Abortion: What Did the Supreme Court Do in *Roe v. Wade*?

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AMY GROSSBERG AND BRIAN PETERSON, aged 19 and 20, were sentenced to two-and-a-half and two years, respectively, for manslaughter for killing their baby boy after Amy gave birth to him in 1996 at the Comfort Inn in Newark, Delaware. The autopsy showed that the full-term, healthy boy died from "multiple fractures... with injury to the brain due to blunt force head trauma and shaking." Amy and Brian did not concede that they knew the baby was alive when they put him in a plastic bag which they put in a trash container in the hotel parking lot. It is unclear whether the injuries to the baby happened before or after he was put in the trash bin. After the birth, Amy and Brian returned to their colleges. The incident came to light when she was hospitalized for complications from the delivery.

Amy and Brian are criminals, not because they intentionally, or through indifference, killed an innocent human being, but because they waited ten minutes too long and used the wrong method. They would be in the clear if they had hired an abortionist to solve their problem, even during delivery, by a legal partial-birth abortion. The Supreme Court has decreed that abortion may not be banned, even in the ninth month, when it is sought to protect the mother's mental health as could be claimed in a case such as this. Had Amy and Brian exercised their "right to choose" in this way, the abortionist would have dilated the entrance to the uterus sufficiently to deliver the baby's body, except for the head. He would have delivered the baby, feet first, except for the head. He then would have inserted scissors into the base of the baby's skull and opened the scissors to enlarge the hole. He would have inserted a suction catheter and sucked out the baby's brains. The head would have collapsed and the abortionist then would have removed and disposed of the body. If they had chosen that course, Amy and Brian could have gone back to college, not as targets of a homicide prosecution, but as vindicators of the

preferred constitutional "right to choose."

The attorneys for Amy and Brian chose not to use an insanity defense. In fact, Amy and Brian would seem to be more in touch with reality than are the Supreme Court of the United States and the State of Delaware. Their boy was no less a human being–and no less a person–during delivery, or at his conception, than he was when they killed him or put him in the trash bin. Yet the Court and the State would have mobilized the federal marshals to protect their right to kill him before birth and even during delivery. But because Amy and Brian waited for ten minutes and did not use an approved method of killing, the State charged them with murder and sought the death penalty. As columnist George Will put it: "Could Delaware choose to execute [Amy and Brian] by inserting scissors into the bases of their skulls, opening the scissors, inserting suction tubes and sucking out their brains? Of course not. The Constitution forbids choosing cruel and unusual punishments." So who's crazy?

The killing of newborn babies, who could have been legally and secretly aborted, is not all that rare. This case drew attention because Amy and Brian are children of wealth who could have easily had an abortion. But their case reminds us that legalized abortion will inevitably lead to infanticide and euthanasia. All three are founded on the denial of personhood to the victim. A "[r]eckless disregard for the value of human life has been transmitted through the culture for 25 years. The easy resort to abortion and the extremist rhetoric supporting the abortion regime have clearly cheapened the lives of babies.... There never was a clear dividing line between abortion and infanticide.... [I]t should not come as a huge surprise that young women from nice families don't quite see why prosecutors are knocking at their doors for performing very late abortions. Isn't it still a choice?"

THE SUPREME COURT RULINGS

The Supreme Court's abortion rulings include four principal elements:

1. The unborn child is a non-person and therefore has no constitutional rights;
2. The right of his mother to kill that non-person is a " liberty

interest" protected by the due process clause of the Fourteenth Amendment;

3. The states may impose some marginal restrictions on abortion but are barred from effectively prohibiting abortion at any stage of pregnancy;
4. Efforts undertaken in the vicinity of an abortuary to dissuade women from abortion are subject to more stringent restrictions than are other forms of speech, assembly and association.

A NON-PERSON

The Fourteenth Amendment, adopted in 1868, protects the right of a "person" to life and to the equal protection of the laws. The framers of that amendment did not consider the status of the unborn child but they intended that, "in the eyes of the Constitution, every human being within its sphere...from the President to the slave, is a person." This was in reaction to the *Dred Scott* case in 1857, in which the Supreme Court held that the free descendants of slaves were not citizens and said that slaves were property rather than persons.

In any society where personhood determines the possession of legal rights, justice mandates an inseparable connection between humanity and personhood. If that connection is broken, where does one draw the line? Peter Singer carries to its logical conclusion the separation of humanity from personhood:

> We should reject the doctrine that places the lives of members of our species above the lives of members of other species. Some members of other species are persons; some members of our own species are not. No objective assessment can give greater value to the lives of members of our species who are not persons than to the lives of members of other species who are.

On the contrary, as we have seen there are strong arguments for placing the lives of persons above the lives of non-persons. So it seems that killing, say a chimpanzee is worse than the killing of a gravely defective human who is not a person.

Singer, an Australian ethicist, is the Ira W. DeCamp Professor of

Bioethics at the Princeton University Center for Human Values, which may tell us something about Princeton. "We can no longer base our ethics," says Singer, "on the idea that human beings are a special form of creation, made in the image of God, singled out from all other animals, and alone possessing an immortal soul." Singer's views are a consistent application of mainstream positivist jurisprudence. "The right to life," Singer thinks, "is not a right of members of the species *Homo sapiens*; it is...a right that properly belongs to persons. Not all members of the species *Homo sapiens* are persons, and not all persons are members of the species *Homo sapiens*." Singer believes that while chimpanzees, whales, dolphins, dogs, and cats can be persons, newborn infants and retarded humans are not. He even seems to think that chickens may be persons, raising the prospect that the greatest mass murderer in history is not Ghengis Khan, Hitler, or Stalin, but Colonel Sanders.

If all human beings are not entitled to be treated as persons before the law, the criteria for inclusion and exclusion will be utilitarian, political, and arbitrary. The denial of personhood was the technique by which the Nazis set the Jews on the road to the gas chambers. Under the Nuremberg Laws of 1935, the Nazis stripped Jews of their citizenship and political rights, effectively depriving them of personhood. Hitler's euthanasia program, designed to achieve "the destruction of life devoid of value," would later deprive them of their lives as well.

An innocent human being subject to execution at the discretion of another is, in that most important respect, a non-person. If a human being can be defined as a non-person at the beginning of his life and put to death at the discretion of others, the same thing can be done to his elder retarded brother or his grandmother. Abortion is merely prenatal euthanasia.

Before 1973, state and lower federal courts increasingly recognized the personhood rights of the unborn child with respect to his right to recover for prenatal injuries and wrongful death, to inherit property, and to get a court to compel his mother to get a blood transfusion to save his life. The precise question of the personhood of the unborn child, however, did not reach the Supreme Court until 1973. In *Roe v. Wade* and *Doe v. Bolton*, the unborn child's right to life was asserted against

the mother's constitutional right to privacy, which the Court had discovered in 1965 in the "penumbras formed by emanations from" the Bill of Rights. The Court acknowledged that the right to life is superior, indicating that, if the unborn child were a person, abortion would not be permitted even to save the life of his mother:

> When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other state are all abortions prohibited. Despite broad proscription, an exception...for an abortion...for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

The Court stated that if the personhood of the unborn child were established, the pro-abortion case "collapses, for the fetus's right to life is then guaranteed by the [Fourteenth] Amendment."

After declining to decide whether an unborn child is a living human being, the Court ruled that he is not a person, since "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Regardless of whether he is a human being, he is not a person. This ruling is the same, in effect, as a ruling that an acknowledged human being is a non-person. As a non-person the unborn child has no more constitutional rights than does a goldfish or a turnip.

Once the Court ruled out the rights of the unborn non-person, the only right remaining was the mother's right to privacy. While asserting that this right is not absolute, the Court defined it so as to permit, in effect, elective abortion at every stage of pregnancy up to the time of normal delivery. According to *Roe*, even after viability, when the state may regulate and even prohibit abortion, the state may not prohibit abortion "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." The health of the mother includes her psychological as well as physical well-being. And "the medical judgment may be exercised in the light of all factors–physical, emotional, psychological, familial, and the woman's age–relevant to the well-being of the mother." This is equivalent to a sanction

for permissive abortion at every stage of pregnancy.

The essential holding of *Roe* is that the unborn child is not a "person" within the meaning of the Fourteenth Amendment which protects the right to life of persons.

BUT HASN'T THE COURT RETREATED FROM ITS HOLDING IN *ROE*?

No. Since 1973, the Court has upheld marginal restrictions on abortion, such as a requirement that abortions be performed by physicians. In 1992, in *Planned Parenthood v. Casey*, the Court upheld Pennsylvania requirements that the woman be given information about abortion 24 hours before the abortion; that a minor have the consent of at least one of her parents, or the approval of a judge, before she can have an abortion; and that abortion facilities comply with record keeping and reporting requirements. But the Court struck down a requirement that the woman notify her spouse before the abortion.

A "LIBERTY INTEREST"

The Court in *Casey* described the woman's right to an abortion as a "liberty interest" protected under the Fourteenth Amendment rather than as an exercise of the right to privacy." In the 1997 "right to die" case, the Court described its *Casey* ruling as follows: "There, the Court's opinion concluded that 'the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.' We held, first, that a woman has a right, before her fetus is viable, to an abortion without undue interference from the State; second, that States may restrict post-viability abortions, so long as exceptions are made to protect a woman's life and health; and third, that the State has legitimate interests throughout a pregnancy in protecting the health of the woman and the life of the unborn child."

NO EFFECTIVE PROHIBITION OF ABORTION

Although the Court allows marginal restrictions on abortion, the Court will not allow the states to enact any effective prohibition of abortion at any stage of pregnancy. The Court requires that the states allow abortion for emotional as well as physical health even up to the time of normal

delivery. The Court has also imposed severe restrictions on pro-life activities at abortion sites.

A UNANIMOUS COURT

Casey reaffirmed *Roe* by a 5-4 vote. That margin led some to conclude that we are only one vote away from overruling *Roe v. Wade.* That is not true. The *Casey* dissenters did say, in Chief Justice Rehnquist's words, that *Roe* was wrongly decided and that it can and should be overruled. However, when those dissenters (Rehnquist, White, Scalia, Thomas) say they want to overrule *Roe*, they mean they want to turn the issue back to the states to let them decide whether to allow or forbid abortion.

Such a states' rights solution would confirm, rather that overturn, the holding of *Roe* that the unborn child is a non-person who has no constitutional rights and who can therefore be legally killed at the discretion of others. In his *Casey* opinion, Justice John Paul Stevens explained this basic holding of *Roe*:

> The Court in *Roe* carefully considered, and rejected, the State's argument "that the fetus is not a 'person' within the language and meaning of the Fourteenth Amendment." ... [T]he Court concluded that that word has application only postnatally.... Accordingly, an abortion is not the termination of life entitled to Fourteenth Amendment protection.' ...From this holding, there was no dissent, ...indeed, no member of the Court has ever questioned this fundamental proposition. Thus, as a matter of federal constitutional law, a developing organism that is not yet a 'person' does not have what is sometimes described as a 'right to life.' This has been and, by the court's holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy.

In his *Webster* opinion, in 1989, Justice Stevens had stressed that "(e)ven the dissenters in *Roe* implicitly endorsed that holding [of non-personhood] by arguing that state legislatures should decide whether to prohibit or to authorize abortions.... By characterizing the basic question as a 'political issue,'...Justice Scalia likewise implicitly accepts this holding." In the *Thornburg* case, in 1986, Justice Stevens said that, "unless the religious view that a fetus is a 'person' is adopted...there is a fundamental and well-recognized difference between a fetus and a human

being; indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures."

When the *Casey* dissenters argue for a states' rights solution, they confirm the non-personhood of the unborn child. If an innocent human being is subject to execution at the decision of another whenever the legislature so decrees, he is a non-person with no constitutional right to live. Justice Rehnquist's bottom line is that, "A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest." Justice Scalia's bottom line is that: "The states may, if they wish, permit abortion-on-demand, but the Constitution does not require them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. As the Court acknowledges, 'where reasonable people disagree the government can adopt one position or the other'."

The Supreme Court is unanimous in its endorsement of the proposition that the law can validly depersonalize innocent human beings so as to subject them to execution at the discretion of others.

WORSE THAN SLAVERY

The Thirteenth Amendment was adopted to eliminate slavery which, throughout history, has been based on a comparable denial of personhood. In the Roman Republic, "the slave had no rights respected by the law.... The slave was property, not a person.... The owner of a slave was free to whip him, jail him, or kill him, with or without reason. He could send his slaves to death against beasts or against men in the arena or put them out to die of starvation." In the United States before the Civil War, "In the law's eye the slaves were chattels to be disposed of at their master's pleasure. The slave, therefore, had no political or civil rights.... If he was killed by a white the white would probably not be tried for murder."

However, there were cases in which whites were convicted of murder for killing slaves in the pre-Civil War South. In this light, *Roe v.*

Wade, because it allows him to be killed with total impunity, inflicts on the unborn child a status worse than American chattel slavery.

In 1854, William Lloyd Garrison, leader of a radical anti-slavery movement, described the United States Constitution as "a covenant with death, and an agreement with hell." A century and a half later, the Supreme Court's conversion of murder of the innocent into a constitutional right has again merited for the Constitution that same evaluation.

TO RESTORE CONVICTION

Roe applies precisely the principle that underlay the Nazi extermination of the Jews, that an innocent human being can be declared to be a non-person and subjected to death at the discretion of those who regard him as unfit or unwanted. The Justices who triggered the abortion avalanche by their own free decision, are no more defensible than the Nazi judges who acquiesced in the crimes of that regime and the functionaries who administered its decrees at Auschwitz and similar places. At least in some cases, those who cooperated with the Nazi exterminations did so under the impression that they would be subjected to serious sanctions if they did not cooperate. The most that our depersonalizing justices have to fear is that a pro-life vote could cost them favor in the media and the academy. And Pontius Pilate, as an operational positivist who executed the innocent for reasons of state and of his own convenience, would have found little to quarrel with in the philosophy of the Supreme Court.

The Court will allow states to enact marginal restrictions on surgical abortions but those abortions are becoming obsolete because of early abortifacient drugs and devices. As Pope John Paul II said at the Capitol Mall in 1979, "No one ever has the authority to destroy unborn life." Until that conviction is restored among the American people, there will be no chance of enacting the licensing and other restrictions and prohibitions which will be the only possibly effective ways of preventing the use of early abortifacients. Nor will there be any chance of undoing the legally sanctioned practice of euthanasia.