Observations and Commentary by Rev. Michael J. Furlan

Roe v. Wade and Common Sense

(Apologies to Thomas Paine)

Mention "Roe v. Wade" and most people will know that it is the Supreme Court decision that "legalized abortion." While that is a convenient shorthand headline, like the issue itself, the case is more complicated. Although I am not a lawyer, I am a thinking human being and have read and discussed this issue frequently and have some thoughts and observations. Whether they would stand up to judicial or legislative scrutiny is unknown, but they make sense to me and I hope they make sense to others. The first consideration is what this decision was really about.

Technically, what the Court did was to declare that laws prohibiting or restricting abortion for any reason in the first trimester were unconstitutional. Although acknowledging the viability of the fetus after the first trimester, the Court declined to acknowledge the right to life of the unborn fetus since it determined that the fetus was not a legal person entitled to Constitutional protection under the Fourteenth Amendment. As a result, any laws restricting abortion after the first trimester were also severely limited by this decision. The Constitution itself was established to limit the power of the government to infringe upon the fundamental rights of the people. In itself this is a good thing.

There are two problems that I see with the Roe decision. The first is the Court's definition of the "people." I have already mentioned that the Court decided that the fetus was not a legal person. While some callous individuals may be unwilling to acknowledge the humanity of the unborn child, most expectant families spend nine months preparing to welcome a new <u>person</u> into their homes. From the moment of conception, the developing organism has its own unique <u>human</u> DNA. Once before, the Supreme Court decided that certain human beings were not legal persons. That was the Dred Scott decision (a slave was only counted as three fifths of a person for apportionment purposes). The Court was wrong then as well.

The second problem is their definition of "fundamental right." The *Roe* Court deemed abortion a fundamental right, thereby subjecting all laws attempting to restrict it to the standard of strict scrutiny. As I understand it, they argued that restricting abortion violates the "right to privacy" which they asserted was guaranteed by the Fourth Amendment. The Fourth Amendment states (in its entirety): *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be*

searched, and the persons or things to be seized. This so-called "right to privacy" is not even mentioned. At best, it is an exaggeration of the right to "be secure against unreasonable searches and seizures." But, in my non-legal opinion, that seems to be stretching the definition. Then, to claim that having an abortion is part of being secure in one's person seems backward to me. Allowing someone to perform an abortion strikes me as more of an invasion of privacy (whether or not privacy is a right) than preventing it. A law restricting abortion does not search or seize any person or thing. I consider the argument linking the right to abortion with the Fourth Amendment to be flawed and weak.

Even if abortion was a right guaranteed and protected by the Constitution, there is no reason for the government to support it, financially or otherwise. The government does not provide assistance to enable anyone to exercise the rights that are more clearly enumerated in the Constitution. For example, the government does not have to provide me with a sound system, printing equipment, or a meeting hall if I choose to exercise my freedom of the speech, press, or assembly.

A more dramatic example of the inconsistency present in the Court's view of abortion can be found in a comparison between abortion and another controversial right.

The Second Amendment clearly states: …*the right of the people to keep and bear Arms, shall not be infringed.* First of all, the right to keep and bear arms is clearly and specifically stated unlike the right to abortion which emerges through some vague connections. Yet, the government has been able to limit this right by licensing the sale of firearms, restricting the types of firearms that may be kept, how and where "the people" can "bear" those arms and establishing qualifications for people who wish to exercise that right. And, of course, private citizens can seldom, if ever, get the government to buy guns for them.

It can be argued that firearms are dangerous and "the state" has a valid interest in protecting its citizens from injury or death. Therefore laws limiting and restricting this right pass the standard of strict scrutiny. The danger of death or injury from a firearm is potential. Most firearms have never killed or injured any human being. Considering the number of firearms in circulation, if that were not true, every human being would have to be killed or injured three times. On the other hand, abortion is also dangerous and that danger is immediate and inherent. Every abortion results in an injury (under controlled circumstances, of course) to the mother and the death of another human being, even if the human being is not a "legal person." To sarcastically paraphrase a well-known slogan: "Guns don't kill people; abortions kill people." Ironically, many of the most adamant proponents of stricter

limitations on the Second Amendment right are also adamant in their opposition to any limitation on the abortion "right."

Another example of this inconsistency can be found in various "animal rights" laws. We have laws protecting wildlife and limiting the killing of various fish and animals. Some laws even prohibit the killing of certain endangered or threatened species. There are laws which mandate the humane treatment of domestic animals including pets. In many cases these laws apply to animals owned by alleged perpetrators of such inhumane treatment. Suspected violations of these laws permit the "search and seizure" of the alleged violator's property. Animals are certainly not "legal persons." By the standard set in the Roe decision, shouldn't the government respect the "right to privacy" of the animal owners and allow them to be "secure" in doing whatever they want with their property?

Our government does have laws which permit the taking of human life under extreme circumstances: capital punishment (as long as it is not "cruel and unusual"), war, the defense of self or others, etc. But it seems as though it is only under extreme circumstances that the law can protect human fetal life.

In summary, the decision in Roe v. Wade makes no sense to me. But as I mentioned at the beginning, I am no expert or professional and I am sure that some of them would easily refute my observations. It just seems to me that there are better ways of dealing with the question and the conditions requiring the need to consider the possibility of abortion.

(A reflection linking Martin Luther King's Birthday, Roe v. Wade and the earthquake in Haiti appeared in my "Shepherd's Sharing" column for January 24, 2010 and can be found on the Reflections page of our parish website or at www.stgermaine.com/pdf/KingRoeHaiti.pdf.