Killing and the Ethical Erosion from *Roe v. Wade*

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I want to thank Missy Larsen of Planned Parenthood for graciously agreeing to come
down and for presenting a very thoughtful defense of the pro-choice position. We want to hear
the best arguments on all sides of this important issue. I know what it is like to present a
minority position in an unsympathetic venue, so I honor her willingness to speak up for the
position she supports.

“Thou shalt not kill.”1 These four words express one of basic, foundational principles of
human society and civilization. The general prohibition against killing pre-dates Moses, whose
succinct expression of the principle is the most famous. <<Even older records from even earlier
societies show the ancient and foundational nature of the taboo against killing.2>>

The legal and intellectual traditions out of which our Constitution and our legal system
emerged agreed that killing is generally outside of the social compact. The risks of killing
characterized the state of nature and led men to form political societies. [T-?] For example,
Thomas Hobbes wrote that in the state of nature: “there is always war of everyone against

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1 Exodus 20:13 (KJV).
2 *See, e.g.*, Genesis 4:9-13 (Cain’s punishment for killing Abel; his punishment from God was greater than he could
bear, or, as the alternative translation renders it “Mine iniquity is greater than that it may be forgiven.” (1953,
University Press, Cambridge edition of KJV); Genesis 6:13 (God tells Noah he will destroy all humanity, save
Noahh’s family, because “the earth is filled with violence . . . .”); **. **
everyone,” and “every man is enemy to every man . . . .”

3 Political society organized because, in the state of nature, he said, were “continual fear, and dangers of violent death; and the life of man [was] solitary, poor, nasty, brutish, and short.”

4 John Locke agreed that men left the state of nature because of such risks, but argued that there was also in the state of Nature a Law of Nature which taught all mankind even the most primitive peoples in the most primitive conditions that “no one ought to harm another in his life, health, liberty or possessions,” and that he “ought to do as much as he can to preserve the rest of mankind,” and to support “what tends to the preservation of the life . . . of another.”

5 But because humanity was weak and vulnerable in the state of nature, men “unite into a community for their comfortable, safe, and peaceable living . . . and a greater security,” and “for the mutual security of their lives, liberties and estates . . . .”

6 In so doing, the individual relinquishes the right to “do whatsoever he thinks fit for the preservation of himself and others” in return for the privilege of enjoying the protection of the law.

7 Locke has been called “America’s philosopher” because of his great influence upon the Founders of America. The Founders agreed that the ethic of civilized life and of society forbids killing except in rare circumstances such as for self-preservation when the law cannot protect, or when the law requires for preservation of the community. The exceptions deal with rare cases in which the grave moral wrong of killing human life is outweighed by preventing a comparably grave moral evil (such as saving another life, preventing severe suffering and death, preventing the destruction of one’s agency).

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3 Thomas Hobbes, Leviathan, Ch. 13, at 100 (Michael Oakeshott ed. 1962, Macmillan) (1651).
4 Id.
6 Id. at ¶95.
7 Id. at ¶123.
8 Id. at ¶128, 129.
Abortion is an act of killing. I speak carefully and precisely here. Abortion causes (and is intended to cause) the death of a living human being, homo sapien, a human embryo or fetus. It is an act performed upon a living unborn child deliberated done to cause the death of the child.

Because abortion was killing, Hypocrites, the great Greek physician and father of the medical Oath that bears his name, forbade as a matter of basic medical ethics, the performance of abortion even though abortion was not illegal in his day. Millennia earlier, the Babylonians had prohibited and punished abortion severely. The ethic of protecting and preserving all human life was so strong in Israel that there is no record or hint of any abortion in ancient Israel, though similar practices such as infanticide were widely practiced among neighboring societies.

Thus, it is not surprising that abortion was prohibited at Common Law as far back as we have record (nearly a thousand years). In the Section on the Rights of “Persons” in Blackstone's Commentaries on the Laws of England, William Blackstone wrote:

Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother’s womb. For if a woman is quick with child, and by potion or otherwise, killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offense in quite so atrocious a light but merely as a heinous misdemeanor.9

The words I have highlighted -- “life,” “killeth,” “dead,” “murder,” “homicide” “manslaughter,”
-- underscore that even in the darkest medieval ages in England, abortion was understood to involve killing. Abortion was not considered murder at common law (that technical crime required a victim who had been born alive), but abortion was considered homicide, manslaughter, and an heinous misdemeanor because human life was so precious and even in the darkest ages even the most ignorant people knew that abortion kills a living human child.

When our Founders established our nation, they eloquently expressed the basic principles upon which the new government would be established: “that all Men are created equal, that they are endowed by the Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness – That to secure these Rights Governments are institute among men . . . .” These principles were deemed to be “self-evident” to all rational persons. As Blackstone’s treatise, written just 20 years before the Declaration of Independence, and colonial records confirm, abortion was criminally prohibited throughout America when the Founders drafted the Constitution. The Fourteenth Amendment was adopted, some 80 years later, during a great national movement (promoted by the AMA, ironically) to extend the prohibition of abortion, and some legislatures that ratified the Fourteenth Amendment also enacted broad statutory prohibitions of abortion. Nothing in the text or history of the Constitution or the Bill of Rights of the Fourteenth Amendment lends even a hint of support for Roe v. Wade.

Roe v. Wade attacks the very foundation of our Constitutional principles. It attacks the basic principle of the equality of all human lives in the eyes of the law. Roe defied the principle that the law does not deny or disregard the equal worth of human lives. The first right mentioned by Mr. Jefferson was the right to life; yet Roe mocks that principle. Mr. Jefferson declared that the purpose of government is to secure these basic rights but Roe held that the lives of the most
vulnerable, most defenseless class of human lives must be stripped of any legal protection. Roe has compelled all of our state governments and our national government to withdraw legal protection from the unborn child.

Roe damaged the cornerstone ethical principles against killing. Is it any wonder that since Roe v. Wade was decided, other vulnerable classes of human beings have increasingly been violated? <<One might mention Terri Schiavo as just one example, who was starved to death for thirteen days -- a painful, ugly, cruel, torturous way to die-- denied food and hydration by court order because she in her mentally handicapped condition was deemed by the court to have a life not worth living.>> Is it any wonder that the aged, infirm, elderly, handicapped and decrepit are less protected and more easily disposed of today?

Is it any wonder that since Roe v. Wade was decided, the killing of unwanted children and other violence and abuse against infants has dramatically increased?

Is it any wonder that since Roe v. Wade the rates of violent crime have risen?

Is it any wonder that a hardening of the hearts has occurred among all people who have practiced, promoted, facilitated, allowed, encouraged and excused abortion? Killing has that effect upon people; it makes them hard, less sensitive, less humane, and less compassionate.

Abortion is not the first gravely immoral and unethical social practice embraced by many Americans and endorsed and protected by the Supreme Court. The closest analogy for abortion is slavery, and the closest precedent for Roe v. Wade is the infamous Dred Scott v. Sandford.10

Slavery discounted the humanity of its victims just as abortion-on-demand discounts the humanity of its victims. The Supreme Court denied the “personhood” of slaves for protection as citizens in Dred Scott, just as the Supreme Court denied the “personhood” of unborn children for protection against destruction by abortion-on-demand in Roe.

10 60 U.S. 393 (1857).
Defenders of slavery argued that slavery was best for the slaves who, they insisted, were incapable of caring for themselves in a civilized society. Defenders of abortion-on-demand argue that it is better for unwanted children to be killed rather than to be born unwanted.

Defenders of slavery insisted that the nation had no right to tell slaveholders what to do if they wanted to own slaves, just as defenders of abortion-on-demand insist that society has no right to tell pregnant women what to do if they want elective abortions. Slave owners claimed the right to choose for themselves whether or not to have slaves, just as defenders of abortion-on-demand insist that pregnant women have the right to choose for themselves whether or not to have abortions.

Defenders of slavery insisted that the Constitution protected their right to own slaves just as the defenders of abortion-on-demand insist that the Constitution protects their right to abortion-on-demand.

Slave owners insisted abolition of slavery would create economic and social chaos, just as defenders of abortion-on-demand insist that abolition of elective abortions will cause economic and social chaos. Then and now they objected to imposing such burdens upon just one class – southern slave-owners then or women who want elective abortions now.

Defenders of slavery argued that a slave becomes a person only when he is set free and until then has no right to liberty; defenders of abortion-on-demand argue that a child becomes a person only when set free from the womb, and until then has no right to life.

Defenders of slavery argued that if the abolitionists would leave them alone, southerners would eventually eliminate slavery; just as defenders of abortion argue that if pro-lifers will leave them alone, abortion will eventually become rare.
Slavery embodied a hierarchical view of human life, as does abortion-on-demand. Slavery rejected the inherent equality of all living human beings, as does abortion-on-demand.

Defenders of slavery fiercely prosecuted and persecuted the expression of abolitionist views (whom they accused of being religious fanatics). Today advocates of abortion-on-demand pass and try to enforce draconian laws restricting pro-life free speech (by pro-lifers they claim are religious fanatics).

Lincoln asked at Coopers Union: “Is a man not a man because he is Black?” Pro-lifers today ask, “Is a child not a child because she is living in a womb?”

Roe v. Wade was an illegitimate, immoral, unprincipled decision 35 years ago, and it remains an illegitimate, immoral, unprincipled decision today. The Court had no credible authority, reason or precedent to support its decision then, nor has it any today. Thoughtful legal commentators, both liberal and conservative, both men and women, criticized Roe for being ungrounded and illegitimate then, and still do today.

<<Professor Alexander Bickel of Yale chastised the High Court for ruling by judicial fiat and for failing to explain its reasoning: “One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject. It simply asserted the result it reached.”

<<Professor John Hart Ely, then of Harvard, wrote: “At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of any obligation to draw one been so obviously lacking.” He further observed: “Roe lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine . . . .” Professor Ely

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2 Ely, supra note 63, at 936-37 (emphasis added).

3 Id. at 943.
concluded his stinging analysis of *Roe* by observing that it “is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.”

<<Professor Richard Epstein of the University of Chicago stated that the Supreme Court’s rationale for its abortion decisions was so poor that “[w]hat seemed to make sense as a matter of principle to a lot of people and a lot of lawyers is all of the sudden suspect.”

<<Watergate Special Prosecutor and Harvard Law Professor Archibald Cox wrote: “[T]he Court failed to establish the legitimacy of [*Roe*] by not articulating a precept of specific abstractness to lift the ruling above the level of political judgment”

<<Professor Mary Ann Glendon observed, "Nowhere have the courts gone so far as has the United States Supreme Court in precluding . . . statutory" regulation of abortion by legislative process. She added: “[T]o a greater extent than any other country, our courts have shut down the legislative process of bargaining, education and persuasion on the abortion issue.” She noted: “Today, in order to find a country where the legal approach to abortion is as indifferent to unborn life as it is in the United States, we have to look to countries which are much less comparable to us politically, socially, culturally, and economically, and where concerns about population overrides both women’s liberty and fetal life.”

4 *Id.* at 947 (emphasis in original).


Roe was just the first of what has become a very long line of Supreme Court cases (nearly 40 major cases), most of which have expanded the right to abortion, and curtailed the power of states to restrict or even regulate abortion.

The consequences of Roe have been ghastly. Since Roe was decided 35 years ago, what was a rare surgical procedure has become one of the most common surgical procedures in America. In those 35 years since Roe, nearly 50 million abortions have been reported in America (and the Alan Guttmacher Institute estimates that an additional 3-6% more abortions are not reported).

-In 2005, there were 1,206,200 reported abortions in the USA according to the Alan Guttmacher Institute, the most reliable source of abortion data.

-Nearly ¼ of all known pregnancies (224 of every 1000) ended in abortion that year. <<1.94% of all women 15-44 had an abortion that year.>>

-Nearly half (47%) of all women having abortions in 2005 had previously had one or more abortions.

-Over one-thirds (37%) of abortions are performed at nine or more weeks gestation, when the child’s beating heart and brain waves are detectable (and fingernails – “Juno”).

- The rate of abortion in the US is one of the highest in the world, especially high compared to other affluent nations.

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- The overwhelming majority of abortions are not done because of “hard cases” or life or health threats or rape or incest. The reasons are social and personal convenience – concern about effect on relationships, interference with education or a job, don’t want more children, finances, etc.

- 86% of all abortions are performed on unmarried women, suggesting the prime motive.

Utah is one of the few states that tries to gather information on the reason for abortion, and the statistics show that less than 2% of all abortions are done for any of the “hard case” reasons. The latest data is for 2005 when 3,556 abortions were performed in Utah (rate = 5.7/k wo; ratio = 63.6/k births) and reasons were given for 3,279 abortions; of those 22 were because the mother’s life was endangered (that is less than 0.7 percent of all the abortions). Thirteen (13) abortions were for fetal malformation (that is less that 0.4 percent of all abortions) and one other because the mother was HIV positive (raising fetal health to just over 0.4 percent). Two abortions were performed because of reported rapes (that is less than 0.1 percent of all abortions. None were performed because of incest that year and one listed “other” for the reason. In total, 39 of 3,279 abortions noting reasons, only 1.2% of all abortions were performed because of these serious conditions. (In 2001, the percentage was 1.8).12 The rest were performed for reasons of personal convenience.

So why doesn’t the legislature legalize abortion for the hard cases (broadly defined) and prohibit the others? Because Roe forbids the states to prohibit abortion for any reason before viability (essentially the six or seventh month of pregnancy).

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Conclusion:

I recently reread in new translation *Night*, by Elie Wiesel, the Nobel prize-winning author who tells the story of his and his father’s arrival in 1943 at Birkenau. When they got out of the cattle cars in which the Hungarian Jews had been transported, the prisoners saw the flames of the crematorium and open fire pits. Where bodies (living and dead) were being burned. Weisel wrote:

. . . Not far from us, flames, huge flames, were rising from a ditch. Something was being burned there. A truck drew close and unloaded its hold: small children. Babies! Yes, I did see this, with my own eyes . . . children thrown into the flames. . . .\(^{13}\)

That was in 1943 in Nazi Europe. Today, in 2008, in Utah and throughout the United States, another holocaust is ongoing. Here, in Utah, there are equivalent fire pits -- places where unwanted, unvalued human lives are wantonly, violently destroyed. I refer, symbolically, to the abortion clinics and sections of various hospitals where abortions-on-demand are performed on innocent, defenseless unborn children. Abortion is an act of violence. It is an act of extreme, irremediable child abuse. It is undeniably an act of *killing*!.

There are differences, of course between what is happening in the United States in 2008 and what happened in Nazi-occupied Europe in the 1940s. Then, the victims mostly were adults and teens, and children and infants who had been born alive. Today, the victims are pre-natal human beings – healthy, living, developing, normal babies growing, alive, in the safety of their mother’s womb. Then, the victims could resist, run, hide, fight, oppose, cry out, and tell their plight. Today, the victims are entirely helpless, completely vulnerable, totally incapable of

running or hiding or fighting, and their cries are silent, and they cannot tell anyone of their plight or their killing.

<There is another difference. In the 1940s, the Jewish women and men resisted, protested, and used all their powers to protest against and prevent the horror of the destruction of their children, and the children of the other prisoners. Today, by contrast, most American women and men, including, sadly, most lawyers, are silent, and even more inexplicably, most Mormon women and men, are silent; rarely protesting, or opposing, or resisting, or trying to prevent the holocaust of abortion that, each year, kills more than one and a quarter million living children in America.>>

As a young teenager, standing before those fire pits in Birkenau, watching as children were being thrown into the flames, Elie asked, and as a survivor he demanded: “How was it possible that men, women, and children were being burned and that the world kept silent. . . .”14

As an adult in the United States of America, who has witnessed the creation and implementation of the ghastly, unconstitutional, illegitimate and immoral judicial doctrine of mandatory abortion-on-demand under Roe v. Wade and nearly forty subsequent decisions, I, too, wonder “how is it possible” that this can happen in America, and how is it possible that my fellow lawyers, whose profession is committed to protecting the lives and liberties of the weak, vulnerable, oppressed, marginalized, and defenseless are silent. How is it possible that my fellow members of the Church of Jesus Christ of Latter-day Saints fail to express outrage, and fail to protest in legal, appropriate, meaningful ways? Like Wiesel, I cannot understand it!

In his Nobel Peace Prize Acceptance Speech in 1986, Wiesel recalled his experience, and declared: “I swore never to be silent . . . . We must take sides. Neutrality helps the oppressor,  

14 Elie Wiesel, Night, 32 (1972, 2006).
never the victim. Silence encourages the tormentor . . . .”

We too must speak up and get involved.

In his book *Standing for Something*, the President of the Church of Jesus Christ of Latter-day Saints, Gordon B. Hinckley, expressed it well when he wrote:

What we *desperately need* today on all fronts . . . are leaders, men and women who are *willing to stand for something*. We need people . . . who are willing to *stand up* for decency, truth, integrity, morality, and law and order . . . even when it is unpopular to do so – perhaps *especially* when it is unpopular to do so.

. . . Never before, at least not in our generation, have the forces of evil been so blatant, so brazen, so aggressive as they are at the present time.

*We are involved in an intense battle. It is a battle between right and wrong.* . . .

*We desperately need men and women who, in their individual spheres of influence, will stand for truth in a world of sophistry.* . . . *We need moral men and women, people who stand on principle,* to be involved in the political process.

. . . . The weight of our stance may be enough to tip the scales in the direction of *truth and right.*

Elie Wiesel ended his Nobel speech stating: “There is much to be done . . . . [O]ne person . . . of integrity can make a difference, a difference of life and death.”

I conclude on that point, too. There is much to be done. There are arguments to be made, claims to be filed, briefs to be prepared, law review articles to be written, speeches to be presented, candidates to be persuaded, letters to be sent to public officials, and to newspapers,


17. *Id.* at 120.
and there are lawful, orderly, free speech protests to be made against the killing of abortion.

As Wiesel said, one person of integrity can make a huge difference in his or her family, school, community, profession, or nation. We all have a duty to not be silent about the wrongs and abuses around us, including the horrific, lethal abuses of abortion on demand. And we must commit to speaking up over the long-term. As President Gordon B, Hinckley wrote:

“We cannot effect a turnaround in a day or a month or a year. But with enough effort, we can begin a turnaround within a generation, and accomplish wonders within two generations – a period of time that is not very long in the history of humanity.”\(^{18}\)

Thank you.