

# DECONSTRUCTING *ROE V. WADE'S BIRTH WALL:* OPPORTUNITIES AND DANGERS

Richard Stith

IN ITS FAMOUS 1973 DECISION, *Roe v. Wade*, the U.S. Supreme Court mandated elective abortion up to viability and abortion for broadly defined “health” reasons (*i.e.*, virtually elective abortion) thereafter.<sup>i</sup> That opinion contains a deep contradiction which can be understood as a conflict between nominalism and realism. The Court asserts in effect that the unborn child has no real nature, that what it is called is solely a matter of the conventions of labeling. Yet the moment of birth is assumed to mark an essential difference, a real (not merely conventional) transition to a living entity human in nature.

In the past twenty five years, this “birth wall” has been largely dismantled or, to use appropriately the more fashionable expression, “deconstructed.” That is, the purely nominal character of the birth difference has become increasingly accepted by those on both sides of the abortion debate. This essay seeks to elucidate this shift and to show the possibilities and perils of our emerging legal world.

*Roe's* nominalism can be seen most simply in Justice Blackmun's well-known assertion that he “need not resolve the difficult question of when life begins”<sup>ii</sup> in order to justify the Court's requirement that legislators treat the fetus at most as “the potentiality of human life” right up to the moment of birth.<sup>iii</sup> There is no need, he says, to answer this question because the diversity of answers given by others shows the question to be unanswerable, at least at present. But surely the law may take controvertible stands, and it may seek to minimize the possible harm of error even where it has no access to truth. Blackmun's insistence that what we call the fetus does not matter seems to imply a much more radical agnosticism: the assumption that the names we give to preborn human beings are wholly conventional, that one can in principle never say that abortion *really* takes a human life.

Blackmun's justificatory history of permissive abortion practices bears out this appearance of deep-seated nominalism. Let me explain. In order to decide whether or not practices of past ages can be justified today, we ought to look not only at the practices themselves (*e.g.*, practices of permitting abortion), but also at the beliefs about values and facts upon which those practices were based. If those underlying values now seem to us quite mistaken, the practices arising from those beliefs acquire no precedential authority for us today.<sup>iv</sup> Similarly, we cannot honestly invoke the authority of past scientific conclusions if we now see that the data upon which the conclusions were based were incomplete or mistaken. If we seek to know what is real, we cannot rest content with labels. We have to inquire into reasons.

Yet throughout Justice Blackmun's lengthy surveys of past practices allowing abortion,<sup>v</sup> he never once asks whether or not the beliefs upon which those practices were based are in fact ones which he considers admirable or accurate. (By contrast, by the way, he occasionally does try to refute past reasons for *restricting* abortion—such as to protect the mother's life.<sup>vi</sup> )

For example, Blackmun refers often to “quickenings” as a popular dividing line, without once mentioning that modern medical knowledge shows this “event,” as he calls it,<sup>vii</sup> to be an illusion. The overall impression that Blackmun gives is that whether and when abortion is allowed is an open choice, with most cultures voting for abortion.<sup>viii</sup>

At the same time, Blackmun suggests (without exactly stating) that birth makes a real difference. Such a claim is arguably implicit in his refusal to find that constitutional personhood<sup>ix</sup> or actual human life<sup>x</sup> begins “before live birth.”<sup>xi</sup> In any event, Justice Stevens, writing 13 years later in support of *Roe v. Wade*, makes clear the necessity of what I have here called “the birth wall.” Concurring in *Thornburgh v. American College of Obstetricians and Gynecologists* (1986),<sup>xii</sup> he insists that “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.”<sup>xiii</sup> In the next sentence, Stevens makes clear that, in his view, even “the 9-month-gestated, fully sentient fetus on the eve of

birth<sup>xiv</sup> is not yet a human being.

Stevens gives no explanation for his claim that a fundamental difference prior to birth is required in order to justify legal abortion. But one basis for his view is surely the principle of human equality that underlies both our ethics and our law. There must be a real and deep difference between human and non-human entities in order to give force and limit to the normative demand for equal protection for all humans. If any and all entities could be defined at will into or out of humanity, human equality would have no practical significance. Insofar as human equality does make practical demands on us, it follows that we are committed to ontological realism. Stevens has to claim a split in being between fetus and infant in order to avoid recognizing a right to life in principle<sup>xv</sup> equal before and after birth. Only if expulsion from the womb gives the fetus a human nature for the first time is late-term abortion easily justified.

We are thus bequeathed a curious antinomy by *Roe*. We are to presume that the unborn child or fetus has no inner nature of its own. What it is called is a matter of convention or preference, for it is not “really” anything at all. At the same time, we must assume that birth is a bright line, a moment when (in reality not merely in convention) by leaving the uterus, the fetus becomes undeniably one of us. In other words, we are to be skeptical nominalists prior to birth, but credulous realists about birth itself.

It should be obvious, even to Stevens, that the notion of a clear, fundamental difference at birth is not viable. The many postmodern nominalists among us (especially among academics) can hardly be expected to accept the mere assertion that a bright line between human and non-human exists at birth. If definition in principle is social construction, Stevens’s definition of humanity will inevitably be deconstructed by those who have the political will to do so, *i.e.*, those interested in protecting the unborn or in justifying infanticide (of which more below).

But even non-postmodern realists (count here most non-academics) must in the end reject the birth wall thesis, because it claims that what something is depends upon where it is. It makes the fundamental nature of the perinatal entity depend solely upon location. But location cannot

determine a being's inner nature, though location may well affect how that being functions for others and thus affect what they name it. That is, the jurisprudence of Blackmun and Stevens abjures the search for the nature of the fetus prior to birth, where a realist would search it out, while relying on a form of naïve realism about birth itself, where the fetus-infant difference cannot be more than nominal. In more concrete terms, Blackmun and Stevens would have us believe the child born prematurely at seven months to be a human being, while its more developed cousin in the womb overdue at nine and a half months is still a creature without a fundamentally human nature. Without an appeal to some supernatural change such as the insertion of a soul at first breath, an appeal which neither judge makes nor constitutionally could make, such a belief is quite simply absurd, beyond the limits of even the most extreme credulity.

The absurdity of the birth wall has not caused it to fall entirely. The U.S. Supreme Court in fact reaffirmed *Roe v. Wade* in 1992 in *Planned Parenthood v. Casey*<sup>xvi</sup> but it did so without claiming that birth *really* makes a difference, explicitly avoiding any claim that *Roe* was rightly decided in the first place. Instead, *Casey* based the right to abort in large measure on *stare decisis*,<sup>xvii</sup> binding precedent, which is for *Casey* a doctrine of court vanity and positivism. Past decisions cannot be overturned just because they were based on fallacious reasoning.<sup>xviii</sup> Fidelity to the Constitution is not by itself a sufficient reason to right old wrongs. Only on the basis of new information not available to the earlier court can erroneous holdings be overruled.<sup>xix</sup> Except in such circumstances, to correct past mistakes would undermine the Supreme Court's prestige, *Casey* argued, particularly so on matters of great controversy.<sup>xx</sup> The abortion *fiat* stands, but only as such. Not willing to deny (or even explicitly to doubt) that millions of actual human lives are being lost under *Roe*, *Casey* says simply that the Court has spoken, *causa finita est*. Referring to "the interest of the State in the protection of 'potential life,'<sup>xxi</sup> also characterized as "a legitimate interest in promoting the life or potential life of the unborn,"<sup>xxii</sup> the opinion of Justices O'Connor, Kennedy, and Souter declared in sum:

We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly 20 years of litigation in *Roe*'s wake we are satisfied that the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding.<sup>xxiii</sup>

There is good news and bad news in *Casey*'s bold revisionism. The good news is that, since the Court no longer assumes that a magical change comes about at birth, the unchanging identity of the child before and after birth can be affirmed in law—provided always that the ultimate right to abortion be preserved. Postnatal realism can begin to replace prenatal nominalism. If the child has real dignity outside the womb, it must have dignity inside—since location cannot make an essential difference. Again in the words of O'Connor, Kennedy, and Souter:

Regulations which do no more than create a structural mechanism by which the State ... may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.<sup>xxiv</sup>

For example, laws requiring a woman contemplating abortion to be fully informed about the procedure, including what it does to the fetus, were declared constitutional by *Casey* (overruling a contrary 1983 holding that had read *Roe* to forbid State attempts to dissuade women from having abortions).<sup>xxv</sup>

Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term....<sup>xxvi</sup>

Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe*....<sup>xxvii</sup>

Although it sometimes still uses the opaque and demeaning phrase

“potential life” (along with “life” and “child”)<sup>xxxviii</sup> for the living human fetus, the *Casey* decision clearly permits state anti-abortion laws to be motivated by the “legitimate goal of protecting the life of the unborn,”<sup>xxxix</sup> so long as their purpose remains “to persuade the woman to choose childbirth”<sup>xxxix</sup> rather than forcibly to stop her from choosing abortion.<sup>xxxi</sup> Indeed, already in the 1989 *Webster* case, the birth wall had weakened to the point where the Court had upheld Missouri legislation requiring the unborn child, from the moment of conception, to be treated as a legal person except insofar as the decisions of the U.S. Supreme Court might otherwise require.<sup>xxxii</sup>

In addition to informed consent, *Casey* approves a minimum 24-hour period of reflection between the time the pregnant woman is given the required information and the actual abortion.<sup>xxxiii</sup> But *Casey*’s persuade-but-do-not-actually-block principle need not stop there. After that case was decided, for example, Pennsylvania initiated a system of state subsidies for (non-religious, of course) pro-life crisis pregnancy centers,<sup>xxxiv</sup> the sort that had previously subsisted almost solely on private contributions and volunteers. And if women already in a crisis pregnancy can be given accurate factual information<sup>xxxv</sup> intended to encourage them to choose life, why not public high school students, even as part of a required curriculum? Such information may well be more effectively integrated into decision-making if it is provided prior to a pregnancy-induced sense of desperation. Just such an educational initiative appears to be beginning in Florida.<sup>xxxvi</sup>

Where the Court-declared constitutional right to abortion is not even peripherally at issue, the Supreme Court has been still more indulgent regarding state action designed to protect unborn human beings. Just recently, for example, it refused to review the state supreme court’s decision upholding a South Carolina statute punishing drug use by pregnant women as a form of “child endangerment.”<sup>xxxvii</sup> And at no point post-*Roe* has the U.S. Supreme Court ever struck down any of the many state laws punishing the killing of a fetus without the mother’s permission.<sup>xxxviii</sup> In Minnesota today, an assailant who intentionally destroys a just-conceived human embryo—by battering its mother, for example—can be sentenced to life in prison for “murder of an unborn

child,<sup>xxxix</sup> even if she was on her way to an abortion clinic at the time.

The “good news,” then, is that *Roe*’s never-absolute birth wall was partially dismantled by the *Casey* decision, permitting greater recognition and protection for the child prior to birth. *Roe*’s postnatal realism has begun, to a degree, to displace its prenatal nominalism.

The “bad news” is of a piece with the good: The weakness of the birth wall, the absurdity of thinking that a child’s location (or its mother’s choice) can change its inner nature, can easily permit *Roe*’s prebirth nominalism to expand to displace realism after birth as well. For someone committed to *Roe*, the realization that there is no real difference between abortion and infanticide can mean only that infanticide must, at least in principle, be permitted.

This logic can be seen at work in the current widespread support, among pro-*Roe* people, for the right to kill a fetus during induced delivery. If the child partially outside the womb could be protected against having its brain sucked out, how could exactly the same child still wholly inside be dismembered with impunity? In order to avoid this question, the right to partial-birth abortion must be affirmed with vigor.

But even clearer, I think, has been the near-universal support for infanticide among pro-abortion academics. I am thinking here of people like Fletcher,<sup>xl</sup> Tooley,<sup>xli</sup> Green,<sup>xlii</sup> Glover,<sup>xliii</sup> Singer,<sup>xliv</sup> and perhaps Pinker,<sup>xlv</sup> but to my knowledge they represent not just a majority, but a very solid consensus. I know of no pro-abortion scholars who have written that there is something *intrinsically* wrong with early postnatal infanticide.<sup>xlvi</sup> The reason is obvious: if the newborn has intrinsic (real, in our terms) dignity, then the same child located in the womb just prior to birth must have equal dignity. Indeed, if the newborn infant has inherent dignity, even the just-conceived embryo must have a like dignity, for the only humanly significant attributes possessed by the newborn are possessed as well by the embryo: membership in our species and (what comes to the same thing) design for human community, with its virtues of reason and love.

To say that actual manifestation of (rather than mere design for) these virtues is required for human dignity would be to exclude the infant along with the fetus. To focus upon the actualized traits possessed by the

infant but not the fetus (*e.g.*, size, ability to survive with less external life support) would be to include many non-human entities and, moreover, would be to point to traits that are ultimately just not very important to our idea of human dignity. For this very reason, the German Constitution Court ruled unanimously in 1975,<sup>xlvii</sup> with an entirely different panel reaffirming unanimously in 1993,<sup>xlviii</sup> that the constitutional right to life must extend throughout pregnancy. Since we know that newborn infants have human dignity, despite the fact that their uniquely human virtues subsist only as potentialities, we cannot deny that same dignity to the unborn. In that court's own words:

The process of development ... is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of the human life. The process does not end with birth; the phenomena of consciousness which are specific to the human personality, for example, appear for the first time a rather long time after birth. Therefore, the protection ... of the Basic Law cannot be limited either to the "completed" human being after birth or to the child about to be born which is independently capable of living ... [N]o distinction can be made here between various stages of the life developing itself before birth, or between unborn and born life.<sup>xlix</sup>

Many pro-abortion academics do claim to discern a bright line at some post-infantile stage of human life. For example, H. Tristram Engelhardt, Jr., has averred that true personhood inheres only in the normal adult human.<sup>1</sup> Such thinkers are still realists; they just think that what really matters begins quite a bit later than birth. And, in their favor, it must be admitted that almost any developmental point they might choose—*e.g.*, self-consciousness, the age of reason, even puberty—will be more real and thus more arguable than *Roe's* choice of birth. But can such points remain bright lines in the postmodern era? If the existence of the self is a cognitive illusion, as some argue,<sup>li</sup> how can self-consciousness really matter? If reason is only manipulation, an epiphenomenon of power, why should it matter more than, say, muscles? It is vain to suppose that new attempts to build real walls against killing can be successful during our current orgy of deconstruction.

Rather than search vainly for a new bright line after birth, more perspicacious pro-abortion jurists have opted to rid themselves of the



principle to which we pointed early in this essay, a principle that makes it necessary to have bright lines in the first place: human equality. If human beings can be treated in radically unequal ways, if they need not even in principle be accorded equal protection under the law, then those who favor abortion need not be disturbed by the continuity of human life. If unequal treatment of human beings is acceptable, Stevens's need to assert a fundamental difference between fetus and infant disappears. Why bother wracking one's brain to find a difference if they need not be shown equal respect even granting their common humanity?

Among academics, Ronald Dworkin has perhaps done the most to advance human inequality in the law. "The less profitable effort invested in each human being, the less regrettable the killing of that being" paraphrases an inegalitarian notion that Dworkin applies after as well as before birth.<sup>lii</sup>

But some of our federal appellate judges have cut even more directly to the quick. Seeking to justify lesser state protection for the lives of those terminally disabled, Judge Miner has written for the Second Circuit, "Surely the state's interest lessens as the potential for life diminishes."<sup>liii</sup> For the Ninth Circuit, Judge Reinhardt wrote: "[The strength of] the state's interest in preserving life ... is dependent on relevant circumstances, including the medical condition ... of the person whose life is at stake."<sup>liv</sup> Judge Beezer, writing in dissent, countered that the Court is thus re-examining "the historic presumption that all human lives are equally and intrinsically valuable," and that this re-examination may be "a mere rationalization for house-cleaning, cost-cutting and burden-shifting—a way to get rid of those whose lives we deem worthless."<sup>lv</sup>

Perhaps because of Judge Beezer's forceful challenge, Judge Reinhardt sought to bolster his case with the Supreme Court's jurisprudence denying equal protection to the unborn:

In right-to-die cases, the outcome of the balancing test may differ at different points along the life cycle as a person's physical or medical condition deteriorates, just as in abortion cases the permissibility of restrictive state legislation may vary with the progression of the pregnancy. ... [B]oth types of cases raise issues of life and death....<sup>lvi</sup>

Judge Beezer did not attempt to deny the majority's analogy to abortion law, just to narrow it:

[I]n the abortion context, the Supreme Court tells us that the state's interests in fetal life are weaker before viability than they are once the fetus becomes viable. *See Casey*, 505 U.S. at 845, 112 S. Ct. at 2804. A state's interest in preserving human life is stronger when applied to viable beings than it is when applied to nonviable beings. Like a first-trimester fetus, a person kept alive by life-sustaining treatment is essentially nonviable. A terminally ill patient seeking to commit physician-assisted suicide, by contrast, is essentially viable. The patient may be inexorably approaching the line of nonviability. But the patient is still on the viable side of that line, and consequently enjoys the full protection of the state's interest in preserving life.<sup>lvii</sup>

Of course, since even fully viable fetuses enjoy nowhere near the "full protection" of the Constitution under *Roe* and *Casey*, Judge Beezer's analogy is cold comfort even for the disabled person capable of surviving without life supports. If such a person counts only as much as a viable fetus, she will get far less than equal protection from our law.

In denying the constitutional duty of equal protection, are these appellate judges doing anything more than follow the lead of *Casey*? In holding that *Roe* must stand even if it was wrongly decided, which means even if it removed legal protection from millions of human beings, *Casey* proclaimed that the State's duty of equal protection falls before *stare decisis* and the prestige-needs of the Court. Reinhardt and Beezer read that case well.

The honesty newly permitted by the American Supreme Court's *Casey* decision thus cuts in two directions. The fact that the same child exists within and without the womb can lead us to two opposite conclusions. We can begin to treat the preborn with respect equal to that which we now show to already-born human beings. Or we can come to treat some of those already born with the same disrespect we now show toward the preborn. We can become more realistic about the entire human life span, or we can begin to doubt the human nature of others thought inconvenient and less capable. Or we may *finesse* the whole problem of nominalism vs. realism by denying the State's duty of equal protection,

leaving the weak to their own devices regardless of whether they are human in nature or only in name.

## NOTES

---

i. *Roe v. Wade*, 410 U.S. 113, 164-65 (1973). At 165, after spelling out the right to postviability abortions for health reasons, *Roe* directs the reader to its companion case *Doe v. Bolton* 410 U.S. 179 (1973). *Doe*, in turn, at 192 indicates that, to the Court, the word “health” includes all factors—even “psychological” and “familial”—relevant to maternal well-being. Even after viability, *Roe* continues to refer to the fetus as only “the potentiality of human life” (162, 164) and permits states to leave it entirely unprotected (164-65).

The federal appellate court for the Third Circuit has read *Roe* and *Doe* to grant a constitutional right intentionally to kill a fetus even after viability simply because “the unborn child’s survival” would have a “potential psychological or emotional impact on the mother.” *Thornburgh v. American College of Obstetricians and Gynecologists*, 737 F. 2d 283, 299 (3d Cir. 1984).

ii. *Roe v. Wade*, *supra* n.1, at 159.

iii. *Ibid.* at 164.

iv. For example, if we looked only at historical popularity, there is one legal and moral practice when we ought to adopt immediately. It has existed in almost every major civilization from earliest history right down to the nineteenth century. I am speaking of slavery. Why do we not imitate past social practices and re-introduce slavery? Obviously, we reject slavery because we think these past practices were based either upon unacceptable values (as in the ancient world, where the intrinsic dignity of human beings was not an article of faith) or upon erroneous facts (as in the U.S., where the myth of black inferiority helped support the slave system). Consequently, this almost universal historical practice of slavery provides no precedent whatsoever for the re-introduction of slavery today.

In the same way, we can see that although some pre-twentieth century societies have permitted abortion, they have always done so for reasons which we today would reject. For example, Justice Blackmun appeals to ancient Rome and Greece as precedents. But the ancient world lacked both modern scientific knowledge of life in the womb, and our modern belief in the sanctity of the human individual. (Rome, for example, permitted infanticide as well as

---

abortion.) On the other hand, the author of the Hippocratic Oath, the great ethical foundation of modern medicine, believed both in the continuity and in the sanctity of life—and therefore the oath forbids abortion. Which precedent is more compelling depends on which underlying beliefs we today find more plausible.

Or again, during many of the Christian centuries there was a widely-held biological theory which placed the beginning of life at what was called “quickening” (“quick” here meaning “alive”), which supposedly occurred in mid-pregnancy. One can hardly fault these centuries for considering abortion less serious prior to quickening, because even though they believed in our modern value of the individual, their facts were wrong. We now know that quickening designates only the mother’s sudden perception of movement, rather than an infusion of life. In fact, we now know that bodily movement begins in very early pregnancy, and heartbeat still earlier, long before it can be perceived without the aid of medical instruments. Two centuries ago a morally serious person could permit early abortion because she could honestly believe that life had not yet begun, but this position could not be honestly and seriously taken today.

v. *Ibid.* at 129-41, 160-61.

vi. *Ibid.* at 148-49.

vii. *Ibid.* at 160.

viii. If, on the other hand, Justice Blackmun had factored out all erroneous medical data as well as all purely religious doctrines about ensoulment and the like (especially the ones in which no one any longer believes) he would have found far more agreement that the continuity and dignity of developing human life demand its protection.

Indeed, I would argue that, at all times and places until the mid-twentieth century, legal protection of the fetus has increased in direct proportion to increased medical knowledge of the continuity of life and to increased adherence to individual human dignity.

ix. *Ibid.* at 156-59. Blackmun concludes that the fetus at no stage possesses constitutional personhood *prior* to his asking whether the fetus counts as a living human being. Thus *Roe* must clearly be read to be wholly nominalist with regard to the legal name “person,” even if not with regard to the extra-legal name “human being,” since Blackmun thinks that the extent of that legal appellation can be ascertained by looking only at positive law, without regard to natural realities.

---

x. *Ibid.* at 161-62.

xi. *Ibid.* at 161. Blackmun is non-explicit about what I call the “birth wall” only in that he does not state in so many words that actual human life exists *after* birth. That is, *Roe* does not explicitly condemn postnatal infanticide. But it seems fair to read Blackmun in 1973 as not taking a culturally radical stance favoring infanticide.

xii. 475 U.S. 747 (1986).

xiii. *Ibid.* at 779.

xiv. *Ibid.* The clarity of Stevens’s birth wall depends, as with Blackmun, *supra* note 11, on the highly plausible assumption that he would consider a newborn baby to be “a human being.” Certainly there is no hint in his opinion of the openness to infanticide discussed later in this essay.

xv. This is not to say that its location might not dictate different techniques of protection. Consider, for example, the German abortion cases (at notes 47 and 48 *infra*, and accompanying text) which hold that, despite the unborn child’s constant right to life throughout pregnancy, abortion may sometimes go unpunished in order to facilitate protective counseling.

xvi. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

xvii. Referring to the cases upholding a constitutional right to contraception, the Court says clearly “We have no doubt as to the correctness of those decisions.” *Ibid.* at 852. The Court then contrasts its view of *Roe v. Wade*, saying only “[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.” *Ibid.* at 853. *See also* the paragraph quoted *infra* in the text of this essay at note 23.

xviii. “[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.” *Ibid.* at 864. The Court indicates that it looks to what “the thoughtful part of the Nation” finds acceptable in order to see when such a “special reason” may exist. *Ibid.*

xix. The Court lists various sorts of such new information: unworkability in practice, no significant reliance on the erroneous decision, later contrary case law, and changed factual understandings. *Ibid.* at 855.

---

xx. *Plessy v. Ferguson* 163 U.S. 537 (1896), the decision approving racial segregation, was wrongly decided from the beginning, according to *Casey*. *Ibid.* at 863. Nevertheless, it was appropriately overturned by *Brown v. Board of Education* 347 U.S. 483 (1954) only because the “facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions.” *Ibid.* Had no new factual understandings emerged, concededly unconstitutional racial segregation would have remained the law of the land, according to the *Casey* doctrine. *See also Ibid.* at 864-69 for a broad discussion of how *the Court’s need to be perceived as legitimate may require it to re-affirm precisely those decisions it regards as extremely wrong*. “There is a limit to the amount of error that can plausibly be imputed to prior Courts.” *Ibid.* at 866. To exceed that limit would mean that the “legitimacy of the Court would fade ...” *Ibid.* Concluding, the Court writes “A decision to overrule *Roe’s* essential holding under the existing circumstances would address error, of error there was, at the cost of both profound and unnecessary damage to the Court’s legitimacy...” *Ibid.* at 869.

xxi. *Ibid.* at 871.

xxii. *Ibid.* at 870.

xxiii. *Ibid.* at 871. Although this portion of the *Casey* opinion was joined in only by justices O’Connor, Kennedy, and Souter, when the votes of the four justices who wished to overrule *Roe* entirely (Rehnquist, Scalia, Thomas, and White) are added in, there is a solid majority of seven in favor of weakening *Roe* along with a bare majority of five in favor of re-affirming its core holding.

xxiv. *Ibid.* at 877.

xxv. *Ibid.* at 882, overruling “*Akron I* 462 U.S. 416 (1983)” insofar as that case held that the State could not seek to dissuade women from abortion.

xxvi. *Ibid.* at 872. Note *Casey’s* explicit affirmation that there are non-religious “philosophic and social arguments” against abortion.

xxvii. *Ibid.* at 873.

xxviii. *E.g.*, at 871. *Casey* uses “life or potential life,” *e.g.*, at 852 and 870, “life of the unborn,” *e.g.*, at 883, and even “life of the child his wife is carrying,” speaking for the majority of the Court at 898.

xxix. *Ibid.* at 883.

xxx. *Ibid.* at 878.

---

xxx. *Ibid.* at 879.

xxxii. *Webster v. Reproductive Health Services*, 492 U.S. 490, 504-07 (1989). The Court in *Webster* reversed a federal appellate decision holding that *Roe* did not permit states to consider the fetus a human being and a person in regulations affecting abortion.

However, the Court approved the Missouri requirement only as a statement of principle, leaving itself room to invalidate some applications if it so chose at a later date.

Before *Webster*, only the Supreme Court decisions approving state refusal to fund or otherwise affirmatively support abortion had clearly permitted states to act on a fetus-as-human-life point of view in connection with abortion. See *e.g.*, *Poelker v. Doe*, 432 U.S. 519, 521 (1977).

xxxiii. *Ibid.* at 885-87.

xxxiv. “In Pennsylvania, the Future of the Pro-Life Movement?” in *National Catholic Register* (May 24-30) 16.

xxxv. Note that, although *Casey* definitely permits the state to take the pro-life side in seeking to dissuade people from abortion, it assumes that all informed consent materials will be “truthful and not misleading” (at 882) and “aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion” (at 883).

xxxvi. See “Public Schools Can Teach Pro-Life” in *Life Issues Connector* (April, 1998). The article discusses the efforts of John Beasley, and his group entitled “Freedom to Learn” which aims at getting every public school in America to openly teach “both sides” of the abortion issue.

If the State claimed to be teaching the pros and cons of abortion, then *Casey*, I agree, would require teachers to present both sides, as Dr. Beasley urges. But if the State, for example, were simply to insist that all biology students be told about the facts of fetal development, I do not see why pro-abortion arguments (*e.g.*, claims of overpopulation) would need to be introduced into the curriculum. Dr. Beasley may be reading *Casey* less generously than he could.

xxxvii. *Whitner v. South Carolina*, 118 S. Ct. 1857 (May 26, 1998). The U.S. Supreme Court thus let stand without comment the state supreme court decision found at 492 S.E. 2d 777.

xxxviii. For a brief survey of this and other forms of legal recognition of the rights of unborn children, see “Legal Protection of the Unborn Child Outside the

---

Context of Induced Abortion,” *Association of Interdisciplinary Resources Bulletin*, II/1 (March/April 1997). The article notes that the number of states with fetal homicide laws increased from 19 in 1993 to 25 by 1996. By 1998, the number had reached 26 according to “Texas Court and Midwest Lawmakers Recognize Rights of Preborn,” *National Catholic Register* (May 31-June 6) 16.

xxxix. The Minnesota Supreme Court rejected a defendant’s argument that he was being treated unfairly in being prosecuted for killing an embryo or fetus less than one month after conception when the same act could be done by others with impunity. *State v. Merrill*, 450 N.W. 2d 318 (Minn. 1990). Wisconsin has just enacted a fetal protection law comparable in strength to Minnesota’s. Cf *National Catholic Register* (June 28-July 4, 1998) 1.

xl. “The only difference between the fetus and the infant is that the infant breathes with its lungs. Does this make any significant difference morally or from the point of view of values? Surely not.... True guilt arises only from an offense against a person, and a Down’s is not a person.” Joseph Fletcher, “The Right to Die: A Theologian Comments” in *The Atlantic Monthly* 221/4 (April 1968) at 62-64.

xli. Michael Tooley, “Abortion and Infanticide” in *Philosophy & Public Affairs* 2 (1972) 37.

xlii. Ronald M. Green, “Conferred Rights and the Fetus” in *Journal of Religious Ethics* 2 (1974) 55.

xliii. Jonathan Glover, *Causing Death and Saving Lives* (1977) 137-69.

xliv. See, e.g., Peter Singer, “Killing Babies Isn’t Always Wrong,” *The Spectator* (16 September 1995) 20-22. Singer has been rewarded recently with an appointment as Professor of Bioethics at Princeton University’s Center for Human Values.

xlv. See the illuminating commentaries on Prof. Steven Pinker’s recent article (“Why They Kill Their Newborns,” *New York Times Magazine*, November 2, 1997) in *Human Life Review* 34/1 (1998) 77 and in *Human Life Review* 34/2 (1998) 87. Pinker later denied that his article had supported infanticide as opposed to providing explanations for it.

xlvi. This was also the finding of a survey by Don Marquis, “Why Abortion is Immoral” in *Journal of Philosophy* 86 (1989) 183, 195-201 (showing that extant pro-choice theories all deny that there is anything *prima facie* wrong with killing infants). Nevertheless, Glover (and perhaps Pinker and others) would



---

permit some (not full) legal prohibition of infanticide in order to avoid “side effects” of killing infants. See Glover, *supra* note 43.

xlvi. Judgment of 25 February 1975, 39 BVerfGE 1 (First Senate), translated in Robert E. Jonas and John D. Gorby, “West German Abortion Decision: A Contrast to *Roe v. Wade*” in *John Marshall Journal of Practice and Procedure* 9 (1976) 551.

xlviii. Judgment of 28 May 1993, 88 BVerfGE 203 (Second Senate). For a clear summary, see Donald Kommers, “The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?” in *Journal of Contemporary Health Law & Policy* 10 (1994) 1.

Note that although the 1975 decision was to a degree ambiguous about whether the unborn child itself possesses the right to life, as opposed to being only the beneficiary of constitutional protection, the 1993 decision clearly resolves the matter in favor of the child having his or her own right. See Stith, *infra* note 52, note 28. See also Udo Werner, “The Convergence of Abortion Regulation in Germany and the United States” in *Loyola of Los Angeles International and Comparative Law Journal* 18 (1996) 571.

Caveat: The German cases do not address the question of the legal status of the embryo prior to implantation, and they permit pro-life counseling, as a substitute

for punishment, to be the means of protecting the child’s life.

xlix. Judgment of 25 February 1975, *supra* note 47, Jonas and Gorby translation at 638.

l. “On the Bounds of Freedom: From the Treatment of Fetuses to Euthanasia” in *Conn. Med.* 40 (June 1976) at 51-52. See also the quotation from Tooley, *infra* note 52.

li. See discussion in *Human Life Review* 34/2 (1998) 87, 95.

lii. See Richard Stith, “On Death and Dworkin: A Critique of His Theory of Inviolability” in *Maryland Law Review* 56 (1997) 289.

Michael Tooley has suggested slightly less elastic criteria dividing *postnatal* humans into the stages of non-persons, quasi-persons and persons: “Newborn humans are neither persons nor even quasi-persons, and their killing is in no way intrinsically wrong. At about the age of three months, however, they acquire properties that are morally significant.... As they develop further, their destruction becomes more and more seriously wrong, until eventually it is comparable in seriousness to the destruction of a normal adult human being.” Michael Tooley, *Abortion and Infanticide*, 411-12.

---

liii. *Quill v. Vacco*, 80 F. 3d 716, 729 (2nd Cir., 1996).

liv. *Compassion in Dying v. State of Washington*, 79 F. 3d 790, 817 (9th Cir., 1996).

lv. *Ibid.* at 856-57.

lvi. *Ibid.* at 800-01.

lvii. *Ibid.* at 851.