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## JUDICIAL EVASION AND DISINGENUOUS LEGISLATIVE APPEALS TO SCIENCE IN THE ABORTION CONTROVERSY

*Caitlin E. Borgmann\**

### INTRODUCTION

As John Rawls proclaimed, “Justice is the first virtue of social institutions, as truth is of systems of thought.”<sup>1</sup> Justice and truth are pillars of the good society, and the courts play a vital role in ensuring both. The courts’ primary responsibility is for the norms of justice, but implementing justice depends upon factual truth. Laws founded upon untruths subvert justice. Thus, when courts address laws that implicate individual rights like the right to abortion, they must ensure that these laws are based on a sound factual foundation. In the abortion context, the Supreme Court has increasingly shirked its duty to ensure both justice and truth. First, in *Planned Parenthood v. Casey*, the Court undermined the fundamental right to abortion by inviting laws premised on moral opposition to abortion. Yet its decision was dishonest, denying the conflict it created and purporting to leave the right to abortion intact; the decision has thus caused mischief and confusion in abortion regulation.<sup>2</sup> Second, in *Gonzales v. Carhart*, the Court shunned its responsibility for truth, signaling its readiness to grant extraordinary deference to disingenuous legislative attempts to

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<sup>1</sup> JOHN RAWLS, A THEORY OF JUSTICE 3 (revised ed. 1999).

<sup>2</sup> See *infra* notes 75–85 and accompanying text.

present morally based abortion restrictions as grounded in science.<sup>3</sup>

*Casey's* muddled constitutional standard for abortion regulation has helped to subvert the integrity of legislative factfinding on abortion. Legislatures historically have sought to regulate abortion for reasons of ideology, not medicine.<sup>4</sup> Under *Roe v. Wade*, this was not permissible, at least before viability.<sup>5</sup> The framework set forth in *Roe* allowed the state to restrict pre-viability abortions only in order to further the woman's health. In *Planned Parenthood v. Casey*,<sup>6</sup> the Court explicitly sanctioned the state's reliance on morality as the basis for abortion regulation.<sup>7</sup> Yet the decision, which upheld a woman's right to abortion, placed limits on how the state could express or implement its preference for childbirth. Accepting *Casey's* invitation, legislatures have enacted a wide variety of restrictions based on moral opposition to abortion. But, partly in response to the confusing legal standard set forth in *Casey*, they have felt compelled to disguise these moral viewpoints as scientific fact.

The controversial nature of abortion, and the close tie between abortion regulation and the social movement against abortion rights amplify the unreliability of legislative factfinding on abortion issues. Since *Roe v. Wade*, opponents of the right to abortion have struggled to identify the most effective strategy for reigniting the public debate and winning over the hearts and minds of voters. The movement has sometimes determined that the right to abortion is best attacked indirectly and even deceptively.<sup>8</sup> As the

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<sup>3</sup> See *infra* notes 48–70 and accompanying text.

<sup>4</sup> See generally JAMES RISEN & JUDY L. THOMAS, WRATH OF ANGELS: THE AMERICAN ABORTION WAR 8–20 (1998); see also Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 940–41 (discussing specifically “informed consent” laws); Letter from James Bopp, Jr. & Richard E. Coleson to “Whom It May Concern” (Aug. 7, 2007) (on file with the author).

<sup>5</sup> See *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).

<sup>6</sup> 505 U.S. 833 (1992).

<sup>7</sup> See *id.* at 876–78.

<sup>8</sup> See, e.g., Letter from Samuel B. Casey & Harold J. Cassidy to Members of the South Dakota Pro-Life Leadership Coalition at 2–3, 13 (Oct. 10, 2007) (on file with author). See generally Reva Siegel, *The Right's Reasons*, 57 DUKE L.J. 1641 (2008) (describing evolution of anti-abortion movement strategy post-

## JUDICIAL EVASION

17

social movement against abortion has evolved, legislation and legislative factfinding have mirrored its trajectory, often serving as the vehicle by which the movement implements its strategy. *Gonzales v. Carhart* (“*Carhart II*”) only encourages this troubling trend.<sup>9</sup> In *Carhart II*, the Court broke with its longstanding abortion precedents and gave broad deference to legislative factfinding on abortion.<sup>10</sup>

As I have argued elsewhere, judicial deference to legislative factfinding is problematic, especially where important individual rights are at stake.<sup>11</sup> This concern is sharply evident in the abortion context. When courts defer to legislative factfinding on abortion, what results is an elaborate charade. Legislatures enact laws based on moral positions about pregnant women or the status of the embryo or fetus. Rather than make these moral underpinnings explicit, however, they present abortion restrictions as medical or health regulations. They then amass questionable legislative records to support these manufactured medical or health concerns. Recently, the Eighth Circuit joined the Supreme Court in deferring to such legislative factfinding.<sup>12</sup>

In this Article, I discuss and critique legislative factfinding in the context of so-called “informed consent” legislation, fetal pain laws, and “partial-birth abortion” bans. I argue that courts neglect their responsibility for justice and truth when they defer to biased and unreliable legislative factfinding on abortion. The Article proceeds in two Parts. In Part I, I examine judicial deference to legislative factfinding, both generally and in the abortion context specifically. In Part I.A., I review the traditional justifications for judicial deference to legislative factfinding. In Part I.B., I describe the courts’ historical treatment of legislative factfinding on abortion and argue that the Supreme Court’s deference to congressional factfinding in *Carhart II* marked a dramatic

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*Roe*).

<sup>9</sup> See *infra* text accompanying notes 49–71.

<sup>10</sup> See *infra* text accompanying notes 51–58.

<sup>11</sup> See Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Factfinding*, 84 IND. L.J. \_\_\_ (forthcoming 2008).

<sup>12</sup> *Planned Parenthood v. Rounds*, 530 F.3d 724, 730 (8th Cir. 2008) (en banc). See *infra* Part II.B.

departure from past precedent.

Part II addresses the problematic nature of legislative factfinding in the abortion context. In Part II.A., I argue that *Casey*'s formulation of the constitutional framework for abortion regulation has sown confusion and contributed to legislatures' tendency to disguise morally based abortion regulations as resting on science. In Parts II.B., C., and D., I discuss how "informed consent" laws, fetal pain measures, and "partial-birth abortion" bans, respectively, are disingenuously presented as justified and even motivated by science. I also criticize the courts for accepting and encouraging these insincere legislative appeals to science. I conclude the Article by arguing that courts should approach legislative factfinding on abortion with caution and skepticism, and that their duty to ensure justice in the abortion context carries with it a responsibility to seek the truth underlying abortion regulations.

## I. JUDICIAL DEFERENCE TO LEGISLATIVE FACTFINDING

### A. *Justifications for Judicial Deference*

In discussing legislative factfinding on abortion, I refer to a particular category of facts commonly called "legislative" or "social" facts. Donald Horowitz has defined social facts as "the recurrent patterns of behavior on which social policy must be based."<sup>13</sup> Social facts stand in contrast to "adjudicative" or "historical" facts, which are the facts particular to the litigants and dispute before a court.<sup>14</sup> When legislatures conduct factfinding in connection with proposed legislation, they examine social facts.

Social facts overlap, but are not synonymous, with policy judgments. It is often said that courts should defer to legislative factfinding because legislatures are the appropriate institutions for policymaking. But even if legislatures should generally be solely responsible for making policy, this does not address the question of which institution should have the final say in determining the facts

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<sup>13</sup> See DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 45 (1977).

<sup>14</sup> See DAVID L. FAIGMAN, *CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS* 43–62 (2008) (discussing fact classification and providing a taxonomy of constitutional facts).

*JUDICIAL EVASION*

19

relevant to those policy choices.<sup>15</sup> Another common but mistaken assumption is that deference to legislative factfinding tracks the levels of scrutiny applied in constitutional decisionmaking. Thus, many assume, courts applying rational basis review are highly deferential to legislative factfinding whereas, when applying strict scrutiny, courts independently review the facts.<sup>16</sup> But the courts have not consistently followed this pattern and have sometimes deferred when strict or heightened scrutiny applies, and sometimes declined to defer where rational basis applies.<sup>17</sup> Moreover, although the questions are related, how much deference to accord a legislature's factfinding is a distinct question from which legal standard to apply to the facts.<sup>18</sup>

Although the Supreme Court's treatment of legislative factfinding is confused and incoherent, a recurring theme in the Court's decisions is that courts should defer to factfinding by Congress and state legislatures.<sup>19</sup> This principle of judicial deference stems from two concerns.<sup>20</sup> The first is a concern for institutional legitimacy and separation of powers. Because legislatures are the institutions invested with the authority to make policy, the Court has sometimes suggested that legislatures retain authority to decide the underlying facts as well.<sup>21</sup> Thus, for

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<sup>15</sup> See Borgmann, *supra* note 11, at text accompanying note 43.

<sup>16</sup> See, e.g., *Heller v. Doe*, 509 U.S. 312, 333 (1993) (stating that under rational basis review, courts must defer to factual assumptions underlying legislative rationale, even if they are erroneous); *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 844 (S.D. Ind. 2006) (suggesting that court's refusal to apply strict scrutiny to state voter identification law meant that court could not question state's factual justifications for the law (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)), *aff'd sub nom.*, *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (2007); *Am. Subcontractors Ass'n v. City of Atlanta*, 259 Ga. 14, 17 (1989).

<sup>17</sup> See Borgmann, *supra* note 11, at \_\_ (citing cases).

<sup>18</sup> See *id.*

<sup>19</sup> See generally Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941 (1999) (reviewing history of judicial deference).

<sup>20</sup> See Borgmann, *supra* note 11, at \_\_ (discussing justifications for judicial deference to legislative factfinding).

<sup>21</sup> See HOROWITZ, *supra* note 13, at 25–26, 28–29; Saul M. Pilchen,

example, in *Turner Broadcasting System, Inc. v. FCC*, the Court asserted:

We owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power. Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to *the harm to be avoided* and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.<sup>22</sup>

Judicial deference to legislative factfinding is also defended on the ground that legislatures possess greater capacity, or competence, in factfinding as compared with the courts.<sup>23</sup> Legislatures can draw on a broader range of resources, including the subpoena power and informal sources of information. They are more diverse than the judiciary and represent a broader array of viewpoints and backgrounds, thus fostering a better understanding of the social circumstances requiring legislative solutions. Because they control their own agenda, they are not reactive in the way courts are and can take a broader view of a given social issue. In Congress particularly, legislators can specialize, thus bringing individual expertise to bear in certain contexts, whereas judges

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*Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337, 365 (1984); see also Borgmann, *supra* note 11, at \_\_\_ (summarizing arguments); B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 282 (2007) (same).

<sup>22</sup> *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 196 (1997) (*Turner II*) (emphasis added). The “harm to be avoided” is a factual inquiry whereas the “remedial measures” are a policy choice; in *Turner II*, the Court advocated deferring to both.

<sup>23</sup> See Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1177–79 (2001); HOROWITZ, *supra* note 13, at 25–26, 28–29; Pilchen, *supra* note 21, at 365; Solove, *supra* note 19, at 1005–06; MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 68 (1999); see also Borgmann, *supra* note 11, at \_\_\_ (summarizing arguments); Hill, *supra* note 21, at 282 (same).

*JUDICIAL EVASION*

21

tend to be generalists.

Neither institutional concerns nor relative competence support judicial deference to factfinding in the abortion context.<sup>24</sup> Legislatures seeking to pass abortion restrictions do so for political and ideological reasons, reasons formed prior to any related factfinding and unlikely to be swayed by exposure to countervailing facts. Far from lacking institutional authority to review facts independently in such cases, the courts play an important constitutional role as a protector of individual rights from the tyranny of the majority.<sup>25</sup>

Moreover, rather than enjoying superior factfinding competence, the legislative system is an inherently unfavorable setting for factfinding with integrity. As I have argued,

Superior legislative factfinding competence is a chimera, especially when a legislature considers a proposal that will restrict individual rights in a controversial context. The problem is multi-layered. At the first level lie significant structural issues. Legislators are subject to political pressures beyond their control that are markedly different from those faced by courts, and these pressures profoundly affect the nature of legislative factfinding. The second level of difficulty is legislatures' frequent failure to seize whatever opportunities and advantages they do possess to conduct dispassionate and rigorous factfinding. Finally, the combination of these two problems impairs legislators' cognitive judgment, engendering mistakes in evaluating facts. Legislatures take non-facts for facts, or they dwell on

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<sup>24</sup> For a fuller critique of the principle of judicial deference to legislative factfinding in the context of individual rights, see Borgmann, *supra* note 11, at Part III.

<sup>25</sup> JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 68 (1980); see also FAIGMAN, *supra* note 14, at 175–76; Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753, 801 (2006); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1706–08 (2008); Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 NEB. L. REV. 1, 13 (2006); Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1174 (reviewing MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005)).



insignificant facts. These tendencies are exacerbated when legislators consider hot-button social issues . . . Courts of course face their own obstacles in evaluating facts, and their factfinding is far from perfect. But in important cases they have proven to do a better job than the legislatures, justifying a reevaluation of deference to legislative factfinding in these contexts.<sup>26</sup>

*B. Courts' Treatment of Legislative Factfinding in the Abortion Context*

Until very recently, courts have not deferred to legislative factfinding in abortion cases.<sup>27</sup> Rather, they have independently reviewed the relevant medical and other social facts implicated by abortion legislation. For example, just three years after *Roe*, in *Planned Parenthood v. Danforth*,<sup>28</sup> the Court addressed a Missouri statute banning the saline amniocentesis method of abortion. The statute included a legislative finding that the method was "deleterious to maternal health."<sup>29</sup> Rather than defer to this finding, the Court independently reviewed the facts and found that the safest alternative method—prostaglandin induction—was not readily available. Because saline amniocentesis was, at the time, the most common method of second-trimester abortions, the Court concluded it could not be banned.<sup>30</sup>

In *Akron v. Akron Reproductive Health Services*,<sup>31</sup> the Court likewise refused to defer to the factfinding underlying challenged

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<sup>26</sup> Borgmann, *supra* note 11, at \_\_\_ (footnotes omitted). For a discussion of the conditions that lead to biased factfinding in legislatures, see DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974); Laycock, *supra* note 25, at 1174–75.

<sup>27</sup> See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Akron v. Akron Reprod. Health Servs.*, 462 U.S. 416, 434–37 (1983); *Planned Parenthood v. Danforth*, 428 U.S. 52, 76–79 (1976).

<sup>28</sup> *Danforth*, 428 U.S. at 75–76.

<sup>29</sup> *Id.* at 58.

<sup>30</sup> *Id.* at 78–79.

<sup>31</sup> *Akron*, 462 U.S. at 434–37.

*JUDICIAL EVASION*

23

abortion restrictions. *Akron* involved an ordinance that set forth a number of restrictions, including requirements for a mandatory delay and so-called “informed consent,” hospitalization for all abortions performed after the first trimester, and either parental notice or parental consent for minors (depending on their age).<sup>32</sup> The ordinance contained several “findings” that mixed medical assertions—including that abortion is “a major surgical procedure” that should be performed only in a “hospital or in such other special outpatient facility offering the maximum safeguards to the life and health of the pregnant woman”<sup>33</sup>—with moral views—that “there is no point in time between the union of sperm and egg, or at least the blastocyst stage and the birth of the infant at which point we can say the unborn child is not a human life.”<sup>34</sup>

The Court cautioned that, while the state was permitted to regulate abortion in order to promote women’s health, “[t]he State’s discretion . . . does not, however, permit it to adopt abortion regulations that depart from accepted medical practice.”<sup>35</sup> Thus, the Court declined to defer to Akron’s finding that a hospitalization requirement promoted women’s health. Instead, the Court reviewed evidence regarding the safety and availability of new abortion procedures, as well as professional opinions regarding hospitalization for abortion.<sup>36</sup> The Court also examined the cost to patients of hospital abortions as compared with those performed in outpatient facilities.<sup>37</sup>

Not all of the Justices agreed with the Court’s failure to defer to the government’s factfinding. Justice O’Connor, in a dissenting opinion, at first seemed to acknowledge the inherent difficulties in legislative regulation of the details of medical practice. She suggested that it was unrealistic to expect that legislatures could “continuously and conscientiously study contemporary medical and scientific literature in order to determine whether the effect of a particular regulation is to ‘depart from accepted medical practice’

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 421 n.2.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 431.

<sup>36</sup> *Id.*

<sup>37</sup> *See id.* at 434–35.

insofar as particular procedures and particular periods within the trimester are concerned.”<sup>38</sup> Nevertheless, she argued for deference to legislatures’ factfinding on abortion, asserting, “Irrespective of the difficulty of the task, legislatures, with their *superior factfinding capabilities*, are certainly better able to make the necessary judgments than are courts.”<sup>39</sup>

Despite O’Connor’s admonition, the Court continued to ignore legislative factfinding in subsequent abortion cases. In *Webster v. Reproductive Health Services*,<sup>40</sup> the legislature had included, in an omnibus abortion bill, a “finding” that “[t]he life of each human being begins at conception.”<sup>41</sup> Far from deferring to this finding, the Court interpreted it to have no effect, noting that “the preamble does not by its terms regulate abortion or any other aspect of appellees’ medical practice” and concluding that it be “read simply to express [a] value judgment” favoring childbirth over abortion.<sup>42</sup>

In *Planned Parenthood v. Casey*, the Court wholly disregarded any legislative factfinding and instead reviewed the district court’s findings concerning the effects of several challenged provisions including “informed consent,” husband notification for married women, and parental consent for minors.<sup>43</sup> The Court’s deference to the district court’s findings of fact on these provisions was admittedly uneven. It seemed to take seriously only the district court’s findings on the effect of the husband notification provision, repeating in detail evidence of the social problem of family violence.<sup>44</sup> It was less impressed with the district court’s findings of fact on “informed consent.” Yet even there, the Court purported to accept the district court’s finding that the provision could result in delays and increased health risks to the woman and nowhere

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<sup>38</sup> *Id.* at 456 (O’Connor, J., dissenting).

<sup>39</sup> *Id.* at 456 n.4 (emphasis added).

<sup>40</sup> 492 U.S. 490 (1989).

<sup>41</sup> *Id.* at 504 (referencing MO. REV. STAT. §§ 1.205.1(1)-(2) (1986)).

<sup>42</sup> *Webster*, 492 U.S. at 506.

<sup>43</sup> *See* 505 U.S. at 881–99.

<sup>44</sup> *See* Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After Casey and Carhart*, 31 *FORDHAM URB. L.J.* 675, 678–700 (2004) (comparing Court’s treatment of district court’s factfinding on the various provisions challenged in *Casey*).

## JUDICIAL EVASION

25

deferred to stated or implicit legislative findings regarding the provision's effects. Instead, the Court differed with the district court on the legal significance of its findings, concluding that the statute's predicted effects did not amount to an "undue burden."<sup>45</sup>

Similarly, although the Court in *Casey* did not even mention the district court's findings regarding the harmful effects of the parental consent provision, it upheld the provision not out of deference to the legislature's understanding of the facts, but rather because the Court had previously held such provisions to be permissible under *Roe*.<sup>46</sup> Those earlier decisions themselves were based, not on deference to state legislatures, but on minimal factfinding by the district courts and, primarily, by a constitutional analysis that weighed a minor's right to end her pregnancy against countervailing interests including "the importance of the parental role in child rearing."<sup>47</sup>

The Court continued to disregard legislative factfinding in its 2000 decision in *Stenberg v. Carhart* ("*Carhart I*"),<sup>48</sup> invalidating Nebraska's ban on so-called "partial birth abortion." In *Carhart I*, the trial court, Eighth Circuit, and Supreme Court all independently reviewed the facts underlying Nebraska's "partial-birth abortion" ban and did not even consider deferring to state legislative factfinding.<sup>49</sup> But the Court's decision in *Carhart II*<sup>50</sup> marked a sharp change in its approach to legislative factfinding on abortion. In *Carhart II*, the Court credited dubious legislative factual assertions in order to justify a largely incoherent decision.

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<sup>45</sup> 505 U.S. at 886.

<sup>46</sup> *See id.* at 899.

<sup>47</sup> *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

<sup>48</sup> 530 U.S. 914 (2000).

<sup>49</sup> *See id.* at 923–30; *Stenberg v. Carhart*, 192 F.3d 1142 (8th Cir. 1999); *Carhart v. Stenberg*, 972 F. Supp. 507 (D. Neb. 1997). Similarly, courts considering the many other challenged state bans independently determined the facts without deferring to the legislatures. *See, e.g., R.I. Med. Soc'y v. Whitehouse*, 66 F. Supp. 2d 288, 295 (D.R.I. 1999), *aff'd*, 239 F.3d 104 (1st Cir. 2001); *Planned Parenthood, Inc. v. Miller*, 30 F. Supp. 2d 1157 (S.D. Iowa 1998), *aff'd*, 195 F.3d 386 (8th Cir. 1999); *Eubanks v. Stengel*, 28 F. Supp. 2d 1024 (W.D. Ky. 1998), *aff'd*, 224 F.3d 576 (6th Cir. 2000).

<sup>50</sup> *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

In *Carhart II*, the Court upheld the federal Partial-Birth Abortion Ban Act of 2003, a ban nearly identical to the Nebraska ban struck down in *Carhart I*.<sup>51</sup> Congress had attempted to distinguish its ban from the now-invalid state bans in part by inserting formal congressional findings into the statute. These findings included detailed assertions that the targeted procedure was “not only unnecessary to preserve the health of the mother, but in fact pose[d] serious risks to the long-term health of women and in some circumstances, their lives.”<sup>52</sup> The findings also claimed that the procedure was a rogue method disfavored among abortion providers and not taught in medical schools.<sup>53</sup> The government argued that the courts owed these findings deference.

The Supreme Court’s opinion first acknowledged the importance of judicial deference and, in the next breath, proclaimed its duty to review the facts independently because a “constitutional right” was at issue.<sup>54</sup> Then, despite the demonstrably poor quality of Congress’s factfinding,<sup>55</sup> the Court implicitly deferred to Congress on the issue of whether the ban needed a health exception. The Court gave sufficient credit to Congress’s factfinding to hold that there was medical disagreement as to the risks and benefits of the targeted abortion technique.<sup>56</sup>

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<sup>51</sup> *See id.* at 1619.

<sup>52</sup> 18 U.S.C. § 1531 (2000).

<sup>53</sup> *Id.* (stating that the targeted method is a “disfavored procedure” that is “outside the standard of medical care”).

<sup>54</sup> *See* 127 S. Ct. at 1637 (asserting that “we review congressional factfinding under a deferential standard” but that “[t]he Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake”).

<sup>55</sup> *See* *Planned Parenthood v. Ashcroft*, 320 F. Supp. 2d 957, 1019 (N.D. Cal. 2004) (“[T]he oral testimony before Congress was not only unbalanced, but intentionally polemic.”); Brief of 52 Members of Congress as Amici Curiae Supporting Respondents, *Gonzales v. Planned Parenthood*; *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (Nos. 05-1382, 05-380), 2006 WL 2736635, at 9–10 (arguing that congressional “findings” in the federal ban were drafted by the majority before additional hearings were held, and the subsequent testimony “was politically biased and transparently partisan, calculated to highlight testimony from supporters of the ban”).

<sup>56</sup> *See* 127 S. Ct. at 1636.

*JUDICIAL EVASION*

27

Given this purported disagreement, the Court sided with Congress, determining that a health exception was not needed to render the act constitutional on its face:

Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends . . . . The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.<sup>57</sup>

As David Faigman observes:

In truth . . . this so-called medical disagreement was on the level of such scientific disagreements as evolution versus intelligent design and the reality of global warming. All three lower district courts agreed that there was, at least, "a significant body of medical opinion" that the absence of a health exception carried significant health risks. The "scientific" debate over this procedure was largely manufactured by Congress, which had held highly partisan hearings on the subject and then concluded that a health exception was not necessary. Nonetheless, [Justice] Kennedy relied on this "uncertainty" to support his conclusion that "the Act can survive this facial attack."<sup>58</sup>

In a dramatically dishonest portion of the opinion, the Court went out of its way to signal its approval of broad moral positions promoted by the anti-abortion movement, even as it pretended merely to articulate common-sense reasons for its relatively narrow ruling in the case before it. In an opinion supposedly addressing how abortions may be carried out, the Court suddenly waxed nostalgic about motherhood, proclaiming, "Respect for human life

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<sup>57</sup> *Id.* at 1638; *see also id.* at 1637 ("Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden." (citation omitted)).

<sup>58</sup> FAIGMAN, *supra* note 14, at 60.

finds its ultimate expression in the bond of love the mother has for her child.”<sup>59</sup> Attempting to tie this moral statement to the regulation of abortion, the Court implied that a woman’s right to information was somehow at stake in the case. It suggested that the ban would protect a woman from a painful decision that she would later regret and stressed that it was important for women to be informed of “the way in which the fetus will be killed.”<sup>60</sup> The passage seemed clearly intended to signal to legislatures the Court’s willingness to accept future “informed consent” legislation premised on the dubious factual claim that women experience emotional trauma following abortions.<sup>61</sup>

The Court seemed not to care that medical authority had debunked the theory of a “post-abortion syndrome,”<sup>62</sup> blithely admitting that “we find no reliable data to measure the phenomenon” of post-abortion mental trauma.<sup>63</sup> Further, it seemed to forget that the case was not about information but about whether a certain method could be banned altogether, so that a woman would never have access to it, much less hear a description of it. Justice Ginsburg’s dissent condemned the Court’s awkward invocation of “an antiabortion shibboleth for which it concededly has no reliable evidence” to support a moral position “that could yield prohibitions on any abortion.”<sup>64</sup>

Particularly noteworthy was the Court’s reliance on an amicus brief containing testimonials against abortion that were also cited

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<sup>59</sup> 127 S. Ct. at 1634.

<sup>60</sup> *Id.*

<sup>61</sup> Indeed, the Eighth Circuit recently issued an en banc ruling that was clearly influenced by the Supreme Court’s acceptance of the mental trauma claim, quoting the Court’s entire passage in its opinion. *Planned Parenthood v. Rounds*, 530 F.3d 724 (8th Cir. 2008). *See infra* Part II.B.

<sup>62</sup> *See* 127 S. Ct. at 1648 (Ginsburg, J., dissenting); Post, *supra* note 4, at 962–63. In fairness, the controlling opinion in *Casey* had also suggested that mental trauma might result from abortion if the woman were not “fully informed.” 505 U.S. at 882; *see also* Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 122, 122 & n.66 (2008). The Court did not cite a source for this statement in *Casey*.

<sup>63</sup> 127 S. Ct. at 1634.

<sup>64</sup> *Id.* at 1647–48 (Ginsburg, J., dissenting).

## JUDICIAL EVASION

29

by a legislatively appointed, highly partisan South Dakota task force.<sup>65</sup> The South Dakota legislature relied on the task force's factual findings in enacting a complete ban on abortions in South Dakota.<sup>66</sup> Two anti-abortion lawyers who were architects of the South Dakota strategy acknowledged an implicit conversation between the South Dakota law's advocates and the Court on this point. They wrote that the South Dakota law and its defense in federal court have "been litigated with an eye towards Justice Kennedy" (the author of the majority opinion in *Carhart II*) and that "[i]t was not a coincidence that Justice Kennedy cited to [an amicus brief] which related the experiences of post-abortive women."<sup>67</sup>

At a more general level, the majority opinion in *Carhart II* vividly displays the Court's complicity in factual gamesmanship by legislatures addressing abortion. The Court began its legal analysis by declaring that its central task was to "determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child."<sup>68</sup> But because a law that purports only to ban a single (and allegedly unnecessary) method of abortion can in no measure be said to "protect the life of the fetus," the Court was forced to emulate Congress's contorted attempts to make the foot fit the slipper. The Court explained that the Act protected fetal dignity by fending off a "coarsening" of the culture that would lead to widespread indifference to the lives of newborns and "all vulnerable and innocent human life."<sup>69</sup> The Act allegedly promoted this goal by "proscrib[ing] a method of abortion in which a fetus is killed just

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<sup>65</sup> See Siegel, *supra* note 8, at 1642–43; Post, *supra* note 4, at 966–68.

<sup>66</sup> S.D. HB 1215 (2006) ("[T]he Legislature finds, based upon the conclusions of the South Dakota Task Force to Study Abortion, . . . [that] abortions in South Dakota should be prohibited."). The ban contained only a limited death exception for the woman. See *id.* It was ultimately repealed by voters. See Kaiser Daily Women's Health Policy Report, South Dakota Voters Reject State Abortion Ban (Nov. 8, 2006), available at [http://www.kaiser-network.org/daily\\_reports/rep\\_index.cfm?DR\\_ID=40932](http://www.kaiser-network.org/daily_reports/rep_index.cfm?DR_ID=40932).

<sup>67</sup> Casey & Cassidy, *supra* note 8, at 10, 12.

<sup>68</sup> *Carhart II*, 127 S. Ct. at 1626.

<sup>69</sup> *Id.* at 1633 (quoting congressional findings).



inches before *completion of the birth process*.”<sup>70</sup>

This suggestion that the abortions at issue entailed killing full-term babies about to be born was an utter falsehood. As the Court itself noted, the district court’s injunction against the ban did not apply to fetuses who were viable (let alone to fetuses in the midst of being born).<sup>71</sup> Justice Ginsburg bemoaned the Court’s chicanery:

Ultimately, the Court admits that “moral concerns” are at work, concerns that could yield prohibitions on any abortion. Notably, the concerns expressed are untethered to any ground genuinely serving the Government’s interest in preserving life. By allowing such concerns to carry the day and case, overriding fundamental rights, the Court dishonors our precedent.<sup>72</sup>

Thus, in *Carhart II*, the Court was complicit in injustice in two ways. It failed to acknowledge how the limited “moral concerns” Congress set forth in fact subverted the fundamental norm of protecting the right to abortion set forth in *Casey* and reaffirmed in *Carhart I*. Second, it shirked its duty to identify a sound factual basis for the law, accepting and echoing patently false assertions about the motives for the Act and about its medical implications.

## II. LEGISLATIVE FACTFINDING IN THE ABORTION CONTEXT

### A. *The Problematic Nature of Legislative Factfinding in Abortion Regulation*

Legislatures are by their very nature prone to conduct tendentious, and therefore unreliable, factfinding to support proposed legislation.<sup>73</sup> This tendency can be exacerbated by judicial deference to legislative factfinding, since legislatures who

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<sup>70</sup> *Id.* at 1632–33 (emphasis added).

<sup>71</sup> *See id.* at 1619 (“In 2004, after a 2-week trial, the District Court granted a permanent injunction that prohibited the Attorney General from enforcing the Act in all cases but those in which there was no dispute the fetus was viable. The Court of Appeals for the Eighth Circuit affirmed.” (citation omitted)).

<sup>72</sup> *Id.* at 1647 (Ginsburg, J., dissenting) (citation omitted).

<sup>73</sup> Borgmann, *supra* note 11.

## JUDICIAL EVASION

31

expect that courts will defer to their factual findings will often try to package rights-limiting moral positions as factual claims.<sup>74</sup> In the abortion context, the likelihood of unreliable factfinding is especially acute. Legislatures eager to pass abortion restrictions not only ignore countervailing facts, but both the *Casey* standard and the evolving strategy of the anti-abortion movement have led legislatures to design abortion laws that conceal their true purpose and then to embark on “factfinding” that skirts the ideological basis for the laws.

The unique nature of pregnancy and how the *Casey* Court formulated the constitutional standard for abortion regulation has likely contributed to the legislative propensity to present abortion restrictions as scientifically based. Nearly all abortion restrictions are, at bottom, driven by morality rather than science.<sup>75</sup> But the Court’s abortion decisions have sown confusion about how explicitly the government can base abortion regulations on purely moral underpinnings. The test that *Casey* established, on the one hand, endorsed states’ taking a stance in the moral debate and conveying their stance to women. On the other, it seemed to require adherence to some sort of standard of truth and accuracy more suited to factual assertions than to moral opinions. More fundamentally, it affirmed the constitutional right to abortion, which is squarely at odds with morally based laws designed to limit or ban abortion.

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<sup>74</sup> See *id.* at \_\_ (citing *Buck v. Bell*, 274 U.S. 200, 205, 207 (1927) (deferring in part to “the general declarations of the legislature” in finding that societal welfare would be promoted by sterilizing “mental defectives”); Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1965 (2006) (using *Buck v. Bell* to demonstrate the normative judgments underlying many “factual” assertions by courts)); see also, e.g., MO. REV. STAT. § 1.205 (including “findings” that “the life of each human being begins at conception”; that “[u]nborn children have protectable interests in life, health, and well-being”; and that “[t]he natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child”).

<sup>75</sup> See generally RISEN & THOMAS, *supra* note 4; see also Bopp & Coleson, *supra* note 4; Post, *supra* note 4, at 940–41 (discussing “informed consent” laws).

In *Casey*, the Supreme Court reaffirmed the woman's right to abortion, but it also held that the state's interest in the embryo was compelling from the inception of pregnancy.<sup>76</sup> The Court asserted that these interests "do not contradict one another."<sup>77</sup> This, of course, is nonsense:

The strength of the state's interest in fetal welfare is inversely proportional to that of the woman's liberty. The Court could not expand *Roe*'s recognition of the state's interest in the fetus into the pre-viability stage without placing the woman's liberty fundamentally at risk. . . . Apparently recognizing the hornets' nest into which they had stumbled, the joint opinion's authors attempted a fast exit, adding that "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."<sup>78</sup>

Permissible restrictions, the Court explained, were regulations "not designed to strike at the right itself" but those that "do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn."<sup>79</sup>

The Court was deceiving itself if it thought that such a law could really exist. In fact, there is no meaningful distinction between a law intended to make abortions harder to obtain and one intended to promote the state's preference for childbirth over abortion.<sup>80</sup> As Justice Scalia pointed out in his *Casey* dissent, "Any regulation of abortion that is intended to advance what the joint opinion concedes is the State's 'substantial' interest in protecting unborn life will be 'calculated to hinder' a decision to have an abortion."<sup>81</sup>

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<sup>76</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

<sup>77</sup> *Id.*

<sup>78</sup> Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After Casey and Carhart*, 31 *FORDHAM URB. L.J.* 675, 690–91 (2004) (footnotes omitted).

<sup>79</sup> 505 U.S. at 877; *see also id.* at 878 ("[A] state measure designed to persuade [women] to choose childbirth over abortion will be upheld if reasonably related to that goal" and if it does not impose an undue burden.).

<sup>80</sup> Borgmann, *supra* note 78, at 692.

<sup>81</sup> 505 U.S. at 987 (Scalia, J., dissenting).

## JUDICIAL EVASION

33

By recognizing the state's interest in the embryo or fetus as compelling throughout pregnancy, *Casey* emboldened state legislatures to pass laws motivated by moral opposition to abortion. But these legislatures have also been mindful of *Casey*'s caution that such laws may only incidentally burden access to abortion, and that any mandated information must be "truthful and not misleading."<sup>82</sup> Cautious or uncertain about the extent to which they can openly profess ideological grounds for abortion laws, the legislatures instead present abortion restrictions as rooted in medical and scientific concerns.<sup>83</sup> This juxtaposition of science and morality is particularly vivid in the context of a recently upheld South Dakota "informed consent" law. The Eighth Circuit en banc opinion showed extraordinary deference to the legislature's presentation of moral opinions as scientific fact.<sup>84</sup> But even when restrictions are not about conveying information, legislatures seek to present them as supported, and even motivated, by science and medicine.<sup>85</sup>

It is not hard to imagine what laws and legislative factfinding look like when a legislature is forthright about the ethical basis for a proposed law. If a legislature wants to prevent vandalism to buildings occupied by religious institutions, it enacts a ban on such behavior.<sup>86</sup> The legislative hearing process is likely dominated by ethical concerns and presumably acknowledges the bill's moral impetus.<sup>87</sup> To the extent the legislature delves into factfinding, it explores factual questions directly relevant to the law's the moral purposes. It may also use the factfinding process to rally moral outrage, perhaps by documenting the extent and heinousness of vandalism targeting religious institutions. Likewise, if a legislature believed abortions were immoral and openly sought to prevent them on this basis, its first step would be to propose a ban. In

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<sup>82</sup> *Id.* at 882.

<sup>83</sup> Siegel, *supra* note 8 (describing strategic shifts in social movement opposing abortion as responsible for abortion restrictions premised on women's emotional and physical well-being).

<sup>84</sup> *See infra* Part II.B.

<sup>85</sup> *See infra* Part II.C.–D.

<sup>86</sup> *See, e.g.*, CAL. PENAL CODE § 594.3 (2008).

<sup>87</sup> *See id.*

support of the ban, it would introduce evidence about the numbers of abortions and perhaps about the reasons women seek them. It might also try to demonstrate how effective its legislation would be in preventing abortions. It might even take a page from the book of some extreme anti-abortion-rights advocates, showing images of aborted fetuses or giving other information designed to raise discomfort over abortion.<sup>88</sup>

But *Casey* and *Carhart I* and *II* tell legislatures that they may not unduly burden access to abortion, so bans are out of the question. Moreover, even restrictions short of a ban are subject to *Casey*'s admonition that laws may not be "designed to strike at the right itself"<sup>89</sup> and may impart only "truthful, nonmisleading" information.<sup>90</sup> It is unclear how this standard applies to laws rooted in moral opposition to abortion. Consequently, abortion rights opponents seem to feel obligated to hide the ball on abortion legislation.<sup>91</sup> Abortion providers are targeted with onerous and discriminatory facility regulations purportedly in order to safeguard women's health and safety, when in fact the goal is to force clinics to shut down.<sup>92</sup> "Informed consent" regulations are allegedly designed to protect women's mental health, when in fact they endeavor to trick women through misleading and selective disclosures into rejecting abortion.<sup>93</sup> Fetal pain measures supposedly aim to alleviate fetal pain during abortion, when in fact they are meant to provoke moral outrage against abortion by

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<sup>88</sup> These kinds of "facts" often still find their way into legislative factfinding on abortion measures, but in a more cunning, indirect way. *See infra* Part II.B.

<sup>89</sup> 505 U.S. at 877.

<sup>90</sup> *Id.* at 882.

<sup>91</sup> It is not *Casey* alone that has prompted the anti-abortion movement to repackage moral arguments against abortion as public health arguments. *See* Siegel, *supra* note 8, at 2 (detailing evolution of anti-abortion movement, including shift from moral arguments about the humanity of the embryo or fetus to public health arguments centered on abortion's alleged harm to women).

<sup>92</sup> *See* Bopp & Coleson *supra* note 4 (anti-abortion strategy memo, referring to benefits of "'incremental' efforts" to eliminate abortion, including "clinic regulations (which often shut down clinics)"); Casey & Cassidy, *supra* note 8, at 7–8.

<sup>93</sup> *See* Post, *supra* note 4, at 940–41; *infra* Part II.B.

*JUDICIAL EVASION*

35

equating the fetus with a baby or child.<sup>94</sup> In South Dakota, anti-abortion-rights activists are gearing up for the ultimate conflation of science and morality on the issue of abortion; they intend to “prove” in legislative hearings, through scientific evidence, that a fetus is a person. They plan to do so first in the context of defending South Dakota’s “informed consent” law.<sup>95</sup> But they see this law as merely a step toward the final goal: “proving” the humanity of the fetus so that the Supreme Court has no choice but to overturn *Roe*.<sup>96</sup>

*B. “Informed Consent” Laws and “Proving” Fetal Personhood*

*Casey*’s confusing directive to states on permissible abortion regulation seems most clearly to contemplate an “informed consent” law. It seems straightforward enough that, under *Casey*, a state may enact a law expressing the state’s preference for childbirth. But, of course, a law that requires women to hear simply that the legislature thinks abortion is immoral and prefers childbirth would not be very effective. As soon as legislatures attempt to go beyond such a bland statement, however, they butt up against *Casey*’s “truthful and not misleading” limitation.<sup>97</sup> Earlier generations of these laws required abortion providers to disclose or offer basic, “neutral” information, such as the gestational age of the fetus and depictions of fetuses at various anatomical stages.<sup>98</sup> Current versions require that women seeking

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<sup>94</sup> See *infra* Part II.C.

<sup>95</sup> See *Casey & Cassidy*, *supra* note 8, at 8 (predicting that a “trial on the humanity of the child will likely take place in 2008” following the Eighth Circuit’s en banc ruling).

<sup>96</sup> See *id.*; see also ChristianNewsWire, *U.S. Appeals Court Decision Acknowledges Humanity of Unborn Child* (July 3, 2008), <http://christiannewswire.com/news/657267089.html>.

<sup>97</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 882 (1992); see *supra* text accompanying notes 75–85.

<sup>98</sup> See, e.g., S.D. CODIFIED LAWS § 34-23A-10.1 (2008); *Akron v. Akron Reprod. Health Servs.*, 462 U.S. 416, 423 (1983) (describing “informed consent” provisions of abortion ordinance).

abortion view, or at least be offered the opportunity to view, ultrasound images of their fetuses,<sup>99</sup> or they require that doctors recite blatantly ideological statements on the state's behalf.<sup>100</sup>

First-generation "informed consent" laws sometimes also contained moral statements, but these seemed to acknowledge that positions on abortion are a matter of belief or conviction, not science. For example, an Illinois law required that doctors give patients printed materials about abortion that included the following statement: "The State of Illinois wants you to know that *in its view* the child you are carrying is a living human being whose life should be preserved. Illinois strongly encourages you not to have an abortion but to go through to childbirth."<sup>101</sup> This pre-*Casey* provision was invalidated,<sup>102</sup> but it is not clear that *Casey* would forbid such a requirement as "misleading."<sup>103</sup> The law goes slightly beyond a bare recitation of the state's preference by asserting that the embryo or fetus "is a living human being" (and a "child"), but it admits that this is the state's "view," suggesting opinions may differ.

The tack recently taken by some legislatures in the current generation of "informed consent" laws is to present similar moral "information," but to clothe it in scientific or public health garb.<sup>104</sup>

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<sup>99</sup> See, e.g., OKLA. STAT. tit. 63, § 1-741 (2008); S.C. CODE ANN. § 44-41-330 (2007); see also Daily Women's Health Policy Report, *S.C. Legislature Approves Abortion Ultrasound Measure* (Apr. 21, 2008), available at [http://www.nationalpartnership.org/site/News2?news\\_iv\\_ctrl=-1&abbr=daily2\\_&page=NewsArticle&id=11037](http://www.nationalpartnership.org/site/News2?news_iv_ctrl=-1&abbr=daily2_&page=NewsArticle&id=11037) (discussing earlier version of South Carolina bill which required women to view ultrasound).

<sup>100</sup> See, e.g., S.D. CODIFIED LAWS § 34-23A-10.1 (2008).

<sup>101</sup> *Charles v. Carey*, 627 F.2d 772, 781 n.13 (7th Cir. 1980) (emphasis added).

<sup>102</sup> *Id.* at 775 n.2.

<sup>103</sup> *Casey*, 505 U.S. at 882.

<sup>104</sup> See *Planned Parenthood v. Rounds*, 530 F.3d 724, 748 (2008) (Murphy, J., dissenting) (describing South Dakota law as requiring "vague and ideological statements disguised as medical information"); Siegel, *supra* note 8, at 1673 (describing how anti-abortion activist David Reardon took moral objections to abortion rooted in "the language of Christian love" and couched them "as a concern about women's welfare expressed in the language of public health," which would appeal more to ambivalent voters).

## JUDICIAL EVASION

37

Thus, for example, when the South Dakota legislature enacted an “informed consent” measure, it included in the law a “finding” that “all abortions, whether surgically or chemically induced, terminate the life of a whole, separate, unique, living human being.”<sup>105</sup> The statute required doctors to deliver a similar message to their abortion patients, namely “[t]hat the abortion will terminate the life of a whole, separate, unique, living human being.”<sup>106</sup> While most would read this as an explicitly moral pronouncement, a South Dakota task force appointed by the legislature to investigate the effects of abortion characterized the assertion “as a matter of scientific fact.”<sup>107</sup>

The South Dakota “informed consent” law was immediately challenged in federal court.<sup>108</sup> One of the plaintiffs’ claims was that the statute’s disclosure requirements violated physicians’ free speech rights. The plaintiffs sought a preliminary injunction to prevent the statute from taking effect. Following the submission of evidence (which included facts from the legislative history) and a hearing, the district court granted the preliminary injunction based on the physicians’ free speech claim.<sup>109</sup> A divided panel of the Eighth Circuit Court of Appeals affirmed, but the court granted a rehearing en banc.<sup>110</sup>

While the en banc ruling was pending, two lawyers and architects of the South Dakota strategy<sup>111</sup> described the *Rounds* case as addressing purely “legal and factual issues,” including women’s alleged regret after abortion and the “humanity” of the embryo or fetus. In fact, they predicted, once the Eighth Circuit issued its en banc ruling, “a trial on the humanity of the child” would follow.<sup>112</sup>

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<sup>105</sup> H.B. 1166, 2005 Legis. Assem., 80th Sess. (S.D. 2005).

<sup>106</sup> *Id.*

<sup>107</sup> SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 5 (2005), available at [http://www.voteyesforlife.com/docs/Task\\_Force\\_Report.pdf](http://www.voteyesforlife.com/docs/Task_Force_Report.pdf).

<sup>108</sup> *Rounds*, 530 F.3d at 724.

<sup>109</sup> *Rounds*, 530 F.3d at 729 (summarizing district court’s ruling).

<sup>110</sup> *Id.* at 730.

<sup>111</sup> See Siegel, *supra* note 8, at 1646 n.16.

<sup>112</sup> Casey & Cassidy, *supra* note 8, at 7–8.



The Eighth Circuit en banc ruling gave extraordinary deference to the legislature's blatant attempt to package a moral statement about when life begins as a scientific statement about embryonic genetics. It was important that the court accept the legislature's characterization of the question as scientific, because it interpreted *Casey* and *Carhart II* to forbid South Dakota to convey a purely moral viewpoint through physicians. As the court stated the test:

[W]hile the State *cannot compel an individual simply to speak the State's ideological message*, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion."<sup>113</sup>

The court found that the "informed consent" law's mandated disclosure met this test:

Once one accepts that the required disclosure must take into account the limiting definition in § 8(4), the evidence submitted by the parties regarding the truthfulness and relevance of the disclosure in § 7(1)(b) generates little dispute. The disclosure actually mandated by § 7(1)(b), in concert with the definition in § 8(4), is "[t]hat the abortion will terminate the life of a whole, separate, unique, living human being," § 7(1)(b), and that "human being" in this case means "an individual living member of the species of *Homo sapiens* . . . during [its] embryonic [or] fetal age[]," § 8(4).<sup>114</sup>

The court assured that "the biological sense in which the embryo or fetus is whole, separate, unique and living should be clear in context to a physician" and noted that "Planned Parenthood submitted no evidence to oppose that conclusion."<sup>115</sup>

To accept the South Dakota legislature's findings as scientific fact is to make the absurd suggestion that pregnant women do not know that the embryo or fetus they are carrying is of the human

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<sup>113</sup> *Rounds*, 530 F.3d at 734–35.

<sup>114</sup> *Id.* at 735.

<sup>115</sup> *Id.* at 736.

## JUDICIAL EVASION

39

species.<sup>116</sup> There is no other way to interpret the South Dakota findings on a scientific level—as science, the information conveyed is laughably obvious and unnecessary. Robert Post writes, “It hardly seems plausible that a woman could be confused about whether she is carrying the biological fetus of a zebra, a raccoon, or a bat.”<sup>117</sup> If the information were presented with more scientific detail, it might impart information women do not typically know, but it still seems unlikely to affect a woman’s abortion decision. For example, few women are likely to be deterred from obtaining abortions simply because they are told:

Although the material messenger RNA initially present in the fertilized egg can provide the basic functions necessary to transcribe the [blastocyst’s] DNA in the initial one or two cell divisions immediately following fertilization, these messenger RNAs are quickly degraded and lost after the first two rounds of cell division, and the housekeeping genes in the [blastocyst’s] own DNA are transcribed into messenger RNA at that point. This newly synthesized RNA directs the program of global demethylation of genes so that they can be activated to replenish the functions lost after the degradation of the maternal RNA. Modern molecular biology has discovered that by the third cell division (long before implantation) all control of growth and development are established by the [blastocyst’s] DNA. This means that immediately after conception, all programming for growth of the [blastocyst] is self-contained.<sup>118</sup>

It is only as a *moral* statement that the legislature’s “findings” become significant. The South Dakota legislature has a particular opinion about the moral significance of the scientific facts that it

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<sup>116</sup> See Caitlin E. Borgmann, *Eighth Circuit to Pregnant Women: You’re Not Carrying a Dolphin!*, Reproductive Rights Prof Blog (June 28, 2008), available at [http://lawprofessors.typepad.com/reproductive\\_rights/2008/06/eighth-circui-1.html](http://lawprofessors.typepad.com/reproductive_rights/2008/06/eighth-circui-1.html).

<sup>117</sup> Post, *supra* note 4, at 954.

<sup>118</sup> SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, *supra* note 107, at 25.

wants the woman to hear.<sup>119</sup> Pregnant women, given not the dry science quoted above but rather the statement required by the statute, will get a strong message from the state that the embryo or fetus is morally equivalent to a child, that the pregnant woman is already the “mother” of that child, and that to proceed with the abortion would be to murder her own child.<sup>120</sup> The Task Force Report noted, “For women *who believe that they have consented to the killing of a human being*, the burden of guilt can be unbearable.”<sup>121</sup> The informed consent statute thus becomes a self-fulfilling prophesy. Women are persuaded of the state’s moral position, which leads those who have had abortions to suffer “unbearable” guilt, and this mental anguish must now be conveyed to women as part of the “informed consent” process.

The South Dakota Task Force to Study Abortion continued and expanded the South Dakota legislature’s efforts to transform moral pronouncements about abortion into scientific statements. The Task Force was established pursuant to a companion bill to the “informed consent” statute.<sup>122</sup> The bill’s mandate was wide-ranging, directing the Task Force to study, among other issues, “the practice of abortion since its legalization” and “the societal, economic, and ethical impact and effects of legalized abortion.”<sup>123</sup> The Task Force thus picked up the themes of the factfinding conducted in support of the “informed consent” law and laid the groundwork for a later law banning abortion in South Dakota entirely.<sup>124</sup> The legislature relied heavily upon the Task Force’s report in enacting the ban, which, in contrast to the “informed

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<sup>119</sup> See Post, *supra* note 4, at 954–55.

<sup>120</sup> See *id.* at 958.

<sup>121</sup> SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, *supra* note 107, at 43.

<sup>122</sup> *Id.* at 4; see also Siegel, *supra* note 8 (offering a detailed description and analysis of the South Dakota Task Force Report).

<sup>123</sup> HB 1233, 80th Legis. Assem., Reg. Sess. (S.D. 2005); SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, *supra* note 107, at 5.

<sup>124</sup> HB 1215, 81st Legis. Assem., Reg. Sess. (S.D. 2006), See Kaiser Daily Women’s Health Policy Report, *supra* note 66 (reporting on the overturning of South Dakota abortion ban by voter initiative); see also CASEY & CASSIDY, *supra* note 8, at 8–10 (describing South Dakota strategy).

## JUDICIAL EVASION

41

consent” law, was intended to put the issue of overturning *Roe* directly before the Supreme Court.<sup>125</sup>

Much of the Task Force’s inquiry centered on whether a fetus is a “human being.” The Task Force elicited scientific testimony describing the genetic structure of a human embryo, but its question to witnesses opposing the ban exploited the ambiguity between the superficially scientific question of genetics and the moral question that obviously motivated the entire project.<sup>126</sup> Confused, or suspicious of the Task Force’s motives, these witnesses refused to answer. The report notes, “No credible evidence was presented that challenged these *scientific facts* [that the ‘human embryo and fetus is . . . a human being’]. In fact, when witnesses supporting abortion were asked *when life begins*, not one would answer the question, stating that it would only be their personal opinion.”<sup>127</sup>

Although the Task Force deliberately melded scientific and philosophical questions about “life,” it ironically accused Planned Parenthood of confusing the moral and scientific facts about when life begins: “We find that Planned Parenthood has confused the objective biological fact that the procedure terminates the life of a human being with the moral, or value judgment of what respect or value should be placed upon the life of that human being.”<sup>128</sup> The Task Force repeatedly denied intending to attach any moral significance to its findings concerning the biological uniqueness of a human embryo.<sup>129</sup> Yet the Task Force clearly intended that

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<sup>125</sup> See Evelyn Nieves, *S.D. Abortion Bill Takes Aim at ‘Roe’*, WASH. POST (Feb. 23, 2006); Casey & Cassidy, *supra* note 8, at 2.

<sup>126</sup> See Post, *supra* note 4, at 957–58.

<sup>127</sup> SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, *supra* note 107, at 12.

<sup>128</sup> *Id.* at 17.

<sup>129</sup> See, e.g., *id.* at 30. The Task Force parlayed other kinds of scientific “facts” into ethical edicts as well. For example, the Report condemned abortions in cases of rape or incest by quoting a pediatrician who testified that incest seldom leads to “deformities.” He then recounted the story of a “very young teenage mother” who was “allegedly raped by her brother.” He lauded the “young lady’s courage to choose life for her newborn son.” *Id.* at 32–33. Still other parts of the report were openly moral in nature. See, e.g., *id.* at 34 (“[A]bortion is unethical and immoral and our support of it as a society wounds

women discern an ideological message in the supposedly “scientific” information.<sup>130</sup>

Apart from its shrewd conflation of morality and science, the South Dakota Task Force’s report dramatically demonstrates the dangers of relying upon “scientific” findings legislatures make in the politically charged context of abortion. Although the Task Force heard from witnesses on both sides of the issue, it cherry-picked those conclusions that fit its blatantly ideological agenda and conclusorily dismissed the others as noncredible. The witnesses the Task Force found the most credible were ideologically opposed to abortion. For example, several of the doctors it quoted were leaders in the anti-abortion movement.<sup>131</sup> The Task Force’s findings regarding women’s alleged regret after abortion were not based on credible evidence, as even the conservative majority on the Supreme Court has acknowledged.<sup>132</sup> The Task Force was also impressed with the testimony of “pregnancy help center personnel.”<sup>133</sup> The reliance upon “pregnancy help centers” seems innocuous, but in fact these centers are formed to dissuade women from having abortions and to perpetuate the myth that abortion causes post-traumatic stress disorder.<sup>134</sup> Improbably, the Task Force described the testimony of

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all of us.”).

<sup>130</sup> See Post, *supra* note 4, at 957–58. The Task Force objected to the unadorned, factual information abortion providers currently do provide patients. This information includes the relative risks of childbirth and abortion, the relative safety of abortion procedures, and the fact that there is no credible evidence of long-term mental trauma from abortion. See SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, *supra* note 107, at 40–41.

<sup>131</sup> One doctor was Bernard Nathanson, a former pro-choice advocate who became an activist against abortion rights and created the famous anti-abortion film, “The Silent Scream.” See SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, *supra* note 107, at 11–12.

<sup>132</sup> *Carhart II*, 127 S. Ct. at 1634; see also Siegel, *supra* note 8, at 1689.

<sup>133</sup> SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, *supra* note 107, at 19–21.

<sup>134</sup> See Post, *supra* note 4, at 940–41; United States House Of Representatives Committee On Government Reform — Minority Staff, Special Investigations Division, *False And Misleading Health Information Provided By Federally Funded Pregnancy Resource Centers* (July 2006) (prepared for Rep.

*JUDICIAL EVASION*

43

these witnesses as “particularly credible because they are free of any conflict of interest” since they “do not provide abortions.”<sup>135</sup>

The Task Force’s factfinding was so biased, in fact, that the anti-abortion chair of the Task Force voted against its final report.<sup>136</sup> She later campaigned against the South Dakota abortion ban, enacted on the heels of the Task Force’s report, “because, she said, the Task Force had opposed motions to restrict the evidence it accepted to ‘data that is consistent with current medical science and based on the most rigorous and objective scientific studies.’”<sup>137</sup>

*C. Fetal Pain Laws*

Fetal pain laws are a recently added component in several states’ abortion-specific “informed consent” laws,<sup>138</sup> although some go further and require abortion providers to administer anesthesia to the fetus if the woman consents.<sup>139</sup> Arkansas’s law requires that women seeking abortions at twenty weeks or later<sup>140</sup> be offered printed materials about “fetal pain.”<sup>141</sup> The materials include the statement:

By twenty (20) weeks gestation, the unborn child has the physical structures necessary to experience pain. There is evidence that by twenty (20) weeks gestation unborn children seek to evade certain stimuli in a manner that in an infant or an adult would be interpreted to be a response to

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Henry A. Waxman), available at <http://oversight.house.gov/story.asp?ID=1080>.

<sup>135</sup> SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, *supra* note 107, at 19.

<sup>136</sup> Siegel, *supra* note 8, at 1681.

<sup>137</sup> *Id.*

<sup>138</sup> See generally Tobin, *supra* note 62 (discussing and analyzing fetal pain laws in context of medical informed consent principles). Congress has also considered a fetal pain measure, the Unborn Child Pain Awareness Act of 2006. See *id.* at 141 n.169.

<sup>139</sup> See, e.g., ARK. CODE ANN. § 20-16-1104 (2005).

<sup>140</sup> In Georgia, women must be offered similar information regardless of the stage of their pregnancy. See GA. CODE ANN. §§ 31-9A-3, -4 (2006).

<sup>141</sup> ARK. CODE ANN. §§ 20-16-1103, -1105 (2005).

pain. Anesthesia is routinely administered to unborn children who are twenty (20) weeks gestational age or more who undergo prenatal surgery.<sup>142</sup>

The laws are presented as ensuring that women's decisions regarding abortion are fully informed, as well as to give the pregnant woman an opportunity to authorize or demand fetal anesthesia.<sup>143</sup> Like the South Dakota "informed consent" law, fetal pain measures are presented as reflecting value-neutral, scientific information. Arkansas's statute requires that "the materials shall be objective, nonjudgmental, and designed to convey only accurate scientific information about the human fetus at the various gestational ages."<sup>144</sup>

Far from reflecting concerns about fetal pain drawn from reliable scientific research, however, fetal pain laws are designed to make women feel troubled about ending the pregnancy by making women think of their fetuses as morally equivalent to babies. As a reporter observes, "[I]t is clear that many of the anti-abortion activists . . . have something more sweeping in mind [than preventing fetal pain]: changing perceptions of the fetus."<sup>145</sup> The reporter further notes that "[a]nother, perhaps intended, effect of fetal-pain laws may be to make abortions harder to obtain," since many abortion clinics do not have the equipment or expertise to administer fetal anesthesia.<sup>146</sup>

A strategy memo from prominent anti-abortion attorney James Bopp, Jr., confirms that the ultimate motive for the laws is not to alleviate fetal pain but to turn the public against abortion. The memo lists "helpful legal changes" short of bans that will serve to "keep the abortion issue alive and change hearts and minds . . . transl[ate] into more disfavor for all abortions."<sup>147</sup> The list includes "statute[s] patterned after the proposed Unborn Child Pain Awareness Act" and "statute[s] informing the woman seeking an

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<sup>142</sup> *Id.* § 20-16-1105(a)(1)(A).

<sup>143</sup> *See, e.g., id.* §§ 20-16-1103, -1104, -1105.

<sup>144</sup> *Id.* § 20-16-1105(a)(1)(B).

<sup>145</sup> Annie Murphy Paul, *The First Ache*, N.Y. TIMES MAG., Feb. 10, 2008.

<sup>146</sup> *Id.*

<sup>147</sup> Bopp & Coleson, *supra* note 4, at 6.

*JUDICIAL EVASION*

45

abortion that the unborn will experience pain.”<sup>148</sup> These statutes are expected to “change hearts and minds” because the notion that a fetus can feel pain will make it seem more like a person:

In their use of pain to make the fetus seem more fully human, anti-abortion forces draw on a deep tradition. Pain has long played a special role in how society determines who is like us or not like us (“us” being those with the power to make and enforce such distinctions). The capacity to feel pain has often been put forth as proof of a common humanity.<sup>149</sup>

Like the South Dakota “informed consent” law, fetal pain laws are designed to conceal their ulterior, ideological motives, purporting instead to reflect only neutral, scientific facts. As a commentator notes, “The express purpose of [fetal pain measures] is to diminish the suffering that a fetus must endure as part of a post-20-week abortion. But the real purpose . . . is to discourage women from choosing an abortion by stressing that a 20-week-old fetus feels pain.”<sup>150</sup>

Legislative factfinding on fetal pain is not just problematic because it deceives the public about the legislation’s true motives. It is also substantively unreliable. Although the laws purport to reflect scientific research showing that fetuses may experience pain after a certain stage of pregnancy, the scientific community is divided on this claim. Harper Jean Tobin argues that two out of three of the most commonly mandated statements on fetal pain “are questionable on the issue of truthfulness, and all are misleading.”<sup>151</sup> Most women would likely infer from these statements that fetuses can perceive pain and that anesthesia will alleviate that pain. The women are told nothing of the conflicting evidence concerning whether and when fetuses can perceive pain.

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<sup>148</sup> *Id.* at 9.

<sup>149</sup> Paul, *supra* note 145.

<sup>150</sup> Arthur Caplan, *Abortion Politics Twist Facts in Fetal Pain Laws*, MSNBC.com (Nov. 30, 2005), available at <http://www.msnbc.msn.com/id/10238840/> (The author is the director of the Center for Bioethics at the University of Pennsylvania.).

<sup>151</sup> Tobin, *supra* note 62, at 33–38.



Nor are they told that even physicians who do not believe fetuses perceive pain may nevertheless administer fetal anesthesia during prenatal surgery in order to make the surgery easier (by immobilizing the fetus and/or relaxing the uterus) and to improve surgical outcomes (by reducing the production of fetal stress hormones).<sup>152</sup>

As Tobin explains, the research on fetal pain is at best inconclusive.<sup>153</sup> Researchers and medical experts are sharply divided on the issue of fetal pain and the advisability of fetal anesthesia. Some believe that fetuses can perceive pain beginning around twenty weeks of pregnancy and that, even if this fact is uncertain, doctors should “play it safe” by anesthetizing fetuses before abortion. Others object that, in the presence of uncertainty, a doctor “playing it safe” should not anesthetize the fetus before abortion, since such a procedure increases the woman’s health risks.<sup>154</sup>

In a 1980 decision striking down an early fetal pain measure, the Seventh Circuit refused to defer to the legislature’s assertions about the fetus’s ability to perceive pain. Instead, it independently reviewed the facts and concluded, “The uncontroverted medical testimony in the record at this stage describes this information as ‘medically meaningless, confusing, medically unjustified, and contraindicated, causing cruel and harmful stress to patients.’”<sup>155</sup> Fetal pain measures may still be unconstitutional today, particularly if it can be proved that the information the legislature requires is either false or misleading.<sup>156</sup> But this constitutional argument can succeed only if the courts refuse to defer blindly to legislative factfinding on fetal pain.<sup>157</sup>

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<sup>152</sup> *Id.* at 143; Paul, *supra* note 145.

<sup>153</sup> See Tobin, *supra* note 62, at 149.

<sup>154</sup> Paul, *supra* note 145.

<sup>155</sup> Charles v. Carey, 627 F.2d 772, 784 (7th Cir. 1980).

<sup>156</sup> See Tobin, *supra* note 62. But see Antony B. Kolenc, *Easing Abortion’s Pain: Can Fetal Pain Legislation Survive the New Judicial Scrutiny of Legislative Fact-Finding?*, 10 TEX. REV. L. & POL. 171, 228 (2005) (arguing that fetal pain laws should be held constitutional).

<sup>157</sup> But see Kolenc, *supra* note 156, at 218–19 (arguing that judicial deference to legislative factfinding on fetal pain may be appropriate since “facts

## JUDICIAL EVASION

47

## D. "Partial-Birth Abortion"

Like "informed consent" and fetal pain laws, "partial-birth abortion" bans vividly demonstrate the dangers of judicial deference to legislative factfinding on abortion. The bans were conceived and promoted by advocates and politicians who oppose *all* abortions.<sup>158</sup> Although they purported to be about a particular abortion procedure, they were intended to force the public to confront the details of abortion procedures, and thereby to turn public sentiment against abortion. The campaign to prohibit "partial-birth abortion" was thus part of an assiduously planned strategy to muster public outrage over abortion more generally.<sup>159</sup>

The campaign to ban so-called "partial-birth abortion" began as a collaboration between a National Right to Life Committee ("NRLC") lobbyist, Douglas Johnson, and Charles Canady, a right-wing Republican congressman from Florida. The anti-abortion-rights movement had failed to see *Roe v. Wade* overturned in the 1980s and early 1990s. In response to its decisive defeat in *Planned Parenthood v. Casey*, the movement shifted its focus to passing incremental restrictions that would gradually undermine the core right to abortion. When Dr. Martin Haskell presented a lecture at a national conference of abortion providers, describing a new variation on the most common method of second- and third-trimester surgical abortions, Johnson and Canady seized upon it. They believed that the method was a perfect vehicle to provoke moral outrage at abortion generally. A description of this procedure would arrest the public's attention, in part because it was not so disturbing as to cause the public to avert its eyes. Johnson and Canady coined a deliberately incendiary term for

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regarding fetal pain are best discovered using the processes normally seen as legislative strengths -- long investigations, evolving medical evidence, and a building of institutional expertise in a complex area").

<sup>158</sup> Brief for NARAL Foundation, et al. as Amici Curiae supporting Respondents, *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>159</sup> See Cynthia Gorney, *Gambling with Abortion: Why Both Sides Think They Have Everything To Lose*, HARPER'S MAG., Nov. 1, 2004, at 33; Nadine Strossen & Caitlin Borgmann, *The Carefully Orchestrated Campaign*, 3 NEXUS 3, 5-6 (1998).

Haskell's method, "partial-birth abortion." Pursuant to Johnson and Canady's plan, the NRLC circulated model legislation, along with strategic advice, to all of its state chapters. The state and federal bans that followed were thus a product of this carefully orchestrated public relations campaign.<sup>160</sup>

As part of the campaign, line drawings purporting to depict the targeted procedure were developed specifically to make the fetus appear as a newborn infant. As a recent anti-abortion strategy memo acknowledged, "The PBA drawings set before the public showed a *developed baby, capable of life outside the womb, within inches of birth*, being slaughtered by a stab in the skull and the suctioning of its brains. People were shocked out of their lethargy and flawed beliefs."<sup>161</sup> In fact, the intact D&E<sup>162</sup> variant of D&E abortions is often used in the second trimester of pregnancy, well before fetal viability.<sup>163</sup>

The point of the drawings, however, was not to engage in a medically accurate public dialog about abortion procedures. Rather, it was to fuse abortion and infanticide in the public consciousness. In a memo the NRLC distributed to its state chapters nationwide,<sup>164</sup> Johnson acknowledged the bans' true purpose. Far from reflecting a considered, public response to a medically questionable procedure, the bans were intended to draw pro-choice advocates into discussions centering on how abortions are performed. The memo advised:

When someone attacks the definition as "unclear" or as overly sweeping, simply keep reading the definition and asking, "What part of this is not clear? *Please describe in detail the procedures that you want to do that you believe*

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<sup>160</sup> Strossen & Borgmann, *supra* note 159, at 26 (footnotes omitted).

<sup>161</sup> Bopp & Coleson, *supra* note 4, at 5. The Supreme Court adopted this depiction of the procedure as performed upon full-term babies. *See supra* text accompanying notes 68–69.

<sup>162</sup> "D&E" stands for "dilation and evacuation," the most common method of abortion after the first trimester of pregnancy. *See Carhart I*, 530 U.S. at 924. "Intact D&E" is a variant of this procedure and is also sometimes referred to as "D&X." *Id.* at 927.

<sup>163</sup> *See* Bopp & Coleson, *supra* note 4, at 5.

<sup>164</sup> *See* Amicus Brief of NARAL Foundation, et. al., *supra* note 158.

## JUDICIAL EVASION

49

would be banned by this definition.” Generally, the pro-abortion side quickly drops this discussion, as it *serves mainly to focus the discussion on the grisly mechanics* of late term abortions.<sup>165</sup>

In contrast to recent “informed consent” laws and fetal pain measures, “partial-birth abortion” bans were openly moral in purpose.<sup>166</sup> But the real moral purpose, to advance a future ban on all abortions, was not legally acceptable. Nor were the bans reasonably related to that goal, since they purported to ban only a single procedure. “Partial-birth abortion” thus became a decoy in the battle to win over the public. Advocates narrowed the moral goals, allegedly aiming only to protect the dignity of the fetus and to promote the integrity of the medical profession.<sup>167</sup> Yet even these goals could be pursued only insofar as the bans did not unduly burden the right to abortion.<sup>168</sup> If the bans endangered women’s health, they would impose an undue burden.<sup>169</sup> In order to prove that the bans could be constitutional even without a health exception, legislatures had to appeal to medical “facts.” They had to demonstrate that the targeted method was medically questionable (i.e. not widely accepted by the medical establishment) and of little to no medical benefit, or even affirmatively dangerous, to women.<sup>170</sup>

Anti-abortion advocates therefore portrayed the procedure as a rogue method that was invented more for physicians’ convenience than women’s safety and wellbeing.<sup>171</sup> They suggested that a fetus

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<sup>165</sup> *Id.* at 17 (quoting memo) (emphasis added).

<sup>166</sup> See Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (Supp. IV 2000); *Carhart II*, 127 S. Ct. at 1633.

<sup>167</sup> See 18 U.S.C. § 1531; *Carhart I*, 530 U.S. at 930–31.

<sup>168</sup> See *Casey*, 505 U.S. at 837.

<sup>169</sup> See *Carhart I*, 530 U.S. at 931; Borgmann, *supra* note 44.

<sup>170</sup> Legislatures did not attempt to defend the premise regarding fetal dignity, probably because a comparison to other procedures would inevitably have failed to show why intact D&E was any more of an affront to fetal dignity than other available procedures.

<sup>171</sup> See, e.g., Illinois Right to Life Committee, Partial Birth Abortion Ban: In Depth, <http://www.illinoisrighttolife.org/PartialBirthAbortionBan.htm> (“[T]he procedure itself is dangerous and solely for the convenience of

aborted through this procedure could be born and could survive if only the physician did not kill it first.<sup>172</sup> They gave dramatic accounts of risks the procedure allegedly carried.<sup>173</sup> They claimed that banning the procedure would not harm women because alternative methods were just as safe or safer.<sup>174</sup> Ultimately, none of this “factfinding” had anything to do with the real impetus for the bans. As Judge Richard A. Posner wrote, dissenting from a Seventh Circuit decision addressing two state “partial-birth abortion” bans:

The statutes do not seek to protect the lives or health of pregnant women, or of anybody else. . . . Any general health regulation is likely to hurt a few people. But as banning “partial birth” abortions is not intended to improve the health of women (or anyone, for that matter), it cannot be defended as a health regulation.<sup>175</sup>

Moreover, if the legislature were concerned about women’s health, Posner pointed out, it is unclear why it failed to include a health exception:

Tomorrow, studies may show that, yes, there indeed are cases where a “partial birth” abortion is necessary to protect the mother’s health, as many physicians believe. Tomorrow, then, these two statutes may be unconstitutional even by the lights of the majority opinion. Why would a state risk the early obsolescence of its statute by making it wholly dependent on ever-changing medical opinion, when to avoid this risk it need only have excepted those “partial birth” abortions, if any, that are necessary to protect the woman’s health?<sup>176</sup>

The NRLC exercised remarkable influence over the legislative

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abortionists.”).

<sup>172</sup> See Bopp & Colleson, *supra* note 4, at 5.

<sup>173</sup> See Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 153 (findings section).

<sup>174</sup> See *id.*

<sup>175</sup> *Hope Clinic v. Ryan*, 195 F.3d 857, 878 (7th Cir. 1999) (Posner, J., dissenting).

<sup>176</sup> *Id.* at 880.

*JUDICIAL EVASION*

51

process of enacting the “partial-birth abortion” bans, drafting, promoting, and lobbying vigorously for their passage.<sup>177</sup> The advocacy group controlled how the bans were worded, “instruct[ing] legislatures in State after State on how to resist limiting or clarifying the scope of so-called ‘partial-birth’ abortion legislation.”<sup>178</sup> The strategy was so successful that “all the States that enacted such legislation in 1996, 1997, or 1998 adopted language substantially similar to the model legislation espoused by the NRLC.”<sup>179</sup> Judge Posner lamented the partisan quality of the legislative response:

The wave of “partial birth” abortion statutes that broke over the nation after a description of the D & X procedure was publicized does not exhibit the legislative process at its best, whatever one thinks of abortion rights. Whipped up by activists who wanted to dramatize the ugliness of abortions and deter physicians from performing them, the public support for the laws was also based . . . on sheer ignorance of the medical realities of late-term abortion.<sup>180</sup>

Indeed, the state and federal legislative hearings on the “partial-birth abortion” bans more closely resembled boisterous town hall meetings more sober, thoughtful inquiries into the relevant facts. Testimony often included wild accusations and virulent condemnations of abortion generally (comparing it to the Holocaust, for example).<sup>181</sup> Witnesses typically included members of advocacy groups and interested citizens. There was little testimony from doctors. In Arizona, the witnesses who testified in a 1997 hearing on H.B. 2191 were typical of those who appeared in other state legislatures.<sup>182</sup> They included a staff member of the Arizona Catholic Conference, a lawyer and another staff member from Planned Parenthood, the Executive Director of Arizona Right

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<sup>177</sup> Brief of NARAL Found. et. al., as Amicus Curiae supporting Respondent, *supra* note 158, at 17.

<sup>178</sup> *Id.* at 18.

<sup>179</sup> *Id.*

<sup>180</sup> *Hope Clinic*, 195 F.3d at 880 (citations omitted).

<sup>181</sup> See Borgmann, *supra* note 11, at \_\_.

<sup>182</sup> See, e.g., *id.* at \_\_ (describing testimony before Alaska Legislature).

to Choose, a woman who described her own tragic pregnancy that necessitated an intact D&E, two representatives of the Center for Arizona Policy (a conservative advocacy group), a Reverend of the Church of Christ, and two interested citizens. In addition, fifteen members of the public “want[ed] to have their opposition to H.B. 2191 noted for the record but [did] not wish to speak.”<sup>183</sup>

Allowing interested members of the public to express their views on a controversial topic may serve a worthy purpose in a legislative hearing. But it is not an effective mechanism for educating the legislature about the *facts*. Yet the state legislatures seemed to rely on the testimony of non-medically-trained advocates for the relevant medical information. For example, a representative of Arizona Right to Life testified that the ban’s description of the targeted procedure did not encompass other procedures and “questioned the idea of this method being a life-saving procedure.”<sup>184</sup> In Alaska,

[c]ommittee members directed many medically related questions to one of the Alaska Civil Liberties Union representatives, who repeatedly reminded the committee that she was not a physician. The sole doctor to testify was not able to speak to all of the relevant medical issues, since he did not himself provide abortions. The lone citizen to testify against the ban asked the committee whether any doctors in Alaska performed the targeted procedure, but none could answer that question.<sup>185</sup>

Congress’s hearings were not much better. In fact, fifty-two members of Congress signed onto an amicus brief that attacked Congress’s factfinding on the federal “Partial Birth Abortion Ban Act.” The brief noted that detailed congressional “findings” were inserted into the new version of the ban *before* any hearings on the

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<sup>183</sup> *Partial-birth Abortions; Prohibition: Hearing on H.B. 2191 Before the Gov’t Reform & States’ Rights Comm.*, 43rd Leg., 1st Sess. 8 (Ariz. 1997) (on file with author).

<sup>184</sup> *Id.* at 7. This witness also submitted a transcript of the congressional testimony of Brenda Pratt Shafer, a nurse who claimed to have worked for Dr. Haskell and to have witnessed him performing three intact D&E procedures and who described in detail what she had allegedly seen.

<sup>185</sup> Borgmann, *supra* note 11, at \_\_\_.

## JUDICIAL EVASION

53

new version were held, and that “[t]he Congressional hearing that followed the drafting of the Findings was politically biased and transparently partisan, calculated to highlight testimony from supporters of the ban.”<sup>186</sup>

In contrast, the court proceedings on the state and federal bans played out very differently. “Free of the advocacy-oriented rhetoric that punctuated the [legislative] hearings, the parties enjoyed the comparative luxury of a fair process and the court’s serious attention to the factual issues.”<sup>187</sup> When courts declined to defer to legislative factfinding, as virtually every court did until the Supreme Court’s decision in *Carhart II*, they invalidated the bans with near uniformity.<sup>188</sup> In *Carhart II*, it was the Court’s solicitude toward Congress’s judgments regarding the health effects of the federal ban that enabled the Court to uphold it.<sup>189</sup>

## CONCLUSION

Legislative factfinding will inevitably be a mixture of morality and science. The normative context in which legislative decision-making occurs shapes the very questions that are asked and the way those questions are answered.<sup>190</sup> This, however, means that courts must approach legislative factfinding cautiously and skeptically. To the extent an issue like abortion does raise empirical scientific questions (Can we know whether a fetus is able to perceive pain? Do abortions cause post-traumatic stress

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<sup>186</sup> See Brief of 52 Members of Congress as Amici Curiae Supporting Respondents at 10–11, *Gonzales v. Planned Parenthood Fed’n of Am.*, 127 S. Ct. 1610 (2007) (Nos 05-1382, 05-380).

<sup>187</sup> Borgmann, *supra* note 15, at \_\_\_. For a more detailed comparison between court proceedings and federal and state legislative hearings on “partial-birth abortion” bans, see *id.* at 25–33.

<sup>188</sup> See ACLU, *Abortion Bans: In the States* (2006) (summarizing court rulings on “partial-birth abortion” bans), <http://www.aclu.org/reproductiverights/abortion/12544res20051007.html>.

<sup>189</sup> See *supra* text accompanying notes 46–68.

<sup>190</sup> See FAIGMAN, *supra* note 14, at 178–81; Rebecca Bratspies, *The Role of Trust in Regulatory Systems* (draft on file with author); see also Suzanne Goldberg, *Constitutional Tipping Points*, 106 COLUM. L. REV. 1955, 1957 (2006) (making a similar point regarding judging).



disorder?), courts should conduct an independent review to ensure that the facts are driving the moral conclusions and policy choices, and not the other way around. A court may defer to a legislature's policy decision to respond to a given set of facts in a particular way (assuming that to do so does not violate constitutional rights). But if it turns out that the facts are not as the legislature portrayed them, then the policy decision itself is called into question. Sometimes moral influences are subconscious. But often they are not, and yet they are unacknowledged or even obscured for political reasons. This undermines healthy decision-making at both the legislative and judicial levels.<sup>191</sup> While it would be impossible completely to segregate science and morality in factfinding, the integrity of the decision-making process will only be improved if ideological influences are explicitly acknowledged.<sup>192</sup>

In the abortion context, recent decisions by the Supreme Court in *Carhart II* and the Eighth Circuit in *Rounds* have taken the opposite approach. Faced with legislation and legislative factfinding clearly orchestrated so as to conceal the true ideological impetus for the laws, each court rewarded this obfuscation.<sup>193</sup> Each accepted questionable "scientific" conclusions and then found that these conclusions justified the laws. In *Carhart II*, the Court admitted that Congress's factfinding was shoddy, yet favored it over the thorough factfinding of both district courts below.<sup>194</sup> Even more remarkably, it appeared to send a message to state legislatures, encouraging them to continue their biased factfinding on abortion, and to lower courts, urging them to defer.<sup>195</sup> In its en banc opinion in *Rounds*, the Eighth Circuit

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<sup>191</sup> Cf. Goldberg, *supra* note 190 (arguing that greater judicial candor regarding the normative underpinning of court decisions will improve theories of judicial review).

<sup>192</sup> See *id.*

<sup>193</sup> I assume that the legislators knew of or were complicit in the long-term plan underlying the South Dakota "informed consent" laws and the "partial birth abortion" bans. But if they were misled by anti-abortion advocates, this only further supports the need for searching judicial review of the facts to ensure that the influence of lobbyists has not tainted the factfinding process.

<sup>194</sup> See *supra* text accompanying notes 48–53.

<sup>195</sup> See *supra* text accompanying notes 57–59.

## JUDICIAL EVASION

55

accepted the invitation wholeheartedly, participating in the South Dakota legislature's farce.<sup>196</sup>

It is one thing for legislatures to engage in biased factfinding; it is quite another for courts to repeat the phenomenon. We may be willing to accept that politically influenced legislators will engage in advocacy-oriented "factfinding." But we can tolerate this system only so long as we can rely on the federal courts to protect against its harmful effects.<sup>197</sup> Blind judicial deference sidesteps this critical role of the courts, reproducing the legislatures' disingenuous factfinding at the Supreme Court level and embedding it into the Court's abortion jurisprudence. This is especially troubling inasmuch as the Court, once it finds certain medical facts, tends to view those as fixed by *stare decisis*.<sup>198</sup> Far worse than a legislature's enactment of a misinformed statute, which can always be repealed or judicially invalidated, judicial deference leads to long-term, legal recognition of politically motivated, unreliable factual claims.

There is another troubling aspect to the courts' acceptance of legislatures' attempts to repackage ideologically motivated restrictions as grounded in science and public health. Jessie Hill has argued that the Court's jurisprudence on medical decision-making has proceeded on two separate tracks—a public health model and an autonomy model.<sup>199</sup> The autonomy model is more protective of the right to make medical treatment decisions, and traditionally the Court has analyzed abortion regulations under this paradigm.<sup>200</sup> To the extent that legislatures cast abortion regulation as less about morality and more about science and medicine, the Court may find reason to shift more to the public health model, under which health regulations are subject only to rational basis review.<sup>201</sup> There were already hints of this in *Carhart II*, where the

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<sup>196</sup> See *supra* text accompanying notes 102–11.

<sup>197</sup> Borgmann, *supra* note 11, at \_\_.

<sup>198</sup> See FAIGMAN, *supra* note 14; Hill, *supra* note 21.

<sup>199</sup> Hill, *supra* note 21, at 294.

<sup>200</sup> *Id.*

<sup>201</sup> See *id.* (stating that public health regulations are subject to rational basis review).

Court combined the undue burden standard with language echoing rational basis review.<sup>202</sup>

When legislatures jeopardize important individual rights, courts have a duty to step in to implement the norms of justice.<sup>203</sup> This “profound obligation”<sup>204</sup> carries with it a responsibility for factual and scientific truth in implementing those norms. In the context of abortion restrictions, the Supreme Court has failed on both of these fronts. In *Casey*, the Court invited legislatures to base abortion restrictions upon moral norms that directly conflict with the right to abortion. Yet it refused to acknowledge this conflict and the extent to which it undermined the fundamental right declared in *Roe*. The Court’s prevaricating confused the legislative landscape on abortion, prompting legislatures to pass laws based on moral opposition to abortion while disingenuously presenting them as scientifically based. In *Carhart II*, the Court made plain its willingness to tolerate this legislative disregard for factual and scientific truth in regulating abortion. In so doing, it shirked its primary constitutional responsibility to protect individual rights and promote justice, as well as its subsidiary responsibility for truth.

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<sup>202</sup> See *Carhart II*, 127 S. Ct. at 1633. Professor Hill describes *Carhart II* as suggesting a possible middle ground between the public health and autonomy models. See Hill, *supra* note 21, at 342.

<sup>203</sup> See *supra* note 23.

<sup>204</sup> CHOPER, *supra* note 25, at 78.