The Unbearable Wrongness of Roe

by Michael Stokes Paulsen

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39 years ago, the Supreme Court delivered a radical, legally untenable, immoral decision. It has forfeited its entitlement to have its decisions respected, and followed, by the other branches of government, by the states, and by the people.

Today, thousands of people at the March for Life in Washington, D.C., are commemorating the thirty-ninth anniversary of a legal and moral monstrosity, *Roe v. Wade,* and its companion case, *Doe v. Bolton*. The two cases, in combination, created an essentially unqualified constitutional right of pregnant women to abortion - the right to kill their children, gestating in their wombs, up to the point of birth. After nearly four decades, *Roe's* human death toll stands at nearly sixty million human lives, a total exceeding the Nazi Holocaust, Stalin's purges, Pol Pot's killing fields, and the Rwandan genocide combined. Over the past forty years, one-sixth of the American population has been killed by abortion. One in four African-Americans is killed before birth. Abortion is the leading cause of (unnatural) death in America.

It is almost too much to contemplate: the prospect that we are living in the midst of, and accepting (to various degrees) one of the greatest human holocausts in history. And so we don't contemplate it. Instead, we look for ways to deny this grim reality, minimize it, or explain away our complacency - or complicity.

It is important, however, to view reality with eyes wide open, focus clear, and gaze not averted. On this thirty-ninth anniversary of *Roe* and *Doe,* I would like simply to set forth what *Roe* and *Doe* held, in as clear-headed and straightforwardly descriptive legal terms as possible, and to lay out its human and moral consequences. My brief tour of Roe's unbearable wrongness begins with *Roe's radicalism* - its extreme holding creating a plenary right to obtain or commit abortion - proceeds with Roe's legal *untenability,* and concludes with *Roe's immorality* and the moral problem of our seeming passivity and quiescence in response to the greatest legal and moral wrongs of our age.

Roe's **Radicalism**

Start with *Roe's* radicalism, a radicalism that we may no longer grasp because it has become so familiar. Roe created a constitutional right to obtain or commit an abortion of a human life - that is, to terminate the life of a human embryo or fetus. It is important to be clear-sighted about this: abortion kills a living human embryo or fetus. What distinguishes "abortion" from (say) miscarriage is the specific intention *to kill a living fetus.* What was alive before has been deliberately killed. Abortion takes a life. Further, the life taken is *human* life. There is really no doubt about that as a matter of biology. The embryo or fetus belongs to the species *homo sapiens.* It is a separate, living human being that is killed by abortion.

To be sure, that human being is killed at an early stage in its life cycle, and for a substantial part of that time could not live without direct biological connection to his or her mother (the person in whom *Roe* vests the right to terminate that human life). But that does not make the human embryo any less alive, any less human, or any less a separate life from the mother. It just makes the unborn baby more vulnerable and dependent.

The right created by the Supreme Court in *Roe* is a constitutional right of some human beings to kill other human beings. I do not mean for my description to be provocative, but simply direct - blunt about facts. One need not presume that the human fetus has a right not to be killed in order to recognize that, as a descriptive matter, *Roe* creates a right for one class of human beings to kill other human beings.

Roe, coupled with *Doe,* creates a plenary right to kill the embryo or fetus for essentially *any* reason, at *any* time throughout all nine months of pregnancy. Distilled to its essence, *Roe* created a "trimester" framework for abortion. In roughly the first three months of pregnancy, the right of abortion is avowedly plenary: abortion may be had for any reason. In the second three months, government may regulate abortion to protect the life or health of the mother, but again the right to have an abortion

remains plenary. In the final three months - after the point of "viability," when the human fetus could live on his or her own outside the mother's womb - *Roe* says that abortion can be restricted or prohibited … *except where abortion is necessary to protect the "life or health" of the pregnant woman.*

This is a big exception. And here is where *Doe* steps in. On its face, *Roe* might appear, to the unwary or uninitiated, "moderate" - its trimester-balancing framework a measured, reasonable-sounding, proportionate act of judicial legislation concerning abortion. It is *Doe* that does a lot of the work, through an indirect and ultimately disingenuous definition of the "health" reasons that *always* may justify a woman's decision to have an abortion and trump any interest of society in protecting fetal human life, even when the child could survive outside the mother's womb. *Doe* holds that relevant "health" considerations justifying late-term abortions include "all factors - physical, emotional, psychological, familial, and the woman's age - relevant to the well-being of the patient. All these factors may relate to health." (*Doe's* understanding of "the patient" did not include the fetus; *Roe* held elsewhere that the human fetus has no legal rights that any person is bound to respect.)

Roe then cross-referenced *Doe's* stylized definition of health and incorporated it into the main holding. The result is that an abortion may be had, under *Roe* and *Doe,* for essentially any reason, throughout all nine months of pregnancy, up to the point of birth.

Nothing in any of the Court's later abortion cases alters this definition of "health" or the right to abortion throughout pregnancy. *Planned Parenthood v. Casey,* the 1992 case reaffirming *Roe,* tinkered slightly with the trimester framework and the point at which "viability" occurs but did not change Roe's (and *Doe's*) holding that abortion may be had for any reason, before viability, and for any "health" reason throughout pregnancy. The partial-birth abortion cases carried this understanding forward, holding that the state may not prohibit the abortion method of inducing birth and killing the fetus on the way out of the birth canal (*Carhart I* [2000]), unless an equally effective, equally "healthy" method of killing the fetus is available (*Carhart II* [2007]).

I suspect that if more people understood *Roe's* and *Doe's* actual holding fewer would support that constitutional regime. *Roe* was a truly extreme decision, creating an effectively unrestricted constitutional right to abort a living human being for any reason the mother might have, throughout pregnancy right up to the point of birth.

***Roe's* Legal Untenability**

This brings us to *Roe's* utter indefensibility as a matter of constitutional law. If the U.S. Constitution actually protected such an extreme personal legal right to kill the human fetus, that would be troubling enough, but the trouble would be with the content of the Constitution. The further problem with *Roe* is that it has absolutely no basis in the text, structure, or history of the Constitution. No rule or principle of law fairly traceable to the text, discernible from its structure, or fairly derived from evidence of intention or historical understanding of an authoritative decision of the people, remotely supports the result reached in Roe. In terms of fair principles of constitutional interpretation, Roe is perhaps the least defensible major constitutional decision in the Supreme Court's history.

Roe's reasoning, distilled to its essentials, is that the Constitution creates a "privacy" right to abortion, on the premise that the right not "to bear" a child is protected by the Fourteenth Amendment's Due Process Clause. No serious constitutional law scholar thinks this is a plausible reading of the Due Process Clause. That clause forbids government to "deprive any person of life, liberty or property, without due process of law." *Without due process of law* are crucial words. The Due Process Clause does not say that government never may deprive a person of life, liberty or property. It only says that government may not do so "without due process of law" - that is, arbitrarily, lawlessly, not in conformity with duly enacted laws and accepted procedures for their application.

Many nonetheless support *Roe's* holding as a policy matter and therefore seek to rationalize the holding some other way. Perhaps the goofiest is the suggestion advanced by a few law professors, in apparent seriousness, that abortion restrictions violate the Thirteenth Amendment's ban on slavery. Saner, but in the end still unsound as a legal matter, is the notion that abortion laws discriminate on the basis of sex and thus deny "equal protection of the laws." The defect in this argument is that abortion laws do not classify on the basis of sex or gender and are not disguised attempts to do so. Rather, they aim at *conduct* - obtaining or committing an abortion - when engaged in by persons of

either sex. Abortion restrictions do not restrict acts of women because they are women; they restrict acts committed by men or women because they kill human fetuses. Further, ask a "pro-choice" "feminist" whether abortion should be permitted for reasons of sex-selection - that is, because the unborn child is a girl - and the sex discrimination argument begins to turn back on itself. All but the most blindly pro-abortion ideologues abandon the argument that abortion rights are required for gender equality, if that means abortion can be chosen for gender-selection of boys over girls.

In *Planned Parenthood v. Casey,* the Supreme Court rested the right to abortion back where *Roe* purported to find it, in the Due Process Clause. Recognizing the embarrassments created by this view, Casey added another prop: the doctrine of precedent or *"stare decisis,"* which is essentially all that is left to support *Roe.* But *Casey's* invocation of the doctrine was transparently disingenuous: Because the public expects the Court to adhere (usually) to its past decisions, because the Court had staked its authority on *Roe,* and because the Court might be viewed unfavorably by some of the public if it reversed itself in such a case, the Court said that it had decided to adhere to *Roe* "whether or not mistaken." Thus, what *Roe* held to be required by substantive due process *Casey* held to be required by *stare decisis,* even assuming *Roe* to be wrong.

If *Roe* was radical, *Casey* was craven. A majority of the Supreme Court apparently believed that *Roe* was wrongly decided, fully understood the moral and human consequences of the decision, and deliberately adhered to it anyway. *Stare decisis* has never been thought required by the Constitution, before or since. *Brown v. Board of Education* (1954) famously repudiated *Plessy v. Ferguson* (1896) on the question of whether racial segregation was consistent with "equal protection of the laws." The Court has overruled scores of its own precedents. Indeed, it overruled two cases in *Casey. Casey's* reaffirmation of *Roe,* in the name of *stare decisis*, was a sham - perhaps the most transparently dishonest major judicial decision since *Dred Scott.*

***Roe's* Immorality**

Finally, there is *Roe's* immorality - the abortion holocaust it unleashed - and the problem of our response to it. *Roe* is a radical decision and a legally indefensible one. But what really makes Roe unbearably wrong is its consequences. The result of *Roe* and *Doe* has been the legally authorized killing of nearly sixty million Americans since 1973. *Roe v. Wade* authorized unrestricted private violence against human life on an almost unimaginable scale, and did so, falsely, in the name of the Constitution.

It is hard to escape this conclusion, but not impossible - and many certainly try. I will not here belabor the question of whether the intentional killing of innocent, dependent, vulnerable human children is a grave moral wrong. My concluding point concerns the lengths to which we will go to deny the reality of this holocaust, because it is almost unbearable to contemplate and still go on living life as if nothing is terribly wrong. The cognitive dissonance is simply too great. And so we have become, in effect, a nation of holocaust deniers.

Here is the problem, undressed: If human embryonic life is morally worthy of protection, we have permitted sixty million murders under our watch. Faced with this prospect, many of us - maybe even most - flee from the facts. We deny that the living human embryo is "truly" or "fully" human life, adopt a view that whether the embryo or fetus is human "depends," or can be judged in degrees, on a sliding scale over the course of pregnancy; or we proclaim uncertainty about the facts of human biology; or we proclaim moral agnosticism about the propriety of "imposing our views on others"; or we throw up our hands and give up because moral opposition to an entrenched, pervasive social practice is not worth the effort, discomfort, and social costs. The one position not on the table - the one possibility too hard to look at - is that abortion is a grave moral wrong on a par with the greatest human moral atrocities of all time and that we passively, almost willingly, accept it as such.

All of this should tell us a few more sobering things. It should tell us that, much as we would like to believe that human beings have become more morally conscious, more sensitive to injustice and intolerant of clear evil, it remains the case that we often either fail to recognize it in our midst, or refuse to respond to it decisively, out of self-interest or cowardice. It should tell us that, much as we would like to think that we surely would have stood bravely against slavery, even if embedded in a nineteenth-century society that tolerated and accepted it as a legal right, we might have acquiesced or been tepid in our condemnation. It should tell us that, much as we would like to think we would

never have put up with what transpired in Nazi Germany in the 1930s and the 1940s, the evidence of our lives in twenty-first century America is that we might have put up with quite a lot.

And it should tell us finally, that, as much as we may claim to admire our governmental and constitutional system, the decisions of the Supreme Court in the abortion cases expose the Court at - least on this matter of life, death, and law - as a lawless, rogue institution capable of the most monstrous of injustices in the name of law. The Court has, with its abortion decisions, surely forfeited its legal and moral legitimacy as an institution. It has forfeited its claimed authority to speak for the Constitution. It has forfeited its entitlement to have its decisions respected, and followed, by the other branches of government, by the states, and by the people. Yet the docility of the American people with respect to *Roe* and abortion rivals the pliancy of the most cowardly, servile peoples toward ruinous, brutal, anti-democratic regimes throughout world history.

The Supreme Court is empowered by the Constitution to faithfully interpret the Constitution. But it is not alone in that power, and when it exceeds it and violates it, it is the responsibility of other actors in our system to check the abuse. As James Madison wrote in *The Federalist* No. 49, "the several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers." Moreover, it is "the people themselves" who are "the grantors of the commission" and who "can alone declare its true meaning and enforce its observance."

The Court's decision in *Roe v. Wade* should not be accepted as law, in any sense. It should be resisted by legislatures and it should be refused enforcement by executive officials because it is *not* the law. It should be resisted by all citizens, with all the resources at their disposal, and perhaps even with resources not (yet) at their disposal. Anything less is holocaust denial.

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Amendment XIV
(Ratified July 9, 1868)

Section 1
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.