Neutrality is Impossible: A Debate Case Study

By Scott Klusendorf

In our October 2009 debate at the University of North Carolina, Nadine Strossen, former President of the ACLU (1991-2008), defended her case for elective abortion with an appeal to relativism. To summarize her case, reproductive freedom means the freedom to choose whether or not to have children. Laws restricting abortion unjustly curtail that freedom and impose the religious beliefs of some on others who disagree. “Our individual principles of morality cannot control our judicial decisions,” she told the audience. “Our obligation is to liberty. We must respect freedom of conscience that allows women a right to choose.” True, she did say that pro-lifers are free to believe what they wish about abortion, but, citing Roe v. Wade, she insisted “the State should not enter the private realm of family life. Government must remain neutral.” She concluded by quoting the Supreme Court’s famous “mystery passage” in the 1992 Casey decision. “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”

Setting aside for the moment that each of her above claims assumed the unborn were not human—for example, would she make this same pitch for personal choice and freedom if the topic were killing toddlers instead of fetuses?—her appeal to relativism was seriously flawed in at least four ways.

1. Nadine’s appeal to state neutrality is not neutral. Indeed, state neutrality is impossible on abortion. The law either recognizes the unborn as valuable human beings and thus protects them or it does not and permits killing them. By agreeing that human embryos are fitting subjects for abortion, the federal courts are taking a public policy position that the unborn do not deserve the same protections owed toddlers or other human beings. This is hardly a neutral position; it’s an extremely controversial one with deep metaphysical underpinnings. Why, then, is it okay for Nadine to legislate her own view on the status of human embryos but not okay for pro-lifers to legislate theirs?

2. Nadine’s appeal to moral neutrality also is not neutral. Notice what she says. “Our individual principles of morality cannot control judicial decisions. Our obligation is to liberty and we must respect freedom of conscience.” Really? Is that morally true or just her individual principle of morality? It’s like she’s saying morality is personal, but here are some objective rules everyone must follow—“We must respect freedom. We must respect conscience. We have an obligation to liberty.” Says who? Notice she seeks to impose, through law, her own controversial view of morality on pro-lifers who disagree. That is, she smuggles morality into her claim through the back door. Let me be clear. I have no problem with grounding our laws on objective moral principles. Indeed, if we don’t, law is reduced to mere power. However, what I do take issue with are those who pretend they are neutral regarding morality and the law. No they are not. Nadine wants to legislate her position every bit as much as I want to legislate mine. There is no neutral ground here. Everyone takes a position. And I am fully prepared to accept Nadine’s position on abortion if she can demonstrate the unborn are not human. But a faulty appeal to neutrality just won’t do the trick.
3. Nadine’s appeal to relativism provides an insecure foundation for basic human rights. As noted above, she cites the infamous “mystery passage” in *Casey* to argue that liberty means “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” That is, human nature is not fixed, but determined subjectively. But if that is true, there can be no fixed rights that arise from that nature, including a fixed right to an abortion. So why can’t a future Court just arbitrarily decide that women don’t have a right to an abortion? The Court didn’t say.

So what are we left with? The Court has affirmed the right of a person to define his own concept of existence, the meaning of the universe, and the meaning of human life. But, writes Hadley Arkes, “was there any reality or truth attaching to him? And what was there about him that commanded the rest of us to respect these decisions he reached about himself and the universe?” Why can’t we just make him up to be someone who has no rights if that fits our own concept of meaning and human life? In short, the Court’s infamous “mystery passage” assumes the very thing it denies. By demanding that we respect a person’s judgment about human life and the meaning of the universe, the Court assumes that the human being in question actually exists, whether my own concept of the universe admits him or not.

4. Nadine is just plain wrong to say that the government, thanks to Roe v. Wade, is no longer involved in the abortion issue. Sure it is. In fact, one branch of the federal government, the federal courts, has co-opted the issue from the other two branches of government—the legislative and the executive—leaving them no say on the matter. In fact, *Roe v. Wade* and its companion case *Doe v. Bolton* instituted through raw judicial power a regime of abortion-on-demand through all nine months of pregnancy. True, Justice Harry Blackmun claimed to limit abortion after six months, but the devil is in the details. What he really said is that the state *may*, if it chooses, pass laws protecting unborn humans after six months, but if and only if those laws do not interfere with the mother’s “health.” The Court in *Doe v. Bolton* went on to define “health” so broadly you can drive a Mack Truck through it. In short, “health” does not mean only that the mother’s physical life is in trouble, but anything you want it to mean in relation to her “well-being.” That includes her social health, economic health, family health—you name it! That’s why a 1983 U.S. Senate subcommittee concluded that thanks to *Roe* and *Doe*, there are no practical restrictions on abortion up until the time of birth! As for the Court not saying when life begins, true, Blackmun did say those words, but he didn’t mean them. Notice what he said. He said no one knows when life begins, but that abortion should remain legal through all nine months of pregnancy. Thus, he really did claim to know when life begins in that he gave unborn humans no protection until birth!

On a related note, Nadine said we should work together to reduce abortion rather than pass laws against it. She repeatedly stressed our need to get at the underlying causes that drive women to abort in the first place. But why should we worry about reducing abortion? If there is nothing wrong with it, why care how many there are? But if it unjustly takes the life of a human being, isn’t that a good reason to legislate against it?

At the same time, Nadine’s appeal to underlying causes is not persuasive. To borrow an example from Steve Weimar, suppose I said the “underlying cause” of spousal abuse is psychological, so instead of making it illegal for husbands to beat their wives, the solution is to provide counseling for men.” There are “underlying causes” for rape, murder, theft and so on, but that in no way makes it “misguided” to have laws banning such actions. Why should it be any different with laws protecting the unborn?

Answer: It’s only different if you assume the victims in question aren’t human. Herein lies Nadine’s fundamental error, an error I made sure the audience noticed.

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