Abortion, the Supreme Court, American Wishes


Mary Ann Glendon is the Learned Hand Professor of Law at Harvard University. This essay is adapted from a speech given at a Boston College School of Law symposium.

To understand fully the incalculable effects of Roe v. Wade it is necessary (though of course not sufficient) to understand the historical and legal context in which it occurred. When the decision came down in February 1973, the nation was embroiled in the Vietnam War and President Nixon had just begun his second term. Just around the corner, but unforeseen by any of us, were the fall of Saigon and the President’s resignation. Nor did most of us perceive how, all around us, the social environment was being transformed by a sudden breakdown in traditional norms governing sexual behavior and a sharp rise in family disruption. It would be years before professional demographers took the full measure of that cultural revolution, and when they did, even they were startled. Here is how one of them, looking back on the period, summarized what happened: “It is exceedingly rare in the history of populations that sudden changes appear across the entire set of demographic indicators. Yet in barely fifteen years, starting in 1965, the birth rate and the marriage rate in all the industrialized countries tumbled, while divorces and births outside marriage increased rapidly. All those changes were substantial, with increases or decreases of more than 50 percent.”

With hindsight, we can now see that in February 1973, the U.S. (Along with other affluent nations) was a few years into a massive social experiment. No society was prepared for that experiment, and no society has yet adjusted to its consequences. It was in that time of social and political turmoil that a pair of cases involving abortion were presented to the Supreme Court. The better known case, Roe v. Wade, challenged an old Texas statute that banned abortion except where the mother’s life was in danger. The other, Doe v. Bolton, challenged a more modern statute patterned on the Model Penal Code drafted by the prestigious American Law Institute. The statute in Doe permitted abortion under certain conditions, but subjected it to regulation.

Though Roe got all the attention, I think it is fair to say that Doe, decided on the same day, was the more ominous of the two decisions. It was Doe that signaled the doom of legislative efforts to provide even modest protection of unborn life — statutes of the type that are in force in most other liberal democracies (where the regulation of abortion has largely been left to be worked out in the ordinary democratic processes of bargaining, education, persuasion, and voting). And it was Doe’s broad definition of “health” as “well-being” that the Court would later use to strike down even bans on the cruel procedure known as partial-birth abortion.

Among legal scholars, what attracted the most attention about Roe and Doe were the separation of powers and federalism issues. Leading constitutional lawyers such as Paul Freund and Archibald Cox were critical of the Court majority for striking down the statutes of all fifty states with so little warrant in constitutional text or precedent. Even Court watchers who favored legislative liberalization of abortion law were inclined to agree with dissenting Justice Byron White that the case represented an extraordinary judicial power grab. As for pro-life lawyers, most of them did not foresee how far the Supreme Court would extend Roe and Doe over the years — even to the point of striking down laws designed to protect late-term, healthy, viable babies. For years, the pro-life movement poured much of its energy into litigation, confident that Roe and Doe would eventually be limited, if not expressly overruled.

To be sure, there were a few visionaries, but their fears were generally dismissed. Who but a madman or a prophet would have imagined, as novelist Walker Percy did, that a whole industry of profitable “Qualitarian Centers” would spring up, where, as one of Percy’s characters explained, doctors would respect “the right of an unwanted child not to have to endure a life of suffering”? Who but a madman or a prophet — or an artist who sees more deeply into things than the rest of us — would have imagined, as Percy did in a 1971 novel, that state governments might recognize a right to die, and that arrangements would be made for the sick and elderly to push a button
that would waft them away into a “happy death” in Michigan, a “joyful exitus” in New York, or a “luanalu-hai” in Hawaii?

It’s something of a puzzle why the public has never really grasped how extreme the legal treatment of abortion is in the United States. (Even Sweden, the poster country for women’s equality and liberal attitudes toward human sexuality, strictly regulates abortion after the eighteenth week of pregnancy.) Two factors, I believe, combined to obscure the degree to which the U.S. Has become careless about protecting human life at its fragile beginnings and endings. First, journalists and other opinion leaders have persisted in misdescribing Roe v. Wade as a case that permits abortion in the first trimester of pregnancy, but permits regulation thereafter. That is a flagrant misstatement, for Roe permits no regulation in the interest of protecting the unborn child for the first two trimesters. Moreover, when Roe is read with Doe, third-trimester restrictions are effectively ruled out as well — for Roe’s dictum that such restrictions might be permissible if they did not interfere with the mother’s health was negated by Doe’s definition of “health” as “well-being.”

The second factor that enabled the radical character of these decisions to pass under the radar is that most people just couldn’t believe the Supreme Court would do such a thing. When I have explained the extreme permissiveness of American abortion law to people, one of the most common reactions is: “That can’t be right.” I’ve found that most people — including many law professors — have a great deal of difficulty wrapping their minds around the idea that the Court would permit the intentional destruction of a healthy infant who was capable of living outside his or her mother’s body, when the mother’s health (in the ordinary meaning of that word) is not in serious danger. That’s why polls show that the same people who say they approve of Roe v. Wade also say they believe that abortion should not be permitted except for grave reasons, and that it should never be permitted after viability except to save the mother’s life.

What finally helped to raise public consciousness was the most shocking decision thus far, Stenberg v. Carhart (2000), in which the Court struck down a state statute that would have banned partial-birth abortion. By 2000, technology had advanced to the point where many parents proudly displayed ultrasound photos of pre-born babies. Thus, Justice Stephen Breyer’s callousness about something so close to infanticide highlighted as never before the discrepancy between the rigid, lethal logic of the Court majority and the more complex moral sentiments of most Americans.

One other aspect of the history of the 1973 decisions demands comment. When reading Roe and Doe, it is surprising to see how little they have to say about protecting women and how much they have to do with protecting doctors. That is because much of the pressure for these decisions came from the medical profession. By 1973, with the sexual revolution well underway, licensed doctors were increasingly performing elective abortions for their patients, but they were worried about criminal and civil liability. Justice Harry Blackmun, who had been counsel for the Mayo Clinic, wrote much of the majority opinion in Roe at the Mayo Clinic library. As is well known, he grounded the decision on the supposed “right to privacy” in the physician-patient relationship. It was not until years later that the Court majority described abortion as a woman’s right, and then shifted in Casey v. Planned Parenthood (1992) from the much-criticized privacy ground to treating abortion as an individual liberty.

Part of what emboldened the Court majority to go as far as it did in the line of cases extending Roe and Doe was the embrace of unlimited abortion rights by the peculiar form of feminism that took shape in the 1970s. To earlier feminists who had fought for the vote and for fair treatment in the workplace, it had seemed obvious that the ready availability of abortion would facilitate the sexual exploitation of women. Women like Susan B. Anthony and Elizabeth Cady Stanton regarded free love, abortion, and easy divorce as disastrous for women and children. They would have regarded women who actively promoted those causes as foolish and deranged.

What made 1970s feminism such an anomaly was a puzzling combination of two things that don’t ordinarily go together: anger against men and promiscuity; man-hating and man-chasing. I remember that it was around this time that some of my students at Boston College Law School began to ask me if I was a feminist. My answer, then and now, is yes — if that means I am special-ly concerned about a range of issues that disproporionately affect women. But, as the mother of three young children in those days, I had to admit I was baffled by the groups that were purporting to speak for women. Organized feminism had almost nothing to say to women like me who were
trying to juggle work and family obligations. In fact, many of its spokeswomen went out of their way to denigrate marriage and motherhood. Moreover, as a lawyer, I could see that the chief beneficiaries of the divorce reforms they backed so enthusiastically were ex-husbands and second wives.

The feminism of the 1970s was decisively shaped by a demographic phenomenon that brought heartbreak and disappointment to two large groups of women. The first group was the cohort of women born in the early years of the post-World War II baby boom. These young women were caught in what demographers call the “marriage squeeze” — the shortage of potential mates that resulted from the sharp jump in birthrates that began in 1947. There simply were not enough baby boys born during the war years to provide husbands for the bumper crop of girls born in 1947, ‘48, and ‘49 (given the then-custom for women to marry men a year or two older than themselves). When these girls started dating (in the 1960s), there were 1.7 million more of them than there were men in the age group where they ordinarily would have expected to find husbands. Just imagine what a painful experience that must have been for young women who had been socialized for domesticity, girls who had grown up in the 1950s to expect life as it was portrayed in the Ladies Home Journal and Good Housekeeping. They had no idea why things weren’t working out the way they were supposed to.

The increased competition for mates, coinciding with the arrival of the birth control pill, helps to explain a number of things, such as the collapse of sexual taboos as young women began to offer free samples and to pursue men previously considered off limits (such as other women’s husbands). The ripple effects were vast and affected nearly everyone. Inevitably, there were abuses by men of their suddenly dominant position in the mating market. Many women of Betty Friedan and Bella Abzug’s generation found themselves alone and in difficult circumstances when their husbands divorced them to marry younger women. That created a second large group of angry women, and 1970s feminism was off to the races.

The unusual conditions that gave rise to that particular form of feminism have long since passed, and thus it is hardly surprising that most women today are looking for something more responsive to their needs and aspirations. Betty Friedan, the smartest of the old guard, was the first of their number to see the writing on the wall. In a 1996 piece for the New Yorker, she warned organized feminism that “as a number of recent polls have made clear, the urgent concerns of women today are not gender issues but jobs and families.” Two years later in Time, she again advised official feminism to get over its fixation with gender, saying, “All the sex stuff is stupid. The real problems have to do with women’s lives and how you put together work and family.”

Friedan was right that problems of work and family are central concerns of many women, and there are signs that she and others have succeeded in moving the feminist establishment to pay closer attention to those matters. But old-line feminism still has a tin ear for listening to women with children, as evidenced by their main solution to the problem of combining work and family life: the socialization of child care. Ironically, the old feminism brought to light how much of women’s work has been undervalued, but then bought into that very same disrespect by acting as though the only work that matters is market work.

It’s no wonder that four out of five young women today are so turned off by these negative attitudes toward men, marriage, and motherhood that they reject even the term “feminism.” The title of Elizabeth Fox-Genovese’s book Feminism Is Not the Story of My Life, taken from her interviews with dozens of women in all walks of life, says it all.

It is now apparent to nearly everyone that what Betty Friedan calls the “sex stuff” does matter, and that it matters very much. As the bills for the sexual revolution pile up, it looks as if the late nineteenth and early twentieth century feminists were closer to the mark. The price for the nation’s prolonged bacchanal has been high, especially for women and children. There’s been a high cost in terms of women’s health, including an epidemic of infertility caused by sexually transmitted infections, and a startling rise in cervical and oral cancers among young women from the same cause.

Most women have understood all along that Roe v. Wade would not, as Friedan once predicted, “make women whole.” For the past thirty years, all three leading polling organizations have consistently told us that a large majority of Americans, women even more than men, disapprove of the majority of abortions that are performed in this country. In recent years, that disapproval has increased significantly. The latest Zogby poll, reported in November 2002, reveals not only that Americans in general are
becoming more conservative in their views about abortion, but that young people are significantly more pro-life than their parents. The strongest supports of abortion rights in the United States, as any nineteenth-century feminist could have predicted, are not women — but men in the age group of eighteen to twenty-five. Nevertheless, the most pro-life part of the population is people under thirty.

Why, then, a curious person might ask, has that widely shared sentiment not tempered the extremism of American abortion law? In part it’s probably because the Supreme Court has left so little room for expression of popular will through legislation. In part it’s probably also also because so much confusion exists about what the law really says. But there may be other, deeper reasons. With almost a million-and-a-half abortions a year for thirty years, we have become a society where nearly everyone has been touched by abortion, if not personally, then through friends and family members. When we speak about abortion today, we are speaking to women who have had abortions; to men who have asked women to have abortions; to young people who have lost brothers and sisters to abortions; and to the mothers and fathers, friends and neighbors of those women and men. That knowledge often leaves us tongue-tied, at a loss for words, for what to say and how to say it.

That knowledge has made it tempting for countless women and men to take refuge in slogans like: “Who am I to be judgmental?” and the famous “Personally, I’m opposed, but I can’t impose my opinions on others.”

I have to admit that, back in the 1970s, I was rather uncritical of such phrases. I remember asking the former dean of Boston College, a Jesuit priest, “Father, what do you think about this abortion issue?” He said, “Well you see, Mary Ann, it’s very simple. According to Vatican II, abortion is ‘an unspeakable moral crime.’ But in a pluralistic democracy, we can’t impose our moral views on other people.” “Oh,” I said, “OK.”

I know this story doesn’t reflect any credit on me, but I mention it to show than many of us just didn’t focus on the issue all that closely. I know now that I should have questioned the word “impose.” But it took some time before growing numbers of Catholics, Protestants, and Jews stepped forward to point out that when people advance their moral viewpoints in the public square, they are not imposing anything on anyone. They are proposing. That’s what citizens do in a democracy — we propose, we give reasons, we vote. It’s a very strange doctrine that would silence only religiously grounded moral viewpoints. And it’s very unhealthy for democracy when the courts — without clear constitutional warrant — deprive citizens of the opportunity to have a say in setting the conditions under which we live, work, and raise our children.

It was only after I started to look into how controversial issues like abortion and divorce were handled in other liberal democracies that I realized how my dean’s slogan has been used not only to silence religiously grounded views, but to silence all opposition to abortion. I should have asked the dean why citizens should have to withhold their moral views on abortion but not on other issues where he did not hesitate to advance religiously grounded moral viewpoints — the Vietnam War, capital punishment, civil rights, and relief of poverty. Years later, I put a related question to the former dean of Harvard Law School. In the mid-1980s, after I had given a talk to the Harvard faculty comparing American abortion law unfavorably with the approaches taken in several other liberal democracies, Dean Al Sacks took me out for lunch and said, “You know, no one in that room agrees with you.” Since he had put the point in a friendly, avuncular way, I asked him about something that had long puzzled me. “Why,” I asked, “did you and so many other constitutional lawyers stop criticizing the Court’s abortion decisions after most of you had been highly critical of Roe v. Wade?” He sighed and gave me a very candid answer that had the ring of truth. “I suppose,” he said, “it was because we had been made to understand that the abortion issue was so important to the women in our lives, and it just did not seem that important to most of us.”

Today, thirty years after Roe and Doe, polls tell us that the abortion issue is still more important to women than to men. But they also tell us that women’s and men’s views have changed. For one thing, many of the unintended consequences of the cultural revolution of which these decisions were part have come into clearer view. There is growing awareness that the moral ecology of the country has suffered something like an environmental disaster, and that we are faced with a very complicated clean-up operation.

What makes the task especially difficult now is that the social changes of the past four decades have taken a heavy toll on the nation’s human capital. We now live in a culture in which about half of all marriages end in divorce; in which
nearly half of all children spend part of their childhood in fatherless homes; in which women and men who put their families first are falling behind economically and professionally; in which many of the nation’s youngest citizens are starving for parental time and attention, and often for basic material necessities.

Moreover, though old-line, hard-line feminism has little appeal for today’s women, its ideology lives on in law and policy — like light rays from a dead star. The cohort of women most captivated by that ideology now holds influential positions, and the organizations that promote the worst ideas of 1970s feminism continue to be handsomely bankrolled by its chief beneficiaries — the vast, profit-making abortion industry, the sex industry, and the organizations that promote aggressive population control.

Fortunately, however, the times are changing. There are signs that new forms of feminism are emerging to tackle the challenge of renewing the culture. We are hearing more voices of women who are in touch with the real-life needs and aspirations of a broad range of women. We are hearing more voices of women who regard men and women as partners rather than antagonists in the eternal quest for better ways to love and work. We are hearing enough to give us hope that a collaborative, creative effort is underway — an effort to promote a moral ecology that is in keeping with American traditions of welcoming the stranger, caring for the weak and vulnerable, lending a helping hand to the needy, and giving a fresh start to someone who got off on the wrong track.

Skeptics might say that that hope is misplaced. Perhaps so, but hope may be all that we have in an otherwise daunting time.