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Three centuries ago, John Locke, whose writing had a significant influence on the leaders of Revolutionary America, declared that "tyranny is the exercise of power beyond right," and that "where-ever law ends, tyranny begins" ("Second Treatise of Government," par. 199, 202). On Jan. 22, 1973, with its decision in Roe v. Wade, 410 U.S. 113 (1973), the U.S. Supreme Court not only stripped from the unborn children of this state and this nation their legal statuses and rights, including the protections of the criminal law, but it also fashioned an affirmative right in their mothers to kill them by abortion. Stated differently, the Court purported to transform a deliberate act of human killing — a naked evil — into a "fundamental" constitutional "right." To the unwanted, unborn children of this state and this nation, and to most of those babies who are alive after abortions, death has become a way of life. Today in Texas, killing by abortion is wide open from conception to the commencement of childbirth. Did the Supreme Court exercise its power beyond right?

I plan to share some thoughts with you concerning the Roe v. Wade decision, and how the Supreme Court, in deciding that case, turned its collective back on the U.S. Constitution, the principles on which this nation was founded and on its own constitutional teachings.

I. Roe v. Wade

In Roe v. Wade, the basic adversary clash was between a class of pregnant women in Texas and the district attorney of Dallas County, Henry Wade. Although the State of Texas participated in the case, it was not a party. In addition, the victims of abortions — unborn children and children alive after abortions — were not parties. The pregnant women claimed that the Texas anti-abortion laws were unconstitutional because those laws prevented them from obtaining safe, legal abortions. The basic holdings of the Supreme Court were these:

1. The Texas anti-abortion laws are unconstitutional;
2. The pregnant woman has a "fundamental right" to end her pregnancy by abortion;
3. In the first trimester of pregnancy, that "right" is absolute;

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4. From the first trimester to viability, the state can exert itself only in the interests of the woman, not the child;
5. From viability to birth, the state may protect the child — if it wishes — except where the mother’s life or health is involved. (In a companion case, Doe v. Bolton, the mother’s health was defined so broadly that any protection afforded the viable child would be more form than substance.)
6. The unborn child is not a person under the protection of the 14th Amendment to the Constitution.

The Court said it could not decide the “difficult question” of when human life began but, by referring to the unborn child as “potential life” or “the potentiality of life,” and by resolving all doubt on the subject against the unborn child, the Court, in effect, concluded that human life began at birth. Through euphemisms and genteel language, the savagery of that decision was masked in this fashion:
- killing by abortion became “termination of pregnancy,”
- the abortionist became the “attending physician,”
- the victim of abortion became “potential life” or the “potentiality of life.”

At this juncture let’s look at some of the constitutional aspects of Roe v. Wade.

II. The Unconstitutionality of Roe v. Wade

By way of background, it is a basic proposition of U.S. constitutional law that if a court — any court — violates the U.S. Constitution in a case before it, that court loses jurisdiction over the underlying cause of action, and any “judgment” which it might render would be void. Examples are: Johnson v. Zerbst, 304 U.S. 458, 467-468 (1938); Windsor v. McVeigh, 93 U.S. 274, 277-284 (1876); Wetmore v. Karrick, 205 U.S. 141, 149-150 (1907); Bass v. Hoagland, 172 F. 2d 205, 208-209 (C.A. 5, 1949), cert. denied, 338 U.S. 816. It is also basic that if a court proceeds without personal jurisdiction over a necessary party, the judgment of the court is void as to said party. Is the U.S. Supreme Court capable of violating the Constitution in its functionings? Yes, it is; and in the 1938 case of Erie Railroad v. Tompkins, 304 U.S. 64, the Court admitted that it had violated the Constitution and usurped power from the states when it decided the case of Swift v. Tyson, 16 Pet. 1 (1842).

Did the Court violate the Constitution when it decided Roe v. Wade? Let’s look at the procedure and let’s look at certain substantive aspects of that decision.

A. Procedural Violations. From a standpoint of procedure, we see that the victims of abortion were not parties to the case nor were they represented therein through guardians, next friends or counsel. The victims of abortion are babies who are alive after abortion but who nevertheless die because of abortion, and unborn children. The abor-
tion "survivors" are U.S. citizens under Section 1 of the 14th Amendment because they are born in the U.S. and subject to its jurisdiction and unborn children have well-recognized legal personalities or statuses under English and American law.

U.S. citizens who are affected directly by judicial proceedings have the clear right to be parties to such proceedings. So do unborn children. In McArthur v. Scott, 113 U.S. 340, 391-392, 404 (1885), the Supreme Court ruled that if unborn children were not represented in judicial proceedings which affected them, the judgment rendered in such proceedings would be void as to them. State courts have ruled similarly, e.g., Dietrick v. Migatt, 19 Ill. 146, 148 (S.C. Ill., 1857); Deal v. Sexton, 56 S.E. 691, 692 (S.C. N.C., 1907). This feature of representation for the unborn was not dreamed up by American courts. It was part of English law for centuries. In 1660, during the reign of Charles II, a father was given the right to appoint a guardian for his unborn child, and the guardian was authorized to sue on behalf of such child (12 Ch. II, c. 24, §§ VIII and IX). In Lutterel's Case, decided in 17th century England, an unborn child was awarded an injunction to prevent waste of the child's interest in certain real property [Lutterel's Case, referred to in Hale v. Hale, 24 E. Repts. 25, 26 (Ch., 1692)]. Except for Louisiana, we took our basic legal system — the common law — from England.

From the lack of representation, two legal conclusions can be drawn readily: (1) the federal courts lacked personal jurisdiction over the victims of abortion, and hence Roe v. Wade is void as to them under well-established jurisdictional concepts [see Pennoyer v. Neff, 95 U.S. 714 (1878)]; and (2) the victims of abortion were deprived by the federal courts of life, liberty and property without due process of law, in violation of the 5th Amendment to the Constitution.

Let us look further. In Roe, no evidence was presented on behalf of the victims of abortion, not even an affidavit. There was no trial, the case having been disposed of by way of summary judgment; and the victims of abortion were discriminated against invidiously when compared to the non-aborted born and to those constitutionally recognized "persons" called corporations.

This, then, was the procedure used: no representation, no personal jurisdiction, no evidence, no trial and standards of invidious discrimination. The Supreme Court, however, has taught us that the "fundamental requisite of due process of law is the opportunity to be heard" [Grannis v. Ordean, 234 U.S. 385, 394 (1914)], and that due process "must give ... an opportunity to be heard respecting the justice of the judgment sought" [Hagar v. Reclamation Dist., 111 U.S. 701, 708 (1884)]. The "due process" provisions of the 5th Amendment are mocked by Roe v. Wade.

B. Certain Substantive Violations. Let's look at two substantive facets of Roe v. Wade: (1) the creation of the "liberty" to kill by
abortion, and (2) the effect of the exercise of that “liberty” upon the existence of the legally cognizable rights of the infant victims of abortion.

1. Creation of the Liberty to Kill by Abortion. Since the U.S. Constitution does not give any human being the right to kill another human being, the Court had to discover—somehow—a right to kill by abortion in the Constitution. It did this by seizing upon the word “liberty” in the 14th Amendment, and it held that a pregnant woman’s implied right of privacy included a liberty to kill her unborn child. It labeled this “liberty” a “fundamental right.”

Now, what is a fundamental right that the Constitution protects in its generalized expressions? The Supreme Court has given the answer in earlier decisions, namely, those rights which are rooted in the life and traditions of the people of this nation; and, through the years, various fundamental rights have been denominated and protected expressly. These include, in the family context, the rights to marry, to have children and to rear and educate one’s child.

How about a right to kill by abortion? Was that activity rooted in the life and traditions of the people of this nation? What does our legal and social heritage show? We, of course, took our basic legal system from England. This is how abortion was viewed under the English common law at the time of the adoption of our Constitution in 1789:

a. If the mother died as a result of an abortion, regardless of the length of the pregnancy, the offense as to her was murder [Margaret Tinkler’s Case (1781), I East, A Treatise of the Pleas of the Crown (Phil., 1806), pp. 230, 354-356].

b. If the child was born alive and afterwards died as a result of the abortion, regardless of the length of pregnancy, the offense as to the child was murder [see, e.g., Sim’s Case, 75 E. Repts. 1075 (Q.B., 1601) (dictum)].

c. If a child was killed in the womb as a result of an abortion, the offense as to the child was called “great misprison” (Coke), “heinous misdemeanor” (Blackstone), “horrible offense” (Coke) and “great crime” (Hale). And when was a child “alive”? Sir William Blackstone, in his Commentaries on the Laws of England, gave us an answer based on the biology of the times (about 1765). He said:

 LIFE is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother’s womb (I Bl., Com., p. 129).

Abortion was prosecuted as a common law offense in this country. Examples include: Mills v. The Commonwealth, 13 Pa. St. 630 (S.C. Pa., 1850); Commonwealth v. Bangs, 9 Mass 386 (S.J.C. Mass., O.T., 1812); see The People v. Jackson, 3 Hill 92, 94 (S.C. N.Y., May Term, 1842). When the 9th Amendment was adopted in

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1791, the 14 states of this nation had received or adopted the English common law; and when the "liberty" provisions of the 14th Amendment were adopted in 1868, 36 states and territories of the U.S. had made abortion a statutory offense (Rehnquist, J., dissenting in Roe v. Wade), and the few remaining U.S. jurisdictions which had not yet done so continued the common law offenses of abortion (e.g., North Carolina).

Given this perspective, was the right to kill by abortion rooted in the life and traditions of the people of this nation? If not, where did the Supreme Court get the authority to make up such a "right"? The judicial article of the Constitution — Article III — gave it no such power.

2. Effect of the Exercise of the Liberty to Kill on the Legal Rights of the Victims. Under English law, the unborn child was recognized expressly and impliedly under statutory and case law. In addition to the life right, the English courts recognized the unborn child as having numerous other rights — both vested and contingent upon live birth — such as representation in judicial proceedings, taking property under a will, taking property under a trust, taking property under marriage articles, and taking property by inheritance in certain situations.

In the great English case of Thellusson v. Woodford, decided in 1799 (31 E. Repts. 117) and affirmed by the House of Lords in 1805 (8 Rev. Repts. 104), Justice Buller, in answering the contention that an unborn child was a non-entity, said:

Let us see what this non-entity can do. He may be vouched in a recovery ... He may be an executor. He may take under the Statute of Distributions (22 & 23 ch. 11 c. 10). He may take by devise. He may have an injunction: and he may have a guardian (p. 163).

The fact that many of these rights were contingent upon live birth is of no great moment, for the law recognizes and protects many forms of contingent or future property interests, such as springing uses, shifting uses, executory devices, contingent remainders, and inchoate dower.

In this country, the legal status and rights posture of unborn children became part of our law through reception or adoption of the English common law. The law relative to unborn children has been expanded greatly by federal and state statutory and case law. For example, the pre-natal tort injury doctrine is law in all 51 domestic U.S. jurisdictions. Can there be a "duty of care," which is central to the tort of negligence, to a non-entity? In addition to recognition under the laws of inheritance, wills, trusts and torts, various state courts have held that an unborn child is entitled to support [e.g., Metzger v. People, 53 P. 2d 1189, 1192 (S.C. Colo., 1936)], to a life-saving blood transfusion [e.g., Raleigh Fitkin-Paul August, 1982 219

In the 1972 Lynch case, the U.S. Supreme Court declared: “Property does not have rights. People have rights” [Lynch v. H.F.C., 405 U.S. 538, 552 (1972)]. Well, if that’s true, unborn children are people because they have legally cognizable rights.

The exercise of the woman’s abortion “right” operates quite clearly to the naked destruction of all of such rights of the unborn child. How can the Supreme Court — or any federal court — which sits primarily to adjust rights and to dispense justice authorize the wholesale deprivation of such rights? To do so is to wage war on the due process clause of the 5th Amendment, the rights of the people under the 9th Amendment, the rights of the states under the “division of powers” concept as guaranteed by the 10th Amendment, the rights of Congress, and the very duties of the judiciary under Articles III and VI of the Constitution.

Against this background, we see that:

— the victims of abortion were not represented in the very proceedings which spelled death to them;
— the federal courts lacked personal jurisdiction over such victims;
— no evidence was offered on behalf of the victims;
— there was no trial;
— the Supreme Court stripped the unborn child of his or her well-recognized legal status;
— the Supreme Court deprived nakedly the unborn child of all of his or her legally cognizable rights, including rights provided for or recognized by federal statutory law; and
— the Supreme Court manufactured a constitutional right out of a beastly criminal act.

Roe v. Wade is the most savage and shocking abuse of judicial authority on record. It stands as a solemn fraud on the U.S.
Constitution, the principles on which this nation was based, the Court’s own constitutional teachings, and the rights of the victims.

Others who have studied the Roe decision have come to similar conclusions. Prof. John Hart Ely of Yale Law School, who favors abortion, said that Roe v. Wade “is a very bad decision. It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be” [82 Yale L.J. 920, 947 (1973)] (emphasis in original). Former U.S. Solicitor General Robert Bork said that Roe v. Wade was noteworthy “because it is not grounded on law, only social policy.” Prof. John Noonan, Jr. of the University of California Law School at Berkeley said:

The liberty established by The Abortion Cases has no foundation in the Constitution of the United States. It was established by an act of raw judicial power. Its establishment was illegitimate and unprincipled, the imposition of the personal belief of seven justices on the women and men of fifty states. The continuation of the liberty is a continuing affront to constitutional government in this country [Noonan, A Private Choice (1979), p. 189].

III. Roe v. Wade and the Future

Where can Roe v. Wade take us? If human life can be defined out of legal existence at one end of the life spectrum, it can be so defined at the other end, and at intermediate points. In stripping the unborn child of his legal status, the Court used the “person not in the whole sense” tack. How about the aged? Can it be said that they are not persons in the whole sense? Or the chronically ill? Or the handicapped? Or the newborn? Do they have the same “quality of life” characteristics as those not in such categories? Professor Noonan has written:

No “discrete and insular minority” can feel secure when its constitutional existence may be affected by the exercise of such raw power. And we are all members of discrete and insular minorities, depending on the criterion employed to set up the categories. The population may be divided a thousand ways to suit the preferences of the judges, who have power to define who is a person, who have even power to declare who is alive. If it becomes settled that it is the Supreme Court’s will that confers personhood and existence, no one is safe (ibid.)

In her book, Land Where Our Fathers Died, Marian L. Starkey, in reviewing the accomplishments of America, asks certain questions of our founding fathers: “Are we finding what you prayed for, William Bradford, John Winthrop? . . . Are you content, James Oglethorpe, you who alone among the founding fathers lived to see the nation you helped create? If we have not yet realized your hopes, your prayers, take heart, for beyond us lies yet a newer beginning.” The question I leave with you is simply this: Will you help bring to this nation a newer beginning?