

The Fictional Post-*Roe* Prison Rush

Kathryn Jean Lopez

“I want to put them in jail for a long time and make sure we have GPS on them for the rest of their lives. One strike and they’re ours. I want to know where they are forever.”

That was Republican presidential hopeful Mitt Romney in Iowa this August, talking about what he’d like to see done with those who are convicted of sex crimes against children. But to listen to pro-legal-abortion activists, he could have just as easily been describing what he and his fellow pro-lifers would want done with women who seek abortions in a United States after the overturning of *Roe v. Wade*.

Celebrated writer Anna Quindlen recently fell into this common abortion trap—assuming that pro-lifers are pining for the day they can toss pregnant women in jail—in her *Newsweek* column. Addressing pro-lifers, Quindlen asked: “How much jail time?”—for women who seek abortions in a post-*Roe* U.S. She insisted that those who oppose abortion have “only two logical choices: hold women accountable for a criminal act by sending them to prison, or refuse to criminalize the act in the first place. If you can’t countenance the first, you have to accept the second. You can’t have it both ways.”

Quindlen thinks there’s a vast pro-life conspiracy afoot. That some recent state bans on abortion in states like South Dakota have post-*Roe* activation provisions that explicitly indicate that women will *not* be sent to jail—“Nothing in this section may be construed to subject the pregnant mother upon whom any abortion is performed or attempted to any criminal conviction and penalty”—only deepens the conspiracy. Quindlen explained: “Lawmakers in a number of states have already passed or are considering statutes designed to outlaw abortion if *Roe* is overturned. But almost none hold the woman, the person who set the so-called crime in motion, accountable. Is the message that women are not to be held responsible for their actions? Or is it merely that those writing the laws understand that if women were going to jail, the vast majority of Americans would violently object?”

Quindlen’s suspicions, and her conclusions, are wrong. The answer to her bottom-line question—“How much jail time”—is: Life is a bit more complicated than that. The reality is not as black and white as pro-choice fright propaganda would have it. Still, she isn’t the first and won’t be the last person

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to ask the mistaken and misleading question.

In her 2006 book, *How the Pro-Choice Movement Saved America*, Cristina Page asserted that “Clearly, pro-life states are eager to prosecute women. In some instances, they have already found ways.” She pointed to a South Carolina case—a migrant farm worker from Mexico who drugged herself to miscarry and spent four months in jail—as evidence of widespread imprisonment to come. She continued:

That these convictions occur now, with *Roe v. Wade* intact, is an ominous sign. As a lawyer for the boy in the Michigan case [who was tried under Michigan’s fetal-protection law for killing his girlfriend’s unborn child by striking her belly with a baseball bat, at her request] pointed out, “What this case represents is a harbinger of things to come.” After all, *Roe* now protects most people most of the time. With *Roe* gone, the number of acts of desperation by women and girls will multiply, as will convictions. And since pro-life compassion seems to extend only to the unborn—indeed, for those making difficult decisions they revel in the harshest penalties—we may one day see women condemned to death for abortion.

Condemned to death? Is she kidding? In a country that has trouble banning even partial-birth abortion, i.e., infanticide?

But even Republicans sometimes fall into this jail-time-for-abortion-seekers trap. Former New York City mayor Rudy Giuliani, who thinks abortion should be legal, knows enough to stress to conservatives that he wants judges who stick to the Constitution—yet he still hasn’t stopped talking about how he doesn’t want women to go to jail. He told CNN in April, for example: “It is your choice, an individual right. You get to make that choice, and I don’t think society should be putting you in jail.” True, this is from a guy who clearly wants the choice for abortion to be legal—but bringing up jail should be an avoidable misstep for a former altar boy who once ran for Congress as a pro-lifer.

Former Tennessee senator Fred Thompson, who is otherwise believably pro-life, has made the same mistake—he doesn’t want to criminalize women, he’s said during his presidential deliberations. It’s been on his mind for a while, too. In 1994, during a Senate campaign debate, he said: “Should the government come in and criminalize let’s say a young girl and her parents and her doctor? I think not.”

I doubt I’ll convince Cristina Page and Anna Quindlen, but a quick memo to Republican politicians trying to convince primary voters they are pro-life: *Don’t* earnestly insist you don’t want to throw women in jail. Because guess what? I’m pro-life and I don’t want to either. In fact, *nobody* in the mainstream pro-life movement does—so even to discuss the issue in these terms is to play into the pro-abortion spin machine.

Pro-lifers Are People Too

Quindlen—like everyone else concerned about all those American women who supposedly will go directly to jail after *Roe* is overturned—misunderstands what most abortion opponents seek. We're not looking to further victimize women. They already are victimized—by abortion. They are frequently pressured into it; they are often unaware there's help out there for them if they want to keep the baby; in many cases, they suffer in silence for years after the abortion.

Perhaps nothing in the public-policy realm better illustrates the compassionate approach pro-lifers have toward women who find themselves seeking abortion than the “Women Deserve Better” message of Feminists for Life. The “women deserve better” campaign is threatening to the legal-abortion supporters: It complicates the black-and-white polarity they seek to project, of warm, compassionate “pro-choicers” versus heartless pro-lifers. That's why the “jail” scare tactic is so important to them.

But anyone who just visits a website like feministsforlife.org or silentnomoreawareness.org can learn the simple and essential truth: *Pro-lifers are pro-women*. Some of us even *are* women, and care deeply about what happens to our sisters.

The “Feminists for Life” message—which, in many ways, echoes the New Feminism of Pope John Paul II—breaks down caricatures. And it's essential to understanding what life might look like after *Roe* is gone.

Leslie J. Reagan, in her 1997 book *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973*, wrote: “The antiabortion movement has projected a fetal ‘voice’ to compete with and discredit the voices of real, live women, a group that only recently spoke of its experiences in public, political arenas. The fetus has been used to shift the debate away from women and their narratives about the crimes of illegal abortion. . . . The New Right has pushed forward a conservative political agenda hostile to feminism.”

But this contention just doesn't stand up, when it's put up against the stories of real, live women victimized by “choice”—the kind of women on whom the Feminists for Life shine a long-overdue spotlight. Just this summer, at a Capitol Hill press conference, the group introduced a lineup of speakers including the following (the description is from the FFL website):

- Karen Shablin converted from a “card-carrying member of NARAL” to a pro-life feminist position. She discusses her experience choosing to have an abortion and how she became pro-life. A health-policy expert and former state Medicaid agency head, Ms. Shablin is speaking for FFL on campus

because, she says: “I can’t undo my mistakes over the years—having an abortion, advocating abortion, but I can help others to learn from my mistakes. Every life counts.”

- Ann Lowrey Forster was known for her pro-choice letters to the editor when she became pregnant her sophomore year in college. She gave birth that summer, returning to school for junior year. Urged to abort and deserted by her boyfriend, Ms. Forster continued her pregnancy and graduated on time with honors. Now a pro-life feminist, married, with a toddler and a newborn, and a law clerk with a law firm in the South, Ms. Forster believes resources and support are critical for pregnant and parenting women.

- Joyce Ann McCauley-Benner was raped at 20 and chose not to abort, not knowing if her unborn son was the result of rape or of her relationship. She says, “I know what it’s like to want to run as far away as possible from a problem, how it feels to hang on to ‘if I wasn’t pregnant anymore, it would all be o.k. again.’” Ms. McCauley-Benner, who graduated from college while raising her son, works with a task force for racial justice. A mother of two sons, Ms. McCauley-Benner lives in the Midwest.

- Angelica Rosales founded a pregnancy center shortly after graduating from college and continues to run it in her hometown in the Southwest. Her own mother was advised to abort her and that continues to be a motivation for Ms. Rosales. Ms. Rosales presents the perspective of a woman who works daily with pregnant and parenting women, particularly college-age women, facing crisis situations and she sees firsthand how lack of support hurts women: “This failure to provide resources is a reflection of how far we still need to go to eliminate the root causes of abortion,” Ms. Rosales said.

What will happen after the Supreme Court overturns *Roe v. Wade*? It will depend, in great measure, on women like these, and on millions of ordinary women. Headlines will trumpet a new world of oppression for American women, in which they will be carted off to jail in their most desperate moments. In truth, however, the Court will have put the abortion decision in the hands of *the people*, where it should have been all along. And federalism will reign, as state after state will decide for itself what to do.

And what *will* all these people decide to do? Fred Thompson caused a little controversy earlier this year by not being clear how he would vote if his home state were to face that decision: How much abortion should be legal? Should there be an outright ban? Wouldn’t—couldn’t—women, in Tennessee and elsewhere, be hit with severe sentences for trying to get an

abortion? After all, if you believe abortion is murder, isn't it in the best interest of society to punish a mother who would do such a thing?

Before *Roe* and After

In pre-*Roe* New York State, as it happens, women who procured abortions were considered, according to the letter of the law, criminals (this was not the case in every state). But in practice—in the interest of shutting down doctors who performed abortions—women would customarily get immunity from any criminal prosecution if they would testify against the abortionists.

History, in other words, suggests that when tough anti-abortion laws exist, desperate women aren't rushed to the slammer. If that awful award-winning movie *Vera Drake*, about a woman who performed door-to-door illegal abortions with rudimentary household tools, did anything good it illustrated this point. Was it the kid—the one who nearly died after Mrs. Drake left her to bleed her baby away in her parents' toilet—who was brought to trial? No, it was Vera Drake herself. As an officer made clear to the girl and her mother, it's the abortionists they were after.

Albeit with exceptions, the historic record in the United States demonstrates that same attitude. Abortion was illegal in the U.S. prior to the Supreme Court's 1973 ruling—and women weren't being rushed to jail for seeking abortions. Women weren't prosecuted, because the law was never after them to begin with. According to *Dispelling the Myths of Abortion History*, a 2006 book by Joseph W. Dellapenna and other historians, law enforcement aimed at the “do no harm” community—the doctors who performed abortions. And even then, “enforcement in the United States focused on the revocation of medical licenses” in the 1930s, with an uptick in prosecutions in the 1940s and 1950s.

If pro-lifers contend abortion is murder, Quindlen and others will ask, how can this be? How can those who oppose abortion morally justify not throwing the book (or Book?) at, and slamming the jailhouse door on, pregnant women who seek to or obtain abortions in a *Roe*-less America? In response to Quindlen's *Newsweek* column, Amherst College professor Hadley Arkes explained:

In the tradition of legislating on abortion, a certain distinction was made out of prudence: On the one hand there may be a young, unmarried woman, who finds herself pregnant, with the father of the child not standing with her. Abandoned by the man, and detached from her family, she may feel the burden of the crisis bearing on her alone, with the prospect of life-altering changes. On the other hand, there is the man trained in surgery, the professional who knows exactly what he is doing—he knows that he is destroying a human life, either by poisoning a child or dismembering it.

And in perfect coolness and detachment, and at a nice price, he makes the killing of the innocent his office-work. Certain women may indeed be guilty of a callous willingness to destroy a child for the sake of their own self-interest. But the law makes a prudent, tempered choice when it makes the abortionist the target of its censure and brings solely upon him the weight of the punishment.

In his 2006 book, *Party of Death*, my colleague Ramesh Ponnuru thinks about the post-*Roe* world in a sensible and politically astute way: The end of *Roe* would not hand pro-lifers victory in all the political debates over abortion policy. It would give them the right to have those debates in the first place.

The result might be a surprising return to political moderation. It would be surprising for two reasons. First, many of the people who decry the absence of moderation in our politics—editorialists, affluent voters, “centrist” thumbsuckers—treat support for legal abortion as part of the definition of moderation. So for increased moderation to accompany the achievement of many pro-life goals would contradict much of the official discourse about political temperance. Second, abortion is obviously an emotionally polarizing issue. I suspect that one reason many people are happy to let judges set abortion policy is fear that the issue is too hot for the political process to handle.

Ultimately what life after *Roe* will look like is a question that could fill many a book, and will be much discussed and debated. Gregory Sisk, Orestes A. Brownson Professor of Law at the University of St. Thomas School of Law in Minneapolis, has written:

If and when *Roe v. Wade* is overruled, and if the public were to react initially with anxiety as provoked by extreme rhetoric from the cultural elite, those of us who stand for the dignity of all human life should respond firmly but calmly. And we should not be discouraged by temporary trends. Slowly the public will discover that any parade of horrors marched out by the media simply is not being realized, that dictatorship has not emerged, that women are not being rounded up and forcibly removed from public life, that decades of progress in equality between the genders has not been reversed, and that freedom has survived and in fact was never endangered. Because the general public will appreciate that the Supreme Court by overturning *Roe v. Wade* was taking nothing away but rather was returning a subject of great moral concern to democratic deliberation, allowing the people to chart their own course and create a culture of life.

That’s the truth of it. So let’s put an end to the hysterics—all the “jail” canards concocted by fear-fanning abortion advocates. Aborting the propaganda would be a baby step toward an eventual culture of life.