FIRST THINGS

ROE: TWENTY-FIVE YEARS LATER

by
The Editors
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Twenty-five years ago, on January 22, 1973, the Supreme Court of the United States, in what numerous constitutional scholars have called an act of raw judicial power, abolished the abortion laws of all fifty states. The news went out that the Court had settled the controversy over abortion. A generation later there is no more unsettled and unsettling question in American public life, and a settlement is nowhere in sight. For the next generation as well, it seems possible that abortion will be the bloody crossroads where conflicting visions of the kind of people we are and should be will do battle.

In an editorial following the *Planned Parenthood v. Casey* decision of 1992, we wrote:

> For years, some of us have been writing about the "culture wars" in which our society is embroiled. We are two nations: one concentrated on rights and laws, the other on rights and wrongs; one radically individualistic and dedicated to the actualized self, the other communal and invoking the common good; one viewing law as the instrument of the will to power and license, the other affirming an objective moral order reflected in a Constitution to which we are obliged; one given to private satisfaction, the other to familial responsibility; one typically secular, the other typically religious; one elitist, the other populist. The strokes are admittedly

> broad, but the reality is evident enough to anyone who attends to the increasingly ugly rancor that dominates and debases our public life. And, of course, for many Americans the conflicts in the culture wars run through their own hearts.

One might argue whether the two nations are more or less divided today, but the reality has not substantively changed. No other question cuts so close to the heart of the culture wars as the question of abortion. The abortion debate is about more than abortion. It is about the nature of human life and community. It is about whether rights are the product of human decision or, as the Founders declared, an endowment from our Creator. In the words of Pope John Paul II in the encyclical *Evangelium Vitae*, the abortion debate is about the conflict between "the culture of life and the culture of death." It is about euthanasia, eugenic engineering, and the protection of the radically handicapped. Press almost any of the great social and moral disputes in our public life and, usually sooner rather than later, the argument turns to abortion. That is what it means to say that abortion is the bloody crossroads.

In *Roe v. Wade* and related decisions, the Supreme Court has gambled its authority, and with it our constitutional order, by coming down on one side of this great conflict. The result is a clear declaration of belligerency on one side of the culture wars. And one result of that is a constitutional crisis created by what is aptly described as the judicial usurpation of politics. Another result weighs even more heavily on those who believe—in accord with all scientific evidence and sound reasoning—that the life terminated by abortion is a human being. Not in a distant time and place, but in our time and in our land we have witnessed these past twenty-five years the legal killing of approximately thirty-five million innocent unborn children. We do well to recoil when it is put so bluntly. The desperate search for euphemism is understandable, but it is in vain.

Remember how it happened. The conventional telling of the story is that the Court only gave a nudge to what was already happening. The author of the majority opinion, the late Justice Harry Blackmun, opined, "Roe against Wade was not such a revolutionary opinion at the time." Justice

Ruth Bader Ginsburg has said that the radical decision of *Roe* was unnecessary because society was already moving toward the same result of its own accord. The conventional telling of the story is false. When the *Roe* decision came down, pro-abortionists and anti-abortionists alike expressed amazement at the sweeping change that the Court had imposed upon the country. A "liberalization" of existing law was expected by most; the abolition of all law protecting the unborn was expected by almost nobody outside the Court itself.

It is twenty-five years later and most Americans still do not believe how radical is the abortion regime imposed by *Roe*. The pro-abortion media persist in reporting that the law permits abortion in the early months of pregnancy and only for compelling reasons, and many prefer to think that is so. In fact, abortion is legal at any time for any reason during the entire pregnancy, and, as partial-birth abortion makes starkly clear, beyond. In the regime of *Roe* and its judicial progeny, psychological distress triggers a constitutional right to abortion, even if the distress is occasioned by being denied an abortion. The new order imposed by the Court is abortion on demand. Some object to that phrase. Call it abortion on request or free market abortion. Whatever it is called, it is the unlimited right to the private use of lethal force against innocent human beings.

We may seek moral shelter behind claims that it is not *really* a human being, that it is only a potential human being, that it does not look like a human being. But we know that nothing that is not a human being has the potential of becoming a human being, and nothing that has the potential of becoming a human being is not a human being. We hold against it that it is totally dependent, but it will be as dependent one month outside the womb as it is one month inside the womb. Nor can we entirely repress the knowledge that, in the moral tradition that formed our culture, the condition of dependence obliges others to be dependable. As for it not looking like a human being, the embryo or fetus, or call it what we will, is exactly what a human being looks like at that age. It is what each of us looked like when we were that old.

We must never lose sight of the fact that the abortion regime of *Roe* was arrogantly imposed by the Court. At the time, the country was *not* moving toward liberalized abortion, never mind abortion

on demand. This is amply documented also in pro-abortion writings such as David Garrow's history, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*. It began with contraception when in *Griswold v. Connecticut* (1965) the Court "invented" (Garrow's word) the right to privacy, the putative right on which *Roe* was later based. Until then, the opponents of restrictions on contraceptive devices had failed to win a single legislative victory. As for abortion, Alan Guttmacher of Planned Parenthood flatly said in 1963 that any abortion law suggesting the non-humanity of the fetus would "be voted down by the body politic." He was right. It is true that in 1970 New York and Hawaii "liberalized" their abortion laws, but the changes were narrow and contentious, and it is generally acknowledged that in New York opinion was shifting back to support for laws protective of the unborn.

The larger picture was unmistakably clear. In 1967, "reform" measures, usually limited to therapeutic exceptions, were turned back in Arizona, Georgia, New York, Indiana, North Dakota, New Mexico, Nebraska, and New Jersey. In 1969, such bills failed to get out of committee in Iowa and Minnesota, and were defeated outright in Nevada and Illinois. In 1970, exceptions based on therapeutic reasons were defeated in Vermont and Massachusetts. In 1971, on the eve of *Roe*, repeal bills were voted down in Montana, New Mexico, Iowa, Minnesota, Maryland, Colorado, Massachusetts, Georgia, Connecticut, Illinois, Maine, Ohio, and North Dakota. In 1972, at the very time the Court was considering *Roe*, the Massachusetts House by a landslide vote of 178 to 46 passed a measure that would have bestowed the full legal rights of children on fetuses, from the moment of conception. At the same time, the supreme courts of South Dakota and Missouri upheld state anti-abortion laws. At the moment Justice Harry Blackmun was putting the finishing touches on his opinion in *Roe*, 61 percent of the voters in Michigan and 77 percent in North Dakota voted down repeal. Everywhere, in every test, the voters overwhelmingly rejected the doctrine that individuals are answerable to no one other than themselves in the matter of abortion. In the face of that reality, the Court imposed the regime of *Roe*. That is what is meant by an act of raw judicial power.

This past year, writing for a tenuously unanimous Court, Chief Justice William Rehnquist refused to invent a constitutional right to assisted suicide, noting the political dangers of abolishing the existing laws of virtually all the states. Although the 1973 decision was not mentioned explicitly, there was no mistaking the reference to *Roe*. The Court acknowledged that it dare not do again what it did in *Roe*. Yet *Roe* was left untouched. While a majority of the Court is not prepared to say that *Roe* was rightly decided and some Justices say it was a monumental error, it is a decision that the Court is afraid to correct. That is the indisputable message of *Casey,* in which the astonishing assertion is made that the legitimacy of the Court and the rule of law itself depends upon the American people accepting the abortion regime imposed by *Roe*.

The proper response to that claim was offered by a broad array of Christian leaders in the statement "We Hold These Truths" (see FT, October 1997):

> In *Casey* the Court admonished pro-life dissenters, chastising them for continuing the debate and suggesting that the very legitimacy of the law depends upon the American people obeying the Court's decisions, even though no evidence is offered that those decisions are supported by the Constitution or accepted by a moral consensus of the citizenry. If the Court is inviting us to end the debate over abortion, we, as Christians and free citizens of this republic, respectfully decline the invitation.

That statement also declares:

> Our goal is unequivocal: Every unborn child protected in law and welcomed in life. We have no illusions that, in a world wounded by sin, that goal will ever be achieved perfectly . . . .
> [But] we are convinced that the Court was wrong, both morally and legally, to withdraw from a large part of the human community the constitutional guarantee

> of equal protection and due process of law. The American people as a whole have not accepted, and we believe they will not accept, the abortion regime imposed by *Roe v. Wade*. In its procedural violation of democratic self-government and in its substantive violation of the "laws of nature and of nature's God," this decision of the Court forfeits any claim to the obedience of conscientious citizens. We are resolved to work relentlessly, through peaceful and constitutional means and for however long it takes, to effectively reverse the abortion license imposed by *Roe v. Wade*. We ask all Americans to join us in that resolve.

That is, we believe, precisely the right response and the necessary resolve. As many others have done, the religious leaders point to the ominous parallels with the infamous *Dred Scott* decision about slavery in 1857. At the time of that decision, there seemed to be little hope for its reversal, and it was reversed in fact only by the bloodletting of civil warfare. God willing, we do not face the prospect of another civil war. It is impossible to imagine what civil war would mean today. But the cleavage in our society over abortion and related questions touching on respect for human life is deep and ominous, comparable only to the cleavage over slavery. In the way that we now look back on slavery, we hope that Americans of the next century will look back with deepest shame on the abortion regime of *Roe*.

Twenty-five years is a long time in our political history, a short time in the human story. Many Americans refuse to recognize the horror of abortion on demand, many have gotten used to it, and a substantial number support it. *Casey* was right in saying that the American people are being tested by the regime of *Roe*, but the test is whether we have the decency and the will to overthrow it. Elections are important to that testing. It seems quite possible that the next President will appoint four Justices to the Supreme Court. Also important are fresh legislative initiatives at the state and federal levels, persistent activism, and unrelenting public education. And prayer without ceasing.

The culture of death commands a formidable array of powerful institutions. With few exceptions, it has in its service the establishment media, the universities, the foundations, the corporate elites, the labor unions, the oldline churches, and, of course, the courts. More than any other question in public dispute, abortion on demand is the core commitment of the American establishment. The institutional base of the culture of life seems pitiably weak by comparison. But on the side of the goal of "every unborn child protected in law and welcomed in life" is moral truth, and what we must hope is the enduring, if sometimes inarticulate, decency of most Americans. This people, we must also hope, have not entirely lost their taste for self-government. They have not agreed to be ruled by nine unelected lawyers on the Supreme Court. They have not, in the words of Lincoln's First Inaugural Address, "practically resigned their government into the hands of that eminent tribunal."

Roe v. Wade will, one way or another, sooner or later, be a nightmare past. Millions of lives depend upon it, our moral self-respect depends upon it, our constitutional order depends upon it, the rule of law depends upon it. Join prayer to resolve that the way be peaceful and the end be sooner rather than later.