state legislatures friendly to their cause gain ground in restricting abortion, litigants and pro-choice advocates may welcome new conceptual avenues and fresh litigation strategies to combat the influx of abortion restrictions passed in recent years.[5]

Abortion restrictions in place today range from those that regulate the context of abortion — principally providers — to those that impose physical restrictions directly upon women seeking abortions. The former make abortion more costly and time consuming by reducing the number and convenience of locations. For example, this type of restriction may require that providers are licensed physicians, that two physicians participate, or that provider locations qualify as surgical

---

[1] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[2] *See, e.g.*, Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 151 (1992).

[3] *See, e.g.*, Ruth Bader Ginsburg, Essay, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Frances Olsen, *The Supreme Court, 1988 Term — Comment: Unraveling Compromise*, 103 HARV. L. REV. 105, 108–09 (1989).

[4] For example, in *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court rejected an equal protection challenge to the denial of pregnancy-related disability benefits. Pro-choice scholars have viewed *Geduldig* as foreclosing sex-equality arguments against abortion restrictions. *See* Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889, 901 (2011) (describing *Geduldig* as "dampen[ing] the hopes of abortion advocates that abortion restrictions would one day be governed by the constitutional guarantee of equal protection").

[5] *See* Elizabeth Nash et al., *Laws Affecting Reproductive Health and Rights: 2013 State Policy Review*, GUTTMACHER INST., http://www.guttmacher.org/statecenter/updates/2013/statetrends42013.html (last visited Nov. 23, 2014) [http://perma.cc/85VX-MFYW] ("Twenty-two states enacted 70 abortion restrictions during 2013. This makes 2013 second only to 2011 in the number of new abortion restrictions enacted in a single year. To put recent trends in even sharper relief, 205 abortion restrictions were enacted over the past three years (2011–2013), but just 189 were enacted during the entire previous decade (2001–2010).").

centers.[6] In addition, requiring a twenty-four-hour waiting period between a first visit and the visit during which the abortion is performed necessitates multiple trips to the provider, which may be located dozens or hundreds of miles from where the woman lives.[7] The other principal type of restriction can be physically intrusive. They include requirements that providers perform ultrasounds prior to providing the abortion, even if the woman's medical condition does not call for an ultrasound, and even if the woman would prefer it not be performed. Similarly, prohibitions on mid- and late-term abortions could be considered physically intrusive insofar as pregnancy entails fairly dramatic physical changes to a woman's body and such prohibitions mandate that a woman remain in an unwanted state of pregnancy.

Despite efforts under the Due Process[8] and Equal Protection Clauses,[9] abortion restrictions abound. Physically intrusive abortion restrictions are common. While the Oklahoma Supreme Court struck down its state's mandatory ultrasound law in *Nova Health Systems v. Pruitt*,[10] and cited *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[11] it did so with very little analysis.[12] Twelve other states mandate that ultrasounds be performed prior to each abortion sought in the state, with three requiring the provider to display and describe the image and nine requiring the provider to offer the patient the opportunity to view the image.[13] Indeed, the Fifth Circuit rejected a

---

[6] *See* GUTTMACHER INST., STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS (Nov. 1, 2014), http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf [http://perma.cc/Q265-PDAF] [hereinafter AN OVERVIEW OF ABORTION LAWS].

[7] *See, e.g.*, Brian M. Rosenthal & Mark Collette, *Women Seeking Abortions Scramble to Find Places to Go*, HOUS. CHRON. (Oct. 11, 2014, 9:29 PM), http://www.houstonchronicle.com/news/houston-texas/houston/article/Women-seeking-abortions-scramble-to-find-places-5815451.php [http://perma.cc/8Q7F-BZQ8] (noting that about "750,000 Texas women of reproductive age now live more than 200 miles away from an abortion clinic").

[8] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (holding, in response to Due Process challenges to an abortion statute, that abortion restrictions may be constitutional under the Due Process Clause so long as they do not pose an "undue burden" on the abortion right, *id.* at 877 (opinion of O'Connor, Kennedy, Souter, JJ.), and upholding restrictions such as informed consent, *id.* at 883, and twenty-four-hour waiting periods, *id.* at 887).

[9] Scholars have observed that *Casey* "diminished protection for abortion rights." Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865, 867 (2007); *see also* Paula Abrams, *The Scarlet Letter: The Supreme Court and the Language of Abortion Stigma*, 19 MICH. J. GENDER & L. 293, 294 (2013). They have also emphasized the benefits of a sex-equality framework. *See* Ginsburg, *supra* note 3, at 383; Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1016–17 (1984). However, *Geduldig* deflated hopes of such a framework. *See* Bachiochi, *supra* note 4.

[10] 292 P.3d 28 (Okla. 2012), *cert. denied*, 134 S. Ct. 617 (2013) (mem.).

[11] 505 U.S. 833.

[12] *See Pruitt*, 292 P.3d 28.

[13] GUTTMACHER INST., STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND (Nov. 1, 2014), http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf [http://perma.cc/Q45Z-M8BR]. The three states requiring display and description of the image are Louisiana, Texas,

challenge to a Texas law requiring, *inter alia*, mandatory ultrasounds.[14] In addition, ten states prohibit abortions after twenty weeks of pregnancy (except in cases of life or health endangerment),[15] even though fetal viability in the United States occurs at approximately twenty-three to twenty-five weeks of gestational age.[16]

Such state-mandated physical intrusions may infringe on constitutional rights other than those protected by the Due Process or Equal Protection Clauses. When the government physically intrudes upon certain areas enumerated as constitutionally protected under the Fourth Amendment, the Constitution requires that such intrusions be "[]reasonable."[17] The Fourth Amendment guarantees that the security of "persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[18] By the plain language of the Amendment, unreasonable intrusion constituting a Fourth Amendment search or seizure upon a person is unconstitutional. To the extent certain abortion restrictions can be understood as such unreasonable intrusions, they can be challenged as unconstitutional Fourth Amendment events.[19]

This Note proposes that certain physically intrusive abortion restrictions — such as mandatory ultrasounds — amount to unconstitutional physical intrusions into the constitutionally protected space "person." Part I addresses questions of cognizability and conceptual fit. It argues that, as such physically intrusive abortion restrictions are legally mandated, even though they are carried out by medical providers rather than government officials, the state-action component neces-

---

and Wisconsin, though all three states "allow[] the woman to look away from the image." *Id.* The nine states requiring providers to offer the opportunity to view the image are Alabama, Arizona, Florida, Indiana, Kansas, Mississippi, North Carolina, Ohio, and Virginia. *Id.*

14 *See* Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570 (5th Cir. 2012). Specifically, the court rejected First Amendment and vagueness challenges. *See id.* at 584.

15 AN OVERVIEW OF ABORTION LAWS, *supra* note 6 (Alabama, Arkansas, Indiana, Kansas, Louisiana, Mississippi, Nebraska, North Carolina, North Dakota, and Texas).

16 *See* Jon E. Tyson et al., *Intensive Care for Extreme Prematurity — Moving Beyond Gestational Age*, 358 NEW ENG. J. MED. 1672, 1673 (2008) (noting that intensive neonatal care is "routinely administered at 25 weeks' gestational age but may be provided only with parental agreement at 23 to 24 weeks, and only 'comfort care' may be given at 22 weeks").

17 U.S. CONST. amend. IV.

18 *Id.* The Fourth Amendment also provides that "no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.*

19 Challengers to a North Carolina mandatory-ultrasound law included, among other constitutional claims, a Fourth Amendment claim in their amended complaint, but did not explain the basis of the claim. *See* Second Amended Complaint for Injunctive and Declaratory Relief at 4, Stuart v. Loomis, 992 F. Supp. 2d 585 (M.D.N.C. 2014) (No. 1:11-cv-00804), 2012 WL 978642. The court considered only the challengers' First Amendment claims, and permanently enjoined the law's provision mandating that doctors display and describe ultrasound images. *See Stuart*, 992 F. Supp. 2d 585 , *argued*, Stuart v. Camnitz, No. 14-1150 (4th Cir. Oct. 28, 2014).

sary to a Fourth Amendment violation is present. In addition, physical intrusions even for non–law enforcement and noninvestigatory purposes may be actionable under the Fourth Amendment. Part II applies Fourth Amendment doctrine to mandatory ultrasounds as an exemplar of physically intrusive abortion restrictions. This Part argues that, as physical intrusions into a constitutionally protected space, mandatory ultrasounds constitute searches. And because the public interest in these procedures does not outweigh women's expectation of privacy, they are unreasonable and thus unconstitutional. Additionally, as government-imposed physical contact, mandatory ultrasounds constitute seizures. Because their public-interest justifications do not outweigh their intrusiveness, they are unreasonable seizures. Part III concludes by offering an area for further exploration, suggesting that the legal framework proposed for mandatory ultrasounds may be extended to mid- and late-term abortion prohibitions. Such prohibitions may be understood as imposing the unwanted physical intrusion of continued pregnancy into the same constitutionally protected space.

I. COGNIZABILITY AND CONCEPTUAL FIT

The applicability of Fourth Amendment principles to abortion restrictions may not be immediately obvious. The Fourth Amendment concerns searches and seizures, and as such, is typically understood to apply to actions of police or government officials in the course of criminal investigations. However, searches and seizures need not be carried out by government officials themselves or in the context of criminal investigations to implicate the Fourth Amendment. Section I.A discusses how the state action necessary for Fourth Amendment applicability is present when providers comply with mandated abortion restrictions. Section I.B provides an overview of contexts outside of criminal investigations in which courts have applied the Fourth Amendment.

A. Compliance with Mandated Abortion Restrictions as State Action

The Supreme Court has recognized that intrusions upon Fourth Amendment–protected areas that are compelled by law but conducted by private actors nonetheless constitute Fourth Amendment events. In *Skinner v. Railway Labor Executives' Ass'n*,[20] the Court reviewed the constitutionality of a regulation compelling private railroad companies to administer blood and urine tests to employees involved in train ac-

[20] 489 U.S. 602 (1989).

cidents.[21] The Court reasoned that, "[a]lthough the Fourth Amendment does not apply to a search or seizure . . . effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government."[22] Because a railroad performing the tests "[did] so by compulsion of sovereign authority, . . . the lawfulness of its acts [was] controlled by the Fourth Amendment."[23]

This case is closely analogous to that of doctors implementing state-mandated abortion restrictions. First, the tests required in *Skinner* are akin to abortion restrictions such as mandatory ultrasounds in that both implicate bodily integrity.[24] Second, where states require informed consent, waiting periods, and pre-abortion ultrasounds, or prohibit abortions after a certain point in the pregnancy, they mandate that doctors comply with those restrictions. Such requirements compel doctors to withhold not only the course of action they might have chosen in the absence of the restrictions, but also any treatment at all until patients abide by the restrictions. Like the railroad performing the mandated tests in *Skinner*, abortion providers comply with abortion restrictions "by compulsion of sovereign authority." Accordingly, their compliance amounts to state action.

B. Intrusions for Non–Criminal Enforcement Purposes as Cognizable Under the Fourth Amendment

The Fourth Amendment is typically understood to apply to police actions in the course of criminal investigations, where searches and seizures of constitutionally protected areas, such as the home, are "presumptively unreasonable" without a warrant accompanied by probable cause.[25] But courts have also recognized Fourth Amendment protections outside of the criminal law enforcement context, applying them in the context of highly regulated activities by private actors for purposes other than criminal investigation and enforcement. Indeed, the Supreme Court has observed: "It is surely anomalous to say that the individual and his private property are fully protected by the

---

[21] *Id.* at 606; *see also id.* at 615–16. The regulation also authorized railroads to "administer breath and urine tests to employees who violate[d] certain safety rules." *Id.* at 606.

[22] *Id.* at 614.

[23] *Id.*

[24] *See infra* section II.A.2, pp. 959–61 (describing mandatory ultrasounds as physically intrusive Fourth Amendment events).

[25] Brigham City v. Stuart, 547 U.S. 398, 403 (2006); Kyllo v. United States, 533 U.S. 27, 40 (2001); Payton v. New York, 445 U.S. 573, 586 (1980); *see also* Katz v. United States, 389 U.S. 347, 357 (1967) (describing searches conducted without a warrant backed by probable cause as "*per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions" (footnote omitted)).

Fourth Amendment only when the individual is suspected of criminal behavior."[26]

In many cases where searches and seizures have been conducted for non–law enforcement purposes, the Court has applied the "special needs" doctrine, which is framed as an exception to the Fourth Amendment's requirement that searches and seizures be accompanied by a warrant backed by probable cause.[27] The exception applies "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"[28] The Court has applied the "special needs" doctrine to myriad contexts, including public school officials' searches of students[29] and student property;[30] drug testing of student athletes,[31] student extracurricular participants,[32] political candidates,[33] and railroad operators;[34] administrative searches of "pervasively regulated industries;"[35] and public-employer searches of employees' workspaces.[36]

The Supreme Court has also applied the Fourth Amendment outside of the investigation context more broadly. In *Soldal v. Cook County*,[37] the Court applied the Fourth Amendment to a noninvestigatory seizure of a mobile home, which was incident to an eviction proceeding.[38] Indeed, the Court declared itself "puzzled" by the suggestion that the Fourth Amendment might be inapplicable to a

---

[26] Camara v. Mun. Court, 387 U.S. 523, 530 (1967) (applying the Fourth Amendment to a search by a municipal housing inspector); *see also* Soldal v. Cook Cnty., 506 U.S. 56, 69 (1992) (applying the Fourth Amendment to a seizure of a mobile home in the course of an eviction for nonpayment of rent, *see* Soldal v. Cnty. of Cook, No. 88 C 7654, 1989 WL 152294, at *1 (N.D. Ill. Nov. 3, 1989)).

[27] *See* Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) ("[W]e usually require that a search be undertaken only pursuant to a warrant . . . .").

[28] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 619 (1989) (quoting *Griffin*, 483 U.S. at 873) (internal quotation marks omitted). Indeed, the Court has held that the special needs doctrine cannot apply where police are involved in the search and seizure activity, because their involvement renders the activity law enforcement. *See* Ferguson v. City of Charleston, 532 U.S. 67, 81–86 (2001).

[29] *See* Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 370 (2009) (applying the Fourth Amendment and the special needs rule of New Jersey v. T.L.O., 469 U.S. 325 (1985), to school officials' strip search of a middle school–aged girl).

[30] *See T.L.O.*, 469 U.S. at 336–37 (applying the Fourth Amendment and special needs doctrine to school officials' searches of a student's handbag).

[31] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652–53, 657 (1995).

[32] Bd. of Educ. v. Earls, 536 U.S. 822, 829 (2002).

[33] Chandler v. Miller, 520 U.S. 305, 317–18 (1997).

[34] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 619–20 (1989).

[35] New York v. Burger, 482 U.S. 691, 693 (1987); *see also id.* at 702.

[36] *See* O'Connor v. Ortega, 480 U.S. 709, 713–15 (1987) (plurality opinion).

[37] 506 U.S. 56 (1992).

[38] *See id.* at 61–62.

noninvestigatory seizure.[39] Thus, that the abortion-restriction context does not involve law enforcement, or a traditionally investigatory purpose,[40] does not preclude the cognizability of Fourth Amendment challenges to those restrictions.

II. PHYSICALLY INTRUSIVE ABORTION RESTRICTIONS AS FOURTH AMENDMENT VIOLATIONS

The Fourth Amendment protects against government-mandated physical intrusions into the constitutionally protected areas of persons, houses, papers, and effects. Such intrusions come in two principal forms under the Amendment: searches and seizures. Section II.A argues that mandatory ultrasounds constitute unreasonable searches. The Supreme Court has explained the protection vis-à-vis searches in two ways: first, as defending reasonable expectations of privacy,[41] and second, as preventing physical intrusions as harms in themselves.[42] As this Note argues that physically intrusive abortion restrictions constitute Fourth Amendment violations, it applies the physical intrusion test — or "trespass test"[43] from *United States v. Jones*[44] and *Florida v.*

---

[39] *Id.* at 69; *see also id.* ("[T]he reason why an officer might . . . effectuate a seizure is wholly irrelevant to the threshold question whether the [Fourth] Amendment applies. What matters is the intrusion on the people's security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all.").

[40] Although some physically intrusive abortion restrictions, such as mandatory ultrasounds, may be considered in some sense investigatory — in that their purpose is to uncover information — that purpose does not serve the same end as with respect to traditionally investigatory searches. The traditional mode is to collect information or evidence from *A*, the suspect, for the benefit of *B*, law enforcement. Here, however, the purpose is to collect information from inside the woman to provide to the woman. *See* Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 397 (2008) ("Mandatory ultrasound is . . . one of several regulatory interventions seeking to inform a pregnant woman that her fetus is an unborn child and to persuade her on this account not to kill it.").

[41] *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[42] *See* United States v. Jones, 132 S. Ct. 945, 949–51 (2012); *see also id.* at 950 ("Fourth Amendment rights do not rise or fall with the *Katz* [reasonable-expectation-of-privacy] formulation.").

[43] *See The Supreme Court, 2012 Term — Leading Cases*, 127 HARV. L. REV. 198, 228–37 (2013) (discussing the Court's application of the "trespass test" from *Jones* in Florida v. Jardines, 133 S. Ct. 1409 (2013)); Orin Kerr, *Three Questions Raised by the Trespass Test in* United States v. Jones, VOLOKH CONSPIRACY (Jan. 23, 2012, 6:57 PM), http://www.volokh.com/2012/01/23/three-questions-raised-by-the-trespass-test-in-united-states-v-jones [http://perma.cc/77V2-TZ27]. By contrast, the Court has applied reasonableness balancing to privacy violations that do not involve physical intrusions. This approach consists of a totality-of-the-circumstances test to "determine[] a search's reasonableness by balancing 'intru[sion] upon an individual's privacy' against the need for the search to promote 'legitimate governmental interests.'" Recent Case, 126 HARV. L. REV. 637, 639 n.28 (2012) (second alteration in original) (quoting United States v. Davis, 690 F.3d 226, 247 (4th Cir. 2012)).

[44] 132 S. Ct. 945.

Jardines[45] — to evaluate whether certain conduct in the abortion-restriction context constitutes a search. Concluding that mandatory ultrasounds are searches, this section then evaluates their reasonableness under a variety of frameworks.

Section II.B argues that mandatory ultrasounds also amount to unreasonable seizures. The intrusiveness of abortion restrictions such as mandatory ultrasounds makes them prime candidates for evaluation under the intrusiveness rather than invasion-of-privacy conception of seizures.[46] The analysis will address whether a woman undergoing physically intrusive abortion restrictions would believe she is "not free to leave,"[47] and whether the intrusion imposed outweighs its public-interest justification and thus renders it unreasonable.

A. Mandatory Ultrasounds as Unreasonable Searches

To the extent that abortion restrictions physically intrude into constitutionally protected spaces, they constitute searches. The trespass test finds that a Fourth Amendment search has occurred when there have been "physical intrusions into the spaces and items enumerated as protected by the Fourth Amendment — 'persons, houses, papers, and effects.'"[48] As they are carried out without warrants, physically intrusive abortion restrictions are presumptively unreasonable. But that presumption is overcome if one of the Fourth Amendment exceptions to the warrant requirement applies. In the abortion-restriction context, the question whether such restrictions amount to searches becomes whether those restrictions can be considered state-mandated physical intrusions into the "person," a constitutionally protected space. If so, the question whether they are reasonable becomes whether an exception to the warrant requirement applies to overcome their presumptive unreasonableness.

---

[45] 133 S. Ct. 1409.

[46] The Court has recognized that physical intrusions that do not directly implicate privacy rights may constitute unreasonable seizures. *See* Soldal v. Cook Cnty., 506 U.S. 56, 66 (1992) ("If the boundaries of the Fourth Amendment were defined exclusively by rights of privacy, 'plain view' seizures would not implicate that constitutional provision at all. Yet, . . . 'plain view' seizures have been scrupulously subjected to Fourth Amendment inquiry.").

[47] United States v. Mendenhall, 446 U.S. 544, 554 (1980) (plurality opinion). This test has also been described as identifying when a reasonable person would not feel free "'to decline the . . . request[],' or 'otherwise [to] terminate the encounter.'" David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 52 (2009) (second alteration in original) (quoting United States v. Drayton, 536 U.S. 194, 202 (2002)).

[48] *The Supreme Court, 2012 Term — Leading Cases*, *supra* note 43, at 230 (quoting *Jardines*, 133 S. Ct. at 1414); *see also Jardines*, 133 S. Ct. at 1417–18 (holding that the sniff of a drug dog at the front door of a house is a Fourth Amendment search under *Jones*); *Jones*, 132 S. Ct. at 949 (holding that the physical intrusion of attaching a GPS device to a suspect's vehicle is a Fourth Amendment search).

1. Physical Intrusions as Searches. — In *Jones*, the Supreme Court held that attaching a GPS device to a suspect's vehicle and using it to monitor his whereabouts constituted a search within the meaning of the Fourth Amendment.[49] The Court reasoned that "Fourth Amendment jurisprudence [has been] tied to common-law trespass"[50] and that "for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates."[51] Characterizing the violation in terms of its physical intrusion into a constitutionally protected area, the Court emphasized the importance of understanding "what occurred in this case: The Government physically occupied private property for the purpose of obtaining information."[52] The Court then distinguished a case in which police use of monitoring devices was not considered a search because the suspect lacked a reasonable expectation of privacy in the information conveyed[53]: "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."[54]

In *Jardines*, the Court applied the trespass test from *Jones*, holding that police use of a drug-sniffing dog on a home's front doorstep constituted a Fourth Amendment search.[55] Reasoning that a home's curtilage has long "enjoy[ed] protection as part of the home itself," the Court concluded that the police conduct took place in a constitutionally protected space.[56] The trespass test from *Jones* thus identifies physical intrusions into constitutionally protected areas and holds them automatically to constitute Fourth Amendment searches.

Application of this inquiry to the abortion-restriction context requires considering whether a restriction amounts to a physical intrusion into the protected area "persons." If it does, it is a Fourth Amendment search. Justice Scalia has touted the "virtue" of this rubric as that it "keeps easy cases easy."[57]

2. Mandatory Ultrasounds as Physical Intrusions, and Thus Searches. — In *Skinner*, the Court analogized the blood and urine tests required and authorized under the Act to blood alcohol tests: "We

---

[49] *Id.* at 949.

[50] *Id.*

[51] *Id.* at 950. The Court also noted that "*Katz* did not repudiate that understanding." *Id. But see generally* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67 (questioning the synonymy between searches and trespasses).

[52] *Jones*, 132 S. Ct. at 949.

[53] *See id.* at 951–52 (discussing the Court's holding in United States v. Knotts, 460 U.S. 276 (1983)).

[54] *Id.* at 952. The Court added that the "holding in *Knotts* addressed only the [*Katz* test]" because Knotts had not challenged the installation of the device. *Id.*

[55] *Florida v. Jardines*, 133 S. Ct. 1409, 1417–18 (2012).

[56] *Id.* at 1414.

[57] *Id.* at 1417.

have long recognized that a 'compelled intrusio[n] into the body for blood to be analyzed for alcohol content' must be deemed a Fourth Amendment search."[58] Combining physical-intrusion and expectation-of-privacy inquiries, the Court reasoned that, "[i]n light of our society's concern for the security of one's person, it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable."[59] At bottom, the *Skinner* Court recognized a physical intrusion into bodily integrity as a search.

Abortion-restriction challengers may also benefit from the physical intrusion or trespass test. In *Jones*, attachment of a GPS device to a suspect's vehicle — an "effect" under the Fourth Amendment — for the purpose of tracking his whereabouts constituted a search. It was not necessary for the device to have been attached to the *inside* of the vehicle, since merely attaching the device to the vehicle's exterior amounted to an "encroach[ment] on a protected area."[60] In *Jardines*, the physical intrusion occurred when officers "physically enter[ed] and occup[ied] the [constitutionally protected] area," the curtilage of the home.[61] Analogizing to the mandatory ultrasound context, attaching a device to the constitutionally protected area "person," whether outside or inside the protected area, would constitute a search under *Jones*, and physically entering the person would constitute a search under *Jardines*.

Pregnancy ultrasounds are performed in one of two primary ways: pelvically or transvaginally.[62] If performed pelvically, the provider "spreads a clear, water-based gel on [the] belly and pelvis area" and

---

[58] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 616 (1989) (alteration in original) (quoting Schmerber v. California, 384 U.S. 757, 768 (1966)).

[59] *Id.* (citation omitted).

[60] United States v. Jones, 132 S. Ct. 945, 952 (2012).

[61] *Jardines*, 133 S. Ct. at 1414.

[62] *Ultrasound*, MEDLINEPLUS, NAT'L INSTS. OF HEALTH, http://www.nlm.nih.gov/medlineplus/ency/article/003778.htm (last visited Nov. 23, 2014) [http://perma.cc/UNN6-CC43]. States whose mandatory ultrasound laws require the provider to locate a heartbeat or ensure that the image clearly depict certain fetal characteristics essentially require transvaginal ultrasounds for early-stage pregnancies. *See State Policy Trends: Abortion and Contraception in the Crosshairs*, GUTTMACHER INST. (Apr. 13, 2012), https://guttmacher.org/media/inthenews/2012/04/13/index.html [http://perma.cc/R358-JV2F] (describing Texas's and Virginia's laws); Laura Bassett, *Woman Sues over Transvaginal Ultrasound: 'It Felt Like I Was Being Raped,'* HUFFINGTON POST (Sept. 12, 2013, 10:38 AM), http://www.huffingtonpost.com/2013/09/11/transvaginal-ultrasound-lawsuit_n_3907422.html [http://perma.cc/X6FF-K6RJ] ("Half of the 10 states that have mandatory ultrasound laws, in effect if not words, require a vaginal ultrasound because those laws mandate making the fetal heartbeat audible or require specific information for gestational age . . . . Early in pregnancy, the only way to make the fetal heartbeat audible is to use a transvaginal ultrasound." (quoting Elizabeth Nash, Guttmacher Inst.) (internal quotation marks omitted)).

then moves a "hand-held probe" over the area.[63] The probe and the machine to which it is attached use sonography to create a picture of the fetus.[64] Transvaginal ultrasounds, by contrast, require the provider to place the probe into the vagina,[65] and "move the probe around the area to see the pelvic organs."[66] Pelvic ultrasounds are analogous to the attachment of a GPS device in *Jones*, in that they involve application of a tool to the outside of a constitutionally protected area in order to gather information.[67] Transvaginal ultrasounds, in that they involve physically entering the vagina, appear to constitute clear-cut physical intrusions under both *Jones* and *Jardines*.

3. Nonconsensual Physical Intrusions upon Persons Without a Diminished Privacy Expectation as Unreasonable Searches. — The Court in *Jardines* also emphasized that the investigation occurred without the express or implied permission of the owner,[68] and described an implied license to enter, or lack thereof, as the touchstone for the search's reasonableness.[69] Whether an intrusion is licensed can be determined "from the habits of the country."[70] In other words, because custom and tradition dictate that visitors may approach a home and knock, but not that they may "introduc[e] a trained police dog to explore the area . . . in hopes of discovering incriminating evidence,"[71] police could constitutionally do the former but not the latter.[72] Thus, challengers to

---

[63] *Ultrasound*, *supra* note 62.

[64] *Ultrasound: Sonogram*, AM. PREGNANCY ASS'N, http://americanpregnancy.org/prenataltesting/ultrasound.html (last updated Mar. 2006) [http://perma.cc/7EDM-PEH2].

[65] *Ultrasound*, *supra* note 62.

[66] *Transvaginal Ultrasound*, MEDLINEPLUS, NAT'L INSTS. OF HEALTH, http://www.nlm.nih.gov/medlineplus/ency/article/003779.htm (last visited Nov. 23, 2014) [http://perma.cc/X9NG-TJHU].

[67] The fact that mandatory ultrasounds require physical contact between the provider and the patient, as well as the performance of a mandated procedure, distinguishes them among abortion restrictions in their intrusion into bodily integrity. *Cf.* Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 126–27 (1989) (discussing bodily integrity as "essential to identity," *id.* at 126, and former Solicitor General Charles Fried's emphasis in his oral argument in Webster v. Reproductive Health Services, 492 U.S. 490 (1989), on the fact that "restrictive abortion laws" at that time, "[did] not literally involve 'laying hands on a woman,'" *id.* at 127 (quoting *Transcript of Oral Arguments Before Court on Abortion Case*, N.Y. TIMES, Apr. 27, 1989, at B12, http://www.nytimes.com/1989/04/27/us/transcript-of-oral-arguments-before-court-on-abortion-case.html)).

[68] Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013).

[69] *See id.* at 1416–17.

[70] *Id.* at 1415 (quoting McKee v. Gratz, 260 U.S. 127, 136 (1922)) (internal quotation mark omitted).

[71] *Id.* at 1416.

[72] *See id.* at 1417 ("[W]hether the officer's conduct was an objectively reasonable search . . . depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. Here, their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do." (emphasis omitted)).

physically intrusive abortion restrictions could show that those restrictions are unreasonable searches under the *Jardines* principle, insofar as they exceed the scope of an implied license to impose upon the area (in this scenario, the woman's body) as dictated by custom. In the context of mandatory ultrasounds, challengers could argue that a request for a medical procedure authorizes an explicit license to perform that procedure, but not an implied license to perform ancillary procedures unnecessary to the requested procedure. In other words, a woman's request for an abortion supplies the provider with an explicit license to perform the abortion, but does not supply an implied license to perform other tests or procedures, such as an endoscopy, an X-ray, or an ultrasound, when those tests are not medically necessary.[73]

The Court in *Jardines* did not hold that an unlicensed search would always be unreasonable, so further doctrine helps frame the reasonableness inquiry for abortion restrictions. Under well-known Fourth Amendment doctrine, a warrantless search may be deemed reasonable "only if it falls within a specific exception to the warrant requirement."[74] Such recognized exceptions are numerous and span the contexts of criminal law enforcement, consent generally, and special needs beyond ordinary law enforcement (including ensuring security in travel by air or across borders).[75] In the context of abortion requirements, the exceptions with the clearest potential applicability are consent and special needs.

Consent in the Fourth Amendment context can nullify the need for the protections of a warrant supported by probable cause.[76] However,

---

[73] For an example of the harm that such ancillary procedures can cause, see Bonnie Rochman, *Requiring Ultrasounds Before Abortion: One Mother's Personal Tragedy*, TIME (Mar. 23, 2012), http://healthland.time.com/2012/03/23/requring-ultrasounds-before-abortion-one-mothers-personal-tragedy/ [http://perma.cc/7XJW-A83U] (discussing the case of a woman who had already had two ultrasounds in her doctor's office the day she went to a Planned Parenthood in Texas seeking an abortion, and who was forced to undergo a third at the clinic, pursuant to a Texas law mandating ultrasounds prior to abortions except in rare circumstances).

[74] Riley v. California, 134 S. Ct. 2473, 2482 (2014).

[75] The largest group of exceptions applies to searches within the criminal law enforcement context — stop and frisk searches, *see* Terry v. Ohio, 392 U.S. 1 (1968); automobile searches for contraband, *see* Carroll v. United States, 267 U.S. 132 (1925); exigent circumstances or hot pursuit, *see* Warden v. Hayden, 387 U.S. 294 (1967); and searches incident to arrest, *see* Chimel v. California, 395 U.S. 752 (1969). The Court has invoked the consent exception in the law enforcement context, *see* United States v. Drayton, 536 U.S. 194 (2002), and in other contexts as well, *see, e.g.*, Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (OSHA workplace searches). Other exceptions apply to circumstances involving special needs beyond ordinary law enforcement, *see* New Jersey v. T.L.O., 469 U.S. 325 (1985); and a subset of special needs contexts involving certain highly regulated industries — administrative searches, *see* Camara v. Mun. Court, 387 U.S. 523 (1967), and travel across borders, *see* United States v. Ramsey, 431 U.S. 606 (1977), or by air, *see* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989).

[76] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); *see also* Fernandez v. California, 134 S. Ct. 1126, 1132 (2014) ("It would be unreasonable — indeed, absurd — to require police of-

mere acquiescence does not necessarily amount to consent for purposes of the Fourth Amendment.[77] Indeed, when the government seeks to justify a search on the basis of consent, it bears the burden of proving that the consent was "freely and voluntarily given."[78] That burden "cannot be discharged by showing no more than acquiescence to a claim of lawful authority."[79] In *Skinner*, the railroad employees who faced a choice between undergoing the drug testing at issue and keeping their jobs on the one hand, and forgoing the testing and losing their jobs on the other, were not considered to have consented to the intrusions. Rather, the Court distinguished between an employee's "consent[] to significant restrictions in his freedom of movement where necessary for his employment,"[80] and the "additional interference with a railroad employee's freedom of movement that occurs in the time it takes to procure a . . . sample for testing."[81] Though the Court found the latter to be reasonable and not a significant infringement of privacy interests,[82] it did not do so on the basis that the employees had consented to the testing.

Unlike consent, the special needs exception to the warrant requirement does not nullify the need for the Amendment's protections. Rather, it allows warrantless searches based on a lesser degree of suspicion than probable cause "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[83] This exception has also been characterized as applicable when "an individual is already on notice, for instance because of his employment, or the conditions of his release from government custody, that some reasonable police intrusion on his privacy is to be expected."[84] This characterization holds true throughout the paradigmatic special needs cases. Parents are arguably on notice that their children are afforded a lesser expectation of privacy when enrolled in public schools;[85] student athletes are on notice that their par-

---

ficers to obtain a warrant when the . . . occupant of a house or apartment voluntarily consents to a search.").

77 *See* Florida v. Royer, 460 U.S. 491, 497 (1983) ("[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority.").

78 *Id.*; Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

79 *Bumper*, 391 U.S. at 548–49.

80 Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 624–25 (1989).

81 *Id.* at 625.

82 *See id.*

83 Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)) (internal quotation marks omitted).

84 Maryland v. King, 133 S. Ct. 1958, 1969 (2013) (citations omitted).

85 *See* New Jersey v. T.L.O., 469 U.S. 325, 348 (1985) (Powell, J., concurring) ("In any realistic sense, students within the school environment have a lesser expectation of privacy than members

ticipation in extracurricular sports may diminish their privacy;[86] student participants in other competitive extracurriculars "voluntarily subject themselves to many of the same intrusions on their privacy as do athletes";[87] and railroad operators and other common carrier operators, as well as certain public employees, are on notice that their job responsibilities may entail diminished privacy.[88] Thus, to a certain extent, search targets are subjected to lesser protection under the special needs doctrine because they have opted in to a status, or chosen to participate in an activity, that diminishes their reasonable expectations of privacy. Under this formula, searches may be deemed reasonable without a warrant or probable cause when there is a state interest that makes those requirements impracticable, and when the targets of the search have opted in to a weakened expectation of privacy.

4. Mandatory Ultrasounds as Unreasonable Searches. — The consent exception is inapplicable to mandatory ultrasounds, and thus does not overcome these searches' presumptive unreasonableness. Like the railroad operators in *Skinner*, women seeking abortions have only an ostensible choice: they can either undergo the intrusion of a mandatory ultrasound and obtain the abortion they seek, or they can forgo the intrusion and carry the pregnancy to term.[89] Indeed, the Supreme Court has viewed the choice not to exercise a constitutional right as a false

---

of the population generally."); *see also* Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 370 (2009).

[86] *See Vernonia*, 515 U.S. at 657 ("Legitimate privacy expectations are even less with regard to student athletes [than with regard to students generally]. School sports are not for the bashful. They require 'suiting up' before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford.").

[87] Bd. of Educ. v. Earls, 536 U.S. 822, 831 (2002); *see also id.* at 830 ("A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.").

[88] *See, e.g.*, Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 627 (1989) ("[T]he expectations of privacy of covered [railroad] employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety . . . ."); O'Connor v. Ortega, 480 U.S. 709, 717 (1987) (plurality opinion) ("Simply put, it is the nature of government offices that others — such as fellow employees, supervisors, consensual visitors, and the general public — may have frequent access to an individual's office.").

[89] Those in favor of abortion restrictions may argue that women uncomfortable with mandated ultrasounds should simply choose the latter option and opt out of having the abortion. The Supreme Court has held, however, that the government should not be able to burden the exercise of a constitutional right by arguing that the person could choose not to exercise that right. *See* sources cited *infra* note 90. As abortion is constitutionally protected under *Roe* and *Casey*, any argument in favor of abortion restrictions citing the fact that the woman could simply choose not to undergo the abortion would be constitutionally unsound. *Cf.* Molly Cohen & Rachel Proctor May, Comment, *Revolutionary or Routine?* Koontz v. St. Johns River Water Management District, 38 HARV. ENVTL L. REV. 245, 249 (2014) (discussing the unconstitutional conditions doctrine, "which prevents the government from coercing people into giving up their rights by withholding a discretionary benefit," and observing that "[o]ne need not actually yield to the government's coercive pressure in order to have suffered a constitutional injury").

one.[90] Where ultrasounds are not mandatory, some women seeking abortions may nonetheless allow them.[91] But where they are mandated, a woman confirming that she wants an abortion cannot avoid the mandated ultrasound without relinquishing her right to the abortion. Resolving such a false choice one way or another cannot constitute consent for these purposes, as Fourth Amendment consent must be "freely and voluntarily given."[92]

It is also plausible that abortion restrictions could be thought to fall under the special needs exception. Their application is programmatic, and they could be characterized as serving the public interest in protecting fetal life, articulated in *Gonzales v. Carhart*.[93] In other words, abortion restrictions could be thought to serve a "special need" beyond ordinary law enforcement. This public interest has also been described as dissuading abortion generally.[94] In addition, proponents of mandatory ultrasounds have contended that ultrasounds aid the woman's ability to provide informed consent.[95] Professor Carol Sanger has challenged the informed-consent justification by contrasting medical ultrasound with mandatory ultrasound.[96] Informed consent requires only that doctors provide "material medical information," whereas "the point of the mandated scan is to offer the woman a good look at her fetus."[97] This latter purpose, Sanger argues, "merges informed consent with a particular moral position" on the meaning of fetal existence, which in turn is intended to induce the woman to decide against abortion.[98] If the informed-consent purpose is more aptly understood as a

---

[90] *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1449 (2014) (characterizing aggregate campaign contribution limits as presenting an impermissible choice between requiring someone "to contribute at lower levels than others because he wants to support more candidates or causes" and exercising First Amendment rights fully); *cf.* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1499–1500 (1989) (proposing a systemic approach to judicial review of the constitutionality of conditions on constitutional rights, which would extend strict review to any condition "whose primary purpose or effect is to pressure recipients to alter a choice about exercise of a preferred constitutional liberty in a direction favored by government").

[91] Ultrasounds may be performed during pregnancy for a variety of reasons, including "[c]onfirm[ing] a normal pregnancy," "[l]ook[ing] for problems, such as ectopic pregnancies or the chances for a miscarriage," "[l]ook[ing] for multiple pregnancies," or "[i]dentify[ing] problems of the placenta, uterus, cervix, and ovaries." *Ultrasound*, *supra* note 62. Pregnant women seeking abortions may, in consultation with their providers, want to find out such information to ensure that the abortion goes smoothly.

[92] *See* Florida v. Royer, 406 U.S. 491, 497 (1983).

[93] 550 U.S. 124 (2007); *see id.* at 145 ("[A] premise central to [*Casey*'s] conclusion [was] that the government has a legitimate and substantial interest in preserving and promoting fetal life . . . .").

[94] *See* Stuart v. Loomis, 992 F. Supp. 2d 585, 598–99 (M.D.N.C. 2014); Sanger, *supra* note 40, at 397.

[95] *See* Sanger, *supra* note 40, at 360.

[96] *See id.* at 379–83.

[97] *Id.* at 381 (first quotation quoting Acuna v. Turkish, 930 A.2d 416, 428 (N.J. 2007)).

[98] *Id.* at 386; *cf. infra* note 131 (suggesting that deterring abortion may be in tension with the purpose of informing consent).

thinly veiled attempt to deter abortion, then, practically speaking, the two proffered purposes collapse into one, and deterring abortion stands alone.

One court that heard a First Amendment challenge to a mandatory ultrasound law found the justifications of deterring abortion and informing consent insufficient to support requirements that ultrasound images be displayed and described to the patient.[99] Such justifications thus support only restrictions that *offer* the woman the chance to view the ultrasound image or hear the information the ultrasound can provide; they are not legitimate state interests that can support a mandatory ultrasound law *requiring* the doctor to verbalize or the woman to listen to or view such information.[100] If legislatures cannot require that the information be conveyed or received, these restrictions' purposes of informing consent and deterring abortion may not be met at all. By this logic, the informed-consent and abortion-deterrence justifications for mandatory ultrasounds are significantly weakened.

Balanced against these weakened interests, which may also collapse into each other, is the woman's expectation of privacy. Unlike in the paradigmatic special needs cases discussed above, there is arguably no diminished expectation of privacy in the context of abortion restrictions. Indeed, the Court has not characterized pregnant women, or pregnant women seeking abortions, this way. Rather, the Court has contemplated that even pregnant minors do not have a lesser expectation of privacy.[101] Even if courts were to recognize the two proffered public interests — deterring abortion and informing consent — as "special needs," those arguably weakened interests would have to overcome undiminished privacy expectations. The typical special needs dynamic — a strong public interest against a diminished privacy expectation — would be reversed. It is unlikely that courts would consider pregnant women to have "opted in" to any lesser expectation of privacy by becoming pregnant, or by seeking an abortion, as they have not found pregnant minors' privacy expectations diminished. Therefore, the special needs doctrine likely would not justify physically intrusive abortion restrictions as reasonable.

---

[99] *See Stuart*, 992 F. Supp. 2d at 601–07. This decision struck down the "speech-and-display" provision of North Carolina's mandatory ultrasound law, holding that it violated the First Amendment rights of medical providers. *See id.* at 609–10.

[100] *See id.* at 602.

[101] *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (holding a parental consent requirement unconstitutional, *id.* at 74, and reasoning that "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant," *id.* at 75). Indeed, Professor Jeannie Suk has argued that the Court has conceived of the very notion of privacy *as* a woman, suggesting that the intimate acts of a woman, such as bathing, are iconic of privacy. *See* Jeannie Suk, *Is Privacy a Woman?*, 97 GEO. L.J. 485, 487–88, 491–93 (2009).

Mandatory ultrasounds should therefore be deemed unreasonable searches under the Fourth Amendment. As warrantless physical intrusions into constitutionally protected spaces, they are presumptively unreasonable. As they are neither consensual nor imposed upon persons with diminished privacy expectations, the public interests offered in their favor do not overcome their presumptive unreasonableness.

B. Mandatory Ultrasounds as Unreasonable Seizures

Justice Stewart has explained the purpose of the Fourth Amendment's prohibition of unreasonable seizures as prevention of "arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."[102] A seizure occurs when the target of the government action at issue reasonably believes that she is not free to leave, or that she is "being ordered to restrict [her] movement."[103] Whether a seizure is deemed unreasonable is determined by balancing the public interest in the seizure with the "severity of the interference with individual liberty."[104] As applied to the abortion-restrictions context, the question whether the restriction constitutes a seizure is whether a reasonable person undergoing the restriction would believe she is not free to leave. The question whether the seizure is unreasonable is whether the public interest outweighs the severity of the intrusion.

1. The Not-Free-to-Leave Test as Clearly Met by Physical Contact. — The Court has characterized acts involving physical contact pursuant to a show of authority as clear-cut seizures. In *Terry v. Ohio*,[105] the Court *described* Fourth Amendment seizures as "not [encompassing] all personal intercourse between policemen and citizens," but as clearly having occurred when, "by means of physical force or show of authority, [the officer] has in some way restrained the liberty of a citizen."[106] The Court went on to note that it could not conclude that a seizure had occurred in *Terry* "prior to [the officer's] initiation of *physical contact*" with the suspect.[107] Indeed, even if "the party is never actually brought within the physical control of the party making an arrest," a seizure will still have occurred "by merely touching, however slightly, the body of the accused."[108] In *California v.*

---

[102] Kessler, *supra* note 47, at 56 (quoting United States v. Mendenhall, 446 U.S. 544, 553–54 (1980) (plurality opinion)) (internal quotation mark omitted).

[103] California v. Hodari D., 499 U.S. 621, 628 (1991).

[104] Illinois v. Lidster, 540 U.S. 419, 427 (2004) (quoting Brown v. Texas, 443 U.S. 47, 51 (1979)) (internal quotation mark omitted).

[105] 392 U.S. 1 (1968).

[106] *Id.* at 19 n.16.

[107] *Id.* (emphasis added).

[108] *Hodari D.*, 499 U.S. at 625 (quoting A. CORNELIUS, SEARCH AND SEIZURE 163–64 (2d ed. 1930)).

Hodari D.,[109] the finding that a seizure had not occurred turned on the fact that the officer had not made any physical contact with the suspect at the time the suspect dropped the contraband he later sought to suppress.[110] In the moment of physical contact, the government agent effects a restriction of movement as well as an objectively reasonable understanding by the target that she is not free to leave.

2. Mandatory Ultrasounds as Necessitating Physical Contact, and Thus Constituting Seizures. — Parties seeking to challenge abortion restrictions under the Fourth Amendment face an objective test — whether a reasonable person would feel free to disregard the abortion restrictions that limit her movement. To the extent that those restrictions necessitate physical contact, however, advocates can more easily show that the not-free-to-leave standard is met. But even if physical contact were insufficient, physically intrusive abortion restrictions would likely meet the not-free-to-leave test.

As mere touching, however slight, constitutes a seizure,[111] abortion restrictions that require providers to make physical contact with patients, irrespective of the patient's request for or consent to the contact, arguably amount to Fourth Amendment seizures. As mandatory ultrasounds are required by some state laws and necessitate contact between a probe and a woman's pelvic area or the inside of her vagina, they involve physical contact pursuant to a show of authority. That they involve such physical contact makes it unnecessary to consider further whether a reasonable person would not feel free to disregard the restrictions — whether she would not feel free to leave. The state-imposed physical contact itself meets the not-free-to-leave test.

However, even if physical contact were insufficient by itself, such restrictions likely nonetheless amount to seizures. An objectively reasonable person in the patient's position would not consider herself free to leave while her movements are restricted pursuant to the mandatory ultrasound law in her state. Those laws necessitate that she lie still, in a particular place, for the duration of the procedure — or forgo the abortion she seeks.

3. Seizures Whose Public-Interest Justifications Do Not Outweigh Their Intrusiveness as Unreasonable. — In *Tennessee v. Garner*,[112] the Court held unconstitutional a seizure whose intrusiveness outweighed the public justification for it.[113] The "intrusiveness of a seizure by means of deadly force"[114] was "constitutionally unreasonable" where

---

[109] 499 U.S. 621.
[110] *Id.* at 625–26.
[111] *See supra* p. 967.
[112] 471 U.S. 1 (1985).
[113] *Id.* at 11.
[114] *Id.* at 9.

the officer lacked "probable cause to believe that the suspect pose[d] a threat of serious physical harm."[115] The Court likewise held unconstitutional an airport luggage seizure lasting a "prolonged 90-minute period" where the officials lacked probable cause to believe the target was carrying narcotics in *United States v. Place*,[116] and a proposed surgery on a suspect to obtain evidence of a nonfatal shooting in *Winston v. Lee*.[117] Conversely, the Court has deemed reasonable seizures whose public interest justifications clearly outweigh their intrusiveness. Where the "relevant public concern was grave" (police were investigating a crime that resulted in death) and the intrusion was minimal ("a brief wait in line" at a traffic checkpoint and "[c]ontact with the police last[ing] only a few seconds"),[118] the Court held checkpoint stops to be reasonable seizures.[119]

Though the Court often considers the presence or absence of probable cause in weighing the reasonableness of seizures in the law enforcement context, the broader inquiry involves balancing the state's interest in the seizure against the seizure's intrusiveness.

4. Mandatory Ultrasounds as Unreasonable Seizures. — As discussed above,[120] mandatory ultrasounds are typically justified by their proponents as providing the opportunity for informed consent[121] and as dissuading abortions.[122] Against those interests must be weighed the intrusiveness of the procedure. In contrast with highway checkpoints, which typically involve the minimal intrusion of waiting in line and interacting with police for no more than a few minutes, mandatory ultrasounds take longer and involve greater physical intrusion. A transabdominal ultrasound, for instance, requires preparation "one to two hours before the procedure" by drinking "several glasses of water or other liquid" and "not empty[ing] [the] bladder until the procedure is over."[123] The procedure itself takes approximately thirty minutes,[124] requires physical contact between doctor and patient, and may even require removal of clothing and insertion of a urinary catheter to fill

---

115 *Id.* at 11.

116 462 U.S. 696, 710 (1983).

117 470 U.S. 753, 765–66 (1985).

118 Illinois v. Lidster, 540 U.S. 419, 427 (2004).

119 *Id.* at 428; *see also id.* at 425–26 (citing City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000)) (describing involuntary stops as seizures).

120 *See supra* p. 965.

121 *See, e.g.*, Sanger, *supra* note 40, at 360.

122 *See, e.g.*, *id.* at 397.

123 *Pelvic Ultrasound*, JOHNS HOPKINS MED., http://www.hopkinsmedicine.org/healthlibrary/test_procedures/gynecology/pelvic_ultrasound_92,P07784 (last visited Nov. 23, 2014) [http://perma.cc/9LWN-992C].

124 Peter Coombs & Stacy Goergen, *Ultrasound*, INSIDERADIOLOGY: THE ROYAL AUSTRALIAN AND N.Z. C. OF RADIOLOGISTS, http://www.insideradiology.com.au/pages/view.php?T_id=5#.VB87CC6wL-0 (last modified May 1, 2009) [http://perma.cc/9YQB-S3LH].

the bladder.[125] While a transvaginal ultrasound does not require a full bladder, it requires insertion of a probe into the vagina.[126]

In addition, mandatory ultrasounds are arguably at least as intrusive as the ninety-minute luggage seizure in *Place*. While a thirty-minute procedure is shorter, that difference does not render mandatory ultrasounds reasonable. First, the *Place* Court declined to hold that a seizure must span ninety minutes to be unreasonable.[127] Second, while the procedure itself may take only thirty minutes, the overall process involved in a typical pelvic ultrasound spans at least ninety minutes, as it requires preparation one-to-two hours ahead as well as time for the procedure itself.

Though ultrasounds are not as intrusive as deadly force, they may be likened to the unconstitutional surgery in *Winston*. The *Winston* Court recognized the surgery as a state-mandated physical intrusion that would involve the state's "tak[ing] control of respondent's body."[128] State-mandated ultrasounds likewise involve physical intrusions in which the state, through the provider, takes control of the woman's body to prepare her for and to perform the procedure. As such, though surgery carries much greater risks than ultrasounds,[129] intrusiveness of mandatory ultrasounds can nonetheless be understood in a manner similar to that of surgery in *Winston*.

As compared with their considerable intrusiveness, mandatory ultrasounds' public interest justifications are weak. While informed consent is important for any medical procedure, and while ultrasounds may provide useful information in some pre-abortion contexts, *mandatory* ultrasounds are not necessary for informed consent. First, informed consent is standard medical practice, but only twelve states mandate ultrasounds prior to abortions.[130] Indeed, as medical providers are required to inform patients' consent before performing any procedure,[131] justifying mandatory ultrasounds on this basis renders

---

125 *See Pelvic Ultrasound*, *supra* note 123.

126 *See Transvaginal Ultrasound*, *supra* note 66.

127 Indeed, the Court eschewed a specific durational threshold. United States v. Place, 462 U.S. 696, 709–10 (1983).

128 Winston v. Lee, 470 U.S. 753, 765 (1985).

129 *Compare id.* at 766 (noting that, though the medical risks of the operation were "apparently not extremely severe," their "uncertainty militate[d] against finding the operation to be 'reasonable'"), *with Pelvic Ultrasound*, *supra* note 123 (describing the risks of the procedure as including possible discomfort during transabdominal ultrasounds and slight discomfort, as well as possible reactions by patients with latex allergies, resulting from transvaginal ultrasounds).

130 STATE POLICIES IN BRIEF, *supra* note 13.

131 *Cf.* Jessica De Bord, *Informed Consent*, ETHICS IN MEDICINE: UNIV. OF WASH. SCH. OF MED., https://depts.washington.edu/bioethx/topics/consent.html (last modified Mar. 7, 2014) [http://perma.cc/8QXB-YFXQ]. De Bord notes that informed consent "originates from the legal and ethical right the patient has to direct what happens to her body and from the ethical duty of the physician to involve the patient in her health care." *Id.* Using informed consent as a guise to

them redundant. Second, even nonmandated ultrasounds are arguably not necessary for any medical purpose with respect to early-term abortions.[132] And third, while the purported justification for mandatory ultrasounds appears to be informing consent, that justification has been described as a "veiled attempt to personify the fetus and dissuade a woman from obtaining an abortion."[133]

Dissuading abortion may be constitutional under *Casey*, so long as the burden imposed is not "undue." But as discussed above, the abortion-deterrence justification has been weakened by decisions striking down requirements that doctors convey and women receive the information provided by mandatory ultrasounds.[134] In the Fourth Amendment context, justifications offered for mandatory ultrasounds must be weighed against the procedure's intrusiveness. As mandatory ultrasounds require physical contact — through vaginal or abdominal probes that seek information inside the body — and a significant length of time, their intrusiveness arguably outweighs the public-interest justifications offered for them.

III. CONCLUSION

While this Note has used mandatory ultrasounds as its primary example of an abortion restriction that violates the Fourth Amendment, the framework it advocates may be used to understand and challenge other physically intrusive abortion restrictions as well. One area for further consideration may be the framework's potential applicability to mid- and late-term abortion prohibitions. If the state's imposition of an ultrasound, involving physical contact and viewing inside the woman's body, can be understood as unreasonably physically intrusive enough to violate the Fourth Amendment, perhaps a state mandate that unwanted mid- and late-term pregnancies be carried to term can be similarly understood. Pregnancy's dramatic alteration of a woman's body is well-documented.[135] If unwanted, but forced to continue by law, pregnancy and the dramatic alterations it entails can be understood as physically intrusive.

---

influence a patient's choice, therefore, counters the underlying purpose of informing consent — to empower the patient.

132 STATE POLICIES IN BRIEF, *supra* note 13 ("[R]outine ultrasound is not considered medically necessary as a component of first-trimester abortion . . . .").

133 *Id.*

134 *See supra* notes 99–100 and accompanying text.

135 *See* Estrich & Sullivan, *supra* note 67, at 126 (noting that pregnancy "increases a woman's uterine size 500-1000 times, her pulse rate by ten to fifteen beats a minute, and her body weight by 25 pounds or more"; may induce "nausea, vomiting, more frequent urination, fatigue, back pain, labored breathing, or water retention"; and increases "medical risks").

As mid- and late-term abortion prohibitions do not involve probes for information, but do involve preventing the woman from being free to leave the state of pregnancy, they could arguably be conceptualized as seizures. The argument could proceed as follows: though the woman became pregnant without involvement of the state, prohibitions on abortions after a certain period in pregnancy essentially mandate that she *remain* pregnant. Pregnancy's all-encompassing nature[136] and a state mandate that it continue can be conceptualized as the state "seizing" the woman's body for pregnancy.[137] Moreover, forcing a woman to continue to undergo the physical contact between her body and the fetus could amount to state-mandated physical contact sufficient for a seizure under the not-free-to-leave test.

Whether these prohibitions should be understood as seizures is a conceptually difficult question, but one that is at least potentially susceptible to the Fourth Amendment framework that this Note applies. Whether they should be considered *unreasonable* seizures is an ultimately more fraught question. Such a determination would require weighing the public interests served by such prohibitions — for example, preserving fetal life — against the intrusiveness of being compelled to carry an unwanted pregnancy to term — forcing a woman to maintain the physical contact, physical challenges, and general risks involved in pregnancy. This balancing more closely parallels this country's decades-long, intractable abortion debate. However, what distinguishes the Fourth Amendment approach is its potential to recenter the debate. Indeed, by forcing consideration of the physical intrusiveness of abortion restrictions, as weighed against the interests offered for their support, this Note's proposed Fourth Amendment framework shifts the debate away from familiar tropes.

---

136 Professors Estrich and Sullivan have described pregnancy as "keep[ing] a woman from 'belonging to herself'" and "depriv[ing] her of bodily self-possession." *Id.*

137 Indeed, Estrich and Sullivan have drawn a comparison between "compelling pregnancy to term and delivery even where they are unwanted" and the unconstitutional surgery in *Winston*. *Id.* In *Winston*, the Court described the unconstitutional surgery as a substantial intrusion "on respondent's protected interests." Winston v. Lee, 470 U.S. 753, 766 (1985). The comparison between the procedure in *Winston* and abortion prohibitions centers in part on self-determination. *See* Estrich & Sullivan, *supra* note 67, at 126–27. Estrich and Sullivan describe pregnancy compelled to term as interference with bodily integrity, a value "so essential to identity." *Id.* at 126. Indeed, they cite Professor Charles Fried for the proposition that bodily integrity and self-determination go hand in hand: "[to say] that my body can be used is [to say] that I can be used." *Id.* at 127 (alterations in original) (quoting CHARLES FRIED, RIGHT AND WRONG 121 n.* (1978)) (internal quotation marks omitted).