AN UNLIKELY FEMINIST ICON?: JUSTICE HARRY A. BLACKMUN'S CONTINUING INFLUENCE ON REPRODUCTIVE RIGHTS JURISPRUDENCE

SARAH PRIMROSE*

"One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes towards 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." - Justice Harry A. Blackmun[1]

INTRODUCTION

"We're at a critical point," noted Dr. Sarah Weddington recently, the lawyer who argued *Roe v. Wade*,[2] one of the most controversial Supreme Court decisions of all time.[3] "Reproductive rights are under challenge," she continued, echoing the frequent warnings of Justice Blackmun, the author of the opinion.[4] Weddington went on, "the Supreme Court is just one vote away from overturning *Roe v. Wade*,[5] so the next president will have the power to appoint a justice who could change history, or uphold challenges to the landmark case."[6]

Justice Blackmun's historic 1973 opinion legalized abortion and in effect afforded women the right to choose.[7] Yet, forty years later, Americans'

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1 Roe v. Wade, 410 U.S. 113, 116 (1973).

2 *Id.*

3 Nadin Abbott, *Lawyer Who Argued* Roe v. Wade *Says Reproductive Rights are Now at Risk*, E. COUNTY MAG., http://eastcountymagazine.org/node/8837 (last visited Mar. 6, 2012). *See also* WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack M. Balkin ed., 2005) (opinions of Jack M. Balkin, Akhil Amar, Jed Rubenfeld, Reva Siegel, Robin West and detailing what the book referred to as "America's Most Controversial Decision"); LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW (3d. ed. 2001) ("The Supreme Court also, and very dramatically, decriminalized abortion in the famous case of *Roe v. Wade* (1973). Politically, this was—and remains—a bombshell."); Mary Ziegler, *The Framing of a Right to Choose:* Roe v. Wade *and the Changing Debate on Abortion Law*, 27 LAW & HIST. REV. 281, 281 (2009) ("The Supreme Court's decision in Roe v. Wade, arguably the most hotly debated in recent decades....").

4 Abbott, *supra* note 3. Planned Parenthood v. Casey, 505 U.S. 833, 943 (1992) (Blackmun, J., dissenting) (noting that he could not remain on the Court forever and feared for the future of women's reproductive rights).

5 *Roe*, 410 U.S. 113.

6 Abbott, *supra* note 3.

7 *Roe*, 410 U.S. 113. Essentially, "*Roe* established that the fundamental right underlying a

reproductive rights continue to be under fire.[8] The *New York Times* recently noted that "[u]nable to overturn *Roe v. Wade*, anti-abortion campaigners have worked in recent years within Congress and state legislatures, many of which have become increasingly conservative, to make gaining access to the procedure as difficult as possible."[9] Consequently, one may wonder, what is it that makes the *Roe* decision so difficult to overturn, despite immense controversy and criticism?[10] Further, who is the author behind the decision, whom some scholars suggest developed such a strong attachment to the decision that his dedication influenced his decision-making in other seemingly unrelated areas of law?[11] Although Justice Blackmun was just one member of the Court at the time the opinion came down, his daughter, Sally Blackmun noted, "it was he who became the primary recipient of both the pain and fame associated with [*Roe*]."[12]

This Article explores the life of Justice Blackmun, utilizing biographical materials and interviews as a lens for understanding the Justice's influence on the reproductive rights movement. Part I of this Article provides a background regarding Justice Blackmun's life prior to his arrival on the highest bench.[13] This section traces his life in chronological order, providing a necessary foundation for understanding his motivations and aspirations. Part II explores Justice Blackmun's

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woman's choice to terminate pregnancy is her due process right to choose her own reproductive options without interference from the state." Eileen L. McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057, 1064 (1999).

[8] *See* Laura Berman, *Women, Be Aware: Access to Birth Control Coming Under Fire*, CHI. SUN-TIMES (Feb. 28, 2012, 8:00 PM), http://www.suntimes.com/lifestyles/10855039-423/women-be-aware-access-to-birth-control-coming-under-fire.html ("And, ever since that day [that the *Roe* ruling came down], women have been fighting to keep that right. Almost 40 years later, abortion rights are just as fragile as ever. Just recently, the state of Virginia ruled that every woman seeking an abortion must undergo a transvaginal ultrasound before it is permitted.").

[9] Thanh Tan, *Planned Parenthood Struggles After State Budget Cuts*, N.Y. TIMES, (Oct. 15, 2011), http://www.nytimes.com/2011/10/16/us/planned-parenthood-struggles-after-state-budget-cuts.html?_r=0. In a Time Magazine interview, Sarah Weddington was asked whether she thought *Roe* would ever be overruled. She responded, "There's part of me that thinks, 'well, of course the ruling will stand because...' But then I have a hard time finding what comes after 'because.'" Jessica Reaves, *Interview: Sarah Weddington*, TIME (Jan. 16, 2003), http://www.time.com/time/nation/article/0,8599,409103,00.html. *See also* SARAH WEDDINGTON, A QUESTION OF CHOICE (1992) (Weddington's own book detailing *Roe* and her personal story).

[10] *See* Anthony Dutra, Note, *Men Come and Go, But* Roe *Abides: Why* Roe v. Wade *Will Not be Overruled*, 90 B.U. L. REV. 1261, 1273 (2010) ("Although the right to choose to have an abortion has been continually under assault since *Roe v. Wade* was decided, *Roe*'s core holding still stands. This is true despite the fact that eight of the twelve Supreme Court Justices appointed since *Roe* were appointed by Republican Presidents, many of whom shared a belief that *Roe* should be overruled. True, the right to choose to procure an abortion under *Roe* is not as expansive as some once assumed, but *Roe* lives on nonetheless.").

[11] *See* Gregory C. Sisk, *The Willful Judging of Harry Blackmun*, 70 MO. L. REV. 1049, 1059-60 (2005) (citing JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 370 (1994)) ("Justice Blackmun's increasingly radicalized approach to abortion, his personalized and emotional rhetoric in abortion decisions, and anecdotes from former Supreme Court clerks over the years that he often viewed other cases, even in entirely different fields of law, in terms of their potential impact upon abortion jurisprudence, all reveal his, one might say, *obsession* with *Roe v. Wade*.").

[12] GLORIA FELDT, THE WAR ON CHOICE, at xx (2004).

[13] *See infra* Part I.

jurisprudence, more particularly in the context of reproductive rights and gender-focused cases.[14] Justice Blackmun's most famous opinion, *Roe v. Wade*,[15] is explored utilizing biographical material to produce a look into the underlying issues at play. In essence, the section paints a unique picture of the period in which the decision was made. Continuing, Part III investigates Justice Blackmun's legacy, and the impact of his presence on the Court.[16] Additionally, the section delves into the future of *Roe* and provides a survey of current pressing gender issues—issues that came to be close to Blackmun's heart as a Justice.

I. THE MAKING OF A JUSTICE: JUSTICE BLACKMUN'S RISE TO THE HIGHEST COURT

It has been said that "[t]he life of an individual cannot be adequately understood without references to the institutions within which his biography is enacted."[17] Thus, in order to understand the author of *Roe*,[18] one must consider the Justice's upbringing, education, family, and other life experiences. Although Justice Blackmun served on the Supreme Court for twenty-four years, that experience was just one segment of his life, and cannot lead to a full understanding of the Justice or his jurisprudence.[19]

A. Foundation: Justice Blackmun's Early Life

Describing his childhood, Blackmun recalled growing up in "a very lower middle-class neighborhood in St. Paul, Minnesota. We didn't have anything. I think those things tend to make one what he is in later life, to a degree."[20] When later asked by a former clerk how he developed a sympathy for "the little people" and "the outsiders," Blackmun responded, "I suppose growing up as I did there on the east side of St. Paul the people I knew were people of not great influence politically or by wealth or otherwise. They lived on the other side of town. And naturally I probably had empathy for them."[21]

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[14] *See infra* Part II.

[15] Roe v. Wade, 410 U.S. 113 (1973).

[16] *See infra* Part III.

[17] ANNETTE LAREAU, UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE 14 (2003) (quoting C. Wright Mills).

[18] *Roe*, 410 U.S. 113.

[19] TINSLEY E. YARBROUGH, HARRY A. BLACKMUN: THE OUTSIDER JUSTICE viii (2008).

[20] Dena S. Davis, *Moral Ambition: The Sermons of Justice Blackmun*, 72 BROOK. L. REV. 211, 214 (2006) (citing IN SEARCH OF THE CONSTITUTION WITH BILL MOYERS: MR. JUSTICE BLACKMUN (PBS television broadcast 1987)).

[21] YARBROUGH, *supra* note 19, at ix. *See also* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 240-41 (2005). This idea was emphasized by President Clinton when announcing Justice Blackmun's retirement; he noted that "[t]hose of us who have studied the law can at times be lost in its abstractions...[t]he habits, the procedures, the language of the law can separate lawyers from the people who look to the bar for justice. Justice Blackmun's identification was firmly and decisively with the ordinary people of the country, with their concerns, and his humanity was often given voice not only in majority opinions but in his dissents." *Id.*

It was in St. Paul that he met the future Chief Justice, Warren Burger, while attending Bible School at the mere age of five.[22] The two future members of the Court were both kindergarten students at the Van Buren School.[23] Although Burger was fourteen months older than Blackmun, the two were in the same grade.[24] Blackmun later recalled, "We didn't have much, but the Burgers had less than we did."[25] The boys went to different high schools, but still remained close even into their professional careers.[26]

Blackmun's psychologist daughter, Nancy Blackmun, reminisced about the Justice's empathy—even at a young age—for "the vulnerability of women in a harsh world."[27] She noted his anguish for his divorced aunt left "alone in the world," Warren Burger's mother, "widowed young, with many children to support," and the Justice's own mother, whose husband "had a hard time earning an adequate living."[28]

Blackmun earned a scholarship to Harvard University, and took on numerous jobs, such as a janitor, a milk delivery man, a cowboy, a handball court painter, and a boat driver in order to support himself.[29] Blackmun graduated from Harvard with a mathematics degree *summa cum laude*.[30] As a student at Harvard, the future Justice felt sympathy for a maid in his former hall, "a young single mother, bright and dignified, but without the formal work skills to earn a better living."[31] His daughter Nancy later recalled that "[h]er father's heart 'ached over [that woman's] plight in having to work as a maid, and he kept in touch with her all her life.'"[32]

After graduation, he "'was torn between studying medicine and law.'"[33] Blackmun's first saved letter from Warren Burger was a note encouraging him to

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22 Davis, *supra* note 20, at 214. *See also* JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 113 (2011) (noting that Burger became Chief Justice in 1969).

23 GREENHOUSE, *supra* note 21, at 6.

24 *Id.*

25 *Id.*

26 *Id. See generally* Duane Benton & Barrett J. Vahle, *The Burger-Blackmun Relationship: Lessons for Collegiality from the Blackmun Papers*, 70 MO. L. REV. 995 (2005) (tracing the Justices' relationship).

27 YARBROUGH, *supra* note 19, at 346.

28 *Id. See also* GREENHOUSE, *supra* note 21, at 5 ("Blackmun grew up in Dayton's Bluff, a working-class neighborhood of St. Paul whose best days were behind it.").

29 Radhika Rao, *The Author of Roe*, 26 HASTINGS CONST. L.Q. 21, 39 (1998).

30 Justice William J. Brennan, Jr., *A Tribute to Justice Harry A. Blackmun*, 13 AM. J.L. & MED. 163, 163 (1987). *See generally* Diane P. Wood, *The Qualities of a Justice: Harry A. Blackmun*, 99 COLUM. L. REV. 1409, 1410 (1999) ("Justice Blackmun may not have been Everyman, but he thought of himself as Everyman, and he therefore wore his status gracefully and modestly. But behind that modesty was an exceptionally intelligent and observant person—the kind of person who would graduate from Harvard College summa cum laude in mathematics, and the kind of person who would spot even the tiniest grammatical gaffe in a memorandum and draw a careful circle around it in pencil, so that the author would not make the same mistake again.").

31 YARBROUGH, *supra* note 19, at 346.

32 *Id.*

33 Brennan, *supra* note 30, at 163 (quoting Foote, *Mr. Justice Blackmun: A Profile*, 21 HARV. L. SCH. BULL. 18, 19 (1970)).

go directly to law school—advising him to "stay by the guns."[34] Initially, Harry also considered teaching a year before returning to school, but Burger cited examples of those who took a year off, only to never return.[35] In the end, Blackmun decided to go straight to Harvard Law School.[36]

B. Transitions: From Lawyer to Judge

In 1932, Blackmun graduated from Harvard Law School.[37] Following law school, he clerked for Judge Kohn B. Sanborn of the Eighth Circuit Court of Appeals, a Judge Justice Brennan later called "one of the great judges of our history."[38] While clerking, the future Justice's friendship with Warren Burger remained close; Harry served as Warren's best man in his wedding in 1933.[39]

Following his clerkship, he practiced at a Minneapolis firm from 1934 to 1950.[40] He specialized in taxation, wills, trusts, and estate planning—a far cry from the field of jurisprudence for which he is now famous.[41] He also taught these subjects at both the St. Paul College of Law and the University of Minnesota Law School.[42] On June 21, 1941, Blackmun married Dottie Clark, a secretary at the time.[43] The couple had three daughters—Nancy born in 1943, Sally in 1947, and Susan in 1949.[44]

After working in private practice, Blackmun served as resident counsel for the famed Mayo Clinic for more than nine years.[45] Justice Brennan observed that "[h]is innate thoroughness soon made him an expert in the legal aspects of medicine and health care systems."[46] Blackmun referred to his time working at the clinic as the happiest years of his professional life.[47] Interestingly, he largely avoided party politics as both a lawyer in a Minneapolis firm, and as resident

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[34] GREENHOUSE, *supra* note 21, at 9.

[35] *Id.* at 9-10. Later discussing this decision to attend law school over medical school, Justice William Brennan stated, "[w]e in the legal profession know that he made the right choice." Brennan, *supra* note 30, at 163.

[36] GREENHOUSE, *supra* note 21, at 9-10.

[37] Brennan, *supra* note 30, at 163.

[38] *Id.*

[39] Jeffrey B. King, Comment, *Now Turn to the Left: The Changing Ideology of Justice Harry A Blackmun*, 33 HOUS. L. REV. 277, 280 (1996).

[40] Brennan, *supra* note 30, at 163. *See also* TIMOTHY L. HALL, SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 389 (noting that Justice Blackmun was a member of the firm Dorsey, Colman, Barker, Scott, and Barber).

[41] Legal Information Inst., *Harry A. Blackmun (1908-1999)*, CORNELL UNIV. L. SCH. (July 1992), http://www.law.cornell.edu/supct/justices/blackmun.bio.html.

[42] *Id.*

[43] GREENHOUSE, *supra* note 21, at 18.

[44] *Id.*

[45] Brennan, *supra* note 30, at 164.

[46] *Id.* at 164.

[47] Nan D. Hunter, *Justice Blackmun, Abortion, and the Myth of Medical Independence*, 72 BROOK. L. REV. 147, 151 (2006). He revered the clinic so much he requested that some of his ashes be scattered at the clinic following his passing. *Id.* at 161 (citing GREENHOUSE, *supra* note 21, at 248).

counsel for the Mayo Clinic.[48] The future justice registered as a Republican, but remained largely out of politics, unlike his childhood friend Warren Burger.[49]

In 1959, Judge Sanborn, for whom Blackmun once clerked, invited him to dinner. At the dinner, Sanborn announced that he wanted to take senior status, and he wanted Blackmun to be his replacement.[50] Blackmun initially hesitated, and wrote the Judge about "practical problems of my family's attitude, my responsibilities here and the prevailing political atmosphere," in additional to citing a lack of experience.[51] Nevertheless, the Judge was adamant that Blackmun would succeed him.[52]

On November 4, 1959, Blackmun took his seat on the Eighth Circuit Court of Appeals.[53] Judge Sanborn stated, "Harry is the best legal scholar I have ever known. Every opinion . . . is a treatise in itself. He is deliberate, courageous and moderate. He is the single person who, I believe, would be the ideal appellate judge."[54] Regarding the future Justice's tenure on the Eighth Circuit, commentators noted that Blackmun had authored opinions that "reflected 'judicial restraint, an appreciation for the limits of judicial authority and deference to state and legislative prerogatives.'"[55] Further, he was cheered for his "conservatism on defendants' rights and civil liberties issues."[56]

While serving on the Eighth Circuit, Blackmun's daughter Sally had a notable experience that hit close to home in terms of the Justice's later reproductive rights jurisprudence. As a nineteen-year-old sophomore at Skidmore College, Sally became pregnant.[57] Sally recalled, "my father always believed that, with a good education, my two sisters and I could be or do anything we wanted, so I knew he

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[48] YARBROUGH, *supra* note 19, at 63.

[49] *Id.* Burger led several campaigns for Republican Governor Harold Stassen, who made several bids for the presidency. He then joined the Eisenhower Administration as the head of the Civil Division of the Department of Justice. *Id.* at 64. In 1955, Burger joined the Court of Appeals for the District of Columbia. *Id.* at 67.

[50] Richard S. Arnold, *Justice Harry Blackmun: Some Personal Notes*, 43 AM. U. L. REV. 699, 700 (1994).

[51] YARBROUGH, *supra* note 19, at 70.

[52] *Id.*

[53] Arnold, *supra* note 50, at 700. "The story is that Judge Sanborn really meant this: 'Appoint Harry Blackmun, or there will be no appointment to make.'" *Id.*

[54] Brennan, *supra* note 30, at 164 (quoting Foote, *supra* note 33, at 19). Justice Brennan noted that "Justice Blackmun came to be one of the most highly regarded appellate judges in the federal system, writing over two hundred majority opinions. His opinions, models of clarity, construction and legal reasoning, are the results of industrious and comprehensive research, and reflect a rich background of culture and learning." *Id.*

[55] Stephen L. Wasby, *Justice Blackmun and Criminal Justice: A Modest Overview*, 28 AKRON L. REV. 125, 125 (1995) (quoting MICHAEL POLLET, *Harry A. Blackmun*, *in* THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 3, 8 (Leon Friedman ed., 1978)).

[56] Wasby, *supra* note 55.

[57] Cynthia L. Cooper, *Daughter of Justice Blackmun Goes Public About* Roe, WOMEN'S E NEWS (Feb. 29, 2004), http://womensenews.org/story/the-nation/040229/daughter-justice-blackmun-goes-public-about-roe.

would be hugely disappointed if I had to quit college."[58] Although her older sister mentioned the possibility of abortion, it was illegal at that time.[59] Thus, she thought it would be an extreme risk to her health and also a source of potential embarrassment for her father.[60] "I did what so many young women of my era did. I quit college and married my 20-year-old college boyfriend. It was a decision that I might have made differently, had *Roe v. Wade* been around."[61] Describing her parents' reaction, Sally recalled, "[n]eedless to say, they were not happy about the unplanned pregnancy, and worried about my marrying so young, but with reluctance, they supported my decision."[62]

Three weeks after her wedding, Sally miscarried, but her time at Skidmore was already cut short.[63] It would later take her several more years to finish her degree.[64] Sally's situation was not uncommon at the time, with over half of all pregnancies unintended, and an estimated one million illegal and potentially deadly abortions performed each year.[65] Sally recalled, "[h]ard as it was for me to have gone to my parents with this news, I knew I could count on them to love me, no matter what."[66] She added, "[o]ther women of my generation who were not lucky enough to have such understanding parents felt that their only choice was a secret back-alley abortion, with all the attendant legal and physical risks."[67] Indeed, it would be several more years before women would have access to legal abortions.

C. Beginnings: Appointment to the Court & Early Work

In the 1968 campaign, President Nixon expounded his opposition to "the so-called liberal Court."[68] He vowed to appoint justices who would rein in the rampant liberalism of the Warren Court, a Court which had focused on Civil Rights

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[58] FELDT, *supra* note 12, at xv (2004).

[59] *Id.*

[60] *Id.* at xvi.

> I really had only two options: disappear and carry the baby to term, after which I would put it up for adoption (an option I did not feel was right for me), or marry the baby's father. Faced with such choices, I decided to do what so many young women of my era did: I quit college and married my twenty-year-old boyfriend. *Id.*

See also GREENHOUSE, *supra* note 21, at 75 (noting that with Blackmun's medical connections he probably could have procured a relatively safe abortion for his daughter).

[61] Cooper, *supra* note 57.

[62] FELDT, *supra* note 12, at xvi.

[63] *Id.*

[64] Cooper, *supra* note 57.

[65] GREENHOUSE, *supra* note 21, at 75. *See generally* David J. Garrow, *Abortion Before and After* Roe v. Wade*: An Historical Perspective*, 62 ALB. L. REV. 833 (1999) (describing pre-*Roe* abortion laws, in which the state of New York was a popular destination for women seeking the procedure).

[66] FELDT, *supra* note 12, at xvi.

[67] *Id.*

[68] MARIAN FAUX, ROE V. WADE: THE UNTOLD STORY OF THE LANDMARK SUPREME COURT DECISION THAT MADE ABORTION LEGAL 266 (1988). This was in large part motivated by a desire to appeal to Southern conservatives. *Id.*

and in the process alienated many Southern conservative voters.[69] After several failed attempts, President Nixon found a suitable and seemingly uncontroversial candidate in Blackmun.[70] Blackmun was confirmed by a Senate vote of 98-0 with relatively little hullabaloo.[71]

After over a decade of service on the Eighth Circuit Court of Appeals, Judge Harry A. Blackmun became Justice Blackmun on June 9, 1970.[72] The Justice was appointed to what he referred to as the "Story-Holmes Seat," a seat that was held by Felix Frankfurter, Benjamin Cardozo, Oliver Wendell Holmes, and Joseph Story.[73] Regarding the position, he stated, "[t]here is a challenge that abides in the very appointment to a seat that has been occupied by persons of such recognized ability and accomplishment . . . A sterling example begets emulation and challenge."[74] Despite the famous seat he held, Justice Blackmun later referred to himself as "old No. 3" in recognition of Justice Fortas's resignation and President Nixon's failed appointments of Judge Clement Haynesworth and Judge G. Harrold Carswell.[75]

Following Justice Blackmun's nomination, in a flight from Washington to his home state of Minnesota, Justice Blackmun overheard by happenstance a

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[69] *Id.*

[70] Arnold, *supra* note 50, at 700. *See also* Joel K. Goldstein, *Choosing Justices: How Presidents Decide*, 26 J. L. & POLITICS 425, 446 (2011) (noting that after President Nixon's failed attempt to nominate Carswell, he realized that a southern conservative would likely not be approved, thus he opted for the uncontroversial Midwesterner whom he presumed would follow in the footsteps of Chief Justice Burger).

[71] YARBROUGH, *supra* note 19, at 138. But, not everyone found the Justice uncontroversial. Reporter Fred Graham noted that Blackmun seemed a lot like "Potter Stewart, a judicial and constitutional moderate 'in philosophy and style,'" which was not quite the conservative Nixon was aiming for. *Id.* at 123. Yale Kamisar, a University of Michigan law professor contended that Blackmun "cheered the Warren Court on to its most liberal criminal rulings." *Id.* However he noted, "[a]ll the evidence . . .supports Judge Blackmun's own statement that he can't be classified as a conservative or a liberal." *Id.* Kamisar continued that he "wonder[ed] if Nixon might have been misled." *Id.*

[72] Arnold, *supra* note 50, at 700.

[73] Stephen Breyer, *Justice Harry A. Blackmun: Principle and Compassion*, 99 COLUM. L. REV. 1393, 1393 (1999) (citing Harry A. Blackmun, *The Story-Holmes Seat*, 2 SUP. CT. HIST. SOC'Y J. 11, 11-16 (1996)). *See also* Harold Hongju Koh, *Unveiling Justice Blackmun*, 72 BROOK. L. REV. 9, 11 (2006) ("As our ninety-ninth Supreme Court Justice, Harry Blackmun sat on 3,875 cases in the seat occupied by Justice Story, Holmes, Cardozo, Frankfurter, Goldberg, Fortas, and now Breyer.").

[74] Breyer, *supra* note 73 (quoting Blackmun, *supra* note 73, at 11-16). Justice Breyer added, "I'm not surprised Harry Blackmun wrote those words. Harry liked challenges. And we all know that he met this one." *Id.*

[75] Arnold, *supra* note 50, at 700. *See also* Koh, *supra* note 73, at 12 (noting that "one reason that the announcement of Justice Blackmun's nomination to the Supreme Court was delayed was that at the same moment the nomination was being considered, Apollo 13 was caught on the other side of the moon . . . So President Nixon told Justice Blackmun that he would not be able to announce the nomination until Apollo 13 was either lost or came back safely, and advised him to keep his pending nomination quiet until then."). *See generally* Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988); James E. Gauch, Comment, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337 (1989); Charles M. Mathias, *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200 (1987) (describing the Senate confirmation process); Henry P. Monaghan, *The Confirmation Process: Law or Politics*, 101 HARV. L. REV. 1202 (1988).

conversation about himself.[76] One occupant of the plane asked, "Who is this guy, Blackmun, whose photograph is in today's paper?"[77] The respondent, who turned out to be Senator Walter Mondale, replied, "Oh, he's just another old conservative."[78] Similarly, *New York Times* reporter Fred Graham noted that Blackmun was a conservative choice, stating that Blackmun and Burger "appear[ed] strikingly similar in judicial philosophy."[79] Jon R. Waltz, writing for the *New York Times*, characterized the Justice as a "white Anglo-Saxon Protestant Republican Rotarian Harvard man from the suburbs."[80]

Justice Blackmun was quickly nicknamed the "Minnesota Twin," a reference to his home state and longtime relationship with Chief Justice Burger.[81] Both Justices were reared in the same blue-collar neighborhood in St. Paul, Minnesota.[82] Despite their paths changing when they reached college, the two remained close and were eventually brought together again on the highest court.[83] Further, their voting record was nearly identical during Justice Blackmun's early years on the Court—he voted the same way as the Chief Justice nine times out of ten.[84] Blackmun was more depreciatively called "hip pocket Harry," a reference to his initial agreement with the Chief Justice on many matters.[85]

At first it did indeed appear to many that the two Justices really were identical in conservative ideology and voting patterns.[86] In one of the first cases that Justice Blackmun heard while serving on the Court, he and Chief Justice Burger dissented in *New York Times v. United States*.[87] Their joint stance was seemingly pro-government.[88] The case revolved around a series of printed articles founded on classified Vietnam documents, and the government sought an

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[76] Koh, *supra* note 73, at 12-13.

[77] *Id.* at 12.

[78] *Id.* at 13.

[79] YARBROUGH, *supra* note 19, at 122.

[80] Dennis J. Hutchinson, *Aspen and the Transformation of Harry Blackmun*, 2005 SUP. CT. REV. 307, 307 (2005) (quoting Jon R. Waltz, *The Burger/Blackmun Court*, N.Y. TIMES MAG., Dec. 6, 1970, at 61).

[81] Harvard Law Review, Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717 (1983).

[82] FAUX, *supra* note 68, at 268.

[83] *Id.* ("[A]lthough their paths had veered off in different directions after high school when Blackmun went to Harvard while Burger attended night school in his hometown, the press had made much of their supposedly similar backgrounds when Blackmun joined his fellow Minnesotan at the Supreme Court.").

[84] *Id.* at 268-69.

[85] Stephen L. Wasby, *Justice Harry A. Blackmun in the Burger Court*, 11 HAMLINE L. REV. 183, 190 (1988).

[86] *See generally* Nina Totenberg, *Harry A. Blackmun: The Conscientious Clause*, 43 AM. U. L. REV. 745, 745 (1994) ("The new Justice was conservative enough to be paired in the press with Chief Justice Warren Burger as 'The Minnesota Twins' and perhaps more surprisingly, he seemed to lack any generosity of spirit, lashing out at the poor in a case involving court fees for bankruptcy filings, lashing out at the press as unpatriotic in the pentagon papers case.").

[87] New York Times v. U.S., 403 U.S. 713, 752-59 (1971) (Harlan, J., dissenting).

[88] *Id.*

injunction to prevent further publication of similar articles arguing that the newspaper would reveal valuable military secrets.[89] The majority refused to issue an injunction, finding that the government had failed to prove its case.[90] In dissent, Blackmun, Burger, and Harlan contended that the First Amendment had meaningful limits.[91] One man wrote to Blackmun, "If the first amendment means nothing to you what does the rest of the Constitution mean? Strict constructionist *bah*! More a strict Nixonist."[92] Another wrote, "The 2 Nixon appointees from Dayton Bluff Elem. School jump thru the hoop like 2 trained poodles."[93] By most accounts, Justice Blackmun was living up to his predictable and conservative reputation.

Nevertheless, Blackmun's Senate hearings might have been a predictor of his later mystifying political leanings. In the hearings, Blackmun identified himself as a "nominal Republican all my life."[94] He continued, "I've been called both a liberal and a conservative. I think labels are deceiving. I've tried to call them as I've seen them."[95] Indeed, labels can be illusory.[96]

II. DEVELOPING INTO A FEMINIST ICON

"United States Supreme Court Justice Harry A. Blackmun has had a greater impact on the lives of American women than any other person in at least the past half century," remarked Sarah Weddington.[97] Her statement is a bold one, leaving one to wonder how someone first labeled "just another old conservative"[98] could transform into an apparent feminist icon.[99] Interestingly, the opportunity for the Justice to define himself arose not long after his appointment.

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89 *Id.* at 717.

90 *Id.*

91 *Id.* at 742-60.

92 GREENHOUSE, *supra* note 21, at 71.

93 *Id.*

94 YARBROUGH, *supra* note 19, at 118.

95 *Id.*

96 *See also* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 11 (1990) ("Justice Blackmun has always been regarded as an extraordinarily kind man. He is more judicious than political. While at the time of his appointment he was described as a 'conservative,' he has undergone something of a transformation in philosophy on the bench—in part, perhaps, as a result of the reaction to his decision in *Roe*."). *See generally* Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 MO. L. REV. 1209 (2005) (detailing the transition of Blackmun's ideology).

97 Sarah Weddington, *Parting Praise for Justice Harry A. Blackmun*, 43 AM. U. L. REV. 750, 750 (1994).

98 Koh, *supra* note 73, at 13. *See generally* Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 AM. U. L. REV. 699 (1995) (describing the federal appointment process and the inevitable gratitude those appointed must feel towards their nominator).

99 *See* Rao, *supra* note 29, at 49 ("[P]erhaps 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.").

In 1971, Justice Blackmun left a note to himself, as he so often did,[100] writing "here we go in the abortion field."[101] The case, *United States v. Vuitch*,[102] marked the start of an avalanche of reproductive- and gender-focused cases that would eventually become Justice Blackmun's defining step away from his conservative underpinnings.[103] In *Vuitch*, a slim majority upheld the Washington D.C. statute that prohibited abortions not "necessary for the preservation of the mother's life or health."[104] But, the abortion debate was not over with *Vuitch*,[105] with several cases approaching from the lower courts. The next time, the Court would find itself placed squarely in the position of determining whether or not a woman has a constitutional right to abortion.

Justice Blackmun's opinion in *Roe v. Wade*,[106] which served as the zenith of the Court's extension of individual rights, was seemingly a transformation.[107] At the very least, the decision marked a step into the proverbial sunlight.[108] His later apparent revolution in ideology caused one critic to call him "the most wayward Republican appointee since Earl Warren."[109] Nonetheless, others contend that since *Roe* was Justice Blackmun's first major decision, perhaps he had always

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100 *See* Breyer, *supra* note 73, at 1395 ("We can give more credit to his enormous diligence. Harry kept careful notes in a beautifully written hand. He checked every citation himself by hand. And he would ask his dear Dottie to help by reading certiorari petitioners to him as they drove each summer from Washington to a Wisconsin lakeside cottage. We can imagine him sitting on the porch, looking out across the lake, Dottie swimming, the sun rising, thinking how wonderful the early morning light was—'perfect,' he might say, 'for doing cert. work.'").

101 C.D. Rogers, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey by Linda Greenhouse*, 80 FLA. B.J. 44, 44 (2006). *See generally* DANIEL CALLAHAN, ABORTION: LAW, CHOICE, AND MORALITY (1970) (providing a contemporary view of abortion law in the late 1960s).

102 U.S. v. Vuitch, 402 U.S. 62 (1971). Interestingly, the first question Chief Justice Burger asked during oral arguments was whether this case had resolved any of the issues in *Roe*. FAUX, *supra* note 68, at 242. Weddington responded that *Vuitch* was about a Washington, D.C. law and was limited to that. Further, she argued that the Washington law permitted physicians with greater discretion to decide which patients could be provided with an abortion, whereas the Texas law only allowed abortion if a woman's life was in danger, but not in cases of rape or incest. Additionally, *Roe* challenged the constitutionality of the law, but *Vuitch* simply involved the issue of constitutional vagueness. *Id.*

103 *See* GREENHOUSE, *supra* note 21, at 75-77 (providing a behind the scenes look at the Justices' views on *Vuitch*).

104 *Vuitch*, 402 U.S. at 68. *See also* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN POLITICS 3 (8th ed. 2008) ("By upholding the statute, the Court increased the availability of abortions in Washington, but it did not address the question of whether women have a constitutional right to abortion").

105 *Vuitch*, 402 U.S. at 62.

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

107 *See* LAZARUS, CLOSED CHAMBERS 288 (1999) (noting that *Roe* was "the high-water mark of the modern Court's expansion of individual rights.").

108 *See generally* Allan Gates, *It's Been a Great Ride: A Tribute to Justice Harry A. Blackmun*, 43 AM. U. L. REV. 717 (1994) (noting that judicial attitudes can change); Hunter, *supra* note 47, at 147 ("Few other Supreme Court opinions have so dominated political culture for so long, yet its author did not come even close to dominating the Court. Nonetheless, both the fury and the celebration that *Roe* engendered have attached themselves indelibly and improbably to Harry Blackmun.").

109 Christopher Cox, *The Sad Career of the Reagan Justices*, WALL ST. J., July 1, 1992, at A14. *See also* Bryan H. Wildenthal, *Judicial Philosophies in Collision: Justice Blackmun, Garcia, and the Tenth Amendment*, 32 ARIZ. L. REV. 749, 749-50 (1990) (noting that "Justice Blackmun is widely regarded as having undergone an ideological shift" and becoming a liberal ally).

harbored what some might call "liberal" sentiment—at least in the abortion context.[110]

A. Game Changer: Roe v. Wade

Commenting on *Roe v. Wade*,[111] Justice Blackmun stated, "We all pick up tabs. I'll carry that one to my grave."[112] Yet, initially, the decision did not cause as big a splash as one might think.[113] Justice Stevens noted that the seven-to-two vote was illustrative of the fact that "the basic issue was not as controversial in 1973 as it became in later years."[114] Even Justice Blackmun recalled, "We didn't think it was that important at that time."[115] Contributing to the calm before the storm, Chief Justice Burger postponed the release of *Roe* until January 1973, so that it would not be not passed down until after President Nixon's inauguration.[116] On the day of *Roe*'s eventual release, President Lyndon B. Johnson died, thus averting an immediate onslaught of publicity.[117]

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[110] King, *supra* note 39, at 290. Of course, the practice of labeling can be problematic. *See generally* Wildenthal, *supra* note 109, at 750 ("If is far from clear, of course, what such political labels mean in the context of constitutional interpretation. They are, at face value, too blunt and imprecise to convey much meaningful information about a judge's constitutional philosophy. Yet we use them anyway, because of their convenience, and because, in the view of many cynics, judicial decisionmaking, . . . is simply the continuation of politics by other means."). *See also* JEFFREY TOOBIN, THE NINE 12 (2007) (calling *Roe* the abortion rights decision that "still defines judicial liberalism.").

[111] *Roe*, 410 U.S. 113.

[112] Breyer, *supra* note 73. Indeed, *Roe* weighed so heavily on Justice Blackmun, that he warned potential clerks. *See* LAZARUS, *supra* note 107, at 23 ("As with everyone who interviews with Justice Blackmun, the conversation eventually turned to *Roe*. Standing before a window, the weak February light catching a certain weariness in his deeply etched face, the Justice asked whether I would mind working for a man who had excited such fury. You could see that he lived with the heavy mantle of that case every day of his life, and he wanted me to recognize that for a year and maybe longer, in some small way, that weight might rest on me too.").

[113] *See* O'BRIEN, *supra* note 104, at 3 ("Little public attention was paid on May 4, 1971, when *Roe v. Wade* appeared on the Court's order list. It was one of the few cases from more than forty-five hundred cases on the docket granted oral argument and to be heard the next term. The *New York Times* simply reported that the Court 'agreed to consider if state anti-abortion laws violate the constitutional rights of pregnant women by denying their right to decide whether or not to have children.'").

[114] STEVENS, *supra* note 22, at 143 ("Indeed, in 1975 when the Senate Committee on the Judiciary held hearings on my nomination to the Court, no senator asked me a single question about abortion.").

[115] Hunter, *supra* note 47, at 171 (quoting *The Justice Harry A. Blackmun Oral History Project: Interviews with Justice Blackmun*, conducted by Professor Harold Hongju Koh, Yale Law School, July 6, 1994-Dec. 13, 1995, at 193, *available at* http://lcweb2.loc.gov/cocoon/blackmun-public/page.html?FOLDERID=D0901&SERIESID=D09). He added, "[h]ow wrong we were." *Id.*

[116] Koh, *supra* note 73, at 12. *See also* FAUX, *supra* note 68, at 269 ("More than anything, Burger would have preferred not to have the abortion cases before his court at this particular time. He wanted to decide them as narrowly as possible and would even be pleased to find a reason to send them back to the state courts."); GREENHOUSE, *supra* note 21, at 127 ("Blackmun suspected that in the winter of 1972-73, Burger had deliberately delayed circulating his concurring opinion in *Roe v. Wade*, at a time when Blackmun thought speed was essential, in order to spare Richard Nixon embarrassment in his second inauguration. Having assigned Blackmun to write for the Court in *Roe*, Burger did little to support the opinion and eventually joined its critics, surely another source of resentment. *Roe* had been a baptism by fire, and Burger did little to help Blackmun endure the flames.").

[117] Koh, *supra* note 73, at 12 ("The newspapers did not begin to comprehend the significance of the ruling until many weeks later.").

Perhaps the United States was ready to accept such a change.[118] In 1972, a Gallup poll revealed that sixty-four percent of Americans agreed "'with the statement that the decision to have an abortion should be made solely by a woman and her physician'—with a 'greater proportion of Republicans [sixty-eight percent] . . . than Democrats [fifty-nine percent] holding the belief that abortion should be a decision between a woman and her physician.'"[119] The poll suggests that the Republican view on abortion has only changed in recent decades. As such, perhaps it is not so surprising that a marked conservative authored the decision, given the popular public perception of such a right. Additionally, there was support for some abortion rights from several religious groups.[120] Although the Catholic Church was in adamant opposition,[121] the Baptist, United Methodist, Presbyterian, and Lutheran Churches expressed some support for the right to abortion, albeit with various caveats.[122]

At the time of *Roe*, abortion laws were also changing—at least in some states.[123] By 1910, every state except Kentucky criminalized abortion.[124] Most

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118 *See generally* DONALD T. CRITCHLOW, THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE (1996) (detailing the politics inherent in the abortion debate). *But see* TRIBE, *supra* note 96, at 51 ("There is little evidence that the United States was on the verge of emerging, in the early 1970s, from the long shadow of shame that had branded women as blameworthy for extramarital sex and nonprocreative sex and that condemned them for choosing abortion even when the choice was a painful and profoundly reluctant one.").

119 Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2031 (2011) (citing George Gallup, *Abortion Seen Up to Woman, Doctor*, WASH. POST, Aug. 25, 1972, at A2).

120 *See generally* Reverend Dr. Carlton W. Veazey & Marjorie Brahms Signer, *Broadening the Lens for Reproductive and Sexual Rights: Religious Perspectives on the Abortion Decision: The Sacredness of Women's Lives, Morality and Values, and Social Justice*, 35 N.Y.U. REV. L. & SOC. CHANGE 281 (2011) (discussing the "long tradition of religious support for reproductive rights on moral and religious grounds").

121 *See* CATHERINE WHITNEY, WHOSE LIFE?: A BALANCED, COMPREHENSIVE VIEW OF ABORTION FROM ITS HISTORICAL CONTENT TO THE CURRENT DEBATE 44 (1991) (noting that the Catholic Church spent $4 million attacking *Roe* in the first year following the decision).

122 FAUX, *supra* note 68, at 196-97. "[T]he powerful Baptist General Convention had gone on the record, stating in their view the present restrictive law denied people 'the benefit of the best medical judgment' and failed to deal with the problems of rape, incest, and fetal deformity." *Id.* at 196. "[T]he United Methodist Church, speaking for its ten million members nationwide, announced that it felt abortion should be removed from the criminal codes and 'made available only on request of the person most directly involved.'" *Id.* Additionally, "the Presbyterians issued a statement indicating that they supported abortion in cases of rape, incest, fetal deformity, and where the 'physical or mental health of either mother or child would be gravely threatened, or the [sic] socioeconomic condition of the family." *Id.* The Lutheran Church of America issued the statement, "'People have a right not to have children without being accused of selfishness or betrayal of the divine plan, and every child has a right to be a wanted child. On the basis of the evangelical ethic, a woman may decide responsibly to seek abortion.'" *Id.* at 197.

123 *See* GREENHOUSE, *supra* note 21, at 72 (noting that there was "little prospect for change" in some of the thirty-three states that outlawed abortion, with little to no instances where the procedure could be performed legally).

124 O'BRIEN, *supra* note 104, at 4. Yet, Justice Blackmun emphasized that the "restive laws in effect in a majority of States" then were of "recent vintage." Roe v. Wade, 410 U.S. 113, 129 (1973). He added that those laws "are not of ancient or even of common-law origin." *Id.* Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century. *Id. See also* Mark A. Graber, *The Ghost of Abortion Past: Pre-*Roe *Abortion Law in Action*, 1 VA. J. SOC. POL'Y &

states permitted an exception when an abortion was necessary to save a woman's life.[125] By the late 1960s, however, fourteen states allowed for abortion "when the woman's health was in danger, when there was a likelihood of fetal abnormality, and when the woman had been the victim of rape or incest."[126] Furthermore, four states—New York, Washington, Alaska, and Hawaii—altogether retracted criminal penalties for early-term abortions.[127] In 1968, the American Public Health Association voted to advocate repeal of some abortion laws, noting that "access to abortion should be accepted as an important means of securing the right to space and choose the number of wanted children."[128] Additionally, by the 1970s, Congress had repealed almost all of the original Comstock provisions—laws that drastically limited the proliferation of even information on contraceptives.[129] Nevertheless, thirty-three states outlawed abortion, and in some states, change was seemingly unforeseeable.[130]

Yet, President Nixon—who appointed both Justice Blackmun and the Chief Justice—took a public stance against abortion, in part because he recognized the political potential of an anti-abortion position.[131] In 1972, Nixon stated:

> From personal and religious beliefs, I consider abortion an unacceptable form of population control . . . Further unrestricted abortion policies, or abortion-on-demand, I cannot square with my personal belief in the sanctity of human life—including the life of the unborn . . . A good and generous people will not, in my view, opt for this kind of alternative to social dilemmas. Rather, it will open its hearts and its homes to the unwanted children of its own, as it has done for the unwanted millions of other lands.[132]

President Nixon's position against abortion helped him to secure sixty-percent of the Catholic vote, a group that had consistently voted Democratic in previous years.[133] In the same year, he also revoked a two-year-old policy of allowing abortion at military hospitals and mandated that state law control whether the procedure was available, thus drastically limiting access.[134]

L. 309 (1994) (detailing pre-Roe abortion law); Paul Benjamin Linton, Roe v. Wade *and the History of Abortion Regulation*, 15 AM. J.L. & MED. 227 (1989) (same).

125 O'BRIEN, *supra* note 104, at 4.

126 *Id.*

127 *Id.*

128 GREENHOUSE, *supra* note 21, at 74.

129 FELDT, *supra* note 12, at 262. *See generally* Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before* Griswold v. Connecticut, 75 IOWA L. REV. 915, 918 (1990) (discussing the Comstock provisions).

130 GREENHOUSE, *supra* note 21, at 72.

131 DEAN J. KOTLOWSKI, NIXON'S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY 251 (2001).

132 FAUX, *supra* note 68, at 257.

133 Juan Williams, *Republicans Desperately Seeking Wedge Issues for 2012 Campaign*, FOX NEWS (Feb. 12, 2012), http://www.foxnews.com/opinion/2012/02/14/search-is-on-for-new-wedge-isses-to-help-gop-in-2012-campaign/.

134 GREENHOUSE, *supra* note 21, at 83. The majority of jurisdictions in which military hospitals

On the other hand, new tapes released from the Richard Nixon Presidential Library hint that although the President was concerned with the possible cultural repercussions of broadly available abortion procedures, he understood the need for them in the most extreme situations.[135] Additionally, his wife publicly stated that she found abortion to be "a personal thing" that should be left to individual states to regulate.[136] Thus, perhaps the Republican Party's stance on abortion was not as predictable as one might have originally thought. Furthermore, the Nixon Administration passed the Public Health Services Act, now known as Title X, which authorized grants to establish voluntary family planning projects.[137] As such, the Nixon Administration was seemingly open to, at the very least, contraceptives.[138]

1. The Case

Roe began with two young female attorneys, Sarah Weddington and Linda Coffee, who were determined to challenge Texas's prohibition on abortion.[139] Texas, like most states at the time, had a statute deeming abortion illegal unless necessary to save the mother's life.[140] The two lawyers crossed paths with Norma McCorvey, a woman who received their names when she began exploring abortion as an option for her undesired pregnancy.[141] The trio met at a pizzeria in Dallas, Texas.[142] McCorvey was twenty-three and divorced, lacked a high school degree, and was financially unstable.[143] She was pregnant and unable to find a doctor to

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were located at the time deemed abortion illegal. *Id.*

135 Zach Lisabeth, *New Tapes Show Nixon's Feelings on Abortion*, OPPOSING VIEWS (Mar. 5, 2012), http://www.opposingviews.com/i/politics/abortion/roe-v-wade/new-tapes-show-nixons-feelings-abortion.

136 KOTLOWSKI, *supra* note 131.

137 Rachel V. Rose, *Cutting Funds for Oral Contraceptives: Violation of Equal Protection Rights and the Disparate Impact on Women's Healthcare*, 5 MOD. AM. 23, 25 (2009). The only method of contraception not covered was surgical abortion because it was not considered a preventative measure. *Id.*

138 *See generally* Sarah Primrose, *The Attack on Planned Parenthood: A Historical Analysis*, 19 UCLA WOMEN'S L.J. 165 (2012) (discussing the ties between the contraceptives and abortion debate).

139 LAZARUS, *supra* note 107, at 346. *See also* N.E.H. HULL & PETER CHARLES HOFFER, ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY 113 (2001) ("Weddington sympathized [with the future Roe], for she had secretly had an abortion herself. As she revealed in her autobiography, she and her boyfriend, later husband, had driven across the Texas border to Nogales and spent all her savings, four hundred dollars, on a clean and safe abortion. She was already in law school, but the shame of a minister's daughter having to sneak about to get an abortion was indelibly burned in her memory.").

140 O'BRIEN, *supra* note 104, at 1. The Texas statute in the 1970s did not undergo any substantial changes since its creation a century earlier. Dutra, *supra* note 10, at 1264 (citing Roe v. Wade, 410 U.S. 113, 119 (1973)).

141 Reaves, *supra* note 9. *See also* O'BRIEN, *supra* note 104, at 2 ("A Dallas lawyer, Henry McCloskey Jr., found someone to adopt the baby she never saw. He also introduced her to two recent graduates of the University of Texas Law School, Sarah Weddington and Linda Coffee.").

142 HULL & HOFFER, *supra* note 139, at 1.

143 *Id.* Initially, McCorvey alleged that she was gang-raped by three men and a woman, which would not have permitted her to obtain an abortion either. O'BRIEN, *supra* note 104, at 1. However, she later stated, "'That was a lie—I said it because I was desperate and wanted an abortion very, very bad

perform an abortion because the procedure remained illegal.[144] She could not afford the trek to another state to obtain an abortion.[145] As such, adoption was her only option unless she wanted to be a mother again.[146] Following the meeting, McCorvey became the anonymous Roe, challenging the statute "on behalf of herself and all other women similarly situated" as an infringement of their right to privacy governed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution.[147]

Roe filed the action in March 1970 against Henry Wade—the Dallas district attorney charged with prosecuting those engaging in illegal abortions[148]—requesting a declaratory judgment that the Texas criminal abortion statutes were unconstitutional.[149] She also sought an injunction that would prevent the district attorney from enforcing the statutes.[150] The district court panel found that Roe had a justiciable constitutional right, yet denied her request for an injunction, leaving her with a cognizable right yet no apparent remedy for its violation.[151] The plaintiffs appealed directly to the United States Supreme Court, and both sides took protective appeals to the United States Court of Appeals for the Fifth Circuit.[152] Roe was six months pregnant at the time of the panel ruling, and gave birth before the suit reached the Supreme Court.[153] The child was placed for adoption.[154]

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and thought that would help the situation. It didn't.'" *Id.* at 1-2. *See also* NORMA MCCORVEY & ANDY MEISLER, I AM ROE: MY LIFE, ROE V. WADE, AND FREEDOM OF CHOICE (1994) (McCorvey's autobiography providing a personal perspective).

144 HULL & HOFFER, *supra* note 139, at 1. "'No legitimate doctor in Texas would touch me,'" recalled Norma McCorvey. O'BRIEN, *supra* note 104, at 1. "'I found one doctor who offered to abort me for $500. Only he didn't have a license, and I was scared to turn by body over to him. So there I was—pregnant, unmarried, unemployed, alone and stuck.'" *Id.*

145 *Id.*

146 Roe v. Wade, 410 U.S. 113, 120 (1973).

147 *Id. See also* Sarah Weddington, *Reflections on the Twenty-Fifth Anniversary of* Roe v. Wade, 62 ALB. L. REV. 811, 813 (1999) (emphasizing that Roe was a class action for all women who might become pregnant, and not simply a case about one woman).

148 HULL & HOFFER, *supra* note 139, at 1.

149 *Roe*, 410 U.S. at 120.

150 *Id.*

151 *See* Roe v. Wade, 314 F.Supp. 1217 (N.D. Texas 1970); HULL & HOFFER, *supra* note 139, at 125-26.

152 *See id.* at 122 ("The plaintiffs Roe and Doe [companion case plaintiff] and the intervenor Hallford [physician seeking clarification], pursuant to 28 U.S.C. § 1253, have appealed to this Court from the part of the District Court's judgment denying the injunction. The defendant District Attorney has purported to cross-appeal, pursuant to the same statute from the court's grant of a declaratory relief to Roe and Hallford. Both sides have also taken protective appeals to the United States Court of Appeals for the Fifth Circuit. The court ordered the appeals held in abeyance pending decision here."). At the district court level the case was assigned to a three judge panel including Judge Sarah Hughes, described as "a feisty and outspoken liberal and feminist septuagenarian," Judge William M. Taylor, a more conservative Democrat, and Irving Goldberg, described as "a leading liberal jurist." HULL & HOFFER, *supra* note 139, at 121.

153 HULL & HOFFER, *supra* note 139, at 127. Following the panel decision she went back to waitressing. She eventually switched her allegiances and became a pro-life advocate. *Id.*

154 *Id.*

The case pushed forward and the Court heard oral arguments on December 13, 1971, with just seven justices present.[155] Weddington asserted the burdensome effects of pregnancy on women.[156] She stated:

> It disrupts her body, it disrupts her education, it disrupts her employment, and it often disrupts her entire family life and . . . because of the impact on the woman, this certainly, in as far as there are any rights which are fundamental, is a matter . . . of such fundamental and basic concern to the woman involved that she should be allowed to make the choice as to whether to continue or terminate her pregnancy.[157]

Her powerful statement regarding the unequal effects of pregnancy on women went uninterrupted, but was followed by numerous questions.[158]

When the justices discussed the case, Chief Justice Burger's stance on abortion initially seemed unclear.[159] He called the matter a "sensitive issue," and noted that the Texas law in question was "certainly arcane," but he did not think it unconstitutional.[160] He preferred to have the law struck down for vagueness, but was a chief advocate for rehearing oral argument on the issue, thus allowing two more Nixon appointees—Rehnquist and Powell—to rule on the matter.[161] Justice White was adamant that the state law, which criminalized abortion, should stand.[162] In contrast, Justices Douglas,[163] Marshall, and Brennan were prepared to recognize a constitutional right to choose abortion.[164] It appeared that Justices Stewart and Blackmun were in favor of striking down some of the state law, but not all.[165] Justice Blackmun spoke last stating, "Don't think there's an absolute right

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155 *Id.* at 155. Justices Harlan and Black had recently resigned due to health concerns. *Id.*

156 *Id.* at 156. See also O'BRIEN, *supra* note 104, at 4 ("Sarah Weddington was calm in her first appearance before the high bench. She made no mention of McCorvey's story about being raped. (Nor did Weddington mention the fact that as a twenty-two-year-old daughter of a Texas Methodist minister in the late 1960s she herself had to cross the border in order to obtain an abortion in Mexico.) Instead, Weddington began by reviewing the lower court's holding that the Texas abortion law violated a woman's right to continue or terminate a pregnancy.").

157 HULL & HOFFER, *supra* note 139, at 156.

158 *See id.* (noting that Justice Stewart asked whether the Due Process Clause of the Fourteenth Amendment was the constitutional foundation for abortion rights, while Justice White "continued with a question whether the Texas law made any distinction between early and late abortions, and whether, consequently, Weddington made those distinctions").

159 *Id.*

160 O'BRIEN, *supra* note 104, at 6.

161 *Id.*

162 FAUX, *supra* note 68, at 267. *See also* O'BRIEN, *supra* note 104, at 7 (Justice White "could not go along with the argument that women have a constitutional right of privacy, giving them a choice on abortion. He did not find persuasive arguments that a right of privacy is one of the unenumerated rights retained by the people under the Ninth Amendment and protected by the Fourteenth Amendment's provision that no state may deprive any person of life, liberty, or property without due process of law."). *See also* TOOBIN, *supra* note 110, at 12 (noting that White was appointed by John F. Kennedy, while Burger, Powell, and Blackmun were all Nixon nominees).

163 O'BRIEN, *supra* note 104, at 6-7. Justice Douglas was next to speak; as the Senior Associate, he "disagreed and had no doubt that the statute was unconstitutional." *Id.*

164 FAUX, *supra* note 68, at 267.

165 *Id.*

to do what you will with [your] body."[166] Conversely, he felt the statute was poorly drafted and too restrictive, stating it "'doesn't go as far as it should and impinges too far on [Roe's] Ninth Amendment rights.'"[167]

Generally, the Chief Justice assigns the opinion unless he is in the minority.[168] In that event, the senior justice in the majority—in *Roe*, Justice Douglas—assumes that duty.[169] Reportedly, some of the justices were surprised to find that the Chief Justice made the assignment, despite potentially falling into the minority.[170] He assigned the opinion to Justice Blackmun.[171] In Justice Blackmun's initial memorandum, circulated four months after the case's first argument, he struck the statute on vagueness, rather than privacy grounds.[172] Later, Weddington reargued the case, this time with William Rehnquist and Louis Powell added to the Court.[173] The addition of the two Nixon-appointed justices rendered the outcome seemingly unpredictable.[174] But, in the end, Louis Powell sided with the majority, while William Rehnquist dissented.[175]

Justice Blackmun's medical background clearly had an impact on the opinion, and likely factored into the Chief Justice's decision to assign it to him.[176]

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166 O'BRIEN, *supra* note 104, at 7.

167 *Id.* (quoting Docket Book, William J. Brennan Jr. Papers, Box 417, LC).

168 FAUX, *supra* note 68, at 267.

169 *Id.* at 267.

170 FAUX, *supra* note 68, at 268 ("Douglas double-checked his notes; they showed he was in the majority and the chief in the minority. Brennan and Marshall agreed with him that the vote had been five to two, with only Burger and White firmly opposed.").

171 *See id.* at 269 (1988) (noting that Justice Douglas circulated an angry memorandum regarding the Chief Justice's missteps in assigning cases, to which the Chief Justice admitted two mistakes, but contended that the position of the Justices regarding abortion were unclear at conference). *See also* Doe v. Bolton, 410 U.S. 179 (1973) (companion case to *Roe*, with an opinion also authored by Justice Blackmun).

172 Joseph F. Kobylka, *Tales from the Blackmun Papers: A Fuller Appreciation of Harry Blackmun's Judicial Legacy*, 70 MO. L. REV. 1075, 1086 (2005) (citing Blackmun Papers, Box 151).

173 FAUX, *supra* note 68, at 165-66.

174 *See generally* TRIBE, *supra* note 96, at 12 (describing Justice Rehnquist and Justice Powell's views).

175 *See generally* Lisa Shaw Roy, Roe *and the New Frontier*, 27 HARV. J.L. & PUB. POL'Y 339, 339 (2003) ("Sitting under a tent in an audience filled with lawyers, judges and constitutional scholars, I listened to long-time United States Supreme Court correspondent Nina Totenberg describe a very interesting—and apparently intimate—conversation with Supreme Court Justice Lewis Powell. 'Nina, have I ever told you why I voted as I did in *Roe v. Wade*?' Justice Powell recounted a story about a young man whose married lover had become pregnant. Desperate to keep the affair and ensuing pregnancy a secret, the man requested the help of his employer, then-attorney Powell, who followed him to the scene of a horribly performed abortion. Powell saw the woman as she helplessly lay bleeding in a small apartment. Ms. Totenberg never connected the story to any particular aspect of Justice Powell's ideology, but the significance of the story was not lost on anyone in the audience.").

176 *See* GREENHOUSE, *supra* note 21, at 82 ("Burger assigned the cases to Blackmun, who never knew exactly why. Certainly his medical background from his years at the Mayo Clinic made him a logical candidate. But the more like reason was that Burger, whose political antennae made him better attuned than some other members of the Court to the inflammatory nature of the issue, believed he could count on Blackmun to deliver narrowly focused opinions that would discharge the court's duty without doing or saying anything more than necessary."). Reportedly, this angered Justice Douglas. FAUX, *supra* note 68, at 268. "He had been trying for years to get the Court to take on the abortion issue, and he knew how difficult it was going to be to get a solid majority opinion. Since he did not believe that

Justice Blackmun personally conducted much of the research for the decision at the Mayo Clinic, and the clinic was helpful in sending him relevant information prior to his arrival.[177] Further, in a show of deference to the views of medical professionals, the decision explored the position of the American Medical Association.[178] Sally Blackmun noted that her father carefully researched "the medical and ethical aspects of the case."[179]

Yet, Justice Blackmun's experience at the Mayo Clinic was not directly on-point with the issues he confronted in *Roe*. In two decades, between 1945 and 1965, the Minnesota clinic performed only one hundred abortions.[180] Regarding his time spent at the Mayo Clinic, Justice Blackmun later recalled, "I don't remember any abortion problems at the time."[181] Nevertheless, Bob Woodward and Scott Armstrong, authors of *The Brethren*, noted that Justice Blackmun was responsible for advising the Mayo Clinic staff of the legality of the procedure, and that many of the performed abortions would not have qualified under the Georgia and Texas statutes challenged in *Roe* and *Doe*.[182] As such, just how much Justice Blackmun's medical background influenced his decision-making is of interest.

Blackmun was firmly in the liberal camp, he saw this as an attempt to sabotage the case." *Id.* Additionally, "[i]t bothered him that Blackmun seemed to think that the case revolved around physicians' right to practice medicine freely rather than women's right to privacy." *Id.*

177 King, *supra* note 39, at 291.

178 Roe v. Wade, 410 U.S. 113, 119 (1973).

179 FELDT, *supra* note 12, at xviii. Sixth Circuit Judge Karen Nelson Moore, and former clerk for Justice Blackmun in the 1974 term noted, "[w]e clerks knew that Justice Blackmun would read everything relevant to a case, ranging from the records to the briefs, from our bench memoranda to the pertinent cases, from secondary legal resources to literature, history, medicine, or science, before reaching his conclusions as to how to decide a particular case." Judge Karen Nelson Moore, *Justice Harry A. Blackmun: The Model Judge*, 26 HASTINGS CONST. L.Q. 5, 7 (1998). Judge Moore continued:

> Each item would be scrutinized carefully, with penciled comments in the margins providing trenchant analysis, cogent questions, or even grammatical correction. We also knew that once the opinion-writing phase began, Justice Blackmun would sequester himself in the Justices' library, with all the materials spread out before him for his analysis and review, and that he would not be satisfied until he had produced an opinion that was as perfect as possible. *Id.*

See also Schlesinger & Nesse, *Justice Harry Blackmun and Empirical Jurisprudence*, 29 AM. U. L. REV. 405, 406 (1980) (exploring Justice Blackmun's "use of scientific data in the formulation of his legal analysis"); *see also* LAZARUS, *supra* note 107, at 23 (noting Blackmun's "overwhelming sense of duty, often agonized and joyless, to the Court and the country; his nearly obsessive concern for detail; his appreciation of the impact of his work on others' lives; and, most of all, his deep, almost romantic, belief in the idea of the United States as a nation committed to broad principles of moral governance"); Ross E. Davies, *Blackmun's Books*, 15 GREEN BAG 2D 191, 202 (2012) ("Blackmun was committed to understanding everything that had his name attached to it, including his judicial opinions and everything cited in them, and that commitment required him to read all that stuff.").

180 Hunter, *supra* note 47, at 155 (citing Richard S. Sheldon & David G, Decker, *Therapeutic Abortion at the Mayo Clinic 1945-1965*, 50 MINN. MED. 1283, 1284 (1967)). The majority of the abortions were performed because of somatic disease. *Id.*

181 Hunter, *supra* note 47, at 155 (quoting *The Justice Harry A. Blackmun Oral History Project: Interviews with Justice Blackmun*, conducted by Professor Harold Hongju Koh, Yale Law School, July 6, 1994-Dec. 13, 1995, at 112, *available at* http://lcweb2.loc.gov/cocoon/blackmun-public/page.html?FOLDERID=D0901&SERIESID=D09).

182 BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 220 (2005).

Justice Blackmun's clerk at the time of *Roe*, Randall Bezanson, disputed the argument that *Roe* was solely based on physician-focused issues.[183] Bezanson recalled, "[t]he physician thing was secondary. It was clearly there, but he saw the claim as the woman's ability to seek the advice of a physician in making this kind of decision, the way men seek the advice of physicians about surgery."[184] He continued, "there's just nothing to that claim that *Roe* was a physician-based opinion."[185] Nevertheless, despite Blackmun's dedication to researching the decision, the Justice apparently confessed that he did not originally savor the task of writing the opinion, and reportedly his initial drafts of the opinion evidenced his displeasure.[186]

Justice Blackmun not only researched with the assistance of the Mayo Clinic, but he also asked the opinion of his family. His youngest daughter Susan recalled:

> All three of us girls happened to be in Washington soon after Justice Burger had assigned the opinion to Dad. During a family dinner, Dad brought up the issue. 'What are your views on abortion?' he asked the four women at his table. Mom's answer was slightly to the right of center. She promoted choice but with some restrictions. Sally's reply was carefully thought out and middle of the road, the route she has taken all her life. Lucky girl. Nancy, a Radcliffe and Harvard graduate, sounded off with an intellectually leftish opinion. I had not yet emerged from my hippie phase and spouted out a far-to-the left, shake-the-old-man-up response. Dad put down his fork mid-bite and pushed down his chair. 'I think I'll go lie down,' he said. 'I'm getting a headache.'[187]

What impact, if any, this conversion had on the Justice will always remain speculative.[188]

As the Justice's daughters recognized, for feminist organizations, abortion was more than just a medical issue.[189] Betty Friedan, leader of the National Organization for Women, noted "that there is no freedom, no equality, no full

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[183] YARBROUGH, *supra* note 19, at 230.

[184] *Id.*

[185] *Id.*

[186] *See* HULL & HOFFER, *supra* note 139, at 164 ("Blackmun had admitted that he did not relish the task, and the opinion showed his distaste for it. None of the justices who had voted to affirm were impressed. Stewart decided to write a concurrence. Brennan quickly sent a note to Blackmun's chambers: Brennan would 'prefer a disposition of the core constitutional question.' Invalidation solely on the ground of vagueness was not what Brennan had in mind, and his displeasure was obvious.").

[187] GREENHOUSE, *supra* note 21, at 83.

[188] *See generally* WOODWARD & ARMSTRONG, *supra* note 182, at 220 (contending that Dottie Blackmun, the Justice's wife told a clerk that she was "doing everything she could" to encourage her husband to strike the restriction found in *Roe*).

[189] At the beginning of the *Roe* opinion, Justice Blackmun focuses on the medical issue in order to keep the decision free of emotion. *See* Roe v. Wade, 410 U.S. 113, 116-17 (1973) ("Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and because we do, we have inquired into, and in this opinion place some emphasis upon medical and medical-legal history and what that history reveals about man's attitude toward the abortion procedure over the centuries.").

human dignity and personhood possible for women until we assert and demand the control over our bodies, over our own reproductive process."[190] Of course, pro-choice advocates made policy-based arguments regarding pragmatic social harms associated with illegal abortion, but they juxtaposed such medical arguments with rights-based contentions.[191] Sarah Weddington, explaining the larger issues at play, stated, "we were arguing about abortion, but women's issues are part of a big wheel, and reproductive rights are only one part of a larger consciousness—if you can't decide this for yourself, you can never have control over the rest of your life."[192]

In the end, the decision held that while a fetus does not qualify as a constitutional person, the state still has some interest in protecting life.[193] In order to balance such interests, including a woman's right to privacy, Justice Blackmun constructed a trimester framework.[194] In early discussions, Justice Stewart contended that the trimester framework was difficult to justify, and instead suggested a viability standard.[195] Ultimately, Blackmun stuck with the trimester framework.[196] In his decision, Blackmun conducted a historical analysis of abortion laws and ethical issues.[197] He followed up his historical analysis by acknowledging the medical community's changing views on abortion.[198] He also cited greater acceptance of abortion within the legal community.[199]

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[190] Greenhouse & Siegel, *supra* note 119, at 2043. *See also* Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 HARV. J.L. & GENDER 377, 383-89 (2011) (discussing the equality issues at play).

[191] Mary Ziegler, *The Framing of a Right to Choose:* Roe v. Wade *and the Changing Debate on Abortion Law*, 27 LAW & HIST. REV. 281, 282 (2009) (citing Mary S. Calderone, *Illegal Abortion as a Public Health Problem*, 50 AM. J. PUB. HEALTH 948-54 (1960)); ABORTION: LEGAL AND ILLEGAL (Jerome M. Kummer ed., 1967).

[192] Reaves, *supra* note 9.

[193] *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 920-21 (1973) (citations omitted) ("The state does have two 'important and legitimate' interests here, the first in protecting maternal health, the second in protecting the life (or potential life) of the fetus. But neither can be counted 'compelling' throughout the entire pregnancy: Each matures with the unborn child. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'").

[194] *See generally* Claudia Pap Mangel, *Legal Abortion: The Impending Obsolescence of the Trimester Framework*, 14 AM. J. L. & MED. 69 (1988) (detailing the trimester framework and correctly predicting its demise).

[195] GREENHOUSE, *supra* note 21, at 96. *See also* Rao, *supra* note 29, at 25 (discussing the trimester standard).

[196] *See* Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of* Planned Parenthood v. Casey, 45 AM. U. L. REV. 77, 92 (1995) ("Roe adopted the trimester framework which was more objective than quickening, yet still capable of being assessed by the woman herself."). *See also* Randy Beck, *Self-Conscious Dicta: The Origins of* Roe v. Wade's *Trimester Framework, 51 AM. J. LEGAL HIST. 505 (2011) (analyzing the trimester framework).*

[197] Roe v. Wade, 410 U.S. 113, 129 (1973). *See also* Clarke D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 19 TEX. REV. L. & POL. 301, 307 (2006) (criticizing this historical analysis).

[198] *Roe*, 410 U.S. at 141-46.

[199] *Id.*

The decision relied heavily on the right to privacy in justifying the result.[200] The right to privacy, found in the Due Process Clause of the Fourteenth Amendment, though not explicit, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[201] Nonetheless, the Court noted that while this right to privacy is fundamental, it is not absolute, thus permitting a state to institute "narrowly drawn" restrictions when there is a "compelling state interest."[202] The trimester framework fits into this construct: as a pregnancy progresses, the "risk to the woman increases," thus bolstering the state's right to intervene by citing protection of the mother's life as justification.[203] In essence, the protection of a mother's health develops into a compelling state interest "at approximately the end of the first trimester."[204]

In effect, *Roe v. Wade* rendered forty-six out of fifty state abortion laws unconstitutional.[205] Prior to the decision, there was no plainly cognizable national right to obtain an abortion.[206] Following the decision, the right to abortion became "fundamental," at least until reevaluated in later related cases.[207] Justice Lewis Powell quickly wrote to Dottie Blackmun that her husband had "written an historic opinion."[208]

2. The Reaction

Although the decision initially went unnoticed by a large portion of the population, with the exception of anti-abortion groups,[209] legal scholars began to criticize the decision shortly after its release.[210] Biographer Tinsley Yarbrough

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[200] *Id.* at 153. *See also* David B. Cruz, *"The Sexual Freedom Cases"? Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 311-12 (2000) (exploring the decision).

[201] *Roe*, 410 U.S. at 153.

[202] *Id.* at 155.

[203] *Id.* at 150.

[204] *Id.* at 163.

[205] Amy S. Cleghorn, Comment, *Justice Harry A. Blackmun: A Retrospective Consideration of the Justice's Role in the Emancipation of Women*, 25 SETON HALL L. REV. 1176, 1181 (1995) (citing *Roe*, 410 U.S. at 153; Michael Pollett, *Harry A. Blackmun*, *in* 5 THE JUSTICES OF THE SUPREME COURT 1789-1978: THEIR LIVES AND MAJOR OPINIONS 13 (Leon Friedman & Fred L. Israel eds., 1980)).

[206] Dutra, *supra* note 10, at 1264.

[207] *Roe*, 410 U.S. at 122. A compelling state interest is necessary for intrusion on a fundamental right. *Id. See generally* Robert A. Sedler, *The Supreme Court Will Not Overrule* Roe v. Wade, 34 HOFSTRA L. REV. 1207 (2006) (noting the importance of the decision).

[208] *See* GREENHOUSE, *supra* note 21, at 101 ("Dottie Blackmun was in the courtroom audience on the morning of January 22, 1973. Lewis Powell had a messenger deliver to her a handwritten note: 'Dottie—Harry has written an historic opinion, which I was proud to join. His statement from the Bench this morning also was excellent. I am glad you were here.'").

[209] *See* TRIBE, *supra* note 96, at 16 ("The main consequences of the decision in *Roe*, aside from the statement of a principle under which almost no existing government regulation of abortion could be upheld, was to galvanize a right-to-life movement that had, of course, predated *Roe* in nascent form but that gained cohesion largely by virtue of the Supreme Court's ruling.").

[210] *See* O'BRIEN, *supra* note 104, at 16 ("While *Roe* sparked political conflict among special-interest groups about abortion policy, the general public remained ambivalent. Rather consistently since 1973, public opinion polls show that about 90 percent approves of abortions if the woman's health is

wrote, "*Roe*'s rationale has been subjected to more sustained and scathing scholarly and popular criticism than any other Supreme Court opinion, even by those supportive of the Court's recognition of a constitutional abortion right."[211] Interestingly, in Justice Blackmun's last oral interview, he was asked "whether writing *Roe v. Wade* was 'a piece of bad luck or good luck?"[212] He responded, "I think one grows in controversy."[213] Indeed, the controversy of the decision seemed to not only cultivate Justice Blackmun's jurisprudence, but it also served to breed a new role for the Supreme Court, one in which reproductive rights cases would be more readily taken on.[214]

The right to choose abortion is often defended as falling under the umbrella of penumbral privacy.[215] But, some scholars suggest that there is a lack of historical support for the construct of penumbral privacy in the context of familial planning.[216] Although Justice Stevens was quick to note that Blackmun's lengthy and well-researched analysis of the medical history was worthy of further exploration, he criticized the emphasis on the "so-called right of privacy protected by 'penumbras of the Bill of Rights.'"[217] In essence, some theorists suggest that Supreme Court abortion jurisprudence is faulty because of the muddling of liberty with privacy.[218]

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endangered, if a pregnancy is due to rape or incest, and if there is a likelihood of fetal abnormality liver a majority oppose changing laws to make it more difficult for women to have an abortion; and less than one-third favor a constitutional amendment overturning *Roe v. Wade*."). *See also* Richard A. Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 441-42 (1992) ("*Roe v. Wade* is the Wandering Jew of constitutional law. It started life in the Due Process Clause, but that made it a substantive due process case and invited a rain of arrows. Laurence Tribe first moved it to the Establishment Clause of the First Amendment, then recanted. Dworkin now picks up the torch but moves the case into the Free Exercise Clause, where he finds a right of autonomy over essentially religious decisions. Feminists have tried to squeeze *Roe v. Wade* into the Equal Protection Clause.").

211 YARBROUGH, *supra* note 19, at xi.

212 Rogers, *supra* note 101.

213 *Id.*

214 *See generally* TRIBE, *supra* note 96, at 14 (citing *Roe* as one of the first major reproductive rights cases, and the discussing *Roe*'s "progeny," in which "the Supreme Court issued a series of opinions both reaffirming the rules of *Roe* and, over a gradually growing number of dissents, applying them to specific cases.").

215 Peggy Cooper Davis, *Neglected Stories and the Lawfulness of* Roe v. Wade, 28 HARV. C.R.-C.L. L. REV. 299, 301 (2003). Since the Constitution contains no explicit mention of marriage, family, procreation, contraception, or abortion, the court has justified such rights as privacy right "emanations" and "penumbras" as part of the Bill of Rights. *Id.* at 299, 301. *See generally* TRIBE, *supra* note 96 (defending *Roe*); MARK TUSHNET, ABORTION: CONSTITUTIONAL ISSUES (1996) (same). *See also* PETER H. IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT: THE MEN AND WOMEN WHOSE DECISIONS HAVE SHAPED OUR CONSTITUTION 32-33 (2006) (detailing the concept of "penumbras of privacy).

216 Davis, *supra* note 215, at 304.

217 STEVENS, *supra* note 22, at 143. *See generally* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) (providing an analysis of the Bill of Rights and the Fourteenth Amendment).

218 Anita L. Allen, *Feminist Moral, Social, and Legal Theory: Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461, 467 (1987). Professor Anita L. Allen criticized Justice Blackmun for "conflat[ing] restricted access privacy rights with decisional privacy rights when he relied upon his metaphysically suspect belief that a 'pregnant woman cannot be isolated

Furthermore, substantive due process support for abortion has also been attacked.[219] Justice White expressed the "concern that federal enforcement of unenumerated due process rights of family is justified by nothing more than 'the philosophical predilections of individual judges.'"[220] Justice Stevens criticized *Roe* for its shaky reliance on "penumbras," but called the liberty argument found in *Griswold*—which relied on the Due Process Clause of the Fourteenth Amendment to permit contraceptive usage[221]—to be more persuasive.[222]

Other critics suggested the decision lacked a constitutional basis as a whole. Former Supreme Court nominee Judge Robert H. Bork called *Roe* "an unconstitutional decision, a serious and wholly unjustifiable usurpation of state legislative authority."[223] Additionally, one of the decision's earliest and fiercest critics, John Hart Ely, wrote that "*Roe* lacks even colorable support in the constitutional text, history, or any appropriate source of constructional doctrine."[224]

Other scholars criticize the decision for focusing too much on the medical issue behind the procedure, and not the underlying gender issues.[225] Justice Ruth Bader Ginsburg later noted 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."[226] In contrast, others criticized

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[presumably, from the fetus] in her pregnancy' as a ground for her decisional prerogatives." *Id.* at 468 (quoting Roe v. Wade, 410 U.S. 113, 159 (1973)). She contended that he potentially mistakenly assumed "first, that pregnant women inherently lack privacy, and, second, that the claim to decisional privacy is necessarily weaker where one does not possess privacy in the restricted access sense." *Id.*

[219] *See* Davis, *supra* note 215, at 304 ("To the extent that the right of abortion choice is an aspect of substantive due process rights of family, its legitimacy depends upon our ability to understand United States constitutional history and traditions as supportive of the protection of familial and procreational choice.").

[220] Davis, *supra* note 215, at 304 (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 791 (1986) (White, J., dissenting)).

[221] Griswold v. Connecticut, 381 U.S. 479 (1965). The *Griswold* decision came down before Justice Blackmun arrived on the Court, but is considered a foundational case for reproductive rights. *Id.* In Justice Stevens's view, "cases protecting the right of the individual, whether married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision of whether to bear or beget a child necessarily included the right of a woman to decide whether to terminate her pregnancy." STEVENS, *supra* note 22, at 143-44.

[222] *See* STEVENS, *supra* note 22, at 143 (noting that Justice Stewart's reasoning in *Griswold* was more persuasive because it focused on liberty protected by the Due Process Clause of the Fourteenth Amendment). *See generally* Dixon, *The* Griswold *Penumbra: Constitutional Charter for an Expanded Law of Privacy*, 64 MICH. L. REV. 197 (1965).

[223] GREENHOUSE, *supra* note 21, at 188. *See also* John A. Robertson, *Gestational Burdens and Fetal Status: Justifying* Roe v. Wade, 13 AM. J. L. & MED. 189, 189 (1987) (citing Koop, *The Slide to Auschwitz*, *in* RONALD REGAN, ABORTION AND THE CONSCIENCE OF THE NATION 49-50 (1984)) (noting that some likened the decision to "Dred Scott and Nazi atrocities.").

[224] John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 943 (1973).

[225] *See, e.g.*, Andrea Asaro, *The Judicial Portrayal of the Physician in Abortion and Sterilization Decisions*, 6 HARV. WOMEN'S L. J. 51 (1983); CATHERINE MACKINNON, ROE V. WADE: A STUDY IN MALE IDEOLOGY (1974); Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979).

[226] Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 386 (1985).

the decision for placing too much emphasis on the protection of a "woman's 'sovereignty' over her own body," and storied conservative columnist William F. Buckley declared, "'[i]t is instructive to remember that exactly such thought was relied upon 150 years ago in asserting the rights of the slave master.'"[227] Yet not everyone found the medical discussion inappropriate. Justice Rehnquist, a dissenter, lauded the decision's foundation of "'extensive historical fact and . . . wealth of legal scholarship,'" and conceded that the opinion "'command[ed his] respect.'"[228]

Adding to the debate is discussion of the potential predisposition of Justice Blackmun to make such a ruling. Professor Gregory Sisk argued that Justice Blackmun was essentially predisposed to make his ruling in *Roe*.[229] He wrote, "his personal papers reveal that, almost from the moment that he ascended to the Supreme Court bench, he was primed to formulate a constitutional right to abortion through a right to privacy[.]"[230] In contrast, Professor Nan D. Hunter argued that it was "apparent from his papers that Justice Blackmun brought no conscious agenda to this issue [of abortion]; indeed, he seems to have given it very little thought prior to joining the court."[231]

Furthermore, even the initial lack of attention paid to the decision has drawn skepticism regarding the power of Justice Blackmun's analysis. Justice Stevens suggested that the reason why the abortion debate did not develop until several years later "may, in part, have been fostered by the difference between Justice Blackmun's opinion for the Court and Justice Stewart's more straightforward analysis in his concurring opinion."[232] Nevertheless, the decision eventually did garner publicity and, with it, controversy. Justice Ruth Bader Ginsburg reflected that "it invited no dialogue with legislators. Instead, it seemed entirely to remove the ball from the legislator's court . . . [a]round that extraordinary decision, a well-organized and vocal right to life rallied."[233]

Indeed, in 1976, the right-to-life camp achieved a significant victory with the Hyde Amendment, which outlawed the use of federal funds for abortion.[234] The fight to end the legalization of abortion, or at the very least to limit it substantially,

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227 YARBROUGH, *supra* note 19, at 302.

228 *Id.* at 228.

229 Sisk, *supra* note 11, at 1055-58.

230 *Id.* at 1056.

231 Hunter, *supra* note 47, at 170.

232 STEVENS, *supra* note 22, at 143.

233 Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1205 (1992)).

234 WHITNEY, *supra* note 121, at 78-82 (1991). In 1980, the Supreme Court upheld the constitutionality of the Hyde Amendment. Harris v. McRae, 448 U.S. 297 (1980); *see generally* Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113 (1980). President Clinton successfully encouraged Congress to change the language of the Hyde amendment to allow funding for "wrongful pregnancies" associated with rape and incest, and also permitted abortion on military bases. HULL & HOFFER, *supra* note 139, at 259. *See generally* Nicole Huberfield, *Conditional Spending and Compulsory Maternity*, 2010 U. ILL. L. REV. 751 (2010) (discussing the effect of the cut-off of abortion funding on women).

had just begun.[235] Furthermore, judging by the conflicting criticisms, it was clear that Justice Blackmun's opinion could never make all ideological groups happy.[236] As such, the abortion debate has continued on for decades, with conflicting rhetoric.

B. Demarcations: The Reproductive Rights Cases

Former clerk Harold Hongju Koh noted, "Justice Blackmun decided at a certain point—and surely, *Roe* was the turning point—that the job of a judge was not simply to defer to imperfect institutions, but to use the institution of judicial oversight to force them to be better."[237] A turning point did indeed occur. For example, while Justice Blackmun dissented eight percent of the time during the Burger Court, the number rose to fifteen percent of the time while serving on the Rehnquist Court, evidence of a changing court and his willingness to step away from the majority.[238] Furthermore, as time passed, Justice Blackmun's voting patterns became increasingly liberal-leaning. In 1970, when he joined the Court, he agreed with marked liberals Justices Brennan and Marshall roughly half the time, but by Brennan's retirement his level of agreement with the liberal wing had grown to seventy percent, and surged to eighty percent by Justice Marshall's retirement.[239]

During the 1970s, the Supreme Court issued numerous decisions which, in general, served to increase access to contraception and abortion services, including *Eisenstadt v. Baird*,[240] *Planned Parenthood of Central Missouri v. Danforth*,[241]

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[235] *See* TRIBE, *supra* note 96, at 16 (noting that the right-to-life "group harnessed the power of single-issue politics to elect public officials who believed, as they did, that abortion was murder and that it should be outlawed").

[236] *See* Jack Wade Nowlin, Roe v. Wade *Inverted: How the Supreme Court Might Have Privileged Fetal Rights Over Reproductive Freedoms*, 63 MERCER L. REV. 639, 640-43 (2012) (discussing the variety of reactions to the decision).

[237] Koh, *supra* note 73, at 27.

[238] King, *supra* note 39, at 284. *See also* YARBROUGH, *supra* note 19, at xii ("Originally, the thesis runs, Blackmun and Burger were the 'Minnesota Twins,' with the chief justice the dominant partner in the alliance. Gradually, however, Blackmun's vigorous defense of, and defensiveness about, *Roe v. Wade*, his mounting resentment of his reputation as Burger's 'Hip Pocket Harry' and the chief justice's domineering personality, and his growing ties to Justices Brennan and Marshall made Blackmun increasingly receptive to most civil liberties claims."). However, Justice Blackmun did not dissent as much as his peers, with Justices Douglas, Stevens, Brennan, Marshall, and Rehnquist dissenting more than him by the end of their terms. O'BRIEN, *supra* note 104, at 303.

[239] King, *supra* note 39, at 288.

[240] Eisenstadt v. Baird, 405 U.S. 438 (1972). The Court held that a state statute that criminalized the distribution of contraceptives to unmarried people violated the Equal Protection Clause, finding that there was no rational reason for the dissimilar treatment for married and unmarried persons who were similarly situated. *Id.*

[241] Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). The Court held that the state's definition of "viability" was permissible, but the requirement for consent of a spouse or by parents of a minor, and prohibition of a particular abortion method could not survive a constitutional challenge. *Id. See also* GREENHOUSE, *supra* note 21, at 110 (briefly discussing the decision and other related cases issued around that time).

Bellotti v. Baird,[242] and *Carey v. Population Services International*.[243] Yet the Supreme Court turned the other way when it came to funding abortion, leaving Blackmun in the minority for numerous decisions in which he cited the need for financial support to help indigenous women obtain the procedure, unless the state had a legitimate reason to deny such support.[244] In a dissenting opinion joined by Blackmun and Marshall, Justice Brennan summarized the real effect of a state's refusal to fund abortion:

> The stark reality for too many, not just 'some,' indigent pregnant women is that indigency makes access to competent licensed physicians not merely 'difficult' but 'impossible.' As a practical matter, many indigent women will feel they have no choice but to carry their pregnancies to term because the State will pay for the associated medical services, even though they would have chosen to have abortions if the State had also provided funds for that procedure, or indeed if the State had provided funds for neither procedure. This disparity in funding by the State clearly operates to coerce indigent pregnant women to bear children they would not otherwise choose to have, and just as clearly, this coercion can only operate upon the poor, who are uniquely the victims of this form of financial pressure.[245]

Indeed, Justice Blackmun was stepping away from his "Minnesota Twins" moniker, and recognizing the inherent gender issues involved in reproductive rights cases.[246]

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242 Bellotti v. Baird, 443 U.S. 622 (1979). The Court held a state statute unconstitutional where it required parental consent for an abortion and prohibited judicial consent without parental notification and consultation, and where it allowed a judge to withhold consent from a mature minor. *Id.*

243 Carey v. Population Services, 431 U.S. 678 (1977). The Court held unconstitutional a statute which prohibited sales of contraceptives to minors along with their advertisement and display, and allowed only pharmacists to sell to adults, by finding that it was an unconstitutional violation of privacy rights protected by due process. *Id.*

244 *See* Beal v. Doe, 432 U.S. 438 (1977). The Court ruled that states could require a medical necessity certificate as a condition for funding abortions. Additionally, Court found that was not unreasonable for a state to refuse to offer Medicaid coverage for non-therapeutic abortions. *Id.*; Poelker v. Doe, 432 U.S. 519 (1977). The Court ruled that an indigent woman's rights were not violated when a city hospital refused to perform an abortion. The Court reasoned that the Constitution did not prevent a city from suggesting a preference for childbirth. *Id.*; Maher v. Roe, 432 U.S. 464 (1977). States were not required to make abortion available as part of medical care for indigent women. The Court reasoned that no suspect class was involved and the state was merely requiring women to pay for the procedure, not forbidding it. *Id. See also* GREENHOUSE, *supra* note 21, at 111-12 (describing the internal politics at play in the making of each decision). *See generally* Wood, *supra* note 30, at 1411 ("Justice Blackmun readily understood that these decisions fundamentally redefined the right to choice recognized in *Roe v. Wade*. But more than that, I was impressed in our conversation by his deep concern for the possible theoretical basis for a conclusion striking down funding limitations. Indigence, it was established by then, is not a suspect characteristic for purposes of the Equal Protection Clause. If not indigence, then, the Justice asked repeatedly, what is the forbidden classification? Women versus men? Something else?").

245 Maher v. Roe, 432 U.S. 464, 483 (1977).

246 *See* GREENHOUSE, *supra* note 21, at 112 ("Blackmun filed his dissenting opinion in *Beal v. Doe*, with a footnote making it applicable to all three cases. Of all his writing about abortion so far, this five-paragraph opinion constituted Blackmun's most pointed description of the plight of a woman seeking an abortion and unable to get one. 'For the individual woman concerned, indigent and financially helpless, as the Court's opinions in the three cases concede her to be, the result is punitive and tragic,' he wrote.

The 1985 case *Thornburgh v. American College of Obstetricians and Gynecologists* marked Justice Blackmun's final majority opinion focused on the issue of abortion.[247] The Court invalidated a Pennsylvania statute that required informed consent from the mother, a description of fetal development at two-week intervals, disclosure of "detrimental physical and psychological effects" of abortion, information regarding a father's liability for child support, requirements of doctors including a two-physician requirement for post-viability abortions, and a reporting requirement.[248] The Court noted that such restrictions were aimed at pushing the state's anti-abortion agenda, infringed on the physician-patient relationship, served to increase a woman's anxiety, and interfered with a woman's right to privacy because of the potential for loss of anonymity.[249] Chief Justice Burger switched sides from the *Roe* decision, thus marking a divide that would only continue to grow.[250] He noted that "every Member of the *Roe* Court rejected the idea of abortion on demand. The Court's opinion today, however, plainly

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'Implicit in the Court's holding is the condescension that she may go elsewhere for her abortion. I find that disingenuous and alarming, almost reminiscent of 'Let them eat cake.'' Then he added: 'There is another world 'out there,' the existence of which the Court, I suspect, either chooses to ignore or fears to recognize.'"). It was also during the late 1970s that Justice Blackmun and the Chief Justice's friendship seemed to be unraveling, with Justice Blackmun's notes becoming increasingly disparaging towards the Chief Justice. *Id.* at 125-26. Professor John Hart Ely later wrote to Blackmun about his dissents, stating:

> I was critical of *Roe v. Wade* when it came down, but you certainly hit the nail on the head in your dissent in the abortion decisions of June 20. I frankly have trouble understanding how even the most strident anti-abortionist could regard it as a victory to have denied the right to poor people while retaining it for the rest of us. Surely blocking this kind of discrimination is just what the Court should be about. *Id.* at 136-37.

See generally Ruth Colker, *Equality Theory and Reproductive Freedom*, 3 TEX. J. WOMEN & L. 99 (1994) (noting the equal protection and privacy issues at play when discussing reproductive rights).

247 Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986). *See also* Pamela S. Karlan, *Some Thoughts on Autonomy and Equality in Relation to Justice Blackmun*, 26 HASTINGS CONST. L.Q. 59, 60 (1998) (calling the decision "the highwater mark of reproductive choice").

248 *See Thornburgh*, 476 U.S. at 762-63 ("These two reasons apply with equal and controlling force to the specific and intrusive informational prescriptions of the Pennsylvania statutes. The printed materials required by §§ 3205 and 3208 seem to us to be nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician. The mandated description of fetal characteristics at 2-week intervals, no matter how objective, is plainly overinclusive. This is not medical information that is always relevant to the woman's decision, and it may serve only to confuse and punish her and to heighten her anxiety, contrary to accepted medical practice. Even the listing of agencies in the printed Pennsylvania form presents serious problems; it contains names of agencies that well may be out of step with the needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities. Forcing the physician or counselor to present the materials and the list to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list.").

249 *Id.* at 763-65. *See generally* Judith G. Waxman, *Privacy and Reproductive Rights: Where We've Been and Where We're Going*, 68 MONT. L. REV. 299 (2007) (discussing the right to privacy in the context of reproductive rights jurisprudence).

250 *See* GREENHOUSE, *supra* note 21, at 183 (noting that the *Thornburgh* case was different because "the Reagan administration asked the Court directly to overrule *Roe*, and Burger, after years of coyness and hand-wringing, finally abandoned the decision. Blackmun wrote a note for his files: 'We reaffirm the general principles of *Roe v. Wade*, a 7 to 2 decision of the Court from which the Chief Justice—for reasons of his own—has now defected.'").

undermines that important principle."[251] He concluded by suggesting that *Roe* should be "reexamine[d]."[252] Chief Justice Burger revealed his retirement plans six days after the issuance of the decision.[253] President Reagan announced that Justice Rehnquist would replace him as Chief, and he appointed Antonin Scalia to the Court.[254] Indeed, "a chill wind" of change for advocates of reproductive rights was just beginning to blow.[255]

Chief Justice Burger did not need to wait long for the reexamination of *Roe* in the coming decade. In the October term of 1988, the Court heard *Webster v. Reproductive Health Services*.[256] Justice Blackmun's clerk at the time, Edward Lazarus, called the case "our Antietam, the bloodiest battle of our war, and inconclusive but for the certainty that more battles would follow."[257] Molly Yard, president of the National Organization for Women, called it a "total disaster."[258] In a plurality opinion, the Court upheld a Missouri statute that prohibited "use of public employees and facilities to perform or assist abortions not necessary to save the mother's life, and it prohibits the use of public funds, employees, or facilities for the purpose of 'encouraging or counseling' a woman to have an abortion not necessary to save her life."[259] The Court also upheld a post-twenty-week viability test requirement.[260] In reaching its conclusion, the Court's standard of review was unclear, thus making *Roe*'s status unclear.[261] Justice Scalia made his views clear

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251 *Thornburgh*, 476 U.S. at 782-83 (Burger, C.J. dissenting).

252 *Id.* at 785.

253 GREENHOUSE, *supra* note 21, at 185.

254 *Id.*

255 *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 560 (1989) (Blackmun, J., dissenting) ("For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.").

256 *Webster*, 492 U.S. 490. *See also* GREENHOUSE, *supra* note 21, at 190 ("'Missouri is Missouri and will push and push,' Blackmun wrote in notes to himself before the argument[.]"). *See generally* CYNTHIA GORNEY, ARTICLES OF FAITH: A FRONTLINE HISTORY OF THE ABORTION WARS (1998) (tracing the history of the war on abortion, with particular attention paid to the state of Missouri).

257 LAZARUS, *supra* note 107, at 329. *See generally* DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT (1992) (detailing the case and providing an overview of the Rehnquist Court).

258 YARBROUGH, *supra* note 19, at 301. The director of the women's Legal Defense Fund, Judith Lichtman, stated, "Is it still legal to have an abortion? Yes. Is *Roe v. Wade* well on the way to unraveling? Yes." *Id.* at 302. *See also* Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing For an Audience of One*, 138 U. PA. L. REV. 119 (1989) ("Lawyers, of course, have been 'spinning' judicial decisions for years. In court, it's called advocacy. Rarely, though, has a court decision been 'spun' as forcefully and effectively as the United States Supreme court's decision last Term in *Webster v. Reproductive Health Services*. The spin was, surprisingly, the same on both sides. The right-to-lifers said victory was at hand. The pro-choicers said the sky was falling.").

259 *Webster*, 492 U.S. at 511.

260 *Id.* at 519-21.

261 *See* Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83 (1989) ("The *Webster* plurality's backdoor approach allowed it to eviscerate *Roe* without explicitly overruling the case. The opinion neither rejected the long line of decisions supporting a fundamental interest in critical aspects of family relations and procreation, nor distinguished those established rights from abortion.").

in his concurrence, noting that it "appear[ed] that the mansion of constitutionalized abortion-law, constructed over-night in *Roe v. Wade*, must be disassembled doorjamb by doorjamb, and never entirely brought down, no matter how wrong it may be."[262]

As time passed, not only did Justice Blackmun's ideology seem to change, but so too did the Court's interpretation of *Roe*, much to the Justice's chagrin.[263] The right to abortion, Justice Rehnquist noted, "retain[ed] the outer shell of *Roe v. Wade*," but the right had essentially become transformed.[264] No longer was abortion considered a fundamental right requiring strict scrutiny, but rather the "undue burden" test became the proper test.[265] The case that lead to this new standard was *Planned Parenthood v. Casey*,[266] important not only for changing the analysis for abortion cases, but also for illustrating the changing tides. In *Casey*, the challenged Pennsylvania statute required that a woman give her informed consent to an abortion. As part of that consent, the statute required abortion providers to supply women with information aimed at aiding them in the decision-making process at least twenty-four hours before the procedure.[267] Additionally, the statute required minors to obtain the informed consent of a parent or guardian, with the potential for a judicial bypass.[268] Moreover, the law contained a notification provision mandating that a woman inform her husband of her choice to seek an abortion.[269] *Casey's* joint plurality opinion by Justices O'Connor, Kennedy, and Souter upheld "the essential holding of *Roe v. Wade*," at a time when many thought the reign of *Roe* was over.[270] Although the Court sustained the "essential holding," it upheld numerous restrictive provisions including the waiting period, the parental consent provision, and the informed consent provision—a provision that was admittedly proposed to inhibit abortion.[271] However, it should not be forgotten that the majority granted credence to the underlying gender implications by noting that "[t]he ability of women to participate equally in the

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262 *Webster*, 492 U.S. at 537 (Scalia, J., concurring).

263 *See generally* Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important*, 101 NW. U.L. REV. 1483 (2007) (discussing Justice Blackmun's apparent change in ideology).

264 Planned Parenthood v. Casey, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., dissenting).

265 *Id.* at 874 (O'Connor, Kennedy, Souter, JJ., plurality opinion).

266 *Casey*, 505 U.S. 833 (1992).

267 *Id.* at 844. *See generally* Pamela Laufer-Ukeles, *Reproductive Choices and Informed Consent: Fetal Interests, Women's Identity, and Relational Autonomy*, 37 AM. J. L. & MED. 567 (2011) (discussing informed consent policies, goals, and effects on autonomy).

268 *Casey*, 505 U.S. at 844.

269 *Id. See generally* Nicholas Short, Note, *The Story of "the Court": A Narrative Analysis of* Planned Parenthood v. Casey, 34 HASTINGS CONST. L.Q. 477 (2007) (analyzing the language of the decision).

270 *Casey*, 505 U.S. at 845-46 (1992). In *Casey*, the "Court began its plurality opinion . . . by redefining the Right recognized in *Roe* as a right to liberty, a right to autonomy with respect to intimate decisions, such as reproductive choice." Elizabeth M. Schneider, *The Synergy of Equality and Privacy in Women's Rights*, 2002 U. CHI. LEGAL F. 137, 148 (2002) (citing *Casey*, 505 U.S. at 846).

271 Daly, *supra* note 196, at 117.

economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[272] Nevertheless, Justice Blackmun pointed out that the majority's holding would have major consequences for women.[273]

In *Casey*, Justice Blackmun authored a separate opinion concurring in part, concurring in the judgment in part, and dissenting in part.[274] He agreed with the majority's upholding of *Roe*, and the striking of the spousal notification provision, but took issue with the Court's failure to strike the other provisions.[275] Furthermore, he contended that a woman's right to privacy and inherent gender inequality concerns required that strict scrutiny be applied, and that the provisions be declared unconstitutional.[276] Linda Greenhouse, discussing *Casey*,[277] concluded that Justice Blackmun's opinion distinguished reproductive freedom "as an essential aspect of women's equality."[278] Justice Blackmun had begun his step into history as a feminist icon.

Justice Blackmun's desire to protect the basic holding of *Roe* was clear from his majority—and later, dissenting—opinions in the reproductive rights cases of the 1970s, 80s, and 90s. Whether he knew the impact that the decision would have on women when deciding *Roe*, or fell into the role after the decision came down, his mission to protect the decision was clear. Yet, some criticized Justice Blackmun's potentially overly personal involvement in reproductive rights jurisprudence. Columnist Stuart Taylor contended that Justice Blackmun perceived "every abortion case as a new front in a holy war in which he had a highly personal stake."[279] In essence, it has been argued that Justice Blackmun formed an obsession with the *Roe v. Wade* opinion, one that transcended into even unrelated areas of the law.[280]

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[272] *Casey*, 505 U.S. at 856. *See generally* Chris Whitman, *Looking Back on* Planned Parenthood v. Casey, 100 MICH. L. REV. 1980 (2002) (exploring the *Casey* decision).

[273] *Casey*, 505 U.S. at 922-44 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[274] *Id.* at 922-44.

[275] *Id.* at 924-25.

[276] *Id.* at 925-28. *See generally* Anita L. Allen, *Autonomy's Magic Wand: Abortion and Constitutional Interpretation*, 72 B.U.L. REV. 683 (1992) (discussing how the Court went from *Roe*, to *Thornburgh*, to *Casey*).

[277] *Casey*, 505 U.S. 833 (Blackmun, J., concurring in part, concurring in the judgment in parent, and dissenting in part). *See* LAZARUS, *supra* note 107, at 3 (noting that many thought that *Casey* would mark the end of *Roe* and the right to choose abortion).

[278] Rogers, *supra* note 101. *See generally* Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917 (2010) (discussing the unequally burdensome effect of pregnancy on women).

[279] Stuart Taylor, Jr., *Justice Blackmun's Jurisprudence of Compassion*, LEGAL TIMES, Apr. 11, 1994, at 26.

[280] *See* Sisk, *supra* note 11, at 1059 ("Justice Blackmun's increasingly radicalized approach to abortion, his personalized and emotional rhetoric in abortion decisions and anecdotes from former Supreme Court clerks over the years that he often viewed other cases, even in entirely different fields of law, in terms of their potential impact upon abortion jurisprudence, all reveal his, one might say, obsession with *Roe v. Wade*.").

While it can be easily argued that Justice Blackmun refused to forget the decision, it should also be noted that it would be impossible for him to forget *Roe*. In the decades following the decision, the Justice received—and read—over 70,000 letters addressing the decision.[281] He was picketed and ridiculed at numerous law school visits and other speaking engagements.[282] Further, the Justice required special security protection, and even endured a bullet through his apartment window that narrowly missed his wife.[283]

III. JUSTICE BLACKMUN'S INFLUENCE ON THE COURT AND BEYOND

On April 6, 1994, at the age of eighty-five, Justice Blackmun retired, stating, "I know what my numbers are," continuing, "it's time."[284] On his last day serving on the bench, the Court announced its opinion in *Madsen v. Women's Health Center*, which upheld numerous restrictions on protests at abortion clinics.[285] The decision was fitting, given the Justice's legacy.

Justice Blackmun is noted for his signature infusion of compassion into his jurisprudence.[286] This infusion carried on to his reproductive rights jurisprudence, as the Justice frequently noted the personal effect of the Court's decision on individual women.[287] Although the Justice's early decisions may not have

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[281] Rao, *supra* note 29, at 22. *See generally* Alan Brownstein & Paul Dua, *The Constitutional Morality of Abortion*, 33 B.C. L. REV. 689 (1992) (noting the tension between privacy rights and the potential immorality of abortion).

[282] FELDT, *supra* note 12, at xx. *See also* HALL, *supra* note 40, at 391 (noting that Justice Blackmun was called a "murderer," "butcher of Dachau," and "Pontius Pilate").

[283] YARBROUGH, *supra* note 19, at xi-xii. It should be noted, though, that the government's investigation of the bullet shot through his window in 1985 was inconclusive. *Id. See also* Cooper, *supra* note 57 ("People infuriated by the decision picketed Blackmun wherever he traveled. In 1989, a bullet came zinging through his living room window. 'After that, he didn't go out anywhere in public without some kind of police protection,' Sally Blackmun said."); *see also* FELDT, *supra* note 12, at xxi (Sally noted that following the incident, her father always traveled with Supreme Court police or U.S. Marshals).

[284] Breyer, *supra* note 73, at 1394; Arnold, *supra* note 50, at 699. To which, Justice Souter famously responded, "I dissent." Breyer, *supra* note 73, at 1394 (quoting Justice David H. Souter, *Statement at the Announcement of the Retirement of Justice Harry Blackmun* (Apr. 6, 1994) (on file with the Columbia Law Review)). *See also* GREENHOUSE, *supra* note 21, at 242 (in a letter from Justice Souter to Justice Blackmun upon his retirement, the Justice wrote, "You may have been pigeonholed as a liberal, but you have been the center of the Court's integrity, and for four terms you have been to me the wisest and kindest elder brother that a junior justice could ever dream of having.").

[285] Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994); YARBROUGH, *supra* note 19, at 342.

[286] *See* LAZARUS, *supra* note 107, at 39 ("I have no doubt that Harry Blackmun has been the most empathetic Justice in recent times, and very likely in the history of the Court. He has been the Justice most concerned with the human drama behind the briefs and memoranda that flood his desk, the Justice most appreciative that legal cases arise from the unseen anguish of real people, which the law can either soothe or inflame, the Justice most likely to weave silken threads of sympathy across the gap between what is law and what is just. Scholars will long debate the merits of Blackmun's compassionate jurisprudence."). *See also* YARBROUGH, *supra* note 19, at 292-93 (noting Justice Blackmun's famous dissent in *DeShaney*, where he stated, "Poor Joshua," and later remarked about the majority, "I thought they'd lost sight of the individual concern . . . [s]ometimes we overlook the individual's concern, the fact these are live human beings that are so deeply and terribly affected by our decisions.").

[287] *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 538 (1989) (Blackmun, J., concurring

exemplified his empathy, his later decisions served as excellent examples of compassionate judging.[288] Justice Breyer stated, "Harry developed his views of the law, whether of individual cases or of the Constitution itself, slowly over time. But once he reached a decision on a matter of principle, he was firm."[289] Adding to this idea of change, or rather personal growth, Justice Ruth Bader Ginsburg noted that the Justice "taught us all that a person may grow in wisdom and humanity more than a generation past 63."[290]

A. The Legacy

In 1992, Justice Blackmun's law clerk informed him "that he was the justice 'American women look to,' a feminist icon."[291] It was initially noted that this status pleased the Justice's three daughters more than him, at least at first.[292] Linda Greenhouse contended that "[o]n Harry Blackmun's improbable journey, becoming a feminist icon, was perhaps the most improbable destination of all."[293] Yet, this statement can be probed further, given the recollections of the Justice's daughters and former clerks regarding his empathy for women.[294]

Notably, despite the potential personal impact on Justice Blackmun's jurisprudence, Justice Blackmun asserted that his daughters never tried to influence his decision-making. Justice Blackmun stated, "I should add that at no time has one of them ever tried to influence me in decision-making. Each is interested in what is going on and has ideas and convictions, but decision-making is for me, they say, and not for them."[295] Nevertheless, as the Justice noted in *Roe v. Wade*, "one's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes towards life and family and their

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in part and dissenting in part) (Justice Blackmun noted "the quintessentially intimate, personal, and life-directing decision whether to carry a fetus to term."); Singleton v. Wulff, 428 U.S. 106, 117 (1976) ("A woman cannot safely secure an abortion without the aid of a physician, and an impecunious woman cannot easily secure an abortion without the physician's being paid by the State.").

288 *See generally* Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987) (discussing empathy and giving several examples contained in Justice Blackmun's opinions).

289 Breyer, *supra* note 73, at 1395. Justice Breyer continued:

> Unpopularity may have displeased him, but it would not shake him. He would sometimes read those criticisms publicly, making clear that he had considered the criticism, but, still, he had to make up his own mind. Here is his response to one long very critical letter, which ended by asking Harry if he would please resign: "Dear Sir: No. Sincerely, Harry A. Blackmun." *Id.*

290 Ruth Bader Ginsburg, *Tribute to Justice Harry A. Blackmun*, 43 AM. U. L. REV. 692, 692 (1994). *See generally* Norval Harris, *H.A.B.: Integrity at its Highest Level*, 113 HARV. L. REV. 21 (1999) (remarking upon the Justice's humility and integrity).

291 Rogers, *supra* note 101. *See also* Pamela S. Karlan, *Some Thoughts on Autonomy and Equality in Relation to Justice Blackmun*, 26 HASTINGS CONST. L.Q. 59, 71 (1998) ("Not only do the pages of the United States Reports show Justice Blackmun to be the hero of his own life, but they show his fierce commitment to enabling others to become heroes of their own lives as well.").

292 Rogers, *supra* note 101.

293 GREENHOUSE, *supra* note 21, at 207.

294 YARBROUGH, *supra* note 19, at ix.

295 MARIANA COOK, FATHERS AND DAUGHTERS: IN THEIR OWN WORDS 80 (1994).

values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinkings about abortion."[296] Although we will never know the exact influence of Justice Blackmun's daughters on his decision-making, one could at least hypothesize that having daughters, and specifically one with an unplanned pregnancy, affected his empathy for those pondering abortion. Thus, perhaps his views on abortion went beyond the medical framework upon which he was accused of placing too much emphasis and more so to a practical understanding of the gender implications inherent in the abortion debate.

According to former clerk Harold Koh, Justice Blackmun "did understand *Roe* initially to be a case about the discretion of doctors."[297] However, he continued, "by the end of his career he had fully come to understand it as an important step down the road to the full emancipation of women, in no small part because he listened to women who told him that that is how they view the case."[298] In Justice Blackmun's dissent in *Rust v. Sullivan*, he recognized this idea, noting that "*Roe v. Wade* and its progeny are not so much about a medical procedure as they are about a woman's fundamental right to self-determination."[299]

Furthermore, Justice Blackmun's gender-focused jurisprudence seemed to affect the Justice's views in other areas as well. Judge Karen Nelson Moore, Justice Blackmun's first female clerk, stated, "I salute Justice Blackmun for his stellar treatment of women. At a time when many judges were reluctant to hire women, Justice Blackmun was not. Beginning in 1974, he regularly had one—or two or three—women clerks."[300] In fact, amongst the Justices he served with, he hired more female law clerks than any other Justice.[301] Moreover, during the Justice's last decade on the Court, the majority of his clerks were female.[302] As Justice Ruth Bader Ginsburg noted, "the shape of the law on gender-based classification and reproductive autonomy indicates and influences the opportunity women will have to participate as men's full partners in the nation's social, political, and economic life."[303] Essentially, Justice Blackmun combined these two concepts not only by fiercely advocating for the protection of a woman's reproductive freedom, but also by "walking the walk" in hiring female clerks at a

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296 Roe v. Wade, 410 U.S. 113, 116 (1973).

297 Koh, *supra* note 73, at 31.

298 *Id.* (citing *Statements on Retirement of Blackmun from Court*, N.Y. TIMES, Apr. 7, 1994, at A24).

299 Rust v. Sullivan, 500 U.S. 173, 216 (1991) (Blackmun, J., dissenting). *See generally* Ann Brewster Weeks, Note, *The Pregnancy Silence:* Rust v. Sullivan, *Abortion Rights, and Publicly Funded Speech*, 70 N.C. L. REV. 1623 (1992) (analyzing the *Rust* case); Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 AM. U. J. GENDER & LAW 147 (1996) (espousing a multitude of concerns regarding reproductive rights jurisprudence).

300 Moore, *supra* note 179, at 9.

301 YARBROUGH, *supra* note 19, at 146. Thirty-one of Justice Blackmun's ninety-three clerks were female. Additionally, Justice Blackmun was noted for his desire to hire aides who wanted to go to law school, and could use the position as a stepping stone. Longtime secretary Wanda Martinson recalled, "He wanted to hire very qualified young people, [including] women" for the position. *Id.*

302 GREENHOUSE, *supra* note 21, at 208.

303 Ginsburg, *supra* note 226, at 376.

time when it was not en vogue. Noting past tension with her father, his youngest daughter Susan noted, "[n]ow I see Dad was a great champion of free speech and privacy and individual rights, especially for minorities and women. He's the person I most admire and respect."[304]

B. The Future

Justice Blackmun prophetically warned in *Planned Parenthood v. Casey*, "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."[305] On March 4, 1999, at the age of ninety, Justice Harry A. Blackmun died.[306] Five years after his death, the Justice's papers were released to the public at the Library of Congress, thus allowing for significant insight into the judicial process, Justice Blackmun's personal life, and his jurisprudence.[307]

For better or for worse, Justice Blackmun has had an effect on the lives of women across the United States. Although Justice Blackmun was just one member of the Court, his allegiance to the *Roe* decision reminded the rest of the Court of the consequences of judicial decision-making on individuals, and in particular, women. Gloria Steinem wrote to Justice Blackmun in 1995, stating, "[t]he truth is: You have saved more American women's lives than anyone in our nation's history."[308] According to statistics from the Guttmacher Institute, 1.21 million abortions were performed in the United States in 2008.[309] It is estimated that three in ten women will have an abortion by the age of forty-five.[310] Yet, the abortion rate was roughly the same or higher, according to estimates, prior to the 1973 *Roe* decision.[311] The difference is that the pre-1973 abortions were illegal, and far

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304 YARBROUGH, *supra* note 19, at 343.

305 Planned Parenthood v. Casey, 505 U.S. 833, 943 (1992) (Blackmun, J., dissenting).

306 Davis, *supra* note 20, at 211. The funeral was held at Metropolitan Memorial United Methodist Church in Washington, D.C. *Id.*

307 *See* Jonathan Band & Tara Weinstein, *The Blackmun Papers: A Peek Behind the Scenes of a Quarter Century of Supreme Court Copyright Jurisprudence*, 28 COLUM. J.L. & ARTS 315 (2005) (discussing the release of his papers); Tony Mauro, *Lifting the Veil: Justice Blackmun's Papers and the Public Perception of the Supreme Court*, 70 MO. L. REV. 1037 (2005) (same).

308 GREENHOUSE, *supra* note 21, at 246.

309 Andrew Rosenthal, *Is Abortion Rare?*, N.Y. TIMES (Feb. 6, 2012, 2:42 PM), http://loyalopposition.blogs.nytimes.com/2012/02/06/is-abortion-rare/. A quarter of the abortions were medically induced by mifespristone within the first nine weeks. *Id. See also Mifepristone*, PUBMED HEALTH, http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000008/ (last reviewed Feb 1, 2009) (providing information on the drug mifepristone).

310 Rosenthal, *supra* note 309.

311 *See id.* ("Approximations of illegal abortions in the 1960s range from 200,000 to 1.2 million a year, and the total population was under 200 million until the end of that decade. If the truth lies closer to the larger number, the rate was actually higher than post-Roe."). *See also* Mary Steichen Calderone, *Illegal Abortion as a Public Health Problem*, 50 AM. J. PUB. HEALTH 948, 951 (1960). In 1960, Mary Steichen Calderone, the medical director for Planned Parenthood, "estimated the annual incidence of illegal abortions in the United States at 200,000 to 1.2 million and argued that a profession committed to fighting disease had an obligation to concern itself with 'this disease of society, illegal abortion.'" *Id.*

more dangerous.[312] It is estimated that during the Great Depression alone, between 8,000 and 15,000 women died from illegal abortions.[313] In essence, regardless of the legality of abortion, women will continue to have the procedure, with the major difference being safety and dignity.[314]

Of course, not all feminists believe that the right to abortion is necessary for female equality.[315] But for many feminists, and women in general, the choice of whether or not to have an abortion is an important right.[316] Margaret Sanger, reproductive rights advocate and founder of Planned Parenthood, succinctly expressed this view, stating, "No woman can call herself free who does not own and control her body. No woman can call herself free until she can choose consciously whether she will or will not be a mother."[317]

Reproductive rights issues continue to be a hot topic in the forty years since *Roe*, with a growing anti-abortion movement allied with conservative politicians. *Time* magazine recently wrote that "for the first time since abortion became legal, more Americans call themselves pro-life than pro-choice, including 29 governors (up from 21 before last fall's midterms). Activists call this the best climate in years for passing pro-life laws."[318] Indeed, "[a]bortion opponents, dismayed by the

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312 *See* ELLEN MESSER & KATHRYN E. MAY, BACK ROOMS: VOICES FROM THE ILLEGAL ABORTION ERA (1994) (describing the need for legal abortion through the use of stories of illegal and sometimes dangerous abortion). *See also* Rosenthal, *supra* note 309 ("According to some estimates, fifty percent of the maternal deaths in the first half of the 20th century were due to illegal abortions.").

313 LAZARUS, *supra* note 107, at 343.

314 *See* Ronli Sifris, *Restrictive Regulation of Abortion and the Right to Health*, 18 MED. L. REV. 185, 185 (2010) (citations omitted) ("Women have always had abortions and will always continue to do so, irrespective of prevailing laws, religious proscriptions, or social norms. Although the ethical debate over abortion will continue, the public-health record is clear and incontrovertible: access to safe, legal abortion on request improves health."). *See generally* Lance Gable, *Reproductive Health as a Human Right*, 60 CASE W. RES. L. REV. 957 (2010) (detailing the horrors of illegal abortion across the world and the necessity of safe access); Joanna N. Erdman, *Access to Information on Safe Abortion: A Harm Reduction and Human Rights Approach*, 34 HARV. J.L. & GENDER 413 (2011) (noting that not all clandestine abortions are dangerous, but noting the problem of unsafe abortion); Edith L. Pacillo, *Expanding the Feminist Imagination: An Analysis of Reproductive Rights*, 6 AM. U. J. GENDER & LAW 113 (1997) (discussing the prevalence of abortion and the problems associated with pregnancy).

315 *See* Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889 (2011) ("Within legal academic circles and the general prochoice feminist population, it is axiomatic that women's equality requires a right to abortion. Yet not all women agree. Indeed, a growing segment of women instead echoes the views of the early American feminists, who believed that abortion was not only an egregious offense against the most vulnerable human beings, but that it was also an offense against women and women's equality.").

316 *See* Allen, *supra* note 218, at 481-82 ("First, feminism argues that whether women themselves choose to have children ought to be the determining factor in whether they are subjected to pregnancy and childbirth. Women have the inviolable right to choose freely . . . Second, feminism argues that denial of freedom of choice to women entails that government fails to take seriously women's claims for equal treatment and full participation in society . . . Third, feminism argues that denial of choice treats women with moral disrespect. Denial of procreative choice implies that it is fitting that women should be instruments of others' ends rather than persons in their own right. Women who are expected to live lives as wives and mothers—whether or not they prefer to—are used by government and the male-dominated society.").

317 MARGARET SANGER, WOMEN AND THE NEW RACE 50 (1923).

318 Nancy Gibbs, *The Baby and the Bathwater*, TIME (Mar. 14, 2011), http://www.time.com/time/magazine/article/0,9171,2056716,00.html.

Court's unwillingness to overrule *Roe*, have adopted an incrementalist strategy, whereby instead of 'trying to make abortion illegal' they are 'trying to make it impossible.'"[319] Justice Blackmun's dissent in *Casey* clearly recognized this effort and the consequences of such a strategy on a woman's right to choose.[320] Yet, such efforts have only intensified since the Justice's passing.

In Mississippi, a state with only one abortion service provider, legislators are doing everything in their power to shut down the lone clinic.[321] Governor Phil Bryant summarized, "We want Mississippi to be abortion-free."[322] A new bill recently signed by the Governor requires that a doctor performing an abortion be a certified obstetrician and gynecologist with admitting privileges at a local hospital.[323] Such privileges are difficult for providing doctors to acquire both because of residency requirements and anti-abortion sentiment at area hospitals.[324] At this time, the lone clinic has suggested that it may not be able to meet this requirement.[325] Little consideration has been given to the effect on women who would have to travel out of state to obtain the procedure.[326] As Justice Blackmun cautioned in *Beal v. Doe*, "for the individual woman concerned, indigent and financially helpless . . . the result is punitive and tragic. Implicit in the Court's holding [that access to the procedure can be heavily limited] is the condescension that she may go elsewhere for her abortion. I find that disingenuous and alarming, almost reminiscent of 'Let them eat cake.'"[327] North Dakota and South Dakota

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319 Janessa L. Bernstein, *The Underground Railroad to Reproductive Freedom: Restrictive Abortion Laws and the Resulting Backlash*, 73 BROOK. L. REV. 1253, 1473 (2008).

320 Planned Parenthood v. Casey, 505 U.S. 833, 922-44 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

321 Emily Wagster Pettus & Laura Tillman, *New Law Targets Lone Abortion Clinic in Miss.*, ONLINE ATHENS (Apr. 12, 2012), http://onlineathens.com/national-news/2012-04-12/new-law-targets-lone-abortion-clinic-miss.

322 *Id.*

323 Emily Wagster Pettus, *Miss. Gov. Signs New Limit on Abortion Providers*, BLOOMBERG BUS. WEEK, (Apr. 17, 2012, 8:20 AM), http://www.businessweek.com/ap/2012-04/D9U6M0A82.htm.

324 Pettus & Tillman, *supra* note 321.

325 *Id.* If the clinic closes, women would be forced to travel out of state. *Id.* "The closest clinics to Jackson are in Baton Rouge, La., and New Orleans, both some 150 miles away . . . Democratic Sen. David Jordan of Greenwood, who opposed the bill, warned that some women, particularly the poor, could seek dangerous illegal abortions if they can't afford a trip out of state." *Id.*

326 *See* Alissa Quart, *Will Mississippi Close Its Last Abortion Clinic?*, THE ATLANTIC (Jan. 22, 2013), http://www.theatlantic.com/national/archive/2013/01/will-mississippi-close-its-last-abortion-clinic/267352/ ("If the Jackson clinic is closed, the 2,000 women who go there for abortions each year will need to travel out-of-state. That will mean paying for bus fare or gas, as well as covering childcare and the loss of wages. There will also be hotel fees: many nearby states require a 72-hour waiting period between a state-mandated counseling session and an abortion. And the procedure itself can cost $450 or even more. (Several of the women in the waiting room of the Jackson clinic said they had received financial assistance from the National Abortion Federation.) All of this may make abortions prohibitively expensive for many Mississippi women, who are among the poorest in the union. According to the latest census, Mississippi had a poverty rate of 22.6 in 2011. The clinic's clientele fall disproportionately into this poorest sector.").

327 Beal v. Doe, 432 U.S. 438, 462 (1977) (Blackmun, J., dissenting).

also have only one provider, thus drastically limiting access for women seeking abortions.[328]

Pennsylvania, the battlefield for both *Casey*[329] and *Thornburgh*,[330] is currently considering legislation that would require women to have ultrasounds prior to obtaining an abortion.[331] Currently, twenty-three other states have such laws in place regulating ultrasounds,[332] with seven of those states mandating ultrasounds—Alabama, Arizona, Florida, Kansas, Louisiana, Mississippi, and Texas.[333] Another nine states are considering requiring pre-abortion ultrasounds as well.[334] In Texas, North Carolina, and Oklahoma, the performing physician is required to give a detailed explanation of the features of the fetus.[335] Virginia recently passed similar legislation.[336] A *USA Today* editorial contended that the objective of "such laws has nothing to do with good medicine" but "is to dissuade women from having an abortion."[337] Cecile Richards, president of Planned Parenthood, called the new law "an appalling and offensive government overreach that is designed to shame women who are seeking legal healthcare."[338] It seems that many states have forgotten Justice Blackmun's now partially overruled words in *Thornburgh*, in which he contended that states "are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies."[339] Nevertheless, *Casey* upheld an "informed consent" provision, despite the fact that it was admittedly enacted to discourage abortion.[340]

Interestingly, the ultrasound bills may not be as effective as the anti-abortion movement had hoped. In a three-year study through the University of California-

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328 Pettus, *supra* note 321.

329 Planned Parenthood v. Casey, 505 U.S. 833 (1992). *See generally* Alan I. Bigel, Planned Parenthood of Southeastern Pennsylvania v. Casey*: Constitutional Principles and Political Turbulence*, 18 DAYTON L. REV. 733 (1993) (describing the setting of the *Casey* decision).

330 Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986).

331 Scott W. Gaylord & Thomas J. Mahoney, *Ultrasound Laws are Constitutional*, PHILADELPHIA INQUIRER (Mar. 25, 2012), http://www.philly.com/philly/opinion/20120325_Ultrasound_laws_are_constitutional.html. The proposed bill is currently on hold as legislators consider the effect of the requirement in other states. *Bill Information*, PENNSYLVANIA LEGISLATURE, http://www. legis.state. pa.us/cfdocs/billinfo/billinfo.cfm?syear=2011&body=H&type=B&BN=1077.

332 Gaylord & Mahoney, *supra* note 331.

333 Bonnie Rochman, *Requiring Ultrasounds Before Abortion: One Mother's Personal Tragedy*, TIME (Mar. 23, 2012), http://healthland.time.com/2012/03/23/requring-ultrasounds-before-abortion-one-mothers-personal-tragedy/.

334 Gaylord & Mahoney, *supra* note 331.

335 *Id.*

336 Kim Geiger, *Virginia Gov. Bob McDonnell Signs Pre-Abortion Ultrasound Bill*, L.A. TIMES (Mar. 7, 2012), http://articles.latimes.com/2012/mar/07/news/la-pn-va-gov-bob-mcdonnell-signs-pre abortion-ultrasound-bill-into-law-20120307.

337 Editorial, *Ultrasound in Abortion Should Be a Woman's Choice*, USA TODAY (Mar. 5, 2012, 7:43 PM), http://www.usatoday.com/news/opinion/editorials/story/2012-03-05/ultrasound-mandates-abortion-restrictions/53375024/1.

338 Geiger, *supra* note 336.

339 Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 759 (1986).

340 Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992); Daly, *supra* note 196, at 117.

San Francisco, 457 women at abortion clinics across the nation were presented with a chance to look at ultrasound; although roughly sixty-percent of the women chose to view the ultrasound, not a single woman changed her decision to have an abortion.[341] Although ineffective, women forced to view the ultrasound images without an option to decline have deemed the requirements offensive and aggressive.[342] Nevertheless, the contested bills seem to be an extension of *Casey*, meant to keep women "informed" with regard to consent, whether they want to be or not.[343] Such efforts also fail to recognize that a woman may already be "informed," and thus may not need the paternalistic efforts of the state to educate them. For some women, the mandatory ultrasound images are inappropriate, and in the words of Justice Blackmun, "poorly disguised elements of discouragement for the abortion decision."[344]

In Arizona, a recently passed bill added disclosure requirements for women considering abortion and also bans abortions past the twenty-week mark.[345] The ban was ruled constitutional by U.S. District Court Judge James Teilborg.[346] Currently, several states make abortion past the twenty-week mark illegal, although opponents call this benchmark overly arbitrary.[347] As part of the disclosure requirements, women are required to look at a state-maintained website containing pictures of fetuses at two-week intervals.[348] Justice Blackmun raised concerns regarding a similar provision in *Thornburgh*, stating, "[t]he mandated description of fetal characteristics at 2-week intervals, no matter how objective, is plainly

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341 *Ultrasound in Abortion Should Be a Woman's Choice*, *supra* note 337.

342 Rochman, *supra* note 333.

343 *Casey*, 505 U.S. at 922-44 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

344 *See generally Thornburgh*, 476 U.S. at 763 ("The requirements of [the statute at issue] that the woman be advised that medical assistance benefits may be available, and that the father is responsible for financial assistance in the support of the child similarly are poorly disguised elements of discouragement for the abortion decision. Much of this would be nonmedical information beyond the physician's area of expertise and, for many patients, would be irrelevant and inappropriate. For a patient with a life-threatening pregnancy, the 'information' in its very rendition may be cruel as well as destructive of the physician-patient relationship. As any experienced social worker or other counselor knows, theoretical financial responsibility often does not equate with fulfillment. And a victim of rape should not have to hear gratuitous advice that an unidentified perpetrator is liable for support if she continues the pregnancy to term. Under the guise of informed consent, the Act requires the dissemination of information that is not relevant to such consent, and, thus, it advances no legitimate state interest.").

345 Michelle L. Price, *Arizona Lawmakers Spar Over Anti-Abortion Bill*, ARIZ. DAILY STAR (Mar. 22, 2012), http://azstarnet.com/news/local/govt-and-politics/arizona-lawmakers-spar-over-anti-abortion-bill/article_4fa37d8e-747c-11e1-bc85-001871e3ce6c.html; *Gov. Brewer signs Abortion bill with 20-week abortion ban*, FOX NEWS (Apr. 12, 2012), http://www.foxnews.com/politics/2012/04/13/gov-brewer-signs-arizona-bill-with-20-week-abortion-ban/.

346 *Judge Says Arizona's Abortion Ban Can Take Effect*, USA TODAY (July 30, 2012), http://usatoday30.usatoday.com/news/nation/story/2012-07-30/arizona-abortion-ban/56596736/1.

347 *Id.*

348 *Id. See generally* John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327 (2011) (describing the role of technology in the abortion debate).

overinclusive. This is not medical information that is always relevant to the woman's decision, and it may serve only to confuse and punish her and to heighten her anxiety, contrary to accepted medical practice."[349] Nonetheless, the new Arizona bill goes even further by requiring that the ultrasound be performed twenty-four hours in advance of the procedure, rather than the one hour period that had previously been mandated.[350] Such a bill is in addition to the Partial-Birth Abortion Ban Act, which the Supreme Court deemed constitutional in the 2007 case *Gonzales v. Carhart*.[351] The Partial-Birth Abortion Ban Act barred a certain type of abortion procedure, often used in the later months of pregnancy, regardless of the best interests of the mother.[352]

Anti-abortion activists are also currently attempting to take parental notification laws a step further. The Child Interstate Abortion Notification Act, if passed, will institute a mandatory parental notification requirement and a twenty-four-hour waiting period on women under the age of eighteen who travel outside their home states to obtain abortions.[353] Currently, thirty-two states already have laws in place that require underage women to obtain the permission of their parents, or else obtain the permission of a judge.[354] Under the proposed bill, any person convicted of assisting a minor with obtaining an out-of-state abortion could serve a year in jail, or be fined $100,000.[355] The Supreme Court previously addressed parental notification laws in cases such as *Bellotti v. Baird*[356] and *Planned Parenthood of Kansas City v. Ashcroft*,[357] but this time, if challenged, a

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[349] *Thornburgh*, 476 U.S. at 762.

[350] Price, *supra* note 345.

[351] Gonzales v. Carhart, 550 U.S. 124, 157, 160-65 (2007). The Court held the Partial-Birth Abortion Ban Act constitutional because the state's interests in protecting the dignity of "the life within the woman" and the respect and character of physicians who perform such abortions prevailed over the need for continuing the safe accessibility of the intact dilation and evacuation procedure (medical term for the procedure used in partial-birth abortions), and that the Act was not overly broad and did not overburden women seeking pre-viability abortions. *Id. See generally* Khiara M. Bridges, *Capturing the Judiciary:* Carhart *and the Undue Burden Standard*, 67 WASH. & LEE L. REV. 915 (2010) (providing an excellent analysis of the decision); Martha K. Plante, *"Protecting" Women's Health: How* Gonzales v. Carhart *Endangers Women's Health and Women's Equal Right to Personhood Under the Constitution*, 16 AM. U. J. GENDER SOC. POL'Y & L. 387 (2008) (pointing to major problems with the decision); Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After* Casey *and* Carhart, 31 FORDHAM URB. L.J. 675 (2004) (discussing the effect of *Carhart*).

[352] Laufer-Ukeles, *supra* note 267, at 581.

[353] Editorial, *Yet Another Curb on Abortion*, N.Y. TIMES (Mar. 13, 2012), http://www.nytimes.com/2012/03/13/opinion/yet-another-curb-on-abortion.html. *See generally* Dean J. Haas, *"Doctor, I'm Pregnant, and Fifteen—I Can't Tell My Parents—Please Help Me": Minor Consent, Reproductive Rights, and Ethical Principles For Physicians*, 86 N.D. L. REV. 63 (2010) (discussing the effect of laws relating to minor consent on doctors).

[354] *Id. See generally* J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 BERKELEY WOMEN'S L.J. 61 (2003).

[355] *Yet Another Curb on Abortion*, *supra* note 353.

[356] Bellotti v. Baird, 443 U.S. 622 (1979). The Court held a state statute unconstitutional where it required parental consent for an abortion and prohibited judicial consent without parental notification and consultation, and where it allowed a judge to withhold consent from a mature minor. *Id.*

[357] Planned Parenthood of Kan. City v. Ashcroft, 462 U.S. 472 (1983) (parental notification statute

new Court would consider its constitutionality. Currently, parental notification statutes can be constitutional, so long as there is a judicial bypass option.[358]

A recently proposed Tennessee bill would have required the state to publicize the names of doctors who provide abortion services, along with statistics regarding the women who obtain the procedure.[359] The Life Defense Act of 2012 would have required a multitude of information to be publicized regarding women who obtain abortions including their age, ethnicity, home county, marital status, educational background, number of children, where they obtained the procedure and how many times they have been pregnant, in addition to the doctor's name.[360] Opponents of the legislation contended that the bill was meant to "terrorize" abortion services providers and would result in more violence aimed at physicians.[361] Representative Gary Odom described the legislation as "'very dangerous,' and said the Republicans who voted it out of a House subcommittee offered 'no explanation as to why this was something that needed to be done.'"[362] The bill was eventually passed in modified form, leaving out the publication requirement and instead requiring providers to have admitting privileges at nearby hospitals.[363] Nevertheless, the proposed legislation was eerily similar to a provision at issue in *Thornburgh*, which the Court struck down.[364] In his opinion in *Thornburgh*, Justice Blackmun expressed concern, stating:

> A woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly. Although the statute does not specifically require the reporting of the woman's name, the amount of information about her and the circumstances under which she had an abortion are so detailed that identification is likely.[365]

Given the number of abortion facility bombings, and murders of providers, Justice Blackmun's concerns are still relevant today.[366]

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with option of obtaining judicial consent instead was constitutional).

358 *See id. See generally* Katheryn D. Katz, *The Pregnant Child's Right to Self-Determination*, 62 ALB. L. REV. 1119 (1999) (discussing the constitutional parameters of a minor's access to abortion).

359 Laura Bassett, *Tennessee Abortion Bill Would Make Providers' Names Public*, HUFFINGTON POST (Mar. 19, 2012), http://www.huffingtonpost.com/2012/03/19/tennessee-abortion-bill_n_1363410.html.

360 *Id.*

361 *Id.*

362 *Id.*

363 Family Action Council of Tennessee, *Enacts the "Life Defense Act of 2012" (SB 3323 HB 3808)*, http://factn.org/portfolio/enacts-the-life-defense-act-of-2012-sb-3323-hb-3808/; Chas Sisk, *TN House passes amended abortion bill*, THE TENNESSEAN (Mar. 30, 2012), http://www.wbir.com/rss/article/213729/2/TN-House-passes-amended-abortion-bill.

364 Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 766-67 (1986).

365 *Id.*

366 *See* Laura Bassett, *Wisconsin Planned Parenthood Bombing Draws FBI Vow To Protect Public Access To Abortion Clinics*, HUFF. POST (Apr. 4, 2012), http://www.huffingtonpost.com/2012/ 04/04/wisconsin-planned-parenthood-bombing-fbi_n_1402897.html (noting the recent bombing of a Wisconsin Planned Parenthood facility); DOROTHY E. MCBRIDE, ABORTION IN THE UNITED STATES: A

The recent nationwide attempts to limit access to abortion and to dissuade women from obtaining the procedure are not the first since *Roe*, nor will they be the last. With a tumultuous election recently culminating and with reproductive rights serving as a divisive issue, such legislation will likely continue to proliferate.[367] Under the Supreme Court's "undue burden" standard, many of these attempts will likely withstand constitutional challenge.[368] Justice Blackmun repeatedly raised concerns regarding the repercussions of decisions limiting the choice of abortion, but his trepidations seem to have fallen by the wayside.

CONCLUSION

Sally Blackmun recently stated, "today I fear that, as my father, U.S. Supreme Court justice Harry Blackmun, put it, 'a chill wind blows,' endangering women's reproductive freedoms, which are now under serious threat—far more than most of us realize."[369] She continued:

> Young women today don't understand the terrible choices—or lack of choices—women of . . . my generation had to deal with. And unless those of us in the majority wake up to what is happening, we will face a crisis of immense proportions as women's reproductive choices are taken away and life in this country returns to the way it was before *Roe v. Wade*[.][370]

Indeed, given that the *Roe v. Wade* decision is now almost forty years old, many Americans may have forgotten, or have never known, what a world without choice is like. Yet, legislative attempts to limit this right should serve as a reminder of the fragility of the right. Jennifer Baumgartner summarized the decision, stating, "[t]hough flawed according to some activist and legal scholars, *Roe* was and remains a cornerstone feminist decision—one that affirms a woman's right to freedom and the pursuit of happiness."[371]

Justice Harry A. Blackmun understood the fragility of reproductive rights jurisprudence, and reminded the Court of the power of judicial decision-making. More specifically, he understood the potential benefits and repercussions of Supreme Court decisions on the lives of Americans, and in particular on women.[372]

REFERENCE HANDBOOK 47 (2008) (discussing violence directed at abortion providers).

[367] *See generally* Laurie Kellman, *Social Issues Retake U.S. Politics, 2012 Elections*, HUFFINGTON POST (Feb. 10, 2012), http://www.huffingtonpost.com/2012/02/10/social-issues-politics-2012-elections_n_1267779.html (discussing abortion and contraceptives as a major election issue in 2012).

[368] *See generally* Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy*, 16 WM. & MARY J. WOMEN & L. 291 (2010) (exploring the undue burden standard and its effect on women).

[369] FELDT, *supra* note 12, at xvii.

[370] *Id.*

[371] JENNIFER BAUMGARTNER, ABORTION & LIFE 31 (2008). *See generally* Jennifer S. Hendricks, *Body and Soil: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329 (2010) (discussing equality arguments in the abortion debate).

[372] *See generally* Dennis J. Hutchinson, *Aspen and the Transformation of Harry Blackmun*, 2005 SUP. CT. REV. 307, 307 (2005) ("[A]t the end of his twenty-four-year tenure on the Supreme Court of

As such, the Justice should be considered an influential figure in the reproductive rights movement. As Justice Blackmun noted in *Thornburgh*:

> Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.[373]

Although the composition of the "our" in his opinion has changed, Justice Blackmun's words are still applicable today, particularly given the surge of legislation affecting a woman's choice. Consequently, his words and concerns should not be forgotten.

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the United States, is the Justice lionized as champion of the social outsider—prisoners, aliens, Native Americans, poor women, pregnant teenagers, gays and lesbians.").

[373] Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986).