

The Author of *Roe*

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Justice Harry A. Blackmun was widely known as the author of *Roe v. Wade*,¹ a decision he was assigned to write in just his second year on the Supreme Court. The landmark case of our generation, *Roe v. Wade* has been used as a litmus test for candidates for judicial office,² and it has also served as a lightning rod for modern constitutional law, compared frequently³ to both the reviled decision in *Lochner v. New York*⁴ and the celebrated desegregation case, *Brown v.*

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1. 410 U.S. 113 (1973).

2. See, e.g., *Nomination of Robert H. Bork To Be Associate Justice of the Supreme Court of the United States, Hearings Before the Committee on The Judiciary of the United States Senate*, 102d Cong., 1st Sess. (Sept. 15-30, 1987); *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States, Hearings Before the Committee on The Judiciary of the United States Senate*, 101st Cong., 2d Sess. (Sept. 13-19, 1990); *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States, Hearings Before the Committee on The Judiciary of the United States Senate*, 102d Cong., 1st Sess. (Sept. 10-16, 1991); *Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States, Hearings Before the Committee on The Judiciary of the United States Senate*, 103d Cong., 1st Sess. (July 20-23, 1993); *Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States, Hearings Before the Committee on The Judiciary of the United States Senate*, 103d Cong., 2d sess. (July 12-15, 1994).

3. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 861-64 (1992) (declaring that “the sustained and widespread debate *Roe* has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies,” namely *Lochner* and *Brown*); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 32 (1990) (comparing *Roe* to *Lochner* and *Dred Scott v. Sandford*); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 940 (1973) (suggesting that “*Lochner* and *Roe* are twins”).

4. 198 U.S. 45 (1905) (striking down New York statute limiting bakers' working hours on grounds that it interfered with their freedom to contract in violation of the Due Process Clause of the Fourteenth Amendment).

Board of Education.⁵ But if *Roe* is a lightning rod, Justice Blackmun himself drew, almost all of its lightning. He personally received—and read—over 70,000 letters regarding the opinion, many of them labeling him with the most vicious epithets. In addition to all this hate mail, he has been picketed, threatened with death, and even targeted by a bullet shot through his living-room window.⁶ Justice Blackmun thus bore a high price for *Roe*, sacrificing his own right to privacy in order to protect the privacy rights of others.

At times, Justice Blackmun seemed to regret his close connection with *Roe*: “Author of the abortion decision,” he once said, “We all pick up tags. I’ll carry this one to my grave.”⁷ But while *Roe* is often associated with Justice Blackmun, the Justice also appeared to identify himself with this decision, as is evident in the unusually personal and passionate tone of his dissents in cases where he felt the abortion right to be under assault.⁸ In a poignant conclusion to his separate opinion in *Planned Parenthood v. Casey*,⁹ for example, Justice Blackmun wrote:

In one sense, the Court’s approach is worlds apart from that of the Chief Justice and Justice Scalia. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote. I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.¹⁰

Such statements suggest that, over the years, Justice Blackmun’s own sense of identity became intertwined with his opinion in *Roe*. Not only did he define the boundaries of abortion law in this important decision, the decision also played a critical role in defining him.

5. 347 U.S. 483 (1954) (holding that “separate but equal” public schools denied black schoolchildren equality in violation of the Equal Protection Clause of the Fourteenth Amendment).

6. See Harold Hongju Koh, *Tribute to Harry A. Blackmun*, 108 HARV. L. REV. 1, 10 (1994).

7. *Blackmun Accepts Aftermath of Writing Abortion Opinion*, N.Y. TIMES, Jan. 18, 1983, at A20. As Justice Blackmun predicted many years ago, this title (the author of *Roe*) did in fact accompany him to his grave. See Linda Greenhouse, *Justice Blackmun, Author of Abortion Right, Dies: Judge, 90, Will Forever Be Linked to Issue in Roe v. Wade*, N.Y. TIMES, Mar. 5, 1999, at A1.

8. See, e.g., *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 538 (1989) (Blackmun, J., dissenting) (stating: “I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided. I fear for the integrity, and public esteem for, this Court.”).

9. 505 U.S. 833 (1992).

10. *Id.* at 943 (Blackmun, J., dissenting).

But what exactly was at stake in this celebrated case? The actual outcome of the case was that seven out of nine Supreme Court justices voted to strike down a Texas statute making it a crime “to ‘procure an abortion’ . . . except with respect to ‘an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.’”¹¹ In his opinion for the Court, Justice Blackmun concluded that the “right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”¹² Despite the sage advice he had been given by his senior colleague Justice Hugo Black “never [to] display agony,”¹³ Justice Blackmun openly agonized over this decision in an unusually personal preface to the opinion, stating:

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One’s philosophy, one’s experiences, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one’s thinking and conclusions about abortion.¹⁴

Such public agonizing reveals the painstaking conscientiousness with which Justice Blackmun typically approached his judicial duties and the heavy weight his responsibilities placed upon him. “We need not resolve the difficult question of when life begins,” he continued. “When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”¹⁵ Nevertheless, the Justice expressed reluctance to leave this important question entirely open to be resolved by the people of each state, reasoning: “we do not agree that, by adopting one theory of life, Texas may override the rights of

11. *Roe v. Wade*, 410 U.S. 113, 117-18 (1973).

12. *Id.* at 153.

13. One decade later, Justice Blackmun stood by his introductory remarks, declaring:

I believe everything I said in the second paragraph of that opinion, where I agonized, initially not only for myself, but for the Court. Parenthetically, in doing so publicly, I disobeyed one suggestion Hugo Black made to me when I first came here. He said, “Harry, never display agony. Never say that this is an agonizing, difficult decision. Always write as though it’s clear as crystal.”

John A. Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. TIMES, Feb. 20, 1983, § b (Magazine), at 26.

14. *Roe*, 410 U.S. at 116.

15. *Id.* at 159.

the pregnant woman.”¹⁶ To the contrary, some might say that the Court proceeded to answer this question itself by holding that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”¹⁷

Although *Roe* found that the fetus is not a constitutional person, it acknowledged the importance of the state’s interests in preserving the health of the pregnant woman and protecting potential human life, and it balanced these competing interests by means of the famous trimester framework. Dividing the nine months of gestation into three trimesters, the Court determined that during the first trimester—roughly the first three months of pregnancy—the abortion decision must be left to the woman alone, in consultation with her physician.¹⁸ In the second trimester, the Court deemed the state’s interest in the health of the mother to be compelling because at that time the medical risks of abortion approach the risks of childbirth. Accordingly, the Court held that the state may regulate second-trimester abortions in order to safeguard the woman’s health, requiring for example that they be performed by specially licensed physicians or in a hospital rather than in a clinic.¹⁹ The Court, however, drew the line at viability—the point at which the fetus is “potentially able to live outside the mother’s womb, albeit with artificial aid”—which occurs at approximately 24 weeks after conception.²⁰ In the third trimester, when the fetus becomes viable, the Court ruled that the state may further its compelling interest in potential life by completely proscribing abortion “except when . . . necessary to preserve the life or health of the [woman].”²¹

This clinical approach to abortion, with its focus upon trimesters, medical risks, and fetal viability,²² probably derives from Justice Blackmun’s previous experience as legal counsel for the Mayo Clinic, one of the foremost medical facilities in the country. In his years at the Mayo Clinic, the Justice developed a great deal of respect for doctors and for the practice of medicine. In fact, earlier in his career, he

16. *Id.* at 162.

17. *Id.* at 158.

18. *See id.* at 163.

19. *See id.*

20. *Id.* at 160.

21. *Id.* at 163-64.

22. *See* Nancy K. Rhoden, *Trimesters and Technology*, 95 *YALE L.J.* 639, 640 (1986) (noting that “two medically determined times—the time when the hazards of abortion surpassed those of childbirth, and the time of fetal viability—appeared to form the structural foundation of the *Roe* trimester framework”).

was himself torn between medical school and law school, and he sometimes wished that he had taken the other road.

Many scholars have criticized *Roe* for its medical approach to abortion. Professor Archibald Cox contends that the opinion “read[s] like a set of hospital rules and regulations, whose validity [will] be destroyed with new statistics upon the medical risks of childbirth and abortion or new advances in providing for the separate existence of a fetus.”²³ Andrea Asaro argues that *Roe*’s emphasis upon the practice of medicine is problematic because it “subsumed the woman’s right to privacy within the ambit of the doctor-patient relationship, and ultimately subordinated her interest to [that of] the physician[].”²⁴ She believes that the Court, in so doing, caused “the woman patient [to take] a back seat to the male physician.”²⁵ Others have advanced the related argument that *Roe* should have been grounded not in a woman’s privacy right to choose whether or not to terminate her pregnancy in consultation with her physician, free from state interference, but rather in the constitutional guarantee of equality.²⁶ One such critic is Justice Ruth Bader Ginsburg, who observed many years ago, when she was a judge on the federal court of appeals, that “*Roe* is weakened . . . by the opinion’s concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective.”²⁷

As Justice Blackmun himself recognized some years later in his dissent in *Rust v. Sullivan*,²⁸ however, “*Roe v. Wade* and its progeny are not so much about a medical procedure as they are about a wo-

23. ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 113-14 (1976).

24. Andrea Asaro, *The Judicial Portrayal of the Physician in Abortion and Sterilization Decisions*, 6 HARV. WOMEN’S L. J. 51, 53-55 (1983).

25. *Id.*

26. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. REV. 375, 386 (1985); CATHARINE MACKINNON, *ROE V. WADE: A Study in Male Ideology*, in *Abortion: Moral and Legal Perspectives* 45-54 (1984) (arguing that abortion is inextricably intertwined with the issue of gender inequality and “criticiz[ing] the doctrinal choice to pursue the abortion right under the law of privacy”); Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979) (arguing that laws forbidding abortion violate equal protection by imposing duties upon pregnant women that are at odds with a deeply rooted principle of American law, namely that individuals are not required to be good samaritans, volunteering their aid to others who are in danger or in need of assistance); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1 (1992).

27. Ginsburg, *supra* note 26, at 386.

28. 500 U.S. 173 (1991).

man's fundamental right to self-determination."²⁹ The close connection between access to abortion and gender equality did not escape Justice Blackmun, who was also the husband of a spirited woman, the father of three strong daughters, and the mentor to many female law clerks. In fact, on a Court in which women and minorities make up a very small fraction of the total law clerk population, Justice Blackmun stood out as the only Justice to have hired a majority of female clerks in several different terms. At this very symposium, the Justice's female law clerks clearly outnumber the men—by nearly two to one. Hence, Justice Blackmun undoubtedly understood the intimate relationship between a woman's right to reproductive autonomy and her ability to participate equally in the economic, political, and social life of the nation, and I believe that this understanding necessarily influenced his decision in the case, although it was not made explicit in his opinion for the Court.³⁰

Justice Blackmun was a pragmatist who consistently demonstrated concern for the real world consequences of his decisions. Unlike some others on the Court, his jurisprudence was grounded not simply in legal theories, but rather in the way things actually work in our society.³¹ Accordingly, he approached the question whether laws prohibiting abortion violate the Constitution mindful of the fact that the burden of such laws rests primarily upon women, especially poor, minority, and under-age women.³² As a result, even though *Roe* ostensibly located the abortion right in the due process clause rather

29. *Id.* at 216 (Blackmun, J., dissenting).

30. Of course, I do not know for sure whether Justice Blackmun fully understood the relationship between abortion and sex equality at the time he authored *Roe*. All I can say for certain is that he consciously made the connection in later years. In a 1986 speech, for example, Justice Blackmun confessed that he viewed *Roe* "as a landmark in the process of the emancipation of women." Greenhouse, *supra* note 7, at A19.

31. *See infra* notes 82-83 and accompanying paragraph (arguing that Blackmun's jurisprudence was driven not by abstract legal theories, but by concrete social realities).

32. As Professors Estrich and Sullivan point out, the impact of such laws is generally borne by the most vulnerable women in our society:

History also makes clear that a world without *Roe* will not be a world without abortion but a world in which abortion is accessible according to one's constitutional caste. While affluent women will travel to jurisdictions where safe and legal abortions are available, paying whatever is necessary, restrictive abortion laws and with them, the life-threatening prospect of back-alley abortion, will disproportionately descend upon "those without . . . adequate resources" to avoid them. Those for whom the burdens of an unwanted pregnancy may be the most crushing—the young, the poor, women whose color already renders them victims of discrimination—will be the ones least able to secure a safe abortion.

Susan R. Estrich and Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PENN. L. REV. 119, 154 (1989) (citation omitted).

than the equal protection clause of the fourteenth amendment,³³ I believe that Justice Blackmun's decision to protect that right was informed by his appreciation of its importance to sex equality.³⁴ Indeed, his opinion relied heavily upon the significant disadvantages that may be suffered by women denied the option to abort, including the physical and psychological harms of pregnancy, the stigma of unwed motherhood, the distress associated with an unwanted child, and the potential impact of maternity upon a woman's future life and career.³⁵

33. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

34. Such an approach recognizes that due process and equal protection are not necessarily in tension, that the two concepts may work in tandem. Liberty may benefit from an awareness of inequality, while equality may expand with a truer understanding of the meaning of liberty. Hence, the question whether the liberty protected by the due process clause encompasses the right to an abortion gains an added dimension from awareness of the fact that the burden of anti-abortion laws is borne disproportionately by poor, minority, and under-age women. Several cases illustrate this important insight. In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), for example, the Court's decision to strike down an Oklahoma statute authorizing forcible sterilization of certain classes of criminals seems to be prompted in part by its concern that such laws often target poor persons and minorities. The protection extended to the right to procreate thus flowed from the fear that government might exercise the power to sterilize its citizens in a discriminatory fashion. *See id.* at 541. The Court stated:

Marriage and Procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear [S]trict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.

Id. Similarly, in *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court's opinion invalidating a Wisconsin law preventing marriage by those unwilling or unable to fulfill previous child support obligations rested as much upon the unequal impact of such laws on the poor as it did upon the importance of the right to marry. *See id.* at 395. *See also* *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that a Virginia law prohibiting racial intermarriage violated both the Due Process clause and the Equal Protection clause of the Fourteenth Amendment).

The same insight seems to underlie Justice Blackmun's majority opinion in *Santosky v. Kramer*, 455 U.S. 745 (1982), which ruled that clear and convincing evidence of abuse or neglect is necessary in order to terminate parental rights. *See id.* at 756. The protection accorded to parents in that case was fueled by the Justice's fear that a lesser standard might license judgments based upon class or cultural biases, with adverse consequences for the parental rights of the poor, minorities, and other outsiders. *See id.* at 763. *Cf.* *Plyler v. Doe*, 457 U.S. 202 (1982), (Blackmun, J., concurring) (suggesting that illegal alien schoolchildren must possess the right to a free public education in order to prevent perpetual caste hierarchies). In a famous article, however, Professor Ira Lupu appears to quarrel with such an approach: he contends that the Due Process and Equal Protection clauses of the Fourteenth Amendment should be viewed as separate and distinct, protecting independent values. *See* Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979).

35. Justice Blackmun enumerated in detail the detrimental consequences for women forced to carry their pregnancies to term:

This reading of *Roe* finds further support in Justice Blackmun's opinion for the Court several years later in *Planned Parenthood v. Danforth*,³⁶ which intimated that the decision whether or not to have an abortion must ultimately reside with women because they are disproportionately affected by the adverse consequences of pregnancy, childbirth, and maternity.³⁷

Had the equality argument squarely been raised in *Roe*, however, it is unlikely that a majority of Justices would have been willing to strike down laws prohibiting abortion pursuant to the equal protection clause. At that time, laws relating to pregnancy simply were not perceived as a form of sex discrimination by the Supreme Court. In 1974, just one year after *Roe* was decided, the Court upheld a California insurance scheme that excluded pregnancy-related disabilities, reasoning that the different treatment accorded pregnant woman was not sex-discriminatory, even though only women become pregnant, because the category of nonpregnant persons encompasses women as well as men.³⁸ An institution that failed to grasp the intimate relationship between pregnancy and gender equality probably would not have held that laws proscribing abortion discriminate against women.³⁹ In-

Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other case cases . . . the difficulties and continuing stigma of unwed motherhood may be involved.

Roe v. Wade, 410 U.S. 113, 153 (1973).

36. 428 U.S. 52 (1976) (striking down spousal consent requirement for abortions).

37. *See id.* at 71 (stating: "[t]he obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.").

38. *See Geduldig v. Aiello*, 417 U.S. 484 (1974) (finding that the failure of a state disability insurance system to cover pregnancy did not deny women equal protection). *Cf. General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (holding that the exclusion of women unable to work due to pregnancy or childbirth from disability coverage did not violate Title VII).

39. In fact, some members of the current Supreme Court continue to dispute the view that laws proscribing abortion discriminate against women. *Cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (opinion of Scalia, J.) (holding that a conspiracy to obstruct access to an abortion clinic did not involve class-based invidiously discriminatory animus within the meaning of a federal civil rights law on the grounds that, although "[a] tax on wearing yarmulkes is a tax on Jews . . . opposition to voluntary abortion cannot possibly be considered such an irrational surrogate for opposition to (or paternalism towards) women").

deed, only in recent years has the Court explicitly acknowledged that reproductive regulations may impede women in their quest for full equality. In 1991, in a slightly different context, Justice Blackmun authored a majority opinion concluding that a company “fetal protection policy,” which prohibited the hiring of fertile women in any jobs that might potentially involve exposure to lead, constitutes sex discrimination in violation of Title VII.⁴⁰ One year later, in his concurring opinion in *Planned Parenthood v. Casey*,⁴¹ the Justice finally made clear the connection between abortion and equal protection, explaining:

A State’s restrictions on a woman’s right to terminate her pregnancy also implicate constitutional guarantees of gender equality. . . . By restricting the right to terminate pregnancies, the State conscripts women’s bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the ‘natural’ status and incidents of motherhood—appears to rest upon a conception of women’s role that has triggered the protection of the Equal Protection Clause.⁴²

Moreover, even if *Roe* had concluded that laws banning abortion amount to sex-based classifications, the Court still would have sustained such laws under the most lenient standard of review.⁴³ It is easy to belittle *Roe* with the benefit of hindsight. But although the equal protection basis for the abortion right has gained greater acceptance today,⁴⁴ it is by no means clear that this position could have mustered a majority of votes upon the Supreme Court in 1973.

40. *International Union, United Auto., Aerospace & Agricultural Implement Workers of America v. Johnson Controls, UAW, Inc.*, 499 U.S. 187, 200 (1991).

41. 505 U.S. 833 (1992).

42. *Id.* at 928 (Blackmun, J., concurring in part and dissenting in part).

43. Until 1976, gender classifications received only rational basis review. The Court did not hold that gender merits heightened scrutiny under the Equal Protection Clause until *Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate scrutiny for the first time to strike down an Oklahoma statute prohibiting the sale of beer to males under 21 and females under 18).

44. A careful reading of the Supreme Court’s decision in *Planned Parenthood v. Casey* suggests that there may now be five votes in support of an equal protection basis for the abortion right. 505 U.S. at 852 (joint opinion of O’Connor, Kennedy, and Souter, JJ). The opinion suggested that a woman’s

suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

Others have attacked *Roe*'s mechanism for balancing the competing interests of pregnant woman, the fetus, and the state, asserting that the trimester framework and the line drawn at fetal viability make constitutional standards turn upon shifting medical technology.⁴⁵ Justice Sandra Day O'Connor, for example, is often cited for her catchphrase criticism that *Roe* is "on a collision course with itself" because, as medical technology improves, fetal viability may advance to an earlier stage of gestation whereas abortions may take place safely later and later in the pregnancy.⁴⁶ It is true that the fetus' ability to survive outside the womb depends to a certain degree upon the state of medical technology, but there are also suggestions that viability strikes an "anatomic threshold" at 23 weeks of gestation, for prior to that time the crucial organs are not sufficiently developed to permit extrauterine survival.⁴⁷ For this reason, Justice Blackmun continued to believe that "the threshold of fetal viability is, and will remain, no different from what it was at the time *Roe* was decided [and that] [p]redictions to the contrary are pure science fiction."⁴⁸

In addition, although recent abortion decisions have effectively abandoned the trimester framework,⁴⁹ the viability line still stands and, I believe, represents Justice Blackmun's lasting contribution to abortion jurisprudence.⁵⁰ In a cryptic statement, *Roe* draws the critical line at viability—the point at which the fetus is "capab[le] of meaningful life outside [its] mother's womb."⁵¹ According to Professor

Id.; see also *id.* at 928 (Blackmun, J.) and *id.* at 912 (Stevens, J., concurring) (stating that "*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women"). See also Ginsburg, *supra* note 26.

45. See, e.g., Cox, *supra* note 23.

46. Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting) (arguing that "[t]he *Roe* framework . . . is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception.")

47. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 554 n.9 (Blackmun, J., dissenting) (stating that "there is an 'anatomic threshold' for fetal survival of about 23-24 weeks of gestation") (quoting Brief for the American Medical Association et al. as Amici Curiae 7). See also Estrich et al., *supra* note 32, at 142 (describing conclusions of Fetal Extrauterine Survivability, Report to the New York State Task Force on Life and the Law 3 (1988)).

48. *Webster*, 492 U.S. at 554 n.9.

49. See, e.g., *id.* at 518 (revising the trimester framework); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992) (rejecting the trimester framework).

50. See *Casey*, 505 U.S. at 870-71 (retaining and reaffirming the "central principle" of *Roe*, namely "[t]he woman's right to terminate her pregnancy before viability").

51. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

John Hart Ely, the Court's reliance upon fetal viability "mistake[s] a definition for a syllogism."⁵² Indeed, at first glance, the logic underlying the line drawn at viability appears to be backwards: *Roe* perversely permits states to prohibit abortion and force women to carry their pregnancies to term after viability—precisely the moment at which the fetus is presumably capable of survival *independent* of its mother.

Such criticisms, however, may justifiably be levied against viability only if the concept is interpreted narrowly and equated solely with technological survivability. Read more expansively, the viability line possesses enduring significance because it is a multi-layered concept that encompasses many meanings.⁵³ Professor Laurence Tribe believes that the fetus' capacity for independent existence is important because it marks the critical division between extraction of the fetus from a woman's body and termination of its life, between abortion and what is essentially infanticide:

Once the fetus can be severed from the woman by a process which enables it to survive, leaving the abortion decision to private choice would confer not only a right to remove an unwanted fetus from one's body, but also an entirely separate right to ensure its death. . . . [R]ecognition and enforcement [of the latter right] would be indistinguishable from recognizing and enforcing a right to commit infanticide Viability thus marks a point after which a secular state could properly conclude that permitting abortion would be tantamount to permitting murder.⁵⁴

Professor Nancy Rhoden further spells out the significance of this factor, reasoning that "[b]efore viability, removing an unwanted fetus from the womb necessarily entails its destruction. After viability, however, these dual functions of removal and destruction diverge."⁵⁵ By protecting the choice to terminate pregnancy only prior to viability, when the fetus is completely dependent upon the woman for survival, the Court revealed intimate relationship between abortion and bodily autonomy. Viability connects the embryo's or fetus' status with its dependence upon the woman's body, thereby reaffirming the importance of bodily integrity as a principle underlying the right to abor-

52. See, e.g., Ely, *supra* note 3, at 924.

53. Cf. Rhoden, *supra* note 22, at 672 (suggesting that viability "is what is known in philosophy as a 'cluster concept'—a concept made up of several important components, none of which is sufficient to define it.")

54. Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 27-28 (1973).

55. Rhoden, *supra* note 22, at 666.

tion. Indeed, this point is implicit in *Roe* itself, which traced the genealogy of the constitutional right to privacy to *Union Pacific Railway Company v. Botsford*,⁵⁶ an early Supreme Court decision avowing that “[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others.”⁵⁷

Others have argued that viability singles out the point at which the fetus is capable of life outside the womb and thus independent of its mother because it is reasonable to regard the fetus at that time as no longer just a part of the woman, parasitic upon her, but rather as a distinct being possessing interests in its own right.⁵⁸ Professor Jed Rubenfeld appears to advocate one version of this argument, noting that “the concept of viability holds a strong normative pull” because it marks the earliest moment at which a fetus may be deemed a constitutional person. He argues that “[t]he advent of personhood is the moment when we regard the fetus as an end-in-itself, a distinct human life-in-being. The effort to draw a line for this purpose should perhaps be an effort to identify a moment when the fetus develops the capacity for some sort of independent life in the world.”⁵⁹ In a related vein, Professor Patricia King contends that the juridical status of the fetus hinges upon whether or not it is viable because “the law has traditionally considered the acquisition of a capacity for independent existence to be the significant point in human development.”⁶⁰

Moreover, the concept of viability is imbued with additional meaning because it roughly corresponds with several other important factors in fetal development. First, if the focus is upon sentience (the point at which a fetus first becomes a thinking, conscious being) medical evidence regarding brain development and electrical activity suggests that this occurs somewhere between 19 and 30 weeks after

56. 141 U.S. 250 (1891).

57. *Id.* at 251.

58. *Cf. Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992) (adhering to the viability line because “the concept of viability . . . is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.”).

59. Jed Rubenfeld, *On the Legal Status of the Proposition that “Life Begins at Conception,”* 43 STAN. L. REV. 599, 621 (1991).

60. Patricia A. King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1676 (1979).

conception, which is around the time of viability.⁶¹ Rubenfeld also observes this element, observing that “[v]iability occurs not only at the time when the fetus’ pulmonary capability begins, but also when its brain begins to take on the cortical structure capable of higher mental functioning,” and arguing that “[t]hese two important developments provide indicia both of *independent* beingness and of distinctly *human* beingness.”⁶² Second, viability may be important because it coincides with late gestation, thereby affirming that the fetus’ claim to societal protection increases with advances in fetal development.⁶³ According to Rhoden, at viability the fetus has reached a stage of development such that it may be deemed close enough to an infant to merit constitutional protection.⁶⁴ Third, the viability line also tracks the English and early American common law, which restricted abortion (if at all) only after quickening—the moment at which perceptible movement first occurs.⁶⁵ Finally, by protecting abortion prior to viability while permitting regulation after that time, the Court accommodates the interests of both the pregnant woman and the fetus within her.⁶⁶ Indeed, viability is perhaps the *only* point at which a principled line may be drawn during the continuum of pregnancy.⁶⁷

Accordingly, Justice Blackmun struck a brilliant and ingenious compromise by drawing the line at viability, an intermediate stage in

61. See Ken Martyn, *Technological Advances and Roe v. Wade: The Need to Rethink Abortion Law*, 29 UCLA L. REV. 1194, 1207-10 (1982).

62. Rubenfeld, *supra* note 59, at 622-23.

63. Justice Stevens seems to be making a similar point in his concurring opinion in *Thornburgh v. American College of Obstetricians and Gynecologists*, which stated:

I should think it obvious that the State’s interest in the protection of an embryo . . . increases progressively and dramatically as the organism’s capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day. The development of a fetus B and pregnancy itself B are not static conditions, and the assertion that the government’s interest is static simply ignores this reality. . . . [T]here is a fundamental and well-recognized difference between a fetus and a human being And if distinctions may be drawn between a fetus and a human being in terms of the state interest in their protection . . . it seems to me quite odd to argue that distinctions may not also be drawn between the state interest in protecting the freshly fertilized egg and the state interest in protecting the 9-month-gestated, fully sentient fetus on the eve of birth. Recognition of this distinction is supported not only by logic, but also by history and by our shared experiences.

476 U.S. 747, 778-79 (1986).

64. See Rhoden, *supra* note 22, at 671-72.

65. See *Roe v. Wade*, 410 U.S. 113, 132 (1973).

66. See generally Rubenfeld, *supra* note 59 (arguing that women must be accorded some reasonable amount of time to terminate their pregnancies, and that viability is a workable place to draw this line).

67. See *Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992) (suggesting that “there is no line other than viability which is more workable”).

the course of pregnancy that correlates with a phase of fetal development thought to be critical from the standpoint of several different theories. Therefore, although the manifold meanings of viability may not have been clearly elucidated in *Roe*, when untangled and explained they demonstrate that Justice Blackmun was correct in finding the line drawn at fetal viability to possess “both logical and biological justifications.”⁶⁸

Furthermore, *Roe*'s emphasis upon viability portends well for future privacy conflicts. The concept of viability gains new meaning with the advent of modern medical technology that allows sperm and egg to be united by means of in vitro fertilization in a laboratory, and the resulting 4 to 8-celled embryos to be stored indefinitely in a freezer. By limiting the abortion right to the stage prior to viability, when the fetus cannot survive outside its mother's womb, *Roe* suggests that the Constitution confers only a right to remove the fetus from the woman's body, and not the corollary right to destroy the fetus or embryo.⁶⁹ In so doing, the opinion wisely leaves open additional questions, such as the status of extracorporeal embryos, which may be deemed “viable” from the very moment of conception because they can exist indefinitely outside the womb.⁷⁰ Viability thus connects the embryo's or fetus' status with its dependence upon the woman's body, thereby underscoring the importance of bodily integrity as a principle underlying the right to abortion. Such a limitation is wise in light of new developments in reproductive technology, which implicate reproductive autonomy but not bodily integrity.⁷¹ Although Justice Blackmun may not have contemplated a quarter-century ago developments in medical technology that would some day enable individuals to genetically select embryos and fetuses or even reproduce by means of cloning, he had the foresight to write *Roe* in a way that affords the states substantial leeway to regulate these new reproductive technologies.

Whether by chance or by choice, Justice Blackmun was assigned many of the early abortion cases handed down in the years following *Roe*. It is majority opinions in these cases that construct a considerable body of privacy law, which is far too extensive for me to document

68. *Roe*, 410 U.S. at 163.

69. See Radhika Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473, 1484-85 (1995); see also Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1114 (1998).

70. See Rubinfeld, *supra* note 59, at 620-21.

71. See Rao, *Reconceiving Privacy*, *supra* note 69, at 1112-13.

in this commentary. In *Planned Parenthood v. Danforth*,⁷² he authored the majority opinion striking down a Missouri law requiring spousal consent and parental consent in order for married women and minors, respectively, to obtain an abortion.⁷³ Writing for the Court in *Colautti v. Franklin*,⁷⁴ Justice Blackmun found unconstitutional a Pennsylvania statute requiring the physician to use the abortion technique that provided the best opportunity for the fetus to be aborted alive because it might require physicians to make a trade-off between a pregnant woman's health and additional percentage points of fetal survival.⁷⁵ And in *Thornburgh v. American College of Obstetricians and Gynecologists*,⁷⁶ Justice Blackmun again ruled for the Court that a law mandating that women seeking abortions be provided with certain information and requiring a second-physician in certain circumstances to save the life of the fetus was unconstitutional. This body of law still stands to the extent that it is consistent with the undue burden standard established by the joint opinion in *Planned Parenthood v. Casey*.⁷⁷ Under this new standard, only regulations that amount to an undue burden—those whose “purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability”—are unconstitutional.⁷⁸ Yet the abortion issue is by no means settled, as is evident in recent efforts to enact laws banning “partial-birth” abortions.⁷⁹ Although *Casey* discarded some parts of *Roe*, including the “rigid trimester framework,”⁸⁰ other portions of *Roe* survive and remain secure. Indeed, *Casey* expressly retained and reaffirmed the essential holding of *Roe*, that “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”⁸¹ Accordingly, Justice Blackmun's privacy jurisprudence will continue to frame the terms of future conflicts.

72. 428 U.S. 52 (1976).

73. *See id.* at 71, 74.

74. 439 U.S. 379 (1979).

75. *See id.* at 400-01.

76. 476 U.S. 747 (1986).

77. 505 U.S. 833, 878 (1992).

78. *Id.*

79. *See, e.g.*, ALA. CODE ' 26-33-3 (1998); ARK. CODE ANN. ' 5-61-203 (1997); IDAHO CODE ' 18-613 (1998); ILL. COMP. STAT. ANN. ' 720 ILCS 513/10 (1998); MICH. STAT. ANN. ' 14-15 (17016)(1998); MISS. CODE ANN. ' 41-41-73 (1998); MONT. CODE ANN. ' 50-20-401 (1998); NEB. REV. STAT. ' 28-328 (1998); 21 OKLA. STAT. ' 684 (1998); R.I. GEN. LAWS. ' 23-4, 12-2 (1998); S.C. CODE ANN. ' 44-41-85 (1998); S.D. CODIFIED LAWS ' 34-23A-27 (1998); VA. CODE ANN. ' 18.2-74.2 (1998); W. VA. CODE ' 33-42-8 (1999).

80. *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992).

81. *Id.* at 879.

Justice Blackmun's majority opinions were, however, constrained by the need to obtain the necessary number of votes. Accordingly, we must look to his separate opinions to hear his distinctive voice. In the privacy area, several of these opinions are evocative of longstanding themes in the Justice's constitutional jurisprudence. These opinions reveal him to be a pragmatist, whose jurisprudence was grounded not simply in abstract legal theories, but in concrete social realities. He always immersed himself in the facts of the particular case before him. Indeed, at oral argument, he would often pull out a huge map in order to locate the particular geography of the situation. In his dissenting opinion in *Beal v. Doe*,⁸² for example, the Justice criticized the Court for upholding a series of laws that prohibited the performance of non-therapeutic abortions in public hospitals and that denied indigent women Medicaid funding for abortion, while covering the costs of maternity, declaring:

The Court concedes the existence of a constitutional right but denies the realization and enjoyment of that right on the ground that existence and realization are separate and distinct. For the individual woman concerned, indigent, and financially helpless . . . the result is punitive and tragic. Implicit in the Court's holdings is the condescension that she may go elsewhere for her abortion. I find that disingenuous and alarming, almost reminiscent of: 'Let them eat cake.' . . . There is another world 'out there,' the existence of which the Court, I suspect, either chooses to ignore or fears to recognize. And so the cancer of poverty will continue to grow. This is a sad day for those who regard the Constitution as a force that would serve justice to all evenhandedly and, in so doing, would better the lot of the poorest among us.⁸³

For Justice Blackmun, the existence and realization of constitutional rights were not separate and distinct. He was always sensitive to the real world consequences of the Court's decisions. Accordingly, in another dissenting opinion, he objected to a law that would increase the price of abortions by \$40, explaining:

It is undisputed that this requirement may increase the cost of a first-trimester abortion by as much as \$40. Although this may seem insignificant from the Court's comfortable perspective, I cannot say that it is equally insignificant to every woman seeking an abortion. For the woman on welfare or the unemployed teenager, this additional cost may well put the price of an abortion beyond reach.⁸⁴

82. 432 U.S. 438 (1977).

83. *Id.* at 483 (Blackmun, J., dissenting).

84. *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983) (Blackmun, J., dissenting).

And in *Ohio v. Akron Center for Reproductive Health*,⁸⁵ Justice Blackmun would have struck down an Ohio law making it a crime to perform an abortion upon an unmarried minor woman unless timely notice was provided to one of the minor's parents. The majority rested its holding upon the assumption that families are generally warm and nurturing and that minors will usually benefit from the compassionate advice of their parents. Once again acknowledging that "there is another world out there," Justice Blackmun pointed out:

Sadly, not all children in our country are fortunate enough to be members of loving families. For too many young pregnant women, parental involvement in this most intimate decision threatens harm rather than promises comfort. The Court's selective blindness to this social reality is bewildering and distressing. . . . The sexually or physically abused minor may indeed be 'lonely or even terrified,' not of the abortion procedure, but of an abusive family member. The Court's placid reference to the 'compassionate and mature' advice the minor will receive from within the family must seem an unbelievable and cruel irony to those children trapped in violent families.⁸⁶

He concluded that it is "the unfortunate denizens of that world, often frightened and forlorn" who require constitutional protection.⁸⁷ Justice Blackmun understood that \$40 is not an insignificant sum for indigent individuals, and he acknowledged that some pregnant minors may be trapped in abusive and violent families. His sheltered life of privilege as a Supreme Court Justice did not blind him to these harsh realities.

Indeed, Blackmun was the Justice who gave justice a human face, recognizing the plight of the people behind the cases and consistently advocating a compassionate reading of the expansive provisions of the Constitution. Both of these characteristics are evident in his eloquent dissent in *DeShaney v. Winnebago County*,⁸⁸ which lamented the fate of "poor Joshua," a child who was battered by his father and neglected by the social service workers who failed to remove him from an abusive environment. In that dissent, Justice Blackmun wrote:

Today, the Court purports to be the dispassionate oracle of the law, unmoved by 'natural sympathy.' But, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts. . . . Like the ante-

85. 497 U.S. 502 (1990).

86. *Id.* at 536-37 (Blackmun, J., dissenting).

87. *Id.* (Blackmun, J., dissenting).

88. 489 U.S. 189 (1989).

bellum judges who denied relief to fugitive slaves, the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. On the contrary, the question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a 'sympathetic' reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging. Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by [the social service workers] who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except . . . 'dutifully record[] these incidents in [their] files.' It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about 'liberty and justice for all'—that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.⁸⁹

Some have criticized Justice Blackmun for his compassion, arguing that his decisions were fueled by sentiment rather than by reason. What these critics fail to understand is that pure logic divorced from context and compassion may produce flawed results, while careful concern for factual context and empathy for the plight of others may lead to wisdom. Indeed, this insight is embodied in Justice Holmes' famous aphorism that "the life of the law has not been logic: it has been experience."⁹⁰

Justice Blackmun's compassion for the plight of "poor Joshua" was typical of his concern for the real people behind the cases before the Supreme Court, and this compassion often drove his decisions. For example, his anxiety for the welfare of another young child who was to be ripped from the arms of the only parents she had ever known and returned to her biological family led him to dissent from the Court's denial of certiorari in a case called *DeBoer v. DeBoer*.⁹¹ During oral argument in another case involving the rights of biological parents called *Santosky v. Kramer*, he was the only Justice who thought to ask the lawyer representing the parents: "[W]hen was the last time your clients saw [their] children?"⁹² Despite his status as a Supreme Court Justice, he empathized with the common person—the

89. *Id.* at 212-13 (Blackmun, J., dissenting).

90. OLIVER WENDELL HOLMES, *THE COMMON LAW*, lecture 1, at 1 (1909).

91. 509 U.S. 983 (1993).

92. *See* Petitioners' Oral Argument at 10, *Santosky v. Kramer*, 455 U.S. 745 (1982) (No. 80-5889).

poor, the underprivileged, and the oppressed. Perhaps this empathy was born of his personal experience as the son of a grocer who worked his way through Harvard College while his classmates enjoyed the perks of their wealth and privilege: unlike many of his colleagues, Justice Blackmun was a scholarship student who supported himself in college by taking various jobs—as a janitor, a milkman, a cowboy on a dude ranch, a handball court painter, and a boat driver for the Harvard crew club. And perhaps his empathy grew from his long-standing association with the abortion issue, an issue which heightened his awareness of the plight in women in desperate circumstances, particularly poor, minority and under-age women.

Roe marks the beginning of Justice Blackmun's historic career on the Supreme Court, and it has clearly acted as a formative influence upon the life of its author. Justice Blackmun shaped and was in turn shaped by the abortion conflict. His close association with *Roe* seemed to confer upon the Justice a special responsibility to serve as the guardian of abortion rights. And his heightened sensitivity on this issue often propelled other decisions, spawning entire areas of his jurisprudence. From his opinion in an abortion-related speech case,⁹³ for example, Justice Blackmun derived his unique approach to the commercial speech context.⁹⁴ From his sympathy for the plight of poor women and minors unable to obtain abortions without government assistance, Justice Blackmun gained insight into the responsibility of government to protect those who are powerless.⁹⁵ And from his perspective upon reproductive autonomy, Justice Blackmun came to understand that the right to privacy protects the sexual activities of homosexuals as well as heterosexuals.⁹⁶ For this reason, any biography of Justice Blackmun would be incomplete without consideration of his opinion in *Roe*, the case that was a critical step in the career of a "White Anglo-Saxon Protestant Republican Rotarian [Heterosexual] Harvard Man from the Suburbs"⁹⁷ who ultimately became renowned

93. See *Bigelow v. Virginia*, 421 U.S. 809 (1975).

94. See, e.g., William S. Dodge, *Weighing The Listener's Interests: Justice Blackmun's Commercial Speech and Public Forum Opinions*, 26 HASTINGS CONST. L.Q. 165 (1998).

95. See generally *DeShaney v. Winnebago County*, 489 U.S. 189 (1989).

96. See, e.g., *Bowers v. Hardwick*, 478 U.S. 1039 (1986). See also Pamela S. Karlan, *Some Thoughts on Autonomy and Equality in Relation to Justice Blackmun*, 26 HASTINGS CONST. L.Q. 159 (1998).

97. Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51 (1985) (citing Waltz, *The Burger/Blackmun Court*, N.Y. TIMES, Dec. 6, 1970, ' 6 (Magazine), at 61).

as the champion of women, minorities, the poor, and other outsiders. Although Harry A. Blackmun was the author of *Roe*, it should not surprise that *Roe* itself played a critical role in writing the course of his life.