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THE FACTS ON ABORTION

Everyone knows the basic facts about abortion. Almost universally illegal before 1972, abortions were unheard of except for rare, and very dangerous, operations by unqualified "back alley" abortionists. The Court's 1972 decision in *Roe v. Wade* was like a thunderbolt; no one expected the Justices to overturn laws favored by the anti-abortion majority. Since then, opposition to *Roe* has mostly come from men, particularly Catholics because the church has always considered abortion tantamount to murder.

As a new book titled *The Abortion Question*¹ reveals, none of the assertions in the preceding paragraph are true. Abortions were neither universally illegal nor particularly rare before 1972. A number of states, most notably New York, had recently liberalized their abortion laws in a way that purported to retain limitations but actually required only that a woman find a cooperative doctor. Even before these liberalized laws, doctors performed numerous abortions by making a "determination" that a woman's life might be endangered by the pregnancy. Indeed, abortions were extremely widespread before 1972, almost as much so as in the period immediately after *Roe*. For example, Kinsey found in 1958 that one out of four American women had had an abortion. Other estimates suggest that roughly one million abortions per year were performed prior to legalization.²

Moreover, *Roe* was neither an unexpected thunderbolt nor an example of life-appointed judges overriding majority views. A number of lower court judges had correctly anticipated *Roe* by ruling that *Griswold* required recognition of the right to an abortion. By the early 1970s, a substantial majority of Americans believed that abortion should be legal under at least some circumstances. For example, in 1972 about eighty percent believed that abortion should be legal if the woman was raped or if the baby might have a serious defect; half of the public thought abortion was acceptable if the woman could not afford to support a child. The Court may have gone somewhat farther than the majority of the population,

1. The book, H. RODMAN, B. SARVIS & J. BONAR, *THE ABORTION QUESTION* (1987) [hereinafter *ABORTION QUESTION*], is available from the Columbia University Press for \$27. It provides a remarkably thorough and even-handed summary of the voluminous research on abortion.

2. *ABORTION QUESTION*, *supra* note 1, at 23.

but the difference was not huge, and the Court may have been closer than the state legislatures to popular opinion.

Opposition to abortion is not, it turns out, sharply divided along religious or gender lines. At least by 1986, Catholics and Protestants had almost identical attitudes toward abortion.³ And Catholic women have abortions in about the same proportion as Protestants.⁴ Also, although the Church now believes that the soul is present from the moment of conception, this has not always been true: Aquinas, for example, believed that the soul is "infused" into the embryo at forty or eighty days after conception, depending on the fetus's sex.⁵

Despite the myth that "we would have no anti-abortion laws if men could get pregnant," men are more favorable than women toward legalizing abortion.⁶ Abortion restrictions perhaps may be said to reinforce patriarchy, but they are not something that men have forced upon an unwilling female population.

All of this is very interesting, but what does it have to do with teaching constitutional law? The short answer is: enough to make *The Abortion Question* worthwhile reading for anyone who teaches the course. Many of the common misperceptions about abortion are likely to crop up in class discussions. It is useful for a teacher to be able to correct them.

Probably the biggest lesson of the book, however, is that the stakes are lower in *Roe v. Wade* than most people think. *Roe* has acquired so much drama and significance in part because so much seems to be at stake: from one perspective, the lives of millions of unborn children; from the other, the necessity for millions of women to bear unwanted children. The reality is that overruling *Roe* would have only a marginal effect on the number of abortions. Just as they did before *Roe*, many states would undoubtedly legalize abortion without judicial mandates to do so; and even where abortions were theoretically illegal, most women would find ways to obtain them, often by traveling to states with permissive laws.⁷

In all likelihood, overruling *Roe* would have three major effects: the price (both monetary and otherwise) of abortions would rise; a few women, particularly the poorest and the youngest, would

3. One study did show, however, a higher percentage of Catholics among anti-abortion activists. *Id.* at 30.

4. *Id.* at 15.

5. *Id.* at 2.

6. *Id.* at 140-41.

7. See Collins, *Is There "Life" (or "Choice") After Roe?*, 3 CONST. COMM. 91 (1986); Kaplan, *Abortion as a Vice Crime—A "What If" Story*, LAW & CONTEMP. PROBS. (forthcoming).

be unable to obtain them; and a symbolic victory would be scored by the pro-life movement. These are not insignificant effects, but they are surely less substantial than most people on both sides envision.

The abortion funding cases provide a good example of the gap between judicial decision and social reality in the abortion area. In *Maher v. Roe*⁸ and *Harris v. McRae*⁹ the Court held that the government has no obligation to pay for abortions for women on welfare, even if it does pay their childbirth expenses. Justice Marshall's dissent in *Harris* warned, not unreasonably, that "[i]f abortion is medically necessary and a funded abortion is unavailable, [women] must resort to back-alley butchers, attempt to induce an abortion themselves by crude and dangerous methods, or suffer the serious medical consequences of attempting to carry the fetus to term."¹⁰ Events turned out differently:

The hope of anti-abortion groups and the fear of pro-choice groups that restrictions of federal Medicaid funding for abortion would greatly reduce the number of abortions by poor women have not been borne out. One estimate, for a thirty-month period between 1977 and 1980, is that 94 percent of women eligible for Medicaid who would otherwise have obtained a legally induced abortion did in fact do so despite federal restrictions. About one-third of the abortions were financed by the private rather than the public sector; in many cases poor women used their own meager resources to pay for the abortion. The early results were therefore not devastating, but they were not entirely benign. About 5 percent of the women who desired an abortion were unable to get one and bore a child; other estimates are much higher. About 1 percent turned to an illegal abortion. Many who did get an abortion were delayed in the process, with an increased risk to their health. In short, the restrictions increased the obstacles already faced by poor women in obtaining an abortion, but the increase was not dramatic.¹¹

This does not mean, of course, that the Hyde Amendments were innocuous, or that the Court was right about the constitutional issue. It does suggest, however, that the issue was less dramatic than it seemed to Justice Marshall.

The Abortion Question may have some relevance to the constitutional issues involved in abortion. For example, the poll results showing overwhelming support for legalizing abortions under some circumstances suggest that the "counter-majoritarian difficulty" is not quite so horrendous as it might appear. The major implication of the book for the abortion debate is more subtle. The knowledge that less is at stake may transform the tenor rather than the substance of the debate. It may do little to change what we say in

8. 432 U.S. 464 (1977).

9. 448 U.S. 297 (1980).

10. 448 U.S. at 338.

11. ABORTION QUESTION, *supra* note 1, at 156.

arguments about *Roe*. But it might lead us all to lower our voices a bit. That would be a major improvement.

D.A.F.