

Roe Must Go!



By Jan LaRue, Chief Counsel

When a U.S. senator recently appeared on a news show to discuss his meeting with Supreme Court nominee Judge Samuel Alito, the topic turned to abortion. That's not surprising, for ever since the 1973 Supreme Court decision that created a right to abortion out of whole cloth, the liberal establishment has tried to guard it from reconsideration.

The senator said that his religious belief is that human life begins at conception and he expressed his hope that some day science will actually tell us when human life begins.

However, the senator's statement rests on the common fallacy that science is uncertain about when life begins. Tragically, our abortion laws are based on one of the greatest suppressions of truth in Supreme Court history: *Roe v. Wade*.

In *Roe*, seven Supreme Court justices decided that it was unnecessary to know when life begins in order to decide if it may be ended. The majority's predeter-

mined outcome exposed an activist court willing to adopt a ridiculous rationale in order to create a new "constitutional right."

To write the majority opinion in *Roe v. Wade*, the late Supreme Court Justice Harry Blackmun spent an entire summer studying in the medical library of the acclaimed Mayo Clinic. He identified the

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salient issue that stood in the way of *Roe* prevailing on the theory that abortion is a constitutional right, and wrote in the court's opinion, "If this suggestion of personhood (fetus) is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed by the [14th] Amendment."

For the unborn to be denied status as "persons" protected by the 14th Amendment, the Court first had to dehumanize them. The majority did so by pre-

tending that no one could agree on when human life begins.

Sadly, Blackmun's statement does not read like a jurist looking for truth; instead, it reads as though written by a high school student who flunked biology: "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus," he said, "the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."

Yet Blackmun cited and dismissed many pro-fetal-life sources, including the American Medical Association's (AMA's) Committee on Criminal Abortion Report of 1859, which referred to "the independent and actual existence of the child before birth, as a living being."

The AMA adopted resolutions protesting "against such unwarrantable destruction of human life" and called upon state legislatures to revise their abortion laws. In 1970, an AMA Committee noted "polarization of the medical profession on this controversial issue." According to Blackmun, it was "felt to be influenced by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available."

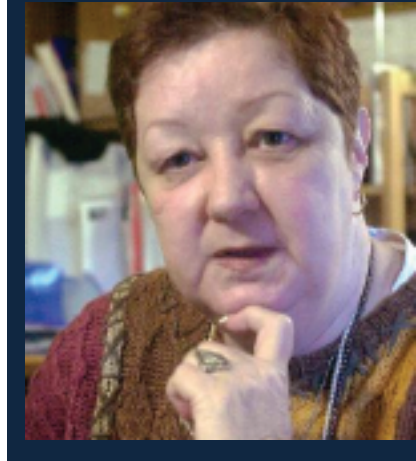
It gets worse. The unborn, Blackmun decreed with a straight face, are merely "potential life" until "the fetus becomes 'viable,' that is, potentially able to live outside the mother's womb, albeit with artificial aid."

Blackmun's inconsistency could hardly be more obvious when compared to his statement about the "developing young": "[T]he pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus."

You'd think that Blackmun, former general counsel for the Mayo Clinic, would



Above: Former Supreme Court Justice Blackmun wrote the opinion that "legalized" abortion.
Below: Norma McCorvey, "Roe" in *Roe v. Wade*, later came to Christ and renounced her role in the case.



have found persuasive Dr. Hymie Gordon, the Mayo Clinic's chief geneticist, who wrote in the *South African Medical Journal*:

From the moment of fertilization, when the deoxyribose nucleic acids from the spermatozoon and the ovum come together to form the zygote, the pattern of the individual's constitutional development is irrevocably determined. . . . Even at that early stage, the complexity of the living cell is so great that it is beyond our comprehension. It is a privilege to be allowed to protect and nurture it.

Blackmun also “missed” the work on biogenesis of Louis Pasteur and others, who scientifically disproved that life arose from nonliving matter. Indeed, the *Oxford Dictionary of Biology* states: “[A] living organism can only arise from other living organisms similar to itself (i.e., that like gives rise to like) and can never originate from nonliving material” (Oxford University Press, 2000).

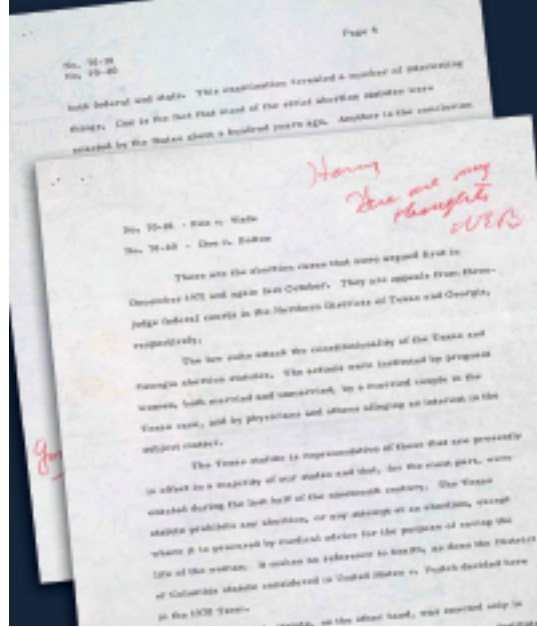
All life comes from pre-existing life, with no period of nonlife. Biological growth proves the unborn are alive at conception. They are human life because each being reproduces after its own kind. It doesn’t make sense to conclude that two human beings produce a being that later becomes a human being.

Walker Percy, author and medical doctor, rebuked misguided jurists of the 20th century who suppressed scientific facts. He wrote, as quoted in the June 15, 1997, edition of *The Washington Post*: “Nowadays it is not some misguided ecclesiastics who are trying to suppress an embarrassing scientific fact. It is the secular juridical(sic)-journalistic establishment.”

Why did a 20th century jurist suppress the truth about the onset of human life? The only rational explanation is outcome-based jurisprudence, where absurdities that pass for scholarship and constitutional law replace truth and sound reasoning.

With the first linchpin—that life begins at conception—pulled out from protection for the unborn, Blackmun proceeded to pull the second. He concluded that no case had been cited that included the fetus within the language of the 14th Amendment. The fact that no case existed that included a right to abortion under any provision of the Constitution didn’t stop Blackmun from creating the one that did.

Blackmun argued that the reference to



Justice Blackmun’s papers were opened to the public in 2004, five years after his death.

“person” in the 14th Amendment means “citizens” who are born or naturalized in the United States. The fact that aliens, who are neither born in the U.S. nor naturalized, are persons protected by the Amendment was of no moment to Blackmun.

Further, Blackmun arbitrarily refused to include the unborn in the doctrine of “personhood,” even though “person” in the 14th Amendment includes inanimate entities such as corporations and ships. He concluded: “[T]he unborn have never been recognized in the law as persons in the whole sense.”

Blackmun and six other highly educated men agreed that the “human life” of the unborn didn’t matter, in order to decide whether they can be terminated without due process. It’s no wonder that Justice Byron White called it an act of “raw judicial power.”

It is wrong, however, to state that *Roe* actually holds that the unborn are not human beings. Other laws include legal protection for the unborn, both pre- and post-*Roe*.

William Prosser writes in *Law of Torts* that “the unborn child in the path of an automobile is as much a person in the street as the mother,” and the law of property recognizes him or her for wills and descent. Legal action may be taken for prenatal injuries and, if the baby dies, for wrongful death.

For example, the California Penal Code recognizes “a child conceived, but not yet born” as an existing person and the California Civil Code § 373.5 provides for the appointment of a guardian *ad litem* for an unborn child. California has had a fetal homicide law since 1970, and it was on the books when Blackmun was writing the majority opinion in *Roe*.

Blackmun’s legal fictions attempted to distinguish between a fetus and a human being. Yet, laws impose the same penalty for murdering either. This exposes a flawed and dangerous policy in which the unborn baby’s right to life depends on who wants her terminated—the mother or another.

Even Supreme Court Justice Ruth Bader Ginsburg, a supporter of abortion, has acknowledged the difficulty of justifying the judicial activism of *Roe*. She wrote in 1985: “Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.”

One would think that the Supreme Court would have learned from another case more than 100 years before, when another unjustifiable and Supreme shame created a “constitutional right” to own human beings. *Dred Scott v. Sandford* rested on a dreadful lie ended only by war. Those who insist that the national disgrace of *Roe v. Wade* must remain inviolate because it is precedent should be made to defend *Dred Scott* on the same principle.

And what does it say about a nation that protects the nests and eggs of endangered species to the same degree that it protects them as adults but fails to protect the life of unborn humans?

Whoever, except in compliance with rules and regulations promulgated by authority of law, hunts, traps, captures, willfully disturbs or kills any bird, fish, or wild animal of any kind

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whatever, or takes or destroys the eggs or nest of any such bird or fish, on any lands or waters which are set apart or reserved as sanctuaries, refuges or breeding grounds for such birds, fish, or animals under any law of the United States or willfully injures, molests, or destroys any property of the United States on any such lands or waters, shall be fined under this title or imprisoned not more than six months, or both. (18 U.S.C. § 41)

As this issue of *Family Voice* went to press, the nation was awaiting the confirmation of Samuel Alito, President Bush’s outstanding nominee to the second vacancy on the U.S. Supreme Court. It remains to be seen whether the court that Alito will presumably join will be the one to overthrow *Roe v. Wade*, returning the issue of abortion to the jurisdiction of the states, where it belongs.

Nevertheless, *Roe v. Wade* is based on a house of cards. It’s beyond time for its collapse.

This article is adapted from a paper by Jan LaRue, It’s Time to Reject Roe v. Wade as Invincible Precedent. To read the full paper, visit www.cwfa.org, or call 1-800-323-2200 to request your copy. ■