

## ISSUES IN PERSPECTIVE

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### ***Rethinking Pro-Life Arguments in the Abortion Debate***

Since the 1973 Roe v. Wade Supreme Court decision 45 years ago, the pro-life (or anti-abortion) side of the debate has focused on the ethical issue that the baby growing in its mother's womb deserves to be protected as any other human being having rights under the US Constitution. Increasingly sophisticated technology is changing the nature of the debate. Indeed, Emma Green in a recent issue of *The Atlantic* has argued that "science is giving the pro-life movement a boost." In addition, columnist Michael Gerson suggests that the way the Court framed its 1973 decision created a tension between autonomy and inclusion, producing a conflict that "will only be managed, not settled." Let me explain both of these observations.

- First, Gerson demonstrates that public opinion regarding abortion is rather confusing, somewhat inconsistent but changing. For example, a May 2017 Gallup Poll indicated that 78% of Americans think abortion should be legal in some or all circumstances. Yet, in that same Gallup poll, 49% agreed that abortion is "morally wrong" (compared with 43% who find it "morally acceptable"). Just 29% believe abortion should be legal in every circumstance. Further, Gerson shows that a number of states have moved to restrict abortion at the "edges"—requiring clinics to meet the standards of ambulatory surgical centers, mandating that abortion providers obtain visiting privileges at local hospitals, restricting the procedure after the fetus can feel pain.
- Second, Gerson asks this pivotal question: "Why does this issue refuse to fade from our politics?" As Justice Byron White argued in his Roe v. Wade dissent, the ruling was "an exercise in raw judicial power." Its legal reasoning as a decision has not held up well. "[Blackman's] system of trimesters and viability was (and is) arbitrary and medically rootless, a fig leaf covering an almost limitless abortion right. Blackman's weak argument largely substituted for the democratic process in 50 states. Fiat replaced deliberation and democratic legitimacy. This was a recipe for resentment and reaction." Those who advocated for the legitimacy of Roe v. Wade did so on the basis of rights—rights of the mother, not of the child. But as Gerson so eloquently argues, "All the great civil rights movements have been movements of inclusion . . . [But] the abortion rights movement, in contrast, is a movement of autonomy. Its primary appeal is to individual choice, not social inclusion. And the choice it elevates seems (to some people) in tension with the principle of inclusion. A fetus is genetically distinct from the mother, is biologically human and has the inherent capacity to develop into a child." It is, therefore, the anti-abortion movement that appeals to inclusion. "It argues for a more expansive definition of the human community. It opposes ending or exploiting one

human life for the benefit of another . . . But there is an ethical and political alternative, emphasizing an inclusive concern for the common good and solidarity with the most vulnerable members of the human family. Martin Luther King Jr. called this ‘the beloved community.’ It emerges not through the assertion of autonomy, but through the acceptance of our shared humanity and of the loyalty we owe to one another.”

- Third, Green’s article in *The Atlantic* [unintentionally] offers a refreshing perspective on how science is actually embellishing this call for inclusion that Gerson mentions. Green quotes activist Ashley McGuire who pointedly shares that for over 40 years the pro-life movement has argued that the fetus is a life worthy of the rights the rest of us have but it has always been a “rather an abstract concept.” But “when you’re seeing a baby sucking its thumb at 18 weeks, smiling, clapping, it becomes harder to square the idea that that 20-week old, that unborn baby or fetus, is discardable.” Green makes these observations about the results of scientific progress as it relates to the unborn child:
  1. These advances (e.g., ultrasounds) fundamentally shift the moral intuition around abortion. New technology makes it easier to apprehend the humanity of a growing child and imagine a fetus as a creature with moral status.
  2. Pro-life activists have successfully shifted the terms of the policy debate on abortion. “Advocates have introduced research on the question of fetal pain and whether abortion harms women’s health to great effect in courtrooms and legislative chambers.”
  3. Green reports on the growing sophistication of surgery on the fetus still in the womb. A handful of medical centers in major cities “can now perform surgeries on genetically abnormal fetuses while they’re still in the womb. Many are the same age as the small number of fetuses aborted in the second and third trimesters of a mother’s pregnancy.” In this kind of procedure, pro-life advocates harness “science as a source of authority” to buttress the claim that the fetus is life; life of value and worth that deserves legal protection. You don’t operate on a blob of meaningless cells. This is a human life worth saving—that is why doctors are doing these types of surgeries. Farr Curlin, a physician who holds joint appointments at Duke University’s schools of medicine and divinity, argues that “Science is a practice of using systematic methods to study our world, including what human organisms are in their early states. I don’t see any way it’s not an ally to the pro-life cause.”
  4. In framing the pro-life cause in scientific terms, the best argument remains the common sense ones of fetal heartbeats and swelling stomach: “the pro-life movement has always been a movement aimed at cultivating the moral imagination so people can understand why we should care about human beings in the womb.”

- Finally, a 2013 book on the Court's 1973 decision, *Abuse of Discretion*, by Clarke Forsythe, offers some helpful insights into how the Court made its 1973 decision. Shortly after the 1973 decision, Harvard Law School professor Lawrence Tribe commented that the Court "went to lengths few observers had expected, imposing limits on permissible abortion legislation so severe that no abortion law in the United States remained valid." Before she joined the Court, Ruth Bader Ginsburg argued that *Roe* was "not a measured motion" because it "invited no dialogue with legislators." Instead, it created "a set of rules that displaced virtually every state law then in force." Not only did this case cause a furor, but in a companion case, *Doe v. Bolton*, the Court voted by the same 7-2 margin to strike down 13 more liberal abortion laws, passed between 1967 and 1970, on the grounds that they did not include a health exception that permitted women to seek abortions at any point in a pregnancy if their health was threatened. Further, the Court mandated that "health" include psychological as well as physical issues. For these reasons, Forsythe argues that "the sweeping scope of *Roe* and *Doe* isolated the United States as one of approximately nine countries that allow abortion after 14 weeks and one of only four nations (with Canada, China and North Korea) that allow abortion for any reason after fetal viability." Forsythe demonstrates that Justice Blackman, who was assigned to write the opinion, at first wanted a narrow decision, but it was Justice William O. Douglas who threatened a scathing dissent unless Blackman agreed to a broader ruling without a rearguing of the case. Forsythe also demonstrates how "haphazardly the court selected 'viability' as the point in fetal development after which abortions could be prohibited by the states." Forsythe also maintains that the premise on which the justices were basing their decision was that "abortion is safer than childbirth." He suggests that the data they used were open to question and, by treating abortion as a constitutional right, they made "abortion virtually immune" from public health oversight. In short, Forsythe's book enables us to reach the conclusion that the 1973 decision and its accompanying *Doe v. Bolton* decision were both examples of extreme judicial arrogance almost without precedent in US history. Perhaps the only comparable example was the 1857 *Dred Scott* decision. Many have compared *Roe* to this dastardly Court decision that helped bring on the Civil War. From *Dred Scott* came the conclusion that slaves (and blacks in general) were not citizens and had no rights or constitutional protection whatsoever. That is exactly how *Roe* treated the unborn baby. This 45<sup>th</sup> anniversary of the *Roe* decision is one the darkest anniversaries in our nation's history. As a nation, may we hang our collective heads in shame—for this decision has produced a modern holocaust of over 60 million babies murdered. Those babies had no constitutional protection, no rights and no value—except to God!

See Michael Gerson in the *Washington Post* (18 January 2018); Emma Green in *The Atlantic* (18 January 2018); and Jeffrey Rosen's very helpful review of Forsythe's book in the *Wall Street Journal* (12-13 October 2013).