
COMMENTARY

Abortion Case Law is Ill-conceived

The U.S. Supreme Court did a great disservice when it decided *Roe v. Wade* by balancing a woman's right to privacy and health against the state's interest and responsibility for protecting human life. The Court applied traditional legal analysis to an issue not easily susceptible to such resolution. The decision is still on the books, but it takes the wrong approach to deciding whether a state can regulate or prohibit abortion. If the issue is viewed in a different light, people will still argue for or against abortion, but they will do so from firmer ground.

Roe v. Wade adopted a dual overlapping sliding scale of rights. The longer a fetus is carried, the lower falls the woman's right to abort, and the higher rises the state's interest in promoting birth. This theory is based mainly on the chance of fetal survival outside the womb and the "humanness" of the developed fetus. In essence, the court said that a fetus that can't survive outside the womb carries fewer attributes of humanity, including legal rights, than a more mature fetus.

This sliding scale means that a woman who chooses to abort in the first few months of pregnancy is making a personal decision beyond state control to rid her body of an unwanted object. Conversely, a woman who carries a fetus into the third trimester is considered to be carrying a proto-baby, an entity with substantial human attributes needing only the technicality of birth to achieve legal rights.

New technologies have pushed the frontier of successful birth earlier in pregnancy, indeed, some fertilized ova have been carried to term by third parties. Changes in techniques have rendered Justice Blackmun's trimester scheme of rights shakier, but it was flawed at the outset. It is flawed because it erroneously equates ability to survive with status as a human.

With enough technical support, any



By Alan Contreras

fertilized egg can become a baby without any effort by the biological mother. Thus, survivability applies to all pregnancies, and raises the issue of when a fetus becomes human.

What is a human, after all? A five month old child will survive only days longer than a five month old fetus if left alone. Both can move, neither can do anything important that the other can't. The differences between them are matters of degree, not of kind. Neither doctors nor lawyers are qualified to say when a fetus becomes a human, but in *Roe v. Wade* they pasted together a theory that didn't hold up.

There are three main ideas as to when a fertilized egg becomes a human life. One idea is that humanity begins at conception, another is that it begins when the fetus begins to move, the third is that humanity begins with separation from the mother.

Birth is a convenient demarcation, but there is no important developmental difference between a baby five minutes before birth and one five minutes after. I see no way to say that one is human and one is not other than by reference to traditional legal standards. Laws are merely rules made by societies to govern themselves; human laws do not derive from nature as human beings do. A law could be written saying that a two-year-old child is not human, just as

laws have been created that deny human status to certain minority groups.

The second definition is the one implicitly adopted in *Roe v. Wade*. I reject it because I see no way to correlate a particular level of physical or mental development with human status. I accept the first definition as the most rational because it is the only one subject to objectivity and does not rely on guesswork regarding development.

Once we recognize the humanity of fetuses of different ages as equal, the question of abortion is ready to be discussed: under what circumstances should a society end a human life?

This is surely not a new question.

We discuss capital punishment when a human has committed an act of extraordinary destruction against other humans. We consider the merits of war when faced with extreme danger to our society. We face the issue of killing or dying if we are threatened with death at the hands of another. If a loved one will lie comatose for decades, do we sustain or end life, or is it already gone?

How, then, do we treat an unwanted human fetus? Is its threat to its mother's mental or physical health enough to justify killing it? Its status as product of rape or incest? Its burden to a teenage mother and the people of the state? Its known mental or physical deformity? Its unwanted addition to a world bearing too many people?

These are legitimate questions in the abortion debate, and both sides can and should argue them. *Roe v. Wade* has sapped too many years of debate. Abortion rights advocates seized that decision believing it to be high ground. It is a flimsy legal fence guarding a medical, legal, and intellectual cul-de-sac. The debate needs to shift from fantasy to reality, from the past to the present, and from the embarrassing morass of judicial malpractice to the true high ground: what shall we do with an unwanted fetal human? ©