

## Nevertheless She Persisted: Comparing *Roe v. Wade*'s Two Oral Arguments

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*There is a longstanding and popular sentiment in the legal profession that oral arguments do not really matter; rather, everything rides on the written briefs. This Article takes that old adage head on, and does so through analysis of one of the most controversial cases ever decided by the United States Supreme Court: *Roe v. Wade*. It is a little-known fact that *Roe* was argued before the Court not once, but twice, which presents a unique opportunity to consider the place and power of oral arguments in Supreme Court jurisprudence.*

*This Article offers a comprehensive analysis and critique of the two oral arguments in *Roe*. The Article first analyzes the oral arguments pragmatically, undertaking a scholarly investigation of the arguments to investigate their impact on the majority opinion. Next, the Article proceeds theoretically, engaging in a feminist legal theory analysis to assess how the *Roe* arguments were both a product of their time and shaped feminist legal theory going forward.*

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Be brief, be pointed; let your matter stand  
 Lucid in order, solid, and at hand;  
 Spend not your words on trifles, but condense;  
 Strike with the mass of thought, not drops of sense[.]<sup>1</sup>

#### I. INTRODUCTION

Conventional wisdom among Supreme Court observers is that oral arguments do not impact the Justices' decisions. Besides being illogical—why would the Court hold oral arguments if they were a waste of time?—this conventional wisdom is contradicted by the Justices' own statements and data-driven research.<sup>2</sup>

Oral arguments are perhaps the Justices' most significant avenue of independent information-gathering.<sup>3</sup> Aside from any independent research

<sup>1</sup> Joseph Story, *Advice to a Young Lawyer*, in 4 A LIBRARY OF AMERICAN LITERATURE: AN ANTHOLOGY IN ELEVEN VOLUMES, LITERATURE OF THE REPUBLIC, PART I., CONSTITUTIONAL PERIOD, 1788–1820, 5 (E.C. Stedman & E.M. Hutchinson eds., 1891), [www.bartleby.com/400/poem/767.html](http://www.bartleby.com/400/poem/767.html).

<sup>2</sup> TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 2 (2004).

<sup>3</sup> *Id.*

the Justices and their clerks conduct, too much of which is time-prohibitive, all information the Justices have is what the advocates and amici put in front of them.<sup>4</sup> Oral arguments also present a key opportunity for the Justices to signal to each other which way they are leaning and coordinate about final policy outcomes.<sup>5</sup>

Naturally, oral arguments are not the sole, or even the most significant, determiner of case outcomes.<sup>6</sup> But Justices have consistently, and repeatedly, asserted that oral arguments can and do affect their decisions in cases:

Justice William J. Brennan, Jr.: I have had too many occasions when my judgment of a decision has turned on what happened in oral argument. . . . Often my idea of how a case shapes up is changed by oral argument.<sup>7</sup>

Justice William Rehnquist: I think that in a significant minority of cases in which I have heard oral argument, I have left the bench feeling different about the case than I did when I came on the bench. The change is seldom a full one-hundred-and-eighty-degree swing.<sup>8</sup>

Justice William O. Douglas: The purpose of a hearing is that the Court may learn what it does not know . . . . It is the education of the Justices . . . that is the essential function of the appellate lawyer.<sup>9</sup>

*Roe v. Wade*,<sup>10</sup> certainly one of the most controversial Supreme Court cases in history, was argued before the Supreme Court not only once, but twice. The first argument was held on December 13, 1971, and the second on October 11, 1972.<sup>11</sup> Few cases are argued twice, but interestingly, those that are turn out to be tremendously significant cases; for example, *Roe v. Wade*, *Brown v. Board of Education*,<sup>12</sup> and *Baker v. Carr*<sup>13</sup> were all argued

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<sup>4</sup> *Id.* at 143 n.19.

<sup>5</sup> *Id.* at 61.

<sup>6</sup> See generally LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 7–8 (1992) (debunking the ideas that the personalities of the Supreme Court Justices, the “climate of the times,” or the types of litigants who come before the Court determine case outcomes, and concluding instead that “it is *the law and legal arguments as framed by legal actors* that most clearly influence the content and direction of legal change”) (emphasis in original).

<sup>7</sup> JOHNSON, *supra* note 2, at 15.

<sup>8</sup> *Id.* at 15.

<sup>9</sup> *Id.* at 16.

<sup>10</sup> 410 U.S. 113 (1973).

<sup>11</sup> *Roe v. Wade*, OYEZ, <https://www.oyez.org/cases/1971/70-18> (last visited Nov. 15, 2018).

<sup>12</sup> 347 U.S. 483 (1954) (argued Dec. 9–11, 1952; reargued Dec. 7–9, 1953).

<sup>13</sup> 369 U.S. 186 (1962) (argued Apr. 19–20, 1961; reargued Oct. 9, 1961). In an interview after his retirement, Chief Justice Earl Warren was asked which case that he

twice.

This Article undertakes a deep analysis of both sets of the *Roe v. Wade* oral arguments. Part II summarizes, compares, and contrasts both sets of oral arguments. This Part also critiques the effective and ineffective oral advocacy and narrative framing techniques used during the oral arguments. Part III examines the final majority opinion and traces key points from that opinion back to the briefs and the oral arguments, thus identifying whether moments at oral argument germinated into significant features of the opinion. Part IV deconstructs and contextualizes the oral arguments through various lenses of feminist legal theory, analyzing how the framing of *Roe* was both a product of its time and a shaping force in the feminist legal theory that developed after the decision. Part V concludes by discussing how the *Roe* oral arguments and opinion are full of contradictions. During the oral arguments, the advocates and Justices used gendered language to discuss a due process analysis, even though due process is not implicated in gender discrimination issues. The oral arguments and the majority opinion are also problematic from a feminist legal theory standpoint because they define the rights of women by articulating the rights of men, and by finding a constitutionally protected right while denying autonomous decision-making by the right-holders.

## II. SUMMARY OF THE ORAL ARGUMENTS

The statute at issue in *Roe v. Wade* was a Texas law prohibiting doctors from performing abortions except to save the life of the pregnant woman:

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By “abortion” is meant that the life of the fetus or embryo shall be destroyed in the woman’s womb or that a premature birth thereof be caused.<sup>14</sup>

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.<sup>15</sup>

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participated in was the most significant. He replied, not *Brown*, *Miranda*, *Gideon*, *Griswold*, or any of the other cases decided between 1953 and 1969—but *Baker*, which held that redistricting for state elected officials is not a political question, and can be reviewed by the Supreme Court. See *More Perfect: The Political Thicket*, WNYC STUDIOS (June 9, 2016), <https://www.wnycstudios.org/story/the-political-thicket>.

<sup>14</sup> TEX. PENAL CODE ANN. § 1191 (repealed 1973).

<sup>15</sup> § 1196 (repealed 1973). Related statutes, §§ 1192–95, were also challenged.

A. *The Road to the Courtroom*

Before arriving at the United States Supreme Court as *Roe v. Wade*, the case began as two separate actions in the Northern District of Texas. Jane Roe, the now-famous plaintiff, filed one suit alleging that the Texas statute violated several fundamental personal rights.<sup>16</sup> John Hallford, a Texas physician who performed abortions, later intervened in her case.<sup>17</sup> The other case was brought by John and Mary Doe, a married couple who did not have and did not want children.<sup>18</sup> Mrs. Doe had an unspecified medical condition and had been advised by her physician not to get pregnant or to take birth control pills; the Does alleged that the Texas abortion statute interfered with their marital relations because they would be unable to obtain an abortion if Mrs. Doe became pregnant.<sup>19</sup>

The cases were consolidated and heard as one before a three-judge District Court panel.<sup>20</sup> The District Court panel found nearly entirely in favor of Plaintiffs Roe and Hallford.<sup>21</sup> The District Court found that the Does lacked standing to sue and dismissed their case.<sup>22</sup> The District Court declared the statute unconstitutional on the grounds of vagueness and infringement of a woman's Ninth Amendment right to abortion,<sup>23</sup> and it granted declaratory relief as to Plaintiffs Roe and Hallford.<sup>24</sup> The District Court declined, however, to grant injunctive relief, presumably because the court assumed that prosecutors would not continue to prosecute an unconstitutional statute.<sup>25</sup>

The next day, however, Henry Wade, the Dallas County District Attorney and eventual defendant in this case, gave a press conference announcing his intention to continue prosecuting violations of the Texas

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<sup>16</sup> See Brief for Appellants at 8–9, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 128054, at \*8–9 [hereinafter Brief for Appellants].

<sup>17</sup> *Id.* at \*12.

<sup>18</sup> *Id.* at \*10. The names John and Mary Doe were, of course, pseudonyms. The woman styled as Mary Doe was, in real life, a friend of Jane Roe's lead lawyer, Sarah Weddington. Telephone Interview with Sarah Weddington, Professor of History, University of Texas (retired) (Feb. 18, 2018).

<sup>19</sup> Brief for Appellants, *supra* note 16, at 10.

<sup>20</sup> *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *aff'd in part, rev'd in part*, 410 U.S. 113 (1973).

<sup>21</sup> See *id.* at 1225.

<sup>22</sup> *Id.*

<sup>23</sup> The Ninth Amendment provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The District Court found that the Ninth Amendment provided protection for individual rights, including a woman's right to abortion. See *Roe*, 314 F. Supp. at 1225.

<sup>24</sup> *Roe*, 314 F. Supp. at 1225.

<sup>25</sup> See *id.*

statute, completely disregarding the District Court's ruling.<sup>26</sup> Roe's lawyer, Sarah Weddington, later mused that Wade may not have meant to help her case, but he did—the District Court's refusal to grant injunctive relief would not have been appealable to the Supreme Court if Wade had kept his mouth shut.<sup>27</sup>

Roe, Hallford, and the Does appealed directly to the Supreme Court on the grounds that the District Court had erred both in dismissing the Does' case and denying injunctive relief.<sup>28</sup> The State of Texas, through Henry Wade, also appealed, but was styled as the appellee.<sup>29</sup>

Appellants' brief to the Supreme Court advanced several arguments why the Texas abortion statute should be struck down, two of which were discussed extensively at oral argument. First, Appellants argued that the statute abridged their fundamental personal rights by restricting access to abortion.<sup>30</sup> Second, Appellants asserted that the statute was unconstitutionally vague and indefinite because doctors could not know whether an abortion which would benefit the woman's *health* (physical or mental) would also necessarily save her *life*.<sup>31</sup> Appellee filed a brief asserting a lack of standing and justiciability, that the statute was not overbroad or vague, that the Constitution did not guarantee a woman's right to abortion, and that the State of Texas had an interest in prohibiting abortions except in "limited circumstances."<sup>32</sup> In addition to the parties' briefs, Justice Harry Blackmun would later bemoan the number of amicus briefs—there were fifteen<sup>33</sup>—calling the number "voluminous" and claiming

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<sup>26</sup> Dave McNeely, *Wade to Continue Abortion Trials*, DALL. MORNING NEWS, June 19, 1970, at D1.

<sup>27</sup> Telephone Interview with Sarah Weddington, Professor of History, University of Texas (retired) (Feb. 18, 2018). A failure to grant injunctive relief "in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges" may be appealed directly to the Supreme Court. See 28 U.S.C. § 1253 (1948).

<sup>28</sup> Brief for Appellants, *supra* note 16, at 1–2.

<sup>29</sup> It is unclear why, but the parties and the Court consistently used the terms "Appellant" and "Appellee" in this case, instead of the usual "Petitioner" and "Respondent."

<sup>30</sup> Brief for Appellants, *supra* note 16, at 10.

<sup>31</sup> *Id.* at 15.

<sup>32</sup> Brief for Appellee at 7–9, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 134281, at \*7–9 [hereinafter Brief for Appellee]. The full briefs contain numerous arguments that did not ultimately interest or influence the Justices, as evidenced by the fact that those arguments were not raised at either of the oral arguments nor did they find their way into the final opinion. For example, Appellants advanced an argument in their brief that the Texas abortion statute violated the physician's Fifth Amendment right against self-incrimination and the presumption of innocence. Brief for Appellants, *supra* note 16, at 143. Arguments asserted in the briefs but not raised at oral argument or included in the majority opinion will not be discussed extensively in this Article.

<sup>33</sup> See *Roe v. Wade*, 410 U.S. 113, 115 (1973). One author expressed the complaint of a Chicago lawyer who planned to submit an amicus brief on behalf of 222 physicians, but never did: "[T]his avalanche of amici briefs will probably go for naught since [the Justices] will not

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that “we’re overwhelmed.”<sup>34</sup>

B. *The First Oral Arguments: December 13, 1971*

1. For Appellants Roe, et al.: Sarah Weddington

During the first oral argument, on December 13, 1971, Sarah Weddington took the podium before the Supreme Court for Appellants.<sup>35</sup> Most resources that provide advice to appellate oral advocates stress that an advocate should be absolutely certain of what he or she is asking for, and should offer carefully selected reasons that support his or her position.<sup>36</sup> Weddington, however, began by reciting the procedural posture of the case, eventually including the District Court’s two grounds for finding the Texas abortion statute unconstitutional: “First, that the law was impermissibly vague, and second, that it violated a woman’s right to continue or terminate a pregnancy.”<sup>37</sup> These two grounds—the vagueness of the statute and a

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be able to read them all.” DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 510–11 (1998). By comparison, twenty-nine briefs were filed in the next major abortion case, *Planned Parenthood v. Casey*. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); see also Nina Totenberg, *Record Number of Amicus Briefs Filed in Same-Sex-Marriage Cases*, NPR (Apr. 28, 2015), <https://www.npr.org/sections/itsallpolitics/2015/04/28/402628280/record-number-of-amicus-briefs-filed-in-same-sex-marriage-cases> (noting that there were 148 amicus briefs in *Obergefell* and 136 in *Sebellius*).

<sup>34</sup> Oral Argument at 19:58, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), <http://www.oyez.org/cases/1971/70-18> [hereinafter Oral Argument II]. Oyez provides a transcript of oral arguments as well as the audio recording. In this Article, I have, in some instances, disagreed with and therefore departed from the Oyez transcripts. Naturally, when transcribing speech, reasonable minds may differ as to the appropriate placement of punctuation, among other things. See Daniel Libit, *Transcribers’ Agony: Frustrated Not by What Trump Says but How He Says It*, CNBC (Aug. 15, 2016), <https://www.cnbc.com/2016/08/15/transcribers-agony-frustrated-not-by-what-trump-says-but-how-he-says-it.html>. I have also generally removed “ums,” “ahs,” and verbal stumbles.

<sup>35</sup> Weddington had been the lawyer on the case from its inception and had resisted efforts from other lawyers to substitute another oral advocate. Telephone Interview with Sarah Weddington, Professor of History, University of Texas (retired) (Feb. 18, 2018); see also GARROW, *supra* note 33, 514–17.

<sup>36</sup> Saylor and Shadel advise, “Be selective, both in the *quantity* of points you make and also their quality. Get to the main points, prioritize them, and make sure you know when and how to use them.” ROBERT N. SAYLER & MOLLY BISHOP SHADEL, *TONGUE-TIED AMERICA: REVIVING THE ART OF VERBAL PERSUASION* 161 (2d ed. 2011) (emphasis in original). Garner articulates this point a few different ways, suggesting separately that advocates should “[l]imit the material [they]’ll try to cover[.]” and should “[f]ormulate the rule for which [their] case stands—and be willing to show how the rule would apply by analogy to other cases.” BRYAN A. GARNER, *THE WINNING ORAL ARGUMENT: ENDURING PRINCIPLES WITH SUPPORTING COMMENTS FROM THE LITERATURE* 55, 60 (2d ed. 2009). See also RUGGERO J. ALDISERT, *WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT* 325 (2d ed. 2003); DAVID C. FREDERICK, *THE ART OF ORAL ADVOCACY* 81 (2003); ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 155–56 (2008).

<sup>37</sup> Oral Argument at 00:46, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18),

woman's right to abortion—formed the two basic themes of the next half hour, but they were not firmly established theses at the beginning or the end of her argument.

First, Weddington asserted that the Texas statute, which provided that abortions could only be performed in order to save the woman's life, was too vague:

We submit that a doctor is not used to being restricted to acting only when it's for the purpose of saving the life of the woman, and that health is a continuum which runs into life, and a doctor in our state does not know whether he can perform an abortion only when death is imminent, or when the woman's life would be shortened. He does not know if the death must be certain, or if it could be an increase in the probability of her death.<sup>38</sup>

[I]f a woman comes in alleging that she will commit suicide[,] [i]s it then necessary for him to do, or *can* he do an abortion for the purpose of saving her life?<sup>39</sup>

During this discussion, Weddington wove in arguments about the standing of Appellants John and Mary Doe, a married couple who were not and did not seek to become pregnant,<sup>40</sup> and distinguished *United States v. Vuitch*,<sup>41</sup> a case from the previous term that found a D.C. abortion statute constitutional.<sup>42</sup> Justice Potter Stewart questioned her about the standing of Appellants John Hallford and Jane Roe, as well.

Throughout, Weddington delivered what amounted to an impassioned public policy argument for overturning the Texas statute, painting pictures of women in need,<sup>43</sup> and noting that those Texas women who could afford to were simply traveling to other states to obtain abortions: "It's so often the poor and the disadvantaged in Texas who are not able to escape the effect of the law," she said.<sup>44</sup> She emphasized the impact an unwanted pregnancy could have on a woman's body, education, employment, and family life,

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<http://www.oyez.org/cases/1971/70-18> [hereinafter Oral Argument I].

<sup>38</sup> *Id.* at 03:22.

<sup>39</sup> *Id.* at 04:20.

<sup>40</sup> *Id.* at 04:41 ("This brings up the married couple in our case.").

<sup>41</sup> 402 U.S. 62 (1971).

<sup>42</sup> *Id.* at 72–73. After the *Vuitch* decision, "in the District [of Columbia], doctors are able to exercise their normal matter of judgment, whether or not the health of the woman, mental or physical, will be affected. But in Texas, we tell the doctor that unless he can decide whether it's necessary for the purpose of saving [the woman's] life, and for no other reason, that he is subject to criminal sanctions." Oral Argument I, *supra* note 37, at 03:52.

<sup>43</sup> *E.g.*, Oral Argument I, *supra* note 37, at 13:55 ("I think it's without question that pregnancy to a woman can completely disrupt her life. Whether she's unmarried, whether she's pursuing an education, whether she's pursuing a career, whether she has family problems—all of the problems of personal and family life, for a woman, are bound up in the problem of abortion.").

<sup>44</sup> *Id.* at 06:07.



including legal realities that seem almost bizarre by modern standards: a pregnant girl or woman could be required to drop out of high school or college, or be required to quit her job, after which she would be unable to collect unemployment benefits because the law at the time provided that she was not eligible for employment.<sup>45</sup> “[P]regnancy to a woman is perhaps one of the most determinative aspects of her life. It disrupts her body, it disrupts her education, it disrupts her employment, and it often disrupts her entire family life,” Weddington said.<sup>46</sup> Weddington also mentioned, but did not discuss in much detail, the possibility (and reality) that women would seek illegal abortions if legal ones were unavailable.<sup>47</sup>

Seventeen minutes into her allotted half-hour, Justice Stewart rather pointedly said, “I trust you are going to get to what provisions of the Constitution you rely on.”<sup>48</sup> Weddington floundered a bit, suggesting—in less than two minutes—the Ninth Amendment, then citing a law review article and common law precedent, then referencing *Griswold v. Connecticut* and the Ninth Amendment again, before finally offering the liberty interest of the Fourteenth Amendment.<sup>49</sup> Justice Stewart replied, “And anything else that might be applicable.” Weddington laughingly agreed.<sup>50</sup> She could not—or would not—commit to a specific constitutional provision that would establish such a right.<sup>51</sup> At one point, she essentially admitted that she was not asserting a concrete position, but spun this as modesty: noting that the *Griswold* Court was “obviously divided” on where the right to privacy rests, she said, “I’m a little reluctant to aspire to a wisdom that the Court was not in agreement on.”<sup>52</sup> The humility here is perhaps understandable, but it again underscores a fundamental weakness of the oral argument, that Weddington was not articulating a clear legal standard by which the Court could grant the relief she was requesting.

Forty-five years later, Weddington herself remains bothered by this exchange. She knows her answer did not hit a home run, but each constitutional provision was included for the benefit of a specific Justice, and she did not then—and does not now—feel she could have safely omitted any options or committed herself more specifically.<sup>53</sup>

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<sup>45</sup> *Id.* at 14:17.

<sup>46</sup> *Id.* at 15:41.

<sup>47</sup> *Id.* at 12:45.

<sup>48</sup> *Id.* at 17:21.

<sup>49</sup> 381 U.S. 479 (1965); Oral Argument I, *supra* note 37, at 17:33.

<sup>50</sup> *Id.* at 19:27.

<sup>51</sup> *See id.* at 19:16 (“We had originally brought the suit alleging [violations of] . . . the Due Process Clause, Equal Protection Clause, the Ninth Amendment, and a variety of others.”).

<sup>52</sup> *Id.* at 18:17.

<sup>53</sup> Telephone Interview with Sarah Weddington, Professor of History, University of

The Court's final majority opinion ultimately articulates the constitutional rights of the woman, the lack of constitutional rights of the unborn fetus, and the State's interests in regulating the procedure for the protection of the woman's health and for preserving fetal life.<sup>54</sup> Weddington was not quite able to tease these interests apart and discuss them with confidence. For example:

Justice Byron White: The right you insist on [for a woman to choose an abortion] reaches right up to the time of birth?

Weddington: The Constitution, as I read it, and as interpreted and documented by Professor Means, attaches protection to the person at the time of birth.<sup>55</sup>

Here, Weddington confused a question about the rights of the woman with the rights of the fetus.

Twenty-two minutes into the argument, Justice White raised the possibility that the length of the pregnancy might be significant: he asked whether "the statute doesn't make any distinction based upon what period of pregnancy the abortion is performed."<sup>56</sup> This point had not been raised in the briefs, but historically the legality of an abortion often hinged on whether it was performed before or after "quickening" of the fetus.<sup>57</sup>

Weddington answered accurately that no, the statute did not distinguish based on the length of a pregnancy,<sup>58</sup> but a few minutes later, she said, "Obviously I have a much more difficult time saying that the [S]tate has no interest in late pregnancy."<sup>59</sup> Justice White jumped on this: "Why? Why is that?" Weddington was again rather inarticulate in her response, saying, "I think it is more the emotional response to a late pregnancy rather than it is any constitutional [reason]."<sup>60</sup>

Making concessions as an advocate is a tricky business. Doing so may build credibility with the bench, but on the other hand, an advocate does not want to give away the case. "Know what you can and can't concede," advises Bryan A. Garner.<sup>61</sup> And with his coauthor Justice Antonin Scalia, "Beware": "Any judge who presses you for a concession might well use it against you."<sup>62</sup> Each advocate at the *Roe* oral arguments made a key

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Texas (retired) (Feb. 18, 2018).

<sup>54</sup> See *Roe v. Wade*, 410 U.S. 113, 158–63 (1973).

<sup>55</sup> Oral Argument I, *supra* note 37, at 24:02.

<sup>56</sup> *Id.* at 22:28.

<sup>57</sup> See *Roe*, 410 U.S. at 132–39. "Quickening" is "the first recognizable movement of a fetus *in utero*, usually appearing from the 16th to the 18th week of pregnancy." *Id.* at 132.

<sup>58</sup> Oral Argument I, *supra* note 37, at 22:36.

<sup>59</sup> *Id.* at 23:34.

<sup>60</sup> *Id.* at 23:42.

<sup>61</sup> GARNER, *supra* note 36, at 191.

<sup>62</sup> SCALIA & GARNER, *supra* note 36, at 199. The authors also caution against conceding

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concession that was, in fact, used against them. This was Weddington's: conceding that the State could have greater interest in late pregnancy than in early. As Justice Scalia and Garner predicted, the Court indeed used the concession against Appellants, since the final opinion concluded that the State has a compelling interest in regulating abortion after the end of the first trimester.

Throughout the first oral argument, Weddington demonstrated broad mastery of the subject matter.<sup>63</sup> In addition to discussing abortion and related statistics in Texas and around the nation, she was able to answer a wide variety of questions from the bench, including questions on standing,<sup>64</sup> declaratory judgment law in Texas,<sup>65</sup> and whether unborn children can recover in other contexts, such as through inheritance and in tort.<sup>66</sup> In one exchange with Justice White, Weddington was able to cite to an Iowa Supreme Court case that had been handed down only two weeks before.<sup>67</sup> Overall, Weddington demonstrated mastery of case law, having apparently prepared for every question the Justices might ask, with the exception that she proffered no definitive position on where the Constitution protects a right to an abortion.<sup>68</sup>

Though her voice remained confident throughout, her word choices suggested that she was not entirely sure what she was arguing for: "It is our position that [pause] the freedom involved is that of a woman to determine whether or not to continue a pregnancy."<sup>69</sup> As Weddington drew to a close, she recapped rather weakly: "I think perhaps we would stress that there are two separate actions before the Court: first, that of the women, and second, that of the doctor."<sup>70</sup>

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points that are not in the briefs. *Id.* at 200.

<sup>63</sup> Oral argument guides are unanimous that thorough preparation is essential. *See, e.g.,* ALDISERT, *supra* note 36, at 333, 340, 342–43; FREDERICK, *supra* note 36, at 15; SAYLER & SHADEL, *supra* note 36, at 160; SCALIA & GARNER, *supra* note 36, at 150.

<sup>64</sup> *E.g.,* Oral Argument I, *supra* note 37, at 25:47.

<sup>65</sup> *Id.* at 11:32.

<sup>66</sup> *Id.* at 32:40.

<sup>67</sup> *Id.* at 33:36.

<sup>68</sup> Weddington had conducted a moot court only a few days before the first oral argument, and she gave tickets to the oral argument as thank you gifts for the lawyers who had played the justices. Telephone Interview with Sarah Weddington, Professor of History, University of Texas (retired) (Feb. 18, 2018). Conventional wisdom holds that moot courts are "mandatory" for advocates. *See* ALDISERT, *supra* note 36, at 327; *see also* GARNER, *supra* note 36, at 45; FREDERICK, *supra* note 36, at 75; SAYLOR & SHADEL, *supra* note 36, at 160; SCALIA & GARNER, *supra* note 36, at 158.

<sup>69</sup> Oral Argument I, *supra* note 37, at 23:25.

<sup>70</sup> *Id.* at 28:26.

## 2. For Appellee Wade: Jay Floyd

If Weddington lacked a mantra during her portion of the first oral argument, Wade's advocate, Jay Floyd, appeared hapless.<sup>71</sup> When he took the podium, Floyd, an Assistant Attorney General, attempted to ingratiate himself with the Justices by saying, "It's an old joke, but when a man argues against two beautiful ladies like this, they are going to have the last word."<sup>72</sup>

If Floyd was expecting knowing chuckles from the men on the bench, he was disappointed. There was absolute silence in the courtroom.<sup>73</sup> Floyd's opening gambit is now an actual textbook example of what not to do at oral argument: in their book on successful appellate advocacy, Justice Scalia and Garner warn, "Never tell prepared jokes," and cite this example for their reasoning.<sup>74</sup> The audio recording evidences complete silence after Floyd's remark,<sup>75</sup> and observers who were in the courtroom reported that Chief Justice Warren E. Burger stared disapprovingly at Floyd.<sup>76</sup> Sarah Weddington later quipped that she thought Floyd "had argued too many cases in rural Texas, where a little humor would have been received better."<sup>77</sup>

"The general rule . . . is that humor is for the court and not the advocates[.]"<sup>78</sup> and indeed, the most amusing moments of the oral arguments were at the advocates' expense.<sup>79</sup> Floyd hustled away from his opening faux pas by launching into a lengthy assertion that neither Roe nor the Does had standing to bring suit.<sup>80</sup> He argued that the Does did not have standing because they were not pregnant,<sup>81</sup> but then incongruously asserted that Roe *lost* her standing when she *became* pregnant, saying, "I think she makes her choice prior to the time she becomes pregnant."<sup>82</sup> Justice White retorted,

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<sup>71</sup> See EPSTEIN & KOBYLKA, *supra* note 6, at 180–81; see also FREDERICK, *supra* note 36, at 169 ("Have a Mantra.").

<sup>72</sup> Oral Argument I, *supra* note 37, at 34:17. Floyd was referring to Weddington and her co-counsel, Linda Coffee. Of course, as appellants who reserved time for rebuttal, Weddington and Coffee *would* have the last word, their beauty notwithstanding.

<sup>73</sup> *Id.* at 34:24.

<sup>74</sup> SCALIA & GARNER, *supra* note 36, at 186–87; see also Debra Cassens Weiss, *Was "Beautiful Ladies" Comment in Roe v. Wade the Worst Courtroom Humor of All Time?*, A.B.A.J. (July 30, 2013, 11:30 AM), [http://www.abajournal.com/news/article/was\\_comment\\_in\\_roe\\_v\\_wade\\_the\\_worst\\_courtroom\\_humor\\_of\\_all\\_time/](http://www.abajournal.com/news/article/was_comment_in_roe_v_wade_the_worst_courtroom_humor_of_all_time/).

<sup>75</sup> See Oral Argument I, *supra* note 37, at 34:24.

<sup>76</sup> GARROW, *supra* note 33, at 525–26.

<sup>77</sup> Telephone Interview with Sarah Weddington, Professor of History, University of Texas (retired) (Feb. 18, 2018).

<sup>78</sup> FREDERICK, *supra* note 36, at 189.

<sup>79</sup> For example, during Weddington's argument, Justice Stewart suggested that she was asserting any and all constitutional provisions that might apply, and Weddington laughingly agreed. See *supra* text accompanying note 50.

<sup>80</sup> See Oral Argument I, *supra* note 37, at 34:45.

<sup>81</sup> *Id.* at 37:40.

<sup>82</sup> *Id.* at 41:55.

“Maybe she makes her choice when she lives in Texas,” and the courtroom erupted in laughter.<sup>83</sup> As the laughter peaked, Floyd, sounding affronted (though he may have been affecting it), asked, “May I proceed?”<sup>84</sup> After the laughter died down, he suggested, “There is no restriction on moving,” but that line did not get an audible reaction.<sup>85</sup>

When asked by Justice Thurgood Marshall what the State’s interest was in regulating abortion, Floyd bumbled a bit before reciting that the Texas Court of Criminal Appeals had ruled that the State’s interest was in the protection of fetal life.<sup>86</sup> He hinted that the State had an interest in protecting the health of the woman, but never said so directly. Instead, Floyd said he was not convinced by the information on the record that abortion is safer than childbirth, nor that women do not experience emotional problems after having an abortion.<sup>87</sup> He did not explain how his personal skepticism about the medical evidence affects the constitutional analysis at hand.

As happened in the half-hour before (and would happen again during the reargument), the Justices extracted an important concession when Floyd was forced to admit that “I don’t think the courts have come to the conclusion that the unborn has full juristic rights. . . . I just don’t feel like they have, at the present time.”<sup>88</sup> Again here, Floyd phrases this as a personal belief rather than a fact, which probably did not help his credibility with the bench.

Throughout the oral argument, Floyd seemed to articulate numerous positions that contradicted each other. In addition to his assertion that neither pregnant nor non-pregnant women had standing, he alternately argued that life begins at conception, but he did not know when life began for the purposes of the abortion statute, saying, “Mr. Justice, there are unanswerable questions in this field”—again, to audible chuckling in the gallery.<sup>89</sup>

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<sup>83</sup> *Id.* at 42:15.

<sup>84</sup> Oral Argument I, *supra* note 37, at 42:23.

<sup>85</sup> *Id.* at 42:33.

<sup>86</sup> *Id.* at 47:50.

<sup>87</sup> *Id.* at 53:33 (“The protection of the mother, at one time, may still be the primary [purpose of the abortion statute], but the policy considerations, Mr. Justice, would seem to me to be for the State legislature to make a decision.”).

<sup>88</sup> *Id.* at 55:10.

<sup>89</sup> *Id.* at 56:23. Justice Marshall: “[Does the fetus have rights i]n the first few weeks of pregnancy?” Floyd: “At any time, Mr. Justice. We make no distinctions in our statute.” Justice Marshall: “You make no distinctions whether there’s life there or not?” Floyd: “We say there is life from the moment of impregnation.” Justice Marshall: “And do you have any scientific data to support that?” Floyd: “Well, we begin, Mr. Justice, in our brief, with the development of the human embryo, carrying it through to the development of the fetus from about seven to nine days after conception.” Justice Marshall: “Well, what about six days?” Floyd: “We don’t know.” Justice Marshall: “But the statute goes all the way back to one hour?” Floyd: “I don’t . . . Mr. Justice, there are unanswerable questions in this field.” *Id.* at 55:31.

The strongest part of Floyd's argument comes in the waning minutes. He correctly summarized Appellant's constitutional assertions as "the individual, or marital right of privacy . . . or the right to choose whether or not to abort a child."<sup>90</sup> He then made a strong point that

neither individual nor marital privacy has been held to be absolute. We have legal search and seizure. We have [criminalized] the possession of illegal drugs, the practice of polygamy, and other matters . . . . As far as the freedom over one's body is concerned, this is not absolute, the use of illicit drugs, the indecent exposure legislation[.]<sup>91</sup>

Close listening suggests that Floyd read the case law, but that he was prone to making bone-headed remarks that strained his credibility. In responding to questions from the bench, Floyd said in one instance, "I say, I have no authority to support this position, but it would appear . . ." <sup>92</sup> and a minute later, "Let me answer your question with a statement, if I may."<sup>93</sup> When questioned about the purposes behind the Texas abortion statute, Floyd was only able to speculate. He said, "This is just from my—I speak personally, [inaudible] I would think that even when this statute was first passed, there was some concern for the unborn fetus."<sup>94</sup> Justice Harry A. Blackmun pointed out, "Apart from your personal attitude, your court has spoken on the intent of the statute, has it not?"<sup>95</sup> Floyd replied, "Yes," but did not say more; he was unable to utilize legal precedent to establish his point.<sup>96</sup> When asked how to reconcile seemingly inconsistent Texas court opinions on whose interests are at stake, Floyd's response not only sounded ill-informed, but also undermined his own position: "Well, as I say, Your Honor, I don't think the courts have come to the conclusion that the unborn has full juristic rights. Not yet. Maybe they will. I don't know. I just don't feel like they have, at the present time."<sup>97</sup> This, of course, is precisely what Floyd was asking the U.S. Supreme Court to determine, that a fetus is a person and has constitutional rights.

Overall, Floyd comes across as rather bumbling, inconsistent, and light on the existing law and how it applied to this case, despite having brought a detailed outline of what he planned to cover during oral argument.<sup>98</sup> Although technically the Appellee—Roe had appealed the one claim denied

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<sup>90</sup> Oral Argument I, *supra* note 37, at 57:37.

<sup>91</sup> *Id.* at 58:20.

<sup>92</sup> *Id.* at 40:40.

<sup>93</sup> *Id.* at 41:38.

<sup>94</sup> *Id.* at 54:13.

<sup>95</sup> *Id.* at 54:49.

<sup>96</sup> Oral Argument I, *supra* note 37, at 54:55.

<sup>97</sup> *Id.* at 55:09.

<sup>98</sup> GARROW, *supra* note 33 at 526.

by the District Court—the state of Texas had also appealed the ruling.<sup>99</sup> Floyd should have been arguing zealously that the District Court erred in finding the Texas statute unconstitutional. He should have argued that the District Court was incorrect, both because the Texas abortion statute was not vague and because there was no constitutional right to abortion. Instead, Floyd spent the first half of his time at the podium arguing that Appellants lacked standing, and a significant portion in the middle of his time discussing (inaccurately) which party appealed where.<sup>100</sup>

### 3. Rebuttal

Oral argument best-practices suggest that the best use of rebuttal time is to “respond to the appellee’s presentation, not to rehash your argument in chief.”<sup>101</sup> Then-lawyer, now Chief Justice, John Roberts has been quoted as advising, “Only go for home runs” during rebuttal.<sup>102</sup>

During her brief rebuttal in the first *Roe* oral argument, Weddington did respond to Floyd’s presentation, but it was not exactly a home run: she pointed out that, contrary to Floyd’s assertion minutes before, Appellee had filed an appeal with the Supreme Court.<sup>103</sup> The point was hardly one that pinned Floyd to the mat, but it was an attempt to demonstrate further that Floyd was not in control of the argument he was making to the Court. Given Floyd’s hapless performance, Weddington’s point on rebuttal was probably redundant.

### C. *The Second Oral Arguments: October 11, 1972*

A few months after the December 1971 oral arguments, the Court ordered reargument, despite the fact that a five-person majority seemed already secured.<sup>104</sup> Justice Blackmun and Chief Justice Burger pushed for the reargument, while Justices Douglas, Brennan, and Marshall opposed the idea.<sup>105</sup>

Various rationales have been offered for the Court’s order for reargument, including that the case was clearly an important one and that the advocates had been unhelpful during the first argument.<sup>106</sup> In addition, there had only been seven Justices on the Court during the first argument and two

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<sup>99</sup> Oral Argument I, *supra* note 37, at 1:02:38.

<sup>100</sup> Oral Argument I, *supra* note 37, at 45:12–47:39; *see also infra* text accompanying note 103.

<sup>101</sup> ALDISERT, *supra* note 36, at 378.

<sup>102</sup> FREDERICK, *supra* note 36, at 125.

<sup>103</sup> Oral Argument I, *supra* note 37, at 1:02:37.

<sup>104</sup> EPSTEIN & KOBYLKA, *supra* note 6, at 185–86; GARROW, *supra* note 33, at 553.

<sup>105</sup> Joseph F. Kobylka, *Tales from the Blackmun Papers: A Fuller Appreciation of Harry Blackmun’s Judicial Legacy*, 70 MO. L. REV. 1075, 1087 (2005).

<sup>106</sup> EPSTEIN & KOBYLKA, *supra* note 6, at 185–86.

more had since been seated.<sup>107</sup>

The more provocative possibility—though purely rumor—is that President Nixon requested that the Supreme Court delay its decision in *Roe v. Wade* until after Nixon’s 1972 reelection campaign.<sup>108</sup> President Nixon had appointed Chief Justice Burger and Justice Blackmun to the Court fairly early in his presidency, and it was these two Justices who pushed for reargument. After the first oral arguments, Nixon would go on to appoint Justice Rehnquist and Justice Lewis F. Powell, Jr., but they were not yet on the Court when the decision was made to order reargument in *Roe*.<sup>109</sup>

Whatever the rationale, the Court ordered reargument and also requested briefing on the issue of whether the right to abortion changes as pregnancy progresses.<sup>110</sup> Appellants did not address this question in their supplemental brief and Appellee did not file a supplemental brief.<sup>111</sup>

#### 1. For Appellants *Roe*, et al.: Sarah Weddington

During the second oral argument on October 11, 1972, Sarah Weddington again argued for Appellants, bringing up constitutional grounds for the right to an abortion six minutes into her argument.<sup>112</sup> Relying on the Fifth, Ninth, and Fourteenth Amendments, along with “a great body of precedent[.]”<sup>113</sup> she then referenced a variety of Supreme Court cases related to the right to privacy:

The Court has in the past, for example, held that it is the right of the parents and of the individual to determine whether or not they will send their child to private school, whether or not their children will be taught foreign languages, whether or not they will have offspring—the *Skinner* case—whether the right to determine for themselves whom they will marry—the *Loving* case—and even in *Boddie versus Connecticut*, the choice saying that marriage itself is so important that the state cannot interfere with termination of a marriage just because the woman is unable to pay the cost.

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<sup>107</sup> GARROW, *supra* note 33, at 553, 537–38. Justices John M. Harlan II and Hugo L. Black left the Court in September 1971, a few months before the first oral argument in *Roe*. See *Justices*, OYEZ, [www.oyez.org/justices](http://www.oyez.org/justices) (last visited Nov. 15, 2018).

<sup>108</sup> Telephone Interview with Sarah Weddington, Professor of History, University of Texas (retired) (Feb. 18, 2018). In a memo among the Justices, Justice Douglas—who opposed reargument—wrote, “If the vote of the Conference is to reargue, then I will file a statement telling what is happening to us and the tragedy it entails.” GARROW, *supra* note 33, at 553–54. We do not know precisely what he was referring to, however. Justice Douglas considered writing a dissent to the order for reargument, but ultimately did not. *Id.* at 555–56.

<sup>109</sup> GARROW, *supra* note 33, at 553, 537–38.

<sup>110</sup> JOHNSON, *supra* note 2, at 23.

<sup>111</sup> EPSTEIN & KOBYLKA, *supra* note 6, at 189.

<sup>112</sup> Oral Argument II, *supra* note 34, at 06:34.

<sup>113</sup> *Id.* at 06:41.



*Griswold*, of course, is the primary case, holding that the state could not interfere in the question of whether or not a married couple would use birth control and, since then, the courts—this Court, of course, has held that the individual has the right to determine, whether they are married or single, whether they would use birth control. So, there is a great body of cases decided in the past by this Court in the areas of marriage, sex, contraception, procreation, childbearing, and education of children which says that there are certain things that are so much part of the individual concern that they should be left to the determination of the individual.<sup>114</sup>

Weddington spoke virtually uninterrupted for thirteen full minutes.<sup>115</sup> Looking back on the two sets of oral arguments, Weddington says the Justices were far less engaged the second time; it was as if their minds were already made up.<sup>116</sup>

As the Justices attempted to raise hypotheticals, Weddington consistently refused to engage, repeatedly asking them only to rule on the statute before them. Appellate argument frequently revolves around hypothetical questions from the bench, and the standard advice for oral advocates is to answer them: “Willingly answer hypotheticals. Appellate courts are concerned not only with the outcome of your case but also with how their ruling will affect the law generally.”<sup>117</sup> During the second oral argument, Weddington was much firmer in asking for the relief she requested than during her first oral argument, but her commitment to the relief requested translated into a near-refusal to answer the Justices’ hypotheticals. For example:

Justice Burger: Do you make any distinction between the first month and the ninth month of gestation?

Weddington: Our statute does not.

Justice Burger: Do you, in your position in this case?

Weddington: We are asking in this case that the Court declare the statute unconstitutional, the [S]tate having proved no compelling interest at all.<sup>118</sup>

Weddington did not abandon the strong public policy arguments she relied upon during the first oral argument. She referred to pregnancy as “an

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<sup>114</sup> *Id.* at 07:08.

<sup>115</sup> The first substantive question came from Justice Stewart after approximately thirteen and a half minutes. *Id.* at 13:33.

<sup>116</sup> Telephone Interview with Sarah Weddington, Professor of History, University of Texas (retired) (Feb. 18, 2018).

<sup>117</sup> GARNER, *supra* note 36, at 167; *see also* SCALIA & GARNER, *supra* note 36, at 155, 194–95.

<sup>118</sup> Oral Argument II, *supra* note 34, at 16:49.

irreparable injury” and continued on in that vein for some time.<sup>119</sup> Though criticized by some as failing to assert constitutional bases for the right to abortion, this theme of pregnancy-as-injury addressed the standing issues that Appellee hammered so hard during the first oral argument.

During the second set of oral arguments, the Justices again elicited important—and matching—concessions from the advocates. Justice Stewart asked Weddington, “If it were established that an unborn fetus is a person within the protection of the Fourteenth Amendment, you would have an almost impossible case here, would you not?”<sup>120</sup> She replied, with some laughter in her voice, “I would have a *very* difficult case.”<sup>121</sup> This concession, however, was one that ultimately was not used against the advocate’s position in the final opinion.

## 2. For Appellee Wade: Robert Flowers

Jay Floyd did not return to the Supreme Court for the second oral arguments on October 11, 1972. Instead, his immediate supervisor in the Attorney General’s office, Robert Flowers, argued for Appellee.<sup>122</sup> The thesis of his argument, indeed nearly the entire content of the thirty minutes he spent at the podium, was that a fetus is a person, leaving largely unsaid the legal consequence that fetal personhood means a woman has no right to an abortion.<sup>123</sup> He attempted to impress upon the Justices that pregnancy, and thus personhood, is a medical truth: “[T]he Court must take . . . the medical research and apply it to our Constitution as best it can.”<sup>124</sup>

Yet when specifically asked, Flowers admitted he had no medical evidence to support his thesis of fetal personhood:

Justice Marshall: I want you to give me a . . . recognizable medical writing of any kind that says that at the time of conception that the fetus is a person.

Flowers: I do not believe that I could give that to you without researching through the briefs that have been filed in this case, Your Honor. I’m not sure that I can give it to you after research.<sup>125</sup>

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<sup>119</sup> *Id.* at 09:48.

<sup>120</sup> *Id.* at 24:03.

<sup>121</sup> *Id.* at 24:13.

<sup>122</sup> GARROW, *supra* note 33, at 569.

<sup>123</sup> Oral Argument II, *supra* note 34, at 26:45.

<sup>124</sup> *Id.* at 43:56. It is an old joke, but if lawyers could do math, they would have become doctors.

<sup>125</sup> *Id.* at 45:46. Justice Rehnquist attempted to assist Flowers in finding medical authority, asking, “Did Judge Campbell rely on medical authorities in that statement you’re summarizing?” Flowers replied, “Yes, sir, he did.” *Id.* at 46:14. Flowers, however, was still unable to provide Justice Marshall with citations to relevant medical authorities. Flowers: “Now, I know he doesn’t address himself, Your Honor, to the moment of conception.” Justice Marshall: “I didn’t think so.” *Id.* at 48:51.

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In fact, Flowers's medical evidence explained the progression of fetal development, but did not articulate when life began.<sup>126</sup> Moreover, when pressed, Flowers backed away from his emphasis on medical certainty:

Justice Stewart: You think it's basically a medical question?

Flowers: From a constitutional standpoint, no, sir.<sup>127</sup>

Justice Blackmun: Is it not true, or is it true, that the medical profession itself is not in agreement as to when life begins?

Flowers: I think that's true, sir. But from a layman's standpoint, medically speaking, we would say that at the moment of conception, from the chromosomes, every potential that anybody in this room has is present from the moment of conception.<sup>128</sup>

Unable to make a cohesive medical argument for personhood, Flowers conceded early in the argument that he was unaware of any cases that hold a fetus is a person.<sup>129</sup> Yet ten minutes later, he articulated several cases where courts had identified tort rights of fetuses.<sup>130</sup> His inability to make the connection in a more timely manner weakened his position and his credibility—he appeared unable to draw connections between his assertions and, by extension, unable to understand their implications.

Flowers argued consistently that life (by which he meant personhood) begins at conception, yet he was unable to offer any medical or legal evidence to support his argument. Lacking evidentiary support, Flowers turned to the emotional:

This Court has been diligent in protecting the rights of the minorities, and gentlemen, we say that this is a minority, a silent minority, the true silent minority. Who is speaking for these children? Where is the counsel for these unborn children, whose life is being taken? Where is the safeguard of the right to trial by jury? Are we to place this power in the hands of a mother? In a doctor?<sup>131</sup> I think that, possibly, we have an opportunity to make one of the worst mistakes here that we've ever made.<sup>132</sup>

As the other advocates did before him, Flowers made a key concession:

Justice White: You've lost your case, then, if the fetus or the embryo is not a person, is that it?

<sup>126</sup> *E.g.*, *id.* at 44:43.

<sup>127</sup> Oral Argument II, *supra* note 34, at 27:57.

<sup>128</sup> *Id.* at 30:52.

<sup>129</sup> *Id.* at 28:15.

<sup>130</sup> *Id.* at 38:38 (citing *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967), *abrogated by Berman v. Allan*, 404 A.2d 8 (N.J. 1979); *Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson*, 201 A.2d 537 (N.J. 1964); *Jones v. Jones*, 144 N.Y.S.2d 820 (Sup. Ct. 1955)).

<sup>131</sup> Oral Argument II, *supra* note 34, at 41:52. Flowers consistently referred to fetuses as “children” and pregnant women as “mothers.” See discussion *infra* Part IV.A.2.

<sup>132</sup> Oral Argument II, *supra* note 34, at 44:12.

Flowers: Yes sir, I would say so.<sup>133</sup>

During the oral argument, Flowers appears to have been quite unprepared. He answered numerous questions from the bench with responses such as, “I would think so,”<sup>134</sup> and “I would assume so.”<sup>135</sup> Flowers ran out of material several minutes early, thanking the Justices in a farewell tone of voice before they peppered him with a few more questions.<sup>136</sup> The comments leading up to Flowers’s thanks, which were presumably his closing remarks, are so vague as to be almost nonsensical:

In this whole field of abortion here we have, on the one hand, a great clamoring for this liberization [sic] of it. Perhaps this is good. Population explosion, we have so many things that are arriving on the scene in the past few years that might have some effect on producing this type of legislature [sic], rather than facing the facts squarely. I don’t think anyone has faced the fact in making a decision whether this is a life, in a person concept.<sup>137</sup>

Flowers admitted later that he was unprepared, and that he had not even made notes about what he wanted to cover during the argument.<sup>138</sup>

### 3. Rebuttal

After Flowers’s haphazard performance, Weddington retook the podium<sup>139</sup> and hit a few home runs. Using Flowers’s admissions against him, Weddington asserted that if there was no proof of when life begins or that the statute was designed to protect fetal life, then the decision to continue a pregnancy must be a decision that “is so fundamentally a part of individual life of the family, of such fundamental impact on the person[.]”<sup>140</sup>

Justice White, stammering a bit, said, “[Y]our argument, as the way you state it, is that it wouldn’t make any difference what part of pregnancy the [S]tate would [prevent] the abortion—[i]t will still be unconstitutional.”<sup>141</sup> Weddington replied calmly, “At this time, there is no indication to show that the Constitution would give any protection [to a fetus] prior to birth,”<sup>142</sup> and that the Texas abortion statute “certainly is void

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<sup>133</sup> *Id.* at 36:38. Flowers responded so quickly and readily it seems likely he did not understand what he was being asked. *Id.*

<sup>134</sup> *E.g., id.* at 33:56.

<sup>135</sup> *Id.* at 38:13.

<sup>136</sup> *Id.* at 52:15.

<sup>137</sup> *Id.* at 51:25.

<sup>138</sup> GARROW, *supra* note 33, at 569.

<sup>139</sup> Oral Argument II, *supra* note 34, at 55:28.

<sup>140</sup> *Id.* at 55:43. Weddington was interrupted before she finished her sentence, but her point was made. *Id.*

<sup>141</sup> *Id.* at 56:22.

<sup>142</sup> *Id.* at 56:36.

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because it infringes upon the fundamental right at a time when the [S]tate can show no compelling interest early in pregnancy.”<sup>143</sup> Weddington also addressed several of Flowers’s contentions concisely:

No one is more keenly aware of the gravity of the issues or the moral implications of this case, but it is a case that must be decided on the Constitution. We do not disagree that there is a progression of fetal development. It is the conclusion to be drawn from that, upon which we disagree. We are not here to advocate abortion. We do not ask this Court to rule that abortion is good or desirable in any particular situation. We are here to advocate that the decision as to whether or not a particular woman will continue to carry or will terminate a pregnancy is a decision that should be made by that individual.<sup>144</sup>

All in all, the second set of oral arguments somewhat refined the possible grounds on which a woman’s right to an abortion might or might not be protected by the Constitution, but it did not provide new arguments or evidence from the State that fetuses have constitutional rights, nor did it flesh out the State’s interests in regulating abortions.

After both sets of oral arguments, Weddington wrote, “I think we are going to win this case. Not sure what grounds or how good the opinion will be, but [I] really think we’ll win.”<sup>145</sup> Her uncertainty about what the grounds would be was warranted, since she had presented the Court with a wide variety of possible Constitutional arguments without advocating for one in particular.

### III. TRACING THE OPINION

Sarah Weddington’s prediction,<sup>146</sup> that Appellants would win the case, proved (mostly) true: the Supreme Court struck down the Texas abortion statute as unconstitutional and largely affirmed the District Court’s rulings.<sup>147</sup> She was also right to be cautious about what the grounds would be, because the majority opinion announced rules no one had anticipated.

Justice Blackmun wrote for a seven-person majority. The text of the majority opinion is fifty-one pages long in the United States Reports.<sup>148</sup> Following a brief introduction, the majority opinion proceeded in twelve parts.

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<sup>143</sup> *Id.* at 58:07.

<sup>144</sup> *Id.* at 01:01:21.

<sup>145</sup> See GARROW, *supra* note 33, at 573.

<sup>146</sup> *Id.*

<sup>147</sup> *Roe v. Wade*, 410 U.S. 113, 166–67 (1973). The Supreme Court reversed the District Court’s determination that Hallford had standing. *Id.*

<sup>148</sup> Excluding the Court’s syllabus and recitation of the attorneys.

In the introductory paragraphs, the opinion acknowledged the swirling storm that the abortion debate engenders in the United States, and identified “the sensitive and emotional nature of the abortion controversy . . . the vigorous opposing views, even among physicians, and . . . the deep and seemingly absolute convictions that the subject inspires.”<sup>149</sup>

The introduction also noted that “population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.”<sup>150</sup> These points had not been addressed in any of the briefs, but were addressed at oral argument. Weddington had stressed the impact of the law on “the poor and the disadvantaged in Texas” during the first oral argument,<sup>151</sup> and Flowers referred to “population explosion” during the second oral argument.<sup>152</sup> No brief or oral argument, however, mentioned a disparate impact of the abortion laws on women of different races, and the opinion did not go on to analyze the “racial overtones” it casually mentioned.

Part I recited the Texas statutes at issue, noting that the statutes have been “substantially unchanged” since the 1850s and that “[s]imilar statutes are in existence in a majority of the States.”<sup>153</sup> Part II reviewed the identities of Appellants Jane Roe, John and Mary Doe, and James Hallford, as well as recited the procedural posture of the case.<sup>154</sup> Part III consists of a single paragraph, which explains that the Court will hear both the declaratory and injunctive aspects of the case.<sup>155</sup>

In Part IV, the Court addressed the standing of the four Appellants.<sup>156</sup> Given that this subject took up such a significant part of the oral arguments,<sup>157</sup> the Court disposed of this issue rather quickly, in just a couple of pages apiece. Roe was found to have standing, given that “there can be little dispute that [her case] then presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes.”<sup>158</sup> These points were made in Appellants’ brief<sup>159</sup> as well as at oral argument, though in both instances Appellants emphasized the class

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<sup>149</sup> *Roe*, 410 U.S. at 116.

<sup>150</sup> *Id.*

<sup>151</sup> Oral Argument I, *supra* note 37, at 06:07.

<sup>152</sup> Oral Argument II, *supra* note 34, at 51:43.

<sup>153</sup> *Roe*, 410 U.S. at 118.

<sup>154</sup> *Id.* at 120–22.

<sup>155</sup> *Id.* at 123.

<sup>156</sup> *Id.* at 123–29.

<sup>157</sup> See *supra* text accompanying notes 40–43, 64, 80–82, 89, 100.

<sup>158</sup> *Roe*, 410 U.S. at 124. The Court acknowledged that were it to hold otherwise, pregnancy-related claims “truly could be ‘capable of repetition, yet evading review.’” *Id.* at 125 (citations omitted).

<sup>159</sup> Brief for Appellants, *supra* note 16, at 54.

action nature of Roe's case more than the Court did in finding standing.<sup>160</sup> The majority went on to find that neither Dr. Hallford nor the Does had standing: Dr. Hallford did not have standing because his relief regarding pending or possible criminal prosecution must be in state courts,<sup>161</sup> and the Does did not have standing because the Court was "not prepared to say that the bare allegation of so indirect an injury [wa]s sufficient to present an actual case or controversy."<sup>162</sup> Here, the Court adopted the points made by Appellee in its brief and at oral argument.<sup>163</sup>

Part V of the majority opinion is a single paragraph, which served as a kind of transition into the next section. Part V summarized Roe's argument:

that [the Texas statutes] improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal 'liberty' embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras; or among those rights reserved to the people by the Ninth Amendment.<sup>164</sup>

This is a concise recitation of the points Weddington raised at oral argument and in her brief in support of a woman's right to terminate an unwanted pregnancy.<sup>165</sup> Appellants asserted, in their brief and at oral arguments, that the Texas statutes were unconstitutionally vague, but the majority did not reach that argument.<sup>166</sup>

Part VI is the longest section of the opinion, at just over seventeen pages, in which the Court reviewed the history of laws and attitudes about

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<sup>160</sup> Compare Brief for Appellants, *supra* note 16, at 54, and Oral Argument I, *supra* note 37, at 10:34 (emphasizing the class action), with *Roe*, 410 U.S. at 124–25 (no reliance on the class to find standing). The Court did not analyze whether Roe could have had standing to challenge a criminal statute to which she could not have been subject; the Texas abortion statute criminalized the behavior of doctors performing abortions, not women receiving them.

<sup>161</sup> *Roe*, 410 U.S. at 126.

<sup>162</sup> *Id.* at 128 (citations omitted).

<sup>163</sup> Brief for Appellee, *supra* note 32, at 12; Oral Argument I, *supra* note 37, at 34:27 (Does's standing), 42:38 (Hallford's standing).

<sup>164</sup> *Roe*, 410 U.S. at 129 (citations omitted).

<sup>165</sup> Brief for Appellants, *supra* note 16, at 91–124; Oral Argument I, *supra* note 37, at 17:33.

<sup>166</sup> Compare Brief for Appellants, *supra* note 16, at 125, and Oral Argument I, *supra* note 37, at 05:20 (arguing that the statutes are unconstitutionally vague), with *Roe*, 410 U.S. at 164 (declining to consider the vagueness argument). Appellants' brief also contained an argument that the Texas abortion statutes violated a doctor's right to presumed innocence and the privilege against self-incrimination by placing the burden of proving the medical necessity of the abortion on the doctor. Brief for Appellants, *supra* note 16, at 140. This argument was not mentioned at the oral arguments and it does not appear in any of the final opinions in the case.

abortion.<sup>167</sup> Taking a very long historical view, the majority described the hundred-plus years of American abortion restriction laws to be “of relatively recent vintage.”<sup>168</sup> The majority reviewed abortion practices and attitudes in the Persian, Roman, and Greek Empires, as well as the history of the Hippocratic Oath, which dates from about 400 B.C., and in some translations contains language that the doctor will not perform or assist in the procurement of abortions.<sup>169</sup>

Part VI continued by analyzing how English and American common law placed restrictions on abortions performed after “quickening,” but not before.<sup>170</sup> This may be one of the Court’s inspirations for ultimately concluding that the state’s interest in protecting fetal life matures at viability, though the majority opinion uses “viability” rather than “quickening” as the relevant point in time.<sup>171</sup> Later English statutory laws generally preserved the distinction between abortions performed before and after quickening, though these laws also introduced the exception that abortions after quickening were permissible to save the life of the mother.<sup>172</sup> American statutes, comparatively, which were first passed in the decades following the Civil War, retained the exception for abortions performed to save the woman’s life, but “the quickening distinction disappeared[.]”<sup>173</sup>

The briefs contain comparatively little on the history of abortion. Appellants’ brief spent only a few paragraphs on the history of anti-abortion statutes in the 1800s, but in less detail than the majority opinion.<sup>174</sup> Neither the Appellee’s brief nor the Appellants’ supplemental brief addressed the history of abortion.<sup>175</sup> Justice Blackmun, the author of the majority, had signaled his interest in this historical perspective several times during the second oral argument. For example, he questioned Flowers: “When you quote Blackstone, is it not true that in Blackstone’s time abortion was not a felony?”<sup>176</sup> And later:

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<sup>167</sup> *Roe*, 410 U.S. at 129–47.

<sup>168</sup> *Id.* at 129.

<sup>169</sup> *Id.* at 130–31.

<sup>170</sup> *Id.* at 132–36 (English common law), 138–39 (American common law).

<sup>171</sup> *Id.* at 163–64 (announcing the trimester framework). Justice Blackmun admitted in a conference memo that the end of the first trimester timeframe is “arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary[.]” JOHNSON, *supra* note 2, at 71.

<sup>172</sup> *Roe*, 410 U.S. at 136–38.

<sup>173</sup> *Id.* at 139. The majority opinion also reviewed the positions of the American Medical Association, the American Public Health Association, and the American Bar Association on abortion procedures. *Id.* at 143–47 n.40.

<sup>174</sup> Compare Brief for Appellants, *supra* note 16, at 34–35, with *Roe*, 410 U.S. at 138–39.

<sup>175</sup> See Oral Argument I, *supra* note 37; Oral Argument II, *supra* note 34.

<sup>176</sup> Oral Argument II, *supra* note 34, at 30:24.



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## NEVERTHELESS SHE PERSISTED

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Justice Blackmun: Do you know as a matter of historical fact when most of these abortion statutes came on the books?

Flowers: I think it was—most of them were in the mid-1800s, Your Honor.

Justice Blackmun: In fact, the latter half of the 19<sup>th</sup> century. Do you know why they all came on them at that time?

Flowers: No, sir, I surely don't. I'm sorry.<sup>177</sup>

During the second oral argument, Justice Blackmun also questioned Weddington about the Hippocratic Oath, asking why it had not been discussed in her brief.<sup>178</sup> Weddington explained—appropriately—that the content of the Hippocratic Oath did not define constitutional rights in the United States, but Justice Blackmun persisted, both at oral argument<sup>179</sup> and by including the Hippocratic Oath in the opinion.<sup>180</sup> His interest in the Hippocratic Oath may reflect his personal attachment to the medical field; he served as counsel to the Mayo Clinic during this period.<sup>181</sup>

Part VII analyzed Texas's asserted reasons behind the criminal abortion statute. At oral arguments, the advocates struggled to articulate the legislative rationales. During the first oral argument, Floyd offered both the interest in protecting fetal life<sup>182</sup> and in protecting the health of the woman,<sup>183</sup> but he was not authoritative on either point: "This is just from my—I speak personally, if I may, I would think that even when this statute was first passed, there was some concern for the unborn fetus."<sup>184</sup> Weddington asserted that there was no legislative history regarding the Texas law and that "the only legislative history . . . is that which is found in other states . . . that these statutes were adopted for the health of the mother."<sup>185</sup> Weddington had criticized the State's inability to "point to any authority, of any nature whatsoever, that would demonstrate that this statute was, in fact, adopted for [the] purpose [of protecting the life of the fetus]."<sup>186</sup>

The Court nevertheless identified state interests behind the abortion statutes, critiquing each in turn. First, the Court acknowledged the State's rationale "to discourage illicit sexual conduct," but dismissed this out of hand, writing that "it appears that no court or commentator has taken th[is]

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<sup>177</sup> *Id.* at 53:43.

<sup>178</sup> *Id.* at 19:46.

<sup>179</sup> *Id.* at 59:43.

<sup>180</sup> *Roe v. Wade*, 410 U.S. 113, 130–31 (1973).

<sup>181</sup> Telephone Interview with Sarah Weddington, Professor of History, University of Texas (retired) (Feb. 18, 2018); *see also infra* Part IV.A.3.

<sup>182</sup> Oral Argument I, *supra* note 37, at 48:20.

<sup>183</sup> *Id.* at 53:34.

<sup>184</sup> *Id.* at 54:13.

<sup>185</sup> *Id.* at 20:53.

<sup>186</sup> Oral Argument II, *supra* note 34, at 12:37.

argument seriously.”<sup>187</sup> Second, the Court acknowledged the State’s “concern[] with abortion as a medical procedure[,]” but finds that “[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth.”<sup>188</sup> The safety of the abortion procedure was emphasized by Appellants in both briefs and at both oral arguments.<sup>189</sup> Third, the Court analyzed “the State’s interest—some phrase it in terms of duty—in protecting prenatal life.”<sup>190</sup> Appellee stressed the importance of protecting fetal life in the brief and at both oral arguments.<sup>191</sup> The Court, however, pointed out that legislative history does not support this view and notes that “the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.”<sup>192</sup> Weddington had hammered that last point at both oral arguments: if the abortion statute was designed to protect fetal life, it made no sense that a pregnant woman who received an abortion (or even performed one on herself) was not liable.<sup>193</sup>

Part VIII is the beginning of the “meat and potatoes” of the *Roe* majority opinion. Here, the Court acknowledged a constitutionally protected right to privacy, and concluded that the right “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>194</sup> Strangely, the Court did not announce where in the Constitution the right to privacy is founded, writing instead that the Court “fe[lt]” the right was located “in the Fourteenth Amendment’s concept of personal liberty” but acknowledged—without exactly disagreeing—that the District Court found the right to be located in the Ninth Amendment’s reservation of rights to the people.<sup>195</sup> Here, the Court acknowledged “[t]he detriment that the State would impose upon the pregnant woman by denying her this choice altogether”:<sup>196</sup>

Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring,

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<sup>187</sup> *Roe v. Wade*, 410 U.S. 113, 148 (1973).

<sup>188</sup> *Id.* at 148–49.

<sup>189</sup> Supplemental Brief for Appellants at 10, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), 1972 WL 126044, at \*10 [hereinafter Supplemental Brief for Appellants]; Brief for Appellants, *supra* note 16, at 23, 30; Oral Argument I, *supra* note 37, at 12:41; Oral Argument II, *supra* note 34, at 05:03.

<sup>190</sup> *Roe*, 410 U.S. at 150.

<sup>191</sup> Brief for Appellee, *supra* note 32, at 56; Oral Argument I, *supra* note 37, at 48:20; Oral Argument II, *supra* note 34, at 37:02.

<sup>192</sup> *Roe*, 410 U.S. at 150–51.

<sup>193</sup> Oral Argument I, *supra* note 37, at 07:48; Oral Argument II, *supra* note 34, at 10:21.

<sup>194</sup> *Roe*, 410 U.S. at 153.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically or otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.<sup>197</sup>

At oral argument, of course, Weddington stressed the impact unwanted pregnancy has on the life of a woman.<sup>198</sup>

As is now well known, the Court announced in Part VIII of the opinion that “[t]he privacy right involved . . . cannot be said to be absolute” and that a court must consider the important state interests in regulating abortion.<sup>199</sup> The Court found that a majority of state and federal abortion decisions over the past two or three years reached this same conclusion.<sup>200</sup> At the second oral argument, Weddington had itemized the number of cases in lower courts that held in favor of the woman.<sup>201</sup> Yet the Appellee asserted in his brief<sup>202</sup> and at the first oral argument that other constitutional rights are not unlimited: “We have legal search and seizure. We have [criminalized] the possession of illegal drugs, the practice of polygamy, and other matters.”<sup>203</sup> The Court obviously agreed with both positions.

In Part IX, the Court addressed whether fetuses themselves have constitutional protections, as distinct from whether states have interests in protecting fetal life.<sup>204</sup> Fetal personhood was a large focus of Appellee’s first oral argument and the near-total content of the second oral argument.<sup>205</sup> Unfortunately for these advocates, the Court concluded exactly the opposite of the proffered arguments, which may have resulted largely from the advocates’ failure to provide legal or medical evidence supporting the assertion of fetal personhood.<sup>206</sup>

Analyzing the language of the Constitution, the Court concluded that a fetus is not a “person” under the Fourteenth Amendment, and that constitutional protections do not attach until birth.<sup>207</sup> The Court noted:

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<sup>197</sup> *Id.*

<sup>198</sup> *See supra* text accompanying notes 43–47, 119.

<sup>199</sup> *Roe*, 410 U.S. at 154.

<sup>200</sup> *Id.* at 154–55.

<sup>201</sup> Oral Argument II, *supra* note 34, at 01:00:56.

<sup>202</sup> Brief for Appellee, *supra* note 32, at 8–9.

<sup>203</sup> Oral Argument II, *supra* note 34, at 58:27.

<sup>204</sup> *Roe*, 410 U.S. at 156–62.

<sup>205</sup> *See supra* Parts II.B.2, II.C.2.

<sup>206</sup> *See supra* text accompanying notes 88, 123–33.

<sup>207</sup> *Roe*, 410 U.S. at 156–59.

If this suggestion of personhood [before birth] is established, the [A]ppellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. . . . On the other hand, the [A]ppellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.<sup>208</sup>

Floyd made the same concession during the first oral argument: "I don't think the courts have come to the conclusion that the unborn has full juristic rights. . . . I just don't feel like they have, at the present time."<sup>209</sup>

During both oral arguments, the Justices pressed Appellee's advocates to articulate and defend their assertions about when life begins.<sup>210</sup> Though both asserted that life began at conception, their positions fell apart upon closer questioning.<sup>211</sup> In the final majority opinion, the Court abandoned efforts to determine when life begins, writing: "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."<sup>212</sup> The Court reviewed the conflicting historical, legal, religious, and medical views about when life begins, finally noting that "[i]n areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth."<sup>213</sup> Weddington discussed this with the Justices in her second oral argument, and the majority opinion contains—and expands upon—the information she provided regarding tort injuries available to babies who sustained injuries as fetuses as well as the inheritance rights of the unborn.<sup>214</sup>

Part X of the majority opinion reiterated the woman's right to choose to terminate a pregnancy and the two "important and legitimate" state interests of "preserving and protecting the health of the pregnant woman . . . and . . . protecting the potentiality of human life."<sup>215</sup> The Court then introduced the trimester framework for which *Roe* is remembered: (1) the state may not infringe on the woman's right to choose to terminate a pregnancy during the first trimester; (2) the state's interest in protecting the woman's health permits regulation of the procedure after the end of the first

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<sup>208</sup> *Id.* at 156–57; see also Oral Argument II, *supra* note 34, at 28:15.

<sup>209</sup> Oral Argument I, *supra* note 37, at 55:10.

<sup>210</sup> See *supra* text accompanying notes 97, 123–33.

<sup>211</sup> See *supra* text accompanying notes 97, 123–33.

<sup>212</sup> *Roe*, 410 U.S. at 159.

<sup>213</sup> *Id.* at 161.

<sup>214</sup> *Id.* at 161–62; Oral Argument II, *supra* note 34, at 25:18.

<sup>215</sup> *Roe*, 410 U.S. at 162.

trimester; and (3) after viability, the state's interest in the potential life becomes "compelling" enough that the state "may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."<sup>216</sup> Here, Weddington's concession during the first oral argument comes back to haunt her: "Obviously I have a much more difficult time saying that the state has no interest in late pregnancy."<sup>217</sup> Though she quickly tried to characterize this interest as an "emotional response to a late pregnancy"<sup>218</sup> rather than as a constitutional interest, the damage to her case was done.

"Measured against these [newly-announced] standards," the Court concluded, the Texas abortion law "sweeps too broadly" and is unconstitutional.<sup>219</sup> Based on this reasoning, the Court also declines to address Roe's argument that the statute is unconstitutionally vague.<sup>220</sup>

Part XII concludes the opinion.<sup>221</sup> Here, the Court strikes down the entirety of the Texas abortion statutes, and writes, "we assume the Texas prosecutorial authorities will give full credence to this decision[.]"<sup>222</sup> Procedurally, Dr. Hallford's complaint is dismissed as an intervenor, but the remainder of the District Court's judgments are affirmed.<sup>223</sup>

Overall, the major surprise of the *Roe* majority opinion was the announcement of the trimester framework, which neither party had briefed nor argued. Over the course of both oral arguments, several Justices asked questions about whether a state's interest in protecting fetal life changed as the pregnancy progressed. Justice White asked Weddington whether the Texas statute "ma[d]e distinctions based upon what period of pregnancy the abortion is performed[.]"<sup>224</sup> and Chief Justice Burger asked Weddington whether Texas could "constitutionally, in [her] view, declare by statute that a fetus is a person for all constitutional purposes after the third month of gestation?"<sup>225</sup> There were no questions, however, that got as specific as the ultimately-announced trimester framework.

All in all, comparing the oral arguments to the final majority opinion, it is clear that strongly-argued points were influential, such as the impact of

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<sup>216</sup> *Id.* at 163–64.

<sup>217</sup> Oral Argument I, *supra* note 37, at 23:34.

<sup>218</sup> *Id.* at 23:42.

<sup>219</sup> *Roe*, 410 U.S. at 164.

<sup>220</sup> *Id.*

<sup>221</sup> Part XI of the opinion is a summary of the foregoing that does not contain any new substantive material.

<sup>222</sup> *Roe*, 410 U.S. at 166.

<sup>223</sup> *Id.* at 166–67.

<sup>224</sup> Oral Argument I, *supra* note 37, at 22:28.

<sup>225</sup> Oral Argument II, *supra* note 34, at 24:38.

unwanted pregnancy on women's lives,<sup>226</sup> and the truism that constitutional rights are not unlimited.<sup>227</sup> It is also evident that weakly-argued points were largely unpersuasive to the Justices, such as unsupported assertions that fetuses have constitutional rights. The glaring exception, though, is that despite Weddington's inability (or unwillingness) to commit to a constitutional theory that would support a woman's right to abortion, the majority of Justices found that right to exist, even though they were also rather wishy-washy on where the right was found.<sup>228</sup>

Another important takeaway when comparing the oral arguments to the majority opinion is that concessions matter. Each advocate made a concession at oral argument that the Court raised against them in its opinion. Weddington conceded at the first oral argument that she had "a much more difficult time saying that the [S]tate has no interest in late pregnancy[.]"<sup>229</sup> and conceded during the second oral argument that she "would have a *very* difficult case" if the Court found that fetuses were people under the Constitution.<sup>230</sup> The advocates for Texas conceded that they had no sources establishing fetal personhood, either legal<sup>231</sup> or medical.<sup>232</sup>

Overall, it appears that the advocates' performances at oral argument did shape the majority opinion, in that the stronger advocacy found its way into the opinion.

#### IV. *ROE*'S ORAL ARGUMENTS AND FEMINIST LEGAL THEORY

Feminist legal theory<sup>233</sup> was only in its infancy when *Roe v. Wade* was argued and decided, and advocate Sarah Weddington admits she did not incorporate even the nascent feminist legal theory into her case.<sup>234</sup> From a feminist standpoint, however, the case was both a product of its time and also shaped feminism and feminist legal theory going forward. This section analyzes both oral arguments in *Roe v. Wade* through various lenses of feminist legal theory.<sup>235</sup>

<sup>226</sup> See *supra* text accompanying notes 43–47, 119.

<sup>227</sup> See *supra* text accompanying notes 91, 202–03.

<sup>228</sup> See *supra* text accompanying note 195.

<sup>229</sup> Oral Argument I, *supra* note 37, at 23:34.

<sup>230</sup> Oral Argument II, *supra* note 34, at 24:13.

<sup>231</sup> Oral Argument I, *supra* note 37, at 55:10; Oral Argument II, *supra* note 34, at 28:15.

<sup>232</sup> See *supra* text accompanying notes 124–28.

<sup>233</sup> "[F]eminist theory assumes that the oppression of women is part of the way the structure of the world is organized, and that one task of feminist theory is to explain how and why this structure evolved." Jane Flax, *Women Do Theory*, in *FEMINIST FRAMEWORKS* 81 (Alison M. Jaggar & Paula S. Rothenberg eds., 3d ed. 1993).

<sup>234</sup> Telephone Interview with Sarah Weddington, Professor of History, University of Texas (retired) (Feb. 18, 2018).

<sup>235</sup> "[T]heoretical writing is often so full of jargon that it seems divorced from ordinary experience." Flax, *supra* note 233, at 81. This Article strives to avoid this problem.

“Feminist legal theory” is, of course, a rich and diverse body of scholarship, and it would be impossible to encapsulate all of it here. A few primary schools of thought have emerged, however. This Article will briefly summarize these schools, though it will go beyond these classifications in its examination of the *Roe* oral arguments.

*Equal treatment theory* and *liberal feminism* posit that the law should not treat women differently than similarly-situated men.<sup>236</sup> Emphasizing the similarities between men and women, equal treatment theory has had primary implications in employment and economic settings.<sup>237</sup> Equal treatment theory also asserts that “the law should not base decisions about individual women on generalizations (even statistically accurate ones) about women as a group.”<sup>238</sup> Accentuating the similarities between women and men also means downplaying the differences, and liberal feminism has been portrayed as “de-emphasi[zing] the mothering role.”<sup>239</sup> Relatedly, equal treatment theorists assert that pregnancy should be treated as any other disability.<sup>240</sup> Treating pregnancy as a disability, however, as the Family Medical Leave Act does, means that only women will take such leave; this means that women who desire to have children are technically protected by the law, yet employers are still incentivized to hire men who will not be requesting pregnancy-related leave.<sup>241</sup>

*Cultural feminism* emerged, in part, as a response to equal treatment theory, acknowledging and embracing the biological and cultural differences between women and men rather than focusing on similarities.<sup>242</sup> Cultural feminism is based on educational psychologist Carol Gilligan’s work and book, *In a Different Voice*, which concluded “that women and men display different emotional and cognitive traits and social skills. Women reason with an ethic of care, emphasizing connections and relations with other people, while men reason with an ethic of rights, stressing rules and autonomy concerns.”<sup>243</sup> Cultural feminist legal theory seeks to explore “how women’s

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<sup>236</sup> ALISON M. JAGGAR, *FEMINIST POLITICS & HUMAN NATURE* 28 (1983) (liberal feminism) (“The liberal conception of the good society . . . is one that . . . protect[s] the dignity of each individual and promote[s] individual autonomy and self-fulfillment.”); NANCY LEVIT & ROBERT R. M. VERCHICK, *FEMINIST LEGAL THEORY: A PRIMER* 12 (2006) (equal treatment theory).

<sup>237</sup> LEVIT & VERCHICK, *supra* note 236, at 8.

<sup>238</sup> *Id.* at 16.

<sup>239</sup> MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 22 (3d ed. 2013).

<sup>240</sup> LEVIT & VERCHICK, *supra* note 236, at 21.

<sup>241</sup> *Id.* at 21–22.

<sup>242</sup> LEVIT & VERCHICK, *supra* note 236, at 18.

<sup>243</sup> *Id.* at 9, 19–20. This takeaway—that women reason with an ethic of care and men reason with an ethic of rights—is a bit of an oversimplification of Gilligan’s thesis. Gilligan’s book grew out of her observations that oftentimes women talked about their lives in language that did not fit the psychological models of the time. Gilligan suggested this meant not that

‘different voice’—with its concern for human relationships and for the positive values of caring, nurturing, empathy, and connection—could find greater expression in law.”<sup>244</sup>

By considering women’s “different voice,” cultural feminism also “br[ought] into focus the thoroughgoing but previously unacknowledged gender-structuring of human society and human nature.”<sup>245</sup> This school of thought asserts that purely formal equality of opportunity does not lead directly to equality of results: that “identical treatment of each group might never produce meaningful equality.”<sup>246</sup> For example, cultural feminists argue that pregnancy-specific disability policies are sensible and appropriate, because the condition burdens only women.<sup>247</sup> Without gender-specific protections, women who “could not perform as men [in the workplace] [are] not entitled to equal treatment and need not be hired.”<sup>248</sup>

Equal treatment theory, liberal feminism, and cultural feminism have been criticized for setting out the male experience as the norm, addressing the female experience only insofar as it is similar to or different from the male.<sup>249</sup> Cultural feminism, with its emphasis on “empathy, nurturing, [and] caretaking” has also been criticized for “reinforc[ing] women’s stereotypical association with domesticity.”<sup>250</sup>

*Dominance theory*, developed by Catharine MacKinnon in 1979, focuses on the difference in power between men and women.<sup>251</sup> The theory identifies economic, political, and familial inequalities that arise from patterns of male domination.<sup>252</sup> Dominance theory has been influential in

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women were flawed, but that the models were. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* 1–4 (1982). Gilligan did not attempt to analyze the origins of the differences in language used by men and women, but noted that “[c]learly, these differences arise in a social context where factors of social status and power combine with reproductive biology to shape the experience of males and females and the relation between the sexes.” *Id.* at 2.

<sup>244</sup> CHAMALLAS, *supra* note 239, at 22.

<sup>245</sup> JAGGAR, *supra* note 236, at 98.

<sup>246</sup> CHAMALLAS, *supra* note 239, at 21.

<sup>247</sup> Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1701 (1990).

<sup>248</sup> Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School”*, 38 J. LEGAL EDUC. 61, 72 (1988).

<sup>249</sup> See SHARON L. ROACH ANLEU, *LAW AND SOCIAL CHANGE* 428 (2d ed. 2010) (“As male is the implicit reference for human, maleness will be the measure of equality in sex discrimination law.”); see also LEVIT & VERCHICK, *supra* note 236, at 9.

<sup>250</sup> LEVIT & VERCHICK, *supra* note 236, at 20.

<sup>251</sup> See generally CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32 (1988).

<sup>252</sup> See, e.g., Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135 (2000).



reshaping legal approaches to rape, sexual harassment, and pornography,<sup>253</sup> but it is criticized for framing all women as victims and universalizing the female experience (especially the white, middle-class female experience.)<sup>254</sup>

*Postmodern feminist legal theory* and *critical race feminism* are two newer schools of *intersectional* feminist legal theory, which stress the differences between women's experiences, especially when looking across racial and socioeconomic lines.<sup>255</sup> These theories reject the idea that women have universal experiences.

Between and among these various schools of feminist legal theory emerge two theoretical axes. First, are women best considered as being like men or different from them? Second, are women better theorized as a group or as individuals? This section asks where along these axes the *Roe v. Wade* oral arguments were framed, and whether that framing was ultimately harmful or beneficial.<sup>256</sup>

#### A. *Are Women Like Men, or Are They Different?*

A recurring theme in contemporary feminist thought focuses on “difference.” On one side, feminists argue that to overcome oppression and inequality women must be treated equally or in the same way as men. In contrast, others maintain that women have distinctive and special qualities which should be recognized and

<sup>253</sup> See Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

<sup>254</sup> E.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990). Harris argues that MacKinnon's work

though powerful and brilliant in many ways, relies on . . . gender essentialism—the notion that a unitary, “essential” women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience. The result of this tendency toward gender essentialism . . . is not only that some voices are silenced in order to privilege others . . . but that the voices that are silenced turn out to be the same voices silenced by the mainstream legal voice of “We the People”—among them, the voices of black women.

*Id.*

<sup>255</sup> See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); see also CHAMALLAS, *supra* note 239, at 23–26. Other schools of feminist thought also exist, but are omitted here as not being particularly useful in analyzing the *Roe v. Wade* oral arguments—e.g., lesbian legal theory, pragmatic legal feminism, and ecofeminism. See LEVIT & VERCHICK, *supra* note 236, at 29–31, 34–44 for more on those theories.

<sup>256</sup> Future works should also analyze the *Roe v. Wade* oral arguments and the public/private dichotomy, such as Weddington's assertion that, “a woman, because of her pregnancy, is often not a productive member of society. She cannot work, she cannot hold a job, she's not eligible for welfare, she cannot get unemployment compensation. And furthermore, in fact, the pregnancy may produce a child who will become a ward of the state.” Oral Argument II, *supra* note 34, at 01:00:10.

given greater credence.<sup>257</sup>

### 1. Individual Right or Gender Discrimination?

*Roe v. Wade* was briefed and argued as a due process case, not as an equal protection case, meaning that the Plaintiffs in *Roe* framed their case not as a gender discrimination case, but as an individual rights case.<sup>258</sup> But why should this be so, when abortion is perhaps the most gendered legal issue the Court has decided?

The most straightforward answer is that at the time *Roe* was being decided, gender discrimination was not unconstitutional. *Craig v. Boren*, the case in which the Supreme Court announced that discrimination on the basis of gender would be subject to heightened scrutiny, was argued and decided in 1976,<sup>259</sup> three years after the *Roe* decision and six years after the *Roe* Plaintiffs originally filed suit.

So, while gender cases would later be analyzed under an equal protection framework, that argument was not available to *Roe*. Weddington admitted at the first oral argument that the suit had originally been brought “alleging both [a violation of] the Due Process [C]lause, [the] Equal Protection [C]lause, the Ninth Amendment, and a variety of others[,]”<sup>260</sup> but the equal protection argument had fallen away by the time the case was briefed for the Supreme Court—neither the briefs nor the oral arguments included an equal protection or explicit gender discrimination argument. This was probably a good strategic decision, as the Court of this era was not prepared to consider pregnancy to be a gendered issue.<sup>261</sup>

Instead, the Plaintiffs’ case was argued under an individual rights analysis, relying on either the Ninth Amendment<sup>262</sup> or the Fourteenth Amendment<sup>263</sup> to support a woman’s right to terminate an unwanted

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<sup>257</sup> ANLEU, *supra* note 249, at 424.

<sup>258</sup> See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 386 (1985) (“Overall, the Court’s *Roe* position is weakened, I believe, by the opinion’s concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective.”).

<sup>259</sup> *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>260</sup> Oral Argument I, *supra* note 37, at 19:16.

<sup>261</sup> See, e.g., *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that the exclusion of pregnancy from disability insurance does not violate the Equal Protection Clause). “The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.” *Id.* at 496 n.20.

<sup>262</sup> U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

<sup>263</sup> U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]”).

pregnancy. During her first oral argument, Weddington made this assertion:

I think the Fourteenth Amendment is equally an appropriate place [to find the right to abortion], under the rights of persons to life, liberty, and the pursuit of happiness. I think that in as far as “liberty” is meaningful, that liberty to these women would mean liberty from being forced to continue the unwanted pregnancy.<sup>264</sup>

Weddington failed to expand effectively on this point, however. The Court had written in 1923 that the liberty interest protected by the Due Process Clause includes the freedom “to marry, establish a home and bring up children[.]”<sup>265</sup> and Weddington was familiar with the case law that came after. At the first oral argument, however, it appeared she could only *suggest* constitutional arguments, rather than actually make them.<sup>266</sup>

During the second oral argument, Weddington asserted the individual rights argument in more detail:

The main [constitutional grounds] that we are relying on before this Court are the Fifth, Ninth, and the Fourteenth Amendments. There’s a great body of precedent. . . . The Court has[,] in the past, for example, held that it is the right of parents and of the individual to determine whether or not they will send their child to private school, whether or not their children will be taught foreign languages, whether or not they will have offspring[—]the *Skinner* case[—]whether the right to determine for themselves whom they will marry[—]the *Loving* case[—]and even in *Boddie* versus Connecticut the choice saying that marriage itself is so important that the state cannot interfere with termination of a marriage just because the woman is unable to pay the cost. *Griswold*, of course, is the primary case[,] holding that the state could not interfere in the question of whether or not a married couple would use birth control and, since then, . . . this Court, of course, has held that the individual has the right to determine[,] whether they are married or single, whether they would use birth control. So there is a great body of cases decided in the past by this Court in the areas of marriage, sex, contraception, procreation, childbearing, and education of children which says that there are certain things that are so much part of the individual concern that they should be left to the determination of the individual.<sup>267</sup>

Again here, Weddington argues that abortion is an extension of the rights already recognized by the Court that allow individuals to make decisions about their families. There is one more logical step Weddington

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<sup>264</sup> Oral Argument I, *supra* note 37, at 18:49.

<sup>265</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>266</sup> See *supra* text accompanying notes 49–53.

<sup>267</sup> Oral Argument II, *supra* note 34, at 06:41.

could have taken here, but she stops just short: she could have made explicit the argument that, if birth control is constitutionally protected so people do not become parents if they do not want to, then abortion should be constitutionally protected for the same reason.<sup>268</sup>

As briefed and argued, the Plaintiffs' emphasis on individual rights, rather than women's rights, also fits with the equal treatment theory that was gaining ground during this era: that women are like men and should be treated the same.<sup>269</sup> Both male and female humans can be parents—from that perspective, there is nothing particularly gendered about the right to procreate or the right to have access to birth control, and framing abortion as one more option in an individual's decision to form a family and/or become a parent removes the gendered impact of the abortion procedure.

There is, of course, an obvious hole in this approach, which is that pregnancy is experienced exclusively by women, and that unwanted pregnancies in particular burden women in a far different way than men. In that sense, Jane Roe was hamstrung by the individual rights and equal treatment approaches—the ability to have access to contraception, for example, applied to both men and women, meaning every individual could potentially make use of the right articulated in *Griswold* and *Eisenstadt*. A right to abortion, on the other hand, would not apply to all individuals, only women.

Moreover, in the first oral argument, when Weddington spoke about privacy and individual rights, she discussed the impact of the Texas abortion law on women exclusively. During the portion of the argument devoted to the vagueness of the statute, she argued that the statute impacted doctors—universally referred to as “he’s” during the case—but she never discussed how the abortion statute affected the individual rights of potential fathers, and the Justices did not ask.<sup>270</sup> Thus, there was a fundamental disconnect between the gender-neutral argument required by the Due Process Clause and the gendered impact Weddington was arguing before the Court.

In both oral arguments, Weddington emphasized the policy rationales that supported her position that the abortion statute was bad for women, but

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<sup>268</sup> The majority opinion also fails to explain the connection between family planning via contraceptives and via abortion. See Kobyłka, *supra* note 105, at 1091.

<sup>269</sup> See CHAMALLAS, *supra* note 239, at 44. As Weddington argued *Roe*, equal treatment theory was gaining traction in legal spheres. See Ginsburg, *supra* note 258, at 377–78 (finding the strategy effective). But see LEVIT & VERCHICK, *supra* note 236, at 17 (finding mixed results).

<sup>270</sup> In the final moments of his time at the first oral arguments, Wade advocate, Jay Floyd, suggested that “in some instances, a consideration should be given for the father, if he would be objective to abortion.” Oral Argument I, *supra* note 37, at 01:02:13. The Court did not take up this possibility, either at oral argument or in the opinion. For more on *Roe* and men, see *infra* Part IV.A.3.

her emphasis on the suffering of women would have better supported a gender discrimination analysis, rather than a due process argument. The reverse is also true: in making a due process argument, Weddington would have done better to emphasize the impact of the Texas abortion law upon potential *parents*, rather than just women.

## 2. Ethic of Rights, Ethic of Care

Cultural feminism as a legal theory had not yet been developed when *Roe* was being litigated, but the oral arguments and the opinion reflect, and indeed may have influenced, its underlying framework. Cultural feminism posits that women frame concepts of justice according to an ethic of care, “stressing connections and relations with other people[,]” while men consider justice according to an ethic of rights, “stressing rules and autonomy.”<sup>271</sup> As a result of these differences, some scholars conclude that “[w]omen’s morality arises from the experience of connection which they conceive of as a problem of inclusion rather than one of balancing competing claims, whereas men value individual achievement, separation, and competition.”<sup>272</sup> This theory has been criticized for reinforcing stereotypical female domesticity and characterizing women as needing protection,<sup>273</sup> and it ignores the role of socialization within a patriarchal system on the “different” moral and emotional development of boys and girls.<sup>274</sup>

In her initial oral argument—fairly criticized for being more of a lobbyist pitch than a constitutional analysis<sup>275</sup>—Weddington utilized frequent feminist techniques of storytelling<sup>276</sup> and contextual reasoning<sup>277</sup> in arguing that the Texas abortion statutes were bad for women, and that the idea poor women were more likely to carry unwanted pregnancies to term was unfair.<sup>278</sup> This ethic of care, emphasizing the personal in arriving at a concept of justice, did not sit well with the (male) Justices. During her second oral argument, Weddington changed her angle, shifting away from story- and policy-based arguments to rights-based arguments more grounded in the Constitution:

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<sup>271</sup> Menkel-Meadow, *supra* note 248, at 78–79; *see also* GILLIGAN, *supra* note 243, at 174 (“While an ethic of justice proceeds from the premise of equality—that everyone should be treated the same—an ethic of care rests on the premise of nonviolence—that no one should be hurt.”).

<sup>272</sup> ANLEU, *supra* note 249, at 425.

<sup>273</sup> LEVIT & VERCHICK, *supra* note 236, at 18.

<sup>274</sup> I am grateful to Kyle Velte for this insight.

<sup>275</sup> EPSTEIN & KOBYLKA, *supra* note 6, at 179.

<sup>276</sup> LEVIT & VERCHICK, *supra* note 236, at 50.

<sup>277</sup> *Id.* at 44–49.

<sup>278</sup> *See supra* text accompanying notes 43–46.

Justice Blackmun: Do I get from this, then, that your case depends primarily on the proposition that the fetus has no constitutional rights?

Weddington: It depends on saying that the woman has a fundamental constitutional right and that the [S]tate has not proved any compelling interest for regulation in the area.<sup>279</sup>

We are here to advocate that the decision as to whether or not a particular woman will continue to carry or will terminate a pregnancy is a decision that should be made by that individual. That, in fact, she has a constitutional right to make that decision for herself and that the [S]tate has shown no [compelling] interest in interfering with that decision.<sup>280</sup>

I am urging that, in this particular context, this statute is unconstitutional that in the *Baird v. Eisenstadt* case, this Court said that if the right of privacy is to mean anything, it is the right of the individual, whether married or single, to make determinations for themselves.<sup>281</sup>

Viewing the oral arguments through the lens of cultural feminism, then, suggests that Weddington was more successful arguing a rights-based approach to the men on the bench. The final opinion is defined by its rights-based analysis: the majority opinion carefully delineates the right of a woman to terminate a pregnancy, the fetus's lack of constitutional rights, and the moments at which the state's interest in protecting maternal health and protecting fetal life matures. Viewed from the vantage point of the majority opinion, Weddington's masculine, ethic of rights-based approach during the second oral argument was more effective than her ethic of care-based argument the first time.

Now-Justice Ginsburg has hypothesized that the *Roe v. Wade* opinion created such a firestorm because it "ventured too far in the change it ordered[,]"<sup>282</sup> and that the trimester framework announced by the Court went so far past Appellants' comparatively modest request to strike down the "extreme" Texas statute.<sup>283</sup> Through a cultural feminism lens, however, the (male) justices may have felt the trimester framework was necessary to carefully delineate which party had which rights and when. Utilizing an ethic of rights, the Justices in the majority may have felt it especially important to articulate when the state's two interests (protecting the woman's

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<sup>279</sup> Oral Argument II, *supra* note 34, at 23:19.

<sup>280</sup> *Id.* at 01:01:48.

<sup>281</sup> *Id.* at 01:03:06.

<sup>282</sup> Ginsburg, *supra* note 258, at 376.

<sup>283</sup> *Id.* at 385; *see also* Oral Argument II, *supra* note 34, at 56:02. Justice White: "I gather your argument is that the state may not protect the life of the fetus or prevent an abortion even, at any time during pregnancy. Right up until the moment of birth." Weddington: "At this time, my point is that this particular statute is unconstitutional." *Id.*

health and protecting fetal life) mature.<sup>284</sup>

Gilligan did not conclude that men and women *inherently* reason differently; she explicitly declined to analyze whether women's concern for relationships over rights was biological or the result of socialization.<sup>285</sup> I am skeptical that women inherently reason with an ethic of care, but I theorize that our society reasons *about* women with an ethic of care.<sup>286</sup> Women are expected to focus on relationships and are indeed frequently defined by their relationships—particularly when those women are mothers.<sup>287</sup>

Using this perspective, then, the backlash against *Roe* is explainable not because the opinion impresses an ethic of rights onto women who reason with an ethic of care. Instead, the backlash can be traced to the opinion's granting individual rights to pregnant women *independent* of their relationships, particularly their relationship to the fetus.<sup>288</sup> The majority opinion finds that women have a due process right to choose to terminate a pregnancy, but finds that the fetus has no constitutional rights. The objection to this framework may be based, at least in part, in the rejection of the notion of a woman having her own rights, separate and apart from her relationships to other people, particularly her potential child.

During oral argument, the advocates reinforce their emphasis on the woman's individual rights or on the woman's relationship to the fetus. Weddington consistently refers to pregnant women, either in the plural or the singular, and occasionally refers to Jane Roe as "an unmarried pregnant

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<sup>284</sup> Of course, the Justices are justices, and they are supposed to be rights-oriented. Then again, the Constitution and the entire U.S. legal system was designed by men, and the ethic of care versus the ethic of rights thesis of cultural feminism suggests that law in the United States is naturally rights-based in its reasoning. This begs the question of what a legal and constitutional system would look like if it were based on an ethic of care, emphasizing relationships over individual rights.

<sup>285</sup> GILLIGAN, *supra* note 243, at 2.

<sup>286</sup> See ANLEU, *supra* note 249, at 426. Anleu suggests that women's biological potential for pregnancy means they have the "experience of connection [which] contrasts with the essentially masculine ideals of separation and individuation which underpin modern liberal legal theory. Women's lives are relational not autonomous; their experience of being human is different from that of men." *Id.* (footnote omitted). While I am unwilling to accept that possession of a uterus causes a woman to inherently reason differently, I readily believe that possession of a uterus causes women to be socialized and taught differently than men. I also recognize that not every woman has a uterus.

<sup>287</sup> See GILLIGAN, *supra* note 243, at 23. The author concludes that when human development is considered only from the vantage point of "man's life cycle[, which includes] the celebration of separation, autonomy, individuation, and natural rights," the role of a woman is "to protect" "the continuing importance of attachment[.]" *Id.*

<sup>288</sup> In the final moments of his time at the first oral arguments, Floyd suggested that "in some instances, a consideration should be given for the father, if he would be objective to abortion." Oral Argument I, *supra* note 37, at 01:02:13. The Court did not take up this possibility, either at oral argument or in the opinion.

girl.”<sup>289</sup> Floyd and Flowers, arguing for Wade and the State of Texas, both consistently refer to pregnant women as “mothers,”<sup>290</sup> even though a pregnant woman is not typically considered a mother until the child is born—baby shower cards congratulate the “mother-to-be” rather than the “mother.”<sup>291</sup> These word choices at oral argument were significant. By calling pregnant women “mothers,” Floyd and Flowers are emphasizing the woman’s relationship to the utterly dependent fetus, in an effort to make an abortion seem not only like the ending of a life, but as a violence against the very role women are expected to play in society—that of caretakers. Justice White, who dissented in *Roe*, also referred to pregnant women as “mothers” several times during the oral arguments.<sup>292</sup> Weddington, by contrast, refers to the women themselves, referencing pregnancy as a condition affecting the individual. Weddington’s deliberate use of the word “girl” to describe Jane Roe is, of course, problematic: at twenty-one years of age, Roe was an adult, but referring to her as a “girl” made her sound childlike, victimized, and unable to be held responsible for her pregnancy.<sup>293</sup>

Thus, much of the *Roe* oral arguments can be boiled down to a discussion of whether the pregnant woman has rights of her own. The majority opinion, written by men as part of a legal system designed by men, answers that question in the affirmative. Granting such a right to a woman as an individual, however, defies the powerful social construct of women not as individuals, but as nodes in networks of people.

### 3. *Roe* and Men

Of the various schools of feminist legal theory, dominance theory is defined by its emphasis on the difference in power between men and women.<sup>294</sup> Indeed, “there are real advantages to men in retaining control over women. Feminist theorists want to explain why that’s so.”<sup>295</sup>

Texas’s abortion law can certainly be viewed as men exercising power over women: the male-dominated legislature passed a statute that severely restricted women’s access to abortion, effectively forcing women to remain

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<sup>289</sup> Oral Argument I, *supra* note 37, at 01:17; Oral Argument II, *supra* note 34, at 01:06. The use of the identical phrase “unmarried pregnant girl” during both opening statements cannot be accidental.

<sup>290</sup> *E.g.*, Oral Argument II, *supra* note 34, at 26:20.

<sup>291</sup> No disparagement is intended toward those women whose pregnancies have ended in miscarriage or stillbirth, and who consider themselves mothers to those children.

<sup>292</sup> *E.g.*, Oral Argument II, *supra* note 34, at 15:53, 31:55, 37:22. For Justice White’s dissent, see *Roe v. Wade*, 410 U.S. 113, 221 (1973).

<sup>293</sup> For more on the concept of victimhood in abortion law, see *infra* Part IV.B.1.

<sup>294</sup> See *supra* text accompanying notes 251–54.

<sup>295</sup> Flax, *supra* note 233, at 82.



pregnant and bear unwanted children.<sup>296</sup> Weddington characterized the issue in the case as “the question of whether or not [women] will be forced by the [S]tate to continue an unwanted pregnancy[.]”<sup>297</sup> and in later discussing unwanted pregnancy as an “injury,” she said, “the women who continue to be forced to go through pregnancy have certainly gone through something that is irreparable, that can never be changed for them.”<sup>298</sup>

Considered more deeply, however, there are two separate instances of men exerting power over women in the context of *Roe* and the Texas abortion statute: that of the overwhelmingly male legislature exerting power over doctors,<sup>299</sup> and the universally male doctors exerting power over pregnant women.

The abortion statute at issue in *Roe* was a criminal statute directed not at women seeking abortions, but at the doctors willing or able to perform them.<sup>300</sup> In that way, the legislature exerted control over women indirectly, by controlling (and limiting) the behavior of doctors.<sup>301</sup> During both sets of oral arguments, the Justices indicated interest in what the legislature’s purpose had been in passing the abortion statute.<sup>302</sup> During the second oral argument, Justice Stewart stated, “The materials indicate that, generally speaking, [abortion statutes are] enacted to protect the health and lives of pregnant women because of the danger of operative procedures generally in

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<sup>296</sup> See also Flax, *supra* note 233, at 83 (“Why didn’t the oppression of women disappear [in the supposedly classless Soviet Union]? For one thing, the structure of the family was not altered—no efforts were made to change the reproductive sphere.”).

<sup>297</sup> Oral Argument II, *supra* note 34, at 06:18.

<sup>298</sup> *Id.* at 10:03.

<sup>299</sup> After the completion of the *Roe v. Wade* oral arguments, Weddington ran for the Texas House of Representatives so she could be sure to influence abortion access for women irrespective of the case’s outcome. Telephone interview with Sarah Weddington, Professor of History, University of Texas (retired) (Feb. 18, 2018).

<sup>300</sup> There is an interesting standing dilemma regarding Jane Roe, separate from the rather well-known problem of mootness. Rather, the more nuanced standing problem is that Roe was filing suit to challenge a criminal statute she was not subject to. The statute criminalized the doctor’s behavior, not the woman’s. Texas case law made it very clear that a pregnant woman was the victim of an abortion, not the perpetrator, even when she sought, procured, or even performed an abortion for herself. Oral Argument I, *supra* note 37, at 07:48. The idea that women are the victims of criminal abortion statutes is ripe for additional feminist analysis.

<sup>301</sup> So, too, did the state exert power over women when Dallas County District Attorney, Henry Wade, and Assistant District Attorney, John B. Tolle, announced that their office would continue to prosecute doctors even though the statute had been declared unconstitutional. See Brief for Appellants, *supra* note 16, at Appendix A; see also Oral Argument II, *supra* note 34, at 02:46 (Weddington: “The problem that we face in Texas is that even though we were granted a declaratory judgment ruling the law unconstitutional and even though we’ve been before this Court once in the past, in Texas, women still are not able to receive abortions from licensed doctors because doctors still fear that they will be prosecuted under the statute.”). This quote from Weddington also suggests that the Supreme Court’s delay in deciding the case is yet another instance of men exerting power over women.

<sup>302</sup> See *supra* text accompanying notes 94–96.

that era of our history [the late 19<sup>th</sup> century].”<sup>303</sup> Weddington had pointed out that if the State’s purpose was the protection of fetal life, it makes no sense that a woman who obtains an abortion is not guilty of a crime<sup>304</sup> and that “the penalty for abortion is determined by whether you have the woman’s consent”<sup>305</sup>—the Texas statute provided that the penalty for providing an abortion was doubled “if it be done without her consent.”<sup>306</sup>

It is noteworthy that so much of the *Roe* oral arguments are spent discussing the doctors who perform abortions—doctors who are universally referred to with male pronouns—and what constraints are placed on the doctors’ practice of medicine. By their questions, the Justices demonstrate that they are keenly interested in how the case affects the men who practice medicine in Texas and across the United States. During the second oral argument, the first question posed was Chief Justice Burger’s request that Weddington clarify whether she was discussing “the prosecutions of doctors” under the statute<sup>307</sup>—no Justice asked a question about women until almost sixteen minutes into the argument.<sup>308</sup> Justice Blackmun pointedly asked during the second rebuttal, “To make sure I get your argument in focus, I take it from your recent remarks that you are urging upon us abortion on demand of the woman alone, not in conjunction with her physician.”<sup>309</sup>

In the second oral argument, Weddington capitalized on the Justices’ interest in doctors’ freedom to practice when she pointed out:

That, in *Vuitch*, this Court had before it the D.C. statute which allowed abortion for the purpose of saving the life or the health, and this Court adopted the interpretation that health meant both mental and physical health. And, it seemed to me, the Court’s language in that case talked a great deal about the fact that the doctor’s judgment goes to saving the health of the woman, that that’s the kind of judgment that he is used to making. In Texas, that’s not the judgment he is forced to make. The judgment in Texas is, is this necessary for the purpose of preserving the life of the woman?, and the language of that statute has never been interpreted. That’s not the kind of judgment that a doctor is accustomed or perhaps even able to make.<sup>310</sup>

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<sup>303</sup> Oral Argument II, *supra* note 34, at 54:09.

<sup>304</sup> *Id.* at 10:34.

<sup>305</sup> *Id.* at 13:22.

<sup>306</sup> TEX. PENAL CODE ANN. § 1191 (repealed 1973).

<sup>307</sup> Oral Argument II, *supra* note 34, at 02:40.

<sup>308</sup> *Id.* at 15:53 (Justice White: “You’re going to be balancing the rights of the mother against the rights of the fetus[?]”).

<sup>309</sup> *Id.* at 01:02:51.

<sup>310</sup> *Id.* at 18:45.

And again:

Here, it's the question of whether or not the [S]tate, by the statute, will force the woman to continue [a pregnancy]. The woman should be given that freedom, just as the doctor has the freedom to decide what procedures he will carry out and what he will refuse to his patient.<sup>311</sup>

Justice Blackmun's fixation on the Hippocratic Oath is another example of the Court's interest in men's rights (rather than women's). During the second oral argument, Justice Blackmun demanded to know why Weddington had not discussed the Hippocratic Oath in either of her briefs.<sup>312</sup> She replied: "The fact that the medical profession, at one time, had adopted the Hippocratic Oath does not weigh upon the fundamental constitutional rights involved. It is a guide for physicians[.]"<sup>313</sup> And she was right—Plaintiff Jane Doe was arguing that the Texas abortion statute infringed on her individual right to terminate an unwanted pregnancy, and that the [S]tate had not established a compelling interest that would justify the curtailment of that right; a statement of medical ethics bears no relation to the determination of constitutional rights. Justice Blackmun could not let the point go, however; the final opinion dwelled on the Hippocratic Oath for several paragraphs, analyzing it as one type of restriction on the physician's behavior. Since the Justices and advocates universally refer to doctors with male pronouns, the obvious conclusion is that the Court simply cannot consider restrictions on women's behavior independently from restrictions on men's behavior.

Also noteworthy is the fact that the majority opinion cannot quite grant women the individual, autonomous right to abortion—the right is tied to their doctors:<sup>314</sup>

[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.<sup>315</sup>

Read in the most cynical way, this language grants women mere "consultation" rights regarding their abortions; the right to determine that the abortion is warranted is the doctor's. As discussed above, this may evidence

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<sup>311</sup> *Id.* at 1:02:38.

<sup>312</sup> *Id.* at 20:37.

<sup>313</sup> Oral Argument II, *supra* note 34, at 21:07.

<sup>314</sup> Reva B. Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 43, 53 (Martha Albertson Fineman & Isabel Karpin eds., 1995).

<sup>315</sup> *Roe v. Wade*, 410 U.S. 113, 163 (1973) (emphasis added).

the social tendency to define women in relation to other people,<sup>316</sup> but it also evidences the Court's inability to focus exclusively on the rights of women, but instead to define the rights of men.

B. *Are Women Individuals or a Collective?*

Despite equal treatment theory's admonition that "the law should not base decisions about individual women on generalizations (even statistically accurate ones) about women as a group[,]""<sup>317</sup> Weddington frequently cites statistics about women and abortion:

[T]here have been something like 1,600 Texas women who have gone to New York City alone for abortions in the first nine months of 1971.<sup>318</sup>

[T]he overall maternal death rate from legal abortion in New York dropped to 3.7 per 100,000 abortions in the last half of 1971, and that, in fact, is less than half of the death rate associated with live delivery for women.<sup>319</sup>

Weddington's use of both statistics and storytelling<sup>320</sup> illustrate a tension in the way the *Roe* advocates, Justices, and opinion consider women: sometimes women are grouped together, their experiences made universal, while at other times women's individual situations are paramount.

1. Victimhood

Dominance theory has been criticized not only for universalizing the white, middle-class female experience, but for framing women collectively as victims.<sup>321</sup> Certainly, Weddington painted Texas women as victims in both oral arguments.<sup>322</sup>

Victimhood disempowers women, and pregnant women in particular. The *Roe* Court obviously found that women have a fundamental right to choose to terminate a pregnancy, but the idea of pregnant women as victims, and thus in need of protection, has not left the abortion debate. It is this mentality that allows legislatures to pass laws requiring twenty-four-hour waiting periods before obtaining an abortion<sup>323</sup>—as if women did not understand the gravity of their decision when they first walked in to the clinic, but instead need guidance, enlightenment, and protection so as to

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<sup>316</sup> See *supra* text accompanying notes 286–89.

<sup>317</sup> LEVIT & VERCHICK, *supra* note 236, at 16.

<sup>318</sup> Oral Argument II, *supra* note 34, at 03:35.

<sup>319</sup> *Id.* at 05:03.

<sup>320</sup> See *supra* text accompanying notes 276–78.

<sup>321</sup> LEVIT & VERCHICK, *supra* note 236, at 25.

<sup>322</sup> Oral Argument I, *supra* note 37, at 07:21, 21:16; Oral Argument II, *supra* note 34, at 11:26, 12:56.

<sup>323</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

avoid making a decision they will later regret.<sup>324</sup>

## 2. Decision-making

The law has frequently struggled with the idea that women are able to make meaningful decisions. “This attitude not only fueled the exclusion of women from the jury and the franchise, but also contributed, in the view of some scholars, to the efforts of state officials to regulate reproductive experience.”<sup>325</sup> On the other hand, “[s]ome cultural feminists argue that it is precisely because women have such a deep capacity for connection and caring that society should trust their independent and morally responsible decision-making regarding abortion.”<sup>326</sup>

At oral argument, Weddington certainly emphasized the importance of pregnant women being able to decide for themselves whether to continue or terminate a pregnancy.<sup>327</sup> The Court superficially agreed, finding the right to privacy “broad enough to encompass [this] decision[,]”<sup>328</sup> yet requiring this decision to be made together with a doctor.<sup>329</sup> The inability to consider a woman an autonomous agent subordinates her.<sup>330</sup>

## V. CONCLUSION

The oral arguments for *Roe v. Wade* were a metaphor for the case itself and for the nationwide abortion debate it continues to represent— full of contradictions.

Sarah Weddington was the only woman with a microphone, arguing against male advocates to an all-male bench. She argued on behalf of women, but could not benefit from the language of gender discrimination in asserting her case. She was by far the best-prepared advocate at the podium, but she made little headway with the bench until she argued like a man, asserting rights over policy. Yet within her constitutional arguments, she shied away from taking a firm position, fearing alienation of any Justice.

Like the contradictions within the oral arguments, the opinion is full of steps forward and steps back. The Court ultimately found that the ill-defined right to privacy nonetheless included the right to abortion, but denied women the autonomy to make that private choice, finding instead that the choice

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<sup>324</sup> See generally Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (2007).

<sup>325</sup> Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761, 784–85 (1990).

<sup>326</sup> LEVIT & VERCHICK, *supra* note 236, at 141.

<sup>327</sup> See *supra* text accompanying note 114.

<sup>328</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973).

<sup>329</sup> See *supra* text accompanying notes 314–15.

<sup>330</sup> Tracy E. Higgins, “*By Reason of Their Sex*”: *Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536, 1538 (1995).

must be made in connection with male doctors.

What lessons can advocates take away from the lessons of the *Roe* oral arguments? Are there specific lessons for abortion cases, for women's rights, or for civil rights?

Perhaps the biggest take-away is that change comes incrementally. Weddington made a big ask, seeking a determination by the Court that the constitution protected a right to abortion, but she did so by offering a menu of possible rationales and implying that they were small extensions of existing privacy doctrine. She did not ask that *Roe* be the first gender discrimination case, and she was right to be conservative there—although the Justices found a constitutionally-protected right to abortion, they were unwilling to find that right belonging to the woman alone. Given that the Justices felt the need to connect this extension of privacy law to women in conjunction with their doctors, it is unlikely the Justices would have found this to be the seminal case on gender discrimination.

The second, more cynical lesson is that women's rights cannot be defined without relating them to the rights of men, though the reverse is not true. Although the Court did not consider the possible rights of fathers, the idea of women as autonomous decision makers, defined as individuals rather than by their relationships with others, was so unrealistic as to be impossible. At oral argument, pregnant women were portrayed as victims, even by Weddington herself, requiring the paternal guidance and protection of doctors, legislators, and even Justices.

More broadly, *Roe* is an example of the Court defining rights in a zero-sum way. By carefully articulating the rights of a woman (and her doctor), the lack of rights of the fetus, and the interests of the state, and where those rights appear and disappear along the timeline of a pregnancy, the Court cannot conceive of a constitutional scheme that benefits all actors. Perhaps the next incarnation of a gendered constitutional problem, with female advocates and female Justices no longer anomalies in the courtroom, will result in a new way of conceptualizing the autonomy of all individuals—even female ones.