

Kristopher Turner:

Hello, and welcome back to Wisconsin Law In Action, a podcast where we discuss new and forthcoming scholarship with University of Wisconsin Law School professors. I'm your host, Kris Turner, and my guest today is the Assistant Professor of Law, Nina Varsava. Professor Varsava teaches civil procedure, professional responsibility, and jurisprudence here at Wisconsin, while her research interests especially focus on precedent, interpretation, and inter-systemic adjudication.

Today we'll discuss Professor Varsava's newest article titled, Precedent, Reliance and Dobbs, forthcoming in the Harvard Law Review in 2023. The article examines treatment of stare decisis in the 2022 Dobbs majority opinion, focusing on its approach to reliance. The article argues that Justice's refusal to recognize the reliance interest at stake is inconsistent with the Court's previously prevailing stare decisis doctrine, and is also mistaken as a matter of first principles, undermining basic rule of law values. Thank you for joining the podcast today, Professor Varsava.

Prof. Varsava:

Hi Kris. Thanks for having me.

Kristopher Turner:

Oh, it's absolutely my pleasure. Let's start our discussion by learning a bit more about your backgrounds. What has your professional experience led you to focusing your research on stare decisis and reliance?

Prof. Varsava:

Well, alongside my JD, I completed an interdisciplinary PhD in the humanities at Stanford. And while there I studied mainly philosophy and law. And my dissertation was all about the theory and practice of precedent. So I've been fixated on the topic for a while now. And after finishing my JD and PhD, I spent a year as a judicial clerk, and in that role I gained valuable firsthand experience working with precedent.

Since starting as a faculty member at UW a few years ago, I continued working on issues related to precedent. And the most recent article is the first time I focused on the topic of reliance, in particular. That focus was inspired by the Court's recent decision in Dobbs. So the Court there approached the matter of stare decisis, and in particular reliance interests, in a way that I found striking, and in a way that I believe is questionable. So I wanted to explore that in depth.

Kristopher Turner:

To begin with your paper, you start with an examination of reliance interest and how their protection is an essential feature of stare decisis. Why do reliance interests play such a pivotal role in stare decisis decisions?

Prof. Varsava:

Well, one of the reasons for having a system of stare decisis in the first place is so that people can form reliable expectations about their future legal rights and duties. When people conform such expectations, they can more confidently and clearly imagine their futures, form understandings about their place in society, and make and execute plans.

The deeper values that this is all meant to serve include autonomy and agency, self-determination, and dignity. And the idea is that we can lead more autonomous and self-directed lives when we're able to

form stable expectations about our legal future. When courts overturn precedent, they risk undermining or sacrificing the values that stare decisis is meant to serve. So that's sort of starting at the beginning.

Now, once we have a system of precedent in place, which we of course do in the US, courts are responsible for people's reliance, because the courts effectively induce it. So the idea is that courts proclaim a commitment to precedent, and people reasonably respond by relying on precedent. So then when a court overrules a case that people have relied on, it can cause not only surprise, but unfair surprise. And is unfair because the court itself encouraged people to form expectations and then acted in a way that thwarted those expectations.

So it makes sense that when a court like the US Supreme Court deliberates about whether to overrule some precedent, it would consider whether there is reliance at stake, and how much weight that reliance puts on the Court as a pressure against overruling. So upsetting reliance interests is a relevant harm for the Court to consider, which would weigh against overruling, although it might not be dispositive. Sometimes there are very strong factors weighing in favor of overruling as well.

Kristopher Turner:

Right. And that came across in your paper as, this is not a paper against overruling per se, but just the way that sometimes the reliance can be affected by these kind of measures. And that we'll get in a little bit more to when overruling is more prudential, I guess, is the word I'll look for here. But let's turn to Dobbs first, and how reliance interpreted in its majority opinion this last year. First, what is a tangible reliance interest, and what did the Dobbs majority mean when they used that term?

Prof. Varsava:

Yeah, so the Dobbs majority insists that only so-called tangible reliance counts for stare decisis purposes. Tangible reliance on a decision means that people took concrete action based on that decision that they would not have taken otherwise. And if the decision is overruled, they would be worse off in a material way than they would've been had the decision never existed at all.

So this is a very narrow and specific formulation of reliance. It's sometimes referred to as detrimental reliance. So an example might help. So suppose that you and I enter into a contract, and because I expect you to fulfill your side of the bargain, I make certain investment decisions that only make sense if you do fulfill your side, and otherwise would be wasteful. And then suppose you breach our agreement. So I've now lost money because of the investment decisions I made, and now I'm materially worse off economically than I would've been had we never formed the contract at all. So that's a tangible reliance harm.

Kristopher Turner:

Would you say that reliance by Supreme Court opinions is like a bargain or a contract between the people and the Supreme Court?

Prof. Varsava:

I haven't said it that way, but we might think that that is now how the Court is conceiving of reliance on precedent, that the Supreme Court has made a deal or a type of commitment, people have relied on it, and then if they did so in such a way that they're now harmed materially...

Kristopher Turner:

It's an overt agreement. A contract, like you said. That's what the tangible reliance they were trying to suggest would be?

Prof. Varsava:

Yes. But I think there's more to it because even if the Court did make an overt agreement and people relied on it in the sense that they formed expectations and hopes and dreams about the future, that's not enough to matter. You have to have actually made done something, like made an investment decision, and then you can now demonstrate, I'm worse off. So you have a duty, or at least a good reason to consider upholding this precedent.

Kristopher Turner:

And one thing that you mentioned in your paper is one individual group who were obviously very impacted by this decision were pregnant women at the time. Beyond individuals who were pregnant at the time of the Dobbs decision, what other people may have tangibly relied on this decision in Dobbs, the right to abortion that is?

Prof. Varsava:

Yeah, let me say a little bit first about these individuals that you mentioned who were pregnant at the time of the Dobbs decision. So even commentators who take the narrowest view of reliance interests acknowledge that people who are already pregnant at the time of the Dobbs decision might have legitimate reliance interests at stake. And the idea is that at the time these individuals engaged in the conduct that led to the pregnancy, they had the belief that they would have access to abortion in the event that they unintentionally became pregnant or intentionally became pregnant, but with expectation that if a complication arose in the pregnancy, that made the pregnancy unfeasible or undesirable to continue, then they could terminate it.

Now if they did not have that belief, then they might have made different decisions. They might have decided not to become pregnant. Or in the event of an unintentional pregnancy, they might have taken more precautions in their sexual activity, or even avoided sexual activity altogether. So now that they're pregnant without a constitutionally protected right to abortion, they might be worse off than they would've been had they never relied on that right to begin with.

Okay. So that's, I think, the most obvious group that would have a direct reliance interest on Roe and the related precedence. So what about other ways that people might have relied on the right to abortion in a tangible sense? I think we can come up with all kinds of plausible ways in which people might have tangibly relied. For example, people have moved to the US with the expectation that they would have the benefit of access to abortion. That's a pretty big deal for a lot of people, and they might not have moved here had they known that the country would not have legal protection for abortion in the future. People have also made career, education and family planning decisions with the background expectation that abortion will be protected across the country.

So decisions about what kind of education and career to pursue, and when, and in which state, decisions about the division of labor between partners, and decisions about when to have kids. So in all those realms, people may have tangibly relied on the abortion precedents.

Maybe I'll just mention one other way in which people may have tangibly relied. Individuals might have done so in directing their political activity and voting behavior. So for example, some people may have seen no need to push for abortion rights at the state level, operating under the assumption that abortion would be protected federally. And relatedly, state governments may have relied in a tangible

way on the abortion precedence. So some states have old abortion bans on the books that were unenforceable under Roe, but have now come back into effect, to the surprise of many.

So for example, as you probably know Kris, here in Wisconsin, we have a pretty extreme abortion statute from 1849, which criminalizes the provision of abortion with the exception, I think, only for the life of the pregnant person. So legislators may have made an effort to repeal those laws, and the public may have pushed for that if they had not been relying on the precedential status of Roe.

Kristopher Turner:

That's tangible reliance. Now, some people may have relied on Roe and how Dobbs might have impacted those directly. Intangible reliance is the other type of reliance discussed in Dobbs. Why does the majority consider this reliance intangible, and less important stare decisis and precedent?

Prof. Varsava:

Yeah, the Dobbs majority acknowledges that there may be other types of reliance on the precedents protecting a right to abortion, aside from the tangible kind that we just discussed. But the majority insists that this other reliance is not relevant for stare decisis purposes. And the majority gives two main reasons for excluding so-called intangible reliance. It says, one, that the Court hasn't considered that type of reliance in other cases, aside from Casey, which it views as anomalous. And two, that the Court is not well equipped to assess or measure that kind of reliance, so it should just refrain from considering it at all.

Kristopher Turner:

You said that this Court views Casey as anomalous. Can you expand on that a little bit, and why would they take that viewpoint?

Prof. Varsava:

Yeah. Casey did embrace a broad and abstract conception of reliance. So what the Dobbs majority is calling intangible reliance, the Casey majority clearly thought was a legitimate and important type of reliance to consider. Now, the Casey joint opinion, where this reliance analysis comes from, put weight on that reliance, but it didn't unpack it. And as I hope my article makes clear, it's actually a difficult and complicated issue, exactly what this intangible reliance is.

So I do think that Casey was vulnerable to that kind of attack, because the opinion there named this reliance as mattering, it called it societal reliance, but it didn't explain exactly what it meant. And so the Dobbs majority says that Casey was just wrong, and that the Court hasn't invoked that kind of reliance in other cases, which I think is incorrect. The dissent in Dobbs agrees with Casey and rejects the Dobbs majority's characterization of Casey.

Kristopher Turner:

So has this reliance in Casey been used in other Supreme Court cases?

Prof. Varsava:

Yeah, the Court has put weight on intangible reliance interest, not just in Casey, but in various other cases. I discuss several of them in the paper. A salient example is the case of Dickerson versus United States, where the Court considered the precedential status of Miranda v Arizona. And Miranda

established the well-known rule that criminal suspects have a constitutional right to receive a warning about the right to remain silent among other things.

In *Dickerson*, the Court considered overruling *Miranda*, but ultimately decided not to. And one factor it took to weigh heavily against overruling was the widespread societal reliance on the *Miranda* rule. That reliance couldn't conceivably be thought of as tangible, I think, and the Court didn't try to construe it that way, but nevertheless, the reliance at state counted for the Court, and significantly in the Court *stare decisis* analysis.

Kristopher Turner:

Interesting. Obviously everyone has heard of *Miranda* rights, especially in the law world, legal world, policing world, and it's been so widespread. It'd be fascinating to see them just say that is no longer a necessity. And I can see how they can draw parallels between *Roe* and *Dobbs* in that same way.

Prof. Varsava:

Yeah, both of those cases, I think, are especially publicly salient. There are many precedents that non-legal experts don't know much about, but I think both *Miranda* and *Roe* were particularly well-known. And in part for that reason, claims of society-wide reliance are particularly strong.

Kristopher Turner:

I have to agree. That's very interesting to see how this approach has been taken by the *Dobbs* majority. Part three of your paper examines the value of the intangible reliance that we've been discussing here, and which the *DOS* majority would dismiss. Tell us a little bit more about these types of reliance that you examine.

Prof. Varsava:

Yes, here I try to show that even when reliance on precedent is purely intangible, upsetting that reliance can undermine people's autonomy and offend their dignity. And I argue that courts have a responsibility to recognize and mitigate these harms. Many people have formed their beliefs, attitudes, and intentions around the expectation that abortion would be protected nationwide. And thwarting the expectation that those beliefs, intentions and so on are based on, constitutes a harm, even if we can't pinpoint any tangible reliance.

In the paper, I work through several analogies that I hope draw out the intuition that I'm getting at here that I think many people would share upon reflection. So maybe I'll describe just one of these analogies. That might help elate the kind of harm at issue here. So the example is based on an English case, but I'm going to oversimplify it and change it to some extent just for the purposes of exposition.

Okay. So convicted defendants who were sentenced to prison terms were presented with a policy at the beginning of their terms, which indicated that they would be eligible for home leave once they had served one third of their sentence, provided that they met some conditions like following prison rules. So some of these prisoners, once they had served one third of their sentences, requested home leave, only to be informed that the policy had changed without notice.

So the prisoners might have relied in a tangible way on the policy, but they didn't necessarily rely in a tangible way. So let's suppose that they didn't rely in a tangible way. So that means that they didn't take any concrete action that they otherwise would not have taken, such that they're now worse off than they would've been had they not relied at all. They nevertheless would've imagined their futures

differently, formed different intentions and understandings, and so on, based on their expectation of home leave.

So the prison officials have wronged the prisoners here, because they'd led them to develop certain expectations and then dashed those expectations. Because of the intentional action on the part of the officials, the individuals are forced to abandon their intentions and reimagine their futures with inevitably destabilizing and disorienting effects.

The harm here may not have a physical or economic dimension, but that doesn't mean it's not real or is any less important. The officials thwart the expectations of the individuals affected, which undermines the autonomy and self-determination of those individuals by making it impossible for them to follow through on their plans and realize their visions of the future. And further, the action is unfair because the officials themselves led the individuals to form the expectations at issue by presenting them with the policy, and those expectations are now upset at the hands of those same officials.

So turning back to reliance on precedent. When precedents are overturned and expectations thwarted, it comes with costs to the kind of autonomy and dignity that stare decisis, when followed, serves to protect. And because people form their expectations because the Court in a sense induced them to do so, it may be unfair for the Court to frustrate those expectations, at least without giving it second thought.

So all of this holds regardless of whether the reliance at issue has a tangible aspect. So even if the Court ultimately determines that the advantages of overruling a precedent outweigh the disadvantages, the reliance costs are relevant to the analysis, it ought to take them into consideration.

And to return to Dobbs, with the overruling of Roe, the Court forces us to abandon intentions, to change our attitudes, and to reimagine our identities and positions in society. Our careers, relationships, and lives are suddenly not what we thought that they would be based on what the Court had previously determined and publicly declared. And the effect is destabilizing and disorienting, undermining our autonomy and setting back our self-determination, because we're unable to carry out the lives that we had imagined for ourselves.

Kristopher Turner:

Thank you for that. The analog of the English case that you provided in the paper was especially helpful for me, because I could imagine myself knowing that I had this possibility of home leave, even if I didn't make any tangible plans to go visit home, I said, that's always my back pocket. That's something I can rely on in the future. For then to have that changed just would be frustrating in more ways than just a physical way of like, "Well, I had this plan, and now it's dashed," even if I didn't have that plan.

And so to draw that parallel is very helpful for me, to have the ground shift under your feet even though you didn't move yourself. If you hadn't taken concrete steps one way or the other. I just want to go back through the way things are changed normally, this direct overruling or whatnot. So incremental changes are more common when we're doing overrules in parts. Do you think that we see more or less reliance in these incremental changes going forward

Prof. Varsava:

In the sense that there would be less of a reliance cost if the Court changed things incrementally versus erratically, like they did here?

Kristopher Turner:

Yes.

Prof. Varsava:

So I think that there's an argument to be made that incremental changes are less harmful to reliance interests for a variety of ways. I think the most obvious one is that if people notice the incremental change, then they can gradually adjust their plans and attitudes and so on over time, and they have the time to do that. But I don't want to go too far on that, because I do think that even if the Court had overruled the right to abortion in the course of a few decisions, I still think that substantial reliance interests would be harmed.

I think the difference even between drawing the line at six or eight weeks or something, like not allowing prohibitions before then, versus allowing any prohibitions, is a really huge one. And I think that's something that people who aren't familiar with pregnancy might not appreciate. It might seem like a small change, to go from allowing six weeks or eight weeks to nothing, but actually I think that's a really huge change.

I have heard the argument made that it would've been better if the Court had gone incrementally. I have also heard the argument made that the Court did in fact go incrementally, because abortion rights have been chipped away at over time. And I think it's true that abortion rights have changed since Roe, but I have to agree with Chief Justice Roberts, that actually the core right of Roe has been upheld all of this time, a right to some meaningful access to abortion, to some meaningful ability to choose after you know that you're pregnant.

Kristopher Turner:

And especially when you are pregnant, six to eight weeks. I am a hundred percent in agreement with you, six to eight weeks to nothing is a very drastic change for those who may not have had kids in any recent time. That's something that is a very relevant amount of time to be aware of.

Following Dobbs, I just want to expand on that a little bit more to discuss incremental changes.

Following Dobbs. What changes if any do you foresee with the Court's approach to reliance precedent, and stare decisis in general?

Prof. Varsava:

Yeah, so Dobbs may have overruled Casey not only on the most obvious matter of abortion, but also on the matter of stare decisis itself, and that's something that I want to draw attention to with this article. Casey's probably the most well-known case about the doctrine of precedent. So in that sense it is or was a precedent about precedent.

In Casey, the Court articulated a set of factors meant to guide its analysis of whether to overrule Roe. Reliance interest was an important one of these factors. And these factors have been taken to be trans-substantive, meaning that they apply not just to precedent in a specific area, not just to abortion precedents, but to precedents concerning any area of law. So it's unclear whether the Court will now treat Dobbs as the prevailing precedent on precedent, but it would not be surprising if it did, especially given the animosity we see from the Justices and the majority in Dobbs towards Casey's approach to precedent.

So that would mean that reliance is likely to play a relatively minor role in stare decisis analyses going forward. At least when these five Justices come together. Maybe the other Justices will put pressure on these ones in other ways when there's different alignments of the Justices. So I would predict that reliance is likely to play a relatively minor role in stare decisis analyses going forward, at least outside of the realm of cases concerning commercial matters like property and contract, where the Court's more likely to perceive tangible reliance.

In Dobbs, the factor of doing all the work, ultimately, I think, in the stare decisis analysis is the nature of the error, and in particular the majority's assessment of the error in Roe as egregious in nature. It uses that word multiple times. So it seems that if a majority of the Justices perceive a precedent to be egregiously wrong, then they may feel justified and even obligated to overrule it. It's unclear what exactly it takes to make a precedent not only wrong, but egregiously wrong.

And something I'd like to pursue in future work is the question of, what would make an error so bad that the Court should overrule the case, regardless of reliance or other costs associated with overruling? And also how do we know, what should we expect the Court to demonstrate, before it could say that this case is so bad that we're going to overrule it, regardless of the other costs?

Kristopher Turner:

I have about five questions to follow up on that one, but I'll wait for the paper. I'll be first in line when you write that paper to read about all of that, because egregious error, what does that mean? Are there going to be any tests? Tell us what kind of egregious errors are out there. It's going to be interesting to see how that develops, and how much this new precedent and unprecedented might develop across different types of cases that they come across. What do you most hope readers take away from your article?

Prof. Varsava:

So I hope that the article helps people see more clearly what's going on with the Court's stare decisis analysis in Dobbs. I also hope that it elucidates the decision as a decision about precedent. Of course, it's a very important decision about abortion. Abortion law is not my area of expertise, but stare decisis is. So I saw it as my professional responsibility to focus on the stare decisis elements, which other people might not be because they're justifiably more concerned with the substantive part of the decision.

And I hope it helps people understand what reliance interests are, why there's value in protecting them, and why the Dobbs Court's conception of reliance interests is unduly narrow.

Kristopher Turner:

It definitely succeeded in many of those aspects for me, reading this paper. I obviously was aware of Dobbs and its impact on abortion rights, but this really raised, in my estimation, the importance of the reliance aspect and stare decisis aspect of Dobbs as well. So, so far, so good. It has accomplished its goals.

Prof. Varsava:

Great, thank you.

Kristopher Turner:

Thank you for writing it. It's just highlighting an important aspect I think more people should be aware of, because this could ring across different types of cases, as you've mentioned, potentially impacting more than just reproductive rights. So where can researchers find more of your work?

Prof. Varsava:

Well, thanks for asking. My published and forthcoming articles are available for the most part on SSRN. I'm also on Twitter, and typically post about my new work there, and also about related work by other scholars.

This transcript was exported on Jan 23, 2023 - view latest version [here](#).

Kristopher Turner:

Professor Varsava is a great follow on Twitter. I follow her, and it's always interesting to see what she's discussing, because she's very plugged into these kind of issues, and I highly suggest you follow her. You can learn more about stare decisis precedent, professional responsibility, all that kind of good stuff.

We'll also link Professor Varsava's scholarship on our podcast page. Thank you very much for joining the podcast today, Professor Varsava, for an enlightening discussion of precedent, reliance, and stare decisis with the Dobbs majority opinion.

Prof. Varsava:

Thanks so much, Kris. This was great.

Kristopher Turner:

We've been discussing Professor Varsava's newest article, Precedent, Reliance, and Dobbs, forthcoming in the Harvard Law Review. Again, you can find the full text of this article on SSRN linked on our podcast page. Thank you all for listening. For a complete listing of Professor Varsava work, visit the University of Wisconsin Law School Repository. Find these links and all our previous podcasts at wilawinaction.law.wisc.edu.

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