WHY JUSTICE BLACKMUN'S APPEAL TO ROMAN LAW TO JUSTIFY *ROE V. WADE* IS WRONG

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Struggling to root a constitutional right to abortion in some legal tradition, *Roe v. Wade*, 410 U.S. 113 (1973) made two deeply misleading claims. First, Justice Blackmun vaguely pointed to "[a]ncient attitudes," ones "not capable of precise determination," to claim that, in other places and times, "the Roman Era" endorsed abortion "without scruple." *Id.* at 130. Second, the Court continued, "Greek and Roman law afforded little protection to the unborn." *Id*.

On both counts, the Court was wrong. *Roe*'s unsophisticated grasp of "ancient [Roman] attitudes" toward the unborn generally and abortion specifically ignores both the effect of Christianity on the Roman Empire and the ways in which even the pre-Christian Roman Empire and Roman Republic protected the unborn. A proper historical analysis would account for both, and produces the opposite conclusion than the breezy one reached after two sentences in *Roe*. As the Supreme Court is poised to reconsider *Roe*, this article provides a brief summary of the key aspects of Roman law that show *Roe*'s error.

The Pagan Roman Empire vs. the Christian Roman Empire

When Justice Blackmun claims that "Ancient religion did not bar abortion[,]" he cannot be referring to the Christianity which gradually reshaped Roman Empire. *Id.* Unlike the pagan religions that influenced Rome, Christians already in the 2nd c. AD were considered exceptional since they believed that those "who use drugs to bring on abortion commit murder"[1] and they "did not expose [their children] once they are born."[2] From a Christian perspective, abandoning (exposing) newly born children was equivalent to killing a child, just like abortion. By contrast, some pagan religions may have justified abortion on the basis of convenience and self-interest, or even preferred abandoning children instead of abortion. Yet at no point does *Roe* explain why "Assyrian, Canaanite, or the utilitarian Greek and Roman worldviews" should supplant the "Western, unmistakably Judeo-Christian, and Enlightenment premises" that actually produced the American legal tradition.[3]

The Christian Roman Empire did not completely apply the laws of the Christian Church, and relied heavily on pre-Christian Roman law. It combined much of this with the tenets of Christianity. Pre-Christian Roman law lacked coherent conceptual categorization of unborn child due to a Stoic idea expressed by Papinian, a pagan jurist of 2nd c. AD and 3rd c., that an unborn child is only a *spes animantis*[4], the hope of a living being (Justinian's *Digest* – D. 11,8,2), and that "it cannot be correctly called as a man (*homo non recte dicitur*)" (D. 35,2,9,1). But pre-Christian Roman law still created a set of protections for unborn childrens' interests in private law, and had limitations on abortion in public law. At the turn of 2nd c. AD and 3rd c. AD pagan emperors Septimus Severus and Caracalla introduced the first public penal sanction against abortion: the woman who did abort her child was condemned to exile, and the reason for it was the ancient right of a husband to have a progeny.[5] Although various methods of abortion were already well known in the early Roman Empire,[6] abortion was not accepted in society and Romans generally tried to limit abortion for many different reasons

[1] Athenagoras, *A Plea for the Christians*: *Volume II,* 147 (Benjamin P. Pratten trans., 1885) (177).
[2] *Epistle to Diognetus*, *in The Apostolic Fathers: Volume II*, 141 (Bart D. Ehrman eds. & trans., 2003) (130).
[3] Emma Finney, *Shifting Towards A European Roe v. Wade: Should Judicial Activism Create an International Right to Abortion with A., B. and C. v. Ireland*, 72 U. Pitt. L. Rev. 389, 416-17 (2010).
[4] E. Nardo, *Procurato aborto nel mondo greco romano*, 30 (1971).
[5] E. Cantarella, *Women and Patriarchy in Roman Law*, *in The Oxford Handbook of Roman Law and Society*, 421-422 (P.J. du Plessis, C. Ando, & K.Tuori eds., 2016).
[6] J.M. Riddle, *Contraception and Abortion from the Ancient World to the Renaissance*, 84 (1992).

– including the risk for women and to protect the patrimonial interest of citizens and the state.[7] In the sphere of private law, pre-Christian Roman jurists shaped legal solutions in favor of the unborn children even though they did not use a clear anthropological category.[8] They fashioned the concept of *nasciturus* [child to be born]. The patrimonial interests of a conceived child were of the utmost importance, and doubts were resolved in favor of the unborn (D. 37,9,1,1). Ulpian – a pagan Roman jurist of 2nd c. AD and 3rd c. AD – explains that according to the Law of the Twelve Tables (5th c. BC) – "one in the womb (*qui in utero fuit*)" can inherit on the same footing as one already born: "one brother and one unborn brother, or one nephew and one who is not yet born" (D. 38,16,3).

Roe's cursory reasoning about the Roman Empire before it became Christian overlooks Roman law's surprisingly positive appreciation of life from the moment of conception, and the importance it placed on protecting pregnant women. Nonetheless, even taking the pre-Christian Roman law on its own terms, it did authorize considerable protection to the unborn, and did not authorize unlimited abortion like *Roe* did. Three aspects of Roman law demonstrate *Roe*'s error: 1) the legal importance of the moment of conception for a child's legal status, 2) the unborn child's inheritance rights and protections for its safe birth, 3) the unborn child's treatment as an ontologically individual being, even though this proposition was dubious from a Stoic perspective.

Moment of Conception and the Child Legal Status

Even focusing the analysis of "[a]ncient attitudes" in Rome toward protection of the unborn in the pre-Christian Roman Empire, we see a consistent recognition, summed up by Julian, a pagan Roman jurist of the 2nd c. AD, that "[f]or almost all purposes of civil law, children in utero are considered as existent beings" (*Qui in utero sunt...in rerum natura esse*)" (D. 1,5,26).[9]

A complete person in Roman law was defined by three statuses: freedom, citizenship, and a position in the Roman family. Marriage was about having children under paternal power. Accordingly, if a child was born in marriage, the recognition of the child's family status began at the moment of conception. The virtue of this solution was to afford children a status that benefitted them. For example, Gaius – a Roman legal scholar of 2nd c. AD – reports that if a Roman citizen was sentenced to exile from Rome during her pregnancy but conceived a child while still married, the child born in exile would have the status of a Roman citizen (*Institutes of Gaius* – G. 1,90). Similarly, if a Roman citizen lost her freedom during her pregnancy and became a slave, the child she gave birth to would also be born as a full citizen, as long as conceived in marriage (G. 1,91). Marcian, a Roman jurist of the 3rd c. AD, further points out that pregnant slaves who were free at any time—whether at conception, at birth, or at any time during pregnancy—always bore free children. And this is supported by the principle that through the "moment of freedom," the born child will receive at least one of the critical statuses, because of the principle that freedom should be favored supported by the principle to favor freedom – *favor libertatis* (D. 1,5,5,3). Similar reasoning was applied to a child receiving the status of a *decurion*, i.e., a member of a city council. As Ulpian reports on the son of a *decurion*: "if his father loses his rank after his conception, one must generously admit that he is to be regarded as the son of a *decurion* (...) and again, if the father was a *decurion* during the period between conception and birth, the child is given the status of a *decurion*" (D. 50,2,2,2–3).

The Concept of Nasciturus *– Not to Neglect Those Yet Unborn*

[7] W.J. Watts, *Ovid, The Law and Roman Society on Abortion*, 16 Acta Classica 89, 89-101 (1973).
[8] F. Longchamps de Bérier, *Law of Succession: Roman Legal Framework and Comparative Law Perspective*, 83 (2011).
[9] English versions of Roman legal sources follow Alan Watson's translation of Justinian's *Digest*; Samuel P. Scott's translations of the *Institutes* of Gaius, and the *Institutes* of Justinian.

In addition to acknowledging the child's existence at conception, Roman law also granted any child conceived in marriage the right to succeed and to inherit parental property. Julian, in speaking of the fact that children in utero are considered as existent beings, explains that statutory inheritances revert to them. He comments: "Even *hereditates legitimae* (statutory inheritances) revert to them; and if enemies take a pregnant woman prisoner, the child to be born has the right of *postliminium* (a recovery of rights)" (D. 1,5,26).

As Ulpian points out, children conceived were brought into possession of the inheritance by the praetor who, "given the prospect of their birth, (...) has not neglected those yet unborn" (D. 37,9,1,1). Even if there were doubts whether the child, if born, would be in the first class of statutory heirs (*sui heredes*), the praetor should put the unborn child into possession. Ulpian argues that maintenance cannot be refused to "him that is in a position to be the owner of the property in some event." (D. 37,9,1,1).

The idea that unborn should be provided with the maintenance coming from his father's estate is based on the Stoic perspective that a "child (...) is born if not for the advantage of the parent alone, whose child he is said to be, yet also for that of the state" (D. 37,9,1,15). However as Paul, a pagan Roman jurist of the 2nd and 3rd c. AD, explains "The one who is in the womb is deemed to be entirely a human being whenever the question concerns advantages accruing to him when born, even though his existence is never assumed in favor of anyone else before birth." (D. 1,5,7). It is neither the interest of the father or the mother, nor the welfare of society, but the benefit of the child himself that constitutes the reason and basis for considering it as a complete child during fetal life.

Children already conceived, but who were born after the death of their fathers were considered, while in utero, as already born (G. 2,147), and Romans either instituted them in their wills as heirs, like in the landmark case of *Causa Curiana*, from 93 BC, or disinherited them. Even when disinherited, however, when there were any doubts regarding the father's will, Roman law preferred to maintain the unborn child (D. 37,9,1,4). Similarly, in intestate succession, the existence of an unborn child served to withhold or entirely block the acceptance of the estate by more distant heirs. As Ulpian explains, "the heir next after a posthumus son cannot accept the inheritance while the widow is pregnant or is thought to be so" (D. 29,2,30,1). And what "if she was pregnant when the heir thought that she was not pregnant, he accepted, and then she had an abortion? Undoubtedly, his action was ineffective" says Ulpian (D. 29,2,30,4), for, indeed, the unborn child existed at that moment.

A curator for the child conceived (*curator ventris*) was usually appointed to exercise a child's possession of estate during child's fetal life, without waiting for the child to be born so as to protect its interests and secure its safe birth – to "furnish food, drink, clothing, and lodging to the woman" (D. 37,9,1,19), and "to take care of an unborn child" (D. 50,4,14).

A Child Is Neither the Fruit of a Woman, Nor Part of the Woman

Some have invoked one Roman text, authored by Ulpian, to support the thesis that an unborn child is considered a part of a woman's body—*partus* (D. 25,4,1,1). However, as Professor Waldstein has wisely observed, this is an inaccurate interpretation of the text.[10] In the case described in the text, the woman denied being pregnant. The ex-husband was convinced that she was pregnant and wanted to protect the child's interests, and obviously his own interest. Under the law it was the mother who could ask for the appointment of *curator ventris*, not the ex-husband. The emperors Marcus Aurelius and Lucius Verus, however, subjected the examination of this matter to the praetor

[10] W. Waldstein, *Quelleninterpretation und 'status 'des 'nasciturus'* in *Status familiae: Festschrift für Andreas Wacke zum 65 Geburtstag*, 513-529 (2001).

and ordered him to carefully check whether the woman was pregnant to ensure the child's interest, neither plainly rejecting nor merely following the ex-husband's request. They took the case out of the private sphere, as Waldstein points out, affirming the importance of determining whether a child exists in the womb, and acted to protect fetal life.

Analogically, in 142 BC, a jurist named Brutus decided in favor of a slave child – the object of property – having its individuality. "The question was raised in times gone by whether the offspring of a female slave belonged to the usufructuary." (D. 7,1,68). Brutus argued that "one human being cannot be treated as being among the fruits of another" so the rules of usufruct do not apply to it. The decision remained highly controversial, because it preserved future offspring of slaves for the owner. Regardless of that, already in the 2nd c. BC the argument that a human being is not classified legally as fruit of the mother persuasively expressed even a slave child's distinct position.

Abortion, Exposing Children, and the Role of Adoption

Did the pre– and non–Christian Romans protect life during pregnancy because of the sanctity of life? No. To understand the Roman perspective, however, it is crucial to take some distance and look at the unborn child as a future member of the community, an expectant (*nasciturus*), and as the future owner of the estate. The Romans were conscious that their lives did not end with themselves but continued through generations. Protecting life from the moment of conception was natural and obvious to them, and giving birth to and raising children was a common law of nature (D. 1,1,3). They discussed the status of the unborn child, however, primarily in the private law context.

The ancient Roman law did not penalize abortion performed by woman with the consent of her husband. That idea was an obvious consequence of the right of killing which the head of family (*pater familias*) had over persons under his power in the patriarchal Roman family. Possibly due to convenience, Ancient Romans developed yet another inhumane practice based on this right – they preferred abandoning the newborn instead of abortion. But pre-Christian law did attempt to protect exposed children. The power of the head of the family to decide about the life and the death was gradually limited under imperial legislation in pre-Christian Empire. Quite interestingly the pagan jurist Paul equates exposing children with murdering them (D. 25,3,4). A new perspective was brought by Christianity. Constantine allowed for the legal status of foundlings to be changed, which allowed ancient Romans to adopt such abandoned children. Constantine, in addition, offered financial help to parents to prevent them from killing or exposing their children due to poverty. Subsequently, Emperor Justinian, in 529, decided that abandoned children could not be raised as slaves, regardless of their previous status.[11]

Therefore, the idea of adoption, invented by pre-Christian Romans, which served many different goals, started to be used to protect exposed children. Adoption places a foreign child within a family and treats it as if it were born from the new parents. It was a way to introduce people into different social spheres. The Romans believed that even where one did not have children, one could adopt them, and that one's children can become heirs to others – since "adoption imitates nature" (*Institutes* of Justinian – I. 1,11,4). As Professor Witte argues, adoption, which was used in the past to remove the cultural stigma of illegitimate children, today may be "one of the best hopes and remedies to the new illegitimates who are condemned" in utero.[12] Indeed, it is yet another topic to which Roman legal experience can contribute.

[11] Y. Monnickendam, *The Exposed Child: Transplanting Roman Law into Late Antique Jewish and Christian Legal Discourse*, 59 American Journal of Legal History 1, 23, 10 (2019).
[12] J. Witte Jr., *God's Joust, God's Justice: Law and Religion in the Western Tradition*, 421 (2006).

Conclusion

In ancient Rome abortion was considered a breach of the public trust. Does this mean that the Romans did not perform abortions at all? No. Rome's allowance for abortion is one of the distinguishing marks between the pre-Christian and Christian Roman Empires. Pre-Christian Rome, as should surprise no one, operated in an entirely different cultural context, yet it still was able to inform the Western legal tradition that influenced America's legal structure. Pre-Christian Rome's understanding of human life and worth are simply incomparable to Christian Rome and the American experience. But, as the foregoing demonstrates, even pre-Christian Rome's distinct understanding of the human person did authorize considerable protections for the unborn child, always afforded the benefit of the doubt to the unborn, and did not authorize the unlimited abortion regime like the one sanctioned by *Roe*. Pre-Christian Roman law recognition of "one in the womb" as a legally-recognized human life contradicts Blackmun's opinion about Rome's unfettered allowance of abortion and the lack of protection for unborn children. Perhaps today, we are at a point where we can learn from pre-Christian Rome to respect life from the moment of conception, just as it could have learned from us to appreciate life after birth.