




An umbilical cord around women's necks

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The constitutional right to abortion in the United States: Under threat

It was 1973. The US Supreme Court decision in the case of *Roe v Wade* finally granted all American women a constitutional right to abortion. The Court held that: “the Due Process Clause of the 14th Amendment to the U.S. Constitution provides a fundamental ‘right to privacy’ that protects a pregnant woman’s liberty to choose whether to have an abortion. This right is not absolute and must be balanced against the government’s interests in protecting women’s health and protecting prenatal life.”¹

The “balance” was achieved by restrictions that were based on the pregnancy trimester. States could put restrictions in place and could prohibit third trimester abortions except where the mother’s life or health were in jeopardy.

In an unprecedented, unauthorized release on May 2, 2022, of a draft of the current Justices’ decision on a challenge to a 50-year-old precedent, it appears that the Supreme Court is poised to overturn *Roe v Wade*. Justice Samuel Alito states: “We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision.”²

Rights of privacy

Privacy is a derivative or implicit right as it is not explicitly mentioned in the US Constitution, though it is a right in a number of constitutions internationally. Article 12 of the United Nations Declaration of Human Rights is often interpreted as including a right to privacy. It states “No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.”³ The legal right to personal privacy protects US residents from a range of intrusions and exposures. More specifically, the right to privacy prevents the disclosure of personal information or matters by another (one of the protections discussed in bioethics) and protects the right of the person to make important, private decisions without government interference. From the January 1973 publication of the *Roe v Wade* decision, legal scholars, even those who have affirmed a right to abortion, have argued over the legal basis of the decision.

In the draft decision, Justice Alito argues that the *Roe v Wade* decision is fatally flawed. If the draft goes forward with the same intent, even after revisions, abortion will be abolished as a Constitutional right. Abortion will then be governed by state law in each of the 50 states. Sixteen states will likely protect access to abortion; twenty-six states will likely restrict or ban abortion altogether. The latter have set in place “trigger laws” or retain pre-*Roe* laws that will become effective the moment the Supreme Court decision is published.^{4,5} In some cases there will be no exceptions for rape, incest, fetal condition incompatible with life, or very young age. Thirty-one states accord rapists parental rights, or even child custody, for children born of rape, thus unconscionably shackling a woman to her rapist for at least 18 years. Some states are formulating means of preventing women from traveling out-of-state to obtain an abortion or obtaining abortion medication from another state.⁶ This issue affects all women of childbearing age, but hits poor women the hardest—those who do not have the resources to travel or obtain medication. As it was before 1973, this is a women’s issue as well as an issue of race and poverty. But it goes beyond that. While the Constitutional right to abortion is rooted in the right to privacy, a succession of other personal rights have been so situated. If *Roe v. Wade* falls, it implicates rights to gay marriage, interracial marriage, same-sex sex, access to contraception, LGBTQ+ rights, and perhaps even the right of religious parents to homeschool their children.

The veil of law

While the argument that will strike down *Roe v Wade* is a legal one, it does not lack religious influence. Some of the justices are known to hold a particular religious perspective on when life begins and when its protections are demanded. Yet, a religious position on abortion that proscribes one’s own participation is not the same question as whether that perspective ought to be imposed on all others under the force of law. The “religious right,” which stiffly and fully opposes abortion represents a minority Christian religious view in the US. According to the Pew Research Center, 77% of white Protestant evangelicals believe abortion should be illegal in all or most cases. That is compared with 37% of white, non-evangelical (“mainstream”) Protestants; 33% of Black Protestants; 43% of Catholics.⁷ Both the Jewish and Islamic faith traditions permit abortion, with some limitations. In the Jewish tradition, “murder (of the innocent) is forbidden even to save life.

But with abortion removed from the category of murder, in Jewish law, therapeutic abortion becomes permissible and, in fact, mandated. Abortion is removed from the category of murder as “the fetus is deemed a ‘part of its mother’ rather than an ‘independent entity’ and the fetus ‘has no ‘juridical personality’ of its own.”⁸ An abortion is mandatory, not optional, when the mother’s wellbeing or life is endangered. The Islamic tradition also permits abortion: “Islam is considerably liberal concerning abortion, which is dependent on (a) the threat of harm to mothers, (b) the status of the pregnancy before or after ensoulment (on the 120th day of gestation), and (c) the presence of fetal anomalies that are incompatible with life.”⁹

Confucianism also permits abortion and has a range of considerations that figure into the decision including the wellbeing of the family and its good. However, “Confucianism holds that it is morally obliged to conduct abortion in a case in which the pregnancy has arisen from rape or incest.”¹⁰ This is not a review of religious traditions as much as it is an indication that across religions abortion is generally permitted and, in some cases, religiously mandated. Just as privacy and abortion are not mentioned in the US Constitution, fertilization and abortion are not mentioned in the Christian Bible. Here, the more stringent and conservative factions of religious traditions engage in interpretation of their scriptures to oppose abortion, and to impose that particularistic interpretation and prohibition upon others. The “elephant in the room” here is the likelihood of a minority religious perspective reshaping precedent-interpretation, and masking it in a legal argument so that it might be imposed across American society. This is a religiopolitical agenda to abolish abortion for all, cloaked as a critique of the legal basis that granted a Constitutional right to abortion. In some cases, the abolition of access to abortion will deny religious persons the free exercise of their religion and deny them the ability to meet the mandates of their faith.

Not only do many religious persons across faith traditions in the US support access to safe medical abortion, most of American society does as well.¹¹ Even more broadly, The UN Office of the High Commissioner for Human Rights regards access to reproductive care, including abortion, to be a human right. It states that:

Treaty body jurisprudence has indicated that denying women access to abortion can amount to violations of the rights to health, privacy, and in certain cases, the right to be free from cruel, inhumane and degrading treatment. The Human Rights Committee has confirmed that “although States parties may adopt measures designed to regulate voluntary terminations of pregnancy, such measures must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant.”¹²

If, or perhaps when, *Roe v Wade* is overturned, and 26 states ban or severely restrict abortion, only those women with means will be able to access safe abortion.¹³ For many it will mean insurmountable issues, hundreds of miles of travel, childcare, job absence, and more.¹⁴ Women unable to afford travel or medical care, or unable to leave a job will be forced to endure an unwanted pregnancy. It is unfortunate that the sanctity of life extends only to the fetus and not to the mother, or neonate, or a hungry child living in poverty.

Many of us entered nursing before there was a Constitutional right to abortion. We remember what were called “backstreet” abortions or self-abortions called “coathanger” abortions. She cannot be forgotten: the young married woman who, in the fourth of her annual pregnancies, had unsuccessfully tried herbal abortifacients and in desperation used a fountain pen, perforated the uterus, hemorrhaged, became septic, and died. It is a godsend that times have changed, and abortifacient medications are available. For now. And for now, we will not have young, desperate patients die in this horrific and inhumane way.

The World Health Organization writes:

Making health for all a reality, and moving towards the progressive realization of human rights, requires that all individuals have access to quality health care, including comprehensive abortion care services – which includes information, management of abortion, and post-abortion care. Lack of access to safe, timely, affordable, and respectful abortion care poses a risk to not only the physical, but also the mental and social, wellbeing of women and girls.¹⁵

Access to safe and caring abortion services is a human rights issue, a reproductive rights issue, a women’s rights issue, a family issue, a global issue. It is also a nursing issue, that demands “nurses promote an environment in which the human rights, values, customs, religious, and spiritual beliefs of the individual, families, and communities are acknowledged and respected by everyone”¹⁶ while simultaneously recognizing nurses’ right to conscientious objection. As nurses our political intervention and advocacy are urgently needed.

Notes

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16. International Council of Nurses. *The ICN Code of Ethics for Nurses*, 2021, p. 7.