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Two Notes on the Jurisprudence of Privacy.

Mark Tushnet

TWO NOTES ON THE JURISPRUDENCE OF PRIVACY

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I. *GRISWOLD*

Justice Douglas's opinion for the Supreme Court in *Griswold v. Connecticut* [1] is widely regarded among law professors as fatally flawed.[2] The Court may have reached the right result, the standard argument goes, but should have rested the result on the idea of unenumerated rights as suggested by Justice Goldberg[3] or on the deep traditions of the country as suggested by Justice Harlan,[4] rather than on the spectral penumbras and emanations of specific provisions of the Constitution on which Justice Douglas relied.[5]

I will attempt to rehabilitate the *method* of constitutional analysis Justice Douglas used. I believe that his opinion offers a defensible form of legal argument, though of course one may disagree with the application of that method to the problem in *Griswold*. After explaining why Justice Douglas's construct is a coherent one, I enumerate some objections to its application, and conclude with some observations about the implications of my defense of Justice Douglas's construct.

A. THE METHODOLOGY OF GRISWOLD

Griswold held unconstitutional a Connecticut statute prohibiting the use of contraceptives.[6] The central passage in Justice Douglas's opinion for the Court says that "specific guarantees in the Bill

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1. 381 U.S. 479 (1965).

2. *See, e.g.*, Dixon, *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43, 84; Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 994 (1979) ("magical mystery tour").

3. 381 U.S. at 517-20 (Goldberg, J., concurring).

4. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

5. *See* Greely, *A Footnote to "Penumbra" in* Griswold v. Connecticut, 6 CONST. COMM. 251 (1989).

6. The defendants were convicted as accessories to a violation of the prohibition on use, and the Court held that the validity of their convictions rested on the constitutionality of the prohibition on use.

of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[7] He listed the first, third, fourth, and fifth amendments as guarantees with such penumbras.

One might interpret this passage as referring to penumbral rights that are essential to the point or purpose of the enumerated rights. Thus, for example, we value the protections specifically provided in the fourth amendment because we believe that there are activities in the house that deserve to be protected against unjustified intrusion, and those activities are rightly called private.[8] Yet, although this approach to the problem posed by *Griswold* is plausible, it does not seem to capture the metaphor of penumbras; one pursuing this analysis could use the metaphor of "foundations" or the language of "purpose" to express the analysis.

The essential argument expressed by the metaphor of penumbras, I believe, is this: Each specific constitutional provision fully protects matters within its domain. Yet, to assure that those matters actually received the full protection to which they are entitled, it is necessary to protect matters outside the domain of the specific amendments. Justice Douglas offered *NAACP v. Alabama*[9] as an example. There the Court held that it was unconstitutional to require that the membership lists of the NAACP be disclosed. On the Court's analysis, disclosure would inhibit the free choice people would otherwise make to join or not join the NAACP; to the extent that the decision to join was inhibited, the effectiveness of association for speech would be diminished. As Justice Douglas interpreted the case, it did *not* hold that mere compulsory disclosure of membership in the NAACP directly violated the free speech guarantee of the first amendment; rather, it held that the effective protection of the speech of the NAACP, which *was* within the domain of the first amendment, required that compelled nondisclosure be barred.[10]

A similar analysis might be made of the other provisions Justice Douglas listed. For example, one might develop a law of the

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7. 381 U.S. at 484.

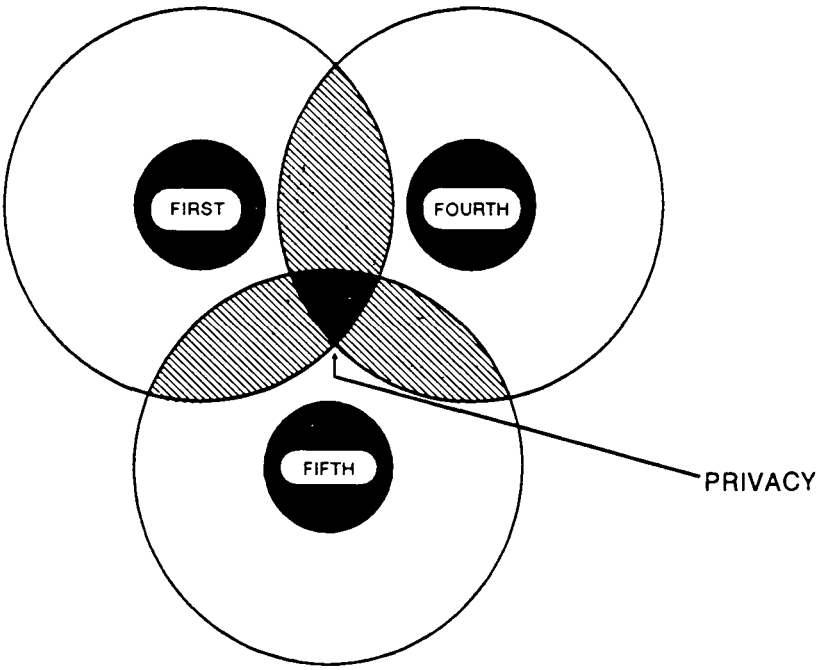
8. Another example of this approach can be found in Justice Marshall's dissenting opinion in San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973), which justified heightened scrutiny of classifications affecting basic education because education is important to the proper exercise of the right to vote.

9. 357 U.S. 449 (1958).

10. One might describe the holding in *NAACP v. Alabama* as creating a prophylactic rule, protecting matters not themselves protected by the specific provision in order to assure protection of matters that were so protected. The language of prophylactic rules is more familiar to lawyers than that of "penumbras" and "emanations," though it may not differ in substance, but plainly it could not have been used in *Griswold*.

fourth amendment on the "onion" model: As searches intrude more deeply on fundamental values, a larger probability of cause is necessary to justify the intrusion.[11] The fifth amendment law of self-incrimination might be sensitive to the values embodied in various evidentiary privileges, so that the amendment would bar spouses or children from being compelled to disclose what a defendant told them.[12]

On Justice Douglas's construct, then, each specific constitutional provision is surrounded by a penumbra, and matters that fall within the penumbras receive protection in order to assure that the specific provisions are fully enforced. Now, consider the following image of the construct. (See Diagram.) Each provision fully pro-



tects matters within the dark circles. The penumbras shade off around each provision. The penumbras of various provisions may

11. The Court has rejected the "onion" model. *See* W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.6(3) (1987). *Compare* Stanford v. Texas, 379 U.S. 476 (1965) (invalidating search for books because of insufficient reason to intrude). To the extent that *Stanford* adopts an analysis like that suggested in the text, it could be criticized for "double counting": the first amendment itself provides the protection, and heightening the amount of cause required to search under the fourth amendment because a book is involved is improper.

12. Again, this is not the present state of the law.

overlap—as when the penumbral protections of association overlap the penumbral protections of the household under the "onion" model of the fourth amendment and the penumbral protections of spousal disclosures under the suggested model of the fifth amendment. The degree of protection available to matters within the area of overlap is as substantial as the degree of protection available to matters within the core domains of the specific constitutional provisions.

That is Justice Douglas's construct. At least on the level of metaphor, it seems to "work." What might be wrong with it?[13]

> (1) There are no penumbras at all. Each constitutional provision protects only what it protects, and cases like *NAACP v. Alabama* are justified as direct protection of first amendment matters: Compelled disclosure of membership in the NAACP itself violates the free speech guarantees of the Constitution, period.[14]
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> (2) The penumbral protections do not (significantly) overlap. *NAACP v. Alabama* is indeed a case of penumbral protection, but it is penumbral protection of political speech, with no connection to or overlap with any possible penumbral protections the household under the "onion" model of the fourth amendment.
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> (3) The overlap among the penumbral protections does not cover enough territory to justify the holding in *Griswold*.
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> (4) The overlap cannot fairly be described as protecting a domain of privacy in the sense of personal autonomy, as it has come to be defined by the Court in cases purporting to apply the doctrine first articulated in *Griswold*.
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> (5) Whatever doctrine emerges from Justice Douglas's construct, it cannot be a free-standing doctrine of privacy; under the construct, every application of the doctrine must ultimately be tied to some set of specific constitutional provisions.

It should be noted that Justice Douglas may have understood

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13. I enumerate these objections essentially in the order of the threat they pose to Justice Douglas's construct, with the most threatening first. I will not state the prefatory phrase, attached to each objection, "even if the preceding objections are rejected, there is the following problem."

14. *See, e.g.*, Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1421 (1974) ("When the Constitution sought to protect private rights it specified them; that it explicitly protects some elements of privacy, but not others, suggests that it did not mean to protect those not mentioned.")

the force of these last two objections. In his concurring opinion in the abortion cases Justice Douglas used his construct, as the Court did not. Justice Blackmun's opinion for the Court was unconcerned about locating the protection of privacy in any specific constitutional provision. Justice Douglas, in contrast, again enumerated specific constitutional provisions implicated in the "choice of life style" that was affected by a woman's decision to bear or not bear a child, and listed cases in which the Court had protected dimensions of that choice in the course of dealing with specific constitutional provisions.[15] For Justice Douglas, then, the "choice of life style" is within the penumbral overlap of those provisions.

I do not wish to address here the merits of these objections.[16] My aim is only to establish that Justice Douglas's construct is hardly incoherent. Like any other technique of constitutional interpretation, the elements that make it up can be discussed rationally in the terms lawyers usually employ in constitutional discussions. It is difficult to distinguish, I believe, from the law of free speech in this regard.

What, however, is the significance of this explication of Justice Douglas's construct in *Griswold*? The Bork nomination hearings appear to have established that the Court decided *Griswold* correctly because it got the right answer, and may have established that, at least in a case now understood by all to involve "an uncommonly silly law,"[17] all that matters is getting the right answer. Even if the Court's rationale in *Griswold* is no longer important,[18] explaining why Justice Douglas's construct makes sense may be useful. The criticisms of the construct may have led lawyers to overlook the possibility of invoking the construct in other cases, and it is always useful to add another argumentative technique to the lawyer's armamentarium.

More important, Justice Douglas's construct is purely textualist; that is, it pays close attention to the language of the Constitution and to the relations among its specific provisions.[19] Textualism is

15. Doe v. Bolton, 410 U.S. 201, 211-14 (Douglas, J., concurring).

16. I find the last objection the most interesting. The development of a free-standing doctrine of privacy may exemplify a general process of constitutional development. A result justified according to one approach to constitutional analysis not infrequently comes to take on a life of its own, generating new results by the usual processes of analogy and re-rationalization that lawyers always employ, to the point where the courts are invoking the original case to justify outcomes not at all close to that case's facts or rationale.

17. 381 U.S. at 527 (Stewart, J., dissenting).

18. Either because what matters is that the Court got it right or because the case has now generated a free-standing doctrine of privacy.

19. *See also* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

ordinarily regarded as the most confining technique of constitutional interpretation, the one that places the most severe limits on a judge's ability to enact personal preferences into constitutional law. Justice Douglas's construct shows that this common perception is erroneous. A talented textualist judge has as much freedom as a talented nontextualist, whether the nontextualist is an originalist, an ethicist, or a process theorist.[20]

The Court's decision in *Griswold* is often taken to be a watershed in the development of modern constitutional theory, because it appears to have licensed the Court to engage in a variety of substantive innovations. I suggest that it is a watershed in another way. By showing that the purportedly most confining technique of constitutional interpretation can be turned to quite unexpected ends, Justice Douglas's opinion in *Griswold* supports the argument that controversies over methods of constitutional interpretation are unlikely to yield fruitful results of any sort.

II. *ROE*

Many discussions of the abortion issue take the distinction between viability and non-viability to be important.[21] Yet, the coherence of that distinction is rarely examined. When it is, we find that the distinction itself leads directly to the basic questions about the morality of abortion.

One of the fundamental components of the *Roe* test is viability. Yet on close examination, this concept is highly problematic. Consider a full-term baby five minutes after it emerges from its mother's womb. First, is the concept of viability relevant to such a child at all? In ordinary use, we sometimes say that a plan is "not viable," meaning that it is foreseeably doomed to failure. A person in a persistent vegetative state who has been maintained solely by mechanical means is often said to be "not viable" from the moment the

20. Perhaps, precisely because Justice Douglas's opinion seems so wide-ranging, it ought not count as textualist, where "textualism" is defined as a technique of constitutional interpretation whose attention to text rules out the kind of analysis in which Justice Douglas engaged. Yet, that would incorporate into the definition of textualism a substantive limitation on what counts as textualism, whose purpose is to constrain judicial activity in ways that the remainder of the definition cannot. One might as easily resolve problems about the scope of originalism, representation-reinforcement, or ethical analysis by incorporating similar substantive restrictions into those approaches to constitutional interpretation.

21. *See, e.g.*, Wertheimer, *Understanding the Abortion Argument*, 1 PHIL. & PUB. AFF. 66, 78-85 (1974) (outlining the position). Other discussions take viability to be irrelevant to the issue of abortion, which, on these views, may involve questions about the proper scope of government action, womens' rights to control their bodies or to participate in society as full citizens, or protecting actual or potential human life. I consider here only problems associated with claims that viability is relevant to the abortion issue.

machines are turned off.[22] An anencephalic baby is "not viable" either, in ordinary terms. So the concept of viability is not confined to fetuses in the womb.

What does it mean to say that a full term, normal baby is "viable"? Of course we can't mean that the baby *will* live out a "normal" lifespan, for at this point we have no reason to be confident of that judgment. Nor can we mean that the baby can live "on its own," because it obviously can't; it needs all sorts of support from other people—food, shelter, and the like. According to the Supreme Court, viability is the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."[23] This formulation implicitly distinguishes between artificial aid and natural assistance like the provision of food and shelter, although the sense in which the latter is natural is, as I will argue, obscure. Yet, the baby's lifespan, and more important, its ability to live on its own, do point us in the right direction, although the Court's conjoining potentiality with the necessity for artificial aid may mislead.

Suppose that the baby is born with characteristics that make it certain that it will not survive for more than two days. Is the baby viable? What about two years? I am inclined to think that, for most people, the first baby—perhaps anencephalic—is not viable and the second—perhaps one with Tay-Sachs disease—*is* viable. If so, there appears to be some threshold for viability such that the baby must live long enough to acquire the characteristics of personhood or at least a morally worthwhile lifespan. Concepts of personhood typically include the ability to generate specific affectional ties with other people, the ability to apprehend the environment, and perhaps more; concepts of a morally worthwhile lifespan might be less stringent.[24] But for present purposes, the crucial point is that viability must be defined with reference to some normative concepts—of personhood or of a morally worthwhile lifespan.[25]

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22. Such a person is viable before the machines are turned off largely, I believe, because he or she has previously attained the normative status of personhood that is the relevant consideration in discussions of viability. What makes the question of "pulling the plug" difficult is the problematic status of someone who once was a person but will never be a person again. Because the "nonviable" fetus has never been a person, the issues implicated in consideration of abortion differ from those implicated in discussions of termination of mechanical means of life support.

23. Roe v. Wade, 410 U.S. 113, 160 (1973).

24. For a discussion of these characteristics, see M. TOOLEY, ABORTION AND INFANTICIDE (1984).

25. One formulation, based on standard reporting practices as of 1979, is that viability is "the ability of the infant, afforded the best available medical care, to . . . live beyond 28 days." Stubblefield, *Late Abortion and Technological Advances in Fetal Viability: Some Medical Considerations*, 17 FAM. PLAN. PERSP. 161 (1985).

Now suppose that we have no reason to believe that the baby's lifespan will be below the threshold. That in itself is sufficient, I believe, to make the baby *viable*. Thus, in the ordinary case, this criterion converges with another: viability is also defined by the fact that we have no reason to believe that the baby's lifespan will be shorter than that typical of other full-term babies.

Consider next a baby delivered prematurely. Is it viable if (a) we have no reason to believe that its lifespan will be below the threshold of personhood or a morally worthwhile lifespan? Or is it necessary in addition that (b) we have no reason to believe that its lifespan will be shorter than that typical of babies delivered at full term, or (b′) we have no reason to believe that its lifespan will be shorter than that typical of other babies delivered—or aborted spontaneously—at that premature stage? If (a) is sufficient, we are left only with the question of defining the threshold. If, however, (b) or (b′) is needed as well, we face different questions. In particular, if (b) is necessary, fewer premature babies will be viable.

In addition, the lifespan typical of a full-term baby, and that typical of babies delivered prematurely at various points, depends on characteristics of the baby's society. Consider a baby born, either at term or earlier, with characteristics that give us reasons to believe that it will not survive long enough to cross the threshold of personhood or of a morally worthwhile lifespan.[26] The widespread availability of infant intensive care units would offset those reasons, thereby making the baby "viable" in the sense that, all things considered, we no longer have reasons to believe that it will not cross the threshold. As Roger Wertheimer puts it, "the viability of a fetus is its capacity to survive outside the mother, and *that* is totally relative to the available medical technology."[27] As I will argue, however, Wertheimer's statement that viability is "totally" relative to technology is an overstatement, at least if it is taken to mean that viability is *solely* relative to technology.[28] For, I argue, viability is also relative to the laws a society has in place.[29]

We are now in a position to consider the question of viability

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26. The conclusions drawn in the text hold, of course, as to babies delivered before term as well.

27. Wertheimer, *supra* note 6, at 82.

28. The reduction of viability to a technological issue is quite common. *See, e.g.*, Rhoden, *Trimesters and Technology: Revamping* Roe v. Wade, 95 YALE L.J. 639, 657 (1986) ("[v]iability is merely a medical or technological fact (or, more accurately, a statistical prediction).") This and similar formulations overlook the impact that the predictive element in the definition of viability necessarily adds a social dimension to the medical and technological elements.

29. As well as the resources the society chooses to devote to "the best available medical care," in Stubblefield's formulation, *supra* note 25.

with respect to abortion. If one believes that a fetus is a normative person from the moment of conception or from some point prior to the act of abortion, viability is irrelevant. Many people believe, however, that viability has something to do with the issue. Consider, then, a society which has decided to devote enormous resources to the preservation of fetuses removed from wombs.[30] Some such fetuses will survive long enough to cross the threshold, though perhaps not long enough to have a lifespan typical of babies born at term (condition [b] above). In that society, more fetuses will be viable than in one that devotes essentially no resources to the preservation of fetuses removed from the womb.

Now, this observation has two consequences. First, it makes it clear that using the line of viability to distinguish the time when abortion is permitted from the time after viability when it is prohibited (as *Roe v. Wade* does), is entirely perverse.[31] Precisely because the removed fetus is viable, it can survive past the threshold and have a significant life, so the abortion is less objectionable.

Perhaps the implicit point is that more than the threshold is required; by removing the fetus from the womb "prematurely," we make it less likely that the child will have a life span typical of that of children born at term. The "viability" distinction makes sense as it is used in the abortion context, then, only if something like condition (b) is part of the definition of viability. Yet, that condition is implausible, for it would make many premature babies not viable in the sense that at the moment of their birth their chances for having a lifespan typical of babies born at term are small, and grow smaller the more premature they are.

Second, assume that fetuses are *not* persons prior to the time of abortion. Then their viability depends on the surrounding social structure: the availability of infant intensive care units, but also the availability of programs for the promotion of the health of pregnant women. One decisive element in that social structure is, of course, the set of laws regulating abortion in the society. If abortions are relatively widely available under the society's laws, fetuses that are aborted are by definition not viable; that society's social structure is what gives us reason to believe that fetuses removed from the womb will not survive long enough to cross the threshold of personhood.

This conclusion cannot be defeated by suggesting that a soci-

30. For present purposes, I assume that these resources can be devoted to forms of extrauterine development that are at present unavailable. Thus, I am assuming "plastic wombs" or something of the kind.

31. *See* Tushnet & Seidman, *A Note on Tooley's* Abortion and Infanticide, 96 ETHICS 350 (1986).

ety's laws, or its laws relating directly to abortion, should be excluded from consideration in determining whether an infant is viable. For, the availability of infant intensive care units, for example, depends rather directly on the way in which a society structures its legal system—the provision of tax benefits for certain kinds of hospitals, the dimensions of tort liability, and the like. And, as to the laws relating to abortion, consider a statute that requires physicians to do the most they can, within the limits of available technology, to "preserve" the life of potentially viable fetuses removed from wombs during abortions. The term "potentially" is essential to the coherence of such a statute, and it shows that the viability of fetuses depends on the laws relating to abortion; in a state with such a statute, more fetuses are viable than in a state without one, because more fetuses will live long enough to cross the threshold of personhood.

In short, the concept of viability cannot be used as it has been in discussions of abortion, to distinguish sharply between times when abortion is permissible and times when it is not.[32] It is, at most, a term that defines which abortions a society chooses to permit or prohibit.

What might account for the attraction the idea of viability has in discussions of abortion? One clue is provided by the statement by the West German Constitutional Court in its Abortion Case: "The developmental process . . . is a continuous one which manifests no sharp demarcation and does not permit any precise delimitation of the various developmental stages of the human life. Nor does it end with birth; for instance, the phenomena of consciousness specific to human personality do not appear until some time after birth."[33] I believe that people attracted to using viability in discussions of abortion share something like this view. Yet, if they do, they are likely to be quite nervous about their commitment to the permissibility of abortions under some circumstances. They will find themselves unable to draw a logically defensible line anywhere in the developmental process, with the effect that everyone might be vulnerable to the termination of life—pre-viability fetuses, post-viabil-

32. The argument is *not* that, because viability is necessarily defined with reference to technology, a constitutional rule predicated to some extent on viability is unstable; the argument is, rather, that because viability is necessarily defined with reference to the entire social setting in which gestation, childbirth, and abortion occurs—including laws regulating the availability of abortion—a constitutional rule predicated to some extent on viability is incoherent.

33. *Quoted* from D. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 350 (1989). *See also* Engelhardt, *Viability, Abortion, and the Difference Between a Fetus and an Infant*, 116 AM. J. OBSTETRICS & GYNECOLOGY 429, 430-31 (1973) ("Human life is an unbroken continuum extending from one person to another.")

ity fetuses, new-born infants, people in persistent vegetative states, and so on indefinitely. Although they recognize that they cannot draw a logically defensible line at any particular point in this continuum of development, they believe that positions at the extremes are clearly distinguishable. Philosophers call this the "sorites" problem: We know the difference between a bald person and one with a full head of hair though we cannot say at what point a person "becomes" bald; we know the difference between a beach and a patch of sand though we cannot say which grain of sand transforms the patch into a beach. Identifying the point of transition is not a matter of logic but of social convention.

Similarly, people who believe that the developmental process is continuous, and who nonetheless believe that abortions ought to be permitted under some circumstances, require a social convention that will preserve the rights of those who they agree are uncontroversially "persons." As Nancy Rhoden put it, viability has "symbolic import." For Rhoden, the importance was that the term stood for "that time after which a fetus is so fully developed that it looks like a baby and evokes the emotional and social responses that babies evoke."[34] It should be apparent that in this formulation the conjunction of appearance and emotion is purely accidental, and that the symbolic function would be served by whatever time came to identify the point at which the emotional responses were evoked. In the recent past viability has served as that convention, though of course *any* other point would do: quickening, implantation, birth, or even "the point at which a woman considering abortion has had a fair opportunity to obtain one." It would take a different sort of analysis—sociological and not philosophical—to identify why certain communities select one logically arbitrary convention while others select another.[35]

One might even say that "viability" identifies a point in the penumbra of the right to life.

34. Rhoden, *Late Abortion and Technological Advances in Fetal Viability: Some Legal Considerations*, 17 FAM. PLAN. PERSP. 160 (1985). Rhoden, *supra* note 28, at 672-73, recognizes the point in distinguishing between "Viability$_1$," the technological version, and "Viability$_2$," the social/ethical one.

35. For one possible analysis, see Engelhardt, *supra* note 33, at 432 (relying on emergence of "a social structure" of mother-child relation, with certain psychological components, to explain why line might be drawn at point of birth, as distinguished from "primarily biological" interactions between mother and fetus, which "occurs automatically and without active involvement of the mother").