

# ROE V. WADE

## Questions and Answers



### 1. WHAT IS ROE V. WADE?

It is the 1973 Supreme Court ruling that legalized abortion nationwide. A woman named Norma McCorvey ("Jane Roe") said she was pregnant from rape and wanted an abortion. She sued a Texas district attorney (Henry Wade) to prevent him from enforcing a Texas law banning abortion except to save the mother's life. On January 22, 1973, the Court decided this case, and a similar case (*Doe v. Bolton*) in which a woman named Sandra Cano ("Mary Doe") was denied an abortion by a hospital review committee and challenged Georgia's law. The Court struck down both laws, with the effect of striking down similar laws in all the other states as well. Norma McCorvey later admitted having lied about the rape. Horrified at these decisions' impact, she and Sandra Cano (both now deceased) urged the Supreme Court to reverse the decisions.

### 2. WHAT DID ROE V. WADE DO?

It said the right of privacy (not mentioned in the text of the Constitution) "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The Justices ruled that a state may not restrict abortion at all in the first three months of pregnancy (first trimester). It may establish guidelines only to protect the *mother's* health during the next three months (second trimester). After "viability," when the unborn child could survive if delivered (which the Court placed at 24 to 28 weeks of gestation), the state may prohibit abortion unless it is deemed necessary to preserve the mother's "life or health."

### 3. SO, ROE ALLOWS STATES TO PROHIBIT ABORTION AFTER VIABILITY?

Well, no. In the companion case *Doe v. Bolton*, which the Court said must be read together with *Roe*, "health" was defined in the abortion context to include "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." By this definition, abortion must be allowed in the ninth month if the abortionist says it is needed to serve a woman's emotional well-being. Though the modern court has yet to confront a challenge to a post-viability ban, *Doe* suggests that no meaningful limits can be placed on abortion throughout the nine months of pregnancy.

### 4. HAVE COURTS APPLIED ROE TO OTHER ISSUES?

Courts have used *Roe* to strike down safety regulations protecting women, as well as laws protecting children born alive during abortion attempts. Judges have invoked *Roe* to

argue for a constitutional right to assisted suicide, to nullify federal regulations protecting handicapped newborns from lethal neglect, and to demand legal recognition of same-sex marriage.

### 5. DID THE COURT FIND THAT LIFE DOESN'T BEGIN UNTIL BIRTH?

No. It argued that uses of the word "person" in the Constitution do not seem to include the unborn. Then, citing wide disagreement as to when human life begins, the Court said it "need not resolve" this difficult question. Instead of considering the scientific evidence that life begins at conception, or even allowing legislatures to protect those who have never been proven to be anything but human beings, the Court decided to treat unborn children merely as "potential life"—and to prevent the people or their elected representatives from determining otherwise.

### 6. WASN'T THE COURT ONLY CONTINUING A TREND TOWARD "LIBERALIZING" ABORTION LAWS BEGUN BY THE PEOPLE AND THEIR ELECTED REPRESENTATIVES?

No. In the years leading up to *Roe*, proposals to weaken laws against abortion were introduced in most states but usually not enacted. Some states did add narrow exceptions to their laws, and a few legalized abortions for any reason, generally up to 20 weeks' gestation. But then the trend reversed. New York's legislature voted to restore legal protection to unborn children (a move blocked by the governor's veto). And in 1972 the people of Michigan and North Dakota overwhelmingly voted to reject proposals to loosen their abortion laws. After studying public opinion against legalized abortion, demographer Judith Blake concluded that a Supreme Court decision striking down state laws would be "the only road to rapid change." *Roe* created a national policy more extreme than the law of any state, and it disrupted the democratic process by which the American people had begun to deal with the conflicting claims of the abortion debate.

### 7. IN MORE THAN FOUR DECADES, HAVEN'T PEOPLE COME TO ACCEPT THE POLICY OF ROE V. WADE?

No. Public opposition to legalized abortion remains strong. The vast majority of Americans oppose the policy of unlimited abortion imposed by *Roe*, and most believe abortion should not be legal for the reasons it is most often performed. A May 2018 Gallup poll shows that 65% of

Americans said abortion should be illegal in the second trimester and 81% said abortion should be illegal in the last trimester. A 2018 Marist poll shows that 51% of women said abortion should never be permitted (9%) or permitted only in cases of rape, incest, and to save the woman's life. (42%).

## 8. DO ALL LEGAL EXPERTS APPROVE OF ROE?

No. *Roe* has been criticized by several Supreme Court justices and even by legal experts who favor legalized abortion. Justice Byron White called it "an exercise of raw judicial power." Yale law professor John Hart Ely has said that *Roe* is "a very bad decision .... 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." Edward Lazarus, former clerk to Justice Harry Blackmun who wrote the *Roe* opinion, says that "*Roe*, as constitutional interpretation, is virtually impossible to defend."

## 9. HAS THE SUPREME COURT SPOKEN MORE RECENTLY ABOUT THE VALIDITY OF ITS DECISION IN ROE?

In 1992, in *Planned Parenthood v. Casey*, the Court abandoned *Roe's* trimester framework, but reaffirmed *Roe's* holding that no abortion could be banned before viability. Three Justices said they were doing this not so much because the original case was rightly decided, but because it had been the law for a long time and many people had come to rely on the availability of abortion. They said that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." But if one realizes the decision was wrong, it is doubly wrong to keep imposing it on the country. In his *Casey* dissent, Chief Justice William Rehnquist noted that in the previous two decades the Court had "overruled in whole or in part 34 of its previous constitutional decisions." Reversal of *Roe* is long overdue.

## 10. WHAT IS ROE'S IMPACT ON SOCIETY?

The legacy of *Roe* is virtually incalculable. In its wake it has left death and sorrow and turmoil:

- the deaths of millions whose lives have been destroyed before birth
- many women have been maimed or killed by legal abortion, and abortionists have been protected from legal scrutiny by courts applying *Roe*
- countless more women have been traumatized so deeply by abortion that they spend years struggling to find peace, healing, and reconciliation and increasingly they are making their stories public to warn other women
- far from emancipating women, *Roe* has helped create the expectation that women will resort to abortion—to "fit" into college and the workforce, and to free men from unwanted parental responsibility. It has blocked progress toward a society that welcomes women *with* their children

- men who grieve because they could not "choose" to protect a child they helped bring into existence
- problems that some claimed *Roe* would alleviate—"unwanted" children, child abuse and abandonment, etc.—have worsened
- a society increasingly coarsened by toleration and acceptance of acts that purposely destroy human life

## 11. WHAT WOULD HAPPEN IF ROE WERE REVERSED?

Abortion would not automatically become illegal. Rather, the people and their elected representatives would be allowed to begin enacting abortion policies that respect the lives of both women and their unborn children. The move away from the Court's policy of virtually unlimited abortion would likely be gradual, leading to improvements in cultural attitudes toward women and children and in concrete support for women facing unplanned pregnancies.

## 12. WOULD THIS MEAN A RETURN TO DANGEROUS ILLEGAL ABORTIONS?

No. Claims that thousands of women were dying from illegal abortions at the time of *Roe* were fabricated for political purposes, as a chief strategist later admitted. Research confirms that the actual number of maternal deaths resulting from abortion in the 25 years prior to 1973 averaged 250 a year, with a high of 388 in 1948. In 1966, before the first state legalized abortion, 120 mothers died from abortion. While any death is a tragedy, by 1972, when abortion was still illegal in 80 percent of the country, the number dropped to 39 maternal deaths from abortion. Furthermore, a groundbreaking 2012 study of abortion in Chile published in a peer-reviewed scientific journal found that Chile's abortion prohibition in 1989 did not cause an increase in the maternal mortality rate (MMR). On the contrary, after abortion was prohibited, the MMR decreased by 69.2% in the following fourteen years.

## 13. WHY ARE ABORTION ADVOCATES SO STRONGLY COMMITTED TO RETAINING ROE?

*Roe v. Wade* is increasingly recognized as bad law, bad medicine, and bad social policy. Most Americans object to an unlimited right to abortion. Therefore, such a policy can be kept in place only by extraordinary measures—by insisting that *Roe* is untouchable, regardless of the evidence. Abortion advocates know that any return of this issue to the democratic process would produce a very different policy from what the Court created. But false judicial doctrines do not have a right to live. Human beings do.



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