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ARTICLE

Trust, Brutality, and Human Dignity: How "Partial Birth Abortion" Helps Shape American Biopolitics

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Abstract

In this Article, I explore how nearly continuous public rhetorical challenges to abortion in the political realm first led the public and the courts to turn away from a particular abortion procedure (intact dilation and extraction, also known as partial-birth abortion) which political agitators labeled as "barbaric" and then to view physicians who performed abortions not as legitimate professionals, but simply as "abortionists," and sometimes as evil "Frankensteins." "Abortionists" use no "medical judgment" and are unworthy of deference by state legislatures, Congress, or the courts when deciding how or when to perform an abortion. The concentration on the welfare of fetuses and the actions of physicians permitted the abortion debate to bypass discussion of both the rights and welfare of pregnant patients, including their right to health, and to virtually never mention that abortion restrictions primarily affect people in poverty who cannot afford to seek reproductive health care, including an abortion, by traveling to a nonrestrictive state. Understanding the power of extreme rhetoric, including the use of social media in political campaigns and the use and misuse of concrete terms such as murder, infanticide, brutality, and dismemberment, and abstract concepts such as "human dignity," can help us plot a post-Dobbs way forward. Perhaps the demise of Roe can lead to a birth of a new rhetoric on abortion, one that concentrates on the right to health of everyone, including the right to make reproductive decisions, and requires moving abortion back into the realm of contemporary medicine, complete with a meaningful doctor-patient relationship protected by privacy and financed in a way that is accessible to all pregnant patients.

Introduction

In 1987, this Journal published a special symposium issue entitled "Justice Harry A. Blackmun: The Supreme Court and the Limits of Medical Privacy" to honor Justice Blackmun and his work.[1] No Supreme Court Justice has done more to bring the professions of law and medicine together in common cause than Justice Blackmun. That was true in 1987 and remains true today. Blackmun described his own view of the relationship between law and medicine in his introductory essay for the symposium: "In this country, Medicine and Law, of course, are sister professions and share many goals."[2] Controversies between the sisters are inherent in the courtroom, but Justice Blackmun believed that "most of them are comparatively trivial, are unnecessary, and with a little effort, can be avoided."[3] In his words, "What is really important is that there are significant issues that the two professions face in common and that are

Looking for the necessary body parts Limbs and livers and brains and hearts Bob Dylan, 2020 *(My Own Version of You)*

[1]Symposium, *Justice Harry A. Blackmun: The Supreme Court and the Limits of Medical Privacy*, 13 Am. J.L & Med. 153 (1987) [hereinafter *Limits of Medical Privacy*].

[2]Harry A. Blackmun, *Remarks*, 13 Am. J.L. & Med. 167, 167 (1987).

[3]*Id.*

best jointly considered and jointly resolved."[4] This is probably why Blackmun termed the birth of the American Society of Law and Medicine in 1972, the year *Roe* was re-argued in the Supreme Court, as "refreshing to see."[5]

Justice Blackmun listed some of the major issues faced by the two professions,[6] all of which were addressed by the 1987 symposium authors, and all of which can also be placed in the continually expanding category of American biopolitics:[7]

- Individual and familial privacy rights concerning reproduction
- The regulation of sexual behavior
- Pregnancy discrimination in the workplace
- The impact of technological advances on reproductive rights
- Fetal status under the law
- The right to procreate and the limits of that right

Justice Blackmun did not comment on his own contribution to these issues, all of which are directly affected by his majority decision in *Roe v. Wade*.[8] He was likely thinking about his most famous opinion, however, when he mused that "perhaps somewhat disturbing to me" was the Supreme Court's "inevitable involvement with all this, a Court with human limitations and fallibility, with what seems to be occasional insensitivity, almost fear, for that which is so important for medicine…"[9] He also asserted that we will inevitably fall short if we cannot assume that "all of us … are engaged in a quest for truth—truth in Medicine and truth in Law."[10]

Biopolitical sights and sounds

Abortion arguments are seldom about truth and often concern politics and polarizing extreme positions. The political debate is usually framed as pro-choice versus pro-life: protecting the liberty rights of the pregnant person versus the life of the fetus, and the rights of physicians to practice medicine versus the state's interest in regulating an arguably illegitimate procedure. These post-*Roe* political disputes have demonstrated that abortion disputes are unlikely to ever be resolved in the political arena. In fact, overall public attitudes toward abortion have not changed significantly in the past five decades. Most successful anti-*Roe* arguments concentrate on the life of the fetus by portraying it, at virtually any post-conception stage, as a "baby." Anti-*Roe* forces, for example, won a major rhetorical victory by commandeering the word "life;" pro-*Roe* activists were left to employ a less emotionally powerful word: "choice."

Deploying the "life" strategy, *Roe* has historically been attacked by displaying photographs of viable fetuses outside of abortion clinics and sonograms of developing fetuses inside the examining room.[11] Most recently, Texas has adopted a "heartbeat" law that prohibits abortions after about six weeks.[12] The Texas law highlights sounds rather than sights: adding sounds of early fetal development to the iconic "silent scream" of the twelve week fetus being aborted.[13] With the metaphoric "heartbeat" law, the battle

[4]*Id.*
[5]*Id.*
[6]*Id.*
[7]*See, e.g.*, Beyond Biopolitics: Essays on the Governance of Life and Death (Patricia Ticineto Clough & Craig Willse, eds., 2011); Nikolas Rose, The Politics of Life Itself: Biomedicine, Power, and Subjectivity in the Twenty-First Century (2007).
[8]*See* Roe v. Wade, 410 U.S. 113 (1973).
[9]Blackmun, *supra* note 2, at 167.
[10]*Id.* at 168.
[11]*See, e.g.*, Mary Ziegler, Abortion and the Law in America: Roe v. Wade to the Present 78 (2020) (discussing Anti-*Roe* strategies, including encouraging Americans to visualize fetal life)
[12]Caroline Kelly, *Texas Governor Signs Heartbeat Abortion Ban Into Law*, CNN (May 19, 202l, 11:27 AM), https://www.cnn.com/2021/05/19/politics/texas-abortion-heartbeat-ban/index.html [https://perma.cc/99NK-WL9G] (S.B. No. 8).
[13]*See* Karen Newman, Fetal Positions: Individualism, Science, Visuality 110-11 (1996) ("New forms of visualization occupy … an uneasy position in the contemporary debates about reproduction. On the one hand, the New Right's deployment of these

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to capture the language of the abortion debate continues and has been supplemented by plastic models of tiny fetuses.[14] As the late Joan Didion's biographer, Tracy Daugherty, explained of Didion: "She knew that when you change how things look and sound, you might be changing long-held values, sexuality, and how people lived their lives."[15]

The rhetoric of abortion was already extreme in 1987, with abortion widely termed "murder," physicians who performed abortions called "abortionists," and a medical procedure used for second trimester abortions denoted as a "partial birth abortion."[16] Justice Blackmun participated in more abortion opinions after 1987, including *Webster*[17] in 1989 and *Casey*[18] in 1992, both of which the pro-life community hoped the Court would use to overrule *Roe.* Neither did, although *Casey* radically diminished *Roe's* reach by replacing the fundamental right to privacy with a liberty interest. Similarly, *Roe's* requirement of a compelling state interest to justify regulation of abortion prior to viability was replaced with the rule requiring the regulation to not create an "undue burden" on the decision to terminate a pregnancy.[19]

Justice Blackmun's basic approach to the abortion right had been to try to protect physicians from state regulations that would constrain the exercise of medical judgment. Blackmun spent a decade as legal counsel to Minnesota's Mayo Clinic and often called that time the best ten years of his life.[20] Under *Roe,* physicians were permitted to use their "medical judgment" at least until the fetus was "viable."[21] Physicians could also determine, for particular fetuses, if viability had been reached.[22] Similarly, throughout pregnancy, physicians could determine if the life or health of the pregnant patient was threatened by the pregnancy and end it (of course, with the consent of the patient) if, in the physician's medical judgment, termination was necessary to preserve the patient's life or health.[23] This view had much to commend it.[24] Nonetheless, *Casey* found the physician focus of *Roe* overly deferential to physicians, noting that whatever rights physicians have in the doctor-patient relationship are derived from the rights of the patient.

After *Casey*, many in the right to life movement despaired of ever appointing enough anti-*Roe* Justices to the Court to explicitly overrule *Roe.* It was at this juncture of the long running *Roe* dispute that a new approach to challenging abortion presented itself, when an article with illustrations of what was seen as a particularly brutal method of second trimester abortion. Instead of attacking the physician or the pregnant patient, the new focus was on protecting fetuses (and the public) from a specific abortion procedure, branded as a "partial-birth abortion."[25]

"Partial-birth abortion" provided a new weapon against "abortionists" who could be portrayed as modern, reverse Frankensteins, not creating life from dead body parts, but ending the life of live fetuses by dismembering them. For anti-abortionists, partial-birth abortion seemed to be "a political

fetal images, as in *The Silent Scream*, the anti-abortion film purporting to record an abortion [by ultrasound]; the constitution of fetology and obstetrics around the fetus as an individual in need of diagnosis and treatment; medical, feminist, and cinematic discourses that fret over the 'bonding' mother … all these factors collapse the mimetic and the simulated on behalf of a humanist hermeneutics enabling to 'pro-life' rhetoric and the conservatism of the Rehnquist Supreme Court."); *see also* George J. Annas, *"I Want to Live": Medicine Betrayed by Ideology in the Political Debate Over Terri Schiavo*, 35 Stenson L. Rev. 49, 66-67 (2005).

[14]Newman, *supra* note 13, at 19.

[15]Jeffrey A. Trachtenberg, *Joan Didion, Writer Who Captured Turbulent Times, Dies at 87*, Wall St. J., Dec. 24, 2021, at A2.

[16]*See, e.g.*, *Partial-Birth Abortion and Who Decides the Costs and Benefits*, in Ziegler, *supra* note 11.

[17]Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

[18]Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[19]*See* Laurence H. Tribe, Abortion: The Clash of Absolutes 243-56 (1992).

[20]Bob Woodward & Scott Armstrong, The Brethren: Inside the Supreme Court 97, 205 (1979).

[21]Roe v. Wade, 410 U.S. 113, 163 (1973).

[22]*Id.* at 163-66.

[23]*Id.* at 163.

[24]Especially the "right to privacy." *See* George J. Annas et al., *The Right of Privacy Protects the Doctor-Patient Relationship*, 263 JAMA 858 (1990).

[25]Ziegler *supra* note 11, at 152-54. See also Letters, *The Law, the AMA, and Partial-Birth Abortion*, 281 JAMA 23, 23-26 (1999) [hereinafter Letters] for a summary of the arguments physicians on both sides of the debate were making about partial birth abortion legislation and the role of organized medicine.

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godsend."[26] When the first "partial birth abortion" case was heard by the Court, Justice Blackmun had retired and been replaced by Stephen Breyer. Breyer authored the opinion in *Stenberg* that would likely have been assigned to Justice Blackmun had he still been on the Court.[27]

I wrote about the two US Supreme Court decisions on "partial birth abortion" in the *New England Journal of Medicine* shortly after each was decided.[28] Two decades later it is much easier to discern the implications of what can be characterized as outlawing specific "pre-viability abortion techniques," which included extreme anti-abortion rhetoric that inaccurately conflated all "late term" abortions with a ghoulish method of infanticide

In retrospect it is reasonable to argue that what appeared as a freakish and marginal abortion technique at the time has turned out to be central in the ongoing image-dominated debate over *Roe.* The use of a specific technique, which could be rhetorically (but not really) linked to birth, signaled that the *Roe/Casey* framework based on fetal viability and maternal health, defined and protected by a trustworthy physician practicing standard of care medicine, was unlikely to hold for much longer. The trustworthy physician was being transformed by the anti-abortion community into a brutal abortionist who used non-medical methods to destroy life that the state had a religious/ethical interest in protecting to affirm the human dignity of the "unborn child" throughout pregnancy.

There was no medically accepted name for this procedure, which is why right to life organizations were able to label it based on politics rather than science or medicine.[29] The partial-birth abortion label is more akin to an advertising slogan, or the language of a carnival barker outside an exhibit of a deformed fetus than based on medicine or science. The label purposely adopts overtly inflammatory political language that ties abortion to childbirth to condemn this method of abortion as "infanticide." The procedure also has its own illustration, a line drawing which pictures a full-term fetus in the process of being delivered—just before it would be killed by the "abortionist."[30]

During the post-*Casey* 1990s laws prohibiting partial-birth abortions were adopted in most states. Federal anti-partial birth abortion bills were also twice passed by Congress. President Clinton vetoed both of the federal bills (both vetoes survived attempts to override them) and Clinton said he would sign a ban if the Congress included an exception for the health of the patient.[31] In his memoir, Clinton notes that while the procedure seemed "heartless and cruel," he believed it was rare "and was predominantly performed on women whose doctors had told them it was necessary to preserve their own lives or health, often because they were carrying hydrocephalic babies who were certain to die before, during, or shortly after childbirth."[32]

In 2000, the Supreme Court ruled that a Nebraska partial-birth abortion law was unconstitutional because (1) the procedure it attempted to outlaw was too vaguely described, and that therefore,

[26]Ziegler, *supra* note 11, at 152. *See also* David L. Faigman, Laboratory of Justice: The Supreme Court's 200-year Struggle to Integrate Science and the Law 243 (2004) ("[L]aws regulating so-called partial birth abortions keep the issue on the front pages of the newspapers … .").

[27]Stenberg v. Carhart, 530 U.S. 914, 920 (2000).

[28]George J. Annas, *"Partial-Birth Abortion" and the Supreme Court*, 344 New Eng. J. Med. 152 (2001); George J. Annas, *The Supreme Court and Abortion Rights*, 356 New Eng. J. Med. 2201 (2007). Portions of my discussion of *Carhart* are adapted from this article. I was criticized, and I now think properly so, for using the political term "partial birth abortion" in the title of an article for a medical journal. Steve Heilig, Letter to the Editor, *Partial Birth Abortion Letter to the Editor*, 339 New Eng. J. Med. 1717 (1998).

[29]*See* Letters, *supra* note 25, at 23.

[30]Procedure described by Douglas Johnson, National Right to Life Committee, in *A Closer Look at Partial Birth Abortions.* 142 Cong. Rec. 1743-48 (1996). The drawing can be easily located online. *See also Partial-Birth Abortion and Who Decides the Costs and Benefits, in* Ziegler, *supra* note 11.

[31]William Jefferson Clinton, My Life 706-07 (2004). He had 5 women who had undergone partial-birth abortion with him when he vetoed the first of 2 partial birth abortion bills. They represented the strongest case for the procedure: the woman's life and health were at stake, the fetus would be born dead or die shortly after birth, and the woman's ability to have additional children could be compromised. *Id.*

[32]Clinton does not even mention the second veto in his autobiography, perhaps since it would have no political consequences for him as he was then in his second term. *Id.*

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physicians could not know what exactly was being prohibited, and (2) because there was no exception for the health of the pregnant patient.[33] Nonetheless, political activists continued to seek prohibition. To improve its chances before the Supreme Court, Congress modified the definition of the prohibited procedure, and in the preface to the act declared that "partial birth abortion" was "never medically necessary."[34] President George W. Bush signed the modified bill into law on November 5, 2003, surrounded by an all-male group of nine legislators. In remarks, Bush said that the law comes to "the defense of the innocent child" by prohibiting "a terrible form of violence [that] has been directed against children who are inches from birth …"[35]

The supreme court and partial birth abortion

By the time the Supreme Court reviewed the 2003 federal law, it was a different Court than the one that had declared a substantially similar state law unconstitutional in 2000. Most importantly, Justice Sandra Day O'Connor had been replaced by Justice Samuel Alito who was nominated to the Court primarily because of an expectation that he would vote to reverse *Roe v. Wade*. He did not disappoint. Justice Alito joined with Chief Justice John Roberts and the Court's two most consistently anti-*Roe* members, Justices Antonin Scalia and Clarence Thomas, to give Justice Anthony Kennedy's minority opinion in *Stenberg* the five votes it needed to be the majority.[36] In short, the political strategy to reframe the abortion debate in America to focus on a medical procedure—denoted "partial-birth abortion"—rather than on pregnant patients, fetuses, or physicians, succeeded in the Court.

Justice Kennedy opens his opinion with descriptions of what, "for discussion purposes," he termed "intact D&E," (instead of "partial-birth abortion," the term used in the statute).[37] His descriptions of the procedure at issue are almost exclusively based on first-hand accounts from one physician and one nurse who had described how the procedure was done in the early 1990s, the time of *Casey*.[38] The physician, Martin Haskell, described the procedure in a presentation to the National Abortion Federation in 1992.[39] In Haskell's words, after the fetus is partially delivered, the physician forces a "scissors into the base of the skull" and then "evacuates the skull contents" before removing the fetus "completely from the patient."[40] In Justice Kennedy's words, "This is an abortion doctor's clinical description."[41]

An unnamed nurse, who witnessed one such abortion, described Haskell's procedure in especially gruesome, Frankenstein-like terms. The physician begins by grabbing the "baby's legs" with forceps, pulling the baby down the "birth canal" until "everything but the head [is delivered] … The baby's little fingers were clasping and unclasping, and his little feet were kicking."[42] She continues, "Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out … the doctor … sucked the baby's brains out … He threw the baby in a pan, along with the placenta and the instruments he had just

[33]Stenberg v. Carhart, 530 U.S. 914, 920 (2000).

[34]Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, §§ 2(1), 2(14)(E), 117 Stat. 1201, 1201, 1205 (codified as amended at 18 U.S.C. § 1531).

[35]President George W. Bush, Remarks at Signing Ceremony for Partial Birth Abortion Ban Act of 2003, (Nov. 5, 2003). The press release also includes a color photo of all the Congressmen and Senators who attended the signing ceremony. Press Release, White House Off. of the Press Sec., President Bush Signs Partial Birth Abortion Ban Act of 2003, https://georgewbush-whitehouse.archives.gov/news/releases/2003/11/20031105-1.html [https://perma.cc/QP2M-MFUV] (last visited June 8, 2022).

[36]Gonzales v. Carhart, 550 U.S. 124, 130 (2007).

[37]*Id.* at 137.

[38]*Id.* at 138.

[39]*Id.*

[40]*Id.*

[41]*Id.*

[42]*Id.* at 138-39. Sanger quotes Michael Dorf and Sherry Colb as observing, "only a psychopath could read that description without viscerally reacting with sympathy for the fetus." Carol Sanger, About Abortion: Terminating Pregnancy in Twenty-First-Century-America 236 (2017).

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used."[43] Justice Kennedy concedes that the procedure as described "has evolved," and that other physicians do it differently.[44] But these other methods, like squeezing the skull, crushing the skull, or even decapitating the fetus prior to removing it, do not seem like much of an improvement.

Only after these ghoulish descriptions does Kennedy quote the language of the 2003 federal law that had been modified to respond to the vagueness problems in the definition of the forbidden procedure that a majority of the Court had identified in *Stenberg*. The 2003 federal definition is as follows:

> the term 'partial-birth abortion' means an abortion in which the person performing the abortion—
>
> (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
>
> (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus …[45]

Justice Kennedy concludes that the new federal law cures the vagueness defects of the Nebraska statute. The Nebraska law was held to create an "undue burden" on women because their physicians could not readily distinguish the prohibited procedure from the commonly performed D&E procedure, and thus might not perform even the legal D&E procedure.[46] The Nebraska law reads in relevant part:

> [a "partial-birth abortion" is] an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery … . ["partially delivers vaginally a living unborn child before killing the unborn child" means] deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.[47]

Justice Kennedy believes that the new law is no longer vague because it "adopts the phrase 'delivers a living fetus' … instead of 'delivering … a living unborn child, or a substantial portion thereof.'"[48] He also finds that this new law makes the distinction between the prohibited procedure and a standard D&E abortion clear. This is primarily because the federal law specifies fetal landmarks (e.g., the "navel") instead of the vague description used in the Nebraska law, "substantial portion" of the "unborn child."[49]

Because the law applies to both previable and viable fetuses, Kennedy concedes that under *Casey* the law would be unconstitutional "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[50] Justice Kennedy, however, finds that Congress had two aims: First, Congress wanted to "[express] respect for the dignity of human life" by outlawing "a method of abortion in which a fetus is killed just inches before completion of the birth process."[51] Congress was concerned that this abortion method has "a disturbing similarity to the killing

[43]Gonzales v. Carhart, 550 U.S. at 139.

[44]*Id.* at 139.

[45]Gonzales v. Carhart, 550 U.S. at 141-43. Justice Kennedy had some experience in describing brutal methods of killing (although of animals) in his majority opinion in Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 525, 537-39 (1993) (describing the Santeria ritual sacrifice of chickens, pigeons, doves, ducks, guinea pigs, goats and sheep which are killed by "cutting … the carotid arteries in the neck," and holding that the methods of sacrifice were not "unnecessarily" cruel.)

[46]*Id.* at 144.

[47]*Stenberg*, 530 U.S. at 922.

[48]Gonzales v. Carhart, 550 U.S. at 152.

[49]*Id.* at 152-53.

[50]*Id.* at 156.

[51]*Id.* at 156-57.

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of a newborn infant [… and] was concerned with drawing a bright line that clearly distinguishes abortion and infanticide."[52]According to Congress, use of this procedure "will further coarsen society to the humanity of not only newborns, but of all vulnerable and innocent human life … ."[53] Second, Congress (although having no respect for physicians) wanted to protect medical ethics, finding that this procedure "confuses the medical, legal and ethical duties of physicians to preserve and promote life."[54]

The key to Justice Kennedy's legal analysis is his conclusion that these reasons are constitutionally sufficient to justify the ban on partial-birth abortions. Under *Casey* "the State, from the inception of pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child [and this interest] cannot be set at naught by interpreting *Casey*'s requirement of a health exception so it becomes tantamount to allowing the doctor to choose the abortion method he or she might prefer."[55] His conclusion was that

> [w]here [the State] has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in the furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including the life of the unborn.[56]

Imagine there's no woman[57]

Justice Blackmun in *Roe* concentrated so much on the rights of physicians to practice medicine that the decision marginalized the role of the patient in the abortion decision. Justice Kennedy only briefly acknowledges the patient, seeming to suggest that pregnant patients have little involvement with the decision about whether to continue a pregnancy. He writes that "respect for human life finds an ultimate expression in the bond of love the mother has for her child," and that "while no reliable data" exists on the subject, "it seems unexceptional to conclude some women come to regret their choice to abort the infant life they once created and sustained … Severe depression and loss of esteem can follow."[58] Such regret, Justice Kennedy believes, can be caused or exacerbated if a woman later learns the details of what the abortion procedure entailed. Here he suggests that physicians undermine informed consent by failing to describe the procedure to patients because they "may prefer not to disclose precise details of the means [of abortion] that will be used …"[59] From this claim, he concludes that the new law, although itself unable to prevent one abortion (only change the method used) is rationally based, because it may save some fetuses:

> It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. *The medical profession*, furthermore, *may find different and less shocking methods to abort* the fetus in the second trimester, thereby accommodating legislative demand. The *State's interest in respect for life* is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.[60]

[52]*Id.* at 158.
[53]*Id.* at 157.
[54]*Id.*
[55]*Id.* at 158.
[56]*Id.*
[57]Joan Copjec, Imagine There's No Woman: Ethics and Sublimation (2002). This provocative title for a book on Jacques Lacan suggests (to me) one way to look at Kennedy's decision. *See* Terry Eagleton, Literary Theory: An Introduction (1983) 163-74, for a discussion of Lacan's views.
[58]Gonzales v. Carhart, 550 U.S. at 159.
[59]*Id.*
[60]*Id.* at 160 (emphasis added).

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The final, closely related issue is whether the prohibition would ever pose significant health risks to pregnant patients, and whether physicians or Congress should make this determination. Kennedy picks Congress: "The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community … Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."[61] Furthermore, Kennedy argues, the law does not impose an "undue burden" on women for another reason: alternative ways of killing fetuses exist and have not been prohibited, and not only standard D&E. In his words, "If the intact D&E procedure is truly necessary in some circumstances, it appears likely *an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure.*"[62] Why this is a legitimate medical procedure, but "partial birth abortion" as described in the statute is not, goes unexplained and unexplored.

Justice Ginsburg argues (correctly in my view) that the majority of the Court has overruled *Stenberg*'s conclusion that a health exception is required as long as "substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health [because a division in medical opinion] at most means uncertainty, a factor that signals the presence of risk, not its absence."[63] This conclusion, bolstered by evidence presented by nine professional organizations, including the American College of Obstetrics & Gynecology,[64] and conclusions by all three US District Courts[65] that heard evidence concerning the Act and its effects, directly contradicts the Congressional declaration that "there is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures."[66] Even the majority agreed that this Congressional finding was untenable, which is why the Court had to disregard the relevance of the pregnant patient's health altogether.[67]

This leaves, Justice Ginsburg concludes, only "flimsy and transparent justifications" for upholding the ban. She rejects those justifications, arguing that the state's interest in "preserving and promoting fetal life" cannot be furthered by a ban that targets only a method of abortion and therefore cannot save "a single fetus from destruction" by its own terms.[68] Nor, she believes, is the condemned method sufficiently different from approved methods to make the distinction rational. This is because the Court-permitted alternative—lethal injection followed by delivering the dead fetus, also results in an intact fetus that resembles an infant.[69]

Ultimately, Ginsburg believes that the majority opinion rests entirely on the proposition, never before enshrined in a majority opinion, and explicitly repudiated in *Casey,* that "ethical and moral concerns" unrelated to the government's interest in "preserving life" can overcome fundamental rights of citizens.[70] The majority seeks to bolster this reasoning by describing pregnant patients as in such a fragile emotional state that physicians may take advantage of them by withholding information about abortion. The solution to this hypothetical problem, as Justice Ginsburg describes in the majority opinion, is to "deprive women of the right to make an autonomous choice, even at the expense of their safety."[71] The only woman on the Court at this time continues, "This way of thinking [that men must protect

[61] *Id.* at 163-64.
[62] *Id.* at 164 (emphasis added).
[63] *Id.* at 174 (Ginsburg, J., dissenting).
[64] *Id.* at 176.
[65] *Id.* at 177-79.
[66] *Id.* at 176.
[67] *Id.* at 165-66 (majority opinion).
[68] *Id.* at 181 (Ginsburg, J., dissenting).
[69] *Id.* at 182. Moreover, "in all the Court's discussion of butchery something important has been missed. Sometimes intact D&E is preferred by the patient herself…[because it brings with it] the possibility of seeing, holding, and bidding goodbye to their baby … ." Sanger, *supra* note 42, at 151.
[70] Gonzales v. Carhart, 550 U.S. at 182.
[71] *Id.* at 184.

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women by restricting their choices] reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."[72]

Justice Ginsburg also observes that Kennedy's majority opinion ignores the viability line, and instead approves a law based on "where a fetus is anatomically located when a particular medical procedure is performed … ."[73] She does not add, but could have, that application of the law prior to fetal viability makes its foundational concept, "partial-birth abortion," incoherent since if the fetus is not viable there will usually be only a delivery of dead fetal parts.[74]

Imagine there's no physician

The majority in *Carhart,* in Justice Ginsburg's words, simply can't contain its contempt for physicians who perform abortions:

> The Court's hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label "abortion doctor." A fetus is described an "unborn child," and as a "baby"; second-trimester, pre-viability abortions are referred to as "late-term," and the reasoned medical judgments of highly trained doctors are dismissed as "preferences" motivated by "mere convenience."[75]

Justice Ginsberg argues further that the opinion threatens to undercut the rule of law and the principle of stare decisis, both of which the Court affirmed in *Casey*.[76] Of course, stare decisis is at the core of the Court's deliberations in the Mississippi case which challenges a law that prohibits abortion after 15 weeks (not coincidentally the time period in which the "partial birth abortion" technique is usually used).[77] It is *Gonzales v. Carhart* that provides a precedent to disregard the medical judgment of physicians about not only the use of a particular medical procedure, but also about the health and welfare of the patient.[78]

With Blackmun retired from the Court, no Justice seriously considered the role of physicians and medical ethics in caring for pregnant patients (Kennedy did mention medical ethics, but only as an excuse for Congress to regulate the actions of physicians).[79] The majority concluded that physicians, especially "abortion doctors" (Kennedy at least stopped calling physicians "abortionists" as he did in his *Stenberg* dissent), cannot be trusted either to tell their patients the truth or to act in the medical best interests of their patients.[80]

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[72] *Id.* at 185.

[73] *Id.* at 186.

[74] Use of fetal bodies and body parts has also provoked heated debates. *See, e.g.*, George J. Annas & Sherman Elias, *The Politics of Transplantation of Human Fetal Tissue*, 320 New Eng. J. Med. 1079, 1079 (1989) (noting that federal law permits the use of tissue from dead fetuses in experimentation when it is authorized by state law.) The authors quote bioethicist Kathleen Nolan as noting that asking for fetal tissue brings to mind the image of a "devouring mother" who fails to protect her dead fetus. "No matter that the fetus is dead-mothers should still fend off the scavengers." *Id.* at 1080.

[75] Gonzales v. Carhart, 550 U.S. at 186-87 (citations omitted).

[76] *Id.* at 190-91.

[77] H.B.1510, 2018 Leg., Reg. Sess. (Miss. 2018); Richard Fausset, *Mississippi Bans Abortions After 15 Weeks; Opponents Swiftly Sue*, N.Y. Times (Mar. 20, 2018), https://www.nytimes.com/2018/03/19/us/mississippi-abortion-ban.html [https://perma.cc/8LBC-N5VZ].

[78] Gonzales v. Carhart, 550 U.S. at 163-66.

[79] *Id.* at 157. After Blackmun's retirement, the only Justice who took the privacy of the doctor-patient relationship seriously was John Paul Stevens. *See* George J. Annas, *Justice John Paul Stevens—The Practice of Medicine and the Rule of Law*, 362 New Eng. J. Med 2246, 2246 (2010) ("Stevens believes that the Constitution prohibits government from interfering in personal decision making, including medical decisions that belong in the hands of physicians and their patients, not politicians and regulators…").

[80] Gonzales v. Carhart, 550 U.S. at 159-60.

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The majority remarkably asserts that giving Congress constitutional authority over medical practice is nothing new, but identifies no case in which Congress had ever outlawed a medical procedure. Its reliance on the more than 100-year-old *Jacobson v. Massachusetts*[81] case in this regard is especially inapt. *Jacobson* was about mandatory smallpox vaccination during an epidemic. The statute had an exception for "children who present a certificate, signed by a registered physician, that they are unfit subjects for vaccination," and the Court implied that a similar medical exception would be constitutionally required for adults.[82] It is not just abortion regulations that have had a health exception for physicians and their patients—all health regulations have.

In *Roe v. Wade*, and even more centrally in its companion case, *Doe v. Bolton*,[83] Justice Harry Blackmun, writing for a 7-to-2 majority in both opinions, had centered the privacy rights *Roe* articulated in the doctor–patient relationship generally, and on the doctor's right to practice medicine specifically.[84] In rejecting a Georgia statute that required a physician to obtain the concurrence of two other physicians before performing an abortion, Justice Blackmun wrote for the majority:

> If a physician is licensed by the State, he is *recognized by the State* as *capable of exercising acceptable medical clinical judgment*. If he fails this, professional censure and deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the *physician's right to practice*.[85]

Carhart is a wholesale vote of no confidence by the Court, not only in the way physicians are licensed and regulated by state medical boards, but also in the ethics of physicians themselves. Justice Blackmun would be horrified.

Contemporary attacks on abortion techniques

After *Carhart,* abortion politics only intensified as individual states began enacting even more laws specifically designed to make abortion more difficult for both physicians and their patients. One major movement was to pass what have been politically-termed "TRAP" laws, targeted regulation of abortion providers.[86] When the Court considered a Texas statute that required, among other things, physicians who perform abortions have hospital privileges at a nearby hospital so patients can be transferred there in the event of an emergency, the Court found that laws that make it more difficult for women to obtain pre-viability abortions cannot be justified on the basis of protecting women's health unless there is evidence that the regulation has a beneficial effect on women's health.[87]

More recent attacks on abortion techniques have targeted "live dismemberment abortion," which involves delivering the fetus not whole (as in D&E or partial birth abortion), but in pieces.[88] The

[81]Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[82]Wendy K. Mariner et al., *Jacobson v. Massachusetts: It's Not Your Great-Great-Great-Grandfather's Public Health Law,* 95 Am J. Pub. Health 581, 583 (2005).

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

[84]*See* Annas et al., *supra* note 24, at 860-61.

[85]Doe v. Bolton, 410 U.S. at 199 (emphasis added).

[86]*E.g.*, *Evidence You Can Use*: *Targeted Regulation of Abortion Providers (TRAP) Laws*, Guttmacher Inst. (Jan. 22, 2020), https://www.guttmacher.org/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws [https://perma.cc/MH3M-PR4C]; Marshall H. Medoff & Christopher Dennis, *TRAP Abortion Laws and Partisan Political Party Control of State Government*, 70 Am. J. Econ. & Socio. 951 (2011).

[87]Whole Women's Health v. Hellerstedt, 136 S.Ct. 2292, 2309-10 (2016).

[88]*E.g.*, Jessica Ladd, *Ky. Attorney General Files U.S. Supreme Court Brief in Live Dismemberment Abortion Case*, WYMT (June 14, 2021, 4:25 PM), https://www.wymt.com/2021/06/14/ky-attorney-general-files-us-supreme-court-brief-live-dismemberment-abortion-case/ [https://perma.cc/YBQ9-J6LP] (discussing Kentucky House Bill 454).

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motivation for outlawing dismemberment abortion is the same as outlawing partial birth abortion: to horrify and shock Americans and make political points in the abortion debate.[89]

A Texas statute, currently being challenged in court, well illustrates the continuing fascination with making abortion appear ghoulish and horrifying. The Texas statute outlaws the procedure approved of as an alternative to "partial birth abortion" by the US Supreme Court in *Carhart.* Specifically, the Court approved of delivering the fetus in pieces.[90] Texas is now asking why what it terms "dismemberment abortion" is any better than "partial birth abortion," arguing that they should both be outlawed.[91] The Texas legislature defines (SB8) "live dismemberment abortion" as:

> An abortion in which a person, with the purpose of causing the death of an unborn child, dismembers the living unborn child and extracts the unborn child one piece at a time from the uterus through the use of clamps, grasping forceps, tongs, scissors, or a similar instrument that, through the convergence of two rigid levers, slices, crushes, or grasps, or performs any combination of those actions on, a piece of an unborn child's body to cut or rip the piece from the body.[92]

Winning its case in an *en banc* appeal, 9-5,[93] Texas made arguments justifying outlawing live dismemberment similar to those made by the US in *Carhart.* Most central is the state's interest "in providing a greater degree of dignity in a soon-to-be-aborted fetus's death" by requiring physicians to use an alternative to live dismemberment which the state argues is "self-evidently gruesome."[94] Texas bolstered its argument by noting that it "has long been illegal to kill capital prisoners by dismemberment," and it "is also illegal to dismember living animals."[95] Texas concluded that its new law "would simply extend the same protection to fetuses."[96]

According to the Appeals Court, the outlawed procedure was used only in weeks 15 to 22.[97] In weeks 15 and 16 suction alone can be used to cause fetal death and avoid the restrictions of SB8; likewise, in later weeks, digoxin can be used to "achieve" fetal death, and thus avoid the restrictions of SB8.[98] Ginsberg seems right in observing that distinguishing these procedures on the basis of one being more "ethical" or palatable seems irrational on its face.[99] Nonetheless, it is worth revisiting *Carhart* on this point. Justice Kennedy uses a line to bolster the Court's conclusion that Congress may draw boundary lines "to prevent certain practices that extinguish life and are close to actions that are condemned."[100]

The "slippery slope" case Justice Kennedy uses is as unexpected as is the Appeals Court's use of dismemberment execution of capital prisoners, his analogy is to physician assisted suicide.[101] In

[89]*See supra* notes 28-32 and accompanying text. Dismemberment as a technique of killing also brings to mind the dismemberment of the mate Frankenstein had constructed for his monster. Mary Wollstonecraft (Godwin) Shelley, Frankenstein; or The Modern Prometheus (Airmont Publ'g Co. 1968).

[90]Gonzales v. Carhart, 550 U.S. 124, 160 (2007).

[91]Tex. Health & Safety Code Ann. § 171.151 (West 2017).

[92]Similar statutes have been enacted in Alabama, Kansas, Louisiana, and Oklahoma. Ala. Code § 26-23G-2(3) (2016) (held unconstitutional by W. Ala. Women's Ctr. v. Williamson, 900 F.3d 1310 (11th Cir. 2018)); Kan. Stat. Ann. § 65-6742(b) (West 2015) (held unconstitutional by Hodes & Nauser v. Schmidt, No. 2015-CV-000490 (Kan. Dist. Ct. Apr. 7, 2021)); La. Stat. Ann. § 40:1061.1.1(B)(3) (2016); Okla. Stat. Ann. tit. 63 § 1-737.8 (2015).

[93]Whole Woman's Health v. Paxton, 10 F.4th 430 (5th Cir. 2021).

[94]*Id.* at 443.

[95]*Id.* On physicians and torture see: George J. Annas, *Unspeakably Cruel—Torture, Medical Ethics, and the Law*, 352 New Eng. J. Med 2127 (2005).

[96]The conjunction of prisoners, living animals, and fetuses suggests that "dignity" applies to all three and that it is undermined by dismemberment. Suffice it to say that the dignity of the fetus can be undermined by equating it with the dignity of "living animals" some of whom are regularly eaten alive.

[97]*Paxton*, 10 F.4th at 453-54.

[98]*Id.* at 437.

[99]Gonzales v. Carhart, 550 U.S.124, 182 (2007).

[100]*Id.* at 158.

[101]*Id.* at 157-59.

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Kennedy's words, "*Glucksberg* found reasonable the State's 'fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia."[102] We are getting very confused and confusing arguments here, and we can expect more of them in our renewed national debate on *Roe v. Wade* as well. Suffice it to note that while the slippery slope is a real[103] we are well able to distinguish our treatment of animals from our treatment of humans.

But perhaps this is the point of the "argument." We have stopped torturing prisoners and (some) animals because we recognize that they suffer, and that it is wrong for us to inflict suffering upon them. Focusing on the suffering of the fetus can lead to attempts to identify and quantify suffering, and from that point (we are not there yet), to outlaw all abortion techniques that could inflict suffering on the fetus during specific abortion procedures. There is no convincing evidence to support the claim that pre-viable fetuses can suffer.[104] Nonetheless, as with the deployment of the film *Silent Scream*, evidence is not the point: scoring anti-abortion political points is the point.[105] We will get no further "following the science" in our renewed abortion debate than we got following the science in our pandemic era debates over mask wearing and vaccine mandates.[106]

Post-pandemic abortion politics

Dobbs will not end the abortion debate in the US, and is likely to make it even more contentious. A half-century after *Roe* there have beemany changes that will directly affect how the continuing political debate over *Roe* is waged as the states get more power from the Court to regulate pregnant patients and the care their physicians can provide them. *Roe* got the abortion debate off to a problematic start by concentrating it on the right of a physician to practice medicine, rather than on the right of a patient to make critical decisions regarding her life and health. A post-*Dobbs* "restart" of the abortion debate should begin with the rights of women to equality, dignity, and nondiscrimination.[107] We should no longer be able to "imagine there's no woman" in pregnancy, and pregnant and potentially pregnant patients will have to be at the center even in states that seem to be living in earlier times.

Medical technology did not undermine *Roe* in the way Justice O'Connor thought it would. Instead of the viability line moving to an earlier and earlier fetal age, it has been virtually stable, moving only about 2 weeks since *Roe*. The most recent anti-*Roe* quest is to find an earlier line to replace viability as a relevant legal line altogether. At least for now, states have wide authority to choose their own lines at which to ban abortion, and many states will limit abortion to the first trimester (longer than the Texas heartbeat law,

[102]*Id.* at 159. Politics at the end of life has its own political slogans which are deployed instead of arguments. *See generally* George J. Annas, *The 'Right to Die' in America: Sloganeering from* Quinlan *and* Cruzan *to* Quill *and* Kevorkian, 34 Duq. L. Rev. 875 (1996).

[103]It is also worth noting that the Court, first in *Cruzan* and later in the assisted suicide cases, continued its post-*Casey* habit of virtually ignoring the role of physicians. *See* George J. Annas, *First Man and Second Woman: Reflections on the Anniversaries of Apollo 11 and* Cruzan, 73 SMU L. Rev. 7, 14 (2020).

[104]*See* Stewart W G Derbyshire, *Can Fetuses Feel Pain?*, 332 The BMJ 909, 912 (2006) (stating that the neural and anatomical pathways for pain are not complete until a gestational age of 26 weeks); Stewart W G Derbyshire & John C. Bockman, *Reconsidering Fetal Pain*, 46 J. Med. Ethics 3, 4-6 (2020) (indicating that several studies have found fetuses may feel pain as early as 20 weeks gestational age, and it is possible that fetuses can feel pain at 12 weeks); Erik Eckholm, *Theory on Pain is Driving Rules for Abortions*, N.Y. Times (Aug. 1, 2013), https://www.nytimes.com/2013/08/02/us/theory-on-pain-is-driving-rules-for-abortions.html?pagewanted=all&_r=0 [https://perma.cc/A8U3-6P5X] (discussing "pain-based abortion limit" tactics by abortion rights opponents).

[105]*See* Newman, *supra* note 13, at 110-11.

[106]For an extreme, but detailed, argument against vaccine mandates published during the pandemic see Robert F. Kennedy Jr, The Real Anthony Fauci: Bill Gates, Big Pharma, and the Global War on Democracy and Public Health (2021). For a more academic view of the complexities of the new public health and communicating science to the public see Heidi J. Larson, Stuck: How Vaccine Rumors Start—and Why They Don't go Away (2020).

[107]*See e.g.*, Rebecca Cook, *Gender, Health and Human Rights*, 1 Health & Hum. Rts. 350, 357 (1995) ("Whether it is discriminatory and socially unconscionable to criminalize a medical procedure that only women need is a question that usually goes not simply unanswered, but unasked.").

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but shorter than Mississippi's fifteen-week limit), or sometime within it.[108] Images of second trimester abortions, including "partial birth abortions" and "live dismemberment abortions" will be employed to outlaw these procedures. The goal in focusing on these techniques is political: to undermine public support for abortion itself.

Technology will also change the abortion debate in a way that has already begun to reintroduce the privacy of the doctor-patient relationship. Medical abortions are now relatively routine, and with telemedicine no actual visit to the physician is necessary.[109] First-trimester abortions with medication prescribed and monitored by a physician seems to be the direction the U.S. in heading in.[110] Justice Blackmun would, I think, approve of this development.

The U.S. health care "system" mirrors society and all its flaws. In the abortion realm there has been and remains vicious discrimination against poor and minority women. Congress has, since *Roe*, forbidden the use of any federal funding to finance abortion, and the Court has made it clear that there is no "right" to have the government pay for an abortion even if the pregnant woman cannot afford the procedure.[111] Payment remains a major challenge and a major obstacle to obtaining medical care, and all people should have equal access to health care, including contraception and abortion—but that is the subject of another article.[112]

Fifty years of Blackmun's *Roe* have ended with physicians playing a smaller and smaller role at the Supreme Court.[113] Instead of expert specialists who follow medical ethics to protect the health of their patients, a majority of the Court now sees physicians as brutal technocrats who use nonmedical methods to kill living fetuses who might otherwise become children. States have no constitutional obligation to turn over abortion regulation to physicians. Justice Blackmun's admiration of physicians and the practice of medicine is no longer shared by any of the Justices, who are as likely to see medicine as just another business that has no special ethics. Blackmun would be deeply disappointed that his view of medicine did not prevail. He would be even more disappointed at doctors and lawyers working together in the post-9/11 war on terror to torture terrorist suspects.[114]

The American public was horrified at the photos of tortured prisoners at Abu Ghraib, which drained any enthusiasm the country had to pursue the war in Iraq.[115] Similarly, the American public was horrified at the depiction of "partial-birth abortions" and "live dismemberment abortions," and support ending their use by evil Frankensteins.[116] The extreme tactics adopted by anti-abortion forces deploying partial birth abortion rhetoric and images remain effective. They will not only continue to be used; they

[108]*See* Katherine Kortsmit et al., Ctrs. for Disease Control & Prevention, *Abortion Surveillance—United States, 2019*, 70 MMWR Surveillance Summaries, Nov. 2021, at 1 (finding 93% of all abortions are performed at 13 weeks or less and 79% were performed at 9 weeks or less).

[109]Laura Schummers et al., *Abortion Safety and Use with Normally Prescribed Mifepristone in Canada*, 386 New Eng. J. Med. 57 (2022).

[110]Of abortions performed at 13 weeks or less (93%) about half are performed surgically, and about 42% are done medically. *See* Kortsmit et al., *supra* note 108, at 1.

[111]*See* George J. Annas, *Abortion Politics and Health Insurance Reform*, 361 New Eng. J. Med. 2589, 2689-90 (2009).

[112]George J. Annas et al., *Money, Sex, and Religion: The Supreme Court's ACA Sequel*, 371 New Eng. J. Med. 862, 862-64 (2014) (Court permits "religious" corporations to refuse to cover abortion and contraceptive techniques the corporation sees as abortifacients in their health plans for employees).

[113]Their role is reduced especially at the beginning and end of life. On the many other ways physicians have been directly involved with the law over the past 200 years see George J. Annas, *Doctors, Patients, and Lawyers: Two Centuries of Health Law*, 367 New Eng. J. Med. 445, 446-49 (2012).

[114]George J. Annas & Sondra S. Crosby, *Post-9/11 Torture at CIA 'Black Sites'—Physicians and Lawyers Working Together*, 372 New Eng. J. Med. 2279, 2279 (2015).

[115]The photos from Guantanamo prison produced similar negative reactions which have endured. *See, e.g.*, Carol Rosenberg, *20 Years Later, an Image From Guantanamo Bay Endures*, N.Y. Times (Jan. 11, 2022), https://www.nytimes.com/2022/01/10/us/politics/guantanamo-photos-prisoners.html [https://perma.cc/E99Y-M2BF] (The most disturbing photo is of the prisoners in orange jump suits on their knees in a large chain link fence cage. "How you see that photo depends on your politics … .") (quotation omitted).

[116]*See* discussion *supra* Sections II and III.

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will be adopted to challenge other public health measures that provoke minority resistance, including quarantine, mask requirements, and mandatory vaccination.[117]

Public opinion is where it was when *Roe* was decided, and remains consistent with Justice Blackmun's views: about 75% of Americans believed in 1972, and continue to believe today, that abortion should be a matter decided between a woman and her physician.[118] Post-*Dobbs*, each state will now have much more constitutional authority to write its own abortion law, and the country will be given yet another opportunity to divide itself into opposing camps over how the actions of pregnant people should be governed by the law.

In the context of continuing efforts to dehumanize and delegitimize abortion and the physicians who treat pregnant patients by providing this medical service, it seems appropriate to end this reflection on abortion and American biopolitics with the words of Justice Blackmun at the beginning of his opinion in *Roe v. Wade*. Justice Blackmun begins *Roe* by stating that he is aware "of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, *even among physicians*, and of the deep and seemingly absolute convictions that the subject inspires."[119] He continues by all but predicting that because of abortion's personal and emotional core, that *Roe* will not be the last Constitutional word on abortion in America. Rather, *Roe* is more likely to usher in an era of continuing biopolitical disputes that may produce even more extreme and more vicious disputes, rather than yielding a resolution. This is because one's views on how abortion should be governed are grounded in

> [o]ne's philosophy, one's experiences, *one's exposure to the raw edges of human existence*, one's religious training, *one's attitudes toward life* and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.[120]

[117] *See, e.g.*, Kennedy Jr., *supra* note 108.

[118] *Abortion*, Gallup, https://news.gallup.com/poll/1576/abortion.aspx [https://perma.cc/828W-VBXL] (last visited Apr. 13, 2022) (finding that 75%-80% of Americans have consistently thought abortion should be legal, in at least some circumstances, from 1975-2021).

[119] Roe v. Wade, 410 U.S. 113, 116 (1973) (emphasis added).

[120] *Id.* (emphasis supplied).

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