even granted the state's right to prohibit abortion in some circumstances.

Stephen Galebach's "A Human Life Statute" argues that a federal human life statute would be constitutional. He agrees with the *Roe* court's finding that the judiciary is not competent to rule on the issue of fetal personhood, and that given the current legal situation, it would be incorrect to view the fetus as a person for the purposes of the Fourteenth Amendment. He suggests, however, based upon past uses of the Fourteenth Amendment, that it is within Congress's purview to determine just what and who is to count as a person for the purposes of Fourteenth Amendment protection. Further, he suggests that the function of the legislative branch generally is to arrive at difficult legislative classifications. Hence, he argues, Congress would be well within its power to determine that fetuses are persons for the purposes of Fourteenth Amendment protection, and to extend such protection to them.

David A. J. Richards's "Constitutional Privacy, Religious Disestablishment, and the Abortion Decisions" provides a novel legal and moral analysis of the abortion issue grounded in a philosophical interpretation of the First Amendment's prohibition of the establishment of religion. Richards first discusses the development of privacy theory in law, political theory, and philosophy, and concludes that as developed by the Court, privacy theory provides insufficient support for the abortion decisions.

Richards then offers an alternative argument for grounding the abortion decisions in the right to privacy, based upon the antiestablishment clause. He approaches this argument through considerations raised by John Stuart Mill, as well as through the history of the use of the antiestablishment clause both within and outside the context of the abortion controversy.

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Understanding Blackmun's Argument: The Reasoning of *Roe* v. *Wade*

Roger Wertheimer

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[1]

THESE words of Justice Blackmun, speaking for the majority in *Roe* v. *Wade*, bid fair to be among the most oft-quoted sentences of any Supreme Court opinion. Their fame derives from their having defined the pivotal premises for a ruling that all would deem epochal and many would damn as apocalyptic. But an aura of infamy now hangs round them, for to many trained minds they seem, in context, duncically paradoxical. Though the ruling has many friends, virtually all of them seem embarrassed by this particular reasoning; scholarly apologists defend their endorsement of the ruling with explanations notably independent of—if not inconsistent with—any argument in which those propositions figure.[2] And embarrassment has turned to chagrin as so-called pro-life advocates have interpreted those words as a license to undermine the ruling by means of congressional legislation or constitutional amendment. In brief, Blackmun's judicial epoche has induced every condition from perplexity to apoplexy, except ataraxy.

Though I shall later list some of my misgivings with other parts of the Blackmun opinion, my main message is that the greatest shortcoming of those two notorious sentences is that there are only two of them. Whereas the claims they proffer are correct and consistent with the rest of the opinion, some of the structure of suppositions requisite for understanding Blackmun's reasoning is neither obvious nor asserted,

and thus uncertainty remains regarding the propriety of the Court's decision. To this extent the Court did not completely succeed in fulfilling its solemn responsibilities, which include not merely reaching just decisions and doing so for good and sufficient reasons, but also adequately informing the nation's citizenry, legislators, and lower courts of the rationale for the legal order it imposes. With all the fierce passions surrounding and sometimes beclouding the abortion controversy, that shortcoming is regrettable. Still, it is remediable. The explanations needed to render manifest the coherence of Blackmun's reasoning can be supplied by weaving his words into the structure of the argument I recommended two years prior to the *Wade* decision.[3]

Those notorious two sentences have been subject to three critical responses. First, those sentences state that there is a difficult question that the Court did not have to ("need not"), cannot ("is not in a position to"), and thus presumably should not try to answer. The unvoiced but unobviable implication is that the Court did not, expressly or otherwise, answer this difficult question. Yet, according to Blackmun's own analysis of the salient issues of the case, it appears that the Court had to and did endorse an answer. Second, the second sentence says that the Court's incapacity is connected with the presence of some disagreement among experts regarding this difficult question ("those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus"). Yet, courts daily resolve questions upon which expert opinion is divided; that is one of the functions of a court. Third, the second sentence predicates this incapacity only of the judiciary. This leaves open the possibility that some other part of the government could properly resolve the question and thereby nullify the Court's ruling. In brief, the first criticism concerns the *internal consistency* of Blackmun's implicit denial that the Court answered the difficult question; the second criticism concerns the *justification* of his claim that the judiciary is incapable of answering that question; and the third criticism concerns the implications of that last claim for the *propriety of any governmental decision* on the question. Let us begin examining these matters in that order; eventually it will become apparent that the issues are intertwined.

Blackmun continually (and perhaps pointedly) refers to the difficult question as the "question when life begins." He also uses the expression "when a new human life is present,"[4] and he would assuredly accept the formulation, "Whether and when a human conceptus is a living human being." However, such rephrasing cancels only the crudest misconstruals.

Blackmun's disavowal of an answer is, at minimum, paradoxical. He unequivocally asserts that "if it is established" that "the fetus is a 'person' within the language and meaning of the Fourteenth Amendment," then "the appellant's [i.e., the pro-choice] case, of course, collapses, for the fetus's right to life is then guaranteed specifically by the Amendment."[5] And he unequivocally denies that antecedent clause: "The word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[6] And, more generally, he concludes that "the unborn have never been recognized in the law as persons in the whole sense."[7] Further, of course the pro-choice case did not "collapse": the Court ruled that abortion may not be prohibited before viability (but only regulated in its medical aspects to protect the mother's health),[8] so the Court must have held that a fetus is not a person. Indeed, strictly speaking the Court appears committed to holding that personhood is not acquired before live birth, because the Court ruled that even after viability, an abortion necessary to preserve the life or health of the mother may not be prohibited.[9] (This latter point is almost as forceful as the former in light of Blackmun's footnote 54, wherein he questions whether abortion prohibitions which contain some exceptions—as they all do, if only for the purpose of protecting the life of the mother—could be consistently based on a person's Fourteenth Amendment right to life.)

Evidently Blackmun must be presuming some distinction between the question of whether, within the meaning of the law, a fetus is a person, and the "difficult question" of whether it is a human life. Clearly the Court must and did answer the former question, if only because the law (e.g., the Fourteenth Amendment) explicitly speaks of persons and secures them a right to life, a right which would supersede a mother's rights. The problem, then, is whether and how Blackmun could separate these two questions so as to answer the former without answering the latter.

In light of the philosophical literature of the last decade, it is necessary to state that in none of the *Wade* opinions do any of the justices contemplate separating these questions by invoking that novel theory proclaimed to be self-evident by numerous contemporary philosophers: to wit, that the question of whether something is a living human being is utterly irrelevant—logically, morally, and metaphysically—to the

question of whether that thing is a person, just as one's race and sex are irrelevant to one's being a person. That is, Lord knows, a lunatic theory, but, like many another theory only lunatics live by, it properly interests philosophers if only because its rebuttal requires an examination of a matrix of profound assumptions.[10] In any case, whatever its merits as pure moral theory, it is utterly irrelevant to the political and legal realities confronted in *Wade*. A Court endorsement of such a theory would be lunacy, because it would enrage a monolithic majority of the populace and legislators, not coincidentally, because it would grossly violate our most well-established legal principles. No philosophical theory that purports that a living human being must acquire certain cognitive, volitional, or affective capacities to be a person has a speck of respectable legal precedent in its favor.[11] For Blackmun, the operative contrast is between the born and the unborn, not between the presence and the absence of some psychological capacities. His opinion supplies no fuel for the hysteria of antiabortionists anxious about legalizing infanticide. Within the bounds of our legal tradition no court could rule that an unborn child is not legally a person while recognizing it as a living human being in every sense in which a born child is.

On the other hand, throughout his opinion Blackmun carefully distinguishes his talk about persons from his talk about life, human life, human beings, and so on. (The sole apparent exception occurs while he is describing some ancient and medieval discussions that "approached the question . . . in terms of when a 'person' came into being."[12] Here Blackmun is clearly not endorsing this terminology.) The crucial point here is that the laws relevant to this case are formulated with the term "person," not with such terms as "human being" or "human life." Yet, again, nothing Blackmun says implies a rejection of the principle that a living human being is a person. On the contrary, he does not rule out the argument for the personhood of the fetus based on "the well-known facts of fetal development" as being irrelevant or a non sequitur.[13]

But, then, if he accepts that principle as relevant, how could he say that he need not answer the "difficult question"? And if he did not reject that principle while denying that a fetus is a person, how could he implicitly say that he did not deny that a fetus is a human being? A key to solving both of these questions is that, following the lead of the district court,[14] Blackmun put the burden of proof on the state to establish that a fetus is a person; he did not put it on the individual,

Roe, to establish that a fetus is not a person. The onus of proof ultimately lies with the state because our theory of government is premised on the principle that government derives its legitimate powers from the consent of the governed—which means that governmental acts infringing on their rights or frustrating their interests must be justifiable to them. Thus, the individual is not compelled to justify her exercise of her rights and capacities for action; rather, it is the state that must justify its coercive acts. In *Wade* the adversaries were not two persons (or a person and an alleged or putative person) with competing claims of rights; the adversaries were a person and the State of Texas. This is so, not because the case arises from the violation of a criminal statute which pits a woman as a defendant against the state as prosecutor, but because the abortion statute at issue severely limits the woman's "fundamental" right of privacy.[15] It is crucial that a governmental ruling to the effect that a fetus is a person is not an abstract intellectual thesis; it is itself a limitation of the rights of pregnant women. So the issue before the Court was not, Is the fetus, in some scientific, metaphysical or moral sense, a person? Rather, it was, Can the state provide sufficient justification for limiting the rights of the pregnant woman by categorizing a fetus as a person? Thus, when Blackmun had determined that the state failed to carry its burden, he formulated his conclusion on this whole issue by saying, "In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman at stake."[16]

As that concluding remark suggests, Blackmun countenanced no support of the suggestion made by others that the legislature or the judiciary is empowered to define the category of person to suit public policy.[17] No trace of a dubious theory of legal positivism or pragmatism is in evidence here.[18] Certainly classification by fiat is a common legislative and judicial activity elsewhere, but Blackmun does not treat the category of person as susceptible to governmental discretion. And rightly so, for the bestowal or denial of that status is not only awesome in its consequences but also profound in its presuppositions. A theory of government such as ours, predicated on the idea that government is an instrument for protecting the rights and furthering the interests of persons, cannot coherently deny that the nature of personhood and the fundamental rights inhering in it are anterior to governmental acts. To deny the status of person to those who rightfully possess it is a howling injustice. And bestowing that status upon those

who don't rightfully possess it is hardly less an injustice, inasmuch as that bestowal inevitably involves gross abridgments of the rights of those who rightfully possess that status.[19]

Still, a legal category is perforce distinct from its "natural" or nonlegal counterpart simply because it functions within an essentially distinct (albeit generally similar) system of epistemological norms. Although the defining criteria of the legal and nonlegal category may be the same so that the concepts are coextensive, the epistemological norms governing their application may permit or require the detachment of the legal category from its nonlegal counterpart. In the natural, nonlegal context wherein laymen (or "those trained in . . . medicine, philosophy and theology") debate their questions—whether the questions be about the personhood or humanhood of the fetus, or whatever—there are no constraints on the debate comparable to the special rules of evidence and inference recognized by our courts. In particular, there is nothing comparable to an *onus probandi* assigned to one disputant. In a nonlegal context, the failure to prove that a fetus is a person or human being does not entail ~~that it is~~ contradictory, and the failure to prove that a fetus is not a person or human being does not entail that it is. Yet in a legal context an *argumentum ad ignorantium* need not be a fallacy. There, a failure to meet a burden of proving that x is y may permit and require the inference that x is not y. As a consequence, a legal question can be resolved while and even because its nonlegal counterpart remains moot.

What ought to be the epistemological rules employed by a court is a debatable matter of legal theory. But it appears sufficiently certain that a legal system must employ principles somewhat different from those in a noninstitutional context, and that Blackmun does not rely on any controversial principles of legal epistemology. Legal reasoning is practical: a decision must be reached, and even if avoided, the status quo is in effect sustained. Placing the onus of proof on some party is necessary and is often sufficient to insure that a decision is made. In a criminal trial we place that burden on the prosecution. For different but not unrelated reasons, in deciding an issue of constitutional law, the burden is placed on the state. However, these two situations are not completely parallel. When a criminal court finds a defendant innocent because the presumption of innocence has not been defeated, it is presupposing and applying but not defining the notion of innocence, and its "finding" does not alter the truth of the proposition that the defendant is really guilty, nor does it detach its sense from the ordinary, nonlegal interpretation of that claim. But in a case such as *Wade*, though the Court is presupposing and applying a notion of person, the Court is also specifying its application in law, defining it subject to constraints on legal reasoning that may cause that legal concept to be detached from its nonlegal interpretation. Thus, the Court's decision that a fetus is not legally a person need not imply an answer to the question of whether a fetus is, in some nonlegal sense, a person or a human being; it need not imply any more than that an affirmative answer was not sufficiently proven.

Blackmun need not have answered the question in another sense, for he can and does reach his denial of the personhood of the fetus quite independently of whether it is a human life. He does so by employing another legal epistemological principle that philosophers and scientists would not use for their comparable questions: viz., *stare decisis*, the authority of legal precedent. Yet here too the burden of proof plays a major role. Blackmun's tendentious deployment of legal precedent—his narrow reading of the law's use of the term "person" ("persons in the whole sense") and his interpretation that *any* divergence in the law's treatment of the unborn from that of the born is evidence that the law has not regarded the unborn as persons[20]—should, I believe, be understood as having been guided by an assumption that a rather severe burden of proof lies on the state because of the "fundamental" character of the woman's right at stake.[21]

Yet, presumably, Blackmun could have arrived at his ruling even if precedent were against it (as arguably much of it is), for the law is not, except in a trivial and innocuous sense, what the judges have said or do say it is.[22] Properly, the law is what the judges *ought* to say it is. Certainly Blackmun does not treat precedent as the sole and automatically decisive consideration. Although he argues against the unborn being persons for purposes of the Fourteenth Amendment solely by reference to precedent, he does not reject the facts of fetal development as irrelevant even for that restricted but crucial issue. Moreover, upon concluding his reading of the Fourteenth Amendment, he acknowledges that "this conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations." [23] He then confronts the Texas contention "that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception." [24]

Up to this point it appears that Blackmun could have embraced the

Texas "theory of life" and found antiabortion legislation constitutional, and also that he could have denied that a fetus is a human being ("in the whole sense") and ruled against such legislation despite the substantial precedent behind it. He might have done either, but instead at this point he enters his claim that the Court need not and could not affirm or deny that "theory of life."

Thus far we have explained two senses in which Blackmun need not answer the difficult question: First, independent of any argument on the question, the weight of precedent alone could have decided whether the unborn are persons; Second, independent of the truth of an answer to the question, inasmuch as the state had the burden of proof and had no other line of argument, the mere failure of the state to demonstrate the truth of its theory of life would imply that the unborn are not persons and that its legislation is unconstitutional. What still needs explaining is why the Court did not need to (i.e., was not compelled by logic to) deny that a fetus is a human being while maintaining both that a fetus is not a person and that a human being is a person. To understand why the Court was under no necessity in this last and crucial respect we must move to the issue of why it could not answer the difficult question.

The Court cannot be compelled to answer a question that it cannot answer, and here "the judiciary . . . is not in a position to speculate as to the answer." But why not? After all, private individuals, including justices as private citizens, are in a position to speculate, for everyone has the First Amendment freedom to speculate about this or anything. Everyone, that is, except a justice, an authority whose mere opinions are law imposing constraints on others. For someone in that position, merely to pronounce an opinion is to impinge upon the legitimate interests of others. Here freedom of expression is limited. Indeed, even freedom of thought is restricted because a court has no unexpressed opinions: the mind of a court exists only in its pronouncements. Expressing an opinion is an action, and an authority may not act when it would thereby violate the principles which legitimate its authority.

Blackmun described the instant circumstances this way: "Those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus." He did not say—nor is it credible that he could possibly mean—that whenever a question lacks a consensus of expert opinion the judiciary is not competent to make a legal finding on the matter. Rather, he refers specifically to the extraordinary fact that, with this difficult question, presumptively expert

opinion is divided within science *and* philosophy *and* religion. By contrast, when pathologists present opposed explanations of a wound, or psychiatrists disagree over the mental competence of an agent, theologians and philosophers have no expert opinion on the issue, no more than a chemist has much of interest to say about transubstantiation or logical atomism. Few questions arise in all three domains, and with those that do, the main disputes occur between different domains and perhaps within one domain, but not within and between all three. Some questions of cosmology and evolution may be debated within each domain, but in that case typically the premises, methods, and conclusions differ in kind for each domain. Yet with the question of when a human life begins we find the specialists of each discipline agreeing on and appealing to much the same subsidiary data and arriving at the same wide divergence of conclusions. In fact, aside from the disagreements on the answer itself, virtually the only matter debated within any discipline here is debated within all three—and that is the question of whether this question is scientific, religious, or philosophical (e.g., moral or conceptual). And surely, when the presumed experts are in utter disarray over what kinds of expertise are even relevant to a question, a judicious man might well be wary.

When Blackmun then proceeded "to note briefly the wide divergence of thinking on this most sensitive and difficult question," [25] he did not dwell on the disagreements about the character of the question. But then he hardly needed to, inasmuch as he had already taken judicial notice of the troublesome character of the question with these extraordinary introductory remarks:

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.[26]

This might be dismissed as rhetorical window-dressing, inconsequential platitudes. Yet Blackmun deemed it worth saying, despite being keenly aware of how thoroughly unorthodox—and perhaps unique—such remarks are in the context of a Supreme Court opinion. A decade later he declared:

I believe everything I said in the second paragraph of that opinion, where I agonized, initially not only for myself, but for the Court. Parenthetically, in doing so publicly, I disobeyed one suggestion Hugo Black made to me when I first came here. He said, "Harry, never display agony. Never say that this is an agonizing, difficult decision. Always write as though it's clear as crystal." [27]

Why then did he preface his whole opinion this way? After all, great passions commonly surround the controversies coming before the Court. Blackmun must mean that the "emotional nature of the abortion controversy" is special—and presumably not (just) in degree, in that many of the momentous, fiercely contested Court cases have obviously been no less emotional in most senses of the word.

Blackmun's brief remarks do not constitute a theory about the emotional character of the controversy. They only highlight certain key features. For example, he does not deny that there is a question of empirical fact here: his stressing that even physicians hold vigorous opposing views would be pointless if their empirical expertise were not pertinent. However, he emphasizes "the deep and seemingly absolute" character of the convictions on this subject. Here he may be alluding to such phenomena as that the different claims concerning the time of hominization are typically not put forward as *hypotheses*, conjectures genuinely open to falsification by new empirical findings. Rather, people generally seem to be either in a quandary, with no clear sense of what they might learn that would relieve their doubts, or else they hold to their datings with a sense of obviousness, of being immediately justified by the most basic, uncontroverted and uncontrovertible facts of reproduction. He then rightly emphasized that both our conclusions and the thought processes by which we reach them seem to be a function of a great stew of factors—philosophical, religious, moral, experiential, intellectual, and attitudinal.[28]

Blackmun quickly contrasted this situation with another: "Our task, of course, is to resolve the issue by constitutional measurement free of emotion and predilection." [29] Of course. This may sound like a mere judicial piety, more window-dressing, and yet, again, Blackmun saw some need to affirm a platitude here. He continued: "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 attitudes toward the abortive procedure over the centuries." [30]

With this as his preface, Blackmun first efficiently handled the

preparatory issues and then devoted over one-fourth of the entire opinion and about one-half of his central argument to a review of that history.[31] It is a curiously inconclusive review whose structure and selection of contents seem determined by various motives. Putting aside any doubts about the accuracy or biases in that review, there remains the puzzle: What is it that Blackmun thinks this history "reveals about man's attitudes toward the abortive procedure"? What lesson does he think is to be learned from this history or his inquiry into it?

Blackmun concluded that the judiciary is not in a position to speculate as to when life begins. That conclusion seems justified on the plausible assumption that the character of the "emotional nature" of that question is such that the question cannot be resolved "by means of constitutional measurement free of emotion and predilection." That is, when a judge thoroughly takes on the disinterested, impartial, emotionally detached, utterly unbiased attitude required by his role, he assumes a cognitive standpoint from which no answer will seem correct. It is only within a fully embodied, emotionally engaged human life that the question has a relevant determinate sense and appears to have a determinate answer. In fact, there is no correct answer. Any one of a range of answers may appear to us (normal human beings) to be right, even obviously right, but in the blindness of total dispassion no answer at all appears.

To be sure, Blackmun did not explicitly advance this epistemological thesis, let alone argue for it in detail. (But then, consider how extraordinary it would be for a justice to expound a novel epistemological theory.) Nevertheless, that thesis is not only consistent with both the letter and the spirit of the whole opinion, but it also renders the opinion's central argument coherent and compelling. Moreover, attributing some version of the thesis to Blackmun is hardly far-fetched insofar as its core idea, in however vague or inchoate a form, has been shown by some polls to be among the most common views regarding the difficult question.[32] (It seems plainly irrelevant that most people who feel that the question has no objectively correct answer lack the knowledge of logic to appreciate and work out the formal implications of that idea.)

Of course, the truth of this epistemological thesis is another matter, but I am afraid that the arguments for it are too complex to do much more here than refer you to my writings for a more involved presentation.[33] Yet the essential idea is simple enough: for a belief to be objectively true or false there must be the possibility of intersubjective agree-

ment on its truth value; we have, I think, good reason to believe that the requisite preconditions for agreement do not exist in this case. We can say that some answers to the question are flatly wrong—e.g., that an unfertilized egg or sperm is, by itself, a human being, or that hominization occurs substantially after birth. But between conception and partuition there seems to be no consensus as to when human life begins, for there seems to be nothing in logic or nature that would compel agreement on the matter.[84] The crucial point is not that people do do in fact disagree, but rather that we have no sound basis for supposing that disagreement here must be due to some cognitive defect.

That Blackmun accepted the epistemological thesis is further suggested by his denying the judiciary the capacity even to "speculate" as to the answer. Mere speculation requires less evidentiary backing than rendering an opinion, and, unlike the latter, it is not even a category of official judicial action. This description of the Court's incapacity suggests a more radical kind of nescience than the mere lack of information requisite for making a proper judicial determination. On the other hand, when Blackmun qualified the Court's incapacity with the clause, "at this point in the development of man's knowledge," he seems to allow the possibility that the Court's incapacity is due to some form of ignorance that could be remedied, perhaps in ten years, perhaps tomorrow. There are, however, more plausible possibilities. Blackmun speaks here of "man's knowledge," something much broader than embryological knowledge or even scientific knowledge, something that might encompass epistemological knowledge, self-knowledge, an understanding of our thinking on this question and the norms governing our thinking. The judiciary's position could conceivably be altered by, for example, a change in our conception of what constitutes a prejudicial bias regarding the question, or in our conception of what influences on our convictions are perversions of our cognitive activity. Consider the following: One's disposition to react to the human form with sympathetic and identificatory responses is, I assume, emotional, but do we really know whether it is a prejudicial "predilection" we must be free of to be able to resolve the question?

Again, although we could conceivably come to believe that the question of when human life begins has an objectively correct answer, we can not now substantiate such beliefs. Hence, in this situation, the Court should not try to answer the question; and when it denies that the unborn are persons, it need not abandon the principle that a human being is a person in order to refrain from denying that a fetus is a human being.

The epistemological thesis aside, Blackmun surely could not have meant that the judiciary's inability to resolve the question was due to some incapacity that did not affect a legislature. The whole thrust of his opinion is that a state legislature is not empowered to deprive a woman of her fundamental rights by endorsing some theory of life; nothing in that opinion suggests that the impotence of a state legislature here is due to its lacking some power possessed by the federal legislature. A woman's rights—which an abortion prohibition restricts—include the right against interference by *any* level or branch of government.

But if the epistemological thesis is implicit in Blackmun's opinion, then that opinion presents a decisive argument against even a constitutional amendment to nullify the *Wade* ruling, not to mention a congressional enactment to that effect. The argument as presented thus far has been tailored to fit Blackmun's phrases, but the essence of the argument can readily be reformulated so as to be utterly free of any peculiarities of the judiciary. Indeed the argument is far simpler when divested of the forms internal to the judiciary to which a Court opinion must conform. First, the burden of proof is on the government. It must justify its coercive acts to its coerced subjects, because government derives its legitimacy from the consent of the governed. Second, any full-scale abortion prohibition (e.g., any that prohibited abortion from conception on, except to protect the mother's health, or in cases of rape) so severely limits a woman's liberties and damages the interests of parents that it could be justified only if the unborn are human beings (i.e., in the same sense that the born are human beings). Thus, a government may legitimately impose such a prohibition only if it can demonstrate that the unborn are human beings. Third, the epistemological thesis: that the unborn are human beings is, *in principle*, undemonstrable; it cannot even be shown to be probable ~~in that~~ since it is neither genuinely true nor false. Thus, no authority can legitimately demand that people respect such a prohibition, because no reason can be given as to why they should respect it.

Again, Blackmun's argument is more complicated, simply because a judicial ruling must be the result of reason referring to and restrained by existing rules and concepts of the legal system. For example, Blackmun was not free to finesse the term "person," as the simplified argu-

ment above did, for our legal forms fix that term in a way that makes it the focal term in this case. So too, inasmuch as the logic of the legal *onus probandi* legitimates an *argumentum ad ignoratium*, the epistemological thesis is inapplicable to the legal term, "person." Natural, nonlegal language is not so constrained, so if the epistemological thesis applies to "the unborn are human beings," and if a human being is *ipso facto* a person, then that thesis applies as well to the natural language claim that the unborn are persons. Further, though the epistemological thesis was introduced here in the context of discussing the judicial stance of disinterestedness and emotional detachment, the claim was not that the judicial perspective is epistemically inferior, restricting a judge from seeing something any competent observer can see. Quite the contrary, the restriction of detachment is required of a judge precisely so that his judgments and opinions can command the respect of any reasonable person. To be sure, we do not expect or require such detachment of citizens and legislators when they vote, for we think that generally the wishes of the majority should prevail over those of a minority. But we also think that majority rule should be limited so as to protect the rights of individuals. Of course, depriving some people of some of their rights by amending the Constitution would not be illegal; no such amendment could be voided by the Supreme Court. It would merely be unjust, a violation of the principles legitimating government, and incapable of commanding the respect of the governed.

But note now, none of this implies that Blackmun's ruling is fully justified in all its particulars. The analysis so far confirms Blackmun's argument only up to the notorious two sentences. There remains the question of how he gets from here to the holding. The answer is: very, very quickly indeed. Throughout, Blackmun recognized only two relevant state interests that could be compelling enough to warrant some state regulation of abortion. The first, protection of the mother's health, seems to put abortion in the same category as other medical procedures. Yet Blackmun provides no rationale for imposing, as a matter of constitutional law, special restrictions on the state regulation of this medical procedure. But, having contended that the state's right to regulate was actuated by the increased peril to maternal health after the first trimester, the Court cannot easily deny the reasonableness of regulations requiring that after the first trimester,[85] the decision to abort be subject to procedures ensuring that the decision be well informed. The Court seems to have recognized at least a prima facie

reason for a woman not to abort after the first trimester, a reason that a state has a legitimate interest in having her act upon. When the dangers to her health are certain and severe enough, I presume the state has here whatever power it has elsewhere to proscribe self-destructive activity. But where the dangers are not so certain or severe, the state could, without infringing upon the woman's liberty, require her to engage in a supervised deliberative process. That process need not be confined to a discussion of the health risk, because the purpose of the deliberation is that she be justifiably certain that she has sufficiently sound reasons for putting her health at risk. Certainly, there is considerable room for controversy over what here constitutes reasonable regulations, but my interest is with the general principle and not the details. However, one detail is worth stating: the principle would warrant exempting from the deliberative procedure women who are certified by a physician to require an abortion to protect their own health.

Blackmun refers to the other state interest, the crucial one, as "an interest in protecting the potentiality of human life." He says that it "grows in substantiality as the woman approaches term" and that it becomes "compelling" at viability "because the fetus then presumably has the capability of meaningful life outside the mother's womb."[86] This, he says, provides "both logical and biological justifications"[87] for the holding that

> for the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion, except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[88]

Manifestly this is underargued. Justice White seems correct in calling this "an exercise in raw judicial power," for there is "nothing in the language or history of the Constitution to support the Court's judgment" here.[89] Precedents for a more conservative decision are plentiful. Though the meaning of "potentiality for life" and the nature of the legitimate state interest in it have little history of legal interpretation, arguably the whole history of the laws restricting abortion provides massive precedent for holding that the state's interest in the potentiality for life is compelling long before viability. Yet, whether this, the crucial part of the *Wade* decision, is "an improvident and extravagant exericse of the power of judicial review,"[40] as White claimed, is another matter. Leaving aside the vexed questions of legal precedent, and approaching the argument "philosophically," it seems a mixed bag, far

too large for me to unpack completely and do it justice. I shall briefly focus on a few salient points.

First, the mind boggles when Blackmun tells us that the holding has multiple justifications, one logical and one biological. Neither the principles of logic nor the facts of biology could individually yield a justification; only by combining the two can even an enthymatic argument be produced. Anyway, the cited premise—"the fetus then presumably has the capability of meaningful life outside the mother's womb"—is not a bit of biology or logic, but only a bare definition. "Viability" applied to a fetus means its capability for living outside the mother's womb. Biology, in conjunction with available medical technology, determines when viability occurs, not what the word means. And a definition is more a prelude to than a premise of reasoning, let alone a justification on its own.

Presumably what Blackmun has in mind here harks back to that key distinction between the born and the unborn. Though sometimes, as in Part VII, he seems to treat the term "potential life" as though it were interchangeable with "prenatal life," elsewhere, particularly in his conclusion, he seems pulled by the term's obviously distinct connotations. A prenatal life is the life of a fetus, but the life referred to by the term "potential life" is clearly that of a born human being. A fetus has an actual prenatal life but is only potentially a living born human being. And, I take it, Blackmun presumes that the legitimate state interest in the life of the prenatal derives wholly from its interest in the life of the postnatal. Further, it is natural (if not necessary) to construe potentiality as linked to capability in such a way that to be a potential human life at some moment is to have the capability of living as a born human being at that moment. This, I believe, is the reasoning behind Blackmun's finding viability to be the compelling point. It has some plausibility, but I would not wish to endorse it. If it is the rationale, then little sense can be given to Blackmun's claim that the state's interest in protecting the potentiality of human life "grows in substantiality as the woman approaches term." That claim rings hollow in any case, inasmuch as that substance has no detectable legal effect prior to viability.

Still, I would not deny that the use of viability as a "compelling" point is defensible and reasonable, though I defy anyone to show it to be uniquely so. Nor would I deny the propriety of abortion to prevent the mother's death or injury to her health if the state's interest in protecting maternal health is superior to its interest in protecting potential

life. Of course, many will protest when Justice Douglas informs us in his concurring opinion, which refers to the *Vuitch* decision, that "health" must here be construed to "give full sweep to the 'psychological as well as the physical well-being' of women patients." [41] With that construal, a woman who wants a late-term abortion will usually be able to find a physician willing to certify it as necessary for her health.

Yet the broad interpretation of maternal health as justification for an abortion is not itself so worrisome, or would not be if it were not for two further factors. First, when the Court said, not that a state must, but that it "may, if it chooses . . . proscribe abortion," and that it may do so only in the state's interests, not the fetus's, the Court moved from denying that the fetus is a person "in the whole sense" to denying it any constitutional standing altogether, leaving it without any legally enforceable interests. Nothing in Blackmun's opinion provides a rationale for this or rules out the alternative implicit in the history of abortion regulation, of recognizing the existence of a legal status peculiar to the fetus.

Yet, even this would be primarily of symbolic importance and not of great practical consequence, if, in *Wade* or later, the Court had properly distinguished abortion—the termination of pregnancy—from the termination of the child's life. That distinction would seem of obvious intrinsic importance no matter what event the Court had picked as triggering legitimate state regulation. But when the Court finds some inherent significance in the condition of viability, its position seems threatened with incoherence if it then denies significance to the distinction between abortion and feticide, for there seems to be nothing significant about viability independent of its being the condition in which the distinction between abortion and feticide is practical and meaningful. I do not say that the significance of viability is constituted by that distinction, but only that the former is not independent of the significance of the latter. Pro-choice radicals may insist that a woman's right to privacy extends to her acting on an intention to kill her unborn child, not only when unavoidable to liberate herself from it physically, but also as something desired in itself or perhaps as a means of psychologically liberating herself from the child. But that surely is a distinctive and highly tendentious thesis. At minimum, even if a woman has a right to decide the fate of a viable fetus, that right is not directly entailed by her right to an abortion. Nothing in Blackmun's opinion precludes the Court from ruling that a state may—or even

must—require that a viable fetus may not be endangered, any more than is necessary to remove it from the mother without endangering the mother's physical health. With that requirement the state would have little reason to prohibit any abortion of a viable fetus, except for those abortions that are not necessary for the mother's life or health and do significantly imperil the fetal life. In my judgment, the grave moral and political reasons in this issue demand that the High Court consider the abortion controversy with utmost care.

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This sentence is gobbeush + I can't locate the manuscript now,

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A Human Life Statute

Stephen H. Galebach

The Congress finds that present day scientific
cant likelihood that actual human life exists f
basis of this finding, and in the exercise of th
including its power under Section 5 of the Fou
Constitution of the United States, the Congre
the purpose of enforcing the obligation of the S
Amendment not to deprive persons of life wi
human life shall be deemed to exist from con
race, age, health, defect, or condition of depend
"person" shall include all human life as defined

DOES Congress have constitutional power to
Congress were to enact a statute of this
Court uphold it?

The Supreme Court's 1973 abortion decis
received trenchant criticism for its defective
its consequences.[1] For the growing number
tolerate the consequences of *Roe* v. *Wade*,
to lie in a constitutional amendment to pr
such an amendment may well afford the sur
children, it will require an extraordinary co
ratification effort.

Until the time when an amendment could
interim answers that a simple majority of Co
sistent with the Constitution and with Supre
fact there are. The Constitution was not desig
human life unprotected. Nor do Supreme
shall see, prevent or discourage Congress fro

> [T]he right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandize and property, was guarantied [*sic*] to the citizens of the United States. . . . And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. [*Dred Scott* v. *Sanford*, 60 U.S. (19 How.) 393, 451–52 (1856)]
>
> Blacks in America are not the only persons discriminated against because of supposed biological inferiority. The Chinese in America and the Jews in Europe as well as others have suffered similar fates. See *People* v. *Hall*, 4 Cal. 339, 404–5 (1854) (Chinese, as well as blacks, excluded from testifying in action where any party is white because marked by nature as inferior and incapable of progress of intellectual development beyond a certain point); International Military Tribunal: Nuremberg 14 Nov. 1945–1 Oct. 1946 Trial of the Major War Criminals.

162 *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 64 (1976).

163 Natl. Commn. for the Protection of Human Subjects of Biomedical and Behavioral Research, *supra* note 146, at 5, 75.

164 Note, however, that suggestions for new criteria for determining death originated with nongovernmental groups. See note 156, *supra*.

165 See note 132, *supra*.

166 Some commentators who look to the possession of certain unique characteristics in defining when life begins have been forced to consider the legality of infanticide as well as that of abortion. Some would allow infanticide in some circumstances. See, e.g., J. Fletcher, *The Ethics of Genetic Control* [Garden City, N.Y.: Anchor Press, 1974], 152–54, 185–87; Tooley, "Abortion and Infanticide," 2 *Phil. Pub. Aff.* 37 (1972). Other commentators reach different conclusions. Paul Ramsey, for example, advises against the abortion of defective fetuses but supports a withdrawal of medical treatment that would lead to the fetus's death. Ramsey, *supra* note 71, at 97–100.

Understanding Blackmun's Argument: The Reasoning of *Roe* v. *Wade*

1 *Roe* v. *Wade*, 410 U.S. 113 at 159 (1973).

2 For a critical review of Blackmun's apologists up to 1978, see John T. Noonan, Jr., *A Private Choice*, (New York: The Free Press, 1979). Noonan's criticisms of the apologists are generally fair; his criticisms of Blackmun are of the common sort I shall be scouting.

3 Wertheimer, "Understanding the Abortion Argument," *Philosophy and Public Affairs* 1, no. 1 (Fall 1971). (Lest the point of the present essay be misunderstood, I should add that I harbor no fantasy that the Court was familiar with or influenced by the earlier essay.)

4 *Roe* v. *Wade*, 410: U.S. 113, 150.

5 Ibid., pp. 156–57.

6 Ibid., p. 158.

7 Ibid., p. 162.

8 Ibid., pp. 163–64.

9 Ibid.

10 Cf. my "Philosophy on Humanity," in Edward Manier et al., eds., *Abortion* (South Bend, Ind.: University of Notre Dame Press, 1977).

11 No doubt the legal status of the neonate is in *some* ways special. In particular, our legal system has often—in practice, if not in judicial pronouncements—been more permissive about "euthanasia" with neonates. However, where courts have ruled on this, the permission has not been predicated on a denial that the neonate is legally a person, and still less on the idea that the neonate lacks some psychological attributes requisite for having legal rights.

12 *Roe* v. *Wade*, 410 U.S. 113, 162.

13 Ibid., pp. 156–59.

14 Ibid., p. 156.

15 Admittedly, Blackmun's locating the abortion decision within a woman's "right of privacy" is not unproblematic. But whatever difficulties there may be in defining the general right which encompasses the abortion decision or in tracing its constitutional roots, still—absent any suppositions attributing some kind of personhood to the fetus—doubts about the abortion decision being within a woman's rights seem quite far-fetched. In any case, the focus of this essay is not on establishing the existence of the constitutional right, but on the larger argument that assumes its existence.

16 Ibid., p. 162.

17 Cf. the opinion of Judge Charles Breitel in *Byrn* v. *New York City Health and Hospitals Corp.*, 31 N.Y.2d 194, 286 N.E.2d 887 (1972); *appeal dismissed*, 410 U.S. 940 (1973).

18 *Contra* Noonan, *Private Choice*, pp. 13–19.

19 Obviously, granting corporations the status of (artificial) persons for restricted purposes of civil law is an altogether distinct matter.

20 *Roe* v. *Wade*, 410 U.S., 157–59, 161–62.

21 Ibid., pp. 155–56.

22 Still, the reasons properly governing judicial pronouncements differ from those governing our judgments unfettered by the internal demands of a legal system. The interesting question, which I cannot pursue here, is whether we in the community ought to talk as the judges do when they talk as they ought to.

23 Ibid., p. 159.

24 Ibid.

25 Ibid., p. 160.

26 Ibid., p. 116.

27 "A Candid Talk with Justice Blackmun," *New York Times Magazine*, February 20, 1983, p. 26.

28 *Contra* the opinion of Judge Raymond Pettine in *Doe* v. *Israel*, 358 F. Supp. 1197 (D.R.I., 1973).

29 *Roe* v. *Wade*, 410 U.S. 113, 116.

30 Ibid., pp. 116–17.

31 Ibid., pp. 129–50, 160–61.

32 Cf. "Woman Speak Out," *Life*, vol. 4, no. 11, November 1981, p. 52. To the question, "When do you think a fetus becomes a human being?", 30 percent

answered yes to, "Or is this a question that can't really be determined one way or another."

33 In addition to Wertheimer, "Understanding the Abortion Argument," see also my "Misunderstanding the Abortion Argument," presented to the Senate Judiciary Subcommittee on Separation of Powers hearings on S. 158, 1981.

34 This misleadingly oversimplifies the situation. Something more subtle and complex needs to be said about the diversity of attitudes toward the fetus at its various stages of development.

35 This date would have to shift if the Court were to accept the argument many have urged that advances in medical technology have made second-trimester abortions far safer than they were a decade ago and generally safer than childbirth.

36 *Roe* v. *Wade*, 410 U.S. 113, 163.

37 Ibid.

38 Ibid., pp. 164–65.

39 *Doe* v. *Bolton*, 410 U.S. 179, 221–22.

40 Ibid.

41 Ibid., p. 215.

A Human Life Statute

1 410 U.S. 113 (1973). For a critique of the Court's reasoning by a commentator not opposed to abortions, see Ely, "The Wages of Crying Wolf: A Comment on *Roe* v. *Wade*," 82 *Yale L.J.* 920 (1973) (reprinted in *The Human Life Review*, vol. 1, no. 1, Winter 1975). A stinging attack on the widespread taking of unborn life since *Roe* v. *Wade* has been delivered by the cofounder of the National Association for Repeal of Abortion Laws (now the National Abortion Rights Action League). See B. Nathanson, *Aborting America* ([Los Angeles: Right to Life,] 1979).

2 "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The Declaration of Independence.

3 See *Roe* v. *Wade*, 410 U.S. at 157–58.

4 *Id.* at 162.

5 *Id.* at 152–54.

6 *Id.* at 156–57.

7 *Id.* at 160.

8 *Id.* at 159.

9 U.S. Const., amend. XIV, § 5.

10 *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948).

11 *Id.* The "dominant considerations" in the political question doctrine are "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination," *Coleman* v. *Miller*, 307 U.S. 433, 454–55 (1939).

12 *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

13 *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp* 111 (1948).

14 Clark, "Religion, Morality, and Abortion: A Constitution *Loyola U. of L.A.L. Rev.* 1, 9 (1969).

15 *Harris* v. *McRae*, 100 S. Ct. 671, 2692 (1980).

16 See, e.g., *Gulf, C. & S. F. Ry.* v. *Ellis*, 165 U.S. 150, 154 (

17 Cong. Globe, 39th Cong., 1st Sess. 1089 (1866) (state Bingham).

18 Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (statement o See also Cincinnati Commercial, Aug. 27, 1866, at 1, col. 3 (Bingham at Bowerstown, Ohio, Aug. 24, 1866).

19 See, e.g., 12 Transactions of A.M.A. 73–77 (1859). See J. M *America: The Origins and Evolution of National Policy, 18* (1978); J. Noonan, *A Private Choice: Abortion in America* 52 (1979) (quoting minutes of A.M.A. annual meeting of 18

20 The Fifteenth Amendment provides:

> Section 1. The right of citizens of the United States to v denied or abridged by the United States or by any State on color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this priate legislation.

21 See *Fullilove* v. *Klutznick*, 100 S. Ct. 2758, 2774 (1980); *United States*, 100 S. Ct. 1548, 1578 n.1 (1980) (Rehnquis *United States* v. *Guest*, 383 U.S. 745, 784 (1966) (opinion

22 360 U.S. 45 (1959).

23 See *id.* at 50–53. Appellant also raised a Seventeenth Amen against the literacy test, with equal lack of success. See *id.* at

24 *Id.* at 51.

25 See *id.* at 50, 53.

26 See 42 U.S.C. § 1973b(a)–(d) (1976). Most of the areas formula turned out to be in the South. The *Lassiter* case southern state, North Carolina.

27 383 U.S. 301 (1966).

28 See *id.* at 310–15, 333–34.

29 See *id.* at 329.

30 See *id.* at 333–34.

31 See *City of Rome* v. *United States*, 100 S. Ct. 1548, 1561 (*id.* at 1575 (Powell, J., dissenting).

32 See 42 U.S.C. § 1973b(e) (1976). Although the section spe American flag schools teaching in languages other than Engl effect to Puerto Rican schools. The state that used a literacy graduates of such schools was New York.

33 Because Section 4(e) was introduced as an amendment to the Act on the floor of the Senate, it was debated only briefly an sidered in congressional hearings. See 111 Cong. Rec. 11027 (1965).