THE HOW AND WHY OF ROE'S RADICAL MANDATE

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Clarke D. Forsythe, *Abuse of Discretion: The Inside Story of Roe v. Wade* (New York: Encounter Books, 2013)

With his extensive background in law, Clarke Forsythe, senior counsel at Americans United for Life, seems the ideal author for a detailed overview of *Roe v. Wade*. In *Abuse of Discretion*, he does not disappoint, providing a comprehensive account of *how* and *why* the Supreme Court justices used Roe – and its often overlooked but equally significant companion case, *Doe v. Bolton* – to impose a radical pro-abortion mandate on the entire nation.

Through what he describes as "a quarter-century of research" – research that included examination of the papers of eight of the nine justices who decided *Roe* – Forsythe analyzes *Roe* and its impact, 40 years later, in the process confirming what many pro-life activists knew instinctively at the time:

- that the ruling was far more sweeping, and radical, than claimed by media and Court members themselves;
- that it resulted *not* from a comprehensive, reasoned analysis of facts, but from an *ideological agenda* pushed by the Court's most activist members;
- that the justices misused, misunderstood and misrepresented pertinent facts in a range of critically relevant areas, from the history of abortion laws, to medical data and developments, to public opinion regarding abortion;
- that instead of a careful, balanced study of empirical data from various perspectives, the justices relied almost exclusively on *advocacy* pieces produced by pro-

abortion activists;

- that the social crises the justices believed legal abortion would help alleviate – poverty, child abuse, out-of-wedlock pregnancies – would grow *worse* in ensuing decades.

Most disturbing is the justices' – especially Justices William O. Douglas and William J. Brennan, Jr. – manipulation of the judicial process to bring about their fore-ordained result: a nationwide mandate legalizing abortion.

This is telegraphed in Brennan's communication to Douglas, in December 1971, that the "right to privacy" Brennan was then positing in a contraception case would prove "useful" later in the abortion cases.

"Brennan knew well the tactic of 'burying bones' – secreting language in one opinion to be dug up and put to use in another one down the road," Forsythe quotes Brennan's former law clerk Edward Lazarus. In this case, Lazarus explained, "Brennan slipped into *Eisenstadt* (the contraception case) the tendentious statement explicitly linking privacy to the decision whether to have an abortion."

Even the targeting of *Roe* and *Doe* – "cases without any factual record addressing the legal, historical, or medical questions involving abortion" – as vehicles to transform the nation's abortion laws was part of this manipulation. The Court had agreed to hear these cases, Forsythe explains, *not* to address the broad issue of abortion laws, but only to clarify a recent ruling, unrelated to abortion, involving federal jurisdiction to intervene in state criminal proceedings.

Douglas and Brennan, however – "as evidenced by … phone and written exchanges" between them – wanted "to find the best way to get around" such procedural and jurisdictional issues, so they could use *Roe* and *Doe* to advance their pro-abortion agenda. And as Forsythe makes clear, the *absence* of a trial

record bearing on legal, historical and medical factors – a record which *other* pending abortion cases did have – would better serve that goal, allowing the justices to substitute pro-abortion advocacy papers for true evidentiary documents.

For example, the justices seemed to take at face value pro-abortion claims that prior to the 19th century abortion was not a crime, and that the purpose of 19th century laws against abortion was solely to protect the mother, not the child *in utero*.

Forsythe documents – dating back to 1200 A.D. – that English common law and American laws based on it have historically restricted abortion to protect unborn children. As for 19th century American laws, he points out, "The Justices did not have to speculate" because "as one legal scholar has summarized the data, there were 'thirty-one decisions from seventeen jurisdictions expressly affirming that their nineteenth century statutes were intended to protect unborn human life, and twenty-seven other decisions from seventeen additional jurisdictions strongly implying the same.'" Forsythe also effectively debunks the related claim that restrictive abortion laws "criminalize women," noting that historically such laws have treated women as "the second victim of abortion."

Ignoring all this, "the Justices relied almost exclusively on the historical revisionism in two articles by Professor Cyril Means" who was general counsel to the National Association for the Repeal of Abortion Laws (NARAL).

The justices also accepted wildly exaggerated claims regarding the numbers of deaths resulting from illegal abortions – dismissed even by some pro-abortion leaders as "unmitigated nonsense" (Christopher Teitze, statistician for the Population Council); and the "mantra" adopted by Justice Harry Blackmun that legal abortion "is safer than childbirth." In making this assertion, Forsythe observes, Blackmun and Douglas cited a

total of only seven medical sources: three papers by prominent abortion activist Teitze; another by a leader of the International Planned Parenthood Federation of London; a letter-to-the-editor from a Czech doctor; and two reports, woefully lacking in reliable empirical data, purporting to prove the assertion through the abortion experiences within the Soviet bloc and New York's less than one year of legalized abortion. Forsythe notes contradictory sources that the justices ignored, showing little interest in true data about the *dangers* to women posed by legal abortion.

Forsythe illustrates the sloppiness of the Court's reasoning with a rather remarkable quote from Blackmun's ruling, as he stumbles through the assertion that abortion is safer than childbirth:

On page 149, Blackmun states that "Mortality rates for women undergoing early abortions, where the procedure is legal, *appear to be* as low or lower than the rates of normal childbirth." Fourteen pages later, Blackmun writes of the "*now-established medical fact*" that, "until the end of the first trimester mortality in abortion *may be less* than mortality in normal child birth."

So, as Forsythe points out, "The 'appear to be' on page 149 becomes an 'established medical fact' on page 163"; but then Blackmun "immediately qualifies the 'established medical fact'" with a "may be." Yet "despite the contradiction in this paragraph, the mantra was taken to be fact by the Justices."

Relying on such one-sided "data," the justices arrived at Brennan's and Douglas's ultimate goal – overturning the abortion laws of all 50 states. They did so by guiding Justice Blackmun, once he was assigned to write the majority opinion, away from his much more moderate initial inclinations (he had originally found the Georgia statute challenged in *Doe* – which allowed abortion only in cases of fetal deformity, rape and incest, or to protect the mother's life and health – to be

"perfectly workable").

Roe and *Doe* mandated legalized abortion for any reason, at any time of gestation. While pro-life activists recognized this immediately, the Court – with enthusiastic media cooperation – promulgated a widely-accepted myth that they had legalized only "early" abortions – a myth that, as Forsythe notes, still has many Americans today claiming to be in favor of *Roe*, while also voicing support for many abortion restrictions that *Roe* has disallowed. Much of the public still does not know how extreme the ruling was.

Forsythe lays it out clearly: *Roe* held that in the first trimester, the only restriction a state may impose is that abortions be done by a licensed physician. The state interest in protecting fetal life during the second trimester is undermined by the Court holding that "viability" – when the child can survive outside the womb (usually not before the *end* of the second trimester) – is the "turning point" when the state may provide some protection for the child. And in *Doe*, the Court included a "health of the mother exception" so broad – and subject to the sole medical judgment of the *abortion provider* – that it renders even third trimester restrictions meaningless. (Forsythe notes how the justices, buying into the slogan that "an abortion should be between a woman and her doctor," did not foresee the explosion of an abortion industry in which the vast majority of women seeking abortions go *not* to their personal physician, but to strangers, abortionists who do not know them or their medical history.)

Forsythe also challenges the perception that Americans are "polarized" over the abortion issue. He refutes the conventional wisdom – clearly accepted by the *Roe* justices – that the nation at that time was moving inexorably toward widespread public support for reform or repeal of laws protecting the unborn. While 13 states had legislated some reforms between 1967 and 1970, he notes, most had only moderately liberalized their laws, and *none* had gone as far as

the Supreme Court did in allowing abortion at any time for any reason. Then in 1971, not one additional state passed legislation loosening prohibitions on abortion. And in 1972 voters in Michigan and North Dakota overwhelmingly defeated referendum proposals to legalize abortion, while New York's elected state representatives voted to *repeal* its liberalized abortion law – which was only sustained by Gov. Nelson Rockefeller's veto. The trend seemed to be shifting away from the brief flurry of liberalized state abortion laws, as the nation began to take a closer look at the reality of abortion and life before birth.

In the ensuing four decades, dramatic advances in medical technology have further enhanced public knowledge of pre-born human life, and further *united* Americans in what surveys increasingly show is a widespread national discomfort with unlimited abortion. Our "polarization," Forsythe shows, is not *between* the vast majority of Americans, but between that vast majority and a Supreme Court that continues to mandate legal abortion at any time for any reason.

Some pro-lifers will be unhappy with Forsythe's concluding vision of a post-Roe America in which, with the issue returned to the states and the people therein, there might result a wide variety of abortion laws: some states "might maintain abortion-on-demand as under Roe," others "might prohibit abortion except to save the life of the mother," and the majority will probably keep abortion legal, but with tighter time limits and more restrictions than *Roe*.

Abuse of Discretion is a work of analysis, however, not advocacy. And while it reminds us that even should *Roe* be overturned, we will still have much work to do, there is great hope to be taken from Forsythe's analysis. For he confirms what surveys consistently show: that the American people, profoundly uncomfortable with abortion at the time of *Roe*, are even more so now; and while they have not yet arrived at a consensus for securing full Constitutional protection for pre-

born human life, they are much closer to that position than they have ever been to the Court’s mandate of legal abortion at any time, for any reason.

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