"Catholicism's Intellectual Prizefighter!" - Karl Keating "Cheeky!" - Newsweek "Very offensive!" - Archbishop Rembert Weakland

New Oxford Review

New Oxford Book Reviews

Roe Exposed: The Emperor Has No Clothes

By Anne Barbeau Gardiner **March 2013**

Anne Barbeau Gardiner, a Contributing Editor of the NOR, is Professor Emerita of English at John Jay College of the City University of New York. She has published on Dryden, Milton, and Swift, as well as on Catholics of the seventeenth century.

Roe v. Wade: Unraveling the Fabric of America. By Philip A. Rafferty. *Tate Publishing. 236 pages. $18.99.*

Philip Rafferty offers a powerful argument against *Roe v. Wade* that is seldom heard: He demonstrates that the ruling is voidable on constitutional grounds alone.

According to Justice William Brennan, judges in our legal system "have no power to *declare* law" but only to "*derive* legal principles." They are duty-bound "to explain *why* and *how* a given rule has come to be." Only if they do this are they "accountable to the law and to the principles that are the source of judicial authority." The Supreme Court's *Roe* opinion was, therefore, supposed to explain *why* and *how* the majority justices came to their decision and give constitutional justification for it. Yet legal commentators are in virtually unanimous agreement that the majority's opinion does not justify the *Roe* decision. Hence, the Court was not "accountable."

Moreover, in its *Casey v. Planned Parenthood* opinion (1992), the Court adopted *Roe*'s holdings but implicitly rejected its opinion. Yet it set forth no alternative constitutional reasoning. Since then the Court has failed to come up with any constitutional justification for the *Roe* decision. Instead, we have Justice Robert Kennedy in a (joint) lead opinion in *Casey* musing that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." What keeps *Roe* standing then is, as Rafferty puts it, "the clinging to precedent by five justices in *Casey*."

Yet a precedent can be overruled. According to Justice John Paul Stevens, the Court "has not hesitated to overrule decisions…where scholarship…demonstrated that their fundamental premises were not to be found in the Constitution." In *Lawrence v. Texas* (2003), the Court overruled the holding of *Bowers v. Hardwick* (1986), "notwithstanding the principle of *stare decisis*," because, it said, the "criticism of *Bowers* has been substantial, and continuing, disapproving of its reasoning in all respects, not just its historical assumptions." How much more has the criticism of *Roe* been ongoing and substantial! Justice Robert H. Bork rightly called it "the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century."

According to Justice Brennan, "the integrity of the process through which a rule is forged and fashioned is as important as the result itself." Otherwise, the rule's

News Link

Vatican City
Jorge Mario Bergoglio of Buenos Aires, Argentina has been elected Pope. The new Pontiff, who chose the name Francis, is the first Latin American and the first Jesuit Pope.

Vatican City
Pope Francis' inauguration as Bishop of Rome will be held Tuesday, March 19, the feast day of St. Joseph. The inauguration is to be held at St. Peter's Square.

Vatican City
Black smoke issued from the Sistine Chapel, signalling that the conclave's second and third votes have been inconclusive.

Malta
Bishop Charles Scicluna, the Vatican's former chief prosecutor in sex-abuse cases, has suggested that Pope Benedict XVI resigned in order to give his successor a better chance to purge unreliable aides from the Vatican.

Vatican City
The conclave begins Tuesday at 5:00 p.m., and the first possible smoke sighting is that evening around 7:00. The schedule allows four votes per day: two in the morning, two in the afternoon.

Maryland
The state senate voted

legitimacy will be in doubt. In *Roe*, as Rafferty shows, the integrity of the process was violated in two ways: by the justices' lack of impartiality and by their failure to appoint an attorney to represent the "fetus," whose right to life was in jeopardy.

It is a violation of procedural due process if the private view of a Supreme Court justice has a significant bearing on his decision since the litigants arguing before the Court are not cognizant of "the contents of this hidden agenda." In *Roe*, the majority justices were biased in favor of the plaintiff, Norma McCorvey, the pseudonymous "Jane Roe," and were in violation of the due-process mandate of "judicial impartiality." Since their bias was hidden from defendant Henry Wade, the attorney general of the State of Texas, the Court's decision violated the Fifth Amendment, which prohibits "arbitrary action." That decision is unconstitutional and amounts to "law by judicial predilection."

While the majority justices in *Roe* declared that their task was "to resolve the issue by constitutional measurement, free of emotion and predilection," we now know from Mark Tushnet, today a Harvard law professor but then a law clerk for Justice Thurgood Marshall, one of *Roe*'s majority justices, that "all they wanted was to get those [state-level criminal abortion statutes] off the books." One example involves Justice Henry Blackmun, who arbitrarily replaced the phrase "end of the first trimester" with "fetal viability" in the *Roe* opinion. He did so at the prompting of Justice Marshall, who sent him a memo on December 12, 1972, stating, "I fear that the earlier date may not in practice serve the interest of those women, which your opinion does seek to serve." Now, Supreme Court justices are bound by oath not to serve the interests of any party. As William Blackstone, the eighteenth-century common-law authority, declared, a judge takes an oath "to decide, not according to his own private judgment, but according to the known law and customs of the land." Justice Antonin Scalia put it well in 2008: "The absolute worst violation of the judge's oath is to decide a case based on a partisan political or philosophical basis, rather than what the law requires."

A second example of how *Roe* stands on "judicially tainted grounds" involves Justice Lewis Powell Jr. After retiring in 1987, he told National Public Radio's Nina Totenberg that he engaged *Roe*'s decision-making process with a bias toward the legalization of abortion that "strongly influenced" his decision. Hidden from the *Roe* litigants, this bias came from a personal experience he had had of a criminal abortion committed by his office boy that ended with the woman's death. Totenberg reported that "Powell had to turn his office boy over to the local prosecutor, but he persuaded the prosecutor not to bring charges." Then Justice Powell added, "Ever after that, I thought this was the business of private choice." Because he lacked impartiality, Justice Powell had an absolute Fifth-Amendment duty to "recuse himself from participating in the deciding of *Roe v. Wade*," Rafferty writes.

A third example involves Justice Kennedy, who voted with the minority to overrule *Roe* in *Webster v. Reproductive Health Services* (1989). In *Casey* Kennedy first agreed to overrule *Roe*, but while Chief Justice William Rehnquist was writing his majority opinion, Justice Blackmun, "in a highly unethical move," asked Justice Kennedy to read the letters he had received from women who said "the right to choose abortion had been important in their lives." As a result, Justice Kennedy changed his mind and *Roe* was upheld. He then remarked that while justices are "bound by the facts, the rules of logic, legal reasoning and precedent," they must not fail to ask themselves "what the law should be." This amounts to saying that he can make his private reason the measure of the law. Yet, as Rafferty observes, the "Fifth Amendment due process mandates that a Court opinion serve 'only' the Constitution."

According to Justice Marshall, "the validity and moral authority of a conclusion largely depend on the mode by which it was reached." On this ground, the *Roe* conclusion is "voidable," Rafferty argues, because the Court, "in its rush to judgment, forgot to appoint independent, sagacious counsel (let alone a guardian *ad litem*) to represent the fetus." In the process of determining whether the fetus could be put to death arbitrarily and with impunity at his mother's direction, the Court "inexcusably and unconstitutionally" failed to give the fetus "a due-process-mandated, meaningful opportunity to be heard" on whether he qualifies "as a Fourteenth Amendment, due process clause person." Attorney General Wade was arguing on behalf of Texas, not the fetus.

In 1985 Justice Stevens noted that the Supreme Court, when interpreting the Constitution, is bound to read its words "in the context of the beliefs that were widely held in the late eighteenth century." In 1888 the Court in *Smith v. Alabama* likewise observed that "the interpretation of the Constitution…is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in light of its history." Since the inception of colonial America, a woman about to be executed who was found to be pregnant was reprieved until she gave birth, so that her child might not also be executed. In

to repeal the death penalty. If passed, the law would replace death sentences with life in prison and no possibility of parole.

more news links...

1791, for instance, a petition was filed on behalf of a fetus for which a stay of his mother's execution was granted. In *Hall v. Hancock* (1834), the fetus was termed to be "in being" at common law "in all cases where it will be for the benefit of such child to be so considered."

There is every reason to think, Rafferty writes, that our Founding Fathers regarded the fetus "as a human being no less than themselves and therefore entitled to the security for its life that the 'rule of law' can provide." It follows that they considered the fetus a due-process-clause "person" in the meaning of the Fifth Amendment.

The "primary legal authority" on common law for eighteenth-century American lawyers, magistrates, and judges was William Blackstone, whose *Commentaries* were constantly consulted. Blackstone declared that "if a woman is *quick with child* and, by a potion or otherwise, kills it in her womb," this is "a very heinous misdemeanor." Therefore, abortion, in Blackstone's reasoning, was a crime, not a right. At the time, the phrase *quick with child* meant that the woman was six to eight weeks pregnant. Blackstone's importance in the epoch when our Constitution was written is indisputable: In *O'Bannon v. TCNC* (1980) Blackstone's vision of liberty was said to have "unquestionably informed the Framers of the *Bill of Rights*."

It was chiefly from the false premise that "intended abortion was recognized as a right or liberty at the English common law" that the *Roe* Court decided that the human fetus does not qualify as a due-process-clause person in the meaning of the Fifth and Fourteenth Amendments and that a mother has a fundamental, constitutional right to an abortion. In answer, Rafferty persuasively cites many cases of prosecution for abortion at common law. Spanning many centuries, these cases, which are presented as appendices in his book and take up a hundred pages, "squarely and authoritatively" refute *Roe*'s "fundamental premise that under the English common law a woman enjoyed the right to do away with her unborn child."

The Court's erroneous view of abortion as a "right" was based on two law-review articles published by abortion-advocate Cyril Means Jr., then a law professor in New York. Means asserted that before the nineteenth century, abortion was not prosecuted in England as a crime, but was recognized as a right or liberty, and that therefore it was also recognized as a right in colonial America as well as in the American states and territories into the nineteenth century since, for the most part, colonial Americans "adopted as their own law, the then-existing English common law on crimes." It was by giving uncritical acceptance to Means's lies that the *Roe* Court was able to make abortion a "substantive, due process, fundamental right."

Means went so far as to accuse Sir Edward Coke (1552-1634) of "deliberately" misrepresenting abortion as a crime at the English common law, an accusation the Court should have recognized as false. Yet in its *Roe* opinion, the Court noted that there might be "a real basis" for Means's accusation! It also gave its *imprimatur* to another lie by uncritically adopting Means's claim that criminal abortion statutes in nineteenth-century America were designed to protect not unborn children but their mothers from the "dangers of surgical abortion." Means was an ideologue who used seemingly scholarly research to promote abortion rights. It's astounding that the Court didn't recognize this.

It would be cheering if legal scholars today finally agreed that abortion has always been a criminal offense at common law. Sadly, this is not the case. In *The Criminalization of Abortion*, a 2012 book by Wolfgang P. Müller, who teaches history at Fordham University, we read that "all such criminal prosecutions for abortion and unborn child-killing at English common law ceased around 1348." This is historically inaccurate — egregiously so. To kill a child in the womb was a hanging felony until around 1600, and then, when no longer a "capital homicide," it continued to be prosecuted as a heinous misdemeanor. It never ceased to be a criminal offense.

Contrary to the *Roe* opinion, it is unquestionable that our Founding Fathers thought that after forty days the fetus qualified as a person within the meaning of the due-process clauses. American legal tradition does not support the existence of a woman's right to an abortion, but rather supports the right of a preborn child not to be aborted. The *Roe* opinion, denuded of constitutional support, is like the proverbial emperor parading about without his clothes.

Some of Rafferty's arguments and proofs are available in his 1992 work *Roe v Wade: The Birth of a Constitutional Right*, available at www.parafferty.com. See also his article "*Roe v Wade*: A Scandal Upon the Court" (*Rutgers Journal of Law & Religion*, vol. 7, Dec. 2005). Even if defenders of preborn children are at a political disadvantage today, we hold the high ground in terms of the Constitution. Rafferty persuades us that our Founding Fathers, who well understood our legal tradition, are in spirit standing right by our side.