37 Years Later . . . *Roe v. Wade* Revisited

Prologue:

"*Before I formed you in the womb, I knew you, and before you were born, I consecrated you."* (Jeremiah 1:5 Old Testament")

"*There is an appointed time for everything, and a time for every event under the heavens. A time to be born and a time to die."* (Ecclesiastes 3:12 Old Testament)

"*Speak up for those who cannot speak for themselves.* (Proverbs 31:8 Old Testament)

In their rendition of the ballad, 'Blowing in the Wind," Peter, Paul and Mary plaintively pose the questions: "How many deaths will it take till [a man] knows that too many people have died?" and "How many times can a man turn his head pretending that he just doesn't see?" Then, in the haunting refrain, they softly reply: "The answer, my friend, is blowing in the wind, the answer is blowing in the wind."

Whenever I hear those lyrics, unfailingly it conjures up in my mind vivid images of a Great American Paradox.

On the one hand, I see images of brave, young Americans, with weaponry at hand, battling our nation's enemies, on bloody battlefields, in foreign lands, making the supreme sacrifice defending and preserving our cherished right to "life, liberty and the pursuit of happiness."

On the other hand, I see reflections of skilled surgeons, in their sterilized 'abortuaries', on American soil, with bright shiny instruments in hand, legally destroying innocent human beings in varying stages of prenatal maturity, denying each of them their inviolable God-given right to be born – and the opportunity to be reborn, spiritually, in the waters of baptism.

Consider for a moment that 1,500,000 Americans have been killed in the six major wars in which our country has engaged; now consider that almost 1,500,000 innocent human beings in varying stages of development in the womb, are being destroyed by abortion every year – one every twenty seconds.

The genesis of this appalling contradiction can be traced to the landmark, life-changing, decision of the U.S. Supreme Court in *Roe v. Wade,* decided in the year 1973. In brief fashion, let's follow the path taken by the Supreme Court in arriving at its 7 – 2 decision, while taking a hard look at what the Court decided, and why, and what it failed to decide.

Jane Roe, a single pregnant woman who resided in Texas, wanted to have an abortion; however, a Texas statute restricted legal abortions except for the purpose of saving the life of the mother.

The rationale of the Texas law was that life begins at conception and continues throughout the pregnancy.

Roe attacked the constitutionality of the statute primarily on the ground it violated her right to choose to terminate her pregnancy based on a right of personal privacy; her life did not appear to be threatened by the continuation of her pregnancy.

Texas, meanwhile, argued that the state had a duty as well as a right to recognize and protect *prenatal life* from and after conception. It also claimed *the fetus* is a "person" whose right to life was guaranteed by the 14th Amendment.

The U.S. Supreme Court concluded that the state abortion law was unconstitutional in that it violated the due process clause of the Constitution and *Roe's* right of privacy which, the Court held, included the qualified right to choose to have an abortion.

The effect of the *Roe* decision was to legalize abortion during all nine months of pregnancy, with virtually no restrictions pertaining to the welfare of the unborn child until the point where 'viability' of the fetus occurs, which is, the Court said: "usually placed at about seven months (28 weeks) but may occur earlier, even twenty-four (24) weeks. The Court stated that at this 'compelling point' of the State's interest in *potentiality* of life, the State may . . . *if it chooses*, regulate and even proscribe abortion (except where necessary to preserve the life or health of the mother.)"

In addition to the ruling that *Roe* had a 'right' to an abortion based on a 'right' of privacy, the other cornerstone of the *Roe* decision was the Court's conclusion that the word "person" as used in the 14th Amendment which 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 law" does not include *the unborn* and that, therefore, the *fetus'* right to life is *not* guaranteed by the amendment.

However, to this conclusion, the Court attached a far-reaching, significant proviso as follows: "If this suggestion of personhood is established, [*Roe's*] case, of course, *collapses*, for the fetus' *right to life* is then *guaranteed* specifically by the 14th Amendment."

Following are 3 *suggestions of personhood* for *establishment* of 'personhood' I would proffer to the panel of current Supreme Court Justices who were not on the High Court which decided *Roe v. Wade* in 1973 when it faces the same – or similar – issues as those faced by the 1973 *Roe* Supreme Court:

No. 1 Suggestion: *Resolve the question 'When does life begin?'.*

That was one of the central issues which was addressed by the *Roe* Court but *never* answered.

Instead, the Court declared "We need not resolve the difficult question of when life begins since other disciplines are unable to arrive at any consensus and the judiciary is not in a position to speculate as to the answer."

Thirty-six years later, in an interview by *Columbia*, national magazine of the Knights of Columbus, reported in its January 2009 edition, Dr. Maureen L. Condic, author of "When Does Human Life Begin?: A Scientific Perspective," unequivocally asserts: "We must move beyond the false neutrality of 'nobody knows when life begins' because multiple scientists have examined the various stages of human life and there is *only one answer* that is consistent with the scientific facts: *A new human life* commences at the moment of sperm-egg fusion; a new individual of the species *Homo Sapiens* comes into existence generating new types of cells *in an on-going progression*.

Also, when the Roe Court declared a fetus is not a 'person' it referred to what it described as "new embryological data that indicates conception is a *"process over time rather than an event."*

Again, 36 years later, Dr. Condic flatly refutes that statement of the Court, too, declaring: "sperm-egg fusion *IS* an *EVENT* – an event that occurs in less than a second" – and *not* a "process over time."

Put another way, Dr. Condic is saying a new human being exists in a mother's womb from the moment of sperm-egg fusion, throughout the pregnancy, up to the moment of live birth; once the fusion occurs, the human embryo begins a journey *of* life, not a journey *to* life; the

embryo *is a new human being - a new human life exists*, not merely the *potentiality* of human life.

Dr. Condic, who, at the time of the interview was a senior fellow at the Westchester Institute for Ethics & the Human Person and an associate professor of neurobiology and anatomy at the University of Utah School of Medicine, unveiled this provocative opinion: The real question underlying the abortion issue is not about "when does human life begin" but "when does human life have *value*!" The real dispute going on is about what *value* society ought to place on embryonic human life; that is, whether an embryo has the same rights and *value*, and is entitled to the same protection as a human being at more mature stages of development.

She also dispatched a chilling admonition saying: "This continuity of life, with living cells generating new types of living cells in an ongoing progression, has led many to believe that any decision about when the life of a new individual human being commences must be arbitrary – that is, we simply point to some place along the progression of life and decide more or less at random, 'this is when life begins.' However, if we make such an arbitrary decision, then the important question of what is a human being and what is not becomes entirely a matter of personal taste and the *power* to impose this taste on others. Just as in the case of slavery, where powerful slave-owners could decide whether an individual was a person or mere property, if we accept an arbitrary definition of when life begins, deciding who is a human being and who is not reduces the issue to a question of *power*.

To sum up, I suggest that the Court, unlike in *Roe*, accord a 'fetus' its *true status, dignity and worth* by referring to it either as an *unborn human being* or an *unborn human life*, not merely as *the fetus*, and find that life begins at conception and continues throughout the pregnancy.

No. 2 Suggestion: *That the Court find in the Constitution that an unborn human being has a fundamental right to life.*

The *Roe* Court admitted the Constitution explicitly mentions neither a fundamental 'right' of privacy nor a 'right' to an abortion.

And yet, somehow, the Court managed to *find* those rights in the 'roots' of the Constitution and in the 'penumbras' of the Bill of Rights.

That fosters hope that the Court can, likewise, *find* somewhere in the *body* of the Constitution that an unborn human being has a *fundamental right to life*-- and if not in its body, perchance in the 'roots' and in the 'penumbras' of its *soul*!

No. 3 Suggestion: *Define the words "person" and "personhood" affirmatively.*

In *Roe* the Court admitted, too, that the Constitution does not define the word person "in so many words." Still, the Court was persuaded the word "person" does *not* include the *unborn*, a negative definition at best.

The *Roe* Court further stated that at 'viability' (24-28 weeks after conception) *the fetus* then "presumably has the capability of *life* outside the other's womb – a statement which impels me to ask: Once the *Roe* Court recognized the existence of capable life in the womb – a life which by its own measure was *meaningful* – why did it not, then and there, respect and protect that life absolutely, a life a possible C-section away from live birth, a birth certificate, and yes – "personhood," that-so-difficult-to-attain status, with its right to life, 14th Amendment guarantee!

Had the Court protected unborn human life *at least at that stage*, the Court would have significantly limited the abortion 'right', reduced abortion rates, and saved lives – including the unborn human beings who became victims of brutal partial birth abortions (often referred to as "thinly veiled infanticide") and those babies who somehow survive botched abortions but are left to die, bereft of any civil rights.

Ironic as it may seem the Courts today recognize – as they have for many years – persons of *2* kinds – natural and *artificial*! A natural person is a human being.

Included among 'artificial persons' are: counties; corporations; property (as the estate of a bankrupt or deceased person); and a university.

Even more ironic is the inclusion among 'artificial persons' of an *unborn child* – for the *purpose* of remedies given for personal injuries for which a child may sue after birth; and a *viable fetus – within the meaning* of the wrongful death statute and within the meaning of a state's vehicular homicide statute!

Can it be there is no 'room at the inn' for one more kind of person—and/or for one more purpose?

Another component of the "personhood" issue is the matter of 'ensoulment.' Some people claim that the act of abortion is not too serious since what is destroyed in an abortion is not really "a person" – because 'it' does not possess a soul. Millions of Americans hold the belief human beings live in not one but two worlds; that they are both body and soul. Bishop Sheen, in one of the many books he has authored, put it this way: "The animal pads along on four legs, his nose stolidly fixed on the ground because the earth is his only home and his only end. Man, on his two legs, walks erect and looks upward because his true destiny is beyond his earthly existence."

That evokes the question – *when* does the spiritual soul come into existence? - "are body and soul joined at the very first moment?" In *Roe,* the Supreme Court briefly alluded to the issue of ensoulment as a historical factor in the recognition of existence of life. In doing so, the Court noted that the official belief of the Catholic Church is the "existence of life from the moment of conception," adding that it was a view "strongly held by many non-Catholics as well." As a matter of fact, the Catechism of the Catholic Church also teaches that every soul is created

immediately by God, that the human person – created in the image of God - is a being at once corporeal and spiritual; and that each person's soul is immortal.

Moreover, the Catechism of the Catholic Church teaches that a child possesses the right to be respected from the moment of conception, and that from that moment on, human life exists and must be respected and protected absolutely. I feel a 'divine terror' would come over me if I did not so believe.

In the final analysis, we can all be certain of one thing and that is: No one can validly assume that God does *not* create the soul immediately.

The possibility alone should give one cause to pause and ponder.

Currently, we are witnessing a growing concern that certain health care reform legislation will lead to selective discrimination against certain segments of society, such as the elderly. The concern is the possibility that the intensity of medical intervention on their behalf will be drastically reduced, with the goal of controlling medical costs.

Is it possible the next right-to-life issue will involve human beings who are living in the third trimester of *postnatal* life, and that the next right-to-life question might be: "Should the *quality* of medical care available to [them] depend upon the *quantity* of years they presumably have left to live?

If this scenario should come to pass, might it be a predictor of *things to come*?

How many *more* times can we turn our heads? How many *more* times can we pretend that we just don't see?

"The answer, my friend, is blowing in the wind; the answer is blowing in the wind!"

Ronald G. Varckette, (Ret.) Judge
Juvenile and Probate Court of Ashtabula County