

EDITORIAL

Abortion and “Zombie” Laws: Who Is Accountable?

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In the recent U.S. Supreme Court decision, *Dobbs v. Jackson Women’s Health Organization*, *Roe v. Wade* was overturned.¹ One consequence of that was that, in at least 26 states, so-called “zombie laws” were resurrected.² These laws, which were enacted in the late 1800s and early 1900s, and never repealed, often outlawed abortion under almost all circumstances.

The 1931 law in Michigan was one such “zombie law.” It outlawed abortion in all cases except when the life of the mother was at risk. Other such laws go all the way back to the latter part of the nineteenth century. What that means is that when the *Roe* decision was handed down in 1973, all those laws that outlawed abortion became invalid. Though invalid, they remained on the books until the recent *Dobbs* decision breathed life into them again. This pertains to the “separation of powers” doctrine in the United States. Courts can invalidate a law, but only a legislative body can remove a law from the books. That requires a separate and explicit legislative act. What is wrong with this state of affairs?

In the *Dobbs* opinion, Alito wrote, “The Constitution does not confer a right to abortion; *Roe* and *Casey* are overruled; and the authority to regulate abortion is returned to the people and their elected representatives.”³ However, what Alito describes is precisely what is not happening in many of those states where these “zombie laws” are being restored. There is nothing democratic or politically accountable about resurrecting these “zombie laws.”⁴

All the legislators responsible for enacting those laws are dead, which is to say that there is no current political accountability for the effects of those laws in the present. There is no taking account of all the changes in reproductive medical technology and medical practice that have occurred in the intervening 90 years in the United States, such as our capacity to provide infertile couples with access to in vitro fertilization so that they can have children, or preimplantation genetic diagnosis to identify embryos with life-threatening genetic disorders. Likewise, there is no taking account of cultural changes during those 90 years, most especially attention to protecting the equal rights of women in multiple areas of our social, political, and economic life.

Allowing these “zombie laws” to be resurrected is a perfect example of an unaccountable dead hand reaching from the past and governing our medical and political life today. Current legislators, mindful of all the controversy around the abortion issue, can duck their democratic responsibility to thoughtfully consider with the people of the various states what sort of regulation of abortion is most appropriate and reasonable in a liberal, pluralistic, tolerant democratic society. This is ethically and politically wrong. In addition, it is cowardly.

Responsible legislators should be willing to engage in the ethically and medically complex, difficult public conversations necessary to forge reasonable policies regarding abortion in Michigan (or any other state seeking to allow “zombie laws” to take effect). Legislators need to listen to women who have been the victims of rape or incest. These are not voices that were given a fair hearing in 1931. Moreover, if nothing is done to invalidate these zombie laws, these women will not be given a fair hearing in 2022 and beyond.

Legislators need to listen to women today who know they are at greater risk of death from birth than from abortion. This is especially true for poorer women who have little or no access to prenatal care.⁵

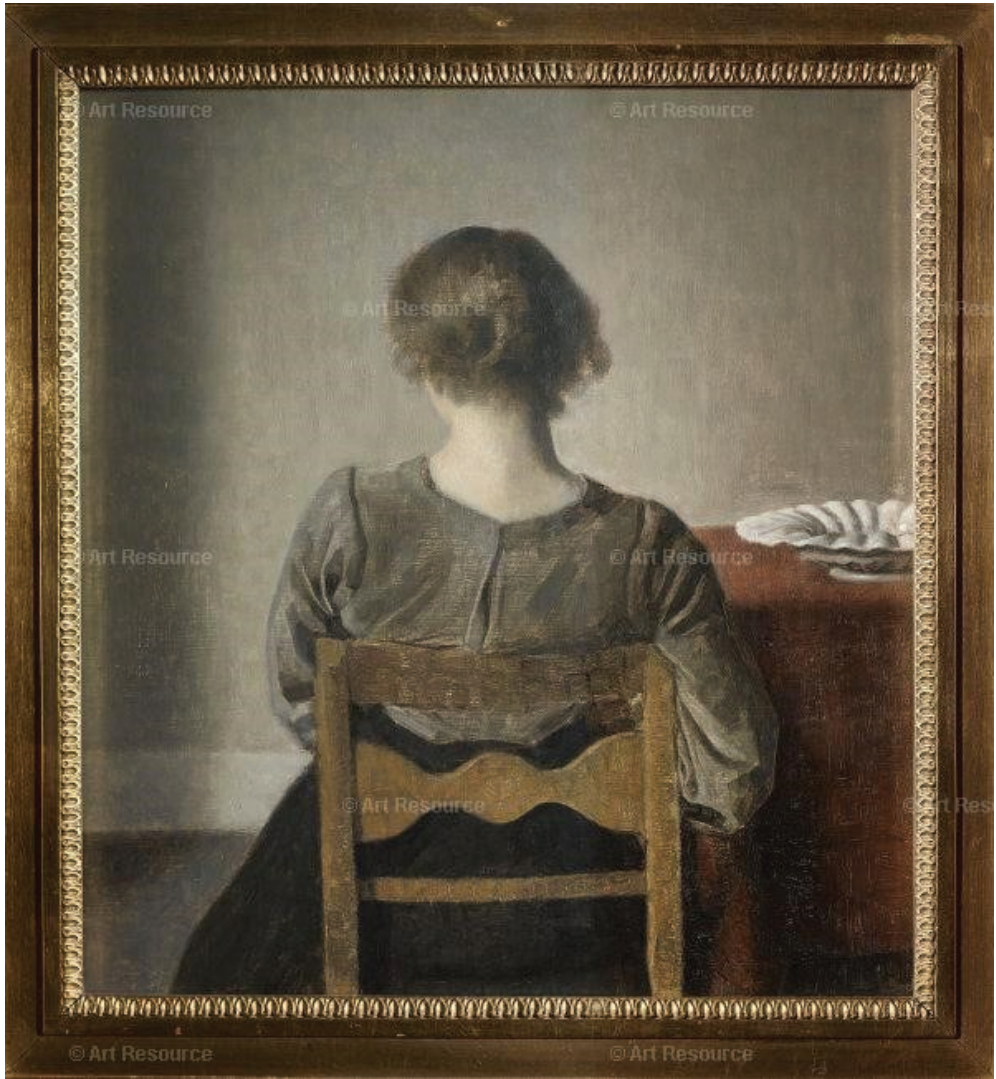
Legislators need to listen to physicians who must now struggle with legal risks related to miscarriages that show up in an Emergency Room that might be either a miscarriage for natural reasons or the result of

a botched attempt at self-abortion. Should legal self-interest interfere with providing necessary emergency care to these women? These physicians need to have a fair hearing today.⁶

Legislators need to listen to couples who today would know they are at risk of having a child with a serious life-shortening genetic disorder. Such couples who have access to preimplantation genetic diagnosis can have a healthy child spared such life-diminishing risks, although multiple eight-cell embryos will have to be discarded to achieve that result. These are life-giving and life-affirming couples whose voices would be stifled by these zombie laws. Legislators today have no right to be legislative zombies. They are politically obligated to engage their constituents in the present regarding appropriate and reasonable abortion legislation for which they can then be held accountable.

Notes

1. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. [2022]; available at https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf (last accessed 20 Nov 2022).
2. Dorf MC. Would overruling *Roe v. Wade* retroactively reanimate “zombie” abortion laws? *Justia*; 2021 Sept 13; available at <https://verdict.justia.com/2021/09/13/would-overruling-roe-v-wade-retroactively-reanimate-zombie-abortion-laws> (last accessed 7 Dec 2022).
3. See note 1, *Dobbs* 2022, the syllabus.
4. To be clear, shortly after the *Dobbs* opinion was announced, Attorney General Dana Nessel in Michigan issued a “stay” order that prevented enforcement of that 1931 law. In the November election, Proposition 3 was passed 54% to 46% as a constitutional amendment, which assured access to abortion services roughly analogous to those protected by *Roe*. See Rich S. Prop 3 passes, enshrines right to abortion in Michigan constitution. *The Michigan Daily*; 2022 Nov 9; available at <https://www.michigandaily.com/news/prop-3-passes-enshrines-right-to-abortion-in-michigan-constitution/> (last accessed 7 Dec 2022).
5. Editorial. The US Supreme Court is wrong to disregard evidence on the harm of banning abortion. *Nature* 2022;605:193–4.
6. Harris LH. Navigating loss of abortion services—a large academic medical center prepares for the overturn of *Roe v. Wade*. *New England Journal of Medicine* 2022;386:2061–3; see also Watson K, Paul M, Yanow S, Baruch J. Supporting, not reporting—emergency department ethics in a post-*Roe* era. *New England Journal of Medicine* 2022;387:861–3; Paltrow LM, Harris LH, Marshall MF. Beyond abortion: The consequences of overturning *Roe*. *American Journal of Bioethics* 2022;22(8):3–15.



Wilhelm Hammershoi (1864-1916) *Hvile (Rest)*, 1905. Location Musée d'Orsay/Paris/
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