

ABORTING *ROE*:  
JANE ROE QUESTIONS  
THE VIABILITY OF *ROE V. WADE*

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## I. INTRODUCTION

The Edith Jones Project is:

- (a) A group of seven anonymous ACLU attorneys working to establish sufficient evidence to impeach Fifth Circuit Judge Edith H. Jones;
- (b) A super-secret vast right-wing conspiracy to nominate Fifth Circuit Judge Edith H. Jones to the United States Supreme Court;
- (c) A Maine-based all-female band specializing in modern big band jazz; or
- (d) All of the above.

Before the silent late-night phone calls and death threats come rolling in from covert operatives who believe they have been exposed, let me make it clear that I can neither confirm nor deny whether the answer is (a), (b), or (d). I can confirm that the only publicly known *Edith Jones Project* advertises itself as having “86% less testosterone than the average big band . . . 200% of the swing.”<sup>1</sup> The curiously named “EJP” pays homage to several Edith Joneses “worthy of note.” Included are Edith Jones Wharton, the first woman to win a Pulitzer Prize, and Fifth Circuit Court of Appeals Judge Edith H. Jones. Though the ladies of the EJP probably do not share Judge Jones’s judicial philosophy, they pay her the compliment of being “one tough cookie.”<sup>2</sup> Judge Jones is one tough cookie, indeed, and her concurring Fifth Circuit opinion in *McCorvey v. Hill* further testifies to this truth.

*McCorvey v. Hill* affirmed the denial of Norma McCorvey’s motion for relief under Federal Rule of Civil Procedure 60(b) from a thirty-two year-old judgment in her favor.<sup>3</sup> That may not

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1. The Edith Jones Project, <http://www.edithjonesproject.com/> (last updated May 4, 2005). See also Who is Edith Jones???, [http://www.edithjonesproject.com/who\\_is\\_edith\\_jones.htm](http://www.edithjonesproject.com/who_is_edith_jones.htm) (last visited May 20, 2005). Fans of the EJP can listen to them on Maine public radio or book them for a performance through their website.

2. *Id.*

3. *McCorvey v. Hill*, 385 F.3d 846, 850 (5th Cir. 2004). The district court held that McCorvey’s motion was not filed within a reasonable time after final judgment was entered. *Id.* at 847; FED. R. CIV. PROC. 60(b) states: “On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final

seem unusual at first glance, but to fully understand the implications of this unique case, one has to know Ms. McCorvey's former pseudo-name: Jane Roe. Her original case was styled *Roe v. Wade*.<sup>4</sup> For anyone living under a rock the last thirty-two years, *Roe v. Wade* was the Supreme Court decision that found the abortion right within the U.S. Constitution and held unconstitutional any substantive state restriction on access to abortion. Norma McCorvey, a.k.a. Jane Roe, now wants *Roe v. Wade* overturned.

A Fifth Circuit panel unanimously agreed that, regardless of the merits of McCorvey's Rule 60(b) motion, McCorvey had presented no live case or controversy.<sup>5</sup> Accordingly, her case was moot and her appeal was dismissed.<sup>6</sup> The decision was rendered September 17, 2004 and was easy to miss amid the growing media circus surrounding the presidential election. Moreover, it was the result commentators on both sides of the abortion debate expected.<sup>7</sup> Few gave the Rule 60(b) motion much of a chance to succeed. Accordingly, the decision slipped by largely unnoticed.

What should not have slipped by was Judge Edith H. Jones's remarkable concurrence in *McCorvey*. Despite having dutifully crafted the panel opinion, Judge Jones felt compelled to write a strikingly candid concurrence. The subject matter of her concurrence gives us some clue about her motivations. Excepting Justice White's dissent in *Doe v. Bolton*,<sup>8</sup> it is difficult to find a stronger call (at least in the Federal Reporter) for the reassessment of *Roe v. Wade* and its critical factual premises. Such candid and forthright assessments are rare from judges who are

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judgment, order, or proceeding . . . . The motion shall be made within a reasonable time . . . ."

4. 410 U.S. 113 (1973).

5. The panel actually disagreed with the basis for the district court's dismissal of McCorvey's Rule 60(b) motion. *McCorvey*, 385 F.3d at 849 n.4. However, the question of mootness was held to be "antecedent" to McCorvey's claim. *Id.* at 848.

6. McCorvey's case was considered moot because the legal framework she wished to reinstate, i.e., pre-*Roe* Texas abortion laws, had been repealed and no longer existed. *Id.* at 849. The United States Supreme Court has declined to issue certiorari.

7. See Lisa Falkenberg, *Court to hear Motion on Roe v. Wade*, FT. WORTH STAR-TELEGRAM, Feb. 20 2004 at 5B; Shannen W. Coffin, *A Tough Boat to Roe*, NAT'L REV. ONLINE, Sept. 16, 2004 at <http://www.nationalreview.com/coffin/coffin200409160630.asp>.

8. *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting) (describing the Court's decisions in both cases as an "exercise of raw judicial power").

already on the Supreme Court bench, and even rarer from those who are not.<sup>9</sup>

Judge Jones believed her concurrence was necessary because “the serious and substantial evidence [Ms. McCorvey] offered could have generated an important debate over the factual premises that underlay *Roe*.”<sup>10</sup> These “factual premises” form nothing less than the basis for *Roe*’s two critical determinations: (1) that constitutional privacy rights encompass the right to abort, and (2) that the unborn fetus merits no legal protection sufficient to justify any significant restriction on abortion rights.<sup>11</sup> Furthermore, Judge Jones also believed that the judicial means used to lodge the abortion right within the Constitution has made it immune from reassessment by legislative or even judicial means, even in the light of these significant changed factual assumptions.<sup>12</sup> Thus, Judge Jones’s concurrence is a call to take up arms (figuratively, of course) against *Roe*.

While an infinite number of monkeys with typewriters might need an infinite amount of time to crank out *Macbeth*, they could easily pound out *Roe* in a few hours. Perhaps, it is unscholarly, or even a tad unserious, to make such a comparison with a majority opinion of the Supreme Court of the United States. So be it. Confronted with the toxic cocktail of false assumptions and abortions of logic that is *Roe v. Wade*, proper respect is difficult to muster. The evidence that McCorvey has assembled covering

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9. Another example is Justice Thomas’s dissent in *Stenberg v. Carhart*, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting). Contrary to the opinion of the United States Senate Minority Leader, this author found Justice Thomas’ opinion to be exceedingly well written.

10. *McCorvey*, 385 F.3d at 850. Judge Jones briefly touches on the historical irony of the panel’s denial of McCorvey’s appeal for mootness. The *Roe* court had made an exception to precisely that doctrine to decide the case in her favor in 1973. *Id.*

11. 410 U.S. at 153, 158. *Roe*’s failure to provide the basis for any meaningful or substantive justification to restrict access to abortion will be repeatedly referenced in this essay. It may be argued that this is technically inaccurate. It is true that the *Roe* Court claimed not to have created an absolute abortion right. The *Roe* court stated that a State “interested in protecting fetal life after viability” may “go so far as to proscribe abortion [after viability], *except when it is necessary to preserve the life or health of the mother*.” *Id.* at 164 (emphasis added). While this would appear to create a significant sphere of protection for the unborn fetus, *Doe v. Bolton*, 410 U.S. 179 (1973), *Roe*’s companion case, allowed the exception to swallow the rule. In describing what “health” meant, the court stated that “all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the wellbeing of the patient” must be considered. *Id.* at 192. Any one of these factors may, within the sole judgment of the woman and, presumably but not necessarily, her doctor, justify terminating the fetus without state interference. Thus, the sphere of protection a State may offer to an unborn fetus is now, at best, theoretical. This essay will not pretend otherwise.

12. *McCorvey*, 385 F.3d at 852.

the last thirty-two years and forty million-plus abortions is partly to blame for this, but there were significant false assumptions and misrepresentations present within *Roe* the day it was decided. Thus, we cannot blame *Roe*'s problems on mere ineptness or lack of foresight. Considering *Roe*'s problems as a whole, the oft-quoted condemnation of *Roe* as an "abomination" is just and appropriate.<sup>13</sup> The display of hubris and malevolence in the *Roe* opinion merits no other conclusion. So, let us make that an infinite number of *demon* monkeys pounding away on their typewriters.

Perhaps being flippant about *Roe* is inappropriate for other reasons. Should one really make light of something so dreadful? C.S. Lewis confronted this same question by prefacing his *Screwtape Letters*, a purported collection of letters from the Archdemon Screwtape to his nephew Wormwood, with quotes from Martin Luther and Thomas More.<sup>14</sup> From Luther, "The best way to drive out the devil, if he will not yield to texts of Scripture, is to jeer and flout him, for he cannot bear scorn."<sup>15</sup> More agreed, "The devil . . . the prowde spirit . . . cannot endure to be mocked."<sup>16</sup> Thus, Lewis communicated to his readers one of his purposes in writing the *Screwtape Letters*: to make a mockery of the devil. What is true of the devil is also true of *Roe v. Wade*. Ironic is it not? In writing about *Roe*, a mocking tone is always appropriate.

## II. NORMA MCCORVEY VS. JANE ROE

What was the "serious and substantial evidence" Ms. McCorvey offered that challenges the factual assumptions of *Roe*?<sup>17</sup> Judge Jones placed them into four distinct categories: (1) significant and credible testimony and scientific studies concerning the physical and emotional harm experienced by women who have had abortions; (2) evidence challenging *Roe*'s assumption of a close consultation between the woman and the doctor performing the abortion; (3) evidence challenging *Roe*'s assumptions concerning the burden of an unwanted pregnancy and child; and (4) evidence concerning advancements in

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13. See *infra* note 140 and accompanying text.

14. *Introduction to C.S. LEWIS, THE SCREWTAPE LETTERS* at VII (HarperCollins 2001).

15. *Id.*

16. *Id.*

17. *McCorvey v. Hill*, 385 F.3d 846, 850 (5th Cir. 2004) (Jones, J., concurring).

neonatal and medical science that challenge *Roe's* assumptions about the existence and moral worth of fetal life.<sup>18</sup>

The first three categories all concern women's health, and form the underpinnings of *Roe's* conclusion that constitutional privacy rights are broad enough to encompass the abortion decision. *Roe* stated this very clearly even if it was less clear *how* that was actually the case:

This right of privacy . . . is broad enough to encompass a women's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by childcare. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.<sup>19</sup>

Thus, we come very early to one of the most obvious problems with relying on an infinite number of monkeys to do your dirty work (aside from the flying feces): conclusory logic. Conveniently, constitutional privacy rights had been previously "defined" by past Supreme Court precedents to include "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'"<sup>20</sup> Thus, the *Roe* Court needed no evidence or support, other than the rhetorical liturgy quoted *supra*, to find that abortion fell within the confines of this definition. Maybe the Court simply squinted really hard at those words. In any event, abortion's status as a final solution for the problems associated with unwanted pregnancies was a sufficient basis, for the *Roe* Court, to make it a constitutional right.<sup>21</sup> The

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18. *Id.* at 850–52.

19. *Roe*, 410 U.S. at 153.

20. *Id.* at 152.

21. There are persuasive arguments why this conclusion was not warranted separate and apart from the validity of *Roe's* assumptions about abortion's positive impact on women's health. These arguments are beyond the scope of this essay.

conclusory nature of this rationale has inspired many well-founded criticisms since 1973, but we will primarily concentrate on what the evidence developed since 1973 has to say about those assumptions.<sup>22</sup> In any event, we can see that the Court's belief that abortion benefited and advanced women's health was a critical assumption for its determination. How viable is that determination in light of the evidence accumulated over the last thirty-two years and 40 million-plus, to use the Court's phrase, "unwanted" children?<sup>23</sup>

### A. *Harm from Abortion*

*Roe* never seriously considered the possibility that women might suffer harm *from* abortion. *Roe's* interest in "preserving and protecting the health of the pregnant woman" meant establishing a broad abortion right.<sup>24</sup> Thus, abortion was synonymous with good health. Access to abortion was something to be *expanded*, not restricted.

The only harm to women considered by *Roe* was the harm a woman might suffer from *not having* an abortion.<sup>25</sup> For example, the Court stated:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent.<sup>26</sup>

Thus, for *Roe*, abortion was a positive act to be broadly licensed, if not encouraged. Abortion was an act of liberation: freeing the pregnant woman, and all women, from unwanted occupying forces.

Contrary to this view, McCorvey has presented significant evidence that abortion has serious negative consequences on women's health. McCorvey offered more than one thousand

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22. See, e.g., ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH* 172 (ReganBooks 1996); STEPHEN B. PRESSER, *RECAPTURING THE CONSTITUTION 192-97* (Regnery Pub. 1994).

23. *Roe*, 410 U.S. at 153.

24. *Id.* at 162-63. But, it is only after that interest has become "compelling." For the *Roe* Court this occurred after the first trimester. States could regulate those who could perform abortions and their licensing as well as abortion facilities.

25. *Id.* at 153.

26. *Id.*

affidavits from post-abortive women claiming emotional damage and impaired relationships from their decision to abort.<sup>27</sup> Moreover, McCorvey offered credible scientific studies reporting that women may be affected emotionally and physically for years afterward and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions.<sup>28</sup>

Generally, the affidavits from post-abortive women describe significant emotional and physical tolls, including depression, grief, drug and alcohol abuse, divorce, and a litany of other harms never considered by the *Roe* Court.<sup>29</sup> The expert affidavit of Doctor David Reardon confirms that the experiences of these women were not merely anecdotal. Dr. Reardon's affidavit states: "After thirty years of experience with legal abortion in the United States, it is now clear that mortality risks associated with abortion significantly exceed those associated with childbirth, both in the short term (under one year) and in the longer term."<sup>30</sup> Dr. Reardon continues:

Newly found research has discovered that women who abort, compared with women who carry their pregnancy to term, are more likely to require psychiatric care, to suffer from anxiety, sleep disorders, sexual dysfunction, eating disorders, promiscuity, depression, and other negative emotions, which can cause behavioral problems in the children born to them subsequently. They are more likely to remain on Medicaid longer, to have more subsequent health care claims, and to have more subsequent pregnancies and miscarriages. In addition, aborting women are more likely to commit suicide, abuse drugs or alcohol, and have higher rates of divorce.<sup>31</sup>

Of course, we have read all about this evidence in the *New York Times* and it has been thoroughly discredited and debunked, right? No, we have not. Indeed, the women behind this evidence and their experiences merit no concern from any so-called "women's rights" groups for whom abortion is the highest form of constitutional expression. Their evidence directly contradicts *Roe's* critical assumption that abortion is a positive right or even

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27. *McCorvey*, 385 F.3d at 850 (Jones, J., concurring).

28. *Id.*

29. Some of these affidavits may be read online at <http://www.operationoutcry.org/stories/storiesDir.asp>.

30. Petitioner's Brief, n. 46 citing Affidavit of Dr. David Reardon, *McCorvey v. Hill*, 125 S.Ct. 1387 (No. 04-967).

31. *Id.*

a safe alternative to pregnancy.<sup>32</sup> Yet, as Judge Jones notes, *Roe* has stolen our ability to review this evidence or act on it.

With more than a million abortions taking place every year in the United States, evidence that abortion actually causes significant physical and mental harm raises serious questions about the societal health concerns of abortion. Thus, abortion becomes less a matter of individual choice and more a matter of social policy. This fact alone calls into serious question the wisdom of the Court's extension of constitutional privacy protections to a procedure that actually harms women. Moreover, this evidence enhances the state's interest in regulating a procedure that causes more harm than good and in severely restricting *access* to abortion, regardless of the constitutional question.

The *Roe* Court never considered the possible harm caused by abortion, or the potential problems with unleashing a broad abortion right despite centuries of legal restraints and prohibition still retained by a majority of American state legislatures at that time. At the same time, the *Roe* Court robbed the American people of the ability to reconsider this unprecedented break from tradition and law. Does ignorance of the potential consequences of these actions truly excuse them?

#### B. *An Informed Decision?*

The second category of evidence noted by Judge Jones concerns the close consultation between doctor and patient *Roe* presumed to be a routine part of the abortion decision. The presence of this sort of medical consultation was another important factual assumption for *Roe*. When the *Roe* Court described the various health factors and risks associated with pregnancy, Justice Blackmun stated: “[a]ll these are factors the woman and her responsible physician necessarily will consider in consultation.”<sup>33</sup> Repeatedly, the doctor was presumed to be involved in the decision, providing guidance and medical judgment.<sup>34</sup> This presumption was critical to *Roe*'s placement of the decision to abort within the umbrella of constitutional privacy.

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32. 410 U.S. at 149.

33. *Id.* at 153.

34. *Id.* at 156, 163.

Ms. McCorvey's evidence indicates that this assumption was not realistic. McCorvey submitted affidavits from workers at abortion clinics that testify to the absence of any meaningful medical or emotional counseling at their clinics.<sup>35</sup> The reports of former and current abortion clinic directors reveal an abortion clinic that resembles an assembly line or a discount muffler shop, rather than a doctor's office:

In the typical abortion clinic, the staff members who counsel the patients about the procedure, examine the patients, estimate gestation, perform any required tests (e.g., pregnancy tests and blood samples), record vital signs, prepare the patient for surgery, and assist patients through the recovery room only have on the job training. Typically, they are not licensed medical or mental health care professionals. In almost all cases, the physician does not even see the patient until he enters the room to begin the operation. Often the abortionist doesn't even know the patient's name, or vice-versa. By delegating responsibility and minimizing patient/doctor interaction, abortionists free themselves to work solely on performing the actual abortions in the least amount of time possible.<sup>36</sup>

Consider also the comments of Claudia, an abortion clinic employee in San Diego, about the efforts made to "consult" with women:

Most of us abortion providers don't have time. We at least at our clinic, we don't specifically counsel every woman. I like that—today's term—'consult with women' as a part of getting them—as a part of the decision of making an abortion rather than counseling. So I used to be really pro-counseling but now I'm really changing my thinking in term—in that term.<sup>37</sup>

So, "consult" is really just another term for "closing the deal." Such accounts make one wonder whether there is a set of steak knives for the "counselor" that moves the most product? Contrast these accounts with the 1970 resolutions of the American Medical Association (AMA) recounted by *Roe*. At the time, the AMA fully accepted the liberalization of abortion law

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35. *McCorvey*, 385 F.3d at 851 (Jones, J., concurring).

36. Petitioner's Brief, n. 69 citing Affidavit of Dr. David Reardon, *McCorvey v. Hill*, 125 S.Ct. 1387 (No. 04-967).

37. *Id.*, n. 216 (citing Transcript from the National Abortion Federation, Sixteenth Annual Meeting, April 12–15, 1992, San Diego, CA).

in certain jurisdictions, and emphasized that abortion be administered based on “the best interests of the patient,” “sound clinical judgment,” “informed patient consent,” and not based on a “mere acquiescence to the patient’s demand.”<sup>38</sup>

Thus, *Roe*’s assumptions about the consultation between a woman and her doctor appear to be rosy at best. McCorvey’s evidence strongly suggests that *Roe*’s assumptions bear no resemblance to the practice of abortion today.

What difference would this sort of evidence make? *Roe*’s assumptions about doctor-patient counseling were an important part of the Court’s rationale for extending constitutional privacy rights to abortion. Moreover, *Roe* noted that evidence of the health risks of pre-*Roe* illegal “abortion mills” strengthens, rather than weakens, the State’s interest in regulating conditions under which abortions are performed.<sup>39</sup> Thus, it follows that evidence of the failure to provide adequate counseling or to foster safe medical practices at post-*Roe* abortion mills at the very least would strengthen the State’s interest in regulating abortion clinics.

One can imagine that this kind of evidence might justify enhanced restrictions on access to abortion. For example, *Roe*’s “history” of abortion law examined the liberalized English abortion laws of the 1960s in some detail. While legalizing abortion, the laws required that an abortion be allowed for health reasons only upon the consent of multiple physicians.<sup>40</sup> Such a restriction would at least ensure that the sort of informed consent presumed by the *Roe* Court would in fact take place. Of course, though these laws were “liberal” at the time of *Roe*, they would undoubtedly be condemned as draconian by today’s abortion advocates.

This evidence of the absence of an informed consent and the descriptions of these new constitutionally-approved abortion mills again brings into question the wisdom of the *Roe* Court’s extension of constitutional privacy to the abortion procedure. McCorvey’s evidence suggests that the abortion decision today more closely resembles the food counter at a McDonald’s (Marque: “More than forty-two million served”) than the sacred doctor-patient decision presumed to exist by the *Roe* Court.

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38. 410 U.S. at 143.

39. *Id.* at 150.

40. *Id.* at 138–40.

*C. The Burden of Unwanted Pregnancy*

Judge Jones also noted McCorvey's evidence challenging *Roe's* assumptions about the burdens of an unwanted pregnancy. The litany of harms the *Roe* Court associated with bringing an unwanted child to term was a long one.<sup>41</sup> *Roe* did not paint a pretty picture of motherhood and maternity:

Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.<sup>42</sup>

These harms formed the final critical factor to *Roe's* extension of constitutional privacy protection to abortion. Adoption was, of course, an option that would solve many of the harms identified by *Roe*. But, *Roe* never considered adoption to be an alternative that had any ameliorative effect on the burden imposed by an unwanted pregnancy. This was not because the Court had discounted adoption as a viable abortion alternative. It was simply never mentioned.

McCorvey submitted new evidence concerning the changed social context of unwed motherhood that challenges *Roe's* assumptions about the harms associated with such motherhood.<sup>43</sup> McCorvey noted that the ostracism so prevalent for an unwed mother thirty years ago, and relied upon by *Roe*, has been dramatically reduced today.<sup>44</sup> In addition, she submitted evidence concerning the development of various medical programs, social services, and other programs that have reduced the stigma and burden borne by unwed mothers.<sup>45</sup> In her concurrence, Judge Jones cited the fact that forty states have adopted "Baby Moses" or "safe haven" laws providing unwed mothers with the option, without threat of legal sanction, of leaving a newborn directly in the care of the State until it can be adopted.<sup>46</sup>

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41. *Id.* at 153.

42. *Id.*

43. *McCorvey*, 385 F.3d at 851 (Jones, J., concurring).

44. *Id.*

45. *Id.*

46. *Id.*

To be sure, there is still a temporary burden to pregnancy per se, as any pregnant mother would forthrightly state.<sup>47</sup> However, *Roe* was concerned primarily with resolving the *permanent* harms associated with raising and providing for an unwanted child. McCorvey's evidence challenges *Roe's* assumption that abortion presents the only way to avoid the burdens of an unwanted pregnancy and suggests that many of *Roe's* presumed burdens no longer exist or have been greatly ameliorated. Thus, this evidence calls into question the degree of burden a state's restrictions on abortion really place on women.

D. *The Bases for Roe's Abortion Right are No Longer Viable*

The challenge these first three categories of evidence present to *Roe* is significant. Judge Jones's willingness to highlight this evidence is justified. There is nothing less at stake than the viability of *Roe's* critical determination that abortion is a right guaranteed by the Constitution. McCorvey's evidence demolishes *Roe's* one-sided assumptions concerning the benefit of abortion to women's health, the private nature of the doctor-patient abortion decision, and the burden of unwanted pregnancy.

Perhaps each of these points could be countered. Perhaps the testimony of thousands of other women who do not regret their decision to abort could be submitted. Perhaps evidence that inadequate counseling is not typical of abortion clinics across the country could be submitted. Perhaps the burden of an unwanted pregnancy is still too great to prohibit the final solution abortion is supposed to provide. Perhaps, perhaps, perhaps; the problem is that none of these potential challenges are sufficient to resuscitate *Roe's* absolutist assumptions in the wake of McCorvey's evidence.

*Roe* did not establish an abortion right that, while carrying certain costs, was justified on the whole by the benefits. Apparently, the monkeys banging on the keys for *Roe* were not capable of that sort of finesse. There was no balancing of rights,

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47. This would be right after punching you in the nose for suggesting otherwise. This especially applies to mothers who are currently pregnant. It has been the author's experience that mothers who are not pregnant tend to downplay the hardships of their past pregnancies. Whether this is just the author's experience or a demonstrable scientific phenomenon of hormonally induced revisionist history necessary for the propagation of the species is an open question.

despite *Roe*'s protestations to the contrary. The *Roe* Court could have engaged in that sort of analysis, but it did not. Perhaps this was the result of a concern that it would have looked too much like what a legislature would do. Here in the year 2005, such a concern seems quaint.

Regardless, *Roe* was absolute about the benefits of abortion. For *Roe*, abortion was a liberating act, a good, in and of itself. To the extent that harm from abortion was considered at all, it was something the Court presumed to have been overcome by the advancement of medical science.<sup>48</sup> That critical assumption was the proximate cause of the Court's establishment of the constitutional right to abort. Yet, today, more than thirty years later, there is significant evidence that the practice of abortion has wrought great harm upon thousands of women who chose, much to their regret, to exercise their rights under *Roe*. McCorvey's evidence reveals *Roe*'s utopian assumptions about the efficacy of abortion to be pure fantasy. So too, *Roe*'s other absolutist assumptions concerning the role of a physician in the abortion decision and the burden of an unwanted pregnancy do not hold up under scrutiny. To legitimize *Roe*, in light of McCorvey's evidence, *Roe*'s defenders must do more than simply counter McCorvey's evidence. They must demonstrate that evidence to be false, and that is something they can never do.

#### E. *Roe*'s Condemnation of Unborn Life

The last category of evidence considered by Judge Jones targeted *Roe*'s determination of the moral worth and value of fetal life. This was the second critical determination of *Roe*, and perhaps, the more critical of the two. Indeed, the Court's entire decision was completely dependent upon a particular view of fetal life, a particularly dim view at that. If the unborn fetus could be considered a "person" under the Constitution, then the privacy rights of the mother would have to yield to the more fundamental right of life possessed by the unborn fetus and guaranteed by the Constitution. But, even if the fetus was not a person imbued with constitutional rights, a State might still find sufficient justification to protect the unborn fetus from another source, such as a consensus about the moral status of the fetus and its right to life.

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48. *Roe*, 410 U.S. at 149.

Thus, the *Roe* Court had to discount both bases for providing state-sponsored protection for the unborn fetus. McCorvey now contends that current medical science reveals *Roe*'s consideration of fetal life to be deficient. Specifically, McCorvey argues that there is overwhelming evidence to prove the medical fact that life begins at conception.<sup>49</sup>

*Roe*'s failure to consider a new medical consensus about the unborn fetus might be considered understandable as a matter of civil procedure. But, a close inspection of the assumptions and logic *Roe* used to reach its conclusion reveals something more sinister. Indeed, it is apparent that the *Roe* Court did everything it could to *avoid* finding a justification to protect fetal life.

Accordingly, we will examine the assumptions and underpinnings of this most critical part of *Roe* in some detail. We will find that it is not simply the track record established by thirty-two years and forty million-plus abortions that calls *Roe* into question. *Roe* was a mistake the day it was decided. Moreover, we will find that this was not the result of accident or ineptness. *Roe*'s actions were the result of willful malfeasance and should be universally condemned.

### 1. Is the Fetus a Person?

First, *Roe* considered whether the fetus was entitled to any constitutional rights as a "person" under the Fourteenth Amendment.<sup>50</sup> To possess such rights, one must be *capable* of possessing them. One must be a "person" under the law.<sup>51</sup> *Roe* admitted that this was the potential trump card for the unborn fetus: "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."<sup>52</sup> Thus, the Court could not equivocate about this question.

Looking *strictly* to the confines of the Constitution, specifically the Fourteenth Amendment, *Roe* determined that every use of "person" had only a post-natal application and that none had

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49. Petitioner's Brief at 10, *McCorvey v. Hill*, 125 S.Ct. 1387 (No. 04-967).

50. 410 U.S. at 156.

51. U.S. CONST. amend. XIV, § 1, cl. 3 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

52. 410 U.S. at 156-57.

any possible “pre-natal” application.<sup>53</sup> Combining this point with a previous “insight” concerning nineteenth century abortion law convinced the Court that the fetus had no rights under the Constitution of the United States. As we will see, this was a deduction worthy of the Wannsee Conference.<sup>54</sup>

As a preliminary observation, where was this sort of strict textualist construction of constitutional language when the question of whether abortion was a right guaranteed by the Constitution was considered a mere five pages before? Where does the text of the Constitution support the right to abort? To the point, what significance was it (especially to *this* Court) that the fifteen references to “person” within the Constitution had only a post-natal application? Logically, that did not necessarily preclude the existence of any rights for a pre-natal person. Indeed, the “strict language” of the Fourteenth Amendment that the Court supposedly found so important made no such exclusion.

Moreover, there clearly *was* a possible pre-natal application of the rights guaranteed by the Due Process clause of the Fourteenth Amendment, which states: “nor shall any State deprive any person *of life*, liberty, or property, without due process of law.”<sup>55</sup> Pre-natal life is, by definition, capable of possessing life. Hence, this would qualify as a pre-natal application of “person.” Once again, either through ineptness or malfeasance, this particular application did not occur to the chattering monkeys of the *Roe* Court.

But, this was only part of *Roe*’s basis for declaring that the fetus was not a person possessing any constitutional right to life. The proverbial icing on the cake was the Court’s “observation, *supra*, that throughout the major portion of the nineteenth century prevailing legal abortion practices were far freer than they are today, persuades us that the word “person” . . . does not include the unborn.”<sup>56</sup> Thus, we see that the aforementioned history of

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53. *Id.* at 157. Of course, as everyone knows, the Fourteenth Amendment was passed to ensure the freedom of all post-natal citizens as opposed to pre-natal ones. After all, why else was the Civil War fought?

54. On January 20, 1942, a group of National Socialist elites met in the Wannsee Villa near Berlin to discuss “the Jewish Question.” The Conference has been recognized as the first discussion of the ‘final solution’ and the records and minutes were used during the Nuremberg Trials. Reinhard Heydrich and Adolf Eichmann led the conference. See [http://en.wikipedia.org/wiki/Wannsee\\_conference](http://en.wikipedia.org/wiki/Wannsee_conference).

55. U.S. CONST. amend. XIV, § 1, cl. 3 (emphasis added).

56. 410 U.S. at 158.

abortion law was a critical underpinning for *Roe's* denial of any constitutional protection for unborn life.

An inspection of that history and whether it compels the conclusion the Court declared follows. We will see that *Roe's* history of abortion law was not meant merely to inform. Rather, it was the set-up for *Roe's* climactic conclusion that the fetus was not a person and that it had no rights worthy of protection by the Constitution. Thus, the history itself is a fundamental underpinning of the decision. Too bad it's just a farce.

## 2. History of Abortion Law According to *Roe*

The farcical status of *Roe's* history of abortion was not due to a lack of ambition. The history began with a discussion of ancient Persian, Greek, and Roman attitudes about abortion.<sup>57</sup> We are told that Greek thinkers actually *commended* abortion.<sup>58</sup> Next, the history tackled the Hippocratic oath and revealed its absolute abortion prohibition to be nothing more than Pythagorean dogma.<sup>59</sup> The history then skipped a thousand years or so (imagine the Mel Brooks classic *History of the World: Part I* and you get the idea) and traveled through English common law and the common law's gradual settling upon "quickening" as a point of distinction in recognizing protections for the fetus.<sup>60</sup> As we will see, the notion of "quickening" was very important to the *Roe* Court.

The history also examined English statutory law, beginning with Lord Ellenborough's Act of 1803 that made the abortion of a fetus after quickening a capital crime and an abortion prior to quickening a felony.<sup>61</sup> *Roe* ended its treatment of English statutory law with a consideration of the aforementioned liberalized 1967 English abortion law that allowed a physician, upon the concurrence of two other physicians, to perform an abortion only under certain conditions, such as a threat to the life or physical or mental health of the mother.<sup>62</sup>

Perhaps surprisingly to twenty-first century Court observers, the history also considered American abortion law. Specifically,

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57. *Id.* at 130.

58. *Id.* at 131.

59. *Id.*

60. 410 U.S. at 133.

61. *Id.* at 136.

62. *Id.* at 137.

the Court was concerned with demonstrating that the abortion prohibitions at issue (with their origins in the late 1800s) were out of step with earlier American law and the inherited common law.<sup>63</sup> This was a critical point for the Court, and one with grave implications for *Roe's* ultimate conclusion.

Non-legal sources were also considered. Exactly why these sources were considered is obvious, even if they should have no bearing on what the Constitution says about abortion. The evolution of the American Medical Association's position was explored in some detail. Of particular interest was the AMA's role in the passage of more restrictive abortion prohibitions in the latter part of the nineteenth century. For example, the Court noted that in 1857 (is this really the *late* 1800s?) the AMA's Committee on Criminal Abortion condemned abortion as an "unwarrantable destruction of human life" and called upon state legislatures to revise their abortion laws.<sup>64</sup> However, the Court also noted the evolved, more liberal view of the AMA in 1970, and its refusal to categorically condemn the practice of abortion.<sup>65</sup>

Finally, the Court concluded with the American Bar Association's 1972 approval of the Uniform Abortion Act and its "enlightening Prefatory Note."<sup>66</sup> That note stated:

This Act is based largely upon the New York abortion act following a review of the more recent laws on abortion in several states and upon recognition of a more liberal trend in laws on this subject. Recognition was given also to the several decisions in state and federal courts which show a further trend toward liberalization of abortion laws, especially during the first trimester of pregnancy.<sup>67</sup>

The Court did not admit why it found this note "enlightening," but it is not difficult to guess why. The Court found it enlightening because it was exactly the sort of liberalized approach the Court hoped to impose. This approach stood in direct contrast to the clear majority of states that were, either out of stubbornness or inaction, holding on to their

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63. *Id.* at 140.

64. 410 U.S. at 141.

65. *Id.* at 144.

66. *Id.* at 147.

67. *Id.* at 147 n.41.

abortion prohibitions. But, this fact, in and of itself, could not be the stated basis for overturning these abortion statutes.<sup>68</sup>

The *Roe* Court needed something more. Nineteenth century abortion law would provide the key:

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the nineteenth century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the nineteenth century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.<sup>69</sup>

Thus, *Roe's* history was not meant to merely demonstrate a modern trend toward liberalizing abortion laws. We are meant to gain the sense that the Court's decision was not a radical departure from the traditional norms of the law that existed more than 100 years before *Roe*. Thus, we should believe that the abortion laws at issue were the departure from the norm, and *Roe* was merely restoring a right that had previously existed. But how reliable was this history? Let us examine a few examples that do not quite fit the Court's view of the facts and then turn to the validity of that key insight about nineteenth century abortion law.

#### a. *Roe's Big Fat Greek Mistakes*

The Court's treatment of ancient attitudes about abortion is worthy of censure. First, the declaration that "[m]ost Greek thinkers . . . commended abortion, at least prior to viability" was more than a slight stretch.<sup>70</sup> The Court cited Aristotle's *Politics* Book VII, part 16 as an authority for that statement. It is clear that Aristotle was not an anti-abortion absolutist. Indeed, Aristotle found the practice of abortion, and even exposure,<sup>71</sup> to

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68. It might be sufficient today, but in 1973, we were still a long way of from *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

69. 410 U.S. at 140–41.

70. *Id.* at 131 (emphasis added).

71. "Exposure" refers to the ancient Greek practice of abandoning an unwanted newborn child to die from exposure to the elements, starvation, dehydration, or wild

be acceptable in some cases. However, in this part of his *Politics*, Aristotle discussed the circumstances in which abortion was appropriate and those in which it was not.<sup>72</sup> Even in those appropriate cases, he stated “. . . let abortion be procured before sense and life have begun; what may or may not be lawfully done in these cases depends on the question of life and sensation.”<sup>73</sup>

Would that the Supreme Court “commend” abortion in such a way! This was no commendation. Aristotle was setting a rule that allowed abortion only before life was considered, at that time, to have begun. While certainly not the views of a “radical pro-lifer,” Aristotle was declaring that the presence of life in the unborn fetus should dictate the lawfulness of abortion. This is a long way from giving free license to abortion. It is most certainly not *commending* abortion. Moreover, it reflects what will become a current throughout the later abortion laws considered by the *Roe* Court: that is the effort to extend legal protection to the unborn fetus. Instead, the *Roe* Court turned a statement designed to establish a prohibition of abortion (as narrow as it was) into a prescription for abortion.

The Court’s treatment of Hippocrates’ Oath deserves more severe criticism. Evidently, the Court was not creative enough to turn this clear abortion prohibition into a prescription. After all, the statement “I will not give a woman an abortive remedy,” does not offer much wiggle room.<sup>74</sup> Instead, the Court attempted to marginalize the Oath’s importance. The Court cited with great weight the views of one historian, L. Edelstein, who believed the Oath was merely “a Pythagorean manifesto and not the expression of an absolute standard of medical conduct.”<sup>75</sup> Furthermore, for this historian, the Oath represented “only a small segment of Greek opinion” and “it certainly was not accepted by all ancient physicians.”<sup>76</sup> It was only much later that the Oath “came to be popular,” considered “the nucleus of all

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animals. Judge Greer and Michael Schaivo can take some solace in Aristotle’s sympathy for these acts.

72. Aristotle, *POLITICS*, BOOK VII, pt. 16. See, e.g., [http://www.constitution.org/ari/polit\\_07.htm](http://www.constitution.org/ari/polit_07.htm).

73. *Id.*

74. *Roe*, 410 U.S. at 131.

75. *Id.* at 132 (citing L. EDELSTEIN, *THE HIPPOCRATIC OATH* 64 (1943)).

76. *Id.*

medical ethics,” and “applauded as the embodiment of truth.”<sup>77</sup> Thus, *Roe* concluded that these facts offered “a satisfactory and acceptable explanation of the Hippocratic Oath’s *apparent* rigidity,” within a “historical context.”<sup>78</sup>

“Wink, wink, nudge, nudge,” the *Roe* Court was in effect saying. “Pay no attention to that ‘supposed’ legendary Oath! Few of Hippocrates contemporaries even thought it worth following at the time. It was only because later Christians found it to be consistent with their own worldview that it became a big deal at all.” Thus, we are left to dismiss the Hippocratic Oath (and more importantly, its strong condemnation of abortion) from our minds as the product of mere ancient mysticism.

But, even assuming the views of this one historian were accurate, *Roe* missed two critical points. First, the fact that Hippocrates’ Oath was not fully appreciated or widely followed during his own time is irrelevant to the fact that it became, as the Court cited, “the embodiment of truth.”<sup>79</sup> The important point is that later generations cherished its moral statements and held it to be a universal standard to follow. Would Harry Blackmun have dismissed the findings of a Galileo or a Darwin because they represented only a “small segment of opinion,” were not accepted by their contemporaries, and only later became popular? Surely the answer is no, *unless they condemned abortion*.

Second, what of the later ethicists and medical professionals that came to revere the Oath as the “nucleus of all medical ethics”?<sup>80</sup> Why were their views *not* worthy of *Roe*’s consideration? Indeed, the *Roe* Court would never have been aware of anything called the Hippocratic Oath but for countless generations before it that found the Oath worthy of honor and respect. Yet, the Court did not bother to mention the circumstances under which Hippocrates’ Oath became a solemn vow for physicians even to this day.<sup>81</sup>

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77. *Id.*

78. *Id.* (emphasis added).

79. *Roe*, 410 U.S. at 132.

80. *Id.*

81. Leon Kass has offered such criticism of Edelstein, the *Roe* Court’s Oath authority, “He never raises for himself or for us the question of whether, despite its dated beginnings, it might nevertheless speak truly and timelessly.” LEON KASS, *TOWARDS A MORAL NATURAL SCIENCE* 227 (Free Press 1985).

*Roe*'s failure to consider these points and its treatment of Aristotle demonstrates that *Roe* was not interested in a fair treatment of ancient Greek attitudes about abortion. Instead, the Court's agenda was to demolish any foundation of support for abortion prohibitions from these ancient sources. The rationale for this is easy to see. Challenging a prohibition that has been revered by ethicists and medical professionals for two thousand years is one thing. Ignoring the mysticism of an ancient Greek zealot is much easier to do.

But, why do the thoughts of two Greeks who lived more than 2000 years ago even matter today? Both Aristotle and Hippocrates were men with profound impacts beyond their own time. Their ideas have rippled throughout time, impacting successive generations of philosophers, theologians, and doctors even unto our present time. It is not simply ancient history we are discussing when we discuss the ideas of Aristotle and Hippocrates. Instead, we are discussing the underpinnings of modern ethics and philosophy. Accordingly, we can at least understand why *Roe* wanted to find some support for (or neutralize opposition against) a liberal abortion right within these sources.

The more important question is why was the *Roe* Court willing to misrepresent Aristotle's views and marginalize the Hippocratic Oath? Was this simply a mistaken reading of history? Given the facts, that explanation is far too charitable. The *Roe* Court had an agenda that controlled what facts were important and what facts were not important. We will see this agenda manifest itself even more clearly in the Court's consideration of nineteenth century abortion law.

#### b. *Clueless History*

The ultimate "insight" the history was supposed to provide was that the abortion statutes at issue were anachronistic compared to the "far freer" abortion laws that predated them.<sup>82</sup> For the Court, the abortion statutes at issue were the product of a nineteenth century anti-abortion "mood."<sup>83</sup> According to the Court, this mood was the impetus for the rollback of abortion rights that took place in the latter half of the nineteenth

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82. 410 U.S. at 158.

83. *Id.* at 141.

century.<sup>84</sup> Thus, *Roe* was a *restoration* of rights, not a radical new expansion of rights. This was a remarkable fiction.

To help establish this fiction, *Roe*'s history focused great attention on the concept of "quickening," its development under the common law, and its later use under American law. *Roe* would have us believe that "quickening" was *synonymous* with a liberal abortion right. This was a curious role for a concept conceived by ancient and medieval doctors, philosophers and theologians struggling to discern when life began.<sup>85</sup> We are told that the concept of quickening was a dividing line used to distinguish between the legal sanctions applied to abortion.<sup>86</sup> *Roe* contended that under common law it was a matter of dispute what sort of crime the abortion of even a quick fetus (post-quickening) was considered.<sup>87</sup> This was despite the fact that under English statutory law by 1803, abortion of a "quick fetus" was a capital crime,<sup>88</sup> and an abortion before quickening was a felony.<sup>89</sup> Was this a *liberal* abortion right? Did these severe statutory prohibitions simply develop out of thin air? Under *Roe*'s history, we are left to believe they did.

The Court in *Roe* saw this 1803 act, more commonly known as Lord Ellenborough's Act, as the precursor for American abortion law, but for the Court the crucial exception was that pre-quickening abortions were only lightly penalized in America, if at all.<sup>90</sup> As an example, the Court cited Connecticut's adoption of the first state abortion legislation in 1821 making an abortion to a woman "quick with child" a criminal offense.<sup>91</sup> Likewise, the Court emphasized that most of the other American state statutes that were passed dealt "severely with abortion after quickening" even if they were "lenient with it before quickening."<sup>92</sup>

So, we see the great import *Roe* attached to the idea of quickening, and we see that the law seemed to treat pre-quickening abortions differently than post-quickening abortions. However, is it not odd to characterize this sort of legal

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84. *Id.*

85. *Id.* at 133.

86. *Id.* at 132–36.

87. 410 U.S. at 134–35.

88. *Id.* at 136.

89. *Id.*

90. 410 U.S. at 138.

91. *Id.*

92. *Id.* at 139.

framework concerning abortion as granting a “substantially broader right” to abortion? Connecticut did not adopt the Lord Ellenborough’s Act’s *capital* penalty for the abortion of a quick child, but was this really evidence of a “far freer” abortion right?<sup>93</sup>

The fact is that whether the point of quickening had passed or not, abortion was never a matter of “favor” or ever considered a “right” under the laws of the nineteenth century or any century prior. Moreover, there were incentives against abortion completely apart from the law. The strong likelihood, at the time, that an attempted abortion would result in the deaths of *both* mother and child was only one such example.<sup>94</sup> Additionally, the common law of many states expressed extreme disfavor toward abortion well before the later nineteenth century.<sup>95</sup>

Furthermore, the quickening distinction was not the monolithic presence in abortion law *Roe* would have us believe. The second and third anti-abortion laws passed in the United States in Missouri (1825) and Illinois (1827) made no mention of quickening.<sup>96</sup> Curiously, *Roe* ignored these laws. Consider the example of New York City’s 1716 ordinance forbidding midwives from aiding or recommending abortions.<sup>97</sup> All midwives were required to swear that they would not give or recommend any abortive remedy.<sup>98</sup> There was no exception was for pre-quickening abortions even at this early date.<sup>99</sup> Finally, well before the nineteenth century, medical science had recognized that quickening was a medieval concept that did not mark the beginning of human life.<sup>100</sup> To be sure, references to quickening

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93. In fact, the importance placed by *Roe* on the Connecticut law’s exclusion of pre-quickening penalties is misplaced. As social historian Marvin Olasky has noted, the Connecticut legislature was not concerned with what an English parliament had done. Instead, it was responding to a local scandal occurring just seven months prior in which a Connecticut minister had been imprisoned for causing an abortion by drugs. Olasky persuasively points out that the Connecticut legislation was a direct response to the issues at trial in a sensational case for the time, not the acts of a Parliament 3000 miles away and eighteen years before. See MARVIN OLASKY, *ABORTION RITES: A SOCIAL HISTORY OF ABORTION IN AMERICA 90–93* (1992).

94. *Id.* at 27.

95. *See id.* at 19–41.

96. *Id.* at 104.

97. OLASKY, *supra* note 93, at 37.

98. *Id.*

99. Dennis J. Horan & Thomas W. Marzen, *Abortion and Midwifery: A Footnote in Legal History*, in THOMAS W. HILGERS, DENNIS J. HORAN & DAVID MALL, *NEW PERSPECTIVES ON HUMAN ABORTION* 200 (1981).

100. OLASKY, *supra* note 93, at 35.

in the law remained for sometime thereafter, but the use of “quickening” as an important distinction in abortion law was never the expression of a liberalized abortion right. Thus, *Roe* vastly overstated the importance of the presence or absence of a quickening distinction within nineteenth century abortion law.

The fact that the laws of most states moved from disfavoring abortion to laws that *even more strongly* disfavored abortion was not evidence that a “substantially broader right” to abort existed prior to those changes in the law. That is akin to claiming that the declaration of the “war on drugs” in the 1980s proves that Americans had a “substantially broader right” to use crack cocaine in the 1950s. Such a conclusion fails to account for the social and legal context of the 1980s *and* the 1950s.

So too, *Roe* utterly failed to take into account the legal minimalism in ascendancy in the nineteenth century and earlier.<sup>101</sup> While such a notion is surely foreign to twenty-first century minds, the law was simply not seen as a panacea for every social ill at this time. Thus, the absence of a complex legal framework to prohibit or control abortion in the decades leading up to the late nineteenth century does not support the conclusion that abortion was ever considered a “right” during this period.

What we *can* conclude from any survey of nineteenth century abortion law, as well as eighteenth and seventeenth century abortion laws, is that whenever and wherever abortion became prevalent, communities uniformly penalized and discouraged it by whatever means they saw fit.<sup>102</sup> For Connecticut, that happened to be in 1821, for Missouri it was 1825, and for Illinois it was 1827.<sup>103</sup> The gradual passage of abortion laws continued throughout the nineteenth century, as Marvin Olasky chronicled in his *Abortion Rites*:

During the 1840s and 1850s alone, at least thirteen states passed laws forbidding abortion at any stage of pregnancy. Three others passed laws making abortion illegal only after quickening. By the end of 1868 thirty states had overcome all the legislative and cultural obstacles to passing an anti-abortion law, and twenty-seven of them punished attempts to induce abortion before quickening. Twenty of the states had

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101. *Id.* at 83–85.

102. OLASKY, *supra* note 93., at 101–04.

103. *Id.* at 104.

bitten the bullet and were punishing abortion at all stages equally, regardless of the added evidence given by quickening; others had increased the range of punishment.<sup>104</sup>

Thus, *Roe's* "major portion of the nineteenth century" in which broad abortion rights supposedly prevailed never existed.<sup>105</sup> This was a *fabrication* of the *Roe* Court's imagination.

Abortion laws, from common law to nineteenth century American law, were as varied and diverse as the jurisdictions that established them. But as different as they were, these laws consistently demonstrated a respect for unborn fetal life and reflected a willingness to protect it with legal sanction. This was true despite the evolving nature of medical science and even the changing philosophic and theological understandings of the origins of life. Even the misconstrued and misrepresented history of abortion law in *Roe* testifies to this truth. The failure to perceive this point could have been the result of ineptness. Arriving at a conclusion completely contrary to this point, as *Roe* did, could only be the result of willful malfeasance.

### 3. An Act of Hubris

What are we to make of this Supreme Court edition of three-card-monty? Surely, it was not simply the ineptness of a Nixon-appointed associate justice that led the *Roe* Court down this road. *Roe's* treatment of abortion history was demonstrative of a Court with a preconceived contempt for the abortion prohibitions at issue, the society and culture that would not let go of them, and the unborn life these laws aimed to protect. This contempt translated into an effort to airbrush the traditional recognition and protection of unborn fetal life out of the historical record, like a Soviet politburo yearbook. But, this contempt is not limited to the confines of the history.

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104. *Id.* at 102.

105. It may be argued that the high incidence of abortion during this time period contradicts that conclusion. But, just as murders continue even to this day though murder has always been subject to severe sanction, it is certainly true that despite anti-abortion laws, abortions did occur. Though there are no firm statistics on the abortion rate throughout the nineteenth century, it is also most certainly true that the numbers of abortions were consistently rising as the factors that contributed to abortion, including urbanization, increased mobility, theological liberalism, and prostitution, were on the rise. OLASKY, *supra* note 93, at 288. But, abortion was never "mainstream" as it has been suggested by pro-abortion historians and implied by *Roe*. *Id.* at 289.

Recall that the *Roe* Court claimed that nineteenth century abortion law *also* demonstrated that unborn life had no constitutional protection. To the contrary, nineteenth century abortion law and abortion laws predating the nineteenth century compelled the exact opposite of the Court's conclusion. The abortion prohibitions in existence at the time were evidence that there was widespread recognition of and respect for the inherent rights of unborn life. If the existence of these laws tended to show anything about the personhood of an unborn fetus, it tended toward recognition of the unborn fetus as a person under the Fourteenth Amendment.<sup>106</sup> It most certainly does not compel the opposite conclusion.

*Roe's* claim that its survey of nineteenth century abortion law definitively precluded extension of constitutional protection to the unborn fetus was simply outrageous. Why did *Roe* stop there? Why not also claim that nineteenth century abortion law required every American to pay Harry Blackmun one dollar and suck his big toe? Such a claim would have been just as grounded in the historical record as the claims *Roe* did make. Indeed, *Roe's* failure here was perfect. *Roe* turned nineteenth century abortion law and its consistent protections for unborn life on its head. What once provided the unborn with a shield of protection was, decades later, used to strip all of those protections away.

The ancient Greeks had a word for this sort of egregious behavior; they called it hubris. Hubris was an outrageous act of arrogance, and we can see it played out over and over again in ancient Greek tragedies and histories. Acts of hubris carried grave consequences for the actor, with divine vengeance usually playing a role. Such retribution was not always immediate and was often visited upon successive generations. When retribution finally came, more often than not, no distinction was made between the innocent and the guilty. Thus, the Greeks desperately sought to avoid committing acts of hubris and quickly remedy those that were committed. Perhaps, modern Americans should pay more heed to these ancient notions of justice.

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106. That is not to say definitively that Fourteenth Amendment protections should be extended to unborn fetuses. That is another debate. However, the *Roe* Court should have had the intellectual honesty to play by its own rules. *Roe* provided a perfect example of the Court picking and choosing how it should apply the Fourteenth Amendment—broadly when discerning the guarantee of an abortion right and narrowly when failing to find protections for the unborn. The Court should not have had it both ways.

4. The Supreme Court's Theory of Life—*Über Alles*

Eliminating any constitutional protection for the unborn was not enough for the *Roe* court. The State of Texas had asserted that apart from the Constitution, the State had a compelling interest in protecting life, beginning at conception and thereafter.<sup>107</sup> Thus, the *Roe* Court believed it was necessary to eliminate any basis to support a State interest for restricting access to abortion. Even though the *Roe* Court had confidently established that the fetus was not a person and had no constitutional rights, the Court could not bring itself to declare that the fetus was simply nothing. Indeed, the Court stated:

The pregnant woman cannot be isolated in her privacy. . . . As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved.<sup>108</sup>

To the question of what sort of life was present inside the womb, the Court gave the appearance that it would punt. The Court stated that it was not necessary to decide “the difficult question of when life begins.”<sup>109</sup> But the Court then stated that due to myriad definitions of life and the lack of “consensus” among the disciplines of medicine, philosophy, and theology, “the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”<sup>110</sup> Further, the Court noted that in “*areas other than criminal abortion law*, . . . the unborn have never been recognized in the law as persons in the whole sense.”<sup>111</sup>

Consequently, the Court stated that the State of Texas, by proscribing abortion after conception, imposed only “one theory of life,” i.e., the theory that life begins at conception.<sup>112</sup> This was too much for the *Roe* Court, given the supposed lack of a consensus about the definition of life and the absence of any consistent recognition for unborn rights in the law (excluding of course, abortion law). The *Roe* Court could not allow a State to

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107. 410 U.S. at 156.

108. 410 U.S. at 159.

109. *Id.*

110. *Id.* This quote gets a chuckle from this author every time. Has there ever been a more transparent display of false piety? OK, prior to Bill Clinton?

111. *Id.* at 158, 161–62.

112. *Roe*, 410 U.S. at 162 (emphasis added).

pick its own theory of life that would trump the freshly minted right of the pregnant woman to abort.<sup>113</sup>

The logic used by the Court here is highly suspect. Why did the Court only consider “areas other than criminal abortion law”? Was it, perhaps, because that was the one area of the law that *did* recognize unborn fetuses as persons having, at a minimum, a right to life? Perhaps it was because the Court had assumed that these laws would be biased in favor of recognizing the rights of unborn life. If that was the case, the Court was almost certainly right, but why would that be a legitimate basis to exclude these laws from consideration? In fact, it would seem such bias would be supremely relevant to the question of whether the law recognized rights for the unborn. Yet the *Roe* Court deemed it irrelevant, just like the unborn fetus.

Moreover, the *Roe* Court would not simply prohibit the judiciary from speculating about the definition of life. *No state or federal legislature*—i.e., the citizens of the State through their duly elected representatives—would be allowed to discern a theory of life on its own. One could suppose that there is a sort of intrinsic fairness in the Court’s position—a sort of “if I cannot decide, then no one can decide” approach. One could suppose this fairness *if* the Court had actually taken that approach.

Instead, directly contradicting its previous declarations, the *Roe* Court went on to divine its own theory about life that could constitute a legitimate state interest: something called “the *potentiality of human life*.”<sup>114</sup> This theory of life would take precedence over all others. This notion of “potential life” would be the *only* aspect of a fetus’ existence that a State could take an interest in protecting. As a result, the Court’s feigned forbearance about deciding upon a definition of life became a platform for usurping all power from the state and federal legislatures to ever decide the question.

The *Roe* Court did not deem it necessary to consult ancient wisdom or early nineteenth century abortion law to discover this “potential life” concept. Indeed, *Roe* hardly referenced this particular theory of unborn life prior to declaring that this was the only thing a State could take an interest in protecting. Some reference is made to it when the Court considered how the law

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113. *Id.*

114. *Id.* at 162 (emphasis added).

had previously (again, in areas other than abortion law) recognized unborn rights. For example, the *Roe* Court discerned that the establishment of tort actions for prenatal injuries *really* vindicated the parents' interest and reflected a view that the fetus "*at most*, represents only the potentiality of life."<sup>115</sup>

Whatever the background for this theory of "potential life," *Roe* simply declared that the State's interest in such life was not sufficient to justify a prohibition on abortion that has the potential to ever actually prevent an abortion.<sup>116</sup> Thus, it seems that the Court simply *lied* when it declared it would not engage in speculation about the definition of life. The very concept of "potential life" was rank speculation, without any foundation in law, medicine, philosophy, or theology. Yet, without any hesitation, the *Roe* Court declared this to be the *only* "compelling interest" legitimate enough to establish any restrictions on the abortion right.

Because the State interest was limited to *potential* life, the restrictions the State could impose were theoretical at best. As noted *supra*, the *Roe* court stated that a State "interested in protecting fetal life after viability . . . may go so far as to proscribe abortion [after viability], *except when it is necessary to preserve the life or health of the mother.*"<sup>117</sup> In the ultimate example of a "bait and switch" *Roe*'s companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), explained what "health" meant. There the Court stated that "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the wellbeing of the patient."<sup>118</sup> Any one of those factors could, within the sole judgment of the woman and, presumably but not necessarily, her doctor, justify terminating a fetus at any gestational age without state interference. For the *Roe* Court, *mere* potential life merited no better protection.

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115. *Id.* at 162 (emphasis added).

116. More commonly referred to as the "compelling interest" test of *Roe*. It is the opinion of this author that *Stenberg v. Carhart*, 530 U.S. 914 (2000), makes it clear that there is no restriction on the abortion right that could ever hope to prohibit a substantial number of abortions and still pass constitutional muster. Contrary to *Roe*'s statement that the abortion right is "not absolute," today *Roe* and its kin have established an absolute abortion right.

117. 410 U.S. at 163–64 (emphasis added).

118. *Doe*, 410 U.S. at 192.

## 5. A New Consensus about Life?

The *Roe* Court assumed that “at this point in the development of man’s knowledge,” no “consensus” about the beginning of life had been reached.<sup>119</sup> Assuming the Court actually meant what it said (a dubious assumption in the author’s opinion), a clearly established consensus about when life begins would certainly impact the “compelling interest” a state would have in protecting unborn life. Such a consensus would contravene *Roe*’s “potential life” concept and provide the support that the Texas statute lacked when *Roe* was considered.

Judge Jones wrote that “neonatal and medical science . . . now graphically portrays, as science was unable to do 31 years ago, how a baby develops sensitivity to external stimuli and to pain much earlier than was then believed.”<sup>120</sup> Indeed, no such examination was present in *Roe*.

On the contrary, *Roe* predicted the opposite. Consider this statement by Justice Blackmun, “Substantial problems for precise definition of this view [that life exists from the moment of conception] are posed, however, by new embryological data that purport to indicate that conception is a ‘process’ over time, rather than an event.”<sup>121</sup> Thus, we can surmise that Blackmun believed the question of when life began would only get murkier as the years passed. McCorvey’s evidence demonstrates that Blackmun was grossly mistaken.

McCorvey offered scientific and medical analyses from several experts in the fields of biochemistry, surgical medicine, genetics, and neurology.<sup>122</sup> The analyses highlight three basic areas of research and study that now demonstrate that a unique human life exists from the moment of conception and is considered to be an entity existing separate and apart from its mother throughout gestation. These areas include: molecular DNA analysis, fetal pain, and fetal surgery. Significantly, at the time *Roe* was decided, these areas of research were non-existent or had just been conceived.

Advancements in molecular DNA analysis have revolutionized our understanding of the beginning of human life since *Roe* was

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119. *Roe*, 410 U.S. at 159.

120. *McCorvey*, 385 F.3d at 852 (Jones, J., concurring).

121. *Roe*, 410 U.S. at 161.

122. Petition for Writ of Certiorari, *McCorvey v. Hill*, 2005 WL 123452 (U.S. 2005).

decided. Dr. David Fu-Chi Mark, a Harvard-trained molecular biologist, stated in a report on how developments in molecular biology have changed our understanding of fetal development that an unborn “child is a complete, separate and unique human being immediately following conception and throughout gestation. There is today a consensus in the scientific community concerning this scientific fact.”<sup>123</sup> Specifically, Dr. Mark discussed the significant developments in our understanding of DNA and RNA. For example, he stated:

The DNA fingerprint of any child is derived from the combination of the unique DNA fingerprints of both his or her mother and father. The child’s DNA fingerprint is completely unique. The discovery of the difference in every human being’s DNA, and the development of DNA fingerprinting, proves the uniqueness of each human being. Thus, today, by the use of DNA analysis, including DNA fingerprinting, science can determine not only which species a being is a member of, but can identify a specific member of that species.<sup>124</sup>

Moreover, Dr. Mark noted that this uniqueness exists “even at the first cell stage.”<sup>125</sup> Dr. Mark explored other developments regarding DNA analyses that confirm this conclusion. For example, the significance of methylation of cytosine was unknown prior to 1985 but now demonstrates that at the “one cell age” human beings are “fully programmed for human growth and development for [our] entire life.”<sup>126</sup> Another expert, Dr. Marie Peeters-Ney, medical director for the International Foundation of Genetic Research and a scientific advisor to the Jerome Lejeune Foundation, states:

The recent advances in in vitro fertilization as well as the development of molecular DNA analysis have confirmed the fact that the child is a complete, separate and unique human being upon conception . . . . At that moment a new human being exists, who has a unique genetic message, containing all the genetic information . . . that is needed for his or her entire life. No new genetic information will ever be added. The

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123. Evidence Packet at 5211, Petition for Writ of Certiorari, *McCorvey v. Hill*, 2005 WL 123452 (U.S. 2005).

124. Evidence Packet at 5216, Petition for Writ of Certiorari, *McCorvey v. Hill*, 2005 WL 123452 (U.S. 2005).

125. *Id.* at 5208.

126. *Id.* at 5220.

entire genetic message received at conception is present in every cell of the new human being throughout his or her entire life. He or she is a member of our species. Humanity is acquired.<sup>127</sup>

Blackmun's statement that "conception is a 'process' over time, rather than an event"<sup>128</sup> looks positively "flat earth" in light of the knowledge gained through developments in molecular DNA analysis. But let us consider something more disturbing: the realization that very early in its development, the fetus feels pain.

Dr. Gabrielle A. deVerber, an expert in pediatric neurology, stated "It is now clear that premature neonates as young as 25 to 30 weeks feel pain."<sup>129</sup> Moreover, some experts have concluded that a fetus can sense pain at least by 13 ½ weeks and perhaps as early as 8 weeks.<sup>130</sup> Dr. Mark's report stated that "basic mechanisms for transmission of pain signals and the natural analgesics for the attenuation of pain signal transmission from the periphery of the brain are in place early during fetal development, therefore the child feels and responds to pain."<sup>131</sup>

The discovery that fetuses, from a very early age and throughout the rest of gestation, feel and respond to pain begs one critical question: Can a mere "potential life" feel pain? While the developments in our understanding of DNA confirm that a unique human life exists from the moment of conception, the advent of our knowledge concerning fetal pain adds a visceral element to our understanding about life inside the womb. Indeed, it is clear that *Roe's* view of life inside the womb as mere "potential life" is now woefully inadequate.

The last area of developing knowledge concerns fetal surgery, and it confirms the separate and independent nature of the unborn fetus. The report of Dr. Joseph C. Langer, an expert in pediatric surgery, stated:

Because of this new ability to identify and treat a wide variety of fetal diseases, we have witnessed a revolution in the attitude of the medical profession toward the fetus, which has come to

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127. *Id.* at 5269-70.

128. *Roe*, 410 U.S. at 161.

129. Evidence Packet at 5289, Petition for Writ of Certiorari, *McCorvey v. Hill*, 2005 WL 123452 (U.S. 2005).

130. *Id.* at 5290.

131. *Id.* at 5222.

be regarded as a patient in his/her own right. There is no doubt that modern medicine now considers and treats the fetus as a separate and complete human being. Medical and surgical decisions are routinely made in the same way as they would be for a child who has already been born. Techniques for delivering drug therapy, blood transfusions, cellular transplantation, and various types of surgical intervention have all been developed.<sup>132</sup>

Do these developments reflect mere “potential life”? On the contrary, the advent of fetal surgery confirms that the independent existence of the fetus is not merely a theory of life. It is scientific fact that is routinely acted upon. Thus, the unborn fetus can no longer be written off as merely a piece of tissue. However, do not expect to see this as a headline in the *New York Times*.

These scientific and medical advances explode many myths. *Roe*'s belief that there was an absence of consensus about the beginning of human life can no longer be true. Such a consensus now exists, and it is that unique, independently existing, human life begins at conception. Interestingly, this reflects the State of Texas' understanding of life in 1973.<sup>133</sup> Moreover, these advancements reveal *Roe*'s “potential life” to be pure fantasy, no more real than a unicorn (or perhaps the “Loch Ness monster”).

In considering these advances, it is also apparent that they have consequences for *Roe*'s progeny, specifically *Planned Parenthood of Southeast Penn. v. Casey*. Consider *Casey*'s famous “mystery” passage in which Justice O'Connor declared that “[a]t 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.”<sup>134</sup> In light of the medical advances and the emerging scientific consensus we have reviewed, it seems that O'Connor's statement now runs afoul of the Supreme Court's Establishment Clause jurisprudence as an unconstitutional establishment of sorcery. Is the Supreme Court now going to contend that we cannot be certain about the appropriate theory of life because there is no consensus about when the

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132. Evidence Packet at 5233, Petition for Writ of Certiorari, *McCorvey v. Hill*, 2005 WL 123452 (U.S. 2005).

133. *See, e.g.*, 410 U.S. at 156.

134. *Planned Parenthood of Southeast Penn. v. Casey*, 505 U.S. 833, 851 (1992).

“ensoulment” of the fetus occurs? Such a result would certainly be ironic, but it appears that *Roe*’s own assumptions about the state of medical knowledge and what it had to say about when life begins are wrong.

### III. NIGHT OF THE LIVING *ROE V. WADE*

McCorvey has sought to draw our attention to the mountain of evidence that has accumulated from the collateral damage of more than forty million abortions since *Roe*. McCorvey contends, and Judge Jones agrees, that such evidence challenges the viability of *Roe*’s critical factual assumptions and underpinnings, which form the basis of *Roe*’s decision to give constitutional protection to abortion and eliminate all substantive protections, constitutional or otherwise, from the unborn. We have also seen that *Roe*’s problems are not simply the result of emerging evidence. If that were the case, any criticism of the *Roe* decision would have to be tempered by the fact that the majority of Justices simply did not understand what sort of Pandora’s Box they had opened. But that was never the case. *Roe*’s reasoning was flawed the day *Roe* was decided.

This covers quite a bit of ground, so let us again specifically identify the factual assumptions of *Roe* which are now in peril as a result of McCorvey’s evidence and an analysis of *Roe*’s inherent problems:

Assumption No. 1 – Abortion causes no harm to women;

Assumption No. 2 – Abortions occur only after consultation between patient and physician;

Assumption No. 3 – The burden of an unwanted pregnancy is too great to bear without access to abortion;

Assumption No. 4 – The text of the Constitution precludes any possibility that the unborn possess a right to life;

Assumption No. 5 – Prior to the late nineteenth century, women enjoyed “substantially broader” rights to abortion;

Assumption No. 6 – Nineteenth century abortion law confirms that the Constitution recognizes no right to life for the unborn; and

Assumption No. 7 – There is no medical consensus about when life begins.

These factual assumptions are *Roe v. Wade*. To question their viability is to question the viability of *Roe* itself. In this author's view, the combination of McCorvey's evidence and a healthy dose of logic is fatal to *Roe*, for there are no premises left for *Roe* to stand on. If this is true, why does *Roe* still live?

This question brings us to Judge Jones's final point. Regardless of how substantive the questions raised by this evidence may be, no legislative, or even judicial, challenge to *Roe* appears possible without the express consent of the entity that created it. Indeed, Judge Jones stated that she cannot "conceive of any judicial forum in which McCorvey's evidence could be aired."<sup>135</sup> Moreover, Judge Jones declared:

At the same time, because the Court's rulings have rendered basic abortion policy beyond the power of our legislative bodies, the arms of representative government may not meaningfully debate McCorvey's evidence. The perverse result of the Court's having determined through constitutional adjudication this fundamental social policy, which affects over a million women and unborn babies each year, is that the facts no longer matter.<sup>136</sup>

In other words, by enshrining abortion in the Constitution, the *Roe* Court acted for all Americans, for all time. *Roe* ripped abortion from the legislative sphere and placed it beyond the reach of any governmental authority. In the place of an existing legal framework that severely restricted abortion, passed into law by the duly elected members of dozens of state legislatures, *Roe* imposed a broad abortion right throughout the entire United States. No such legal framework had ever existed under the inherited common law or American law. Even so, abortion was pushed from the sidestreams to the mainstream, and the ability to appeal that decision, or even question it, was removed at the same time.

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135. *McCorvey*, 385 F.3d at 852. Nevertheless, McCorvey filed her appeal with the Supreme Court of the United States. In it, she continued to argue that her case is not moot and that the change in facts and the laws on abortion compel the reversal of *Roe*. Petition for Writ of Certiorari, *McCorvey v. Hill*, 2005 WL 123452 (U.S. 2005). The Supreme Court has since declined to issue certiorari. *McCorvey v. Hill*, 125 S.Ct. 1387 (No. 04-967).

136. *McCorvey*, 385 F.3d at 852.

Thus, despite the fact that *Roe's* critical factual assumptions can no longer be sustained, *Roe* endures. Like some kind of killer zombie<sup>137</sup> from a low-budget horror movie, *Roe* lives on even though the body that once gave it life has rotted away. In view of all this, the condemnation of *Roe v. Wade* as an abomination is well deserved and justified. No other word seems suitable to describe such an act of raw judicial hubris.

#### IV. A FERVENT HOPE?

How do you kill a zombie when it is already dead? While this is a robust topic of discussion for thousands of internet chat sites, none of the ingenious methods listed there offer relief from *Roe*.<sup>138</sup> Moreover, *Roe* and its progeny appear stronger than ever.<sup>139</sup> The recent nomination hearings of Alabama Attorney General William Pryor provided us with one more example of *Roe's* continuing endurance.

Attorney General Pryor has been praised by conservatives for his strong stance against abortion during highly critical questioning before the Senate Judiciary Committee, and he is worthy of such praise. His clear and unequivocal statements of his belief that *Roe v. Wade* is “the worst abomination in the history of constitutional law” were a breath of fresh air to like-minded conservatives expecting the usual vagueness about abortion expressed by so-called “right-wing” judicial nominees.<sup>140</sup> However, Pryor ultimately did equivocate when asked directly by Senator Schumer, whether he would “endorse the Court’s reversing *Roe v. Wade* at the first opportunity.”<sup>141</sup> Pryor retreated to a vague non-answer:

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137. For the record, it is now an infinite number of killer-zombie-demon-monkeys with typewriters.

138. See, e.g., [http://posseincitatus.typepad.com/posse\\_incitatus/2005/03/shooting\\_zombie.html](http://posseincitatus.typepad.com/posse_incitatus/2005/03/shooting_zombie.html).

139. One might argue that in light of the holdings in *Casey* and *Stenberg*, *Roe* no longer matters. These attacks on *Roe*, so the argument goes, are pointless because *Roe* is no longer the applicable law. I disagree. *Casey* made clear that its decision was based on and guided by *Roe's* holding. “[N]either the factual underpinnings of *Roe's* central holding nor our understanding of it has changed . . .” *Casey*, 505 U.S. at 864. *Roe* is the foundation upon which *Casey* and every other abortion case is based. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914 (2000). Take away *Roe's* foundation and the entire house of cards falls.

140. Panel I of a Hearing of the Senate Judiciary Committee: Nomination of William Pryor Jr. to be U.S. Circuit Judge for the 11th Circuit, 108th Cong. (June 11, 2003).

141. *Id.*

Well, I'll tell you this, in the context of the *Stenberg* case, when it was presented to the Supreme Court of the United States, the Attorney General of Nebraska at the time was a very dear friend of mine named Don Stenberg, and he presented two questions before the Supreme Court, and one of the questions he presented was an invitation for the Court to overrule *Roe*. I called him up and urged him not to include that question in his petition. So I would say that in that instance, I did not do that.<sup>142</sup>

Senator Schumer, perhaps jeopardizing his bid to be the Senate's chief champion of the *non sequitur*,<sup>143</sup> asked about this "contradiction" suggesting that "it would seem to me to directly follow [from Pryor's belief that *Roe* is an abomination] that you would want the Court to reverse *Roe*."<sup>144</sup> It would indeed. However, Pryor gave the same answer, and Schumer seemed satisfied that while Pryor despised abortion, *Roe v. Wade* would not be threatened.<sup>145</sup>

Mr. Pryor's answer may be deemed prudent in the sense that his answer would help assuage concerns that his nomination would pose a direct threat to *Roe v. Wade* and win him more votes for confirmation. But the very fact that such counsel is deemed "prudent" is evidence of *Roe's* enduring strength. Moreover, the exchange between Sen. Schumer and Mr. Pryor demonstrates that even the most stalwart of judicial nominees wish to avoid making definitive statements about the fate of *Roe*.

Even so, Judge Jones expressed her view that we may "fervently hope" that the Supreme Court will reevaluate *Roe* someday. But, given what Judge Jones declared about the judiciary's inability to reconsider *Roe*, it is fair to ask whether this "fervent hope" is based on anything more than a beneficent wish.

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142. *Id.* This author is certain Mr. Pryor had very sound reasons for urging Attorney General Don Stenberg not to present an invitation to the Supreme Court to overturn *Roe*. Moreover, Mr. Pryor's stance concerning *Roe* was strong and courageous. However, this author still holds out hope that future judicial nominees will not hesitate to take every opportunity to point out the compelling reasons *Roe v. Wade* should be overturned. Moreover, future judicial nominees are invited to cite this essay as the basis for their contention that *Roe v. Wade* could have been written by an infinite number of demonic typewriting monkeys.

143. A position for which there is ample competition.

144. Panel I of a Hearing of the Senate Judiciary Committee: Nomination of William Pryor Jr. to be U.S. Circuit Judge for the 11th Circuit, 108th Cong. (June 11, 2003).

145. *Id.*

There is, at least, a possibility that the Supreme Court could simply change its mind. A critical case cited in McCorvey's brief to the Supreme Court was *Agostini v. Felton*.<sup>146</sup> *Agostini* was an Establishment Clause case in which the Supreme Court, by way of Federal Rule 60(b), overturned two prior twelve-year old (at that time) rulings in *Aguilar v. Felton*<sup>147</sup> and *School District v. Ball*.<sup>148</sup> The *Agostini* Court held that the change in law concerning the Establishment Clause that had taken place since the original cases were decided compelled the rehearing and overturning of those two precedents.<sup>149</sup> McCorvey's brief to the Supreme Court argued that the evidence developed since *Roe* satisfies the Rule 60(b) standard set out in *Agostini*.<sup>150</sup> However, the successful Rule 60(b) motion in *Agostini* followed a string of Supreme Court Establishment Clause cases that softened the Court's view about the unconstitutionality of conduct at issue in *Agostini*.<sup>151</sup> *Roe* has undergone no such softening, and McCorvey's writ of certiorari to the Supreme Court was denied on February 22, 2005.<sup>152</sup> At least for the immediate future, we must look elsewhere for Judge Jones's fervent hope.

The current challenges to the Partial Birth Abortion Act of 2003 making their way through the federal circuit courts may offer the Supreme Court another opportunity to reconsider *Roe*.<sup>153</sup> There is also the ever-present possibility of a constitutional amendment specifically repealing *Roe*, though this can often seem more of a quixotic quest than any of the others.

Regardless of the specific means of overturning *Roe* available at this time or at some future date, the basis for an enduring hope may be found within the confines of *Roe* itself. *Roe* cannot

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146. Petition for Writ of Certiorari, *McCorvey v. Hill*, No. 04-967, 2005 WL 123452 (U.S. 2005) (citing *Agostini v. Felton*, 117 S. Ct. 1997 (1997)).

147. Petition for Writ of Certiorari, *McCorvey v. Hill*, No. 04-967, 2005 WL 123452 (U.S. 2005) (citing *Aguilar v. Felton*, 473 U.S. 402 (1985)).

148. Petition for Writ of Certiorari, *McCorvey v. Hill*, No. 04-967, 2005 WL 123452 (U.S. 2005) (citing *School Dist. v. Ball*, 473 U.S. 373 (1985)).

149. See *Agostini*, 521 U.S. at 236.

150. Petition for Writ of Certiorari at 23, *McCorvey v. Hill*, No. 04-967, 2005 WL 123452 (U.S. 2005).

151. See generally, Note, Andrew A. Adams, *Cleveland, School Choice, and "Laws Respecting an Establishment of Religion"*, 2 TEX. REV. L. & POL. 166 (1997).

152. *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004), cert. denied, 125 S.Ct. 1387 (Feb. 22, 2005) (No. 04-967).

153. See, e.g., Statement Of Monica Goodling, Spokesperson For The Justice Department, Regarding The Partial Birth Abortion Ban Cases (Feb. 12, 2004), available at [http://www.usdoj.gov/opa/pr/2004/February/04\\_opa\\_085.htm](http://www.usdoj.gov/opa/pr/2004/February/04_opa_085.htm)

withstand scrutiny of the very premises and factual assumptions upon which it is based. Furthermore, the questions about those factual assumptions continue to mount and the bases for challenging *Roe* continue to multiply.

Even *Roe*'s staunchest supporters are beginning to run low on porcine lip-gloss. *Roe*'s endorsement of abortion as a positive and liberating act stands in stark contrast to the statements of politicians today who say they wholeheartedly support *Roe* but want to make abortion "safe, legal, and rare." Senator Hillary Clinton in a 2005 speech to the New York State Family Planning Providers stated, "There is no reason why government cannot do more to educate and inform and provide assistance so that the choice guaranteed under our constitution *either does not ever* have to be exercised or *only in very rare* circumstances."<sup>154</sup> Even the legal scholars who count themselves among *Roe*'s supporters must equivocate and qualify their support for *Roe*.<sup>155</sup> Surely a body of law built on such faulty foundations, with its defenders deserting the ramparts, cannot continue to stand in perpetuity beneath the weight of mounting evidence calling for its reversal.

The basis for Judge Jones's hope can also be found beyond the confines of *Roe*. Individuals like Judge Jones and Ms. McCorvey provide examples to emulate. One can imagine that many tongues were clucked at the prospects of Judge Jones ever receiving a Supreme Court nomination after writing such a concurrence. That may well be, but Judge Jones, to her credit, did not have conventional wisdom on her mind. Perhaps, Judge Jones knows that words and the ideas they communicate can have consequences that ripple beyond their present time and even the confines of the Federal Reporter. Perhaps, we may yet see Judge Jones defend her concurrence before the Senate Judiciary Committee and articulate what other nominees dared not. In any event, the impact of Judge Jones's concurrence has yet to run its course. It will inspire questions and further debate about *Roe* for many years to come.

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154. Senator Hillary Rodham Clinton, Remarks by Senator Hillary Rodham Clinton to the NYS Family Planning Providers (Jan. 24, 2005) (emphasis added), at <http://clinton.senate.gov/~clinton/speeches/2005125A05.html>.

155. See, e.g., LAWRENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 138 (1990). ("As an interpretation of the Constitution *Roe* will remain controversial. But it has much to commend it and cannot fairly be dismissed as indefensible or flatly wrong.") What a stirring defense.

To many people, Ms. McCorvey's efforts might also seem like a waste of time. Indeed, upon first hearing about them several years ago, this author must confess to an overwhelming skepticism about the efficacy of McCorvey's efforts. But, despite the Supreme Court's denial of certiorari, the efficacy of McCorvey's efforts is no longer in doubt. The evidence her attorneys have accumulated and the concurrence that Judge Jones was moved to write have dispelled any doubt. McCorvey has made an important and essential contribution to the abortion debate regardless of whether Norma McCorvey ever succeeds in ending the reign of Jane Roe.

With Judge Jones and the woman formerly known as "Jane Roe," we can fervently hope for future generations that have discarded the belief that stripping the lives of the unborn should be a constitutional right. But, those future generations will never come without ever growing ranks of voices willing to denounce *Roe* and articulate its faults. For those who truly believe that *Roe* is the "abomination" we say that it is, no opportunity should be missed to challenge *Roe's* tangled mass of faulty premises and assumptions. Judge Jones's "fervent hope" must inhabit more than our hearts and minds, it must become the object of our will. There is no better way to honor Judge Jones and Ms. McCorvey for their efforts and make certain that they someday succeed than to step forward with our own.