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Preface: Silence of the Law (Textbooks)

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PREFACE: SILENCE OF THE LAW (TEXTBOOKS)

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In this issue of the University of St. Thomas Journal of Law and Public Policy, readers will find three reviews of the treatment of abortion and euthanasia in legal casebooks. These reviews are part of an ongoing project by the Prolife Center at the University of St. Thomas to promote effective legal protection for human life from inception to natural death through scholarly research, curriculum development, and legal initiatives. The Center seeks to train students to work with lawyers and policy makers in the development and defense of laws recognizing the inviolable right to life of every innocent human being.

The Center receives no funding from the University. Leadership of the Center seek to accomplish its objectives by leveraging existing scholarly and pedagogical efforts by prolife members of the faculty, and by obtaining external funding. External funding through grants and contributions by interested organizations and individuals allows the Center to extend efforts of the Center beyond the individual interests of faculty and pursue more coordinated efforts to advance the culture of life. The textbook evaluation project is one such effort, and funded through a generous grant by Our Sunday Visitor Institute.[1]

The legal academy's support for abortion rights is long-standing and seemingly monolithic. While *Roe v. Wade* was initially

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1. "Our Sunday Visitor Institute was established to carry on the vision of Archbishop John F. Noll who founded Our Sunday Visitor for one purpose—'To Serve the Church.'" Our Sunday Visitor Institute, http://www.osvinstitute.com/ (last visited Oct. 27, 2012). As a part of serving the Church, the Institute provides funding for projects that explain and promote the dignity of the human person.

criticized by some who expressed concern about judicial usurpation of the democratic debate on abortion,[2] the outcome of the case is widely applauded.[3]

This widespread support for an unlimited access to abortion has resulted in a variety of initiatives to instruct and engage law students and faculty in the creation of a universal "right" to abortion. The University of Toronto offers the International Reproductive and Sexual Health Law Programme with the express purpose of promoting an international right to "reproductive health," a phrase that has increasing come to mean unlimited access to abortion.[4] An interdisciplinary e-journal, *Reproductive Justice, Law and Policy*, is edited, produced, and promoted as a collaborative project of The Center for Reproductive Rights and American University Washington College of Law.[5] The e-journal is part of a larger initiative by the Center for Reproductive Rights to promote teaching about "reproductive justice"[6] and abortion as a basic human right as a

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2. *See, e.g.*, Alexander M. Bickel, THE MORALITY OF CONSENT 27 (1975) ("But if the Court's model statute [on abortion] is generally intelligent, what is the justification for its imposition? If this statute, why not one on proper grounds of divorce, or on adoption of children?"); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 943 (1973) ("The problem with *Roe* is not so much that it bungles the question it sets itself, but rather that it sets itself a question the Constitution has not made the Court's business.").

3. *See, e.g.*, WHAT ROE V. WADE SHOULD HAVE SAID (Jack M. Balkin ed., 2005) (containing eleven separate opinions with eight supporting abortion rights, two opposing creation of such rights, and one arguing that the right should develop legislatively). For a statistical study of political affiliations of law faculty *see* John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1168 (2005).

4. Meetings Coverage, Third Committee, Several Aspects of Sexual, Reproduction Health—Providing Information, Using Contraception, Abortion—Should Be 'Decriminalized', Third Committee Told, GA/SHC/4017 (Oct. 24, 2011).

5. The Center for Reproductive Rights promotes the journal as co-edited and "co-sponsored" by "The Center for Reproductive Rights and American University Washington College of Law." *See* Center for Reproductive Rights, *Law School Initiative*, http://reproductiverights.org/en/our-work/law-school-initiative, (last visited Oct. 7, 2012) and SSRN, *Weekly Announcements—March 8, 2010*, http://ssrnblog.com/2010/03/10/weekly-announcements-march-8-2010/ (last visited Oct. 7, 2012). Notwithstanding the claims of affiliation, the journal is not listed on the university website page listing all other sponsored journals at American University Washington College of Law, http://www.wcl.american.edu/.

6. As explained in the 2011 Reproductive Rights and Justice Course Survey:

> The terms "reproductive rights" and "reproductive justice" are rooted in different analyses and strategies. The reproductive rights framework is a legal model that serves to protect an individual woman's right to reproductive decision-making. The reproductive justice framework employs a broader, intersectional analysis that emphasizes the ways that race, class, gender, sexuality, ability, age, and immigration status can affect a person or community's reproductive lives.

part of all law school curriculum.[7] Students for Reproductive Justice, a national organization, provides course supplements on the law governing abortion and human reproduction for constitutional law and human rights classes. They encourage the development of law school courses focusing exclusively on reproductive rights and provide an extensive list of topics and suggested readings for such courses. According to this organization's course survey, at least 27 courses focused exclusively on reproductive rights were offered during the 2010–11 academic year.[8] However, as the survey notes, the topic of abortion is addressed in numerous law school courses including family law, bioethics, criminal procedure, health law, and poverty law.[9]

It is this last point that is the genesis of the Prolife Center's textbook initiative. In order to determine whether the issues surrounding abortion, infanticide, and euthanasia were treated in a fair manner, the Center proposed to review and evaluate treatment of the issues of abortion, infanticide, and euthanasia in leading law school texts in eight subject areas including Constitutional Law, Bioethics, and Family Law. These reviews are reproduced in this issue of the St. Thomas Journal of Law and Public Policy.

Not surprisingly the reviews reveal that contemporary legal casebooks generally treat the legal right to abortion, which was judicially created in *Roe v. Wade*, as a necessary and desirable development of law. Case excerpts in the texts are typically edited to highlight and reinforce the reigning orthodoxy in academic circles regarding the right to obtain abortions, with limited or no attention given to dissenting views—whether judicial, political, or academic. For example, a number of textbooks include excerpts from Judith Jarvis Thomson's *A Defense of Abortion*, but not one offers an in-depth critique of her article.[10] The primary form of diversity found in

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LAW STUDENTS FOR REPRODUCTIVE JUSTICE, REPRODUCTIVE RIGHTS LAW & JUSTICE COURSE SURVEY 3, n.1 (2011), http://lsrj.org/resources#coursesurvey.

7. *See* Center for Reproductive Rights, *supra* note 5.

8. STUDENTS FOR REPRODUCTIVE JUSTICE, *supra* note 6, at 10.

9. *Id.* at 4–5.

10. Prolife Center at the University of St. Thomas, *Academic Treatment of Abortion and Euthanasia in Leading Family Law Textbooks*, 6 U. ST. THOMAS J.L. & PUB. POL'Y 35, 35 (2011); Prolife Center at the University of St. Thomas, *Academic Treatment of Abortion and Euthanasia in Leading Bioethics Textbooks*, 6 U. ST. THOMAS J.L. & PUB. POL'Y 54, 54 (2011); Prolife Center at the University of St. Thomas, *Academic Treatment of Abortion and Euthanasia in Leading Constitutional Law Textbooks*, 6 U. ST. THOMAS J.L. & PUB. POL'Y 11, 11 (2011).

the texts comes in the form of notes providing alternative theories that justify the same conclusion—that abortion is and should be freely available.

On November 15, 2011, the Prolife Center hosted a conference where the textbook reviews were presented to twenty-one academic and practicing lawyers. Conference participants were asked to consider a number of questions including:

- Are these text reviews accurate?
- What skills and knowledge do we need to impart to prolife law students?
- Are those skills and knowledge different in any way from the skills and knowledge that all students need?
- Are we preparing the next generation of prolife lawyers effectively?
- What legal issues/topics in Bioethics, Constitutional Law, and Family Law should include some discussion of the prolife perspective?
- Academic lawyers should be aware of what trends in constitutional litigation, legislation, and public policy work? How should these trends affect law school texts and course offerings?
- What support do lawyers who work to advance the prolife view need from the legal academy?

The resulting discussion was rich and rewarding. Every participant recognized the omission of the prolife perspective in most law school texts. With a few notable exceptions, like Paulsen, Calabresi, McConnell, and Bray's *The Constitution of the United States: Text, Structure, History, and Precedent* (2010), professors who want a balanced presentation of the legal issues surrounding abortion, euthanasia, and infanticide must supplement any standard legal textbook they adopt.

RESEARCH ON STUDENT ATTITUDES

Professor Nicholas DiFonzo opened the conference with a presentation entitled "Setting the Context: Understanding Pro-Choice Attitudes and Pro-Life Persuasion." Dr. DiFonzo, an expert on the psychology of rumors and how harmful rumors may be most

effectively refuted, explained how students become pro-choice and the psychological rewards they enjoy from maintaining their position.

Based on attitude research, he noted that pro-choice students believe that changes in abortion law will harm women's health and restrict sexual liberty. These beliefs are rarely challenged in any academic setting, and students come to believe that their views represent the views of a large majority of Americans. They are embedded in social networks where their fears are reinforced by repetition, and their group identity becomes associated with the pro-choice position. In short, any challenge to the pro-choice position is seen as personally threatening. Yet when confronted with cases of coerced abortion, abortion used for sex-selection, and the horrific practices of some abortion providers like Kermit Gosnell in Philadelphia,[11] pro-choice students often modify their views and recognize the legitimacy of government regulation and limited prohibition of abortion.

Prolife students, in contrast, have maintained their beliefs, in spite of their academic and social surroundings. They are regularly challenged to defend their view that human life should be legally protected from conception to natural death. Because they routinely encounter questions about the "hard cases" of rape and painful terminal illness, they have thought through their responses, and more easily distinguish the rare tragic circumstances that may necessitate an exception from the common experiences that support legal and moral constraints.

Dr. DiFonzo's presentation occasioned a lively discussion regarding student participation and response to classroom discussion of life issues. Conference participants described specialized courses or seminars they have developed to assist law students in understanding the complexity of legal regulation of abortion and euthanasia. Professor Sam Calhoun discussed the pedagogical challenges that arise in presenting these controversial topics in a way that encourages student dialogue and understanding of the deep cultural and political divisions surrounding the issues.[12] Others committed to sharing syllabi and course materials to any attending requesting them.

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11. *Report of the Grand Jury Investigating the Charges against Kermit Gosnell*, Jan. 14, 2011, http://www.phila.gov/districtattorney/PDFs/GrandJuryWomensMedical.pdf.

12. Samuel W. Calhoun, *Impartiality in the Classroom: A Personal Account of a Struggle to Be Evenhanded in Teaching About Abortion*, 45 J. LEGAL EDUC. 99 (1995).

CONFERENCE WORKING GROUPS

Conference attendees then broke into working groups focused on the particular substantive areas of Bioethics, Constitutional Law, and Family Law. While all participants agreed that law school texts needed to provide more comprehensive and balanced treatment of life issues, the proposed solutions of each working group varied.

BIOETHICS

The Bioethics group emphasized that any criticism of mainstream texts, like those reviewed by the Center, should be framed in terms of balance, depth of coverage and sound scholarship, as well as good pedagogy. Current texts tended to approach the law of abortion as "here is the mainstream view, with a note on this odd minority view." This is not an accurate reflection of the legal and political landscape and shortchanges students in their development of analytical skills and abilities to understand and respond effectively to views they disagree with. The coverage of euthanasia is less polarized, but still evidences a bias toward radical individualism and crude views of autonomy. The group concluded that there is a need for a new text with more public bioethics material in addition to clinical bioethics. The ideal text would include chapters of the underlying common law tradition and the history of bioethics. After the conclusion of the conference one group member circulated and requested comments on a tentative outline for such a text.

CONSTITUTIONAL LAW

The Constitutional Law group identified the primary problem with current texts as one of omission and framing. They summarized the problems as marginalization, minimalization, and formation. Marginalization occurs when life issues are talked about only in connection with abortion. Minimalization occurs when texts leave the impression that the prolife view is extreme and essentially religious. Formation of the students appears directed to inculcating the view that the pro-choice position is the moderate view, and there are not serious arguments against a constitutional right to abortion.

The texts omit the extreme positions taken by the abortion rights organizations in support of partial-birth and sex-selection abortions. The books omit any materials dealing with coerced

abortions and whether women facing crisis pregnancies experience their choices as real. When dealing with objections to abortion jurisprudence, the texts usually include questions of judicial restraint, but rarely address the question of whether abortion is something that should be permitted. There is little material raising the question, "What if the Court is mistaken on the critical factual assumptions and reasoning in *Roe*?" While some suggest that these omissions are simply reflect the state of the law, the authors readily include materials suggesting where the law is trending in other areas such as the application of *Lawrence v. Texas*[13] to questions about the definition of marriage.

The Constitutional Law group noted that the sheer amount of historical information and doctrine that must be transmitted in this course limits the ability of professors to supplement a textbook. Technology may provide some relief for this problem as law texts increasingly link to online materials to provide visual and audio history, as well as information about the diversity of views on a particular topic. Technology also provides that opportunity to create an on-line course supplement accessible to both faculty and students, similar to that produced by Law Students for Reproductive Choice.

Any supplement should be short to facilitate classroom use and organized around key cases contained in most Constitutional Law texts. Coverage of *Doe v. Bolton*[14] and the Court's insistence on a broad health exception in abortion laws would provide students some insight into the legislative battles and litigation surrounding regulation. The supplement could include excerpts from dissents, the texts of statutes that regulate or limit abortion, excerpts from scientific and social science literature on the impact of abortion on women, and a substantial treatment of rights of conscience. Comparisons to the constitutional treatment of the death penalty and foreign laws regulating abortion could encourage robust discussion of the underlying assumptions in American abortion jurisprudence.

This is an ambitious project and the group suggested that it might be best undertaken in collaboration with other national groups such as University Faculty for Life or Students for Life.

13. Lawrence v. Texas, 539 U.S. 558 (2003).
14. Doe v. Bolton, 410 U.S. 179 (1973).

FAMILY LAW

Members of the Family Law working group agreed that Family Law texts failed to include a balanced presentation on foundational issues. The pro-choice perspective is assumed in discussions of when life begins, and whether pre-natal human life should be treated as a "child" for purposes of child support, medical interventions, etc. The texts ignore the importance of pregnancy when discussing how one determines membership in the family and when parental rights and responsibilities begin. While most texts discuss the status of women in the family and society, there is little discussion of the role and effect of abortion on that status. When discussed, abortion is presumed to have improved women's status, with no critiques or alternative views presented.

Like Constitutional Law, there is a canon of cases and concepts that every Family Law course must cover, leaving little room for supplementary topics and issues. Members of the group emphasized that no Family Law course can include discussion of all of the subjects and topics. Some decisions must be made regarding coverage; and some topics simply must be excluded. Traditional Family Law courses includes formation of marriage; creation or recognition of parentage; regulation of ongoing spousal and parent-child relations, as well as quasi- or extended-family relations; regulation of the dissolution or termination of spousal and parental relations; and the economic and relational incidence of such termination or dissolution. There is more to cover than can be covered in even a 4-credit Family Law course. Yet even given this constraint, there is real evidence of ideological bias in the coverage of topics and in the topics selected for inclusion.

Members of the working group believe that some significant discussion of abortion belongs in every Family Law casebook, while the topic of euthanasia could be included or omitted depending on other course coverage. The group identified and prioritized the following topics that could be included in a comprehensive discussion of abortion in Family Law classes:

1. History of abortion, at common law, etc.
2. Minors' access to abortion;

3. Parental rights regarding their minor children's abortions;
4. Coerced abortions (e.g., parents forcing teens to abort);
5. Spousal (husbands/boyfriends) rights and interests;
6. Gender equality and abortion;
7. Abortion as crime, poverty prevention, and racism;
8. Embryo adoption and custody;
9. Personhood and neonaticide;
10. Counseling and attorney role as counselor;
11. Federalism in Family Law;
12. Free speech;
13. Privacy and state interests;
14. Private approaches and solutions; and
15. Health-care decision making in the family context.

These topics could easily be gathered into a course supplement that could be either be published as a supplemental text or provided electronically to all interested faculty and students.

CONCLUSION

It is clear that law school texts in Bioethics, Constitutional Law, and Family Law omit materials that would allow students to understand the public controversy surrounding abortion, and to a lesser extent the growing debate over euthanasia. Advocacy groups like the Center for Reproductive Rights are actively seeking to promote this intellectual bias, and academic centers like the University of Toronto International Reproductive and Sexual Health Law Programme provide only one perspective on these issues of great public importance. Failure to admit prolife views and alternative perspectives into the law school classroom leaves students unprepared to address these issues in a thoughtful and deliberate manner when they encounter them as citizens and as lawyers. Our Sunday Visitor Institute, through its funding of this project, and the St. Thomas Journal of Law and Public Policy, through its publication

of these reports, have taken a significant step in identifying the problem. As Director of the Prolife Center at the University of St. Thomas, I am grateful for their generosity and courage.