

A Comment on “The Constitutional Law and Politics of Reproductive Rights”

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ABSTRACT: One of the most interesting things about current legal scholarship is the continuing flow of articles re-evaluating *Roe v. Wade*. For example, in 2009 the *Yale Law Journal* published several essays from a conference that dealt with “The Constitutional Law and Politics of Reproductive Rights.” These essays were all from the perspective of those favoring abortion rights. I think these articles are quite instructive for pro-life scholars. This paper reflects upon the principal lessons revealed through a careful reading of this scholarship. The articles indicate that *Roe* and *Casey* are still in play; these cases are not a settled part of the legal landscape. The articles, which typically suggest that the current law only protects a rather modest right to an abortion, also indicate that there is a continuing need to describe the current legal situation accurately. There is also a need to continue to focus on the harms of abortion – the harm to the unborn, of course, but also the harm to women. The articles also reflect a desire to move away from a focus on the courts. I think that is a sign of weakness for pro-choice academics, but it also reflects the importance of trying to promote a culture of life while at the same time trying to change the law. There has been progress in both areas. The pro-life legal movement has made modest and important gains over the last two decades and there is an increasing pro-life sentiment in the broader culture. In sum, reflecting upon these articles leaves me with a sense of optimism about the long-range objective of building a culture of life.

ONE OF THE MOST INTERESTING THINGS about current legal scholarship¹ is the continuing flow of articles re-evaluating *Roe v. Wade*.² For example, in 2009 the *Yale Law Journal* published several essays from a conference on “The Constitutional Law and

¹ This paper was presented on 5 June 2010 at the twentieth annual conference of University Faculty for Life. I have updated the paper at appropriate places.

² 410 U. S. 113 (1973).

Politics of Reproductive Rights.”³ This conference and the published essays were from the perspective of those favoring abortion rights. Other conferences from around the same time period, such as a November 2009 gathering at Georgetown (entitled “The New Abortion Debate: Emerging Perspectives on Choice, Life and Law”),⁴ brought together pro-life and pro-choice scholars to evaluate the current situation. Pro-life scholars have also gathered to assess the current situation. For example, an April 2010 conference at Columbia Law School was entitled “Looking Back, Looking Forward: Pro-Life Strategy and Jurisprudence for the 21st Century.”⁵

These types of conferences and discussions show no sign of abating. In May 2012 Americans United for Life sponsored a conference to mark the twentieth anniversary of *Planned Parenthood v. Casey*.⁶ On June 2, 2012 at the annual meeting of University Faculty for Life, I presented a paper reflecting on the twentieth anniversary of *Planned Parenthood v. Casey*.⁷

In this paper I will largely focus on scholarship from the abortion rights perspective, with a particular focus on the articles published in the *Yale Law Journal*. I think that these articles are quite instructive. What I hope to do in this paper is to reflect upon the lessons that pro-lifers can learn from these articles. In sum, these articles lead me to have a sense of optimism about the long range objective of building a culture of life.

Summary of the Yale Law Journal Articles

The *Yale Law Journal* symposium featured articles by Neal Devins,

³ See Reva B. Siegel, “Introduction: The Constitutional Law and Politics of Reproductive Rights,” *Yale Law Journal* 118 (2009): 1312, describing the conference and introducing the published papers.

⁴ For information about the Georgetown conference, see http://scholarship.law.georgetown.edu/new_debate/.

⁵ For information about the Columbia conference, see <http://www.aul.org/2010/04/looking-back-looking-forward-pro-life-strategy-and-jurisprudence-for-the-21st-century/>.

⁶ For information about this Americans United for Life conference, see <http://www.aul.org/2012/05/aul-presents-legal-experts-detailing-the-%e2%80%9cjudicial-violence%e2%80%9d-of-planned-parenthood-v-casey/>.

⁷ *Planned Parenthood v. Casey*, 505 U. S. 833 (1992).

Dawn Johnsen, and Robin West. Reva Siegel, who wrote the introduction to the Yale symposium,⁸ also published an article⁹ in the *Yale Law Journal* “on the eve”¹⁰ of the conference from which the symposium articles were drawn. In this section I will briefly summarize these four articles.

Neal Devins’s article, “How *Planned Parenthood v. Casey* (Pretty Much) Settled the Abortion Wars,”¹¹ argues that *Casey* has largely settled the constitutional law and the politics on abortion. Devins claims that *Roe* was far too sweeping for the country to accept but that *Casey*’s approval of limited abortion rights reflected an emerging national consensus in 1992. Devins believes that the Supreme Court is unlikely to risk political backlash by modifying *Casey*. He also claims that *Casey* has stabilized state abortion politics. Most states, he contends, are content to work within *Casey*’s parameters. He believes that *Casey* is “something that the Court, federal and state officials, and the American people can all accept,”¹² and he concludes that “[p]ro-choice and pro-life interests should accept...[*Casey*].”¹³ Both sides “would be better served shifting their energies away from legalistic fights over abortion regulations and toward shaping the hearts and minds of the women who may seek abortions and the doctors and clinics that may provide abortion services.”¹⁴

Dawn Johnsen’s article, “‘TRAP’ing *Roe* in Indiana and a Common-Ground Alternative,”¹⁵ deals with the practical impact of laws that target regulations at abortion providers. She contends that these laws, although characterized as reasonable compromise regulations, create a significant burden on the right to an abortion and that this

⁸ See Siegel, *supra* n3.

⁹ Reva B. Siegel, “Dignity and the Politics of Protection: Abortion Restrictions Under *Casey/Carhart*,” *Yale Law Journal* 117 (2008): 1694.

¹⁰ Siegel, *supra* n3, at pp. 1315-16.

¹¹ Neal Devins, “How *Planned Parenthood v. Casey* (Pretty Much) Settled the Abortion Wars,” *Yale Law Journal* 1188 (2009): 1318.

¹² *Ibid.* at p. 1354.

¹³ *Ibid.* at p. 1354.

¹⁴ *Ibid.* at p. 1318 (this quote is from the abstract to Devins’s article).

¹⁵ Dawn Johnsen, “‘TRAP’ing *Roe* in Indiana and a Common-Ground Alternative,” *Yale Law Journal* 118 (2009): 1356.

burden falls disproportionately on the most vulnerable women. She contends that these laws do not serve any objective other than to limit access to abortion and that they should therefore be invalidated. She contends that both sides ought to focus on common-ground alternatives. The alternatives that she has in mind involve programs that prevent unintended pregnancy and promote healthy childbearing; these alternatives would help “in reducing the number of abortions while affirming our nation’s fundamental values.”¹⁶

Robin West’s article, “From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights,”¹⁷ critiques *Roe*. Her critique is not that *Roe* went too far but that *Roe* was too narrow. The *Roe* right to an abortion is only a negative right and, in West’s view, it privatized a decision in a way that does not support reproductive justice. According to West, who works from a radical perspective, it is necessary to push for greater governmental and social support for the reproductive and parenting choices of poor women. An undue focus on constitutional law, she believes, has undermined the prospect of achieving the broader objective. She concludes that efforts ought to be made to create a right to legal abortion and broader conceptions of reproductive justice (including a moral duty to use contraceptives for those who do not intend to conceive¹⁸) through ordinary political means (across the pro-life/pro-choice divide) rather than through constitutional adjudication.

Reva Siegel’s article, “Dignity and the Politics of Protection: Abortion Restrictions Under *Casey/Carhart*,”¹⁹ explores the Supreme Court’s approach to addressing the constitutionality of laws restricting abortion. She examines the legal framework set forth in *Casey* and *Gonzales v. Carhart*²⁰ (the Court’s decision dealing with the

¹⁶ *Ibid.* at p. 1362.

¹⁷ Robin West, “From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights,” *Yale Law Journal* 118 (2009): 1394.

¹⁸ *Ibid.* at p. 1430.

¹⁹ Siegel, *supra* n9.

²⁰ 550 U. S. 124 (2007). For my comments on *Gonzales v. Carhart*, see Richard S. Myers, “The Supreme Court and Abortion: The Implications of *Gonzales v. Carhart*” in *Life and Learning XVII: The Proceedings of the Seventeenth University Faculty for Life Conference*, ed. Joseph W. Koterski, S.J. (Washington, D.C.: UFL, 2008), pp. 103-28.

constitutionality of the federal ban on partial-birth abortion) and finds in those cases a core commitment to dignity in various dimensions. According to Siegel, “a commitment to dignity structures the undue burden test itself, which allows government to regulate abortion to demonstrate respect for the dignity of human life so long as such regulation also demonstrates respect for the dignity of women.”²¹ Siegel uses this framework to analyze those new abortion restrictions that she describes as “women-protective abortion restrictions.”²² Despite talk of bridging communities, it is clear that this dignity analysis does not allow the state to protect the unborn. In the end, she advocates protecting women by providing social resources to women to avoid unwanted pregnancy and to women who might choose not to have abortions. According to Siegel, this commitment of social resources would “respect women’s dignity and self-sovereignty in ways that give differently inflected meaning to the dignity of human life. They promote an affirmatively and avowedly transformative vision of family values concerned with sexual freedom, accessible health care, the integration of those who engage in caregiving work into spheres of citizenship, and the commitment to help all who are struggling to support and raise families.”²³

Lessons

These *Yale Law Journal* articles, all of which are from an abortion rights perspective, are quite instructive. Reading these articles offers an opportunity to reflect on the current legal situation facing the pro-life movement and to think about strategies that might help contribute to building a culture of life. In this section, I will discuss five significant lessons.

(1) One thing that is striking about the articles is that they follow in a long tradition of scholarship re-evaluating *Roe v. Wade*. From the

²¹ Siegel, *supra* n9, at p. 1696 (footns omitted).

²² See Siegel, *supra* n9, at pp. 1767-95. See generally Reva B. Siegel, David C. Baum Memorial Lecture, “The New Politics of Abortion: An Equality Analysis of Women-Protective Abortion Restrictions,” *University of Illinois Law Review* (2007): 991.

²³ Siegel, *supra* n9, at p. 1797.

very beginning, there has been a steady stream of scholarship criticizing *Roe v. Wade*.²⁴ Interestingly, some of this scholarship has been from those in favor of abortion rights.²⁵ These articles typically support the outcome in *Roe* but recognize that Justice Blackmun's opinion is terribly flawed. So, there is a long list of articles that critique *Roe* but try to articulate a different rationale that these authors hope will be more persuasive.²⁶

The mere fact of this ongoing tradition is stunning. In other areas of the law we do not encounter this sort of ongoing critique of decisions that are, in theory, settled law. So, for example, the sex discrimination decisions of the Burger Court in the early and mid-1970s (precisely the time of *Roe v. Wade*) were enormously controversial.²⁷ These decisions made significant changes in equal protection law. The Court elevated the level of scrutiny that it used in sex discrimination cases from the lowest level of scrutiny to a form of heightened scrutiny that resulted in the invalidation of many laws that contained classifications based on sex. These decisions were criticized as examples of judicial activism. There was little support for the Court's approach in the text, or history, or prior judicial interpretation of the equal protection clause. The decisions came at a time of sweeping cultural changes on matters of sexual equality.

²⁴ See, e.g., John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," *Yale Law Journal* 82 (1973): 920; Richard A. Epstein, "Substantive Due Process by Any Other Name: The Abortion Cases," *Supreme Court Review* (1973): 159.

²⁵ See, e.g., Ruth Bader Ginsburg, "Speaking in a Judicial Voice," *New York University Law Review* 67 (1992): 1185; Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," *North Carolina Law Review* 63 (1985): 375; Donald H. Regan, "Rewriting *Roe v. Wade*," *Michigan Law Review* 77 (1979): 1569; Nancy K. Rhoden, "Trimesters and Technology: Revamping *Roe v. Wade*," *Yale Law Journal* 95 (1986): 639.

²⁶ See Clarke D. Forsythe & Stephen B. Presser, "Restoring Self-Government on Abortion: A Federalism Amendment," *Texas Review of Law & Policy* 10 (2006): 315, noting this point and citing representative scholarship.

²⁷ See Reva B. Siegel, "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De facto ERA," *California Law Review* 94 (2006): 1323, exploring how equal protection doctrine relating to sex discrimination was forged through social movement conflicts during the time of the defeat of the Equal Rights Amendment.

Yet, today there is almost no controversy at all about these decisions. The Court's decisions are widely accepted.²⁸ No one holds conferences re-assessing *Craig v. Boren*.²⁹

A caveat is necessary. There is, of course, a great deal of controversy from feminist scholars about the Court's cases, with many contending that the Court's decisions that elevated the level of scrutiny for sex discrimination did not go far enough to rectify the subordination of women.³⁰ There has also been criticism of the Court's sex discrimination cases from an originalist perspective,³¹ although some originalist scholars defend the Court's decisions.³² My point is that the core commitment to an idea of formal equality is well accepted even though that was deeply contested as a matter of constitutional law in the early 1970s.

There are a variety of explanations for this varying treatment. I think the most persuasive explanation is that this development illustrates the relationship between constitutional law and popular opinion.³³ The Court's interpretation of broad, general language – liberty, equality – is often influenced by the broader culture's understanding of these ideas.

²⁸ See Siegel, *supra* n27, at p. 1335: “The core precepts of sex discrimination law are now canonical.”

²⁹ *Craig v. Boren*, 429 U. S. 190 (1976). *Craig* was the decision that established that sex discrimination was subject to intermediate scrutiny.

³⁰ Cary Franklin, “The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law,” *New York University Law Review* 85 (2010) 85, noting this criticism.

³¹ Steven G. Calabresi & Julia T. Rickert, “Originalism and Sex Discrimination,” *Texas Law Review* 90 (2011) 2: “It is a truism of modern constitutional law scholarship that originalism, the judicial philosophy propounded by Justice Antonin Scalia, Justice Clarence Thomas, former Judge Robert H. Bork, and former Attorney General Edwin Meese III, cannot justify the Supreme Court's sex discrimination cases of the last forty years.”

³² See Calabresi & Rickert, *supra* n31. This article, which takes the view that the Court's sex discrimination cases can be defended on original grounds, has prompted a great deal of critical commentary. See e.g., Josh Blackman, “Originalism at the Right Time?” in *Texas Law Review* 90 (2012): 269.

³³ There is a lot of controversy about the extent to which the Supreme Court reflects majoritarian views. For a recent discussion, see Richard H. Pildes, “Is the Supreme Court a ‘Majoritarian’ Institution?” in *Supreme Court Review* (2010): 103.

And the durability of the Court's decisions often depends on how well the Court's approach accords with the broader culture. Or, put another way, the Court's rulings are far less secure when they are significantly out of line with the broader culture.

There are many examples. In the early decades of the twentieth century, the Supreme Court gave significant protection to economic liberty. The Court's decisions became increasingly untenable by the 1930s when the country became far more accepting of governmental regulation of the economy. More recent examples would include assisted suicide and homosexual conduct. With regard to assisted suicide, although there was significant cultural support for assisted suicide, the Court in 1997 seemed to realize that the country was not ready to accept a fundamental constitutional right to assisted suicide.³⁴ The Court's decisions allowed the broader cultural debate to continue.³⁵ Even the controversial decision in *Lawrence v. Texas*³⁶ reflects this idea.³⁷ The country seems to largely support decriminalization of homosexual conduct. The more significant controversy relates to the implications of *Lawrence* for the issue of same-sex marriage.³⁸ It seems that the country is willing to live with *Lawrence* as long as the decision is not interpreted

³⁴ See *Washington v. Glucksberg*, 521 U. S. 702 (1997); *Quill v. Vacco*, 521 U. S. 793 (1997). See generally Richard S. Myers, "Physician-Assisted Suicide and Euthanasia: A Current Legal Perspective" in *Life & Learning XI: Proceedings of the Eleventh University Faculty for Life Conference*, ed. Joseph W. Koterski, S.J. (Washington, D.C.: UFL, 2002), pp. 3-27.

³⁵ The court specifically noted this point. *Glucksberg*, 521 U. S. at 735: "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."

³⁶ 539 U. S. 558 (2003).

³⁷ See Cass R. Sunstein, "What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage," *Supreme Court Review* (2003): 27. "My principal suggestion here is that the Court's remarkable decision in *Lawrence v. Texas* is best seen as a successor to *Griswold v. Connecticut*: judicial invalidation of a law that has become hopelessly out of touch with existing social conventions."

³⁸ For judicial responses to this question, see Richard S. Myers, "Pope John Paul II, Freedom, and Constitutional Law," *Ave Maria Law Review* 6 (2007): 76 n86. See also Sunstein, *supra* n37, at pp. 68-72.

to legalize same-sex marriage, which at least at this time lacks the support of a majority of the populace.³⁹

With regard to sex discrimination, the resulting legal doctrine, which largely prohibits classifications on the basis of sex, is widely supported in the broader culture. As a result, this law, which is sometimes called the de facto ERA,⁴⁰ is not a large subject of controversy in the world of legal scholarship.

The contrast with *Roe v. Wade* could not be more striking. *Roe* was controversial in 1973 and is still controversial. In addition to the withering critiques of *Roe* as an exercise of constitutional interpretation, there is the profoundly significant matter that *Roe* was not accepted in the broader culture.⁴¹ Moreover, *Casey* is not really accepted either.⁴² There is constant resistance to *Roe v. Wade* among judges,⁴³ legislators,⁴⁴

³⁹ See Sunstein, *supra* n37, at p. 72: “But in my view, the major difference between Lawrence and a ban on same-sex marriage is that sodomy law no longer fits with widespread public convictions, whereas the public does not (yet) support same-sex marriage.”

⁴⁰ See Siegel, *supra* n27.

⁴¹ See Clarke D. Forsythe & Stephen B. Presser, “The Tragic Failure of *Roe v. Wade*: Why Abortion Should be Returned to the States,” *Texas Review of Law & Policy* 10 (2005): 164-67, discussing the Court’s abortion jurisprudence and public opinion). See also blog post on *National Review* by Clarke D. Forsythe, “Progress after Casey” (29 June 2012): “At the same time, support for what the Court actually did in *Roe* has declined. Support for abortion for any reason, at any time, declined from 12 percent to 7 percent between 2006 and 2009. One clear reason that abortion is so controversial is that the Court has sided with the 7 percent since 1973.” <http://www.nationalreview.com/corner/304416/progress-after-casey-clarke-d-forsythe>.

⁴² See Forsythe & Presser, *supra* n41.

⁴³ See, for example, the special concurrence by Justice Parker of the Alabama Supreme Court in *Hamilton v. Scott*, 97 So. 3d 728, 737-747 (Ala. 2012) (Parker, J., concurring specially). In that opinion, which dealt with wrongful death and not abortion directly, Justice Parker noted at length the deficiencies in *Roe v. Wade*’s emphasis on viability.

⁴⁴ There continue to be legislative efforts to limit abortion rights in the states. <http://www.uffl.org/blog/2012/03/18/pro-life-legislation-in-the-states/>.

academics,⁴⁵ and in the broader culture.⁴⁶ Increasing pro-life sentiment makes it clear that *Casey* is not sufficiently well accepted to remove the issue from broader public debate. *Roe* and *Casey* have not been accepted, or at least not to the degree of the Court's sex discrimination decisions from the same era.

This indicates that *Roe* and *Casey* are still in play. They are still subject to re-examination. No one thinks that the Court's approach to sex discrimination hangs by a thread. Yet, nearly forty years after *Roe* that notion (that *Roe* hangs by a thread⁴⁷) is a reasonable (albeit contested) assessment. This fact – that *Roe* and *Casey* – are still in play ought to give us hope that the battle with regard to constitutional law and abortion is not over.

(2) These articles indicate that there is a continuing need for an accurate statement of the law. The articles typically describe the constitutional law as providing a modest right to abortion. This has long been a problem, but these articles indicate that the problem has not gone away. It is quite common for knowledgeable observers to fail to describe the full impact of the Court's abortion jurisprudence. For example, as Clarke Forsythe and Stephen Presser noted several years ago, “[i]n her book, *The Majesty of the Law*, Justice O'Connor – not once but twice – inaccurately describes the *Roe* decision as legalizing abortion only in ‘the first three months of pregnancy’.”⁴⁸ In truth, as Michael Paulsen has explained, “*Roe* was a truly extreme decision, creating an effectively unrestricted constitutional right to abort a living human being for any

⁴⁵ The proceedings from the annual conferences of University Faculty for Life are good examples. See <http://www.ufl.org/pastproceedings.html>.

⁴⁶ See Michael New, “Additional Gallup Data Proves America Trending Strongly Pro-life” at <http://www.lifenews.com/2012/06/14/additional-gallup-data-proves-america-trending-strongly-pro-life/>.

⁴⁷ See West, *supra* n17, at p. 1400.

⁴⁸ Forsythe & Presser, *supra* n41, at pp. 136-37, quoting Sandra Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* (New York NY: Random House, 2003), p. 45. See also Richard S. Myers, “Reflections on ‘Looking Back on *Planned Parenthood v. Casey*’,” in *Life & Learning XIII: Proceedings of the Thirteenth University Faculty for Life Conference*, ed. Joseph W. Koterski, S.J. (Washington DC: UFL, 2004), pp. 5-10, discussing the same point.

reason the mother might have, throughout pregnancy right up to the point of birth.”⁴⁹

(3) The articles indicate the continuing need to focus on the harms of abortion. This involves both the harm to the unborn victim of abortion and also on the harm of abortion to women. The first issue is almost completely neglected in this scholarship. Maybe that is because these articles take it as a given that the status of the unborn has been definitively resolved. But this inattention to the unborn is really a glaring gap. This may indicate that the reality of the situation -- that every abortion results in the taking of an innocent human life -- is now so clear to everyone that it is necessary that this reality be ignored. This indicates the need for a renewed effort to focus on the humanity of the unborn.⁵⁰

The impact of abortion on women is a more important part of the recent scholarship. This is no doubt due in large part to Justice Kennedy’s opinion in *Gonzales v. Carhart*,⁵¹ which acknowledged this issue. In his opinion in *Gonzales v. Casey*, in which the Court upheld the constitutionality of the Partial Birth Abortion Act of 2003, Justice Kennedy’s opinion noted: “Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral choice. 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.”⁵² He further noted the State’s interest in fully informing woman about the abortion procedures involved. Justice Kennedy stated: “The State has an interest in ensuring so grave a choice is well informed. It is

⁴⁹ Michael Stokes Paulsen, “The Unbearable Wrongness of *Roe*,” <http://www.thepublicdiscourse.com/2012/01/4577>.

⁵⁰ The increasing use of ultrasounds has helped to make this point, to the consternation of supporters of abortion rights. See Eric Metaxas, “Denying Humanity: Abortion Backers Can’t Stand Ultrasound Pictures,” <http://www.lifenews.com/2012/07/05/denying-humanity-abortion-backers-cant-stand-ultrasound-pictures/>.

⁵¹ For commentary on *Gonzales v. Carhart*, see Myers, *supra* n20.

⁵² *Gonzales v. Carhart*, 550 U. S. 124, 159 (2007), citations omitted.

self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.”⁵³

Most of the reaction from pro-choice judges and scholars to the idea that Justice Kennedy’s opinion admitted – that abortion might harm women – has been overwhelmingly negative. Yet, one recent article takes a very different approach. Jeannie Suk’s *Columbia Law Review* article, “The Trajectory of Trauma: Bodies and Minds of Abortion Discourse,”⁵⁴ is a fascinating treatment of this idea of abortion regret. Suk ns the overwhelmingly negative comments about Justice Kennedy’s opinion in *Gonzales v. Carhart*. The main criticism is that the idea that abortion harms women is “junk science” that is based on archaic, paternalistic views.⁵⁵ Suk is sympathetic to the need to critique *Gonzales v. Carhart*, but she contends that the idea that abortion causes psychological harm to women is consistent with feminist ideas that have profoundly influenced the law in the last several decades.

Suk shows that the idea of abortion trauma has deep support in Supreme Court case law.⁵⁶ Moreover, this idea of abortion trauma “accords with an influential feminist critique that has bred sensitivity to coercion, and skepticism of consent, in conditions of gender subordination – particularly in women’s decisions and experiences regarding their bodies.”⁵⁷

Although most abortion rights scholars are dismissive of the idea that abortion causes psychological harm (in fact, the idea of abortion trauma is typically viewed as only a tactical move designed to limit abortion rights), Suk explains why the idea resonates with so many. Although Suk does not take a position on the matter, she acknowledges that there might be truth to the claim that abortion harms women. She ns

⁵³ Ibid. at pp. 159-60.

⁵⁴ Jeannie Suk, “The Trajectory of Trauma: Bodies and Minds of Abortion Discourse,” *Columbia Law Review* 110 (2010): 1193.

⁵⁵ Ibid. at p. 1196.

⁵⁶ Ibid. at pp. 1214-23.

⁵⁷ Ibid. at p. 1198, foot nomitted.

that the criticisms of abortion trauma are the same criticisms that were made of Battered Women's Syndrome, which now is legally accepted.

I think Suk's article indicates the enormous power of the truth.⁵⁸ There is mounting evidence that abortion harms women,⁵⁹ and pro-lifers have recognized this for some time.⁶⁰ Ideological commitment can create blinders that prevent people from recognizing the truth, and I think this is why abortion rights scholars have been so dismissive of the idea. Yet in the end, the truth has an enormous appeal. The Suk article is a hopeful sign; it suggests that there may be broader recognition of the idea that abortion harms women. This all indicates the importance of continuing to focus on the multiple harms of abortion.

(4) The articles reflect a move by abortion rights scholars away from reliance on the courts. This may be because these scholars recognize that *Roe* and *Casey* will ultimately fall. But the focus on the broader culture is extremely important. The battle in this area is indeed largely cultural. As John Breen has noted, "culture enjoys a kind of priority over law in ordering society."⁶¹ I have long thought that some elements in the pro-life movement have focused too narrowly on the courts.⁶² I think it is a mistake to regard the Supreme Court Justices as the sole villains in this area. To a large extent, the Court is simply reflecting broad cultural trends. These trends need to be countered to ensure success.

It is important to pursue a multi-prong strategy. We should not think about changing the culture or changing the law; we ought to try to do both. As Cardinal George stated (in a speech at the dedication

⁵⁸I want to make it clear that Suk does not indicate that she accepts the idea of abortion trauma. But her article is important because she seems open-minded on the issue (she doesn't reject the idea out of hand) and she says that the concept rings true to many in part, she maintains, because it is consistent with feminist ideas that have influenced the law in the last several decades.

⁵⁹A recently developed website collects some of this current research. See e.g. <http://www.wecareexperts.org/>.

⁶⁰See Myers, *supra* n20, at p. 124, noting this point.

⁶¹John M. Breen, "Modesty and Moralism: Justice, Prudence, and Abortion – A Reply to Skeel and Stuntz," *Harvard Journal of Law & Public Policy* 31 (2008): 262, foot omitted.

⁶²Myers, *supra* n20, at p. 126.

ceremony for Ave Maria School of Law's original building in Ann Arbor, Michigan): "The work of legal reform is a necessary, though not sufficient, ingredient on the larger project of cultural transformation. Yes, we must change people's hearts. No, we must not wait for changes of heart before changing the laws. We must do both at the same time, recognizing that just laws help to form good hearts, and unjust laws impede every other effort in the cause of the gospel of life."⁶³ It is essential to focus on the courts because *Roe* and *Casey* prevent significant progress. These decisions also inhibit the broader cultural conversation on these issues. As John Breen has argued, "*Roe* has prevented the nation from having a serious dialogue about the moral and legal status of abortion through the normal political process. As such, the law in its current state effectively prevents the culture from developing as it should. It makes nearly impossible the very sort of education necessary for the foundation of a truly human culture."⁶⁴ In addition, efforts at legal reform can also help the cultural battle. That was true with regard to the battle over partial birth abortions, which was largely an educational effort.⁶⁵ Steve Calabresi,⁶⁶ among many others, has supported efforts at legal reform (e.g., laws banning sex-selection abortions or laws banning abortion that might cause pain to the unborn; the recently enacted Nebraska law, the Abortion Pain Prevention Act, which largely bans abortion after twenty weeks is one example of this sort of legislation) that will help to shape and influence the cultural debate.

The broader cultural debate is also necessary. There are too many things to mention here that are part of building a culture of life. On a practical level, the work of crisis pregnancy centers is of particular importance. On a more theoretical level, it is important to emphasize the

⁶³ Francis Cardinal George, "Law and Culture," *Ave Maria Law Review* 1 (2003): 10, foot omitted.

⁶⁴ Breen, *supra* n61, at p. 308, footns omitted.

⁶⁵ Myers, *supra* n20, at pp. 108-10.

⁶⁶ Steven G. Calabresi, "How to Reverse Government Imposition of Immorality: A Strategy for Eroding *Roe v. Wade*," *Harvard Journal of Law & Public Policy* 31 (2008): 90.

linkage between freedom and truth.⁶⁷ As Pope John Paul II stated in *Evangelium Vitae*: “When freedom is detached from objective truth it becomes impossible to establish personal rights on a firm rational basis; and the ground is laid for society to be at the mercy of the unrestrained will of individuals or the oppressive totalitarianism of public authority.”⁶⁸

(5) The articles contain repeated pleas for an emphasis on common ground approaches. I think this is a sign of weakness and a recognition that the positive momentum is with the pro-life side. It is important to recognize that these appeals to common ground are not very persuasive. As John Breen has noted, the social resources approach that is so frequently a part of these common ground solutions is not likely to significantly reduce the incidence of abortion.⁶⁹ Moreover, there are more significant underlying problems with these common ground approaches. Reva Siegel’s appeal to a focus on dignity is a good example. She recognizes that the idea of dignity has broad resonance across ideological lines. But this is in large part because the meaning of the term “dignity” is subject to such varying interpretations. Her approach to dignity reflects support for dignity as decisional autonomy.⁷⁰ Her approach thus recapitulates the debate we have seen on other issues – such as assisted suicide and abortion and sexual freedom. Siegel emphasizes one particular view of dignity – dignity as autonomy – but that view is highly contested and subject to powerful and persuasive critiques. Her approach then is not to common ground but to one side of a broader divide on the proper understanding of the nature of freedom and of the demands of moral truth. Dawn Johnsen’s approach is similar.⁷¹ She appeals to common ground alternatives but her appeal leaves in place the abortion license.

It is important not to let these appeals to common ground ultimately undermine pro-life goals. Johnsen’s approach would in practical terms abandon the goal of protecting the unborn. Other approaches – such as

⁶⁷ Richard S. Myers, *supra* n38, at p. 80.

⁶⁸ Pope John Paul II, *Evangelium Vitae* (2005) §96.

⁶⁹ See Breen, *supra* n61, at pp. 291-97.

⁷⁰ Siegel, *supra* n9, at pp. 1735-66.

⁷¹ Johnsen, *supra* n15, at pp. 1390, 1393.

Siegel's emphasis on decisional autonomy or West's emphasis on a virtually unlimited idea of sexual freedom⁷² – would involve accepting premises that would undermine the goals of the pro-life movement.

Conclusion

A reading of this abortion rights scholarship leaves me with a sense of optimism. The battle is certainly not over and there is much here to suggest helpful avenues. I will briefly summarize the best options. We must continue to attack *Roe* and *Casey*. This is necessary for long term success and also to help with the broader cultural debate. We must continue to try to make gains where possible on the legal side. Prohibitions on sex-selection abortion or fetal pain legislation are just two examples of laws that might help to continue to chip away at *Roe* and *Casey*. These laws may not significantly reduce abortion but they have profound educational value. We must continue to communicate the truth about the harms of abortion – to the unborn and to women. We must, in every venue, continue to build the culture of life. Cultural change is necessary for long term success. This effort has many dimensions. It will require both an emphasis on building respect for life and also a proper understanding of human freedom. This involves a rejection of the dictatorship of relativism about which Pope Benedict has warned.

⁷² West, *supra* n17 at p. 1430.