

Beyond Roe

Thanks to the Supreme Court's best-known decision, the women's movement is stalled. Here's how to restart it.

OUR BODIES, OUR CRIMES BY JEANNE FLAVIN • NEW YORK UNIVERSITY PRESS • 2008 • 288 PAGES • \$35

Author Jane Smiley rightly observed that pregnancy is the most public of conditions. Check-out-counter magazines flash baby bumps as routinely as they offer ten-minute meals. Whether it's Angelina Jolie or Bristol Palin, bump watch is rampant. Yet abortion, which in my experience of three decades on the frontlines of the reproductive justice movement is as much a part of making families as childbirth, rarely elicits so forthright a mention. The wildly popular movie "Juno" boasts hip, smart dialogue that glosses over the reality that a young woman's life is unalterably changed by a pregnancy, no matter what option she chooses. The film *Knocked Up* reinforces the narrative that all a woman needs to find her bliss is any jerk of a man to get her pregnant and take her away from a meaningless high-powered professional life (abortion, meanwhile, is hardly mentioned—literally: The film referred to it

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euphemistically as “smashmortion”).

But if the realities of abortion are often overlooked, its potency as a political weapon for the right has never been stronger, despite well-deserved euphoria that Americans—thanks to an eight percent female-tilted gender gap—elected a pro-choice president, and additional pro-choice members of Congress, and defeated three anti-choice ballot initiatives. Today, nearly half a century since the birth control pill arrived in 1960, contraception was legalized by the U.S. Supreme Court’s *Griswold v. Connecticut* decision in 1965, and pre-viability abortion was legalized by *Roe v. Wade* in 1973, the purposefulness of pregnancy among most women in America is sure evidence that many victories have been won. Yet these very victories carried within them the seeds of their own demise, for they were not grounded in women’s moral and legal agency for which the law should provide protection equal to men’s—the right to one’s own life—but in a right never deemed an absolute value by the Court or the court of public opinion, the right to privacy.

Paradoxically, those very personal freedoms to make childbearing decisions privately had to be won through the political process. That’s how the state of a woman’s uterus has become the most public of political battlegrounds. *Griswold* and *Roe* didn’t end the fight for dominance over women’s sexual and procreative lives; they started a new round. Look no further than the stringently anti-choice Sarah Palin to see how the right’s assault on reproductive privacy hoists even its own zealous advocate on its petard. Mother Palin insisted we respect her family’s privacy concerning her Down Syndrome baby and her 17-year-old daughter’s “choice” to continue her pregnancy and marry her high school boyfriend, even as Candidate Palin campaigned on the draconian Republican platform to strip other women of their childbearing choices.

Like water on porous stone, the right has slowly eroded the vulnerable legal protections of *Griswold* and *Roe*. A cascade of more than 30 post-*Roe* Supreme Court decisions—starting with 1980’s *Harris v. McRae* (upholding the Hyde Amendment’s prohibition on Medicaid abortion coverage) through *Planned Parenthood v. Casey* (allowing legislatures to restrict abortion in any way that does not create an “undue burden”)—laid a smooth path for 2007’s *Gonzales v. Carhart* decision, which upheld the first ever federal abortion ban (misnamed the Partial Birth Abortion Act). The Roberts Court reversed the often-reaffirmed precedent that women’s health is paramount in abortion law, and it used anti-abortion code language to signal that it will likely allow states and Congress to limit women’s reproductive rights. Even Barack Obama’s presidency cannot soon change the reality that the lower federal courts are now dominated by anti-choice judges, and the Supreme Court stands one unreliable Anthony Kennedy

vote away from eviscerating *Roe* entirely; the oldest justices, most likely to retire to make way for Obama appointments, are those in the pro-choice bloc.

Roe has been de facto, if not technically, overturned. *Carhart*'s language drips with such disrespect for women that Justice Ruth Bader Ginsburg charged it "reflects ancient notions about women's place." But those ancient notions are alive and well today.

This year, emboldened by this juridical trend, abortion foes in Colorado moved to their endgame, proposing a state ballot initiative to create personhood rights for fertilized eggs from the moment of fertilization, flouting the medical definition of pregnancy (implantation of the fertilized egg in the uterus) and making this fertilized egg more important in the law than the woman upon whose body it is wholly dependent. It would have outlawed not just abortion but also most hormonal birth control and IUDs, since they can prevent a fertilized egg from implanting. (The proposal was soundly defeated, owing in part to fissures among anti-choice groups.)

The egg debate has a silver lining. After decades of defending *Roe*, the Women's Movement must now face the question it so has long avoided: the value of a woman and her life. *Roe* was a meaningful and necessary advance, but its grounding in privacy rights portended that it could not stand forever. It is well past time for the women's movement, not just policy makers, to set a bold new agenda based on justice and human rights and secure the policies and social support that make rights meaningful.

Within this bleak political context, society's perverse focus on women's reproductive capacity makes the subtitle of Jeanne Flavin's book *Our Bodies, Our Crimes: The Policing of Women's Reproduction in America* ring very true. The book's exploration of what lies beneath the baby-bump fixation from a feminist perspective could not be more timely. It's easy to get mired in debates about abortion techniques, the fetus, or who is "fit" to be pregnant or to mother in the first place. But in reality, the argument, as Ginsburg pointed out, has always been about whether women will have an equal place in the world, and who controls the means of reproduction. Flavin's book pushes the reader to peel back layers of rhetoric and lay bare what's at stake for all women in this seemingly endless debate.

The book's major sections are organized in reproductive terms: "Begetting," "Bearing," "Mothering." Flavin documents how the maltreatment of women through judgments placed on their reproductive capacity, though frequently reduced in common parlance to the single word "abortion," actually extend on a continuum from pre-conception through motherhood. This is an impor-

tant framework within which to ask why such scrutiny, so often translating to oppressive gender-based policies and intrusion upon women's bodily integrity, has pervaded our history.

To convince readers that "the patriarchal regulation of motherhood" deems a woman's value to society to come mainly from her sexuality and reproductive capacity, Flavin uses the criminal justice system's most extreme examples as measure and metaphor. "Our formal systems of criminal justice and public welfare," she writes, "maintain invidious distinctions between bad women and girls and good ones, welfare recipients and workers, offenders and mothers." The chapter titled "'Liars and Whiners': Incarcerated Women's Right to Reproductive Health" tells one horrendous story after another, of legs shackled together during delivery, tubal pregnancy misdiagnosed as constipation or pelvic inflammation resulting in near death of the inmate, a delay of 18 months between breast cancer diagnosis and starting chemotherapy. Flavin documents the system's poor reproductive health care practices, especially the lack of preventive care for pregnant women, as a case study of how society devalues women, punishing rather than supporting their reproductive capacity, and in the process harming the fetuses and children the system is supposedly protecting. She also illustrates, with powerful numbers, the system's inherent racism: Black women are more than twice as likely as Hispanic women and over three times more likely than white women to be incarcerated, and thus more likely to be subjected to deficient reproductive health care.

Few women have been to prison, to be sure. But the criminal justice system merely magnifies the disrespect for women's ownership of their own bodies that permeates society as a whole: lack of access to basic reproductive health care, including contraception and screening for reproductive cancers for millions of uninsured women; barriers to finding and getting a safe abortion, especially if you are young, poor, or live in one of the 87 percent of counties that have no abortion providers; insurance plans that still don't cover contraception; and the Supreme Court's assumption that women are incapable of determining when they should carry a pregnancy to term so the state should decide for them. No other civil right is divisible by popular will. Americans either have the right to freedom of religion or they don't. We don't vote on this state by state. Why is it so different when it comes to women's rights to their own bodily integrity?

As a description of what ails us, *Our Bodies, Our Crimes* offers convincing

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arguments. But it falls short of prescribing a cure. Though Flavin sounds a ringing plea for women's empowerment as the desirable outcome, the book does not attempt to create a coherent action framework to get there. That left me feeling morose rather than energized to right these wrongs. The package's appearance exacerbates the depressing message of the author's effectively made case: the dreary cover of a woman in handcuffs, the title and chapter titles ("Bad Mothers," "Innocent Preborn Victims," "Baby Killers") repeat anti-choice images of women as criminals just for being women. To what end?

Interestingly, *Our Bodies, Our Crimes* is itself measure and metaphor for the most vexing strategic mistake made by the reproductive rights movement today. It does not effectively challenge the intellectual framework of those whose mission is to advance the patriarchal regulation of motherhood by stripping women of the hard-won right to make childbearing decisions. (Start with their usurping the term "pro-life," a complete misnomer.)

As a result, pro-choice political leaders are failing to elevate the debate to a higher, human-rights and justice-based value set. When, during the presidential campaign, Barack Obama was asked "at what point does a baby get human rights?" during a nationally televised interview with Reverend Rick Warren, he demurred, saying the answer was "above my pay grade." In doing so, he illustrated the self-inflicted wounds incurred when a movement bases its arguments on the narrowest portions of justice that must be meted out to women to remain legal. Though Obama later acknowledged his answer had been too flippant, he uttered not a word about the woman's right to life, liberty, and the pursuit of happiness, nor did he elevate the discussion, as he had done so eloquently with racism, to an examination of the sexism that puts responsibility and blame for unintended pregnancy on women. And while he did allude to prevention, it turned out he meant helping women with resources to continue pregnancies and encouraging adoption. This despite the fact that he is a cosponsor of the omnibus prevention bill, the Prevention First Act, and the Freedom of Choice Act, which would codify the right to decide whether or not to have a child (there are two sides to the procreation coin, after all) as a civil right, while tracking *Roe*'s guidelines for restrictions on post-viability abortions.

Such legislation is badly needed not only to restore liberties systematically carved away out of *Roe*, but also to shift the legal framework from one based on privacy to one based on equal protection. The language of the debate must be elevated accordingly, and at the same time advocates must create a steady stream of policy initiatives to protect and expand reproductive rights, health care access, and justice.

We might have John McCain to thank if these policy initiatives start to move forward in the new Congress. When he denigrated the notion of “women’s health” (the quotation marks represent his hand gestures as he uttered those ewey, nasty words during the final presidential debate), even complacent pro-choice and mushy middle voters were offended; it drove home how real the threats are to their own personal, ostensibly private, reproductive decisions. But such concern will only propel action if the movement is reinvigorated and courageous enough to take on core justice and equality issues so long submerged under the more palatable privacy and health concerns.

In proposing that the movement return almost to its beginning, it is important to take a step back and review why history unfolded as it did. Abortion wasn’t illegal during the early days of our country, and nostrums for pregnancy prevention and termination were widely advertised until, gradually during the nineteenth century, they became illegal state by state, largely to wrest control of women’s medical care away from (mostly female) midwives and give it to (mostly male) physicians. Opponents of birth control argued it would cause promiscuity, sterility, the demise of the family, and the end of the existing (male-dominated) social order.

The American birth control movement began just after the turn of the twentieth century, but largely amounted to pamphleteering until Margaret Sanger committed civil disobedience by opening the first clinic in 1916. “No woman,” she said, “can call herself free who does not own and control her own body. No woman can call herself free until she can choose consciously whether she will or will not become a mother.” Though the law was against her and she was promptly arrested, Sanger’s bold action began an era of step-by-step progress in birth control laws, technology, and public acceptance.

I entered the movement in 1974 as executive director of the fledgling West Texas Planned Parenthood affiliate, just as those who had been involved for years thought all the battles had been won. A woman could still be denied, or fired from, a job if she were to sport that telltale bump; still, it was a heady time. The second wave of the women’s movement was creating firsts for women in jobs, professions, and public life. All this was made possible by reliable birth control, symbolized by the Pill (always referred to in capital letters: The little pink contraceptive’s impact was that profound). It seemed so clear that when people can make babies as a conscious decision, then babies, and the women who birth them, become more highly valued by society. Or so we thought.

I had to learn on the job that the admonition “eternal vigilance is the price of liberty” applies to social movements as well as democracies. There were

two near-fatal flaws in the otherwise rosy situation. First, the political mistake plaguing all social movements: They suffer the wages of winning. In a pluralistic democracy, no victory is safe from the next wave of activists who organize to champion competing policies. The energy tends to be with insurgents. And it's an uphill battle to maintain the passionate advocacy that brought about reproductive rights victories.

Second, the platform of legal precedents upon which the Supreme Court built reproductive justice has always been less than sturdy. When the question of whether to legalize birth control came before them, the Court based *Griswold v. Connecticut* on a penumbral right to privacy within the marital relationship. Jeffrey Toobin, author of *The Nine*, explains that since the Court hadn't yet taken up gender equality issues in the early 1960s, privacy was the

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best precedent it had to go on. It turned out to be a haunting rationale: Privacy is highly valued, to be sure, but pit the moral scales of privacy against life, and there is no contest (same with "choice," though I have always thought the word "choice" could and should be rebranded to convey that choice is the basis for all morality). *Roe v. Wade* built upon

that same right to privacy, sowing the seeds of culture wars so visceral they led Toobin to observe that since *Roe*, the Court has basically had only two kinds of cases, those about abortion and those not about abortion.

Despite a ringing affirmation of *Roe*'s notion of privacy concerning consensual gay sex in 2003's *Lawrence v. Texas*, both the rhetoric and the laws on women's reproductive rights have been pushed so far backward by other decisions that *Roe*'s remaining, fragile shell affords limited real protection. Privacy is a highly valued principle and a cornerstone of modern understanding of the limits of government intrusion, but it does not provide the same affirmation of the value of women's lives that reproductive self-determination and justice deserve.

In other words, there must be something more than privacy. And there is. A woman's right to her own life and body has to be elevated to the moral position that supports a human rights framework. This framework must be translatable into civil rights-based legislation that gives access to relevant healthcare, education, supportive counseling, and economic justice, through policies that will be upheld by courts reshaped by presidents who speak without apology about the legitimacy of women's reproductive self-determination.

America stands at a crossroads for reproductive rights. It remains to be seen whether President Obama will take the turn toward a proactive reproductive justice agenda. A pro-choice president does not necessarily equal pro-choice initiatives; Bill Clinton rescinded George H.W. Bush's executive orders such as the Global Gag Rule, but he never aggressively pursued proactive legislation to expand access to reproductive health care or rights (at least not without much prodding).

Obama should assume leadership on the new reproductive justice agenda, including but not limited to the Freedom of Choice Act, Prevention First Act, and inclusion of the full range of reproductive health care in any expanded or universal health plans. That will only happen if women's movement constituencies demand it, supply a constant flow of sensible policy measures, and organize to support lawmakers and the president to pass them.

American society has changed dramatically since *Roe*, almost 36 years ago. What was once considered private is a very public issue again. The next phase of our long trajectory toward women's full personhood requires that we build a movement anew from the ground up—person by person, state by state, vote by vote, step by step. With an Obama administration in the lead and Congress tilting pro-choice, there's an exciting opportunity to declare, "Yes, we can!" achieve Flavin's positive vision for "empowered women" who have real choices. Still, only we the people can determine whether the response resounds: "Yes we will!" **D**