

Challenges for the Pro-Life Movement in a Post-Roe Era

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Abstract: This article considers challenges facing the pro-life movement after *Dobbs v. Jackson Women's Health Organization* (2022). It identifies four questions the movement must face: (1) whether to adopt a combative or conciliatory rhetorical stance; (2) how to prioritize new legislative goals; (3) how to define the limits of acceptable compromise; and (4) how to respond to Americans with ambivalent attitudes toward abortion. The article argues that each of these issues could precipitate serious division in the pro-life movement that will impact likelihood of future success.

On January 20, 2023, the pro-life movement converged on Washington, DC for its annual March for Life. The 2023 March, however, reached a different destination from its predecessors. Rather than finishing on the Supreme Court steps, it culminated between the Court and the U.S. Capitol.¹ The 2023 March recognized that the battleground had decisively shifted after the Supreme Court issued *Dobbs v. Jackson Women's Health Organization*,² which overturned *Roe v. Wade*³ and returned power to regulate abortion to the states and federal government, although doubtless with continuing judicial involvement.

Pro-life leaders at the 2023 March were grateful for *Dobbs*, and determined to take advantage of new opportunities.⁵ At the same time, however, they evinced an uncertainty, even wariness, about next steps. The pro-life movement had already experienced significant defeats in the post-*Roe* world. In the six states that had put the question of abortion directly to the people, the pro-life position had decisively lost. Moreover, these losses occurred not only in liberal states, like Vermont, but also in moderate and even conservative states, like Michigan and Kansas.⁶

What, exactly, are the challenges facing the pro-life movement after the demise of *Roe*? As a scholar who operates at the intersection of law, religion, and morality and who has long been following the pro-life movement and is sympathetic to some of its concerns, I would like to identify four questions of both principle and practice facing pro-lifers in these strange new days: (1) What is the appropriate rhetorical stance to address the issue of abortion?; (2) What are the

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goals of the pro-life movement?; (3) What is a morally acceptable compromise in a nation with highly divided views on abortion?; and (4) How should the pro-life movement think about the “muddled middle,” the large group of people with ambivalent and perhaps self-contradictory views of abortion, who cannot be characterized neatly as pro-life or pro-choice.⁷

Each of these questions is quite large. Taken together, they seem quite diverse. But in my view, they all stem from a common source: the sea-change in the political position of the pro-life movement wrought by *Dobbs*. Before *Dobbs*, the focus of the pro-life movement was both negative and unified in nature. Its common objective was to get rid of *Roe*. After *Dobbs*,

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however, the pro-life movement must confront the demands of developing and enacting restrictions on abortion. They are moving from the unifying task of defeating a common enemy to the far more contentious challenges of developing and enacting legal policies and programs. If these challenges are not handled carefully, they may end up both dividing the pro-life movement itself and alienating the many Americans who are ambivalent about abortion.

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The Role of Prophetic Indictment

The rhetoric of prophetic indictment has long been a key part of American social criticism. Indebted to the Puritans, it is modeled on the fiery condemnations of wrongdoing attributed to biblical prophets such as Isaiah, Jeremiah, and Hosea.⁸ Over time, the religious worldview of the Puritans has faded from the nation’s consciousness. But their distinctive rhetorical style

has been adapted by cultural critics of successive generations, both religious and secular.⁹

Prophetic indictment has three features. First, it is relentlessly negative in its orientation; it is an authoritative condemnation that does not tolerate nuance or exceptions. Second, it appeals to emotion rather than to reasoned judgment; it relies on words and images designed to produce shock or fear in its audience. Third, it tends toward utopianism; while prophetic indictment is generally very clear about what it is against, it often tends to lack a positive program for action.¹⁰

The rhetoric of prophetic indictment was perfectly suited to the pro-life movement in the five decades after *Roe*, for two reasons. First, *Roe* itself was an ideal target; pro-choice as well as pro-life legal scholars criticized the decision as an exercise of “raw judicial power.”¹¹ Second, given the fact that pro-lifers could not immediately amend the legal regime, focusing their ire on the act of abortion was a logical strategy. Words and images depicting abortion as baby-killing were designed to appeal to their audience’s visceral sense of human decency and outrage, rather than to precipitate a cool-headed debate how best to legally restrict abortion. Such a debate would have been fruitless, given *Roe*’s scope and reach.

The three characteristic features of prophetic rhetoric worked to the benefit of the pro-life movement. The concentration on the negative — the evils of *Roe* and of the practice of abortion — served to unify a group whose positive commitments may have differed substantially. It revived the flagging energies and steeled the resolve of pro-lifers for their long fight. Moreover, it kept the focus on the task at hand, rather than diverting attention to remote possibilities that seemed tenuous and hypothetical at the time.

After *Roe* fell, however, the rhetorical situation facing the pro-life movement changed significantly. All three characteristic features of prophetic indictment have moved from the benefit category to the liability category for the pro-life movement. *Roe* is no longer a target of attack. The adamant condemnations of abortion, brooking no counterargument, can serve to alienate and even frighten voters who now must be persuaded to enact legislation restricting abortion. And the emerging need to develop a positive plan to regulate abortion has already surfaced disagreement about priorities and strategy.

So the challenge for the pro-life movement is to learn how to employ a different type of rhetoric —

that of practical deliberation, the quintessential language of pragmatic policy making. But that is easier said than done — precisely *because* people's rhetorical strategies shape not only their discourse, but also their modes of perceiving the world. And the rhetoric of prophetic indictment has long shaped the minds and hearts of those who consider abortion a grave evil. As the nineteenth century British critic Matthew Arnold noted, those who engage in prophetic indictment often exhibit an absolute and unyielding commitment to the "one thing needful."¹² They show disdain and even disgust for those who do not seem share their absolute commitment.

The pro-life movement is a diverse group, including prophets who will accept nothing less than absolute protection for unborn life in all cases and pragmatists who are willing to work incrementally. While the unifying aim of the pro-life movement was overturning *Roe*, these tensions were constrained. Post-*Dobbs*, however, those tensions could expand, and perhaps divide, the pro-life movement, as the practical challenges of enacting pro-life legislation become dominant.

The Broader Goals of the Pro-Life Movement

The primary substantive question facing the pro-life movement is the most fundamental: what is its overarching goal? Is it to ensure that the law legally restricts abortion as much as possible or is it to reduce the number of abortions as much as possible? One might think that the first scenario is a reliable means to the second. But it is not obvious that this is the case. Before *Dobbs*, the data suggested that the countries that had more permissive abortion laws also had lower rates of abortion.¹³ Are there other effects on maternal-fetal health to be considered? Recent studies suggest that younger doctors are less likely to want to practice in states that ban abortion.¹

It is not clear, of course, how *Dobbs* will affect the practice of abortion. A year after *Dobbs*, fourteen states have banned abortion (with and without an exception for rape and/or incest), while four others have instituted bans after gestational periods ranging from six to twelve weeks.¹⁵ But that does not mean the abortion rate will be proportionately reduced. Unless states that ban abortion are able to drastically constrict the right to travel, some women (with financial means) will be able to leave the state to obtain an abortion.¹⁶ Moreover, the increasing availability and popularity of medication abortion pose clear challenges to states wishing to impose restrictions, particularly if the federal government does not cooperate by helping them police the mail. What would the impact of this prospect of ineffectiveness be on pro-life activists? Is not

the point of the pro-life movement to save the lives of the unborn? Yes, of course, most pro-life activists would say. But they would also claim that a fundamental purpose of the movement is to inscribe into law the principle of the equal dignity of the unborn. For pro-lifers, abortion is a civil rights issue raising questions of the basic equality of all human beings, including the unborn, not merely a public health problem. Effectiveness is important, but the overriding message is even more essential.

A second challenge for the pro-life movement is how to respond to some of the means and methods that can avoid the need for abortion, such as promoting the use of birth control, particularly long-acting birth control, among women at risk of crisis pregnancies. For some members of the pro-life community, this approach would not be morally problematic. For others, however, it would raise significant moral challenges, because it encourages behavior they believe to be morally objectionable on its own terms. For many conservative Christians, Catholic and Protestant alike, sex is an activity that should be reserved to marriage.¹⁷ Moreover, many Catholic members of the pro-life community accept official Catholic teaching that contraception is not a morally acceptable choice for anyone.¹⁸

In addition to preventing crisis pregnancies from occurring, it is also possible to make it easier to deal with them, by offering practical and emotional support to pregnant women and their families. Such support may change the calculation for some women, making it more feasible (in their own view) to have the child. It would seem that all pro-lifers would gladly unite around this goal. Yet matters may not be quite so simple. Many (but not all) pro-life activists situate their opposition to abortion within a broader normative framework, which promotes traditional family values. Consequently, they would have significant reservations about any approach to reducing abortion that undermined this larger goal of restoring the place of heterosexual marriage in American life.¹⁹

These challenges have the potential to exacerbate fault lines in the pro-life movement. Younger and less religious pro-lifers may want to minimize crisis pregnancies, to support programs that help women choose to bring crisis pregnancies to term and to raise their children alone if they desire to do so. They may have no moral objection to birth control, nor any desire to re-establish an older form of sexual morality based on marriage.²⁰ By contrast, older and more religious pro-lifers may think that the best way to protect the unborn is to encourage

their conception only within heterosexual marriage.

The Role of the State

A related challenge facing the pro-life movement post-*Roe* has to do with questions regarding the purpose of the state. In my judgment, members of the pro-life coalition have successfully suppressed significant differences about this question to concentrate on overturning *Roe*. But it is inevitable that those questions will resurface in a post-*Roe* era, putting stress upon the coalition of Roman Catholics and evangelical Protestants that form the core of the pro-life movement.

Some history is helpful here. As Randall Balmer has shown, the pro-life movement is largely a coalition of Roman Catholic and evangelical Protestant Christians, who have worked to achieve their goals through the Republican Party.²¹ More specifically, before *Roe* was decided, the pro-life movement was largely comprised of and led by Catholics, such as John Wilke, M.D. The Catholic moral tradition has long condemned abortion, while also holding that the legitimacy of the prohibition should be apparent in principle to all moral agents, since it was a matter of natural morality, not specifically religious doctrine. Other Christian traditions, however, did not have clear teaching against abortion, in part because they do not have the centralized authority structure characterizing Catholicism, and in part because they saw the issue as more morally complicated than Catholics did.²²

After *Roe*, some evangelical Protestants, such as Jerry Falwell, supported it. Others were indifferent about it, considering abortion to be a Catholic issue. By 1980, that all changed — for reasons that had more to do with political strategy than bioethics. The conservative political operative Paul Weyrich began looking for an issue that would motivate Evangelical Protestants to vote when it became clear that his efforts to support racially segregated schools, as a matter of religious freedom, was not going to succeed. After testing one or two other issues, he hit upon abortion as the best motivator. By 1980, formerly pro-choice Jerry Falwell had founded the Moral Majority, a movement which placed opposition to abortion at its core.²³

Over the next several decades, evangelical Protestants became crucial partners with Roman Catholics in the fight against abortion. During this time, many Catholics who saw the abortion issue as one of their first political priorities migrated to the Republican Party, which became more and more pro-life. The Democratic Party, in turn, began to show greater commitment to pro-choice policies, as fewer and fewer pro-life politicians saw themselves welcome in Democratic circles.²⁴

As noted above, these political alliances were stable while the goal of the pro-life movement was overturning *Roe*. After *Dobbs*, however, I think that significant tensions in worldviews will be exposed, particularly disagreements around the purpose of government and the nature of the law. These disagreements run along religious lines.

The Catholic moral tradition always opposed abortion. At the same time, from the end of the nineteenth century, it increasingly stressed the obligation of the state to step in to provide a safety net for the most vulnerable members of society, particularly the very young and the very old. The purpose of the state (and the laws enacted and enforced in its name) is positive; it is to promote the “common good” of the community. The “common good” is a technical term in Catholic moral theology; it is the good of each individual and the good of the whole, working harmoniously together. The purpose of law, therefore, is ultimately positive; its function is to promote better living in community, not merely to restrain people from committing harmful acts. In fact, St. Thomas Aquinas said that human beings would need to enact law even if they had not sinned, because they would still need to solve coordination problems and address good-faith disagreements.²⁵

What does this have to do with abortion policy? In the post-*Roe* world, many Catholic pro-life leaders emphasize that they want to make abortion not only legally unavailable, but also morally unthinkable. This broader goal requires far more than legal prohibitions. In accordance with Catholic social teaching, pro-life leaders have long called for expanded social services, including Medicaid expansion, well-baby care, and post-partum care.²⁶ The idea that caring adequately for unborn life also means caring for their parents, brothers, and sisters is embedded in Catholic social teaching, as is the idea that these tasks belong to the government if they cannot be accomplished at more local levels of society, such as families, voluntary organizations, and houses of worship.

In contrast, many evangelical Protestants, particularly in the South, do not have such an expansive and positive view of government. In their perspective, the purpose of government is far more restrictive. Law is configured primarily as criminal law; its central task is to keep members of the community from taking one another's lives, limbs, and properties. The positive tasks of the state are limited to those that benefit all people and cannot be accomplished by private means, such as building transportation systems.

Social welfare is a suspect governmental project, on this view, for at least three reasons. First, it interferes with the idea that adults are meant to stand on

their own two feet in facing their problems. Second, families, houses of worship, and local organizations are the proper locus for assistance to those who need charity. Third, it is not government's role to engage in the kind of redistribution of wealth that strong social programs require. It is tantamount to stealing from the wealthy and middle class to give to the poor; it creates a "nanny state" and a culture of dependency. The Catholic view of the purpose of government resonates more with that of the Democratic Party, while the evangelical Protestant view has more in common with the Republican vision of limited government. Indeed, many Catholic pro-life leaders have lamented the fact that they left the Democratic Party only (or largely) because of its stance on abortion. With *Roe* overturned, however, there may be some opportunity for political realignment, depending upon how pro-lifers think about their next set of goals.

The Moral Acceptability of Compromise

A third major issue of both principle and practice that the post-*Roe* pro-life movement needs to address is the moral acceptability of political compromise with respect to laws regulating abortion. Like the previous issues, this discussion could also reveal and exacerbate latent fissures in the pro-life movement at two distinct levels.

First, any discussion of compromise presupposes a sense of what the ideal legal situation with respect to abortion would entail. For some pro-life activists, it would entail banning abortion for any reason whatsoever. For others, however, the ideal legal situation includes one or more exceptions, such as to save the life of the mother or in the case of rape or incest. Some pro-lifers ideally would ban birth control methods that prevent a fertilized egg from implanting in the mother's uterus, while others would not.

Second, after the ideal legal situation is specified, pro-life activists need to consider what departures from that ideal they would consider morally acceptable. This is a moral and a practical issue. Some pro-lifers take the position that no compromise at all is morally acceptable: Legislators should vote only for the laws that they believe reflect the status of and protections due to unborn life. Political activists are not always known for being realistic. In fact, the patterns of thinking that characterize prophetic indictment do not lend themselves to compromise, and indeed tend to view it as a betrayal of the moral principle at stake.

Other pro-lifers think they should press for as much as they can get, whenever they can get it. So if pro-lifers happen to control the state or the federal legislature, they should enact the law that best corresponds

to their ideal—full stop. They should only compromise if it is necessary to pass *some* form of pro-life legislation, and then only to the degree necessary.²⁷ The difficulty with this approach, however, is that it is only a "compromise" in a tenuous sense. If I am unable to do something, I am not compromising by agreeing not to do it — I am simply admitting lack of power.

But a broader group of the pro-life movement, in my judgment, is willing to grapple with true questions of compromise, which require asking themselves what they are willing to give up about their ideal situation to realize a situation that they believe is morally acceptable, even if not perfect. The controversy over incrementalism is an enormous issue, potentially involving all aspects of abortion law and regulation. I want to focus here on one strand, which seems particularly pertinent in light of the pro-life defeats in Michigan and Kansas: Should the pro-life movement prioritize having a *broader* influence on the law in more regions of the country, or a *deeper* influence on the law in fewer regions?

Dobbs encourages pro-life activists to prioritize depth, because it allows each state to enact the abortion law that it sees fit. Texas is free to adopt a restrictive law, while Vermont is free to adopt a liberal one. Compromise, on this view, is recognizing that the people of different states are going to have different tolerance for abortion regulations and acting accordingly. Pro-lifers have an opportunity to create political entities that perfectly reflect their views — but those entities are not as geographically extensive as they would want.

An approach to compromise that prioritizes breadth over depth would set different priorities. It would prioritize consistency across state borders, sacrificing the ability to pass more restrictive laws in some conservative states to nudge more liberal states to accept some restrictions rather than no restrictions. In my view, the concurring opinion authored by Chief Justice John Roberts in *Dobbs* exemplifies this approach: he would have upheld Mississippi's 15-week ban as "providing an adequate opportunity to exercise the right *Roe* protects," without overruling *Roe* entirely.²⁸ Moderate as well as conservative states might be willing to pass a fifteen-week ban (with health and life exceptions).²⁹ Incrementalist pro-lifers might view a stable and national fifteen-week compromise as the best foundation to promote a "culture of life" that values unborn children.³⁰

Thinking about the question of depth versus breadth of pro-life legal influence will require pro-life leaders to consider the purpose of the pro-life movement. Is it to establish a "city on the hill," a perfect pro-life

community, which should serve as an ideal and model for other communities? Pro-lifers who resonate with this vision will likely prioritize depth over breadth. Or is the purpose to act as leaven in a broader, more pluralistic society, moving the entire public opinion along slowly and incrementally? Pro-lifers who adopt this vision will prioritize breadth over depth, willing to enact a less stringent but broader law in order to advance the pro-life vision slowly and steadily.

One might ask: why not do both? Why not pursue the more stringent legislation where it is possible (e.g., in the South), while advocate for less stringent compromises in states where it is not (e.g., in some states in the Midwest)? In my view, the strategies are in significant tension, if not outright contradiction. If people in more liberal or moderate states see pro-lifers in other states criminalizing abortion from six weeks after fertilization, or advocating penalizing a doctor who performs an abortion on a ten-year-old rape victim, they will take notice. They will not trust assurances of the pro-life activists in their state that they are operating in good faith, or that they will consider other values besides the life of the unborn. And they

rately have been summarized as: “55% of Americans support making abortion available at least through the first three months of pregnancy.” It is in that time period that most abortions occur.

So what is the right way to think about the American public and abortion? The key to correct interpretation of the Knights of Columbus poll, like many other polls on abortion, is the view of the “muddled middle” — those whose support of abortion is clear, but also limited. In this case, the poll showed that a full quarter of the American population think that abortion should be freely available in the first three months of pregnancy but have qualms about later abortions. In our representative democracy, they may well hold the key to the legal frameworks that will govern abortion in the post-*Dobbs* era.

It is understandably difficult for activists on both sides of the abortion issue — many of whom view the world through the lens of prophetic indictment — to understand the muddled middle. For many pro-lifers, who frame most abortions not merely as intentional killing of the innocent, but also as a mother killing her innocent baby, the immorality of the act is self-evi-

Is there a way to bridge the divide? For many people, of course, the answer is no. But for the substantial portion of Americans in the middle, a more nuanced approach might be persuasive. I continue to think, for example, that many people might be persuaded by the “safe, legal, and rare” approach proposed by the Democratic Party in the Clinton era. This approach would require focusing on the “demand” side for abortion, rather than the “supply” side. It would not go over particularly well with activists on either side. But it might capture the more nuanced intuitions of the middle and bring some measure of peace to this half-century long culture war.

will vote accordingly.

Pro-Lifers and the “Muddled Middle”

In anticipation of the 2023 March for Life, the Knights of Columbus released its annual poll, which is widely seen as tilted in favor of the pro-life movement. Indeed, the statement to the press summarized its results in just such a favorable manner: “Released today, the 2023 Knights of Columbus–Marist Poll reveals that 69% of Americans support limiting abortion to, at most, the first three months of pregnancy.”³¹ But complexities for the pro-life movement lurked just below the surface. The poll’s results could just as accu-

dent, even if many have sympathy for women who find themselves in this desperate situation. For many pro-choicers, who recognize the significant burdens that pregnancy involves, the immorality of restricting the option is also self-evident, even if many do not deny all value to unborn life. On each side, the strong prophetic framing, leading to the pursuit of the “one thing needful,” minimizes the perspective of the other side.

But the trouble with the abortion issue is that many ordinary people don’t believe it fits neatly within the dominant framing of activists on either side. In my view, the phenomenon of abortion itself does not fit neatly within those framings either. In most cases,

refraining from intentional killing does not require the refrainer to provide bodily life support to the potential victim. In most cases, exercising one's own bodily autonomy does not result in harm to another being. It is not self-evident that very early embryos count as equally protectable human beings; it is also not self-evident that fetuses after four months do not. For the past fifty years, abortion has stood at the intersection of the conflicting moral intuitions of many Americans. They are not "confused" or "misled" as activists on both sides tend to paint them. Instead, they are trying to respond as honestly as they can to the conflicting values they see at stake in the debate.

Bridging the Divide?

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Note

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 24. It is important to note that the party members are not monolithic in their views. See, e.g., J. Damant, "Three-in-Ten or More Democrats and Republicans Don't Agree with Their Party on Abortion," *Pew Research Center*, June 18, 2020, available at <<https://www.pewresearch.org/short-reads/2020/06/18/three-in-ten-or-more-democrats-and-republicans-dont-agree-with-their-party-on-abortion/>> (last visited Sept. 1, 2023).
 25. Some of the difference turns on a view of the state. See, e.g., G. J. Harp, *Protestants and American Conservatism* (New York: Oxford University Press, 2019). For a good account of a Catholic perspective, see D. Hollenbach, S.J., *The Common Good and Christian Ethics* (Cambridge, UK: Cambridge University Press, 2002).
 26. United States Conference of Catholic Bishop, "Statement of U.S. Bishops' Pro-Life Chairman on Supporting Pregnant and New Mothers," September 9, 2021, available at <<https://www.usccb.org/news/2021/statement-us-bishops-pro-life-chairman-supporting-pregnant-and-new-mothers>> (last visited Sept. 1, 2023).
 27. This seems to be the approach of Pope John Paul II in his encyclical *Evangelium Vitae* (*The Gospel of Life*), which addresses the responsibility of legislators in pluralistic societies.
 28. *Dobbs*, 142 S.Ct. at 2315.
 29. According to the *New York Times* abortion tracking website, both Arizona and Florida have instituted fifteen-week bans. Utah has an eighteen-week ban. *New York Times*, "Tracking the States Where Abortion is Banned" (updated July 12, 10:30 AM), available at <<https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html>> (last visited Sept. 1, 2023).
 30. This is my own view. See M. C. Kaveny, "Deepening the Divisions," *Commonweal*, September 25, 2022, available at <<https://www.commonwealmagazine.org/deepening-divisions>> (last visited Sept. 1, 2023). See also M. Cathleen Kaveny, "Abortion and the Law in the United States: From *Roe* to *Dobbs* and Beyond," *Theological Studies* 84, no. 1 (2023): 134-156.
 31. Knights of Columbus, "Americans' Opinions on Abortion: January 2023 (Marist Poll)," available at <<https://www.kofc.org/en/resources/communications/polls/2023-kofc-marist-poll-presentation.pdf>> (last visited Sept. 1, 2023).