ABORTION JURISPRUDENCE AND EMPIRICAL EVIDENCE
Jeremy A. Blumenthal, J.D., Ph.D.
Syracuse College of Law
AALS 2011

ABSTRACT

The Supreme Court’s abortion jurisprudence has been long on speculation and short on empirical evidence. In Casey and Carhart, the Court misread much of the existing literature, assuming that women would likely regret their abortion decision. Indeed, the Carhart Court fundamentally misconstrued the psychological literature on regret. Various State regulations—i.e., informed consent requirements, waiting periods, and required ultrasound viewing—also implicate existing or potentially useful psychological research. Here I note some disconnects between the Court’s speculation and what data in fact show; I also note specific future research that could be useful to developing a more realistic abortion jurisprudence.
GAPS

- *Casey* approved informed consent statutes in order to ensure women do not suffer “devastating psychological consequences” post-abortion; *Carhart* was based in part on the conclusion that “some women come to regret their choice to abort the infant life they once created and sustained.”

  - However, research shows that most women choosing abortion have positive psychological outcomes.¹

- *Carhart* neglected literature showing that people consider potential regret when making decisions; over-estimate the intensity and duration of regret; and develop coping strategies for regret.²

NEW INSIGHTS

- Under *Casey*, States may provide information explicitly designed to persuade women to carry a fetus to term, if the information is “truthful and not misleading.”

  - But such information is often geared to induce an emotional state—e.g., anxiety or fear—in which individuals are more easily persuaded. Thus, States’ informed consent statutes, including mandatory ultrasound viewing, may impermissibly burden women’s autonomous decision-making precisely because they bias a woman’s free choice, not inform it.³ Such regulation could thus be examined more closely, even under *Casey*’s “truthful and not misleading” standard.

FUTURE DIRECTIONS and RESEARCH

- New empirical research shows that the setting in which a decision is made can influence the actual decision—e.g., voting in a school elicits pro-education votes.⁴ Might this apply to abortion decisions? Utah requires women to be provided with a video showing a developing fetus, and encourages women to watch the video at the clinic. Would encouraging women to view at home, in a “homier” setting, in fact encourage more decisions to carry to term?

- Empirical research could also test whether informed consent material makes women more persuadable, even inappropriately so.⁵

---

⁵ Blumenthal, supra note 3.