

# ABORTION JURISPRUDENCE AND EMPIRICAL EVIDENCE

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## 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—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.<sup>1</sup>
- *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.<sup>2</sup>

## 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

<sup>1</sup> Nancy E. Adler et al., *Psychological Factors in Abortion*, 47 AM. PSYCHOL. 1194, 1198-99 (1992).

<sup>2</sup> Chris Guthrie, *Carhart, Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877 (2008); see also Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L. J. 155 (2005).

<sup>3</sup> E.g., Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading Casey*, 83 WASH. L. REV. 1 (2008); Martha A. Field, *Abortion Law Today*, 14 J. LEGAL MED. 3 (1993); Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351 (2008).

<sup>4</sup> Jonah Berger et al., *Contextual Priming: Where People Vote Affects How They Vote*, 105 PNAS 8846 (2008); Jeremy A. Blumenthal & Terry L. Turnipseed, *Is Voting in Churches (or Anywhere Else) Unconstitutional?: The Polling Place Priming (PPP) Effect*, – B.U. L. REV. – (forthcoming 2011).

<sup>5</sup> Blumenthal, *supra* note 3.