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# Making Fetal Persons

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## Fetal Homicide, Ultrasound, and the Normative Significance of Birth

CATHERINE MILLS

IN EARLY 2012, the then attorney general of Western Australia, Christian Porter, announced plans to introduce fetal homicide laws that would “create a new offence of causing death or grievous bodily harm to an unborn child through an unlawful assault on its mother” (Porter 2012). While well established in the United States, fetal homicide laws are only beginning to take shape in Australia.<sup>1</sup> The proposed law would mean that if an offender assaulted a woman and thereby caused the death of the fetus she was gestating, the courts would be required to impose a sentence of life imprisonment in all but exceptional circumstances—equivalent to the penalty for murder. While the proposed fetal homicide law is said to give appropriate recognition to the grief and suffering of the woman involved—and while it may help to do that—this is certainly not all it would do.<sup>2</sup> For it would also give existence to a new legal subject in Western Australia, that is, the “unborn child”: currently, under Western Australian law a child is only legally capable of being murdered when already external to the mother’s body. Thus, the woman’s body constitutes a kind of “natural” basis for a legal boundary—one that the proposed law transgresses and perhaps obliterates, at the same time as it purports to recognize the trauma associated with the transgression and obliteration of that boundary by another.

Fetal homicide laws thus traverse difficult territory in the maternal-fetal relationship, in which actions against one person come to constitute a crime against another. Significantly, these laws are typically formulated to provide legal protection for pregnant women against the intrusions of a third party against

their person. However, it may be that they can also be interpreted more generally to provide legal protection for the fetus against others. So construed, such laws open up a danger for pregnant women themselves, insofar as their actions threaten the life and well-being of the fetus they carry. One recent example of the exploitation of this ambiguity in fetal homicide laws is the case of Bei Bei Shuai, a young woman of Chinese descent who faced felony charges of murder in Indiana after a failed suicide attempt resulted in the death of the thirty three week old fetus she was gestating (Pilkington 2011, 2012). If a woman's actions against herself, leading to the death of her fetus, can be legally construed as murder, where does this leave the law on abortion? The Western Australian attorney general insisted that the proposed law would not affect laws on abortion in any way, since it would not encroach on a woman's right to make decisions about her pregnancy (Porter 2012). But a woman's decisional rights in regards to her pregnancy are at best an unstable dividing line; at worst, it is precisely her decision to terminate a pregnancy—that is, to intentionally bring about the death of the fetus—that substantiates a murder charge. Indeed, at the crux of the Shuai case was her suicide note, in which she apparently stated her intent to kill her fetus.

This ambiguity between abortion and fetal homicide has been the topic of much discussion in legal literature, and it raises significant questions that bear further investigation. For one, it raises in a particularly pointed way questions about the moral and legal significance of birth, and the bearing it has on the status of the fetus. Birth has historically been significant in establishing personhood, but this reliance on birth is challenged by the shift to treating the fetus as a person for the purposes of some areas of the law. The further question then arises of whether that status must remain consistent across domains of the law, such as those addressed to the death of a fetus at the hands of a third party, and those on abortion. While these questions have been well canvassed in legal discussions, we might also consider the impact that technologies such as obstetric ultrasound have on notions of fetal life and personhood. Advances in medical technologies appear to render birth irrelevant, or at least considerably less significant, to the determination of fetal life. Consequently, it may be argued, the frontiers of fetal personhood should be made congruent with the current state of knowledge made possible by technology. Interestingly, obstetric ultrasound appears more and more to have a particular influence within the formulation of laws relating to the fetus, and there appears to be a broad consensus that it contributes to the construal of the fetus as a person. The task of this paper is to examine this influence, particularly through the rubric of the constitution of fetal personhood. Throughout, I will argue that obstetric ultrasound increasingly operates as a technological mechanism through which fetal life and personhood can be separated or made to coincide. Moreover, this separation and coincidence has less to do with

the characteristics of the fetus per se, than with the social mobilization and distribution of emotion.

Given this task, two points should be noted about this paper. First, there is already a significant literature on fetal rights and maternal-fetal conflict, as well as a more specific legal literature on fetal homicide laws. This paper contributes to that literature by exploring one contemporary source for the emergence and framing of such conflicts, that is, obstetric ultrasound and its relation to the law. However, it is neither a defense nor a critique of the notion of fetal rights. My aim is not to determine whether a fetus *is* a person, and thus a subject of rights, but rather, to examine the social and political implications of a machinery that *produces* the fetus as a person. Second, it is not an investigation of case law, nor a contribution to legal theory, either in general or regarding the notion of fetal homicide. While I take recent legal events as a point of departure, this is primarily a paper in feminist philosophy, in which I attempt to understand one operation in the contemporary constitution of the subject, that is, the idea of the fetus as person and, by necessity, its relation to the maternal body. As I discuss below, the medical technology of obstetric ultrasound is increasingly implicated in the ethics and politics of abortion; it also increasingly impacts upon the formulation of law relating to women, their (maternal) embodiment, and their reproductive rights. How the fetus is characterized or construed is of central importance to these issues, and vice versa. Thus, it is impossible to address one without at least touching on the other.

### TECHNOLOGY MAKING PERSONS: OBSTETRIC ULTRASOUND AND THE LAW

The central issue in the differentiation and intersection of laws on abortion and fetal homicide is that of personhood, since a fetus can only be the subject of a homicide—that is, it can only be murdered—if it has the legal status of a person. Two points should be noted of this. First, and most obviously, the attribution of the status of personhood affords a definitive right to life that was hitherto uncertain or absent. But second, this also indicates that the person and the biological body of the human being are not necessarily coextensive. This break between the human (that is, a thing that belongs to the species *homo sapiens*) and the person is a decisional space in which personhood can be attributed or withheld. As Judith Butler notes, the conventional response to this decisional space is to ask, “Who decides, and upon what principle?” (2009, 20). But in fact, it may be more telling to ask: By what mechanisms is such a decision facilitated? Or, in other words, what are the material framing conditions for such a decision? The contention of this paper is that obstetric ultrasound is coming to play a crucial role in the “personhood-deciding machine [that] marks the final

difference between what must live and what can be legitimately cast to death” (Esposito 2012, 13).

Historically, the determination of the personhood of the fetus in common law traditions has rested on the “born alive” rule, according to which live birth is necessary to establish the applicability of homicide laws—that is, a baby must first be born alive in order to be the victim of a homicide. Not surprisingly, the interpretation of this rule has been controversial. As Kristen Savell (2006, 627–29) outlines in her discussion of the born alive rule in the context of Australian law, the notion of born alive has been explicated in various ways, with little consensus on what the standards of separateness (birth) or evidence of an independent existence (aliveness) actually require. For instance, whether indicia such as crying, breathing, a heartbeat, and independent circulation are necessary or sufficient to establish that a neonate is alive for the purposes of the law is a matter of ongoing debate. Further, Savell points out that there is controversy over whether the rule itself should be treated simply as evidentiary, or as providing a more substantive definition of the human being (see also Steinbock 2011). Taken as an evidentiary rule, live birth was necessary in times past because it was impossible to rule out natural stillbirth as a cause of fetal death, or to ascertain with any certainty other causes. Today, however, the state of medical knowledge and technology is such that it is possible to establish that a fetus is alive well before birth, just as it is to ascertain that a particular act caused fetal death (Savell 2006, 630–31)—through obstetric ultrasound, fetal heart monitoring, and fetal autopsy, for instance. Thus, it would appear that technological advances have rendered the born alive rule redundant. However, understood as providing a substantive definition of legal personhood, the born alive rule is not so easily rendered irrelevant by technological advances.

Whether the rule is interpreted as evidentiary or substantive has broader political implications that I will return to later; for now, the important point to notice is the way that medical technologies contribute to the instability and contingency of the category of the person. Insofar as the matter of what counts as a person is dependent on knowledge of the characteristics of that thing, technologies that permit such knowledge come to hold sway over just what can in fact be identified as a person. Of these technologies, obstetric ultrasound has come to play an interesting and significant role in the determination of fetal personhood. It contributes to the transformation of the category of the person, and its attribution pre-birth, by making the fetus visible to us in a manner that was previously only possible post-birth. Of course, the manner in which the fetus is visible is, more strictly speaking, not the same as post-birth, since the technology itself shapes the manner in which we see the fetus. In this way, ultrasound has come to be characterized as a kind of moral speculum: it allows us—or, rather, is perceived to allow us—to “see” just what is and what is not a person. In the remainder of this section of

the paper, I will outline this common understanding of ultrasound at work in contemporary political and legal debates. In the section that follows, however, I will suggest that this is a misleading account of what ultrasound does. Ultrasound does not simply allow us to identify persons on the basis of their having a set of characteristics; rather, I will argue, it works performatively to bring persons into being.

Obstetric ultrasound was developed throughout the 1960s and became increasingly routine during the 1980s. Initially developed as a military technology, ultrasound was used therapeutically in medicine up until the 1940s, when its diagnostic capacities began to be explored. In 1959, Ian Donald, then at Glasgow University, found that ultrasound could be used to measure fetal heads. During the 1960s, Donald developed and used ultrasound to detect conditions such as multiple pregnancies, placenta praevia, and fetal abnormalities. Since then, the use of ultrasound in pregnancy has become largely routine in the developed world and increasingly available in developing countries, although its clinical value has sometimes been challenged (see Ewigman et al. 1993). Today, the grainy black and white images produced by two-dimensional ultrasound pioneered by Donald and others are rapidly being replaced by sepia-toned three dimensional images, to such an extent that obstetric ultrasound has passed out of the clinic into commercial services for “keepsake” images. In this, ultrasound images of the fetus have attained an unprecedented cultural and social saturation, featuring in advertisements as well as on social media sites where women post “first pictures” of their “baby” well before it makes its material appearance in the world.

Most interestingly, the technology of obstetric ultrasound has always maintained an intimate relation with the ethics and law of abortion, a relationship that seems to be increasingly important in the contemporary context. Donald himself saw and exploited the potential of the ultrasound image of the fetus to alter a woman’s thinking about terminating a pregnancy. Committed to an antiabortion position, he used ultrasound in the clinic to convince Scottish women who fell pregnant during the 1960s to carry their pregnancies to term, and also used ultrasound images and video publicly in antiabortion campaigns (Nicholson 2004). More recently, in a manner not unlike Donald’s moralization of ultrasound, in the United States ultrasound has been central to legal efforts to restrict access to abortion. Some nine states have introduced legislation in recent years that requires women seeking terminations of pregnancy to undergo an ultrasound and either be given the option of viewing the images or be required to do so. For example, Wisconsin’s recent law requires that the medical practitioner involved display the ultrasound image while identifying any visible organs and external features of the fetus. Further, ultrasound was the medium through which a fetus was enabled to “testify” in court, when video of a nine-week and fifteen-week-old fetus was used in an attempt to introduce

a bill in Ohio that forbids abortion after the detection of a fetal heartbeat (the so called “Heartbeat Bill”).

Ultrasound has also been central to attempts to reduce the gestational limit for so-called social abortions from twenty-four to eighteen weeks in England. The obstetrician at the forefront of the use of 3D and 4D obstetric ultrasound in the UK, Stuart Campbell, weighed into this controversy, arguing that ultrasound images reveal new details about fetal life that necessitate a reconsideration of abortion law. In an opinion piece, he writes,

No one seriously disputes that the earlier a termination is carried out the better and safer it is. My own conviction about this has been influenced by my technique for producing detailed 3D images of the developing fetus that show it smiling, yawning, rubbing its eyes and apparently “walking” in the womb. Though I perform these scans every day, I am still overcome by the excitement and the wonder of the fetus that is learning to be a baby. By twenty weeks it smiles, makes crying expressions and sucks its thumb. At twenty-three weeks, it begins to open its eyes and develops quite complex patterns of behaviour. (Campbell 2008)

He defied anyone who disagreed with his proposal to reduce the upper limit for “social” abortions to eighteen weeks, “to see these pictures and not pause to wonder if they [the critics] might be wrong” (Campbell 2006). In response, Campbell’s critics argued that the scans provided no new scientific evidence about the neurological and behavioral capacities of the fetus (see Hall 2006).

Uses of ultrasound images such as those of Campbell attempt to establish a neurobiological and behavioral continuity between the fetus and the neonate. The presupposition of this approach is that this means that the late-term fetus is as equally deserving of legal protection as the neonate (see Savell 2007). The underlying view is that personhood is intimately related to the possession of a set of identifiable characteristics, and these characteristics are possessed as much by the late term fetus as by the neonate. Significantly, this is congruent with the argumentative strategy discussed earlier in regard to the born alive rule, whereby new evidence of biological characteristics, garnered by improvements in medical technologies, urges a transformation of the frontiers of personhood to encompass the fetus. Within this view, ultrasound is portrayed as a representative machine that reveals biological data that ought to reset our notions of personhood. It allows us to more correctly identify the frontiers of personhood. In this way, it is characterized as a kind of moral speculum, allowing us to peer into the maternal body in order to find the person within. However, this underestimates the ontological force of the ultrasound image, and thereby fails to recognize the way that ultrasound does not so much reveal persons as produce them (see Franklin 1991). Moreover, there is more going

on in the political and legal reliance on ultrasound than the “developmental continuity” thesis allows, for what is crucial to the success of the antiabortion strategy is a sophisticated mobilization of the emotionally charged nature of the ultrasound image.

Underlying the ventures mentioned above, and others like them, is the idea that ultrasound creates, or at least contributes to, a different kind of relationship between the pregnant woman and the fetus she carries, or more broadly, between the fetus and the viewer of an ultrasound image. In other words, the speculation is that ultrasound shapes the affective response of the viewer to the fetus, and moreover, that it does so in ways that can be mobilized politically. Janelle Taylor (2008, 80–95) has pointed out that antiabortion strategies that mobilize ultrasound images, such as those behind the legal changes outlined above, draw on the idea that ultrasound enhances maternal bonding.<sup>3</sup> As Taylor discusses, the idea that ultrasound has a positive bearing on a woman’s affective attachment to the fetus she is gestating derives from an article by Campbell et al., and a commentary published in the *New England Journal of Medicine* (Campbell et al. 1982; Fletcher and Evans 1983). Taylor points out that despite their continuing influence, in neither of these sources is the claim that ultrasound enhances maternal bonding substantiated. She also suggests that the publication of the commentary, and particularly the speculation therein that ultrasound images may assist in opposing abortion, has lent authority to precisely such uses of ultrasound images in subsequent antiabortion campaigns. Taylor goes on to criticize the notion of bonding, focusing on the supposed biological basis of it and reading it alongside older theories of the maternal imagination. For her, the question of “bonding” is primarily one of maternal love. But can we not see the claim that ultrasound has emotional effects—though these effects are understood poorly through the notion of maternal bonding—as pointing toward a significant dimension of the social mobilization of ultrasound and its imbrication with the question of the legal and moral status of the fetus? In other words, might we step back from the claims about maternal love, to ask, perhaps in a somewhat diaeresis naïve way, what does an ultrasound image do? Or, more specifically, how exactly does it contribute to making persons?

### WHAT DOES ULTRASOUND DO?

Given the apparent imbrication of ultrasound images and morality and law relating to the life and death of a fetus, it is worth considering just what it is that ultrasound images do. Are these simply a matter of representing the fetus as it is, though otherwise undisclosed to us? Attempts to render ultrasound as a means of acquiring evidence about the personhood of the fetus try to limit ultrasound to this representational role. Ultrasound thereby appears as the

speculum through which the fetus becomes visible as a person. As feminist theorists have long argued, however, the function of ultrasound far exceeds this representational fantasy. In different ways, Rosalind Petchesky (1987), Carol Stabile (1998), Valerie Hartouni (1998), Sarah Franklin (1991), and others make clear that ultrasound frames the fetus and its relationship with the woman gestating it in very specific ways. That is, it occludes the embodied being of the pregnant woman and constructs the fetus as a being separate from her, and at times in conflict with her. Building on these analyses, I have argued elsewhere that ultrasound does not simply represent an already existing body, but actually constitutes the fetus as an embodied, social being toward whom we bear a particular ethical relationship (Mills 2011). In the remainder of this paper, I wish to take this analysis in a slightly different direction, to elucidate the position of ultrasound in the designation of some beings as persons and others as not. I will make the case that in regard to the constitution of the fetus as person, ultrasound increasingly operates as the means of mediation between the human body and the concept of the person. Ultrasound is a principle means for establishing either the coincidence or, in some cases, the noncoincidence of the fetal body and the person toward which it attains. Thus, it operates at the border of the person and the “merely” human, bringing these into articulation—which entails both separation and conjunction.

It is often noted that the concept of the person derives from the Latin term *persona*, meaning the mask used in a play or performance, or the part played by an individual in life—in essence, *a role* that an individual plays. This etymology highlights the specifically performative dimension of the concept of the person, a dimension that takes at least two forms. The first of these is the sense in which being a person demands a certain kind of *performance*, or can be understood as such a performance. This interpretation is developed by Friedrich Nietzsche, for instance, in his proclamation that “there is no ‘being’ behind doing, effecting, becoming; ‘the doer’ is merely a fiction added to the deed—the deed is everything” (Nietzsche 1989, 1st essay, section 13). The second form refers more directly to the force of the concept of the person, and its imbrication within social convention. In *How to Do Things with Words*, J. L. Austin (1975) identified a subset of speech acts as *performative* (rather than constative), in that they do things in their very declaration or utterance. They do not simply describe states of affairs or things, but actually perform the act they ostensibly describe. Austin saw the utterances “I promise” or “I apologize” as paradigmatic of such performative statements.

While Austin attempted to limit performatives to a particular grammatical form, social theorists have subsequently extended his identification of the performative capacity of speech acts well beyond this. Judith Butler’s account of performativity, for instance, combines aspects of both Nietzsche and Austin, to account for the social constitution of the subject through the operation

of discursive norms. Butler's work in books such as *Gender Trouble*, *Bodies That Matter*, and *The Psychic Life of Power* is dedicated to developing a critical ontology of embodied subjectivity, in which "performativity" comes to name a social force that fundamentally conditions the subject's possibilities for existence. In tying Austin's notion of performativity to Louis Althusser's account of interpellation, Butler makes performativity a deeply social phenomenon inextricably linked to matters of authority and power. Further, she also makes it clear that subjectivity cannot be extracted from the linguistic conditions in which it appears, though these conditions are not strictly determining for the subject. Because of this, she argues in *Excitable Speech*, the body of the subject is peculiarly vulnerable to language (and vice versa). She argues that

[l]anguage sustains the body not by bringing it into being or feeding it in a literal way; rather, it is by being interpellated within the terms of language that a certain social existence of the body first becomes possible. To understand this, one must imagine an impossible scene, that of a body that has not yet been given social definition, a body that is, strictly speaking, not accessible to us, that nevertheless becomes accessible on the occasion of an address, a call, an interpellation that does not "discover" this body, but constitutes it fundamentally....[T]o be addressed is not merely to be recognized for what one already is, but to have the very term conferred by which the recognition of existence becomes possible. (Butler 1997, 5)

I will return to other aspects of this statement in a moment, but for now the point to be made relates to the constitutive force of the address, which constitutes a body in the very process of naming it.

My contention is that in regard to the fetus, the concept of personhood has something of this performative force. This means that in being called a person, the fetus is *made into* a person, such that the name person "retroactively constitutes its reference" (Žižek 1989, 95). The person does not exist prior to this designation, waiting to be recognized as a person. Rather, its recognition is only possible through the interpellation effected in being called a person. Thus, the designation of the fetus as person performatively engenders the fetal person; or, in other words, that subject is brought into being through the conferral of the terms of its recognition. Consequently, fetal personhood is not a matter of the accurate attribution of the concept person on the basis of objective properties of the fetus, with the change in moral status depending on these changing properties. Rather, the attribution of personhood immediately and in itself changes moral status, and this attribution may occur independently of the actual properties of the fetus.

Importantly, in Austin's view, performative speech acts cannot be judged according to their truth-value, but are instead considered "felicitous" or

“infelicitous,” depending on their success in doing what they state (Austin 1975). Thus, the claim that a fetus is a person—or, is not a person—cannot simply be judged on the basis of whether it is true or not; what matters is whether the claim is felicitous or infelicitous. This undermines the claim discussed in the previous section that the continuity between the late-term fetus and the neonate, revealed by ultrasound, grounds fetal personhood. In fact, developmental continuity may or may not be significant in whether a fetus can be understood as a person, depending on other contextual factors. In other words, though in itself it does not establish personhood, it may be mobilized in the delimitation of “the appropriate circumstances” (Austin 1975, 13) for the felicitous attribution of personhood. At other times, though, it will be disregarded or set aside in the withholding of that attribution. It may even be used against the attribution of personhood, such as in the way that utilitarian philosophers emphasize the continuity between the fetus and the neonate to the end of justifying infanticide. This raises the question of just what the conditions of felicity may be for establishing fetal personhood. There is no doubt that the felicity of attributions of personhood is context-dependent, in the manner that Austin argued was the case for speech acts generally (Austin 1975). Further, the elements of this context necessarily exceed any attempt to circumscribe them (see Butler 1997, 3–4). Nevertheless, two points about the felicity conditions for the attribution of personhood to the fetus should be mentioned.

First, the felicity of a claim will be heavily dependent on the relationship of the fetus to the woman who gestates it, or, in shorthand, whether it is a “wanted” or “unwanted” pregnancy. A central question in determining the personhood of a fetus is, to what extent does the woman who gestates it bestow personhood upon the fetus?<sup>4</sup> Relational conceptions of personhood developed by feminist philosophers attempt to capture the social and moral significance of the emotional attachment that a woman feels to her fetus (see, for example, Mackenzie 1992; Sherwin 1992). This is consistent with an emphasis on women’s self-determination in the moral justification of abortion, and the mother’s primacy in establishing the social status of her fetus. Further, various studies have shown that obstetric ultrasound has a significant impact in this attachment, where, upon seeing their fetus on the screen, women feel compelled to attribute personhood to them (see Mitchell 2001; Mitchell and Georges 1997; Harris et al. 2004; and Williams et al. 2001). It is this kind of incitement of attachment that campaigns discussed in the previous section work upon. However, the effects of ultrasound on women’s attachment to the fetus they carry are more ambivalent than this allows. For the use of ultrasound may be double-edged: while it may in most circumstances encourage fetal personification, it can also have the opposite effect, typically in cases where fetal abnormalities are detected through clinical scans.

Second, then, this “prenatal paradox” (Taylor 1998, 15) indicates that ultrasound is invested in both the attribution of personhood and its withholding. Consistent with both Austin’s emphasis on the degree of conventionality required for a performative speech act to be felicitous (Austin 1975, 14), and Butler’s insistence on the repetition or citation of regulatory discourse, the felicitous performance of calling something a person is highly norm-bound. The clinical value of ultrasound is dependent on the elaboration of biophysical norms, against which any individual fetus can be assayed. In Foucaultian terms, ultrasound has thus been central to the normalization of the fetus, and to a lesser extent, of the maternal body understood as a “uterine environment” (see esp. Foucault 2007, 57–63). This integration of ultrasound within a complex of normalization is well evidenced in screening for Down Syndrome using nuchal translucency measurements typically taken at around twelve weeks gestation. In combination with blood tests and maternal age, these measurements are used to generate a risk calculation for the likelihood of the fetus having the chromosomal mutation responsible for Down Syndrome. On the basis of this risk calculation and further diagnostic tests, the large majority of women in developed countries terminate pregnancies when Down Syndrome is diagnosed.<sup>5</sup> As this suggests, the clinical use of ultrasound can itself impact on the affectivity of a “wanted” or “unwanted” pregnancy, and the performative attribution or withholding of personhood.<sup>6</sup> Interestingly, in cases where women wish to continue a pregnancy, or do not wish to undertake further diagnostic tests following a calculation of high risk, they often meet strong resistance (Gothard 2011). They may find that their attribution of personhood is seen by others as misplaced, and insofar as it is, the felicity of the performative is tenuous and contested.

As this suggests, obstetric ultrasound is deeply implicated in the attribution or withholding of personhood in regard to the fetus. Or, in other words, ultrasound mediates between the human body and the person, insofar as it provides the mechanism by which they are allowed to coincide or fall apart. Given this role, it is illuminating to return to Butler’s statement from *Excitable Speech*, in which she invites us to imagine an “impossible scene, that of a body that has not yet been given social definition, a body that is, strictly speaking, not accessible to us, that nevertheless becomes accessible on the occasion of an address...that does not ‘discover’ this body but constitutes it” (Butler 1997, 5). In the context of thinking about obstetric ultrasound, this scene is not impossible—rather, it is precisely the situation of the fetus. This invites some adjustment of theories of subject-formation, pushing the starting point for subjectivation well into the gestational period. For instance, in regard to the performative constitution of gender identity, Butler’s scene in which “the doctor who receives the child and pronounces—‘it’s a girl,’—begins that long string of interpellations by which the girl is transitively girlred” (Butler 1996, 204) would

need to be revised. The frequent use of ultrasound for sex determination at around eighteen weeks' gestation means that such gendering begins *in utero*. Moreover, the process of personification of the fetus might plausibly be said to begin with the address effected in the ultrasound image produced almost routinely at around twelve weeks' gestation. Thus, ultrasound appears not only to undermine the normative significance of birth, but also its significance in processes of subjectivation and personification. It can either instigate or thwart those processes with the fetus *in utero*.

At this point, several critical questions can be posed to the performative account of the constitution of fetal persons that I have been developing. First, while it is certainly the case that legal uses of the concept of the person can be understood performatively, as may well be broader uses, can we go so far as to argue that the ultrasound image itself has a performative force? In other words, is it possible to talk about the performativity of the image, in the way that one can talk about the performativity of the speech act or of discourse? Austin's account of performativity is directed toward the question of what utterances such as "I promise" do, while Butler's account of the performativity of gender significantly broadens the scope of the concept of performativity. However, even with this broader scope, it is still not clear that images such as those produced through ultrasound can themselves be said to have a performative force. Transposed to ultrasound, the performative approach appears to throw light on the narratives that may frame ultrasound images, as well as the cultural practices that mobilize such images in various ways. What it may not do, though, is explain what the image itself does. Posing the matter this way highlights the necessity of thinking the particular force of the *visual*, and its role in the constitution of persons.

To briefly address this question, two points can be made. First, images are a central vector for the instigation and "harnessing" of affect. As Butler discusses in regards to Susan Sontag's understanding of photography, images such as those produced in photography have a "transitive affectivity," that is, "[t]hey do not merely portray or represent – they relay affect" (Butler 2009, 68). Further, and this is the second point, this harnessing of affect occurs in conjunction with the transmission or "iteration" of social norms that regulate the appearance of the socially recognizable. The body that "appears" in an image cannot but recall those norms, whether in a photograph or an ultrasound scan. Grappling with this relation of visibility and norms in her account of "humanization," Butler writes, "the norms that would allocate who is and is not human arrive in a visual form. These norms work to *give face* and to *efface*" (Butler 2009, 77). While this brief discussion does not do justice to the problem of visibility and performativity, it is suggestive of ways in which a further analysis might proceed. Further, it brings to the fore the peculiar position of the face in processes of personification (or what Butler calls humanization),

and as it happens, the face of the fetus is particularly significant in tracing the role of ultrasound in the attribution or withholding of personhood.

Second, then, does it make sense to talk about the object of personification as a subject? Or, in other words, in what sense is the fetus an active participant in its own personification or subjectification? Appropriating the account of the performative constitution of the subject to elucidate the process by which ultrasound images personify the fetus raises in a particularly sharp way the question of the extent to which performativity presupposes agency, and more specifically, intentionality, on the part of the subject thereby constituted. As Butler points out, Austin tended to presuppose an agential subject as the source of illocutionary speech acts (e.g., Butler 1996, 203). For her, though, the question of agency and intentionality is more vexed. This is not the place to explore this question in detail (especially since it has been the focus of an extensive literature already); suffice to say here that the paradox of subjectivity, whereby the subject comes into being through its own citational practice, ensures that agency and intentionality cannot be taken as evidence of subjectivity prior to its emergence in and through discourse. Nevertheless, a popular way of understanding the performativity of gender is to say that someone is performing gender, even if they are constituted in that performance, and even if that performance does not have the effects intended.

This interpretation reveals something significant about the personification of the fetus, whereby agency, and perhaps even a kind of intentionality, is attributed to the fetus. What is often at stake in the use of ultrasound images in order to render legal change is the question of how certain actions on the part of the fetus can be interpreted, and particularly, whether they can be interpreted in the field of emotions. For instance, Campbell's comments cited earlier cast the fetus as capable of certain facial expressions such as smiling and crying, and give the impression that these facial movements meaningfully correlate with stimuli, that is, that they can legitimately be read as at least rudimentary emotional expressions. However, in general, emotions are understood to require a kind of intentionality, insofar as they "involve a stance on the world, or a way of apprehending the world" (Ahmed 2004, 7). Understanding the fetus to be expressing emotions, even if only as basic as pain and pleasure (the absence of pain), therefore attributes an agency—albeit a limited one—to the fetus.<sup>7</sup> Many expert commentators are clearly uncomfortable with this view; for them, such actions are more appropriately understood as "unconscious" facial configurations that say nothing about the psychological state of the fetus itself, let alone count as more or less intentional expressions of an emotion (Reissland et al. 2013; RCOG 2010, 10).<sup>8</sup> Nevertheless, that the fetus is popularly understood to engage in a certain performance of emotive states, and that this performance is seen as evidence of personhood, is significant for an understanding of what ultrasound does. For this highlights the way that

fetal personhood is established through the framing of actions on the part of the fetus as iterations—performative practices—of personhood. Insofar as a fetus enacts characteristics of the person—for instance, expressing emotions that betray a consciousness internal to the fetus—then it is itself a person. The point is Nietzschean via Butler: insofar as someone performs being a girl, she *is* a girl. Insofar as a fetus performs personhood, it *is* a person.

This brief discussion of fetal emotion and personhood brings to the fore a point that has been implicit in much of my discussion, which is that the attribution or withholding of personhood is intimately bound up with—perhaps inseparable from—circuits of affectivity and their mobilization. While the moral significance of the ultrasound image is most obviously captured in the judgment on the moral rightness or wrongness of abortion, there may be something more basic at work in the relationship of the ultrasound image to ethics than is often recognized. Using object relations theory, and the work of André Green on the relationship of representation and affect, Lisa Cartwright (2008) has recently developed an analysis of the way that representations interpellate viewers or spectators in particular ways, and specifically through the moral emotion of empathy. For Cartwright, empathy means “the reflexive experience of awareness of the thoughts, emotions...or concerns of an other or others” (23), and offers a plausible alternative to the film theory focus on identification. The significance of empathy is that it places the practice of spectatorship in a particularly moral register, and may prompt a kind of responsibility for the other or others. Cartwright writes, “spectators may also ‘feel themselves into’ those they can imagine not as themselves but as *theirs*, or rather, as their responsibility. Moreover, they may imagine themselves as part of a ‘we’ that shares that responsibility. This kind of empathy is at the core of sociality” (235–36). Importantly, Cartwright insists that empathy is not a matter of “feeling like” the other, but rather, of “feeling for” him or her (33–34). In this, her account of empathy appears to be consistent with what I have elsewhere called sympathy, drawing on the work of Peter Goldie (Mills 2011, 105–106).

Regardless of whether this affective relation to the other or others is more appropriately understood as empathy or sympathy, the important point to be made here in regard to the ultrasound image is that “seeing the fetus” draws its viewers into affective circuits, and in so doing, establishes a relation between the fetus made apparent in the image and its viewer. Perhaps because of the unquestioned moral value of personhood (see Esposito 2012), this affective relationship is almost overwhelmingly channeled through the category of the person. However, the matrix of personhood may be particularly ill-suited to capturing the moral valence of this affective relation. Rather than bringing to light the particular affect involved in pregnancy and its subtle relations with responsibility, this reliance on personhood obscures those subtleties, and

instead, mires us in an overdetermined reliance on technology for clarifying the frontiers of our ethical categories.

## CONCLUDING REMARKS

In the past several decades, obstetric ultrasound has become one of the most routine and emotively loaded technologies that a woman or couple encounters within a pregnancy. At the same time, the cultural saturation of the ultrasound image of the fetus has reached unprecedented levels, with such images circulating within law courts, on social media, and within antiabortion campaigns, to name but a few sites in which they appear. While feminists have long argued that these images contribute to the personification of the fetus, what has been less clear is the specific force of the ultrasound image in this contribution. Furthermore, the normative implications of this role have to a large extent dropped from view, with bioethical debates on abortion, for instance, largely taking place without reference either to feminist studies of ultrasound, or to the technology itself and its role in the experience of pregnancy today. In this paper, I have attempted to make some headway in addressing these two lacunae. Of the first, I have argued that the ultrasound image can be understood to have a performative force, which means that the fetus revealed in the ultrasound scan may be brought into being as a person in its address in the ultrasound image. It has the terms of recognition conferred upon it in this address, but that conferral may also be withheld. This shows that ultrasound acts as a mediator between the human body of the fetus and the concept of the person, allowing them to coincide or fall apart. In regard to the second problem of the normative implications of the contemporary role of ultrasound, I have sought to elucidate some of these implications by examining the way that ultrasound is increasingly embedded within legal phenomena such as the emergence of fetal homicide laws.

It should be clear that the routine use of ultrasound throughout pregnancy and the politico-cultural mobilization of ultrasound images contribute to undermining the significance of birth as the threshold of the appearance of the subject or person. If this is so, then it appears to lend credence to the dismantling of the born alive rule within the common law tradition. As I mentioned early in the paper, this rule is interpreted either as evidentiary—in which case technologies such as ultrasound appear to instigate a revision of the legal concept of the person—or as offering a substantive conception of the person that is not undermined by technological advents. As specialized as this debate about how to interpret the rule may seem, it has significant implications for women's reproductive rights. Rendering the rule redundant allows for the passage of fetal homicide laws, which rest on the condition that the attainment of personhood can be established before birth. But this is also arguably part of a broader attack on reproductive rights. As Steinbock

points out, “Many of those who advocate this change [to allow fetuses to be homicide victims] have a larger agenda: the ultimate abolition of abortion and the coercion of pregnant women” (2011, 133). Thus, a new “prenatal paradox” may well be emerging: ultrasound affords women reproductive choice insofar as it permits them to make informed decisions about the continuation or termination of a pregnancy in light of diagnoses of fetal abnormalities; but, the images produced in ultrasound also are used to undermine that very choice through the establishment of more restrictive abortion laws and fetal homicide laws. These latter laws seem beset by a similar ambivalence, in that on the one hand, they may give recognition to the significant emotive and embodied relationship between a mother and her fetus and the social status that she may therefore bestow upon it, while on the other they may be mobilized against pregnant women themselves, precisely, perhaps, when that relationship breaks down.

Finally, it is worth mentioning a broader set of questions that emerge from the routinization of ultrasound and its implication in legal and moral debates about personhood. An obstetric ultrasound image always comes into being through an embodied experience and interchange: at the very least, this involves the pregnant woman and the sonographer (usually also a woman). Contingently, it may also involve various other “spectators,” such as the woman’s partner, or other support person/s. It also involves the fetus, whether that fetus is personified or not through the process of the generation of its image. This embodied experience provides the nexus around which circulate a complicated array of affects and moral concepts, which are mobilized and dispersed more broadly in legal and political debates about abortion and the status of the fetus. In this, the situation of obstetric ultrasound may be taken as indicative of a more general set of relations between technology, morality, and affect that are materialized in embodied experience, whereby moral concepts are intimately tied to technology and its role in the mobilization of affect. But this does not mean that we should allow technology to determine those concepts. Rather, it suggests a need for critical vigilance in regard to the formation and operation of moral concepts such as that of the person, which neither attempts to repress or deny the affectivity they entail, nor simply accepts or embraces it.

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## NOTES

1. Some thirty-eight states have now adopted fetal homicide laws in the United States. In Australia, fetal homicide laws are effective in one state (Queensland), and have been mooted in at least two others (Western Australia and South Australia). The New South Wales Parliament is currently considering an amendment to assault laws to include harm to or destruction of an “unborn child.”
2. Note that this goal could be achieved through different legal means, such as the imposition of harsher penalties for aggravated assault. See Steinbock 2011 for further discussion.
3. 3D and 4D ultrasound in particular have provoked much discussion about their aesthetic and psychological benefit, insofar as they enhance parental, and particularly maternal, “bonding” with the fetus.
4. Note that this may be different in cases of surrogacy, where personhood is more dependent on the attribution by the commissioning parents, who may or may not include a mother, rather than the gestational mother.
5. The actual statistical figure is disputed, though one influential international study puts it at 92 percent (Mansfield et al. 1999). A more recent review argues that termination rates in the United States are significantly lower than this (Natoli et al. 2012).
6. I concede that the mapping of “wanted” and “unwanted” onto the attribution or withholding of personhood here is not entirely justified, since it is possible for a woman to want to continue a pregnancy without attributing personhood to the fetus she is gestating. The reverse may also be possible, though perhaps at a higher cost. Nevertheless, it is the case that maternal attachment to a fetus is often cast as deeply intertwined with personification.
7. The claim by Republican Congressman Michael Burgess that fifteen-week-old-male fetuses can be observed masturbating, made in debates on the Pain-Capable Unborn Child Protection Act in Texas, is a particularly striking example of the attribution of agency on the basis of ultrasound images. See Stan 2013.
8. This attribution of emotion to the fetus raises a host of questions about the nature of emotion and especially its relation to physiological or bodily modes of expression. It is not possible to properly engage these questions here, but note that there is a tradition of understanding emotion solely in terms of expression—that is, without reference to internal “feelings”—deriving from Charles Darwin’s classic study of expression in humans and animals. In terms of fetal development, one of the central issues here is the degree of awareness that a fetus is capable of *in utero*—even if it has the neurophysiological structures in place for such awareness, with a consensus emerging that the fetus is largely if not wholly unconscious *in utero* (Mellor et al. 2005; RCOG 2010).

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