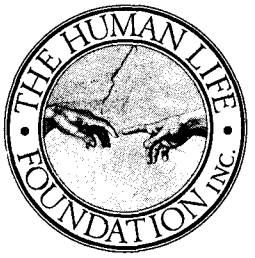
the HUMAN LIFE REVIEW



FALL 1976

Featured in this issue:

Published by:

The Human Life Foundation, Inc.

New York, N.Y.

Vol. II, No. 4 $3.00 a copy

. . . about THE HUMAN LIFE REVIEW

With this issue, we complete two full years of publication. So far, we have not been able to arrange "subscriptions" in the usual sense: copies of our review have been sent to those who have supported the work of the Foundation, and to anyone else who ordered them. Beginning with the next (Winter, 1977) issue, we will set up a regular subscription service. Thus you may, as of now, enter subscriptions (for yourself and/or others—we hope many will want to send subscriptions to libraries, etc.) for all four 1977 issues. The price is $12 per subscription, complete.

For full information on how to order, please see the inside back cover of this issue. You will also find out how to order back copies and bound volumes of both the 1975 and 1976 issues. The bound volumes are handsome indeed (looking very much like what you would expect to find in a good law library); they provide a convenient means for making THE HUMAN LIFE REVIEW a part of your permanent library—or an impressive gift to someone who would appreciate it. They are in short supply, so those interested should order now (thank you).

Dr. Harold O. J. Brown, who has been our associate editor for the past year, leaves to take up teaching duties at Trinity Evangelical Divinity School (in Deerfield, Illinois), but will remain a contributor (frequently, we hope).

Those who wish to obtain copies of Prof. Archibald Cox's book, *The Role of the Supreme Court in American Government,* may do so from the publisher, Oxford University Press, Inc., 200 Madison Avenue, New York, N.Y. 10016 (price: $6.95).

THE HUMAN LIFE REVIEW

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Published by THE HUMAN LIFE FOUNDATION, INC. Editorial Office, Room 540, 150 East 35 St., New York City 10016. The editors will consider all manuscripts submitted, but assume no responsibility for unsolicited material. All editorial and subscription inquiries (and all requests for reprints and permissions) should be sent directly to the editorial office. Subscription price: $12 per year; single copy, $3.00. Bulk prices on request.

INTRODUCTION

"THE ABORTION question is profoundly important not only in its own terms but because it is recognized by all sides, whether clearly or dimly, as the harbinger of an almost cosmic moral struggle, likely to occur in America in the coming decades, between what might roughly be called the 'old' and 'new' moralities."

Prof. James Hitchcock said that in 1974 (he repeats it in this issue), shortly after the U.S. Supreme Court's abortion decisions. What was plain to Prof. Hitchcock then is plain to just about everyone today: abortion has become *the* moral issue (and has spilled over into current politics as well). In earlier issues of this journal we published a great deal on the subject; we return to it almost exclusively in this issue (although, as has become obvious, it is impossible to discuss the abortion question without bringing in a host of other matters—and *vice versa*).

The Court remains at the center of the controversy. Its 1973 *Roe* and *Doe* abortion decisions are considered by many as prime examples of yet another controversy *re* the Court: "judicial activism." Robert G. Kaiser, writing in the Washington *Post*,* calls the Court's abortion stand "one of the most dramatic examples of judicial activism in American history." (In this issue, Prof. Steamer would seem to agree, and even Prof. Cox—a defender of the Court's activism—would not disagree that the abortion cases *are* a good example of it.) We begin here with a commentary, by Prof. Francis Canavan, on the latest in the Court's abortion-related decisions, the so-called *Danforth* case (decided last July 1).

Some 50 years ago, the then-young philosopher Jacques Maritain pointed out that the modern world had confounded *individuality* with *personality*. In Prof. Canavan's judgment, the Court has done that too: it conceives of marriage not as Western tradition sees it, a unique social relationship in which—for many and most *practical* purposes—two people become as one, but rather as merely another form of the "social contract," in which two individuals agree to come together for certain limited purposes, but remain *primarily* individuals.

We then hear from Prof. Archibald Cox on the Court's original abortion decisions. He has some very interesting things to say, and, of course, his opinions carry enormous weight in the judicial community. (We should make it plain that what you will read here is taken from *several* sections of his new book, *The Role of the Supreme Court in American Government,* in which he has a good deal more to say about *other* subjects; we hope that

*"For Better or Worse, Judicial Activism Seems Here to Stay," The Washington *Post*, July 22, 1976 (p. 3).

those interested will read the book.) Certainly he makes one statement that seems to many to penetrate the very heart of the abortion question: "Oddly, but possibly because counsel did not stress the point, the opinion fails even to consider what I would suppose to be the most compelling interest of the State in prohibiting abortion: the interest in maintaining that respect for the paramount sanctity of human life which has always been at the centre of western civilization, not merely by guarding 'life' itself, however defined, but by safeguarding the penumbra, whether at the beginning, through some overwhelming disability of mind or body, or at death."

Prof. Robert A. Steamer follows with an interesting discussion of what are, in his view, the Court's obligations when deciding questions on which it is, for practical purposes (and short of constitutional amendments) the court of last resort. He provides, along the way, the historical context in which the Court's powers have grown: without question, the Court today occupies a very different place in our governmental system from that of even a century ago (not to mention the original intentions and expectations of the Founding Fathers). His conclusion is, we think, a noble statement: "The Constitution is not a panacea for every blot on the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens."

We hope all this whets your appetite for more about what the Court did *re* abortion, for a great deal more follows: Mr. Robert A. Destro contributes a prodigious effort (and we reprint just over *half* of it here!) at analyzing the *Roe* and *Doe* decisions, which seems to us all the more interesting because he is a young man just out of law school (and just beginning his career as a practicing lawyer, which says something, we think, about how long the abortion issue is likely to be with us).

The undaunted reader will then find a change of pace and subject. We noted that abortion has become deeply embedded in current political discussions, and in religious controversy as well. Prof. Hitchcock lays out the general situation quite clearly (writing, as we said, almost three years ago); his article serves as a general introduction for the three that follow. Prof. Robert M. Byrn discusses some specifically Catholic problems about the still-growing movement for a constitutional amendment to solve the abortion question; Dr. Harold O. J. Brown gives a Protestant view that is not only steeped in the historical traditions of America's dominant religious persuasion, but also quite topical (e.g., he makes some very interesting points about the likely effects of the *Danforth et al.* decisions). Finally, Rabbi Seymour Siegal provides a Jewish viewpoint all too often overlooked in the public media (admittedly—unless the polls are wildly wrong—his is a minority view within the Jewish community, but it may be all the more interesting for exactly that reason).

All this comprises what is our largest (and some may say *heaviest*) issue to date. But it all seemed to fit together, and we hope the readers agree. In future issues, we will return to other subjects of general interest (population problems, bio-medical research, etc.), having "solved," for the moment at least, the abortion question in this *magnum opus,* so bursting at the seams that it has eliminated all our frills (letters, etc.—even our heretofore constant M. J. Sobran whom, we trust, will rejoin us next issue, sharp as ever).

J. P. MCFADDEN
Editor

The Theory of the Danforth Case

Francis Canavan

THE LATE Justice Felix Frankfurter of the U.S. Supreme Court once remarked that "constitutional law . . . is not at all a science but applied politics." There is much truth in what he said. Students of constitutional law understand the extent to which it is a part of the process of practical politics. But, after reading the Supreme Court's latest abortion decision, I am inclined to modify Justice Frankfurter's dictum slightly and to see the Court's opinions on abortion as essays in applied political theory. Let me attempt to explain my reasons for so thinking.

On July 1, 1976, the Court decided the case of *Planned Parenthood of Central Missouri et al. v. Danforth, Attorney General of Missouri et al.* Popularly known as the *Danforth* case, it concerned the constitutionality of a law enacted by the State of Missouri to regulate abortions in the aftermath of the Court's 1973 decision in *Roe v. Wade* (410 U.S. 113). In that case the Court had held that the States could not constitutionally prohibit abortion. In the *Danforth* case, the majority of the Court found five provisions of the Missouri law incompatible with *Roe v. Wade* and therefore unconstitutional. But, for our purposes here, we shall ignore a large part of the Court's opinion and concentrate on the two most important of the Missouri provisions found unconstitutional.

Section 3 (3) and (4) of the Missouri law provided that no abortion could be performed prior to the end of the first twelve weeks of the pregnancy except with the written consent of the woman's husband, if she were married, or with the written consent of one parent or person *in loco parentis,* if she were unmarried and under eighteen years of age. In each instance the qualifying phrase was added, "unless the abortion is certified by a licensed physician to be necessary to save the life of the mother." In *Roe v. Wade* the Court had held that a woman's freedom to decide to have an abortion was a "fundamental right" protected by the Constitution against

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State interference; here it held that this freedom cannot be limited by a State requirement that the woman's husband or parent must consent to the abortion.

Mr. Justice Blackmun wrote the opinion of the Court, as he had in *Roe v. Wade*. He therefore spoke for the majority of the Court. It remains nonetheless that he wrote the opinion, that he chose its phraseology and its arguments, and that the political theory which it embodies is in the first instance his. I stress this point because Justice Blackmun would surely deny that any theory at all was in his mind when he wrote the opinion of the Court. Unfortunately it would be all too easy to agree with him. He is not a profoundly reflective man and is quite capable of believing that he was only expounding the meaning of the Constitution when he was in fact unconsciously bringing a particular theory to bear on it. The theory is *there* just the same.

But first let us look at Justice Blackmun's reasons for finding the husband's and the parent's consent clauses of the Missouri law unconstitutional. *Roe v. Wade* had determined that during the first trimester of pregnancy the mother and her physician were free to decide upon and carry out an abortion without interference by the State. But it was precisely during this first trimester (or twelve weeks) that the Missouri law required the consent of husband or parent. "Clearly," said Justice Blackmun, "since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during the same period."

A woman's husband is thus presented as an individual whose right to prevent the abortion of his own child can only be a derived right, delegated to him by the State. Justice White commented in his dissenting opinion that Blackmun's argument rested on a misapprehension. White pointed out that under the Missouri law "the State is not . . . delegating to the husband the power to vindicate the *State's* interest in the future life of the fetus. It is instead recognizing that the husband has an interest of his own in the life of the fetus which should not be extinguished by the unilateral decision of the wife." Even if, he continued, we accept the principle that, in regard to an abortion, the mother's interest outweighs the State's interest, it does not follow "that the husband's interest is also outweighed and may not be protected by the State. A father's interest in having a child—perhaps his only child—may be unmatched by

any other interest in his life." The husband's right therefore stands on an independent base and is not one delegated to him by the State.

In a footnote to his own opinion, Blackmun answered White, saying that the latter did not understand the implication of the Missouri law: that the State had granted the husband "the right to prevent unilaterally, and for whatever reason, the effectuation of his wife's and her physician's decision to terminate her pregnancy." But the State had no power to do this. As Blackmun put it in the section of the opinion dealing with the parental consent clause, "the State does not have the constitutional authority to give a third party an absolute and possibly arbitrary veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." This is the essential premise of the Court's decision in regard to the consent clauses. To require the consent to an abortion of anyone other than the woman and her doctor is to grant a unilateral veto power on the exercise of a constitutional right.

There is, however, an obvious problem with this insistence on the unilateral character of the "veto power." Justice Blackmun dealt with it in these words:

> We recognize, of course, that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Since it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.

But to say this is to admit that the essential flaw of the Missouri law was not that it granted someone a unilateral right, but that it gave such a right to someone other than the mother. Justice Blackmun, and the majority of the Court with him, apparently cannot conceive of the issue posed by laws regulating abortion in any way but as a conflict of rights. In this conflict, one side always wins and, for all practical purposes, wins totally. So far, the winner has always been the woman who wants an abortion.

Thus, in *Roe v. Wade,* the Court considered the conflict between a woman's right to abort her unborn child and the child's right to keep his life. Speaking through Justice Blackmun, the Court remarked: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the

judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." With that remark, the mother's right to abort became absolute and the unborn child became merely a "potential life," and in no way the subject of a constitutional right to life. From that point on in the Court's opinion, having lost the battle in the conflict of rights, the child simply faded out of the picture.

This was true to the point where, later in the same opinion, when the Court granted that the State might prohibit the abortion of a viable child—one capable of living outside the womb—the most it would concede was the following: "If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother." But this was not to recognize any inherent right of the child as against the mother, since the child would be protected only if the State were interested in protecting it.

Next, still in *Roe v. Wade,* the Court considered the conflict between the woman's right to abort and the State's right to proscribe or to regulate abortion. This conflict was resolved in accordance with a doctrine that the Court had worked out since *Griswold v. Connecticut* (381 U.S. 479) in 1965. The doctrine teaches that the Constitution implicitly guarantees to every individual a "right of privacy." *Roe v. Wade* determined that privacy includes the right to decide upon an abortion. But the doctrine also holds that the right of privacy can be overridden by a "compelling State interest," and therefore is not an absolute right. But in *Roe v. Wade* the Court found no "compelling" State interest in protecting "the potentiality of human life" prior to the point of viability. Up to that point, therefore, the woman's right to abort was in effect absolute, not only as against her child but as against the State. The *Danforth* decision merely carried this line of reasoning farther by absolutizing the woman's right to abort as against the conflicting claims of her husband or her parents. As we said, in *every instance* the issue has been reduced to a conflict of rights, in which the mother's right is always found superior.

The opinion of the Court in the *Danforth* case therefore deserves the comment that Justice White made on it in his dissent: "It is truly surprising that the majority finds in the United States Constitution, as it must in order to justify the result it reaches, a rule that the State must assign a greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child." Presumably, however, the Court

would uphold a mother's right to bear a live child as against her husband's alleged right to make her submit to an abortion. In that sense the Court could claim to be neutral about abortion, and could say that all it requires is that the State assign a greater value to a mother's decision about abortion, whether for it or against it, than to a father's. Justice White's comment is nevertheless justified.

Justice White clearly assigns a greater value to human life than to its extinction. He would favor the father, not because he is the father, but because he wants to preserve his child's life, while the mother wants to destroy it. For Justice White, the content of the decision is important. For the majority of the Court, all that matters is that the mother should make the decision because, as they say in England, she has to carry the baby.

By making the mother's wishes the controlling consideration, the Court is forcing the State into an attitude of utter indifference toward what, in the Court's own terminology, is at least a potential human life. The only admissible object of public policy, in the Court's jurisprudence, is protection of the mother's untrammeled right to decide on the life or death of her child. The law may show no bias in favor of life, even if the male parent wants to preserve it, but must zealously safeguard the female parent's right to kill it. But this legal indifference is a specious neutrality: a legal system that refuses to have, or is not allowed to have, a bias in favor of life winds up with a bias against it.

The majority of the Court, in subscribing to the words that Justice Blackmun wrote for them, reveal just such a bias against life. The constitutional flaw they found in the Missouri law, as we saw above, is that it gave "a third party"—husband or parent—the right to exercise an absolute and possibly arbitrary veto over the mother's decision to have an abortion. But the Court thereby only confirmed the mother's absolute right to make a possibly arbitrary decision in favor of abortion. The Court thus subordinated the value of life to the allegedly higher value of an individual's autonomy—her freedom to do her own will. The Court also came very close to regarding the termination of pregnancy as a positive good, since nothing must be allowed to stand in its way, once the mother, with the advice and consent of her physician, has decided on it.

In the mind of the Court, of course, what I have called a bias against life is only a bias in favor of a woman's freedom to make the abortion decision. This freedom was upheld against the State in *Roe v. Wade* and, in the *Danforth* case, against the family. The Court, however, would not accept my way of describing its decision

in the *Danforth* case. Its position, rather, was that the family as an institution was simply not involved in the case. Nothing was involved but a conflict between individuals: wife v. husband, unmarried minor v. parent. Given that definition of the issue, the only question before the Court was which individual's right should prevail. But to frame the question in those terms is to deny that any rights in the matter arise out of the marriage or the family relationship. There are only individuals with conflicting claims of rights.

The attorneys for the State of Missouri had tried to make the family a factor in the case. They argued that the clause requiring the husband's consent to an abortion had been enacted in the light of the legislature's "perception of marriage as an institution," and that "any major change in family status is a decision to be made jointly by the marriage partners." Similarly, a Federal district court had upheld the clause requiring the consent of the parent of a minor and unmarried mother because of the State's interest "in safeguarding the authority of the family relationship." Justice Blackmun dismissed both arguments and made light of the notion that giving husband or parent a "veto power" over the abortion decision would do anything to strengthen the marriage bond or the family relationship. More significantly, he rejected the premise that the relationship of husband and wife, or of parent and child, furnished any ground for requiring a joint or institutional consent to an abortion. All that he could see was the conflicting wills of distinct individuals, one of whose wills must prevail.

Justice Blackmun was indeed anxious to avoid giving the impression that he had anything but the highest regard for marriage and the family. To demonstrate his true feelings, he inserted a footnote quoting the opinion of the Court in *Griswold v. Connecticut*:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

It is worth remembering, however, why the opinion of the Court in the *Griswold* case included this little *paean* in praise of marriage. The issue in that case was a Connecticut law that prohibited the *use* of contraceptives. In order to find the law unconstitutional, the Court stressed the argument that its enforcement would involve an unwarranted intrusion into the "privacy surrounding the marriage relationship." It was precisely the relationship that was to be defended against the State.

That was in 1965. By 1972, in *Eisenstadt v. Baird* (405 U.S. 438), it turned out that the marriage relationship had little to do with the constitutionality of laws regulating contraception. They were now found unconstitutional whether the persons wishing contraceptive information and devices were married or not. Justice Brennan, speaking for the Court, explained:

> It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

In his opinion in the *Danforth* case, Justice Blackmun quoted the above words (from "the marital couple" on) in the footnote immediately following the one in which he quoted the *Griswold* opinion in praise of marriage. It apparently did not occur to him that what was said in the *Eisenstadt* case effectively negated what had been said in the *Griswold* case. The right to contraception, it now appeared, in no way arose out of or was conditioned by the marital relationship. The right of privacy belongs to individuals simply as individuals, prior to and independently of such relationships as marriage and the family. This was the doctrine that Justice Blackmun applied to the right to abortion in the *Danforth* case. It is a doctrine whose roots reach much farther back in intellectual history than perhaps he realizes.

The doctrine is ultimately rooted in what is known as the social contract theory of the state. This in turn had its remote origins in the philosophical school of late medieval nominalism, according to which only individual substances are real, while essences or common natures, and the relations that spring from them, are mere constructs of the human mind. As a political philosophy, the social contract theory flowered in the seventeenth century, where it found its classic expression in the writings of Thomas Hobbes and John Locke. In the eighteenth century it became the dominant mode of political thought and strongly influenced the ideologies of the American and French Revolutions.

The main lines of the theory are as follows. The starting point is a "state of nature," i.e., the state that men are in by their very nature. Men are conceived of as being by nature independent individuals, without inherent or natural political relations to one another; in the more radical versions of the theory, men are thought of

as not being by nature even social beings. The state of nature, therefore, is a pre-political state, in which there is no political community, no government and no man-made law.

Every individual in the state of nature sovereign over himself and subject to no authority but his own. In most versions of the theory the sovereign individual is indeed subject to the "law of nature," which is the law of God as Author of nature. But the primary function of the law of nature is to confer on the individual his natural rights, which Locke summarized as life, liberty and estate (i.e., property). The only obligation imposed by the law of nature is the derivative one of respecting the rights of other individuals. In this theory, then, the individual is first and foremost a subject of rights, free to do what he will with his person and property (and here we may see foreshadowed a woman's now-famous "right to control her own body").

If men would live up to the law of nature and would respect each other's rights, there would be no need of government and human law. Bad men, however, encroach on the rights of others, and so conflicts arise. Since there is no common authority in society, every individual is the interpreter of the law of nature and the judge of his own natural rights. Consequently, there is in the state of nature no peaceable way of settling disputes over rights. Men therefore decide to form a civil society with a government empowered to settle disputes among individuals under general and standing laws. Civil society is formed by a social contract by which every individual surrenders to the community and its government his original right to be the judge in his own cause.

In this theory, civil society is not natural in the sense of being needed for the full development of human nature. It is a purely artificial construct, made necessary by men's wickedness and not by the innate needs of human beings. It is brought into existence by the contractual act of individual wills, each of which was originally sovereign, and which surrender their sovereignty only in order to set up a government that can protect their rights more effectively than they can themselves.

Such a theory rests on an atomistic conception of human nature. Man is no longer seen as a social and political animal (as Aristotle and Aquinas had seen him) whose very nature determines his basic relations to other persons in community. Man, as man, is an individual and nothing more. His relations to other individuals, consequently, are external, factitious and contractual, i.e., established by acts of free choice. The relations that are thus established will be

consented to by each individual with a view to his own interests alone. There are no truly common interests, only a pooling of individual interests, because there is no natural community and hence no genuine common good of men.

The result is a political theory that divides society between individuals and the state. Individuals have their reserved and guaranteed rights; the state has its necessary and legitimate power as the protector of their rights. The task of political theory is to draw the proper line between these two spheres, much as the Supreme Court draws it between the "right of privacy" and "compelling state interest." In such a theory, all other associations in society are private and voluntary, the product of individuals pooling their interests and rights. There are no natural associations with their own naturally given structures, powers and rights. All the rights and powers of associations are delegations by individuals and/or by the state.

The social contract theory, in its classical form, was a political theory, concerned only with explaining the nature of the political community and the relations between individuals and the state. It generally took marriage and the family for granted. But if one were to carry the logic of the theory through and apply it to marriage, one would come out with a conception of the marriage contract similar to the one now being advocated in certain quarters. That is, the marriage contract not only unites man and woman in matrimony, it determines the entire content and substance of marriage. Marriage implies no rights and obligations except those specified in the contract. That is to say, the marriage relationship has no given nature; it is whatever the two contracting parties choose to make it (including, for example, sanctioned extramarital larks, if they so specify in the contract).

The U.S. Supreme Court certainly has never gone so far as to puts it blessing on that conception of the marriage contract. But one begins to understand the kind of thinking that explains its opinion in the *Danforth* case, and why the social contract theory is relevant to it. As a formal political philosophy, the theory is now out of date, and one no longer expects to find references to the state of nature and the social contract in public documents. But the suppositions of the theory—its atomism, its radical individualism, its obsession with individual autonomy, its tendency to reduce social issues to conflicts of rights—are all powerfully operative in contemporary liberal societies and exercise a profound influence on our thinking today, not least on the thinking of the Supreme Court.

That is why the majority of the Court reduced the issue in the

Danforth case to a conflict of purely individual rights and to the question: Which individual's right prevails? That is why they could see a woman's husband or parents as having no rights in regard to the abortion decision except as delegates of the State, since no rights in the matter arise out of the marital or family relationship. The majority's basic fault is not that they decided in favor of the mother. If the content of the decision is irrelevant and the only question is which individual has the right to make the decision, it might as well be the mother. Justice Blackmun and the majority erred because they asked the wrong question and thereby ignored the family as a natural community and the basic unit of society. And this they did, not because the Constitution made them do it, but because their minds are still dominated by the suppositions of an outmoded political theory.

The Supreme Court and Abortion

Archibald Cox

IN EACH OF the abortion cases[1] a pregnant young woman was reluctant to bear the child for some personal reason involving no serious danger to life or health. In each case she lived in a State in which it would be a crime for a doctor to perform the abortion, either under a nineteenth-century law making it a crime to "procure an abortion" except "for the purpose of saving the life of the mother," or under a modern statute liberalizing the grounds for abortion but still not as permissive as the particular case would require. In each instance the young woman asked a court to enjoin the State authorities from prosecuting any doctor who might abort her, upon the ground that the threat of prosecution under the statute interfered with her exercising a form of personal liberty secured by the Fourteenth Amendment guarantee against deprivation without due process of law.

How should such a case be decided? Justice Frankfurter, Judge Learned Hand, and the other apostles of judicial self-restraint would have no trouble upholding the constitutionality of the statutes. At most, they would have said, the courts may do no more under the Due Process Clause than invalidate a law that no one could rationally believe to be related to some public interest; and no one could sensibly claim that an anti-abortion law fails this test. Justice Black would have reached the same conclusion. He had dissented in an earlier case holding that a married couple has a constitutional right to use contraceptives saying:

> I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of

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Archibald Cox has been (since 1965) the Samuel Williston Professor of Law at the Harvard Law School. While he is best known to the general public as the first Watergate Special Prosecutor, he is generally considered, in legal circles, as one of the foremost living authorities on constitutional law. He served as Solicitor General of the U.S. (under Presidents Kennedy and Johnson) from 1961-65. This article is excerpted from his new book, *The Role of the Supreme Court in American Government* (see pp. 51-55, 112-14, and 117-18; Copyright © 1976 by *Oxford University Press,* Inc.), and is reprinted here with permission.

> "civilized standards of conduct" . . . The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based upon their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination . . .[2]

The Supreme Court, by a 7-2 vote, nevertheless held the anti-abortion laws unconstitutional. The Constitution, the Court said, guarantees "certain areas or zones of privacy." Having an abortion because of personal preference is an aspect of privacy. Since privacy is a "fundamental right," any State interference must be justified by some "compelling interest." That interest, the opinion continues, cannot be in the "life" of the foetus because no one can say except by arbitrary definition when "life" begins; nor can it be the interest in "potential life" prior to the seventh month of pregnancy, for until then the foetus has no capacity for independent existence. The necessary compelling interest cannot be found in the health of the mother during the first six months of pregnancy, because medical statistics show that the dangers to health are greater in childbirth than in abortion; but the State may regulate abortion procedures during the third three months in the interest of health because of the statistically higher risks to health in that period. Oddly, but possibly because counsel did not stress the point, the opinion fails even to consider what I would suppose to be the most compelling interest of the State in prohibiting abortion; the interest in maintaining that respect for the paramount sanctity of human life which has always been at the centre of western civilization, not merely by guarding "life" itself, however defined, but by safeguarding the penumbra, whether at the beginning, through some overwhelming disability of mind or body, or at death.

Finding the medical case against abortion unpersuasive, the Court laid down three rules:

(1) During the first three months of pregnancy the State must leave the decision whether to have an abortion, and when and how to carry it out, to the woman and her doctor.

(2) During the second three months the State may not forbid abortion but may regulate the procedure.

(3) The State may prohibit abortion after six months except when necessary to preserve the life or health of the mother.

For one concerned with the proper role of the Supreme Court in American government and more particularly with the debate over judicial activism the abortion cases have three-fold significance:

First, the decisions plainly continue the activist, reforming trend of

the Warren Court. They are "reforming" in the sense that they sweep away established law supported by the moral themes dominant in American life for more than a century in favour of what the Court takes to be the wiser view of a question under active public debate.

Second, the Justices read into the generalities of the Due Process Clause of the Fourteenth Amendment a new "fundamental right" not remotely suggested by the words. Because they found the right to be "fundamental," the Justices felt no duty to defer to the value judgments of the people's elected representatives, current as well as past. They applied the strict standard of review applicable to repression of political liberties.

Third, three Justices in the seven-man majority were appointed by President Nixon as "strict constructionists": Chief Justice Berger, Justice Blackmun who wrote the opinion of the Court, and Justice Powell. Only one Nixon appointee dissented. There are ample signs that the Berger Court will not respond to new libertarian and egalitarian values with all the enthusiasm of its predecessor, and also that it is more worried by some of the complexities, cross-currents, and needs for accommodation that refuse to yield to optimistic generalizations. A court more concerned with the preservation of old substantive values than the articulation of a new spirit will find fewer occasions for rendering activist decisions. Still, the abortion cases strongly suggest that the new Justices are not restrained by a modest conception of the judicial function but will be activists when a statute offends their policy preferences.

In the end, therefore, one comes to the question: has the Court swung around the circle back to the method which led to equating Due Process with the economics of *laissez-faire*? Is there any *general* principle which authorizes the Court to substitute its judgment for the result of the political process when dealing with abortion but not with hours of work? To read liberty of abortion into the Fourteenth Amendment but not liberty of contract? If not, which judicial method was right and which wrong? Before one proposes to judge by results and not by method, one has also to ask how a purely eclectic, result-oriented approach would affect the Court's standing and utility.

* * * * *

What are we to say of the Supreme Court's decision holding that the Due Process Clause forbids a State to interfere with a woman's right to an abortion? What of the judicial method?

My colleague John Ely criticizes the abortion decision on the

ground that there is nothing in the Constitution that marks freedom to have an abortion as something special: "A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special it is not a constitutional principle and the Court has no business imposing it."[3]

My own view is less rigid. I find sufficient connection in the Due Process Clause. All agree that the clause calls for some measure of judicial review of legislative enactments, and from that point forward all must be done by judicial construct with no real guidance from the document. Nothing in the document dictates reading the federal Bill of Rights into the Fourteenth Amendment as either a source or a limitation of fundamental values, nor does the document suggest restrained review in some cases and strict review in others. The Court's persistent resort to notions of substantive due process for almost a century attests the strength of our natural law inheritance in constitutional adjudication, and I think it unwise as well as hopeless to resist it.

My criticism of *Roe* v. *Wade* is that the Court failed to establish the legitimacy of the decision by not articulating a precept of sufficient abstractness to lift the ruling above the level of a political judgment based upon the evidence currently available from the medical, physical, and social sciences. Nor can I articulate such a principle—unless it be that a State cannot interfere with individual decisions relating to sex, procreation, and family with only a moral or philosophical State justification: a principle which I cannot accept or believe will be accepted by the American people.[4] The failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations, whose validity is good enough this week but will be destroyed with new statistics upon the medical risks of childbirth and abortion or new advances in providing for the separate existence of a foetus. Neither historian, layman, nor lawyer will be persuaded that all the details prescribed in *Roe* v. *Wade* are part of either natural law or the Constitution. Constitutional rights ought not to be created under the Due Process Clause unless they can be stated in principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.

* * * * *

Constitutional adjudication depends, I think, upon a delicate, symbiotic relation. The Court must know us better than we know

ourselves. Its opinions may, as I have said, sometimes be the voice of the spirit, reminding us of our better selves. In such cases the Court has an influence just the reverse of what Thayer feared; it provides a stimulus and quickens moral education. But while the opinions of the Court can help to shape our national understanding of ourselves, the roots of its decisions must be already in the nation. The aspirations voiced by the Court must be those the community is willing not only to avow but in the end to live by. For the power of the great constitutional decisions rests upon the accuracy of the Court's perception of this kind of common will and upon the Court's ability, by expressing its perception, ultimately to command a consensus.

NOTES

1. *Roe v. Wade,* 410 U.S. 113 (1973); *Doe v. Bolton,* 410 U.S. 179 (1973).
2. *Griswold v. Connecticut,* 381 U.S. 479, 513 (1965).
3. Ely, "The Wages of Crying Wolf," 82 Yale L.J. 920, 949 (1973), also reprinted in *The Human Life Review,* Vol. I, No. 1, (Winter 1975).
4. The rulings bringing patently offensive utterances within the First Amendment suggest that the notion may influence some Justices.

Judicial Accountability

Robert J. Steamer

"The Supreme Court is the terrible end of the line of litigation. There is no further place to go. The decision had better be right."

—Justice Harry Blackmun in his statement to the Senate during his confirmation hearings.

IN ATTEMPTING to assess what has happened in the American system, as opposed to what was supposed to happen, it is standard practice to begin with the "intention of the framers." However, debates in the Constitutional Convention about judicial matters such as proper jurisdiction of courts or judicial review prove very little, and all arguments about what the framers intended in this regard have been deduced from our own familiarity with the problems that the Constitution should have been designed to master.[1] What we do know is that the Constitution is brief, reasonably comprehensive and eminently workable, and that it does not say that those who govern must do so in accord with what the original framers intended. The framers were men of the age of reason and enlightenment and certainly assumed that generations to follow would adapt the Constitution to inevitable changes of a dynamic society. It is important to remember, however, that the men of 1787 were in agreement on certain fundamental values which they expected to endure and to permeate the body politic. They were a part of the natural law tradition, a tradition which presupposed the existence of proper rules for governing men's conduct, rules discoverable through "right reason." They also viewed man as neither a god nor a devil but as a frail human who needs guidance through a belief in moral standards anchored in objective and transcendental reality, standards beyond human manipulation and control. The framers did not believe that altruism is a basis for government. They were not utopians, and their views of judicial power were not even reformist. They accepted the Anglo-American model that they knew. In this sense the American experience with revolution, with change and with subsequent constitution-making did not differ from the historical pattern. The Con-

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stitution was essentially a superstructure erected over a pre-existing system of law, and although the entire system of government was overhauled, most of the rules of just conduct, of civil and criminal law, remained in force. This is a necessary concomitant of governmental change, even revolutionary change, since "only by satisfying general expectations can a new government obtain the allegiance of its subjects and thereby become legitimate."[2]

After 1789 American courts, although encased in a new structural arrangement, operated in the same fashion as English courts, colonial courts, and the recently established state courts. Very soon, of course, the Supreme Court appended something novel and dramatic to the constitutional system, the practice of judicial review. By the 1830's, only four decades after the Constitution had become operational, Tocqueville described with keen accuracy the American judiciary. After pointing out that the new nation had retained the distinguishing characteristic of judicial power common to other nations—the pronouncement of a decision only when litigation has arisen in a specific case properly brought before the court—he added that American judges were "invested with immense political power." Tocqueville asked: "If the sphere of his authority and his means of action are the same as those of other judges, whence does he derive a power which they do not possess?" His answer was clear: "The cause of this difference lies in the simple fact that the Americans have acknowledged the right of judges to found their decisions on the *Constitution* rather than on the *laws*. In other words, they have permitted them not to apply such laws as may appear to them to be unconstitutional."[3]

It is significant that by the 1830's a visible, national consensus was emerging that held it a part of the Supreme Court's function to make pronouncements on matters of fundamental law which were binding not only on the private parties to a lawsuit but on the states and on the other branches of government as well. Although the Supreme Court had invalidated only one act of Congress by the time Tocqueville was making his observations, no less than a dozen state laws had been consigned to constitutional oblivion. What appears to have emerged rather quickly in America was a healthy corrective to legislative tyranny, one which the framers foresaw and invited. Without judicial review governmental assemblies whose activities ought to be limited by law are able to command whatever they please by simply calling their commands "laws."[4] That is, representative assemblies which arose, in part, in response to executive abuses of power in monarchies were now subject to the charge of

abuse themselves. But a key question remains. Who is to muzzle the watchdog when he viciously bites members of the family instead of protecting the household? What is to prevent an overzealous Supreme Court from using its powers either arbitrarily or unwisely? We need not dwell on the methods in the constitutional system for curbing arbitrary judicial power. They have often been detailed elsewhere and they embrace, among others, the "case or controversy" requirement, congressional control of jurisdiction and appellate structure, and constitutional amendment. In spite of periodic charges of judicial tyranny, some warranted perhaps, I agree with the late Alexander Bickel that the Supreme Court is, indeed, "the least dangerous branch." But this does not reach the problem whether the Court is acting prudently, responsibly and legitimately, or more pertinent to our topic, whether there has been a change over the years in the manner in which it resolves constitutional issues.

I would suggest that although the work of the Supreme Court under Chief Justices Warren and Burger has not been qualitatively different from Courts of the past, given the nature of the litigation in the Court today, it has not met its responsibility as a neutral guardian of constitutional liberty. Any appellate court has three functions: (1) correcting erroneous decisions of inferior judicial tribunals; (2) maintaining a consistency among lower subordinate courts so that the law is applied even-handedly everywhere; and (3) amending the rules of law or actually making law.[5] It is the third category that primarily concerns the Supreme Court, and the one which is now and always has been the most important and the most controversial. There is a large body of legal opinion, with which I am in agreement, that argues that the Court can maintain its position in the constitutional system only if: (1) its decisions are based on neutral principles;[6] (2) the Court deals only with those properly defined areas—enduring principles—stated in and placed beyond the reach of majorities by the Constitution; and (3) the Court eschews the attempt to solve judicially the major social evils of our society and concentrates on those issues in which it has competence.

The Supreme Court's power rests primarily on its ability to convince the rest of us that its decisions are right, and it can do so only if it clearly argues from neutral ground and not from preconceived notions, personal predilections or value preferences. Presumably certain value preferences were made by the Constitution, and it is the judge's duty to implement rather than choose. At the same time the Constitutional phraseology is often so general that it requires a judge not only to *apply* principles, but to *define* and *derive* principles as

well, and this the modern Supreme Court has not done with any consistency. The Court's very authority is thus placed in jeopardy since its accountability to the Constitution and to the law depends upon how it justifies its decisions to the people, meaning to the majority. Normally the Court's opinion is defending a minority's (technically an individual's) right against the majority's will embodied in a statute, and in an enlightened, democratic society majorities will concede that their preferences may not be in accord with constitutional principles. But the judicial reasoning must contain an inner logic of such overwhelming substance that even those who disagree with it can accept it as a proper limitation on majority rule. Unless this is the case, the Court's authority will be weakened, its prestige impaired, its power eroded and eventually its commands ignored. Minorities who win badly reasoned cases do great harm to the cause of minority rights.

The recently published memoranda of Justice Jackson prior to his assenting to the Warren opinion in *Brown* v. *Board of Education* highlights the inner struggle of a Justice who understands the impact of deciding a case inadequately reasoned. In sketching his thoughts on the school cases, Jackson wrote that although he disagreed with racial segregation in principle and believed it had outlived whatever justification it may have had, he could not answer the question "whether the real abolition of segregation would be accelerated or retarded by what many are likely to regard as a ruthless use of federal judicial power."[7] Despite his personal satisfaction with the Court's judgment, Jackson said that he could not find, in surveying all the usual sources of law, anything which warranted his saying that desegregation of the schools was required by the original purpose and intent of the Fourteenth or Fifth Amendment. Central to our concern with appropriate judicial reasoning is Jackson's inner struggle for neutrality as opposed to subjectivity. As he wrote in the context of *Brown*, "we cannot oversimplify this decision to be a mere expression of our personal opinion that segregation is unwise or evil. We have not been chosen as legislators but as judges. . . . And the thoughtful layman, as well as the trained lawyer, must wonder how it is that a supposedly stable organic law of our nation this morning forbids what for three quarters of a century it has allowed."[8] In the final analysis he argued that the Court should admit that there was no judicial basis for its decision except the majestic generalities of the Constitution which might vary from age to age. Jackson rejected outright the "elusive psychological and subjective factors," admon-

ishing that even if the Court adheres to objective criteria, "the judicial process will be capricious enough."[9]

In the end Jackson acquiesced not only in the decision, the principles with which no one dedicated to liberal democracy can disagree, but also in the opinion which epitomized the very looseness and flaccidity which Jackson deplored. We are all familiar with the immediate aftermath of *Brown* and we are living with the long-range implications. *Marbury* v. *Madison* was invoked by both the supporters and the opponents of *Brown.* Clearly, said *Brown's* adversaries, Marshall's edict that the Court had a duty to invalidate legislation that did not square with the Constitution was acceptable and controlling doctrine, but where in the Constitution was there any mention of a practice which the states had engaged in for decades? *Brown's* proponents argued that whatever the Court says is right, even if wrong, because the Court, and only the Court, speaks in the name of the Constitution and its decisions must be obeyed. A critical moment for judicial authority came in the desegregation of the schools in Little Rock when the Court, in upholding the executive use of troops to enforce the order of the district court, declared that "the federal judiciary is supreme in the exposition of the law of the Constitution," and that all officials must support it. The opinion in *Cooper* v. *Aaron*[10] dramatically emphasized that "to war against the Court was to war against the Constitution itself . . . and it intended to proscribe not only resistance to specific decrees but resistance to the principles of integration as a political rule."[11]

Professor Wechsler, whose views on the necessity of neutrality in judicial decisions are well known, saw the *Brown* cases as dealing with two legitimate rival claims, the freedom to associate and the freedom not to associate, a view which suggests an insoluble judicial dilemma. The Court had to choose between rival gratifications in order to find a fundamental human right, and in making the choice the Court was hardly acting neutrally. But instead of resting the case on the ground that enforced segregation has harmful effects upon black school children, an argument that could not be, and was not, used in subsequent cases outlawing segregation in public parks, beaches, golf courses and marriage, why did not the Court maintain that race may not be employed by the law as a classification? All law discriminates and thereby creates inequality, but not all law discriminates racially. We know that as a minimum the Fourteenth Amendment was intended to restrain government from discriminating on the basis of race, that its language does not distinguish between legal, social, political or psychological equality, and that any law

which treats races differently, i.e., unequally, does not comport with the Amendment's intent.[12] This, then, can be said not to be the value judgment of an ephemeral group of sitting judges, but the values of the framers of the Fourteenth Amendment, and it is not subject to intellectual rebuttal but only to an emotional attack, an attack which suggests that counter desires to equal treatment are not being gratified.

Although we know what the framers of the due process and equal protection clauses of the Fourteenth Amendment intended those clauses to mean in terms of equality of treatment of the races, there is no constitutional specificity in the Amendment's language regarding rights *of any other kind.* And yet the rhetoric of constitutional adjudication since *Brown* talks increasingly of "fundamental" rights, a phenomenon that leads the Court to construct new rights without adequate guidance from constitutional materials and to distort the scope and definition of rights that have claim to protection. If rights are not specific enough to be translated into rules based upon principles which are rationally acceptable to the electorate, how can the Court justify derivative or secondary rights? Only, as Solicitor General Robert Bork suggests, by grounding them in the democratic process itself.[13] That is, if there is no guidance in the Constitution, then the Court should leave the questions up to the legislature, for this is the essence of the Madisonian system, which assumes that majorities are entitled to rule by virtue of being majorities. This is their claim to legitimacy.

What seems to be the culprit is the idea of substantive due process and substantive equal protection, a concept which is the least neutral and the most frail of judicial inventions and one which litigants tend to push to its extremity. They do so precisely because there is no guidance for the Supreme Court in the Constitution. Although one may feel that reapportionment of state legislatures was long overdue when the Court decided the series of cases beginning with *Baker* v. *Carr*,[14] the fact remains that the majority was unable to support its decision with neutrally derived constitutional arguments.

One man, one vote is a beautiful rhetorical slogan, but it has no support in the equal protection clause, in history or in American practice. If the Constitution requires equal weight for all votes, then surely the principle is circumvented by the electoral college, the executive veto, the congressional committee system, the election of Senators, the procedure for amending the Constitution, the impeachment procedure and the ratification of treaties. Justice Harlan cut through the haze in his dissent in *Reynolds* v. *Sims*[15] when he de-

clared that the Court "does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process." And yet Harlan acquiesced in the holding in *Griswold* v. *Connecticut*,[16] a decision which was totally devoid of any attempt to derive a neutral principle on which to strike down the Connecticut anti-contraception statute. Justice Douglas' opinion with its "penumbras" and "emanations" flowing from Amendments One, Three, Four and Five performed a "miracle of transubstantiation"[17] when it attempted to create a foundation for a constitutional right of privacy. He failed because he did not disclose how guaranteed specified rights combined to create a new, unspecified right. It is difficult to gainsay Solicitor General Bork's allegation that the Court could not reach its decision in *Griswold* through principle since the Constitution had not spoken; and given that fact, the result depended upon the Justices' own value preferences.[18] It was a choice between the minority—in this instance a husband and wife—who asserted they wished to have sexual relations without fear of unwanted children and the majority which claimed the power to regulate, to impair the married couple's gratification. Since the value choice was made by the legislature, and properly so, unless a contrary choice had been made by the Constitution, the Supreme Court should have followed the legislature, i.e., majority will. *Griswold,* of course, had its antecedents,[19] and they too were not decided in accord with constitutional principles. It has always been good sport to condemn Justice Peckham's opinion in *Lochner,*[20] but the Douglas opinion in *Griswold* is in the same mold. And how different is the old activist, liberal warrier Douglas from the conservative Blackmun? If *Roe*[21] and *Doe*[22] are examples, not very!

In the abortion cases the Supreme Court once again viewed constitutional litigation as a means of settling a major social question and it settled the issue without principle. Justice Blackmun, in speaking for the Court, invoked a constitutional right that is nowhere mentioned in the Constitution, the right to privacy. He had, of course, to rely on other cases, including *Griswold,* in which the Court had also invoked the unarticulated idea that a general right of privacy is guaranteed by the Constitution. Relying on the due process clause and with the concurrence of six of his brethren, Justice Blackmun rewrote the law of abortion and couched it in constitutional terms, thereby foreclosing all debate on the issue excepting the remote possibility of a constitutional amendment. And he did so without really facing the key question: who is a person?[23]

In Justice Blackmun's words, the Court "need not resolve the difficult question of when life begins," but need only look at the harm which might devolve upon the mother which might be "psychological" or simply "distressful" as a result of giving birth to additional offspring. I cannot improve upon Professor Epstein's analysis of why this decision is so constitutionally vacuous. If the unborn is not a person, says Epstein, it is difficult to see why either the woman who requests an abortion or the doctor who performs it owes anyone an explanation for what they have done. The decision to end a pregnancy is a personal preference which needs no justification because it suggests no wrong. Remove a hangnail, terminate a pregnancy, it is all the same thing. But if we decide that the unborn child is a person, we must find some justification for deliberately killing a human being. Had the child been born, the mother could not have killed it at birth for the reason that the child would have forced upon the woman, in Blackmun's phrase, "a distressful life and future." This is a brutal justification for deliberate killing, and if the unborn child is a person, the logic of Mr. Justice Blackmun's position collapses. But this is not a discourse on the merits of permissible abortion. It is a criticism of the methods of constitutional interpretation which allows the Supreme Court to use the due process clause to invent constitutional rights and to settle social issues that might better be settled democratically. As Justice White said in dissent in *Roe* v. *Wade,* the Court's judgment is "an improvident and extravagant exercise of the power of judicial review."[24]

The question must be asked: Does the Supreme Court act any differently today than it always has? The answer is yes and no. Surely beneath John Marshall's constitutional rhetoric were political motives, some not always of the highest order. The Marshall Court, nevertheless, stuck rather closely to the phrases of the Constitution in deriving its fundamental principles, as have most Justices most of the time over the past 175 years. We can all point to those cases that have arisen in all eras whose tortured reasoning invited—sooner or later—an overturning of the law. Sustained opinion running counter to the Court's constitutional law will eventually nullify it, by desuetude if all else fails.[25] But the modern period suggests some distinctions from the past. The general outlines of legislative/executive power and federal/state spheres had been reasonably well marked out by the end of the nineteenth century, and by the beginning of World War II the questions of economic regulation which had occupied so much of the Court's time from the post Civil War period to the end of the New Deal had been settled with a fair degree of

certainty. The current era, the period of extended protection of individual rights, had its beginnings in the late 1930s, picked up momentum in the 1950's and 60's, and appears to be going on unabated. Certainly the Supreme Court is well suited to its role as protector of the individual against arbitrary government, but it ought not to assume that the major problems of society are justiciable. Once it enters a field in which public emotions run high, it does not solve the problem but opens the door to additional litigation and then tends to push its doctrines to an extreme formulation. The rule that equal protection requires no forced segregation becomes "requires forced integration," which tends to become "requires preferential treatment." The rule that the right to privacy requires no searches and seizures without a warrant becomes "requires no law forbidding the sale of contraceptive devices," then becomes "requires no law forbidding abortions," which tends to become "requires no law forbidding any sexual activities between consenting adults." Can a right to privacy be construed to protect a person's right to use heroin in his own home? The right to engage in sexual activity with a consenting minor?

It is not my intent to take issue with a public policy that decriminalizes former criminal activity or insists that mistreatment of minorities must cease, but this question does return to the consideration of accountability. Who should alter the existing law? Majorities democratically chosen or courts? I would argue that unless a principle is clearly stated in the Constitution or may be derived from the Constitution with a sense of logic that the people can respect, the decision is more properly left with representative bodies who can be held to account by their constituents. Furthermore, to make every private desire into a public issue of constitutional law is to trivialize the Constitution and to turn the Supreme Court into a moral and social preceptor. The Court's currency is limited and it should not be squandered in attempts to promote reform which failed to muster support in the legislature. If neither reason nor tradition can bring about a broad consensus within which the community agrees to accept, in Allan Bloom's phrase, "a compelling horizon of values," the Supreme Court cannot create it and the Constitution cannot guarantee it. I close with Justice Harlan's admonition:

> The Constitution is not a panacea for every blot on the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens.[26]

NOTES

1. John P. Roche, "The Founding Fathers: A Reform Caucus in Action," *American Pol. Sci. Rev.*, Vol. LV, December, 1961.
2. F. A. Hayek, *Law, Legislation and Liberty* (Chicago: Univ. of Chicago Press, 1973), p. 135.
3. Alexis de Tocqueville, *Democracy in America* (New York: Knopf, 1948), p. 100.
4. Hayek, *op. cit.*, p. 130.
5. Philip B. Kurland, "Jurisdiction of the United States Supreme Court: Time For A Change," 59 Cornell Law Review 618.
6. The classic statement on neutrality in judicial decision making is that of Professor Herbert Wechsler in the essay, "Toward Neutral Principles of Constitutional Law" in his book *Principles, Politics and Fundamental Law* (Cambridge: Harvard University Press, 1961). In Wechsler's words: "A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."
7. Richard Kluger, Simple Justice (New York: Knopf, 1976), p. 688.
8. *Ibid,* p. 689.
9. *Ibid.*
10. 358 U.S. 1 (1958).
11. Alexander M. Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962), p. 265.
12. See Robert H. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Journal pp. 10-14 for a careful discussion of the issue.
13. *Ibid,* p. 17.
14. 369 U.S. 186 (1962).
15. 377 U.S. 533 (1964).
16. 381 U.S. 479 (1965).
17. Bork, *op. cit.*, p. 8.
18. *Ibid,* p. 9.
19. See, for example, *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Adkins* v. *Children's Hospital*, 261 U.S. 255 (1923); *Lochner* v. *New York*, 198 U.S. 45 (1905).
20. 198 U.S. 45 (1905).
21. *Roe* v. *Wade*, 410 U.S. 113 (1973).
22. *Doe* v. *Bolton*, 410 U.S. 1 (1973).
23. See Richard A. Epstein, "Substantive Due Process By Any Other Name" (Chicago: The Supreme Court Review, 1973) for a comprehensive treatment of the issue.
24. 410 U.S. at 222.
25. Bickel, *op. cit.*, p. 28.
26. From Justice Harlan's dissent in *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

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

Robert A. Destro

> 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, in the courts, and in the media. 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.

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

Introduction

In *Roe* v. *Wade*, which involved a challenge to the Texas abortion statutes,[4] 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

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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.[5]

The Court's attempted accommodation of these interests was based upon a division of pregnancy into three periods, roughly equivalent to "trimesters."[6] 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.[7] The Court concluded that near 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.[8] The Court felt that subsequent to the point at which the unborn attain viability[9] 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.[10]

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[11] interests involved—those of the unborn—could be avoided by assuming that those interests were somehow less than "real."[12] 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].[13]

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"[14] and to reject the "rigid" claims argued by both sets of adversaries.[15] By resorting to the concept of "potential life" to define the existence of the prenatal human organism, and by assuming that an individual's life must be "meaningful" before there is logical justification for protecting it,[16] 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,[17] the state could assert a compelling interest in protecting the unborn once they reached viability.[18] 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.[19] In fact, it is only within the context of the abortion controversy that this basic fact is called into question.[20] In an editorial frankly discussing 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."[21]

So, by sidestepping discussion of biological fact, the Court was able to recognize that viability, a concept fairly new to the controversy over abortion,[22] signaled the period in which the state's interest in potential life would become compelling.[23] 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.[24] Since, in the Court's opinion, the unborn have no consti-

tutionally cognizable 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.[25]

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*,[26] 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*.[27] 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.[28]

Were the Court to continue to employ such an expansive definition of health after *Roe*,[29] the exception to state proscription of abortion after viability would swallow the rule, and the apparent accommodation of 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.[30] 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.

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,[31] but also by the Texas constitution's counterpart of the due process clauses of the fifth and fourteenth amendments.[32] That determination of Texas law was binding upon the United States Supreme Court.[33] 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*,[34] 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."[35] But the ultimate resolution of the question 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,[36] the Court's opinion contains no finding that such a state de-

termination would be either factually erroneous or so unreasonable as to be precluded by a broad interpretation of the Federal Constitution.[37]

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.[38]

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."[39] 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 rights are asserted.[40] This question and others closely related to it are more fully discussed in Part V of this Comment.

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.[41]

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.[42] 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.

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*[43] 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*,[44] especially when the procedures involved in the clinical setting involve not only a high degree of technical expertise and danger to physical health,[45] but also the economic incentives and considerations attendant upon the operation of any public service facility.

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 human life are equally deserving of constitutional protection. The Court rejected this proposition in *Roe*. In fact, the an-

swer 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.[46] 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.

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.[47] From a perspective in which abortion constitutes the taking of a human person's life, the privacy argument would have had to yield,[48] 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."[49] 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."[50] Stating that a woman's right to privacy is "broad enough to encompass her decision whether or not to terminate her pregnancy,"[51] 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.[52] 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 also its determination concerning the constitutional valuation of unborn life.

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.[53] 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 no-

menclature of the unborn, one may safely assume that there is at least *something* which is destroyed in the abortion process. To some,[54] 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.[55] Others[56] 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."[57] By electing to give recognition to the "less rigid" claim that "potential" life exists before birth[58] 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[59] 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.[60] According to *California Medicine*,[61] 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 ludicrous if not often put forth under socially impeccable auspices."[62]

Given the wealth of scientific evidence which will attest to the veracity of the foregoing statement, it is difficult to justify legalizing that 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 quandary over allowing abortion to become nothing more than a commonly accepted medical procedure.[63] 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 hurdle to cross before deciding that legal restraints on a woman's decision to abortion were unconstitutional: that of history.

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]."[64] 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,"[65] 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.[66] If, on the other hand, abortion was perceived as an offense against the unborn rather than women, the Court's rationale collapses.[67] Thus, before examining the conclusions the Court drew from its historical excursus, it will prove informative to review the historical terrain.

The Common Law

Perhaps the most influential statement of the common law atti-

tude 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."[68] 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 commision of the crime of abortion, was severely criticized by New York Law School professor Cyril Means Jr. in an article which appeared in the 1971 Women's Rights Symposium of the New York Law Forum."[69] Relying in the main upon Professor Means' analysis of the common law, which was written with the express intention of influencing the outcome of *Roe* and *Doe*,[70] 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.[71] 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.[72] Professor Means' own interpretation of the common law was based upon two 14th century case reports[73] 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.[74]

Contrary to the conclusion of Professor Means, *The Twinslayer's Case* is not precedent for a "common law freedom" of abortion. By focusing the reader's attention on the statement that the judges were unwilling to adjudge the existence of a felony, and by simultaneouly relegating the closing lines of the case to a long textual footnote professing ignorance of their import,[75] 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[76] 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,[77] 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,[78] demanded his presence to answer the charge. 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,[79] D.'s recall to answer the charge lends support to the proposition that the judges had indeed characterized D.'s action 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.*[80]

An examination of these two cases demonstrates that the reticence of some early common law writers to classify abortion as a felony[81] 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*,[82] wherein he stressed that:

> [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,"[83] goes on to discuss Stanford's opinion that the lack of a baptismal name noted in *The Abortionist's Case* "is of no force."[84] 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 natura* (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,"[85] 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 before, however, *The Twinslayer's Case* is not precedent.[86] 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."[87]

The basic importance of the two aforementioned factors to the

position of the early common law is underscored by their gradual demise in the face of the growing willingness of both statutory[88] and common law[89] 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.[90] 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 law into step with the times.[91]

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.[92] 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.

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,* [93] 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,[94] 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."[95] Although this statement, taken out of context, lends strong support to the central thesis of *Roe v. Wade,* [96] 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,[97] 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.[98]

Thus, even conceding the validity of the ancient maximum *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,[99] 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 cases,[100] 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.*[101] Both *Smith* and a New Jersey case, *In re Vince,*[102] 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."[103] Professor Means cited *Smith* along with a Massachusetts case, *Commonwealth v. Parker,*[104] 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.[105] 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 affect 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 considered 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 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.[106]

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:[107] (1) the destruction of the unborn child was, itself, the gravamen of the crime of abortion;[108] (2) the woman herself could very well be punished for destroying her unborn offspring;[109] (3) the "quickening" distinction had been abrogated;[110] 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.[111] 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,"[112] especially when those observations were based in part on cases like *Smith* and *Murphy*.[113]

Of similar import is the language of *In re Vince*,[114] also cited by the Court in support of its conclusions.[115] 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*.[116] The case is interesting not only because the woman involved was forced to testify,[117] 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."[118] Contrary to the implication of the Supreme Court in *Roe*, the New Jersey statute involved[119] 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.[120] 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,*[121] or by lower federal courts employing similar rationales,[122] 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 laws 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 the fact that the federal judiciary has decided that such life is not worthy of constitutional protection.[123] A thorough understanding of constitutional law is not required in order to appreciate the distinction.

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."[124] 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.[125]

Perhaps the best evidence of state intent to protect the unborn by statute is found in *Smith v. State,*[126] decided by the Supreme Court of Maine 17 years before the enactment of the fourteenth amendment. Not only did the statute[127] involved in *Smith* abrogate the "quickening" requirement which had, by that time, become obsolete for purposes of defining the nature of the offense charged,[128] 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.[129] Even more revealing, however, is the 19th century Connecticut abortion law,[130] 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.[131] The history of that statute which 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.[132] Stating that the prevailing view of late 19th century America was anti-abortion,[133] 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."[134] 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:[135]

> 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 exploded 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.[136]

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."[137] A report of the A.M.A.'s position appeared in an 1860 edition of the Connecticut House Journal,[138] 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.[139] 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*.[140] 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;[141] the interests of the unborn had already been determined to be "insufficient."[142]

> The Malthusian spector, 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.[143]

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."[144]

After the first decision in *Abele* the Connecticut legislature reinacted its abortion statute, this time specifically expressing its intent

to protect unborn life.[145] Again, the same three-judge federal court held (2-1) that the statute was unconstitutional,[146] relying upon an argument similar to that which underlies the *Roe* decision.[147]

In *Roe v. Wade* the Supreme Court cited *Abele* with approval, stating that its decision was "in accord" with the results of that case.[148] 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,[149] 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."[150] The resolution of this inconsistency may be found in the rationale of *Babbitz v. McCann,*[151] 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."[152]

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 notwithstanding.[153] 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 substantive 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."[154]

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."[155] 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.[156]

The central legal issue in *Roe v. Wade* was whether or not the unborn are "persons" protected by the fourteenth amendment.[157] 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."[158] Given the importance of resolving this issue, and the fact that the matter was one of first impression,[159] it is unfortunate that 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.[160]

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.

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.[161] 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.[162] 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.

Two examples—the apportionment clause[163] 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 ap-

portionment 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,"[164] 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,[165] 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."[166]

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.[167] Although Congress has never done so, it would be neither irrational nor unconstitutional 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.*[168] The holding regarding the unborn can 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.[169]

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.[170] 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";[171] 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.[172] The lower court decision was based upon the premise that the unborn are human beings.[173] 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.[174] The question to be answered by the Court was this: absent some affirmative 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?[175] 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."

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. [176] 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 Frederick 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 per-*

son."[177] 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 unborn have never been considered persons "in the whole sense."[178] 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.[179] 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,[180] 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,[181] 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 controversy over legal abortion. The fourteenth amendment does not speak in terms of a right to "meaningful"[182] life, or a right to life "as [the Court] recognized it";[183] 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 pro-

tect 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.[184] 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.[185] As one commentator has noted,[186] 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.[187] Such a fact only pointed to a need for enactments to protect the right.[188] 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 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.[189]

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,[190] and who are considered to be hu-

man beings at the present time. The Court based its restrictive interpretation of the word "person" upon certain conclusions about *state* policies concerning the unborn.[191] 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[192] is the functional equivalent.

As noted above,[193] 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.[194] The reason for this development was that abortion laws of the early 19th century did not go *far enough* to protect unborn human life.[195] In response to the petition of the American Medical Association, at least one state, Connecticut, strengthened its abortion law.[196] 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.[197] In light of the contemporary 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,[198] and that they considered abortion to be a part of the liberty protected by the amendment.[199] To do so would be to ignore the tenor of the times.

The fourteenth amendment recognizes two classes: citizens and persons.[200] As to the broader class—"persons"—the rights of life, liberty and property are assured.[201] As to the narrower class—"citizens"—a bar is interposed to state interference with the privileges and immunities of national citizenship.[202] 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.[203] The same distinction exists in the fourteenth amendment today.[204]

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.[205] In fact, given the predominantly anti-abortion mood of the country, as well as the intensive lobbying campaign of the American Medical Association[206]

and the medical societies of some of the states,[207] 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.[208] The Court recognized that these facts are "well-known."[209] It is hard to imagine what other evidence of the "personhood" of the unborn was necessary.[210] The only meaningful and concrete distinction between the unborn and their adult counterparts is one of *age* rather than nature.[211] If the constitutional concept of "person" is broad enough to encompass corporations[212] (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[213] challenged in *United States v. Vuitch,*[214] 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*—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.[215] Faced with cogent arguments that the unborn offspring of human beings are individuals protected by the Constitution,[216] 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

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.[217] 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.[218] 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 framework upon which the states are permitted to construct constitutionally acceptable regulations lies in the trimester approach of *Roe*.[219]

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.[220] 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,[221] but even then the decision in *Doe* precludes it from requiring that abortions be performed in fully equipped hospitals[222] and from imposing mandatory consultation requirements upon the physicians who are to perform the procedures.[223]

While it is true that one's perspectives on the need for free accessi-

bility to legal abortion will influence one's perceptions of what is "proper" in this area, the need for objectivity is great.

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.[224] Since a state has an 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"[225] which may be limited by the federal courts only to the extent required by the Constitution.[226]

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.[227] The Court did this in neither *Roe v. Wade* nor *Doe v. Bolton*. Instead, it held the states to a higher standard of review.[228]

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.[229] 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;[230] the statutes invalidated were penal provisions.[231] 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."[232] Such matters are most properly resolved by

prompt judicial action upon evidence clearly demonstrating an invalid state purpose.

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.[233] 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 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,[234] and held, in effect, that early abortion, "although not without its risk,"[235] is, for constitutional purposes, now safer than normal childbirth.[236] 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,"[237] for this fact is the sole basis upon which the first trimester prohibitions are based.[238] But would such a fact, even if established beyond any reasonable doubt,[239] destroy the constitutional validity of the regulations being examined? Clearly it would not.

Given the Court's broad definition of health, it is rather odd that it focused on mortality as the only determinative health factor. Indeed, 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.[240] Its importance is equal to, if not greater than, mortality, in considering the relative safety of any abortion procedure.[241] To invalidate abortion-related health regulations solely on the basis of mortality[242] is akin to striking down industrial safety standards without considering the incidence of non-fatal injuries.[243]

Morbidity includes latent, as well as immediate complications. The overall safety of any surgical procedure, especially abortion, cannot 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,[244] for not only is their own health and fertility[245] at stake, but also the health of any future "wanted" offspring which the women may produce.[246] 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,[247] 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,[248] it should be clear that early abortion is not so trivial an operation as the low mortality figures based upon the New York experience might seem to indicate.[249] 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."[250] This morbidity includes cervical incompetence,[251] intrauterine damage,[252] including perforation,[253] iso-immunization,[254] extrauterine (ectopic) pregnancy, and psychological sequelae.[255] 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.[256]

While a study of the comparative incidence of fatal and morbid

consequences subsequent to full term pregnancy and elective induced abortion[257] 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,[258] 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[259] and morbidity; (2) restrict considerations 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.[260] 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.[261] 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. An examination 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.[262] 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.[263] Identical criticisms can be levelled at contemporary abortion studies: sampling is incomplete,[264] followups are difficult,[265] and reporting is either skewed[266] or incomplete.[267] Such unreliable statistical information should not form the basis for rigid constitutional interpretations depriving the states of the power to regulate in the public interest.[268]

Even if a fundamental right to an abortion does exist,[269] it cannot be intelligently and safely exercised with informed consent[270] 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. 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 inappropri-

ate,[271] but also unwarranted in light of all the relevant medical data.

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; [272] the regulations themselves are surely not unreasonable on their face.[273] Moreover, the lower courts have adopted *Roe*'s rigidity, and have opted for an extremely 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.[274]

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 pregnant 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.[275]

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,[276] 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 im-

poses an "unreasonable burden" upon the exercise of the protected activity.[277] 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.[278]

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.

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 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,[279] 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.[280]

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,[281] the well-intentioned physician may sometimes find it difficult to square the perceived needs of patients with the letter of the law.[282] As a result, there develops a clamor for change in an attempt to make the law responsive to these needs.[283]

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.[284]

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[285] and fetal experimentation.[286] The Supreme 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.[287] 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.[288]

The opinion of the California Medical Association (C.M.A.)

lends credence to such a view by its frank recognition of the issues involved.[289] While agreeing that the "traditional Western ethic has always placed a great emphasis on the intrinsic worth and equal value of every human life,"[290] 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.[291]

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.

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[292] 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.[293] 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."

As recent developments have shown,[294] 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[295] requires a

careful examination of a fundamental, but little discussed, question: what is the purpose of an abortion?[296] 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.[297] These questions take 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.[298]

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.

The Concept of Viability

The inquiry begins with the concept of "viability." Making a judgment on the medical evidence presented in the briefs,[299] the Court decided that viability usually occurs at 28 weeks, but may even occur as early as 24 weeks.[300] 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[301] up until the point at which "actual" viability is proved by survival.[302]

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 downward 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.[303] 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?[304] If so, what would support such a distinction?[305]

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"?[306]

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.[307] But what if the techniques which almost always assure fetal death are also extremely dangerous to the mother?[308] May a state validly forbid their use?[309] Even if the result is an increase in the number of "live borns"?[310] Perhaps one approach to these questions would be simply to assure that all abortions are performed during the very early gestational period. But a government 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 the trimester formulation collapses en-

tirely. 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,"[311] 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.

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,[312] 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 abort an unwanted pregnancy, her concern is obviously not directed to the welfare of the child.[313]

Pre-abortion 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[314] and are unquestionably alive;[315] *Roe* merely denied them the legal status of "person." A judicial interposition of a compelling state interest requirement to justify limits on pre-abortion 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. For more on the ramifications of such a policy, see below.

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.

IV
Current Status of the Abortion Controversy

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.[316] While the Court does have such power, the validity of its 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,[317] even those of the "least dangerous branch,"[318] the ultimate safety of any group of individuals whose existence or physical need threatens to exacerbate the "profound problems" of others is in question.[319]

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*[320] to support the part of his concurring opinion dealing with the existence of the state's power to protect its own interests.[321] 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:[322]

> 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.[323]

Through the process of amniocentesis,[324] 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,[325] what "of value" would be destroyed?[326] Although most would recoil at such a suggestion,[327] 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.[328] 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 *quality* of life, rather than its existence *per se*, is the supreme virtue.[329] 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.[330] testified on some of the motivating factors which led him to introduce a bill to legalize "death with dignity," a common euphemism for euthanasia[331] in Florida.[332] 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.[333] Dr. Sackett asked: "Now where is the benefit in these 1,500 severely retarded, who never had a rational thought . . .?"[334] Rather, he continues, society should concern itself with those whose lives are "useful."[335]

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.[336] 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 system . . . [if] a child were not declared alive until three days after birth."[337]

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.[338] 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

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,[339] yet nowhere is it 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,[340] as do those of his contemporaries.[341]

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 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.*[342] 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.[343] 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.[344]

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.[345]

> 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.[346]

The arguments in the briefs apparently assumed that the term "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.[347] 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.[348] 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."[349]

But is it true, as Judge Cassibry argued in his dissent in *Rosen v. Louisiana State Board of Medical Examiners*,[350] that the "meaning of the term 'human life' is a relative one which depends on the purposes for which the term is being defined"?[351] 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 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.[352] 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.[353]

Equal Protection

As Justice Douglas pointed out in the course of his concurring

opinion in *Doe*,[354] 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."[355]

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,[356] on the second, the Court denied those same protections to the unborn offspring of human beings.[357]

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,[358] women could not vote or hold property in their own name, and Indians not taxed were not to be counted in the decennial census[359]—few would have denied that these politically and socially disadvantaged individuals were persons.[360] 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 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.[361] 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,[362] 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 sacri-

ficed, if at all, only in the face of grave or compelling necessity.[363] It is for this reason that even some of the most highly reputed proponents of this "new ethic," by their own admission, find themselves forced to obscure[364] 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,[365] 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.[366]

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 the rest of the common law developed apace.[367] 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.[368]

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 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 application 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,[369] 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 health-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 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.

NOTES

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 material cited in footnote 83.

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. Tex. Penal Code §§ 1191-94, 1196 (1963).
5. 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).
6. *Roe*, 410 U.S. at 162-63.
7. *Id.* at 163.
8. See Part II *infra*.
9. *Roe*, 410 U.S. at 163.
10. "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.
11. In any decision concerning abortion, the marshalling of the interests at stake must reflect the potential effect 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 enforcement of the statute) (statute provision requiring consent of father); Doe v. Rampton, 366 F. Supp. 189 (1973) (same); Jones v. Smith, 278 So. 2nd 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.

12. 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).
13. *Roe,* 410 U.S. at 150.
14. *Id.* at 159.
15. 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.
16. *Roe,* 410 U.S. at 163.
17. *Id.* at 158.
18. *Id.* at 163-64.
19. 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 Embryology 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).
20. 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 19, 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 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 scientific 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).

21. California Medicine, *supra* note 19, 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 artificial 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 convenient means by which to estimate the progress of prenatal development. *See* sources cited note 19 *supra*.

22. 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.

23. *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.

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

25. 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 essentially different from 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] 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).

26. 402 U.S. 62 (1971).
27. 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.
28. *Roe,* 410 U.S. at 153.
29. 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 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 judical policy, notwithstanding Chief Justice Burger's contentions to the contrary. *See*

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 69, 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 homocide. 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.

91. 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 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).

92. 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.
93. 27 N.J.L. 112 (1858).
94. 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).
95. 27 N.J.L. at 114.
96. 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 69, 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).

97. State v. Cooper, 22 N.J.L. 52 (1849).
98. 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.
99. *See Roe,* 410 U.S. at 149; Means, *supra* note 69, at 382-96.
100. *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).
101. 33 Me. 46 (1851).
102. 2 N.J. 443, 67 A.2d 141 (1949).
103. *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 22 *supra.*
104. 50 Mass. (9 Met.) 263 (1845).
105. Means, *supra* note 69, 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.
106. Smith v. State, 33 Me. 48, 54-55, 57 (1851).
107. See text accompanying notes 181-212 *infra.*
108. 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.

109. *Id.* at 58.
110. *Id.*
111. *Id.* at. 60.
112. *Roe,* 410 U.S. at 158.
113. *Id.* at 151 nn. 48-50.
114. 2 N.J. 443, 67 A.2d 141 (1949).
115. *Roe,* 410 U.S. at 150 n.50.
116. 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.

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].

243. The folly of using abortion related mortality as the sole indicator of the operation's safety vis-a-vis normal childbirth 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.*

244. *Compare* Pakter, *supra* note 242 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 242, at 5 (61.0% and 24.2% respectively).

245. *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].

246. 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].

247. *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").

248. *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 243.

249. 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 Eng-

land J. Med. 1206 (1969). *See also,* Fleck, *Some Psychiatric Aspects of Abortion*, 115 J. Nervous and Mental Disease 42 (1970):

> The phrase [therapeutic abortion] compounds 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.

250. A. Wynn, *supra,* note 245, at 12 (emphasis in original).
251. *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).
252. A. Wynn, *supra* note 245, at 18-19. *See also* Stewart & Goldstien, *supra* note 245, at 548 (noting the risk of postabortal infertility due to high rate of infection); M. Wynn, *supra* note 246, 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).
253. *See* Stallworthy, *supra* note 243; Stewart & Goldstien, *supra* note 245, at 545.
254. A. Wynn, *supra* note 246, at 21.
255. Much of the research into psychological sequelae of induced abortions 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 242, 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 246, at 6-7.
256. *See, e.g.,* Nigro, *supra* note 248, at 37-38.
257. See note 249 *supra.*
258. 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 242, 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 239, at 36:

> There is at least one apocryphal story circulating about an abortion death in a physician's office from air embolism when an aspiration pump acted as a pressure rather than a suction device; following which the woman's corpse was trans-

ported back to her home state and the true cause of death there was not recorded.

259. 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).

260. 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 patient's prior physical health; (4) the method by which the abortion or birth was effected; and (5) the degree to which the patient was able to receive post-partum or post-abortal care.

261. *See, e.g.,* Tietze and Lewit, *A National Medical Experience: The Joint Program for the Study of Abortion (JPSA),* in Osofsky & Osofsky, *supra* note 242, 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 260 *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.

262. *See* Simon and Senturia, *Psychiatric Sequelae of Abortion, 15* Archives of General Psychiatry 378 (1966), *discussed in* Nigro, *supra* note 248, at 22, 23.

263. *Id.*

264. *See, e.g.,* Tietze & Pakter, *supra* note 242 (mortality figures gathered from recollections or secondhand knowledge of physicians specializing in obstetrics and gynecology with 54.5% response from sample).

265. *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 242, 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).

266. See note 261 *supra.*

267. *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 258 (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 incidence of complications to answer requests for such information. Personal Communication, Center for Health Statistics, January 29, 1975.

268. 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 273-74 *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 procedures 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.

269. See Part I *supra*.

270. *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).

271. 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 ignore 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 Delaney Clause: Technical Naiveté and Scientific Advocacy in the Formulation of Public Health Policies,* 62 Calif. L. Rev. 1084 (1975).

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

273. *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].

274. 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.

275. 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.

276. O'Brien v. United States, 391 U.S. 367 (1968) (draft card burning).
277. Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 513 (1924) (Holmes, J., dissenting).
278. *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting).
279. *Roe*, 410 U.S. at 165-66; *Doe*, 410 U.S. at 199.
280. *Roe*, 410 U.S. at 165-66 (emphasis supplied).
281. *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 Lousiana 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.

282. 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 abortion. Until 1970, the traditional position of the American 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).
283. 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 We 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 19, at 68 (expressly recognizing abortion as the taking of human life).
284. 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 preserve the life or health of the mother is unconstitutionally vague when there is no set definition of terms such 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 infinitely 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).

285. 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.

286. 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).

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 apparently 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 found 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 19, 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 and 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).

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

288. A judicial modification of the law is not limited to holding the governing statute invalid. By refusing 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 post-abortal 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).

289. California Medicine, *supra* note 19, at 68.

290. *Id.*

291. *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."

292. See text accompanying note 21 *supra.*

Doe, 410 U.S. at 208 (Burger, C.J., concurring).

30. "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.
31. *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 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.
32. 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.
33. 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).
34. *Roe,* 410 U.S. at 119 n.3.
35. *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 13 *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.
36. The Texas court found the unborn to be human in the *biological* sense. See note 31 *supra.*
37. *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.

38. *Id.* at 156-57.
39. *See Doe,* 410 U.S. at 221-22 (1973) (White, J., dissenting); *cf.* Dred 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 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).
40. 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.
41. *Roe,* 410 U.S. at 153.
42. See Part IV *infra.*
43. 493 S.W.2d 913 (Tex. Crim. App. 1971), *vacated and remanded,* 410 U.S. 950 (1973) (inconsistent with *Roe*).
44. 381 U.S. 479 (1965).
45. See Part II *infra.*
46. See Part V *infra.*
47. 410 U.S. at 156-58.
48. 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.
49. 410 U.S. at 162.
50. *Id.* at 159.
51. *Id.* at 153.
52. *See id.* at 162-63.
53. E. M. Schur, Crimes Without Victims 11 (1965).
54. *See, e.g.,* The Morality of Abortion (J. Noonan ed. 1970).
55. U.S. Const. amend. V and amend. XIV, § 1.

56. *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).
57. *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).
58. *Id.* at 150.
59. *See* sources cited notes 19-20 *supra.*
60. *Id.*
61. California Medicine, *supra* note 19, at 68.
62. *Id.* at 69.
63. *Id.* (during the period when the "new" ethic is replacing the old).
64. *Roe,* 410 U.S. at 140.
65. *Id.*
66. *See* note 20 *supra.*
67. *Roe,* 410 U.S. at 157-58 (by implication).
68. 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).
69. Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth Century Common-Law Liberty?* 17 N.Y. L. Forum 335 (1971) [hereinafter cited as Means].
70. Means, *supra* note 69, at 336.
71. *Roe,* 410 U.S. at 136.
72. 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 69, at 346. This contention is pure speculation on the part of Means. *See id.* at 343-46.
73. Anonymous, Y.B. Mich. 1 Edw. 3, f. 23, pl. 18 (1327), in Means, *supra* note 69 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 (3rd ed. 1565), *quoted in* Means, *supra,* at 338-39 nn.5 & 6 (denominated The Abortionist's Case).
74. Anonymous, Y.B. Mich. 1 Edw. 3, f. 23, pl. 18 (1327) in Means, *supra* note 69 at 337-38 & nn.3 & 4 (C. Means trans.).
75. Means, *supra* note 69, at 338 n.4.
76. 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).
77. 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.

78. 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 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.

79. See note 76 *supra.*
80. Anonymous, Y.B. Mich. (1348), *reported in* Fitzherbert, Graunde Abridgement, tit. *Corone* f. 268, pl. 263 (1st ed. 1516), f. 255, pl. 263 (3rd ed. 1565), *quoted in* Means, *supra* note 69, at 338-39 & n.5 (C. Means trans.) (infant was stillborn).
81. *See e.g.,* M. Hale, History of the Pleas of the Crown 433 (1736). *Contra, e.g.,* W. Blackstone, 4 Commentaries *198 (1769).
82. W. Stanford, Les Plees del Coron, Book I ch. 13 (1557) (*Queux choses sont requisites à faire homicide*), *quoted in* C. Means, *supra note* 69 at 339-40 & n.8.
83. Means, *supra* note 69, at 339.
84. *Id.* at 340.
85. *Id.* at 351.
86. See text accompanying notes 74-78 *supra.*
87. E. Coke, Third Institute, *50-*51 (1648), *quoted in* Means, *supra* note 69, at 345.
88. *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).
89. *See, e.g.,* Commonwealth v. Parker, 50 Mass. (9 Met.) 263, 265-66 (1845); State v. Murphy, 27 N.J.L. 112, 114 (1858).
90. 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,

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. 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).

117. *In re* Vince, 2 N.J. 443, 451, 67 A.2d 141, 145 (1949).
118. *Id.* at 449-50, 67 A.2d at 144.
119. N.J. Rev. Stat. 2A:87-2 (1973).
120. *In re* Vince, 2 N.J. 443, 451, 67 A.2d 141, 145 (1949).
121. *E.g.* La. Rev. Stat. § 37: 1285 (1964); Me. Rev. Stat. Ann. tit. 17, § 51 (1964); Ohio Rev. Code § 2901.16 (1953).
122. *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).
123. *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).
124. *Roe,* 410 U.S. at 158 (1973).
125. 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.
126. 33 Me. 48 (1851). See notes 101-111 and accompanying text *supra.*
127. Me. Rev. Stat. c. 160, §§ 13-14 (1840).
128. *Id.* § 14.
129. Smith, 33 Me. at 60.
130. 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).
131. *Id.*
132. 410 U.S. at 141-42.
133. *Id.* at 141.
134. *Id.*
135. *Id.* at 141-42.
136. 12 Trans. A.M.A. 73-77 (1859), *quoted in Roe,* 410 U.S. at 141-42.
137. *Roe,* 410 U.S. at 142.
138. Abele v. Markle, 342 F. Supp. 800, 805, 807 (D. Conn. 1972) (Newman, J., concurring).
139. See note 130 *supra.*
140. 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.
141. *Id.* at 802.
142. *Id.*
143. *Id.*
144. *Id.* at 816 (Clarie, J., dissenting).
145. Conn. Pub. Act No. 1, May 1972 Special Session.
146. Abele v. Markle, 351 F. Supp. 224 (D. Conn. 1972).

147. *See id.* at 805-07.
148. *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).
149. *See Doe,* 410 U.S. at 190-91 (1973).
150. Abele v. Markle, 342 F. Supp. 800, 802 (1972).
151. 310 F. Supp. 273 (E.D. Wis. 1970).
152. *Id.* at 301.
153. 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 69, at 336. The "proof" offered by Professor Means, however, was his erroneous interpretation of The Twinslayer's Case discussed in the text accompanying notes, 48-70 *supra.*
154. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
155. Doe v. Bolton, 319 F. Supp. 1048, 1055 n.3 (N.D. Ga. 1970), *aff'd,* 410 U.S. 179 (1973).
156. *Roe,* 410 at U.S. at 156-57.
157. *Id.*
158. *Id.* at 162-63.
159. 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 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).
160. *Roe,* 410 U.S. 157.
161. *Id. See generally* address by Edward T. Lee to the Gary, Indiana Bar Association, "Should Not the 14th Amendment to the Constitution of the United States be Amended?" (November 20, 1936) (arguing that the fourteenth amendment should not include corporations).
162. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 *Yale* L.J. 920 (1973) [hereinafter cited as Ely].
163. U.S. Const. art. I, § 2, cl. 3, 4.
164. The apportionment clause was changed by Section 2 of the fourteenth amendment.
165. Means, *supra* note 65, at 402-3.
166. *Roe,* 410 U.S. at 157 n.53.

167. Means, *supra* note 70, at 402.
168. 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.
169. U.S. Const. art II, § 1, cl. 5.
170. *See also* U.S. Const. art. I, § 2, cl. 2, and amend. XIV, § 3.
171. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1817).
172. *See* Thompson v. State, 493 S.W.2d 913 (Tex. Crim. App. 1971), *vacated and remanded,* 410 U.S. 950 (1973) (inconsistent with *Roe*).
173. *Id.* at 914.
174. 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.
175. 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.
176. *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.

177. F. Pollock, A First Book of Jurisprudence 111 (3d ed. 1911), *quoted in* Means, *supra* note 65, at 409 n.175.
178. 410 U.S. at 162.
179. The fact that some courts may have felt it necessary to imply a "live birth" requirement 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).
180. 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").

181. See note 19 *supra.*
182. *Roe,* 410 U.S. at 163.
183. *Id.* at 161.
184. Cong. Globe, 39th Cong., 1st Sess. 1034 (1865).
185. *Id.* at 2542-43.
186. J. Flack, The Adoption of the Fourteenth Amendment 80 (1908) [hereinafter cited as Flack].
187. Cong. Globe, 39th Cong., 1st Sess. 429 (1865).
188. Flack, *supra* note 186, at 81.
189. Cong. Globe, 40th Cong. 1st Sess. 514 (1868) (emphasis added).
190. *See, e.g.,* 12 Trans. A.M.A. 73-77 (1859).
191. *Roe,* 410 U.S. at 161-62.
192. *See* Thompson v. State, 493 S.W.2d 913 (Tex. Crim.App. 1971).
193. See text accompanying notes 47-125 *supra.*
194. See note 130 *supra.*
195. *See* 12 Trans. A.M.A. 73-77 (1859).
196. See note 139 *supra* and accompanying text.
197. *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).
198. 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.
199. 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.
200. Flack, *supra,* note 186 at 63.
201. *Id.*
202. *Id.*
203. *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 198, at 71-97; J.B. James, The Framing of the Fourteenth Amendment 194-97 (1956).

204. 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 175.

205. *Compare* Dred 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 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.*
206. See notes 132-139 *supra.*
207. 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.L. Forum 411, 459 (1968).
208. 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 69, 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 19 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").
209. *Roe,* 410 U.S. at 156.
210. 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.
211. See note 19 *supra* and accompanying text.
212. Santa Clara County v. Southern Pacific R.R., 118 U.S. 394 (1886).
213. D.C Code Ann. § 22-201 (1973).
214. 402 U.S. 62 (1972).
215. *See, e.g.,* Commonwealth v. Parker, 55 Mass. (9 Pet.) 263 (1845).
216. *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).
217. *Roe,* 410 U.S. 113, 165 (1973).
218. See Part I *supra.*
219. *Roe,* 410 U.S. at 163-66.
220. *Id.*
221. *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.
222. *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).
223. *Doe,* 410 U.S. at 199.
224. Williamson v. Lee Optical Co., 387 U.S. 483 (1957).
225. 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*).
226. Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833).
227. Williamson v. Lee Optical Co., 387 U.S. 483 (1957).
228. *See Doe,* 410 U.S. at 195.

229. *Id* at 199.

230. 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. § 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.

231. Ely, *supra,* note 163, at 194 n.7.

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

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

234. *Roe,* 410 U.S. at 149, 163.

235. *Roe,* 410 U.S. at 149.

236. *Doe,* 410 U.S. at 190.

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

238. *Id.*

239. 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].

240. 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.

241. *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.

242. 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

293. *See Roe,* 410 U.S. at 162-63.
294. *See, e.g.,* Hodgson v. Anderson, 378 F. Supp. 1008 (D. Minn. 1974).
295. 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).
296. 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.

297. *See* Abele v. Markle, 351 F. Supp. 224 (D. Conn. 1973) (defining a "successful" abortion as one in which the fetus is destroyed).
298. *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 74 *supra*), though not a precedent, reveals that the writ of homicide was employed to summon one charged with killing an unborn child. See note 77 *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.
299. *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 and Fellows of the American College of Obstetrics and Gynecology as Amicus Curiae, at 6-24, *id.*
300. *Roe,* 410 U.S. at 160.
301. The Court itself defined "viable" as "potentially able to live outside of the mother's womb, albeit with artificial aid." *Id.*
302. 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).
303. *See* note 296 *supra.*
304. 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.
305. 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).

306. 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 242, at 310, 316-18.

The problems caused a woman by an unwanted pregnancy or the birth of an "unwanted" child are not immune to treatment by means other than abortion. Nigro, *supra* note 248 at 37-38 (suggesting psychosocial help as an alternative).

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

308. 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).

309. 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).

310. 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 242, at 535, 540-41.

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

312. 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.

313. *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).

314. Any member of the species Homo sapiens is biologically a human being, the unborn are Homo sapiens because they have two human parents. Any other definition of "human" reflects subjective evaluation rather than biological fact.

315. As an organism, the unborn individual is alive; an organism can only be alive or dead, there is no mediate state. *See* note 19 *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."

316. *Cf.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 577-78 (1857) (Curtis, J., dissenting). The relevance of Justice Curtis' dissent in *Dred 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 *Dred Scott* and *Roe*: the former rests upon a 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 Constitution which required exclusion of the unborn from the status of "person."

317. 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.

318. 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.

319. 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).

320. 274 U.S. 200 (1927).
321. Doe v. Bolton, 410 U.S. 179, 215 (1973) (Douglas, J., concurring).
322. See note 319 *supra.*
323. 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).
324. 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.
325. Brief for Appellants at 119, Roe v. Wade, 410 U.S. 113 (1973).
326. *Id.*
327. *E.g.,* Tribe 27-28 n.22.
328. *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 19.
329. *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 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 identical 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").
330. Member, Florida House of Representatives.
331. 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.
332. H.B. 407, Florida Legislature, 1973 Regular Session. The bill was severely modified in committee.
333. *Hearings on Death with Dignity Before the Senate Special Comm. on Aging,* 92d

Cong., 2d Sess., pt., 1 at 30 (1972).

334. *Id.*

335. *Id.*

336. Time, May 28, 1973, at 104.

337. Watson, *Children from the Laboratory*, Prism, May 1973, at 12, 13.

338. 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."

339. 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.

340. 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?

341. 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 has 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).

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

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

344. 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.

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

346. *Id.* at 122, *quoting* G. Hardin, *Abortion or Compulsory Pregnancy?*, 30 J. Mar. & Fam. No. 2 (1968).

347. *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 319.

348. See note 341 *supra*. *See also* text accompanying note 346 *supra*.

349. *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.*

350. 318 F. Supp. 1217 (E.D. La. 1970).

351. *Id.* at 1236.

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

353. 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.)

354. 410 U.S. 179, 209, 217-18 (1973) (Douglas, J., concurring).

355. *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 19 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).

356. Santa Clara County v. Southern Pacific R.R., 118 U.S. 394, 396 (1886). *See also* notes 140-42 *supra* and accompanying text.

357. 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. 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 danger 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 belligerants, it can be pushed back wider for others, perhaps ultimately for all.

Id. at 78-79.

358. *See also* Dred 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.

359. U.S. Const. art. I, § 2, cl. 3, changed by U.S. Const. amend. XIV, § 2.

360. 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.

361. *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 19, at 68; San Francisco Examiner, March 12, 1974, at 12, col. 1.

362. *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).

363. 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 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.

364. California Medicine, *supra* note 19 at 68.
365. Furman v. Georgia, 408 U.S. 238, 272 (1972) (Brennan, J., concurring) (characterized as the "right to have rights").
366. Drinan, *The Inviolability of the Right to Be Born*, in Abortion and the Law 123 (Smith ed. 1967).
367. *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).
368. 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.

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

Catholics and Liberals

James Hitchcock

CONSERVATIVE CATHOLICS used to criticize American liberalism on the grounds that its pragmatism implied a basic moral relativism, while many of its leading spokesmen were agnostics or secular humanists. Liberal Catholics defended it on the grounds, for the most part accurate, that its pragmatism was precisely what enabled Catholics to cooperate with it. In the interest of maximum consensus on economic and political issues, liberals avoided involvement with other kinds of questions (for example, abortion) which might split the New Deal coalition. Although many of them were privately skeptical about religion, for the most part they kept their skepticism to themselves.

The classic statement of this Catholic position was that of John Courtney Murray. The issue is a good deal older than his writings, however, and reaches back into the 19th-century controversies over "Americanism"—the debate between those who believed the Church would have to be a rather alien and separatist entity in the United States and those who saw no conflict between Catholicism and Americanism and wished to promote harmony between them.

Despite a rebuff from Rome, the "Americanizers" of 80 years ago, like Cardinal James Gibbons and Archbishop John Ireland, largely won the day. But the surprises that history constantly inflicts have been unusually frequent and traumatic in recent years, and the present prospect of American society suggests that the whole question of the relationship between the Church and American liberalism may have to be laboriously and painfully rethought. The views of Fr. Murray were valid enough during a particular era. The country may be entering a new political epoch, however, in which the opinions of the defeated "conservatives" will have renewed validity.

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The new liberalism differs partly from the old in that moral relativism has moved into the forefront and has become militant. The desire to maintain as broad a consensus as possible gave way, among many of the "new politics" Democrats in 1972, to the willingness to polarize and fragment in the name of ideological purity. The "civility" which Fr. Murray considered so important in American life has all but disappeared under the pressure of passionately moralistic movements.

The new liberalism is the religion of many intellectuals. Those who believe in the necessity of total liberation of the human race regard those outside their cause as infidels. They are quick to discover and exclude heretics. Their dislike of traditional religion is the dislike of a competing faith. Converts are eagerly welcomed, and those willing to confess publicly their past errors are given platforms to do so. Those other religions are tolerated which are sufficiently meek and accommodating to serve the purposes of the liberal faith, but they are used rather than respected. There is a desire for confrontations, tactics are bruising, and animosities run very deep. There is a sense that inevitable conflicts loom ahead which it is neither possible nor desirable to avoid. Many of the new liberals believe they have history on their side, and they are eager to do battle with what they regard as dying or already moribund ideas and institutions.

In the 1972 election, the "new politics" elements of the Democratic party were severely discredited, and they have lost much of their influence. The new liberalism will fight its battles on different fields, therefore, avoiding, as much as possible, situations that can be decided by popular vote. The movement is deeply distrustful of popular wisdom and regards the enlightenment of the "silent majority" as one of its major tasks. The most important areas of confrontation will be the schools, the media and the courts, where "enlightened" individuals can have influence far beyond their numbers.

The future of the Catholic schools is one of the principal points of conflict for reasons beyond the purely financial. Virtually no altruistic, non-profit institution in America—school, hospital, museum, orchestra, zoo, library—can survive without government aid. Ways are increasingly found to provide it to those institutions deemed valuable. No such statesmanlike creativity is applied to the survival of the Catholic schools, however, and a major reason is the common belief on the part of many liberals that these schools deserve to die, that they are breeding grounds for a reactionary, superstitious, repressed mentality.

It is assumed that Catholics who favor state aid do so because they believe in the values parochial schools embody. But opponents present their own position as that of disinterested defenders of the Constitution. The fact that many opponents in fact harbor strong anti-Catholic sentiments, or regard the ethos of the parochial schools with suspicion, is implicitly deemed irrelevant. The new liberalism has, among other things, made "real" or "hidden" motives of behavior—racism, sexism, etc.—legitimate issues. With respect to the parochial schools, however, discussion is still carried on at a level of hypocritical highmindedness, as though every opponent of aid were a Constitutional scholar. On no other issue do liberals so regularly invoke legal dogma as the last word, without regard for the likely practical effects of that dogma.

At stake here also, at present only rather dimly perceived but likely to become a major national issue, is the moral nature of education. In the past, Catholic parents could be relatively sure that, insofar as public schools dealt with moral issues at all, they dealt with them in ways acceptable to the parents. The situation has rapidly changed, however, with the emergence of various movements of radical pedagogy and the entry into the schools of younger teachers imbued with a messianic spirit and the fervent desire to save their pupils from the "deadening" influence of parents, society and churches.

In a number of places, the schools may be dominated by a militant secular humanism which, although it deals with ultimate values and aspires to be a way of life, is apparently not legally a religion and is thus not bound by the same legal constraints the Constitution imposes on the churches.

The dogma of church-state separation, which applied to the public schools, has already created some strange anomalies. Thus, a self-declared "practicing witch" proselytizes in a junior high school, while evangelization in the classroom by Christian clergy could doubtlessly be ruled illegal. School officials defend the use of books some parents regard as morally offensive, but reject an offer of free Bibles for every child. Christian symbols like prayers or Nativity scenes are banned, but "enlightened" school districts tolerate every sort of controversial and polarizing form of political expression.

Sex education is inevitably a major focus of conflict, in which some teachers perceive it as their duty to "liberate" children from the older generation's neuroses. Teachers can use Planned Parenthood material favorable to birth control and abortion, while attempts by

Catholic groups to engage in counter-propaganda would probably encounter serious legal obstacles.

All teachers inevitably censor what their students learn, consciously or otherwise. (Radical pedagogy recognizes this fact in insisting that all education is necessarily political and frankly calling on teachers to use their power to promote radical change.) In California, the state rejected requests by fundamentalist Protestants that the biblical account of creation be given "equal time" with theories of evolution, and on the whole progressive educators show little concern for the sensibilities of conservatively religious people. The new liberalism holds that virtually any opinion, and indeed many kinds of actions as well, are tolerable in the schools, with the exception of theological opinions, which are effectively barred by invoking church-state dogmas. (In the *McCollum* decision of 1947, the Supreme Court ruled against optional religious instruction in the public schools, partly on the grounds that children not attending might be subject to embarrassment and ostracism. It is unlikely that a similar ruling will be advanced on behalf of the children of religious parents who object to the secular tone of the schools.)

The Supreme Court's ruling on the abortion issue already demonstrates how revolutionary moral changes can be introduced into society without regard for popular opinion. Efforts were begun to limit the freedom of Catholic consciences in this area. The American Civil Liberties Union, far from showing any concern for the rights of those who consider abortion immoral, has announced a campaign to force all hospitals to perform abortions if requested . . .

The Agency for International Development, tax-supported, has distributed a comic book in Panama which advocates birth control through means of a blasphemous cartoon about the Virgin Birth. There is no possibility that the state will remain neutral on questions pertaining to population control, and those who believe that abortion, contraception and sterilization are positively desirable at the present time are prepared to use the full power of government to promote them.

In New York, a Federal grant has financed a study into the methods used by Catholics to oppose the state's liberal abortion laws, so the same methods can be effectively countered elsewhere. Meanwhile, church-state dogmas have been invoked to suggest that the Church has no right to involve itself in such legislative battles . . . and a columnist for the St. Louis *Post-Dispatch,* Jake McCarthy, has argued that separation of church and state ought to prohibit Catholics from such activity. The New York *Times* pointed to the

Church's stand on abortion as an argument against tax aid to parochial schools, on the grounds that the "interests of organized religion and of secular government often remain manifestly separate" and such money "subsidizes the specific goals of those institutions which may be in conflict with the will of the people's elected representatives." Here Catholics are in effect treated as non-citizens, whose interests are foreign to the interests of "the people" at large.

Church-state dogma is also in danger of paving a one-way street, in which permissible ecclesiastical activities will be restricted and the autonomy of the churches lessened, partly through attempts to settle internal church controversies by appeals to the secular courts. Thus, a married priest in Illinois has been granted permission by an appellate court to sue his bishop for breach of contract for removing him from his parish, and a small splinter group calling itself the National Association of Laity has indicated that it regards appeals to the civil courts as a promising way of obtaining its "rights" from the hierarchy.

In general, religious liberty does not rank very high on the priorities list of doctrinaire liberals, as evidenced by the absence of any general concern over the United Nations' repeated failure to adopt a declaration on the subject. Dogmas about church and state are invoked primly and in a social vacuum, although the application of certain of these dogmas tends to inhibit the full exercise of religious freedom (by denying children access to their religious heritage as part of their normal education and by prohibiting the full-expression of religious opinions in the schools, while allowing the expression of controversial political and moral viewpoints).

The abortion question is profoundly important not only in its own terms but because it is recognized by all sides, whether clearly or dimly, as the harbinger of an almost cosmic moral struggle, likely to occur in America in the coming decades, between what might roughly be called the "old" and "new" moralities.

It is an accurate truism that relativists can tolerate anything except absolutism, and although liberals continue to speak piously of the "free marketplace of ideas," the more cynical new liberals recognize that the flow of information and opinions is inevitably controlled in even the freest of societies. The treatment accorded abortion and "sexual revolution" in the prestigious media has been highly favorable to the iconoclasts. *Time* is now in the camp of innovation, still using its old methods. Despite much talk about "the people's right to know," a New York minister, Howard Moody, has revealed that the New York *Post* suppressed a story on an illegal abortion-

referral service at his church, because the editors did not want to jeopardize its operation.

Such bias is probably attributable to the personal beliefs of journalists themselves. Under the concept of "advocacy journalism," the reporter ceases to strive for a chimerical and misleading "objectivity" and tailors stories to support whichever party in a controversy appears to be in the right.

The two programs dealing with abortion on CBS's *Maude* show were, as it turned out, inspired at least in part by solicitations, including the offer of cash prizes, from a pro-abortion organization, the Population Institute. The A.C.L.U. protested when some local stations dropped reruns of the shows, and subsequently it was announced that the producer of *Maude* had been elected president of the A.C.L.U. Foundation. Meanwhile, as CBS's *All in the Family* satirizes the ignorant "middle American," the actress Sally Struthers, Archie Bunker's daughter Gloria, announces that she will not become a mother on the show and suggests that there should be a law prohibiting all childbearing for the time being.

Most significant, however, is the extraordinary interest shown by the secular media in the opinions of embittered and sometimes vituperative former Catholics, who have been given national publicity far in excess of their numbers or intellectual significance. There has been a steady parade of confessional articles by ex-Catholics recounting how their upbringing was repressive, tyrannical, benighted, blighting and joyless. Such a view has in fact become a semi-official tenet of the new liberalism, and the liberal media regularly bestow attention on anti-Catholic Catholics, while anti-Semitic Jews and anti-black Negroes are regarded as pathological cases and generally ignored.

Noting this revived anti-Catholicism, Father Andrew Greeley has suggested that it stems especially from the trauma of the Vietnam War, for which lower-middle-class "ethnics" will be made the scapegoats. More probably, however, it has a different cause. The new liberalism, in pursuing its moral revolution, perceives the ushering in of a period of general permissiveness as perhaps its principal task. Of the obstacles ranged against this, the Catholic Church and its millions of members is probably the single most formidable. Hence, the Catholic ethos is perceived, quite correctly in one sense, as the enemy.

The liberal media treat traditional religion in critical and unsympathetic ways, not only in expressions of opinion, but also in the slanting of news, much of which is designed to show that traditional

religion is sick and dying, hence that it is foolish to remain faithful to it. Thus, in a typical week, *Time* readers may learn: a) that 68 percent of the clergy in the Church of Scotland have severe psychological problems, including "sexual fantasies," and b) that many adult Catholics have neuroses caused by the experience of childhood confession. (To demonstrate the stupidity and sickness of the religious personality, the magazine adds that some adult Catholics continue to confess that they have disobeyed their parents long after their parents are dead.) Liberals who formerly despised *Time's* methods are not nearly so sensitive since it changed its ideological slant.

In a society lacking any moral consensus, in which religion is officially a private affair only, the civil law itself tends to determine moral beliefs. An assumption develops that whatever is legal is also moral, so that the Supreme Court's declaration on abortion has probably had the effect of convincing many people that there is no moral problem involved. Groups which challenge, on moral grounds, practices that the state has declared legal then run the risk of being read out of the American consensus.

Groups which do not accept one or another major tenet of the official American morality are increasingly driven to create special conditions of living for themselves and special ways of handing on their traditions to their children, a task for which American Catholics seem at present very badly prepared. "Enlightened" Catholics still manifest a strong desire to fit into the liberal consensus, although the new liberalism shows little disposition to compromise. It envisions, not a pluralistic society, but one in which its own militantly secular moral relativism is the general norm. When Daniel Callahan undertook his agonizing reappraisal of the morality of abortion, Harriet Pilpel of Planned Parenthood dismissed his work condescendingly as significant only for those who grew up "in a rigid religious tradition." She thought Mr. Callahan was much too concerned with imaginary moral problems.

Those who decry, from whatever standpoint, the "emotionalism" of the abortion issue miss the point, which is that this issue, like others in recent years (for example, the Vietnam War), has revealed the hollowness of many comfortable liberal beliefs. "Dialogue," "reason," "openness" and "mutual respect" all prove to be flimsy and unserviceable in fundamental moral conflicts. Instead, passion asserts itself as an expression of profound intuitions of reality that can scarcely be articulated at the rational level. All sensitive persons recognize that abortion is merely the first manifestation of a coming

moral conflict whose limits cannot be even dimly perceived at present. Ordinarily the new liberalism values moral passion and anger in the service of a righteous cause. It is the aim of some of the new liberals, however, fortified with chosen instruments from psychiatry, to define which publicly expressed emotions, which passions, are to be deemed healthy and moral and which pathological. The literary barrage against American Catholic culture aims to "prove" that the emotions it engenders are wholly neurotic.

In one area, particularly, the new liberalism frankly invokes the prospect of legal coercion to achieve its goals. Zero Population Growth piously hopes that parents will voluntarily limit the size of their families but immediately warns that, reluctantly, they are prepared to impose limits. Some deny that anyone has the right to bear children, and there has been considerable talk about compulsory contraception, abortion and sterilization.

There is no doubt that if the principle of legal control of childbearing is accepted, it will serve as the foundation for many other kinds of state intervention, all in the interest of the "quality of life." Harriet Pilpel has predicted that the most explosive political issue of the coming decade will be the status of the family. It has, in fact, already become an issue, through questions like the rights of fathers in abortion cases, the desire of some people to have large families and the impotent anguish experienced by some parents at the prospect that the educational system will thoroughly alienate their children from traditional values.

There is now an abundant literature arguing against marriage in the traditional sense, while some liberals promise to raise civil-liberties issues in connection with parents' authority over their children. Much of the new liberalism is suffused with the belief that the family is a tyrannical and decadent institution that needs to be replaced.

Jeanne Binstock, a sociologist, argues that women must be liberated from childbearing "whether they want to be or not" and decries the maternal instinct which "tyrannizes" over children. Mothers are an "outdated occupational group," and Professor Binstock foresees that as children become rarer they will be recognized "as a national resource . . . too valuable to be owned by their biological parents, or solely guided by them."

Her analysis points to one of the most glaring ironies of the coming "brave new world"—that those people who wish to have children may be defined precisely as those not suited to have them. They may be permitted biological parentage, but the nurture of tomorrow's citizens will have to be transferred to people less backward and do-

mestic in their outlook. The new liberalism seems to harbor notions of fit parenthood greatly at odds with traditional notions. The journalist Tom Wolfe, referring to a newspaper headline, "Dean Gets Custody of Children; Wife Joined Hippie Commune," suggests that in the future it might read: "Wife Gets Custody of Children From Dean; Charges Husband Was 'Spiritually Dead.' " His rewrite may turn out not to be a joke.

The logic of the new liberalism dictates that parents who are "rigid," "authoritarian," "reactionary" and "uncreative" are major obstacles to the betterment of society and to the personal fulfillment and happiness of their children. Those who remain religious in an orthodox sense, those who teach their children the "old morality," those who show insufficient community awareness, those who are not "open" and "warm" enough, logically ought not to be allowed to "blight" the children's lives and retard the New Jerusalem.

There has been much discussion of the morality of biological engineering for the sake of "improving" the species. But if man's biology is to be systematically tampered with in the interests of "better" human beings, how much more likely it is that his social and cultural environment will also be systematically controlled for the same purpose. Here again logic dictates that society not tolerate "reactionary" forms of family life, religion or education.

The possibility of totalitarian control is further heightened by the amazingly naive and wishful character of many liberals' admiration for the Chinese "experiment," whose unabashedly regimented social order is extravagantly praised. The old liberalism splintered in the later 1960's as many of the new liberals gave their support to the coercive tactics and authoritarian ideology of the New Left. There is evidently now a hunger among some liberals for real authority and power, and a corresponding disdain for the old liberals' preoccupation with democratic procedures. (Some of the liberal publications which so eagerly expose Catholic "repression" every time a priest is transferred against his will are thoroughly admiring of the methods of Chairman Mao.)

Michael Novak has said of the Democratic Party: "One portion of its left wing is aggressively secular and, although it thinks of itself as humane, is crazily destructive of families, neighborhoods and the social texture of individual life. . . . It is drunk on alienation, and it offers alienation as the sweetest badge of authenticity." . . .

Those Catholics who are embarrassed by the "extremism" of their coreligionists on matters such as abortion fail to recognize the fundamentally political character of the present situation. The new liberals

deem the Church "irrelevant," not because of its teachings or its structure but solely because of its perceived political weakness. Catholics will be listened to, and their rights respected, only to the extent that they can make their political influence felt. We have entered an age in which, at least for the time being, the civility of the old liberalism has been discarded and will not soon be recovered.

On the Objections to an Amendment

Robert M. Byrn

WHEN ON JAN. 22, 1973, the Supreme Court created a new constitutional right to abort in *Roe* v. *Wade,* it welded numerous local and state right-to-life organizations into a constitutional-amendment movement. A week after the decision, the first of several amendments was proposed in Congress. Four months later, another was introduced with a cosponsorship encompassing the spectrum of American political, geographic and religious diversity.

There are hurdles, of course. One of these is the opposition of certain Catholics who seem to be at least intuitively anti-abortion. Their objections to an amendment vary, and some are not exclusively Catholic. From the lawyer's perspective, none are persuasive.

I use the term "*the* lawyer's perspective," not out of arrogance, but because of the belief that it is the one imposed on lawyers by the American commitment to freedom. The validity of any objection to a constitutional amendment may fairly be judged from this viewpoint.

In attempting to make such judgments, I have avoided naming the proponents of the objections. My aim is not *ad hominem*; it is the substance that is crucial. On the other hand, no judgment on the substance can carry weight unless it is preceded by an exposition and defense of the lawyer's perspective. This, then, is the starting point.

The American commitment to freedom, which indelibly colors the lawyer's perspective, presumes the existence of certain fundamental rights of individuals beyond the reach of capricious governmental infringement. "It must be conceded that there are such rights in every free government beyond the control of the State," opined the Supreme Court in 1875, and, further, a government that would make these rights "subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power

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is after all but a despotism" (*Loan Ass'n* v. *Topeka*). Whether the rights arise out of the nature of man or from the social compact is not particularly relevant. That they exist is the "self-evident" starting point and the pervasive principle of our jurisprudence of liberty.

On the other hand, we do not take our fundamental rights for granted. John Courtney Murray wrote in *We Hold These Truths*: "It is not an American belief that free government is inevitable, only that it is possible." To transform the possibility into an inevitability, the Founding Fathers added the Bill of Rights to the Constitution. This expression of protected rights—most of them fundamental—stands as a bulwark against arbitrary Federal transgression.

From the beginning, the states had their own Bills of Rights, but the states' rights-slavery experience led the nation to conclude that the Federal Constitution must also protect fundamental rights from state infringement. Thus the Fourteenth Amendment, with its guarantee that "no state shall . . . deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," safeguards what the Supreme Court in 1972 called "the fragile values of a vulnerable citizenry" (*Stanley* v. *Illinois*) against subjection to a majority's whims, conveniences and prejudices.

Together the Bill of Rights and the Fourteenth Amendment limit "the sovereignty of the people . . . itself," as the Court put it in 1969 (*Hunter* v. *Erickson*). So it must continue, lest we become a "despotism" of "even the most democratic depository of power." In the context of this imperative, the Supreme Court in 1943 was able to expound as a truism: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials. . . . One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections" (*Board of Education* v. *Barnette*).

Not by accident did the Court place "one's right to life" first in the catalog of protected rights. It is, as Justice William J. Brennan urged in 1972, "the right to have rights" (*Furman* v. *Georgia*), the condition precedent to the enjoyment of all others. In *The Development of Constitutional Guarantees of Liberty*, Roscoe Pound warned: "Any considerable infringement of guaranteed individual or minority rights appears to involve much more than overriding a pronouncement of political ethics in a political instrument. It involves defiance of fundamental law." In the context of the "right to have rights,"

defiance of fundamental law occurs not only by an arbitrary or discriminatory governmental directive to kill. "A person may be deprived of life," asserted a New York judge 40 years ago, "by the removal of those safeguards which restrain one individual from violating the personal rights of others" *(Vanderbilt* v. *Hegman).*

We come closer now to the constitutional right to abort created by the Supreme Court in *Wade.* By denying Fourteenth Amendment personhood to a whole class, the Court deprived the members of the class of the fundamental right to life, the very right to have rights, "by the removal of those safeguards which restrain one individual from violating the personal rights of others." Any claim that *Wade* has placed government in a position of neutrality toward abortion is specious.

Of course, thus to condemn *Wade* presumes that the creatures removed from the law's protection are not flora or fauna, but human beings—persons—who share in the right to life. Are they? Who are the "persons" entitled to the law's protection of life?

The answer is to be found in the Fourteenth Amendment guarantee of equal protection of the laws. The ideal of threshold human equality was written into the Declaration of Independence as a moral principle, but was only imperfectly encompassed in our positive law because of the concurrent existence of legalized slavery, the glaring exception that disproved the rule. In *Rights of Persons,* Bernard Schwartz demonstrated that "it was the Fourteenth Amendment's Equal-Protection Clause that, for the first time, elevated the concept of equality to the constitutional plane." The moral ideal became both politically possible and constitutionally mandated with the abolition of chattel slavery.

Slavery was the visible vice to be eradicated, but it must be understood in context. The evil was more malign than mere bondage. In the argument of a slave's rights case in Virginia in 1858, counsel expounded the first principle of slavery: "That fundamental idea is that . . . so far certainly as civil rights and relations are concerned, the slave is not a person, but a thing. The investiture of a chattel with civil rights . . . is indeed a legal solecism and absurdity. The attribution of legal personality to a chattel slave . . . implies a palpable contradiction in terms" (*Bailey* v. *Poindexter's Estate*). The particular evil of involuntary servitude was eradicated by the Thirteenth Amendment. The general malignancy of reducing a human being to the status of "thing" was excised by the Fourteenth.

The framers of the Fourteenth Amendment did not address themselves only to making chattel of black persons. In testimony before

a House of Representatives subcommittee last February, Prof. Joseph Witherspoon of Texas Law School conclusively demonstrated, out of the mouths of the framers themselves, their intent that never again would *any* factual human being be so depersonalized. "Personhood," he showed, was equated with the reality of human existence. Congressman John A. Bingham, who proposed the Fourteenth Amendment in the House, stated: "The only question to be asked of the creature claiming its protection is this: Is he a man? Every man is entitled to the protection of American law because its divine spirit of equality declares that all men are created equal."

The word "created" was not used carelessly by Bingham. He meant to protect the entire life span of the "creature." This became obvious when Prof. Witherspoon shifted his focus to the second great abolition movement of the 1850's and 1860's, the abortion reform movement, led by Dr. Horatio Storer and the American Medical Association. One state after another enacted abortion laws that incriminated the offense at every stage of gestation, in response to Storer's admonition that "the fetus in utero is alive from the very moment of conception. . . . Willful killing of a human being, at any stage of its existence, is murder." It is inconceivable that the states would have accepted the Amendment had they known that they were denying personhood and protection of life to any class of human beings, born or unborn, and substituting for it a constitutional right to kill.

All other evidence aside, it is also inconceivable that the Reconstruction Congress would have established "personhood" at any level other than the common denominator, human-biological, life-continuum level. The pressing concern was to protect human beings, *as* human—not human beings of only a particular age, or stage of biological maturation, or condition of cortical development, or minimal genetic quality, or state of socialization, or level of reasoning capacity, or responsiveness to the latest technological procedures for preserving life outside the uterus (viability). This was the only choice the Congress had if the members truly desired to establish for all time the universality of our fundamental rights. The immediacy of the chattel-slave experience demanded that the amendment cut wide and deep, that it be inclusive not selective; the malignancy of legalized class-depersonalization must not recur.

Parenthetically, it is for this very reason that the "mediate vs. immediate animation" debate among Thomists is not really apposite to a lawyer's critique of *Wade*. One may accept that ensoulment comes with formation: or one may take note of the discoveries of

DNA or RNA, and the uniquely human characteristics of the zygote and embryo, to conclude that the new being is so distinctly a *human* being and in such a teleological life-continuum that the human being must at all times be ensouled. One may view twinning and recombination of zygotes as conclusive proof of the interim absence of a rational soul; or one may see in these events a form of asexual reproduction with the man and woman being the parents of the intermediate zygote(s)-cum-human person(s), and the grandparents of the zygote(s)' progeny. Or one may go outside Thomism, to embrace a more recent thesis that "personalization" comes with postnatal socialization.

Whichever view one takes, he must realize that the law requires, and has always required, demonstrable phenomena for its indispensable and necessarily factual judgment on whether the victim in a particular killing situation is a live human being. The evidence must come from science. Once the evidence is in, the only choice the law has is to identify person with human being. To separate the two would be to compromise the universality of the Fourteenth Amendment. And the advanced science of today confirms what Storer could already state as a scientific fact in the 19th century. The new life brought into being at conception is human, a living human being.

Norman St. John-Stevas was correct when he wrote of fundamental rights in *The Right To Life*: "Their only firm foundation is universality. Once exceptions are made, the whole structure of human rights is undermined." In the legally secularized and factually pluralistic society that is America, the alternative to universality is the quality-of-life ethic, which, as in *Wade*, would confer personhood according to whether a life is "meaningful" and its protection "consistent with the profound problems of the present day," or, on the debit side, whether its continued existence may mean "a distressful life and future" for others.

The raw utilitarianism of selective depersonalization is incompatible with the American commitment to freedom. As Mr. St. John-Stevas reminded us, we do not dole out the right to life on the basis of a "felicific calculus," or on the balancing of "the pleasure and the pain." We protect the life of a human being because he is human.

Wade's destruction of the primacy and universality of the "right to have rights" amounts to the "defiance of fundamental law," the "revolution," the "overthrow" that Roscoe Pound spoke of in *The Development of Constitutional Guarantees of Liberty*. It is from this perspective that I have espoused a Human Life Amendment to the Constitution—one which would, at a minimum, re-recognize the

personhood of every unborn child at every stage of the child's existence and restore constitutionally mandated protection of the child's right to life. It is from this perspective, too, that I undertake to confront the opposition of some Catholics; in each case, I have used the language in which I have heard or seen their objections expressed. Here, then, are the objections:

1. I do not wish to impose my morality on others.

This could mean a number of things:

First, it may mean that law does not, and cannot, have a moral component; law is but an ad hoc security regulation in aid of order. But there is a difficulty here. The Nazi experience discredited the amorality of legal positivism. I have elsewhere recounted the confrontation between German positivism and the American ethic at the Nuremberg abortion trial.* It is sufficient to recall that the prosecution placed in evidence a captured document discussing the objections of German Catholic doctors to a Nazi abortion decree, which, the doctors, asserted, violated "the moral obligation of a physician to preserve life"; and to recall further that the document became a basis for the accusation by an American prosecutor, before a court of American judges, that "protection of the law was denied to unborn children." The defendants were convicted (*U.S.* v. *Greifelt*).

Should those "Catholic" doctors have remained silent lest they impose their morality on others? American law at Nuremberg thought not. Indeed, the abortion trial reaffirmed what American lawyers already knew. Fundamental rights transcend the absolute disposition and unlimited control of government precisely because they are universal moral precepts. John Courtney Murray in *We Hold These Truths*, Paul Freund in *On Law and Justice* and other eminent writers on jurisprudence have reminded us that our fundamental rights are really the moral imperatives of liberty. In the language of their respective professions, the German doctors in 1943 and the American prosecutor in 1946 reminded Germany of the universality of these rights—just as Storer and the A.M.A. had done for our nation almost 100 years before. Ought we do less today?

Second. Somewhat related to the positivist's stance is the libertarian argument that we achieve our greatest fulfillment when we make individual choices, free of external pressures like a law against abortion, which might unduly influence our singular and independent judgments on the morality of what we choose to do. Abortion is

*Byrn, "A Human Life Amendment: What Would It Mean?" *The Human Life Review*, Vol. I, No. 2 (Spring 1975) 50, 62-63.

a matter of "private choice." Carried to the extreme, the argument is for removing all fundamental rights from the law's protection. And the argument carries itself to the extreme because it would deny to a whole class the right to have rights. Might I not urge, as a natural corollary, that rape ought to be decriminalized so that each man may make an independent judgment, uninfluenced by the dictates of law, as to whether it is moral to rape a woman? Or do we recognize that fundamental rights are not up for grabs? From the lawyer's perspective the answer is obvious.

Third. The statement may mean that because there is no longer a "consensus" on the illicit character of abortion, the rights of the unborn ought not be constitutionally mandated. Upon analysis, it becomes clear that consensus refers here to either virtual unanimity or majority opinion. This is not what it means to lawyers.

In his essay, "Natural Law and Public Consensus," John Courtney Murray identified consensus with the very fabric of the nation, the first principles that follow the assertion "We hold these truths" in the Declaration of Independence. These propositions remain the warp and woof of the consensus even if held only by a minority at a given point in history. (How many times has the Bill of Rights lost in public opinion polls?) We are back, in other words, to the concept of fundamental rights beyond absolute governmental disposition. When we look for a consensus, therefore, we look not to changeable opinion on an issue (abortion) but to the raison d'etre of the nation (transcendence, primacy and universality of the right to life). So viewed, the relevant consensus has not changed. If the people wish to rend this fabric, to change radically the first principles that are the consensus, there are constitutionally prescribed methods for so doing. The exercise of raw judicial power by the Supreme Court is not one of them.

Then, too, why do we conclude that there is no longer even a majority bias against permissive abortion? Public opinion polls are of dubious value. We can readily apply Justice Thurgood Marshall's analysis of the reliability of a capital punishment poll in *Furman* v. *Georgia* to any abortion poll: "Its utility cannot be great. . . . The question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available." Respecting "information presently available," let us not ignore a now notorious 1970 pro-abortion editorial in the prestigious *California*

*Medicine.** The writer admitted that acceptance of abortion is "in defiance of the long held Western ethic of intrinsic and equal value for every human life." Thus, "it has been necessary to separate the idea of abortion from the idea of killing." This has resulted in "very considerable semantic gymnastics," but "this schizophrenic sort of subterfuge is necessary because, while a new ethic is being accepted, the old one has not been rejected." What we have, then, are abortion polls influenced to some degree, not by the "information presently available," but by semantic gymnastics and subterfuge. Their "utility cannot be great."

Fourth. Some may have decided "not to impose their morality" because they believe that legalized, safe abortion is preferable to the ministrations of the "backroom butcher" who will flourish if a human life amendment is ratified. Sometimes this is stated in terms of "compassion"; sometimes, as "the lesser of two evils." That medical abortions are as safe as they have been touted to be is very doubtful. Further, every nation which has relaxed its abortion law has experienced a sharp upturn in abortions. Still, from the lawyer's perspective, neither of these partial answers is vital to discrediting the basic premise. The dispositive answer is that fundamental rights of a minority group are not to be sacrificed to law and order. In 1958, in *Cooper* v. *Aaron*, the Supreme Court was faced with a claim by a local school board that desegregation had resulted in chaos and violence against blacks. The board asked to be relieved of an integration order, so that the public peace and the safety of blacks could be assured. The Court replied: "Desirable as this is, [it] cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution. . . . Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights." Hostility to born blacks and unborn babies is no reason to deny them their fundamental rights, no matter what violence their victimizers may perpetrate if the rights are upheld. Were it otherwise, our fundamental rights would be at the discretion of the lawless.

In this connection let us not fall into the trap of mistaking a human life amendment for Prohibition. There are essential differences. Prohibition did not touch basic rights; it was negative; it took away a preexisting right; it invited disobedience. A human life amendment affirmatively re-enshrines a fundamental right; it invites obedience by discrediting the subterfuge and advancing a proposition that is

*For the complete text of the editorial, see *The Human Life Review*, Vol. I, No. 1 (Winter 1975), Appendix B, 103.

part of the American consensus: Every human being, *as* human, has a fundamental right to life that the law must protect. The Volstead Act taught a generation to drink. A human life amendment will teach many generations the transcendent value of the American commitment to freedom.

From the lawyer's perspective, a hesitancy to impose one's morality on others is not sufficient reason to oppose a human life amendment—or even to remove oneself from the marketplace of ideas. After all, *Wade* itself imposed *someone's* destructive morality on the American commitment.

2. Restrictive abortion laws discriminate against the poor because the rich always find ways to evade the law.

From the lawyer's perspective, there is nothing discriminatory about protecting the fundamental rights of a vulnerable minority, even if the rich are able to circumvent the protection (as they can in the case of many laws). Those genuinely concerned for the poor let the tail wag the dog when they raise this objection to a human life amendment. They make the vices and evasions of some of the rich the norm for our public policy and for the constitutional protection of our most fundamental rights. This is not what the American commitment to freedom is all about.

3. The church (or right-to-life movement) has not opposed other legalized killing; therefore, we will not give credence to its opposition to abortion.

Again the tail wags the dog, but this time with overtones of a trade-off. Because the movement or the church does not support my cause, I will not make an independent judgment on the merits of theirs, no matter how vital it may be. For thoughtful people, no trade-off is possible on grave issues like abortion.

From the lawyer's perspective, there is also a self-defeating simplism about the objection. There must be a better jurisprudential argument against war, capital punishment and the like than the argument against the jurisprudence of *Wade*. The lawyer's brief for a human life amendment simply does not apply.

Consider, first of all, that *Wade* denied the personhood and fundamental right to life of a whole class of humans, *as* human. The same is not true of people killed in war or in the electric chair. The issue in those cases is whether there are countervailing interests justifying the invasion of the acknowledged right to life of acknowledged persons. (Remember, our fundamental rights are beyond the "absolute" disposition and "unlimited" control of government. There

may be some limited instances when one or more may be subordinated to other interests.) Some in the human life amendment movement prefer an amendment that ignores any reference to allegedly competing interests and seeks only to reestablish the constitutional personhood of the unborn vis-à-vis the right to life. An amendment in this form has nothing to do with other legalized killings, with the possible exception of legalized euthanasia, in which case other dependent people might be redefined as nonpersons. It just does not speak to a balancing of interests.

Consider next a human life amendment that does establish a priority of interests. This amendment, which I particularly prefer, would permit a state to enact a statute providing for the performance of medical procedures required to prevent the death of the mother, but would allow for no other induced abortion. It does, of course, necessitate an examination of purportedly conflicting rights. But the resulting close analyses of legal necessity, self-defense and the right of privacy, as well as the application of conclusions drawn therefrom to the validity of legalized abortion and the continued viability of the primacy and universality of the right to life, have nothing to do with anything but abortion. They do not pertain, for instance, to the death of an unborn child in an air raid. In short, the lawyer's brief in support of either type of human life amendment cannot be used as a brief against war or capital punishment.

It may be possible to construct, out of the lawyer's perspective, various analyses that would also preclude these other killings. But the briefs would differ from one another and from the abortion brief because the alleged justifications are different. It may also be possible, by introducing other disciplines, to broaden the lawyer's perspective and deduce therefrom a single argument against all killing. But this new brief could hardly exclude opposition to legalized abortion; nor would the proponent of the argument be justified in opposing a human life amendment on the ground that proponents of the amendment do not accept his position. Trade-off aside, he would defeat himself by creating an untenable exception to his comprehensive pro-life argument.

In sum, the indictment of the church and right-to-life movement for their alleged indefensible selectivity in opposing legalized killing, whether fair or not, provides no justification for opposing a human life amendment.

4. A constitutional amendment is not the answer.

This objection is most often accompanied by a certain God-will-

influence-history faith that this, too, will pass. The church and humanity will survive. Truth will triumph in the end. We are urged to concentrate on protecting the preaching rights of the church and the conscience rights of individuals. Ultimately, the teaching and the witness will change things. Others advise us to shift our legislative and social focus to alternatives to abortion. In the end, the people will choose life.

Perhaps those who believe that, at some point in the dim future, the tide will turn are right. I hope so. But while we pray as though everything depended on God, ought we not work as though everything depended on us? There is nothing inconsistent between protecting teaching and conscience rights and promoting abortion alternatives, on the one hand, and laboring for a human life amendment, on the other. A number of the same people have been doing it for years.

Those who would have us wait for abortion to "run its course" ought to note, too, that the proselytizers of the quality-of-life ethic remain busy. By and large, they have convinced state and lower federal courts that public hospitals must open their doors to abortion; that these hospitals must recruit abortionists if their own doctors decline to participate; and that abortion may not be excluded from Medicaid. The Supreme Court has ruled that the consent of neither the parents of a pregnant minor nor the father of an unborn child may be made a "blanket" condition of legal abortion. Abortion is being pushed, not only as a "freedom," but also as the public policy of the land.

From the lawyer's perspective, *Wade*'s subversion of our fundamental laws is intolerable. Remember John Courtney Murray's admonition: free government is not inevitable, only possible! As the corrosive jurisprudence of raw utilitarianism gains ascendancy, as we continue, with the law's blessing, to kill upwards of a million children a year, can we say with confidence that we shall not reach the point where the shared values of the American commitment "are no longer vigorous enough to restrain the passions and shatter the selfish inertia of men"? At this point, Murray warned, the "possibility" of free government can no longer be realized. To say it cannot happen here is to ignore the lessons of Nuremberg. Even if a human life amendment does not become an immediate reality, there shall have been no détente with the new jurisprudence.

The threat to our fundamental law is also reason enough (there are others*) to reject proposals for a states' rights amendment—one

*Again, see Byrn, *HLR*, Spring 1975.

that would subject the personhood and right to life of unborn children "to the absolute disposition and unlimited control" of majority rule, instead of elevating them, as would a human life amendment, to a constitutional plane, "beyond the reach of majorities" and dependent "on the outcome of no elections." Those who urge a states' rights amendment believe it to be the most politically feasible answer to *Wade* (which I doubt since I do not believe grass-roots activists will support it). With something like an equanimity mentioned earlier, they see the nation gradually rejecting abortion. In the meanwhile, however, we shall have written into our fundamental law the principle that while some human beings have a constitutional right to life, others do not. The more likely result will be an increasing disrespect for "nonmeaningful" life. When all is said and done, we will not salvage the American commitment to freedom by subjecting the lives of any class to a thumbs-up-thumbs-down vote in state legislatures.

Our Constitution is living law. If its flexibility is to be preserved, amendments should be few. But *Wade* rends the fabric of the American commitment. The people must be allowed to repair the damage, to decide what kind of government they want. From this perspective, the objections to a human life amendment urged by some Catholics are unpersuasive.

Protestants and the Abortion Issue: A Socio-Religious Prognostication

Harold O. J. Brown

THE OPINION that opposition to abortion stems chiefly from Roman Catholic sources remains widely held, although it is contrary to fact. The overwhelming consensus of the spiritual leaders of Protestantism, from the Reformation to the present, is clearly anti-abortion. There is very little doubt among biblically oriented Protestants that abortion is an attack on the image of God in the developing child and is a great evil. Where differences of opinion arise is in two areas: (1) what society may be expected to legislate in the area; and (2) the extent to which Christians should actively seek to influence legislation. It is at this point that a traditional concern of American Protestants, dedication to the separation of church and state, cuts across the consensus that destruction of developing life is an evil, and leads to the disarray with which Protestants confront the challenge posed by America's abortion legislation, or lack of it. The most recent pro-abortion decision of the United States Supreme Court, *Planned Parenthood of Missouri* v. *Danforth,* is certain to turn many politically quietist Protestants more strongly against American abortion practices, inasmuch as it represents a clear repudiation of principles of paternal and parental authority and responsibility that are fundamental to Christianity.

The Protestant Consensus

We have stated that the overwhelming consensus of Protestant spiritual leaders is against abortion. This is almost self-evident in the case of evangelicals and fundamentalists[1] with their strong concern to preserve the spiritual heritage of early Christianity and of the Protestant Reformation. Inasmuch as both the early Church and the Reformation unambiguously condemned deliberate abortion, often describing it as worse than murder, it is not surprising that the heirs of the Reformation take a similar if sometimes less massive position.

The churches with the clearest direct ties to the Reformation, the

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Lutheran and Reformed (Calvinist) churches of the Continent, are explicitly anti-abortion and make common cause with the Roman Catholics on this issue, despite the fact that they may have liberalized their theology and social ethics. All the great Continental theologians of our century who discuss abortion strongly oppose it. Karl Barth, the most productive Protestant theologian since the Reformation,[2] Emil Brunner, his slightly less didactic contemporary,[3] Dietrich Bonhoeffer, the Lutheran pastor and teacher of ethics who died for his role in the German opposition to Hitler,[4] Helmut Thielicke, the youngest of the giants of mid-century European theology and the only one still active,[5] and Francis Schaeffer, American-born but resident in Switzerland for twenty years and one of the foremost Reformed thinkers of our age.[6] According to Lutheran Bishop Per Lønning of Borg, Norway, only *one* of Norway's thousand Lutheran pastors was willing to endorse the Norwegian government's pro-abortion initiative.

The situation in the United States seems different, for a number of the most prestigious churches have taken a pro-abortion or pro-Supreme Court stand, e.g. The United Presbyterian Church in the United States of America ("northern Presbyterian") as well as the recently-split Presbyterian Church in the United States ("southern Presbyterian"). Most extreme is the position of the large United Methodist Church. The actions of church governing boards in endorsing some form of permissive abortion are often typified by the most recent United Methodist action at the church's quadrennial General Conference meeting in Portland, Oregon (May, 1976). On the one hand, a Methodist-commissioned poll had revealed, immediately prior to the General Conference, that a majority of Methodists oppose abortion on demand, and on the other, the foremost spiritual leaders of Methodism in the United States, theologians Paul Ramsey, Albert Outler and J. Robert Nelson, are strongly opposed to abortion, and in fact lead the fight of intellectual Protestants against it. Nevertheless the General Conference not merely failed to condemn *Roe* v. *Wade* but actually approved it.

This action simply does not represent what church members in their majority think, even in the so-called liberal bodies such as the United Methodist Church, and it certainly does not represent the views of the numerous smaller, more evangelical bodies, nor of the great number of independent, unaffiliated Protestants. The National Association of Evangelicals, representing perhaps forty million theologically conservative Protestants, has repeatedly condemned abortion on demand, including a specific condemnation of *Roe* v. *Wade.*

The most vigorous of the Lutheran bodies in America, the Lutheran Church-Missouri Synod, is resolutely committed to a constitutional amendment overturning *Roe* v. *Wade*. Billy Graham, Bruce Waltke, and Francis Schaeffer, to name the outstanding evangelical figures in biblical studies and theology, are strongly opposed to abortion, as is George H. Williams, who as Hollis Professor of Divinity at Harvard occupies the most distinguished chair of Protestant theology in America. By contrast, there is no Protestant of remotely similar distinction who *endorses* abortion. Figures such as J. Philip Wogaman of American University, who do support *Roe* v. *Wade,* do so in such ambivalent terms that their arguments could be used with better logic to plead for its overthrow. Inasmuch as it is undeniable that the Protestant biblical and ethical tradition, taken as a whole, strongly condemns abortion, why is it that so few Protestants actively oppose the Supreme Court decision to the extent of calling for a constitutional amendment to overthrow it? The attitude of Democratic presidential candidate Jimmy Carter, whose "personal Christian testimony" has become a household word, is rather inconsistent and therefore typical of most Protestants. He considers abortion wrong but is, for the moment at least, unwilling to do anything against it. A somewhat similar stand was taken by his denomination, the sprawling Southern Baptist Convention, meeting in Norfolk, Virginia, virtually on the eve of Carter's nomination. The net effect of such moral disapproval followed by a commitment to total inaction is, of course, in effect approval, or at least toleration, of the status quo. It reinforces the widespread erroneous opinion that Protestantism as a whole approves of abortion. What then is the source of this evident inconsistency between Protestant principle and Protestant policies?

Piety and Power

Any scruples that one might have had about the propriety of introducing the particular religious beliefs of a specific candidate into a general discussion such as this may well have been banished by Governor Carter's refreshing candor in presenting them himself. By himself bringing them into the glare of media attention, he has relieved us of this suspicion of prying and has made it possible for us to raise, with his aid as a concrete example, the significant principial question of the relationship between personal piety and political power.

This question was raised before, during the 1960 presidential campaign. The interest and controversy at that time centered not on

Catholic piety but on Catholic power. The fear—fanciful though it was—was that the election of a Roman Catholic as president would "put the Pope in the White House," i.e., give American political power and influence to a foreign religious potentate. There is no similar apprehension concerning Governor Carter. He is a Southern Baptist. His denomination is *congregational* in polity and has no hierarchy: hence, no "pope" to put into the White House. In addition, the Southern Baptists are among the strongest supporters of a total "separation of church and state." It may well be true that Baptist opposition to state support of religion was motivated in part by the fear that such support would go primarily to a rival denomination, the Roman Catholics, but it is also true that Baptists have been remarkably consistent in applying the same standards of non-entanglement to themselves that they demanded for others. The apprehension with respect to Carter concerns not power but piety. This apprehension has led him, the most outspokenly evangelical candidate since William Jennings Bryan, to take considerable pains to separate his admitted personal piety from this stated public policy.

The line that Carter has rather clearly taken is that his piety will not influence his policy. This is exactly the principle stated by Kennedy. But there is one significant distinction: John F. Kennedy gained support among Catholics (and lost it among some non-Catholics) not for the sincerity of his Catholicism, but for the mere *fact* of it. Baptists are not numerous enough, nor clannish enough, for Carter to secure much support from the mere fact of being one of them. The point at which his evangelical profession gains support and sympathy for him among a broad electorate is the point at which it is perceived as *genuine*. Thus where Kennedy was stating that his *membership,* specifically his formal loyalty to a "foreign chief of state," namely the Pope, would not influence his official conduct, Carter seems to be in the position of having to promise that his *beliefs* will not influence his conduct. And this is indeed a perplexing situation for one whose appeal is clearly based on his evident sincerity, on the correspondence, until now, between principle and policy. It is no doubt correct to predict that if Carter continues to garner wide support among his fellow-evangelicals, it will be precisely because they think that he will in fact be influenced by his beliefs, despite any demurrals he may make to the contrary.

Surely it is *not* an ethically defensible principle to state that one's character and deepest personal convictions ought not, in high office, to influence one's decisions. Yet that is the effect of assurance such as Governor Carter is now giving, and Kennedy and Nixon gave before

him. How is it possible to accept them without discrediting the integrity or consistency of character of those making them? Evidently, another principle must intervene to allow this separation between personal principle and public policy. This intervening principle, which apparently frees national candidates from the need to practice what they preach, is nothing other than a misunderstanding of the constitutional doctrine of the separation of church and state. This separation is perceived at two levels: morality is not to influence law, and the church is not to attempt in any way whatsoever to influence the government. Each of these is in itself an unworkable principle, one that results in absurdities if carried to a logical conclusion. In addition, neither is a legitimate application of the First Amendment prohibition of an establishment of religion.

The purpose of the First Amendment—adopted at a time when two states, Massachusetts and Connecticut—still had established churches, was to guarantee that the State (at the time, the federal government; since the Fourteenth Amendment, the states as well) could not dictate to the conscience of the citizens. But it was never intended to mean that the conscience of citizens—which at that time and ever since has been largely formed by *religious* traditions—could not speak to the State. Since, in a nation peopled by a majority of Christians, the common moral sense will in large measure be a Christian moral sense, to say that Christian morality may in no sense be reflected in law would be to say that morality as such may not be reflected in law. This would be an absurdity. Clearly much of the criminal code is derived from and consistent with principles of biblical, Jewish, Christian, and other religious morality. Those principles could not be purged from the law without creating chaos; indeed, in large measure they remain fundamental to the law codes even of anti-religious states such as the Soviet Union and Communist China. The traditional theological explanation for this is the idea that the Law of God is written in the heart of man. Whatever the reason, it is evident that it would be an absurd undertaking to attempt to purge all principles of religious origin from the civil law.

The slogan, "one cannot legislate morality," was rejected when used in defense of traditional segregationist practices. Integration is surely a *moral* issue, yet few Americans felt or feel that for that reason it is not a proper concern of law. This slogan is taken seriously only at the point when the morality in question is *sexual* morality. Even then it is questionable whether it would be generally accepted. Certainly it is doubtful that most Christians would ever accept the contention that no principles of sexual morality at all should be re-

flected in public law. But even when limited to sexual morality, the slogan does not justify disinterest in legislative action on abortion, for the primary concern of the anti-abortionists is respect for *life*, not for sexual morality. This is recognized by the eminent jurist and critic of the Supreme Court, Archibald Cox, who charges the Court with failing, in this issue, to consider the essence of the matter at stake.[8]

The second aspect of the extremist view of the First Amendment, that churches should make no attempt whatsoever to influence law is clearly a kind of Red Queen rule, made to suit the occasion and to apply only to one specific class of offender. Churches, whatever else they are, are associations—the Greek word *ekklesia* means *assembly* —of people, constituting what can be called interest groups. American democracy is based on the interplay of divergent interest groups, and it is impossible to find a valid principle whereby one substantial class of interest groups—those held together by a common religious orientation—should be denied the right to speak their concerns to the State.

In other words, the suggestion that piety may not influence policy, applied to an individual, implies either that faith should not influence character, or that character should not influence conduct. Neither would be accepted either as a general principle of education or as a principle of Christian practice. Applied to law, the idea that morality may not influence law would logically mean that laws may be based on nothing more ultimate than statistics. It is true that Francis Schaeffer has already charged twentieth-century civilization with reducing ethics to statistics, and that both Associate Justice Blackmun in *Roe* v. *Wade* and several pro-abortion witnesses in Senate and House hearings leaned heavily on statistical arguments in favor of abortion-on-demand. However, though the practice of substituting statistics for ethics is creeping in, surely the majority of Americans would not yet be willing to accept this as a principle, least of all those of evangelical Protestant convictions. Applied to institutions, it means that churches alone among voluntary associations must be muzzled in political debate.

Protestant Quietism

Earlier allusion was made to "evangelicals or fundamentalists." Although evangelical and fundamentalist are not mutually exclusive terms, the evangelical is less inclined to separatism, which is a characteristic feature of fundamentalism. The fundamentalist has traditionally withdrawn from various aspects of the general culture: the

avoidance of movies, dancing, alcoholic beverages and sometimes even of television is indicative of the importance most fundamentalists attach to the biblical injunction, "Come out from among them and be separate" (II Corinthians 6:17). Accompanying such separatism is the feeling that the world and its structures are primarily under the domination of evil, and can be but slightly influenced, if at all, by Christians. In addition, most fundamentalists look forward to an early return of Christ, and many draw from this the unwarranted conclusion that in the present age, prior to his return, there is little use in attempting to ameliorate society and its structures. This leads to the traditional attitude of fundamentalist political quietism, expressed in a quasi-religious endorsement of the social and political *status quo* and a general reluctance to work for any changes. This is sometimes seen as conservatism, but it is not principled conservatism, as fundamentalists of the quietist type are no more willing to work to prevent the establishment of liberal structures than to defend existing conservative ones.

Evidently the emerging Protestant political leaders, although professedly fundamentalists in faith, are not of the quietist variety, as they involve rather than separate themselves. The salient question is: although not or no longer quietists, will they be only *personal* pietists? That is, will they seek to maintain a strict separation between the piety they practice at home and the policies they enact and enforce in public? This is certainly possible, and some of the assertions made by Governor Carter, among others, suggest a trend in the direction of subordinating piety to policy. However, such subordination surely is not what the growing number of politically interested evangelical Protestants expect from "Christian" candidates.

Significance of the Abortion Issue

The answer to the question of the degree to which Protestant principle may influence public policy when that policy is guided by a pious Protestant will be indicated by the direction in which national political leaders of acknowledged piety move on the abortion issue. The reaction to abortion is clearly a significant indicator of Protestant integrity and commitment in two ways. First, there is no other issue on the horizon in which the Law of God, as understood from the Bible, and the laws of man in America are so clearly in conflict. As though to make *Roe* v. *Wade* a perfect challenge to those who believe in biblical principles, Associate Justice Harry A. Blackmun explicitly appealed to "ancient religion," i.e., Roman paganism, in seeking precedents for his decision.[9] On the level of prin-

ciple, if evangelicals do not react in overwhelming number to this challenge, it is difficult to imagine another to which they might rise.

Second, from the nature of the forces already committed on this issue, it is evident that evangelical Protestants hold the key to success or failure of anti-abortion efforts. The second-largest religious group, the Roman Catholics, is already strongly committed to a pro-amendment effort. It is seconded by other groups, some, like the Lutheran Church-Missouri Synod, having much in common with the other evangelicals but not usually aligned with them organizationally, and others, such as the Mormons, who have a significantly different religious orientation but coincide with Catholics and the Missouri Synod in their views on abortion. The largest religious group, that of conservative Protestants, is generally anti-abortion but passive. *If* it reacts in significant strength, it is hard to see how an anti-abortion amendment could be resisted, particularly if an evangelical is Chief of State. If it fails to do so, since the other groups of pro-life conviction are, in Patrick Henry's words, "already in the field," the failure of an amendment will be the direct responsibility of evangelical Protestantism's failure to match practice to preaching.

Principles vs. Personalities

The question, ultimately, will turn on whether Protestants in large numbers think in terms of the general principles involved, and act on them, or are content to vote for personalities. How the issue is resolved, both in terms of voter interest and choice and in terms of the way in which elected evangelical Protestants apply professed principles to policies, will determine not only the concrete question of restriction or total permissiveness of abortion, but also the long-term issue of whether the principle of the separation of church and state in America will come to mean the total separation of morality and law and the reduction of justice to regulations, of ethics to statistics.

NOTES

1. A clarification may be helpful to the reader who is not conversant with this terminology. Evangelicals and fundamentalists, with minor fluctuations, hold the same doctrinal position, emphasizing the divinity, substitutionary atonement, bodily resurrection, and personal return of Christ and the absolute trustworthiness of Scripture, but fundamentalists insist on a much greater degree of separation from non-evangelical elements in the churches and from secular society in general.
2. The general Christian attitude in its radical break with pre-Christian paganism is well summarized by William E. H. Lecky in *History of European Morals* (New York: Braziller, 1955), Vol. II, pp. 20-24. For Barth, "The unborn child is from the very first a child. It is still developing and has no independent life. But it is a man and

not a thing, nor a mere part of the mother's body. . . . He who destroys germinating life kills a man. . . . The fact that a definite No must be the presupposition of all further discussion cannot be contested, least of all today." Karl Barth, *Church Dogmatics,* English translation edited by G. W. Bromiley and T. F. Torrance (Edinburgh, T. & T. Clark, 1961), Vol III, *The Doctrine of Creation,* Part IV, pp. 415ff.

3. Emil Brunner, *The Divine Imperative,* translated by Olive Wyon (Philadelphia: Westminster, 1947), pp. 367ff.
4. Dietrich Bonhoeffer, *Ethics,* translated by Neville Horton Smith (New York: Macmillan, 1955), pp. 130-131: "The simple fact is that God intended to create a human being and that this human being has been deliberately deprived of his life. And that is nothing but murder" (p. 131).
5. Helmut Thielecke, *The Ethics of Sex* (New York: Harper, 1964), pp. 227-228.
6. Personal conversation with the author. Dr. Schaeffer's forthcoming volume will include a detailed treatment of the ethics of abortion, he advised this writer in Washington in February, 1976.
7. J. Philip Wogaman, "Abortion: A Protestant Debate," *Human Life Review,* Vol. 1, No. 2.
8. Archibald Cox, *The Role of the Supreme Court in American Government* (New York: Oxford, 1976), pp. 113-114.
9. *Roe* v. *Wade,* VI, No. 8.

A Jewish View

Rabbi Seymour Siegal

OUR PLACE should be with those who fight for life against death; for existence against extinction; for growth against destruction.

The fight for life is not a Catholic issue; it is not a Protestant issue; it is not a Jewish issue. It is not even a religious issue. It is a *human* issue—for the struggle is to preserve the exalted position of our human existence—the humanity of man.

Every generation has a conception of man which it deserves. If we insist that man is nothing more than a complex animal—then it is of no great moment that human life is diminished. However, if our conception of man is that of a being reflecting the Divine, created in the very image of God—then human life is infinitely precious—whether we are discussing an adult or an innocent unborn child, or one afflicted who is close to death.

Those of us who are committed to belief in a Creator or God, in the Lord of Life, must support all efforts to affirm the importance of human life.

This is especially true for those to whom the Hebrew Scriptures reveal the nature of truth; the demands upon us and the hope we can entertain.

The Scriptural assertion that man was created in God's image—that his existence is a matter of concern to the Creator of All—represents the very foundation of our civilization. The biblical view means that the life of a human being cannot be dealt with casually, with flippancy or whim. Life is not only the activation of chemical or physical processes; not only a genetic procedure through which codes are transmitted. Of course, it is all of these. But it is much more as well—a gift from the Lord of the Universe.

The talmudic rabbis, who in our tradition are the interpreters for the community of the truths and imperatives of Scripture, said:

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They base this assertion on the fact that there is a great difference between human creativity and divine creation. A man strikes many seals from one die. They are all identical. The Holy One Blessed Be He, on the other hand, stamped many from one die (that is He has created all humans according to the model of creation) yet each person is different. Human life is precious not only because it comes from the Ground of Being—not only because it is an image of God Himself—but also because every human life is unique. Each person is an exclusive model. As long as history continues none of us will ever be duplicated. To destroy any human life is therefore to destroy a whole world.

> "trailing clouds of glory do we come
> from God, who is our home." (W. Wordsworth)

It is *because* we come "from God" that we claim to be trailing "clouds of glory."

The *bias for life* is the foundation of the Judeo-Christian world view. This "bias for life" means that whenever we can, we must sustain and further life. This "bias" is most important when life is still in the womb or is about to expire.

Those who attack life attack the very foundation of our civilization. As a Jew I cannot erase from my consciousness the realization that the most horrible act of our century or of any century—the deliberate murder of millions of living human beings by the Nazis and their allies—began with the extermination of "useless" and "helpless" human beings. Once the angels of destruction are freed to do their gruesome work, there is no way to know where they will stop.

Most civilized human beings, of course, would agree with what we have said. Since all people expressing an opinion are now living, they could naturally be expected to be pro-life.

The problem arises when we speak about the weak and the helpless—especially the "useless" and the defenseless. They cannot ordinarily speak for themselves. We must be their spokesmen.

The weakest of those who possess human life are the unborn—the foetuses developing within the bodies of their mothers. The most helpless of the helpless are the unborn who have been abandoned by those who conceived them—who have decided to destroy them.

The Judaic view of the status of these foetuses, which differs from the view of other groups within the Judeo-Christian tradition, has

been stated succinctly by Rabbi Immanuel Jacobovits, the Chief Rabbi of Great Britain (in the Winter, '75 issue of *The Human Life Review*):

> Judaism, while it does not share the rigid stance of the Roman Catholic Church which unconditionally proscribes any direct destruction of the foetus from the moment of conception, refuses to endorse the far more permissive views of others. . . . While the destruction of the unborn child is never regarded as a capital act of murder, it does constitute a heinous offense except when indicated by the most urgent medical considerations. The foremost concern is the safety of the mother. Hence, in Jewish law an abortion is mandatory whenever there is a genuine fear that a continued pregnancy might involve a grave hazard to the life of the mother, whether physical or psychiatric (such as the risk of suicide, following previous experiences of mental breakdown).

The "bias for life" is extended to the foetus. This gives it the right to our concern, protection, and nurture. Only when it threatens the life of an already existing individual, that is most often the mother, can its life yield to the life of one already born.

Whether we share the above-stated view of the Judaic tradition or believe that foeticide is identical with homicide (this is not the Judaic view), we can unite in defense of the weak and the helpless, the defenseless and the "useless" against those who would not recognize that we are dealing with a precious dimension when we discuss the issue of abortion.

In saying this are we invading the privacy of the mother and the "right of the woman to her own body"?

Even if it were true that a foetus is "merely" a part of the mother's body it would not be true that from an ethical standpoint she could then do with it what she pleased. No society would allow individuals to capriciously cut off limbs from their own bodies—even if they wished to do so. Limbs can be amputated for the sake of the whole individual. But only when medical and ethical considerations indicate that this should be done. Furthermore, the foetus is more than a "mere" organ of the body. It is the only part of the mother's body which is destined to be an independent life. It should enjoy our "bias for life." There is a great deal of ambiguity and confusion concerning the "right of privacy." It has heretofore meant that certain actions should not be prosecuted because such prosecution would require the invasion of someone's home. "But what the right to privacy protects in such cases is *privacy*. The action performed in private does not thereby become a positive right whose exercise the law must

facilitate." (*See Prof. Francis Canavan*, "Law and Society's Conscience," *The Human Life Review, Winter '76.*)

This is quite different from saying that because the act is performed in private it thereby becomes morally neutral and is left up to the individual to decide whether it is right or wrong.

The whole history of civilization is based on the imposition of rules of morality upon the "natural man" who does not always choose to do right. In that sense all laws are an invasion of privacy. In civilized life, we do not do what we *want* to do even though we ought not to do it: rather, we do what we *ought* to do, even though we do not want to do it.

Nor should we be dissuaded by the idea that "morality cannot be legislated." As a matter of fact, it is *only* morality which we legislate. The laws of a society reflect the moral standards of that society. It is of course true that law tolerates much that morality condemns. Thus we do not legislate such a basic commandment as "thou shalt not commit adultery" or the commandment not to lie. But when there is a desecration of life, then if the law does not reflect the "bias for life," it will be exceedingly difficult for morality to do so. As Prof. Canavan says (see above): "The laws that regulate the people's morals and promote their welfare are of necessity a reflection of the morals of the people. In our contemporary controversies over law and morals, therefore, the real battle is not for society's laws but for its soul."

Thus we fight for life. We fight for it in different ways—in raising the quality of the lives already born; in seeing that the dying and the aged are accorded the dignity which their humanity demands; and in insisting that unborn life is given an opportunity to develop its existence so that it can take its rightful place in human society. In doing this we are fulfilling Scripture's command: "Choose Life."

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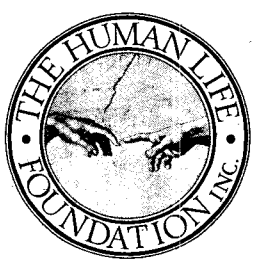
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