**CONFRONTING THE DOBBS DECISION:**

**ON THE *LEGALITY* OF ABORTION**

**ROBERTO DELL’ORO**

Introduction

I am grateful to Prof. Gumer and Prof. Clark for their interventions. They have prepared the terrain for my own considerations, even if I will introduce a change in perspective.

My talk addresses the following questions at the boundary of morality and law: what moral premises have informed the American legal discussion on abortion? What premises ought to do so?

I speak of *moral* rather than legal *premises*. Though it is necessary to distinguish morality and law, it is also impossible to separate them. I stand by the presupposition that legal developments do reflect maturations (and sometimes declines) in the ethos of society, in the perceptions of right and wrong, good and bad that substantiate our living together.

Moral premises about abortion then, whether supporting a Constitutional “right to choose” (as in *Roe* and *Casey*) or, conversely, denying such a right (as in *Dobbs*), stand in the background of the norms articulated by the law. They define recessive premises, informed with philosophical and ethical presuppositions that might be less evident in their meaning than the legal provisions they overtly convey.

Still, we cannot have a full picture of the legal landscape without taking into account such moral premises. The *letter* of the law becomes fully clear only in light of the *spirit* that pervades it.

I offer three considerations. The first concerns the *Dobbs* decision. The second looks back at the framework overridden by *Dobbs*. The third outlines a personal position on the legal matter of abortion in our country.

1.

The first consideration focuses on the moral premises of the *Dobbs* decision. I find the decision morally inadequate for the following reason: *Dobbs* fails to provide a full account of the moral agency of women as autonomous beings, endowed with full equality and the freedom to make a substantial choice over, perhaps, their most personal and consequential of all life decisions.

It is true that the failure in question concerns *per se* only the recognition of a *constitutional* right to abortion. It does not deny the *freedom of the states* to enshrine such right in their laws -- through statutes, legislations, or referenda.

However, it also leaves the door open for the states to do the opposite. In the potential conflict between a woman’s claim to autonomy and a state’s right to determine the future of her pregnancy, the *Dobbs* decision sides with the latter over the former, rejecting any space of “personal liberty” for women, even in cases of rape or incest.

Why so? I find it interesting that the argument for the position adopted by the Supreme Court in *Dobbs* is not grounded in the concern to protect prenatal life. Nor it is based on the affirmation that the right to life of a developing human being overrides a woman’s right to choose.

The state’s interest in protecting prenatal life plays no part in the majority’s analyses. In fact, the majority takes pride in not expressing a view “about the status of the fetus.”

Their argument relies purely on the following question: does the woman’s decision to end a pregnancy involves any *Fourteenth Amendment* “liberty interest” or not? Their answer is that it does not.

The legal reasoning justifying such denial of a woman’s liberty interest is not my immediate concern, at this point of our conversation. I leave it to legal scholars to decide whether and why *Dobbs* sides with a so-called “originalist” interpretation of the Constitution, or whether its decision to abandon *stare decisis* as a principle central to the rule of law is justified.

I want to call attention to something deeper, and that is the apparent decision’s blindness to developments in our society that have contributed to the affirmation of women’s moral agency.

According to *Dobbs*, a woman’s decision to end a pregnancy does not involve any *Fourteenth Amendment* “liberty interest,” for the simple fact that *the law did not intend to do so when the amendment in question became law*. In other words, since the *liberty* in question *did not extend to the protection of a woman’s choice* *in 1868*, it cannot serve as a basis for its later justification either.

I am quite puzzled by such argument. As the dissenting opinion points out, there are a number of other things the law did not protect, back then. In fact, it failed to do so for decades to come.

It did not protect the right to same-sex intimacy and marriage. It did not protect the right to marry across racial lines. It did not protect the right to contraceptive use or the right not to be sterilized without consent.

*Dobbs* fails to recognize, then, that our social and cultural perceptions of women’s autonomy, in all its dimensions, including the power of control over their bodies, have dramatically changed since 1868.

I do not see such changes in perception as a sliding into some kind of moral relativism. I also do not subscribe to the notion that, then, “everything is up for grabs,” unless we hold firm to an “a-historical” interpretation of the *Fourteenth amendment*.

The changes I am referring to are the results of social struggles by women to affirm their place within our American society. I see them as contributing to a maturation in our moral sensibility, in finally coming to recognize women as full moral agents.

Such moral agency gives women the freedom to decide whether and when to have children. It determines how they live their lives and how they contribute to the society around them.

Furthermore, since full moral agency defines the status of citizens within a secular, democratic polity, the failure to recognize dimensions that are essential to women’s freedom risks curtailing the requirements of full democratic participation for more than half of our society.

To impose a choice on women over matters that belong to their most intimate sphere threatens to compromise their integrity, bodily and otherwise, as persons.

It also undermines basic requirements of tolerance toward the pluralism of moral perspectives within society. *In matters of personal life*, a democracy differs from a totalitarian regime because it maximizes, rather than restricting, a space of personal freedom for *all citizens*, including women.

2.

I come to my second consideration. I want to unpack now the underlying premises of the framework overridden by *Dobbs*, and submit that the latitude of a woman’s right to choose in *Roe* and *Casey*, extending all the way to *viability*, goes too far.

My argument relies upon two premises: (2.1.) a notion of the human being defined by a *relational, rather than absolute*, autonomy; and (2.2.) a *positive* rather than negative understanding of the purpose of the law.

2.1.

I stand by a notion of the human being -- a *philosophical anthropology*, to use a technical term, in which freedom of choice is not absolute. We are embodied beings, not isolated monads. Since we are dependent upon one another, we are also responsible for each other’s vulnerability, which we share in our common human condition.

I believe society has a responsibility to support and care for both a woman facing pregnancy and the developing human being in her. We need to overcome an anthropology for which “each person is an island,” and a notion of society that is simply the sum total of individuals living side by side, caring for their own interests only, trying not to stamp on each other’s feet.

What I am saying here does not contradict at all what I articulated in my first consideration. A right to a fully free decision toward one’s pregnancy stands within a *wider matrix of additional rights* the law ought to defend. They include the right to prenatal care, work leaves, family financial support, and a slew of social goods necessary to the flourishing of women (and children) as human beings.

The agency of women, which I fully support, can find the conditions of its practical sustainability only in the relativity and support of others.

In light of this, the anthropology that underlies the framework of *Roe* and *Casey* seems defective to me. It rightly recognizes the centrality of women’s autonomy in matters central to their existence. At the same time, it fails to pay heed to the *responsibility generated by the relation of mother and child*. If at all, it does so too late.

For *Roe* and *Casey*, such responsibility, and the subsequent interest of the state, sets in *only at the point of viability*, when, presumably, the developing human being is *able to survive on its own*, becoming now a self-sufficient being, potentially capable of autonomy and self-determination.

With respect to the *unborn life before viability*, such notion has little to offer: the unborn is not autonomous or self-determining. Thus -- so goes the argument, if the fetus is not autonomous, abortion harms no one. If autonomous, then the harm cannot be justified.

2.2.

As I said before, at stake here is also a way of thinking about *the purpose of the law*. We tend to see the basic *purpose of the law as essentially negative*. In this view, the “business” of the law is strictly to set boundaries and impose limits. It restrains individuals from harming other self-standing, autonomous individuals seen in isolation.

For my part, I see the law as transcending a purely negative purpose. *The law has also a positive function.* It can help foster a sense of care for the bond of reciprocity between human beings, including the bond of mother and child, and the bond a pregnant woman shares with the community to which she belongs.

In America, it is this positive understanding of the law what has shifted the way we look at issues like civil rights, medical leave, disability, etc. I indulge, for the sake of argument, on the latter.

All the way up to mid-1970s, many American cities, including Chicago, Columbus, and Omaha, prohibited persons with disability to have a normal public presence. The Chicago Municipal Code of the time had a provision, known as “ugly law,” which required the following:

“No person who is diseased, maimed, mutilated, or in any way deformed, so as to be an unsightly or disgusting object or improper person, is to be allowed in or on the public ways or other public places in this city, or shall therein or thereon expose himself to public view, under a penalty of not less than one dollar nor more than fifty dollars for each offence.”

The historical discrimination against persons with disability may appear hardly believable, when not simply dumbfounding, to our contemporary sensibility. Yet it puts us in the condition to appreciate the cultural maturation we have been able to achieve when we introduced, in 1990, a new legal framework, the *American with Disabilities Act* (ADA).

Such framework and its measures have had a profound impact on our social sensibility toward the disabled. They have produced changes not only in our personal attitudes toward them, but also in the legal recognition of their individual rights.

In the *American with Disabilities Act*, the law goes beyond the task of setting boundaries among individuals, carving out a space of isolation for those who cannot claim full autonomy and self-determination.

It *positively* calls for the integration of the disabled. Furthermore, it engages citizens to *come to terms with the reality (I am tempted to say, with the “visibility”) of persons with disability*, to recognize their potential contribution, to assure equality of opportunity and full participation within society.

This model of the law offers a different understanding of freedom because it sees autonomy as a dimension that is integral, rather than alternative, to social solidarity. It also shows the potential effect of a different anthropological ideal, which recognizes the embodied condition of the person, her vulnerability and dependence within social and historical ties.

3.

 I have come to my final point, in which I try to bring together the considerations developed in my previous two sections. I offer suggestions for what I consider a potential compromise on the *legality* of abortion, a compromise in which women’s autonomy and social solidarity toward prenatal life might come to mutual recognition.

I said before that an anthropology of dependence and vulnerability ought to provide the context within which to frame the *extension of autonomy*. The nature of freedom, for women as for men, is not reducible to a “freedom from,” but only grows in relativity to the other, in becoming a “freedom to.”

It is a freedom that finds limits, but also meaning, in serving the “face” of the other. As the Jewish philosopher Emmanuel Levinas reminds us, we are truly free only when we become responsible.

Freedom is mysterious. It gives us the choice to exploit the vulnerability of the other who is dependent on us, and turn such dependence into an opportunity for the exercise of power. In this case, freedom becomes an opportunity for exploitation.

But freedom can also give us the courage to pay heed to the vulnerability of the other, allowing into full visibility the injunction inscribed in the other’s face, the command that says, “do not kill me!”

Even when it does not speak, even when it is incapable of speaking, *the face of a human being summons to respect and reverence*.

It does so especially *when it suffers and grimaces in pain*. This is for me the threshold beyond which a freedom to choose cannot *legally* go. This threshold we cross substantially earlier than viability.

I grant that the life of a developing human being does not exist *in a vacuum:* it is embodied in the flesh of a woman. In this sense, it is “entrusted” to her choice. The latter however, extends only so far. *I submit that the ability of the fetus to feel pain represents the limit at which the legal right to choose ought to end*.

It is not entirely easy to come to scientific consensus around the moment such emergence of pain occurs in fetal development. Evidence seems to point to somewhere between 15 and 20 weeks, but doubt with respect to extinguishing human life imposes prudential restraint, rather than uncertain daring.

This is why the law should limit a woman’s freedom to choose at the point when the possibility of inflicting pain upon a developing human being sets in. In fact, for prudential reasons, it should do so before that possibility becomes actual reality.

Beyond that point, I believe abortion represents a form of cruel intervention on the fetus and our sense of communal belonging falters. This we owe, minimally, to the vulnerability and dependence of a developing human being.

For most of European countries, the space of freedom to choose is limited, with certain exceptions, to the *first trimester of pregnancy*. I stand by this threshold for our state laws as well, on the premise that such space is sufficient for a woman to make an *informed* choice, as it should be for all medical decisions.

Conclusion

I would hope that the change of heart entailed by hospitality to the disabled, of which I spoke before, might bring about, in the long-run, a legal landscape for the unborn consistent with the compromise I articulated.

The decision toward a developing human life belongs in principle to the woman who bears it, to her responsibility and choice. This, as I said, within limits.

*From a moral point of view*, and for reasons that belong to a different talk, I would hope for that decision to be *in favor of life* and to honor the mystery of a new human being *emerging* in a woman’s body. The reason for this new human life “being there,” a body in the flesh of another, transcends the biological mechanisms that brought it into existence.

The *moral response to life* cannot be, in my opinion, anything less that *life-affirming*. One can easily recognize that “being alive,” for each one of us, owes first to our mother accepting *our* emergence in *her* flesh.

I do not assume that for *all* women such acceptance was entirely free. There are forms of constriction upon a woman more subtle, and perhaps more violent, than those imposed by a state. Still, I hope for a legal framework in which a woman’s decision toward her pregnancy is the response of a moral agent endowed with dignity and, for that, capable of recognizing the dignity of the life that grows in her as well.