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Abortion and the Constitution: The Need for a Life-Protective Amendment

Robert A. Destro†

As a result of the recent congressional hearings held on proposed constitutional amendments designed to overturn the rulings of the United States Supreme Court concerning abortion, the abortion controversy has once again become a major topic of public interest. The author seeks to identify the two distinct areas of debate involved in the issue and to discuss, in particular, the central topic raised by many of the proposals—the rights of the unborn.

> It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law and forgets that what seem to him to be first principles are believed by half of his fellow men to be wrong . . .[1]

Abortion, the right to privacy, the right to life—these topics have been in the public eye since the decisions of the United States Supreme Court in *Roe v. Wade*[2] and *Doe v. Bolton*.[3] These decisions have not settled the abortion controversy: it continues in Congress,[4] in the courts,[5] and in the media.[6] The subject matter is complex and may be debated at many levels. However, without a focus or common ground of discussion, efforts toward resolution inexorably lead to more debate, more confusion, and ultimately, frustration and anger for the parties involved.[7]

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* A.B., 1972, Miami University; J.D., 1975, Boalt Hall School of Law. The author acknowledges Professor Hal Scott, now at the Harvard Law School, and Mr. Joe Feldman of Boalt Hall School of Law for their assistance in locating the materials cited in footnote 83, and Ms. Gudrun Fuchs, a visiting research scholar at Boalt Hall School of Law, for the many hours she spent translating the parts of the opinion of the West German Federal Constitutional Court found in the Appendix to this Comment.

1. O.W. HOLMES, COLLECTED LEGAL PAPERS 295 (1920).
2. 410 U.S. 113 (1973) [hereinafter cited as *Roe*].
3. 410 U.S. 179 (1973) [hereinafter cited as *Doe*].
4. *See, e.g.*, San Francisco Chronicle, April 7, 1975, at 34, col. 1 (editorial comment).
5. *See, e.g.*, Commonwealth v. Edelin, Crim. No. 81823 (Super. Ct. Suffolk County, Mass., filed Feb. 15, 1975) *on appeal*, No. 81823 (Ct. App. Suffolk County, Mass., filed July 1, 1975) *discussed in* NEWSWEEK, March 4, 1975, at 18.
6. *See, e.g.*, NEWSWEEK, March 4, 1975, at 18 (cover story).
7. *See, e.g.*, NEWSWEEK, June 9, 1975, at 11 (current status of abortion controversy characterized as "sellout").

This Comment undertakes to identify and explore several areas of debate. First, it discusses the rationale and practical effect of the Supreme Court's decision to legalize abortion in *Roe v. Wade* (hereinafter the "access" question). The focus then shifts to a discussion of the Court's decision in *Doe v. Bolton* and the existence of state power to regulate the *means* through which abortions may be obtained. Finally, mention is made of the background, rationale, and content of proposals for reform in these areas. It is hoped that the areas of debate relevant to this controversial issue will be seen as separate issues, each requiring careful and individualized consideration.

I

ROE V. WADE: A QUESTION OF ACCESS

A. Introduction

In *Roe v. Wade*, which involved a challenge to the Texas abortion statutes,[8] the Court held that a woman's decision to procure an abortion is constitutionally protected and may be restricted only in the face of a compelling state interest. The majority opinion identified legitimate governmental interests in protecting the unborn and in ensuring that abortions are performed in circumstances maximizing the health and safety of the mother. These interests were then weighed against the more generalized interests of the pregnant woman.[9]

The Court's attempted accommodation of these interests was based upon a division of pregnancy into three periods, roughly equivalent to "trimesters".[10] During the first trimester there was to be no interference with either the decision to abort or the means by which this decision was to be effectuated. In the Court's opinion, neither of the states' interests was so compelling as to justify any restriction upon either the personal freedom of the pregnant woman or the medical judgment of her attending physician.[11] The Court concluded that near

8. TEX. PENAL CODE §§ 1191-94, 1196 (1963).

9. The decision purported to decide the issue without predilection. *Roe*, 410 U.S. at 116-17. The opinions, however, do not bear out this assertion. Recurrent in both the majority and concurring opinions are both the personal opinions of the Justices and the phrases "meaningful life" and "potential life." *Roe*, 410 U.S. at 162, 163; *Doe*, 410 U.S. at 217. This is not to say, however, that the Justices did not make an attempt to subordinate their personal feelings; but if, as they correctly noted, the question was of such a nature as to be singularly inappropriate for judicial decision, it is difficult to understand why they even decided the case. Where particularly delicate policy questions are involved, the appointed judiciary may be the *least* qualified to speculate as to the proper resolution. A legislature, or the people themselves, would be able to rest their decision upon basic democratic principles; a judicial tribunal invoking the doctrine of judicial review would not. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

10. *Roe*, 410 U.S. at 162-63.

11. *Id.* at 163.

the onset of the second trimester, the health hazards associated with abortion were sufficiently serious to outweigh the risks of continuing the pregnancy to term. Thus, the states' interest in safeguarding the well-being of the woman led the Court to permit state regulation of abortion procedure in ways reasonably related to the protection of maternal health.[12] The Court felt that subsequent to the point at which the unborn attain viability[13] the states' interest in the protection of "potential life" would become compelling. During this final period of pregnancy, the state could, at its option, prohibit abortion except when necessary to preserve the life or health of the mother.[14]

B. Structuring the Interests

By characterizing the major interests affected by a woman's decision to procure an abortion as those of the woman and the state, the Court was able to avoid the underlying conflict between fundamental *personal* rights—the clash between a woman's right to privacy and her unborn offspring's right to live—which lies at the heart of the abortion issue. Since the Court characterized the basic conflict as one between an individual's right to privacy in decisions regarding reproduction and a set of *state*-asserted interests, including a concern for "potential" life, any discussion of the primary nonmaternal[15] interests involved—those

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12. See Part II *infra*.

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

14. "Viability" is defined as the ability of the unborn to survive outside the uterus. This stage of maturity can, under present medical technology, be reached as early as 20 weeks. *See* TIME, March 31, 1975, at 82 (smallest surviving infant weighed 395 grams). The Court placed viability at 28 weeks, but conceded that it may occur as early as 24 weeks. *Roe*, 410 U.S. at 160.

15. In any decision concerning abortion, the marshalling of the interests at stake must reflect the potential effects under various results. Rather than characterizing the interests as either maternal or state—which may ignore other interests at least as important as those of the state and encourage a bias in favor of maternal interests—the interests involved are best characterized as either maternal or nonmaternal.

For the woman, pregnancy represents a substantial burden, both mental and physical. Abortion is one means by which to avoid some of these problems. For the unborn, abortion is an ultimate event which terminates existence. The unborn's interest in life clearly does not depend upon the existence of a public policy concerning abortion. For the state, an anti-abortion policy may seek to protect the unborn either because of a belief that those who are incapable of protecting their own interests need the protection of the state, or for more pragmatic reasons (for example, to increase the labor force). Likewise, a pro-abortion policy might be aimed at enabling a woman to end an unwanted pregnancy, or at facilitating a state policy to limit population growth.

There are other nonmaternal interests affected by a decision regarding abortion policy, the clearest of which are the interests of the father. Since *Roe*, however, the father's rights have been regarded as unpersuasive in comparison to the mother's decision to abort. *See, e.g.*, Coe v. Gerstien, 376 F. Supp. 695 (S.D. Fla. 1974), (three-judge court), *appeal dismissed, cert. denied*, 417 U.S. 277, *aff'd in part sub nom.*, Poe v. Gerstien, 412 U.S. 279 (1974) (per curiam affirmance of denial of injunction against

of the unborn—could be avoided by assuming that those interests were somehow less than "real."[16] The device which the Court employed to sidestep a resolution of the more difficult issues presented by the conflict between personal rights was both subtle and deceptively simple. The Court wrote:

> Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the *State's* interest [emphasis added], recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone [emphasis by the Court].[17]

This slight shift in characterization of the interests at stake allowed the Court to eschew any frank discussion of the "difficult question of when life begins"[18] and to reject the "rigid" claims argued by both sets of adversaries.[19] By resorting to the concept of "potential life"[20] to define the existence of the prenatal human organism, and by assuming that an individual's life must be "meaningful" before there is logical

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enforcement of the statute) (statute provision requiring consent of father); Doe v. Rampton, 366 F. Supp. 189 (1973) (same); Jones v. Smith, 278 So. 2d 339 (Fla. App. 1973), *cert. denied*, 415 U.S. 958 (1974) (same).

It should be noted that if one assumes at the outset that the unborn have no interests, one has effectively decided the most difficult question presented by abortion. All that is left is to balance interests which are less than "ultimate" for those involved.

16. By characterizing the unborn as "potential" life the Court assumed at the outset that it was dealing with something less than *actual* human life. Such a characterization goes a long way toward deciding the ultimate issue; once the unborn are reduced to the status of "potential" life, their destruction is made to seem less serious. Thus, by giving constitutional recognition only to the "less rigid" claim that only *potential* life exists before birth, the Court implicitly decided the "difficult question of when life begins," which it so eloquently sought to avoid later in the opinion. *See Roe*, 410 U.S. at 150, 159. In the Court's eyes this potentiality exists until live birth, at which point actual life begins. *See Roe*, 410 U.S. at 164-65 (in the post-viability stage the state may protect the "potentiality" of life).

17. *Roe*, 410 U.S. at 150.

18. *Id.* at 159.

19. The "rigid" claims of the opposing parties are essentially two: one side argues that a woman has an absolute right to procure an abortion at any time; the other side claims that the unborn are living human beings deserving of constitutional protection. The Court rejected both of these claims, opting for a limited right in the first case, and adopting the "less rigid" claim of "potential" life in the second. The second claim, however, was actually the central issue of *Roe v. Wade*, for if the unborn are living human beings entitled to constitutional protection the claim of a right to abortion fails. *Roe*, 410 U.S. at 156-57. The Court never discussed just why the "rigid" claim on behalf of the unborn had to be rejected, but it is fair to assume that rejection of the proposition that *actual* human life was involved made its subsequent decision on the meaning of the word "person" much easier. Indeed, it would have been difficult for the Court to explain just why a living human being is not a "person" within the meaning of the Constitution.

20. See note 16 *supra*.

justification for protecting it,[21] the Court was able to compromise the interests of the unborn by defining away their rights. While the Court felt that no "person" entitled to constitutional protection existed at conception or at any other period prior to live birth,[22] the state could assert a compelling interest in protecting the unborn once they reached viability.[23] The Court completely omitted any discussion of why the unborn should or should not have rights of their own. The rationale behind this marshalling of interests and the necessity for this approach to the issues were unexplained.

In an attempt to buttress its ultimate conclusion that the unborn can find no protection under the Constitution, the Court attached great weight to its professed inability to find agreement in the community at large as to when life begins. The validity of such a justification, however, is open to serious question. In fact, the answer to "the difficult question of when life begins" is a matter of common understanding. The increasing sophistication of the science of biology has made it impossible to deny that biologically, human life exists before birth.[24] In fact, it is only within the context of the abortion controversy that this basic fact is called into question.[25] In an editorial frankly discuss-

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

22. *Id.* at 158.

23. *Id.* at 163-64.

24. W. WINDLE, PHYSIOLOGY OF THE FETUS 3 (1971):

> Embryonic development is at one end [of the spectrum of human development], maturation follows and aging comes at the farther end of a continuing growth spectrum in which the only sharply defined boundary is at the beginning. The other boundary is a variable one. It may be a day or a hundred years. . . . Be that as it may, development goes on until the spectrum has been completed or aborted by accident, genocide or disease. Fetal life is normally only a small part of it, birth just an event along the way.

See GRAY, ANATOMY OF THE HUMAN BODY 56-57 (C.M. Goss, 25th ed. 1948); C. HERTWIG, TEXTBOOK OF THE EMBRYOLOGY OF MAN AND MAMMALS (E.L. Mark transl. 1905); P. WIESS, PRINCIPLES OF DEVELOPMENT: A TEXTBOOK OF EXPERIMENTAL EMERYOLOGY 3-9, 14-17 (1939); E. WITSCHI, DEVELOPMENT OF VERTEBRATES 7 (1956). *See generally* L. BARTH, EMBRYOLOGY 1-13 (rev. ed. 1953); Editorial, *A New Ethic for Medicine and Society*, CALIFORNIA MEDICINE, September, 1970, at 68 (hereinafter cited as CALIFORNIA MEDICINE).

25. The basic difficulty within the abortion controversy is a failure to agree on a definition of the term "human life." Human life can be defined to include all individuals who are biologically human (members of the species Homo sapiens), or it can be defined as a quality attaching when certain societally defined criteria have been fulfilled. It is the latter definition of "human" to which the Court was alluding when it claimed to find disagreement in the community at large, including the medical and scientific communities, as to when "life," meaning "human life," begins. *See Roe*, 410 U.S. at 159. For purposes of this Comment, however, "life" is equated with biologically human life so that subjective criteria for establishing those qualities which make one "human" in the eyes of society can be avoided. *Compare* CALIFORNIA MEDICINE, *supra* note 24, at 68, *with* the following:

> Whenever scientific debate becomes unreasonably strident, and its participants unusually intransigent, one cannot help but suspect that technical matters are

ing the changing attitudes toward the value to be placed upon individual human lives, *California Medicine*, the official journal of the California Medical Association, noted that all of the rhetoric surrounding the abortion controversy betrays "a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous, whether intra- or extra-uterine until death."[26]

So, by sidestepping discussion of biological fact, the Court was able to recognize that viability, a concept fairly new to the controversy over abortion,[27] signaled the period in which the state's interest in potential life would become compelling.[28] Yet, even when viability has been reached, protection of the unborn is illusory because state protection of the unborn is not constitutionally compelled and may be set aside when the life or health of the mother is in jeopardy.[29] Since, in the Court's opinion, the unborn have no constitutionally cognizable

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no longer the real issue. In such circumstances it is not unusual to find that opponents completely understand and accept the contents of each other's arguments. They carry on the debate because they favor opposing policies, not because they disagree about scieutific matters. They perceive a policy decision as an implicit consequence of their technical conclusions, and having a personal preference for a particular policy they tend to defend whatever technical conclusion is most conducive to their favored policy. In short, scientific objectivity is abandoned in favor of scientific advocacy.

Blank, *The Delaney Clause: Technical Naiveté and Scientific Advocacy in the Formulation of Public Health Policies*, 62 CALIF. L. REV. 1084, 1119 (1975).

26. CALIFORNIA MEDICINE, *supra* note 24, at 68.

Thus, while the trimester approach to resolving the abortion issue appears warranted if the sole question to be decided is the relative safety of "early" (first trimester) as opposed to "late" abortion for the woman involved, it is too artifical to support rigid constitutional rules governing either the existence of fundamental personal rights during the prenatal period or the extent of state police power over the timing and quality of the medical procedures involved in abortion. In purely biological terms, the trimester is a construct having little significance other than as a convenieut means by which to estimate the progress of prenatal development. *See* sources cited note 24 *supra*.

Since the end result of the abortion cases is to deny all constitutional protection to the unborn, the analytical framework upon which the decisions rest can hardly be characterized as a "balance" between fetal and maternal interests without doing violence to the meaning of the word.

27. Historically, the key points considered in the framing of abortion policy were conception, quickening, and birth. Quickening was chosen by the early common law as an interim point because it represented the first concrete proof that the child was alive. *See, e.g.*, State v. Cooper, 22 N.J.L. 52 (1849). Choosing viability as the relevant point in the protection of the unborn, however, makes the bodily integrity of the fetus dependent not on whether it is alive, but whether it is sufficiently mature to lead a "meaningful" life should it survive the abortion procedures. *Roe*, 410 U.S. at 163.

28. *Id.* at 163. It is important to recognize that the Court did not refer to this point as the beginning of the "third trimester," although some courts seem to have taken this approach. *See, e.g.*, Hodgson v. Anderson, 378 F. Supp. 1008, 1016 (D. Minn. 1974). Furthermore, although the point of viability was not strictly limited in the Court's opinion, the lower courts seem to be interpreting the opinion as if it had been limited. See *id.* at 1016.

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

interest in the preservation of their own lives, the state's interest in protecting their lives would not be sufficiently compelling to require a balancing of the life interest of the unborn with the interest of its mother.[30]

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30. The Court buttressed its argument that the Constitution does not protect the unborn against governmentally sanctioned destruction at the hands of their mothers' physicians with the contention that abortion laws typically contain an exception for the life of the mother. This fact is undisputed. What is disputed, however, is that the exception destroys the rule.

Clearly, the fact that there may be exceptions to any criminal law does not destroy the law's proscriptions. The law relating to self-defense is, perhaps, the best example of the law's recognition that there are situations where the interest of one individual in the preservation of his or her own life is held to negate the criminality of the homicide or battery with which the person is charged. The life exception to the rules against abortion has the same genesis.

The other "inconsistencies between Fourteenth Amendment status and the typical abortion statute" noted by the Court are equally devoid of merit. The Court pointed out that, under Texas law, a woman could not be liable for an abortion performed upon her as a principal or as an accomplice. *Roe*, 410 U.S. at 151 & nn.49-50. While this may have been true to some degree in Texas, it was certainly not true in all other states. *See, e.g.*, Smith v. State, 33 Me. 51 (1833); *In re* Vince, 2 N.J. 443, 67 A.2d 141 (1949). *Vince* was cited by the Court in support of the opposite contention. *Roe*, 410 U.S. at 151 & n.50.

The Texas rule that a woman could not be considered an accomplice is deserving of independent scrutiny. The rule first found expression in Watson v. State, 9 Tex. Crim. 237 (1880), in which the court addressed itself not to the woman's legal culpability, but to the evidentiary effect of her being considered an accomplice:

> The rule that she does not stand legally in the situation of an accomplice, but should rather be regarded as the victim than the perpetrator of the crime, is one which commends itself to our sense of justice and right . . . . But, though not *strictly* an accomplice inasmuch as she is in a moral point of view implicated in the transaction, it would be proper for the jury to consider that circumstance in its bearing on her credibility.

Id. at 244-45 (emphasis added). Thus, even in Texas, a woman was considered to be "implicated" in the abortion, a crime which was defined in terms of its effect upon the fetus, not the mother. *See, e.g.*, Moore v. State, 37 Tex. Crim. 552, 567-72, 40 S.W. 287, 290 (1897). The major case upon which the Texas court in *Watson* relied was Rex. v. Hargrave, 5 Carr. & Payne 170, 24 Eng. Com. L. Rep. 509, 510 (1838):

> Although all persons present at and sanctioning a prize fight, where one of the combatants is killed are guilty of manslaughter, as principals in the second degree; yet they are not such accomplices as require their evidence to be confirmed, if they are called as witnesses against other parties charged with the manslaughter.

Since the Texas rule was based upon evidentiary rather than substantive considerations, it was not esseutially different than the rule in those jurisdictions which did not prosecute the woman who procured an abortion. The rule proscribing prosecution was equally based upon evidentiary considerations: the courts needed the woman's testimony to bring the abortionist before the bar. *In re* Vince, *supra* at 451, 67 A.2d at 145.

The final "inconsistency" raised by the Court in support of the contention that abortion laws were intended solely to protect the woman was the differentiation of penalties between abortion and murder. Since criminal liability is solely a creature of statute, one must assume that the perceptions of the legislators who framed the penalty provisions governed the scope of the laws. The crime of abortion is one which has always involved unique evidentiary and circumstantial problems, a fact which explains why the penalties affixed were differentiated from those of murder. *See, e.g.*, ch. 4 § 119 [1898]

How expansive this life and health exception will prove to be remains uncertain, but the Court's own language in recent opinions has provided it with a seemingly wide scope. In the 1971 case of *United States v. Vuitch*,[31] a vagueness challenge to the District of Columbia abortion statute, the Court gave the concept of health an extremely broad definition. That construction effectuated increased access to abortion in the District without completely invalidating the statutes. In effect, the broad strokes of *Vuitch* were a half-step toward the decision in *Roe v. Wade*.[32] In *Roe*, the Court enumerated a list of factors paralleling those relied upon in *Vuitch* to support its decision to expand a woman's right to privacy so as to include the right to procure an abortion.

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity or additional offspring may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.[33]

Were the Court to continue to employ such an expansive definition of health after *Roe*,[34] the exception to state proscription of abortion after viability would swallow the rule, and the apparent accommodation of

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Laws of New Jersey (not more than $5,000 or 15 years at hard labor, or both, if either the woman or the child died as a result of the abortion).

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

32. In *Roe* the Court stated: "[W]e would not have indulged in statutory interpretation favorable to abortion [in *Vuitch*] . . . if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection." 410 U.S. at 159.

33. *Roe*, 410 U.S. at 153.

34. Given the Court's characterization and resolution of the primary conflict of interests as one between the state and the pregnant woman, one would have to conclude that the state protection of maternal interests, even at the expense of its compelling interest in protecting those of the unborn presumed capable of extra-uterine survival, is constitutionally mandated. An examination of the Court's language will serve to illustrate the point.

> For the stage subsequent to viability the State, in promoting *its* interest in the *potentiality* of human life, may if it chooses, regulate, and even proscribe abortion except where it is necessary in appropriate medical judgment, for the preservation of the life or health of the mother.

Roe, 410 U.S. at 164-65 (emphasis added). If this language is taken at face value it would appear that the Court did indeed declare abortion-on-demand to be a matter of judicial policy, notwithstanding Chief Justice Burger's contentions to the contrary. *See Doe*, 410 U.S. at 208 (Burger, C.J., concurring).

interests in *Roe* would then prove wholly illusory. The compelling interest in the preservation of the lives of the unborn then would be nothing more than another legal fiction.

Such a broad definition of health should not survive the judicial restructuring of abortion policy in *Roe*, unless it is made absolutely clear that the practical effect of such a definition is to establish abortion-on-demand for the full nine months of pregnancy as this nation's public policy.[35] The Court considered the interests underlying the more expansive "health" concerns when it held that the protection of unborn human life was not sufficiently compelling to override maternal interests during approximately the first six months of pregnancy. After viability, which may occur as early as five months, the states' interest, even under the Court's formulation, becomes "compelling" and thus clearly justifies regulations restricting the accessibility of abortion. Only a highly predictable danger to the pregnant woman's *life* approaches the weight of the states' interest in precluding the destruction of her unborn offspring after that point.

C. The Question Presented

That the unborn were found to be excluded from the protection of the Constitution was the keystone of the Court's argument that the state has no interest in protecting them through the use of criminal or civil sanction. Since, under the Court's expansive definition of "health" virtually any maternal interest may be sufficient to overcome the state's compelling interest in preserving prenatal life, it cannot be argued that the Court considered such life important enough even to be included in the balancing which did take place.

An examination of the standards employed by the Court in its negation of state power to recognize in the unborn a fundamental human right to life raises several difficult and serious questions concerning the limitations of judicial power in this area of constitutional law. The precise question presented to the Court in the abortion cases was a matter of first impression. In construing the Texas abortion statute, the Texas Court of Criminal Appeals had ruled that the lives of the unborn were protected not only by the statute,[36] but also by the

35. "Abortion-on-demand" is used here to refer to the absence of legal restraint upon the procuring of an abortion. The fact that a woman need procure a willing physician or the funds with which to pay for the procedure are separate issues. To define the term to include both of these factors would be to imply that a woman could force an unwilling physician to perform the procedure, a proposition not without substantial constitutional problems of its own, and that the state is under an obligation to pay for any such services upon request, another proposition not without substantial difficulties.

36. *See* Thompson v. State, 493 S.W.2d 913 (Tex. Crim. App. 1971), *vacated and remanded*, 410 U.S. 950 (1973) (pursuant to *Roe*):

> In the homicide statute the Texas legislature has manifested its intent to

Texas constitution's counterpart of the due process clauses of the fifth and fourteenth amendments.[37] That determination of Texas law was binding upon the United States Supreme Court.[38] The effect of the Texas court's ruling was to narrow the question presented in *Roe* to the following: does the Federal Constitution forbid the protection of the rights of the unborn? Although the Court took note of the decision in *Thompson v. State*,[39] it did not discuss its rationale.

If it be assumed that the fundamental rights of life, liberty, and property protected by the due process clauses of the fifth and fourteenth amendments find protection under terms of the Constitution but are not themselves of constitutional origin, it is clear that the Court was dealing with a difficult question indeed. The Texas courts had determined that the unborn were human beings whose lives were deserving of legislative protection. The Supreme Court disagreed, holding that no state may override the rights of a pregnant woman by simply adopting "one theory of life."[40] But the ultimate resolution of the question

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> protect that human life in existence by actual birth. . . . This is an implicit recognition of human life not in existence by actual birth. The State attempts to protect that human life not in existence by actual birth through its abortion statutes and defines this as the life of the fetus or embryo.

493 S.W.2d at 919.

37. The court in *Thompson* stated:

> The State of Texas is committed to preserving the lives of its citizens so that no citizen "shall be deprived of life . . . except by due course of the law of the land." Texas Constitution, Article I, Section 9, Vernon's Ann. Stat. Article 1191 [the abortion law], is designed to protect fetal life . . . and this justifies prohibiting termination of the life of the fetus or embryo except for the purpose of saving the life of the mother.

Id.

38. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875); *accord*, Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Broad River Power Co. v. South Carolina, 281 U.S. 537, 540 (1930); Enterprise Irrigation Dist. v. Farmers Mutual Canal Co., 243 U.S. 157 (1917); Berea College v. Kentucky, 211 U.S. 45 (1908). An examination of the Texas cases construing that state's abortion law demonstrates that the opinion of the Texas Court of Criminal Appeals was entirely consistent with past interpretations of the statute. *See, e.g.*, Gray v. State, 77 Tex. Crim. 221, 223-24, 178 S.W. 337, 338-39 (1915); Fondren v. State, 74 Tex. Crim. 552, 556, 169 S.W. 411, 413 (1914); Shaw v. State, 73 Tex. Crim. 337, 338, 165 S.W. 930, 931 (1914); Moore v. State, 37 Tex. Crim. 552, 560, 571, 40 S.W. 287, 289, 295 (1897).

39. *Roe*, 410 U.S. at 119 n.3.

40. *Roe*, 410 U.S. at 162.

The Court offered neither citations nor reasoned explanation for this holding. The mere recognition of a continuing controversy over the extent to which the unborn are to be protected explains nothing. Rather, it points to the impropriety of *any* judicial attempt to resolve the controversy. Apparently the Court recognized this when it noted its own lack of expertise in the matter. *See Roe*, 410 U.S. at 159. Nevertheless, it substituted its own "theory of life" for that of the states. See note 17 *supra*. Texas had determined that unborn human life was deserving of constitutional protection; the Court felt that it was not. If a constitutional ruling establishing the latter view as the law of the land is not the adoption of one theory of life, it is indeed difficult to determine what is.

was not nearly as simple as the Court's language made it sound. Although the effect of the Court's holding was to forbid state protection of a class of individuals found to be human beings,[41] the Court's opinion contains no finding that such a state determination would be either factually erroneous or so unreasonable as to be precluded by a broad interpretation of the Federal Constitution.[42]

Since the Court was apparently unwilling to disclose the constitutional basis of this particular facet of its ultimate resolution of the merits of *Roe v. Wade*, the holding, of necessity, must rest upon a determination that the judicial power of the United States includes the right to restrict the protection of fundamental liberties to those classes the Court deems worthy. This was the only theory upon which the Court's implication of a right to abortion could rest.[43]

While the Court undoubtedly has the power to engage in such interpretation, the exercise of that power gives an entirely new significance to the maxim that the "constitution is what the judges say it is".[44] Not only does the Court control the technical interpretation of the Constitution, but by defining "person" narrowly to fit its perceptions of acceptable public policy, it controls the applicability of the due process clause to specific classes. This situation demonstrates the need for a thorough examination of the constitutional policy considerations involved in allowing the Court to be the sole arbiter of the existence of fundamental rights simply by basing the application of the due process clause upon its own perception of the relative worth of the parties whose

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41. The Texas court found the unborn to be human in the *biological* sense. See note 36 *supra*.

42. *Compare* Danforth v. Rogers, 486 S.W.2d 258 (Mo. 1972), wherein the Supreme Court of Missouri attempted to speculate as to the outcome of *Roe*:

> The issues in this case are sharply and significantly narrowed by the following facts stipulated by the parties:
>
> > Infant Doe . . . and all other unborn children have all the qualities and attributes of adult human persons differing only in age or maturity. *Medically, human life is a continuum from conception to death* (emphasis by the court).
>
> The United States Supreme Court has expressed itself on the taking of "human life" in the case of *Furman v. Georgia* [408 U.S. 238 (1972)]. As we read the opinion in *Furman*, the Court generally expressed its disapproval of the practice of putting to death persons who, some would argue, had forfeited their right to live. *We believe we must anticipate at least equal solicitude for the lives of innocents* (emphasis supplied).

Id. at 259.

43. *Id.* at 156-57.

44. *See Doe*, 410 U.S. at 221-22 (1973) (White, J., dissenting); *cf.* Dredd Scott v. Sanford, 60 U.S. (19 How.) 393, (1857):

> [W]hen a strict interpretation of the Constitution according to the fixed rules which govern the interpretation of laws is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution: we are under the government of individual men, who for the time being have the power to declare what the Constitution is, according to

rights are asserted.[45] This question and others closely related to it are more fully discussed in Part V of this Comment.

D. *Abortion: Some Common Assumptions*

1. *Abortion as a Matter of Personal Privacy*

Perhaps the most commonly cited argument for the relaxation of restrictive state abortion laws is the assertion that the matter should be a private one to be decided by a woman in consultation with her physician. This argument was accepted by the Supreme Court in *Roe* and raised to constitutional proportions by its holding that the newly created right to abortion was included in a broad right to privacy based upon the fourteenth amendment's concept of liberty.[46]

Notwithstanding the Court's finding as to the legal status of abortion, it is difficult to characterize abortion as a purely private matter unless one totally ignores not only the nature of abortion itself, but also the many outside interests which are affected by such a decision. It is necessary, then, to examine the logical basis for the finding and its relevance to the growing debate over proposals to overturn or limit the Court's decision by constitutional amendment.[47] Assuming that a "private matter" may be defined as an individual interest in which government and uninvolved third parties can claim no valid or permissible interest, it follows that before the abortion decision may be characterized as a private matter between a woman and her physician the nonmaternal interests involved in such a decision must be identified and weighed.

> their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican government, with limited and defined powers, we have a government which is merely an exponent of the will of Congress; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court.

Id. at 790 (Curtis, J., dissenting).

45. Although the Court did not rely upon an express balancing of the interests of the unborn as against those of pregnant women in coming to its conclusion that the unborn are not "persons," the language of the majority opinion in *Roe* betrays all too clearly that just such a weighing of interests took place: "This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and example of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day." 410 U.S. at 165.

The difficulty with such justification, however, is that it does not answer the question presented by the Texas statute, and the cases construing it. The validity of a recognition of fundamental rights for a group of individuals does not turn upon the relative weight of their interests in the eyes of the Court. Neither the common law, the lessons of history, nor the profound problems of the present day are sufficient to justify the denial of fundamental rights.

46. *Roe*, 410 U.S. at 153.

47. *See* Part IV *infra*.

The primary nonmaternal interests involved in the access question are those of the unborn. Since the unborn are physically incapable of asserting and protecting their own interests, those interests must be protected and asserted by government or by concerned third parties. Approaching the problem from the perspective of those who perceive abortion as the taking of human life, rejection of the privacy argument follows logically from the commonly held belief that the taking of human life is a proper matter of societal concern. This was the position taken by the Texas Court of Criminal Appeals in response to the privacy argument in *Thompson v. State*[48] and argued before the Supreme Court by counsel for the State of Texas in *Roe v. Wade*. Given the interest being asserted by the opponents of legal abortion—the right of the unborn child to life—a pro-abortion argument based upon the right to privacy is no argument at all. Rather, it is a conclusion, based upon a decision that maternal interests take precedence over those of the unborn.

Even if it be assumed that the foregoing bases for the decision in *Roe* are valid, the privacy rationale as applied to strike down state regulations governing the time, place and manner of the abortion procedure still suffers from a serious practical defect. Legal abortion, as a medical procedure, is not a private matter. Although the personal decision to undergo the procedure, as well as the medical record of its performance, may be confidential, the actual procedure, performed by a state-certified medical practitioner in a regulated health facility, can hardly be considered a private occurrence. It is almost ludicrous to compare the sterile anonymity of the operating theatre or clinical facility to the privacy of the marital bedroom upheld in *Griswold v. Connecticut*,[49] especially when the procedures involved in the clinical setting involve not only a high degree of technical expertise and danger to physical health,[50] but also the economic incentives and considerations attendant upon the operation of any public service facility.

Since the abortion procedure itself is far from private, the Supreme Court's decision to characterize the procedure as a matter of private right is, of necessity, based upon its resolution of the competing interests involved in favor of the woman and its holding that the unborn are not "persons" within the meaning of the fourteenth amendment. Thus, it is apparent that the privacy rationale must stand or fall on the validity of the conclusions which support it. The strongest argument against the legalization of abortion is that both prenatal and postnatal

48. 493 S.W.2d 913 (Tex. Crim. App. 1971), *vacated and remanded*, 410 U.S. 950 (1973) (inconsistent with *Roe*).

49. 381 U.S. 479 (1965).

50. See Part II *infra*.

human life are equally deserving of constitutional protection. The Court rejected this proposition in *Roe*. In fact, the answer to the question of when constitutional protection for human life begins was left open by the Court. As a result, several proposals for constitutional amendments have been introduced to fill the gap.[51] Such proposals attack the very foundation of the Court's opinion and render the privacy rationale unsound as an argument in support of the decision; an attack upon the decision is an attack upon the argument itself.

2. *"Early" Abortion as a "Relatively Safe" Medical Procedure*

Although a detailed discussion of this particular topic is more properly reserved for an examination of the Court's invalidation of state regulation of the medical aspects of the abortion procedure, it is not without significance to the Court's resolution of the access question. The proposition, directly stated, is that the relative safety of the abortion procedure is relevant only to the extent that it compels the conclusion that the procedure should be legal.

Since the abortion question involves a clash between the interests of the unborn in continued growth and development and the mother's interest in a life unfettered by fetal and infant demands, the relative safety of the abortion process for the woman is irrelevant to the question of whose interests will prevail; the abortion process is obviously not designed to accommodate the interests of the unborn.

Once having identified the interests involved in the access question and having recognized the irrelevance of the safety argument one is led to investigate the reasons behind the Court's acceptance of the argument as a basis for decision. The answer to this inquiry becomes apparent with the realization that the force of the "relative safety" argument depends upon acceptance of two novel and substantially broader propositions: (1) that abortion laws were originally designed to protect the woman from unsafe medical procedures and were unconcerned with the preservation of prenatal human life; and (2) that prenatal human life is not worthy of constitutional protection when compared with the interests of a pregnant woman. The court accepted both of these propositions.

E. The Fourteenth Amendment and the Unborn

To sustain the structure of the abortion cases it was essential for the Court to hold that the unborn are not persons entitled to the protection of the fourteenth amendment.[52] From a perspective in which

51. See Part V *infra*.
52. 410 U.S. at 156-58.

abortion constitutes the taking of a human person's life, the privacy argument would have had to yield,[53] for one person's interest in privacy does not outweigh another's interest in remaining alive. In reaching its conclusions regarding the status of the unborn, the Court relied on an interpretation of the history of abortion practices in the 19th century and a cursory examination of the uses of the word "person" in the text of the Constitution.

Before turning to an examination of the Court's observations concerning history and constitutional interpretation, however, it should prove helpful to review what is perhaps the most crucial of the arguments accepted by the Court: that "the fetus, at most, represents only the potentiality of life."[54] By resting its decision to legalize abortion on a right to privacy founded upon the fourteenth amendment's concept of personal liberty, the Court ostensibly sought to avoid the "difficult question of when life begins."[55] Stating that a woman's right to privacy is "broad enough to encompass her decision whether or not to terminate her pregnancy,"[56] the Court made the statement constitutionally meaningful by further holding that the unborn have no constitutionally protected right to life which would outweigh the interests of women.[57] However, given the nature of the problems raised by the abortion cases, it is not clear that the Court could avoid that "difficult question."

In order to reach the conclusion that a woman's right to terminate her pregnancy is superior to the right of her unborn offspring to live it was necessary for the Court to have made at least one of the following assumptions: (1) human life does not begin until birth; (2) even if human life does begin at some point before birth (for example, "viability"), the unborn are not persons within the meaning of the Constitution and, therefore, not privy to the constitutional right to life; or (3) unborn life, regardless of its essential nature as either human or nonhuman, is not an interest worth protecting when balanced against other interests. Although the Court expressly adopted only the second of the foregoing characterizations in holding that abortion is a purely private matter, a close reading of the majority and concurring opinions in *Roe v. Wade* reveals that all three of the assumptions underlie not only the Court's conclusions concerning a woman's right to privacy, but

53. It is interesting to note that a majority of the Court accepted this proposition without dissent. Presumably the Court felt that the express terms of the fourteenth amendment precluded an interpretation in which the unborn were held to be "persons" whose rights could be balanced away through state action.

54. 410 U.S. at 162.

55. *Id.* at 159.

56. *Id.* at 153.

57. *See id.* at 162-63.

also its determination concerning the constitutional valuation of unborn life.

1. *Life Before Birth: Potential or Actual?*

It has been said that abortion, while illegal, was nevertheless a "victimless" crime, comparable to gambling, prostitution, and illegal consensual sexual activity.[58] Such a comparison however ignores the fact that there is indeed a victim in every abortion—the unborn.

Without getting into the semantic difficulties inherent in the nomenclature of the unborn, one may safely assume that there is at least *something* which is destroyed in the abortion process. To some,[59] the unborn are human beings, fully endowed with the characteristics of any other individual and, therefore, entitled to the full complement of fundamental human rights, including the right to life.[60] Others[61] regard the unborn as a "protoplasmic mass" which is not comparable to a living individual. These disparate views are largely based upon value judgment, definition—and ontology. Thus, blind adherence to either of the foregoing characterizations does nothing to advance the factual inquiry; the search for an answer must look to a dispassionate forum.

The vehicle employed by the Court to define the beginnings of human life for constitutional purposes was the concept of "potential life." Thus, in assessing the state's interest in the protection of unborn human life, the Court rejected the contention that human life begins at conception and, instead, adopted the view that "the fetus, at most, represents only the potentiality of life."[62] By electing to give recogni-

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58. E. M. SCHUR, CRIMES WITHOUT VICTIMS 11 (1965).

59. *See, e.g.*, THE MORALITY OF ABORTION (J. NOONAN ed. 1970).

60. U.S. CONST. amend. V and amend. XIV, § 1.

61. *See* Guttmacher, *Symposium—Law, Morality, and Abortion*, 22 RUTGERS L. REV. 415, 416 (1968): "My feeling is that the fetus, particularly during its early intrauterine life is merely a group of specialized cells that do not differ materially from other cells." *But see* A. GUTTMACHER, HAVING A BABY 15 (1950) (same author): "When the sperm has penetrated the egg, the male nucleus . . . fuses with the female nucleus . . . . The new baby is created at this exact moment . . . . [At implantation] not only has new life been conceived, but it is already well on its way." *See also* A. GUTTMACHER, INTO THE UNIVERSE 84 (1937) (same author) (noting that "the world's youngest human" was an 11-day-old fertilized ovum). *See generally*, Blank, *The Delaney Clause: Technical Naiveté and Scientific Advocacy in the Formulation of Public Health Policies*, 62 CALIF. L. REV. 1084, 1119 (1974).

62. *Roe*, 410 U.S. at 162. It is interesting to note, in this regard, that the Court itself quoted a telling statement of the American Medical Association's Committee on Criminal Abortion regarding the characterization to be attached to prenatal existence: "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." *Id.* at 142, *quoting* 22 TRANS. A.M.A., 258 (1871).

tion to the "less rigid" claim that "potential" life exists before birth[63] the Court served notice that, for constitutional purposes, life—as opposed to a mere potential or inchoate state of being—begins at birth.

The Court's use of the concept of "potential" life to describe the nature of the prenatal organism creates an interesting legal fiction which has no basis in fact. Scientifically speaking, an organism is either alive or it is dead; before it exists—when there is only the potential to create an organism—there is no organism. No meaningful scientific justification can be found[64] for describing the prenatal human organism as a potentiality. Therefore, it seems strange that the Court professed an inability to find agreement in the community at large as to the point at which life "begins;" the answer it so earnestly sought to avoid is a matter of common knowledge in scientific circles.[65] According to *California Medicine*,[66] the official journal of the California Medical Association (hereinafter referred to as the C.M.A.): "the very considerable semantic gymnastics which are required to rationalize abortion as anything but the taking of human life would be ludicrious if not often put forth under socially impeccable auspices."[67]

Given the wealth of scientific evidence which will attest to the veracity of the foregoing statement, it is difficult to justify legalizing the taking of what is admittedly human life. In order to accomplish the desired result, one must divorce the idea of abortion from the concept of killing a human being. Notwithstanding its belief that such an idea is nothing more than a "schizophrenic subterfuge," the C.M.A. editors took the position that such deception is necessary in order to make abortion more palatable to those who might otherwise find themselves in an ethical quandry over allowing abortion to become nothing more than a commonly accepted medical procedure.[68] A careful examination of the language of the Court in *Roe* leads to the conclusion that a similar approach underlies the Court's use of the term "potential life" to describe the organism destroyed in an abortion, for it implicitly denies that the destruction of this type of life is to be equated with the destruction of *actual* human life. In short the Court decided that "human" life does not begin until live birth.

Once having disposed of the "rigid" contention that human life is destroyed in the course of an abortion, the Court had yet another

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63. *Id.* at 150.
64. *See* sources cited notes 24-25 *supra.*
65. *Id.*
66. CALIFORNIA MEDICINE, *supra* note 24, at 68.
67. *Id.* at 69.
68. *Id.* (during the period when the "new" ethic is replacing the old).

hurdle to cross before deciding that legal restraints on a woman's decision to abortion were unconstitutional: that of history.

2. *The Relevance of History: An Introduction*

After briefly sketching a common law history of criminal sanctions against abortion, the Court concluded that abortion practices in the early common law period and "throughout the major portion of the 19th Century [were] viewed with less disfavor than under most American abortion statutes [passed within the last 100 years]."[69] It also accepted the contention that at common law "a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most states today,"[70] and relied upon persistent references to the significance of quickening as sources of tradition and authority for its own resolution of the controversy. If practices were traditionally freer during those periods considered by the Court, no overriding popular or governmental concern for the unborn probably existed when the fourteenth amendment was written; if the law treated abortions harshly only when performed subsequent to quickening, then it could be argued that the Court had historical basis for choosing some interim point at which to protect the unborn.[71] If, on the other hand, abortion was perceived as an offense against the unborn rather than women, the Court's rationale collapses.[72] Thus, before examining the conclusions the Court drew from its historical excursus, it will prove informative to review the historical terrain.

3. *The Common Law*

Perhaps the most influential statement of the common law attitude toward abortion was that of Lord Coke. In his seminal series, *Institutes*, he wrote that abortion of a woman "quick with childe" was "a great misprision, and no murder."[73] Coke's position on the status of abortion during the early common law period, although widely accepted by most courts and legislatures as marking the minimum degree of legal culpability for the commission of the crime of abortion, was severely criticized by New York University law professor Cyril H. Means in an article which appeared in the 1971 Women's Rights Symposium of the New York Law Forum.[74] Relying in the main upon Pro-

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69. *Roe*, 410 U.S. at 140.
70. *Id.*
71. *See* note 25 *supra*.
72. *Roe*, 410 U.S. at 157-58 (by implication).
73. E. COKE, THIRD INSTITUTE 50 (1648). Early American cases equated a misprision with a misdemeanor. *See, e.g.*, Smith v. State, 33 Me. 48, 55 (1851).
74. Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-*

fessor Means' analysis of the common law, which was written with the express intention of influencing the outcome of *Roe* and *Doe*,[75] the Court alluded to doubts as to whether "abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus."[76] The Court attached great weight to the professor's criticism of Coke's jurisprudence as well as the apparently "uncritical" acceptance of Coke's statement of the common law by 19th century American courts and legislatures.[77] Professor Means' own interpretation of the common law was based upon two 14th century case reports[78] which he denominated *The Twinslayer's Case* and *The Abortionist's Case.*

The Twinslayer's Case, reads as follows:

> Writ issued to the Sheriff of Glousestershire 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.[79]

Contrary to the conclusion of Professor Means, *The Twinslayer's Case* is not precedent for a "common law freedom" of abortion. By

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Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth Century Common-Law Liberty? 17 N.Y.U.L. FORUM 335 (1971) [hereinafter cited as Means].

75. Means, *supra* note 74, at 336.

76. *Roe*, 410 U.S. at 136.

77. The Court even seemed to accept Means' contention that Coke may have intentionally misstated the law to suit his own purposes, *See Roe*, 410 U.S. at 135 n.26; Means, *supra* note 74, at 346. This contention is pure speculation on the part of Means. *See id*, at 343-46.

78. Anonymous, Y.B. Mich. 1 Edw. 3, f. 23, pl. 18 (1327), in Means, *supra* note 74 at 337 nn. 3 & 4 (denominated by Means as The Twinslayer's Case); Anonymous, Y.B. Mich., (1348), *reported in* Fitzherbert, Graunde Abridgement, tit. *Corone*, f. 268, pl. 263 (1st ed. 1516), f. 255, pl. 263 (3d ed. 1565), *quoted in* Means, *supra*, at 338-39 nn.5 & 6 (denominated The Abortionist's Case).

79. Anonymous, Y.B. Mich. 1 Edw. 3, f. 23, pl. 18 (1327) in Means, *supra* note 74 at 337-38 & nn.3 & 4 (C. Means trans.).

focusing the reader's attention on the statement that the judges were unwilling to adjudge the existence of a felony, and by simultaneously relegating the closing lines of the case to a long textual footnote professing ignorance of their import,[80] the Means analysis of this early common law report gives an erroneous impression of early common law attitudes toward the killing of the unborn. If one examines the closing lines of the first paragraph and those of the second, a conclusion contrary to that of Professor Means—that abortion was indeed a common law crime as early as 1327—seems well supported.

From a critical examination of the case report several things appear. First, the writ issued to bring D. into court appears to have been one of homicide, a fact which may be inferred from D.'s release to mainpernors[81] prior to the adjournment of the argument "sine die." Since the writ of mainprise was the early common law equivalent of bail in homicide cases,[82] it is clear that D. was neither acquitted nor released in the reported proceedings, but was held to answer the charge at a later date. Second, it is clear that D. was not acquitted in the course of the reported proceedings; only the argument was adjourned. No mention is made of the writ's being dismissed. Third, it appears that after D. had been released Herle, the Chief Justice of the Common Bench,[83] demanded his presence to answer the charge.

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80. Means, *supra* note 74, at 338 n.4.

81. The mainpernor was a surety for the appearance of a person under arrest. Upon receipt of a writ of mainprise the sheriff would release the accused into the hands of the mainpernors to await the arrival of the itinerant judges who would hear the charges. BLACK'S LAW DICTIONARY 1105 (rev. 4th ed. 1968).

82. In the days of the early common law, bail was unavailable from the sheriff in cases involving a charge of homicide. E. DE HAAS, ANTIQUITIES OF BAIL: ORIGIN AND HISTORICAL DEVELOPMENT IN CRIMINAL CASES TO THE YEAR 1275, at 68 nn. 69 & 79 (1940) [hereinafter cited as DE HAAS]. To remedy this situation, the courts of chancery devised the writ *de ponendo*. *Id.* at 68-69 & n.79, 118, 127 n.142. Under the writ, the accused was delivered to mainpernors, or sureties, who would guarantee his appearance before the court to answer any charges pressed. *See* 3 BLACKSTONE, COMMENTARIES *128 (1765). Later, the writ came to be known as *de manucaptione*. DE HAAS at 68-69. In time, a special form of *de ponendo* became available where the investigation of the homicide in question revealed that the defenses of self-defense, death from misfortune, or non-felonious killing might be available. *See id.* at 122 n.125.

83. The naming of Sir Geoffrey Scrope, Chief Justice of the King's Bench, and Sir Robert Herle, Chief Justice of the Common Bench, in the same case report gives some clue as to the procedures followed in The Twinslayer's Case.

During the Michelmas term of 1327, the court of Edward III was located at York for protection from the invading Scots. The court of King's Bench followed the royal court in its travels about the country and also sat at York during this period. *See* 1 HOLDSWORTH'S HISTORY OF ENGLISH LAW 204 (3d ed. 1922) [hereinafter cited as HOLDSWORTH]. Facing a similar danger from the Scots, the Court of Common Pleas was ordered to York from its usual seat at Westminster, and there it heard cases during the Michelmas term of 1327. *See* 74 Selden Society, 4 Select Cases Under Edward II, at xlii & n.2. *See also* HOLDSWORTH at 197.

During the early days of the common law it was standard practice for the justices of

But D. was unavailable to answer in the proceedings at York since he had been arrested in Bristol on another charge. Thus, Professor Means' uncritical reliance upon the statement that the judges were unwilling to adjudge the existence of a felony is misplaced; D. had been recalled to answer the charges. Since another of the original uses of the writ of mainprise upon which D. had been released was to procure release prior to trial when there was some doubt as to whether or not the killing was felonious,[84] D.'s recall to answer the charges lends support to the proposition that the judges had indeed characterized D.'s actions as a crime.

The report of *The Twinslayer's Case* itself furnishes no clue as to the factors motivating the judges' reticence to characterize D.'s actions as a felony, but it is reasonable to assume that they were similar to those influencing the decision in *The Abortionist's Case*, decided 20 years later. That case is reported 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]

An examination of these two cases demonstrates that the reticence of some early common law writers to classify abortion as a felony[86] is traceable to two factors having little relevance to 20th century constitutional adjudication: (1) a lack of knowledge as to the nature of prenatal development; and (2) problems of proof, including an inability to ascertain with any degree of certainty whether or not the abortion was the cause of the child's death. The importance of these related factors was recognized by William Stanford in *The Pleas of the Crown*,[87] wherein he stressed that:

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the realm to consult with one another when faced with a case of extraordinary difficulty. *See* HOLDSWORTH at 196 n.10, 210, 233-34. The justices would also assist one another by giving advice even during the course of a case. *Id.* at 196 n.10. Thus, given the fact that the justices were unable to conclude at argument in The Twinslayer's Case that D. should be found guilty of a felony (for which the usual punishment was death), it is quite likely that after adjourning the argument the justices met to determine D's fate. *See id.* at 210. Since D. was recalled to answer the charge, it is reasonable to assume that the justices, in consultation, had indeed decided that the crime with which he was charged was a felony.

84. See note 81 *supra.*

85. Anonymous, Y.B. Mich. (1348), *reported in* Fitzherbert, Graunde Abridgement, tit. *Corone* f. 268, pl. 263 (1st ed. 1516), f. 255, pl. 263 (3d ed. 1565), *quoted in* Means, *supra* note 74, at 338-39 & n.5 (C. Means trans.) (infant was stillborn).

86. *See e.g.*, M. HALE, HISTORY OF THE PLEAS OF THE CROWN 433 (1736). *Contra, e.g.*, W. BLACKSTONE, 4 COMMENTARIES *198 (1769).

87. W. STANFORD, LES PLEES DEL CORON, Book I ch. 13 (1557) (*Queux choses sont requisites à faire homicide*), *quoted in* C. Means, *supra* note 74, at 339-40 & n.8.

> [i]t is required that the thing killed be *in rerum natura.* And for this reason if a man killed a child in the womb of its mother: this is no felony, neither shall he forfeit anything, and this is so for two reasons: First because the thing killed has no baptismal [sic] name; Second, because it is difficult to judge whether he killed it or not, that is, whether the child died of this battery of its mother or through another cause. Thus it appears in the [*Abortionist's Case* (1348)]. And see [*The Twinslayer's Case* (1327)] a stronger case. . . .

The full text of Professor Means' translation of Stanford's treatise, which Means himself considered the "definitive analysis of [the] two cases,"[88] goes on to discuss Stanford's opinion that the lack of a baptismal name noted in *The Abortionist's Case* "is of no force."[89] It appears that Stanford was more concerned with the difficulty-of-proof problem inherent in the abortion cases which occasionally came before the courts of England than he was with propounding a theory that abortion was not a secular crime at common law. By comparing abortion cases with those in which the charge was infanticide Stanford illustrated the basis of his disagreement with Bracton's position that abortion is homicide. In the case of infanticide, the child, according to Stanford, was clearly *in rerum nature* (in existence) at the time it was killed, a fact which at that time could not be substantiated in the case of an abortion.

Although Professor Means states flatly that "the true reason for the decision in *The Twinslayer's Case* is not the difficulty-of-proof argument of the justices in *The Abortionist's Case* . . . , but the simple negation of secular criminality . . . in *The Twinslayer's Case* itself,"[90] his conclusion that Coke's statement of the common law did not affect its course is clearly erroneous. First, it ignores the *subsequent* development of the common law relating to abortion; and second, it relies upon *The Twinslayer's Case* as if it were precedent. As noted above, however, *The Twinslayer's Case* is not precedent.[91] Furthermore, it is interesting to note that Coke, who presumably had read and understood the significance of the closing lines of *The Twinslayer's Case,* did not consider it to be precedent: "And the Book in 1 E. 3 [*The Twinslayer's Case*] was never holden for law."[92]

The basic importance of the two aforementioned factors to the position of the early common law is underscored by their gradual de-

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88. Means, *supra* note 74, at 339.
89. *Id.* at 340.
90. *Id.* at 351.
91. See text accompanying notes 79-83 *supra.*
92. E. COKE, THIRD INSTITUTE, *50-*51 (1648), *quoted in* Means, *supra* note 74, at 345.

mise in the face of the growing willingness of both statutory[93] and common law[94] to punish abortion as a crime. By the time Coke expressed his opinion concerning the criminality of aborting a quick fetus, three centuries had passed since the judges considered *The Abortionist's Case*. Coke's statement reflects nothing more than a greater understanding of prenatal development: Coke *was* willing to consider the unborn sufficiently alive after quickening to proscribe their destruction.[95] His position was neither untenable in its own right, nor in conflict with the position of the early common law. Coke, like many common law judges throughout history, sought to bring the written common law into step with the times.[96]

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93. *See, e.g.*, Conn. Stat. tit. 22 §§ 14, 16 (1821), *amended by* Conn. Pub. Acts, ch. 71 § 1 (1860) (deleting the "quickening" distinction); Maine Rev. Stat., ch. 160 §§ 13, 14 (1840) (containing no quickening distinction); Lord Ellenborough's Act, 43 Geo. 3, c. 58 (1803), *amended by*, Offences Against the Person Act, 7 Will. 4 & 1 Vict., c. 85 (1837) (deleting the quickening distinction).

94. *See, e.g.*, Commonwealth v. Parker, 50 Mass. (9 Met.) 263, 265-66 (1845); State v. Murphy, 27 N.J.L. 112, 114 (1858).

95. The importance of the evidentiary problem is underscored by a later English case, Sims's Case, 75 Eng. Rep. 1075 (K.B. 1601). In full text it reads as follows:

> Trespasse and assault was brought against one Sims by the Husband and the Wife for beating of the woman, Cook, the case is such, as appears by examination. A man beats a woman which is great with child, and after the child is born living, but hath signes, and bruises in his body, received by the said batterie, and after dyed thereof, I say this is murder. *Fenner & Popham* (two of the justices), *absentibus caeteris*, clearly of the same opinion, and the difference is where the child is born dead (as in *The Abortionist's Case*—ed.), and where it is born living, for if it be dead born it is no murder, for *non constat* (it cannot be proved), whether the child were living at the time of the batterie or not, or if the batterie was the cause of the death, but when it is born living, and the wounds appear in his body, and then he dye, the Batteror shall be arraigned of murder, for now it may be proved whether these wounds were the cause of the death or not, and for that if it be found, he shall be condemned.

Professor Means expressed doubt as to whether the case has any value as precedent. *See* Means, *supra* note 74, at 343-44. Nevertheless, the case is sufficiently ambiguous to make any judgment on the matter purely conjectural. The importance of Sims's Case lies in the similarity of its fact pattern to that of *The Twinslayer's Case*. The judges who sat on Sims's Case in 1601 were of the opinion that if the abortion were the cause of the child's death, the abortionist would be guilty of homicide. Apparently, the judges who sat on The Twinslayer's Case in 1327 were of the same opinion, for had the Sheriff been able to procure him, D. would likely have been condemned on a charge of homicide.

96. A notable attempt by a later common law judge, Baron Gurney, to accomplish the same thing appears in Regina v. Wycherly, 173 Eng. Rep. 486, 487 (Nisi Prius 1838). In his instructions to the jury of matrons appointed to determine whether Ms. Wycherly was pregnant, Baron Gurney, relying upon medical testimony to the effect that quickening is meaningless in terms of prenatal development, ruled that the phrase "quick with child" was to be taken as meaning pregnant, rather than as "with quick child". Since a conviction of the defendant Wycherly would have resulted in her execution, the Baron was evidently attempting to give the full protection of the law to her unborn offspring.

It is notable, however, that the quickening distinction, having been so firmly engrained into the common law, sometimes persisted in the courts even after the legislature had eliminated it. *See* Evans v. People, 49 N.Y. 86, 90 (1872) wherein the court held that, due to the difficulty of proof, a charge of manslaughter could not be

Even assuming that Coke's view was completely at variance with the earliest common law precedents, however, one question remains to be answered: why did Coke's view persevere and gain acceptance by virtually every court which considered the matter? Perhaps the reason lies in the fact that the common law was not insulated from advances in medicine and biology which made such theories as "mediate animation" and "ensoulment" obsolete and therefore unsuitable as bases for reasoned judicial opinions.[97] The majority opinion in *Roe* contains no citations to cases which support the proposition that the common law was unconcerned with the preservation of a "quick" fetus. In light of the Court's conclusions about the position of the common law, such an omission is indeed an anomaly, but it is easily explained: the cases do not support the Court's interpretation. The Court's uncritical acceptance of an advocate's interpretation of the common law only served to confuse the issues and to rest an important constitutional holding on an erroneous historical foundation.

4. 19th Century Case Law

The central thesis of *Roe v. Wade* and Professor Means' interpretation of history upon which it relied for support are identical: the existence of legal restrictions upon the availability of the abortion procedure was traceable solely to the law's concern with the preservation of unborn human life. Perhaps one of the most widely cited cases in support of this position is *State v. Murphy*,[98] a case decided in 1858 by the New Jersey Supreme Court. In discussing the state abortion law, passed in response to an earlier holding which had denied common law protection to a woman who had undergone an abortion,[99] the New Jersey court made the following statement: "The design of the statute was not so much to prevent the procuring of abortions, so much as to guard the health and life of the mother against such attempts."[100] Although this statement, taken out of context, lends strong support to

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upheld prior to quickening. *But see id.* at 93-95 (Grover, J., dissenting on the grounds that all that was necessary to support a charge of second degree manslaughter was the death of the child).

97. The modern concept of "viability," as employed by the Court, is but a variant on the concept of "ensoulment." "Ensoulment" marked the time when the unborn acquired the distinctive quality of having a soul, thus making its destruction more serious. Viability, as used by the Court, focuses on the ability of the unborn to lead a "meaningful" life, a quality which the Court felt gave the state a compelling interest in seeing them protected under certain circumstances. *Roe*, 410 U.S. at 163.

98. 27 N.J.L. 112 (1858).

99. State v. Cooper, 22 N.J.L. 52 (1849). *See also* State v. Meyer, 64 N.J.L. 382, 385 (1900) (explaining the genesis of the New Jersey statute).

100. 27 N.J.L. at 114.

the central thesis of *Roe v. Wade*,[101] the holding in *Murphy* is not nearly so narrow.

Without examining the case in full, it is possible to conclude that the law of New Jersey, both statutory and common, was unconcerned with the preservation of unborn life. But the court's words, however, clearly show that the opposite was true,[102] even to the extent of prohibiting an abortion by the woman herself:

> At the common law, the procuring of an abortion, by the mother herself, or by another with her consent, was not indictable, unless the woman was quick with child. The act was purged of its criminality, so far as it affected the mother, by her consent. It was an offence only against the life of the child . . . [T]he *statute* [does not] make it criminal for the woman to swallow the potion or consent to the operation or other means to procure an abortion . . . . Her guilt or innocence remains as at common law. Her offence at the common law is against the life of the child.[103]

Thus, even conceding the validity of the ancient maxim *cessante ratione legis cessat et ipsa lex* [the reason for the law ceasing, the law itself ceases] which lies at the root of the Court's argument that abortion in the early stages of pregnancy is safer than normal childbirth,[104] the truth of the maxim does not compel complete abrogation of state restrictions on the abortion process. Abortion procedures are not made safer for the unborn child. In short, use of the *Murphy* case to support the Court's conclusion is pure sophistry; it ignores the primary concern of New Jersey's common law, the life of the child. The degree to which the Court's thesis is unsupported by the cases may be ascertained by a simple examination of several additional

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101. It is interesting to note the language in which both Mr. Justice Blackmun and Professor Means characterized *Murphy* as support for their contentions. Means stated:

> The only contemporaneous judicial explanation of the pre-Lister abortion statutes—a decision of 1858 construing New Jersey's first such statute in 1849—contains the following:
>
> > The design of the statute was not so much to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts.

Means, *supra* note 74, at 389-90 (citing to *Murphy* 27 N.J.L. at 114).

Justice Blackmun stated:

> The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus upon the State's interest in protecting the woman's health rather than in preserving the embryo and fetus.

Roe, 410 U.S. at 151 (citing *Murphy* at 114).

102. State v. Cooper, 22 N.J.L. 52 (1849).

103. State v. Murphy, 27 N.J.L. 112, 114 (1858). The court went on to conclude that the statute had been passed to cure a defect in the common law: that the common law was concerned *only* with the life of the unborn and that if the woman were to be protected, it had to be done by statute.

104. *See Roe*, 410 U.S. at 149; Means, *supra* note 74, at 382-96.

cases,[105] all of which are cited in support of the central proposition that the law was unconcerned with the lives of the unborn.

Perhaps the most instructive of these cases is one decided by the Supreme Court of Maine in 1851, *Smith v. State*.[106] Both *Smith* and a New Jersey case, *In re Vince*,[107] were cited by Mr. Justice Blackmun, writing for the Court, in support of the unqualified contention "that the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another."[108] Professor Means cited *Smith* along with a Massachusetts case, *Commonwealth v. Parker*,[109] in support of the contention that the Maine court's characterization of an abortion as being "without lawful purpose" evinced an opinion that the killing of the unborn did not contravene the strictures of the common law, but merely those of the canon law.[110] The cases cited, especially *Smith*, support neither the central proposition itself, nor either of the subsidiary propositions raised in its support:

> . . . [T]he acts may be those of the mother herself and they are criminal only as they are intended to affeet injuriously, and do so affect the unborn child. If, before the mother had become sensible of its motion in the womb, it was not a crime; if afterwards, when it was cousidered by the common law, that the child has a separate and independent existence, it was held highly criminal. Similar acts with similar intentions by another than the mother, were precisely alike, criminal or otherwise, according as they were done before or after quickening, there being in neither the least intention of taking the mother's life . . . . Consequently . . . the defendant is charged with what at common law was an offense by causing the abortion of

105. *E.g.*, Smith v. State, 33 Me. 46 (1851); Commonwealth v. Parker, 50 Mass. (9 Met.) 263 (1845); *In re* Vince, 2 N.J. 443, 67 A.2d 141 (1949).

106. 33 Me. 46 (1851).

107. 2 N.J. 443, 67 A.2d 141 (1949).

108. *Roe*, 410 U.S. at 151. While the Court's contention is not without some support in the other sources cited in the opinion, the unqualified citation of a case standing for a contrary proposition is indeed questionable. For further discussion on this topic see note 27 *supra*.

109. 50 Mass. (9 Met.) 263 (1845).

110. Means, *supra* note 74, at 362-73. The fact that abortion was at one time within the jurisdiction of the ecclesiastical courts does not make it a solely religious crime. The ecclesiastical courts had a broad jurisdiction, which was not limited to offenses against canon law. In secular matters, the courts applied Roman Civil Law, and took cognizance of such varied matters as marriage and divorce ("family law"), and the probate of estates. *See generally* I. STEPHEN'S COMMENTARIES ON THE LAW OF ENGLAND 32-35 (E. R. Dew, 20th ed. 1938); R. WALKER & M. WALKER, THE ENGLISH LEGAL SYSTEM 50-53 (3d ed. 1972). It is also important to note that the common law of abortion did not originate in the canon law, although the canon law did condemn it. Rather, as the report in The Twinslayer's Case indicates, abortionists were held to answer at common law on a writ of homicide.

> a child, so far advanced in its uterine life, that it was supposed capable of an existence separate from the mother, not with any crime arising from an injury to the mother herself.[111]

The language of the Maine court in *Smith* is important in several respects. It clearly reveals that under Maine law *prior* to the ratification of the fourteenth amendment:[112] (1) the destruction of the unborn child was, itself, the gravamen of the crime of abortion;[113] (2) the woman herself could very well be punished for destroying her unborn offspring;[114] (3) the "quickening" distinction had been abrogated;[115] and (4) the defendant would not be guilty of abortion were the child to be unlawfully expelled, but live in spite of its premature birth.[116] In light of these observations, it seems strange that the Court was able to observe "that throughout the major portion of the 19th Century prevailing legal abortion practices were far freer than they are today,"[117] especially when those observations were based in part on cases like *Smith* and *Murphy*.[118]

Of similar import is the language of *In re Vince*,[119] also cited by the Court in support of its conclusions.[120] While it is entirely reasonable to contend that if a woman could not be punished for the crime of abortion the law might well be designed for her protection, such a contention finds no support in *Vince*.[121] The case is interesting not

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111. Smith v. State, 33 Me. 48, 54-55, 57 (1851).

112. See text accompanying notes 187-218 *infra*.

113. Smith v. State, 33 Me. 48 (1851):

> The offence described in the statute . . . is not committed unless the act be done with an "intent to destroy such child" as is there referred to, and it be destroyed by the means used for that purpose. It is required by established rules of criminal pleading, that the intention, which prompted the act, that caused the destruction of the child, as well as the act itself and the death of the child thereby produced, should be set out in the indictment, in order to constitute a crime punishable by imprisonment in the state prison, under the statute.

Id. at 58.

114. *Id.* at 58.

115. *Id.*

116. *Id.* at 60.

117. *Roe*, 410 U.S. at 158.

118. *Id.* at 151 nn. 48-50.

119. 2 N.J. 443, 67 A.2d 141 (1949).

120. *Roe*, 410 U.S. at 150 n.50.

121. The Court attempted to bolster the assertion by citing several Texas cases which ostensibly stand for the proposition that the laws were passed only to protect maternal health, 410 U.S. at 151 & n.49. However, the cases do not support this contention, even though the woman was not punished as an accomplice under the Texas abortion statute. The cases evince, rather, a concern for the life of the unborn: Gray v. State, 77 Tex. Crim. 221, 224, 178 S.W. 337, 338 (1915) (construing the statute to abrogate the quickening distinction, and defining the crime of abortion as the destruction of the life of the fetus or embryo); Fondren v. State, 74 Tex. Crim. 552, 556, 169 S.W. 411, 413 (1914) (indictment charging destruction of the life of the fetus); Moore v.

only because the woman involved was forced to testify,[122] but also because the New Jersey court made it clear that a woman could be charged with the crime of common law abortion if the child had "quickened."[123] Contrary to the implication of the Supreme Court in *Roe*, the New Jersey statute involved[124] did not grant the woman immunity from prosecution because of a policy favoring abortion. Rather, the statute called for *compulsory* testimony from a witness who had participated in an abortion, and provided statutory immunity for the person so compelled. The purpose of the statute was to facilitate punishing the crime of abortion.[125] The grant of immunity was necessary to save the statute from invalidity under the fifth amendment's guarantee against self-incrimination.

The importance of such facts is clear in terms of their effect on the validity of the analytical structure upon which the Court based its creation of a new constitutional right to abortion. The common law's growing concern with the preservation of unborn life implicitly refutes the central proposition of the Court's thesis: that access to abortion was a common law freedom.

One need not limit inquiry to the cases to ascertain the weakness of the contention that abortion laws were concerned only with the protection of the woman. Examination of the majority of the statutes held unconstitutional by the Supreme Court in *Roe v. Wade*,[126] or by lower federal courts employing similar rationales,[127] reveals that the legislatures and courts of many states were indeed concerned with the preservation of unborn life. If the only reason for challenging the validity of state abortion laws is an alleged lack of necessity to protect a woman from an unsafe medical procedure, such an attack fails upon a showing that the state law is also concerned with the preservation of unborn life.

If the state law forbidding abortion challenged in *Roe* were designed in any respect to protect unborn life, their alleged constitutional infirmity stems from neither a lack of rational basis nor a conflict with the express provisions of the Federal Constitution; rather, it stems from

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State, 37 Tex. Crim. 552, 560, 40 S.W. 287, 289, 295 (1897) (the gravaman of the crime of abortion is feticide, the evidence in the case was sufficient to support the charge).

122. *In re* Vince, 2 N.J. 443, 451, 67 A.2d 141, 145 (1949).

123. *Id.* at 449-50, 67 A.2d at 144.

124. N.J. REV. STAT. 2A:87-2 (1973).

125. *In re* Vince, 2 N.J. 443, 451, 67 A.2d 141, 145 (1949).

126. *E.g.*, LA. REV. STAT. § 37: 1285 (1964); ME. REV. STAT. ANN. tit. 17, § 51 (1964); OHIO REV. CODE § 2901.16 (1953).

127. *E.g.*, Abele v. Markle, 351 F. Supp. 224 (D. Conn. 1972), *aff'd*, 452 F.2d 1211 (1st Cir. 1972); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970), *appeal dismissed*, 400 U.S. 903 (1972).

the fact that the federal judiciary has decided that such life is not worthy of constitutional protection.[128] A thorough understanding of constitutional law is not required in order to appreciate the distinction.

5. 19th Century Statutory Law

At the outset of this discussion it should be noted that the Supreme Court's conclusions concerning the position of 19th century statutory law were expressed in absolute terms: "[the fact 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."[129] Therefore, according to the Court, laws protecting the unborn are unconstitutional. Since this conclusion is based upon an alleged lack of statutory and common law concern with prenatal life in the period prior to the ratification of the Constitution and the addition of the fourteenth amendment, a demonstration that 19th century common and statutory law were committed to the preservation of unborn life casts substantial doubt on the validity of the Court's view. At the same time, such a showing lends credence to the proposition that neither the words of the fourteenth amendment itself, nor the provisions of any other section of the Constitution, require that the unborn be excluded from the protection of the due process clause and, thereby, denied the right to life.[130]

Perhaps the best evidence of state intent to protect the unborn by statute is found in *Smith v. State*,[131] decided by the Supreme Court of Maine 17 years before the enactment of the fourteenth amendment. Not only did the statute[132] involved in *Smith* abrogate the "quickening" requirement which had, by that time, become obsolete for purposes of defining the nature of the offense charged,[133] but it also required specificity in pleading the offense defined by the statute. If the pleading did not allege the destruction of the child, it would be held fatally defective for not charging the essential element of the crime of abortion.[134] Even more revealing, however, is the 19th century Connecti-

128. *See Roe*, 410 U.S. at 161, 163 ("life, as we recognize it", "meaningful life") (majority opinion); *Doe*, 410 U.S. 179, 209, 217 (1973) ("I am not prepared to hold that a state may equate . . . all phases of maturation preceding birth") (Douglas, J., concurring).

129. *Roe*, 410 U.S. at 158 (1973).

130. By holding that a state may not constitutionally adopt a "theory of life" which would enable it to extend substantive protection to the lives of the unborn, the Court effectively decided that the Constitution requires their exclusion. *Roe*, 410 U.S. at 162.

131. 33 Me. 48 (1851). See notes 106-16 and accompanying text *supra*.

132. Me. Rev. Stat. c. 160, §§ 13-14 (1840).

133. *Id.* § 14.

134. Smith, 33 Me. at 60.

cut abortion law,[135] which demonstrates the concern of 19th century legislation for the preservation of unborn life and identifies the inadequacy of the "analysis" undertaken in *Roe v. Wade.*

The nation's first abortion law was enacted in 1821 by the Connecticut legislature.[136] The history of that statute during the years before *Roe v. Wade* foreclosed any further attempt by the Connecticut legislature to protect the unborn, reveals that as medical knowledge of the unborn progressed, so did the protective ambit of the statute. In *Roe v. Wade* the Court referred the reader to the position of the American Medical Association [hereinafter the A.M.A.] in the period *prior to* the adoption of the fourteenth amendment.[137] Stating that the prevailing view of late 19th century America was anti-abortion,[138] the Court conceded that the position of the medical profession "may have played a significant role in the enactment of stringent criminal abortion legislation during that period."[139] Considering the commonly asserted position that American anti-abortion legislation was intended to protect the pregnant woman alone, one might imagine that the anti-abortion position of the A.M.A. was based upon danger to women. This was not the case, however. The A.M.A. Committee on Criminal Abortion rendered a report to the A.M.A.'s 12th Annual Meeting in 1859, nine years before the enactment and ratification of the fourteenth amendment. The focus of the report was the unborn. The Court reported the A.M.A.'s position as follows:[140]

> It deplored abortion and its frequency and it listed three causes "of this general demoralization":
>
> The first of these causes is a widespread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.
>
> The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life . . . .
>
> The third reason of the frightful extent of this crime is found in 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. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and ex-

135. Conn. Stat. tit. 22, §§ 14, 16 (1821), *amended by* Conn. Pub. Acts, ch. 71 § 1 (1860) (deleting the "quickening" distinction), *held unconstitutional,* Abele v. Markle, 342 F. Supp. 800 (D. Conn. 1972), *reinacted* Conn. Pub. Act No. 1, May 1972 Special Session (declaring specifically a legislative intent to protect the unborn), *held unconstitutional,* Abele v. Markle, 351 F. Supp. 224 (D. Conn. 1972).

136. *Id.*

137. 410 U.S. at 141-42.

138. *Id.* at 141.

139. *Id.*

140. *Id.* at 141-42.

> ploded medical dogmas. With strange inconsistency the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it, and to its life as yet denies all protection.[141]

The Court then noted that the A.M.A. adopted resolutions "calling upon state legislatures to revise their abortion laws" and protested "such unwarrantable destruction of human life."[142] A report of the A.M.A.'s position appeared in an 1860 edition of the Connecticut House Journal,[143] and—though it is not clear what effect this report had on the legislative process—the Connecticut statute was amended that year to delete the quickening distinction.[144] Thus amended, the statute remained in effect, surviving two attempts in the late 1960's to change it, until ruled unconstitutional in *Abele v. Markle.*[145] The *Abele* case most clearly reveals that even if the intent of state abortion laws was undisputed, the fact that they were designed to protect the unborn would make little difference to the Court's decision;[146] the interests of the unborn had already been determined to be "insufficient":[147]

> The Malthusian specter, only a dim shadow in the past, has caused grave concern in recent years as the world's population has increased beyond all previous estimates. Unimpeachable studies [referring to the report of the National Commission on Population Growth and the American Future] have indicated the importance of slowing or halting population growth. . . . In short, population growth must be restricted, not enhanced, and thus the state interest in pronatalist statutes such as these is limited.[148]

The "pronatalist" sentiment about which the *Abele* court spoke was summarized by the Connecticut Legislative Council as follows: "The Council feels that should an unborn child become a thing rather than a person in the minds of people in any stage of its development, the dignity of human life is in jeopardy."[149]

After the first decision in *Abele* the Connecticut legislature rein-

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141. 12 TRANS. A.M.A. 73-77 (1859), *quoted in Roe*, 410 U.S. at 141-42.

142. *Roe*, 410 U.S. at 142.

143. Abele v. Markle, 342 F. Supp. 800, 805, 807 (D. Conn. 1972) (Newman, J., coucurring).

144. *See* note 135 *supra.*

145. Abele v. Markle, 342 F. Supp. 800 (D. Conn. 1972) (majority opinion). It is interesting to note that the district court also relied upon Professor Means' interpretation of the common law in striking down a statute which was clearly intended to protect the unborn.

146. *Id.* at 802.

147. *Id.*

148. *Id.*

149. *Id.* at 816 (Clarie, J., dissenting).

acted its abortion statute, this time specifically expressing its intent to protect unborn life.[150] Again, the same three-judge federal court held (2-1) that the statute was unconstitutional,[151] relying upon an argument similar to that which underlies the *Roe* decision.[152]

In *Roe v. Wade* the Supreme Court cited *Abele* with approval, stating that its decision was "in accord" with the results of that case.[153] At first glance, however, the Court's statement appears erroneous. While the Supreme Court concluded that 19th century abortion laws were unconcerned with the lives of the unborn,[154] the panel which decided *Abele* felt that, notwithstanding the focus of Connecticut's 19th century abortion law upon the preservation of prenatal life, the law was unconstitutional "because due to the population crisis . . . the state interest in these statutes is less than when they were passed."[155] The resolution of this inconsistency may be found in the rationale of *Babbitz v. McCann*,[156] another case the Court found "in accord" with its decision. *Babbitz* invalidated an abortion statute which protected the unborn "from the time of conception": "The mother's interests are superior to that of an unquickened embryo, whether the embryo is mere protoplasm, as the plaintiff contends, or a human being, as the Wisconsin statute declares."[157]

The foregoing demonstrates the weakness of the contention that abortion was a matter of right in 14th Century England and 19th Century America—Professor Means' assertions to the contrary notwith-

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150. Conn. Pub. Act No. 1, May 1972 Special Session.

151. Abele v. Markle, 351 F. Supp. 224 (D. Conn. 1972).

152. *See id.* at 805-07.

153. *Roe*, 410 U.S. at 158. The Court also cited Byrn v. New York City Health & Hospital Corp., 31 N.Y.2d 194, 286 N.E.2d 887 (1972) as supporting its proposition that the unborn are not "persons" protected by the Constitution. The import of *Byrn*, however, is substantially broader, as reference to Judge Breitel's opinion for the Court of Appeals points out:

> The second level of debate is the real one, and that turns on whether the human entity conceived but not yet born, is and must be considered a person in the law . . . . It is not true, however, that the legal order necessarily corresponds to the natural order. That it should or ought is a fair argument, but the argument does not make its conclusion the law. . . .
>
> What is a legal person is for the law . . . to say, which simply means that upon according legal personality to a thing the law affords it the rights of a legal person . . . . That such action may be wise or unwise, even unjust and evolutive of principles beyond the law does not change the legal issue or its resolution. The point is that it is a policy determination whether legal personality should attach and not a question of biological or "natural" correspondence.

Id. at 200-01, 286 N.E.2d at 889. *But see* Glona v. American Guarantee Co., 391 U.S. 73, 75-76 (1968) (rejecting the "legal" - "biological" distinction).

154. *See Doe*, 410 U.S. at 190-91 (1973).

155. Abele v. Markle, 342 F. Supp. 800, 802 (1972).

156. 310 F. Supp. 273 (E.D. Wis. 1970).

157. *Id.* at 301.

standing.[158] Since it was never a right recognized by the common law, it cannot be considered to be a ninth amendment right retained by the people. The newly created right to procure an abortion is the creature of the substantaive due process arguments and erroneous interpretations of history relied upon by the Court in *Roe*; it is not a right which may be characterized as "so rooted in the traditions and conscience of our people to be ranked as fundamental."[159]

6. *The Unborn as "Persons" within the Fourteenth Amendment*

In the course of identifying the factors which went into the Supreme Court's resolution of the access question in favor of legal abortion much has been made of the fact that the question's ultimate resolution depends in its entirety upon whether or not a pregnant woman's interest in privacy outweighs the interest of her unborn offspring in remaining alive. Clearly the issue cannot be resolved by stating that "the court does not postulate the existence of a new being with federal constitutional rights at any time during gestation."[160] The Supreme Court recognized the insufficiency of this formulation when it held that the resolution of the access question depended entirely upon the validity of the postulate.[161]

The central legal issue in *Roe v. Wade* was whether or not the unborn are "persons" protected by the fourteenth amendment.[162] The Court noted that if the unborn are "persons" Jane Roe's argument in favor of legalized abortion collapses, "for the fetus' right to life is then specifically guaranteed by the Amendment."[163] If, as the Court found, the unborn are not "persons", the state's interest in protecting unborn life would not be sufficiently "compelling" to outweigh the interests of the woman.[164] Given the importance of resolving this issue, and the fact that the matter was one of first impression,[165] it is unfortunate that

158. To Professor Means, proof that the common law permitted unrestricted access to abortion was sufficient to support the contention that this "freedom" was subsumed within the ninth amendment's guarantee of unenumerated rights. *See* Means, *supra* note 74, at 336. The "proof" offered by Professor Means, however, was his erroneous interpretation of The Twinslayer's Case discussed in the text accompanying notes, 53-75 *supra*.

159. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

160. Doe v. Bolton, 319 F. Supp. 1048, 1055 n.3 (N.D. Ga. 1970), *aff'd*, 410 U.S. 179 (1973).

161. *Roe*, 410 U.S. at 156-57.

162. *Id.*

163. *Id.* at 162-63.

164. *Id.*

165. The fact that several lower courts reached the issue in challenges to specific state abortion laws is not material. The ultimate question whether the unborn are protected from legislatively or judicially sanctioned destruction by the due process clauses of the fifth and fourteenth amendments could only arise in the context of the

the Court's opinion does not contain a thorough analysis of the considerations upon which its conclusions were based.

When it held that the unborn are not "persons" the Court rested its decision on two factors which, taken together, convinced it that the right to life does not exist prenatally:

> All this [referring to a discussion of other constitutional usages of the word "person"] 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.[166]

Since the Court's observations concerning the common law have been found to be unsatisfactory as a basis for constitutional adjudication, it is necessary to examine the Court's first observation—that the terms of the Constitution do not admit of prenatal application—in order to evaluate the Court's ultimate conclusion.

a. Constitutional Usage of the Word "Person"

Although the Constitution makes liberal use of the word "person" it is not defined. The Court recognized this fact at the outset of its inquiry into the word's meaning.[167] A thorough examination of the varied usages of the word throughout the text of the Constitution leaves little doubt that the meaning of the word is generally derived from the context in which it is used. The Court's inability to find other than a postnatal application for the word bears witness to this fact, since the Court might have professed an equal inability to find more than a few references to "person" which have any other than an *adult* application.[168] If the Court was trying to establish that constitutional usage of the word in sections other than the due process clauses of the fifth and fourteenth amendments *precludes* any possible prenatal application, it did not support the proposition by citing the reader to the constitutional passages in which the word is employed. The fact is that the Constitution does not define the word.

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abortion controversy. The law in the only other area relevant to the question of prenatal rights, property, was already settled in favor of the unborn. *See* Louisell, *Abortion, the Practice of Medicine, and Due Process of Law*, 16 U.C.L.A. L. REV. 233 (1969).

166. *Roe*, 410 U.S. at 157.

167. *Id. See generally* address by Edward T. Lee to the Gary, Indiana Bar Association, "Should Not the 14th Amendment to the Constitutiou of the United States be Amended?" (November 20, 1936) (arguing that the fourteenth amendment should not include corporations).

168. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) [hereinafter cited as Ely].

Two examples—the apportionment clause[169] and the twenty-second amendment—should be sufficient to illustrate the Court's illogical approach to the difficult problem posed in *Roe v. Wade*. The apportionment clause directs that both representatives and direct taxes be allocated by "adding to the whole Number of free Persons, and excluding Indians not taxed, three-fifths of all other Persons,"[170] such enumeration to be made every 10 years "in such Manner as [Congress] shall by Law direct." Although it has been argued that this clause furnishes conclusive proof that the unborn are not persons,[171] the argument can best be characterized as "grabbing at straws." The Court was content to note that it was "not aware that in the taking of any census under this clause, a fetus has ever been counted."[172]

Two facts should be noted in determining whether the apportionment clause and the Court's use of the clause are relevant to the meaning of "person" for purposes of due process. First, the clause directs that a census shall be taken every 10 years "in such manner as [Congress] shall by law direct," a fact which the proponent of its conclusive effect apparently neglected to note.[173] Although Congress has never done so, it would be neither irrational nor unconstitsutional for it to direct that account also be taken of the unborn whenever the census-taker is made aware of their existence. The fact that Congress has never done so is irrelevant. The due process question cannot reasonably be made to turn on so specious an argument. Second, if being counted in the decennial census is a primary requisite for personhood it is difficult to understand how a corporation may be a "person" within the meaning of the fourteenth amendment. This writer is not aware that in any census a corporation has ever been counted. If the constitutional usage of "person" is too inflexible to include the unborn, it cannot reasonably be thought flexible enough to include a corporation. Yet it is a fact that the concept of corporate personhood was accepted by the Court without argument in *Santa Clara County v. Southern Pacific Railroad Co.*[174] The holding regarding the unborn can

169. U.S. CONST. art. I, § 2, cl. 3, 4.

170. The apportionment clause was changed by Section 2 of the fourteenth amendment.

171. Means, *supra* note 70, at 402-03.

172. *Roe*, 410 U.S. at 157 n.53.

173. Means, *supra* note 75, at 402.

174. 118 U.S. 394, (1886):

> The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.

Id. at 396.

hardly be said to rely upon the intent of the Framers; most relevant evidence seems to point in the opposite direction.

The second example of the Court's illogical approach to the problem is the twenty-second amendment. By its terms, the amendment prohibits any "person" from being elected to the office of President more than twice. It is apparent that the word "person" as used here derives its meaning from the context. If one were to accept the Court's analytical scheme in a future case where the meaning of the word were in question, it might appear that "persons" are only those who are natural-born citizens who have attained the age of 35.[175]

Admittedly the foregoing are extreme examples, but they are not the only ones which can be employed to show that the Constitution itself is not so restrictive as the Court would have one believe.[176] A reading of the Constitution as a whole makes it clear that the only clauses in which context does not supply the meaning of "person" are the due process clauses of the fifth and fourteenth amendments. The definition of the word in those contexts is critical. The two clauses stand as the constitutional bulwark against unwarranted governmental infringement of the inalienable rights to life, liberty and property. Thus, even if it be assumed that most constitutional usage of "person" in sections other than the fourteenth amendment does not apply to the unborn, it does not follow that the same must hold true for purposes of due process. After all, "it is a constitution we are expounding." and "[i]ts nature, therefore, requires that only its great outlines be marked;"[177] the rest must be determined by reference to the nature of the objects to be protected. The existence of fundamental rights cannot be made to turn upon semantic niceties.

It should be remembered that in *Roe* the Court invalidated a Texas law which had been construed to be protective of the unborn.[178] The lower court decision was based upon the premise that the unborn are human beings.[179] The Court did not reject this proposition. The ultimate issue before the Court, therefore, was whether the Constitution *forbids* state protection of individuals found to be human beings.[180] The question to be answered by the Court was this: absent some affir-

175. U.S. CONST. art. II, § 1, cl. 5.

176. *See also* U.S. CONST. art. I, § 2, cl. 2, and amend. XIV, § 3.

177. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1817).

178. *See* Thompson v. State, 493 S.W.2d 913 (Tex. Crim. App. 1971), *vacated and remanded*, 410 U.S. 950 (1973) (inconsistent with *Roe*).

179. *Id.* at 914.

180. The Court did not offer any citations or other authority for its unqualified statement that Texas could not interfere with a woman's choice of an abortion by adopting "one theory of life." *Roe*, 410 U.S. at 162. In fact, the opinion offers no clue whatsoever as to why the Constitution would forbid such a course of action.

mative evidence that the authors of the fourteenth amendment intended to exclude the unborn, can it be assumed, for the purpose of invalidating state protection of what is a fundamental right, that they indeed intended to exclude the unborn?[181] Although it purported to give great weight to contemporary thought in the pre-fourteenth amendment period, the Court did not address the question. Independent analysis, however, reveals that the correct answer is "No".

b. The Fourteenth Amendment—A Historical Perspective

Few would argue with the proposition that the primary inalienable rights protected by the due process clauses of the fifth and fourteenth amendments are *human* rights.[182] Similarly, the life protected by the clauses is human life. It follows then that the *individual* possessing that biological force known as human life, a human being, is the object of the amendments' protection—a person. Such an analysis is by no means a new one. In 1911, Sir Fredrick Pollock observed that "[t]he person is the legal subject or substance of which rights and duties are attributes. An individual human being, considered as having such attributes, is what lawyers call a *natural person*."[183] The remaining question, however, is the one which the Court avoided, in *Roe v. Wade*: does the language or the history of the fifth and fourteenth amendments permit (or require) that a distinction be drawn between the "human being" and "human person"?

The Court's justification for what must be taken as an affirmative answer to this question rests upon its observation that historically the

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181. Boyd v. United States, 116 U.S. 616 (1885):

> [C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction of them deprives them of half their efficacy, and leads to gradual depreciation of the rights as if it consisted more in sound than in substance.

Id. at 635.

182. *See* Address by Congressman John Bingham at Bowerstown, Ohio, August 24, 1866, in Cincinnati Commercial, Aug. 27, 1866, at 1, col. 1, 3:

> Look at that simple proposition. No state shall deny to any person, no matter whence he comes, or how poor, how weak, how simple—no matter how friendless—no State shall deny to any person within its jurisdiction the equal protection of the laws. If there be any man here who objects to a proposition so just as that, I would like him to rise in his place and let his neighbors look at him and see what manner of man he is. (A voice—"He isn't here, I guess.") That proposition my fellow-citizens needs no argument. No man can . . . dare to utter the proposition that of right any State in the Union should deny to any human being who behaves himself well, the equal protection of the laws. Paralysis ought to strangle the utterance upon the tongue before a man should be guilty of the blasphemy of saying that he himself, to the exclusion of his fellow man, should enjoy the protection of the laws.

183. F. POLLOCK, A FIRST BOOK OF JURISPRUDENCE 111 (3d ed. 1911), *quoted in*, Means, *supra* note 70, at 409 n.175.

unborn have never been considered persons "in the whole sense."[184] This statement could be true if it relied solely upon the opinions of courts addressing the question in the context of the abortion controversy. But reliance upon other types of cases dealing with the rights of the unborn is misplaced: the law of abortion protected their lives, and the law of property recognized their rights to material possessions.[185] The validity of the Court's statement is not material, however, to a discussion of the possible justifications which might be raised in support of a restrictive interpretation of the due process clause,[186] particularly when the Court seemed bent upon ascribing the amendment's alleged lack of flexibility to its authors. Given such a rationale, the appropriate inquiry should focus upon the interests perceived by the authors of the amendment rather than those envisioned by the Court.

Since the Court's determination that abortion is essentially a private matter is based upon its holding that the unborn are not "persons" within the meaning of the due process clause, it must be assumed, in light of scientific data placing the beginning of biological human life at conception,[187] that the Court felt that the existence of human life, as well as the point at which it begins, is irrelevant to any resolution of the constitutional issues involved in the abortion controversy. If it be assumed, however, that the "life" protected by the fifth and fourteenth amendments is human life and the right to the preservation of life is a "fundamental" interest, it follows that the existence of human life in the period before birth is relevant to the issues involved in the

184. 410 U.S. at 162.

185. The fact that some courts may have felt it necessary to imply a "live birth" requiremeut for the perfection of the rights of the unborn does nothing to lessen the fact that the rights did indeed *attach* before birth; the birth requirement was only a means of ascertaining whether there was a living plaintiff to assert his or her prenatally acquired rights. The birth requirement is nothing more than a further manifestation of the difficulty-of-proof problem which plagued the development of the early common law's criminal sanctions on abortion. Further, it should be noted that a beneficiary, living at the time a will is executed, need *also* be alive in order to perfect his or her rights to a bequest or devise; if not, the common law provided for lapse of the beneficial interest. *See* E. SCOLES AND E. HALBACH, PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 709-19 (2d ed. 1973).

186. If protection of an individual's rights to life and property is insufficient to make him or her a person "in the whole sense" what else could possibly be necessary? The fact that live birth was said to be required for the perfection of the inheritance rights of the unborn merely evinces recognition that a stillborn infant is hardly in any position to assert its property rights. Similarly, the fact that the Constitution implicitly requires that one be alive after attaining the age of 35 before the right to seek the office of President can be perfected does not make the younger person any less a person "in the whole sense." The right to run for President arises upon being born alive in the United States. In short, being alive is a prerequisite for the enjoyment of any right. *See*, Furman v. Georgia, 408 U.S. 238, 272 (1972) (Brennan, J., concurring) (right to life is the "right to have rights").

187. See note 24 *supra.*

controversy over legal abortion. The fourteenth amendment does not speak in terms of a right to "meaningful"[188] life, or a right to life "as [the Court] recognized it;"[189] it speaks solely in terms of a right to life. The primary question presented in *Roe* was this: may the Court create substantive exceptions to the enjoyment of fundamental rights where none appear in the Constitution?

The debates over section one of the fourteenth amendment show that its authors were concerned that the proposed amendment protect human life. The manifest purpose of the amendment as originally proposed on December 6, 1865, was to deprive the states of the power to violate the provisions of the Bill of Rights by placing the power of enforcement of those rights in the hands of the Congress.[190] Mr. Bingham, the author of the first section of the amendment, did not intend to restrict its sweep to the negation of laws which the states had already passed. He stated that no state ever had the power, by law or otherwise, to abridge constitutionally protected rights.[191] As one commentator has noted,[192] it can be inferred that the Ohio congressman's remarks meant that no state could abridge, *or could allow to be abridged or denied,* any constitutional privilege. On one occasion, speaking specifically of the right to life, Bingham stated that, notwithstanding the fact that life had never "been protected, and is not now protected, in any State of this Union by the statute law of the United States," such a fact is not determinative of the existence of the right, for it is expressly protected in the Constitution.[193] Such a fact only pointed to a need for enactments to protect the right.[194] Speaking in 1868, Congressman Bingham described the intent of the amendment as follows:

> There is not an intelligent man in America but knows that to secure the rights of all citizens and free persons in every State was the spirit and intent of the Constitution in the beginning. There is not an intelligent man in America but knows that this spirit and intent of the Constitution was most flagrantly violated long anterior to the rebellion, and the Government was powerless to remedy it by law. That amendment [the fourteenth] proposes hereafter that the great wrong [the denial of basic human rights in its then current form—slavery] shall be remedied by putting a limitation expressly in the Constitution, coupled with a grant of power to enforce it by law, so that when either Ohio or South Carolina, or any other State shall in its madness

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

189. *Id.* at 161.

190. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1865).

191. *Id.* at 2542-43.

192. J. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 80 (1908) [hereinafter cited as FLACK].

193. CONG. GLOBE, 39th Cong., 1st Sess. 429 (1865).

194. FLACK, *supra* note 192, at 81.

> or its folly refuse to the gentleman, or his children or to me or to mine, any of the rights which pertain to American citizenship *or to common humanity*, there will be redress for the wrong through the power and majesty of American law.[195]

Given the fact that Bingham himself thought it immaterial to the existence of a fundamental right that the right had never been protected by federal law, it is difficult to perceive just what relevance attaches to the alleged leniency of the common law toward abortion during the 19th century. By the first section of the fourteenth amendment, Bingham sought to assure the rights which pertain to "common humanity." It is, therefore, relevant to inquire whether the fourteenth amendment may be construed to exclude a group of individuals who were regarded as human beings at the time the fourteenth amendment was written,[196] and who are considered to be human beings at the present time. The Court based its restrictive interpretation of the word "person" upon certain conclusions about *state* policies concerning the unborn.[197] Therefore, it matters little in the constitutional context that the states had not expressly declared the unborn to be persons "in the whole sense;" the fact that some states, including Texas, had declared them to be deserving of protection in their own right[198] is the functional equivalent.

As noted above,[199] the common law was not unconcerned with the lives of the unborn. The Court itself pointed out that the dominant popular feeling during the late 1850's, scarcely six years before the framing of the fourteenth amendment, was hostile to abortion. The organized medical profession in the mid-19th century felt that state abortion laws should be *tightened*—and apparently they were.[200] The reason for this development was that abortion laws of the early 19th century did not go *far enough* to protect unborn human life.[201] In response to the petition of the American Medical Association, at least one state, Connecticut, strengthened its abortion law.[202] It hardly seems reasonable to assert that the authors of the amendment were unaware of such sentiment in the educated circles of the times, especially given the courts' cognizance of such attitudes.[203] In light of the con-

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195. CONG. GLOBE, 40th Cong., 1st Sess. 514 (1868) (emphasis added).
196. *See, e.g.*, 12 TRANS. A.M.A. 73-77 (1859).
197. *Roe*, 410 U.S. at 161-62.
198. *See* Thompson v. State, 493 S.W.2d 913 (Tex. Crim. App. 1971).
199. See text accompanying notes 52-130 *supra*.
200. See note 135 *supra*.
201. *See* 12 TRANS. A.M.A. 73-77 (1859).
202. See note 144 *supra* and accompanying text.
203. *See, e.g.*, Smith v. State, 33 Me. 46 (1851); State v. Howard, 32 Vt. 380 (1859). *See also*, Regina v. Wycherly, 173 Eng. Rep. 486 (Nisi Prius 1838).

temporary feeling that abortion involved the taking of human life, it would be incongruous to claim that the authors of the fourteenth amendment intended to exclude the unborn,[204] and that they considered abortion to be a part of the liberty protected by the amendment.[205] To do so would be to ignore the tenor of the times.

The fourteenth amendment recognizes two classes: citizens and persons.[206] As to the broader class—"persons"—the rights of life, liberty and property are assured.[207] As to the narrower class—"citizens"—a bar is interposed to state interference with the privileges and immunities of national citizenship.[208] The privilege of automatic citizenship requires birth in the United States. The inherent rights of the person, however, are subject to no birth requirement. That the authors of the fourteenth amendment well understood the distinction they had made between citizen and person is not open to dispute.[209] The same distinction exists in the fourteenth amendment today.[210]

By use of the broader term "person" the author intended to include all individuals other than those who met the qualifications for the title "citizen." There is no evidence that the authors intended to *exclude* the unborn from this class of individuals.[211] In fact, given the

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204. The Court merely noted that it was not "persuaded" that the fourteenth amendment could be applied prenatally. *Roe*, 410 U.S. at 158. It never attempted to show, as indeed it could not, that that amendment necessarily excludes the unborn.

205. The fact that many states prohibited abortion before the fourteenth amendment became a part of the Constitution is itself strong evidence that the authors of the amendment did not intend to include abortion as one of the liberties protected by the due process clause.

206. FLACK, *supra*, note 192, at 63.

207. *Id.*

208. *Id.*

209. *See* W.D. GUTHRIE, THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 25 (1898), in which the author quotes Senator Edmunds, a member of the Senate during the debates over the fourteenth amendment:

> There is no word in it which did not undergo the completest scrutiny. There is no word in it that was not scanned, and intended to mean the full and beneficial thing it seems to mean. There was no discussion omitted; there was no conceivable posture of affairs to the people who had it in hand which was not considered.

See also FLACK, *supra* note 204, at 71-97; J.B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 194-97 (1956).

210. Even were it true that the 19th Century common law was unconcerned with the lives of the unborn the Court would not be bound by it. *See* United States v. Little Lake Miserle Land Co., 412 U.S. 580, 593 (1973), wherein the Court explicitly recognized the power of the federal courts to effectuate the statutory patterns established by Congress by filling the "interstices." That reasoning applies with even more force to the effectuation of the constitutional scheme for the protection of fundamental personal rights. Boyd v. United States, 116 U.S. 616, 635 (1885), *supra* note 181.

211. *Compare* Dredd Scott v. Sandford, 60 U.S. (18 How.) 393 (1857), wherein the Court found an intent on the part of the Framers of the Constitution to exclude an

predominantly anti-abortion mood of the country, as well as the intensive lobbying campaign of the American Medical Association[212] and the medical societies of some of the states,[213] it is more reasonable to infer that the unborn were meant to be included.

In *Roe* the Court was presented with substantial evidence, most of which was undisputed, as to the biological reality of prenatal human life.[214] The Court recognized that these facts are "well-known".[215] It is hard to imagine what other evidence of the "personhood" of the unborn was necessary.[216] The only meaningful and concrete distinction between the unborn and their adult counterparts is one of *age* rather than nature.[217] If the constitutional concept of "person" is broad enough to encompass corporations[218] (a contention accepted by the Court with considerably less hesitance), it is broad enough to include the unborn offspring of human beings.

In *Roe*, the Court was faced with a dilemma. By giving an extremely broad definition to the concept of "health" when it upheld the validity of the District of Columbia abortion statute[219] challenged in *United States v. Vuitch*,[220] the Court had gone on record as supporting wider access to legal abortion than had existed in the past. In *Roe v. Wade* the Court was asked to complete the process begun in *Vuitch*—

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entire class of individuals— those of African descent— from the protection offered their rights by possession of the status of "citizen." The Court found no such intent in *Roe*.

212. See notes 137-44 *supra*.

213. In 1867 the Medical Society of New York condemned abortion at any stage of gestation as "murder". *See* Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968*, 14 N.Y.U.L. FORUM 411, 459 (1968).

214. The only dispute found in the briefs concerns the question whether biological human life is indeed human "in the whole sense." *See* Brief for Appellants at 19-22, Roe v. Wade, 410 U.S. 13 (1973). In this regard *compare* Means, *supra* note 74, at 403-04 (acclaiming the 18th century perceptions of one writer that the unborn are "monsters" as a "clear voice of the Age of Reason"), *with* CALIFORNIA MEDICINE, *supra* note 24 at 67 (noting that the contention that abortion is anything but the taking of human life would be "ludicrous if not set forth under impeccable auspices").

215. *Roe*, 410 U.S. at 156.

216. Consider Levy v. Louisiana, 391 U.S. 68 (1968), wherein the Court held that the test of "personhood" for purposes of equal protection could be summarized as follows: "They are humans, live, and have their being. They are clearly persons within the meaning of the Equal Protection clause of the Fourteenth Amendment." *Id.* at 70. The fact that *Levy* involved illegitimate children who had already been born is hardly material to the existence of fundamental human rights. Glona v. American Guarantee Co., 391 U.S. 73 (1968): "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." *Id.* at 75-76.

217. See note 24 *supra* and accompanying text.

218. Santa Clara County v. Southern Pacific R.R., 118 U.S. 394 (1886).

219. D.C. CODE ANN. § 22-201 (1973).

220. 402 U.S. 62 (1972).

to remove all access restrictions from the process. Yet, in *Roe* the Court was forced to address the more difficult question of the constitutional status of the unborn. The problem was significant since, historically, the question of abortion had been intertwined with the question of when life begins.[221] Faced with cogent arguments that the unborn offspring of human beings are individuals protected by the Constitution,[222] the Court knew that in order to legalize abortion, it *had* "to resolve the difficult question of when life begins;" the nature of the issue presented left it no other choice.

II

ABORTION: A MEDICAL PROCEDURE

A. Introduction

At the outset of this discussion of the medical aspects of the abortion cases, especially those considered in *Doe v. Bolton*, it is imperative that several facts be kept in mind. The preservation of health and the means by which the state may foster the attainment of this concededly valid goal are matters closely intertwined with those discussed in Part I. There are differences, however, and it is a serious mistake to presume that the Supreme Court's holding in *Roe v. Wade*—that there is a "right" to elective abortion—conclusively settles the questions raised by that holding in the area of health care services.

However, *Roe v. Wade* overlaps with *Doe v. Bolton* in its discussion of state regulation of the medical aspects of abortion.[223] Although the main issue in *Roe* concerned the existence of state power to protect the unborn by restricting access to abortion, the Court did not confine its discussion to that topic. Basing much of its decision upon the premise that abortion laws were passed in order to protect women from dangerous medical procedures, the Court, on finding such a rationale no longer supportable, proceeded to strike down virtually all access restrictions upon the abortion procedure.[224] Deciding to take this reasoning one step further, the Court then inquired into the necessity and utility of state health regulations which had grown up around legal abortion practices in an analysis going beyond the traditional "rational basis" test. While the greater portion of the Court's reasoning in this area may be found in *Doe v. Bolton*, the basic regulatory frame-

221. *See, e.g.*, Commonwealth v. Parker, 55 Mass. (9 Pet.) 263 (1845).

222. *See, e.g.*, Danforth v. Rogers, 486 S.W.2d 258, 259 (Mo. 1972); Thompson v. State, 493 S.W.2d 913 (Tex. Crim. App. 1971).

223. *Roe*, 410 U.S. 113, 165 (1973).

224. See Part I *supra*.

work upon which the states are permitted to construct constitutionally acceptable regulations lies in the trimester approach of *Roe*.[225]

Doe v. Bolton presented the analytically separate issue of the extent to which the state may regulate abortion procedures in order to effectively safeguard maternal health more clearly than that issue was presented in *Roe v. Wade*. A close reading of the majority opinion in *Doe*, however, reveals that the Court was either unable or unwilling to separate the distinct problems presented by the two issues. The medical regulation issue involves two questions: (1) may the state, in order to effectuate its interest in preserving maternal health, regulate the abortion procedure at all; and (2) if so, to what extent?

These two questions are the focus of Part II. Throughout, the discussion assumes that the Court's decision regarding access to legal abortion remains in force.

Roe severely limited the state's regulatory power during the first trimester of pregnancy. Save for requiring that the procedures be performed by a physician, the state may not impose any additional health care standards.[226] Only after the onset of the second trimester may the state regulate abortion procedures at all. During the second and third trimesters, however, the state must confine its regulations to matters involving maternal health,[227] but even then the decision in *Doe* precludes it from requiring that abortions be performed in fully equipped hospitals[228] and from imposing mandatory consultation requirements upon the physicians who are to perform the procedures.[229]

While it is true that one's perspectives on the need for free accessibility to legal abortion will influence one's perceptions of what is "proper" in this area, the need for objectivity is great.

B. The Standard of Review

Although abortion involves many nonmedical considerations and decisions, it is primarily a medical procedure. As such it is subject to reasonable regulation in the public interest.[230] Since a state has an

225. *Roe*, 410 U.S. at 163-66.

226. *Id.*

227. *Id.* During the post-viability period, however, the rule regarding protection of the unborn is relaxed to some degree and regulations to maximize their protection are permissible. Further, it is to be noted that the state is under *no* obligation to protect the unborn at this time. Apparently the Court felt that even after "viability," the unborn could claim no protection under the Constitution.

228. *Doe*, 410 U.S. at 195. *See also* Hallmark Clinic v. North Carolina Dept. of Human Resources, 380 F. Supp. 1153 (E. D. N. C. 1974) (three-judge court).

229. *Doe*, 410 U.S. at 199.

230. Williamson v. Lee Optical Co., 387 U.S. 483 (1957).

interest in the quality of all health care delivered within its borders, it may reasonably prescribe certain minimum standards for the distribution and quality of medical services, including abortion. Indeed, whether such power rests upon the concept of the state's police power or upon a generalized "interest" analysis, it is fair to assume that protection of the public health is among the "powers inherent in every sovereignty"[231] which may be limited by the federal courts only to the extent required by the Constitution.[232]

The limitations upon state power to regulate the medical aspects of abortion mentioned in the introduction to Part II are the result of the Court's independent evaluation of the necessity and utility of particular regulations to the effective distribution of medical services. The problem with this approach is that it was entirely inappropriate to the Court's function as an appellate tribunal for it to strike down state regulatory schemes on constitutional grounds unless it was prepared to determine that the regulations were without rational basis.[233] The Court did this in neither *Roe v. Wade* nor *Doe v. Bolton.* Instead, it held the states to a higher standard of review.[234]

This departure from the traditional standard of review is apparently explained by the Court's concern that state health regulations might turn into "roadblocks" barring access to legalized abortion.[235] This concern was, perhaps, understandable in light of the Court's sweeping invalidation of long-established state abortion policies, but a mere "concern" should not, in itself, support a departure from the traditional standard. It does not appear from the facts of either *Roe* or *Doe* that there was any danger of official disregard of the Court's directive concerning free access to legal abortions;[236] the statutes invali-

231. The License Cases, 46 U.S. (5 How.) 504 (1847); *accord,* Poe v. Ullman, 367 U.S. 497 (1961) (Harlan, J., dissenting); Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217, 1229 (E.D. La. 1970), *vacated mem.,* 412 U.S. 902 (1974) (pursuant to *Roe v. Wade*).

232. Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

233. Williamson v. Lee Optical Co., 387 U.S. 483 (1957).

234. *See Doe,* 410 U.S. at 195.

235. *Id.* at 199.

236. The Georgia abortion statute challenged in *Doe* was based upon the American Law Institute's Model Abortion Act, and was considerably more flexible than the Texas statute challenged in *Roe v. Wade.* While the Georgia law was not as flexible as those of New York or Hawaii, that fact does not support the presumption that Georgia would have refused to accept the Court's access ruling. Obviously, the state was not so opposed to abortion as to prohibit it entirely.

Furthermore, the Court made much of the argument that the restrictions placed on abortion were unlike those of any other medical procedure. The answer to this argument is that no other medical procedure is like abortion. Both the Texas and Georgia abortion statutes explicitly recognized that *fetal* as well as maternal interests are involved in an abortion. Thompson v. State, 493 S.W.2d 913 (Tex. Crim. App. 1971); GA. STAT. ANN.

dated were penal provisions.[237] The Court should have waited for a case actually presenting the problem of "roadblocks" before attempting to fashion a solution.

To presume that all health regulations during the first trimester were roadblocks was speculation in its purest form. It is settled that "the judiciary may not restrain the exercise of lawful power on the assumption that [a] wrongful purpose or motive [will] cause the power to be exerted."[238] Such matters are most properly resolved by prompt judicial action upon evidence clearly demonstrating an invalid state purpose.

C. Deficient Studies and Definitions

An examination of the Court's approach to the medico-regulatory aspects of abortion cannot end with the assertion that an inappropriate standard of review was employed in reaching the decision. The Court's reasoning suffers from even deeper flaws. Its blanket restrictions upon state power to regulate, especially in the first trimester of pregnancy, are not only inconsistent with its own definition of "health," but also ignore the fact that a state might accept the Court's decision on the access issue, yet remain firmly committed to a policy whereby it would seek to make the available procedures as safe as possible.

In *Doe v. Bolton*, the Court reaffirmed its prior holding that "health" encompasses many personal interests aside from purely physical health, such as familial circumstances, mental or emotional needs, financial ability, and age.[239] The use of such a standard to define in part the interests which must be considered in allowing a woman to procure an abortion presents a seemingly inexplicable inconsistency in the Court's reasoning when that same standard is not applied in gauging the permissibility of state regulatory schemes designed to further maternal interests.

Perhaps the most obvious example of this incongruity is the virtually complete abrogation of state power to regulate during the first

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§ 26-1202(c) (1972). Once the Court had determined that the protection of fetal interests was not a matter with which a state could validly concern itself for at least the first 6 months of pregnancy, the rationale for disparate access restrictions was no longer constitutionally valid. In the context of *Doe v. Bolton* these restrictions were the requirements of state residency, committee approval, and, to a lesser extent, two-physician concurrence. The other health regulations involved in *Doe* merely reflected state policy judgments regarding the necessity of safety standards. Nowhere in either opinion did the Court go so far as to say that the remaining requirements were irrational; it merely held, in effect, that they were unnecessary to the attainment of state goals.

237. Ely, *supra*, note 168, at 194 n.7.

238. McCray v. United States, 195 U.S. 27 (1904).

239. *Roe*, 410 U.S. at 153; *Doe*, 410 U.S. at 192; *accord*, United States v. Vuitch, 402 U.S. 62 (1972).

trimester of pregnancy. The Court, after adopting an extremely broad definition of health, restricted the state's power to consider the factors comprising this broad definition in devising a regulatory scheme to protect maternal health. The Court rejected the contention that first trimester abortion remains an inherently dangerous medical procedure,[240] and held, in effect, that early abortion, "although not without its risk,"[241] is, for constitutional purposes, now safer than normal childbirth.[242] Evidently the majority was impressed by the "now established medical fact . . . [that] until the end of the first trimester mortality in abortion is less than mortality in normal childbirth,"[243] for this fact is the sole basis upon which the first trimester prohibitions are based.[244] But would such a fact, even if established beyond any reasonable doubt,[245] destroy the constitutional validity of the regulations being examined? Clearly it would not.

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240. *Roe*, 410 U.S. at 149, 163.
241. *Roe*, 410 U.S. at 149.
242. *Doe*, 410 U.S. at 190.
243. *Roe*, 410 U.S. at 163.
244. *Id.*
245. This "fact" is not nearly so well established as the Court would have one believe. Data from countries having wider experience with legal abortion does not support the contention. *See* Brief for Certain Physicians Professors and Fellows of the American College of Obstetrics and Gynecology as Amicus Curiae for Appellees at 37-43, Roe v. Wade 410 U.S. 113 (1973) [hereinafter cited as Brief for Certain Physicians], wherein the following figures were presented for the Court's examination:

TABLE ONE: ABORTION MORTALITY vs. MATERNAL MORTALITY

Country/State	Year	Legal Abortions	Deaths	Abortion Mortality/ 100,000 Abortions	Maternal Mortality/ Live 100,000 Births
Denmark (92)	1961-66	27,435	9	30	10-20
England and Wales (93)	1968-69	27,331	8	30	Abortion mortality higher than maternal mortality
Sweden (94)	1960-66	30,600	12	39	14.0 (95)
Yugoslavia (Skopje Univ.) (96) (106)	1965-68	13,758	2	10.6	96.5 (97)
Hungary (98)	1964-68	939,800	11	1.2	49.7 (99)
Oregon (100)	1970	7,196	1	13.9	8.4
Maryland (101)	1968-70	7,664	3	40.5	23.1 (102)

TABLE TWO: LEGAL ABORTION MORTALITY—FIRST TRIMESTER ONLY*

Country/State	Year	Abortions 1st Trimester	Deaths	Abortion Mortality/ 100,000 Abortions	Maternal Mortality/ 100,000 Live Births
Denmark (92)	1961-66	8,684	2	23.0	10-20

Given the Court's broad definition of health, it is rather odd that it focused on mortality as the only determinative health factor. Indeed,

Yugoslavia (Skopje Univ.) (96) (106)	1965-68	7,833	2	25.5	96.5 (97)
Hungary (98)	1964-68	939,800	11	1.2	49.7 (99)
Oregon (100)	1970	5,351	1	18.6	8.4

*Breakdown data for England and Wales and Sweden are not available. There were no early abortion deaths in Maryland 1968-70, but a relatively small number (3,900) were performed early (101).

The sources for the materials cited above were reported as follows:

92) Olsen, Nielsen & Ostergaard, *Complications to Therapeutic Abortion*, INT'L J. GYNECOLOGY & OBSTETRICS, Nov., 1970 at 823.

93) *The Abortion Act (1967)*, BRIT. MED. J., May 30, 1970 at 529-35 (findings of an inquiry into the first year's working of the Act, conducted by the Royal College of Obstetrics and Gynecology).

94) C. Tietze, *Abortion Laws and Abortion Practices in Europe*, in PROCEEDINGS OF THE AM. ASSN. OF PLANNED PARENTHOOD PHYSICIANS 198 (San Francisco, 1969) (EXCERPTA MEDICA INT'L CONG. SERIES No. 207).

95) 23 WORLD HEALTH STATISTICS REPORT, No. 7 (1970) at 546-49.

96) Jurukovski, *Complications Following Legal Abortion*, in PROCEEDINGS OF THE ROYAL SOCIETY OF MEDICINE, August, 1969, at 830.

97) *See* source 95.

98) *See* Klinger, *Demographic Consequences of the Legalization of Induced Abortion in Eastern Europe*, INT'L J. GYNECOLOGY & OBSTETRICS, Sept., 1970 at 680.

99) *See* source 95.

100) OREGON STATE BD. OF HEALTH, THERAPEUTIC ABORTIONS IN OREGON—JANUARY-DECEMBER 1970. *See* H.E.W., CENTER FOR DISEASE CONTROL, *Abortion Surveillance Report—Hospital Abortions, January-June (1970)* (commenting on the nearly complete nature of the Oregon statistics).

101) Cushner, *Pregnancy Termination, The Impact of New Laws, an Invitational Symposium*, J. REPRODUCTIVE MEDICINE, June 1971, at 62.

102) 1 VITAL STATISTICS OF THE UNITED STATES, Table 1-35, at 1-30 (1967); 7 (PART B) VITAL STATISTICS OF THE UNITED STATES, Table 7-6, at 7-233 (1967).

106) Jurukovski & Sukharov, *A Critical Review of Legal Abortion*, INT'L J. GYNECOLOGY & OBSTETRICS, May, 1971, at 111.

Several points should be kept in mind when considering the relevance of these statistics. First, they do not purport to be the most recent statistical materials on the subject; those materials and the problems associated with them are discussed in the text accompany notes 251-268 *infra*. Second, since these materials were, in part, the source of the Court's ruling on the relative safety of abortion, their relevance to the present discussion is clear. Third, the maternal mortality figures quoted in the sources numbered 95, 97, and 99 were compiled under a classification system which *included* abortion-related deaths, making the maternal mortality figure appear higher than it should have for purposes of such a comparison. Fourth, the inordinately high maternal mortality ratio noted for Yugoslavia and Hungary reflect adversely on the health care delivery systems of these countries. How they were able to show such an extraordinarily good record for abortion while, at the same time, showing such a poor record for maternal care would seem to make their statistics fairly unreliable as indicators of "relative" safety. Finally, it should be noted that even so much as comparing such a limited statistic as "abortion mortality" to the broadly defined statistic of maternal mortality can be misleading in favor of the safety of abortion. See text accompanying notes 282-85 *infra*.

So, even if one assumes that abortion related mortality is relatively low, it remains fair to inquire just why such an assumption would demand either the total legalization of

there is another extremely important consideration which must be examined before the rational basis of health regulation may be found wanting. That factor is morbidity.[246] Its importance is equal to, if not greater than, mortality, in considering the relative safety of any abortion procedure.[247] To invalidate abortion-related health regulations solely on the basis of mortality[248] is akin to striking down industrial safety standards without considering the incidence of nonfatal injuries.[249]

Morbidity includes latent, as well as immediate complications. The overall safety of any surgical procedure, especially abortion, can-

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abortion for the first 6 months of pregnancy, see Part I *supra*, or the total abrogation of administrative regulation of the health care aspects of the procedure during the first trimester.

246. Morbidity is a collective term. For purposes of the present discussion it is taken to mean all manner of complications, immediate as well as latent, which may arise as a consequence of legal or illegal induced abortion. These include, but are not limited to laceration of the cervix, hemorrhaging, uterine perforation, infertility, susceptibility to miscarriage, and psychological sequelae.

247. *See* Editorial, *How Safe is Abortion?* THE LANCET, December 4, 1971, at 1239:

> The high incidence of post-abortion complications reported by Professor Stallworthy and his colleagues . . . is deeply disturbing, particularly since almost identical results have lately been reported by [other sources]. Healthy young women, whose only complaint is that they are pregnant, are entering the hospital and being subjected to procedures that may permanently affect their fertility and occasionally jeopardize their lives. Clearly, the time has come for a critical assessment of these complications.

248. If mortality associated with legal abortion is to be used as the sole indicia of its safety, the following figures reporting abortion related deaths occurring in New York City during the period 1970-1972 are instructive:

	Legal Abortion	*Illegal Abortion*
1970-71	8	7
1971-72	8	6
Total	18*	13

*includes two deaths subsequently discovered.

Pakter, O'Hare, Nelson, and Svigir, *A Review of Two Years' Experience in New York City With the Liberalized Abortion Law*, in THE ABORTION EXPERIENCE 47 at 63 (Osofsky & Osofsky eds. 1973) [hereinafter the article by Pakter, O'Hare, Nelson and Svigir will be cited as Pakter, and the book edited by Osofsky & Osofsky will be cited as OSOFSKY & OSOFSKY].

249. The folly of using abortion related mortality as the sole indicator of the operation's safety vis-a-vis normal child-birth becomes apparent upon examination of *all* the relevant health factors which would be considered were any other surgical procedure under scrutiny. To fully appreciate the scope of the problem one need only consider the remarks of Professors Stallworthy, Moolgaker and Walsh noting that while "[t]he morbidity and fatal potential of criminal abortion is accepted widely . . . [t]here has been almost a conspiracy of silence concerning [the] risks [of legal abortion]." Stallworthy, Moolgaker, and Walsh, *Legal Abortion: A Critical Assessment of its Risks*, THE LANCET, December 4, 1971, at 1245 [hereinafter cited as Stallworthy]. Unfortunately, they noted, the emotional response evoked in any contemporary discussion of abortion has obscured the perspectives of the public, the courts, and the medical profession itself. *See id.*

not be judged solely upon its immediate impact on the patient; its long-term effects must be considered. This is especially true when the procedure is performed on young women,[250] for not only is their own health and fertility[251] at stake, but also the health of any future "wanted" offspring which the woman may produce.[252] Too little is known of the long-term effects of induced abortion in this country for any court to attempt to determine its safety; it has only been available on any analytically meaningful basis since 1970. Were the Court to base its conclusions on the data available from countries where legal abortion has been available for a much longer period, the decision might not have been any more defensible from a legal point of view, but the conclusion might have been different.

When morbidity is considered, the statement that an "early", or first trimester, abortion is less dangerous than one obtained at a later stage of gestation,[253] becomes much less persuasive. It discloses nothing about the risks of the abortion procedure as compared to those of normal childbirth or any other medical procedure. Because there is considerable controversy within the medical profession over the safety and advisability of *any* abortion, regardless of the stage of gestation,[254] it should be clear that early abortion is not so trivial an opera-

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250. *Compare* Pakter, *supra* note 248, at 56 (207,366 of 334,865 abortions performed in New York City during 1970-72 (61.8%) were upon women aged 24 or younger. Of these, 89,264 (26.6%) were under twenty years of age), *with* Tietze and Lewit, *A National Medical Experience: The Joint Program for the Study of Abortion (JPSA)*, in OSOFSKY & OSOFSKY, *supra* note 248, at 5 (61.0% and 24.2% respectively).

251. *See* Stewart and Goldstien, *Medical and Surgical Complications of Therapeutic Abortions*, 40 OBSTETRICS & GYNECOLOGY, October 1972, at 539, 548 [hereinafter cited as Stewart & Goldstien]; A. Wynn, *Some Consequences of Induced Abortion to Children Born Subsequently: A Supplementary Note of Evidence*, (Foundation for Education and Research in Child Bearing, London, England (1972)), *reprinted in* 4 MARRIAGE AND FAMILY NEWSLETTER, February-April, 1973, at 12, 14-22 [hereinafter cited as A. Wynn].

252. N. BUTLER & D. BONHAM, PERINATAL PROBLEMS: FIRST REPORT OF THE 1958 BRITISH PERINATAL SURVEY 288 (1963) (noting that past medical history of one abortion increased overall perinatal mortality by fifty percent) [hereinafter cited as BRITISH PERINATAL SURVEY]; M. Wynn, *Some Consequences of Induced Abortion to Children Born Subsequently*, (Foundation for Education and Research in Child Bearing, London, England (1972)), *reprinted in* 4 MARRIAGE AND FAMILY NEWSLETTER, February-April, 1973, at 5-7 [hereinafter cited as M. Wynn].

253. *See, e.g.*, CALIFORNIA BUREAU OF MATERNAL AND CHILD HEALTH, THERAPEUTIC ABORTION IN CALIFORNIA: A BIENNIAL REPORT PREPARED FOR THE 1974 LEGISLATURE PURSUANT TO SECTION 25955.5 OF THE HEALTH AND SAFETY CODE 2 (1974) ("in the early and most safe part of their pregnancy").

254. *See* Editorial, *Latent Morbidity After Abortion*, BRITISH MEDICINE, Mar. 3, 1973, at 506; Editorial, *How Safe is Abortion?*, THE LANCET, Dec. 4, 1971, at 1239; Fitzgerald, *Abortion on Demand*, MED. OPIN. AND REV., (1970); Nigro, *A Scientific Critique of Abortion as a Medical Procedure*, PSYCHIATRIC ANNALS, Sept., 1972, at 22 [hereinafter cited as Nigro]; Stallworthy, *supra* note 249. In *Legalized Abortion, Report*

tion as the low mortality figures based upon the New York experience might seem to indicate.[255] Indeed, a recent study, based mainly on German sources, reveals that "there is a serious *latent morbidity* following an induced abortion that only becomes apparent during the course of a subsequent pregnancy or confinement."[256] This morbidity includes cervical incompetence,[257] intrauterine damage,[258] including perforation,[259] iso-immunization,[260] extrauterine (ectopic) pregnancy,

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of the Council of the Royal College of Obstetricians and Gynecologists, BRITISH MEDICINE, April 12, 1966, at 850 it was stated:

> Those without specialist's knowledge, and these include members of the medical profession, are influenced in adopting what they regard as a humanitarian attitude to the induction of abortion by a failure to appreciate what is involved. They tend to regard induction of abortion as a trivial operation, free from risk. In fact, even to the expert working in the best conditions, the removal of an early pregnancy after dilating the cervix can be difficult and is not infrequently accompanied by serious complications. This is particularly true in the case of women pregnant for the first time. For women who have a serious medical indication for termination of pregnancy, induction of abortion is extremely hazardous and its risks need to be weighed carefully against those involved in leaving pregnancy undisturbed. Even for the relatively healthy woman, however, the dangers are considerable.

255. It is important to note at this point that no meaningful distinction can be drawn between the terms "elective" and "therapeutic" abortion. Essentially the terms describe the same indications, since most proponents of legal abortion admit that elective removal of the fetus is without substantial psychiatric or medical justification. *See, e.g.*, Halleck, *Excuse Makers to the Elite: Psychiatrists as Accidental Social Movers*, MED. OPINION, December 1971, at 48; Sloane, *The Unwanted Pregnancy*, 280 NEW ENGLAND J. MED. 1206 (1969). *See also*, Fleck, *Some Psychiatric Aspects of Abortion*, 115 J. NERVOUS AND MENTAL DISEASE 42 (1970):

> The phrase [therapeutic abortion] compouuds the ethical confusion and intellectual dishonesty which are characteristic of popular and professional attitudes and notions about abortion. Obviously abortion is not a treatment for anything unless pregnancy is considered a disease, and if it were that, it is the only disease which is 100 percent curable by abortion or delivery at term.

The identity of the two terms is borne out by the experiences of California and Oregon where the abortion laws provided for abortion based on mental health. *See* CALIFORNIA BUREAU OF MATERNAL AND CHILD HEALTH, A REPORT TO THE 1971 LEGISLATURE: FOURTH ANNUAL REPORT ON THE IMPLEMENTATION OF THE CALIFORNIA THERAPEUTIC ABORTION ACT PURSUANT TO CHAPTER NO. 177 (ACR 113) 1967 4 (1971) (63,872 of 65,044 [98%] of abortions performed in calendar 1970); OREGON STATE HEALTH DIV., VITAL STATISTICS ANN. REP. 93 (1971) (97.9% for mental health).

This is not to say, however, that an abortion can never be truly "therapeutic." An abortion to prevent the death of the mother clearly falls within this very limited category.

256. A. Wynn, *supra*, note 251, at 12 (emphasis in original).

257. *See* Wright, Campbell, and Beazley, *Second-trimester Abortion After Vaginal Termination of Pregnancy*, THE LANCET, June 10, 1972, at 1278 (noting a 10-fold increase in spontaneous second-trimester abortion after one which had been induced during the first).

258. A. Wynn, *supra* note 251, at 18-19. *See also* Stewart & Goldstien, *supra* note 251, at 548 (noting the risk of postabortal infertility due to high rate of infection); M. Wynn, *supra* note 252, at 6 (noting that the tendency of induced abortion to increase the rate of prematurity in subsequent pregnancies may have the overall effect of raising the rate of infants born with some type of handicap).

259. *See* Stallworthy, *supra* note 249; Stewart & Goldstien, *supra* note 251, at 545.

and psychological sequelae.[261] The very existence of these conditions, as a result of *first* trimester abortions as well as from those performed later in pregnancy, has led many medical experts to conclude that abortion is clearly not as safe as carrying a pregnancy to term.[262]

While a study of the comparative incidence of fatal and morbid consequences subsequent to full term pregnancy and elective induced abortion[263] is beyond the scope of this work, one difficulty inherent in this task is worth mentioning. Since abortion-related mortality is often compared with maternal mortality in an attempt to show that early abortion is "safer" than carrying the pregnancy to term, it is necessary to consider not only the number of deaths resulting from each procedure,[264] but also the characteristics of the woman electing either abortion or full-term pregnancy. If the safety of abortion is to be compared in any meaningful way to that of normal childbirth, one of the following methodologies should be employed: (1) define abortion-related mortality and morbidity as broadly as those terms are defined in regard to maternal mortality[265] and morbidity; (2) restrict considera-

260. A. Wynn, *supra* note 251, at 21.

261. Much of the research into psychological sequelae of induced abortion has focused upon feelings of guilt and depression. *See e.g.*, Osofsky, Osofsky, & Rajan, *Psychological Effects of Abortion: With Emphasis Upon Immediate Reactions and Followup*, in OSOFSKY & OSOFSKY, *supra* note 248, at 188. However, a recent study has noted the possible psychological trauma which may be associated with post-abortal complications, especially infertility and sterility. *See* M. Wynn, *supra* note 252, at 6-7.

262. *See, e.g.*, Nigro, *supra* note 254, at 37-38.

263. See note 255 *supra*.

264. In addition to the fact that reporting and followup are seriously incomplete, certain abortion-related deaths may be mentioned, but not counted, in tabulating the mortality ratio. Consider Tietze and Lewit, *A National Medical Experience: The Joint Program for the Study of Abortion (JPSA)* in OSOFSKY & OSOFSKY, *supra* note 248, at 1, wherein it was noted that of the four deaths "directly attribut[able] to" abortion, one involved a young woman, "18 years old, who committed suicide three days after a suction procedure because of guilt feelings about having 'killed her baby,' before she could be informed that she had not been pregnant." *Id.* at 13. *But see* Tietze, Pakter and Berger, *Mortality with Legal Abortion in New York City, 1970-72*, 225 J.A.M.A. 507 (same death not counted) (hereinafter cited as Tietze & Pakter), and Rovinsky, *Abortion in New York City*, April 5-6, 1971 (paper presented to the meeting of the American Association of Planned Parenthood Physicians, President Hotel, Kansas City, Mo.), *quoted in* Brief for Certain Physicians, *supra* note 245, at 36:

> There is at least one apocryphal story circulating about an abortion death in a physician's office from air embolisation when an aspiration pump acted as a pressure rather than a suction device; following which the woman's corpse was transported back to her home state and the true cause of death there was not recorded.

265. Maternal mortality has been defined as: "[T]he death of a woman dying of any cause whatsoever while pregnant or within ninety days of termination of the pregnancy, irrespective of duration of pregnancy at the time of termination or the method by which it was terminated." REID, RYAN, AND BENIRSCHE, PRINCIPLES AND MANAGEMENT OF HUMAN REPRODUCTION 164 (1972).

tions of mortality and morbidity to the sequelae of "abortion only" and "birth only"; or (3) conspicuously disclose the relevant characteristics of the universes from which the sample figures are derived.[266] Failure to adopt one of the foregoing schemes, or another which is substantially similar, will result in skewed complication rates and abortion will appear substantially safer than if the samples were nearly identical.[267] The importance of reliable safety information should be obvious; women are risking their lives and health no matter which alternative is chosen. But such information is difficult to obtain. A study of the 28 major abortion studies conducted prior to 1965, found that in each there were deficiencies in research design, sampling techniques, and evaluation methods.[268] The same report also found that the data upon which these reports relied was inadequate for meaningful statistical analysis of either the efficacy or the adverse consequences of the procedure.[269] Identical criticisms can be levelled at contemporary abortion studies: sampling is incomplete,[270] followups are difficult,[271] and reporting is either skewed[272] or incomplete.[273] Such unreliable sta-

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266. Such characteristics would seem to include, among other things: (1) the age of the patient; (2) the duration of the pregnancy at the time of birth or abortion; (3) the state of the patients' prior physical health; (4) the method by which the abortion or birth was effected; and (5) the degree to which the patients were able to receive postpartum or post-abortal care.

267. *See, e.g.*, Tietze and Lewit, *A National Medical Experience: The Joint Program for the Study of Abortion (JPSA)*, in OSOFSKY & OSOFSKY, *supra* note 248, at 12-13, 14-20 ("A broad definition of complications . . . may produce a distorted impression of the risk. . . ."). Arguably, the contention of Tietze and Lewit would apply with equal force to a broad definition of maternal mortality. See note 266 *supra*.

Evidently, Tietze and Lewit did not harbor fears of "distorted impression(s)" when they broadly defined "pre-existing" complications to include consideration of a group of 164 women who had undergone abortion procedures although they had not been pregnant. *Id.* at 6.

268. *See* Simon and Senturia, *Psychiatric Sequelae of Abortion*, 15 ARCHIVES OF GENERAL PSYCHIATRY 378 (1966), *discussed in* Nigro, *supra* note 254, at 22, 23.

269. *Id.*

270. *See, e.g.*, Tietze & Pakter, *supra* note 248 (mortality figures gathered from recollections or second-hand knowledge of physicians specializing in obstetrics and gynecology with 54.5% response from sample).

271. *See e.g.*, Seiner and Mahoney, *Coordination of Outpatient Services from Patients Seeking Elective Abortion*, CLINICAL OBSTETRICS & GYNECOLOGY, March 1971, at 48 (noting that 53.5% of the patients at one New York hospital were lost to followup.); Pakter, *supra* note 248, at 66, 68-69 (noting that almost two-thirds of the abortions performed in New York City were on non-residents and the followup "dilemma" caused by the loss of such transient patients).

272. See note 267 *supra*.

273. *E.g.*, CAL. DEP'T OF HEALTH, THERAPEUTIC ABORTION IN CALIFORNIA: A BIENNIAL REPORT PREPARED FOR THE 1974 LEGISLATURE PURSUANT TO SECTION 25955.5 OF THE HEALTH AND SAFETY CODE (1974) (containing no information on complications); Tietze and Pakter, *supra* note 264 (failing to include one death, even though "directly attributable" to the abortion).

The California Department of Public Health does not keep sufficient records on the

tistical information should not form the basis for rigid constitutional interpretations depriving the states of the power to regulate in the public interest.[274]

Even if a fundamental right to an abortion does exist,[275] it cannot be intelligently and safetly exercised with informed consent[276] if all governmental safety standards have been eliminated. Yet, the Court stultified the access to information necessary for informed consent when it prohibited any state regulation in the first trimester.[277] The Court's treatment of the health care standards imposed by the Georgia legislature in *Doe* is a classic example of judicial preemption of a field in which rigid constitutional rules are not only inappropriate,[278] but also unwarranted in light of all the relevant medical data.

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incidence of complications to answer requests for such information. Personal Communication, Center for Health Statistics, January 29, 1975.

274. It is ironic that the effect of the Supreme Court's invalidation of first trimester health regulations was to eliminate the provisions of the New York City Health Code credited with making the allegations of safety possible. *See* Johnson, *Abortion Clinics in City Face Rising Competition*, New York Times, March 19, 1973, at 35, col. 3. That health regulations cannot constitutionally be applied to the first trimester appears to be settled in the lower federal courts. *See, e.g.*, Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973); Hodgson v. Anderson, 378 F. Supp. 1008 (D. Minn. 1974). For further discussion on this topic see text accompanying notes 284-85 *infra.*

Perhaps the most noteworthy of the consequences of the Court's decision is to make it virtually impossible for a state to require complete reporting, both for statistical, as well as for followup purposes. *See* Doe v. Rampton, *supra* at 193, 197 (making details of abortion procedurcs performed a matter of public record "chills" exercise of right to privacy); Hodgson v. Anderson, *supra* at 1018, 1026 (regulations not reasonably related to any valid state objective). Thus, in the future it will be a practical impossibility to determine whether or not the Court's conclusions as to safety are supported by objective medical fact.

275. See Part I *supra.*

276. *See generally* MINN. STAT. § 145.412(1)(4) (1973) (specifically requiring such consent after explanation of the procedures and their effect), *invalidated in* Hodgson v. Anderson, 378 F. Supp. 1008 (D. Minn. 1974) (held: unnecessary to protect the woman's health; reliance must be placed upon clinical judgment of physician).

277. See note 275, *supra.*

278. The dangers of judicial tampering with legislatively devised regulatory schemes on the basis of less-than-unanimous medical opinion were summarized in the dissenting opinion of Mr. Chief Justice Burger in Eisenstadt v. Baird, 405 U.S. 438, 470 (1972):

> The actual hazards of introducing a particular foreign substance into the human body are frequently controverted, and I cannot believe the unanimity of expert opinion is a prerequisite to a State's exercise of its police power, *no matter what the subject matter of the regulation.* Even assuming no present dispute among medical authorities, we cannot iguore that it has become commonplace for a drug or food additive to be universally regarded as harmless on one day and to be condemned as perilous the next. *It is inappropriate for this Court to overrule a legislative classification by relying on the present consensus among leading scientific authorities. The commands of the Constitution cannot fluctuate with the shifting tides of scientific opinion.*

Id. at 470 (emphasis added).

See generally, Blank, *The Delancy Clause: Technical Naiveté and Scientific Advocacy in the Formulation of Public Health Policies*, 62 CALIF. L. REV. 1084 (1975).

1. Lochner Revisited

The Court's restrictions on state regulatory power in the context of abortion are not without precedent, however. The now-discredited *Lochner*[279] series of cases evinces similar judicial second-guessing of legislative reasoning. In *Jay Burns Baking Co. v. Bryan*[280] the Court struck down a law aimed at eliminating short-weight loaves of bread. In support of its ruling the Court reasoned that "it is contrary to common experience and unreasonable to assume that there could be any danger of [consumer] deception" from such practices.[281] Clearly the law questioned in *Burns* was not invalid on its face; it merely sought to protect consumers from deception by short weight. It was held invalid only because Nebraska had failed to convince the Court that the law was necessary.

By setting up procedures by which state or federal legislative judgments are tested for constitutional validity by judicially created standards of "necessity," the Court sets itself up as a super-legislature. The Court followed this procedure in *Doe v. Bolton* when it held that Georgia had to "show more than it [did]"[282] in order to prove the necessity of its health regulations. If a woman seeking an abortion may fairly be classified as a consumer of medical services, the Court's invalidation of legislation and administrative regulations designed to protect her can only be based on the same type of judicial disagreement with legislative judgment which characterized the decision in *Jay Burns.*

2. Roadblocks to Free Access?

Although the "roadblock" argument has been made in several recent cases invalidating state regulatory schemes, the courts accepting the contention have failed to show why the health regulations unreasonably or restrictively burdened access;[283] the regulations themselves are surely not unreasonable on their face.[284] Moreover, the lower courts have adopted *Roe*'s rigidity, and have opted for an extremely

279. *E.g.*, Jay Burns v. Bryan, 264 U.S. 504 (1924); Adkins v. Children's Hospital, 261 U.S. 525 (1922); Lochner v. New York, 198 U.S. 45 (1905).

280. 264 U.S. 504 (1924).

281. *Id.* at 517.

282. *Doe*, 410 U.S. at 195.

283. *See, e.g.*, Hodgson v. Anderson, 378 F. Supp. 1008 (D. Minn. 1974).

284. *See e.g.*, 17 CAL. ADMIN. CODE §§ 400-488 (1974), Minn. Health Dep't Regs. 271-288 (1973) [hereinafter cited as Minn. Regs.], *invalidated in* Hodgson v. Anderson, 378 F. Supp. 1008, 1018 (D. Minn. 1974) (virtually identical to those of California and New York City — held: as a whole, not reasonably related to maternal health); New York City Health Code, tit. III, art. 42 (1970) [hereinafter cited as N.Y.C. Health Code].

mechanistic interpretation of its trimester approach without considering the independent validity of the ends sought to be attained by the regulations: the courts have concluded that any law not excluding the first trimester from regulation is automatically invalid.[285]

Although the lower courts are bound by both the letter and spirit of the Supreme Court's inflexible rules, the fear of reversal should not force blind judicial acceptance of the *Roe* criteria. Each case must be evaluated on its own merits. Unless judicial self-restraint is employed, a set of judicially devised rules which are not only unsupported by basic medical fact but which may also be constitutionally infirm as overbroad *judicial* restrictions of legitimate state power to protect the health of preguant women will have been erected. These rules may be virtually impervious to modification.

It is true that legislative enactments which seek to regulate constitutionally protected areas must be narrowly drawn in order to effectuate a legitimate state or federal purpose. But the protection of maternal health is clearly such a legitimate state or federal legislative function.[286]

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285. Hodgson v. Anderson, 378 F. Supp. 1008, 1018 (D. Minn. 1974):

> The regulations are completely without constitutional foundation insofar as they may be applied to facilities involved in administering to first trimester abortions. The words of *Roe* are unequivocal—"free of interference by the State". This must mean all interference of whatever form . . . except . . . in the context of its right to generally regulate professional [medical] standards.

Examples of some of the regulations invalidated on the basis of the *Roe* opinion's conclusion that early abortion is now "relatively safe" are instructive. The state may not, for example, specifically require that abortion clinics performing first trimester abortions possess: (1) laboratory facilities capable of performing tests to determine blood groupings and Rh types. *E.g.*, Minn. Regs. 274(5) (aa); N.Y.C. Health Code, § 42.19(a); (2) emergency transportation arrangements with neighboring hospitals, *e.g.*, Minn. Regs. 274(7); (3) minimum nursing personnel standards, *e.g.*, Minn. Regs. 276(c), N.Y.C. Health Code, § 42.27; or (4) detailed reporting and record keeping practices, *e.g.*, Minn. Regs. 281-282, N.Y.C. Health Code, §§ 204.03, 204.05.

286. The "fundamental" nature of the asserted right to procure an abortion and the existence of a corresponding fundamental right of a physician to perform it have been recognized. *See Roe* at 162-64; *Doe* at 197. However, it does not follow from the application of a higher standard of review that the Court's restrictions upon state power to regulate the procedures during the first trimester were necessary to protect these rights. Past rulings of the Court have left little doubt that the government may impose incidental regulations upon fundamental constitutional rights by restricting their nonfundamental elements if the regulations: (1) are within the power of the government; (2) further a substantial or important governmental interest; (3) are unrelated to the exercise of the constitutional right; and (4) are no broader than necessary to obtain the desired result. *Accord*, O'Brien v. United States, 391 U.S. 367 (1968). Aside from the committee, GA. CODE ANN. § 22-1202(5) (1972), and residency, *id.* § 22-1202(1) (1972), requirements, the regulations involved in *Doe* did not, on their face, run afoul of the foregoing criteria and their application under the access rules of *Roe* had yet to be observed.

This reasoning applies with equal, if not greater, force to the pronouncements of the judiciary. It is incumbent upon the judicial branch, especially at the appellate level, to tailor the relief granted in a particular case to the specific evils to be excised from the legislative program in question. The very real medical risks attendant upon abortions, including those performed in the first trimester, more than suffice to support a comprehensive scheme of regulations aimed at providing the maximum amount of protection for those who seek to exercise the prerogatives granted to them by the Court.

If the government has the power to protect a draft card during an exercise of free speech,[287] it also should have the power to protect a pregnant woman who seeks an abortion, regardless of the duration of the pregnancy. The relevant question in this area is not whether an early abortion is "safe," but rather, in the words of Justice Holmes, whether or not the prohibition or regulation in question imposes an "unreasonable burden" upon the exercise of the protected activity.[288] Even assuming that first trimester abortions are less dangerous than those performed later in pregnancy, regulations to ensure the safety of the early procedures are not therefore invalid *per se*. Small wonder that Mr. Justice Rehnquist was prompted to comment in dissent:

> Unless I misapprehend the consequences of this transplanting of the "compelling state interest test", the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.[289]

III

ROE AND DOE: AREAS OF UNCERTAINTY

In the heat of the current controversy over the immediate impact of *Roe v. Wade* and *Doe v. Bolton*, little has been written concerning their implications in the future development of two areas of the law: (1) the rights of the medical profession as enunciated by the Court in *Roe* and *Doe*; and (2) the rights of the unborn when they do not conflict with those of the mother.

A. The Rights of the Medical Profession

An intriguing facet of Mr. Justice Blackmun's opinions for the Court in *Roe v. Wade* and *Doe v. Bolton* are his passing references to the physician's right to practice the profession with a minimum of

287. O'Brien v. United States, 391 U.S. 367 (1968) (draft card burning).

288. Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 513 (1924) (Holmes, J., dissenting).

289. *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting).

governmental interference. The statement can be viewed in either of two ways: first, the asserted right of the physician to prescribe and perform medical services, including abortions, is an adjunct of the woman's right to seek and to procure medical advice and treatment or, second, the right is personal to the physician. If viewed as a necessary consequence of what is, in the Court's opinion, a fundamental right of women, the right of the physician to administer such services rests upon the same assumptions which underlie the asserted rights of the woman. The right of the physician would then be contingent upon the validity of the right from which it is derived. If, on the other hand, the right of the physician to practice according to his professional judgment is *sui generis*, the Court has broken new ground.

Since the Court merely mentions the "right to practice" in the course of its opinions in *Roe* and *Doe*, without further comment or explanation,[290] one is left floundering in an attempt to divine either its source or parameters. In a rather straightforward statement of its position, however, the Court recognized the right as follows:

> [*Roe v. Wade*] vindicates the right of the physician to administer medical treatment according to his professional judgment up to the point where important state interests provide *compelling* justifications for intervention.[291]

Setting aside the question of where in the constitution such a right might be found (e.g., fourteenth amendment "liberty," privacy, etc.), we are told that any infringement of the right requires a "compelling" state justification. This holding would appear to be based upon the notion that this "right" to practice according to one's professional judgment must then be "so rooted in the traditions and conscience of our people as to be ranked as fundamental"—in short, a constitutional right. But what are the implications of such a right?

As the position of the medical profession throughout the recent controversy over abortion shows,[292] the well-intentioned physician may sometimes find it difficult to square the perceived needs of patients with the letter of the law.[293] As a result, there develops a clamor for

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290. *Roe*, 410 U.S. at 165-66; *Doe*, 410 U.S. at 199.

291. *Roe*, 410 U.S. at 165-66 (emphasis supplied).

292. *Roe*, 410 U.S. at 143 (discussing the position of the American Medical Association). *But see* House of Delegates, Louisiana State Medical Soc'y, Res. No. 600—Abortion, adopted at Monroe, La., May 1973:

> *Resolved*, That the Louisiana State Medical Society repeats its conviction that the deliberate interruption of pregnancy at any stage, except for the purpose of saving the life of the mother, is reprehensible and in violation of the ethical principles which must govern the conduct of members of our profession.

293. This is so notwithstanding the fact that the medical profession itself was responsible for a great deal of the pressure leading to the adoption of restrictive statutory schemes concerning abortiou. Until 1970, the traditional position of the American

change in an attempt to make the law responsive to these needs.[294]

In the case of abortion, a successful campaign was waged by members of the medical profession and others to eliminate the legal impediments to what many of them considered to be a necessary and desirable medical procedure. When legislative action to change the laws was slow in coming, those favoring change found the courts a willing vehicle through which it could be accomplished.[295]

The same legal and ethical dilemmas which face the physician in regard to abortion also face the medical profession in such areas as euthanasia, selective abortion[296] and fetal experimentation.[297] The Su-

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Medical Association had been that abortion should be prohibited since it involves the taking of human life. *See* 12 TRANS. A.M.A. 73-77 (1859) (unanimous resolution of the Twelfth Annual Meeting condemning abortion as the "unwarrantable destruction of human life."); Quimby, *Introduction to Medical Jurisprudence*, 9 J.A.M.A. 164 (1887); Markham, *Foeticide and Its Prevention*, 11 J.A.M.A. 805 (1888). *See generally* AMERICAN MEDICAL ASSOCIATION, DIGEST OF OFFICIAL ACTIONS 66 (Blasingame ed. 1959) (listing the repeated attacks of the A.M.A. on abortion).

294. The medical profession has changed its views concerning the advisability of legalized abortion. *See, e.g.*, Proceedings of the A.M.A. House of Delegates 40-51 (June 1970) discussed in *Roe*, 410 U.S. at 142-43; California Medical Assn., Where Wc Stand 1 (rev. ed. 1974) (position paper) (abortion is a medical procedure and should be a matter between a woman and her physician). However, it has never repudiated its position that abortion is the taking of human life. CALIFORNIA MEDICINE, *supra* note 24, at 68 (expressly recognizing abortion as the taking of human life).

295. At first, abortion statutes were challenged on grounds of vagueness, a theory consistent with the belief that wider access to abortion is both necessary and socially desirable. Thus, a plausible argument could be made that a statute allowing abortion only when "necessary" to preseve the life or health of the mother is unconstituionally vague when there is no set definition of terms sueh as "necessity," "life," or "health." Inevitably, some courts found the argument persuasive and some laws were struck down. *E.g.*, People v. Belous, 71 Cal. 2d 934, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970). Others were interpreted broadly enough to permit abortions for nearly any reason. *E.g.*, United States v. Vuitch, 402 U.S. 62 (1972) (District of Columbia abortion statute). Most such efforts, however, were unsuccessful. *E.g.*, Rosen v. Louisiana State Board of Medical Examiners, 318 F. Supp. 1217 (E.D. La., 1970), *vacated mem.*, 412 U.S. 902 (1974); Stienberg v. Brown, 321 F. Supp. 741 (N.D. Ohio, 1970); Kudish v. Board of Registration of Medicine, 356 Mass. 98, 248 N.E.2d 264 (1969); State v. Moretti, 52 N.J. 182, 244 A.2d 499 (1969), *cert. denied*, 393 U.S. 952 (1969).

The courts rejecting the vagueness argument recognized it as little more than a narrow means by which to avoid forcing a stand on a broader and infmitely more sensitive issue. *See* Stienberg v. Brown, 321 F. Supp. 741, 744-45 (N.D. Ohio 1970) (by implication). It was not until the parties began to assert the substantive interests of the litigants, both doctor and patient, that they were successful in having the laws invalidated. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

296. The term "selective abortion" refers to abortion for purely eugenic reasons, ranging from the desire to eliminate certain physical traits brought about by faulty gene structures (e.g., hemophilia), to the avoidance of producing offspring with given sex or racial characteristics.

297. Among these are: (1) the legal definition of death, (2) euthanasia and the related concept of "Death with Dignity;" (3) genetic selection and experimentation; and (4) human experimentation (prenatal or postnatal).

preme Court's holdings in *Roe* and *Doe* regarding a physician's rights, if taken at face value, support the conclusion that the physician's right to practice is *sui generis* and "fundamental." This was the position taken in the briefs.[298] Thus, there is no meaningful guidance as to the manner in which these dilemmas are to be resolved in situations where a physician, either as plaintiff or defendant, asserts that the interests of his patient, society as a whole, or his professional judgment require judicial modification of the law. Since the Court required that the state's interest be "compelling" before it may interfere with the physician's professional judgment, it does not seem unrealistic to predict that, given the right series of facts, just such a judicial modification of the law might occur.[299]

The opinion of the California Medical Association (C.M.A.) lends credence to such a view by its frank recognition of the issues in-

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In addition to these areas, one might foresee legal problems arising from homicides caused by abortion, where a physician invokes the defense that his or her actions were consistent with good medical practice and that they were in the interest of the woman procuring the abortion. To what extent is the "right to practice" infringed by state protection of the unborn? The Supreme Court was appareutly content to leave the details of the abortion procedure to the "best clinical judgment" of the attending physician. *See Doe*, 410 U.S. at 199. The lower courts have apparently fouud this deference to be conclusive. *See* Hodgson v. Anderson, 378 F. Supp. 1008, 1017 (D. Minn. 1974) (the state must leave the determination of "viability" to the best clinical judgment of the physician). *See generally* Abele v. Markle, 351 F. Supp. 224 (D. Conn. 1973) (defining a "successful" abortion as one in which fetal death is assured).

Although a thorough discussion of these topics is beyond the scope of this work, several will be mentioned in passing. *See generally* Louisell, *Biology, Law and Reason: Man as Self-Creator*, 16 AM. J. JURISPRUDENCE 1 (1971); Louisell, *Euthanasia and Biathanasia: On Dying and Killing*, 22 CATH. U.L. REV. 723 (1973); Williams, *Our Role in the Generation, Modification, and Termination of Life*, THE ARCHIVES OF INTERNAL MEDICINE, August 1969, at 215; CALIFORNIA MEDICINE, *supra* note 24, at 68 (editorial comment). In this regard see also Fletcher, *The Ethics of Abortion*, 14 CLINICAL OBSTETRICS & GYNECOLOGY 1124, 1128, 1129 (1971):

> It is not life as such we are committed to, but *human* life [in the evaluational rather than the biological context]. We reject the classical sanctity-of-life ethics aud embrace the quality-of-life ethics. We are personists not humanists.
>
> . . .
>
> [W]e 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. (italics in original).

298. Brief for The American College of Obstetricians and Gynecologists as Amicus Curiae in support of Appellants, Doe v. Bolton, 410 U.S. 179 (1973).

299. A judicial modification of the law is not limited to holding the governing statute invalid. By refusiug to punish a convicted defendant with anything but the most minor sentence, a court effectively destroys the law's force as applied to a given situation. *See, e.g.*, NEWSWEEK, March 3, 1975, at 23 (physician convicted of postabortal manslaughter, maximum sentence 20 years—sentence imposed: one year probation); Lambert, *Mercy Killings*, San Francisco Chronicle, March 31, 1975, at 12, col. 5 (South African physician convicted of murder after "mercy killing," one year sentence suspended to 56 seconds).

volved.[300] While agreeing that the "traditional Western ethic has always placed a great emphasis on the intrinsic worth and equal value of every human life,"[301] an editorial in the C.M.A.'s publication, *California Medicine*, suggests a "new ethic" which would place a relative value upon the life of the individual and suggests further that:

> Medicine's role with respect to changing attitudes toward abortion will be a prototype of what is to occur . . . . One may anticipate further developments of these roles as problems of birth control and birth selection are extended, inevitably to death selection and death control, whether by the individual or by society, and further public and professional determination of when and when not to use scarce resources.[302]

The stakes in an issue such as "death selection" are immense, and their fair apportionment should only come about through public debate unclouded by the claims of any one profession to vague rights or immunities based upon their best judgment or professional "expertise." Inevitably, difficult choices will have to be made, but extreme care must be taken lest those choices be made without prior examination of their consequences. Such has been the experience with abortion, for the decisions in the abortion cases do little to resolve the many competing interests involved.

B. The Rights of the Unborn

The post-*Roe* controversy over abortion differs markedly from anything previously experienced on the issue because of the Court's trimester-based approach to the resolution of competing interests. The biological artificiality of the trimester[303] has resulted in substantial controversy in those cases where the biological reality of prenatal life comes into conflict with its legal status.

In its attempt to avoid deciding the point at which life begins, the Court, in effect, held that the rights of the person do not attach until live birth.[304] Thus, in terms of fetal interests, the point of viability is virtually irrelevant; the unborn have no rights. During the post-viability period the state may seek to vindicate only its own interest in their preservation, but it is not required to do so, and if it does its power to restrict the availability of legal abortion is severely limited by this broadly worded "life and health exception."

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300. CALIFORNIA MEDICINE, *supra* note 24, at 68.

301. *Id.*

302. *Id.* at 69. One need not reflect on this quote for any great length of time to appreciate the significance of the term "death selection," especially when the "selecting" is to be done by "society."

303. See text accompanying note 26 *supra*.

304. *See Roe*, 410 U.S. at 162-63.

As recent developments have shown,[305] the trimester approach of the Court gives no guidance as to the steps a state may take to protect the post-viable unborn. The recent conviction of a physician for homicide committed during a late-gestation abortion[306] requires a careful examination of a fundamental, but little discussed, question: what is the purpose of an abortion?[307] Is it to destroy the unborn, or merely to terminate an unwanted pregnancy by physically separating mother from child? The latter purpose appears the preferable choice, but some courts apparently disagree.[308] These questions taken on new relevance as the states attempt to supplant the protection once offered the unborn by their abortion statutes, with similar protection under the law of homicide.[309]

Much of the difficulty, it appears, lies in the legal classifications which appear to have resulted from the Court's opinion in *Roe*. When do the unborn become persons? The answer of *Roe* appears to be at the point of live birth. The answers to the many questions which result from this formulation, however, are far from clear.

1. The Concept of Viability

The inquiry begins with the concept of "viability." Making a judgment on the medical evidence presented in the briefs,[310] the Court

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305. *See, e.g.*, Hodgson v. Anderson, 378 F. Supp. 1008 (D. Minn. 1974).

306. Commonwealth v. Edelin, Crim. No. 81823 (Super. Ct. Suffolk County, Mass., filed Feb. 15, 1975), *on appeal*, No. 81823 (Ct. App. Suffolk County, Mass., filed July 1, 1975).

307. Abortion, both spontaneous and induced, is defined as follows:

> Abortion is the termination of a pregnancy at any time before the fetus has attained a stage of viability. Interpretations of the word "viability" have varied between fetal weights of 400g (about 20 weeks of gestation) and 1,000g (about 28 weeks of gestation) . . . . Although our smallest surviving infant weighed 540g at birth, survival even at 700 or 800g is unusual.

L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS 493 (14th ed. 1971). Since the 1971 edition of the foregoing source, an infant weighing less than 400 grams has survived. TIME, March 31, 1975, at 82.

308. *See* Abele v. Markle, 351 F. Supp. 224 (D. Conn. 1973) (defining a "successful" abortion as one in which the fetus is destroyed).

309. *See, e.g.*, Commonwealth v. Edelin, Crim. No. 81823 (Super. Ct., Suffolk County, Mass., filed Feb. 15, 1975, *on appeal*, No. 81823 (Ct. App., Suffolk County, Mass., filed July 1, 1975). Thus, the law relating to abortion has come full circle from its early common law beginnings. The report of The Twinslayer's Case, Anonymous, Y.B. Mich. 1 Edw. 3, f. 23 pl.18 (1327) (text accompanying note 79 *supra*), though not a precedent, reveals that the writ of homicide was employed to summon one charged with killing an unborn child. See note 82 *supra*. This fact is not without relevance to present day adjudication regarding the steps a state may take to protect the unborn in the post-viability period. Clearly, the difficulty-of-proof problem which beset the early common law is of little relevance to current medical and legal standards.

310. *See* Brief for American College of Obstetrics and Gynecology as Amicus Curiae, at 7, Roe v. Wade, 410 U.S. 113 (1973); Brief of Certain Physicians, Professors

decided that viability usually occurs at 28 weeks, but may even occur as early as 24 weeks.[311] Indeed, relevant medical data amply support the Court's position, but only if viability is defined as the point beyond which survival after premature termination of gestation becomes highly likely. The concept of viability is not a static one. It differs for each individual and does not reflect a particularized state of being. Rather, it reflects the ability of an organism to cope with its environment and to survive in a hostile atmosphere with a minimal amount of outside support. To place the concept in an adult setting, an individual stranded without water or nourishment in the middle of a desert may fairly be termed "potentially" viable[312] up until the point at which "actual" viability is proved by survival.[313]

In the case of the unborn, the environmental conditions are similarly adverse if gestation is terminated prematurely. The degree of outside support necessary to preserve the life of a premature infant varies inversely with the length of gestation prior to birth. As medical science makes further advances in the specialities of fetology, embryology, and perinatology the point of "viability" will continually be readjusted downard until the point at which the development of an artificial placenta would spell its coincidence with conception.

If the "compelling" point at which the state may exert its interests in the protection of the lives of the unborn is placed at viability, that point moves closer to the time of conception with each development in the treatment of prenatal and neonatal problems. Already the Court's guidelines are obsolete; viability has occurred even prior to 20 weeks in an infant weighing approximately 395 grams.[314] Although such occurrences are rare, they will surely increase as science advances. Given all this, is the Court's rigid definition of viability to be given a frozen legal meaning separate and distinct from its commonly accepted and continually changing biological meaning?[315] If so, what would

and Fellows of the American College of Obstetrics and Gynecology as Amicus Curiae, at 6-24, *id.*

311. *Roe*, 410 U.S. at 160.

312. The Court itself defined "viable" as "potentially able to live outside of the mother's womb, albeit with artificial aid." *Id.*

313. The term "potential" is used here to reflect the existence of a chance that viability may or may not actually be achieved. Identical terminology was employed by the Minnesota legislature when it set the point of "potential" viability at approximately 20 weeks of gestation. *See* MINN. STAT. § 145.411(2) (1973), *ruled unconstitutional*, Hodgson v. Anderson, 378 F. Supp. 1008 (D. Minn. 1974).

314. *See* note 307 *supra*.

315. In Hodgson v. Anderson, 378 F. Supp. 1008 (1974), the Court adopted a rigid trimester approach, construing the Supreme Court's statements on viability as absolute constitutional lines of demarcation limiting the exercise of state power to protect the unborn. Thus, 24 weeks was set as the absolute lower limit of viability, the court stating unequivocally that it does not occur prior to this time.

support such a distinction?[316]

2. *Legal Terminology and the Unborn*

Even more difficult than the questions surrounding the viability concept is the legal weight which seems to have attached to the varied terminology used to describe the unborn. At what stage does a fetus cease to be a fetus? When does it become a person? Of course, under *Roe* the obvious answer is: when it is born. But, when does birth occur? Is birth to be defined as physical separation of the fetus from its mother, or redefined to be the point at which a pregnancy is terminated by delivery of a "wanted" child? What then of "unwanted" pregnancies? Would the termination of such a pregnancy which results in a live infant's being separated from its mother produce a "person" or merely a live fetus? Is "fetus" a term which has taken on a legal significance of its own in the wake of *Roe*? In short, is the personhood of the infant which survives an abortion to be determined on the basis of its status as "wanted" or "unwanted"?[317]

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316. The only rational basis which could be put forward in this area is that a flexible standard interferes with the Court's grant of the right to procure an abortion. This contention is easily set at rest, however, once the purpose of the abortion process itself is identified. If the purpose of an abortion is always to kill the fetus, state intervention in the process on behalf of the unborn in the period *prior* to viability would be unconstitutional under *Roe*. If this be the case, then *Roe* must be taken to require that viability be defined narrowly in order to vindicate what would then have to be termed the right to destroy one's unborn offspring. *Cf.* Abele v. Markle, 351 F. Supp. 224 (D. Conn. 1972).

The better view, however, would be to define abortion as the physical separation of mother and child. In such a case the woman's interests in termination of an unwanted pregnancy would be vindicated without interfering with the interests of her unborn offspring. Under such a policy, any legislative or judicial rule hampering the effectuation of the latter set of interests would not be related to any valid legislative or judicial policy. *See e.g.*, MINN. STAT. § 145.412(3) (3) (1974) (requiring that, to the extent consistent with good medical practice, abortions after 20 weeks must be performed in a manner reasonably assuring live birth and survival of the fetus), *ruled unconstitutional*, Hodgson v. Anderson, 378 F. Supp. 1008, 1016 (D. Minn. 1974) (not reasonably related to maternal health and unnecessary in light of professional medical standards).

317. The concept of "unwantedness," although considered a crucial indication for legal abortion, is not supported by direct evidence showing it to be a real problem for the children involved; being unwanted does not lead inexorably to adverse reactions. Pohlman, *Unwanted Conception: Research on Undesirable Consequences*. 14 EUGENICS QUARTERLY 143 (1967); Forssman & Thuwe, *One Hundred and twenty Children Born After Therapeutic Abortion Refused: Their Mental and Social Adjustment Up to the Age of 21*, 42 ACTA PSYCHIATRICA SCANDINAVICA 71 (1966); Jackson, *The Question of Family Homeostasis*, 31 PSYCHIATRIC Q. SUPP. 79 (1957). The foregoing sources are discussed in Nigro, *A Scientific Critique of Abortion as a Medical Procedure*, PSYCHIATRIC ANNALS, September 1972, at 22. *See also* David & Friedman, *Psychosocial Research in Abortion: A Transnational Perspective*, in OSOFSKY & OSOFSKY, *supra* note 248, at 310, 316-18.

The problems caused a woman by an unwanted pregnancy or the birth of an

The questions raised in the preceding paragraph represent real issues as more becomes known of abortifacient techniques and their relative safety. Would it be permissible for a state to require that certain abortifacient techniques be employed if they offer a substantially greater chance of survival to the unborn? The answer under *Roe* appears to be in the affirmative, as long as such techniques do not offer greater hazards to the life or health of the mother.[318] But what if the techniques which almost always assure fetal death are also extremely dangerous to the mother?[319] May a state validly forbid their use?[320] Even if the result is an increase in the number of "live borns"?[321] Perhaps one approach to these questions would be simply to assure that all abortions are performed during the very early gestational period. But a governmental policy embodying such restrictions is precluded by the Court's determination that outright prohibition of abortions after the first trimester is unconstitutional. Thus, this approach does not offer any guidance where the late or mid-trimester abortion is performed. Neither does it offer any solution to the problems which must be faced when medical advances lower the point of viability to the extent that

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"unwanted" child are not immune to treatment by means other than abortion. Nigro, *supra* note 254 at 37-38 (suggesting psychosocial help as an alternative).

318. The writer's suggestions as to answers to these questions may be identified by reference to Part V.

319. Two examples of such methods are abortion by use of the "super coil," a series of plastic strips which are inserted into the uterine cavity in order to induce the expulsion of the fetus; and saline-amniotic fluid exchange, a process which involves removing a portion of the amniotic fluid surrounding the fetus and replacing it with hypertonic saline solution. The saline is ingested by the fetus and causes its death by poisoning and dehydration; it is then delivered in normal fashion. The total complication rates for the two procedures were reported as follows: Super Coil—60.0%; Saline—27.9%. HEW CENTER FOR DISEASE CONTROL, *Morbidity and Mortality Weekly Rep.* (22) 18: 159-60 (May 5, 1973), in ABORTION SURVEILLANCE: ANNUAL SUMMARY 1972, Table 20 (April 1974).

320. Saline abortions are no longer performed in Japan due to the high number of fatalities associated with this method. FAMILY PLANNING FEDERATION OF JAPAN, HARMFUL EFFECTS OF INDUCED ABORTION 4 (1966) (translated from the Japanese). A statute mandating abandonment of this practice in the United States would not preclude the abortion, merely the destruction of the child. The Court did not hold that the state has *no* interest in the preservation of the unborn even if they are not "viable." It merely held that the state's interest in protecting the fetus before viability is not sufficiently "compelling" to prohibit a woman's choice to terminate her pregnancy. Some courts have apparently misconstrued the extent of the Court's holding, for they have invalidated just such a law. *See, e.g.*, Hodgson v. Anderson, 378 F. Supp. 1008 (D. Minn. 1974). *See also* Hallmark Clinic v. North Carolina Dep't of Human Resources, 380 F. Supp. 1153 (E.D.N.C. 1974) (three-judge court).

321. A common complaint about the growing use of prostaglandins, agents which induce contraction of the uterus, is that they result in an increase in the number of live born infants. This fact is considered by some to be a "significant clinical disadvantage" over the use of saline, which nearly always results in fetal death. *See* Guttmacher, *Medical Aspects of the Abortion Experience*, in OSOFSKY & OSOFSKY, *supra* note 248, at 535, 540-41.

the trimester formulation collapses entirely. Again, using current techniques as a referent, the problems caused by the Court's overly rigid approach to the question might be avoided by reference to the "health" exception to the state's interests after "viability,"[322] but only to the extent to which science is unable to perfect a "relatively safe" method of early termination which also assures the survival of the unborn child.

3. *Experimentation: A Related Issue*

The same problems arise in the area of fetal experimentation, a subject somewhat beyond the scope of this Comment. The related problems of abortion and experimentation will only be mentioned in order to demonstrate their identity. The difficulties in both areas arise from the legal status of the unborn, which may be alive both before and after it has been removed from its mother. Regardless of whether the individual becomes a "person" immediately upon separation from the mother,[323] it seems difficult to consider post-termination experimentation upon living infants, at least where not directly beneficial to the individual involved, as anything but a gross violation of individual rights. Even condemned criminals are not forced to undergo life-jeopardizing experiments without their consent: the very young are entitled to equal solicitude. The consent of the mother in such a case could hardly be considered appropriate; since her desire is to terminate an unwanted pregnancy, her concern is obviously not directed to the welfare of the child.[324]

Pre-termination experimentation presents different problems. *Roe v. Wade* supplied no answers for situations where the interests of the unborn are set against those of a third party, or of society as a whole; *Roe* and *Doe* addressed only the conflict between maternal and state interests in the preservation of the unborn. It can hardly be alleged that the state would have no rational basis for rules prohibiting all such experimentation where not beneficial to the subject; the subjects are unquestionably human beings[325] and are unquestionably

322. This assumes, of course, that extraction insuring survival would be more dangerous to the mother's health than other methods which might be utilized.

323. Physical separation has historically been defined as "birth." As long as the individual is alive at birth, it is a person. *Roe* does not hold to the contrary; it is wholly silent on the subject. Were the status of "person" to depend upon ability to survive (i.e. "viability"), *Roe* would indeed have implications far beyond abortion; human inability to survive because of physiological problems is not limited to the time immediately after birth.

324. *Cf.* Prince v. Massachusetts, 321 U.S. 158 (1944); Raleigh Fitkin-Paul Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964); In the Interest of Kenneth Clark, 185 N.E.2d 128, 131 (Ohio Common Pleas 1962).

325. Any member of the species Homo sapiens is biologically a human being, the

alive;[326] *Roe* merely denied them the legal status of "person." A judicial interposition of a compelling state interest requirement to justify limits on pre-termination experimentation would mean that the courts are willing to extend the basic rationale of *Roe* and *Doe* as it relates to professional medical interests to an explicit recognition of a constitutional right to practice medicine which would include the prerogative of human experimentation, wholly independent of the woman's interest in procuring an abortion. The ramifications of such a policy are discussed more fully in Part IV.

Thus, we have seen that the decisions in the abortion cases have done little, if anything, to offer a meaningful solution to the central issue of the abortion controversy: the rights of the unborn. In the following sections of this work, several proposals for reform will be identified and discussed, with particular emphasis upon some of the considerations which should influence any decisions on their merits.

IV

CURRENT STATUS OF THE ABORTION CONTROVERSY

One may assume, and justifiably so, that the decisions in the abortions cases have done little, if anything, to put an end to the abortion controversy. Although there are some differences in their reasoning, most opponents of the Supreme Court's decision agree on one thing—the Court went too far.[327] The exact nature of one's disagreement

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unborn are Homo sapiens because they have two human parents. Any other definition of "human" reflects subjective evaluation rather than biological fact.

326. As an organism, the unborn individual is alive; an organism can only be alive or dead, there is no mediate state. *See* note 24 *supra*. By use of the term "potential life," one does not refer to a biological state of being, but rather to a perception of "life" as something more than merely being "alive."

327. *E.g.*, Byrne, *The Supreme Court on Abortion: An American Tragedy*, 41 FORDHAM L. REV. 803 (1973); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) [hereinafter cited as Ely]; Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, [hereinafter cited as Epstein]. Professor Ely summed up his dissatisfaction in the following manner: "[*Roe v. Wade* is] a very bad decision. . . . It is bad because it is bad constitutional law, or rather becausue it is *not* constitutional law and gives almost no sense of an obligation to try to be." Ely at 947 [emphasis in original]. Professor Epstein was even more emphatic:

> Mr. Justice Blackmun cannot take comfort in the bland declaration that the Court "need not resolve the difficult question of when life begins," and still invoke a notion of privacy to decide the case. It may be well to note that philosophers, theologians, and physicians all have not reached agreement on the matter, but they do not have, nor do they pretend to have, the power to decide the question for us all. The Court admits to their ignorance. It is too much to ask the Court to share their impotence? . . .
>
> *Roe v. Wade* is symptomatic of the analytical poverty possible in constitutional litigation. . . . The foes of abortion may not have sufficient strength to overturn *Roe v. Wade* by constitutional amendment. But if they fail, it will not be because they are persuaded by anything the Court said.

with the Court's conclusions depends, of course, upon the perspective from which one approaches the decisions. In the pages which follow, some of the major proposals for change will be identified and discussed in some detail. Although such treatment is by no means exhaustive of the range of views on the subject, it is hoped that, at the very least, these proposals will not remain shrouded in a veil of emotionalism unconducive to public consideration of their merits.

A. Public Opinion as a Motivating Factor for Change

For a year after the decisions in *Roe v. Wade* and *Doe v. Bolton* were handed down the question of legal abortion appeared to be one of settled policy—or at least that was the hope.[328] Unlike many Supreme Court decisions on controversial issues, however, it was not immediately apparent that the decisions in the abortion cases would be accepted. To be expected were the myriad articles appearing in both professional and popular journals reacting to the unprecedented and far-reaching decision of the Court. Less foreseeable, but not totally unanticipated, were the "grass roots" reactions of both pro- and anti-abortion groups.[329] It is this "grass roots" movement, especially on the part of the anti-abortion forces, which has led to the ever-increasing movement in Congress as well as in the state legislatures to force the issue into the public forum once again.

For pro-abortion forces, the development of widespread public acceptance of the concept of legalized abortion was crucial if the newly defined constitutional right to procure an abortion were to remain secure. As a result, numerous constitutional challenges were mounted against state abortion laws, abortion clinics were set up, and pressure was applied to state and local medical and hospital associations to assure the availability of the newly legalized service.[330]

Similarly, anti-abortion groups saw the abortion cases as calls to action. It took only eight days from the date the decisions were handed

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Epstein at 176, 184, 185.

328. *See, e.g.*, Sanders, *Enemies of Abortion* (HARPER'S MAGAZINE, March 1974, at 26; Means, *Slow Action on Abortion*, San Francisco Examiner, March 14, 1974, at 38, col. 7-8. *See also* Daily Californian, April 2, 1974, at 1, col. 1 (U.C. Berkeley); NEWSWEEK, February 4, 1974, at 57.

329. For a discussion of the varions tactics employed by organizations on both sides of the issue see Otten, *Highly Combustible*, Wall Street Journal, October 17, 1974, at 18, col. 3 (Pacific Coast ed.); Otten, *Abortion*, Wall Street Journal, March 20, 1975, at 22, col. 3 (Eastern ed.).

330. *See, e.g.*, Doe v. Hale Hospital, 500 F.2d 144 (1st Cir. 1974); Nyberg v. City of Virginia (Minn.), 495 F.2d 1342 (8th Cir. 1974); Word v. Poelker, 495 F.2d 1349 (8th Cir. 1974); Doe v. Turner, 361 F. Supp. 1288 (S.D. Iowa 1924); Montalvo v. Colon, 377 F. Supp. 1332 (D. Puerto Rico 1974).

down for the first proposed Human Life amendment to be introduced in the House of Representatives,[331] while on the state and local levels further actions were planned and carried out, both in the legislatures and in public forums.[332] An example of such action was pressure exerted by the many "Right to Life" and other anti-abortion groups upon state legislators for the most restrictive laws possible under the Supreme Court's ruling.[333] Of major concern in this area were the numerous "freedom of conscience" statutes designed to assure the right of an individual or institution to refuse to participate in abortions,[334] a right perceived by many pro-life advocates to be endangered by the demands of those desiring immediate access to the service.[335]

One of the most notable developments in the growing movement to restrict the sweep of the Court's decision was the attempt by Rhode Island to circumvent the ruling of the Supreme Court by statutory enactment.[336] Although the statute was quickly overturned as inconsistent with *Roe v. Wade*,[337] the statute was intended to accomplish two goals: (1) to define, as a matter of legislative policy, the point at which human life "begins," and (2) to include the unborn offspring of human beings in the class of "persons" referred to in the fourteenth amendment.[338] The import of the attempt was clear, for it reflected in con-

331. H.R.J. RES. 261, 93d Cong., 1st Sess. (1973), *reintroduced as* H.R.J. RES. 187, 94th Cong., 1st Sess. (1975).

332. *See* Otten, *Highly Combustible*, Wall Street Journal, October 17, 1974, at 18, col. 3 (Pacific Coast ed.).

333. *See, e.g.*, OHIO REV. CODE §§ 2701.15, 2919.14, 3701.431 (1974); UTAH CODE §§ 76-7-301 to 76-7-320 (1973).

334. *See, e.g.*, 42 U.S.C.A. § 300a-7 (1973); CAL. HEALTH & SAFETY CODE § 25955 (West Supp. 1974); ILL. REV. STAT. ch. 91 § 201 (1974); LA. REV. STAT., §§ 40: 1299.31-1299.34 (1974); OHIO REV. CODE §§ 4731.91, 5101.55 (1973); STAT. OF NEV. ch. 449.191, 632.475 (1973); UTAH CODE ANN. §§ 76-7-30, 76-7-314 (1973).

335. *See, e.g.*, Siedell, *The Hospital and Abortion*, 79 CASE & COM. 24 (1974). *See also* Taylor v. St. Vincent's Hospital, Civ. No. 1090 (D. Mont., Oct. 31, 1972) (injunction against hospital policy), *injunction lifted*, 369 F. Supp. 948 (1973). *See generally* H.R. REP. No. 227, 93rd Cong., 1st Sess. (1973) (discussing the rationale of 42 U.S.C.A. § 300a-7, the federal "freedom of conscience" statute and mentioning *Taylor* as a motivating force for its enactment).

336. R.I. GEN. LAWS §§ 11-3-1 to 11-3-5 (Supp. 1973).

337. Doe v. Israel, 358 F. Supp. 1193 (D.R.I. 1973), *aff'd*, 482 F.2d 156 (1st Cir. 1973), *cert. denied*, 416 U.S. 993 (1974). The rationale in Doe v. Israel is quite interesting given its reliance on the lack of state legislative power over the fourteenth amendment. One might only speculate as to the result of a case involving a *congressional* definition of the word "person" under section 5 of the fourteenth amendment.

338. In relevant part the statute provided as follows:

> Whereas, The State of Rhode Island, in fulfillment of its legitimate function of protecting the well-being of all persons within its borders, hereby declares that in furtherance of the public policy of said state, human life and, in fact, a person within the language of the Fourteenth Amendment to the Constitution of the United States, commences to exist at the instant of conception; now therefore, it is enacted by the General Assembly as follows:
>
> . . . .

cise terms the issues presented for debate in the proposals for a Life-Protective amendment. It is understandable that the statute was unable to attain its purpose, since the Court's interpretation of "person" was binding on the states under the supremacy clause, and since legislative power to enforce the fourteenth amendment is vested exclusively in the Congress.[339] By holding the statute unconstitutional the federal courts made clear to the opponents of elective abortion that a constitutional amendment was the only means available to overturn the Supreme Court's holdings in *Roe* and *Doe*.

Any proposed constitutional amendment must overcome substantial obstacles before it becomes law.[340] It is then not surprising that, in the eyes of some commentators, the possibility that the abortion decisions would be overturned via constitutional amendment seemed very remote.[341] That the possibility is much more real, however, than these commentators realized was illustrated in early March, 1974, when the first Senate hearings were held on a proposed Human Life amendment submitted by Senator James Buckley of New York.[342] The publicity and controversy generated by those hearings made it obvious that the debate over the abortion issue was far from over; a new chapter was about to begin.

B. The Proposed Amendments

Turning to an examination of the proposals themselves, one finds that although they are sometimes referred to collectively as "Human Life" amendments, such a collective characterization is somewhat misleading: the proposals vary in form as well as in substance. At this writing there are over 30 such proposals, and the number grows larger as "Right to Life" and other groups dissatisfied with the Court's decisions in *Roe* and *Doe* make their opinoins and influence felt. The proposals falls into two categories: (1) "states' rights" amendments, and (2) "affirmative" and Life-Protective amendments.

1. States' Rights Amendments

Prior to the decisions in the abortions cases the availability of legalized abortion was a matter of legislative determination within each

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§ 11-3-4: (establishing a conclusive presumption that human life begins at conception and allowing abortion only for the purpose of saving the mother's *life.*)

339. U.S. CONST. amend. XIV, § 5.

340. *See* U.S. CONST. art. V.

341. Ely, *supra* note 314, at 947.

342. S.J. RES. 119, 93rd Cong., 1st Sess. (1973).

state, notwithstanding occasional judicial intervention.[343] By virtue of *Roe* and *Doe*, however, the availability of legalized abortion became a matter of federal constitutional right, immune from the usual methods of legislative or popular modification. Proposals for a states' rights amendment would return control of abortion policy to the states and leave the particulars of that policy to legislative wisdom;[344] an interesting combination of traditional political thought and wise practical politics.

By deciding that nearly every facet of an individual's choice to abort is deserving of strict constitutional protection, the Supreme Court forced drastic changes in even some of the nation's most liberal abortion laws. Many state police powers which, until the movement to liberalize abortion laws began in the mid-1960's, had not been questioned since 1934[345] were struck down by the federal courts. In short, the Court left the idea of orderly change through the political process somewhat out in the cold. Thus, from a political standpoint, the strength of the states' rights proposals is readily ascertainable. The concept of "states' rights" is as old as the nation itself and finds expression in the tenth amendment to the Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States espectively, or to the people.

While proposals for a "states' rights" amendment reject the Court's contention that abortion is a matter of constitutional right, it is equally true that the Court's contention is a matter of considerable doubt among some of the commentators who have considered the question since the decisions were handed down.[346] Before the Supreme Court's decisions in *Roe* and *Doe* the abortion issue was being settled in the public forum. A "states' rights" proposal would merely return the issue to that forum.

The chief flaw in these proposals, from the perspective of those who feel that all human beings—born and unborn—are deserving of express constitutional protection, is that they would leave considerable doubt as to the extent to which human life would receive affirmative protection under the laws of the several states. Under such a proposal the states would be free to grant as much or as little protection to un-

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343. *Compare* U.S. v. Vuitch, 402 U.S. 62 (1972), *with* People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1970).

344. *See, e.g.*, H.R.J. RES. 261, 94th Cong., 1st Sess. § 1 (1975):

> SECTION 1. "Nothing in this Constitution shall bar any State or territory or the District of Columbia, with regard to any area over which it has jurisdiction, from allowing, regulating, or prohibiting the practice of abortion."

345. *See, e.g.*, Nebbia v. New York, 291 U.S. 502 (1934).

346. Ely, *supra* note 314; Epstein, *supra* note 314.

born human life as political pressure and popular sentiment dictate. Such proposals, therefore, do not necessarily portend the demise of legal abortion; during the period preceding the decisions in the abortion cases the dominant political pressure in this country was toward the liberalization of existing abortion laws.[347]

2. *"Life-Protective" and "Affirmative" Amendments*

Unlike the Supreme Court in *Roe*, which characterized the operative interests in the abortion controversy as those of the state, the woman, and the physician, a Life-Protective amendment would recognize the marshalling of interests which should properly have been the focus of *Roe* and *Doe*.[348] An "affirmative" or Human Life amendment would require recognition of the unborn as individuals deserving of constitutional protection; a "states' rights" amendment would give the states the option of doing the same.

Much like the first section of the fourteenth amendment in purpose and primary effect,[349] proposals for a Human Life amendment are designed to accomplish several goals. The proposals would negate the effect of the Supreme Court's restrictive interpretation of the word "person" as it is used in the fourteenth amendment by imparting substantive constitutional protection to the unborn. The proposals them-

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347. Political pressure, however, should be distinguished from popular sentiment. The former term reflects the activities of "interest" groups, while the latter reflects the feelings of the so-called "silent majority."

348. The Court recognized that the central issue in the abortion cases was the question of whether the unborn have a constitutionally protected right to live. *See Roe*, 410 U.S. at 153. However, it characterized the issue as one involving a conflict between state and maternal interests. The Court was apparently unwilling to attack the issue directly, for it refused to hear the only case in which the issue had been fully argued and decided, Byrn v. New York City Health & Hospitals Corp., 31 N.Y.2d 194, 286 N.E.2d 887 (1972), *appeal dismissed*, 410 U.S. 949 (1973).

A similar opportunity to decide the issue directly was offered by *Doe v. Bolton* as originally filed in the District Court. The Georgia abortion statute provided that the rights of the unborn be protected by the appointment of a guardian *ad litem*. GA. STAT. ANN. § 26-1202(c) (1972). But the District Court revoked its order appointing a guardian, relegating the statutory representative of the unborn to the status of *amicus curiae*. *See* Brief for Ferdinand Buckley as Amicus Curiae at i-iii, Doe v. Bolton, 410 U.S. 179 (1973). In effect, the District Court had decided the central issue of the case before any arguments were heard. Doe v. Bolton, 319 F. Supp. 1048, 1055 n.3 (1970) ("the court does not postulate the existence of a new being with federal constitutional rights at any time during gestation"). The court offered no citations in support of its postulate and, thus, rested its decision squarely upon nothing more than judicial *ipse dixit*.

349. *Compare* U.S. CONST. amend. XIV § 1 (broadly defining "citizen"), *with, e.g.*, H.R.J. RES. 317, 94th Cong., 1st Sess. (1975), (broadly defining "person"), and H.R.J. RES. 99, 94th Cong., 1st Sess. (1975) (no "human being" shall be deprived of life or of equal protection).

selves fall into two sub-categories: the first type would redefine the word "person" as used in the due process clauses of the fifth and fourteenth amendents,[350] the second would extend substantive protection to the lives of the unborn without regard to the Supreme Court's ruling on the meaning of "person."[351] Since it has been alleged that the proposals for such an amendment, if passed, would create "chaos" in the law,[352] it is necessary to determine just what foundation there might be for such a charge.

Perhaps the most comprehensive of the proposed amendments is House Joint Resolution 132, (hereinafter HJR 132), introduced in January, 1975.[353] An examination of its provisions, with particular reference to potential areas of difficulty, helps to place the debate in proper focus.[354] HJR 132 is framed as follows:

> Section 1)
>
> With respect to the right to life, the word "person" as used in this article and in the fifth and fourteenth Articles of Amendment to the Constitution of the United States applies to all human beings irrespective of age, health, function, or condition of dependency,

350. *E.g.*, S.J. RES. 6, 94th Cong., 1st Sess. (1975):

ARTICLE —

SECTION 1. With respect to the right to life guaranteed in this Constitution, every human being, subject to the jurisdiction of the United States, or of any State, shall be deemed, from the moment of fertilization, to be a person and entitled to the right to life.

SEC. 2. Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

H.R.J. RES. 197, 94th Cong., 1st Sess. (1975):

1. With respect to the right to life, the word 'person' as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States applies to all human beings irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.

2. No person shall deprive any unborn person of life, except in a case where it is necessary to prevent the death of the mother of such person or to terminate a pregnancy of no more than 10 days' duration resulting from rape.

3. The Congress and the several States shall have power to enforce this article by appropriate legislation.

See also H.R.J. RES. 317, 94th Cong., 1st Sess. (1975) (containing exception for life of mother).

351. *E.g.*, H.R.J. RES. 99, 94th Cong. 1st Sess. (1975):

1. Neither the United States nor any State shall deprive any human being, from conception, of life without due process of law; nor deny to any human being, from conception, within its jurisdiction, the equal protection of the law.

2. Neither the United States nor any State shall deprive any human being of life on account of age, illness, or incapacity.

3. Congress and the several States shall have power to enforce this article by appropriate legislation.

352. *See, e.g.*, Sanders, *Enemies of Abortion*, HARPER'S MAGAZINE, March, 1974, at 26, 28.

353. H.R.J. RES. 132, 94th Cong., 1st Sess. (1975).

354. It should be noted that the writer's use of this proposal is for analytical purposes only. No opinion is expressed as to its merits relative to the other proposals which have been introduced.

including their unborn offspring at every stage of their biological development.

Section 2)

No unborn person shall be deprived of life by any person; *Provided, however,* that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

Section 3)

The Congress and the several states shall have power to enforce this article by appropriate legislation.

a. Section One

Designed to overturn the central proposition of the Supreme Court's opinion in *Roe v. Wade*—that the unborn are not "persons" within the meaning of the fourteenth amendment—this section is typical of the first subcategory of Life-Protective proposals. It opts for a fairly restrictive approach to protecting the rights of the unborn by protecting only the right to life. Although the proposal was written in response to the immediate problem of abortion, it should be noted that its coverage is not so restrictive. By specifically mentioning age, health, function, and condition of dependency as impermissible criteria on which to deny the status of "person," the proposal seeks to counter the growing pressure to accord legal protection to life according to its "quality" rather than its existence. In effect, the proposal does nothing more than to declare the inherent equality of all biologically human life, a proposition supported by the history of the fourteenth amendment itself. In this regard it can hardly be said to be inconsistent with the history and spirit of either the original Constitution or the fourteenth amendment. Moreover, like the fourteenth amendment, the proposal provides, in its final section, for legislative enforcement of its essential terms. Unlike the fourteenth amendment, however, the enforcement powers are granted to the states as well as to Congress.[355]

Consistent with its limited intent, however, the proposal does not reach all the implications of the Court's decision in *Roe*, and may, in fact, freeze some of them into the Constitution. By restricting its sweep to the protection of the right to life, HJR 132 may leave intact a possible interpretation of the Supreme Court's ruling to the effect that the unborn are not "persons" with regard to the other express due process rights, liberty and property. While the right of liberty is hardly one that can be exercised by any infant, born or unborn, the right to property presents a much more serious question. By virtue of the decision in *Roe*, the Supreme Court cast substantial doubt upon the ability

355. *See* U.S. CONST. amend. XIV § 5 (enforcement power vested in Congress).

of the courts to protect the property rights of the unborn, a function they had been exercising from the earliest days of the common law.[356] A proposed amendment expressly limited to the right to life could be construed as a ratification of the argument that the Court's holding applies equally to property rights.

Unless a legal system which forbids abortion except where the woman's life is in danger may be fairly described as "chaotic,"[357] the first section of HJR 132, despite its flaws, can hardly be characterized as a radical idea. It merely adopts the policy alternative rejected by the Supreme Court in *Roe*, but found acceptable by the West German Constitutional Court when it struck down as unconstitutional a relaxed version of West Germany's criminal abortion law passed by the Bundestag.[358] In this regard it is similar to other proposals for a Life-Protective amendment.

b. Section Two

This section typifies those proposals that do not seek to redefine "person" and is the most remarkable in HJR 132, since it would operate against the individual as well as against the state. Although some question might be raised as to the propriety of using the Constitution as a restraint upon private action, such a procedure is not without precedent. The thirteenth amendment operates as a similar limitation on the right of the individual to hold another in slavery. Like the thirteenth amendment, enforcement of its provisions would be left to the discretion of the legislative branch of the government.[359] Moreover,

356. The unborn child is considered to be a life in being for purposes of the rule against perpetuities. GREY, THE RULE AGAINST PERPETUITIES §§ 931-47. The right of the unborn to recover for prenatal injuries is also recognized. *See, e.g.*, Scott v. McPheeters, 33 Cal. App. 2d 629, 634, 92 P.2d 678, 681 (3d Dist. 1931):

> The respondent asserts that the provisions of section 29 of the [California] Civil Code are based on a fiction of law to the effect that an unborn child is a human being separate and distinct from its mother. We think that the assumption of our statute is not a fiction, but upon the contrary that it is an established and recognized fact by science and by everyone of understanding.

See generally HARPER & JAMES, THE LAW OF TORTS 1029 (1956); PROSSER, THE LAW OF TORTS 335-38 (4th ed. 1971).

357. This was precisely the argument raised in the briefs in *Roe*. *See* Brief for Appellant at 124, Roe v. Wade, 410 U.S. 113 (1973). Unfortunately, however, the brief writers failed to point out just where the chaotic situation they alleged might be found. Before *Roe* several states had made legal abortion available, either by legislative action or judicial decree. The vast majority did not. It is submitted that the decisions in *Roe v. Wade* and *Doe v. Bolton* have done more to create a chaotic situation by their constitutional-administrative law approach to the entire question than could fairly have been attributed to *any* of the statutory or administrative schemes in force before the decisions. *See* Part II *supra*.

358. Judgment of February 25, 1975, 39 BVerfG 1. A partial translation of the opinion appears as an appendix to this article.

359. Thus it cannot be argued that such a proposal, in and of itself, would make the

the modern analysis of state action already includes much that is "private" in laymen's terms.[360] In so providing, the proposal would merely eliminate any need for a showing of "state action" before the courts could act to implement the policy embodied in the first and second sections. It too can hardly be characterized as a radical proposal; the common law had long recognized that even the mother could be held responsible for the destruction of her unborn offspring.[361]

C. *The Need for Rationality*

A policy position recognizing the existence of fundamental rights in the prenatal period is consistent with both constitutional history and precedent. In view of this consistency, it is understandable that the proponents of elective abortion consider the proposals to be anathemas.[362] Since the Supreme Court expressly noted that the asserted right to elective abortion would collapse were the unborn to be accorded the protection of the due process clause,[363] proposals such as HJR 132 will most surely provoke the most heated debate, in Congress as well as in the public forum. It is important therefore, to make clear just what is *not* involved in the controversy over these proposals.

1. *Legal Abortion: A Policy Choice*

By taking a position in favor of legalized abortion, the Supreme Court chose between a number of difficult and controversial policy alternatives. Proposals for a constitutional amendment to reverse the Supreme Court's decision involve those same policy alternatives: they merely reach the opposite result. In view of this, it cannot validly be alleged that the arguments supporting a constitutional amendment are necessarily contingent upon religious belief or dogma.[364] It is true that

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taking of unborn human life murder; the degrees of homicide are strictly matters of legislative determination. Remarks of Congressman John A. Bingham, House of Representatives, CONG. GLOBE, 39th Cong., 1st Sess. 432 (1866) ("You do not prohibit murder in the Constitution; you guarantee life in the Constitution.") To argue otherwise would be akin to alleging that the thirteenth amendment makes the holding of slaves a felony by its terms, a proposition which finds no support in the cases.

360. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

361. *See, e.g.*, State v. Murphy, 27 N.J.L. 112, 114 (1858); *In re* Vince, 2 N.J. 443, 67 A.2d 141 (1949).

362. *See, e.g.*, Sanders, *Enemies of Abortion*, HARPERS MAGAZINE, March 1974, at 24.

363. *Roe*, 410 U.S. at 156-57.

364. Closing Brief of Prosecution at 1077, United States v. Griefelt, 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW No. 10 (1946) (arguing that denial of legal protection to unborn children of Russian and Polish women was a crime against humanity).

the position of some religious groups is that abortion is morally abhorrent. However, the fact that an opinion may spring from religious beliefs does not mean that such a view is irrelevant in the political context.[365] The establishment clause should not be available as an excuse through which to avoid discussion of the non-religious policy aspects of the issue.[366]

Although it can safely be predicted that charges of religious bias will contribute significantly to the bitterness of the public debate over the abortion issue,[367] it is imperative that debate in the academic and legal communities be unclouded by such inflammatory rhetoric; the integrity of the political process demands no less. The abortion issue is essentially a civil rights issue: one side favoring a woman's right to privacy, the other favoring her child's right to life. By the introduction of proposals for a Life-Protective amendment, questions have been raised as to the consistency of the Supreme Court's resolution of the abortion issue with the basic philosophical tenets and established principles of American constitutional law. What the ultimate responses to these questions should be is the topic of the remainder of this Comment, and a problem which will ultimately be solved by resorting to the supreme arbiter of such conflicts—the American people.[368]

2. *The Fundamental Right to Life*

One need not dwell on the intricacies of constitutional interpreta-

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365. It is clear that *someone's* perceptions of moral propriety are always behind societal or legal prohibitions. It is not enough to make specious distinctions between "moral" and "legal" prohibitions; in either case the prohibited activity is considered by someone to be "wrong." The decision of the Supreme Court in *Roe* represents the obverse of the policy behind a Life-Protective Amendment. *See* Furman v. Georgia, 408 U.S. 238, 360 (1972) (Marshall, J., concurring) (death penalty found to be immoral and therefore unconstitutional). *See also* Prosecution Exhibit 491, United States v. Griefelt, 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBURG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10 (1946) at 1084:

> The decree on interruptions of pregnancy . . . has called forth objections on the part of a minority of reactionary Catholic physicians. Even physicians who hold the right political views occasionally voice objections [on the grounds that the degree was not in accordance with the physician's moral obligation to preserve life].

366. *See, e.g.*, Tribe, *The Supreme Court 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) [hereinafter cited as Tribe] (arguing that the feeling of necessity to draw a strict line is "unmistakably religious" and thus effectively structuring the argument in such a way as to make opposition to the Supreme Court's decision tantamount to an argument in favor of "an establishment of religion").

367. *See, e.g.*, NEWSWEEK, March 3, 1975, at 18.

368. The very nature of the amending process set out in article V assures that the Constitution does not impose a "minority" viewpoint on the American people. To argue against even exposing such a proposal to the monumental hurdles of the amendment process bespeaks more a fear by a minority that the majority will adopt it than a concern for the integrity of the constitutional process.

tion to appreciate that certain individual rights are fundamental. Such reasoning is implicit in the Bill of Rights,[369] the "Civil War" amendments,[370] and the franchise amendments,[371] as well as in the proposed Equal Rights amendment. Consistent with this philosophy, the Supreme Court itself has shown little hesitation protecting these rights in appropriate cases.[372]

The right to life is clearly among those "so rooted in the traditions and conscience of our people as to be ranked as fundamental" and is given explicit protection in the fifth and fourteenth amendments.[373] Thus, to deny an individual is a person and, therefore, not entitled to the rights of life, liberty, and property, is to reject the egalitarian philosophy embodied in the Declaration of Independence and the fourteenth amendment. The right to life is absolutely essential to the preservation of a free society; it is the foundation of all rights, described by Mr. Justice Brennan, concurring in *Furman v. Georgia*,[374] as the "right to have rights." Whether this right shall be protected at all stages of human development is the issue to be decided.

3. *The Dangerous Implications of Roe and Doe*

In *Roe* and *Doe* the Supreme Court exercised the power to say who is—or, more importantly, who is not—a person within the meaning of the Constitution. The awesome nature of this power should be abundantly clear; the power over life and death is indeed the ultimate power.[375] While the Court does have such power, the validity of its

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369. U.S. CONST. amends. I-X.

370. *Id.* amends. XIII-XV.

371. *Id.* amends. XV, XIX, XXIV, and XXVI.

372. *E.g.*, Weinberger v. Wiesenfeld, 419 U.S. 822 (1975) (sex-based discrimination); Brown v. Board of Educ., 347 U.S. 483 (1954) (segregation).

373. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

374. 408 U.S. 238, 272 (1972) (Brennan, J., concurring) (death penalty).

375. *Cf.*, Dredd Scott v. Sandford, 60 U.S. (19 How.) 393, 577-78 (1857) (Curtis, J., dissenting). The relevance of Justice Curtis' dissent in *Dredd Scott* to the exercise of judicial power in *Roe* is unmistakable:

> Before examining the various provisions of the Constitution which may relate to this question it is important to consider for a moment the fundamental nature of this inquiry. It is . . . whether the Constitution empowered Congress to create privileged classes . . . who alone are entitled to the franchises and privileges of citizenship. . . . *If it be admitted that the Constitution has enabled Congress to declare what free persons . . . shall be citizens of the United States, it must at the same time be admitted that it is an unlimited power.* If this subject is within the control of Congress it must certainly depend wholly upon its discretion. For certainly, no limits of that discretion can be found in the Constitution, which is wholly silent concerning it; . . . the necessary consequence [being] that the Federal Government may select classes of persons . . . who alone can be entitled [to the rights of citizenship]. [emphasis supplied]

There is, however, one difference between *Dredd Scott* and *Roe*: the former rests upon a

exercise is open to serious question where the nature of the inquiry and the sought-after results lead inexorably to the creation of legal distinctions which have no basis in reality. As long as the power to make such distinctions remains in the hands of *any* governmental body,[376] even those of the "least dangerous branch,"[377] the ultimate safety of any group of individuals whose existence or physical need threatens to exacerbate the "profound problems" of others is in question.[378]

The significance of a judgment dealing with fundamental rights which is based upon the relative values of the parties in the eyes of the Court was underscored by Justice Douglas' use of *Buck v. Bell*[379] to support the part of his concurring opinion dealing with the existence of the state's power to protect its own interests.[380] In *Bell* it was held that the state has a compelling interest in reducing the number of mentally retarded individuals in society. The Court, per Justice Holmes, held that a woman committed to a state mental institution may be sterilized to prevent her bearing retarded children. In addition to indicating that the woman's freedom of choice in such a situation is not inviolate, Justice Holmes' words manifest the Court's willingness to exercise the same type of judgment earlier identified by Marshall McLuhan:[381]

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fairly solid basis in constitutional history, the latter does not. Although Justice Curtis argued persuasively that persons of African descent could be "citizens" as long as some states considered them to be such at the time the Constitution was ratified, Chief Justice Taney pointed out that history was replete with intent to exclude that race from the status of "citizen." In *Roe* the Court invalidated a state-devised program of protection for the unborn; because the Court could not do so, it did not attempt to point to any history or past interpretation of the Contsitution which required exclusion of the unborn from the status of "person."

376. Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 662 (1875):

> It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism.

377. If it is true that the fundamental rights of the person may be withheld by the simple expedient of judicially constructed definition, the "least dangerous branch" has become, by far, the most powerful, for its adversarially inspired definitions, once woven into the fabric of the Constitution, can only be erased by the cumbersome machinery of constitutional amendment or by appeal to the Court itself.

378. As Marshall McLuhan has noted:

> Since all current secular discussion of abortion takes place on quantitative assumptions relating to human convenience, there can be no question that the arguments in favor of abortion apply with equal validity to the status of all other living beings. The same assumptions of more or less convenience or inconvenience must apply to the decisions about continuing or suppressing the existence of any members or groups of all human or non-human populations.

M. McLuhan, *Private Individual v. Global Village*, in ABORTION AND SOCIAL JUSTICE 246 (Hilgers and Horan ed. 1972).

379. 274 U.S. 200 (1927).

380. Doe v. Bolton, 410 U.S. 179, 215 (1973) (Douglas, J., concurring).

381. See note 378 *supra*.

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. (citation omitted) Three generations of imbeciles are enough.[382]

Through the process of amniocentesis,[383] science has made it possible to predict with an ever-increasing degree of accuracy the characteristics of unborn infants, including possible physical or mental deficiencies. Therefore, it does not seem unreasonable to predict that, under certain conditions, the state might very well be in a position to demand that a woman be aborted as a "lesser" sacrifice in order to prevent her bringing "deficient" children into the world. In fact, it might be argued that, given the right "compelling" interest, the principle which supports compulsory vaccination is "broad enough" to include compulsory abortion. If the unborn are not persons, as the Court held, or human beings, as the appellant argued,[384] what "of value" would be destroyed?[385] Although most would recoil at such a suggestion,[386] it is difficult to ignore the fact that the merits of some degree of compulsion in this area are being extolled by many respectable parties in the scientific and medical communities.[387] If such suggestions are to be subjected to the searching inquiry fitting such matters it is imperative that a thorough examination be made of the basis for much of the current debate over the value of human life—the notion that the

382. Buck v. Bell, 274 U.S. 200, 203 (1927). One might inquire just how Justice Holmes, or anyone else for that matter, could be in a position to declare: (1) what is "best" for all the world; (2) who is "manifestly unfit;" and most importantly (3) who shall or shall not be able to continue their own kind. It is incongruous that any member of the Supreme Court would go so far as to condone such reasoning today, especially one who feels that "valleys, alpine meadows, rivers . . . or even air" should be given legal *personality* to protect them from the "destructive pressures" of modern life. Sierra Club v. Morton, 405 U.S. 704, 727, 743 (1972) (Douglas, J., dissenting).

383. This is a process by which a sample of the amniotic fluid surrounding the fetus is withdrawn. The cells of the fetus suspended in the fluid are stained and the chromosomes mapped in order to determine the nature of any possible infirmity.

384. Brief for Appellants at 119, Roe v. Wade, 410 U.S. 113 (1973).

385. *Id.*

386. *E.g.*, Tribe 27-28 n.22.

387. *E.g.*, Hardin, *Parenthood: Right or Privilege?* 169 SCIENCE 427 (1970); Williams, *Our Role in the Generation, Modification, and Termination of Life*, 124 ARCHIVES OF INTERNAL MED. 214 (1969). *See also*, CALIFORNIA MEDICINE, *supra* note 24.

quality of life, rather than its existence *per se*, is the supreme virtue.[388] The concept is an interesting one, to be sure, but what are its implications?

In his testimony before the Senate Select Committee on Aging, Representative Walter W. Sackett, M.D.[389] testified on some of the motivating factors which led him to introduce a bill to legalize "death with dignity," a common euphemism for euthanasia[390] in Florida.[391] Captioned "Cost-Benefit Question," Dr. Sackett's testimony revealed that there are 1500 severely retarded individuals in Florida's mental institutions who cost the state a great deal of money each day they remain alive.[392] Dr. Sackett asked: "Now where is the benefit in these 1,500 severely retarded, who never had a rational thought . . . ?"[393] Rather, he continues, society should concern itself with those whose lives are "useful."[394]

Similarly, Nobel Laureate James Watson has suggested that the preservation of the lives of laboratory-conceived children be contingent upon their "normality" in the eyes of the physicians attending their birth.[395] Moreover, he would extend the choice to all parents: "[M]ost birth defects are not discovered until birth . . . . All parents would be allowed the choice that only a few are given under the present

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388. *Compare* Judgment of February 25, 1975, 39 BVerfGI (the "Abortion" case), *with* Roe v. Wade, 410 U.S. 113 (1973). The West German Federal Supreme Court's opinion, translated in part in an appendix to this article, carefully distinguishes the interests involved in any decision regarding abortion: those of the unborn, and those of the woman. The State's interest is analyzed in terms of its duty to protect these interests. *See* pp. 1346-48 *infra*. Although the German case arose from a legislative challenge to a "liberalized" abortion law, its reasoning is equally applicable to the contentions made by the State of Texas in *Roe v. Wade*—that the state has an obligation to protect unborn life.

The clause of the West German Constitution upon which the Court relied in striking down the revised abortion law is virtually indentical to the provisions of the United States Constitution referring to the right to life. *Compare* U.S. CONST. amends. V, XIV ("nor [shall any person] be deprived of life"), *with* GRUNDGESETZ art. 2, para. 2, phrase 1 (1949, amended 1961) (W. Ger.) ("Everyone has the right to life and to physical inviolability") ("Jeder hat das Recht auf Leben und körporliche Unversehrtheit").

389. Member, Florida House of Representatives.

390. In this context "euthanasia" is used in the strict sense to denote the concept of "involuntary" mercy killing. The subject is far too complex to make any further distinctions in this context. It is mentioned only because the rationales upon which its proponents base their contentions bear a striking similarity to those heard in the context of the abortion controversy.

391. H.B. 407, Florida Legislature, 1973 Regular Session. The bill was severely modified in committee.

392. *Hearings on Death with Dignity Before the Senate Special Comm. on Aging*, 92d Cong., 2d Sess., pt., 1 at 30 (1972).

393. *Id.*

394. *Id.*

395. TIME, May 28, 1973, at 104, *discussed* in Tribe, *supra* note 366.

system . . . [i]f a child were not declared alive until three days after birth."[396]

The thought of one's own life being terminated because it lacks "utility" or "normality" is a sobering one. "Meaningful life," the "quality" of life, and the necessity to be "wanted" are but a few of the rallying points in a "new ethic" which relegates life itself to a position in which it must be balanced against societal values, opinions, and policies which are apt to change with every generation, ideology, or regime.[397] In *Roe v. Wade* and *Doe v. Bolton* the Supreme Court, perhaps unwittingly, wrote this "new ethic" into the Constitution in the name of personal liberty.

V

A LIFE-PROTECTIVE AMENDMENT: A LOGICAL OUTGROWTH OF CONSTITUTIONAL PRINCIPLE

A. What is a "Person"?

At the crux of the controversy over the Supreme Court's decisions in the abortion cases lies the difficult problem of determining who shall be protected as a "person" under the Constitution. The Constitution and its amendments use the word several times,[398] yet nowhere is it

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396. Watson, *Children from the Laboratory*, PRISM, May 1973, at 12, 13.

397. Consider Shakespeare:

> Out, out, brief candle!
> Life's but a walking shadow, a poor player
> That struts and frets his hour upon the stage
> And then is heard no more; it is a tale
> Told by an idiot, full of sound and fury,
> Signifying nothing.
>
> —Macbeth, Act V, Sc. 5

> What a piece of work is man! how infinite in faculty! in form and moving how express and admirable! in action how like an angel! in apprehension how like a god! the beauty of the world! the paragon of animals!
>
> —Hamlet, Act II, Sc. 2.

Teilhard de Chardin, writing in 1938, observed:

> The truth is that, as children of a transition period, we are neither fully conscious of, nor in full control of, the new powers which have been released.

T. DE CHARDIN, THE PHENOMENON OF MAN 279 (Wall trans. 1959), *quoted in*, Louisell, *Biology, Law and Reason: Man as Self-Creator*, 16 AM. J. JURISPRUDENCE 1, 16 (1971). De Chardin's recognition of the fallibility of the human intellect may be profitably compared to the statement of Judge Cassibry in Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217, 1236 (E.D. La. 1970) (dissenting opinion) to the effect that "human life is a relative" term, its meaning dependent upon the "purpose for which it is defined."

398. U.S. CONST. art. I, § 2, cl. 2,3; § 2, cl. 2,3; § 3, cl. 3; § 9, cl. 1,8; art. II, § 1, cl. 2,5; art. IV, § 2, cl. 2; amends. V, XIV, and XXII.

given any concrete definition. Perhaps the authors of the fourteenth amendment thought it needed none, for they certainly must have intended it to include every living human being. Indeed, Congressman Bingham's words amply support this contention,[399] as do those of his contemporaries.[400]

In the wake of *Roe v. Wade*, however, the United States was left, for the first time since 1868, with an express construction of its Constitution which excludes a class of biologically human individuals from the enjoyment of fundamental human rights. There has been no sufficient

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399. Address by Congressman John A. Bingham, Bowerstown, Ohio, August 24, 1866, printed in Cincinnati Commercial, August 27, 1866, at 1, col. 3:

> [The amendment] imposes a limitation upon the States to correct their abuses of power, which hitherto did not exist in your Constitution, and which is essential to the nation's life. Look at that simple proposition. No State shall deny to any person, no matter whence he comes, or how poor, how weak, how simple—how friendless—no State shall deny to any person within its jurisdiction the equal protection of the laws. . . . That proposition, I think, my fellow citizens needs no argument. No man can look his fellow-man in the face, surrounded by this clear light of heaven in which we live and dare to utter the proposition that of right any State in the Union should deny to any human being who behaves himself well the equal protection of the laws. Paralysis ought to strangle the tongue before a man should be guilty of the blasphemy that he himself to the exclusion of his fellow man, should enjoy the protection of the laws.

Accord, remarks of Congressman John A. Bingham, House of Representatives, CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866):

> If a State has not the right to deny equal protection to every human being under the Constitution of this country in the rights of life, liberty, and property, how can State rights be impaired by penal prohibitions of such denial as proposed?

400. Address by Congressman Thaddeus Stevens, Bedford, Pennsylvania, September 4, 1866, printed in Cincinnati Commercial, September 11, 1866, at 2, col. 1, 3:

> That [Union] triumph brought with it difficulties even greater than the war itself. To rebuild a shattered empire . . . and to erect thereon a superstructure of perfect equality of every human being before the law; of impartial protection to everyone in whose breast God had placed an immortal soul . . . . I shall not deny, but admit, that a fundamental principle of the Republican creed is that every being possessing an immortal soul is equal before the law.

Accord, remarks of Senator Jacob M. Howard (the floor sponsor of the fourteenth amendment in the Senate), CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866):

> The last two clauses of the first section . . . disable a state from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty or property without due process of law [or of equal protection]. This abolishes all class legislation in the States and does away with the injustice of subjecting one class of persons to a code not applicable to another. . . . It establishes equality before the law and it gives to the humblest, the poorest, the most despised of the [human] race the same rights and the same protection as it gives to the most powerful, the most wealthy, or the most haughty.

Accord, remarks of Representative Edgar Cowan, House of Representatives, CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866):

> So far as the courts and the administration of the laws are concerned, I have supported that every human being within their jurisdiction was in one sense of the word [*i.e.*, the non-political sense] a citizen, that is, a person entitled to protection. . . .

See also In re Yamashita, 327 U.S. 1, 43 (Rutledge, J. dissenting).

justification offered to support this construction, either in the opinion of the Supreme Court itself, or in the appellant's brief in *Roe v. Wade*.[401] It has been argued that the fourteenth amendment does not admit of prenatal application, and therefore, an individual does not become a "person" until birth.[402] Although this analysis is fundamental to the Court's holding that abortion is a matter of personal privacy, the express language of the amendment itself does not support it. The argument that a fetus is not a person appears only once in the appellant's brief in *Roe*, and, even then, in a footnote.[403]

Evidently, the appellants did not consider this argument to be important in justifying broader access to legalized abortion, for an examination of the briefs submitted in both *Roe* and *Doe* leave little doubt that the key to their attacks on the Texas and Georgia abortion laws was their contention that the unborn are not human beings:[404]

> People who worry about the moral danger of abortion do so because they think the fetus is a human being, hence equate feticide with murder. Whether the fetus is or is not a human being is a matter of definition, not fact, and we can define it any way we wish.[405]

The arguments in the briefs apparently assumed that the term

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401. Brief for Appellant at 123 n.6, Roe v. Wade, 410 U.S. 113 (1974).

402. *See Roe*, 410 U.S. at 156-58.

403. Brief for Appellant at 123 n.6, Roe v. Wade, 410 U.S. 113 (1973). The full text of the footnote is as follows: "Section 1 of the Fourteenth Amendment of the United States Constitution refers to all persons born or naturalized in the United States . . . . There are no cases which hold that fetuses are protected by the Fourteenth Amendment."

It is interesting to note that, once again, the advocates of legalized abortion appear to have exercised their penchant for deleting the final clauses and sentences of the sources thought to support their position. These pertinent words follow the ellipses in the quotation: ". . . are *citizens* of the United States and of the state in which they reside" [emphasis added]. The citizenship clause does not define who is or is not a person. It was meant to ensure citizenship to all persons meeting its requirements, not merely the slaves. *See* CONG. GLOBE, 39th Cong., 1st Sess. 474-76, 2887-90, 3040 (1866) (tracing the rejection of a citizenship clause limited to those of African descent). Furthermore, it is equally noteworthy that the construction of the amendment urged above would deprive even aliens of fundamental rights of life, liberty and property. In this regard it is clearly erroneous; that result was expressly rejected by Bingham, the author of section one of the fourteenth amendment. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866).

As has been seen, the lack of an express holding on the subject of prenatal constitutional status is attributable to the fact that it was not an issue which had any relevance in any context other than the abortion controversy. Only in the area of prenatal property rights would the issue be of similar import, but even there, the law was settled in favor of prenatal rights. *See* Louisell, *Abortion, the Practice of Medicine, and Due Process of Law*, 16 U.C.L.A. L. REV. 233 (1969). *See generally* W. PROSSER, THE LAW OF TORTS 641-82 (4th ed. 1971) and cases cited therein.

404. Brief for Appellant at 119, Roe v. Wade, 410 U.S. 113 (1973).

405. *Id.* at 122, *quoting* G. Hardin, *Abortion or Compulsory Pregnancy?*, 30 J. MAR. & FAM. No. 2 (1968).

"human being" was, in fact, synonymous with "person." In this assumption the appellants were justified, for several of the Radical Republicans who explained the fourteenth amendment to the public were under the same impression.[406] The only difference between the Radical Republicans and the appellants in *Roe*, however, was that at least one of the original supporters of the amendment, Senator Jacob M. Howard (the amendment's floor sponsor in the Senate) saw it as extending to *every* living human being.[407] In short, those most familiar with the purpose of the fourteenth amendment, its authors, rejected any but a biological standard by which to judge the existence of personal rights. They implicitly recognized that only through the preservation of such a standard can the requisite certainty in this sensitive area be preserved. The alternative is to make the protection of basic rights dependent upon "anything we wish."[408]

But is it true, as Judge Cassibry argued in his dissent in *Rosen v. Louisiana State Board of Medical Examiners*,[409] that the "meaning of the term 'human life' is a relative one which depends on the purposes for which the term is being defined"?[410] If it is, is it not more sensible to argue that, since the purpose for which the term is to be defined is to expand or contract the protection of fundamental rights applicable to a class which stands to lose everything by a limited definition, the term should be given its broadest possible meaning?

Since even the appellants in *Roe* impliedly admitted that "human being" and "person" can be used interchangeably to describe the

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406. *See e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (remarks of Senator Howard); Address by Congressman Thaddeus Stevens, at Bedford, Pa., Sept. 4, 1866, printed in Cincinnati Commercial, Sept. 11, 1866, at 2, col. 3; CONG. GLOBE, 39th Cong., 1st Sess. 2890, (1866) (remarks of Congressman Edgar Cowan). *See also* address by Congressman John A. Bingham, *supra* note 378.

407. See note 400 *supra*. *See also* text accompanying note 405 *supra*.

408. *See* Glona v. American Guarantee Co., 391 U.S. 73, 75-76 (1968):

> 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.

Accord, B. SCHWARTZ, THE SUPREME COURT 265 (1957) *quoted in*, Brief in Opposition to Motions to Dismiss Appeal at 34, Byrn v. New York City Health & Hosp. Corp., No. 72-434 (October Term 1972), *appeal dismissed*, 410 U.S. 949 (1973):

> If we are frank, we must admit that racial classification reflects *not objective science*, but racial animosity. If the equal protection clause means what it says, such irrational classification cannot mount the hurdle of the Fourteenth Amendment (emphasis added).

As the brief goes on to note, "scientifically speaking", classification of the unborn as non-persons is irrational; it does not reflect objective science. Rather, it reflects animosity towards those whose lives are not "meaningful" due to their youth and utter dependence upon others for protection from a hostile environment. *See id.*

409. 318 F. Supp. 1217 (E.D. La. 1970).

410. *Id.* at 1236.

same biological entity, what justification can be cited for the creation of a legal distinction between them? It is submitted that such a justification does not exist.[411] If one looks to the Constitution for a solution to the problem which faced the Court, one finds that, on its face, the document embodies no judgment whatever as to who is or is not a human person; such an appraisal is foreign to the essentially egalitarian philosophy upon which its provisions concerning individual rights are based. Membership in the protected class, "persons," cannot be made to turn on evaluations of an individual's worth made by others.[412]

B. Equal Protection

As Justice Douglas pointed out in the course of his concurring opinion in *Doe*,[413] the controversy over abortion lies in the *valuation* to be placed on prenatal human life at the various stages of its development. By holding that the unborn are not persons within the meaning of the Constitution, the Court attached very little value to prenatal human life. While it did not deny that the unborn are living human beings, it held that, alive or not, they are not worth protecting in light of the "profound problems of the present day."[414]

In the 106 years since the fourteenth amendment was ratified, the Supreme Court had had but two occasions to interpret the meaning of the word "person." On the first occasion, the Court took the opportunity to extend the amendment's protections to a legal fiction known as a corporation by holding it to be a person within the meaning of the due process clause;[415] on the second, the Court denied those same protections to the unborn offspring of human beings.[416]

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411. *See* Byrn v. New York City Health & Hosp. Corp., 31 N.Y.2d 194, 286 N.E. 2d 887 (1972) (Burke, J., dissenting).

412. The Declaration of Independence provides, in relevant part:

> We hold these truths to be self-evident, that all men are *created* equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the Pursuit of Happiness. . . . (emphasis supplied.)

413. 410 U.S. 179, 209, 217-18 (1973) (Douglas, J., concurring).

414. *See* Roe v. Wade, 410 U.S. 113, 165 (1973). But what are these profound problems? The preservation of the "quality of life"? *See* CALIFORNIA MEDICINE, *supra*, note 24 at 69. Overpopulation? *See e.g.*, Abele v. Markle, 342 F. Supp. 800, 803 (D. Conn. 1972). The "vicissitudes of life"? *See* Doe v. Bolton, 410 U.S. 179, 209, 215-16 (1973) (Douglas, J., concurring). Convenience? *See id.* The need to assure each person a "meaningful" life before he or she is permitted to be born? *See* Roe v. Wade, 410 U.S. 113, 163 (1973).

415. Santa Clara County v. Southern Pacific R.R., 118 U.S. 394, 396 (1886). *See also* notes 145-47 *supra* and accompanying text.

416. Roe v. Wade, 410 U.S. 113 (1973). There was one other occasion when a party litigant raised the issue of his "personhood" in support of a contention that the War Crimes tribunal which tried him had violated his right as a "person" to due process.

Considered from this perspective, the overriding policy issue to be resolved in the debate over abortion is not the simple question of whether or not the procedure shall be legal, but rather the more fundamental question of whether or not an individual may be deprived of his or her rights, pre-natally or post-natally, on the basis of third-party determinations that the profound problems of the day demand it. Although the Framers of the Constitution drew distinctions among individuals—black people were not citizens,[417] women could not vote or hold property in their own name, and Indians not taxed were not to be counted in the decennial census[418]—few would have denied that these politically and socially disadvantaged individuals were persons.[419] There is no reason, no matter how appealing it might seem, to return to a policy of such differentiation among individuals.

If one rejects the dubious legal distinction which lies at the basis of the Supreme Court's decision in *Roe*, it becomes extremely difficult to square the notion of abortion-on-request with contemporary social

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The Court did not consider the issue. *See In re* Yamashita, 327 U.S. 1, 25 (1946).

In his dissenting opinion in *Yamashita*, Justice Rutledge noted the dangers of restricting the applicability of the due process clause.

> I am completely unable to accept or to understand the Court's ruling concerning the applicability of the due process clause of the Fifth Amendment to this case. Not heretofore has it been held that any human being is beyond its universally protecting spread in the guaranty of a fair trial. . . . That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy belligerents, it can be pushed back wider for others, perhaps ultimately for all.

Id. at 78-79.

417. *See also* Dredd Scott v. Sandford, 60 U.S. (19 How.) 393, 403-04. Chief Justice Taney, writing for the majority summed up the distinction as follows:

> We think . . . that [black persons] are not included, and were not intended to be included, under the word "citizens" in the Constitution. . . . On the contrary they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, . . . had no rights or privileges but such as those who held the power and the Government might choose to grant them.

418. U.S. CONST. art. I, § 2, cl. 3, changed by U.S. CONST. amend. XIV, § 2.

419. Although it had been argued in some quarters that members of the Negro race were not persons, but things, this philosophy was not accepted by the Framers of the original Constitution or by the authors of the fourteenth amendment. *See* Bailey v. Poindexter's Ex'r, 55 Va. (14 Gratt.) 132, 142-43 (1858), wherein it was argued by counsel for those heirs of the decedent who stood to benefit if the Supreme Court of Virginia refused to recognize the slave as a person that:

> [M]arried women may have sound legal discretion in the eye of the law. . . . They may take estates by deed or will. So may infants, even *in ventre sa mere*, or idiots, or lunatics. They are all free persons, although under partial or temporary disabilities. To reason in favor of similar powers, rights or capacities in slaves . . . is to plunge at once into a labyrinth of error.

But see CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866) (remarks of Representative Bingham), wherein Bingham, reasoning from the absence in the Constitution of a grant of power to Congress to enforce the rights of all persons, argued that the Framers considered slaves to be persons, if not citizens.

thought, which still considers human life as an affirmative value. Although few serious students of the human condition believe that given individuals are any less "valuable" than others and, therefore, not worth the cost or trouble of keeping alive, it is also true that such a philosophy—the "new ethic"—is being suggested in very respectable circles as a remedy for many of society's ills.[420] Assuming that the world has not forgotten the hard-learned lessons of a recent period when the value of human life was set by state-created standards of expedience and racial policy,[421] it is fair to assert that the majority of Americans remain committed to the philosophy that every human life is inherently equal in value and should be sacrificed, if at all, only in the face of grave or compelling necessity.[422] It is for this reason that

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420. *See, e.g.*, Fletcher, *The Ethics of Abortion*, 14 CLIN. OBSTETRICS & GYNECOLOGY 1124, 1125 (1971); G. Hardin, *Parenthood: Right or Privilege?* 169 SCIENCE 427 (1970); Williams, *Our Role in the Generation, Modification, and Termination of Life*, 124 ARCHIVES OF INTERNAL MED. 215 (1969); *cf.*, CALIFORNIA MEDICINE, *supra* note 24, at 68; San Francisco Examiner, March 12, 1974, at 12, col. 1.

421. *See* Indictment, Count 1, subd. 12, United States v. Greifelt, 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBURG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW No. 10 613-14 (1946). *See also* note 351 *supra*.

422. In 1972 it was reported that "National and local polls over the past decade now demonstrate that increasing proportions—now nearly two-thirds of all Americans —support the ready availability of abortion . . . ." The question upon which this contention was based was framed as follows:

> As you may have heard, in the last few years a number of states have liberalized their abortion laws. To what extent do you agree or disagree with the following statement regarding abortion: The decision to have an abortion should be made solely by a woman and her doctor.

Pomeroy and Landman, *Public Opinion Trends: Elective Abortion and Birth Control Services to Teenagers*, FAMILY PLANNING PERSPECTIVES, Oct. 1972, at 44-45, *discussed in* Blake, *Elective Abortion and Our Reluctant Citizenry: Research on Public Opinion in the United States*, in OSOFSKY & OSOFSKY, *supra* note 248, at 447, 456. The percentage favoring abortion in this particular poll, taken in June 1972, was 64%. *Id.*

When the question is framed in terms of abortion-on-request (the result in *Roe*), however, the response is markedly different. The following question was inserted in the September 1972 Gallup survey:

> Do you believe that there should be no legal restraints on getting an abortion—that is, if a woman wants one she need only consult her doctor, or do you believe that the law should specify what kinds of circumstances justify abortion?

The percentage of respondents approving or having no opinion when the question was framed in this manner was 39 percent. *Id.* at 458. This figure hardly evinces majority support for elective abortion; 61 percent of those polled were opposed.

The validity of the foregoing figures was affirmed in November 1972 in the general elections held in Michigan and North Dakota where elective abortion was at issue. In Michigan the issue, denoted "Proposition B", was framed as follows:

> The proposed law would allow a licensed medical or osteopathic physician to perform an abortion at the request of the patient if (1) the period of gestation has not reached 20 weeks, and (2) if the procedure is performed in a licensed hospital or other facility approved by the Department of Public Health.
>
> SHOULD THIS PROPOSED LAW BE APPROVED?

The proposal was defeated by approximately 60.65 percent of the vote. 1972 MICHIGAN OFFICIAL CANVAS OF VOTES at 63. The North Dakota election produced

even some of the most highly reputed proponents of this "new ethic," by their own admission, find themselves forced to obscure[423] the assumptions underlying the policies they propose by characterizing them as matters of privacy or personal liberty.

Open debate over a Life-Protective amendment would force recognition of the fact that abortion involves the taking of another life as well as the rights of the state, the woman, and her doctor. Such proposals reach to the very philosophical roots of the nation. The proponents of a Life-Protective amendment have raised questions as to the constitutional permissibility of legally sanctioned deprivation of human life, the most fundamental of all rights,[424] on the basis of its value in the eyes of others. The point is well-summarized by Representative Robert F. Drinan:

> However convenient, convincing, or compelling the arguments in favor of abortion may be, the fact remains that the taking of life, even though it is unborn, cuts out the very heart of the principle that *no one's* life, however unwanted and useless, may be terminated in order to promote the health or happiness of another human being.[425]

It seems anomalous that such a deviation from basic constitutional philosophy, such as occurred in *Roe*, could parade as an extension of personal liberty, when its basis is a restrictive construction of the very clause of the constitution on which it is purportedly based. Perhaps the Court was misled as to the true position of the common law and decided the abortion cases according to an erroneous belief that it was unconcerned with unborn human life. If so, the decision still fails to give a satisfactory explanation as to why the United States Supreme Court relied so heavily upon a newly discovered common law of abortion, which purportedly became static in the mid-14th century while

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similar results—76.59 percent opposed to wider access to abortion. NORTH DAKOTA OFFICIAL ABSTRACT OF VOTES CAST AT THE GENERAL ELECTION HELD NOVEMBER 7, 1972. It does not seem unreasonable to predict that the percentage of defeat might have been substantially higher had the proposals provided for no limitation on abortions for the full 9 months of gestation—the effect of *Roe v. Wade* in the absence of state regulation during the last 3 months.

A proposal to revise the Washington State abortion law was submitted to the voters in the election of November 1970. "Referendum 20" passed with 56.49 percent of the vote, but the figures do not significantly compare with those of Michigan. "Referendum 20" not only failed to mention abortion-on-request, but, more importantly, it was presented to the Washington electorate as *not* involving abortion-on-request. *See* OFFICIAL VOTERS' PAMPHLET, STATE OF WASHINGTON 8-9, November 1970.

423. CALIFORNIA MEDICINE, *supra* note 24, at 68.

424. Furman v. Georgia, 408 U.S. 238, 272 (1972) (Brennan, J., concurring) (characterized as the "right to have rights").

425. Drinan, *The Inviolability of the Right to Be Born*, in ABORTION AND THE LAW 123 (Smith ed. 1967).

the rest of the common law developed apace.[426] If, on the other hand, the Court's decision is based upon its perceptions of the quality or humanity of prenatal life, it has overstepped the constitutional bounds of governmental power.[427]

C. *Proposed Action*

In the last half-century this nation has experienced a veritable revolution in science, economics, and social policy. Although there remains much to be done, both women and members of racial minorities have come to be recognized by the law as individuals whose interests require full and equal protection. The transition has not been a simple one, and in order to achieve it each group had its champions, often not even members of the disadvantaged class, to mobilize the public support and internal class consciousness without which change would have been impossible. It is this consciousness of purpose, no different in essence than that which inspired the fourteenth amendment and the proposed Equal Rights amendment, which has given impetus to the movement for a Life-Protective amendment.

The cherished constitutional guarantees of life and liberty should not fall victim to restrictive judicial or legislative interpretations before the public has examined and attempted to understand both the reasoning and result of any proposed change. The best protection for individual rights lies with an informed populace which understands the nature and extent of its own freedom.

The realization of such a goal is, of course, an immense task. One thing, however, is abundantly clear at the outset: it is impossible for either the government or the sovereign which creates it to subordinate the right to life to a societal perception of liberty without working the destruction of the intricate balance which makes both of these ideals reality. The Supreme Court did this in *Roe*. Admittedly, the need to preserve individual liberty is one which constantly challenges a free society; equally challenging are the many profound problems which face the world today. On balance, however, it is not unreasonable to state unequivocally that one person's interest in personal freedom, or

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426. *Compare* Roe v. Wade, 410 U.S. 113, 158 (1973) (relying on an advocate's view of 19th century legal practices and implicitly rejecting modern scientific data of unquestionable validity on the beginning of the human organism), *with* Brown v. Board of Educ., 347 U.S. 483, 494-95 & n.11 (1954) (rejecting 19th century understanding in favor of "modern" psychological developments).

427. Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 663 (1875):

> There are limitations on [governmental] power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.

another's conception of a "profound problem," fail to outweigh any individual's interest in the preservation of his or her own life. Such is the philosophy of a Life-Protective amendment.

It is submitted that any argument mounted in opposition to a Life-Protective amendment could have had equal applicaton to the debates over the first sections of both the thirteenth and fourteenth amendments. They, too, extended substantive constitutional protection to a group of individuals who had been considered by the Supreme Court and by some segments of society to be less than human, and certainly not deserving of fundamental rights. Life is the ultimate right, and its denial, publicly or privately, under the aegis of the state, brings back haunting memories of a time when the "quality" of some individuals was the rationalization for their extermination. Abortion involves those same qualitative determinations.

Santayana once noted that those who fail to learn from the mistakes of history are condemned to repeat them. By officially diminishing the value of the lives of one class of human beings society has already made its first mistake. One can only hope that it is rectified before the cycle begins once again.

CONCLUSION

In the course of its opinion in *Roe v. Wade* the Supreme Court recognized that a woman's right to terminate her pregnancy, whether based upon the right to privacy or some other constitutional right,[428] is contingent upon a prior finding that her unborn offspring has no constitutionally protected right to life. Relying upon an analysis of the constitutional usage of the word "person," while also citing a lack of 19th century common law protection for the unborn, the Court ruled that the unborn are not "persons" within the meaning of the due process clause of the fourteenth amendment and, thus, not entitled to the right to life.

In the hope of protecting this extension of the right to privacy, the Court also struck down virtually all state regulation of the heatlh-related aspects of abortion procedure in the first trimester of pregnancy and placed severe limitations upon state power to interfere with access to the process for the remainder of the pregnancy.

The reasoning of the Court has been examined and found to be wanting legally, historically, scientifically, and philosophically. The basic issue in the abortion cases was not whether a woman has a right to terminate her pregnancy, but rather, whether or not the Constitution

428. *See Roe*, 410 U.S. at 153.

forbids the protection of her unborn offspring. The Court did not discuss the issue.

Both aspects of the holdings in the abortion cases have come under attack by the introduction of various proposals for constitutional amendments. If passed, these proposals would either reverse or substantially modify the decisions in *Roe v. Wade* and *Doe v. Bolton*. The proposals merit serious and careful consideration, for they present two issues which are of vital importance to any efficient resolution of the abortion controversy: (1) the extent to which unborn human life is to be considered a value deserving of constitutional protection; and (2) the extent to which the states, as sovereign governmental units, are to be permitted to promulgate reasonable regulations to protect the public health and the welfare of women seeking abortions.

Although it is true that no resolution of the abortion controversy will be satisfactory to all, this should not obscure the need for a critical re-examination of the Supreme Court's decisions in this sensitive area. Indeed, *Roe v. Wade* and *Doe v. Bolton* raise more questions than they resolve. The decisions are no more than an interim "solution" to a problem which must be resolved by the ultimate sovereign—the American people. The controversy is as complex as it is volatile and it will clearly not "go away" if ignored.

Appendix

On June 18, 1974 the West German Bundestag passed a bill modifying the basic provisions of section 218(a) of the Criminal Code relating to abortion.[429] Essentially the bill removed all criminal sanctions imposed upon abortions during the first trimester of pregnancy, leaving the remainder of the statute unchanged.

The statute was challenged by the minority members of the Bundestag in an appeal to the Federal Constitutional Court;[430] they were joined in the appeal by five of the federal states. In an opinion handed down on February 25, 1975 the court ruled (5-2) that the modification of West Germany's abortion law was unconstitutional.[431] The majority of the court expressed its views, in part, as follows:

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429. *See* BGB I § 1297 (Germany).

430. Such appeals are permitted under Article 93 of the West German Constitution. The perfection of such an appeal requires the application of one-third of the members of the Bundestag.

431. 1 BVerfG 39. The appeal was based, in part, on the interpretation to be given art. 2, para. 2, phrase 1 of the federal constitution which provides in relevant part:

I.

1) Art. 2, Para. 2, phrase 1 Grundgesetz (Constitution of the Federal Republic of Germany) [hereinafter G.G.] also protects the life growing in the womb, as this has to be regarded as an independent right, which has to be protected.

a) The right of life (Recht auf Leben), which normally is self-evident, has become an explicit part of the Federal Constitution—contrary to the Constitution of Weimar. Mainly, this must be regarded as a reaction to the administrative measures taken by the National Socialist Regime: the so-called "destruction of worthless life", "end-solution" (Endlösung) and "liquidation". Likewise Article 102 Grundgesetz, by which the death penalty was abolished, Art. 2, Para. 2, phrase 1 G.G. (Grundgesetz) expresses the belief in the absolute value of human life and in a conception of state which is completely contrary to the conception of a political regime in which individual life meant little and which therefore excessively abused this usurped right to decide on people's life and death.
CBVerfGE 18, 112 [117].

b) The interpretation of Article 2, Para. 2, phrase 1 must begin with the meaning of its words: "Everybody has the right to life . . . ." According to affirmed biological-physiological knowledge "life"—in the sense of historical existence of a human individual—doubtlessly is present fourteen days after nidation (citation omitted). The process of development, beginning at this time, is a continuous one without any evident gaps; no precise delimitation can be admitted in the different stages of human life's develpoment. Neither does this process end with birth; the phenomena of consciousness, which are specific for human personality, only appear some time after birth. Therefore, the legal protection of Art. 2, Para. 2, phrase 1 G.G. can neither be limited to the "complete" human being after birth, nor to the independently viable nasciturus. The right to live is guaranteed to everybody who is "alive". No distinction can be made among the several stages of developing life before birth, or between prenatal or postnatal life. "Everybody" in the sense of Art. 2, Para. 2, phrase 1 G.G. means every "living person," in other words, every human individual, being in possession of "life"; therefore, "everybody" in this sense also includes unborn human beings.

c) Objections have been made that according to colloquial language as well as to legal terminology the expression "everybody" normally refers to a "complete" human person and that the sole interpreta-

"Everyone has the right to life, and to physical inviolability." ("Jeder hat das Recht auf Leben und körperliche Unversehrtheit.").

tion of the word makes it impossible to include unborn life in the sphere of the provision of Art. 2, Para. 2, phrase 1 G.G. It must be emphasized accordingly, that in any case, the sense as well as the purpose of this constitutional provision requires that the protection of life also be extended to unborn life. The protection of human life from the encroachments of the state would be incomplete if the first element of "complete life", unborn life, would not be included.

This broad interpretation corresponds to the general rule established by the Bundesverfassungsgericht (Federal Constitutional Court) that "in case of douct such interpretation must be chosen, which makes the legal force and application of the constitutional provision most effective." (BVerfGE 32,54 [71], 6, 55 [72]). This result also can be explained by the history of Art. 1, Para. 2, phrase 1 G.G.

d) After the parliamentary group of the Deutsche Partie (German Party) repeatedly had proposed to mention expressly—in the context of the right of life and of physical inviolability—the right of unborn life to exist, the Parliamentary Council [a body which existed before the creation of the Federal Republic of Germany in 1949 and which elaborated the German Federal Constitution, the Grundgesetz—ed.] discussed this problem (Publications of the Council at 11.48-298 and 12.48-398) for the first time during the 32nd session of its committee for principle questions on January 11, 1949. During this discussion the question arose as to whether a provision should be entered into the Grundgesetz to prohibit surgical treatments which are not curative treatments in their proper sense. The delegate Dr. Heuss (FDP) [Free Democratic Party] explained—and there was no contradiction on this point—that such a provision would refer to compulsory sterilization, and, in the context of the right to life,—to abortion. On the second reading of the basic constitutional rights on January 18, 1949, the 42nd session, the General Committee of the Parliamentary Council went more into the details of the problem of whether the right of unborn life to exist should be included in the protection of constitutional provisions. (Negotiations of the General Committee of the Parliam. Council S.529 ff.). The delegate Dr. Seebohm (Deutsche Partie) brought forward a motion to add the following to sentences to the proposed version of Art. 2, Para. 2: "The right of unborn life to exist is guaranteed" and "The death penalty is abolished". Dr. Seebohm pointed out that the right of existence and physical inviolability might not necessarily include unborn life. Therefore, it must be mentioned expressly in case there should be another point of view as to this problem. Dr. Seebohm insisted that the record of the negotiations reflect that the protection of growing life is expressly included in the provisions referring to the right of life and physical inviolability.

The delegate Mrs. Dr. Weber declared in the name of her party, the [Christian Democratic Union/Christian Social Union], that the right of life means life in every sense, including unborn life, and particularly, the protection of unborn life. Dr. Heuss (FDP) agreed largely that life also includes growing life; but in his opinion no provisions should be taken into the constitution which already were part of the criminal law. Therefore expressly mentioning the problems of unborn life and the death penalty would be unnecessary [Citation omitted]. After these "uncontradicted declarations that the protection of growing life is included in the provision of the right of existence and physical inviolability", Dr. Seebhom intended to withdraw his former motion [citation omitted]. But at that point the delegate Dr. Greve, member of the Social Democratic Party (SPD) stated: "In my opinion the right of life does not include the protection of unborn life and I want this to be taken on the record expressly; I make this statement also in the name of my friends [the other members of the SPD —ed.] or at least most of them, so that the records prove that the General Committee of the Parliamentary Council does not in its entirety share the opinion expressed by our colleague Dr. Seebohm." In answer to this, Dr. Seebohm resumed his former motion which now was rejected by 11 votes to 7 [citation omitted]. Referring to Art. 2, in the bulletin of the General Committee, the delegate Dr. von Mangoldt (CDU) stated: "The intention was to include unborn life in the general idea of the right of life. The motion forwarded by the German Party to insert a special provision relating to the protection of unborn life, had not been accepted by the majority solely for the reason that the committee was dominated by the general opinion that this right already was protected by the version of Art. 2 as originally proposed." Art. 2, Para. 2 passed the plenum of the Parliamentary Council in the second reading on May 6, 1949—with two adverse votes. During the third reading on May 8, 1949 the delegates Dr. Seebohm and Dr. Weber stated that in their opinion of the protection of [unborn life] was included in this constitutional provision. [Citation omitted]. There was no contradiction to either of these statements.

The origin of Art. 2, Para. 2, phrase 1 G.G. leads to the reasonable assumption that the words "everybody has the right to live" also should include unborn life. In any case, even less can be found in these historical materials which supports a different opinion. On the other hand, no answer can be derived from those materials to the question whether unborn life has to be protected by the criminal law.

e) There was unanimity in the negotiations relating to the 5th reformatory bill of criminal law about the need of protection of unborn life, but without a final discussion of the constitutional side of this prob-

lem. The bulletin of the special committee for the reform of the criminal law said the following about this bill, proposed by the parliamentary group of the SPD and FDP:

> Unborn life fundamentally equals born life. This statement is self-evident in those cases when the unborn life is viable even outside the womb. But it also relates to the earlier stages of development beginning about fourteen days after conception—which was pointed out convincingly by Hinrichs, and others, in the public hearing. In accordance with general knowledge and opinions in the medical, anthropological, and even theological fields, there is no break in the whole later development equivalent to this one after 14 days. Therefore, unborn life may neither be neglected nor be looked at with indifference after the nidation [after 14 days]. Further, there is no reason for answering the controversial question of whether—and in case the answer is yes—how far the constitution includes the protection of unborn life. In any case, it is the general legal conception in our community—disregarding extremely differently oriented opinions of some single groups—that unborn life has a high value of itself. This legal conception is basic to this bill. [Publications of the Bundestag 7/1981 neu. p. 5].

Nearly the same words can be found in the documents of the special committee for the other reformatory bills. [Citations omitted].

2) Therefore the duty of our state to protect all kinds of human life can be derived directly from the provisions of Art. 2, Para. 2 G.G. This duty is also expressed in Art. 1, Para. 1, phrase 2 G.G. which guarantees the protection of the dignity of man including the protection of unborn life. Where "life" exists, it has human dignity, regardless of whether there is consciousness of this dignity or not, or whether the dignity is maintained by the human being itself. The potential abilities given to every human being by origin entitle him to the "dignity of Man".

3) There is no reason for deciding the controversial question of whether a nasciturus itself is entitled to be protected by the provisions of the constitution or whether it "only" can be protected in its right of life by the constituent *facts* of the constitutional provisions—because of absence of proper legal capacity and especially capacity to be protected directly by the constitution.

According to the jurisdiction of the Federal Supreme Court, basic constitutional rights not only secure every individual right against interference by the state, but they also represent impartial values which in their quality as basic constitutional decisions influence all fields of law and furnish the leading principles and impulses for legislation, administration, and jurisdiction [citations omitted]. Therefore, the question

of whether the constitution forces the state to protect unborn life can be answered only by the constitutent facts of the constitutional process.

II.

1) The duty of the state to protect every individual is all-encompassing. It not only prohibits direct interferences with unborn life by the state, a point which is obvious, but this duty also forces the state to protect and even to support this unborn life, which means, above all, to save it from the illicit encroachments of others. Therefore the several branches of our legal system must act according to this rule in compliance with their special functions. The duty of the state to protect a right becomes even more serious the higher the impartial value of the right in question is estimated by our Constitution. Human life is estimated to have the highest value in the constitutional system, a fact needing no explanation—it is the compelling basis of the dignity of man and it is the pre-condition for all basic constitutional rights.

2) The duty of the state to protect unborn life also exists relative to the mother. 'Undoubtedly the natural unity of unborn life and the life of the mother involves a special relationship without parallel in other situations in life. Pregnancy is a part of the woman's privacy which is protected constitutionally by Art. 2 in conjunction with Art. 1, Para. 1 GG. If the embryo would be regarded as only a part of the mother's organism, abortion would be in the sphere of private decisions which may not be penetrated by legislation. (BVerfGE, 32 [41]; 6, 389 [433]; 27, 344 [350]; 32, 373 [379]). But as the nasciturus is an independent human being of itself, protected by the constitution, abortion involves social implications which make it necessary to bring it under the regulatory power of the state. The woman's right to freely and fully develop her personality, which inclues freedom of choice and action as well as the responsibilities attendant to this freedom, and the freedom to decide against motherhood and its duties, is deserving of recognition and protection. But this right cannot be granted unrestricted; it is limited by the rights of others, the constitutional decisions as to fundamental rights, and by moral laws. The woman's right never can include automatically the right to penetrate into the protected rights of another without any legal justification, or even to destroy this right by destroying the life itself, least of all when a very special responsibility, which is in the nature of things, exists in particular for this human life.

No compromise which guarantees both the embryo's life and the pregnant women's freedom of abortion is possible, abortion always means the destruction of unborn life. As it becomes necessary to consider the prevailing right, "both values protected by the Constitution

have to be seen in their relationship to the dignity of man, which is the focal point of the constitutional decisions relating to fundamental principles" (BVerfGE 35, 202 [225]).

Turning to Art. 1, Para. 2, phrase 1 G.G. the decision must be that protection of the foetus prevails over the right of self-determination of the pregnant woman. The woman may be affected in her personal development by pregnancy, confinement, and by bringing up the child. But in case of abortion unborn life is destroyed. Following the principle that where a conflict between two constitutionally protected rights arises, the most indulgent solution must be found, and considering the principles of Art. 19, Para. 2, the protection of the embryo's life must prevail. This protection prevails during the whole time of pregnancy and may not be limited in any respect.

During the negotiations of the principal law reform bill the opinion was expressed "that the woman's right of self-determination resulting from the general idea of the dignity of man should prevail over the right of unborn life to exist for a certain period." (Essentially the first "trimester"—ed.). This opinion is inconsistent with the basic constitutional decisions as to values.

3) All this leads to the fundamental and constitutionally mandated position of the legal system towards abortion: the woman's right of self-determination may not be the only guiding principle of regulations in the legal system. The state must always start from the consideration that a child always has to be carried to term; abortion in general means an injustice. The legal system must make clear that abortion is disapproved. It must avoid the wrong impresson that abortion is a social act which can be compared to a normal medical treatment or even to such a legally irrelevant alternative as contraception. The state may not deny its responsibility by leaving a certain field of problems legally unregulated. This wonld mean that the state could evade its judgment as to fundamental principles and leave it to the individual to decide on it in self-responsibility.

The means by which the state complies with its duty to set up effective protection of unborn life must be chosen by legislation. The legislature decides which measures it thinks appropriate and necessary to guarantee effective protection.

1) The protection of unborn life especially must begin from the general idea that preventive measures prevail over reprisals. Therefore, it is a duty of the state to set up social and welfare institutions to protect unborn life. What exactly must occur in this field as well as the form of the measures to be taken by the state to support this development cannot be decided by the Federal Constitutional Supreme Court. In any case those measures must intend to strengthen the mother's willing-

ness to accept pregnancy and to bring the child to birth. In reference to the state's duty of protection, it must be said that it is primarily the mother who, by nature, is entrusted with the protection of unborn life. The chief intention of the state's efforts to protect life should be to awaken and—of necessity—to strengthen the willingness of the future mother to protect unborn life in cases where this willingness has been lost. But the legislature's influence of course can only be limited. The measures taken by legislation often become efficient only indirectly and with a certain delay resulting from extensive efforts in education, leading to change in social attitudes and points of view.

2) The question of whether the state has the constitutional obligation to use its most powerful weapon, the criminal law, for the protection of unborn life cannot be answered by the simple question of whether the state has to punish certain kinds of behavior.

A general view is necessary; looking, on the one hand, at the value of the right which would be violated and the degree of social harm caused by the violation in comparison to other penalized acts estimated to involve about the same degree of social-ethical harm, and looking on the other hand at the traditional legal regulation in this field, the development of attitudes, and in the part criminal law plays in modern society. Further, the efficiency of the penalty provided by law and the possibility of replacing it by other legal sanctions should not be overlooked.

a) In general, the legislature is not obliged to take the same penal sanctions for protecting unborn life as are taken to give all the necessary protection to life which is already born. The historical development of the law shows that, as to punishment, this has never been the case, and, further, the law did not require it before the 5th Bill to reform the criminal law. It always has been the function of criminal law to protect basic societal values within the community. It has been said above that the life of every human individual belongs to these basic values. Abortion destroys definitely existing human life. Abortion is an act of homicide. This is clearly demonstrated by the fact that the punishment—even in the 5th Bill to reform the criminal law—is a part of the section dealing with crimes and violations against human life, and that until now, the name for abortion in the penal code was "killing a foetus", the new term, "interruption of a pregnancy," cannot disguise the facts. No regulation can deny that abortion violates the rights of Art. 2, Para. 2, phrase 1 GG which guarantees, in general, that human life is inviolate and not subject to the disposition of any third party. Therefore, it is undoubtedly legitimate to provide penal laws for sanctioning "acts of abortion." Most of the civilized states have such provisions—under differently developed pre-conditions—and it corres-

ponds especially to German legal tradition. Furthermore, these facts show that abortion must be characterized clearly by law as "injustice."

b) But punishment can never exist for its own sake. In general it is the decision of the legislature to provide it or not. It is also in the nature of the legislature to express, due to the Constitution, its legal disapproval by means other than criminal law provisions, but always considering the rules pointed out above. The crucial point is whether all the measures taken to protect unborn life—no matter whether the meaures are in the field of civil law, public law, especially social policy (and law), or criminal law—can guarantee an adequate, effective protection of this right appropaite to its importance. If the protection constitutionally necessary cannot be attained by any other means, then, in this extreme case, the legislature can liave the duty to provide penal sanctions to protect unborn life. A penal provision is, as to say, the last of all legal instruments the legislature can provide corresponding to the legal principle of "proportionality" which wholly governs the field of public and constitutional law, the legislature must use the means provided by the criminal law with care. But it must be employed if the protection of life cannot be reached by other means. The value and the importance of the right that must be protected require it. The duty to provide punishment then, is not an "absolute" one, but, realizing the ineffectiveness of all other means, a "relative" duty to employ penal sanctions arises.

The argument that constitutional provisions granting rights are incapable of supporting a duty to punish is without merit. If the state is bound by constitutional decisions as to fundamental principles to protect effectively an important right against the attacks of a third person, then measures which touch the scope of the liberties of others enjoying constitutionally guaranteed rights will often be indispensible. Here the legal situation is not different regardless of whether civil law, social policy measures, or provisions of penal law are invoked. The difference is only as to the intensity of the measure deemed necessary. But the legislature must solve this conflict by considering carefully the two basic liberties or values provided by the constitutional scheme and by following the constitutional principle of "proportionality."

If the duty to use the weapon of the criminal law would, as a general rule, be denied, this would mean an essential limitation upon the requisite protection of life. The basic value of the right of unborn life which is threatened by destruction corresponds to the severity of the sanction for its destruction, just as the basic value of human life corresponds to the penalty provided by law for its destruction.

3) The duty of the state to protect unborn life also exists relative to the mother. But here special problems arise as to penal sanctions

because of the unique situation of the pregnant woman. Pregnancy profoundly affects the physical and psychic condition of the woman, a fact which is obvious and needs no elaboration. These effects often cause a substantial change in the conduct of her life and a restriction of her natural development possibilities. This burden cannot always or completely be compensated by the fulfillments of motherhood, its new responsibilities, and by the right of the woman to be supported by the society. (Art. 6, Para. 4 GG). Thus, grave conflicts may arise in individual situations which are threatening or even dangerous to her life. The right of unborn life to exist may, in this situation, be a burden for the woman which exceeds, by far, the normal situation during pregnancy. Thus we are presented with the question of what can be demanded from the pregnant woman, or, phrasing it differently, whether, in these cases, the state may force the woman, under threat of penal sanction, to carry the child to term.

Although due respect is owed to unborn life, such respect is not to be demanded too strongly in those situations of conflict where a woman would have to give up her own fundamental interest in life. In the face of such a conflict, one not admitting of a clear moral judgment, and one in which a decision in favor of abortion can have the quality of a respectable decision of conscience, the legislature is under a particular duty of discretion. If, in these cases, the legislature does not consider the woman's choice to be criminal, and if it therefore renounces the use of a criminal penalty, the result is constitutionally acceptable as a product of the careful deliberations which the legislature is entitled to make.

But in deciding on the criteria for defining an unreasonable demand, circumstances which do not burden the individual to a great degree must be excluded, as these are merely a part of everyday life with which everyone must contend. These criteria must reflect grave situations which make it extremely difficult for the individual in question to fulfill her duty, and which present a situation in which it would be unfair to expect it. In particular, these facts do exist when the individual would be thrown into a deep inner conflict by fulfilling her duty [to carry the child to term-ed]. Solving such conflicts by means of penal sanctions would not generally seem to be appropriate [citation omitted] due to the nature of penal sanctions as external compulsion, and where respect for the personal province of the human individual would require full freedom of decision.

The demand that a pregnancy be continued seems especially unreasonable when it is proved that abortion is necessary to avert "danger to life or grave impairment of the pregnant woman's physical condition" (§ 218 (1) Penal Code) in these cases her own "right to life

and to physical inviolability" is at stake, Art. 2, Para. 2, phrase 1 GG, and which she cannot be expected to sacrifice for the unborn. Further, it is within the power of the legislature to leave abortion unpunished where the pregnant woman is faced with other burdensome situations which as "unreasonable demands" appear similarly grave as those set out in Penal Code § 218(1). These situations may be seen in reference to the cases of eugenic (see § 218(b)(2) StGB), criminological, and social indications for abortion proved in the draft [of the revised law] submitted by the federal government during the sixth electoral period of the Bundestag, and which were the subject of both public and legislative discussion. During the negotiations of the special committee for the reformation of the criminal law, the representative of the federal government argued convincingly and in detail that, in these four cases, bringing the child to term would be an unreasonable demand. The main point is that, in all these cases, another constitutionally protected right is at stake with such urgency that the state cannot insist that the pregnant woman must, in any case, let the rights of the unborn prevail.

The indication of general distress [the social indication] belongs in this area. The general social situation of the pregnant woman and her family can lead to conflict of such gravity that the pregnant woman may not be forced beyond certain limits by penal sanctions to a sacrifice in favor of unborn life. In order to make the social indication congruent with the others the legislature must describe those situations constituting unreasonable demands with such clarity as to make the gravity of the social conflict apparent. If the legislature exempts these real cases of conflict from the protections afforded by the criminal law it does not disregard its duty to protect life. Even in these cases, however, the state may not content itself with controlling or even certifying that the criteria for legal abortion have been fulfilled. On the contrary, the legislature is expected to offer consultation and assistance with the aim of reminding the pregnant woman of the principal duty to respect the right of unborn life to exist, to encourage her to continue her pregnancy, and, especially in cases of social indication, to support her with auxilliary measures.

In every other case, abortion is a punishable injustice, because the disposition of the highest ranking right—without being motivated by a situation of grave distress—remains within the free disposition of a third person. If the legislature were to abrogate the legal sanctions in these cases the duty to protect demanded by Art. 2, Para. 2, Phrase 1 would be fulfilled only when alternative and equally effective legal sanctions were available to make clear that abortion is an injustice and which would avoid it with the same effectiveness as a penal sanction.***