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CONSTITUTIONAL LAW—FROM GOBLINS TO GRAVEYARDS: THE
PROBLEM OF PATERNALISM IN COMPELLED PERCEPTION¹

ABSTRACTS

Advances in technology have enabled the government to convey its moral judgments in novel and emotionally powerful ways. The FDA's recently promulgated graphic tobacco warning labels are one such instance of this development; state statutes that mandate sonograms for abortion-seekers are another. Taking this strategy even further, it is conceivable that the government, under the guise of informed consent—and facilitated by data-mining and psychological methodology—could effect a profound change on American decision-making.

This Note argues that when the government forces Americans to perceive emotionally manipulative messages the resulting infringement on freedom of thought violates the First Amendment. It further demonstrates that, even in the cases of graphic labels and mandatory sonograms, there is inadequate First Amendment protection for the person compelled to perceive the message. Thus, this Note proposes a test with which courts could determine when the government's non-rational compelled message must be limited in order to safeguard personal First Amendment rights. Such messages trample autonomy, derogate dignity, cast aside freedom of thought and belief, and are thus completely anathema to First Amendment principles. As such, courts must recognize a First Amendment right against non-rational government compelled perception.

1. This Note employs the term “compelled perception” in order to include all types of propounded messages, but is mindful of the more commonly suggested term, “compelled listening.” See, e.g., Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 940 (2009).

This Note does not advocate that no one should be forced to perceive *any* message by *any* party. Instead, it argues that the government may not force private Americans to perceive “non-rational” messages. See Kelly Sarabyn, *Prescribing Orthodoxy*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 367, 368-69 (2010) (defining non-rational information as generally playing to emotions rather than logic). While Sarabyn would limit *all* non-rational governmental speech, *id.*, this Note advocates that only *compelled* non-rational governmental speech must be limited under the right against compelled perception. See *infra* Part IV.A.

INTRODUCTION: FORSTER'S GOBLINS

AND the goblins—they had not really been there at all? They were only the phantoms of cowardice and unbelief? One healthy human impulse would dispel them? Men like the Wilcoxes, or ex-President Roosevelt, would say yes. Beethoven knew better. The goblins really had been there. They might return—and they did. It was as if the splendour of life might boil over and waste to steam and froth. In its dissolution one heard the terrible, ominous note, and a goblin, with increased malignity, walked quietly over the universe from end to end. Panic and emptiness! Panic and emptiness! Even the flaming ramparts of the world might fall.

Beethoven chose to make all right in the end. He built the ramparts up. He blew with his mouth for the second time, and again the goblins were scattered. He brought back the gusts of splendour, the heroism, the youth, the magnificence of life and of death, and, amid vast roarings of a superhuman joy, he led his Fifth Symphony to its conclusion. But the goblins were there. They could return. He had said so bravely, and that is why one can trust Beethoven when he says other things.²

Forster's goblins, the manifestations of personal demons, creep up from time to time—extant in the night hours of the psyche, extinguished in day. The State seeks to employ these goblins as tools for paternalistically manipulating Americans' decision-making processes.³ These goblins might be gruesome images or harrowing noises so long as the end result is a reduction in unpopular behavior.⁴ However, "[t]hose who begin coercive elimination of dissent soon find themselves exterminating the dissenters;" accordingly, government compelled perception of Forster's goblins "achieves only the unanimity of the

2. E.M. FORSTER, *HOWARDS END* 34 (Vintage Books 1989). One of the major themes of Forster's works is the short step between the "splendour of life" and "panic and emptiness." *Id.* His "goblins" bridge that gap, and are similarly employed in this Note in reference to the government's use of personal demons to paternalistically manipulate decisions by evoking "panic and emptiness."

3. See *infra* Appendix (proposed cigarette warning labels); see also *infra* Part II (explaining how and why the tobacco warning labels were conceived in order to manipulate emotions).

4. See *infra* Part III (explaining how and why certain abortion legislation has been enacted to dissuade abortion-seekers). "[T]he purpose of the ultrasound requirement was to reduce the number of abortions." Sarah E. Weber, *An Attempt to Legislate Morality: Forced Ultrasounds as the Newest Tactic in Anti-Abortion Legislation*, 45 TULSA L. REV. 359, 365 (2009) (paraphrasing a phone conversation with Oklahoma state Senator Todd Lamb, a proponent of one of three state regulations forcing sonograms for those seeking abortions); see *infra* notes 7-10 (discussing the posture of Oklahoma, North Carolina, and Texas sonogram regulations). See generally *infra* Part III.

graveyard.”⁵

This Note argues that the State’s power to enlist these night-dwelling goblins to modify individual behavior must be limited. In support, it will examine the problem, critique present strategies, advocate recognizing a right against government-compelled perception, and propose a test for implementing that right. This would ensure that Americans are left to listen to Beethoven’s Fifth, or their fetus’s heartbeats—to see the potential effects of their smoking, or any other personal “goblins”—to perceive their joys and their demons, on their own terms.⁶

Although questions of governmental control are best left to political philosophy, the issue has already been thrust upon the legal realm.⁷ States have passed legislation to force abortion-seekers to perceive their fetus as a prerequisite to an abortion, mandating sonograms and amplifying any fetal sounds.⁸ These restrictions have yet to make their way through federal courts.⁹ However, the Fifth Circuit reversed an

5. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). Justice Jackson, who wrote the majority opinion in *Barnette*, was a strong defender of the freedom of belief, and several of his opinions are referenced in this Note.

6. This right would strictly be a right against the State. Other Americans retain the right to express most profane ideas while the listener is charged with avoiding the situation. *See, e.g., Cohen v. California*, 403 U.S. 15, 21-22 (1971) (holding that the plaintiff, who, while in a courthouse, wore a jacket displaying a “scurrilous epithet” was within his First Amendment rights, that people offended by the language could simply “avert[] their eyes,” and noting that “[a]ny broader view of this authority [to curtail speech] would effectively empower a majority to silence dissidents simply as a matter of personal predilections.”).

7. *See State Policies in Brief: Requirements for Ultrasound*, GUTTMACHER INST. (February 1, 2013), http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf (providing the current status of state ultrasound laws and noting that six states require a sonogram with the patient’s ability to opt out, and that two state laws requiring mandatory viewing of sonograms are the subject of legal disputes); *see also Corbin, supra* note 1, at 940 (introducing the topic by inquiring whether “the state [may] compel smokers to watch a video about the dangers of smoking before they purchase cigarettes” and whether “laws [may] force women who want to terminate an unwanted pregnancy to hear the state’s position on when life begins”).

8. *See, e.g., Woman’s Right to Know Act*, 2011 N.C. Sess. Laws 405 (to be codified at N.C. GEN. STAT. § 90-21.80 *et seq.*) (providing in § 21.85 that, pursuant to informed consent aims, a physician must perform an ultrasound, or real-time viewing, and relay the information to the patient. However, “[n]othing in [§ 21.85] shall be construed to prevent a pregnant woman from averting her eyes from the displayed images or from refusing to hear the simultaneous explanation and medical description.”).

9. *See Stuart v. Huff*, 834 F. Supp. 2d 424, 433 (M.D.N.C. 2011) (granting a preliminary injunction as the physicians’ compelled speech is unlikely to pass the strict scrutiny standard, which will likely be applied); *Nova Health Sys. v. Pruitt*, No. CV-2010-533, 2012 WL 1034022 (Okla. Cnty. Dist. Ct. March 28, 2012) (permanently enjoining the sonogram law); *Nova Health Sys. v. Edmondson*, No. CV-2010-533, 2011 WL 6442261 (Okla. Cnty. Dist. Ct. Apr. 27, 2010), *aff’d*, 233 P.3d 380, 380 (Okla. 2010) (struck down for procedural violations).

injunction against similar abortion requirements.¹⁰

Meanwhile, federal lawmakers have required cigarette manufacturers to include graphic imagery on warning labels.¹¹ This, too, is being litigated and has been enjoined.¹² Surprisingly, neither litigation—the warning labels nor the sonograms—take the viewers' rights into account. This is because, as of yet, the viewers—who are otherwise empowered to say,¹³ believe,¹⁴ and publish¹⁵ nearly whatever they wish—have no recognized right to be free from the government's compelled message.¹⁶

Consequently, this Note aims to help recognize a right against compelled perception solely against the government, and solely when the government uses personal golems to influence decision making.¹⁷ At the outset, it is clear that there must be some point at which the government, in expressing itself, engages in over-persuasion.¹⁸

10. *See* *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 806 F. Supp. 2d 942, 959 (W.D.Tex. 2011), *vacated in part*, 667 F.3d 570, 584 (5th Cir. 2012). The Texas statute, which compelled both sonogram viewing and heartbeat listening for abortion-seekers, was enjoined by the lower court for vagueness and compelled speech on the part of the physician. The appeals court vacated and remanded, finding no vagueness, and holding that the compelled perception was truthful and factual enough to pass constitutional muster. The Texas law is currently in force.

11. *Required Warnings for Cigarette Packages and Advertisements*, 76 Fed. Reg. 36628-01, 36628, 36704 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141).

12. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 569 (6th Cir. 2012) (ruling that the graphic warning labels pass rational basis review, but striking down other sections of the Act); *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 823 F. Supp. 2d 36, 47 (D.D.C. 2011) (ruling that the graphic warning labels are unlikely to survive strict scrutiny review).

13. *See, e.g., Snyder v. Phelps*, 131 S. Ct. 1207, 1218-19 (2011) (permitting a religious group to picket a military funeral for political purposes).

14. *Aboud v. Detroit Bd. of Ed.*, 431 U.S. 209, 234-35 (1977) (“For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.”).

15. *Lovell v. City of Griffin*, 303 U.S. 444, 450-51 (1938) (holding a city cannot require licenses for distributing religious publications).

16. *See also* Charles L. Black, Jr., *He Cannot Choose but Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960, 969 (1953) (“It would be an awkward, stumbling job to try to explain to a well-disposed foreign visitor that [compelled perception] is not just ‘perfectly legal’ but fully consonant with those of our aspirations and practices of which we are proudest before the world.”).

17. This problem has been previously recognized. *See, e.g., id.* But the limited response suggested in this Note is unique and perhaps more realistic than an across-the-board right against ‘compelled listening.’ *Cf. Corbin supra* note 1, at 939 (advocating that a right against compelled listening, like a right against compelled speaking, is implicit in the First Amendment).

18. The government of a free country could not, for example, force voters to watch propaganda films before they are permitted to vote.

Correspondingly, there must be some point at which a passive listener has a First Amendment right to escape a forced conversation from the government. This Note presumes that those two situations overlap in a First Amendment right that has heretofore been unrecognized, and this Note will proceed under the assumption that such a right exists.

Accordingly, Part I endeavors to define the scope and limitations of government persuasion and concludes that the limitations are at best undefined. Having so concluded, Parts II and III utilize the timely issues of graphic tobacco warning labels and forced sonograms for abortion-seekers to illustrate the lack of a reliable safeguard for private people with respect to the government. Part II explains why the commercial speech doctrine does not necessarily protect the perceiver from non-rational governmental speech. And Part III demonstrates why neither the compelled speech doctrine nor the undue burden restriction can be counted on to protect the private person from an unwanted, non-rational governmental message. Having determined that (a) the government's powers of persuasion are limitable and that (b) the private person subjected to those persuasive powers is not necessarily protected by any recognized doctrine, Part IV calls for the recognition of a right against non-rational government-compelled perception. Part IV goes on to define that right, propose a test to determine when the right is implicated, and explain why the right is supported from liberty, legal, ethical, and moral perspectives. This Note concludes that the right against government-compelled perception should be recognized for the good of the individual, for the good of society, and to support and enhance the purposes of the First Amendment.

I. ON PATERNALISM: THE GHOSTS OF WILLINGBORO AND OTHER SKELETONS IN THE GOVERNMENT'S CLOSET

This Part attempts to define the constitutional policy for government persuasion. As a preliminary matter, government speech can currently be described as limitless.¹⁹ Presumably the government is empowered to express itself in order to carry out powers it has been

19. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467-68 (2009) (“A government entity has the right to ‘speak for itself’ . . . say what it wishes . . . and to select the views that it wants to express.”) (citing *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000)); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *see infra* note 182 for a discussion on the applicability of the government speech doctrine to this Note; *see also* Sarabyn, *supra* note 1, at 397-99 (concluding that the government is empowered to speak persuasively, even in the voting booth).

granted via the Constitution.²⁰

Indeed, government-sponsored public service announcements²¹ and even state-adopted religious monuments²² demonstrate that the government's free expression powers may as well be plenary. Moreover, there is no constitutional provision that prohibits the government from being deceptive.²³ While no specific limit has been placed on the government's ability to promulgate its ideas,²⁴ the Supreme Court has yet to rule on the issue of the government compelling (forcing) people to perceive its views.²⁵ Accordingly, this Part seeks to derive the limitations on government-compelled perception by first probing the history of modern government expression, and then extrapolating the probable limits on that expression when applied to the forced perceiver's rights.

A. *The Origin of Modern Governmental Expression*

The right against government-compelled perception cannot exist if the government has limitless powers of persuasion. If the government has limits on its persuasion powers, those limits should be evident in cases where personal autonomy is infringed upon by the State. As the fountainhead of freedom, the First Amendment has been interpreted to

20. See, e.g., U.S. CONST. art. I, § 8 (providing Congress with the powers necessary to "establish," "provide," "define," and "declare" in certain circumstances).

21. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562-63 (2005) (permitting the government to anonymously advertise for the beef industry).

22. *Pleasant Grove City*, 555 U.S. at 467.

23. See Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 234 (1992) ("The Constitution is hardly concerned with the government lying, and few have argued that you have a constitutional right to have the government refrain from lying to you.").

24. One could speculate that "surely the government could not say *x*," but the counterargument is that surely the government *wouldn't*, or would otherwise subject itself to the whims of angry voters. The idea of government speech accountability is the province of the government speech doctrine, as discussed *infra* note 1852.

But such accountability cannot alone forestall the government from emotionally manipulating Americans with compelled perception because the electorate could (and does) normalize such behavior. *Id.* Moreover, the minority cannot vote down the message forced upon them, nor can even the majority vote down the method of forcing that message, since a right against government-compelled perception is currently unrecognized.

25. See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 711 (Vintage Books 1970) (noting that "[i]t has fortunately not been necessary to define the exact contours of the principle that the government may not engage in expression directed at a captive audience, or otherwise force its citizens to listen"). But consider Meiklejohn's maxim in this context: "If We, the People are to be controlled, then We, the People must do the controlling." ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 16 (Harper & Brothers, 1960) (1948). A tension arises regarding how much "we the people" can control while still retaining individual autonomy.

deal with this issue.²⁶ Thus the primordial limits of government persuasion in the free speech context must be explored and understood.

Persuasive government speech is a direct effect of anti-paternalistic jurisprudence.²⁷ Although it could not paternalistically prohibit certain speech, the government was permitted, and even encouraged, to adopt an information-providing strategy to persuade Americans.²⁸ The Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* stated:

There is . . . an alternative to this highly paternalistic approach [of withholding information]. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication

26. *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (explaining that the government is not in the business of making decisions for private citizens because “[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion,” therefore “every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us”).

At this point, a note on First Amendment scholarship is in order, since not all agree with Justice Jackson regarding “the very purpose” of the First Amendment—or at least with the purpose behind that purpose. While some feel that the goal of the First Amendment is to further a quest for the truth, *see, e.g., infra* note 27, others argue that the goal is strictly self-realization, *see* Redish, *infra* note 137, and still others believe the goal is strictly to further the aims of democracy, *see, e.g.,* MEIKLEJOHN, *supra* note 25. This Note does not adopt nor does it disavow any of these well-respected theories, but it utilizes them somewhat indiscriminately. It also relies on Strauss’ “autonomy” theory, discussed *infra* note 189 and accompanying text, and on Professor Smith’s “believing person” theory discussed *infra* Part IV.C. At any rate, a right against non-rational government-compelled perception would further any and all of the foregoing theories of First Amendment jurisprudence. Unfortunately, a full epistemological survey of arguments for and against the right against compelled perception within and without these theories is well beyond the scope of this Note, which is limited to showing why the right is needed and why it should be adopted.

27. The process of spurning paternalism in free speech situations began in the early twentieth century:

[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). But anti-paternalism did not yield an information-providing strategy until some fifty years later. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

28. *See Va. State Bd. of Pharmacy*, 425 U.S. 748 at 748, 767. Specifically, Virginia had attempted to prohibit advertising drug prices as it projected that the ensuing price competition would drive small pharmacies out of business. *Id.*

rather than to close them.²⁹

This information-providing theory was further developed in *Linmark Associates, Inc. v. Willingboro*, in which the Court struck down a ban on posting “For Sale” or “Sold” signs on lawns in the town of Willingboro, New Jersey.³⁰ The municipal ordinance was enacted to curb “white flight,” caused by the obsolescent inference that as houses went on the market, the number of minorities in town would rise, and average housing values would decline.³¹ Importantly, in striking this ordinance down, the Court suggested an alternative, stating “[t]he township obviously remains free to continue ‘the process of education’ it has already begun.”³² Willingboro could distribute information as to which homes were *not* for sale, which residents were planning on staying, and whatever other truthful information would keep residents from panicking.³³ Thus, the Court invalidated an information-hiding ordinance, but would have permitted “an information-providing strategy to accomplish the same end.”³⁴

Therefore, the government can strategically coerce public perception of certain ideas in order to accomplish legitimate ends, effectively shouting over competing ideologies. However, there is currently no recognized limit to this information-providing strategy. Indeed, the government may be empowered to force cigarette smokers to view disturbing images, and might force abortion-seekers to view sonograms, so long as no other rights are being violated in the transaction.³⁵ Accordingly, citizens are currently deprived of their right against compelled perception in order for the government to get its point across. In effect, modern jurisprudence, in defending the First

29. *Id.* at 770. The opinion also explained that if such paternalistic regulations were allowed, then states could regulate any kind of speech that could plausibly cause citizens to behave irrationally. *Id.*

30. 431 U.S. 85, 86 (1977).

31. *Id.*

32. *Id.* at 97. The Court was quoting Justice Brandeis’s concurrence in *Whitney*: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

33. *Linmark*, 431 U.S. at 85, 97.

34. Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 596 (2004).

35. *See, e.g., Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012) (holding that the Constitution permits the state to force a woman to view her sonogram before she may have an abortion, and interpreting a sonogram to be solely truthful, non-misleading information as far as the constitutional analysis is concerned).

Amendment by eschewing paternalism, has set the stage for laws and regulations that are increasingly paternalistic.

B. *The Limits of the Government's Information-Providing Strategy*

This section will explore the confusing landscape of government speech in order to determine the currently recognized constitutional limits of the *Linmark* information-providing strategy. In particular, this section will illustrate conflicting policies regarding not only the process, but also the substance of persuasion from a listener's perspective.

The government surely cannot coerce private speech. Both compulsion and prohibition, as speech regulations, abridge speech—running afoul of the First Amendment.³⁶ In *West Virginia State Board of Education v. Barnette*, holding that a student could not be forced to salute the flag, Justice Jackson opined:

[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.³⁷

The government thus cannot compel private speech in order to promote its ideology.³⁸

However, the government *can* impel ideas.³⁹ For example, according to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a regulation requiring abortion-seekers to receive an informed consent booklet is constitutional.⁴⁰ The surgeon general's warning on tobacco products went unchallenged by the tobacco industry.⁴¹ And the

36. U.S. CONST. amend. I.

37. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 879-80 (1963) (interpreting *Barnette* to implicate an implied Freedom of Belief in the First Amendment and concluding that this freedom must be wholly protected from State coercion since it is the "equivalent of expression"); see also *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.").

38. See *Wooley*, 430 U.S. at 717 (1977).

39. See *supra* Part I.A.

40. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

41. *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 823 F. Supp. 2d 36, 40 n.4 (D.D.C. 2011). Actually, the original warning labels were the result of a mutually beneficial deal, which exempted the tobacco industry from advertising restrictions. Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 *IOWA L. REV.* 909, 914 (1992). "The *New*

government is free to promulgate posters expressing the belief that drug use is morally wrong.⁴² In fact, the government could take its War on Drugs much further, erecting billboards that attack the patriotism of pot-smokers, the morality of meth-heads, and the audacity of alcoholics. In like manner, the government could enlist gruesome images of addicts, Forster's goblins, and put them out in the public view.⁴³

Many scholars believe *Barnette* expressly states an implied First Amendment right, but they disagree as to the extent of that right.⁴⁴ At the very least, the case holds that the First Amendment prohibits outright compelled speech.⁴⁵ But any application of *Barnette* toward a greater First Amendment right of freedom from governmental coercive speech⁴⁶ or freedom from government-imposed forced listening⁴⁷ is nebulous at best.⁴⁸ Thus, the true meaning of *Barnette* is awash with speculation.⁴⁹

At any rate, the Court has laid out different policies in *Linmark* and *Barnette* on the *process* by which the listener may or may not be

York Times characterized the law as 'a shocking piece of special-interest legislation . . . to protect the economic health of the tobacco industry by freeing it of proper regulation.' *Id.*

42. One poster depicting a confident adolescent from 2000 reads:

filed under: *Pothead*

kids these days *are just*

a bunch of pot-smoking slackers, right?

Wrong. I'm a writer, a halfback,

and the last thing I smoked

was an *entire* defense.

Drugs aren't me. My life. *My decision.*

Anti-Drug Poster, available at <http://findings.org.uk/images/pothead.gif> (last visited May 13, 2013). The message between the lines is clear: being a *pothead* is *just wrong*.

43. To be fair, most government-compelled ideas are relatively benign. For example, government expression cajoling citizens to vote, participate in the census, and find a designated driver not only enhances the public welfare, but, more importantly, is not *forced* upon the listener. But it seems there was a line that either political or private conscience had—up until the sonogram and warning label regulations—refused to cross.

44. See Leora Harpaz, *Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism*, 64 TEX. L. REV. 817, 821-24 (1986) (describing the overall ambiguity of the meaning of the *Barnette* holding outside of the flag salute context).

45. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 642, 642 (1943). See also *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (holding that forcing New Hampshire drivers to display a license plate with the State's "Live Free or Die" motto is unconstitutionally compelled speech).

46. See generally Sarabyn, *supra* note 1, at 367.

47. See generally Corbin, *supra* note 1, at 977.

48. See Harpaz, *supra* note 44, at 824 n.33 (and sources cited) (explaining how taking *Barnette* to support an autonomous or self-realizing right may be beyond the scope of the holding).

49. See, e.g., Sarabyn, *supra* note 1, at 367.

persuaded. Although *Linmark* is a commercial speech case and *Barnette* is arguably only applicable to flag salutes, the two are useful for the effects they have on the *listener*. They require no inferential step: *Linmark* adopts a policy of informing the listener in order to persuade; *Barnette*—at the very least—adopts a policy of restraint from overt coercion. By recognizing the listener’s rights in these cases, the Court can resolve this conflict.

Similarly, a conflict exists in the *substance* of government persuasion, from the listener’s perspective. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, the Court upheld a ban on gambling advertising.⁵⁰ Even though gambling was legal in Puerto Rico, the Court reasoned that the territory had a “substantial interest” in curbing the vice.⁵¹ Thus, since Puerto Rico had the power to prohibit gambling, the Court decided the territory was empowered to ban speech about that activity.⁵²

In *Stanley v. Georgia*, however, the Court worried about the influence of the government, noting, “[w]e are not certain that [protecting citizens’ minds from obscenity] amounts to anything more than the assertion that the State has the right to control the moral content of a person’s thoughts.”⁵³ The Court went on to state that “[t]o some, [controlling moral content] may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment.”⁵⁴ This is inconsistent with *Posadas*, in which the Court held that the First Amendment is not strong enough to stop Congress from enacting “intermediate” measures (in lieu of outright prohibition) to discourage legal vices.⁵⁵ Unfortunately, the Court has not yet resolved the tension between cases striking down the means and ends of societal persuasion like *Barnette* and *Stanley* with cases upholding the means and ends of societal persuasion like *Linmark* and *Posadas*.⁵⁶

50. 478 U.S. 328, 331 (1986).

51. *Id.* at 341.

52. *Id.* at 346 (“[I]t is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising.”).

53. 394 U.S. 557, 565 (1969).

54. *Id.*; see also *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (reasoning that the Court would not ban virtual child pornography on the theory that it “whets the appetites of pedophiles,” since such reasoning amounts to mind control).

55. *Posadas*, 478 U.S. at 346.

56. One Justice explained that the Court presumes that information-providing laws are the better alternative. See *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 804 (1988) (Scalia, J., concurring) (“[I]t is safer to assume that the people are smart enough to get

Thus, it appears that the limits of government expression with respect to the rights of the listener are heretofore undefined. While no Supreme Court majority⁵⁷ has recognized the right against compelled perception outside of the private home,⁵⁸ a haze of uncertainty is perhaps the next best thing. This indicates that there is space between *Linmark* and *Posadas*, and *Barnette* and *Stanley*, where governmental powers of persuasion, with respect to the listener, are questionable. Although governmental expression is not expressly limited, the First Amendment is conflicted on the issue.

II. THE TOBACCO WARNING LABEL REGULATIONS⁵⁹

First, this Part will explain the history of the warning label regulations (which are attached in an Appendix and readily available online) in order to provide an example of the government engineering and employing Forster's goblins as a means for controlling societal behavior.⁶⁰ Then, this Part will go on to review two cases⁶¹ that analyze the warning labels, and it will conclude that the commercial speech doctrine does not necessarily protect the private person from a forced non-rational government message. As discussed in Part I, although courts normally scrutinize these labels from the speaker's perspective, protecting the speaker's First Amendment rights,⁶² the analysis does not

the information they need than to assume that the government is wise or impartial enough to make the judgment for them.”). Justice Scalia's statement is true enough, but he ignores the reality of the government making the “judgment for them” through information-providing laws.

57. Some dissents have queried whether ‘captive audiences’ must perceive communication that they do not necessarily want to hear. *See, e.g.*, *Pub. Utils. Comm'n of D.C. v. Pollak*, 343 U.S. 451, 469 (1952) (Dougllass, J., dissenting).

58. Inversely, if speech occurs within the privacy of the listener's home, the listener's right not to hear trumps the speaker's right of free speech. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (“There simply is no right to force speech into the home of an unwilling listener.”). Presumably this statement holds true against government speech as well.

59. *See infra* Appendix to examine the proposed warning labels. For an in-depth analysis of the history of tobacco regulations as they relate to individual autonomy, *see generally* Law, *supra* note 41, at 913-19, 924-43.

60. The astute reader might feel that tobacco warning labels are not exactly on point because, while they are arguably non-rational, they are not necessarily forced on the private person. However, since using tobacco is generally the result of an addiction, users are not generally making a choice when they purchase tobacco products. Thus, they have no way of “opting out” of the government's non-rational message, except to “avert” their eyes like the abortion-seekers discussed *infra* Part III.

61. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012); *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 845 F. Supp. 2d 266, 268 (D.D.C. 2012).

62. *See, e.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1340 (2010) (holding that provisions that ensure speech is not misleading are to be reviewed under

provide for the listener's respective rights. Accordingly, rather than analyze these requirements from a commercial speech view, this Part will interpret them from the eye of the beholder.

A. *Genesis of the Graphic Warning Labels*

The proposed regulations were conceived through the Family Smoking Prevention and Tobacco Control Act (FSPTCA), which empowered the Food and Drug Administration (FDA) to impose regulations for new graphic warning labels on cigarette packages.⁶³ The FDA evaluated the current cigarette warning labels and found them inadequate.⁶⁴ It first determined that the current warning label has remained the same for the past twenty-five years.⁶⁵ Secondly, the current labels go unnoticed.⁶⁶ Finally, the current labels are neither relevant nor efficient.⁶⁷

The FDA created thirty-six images and tested them to see which had the greatest emotional impact.⁶⁸ Survey administrators displayed cigarette packages with graphic imagery to samples of each target population, and also showed text-only cigarette packages to a control group.⁶⁹ The survey-takers were then asked questions to determine whether particular images had any effect on their smoking beliefs.⁷⁰ The

a reasonableness standard); *Zauderer v. Office of Disciplinary Counsel of the S. Ct. of Ohio*, 471 U.S. 626, 651 (1985); *see also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 572 (1980) (holding that provisions that regulate otherwise protected speech are to be reviewed under an intermediate standard to ensure that they are “no more extensive than necessary”).

63. Ricardo Carvajal et al., *The Family Smoking Prevention and Tobacco Control Act: An Overview*. 64 FOOD & DRUG L.J. 717, 730 (2009). This provision is one of “the most contentious provisions of the FSPTCA.” *Id.* at 728.

64. Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69524 (proposed Nov. 12, 2010).

65. *Id.* at 69529-30. The report also notes that the last change, in 1985, came about when the FTC determined that the older warning “(1) [was] overexposed and worn out, (2) lack[ed] novelty, (3) [was] too abstract, and (4) lack[ed] personal relevance.” *Id.* (internal citations omitted).

66. *Id.* The report cited a “major” Institute of Medicine study, determining that the warnings are “both unnoticed and stale.” *Id.* (internal citations omitted).

67. *Id.* at 69530-31. The report recognized that in Canada (which requires graphic warning labels), 85% of smokers referred to packages as a source of smoking information; but in the United States only 47% did. *Id.* The report also noted that the current American textual warnings do not impose the perception of the risks involved in smoking. *Id.*

68. *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 845 F. Supp. 2d 266, 269 (D.D.C. 2012).

69. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36628-01, 36638 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141).

70. *Id.*

FDA used this data to measure four key metrics of image utility: salience, recall, influence on beliefs, and behavioral changes.⁷¹ While all four metrics measure persuasion to some effect, the study turned on “salience.”⁷²

The FDA defined “salience” as the “emotional and cognitive responses to the cigarette packages and advertisements that bore health warnings.”⁷³ Two categories measured salience: the emotional reaction and the cognitive reaction scale.⁷⁴ The emotional reaction scale measured “how the warning made the respondent feel, such as ‘depressed,’ ‘discouraged,’ and ‘afraid.’”⁷⁵ Thus, the emotional effect on survey-takers played a major role in determining the selection of a particular image. And the end result of the FDA study was to select nine images based almost entirely on their shocking impact.⁷⁶

71. *Id.*

72. The FDA explained that this “salience” measurement gauged the effectiveness of the images better than other metrics. *Id.* at 36639. First, “research literature” indicated that emotional reaction strongly correlated with risk aversion. *Id.* Second, the emotional response could trigger a ‘bad feeling’ about smoking, so the consumer would be less likely to smoke. *Id.* Third, the “salience” measurement yielded significant results compared with the “behavioral change” and “influence on beliefs” statistics. *Id.* And revealingly, the FDA expressed its belief that, compared with other expected long-term results, emotional responses were more immediate, so they were the most telling statistic. *Id.*

The FDA also explained why it prioritized “salience” over “recall.” The “recall” portion of the survey consisted of a one-week follow-up in which the FDA asked the respondents questions about the warning-label survey. *Id.* The data from this study, however, did not yield a useful result since most respondents remembered each image or text—not one more than another. *Id.* The FDA reasoned that this was not an accurate assessment of the real-world situation of seeing the images over and over again. *Id.* More importantly, it decided that “recall” is influenced by emotional response anyway, so “salience” was given priority. *Id.* See also Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69524, 69529 (proposed November 12, 2010) (noting that pack-a-day smokers could be impacted by the graphical message more than 7,000 times per year).

73. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36628, 36638 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141). Note that Merriam-Webster defines “salience” as “a striking point or feature.” See Salience MERRIAM-WEBSTER DICTIONARY 1097 (11th ed. 2003).

74. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36628, 36638 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141).

75. *Id.*

76. The chosen images are:

[C]olor images of a man exhaling cigarette smoke through a tracheotomy hole in his throat; a plume of cigarette smoke enveloping an infant receiving a kiss from his or her mother; a pair of diseased lungs next to a pair of healthy lungs; a diseased mouth afflicted with what appears to be cancerous lesions; a man breathing into an oxygen mask; a bare-chested male cadaver lying on a table, and featuring what appears to be post-autopsy chest staples down the middle of his torso; a woman weeping uncontrollably; and a man wearing a t-shirt that features a ‘no smoking’ symbol and the words ‘I Quit’. An additional graphic image appears to be a stylized cartoon (as

B. *The Commercial Speech Factor*

The two cases analyzing the warning label regulations cover the commercial speech landscape nicely.⁷⁷ In one case, the regulations were upheld, since that court perceived them as mere disclosures that only merit rational basis review under the commercial speech doctrine.⁷⁸ The other court struck the regulations down, deciding that they are compelled protected speech that falls outside of the commercial speech doctrine, and merits strict scrutiny like any other compelled speech case.⁷⁹ However, while the cases are in conflict, they are in accord as far as the private viewer's rights are concerned.

Indeed, the Sixth Circuit in *Discount Tobacco*, upholding the regulations, “vigorously disagree[d] with the underlying premise that a disclosure that provokes a visceral response must fall outside [the lower, disclosure, standard]’s ambit. Facts can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions.”⁸⁰ And the D.C. District Court in *R.J. Reynolds*, striking down the regulations, provided an alternative: “the Government could disseminate its anti-smoking message itself . . . by increasing its anti-smoking advertisements or issuing additional statements in the press urging consumers to quit smoking or both.”⁸¹ Therefore, although the tobacco warning regulations will be in litigation for the foreseeable future,⁸² all courts agree that, one way or another, the government is free to make its point.⁸³

opposed to a staged photograph) of a premature baby in an incubator.

R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin., 845 F. Supp. 2d 266, 268 (D.D.C. 2012) (citations omitted). The images are described accurately. However, to be clear, the depictions are of actors, rather than actual injured or deceased people. *Id.* at n.8. See Appendix to view the images.

77. See *supra* note 62 (providing a very brief overview of the commercial speech standards of review).

78. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 564 (6th Cir. 2012).

79. *R.J. Reynolds*, 845 F. Supp. 2d at 274-76. The compelled speech doctrine is discussed more fully *infra* Part III.C.

80. *Disc. Tobacco*, 674 F.3d at 569.

81. *R.J. Reynolds*, 845 F. Supp. 2d at 276. The *Reynolds* court did note that the new labels provide only “gruesome images designed to disgust the consumer.” *Id.* However, what seems gruesome in one court can be interpreted as factual in another. See *infra* Part III.C.

82. *United States v. Phillip Morris USA Inc.*, 841 F. Supp. 2d 139, 141 (D.D.C. 2012) (“It is perfectly clear from Defendants’ Response that the litigation challenging the Regulations promulgated by the [FDA] . . . will not end (if ever) for an extremely long period of time.”).

83. See *R.J. Reynolds*, 845 F. Supp. 2d at 272; *Disc. Tobacco*, 674 F.3d at 521.

III. ABORTION POLITICS AND THE SONOGRAM LAWS

The politics involved in abortion regulations are included in this Note to provide context for the sonogram laws discussed below. As in the warning label regulations discussed in Part II, the motivations for the anti-abortion regulations must be understood in order to balance them against the woman's right to be free from viewing graphic imagery. Also, like the warning label regulation analysis, the current speech safeguards are not enough to protect the rights of the listener—in either the undue burden or compelled speech analyses. This Part concludes that the government would manufacture—with the indispensable aid of the woman herself⁸⁴—Forster's goblins, which the government would use to shock abortion-seekers into conforming to governmental ideology, and which would be unassailable from the constitutional perspective of the listener.

A. *Genesis of the Mandatory Sonogram Provisions*

Abortion has been legal in the United States for nearly forty years.⁸⁵ The pro-life faction galvanized as soon as *Roe v. Wade* was decided.⁸⁶ One anti-abortion author explains:

By distorting the U.S. Constitution, the Supreme Court imposed a law of abortion-on-demand in every state and county across the country and empowered federal courts in every state to eliminate abortion prohibitions or regulations that arguably conflict with *Roe*. No matter how strongly public opinion may support abortion prohibitions or regulations, the federal courts are empowered by *Roe* to invalidate and sweep away that popular support, and they have done so in hundreds of instances over the past 37 years.⁸⁷

While *Roe* held that women have the right to choose prior to the viability of the fetus,⁸⁸ that holding was substantially modified in the

84. Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 351 (2008) (pointing out that the government forces the woman "to use her body to produce the very information intended to dissuade her from pursuing an abortion").

85. See *Roe v. Wade*, 410 U.S. 113 (1973) (holding that women have a constitutional right to have an abortion prior to viability).

86. See Clarke D. Forsythe, *The Road Map to Overturning Roe v. Wade: What Can the States Do Now?* in DEFENDING LIFE 2010: PROVEN STRATEGIES FOR A PRO-LIFE AMERICA 33, 33 (Denise M. Burke ed., 5th ed. 2010) (explaining that many believe that surgical abortion is "barbaric") (citations omitted).

87. *Id.* at 34.

88. *Roe*, 410 U.S. at 165 (stipulating that the state may regulate abortions in the second trimester, and may "proscribe" them after viability).

1992 *Planned Parenthood v. Casey* decision.⁸⁹ Correspondingly, the *Roe* right has eroded in other legislative and judicial decisions.⁹⁰ Several 2012 presidential candidates even signed a pledge to defund Planned Parenthood and appoint only anti-abortion judges.⁹¹ Many state governments are similarly poised to take legislative stands against abortive procedures.⁹²

Since *Casey*, states have been empowered to require that pregnant women receive certain information before they may have an abortion.⁹³ This “informed consent” strategy to reduce abortions has been widely criticized,⁹⁴ but has received strong political support in many states.⁹⁵

89. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837 (1992) (holding that a woman still retains the right to choose before viability, but the state may influence her decision so long as it does not impose an “undue burden” on the woman).

90. See GLORIA FELDT WITH LAURA FRASER, *THE WAR ON CHOICE: THE RIGHT-WING ATTACK ON WOMEN’S RIGHTS AND HOW TO FIGHT BACK* 9-15 (2004). Feldt notes that in 1976, Congress passed the Hyde Amendment, which prohibited federal funding for abortion. Feldt also points out that bills were subsequently passed requiring spousal consent (struck down by *Casey*), a twenty-four hour waiting period, and “mandatory ‘counseling’ during which [women] will be shown graphic anti-choice materials.” *Id.* at 10. See Forsythe, *supra* note 86, at 34 (noting that in spite of *Roe*, “states have enacted legislation over the past three decades that has limited the abortion license, reduced abortions, increased legal protection for the unborn, and increased protection for women from the physical and psychological risks of abortion”); see also *Gonzales v. Carhart*, 550 U.S. 124, 164 (2007) (holding that banning a late-term abortion procedure is not an undue burden on women seeking abortions in spite of a lack of a health exception); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 506, 521 (1989) (modifying *Roe* to permit states to allocate funding to counseling women not to have abortions based on the states’ “value judgment” on the point at which life begins).

91. *Who Will Lead for Life in 2012?*, SUSAN B. ANTHONY LIST, <http://www.sba-list.org/2012pledge> (last visited May 13, 2013).

92. See John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327, 330 (2011) (noting that, as of the 2010 midterm elections, twenty-nine governors were pro-life and fifteen of those states had a pro-life legislature).

93. *Casey*, 505 U.S. at 846 (specifically upholding the Pennsylvania regulation requiring abortion-seekers to receive an informed consent booklet). See *Informed Consent Laws*, DEFENDING LIFE 2010: PROVEN STRATEGIES FOR A PRO-LIFE AMERICA, 85, 85 (Denise M. Burke ed., 5th ed. 2010) (“Twenty-four states require informed consent with a one-day reflection period . . .”).

94. See, e.g., Sanger, *supra* note 84, at 360 (“[Informed consent] is harassment masquerading as knowledge.”); Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1 (2012) (discussed *infra* Part IV.E). Cf. Part I.A, *supra*, discussing *Linmark* and the policy of providing more information in order to persuade an audience to the proper choice.

95. Denise M. Burke, *2009 State Legislative Sessions in Review: Abortion & Contraception*, DEFENDING LIFE 2010: PROVEN STRATEGIES FOR A PRO-LIFE AMERICA 53, 57 (Denise M. Burke, ed., 5th ed. 2010) (noting that in the 2009 legislative sessions, twelve states considered requiring or modifying informed consent measures). See also *Informed Consent Regarding Ultrasound*, DEFENDING LIFE 2010: PROVEN STRATEGIES FOR A PRO-LIFE AMERICA 88, 88 (Denise M. Burke, ed., 5th ed. 2010) (“Eighteen states require women

While many “informed consent” regulations are similar to the graphic tobacco warning labels in motivation⁹⁶ and in design,⁹⁷ the most striking examples are those that mandate the administering and viewing of sonograms prior to receiving an abortion.⁹⁸

Arguably, the *Gonzales v. Carhart*⁹⁹ decision broadly enhanced the informed consent powers vested in the states after *Casey*.¹⁰⁰ Many informed consent purposes echo the concerns of the Court in its opinion:

The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.¹⁰¹

This language has helped usher in scores of state abortion

receive information about the availability of ultrasound services prior to abortion or require the performance of an ultrasound prior to abortion . . .”).

96. See Mailee R. Smith, *Informed Consent Laws: Protecting a Woman’s Right to Know*, DEFENDING LIFE 2010: PROVEN STRATEGIES FOR A PRO-LIFE AMERICA 75, 83 (Denise M. Burke, ed., 5th ed. 2010) (explaining that informed consent laws are “an expression of the state’s interest in the health and safety of women”). But see Robert M. Godzeno, Note, *The Role of Ultrasound Imaging in Informed Consent Legislation Post-Gonzales v. Carhart*, 27 QUINNIPIAC L. REV. 285, 300-01 (2009) (explaining that *Casey* recognized the State’s interest in the fetus, as opposed to the woman herself, contrary to earlier precedent).

97. See FELDT AND FRASER, *supra* note 90, at 157 (noting that most states utilize “counseling materials” that “often include photographs and videos of fetuses at various stages of development . . .”).

98. See Burke, *supra* note 95 at 57-58 (relating that in the 2009 legislative sessions, twenty-two states considered ultrasound requirements, with Kansas and North Dakota enacting laws requiring an abortion provider to offer a sonogram and chance to hear a heartbeat); see also Godzeno, *supra* note 96, at 287 (2009) (categorizing sonogram laws into three groups: those that do not require an ultrasound if the woman declines, those that require an ultrasound but allow a woman to decline to view it, and those that require both the ultrasound and displaying the image with permission for the woman to look away).

99. *Gonzalez v. Carhart*, 550 U.S. 124 (2007).

100. See generally Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL’Y 223, 225 (2009) (discussing how the *Carhart* opinion broadens informed consent powers and demeans the decision-making ability of women); see also Godzeno, *supra* note 96, at 302 (explaining how *Carhart*’s language broadens informed consent); accord Kaitlin Moredock, Note, “*Ensuring So Grave a Choice is Well Informed*”: *The Use of Abortion Informed Consent Laws to Promote State Interests in Unborn Life*, 85 NOTRE DAME L. REV. 1973, 1973 (2010).

101. *Gonzales*, 550 U.S. at 159-60. See AUL Model Legislation: *Woman’s Right to Know Act*, DEFENDING LIFE 2010: PROVEN STRATEGIES FOR A PRO-LIFE AMERICA 187, 187 (Denise M. Burke, ed., 5th ed. 2010).

regulations mandating sonograms.¹⁰² In the past, the closer these regulations came to forcing a woman to view personally emotional imagery,¹⁰³ the greater the certainty that the regulations would be struck down by the courts.¹⁰⁴ That is no longer the case.¹⁰⁵

B. *The Undue Burden Factor*

Surely, one might argue, the woman already has a right against compelled perception in this context. She has a right—a penumbral privacy right—to have an abortion, and for nearly twenty years the Court has maintained that as long as the fetus is not yet viable, no law may stand as an undue burden between a woman and her choice.¹⁰⁶ At the same time, the State is empowered to employ regulations that respect life and inform the woman, so long as she is able to choose abortion.¹⁰⁷

It is unlikely, however, that any mandatory sonogram provision would fail the undue burden analysis. The first part of the test requires that the government have a legitimate interest,¹⁰⁸ but courts have reasoned that a mandatory sonogram and/or auscultation provision constitutes truthful information that aids in deciding whether or not to have an abortion.¹⁰⁹ The Fifth Circuit has explained:

To belabor the obvious and conceded point, the required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information. They are not different in kind, although more graphic and scientifically up-to-date, than the disclosures discussed in *Casey*—probable gestational age of the fetus and printed material showing a baby’s general prenatal development stages. Likewise, the relevance of these disclosures to securing informed consent is sustained by *Casey* and *Gonzales*, because both cases allow the state to regulate medical

102. Manian, *supra* note 100, at 261.

103. *i.e.* her own sonogram.

104. *See supra* notes 9, 10.

105. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 572 (5th Cir. 2012) (vacating a preliminary injunction, and moving the mandatory sonogram law toward implementation before the case is heard on the merits in the lower court).

106. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (“[A] statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.”).

107. *Id.*

108. *Id.* at 834, 877.

109. *See Robertson*, *supra* note 92, at 350 (explaining that although mandatory sonograms may serve other purposes, they concededly make the viewer more informed about her choice).

practice by deciding that information about fetal development is “relevant” to a woman’s decision-making.¹¹⁰

Thus, *Casey*’s legitimate government purpose is met by any imagery, no matter how emotional or powerful, so long as it is information “relevant” to the woman’s decision making.¹¹¹

The second part of *Casey* asks if the regulation results in an undue burden upon the abortion-seeker,¹¹² an unlikely result in this case. “[A] willingness to impose unpleasant information on women contemplating abortion is not the same as a purpose to prevent them from exercising that right if that information is an inextricable part of a fully informed decision to abort.”¹¹³ Thus, if a state forced an abortion seeker to view the gruesome dismemberment depicted in the *Carhart* decision,¹¹⁴ such an evocation would not violate the *Casey* standard.

C. *The Compelled Speech Factor*

In evaluating mandatory sonogram provisions, courts also look to whether the doctor is being used as a governmental speaker, perhaps violating his or her First Amendment rights.¹¹⁵ The government may compel speech so long as it is truthful and non-ideological.¹¹⁶ Just as in the commercial speech analogues of *Zauderer* and *Central Hudson Gas & Electric*,¹¹⁷ a right against compelled speech usually protects the listener from government ideologies.¹¹⁸ However, since mandatory sonograms convey true information, it is difficult to argue that they are strictly ideological—they do not force the doctor to say anything that is not true. The Fifth Circuit examined this issue, reasoning that ‘ideologies’ reflect points of view, and that, since a photograph (like a sonogram) is the “purest conceivable expression of ‘factual information,’” there is no unconstitutionally compelled ideological

110. *Lakey*, 667 F.3d at 577.

111. *Id.* at 576; see also Scott W. Gaylord & Thomas J. Molony, *Casey and a Woman’s Right to Know: Ultrasounds, Informed Consent, and the First Amendment*, 45 CONN. L. REV. 595, 646 (2012) (concluding that, under the *Casey* framework, the Texas and North Carolina ultrasound provisions must be upheld).

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

113. Robertson, *supra* note 92, at 352.

114. See *id.* at 353 n.83.

115. See also *supra* Part II.B discussing compelled speech in the warning label context.

116. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 733 (8th Cir. 2008) (holding compelled speech also must be narrowly tailored to further a “compelling” government interest); see also *supra* note 37.

117. See *supra* note 62; *supra* Part II.B.

118. This is because a ban on compelling ideological speech necessarily stops such speech from reaching the compelled perceiver.

speech.¹¹⁹

Even though the government must show that the compelled speech is narrowly tailored to further a compelling government interest, it will likely be able to pass a First Amendment challenge.¹²⁰ It is easy enough to demonstrate that the more information an abortion-seeker is given, the better her choice will be, so any informed consent provision could be narrowly tailored.¹²¹ Moreover, demonstrating a “compelling” interest in the life of the unborn has never proved challenging for state governments.¹²² Although many may disagree with these arguments,¹²³ courts have adopted them,¹²⁴ indicating that the right against compelled speech does not necessarily protect the compelled listener.

IV. RECOGNIZING A RIGHT AGAINST NON-RATIONAL GOVERNMENT-COMPELLED PERCEPTION

This Note has determined that the public lacks protection from compelled government perception. Either the current constitutional safeguards must be strengthened, or a right against government-compelled perception should be recognized within the First Amendment. This Note chooses the latter option,¹²⁵ and this Part will demonstrate that such a right is consonant with the First Amendment, and, indeed exists unrecognized in First Amendment doctrine. First, this Part defines the right and proposes a test to determine when the right is implicated. Second, it explains why the right against government-compelled

119. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577 n.4 (5th Cir. 2012).

120. *Rounds*, 530 F.3d at 733.

121. This argument succeeded in the Fifth Circuit, and there is no reason to believe that it could not succeed in any court. *Tex. Med. Providers*, 667 F.3d at 577 n.4.

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

123. *See Stuart v. Huff*, 834 F. Supp. 2d 424, 433 (M.D.N.C. 2011) (finding that the ends of a mandatory sonogram statute were not compelling since the presumed goal of the provision was to protect a woman’s psychological well-being; the effect of forcing a woman to see her sonogram would actually be quite counterproductive). Furthermore, even if the provision was in furtherance of a compelling state end, there were other means available, such as giving the information in writing, or offering the option to decline viewing. *Id.* *See also* Robertson, *supra* note 92, at 357 (predicting that the First Amendment argument would be better than the *Casey* undue burden standard, and that courts would find it difficult to uphold any mandatory sonogram provision); *supra* Part II.B (discussing compelled speech in the tobacco warning label context).

124. *E.g., Lakey*, 667 F.3d at 577 n.4.

125. One could argue to the contrary that all other First Amendment safeguards, along with the undue burden standard, should be strengthened to better protect the listener from government ideologies. But it seems easier and more logical to recognize this hidden doctrine for what it truly is: a right that protects the listener from unreasonable government-compelled perception.

perception is essential to protect the right to make free decisions, an essential purpose of the First Amendment. Third, this Part argues that any non-rational messages implicate the fundamental American right of belief, a key priority of the First Amendment. Then, this Part goes on to demonstrate how the right is evident in Supreme Court cases. Finally, it explains, from ethical and moral perspectives, that failing to recognize the right against government-compelled perception would espouse the profane by utilizing Forster's goblins—disavowing the sacred and harming both the individual and society in general.

A. *Defining the Right Against Compelled Perception*

Unconstitutional compelled perception is implicated when the government forces people to perceive non-rational messages.¹²⁶ Non-rational messages are those that convey an emotional burden that outweighs any logical benefit, where there are less emotionally burdensome ways to provide the factual decision-making benefit.¹²⁷ A plaintiff would need to demonstrate that the forced message is more emotionally burdensome than logically helpful in order to shift the burden to the government. The government would then need to demonstrate, using recent studies, that such measures are necessary to fully inform perceivers of the choice they are about to make. Deciding whether a message is more emotionally burdensome than logically beneficial would be no easy task, but the test mirrors the “reasonable observer” standard from *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, (FAIR).¹²⁸ Courts would ask whether a reasonable person, under the targeted person's circumstances, would find that the message is more emotional than logical.¹²⁹

126. See also *supra* note 1.

127. See Sarabyn, *supra* note 1, at 368-69 (defining “non-rational” information as generally playing to emotions rather than logic); see also MAX WEBER ON LAW IN ECONOMY AND SOCIETY 63 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954) (“Both lawmaking and lawfinding may be either rational or irrational.”).

128. 547 U.S. 47, 66 (2006). That test asks whether a reasonable observer would see an object or transaction as “expressive,” regardless of what the object actually expresses, in order to determine whether it merits First Amendment protection. See Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 210-11 (2012) (finding the FAIR test an “attractive” method for determining whether something merits First Amendment protection).

129. Concededly, reasonable courts could differ quite drastically on whether a message is emotional or logical. See *Texas Med. Providers Performing Abortion Servs. v. Lakey*, A-11-CA-486-SS, 2012 WL 373132, at *3 (W.D. Tex. Feb. 6, 2012), *vacated in part*, 667 F.3d 570 (5th Cir. 2012) (“As this Court reads the [Fifth Circuit] panel's opinion, an extended presentation, consisting of graphic images of aborted fetuses, and heartfelt testimonials about the horrors of abortion, would be truthful, nonmisleading, and relevant.”) (quotations omitted). Courts should thus consider factors such as: whether the message is, at first blush,

For example, a rational informed consent provision might require gun purchasers to sign a form acknowledging gun-related violence statistics. However, an unconstitutional provision would require gun purchasers to not only sign the form, but also to page through a dozen gruesome images of fatalities.¹³⁰ Such a provision would provide more of an emotional burden than a rational benefit, and would therefore be unconstitutional compelled perception.

Like unconstitutional compelled speech, unconstitutional compelled perception invokes the First Amendment in order to keep the marketplace of ideas free from undue government influence.¹³¹ But unlike unconstitutional compelled speech, unconstitutional compelled perception protects the viewer/listener in the transaction in addition to protecting society as a whole. Furthermore, a right against compelled perception provides a boundary line for informed-consent governmental strategies of persuasion.¹³² So long as the right against compelled listening is not implicated, the State may force citizens to perceive messages in order to make a well-informed, free decision.¹³³ But when the right is violated, the State must desist, since logically it cannot violate individual autonomy under the guise of anti-paternalism.¹³⁴ Finally, this right is not violated when either the information is rational *or* when the perceiver is able to opt out of the message.¹³⁵

more likely to provide useful information, or more likely to shock the senses; whether an otherwise well-informed reasonable person under the same circumstances would strongly prefer not to perceive the message in question; and whether perceiving the message would offend the sensibilities of the ordinary person under the circumstances.

130. Or perhaps pet-owners are forced to sign a consent form at the vet's office acknowledging the finality of the decision to put a sick, but curable, pet to sleep. While that would be constitutional, a similar provision in which pet-owners must acknowledge the decision's finality, but must do so while being forced to hear Sarah McLachlan's "Angel," would not pass the compelled perception test.

131. See *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.").

132. See *supra* Part I.B for a discussion of the lack of a clear boundary for informed consent provisions.

133. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) ("[P]eople will perceive their own best interests if only they are well enough informed . . .").

134. Carpenter, *supra* note 34, at 650.

135. Thus, if the mandatory sonogram provisions allowed the woman to opt out of viewing the sonogram, they would not implicate the right against compelled perception.

B. *On “Thought Control”: The Liberty Justification*

The right against compelled perception would protect the fundamental right to make a free choice.¹³⁶ Throughout history, scholars have recognized the necessity of active choice in the pursuit of personal satisfaction,¹³⁷ personal autonomy,¹³⁸ and societal gain.¹³⁹ The First Amendment implicitly affirms this important right.¹⁴⁰ The right to make a free choice, though often not strong enough to deny an adversary’s free speech right,¹⁴¹ is a powerful force against express governmental coercion.¹⁴² Moreover, courts have even struck down paternalistic

136. While some theorists argue that “free choice” is an illusion, this Note—although skeptical—refrains from addressing the issue, and instead adopts the position that even if free choice is an illusion, it is a societal illusion worthy of protection. See KENT GREENFIELD, *THE MYTH OF CHOICE: PERSONAL RESPONSIBILITY IN A WORLD OF LIMITS* 200 (Yale Univ. Press 2011) (“But when we protect this sphere of human choice, we should not delude ourselves that we are preserving a natural space where autonomous individuals revel in their cognitive freedom. We should protect a sphere of human choice *despite* the fact it is a constructed, contested space where choices are sometimes manipulated and manufactured.”).

Reduced to its essential elements, the modern state rests on the authority of law, and law rests on the authority of personal choice. There are two kinds of public norms in the modern state . . . such norms are said to reflect “the will of the people,” as expressed through their elected representatives or by officials appointed by them. In addition, there are certain specially sacred norms—fundamental rights, whether enshrined in a written Constitution, or treated as basic elements of a just social order. These rights are the building blocks of a system of personal freedom.

LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 39-40 (1990).

137. See WILLIAM BARRETT, *IRRATIONAL MAN: A STUDY IN EXISTENTIAL PHILOSOPHY* 162-63 (Anchor Books 1962) (1958); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (arguing that the sole purpose of the First Amendment is the goal of “self-realization,” a term that is inclusive of, yet distinct from, personal autonomy).

138. See IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 434-35 (Lewis W. Beck trans., MacMillan Publishing Co. 2d ed. 1990) (1785) (positing the supreme importance of human dignity); Emerson, *supra* note 37; FRIEDMAN, *supra* note 136, at 44 (quoting and discussing Joseph Raz).

139. See JOHN STUART MILL, *ON LIBERTY* 12-13 (Albury Castell, ed., Crofts Classics 1989) (1859). Cf. FRIEDMAN, *supra* note 136, at 44-45 (discussing Michel Foucault’s “nightmare vision of the ‘carceral society,’” wherein powerful judges of normalcy exercise “pitiless” control, and determining that society to be “a terrible perversion of the right sort of life”).

140. “The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech and religion.” *Thomas v. Collins*, 323 U.S. 516, 545 (Jackson, J. concurring).

141. See *supra* note 6.

142. See Sarabyn, *supra* note 1, at 400-02 (pointing out that private speech has been limited, so government speech too must be at least similarly limited in similar circumstances: “[T]he government has no First Amendment right to speak. When the government imposes its ideological speech on a captive audience, the scale quickly tips in favor of the captive audience’s right not to listen.”).

ensorship laws in favor of granting Americans true reign over their autonomous decisions.¹⁴³ In sum, a right against compelled perception, like other First Amendment rights, exists in order to protect the liberty of free decision-making.¹⁴⁴

Political theorists have exalted the concept of liberty, which is only possible when citizens have the right to a free decision.¹⁴⁵ John Stuart Mill's treatise, *On Liberty*, is the seminal work on the subject. His main thesis is that the only legitimate reason to deny personal liberty is to prevent harm to others.¹⁴⁶ He further points out that often, when freedom is limited ostensibly to prevent harm, such a deprivation of rights harms society more than the reason for the deprivation itself.¹⁴⁷ Thus, the line of limited liberty should be drawn not where a person causes harm to himself, but where he actually infringes on someone else's rights.¹⁴⁸ It is therefore axiomatic that in a society where citizens are truly free, there is no reason to limit freedom except where the freedom of others could potentially be adversely circumscribed.¹⁴⁹

Essential to this societal freedom is the liberty to make a free choice. Mill describes this as "the privilege and proper condition of a

143. See, e.g., *Linmark Assoc., Inc. v. Willingboro*, 431 U.S. 85, 97 (1977) (striking down an ordinance prohibiting certain information as paternalistic, and instead suggesting that the city campaign the information to paint an accurate picture for the discerning, autonomous citizen); see generally *supra* Part I.A-B.

144. *Thomas*, 323 U.S. at 545 (Jackson J., concurring).

This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society. As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy.

Id.

145. See MILL, *supra* note 139.

146. *Id.* at 9. Scholars have also focused on Kantian theory in this respect. See Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 169 (1997) (discussing how Kantian autonomy, in which the purpose of government is to protect individual autonomy, can be applied to American liberty, and noting that any speech that limits the thoughts of another person must be limited under such a system).

147. MILL, *supra* note 139.

148. *Id.*

149. See *id.* In fact, Mill goes further, noting that society should tolerate *de minimis* harm:

[W]ith regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom.

Id. at 82.

human being, arrived at [by] the maturity of his faculties, to use and interpret experience in his own way. It is for him to find out what part of recorded experience is properly applicable to his own circumstances and character.”¹⁵⁰ Moreover, John Locke, in his *Second Letter Concerning Toleration*, points out that, between individuals and their government, the individuals have a greater interest in the consequences of their actions, thus the best decision for society is one free from governmental interference.¹⁵¹ Mill underscores this point, recognizing that “[t]he human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice. He who does anything because it is the custom, makes no choice.”¹⁵² Likewise, the concept of liberty and the freedoms codified in the First Amendment are rooted in the soil of free choice.¹⁵³

A right against compelled perception must be recognized to protect free decision making. The government forcing a person to perceive a message categorically infringes upon that person’s freedom.¹⁵⁴ This is

150. *Id.* at 57.

151. 5 JOHN LOCKE, *A Second Letter Concerning Toleration*, in THE WORKS OF JOHN LOCKE IN NINE VOLUMES, (London: Rivington, 12th ed. 1824). *available at*: http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=764&chapter=80889&layout=html&Itemid=27.

Why should not the care of every man’s soul be left to himself, rather than the magistrate? Is the magistrate like to be more concerned for it? Is the magistrate like to take more care of it? Is the magistrate commonly more careful of his own, than other men are of theirs . . . ? And ‘why may not the care of every man’s soul be left to himself?’ . . . [The magistrate] never has the benefit of your sovereign remedy, punishment, to make him consider; which you think so necessary, that you look on it as a most dangerous state for men to be without it; and therefore tell us, ‘it is every man’s true interest not to be left wholly to himself’

Id.

152. MILL, *supra* note 139, at 58.

153. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (“First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom”); Wells, *supra* 146, at 69-70 (discussing how Kantian autonomy, in which the purpose of government is to protect individual autonomy, can be applied to American liberty, and noting that any speech that limits the thoughts of another person must be limited under such a system); *see also* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409 (1986) (noting that free speech is rooted in the protection of autonomy, which is essential for a free society). *See generally* EMERSON, *supra* note 25, at 711 (arguing that it is essential that the government withhold from forcing its views on a captive citizenry, and that such a “principal is central to any system of freedom of expression”).

154. *See Am. Commc’ns Ass’n, C.I.O., v. Douds*, 339 U.S. 382, 442 (1950) (Jackson, J., dissenting in part):

While the Governments, State and Federal, have expansive powers to curtail action, and some small powers to curtail speech or writing, I think neither has any power, on any pretext, directly or indirectly to attempt foreclosure of any line of thought.

because there is no such thing as an objective message, audio, visual, or otherwise.¹⁵⁵ A photograph, for example, unless it is accidental, is created with some objective in mind.¹⁵⁶ Susan Sontag wrote that “[p]hotographs cannot create a moral position, but they can reinforce one—and can help build a nascent one.”¹⁵⁷ The moral position is thus already inchoate in the mind, and the photograph is utilized to lure it out.

When the government compels perception in order to emotionally influence a personal decision,¹⁵⁸ personal autonomy is disenfranchised. John Locke wrote that it is imperative that people in a society have the right to choose.¹⁵⁹ John Stuart Mill expanded on that theory, writing that citizens must be able to say and do as they wish, so long as they do not infringe on the rights of another.¹⁶⁰ Therefore, government intrusion on personal decision making results in an illegitimate abridgement of Mill’s liberty.¹⁶¹

Our forefathers found the evils of free thinking more to be endured than the evils of inquest or suppression. They gave the status of almost absolute individual rights to the outward means of expressing belief. I cannot believe that they left open a way for legislation to embarrass or impede the mere intellectual processes by which those expressions of belief are examined and formulated. This is not only because individual thinking presents no danger to society, but because thoughtful, bold and independent minds are essential to wise and considered self-government.

Id.

155. “Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943). *See also* Journal of Henry David Thoreau, *Journal*, (6 May 1854), *available at* <http://www.walden.org/Library/Quotations/Observation> (“There is no such thing as pure objective observation. Your observation, to . . . be significant, must be subjective.”); *see also*, GOETHE INST., *Klaus Kinold—An Architect Photographs Architecture* GOETHE INST. (Translation: Ani Jinpa Lhamo trans.), <http://www.goethe.de/kue/arc/pan/en4961638.htm> (last visited May 13, 2013) (noting that “[t]here is no such thing as objective photography”).

156. *See* SUSAN SONTAG, *ON PHOTOGRAPHY* 192 (Anchor Books 1990) (“Photography is a system of visual editing. At bottom, it is a matter of surrounding with a frame a portion of one’s cone of vision, while standing in the right place at the right time. Like chess, or writing, it is a matter of choosing from among given possibilities, but in the case of photography the number of possibilities is not finite but infinite.”) (quoting John Szarkowski).

157. *Id.* at 17. Sontag further explains that “[i]t is not reality that photographs make immediately accessible, but images.” *Id.* at 165. The perception is not an experience of reality, but an experience of the image as a separate concept.

158. *E.g.* *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 845 F. Supp. 2d 266, 271 (D.D.C. 2012) (noting that the graphic cigarette warning labels include an image of “a bare-chested male cadaver lying on a table” and “a woman weeping uncontrollably”); Appendix.

159. LOCKE, *supra* note 151.

160. MILL, *supra* note 139.

161. Other government intrusion is acceptable according to Mill’s Harm Principle. *See* MILL, *supra* note 139.

C. “*With Increased Malignity*”: *The Belief-Based Justification*

Recognizing a right against non-rational government-compelled perception supports liberty and autonomy interests by protecting the ability to make a free decision, and, insodoing, defends the fundamental freedom of belief.¹⁶² Since the right to believe is protected (and perhaps even the goal of)¹⁶³ the First Amendment, and since any governmentally compelled non-rational messages adulterate the freedom of belief,¹⁶⁴ any such messages must be anathema to the Constitution.

The right to believe is as much central to the First Amendment as it is to being human.¹⁶⁵ Indeed, without belief, “[w]e might purchase quiescence by accepting a kind of creedal emptiness, thereby becoming ‘hollow men.’”¹⁶⁶ And, if believing is so important to personhood, then a proper “association of persons” must be one that “embraces ‘believing persons.’”¹⁶⁷ Given that proposition, one scholar ably quotes Madison, “‘far from suppressing [divergences of the ‘opinions and passions’ of persons] in the interest of civil peace we should recognize that ‘the protection of these faculties is the first object of government.’”¹⁶⁸

Additionally, the protected status of art and music demonstrates the high value society places on belief-altering media, even when such media contains no rational message.¹⁶⁹ “Through the imagination, art

162. *Bowen v. Roy*, 476 U.S. 693, 699 (1986) (“Our cases have long recognized a distinction between the freedom of individual belief, which is absolute . . .”).

163. See generally Steven D. Smith, *Believing Persons, Personal Believings: The Neglected Center of the First Amendment*, 2002 U. ILL. L. REV. 1233 (2002) (proposing that First Amendment jurisprudence shift its focus to the ability to believe, a uniquely human trait).

164. See, e.g., Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 118 (1996).

A wide berth for both religion and art are essential to a free society. Governmental funding of either, however, threatens the private sphere of freedom safeguarded by the First Amendment. In a diverse society, the establishment of an official art is an evil that should be avoided as assiduously as the establishment of an official religion. Such establishment directly threatens the scope of power individuals can exercise over their respective private spheres and therefore against the public sphere.

Id.

165. Smith, *supra* note 163, at 1271-72 (“To some extent, who I am is determined by what I believe.”); *id.* at 1278 (“Finally, and most crucially, it is in having and struggling to live in accordance with beliefs about ultimate meaning or purpose . . . that persons achieve their highest, most morally attractive stature.”).

166. *Id.* at 1281. See also *supra* note 5, and accompanying text.

167. Smith, *supra* note 163, at 1283.

168. *Id.* at 1285-86 (quoting *The Federalist* No. 10, at 78 (James Madison) (Clinton Rossiter ed. 1961)).

169. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (indicating that art by Jackson Pollock, music by Arnold Schönberg, or poetry by

evinces what purely didactic speech cannot—the ‘sensation’ of an experience never had, a world never seen.”¹⁷⁰ And “[m]usic can at once foster a sense of community and maintain inner emotional privacy. Indeed, it is precisely this dual characteristic that underpinned the strict control of music in totalitarian states and must underpin music’s protection under the First Amendment.”¹⁷¹ Art is “unquestionably”¹⁷² protected by the Constitution not because it engenders logical reasoning and democratic debate, but because it offers an avenue to evolve and understand personal and societal beliefs.¹⁷³

When the government compels perception of a non-rational message, it forces the private person to engage in a battle of beliefs: a private ideology must be assessed as against a public ideology. Since the government should be in the business of protecting private beliefs, rather than manipulating them, any forced perception of these messages *per se* violates the First Amendment. Thus, any informed consent message that attempts to change a belief in a non-factual manner must be unconstitutional. Indeed, if an informed-consent message conveys solely emotion, the result is not informed, but rather the increased malignity of manipulated consent.

D. “*Freedom for the Thought We Hate*”: *The Jurisprudential Justification*¹⁷⁴

Moreover, the Supreme Court has implicated a right against compelled perception in its modern First Amendment jurisprudence. In *Barnette*, the Court held that the government cannot compel ideological speech, indicating that there is some personal right to be free from such

Lewis Carroll are “unquestionably” protected by the Constitution).

170. Hamilton, *supra* note 164, at 87.

171. David Munkittrick, Note, *Music as Speech: A First Amendment Category unto Itself*, 62 FED. COMM. L.J. 665, 679 (2010).

172. *Hurley*, 515 U.S. at 569.

173. See Hamilton, *supra* note 164, at 87-88 (“Two phenomena occur simultaneously within the participant’s experience of art: (1) the recognition of preexisting world views, and (2) the act of . . . distancing of oneself from one’s assumptive world view. . . [together they] create a reorientation experiment, the commitment-free experiencing of a perspective different from one’s own.”).

174. Scholars have also argued that the right against compelled perception is a converse corollary to the recognized right to listen within the First Amendment. See Corbin, *supra* note 1, at 940. Since the First Amendment creates a right to speak and a right not to be forced to speak, it follows that a right to listen would be paired with a right not to listen. *Id.* Such an analysis is beyond the scope of this Note, which argues that the right should exist solely against the government because current safeguards are lacking and because the right would serve liberty interests of the individual and society.

intrusions.¹⁷⁵ Some scholars have suggested that *Barnette* stands for more than just a right not to be forced to *speak* ideologically.¹⁷⁶ Justice Jackson, who authored the *Barnette* majority opinion, has opined voluminously on so-called ‘negative’ First Amendment rights.¹⁷⁷ In fact, in *Barnette* itself, Jackson even refers to the “individual freedom of mind,” favorably contrasting it with restrictions within the totalitarian regimes of the time.¹⁷⁸ This sentiment, as supported by previous Supreme Court justices,¹⁷⁹ indicates that *Barnette* and cases like it¹⁸⁰ protect more than just the right not to speak—they protect the right to make a free decision.

A half-century after *Barnette*, in *Hill v. Colorado*, the Court held that “no one has a right to press even ‘good’ ideas on an unwilling recipient.”¹⁸¹ Scholars have reasoned that since *Hill* permits states to abridge private speech when the unwilling recipient’s interests are violated, *Hill* must *prohibit* equally insidious governmental speech, which does not share the same constitutional standing as private speech.¹⁸² *Barnette* presents this idea from the speaker’s perspective,

175. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). *See also* *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (“[W]here the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.”).

176. *See supra* note 37 and accompanying text.

177. GLENDON SCHUBERT, *DISPASSIONATE JUSTICE: A SYNTHESIS OF THE JUDICIAL OPINIONS OF ROBERT H. JACKSON* 29 (1969).

178. *Barnette*, 319 U.S. at 637.

179. *See, e.g.*, *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) *overruled in part* by *Girouard v. United States*, 328 U.S. 61, 61 (1946) (Holmes, J., dissenting) (“[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of *free thought*—not free thought for those who agree with us but freedom for the thought we hate.”) (emphasis added). *Girouard* specifically adopted Holmes’s dissent, noting that “[f]reedom of thought, which includes freedom of religious belief, is basic in a society of free men.” 328 U.S. at 69.

180. *See, e.g.*, *Wooley*, 430 U.S. at 717.

181. *Hill v. Colorado*, 530 U.S. 703, 718 (2000). But the *Hill* court was wary of embracing a right not to be spoken to, explaining that the right is “more accurately characterized as an ‘interest’ that States can choose to protect in certain situations.” *Id.* at 717 n.24. This has led other courts to hold that a person’s right to avoid a message may only serve as a justification for states to abridge that message, and not as a right in and of itself. *See, e.g.*, *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 806 F. Supp. 2d 942, 954 (W.D. Tex. 2011) *vacated in part*, 667 F.3d 570 (5th Cir. 2012).

182. *See supra* note 142. It is important to note that the government is empowered to say whatever it wishes. *See* Carl G. DeNigris, *When Leviathan Speaks: Reining in the Government-Speech Doctrine Through a New and Restrictive Approach*, 60 AM. U. L. REV. 133, 134 (2010). But the government speech doctrine, while characterized by scholars as “unprincipled,” “nefarious,” and the “ugly stepchild” of First Amendment jurisprudence,” is not directly implicated in this discussion. *See* David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government*

but the two cases, from a listener's perspective, approach the same idea: the government cannot compel a private person to perceive ideological, or non-rational, messages.¹⁸³ Informed consent, or information-sharing regulations as promoted in *Linmark*,¹⁸⁴ is permissible so long as it does not infringe on this implied First Amendment right.

The government might argue that since it has the ability to ban certain activities, it should have the ability to influence certain decisions that could cause that activity.¹⁸⁵ Moreover, courts have long held that where a government has a legitimate interest, it cannot paternalistically limit certain speech,¹⁸⁶ but it *may* (paternalistically) promote certain information.¹⁸⁷ The government should indeed have some power to promote its interests. If most people in a state do not want people to smoke, those people may certainly vote for their tax money to pay for anti-smoking campaigns.¹⁸⁸ The line, however, must be drawn where the government attempts to influence the specific “free” decision to smoke by controlling the mind by way of the emotions.

In order to understand the reasonable limits of influence, it is enlightening to imagine the extremes. One scholar has written an interesting thought experiment regarding mind control:

Even if the government can forbid people from acting in certain ways, it does not follow that it may try to prevent them from believing that such actions are proper, or from wanting to engage in those actions.

Suppose that the government could manipulate people's minds directly, by irradiating them in a way that changed their desires. No one would say that the power to ban an activity automatically included the “lesser” power to irradiate people so that they no longer

Websites, 2010 B.Y.U. L. REV. 1981, 1984 (2010) (citations omitted). Still in the early stages of its development, the government speech doctrine is more concerned with political accountability than with the permissible scope of government speech. *Id.* at 1985. There is no question of political accountability in government-compelled emotional perception, so further discussion on the government speech doctrine would be inapposite.

183. See also ROBERT C. POST, *DEMOCRACY, EXPERTISE, & ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* xi (2012) (“The First Amendment stands for the proposition that we are not the students of the state. We are adults who are constitutionally empowered to speak for ourselves.”).

184. *Linmark Assoc's., Inc. v. Willingboro*, 431 U.S. 85, 88 (1977).

185. See *Posadas de P.R. Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328, 331 (1986); *supra* Part I.C.

186. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

187. See *Linmark*, 431 U.S. at 88; *supra* Part I.C.

188. See *supra* note 182 (discussing the government speech doctrine and political accountability).

had the desire to engage in that activity.¹⁸⁹

Clearly “irradiating” people to have certain beliefs is taking government authority too far.¹⁹⁰

The Supreme Court encountered an analogous situation during the Cold War when union employees sued over being required to swear that they were not communists and did not “believe,” *inter alia*, in political strikes.¹⁹¹ While the majority upheld the law in question, Justice Jackson voiced reservations in his partial dissent, reasoning that since Congress had not prohibited political strikes, “the Court must be holding that Congress may root out mere ideas which, even if acted upon, would not result in crime. It is a strange paradox if one may be forbidden to have an idea in mind that he is free to put into execution.”¹⁹²

Scholars, too, have worried that failing to recognize a right against compelled perception is inconsistent with both American principles and general logic:

I tremble for the sanity of a society that talks, on the level of abstract principle, of the precious integrity of the individual mind, and all the while, on the level of concrete fact, forces the individual mind to spend a good part of every day under bombardment with whatever some crowd of promoters want to throw at it.¹⁹³

Indeed, recognizing this right would be not only sensible, but also timely. Scholars have supported recognizing some kind of right against

189. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 360 (1991).

190. See also Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1320 (1998). Heyman discusses Kant’s formulation of human dignity, which would find such mind control morally reprehensible.

As an autonomous being, on the other hand, man ‘is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a *dignity* (an absolute inner worth).’ This dignity not only forms the basis of his own sense of self-esteem or self-respect, but also allows him to ‘exact[] *respect* for himself from all other rational beings in the world.’

Id. (quoting IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 434-35 (Lewis W. Beck trans., MacMillan Publishing Co. 2d ed. 1990). (1785)). See also Corbin, *supra* note 1, at 972 (noting that scholars have recognized that “the freedom of thought is really the only area where the individual is truly autonomous, and that this autonomy requires that the state not invade the private domain of the mind.”).

191. *Am. Commc’ns Ass’n, C.I.O., v. Douds*, 339 U.S. 382, 385-86 (1950).

192. *Id.* at 438 (Jackson, J., dissenting in part).

193. Black *supra* note 16, at 962 (speaking in terms of advertisements and radio programs on public buses, but voicing a more general complaint about the liberty at stake in these transactions).

compelled perception,¹⁹⁴ usually within the First Amendment,¹⁹⁵ but until the mandatory sonogram and warning label regulations,¹⁹⁶ such a right was not entirely necessary.¹⁹⁷ Although a cause of action for violating a right against government-compelled perception has generally not been feasible,¹⁹⁸ the new regulations have ushered in creative new complaints.¹⁹⁹ In sum, the Supreme Court has implicitly supported the right against government-compelled perception, and may soon have occasion to comment more directly on the nature of that right.

E. “Unwelcome Words”: The Ethical Justification

Not only is non-rational government-compelled perception offensive to societal liberty, it also offends societal ethics. Informed consent measures are unethical when they provide immaterial or irrelevant information, when they force information that people do not wish to perceive, and when they manipulate the decision with an emotional message.²⁰⁰

Providing immaterial information in the guise of informed consent is unethical:

No law requires that heart surgery patients be told what will happen to their bodies in graphic detail. The fact that the average person would be disgusted and disturbed by a detailed description of heart surgery does not warrant requiring such a description as a condition of effective consent. On the contrary, most patients would likely rather not hear the description because it would only increase their anxiety about a procedure they know they must undergo.²⁰¹

194. See, e.g., Corbin, *supra* note 1.

195. But sometimes as a more general privacy right. See *supra* notes 16 and 18; see also *Roe v. Wade* discussed *supra* note 85 and accompanying text.

196. Discussed *supra* Parts II and III.

197. EMERSON, *supra* note 25, at 711 (“It has fortunately not been necessary to define the exact contours of the principle that the government may not engage in expression directed at a captive audience, or otherwise force its citizens to listen.”).

198. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 806 F. Supp. 2d 942, 954 (W.D. Tex. 2011) *vacated in part*, 667 F.3d 570 (5th Cir. 2012) (explaining that although the abortion-seeker’s right not to see her sonogram was perhaps implicated by the mandatory provision, the dearth of case law precluded further analysis).

199. See, e.g., Brief for Plaintiffs, *Nova Health Sys. v. Pruitt*, No. 2:12-CV-00395, 2012 WL 1034022 (Okla. Cnty. Dist. Ct. Mar. 28, 2012) (“[I]t is a logical corollary of the captive audience doctrine that individuals have a right to be free from unwanted government speech in private settings.”).

200. See generally Ian Vanderwalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, at 2 (2012).

201. *Id.* at 20.

This analogy demonstrates how immaterial information can do little to effect a rational decision—and can do much to cause an irrational one. It would be absurd to force people who are going to need surgery anyway to hear the gruesome details of the upcoming procedure, just as it would be absurd to force people who attempt eating challenges to hear the gruesome details about morbid obesity. These conversations add nothing of substance to the decision, and only serve to scare the decision-maker.²⁰² But these conversations will occur between the government and the decision-maker if the government is left unchecked.

Forcing people to see that which they do not wish to perceive is also unethical. If the “primary objective” is informed consent, then, quite simply, “patients should not be compelled to receive information they do not want or to make decisions they do not wish to make.”²⁰³ Without opt-out provisions in the abortion and tobacco legislations, they, strictly speaking, force people to perceive things that they do not wish to perceive. This is akin to forcing a voter to watch a propaganda film in order to “inform” him of which way to vote. Surely the film provides information, but it also surely removes the possibility of a truly independent decision. The recent plight of a Texas abortion-seeker is striking:

‘I’m so sorry that I have to do this,’ the doctor told us, ‘but if I don’t, I can lose my license.’ Before he could even start to describe our baby, I began to sob until I could barely breathe. Somewhere, a nurse cranked up the volume on a radio, allowing the inane pronouncements of a DJ to dull the doctor’s voice. Still, despite the noise I heard him. His unwelcome words echoed off sterile walls while I, trapped on a bed, my feet in stirrups, twisted away from his voice.

‘Here I see a well-developed diaphragm and here I see four healthy chambers of the heart . . .’

I closed my eyes and waited for it to end, as one waits for the car to stop rolling at the end of a terrible accident.²⁰⁴

202. See, e.g., John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327, 351-52 (2011).

In the six days the Oklahoma law was in effect, all the patients at a Tulsa clinic averted their eyes. The director of the clinic, which does 3000 abortions a year, reported that ‘Not one patient would look at the screen and they all closed their eyes or turned their heads But it’s hard to turn your ears off Several of the patients were in tears afterwards. No one changed their mind.’

Id.

203. Vanderwalker, *supra* note 200, at 51.

204. Carolyn Jones, ‘We Have no Choice’: *One Woman’s Ordeal with Texas’ New Sonogram Law* TEXAS OBSERVER, March 15, 2012, available at

Finally, the very idea of manipulating people with emotional messages in order to influence their decision making is unethical.

If [a strong emotional reaction is irresistible], it would cause [the decision-maker] to fail the condition of noncontrol²⁰⁵ necessary for autonomous action. This is because an individual who acts in accord with an emotion that is irresistible does not make a choice at all. Unlike being rationally persuaded of prudential or moral considerations, an irresistible emotion unavoidably compels an action and prevents the exercise of autonomy.²⁰⁶

Utilizing emotional imagery in order to manipulate a particular reaction, as the FDA did in creating its warning labels, cannot result in a better-informed decision. Since this kind of manipulation will not make for a more rational decision, it is an unethical practice.

F. “*A Country I Do Not Recognize*”: *The Moral Justification*

Government-compelled perception strikes at the identity of the individual it seeks to protect. The dissonance occurs in the following manner: (1) when an individual is forced to adopt or adapt to offensive messages; and (2) when the individual reflects upon the effect of his or her identity’s unpopular re-categorization. Each event can be further broken down into two offensive events: the moral clash with the messages themselves, and the identity clash with the government’s normative efforts. In practice, compelling citizens to perceive non-rational messages will result in social disharmony and a net moral devaluation.

Opponents of the recognition of this right against compelled perception (a limitation on the power of state and federal governments) might suggest that the personal harm suffered is *de minimis*, thus the societal harm is nonexistent.²⁰⁷ However, the effects of vivid media on

<http://www.texasobserver.org/we-have-no-choice-one-womans-ordeal-with-texas-new-sonogram-law/> (last visited May 13, 2013).

205. “[N]oncontrol means that actions are less than fully autonomous to the extent that they are controlled by external factors, especially other people.” Vanderwalker, *supra* note 200, at 36.

206. *Id.* at 44.

207. They might also argue that *Cohen v. California* would dictate that women seeking abortions can simply shield their eyes from the sonogram, as she must pay the price of stepping out into society. See *Cohen v. California*, 403 U.S. 15, 21 (1971). That is, no images are *forced*, they are merely the result of making the decision to leave the private home and get an abortion in the public sphere. There are two problems with this argument. First, *Cohen* dealt with private speech, which is constitutionally protected. See *supra* Part I.B. This Note deals with governmental speech, which is not expressly protected. Thus, *Cohen* may not have a direct application to this analysis.

the human mind are hardly undeserving of legal attention.²⁰⁸ Henry David Thoreau noted “the question is not what you look at, but what you see.”²⁰⁹ The problem is not, for example, the image—it is the moral position evoked by that image, resulting in the manipulation of a citizen’s mind via emotion.²¹⁰

1. Private morality clashes with government morality

When the government forces a non-rational message, the individual must adopt or adapt to the offensive messages.²¹¹ The first event is the moral clash with the messages themselves. Some scholars believe that the right to self-government should trump personal decisions, that is, that society should dictate what is morally correct, and ‘autonomy’ should defer to that judgment.²¹² However, those same scholars gripe about the loss of “sacred” values when liberty is chosen over moral judgments.²¹³ This author agrees that “sacred” values are important,

Second, regardless, *Cohen* would support recognizing this right since it protects the unpopular minority. *Cohen* attacked the problem from the other end of the spectrum, and in fact was maligned by scholars who argue that it lowers the level of discourse. See, e.g., ROBERT H. BORK, *Introduction*, A COUNTRY I DO NOT RECOGNIZE: THE LEGAL ASSAULT ON AMERICAN VALUES i, xxviii-xxix (Robert H. Bork, ed., 2005). Yet, *Cohen* stands for the very essence of liberty—private expression in the public sphere. The regulations here would curb that expression. *Cohen*, in fact, supported the expression because to hold otherwise would “effectively empower a majority to silence dissidents simply as a matter of personal predilections.” *Id.* at 15. Thus, the purpose of *Cohen* was to protect the marketplace of ideas, not to *force* ideas upon the unwilling.

208. See generally Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 683-710 (2012) (describing the current legal tools at hand for interpreting images).

209. Henry David Thoreau, *Journal*, 5 August 1851, available at <http://www.walden.org/Library/Quotations/Observation>.

210. See Tushnet, *supra* note 208, at 694 (“Images seem especially dangerous because their power is irrational. [B]y bypassing reason and appealing directly to the senses, images fail to participate in the marketplace of ideas.”) (quotations and citations omitted).

211. Rebelling probably would not be a successful option since the offended party is likely in the extreme minority. Otherwise the political process would not have created the offending regulation.

212. See GARY L. MCDOWELL, *The Perverse Paradox of Privacy*, A COUNTRY I DO NOT RECOGNIZE: THE LEGAL ASSAULT ON AMERICAN VALUES 57, 80 (Robert H. Bork, ed., 2005) (“Constitutional self-government is not possible if the Supreme Court . . . assumes . . . the power to declare invalid, based on the right to privacy, the state laws that seek to express moral choices.”). That author would have held differently in Supreme Court cases that held certain state bans on “immoral” acts unconstitutional, specifically *Griswold*, *Roe*, and *Lawrence v. Bowers*. *Id.* at 74-76. But see Emerson, *supra* note 37, at 929 (“And it must be remembered that the expression which needs protection is normally that which is the unorthodox, the hated and the feared.”).

213. See ROBERT H. BORK, *Introduction* to A COUNTRY I DO NOT RECOGNIZE: THE LEGAL ASSAULT ON AMERICAN VALUES i, xxviii-xxix (Robert H. Bork, ed. 2005) (noting

and, furthermore, that forcing people to view graphic images results in a loss of sacred values and a decrease of morality.

Certain graphic images or music, or even the sound of nails on a chalkboard, may be accessed at one's liberty, but should never be forced upon a person by the government, especially in order to influence a particular decision. Utilizing this method to coerce a moral judgment may inevitably cause the "goblins" to go unnoticed over time.²¹⁴ Abortion-seekers could, in the aggregate, grow numb to the sight of a sonogram,²¹⁵ smokers could stop caring about images of cadavers. The ante will need to be increased every few years, and the United States will soon become the country that subjects its populace to the most amoral "brutalization"²¹⁶ in order to further its value judgments. Thus, the effect of this conflict between private and governmental morality will be an overall decline in net morality.²¹⁷

2. Private identity clashes with government authority

The second immediate moral problem caused by non-rational government-compelled perception arises from the targeted individual's resulting personal identity reclassification. The unpopular individual is being told by the government 'you're not paying attention, so I am going to force you to listen.'²¹⁸ This paternalism causes the individual to self-define as a bad person. Again, problems arise here both from the message and the means of transmission.

One scholar explained the harm of the bad person message caused

that permitting freedom of expression often results in "the brutalization of the culture," where "words and images reduce everything to the same level").

214. See *supra* notes 64, 65 (explaining that, over time, warning labels lose their shock value).

215. That is to say, the ubiquity of ultrasound provisions could undermine their personal shock value.

216. BORK, *supra* note 213.

217. The means of implanting this moral message also raise a conflict between the private citizen and the government. The idea of having no choice but to be forced to see offensive images will elicit resentment against the majority forcing its views. The result is a step away from harmony, and a step toward acrimony. While the unpopular individual feels on the same footing with the majority in the marketplace of ideas, this private dictation will cause the individual to feel disenfranchised—and rightly so, for that is the net effect.

218. This message would not offend the right against compelled perception if it were not forced. Thus the State's interests in general welfare may still be satisfied so long as the State does not actually force its very opinion upon the listener. Of course, in extreme circumstances, the State is very much empowered to dictate to the individual, such as when the private person is causing harm to other people. See MILL, *supra* note 139, (discussing Mill's Harm Principle, which dictates that a person's liberty should not be violated unless it would harm others).

by sonogram images in her aptly titled article, *Seeing is Believing*.²¹⁹ She cited a 1983 study on sonograms in which women were asked about their feelings after seeing the images.²²⁰ One woman commented “I feel that it is human. It belongs to me. I couldn’t have an abortion now.”²²¹ Other factors indirectly influence the transaction.²²² Sonographers or obstetricians interpret the images with loving coos, “showing the baby” with at best unintentional mannerisms.²²³ Perhaps posters of babies line the walls, perhaps parenting books fill the shelves. These means of transmission cause an identity shift from “righteous decision-maker” to “bad person.” A woman must be struck by the clinical environment she finds herself in—she must realize that the very fact that she is being forced to view the image is telling her that she is making a bad choice and may even be a bad person. One scholar refers to these feelings of re-categorization as a “phenomenological wallop,” one capable of powerful persuasion.²²⁴

The same feelings pervade any individual decision when it is tainted by the influence of the State. A cigarette smoker who must view a graphic image is now no longer a smoker, but also re-classified as a potential cancer patient, heart attack victim, or cadaver.²²⁵ These new beliefs are not necessarily untrue, and perhaps the smoker is more informed, but, again, indirect forces are influencing the transaction. The nature of the imagery, how bad it is made to look, its overall ubiquity, the grave vocals in the public service announcement voiceover, and the grave look on the convenience store clerk’s face all factor into what was once a free decision.²²⁶ The cigarette smoker is no longer just a cigarette smoker, or even a potential sick person. The cigarette smoker, like the abortion seeker, has been transformed into a miscreant, someone who is on the wrong side of society. The personal choice is no longer personal,

219. Sanger, *supra* note 84, at 351.

220. *Id.* at 365 n.59 (citing John C. Fletcher and March I. Evans, *Maternal Bonding in Early Fetal Ultrasound Examinations*, 308 NEW ENG. J. MED. 391 (1983)).

221. *Id.*

222. *Id.* at 372.

223. *Id.*

224. *Id.* at 382.

225. *See* R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin., 823 F. Supp. 2d 36 (D.D.C. 2011).

226. The FDA has been kind enough to permit any Internet user to view this transformation. Navigate to “Interactive Store Counter Photo” on FDA.gov and use the left and right arrows to watch a non-confrontational store counter transform into a counter beset with personal goblins. *Cigarette Health Warnings*, U.S. FOOD AND DRUG ADMINISTRATION, <http://www.fda.gov/TobaccoProducts/Labeling/Labeling/CigaretteWarningLabels/ucm259862.htm> (last visited May 13, 2013).

nor is it a choice at all.

Compelled perception places the unwilling listener squarely in the wrong. The abortion-seeker is categorized as psychologically unable to make a sound decision.²²⁷ Or she is a deviant. The smoker chooses to smoke, and is no longer a free decision-maker, but a miscreant. These private citizens' identities are re-classified as "bad," "dumb," or even "evil." Consequently, they are maddeningly aware of their political disenfranchisement, and might be quite happy to decrease the level of discourse. Worst of all, as discussed *supra*, the net result of this whole exercise is a decrease in societal morality. Therefore, the pragmatic social and psychological effects of these forced messages demand a right against non-rational government-compelled perception.²²⁸

Naturally, or rather, unnaturally, the law seeks to approach these problems rationally,²²⁹ but now that emotional means have been successfully employed by the government under the guise of rationality,²³⁰ courts must recognize the sanctity of the individual against such measures by recognizing the right against non-rational government-compelled perception.

CONCLUSION

Recognizing a right against non-rational government-compelled perception would call the constitutionality of the warning label and mandatory sonogram regulations into question. It would ensure that the government cannot employ Forster's goblins to manipulate the individual. Compelling this kind of perception is bad for society—it decreases morality and disenfranchises minority groups. Indeed, as

227. See Evelyn Atkinson, *Abnormal Persons or Embedded Individuals?: Tracing the Development of Informed Consent Regulations for Abortion*, 34 HARV. J. L. & GENDER 617, 664 (2011) ("Building off a tradition that saw mental health as commensurate with ability to mother, [*Planned Parenthood v. Casey*] meant that the state's interest in women's health aligned with its interest in the fetus, disrupting *Roe's* purported equipoise between liberty and fetal life.").

228. See also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272 (1977) ("Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived.").

229. See Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2004 (2010) ("Emotion floods careful, stagewise reasoning in a tidal wave of affect; its association with particulars sweeps decisionmakers from their impersonal, Archimedean pedestal."). See generally R. George Wright, *An Emotion-Based Approach to Freedom of Speech*, 34 LOY. U. CHI. L.J. 429, 430 (2003) (explaining that the law generally prefers to avoid questions of emotion).

230. See, e.g., *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012).

Justice Jackson opined, limiting freedom of thought in this manner “achieves only the unanimity of the graveyard.”²³¹ The right against non-rational government-compelled perception should, therefore, be recognized as an essential corollary to the First Amendment, protecting the freedoms of thought, belief, and decision-making—the foundational freedoms of American life.

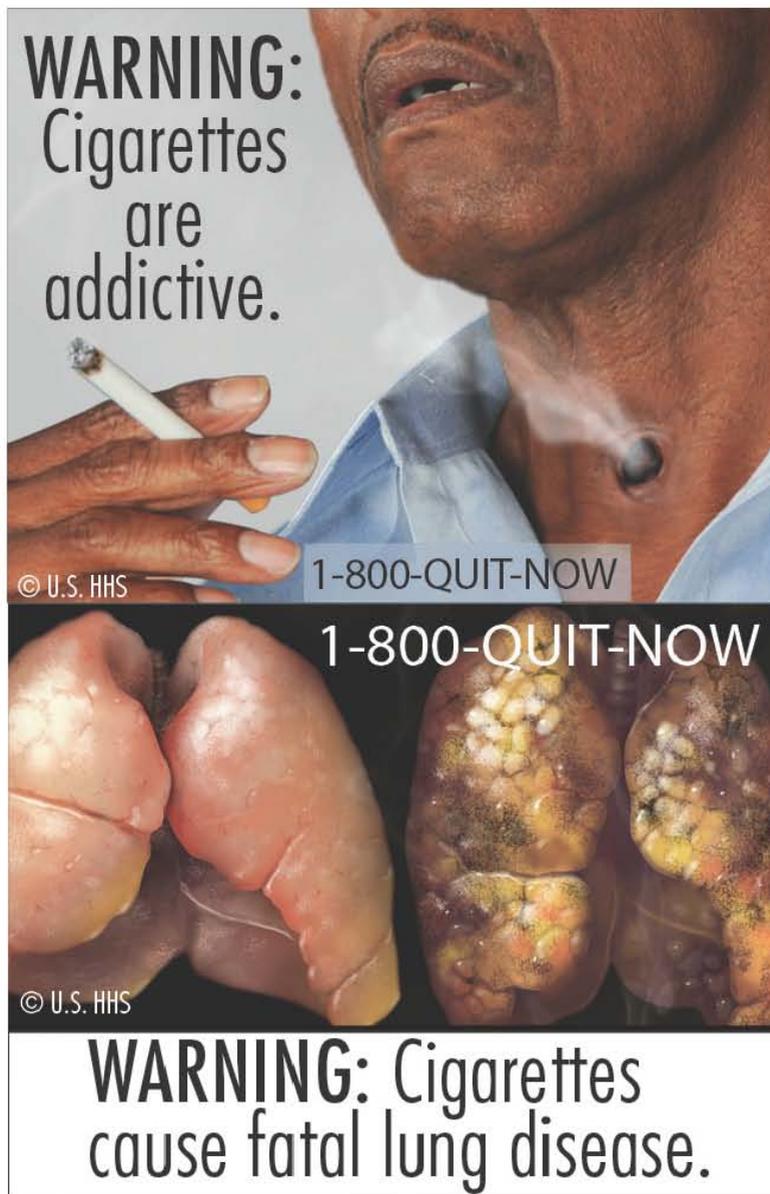
The goblins are there; they may return. But Americans must be left to perceive them on their own terms.

**Peter Ferony*

231. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

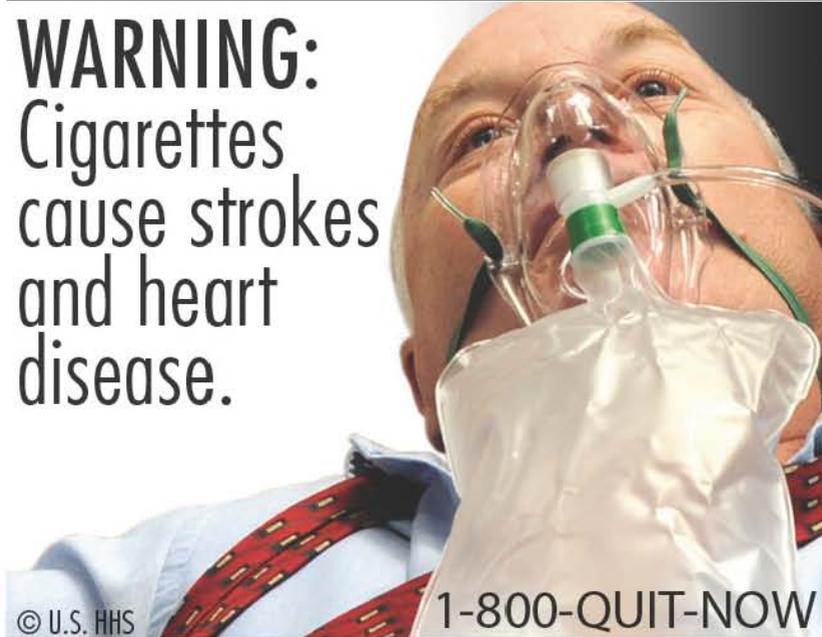
* J.D., Western New England University, 2013. This Note is dedicated to my father, Thomas Ferony.

APPENDIX: TOBACCO WARNING LABELS





WARNING:
Cigarettes cause cancer.



WARNING: SMOKING DURING PREGNANCY CAN HARM YOUR BABY.



1-800-QUIT-NOW

© U.S. HHS



© U.S. HHS

1-800-QUIT-NOW

WARNING:
Smoking can kill you.

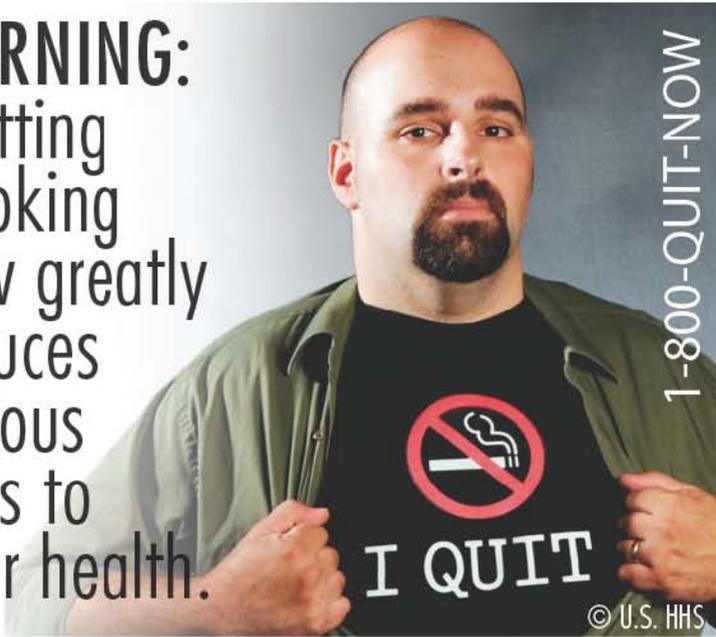
**WARNING:
Tobacco smoke
causes fatal
lung disease
in nonsmokers.**



1-800-QUIT-NOW

© U.S. HHS

**WARNING:
Quitting
smoking
now greatly
reduces
serious
risks to
your health.**



1-800-QUIT-NOW

I QUIT

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