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Justice Blackmun, Abortion, and the Myth of Medical Independence

Nan D. Hunter[†]

The social power and magnitude of abortion as a political issue have long stood in almost comic contrast to the quiet personality of the author of *Roe v. Wade*.[1] Justice Harry A. Blackmun—once described as "the shy person's justice"[2]—wrote one of the most dramatic and far-reaching decisions in American constitutional history. Few other Supreme Court opinions have so dominated political culture for so long, yet its author did not come even close to dominating the Court. Nonetheless, both the fury and the celebration that *Roe* engendered have attached themselves indelibly and improbably to Harry Blackmun.

The most common explanation of how this modest man came to produce such an immodest decision draws on Blackmun's background as resident counsel for the Mayo Clinic and his admiration of the medical profession. Justice Blackmun had wanted to become a doctor;[3] later in life he became a lawyer for doctors,[4] and he brought to the Court a deep attitude of protectiveness toward physicians.[5] Passages in *Roe* frame the abortion right as one to be shared by doctor

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[1] 410 U.S. 113 (1973). In fact, there were two abortion decisions announced the same day. The companion case was *Doe v. Bolton*, 410 U.S. 179 (1973). In this article, I will often use what has become the customary shorthand of referring only to *Roe*, although many of the points apply to both opinions. When I intend to refer specifically to *Doe*, there will be a citation to that case.

[2] Laura Kalman, *"Becoming Justice Blackmun": Deconstructing Harry*, N.Y. TIMES, May 8, 2005, § 7, at 9 (book review) (quoting Garrison Keillor).

[3] The Justice Harry A. Blackmun Oral History Project: Interviews with Justice Blackmun, conducted by Professor Harold Hongju Koh, Yale Law School, July 6, 1994-Dec. 13, 1995, at 468-69, *available at* http://lcweb2.loc.gov/cocoon/blackmun-public/page.html?FOLDERID=D0901&SERIESID=D09 [hereinafter Oral History].

[4] *See infra* text accompanying notes 40-42.

[5] *See infra* text accompanying notes 56-63.

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and patient[6] and as contingent on medical approval by the treating physician.[7] For all these reasons, conventional wisdom has become that Justice Blackmun was a man smitten with medicine, who wrote *Roe* to center on the best interests of physicians.[8]

In this article I test this conventional wisdom by explicitly placing medicine at the center of the analysis of Justice Blackmun's opinions on abortion, and then interrogating the connection between law and medicine. Using the Blackmun papers opened to the public in 2004[9] and augmented by other documents and sources, I examine four critical periods in Blackmun's life: his years at Mayo; his participation in a series of medicine-related cases prior to *Roe*; the period of intra-Court dynamics in *Roe*; and the post-*Roe* period in which a split developed between Blackmun and *Roe*'s critics over the use of medical rhetoric. My first conclusion is

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[6] As Justice Blackmun wrote in *Roe v. Wade*:

> [F]or the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

Roe, 410 U.S. at 163. "The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention." *Id.* at 165-66.

[7] Continuing from *Roe*:

> For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> . . . .
>
> . . . The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.

Id. at 164-66. *See also* Doe v. Bolton, 410 U.S. 179, 183 (1973).

[8] Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1626 n.333 (1987) ("I hear this repeatedly . . . ." (citing popular impact of BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979))); Harold Hongju Koh, *Rebalancing the Medical Triad: Justice Blackmun's Contributions to Law and Medicine*, 13 AM. J.L. & MED. 315, 320 (1987) (characterizing *Roe* as reflecting "Justice Blackmun's early proclivity to trust too fully in the goodness of doctors").

[9] Linda Greenhouse, *Documents Reveal the Evolution of a Justice*, N.Y. TIMES, Mar. 4, 2004, at A1.

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that the long-standing "Mayo made him do it" explanation of *Roe* is wrong and should be jettisoned.

Beyond debunking this common claim, I investigate what effects *were* produced on the early abortion cases by the law-medicine relationship. Fuller knowledge of the Court's deliberations makes clear that the judicial politics embodied in *Roe* can be understood only if it is read as a cobbled together Blackmun-Brennan-Douglas-Powell decision. More than any deference to or identification with physicians, the Justices who decided *Roe* shared a liberal belief in the value of medical authority because they assumed it to be a sphere which could operate independently of the state.

Blackmun was no more naïve than the other Justices in this respect; perhaps he was less so, given his detailed knowledge of how interwoven government and medicine were in the management of a large hospital.[10] His first impulses in *Roe* and *Doe* were to uphold the Georgia abortion statute at issue in *Doe* and to declare the Texas law under consideration in *Roe* unconstitutional on the limited ground of vagueness.[11] Blackmun's experiences as counsel for Mayo left him more pragmatic than starry-eyed about medical authority, notwithstanding his affection for the institution.

In the years after *Roe*, one component in the arguments for its reversal was an attack on the legitimacy of physician autonomy and authority.[12] The salvaging of *Roe* in *Casey v. Planned Parenthood of Southeastern Pennsylvania*[13] derived not from the strength of medical authority, but from the reconfiguration of *Roe* into a decision necessary for the full equality and citizenship of women.[14] The biography of Blackmun that Linda Greenhouse crafted from his papers demonstrates that he too shifted the central basis for his defense of *Roe* to an equality frame.[15]

This article begins with a narrative of Blackmun's experiences at Mayo, when he was on the leading edge of the

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[10] Blackmun expressed skepticism toward some medical claims as well as protectiveness. *See infra* text accompanying notes 112, 118.

[11] *See infra* text accompanying notes 175, 178.

[12] *See infra* text accompanying notes 320-23.

[13] 505 U.S. 833, 846 (1992) (joint opinion of O'Connor, Kennedy and Souter, JJ.).

[14] *Id.* at 852 ("[T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to law.").

[15] LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 222-25 (2005).

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transformation of a legal field centered on the individual doctor-patient relationship into one of much broader scope, centered on large, complex health care institutions. Part I excavates from his papers a richer sense of the nature of his practice at Mayo. Although Mayo provided Blackmun with proximity to superior and sometimes exciting medicine, most of his time was spent on the normal aspects of a corporate counsel's job.[16]

Part II analyzes Blackmun's role in cases associated with medicine that preceded *Roe*. The pre-*Roe* cases provide us with a fuller picture of how Blackmun sought to incorporate insights from his Mayo experiences into high court jurisprudence, and reveal the perspectives that Blackmun did and did not bring to the Court. His papers indicate that he was concerned about what he feared might be careless treatment of physicians' interests, but he was not blind to medical parochialism nor engaged in a mission to expand the authority of doctors. The details of this story cumulate into a picture of Blackmun as a judge whose primary reliance was on his instincts as a realist.

Part III reconstructs the intra-Court dynamics in *Roe*. I argue that Blackmun's reluctance to issue a broad ruling was overcome by lobbying by Justices Douglas and Brennan. Although there are other accounts of the exchanges among Justices, they have overlooked one factor that is highlighted in this section: the emphasis on medical authority that Justice Douglas developed. It is in Douglas's writing, not in Blackmun's, that one finds arguments for a "right to health."[17]

Other Justices provided the contours for *Roe*'s framework. Justice Brennan framed privacy so that it might include abortion in his opinion in *Eisenstadt v. Baird*,[18] and pressed Blackmun in that direction in *Roe*.[19] Powell, who joined the Court shortly after Blackmun, became an unexpected adamant voice for providing maximum leeway to physicians.[20] In his workmanlike fashion, Blackmun stitched together the result.

Part IV analyzes the complex role that medical rhetoric played in post-*Roe* discourse on the regulation of abortion. For

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[16] *See infra* text accompanying notes 64-94.

[17] *See infra* text accompanying notes 232, 235, 239.

[18] 405 U.S. 438 (1972).

[19] *See infra* text accompanying notes 160, 179, 258.

[20] *See infra* text accompanying notes 261.

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Blackmun himself, it offered a vocabulary that he could deploy in justifying the shift in the political valence of his judicial philosophy, which itself was a reaction to the attacks on his abortion opinions. For conservatives on the Court, criticisms of medical authority as excessive became part of the analytic structure supporting efforts to diminish the scope of *Roe*.

Part V argues that beyond any factors particular to Blackmun, we should read *Roe* as a cultural text explaining how late twentieth-century liberals constructed medicine as a mythically independent, parallel realm to the state. What the Court sought to do in essence, even if unknowingly, was to delegate its juridical authority over this procreative question to physicians. The effort failed. An elite consensus as to the correctness of professional control split into two competing paradigms: one, a women's rights discourse, and the other, a claim for the sanctity of fetal life. Governance by medical authority could not in the end withstand the politics of passion and fear.

I. HEALTH LAW PRACTICE IN THE 1950S

Harry Blackmun's admiration of physicians was certainly real. He "always had a sympathetic attitude toward the medical profession and for the medical mind."[21] Justice Blackmun repeatedly stated that the decade he spent as general counsel at the Mayo Clinic from 1950 to 1959 was the happiest period of his professional life.[22] It was a decade in which "health law" as we know it today—with its focus not solely on the doctor-patient relationship, but also on large-scale medical institutions—was just beginning.[23]

Blackmun's experiences at Mayo provide a window into the nature of health law practice when the field was in its

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[21] Harry A. Blackmun, *Remarks*, 15 LAW MED. & HEALTH CARE 175, 175 (Winter 1987-1988) [hereinafter Blackmun, *Remarks*].

[22] *Id.*; John A. Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. TIMES, Feb. 20, 1983, § 6 (Magazine), at 20; Oral History, *supra* note 3, at 109. A "Friends of Mayo" letter, drafted for Blackmun's signature by the Mayo Department of Development soon after he retired from the Court, begins: "'The ten years I spent in Rochester were the happiest years in my professional life.' A remarkable statement—coming as it does from a man who has spent more than two decades on the highest court in the land." Draft Letter from Justice Harry A. Blackmun to the Friends of the Mayo Clinic (Mar. 10, 1994) (on file with the Library of Congress, Manuscript Division, The Harry A. Blackmun Papers, Box 14, Folder 8 [hereinafter Blackmun Papers]).

[23] Barry R. Furrow, *From the Doctor to the System: The New Demands of Health Law*, 14 HEALTH MATRIX: J.L.-MED. 67, 72 (2004).

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infancy. When Blackmun began working at Mayo, practitioners and scholars understood the field as "law and medicine."[24] Its primary focus was on liability and regulation issues directly related to physicians' provision of care, including licensure, malpractice, and forensic or courtroom medicine, such as evidence law.[25] The professional authority paradigm dominated law and medicine, with its emphasis on "providing doctors with sweeping control over health care."[26] The American Academy of Hospital Attorneys did not begin until nine years after Blackmun left Mayo; the National Health Lawyers Association formed three years after that.[27]

Blackmun's experiences presaged these developments in the field, when hospital attorneys became counselors for complex business transactions, including acquisitions of other care providers.[28] As hospitals grew in size and importance, the legal arena expanded to include institutional issues such as organizational status, corporate tax, staff-hospital relationships, institutional liability and licensure, and legal issues generated by medical discoveries.[29] The field became more commonly known as "health law" rather than as "law and medicine," to signal its broader scope.[30]

By the time Justice Blackmun retired from the Supreme Court in 1994, the conceptualization of health law had changed significantly. Bioethics and financing issues had mushroomed into substantial specialties of their own. In *Cruzan v. Director, Missouri Department of Health*,[31] the Court entered the debate

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[24] *See generally* EMANUEL HAYT ET AL., LAW OF HOSPITAL, PHYSICIAN, AND PATIENT (2d ed. 1952); ROWLAND H. LONG, THE PHYSICIAN AND THE LAW (1968); John E. Tracy, *Scientific Proof and Relations of Law and Medicine*, 41 MICH. L. REV. 872 (1943).

[25] Mark A. Hall, *The History and Future of Health Care Law: An Essentialist View*, 41 WAKE FOREST L. REV. 347, 348 (2006); Arnold J. Rosoff, *Health Law at Fifty Years: A Look Back*, 14 HEALTH MATRIX: J.L.-MED. 197, 198 (2004).

[26] Rand E. Rosenblatt, *The Four Ages of Health Law*, 14 HEALTH MATRIX: J.L.-MED. 155, 165 (2004).

[27] PETER D. JACOBSON, STRANGERS IN THE NIGHT: LAW AND MEDICINE IN THE MANAGED CARE ERA 49 (2002).

[28] One of Blackmun's major accomplishments while at Mayo was handling the incorporation and tax issues related to the takeover of the Rochester Methodist Hospital as a Mayo affiliate. Clark W. Nelson, *Historical Profiles of Mayo: Harry A. Blackmun and Mayo*, 74 MAYO CLINIC PROC. 442, 442 (1999). Blackmun's knowledge of hospital operations and systems is evident in his opinion in *Abbott Laboratories v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 8-11, 14-17 (1976).

[29] JACOBSON, *supra* note 27, at 50-52, 55-56; Furrow, *supra* note 23, at 72.

[30] Rosoff, *supra* note 25, at 199-204. The first casebook to use the phrase "health law" in its title appeared in 1987. Hall, *supra* note 25, at 352.

[31] 497 U.S. 261 (1990).

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over autonomy issues in death and dying, an area which has grown and is likely to continue growing.[32] Three federal statutes enacted between Blackmun's years at Mayo and when he joined the Court—Medicare,[33] Medicaid,[34] and ERISA[35]—revolutionized the financial aspects of health care delivery and payment.

Examining Justice Blackmun's Mayo experiences more closely than has been done before provides ground for caution in extrapolating their likely effect on his adjudication of abortion issues. Mayo was a rarefied environment, an elite institution which presented itself as providing last chance medical expertise when lesser providers had failed.[36] Although it is impossible to know about conversations there which may have touched on abortion, or what Blackmun observed or absorbed of staff attitudes about the procedure,[37] normal abortions—those not involving situations of extreme medical urgency—were not performed at Mayo.[38] As Blackmun himself put it, "The clinic . . . was not, and did not wish to be, an abortion mill of any kind . . . ."[39] There is no clear link to the outcome in *Roe* from his experiences at Mayo.

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[32] *See* Gonzales v. Oregon, ___ U.S. ___, 126 S. Ct. 904, 925 (2006) (holding that the Controlled Substance Act does not permit the Attorney General to prohibit doctors from prescribing drugs for use in physician-assisted suicide when the procedure is allowed under state law); Vacco v. Quill, 521 U.S. 793, 808-09 (1997) (upholding New York's ban on assisted suicide by declining to find a violation of the equal protection clause of the Fourteenth Amendment); Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (upholding Washington's ban on assisted suicide by declining to find a fundamental right to assistance in suicide under the due process clause).

[33] Health Insurance for the Aged Act (Medicare Act), 42 U.S.C. §§ 426, 1395-1396d (2000).

[34] Medicaid Act, 42 U.S.C. § 1396 (2000).

[35] Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (2000).

[36] *Clinics: The Court of Last Resort*, TIME, Oct. 23, 1964, at 96.

[37] When asked in his Oral History interview about whether Mayo doctors had a view as to abortion, Blackmun replied, "Well, if they did, it was certainly not uniform, and they divided, just as everybody did. As a matter of fact, some of the nastiest letters I received after *Roe against Wade* . . . were from Mayo Clinic physicians. Nearly all of them approved of *Roe against Wade*, but not all of them by any means." Oral History, *supra* note 3, at 192.

[38] *See infra* text accompanying notes 52-55.

[39] Oral History, *supra* note 3, at 192.

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A. *Justice Blackmun's Connections with Physicians at the Mayo Clinic*

Blackmun began representing the Mayo Clinic and some of its physicians in the 1940s, while he was an associate at a Minneapolis firm.[40] He attributed Mayo's interest in hiring him as its first resident counsel to a managerial realization that continuing to have only a local firm lawyer was insufficient. The administrative head of Mayo "sensed a changing political situation, changing legal situation and thought that maybe the Mayos should have representation by a larger firm that had a rather broad client base, particularly in Washington."[41] In 1950, Blackmun took the Mayo job and remained in that position until 1959, when he was appointed to the United States Court of Appeals for the Eighth Circuit.[42]

Mayo was a leader in world-class health care, attracting 160,000 patients a year by the late 1950s.[43] Blackmun saw himself as part of the support team for eminent physicians whose work produced breakthroughs in such fields as heart surgery[44] and rheumatology.[45] His time there included "the dawn of the heart-lung bypass procedure."[46] He greatly admired the work of the physicians and researchers, retaining a newspaper clipping that catalogued breakthroughs achieved

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[40] GREENHOUSE, *supra* note 15, at 18.

[41] Oral History, *supra* note 3, at 107. Persons associated with Mayo frequently referred to the facility as "the Mayo Brothers' Clinic" or "Mayos' Clinic." Origins of the Name "Mayo Clinic," http://www.mayoclinic.org/tradition-heritage/origins-name.html (last visited Sept. 1, 2006).

[42] GREENHOUSE, *supra* note 15, at 18, 28.

[43] Letter from Leland W. Scott to David A. Lindsay, General Counsel of the Treasury 3 (Apr. 2, 1960) [hereinafter Scott Letter] (Blackmun Papers, Box 14, Folder 1). For historical background on the Mayo Clinic's founding, see PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 210-11 (1982).

[44] Harry A. Blackmun, *Remarks at the Commencement Exercises of Mayo Medical School*, 55 MAYO CLINIC PROC. 573, 576 (1980) [hereinafter Blackmun, *Remarks at Commencement*] ("I was also privileged to be here when the Mayo team, in the early 1950's, developed their own method of [open-heart] surgery . . . . I shall not forget the last experimental operation performed the day before the first human patient was subjected to open-heart surgery. And I shall not forget the early weeks of procedures here on the human heart, the successes and the failures."); Richard C. Daly et al., *Fifty Years of Open Heart Surgery at the Mayo Clinic*, 80 MAYO CLINIC PROC. 636 (2005).

[45] Mayo physicians Edward C. Kendall and Phillip S. Hench won the 1950 Nobel Prize in Physiology and Medicine for their discovery on the uses of cortisone in treating rheumatoid arthritis. Cortisone Discovery and the Nobel Prize, http://www.mayoclinic.org/tradition-heritage/cortisone-discovery.html (last visited Sept. 1, 2006).

[46] Oral History, *supra* note 3, at 111.

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at Mayo: cortisone, a heart-lung machine, open-heart surgery, deep-chilled brain surgery, and the first post-operative recovery room.[47]

Blackmun made a point of observing medical procedures and attending the surgeons' biweekly discussions of recent cases and the monthly clinical staff meetings.[48] "I felt the more I could learn about how medicine was practiced there, the better off I would be in advising the physicians."[49] On occasion, he dealt with end-of-life issues presented by patients in a persistent vegetative state,[50] and provided legal advice as to standards for brain death and do not resuscitate orders.[51]

Abortion was rarely performed at the Mayo Clinic for any reason, which is not surprising for a tertiary care center. Only about one hundred abortions were performed there in the twenty years from 1945 to 1965, almost all because of serious somatic disease.[52] When asked in his oral history interview what Minnesota's law on abortion was while he was at Mayo, Blackmun responded, "I don't remember any abortion problems at the time."[53] Dr. Jane Hodgson, who trained there in obstetrics and gynecology in the early 1940s, recalled that "even at Mayo, we were never taught how to do a therapeutic abortion."[54] While Blackmun was at Mayo in the 1950s, organized medicine viewed even legal abortions as distasteful and morally problematic.[55]

During his time at Mayo, Blackmun developed a lawyer's protective stance for his clients. In 1959, while being considered for the appointment that he ultimately received to the Eighth Circuit, he heatedly criticized a recent malpractice

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[47] *Mayo Clinic Offers Patients a Superb System*, MINN. SUNDAY TRIB., Sept. 13, 1964, (Magazine), at 10 (Blackmun Papers, Box 14, Folder 3).

[48] Oral History, *supra* note 3, at 111.

[49] *Id.*

[50] *Id.* at 112, 405-06, 410-11.

[51] *Id.* at 112.

[52] Richard S. Sheldon & David G. Decker, *Therapeutic Abortion at the Mayo Clinic 1945-1965*, 50 MINN. MED. 1283, 1284 (1967).

[53] Oral History, *supra* note 3, at 112. At a later point in the interview, he was asked again about abortion at Mayo and responded to the same effect: "I do not recall the raising of any legal issue about abortion in the decade I was there at all." *Id.* at 192.

[54] *Quoted in* CAROLE JOFFE, DOCTORS OF CONSCIENCE: THE STRUGGLE TO PROVIDE ABORTION BEFORE AND AFTER *ROE V. WADE* 9 (1995). In fact, under the Minnesota statute in effect during 1950s, performing an abortion was punishable by up to four years imprisonment. MINN. STAT. § 617.18 (repealed 1974).

[55] LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES 1867-1973, at 178 (1997).

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decision of that court, involving a surgeon who had mistakenly left an object in the patient's body cavity.[56] The court had opined that "[e]verybody knows, without being told by an expert, that it is not approved surgical practice to leave in a patient's body . . . any . . . foreign nonabsorbable substance."[57] Blackmun pointed out in his letter that many reasons existed for a good surgeon to leave nonabsorbable medical devices or tools, such as mesh or wire, in the body.[58]

In his later roles, first as a judge and then as a Justice, Blackmun took it upon himself to speak for the medical profession among fellow jurists. He chided Justice Black for referring to licensed physicians as "competent," arguing that "competent" was redundant unless malpractice was asserted.[59] Blackmun expressed this concern about judges' lack of sympathy for the medical profession throughout his life. "I have always been surprised and disturbed by the lack of sympathy that judges often have for the problems that confront the medical profession. . . . I have noticed this even at conferences of our Court. I have done my best to alleviate that feeling. . . ."[60] He wrote in a similar vein to an oncologist at Mayo who was distressed at the continuing use of Laetrile, a hazardous drug being sold illegally to cancer patients, despite a protective Supreme Court opinion:[61] "Federal judges, I have learned, do not understand medical problems very well."[62] In a 1994 lecture on psychiatry and law, he noted that "[t]he judiciary is somewhat intolerant of medical personnel."[63]

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[56] Letter from Harry A. Blackmun to Warren E. Burger (May 18, 1959) [hereinafter Blackmun Letter to Burger] (Blackmun Papers, Box 12, Folder 13). He reiterated this point thirty-five years later in his oral history interview. Oral History, *supra* note 3, at 113.

[57] Young v. Fishback, 262 F.2d 469, 470 (D.C. Cir. 1958).

[58] Blackmun Letter to Burger, *supra* note 56.

[59] Letter from Justice Harry A. Blackmun to Justice Hugo L. Black (Feb. 26, 1971) (Blackmun Papers, Box 123, Folder 8). Blackmun later worked this point into his decisions in *Richardson v. Perales*, 402 U.S. 389, 402 (1971), and *Doe v. Bolton*, 410 U.S. 179, 199 (1973).

[60] Blackmun, *Remarks*, *supra* note 21, at 176.

[61] United States v. Rutherford, 442 U.S. 544, 551-59 (1979) (holding that there is no express or implied exemption for terminally ill patients from the Federal Food, Drug, and Cosmetic Act requirement that a new drug be recognized as "safe and effective" before distribution).

[62] Letter from Justice Harry A. Blackmun to Dr. Charles G. Moertel, Mayo Clinic (Mar. 16, 1982) (Blackmun Papers, Box 14, Folder 8).

[63] Harry A. Blackmun, *Isaac Ray Lecture: The Intersection of Law and Psychiatry*, 69 MAYO CLINIC PROC. 800, 804 (1994) [hereinafter *Isaac Ray Lecture*].

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B. *Health Law as Business Law*

As general counsel at the Mayo Clinic, most of Blackmun's practice dealt with a broad range of business, tax, and litigation-related issues.[64] The series of memoranda that he left for his successor, in which he described his major concerns in some detail, provide what is probably the best indicator of the nature of his work. He was responsible for administering trusts set up by donors as well as for drafting certain trust instruments.[65] He handled real estate and corporate matters for Mayo and various entities which it owned, such as the local airport.[66] On the litigation front, he closely monitored malpractice claims and potential claims,[67] and represented Mayo doctors who were called as witnesses for depositions or trials.[68] His practice also included licensure issues[69] and miscellaneous private legal problems of the staff.[70]

One of Blackmun's major achievements was handling the incorporation and tax issues necessary to found the Rochester Methodist Hospital as a Mayo affiliate in 1955.[71] The hospital had been owned and operated by the Kahler Corporation, which decided to sell off its hospital unit.[72] When leaders at Mayo sought to arrange for a religious organization

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[64] Nelson, *supra* note 28; Clark W. Nelson, *Mayo Legal Department*, 68 MAYO CLINIC PROC. 212 (1993); Oral History, *supra* note 3, at 109-10, 113.

[65] *See* General Memorandum from H.A. Blackmun (Oct. 29, 1959) [hereinafter General Memorandum] (Blackmun Papers, Box 14, Folder 1); Memorandum from H.A. Blackmun 2-3 (Oct. 29, 1959) (Blackmun Papers, Box 13, Folder 20).

[66] General Memorandum, *supra* note 65, at 3, 6; Memorandum from H.A. Blackmun to Mr. G.S. Schuster and Mr. J.W. Harwick, Re: Mayo Association (Oct. 23, 1959) (Blackmun Papers Box 13, Folder 20).

[67] General Memorandum, *supra* note 65, at 5-6; Memorandum on Malpractice from H.A. Blackmun (Oct. 30, 1959) (Blackmun Papers, Folder 13, Box 20); Memorandum: Pending (Oct. 30, 1959) (Blackmun Papers, Folder 13, Box 20). Six of the ten open cases listed were malpractice matters.

[68] General Memorandum, *supra* note 65, at 3-5.

[69] General Memorandum, *supra* note 65, at 1-2. Blackmun described the licensure problems of doctors at Mayo on fellowships, some from outside the United States, as a "vexing little problem with which I have struggled." *Id.* at 1.

[70] Blackmun's papers contain a 1953 speech that he gave to the Minnesota State Medical Association entitled "The Physician and His Estate," consisting of tax and estate planning advice. Harry A. Blackmun, Address at the Centennial Meeting of the Minnesota State Medical Association (May 20, 1953) (Blackmun Papers, Box 14, Folder 19), *reprinted in* 36 MINN. MED. 1033 (1953). His first Mayo-related legal matter, while still in private practice, was a gift tax question from one of the surgeons. Oral History, *supra* note 3, at 107.

[71] Nelson, *supra* note 28.

[72] History of Rochester Methodist Hospital, *available at* http://www.mayo clinic.org/methodisthospital/rmhhistory.html (last visited Nov. 10, 2006).

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to operate the hospital, which would be affiliated with Mayo, Blackmun, as "a prominent lay Methodist," played a key role in arranging for the Methodist church to take over operations.[73] He then led the effort "to lay the legal/financial substructure" for the hospital.[74] He continued to serve as a director and executive committee member for Rochester Methodist Hospital until he joined the Supreme Court in 1970.[75]

Apparently the most significant corporate and tax dispute that arose at Mayo was a long-running battle with the Internal Revenue Service (I.R.S.). Organizationally, "the Mayos" consisted of three separate entities: a nonprofit corporation (the Mayo Association), an association of physicians and others engaged in the practice of medicine (the Mayo Clinic), and a research fund that sponsored fellowships for graduate medical education (the Mayo Foundation).[76] The I.R.S had long treated the second entity, the Mayo Clinic, as a corporation for purposes of tax law, but began to question whether it should be classified as a partnership.[77] The I.R.S. audited the Mayo returns from 1951 to 1955.[78]

Blackmun represented the Mayos in dealings with the I.R.S. until he was appointed to the Eighth Circuit. The Clinic paid several million dollars a year in rent to the Mayo Association and could deduct the rental payments as business expenses, leaving very little net income upon which to be taxed.[79] Because it was treated as a corporation, the Clinic could also deduct group insurance premiums and retirement plan contributions and provide Social Security coverage on more favorable terms than those applying to a partnership.[80]

Blackmun realized that other medical groups were clamoring for corporate status, seeking the pre-tax benefits

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[73] Bill Holmes, Comments on the Occasion of the 30th Anniversary of Rochester Memorial Hospital 2 (Jan. 16, 1984) (Blackmun Papers, Box 1549, Folder 1).

[74] *Id.*

[75] *Id.* at 3.

[76] Scott Letter, *supra* note 43. From a counsel's point of view, these three entities were cursed with confusing names. Mayo Association was in fact a corporation. Mayo Clinic was treated as an association, as federal tax law defined that term. The Mayo Foundation was a fund that had been transferred to the state of Minnesota; it had no distinct legal existence. Harry A. Blackmun, Notes, at 1-b (Aug. 2, 1960) [hereinafter Notes, Aug. 2, 1960] (Blackmun Papers, Box 14, Folder 1); Scott Letter, *supra* note 43, at 1-6.

[77] Notes, Aug. 2, 1960, *supra* note 76, at 1-a; Scott Letter, *supra* note 43, at 1-4.

[78] Scott Letter, *supra* note 43, at 1.

[79] Notes, Aug. 2, 1960, *supra* note 76, at 8; Scott Letter, *supra* note 43, at 6.

[80] Notes, Aug. 2, 1960, *supra* note 76, at 8, 10.

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structure enjoyed by the Mayo staff.[81] He fought to preserve the Clinic's status as a membership association. Mayo's advantage was that its organization pre-dated the relevant federal tax laws and thus could not be seen as motivated by tax avoidance.[82] Blackmun was insistent that no meaningful changes in this corporate structure should occur, such that would give the I.R.S. an opening to re-classify the Clinic as a partnership.[83]

> This is a matter of vital concern to each member of the staff. Personal financial consequences and family well-being are at issue.... [I]f the Association status is lost and the partnership status is gained, each of you would have Federal and Minnesota income taxes in the aggregate more than double the amount you now pay ....[84]

Lurking in the background was the risk that the Mayo Association could lose its tax exemption. The exemption for past and future contributions was essential to the financial base upon which the Mayos' pre-eminence rested. "Without [the tax exemption]," he said, "the Mayo Clinic as we know it cannot exist."[85]

Nor was Blackmun unaware of less official relationships between Mayo and the I.R.S. He advised his successor that "[i]f you wish to be advised whenever a tax man registers as a patient at the Mayo Clinic, arrangements can be made for this."[86] Apparently these efforts succeeded; his papers indicate that the I.R.S. allowed the Clinic to retain its corporate status.[87]

Another of Blackmun's long-term projects as general counsel involved lobbying federal officials for funding and other support for Mayo. In 1953, his close friend and then Assistant Attorney General Warren Burger suggested that Blackmun visit Washington to meet with officials at the Department of

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[81] *Id.* at 9-11. At that time, virtually every state prohibited the corporate practice of medicine. Mark A. Hall, *Institutional Control of Physician Behavior: Legal Barriers to Health Care Cost Containment*, 137 U. PA. L. REV. 431, 509-10 (1988).

[82] Notes, Aug. 2, 1960, *supra* note 76, at 11.

[83] *Id.* at 11-12.

[84] *Id.*

[85] *Id.* at 9.

[86] General Memorandum, *supra* note 65, at 3.

[87] Notes, Aug. 2, 1960, *supra* note 76, at 1-a.

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Health, Education and Welfare ("HEW").[88] Two years later he suggested that Blackmun "browse around the Public Health Institute and warm up some of your friendships with miscellaneous people having common interests" with Mayo.[89] Drawing on Burger's assistance to arrange participation by federal health officials, Blackmun organized "an exploratory trip" to Washington in 1956 for several Mayo Clinic management staff to further "the development of Washington contacts . . . [which are], I think, long overdue."[90] In January 1959, Blackmun consulted Burger about the possibilities for approaching HEW officials to support an amendment to the Hill-Burton Act[91] to secure funding for one of the hospitals owned by Mayo, which Blackmun described as "desperately in need of a new physical plant."[92] Blackmun also sought funds for the hospital from the Rockefeller Foundation.[93]

Blackmun genuinely enjoyed the business law aspects of his work. When asked what his memories were of "the happy events" at Mayo, he recalled "the reorganization of the Mayo Foundation[, t]he transformation of the downtown hospitals, which had been run by the Kahler Corporation, into an

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[88] Letter from Warren E. Burger to Harry A. Blackmun (Oct. 12, 1953) (Blackmun Papers, Box 12, Folder 6). The Department of Health Education and Welfare was later renamed the Department of Health and Human Services.

[89] Letter from Warren E. Burger to Harry A. Blackmun (May 12, 1955) (Blackmun Papers, Box 12, Folder 8).

[90] Letter from Harry A. Blackmun to Warren E. Burger (Mar. 8, 1956) (Blackmun Papers, Box 12, Folder 9). Drawing on the contacts of his old friend Warren Burger, then on the United States Court of Appeals for the D.C. Circuit, Blackmun arranged for a luncheon meeting that included Assistant Secretaries from the Departments of Health, Education and Welfare and Defense, as well as high-ranking staff from the National Institutes of Health, the Veterans Administration, and Capitol Hill. *See* Harry A. Blackmun, Guest List Luncheon—April 12, 1956 (Blackmun Papers, Box 12, Folder 9).

[91] The Hospital Survey and Construction Act (1964), 60 Stat. 1040 (codified as amended in scattered sections of 42 U.S.C.), commonly known as the Hill-Burton Act, provided federal funds for the construction and modernization of public and non-profit hospitals. CLARK C. HAVIGHURST ET AL., HEALTH CARE LAW AND POLICY 27 (2d ed.1998). "[T]he Hill-Burton program flourished in the 1950s and 1960s and stopped granting subsidies for hospital construction in 1974." *Id.* at 30.

[92] Letter from Harry A. Blackmun to Warren E. Burger (Jan. 29, 1959) (Blackmun Papers, Box 12, Folder 13). At this point, Burger was a judge on the United States Court of Appeals for the D.C. Circuit. It appears from the correspondence that Burger had lunch with the HEW Secretary and that Mayo invited the Secretary to visit the facility, but the documents do not indicate whether anything came from the effort. Letter from Warren E. Burger to Harry A. Blackmun (Feb. 4, 1959) (Blackmun Papers, Box 12, Folder 13); Letter from Harry A. Blackmun to Warren E. Burger (Mar. 13, 1959) (Blackmun Papers, Box 12, Folder 13).

[93] Letter from Harry A. Blackmun to Warren E. Burger (Mar. 24, 1959) (Blackmun Papers, Box 12, Folder 13).

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eleemosynary setup[, and t]he building of an experimental hospital in Rochester, which was my responsibility . . . in part . . . ."[94]

C. *Justice Blackmun's Departure from and Lasting Ties to the Mayo Clinic*

After spending almost a decade at Mayo, Blackmun grew restless. In a 1957 letter to Burger, he wrote: "I feel like going back into private practice."[95] His ambivalence about leaving Mayo was apparent in the list of pros and cons that he made for himself when offered the judicial appointment: the pros included "away from trivia" and "better use of my talents," while the cons included "loss of excitement" and "loss of contact with important people."[96]

Despite his desire to leave, Justice Blackmun continued a rich association with the institution for the rest of his life. Almost a year after leaving his position at Mayo, he spoke to the staff about the importance of the dispute with the I.R.S.[97] His notes for the speech indicate that he began by identifying himself as "one who retains his admiration and devotion for the institution and who knows it to be an institution for good, deserving preservation and worthy of all possible protection."[98]

Blackmun continued returning to Mayo to give speeches or to visit friends,[99] and he kept an active interest in the institution for the remainder of his life. More than thirty years after leaving Mayo, when President-elect Clinton began to formulate a health reform proposal, Justice Blackmun arranged for Mayo officials to attend a forum for health care experts at the Aspen Institute.[100] During the taping of his oral history in 1994, soon after his retirement, he told interviewer

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[94] Oral History, *supra* note 3, at 109.

[95] Letter from Harry A. Blackmun to Warren E. Burger (Oct. 24, 1957) (Blackmun Papers, Box 12, Folder 11).

[96] GREENHOUSE, *supra* note 15, at 27.

[97] Notes, Aug. 2, 1960, *supra* note 76.

[98] *Id.* at 1.

[99] His speeches included the 1980 commencement address at the medical school, a speech on pediatrics and law and a speech on the goals of longevity. *See, e.g.*, Harry A. Blackmun, Draft of Speech for Mayo Clinic Pediatric Days (Sept. 28, 1995) [hereinafter Mayo Clinic Pediatric Days Speech] (Blackmun Papers, Box 14, Folder 8).

[100] Letter from Harry A. Blackmun to Dr. James R. McPherson, Mayo Clinic (Nov. 27, 1992) (Blackmun Papers, Box 14, Folder 8). In his November 27 letter, Blackmun wrote: "I just feel that Mayo should be in the forefront of health care plan discussions and decisions and not have someone else take over the lead." *Id.*

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Harold Koh that "Dottie and I still have that feeling of reverence for Mayos."[101] After his death, at his request, a portion of his ashes were scattered on the grounds of the Mayo Clinic.[102]

Blackmun surely treasured the opportunity that he had while at Mayo to be part of an extraordinary institution and to develop front-row knowledge of medical breakthroughs and superior clinical care. His practice, however, centered on corporate, tax, and litigation matters. This fuller understanding of Blackmun's responsibilities there should make plain that, whatever the impact of his time at Mayo, he was not following a Mayo script in writing *Roe*.

II. PRAGMATIC JUDGING

Blackmun was sworn in as an Associate Justice of the Supreme Court on June 9, 1970.[103] Opportunities to undertake the role of protector of medicine in the halls of law arose in his first term on the Court, in three health-related cases: *United States v. Vuitch*,[104] the first abortion case to reach the Supreme Court; *Richardson v. Perales*,[105] an appeal from a denial of disability benefits; and *Eisenstadt v. Baird*,[106] a challenge to a Massachusetts law prohibiting the distribution of contraceptives to unmarried persons. These cases afforded Justice Blackmun the opportunity to proffer his Mayo background as a source of expertise among his colleagues, a capacity that must have been all the more welcome in the wake of press derision of him as Chief Justice Burger's "Minnesota twin."[107] Blackmun's papers from these early cases indicate that he asserted himself on the Court as someone with special ties to medicine, but the attitudes that he brought to evaluating cases involving physicians were on the whole more pragmatic than idealizing.

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101 Oral History, *supra* note 3, at 113.

102 GREENHOUSE, *supra* note 15, at 248.

103 *Id.* at 53.

104 402 U.S. 62 (1971).

105 402 U.S. 389 (1972).

106 405 U.S. 438 (1972).

107 Jenkins, *supra* note 22, at 22.

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A. United States v. Vuitch

In *Vuitch*, a D.C. physician won dismissal of an indictment for performing an abortion on the ground that the statute was impermissibly vague.[108] The D.C. law prohibited abortion "unless . . . necessary for the preservation of the mother's life or health."[109] The district court had found the statute defective based on the uncertain meaning of "health."[110] That court ruled that the statute's failure to define "health" left "no clear standard" for the defendant or the jury to determine "what degree of mental or physical health or combination of the two" was necessary to avoid prosecution.[111]

When the case got to the Supreme Court, Justice Blackmun took a pragmatic view of the physician's predicament. He noted that:

> [T]he vagueness exists in the . . . justification clause. Thus, the more vague the statute, the better it is really for the defendant. If [it] is broad, then the umbrella of justification is a large one. I, for one, could pump a lot of area into the exception. This . . . rather inclines me not to be too concerned about vagueness, and . . . to uphold the statute and let the defendant . . . physician[] roam at large in an attempt to prove justification.[112]

Based on *Griswold v. Connecticut*,[113] counsel for Vuitch also argued for an extension of the privacy right[114] along the lines suggested by Thomas Emerson, who had written that the privacy right which had been articulated in *Griswold* could "consist[] primarily in the right to have or not have children, and to plan a family. . . . On the same view of the scope of the right to privacy, the way would be open for an attack upon significant aspects of the abortion laws."[115] Blackmun's private notes to himself when he first read the briefs in the case indicated that he was not closed to the privacy claim:

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[108] United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969), *rev'd*, 402 U.S. 62 (1971).

[109] *Vuitch*, 402 U.S. at 67-68 (quoting D.C. CODE ANN. § 22-201 (1967)).

[110] *Vuitch*, 305 F. Supp. at 1034.

[111] *Id.*

[112] Harry A. Blackmun, Undated Notes on *United States v. Vuitch* 3 [hereinafter *Vuitch* Notes] (Blackmun Papers, Box 123, Folder 9).

[113] 381 U.S. 479 (1965).

[114] *Vuitch*, 402 U.S. at 72-73.

[115] Thomas I. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 232 (1965).

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> I may have to push myself a bit, but I would not be offended by the extension of privacy concepts to the point presented by the present case . . . [if the majority reached this issue] I could go along with any reasonable interpretation of the problem on principles of privacy.[116]

Blackmun's notes to himself also indicated his recognition of the unfairness of laws that disadvantaged poor women.[117]

At oral argument, Blackmun expressed skepticism about the vagueness claim. When Vuitch's lawyer asserted at oral argument that only the individual doctor's judgment could be the basis for a definition of health, Blackmun responded,

> It's difficult for me to accept your explanation because, and I shouldn't go on my own experience, but I have seen physician after physician after physician say the same thing about malpractice . . . [and] I have known many physicians who are not concerned about [the chilling effect of the law] in this decision-making and who are courageous and make the decisions if they have to.[118]

The government's theory was that "health" should be construed broadly, so that a physician would be protected unless he was performing abortions on demand, that is, performing the procedure without a determination of any physical or mental health-related need for it.[119] The Supreme Court adopted that interpretation of the statute and reversed the district court.[120] Thus, the end result, as Justice White reiterated in his concurrence, was that physicians would be protected only if an abortion was "dictated by health considerations."[121] Counsel for the government had asserted at oral argument that prosecution of a doctor would go forward if there was proof that "in every single case where a woman requested an abortion he performed it."[122]

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[116] *Vuitch* Notes, *supra* note 112, at 3.

[117] Blackmun's private notes on *Vuitch* include as one of his questions about the case, "Does inability to go elsewhere for an abortion, because of lack of finances, constitute a denial of equal protection?" Harry A. Blackmun, Private Notes on *United States v. Vuitch* (Dec. 28, 1970) (Blackmun Papers, Box 123, Folder 8).

[118] Transcript of Oral Argument at 47, United States v. Vuitch, 402 U.S. 62 (1971) (No. 84).

[119] *Id.* at 17-18, 63.

[120] *Vuitch*, 402 U.S. at 72. The Court also held that the prosecution had the burden to prove that an abortion was not necessary for the woman's life or health. *Id.* at 71.

[121] *Id.* at 73 (White, J., concurring).

[122] Transcript of Oral Argument, *supra* note 118, at 64.

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Blackmun would not have reached the merits at all; he concluded that the Supreme Court lacked jurisdiction.[123] Ultimately, he concurred in the majority's decision as to vagueness in order to create a majority of a badly splintered court, and thereby resolve the case.[124] *Vuitch* presented the first opportunity for Blackmun to seize if his overriding concern had been to protect physicians from criminal prosecutions, but he let it pass. It is particularly telling that he did not join the concurring opinion of either Justice Douglas, who expressed his desire to "leave to the experts the drafting of abortion laws that protect good-faith medical practitioners[;]"[125] or of Justice Stewart, who believed that a good faith determination of health needs by a physician provided full immunity from prosecution under the D.C. law.[126]

B. Richardson v. Perales

In *Perales*, which was argued the day after *Vuitch*,[127] Blackmun wrote one of his first opinions for the Court. The case turned on the question of whether a doctor's written report could be admitted into evidence or should be excluded as hearsay.[128] His initial thoughts on the case reflect his identification with physicians: "I have always felt that written medical records qualify as business records and, hence, are an exception to the ordinary hearsay rules. I also get the feeling that if records of this kind cannot be introduced into evidence, the resulting burden on the medical profession . . . will be phenomenal."[129]

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[123] *Vuitch*, 402 U.S. at 81 (Harlan, J., dissenting). The Criminal Appeals Act granted the Court jurisdiction in criminal cases over direct appeals from district court judgments dismissing an indictment due to the invalidity of the statute on which the indictment was founded. *Id.* at 64 (majority opinion) (quoting 18 U.S.C. § 3731). The majority found that this Act applied to such appeals from the United States District Court for the District of Columbia concerning an abortion statute that applied only to the District. *Id.* at 64-66. Blackmun joined Harlan's opinion dissenting as to jurisdiction. *Id.* at 81 (Harlan, J., dissenting).

[124] *Vuitch*, 402 U.S. at 97-98 (Blackmun, J., concurring).

[125] *Id.* at 80 (Douglas, J., dissenting in part).

[126] *Id.* at 97 (Stewart, J., dissenting in part).

[127] *Vuitch* was argued on January 12, 1971, 402 U.S. at 62, and *Perales* on January 13, 402 U.S. at 389.

[128] *Perales*, 402 U.S. at 402.

[129] Harry A. Blackmun, Undated Notes on *Richardson v. Perales* 1 (Blackmun Papers, Box 125, Folder 2).

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The notes Blackmun took during oral argument predicted that "I should catch this if I am in majority."[130] He did "catch it," and ruled on behalf of the Court that a written report by a doctor who had examined the patient should be admitted, despite the doctor's absence from the hearing and the inability of the claimant to cross-examine.[131] This opinion strikes an almost mawkish note: "We cannot, and do not, ascribe bias to the work of these independent physicians, or any interest on their part in the outcome of the administrative proceeding beyond the professional curiosity a dedicated medical man possesses."[132]

During this case, Blackmun succeeded in winning recognition for the value of his experience at the Mayo Clinic. Justice John Harlan, in communicating that he would join the draft opinion that Blackmun had circulated in *Perales*, told him: "I am consumed with admiration for your mastery of the medical lexicon, and, although I feel beyond my depth in this field, I am perfectly content to leave my legal conscience in your careful hands on this score."[133] Harlan's personal note must have been a welcome expression of esteem for Blackmun in his first year on the Court and may have reinforced the value he placed on his Mayo background.

C. Eisenstadt v. Baird

In *Eisenstadt v. Baird*,[134] the Court struck down a Massachusetts statute that prohibited the distribution of contraceptives to unmarried persons. The Court's analysis was grounded in the recognition of a right of marital privacy, including the right to use contraceptives in *Griswold v.*

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[130] Justice Harry A. Blackmun, Handwritten Notes on Argument in *Richardson v. Perales* (Jan. 13, 1971) (Blackmun Papers, Box 125, Folder 2).

[131] *Perales*, 402 U.S. at 402. Blackmun's opinion drew a spirited dissent from Justice Douglas, joined by Justices Black and Brennan, who castigated the agency for using a "stable of defense doctors without submitting them to cross-examination." *Id.* at 414 (Douglas, J., dissenting).

[132] *Id.* at 403 (majority opinion). Blackmun also cited a case striking a similar tone in which the court of appeals ruled admissible the written report of an examining physician: the report is made "as a professional matter by a member of a learned and honorable profession in whom the sense of professional pride, as well as the sense of official duty, is conducive to truth and accuracy." Long v. United States, 59 F.2d 602, 603 (4th Cir. 1932).

[133] Letter from Justice John M. Harlan to Justice Harry A. Blackmun (Apr. 21, 1971) (Blackmun Papers, Box 125, Folder 2).

[134] 405 U.S. 438, 443 (1972).

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Connecticut.[135] Justice Brennan's opinion famously declared that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free of unwarranted governmental intrusion into . . . the decision whether to bear or beget a child."[136]

Eisenstadt was pending before the Court while Blackmun was struggling to produce his first drafts in *Roe* and *Doe*.[137] Justice Brennan used the opportunity of his assignment in *Eisenstadt* to build a doctrinal bridge between *Griswold*'s right of marital privacy and the application of privacy outside of marriage, as would also be required in the abortion cases.[138]

Blackmun did not join Brennan's opinion. He opted instead to concur in the result by joining the separate opinion of Justice White,[139] who ironically became his primary nemesis in the abortion cases. White and Blackmun focused on the fact that Baird had been prosecuted on the ground that he was neither a physician nor a pharmacist, and therefore was barred under the statute from distributing contraceptives to anyone, regardless of marital status.[140] White and Blackmun's opinion further noted that there was no record evidence of the marital status of those to whom Baird had in fact distributed the vaginal foam contraceptive.[141]

The White-Blackmun concurrence drew from *Griswold* the principle that restrictions burdening a married person's use of contraceptives—as the Massachusetts statute did by its limitation of distribution to physicians or pharmacists—must be supported by evidence demonstrating the necessity of the burden to the achievement of the statutory purpose of protecting health.[142] Because the statute before the Court lacked any such justification and because foam was not a prescription drug, they reasoned that the law had to fail, regardless of the marital status of the distributee in the particular case: "Nothing in the record even suggests that the

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[135] 381 U.S. 479, 485 (1965).

[136] *Eisenstadt*, 405 U.S. at 453.

[137] *Id.* at 438.

[138] In *Roe*, Justice Blackmun cited *Eisenstadt* as authority for the privacy right extending to contraception as distinct from marriage. Roe v. Wade, 410 U.S. 113, 152 (1973) (citing *Eisenstadt*, 405 U.S. at 453-54).

[139] *Eisenstadt*, 405 U.S. at 460.

[140] *Id.* at 462 (White, J., concurring) ("The gravamen of the offense charged was that Baird had no license and therefore no authority to distribute to anyone.").

[141] *Id.* at 464.

[142] *Id.* at 463.

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distribution of vaginal foam should be accompanied by medical advice in order to protect the user's health."[143]

Blackmun's position in *Eisenstadt* offers another indication that however strong his concern for medical practice, he could recognize when a purported protection of it was a pretext for other goals. The distinction in *Eisenstadt* may seem obvious, but deference to the state's authority to restrict distribution of health-related products to health professionals was precisely the basis for Chief Justice Burger's dissent.[144] Burger spent the bulk of his dissenting opinion attacking the White-Blackmun concurrence, declaring that there is "nothing arbitrary in a requirement of medical supervision."[145] Burger argued that there was no constitutional basis for holding "that a State must allow someone without medical training the same power to distribute this medicinal substance as is enjoyed by a physician."[146]

Of course one cannot know whether Burger may have stressed this point in an attempt to persuade Blackmun to join him, but if he did, the gambit failed. Blackmun was coming to his own conclusions in *Eisenstadt* at precisely the same time that he was struggling with the abortion issue.

D. Rights Talk

Blackmun did not arrive on the Court with a closed mind as to possible expansion of individual rights doctrine, but neither was he eager to engage those issues. During his second term, the Supreme Court ruled for the first time that a statutory distinction between men and women violated the Equal Protection Clause. In *Reed v. Reed*,[147] ACLU lawyers led by Ruth Bader Ginsburg challenged an Idaho law that required appointment of a male rather than a female if both were equally entitled by consanguinity to administer a decedent's estate.[148]

Blackmun's private notes on the case describe it as "a very simple little case" which had generated "a very lengthy brief [from the ACLU] filled with emotion and historical

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[143] *Id.* at 464 (1972).

[144] *Id.* at 467-70 (Burger, C.J., dissenting).

[145] *Eisenstadt*, 405 U.S. at 470.

[146] *Id.* at 471.

[147] 404 U.S. 71 (1971).

[148] *Id.* at 73-74.

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context about the inferior status of women."[149] Blackmun found the brief "mildly offensive and arrogant, but . . . it has the better side of the case."[150] He expressed hope that the Court would strike down the statute in "a fairly brief and simple opinion,"[151] which it did, without specifying the level of review being utilized.[152]

Intriguingly, though, Blackmun also described himself as "inclined to feel that sex can be considered a suspect classification just as race. . . ."[153] He was troubled by the argument that the Fourteenth Amendment clearly had not been intended to reach sex-based discrimination when it was adopted, but concluded that "my own feeling is that these constitutional provisions must have some flexibility and expansiveness in them as, in theory, we ourselves progress and expand in our concepts of equality."[154]

The understanding of sex discrimination that he brought to the Court did not encompass pregnancy, however. In *Phillips v. Martin Marietta Corp.*,[155] the court below had upheld a hiring policy which discriminated against women with small children, concluding that it did not violate the federal statutory ban against sex discrimination.[156] Blackmun's private notes indicate that he agreed with this perspective:

> At this point, my inclination is in favor of affirmance. . . . [T]he policy, if there was a policy, was not based on sex, and . . . disinclination to hire a woman with pre-school children has

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[149] Harry A. Blackmun, Notes on *Reed v. Reed* 1 (Oct. 18, 1971) [hereinafter *Reed* Notes] (Blackmun Papers, Box 135, Folder 10).

[150] *Id.* at 2.

[151] *Id.* at 4.

[152] *Reed*, 404 U.S. at 76 ("A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920))).

[153] *Reed* Notes, *supra* note 149, at 2. Three years later, Blackmun joined an opinion specifically rejecting strict scrutiny for sex-based discrimination on the ground that the Court should exercise restraint in light of the debates then underway about adoption of the Equal Rights Amendment. Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring). In 1976, he joined a majority opinion finding that sex-based classifications should be subjected to an intermediate level of scrutiny under the Equal Protection Clause. Craig v. Boren, 429 U.S. 190, 197-99 (1976).

[154] *Reed* Notes, *supra* note 149, at 3.

[155] 400 U.S. 542 (1971).

[156] Phillips v. Martin Marietta Corp., 411 F.2d 1, 4 (5th Cir. 1969), *vacated*, 400 U.S. 542 (1971).

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> some rationality behind it. I do not think it is the kind of thing which the statute was intended to reach.[157]

The full Court ultimately vacated the summary judgment for defendant and remanded, holding that a blanket difference in hiring policies for men and women with school-age children was unlawful unless it could be justified as a bona fide occupational qualification.[158] Only by understanding this history is it not surprising that Blackmun joined a majority opinion the year after he wrote *Roe* in which the Court held pregnancy not to be a sex-based classification under the Equal Protection Clause.[159]

In sum, these early cases provide a window into Blackmun's approach to issues involving both law and medicine at a uniquely revealing time. At this point, Blackmun's reasoning was not affected by whatever caution or self-censorship followed the eruption of controversy after *Roe*. His actions suggest that although he enjoyed his quasi-insider status vis-à-vis medicine, he also used this knowledge base to resist what he found to be loose reasoning about how law affected medical practice.

III. THE CRUCIBLE OF *ROE V. WADE*

One of the most significant aspects of the Blackmun papers is what they do not contain. Debates over abortion both triggered and epitomized social ruptures that left deep, sharp cuts in the body politic, along vectors of religion, sexuality and political philosophy. Yet it is apparent from his papers that Justice Blackmun brought no conscious agenda to this issue; indeed, he seems to have given it very little thought prior to joining the Court.[160]

A. A Chronology

When the Supreme Court first focused on *Roe v. Wade*, Justices Black and Harlan had recently died, and the Court

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[157] Harry A. Blackmun, Notes on *Phillips v. Martin Marietta Corp.* 2 (Dec. 7, 1970) (Blackmun Papers, Box 122, Folder 8).

[158] *Phillips*, 400 U.S. at 544.

[159] Geduldig v. Aiello, 417 U.S. 484, 494 (1974).

[160] Referring to the lack of contact that he had with abortion issues while at Mayo, Blackmun said that "[a]ll of that developed later with the cases preliminary to *Roe against Wade*." Oral History, *supra* note 3, at 192.

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began the 1971 term with only seven Justices.[161] At Chief Justice Burger's request, Blackmun, Potter Stewart, and Byron White served as a subcommittee to identify pending cases that the Court could proceed to consider with only seven Justices, on the expectation that none would raise especially difficult or important questions.[162] They included *Roe* on that list. "[W]e didn't think it was that important at that time," Blackmun noted later.[163] "How wrong we were."[164]

Roe v. Wade and *Doe v. Bolton* were first argued in December 1971 to a seven-justice Court.[165] *Roe* involved a challenge to the Texas statute which prohibited all abortions except those necessary to save the woman's life.[166] *Doe* concerned the Georgia law adopted in 1968 based on recommendations from the American Law Institute.[167] Georgia's scheme required that three doctors independently examine the pregnant woman, that the abortion be performed in an accredited hospital, and that at least three members of the hospital staff approve the procedure.[168]

The pro-choice advocates presented a mix of privacy and medical rights arguments to the Court. The birth control movement had been using arguments for physician control for several decades, which then migrated to abortion reform efforts.[169] In a strange overlap, counsel for Roe and Doe included partially identical, lengthy descriptions of medical facts related to abortion in both the initial appellants' brief and the amicus brief filed by the American College of Obstetricians and Gynecologists.[170] The substantive argument in the

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[161] *Id.* at 193.

[162] *Id.*

[163] *Id.*

[164] Letter from Justice Harry A. Blackmun to Chief Justice William H. Rehnquist (July 20, 1987) (Blackmun Papers, Box 151, Folder 3).

[165] Oral History, *supra* note 3, at 193.

[166] Roe v. Wade, 410 U.S. 113, 117-18 (1973) (citing TEX. PENAL CODE ANN. §§ 1191-1196).

[167] Doe v. Bolton, 410 U.S. 179, 182 (1973) (citing GA. CODE ANN. §§ 26-1201-26-1203). The ALI had proposed a model statute requiring that two physicians certify that an abortion was necessary because of the physical or mental health of the pregnant woman or the risk of birth defects or that the pregnancy resulted from rape, incest or other violence. *See id.* at 205-06 (quoting MODEL PENAL CODE § 230.3(2)-(3) (Proposed Official Draft 1962)).

[168] *Id.* at 203 (quoting GA. CODE ANN. § 26-1202(b)(3)-(5)).

[169] DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 13-14, 379-80 (1994).

[170] *Compare* Brief for Appellants at 18-47, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 128054, *with* Motion for Leave to File a Brief and Brief as Amici

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appellants' brief began with an assertion of a right to seek and receive medical care,[171] followed by a section outlining various aspects of a privacy right, including the right of physicians to administer health care without arbitrary state interference.[172] Although some amici presented a sex discrimination argument,[173] there is no indication in the papers of Justices Blackmun, Brennan, or Douglas that members of the Court ever discussed a women's equality analysis.

At the conference following the argument, there appeared to be a majority for finding the Texas law unconstitutional, but no clear result as to the Georgia law.[174] During the conference, Blackmun expressed his view that the Texas law was too restrictive, but the Georgia law was "pretty good and [struck] a good balance" of the competing interests.[175]

Chief Justice Burger assigned the cases to Blackmun, whose first step was to recommend re-argument before what had become a full nine-member Court with the confirmation of Justices Powell and Rehnquist.[176] Apparently no other Justice supported the suggestion, and Blackmun completed drafts in both cases in May 1972.[177] Justice Blackmun's initial draft of an opinion in *Roe* rested on vagueness grounds, the argument that the Texas law gave too little guidance and clarity to enable physicians to exercise their best medical judgment.[178] Justices Brennan and Douglas responded quickly and sharply that the

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Curiae for the American College of Obstetricians and Gynecologists et al. at 7-21, Doe v. Bolton, 410 U.S. 179 (1973) (No. 70-40), 1971 WL 126685.

[171] Brief for Appellants, *supra* note 170, at 94-98.

[172] *Id.* at 110.

[173] *See* Reva B. Siegel, *Siegel, J., concurring*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID 79, 81 (Jack M. Balkin ed., 2005).

[174] Oral History, *supra* note 3, at 193 ("[I]t ended up with the Court members, nearly all of them, not being very firm in their conviction.").

[175] Justice Harry A. Blackmun, Undated Handwritten Notes on *Doe v. Bolton* (Blackmun Papers, Box 152, Folder 2).

[176] Paul R. Hoeber et al., Notes, Opinions of William J. Brennan, Jr., at XLII (Oct. Term, 1971) [hereinafter Hoeber Notes] (on file with Library of Congress, Manuscript Division, The William J. Brennan Papers, Box II:6, Folder 14 [hereinafter Brennan Papers]).

[177] *Id.* at XLIV.

[178] Justice Harry A. Blackmun, Draft Opinion of *Roe v. Wade* (May 18, 1972) (Blackmun Papers, Box 141, Folder 4). Blackmun framed the constitutional question as implicating the Ninth Amendment, not the Due Process Clause: "There is no need . . . to pass upon [Roe's] contention that under the Ninth Amendment a pregnant woman has an absolute right to an abortion, or even to consider the opposing rights of the embryo or fetus . . . ." *Id.* at 16.

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case should be decided on "the core constitutional question."[179] Blackmun's first draft in *Doe* relied on privacy to strike the Georgia statute.[180] "This was not the easiest conclusion for me to reach," Blackmun told his fellow Justices in the cover memorandum.[181] His explanation conveys his hesitancy at using a rights approach to undercut self-regulation within the medical profession:

> I have worked closely with supervisory hospital committees set up by the medical profession itself, and I have seen them operate over extensive periods. I can state with complete conviction that they serve a high purpose in maintaining standards and in keeping the overzealous surgeon's knife sheathed. . . . [I]ntraprofessional restraints of this kind have accomplished much that is unnoticed and certainly is unappreciated by people generally.
>
> I have also seen abortion mills in operation and the general misery they have caused despite their being run by otherwise "competent" technicians.[182]

Justices Brennan, Douglas, and Marshall quickly joined.[183] With time running out in the term, Blackmun again suggested deferral until the next term of the Court, and Chief Justice Burger ordered re-argument in the fall.[184]

During the summer of 1972, Blackmun spent ten days in the Mayo Clinic library doing additional research and reworking his draft opinions.[185] The second set of arguments came in October 1972, after the two new Justices had joined the Court.[186] The Chief Justice re-assigned the cases to

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[179] Letter from Justice William J. Brennan to Justice Harry A. Blackmun (May 18, 1972) (Brennan Papers, Box I-285, Folder 9); *see also* Letter from Justice William O. Douglas to Justice Harry A. Blackmun (May 19, 1972) (on file with Library Congress, Manuscript Division, The William O. Douglas Papers, Box 1589 [hereinafter Douglas Papers]).

[180] Memorandum to the Conference from Justice Harry A. Blackmun 1-2 (May 31, 1972) (Brennan Papers, Box I-286, Folder 1). The "Notes" document from Justice Brennan's chambers records that in conference, "Justice Blackmun urged that it would be politically unwise for the Court to strike down both the death penalty . . . and the abortion laws at the same time." Hoeber Notes, *supra* note 176, at LI.

[181] Memorandum to the Conference from Justice Harry A. Blackmun 1 (May 25, 1972) (Brennan Papers, Box I-286, Folder 1).

[182] *Id.* at 1-2.

[183] GARROW, *supra* note 169, at 551.

[184] Memorandum to the Conference from Justice Harry A. Blackmun, *supra* note 180, at 1.

[185] Oral History, *supra* note 3, at 196-98. But, he later insisted, "I never discussed [the case] at all with any physician." *Id.* at 201.

[186] GARROW, *supra* note 169, at 534, 563.

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Blackmun.[187] The result in the abortion cases was sealed when, at the Court's conference following the second argument, Justice Powell weighed in strongly on the side of striking down both statutes.[188] Observers had speculated that the two new Nixon appointees might spell defeat for abortion rights advocates.[189] Ironically, Justice Powell sealed the victory for the Brennan-Douglas-Marshall approach. His unexpected and unambivalent response was the single most dramatic turn during the Court's internal deliberations.

Blackmun circulated a draft of *Roe* a month after the second oral argument, noting that it "has proved for me to be both difficult and elusive."[190] Although he adopted a privacy analysis in this draft, he also pointedly preserved the *Vuitch* outcome, to uphold a statute which required that a doctor determine that an abortion was necessary for a woman's "health," as construed in that case:

> I have attempted to preserve *Vuitch* in its entirety. You will recall that the attack on the Vuitch statute was restricted to the issue of vagueness. I would dislike to have to undergo another [challenge] based, this time on privacy grounds. I, for one, am willing to continue the approval of the *Vuitch*-type statute on privacy as well as on vagueness.[191]

At this point, Justices Powell, Brennan, and Marshall made important interventions in how the opinions were shaped, affecting the use and extent of privacy language and the concept of viability.[192]

By the time the opinions were announced in January 1973, *Roe* held, as the lead opinion, that the liberty protected under the Fourteenth Amendment "encompass[ed] a woman's decision whether or not to terminate her pregnancy,"[193] but that the state's interests in maternal health and fetal life justified restrictions on abortion after the first trimester.[194] Georgia's process-focused restrictions at issue in *Doe* intruded on the first

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[187] GREENHOUSE, *supra* note 15, at 95.

[188] See *infra* text accompanying notes 260-64, for explication of Powell's position.

[189] GARROW, *supra* note 169, at 521.

[190] Memorandum to the Conference from Justice Harry A. Blackmun (Nov. 21, 1972) (Blackmun Papers Fox 151, Folder 6).

[191] *Id.* (citation omitted).

[192] *See infra* text accompanying notes 256-59, 261-64.

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

[194] *Id.* at 163-64.

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trimester's zone of privacy and thus also were found unconstitutional.[195]

Although the Justices realized that "we had a bull by the tail" by the time of the second oral argument,[196] their correspondence throughout 1971 and 1972 did not evidence any special vehemence of views as to the issues it raised. Six weeks before the decision was announced, Blackmun noted to Lewis Powell that "I have not had any intimation of violent disagreement, but I am informed that Byron and Bill Rehnquist will dissent at least in part."[197] Justice Rehnquist had written that he would "probably still file a dissent, although more limited than I had contemplated after the Conference."[198] A note with a similar tone had also arrived later from Justice White: "I have been struggling with these cases. I shall probably end up concurring in part and dissenting in part."[199] When Justice White read his dissent from the bench, Blackmun thought that White "was rather emotional in delivering the dissent. . . . It surprised me a little[.] I've never asked him [why]."[200] After all, as Blackmun said during a television interview, "[it] was not such a revolutionary opinion at the time."[201]

B. The Hippocratic Oath

Alfred Hitchcock used the term "Macguffin" to signify a mysterious plot objective which appears initially to be determinative, but turns out in the end to be beside the point.[202] If there is a macguffin in the story of Justice Blackmun and the medicalized framing of the right to abortion, it is the Hippocratic Oath.

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[195] Doe v. Bolton, 410 U.S. 179, 195 (1973).

[196] Oral History, *supra* note 3, at 200.

[197] Letter from Justice Harry A. Blackmun to Justice Lewis F. Powell, Jr. 1 (Dec. 4, 1972) [hereinafter Blackmun-Powell Letter] (Blackmun Papers, Box 151, Folder 3).

[198] Letter from Justice William H. Rehnquist to Justice Harry A. Blackmun (Nov. 24, 1972) (Blackmun Papers, Box 151, Folder 4).

[199] Letter from Justice Byron R. White to Justice Harry A. Blackmun (Dec. 1, 1972) (Blackmun Papers, Box 151, Folder 4).

[200] Oral History, *supra* note 3, at 492.

[201] GARROW, *supra* note 169, at 599 (citing *In Search of the Constitution: Mr. Justice Blackmun* (PBS television broadcast Apr. 26, 1987)).

[202] PATRICK MCGILLIGAN, ALFRED HITCHCOCK: A LIFE IN DARKNESS AND LIGHT 158-59 (2003).

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Blackmun's concern with whether the Hippocratic Oath proscribed abortion arose in *Vuitch*. Among the documents that Justice Blackmun collected and saved in connection with that case, two concern the oath. One is a copy of its text.[203] The other is an article by a Mayo Clinic physician arguing that while performing an abortion to save the pregnant woman's life was within the spirit of the oath because its goal was to save life, an abortion based on less dire "health" reasons violated the oath.[204]

Blackmun was dogged in researching its full meaning and impact.[205] Conducting further research on the oath was a primary motivation for Justice Blackmun's recommendation that the cases be put over to the next term and for the ten days he spent in the Mayo Clinic library in the summer of 1972.[206] He "wanted to do a lot more work, including the research on the Hippocratic Oath, find out how important that was."[207] When asked what kind of books he sought at Mayo, Blackmun responded, "Anything that had to do with the Hippocratic Oath, mainly."[208] When asked about any surprising research discoveries, Blackmun identified the book by Ludwig Edelstein on the oath, which he cited in the opinion.[209] "[I]t persuaded me that [the oath] was the product of a certain geographical area and of a certain group of medical specialists in that area. It fortified me and lessened the significance of the oath as a matter of general medical principle."[210]

Blackmun told Harold Koh that "having worked at a medical institution, I can remember that in a majority of the examining rooms, the Hippocratic Oath was on the wall."[211] He also recalled numerous medical school graduations at which

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[203] *Hippocratic Oath* (Blackmun Papers, Box 123, Folder 8).

[204] Robert D. Knapp, Jr., *Similarly I Will Not . . . Cause Abortion*, 122 J. LA. ST. MED. SOC. 297 (1970).

[205] Blackmun requested historical material about abortion less than a month after the first argument. Letter from Justice Harry A. Blackmun to Thomas E. Keys, Mayo Clinic (Dec. 17, 1971) (Blackmun Papers, Box 152, Folder 2). In response, a librarian at the Mayo Clinic sent him an article arguing that the ban on abortion was not included in the original version of the oath. Letter from Thomas E. Keys to Justice Harry A. Blackmun (Dec. 23, 1971) (Blackmun Papers, Box 152, Folder 2).

[206] Oral History, *supra* note 3, at 489-90.

[207] *Id.* at 196.

[208] *Id.* at 197.

[209] *Id.*; *see, e.g.*, Roe v. Wade, 410 U.S. 113, 130 nn.10-12 (1973).

[210] Oral History, *supra* note 3, at 197-98.

[211] *Id.* at 194.

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newly-minted physicians took the oath.[212] The oath is still recited at almost all medical school commencements, although its wording has been revised from the traditional form.[213] For physicians practicing during the 1950s, when Blackmun was at Mayo, its text contained the promise to do no harm in these or very similar terms:

> I will use treatment to help the sick according to my ability and judgment, but never with a view to injury and wrong-doing. Neither will I administer a poison to anybody when asked to do so, nor will I suggest such a course. Similarly, I will not give a woman a pessary to cause abortion.[214]

According to one doctor who advocated for liberalizing abortion laws, the oath had an impact on medical training: "[A]nti-abortion messages were given like a broken record—you can't violate the Hippocratic [O]ath."[215]

Blackmun's major annoyance with the second oral argument was the missing analysis of the oath: the re-argument "was extraordinarily unhelpful as far as the Hippocratic Oath was concerned."[216] He was especially irritated by Sarah Weddington, attorney for the plaintiffs in *Roe*. When he asked, "Do you have any comment about the Hippocratic Oath," she responded by describing how many eminent physicians had signed an amicus brief supporting her clients.[217] Blackmun cut her off, noting that equally eminent physicians had signed a brief for the other side, and directed her back to his query: "Tell me why you didn't discuss the Hippocratic Oath."[218]

Weddington faced up to the question, which she obviously had not anticipated, and responded that the oath did not pertain either to the scope of a woman's right under the Constitution, nor did it address whether the state had a compelling interest in restricting abortion. "[T]he fact that the medical profession at one time had adopted the Hippocratic

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[212] *Id.*

[213] LUDWIG EDELSTEIN, THE HIPPOCRATIC OATH: TEXT, TRANSLATION, AND INTERPRETATION 3 (1943).

[214] *Quoted in* Knapp, *supra* note 204, at 297. The text of the Oath found in Blackmun's papers in *Vuitch* varies slightly; the key sentence is, "Nor will I give a woman a pessary to procure abortion." *Hippocratic Oath*, *supra* note 203.

[215] JOFFE, *supra* note 54, at 33.

[216] Oral History, *supra* note 3, at 198.

[217] Transcript of Reargument at 7, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18), *available at* http://www.oyez.org/oyez/resource/case/334/reargument/transcript.

[218] *Id.*

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[O]ath does not weigh upon the fundamental constitutional rights involved," she stated.[219] Blackmun's frustration is apparent in his reply: "Of course, it's the only definitive statement of ethics of the medical profession. I take it from what you said that . . . you didn't even footnote it, because it's old? That's about, really, what you're saying?"[220]

Blackmun's actual discussion of the oath, after all his concern with it, consumes only four paragraphs on three pages.[221] He posits the apparent contradiction between its injunction against performing abortions and the frequency of abortion during the Greek and Roman empires.[222] What resolved this conflict for him was a history of the oath that he discovered in the Mayo Clinic library, which described it as dogma, the manifesto of only one school of Greek philosophers, "and not the expression of an absolute standard of medical conduct."[223]

Blackmun's concern with the oath reflects the value he placed on professional self-regulation. Blackmun saw the oath as a particularly important text in the relationship between physician, patient, and the state. His impatience with Weddington's legalistic response to his question during oral argument suggests that for him the oath embodied a command which stood outside of law; that its power lay in its quasi-juridical authority within the realm of medicine. Weddington was surely correct that its text did not speak to the questions raised by the conflicting claims of the pregnant woman and the state. But it did create a potential collision between professional self-regulation and judicial authority, a conflict that likely would have been excruciating for Blackmun.

C. Justice Douglas's "Right to Health"

At the conference following the first round of abortion arguments, Blackmun's notes indicate that Douglas argued that abortion was a "medical and psychiatric problem . . . Doctor acting in good faith [must have] absolute immunity when he seeks to protect the life or the health" of his

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219 *Id.*

220 *Id.*

221 Roe v. Wade, 410 U.S. 113, 130-32 (1973).

222 *Id.* at 130-31.

223 *Id.* at 132 (quoting LUDWIG EDELSTEIN, THE HIPPOCRATIC OATH 63 (1943)).

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patient.[224] Justice Stewart agreed with Douglas on the merits, not surprisingly in light of his concurring opinion in *Vuitch*.[225] Following the conference, Justice Douglas immediately began drafting.

The *first* opinion in the abortion cases was written by Justice Douglas. Before the end of December, Douglas drafted an opinion in *Doe* which he sent only to Brennan.[226] The Douglas draft identified multiple defects in the Georgia statute, and prompted a response from Brennan which urged him to prioritize privacy in his analysis.[227] Brennan argued that Douglas's draft section on "the right to care for one's health" should be pegged to privacy rather than the First Amendment[228] and that "the right of privacy in the matter of abortions means that the decision is that of the woman and her alone."[229] Justice Douglas adopted some but not all of Brennan's suggestions; from the perspective of the Brennan chambers, "he still seemed to want to give the physician-patient relationship constitutional significance rather than rest the case entirely on the woman's right of privacy."[230]

Douglas's published concurrence argued that the term "liberty" in the Fourteenth Amendment included three of "the rights retained by the people" referenced in the Ninth Amendment.[231] Among these was "the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf."[232] Douglas also acknowledged that the state had legitimate interests in the woman's health and in fetal life after quickening, which "justify the State in treating the procedure as a medical one."[233]

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[224] Justice Harry A. Blackmun, Handwritten Notes 2 (Dec. 1971) (Blackmun Papers, Box 151, Folder 4).

[225] *Id.* at 3. See text *supra* at note 126 regarding his opinion in *Vuitch*.

[226] Hoeber Notes, *supra* note 176, at XLII.

[227] *Id.*

[228] Letter from Justice William J. Brennan to Justice William O. Douglas 6 (Dec. 30, 1971) (Brennan Papers, Box I-285, Folder 9).

[229] *Id.* at 10.

[230] Hoeber Notes, *supra* note 176, at XLIII.

[231] Roe v. Wade, 410 U.S 113, 210-11 (1973) (Douglas, J., concurring).

[232] *Id.* at 213 (emphasis omitted).

[233] *Id.* at 215. In an early draft, Justice Douglas referred to the propriety of treating "the problem" as a medical one. Justice William O. Douglas, Seventh Draft Opinion of *Doe v. Bolton* 15 (Jan. 1972) (Brennan Papers, Box I-286, Folder 1). He later substituted "the procedure" for "the problem," making the sentence oddly self-evident. *Id.* (handwritten emendation).

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The Douglas concurrence rambles through various objections to the Georgia statute, but at the core of his complaints was its restriction of the scope of the physician's decision-making authority. Although medical regulation by the state was proper, the statute did not "give full sweep to the 'psychological as well as physical well-being'" that the Court established as the proper scope for consideration of the woman's health in *Vuitch*.[234] Even more fundamentally, Douglas believed in a constitutive relationship between medical care and privacy.

Douglas devoted Part III of his opinion to the medicine-privacy link. He framed the right of privacy as "the right to care for one's health and person and to seek out a physician of one's own choice."[235] By allowing a committee of doctors not selected by the patient to override the treating physician's good faith determination, the state caused "a total destruction of the right of privacy between physician and patient and the intimacy of relation which that entails."[236] In terms no less doctor-centered than Blackmun's opinion for the Court, Douglas declared that the "oversight imposed on the physician and patient . . . denies them *their* 'liberty,' *viz.*, *their* right of privacy."[237] In terms at least as bluntly reinforcing of medical authority as Blackmun's language for the majority, Justice Douglas asserted recognition of the woman's right of privacy required that "the [state's] control must be through the physician of her choice."[238]

Douglas had been developing a right to health linked to physicians' expression rights since at least his dissenting opinion in *Poe v. Ullman*, in which he wrote that "[t]he right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion."[239] He had initially drafted *Griswold* also to encompass the physician's role within the scope of the First Amendment. A paragraph in an early draft, later

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[234] *Roe*, 410 U.S. at 215 (Douglas, J., concurring) (quoting United States v. Vuitch, 402 U.S. 62, 72 (1971)).

[235] *Id.* at 219.

[236] *Id.*

[237] *Id.* at 220 (emphasis added).

[238] *Id.*

[239] 367 U.S. 497, 513 (1961) (Douglas, J., dissenting) (arguing that the Connecticut statute prohibiting use of contraceptives was unconstitutional).

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dropped, asserted that "the family, together with its physician, is an instructional unit as much as a school is."[240]

Justice Douglas retired from the Court in 1975,[241] and his concurring opinion in *Doe* remains the fullest explication of his hoped-for "right to health." There is no way to know the precise impact of his views about "control through the physician" on Blackmun's framing of the abortion right as one jointly held by the doctor and the pregnant woman, but they surely reinforced Blackmun's inclinations in that direction, at a minimum.

D. The Triumph of Justice Brennan

More than any other member of the Court, Justice Brennan shaped the creation of a right to privacy. Although the seminal articulation of the concept originated in Justice Harlan's dissent in *Poe*,[242] its positive framing as a right occurred in *Griswold*. Consistent with his focus on the First Amendment, Justice Douglas originally drafted *Griswold* as grounded primarily on the right to association.[243] As in the abortion cases, he sent his first draft only to Justice Brennan, who "suggest[ed] a substantial change in emphasis for your consideration."[244] Brennan argued against bringing the husband-wife relationship within the First Amendment association right because "[a]ny language to the effect that the family unit is a sacred unit, that it is unreachable by the State because it is an instruction unit, may come back to haunt us just as *Lochner* did. . . . I would prefer a theory based on privacy. . . ."[245]

Wary of creating a precedent for protecting association that any group could invoke to resist regulation, Brennan suggested that the right of privacy was "more closely tailored to the real interest at stake."[246] Douglas accepted the suggestion.

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[240] Justice William O. Douglas, Draft Opinion of *Griswold v. Connecticut* 4 (May 1965) (Douglas Papers, Box 1347). The draft also referred to "an intimate relation of husband and wife and their physician's role in one aspect of that relation." *Id.* at 3.

[241] GREENHOUSE, *supra* note 15, at 111.

[242] Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

[243] Letter from Justice William J. Brennan to Justice William O. Douglas 1-2 (Apr. 24, 1965) (Douglas Papers, Box 1347).

[244] *Id.* at 1.

[245] *Id.*

[246] *Id.* at 2.

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A marked-up draft in his papers reveals that a key sentence in the opinion—"[w]e deal with a right of privacy older than the Bill of Rights"—originally read, "[w]e deal with a right of association older than the Bill of Rights."[247] When it was announced, *Griswold* reverberated through the reproductive rights advocacy community, leading lawyers in case after case to reconfigure their arguments to place privacy concepts at the center.[248]

As described above,[249] Justice Brennan's letter to Douglas after the first arguments in *Roe* argued for a right that was more grounded in the individual patient,[250] less tied to the physician,[251] and less restrictive of the state's role in promoting quality of health care.[252] Like Blackmun, Brennan did not frame his analysis in terms of equality rights for women, but he sought a stronger and more unambiguous liberty right than Blackmun did, and this more robust concept of liberty included women.[253]

Brennan pushed Blackmun in the same directions that he pushed Douglas. In the first round of drafting, Brennan called Blackmun to task for using vagueness as the basis for a ruling in *Roe*, and then quickly joined a privacy-centered draft for *Doe*.[254] After the second oral argument, Blackmun's November 1972 draft designated the first trimester as the cut-off point, beyond which state regulation was permissible.[255] Brennan, with Powell and Marshall, again lobbied Blackmun for a new position.

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[247] Justice William O. Douglas, Draft Opinion of *Griswold v. Connecticut* 5 (Apr. 1965) (Douglas Papers, Box 1347).

[248] GARROW, *supra* note 169, at 301-02, 304, 306, 307, 309-10, 312.

[249] See *supra* text accompanying notes 227-30.

[250] Basing a health approach on the right to privacy "identifies the right squarely as that of the individual, not that of the individual together with his doctor." Letter from Justice William J. Brennan to Justice William O. Douglas, *supra* note 228, at 6.

[251] The right of privacy "would seem to be broader than the right to consult with, and act on the advice of, the physician of one's choice." *Id.*

[252] "[T]he First Amendment approach may make it difficult to sustain requirements for consultations with other doctors that should be upheld—as, for instance, measures to restrain over-eagerness in performing novel operations for the sake of research (or, worse, publicity) rather than for the sake of the patient's health." *Id.* at 7.

[253] *Id.* at 10.

[254] *See supra* text accompanying notes 179, 183.

[255] Memorandum to the Conference from Justice Harry A. Blackmun, *supra* note 190.

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Justice Marshall expressed concern that allowing restrictions after the end of the first trimester would harm women who had difficulty both believing they were pregnant and deciding to have an abortion.[256] He suggested specifying that state regulations were permissible after the first trimester and before viability if "directed at health and safety alone."[257] Brennan argued that the timing of regulation should track its purpose, so that regulation designed to protect the woman's health could attach "at that point in time where abortions become medically more complex" and regulation to protect fetal life would apply after viability.[258] As obvious as it sounds, Brennan's point that viability was "a concept that focuses upon the fetus rather than the woman"[259] not only helped to untangle a difficult puzzle, but also drew a boundary that coincided logically with a grounding in autonomy for the still developing right of privacy.

E. Justice Powell's Eleventh-Hour Intervention

At the Justices' conference following the second argument, Justice Powell weighed in as "basically in accord" with Blackmun.[260] Nonetheless, he urged that the Texas case not be decided on vagueness grounds, but on the central merits of the claims. Justice Powell also recommended that *Roe* be made the lead case. Powell argued that "[a]bortion [is a] medical problem broadly defined."[261] Although until then Blackmun had continued to believe that vagueness should form

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[256] Letter from Justice Thurgood Marshall to Justice Harry A. Blackmun (Dec. 12, 1972) (Blackmun Papers, Fox 151, Folder 4).

[257] *Id.*

[258] Letter from Justice William J. Brennan to Justice Harry A. Blackmun 2-3 (Dec. 13, 1972) (Blackmun Papers, Box 151, Folder 8).

[259] *Id.* at 1.

[260] Justice Harry A. Blackmun, Handwritten Notes 2 (Oct. 13, 1972) (Blackmun Papers, Box 151, Folder 9). Powell's position apparently stemmed from his experience when approached by a young lawyer at his Richmond firm. The associate's girlfriend had become pregnant, and he sought Powell's advice and assistance regarding an abortion. Oral History, *supra* note 3, at 200; JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 347 (2001).

[261] Justice Harry A. Blackmun, Notes, *supra* note 260, at 3. Powell also noted his resistance to equal protection arguments on behalf of indigent women: "Do not like economic questions unless related to *health*." *Id.* This presaged his opinion upholding restrictions on Medicaid funding of abortion coverage. Maher v. Roe, 432 U.S. 464 (1977).

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one basis for the opinion in *Roe*,[262] he now dropped it and rearranged the opinions as Powell suggested, making *Roe* the lead case, grounded on the privacy right.

Justice Powell was the first to question Blackmun's initial line-drawing at the end of the first trimester. Blackmun's November 27 draft had summarized the timing as follows:

> For the stage subsequent to the first trimester, the State may, if it chooses, determine a point beyond which it restricts legal abortions to stated reasonable therapeutic categories that are articulated with sufficient clarity so that a physician is able to predict what conditions fall within the stated classifications.[263]

Powell wrote privately to Blackmun that drawing the line at viability would be "more defensible in logic and biologically than perhaps any other single time."[264] Powell directed Blackmun's attention to the opinion in *Abele v. Markle*,[265] which suggested that the state's interest in fetal life would be weightier after the fetus became capable of living outside the uterus.[266] Blackmun requested feedback from the full Court,[267] which elicited the Marshall and Brennan correspondence discussed above.[268]

F. The Opinion Blackmun Intended

When he retired, Justice Blackmun characterized the abortion right as "a step that had to be taken as we go down the road toward the full emancipation of women."[269] Despite this adoption of an equal liberty analysis that he did not share at the time he wrote the opinion in *Roe*,[270] he also never

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[262] Justice Harry A. Blackmun, Undated Notes 1 ("I wrote it before on vagueness. I feel this still is sound and as a complement to [the] Georgia [case].") (Blackmun Papers, Box 151, Folder 8).

[263] Justice Harry A. Blackmun, Draft Opinion of *Roe v. Wade* 48 (Nov. 21, 1972) (Blackmun Papers, Box 151, Folder 6).

[264] Letter from Justice Lewis F. Powell to Justice Harry A. Blackmun 1 (Nov. 29, 1972) (Blackmun Papers, Box 151, Folder 4).

[265] 351 F. Supp. 224 (D. Conn. 1972).

[266] *Id.* at 232. At the conference following the second oral argument, Justice Stewart had also suggested following this decision.

[267] Memorandum to the Conference from Justice Harry A. Blackmun (Dec. 11, 1972) (Blackmun Papers, Box 151, Folder 4).

[268] See *supra* text accompanying notes 256-59.

[269] Oral History, *supra* note 3, at 206.

[270] Blackmun acknowledged that he did not hold that view at the time that he wrote *Roe*. "[A]s the furor developed and its integrity was attacked and upheld, certainly I came to that conclusion, and I feel strongly about it today." *Id.* Indeed, by

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abandoned his view that the physician's guidance was essential: "I think to this day there ought to be a physician's advice in there. I don't believe in abortion on demand."[271]

Blackmun's cry of misunderstanding—that he did not favor "abortion on demand"—was sincere. Fundamentally, Blackmun thought that he was writing an opinion that would reform abortion law, largely by protecting reputable physicians acting in good faith. Although the decisions in *Roe* and *Doe* accomplished that, they also ended state power to compel the completion of pregnancy based on absolutist notions of fetal life or traditional precepts about sexual morality. As a result, in cultural if not legal terms, to his own surprise and dismay, Blackmun wrote the repeal of abortion law.

Perhaps the most important misunderstanding of the Court's opinions in *Roe* and *Doe* has been to treat them as solely Justice Blackmun's analysis. Blackmun repeatedly stressed in the first years after the backlash began that he had been writing for a seven-Justice majority, but as his allies on the Court became less protective of *Roe* or were replaced by Justices hostile to the decision, he more aggressively took up the fight to protect it.[272] These later actions helped secure identification of the abortion right as his legacy. In addition, the simplistic explanation that his Mayo experience generated a distorted emphasis on protecting physicians fueled the perception that the medical reasoning in the abortion cases was the idiosyncratic product of their author.

At every step in the consideration of *Roe* and *Doe*, Blackmun sought an analysis that would resolve the cases on narrower, rather than broader, grounds. He adhered to a vagueness rationale in *Roe* until Justice Powell joined the majority and called for a more substantive approach.[273] He

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1989 even his notes to himself were impassioned. "To overthrow [*Roe*] would resemble [here, Blackmun added as an emendation, "create"] the chaos created by Prohibition. It will turn thousands of American women into criminals and their doctors too or it will return us to the back alley. And a number of these women—an unconscionable number—will die." Justice Harry A. Blackmun, Handwritten Notes on *Webster v. Reproductive Health Servs.* 1 (Apr. 23, 1989) (Blackmun Papers, Box 536, Folder 2).

[271] Oral History, *supra* note 3, at 206.

[272] GREENHOUSE, *supra* note 15, at 138-45, 182-85, 198-206.

[273] In sending his May 1972 draft of *Roe* to the other Justices, Blackmun said that the vagueness theory "would be all that is necessary for disposition of the case, and . . . we need not get into the more complex Ninth Amendment issue. . . . In any event, I am still flexible as to results, and I shall do my best to arrive at something which would command a court." Memorandum to the Conference from Justice Harry A. Blackmun (May 18, 1972) (Blackmun Papers, Box 151, Folder 4).

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relinquished his initial tendency to support the Georgia law and to preserve *Vuitch*-style statutes because he needed the votes of Justices Brennan and Douglas to command a court.[274] He repeatedly advocated carrying the decision over until the next term,[275] although Justice Douglas, especially, was livid that Chief Justice Burger was attempting to change the outcome through delay, by adding the votes of two new Nixon appointees.[276] At that point, in the spring of 1972, Justice Brennan was "prepared to lay three-to-one odds that Justice Blackmun would eventually abandon the opinions he had written" in the two abortion cases.[277] What comes across most clearly in this history is Blackmun's pragmatism, his willingness to shift course on both vagueness and the appropriate timing for restrictions, in order to keep a majority. Blackmun repeatedly explained to his brethren that his flexibility grew out of his efforts to attract sufficient support for the opinion.[278]

Against this backdrop, Blackmun's research of medical history and ethics appears more like caution vis-a-vis his more gung-ho brethren than the construction of an illegitimate rationale for a course that he was unwilling to question or blindly determined to follow. The feedback that he received from the other Justices about the incorporation of this research into his opinion was uniformly positive, and it came not so much from the more liberal Justices as from Powell,[279] Stewart,[280] and Rehnquist.[281]

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[274] See *supra* text accompanying notes 169, 183, 256-59.

[275] See *supra* text accompanying note 176.

[276] GARROW, *supra* note 169, at 553-55.

[277] Hoeber Notes, *supra* note 176, at LI.

[278] *See, e.g.*, Memorandum to the Conference from Justice Harry A. Blackmun, *supra* note 273 ("I shall do my best to arrive at something which would command a court."); Letter from Justice Harry A. Blackmun to Justice William H. Rehnquist (Nov. 27, 1972) [hereinafter Blackmun-Rehnquist Letter] (Blackmun Papers, Box 151, Folder 4) ("My vagueness approach, however, did not find favor. . . . Thus, this time around, I . . . did not reach the issue of vagueness."); Blackmun-Powell letter, *supra* note 197, at 1 ("I could go along with viability if it could command a court.").

[279] "I am enthusiastic about your abortion opinions. They reflect impressive scholarship and analysis, and I have no doubt that they will command a court." Letter from Justice Lewis F. Powell to Justice Harry A. Blackmun, *supra* note 264, at 1. On the day that the abortion decisions were announced, Dottie Blackmun, the Justice's wife, attended the session. Powell had a handwritten note delivered to her which said, "Dottie—Harry has written an historic opinion, which I was proud to join." Justice Lewis F. Powell, Handwritten Note to Dottie Blackmun (Jan. 22, 1973) (Blackmun Papers, Box 151, Folder 3).

[280] "I think your most recent circulations are even better than the original ones, and I was again greatly impressed with the thoroughness and care with which

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There are also signs in the documents that Blackmun was concerned about the proper role of state legislatures. His private notes prior to the second conference include options for smoothing the way for state legislatures to respond, including possible withholding of the mandate until April 1, by which time most would be in session.[282] He expected states to adopt health-related requirements recommended by physicians for the period after the first trimester:

> I have the impression that many physicians are concerned about facilities and, for example, the need of hospitalization, after the first trimester. I would like to leave the states free to draw their own medical conclusions with respect to the period after three months and until viability. The states' judgment of the health needs of the mother, I feel, ought, on balance, to be honored.[283]

He reassured Justice Rehnquist "that after the first trimester a state is entitled to more latitude procedurally as well as substantively."[284]

In short, Blackmun functioned as the broker of a decision that combined the elaboration of privacy rights sought by Brennan, Douglas, and Marshall with the insulation of medical authority which Blackmun himself certainly favored and which was also sought by Douglas, Powell, and Stewart.[285] *Roe v. Wade* has become synonymous with "activist" judging, as contrasted to a jurisprudential ideal of incrementalism and

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you have accomplished a very difficult job." Letter from Justice Potter Stewart to Justice Harry A. Blackmun (Dec. 27, 1972) (Blackmun Papers, Box 151, Folder 3).

[281] "Although I am still in significant disagreement with parts of [your draft opinions], I have to take my hat off to you for marshalling as well as I think could be done the arguments on your side." Letter from Justice William H. Rehnquist to Justice Harry A. Blackmun, *supra* note 198. Rehnquist repeated this courtesy toward Blackmun in his dissent. Roe v. Wade, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting).

[282] Justice Harry A. Blackmun, Undated Handwritten Notes (Blackmun Papers, Box 151, Folder 2). Blackmun also wanted the decisions to be announced by mid-January "to tie in with the convening of most state legislatures." Memorandum to the Conference of from Justice Harry A. Blackmun (Dec. 15, 1972) (Blackmun Papers, Box 151, Folder 4).

[283] Blackmun-Powell Letter, *supra* note 197, at 1-2.

[284] Blackmun-Rehnquist Letter, *supra* note 278.

[285] During his oral history interview, Blackmun declined to elaborate on why he grounded the analysis in substantive due process rather than another constitutional provision. "The main thing, of course, was to try to get the Court together, because it was in such a position of equivocacy among most of the justices." Oral History, *supra* note 3, at 201. David Garrow noted that "Blackmun's colleagues appreciated that his revisions had fully—and sometimes quite precisely—responded to their suggestions." GARROW, *supra* note 169, at 586.

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respect for the political branches.[286] How ironic it is that searching for the narrowest ground for a decision was precisely how Blackmun approached his task of writing the opinions in *Roe* and *Doe*.

After *Roe*, Justice Blackmun smarted from criticism of the opinion's focus on the rights of doctors.[287] In the first several years after *Roe*, Blackmun wanted to distance himself from abortion and similar cases. In *Carey v. Population Services International*,[288] involving minors' access to contraceptives, his letter commenting on Justice Brennan's draft of the opinion of the Court began by thanking Brennan for "taking it on, for I have been too much in evidence in this area in the past few years."[289] Two terms later, in *Beal v. Franklin*,[290] he wrote to himself, "More abortion and more refinement of our theorizing . . . . I grow weary of these."[291] The following year, in *Bellotti v. Baird*,[292] his notes on the case reflect the same theme: "Abortion again and Massachusetts again. . . . Perhaps they are tired, as I am, of all this fuss."[293]

IV. REDEPLOYING MEDICAL RHETORIC

After *Roe*, the framing of medical authority in abortion discourse fractured. Justice Blackmun embraced medicine even more tightly, at least rhetorically, invoking its quality of

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[286] Two articles (out of many potential sources) illustrate the durability of the criticism that *Roe* exceeded the bounds of proper judicial review: Richard A. Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 168, 175, 180; Cass R. Sunstein, *The Supreme Court 1995 Term; Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 20 (1996).

[287] WOODWARD & ARMSTRONG, *supra* note 8, at 415.

[288] 431 U.S. 678, 686-91, 700-02 (1977) (holding unconstitutional under the First and Fourteenth Amendments a state law that criminalized the distribution of contraceptives to minors, or to adults by persons other than pharmacists, and prohibited any advertising or displaying of contraceptives).

[289] Letter from Justice Harry A. Blackmun to Justice William J. Brennan (Mar. 8, 1977) (Blackmun Papers, Box 240, File 3).

[290] Beal v. Franklin, 428 U.S. 901 (1976) (vacating and remanding the case for further consideration in light of *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), *Singleton v. Wulff*, 428 U.S. 106 (1976), and *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976)).

[291] Justice Harry A. Blackmun, Undated Handwritten Notes (Blackmun Papers, Box 281, Folder 9).

[292] Bellotti v. Baird, 443 U.S. 622, 651 (1979) (holding that a Massachusetts law requiring a minor to obtain parental consent, or judicial approval after notification to her parents, before seeking an abortion, was an unconstitutional burden on the minor's right to seek an abortion).

[293] Justice Harry A. Blackmun, Handwritten Notes on *Belotti v. Baird* (Feb. 25, 1979) (Blackmun Papers, Box 293, Folder 6).

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compassion as superior to what he saw as the mean-spiritedness of fellow Justices who sought to overrule *Roe*. Implicitly, this rhetoric also served as an indirect way for him to describe himself in the same invidious terms. Anti-abortion conservatives, by contrast, used a rhetoric of de-legitimating medical authority as one path to undermining the logic of *Roe*.

A. Blackmun's Rhetorical Evolution

Blackmun's life changed irrevocably with the issuance of *Roe v. Wade*. He found himself, almost overnight, both demonized and lionized.[294] As he came to accept his role as chief defender of that decision, another side of medicine—its qualities as a profession of mercy—came into sharper focus in his philosophy. No documents indicate that this shift was conscious, but the trend is clear. Blackmun reconfigured his admiration of medicine, and deployed it rhetorically in a battle over politically-charged attacks against reproductive rights.[295]

Blackmun saw medicine not only as a source of authority and expertise, but also as a model of compassion, increasingly in a specifically political way. A recurring theme in biographical accounts of Blackmun is the question of how a small town Midwestern corporate lawyer turned judge became a champion for the concerns of minorities and the less powerful.[296] He became an impatient critic of those who sought to undercut reproductive rights for women seeking care from public facilities, to the point of chastising his fellow Justices for their blindness to "another world 'out there.'"[297]

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[294] Oral History, *supra* note 3, at 204-05; GREENHOUSE, *supra* note 15, at 101, 134, 138, 182, 207.

[295] See *infra* text accompanying notes 302-04, 309-12.

[296] Pamela S. Karlan, *Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders*, 71 N.D. L. REV. 173, 173-75 (1995); Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 MO. L. REV. 1209, 1211-17 (2005); Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717 (1983); Jenkins, *supra* note 22.

[297] Beal v. Doe, 432 U.S. 438, 463 (1977). The phrase appears first in Blackmun's handwritten notes on the draft of an opinion in *Danforth*. Justice Harry A. Blackmun, Third Draft of *Planned Parenthood of Missouri v. Danforth* 3 (June 6, 1976) (Blackmun Papers, Box 220, Folder 9). Another indicator of the change in Blackmun's political views came in his notes during oral argument in *Rust v. Sullivan*, 500 U.S. 173 (1991). Kenneth Starr, then Solicitor General, represented the United States in defending a statute that barred family planning funds to physicians who counseled women about abortion, the so-called "gag rule." "What a Boy Scout goodie-goodie," Blackmun wrote about Starr. Justice Harry A. Blackmun, Handwritten Notes on Argument in *Rust v. Sullivan* (Oct. 30, 1990) (Blackmun Papers, Box 568, Folder 6).

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Part of the answer lies in his connection to medicine. Medicine provided a model of professionalism for the public good that Blackmun re-interpreted to encompass his changing political understandings and sensibilities. His admiration for medicine was a theme running through his entire professional life, but after *Roe* he deployed its rhetoric for new purposes.

In reading his papers and speeches and the oral history, one is struck by Blackmun's admiration of what he saw as the more robust notion of compassion in medicine than in law. Blackmun believed that the key differences between law and medicine lay in the adversarial approach to dispute resolution characteristic of law as compared to the goal of service and healing that dominated medicine.[298] The attribution of virtue may have originated in idealization, but it seems to have undergone a subtle evolution, such that it came to serve another function. The quality of mercy that Blackmun located in medicine but found often lacking in law provided a benchmark and a justification for his own attempts, with fewer allies among his fellow Justices as the years went on, to point constitutional law in the same direction.

Blackmun's association of medicine with humaneness and not just skill began while he worked at Mayo. In a 1954 speech, he described the Mayo Clinic as "a place of humanitarianism where the guiding principle is that of responsibility to others."[299] He cited numerous institutional policies in support of that conclusion, such as never suing a patient for a medical fee, declining payment if the money resulted from the mortgaging of the patient's home, providing equal treatment to patients regardless of race or financial status, and prioritizing the payment of salaries for the nursing staff.[300] In 1958, on his personal copy of the American Medical Association's Principles of Ethics, Blackmun noted that the ethical rule against disclosure of a patient's confidences contained an exception for when "it becomes necessary in order

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[298] See *infra* text accompanying notes 302-04, 309-12.

[299] Harry A. Blackmun, Speech Notes 14 (Mar. 6, 1954) (Blackmun Papers, Box 13, Folder 17).

[300] *Id.* at 12-13; *Labor Leaders Attack Tax Reform Proposal*, Mar. 8, 1954 (publication unidentified; newspaper article describing meeting at which Blackmun presented his speech) (Blackmun Papers, Box 13, Folder 17).

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to protect the welfare of the individual or of the community," which could be "more broad than the law itself."[301]

After *Roe* and the backlash that it triggered, one finds Justice Blackmun not only lauding medicine, but also making pointed comparisons between it and law. Speaking at the 1980 commencement of the Mayo Medical School, he extended congratulations "as a member of the profession of controversy. . . . to you, now members of the profession of mercy."[302] He repeated this point in his oral history interview in 1994, stating that lawyers worked to resolve controversies, while the goal of physicians was to work "for the common goal . . . [of] cure . . . and alleviation of pain."[303]

In his 1995 speech at Mayo on pediatric issues, Justice Blackmun described various categories of litigation affecting children, concluding with the advice that physicians should "rely on your good medical judgment rather than place too heavy a burden on what might be regarded as established law."[304] Specifically as to abused children, he cited *DeShaney v. Winnebago County Social Services Department*,[305] holding that a brutally battered child had no right to relief based on the state's failure to protect him after being notified of his father's previous assaults.[306] Blackmun noted that "[i]t is the case where, in solitary dissent, I spoke of 'Poor Joshua.'"[307]

A 1994 speech focused on law and psychiatry seems particularly revealing. Blackmun spoke on the occasion of having received the Isaac Ray Lectureship Award from the American Psychiatric Association. He began by describing Ray, one of the Association's founders, in these terms:

> Dr. Ray stressed human kindness. He believed that a psychiatrist must minister to all . . . not just to the patient and must endeavor to soften the ever-present human prejudice and cruelty toward the incompetent. So we have in Dr. Ray an example of . . . an individual who dared to inquire and to investigate the law insofar as it affected his patients directly or indirectly and an individual who would

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[301] Copy of *Principles of Medical Ethics*, J. AM. MED. ASS'N, June 7, 1958, marked by Blackmun with his initials and a handwritten notation, "Mr. Blackmun's personal copy" (on file with author).

[302] Blackmun, *Remarks at Commencement*, *supra* note 44, at 575.

[303] Oral History, *supra* note 3, at 13.

[304] Mayo Clinic Pediatric Days Speech, *supra* note 99, at 11.

[305] 489 U.S. 189 (1989).

[306] *Id.* at 191.

[307] Mayo Clinic Pediatric Days Speech, *supra*, note 99, at 7.

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> improve the lot of some of the least respected among us. That, indeed, is an example of magnitude of character and of endeavor.[308]

In conclusion, Blackmun returned to this theme, describing psychiatrists as "an important part of the profession—indeed, of the ministry—of healing, which demands kindness, understanding, and sympathy."[309] He contrasted that with "[t]he current federal judiciary," which he described as "tak[ing] a tough, narrow view of the defenses based on competence."[310]

Blackmun referred specifically to *Godinez v. Moran*, in which he had dissented, and in which the Court set the standard for assessing competence for a guilty plea or waiver of counsel at the same relatively low level as that for standing trial: whether the individual could consult with a lawyer with a reasonable degree of rational understanding.[311] "Can the recent *Godinez* decision," he asked rhetorically, "possibly be correct in the eyes of the practicing psychiatrist or, if I may be so bold, in the eyes of Isaac Ray?"[312]

B. The Backlash

In the years after *Roe*, as more conservative Justices joined the Court, the Court shifted to a more restrictive approach to abortion rights. In doing so, it used a counter-rhetoric of the unreliability of medical judgment as a primary discursive mechanism.

One example of how the Court constructed medical rhetoric in precisely the opposite way from what Blackmun was attempting is the application of abortion law to minors. In one of its first post-*Roe* abortion decisions, the Court held that laws requiring parental consent before a minor could obtain an abortion were unconstitutional as applied to mature minors or to minors for whom an abortion would be in their best interests.[313] This initial decision left the determination of the minor's best interests, as well as the assessment of medical maturity, that is, whether an adolescent was sufficiently mature to consent to a medical procedure, up to physicians.

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[308] *Isaac Ray Lecture*, *supra* note 63, at 800.

[309] *Id.* at 804.

[310] *Id.*

[311] Godinez v. Moran, 509 U.S. 389, 398 (1993).

[312] *Isaac Ray Lecture*, *supra* note 63, at 804.

[313] Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 74 (1976).

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But the Court later changed course, and upheld state statutes which created a requirement that judges, not doctors, determine a minor's best interests or maturity.[314] On this issue, the Court insisted on evidentiary hearings rather than deference to doctors, despite substantial record evidence that the hearings were of little value.[315]

Similarly, post-*Roe* anti-abortion laws such as the one challenged in *City of Akron v. Akron Center for Reproductive Health*[316] frequently included a provision specifying a script that a doctor had to recite to the patient when obtaining her informed consent, much of it a thinly disguised polemic designed to persuade the woman to reconsider her decision to abort.[317] The Court found that such a requirement constituted an "intrusion upon the discretion of the pregnant woman's physician."[318] Nine years later, however, the Court reversed *Akron*'s holding on informed consent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[319]

The tone of the Court's opinions continued to change, with increasing frequency, to skepticism about the professional reliability of physicians who performed abortions. Justice Blackmun's invocation of medical authority moved to the dissent.[320] Eight years after *Casey*, the debate within the Court centered on whether the majority's analysis in that case was a throwback to a "repudiated" model of deference to physicians.[321]

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[314] Bellotti v. Baird, 443 U.S. 622 (1979). The Court cited Justice Stewart's concurring opinion in *Danforth*, which signaled the beginnings of skepticism as to medical deference: "It seems unlikely that [the pregnant teenager] will obtain adequate counsel and support from the attending physician at an abortion clinic." *Id.* at 641 (citing 428 U.S. at 91). The Court has reaffirmed its commitment to permitting a bypass of parental consent (and additionally notification) only by the judiciary. Hodgson v. Minnesota, 497 U.S. 417 (1990); H.L. v. Matheson, 450 U.S. 398 (1981).

[315] Hodgson v. Minnesota, 648 F. Supp. 756, 766-67, 775 (D. Minn. 1986), *rev'd*, 497 U.S. 417 (1990).

[316] 462 U.S. 416 (1983).

[317] *Id.* at 423 n.5.

[318] *Id.* at 445.

[319] 505 U.S. 833, 884 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

[320] *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 218 (1991) (Blackmun, J., dissenting) ("In our society, the doctor-patient dialogue embodies a unique relationship of trust. The specialized nature of medical science and the emotional distress often attendant to health-related decisions requires that patients place their complete confidence, and often their very lives, in the hands of medical professionals.").

[321] Stenberg v. Carhart, 530 U.S. 914, 968-69 (2000) (Kennedy, J., dissenting). Justice Kennedy's dissent, joined by Chief Justice Rehnquist, argued at length that the Court had ceded too much authority to physician judgment, in what he asserted was a misinterpretation of the more relaxed standard for review of state statutes established in *Casey*. *Id.* at 965-70.

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Even the vocabulary grew sharper. Justices hostile to *Roe* began to include "abortionist" in their opinions and to de-emphasize the more respectful terms "physician" and "doctor." Justice White used the word "abortionist" seven times in his dissenting opinion in *Colautti v. Franklin*.[322] Justice Blackmun noticed it in White's draft, and commented in the margin, "the hateful word."[323] In *Stenberg v. Carhart*, three Justices who filed dissenting opinions used the word "abortionist[s]" thirteen times in their two opinions.[324]

V. THE MYTH OF MEDICAL INDEPENDENCE

Considering the specifics of Harry Blackmun's life, together with the broader dynamics of how the Supreme Court adjudicated the abortion cases, provides us one view of a fascinating and portentous constitutional debate. Consistent with the overarching theme of this article, one can also analyze it in the context of the relationship between the judiciary and medicine. In that frame, the same story operates as a particularly powerful episode in the social negotiation of the role of medicine as a disciplinary discourse.

Roe privileged medical authority, but not in the conventional sense of deference to expertise. What the Court sought to protect as the province of medicine was neither technical nor scientific. The abortion decisions cleared for physicians a sufficiently expansive legal and cultural space to insulate them as they resolved, patient by patient, the clash of incommensurate social values.

The Court in essence delegated juridical authority to physicians. What constituted a therapeutic abortion in the regime of first *Vuitch* and then *Roe* and *Doe* could not be derived solely from law and certainly not solely from science. The Court's decisions revealed "therapeutic" as a social construct, a category with no enforceable meaning. To satisfy therapeutic criteria under the new rules, medical indicators for abortion could include a range of life situations. Regulation was replaced by diagnosis, which was itself regulation.

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[322] 439 U.S. 379, 403, 407-09 (1979) (White, J., dissenting).

[323] Justice Byron R. White, Draft of Dissenting Opinion in *Colautti v. Franklin* 2 (Dec. 29, 1978) (Blackmun Papers, Box 281, Folder 8).

[324] Stenberg v. Carhart, 530 U.S. 914, 953, 957, 958, 959, 960, 964, 965, 968, 974, 976 (2000) (Scalia, J., dissenting; Kennedy, J., dissenting).

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Underlying this discursive move was the assumption that medicine constitutes a private realm apart from the state which can therefore function as a buffer between the individual and the state. In Douglas' mind as well as Blackmun's, medicine helped to define what was private, with doctors serving as border patrols. Douglas was less enamored of the profession than Blackmun, but his libertarianism could align with his concept of medical care as a core aspect of privacy only if and when he believed that physicians operated independently of the state. Both had an unspoken faith in medicine as a parallel and independent universe of power.

Physicians did legitimately present themselves as victims of an over-reaching state because usually only they (and not the women seeking abortions) were the actors at risk of prosecution.[325] The Justices could easily see doctors as targets of state power. What the Court did not see, or at least acknowledge, was the role of physicians as partners in regulation and the power of medicine as social discipline. Whether seen or not, however, the import of the early abortion cases was to entrust physicians with even more regulatory authority than they had previously exercised, by seeming to remove the fear of hostile surveillance by the state.[326]

Delegation to doctors of questions associated with the repercussions of sexual misconduct also resonated with a powerful construct of public-private divide. In a context of adjudicating issues of morality, the law/medicine framework aligned with the public/private dichotomy. The second realm in each dichotomy dealt with family and familial concerns, in ways that could shield the first realm from the messiness of competing moral arguments. Reassuringly, both halves operated under male supervision.

The Court's delegation of power ultimately failed, however, because it occurred at the precise moment when the authority of medicine was itself under challenge. The same discourse of rights against which medical authority was thought to provide a sensible counterweight had invaded medicine itself, and the weight of professional opinion tipped to

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[325] GREENHOUSE, *supra* note 15, at 99.

[326] The California Supreme Court explicitly recognized this move: "The problem caused by the vagueness of the statute is accentuated because under the statute the doctor is, in effect, delegated the duty to determine whether a pregnant woman has the right to an abortion . . . ." People v. Belous, 458 P.2d 194, 206 (Cal. 1969).

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support for the right of the pregnant woman to decide whether to have an abortion just as the early cases were heading toward the Supreme Court.[327] The social control that Blackmun and others on the Court anticipated did not prevail. This broader change is why the opinions in *Roe* and *Doe* said reform, but did repeal.

As the post-*Roe* abortion story unfolded, an increasingly conservative Court realized that physicians as a class could not be trusted to police the border defining the allowable degree of state intrusion into sexual and moral decision-making. The doctor-patient relationship created a sequestered space which enabled resistance to and non-compliance with traditional norms. The Court sought to retrieve aspects of the power which it had delegated, by reinstating the state as ultimate authority.

Today, the many and continuing battles over abortion show us that medical authority can be deployed to enhance the power of the state and not just of the profession. What the Court did in *Roe*—with whatever degree of consciousness—was command and de-control. *Roe*'s invalidation of all extant abortion laws delegated responsibility to another center of power, at least as much as it protected the medical profession. When a critical mass of judges later found medicine to be institutionally unreliable in enforcing social norms, the Court retracted its deference. The expansion and contraction of deference to medicine in the abortion cases has been an epiphenomenon of ideological shifts.

The irony, especially for a classic liberal believer in public and private realms such as Blackmun, was that the 1973 Court's belief in medical authority as apolitical catalyzed the most massive politicization of medicine in American history. Abortion both revealed the extent to which medicine's apolitical status was mythic and drove the Court's own ever deeper politicization, reaching the level of partisan campaigns and litmus tests for judicial appointments.

Blackmun crafted a resolution in *Roe* and *Doe* that sidestepped one crisis of authority, over the intrusion of public power into intimate life, but exacerbated another, the crisis of the judiciary's role in a democratic republic. Medicine failed him and the Court as a mechanism of civic governance. Instead, abortion revealed medicine as a discursive system

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[327] GARROW, *supra* note 169, at 357-60.

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whose meaning, like that of the law, was contingent on structures of power that it could not control.

VI. CONCLUSION

Justice Blackmun bears ultimate responsibility for the decisions that he wrote and whatever shortcomings they contained regardless of the pressures which he experienced. But the glib attribution of *Roe*'s reasoning to his decade at the Mayo Clinic is unfounded. The conventional view of Blackmun as a naïve defender of doctors is itself naïve and grossly inadequate to explain the medicalized framing of *Roe* and *Doe*.

This is not to deny that *Roe* was in part the product of a society-wide renegotiation of the role of medical authority. The Court sought to entrust medicine with decisions which required normative rather than scientific judgments, under a mask of professional expertise. Ultimately, the medical framing could not withstand political challenges from feminists on one side and moral conservatives on the other. Medicine was central, but it could not suffice as a civic or cultural center. It was a center that did not hold.

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