Fordham Law Review

Volume 41 | Issue 4 Article 2

1973

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Recommended Citation

Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807 (1973).
Available at: http://ir.lawnet.fordham.edu/flr/vol41/iss4/2

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AN AMERICAN TRAGEDY: THE SUPREME COURT ON ABORTION

*ROBERT M. BYRN**

"[I]f the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values."[1]

"New York courts have already acknowledged that, in the contemporary medical view, the child begins a separate life from the moment of conception."[2]

I. INTRODUCTION

ON January 22, 1973, in the companion cases of *Roe v. Wade*[3] and *Doe v. Bolton*,[4] the Supreme Court of the United States declared that unborn children are not persons under section one of the fourteenth amendment. Basing its decision on a right of personal privacy to choose whether or not to abort, the Court held further that a state may not enact abortion legislation protecting unborn children for the period of gestation prior to the time the children are said to be " 'viable,' that is, potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."[5]

Wade arose out of a challenge to the Texas abortion statutes.[6] Texas law incriminated all abortions except those "procured or attempted by medical advice for the purpose of saving the life of the mother."[7] In the

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1. Furman v. Georgia, 408 U.S. 238, 303 (1972) (Brennan, J., concurring).

2. Byrn v. New York City Health & Hosps. Corp., 38 App. Div. 2d 316, 324, 329 N.Y.S.2d 722, 729 (2d Dep't) (citations omitted), aff'd on other grounds, 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), appeal dismissed, 93 S. Ct. 1414 (1973).

3. 93 S. Ct. 705 (1973).

4. 93 S. Ct. 739 (1973).

5. 93 S. Ct. at 730 (footnotes omitted). Actually, viability is now placed at twenty weeks, and it is generally recognized that the term signifies, not a qualitative characteristic of the unborn child, but the ability of technology to keep the child alive outside the womb in an artificial life support system. The child is as much alive before viability as after. See Byrn, Abortion-on-Demand: Whose Morality?, 46 Notre Dame Law. 5, 12-13 (1970) [hereinafter cited as Byrn]. Although Justices Rehnquist and White dissented in Wade and Bolton, they did not challenge the Court's holding that unborn children (even after viability) are not persons under section one of the fourteenth amendment. See 93 S. Ct. at 736 (Rehnquist, J., dissenting); Id. at 762 (White, J., dissenting).

6. Tex. Penal Code Ann. arts. 1191-96 (1961). However, art. 1195 was not challenged. 93 S. Ct. at 709 n.1.

7. Tex. Penal Code Ann. art. 1196 (1961).

district court,[8] several plaintiffs, including Roe, a pregnant woman,[9] had sought a declaration of the unconstitutionality of the Texas abortion laws and a permanent injunction against enforcement on the ground that the statutes "deprive married couples and single women of the right to choose whether to have children, a right secured by the Ninth Amendment."[10] The three-judge district court agreed,[11] and also found the statutes unconstitutionally vague.[12] However, the court refused to issue the injunction.[13] Plaintiffs appealed the denial of the injunction, and the Supreme Court determined that it had jurisdiction to deal not only with the injunction issue, but also with the merits of the plaintiffs' constitutional claims.[14]

Bolton arose out of a similar challenge to the Georgia abortion statutes.[15] Georgia law incriminated all abortions except those which, in the best clinical judgment of a duly licensed physician, were necessary because continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or the fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or the pregnancy resulted from forcible or statutory rape.[16] In the district court,[17] numerous plaintiffs, including Doe, a pregnant woman,[18] had (as in *Wade*) sought a declaration of the unconstitutionality of the Georgia abortion laws and a permanent injunction against enforcement. Their claims were more extensive than in *Wade*. In addition to alleging vagueness and invasion of the right of privacy, the plaintiffs asserted that the statutes unconstitutionally restricted the right of physicians and others to practice their professions, and also discriminated against the poor.[19] The three-judge district court, find-

8. Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970).

9. Id. at 1220.

10. Id. at 1219. There have been a number of similar challenges to state abortion laws, many of them in federal courts and some of them were cited in Wade. See 93 S. Ct. at 727-28. For the most part, discussion of these cases has been avoided in this article because obviously they did not bind the Supreme Court in Wade. The Court had to consider the merits of the various constitutional claims de novo. Its decision supersedes all others and it is that decision which is under scrutiny here.

11. 314 F. Supp. at 1221-23.

12. Id. at 1223. The Supreme Court did not reach the issue of vagueness. 93 S. Ct. at 732. But see United States v. Vuitch, 402 U.S. 62 (1971).

13. 314 F. Supp. at 1225 (1970).

14. 93 S. Ct. at 712.

15. Ga. Code Ann. §§ 26-1201 to -1203 (1972).

16. Id. § 26-1202(a). Thirteen other states have statutes similar to Georgia's and all are based on Model Penal Code § 230.3 (Proposed Official Draft 1962). See 93 S. Ct. at 720 n.37. Four states have repealed criminal sanctions on abortions during particular periods of the pregnancy. Id. The remaining states have statutes similar to the Texas law. Id. at 709 n.2.

17. Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970).

18. Id. at 1057.

19. Id. at 1051.

ing that "the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy,"[20] struck down the substantive portions of the Georgia statutes; left standing certain procedural and medical standards; and refused to issue an injunction.[21] Plaintiffs appealed the last two rulings, and the Supreme Court, having passed on the substantive constitutional issues in *Wade*, restricted its opinion to a finding of the unconstitutionality of the standards. In both *Wade*[22] and *Bolton*,[23] the Court refused to reverse the denial of the injunction.[24]

The writer has long maintained that unborn children are in all respects live human beings protected by section one of the fourteenth amendment, particularly the equal protection clause.[25] In an opinion replete with error and fraught with dangerous implications, the Supreme Court in *Wade* found to the contrary. It is with these issues that this article is concerned.[26]

Roe v. Wade is in the worst tradition of a tragic judicial aberration that periodically wounds American jurisprudence and, in the process, irreparably harms untold numbers of human beings. Three generations of Americans have witnessed decisions by the United States Supreme Court which explicitly degrade fellow human beings to something less in law than "persons in the whole sense."[27] One generation was present at *Scott v. Sandford*,[28] another at *Buck v. Bell*[29] and now a third at *Roe v. Wade*. Are not three generations of error enough?

II. The Structure of the *Wade* Opinion and the Specific Holdings of the Court

Parts I through IV of the *Wade* opinion contain an analysis of the Texas anti-abortion statutes, a history of the action, a justification of the

20. Id. at 1055 (footnote omitted).

21. Id. at 1056-57.

22. 93 S. Ct. at 733.

23. Id. at 752.

24. It is to be noted that § 26-1202(e) of the Georgia Criminal Code contains a "conscience" clause protecting hospitals and doctors who refuse to participate in abortions. The Court in Bolton at least inferentially approved this section. 93 S. Ct. at 750.

25. See, e.g., Byrn v. New York City Health & Hosps. Corp., 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), appeal dismissed, 93 S. Ct. 1414 (1973); Report of the Governor's Commission Appointed to Review New York State's Abortion Law, Minority Report 47, 51-56, 67-68 (1968); Byrn, Abortion in Perspective, 5 Duquesne L. Rev. 125, 126-29, 134-35 (1966).

26. Since Bolton does not deal with these issues, that decision will be referred to only in so far as it clarifies some substantive point in Wade.

27. 93 S. Ct. at 731.

28. 60 U.S. (19 How.) 393 (1857).

29. 274 U.S. 200 (1927).

Court's inquiry into the merits, and a decision on the issues of justiciability, standing and abstention.[30]

Part V sets up the basic contention of the appellants that "the Texas statutes . . . invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy," a right which appellants would discover "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 . . . ."[31]

Before addressing this claim, the Court felt "it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws."[32] The historical survey in Part VI of the opinion covers "*Ancient attitudes*," "*The Hippocratic Oath*," "*The Common Law*," "*The English statutory law*," "*The American law*," "*The position of the American Medical Association*," "*The position of the American Public Health Association*," and "*The position of the American Bar Association.*"[33]

In Part VII, the Court analyzed the three reasons usually advanced "to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence."[34] The first reason, not advanced by Texas and which "no court or commentator has taken . . . seriously,"[35] is to discourage illicit intercourse. The second is the protection of the pregnant woman against a hazardous medical procedure, an interest which because of "[m]odern medical techniques" has "largely disappeared," at least for the period of pregnancy "prior to the end of the first trimester," although "the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy."[36] The third reason "is the State's interest—some phrase it in terms of duty—in protecting prenatal life."[37]

Parts VIII (the pregnant woman's "right of privacy" to decide whether or not to abort), IX (the absence of a compelling state interest in the

30. 93 S. Ct. at 709-15. Jurisdiction, justiciability, standing and abstention are outside the scope of this article.

31. Id. at 715.

32. Id.

33. Id. at 715-24. Since this article is concerned with Anglo-American law, there is no need to comment on the Court's analysis of ancient attitudes and the Hippocratic Oath.

34. Id. at 724.

35. Id. (footnote omitted).

36. Id. at 725. An inquiry as to whether abortion is truly safe in the first trimester is outside the scope of this article.

37. Id.

"fetus" as a legal person or a human life or both), and X (the residual interests of the state in safeguarding the pregnant woman against the health hazards of a late abortion and in protecting the "potentiality of life" after viability) contain the Court's decision on the merits.[38] The Court held: *first*, the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy;"[39] *second*, "this right is not unqualified and must be considered against important state interests in regulation;"[40] *third*, the right of privacy being a "fundamental right," regulation limiting it may be justified only by a "compelling state interest," and restrictive legislation "must be narrowly drawn to express only the legitimate state interests at stake;"[41] *fourth*, Texas urges that it has a compelling state interest in protecting the fetus' right to life as guaranteed by the fourteenth amendment,[42] but "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn;"[43] *fifth*, Texas urges "that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception,"[44] but "[w]e need not resolve the difficult question of when life begins. 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,"[45] and, "the unborn have never been recognized in the law as persons in the whole sense;"[46] *sixth*, "we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake;"[47] *seventh*, a state "does have an important and legitimate interest in preserving and protecting the health of the pregnant woman,"[48] however, this interest does not reach

38. Id. at 726-32.
39. Id. at 727.
40. Id.
41. Id. at 728. Justice Rehnquist in dissent objected that the compelling state interest test applies to the equal protection clause, not the due process clause. Id. at 737 (Rehnquist, J., dissenting).
42. Id. at 728.
43. Id. at 729 (footnote omitted).
44. Id. at 730.
45. Id.
46. Id. at 731.
47. Id.
48. Id.

the "compelling" point until approximately the end of the first trimester,[49] from and after which "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health;"[50] but "for 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;"[51] *eighth*, a state has an important and legitimate interest in "protecting the potentiality of human life,"[52] but this interest does not reach the "compelling" point until viability,[53] and "[i]f 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;"[54] *ninth*, the Texas statute "sweeps too broadly," and "cannot survive the constitutional attack made upon it here;"[55] *tenth*, no decision is made with respect to the father's rights, if any, in the abortion decision, or the rights, if any, of the parents of an unmarried pregnant minor;[56] *eleventh*, since a state "may, if it chooses," enact legislation restricting abortion within the limits set forth above,[57] it follows that the state may, if it chooses, repeal all laws restricting abortion, and allow "the potentiality of life" to be destroyed up to the moment of birth.

With respect to unborn children, the *Wade* decision means at a minimum: that an unborn child is neither a fourteenth amendment person nor a live human being at any stage of gestation; an unborn child has no right to live or to the law's protection at any stage of gestation; a state may not protect an unborn child from abortion until viability; after viability, a state may, if it chooses, protect the unborn child from abortion, but an exception must be made for an abortion necessary to preserve the life or health of the mother; and finally, health having been defined in *Doe v. Bolton* to include "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient,"[58] it follows that a physician may with impunity equate the unwantedness of a

49. Id. at 731-32.
50. Id. at 732; see text accompanying note 36 supra.
51. 93 S. Ct. at 732.
52. Id. at 731.
53. Id. at 732.
54. Id.
55. Id.
56. Id. at 733 n.67.
57. Id. at 732-33
58. Id. at 747.

pregnancy with a danger to the pregnant woman's health—emotional, psychological or otherwise. Thus, even after viability, there is little that a state can do to protect the unborn child.

III. The Fundamental Errors in *Wade*: In General

Upon analysis, it becomes evident that the structure of the Court's opinion in *Wade* is defective. The Court agreed that if the fourteenth amendment personhood of the unborn child were established, "the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment."[59] Hence, the approach of the Court should have been to decide: (a) whether the unborn child, as a matter of fact, is a live human being, (b) whether all live human beings are "persons" within the fourteenth amendment, and (c) whether, in the light of the answers to (a) and (b), the state has a compelling interest in the protection of the unborn child, or to put it another way, whether there are any other interests of the state which would justify denying to the unborn child the law's protection of his life. Instead, the Court reversed the inquiry, deciding first that the right of privacy includes a right to abort, then deciding that the unborn child is not a person within the meaning of the fourteenth amendment, and finally, refusing to resolve the factual question of whether an abortion kills a live human being. In effect, the Court raised a presumption against the constitutional personality of unborn children and then made it irrebuttable by refusing to decide the basic factual issue of prenatal humanbeingness.

The refusal to resolve the threshold question of fact at the outset is the crucial error in *Wade*. There is a " 'long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest.' "[60] This fundamental error may have been caused by the Court's misapprehension of the common law of abortion and the motivation behind early American anti-abortion statutes. This, in turn, apparently led the Court to forego researching the intent of the framers of the fourteenth amendment: to bring within the aegis of the due process and equal protection clauses every member of the human race, regardless of age, imperfection or condition of unwantedness. Left without any reliable historical basis for constitutional interpretation, the Court both failed to allude

59. Id. at 728. This statement quite clearly and correctly means that the right of personal privacy is subordinate to the fourteenth amendment right to life. Hence, the key question is whether the unborn child is a human being-cum-human person. If so, then the right of privacy does not include the right to abort.

60. Napue v. Illinois, 360 U.S. 264, 272 (1959) (footnote omitted), quoting Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 121 (1954).

to its own prior explication of "person" under section one of the fourteenth amendment and mistook the general status in law of unborn children. Further, it adverted to a number of criteria which it erroneously interpreted as proof that the unborn child is not a person at all under the fourteenth amendment. In short, error was piled upon error.

IV. The Historical Errors

At the very beginning of its opinion in *Wade*, the Supreme Court announced:

> Our task, of course, is to resolve the issue by constitutional measurement free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortive procedure over the centuries.[61]

At the end of the opinion, the Court concluded that its holding was consistent "with the lessons and example of medical and legal history" and "with the lenity of the common law . . . ."[62]

It is evident that the Court's finding that unborn children are not fourteenth amendment persons was deeply influenced by its own interpretation of history, which, for all practical purposes, was dictated by an uncritical acceptance of two law review articles by abortion advocate Cyril Means.[63] Unfortunately, the Court's understanding of the Anglo-American history of the law of abortion is both distorted and incomplete. Because these errors are so significant and because they span a period beginning in the thirteenth century and extending into the twentieth, a major portion of this article must be devoted to them.

The following are the Court's key historical observations:

> It is undisputed that at the common law, abortion performed *before* "quickening"—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense. . . .[64]
>
> . . . .
>
> . . . [I]t now appear[s] doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus.[65]
>
> . . . .

61. 93 S. Ct. at 709.

62. Id. at 733.

63. Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?, 17 N.Y.L.F. 335 (1971); Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality, 14 N.Y.L.F. 411 (1968). The Supreme Court referred to these articles respectively as "Means II" and "Means I," and they are so cited hereinafter.

64. 93 S. Ct. at 716 (footnote omitted).

65. Id. at 718.

. . . It was not until after the War Between the States that legislation began generally to replace the common law. . . .[66]

. . . .

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. . . .[67]

. . . .

Parties challenging state abortion laws . . . claim that most state laws were designed solely to protect the woman. . . . The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus.[68]

. . . .

All this, together with our observation, . . . that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn.[69]

The historical picture painted by the Court is one of a "right" to abort, extending from the earliest common law, through most of the nineteenth century in America, until the post-Civil War enactment of abortion statutes (which, in the Court's view, were intended for the pregnant woman's protection and not that of her unborn child) and being completely unimpaired by the fourteenth amendment. At issue, therefore, is the status of abortion—or more accurately, the status of the unborn child—at common law, under nineteenth century American abortion statutes, and under the fourteenth amendment.

A. *The Common Law*

It has been claimed, alternatively, that abortion was not a crime at all at common law, but a "freedom" of the pregnant woman, or that abortion was a crime only after quickening. Ergo, the unborn child is not a fourteenth amendment person.[70] These claims obviously influenced the Court in *Wade*. The more plausible view of the common law is to the contrary; namely: (a) even the earliest common law cases do not support the proposition that abortion was regarded as a "liberty" or "freedom" or "right" of the pregnant woman or anyone else; (b) "quickening" was utilized in the later common law as a practical evidentiary test to determine whether the abortion had been an assault upon a live human being in the womb

66. Id. at 720.
67. Id.
68. Id. at 725-26 (footnotes omitted).
69. Id. at 729 (footnote omitted).
70. See note 63 supra.

and whether the abortional act had caused the child's death; this evidentiary test was never intended as a judgment that before quickening the child was not a live human being; and, (c) at all times, the common law disapproved of abortion as *malum in se* and sought to protect the child in the womb from the moment his living biological existence could be proved.

Anglo-Saxon law before the Norman Conquest penalized abortion civilly in the form of heavy fines, and ecclesiastically in the form of penances.[71] In the thirteenth century, abortion of a fetus "formed [or] animated, and particularly if it be animated," was condemned as homicide by Bracton[72] and, later in the same century by the anonymous legal writer, Fleta, although Fleta used the term "formed and animated."[73]

The biologists of the thirteenth century taught that a new life, biologically separate from the mother, came into being (animation) when the fetal body assumed a recognizable human form (formation), approximately forty days after conception (eighty days in the case of a female).[74] This being the science of the day, Bracton's use of the term formed *or* animated is somewhat puzzling. It is possible that he meant to leave open the question of whether animation might occur at some time before formation in deference to Christian teaching which condemned all abortion,[75] although biologically, philosophically and canonically, an abortion after formation was regarded as a much more serious offense. On the other hand, it is probably unfair to argue that Bracton incorporated into secular law a concept not supported by contemporary secular science. His use of the disjunctive "or" and the phrase "and particularly if it be animated" may have been intended only to emphasize that abortion was a crime against human life. Fleta understood Bracton to mean that formation and animation coincided ("formed and animated") and Bracton has been so translated.[76]

Biology led the way in the thirteenth century, and other disciplines, including law and ethics followed. Though Bracton was a canonist, the canon law of abortion was itself the product of current biological thought. Bracton appears to be the common law's first interdisciplinarian, using

71. G. Grisez, Abortion: The Myths, The Realities, and the Arguments 186-87 (1970) [hereinafter cited as Grisez].

72. Quay, Justifiable Abortion—Medical and Legal Foundations, 49 Geo. L.J. 395, 431 (1961) [hereinafter cited as Quay].

73. Id.

74. J. Noonan, Contraception 88-91, 216-17 (1966); Means I, supra note 63, at 411-12; Quay, supra note 72, at 426-31.

75. See J. Noonan, An Almost Absolute Value in History, in The Morality of Abortion: Legal and Historical Perspectives 1 (J. Noonan ed. 1970).

76. 2 H. Bracton, De Legibus et Consuetudinibus Angliae 278-79 (T. Twiss ed. 1879).

secular science as the basis for rational law, updating the disapproval of abortion that had existed even prior to the Norman Conquest.

Common law judges and lawyers from the fourteenth century onward faced a major problem: how to accommodate Bracton's substantive crime to the practical requirements of proof that the aborted woman had been pregnant, that the aborted child had been alive, and that the abortional act had killed the child.

Pro-abortion writers rely on two fourteenth century cases to "prove" that abortion was a treasured common law freedom of medieval English women.[77] One might easily question the relevance of the fourteenth century to the fourteenth amendment. Still, if one thing is certain about the two cases, it is that they do not support the pro-abortion contention.

As translated by Professor Means, the earlier case (1327) reads as follows:

> Writ issued to the Sheriff of Gloucestershire to apprehend one D. who, according to the testimony of Sir G[eoffrey] Scrop[e] [the Chief Justice of the King's Bench], is supposed to have beaten a woman in an advanced stage of pregnancy who was carrying twins, whereupon directly afterwards one twin died, and she was delivered of the other, who was baptized John by name, and two days afterwards, through the injury he had sustained, the child died: and the indictment was returned before Sir G. Scrop[e], and D. came, and pled Not Guilty, and for the reason that the Justices were unwilling to adjudge this thing a felony, the accused was released to mainpernors, and then the argument was adjourned sine die. [T]hus the writ issued, as before stated, and Sir G. Scrop[e] rehearsed the entire case, and how he [D.] came and pled.
>
> Herle: to the sheriff: Produce the body, etc. And the sheriff returned the writ to the bailiff of the franchise of such place, who said, that the same fellow was taken by the Mayor of Bristol, but of the cause of this arrest we are wholly ignorant.[78]

When the defendant originally appeared before King's Bench, and the "justices were unwilling to adjudge this thing a felony," he was released to mainpernors (akin to bail) and the argument was adjourned *sine die*. The writ was not dismissed. The report of the case, then, is not the report of the original proceedings before King's Bench but of subsequent proceedings. It is evident that the Chief Justice of King's Bench (Scrope) was reporting the prior action of King's Bench to another judicial body. Herle, who ordered the sheriff to produce the body after hearing Scrope's account of the prior proceedings, was not a member of King's Bench, but was the Chief Justice of the Common Bench. The presence and intervention of the Chief Justice of the Common Bench are explicable only if these subsequent proceedings were before the King's Council; otherwise, they are not.

77. See, e.g., Means II, supra note 63, at 336-41.

78. Id. at 337, 338 n.4 (footnote omitted), translating Y. B. Mich. 1 Edw. 3, f. 23, pl. 18 (1327).

The King's Council, among its other functions, served as a body of consultation and advice for justices who were experiencing legal difficulty in deciding a case.[79] The justices of the realm were *ex officio* members of the Council,[80] which operated at times either as a conference of judges,[81] or as an alternative to the King's Bench.[82] Moreover, the Council gave attention to anything that, because of the incompleteness of the law, required, in whole or in part, exceptional treatment.[83]

It is most probable that in 1327 the justices of King's Bench consulted the Council for assistance in deciding a case of first impression, as they attempted to interpret and apply Bracton and Fleta. The need to resort to the Council would explain the adjournment *sine die* and the admission of defendant to bail at the original proceedings before King's Bench.[84] However, since the arrest of the defendant on another charge precluded further proceedings, the Council's instruction was not forthcoming and no final disposition was made of the case. It is authority for nothing except the unwillingness of the court to let the abortionist go unpunished and the justices' puzzlement over how properly to deal with him. Subsequent history would suggest that the justices' dilemma was rooted in problems of proof. Had the abortionist's act really been the cause of the stillbirth? Had the two-day-old twin died from the abortion or some other cause?

The next reported abortion case was decided in 1348. Like the 1327 case, it helps the pro-abortionists not at all. As translated by Professor Means, the report reads as follows:

> One was indicted for killing a child in the womb of its mother, and the opinion was that he shall not be arrested on this indictment since no baptismal name was in the indictment, and also it is difficult to know whether he killed the child or not, etc.[85]

The court did *not* dismiss the indictment on the ground that abortion was not an offense at common law. Indeed, if that were the case, there

79. Select Cases Before the King's Council 1243-1482, at xvii-xviii (I. Leadam & J. Baldwin eds. 1918).

80. Id. at xvi.

81. Id. at xxi-xxii.

82. Id. at xxii.

83. Id. at xxvi.

84. "Moreover a case before the justices might become a case before the council not by an appeal or change of venue, but by a postponement until the council . . . should assemble." Id. at xxi. It is to be noted that after the accession of Edward III in January, 1327, King's Bench, perhaps unsure of its authority, refused to impose criminal penalties in some cases with the result that the King called the Council to York to decide on what should be done to restore normal proceedings. Select Cases in the Court of King's Bench Under Edward II, xiv-xv (G. Sayles ed. 1957). It was while the Council (including Scrope and Herle) was at York that the proceedings in the 1327 case occurred.

85. Means II, supra note 63, at 339, translating Y.B. Mich. 22 Edw. 3 (1348).

would have been no indictment at all, or the indictment would have been dismissed expressly on that ground. Rather, the inference is that abortion was a substantive offense, but the indictment had to be dismissed for a defect in pleading (no baptismal name) and an impossibility of proof (the cause of the child's death).[86]

The 1327 case merely demonstrates the dilemma of the justices in attempting to apply Bracton's rule in a case of first impression. The inference in the 1348 case is that abortion was a crime but difficulties in pleading and proof barred prosecution and conviction.[87] Certainly there is nothing in these cases to suggest that abortion was regarded as a "freedom."

Sixteenth century writers[88] were persuaded by these difficulties to state, as a practical matter, that abortion was not a crime. Then, in the seventeenth century, a way was found to satisfy the proof requirements, at least for some abortions.

The seventeenth century, as an era of abortion law reform, began with *R. v. Sims*[89] wherein it was said that if an aborted child were born alive with marks of the abortion and then died, it was murder, but if the child were stillborn, there was no murder because it could not be known "whether the child were living at the time of the batterie or not, or if the batterie was the cause of the death . . . ."[90] The *Sims* live-birth-murder doctrine provided only a minor solution to the problems of proof which were highlighted and reiterated in the remainder of the *Sims* rule.

Later in the seventeenth century, Coke attempted to contribute a further solution:

If a woman be quick with childe, and by a Potion or otherwise killeth it in her

86. It is not only in abortion cases that problems of proof of causation prevented a conviction for the killing of a human being. At common law, a defendant could not be convicted of a homicide if his victim died more than a year and a day after the assault, the theory being that after that time, it was impossible, given the state of medical knowledge, to prove that the defendant's assault had been the cause of the victim's death. R. Perkins, Criminal Law 28-29 (2d ed. 1969). Of course, despite this rule, the substantive common law of homicide remained intact. So too, despite the difficulties in proof in abortion cases at common law, the clear inference from the 1348 case is that a substantive crime of abortion did exist.

87. It is probably for this reason that the canonical courts took jurisdiction of the offense. It is interesting, however, that there were apparently no abortion prosecutions in the canonical courts after the sixteenth century. Means I, supra note 63, at 439. In the seventeenth century, the common law began to find solutions to the problems of proof.

88. For example, Staundford and Lambard, two sixteenth-century writers, seem to have denied the existence of abortion as a crime. It is generally accepted that they took this position because of the historical difficulty in proving the crime, and the resulting paucity of indictments for abortion. See Davies, Child-Killing in English Law, 1 Modern L. Rev. 203 (1937).

89. 75 Eng. Rep. 1075 (K.B. 1601).

90. Id. at 1076.

wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprison [misdemeanor], and no murder: but if the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in the law it is accounted a reasonable creature, in rerum natura, when it is born alive.[91]

The Supreme Court in *Wade*, in effect, accuses Coke, as attorney general in *Sims*[92] and as author of the *Third Institute*, of inventing the crime of abortion in defiance of the 1327 and 1348 cases.[93] An analysis of Coke's rules in the light of prior and contemporary law reveals that the accusation is without merit. As already pointed out, the 1327 and 1348 cases are not contrary to the substantive law propounded by Bracton and Fleta. Also, the live-birth-murder rule in *Sims*, which Coke adopted and which undisputably became fixed in English law,[94] is in accord with Bracton and Fleta. Moreover, in limiting the misdemeanor of abortion to a woman "quick with childe," Coke cited Bracton and Fleta.[95] It seems likely, therefore, that he meant to identify "quick with childe" with "formed and animated." He did, however, depart from the earlier authorities by classifying the crime as a serious misdemeanor rather than murder. The modification probably resulted from difficulties in proving that the stillbirth was the result of the abortion. Finally, Coke's statement that the child is accounted "*in rerum natura*, when it is born alive," is sometimes misinterpreted to mean that the common law viewed the unborn child as something less than a live human being. But when one examines the subsequent interpretation of Coke by English courts, one is led to conclude that Coke was referring only to the law of homicide where the exigencies of proof prevented labelling the intrauterine killing a murder. For other purposes, such as inheritance, the unborn child was recognized as a person *in rerum natura* in the womb. For instance, it was held in *Wallis v. Hodson*:[96]

The principal reason I go upon in the question is, that the plaintiff was *in ventre sa mere* at the time of her brother's death, and consequently a person *in rerum natura*, so that both by the rules of the common and civil law, she was, to all intents and purposes, a child, as much as if born in the father's life-time.[97]

Wallis v. Hodson relied, *inter alia*, on *Beale v. Beale*[98] wherein Lord

91. E. Coke, Third Institute 50 (1644).

92. Coke was attorney general in 1601 and may have been the "Cook" mentioned in R. v. Sims.

93. 93 S. Ct. at 718 & n.26.

94. See R. v. West, 2 Cox Crim. Cas. 500 (1848).

95. E. Coke, Third Institute 50 (1644).

96. 26 Eng. Rep. 472 (Ch. 1740).

97. Id. at 473.

98. 24 Eng. Rep. 373 (Ch. 1713).

Chancellor Harcourt specifically cited Coke's abortion rules as authority for finding a posthumous child "to be *living at her father's death* in *ventre sa mere.*"[99]

That Coke regarded the unborn child as a human being *in esse* is implicit in the live-birth-murder rule. At common law, crime was "generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand . . . ."[100] The rule of concurrence means that the victim of the abortional act must have been a human being *at the time of the act*—that is, while he was intrauterine, though his subsequent death was extrauterine—or else the mind and hand of the defendant could not have concurred to produce a homicide.

Coke's abortion rules are in accord with prior law and with the contemporary status in law of the unborn child as a human being *in esse* prior to birth, at least from formation and animation. His innovations were not substantive, but evidentiary, and in this respect, it is clear that "common law doctrines are not frozen for criminal cases any more than civil cases . . . ."[101] Any inconsistency between Coke and the 1327 and 1348 cases is procedural, not substantive. However, Coke's characterization of an abortion-cum-stillbirth as a great misdemeanor, though good substantive law, did little to solve the problem of proving that the child had been alive when the abortion occurred, or even in some cases, that the woman had been pregnant.

The seventeenth century legal commentator, Sir Matthew Hale, provided another approach to the problem of proof in his posthumously published *History of the Pleas of the Crown.* Hale differed with Coke on whether abortion of a woman "quick or great with childe," resulting in a live birth and subsequent death of the child, was murder. Citing the 1327 and 1348 cases, he stated that the abortion "is not murder nor manslaughter by the law of England because [the child] is not yet in rerum natura, tho it be a great crime . . . ."[102]

The generally accepted view is that Hale took this position, as Staundford and Lambard had before him, because of the evidentiary difficulty in proving the crime.[103] On the other hand, Hale did characterize abortion as a "great crime." It has been argued that Hale was referring to an ecclesiastical crime.[104] Another plausible view, consistent with the clear inference in the 1348 case which Hale cites, is that Hale recognized

99. Id.

100. Morissette v. United States, 342 U.S. 246, 251 (1952).

101. United States v. Schoefield, 465 F.2d 560, 561 (D.C. Cir.), cert. denied, 93 S. Ct. 210 (1972) (footnotes omitted).

102. 1 M. Hale, History of the Pleas of the Crown 433 (1736) [hereinafter cited as Hale].

103. Davies, supra note 88, at 209 & n.23.

104. Means II, supra note 63, at 350, 368-69.

abortion as a common law crime, but was unwilling for the moment to identify it as either a felony or a misdemeanor, perhaps because of disagreement with Coke on the degree of the offense. Weight is lent to this interpretation when one considers an example of murder given elsewhere by Hale:

> But if a woman be with child, and any gives her a potion to destroy the child within her, and she takes it, and it works so strongly, that it kills her, this is murder, for it was not given to cure her of a disease, but unlawfully to destroy her child within her, and therefore he that gives a potion to this end, must take the hazard, and if it kill the mother, it is murder, and so ruled before me at the assizes at Bury in the year 1670.[105]

It has been argued that "unlawfully to destroy the child within her" refers incidentally to ecclesiastical illegality, and the case for murder rests entirely on the foreseeable danger to the woman from taking the abortifacient.[106] But this cannot be so. The abortionist "must take the hazard" specifically because "he gives a potion to this end [of destroying the child]."[107] Thus, it is the *mens rea* of intending to destroy a child and the *actus reus* of giving the potion which combine to make the death of the woman murder. The only logical conclusion is that Hale regarded abortion as a great enough secular crime to condemn the abortionist as a felony-murderer when the pregnant woman died from the abortion attempt. Further, it apparently makes no difference when, in the course of the pregnancy, the abortion takes place. While Hale had earlier used the term "quick or great with child" in connection with the death of a child, he merely specified "with child" in connection with the death of the woman. (It seems apparent that while Coke used "quick with child" to mean formed and animated, Hale employed the term to mean quickening.)

Such was the interpretation given to Hale in *People v. Sessions*:[108]

> At common law life is not only sacred but it is inalienable. To attempt to produce an abortion or miscarriage, except when necessary to save the life of the mother under advice of medical men, is an unlawful act and has always been regarded as fatal to the child and dangerous to the mother. To cause death of the mother in procuring or attempting to procure an abortion is murder at common law.[109]

Thus, at the end of the seventeenth century the law of abortion appears to have been as follows. *First*, an abortion of a woman "quick with child"

105. Hale, supra note 102, at 429-30; accord, R. v. Whitmarsh, 62 J.P. 1711 (1898).

106. Means II, supra note 63, at 362-63.

107. Hale, supra note 102, at 430.

108. 58 Mich. 594, 26 N.W. 291 (1886).

109. Id. at 596, 26 N.W. at 293 (citations omitted); accord, State v. Harris, 90 Kan. 807, 136 P. 264 (1913) (containing an extensive review of the abortion-homicide cases in a number of states); State v. Farnam, 82 Ore. 211, 161 P. 417 (1916).

resulting in the live birth and subsequent death of the child was either murder or "a great crime." *Second*, an abortion of a pregnant woman "quick with child" resulting in a stillbirth was a "great misprison." *Third*, an abortion of a pregnant woman, at any stage of pregnancy, which resulted in her death, was felony murder. *Fourth*, every unborn child was "a person *in rerum natura*" at common law except that problems of proof precluded such a designation in criminal abortion situations. *Fifth*, at the very least, abortion was regarded as *malum in se*, a secular wrong to the unborn child, and can hardly be said to have been considered a "freedom" of the pregnant woman. *Sixth*, the 1327 and 1348 cases are not contrary to any of these rules.

Eighteenth century legal scholars set out to solve the remaining problems of proof by identifying "quick with child" with some observable, evidentiary phenomenon in the gestational period. Hawkins agreed with Coke's statement of the crime of abortion but substituted "big with child" for quick with child.[110] Blackstone, at one point in his *Commentaries*, stated: "To kill a child in its mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems . . . to be murder in such as administered or gave them [citing Hawkins and Coke]."[111] In another part of the *Commentaries*, Blackstone stated:

> Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter [citing Bracton]. But [Sir Edward Coke] doth not look upon this offence in quite so atrocious a light but merely as a heinous misdemeanor.[112]

It is evident that Blackstone intended only to restate Coke. Coke had apparently equated "quick with child" with Bracton's "formed and animated," and, in citing both authors, Blackstone seems also to have equated the two terms. Possibly influenced by the inference of movement in "animated" and "quick," Blackstone identified the beginning of human life as the point at which the child "is able to stir in the mother's womb." The child is able to stir in the womb as early as the eighth to tenth week of gestation, but ordinarily the pregnant woman does not feel the child's movement (quickening) until the fifth month—although being purely subjective, this will vary with each woman.[113] Thus, even

110. 1 W. Hawkins, A Treatise of the Pleas of the Crown, ch. 31, § 16 (7th ed. 1795) [hereinafter cited as Hawkins].

111. 4 W. Blackstone, Commentaries *198.

112. 1 id. at *129-30.

113. See Byrn, supra note 5, at 9-10.

given Blackstone's interpretation of Coke and Bracton, it must be noted that "quick with child" is not the same as "quickening."

Of course, in the eighteenth century, the only way to prove that the child had stirred was to prove that the mother had felt him stir. Thus, the practical exigencies of proof would ultimately require that for the purposes of an abortion conviction, "quick with child" be identified with "quickening," and this may have been what Blackstone intended.

The first English abortion statute, enacted in 1803, imposed greater penalties for an abortion of a woman "quick with child" than one performed on a woman "not being, or not being proved to be, quick with child."[114] The latter crime still required proof of pregnancy,[115] and since "quick with child" probably meant "formed and animated,"[116] the statute provided the first clear abortion protection in English law for the preformed child.[117]

The first case decided under the statute is also the first case clearly to enunciate the quickening rule. In *Anonymous*,[118] the court held:

> [The woman] . . . swore, however, that she had not felt the child move within her before taking the medicine, and that she was not then quick with child. The medical men, in their examinations, differed as to the time when the foetus may be stated to be quick, and to have a distinct existence: but they all agreed that, in common understanding, a woman is not considered to be quick with child till she has herself felt the child alive and quick within her, which happens with different women in different stages of pregnancy, although most usually about the fifteenth or sixteenth week after conception.
>
> Lawrence, J. said, this was the interpretation that must be put upon the words quick with child in the statute; and as the woman in this case had not felt the child alive within her before taking the medicine,—he directed an acquittal.[119]

The court recognized the dichotomy between "quick with child" and "quickening," but chose quickening as the practical norm in the face of conflicting medical testimony as to "when the foetus may be stated to be quick, [alive] and to have a distinct existence . . . ."[120] If there had been

114. 43 Geo. 3 ch. 58, § 2 (1803).

115. R. v. Scudder, 172 Eng. Rep. 565, 566 (N.P. 1828).

116. Davies, The Law of Abortion and Necessity, 2 Modern L. Rev. 126, 134 (1938).

117. The purpose of the preformation branch of the statute is not really known. It may have been to protect the pregnant woman from the criminal abortionist, Means II, supra note 63, at 358, or it may reflect an increased sensitivity to the unborn child's right to life at all stages of gestation. It is interesting that in the very year (1803) that the statute was enacted, Thomas Percival's influential work on medical ethics appeared wherein Percival condemned all abortions except those done for theraputic reasons, insisting on the inviolatability of even "the first spark of life." Grisez, supra note 71, at 190 (citing T. Percival, Medical Ethics 134-35 (Leake ed. 1927)).

118. 170 Eng. Rep. 1310 (N.P. 1811).

119. Id. at 1311-12.

120. Id. at 1312.

available to the court uncontested medical testimony establishing the distinct, living existence of the unborn child at a stage earlier than quickening, the court obviously would have followed that evidence. Quickening was a flexible standard of proof—not a substantive judgment on the value of unborn human life.[121]

At this time, the details of human conception were still unknown. The doctrine of formation and animation remained a carryover from the ancient idea that the male inseminated the female by implanting a seed which grew within her in distinct stages. Not until formation could a new, distinct, separate life be said to exist. (Even then, in the absence of quickening, definitive proof of the separate living existence of the unborn child was lacking.) It was only when the ovum was discovered in 1827 that the true nature of conception, as co-semination instantly producing a new life, was understood.[122]

The discovery of the ovum apparently had its effect. In 1837, Parliament enacted a new abortion statute which deleted the requirement of pregnancy and imposed a common penalty for all abortional acts.[123] All problems of proof were solved and the unborn child was effectively protected from the moment of conception. In 1838, an English court[124] reinterpreted the ancient common law rule which forbade the execution of a death sentence upon a woman "quick with child." The court instructed the jury: " 'Quick with child' is having conceived. 'With quick child' is when the child has quickened."[125] The term "quick with child," which had meant formed and animated, now meant from the moment of conception.

121. That "quickening" was understood to have entered the law essentially as an evidentiary test is apparent from the language in Evans v. People, 49 N.Y. 86 (1872): "But until the period of quickening there is no evidence of life; and whatever may be said of the foetus, the law has fixed upon this period of gestation as the time when the child is endowed with life, and for the reason that the foetal movements are the first clearly marked and well defined evidences of life." Id. at 90 (citation omitted).

122. Andre Hellegers, M.D., quoted in Catholic News, Mar. 15, 1973, at 11, col. 3.

123. 7 Will. 4 & 1 Vict., c. 85 (1837).

124. R. v. Wycherley, 173 Eng. Rep. 486 (N.P. 1838).

125. Id. at 487. The rule of temporary reprieve of a pregnant woman from execution is of ancient origin. A pregnant woman condemned to death would, according to Coke, be granted a reprieve if she were "quick with childe . . . till she delivered, but she shall have the benefit of that but once, though she be again quick with childe." E. Coke, Third Institute 17-18 (1644). Coke distinguished "quick with childe" from pregnancy, but it must be remembered that when Coke used "quick with childe" in his abortion section, he cited Bracton and evidently meant "formed and animated." Hale, on the other hand, employs "quickening" in his version of the reprieve from execution rule. Hale, supra note 102, at 368-69. Blackstone also noted the reprieve rule and stated: "This is a mercy dictated by the law of nature, in favorem prolis . . . . execution shall be staied generally till the next session; and so from session to session, till either she is delivered, or proves by the course of nature not to have been with child at all. But if she once hath had the benefit of this reprieve,

From Bracton's time, the common law had striven to protect the unborn child against abortion from the moment science was able to establish the child's individuated, living, biological existence. The effort reached fruition in the 1830's when law and science cooperated to complete the protection of the child at every stage of gestation.

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and been delivered, and afterwards becomes pregnant, she shall not be entitled to the benefit of a farther respite for that cause. For she may now be executed before the child is quick in the womb; and shall not, by her own incontinence, evade the sentence of justice." 4 Blackstone, Commentaries *395 (footnote omitted). Two things are to be noted about Blackstone's statement of the reprieve rule: first, Blackstone ameliorated Coke's statement concerning a second pregnancy after the reprive. Coke stated that the woman would be executed even though she were then quick with child. Blackstone observed that the execution would inevitably occur before the pregnancy reached that stage. Thus he showed a more mature sensitivity to the right of the child; second, whatever Blackstone may have meant by quick with child in his abortion section, in the reprieve section he seems to be referring to formed and animated, not to quickening. If quickening had occurred, there would be little doubt that the woman was with child, but Blackstone notes that the execution shall be stayed until the woman delivers "or proves by the course of nature not to have been with child at all." Id. at *395. Hence, he is referring to a stage in pregnancy earlier then quickening.

The dichotomy between "quickening" in abortion and "quick with child" in reprieve cases made sense. In an abortion case, the benefit of the doubt was with the defendant and the burden of proof on the prosecution. Quickening was thus an evidentiary sine qua non for conviction. On the other hand, in the execution cases, the benefit of doubt was with the child even to the extent that the woman might not have been pregnant at all. The distinction between the stages of gestation in the abortion and reprieve situations is made even clearer by Hawkins. For the crime of abortion, the woman must be "big with child." Hawkins, supra note 110, ch. 31, § 16. For a reprieve, she must be "quick with child." 4 id. at ch. 51, § 9. Thus, "quick with child" seems to be an earlier stage than that which will satisfy the evidentiary requirements of an abortion conviction "big with child". In Anonymous, 170 Eng. Rep. 1310 (N.P. 1811), the dichotomy is even clearer. In R. v. Wycherley, 173 Eng. Rep. 486 (N.P. 1838), the court interpreted "quick with child" as "having conceived." It appears that the only case after Wycherley that equated "quick with child" with a point in pregnancy later than conception is R. v. Webster, reported in Note, A Jury of Matrons, 9 Cent. L.J. 94 (1879). However, the case is dubious. As the note writer observed, "[t]he plea of pregnancy in arrest of execution took the learned judge by surprise, and the discussion between the bench and the bar shows that the proceeding was unusual to all concerned." Id. In Commonwealth v. Spooner, discussed in 2 P. Chandler, Amer. Crim. Trials 3 (reprint 1970), a 1778 Massachusetts case, a condemned woman claimed to be several months advanced in pregnancy, but the jury of matrons and mid-wives, after two examinations, reported that she was not "quick with child." Id. at 48-49. An autopsy after execution revealed "a perfect male foetus, of the growth of five months. . . ." Id. at 53. Chandler attributes the incident to the "prejudice, or ignorance, or malice" of the jury. Id. at 54. Peleg Chandler published his American Criminal Trials between 1841 and 1844. In the reports of the Spooner case, he cited the "having conceived" definition of "quick with child" in R. v. Wycherley as the latest (and presumably the most authoritative) English rule. Id. at 56 n.1. In State v. Arden, 1 S.C. 196, 1 Bay 487 (1795), the prisoner "pleaded pregnancy" when asked why sentence of death should not be passed upon her. A jury of matrons examined the prisoner and "found that she was not pregnant." Id. at 197, 1 Bay at 490. Perhaps the emphasis was on pregnancy rather than "quick with child," because the court had heard of, and was appalled by, the Spooner incident of 1778.

For the Supreme Court in *Wade* to conclude that at common law "a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today"[126] is incomprehensible. A lack of criminal prosecution cannot be translated into an historic right. At common law, larceny by false promise was not a crime,[127] but few would claim a thief "enjoyed a broader right" to commit a fraudulent larceny than he does today.

For the Supreme Court in *Wade* to cite the "lenity" of the common law as a basis for holding that unborn children do not possess a fundamental right to live and to the law's protection at any time up to birth, is a perversion of Bracton, Coke, Hale, Hawkins and Blackstone. The whole history of the common law cries out against the jurisprudence of *Wade*.

B. *The American Statutes*

During the nineteenth century, several states interpreted the common law so as to render abortion criminal at all stages of pregnancy.[128] The vast majority of states, however, were in accord with the interpretation of the common law inferential in *Anonymous*,[129] that there was no practical way to prosecute an abortion prior to quickening.[130] No state held that an abortion after quickening was not a crime, and indeed, the quickening requirement seems to have been limited to the criminal law, the unborn child being regarded in other areas of the law as a human being *in esse* from the moment of conception.[131]

Almost all the then existing states enacted abortion statutes during the nineteenth century.[132] Relying on the Means articles,[133] and citing only

Although the New York State Legislature employed pregnant with a "quick child" in the Revised Statutes of 1829 to define the crime of manslaughter for aborting an unborn child (Law of Dec. 10, 1828, part IV, ch. 1, tit. 2, § 9, [1828] N.Y. Rev. Stat. 661), the term "quick with child" was used in the reprieve section (Law of Dec. 10, 1828, part IV, ch. 1, tit. 1 §§ 21-22, [1828] N.Y. Rev. Stat. 659). In 1872, the court of appeals affirmed that "quick with child" means having conceived. Evans v. People, 49 N.Y. 86, 89 (1872).

The whole evolution of the reprieve rule was toward the protection of the child at all stages of gestation, and the purpose of the rule is "to guard against the taking of the life of an unborn child for the crime of the mother." Union Pac. Ry. v. Botsford, 141 U.S. 250, 253 (1891).

126. 93 S. Ct. at 720.

127. See Chaplin v. United States, 157 F.2d 697, 698 (D.C. Cir. 1946).

128. See, e.g., State v. Reed, 45 Ark. 333 (1885); State v. Slagle, 83 N.C. 630 (1880); Mills v. Commonwealth, 13 Pa. 630 (1850).

129. See text accompanying notes 118-21 supra.

130. The cases are collected in Roe v. Wade, 93 S. Ct. at 718 n.27.

131. Hall v. Hancock, 32 Mass. (15 Pick.) 255, 257-58 (1834).

132. The statutes are listed in the dissenting opinion of Mr. Justice Rehnquist in Roe v. Wade, 93 S. Ct. at 738-39 nn.1 & 2. The legislative history of the state statutes is detailed in Quay, supra note 72, at 447-520.

133. 93 S. Ct. at 725 n.47.

an 1858 New Jersey case,[134] the Supreme Court in *Wade* commented: "The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus."[135] The best that can be said of this statement is that it is absolutely wrong. For instance, the Supreme Court might have noted with respect to New Jersey: "This law was further extended March 26th, 1872 . . . to protect the life of the child also, and inflict the same punishment, in case of its death, as if the mother should die;"[136] and with respect to Alabama: "[D]oes not the new being, from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extrauterine life?"[137] and with respect to Colorado, that the statute was "intended specially to protect the mother and her unborn child from operations calculated and directed to the destruction of the one and the inevitable injury of the other."[138] These decisions, rendered prior to 1918, did not involve quickening as an issue in the court's interpretation of the intent of the statute.

Had the Supreme Court in *Wade* been interested in cases decided after the early nineteenth century and before the abortion "reform" movement of the 1960's, it might have noted with respect to Idaho: "[T]he abortion statute is not designed for the protection of the woman . . . only of the unborn child and through it society . . . ;"[139] and with respect to Oklahoma: "We hold that the anti-abortion statutes in Oklahoma were enacted and designed for the protection of the unborn child and through it society;"[140] and with respect to Virginia, that the Virginia abortion statute was intended "to protect the health and lives of pregnant women and their unborn children from those who intentionally and not in good faith would thwart nature by performing or causing abortion and miscar-

134. State v. Murphy, 27 N.J.L. 112 (Sup. Ct. 1858).

135. 93 S. Ct. at 725-26 (footnote omitted).

136. State v. Gedicke, 43 N.J.L. 86, 90 (Sup. Ct. 1881) (citation omitted).

137. Trent v. State, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916), cert. denied, 198 Ala. 695, 73 So. 1002 (1917), quoting, in the context of the purpose of the Alabama abortion statute, from Transactions Medical Association of Alabama 265-72 (1911).

138. Dougherty v. People, 1 Colo. 514, 522 (1872). In addition, for similar interpretations of the abortion statutes of other states, see the following cases: State v. Miller, 90 Kan. 230, 233, 133 P. 878, 879 (1913); State v. Tippie, 89 Ohio St. 35, 40, 105 N.E. 75, 77 (1913); State v. Ausplund, 86 Ore. 121, 132, 167 P. 1019, 1022 (1917); State v. Howard, 32 Vt. 380, 399 (1859). One might fairly add to this list Iowa and Michigan where courts, in the abortion context, termed as "sacred" and "inalienable" the lives of unborn children. See State v. Moore, 25 Iowa 128, 135-36 (1868) (discussed infra at notes 198-202); People v. Sessions, 58 Mich. 594, 596, 26 N.W. 291, 293 (1886).

139. Nash v. Meyer, 54 Idaho 283, 292, 31 P.2d 273, 276 (1934) (citation omitted).

140. Bowlan v. Lunsford, 176 Okla. 115, 117, 54 P.2d 666, 668 (1936).

riage;"[141] and with respect to Washington, that the Washington abortion statute was "designed to protect the life of the mother as well as that of her child."[142] Again, in none of these decisions was quickening a factor.

Other state courts clearly implied that their respective abortion statutes had as one of their purposes (at the very least) the protection of unborn children. As early as 1851, the Maine Supreme Court noted with approval that its statute had changed the common law by eliminating quickening: "There is a removal of the unsubstantial distinction, that it is no offence to procure an abortion, before the mother becomes sensible of the motion of the child, notwithstanding it is then capable of inheriting an estate; and immediately afterwards is a great misdemeanor."[143] In 1887, the Maryland Court of Appeals commented on the growing dissatisfaction with the common law quickening criterion which many courts were abrogating by reinterpretation of the common law, and which Maryland had changed by statute.[144] In 1907, the Nebraska Supreme Court interpreted its state abortion statute, which provided the same penalty for causing the death by abortion of the woman or the child, to apply at every stage of pregnancy,[145] thus indicating the high value the legislature placed on the life of the unborn child even prior to quickening. Indiana had a similar statute.[146]

It is regrettable, indeed, that the Court's exposition in *Wade* of nineteenth and early twentieth century judicial expressions of legislative intent did not carry it past *State v. Murphy*.[147] Perhaps the explanation is to be found in the fact that this is the only early American case (outside of New York) cited by Means.[148]

141. Anderson v. Commonwealth, 190 Va. 665, 673, 58 S.E.2d 72, 75 (1950).

142. State v. Cox, 197 Wash. 67, 77, 84 P.2d 357, 361 (1938).

143. Smith v. State, 33 Me. 48, 57 (1851).

144. Lamb v. State, 67 Md. 524, 532-33, 10 A. 208 (1887).

145. Edwards v. State, 79 Neb. 251, 112 N.W. 611 (1907).

146. See Montgomery v. State, 80 Ind. 338, 339 (1881). One might fairly add Utah to this list. See State v. Crook, 16 Utah 212, 51 P. 1091 (1898), wherein the court characterized abortion under the Utah statutes as "the criminal act of destroying the foetus at any time before birth . . . ." Id. at 217, 51 P. at 1093. But see Foster v. State, 182 Wis. 298, 196 N.W. 233 (1923).

147. See text accompanying note 134 supra.

148. Means I, supra note 63, at 452. Even Murphy is doubtful in its statement of legislative purpose. The New Jersey statute, with which Murphy was concerned, was enacted in 1849 after the New Jersey Supreme Court had held that abortion prior to quickening was not a common law crime. State v. Cooper, 22 N.J.L. 52 (1849). The Cooper court focused almost exclusively on the status of the unborn child. The evil to be suppressed was the killing of a human being in utero. The Wade Court might have derived greater support from State v. Carey, 76 Conn. 342, 56 A. 632 (1904), and State v. Jordon, 227 N.C. 579, 42 S.E.2d 674 (1947), both holding that their states' abortion statutes were intended to protect the pregnant woman, not the child. But see Conn. Public Act No. 1, May 1972 Spec. Sess. (1972) (Con-

Professor Means' focus is almost exclusively on New York and he argues that the early history of New York abortion statutes proves that they were intended only to protect the woman and not the child. However, an analysis of the statutes leads more logically to the conclusion that the unborn child was at least one of the intended beneficiaries of the statutes' protection.

The first New York abortion statutes were enacted as part of the Revised Statutes of 1829. Two different sections condemned abortional acts. The first section dealt with successful abortions of a quick child and the second with all other abortional acts, successful or not:

> Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.[149]
>
> Every person who shall wilfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose; shall, upon conviction, be punished by imprisonment in a county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.[150]

The two sections were evidently modeled after the English abortion statute of 1803.[151] The influence of *Anonymous* appears in the adoption of quickening as the key for distinguishing the provable beginning of human life.

It has been claimed that the general abortion section of the Revised Statutes (section 21) was intended solely for the protection of the pregnant woman against a dangerous medical procedure and was not for the protection of the unborn child. But there are compelling reasons for reaching a contrary conclusion.

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necticut abortion law), the preamble of which states: "The public policy of the state and the intent of the legislature is to protect and preserve human life from the moment of conception . . . ;" State v. Slagle, 83 N.C. 630 (1880), wherein the Supreme Court of North Carolina held that abortion was a common law crime in North Carolina at all stages of gestation.

149. N.Y. Rev. Stat. (1829), pt. IV, ch. 1, tit. 2, § 9 [hereinafter referred to in the text as section 9]. The bracketed material was added by Law of Apr. 20, 1830, pt. IV, ch. 320, § 58 (1830).

150. N.Y. Rev. Stat. (1829), pt. IV, ch. 1, tit. 6, § 21 [hereinafter referred to in the text as section 21].

151. See Means I, supra note 63, at 449-50.

First, there is no question that the postquickening section (section 9), in characterizing as manslaughter the killing of a quick child by abortion, was intended to protect the life of the child. The section provided an exemption to criminal liability where the abortion "shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for such purpose."[152] The exemption is extremely stringent. The child's life was considered so precious, that in the view of the legislature, it could not be sacrificed to a lesser value than life itself.

On the other hand, if the exemption in the general abortion section (section 21) had been designated solely to protect the mother's health, without regard to the value of the child's life, it would certainly have been phrased less stringently than the exemption in the postquickening section. Yet the two exemptions are identical. The general abortion section, like the postquickening section, places the highest value on the child's life.

Second, the less stringent exemption is found in a section proposed by the revisers and rejected by the legislature. This section was expressly intended for the preservation of health:

> Every person who shall perform any surgical operation, by which human life shall be destroyed or endangered, such as the amputation of a limb, or of the breast, trepanning, cutting for the stone, or for *hernia*, unless it appear that the same was necessary for the preservation of life, or was advised, by at least two physicians, shall be adjudged guilty of a misdemeanor.[153]

Here, indeed, one finds the more liberal exemption which he would have expected to find in the general abortion section if that section had not been intended to protect the child. There is no crime in proposed section 28 if "*it appear* that the same was necessary for the preservation of life, *or was advised, by at least two physicians* . . . ."[154] The italicized words are significantly different from the phraseology of the exemption in the abortion sections (sections 9 and 21). An abortion was non-culpable: (a) if it "shall have been necessary to preserve the life of such woman"[155]

152. N.Y. Rev. Stat. (1829), pt. IV, ch. 1, tit. 6, § 21.

153. Proposed section 28, pt. IV, ch. 1, tit. 6, § 28 [hereinafter referred to in the text as proposed section 28]. The Revisers' Note stated: "The rashness of many young practitioners in performing the most important surgical operations for the mere purpose of distinguishing themselves, has been a subject of much complaint, and we are advised by old and experienced surgeons, that the loss of life occasioned by the practice, is alarming. The above section furnishes the means of indemnity, by a consultation, or leaves the propriety of the operation to be determined by the testimony of competent men. This offence is not included among the mal-practices in manslaughter, because, there may be cases in which the severest punishments ought not to be inflicted. By making it a misdemeanor, and leaving the punishment discretionary, a just medium seems to be preserved."

154. Id. (emphasis added).

155. N.Y. Rev. Stat. (1829), pt. IV, ch. 1, tit. 6, § 21.

(not merely if "it appear" to have been so necessary), or, (b) if it "shal have been advised by two physicians to be necessary *for that purpose*"[155] (not merely that it "was advised, by at least two physicians").[157]

The purpose of sections 9 and 21 was manifestly different from th proposed surgical section.[158] That different purpose could only be the pro tection of the unborn child, or else the less stringent exemption in th surgical section would also have been written into the abortion sections Then too, it is noteworthy that the abortion sections were enacted whil the proposed surgical section was not.

Third, it is also significant that the New York State Legislature, ir adopting the Revised Statutes of 1829, employed quickening ("quick child") as the key pregnancy factor in section 9, the abortion-manslaughte section, but used the term "quick with child" in the section providing fo a reprieve from execution of a woman "quick with child" who was unde a sentence of death.[159] In 1872, the New York Court of Appeals, relying on *R. v. Wycherley*,[160] distinguished quickening from "quick with child," defining the latter as having conceived.[161] Apparently, the intent of the legislature in 1829 was to protect the unborn child from execution with his mother at all stages of gestation. If the legislature so recognized the value of the life of the child prior to quickening in the reprieve section, must we not conclude that at least one of the purposes of the concurrently enacted abortion sections (sections 9 and 21) was the protection of the child's life against a would-be abortionist?

Fourth, prior to 1829 two significant events had occurred. The ovum had been discovered in 1827, and, for the first time, the details of human conception were well understood.[162] In 1823, the Becks, in their standard work on medical jurisprudence published in New York, had condemned the quickening doctrine for its failure to take cognizance of the fact that the unborn child is alive before he is felt to move.[163] It may be that these events also influenced the legislature to incriminate abortion prior to quickening.

In 1867, the Medical Society of New York condemned abortion at every stage of gestation, as "murder."[164] The Society's resolution was sent to

156. Id. (emphasis added).

157. Proposed section 28, pt. IV, ch. 1, tit. 6, § 28.

158. It is to be noted that the abortion section included both surgery and drugs.

159. N.Y. Rev. Stat. (1829), pt. IV, ch. 1, tit. 1, §§ 21-22.

160. See note 124 supra and accompanying text.

161. Evans v. People, 49 N.Y. 86, 89 (1872).

162. See text accompanying note 122 supra.

163. I.T. Beck & R. Beck, Elements of Medical Jurisprudence 276-77 (1823), cited in Grisez, supra note 71, at 191.

164. See Means I, supra note 63, at 459.

the New York State Legislature which, in 1869, amended the abortion statutes and proscribed as manslaughter an abortion of a "woman with child" which resulted in "the death of such child, or of such woman."[165] It seems as reasonable to connect the 1867 resolution with the 1869 statute as to pretend that the legislature was completely unmotivated by the Medical Society's strong condemnation of abortion as "murder."

Adverting to the common law quickening rule and its evidentiary basis, the court of appeals in 1872, in *Evans v. People*, conservatively interpreted "with child" to mean a child after quickening.[166] The legislature restored the quickening requirement in the 1881 re-codification of the Penal Law, and included a general abortion section which did not require that the woman be pregnant.[167] As a result of these enactments, the unborn child remained protected under a provision which avoided the evidentiary ruling in *Evans*.

Nothing in *Evans* can be regarded as a justification for legalizing abortion prior to quickening or as precedent for a holding that the unborn child is a non-person under section one of the fourteenth amendment. With respect to abortion, *Evans* merely reiterated a somewhat outdated rule of evidence as a basis for interpreting a statute.

On the other hand, the *Evans* court's approval of the reprieve from execution rule of *R. v. Wycherley* signifies an awareness of the fundamental rights of *all* unborn children regardless of age. In this respect, *Evans* supports the proposition that nineteenth century New York abortion legislation was intended to protect the unborn child at every stage of gestation.

Whether one chooses to concentrate only on New York or to look also to the judicial pronouncements of other states, one must conclude that the better view of nineteenth century abortion legislation is that a major purpose was the protection of unborn children without regard to age. Bolstering this view is the twentieth century abortion indictment at the Nuernberg Trials.[168] The indictment charged, *inter alia*, that "[e]astern women workers were induced or forced to undergo abortions,"[169] and hence one might conclude that the trial and judgment are irrelevant to the discussion herein. Yet the shadow of a generation of aborted children darkened Nuernberg. In addition to testifying that the abortions had all been voluntary on the part of the aborted women, one of the defendants thought it

165. Law of May 6, 1869, ch. 631, [1869] N.Y. Laws 92d Sess. 1502.

166. See note 121 supra.

167. See N.Y. Penal Law §§ 80, 1050 (McKinney 1944) (repealed). These were the sections enacted in 1881.

168. U.S. v. Greifelt, 4 Trials of War Criminals Before the Nuernberg Military Tribunal 608 (Government Printing Office) (1946-1949).

169. Id. at 613.

relevant to argue: "Interruption of pregnancy is or was never considered as murder, but it was considered a special violation against life. Generally this incurs considerably milder punishment than if it were murder. *Up to now nobody had the idea to see in this interruption of pregnancy a crime against humanity.*"[170]

It is possible that the defendant thought it necessary to argue that abortion is de minimis because the prosecution had introduced into evidence a captured German document (dated October 30, 1943) which commented on the "objections of a minority of reactionary Catholic physicians" to the decree on interruptions of pregnancy of female eastern workers and female Poles.[171] The doctors had many objections but the first one mentioned is: "These physicians argued that the decree was not in accordance with the moral obligation of a physician to preserve life."[172]

At Nuernberg, the prosecution and the defense joined issue on the unborn child's right to live. And the prosecutor, in addition to arguing that the abortions had been "encouraged and even forced on these women," emphasized in his closing brief:

> Abortions were prohibited in Germany under Article 218 of the German Penal Code . . . . After the Nazis came to power this law was enforced with great severity. Abortions were also prohibited under the Polish Penal Code . . . , and under the Soviet Penal Code. But *protection of the law was denied to unborn children* of the Russian and Polish women in Nazi Germany. Abortions were encouraged and even forced on these women.[173]

The right of the unborn child to the law's protection was a litigated issue even though it was outside the scope of the indictment and not mentioned in the subsequent judgment. Neither prosecution nor defense could ignore the aborted children who stood as mute and invisible accusers at the trial. On behalf of the United States, an American prosecutor condemned the defendants before a court composed of American judges because "protection of the law was denied to the unborn children."[174]

On the eve of the abortion "reform" movement of the 1960's, a Michigan court could observe that American abortion statutes had been amended to delete the obsolete quickening dichotomy (which had persevered as a

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170. Id. at 1090 (testimony of defendant Richard Hildebrandt) (emphasis added). See Roe v. Wade, 93 S. Ct. at 729 n.54: "Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?"

171. U.S. v. Greifelt, 4 Trials of War Criminals Before the Nuernberg Military Tribunal 608, 1082 (Government Printing Office) (1946-49) (emphasis deleted).

172. Id. at 1082.

173. Id. at 1077 (emphasis added).

174. Id. But see Roe v. Wade, 93 S. Ct. 705 (1973).

norm for determining the punishment for abortion) because of the recognition of a child's legal existence while *en ventre sa mere*.[175] And even so ardent an advocate of legalized abortion as the English legal commentator, Glanville Williams, had to admit that the contemporary rationale of anti-abortion legislation was this: "The fetus is a human life to be protected by the criminal law from the moment when the ovum is fertilized."[176]

The Supreme Court in *Wade* was as wrong about the motivation behind nineteenth century abortion legislation as it was about the common law.

C. *The Fourteenth Amendment*

The early American abortion statutes were a continuum of the striving of the common law to protect human life from its very beginning. When, with the discovery of the ovum in 1827, science clearly identified conception as the beginning of life, the law began to move its protection back to the earliest stages of gestation, and penalize abortional acts prior to quickening without, in some cases, even requiring proof of pregnancy. Quickening began to disappear, first as a practical norm for initial criminality and then as a factor calling for increased punishment.[177]

The Supreme Court in *Wade* admitted that "[t]he anti-abortion mood prevalent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period."[178] In 1859, an American Medical Association Committee on Criminal Abortion, appointed to investigate criminal abortion with a view to its suppression, criticized the quickening criterion of criminality and "the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being."[179] On the basis of the report, the Association adopted resolutions protesting " 'against such unwarrantable destruction of human life,' calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies' in pressing the subject.' "[180]

175. LaBlue v. Specker, 358 Mich. 558, 567, 100 N.W.2d 445, 450 (1960).

176. G. Williams, The Sanctity of Life and the Criminal Law 149 (1957).

177. Indeed, from the scientific point of view, quickening has no relevance at all today. See Byrn, supra note 5, at 9-12. See, e.g., State v. Sudol, 43 N.J. Super. 481, 129 A.2d 29, cert. denied, 25 N.J. 132, 135 A.2d 248, cert. denied, 355 U.S. 964 (1957) (stating that modern science has advanced to a point that a court is justified in taking judicial notice of the accuracy of a confirmed pregnancy test).

178. 93 S. Ct. at 721.

179. Id., quoting 12 Transactions of the Am. Med. Assn. 73-77 (1859).

180. Id., quoting 12 Transactions of the Am. Med. Assn. 28, 78 (1859).

In 1867, the Medical Society of New York condemned abortion at every stage of gestation as "murder."[181] In 1868, Francis Wharton urged the injustice of the quickening distinction in abortion statutes (as he had in earlier editions of his treatise on criminal law) and argued that unborn children should be protected regardless of gestational age.[182]

In 1871, the AMA Committee on Criminal Abortion submitted another report in which it concluded: "We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less."[183]

Whatever may be said of the common law and the early nineteenth century, it is evident that in the period from 1859 to 1871, spanning a war fought to vindicate the essential dignity of every human being and the subsequent ratification of the fourteenth amendment in 1868, the anti-abortion mood prevalent in the United States can be explained only by a desire to protect live human beings in the womb from the beginning of their existence.[184] When the fourteenth amendment was ratified in 1868, the law of at least twenty-eight of the thirty-seven states of the United States incriminated abortional acts prior to quickening—two by common law,[185] and the remainder by statute.[186] In the next fifteen years, one additional state (Colorado) entered the United States and at least seven more states incriminated pre-quickening abortional acts.[187]

As previously indicated, the overwhelming weight of authority is to

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181. See note 164 supra and accompanying text.

182. 2 F. Wharton, A Treatise on the Criminal Law of the United States 210-12 (6th ed. 1868).

183. 93 S. Ct. at 721, quoting 22 Transactions of the Am. Med. Assn. 258 (1871). But see 93 S. Ct. at 730: "We need not resolve the difficult question of when life begins. 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." No subsequent medical or bar association statement cited by the Court in Wade denies that abortion takes a "human life." See id. at 721-24.

184. Even in the slavery days of 1858, the legal personhood of unborn children was not unfamiliar. In Bailey v. Poindexter's Ex'r, 55 Va. (14 Gratt.) 132 (1858), counsel for the executor drew an analogy between the legal status of slaves and, inter alia, unborn children, in support of the enforceability of a choice given slaves under testator's will to choose to be sold or set free. In answer, opposing counsel argued: "[Married women] may take estates by deed or will. So may infants even in ventre sa mere, or idiots, or lunatics. They are all free persons, though under partial or temporary disabilities. To reason in favor of similar powers, rights or capacities in slaves, on the ground of analogy, is to plunge at once into a labyrinth of error." Id. at 171.

185. State v. Reed, 45 Ark. 333 (1885); State v. Slagle, 83 N.C. 630 (1880).

186. The states and statutes are collected in Quay, supra note 72, at 447-520.

187. See id.

the effect that at least one of the purposes of these statutes was the protection of unborn children at all gestational stages. The fourteenth amendment era, which finally saw the extension of the equal protection clause to aliens and corporations in the 1880's[188] and, during the same period, witnessed the expression of a new liberality in interpretation of basic constitutional guarantees,[189] was an era of solicitude for the basic right of the unborn child to live no matter what his gestational age might be, and without regard to "quickening."

Given the background of the fourteenth amendment, this solicitude should come as no surprise. The evil, for which the due process and equal protection clauses were designed as a remedy, is typified in the arguments of counsel in *Bailey v. Poindexter's Executor*,[190] wherein a provision in a will that testator's slaves could choose between emancipation and sale was held void on the ground that slaves had no legal capacity to choose. In support of the position, counsel argued:

> These decisions are legal conclusions flowing . . . from the one clear, simple, fundamental idea of chattel slavery. That fundamental idea is, that, in the eye of the law, so far certainly as civil rights and relations are concerned, the slave is not a person, but a thing. The investiture of a chattel with civil rights or legal capacity is indeed a legal solecism and absurdity. The attribution of legal personality to a chattel slave,—legal conscience, legal intellect, legal freedom, or liberty and power of free choice and action, and corresponding legal obligations growing out of such qualities, faculties and action—implies a palpable contradiction in terms.[191]

The court agreed with the arguments of counsel that the slave is property and "has no civil rights or privileges,"[192] and the court, in dictum, went on to observe that the social right of "protection from injury" is limited to free persons.[193]

This, then, was the evil: human beings were degraded to the status of property, without civil rights—without even the right to the law's protection of their lives—unless the legislature, by policy decision, should grant it to them.

Slavery typified the evil, but the remedy was not limited to slaves alone. It was the intent of the framers of the fourteenth amendment that never again would *any* human being be deprived of fundamental rights by an irrational and arbitrary classification as a non-person.[194] Thus,

188. Yick Wo v. Hopkins, 118 U.S. 356 (1886); County of Santa Clara v. Southern Pac. R.R., 18 F. 385, 397-98 (C.C.D. Cal. 1883), aff'd, 118 U.S. 394 (1886).

189. See Boyd v. United States, 116 U.S. 616, 635 (1886).

190. 55 Va. (14 Gratt.) 132 (1858).

191. Id. at 142-43.

192. Id. at 191.

193. Id. at 191-92.

194. "All history shows that a particular grievance suffered by an individual or a class,

Congressman John A. Bingham, who sponsored the amendment in the House of Representatives, noted that it was "universal" and applied to "any human being."[195] Congressman Bingham's counterpart in the Senate, Senator Jacob Howard, emphasized that the amendment applied to every member of the human race:

> It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty.[196]

The Court in *Wade* made no reference to the intent of the framers. Had it done so, in the context of a proper understanding of what had originally motivated the enactment of state abortion legislation, how could it have excluded unborn children from personhood under the due process and equal protection clauses? It was certainly less than consistent for the Court, on the one hand, to admit that the nineteenth century AMA anti-abortion statements may have played a significant role in the passage of restrictive abortion legislation, and on the other hand, to find, in effect, that the framers of the fourteenth amendment acted in defiance of both the 1859 AMA statement and state legislation, and deliberately created an unarticulated right of privacy which included the right to kill unborn children whom the framers intended to exclude from fourteenth amendment protection. If that had been the intent of the framers, one could hardly imagine three-quarters of the state legislatures ratifying the amendment while they were at the same time contemplating (or had already enacted) restrictive abortion legislation designed to protect unborn human children—especially if such legislation was the product of the AMA statements cited by the Court. Then too, what evidence is there that the framers did not share "[t]he anti-abortion mood prevalent in this country in the late 19th century . . . ?"[197]

Statutory law, common law and the prevalent mood converged in an Iowa case decided in 1868, the year in which the fourteenth amendment was ratified. *State v. Moore*[198] affirmed a conviction of murder for causing the death of a woman by an illegal abortion. The trial court had charged the jury:

> To attempt to produce a miscarriage, except when in proper professional judgment it is necessary to preserve the life of the woman, is an unlawful act. *It is known to*

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from a defective or oppressive law, or the absence of any law, . . . is often the occasion and cause for enactments, constitutional or legislative, general in their character, designed to cover cases not merely of the same, but all cases of a similar, nature." County of Santa Clara v. Southern Pac. R.R., 18 F. 385, 397-98 (C.C.D. Cal. 1883).

195. Cong. Globe, 39th Cong., 1st Sess. 1089 (1866).

196. Id. at 2766.

197. 93 S.Ct. at 721.

198. 25 Iowa 128 (1868).

be a dangerous act, generally producing one and sometimes two deaths,—I mean the death of the unborn infant and the death of the mother. Now, the person who does this is guilty of doing an unlawful act. If the death of the woman does not ensue from it, he is liable to fine and imprisonment in the county jail . . . and, if the death of the woman does ensue from it, though there be no specific intention to take her life, he becomes guilty of the crime of murder in the second degree. The guilt has its origin in such cases in the unlawful act which the party designs to commit, and if the loss of life attend it as incident or consequence, the crime and guilt of murder will attach to the party committing such an unlawful act.[199]

In upholding the charge, the Iowa court stated: "We have quoted the court's language in order to say that it has our approval as being a correct statement of the law of the land."[200] The court went on to say:

The common law is distinguished, and is to be commended, for its all-embracing and salutary solicitude for the sacredness of human life and the personal safety of every human being. This protecting, paternal care, enveloping every individual like the air he breathes, not only extends to persons actually born, but, for some purposes, to infants in ventre sa mere.

The right to life and to personal safety is not only sacred in the estimation of the common law, but it is inalienable. It is no defense to the defendant that the abortion was procured with the consent of the deceased.

The common law stands as a general guardian holding its aegis to protect the life of all. Any theory which robs the law of this salutary power is not likely to meet with favor.[201]

Although the abortion in *State v. Moore* occurred after quickening, "no mention is made of that fact in the opinion,"[202] and the court was obviously speaking of the "sacred" and "inalienable" right to life of *all* unborn children.

In *Wade*, the Supreme Court created a new, unfettered right to deprive the unborn children of their lives. In *Yick Wo v. Hopkins*,[203] the Court declared that "the very idea that one man may be compelled to hold his life . . . at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."[204] So it is with *Wade*.

V. The Errors on the Questions of Human Life and Human-Legal Personhood

The *Wade* Court's historical errors were compounded by its equally erroneous holdings on the questions of whether the unborn child is a human being in fact and a human person in modern law.

199. Id. at 131-32 (emphasis added).
200. Id. at 132.
201. Id. at 135-36 (emphasis added) (citation omitted).
202. State v. Harris, 90 Kan. 807, 813, 136 P. 264, 266 (1913).
203. 118 U.S. 356 (1886).
204. Id. at 370.

A. *The Failure To Resolve the Crucial Question of Fact*

The framers intended that every live human being, every member of the human race, even the most unwanted, come under the aegis of the due process and equal protection clauses. History does not support the proposition that the framers intended to exclude unborn children. The Court in *Wade* observed that "[w]e need not resolve the difficult question of when life begins."[205] But the Court erred at the threshold when it failed to determine whether an individual life has already begun before an abortion takes place. That was precisely the fact, of constitutional dimension, to be resolved by the Court before it could even address itself to the rights of unborn children.[206]

The Court noted, as justification for its refusal to resolve the crucial factual issue, that "[w]hen 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."[207] The Court then concluded that "we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."[208] But what was at stake for the unborn child was not a "theory" of life; it was the fact of life. The lack of consensus, to which the Court referred, is not a lack of consensus on the fact of existence of human life at all stages of gestation—that is established beyond cavil by medical science[209]—but on conflicting theories of the value of a human life already in existence.[210] That value judgment was made over one hundred years ago, on a constitutional level and as a matter of binding law, by the framers of the fourteenth amendment. A "consensus" is not relevant. "One's right to life . . . depend[s] on the outcome of no elections."[211]

As guardian ad litem for a class of unborn children, the writer commenced an action in New York in December, 1971 seeking, *inter alia*, a declaration of the unconstitutionality of New York's abortion-at-will law[212] as a violation of the fourteenth amendment rights of unborn chil-

205. 93 S. Ct. at 730.

206. See text accompanying note 60 supra.

207. 93 S. Ct. at 730.

208. Id. at 731.

209. There is no scientific basis for establishing quickening, viability, birth or any event other than conception as the beginning of human life. See Byrn, supra note 5, at 6-15.

210. See id. at 15-18. "I don't know of one biologist who would maintain that the fetus is not alive . . . . Today we are employing euphemisms to pretend that human life is not present. This stems from the fact that we are not quite ready yet to say, yes, there is human life but it has no dignity . . . .There is a consensus on the starting point of life, without any question . . . ." Andre Hellegers, M.D., quoted in The Catholic News, Mar. 15, 1973, at 1, col. 3.

211. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

212. Law of Apr. 11, 1970, ch. 127, [1970] N.Y. Laws 193d Sess. 852 (now N.Y. Penal

dren. In support of a motion for an injunction pendente lite, affidavits of a fetologist, a developmental biologist, a cytogeneticist and an obstetrician-gynecologist were presented to the court.[213]

The testimony of these experts was striking indeed. Relying on it, the trial court drew a composite picture of the typical victim of abortion:

> Credence must, therefore, be given to the testimony, in affidavit form, submitted by plaintiff from accredited scientists that an unborn human infant has a pulsating human heart; that at that stage of development the child's brain, spinal cord and entire nervous system has been established and that, as a medical fact, the fetus is a live human being.[214]

The court then proceeded to grant the application for an injunction.

The appellate division admitted that there were "no factual issues requiring a trial and the parties so conceded on the argument of the appeal. The medical affidavits submitted by the guardian have not been factually disputed and New York courts have already acknowledged that, in the contemporary medical view, the child begins a separate life from the moment of conception . . . ."[215] However, the court dismissed the complaint on the ground that the unborn child is not a legal person.

A divided New York Court of Appeals affirmed the appellate division, but it too conceded that an unborn child "has an autonomy of development and character although it is for the period of gestation dependent upon the mother. It is human, if only because it may not be characterized as not human, and it is unquestionably alive."[216]

Needless to say, the writer disagreed with the legal conclusions of the appellate division and the court of appeals. But their factual conclusions, together with that of the trial court, are impeccable. These findings left only two questions for the appeal to the United States Supreme Court:

1. Whether the individual members of appellant's unborn class, each of whom is a "live human being," a "child [with] a separate life," a "human" who is "alive" and "has an autonomy of development and character," are human persons entitled to the protections afforded to such persons by the Constitution of the United States.
2. Whether New York's Elective Abortion Law, on its face, in its effect and as

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Law § 125.05(3) (McKinney Supp. 1972)). The law puts no substantive restriction on abortion through the twenty-fourth week of pregnancy. Id.

213. Respectively, Leverett Lebaron de Veber, M.D.; Donald J. Procaccini, Ph.D.; James Garner, M.D., and Malcolm Hetzer, M.D. The affidavits are reproduced at pages 100a-128a of appellant's jurisdictional statement before the United States Supreme Court, filed Sept. 14, 1972 (No. 72-434) [hereinafter cited as Juris. State.].

214. Byrn v. New York City Health & Hosps. Corp., Supreme Court of the State of New York, Queens County, Index No. 13113/71, in Juris. State. 60a, 68a (unpublished opinion of Francis J. Smith, J., Jan. 4, 1972).

215. Byrn v. New York City Health & Hosps. Corp., 38 App. Div. 2d 316, 324, 329 N.Y.S.2d 722, 729 (2d Dep't 1972) (citations omitted).

216. Byrn v. New York City Health & Hosps. Corp., 31 N.Y.2d 194, 199, 286 N.E.2d 887, 888, 335 N.Y.S.2d 390, 392 (1972), noted in 41 Fordham L. Rev. 439 (1972).

applied, violates fundamental rights of the members of appellant's class, guaranteed to them by the Constitution of the United States.[217]

The Supreme Court did not address itself to these questions. Instead, it dismissed the appeal for want of a substantial federal question, citing *Wade*,[218] even though in *Wade* the Court had erred at the threshold by declining to decide the crucial question of whether an abortion kills a live human being.

Thus, paying no heed to the facts, the Supreme Court made its own value judgment, one that is contrary to the intent of the framers of the fourteenth amendment.

B. *The Failure to Allude to the Court's Own Explication of "Person" Under Section One of the Fourteenth Amendment*

Before *Wade*, the Supreme Court's explication of human "person" in section one of the fourteenth amendment had been consistent with the intent of the framers. In *Levy v. Louisiana*,[219] the Court identified the human persons protected by the equal protection clause as those who "are humans, live, and have their being."[220]

Of course, it might well be argued that *Levy* concerned the rights of afterborn illegitimate children and is inapposite to the unborn. The argument is specious unless courts and legislatures are free to draw fourteenth amendment life-or-death lines on self-serving fictions, utterly irrational by modern, secular, scientific standards. But that is precisely what they are not free to do. "To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses."[221]

Had the *Levy* standard been applied in *Wade*, the Court could not have avoided passing on the factual, "biological" question of whether unborn children are live human beings. Since, as a scientific fact, all of

217. This is substantially the form in which appellant presented the questions to the Supreme Court. Juris. State. 4.

218. Byrn v. New York City Health & Hosps. Corp., 93 S. Ct. 1414 (1973).

219. 391 U.S. 68 (1968).

220. Id. at 70 (footnote omitted); accord, 2 B. Schwartz, The Rights of Persons (1968): "And the language of the amendment plainly states that the guaranty of equality contained in it is to apply 'to any person.' Unless words are to be deprived of their ordinary meaning, this must include every natural human being within the jurisdiction of any state . . . ." Id. at 492.

221. Glona v. American Guarantee Co., 391 U.S. 73, 75-76 (1968); accord, B. Schwartz, The Supreme Court 265 (1957). The use of objective science in a constitutional context is far from unprecedented. The findings of modern psychology were used to update the law in Brown v. Board of Educ., 347 U.S. 483, 494-95 (1954).

them are, the Court would have been required to take the next step and find all unborn children to be human persons within section one of the fourteenth amendment. Instead, the Court omitted *Levy* completely. Indeed, having decided not to pass on the crucial question of fact, it had no choice but to ignore *Levy*.

C. *The Misunderstanding of the General Status in Law of Unborn Children*

In *Wade*, the Court stated: "In 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."[222] In support of this statement, the Court briefly touched upon tort actions for prenatal injuries and for a stillbirth (wrongful death), as well as the property rights of the unborn child. The Court erred.

The unequivocal status of the unborn child as a legal person in these areas of the law has been analyzed at length,[223] and there is no need to reexamine it here.[224] The more startling error was the Court's failure even to advert to another area of prenatal law.

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222. 93 S. Ct. at 731.

223. See Note, The Law and the Unborn Child: The Legal and Logical Inconsistencies, 46 Notre Dame Law. 349, 351-60 (1971).

224. Two parenthetical observations must be made. First, when the Court in Wade observed that "the traditional rule of tort law had denied recovery for prenatal injuries even though the child was born alive" (93 S. Ct. at 731 (footnote omitted)), it was speaking not of a tradition but of a relatively short-lived aberration. The common law regarded the unborn child as a human being in esse in all areas of the law except for the criminal law where the exigencies of proof gave rise to the quickening dichotomy. Hall v. Hancock, 32 Mass. (15 Pick.) 255 (1834). The prenatal injury rule was first promulgated in 1884 in Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884). The rule has been roundly criticized for its misunderstanding of law and science in a scholarly study in 1935. Law Revision Commission, Communication to the Legislature relating to Prenatal Injuries 449, 453-54, 472-73 (1935). It was discredited in 1946, Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946), and it is now in all but complete disrepute. See Note, The Law and the Unborn Child: The Legal and Logical Inconsistencies, 46 Notre Dame Law. 349 (1971). In referring to the rule in some states which permits a wrongful death action for a stillbirth, the Court in Wade stated that "[s]uch an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life." 93 S. Ct. at 731. The statutory wrongful death action is always intended to vindicate the interests of survivors. W. Prosser, Torts 902, 903-05 (4th ed. 1971). Thus, in New York, a wrongful death action for a stillbirth is denied because the law does not consider the unborn child to have a separate juridicial existence " 'except in so far as is necessary to protect the child's own rights.' " Endresz v. Friedberg, 24 N.Y.2d 478, 485, 248 N.E.2d 901, 904, 301 N.Y.S.2d 65, 70 (1969) (citation omitted).

The recognition of the unborn child as a live human being, a legal person with fundamental human-legal rights—including the right to live and to the law's protection—is explicit in the body of law extending *parens patriae* protection to unborn children, regardless of gestational age.

At least from the time of Bracton, the King, as sovereign, was charged with a special obligation to care for those who were not able to care for themselves, particularly infants.[225] In its modern application, the *parens patriae* doctrine vests in the state, as sovereign, both the right and duty to protect a child from harm, even at the hands of his parents. The sovereign has many obligations to the child. "Chief among them is the duty to protect his right to live . . . ."[226]

Thus, parents *do not* have a right of complete dominion over their children. Most certainly, a parent does not have a right to elect whether his or her child shall live or die. As the court observed in *In re Clark:*

> No longer can parents virtually exercise the power of life or death over their children. No longer can they put their child of tender years out to work and collect his earnings. They may not abuse their child or contribute to his dependency, neglect, or delinquency. Nor may they abandon him, deny him proper parental care, neglect or refuse to provide him with proper or necessary subsistence, education, medical or surgical care, or other care necessary for his health, morals, or well-being; or neglect or refuse to provide the special care made necessary by his mental condition; or permit him to visit disreputable places or places prohibited by law, or associate with vagrant, vicious, criminal, notorious, or immoral persons; or permit him to engage in an occupation prohibited by law or one dangerous to life or limb or injurious to his health or morals. . . . And while they may, under certain circumstances, deprive him of his liberty or his property, under no circumstances, with or without due process, with or without religious sanction, may they deprive him of his *life*![227]

It is true, of course, that *Clark* involved a post-natal child. Still, two propositions must, by common sense and common law, also be acknowledged as true: (a) the *parens patriae* doctrine protects human children precisely because they are legal persons with fundamental human-legal rights (particularly the rights to live and to the law's protection) which they are unable effectively to assert themselves because of their youth and utter dependence on others; (b) if the doctrine has been extended to unborn children, it can only mean that they too are legal persons (with the same fundamental human-legal rights) whose youth and utter dependence impose upon the state the duty to protect their respective rights to live.

In fact, the *parens patriae* doctrine has been extended to unborn children, without regard to their gestational ages, and even at the expense of

225. See Eyre v. Shaftsbury, 24 Eng. Rep. 659, 666 (Ch. 1722).

226. See In re Clark, 21 Ohio Op. 2d 86, 89, 185 N.E.2d 128, 132 (C.P. 1962).

227. Id. at 89, 185 N.E.2d at 131 (citation omitted).

such highly valued rights as personal (bodily) privacy, family privacy and religious freedom.[228]

In *Hoener v. Bertinato*,[229] a New Jersey court was asked to appoint a guardian for a child *in utero*, immediately prior to birth, in order that the guardian might consent to a transfusion at birth. The child's parents had refused their consent for religious reasons. In appointing the guardian, the court stated: (1) " 'This *parens patriae* jurisdiction is a right of sovereignty and imposes a duty on the sovereignty to protect the public interest and to protect such persons with disabilities who have no rightful protector;' "[230] (2) "Additionally, it is now settled that an unborn child's right to life and health is entitled to legal protection even if it is not viable;"[231] and (3) "I conclude, therefore, that the [guardianship] statute is applicable to the instant case even though the child is not yet born."[232]

An attempt might be made to distinguish *Hoener* on the grounds that the guardianship appointment was made while the unborn child was viable, and the transfusion was to be administered after birth. Consequently, it might be argued that the case applied only to born children and not to the unborn (except, possibly, if they are viable). But the plain language of the decision is to the contrary. The court applied, to a particular unborn child, who happened to be viable, the general rule that the sovereign has a *parens patriae* duty to protect *all* unborn children against the conduct of those who threaten their right to live.

Raleigh Fitkin—Paul Morgan Memorial Hospital v. Anderson[233] is a natural corollary to *Hoener*. This case arose out of a dispute over proposed blood transfusions for a pregnant woman, while the child was still in the womb. The plaintiff-hospital sought an order to administer the transfusions in the event that they would be necessary to save the life of the woman and the life of her unborn child. Such medical treatment was contrary to the religious beliefs of the woman and her husband. The court nevertheless ordered the transfusions. In its ruling, the court stated:

> In *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962), we held that the State's concern for the welfare of an infant justified blood transfusions notwithstanding the

228. See Estate of Warner, No. 71 P 3681 (Cir. Ct., Cook County, Ill., May 5, 1971); Raleigh Fitkin—Paul Morgan Mem. Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964); Hoener v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140 (Juv. & Dom. Rel. Ct. 1961).

229. 67 N.J. Super. 517, 171 A.2d 140 (Juv. & Dom. Rel. Ct. 1961).

230. Id. at 522, 171 A.2d at 142 (emphasis omitted), quoting Johnson v. State, 18 N.J. 422 430, 114 A.2d 1, 5 (1955).

231. 67 N.J. Super. at 524, 171 A.2d at 144 (citation omitted).

232. Id. at 525, 171 A.2d at 145.

233. 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964).

objection of its parents who were also Jehovah's Witnesses, and in *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960), we held that a child could sue for injuries negligently inflicted upon it prior to birth. *We are satisfied that the unborn child is entitled to the law's protection* and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time.[234]

State v. Perricone involved protection of an after-born infant. *Smith v. Brennan* involved an injury to a pre-viable infant. *Raleigh Fitkin* itself involved a viable infant. Quite clearly, the *Raleigh Fitkin* court considered after-born, viable and pre-viable infants to be entitled, without distinction, to the law's protection. In allowing a cause of action for injuries sustained *in utero* by an infant while pre-viable, the *Smith* court had held that "the law recognizes that rights which he will enjoy when born can be violated before his birth."[235] It was precisely to prevent such violations of basic rights that the guardians were appointed in *Hoener* and *Raleigh Fitkin*. In neither instance was "quickening," "viability," or birth relevant. Life was the vital element.

Estate of Warner[236] leaves no doubt that *parens patriae* protection extends to all unborn children. In *Warner*, an Illinois court appointed a conservator of the "persons" of a pregnant woman and her unborn child on a doctor's petition showing that "the life of the unborn child . . . is in danger because the mother requires immediate blood transfusions in order to save the life of the unborn child,"[237] and further, that "[t]he unborn child is incapable of making any intelligent decision."[238] The operative part of the order stated: "It is further ordered that the Conservator administer or cause to be administered blood transfusions . . . *in order to save the life of the unborn child* of Katherine Warner."[239]

It is to be noted that the child was not *viable when the transfusion was ordered:*

> A spokesman for Mount Sinai Hospital said the woman . . . remained in critical condition after receiving almost four pints of blood.
>
> However, doctors said an examination showed *the 4-month old fetus* was alive "with a strong heartbeat."[240]

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234. 42 N.J. at 423, 201 A.2d at 538 (emphasis added).

235. 31 N.J. 353, 364, 157 A.2d 497, 502 (1960).

236. No. 71 P 3681 (Cir. Ct., Cook County, Ill., May 5, 1971).

237. Id., Petition For Conservator.

238. Id., Physicians Affidavit—Conservatorship.

239. Id., Order of Adjudication of Incompetency and Appointing Conservator (emphasis added).

240. Chicago Sun-Times, May 6, 1971, at 12, col. 1 (emphasis added).

Like most cases involving emergency blood transfusions, the decision was rendered by a lower court and is unreported. Nevertheless, it remains persuasive as an inevitable application of *Hoener* and *Raleigh Fitkin* to a pre-viable child.

An attempt might be made to distinguish *Raleigh Fitkin* and *Warner* on the ground that the mothers' lives were in danger in both instances, and the transfusion orders were made solely for the women. Such an argument lacks any color of validity. In *Warner*, the "Petition For Conservator," the "Physician's Affidavit," and the "Order of Adjudication Of Incompetency and Appointing Conservator" are all framed in terms of saving the unborn child's life, with no reference to saving the life of the mother. Moreover, in *In re Estate of Brooks*,[241] the Illinois Supreme Court had ruled that a compulsory transfusion of an unwilling adult against her religious beliefs would violate the adult's first amendment rights. In *Brooks*, the adult was not pregnant. In *Warner*, the unborn child's right to live took precedence over any other right.

In *Raleigh Fitkin*, the court specifically refused to decide "the more difficult question" whether a compulsory transfusion for the pregnant woman to save her own life would be mandated, since it had already determined that the child had a right to the law's protection.[242] Thus, *Raleigh Fitkin* must have been based upon the unborn child's right to live. There was, then, no authority for a compulsory transfusion to an unwilling nonpregnant adult nor did *Raleigh Fitkin* decide that issue.

Hoener, *Raleigh Fitkin* and *Warner* may be viewed in three different ways, all leading to the same conclusion. First, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[243] The unborn child's right to life is one of those interests. At the time and under the circumstances of *Raleigh Fitkin* and *Warner*, only the right to life of a live human being, the unborn child as a legal person, could have prevailed over the pregnant woman's right of free religious exercise.

Second, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[244] The clear

241. 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

242. 42 N.J. at 423, 201 A.2d at 538. That issue remained undecided in New Jersey until John F. Kennedy Mem. Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971), noted in 41 Fordham L. Rev. 158 (1972).

243. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

244. Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891).

and unquestionable authority of law in *Raleigh Fitkin* and *Warner* can be found only in the *parens patriae* doctrine, which, in turn, extends only to legal persons who have fundamental rights to live and to the law's protection. The application of the *parens patriae* doctrine to unborn children necessarily means that every unborn child, regardless of his gestational age, is a legal person with a fundamental right to live, which the state has a basic obligation to protect.

Third, "[p]roperty does not have rights. People have rights."[245] Unborn children have rights and are, therefore, valuable people, not disposable property. A principal guarantee of the rights of people in today's society is section one of the fourteenth amendment. Of necessity, every unborn child is a legal person within that section.

The Court's error in attempting to determine the unborn child's status in law without adverting to the blood transfusion cases is obvious. In this same vein, the Court committed another error when it apparently relied on the concession by appellee in *Wade* "that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment."[246] There are two relevant observations to be made about this statement. In the first instance it may be said that the inability of appellee in *Wade* to cite a case does not mean that the case does not exist. In *Steinberg v. Brown*,[247] a federal district court stated: "Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it."[248] Furthermore, the *Wade* Court might have taken note of those cases which, in the abortion context and in obvious paraphrase of the Declaration of Independence, characterize the lives of unborn children of all gestational ages as "sacred" and "inalienable."[249] The Constitution incorporates the basic guarantees of the Declaration.[250] Unless we are to assume that the framers of the fourteenth amendment intended to strip

245. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972), noted in 41 Fordham L. Rev. 431 (1972).

246. 93 S. Ct. at 728-29.

247. 321 F. Supp. 741 (N.D. Ohio 1970). Steinberg arose out of a challenge to the Ohio abortion statutes on grounds similar to those in Wade and Bolton. As indicated at the outset of this article, a discussion of these cases has been avoided. See note 10 supra. Steinberg is mentioned here only in the context of the Court's statement.

248. 321 F. Supp. at 746-47. It might be argued that this statement is dictum, not holding, but that hardly seems relevant in the context of the Court's observation.

249. See State v. Moore, 25 Iowa 128, 135-36 (1868); People v. Sessions, 58 Mich. 594, 596, 26 N.W. 291, 293 (1886); Gleitman v. Cosgrove, 49 N.J. 22, 30, 227 A.2d 689, 693 (1967).

250. Gulf, Colo. & S. Fe Ry. v. Ellis, 165 U.S. 150, 160 (1897); Monongahela Navigation Co. v. United States, 148 U.S. 312, 324 (1893).

live human beings of their sacred and inalienable right to live, these cases must be interpreted as indicating an opinion that unborn children are persons under section one of the fourteenth amendment. Finally, the blood transfusion cases discussed above[251] must be taken as decisions of fourteenth amendment significance.

Secondly, the absence of any such decision should not be influential. As was noted in still another life-or-death context, "[t]he constitutionality of death itself under the Cruel and Unusual Punishments Clause is before this Court for the first time; we cannot avoid the question by recalling past cases that never directly considered it."[252]

It is evident that the Court's errors in *Wade* are cumulative. From a distorted interpretation of the common law of abortion to a general misunderstanding of the status of the unborn in American law, the Court erected a flimsy house of cards, piling one error upon another.

D. *The Presumption Against Human Life and Legal Personhood*

Part of the reason for the Court's errors in *Wade* was its approach. By structuring the opinion to create at the outset a right of privacy which includes the right to abort, the Court shifted the burden to the State of Texas to prove that unborn children are legal persons, whereas the presumption should have been in the children's favor. Moreover, the Court guaranteed the irrebutability of the presumption by refusing to decide whether the victim of an abortion is a live human being. Having created an insurmountable barrier, the Court proceeded to decide the fourteenth amendment personhood of unborn children in a case where they were unrepresented by a guardian and wherein no comprehesive record of expert testimony on the issue of their live humanbeingness had been developed in the trial court.

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251. See text accompanying notes 229-45 supra.

252. Furman v. Georgia, 408 U.S. 238, 285 (1972) (Brennan, J., concurring). However, the Court in Wade did just that when it claimed that it had "inferentially" held in United States v. Vuitch, 402 U.S. 62 (1971), that unborn children are not fourteenth amendment persons. 93 S. Ct. at 729. In Vuitch, the Court held that the District of Columbia abortion statute (which permits abortion only to preserve the life or health of the mother) is not unconstitutionally vague, particularly noting that "vagueness . . . is the only issue we reach here." 402 U.S. at 73 (citations omitted). Life and death issues are not decided sub silentio. "[I]llegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches . . . ." Boyd v. United States, 116 U.S. 616, 635 (1886). One might as well say the whole abortion issue was decided against the Wade and Bolton plaintiffs in Missouri ex rel. Hurwitz v. North, 271 U.S. 40 (1926), wherein the Court unanimously upheld a state statute authorizing revocation of a physician's license for unlawfully performing an abortion. Of course, the constitutional issues raised by the physician were different, but on the "inferential" approach of Wade, that should be irrelevant.

1. The Presumption

The better view of the common law, the known motivation behind nineteenth century abortion legislation, the intent of the framers, the factual humanbeingness of unborn children, the Supreme Court's own prior explication of "person" in section one of the fourteenth amendment, and the general status in law of unborn children point inexorably to a conclusion that the children are within the scope of the due process and equal protection clauses. But assuming *arguendo* that a substantial doubt still exists, unborn children are not, by virtue of that doubt, automatically excluded from the fourteenth amendment. For a number of reasons, the benefit of doubt must rest with the children, and the burden of proof with those who urge exclusion.

"[C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance."[253] The rule of liberal construction of constitutional rights was not meant to be thwarted by a rule of illiberal selectivity in the designation of the "person" entitled to assert those rights. Every live human being is included—*unless a specific intent to exclude particular individuals or classes can be shown.*

The rule of liberal construction places the benefit of the doubt on the side of him whose life or liberty is threatened under color of law by the state or its instrumentalities. If, as we are told by the Supreme Court in *In re Winship*,[254] the requirement of proof of guilt beyond a reasonable doubt in criminal cases is among " 'the fundamental principles that are deemed essential for the protection of life and liberty,' "[255] then how much more endangered are the rights to life and liberty when a live human being, threatened with death, has the burden of overcoming a presumption that he is legally not a person, but property, disposable at the will of his "owner" aided and abetted by government! If "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned,"[256] then how much more critical is it to the continued vitality of constitutional rights that they not be circumvented by a presumption of nonpersonhood raised against the innocent human beings who lay claim to them!

Just as "fundamental fairness"[257] requires the state to prove guilt

253. Boyd v. United States, 116 U.S. at 635.
254. 397 U.S. 358 (1970), noted in 39 Fordham L. Rev. 121 (1970).
255. 397 U.S. at 362, quoting Davis v. United States, 160 U.S. 469, 488 (1895).
256. 397 U.S. at 364.
257. Id. at 363.

beyond a reasonable doubt in a criminal case " 'to safeguard men from dubious and unjust convictions, with resulting forfeitures of life' "[258] so too do both fundamental fairness and an abhorrence of the forfeiture of life require that every live human being be accounted a fourteenth amendment person—*unless a specific intent to exclude particular individuals or classes can be shown.*

As heretofore noted,[259] the intent of the framers was to insure fourteenth amendment personhood not only to blacks but to every member of the human race. Slavery—the degradation in law and society of one class of live human beings to the status of property—was the occasion for a broad, remedial constitutional enactment designed to recognize the legal personhood of all classes of live human beings. All history shows that a particular grievance suffered by one class has led to remedial enactments intended to protect every class from the same fate.[260] To require any human being to hold his life at the will of others is intolerable as being of the very essence of slavery.[261] All live human beings are, by that fact alone, also fourteenth amendment persons—*unless a specific intent to exclude particular individuals or classes can be shown.*

It is submitted that had the Court in *Wade* placed the burden of proof where it belonged—on those urging exclusion of unborn live human beings from fourteenth amendment protection—the outcome, of necessity, would have been different.

2. The Lack of Representation

By ordinary standards of fairness, the *Wade* opinion should not have been considered by the Supreme Court to be decisive of the rights of unborn children.[262] They were not parties to the action, nor was there a guardian before the Court representing their interests. It might be argued, of course, that the State of Texas adequately represented the unborn children,[263] but the argument must fail.

It is true that in *Griswold v. Connecticut*[264] the Court recognized the standing of the Planned Parenthood League of Connecticut and a physician to raise the constitutional rights of married people with whom they had a professional relationship. However, *Griswold* involved a defense to

258. Id. at 362, quoting Brinegar v. United States, 338 U.S. 160, 174 (1949).

259. See Part IV (C) supra.

260. County of Santa Clara v. Southern Pac. R.R., 18 F. 385, 397-98 (C.C.D. Cal. 1883).

261. See Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

262. But it was. See Byrn v. New York City Health & Hosps. Corp., 93 S. Ct. 1414 (1973).

263. In Wade, the defandant raised the fourteenth amendment personhood of the unborn child as a compelling state interest. 93 S. Ct. at 725.

264. 381 U.S. 479 (1965).

a criminal prosecution, and the Supreme Court noted that if declaratory relief had been sought, "the requirements of standing should be strict, lest the standards of 'case or controversy' in Article III of the Constitution become blurred."[265] It seems clear that a decision in *Griswold*, adverse to the constitutional rights of married people (who were not parties), would not have bound them in any pending or subsequent action.[266] Moreover, it cannot be said that the Texas Attorney General stood in substantially the same position as the class of unborn children whose rights he purported to assert. Clearly, he was not a member of the class and could not adequately represent its members.[267] As a public official, his interest was ever subject to the vagaries of legislative action and potentially in conflict with the interests of the unborn child.[268] A party possessing such potentially conflicting interests cannot represent the rights of an absent party or fairly insure their protection.[269] As the Supreme Court has said:

> Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.[270]

Not only did the Court raise a presumption against the rights of unborn children, but, in addition, it denied them a hearing.

VI. The Errors in Interpretation of Criteria Purportedly Negativing the Personhood of Unborn Children

In support of its conclusion that unborn children are not persons under section one of the fourteenth amendment and to bulwark the presumption it had raised against them, the Court in *Wade* resorted to a number of criteria of legal personhood which unborn children purportedly do not meet. None of these criteria supports the Court's conclusion.

A. *The Census Criterion*

The Court observed, "[w]e are not aware that in the taking of any census . . . a fetus has ever been counted."[271] The writer is not aware

265. Id. at 481.

266. See Hansberry v. Lee, 311 U.S. 32, 40 (1940).

267. Id. at 41, 43.

268. Compare Hall v. Lefkowitz, 305 F. Supp. 1030 (S.D.N.Y. 1969) (New York Attorney General defending a restrictive abortion statute) with Byrn v. New York City Health & Hosps. Corp., 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972) (New York Attorney General defending an abortion-at-will statute).

269. See Hansberry v. Lee, 311 U.S. 32, 44-45 (1940).

270. Blonder-Tongue Labs., Inc. v. University Found., 402 U.S. 313, 329 (1971).

271. 93 S. Ct. at 729 n.53.

that in the taking of any census a corporation has ever been counted either. Yet, a corporation is a legal person under the equal protection clause.[272] Obviously, the enumeration clause[273] is not exhaustive of the persons protected by section one of the fourteenth amendment. Indeed, it is too late in the evolution of human rights to label a whole class of live human beings as non-persons, while at the same time extending the equal protection of the laws to corporations, including, ironically, those which manufacture and use the abortional instruments that kill these live human beings.

B. *The Incrimination Criterion*

The Court noted that no state forbids all abortions, and the Texas statute, in particular, contained the "typical" exception from criminality for an abortion necessary to save the life of the mother.[274] The Court then asked rhetorically: "But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?"[275]

No, it does not. The maternal lifesaving exception to criminal abortion is justifiable under the doctrine of "legal necessity" which also applies to postnatal human beings: "(1) the harm, to be justified, must have been committed under pressure of physical forces; (2) it must have made possible the preservation of at least an equal value; and (3) the commission of the harm must have been the only means of conserving that value."[276] The doctrine is of ancient origin and is usually cast in terms of two survivors of a shipwreck clinging to a piece of flotsam which will support only one of them.[277] Although the status of the doctrine in American law has been somewhat ambiguous,[278] the modern view is that legal necessity applies, at least in some cases, to homicide.[279] In the context of *Wade*, two features of the doctrine should be emphasized: first,

272. Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886).

273. U.S. Const. art. I, § 2, cl. 3.

274. 93 S. Ct. at 729 n.54.

275. Id.

276. J. Hall, General Principles of Criminal Law 426 (2d ed. 1960) (footnote omitted).

277. See J. Stephen, A Digest of the Criminal Law 19 (1877).

278. Compare United States v. Holmes, 26 F. Cas. 360 (No. 15,383) (C.C.E.D. Pa. 1842) with Surocco v. Geary, 3 Cal. 69, 73 (1853) (dictum). "[T]he same great principle . . . justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed . . . ." American Print Works v. Lawrence, 21 N.J.L. 248, 257-58 (Sup. Ct. 1847) (dictum).

279. See Model Penal Code § 3.02, at 5-10 (Tent. Draft No. 8, 1958).

in its application to abortion, via the maternal lifesaving exception to criminality, the doctrine was designed for the preservation of life, and typically the choice was between the loss of two lives (mother and child) or the preservation of one (the mother); second, the doctrine is applicable to both prenatal and postnatal human beings. If the availability of legal necessity as a defense to a homicide of a postnatal human being does not turn all such human beings into fourteenth amendment nonpersons, then the application of the doctrine to prenatal human beings, in the form of a maternal lifesaving exception to criminal abortion, cannot be relevant to the determination of whether these live human beings are persons under section one of the fourteenth amendment.

The issue is not whether the Supreme Court agrees with the doctrine of necessity as applied to abortion cases,[280] but whether such application is evidence of the nonpersonhood of unborn children. Clearly it is not.

C. *The Accessoryship Criterion*

The Court pointed out that "in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice?"[281] The reasons appear to be historical and pragmatic and completely irrelevant to the unborn child's legal personhood. Historically, abortion was viewed as an assault upon the woman because she "was not deemed able to assent to an unlawful act against herself . . . ."[282] As a result, the woman was considered a victim rather than a perpetrator of, or an accomplice in, the abortion.[283] Pragmatically, conviction of the abortionist frequently

280. Apparently it does. Earlier in Wade, the Court had cited with apparent approval, The King v. Bourne, [1939] 1 K.B. 687, a controversial decision applying the necessity doctrine to abortion. 93 S. Ct. at 719. See Davies, The Law of Abortion and Necessity, 2 Modern L. Rev. 126 (1938). While the writer has elsewhere expressed his disagreement with the scope of the Bourne decision—applying the necessity doctrine to maternal health as well as life (Report of the Governor's Commission Appointed to Review New York State's Abortion Law, Minority Report 47, 68-69 (1968))—that is not the point here. The point is: how could the Supreme Court be aware of the application of the necessity doctrine to abortion in Bourne and still use the Texas maternal lifesaving exception as evidence of the nonpersonhood of unborn children without even discussing the doctrine?

281. 93 S. Ct. at 729 n.54.

282. State v. Farnam, 82 Ore. 211, 217, 161 P. 417, 419 (1916).

283. "[The woman] did not stand legally in the situation of an accomplice; for although she, no doubt, participated in the moral offence imputed to the defendant, she could not have been indicted for that offence; the law regards her rather as the victim than the perpetrator of the crime." Dunn v. People, 29 N.Y. 523, 527 (1864) (citations omitted); see Annot., 66 Am. Dec. 82, 87 (1911). There is, however, some authority that "the mother may be guilty of the murder of a child in ventre sa mere, if she takes poison with an intent to poison it,

depended upon the testimony of the aborted woman (especially if a subjective element like quickening were at issue). The woman could hardly be expected to testify if her testimony automatically incriminated her.[284] The omission to incriminate the woman is no more than a statutory grant of immunity. It has no bearing on the personhood of the child.

D. *The Penalty Criterion*

The Court asserted that the penalty for criminal abortion in Texas is significantly less than the maximum penalty for murder. "If the fetus is a person, may the penalties be different?"[285]

The penalties may be and are different. The law recognizes "degrees of evil" and states may treat offenders accordingly.[286] Killing an unborn child may, in legislative judgment, involve less personal malice than killing a child after birth even though the result is the same—just as, for instance, a legislature may choose to categorize, as something less than murder, intentional killing under the influence of extreme emotional disturbance[287] or intentionally aiding and abetting a suicide.[288] Such legislative recognitions of degrees of malice in killing have nothing to do with the fourteenth amendment personhood of the victims.

E. *The Citizenship Criterion*

In support of its holding that unborn children are not fourteenth amendment persons, the Court cited[289] *Montana v. Rogers*.[290] It is true that *Rogers* held that a person conceived in the United States but born elsewhere is not a citizen by birth under the citizenship clause of the fourteenth amendment,[291] but it is equally true that the term "persons" and "citizens" in the citizenship clause are not co-extensive. The clause does not relegate non-citizens to nonpersonhood. An alien is not "naturalized" but he is protected as a person by the due process and equal pro-

and the child is born alive, and afterwards dies of that poison." Beale v. Beale, 24 Eng. Rep. 373 (Ch. 1713) (emphasis omitted) (citations omitted) (dictum).

284. People v. Nixon, 42 Mich. App. 332, 343, 201 N.W.2d 635, 646 (1972) (concurring and dissenting opinion).

285. 93 S. Ct. at 729 n.54.

286. Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 540 (1942).

287. E.g., N.Y. Penal Law §§ 125.20(2), 125.25(1a) (McKinney 1967).

288. Id. §§ 125.15(3), 125.25(1b).

289. 93 S. Ct. at 729.

290. 278 F.2d 68, 72 (7th Cir. 1960), aff'd sub nom. Montana v. Kennedy, 366 U.S. 308 (1961).

291. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1.

tection clauses.[292] A corporation is not "born", but it is protected as a person by the equal protection clause.[293] The fact that an unborn child is not a citizen has no bearing on his personhood under section one of the fourteenth amendment.

F. *The Homicide Criterion*

Keeler v. Superior Court[294] and *State v. Dickinson*[295] were cited by the Court[296] as being in accord with its finding that unborn children are not fourteenth amendment persons. It is true that in these cases it was held that an unborn child, killed as a result of a crime committed upon the mother, is not a "person" within the relevant murder (*Keeler*) and vehicular homicide (*Dickinson*) statutes of the respective states. But the decisions do not pertain to the unborn's status under the fourteenth amendment.

First, an assault or a reckless driving statute, which protects a pregnant woman against wrongful injury, of necessity also protects the unborn child she carries within her. If an individual kills the baby by a deliberate assault upon the mother or by reckless driving causing harm to her, he has already committed a separate crime. The child is protected by the same law which protects the mother. On the other hand, the abortion situation is sui generis in that the child requires separate protection. *Keeler* and *Dickinson* do not deprive the child of the law's protection and cannot be said to deny his fourteenth amendment personhood.

Second, both *Keeler* and *Dickinson* correctly held that the homicide statutes under which the defendants were charged must be interpreted according to common law definitions of homicide (or else the statutes would be subject to an ex post facto objection). As pointed out earlier in this article,[297] problems of proof at common law prevented a prosecution for homicide for aborting an unborn child unless the child was born alive and then died. Statutes incorporating common law concepts of homicide must, therefore, be interpreted to exclude the unborn child.

Third, abortion statutes are the proper vehicle for protecting unborn children; such was the intent of the legislatures that enacted them.[298]

292. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

293. Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886).

294. 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).

295. 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971).

296. 93 S. Ct. at 729.

297. See Part IV (A) supra.

298. See Part IV (B) supra. That the crime is labelled abortion instead of homicide, and the victim is called an unborn child or fetus or embryo instead of a person are not factors affecting the personhood of the unborn child under section one of the fourteenth amendment.

Keeler and *Dickinson*, like all of the criteria cited by the *Wade* Court do not support a finding that the unborn child is a fourteenth amendment nonperson.

The veneer of scholarship in the *Wade* opinion is only that and nothing more. Beneath the surface, there is little that is not error.

VII. The Dangerous Implications in *Wade*

Almost three years ago, the writer published an article warning of the dangerous implications of the jurisprudence of permissive abortion.[299] The article pointed out that one of the predominant characteristics of the abortion philosophy is the substitution of the quality of life for the sanctity of life; so that, under the influence of advanced technological know-how, the right to life is reserved only for those whose lives are useful, with the result that euthanasia fits as naturally into the jurisprudence of permissive abortion as does abortion itself.[300] It was also pointed out that there inhered in the quality-of-life jurisprudence the danger of compulsory abortion because any alleged right of privacy to choose whether or not to abort would be subordinated to the interests of society in maintaining a certain quality of life.[301]

Both compulsory abortion and involuntary euthanasia surfaced in *Wade*.

A. *Compulsory Abortion*

It must be remembered that the Court in *Wade* rejected any absolute right of a woman to choose whether or not to abort, and premised its holding on a limited right of privacy, subordinate to compelling state interests.[302] As one example of an appropriate state limitation on the

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"How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!" Trop v. Dulles, 356 U.S. 86, 94 (1958). "A fertile source of perversion in constitutional theory is the tyranny of labels." Snyder v. Massachusetts, 291 U.S. 97, 114 (1934). The futility of relying on labels is evident in the New York Penal Law. A " 'person,' when referring to the victim of a homicide, means a human being who has been born and is alive." N.Y. Penal Law § 125.05(1) (McKinney 1967). Yet, "[h]omicide means conduct which causes the death of . . . an unborn child with which a female has been pregnant for more than twenty-four weeks under circumstances constituting . . . abortion in the first degree or self-abortion in the first degree." N.Y. Penal Law § 125.00 (McKinney 1967). Thus, an unborn child who is not a "person" may nevertheless be the victim of a "homicide."

299. Byrn, supra note 5.

300. Id. at 24-28.

301. Id. at 28-31.

302. 93 S. Ct. at 726-27.

right of privacy, the Court cited[303] *Buck v. Bell*[304] which upheld the validity of a state statute providing for compulsory sterilization of mental defectives whose affliction is hereditary. The state "interest" in that situation was, of course, in preventing the proliferation of defectives.

It had been thought that *Buck v. Bell* died after the Nazi experience,[305] and its revival now is rather frightening. By implication in *Wade*, the Court espoused the constitutional validity of state-imposed, compulsory abortion of unborn children diagnosed intrautero as mentally defective.[306] Neither the child's constitutional rights (of which the Court could find none) nor the mother's right of privacy (which the Court, by citing *Buck*, found limited by the state's "interest" in preventing the birth of mental defectives) could, according to the theory of *Wade*, be interposed to challenge such a statute.

The spectre of compulsory abortion assumes additional substance when one reads in a concurring opinion[307] (within a page to a citation to *Buck v. Bell*) that certain situations of pregnancy make abortion "the only civilized step to take," and "[t]he 'liberty' of the mother, though rooted as it is in the Constitution, may be qualified by the State for the reasons we have stated."[308] Presumably, the state has a sufficient interest to mandate the "civilized step" of abortion in certain situations.

The social engineering overtones of the *Wade* opinion do nothing to quiet the fear of compulsory abortion. In the very beginning of its opinion, the Court asserted that "population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem."[309] At the end of the opinion, the Court concluded that its decision is consistent "with the demands of the profound problems of the present day."[310] Evidently, the Court, as social engineer, views abortion as a viable solution to such quality-of-life problems as pollution, poverty, population growth and race. If the state's interest in the solution of these problems can be said to be sufficiently compelling to overcome the right of individual privacy, then compulsory abortion might conceivably encompass others besides the mentally defective unborn child.

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303. Id. at 727.

304. 274 U.S. 200 (1927).

305. See C. Rice, The Vanishing Right to Live 143-44 (1969).

306. The procedure for such diagnosis is called amniocentesis. R. Rugh & L.B. Shettles, From Conception to Birth 201 (1971). Dr. Y. Edward Hsia of Yale has suggested that amniocentesis might be made compulsory to determine whether or not a child has defects and if so abortion might also be made compulsory. Voice For Life News-Notes, Mar. 1973, at 5.

307. 93 S. Ct. at 756 (Douglas, J., concurring).

308. Id. at 760.

309. Id. at 708-09.

310. Id. at 733.

All this disquietude is compounded by the Court's apparent adoption of what the writer has called "techno-morality."[311] Because advanced technology now knows how to do something, it becomes the right thing to do and facts and law must be readjusted accordingly. Thus, in *Wade*, the Court rejected the view that life begins at conception because of, *inter alia*, "new medical techniques such as menstrual extraction."[312] In other words, the availability of a new technique for performing early abortions justifies a facile redefinition of the facts and law of what an abortion kills so that the technique may be used. What is really being redefined, of course, is the value of the human life destroyed by the abortion. Commenting on the Court's decision, a leading prenatal scientist observed: "[W]e're dealing with human beings; we're dealing with human life. . . . They have used terms like 'potential life,' trying to say that life wasn't there, when the reason for saying that life wasn't there was because they didn't attach any value to it."[313]

To find a basis for compulsory abortion in *Wade* requires no distortion of the Court's opinion. *Buck v. Bell*, judicial social engineering, and techno-morality all combine to make it a very real and very frightening prospect.

B. *Involuntary Euthanasia*

Also very real and very frightening is the prospect of involuntary euthanasia. The Court in *Wade* refused to "resolve the difficult question of when life begins [because] medicine, philosophy, and theology are unable to arrive at any consensus,"[314] even though the Court expressed its awareness of "the well-known facts of fetal development."[315] As previously pointed out,[316] the controversy to which the Court referred involves not whether abortion kills a live human being, but whether that live human being is worth keeping alive or, to put it another way, whether he may be killed with impunity. The determination is not a factual one but a value judgment on whether the life of a human being, distinguishable from other human beings only by kind and degree of dependency, is meaningful. Thus in *Wade*, the Court held: "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is

311. Byrn, supra note 5, at 28.

312. 93 S. Ct. at 731. Menstrual extraction consists in suctioning out the lining of the uterus. It is performed between the fifth and seventeenth day following a missed menstrual period—before pregnancy is confirmed by a pregnancy test. Letter from William D. Walden, M.D., to the Editor, N.Y. Times, Mar. 19, 1973, at 34, col. 5.

313. Andre Hellegers, M.D., quoted in The Catholic News, Mar. 15, 1973, at 1, col. 3.

314. 93 S. Ct. at 730.

315. Id. at 728.

316. See Part V (A) supra and text accompanying note 313.

so because the fetus then presumably has the capability of *meaningful* life outside the mother's womb."[317]

The same kind of controversy might very well arise with respect to the end of life. Because of illness, age or incapacity, a live human being, indistinguishable from other live human beings except by kind and degree of dependency, might be claimed by some in the disciplines of medicine, philosophy and theology to be no longer alive in a "meaningful" way. Joseph Fletcher has argued:

> Consistency may be the virtue of merely petty minds, but I want to point out that, even though it might muddy the waters of debate, the fact is that determining whether the quality of *human* life (as distinguished from mere vitality) is present arises at both ends of the life spectrum, and therefore abortion and euthanasia are intertwined questions of ethics. A physician in North Carolina recently asked me, 'Why is it that society tell us we may terminate a life for some reasons *in utero*, but not *in terminus*?' When is the *humanum*, humanness, here and when is it gone? In our present state of knowledge I suspect this is an unanswerable question but that therefore we ought to be putting our heads together to see what criteria for being "human" we can fairly well agree upon. It's worth a try. Medical initiative is at stake in both abortion and euthanasia and the problem ethically is the same.[318]

More recently,[319] Fletcher has detailed "criteria for being 'human,'" including, among others, minimal intelligence, self-awareness, self-control, a sense of time, a sense of futurity, a sense of the past, the capability to relate to others, concern for others, communication, control of existence, curiosity, change and changeability, balance of rationality and feeling, and (as a negative criterion) that "man is not a bundle of rights."[320] In applying these criteria it must be remembered: "We reject the classical sanctity-of-life ethics and embrace the quality-of-life ethics."[321]

Given a carefully orchestrated controversy (such as that undertaken by Fletcher) and the Court's unwillingness in *Wade* to recognize the fact of life unless there is a "consensus" on its value, a state might persuasively claim that it is free to remove a live human being (*e.g.*, a senile elderly person) from the law's protection. Just as the *Wade* Court redefined the beginning of life as a "process,"[322] so too might death be viewed as a process which may be hastened by those who find that the care of a de-

317. 93 S. Ct. at 732 (emphasis added).

318. Fletcher, The Ethics of Abortion, 14 Clinical Obstetrics & Gynecology 1124, 1128 (1971).

319. Fletcher, Indicators of Humanhood: A Tentative Profile of Man, 2 Hastings Center Report, Nov. 1972, at 1-3.

320. Id. at 3.

321. Fletcher, The Ethics of Abortion, 14 Clinical Obstetrics & Gynecology 1124, 1129 (1971).

322. 93 S. Ct. at 731.

pendent live human being has forced upon them (as the Court said of the unwanted child in *Wade*) "a distressful life and future."[323]

The prospect of involuntary euthanasia is no mere hobgoblin. It results directly from the Court's abandonment in *Wade* of its obligation to resolve factual issues upon which constitutional rights depend.[324] The Court's refusal to decide the crucial question of the fact of life, because of the lack of a consensus on the meaningfulness or value of life, establishes a precedent that conceivably could reach as far as legalized involuntary euthanasia. An editorial in the official journal of the California Medical Association advocated a new ethic for medicine and society in these terms:

> Medicine's role with respect to changing attitudes toward abortion may well be a prototype of what is to occur. . . . One may anticipate further development of these roles as the problems of birth control and birth selection are extended inevitably to death selection and death control whether by the individual or by society.[325]

Those who favor "birth selection" and "death selection" by "society" will be considerably encouraged by *Wade*.

VIII. CONCLUSION

Every decision to abort is a decision to kill a "live human being,"[326] a "child [with] a separate life,"[327] a "human"[328] who is "unquestionably alive"[329] and has "an autonomy of development and character."[330] This is the stark, overwhelming reality about abortion.

In *Wade*, the Supreme Court, with full knowledge of the mortal consequences that would ensue, removed a whole class of live human beings from the law's protection, and left their continued existence to the unfettered discretion of others.[331] But "[h]uman beings are not merely creatures of the State, and by reason of that fact, our laws should protect

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323. Id. at 727.

324. See Part V (A) supra.

325. Editorial, A New Ethic for Medicine and Society, 113 California Medicine 67, 68 (Sept. 1970).

326. Byrn v. New York City Health & Hosps. Corp., Supreme Court of the State of New York, Queens County, Index No. 13113/71, in Juris. State. 60a, 68a (unpublished opinion of Francis J. Smith, J., Jan. 4, 1972).

327. Byrn v. New York City Health & Hosps. Corp., 38 App. Div. 2d 316, 324, 329 N.Y.S.2d 722, 729 (2d Dep't 1972) (citations omitted).

328. Byrn v. New York City Health & Hosps. Corp., 31 N.Y.2d 194, 199, 286 N.E.2d 887, 888, 335 N.Y.S.2d 390, 392 (1972).

329. Id.

330. Id.

331. But see Reitman v. Mulkey, 387 U.S. 369 (1967).

the unborn from those who would take his life for purposes of comfort, convenience, property or peace of mind rather than sanction his demise."[332]

Perhaps it is a measure of the extent to which the quality-of-life philosophy dominates our jurisprudence that a justice of the Supreme Court can write in the "environmental context" of the destruction of trees and animals, "any man's death diminishes me, because I am involved in Mankinde,"[333] while in the human context of the destruction of unborn children, he can opine, contrary to fact, that "the fetus, at most, represents only the potentiality of life;"[334] and proceed to exile the unborn beyond the pale. But unborn children are also a part of mankind and, aware of it or not, his opinion did diminish the Court and all the rest of us.

First, *Dred Scott*, then *Buck v. Bell* and now the most tragic of them all —*Roe v. Wade*. Three generations of error are three too many—and the last of them shall be called the worst.

332. Byrn v. New York City Health & Hosps. Corp., 31 N.Y.2d at 206, 286 N.E.2d at 892, 335 N.Y.S.2d at 397 (Burke, J., dissenting).

333. Sierra Club v. Morton, 405 U.S. 727, 760 n.2 (1972) (Blackmun, J., dissenting).

334. 93 S. Ct. at 731.