The Unknown Scholars of *Roe* v. *Wade*

Gregory J. Roden

Justice Harry Blackmun noted in *Roe* v. *Wade* that "some scholars *doubt* that the common law ever was applied to abortion." Blackmun used the opinion of these scholars to support his more ambitious contention that, "A recent review of the common-law *precedents* argues . . . that even post-quickening abortion *was never* established as a common-law crime." This bolder claim was primarily based on the writings of Cyril Means, Jr., NARAL's counsel at the time *Roe* was written[1]; it is the central premise in *Roe* v. *Wade*—whatever logic the opinion has collapses without this principal proposition. Yet, curiously, Blackmun never revealed the identity of the "some scholars" that he alleged to support this key thesis. The complaint of these "Unknown Scholars," if you will, was that there was a supposed *lack* of English common-law cases to support the various treatise writers who reported that abortion was a crime. Still, the Unknown Scholars did not contend that there were actual common-law cases holding that abortion was *not* a common-law crime; nor did they contend that abortion was not criminal.

Hardly. Instead, the Unknown Scholars held the view that abortion had been prosecuted in England as an ecclesiastical crime, stating, "There is no doubt that abortion was an ecclesiastical offense as late as 1527." And then, with the English Reformation and King Henry VIII's usurpation of the English Catholic Church's property and hierarchy, the Unknown Scholars believed, "The exact status of abortion in the English law prior to the passage of the first abortion statute in 1803 [was] confused." However, the Unknown Scholars next noted that under the English statute of 1803, Lord Ellenborough's act, "Abortion . . . was punishable by death if the woman was 'quick with child,' and by transportation or imprisonment if performed prior to quickening." The Unknown Scholars then concluded their review of English law with this observation: "This statutory adoption of the ecclesiastical distinction based on quickening is good evidence that Parliament continued to regard abortion as a crime against the unborn child."[2]

So who exactly are these Unknown Scholars? Blackmun's reference to them is secondhand. His direct citation is to Lawrence Lader, the founder of NARAL, and Lader's book *Abortion*. In the passage of *Abortion* referred to by Blackmun, the only citation to a work of legal theory is "'The Law of

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Criminal Abortion,' *Indiana Law Journal*, Vol. 32 (1956-57), pp. 193-94."[3] In Lader's citation, the authors are not identified because the reference is to a "Note" in the *Indiana Law Journal*. We may assume, then, that the authors (or author) were student staff members of the *Indiana Law Journal*. For Blackmun to have looked up this "Note" to further investigate this claim, which so crucially supports his *Roe* opinion, would have been as easy as grabbing a copy of the journal from the law library shelf. So why didn't he do so, or, if he did, why didn't he cite this "Note" directly?

After all, the only other support Blackmun could offer for his denigration of abortion as an English common-law crime was from NARAL's founder, Lader, and its legal counsel, Means. Furthermore, Blackmun himself clumsily cited 11 American cases in which abortion of a quickened fetus was affirmed to be criminal without any controversy. Even odder, in the same footnote, he also cited two cases in which abortion was criminal prior to quickening; the declaration "The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated" appeared in both cases.[4] Then there are all the historically important common-law treatise writers who held abortion to be criminal (such as Henry de Bracton, "Fleta," Coke, Blackstone, William Hawkins, and Matthew Hale).

So, too, there are any number of English common-law cases for the prosecution of abortion. Indeed, whereas Means alleged that abortion was not criminal under English common law (and this somehow created a right to abortion in America), there are at least three English cases in which women who had suffered abortions resulting from battery used the common-law "plea of felony" procedure to bring criminal actions against their assailants.[5] The historical precedent for abortion as a common-law crime notwithstanding, Blackmun's contention that it was "doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus" is proven to be clearly erroneous and patently absurd by one of Blackmun's cited cases. Blackmun's contention is clearly erroneous because this case held abortion to actually be an operative common-law crime at the time of *Roe* v. *Wade* decision.

Justice Blackmun cited a number of contemporaneous decisions that in his opinion supported his contention that abortion was a privacy right. One of those cases was decided by the Florida Supreme Court in the year before *Roe* was handed down, *State* v. *Barquet* (Fla. 1972). In *Barquet*, the Florida Supreme Court struck down for vagueness state statutes that outlawed abortion except when "necessary to preserve the life of such mother" under the Florida Constitution's due process clause. But Blackmun apparently overlooked the fact that some jurisdictions, such as Florida, had not abolished

their common law. Rather, they had amended it and supplemented it. So, when a statute in one of those states is repealed by the legislature or struck down by a court, the old common law is automatically resurrected. Accordingly, the Florida Supreme Court wrote:

> Our conclusion creates a tremendous problem in that the common law is now brought into play. It was a crime at common law to operate upon a pregnant woman for the purpose of procuring an abortion if she were actually quick with child . . . . "Quick" means "living; alive." *Black's Law Dictionary*, (4th Ed. 1957). From the filing of this opinion until a statute is enacted by the Legislature, a person may be charged with the common law offense of abortion.[6]

By this decision, at the very time *Roe* v. *Wade* was being heard, the question of whether or not abortion was common-law crime was no longer open for speculation—it was in fact a common-law crime! Incredibly, Justice Blackmun used his spurious review of the common-law history of abortion to establish the abortion right of privacy. So it bears repeating: His *Roe* v. *Wade* opinion is clearly erroneous—it has no basis in fact or law.

Pardon the digression—now, back to our Unknown Scholars. The Unknown Scholars did not intend in any way for their ruminations on the English common law to somehow be a critical inquiry into constitutional rights. Rather, their apparent reason for writing the article was to advocate the strengthening of abortion laws, not to liberalize them. They complained that "[T]he number of these illegal operations has assumed monstrous proportions and, in all but an insignificant number of cases, go unprosecuted." However, legislation to solve this problem was slow in coming, which prompted them to look deeper into the issues: "In attempting to explain this apparent legislative apathy toward a problem of this magnitude, it seems essential to re-examine the underlying rationale of the abortion laws."

The Underlying Rationale of the Abortion Laws

The Unknown Scholars then engaged in their historical review of abortion law, and came to this determination of the "underlying rationale":

> Determination of this underlying rationale is of more than academic interest. To the contrary, it has great utility in that it provides a standard by which we may evaluate tentative solutions to the abortion problem. Thus, every hypothetical solution must be reconciled with *the basic purpose of protecting the life of the unborn child.* No solution which ignores this premise, however effectively it may deal with the immediate problem of non-enforcement, is acceptable.

"[P]rotecting the life of the unborn child"! Perhaps we are uncovering the reason why Blackmun omitted any reference to this article. It should be remembered that in *Roe*, the Supreme Court did not strike down all criminal

abortion laws per se, but only 1) those that did not contain a health exception, and 2) laws that did not have increasingly more liberal health exception for the second and first trimesters.[7] The Texas statute in question already had a life exception, so it was only the health exception that was at issue. Properly understood, *Roe* v. *Wade* is principally and primarily the imposition of a subjective health exception, as a woman's Fourteenth Amendment substantive due process right, upon the states.

The Fourteenth Amendment reads, "No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law"; its plain meaning is to ensure a fair legal proceeding before anyone is executed, incarcerated, fined, or has property confiscated; i.e., procedural due process. Substantive due process, on the other hand, is a controversial legal theory in which the Supreme Court looks to the nature of the right alleged to be under attack. Then, if it so chooses, the Court may declare the right to be "fundamental" and the state law unconstitutional. Ironically, this substantive *due process* may thereby deny the several states the police power to regulate the associated activity through *any* legal due process proceeding. As Justice Scalia wrote in a dissenting opinion, "The entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set forth in the Bill of Rights (usually under the rubric of so called 'substantive due process') is in my view judicial usurpation."[8] And, even in a conciliatory mood, Justice Scalia referred to substantive due process as "an oxymoron"[9] in a concurring opinion.

In order to impose the substantive due process right to abortion on the states, Justice Blackmun first denied "that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus." That allowed Blackmun to substitute his own "underlying rationale" for the enactment of abortion statutes. He promoted in *Roe* the claim that the real legislative *intent* of "the enactment of criminal abortion laws in the 19th century" was to protect the health of the mother:

> Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life. Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman.

Although Blackmun also claimed that there was "some scholarly support" for the health of the woman legislative intent argument, his only supporting citations[10] were to two articles by NARAL's Cyril Means, *Cessation*[11] and *Phoenix.*[12] Yet, Means, in turn, could only provide a single case citation in alleged support of his thesis, a New Jersey Supreme Court case, *State* v. *Murphy* (1858). [13]

State v. Murphy

This case is very significant because when Blackmun wrote, "The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus," he also had only one supporting citation, *State* v. *Murphy*.[14] As for our Unknown Scholars, before they came to the conclusion that the basic purpose of abortion laws was "protecting the life of the unborn child," they examined the idea that the "protection of the mother's health has, *on occasion*, been a salient *factor* controlling judicial interpretation of the rationale of an abortion statute." And it just so happened that the Unknown Scholars discussed *State* v. *Murphy* and the related New Jersey case of *State* v. *Cooper*:

> *State* v. *Cooper*, 22 N.J.L. 52 (Sup. Ct. 1849) decided that at common law abortion was not a crime prior to quickening. As a result of this decision the New Jersey legislature enacted a statute which purported to eliminate any distinction based on quickening. This statute was construed in *State* v. *Murphy*, 27 N.J.L. 112 (Sup. Ct. 1858) where the court, after commenting that at common law abortion was only an offense against the life of the child, went on to say: "The design of the statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts." *Id.* at 114. But at least one section of the New Jersey law is still aimed at protection of the fetus, since by the terms of the 1881 revision the maximum penalty is doubled if the child dies. N.J. Rev. Stat. [Sec.] 2A :87-1 (1951). For an example of a statute rationalized as exclusively for the protection of the fetus, see *Miller* v. *Bennett*, 190 Va. 162, 168, 56 S.E.2d 217, 221 (1949).[15]

The 1881 revision of the New Jersey law and its additional protection for the unborn child were omitted in both Blackmun's and Means's analysis of *State* v. *Murphy*; indeed, there is a lot missing in *Roe*'s legal theory. So Justice Blackmun had the motivation to bury the Unknown Scholars' "Note." After all, the Unknown Scholars examined *State* v. *Murphy*, the only case that Blackmun and Means could offer to support their thesis that the intent of early abortion statutes was to protect the woman's health, and disagreed with their evaluation of that case and all such statutes in general.

Still, the Unknown Scholars' analysis of *State* v. *Murphy* does join Blackmun and Means in failing to note that the New Jersey statute in question did not wholly replace the common law of New Jersey on abortion prosecutions. New Jersey did not abolish common-law crimes until 1979.[16] The New Jersey statute enacted in 1849 *supplemented* their criminal common-law abortion proscriptions, similar to the situation in Florida. Moreover, *State* v. *Murphy* specifically recognized that the common-law criminality of the mother in perpetrating an abortion of her unborn child remained after the

enactment of the statute—*Murphy* provides one of the clearest statements of the mother's culpability for harm to her child, that her only exemption from prosecution was for those actions that affected her own body:

> Nor does the statute make it criminal for the woman to swallow the potion, or to consent to the operation or other means used to procure an abortion. No act of hers is made criminal by the statute. *Her guilt or innocence remains as at common law. Her offence at the common law is against the life of the child.* The offence of third persons, under the statute, is mainly against her life and health. The statute regards her as the victim of the crime, not as the criminal; as the object of protection, rather than of punishment.

In addition to affirming the woman's remaining culpability under the common law, *Murphy* clearly states that the reason the woman was exempted from prosecution under the statute was because the law "regards her as the victim of the crime." In other words, the state's motivation in enacting the statute was to protect the mother as a victim of the crime, rather than to protect the mother's exercise of some otherwise dangerous and immoral civil liberty—this was clear to Supreme Court Justice Joseph Rucker Lamar, who cited *Murphy* on this point in his dissent in *U.S.* v. *Holte*:[17]

> [I]n prosecutions for abortion, the woman does not stand legally in the situation of an accomplice, for although she no doubt participated in the moral offense imputed to the defendant, she could not have been indicted for that offense. The law regards her as the victim rather than the perpetrator. . . . *State* v. *Murphy*, 27 N.J.L. 114.

Justice Lamar affirms the principle that although these statutes exempted the woman from prosecution as a victim of the crime, still she no doubt participated in the moral offense. So, a correct reading of *State* v. *Murphy* dismisses another rationale for the argument based on the health of the woman/legislative intent: the rationale that her exemption from prosecution somehow supported this argument.

The intent of the New Jersey legislature in enacting the statute in question in *State* v. *Murphy* was to supplement their common law. This is quite clear from the opinion. The statute was enacted immediately after the New Jersey Supreme Court decided under its common law, *State* v. *Cooper* (1849), and was designed to correct the "mischief" resulting from that opinion. In *Cooper*, the question presented was "whether *an attempt* to procure an abortion, the mother not quick with child, is an indictable offence at the common law."[18] In this case, where the mother did survive the abortion, the court held that the indictment was valid only if the mother did not consent to the abortion. The court also defined quickening as "that moment when the embryo gives the first physical proof of life, no matter when it first received it." So, where there was no evidence that the fetus was alive, and where the mother

consented to the abortion, no indictment could be sustained under New Jersey common law for any injury to the mother. In response to this legal anomaly, a statute was passed to close this loophole.

This brings us to the only sentence Cyril Means, Jr. quoted from the *Murphy* opinion—although in doing so he left out key passages showing the true intent of the law according to the court. Indeed, even the preceding sentence makes that clear; here is the pertinent quote with the sentence omitted by Means in brackets:

> [An examination of its provisions will show clearly that the mischief designed to be remedied by the statute was the supposed defect in the common law developed in the case of *The State* v. *Cooper*, viz., that the procuring of an abortion, or an attempt to procure an abortion, with the assent of the woman, was not an indictable offence, as it affected her, *but only as it affected the life of the fetus*.] The design of the statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts.

It should not escape notice that the New Jersey statute in question in *State* v. *Murphy* did not contain an actual health exception—the perpetrator could not escape guilt by claiming the abortion was performed for the health of the woman. Instead, as shown, it excused the criminality of the woman as it viewed her as a victim of the crime. Indeed, Justice Blackmun in *Roe* records that the earliest state statute creating a health exception was enacted in 1958; two states and the District of Columbia followed in the 1960s, and several more states enacted such laws in the early 1970s immediately before *Roe*.[19] Therefore, although Blackmun claimed that "the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage," it was instead the statutory health exception that was the Beaujolais of criminal law.

Justice Blackmun's argument was not that a health exception existed as a matter of nineteenth century legal history; rather, he was presenting the untenably weak argument that the "intent" of state legislators, in replacing the criminal common law of abortion with statutes, was to protect the woman's health. Still, if the "intent" of the state legislators was to protect the woman's health, then why didn't these state laws contain a health exception, allowing abortion when the woman's health was at risk?

The Unknown Scholars Consider a *Procedural* Due Process Health Exception

The Unknown Scholars did take note of two twentieth-century state cases in which they believed the state supreme court expanded the state statute to include a health exception. The earliest such case is a 1928 Iowa case, *State* v. *Dunklebarger*, in which the attending physician, Dr. Wallace, testified that he believed that the fetus was dead; as the doctor testified, "I took hold

of the mouth of the womb, withdrew the speculum, and then took my two fingers and straightened up the womb." He did this to facilitate a miscarriage, as he feared if he did not act the dead fetus might remain in the womb, resulting in blood poisoning and death.

The Supreme Court of Iowa made two rulings, one "that the State has introduced no evidence to disprove the good faith of the doctor in his diagnosis, or to disprove the diagnosis itself." The other was that the mortal danger to the patient need not be immediate or certain. Still, the standard was the existence of mortal danger,[20] which is a life exception, not a health exception, and the circumstances to which it was applied involved a fetus that was alleged to be already dead.

The later case, *Commonwealth* v. *Wheeler*, was decided in Massachusetts in 1944 and is the only case that contains some language approximating today's idea of a health exception. The Unknown Scholars quoted this health exception language in their article, but they left out key phrases by which the state supreme court was making it clear the case was not a controlling precedent in that regard. Here is the pertinent quote with the portions omitted by the Unknown Scholars in brackets:

> [For the purpose of this case at least, we may assume that, in general, a] physician may lawfully procure the abortion of a patient if in good faith he believes it to be necessary to save her life or to prevent serious impairment of her health, mental or physical, and if his judgment corresponds with the general opinion of competent practitioners in the community in which he practices. [In *Commonwealth* v. *Nason*, an instruction along these lines was held "sufficiently full and accurate to protect the rights of the defendants." Whether this is a complete and exact interpretation of our statute applicable in all cases need not now be decided.][21]

In *Commonwealth* v. *Wheeler*, a doctor was found guilty of procuring an abortion from his own wife. He had wanted ruling that, "An abortion is not unlawful if in the *average* judgment of the doctors in the community in which it is performed it is reasonably necessary to preserve the life or health, including mental health, of the person upon whom it is performed." The ruling was denied at trial and the Supreme Court of Massachusetts affirmed that denial because the requested ruling "omitted all reference to the *good faith and honest belief* of the doctor." It was the *mental intent* of the doctor in performing the abortion procedure on his wife that was at issue; which is a normal and necessary inquiry in criminal trials. The trial court did not believe his claims of wanting to perform the abortion for reasons other than of avoiding another child; his wife "had successful pregnancies a number of years before," the court noted. The court also observed: "There was much evidence tending to show an unhappy condition in the defendant's family

which might have been made worse by the advent of another child." Still, the *Wheeler* case was not intended by the Massachusetts Supreme Court to set a precedent for a health exception, and no subsequent appellate court cited it for that purpose.

The *Dunklebarger* and *Wheeler* cases illustrate how a health exception, if one existed, would work at the state level as a matter of *procedural* due process. As such, it would be an exercise of the state's police power to enforce abortion law, while at the same time protecting the "rights of the defendant." The defendant would be allowed to introduce testimony that the attending physician undertook the abortion procedure under the exception, and the burden of proof would be shifted to the state to disprove it. But, would even such a hypothetical health exception extend to non-physicians?

The case of *Commonwealth* v. *Nason*, cited in the *Wheeler* case, takes up this very issue. None of the defendants in the *Nason* abortion case were doctors. So when the defendants asked for jury instructions that the abortion was lawful if the fetus had "lost its vitality so that it could never have matured into a living child," the trial court denied their request; and such jury instructions were held to be "refused rightly" by the Supreme Court of Massachusetts. As the court reasoned, although a physician might have the right to commit an abortion involving a dead fetus "upon the *best* judgment of that doctor and his judgment corresponds with the average judgment of the doctors in the community," that was a privilege of his professional judgment which did not extend to the lay defendants who performed the abortion in *Nason*. So too, the mother's consent was ineffective to extend the health exception to persons outside of the medical profession.[22]

The Health Exception as Substantive Due Process

With all this in mind, looking at the underlying legal theory of *Roe*'s health exception, the very idea of a health exception as a constitutionally protected substantive due process liberty under the Fourteenth Amendment is problematic.[23] First, the Fourteenth Amendment only protects against state action. As the Court held in *Harris* v. *McRae*, "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." Obviously, the state did not impregnate the woman. Hence, the Court held in *Harris* v. *McRae*, "it does *not* follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices," and so the government had no responsibility to fund her abortions.[24]

Second, pregnancy itself is not a pathological state—so how would abortion further the health of the mother per se? Blackmun glossed over the

health risks to the mother by claiming that "Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth," ignoring the detrimental health effects to the woman, not to mention the mortality rates for the unborn children. However, the adverse health effects of abortion were known to the Unknown Scholars; in a discussion of the Soviet Union's abortion experience, they wrote, "Shortly before virtually unrestricted legal abortion was repealed in 1936, medical centers began to report a large incidence of delayed medical complications or 'late effects.'" Late effects being:

> Confinements following a legalized abortion had a higher incidence of such complications as long labors, postpartum bleeding, and adherent placenta. Menstrual disturbances, pelvic disturbances, sterility, and functional neuroses such as hysteria, depression, and loss of libido were also traced to a prior abortion.

It is usually alleged that carrying the child to term will cause various health problems, including mental health problems. As the argument goes, the unborn child is the source of the "health" problems, which, for example, might be anxiety over additional children necessitating a lifestyle of "shopping only at Costco and buying big jars of mayonnaise"[25]—not exactly the pioneer spirit that built our great nation. But the Fourteenth Amendment does not protect one person from the harm caused by another individual. As Chief Justice Rehnquist wrote in *DeShaney* v. *Winnebago County Dept. of Social Servs.*, "As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[26] Likewise, in *U.S.* v. *Cruikshank*, the Court held, "The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another."[27] Hence, the unborn child is not an agent of the state from which the woman could be protected under the Fourteenth Amendment.

Blackmun does not solve any of these problems of constitutional theory in *Roe* or *Doe*. Instead, having engaged in his clearly erroneous history of the common law, Blackmun was able to hypothesize on the state interest in the health of the woman as the real intent of abortion laws back in the day when "Abortion mortality was high." Concurrently, he disingenuously dismissed the state concern for the life of the unborn child as only hypothetical, since the unborn child only possessed "potential life." And then, in his conclusion, the *power* held by the state under the Tenth Amendment to legislate for the woman's health (at its discretion), becomes, "presto change-o," a constitutional *right* of substantive due process under the Fourteenth Amendment held by the woman—in a word, sophistry.

Potential Life versus Evident Life

Finally, all of the arguments in *Roe* and its legal regime supporting a health exception are premised on the notion that the *other* state interest in health (that being the life and health of the fetus) is limited by the fetus possessing only "potential life," viability being only a more probable potential life,[28] and that "the difficult question of when life begins" is incapable of being legally answered.[29] The centuries-old use of a jury of matrons to determine the existence of life in the womb as a fact of law notwithstanding,[30] the "potential life" legal fiction was effectively laid to rest in the federal court case *Planned Parenthood Federation of Am.* v. *Ashcroft* (2004).

The plaintiffs in that case were challenging the federal Partial-Birth Abortion Ban Act of 2003 (hereinafter the "Act"). The Act protects "living" "human" fetuses, and the plaintiffs advanced the argument that "the Act's use of the term 'living fetus' adds to the vagueness of the statute." Hence, they asserted in court, "[A] previable fetus may nonetheless be 'living' if it has a detectable heartbeat or pulsating umbilical cord."[31] The District Court for the Northern District of California accepted these arguments and included them in its findings of fact, stating: "The fetus may still have a detectable heartbeat or pulsating umbilical cord when the uterine evacuation begins in any D & E or induction, and may be considered a 'living fetus.'"[32] In its review of that case, the Supreme Court likewise accepted that finding of fact in *Gonzales* v. *Carhart*:

> The Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus *is a living organism* while within the womb, whether or not it is viable outside the womb. See, e.g., Planned Parenthood, 320 F. Supp. 2d, at 971-972. We do not understand this point to be contested by the parties.[33]

So there it is—the fetus is a "living" "human." The plaintiffs in *Planned Parenthood Federation of Am.* v. *Ashcroft* played the void-for-vagueness card once too often. In their overconfidence, born from the previous effectiveness of this ploy, they shot themselves in the foot by admitting the fetus was alive as a matter of legal fact, which obliterated *Roe*'s "potential life" legal fiction. As in *State* v. *Barquet*, the void-for-vagueness ploy boomeranged on them, and the full impact of this tactical error has yet to be felt.

Therefore, the health exception should no longer bar state abortion regulations from the point in gestation where there is "a detectable heartbeat," whether such regulation takes the form of "pain legislation," "personhood" (beginning at that point), or a prohibition of abortion where a heartbeat is present. As nearly all surgical abortions are performed after a viable fetus

has a beating heart, an application of *Planned Parenthood Federation of Am.* v. *Ashcroft* consistent with the prior holdings in the *Roe* legal regime would allow for state prohibition of nearly all abortions.

As for the first few weeks before a detectable heartbeat (or other evidence of life), a health exception would still be applicable, as the fetus would only possess "potential life" under the *Roe* legal regime. Still, the constitutional problems of the health exception remain, and even Justice Blackmun admitted that the woman's right to terminate her abortion is not absolute. Correspondingly, the state interest in her health and in the health of the "potential life" she carries still exists. As the Supreme Court held in *Gonzales* v. *Carhart*:

> The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. This traditional rule is consistent with Casey, which confirms the State's interest in promoting respect for human life *at all stages in the pregnancy*.[34]

Furthermore, as the late Chief Justice Rehnquist wrote in *Washington* v. *Glucksberg*, "We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices."[35] Yet, the health exception has been shown to be absent from our history, legal traditions, and practices. And if it were to exist as an extension of the life exception in Iowa, where a doctor in "good faith" believes "the peril to life" to be at least "potentially present," and where the fetus is dead, then the health exception would be a procedural due process right held only by a doctor in an abortion criminal prosecution—this is hardly the health exception of the *Roe* regime.

As for substantive due process, Chief Justice Rehnquist also wrote in *Glucksberg*:

> Our established method of substantive due process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive due process cases a "careful description" of the asserted fundamental liberty interest.[36]

In the only American case to come within a light-year of even suggesting the existence of a health exception, *Commonwealth* v. *Wheeler*, the state supreme court made it clear that it was not setting precedent. Also, the speculated exception was only intended for the medical profession as a *procedural* due process protection in a criminal trial. Dictum in one case, which was never followed as precedent, hardly establishes a fundamental right "deeply rooted in this Nation's history and tradition." The Supreme Court has set a higher constitutional bar to substantive due process rights than to

due process rights because labeling some right as such operates to "place the matter outside the arena of public debate and legislative action."[37] The next-to-nonexistent legal history of health exception does not justify its existence as a national due process right (applicable to all the states), let alone a substantive due process right; nevertheless, the Court still has placed abortion "outside the arena of public debate and legislative action."

Conclusion

According to our Unknown Scholars, the crux of the abortion problem is this: "[E]very hypothetical solution must be reconciled with the basic purpose of protecting the life of the unborn child." Instead of that noble ambition, our unelected Supreme Court through *Roe* v. *Wade* has promulgated a degenerate policy of secular hedonism—degradation without representation. State courts had with one accord historically regarded abortion with contempt; as Idaho Chief Justice Quarles derided, "The crime for which appellant has been convicted is one of the worst known to the law." So it is no wonder that Justice Powell, in referring to *Roe* and *Doe*, stated that they were "the worst opinions I ever joined."[38] Indeed, that is an understatement—*Roe* and *Doe* are the worst opinions any justice ever joined.

NOTES

1. Roden, "*Roe*'s Abortion Mythology," 31 *Human Life Review*, no. 4, 65 (Fall 2005); Roden, "*Roe* Revisited: A Grim Fairy Tale," 30 *Human Life Review*, no. 2, 49 (Spring 2004).
2. Note, "The Law of Criminal Abortion: An Analysis of Proposed Reforms," 32 *Indiana Law Journal*, no. 2, 193, 194-195 (Winter 1957) [hereinafter "*The Note*"].
3. L. Lader, *Abortion*, 185 n7 (1966).
4. *Mills* v. *Commonwealth*, 13 Pa. 631, 633 (1850); *State* v. *Slagle*, 83 N.C. 630, 632 (1880).
5. J. Dellapenna, *Dispelling the Myths of Abortion History*, 135-138 (Carolina Academic Press 2006).
6. *State* v. *Barquet*, 262 So.2d 431, 437 (Fla. 1972).
7. *Roe*, 410 U.S. at 164-165.
8. *Chicago* v. *Morales*, 527 U.S. 41, 85 (1999), (Scalia, J., dissenting).
9. *U.S.* v. *Carlton*, 512 U.S. 26, 39 (1994), (Scalia, J., concurring).
10. *Roe,* 410 U.S. at 151 n. 47: "See discussions in Means I [*Cessation*] and Means II [*Phoenix*]."
11. Means, "The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality," 14 N.Y.L.F. 411 (1968) [hereinafter "*Cessation*"]. . .
12. Means, "The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?," 17 N.Y.L.F. 335, 401-410 (1971) [hereinafter "*Phoenix*"].
13. *Cessation*, at 507; *Phoenix*, at 390.
14. 410 U.S. at 151 n.48: "See, e. g., *State* v. *Murphy*, 27 N. J. L. 112, 114 (1858)."
15. *The Note*, at 195-196 n.18. *Miller* v. *Bennett*, 190 Va. 162, 169 (1949): "The Virginia anti-abortion statute, Code (Michie's 1942), sec. 4401, does not make the woman who consents to the treatment an accomplice. This statute was passed, not for the protection of the woman, but for the protection of society. Unnecessary interruption of pregnancy is universally regarded as highly offensive to public morals and contrary to public interest.... In a criminal prosecution the consent of the pregnant woman is no defense. 1 C. J. S., Abortion, sec. 7, p. 319."

16. NJSA 2C:1-5.
17. *U.S.* v. *Holte*, 236 U.S. 140 (1915) (Lamar, J., dissenting).
18. *State* v. *Cooper*, 22 N.J.L. 52, 53 (1849).
19. *Roe*, 410 U.S. at 139-140.
20. *State* v. *Dunklebarger*, 206 Iowa 971, 980, 221 N.W. 592, 596 (1928): "In order to justify the act of Dr. Wallace, it was not essential that the peril to life should be imminent. It was enough that it be potentially present, even though its full development might be delayed, to a greater or less extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise *certain*, in order to justify him in affording present relief."
21. *Commonwealth* v. *Wheeler*, 315 Mass. 394, 396, 53 N.E.2d 4, 5 (1944).
22. *Commonwealth* v. *Nason*, 252 Mass. 545, 148 N.E. 110, 1925 Mass. LEXIS 1187 (1925).
23. In trying to make sense out of the health exception, Professor Stephen Gilles observed, "As formulated in *Roe,* the exception turns out to be deeply ambiguous in rationale and scope." And, "Blackmun simply presented *Roe's* life-or-health exception, without explanation, as the rule to which postviability state abortion bans must conform." "*Roe*'s Life-Or-Health Exception: Self-Defense or Relative-Safety?", 85 *Notre Dame Law Review* 525, 527, 551 (Feb. 2010). Professor Gilles also expresses the view that *Doe* does not advance any cogent constitutional arguments, a view with which I heartily concur. *Ibid.* at 554-555.
24. *Harris* v. *McRae*, 448 U.S. 297, 316 (1980) (emphasis added).
25. "LIVES; When One Is Enough," *The Times Magazine* (July 18, 2004). *See*: http://www.nytimes.com/2004/07/18/magazine/lives-when-one-is-enough.html (last visited March 13, 2012).
26. *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 197 (1989). Although some would maintain this limitation of the Due Process Clause would act to limit any 14th Amendment application to unborn children should they be recognized as "persons" to unborn persons as a group, the Court in *DeShaney* went on to note, "The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *Ibid.* at 197 n.3.
27. *U.S.* v. *Cruikshank*, 92 U.S. 542, 554 (1875).
28. *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 870 (1992): "[T]he concept of viability, as we noted in *Roe*, is the time at which there is a *realistic possibility* of maintaining and nourishing a life outside the womb" (emphasis added).
29. *Roe*, 410 U.S. at 159, 162.
30. Roden, "Bathsheba Spooner's Plea of Pregnancy and State 'Personhood' Amendments," 37 *Human Life Review*, no. 3, 47 (Summer 2011).
31. *Planned Parenthood Federation of Am.* v. *Ashcroft*, 320 F. Supp. 2d 957, 977 (2004).
32. *Ibid.* at 971-972.
33. *Gonzales* v. *Carhart*, 550 U.S. 124, 147 (2007) (emphasis added).
34. *Gonzales* v. *Carhart*, 550 U.S. 124, 163 (2007).
35. *Washington* v. *Glucksberg*, 521 U.S. 702, 710 (1997).
36. *Ibid.* at 720-721.
37. *Ibid* at 720.
38. J. Dellapenna, *Dispelling the Myths of Abortion History*, 686 (citing John Jeffries, Jr., *Justice Lewis F. Powell, Jr.* 341 (1994)).