THE FUTURE OF FACTS: THE POLITICS OF PUBLIC HEALTH AND MEDICINE IN ABORTION LAW

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INTRODUCTION

While a great deal of public scrutiny has focused on how information circulates through online outlets including Twitter and Facebook, less attention has been devoted to how more traditional institutions traffic in factual assertions for the sake of setting a particular distributional agenda into motion.[1] Of these more traditional institutions, courts play a central role in legitimating legal and factual claims in the process of applying and clarifying legal rules. In public health-related adjudication, courts play at least two important roles: first, judges and juries make decisions between competing sets of public health and medical claims and second, courts legitimate one set of these assertions over the other. Distributional consequences flow from their decisions, not only for the parties but also for others who are represented in the case before the court and those who will bargain in the shadow of the decision.[2]

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1. For a discussion on "facts" in the context of the COVID pandemic, see Wendy E. Parmet & Jeremy Paul, *COVID-19: The First Post-Truth Pandemic*, 110 AM. J. PUB. HEALTH 945, 945–46 (2020).

2. For thinking about law and distribution, see JANET HALLEY ET AL., GOVERNANCE FEMINISM: AN INTRODUCTION (2018).

For this Symposium issue on the Future of Critical Legal Theory, I argue that it is necessary for legal scholars, lawyers, and activists to understand the relationship between how courts adjudicate public health and medical claims (or scientific evidence more broadly) and how this relates to the distribution of material goods and services. This Essay is a call for a deeper interrogation about the production of knowledge, one common in the social science and humanities[3] but less common in legal scholarship.[4] The call for a deeper interrogation is not simply a question of theory. A critical relationship to the production of knowledge—a position that used to be commonplace among progressives, especially gender and race activists—reflected a deep awareness that how knowledge is made is central to how resources are distributed.[5] I argue that we should return to this place of skepticism in order to bring about greater equality in access to public health services.

In this Essay, I will use abortion jurisprudence as an example to show how facts are made and legitimated through the court adjudication process and how this process increases and decreases access to abortion services. This challenges the assumption that courts are simple arbitrators of fact. Rather, courts are involved in tipping the scales toward what we begin to think of as a truth by legitimating claims, including those that are considered deeply contentious. Finally, I turn to the question of how politically conflicting groups on the issue of abortion—progressives and conservatives—position themselves vis-à-vis the production of knowledge and how this relates to the distribution of material resources.

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3. *See generally* Sheila Jasanoff, *A Field of Its Own: The Emergence of Science and Technology Studies*, *in* OXFORD HANDBOOK OF INTERDISCIPLINARITY 191 (Robert Frodeman et al. eds., 2010). Ruha Benjamin, *Catching Our Breath: Critical Race STS and the Carceral Imagination*, 2 ENGAGING SCI., TECHNOLOGY, AND SOC'Y 145 (2016).

4. For legal scholars interrogating the relationship between law and science, see generally, DOROTHY ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY (2011); JONATHAN KAHN, RACE IN A BOTTLE: THE STORY OF BIDIL AND RACIALIZED MEDICINE IN A POST-GENOMIC AGE (2000); BEYOND BIOETHICS (Osagie Obasogie & Marcy Darnovsky eds., 2018).

5. Sally Engle Merry, *Measuring the World*, 52 CURRENT ANTHROPOLOGY S83 (2005). On the question of distribution, see Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758 (2020).

ABORTION LITIGATION AND FACT-MAKING

Abortion jurisprudence serves as an example of how facts are made and legitimated through the courts. Although we can go much further back in time, tracking abortion jurisprudence at the Supreme Court since the 2007 case *Carhart v. Gonzales* (*Carhart II)*[6] highlights the treatment of medical and public health evidence in courts.

In *Carhart II*, the Supreme Court grappled with a proposed ban on an abortion procedure done later in pregnancy. The procedure is known as an intact dilation and evacuation (D&E).[7] The ban is for a procedure in which the fetus is removed from the mother intact and does not apply to an abortion in which the fetus is removed in pieces. The ban does not allow for an exception for women's health, even though access to the procedure would help ensure that women would not be subject to a series of health risks associated with a non-intact dilation and extraction. In *Carhart II*, we see two dynamics at work: first, how the Supreme Court levels the playing field between a small group of conservative medical experts and the broader public health and medical community in order to claim that the experts are split and, second, how the Court validates the claim of a conservative organization in finding that abortion has negative mental health consequences.

The Court makes room for the conservative argument that there need not be a health exception by framing the medical experts who weigh in on the case as split on whether or not the procedure should be banned.[8] If expertise is divided, then the Court must weigh in on how to move forward. By leveling the playing field between experts—those demanding greater safety for women and those who seek a ban on the procedure—the Court legitimates the claims of those seeking to cut off access to a necessary health procedure. In the abortion context, leveling this playing field means that undue weight is given to discredited experts, while the majority position (that there should be a health exception) is discounted. Once the field is leveled, the Court can legitimately allow the ban to move forward. To do so, in *Carhart II* the Court stated that there should be deference to

6. Gonzales v. Carhart (*Carhart II*), 550 U.S. 124, 159 (2007).
7. *Id.*
8. Aziza Ahmed, *Medical Evidence and Expertise in Abortion Jurisprudence*, 41 AM. J.L. & MED. 85 (2015).

the legislature's ability to consider "marginal safety, including the balance of risks" of the procedure as "within legislative competence when the regulation is rational and in pursuit of legitimate ends."[9] Seeing that the legislature found no need for a health exception, the Court held that the procedure must be banned outright. The Court effectively cut off physicians from using a potentially safer procedure in abortions occurring later in pregnancy.

The decision in *Carhart II* diverged from the Court's prior holdings. In *Stenberg v. Carhart*[10] (*Carhart I*), the Court found a similar law unconstitutional. In *Carhart I*, the majority arrived at the opposite conclusion from *Carhart II*. In *Carhart I*, the majority held that the Supreme Court must err on the side of protecting women's health "if there is substantial medical authority" supporting "the proposition that banning a particular procedure could endanger women's health."

The Court in *Carhart II* did not stop at banning a medically necessary procedure. It also legitimated a discredited claim on the question of the mental health impact of abortion. Speaking to the potential consequences of abortion, Justice Kennedy made the following infamous assertion:

> While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.[11]

The claim of regret is contrary to what the American Psychological Association had stated (and continues to argue) in numerous amicus brief over the course of decades: there is no proven link between negative mental health consequences and abortion.[12] The idea of abortion being linked to negative mental health consequences was also a reversal of the position taken by Justice Blackmun in *Roe v. Wade*, which described pregnancy,

9. *Carhart II*, 550 U.S. at 938.
10. Stenberg v. Carhart (*Carhart I*), 530 U.S. 914, 937 (2000).
11. *Id.*
12. Brief for Amicus Curiae Am. Psych. Ass'n in Support of Petitioners, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006399, at *4.

and not abortion, as the life event that could create negative mental health challenges.[13]

In making his assertion in *Carhart II*, Kennedy sidestepped the public health literature altogether and instead relied on affidavits generated by anti-choice organizations. Indeed, he cited to a brief by the Justice Foundation, a conservative organization that, through its program Operation Outcry, seeks to "end the pain of abortion by exposing the truth about its devastating impact on women, men and families."[14] Kennedy's claim is not without history or context. It is one pushed by anti-choice advocates who claim to be working on behalf of women. And, it represents a new and controversial strategy by the anti-choice movement to publish in peer-reviewed journals, including the British Journal of Psychiatry, to reposition themselves not as pushers of anecdote but instead producers of fact.[15] These facts circulate: Kennedy's assertion that abortion has mental health consequences provides the foundation for increasing informed consent requirements for abortion in an attempt to dissuade women from having the procedure.[16]

The ability of anti-choice advocates to traffic in purported evidence and assertion was put on hold in 2016 when the Supreme Court decided *Whole Woman's Health v. Hellerstedt*.[17]

13. Roe v. Wade, 410 U.S. 113 (1973).

14. OPERATION OUTCRY, https://www.operationoutcry.org (last visited Mar. 2, 2021) [https://perma.cc/S99V-44PE]; Brief of Sandra Cano, The Former "Mary Doe" of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner, *Carhart II*, 550 U.S. 124 (No. 05-380), 2006 WL 1436684.

15. Priscilla K. Coleman, *Abortion and Mental Health: Quantitative Synthesis and Analysis of Research Published 1995–2009*, 199 BRIT. J. PSYCHIATRY 180 (2001); Affidavit of Dr. Priscilla K. Coleman, June Med. Servs. v. Russo, 140 S. Ct. 2103 (No. 18-1323), https://www.supremecourt.gov/DocketPDF/18/18-1323/127325/20200102151531266_Appendix.pdf [https://perma.cc/34FD-DHUJ]; *but see* Ronald C. Kessler & Alan F. Schatzberg, *Commentary on Abortion Studies of Steinberg and Finer (Social Science & Medicine 2011; 72:72–82) and Coleman (Journal of Psychiatric Research 2009; 770–6 & Journal of Psychiatric Research 2011; 45:1133–4)*, 46 J. PSYCHIATRIC RSCH. 410 (2012); *Study Purporting to Show Link Between Abortion and Mental Health Outcomes Decisively Debunked*, GUTTMACHER INST. (March 5, 2012), https://www.guttmacher.org/news-release/2012/study-purporting-show-link-between-abortion-and-mental-health-outcomes-decisively [https://perma.cc/Y872-6X29].

16. Texas Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570 (5th Cir. 2012).

17. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016). Here I draw on my prior writing about the relationship between public health evidence and recent abortion jurisprudence, See Aziza Ahmed, *June Medical: Reason or Politics?*, L. PROFESSOR BLOGS NETWORK: HUM. RTS. HOME BLOG (June 30, 2020), https://lawprofessors.typepad.com/human_rights/2020/06/june-medical-reason-or-

The case pertained to two provisions of a law in Texas which mandated an admitting privileges requirement for physicians providing abortions and required that clinics meet the standards of an ambulatory surgical center. In declaring two provisions of a Texas law unconstitutional, the Supreme Court chipped away at the purported legitimacy of laws targeted at abortion providers (also known as TRAP laws).[18] These laws have the façade of protecting women's health but, in fact, are designed to limit women's access to abortion.[19] In practice, the laws are a pretext for making abortion more difficult, and sometimes impossible, to access. The laws range far and wide from building regulations (e.g., hallway and door width) to requirements for who can provide care and under what circumstances.[20] In *Whole Woman's Health*, Justice Ginsburg acknowledged this in her concurrence, describing how TRAP laws undermine women's access. She quoted *Planned Parenthood v. Wisconsin*, stating that the laws were not designed to enable good health outcomes—they were simply obstacles in the path of accessing abortion.[21]

The majority in *Whole Woman's Health* revisited the undue burden test, treating it as a balancing test. This approach required courts to assess both the burdens the law posed as well as any actual medical benefit in order to justify placing substantial obstacles in the path of a woman seeking an abortion. Assessing the burdens would require an exploration of the "legal and factual" support for the law that exists.[22] This meant an in-depth review of the public health evidence at hand including the findings of the District Court over the course of its proceedings.[23] The District Court's findings drew from peer-reviewed studies, historical analysis, and epidemiological study.[24] The Supreme Court found that given the data presented to the District Court,

politics.html [https://perma.cc/364E-NPA5]; Aziza Ahmed, *Symposium: Will the Supreme Court Legitimate Pretext?* (Jan. 31, 2020, 10:00 AM), SCOTUSBLOG, https://www.scotusblog.com/2020/01/symposium-will-the-supreme-court-legitimate-pretext/ [https://perma.cc/53YJ-V5TK]

18. *Id.* at 2321 (Ginsburg, J., concurring).

19. *Id.*

20. *Targeted Regulation of Abortion Providers*, GUTTMACHER INST. (Jan. 1, 2021), https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers [https://perma.cc/K6BF-L35N].

21. *Whole Woman's Health*, 136 S. Ct. at 2320–21 (Ginsburg, J., concurring).

22. *Id.* at 2309.

23. *Id.* at 2300–03. For an overview of the use of public health evidence and the development of the undue burden standard see Rachel Rebouche, *The Public Health Turn in Reproductive Rights*, 78 WASH. & LEE L. REV. __ (2021)

24. Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673 (W.D. Tex. 2014).

which included the difficulty of physicians getting admitting privileges, the closures of abortion clinics, and the impact this would have on women demonstrated that enacting the proposed regulations would have a negative impact on women's access to abortion. Supporters of access to abortion services celebrated the Court's turn to methodologically sound public health data.[25]

For the conservative Justices, the decision in *Whole Woman's Health* undermined the deference *Carhart II* paid to legislatures in their determination of a legal intervention in the context of medical uncertainty.[26] Instead, the Court in *Whole Woman's Health* stated that there should not be an uncritical reliance on legislative findings (noting that the legislature did not actually provide a set of factual findings in the case of the challenged law).[27] The majority challenged *Carhart II*, finding that the Supreme Court "retains an independent constitutional duty to review factual findings where constitutional rights are at stake."[28]

For pro-choice advocates, the celebration of *Whole Woman's Health* soon turned to worry, however, when the Court agreed to hear *June Medical Services v. Gee*,[29] a case addressing a Louisiana law that was virtually identical to the admitting privileges requirement in *Whole Woman's Health*.[30] To find the law constitutional in Louisiana would mean overturning *Whole Woman's Health*, and potentially walking back the court's interpretation of the undue burden standard in *Whole Woman's Health* that emphasized the balancing of benefits and burdens. In *June Medical Services v. Gee*, the District Court made a similar set of findings with regard to the impact of the law, drawing on public health evidence to hold that the law would do nothing to improve women's health, that admitting privileges do nothing to ensure the competency of the physician, and that there was no evidence that admitting privileges would help women obtain better treatment. When the case reached the Supreme Court in *June Medical Services v. Russo* (*June Medical*), Justice Breyer, writing for

25. *See Whole Woman's Health*, 136 S. Ct. 2292.

26. For a discussion of medical uncertainty in abortion jurisprudence, see Aziza Ahmed, *Medical Evidence and Expertise in Abortion Jurisprudence*, 41 AM. J.L. & MED. 85 (2015). *See also*, Mary Ziegler, *The Jurisprudence of Uncertainty: Knowledge, Science, and Abortion*, 2018 WIS. L. REV. 317 (2018).

27. *Whole Woman's Health*, 136 S. Ct. at 2310.

28. *Id.*

29. 905 F.3d 787 (2018).

30. June Med. Servs. v. Russo, 140 S. Ct. 2103 (2020).

the plurality and following *Whole Woman's Health*, balanced the benefits and burdens of the Louisiana law.[31] The District Court found that the new Louisiana requirement would result in the closure of all but one clinic, which would leave many women without access to any services.[32] Justice Breyer noted that poor women, least likely to be able to absorb the costs of increased travel, are those most likely to be burdened.[33] This evidence helped solidify that the legislation was unconstitutional. Relying on this public health evidence, the plurality found that the law conferred a greater burden than benefit on women as they sought to access abortion. And, given the precedent of *Whole Woman's Health*, they were further bound. In turn, Louisiana's law was found to be unconstitutional.

While the decision discounted the State's pretextual claim that they were enacting these regulations to ensure safety and quality of services for women seeking abortion, it is important to note that public health evidence was also being adjudicated. As we now see, this is a question that has come to haunt abortion jurisprudence.[34] In his concurrence, Roberts explored the possibility that the State's claim that TRAP laws are for the safety of women was true despite being discounted in *Whole Woman's Health* and *June Medical*.[35] Justice Thomas provided the frame by which to lend credibility to the State's argument in asserting that the regulations were within the police powers of State government.[36]

Roberts went one step further: he considered that some ideas about abortion are unknowable, making a balancing test impossible without the risk of making judges act like legislators. Here, despite the plurality's weighing of facts about burdens and benefits, Roberts collapsed knowable facts into relative values:[37]

> In this context, courts applying a balancing test would be asked in essence to weigh the State's interests in "protecting the potentiality of human life" and the health of the woman, on the one hand, against the woman's liberty interest in defining her "own concept of existence, of meaning, of the

31. *Id.*
32. *Id.* at 2112–13.
33. *Id.* at 2130.
34. *See supra*, at 1162.
35. *See also June Med. Servs.*, 140 S. Ct. at 2149 (Thomas, J., dissenting).
36. *Id.*
37. *Id.* at 2324 (Roberts, J., concurring).

> universe, and of the mystery of human life" on the other. There is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were. Attempting to do so would be like "judging whether a particular line is longer than a particular rock is heavy," Pretending that we could pull that off would require us to act as legislators, not judges, and would result in nothing other than an "unanalyzed exercise of judicial will" in the guise of a "neutral utilitarian calculus."[38]

In seeking a way forward that furthers the Court's legitimacy by grounding decisions in fact and law, Roberts's concurrence in *Whole Woman's Health* evades the issue of its own participation in legitimating divergent factual claims, or, as discussed in this Essay, public health and medical evidence. Justice Roberts reifies the idea that the Court sits outside of the world of knowledge production, ignoring the role of the Court in setting the terrain itself. In framing itself as outside of the production of knowledge and expertise, the Court undermines the possibility that these competing expert positions are potentially reflective of the politics inherent in production of medical and public health evidence.[39]

KNOWLEDGE AND DISTRIBUTION

While many legal scholars and progressives push forward the idea that science, evidence, and expertise should be apolitical and neutral, conservatives have exploited the malleability of institutions and knowledge production to advance their cause.

Attempts by conservatives to alter knowledge environments from the inside out has led to an even stauncher defense of science and legal institutions by many progressives. The hardened "believe in science" position of progressives today erases the deep engagement with critiques about the production of knowledge, science, and expertise by progressive activists and the role of

38. *Id.* at 2136 (citations omitted).

39. Roe v. Wade, 410 U.S. 113, 116–17 (1973) ("Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries.")

critique in demanding redistribution of resources. For feminists, it was the critique of medical expertise that helped launch a revolution in women's health. Feminists demanded a decentering of the white male body in medical research and diagnosis.[40] They critiqued research institutions including the Food and Drug Administration and the National Institutes of Health for failing women's needs by excluding women from medical research. They redefined expertise—making women the experts of their own bodies. These feminist women's health movements mirrored other leftist movements in the 1970s that made similar critiques of medical knowledge production.[41] These included the Black Panther Party, which famously created its own health programs, as well as activists who decried the mistreatment of Black people in medical research.[42] The end goals of these various activist movements in health were the same: to challenge the prevailing assumptions embedded in medical knowledge and expertise to make the delivery of medical services more accessible and available, and to ensure that there was trust between the service provider and the patient.[43] Yet today, progressives cabin this history to make the strong claim that science should and must always lead.

Law and society scholar Sally Engle Merry describes the connection between knowledge and governance.[44] She examines the role of indicators in gathering information and data which goes on to impact how programs are designed and implemented. She puts forward what she calls the "knowledge effect" and the "governance effect" of this information gathering process. The knowledge effect is the process of gathering data in a way that makes the world knowable.[45] The governance effect is the ability to govern based on statistical information and knowledge. This has direct impacts on how resources are distributed in society.

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40. WENDY KLINE, BODIES OF KNOWLEDGE (2010). *See also* 1 INST. OF MED. (US) COMM. ON ETHICAL AND LEGAL ISSUES RELATING TO THE INCLUSION OF WOMEN IN CLINICAL STUDIES, *Women's Participation in Clinical Studies*, *in* WOMEN AND HEALTH RESEARCH 36 (Anna C. Mastroianni et al. eds., 1994).

41. AZIZA AHMED, FEMINISM'S MEDICINE: LAW, SCIENCE, RACE, AND GENDER IN AN EPIDEMIC (Cambridge Univ. Press) (forthcoming 2022).

42. *Tuskegee Study, 1932–1972*, CTRS. FOR DISEASE CONTROL & PREVENTION (March 2, 2020), https://www.cdc.gov/tuskegee/index.html [https://perma.cc/FV6H-JQT6].

43. ALONDRA NELSON, BODY AND SOUL: THE BLACK PANTHER PARTY AND THE FIGHT AGAINST MEDICAL DISCRIMINATION 84 (2011).

44. Merry, *supra* note 5.

45. *Id.* at S84.

The abortion context makes the connection between knowledge and governance clear. The success of anti-choice advocates in pushing forward the message that there are negative mental health consequences to abortion, for example, is validated by courts in order to justify regulations that dissuade women from abortions. In the contest of claims on the issue of abortion safety, Justice Roberts's concurrence in *June Medical* suggests that the States were acting in a good faith effort to protect women's health. In other words, that Texas and Louisiana based their regulations on legitimate public health and medical concerns. Again, the uptake of this idea, purportedly rooted in expert knowledge, could go on to justify rules that block access to abortions. Governing abortion this way, of course, has disparate impacts: rural and poor women, many of whom are women of color, face a disproportionate burden in terms of access.

In order to move forward, it is time for progressives to revisit a critical posture towards purportedly expert-based claims and the institutions that legitimate them.[46] This would require tapping into a rich history of institutional skepticism by progressives. In other words, to acknowledge that institutions, like courts, play a role in fact making. Taking this perspective allows progressives to name and identify the institutional spaces that are exploited by conservatives to alter knowledge and alter the legal response to issues including abortion. This reframing would also encourage progressives to be more agile in the face of growing conservative efforts to exploit the norms of scientific research. And it would challenge the default position that "believing science" is all that is required to alter the landscape of health service delivery.

CONCLUSION

In the past decade, much discussion has focused on how institutions traffic in information. Though courts are an important site of adjudication for social and moral debates, they have received little attention as institutions that have the power to legitimate controversial factual claims. This Essay considers the role of courts not as simple adjudicators of fact but as institutions that legitimate controversial factual claims.

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46. For a discussion of the reproduction of the vulnerability of social institutions, see Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 12–15 (2008).

To understand how people continue to be disenfranchised by our regulatory system on abortion requires us to take a critical position towards the production and legitimation of facts about abortion in the courts and its relationship to distribution. The default is to suggest that relying on science, evidence, and expertise will be the wall against misinformation being used against women for the sake of denying reproductive health care. As conservatives more effectively navigate through the infrastructure of scientific production, from research to peer-review, it will become more difficult to write off findings as untrue.[47] And, as courts validate these claims, they will receive increased legitimacy. Revisiting the skepticism of institutions—legal and scientific—held by progressive movements of the past offers a way forward. To avoid seeing the public health landscape as political and shifting, with the aid of the Court, is to ignore the long history of left organizing to improve science and expertise from within, as well as the institutions associated with them, as a tool for achieving progressive goals.

47. *See, e.g.*, Gonzales v. Carhart (*Carhart II*), 550 U.S. 124, 177–84 (2007) (Ginsburg, J., dissenting).