

GENDER IN LAW, CULTURE, AND SOCIETY

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In Search of Common Ground on Abortion

From Culture War to Reproductive Justice



Edited by Robin West, Justin Murray and Meredith Esser

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In Search of Common Ground on Abortion

From Culture War to Reproductive Justice

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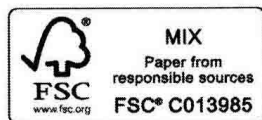
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Introduction

Justin Murray, Meredith Esser and Robin West

This collection of chapters stems from a symposium that was held at the Georgetown University Law Center in the fall of 2009. Originally titled “A New Abortion Debate,” the goal of the symposium was to bring together pro-choice and pro-life scholars in an effort to explore the common philosophical, moral, or political ground that might be shared by these groups who so rarely come together, and more generally to support new and emerging scholarship that is self-reflective on the issue of abortion. The symposium included scholars working on common ground policy or philosophical scholarship, as well as other voices seeking to broaden the scope of the abortion debate to non-legal and non-constitutional themes. This collection includes work from some of the scholars who participated in the symposium, as well as new work from others, but the themes remain the same. Taken collectively, the chapters explore the possibilities for cultural, philosophical, moral, and political common ground on the subjects of abortion and reproductive justice more generally.

The position of the three editors is that any common ground project such as this one in this contentious area must emerge from joint reflection and genuine collaboration among persons who harbor diverse perspectives concerning the subjects that divide us. In this spirit, rather than attempting to sum up the quest for commonality in a unitary voice, each of the three editors has individually composed some brief reflections on central concepts that recur throughout the chapters of this book. Those individual editors’ introductions appear immediately below; first Justin Murray’s, then Meredith Esser’s, then Robin West’s. Following that set of comments, we then briefly summarize the chapters.

Editors’ Introductions

Comments from Justin Murray

Since the middle of the twentieth century, many Americans have begun to dramatically rethink traditional views about women’s place in society, the appropriate link between sex and reproduction, and the moral stature of unborn human life. As a result, many social practices that were once unthinkable are now familiar features of American life. Women work side-by-side with men in virtually every sector of the economy. The vast majority of sexually active Americans use

some form of contraception at least some of the time. Unmarried couples routinely live together in preparation for, or even as a permanent substitute for, marriage. And every year, approximately one million pregnancies are terminated by abortion.

These momentous social developments are not, however, backed by a settled moral consensus. Far from it. Indeed, a prominent social movement—the Moral Majority—came into being for the expressed purpose of turning back the clock on the sexual revolution. Ever since these battle lines were drawn, presidents have been elected, Supreme Court Justices appointed, and wealthy businesses imperiled, based largely on their views about sex and abortion. Public dialogue between representatives of the opposing viewpoints has been largely acrimonious and uncomprehending, leading many observers to characterize it as a *culture war*.

Whether we like it or not, countless politicians, religious leaders, and influential media figures ceaselessly seek to re-enlist us as participants in a culture war against our fellow citizens. The 2012 presidential election, which was in full swing when I first composed this introduction, offered no reprieve from this drumbeat. The leading Republican presidential aspirants accused President Obama of orchestrating a “war on the Catholic Church” (Rick Santorum) and even a full-blown “war on religion” (Mitt Romney). Not to be outdone, a chorus of liberal columnists denounced the GOP’s purported “war on women,” and Vice President Biden added his voice to their accusation. These bipartisan invocations of warfare as a metaphorical description of our social predicament are nothing new; they are simply the most recent iterations of a long-standing pattern that has endured for the better part of the last century.

Some might be tempted to dismiss these exchanges as empty posturing or politics-as-usual, but that response would be a mistake. In a heterogeneous society such as ours, disagreement among citizens is par for the course, and most of these disagreements can be addressed more or less effectively through the conventional problem-solving mechanisms of democratic politics: tolerance for opposing viewpoints, mutual efforts at persuasion, coalition politics, and (when necessary) compromise. None of these tools for achieving political consensus are available, however, when opinion leaders on both sides of a dispute habitually characterize their disagreements as though they were episodes in a protracted military struggle. Language drives our perception of reality and, by extension, our conduct. A dispute that has been framed as a war will be handled through the typical instruments of warfare: propaganda, exaggeration or outright distortion of relevant facts, vilification of outsiders, zero-sum decision-making, and the single-minded pursuit of victory at any price. Each and every one of these warlike dynamics is on full display in our contemporary culture war.

The divisiveness of current conversations about abortion derives, in large measure, from the narrow range of problems and proposals that have come to dominate the discussion. Public debate has revolved almost entirely around the two issues that most sharply pit the pro-life and pro-choice camps against one another: legal restrictions designed to impede access to abortion, on the one hand, and public funding to facilitate access to abortion, on the other. On these subjects,

policymaking has an unavoidably zero-sum character: the law can *either* enhance the freedom of women to opt for abortion (through minimal restrictions and maximal funding), *or* protect fetal life against abortion (through the opposite mix of restrictions and funding), but never both. Because one of these objectives must be sacrificed for the other to prevail, principled compromise is difficult—perhaps impossible—to achieve. Thus, a national discourse fixated primarily on these themes will almost inevitably be a combative and unaccommodating one.

Nevertheless, it is possible to imagine, and work to achieve, a different kind of conversation about abortion that extends beyond the issues of legal prohibition and public funding. For culture war veterans of all stripes, this possibility might initially seem dangerous or fanciful. Understandably so: all too often, partisans on both sides who call for common ground on abortion insist that their adversaries dilute their central moral convictions and political goals as a precondition for dialogue.

That is not the kind of conversation we have in mind. Rather than urging either of the contenders to abandon its core ideals, we envision a discussion that calls upon both sides to reflect more deeply and broadly on the meaning of their respective ideals. We are confident that sustained exploration of the fundamental principles that underlie the pro-life and pro-choice positions on sex, pregnancy, and abortion will uncover promising opportunities for common ground—opportunities that have been obscured by the deafening background noise of culture-war politics.

Beginning with my own philosophical orientation, I believe that the foundational ethical norms that animate the pro-life movement—at least in its finer moments—are the profound dignity of human life and a commitment to care for those who are most vulnerable and dependent on others. Taking these principles seriously certainly means taking meaningful steps to diminish the rate of abortion—including, in my view, legal restrictions on abortion—because few human lives are more vulnerable, dependent, and in need of care than developing children within the womb. But the very same principles the pro-life movement invokes to restrict abortion should lead it to support progressive measures to counteract the many social and economic obstacles that imperil the vulnerability of many pregnant women, parents, and their children—especially when those obstacles generate pressure upon women to consider abortion.

Similarly, the central concerns that motivate the pro-choice movement—enhancing women's health, autonomy, and life opportunities—cannot be set right merely by preserving the formal right to end a pregnancy. As my co-editors and several contributors to this book eloquently explain, a sound agenda for promoting reproductive justice must focus more broadly on expanding the safety net for pregnant women and mothers, thus ensuring that abortion is truly a choice and not a default dictated by economic necessity. Within these expanded parameters for discussion, we believe that it is possible for former enemies in the abortion debate to form mutually advantageous coalitions on highly significant social and political issues, even as they continue to struggle over the more intractable—and, of course, important—topics of abortion prohibition and funding.

Recent years have brought several positive signs of a shift in tone and priorities, but much more remains to be done. Many pro-life organizations have become ardent advocates for, and direct providers of, social support and healthcare to pregnant women and young mothers. Legislators from both parties have begun to explore authentic common ground measures, such as the Pregnant Women Support Act spearheaded by Democrats for Life of America. And during the early months of his presidency, President Obama struck a conciliatory note in his commencement address at the University of Notre Dame, laying groundwork for national reflection on how pro-choice and pro-life groups might work together to reduce abortion and honor the dignity of pregnant women and their children.

Nevertheless, old habits die hard, and it remains to be seen whether these developments prove to be durable or successful. Pro-life healthcare organizations have been widely criticized by pro-choice activists and health providers for allegedly deceiving their patients about the nature of their services and delivering incomplete, inadequate medical care. Media discussions and legislative agendas relating to abortion continue, by and large, to operate within the traditional restrict-or-fund paradigm, overlooking the broader socioeconomic context in which men and women make decisions about sex, pregnancy, and parenting. And, as I noted toward the beginning of these remarks, the lofty appeals to tolerance, collaboration, and common ground with which President Obama began his term have largely given way to mutual recriminations and culture-war rhetoric on both sides of the partisan divide.

All things considered, the future outlook of the half-century-long culture war is anyone's guess. The upshot is that the future lies in our hands. We hope that this book will supply ideas and energy to those who are working to transform the breadth, content, and civility of this important national dialogue.

Comments from Meredith Esser

Over the past decade, the pro-choice movement has undergone an important rhetorical shift from talking about reproductive "rights" to using the more expansive term, reproductive "justice" to describe the movement's central goal. The concept of reproductive justice aims to describe women's reproductive health as connected to and affected by conditions that are much broader than just the decision to terminate a pregnancy. Women's lives are shaped by their socioeconomic status, religious views, race, sexuality, nationality, family life, geography, level of education, and other factors that—until recently—the reproductive rights movement had failed to fully conceptualize when developing a political agenda.

Legal scholars have been slow in adopting this framework, preferring to stick to the rights-based language that is so central to the legal field in general. At first blush, this rhetorical distinction—between "rights" and "justice"—may seem indicative of merely a semantic trend rather than a true ideological change. However, I would argue that this shift within the reproductive rights field is actually a reaction to the polarization that a younger generation of women (and men) involved in these

issues has grown up with, and that the adoption of the phrase “reproductive justice” is an attempt to describe a viewpoint that is often buried by the polarized rhetoric of the abortion debate in general: the way that these issues affect real people, every day. Indeed, as we are beginning to understand, “rights” don’t always make sense in this context. At the same time, the “justice” in the phrase “reproductive justice” means something very different from the court-centric notions of justice. It encompasses a wide range of issues and values such as access to health services, racial justice, socioeconomic justice, and all of the potential barriers to obtaining not just abortion and reproductive services, but education, contraception, and the basic tools that women should have at their disposal for controlling not just their reproductive lives, but their entire lives.

In my view, the reproductive justice movement should also embrace a “common ground” approach to understanding women’s experiences of and surrounding abortion—if not always to the fundamental rights and prohibitions that each political stance embraces. To that end, part of my personal motivation in embarking on this project was to give a voice to the stifled middle ground—if not undertake the daunting task of finding a common ground—on the issue of reproduction and abortion. For example, many women who self-identify as “pro-life” still believe that women should be allowed to abort in the case of rape. On the other side, many individuals who call themselves “pro-choice” agree that late-term abortion is a morally grey area.

So much of the way that political activists talk about abortion and reproduction is divorced from the stories of real individuals; the rhetoric is couched in absolute terms with neither side wanting to cede any “ground” to the other. For example, on the pro-life side, moral arguments against abortion are reduced to abstractions that are difficult for ordinary, non-scientists to grasp, but which nonetheless form the foundation of the fundamental objections to abortion: life begins at conception; human life is sacred; ergo the “morning-after pill” is abortion. On the pro-choice side, the autonomy of woman is paramount, bodily integrity and boundless reproductive freedom must be maintained, ergo late-term abortions should be approached with the same detached attitude as taking the pill or going in for a routine checkup.

In reality, however, neither one of these extremes describes the vast middle ground in which most Americans exist on the spectrum of this debate. Similarly, neither of these arguments captures the moral balancing that women undergo when actually facing the prospect of taking the morning-after pill, or obtaining abortion services. In conversations with friends and colleagues about this project, I have heard a wide range of views on abortion, but very few people actually identify with the extreme pro-choice or the extreme pro-life positions. However, such middle-ground views are—more often than not—eclipsed by the extreme positions that have become the white noise of politics.

At the same time, however, each side employs certain stories—myths—to advance their political agendas. Indeed, while women’s real experiences are suppressed, imagined experiences of women have become rhetorical weapons.

For example the mythical woman who aborts and then “comes to regret her choice,” was a central figure in the Supreme Court decision, *Gonzales v. Carhart*,¹ and served as a primary justification in that opinion for restricting access to certain kinds of abortion procedures. In justifying its decision, the dissent wrote, “the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from ‘[s]evere depression and loss of esteem.’”² As the dissent in that case pointed out, rather than implement policies that educate or inform women regarding the controversial partial-birth abortion procedure, the court took a paternalistic and protective stance, choosing instead to justify its decision on the ground that women were incapable of making that decision with sound mind, and equally incapable of dealing with the consequences.³

The uncomfortable implication of this story is that women are unable to fully appreciate the emotional impact of such a decision.⁴ But the pro-choice reaction to this story may also be overly-simplistic: the pro-choice camp can equally stifle the voices of women for whom regret, remorse, and true sorrow is an inevitable part of abortion.

For example, post-abortion counseling service providers are caught in the middle of this debate, and though they provide a valued and necessary service, are vilified by both movements. Aspen Baker, one of the participants in our symposium and the founder of Exhale, a post-abortion counseling hotline based in Oakland, California, explained that “[s]ome people have characterized us as pro-choice; some people have characterized us as pro-life; some people have characterized us as confusing, or as wishy-washy ... [i]n a pro-choice/pro-life world — in a black-and-white world — we’re trying to say there’s something else.”⁵ Thus the woman “who regrets her choice” is at once turned into a tool of pro-life paternalism, and is simultaneously silenced by pro-choice extremism, but has few places to turn for support.

In so many ways, the gorilla in the room (or standing on the steps of the Supreme Court)—with the pro-life protesters on one side and pro-choice protesters on the other—is sex. Sex is an integral part of this debate, but is rarely discussed in legal and academic discourses on abortion. And attitudes about sex come with its own set of stereotypes and myths. On the one hand, pro-choice activists are viewed as advancing a culture in which unbounded sexual freedom—with no consequences—is the norm. Pro-life activists, on the other hand, are viewed as

1 *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007).

2 *Id.*

3 *Id.* at 1649 (Ginsberg, J., dissenting).

4 See generally, Reva B. Segal, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008).

5 Shoshanna Walker, *Post-Abortion Counseling Group Finds Itself on the Firing Line*, N.Y. TIMES, January 14, 2011, http://www.nytimes.com/2011/01/14/us/14bcexhale.html?pagewanted=all&_r=0.

advancing a worldview in which sex should be restricted and the consequences of sex—wanted or unwanted—should be borne by the women and girls, men and boys who engage in it.

Few exchanges so poignantly highlight this division as the recent controversy involving one of our Georgetown Law colleagues, Sandra Fluke, and a prominent talk radio personality, Rush Limbaugh. The actual transcript of Limbaugh's words illustrate the polarized nature of political rhetoric around sex:

What does it say about the college co-ed Susan Fluke [*sic*], who goes before a congressional committee and essentially says that she must be paid to have sex, what does that make her? It makes her a slut, right?

It makes her a prostitute. She wants to be paid to have sex. She's having so much sex she can't afford the contraception. She wants you and me and the taxpayers to pay her to have sex. What does that make us? We're the pimps ... So, Ms. Fluke and the rest of you feminazis, here's the deal. If we are going to pay for your contraceptives, and thus pay for you to have sex, we want something for it, and I'll tell you what it is. We want you to post the videos online so we can all watch.⁶

There are so many tragedies that this transcript illustrates. The first is that, for women, there is no sexual middle ground—either you are not having sex at all, or you are a prostitute. In this political climate, an accomplished and highly educated law student—who publicly admits that she is sexually active—is “a woman who is happily presenting herself as an immoral, baseless, no-purpose-to-her life woman.” Another is that this public figure—followed by so many Americans—is actually completely ignorant of the pure-and-simple biology of birth control pills (“Ms. Fluke, have you ever heard of not having sex? Have you ever heard of not having sex so often? ... did you ever think about maybe backing off the amount of sex that you have?”). Finally, it is tragic that the base and divisive language used to describe Ms. Fluke dehumanizes, demonizes, and “archetypizes” women (and men) who do not fit into one of two very polarized political groups—so much so that the space between the two “camps” becomes a “no-woman’s land.”

The link between sexual extremism and political extremism thus leads to another source of potential “common ground” regarding abortion: reforming the political rhetoric around sex. Is there room for a common ground conversation about how we talk about sex in the political arena? Surely—with sex an integral

6 See, Jack Mirkinson, *Rush Limbaugh: Sandra Fluke, Woman Denied Right To Speak At Contraception Hearing, A “Slut”*, THE HUFFINGTON POST, February 20, 2012, http://www.huffingtonpost.com/2012/02/29/rush-limbaugh-sandra-fluke-slut_n_1311640.html; J. Bryan Lowder, *Has Rush Limbaugh Finally Gone Too Far in Slut-Shaming Sandra Fluke?*, SLATE.COM, March 2, 2012, http://www.slate.com/blogs/xx_factor/2012/03/02/has_rush_limbaugh_finally_gone_too_far_in_slut_shaming_sandra_fluke_.html.

part of personhood, and an essential prerequisite to abortion—there is a way to talk about the consequences of sex, the pure-and-simple biology of sex—without resorting to base and unhelpful stereotypes that only further serve to stifle the helpful conversations that we could be having.

Just as the polarization of the abortion debate serves to cut women out of the political conversation about approaches to abortion, adoption and birth control, the repressive nature of the political rhetoric surrounding sex has caused an equally problematic gap. Just as the middle-ground voices and perspectives on the debate are being shut out, there is also an entire piece of the abortion story that is entirely missing from the political conversation. How did this woman become unintentionally pregnant? Was it lack of education about her reproductive cycle? Was it lack of family support? Was there sex-based violence or coercion involved? Was there social pressure to engage in sex or become pregnant? Or was it something less concrete—just an inability or unwillingness to say “no”?

All of this leads back to the idea of reproductive justice. What does this term mean in relation to attitudes toward sex in particular? As I mentioned above, many women feel conflicted about the decision to undergo an abortion. Many women feel conflicted about talking about sex. “Reproductive justice” may thus be best served not by silencing these perspectives, but by supporting the organizations and individuals who seek to bring these conversations to the forefront of the national debate.

Comments from Robin West

What is meant by “common ground,” and is there any, in the recently intensified abortion wars?

The questions are related: whether there is any common ground might depend on what we mean by the phrase. The self-labeled search for “common ground” between “pro-life” and “pro-choice” advocates in the abortion debates goes back at least to the mid-1980s, when activists on both sides began to worry about the corrosive effects of this issue on both politics generally, and politics surrounding reproductive justice more particularly.⁷ Since that time, for some activists, and for some purposes, the search for common ground denotes the attempt to find those areas of agreement on the morality or legality of abortion, and the morality, wisdom, and constitutionality of anti-abortion laws. From that common ground, the hope holds, we might reason our way together toward the best resolution of these difficult moral and legal problems. For example, most activists and scholars on both sides of these debates might agree that performing or procuring an abortion to save the life of the mother is generally morally justified, and all or most might agree that multiple abortions sought by a woman who has access to birth control

7 For a history of common ground efforts during the decade following *Roe v. Wade*, see Mary Ziegler, *The Possibility of Compromise: Antiabortion Moderates After Roe v Wade*, 87 CHL.-KENT L. REV. 571 (2012).

but finds it inconvenient to use, raise serious moral questions. All or most might agree on the immorality of late-term abortions for anything other than a very few reasons, and likewise agree that a law that criminalizes the use of at least some birth control methods, whatever the morality of the practice, violates constitutional norms of privacy and liberty. Likewise, all or most might agree on the wrongness of infanticide, and that the inclusion of intentional killings of newborns in a state's homicide statutes bear no constitutional infirmities.

From these shared premises, it is not unreasonable to think, it might be possible to reason one's way, either in law or morality, toward conclusions that are not shared but should be and would be, were the lines of argumentation made clear: if we all agree that abortion to save the life of the mother is generally morally justified, then perhaps all or most might agree on the morality of abortions to prevent grave bodily harm. If we all agree that abortions procured because of a too casual failure to prevent conception are immoral, perhaps all might agree that abortions procured so as to forestall or prevent other inconveniences likewise are immoral (whether or not they should be criminalized, and whether or not it would be unconstitutional to try to do so). If all agree that the criminalization of some forms of birth control is a fool's errand, and unconstitutional to boot, perhaps all would likewise agree that the same is true of other forms of birth control.

"Common ground" in this understanding refers to initial common premises which might be shared by both sides of the abortion wars. The "common ground project," then, refers to the hope that both sides might reason together toward common conclusions on more contentious issues regarding the morality of abortion, and the wisdom or constitutionality of criminalizing it, rather than resolve them through methods more suited for irreconcilable differences, such as the blunt political tool of the ballot box, or self-segregation into separate and gated communities.

Understood in this way, the "common ground" project has a prestigious and important lineage; it is basically the same method, with the same hope, behind the academic disciplines of applied ethics, moral philosophy, and normative political theory. Practitioners in those fields likewise begin with what they hope are shared premises, and then argue on that basis toward surprising conclusions on contentious issues, all on the heroic assumption that if the argumentation is sound, listeners who accept the premises will accept the conclusions, even if those conclusions are at odds with what their beliefs had been before encountering the argument. Unsurprisingly, then, moral and political philosophers have responded to the abortion debates in just this way. Perhaps most famously, Judith Thomson argued in an important article in the early 1970s⁸ for the moral permissibility of some abortions by analogizing the predicament of a woman who has been impregnated against her will, to that of a hypothetical individual, kidnapped and strapped to a hospital bed for nine months, so that his body and its organs might service those of a stranger, threatened by some fatal disease for which the kidnapped victim's

8 Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).