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## **JON O. NEWMAN AND THE ABORTION DECISIONS: A REMARKABLE FIRST YEAR**

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JON O. NEWMAN AND THE ABORTION DECISIONS:  
A REMARKABLE FIRST YEAR

ANDREW D. HURWITZ\*

Jon O. Newman took the oath as a United States District Judge for the District of Connecticut on January 17, 1972. By any reckoning, he had an enormously productive and influential first year. Twice confronted as a member of statutory three-judge courts with cases challenging the constitutionality of Connecticut's anti-abortion statute, he produced two memorable opinions.<sup>1</sup> The first was an innovative – albeit ultimately unsuccessful – attempt to avoid the difficult constitutional issues already before the Supreme Court, which had heard oral argument in *Roe v. Wade* and *Doe v. Bolton* on December 13, 1971.<sup>2</sup> In the second opinion, Judge Newman was forced to address directly the constitutional tension between a woman's right to choose and the state's interest in protecting the life of a fetus.<sup>3</sup>

Although Judge Newman has served for thirty years with distinction on the Connecticut District Court and the United States Court of Appeals for the Second Circuit, his most profound effect on constitutional jurisprudence – and on a landmark opinion of the Supreme Court – probably occurred in those first several months on the bench. I was Judge Newman's law clerk during those months, and this essay recounts the story of this remarkable first inning.

*ABELE I*

The abortion issue dominated Judge Newman's first year on the bench virtually from the day he was sworn in. In 1971, as part of the national assault on anti-abortion statutes, several plaintiffs had filed suit challenging the constitutionality of the Connecticut laws, which prohibited all abortions, all attempts at abortion, and all aid, advice, and encouragement to bring about abortion, unless necessary to pre-

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1. See *Abele v. Markle*, 342 F. Supp. 800 (D. Conn. 1972) (hereinafter *Abele I*); *Abele v. Markle*, 351 F. Supp. 224 (D. Conn. 1972) (hereinafter *Abele II*).

2. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

3. See *Abele II*, 351 F. Supp. at 228.

serve the life of the mother or the fetus.<sup>4</sup> District Judge T. Emmet Clarie dismissed the initial complaint for lack of standing, but the Second Circuit reversed, holding that pregnant women and medical personnel desiring to give advice and aid regarding abortions had Article III standing to challenge the Connecticut laws.<sup>5</sup> Plaintiffs filed an amended complaint, and a statutory three-judge court of Circuit Judge J. Edward Lumbard and District Judges Newman and Clarie was convened.<sup>6</sup>

By a 2-1 vote, the three-judge court struck down the Connecticut statutes. The case, *Abele v. Markle* (“*Abele I*”), produced three separate opinions.<sup>7</sup> Judge Lumbard’s sweeping opinion held the Connecticut prohibitions unconstitutional under the Ninth and Fourteenth Amendments.<sup>8</sup> Judge Clarie filed an impassioned dissent, arguing that a woman’s right to privacy did not extend to “the murder of unborn human beings.”<sup>9</sup> Thus, the swing vote was Judge Newman.

Judge Newman, while finding the Connecticut statutes unconstitutional, did so in a manner he accurately described as “cover[ing] somewhat less ground” than Judge Lumbard’s broad constitutional approach.<sup>10</sup> Judge Newman began from the premise that *Griswold v. Connecticut* and its progeny recognized a right to privacy in family and sexual matters, a right that could be regulated in certain instances by “a subordinating state interest.”<sup>11</sup> Unlike Judges Lumbard and Clarie, however, Judge Newman was not willing to conclude that the interest sought to be advanced by the Connecticut statute was protection of the life of an unborn child. Instead, drawing on the work of Professor Cyril C. Means, Jr., Judge Newman reviewed the historical record, concluding that the Connecticut laws, originally adopted in 1860, were likely intended instead to protect the life of the mother during an area before antiseptic surgery, and perhaps also to guard the mother’s morals.<sup>12</sup> Protecting an unborn life, he concluded, was “most likely not a purpose of the 1860 legislature.”<sup>13</sup> Having so concluded, Judge

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4. See *Abele I*, 342 F. Supp. 800.

5. *Abele v. Markle*, 452 F.2d 1121 (2d Cir. 1971).

6. *Abele I*, 342 F. Supp. 800.

7. *Id.*

8. See *id.* at 801-05 (Lumbard, C.J.).

9. *Id.* at 812-16 (Clarie, D.J.).

10. *Id.* at 805 (Newman, D.J.).

11. *Id.*

12. *Id.* at 805-06 nn. 4, 5.

13. *Id.* at 810.

Newman managed neatly to sidestep the difficult constitutional issue on which his colleagues divided, holding that the Connecticut statute's virtually total prohibition on abortions could not be justified by the remaining purported legislative purposes of protecting the mother's life or her morals.<sup>14</sup> In his view, since a law designed to protect an unborn child "would pose a legal question of extreme difficulty," the doctrine of avoidance of unnecessary constitutional questions counseled to avoid such difficulty when such a legislative determination had not been demonstrated.<sup>15</sup>

Judge Newman's *Abele I* opinion was noteworthy in at least two respects, one explicit and the other unstated. First, even assuming the accuracy of his historical analysis, Judge Newman broke significant new ground in concluding that the legislature's *actual* purpose in passing the statutes as opposed to *any* conceivable purpose – governed the constitutional analysis.<sup>16</sup> Addressing the point entirely in a long substantive footnote, he recognized that the Supreme Court had never expressly so held.<sup>17</sup> Nonetheless, Judge Newman concluded that "more respect is shown to a legislature, and to constitutional freedoms, if the only state interest weighed against the impaired freedom [asserted by a plaintiff] is the interest which the legislature sought to advance in enacting the challenged statute."<sup>18</sup> If another interest might conceivably justify a statute abridging privacy interests, Judge Newman stated, the "legislature should have the opportunity of deciding whether it chooses to advance such an interest."<sup>19</sup>

The clear unstated premise of Judge Newman's approach (made express in conversations with his law clerk) was that the Connecticut legislature, an institution with which he had more than passing experience,<sup>20</sup> would leave well enough alone and not provoke a constitutional attack on a second statute. As a political prognosticator, he was spectacularly wrong. Within little over a month after *Abele I* was issued, the Governor called the Connecticut Legislature into special session. The Legislature promptly adopted Public Act No. 1, which again outlawed all abortions except those necessary to preserve the physical life

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14. *Id.* at 809-10.

15. *Id.* at 810.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 810 n.18.

20. Before taking the bench, Jon O. Newman had served as Majority Counsel to the Connecticut General Assembly, as well as Special Counsel to the Governor.

of the mother. Public Act No. 1 proclaimed, in language adopted in direct response to Judge Newman's *Abele I* opinion, that "[t]he public policy of the state and the intent of the legislature is to protect and preserve human life from the moment of conception."<sup>21</sup> The *Abele I* judges were reconvened into a statutory three-judge court to consider an attack upon Public Act No. 1.

### ABELE II

This time there was no possible skirting of the right to privacy issue. The three judges again split 2-1 in invalidating Public Act No. 1, with Judge Clarie again in strenuous dissent.<sup>22</sup> In *Abele II*, however, Judge Newman wrote alone for the majority.<sup>23</sup> His careful and meticulous analysis of the competing constitutional issues is striking, even in the hindsight of thirty years.

As he had in *Abele I*, Judge Newman began from the premise that the Supreme Court had recognized in *Griswold* a constitutional right to privacy in matters related to the decision by a woman as to whether or not to bear a child.<sup>24</sup> He concluded, however, that such a right was not absolute, and could be curtailed by a "compelling state interest."<sup>25</sup> In this case, it was clear that the interest asserted by Connecticut was the protection of the unborn fetus, and Judge Newman therefore began by addressing that interest.<sup>26</sup> The asserted state interest required analysis of two related, but distinct, issues: first, the nature of the rights possessed by a fetus, and second, the nature of the state interest being asserted.<sup>27</sup>

Judge Newman began by considering "whether the fetus was a person, within the meaning of the Fourteenth Amendment, having a constitutionally protected right to life."<sup>28</sup> He forthrightly recognized that the consequence of that analysis might well be dispositive – if the fetus had Fourteenth Amendment rights, "it is difficult to imagine how a statute permitting abortion could be constitutional."<sup>29</sup> Judge Newman concluded, however, that the fetus was not a Fourteenth Amendment

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21. *Abele II*, 351 F. Supp. at 225 n.1.

22. *Id.* at 232 (Clarie J., dissenting).

23. *Id.* at 225.

24. *Id.*; *Griswold v. Connecticut*, 381 U.S. 479 (1965).

25. *Abele II*, 351 F. Supp. at 227-28.

26. *Id.*

27. *Id.* at 228.

28. *Id.*

29. *Id.* at 228-29.

person until birth. He eschewed the argument that a fetus could not be a person because it was not counted for apportionment purposes, noting that the same could be said of corporations, which “are persons for at least some Fourteenth Amendment purposes.”<sup>30</sup> Rather, he placed primary reliance on the natural implications of *Griswold*: if the capacity of a fetus to be born made it a person endowed with Fourteenth Amendment rights, the same conclusion would seemingly also apply to the unfertilized ovum, whose potentiality for human life clearly could lawfully be terminated under *Griswold*. Judge Newman also relied heavily on the Supreme Court’s recent decision in *United States v. Vuitch*,<sup>31</sup> which rejected a void-for-vagueness attack on a District of Columbia abortion statute by construing the law to allow abortions to protect the mother’s mental health.<sup>32</sup> If in fact an abortion deprived a Fourteenth Amendment person of life, the “narrowing construction” would have been anomalous, since it would have enlarged the situations where constitutionally protected life could be extinguished.<sup>33</sup>

Judge Newman was then forced to face a far more difficult question: whether, even if a fetus was not a constitutional person under the Fourteenth Amendment, a legislature could nonetheless confer *statutory* rights on the unborn.<sup>34</sup> He candidly conceded that a court could never resolve the philosophical issue of whether a fetus was a human being from the moment of conception, or whether abortion amounted to murder.<sup>35</sup> Instead, he noted that since the mother had a constitutional right to privacy in matters of procreation, the state’s view of the nature of the fetus, however well-intentioned, could not simply obliterate that constitutional right of privacy. When asserted on behalf of a fetus which lacks constitutional rights, the state’s interest in preserving unborn life could not “accomplish the virtually total abridgement of a constitutional right of special significance.”<sup>36</sup> Since the new Connecticut statute did precisely that, it could not stand.

In sweeping dictum, Judge Newman then went on to confront the state’s argument that its laws were necessary to prevent the abortion of

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30. *Id.* at 229 n.8.

31. 402 U.S. 62 (1971).

32. *Abele II*, 351 F. Supp. at 228.

33. *Id.* at 228.

34. *Id.* at 229.

35. *Id.* at 230 n.9.

36. *Id.* at 231.

viable fetuses. Candidly acknowledging that this issue was not presented by the current case – which involved a ban on *all* abortions – Judge Newman nonetheless suggested that a statute which simply sought to preserve the life of viable fetuses would involve a very different weighing process. Such a statute would not involve a total ban on a woman's right to privacy “but at most a limitation on the time when her right could be exercised.”<sup>37</sup> It would be based not on metaphysical or religious notions of when life began but instead on scientific evidence, since “there is no doubt that at some point during pregnancy a fetus is capable of surviving outside the uterus.”<sup>38</sup> Such a statute, Judge Newman suggested, “might well” survive constitutional analysis since the right to privacy was not absolute.<sup>39</sup> But since the Connecticut legislature had not enacted such a statute, Judge Newman concluded that the plaintiffs were entitled to an injunction against enforcement of Public Act No. 1.

*ABELE II* AND *ROE V. WADE*: THE EARLY CLUES OF INFLUENCE

*Abele II* was issued on September 20, 1972. Only three weeks later, the Supreme Court heard rearguments in *Roe v. Wade* and *Doe v. Bolton*, having failed to decide those cases in the previous Term. It soon became apparent that the efforts of the neophyte district judge in Connecticut were on the minds of the Justices. When Sarah Weddington, counsel for appellants, directed the Court's attention to *Abele II*, she briefly paused to recall the name of the opinion's author. Justice Stewart promptly provided the answer: “Newman.”<sup>40</sup> Other less direct indications of the force of *Abele II* were sprinkled throughout the argument. Counsel for both sides were repeatedly asked whether the fetus was a Fourteenth Amendment person; and various justices, particularly Blackmun and Stewart, echoed Judge Newman's point in *Abele II* – if the fetus were such a person, the case was over.<sup>41</sup>

When the Supreme Court's opinion in *Roe* was issued on January 22, 1973, there were several express indications of the influence of Judge Newman's opinion in *Abele II*. The opinion is quoted in Justice Stewart's concurrence as support for the proposition that the constitu-

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37. See *Abele II*, 351 F. Supp. at 232.

38. See *id.*

39. *Id.* at 232.

40. DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 568 (1994).

41. *Id.* at 568-72.

tional right to privacy includes the right of a woman to decide whether or not to terminate her pregnancy.<sup>42</sup> Both *Abele I* and *Abele II* are cited, albeit less expansively, in Justice Blackmun's opinion for the Court.<sup>43</sup>

More tantalizing clues of the possible influence of Judge Newman's writings came from the structure of Justice Blackmun's opinion. After discussing standing and engaging in a long historical review of attitudes and legislation concerning abortion, Justice Blackmun began, as had Judge Newman in *Abele I*, by identifying three possible state interests behind anti-abortion statutes: protecting the mother's morals, protecting the mother's life, and protecting the life of the fetus.<sup>44</sup> Justice Blackmun next addressed whether there is a constitutional right to privacy, and concludes, as did Judge Newman, that such a right is grounded in the Ninth and Fourteenth Amendments, and "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>45</sup> Like Judge Newman, Justice Blackmun next proceeded from the premise that only a compelling state interest can subordinate the woman's right to so choose.<sup>46</sup>

In almost perfect lockstep with *Abele II*, *Roe* then turned to the issue of whether a fetus is a Fourteenth Amendment person.<sup>47</sup> Like Judge Newman, Justice Blackmun found no constitutional support for such a proposition. His final argument for this conclusion effectively mirrored Judge Newman's analysis in *Abele II*, claiming that "[O]ur decision in *United States v. Vuitch*, is inferentially to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection."<sup>48</sup>

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42. *Roe v. Wade*, 410 U.S. 113, 170 (Stewart J., concurring).

43. *Id.* at 148 nn.42, 154 & 158.

44. *Roe*, 410 U.S. at 148-52; *Compare Roe with Abele I*, 342 F. Supp. at 805 (identifying the same three putative state interests).

45. *Roe*, 410 U.S. at 153; *Compare Roe with Abele I*, 342 F. Supp. at 805, and *Abele II*, 351 F. Supp. at 227.

46. *Roe*, 410 U.S. at 155-56; *Compare Roe with Abele II*, 351 F. Supp. at 227-28 (adopting compelling state interest test).

47. *Roe*, 410 U.S. at 156-59; *Compare Roe with Abele II*, 351 F. Supp. at 228-29.

48. *Roe*, 410 U.S. at 159 (citation omitted); *Compare Roe with Abele II*, 351 F. Supp. at 228 ("If a fetus was a person with a fourteenth amendment right not to be deprived of life except by due process of law, it is inconceivable that the Court [in *Vuitch*] would have resolved a doubtful question of statutory construction by enlarging the situations in which such a life could be extinguished . . . Surely the Court would have withheld



As did Judge Newman in *Abele II*, Justice Blackmun then turned to the issue of whether a state abortion statute can be justified on other grounds, such as the protection of unborn life.<sup>49</sup> Like Judge Newman, Justice Blackmun began by noting the wide diversity of philosophical opinion about when life begins.<sup>50</sup> And, in language that once again virtually echoes that of *Abele II*, *Roe* concluded that “by adopting one theory of life,” Texas may not “override the rights of the pregnant woman.”<sup>51</sup>

Since the Texas statute at issue in *Roe* outlawed all abortions, Justice Blackmun was not required to address the issue of whether the state’s interest in protecting fetal life might support a less sweeping prohibition. But, just as Judge Newman did in *Abele II*, Justice Blackmun did address the issue. He concluded that the state would have a “compelling” interest in protecting fetal life “at viability,” since “the fetus then presumably has the capability of meaningful life outside the mother’s womb.”<sup>52</sup> Thus in “the stage subsequent to viability,” *Roe* sanctioned proscription of abortion, except when necessary to preserve the life or health of the mother.<sup>53</sup> The parallel to the *Abele II* analysis (“the state interest in protecting the life of a fetus capable of living outside the uterus could be shown to be more generally accepted and, therefore, of more weight in the constitutional sense than the interest in preventing the abortion of a fetus that is not viable”)<sup>54</sup> is obvious.

In short, there was copious evidence when *Roe* was issued from which a legal detective could discern Judge Newman’s fingerprints on the Court’s decision.<sup>55</sup> Indeed, in describing *Roe*, Time Magazine con-

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even tacit approval of abortions in such circumstances if the consequence was the termination of a life entitled to fourteenth amendment protection.”).

49. *Roe*, 410 U.S. at 159; *Compare Roe with Abele II*, 351 F. Supp. at 229-30.

50. *Roe*, 410 U.S. at 159-62; *Compare Roe with Abele II*, 351 F. Supp. at 230-31.

51. *Roe*, 410 U.S. at 162; *Compare Roe with Abele II*, 351 F. Supp. at 231 (“But where a state interest subject to such variety of viewpoint is asserted on behalf of a fetus which lacks constitutional rights, and where the assertion of such an interest would accomplish the virtually total abridgement of a constitutional right of special significance, in these circumstances such a state right cannot prevail.”).

52. *Roe*, 410 U.S. at 163.

53. *Id.* at 164-65.

54. *Abele II*, 351 F. Supp. at 232.

55. The author received some small inkling of the influence of *Abele II* on the Court’s thinking in the fall of 1972, when interviewing for clerkships at the Supreme Court. Justice Powell devoted over an hour of conversation to a discussion of Judge Newman’s analysis, while Justice Stewart (my future boss) jokingly referred to me as

tended that the Court was “influenced by the 1972 opinion of District Judge Jon O. Newman.”<sup>56</sup> But it took the retirement of several of the *Roe* Justices, and the subsequent release of their papers, to demonstrate just how significant Judge Newman’s *Abele II* analysis was to the *Roe* opinion. One need no longer speculate on the point: it is now clear that Jon O. Newman had, in words of one historian, “crucial influence” on both the outcome and the reasoning in the case.<sup>57</sup>

#### JUDGE NEWMAN AND *ROE V. WADE*: THE REST OF THE STORY

##### A. *The 1971 Drafts*

*Roe v. Wade* and its companion case, *Doe v. Bolton*, were both argued in the Supreme Court on December 13, 1971; neither was decided during that Term, and both were set for reargument on October 11, 1972. Several scholars, most notably John C. Jeffries, Jr.,<sup>58</sup> David J. Garrow,<sup>59</sup> and Bernard Schwartz<sup>60</sup> have now reviewed the papers of retired Justices, and provide a snapshot into the Court’s consideration of these cases during the 1971 Term. That background is an important precursor to the effect of Judge Newman’s work upon the Court’s eventual disposition of the abortion cases.

Because of the departures of Justices Harlan and Black, the Court to which the cases were originally argued consisted of only seven members. As Garrow reports, those seven arrived at the December 16, 1971 conference on *Roe* and *Doe* with a wide variety of initial views, both as to the standing of the plaintiffs and the proper disposition of these cases on the merits. The notes of Justices Brennan and Douglas indicated a clear initial consensus that the Texas statute at issue in *Roe* was unconstitutional, although since a number of Justices thought the statute void for vagueness, it was not clear how far any opinion would

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“the clerk who wrote the Newman opinion.” I assume that the latter was based on Judge Newman’s generous letter of recommendation, a medium in which some exaggeration is expected.

56. Editors, *Abortion on Demand*, TIME, January 29, 1973, at 46-47 (quoted in GARROW, *supra* note 40, at 588).

57. David J. Garrow, *Revelations on the Road to Roe*, AMERICAN LAWYER, May, 2000, at 80.

58. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 3 (1994).

59. See GARROW, *supra* note 40; GARROW, *supra* note 57.

60. See generally BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE BURGER COURT (1988).

sweep. The initial vote in *Doe*, which involved a Georgia abortion lawless subject to a vagueness challenge, was unclear.<sup>61</sup>

At the conclusion of the conference, Justice Blackmun was assigned by Chief Justice Burger to write the opinions in both matters.<sup>62</sup> His first draft in *Roe* was circulated on May 18, 1972, and avoided the broad constitutional privacy issues entirely by concluding that the Texas statute, which allowed abortions only “for the purpose of saving the life of the mother,” was void for vagueness.<sup>63</sup> The first draft in *Doe* was circulated a week later. The Georgia statute at issue in *Doe*, prohibited abortion except when a physician made a clinical judgment in writing that abortion was either necessary (a) to protect the life of the mother, (b) to prevent a birth of a child with severe mental or physical disabilities, or (c) to prevent the birth of the child whose conception was the result of rape. The statute limited permissible abortions to Georgia residents and required that they be performed only in accredited hospitals after approval by a hospital committee. Because of the specificity of the statute, Justice Blackmun concluded that it did not suffer from unconstitutional vagueness.<sup>64</sup> He was therefore forced to face the plaintiffs’ privacy arguments.

The treatment of those arguments in the initial *Doe* draft bore scant resemblance to the Court’s landmark *Roe* opinion in the following Term. While Justice Blackmun began from the premise that “a woman’s interest in making the fundamental decision whether or not to bear an unwanted child is within the scope of personal rights protected by the Ninth and Fourteenth Amendments,” he recognized that the fundamental difference between this case and the Court’s prior decisions was the involvement of “another being” – the fetus.<sup>65</sup> Therefore “somewhere, either forthwith at conception, or at ‘quickening,’ or at birth . . . the privacy the woman possessed has become dual rather

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61. GARROW, *supra* note 40, at 528-33; JEFFRIES, *supra* note 58, at 333; SCHWARTZ, *supra* note 60, at 84-87.

62. The assignment itself was apparently the subject of considerable controversy within the Court. Justice Douglas believed that neither Burger nor Blackmun were in the majority at the December 1971 conference, and that therefore the assignment was his prerogative as the senior Justice in the majority. See GARROW, *supra* note 40, at 532-35; JEFFRIES, *supra* note 58, at 333.

63. SCHWARTZ, *supra* note 60, at 89-90, 103-19 (copy of draft); JEFFRIES, *supra* note 58, at 336; GARROW, *supra* note 40, at 548.

64. SCHWARTZ, *supra* note 60, at 131-32 (copy of draft).

65. *Id.* at 128.

than sole.”<sup>66</sup> The draft did not hold that the state lacked the right to ban abortions; indeed, Justice Blackmun stated that “[e]xcept to hold that the State’s interest grows stronger as the woman approaches term, we need not delineate that interest with greater detail in order to recognize that it is a ‘compelling’ state interest.”<sup>67</sup> Rather, Justice Blackmun started from the premise that Georgia had decided to allow some abortions, and then focused on several specific aspects of the Georgia statute: (1) a restriction on abortions to accredited hospitals; (2) the pregnant woman’s alleged inability to make a presentation to the hospital’s abortion committee; (3) the necessity for an allegedly cumbersome and time-consuming review process by the hospital committee; and (4) the statute’s residency requirement.<sup>68</sup> For various reasons, Justice Blackmun concluded that these statutory requirements violated the Due Process Clause or unduly abridged a woman’s right to travel.<sup>69</sup>

Notably, the Blackmun draft in *Doe* did not declare an absolute right to abortion, even when performed by a licensed physician within a limited time after conception. Shortly after the first of the two drafts were circulated, several Justices urged precisely such an approach.<sup>70</sup> But their suggestions were quickly overtaken by other events. On May 31, 1972, Chief Justice Burger circulated a memorandum suggesting that the two cases should be reargued in the next Term.<sup>71</sup> The suggestion was the subject of vigorous (and sometimes acrimonious) opposition from a number of the Justices who favored striking down the Texas and Georgia laws.<sup>72</sup> But Justice Blackmun eventually joined the Chief Justice’s suggestion, as did Justice White (who had circulated a dissent from the Blackmun drafts); Justices Rehnquist and Powell (who had been confirmed since the *Roe* and *Doe* arguments and had therefore not yet participated in the decision of these matters) also suggested reargument.<sup>73</sup> Since the motion for reargument now had at least five votes, further opposition was academic and the Court (with

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66. *Id.* at 129.

67. *Id.* at 130.

68. *Id.* at 132.

69. *Id.* at 132-40.

70. SCHWARTZ, *supra* note 60, at 144; GARROW, *supra* note 40, at 548-49; JEFFRIES, *supra* note 58, at 337.

71. SCHWARTZ, *supra* note 60, at 145; GARROW, *supra* note 40, at 553-54; JEFFRIES, *supra* note 58, at 337.

72. SCHWARTZ, *supra* note 60, at 145-46; GARROW, *supra* note 40, at 552-56; JEFFRIES, *supra* note 58, at 337-39.

73. SCHWARTZ, *supra* note 60 at 147; GARROW, *supra* note 40, at 554-56.

only Justice Douglas dissenting) issued an order on June 29, 1971, setting the cases over for reargument.<sup>74</sup>

### B. *The 1972 Opinion*

As the 1972 Term began, there was justifiably some uncertainty at the Supreme Court about the prospects for a decision broadly upholding a woman's right to seek an abortion. It was clear from the previous Term that Justice White opposed such a ruling, and that Chief Justice Burger was seemingly undecided on the point. The views of the two new Justices were not yet known. And, given the narrow opinions offered during the previous Term by Justice Blackmun, his views about a ruling with broader scope – as had been suggested by several other Justices during May of 1971 – were at least open to question.

Thus, when *Abele II* was issued, it seems fair to assume that at least some of the Justices were still in search of a legal framework in which to address the abortion cases. And it is now clear that Judge Newman's analysis in *Abele II* had an immediate effect on the Court. In the post-argument conference on *Roe*, Justice Stewart reiterated his previous stance that both the Texas, Georgia, and Florida statutes were unconstitutional. He argued, however, that the Texas statute could not be found void for vagueness, and instead expressly urged upon the Court Judge Newman's reasoning in the Connecticut case.<sup>75</sup> Specifically, citing *Abele II* and a New York decision, Justice Stewart urged that the Court directly confront the issue of whether a "fetus is not a person within [the] 14<sup>th</sup> Amendment."<sup>76</sup> Justice Marshall then echoed the Fourteenth Amendment point.<sup>77</sup>

It quickly became clear at the conference following the *Roe* and *Doe* arguments that a majority of the nine member Court favored striking down the Texas and Georgia statutes. The five Justices who had unequivocally favored doing so the previous Term – Douglas, Brennan, Stewart, Marshall and Blackmun – had not changed their minds, Chief Justice Burger's position remained unclear and Justice White continued to voice dissent. The two new Justices – Rehnquist and Powell – split, with Powell joining the majority. Thus, there were at least

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74. 408 U.S. 919 (1972).

75. GARROW, *supra* note 40, at 574.

76. *Id.*

77. *Id.*

six votes (and possibly seven) to find the two challenged statutes unconstitutional.<sup>78</sup>

Justice Blackmun, who had announced at the conference that he had been revising his drafts of the previous term over the summer,<sup>79</sup> was again given the assignment to draft the opinions of the Court. On November 22, 1972, he produced a forty-eight page draft in *Roe* (now the lead case) and a considerably shorter draft in *Doe*.<sup>80</sup> The draft differed markedly from the efforts of the previous Term. Gone was the assertion that the Texas statute was void for vagueness; instead the draft reached and decided the constitutional privacy issues. Like Judge Newman's *Abele II* analysis, it concluded that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation. Like *Abele II*, the draft stated that the abortion statutes were to be judged by the "compelling state interest" standard. But most notably, the draft directly confronted the issue of whether a fetus was a "person" within the meaning of the Fourteenth Amendment, and concluded that it was not.<sup>81</sup> As noted above, Justice Blackmun's reasoning on this point (which survived essentially intact to the final opinion) tracks closely Judge Newman's language in *Abele II*, with particular emphasis on the unstated premise of *Vuitch*. Given Justice Stewart's insistence that the issue be addressed – and his reliance in conference on Judge Newman's treatment of the issue in *Abele II* – the inescapable conclusion is that this portion of the *Roe* opinion bore the direct imprint of Judge Newman's work in *Abele II*.

The Blackmun draft differed from his previous efforts in at least one other significant aspect. He addressed directly the question of when the State's legitimate interests might allow restriction of abortion rights. During first trimester of pregnancy, Blackmun concluded, a state "must do no more than to leave the abortion decision to the best medical judgment of the pregnant woman's attending physician. However, "[f]or the stage subsequent to the first trimester, the State may, if it chooses, determine a point beyond which it restricts legal abortions to stated reasonable therapeutic categories." Justice Blackmun's covering memorandum to the Conference conceded that his use of the first

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78. GARROW, *supra* note 40, at 573-76; SCHWARTZ, *supra* note 60, at 148.

79. SCHWARTZ, *supra* note 60, at 148.

80. GARROW, *supra* note 40, at 580; SCHWARTZ, *supra* note 60, at 148; JEFFRIES, *supra* note 58, at 339.

81. SCHWARTZ, *supra* note 60, at 149.

trimester was “arbitrary,” but suggested that use of any other selected point “such as quickening or viability, is equally arbitrary.”<sup>82</sup>

The reaction by other Justices to this first trimester bright-line provides the most direct evidence of Judge Newman’s influence on the eventual decision in *Roe*. Shortly before oral arguments, Justice Powell had received a bench memorandum from his law clerk, Larry Hammond, which relied heavily on *Abele II*.<sup>83</sup> Hammond had suggested “that you might reason as Judge Newman does that the state interest becomes more dominant when the fetus is capable of independent existence (or becomes ‘viable’).” With respect to the claim that a fetus became a constitutional person at the moment of conception, Hammond again relied heavily on *Abele II*, noting that “the crux of Judge Newman’s analysis is that the state may not bar abortifacient freedom altogether on the basis of a proposition that is subject to such a great public debate and affects individuals so personally.”<sup>84</sup>

When the *Roe* draft was circulated, Hammond was distressed by the line drawn at the end of the first trimester. In a November 27, 1972, memorandum to Powell (written less than a week after circulation of the draft) Hammond began by noting that, in large part, Justice Blackmun “has embraced the straightforward constitutional view taken by Judge Newman in the Connecticut case.” Hammond disagreed, however, with the identification of the end of the first trimester as legally decisive, noting that since the Texas statute banned abortions without regard to fetal age, such a conclusion was unnecessary to the result. “If a line ultimately must be drawn,” Hammond continued, “it seems that ‘viability’ provides a better point. This is where Judge Newman would have drawn the line.”<sup>85</sup>

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82. *Id.*; GARROW, *supra* note 40, at 580-81; JEFFRIES, *supra* note 58, at 341.

83. In one of the many coincidences that seem to occur throughout the story of the abortion cases, Larry Hammond and I joined the same law firm in Phoenix during the summer of 1974, and we have been colleagues in the practice of law in that firm and its successors ever since. When we arrived in Phoenix, we joined Bill Maledon in that firm; Hammond and I have practiced with Maledon since then. Maledon had been Justice Brennan’s clerk during the 1972 Term, and was the law clerk in that chambers who worked extensively on *Roe*. See GARROW, *supra* note 40, at 581-83, 593. My friend John Jeffries, Jr., the curator of the Powell papers and Justice Powell’s biographer, was a clerk in the Powell chambers during the 1973 Term; I was a clerk for Justice Stewart in the same term. Needless to say, any errors in this essay are mine, and not the responsibility of anyone else, especially these distinguished colleagues.

84. Garrow, *supra* note 57, at 82.

85. *Id.* at 83.

Justice Powell enthusiastically embraced Hammond's suggestion. A day after receiving Hammond's memorandum, Justice Powell wrote a private letter to Justice Blackmun expressing general enthusiasm for the *Roe* draft. He suggested, however, that Justice Blackmun reconsider his admittedly arbitrary use of the first trimester as a dividing line. Instead, Justice Powell suggested viability as the cut-off, directly quoting Judge Newman in *Abele II*: "[t]he state interest in protecting the life of the fetus capable of living outside the uterus could be shown to be more generally accepted and, therefore, of more weight in the constitutional sense than the interest in preventing the abortion of a fetus that is not viable. The issue might well turn on whether the time period selected could be shown to permit survival of the fetus in a generally acceptable sense . . ." <sup>86</sup> Justice Powell argued that at viability the interest of the state becomes "clearly identifiable" and that any earlier cut off date seemed more difficult to justify. Justice Powell recognized that the Court did not have to treat the issue at all, but noted that Judge Newman's opinion "pointed the way generally toward 'viability' without making an explicit ruling."<sup>87</sup>

Justice Blackmun initially responded to Justice Powell's suggestions in a private letter. While defending his use of the first trimester, Justice Blackmun noted that "I could go along with viability if it could command a court. By that time the state's interest has grown large indeed."<sup>88</sup> A week later, Justice Blackmun sent a memorandum to the Justices, noting that "[o]ne of the members of the Conference" had suggested that viability might be a better choice than the first trimester "as the point beyond which a state may appropriately regulate abortion practices."<sup>89</sup> Justice Blackmun noted that viability had both important biological and logical justifications, and made clear his willingness to recast viability as the dividing point if a majority of the Court so desired. In doing so, he cited Judge Newman's analysis directly: "I might add that some of the district courts that have been confronted with the abortion issue have spoken in general, but not specific, terms of viability. See, for example, Judge Newman's observation in the last *Abele v.*

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86. JEFFRIES, *supra* note 58, at 341-42; Garrow, *supra* note 57, at 83. The quoted language is from *Abele II*, 351 F. Supp. at 232.

87. *Id.*

88. *Id.*

89. JEFFRIES, *supra* note 58, at 341.



*Markle* decision.”<sup>90</sup> Justice Blackmun then expressly sought his colleagues’ “reactions to this suggestion.”<sup>91</sup>

Within a day, Justice Marshall responded by agreeing with “drawing the line at viability.”<sup>92</sup> In addition, he suggested that the opinion could state that between the first trimester and viability, “state regulations directed at health and safety alone were permissible.”<sup>93</sup> On the next day, Justices Brennan endorsed Justice Marshall’s suggestion and Justice Stewart sent a separate letter to Justice Blackmun questioning whether use of the first trimester as a cut-off point was wise.<sup>94</sup> Meanwhile, in Justice Powell’s chambers, Larry Hammond sent another memorandum to the Justice, emphasizing the practical effects of a shift to viability as the cut-off: for many “frightened, or uneducated, or unsophisticated girls,” a twelve week window of opportunity ending with the first trimester would effectively mean that an abortion would be unavailable.<sup>95</sup> Justice Powell agreed, and drafted a note to Justice Blackmun arguing for use of viability and mentioning again that he was “favorably impressed” with how Judge Newman had “identified viability as the critical time from the viewpoint of the state.”<sup>96</sup>

Justice Powell never sent this letter,<sup>97</sup> but the critical deed had already been done. In subsequent drafts, Justice Blackmun incorporated the suggestions of Justices Powell and Marshall, finally arriving at the familiar tripartite test that appears in the final *Roe* opinion. Most importantly, he identified viability as the crucial cut-off point:

With respect to the State’s important and legitimate interest in potential life, the “compelling” point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has

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90. GARROW, *supra* note 40, at 583.

91. GARROW, *supra* note 40, at 582-83. Schwartz, who wrote on the subject before the release of the Powell papers, mistakenly assumed that the “member[ ] of the Conference” who had first suggested viability was Justice Marshall. SCHWARTZ, *supra* note 60 at 149. Garrow initially made a similar assumption (GARROW, *supra* note 40, at 582-83), but recently reached a different conclusion in light of Jeffries’ work and the later release of the remaining Powell papers. See Garrow, *supra* note 57.

92. JEFFRIES, *supra* note 58, at 149.

93. *Id.*

94. SCHWARTZ, *supra* note 60, at 149-50; GARROW, *supra* note 40, at 583-85.

95. GARROW, *supra* note 57, at 83.

96. *Id.*

97. *Id.*

both logical and biological justifications. If the State is interested in protecting fetal life after viability, it 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>98</sup>

This viability dictum, first introduced by Justice Blackmun into the *Roe* drafts only after Justice Powell had urged that he follow Judge Newman's lead, effectively doubled the period of time in which states were barred from absolutely prohibiting abortions.

#### CONCLUSION

Scholars and legal observers usually speculate at their peril as to the precise influence of a particular argument or lower court opinion on the reasoning of the United States Supreme Court. However, in the case of *Roe v. Wade*, it is clear that the work of Jon O. Newman in *Abele II* played a crucial role in the Court's decisionmaking process and its eventual opinion. Even before the retirement of the *Roe* Justices, as well as the subsequent revelations made possible from their various papers, there was compelling evidence of Judge Newman's significant influence. Now much more is clear. Judge Newman's *Abele II* opinion not only had a profound effect on the United States Supreme Court's reasoning, but on the length of time that a pregnant woman would have the opportunity to seek an abortion.

For any district judge, this kind of influence on an opinion by the Supreme Court is an unusual event. It is truly remarkable for an opinion written in the first eight months of a district judge's tenure to have this kind of demonstrable effect on a landmark of Supreme Court constitutional jurisprudence. For some thirty years, Jon O. Newman has cast a long shadow from the federal bench. But it is difficult to imagine that any opinion he authored during those three decades has had any greater effect on the Supreme Court than one he wrote at the very outset of his tenure.

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98. *Roe*, 410 U.S. at 163-64.

