The original documents are located in Box 4, folder "1973 (4)" of the American Citizens Concerned for Life, Inc., Records at the Gerald R. Ford Presidential Library.

ARCHDIOCESAN OFFICE FOR PRO LIFE ACTIVITIES

N E W S L E T T E R

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CATHOLICS FOR LIFE

Under the direction of the Illinois Catholic Conference, the Bishops of Illinois will sponsor a statewide program entitled Catholics for Life. The purpose of this program is two-fold:

1. To develop a coordinated educational program on the question of abortion.
2. To educate our people as to how they can deal with their elected representatives to get effective legislation to protect human life.

The organizational structure of the program is as follows:

ILLINOIS CATHOLIC CONFERENCE

|

Six Diocesan Pro Life Directors

|

24 Congressional District Chairpersons

|

1083 Parish Co-ordinators

|

100,000 (or more) Members

The effectiveness of the program will depend upon the organization and enthusiasm of each parish. We hope to have at least 100 people from each parish on a telephone tree which can be activated in a matter of a few hours. The whole idea is ACTION ---- writing letters to Senators and Congressmen, protesting media programs, supporting effectively, all reputable Pro Life groups, etc., etc.

The organizational efforts will be going on between now and November 1st. Please try to find out who your parish coordinator is and get in contact with him in order to lend your assistance to the program.

ALTERNATIVES TO ABORTION

While struggling to restore a Constitutional Amendment for the unborn, we must remember that problem pregnancies do cause hardships for some women. Consequently, we must not work only for the elimination of abortion, but also for the elimination of those factors which make some women consider abortion as a solution to a problem pregnancy.

On September 12th we will have a meeting with Cardinal Cody, the administrators of the Catholic Hospitals of the Archdiocese and the social workers of the Maternity Care Department of Catholic Charities.

These people will strive to establish a coordinated program to assist women with counseling, pre-natal and post-natal care, jobs, housing, hospitalization, etc.

We hope to be able to devise a "hot line" phone number, where any needy person may obtain immediate assistance. We hope to advertise this number not only in the parishes and schools of the Archdiocese, but also over the mass media.

You will be hearing more about this program in the months ahead.

"UNITED WE STAND...DIVIDED WE FALL..."

All the Pro Life groups in the State of Illinois have been invited to a meeting in Bloomington on the 8th of September, in order to discuss the formation of a coalition which would unify our efforts to save the unborn. While there is a great deal of difficulty involved in bringing together strong willed and dedicated people, we have every hope that most will see the need for subordinating their own personal preferences to the combined talent of such a group.

There can be no doubt that there has been some disagreement within the Pro Life movement over the past few years. This has been extremely counterproductive in some instances. The fact is that this type of situation can no longer be tolerated.

If a coalition is formed, I will notify all the parishes as to which Pro Life groups belong to the Coalition and, at the same time, I will specifically request that all Pro Life groups not in the Coalition, be excluded from parishes, schools, and agencies in the Archdiocese of Chicago.

RESPECT LIFE PROGRAM

Respect for life is many different things...a slogan, an ideal, an attitude of mind and heart. It has all those meanings in the Respect Life Program.

Respect Life is a Catholic community experience focusing attention on the dignity of human life and threats to life in today's world.

Whose life?

+ The life of the unborn child...jeopardized by abortion on demand.
+ The life of the retarded child or adult...often shunted aside by society.
+ The life of the young person...seeking understanding and trust from preoccupied and sometimes hostile adults.
+ The life of the elderly...frequently placed on the shelf and even penalized by a society which rewards only its "productive" members.
+ The life of the poor and powerless...too often exploited by the rich and powerful.

These lives and many others. Indeed, all lives. Every human life is a gift from God and therefore sacred. When one life is threatened or violated, the lives of all of us are diminished.

Reprinted from FORDHAM LAW REVIEW May 1973

AN AMERICAN TRAGEDY: THE SUPREME COURT ON ABORTION

*ROBERT M. BYRN**

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

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

Bolton arose out of a similar challenge to the Georgia abortion statutes.[15] Georgia law incriminated all abortions except those which, in the best clinical judgment of a duly licensed physician, were necessary because continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or the fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or the pregnancy resulted from forcible or statutory rape.[16] In the district court,[17] numerous plaintiffs, including Doe, a pregnant woman,[18] had (as in *Wade*) sought a declaration of the unconstitutionality of the Georgia abortion laws and a permanent injunction against enforcement. Their claims were more extensive than in *Wade*. In addition to alleging vagueness and invasion of the right of privacy, the plaintiffs asserted that the statutes unconstitutionally restricted the right of physicians and others to practice their professions, and also discriminated against the poor.[19] The three-judge district court, finding that "the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy,"[20] struck down the substantive portions of the Georgia statutes; left standing certain procedural and medical standards; and refused to issue an injunction.[21] Plaintiffs appealed the last two rulings, and the Supreme Court, having passed on the substantive constitutional issues in *Wade*, restricted its opinion to a finding of the unconstitutionality of the standards. In both *Wade*[22] and *Bolton*,[23] the Court refused to reverse the denial of the injunction.[24]

8. Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970).
9. Id. at 1220.
10. Id. at 1219. There have been a number of similar challenges to state abortion laws, many of them in federal courts and some of them were cited in Wade. See 93 S. Ct. at 727-28. For the most part, discussion of these cases has been avoided in this article because obviously they did not bind the Supreme Court in Wade. The Court had to consider the merits of the various constitutional claims de novo. Its decision supersedes all others and it is that decision which is under scrutiny here.
11. 314 F. Supp. at 1221-23.
12. Id. at 1223. The Supreme Court did not reach the issue of vagueness. 93 S. Ct. at 732. But see United States v. Vuitch, 402 U.S. 62 (1971).
13. 314 F. Supp. at 1225 (1970).
14. 93 S. Ct. at 712.
15. Ga. Code Ann. §§ 26-1201 to -1203 (1972).
16. Id. § 26-1202(a). Thirteen other states have statutes similar to Georgia's and all are based on Model Penal Code § 230.3 (Proposed Official Draft 1962). See 93 S. Ct. at 720 n.37. Four states have repealed criminal sanctions on abortions during particular periods of the pregnancy. Id. The remaining states have statutes similar to the Texas law. Id. at 709 n.2.
17. Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970).
18. Id. at 1057.
19. Id. at 1051.

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

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

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

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

20. Id. at 1055 (footnote omitted).
21. Id. at 1056-57.
22. 93 S. Ct. at 733.
23. Id. at 752.
24. It is to be noted that § 26-1202(e) of the Georgia Criminal Code contains a "conscience" clause protecting hospitals and doctors who refuse to participate in abortions. The Court in Bolton at least inferentially approved this section. 93 S. Ct. at 750.
25. See, e.g., Byrn v. New York City Health & Hosps. Corp., 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), appeal dismissed, 93 S. Ct. 1414 (1973); Report of the Governor's Commission Appointed to Review New York State's Abortion Law, Minority Report 47, 51-56, 67-68 (1968); Byrn, Abortion in Perspective, 5 Duquesne L. Rev. 125, 126-29, 134-35 (1966).
26. Since Bolton does not deal with these issues, that decision will be referred to only in so far as it clarifies some substantive point in Wade.
27. 93 S. Ct. at 731.
28. 60 U.S. (19 How.) 393 (1857).
29. 274 U.S. 200 (1927).

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

Part V sets up the basic contention of the appellants that "the Texas statutes . . . invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy," a right which appellants would discover "in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras . . . or among those rights reserved to the people by the Ninth Amendment . . . ."[31]

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

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

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

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

31. Id. at 715.

32. Id.

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

34. Id. at 724.

35. Id. (footnote omitted).

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

37. Id.

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

38. Id. at 726-32.

39. Id. at 727.

40. Id.

41. Id. at 728. Justice Rehnquist in dissent objected that the compelling state interest test applies to the equal protection clause, not the due process clause. Id. at 737 (Rehnquist, J., dissenting).

42. Id. at 728.

43. Id. at 729 (footnote omitted).

44. Id. at 730.

45. Id.

46. Id. at 731.

47. Id.

48. Id.

the "compelling" point until approximately the end of the first trimester,[49] from and after which "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health;"[50] but "for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State;"[51] *eighth*, a state has an important and legitimate interest in "protecting the potentiality of human life,"[52] but this interest does not reach the "compelling" point until viability,[53] and "[i]f the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother;"[54] *ninth*, the Texas statute "sweeps too broadly," and "cannot survive the constitutional attack made upon it here;"[55] *tenth*, no decision is made with respect to the father's rights, if any, in the abortion decision, or the rights, if any, of the parents of an unmarried pregnant minor;[56] *eleventh*, since a state "may, if it chooses," enact legislation restricting abortion within the limits set forth above,[57] it follows that the state may, if it chooses, repeal all laws restricting abortion, and allow "the potentiality of life" to be destroyed up to the moment of birth.

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

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

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

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

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

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

59. Id. at 728. This statement quite clearly and correctly means that the right of personal privacy is subordinate to the fourteenth amendment right to life. Hence, the key question is whether the unborn child is a human being-cum-human person. If so, then the right of privacy does not include the right to abort.
60. Napue v. Illinois, 360 U.S. 264, 272 (1959) (footnote omitted), quoting Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 121 (1954).

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

IV. The Historical Errors

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

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

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

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

The following are the Court's key historical observations:

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

61. 93 S. Ct. at 709.

62. Id. at 733.

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

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

65. Id. at 718.

> . . . It was not until after the War Between the States that legislation began generally to replace the common law. . . .[66]
>
> . . . .
>
> It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. . . .[67]
>
> . . . .
>
> Parties challenging state abortion laws . . . claim that most state laws were designed solely to protect the woman. . . . The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus.[68]
>
> . . . .
>
> All this, together with our observation, . . . that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn.[69]

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

A. *The Common Law*

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

66. Id. at 720.

67. Id.

68. Id. at 725-26 (footnotes omitted).

69. Id. at 729 (footnote omitted).

70. See note 63 supra.

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

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

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

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

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

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

73. Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The court did *not* dismiss the indictment on the ground that abortion was not an offense at common law. Indeed, if that were the case, there would have been no indictment at all, or the indictment would have been dismissed expressly on that ground. Rather, the inference is that abortion was a substantive offense, but the indictment had to be dismissed for a defect in pleading (no baptismal name) and an impossibility of proof (the cause of the child's death).[86]

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

80. Id. at xvi.

81. Id. at xxi-xxii.

82. Id. at xxii.

83. Id. at xxvi.

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

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

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

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

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

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

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

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

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

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

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

90. Id. at 1076.

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

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

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

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

91. E. Coke, Third Institute 50 (1644).
92. Coke was attorney general in 1601 and may have been the "Cook" mentioned in R. v. Sims.
93. 93 S. Ct. at 718 & n.26.
94. See R. v. West, 2 Cox Crim. Cas. 500 (1848).
95. E. Coke, Third Institute 50 (1644).
96. 26 Eng. Rep. 472 (Ch. 1740).
97. Id. at 473.
98. 24 Eng. Rep. 373 (Ch. 1713).

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

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

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

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

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

99. Id.
100. Morissette v. United States, 342 U.S. 246, 251 (1952).
101. United States v. Schoefield, 465 F.2d 560, 561 (D.C. Cir.), cert. denied, 93 S. Ct. 210 (1972) (footnotes omitted).
102. 1 M. Hale, History of the Pleas of the Crown 433 (1736) [hereinafter cited as Hale].
103. Davies, supra note 88, at 209 & n.23.
104. Means II, supra note 63, at 350, 368-69.

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

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

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

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

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

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

105. Hale, supra note 102, at 429-30; accord, R. v. Whitmarsh, 62 J.P. 1711 (1898).
106. Means II, supra note 63, at 362-63.
107. Hale, supra note 102, at 430.
108. 58 Mich. 594, 26 N.W. 291 (1886).
109. Id. at 596, 26 N.W. at 293 (citations omitted); accord, State v. Harris, 90 Kan. 807, 136 P. 264 (1913) (containing an extensive review of the abortion-homicide cases in a number of states); State v. Farnam, 82 Ore. 211, 161 P. 417 (1916).

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

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

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

110. 1 W. Hawkins, A Treatise of the Pleas of the Crown, ch. 31, § 16 (7th ed. 1795) [hereinafter cited as Hawkins].
111. 4 W. Blackstone, Commentaries *198.
112. 1 id. at *129-30.
113. See Byrn, supra note 5, at 9-10.

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

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

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

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

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

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

114. 43 Geo. 3 ch. 58, § 2 (1803).

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

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

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

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

119. Id. at 1311-12.

120. Id. at 1312.

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *The American Statutes*

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

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

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

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

126. 93 S. Ct. at 720.

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

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

129. See text accompanying notes 118-21 supra.

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

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

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

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

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

Had the Supreme Court in *Wade* been interested in cases decided after the early nineteenth century and before the abortion "reform" movement of the 1960's, it might have noted with respect to Idaho: "[T]he abortion statute is not designed for the protection of the woman . . . only of the unborn child and through it society . . . ;"[139] and with respect to Oklahoma: "We hold that the anti-abortion statutes in Oklahoma were enacted and designed for the protection of the unborn child and through it society;"[140] and with respect to Virginia, that the Virginia abortion statute was intended "to protect the health and lives of pregnant women and their unborn children from those who intentionally and not in good faith would thwart nature by performing or causing abortion and miscarriage;"[141] and with respect to Washington, that the Washington abortion statute was "designed to protect the life of the mother as well as that of her child."[142] Again, in none of these decisions was quickening a factor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

147. See text accompanying note 134 supra.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

154. Id. (emphasis added).

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

(not merely if "it appear" to have been so necessary), or, (b) if it "shall have been advised by two physicians to be necessary *for that purpose*"[156] (not merely that it "was advised, by at least two physicians").[157]

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

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

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

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

156. Id. (emphasis added).
157. Proposed section 28, pt. IV, ch. 1, tit. 6, § 28.
158. It is to be noted that the abortion section included both surgery and drugs.
159. N.Y. Rev. Stat. (1829), pt. IV, ch. 1, tit. 1, §§ 21-22.
160. See note 124 supra and accompanying text.
161. Evans v. People, 49 N.Y. 86, 89 (1872).
162. See text accompanying note 122 supra.
163. I.T. Beck & R. Beck, Elements of Medical Jurisprudence 276-77 (1823), cited in Grisez, supra note 71, at 191.
164. See Means I, supra note 63, at 459.

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

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

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

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

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

165. Law of May 6, 1869, ch. 631, [1869] N.Y. Laws 92d Sess. 1502.
166. See note 121 supra.
167. See N.Y. Penal Law §§ 80, 1050 (McKinney 1944) (repealed). These were the sections enacted in 1881.
168. U.S. v. Greifelt, 4 Trials of War Criminals Before the Nuernberg Military Tribunal 608 (Government Printing Office) (1946-1949).
169. Id. at 613.

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

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

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

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

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

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

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

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

172. Id. at 1082.

173. Id. at 1077 (emphasis added).

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

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

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

C. *The Fourteenth Amendment*

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

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

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

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

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

178. 93 S. Ct. at 721.

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

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

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

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

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

As previously indicated, the overwhelming weight of authority is to

181. See note 164 supra and accompanying text.

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

183. 93 S. Ct. at 721, quoting 22 Transactions of the Am. Med. Assn. 258 (1871). But see 93 S. Ct. at 730: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." No subsequent medical or bar association statement cited by the Court in Wade denies that abortion takes a "human life." See id. at 721-24.

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

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

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

187. See id.

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

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

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

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

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

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

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

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

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

191. Id. at 142-43.

192. Id. at 191.

193. Id. at 191-92.

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

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

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

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

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

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

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

195. Cong. Globe, 39th Cong., 1st Sess. 1089 (1866).
196. Id. at 2766.
197. 93 S.Ct. at 721.
198. 25 Iowa 128 (1868).

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

> *The common law is distinguished, and is to be commended, for its all-embracing and salutary solicitude for the sacredness of human life and the personal safety of every human being. This protecting, paternal care, enveloping every individual like the air he breathes, not only extends to persons actually born, but, for some purposes, to infants in ventre sa mere.*
>
> *The right to life and to personal safety is not only sacred in the estimation of the common law, but it is inalienable.* It is no defense to the defendant that the abortion was procured with the consent of the deceased.
>
> *The common law stands as a general guardian holding its aegis to protect the life of all.* Any theory which robs the law of this salutary power is not likely to meet with favor.[201]

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

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

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

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

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

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

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

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

As guardian ad litem for a class of unborn children, the writer commenced an action in New York in December, 1971 seeking, *inter alia*, a declaration of the unconstitutionality of New York's abortion-at-will law[212] as a violation of the fourteenth amendment rights of unborn children. In support of a motion for an injunction pendente lite, affidavits of a fetologist, a developmental biologist, a cytogeneticist and an obstetrician-gynecologist were presented to the court.[213]

205. 93 S. Ct. at 730.

206. See text accompanying note 60 supra.

207. 93 S. Ct. at 730.

208. Id. at 731.

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

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

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

212. Law of Apr. 11, 1970, ch. 127, [1970] N.Y. Laws 193d Sess. 852 (now N.Y. Penal Law § 125.05(3) (McKinney Supp. 1972)). The law puts no substantive restriction on abortion through the twenty-fourth week of pregnancy. Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Had the *Levy* standard been applied in *Wade*, the Court could not have avoided passing on the factual, "biological" question of whether unborn children are live human beings. Since, as a scientific fact, all of them are, the Court would have been required to take the next step and find all unborn children to be human persons within section one of the fourteenth amendment. Instead, the Court omitted *Levy* completely. Indeed, having decided not to pass on the crucial question of fact, it had no choice but to ignore *Levy*.

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

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

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

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

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

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

In *Wade*, the Court stated: "In areas other than criminal abortion the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth."[222] In support of this statement, the Court briefly touched upon tort actions for prenatal injuries and for a stillbirth (wrongful death), as well as the property rights of the unborn child. The Court erred.

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

222. 93 S. Ct. at 731.

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

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

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

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

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

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

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

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

225. See Eyre v. Shaftsbury, 24 Eng. Rep. 659, 666 (Ch. 1722).
226. See In re Clark, 21 Ohio Op. 2d 86, 89, 185 N.E.2d 128, 132 (C.P. 1962).
227. Id. at 89, 185 N.E.2d at 131 (citation omitted).

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

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

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

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

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

228. See Estate of Warner, No. 71 P 3681 (Cir. Ct., Cook County, Ill., May 5, 1971); Raleigh Fitkin—Paul Morgan Mem. Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964); Hoener v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140 (Juv. & Dom. Rel. Ct. 1961).
229. 67 N.J. Super. 517, 171 A.2d 140 (Juv. & Dom. Rel. Ct. 1961).
230. Id. at 522, 171 A.2d at 142 (emphasis omitted), quoting Johnson v. State, 18 N.J. 422 430, 114 A.2d 1, 5 (1955).
231. 67 N.J. Super. at 524, 171 A.2d at 144 (citation omitted).
232. Id. at 525, 171 A.2d at 145.
233. 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964).

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

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

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

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

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

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

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

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

237. Id., Petition For Conservator.

238. Id., Physicians Affidavit—Conservatorship.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

251. See text accompanying notes 229-45 supra.

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

1. The Presumption

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

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

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

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

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

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

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

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

2. The Lack of Representation

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

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

258. Id. at 362, quoting Brinegar v. United States, 338 U.S. 160, 174 (1949).
259. See Part IV (C) supra.
260. County of Santa Clara v. Southern Pac. R.R., 18 F. 385, 397-98 (C.C.D. Cal. 1883).
261. See Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).
262. But it was. See Byrn v. New York City Health & Hosps. Corp., 93 S. Ct. 1414 (1973).
263. In Wade, the defandant raised the fourteenth amendment personhood of the unborn child as a compelling state interest. 93 S. Ct. at 725.
264. 381 U.S. 479 (1965).

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

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

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

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

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

A. *The Census Criterion*

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

265. Id. at 481.
266. See Hansberry v. Lee, 311 U.S. 32, 40 (1940).
267. Id. at 41, 43.
268. Compare Hall v. Lefkowitz, 305 F. Supp. 1030 (S.D.N.Y. 1969) (New York Attorney General defending a restrictive abortion statute) with Byrn v. New York City Health & Hosps. Corp., 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972) (New York Attorney General defending an abortion-at-will statute).
269. See Hansberry v. Lee, 311 U.S. 32, 44-45 (1940).
270. Blonder-Tongue Labs., Inc. v. University Found., 402 U.S. 313, 329 (1971).
271. 93 S. Ct. at 729 n.53.

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

B. *The Incrimination Criterion*

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

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

272. Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886).
273. U.S. Const. art. I, § 2, cl. 3.
274. 93 S. Ct. at 729 n.54.
275. Id.
276. J. Hall, General Principles of Criminal Law 426 (2d ed. 1960) (footnote omitted).
277. See J. Stephen, A Digest of the Criminal Law 19 (1877).
278. Compare United States v. Holmes, 26 F. Cas. 360 (No. 15,383) (C.C.E.D. Pa. 1842) with Surocco v. Geary, 3 Cal. 69, 73 (1853) (dictum). "[T]he same great principle . . . justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed . . . ." American Print Works v. Lawrence, 21 N.J.L. 248, 257-58 (Sup. Ct. 1847) (dictum).
279. See Model Penal Code § 3.02, at 5-10 (Tent. Draft No. 8, 1958).

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

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

C. *The Accessoryship Criterion*

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

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

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

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

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

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

D. *The Penalty Criterion*

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

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

E. *The Citizenship Criterion*

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

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

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

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

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

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

288. Id. §§ 125.15(3), 125.25(1b).

289. 93 S. Ct. at 729.

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

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

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

F. *The Homicide Criterion*

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

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

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

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

292. Yick Wo v. Hopkins, 118 U.S. 356 (1886).
293. Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886).
294. 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).
295. 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971).
296. 93 S. Ct. at 729.
297. See Part IV (A) supra.
298. See Part IV (B) supra. That the crime is labelled abortion instead of homicide, and the victim is called an unborn child or fetus or embryo instead of a person are not factors affecting the personhood of the unborn child under section one of the fourteenth amendment.

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

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

VII. The Dangerous Implications in *Wade*

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

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

A. *Compulsory Abortion*

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

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

299. Byrn, supra note 5.
300. Id. at 24-28.
301. Id. at 28-31.
302. 93 S. Ct. at 726-27.

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

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

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

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

303. Id. at 727.
304. 274 U.S. 200 (1927).
305. See C. Rice, The Vanishing Right to Live 143-44 (1969).
306. The procedure for such diagnosis is called amniocentesis. R. Rugh & L.B. Shettles, From Conception to Birth 201 (1971). Dr. Y. Edward Hsia of Yale has suggested that amniocentesis might be made compulsory to determine whether or not a child has defects and if so abortion might also be made compulsory. Voice For Life News-Notes, Mar. 1973, at 5.
307. 93 S. Ct. at 756 (Douglas, J., concurring).
308. Id. at 760.
309. Id. at 708-09.
310. Id. at 733.

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

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

B. *Involuntary Euthanasia*

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

311. Byrn, supra note 5, at 28.
312. 93 S. Ct. at 731. Menstrual extraction consists in suctioning out the lining of the uterus. It is performed between the fifth and seventeenth day following a missed menstrual period—before pregnancy is confirmed by a pregnancy test. Letter from William D. Walden, M.D., to the Editor, N.Y. Times, Mar. 19, 1973, at 34, col. 5.
313. Andre Hellegers, M.D., quoted in The Catholic News, Mar. 15, 1973, at 1, col. 3.
314. 93 S. Ct. at 730.
315. Id. at 728.
316. See Part V (A) supra and text accompanying note 313.

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

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

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

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

Given a carefully orchestrated controversy (such as that undertaken by Fletcher) and the Court's unwillingness in *Wade* to recognize the fact of life unless there is a "consensus" on its value, a state might persuasively claim that it is free to remove a live human being (*e.g.*, a senile elderly person) from the law's protection. Just as the *Wade* Court redefined the beginning of life as a "process,"[322] so too might death be viewed as a process which may be hastened by those who find that the care of a dependent live human being has forced upon them (as the Court said of the unwanted child in *Wade*) "a distressful life and future."[323]

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

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

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

320. Id. at 3.

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

322. 93 S. Ct. at 731.

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

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

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

VIII. Conclusion

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

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

323. Id. at 727.

324. See Part V (A) supra.

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

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

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

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

329. Id.

330. Id.

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

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

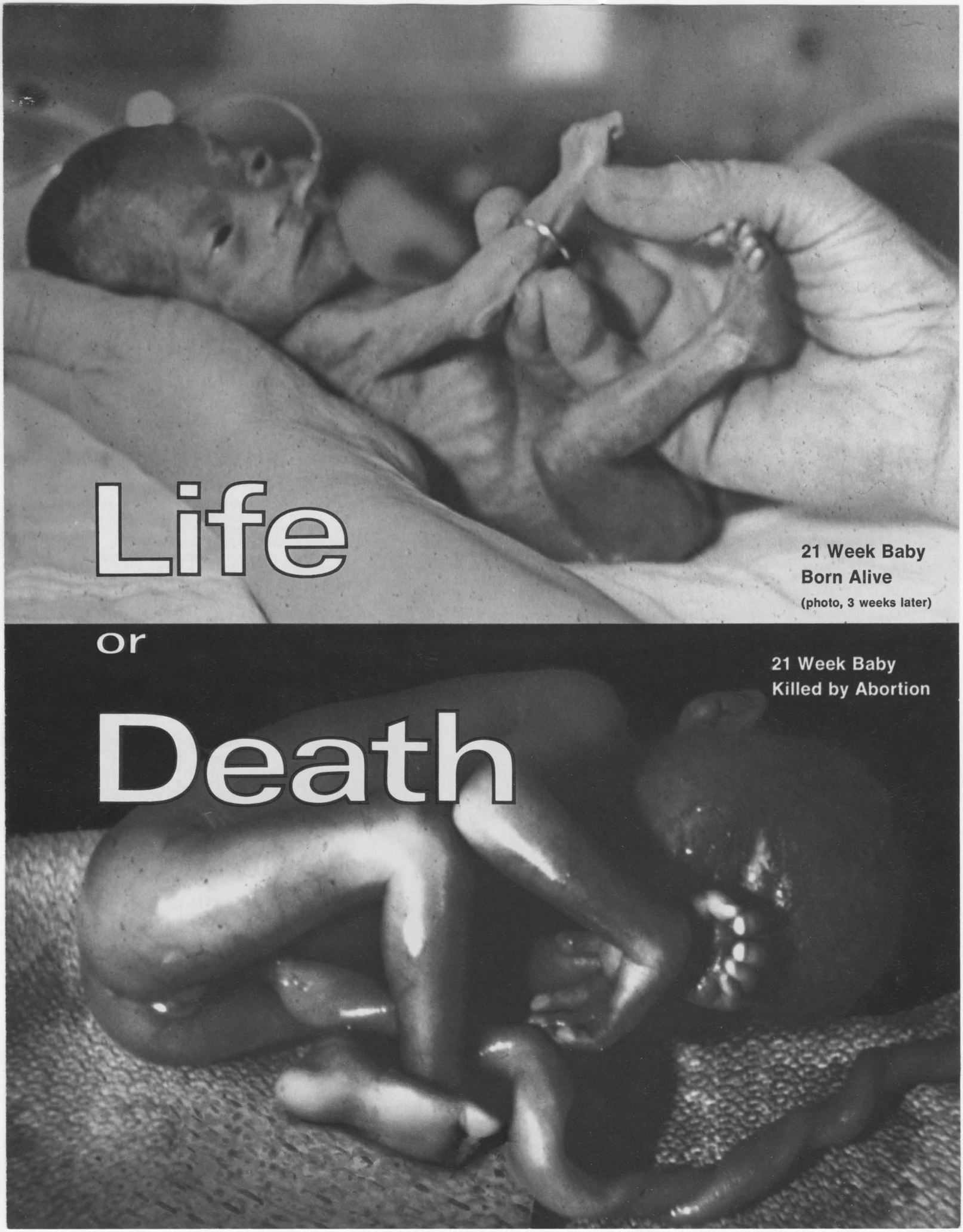
Perhaps it is a measure of the extent to which the quality-of-life philosophy dominates our jurisprudence that a justice of the Supreme Court can write in the "environmental context" of the destruction of trees and animals, "any man's death diminishes me, because I am involved in Mankinde,"[333] while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

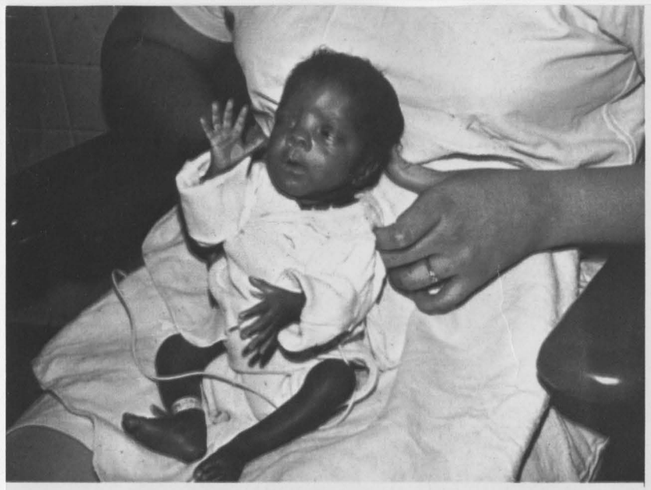
First, *Dred Scott*, then *Buck v. Bell* and now the most tragic of them all —*Roe v. Wade*. Three generations of error are three too many—and the last of them shall be called the worst.

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

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

334. 93 S. Ct. at 731.

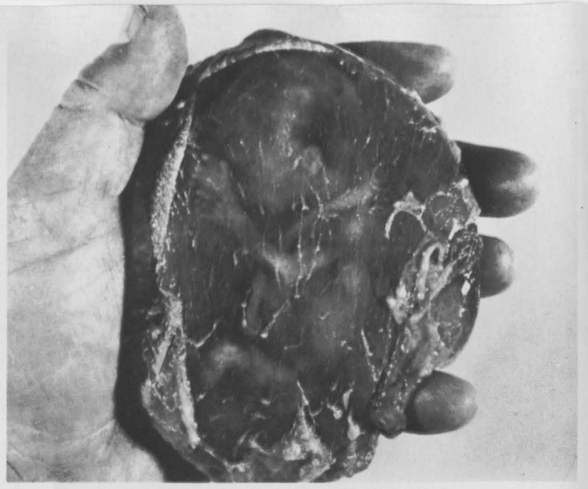

Life
21 Week Baby
Born Alive
(photo, 3 weeks later)
or
Death
21 Week Baby
Killed by Abortion



Baby Born at 20 Weeks

Marcus Richardson was born 1-1-72 in Cincinnati, Ohio, at exactly 20 weeks (16 weeks after his mother missed her menstrual period. A pregnancy normally totals 40 weeks.) He is pictured here 9 weeks later, a perfectly normal child.

Some states use "viability" or ability to survive outside the womb as a measurement of the humanity of the unborn. Thirty years ago, however, "viability" was about 30 weeks. Now it is as early as 20 weeks. In 20 more years it may be at 10 or 12 weeks. What is changing is the increasing sophistication of our external life support systems. The babies are the same. Therefore, "viability" cannot be used to judge the baby's humanity. Rather it measures the skill and equipment of the doctors, nurses, and hospital in which the baby is born.

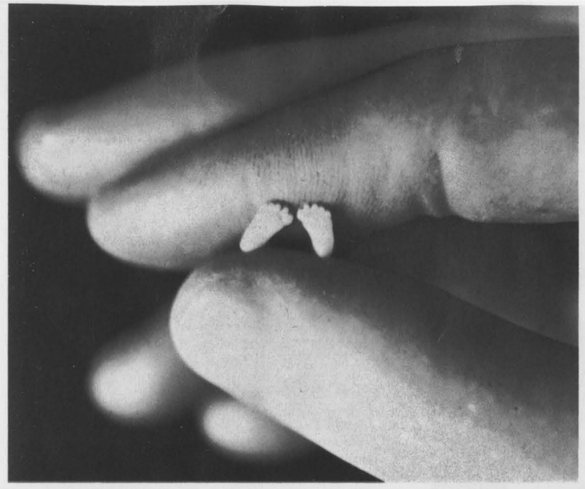


Eleven to Twelve Weeks

At this stage all organ systems are functional. He breathes, swallows, digests, and urinates. He is very sensitive to pain, recoiling from pinprick and noise, and seeks a position of comfort when disturbed. Soon he will sleep and wake with his mother. If his amniotic fluid is sweetened, he will swallow more often, if it is made sour he will quit swallowing.

He can be taught by sound signals to anticipate and recoil from a pain stimulus, but no two little ones will respond the same, they are already individuals. At this stage Arnold Gesel has said, "The organization of his psychosomatic self is well underway."

After this time nothing new will develop or function, only further growth and maturation.



Tiny Human Feet @ 10 Weeks

These perfectly formed feet demonstrate that the baby's tiny body is completely formed at this time.

at six weeks	— "quickening" occurs — that is movement begins. — human brain activity can be recorded on the electroencephalogram.
at 18 days	— the human heart begins to beat.
at conception	— human life begins. At that moment a new being exists — totally different from the body of either the mother or the father (different chromosomal makeup) — human (46 chromosomes) — alive (capable of replacing his own dying cells) — and needing only food and time to grow into an adult human.

Human Life at Eight Weeks

At this stage:

— he (or she) will grab an instrument placed in his palm and hold on
— an electrocardiogram can be done
— he "swims freely in the amniotic fluid with a natural swimmer's stroke"

Caesarean Section Abortion (Hysterotomy)

This method is exactly like a C-section until after the cord is cut. In a Caesarean Section, the baby's phlegm is sucked out, and she is taken to the intensive care, newborn nursery where everything is done to care for her.

The baby in this picture weighing two pounds (a 24 week pregnancy) was to be aborted. She was cut free, dropped in a bucket, and left to die. At this age they all move, breathe and some will even cry.

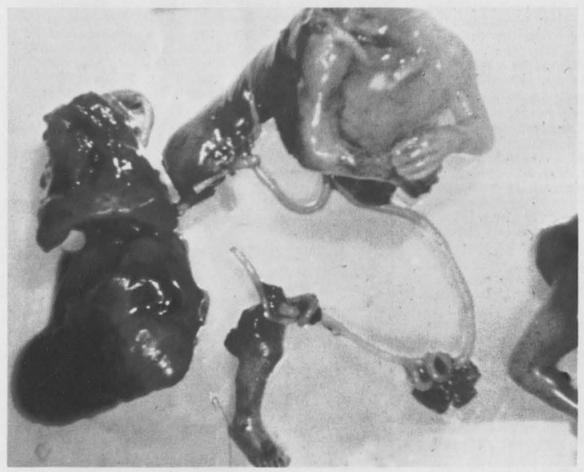
In 1971, about 4000 of these abortions were done in New York. Since all of these babies are born alive, this means that 4000 babies were aborted alive and left to, or encouraged to, die.

Salt Poisoning Abortion at 19 Weeks

This so-called "product of pregnancy" is the result of the second most common type of abortion done in the U.S. and Canada.

This method is done after 16 weeks when enough fluid has accumulated in the sac around the baby. A long needle is inserted through the mother's abdomen into the baby's sac and a solution of concentrated salt is injected into it. The baby breathes in and swallows the salt and is poisoned by it. The outer layer of skin is burned off by its corrosive effect. It takes over an hour to slowly kill a baby by this method.

If the mother is fortunate and does not develop any complications she will go into labor and about one day later will deliver a wretched dead little baby such as the one above.



D & C Abortion at 12 Weeks

Performed between 7 and 12 weeks, this method utilizes a sharp curved knife. The uterus is approached through the vagina. The cervix (mouth of the womb) is stretched open. The surgeon then cuts the tiny body to pieces and cuts and scrapes the placenta from the inside walls of the uterus. Bleeding is usually profuse.

One of the jobs of the operating nurse is to reassemble the parts to be sure the uterus is empty, otherwise she will bleed or become infected.

Suction Abortion at 10 Weeks

Over 75% of all abortions performed in the U.S. and Canada are done by this method. It is like the D & C except that a powerful suction tube is inserted. This tears apart the body of the developing baby and his placenta, sucking the "products of pregnancy" into a jar. Sometimes the smaller body parts are recognizable as on this picture.

What of the U.S. Supreme Court Decision?

This has opened all fifty states to abortion on demand until the cord is cut. It prevents any state from forbidding abortion when needed for the life *or health* of the mother. "Health" specifically includes mental health. Ample precedence both legal (U.S. Supreme Court, Vuitch case) and in practice (California, Wash. D.C.) has shown that "mental health" is abortion on demand.

The Dred Scott Decision in 1857 ruled that black people were not "persons" in the eyes of the Constitution. Slaves could be bought, sold, used or even killed as property of the owner. That decision was overturned by the 14th Amendment.

Now the court has ruled that unborn people are not "persons" in the eyes of the Constitution. They can be killed at the request of their owners (mothers). This dreadful decision can only be overturned by another constitutional amendment.

The fact of human life in the womb cannot be denied. To today allow one age group of humans to be killed because they are socially burdensome will lead inexorably to allowing the killing of other humans at other ages who have become socially burdensome.

But legalizing abortion would eliminate criminal abortions!

This is purely wishful thinking, and a completely false statement. Consistent experience has been that when laws are liberalized, the legal abortion rate skyrockets, the illegal abortion rate does not drop, but frequently also rises. The reason consistently given is the relative lack of privacy of the official procedures. (Europe, Japan, Colorado, etc.)

Doesn't a mother have a right to her own body?

This is not her body but the body of another human person. Since when have we given to a mother the right to kill her children — born or unborn?

Abortion is only a religious question, isn't it?

No, Theology certainly concerns itself with respect for human life. It must turn to science, however, to tell it when life begins. The question of abortion is a basic human question that concerns the entire civilized society in which we live. It is not just a Catholic, or Protestant, or Jewish issue. It is a question of who lives or dies.

Isn't abortion another means of birth control?

No. Do not confuse abortion with birth control. Birth control prevents new life from beginning. Abortion kills the new life that has already begun.

Why bring unwanted babies into the world?

An unwanted pregnancy in the early months does not necessarily mean an unwanted baby after delivery. Dr. Edward Lenoski (U. of S. Cal.) has conclusively shown that 90% of battered children were planned pregnancies.

"A world without unwanted children, wives, oldsters, etc., would be a perfect world. The measure of our humanity is not that we won't always have unwanted ones among us but what we do with hem. Will we try to help them? or kill them?"

Willke, *Handbook on Abortion*

What about the girl who's been raped?

Pregnancy from rape is extremely rare.
A scientific study of 3,500 cases of rape treated in hospitals in the Minneapolis-St. Paul area revealed zero cases of pregnancy. This study took place over a ten-year period.

The Educator, Sept. 1970

What if the mother threatens suicide?

Suicide among pregnant women is almost unknown. In Minnesota, in a 15-year period, there were only 14 maternal suicides. Eleven occurred after delivery. None were illegitimately pregnant. All were psychotic.

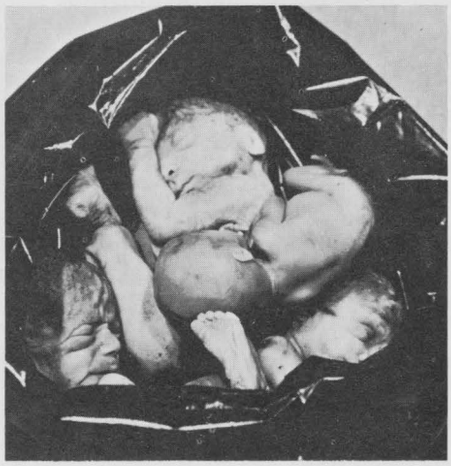
Are there after-effects to the mother?

After legal abortion there is an increase in sterility of 10%, of miscarriages of an additional 10%, of psychiatric aftermath (9 to 59% in England), of Rh trouble later. Tubal pregnancies rise from 0.5 to 3.5% and premature babies from 5 to 15%. There can be perforation of the uterus, blood clots to the lung, infection, and later fatal hepatitis from blood transfusions.

But isn't it cruel to allow a handicapped child to be born — to a miserable life?

The assumption that handicapped people enjoy life less than "normal" ones has recently been shown to be false. A well-documented investigation has shown that there is no difference between malformed and normal persons in their degree of life satisfaction, outlook of what lies immediately ahead and vulnerability to frustration. "Though it may be both common and fashionable to believe that the malformed enjoys life less than normal, this appears to lack both emperical and theoretical support."

Paul Cameron & D. Van Hoeck, Am. Psychologic Assn. Meeting, 1971



Human Garbage—"These dead babies had reached fetal ages of 18 to 24 weeks before being killed by abortion. This is the result of one morning's work at a Canadian teaching hospital."

A new ethic?

For two millenia in our western culture, specifically protected by our laws, and deeply imprinted into the hearts of all men has existed the absolute value of honoring and protecting the right of each person to live. This has been an inalienable, and unequivocal right. The only exceptions have been that of balancing a life for a life in certain situations or by due process of law.

Our new permissive abortion laws represent a complete about-face, a total rejection of one of the core values of western man, and an acceptance of a new ethic in which life has only a relative value. No longer will every human have an absolute right to live simply because he exists. Man will now be allowed to exist only if he measures up to certain standards of independence, physical perfection, or utilitarian usefulness to others. This is a momentous change that strikes at the root of western civilization.

It makes no difference to vaguely assume that human life is more human post-born than pre-born. What is critical is to judge it to be, or not to be, human life. By a measure of "more" or "less" human, one can easily and logically justify infanticide and euthanasia. By the measure of economic and/or social usefulness, the ghastly atrocities of Hitlerian mass murders came to be. One cannot help but be reminded of the anguished comment of a condemned Nazi judge who said to an American judge after the Nuremburg trials: "I never knew it would come to this." The American judge answered simply: *"It came to this the first time you condemned an innocent life."*

Willke, *Handbook on Abortion*

Isn't it true that restrictive abortion laws are unfair to the poor?

It is probably true that it is safer for a rich person to break almost any law, than for a poor person to do so. Perhaps the poor cannot afford all the heroin they want. Rich people probably can. Does that mean we should make heroin available to everyone? Not everything that money can buy is necessarily good. The solution is not to repeal laws, but to enforce them fairly. Laws restricting abortion can be, and frequently have been, adequately enforced.

Isn't abortion safer than childbirth?

No, in the late stages it is far more dangerous. Even in the first three months at least twice as many mothers die from legal abortions as from childbirth.

What of the Population Explosion?

"Fertility in the United States has dropped, for the first time, below the "replacement" level of 2.1 children a family that is necessary to achieve zero population growth."

New York Times, Dec. 5, 1972

If the current decline in the world birth rate continues "It should be possible to reduce the world crude birth rate to less than 20 and the world population growth rate to less than 1% per annum by 1980" (same as U.S.A.).

World Fertility Trends During the 1960's, R. Ravenholt, director, off. of population USAID

Constructive Answers

"Choosing abortion as a solution to social problems would seem to indicate that certain individuals and groups of individuals are attempting to maximize their own comforts by enforcing their own prejudices. As a result, pregnant school girls continue to be ostracized, mothers of handicapped children are left to fend for themselves, and the poor are neglected in their struggle to attain equal conditions of life. And the **only** solution offered these people is abortion. It becomes very disturbing when we think that this destructive medical technique may replace love as the shaper of our families and our society."

"We **must** move toward creating a society in which material pursuits are not the ends of our lives; where no child is hungry or neglected; where even defective children are valuable because they call forth our power to love and serve without reward. Instead of destroying life, we should destroy the conditions which make life intolerable. Then, every child regardless of its capabilities or the circumstances of his birth, could be welcomed, loved, and cared for."

Induced Abortion, A Documented Report, p. 134.

National Right To Life Committee, inc.

1200 15th Street NW SUITE 500 Washington, D.C. 20005

August 1973

MEMORANDUM TO: Members of the AMERICAN BAR ASSOCIATION

FROM : The Officers and the Board of Directors, NATIONAL RIGHT TO LIFE COMMITTEE, Inc.

The NATIONAL RIGHT TO LIFE COMMITTEE, Inc. welcomes you to Washington, and is pleased to provide the following materials to acquaint you with this important new non-profit organization:

-- A statement of purposes, as contained in the Charter;
-- A resolution in support of a Human Life Amendment to the Constitution;
-- The name and address of each member of the Board of Directors--one from each State and the District of Columbia--whom you may contact for additional information; and
-- A "tear off" memorandum, on the green sheet attached, which each attorney may complete and return to request additional information of particular interest to the legal profession.

The following recently published materials are also provided for your information:

-- A reprint from the Fordham Law Review, May 1973, entitled: "An American Tragedy: The Supreme Court on Abortion," by Robert M. Byrn, Professor of Law, Fordham University School of Law.
-- A color brochure showing the humanity of the unborn child, entitled: "Life or Death," by Dr. and Mrs. J. C. Willke, Cincinnati, Ohio. A question-and-answer series is provided on the last page of this brochure.

In addition to consulting the attached green sheet concerning where to obtain additional information, PLEASE VISIT BOOTH NO. 95 located in the far northwest corner of the EXHIBIT HALL in the SHERATON-PARK HOTEL.

National Right To Life Committee, inc.

1200 15th Street NW SUITE 500 Washington, D.C. 20005

STATEMENT OF PURPOSE

The NATIONAL RIGHT TO LIFE COMMITTEE, INC. is a non-profit organization, recently incorporated in the District of Columbia, for the following purposes as stated in the Charter:

* * * * *

ARTICLE III

In order to guarantee the right to life of all people of the United States of America, the purposes of the NATIONAL RIGHT TO LIFE COMMITTEE, INC., are to engage in educational, charitable, scientific and political activities, projects or purposes including specifically, but not in limitation of the foregoing:

A. To promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception.

B. To promote, encourage and sponsor such amendatory and statutory measures which will provide protection for human life before and after birth, particularly for the defenseless, the incompetent, and the impaired and the incapacitated.

C. To engage in such activities as shall be set forth in the bylaws of the Committee which will assist in the accomplishment of those purposes immediately aforementioned.

* * * * *

In furtherance of these purposes, the NATIONAL RIGHT TO LIFE COMMITTEE,INC. has adopted a resolution in support of a mandatory Human Life Amendment to the Constitution. The text of that resolution is provided on the reverse side of this sheet.

National Right To Life Committee, inc.

1200 15th Street NW SUITE 500 Washington, D.C. 20005

RESOLUTION NO. 8

WHEREAS, the Directors of the NATIONAL RIGHT TO LIFE COMMITTEE, INC. have resolved to commit themselves totally to the rejection of the United States Supreme Court's abortion decision of January 22, 1973; and

WHEREAS, a "State' Rights" amendment would not effectuate this rejection but would instead reaffirm the Court's decision; and

WHEREAS, a mandatory Human Life Amendment offers the only vehicle for restoring legal protection for all human life;

NOW THEREFORE BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC., SITTING AT ITS FIRST ANNUAL MEETING JUNE 8-10, 1973:

that all United States Congressmen and Senators who have proposed or co-sponsored a mandatory Human Life Amendment are hereby commended for their dedication and efforts; and be it further

RESOLVED, that the NATIONAL RIGHT TO LIFE COMMITTEE, INC. will support a mandatory Human Life Amendment which applies to all human beings, including their unborn offspring from fertilization at every stage of their biological development, regardless of age, health, function or condition of dependency; and be it further

RESOLVED, that all pro-life supporters throughout this country are mandated to seek out and encourage their United States Congressmen and Senators to sponsor, co-sponsor or publicly endorse such a mandatory Human Life Amendment; and be it further

RESOLVED, that the Secretary of the NATIONAL RIGHT TO LIFE COMMITTEE, INC. be authorized and directed to distribute copies of this resolution to the national news media and to all elected national and state elected representatives.

- - - - - -

National Right To Life Committee, inc.

1200 15th Street NW SUITE 500 Washington, D.C. 20005

August 1973

WHERE TO OBTAIN ADDITIONAL INFORMATION:

-- From a Member of the Board of Directors
-- By returning the "tear off" memorandum, below.

The NATIONAL RIGHT TO LIFE COMMITTEE, Inc. is a non-profit corporation based in Washington, D.C. Its purposes are stated on the immediately preceding sheet. The bylaws provide that the composition of the Board of Directors may include one Director from each State and the District of Columbia.

-- If you are interested in the work of the NATIONAL RIGHT TO LIFE COMMITTEE, Inc., please contact the Director in your State. A list of the names and addresses of the Directors, now of record, is attached.

-- In addition, for information and assistance of particular interest to the legal profession, PLEASE COMPLETE AND RETURN THE "TEAR OFF" MEMORANDUM, BELOW.

M E M O R A N D U M T O :

Miss Nellie J. Gray *
Attorney at Law
515 Sixth Street, S.E.
Washington, D.C. 20003

Please send me additional information on the right to life work. My special interests include:

_____ Trial work.

_____ Appellate advocacy and preparation of briefs.

_____ Participating in a legal advisory capacity.

_____ Writing for legal periodicals.

_____ Working for a Human Life Amendment to the Constitution.

_____ Other (specify) _____.

_____
(Name)

_____
(Address)

* Member of the Board of Directors and of the Legal Advisory Committee, NATIONAL RIGHT TO LIFE COMMITTEE, Inc.; Member, AMERICAN BAR ASSOCIATION.

National Right To Life Committee, inc.

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1st Revision Register of
Addresses: July 1973

National Right To Life Committee, inc.

1200 15th Street NW SUITE 500 Washington, D.C. 20005

WELCOME TO THE BENCH & BAR

attending the

AMERICAN BAR ASSOCIATION ANNUAL MEETING

August 1973

Some items in this folder were not digitized because it contains copyrighted materials. Please contact the Gerald R. Ford Presidential Library for access to these materials.

St Paul Pioneer Press 8/1/73

Former Pro-Abortion Pastor New 'Right to Life' Executive

It's a moral dilemma when to "pull the plug" on a dying patient being kept alive on a machine, but that must be separated from the question of euthanasia for mental patients, criminals or others, according to the head of the National Right to Life Committee.

tem, if it is "well considered in the legal and medical professions and understood by the public."

In fact, he indicated, such a system would avoid confusing the question with "allowing or causing the deaths of vulnerable individuals as a

came through and we realized we had to go back to political struggle.

"Many of those for and against abortion are concerned about the same human problems," he went on. "Yet we use enormous energy to cancel out each other's efforts. One of my

Minneapolis Star 7/31/73

Rector resigns

The Rev. Warren A. Schaller, Jr., rector of St. Andrew's Episcopal Church, 1830 James Av. N., has resigned to become the executive director of the National Right to Life Committee, Inc., Washington, D.C.

The Right to Life group opposes abortion and euthanasia.

Mpls Tribune 8/3/73

Pro-life leader fears extension of euthanasia

By Clifford Simak
Staff Writer

A Minneapolis minister said Thursday he fears that legalization and public acceptance of abortion will lead to legalization and acceptance of euthanasia (mercy killing).

The Rev. Warren Schaller

The minister, The Rev. Warren A. Schaller Jr. is

There is no question, he said, that in American medical jurisprudence doctors are not required to keep alive the hopelessly ill by extraordinary means.

But he said he feels that an attempt is being made to prepare public opinion —through the acceptance of abortion and euthanasia for the hopelessly ill—for the acceptance of extension of euthanasia for other purposes.

He said that suggestions have been made that euthanasia be applied to the repetitive c r i m i n a l, the mentally defective child and the suicidal patient. The argument in regard to the suicidal patient, he said, appears to be that

VOLUME 9, NUMBER 33 35 Cents $12.00 a Year AUGUST 3, 1973

National Catholic Reporter
July

Congress faces abortion battle

By Rick Casey
Associate Editor/Washington

WASHINGTON — A major political battle is taking shape as antiabortion forces prepare a national effort to drag a reluctant Congress into what could become one of the bitterest issues of the next few years.

Although ferocious political and legal fights have been waged in New York and other states over abortion, Washington has largely escaped the rhetoric and rancor of "right to life" groups on one side and feminists and others on the other.

But the Supreme Court brought the issue to Washington last January by ruling that all but the most liberal state abortion laws violate women's right to privacy and guaranteeing almost unlimited right to abortion, at least during the first three months of pregnancy.

"Right to life" forces agree that the only way to reverse the Supreme Court decision is to pass a constitutional amendment, and such a move has received the backing of the nation's Catholic bishops.

Now about 20 bills offering constitutional amendments which would reverse the Supreme Court decision have been introduced in Congress, with the sponsorship of at least 40 members of the House and eight senators. And at least three groups have opened Washington offices to lobby for an amendment, in addition to the U.S. Catholic Conference, which has promised to play an active role.

The proposed amendments fall in two major categories. One is a "states' rights" amendment, which would turn the issue back to the states for legislation. The other type, which may be called "right-to-life" or "mandatory" amendments, would provide constitutional protection for fetuses.

The lobby groups include:

— National Right to Life Committee (NRLC), which claims chapters in all 50 states and which has shown impressive power in such states as New York, Ohio, Michigan and Minnesota. NRLC is likely to become the most powerful of the "pro-life" organizations, with a proposed budget through December of $250,00.

— Human Life Amendment, a smaller, New York-based group propelled by two conservative Catholic men who have registered as lobbyists and work out of a hotel near the Capitol.

— National Youth Pro-Life Coalition (NYPC) with members in more than 30 states and a full-time director in offices a few blocks from the Capitol.

Leaders of all the groups agree that as of now, there is a long way to go before they are ready to muster the two-thirds vote needed in both houses for a constitutional amendment.

"Constitutional amendments are always difficult," said Tom Mooney, executive director of the National Youth Pro-Life Coalition. "But this is the kind of issue no one really wants to touch. They just want to put it in a committee and leave it there."

Which may just happen, at least in the House of Representatives, where the bills have been assigned to a judiciary subcommittee headed by Representative Donald Edwards (D-Calif.) Although his San Jose office has been picketed daily by what he calls "very nice 'pro-life' people," Edwards has no present plans to hold hearings on the issue.

"If hearings are going to be held, they are well down the road," Edwards told *NCR*. "The congressional pressure is just not there."

The congressman noted that about 50 representatives have sponsored a constitutional amendment prohibiting school busing for desegregation, and that isn't considered much interest.

"The House couldn't even pass an amendment for prayer in the schools last year, and that's like apple pie," he said. "I don't think (an amendment on abortion) would pass."

Edwards said he feels abortion is a very divisive issue and "hearings would only exacerbate it."

Edwards' reading of House sentiment was supported when Representative Larry Hogan (R-Md.) filed a discharge petition July 10 in an attempt to pull his bill out of Edwards' subcommittee and onto the floor for a vote. Under this rarely used House rule, a bill can be forced out of a reluctant committee if the majority of the House's 435 members sign a petition.

Two weeks after the petition was filed it had only 12 to 15 signatures and "pro-life" lobbyists were clearly irritated. "The day you put that thing (the discharge petition) out, you damn well better have 100 signatures in your back pocket," said one lobbyist, adding that the tactic was "calculated to lose."

Another lobbyist, after attending a meeting in Hogan's office to discuss the problem, said he wished the petition hadn't been filed since it has no chance of passing, but contended that "right to life" groups should try to get enough signatures on it to avoid embarrassment.

If Edwards, a Unitarian and past president of the liberal Americans for Democratic Action, is aware that members of the House are not anxious to take up the issue, he is also aware that a sizable number of people outside of Congress see the matter as very urgent.

He said he has received "huge" amounts of mail, running five or ten to one in favor of an amendment. He thinks the issue will be "visible" in next year's congressional election, but "won't determine who gets elected." In his own district, he is probably right. Having won 72 per cent of the vote last election and 69 per cent in the previous one, Edwards seems to be securely in his office.

Which is why "right to life" groups are planning to focus much of their pressure on one man who can help get the amendment out of Edwards' subcommittee: Representative Peter Rodino (D-N.J.), chairman of the full Judiciary Committee. Rodino, a Catholic, represents a district which includes a heavily Italian-American section of Newark.

"Right to life" lobbyists say of Edwards: "He is not pro-life." They say of Rodino: "He is not proabortion, but like most politicians, he is reluctant to take a stand on this issue."

"Rodino is very political," said one lob-

NATIONAL CONFERENCE OF CATHOLIC BISHOPS
COMMITTEE FOR POPULATION AND PRO-LIFE ACTIVITIES
1312 MASSACHUSETTS AVENUE, N.W. • WASHINGTON, D.C. 20005 • 202/659-6673

August 6, 1973

Your Excellency:

By means of this letter I wish to provide information on the work of the Committee for Population and Pro-Life Activities, and on recent developments in Washington pertinent to the abortion problem.

I. Constitutional Amendment. There are now 26 versions of a constitutional amendment under consideration by the Congress. Twenty-four are in the House, two in the Senate. However, many are identical, and respecting substantive differences, we are actually dealing with three basic models:

a) The Hogan Human Rights Amendment,

b) The Buckley Human Rights Amendment, and

c) The Whitehurst States Rights Amendment.

In addition, there are bills by Congressmen Denholm and Froehlich that attempt to define the meaning of "person" as it is used in the Fourteenth Amendment.

At present, public attention is focused on Hogan and Whitehurst in the House of Representatives. The House Judiciary Sub-Committee is not predisposed to move on any of the proposals, so Congressman Hogan is seeking a discharge petition to bring his amendment directly to the floor of the House. To accomplish this, 218 Congressmen must sign the petition, and this is extremely difficult to achieve.

On the Senate side, prospects are more positive. Senator Buckley has picked up significant co-sponsorship, and there is a likelihood that the Senate Judiciary Sub-Committee will hold hearings in the Fall.

As you know, the NCCB Administrative Committee reviewed these matters at the June 20, 1973, meeting, and heard a report from the USCC Committee on Law and Public Policy. It was agreed that the summer months would be best used as a time of informing and organizing our people, and that we would look forward to hearings in the Fall as an occasion to present a substantive position on the constitutional amendment, as well as an occasion

to begin a more active public information effort to draw adherents to our cause. In this regard, information and direction have been given to pro-life groups and to Church-related groups by the Family Life Division. In summary then, the recommendations of this Committee are:

a) Utilize the months of August and September to strengthen and expand pro-life activity at the local level, and to strengthen state-wide coordination. It would be best if a state-wide coalition of existing pro-life groups was formed, notably under the prodding and continual direction of a State Catholic Conference. This matter will be taken up at the State Catholic Conference Directors' meeting in early August.

b) Individual bishops should use every appropriate occasion to urge public support for a constitutional amendment. It is not necessary to select or back a specific amendment at this time, except that public support should be for an amendment that provides constitutional protection for unborn human life (i.e., the human rights type).

c) The National Right to Life Committee, formerly located in the USCC building, has reorganized itself and opened an independent office. The Family Life Division will continue to service and coordinate the activities of local pro-life groups. The National Right to Life office is pursuing its own fund-raising effort. At present, the most that the Church might do is provide financial assistance for operating expenses of local pro-life groups.

d) Copies of the various amendments and commentaries on them are available from the Family Life Division.

In summary then, the anticipated time schedule for the constitutional amendment seems to be Senate hearings in Fall, 1973, at which USCC will testify. House hearings may be held in the Fall, or in Spring, 1974. Much depends on Congressional attitudes, but from Fall, 1973 on, momentum can be expected to increase, and our public involvement must encourage the momentum.

II. Congressional Activity. Since June, 1973, the following events have taken place in the U. S. Congress:

a) Passage of a federal conscience clause that protects hospitals and health care workers who refuse to participate in abortion procedures.

b) Reauthorization of the 1970 Family Planning Bill which contains a prohibition of federal funds to any project where abortion is treated as a means of birth control. At best, this slows down the Public Health Service from promoting and funding abortion services.

c) Passage in the Senate of the Human Experimentation Act, which also includes a conscience clause. This bill is due for further action in September, and it may then include an amendment prohibiting experiments on the fetus.

III. Materials for Respect Life, 1973, are now in process of publication and are expected to be mailed to the dioceses in mid-August. Information has been sent to diocesan coordinators.

IV. The next meeting of this Committee is scheduled for late August, and considerable time will be given to the development of an NCCB statement on the U.N. Population Year, and on a suggested program to be followed in the dioceses.

As you will readily understand, this letter is only a brief summary of the many activities being pursued by the various offices of the USCC in Washington and by the State Catholic Conferences in their respective states. We will appreciate any observations or recommendations that you may wish to send us.

Very truly yours in Christ,

+ John Card. Cody

Archbishop of Chicago

P.S. Enclosed for your information is a recent article from the Wall Street Journal, pertinent to the Right to Life effort.

1150 So. Forest St.
Denver, Colorado 80222

AUGUST 6, 1973

To: Executive Committee of National Right to Life Committee

From: Dennis A. Cook, Director for Utah
William P. Moloney, Director for New Mexico
Mary Rita Urbish, Director for Colorado

Re: 1974 Convention

- -

Attached is a copy of a letter from John E. Archibold to Ed Golden, dated June 20, 1973, relative to the 1974 National Right to Life Convention and the proposal to hold it in Denver, Colorado. Also attached is a copy of a letter, dated June 18, 1973, to Ed Golden from Mr. Gerald M. Ashland of The Denver Hilton extending an invitation to the National Right to Life Committee to hold its 1974 Convention at The Denver Hilton.

It should be noted that The Denver Hilton has some of the best display space of any of the hotels in the country and is strategically located in the downtown Denver area close to the State Capitol.

Mrs. Gwen Jordan, Convention Director at The Denver Hilton, has advised that most conventions are planned "from the outside" and do not need a substantial number of local on-site people to handle pre-convention planning. Thus, it is our contemplation that a convention commitee of the National Right to Life Committee would actually plan substantive nature of the program for the 1974 Convention and that the local people would assist in the logistics matters and local features, etc. Ten months' lead time is essential.

We believe The Denver Hilton has been very courteous in holding off as long as it has awaiting a definitive response on whether the 1974 Convention will be held in Denver.

Accordingly, it is requested that the Executive Committee make a firm decision at its August 17, 1973, meeting whether it accepts or does not accept the proposal to have the 1974 Convention in Denver. If no affirmative response is forthcoming as a result of the August 17th meeting, the offer to have the convention in Denver necessarily must

be withdrawn.

It is requested that the above three directors be notified as to the result of the August 17th meeting.

Dennis A. Cook

William P. Moloney

Mary Rita Urbish

Attachments

JOHN EWING ARCHIBOLD
ATTORNEY AND COUNSELOR AT LAW
700 LAFAYETTE STREET
DENVER, COLORADO 80218

TELEPHONE (303) 255-8547

June 20, 1973

Mr. Edward J. Golden
4 Willowbrrok Lane
Troy, New York 02180

Dear Ed : -

To reaffirm the oral comments that I made in Detroit, the Denver chapter of the Colorado Right to Life Committee urges that the 1974 National Right to Life Convention be held in Denver, Colorado during June.

The Hilton Hotel, and the Denver Convention and Visitors Bureau, will be in touch with you and perhaps other members of the Executive Committee with respect to proposals to have the convention in Denver.

There are many advantages to having the convention in Denver which would apply to any organization. With respect to the National Right to Life movement, it would appear that a Western convention would be appropriate. It is true that Colorado is not high in the scale of pro-life states, and is probably at the bottom. However, this is not true for surrouding states such as Utah and Wyoming. Denver, as a communications center for the Rocky Mountain West, would be an ideal focus.

Utah and New Mexico have agreed to lend their valuable assistance to helping us here. As a matter of fact, Dennis Cook from Utah has already gone to work.

I believe it is important for the Executive Committee to decide immediately upon the 1974 site, since I am not confident the two possible weekends at the Hilton will remain open for long. The Convention Director at the Hilton is a personal friend of mine (and is strongly pro-life) and will be able to help considerably.

My warmest personal regards to you, and to the other members of the Executive Committee. Incidentally, my office phone at the Public Utilities Commission is 303-892-3108.

Sincerely,

John E. Archibold

THE
DENVER
HILTON

1550 COURT PLACE, DENVER, COLORADO 80202
TELEPHONE: AREA CODE 303 893-3333

June 18, 1973

Mr. Ed Golden
President
Right to Life Committee, Inc.
Box 9365
Washington, D. C. 20015

Dear Mr. Golden:

It is with great enthusiasm that we extend an invitation for the National Right to Life Committee, Inc., to hold their 1974 Convention in the Denver Hilton.

DATES

We have set aside on a tentative basis the dates of June 7-9, 1974, and also as an alternate, June 28-30, 1974, pending your decision.

GUEST ROOMS

Based on your past history, we are pleased to commit a block of 300 guest rooms. If additional housing is required, we would be happy to adjust that figure upwards.

The Denver Hilton is continually refurbishing its facilities, with complete redecorating of all suites and singles realized this last year, allowing us to provide over 700 of our 850 rooms in almost new condition.

Our first-class sleeping rooms offer the standard items such as color T.V. in every room, as well as individual climate control. Each room features an outside view, with the majestic Rocky Mountains to the West and highlighting the Convention Center and Gold Dome of the State Capitol Building to the East.

GUEST ROOM RATES

Following is our 1973 rate range:

	DELUXE	STANDARD	ECONOMY
Single	$26-$29	$20-$24	$16.50
Double	$31-$35	$27-$30	$24-$26
Twin	$31-$35	$27-$30	$24-$26

Parlor and one bedroom - $80.50-$107.00
Parlor and two bedrooms - $97.00-$157.00

The above convention rates are net, non-commissionable. A definite rate structure would normally be confirmed one year in advance of your convention.

MEETING FACILITIES

Our 59,000 square feet of meeting space is acknowledged to be the most versatile in the Central Southwest, as depicted on the enclosed floor plans. In addition, our facilities offer the following features . . .

- Complete climate control.
- Rheostatic lighting.
- Complete P.A. System monitored from a central control room.
- Flashing light telephones rather than the bell type if desired.
- High speed automatic elevator and escalator service to all meeting rooms.

You will note that our meeting space offers the flexibility to handle your conference meetings and social functions. Of course, all meeting space is complimentary since your delegates will be occupying guest rooms within the hotel.

EXHIBITS

You will note from the enclosed floor plan that we offer several areas that are designed expressly for exhibit purposes.

COMPLIMENTARY ACCOMMODATIONS

We will be happy to compliment one unit per every 50 rooms occupied by your delegates during the convention. They may be assigned in any form that suits your need such as a single bedroom or combination of bedroom and parlor; with each room counting as a unit.

DINING FACILITIES

The Denver Hilton offers a selection of dining establishments within the hotel to indulge a variety of moods and tastes.

- Our Beef Barron features a Gay Nineties atmosphere coupled with entertainment and excellent cuisine.
- The adjoining Lulubelle's Bar serves a daily prime rib or special luncheon.
- The Coffee House offers a modestly priced menu served in an expeditious manner.
- The Pub is quiet and cozy and perfect for your favorite beverage and sandwich.
- Michelle's is a unique ice cream parlor perched on a glass enclosed bridge connecting the Denver Hilton to the famous May D & F Department Store.

CATERING

The Denver Hilton is renowned for offering only the best in food and service, which is so important to the overall success of your convention. Our experienced Catering Staff will be happy to work out menus tailor-made to your requirements.

HOTEL SERVICES

Soft drink and free ice dispensers are strategically located on each floor for the convenience of our guests. All guests have access to our year-around heated pool, sundeck, Roman Baths and a 1,400 car garage.

The Denver Hilton undoubtedly is a full-service hotel in offering a News Stand & Cigar Store, National Car Rental, Gray Line Tours, Liquor Store, printing and duplicating firm, audio-visual companies, convention and exhibit decorating companies, as well as a variety of specialty shops and boutiques.

RESERVATION SERVICE

An ample supply of guest reservation cards will be available at no charge. They are pre-stamped and addressed to facilitate your delegates making their reservations at the Denver Hilton.

Reservations are confirmed daily. Two weeks prior to the conference, the room block is reviewed and the unused portion is released on a first-come, first-served basis.

LADY HILTON

Our Lady Hilton is well versed in many activities of interest in Denver, around which a highly successful program for the wives can be centered.

FAMILY PLAN

There is no extra charge for children when occupying the same room with their parents.

Special children's programs can also be arranged, such as a trip to the Denver Zoo, Elitch Gardens Amusement Park, special tours and shows. Nursery facilities and baby-sitters are also available at the Denver Hilton.

CLIMATE

Denver is regarded by many as the "Climate Capitol of the World" as the sun shines on an average of 310 days a year. Golf courses remain open and active the year around in the "Mile-Hi City."

TRANSPORTATION

Air transportation to Denver is proportionately less due to our Central United States location and the recent increase in direct air routes to the Denver area. Located just eight miles from Stapleton International Airport, the Denver Hilton has limousine service leaving our door about every twenty minutes.

ENTERTAINMENT

Denver offers many entertainment features such as Larimer Square (reminiscent of New Orleans French Quarter), the State Capitol, the U.S. Mint, Elitches Gardens and Lakeside Amusement Park. Special excursions can also be arranged to such renowned areas as the Air Force Academy, or the historic mining towns of Central City and Georgetown, and Heritage Square, the unique "Artisian's Market Place."

COSTS

Certainly an important factor which must be considered in selecting a conference city is overall costs. Denver is famed as a reasonable priced convention city. Entertainment costs are less than in any other major city; and since the Denver Hilton is located in the heart of the city within easy walking distance of many night-spots, intra-city transportation costs are held to a minimum.

Mr. Golden, it is my desire to be of as much help to my clients as possible, and if I may be of any further assistance concerning the formulation of your plans for 1974, please don't hesitate to call on me here at the Denver Hilton.

Sincerely yours,

Gerald M. Ashland
Account Executive

GMA/reb

Enclosure

JAMES J. DIAMOND, M. D.

GENERAL SURGERY
NEOPLASTIC DISEASES

305 MEDICAL ARTS BLD.
READING, PENNSYLVANIA 19601
Phone (215) 374-0938

August 10, 1973

Reverend Albert Kovacs,
St. John's Church
Third and Market Sts.,
Bangor, Penna. 18013

Dear Albert:

Thank you very much for your informative letter concerning the situation at the State level. I had no idea just how bad things had gotten in specifics; all that I knew was that we here in our area had very little evidence that the State office was in existence. All of the recent discoveries about the office have emerged in the very recent past. I am not at all disposed to lay all of the blame at McGuire's feet - a better organized and more closely supervisory board might have prevented some of the abuses - yet I agree with your decision to discharge McGuire and do so with great dispatch. I do hope that we are all not in some sort of legal difficulty because of him.

We here in the Berks County area are perhaps in a unique position to help heal some of the breaches spawned from the McGuire affair. You see, we are not mad at anybody, and we certainly hope that no one is mad at us. I hope that there is some truth to our saying that we get along with one another quite well and with everyone in the entire state very well. Perhaps this is due to our middle position between the two great powers in Pennsylvania, i.e., Philadelphia and Pittsburg. We really should have had much more interdigitating of our efforts with the Philadelphia group, I suppose, but that just never happened. From time to time I have had dealings with Ed Bryce, Randy Engel and Barbara Rutkowski from the Pittsburg area; each of them enjoys our highest esteem and frank admiration. They are a great group and I wish we had them here in Berks County. There are several others, from Judy Fink and Tom Noone down to as near as Lancaster, whom I have met several times, but there does not exist any really close rapport between our people and the western Pennsylvania workers. I am perhaps bitterly accusatory when I observe that this absence of rapport - in my judgment - should be laid squarely in the lap of our recent director (and perhaps the board for which he worked). For as long as I can remember, the dedicated members of P.H.L. have been willing to travel anywhere, do anything, speak anywhere, meet under any circumstances in order to promote the activities of the Group. It is dreadfully easy to get a pervading sense of loneliness when you are working in the smaller cities and towns of the state. Down in Philadelphia or out in Pittsburg, one is always within easy reach and personal contact with someone else who is fighting the

same battle. There are greater numbers of co-workers available for a ten-man job or a hundred-man job. Here in the boondocks we get our thing done with a handful of people, and it becomes very easy for us little people to wonder sometimes whether there is any body out there listening. Are we whistling in the dark, or is there really a big state organization out there somewhere composed of kindred spirits? To this problem I have long maintained that a solution exists, namely State-wide meetings for the people in P.H.L., not just for select groups, directors, boards and the like. Several times I recommended to McGuire that the psychological need for such meetings must be met or irremediable despair or conflict would arise. Pastor Kovacs, it is almost incredible that so many people endowed with community of purpose and good-will deny to themselves opportunities to meet one another and get to know one another personally. For example, when we have our local meetings here, if I say the word Randy Engel, Jane Arnold, Judy Fink, Ed Bryce, Don McGuigan, Tom Noone, etc., I might as well be saying Richard Nixon, Chou En Lai and John Jones. The name may not even be familiar, much less the work behing that name. This is poor organizational psychology. I told McGuire so and yet we have had only random occasions to get together. At the recent Legislators' Luncheon, the social result was zero.

One of the adverse results of this condition is the development of a sub-surface conviction by some regional groups within the state that a central State office is about as necessary as another tax. I suspect that many groups feel that they are very self-sufficiently capable of doing their regional "thing" without benefit of a central office. The mysteries surrounding McGuire's use of regional contributions did nothing to dispel this notion, and - as is usual when money is involved - it was not long until budget considerations at the local level cast wary eyes at the onus of tossing thousands of dollars into a blind alley whence nothing emerged to warrant the contributions.

I disagree quite strongly with this thesis. We are working at the level of an amendment to the Federal Constitution. To do this we need optimal access to and optimal political muscle on our Washington representatives. We need state delegations, not a group of people from this or that city in the state. We need the smaller groups, certainly, particularly for the remaining Pennsylvania legislation to be enacted, but even this chore can be done much more effectively by a strong central organization than by a congery of less potent groups. Despite the financial commitments demanded by a central organization, I am committed to a strong central office in the form of a Pa. R.T.L. committee.

This brings me to the purpose of this letter. I have been in touch with several members of the national R.T.L. committee on a separate matter in the past few weeks. I don't suppose that anyone who attended the Detroit meeting is unaware of Pennsylvania's difficulties, and our plight is common knowledge in Washington. Quite recently Marjorie Mecklenberg called me with a suggestion that we convert our planned October 27th five-region meeting to one that is state-wide.

This will cause problems for us, for we have already begun a chain of commitments involving a smaller group of people. We have reserved a motor-inn with a maximum capacity of 200 people, perhaps 250 at the outside. We have arranged for a 6.25 dinner and a liturgical exercise of limited dimensions. We are not at all prepared to make massive short-notice changes in our plans.

An alternative plan would be the encouragement of the western state groups to have a parallel meeting out there on the other side of the mountains, but a problem exists. Given the current schismatic tendencies in the state, separate meetings might by mischance enhance or perpetuate the divisiveness we sorely need to eliminate. On the other hand, the regional meeting here was planned as regional not out of a regional chauvinism but out of financial and travel considerations. We respect the money demands made on our members, and we hoped to make this meeting as low in cost (time- money-travel-inconvenience) as possible. We even are trying to line up baby-sitters for the day for those who cannot leave their small children for a day. I don't suppose that there is any way to prevent someone out west from suspecting that we are actively fostering an eastern chauvinism, if that person is so disposed. Nothing is further from the truth. We would be as pleased as punch if our western people can afford to come.

A call by you to them in the next day or two would help greatly!

To this end, I suggest the following:

1) Will you at the next meeting of the board invite everyone from the entire state to this meeting?

2) We will personally call the major representatives from all of the other regions and invite them to the meeting. (this week?)

3) We will follow this up with descriptive letters to all the state regional directors not already notified. (in 4-5 days)

4) In approximately one week, we will follow up further with phone calls to the regional directors to sound them out on their ability to attend or send representatives.

5) Could this meeting be proposed state-wide as the first of a series of mandatory meetings for the rank-and-file of the R.T.L. groups in the state? Could the meetings be mandated on a fall-winter-spring basis, rotating the location from east-central-western areas? Attendance is always better in the geographically near-by area, but regional representatives can perhaps be assisted with travel fees by local treasuries.

6) Can this meeting be deliberately employed as a medium by which we can start glue-ing this state together? If necessary, we can provide for an extra long cocktail hour if that is what it takes. The closing liturgy, I feel, will do a great deal to dispel any of those mysteriously spurious animosities which creep into groups. No one seeks power in this group, only results. Some will have to be granted power, certainly, but we all psychologically need to hold hands with those whom we permit to hold the power.

If we can discern in the next few weeks, certainly no later than Labor Day, that the best purpose to which this meeting can be put is a state-wide purpose, and if we can be assured that it will draw from across the state, we will be forced to place the entire matter on a first come-first served reservational basis, perhaps even with advance reservations and/or payment expected from the registrants. Time is of the essence.

If it is to be truly a state-wide meeting, we might want to make other slight changes in the program. All of this is still conjectural, and depends upon the immediately assessable response to a state-wide meeting. If such a response is inadequate to warrant our making critical last-minute changes of serious degree, we will revert to our present plans for a strictly regional meeting.

I will send copies of this letter to all major representatives in the state. You will - please - follow up with a call, and we will follow up further with an assessing phone call to obtain the general state-wide sentiment on the meeting. We simply must know about this decision quickly; we intend to send out our "go" notices to our regional people here this week.

On another note, I am truly sorry that you found that one of your first duties was to fire someone; few introductions to an office could be less pleasant. I am sure that you found the action necessary or you wouldn't have done it. I am also sure that any or all of the schismatic inclinations about the state can be smoothed away by our community of purpose and by our common dedication to the cause of human life. It really doesn't make much sense to love the unborn while cutting the jugular of your neighbor who is already born but who happens to live on the other side of the mountains.

Best wishes,

Jim

James J. Diamond, M.D.

cc: Marjorie Mecklenberg
Jeff Jespersen
All members of Bd. of Dir., P.H.L.

National Right To Life Committee, inc.

1200 15th Street NW SUITE 500 Washington, D.C. 20005

202-872-0324

August 13, 1973

Dear Fellow Member of the States Organization Committee:

Enclosed please find my draft of a suggested cover memo to accompany the STATE ORGANIZATION QUESTIONNAIRE prepared by Mike Taylor, and a redraft of the QUESTIONNAIRE which incorporates my suggested changes. I will go over these changes with you briefly on Wednesday night's conference call.

The reason for the suggested cover memo is that the INSTRUCTIONS page of the QUESTIONNAIRE seemed to me to omit some topics and background information which should be mentioned.

Sincerely yours,

Joseph A. Lampe

Joseph A. Lampe

encl.

National Right To Life Committee, inc.

1200 15th Street NW SUITE 500 Washington, D.C. 20005

August 14, 1973

From: Joseph P. Witherspoon, NRLC Executive Committee member
consultant to Public Policy Committee of NRLC
University of Texas School of Law
2500 Red River Street Tel.: (512) 471-5151 Off.
Austin, Texas 78705 (512) 452-1939 Home

To: Members of NRLC Public Policy Committee:

A. Lawrence Washburn, Jr., Esq.
Hawkins, Delafield, and Wood
67 Wall Street Tel.: (212) 422-5140 Off.
New York, N. Y. 10005 (212) 222-1290 Home

Prof. Walter R. Trinkaus
Loyola University School of Law
1140 West Ninth Street Tel.: (213) 776-4870 Off.
Los Angeles, California 90015

Dr. Andre Hellegers, M.D.
Dept. of Obstetrics and Gynecology
Georgetown University Medical Center
Reservoir Road Tel.: (202) 625-7803
Washington, D. C. 20007

Edwin D. Becker, Esq.
North Dakota Catholic Conference
304 Avenue A West Tel.: (701) 255-1868
Bismarck, N.D. 58501

Roy R. Scarpato
30 Rolling Lane
Wayland, Massachusetts 01778

Subj: Constitution of Public Policy Committee of NRLC; Submission of Working Paper Outline on recommendation by Committee to Executive Committee of NRLC relative to Human Life Amendment

1. On June 23, 1973, the Executive Committee of the National Right to Life Committee constituted a number of standing committees to assist it with various problems of decision-making. One of these is a Public Policy Committee. The charge to this committee and the persons appointed to sit on it are set out in the NRLC Executive Committee announcement in the first week of July set out below:

"PUBLIC POLICY COMMITTEE

CHARGE: The Public Policy Committee is hereby established for the purpose of developing recommendations relative to the organizational positions on public policy, bearing upon the protection of human life, for consideration of the Executive Committee.

MOVED: by Albert Fortman, SECONDED by Robert Greene, that a Public Policy Committee be appointed, with Prof. Joseph Witherspoon to serve as temporary chairman; that the said Policy Committee present its initial report one week prior to the Executive Committee meeting of August 17-18, 1973; that the Policy Committee report its budgetary needs to the Executive Committee, and prepare its own work program.

CARRIED: 6 yes 2 no

The following persons were appointed to the Public Policy Committee:

Prof. Joseph Witherspoon (temporary chairman, Executive Committee Consultant); Prof. Walter Trinkaus; Larry Washburn, Esq.; Edward Becker, Esq; Andre Hellegers, M.D.; Roy Scarpato."

2. During July and early August I have done considerable research and thinking with the assistance of a voluntary staff of two senior law students in Austin concerning the most immediate problem of NRLC with respect to "public policy": its position on a Human Life Amendment. As a result of this, I have prepared a memorandum dated August 14, 1973, to the NRLC Executive Committee outlining the results of my own thinking about the position that NRLC might take on the matter of a Human Life Amendment. This approach was utilized by me for two reasons: (a) to give the Executive Committee something to be considering on the problem of its position on a Human Life Amendment, and (b) to provide the Public Policy Committee with what amounts to an outline of a working paper as a "starter" for its deliberations. It was clear to me after talking with two members of the Committee that this was probably the best way to get things started and to enable us as extraordinarily busy people to make a collective contribution during a period when NRLC had no working staff; minimal funds for employment of the necessary expertise, if any; and the need for preparatory work before any face-to-face meeting of the Committee. Moreover, it has taken me some time to undo my prior alignments with various activities and to respond to the call for considerable time to be devoted to my work on the Executive Committee. I am attorney of record in two major cases involving the problem of abortion and have been preparing briefs for submission in two different United States Courts of Appeal during July and August. In addition, I was called upon to complete during this time my commitment looking to the organization of Texas RLC, which has just been completed.

3. I have enclosed a letter from Larry Washburn containing his suggestion about multiple hearings on Public Policy at the regional level. Please let me have your comments and criticism on my "working paper" outline, your thoughts about Larry's suggestion, and any other comments or suggestions about our carrying out our charge from the Executive Committee.

May

National Right To Life Committee, Inc.

1200 15th Street NW SUITE 500 Washington, D.C. 20005

August 14, 1973

From: Joseph P. Witherspoon, Consultant to Public Policy Committee

To: Executive Committee, NRLC

Subj: Proposed Report of Public Policy Committee on Human Life Amendment to the Constitution of the United States

1. This memorandum submits in outline the contents for a proposed report by the Public Policy Committee to the Executive Committee, NRLC on a Human Life Amendment to the Constitution of the United States. The proposed report has been prepared by your consultant to this committee and is currently being circulated to its members and to certain specialists who can be helpful to them for comment and any proposed modifications.

2. It is recommended that the Executive Committee adopt the following positions:

A. The Buckley Human Life Amendment, S.J. Res. 119 (May 31, 1973) and the Hogan Human Life Amendment, H.J. Res. 261 (January 30, 1973) are both worthy of support by all who are committed to restoring full protection for the life of unborn children under the Constitution of the United States.

B. The Buckley Amendment possesses a number of strong points, including an inbuilt capacity to meet certain difficulties that are likely to be presented in the administration of any human life amendment, that are not clearly possessed by the Hogan Amendment. For this reason, the Buckley Amendment is considered to be preferable to the Hogan Amendment.

C. The Buckley Amendment can and should be strengthened by modification of its Section 2. That section presently reads:

> "Section 2. This Article shall not apply in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother."

For reasons stated below this section should be modified to read as follows:

> "Section 2. No abortion shall be performed by any person except under and in conformance with law permitting an abortion to be performed only in an emergency when a rea-

sonable medical certainty exists that continuation of pregnancy will cause the death of the mother and requiring that person to make every reasonable effort, in keeping with good medical practice, to preserve the life of her unborn offspring."

3. Both the Buckley and Hogan Amendments should be supported by NRLC because although they differ in their expressed formulas, they are likely to produce in large measure the results desired by NRLC with respect to restoring protection under the Constitution for human life from and after conception.

4. The Buckley Amendment should be the Human Life Amendment preferred and promoted by NRLC because it has the following advantages over the Hogan Amendment:

a. because it more assuredly provides protection of the unborn child from the instant of fertilization than does the Hogan Amendment due to the possibility that the Supreme Court of the United States, as a result of its decision in Roe v. Wade, might construe the words of the Hogan Amendment "from the moment of conception" to refer to a process that covers a considerable period of time, perhaps as much as a month, and that would exclude from constitutional protection those unborn children who are not yet one month old. The Buckley Amendment avoids this possibility of construction by the Supreme Court by adopting language which precludes that Court from adopting a view of conception that ignores the facts of life before birth. The language adopted by the Buckley Amendment protects the unborn offspring of human beings as a person under the Fifth and Fourteenth Amendments "at every stage of their biological development." Thus, the unborn child at every stage of its process of biological development as a new, separate, individual, living being is protected by this form of amendment. There is no stage of any such process at which it is outside the protection of the Fifth and Fourteenth Amendments provided for the life of the person. The Supreme Court cannot take some period less than the whole period of biological development of the unborn offspring of human beings as the period, and only the period, in which they are to be recognized as human beings. Moreover, the measure established by the Buckley Amendment for determining the beginning and development of human life is biological science. This measure excludes the method of definition utilized by several members of the Court in defining a human being which would bring to bear on the matter so-called "value judgments".

b. because it utilizes the very language that has been utilized by physicians since at least the 1850's to describe the needed protection for foetal life and that still is in current use. See, e.g., Horatio R. Storer, M.D., Criminal Abortion in America (Philadelphia: J. B. Lippincott & Co., 1860) pp. 10, 100, 107: "... the foetus (is) already, and from the outset, a human being, alive, however early its stage of development and existing independently of its mother. . . .it is not rational to suppose . . . that life . . . dates from any other epoch than conception. . . . medical men, in all obstetric matters, are the physical guardians of women and their offspring. . . ." (Protection of the unborn child is required) at every stage of gestation." See, also, Henry Miller, M.D. "Address" (of President of American Medical Association at 1860 Annual Meeting), Transactions of the American Medical Association, Vol. XIII (June 1860) pp. 58-59: "from the moment of conception, a new being is engendered, in whose constitution, mi-

croscopic though its parts may be, lies unfolded the substratum in which inheres potentially all that pertains to man. . . . In every stage of its development, it is as much an independent being as are its parents. With such enlightenment as this, what virtuous woman . . . would be accessory to so foul a deed as the destruction of her offspring. . .?"

c. because it utilizes a formula that better strikes at the very roots of the Supreme Court's tragic error in Roe v. Wade. That Court separated the concept of the human being from the concept of the human person and held that although a being might be a human being, that fact did not entitle that being without more to the constitutional protection of the human person. In so holding, the Court destroyed the traditional common sense and scientific view equating the concept of the human being and the concept of the human person. And, indeed, it now can be clearly demonstrated that the Court destroyed, for the time being, the work of the framers of the Fourteenth Amendment's First Section. Those framers were very cognizant that these two concepts had been separated in the actual administration of the Constitution of the United States and it was their clear, demonstrable purpose to prevent for all time thereafter any such separation of the two concepts. The author of the first section of this Amendment, Congressman John A. Bingham of Ohio, stated how it was to operate: "Before that great law the only question to be asked of the creature claiming its protection is this: Is he a man?" And of the due process clause of the Fifth Amendment he stated: ". . . no person, no human being, no member of the family of man shall, by virtue of federal law or under the sanction of the federal authority . . . be deprived of his life, or his liberty, or his property, but by the law of the land." See, Alfred Avins, The Reconstruction Admendments' Debates (1967) pp. 274, 36-38.

The Buckley Amendment explictly restores this traditional equation of the two concepts of the human being and the human person by defining "person" as used in the Fifth and Fourteenth Amendments to apply "to all human beings, including their unborn offspring at every stage of their biological development, irrespective of age, health, function or condition of dependency." The Buckley Amendment thus specifically overturns the tragic underpinning of Roe v. Wade. The Hogan Amendment does not specifically overturn this underpinning. It accomplishes the needed rectification only by inference. The Hogan Amendment does not define the constitutional concept of the "person". While it accomplishes the necessary protection of a human being, from the moment of conception (providing the Supreme Court does not distort the proper meaning of the latter clause), the Hogan Amendment fails to correct the basic doctrinal error of that Court committed in Roe v. Wade in haec verba and to restore the Fourteenth Amendment to its original form of equating the human person and the human being. By virtue of this failure, the opportunity for asserting a great moral and legal truth is lost. The basic error of the Supreme Court in Roe v. Wade should be explicitly corrected. The Buckley Amendment does this.

d. The Buckley Amendment is more precise and full in its protection of human beings as persons, irrespective of their age, health, function, or condition of dependency, than is the Hogan Amendment. The latter Amendment explicitly protects a human being against deprivation of his life by the United States or a State only on account of illness, age, or incapacity. The Buckley Amendment fully encompasses a human being within the protection

of the Fifth and Fourteenth Amendments and all clauses thereof with respect to the right to life whatever the excuse that might be advanced for taking away that right by government and then adds, out of an abundance of caution, that that right may not be taken away on account of age, health, function, or condition of dependency. Perhaps, Section 2 of the Hogan Amendment will be read by the Supreme Court as not limiting Section 1 of that Amendment with respect to the protection of the life of a human being. But, at this stage, no stone should be left unturned to prevent the Supreme Court ever playing fast and loose again with the constitutional protection of life of the human person. The Buckley Amendment is not only better drawn to accomplish this result explicitly. It is also better in its draftsmanship by virtue of the fact that it covers the whole field of possible excuses or reasons government might give for taking a person's life, while specifying some such reasons particularly, and it does so in one comprehensive section, rather than in two sections.

e. The Buckley Amendment deals specifically with a problem that could undercut the effectiveness of any Human Life Amendment--the problem of an exception for an abortion for preserving the life of the mother. No Human Life Amendment will be adopted that does not permit state and federal laws to be enacted that permit such an abortion. The Hogan Amendment does not explicitly prohibit such an abortion and inevitably it must face an attack from two sides. One side will urge that the Hogan Amendment prohibits any abortion. Another side will urge that the Hogan Amendment permits abortions to be authorized by state and federal law that are performed to preserve the health of the mother and perhaps to preserve her mental health and to subserve socio-economic purposes. While I do not agree that the Hogan Amendment prohibits any abortion, it is a weakness of that Amendment that it can be subjected to such argumentation and that the latter will prove persuasive to many persons who are basically pro-life in their orientation. On the other hand, the greatest weakness of the Hogan Amendment is that it probably does not confine permissible abortions to those done for the purpose of preserving the life of the mother. Indeed, it would turn over to the very court that decided Roe v. Wade the function of deciding what abortions are permissible under the very fluid and flexible concept of "due process of law". I am unwilling to turn over to that Court such a function after its performance in Roe v. Wade and I think most pro-life people, when they understand this weakness of the Hogan Amendment, will be opposed to it for that reason.

It is essential that any Human Life Amendment clearly and narrowly draw a provision for the kind of an abortion that may be permitted under State and Federal Law. The Buckley Amendment has done this in light of the history of the administration of the exception in traditional anti-abortion laws for abortions for the purpose of saving the life of the mother. That history indicates that even this exception was given a wide and liberal interpretation in many states, such as California. For this reason, the Buckley Amendment would only permit an abortion for this purpose in the situation of an emergency when there is reasonable medical certainty that continuation of the pregnancy will cause the death of the mother. Such a phrasing of the exception will be efficacious in preventing authorization of an abortion, by judicial interpretation, that really involves no real danger to the mother's life from a continuation of her pregnancy.

The Buckley Amendment with respect to this matter of exception for an abortion to save the life of the mother does suffer from two kinds of weaknesses. These

will be examined below and a corrective recommended.

5. A major weakness of both the Buckley and Hogan Amendments is that neither proposal prohibits abortions directly. Thus if a State Legislature or the Congress fails to enact an anti-abortion law, neither the Buckley nor the Hogan Amendment will stop abortions without more. They will resemble, in their actual impact or application, the so-called States Rights Amendments. They are designed to prevent action by the United States or any State in denying due process of law or equal protection of law to any human being from and after the conception of that human being with respect to his or her enjoyment of life. They are not designed to operate upon the private action of physicians in performing or of parents in seeking abortions. Adoption of neither the Buckley nor the Hogan Amendment will stop private action in seeking and authorizing abortions or in performing abortions. They operate only through action that is public or official action. If a State Legislature or a Congress fails to enact an anti-abortion law, this will probably constitute official action that denies due process of law and equal protection of law to unborn children. In such event, court action will have to be instituted to compel a State Legislature or Congress to enact anti-abortion law to protect unborn children from abortions by private persons. This will take time. It will be done piece-meal. It must be done through the courts and this means that these Amendments put the Supreme Court back in the saddle again with many possibilities for delay and inadequate protection of the unborn child. It is entirely possible that adoption of either the Buckley or the Hogan Amendment will result in another fifty years of efforts to get appropriate anti-abortion laws on the statute books plus efforts in the courts to bring this about. This will be an intolerable situation and one which should be avoided at all costs.

What is needed is a Human Life Amendment that prohibits abortions by private persons much as the Thirteenth Amendment prohibits slavery and involuntary servitude by private persons. Indeed, there is a very close resemblance between killing human beings by abortion and submitting them to slavery and involuntary servitude. Slaves were also beaten and killed by their masters. When the people of the United States decided to be rid of slavery and involuntary servitude, they adopted an amendment to the Constitution that prohibited any private person or government itself from imposing slavery or involuntary servitude upon another person. That Amendment reads: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

A provision similar to the Thirteenth Amendment applicable to abortion by private persons as well as officials can readily be inserted into the Buckley Amendment by modification of its Section 2 to read as follows:

> "Section 2. No abortion shall be performed by any person except under and in conformance with law permitting an abortion to be performed only in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother." (Underlined portion is substituted for the words "This Article shall not apply")

Another modification will be suggested of Section 2 of this Amendment shortly for another purpose. At the present moment will be discussed the point that this modification definitely creates from the moment of the adoption of the Amendment

a legal protection for every unborn child in the country from and after its conception with respect to its life. This law can be enforced in the courts without the necessity for state or federal legislation although, of course, it permits implementive legislation. Moreover, it preserves the excellent idea of the Buckley Amendment in dealing with the problem of an exception for an abortion performed for the purpose of saving the life of the mother and doing so in a narrow, precise manner. We definitely need this modification and should vigorously seek to get it adopted.

An excellent point about this modification is that it answers a basic criticism that has been directed against the Buckley Amendment. This criticism is that the Buckley Amendment compels recognition of an abortion for the purpose of saving the life of the mother. While I think this criticism is wrong, the Amendment is subject to having such a criticism made and credited. The criticism should be undercut by modifying Section 2 according to the suggestion just made. The modification clearly does not compel recognition of an abortion for the purpose of saving the life of the mother. It simply leaves it up to the State Legislatures and to Congress to enact a "law permitting an abortion to be performed only . . . etc." Until such law has been enacted "No abortion shall be performed by any person". When such a law is enacted "No abortion shall be performed by any person except under and in conformance" with such state or federal law. Moreover, such state or federal law can only "permit. . . an abortion to be performed . . . in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother." As suggested above, this completely undercuts the criticism that has been made by several prominent persons of the Buckley Amendment at the same time that it accomplishes the main objective under discussion of preventing abortion directly by private persons and thus providing immediate legal protection of unborn children even if state and federal legislatures fail to provide this protection.

6. Another major weakness of both the Buckley and Hogan Amendments is that, while both permit an exception to be made for abortions to save the life of the mother, and while the Hogan Amendment probably permits many other exceptions to be made in behalf of abortions, neither Amendment does anything about protecting the unborn child during and after the process of the excepted abortion. We are all familiar with the fact that babies are aborted live-born usually in hysterotomies and sometimes in saline injections. We are also familiar with the reports that these babies are usually permitted to die without adequate care or even destroyed. Whatever form of abortion is utilized with respect to an abortion that is permitted in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother under the Buckley Amendment, it should be permitted only under a law "requiring . . . every reasonable effort, in keeping with good medical practice, to preserve the life of her unborn offspring." For this reason, the modification of Section 2 of the Buckley Amendment should read as follows:

> Section 2. No abortion shall be performed by any person except under and in conformance with law permitting an abortion to be performed only in an emergency when a reasonable medical certainty exists that continuation of pregnancy will cause the death of the mother and requiring that person to make every reasonable effort, in keeping with good medical practice, to preserve the life of her unborn offspring." (last under-

lined portion is the modification suggested in the instant discussion. The earlier underlined portion is the modification suggested in Point 5.)

7. I was the draftsman of a proposed constitutional amendment to overturn the Supreme Court decisions that came to the attention of Senator Buckley and with one major exception adopted by him. This proposal was drafted in my role as a member of the drafting committee of the Legal Advisory Committee of NRTL in late January and February of this year. Professor Walter Trinkaus of Loyola of Los Angeles made an extremely valuable contribution to this proposed amendment that is incorporated in Section 2 of the Buckley Amendment. As draftsman of the proposal, I was aware of the Hogan Amendment and sought to achieve its objectives by more certain measures and to add correctives to strengthen its protection for human life. The direct prohibition of abortions by private persons was eliminated by Senator Buckley, largely for political reasons. I have redrafted the direct prohibition of abortions by private persons that was submitted to him as described in this memorandum. I believe it is not only necessary in principle but also politically acceptable in its present form.

8. While the Public Policy Committee is performing its task of considering the form of a Human Life Amendment to be recommended by it for support by NRLC, this memorandum will serve, among other purposes, the purpose of informing the Executive Committee of the position of its consultant to that Committee and of stimulating any suggestions or criticisms that seem appropriate to members of the former. While lawyers are essential for the performance of the task of proposing the form of a Human Life Amendment for consideration by the Executive Committee, it is also just as essential that every pro-life person and group consider how any given proposal might operate in practice and what problems may not have been foreseen or considered.

APPENDIX

A. The Buckley Amendment (S.J. Res. 119, May 31, 1973):

"SECTION 1. With respect to the right to life, the word "person", as used in this Article and in the Fifth and Fourteenth Articles of Amendment to the Constitution of the United States, applies to all human beings, including their unborn offspring at every stage of their biological development, irrespective of age, health, function or condition of dependency.

"SECTION 2. This Article shall not apply in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother.

"SECTION 3. Congress and the several States shall have power to enforce this Article by appropriate legislation within their respective jurisdictions.

B. The Witherspoon proposal to the Executive Committee for a modification of the Buckley Amendment:

"SECTION 1. (same)

"SECTION 2. No abortion shall be performed by any person except under and in conformance with law permitting an abortion to be performed only in an

in an emergency when a reasonable medical certainty exists that continuation of pregnancy will cause the death of the mother and requiring that person to make every reasonable effort, in keeping with good medical practice, to preserve the life of her unborn offspring."

"SECTION 3. (same)

C. The Hogan Amendment (H. J. Res. 261, January 30, 1973):

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

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

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

D. Memoranda of June 1 and July 30, 1973, of Michael Taylor, Executive Secretary of NRLC entitled: "Federal Legislation - Constitutional Amendments . . ." and "Constitutional Amendment . . ." (I assume these are generally available)

E. Articles of Robert M. Byrn and Charles Rice in <u>The Wanderer</u>, July 12, 1973. (I assume these are generally available)

National Right To Life Committee, Inc.

1200 15th Street NW SUITE 500 Washington, D.C. 20005

August 14, 1973

From: Joseph P. Witherspoon, NRLC Executive Committee member
consultant to Public Policy Committee of NRLC
University of Texas School of Law
2500 Red River Street Tel.: (512) 471-5151 Off.
Austin, Texas 78705 (512) 452-1939 Home

To: Members of NRLC Public Policy Committee:

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67 Wall Street Tel.: (212) 422-5140 Off.
New York, N. Y. 10005 (212) 222-1290 Home

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North Dakota Catholic Conference
304 Avenue A West Tel.: (701) 255-1868
Bismarck, N.D. 58501

Roy R. Scarpato
30 Rolling Lane
Wayland, Massachusetts 01778

Subj: Constitution of Public Policy Committee of NRLC; Submission of Working Paper Outline on recommendation by Committee to Executive Committee of NRLC relative to Human Life Amendment

1. On June 23, 1973, the Executive Committee of the National Right to Life Committee constituted a number of standing committees to assist it with various problems of decision-making. One of these is a Public Policy Committee. The charge to this committee and the persons appointed to sit on it are set out in the NRLC Executive Committee announcement in the first week of July set out below:

"PUBLIC POLICY COMMITTEE

CHARGE: The Public Policy Committee is hereby established for the purpose of developing recommendations relative to the organizational positions on public policy, bearing upon the protection of human life, for consideration of the Executive Committee.

MOVED: by Albert Fortman, SECONDED by Robert Greene, that a Public Policy Committee be appointed, with Prof. Joseph Witherspoon to serve as temporary chairman; that the said Policy Committee present its initial report one week prior to the Executive Committee meeting of August 17-18, 1973; that the Policy Committee report its budgetary needs to the Executive Committee, and prepare its own work program.

CARRIED: 6 yes 2 no

The following persons were appointed to the Public Policy Committee:

Prof. Joseph Witherspoon (temporary chairman, Executive Committee Consultant); Prof. Walter Trinkaus; Larry Washburn, Esq.; Edward Becker, Esq; Andre Hellegers, M.D.; Roy Scarpato."

2. During July and early August I have done considerable research and thinking with the assistance of a voluntary staff of two senior law students in Austin concerning the most immediate problem of NRLC with respect to "public policy": its position on a Human Life Amendment. As a result of this, I have prepared a memorandum dated August 14, 1973, to the NRLC Executive Committee outlining the results of my own thinking about the position that NRLC might take on the matter of a Human Life Amendment. This approach was utilized by me for two reasons: (a) to give the Executive Committee something to be considering on the problem of its position on a Human Life Amendment, and (b) to provide the Public Policy Committee with what amounts to an outline of a working paper as a "starter" for its deliberations. It was clear to me after talking with two members of the Committee that this was probably the best way to get things started and to enable us as extraordinarily busy people to make a collective contribution during a period when NRLC had no working staff; minimal funds for employment of the necessary expertise, if any; and the need for preparatory work before any face-to-face meeting of the Committee. Moreover, it has taken me some time to undo my prior alignments with various activities and to respond to the call for considerable time to be devoted to my work on the Executive Committee. I am attorney of record in two major cases involving the problem of abortion and have been preparing briefs for submission in two different United States Courts of Appeal during July and August. In addition, I was called upon to complete during this time my commitment looking to the organization of Texas RLC, which has just been completed.

3. I have enclosed a letter from Larry Washburn containing his suggestion about multiple hearings on Public Policy at the regional level. Please let me have your comments and criticism on my "working paper" outline, your thoughts about Larry's suggestion, and any other comments or suggestions about our carrying out our charge from the Executive Committee.

67 WALL STREET

July 27, 1973

Professor Joseph Witherspoon, Jr.
313 Townes Hall
2500 Red River Street
Austin, Texas 78705

Re: National Right to Life Committee, Inc.
Subcommittee on Public Policy

Dear Joe:

Although I have not yet received your letter enclosing the mandate to the Subcommittee on Public Policy, I thought I would put a few words down in answer to your question with respect to how the committee might proceed in its deliberations.

The point I would most like to emphasize is that the deliberations should, if possible, take place in a setting geared to action on the Human Life Amendment and on Congressional and State legislative action. It is my feeling that this purpose cannot be achieved unless there are present interested members of both the Congress and the State legislatures.

Since the deliberations will probably take place during the Congressional recess in August, it would seem to be best both in terms of convenience and of political recognition on the home front to hold our deliberations as much as possible on a regional basis.

The idea of multiple hearings on Public Policy might at first seem to be both expensive and wasteful but on closer examination I feel they will prove to be both thrifty in terms of expenses and more productive in terms of quality and thoroughness.

Meetings on the regional level will be attended by more people who can either drive or take inexpensive flights. No more than 3 or 4 members of the Subcommittee would be needed to attend each regional meeting.

We could determine at a later time whether a final meeting of the entire Subcommittee would be necessary. I have a feeling that it would not be and that if it were necessary, a short meeting as part of another National Right to Life event would be sufficient.

If the regional meetings are held in succession and include the input of invited Congressmen and State representatives who are well briefed in advance as to the purpose of the regional meeting and if the minutes of each regional meeting are immediately circulated so that they are available for consideration prior to subsequent regional meetings, then each regional meeting will in effect consider and build upon the work of the prior regional meetings.

I feel that the preparation and scheduling of such regional meetings is a job which must be handled by a person who is working full-time throughout the months of August and September and who is in a position to attend each regional meeting and to take minutes, have them approved and immediately circulate them. With proper advance notice and preparation for each regional meeting, the minutes of such meetings, taken as a whole, should present a formidable document upon which to base any recommended conclusions with respect to Public Policy to the National Right to Life Committee, Inc.

I hope that these thoughts arrive in time and that they are of some assistance to you. They are not meant to shift the burden to your shoulders and I want you to advise me at the earliest possible time of any way in which I can be of assistance to you.

With all best wishes, I remain

Sincerely yours,

Larry

A. Lawrence Washburn, Jr.

ALW/bw

National Right To Life Committee, inc.

1200 15th Street NW SUITE 500 Washington, D.C. 20005

August 14, 1973

From: Joseph P. Witherspoon, Consultant to Public Policy Committee

To: Executive Committee, NRLC

Subj: Proposed Report of Public Policy Committee on Human Life Amendment to the Constitution of the United States

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93D CONGRESS
1ST SESSION

H. J. RES. 769

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 12, 1973

Mr. BURKE of Massachusetts introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States for the protection of unborn children and other persons.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

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

"SEC. 2. No abortion shall be performed by any person except under and in conformance with law permitting an abortion to be performed only in an emergency when a reasonable medical certainty exists that continuation of pregnancy will cause the death of the mother and requiring that person to make every reasonable effort, in keeping with good medical practice, to preserve the life of her unborn offspring.

"SEC. 3. Congress and the several States shall have power to enforce this article by appropriate legislation within their respective jurisdictions.".

National Right To Life Committee, inc.

1200 15th Street NW SUITE 500 Washington, D.C. 20005

MEMORANDUM

TO: MEMBERS OF THE BOARD OF DIRECTORS
NATIONAL RIGHT TO LIFE COMMITTEE

FROM: ROBERT F. GREENE, EXECUTIVE DIRECTOR

DATE: NOVEMBER 1, 1973

Enclosed please find the minutes of the Executive Committee's meeting of September 14-16 in Chicago which were approved at the last meeting in Chicago on October 26-27, 1973. I would again caution you to treat them as confidential. You should not reproduce them or allow others to do so.

A few days ago, you received a memorandum from President Edward Golden containing some financial information. I have no reason to question the past records, but the memorandum was not, in my opinion, accurate as it related to projected income or expenses. For example, it failed to recite that we have been receiving money daily since October 23, 1973 at an average rate of $1,107.06 each day. In my opinion we will not be in a deficit position by the end of November unless the current drive for enrollments and subscriptions is a total failure. As you know, we are in telephone communication with our Directors weekly and many have promised to send in their assessments in December as they reap the benefits of Christmas-oriented fund raising programs. I don't mean to imply that we are fiscally healthy; we have a lot of fund raising to do, but like Molly Brown, the NRLC "ain't down yet". The Executive Committee has now authorized me to consolidate all NRLC accounting functions in the Washington office. Accordingly, I will present you with a financial report which has been examined and approved by the Executive Committee as soon as possible after these records are made available to me.

It is no secret that the Executive Committee has been involved in a controversy over program planning and the setting of priorities. This should not surprise anyone because the tasks are extremely difficult, and we have very strong people on the Executive Committee. Because they are strong, they don't surrender their positions easily. One immediate question concerns the need for a Board of Directors meeting. Should the matters in dispute be resolved by a majority vote of the Executive Committee or should they

be resolved at a specially called meeting of the Board of Directors? You know that the Executive Committee has been planning a Board of Directors meeting to be held in Washington January 18-20, 1974. It is at this meeting that the Executive Committee plans to share with the Directors the comprehensive reports and recommendations of the Standing Committees and its decisions on programs and program priorities for the foreseeable future. This committee work will not be complete until then.

In order to clear the air on this and several other issues, the Executive Committee voted on four brief resolutions on October 27th. The vote was by roll call so you will know the position taken by each member. This will be reported fully in the October meeting's minutes, but I believe it important for you to have this preview. Please note that Professor Witherspoon was not present at the meeting and his vote was recorded by the Secretary after the meeting in a telephone conversation.

The first resolution concerns the publication of the new NRLC newspaper and was stated as follows:

> We reaffirm strong support for the publication of the proposed NRLC newspaper. The vote was:

Yea	Nay	Abstention
Golden	Taylor	Klein
Mecklenburg		
Greene		
Fink		
Willke		
Fortman		
Witherspoon		

The second resolution was a vote of confidence for me and it was stated as follows:

> We wish to state our approval and support of Mr. Robert Greene's performance to date as Executive Director. Furthermore, we affirm our confidence in and support of his continuing in that capacity at least until the forthcoming meeting of the Board scheduled for January 18-20, 1974. The vote was:

Yea	Nay	Abstention
Golden	Taylor	Greene
Mecklenburg		
Klein		
Fink		
Fortman		
Willke		
Witherspoon		

The third resolution concerns the calling of a Board of Directors meeting, and it was stated as follows:

> We support calling a full meeting of the Board of Directors at as soon a time as can be arranged. The vote was:

Yea	Nay	Abstention
Golden	Mecklenburg	0
Taylor	Klein	
	Greene	
	Fink	
	Willke	
	Fortman	
	Witherspoon	

The fourth resolution concerned the continuing search for an Executive Director, and it was stated as follows:

> We wish to strongly restate that the search for a permanent Executive Director continue to be pursued with vigor, understanding that an essential qualification for the position be the possession of top level expertise in the Washington scene and on Capitol Hill. The vote was:

Yea	Nay	Abstention
Golden	Mecklenburg	0
Willke	Fink	
Fortman	Greene	
Klein		
Taylor		
Witherspoon		

It is my understanding that the minutes will contain summarized statements by some of the members explaining their vote. You should perhaps wait to see those minutes before reaching any hasty conclusions concerning the voting of any particular member.

In summary, we are going to produce the newspaper which is so essential to building a base of continuing, renewable financial support, and I will continue to serve as Executive Director, at least until January 18th, unless my successor be found and is available at an earlier date. We will have a Board of Directors meeting in Washington on January 18-20, 1974, and we could have one earlier if properly called. However, as you can see, a majority of the Executive Committee has voted against an earlier meeting. If I may be permitted to summarize the view of the majority, they believe such a meeting would

be unproductive, wasteful of our resources and divisive. In addition, a search committee has been named to look for an Executive Director with Washington savvy. Meanwhile, I shall continue to consolidate our position here in Washington, to develop a competent staff and carry on the business of the organization.

It is not my purpose to persuade you either to have or not to have a Board of Directors meeting before January 18, 1974. My views on that are reflected in my vote. I do feel a responsibility to the Executive Committee and to you to provide you with the most recent information that is available to guide you in your continuing relationship with the NRLC. Please understand that the contents of this memorandum are in no way to be interpreted as the official minutes of the Executive Committee meeting. I have checked those parts which I deemed essential with the Secretary and the votes recorded agree with her notes. You will, of course, receive the full minutes as soon as they have been transcribed and approved by the Executive Committee.

I hope you will find this information helpful. I certainly do not want to contribute to further dissension or misunderstanding, and I look forward to your continued good will and support.

Enclosure

This draft that you will type is subject to approval of content from the Executive Committee at their next monthly meeting. Mail the copies only to the Executive Committee with this cover note, signed by me as Secretary:

"Enclosed are the draft minutes of the Executive Committee meeting held on August 17, 18, and 19. Please send any corrections, suggestions for re-wording, or additions directly to me at my home address. The minutes will be presented formally for your approval at our September meeting."

Thanks —
Judy Fink
Secretary, NRCC

NATIONAL RIGHT TO LIFE COMMITTEE, INC.

EXECUTIVE COMMITTEE MEETING

O'Hare International Towers Hotel

Chicago, Illinois
August 17, 18, 19, 1973

Present: Edward Golden, Marjory Mecklenburg, Michael Taylor, Prof. Joseph Witherspoon, Albert Fortman M.D., Gloria Klein, Robert Greene Esq., Judith Fink, John Willke M.D., Rev. Warren Schaller (interim Executive Director).

Friday, August 17, 1973, 8:30 p.m.

Upon invitation from Edward Golden, President, Msgr. James T. McHugh, Director, Family Life Bureau, U.S. Catholic Conference, discussed the work of the National Right to Life Committee, Inc. with the members of the Executive Committee. Msgr. McHugh informed the Committee of plans for pro-life work being drawn up which will be implemented by the U.S. Catholic Conference. It was informally agreed that communication will continue to be kept open between the NRLC and the USCC, with opportunity for dialogue as needed.

Saturday, August 18, 1973, 10:00 a.m.

Present: Edward Golden, Marjory Mecklenburg, Michael Taylor, Prof. Joseph Witherspoon, Albert Fortman M.D., Gloria Klein, Robert Greene Esq., Judith Fink, John Willke M.D., Rev. Warren Schaller (interim Executive Director).

The minutes of the previous meeting were approved. Discussion concerning minutes format took place, with the concept of comprehensive minutes once again put forth as desired by the Committee.

Dr. Fortman introduced Mr. Ted Smith, a public relations specialist. Mr. Smith presented an overview of the problems and potentialities surrounding the publication of a pro-life newspaper, stressing the financial aspects and the benefits accruing to NRLC should such a newspaper be published.

Mr. Smith advised that a circulation of 100,000 was almost essential if the venture were to produce the necessary funds for Corporate use. The basic cost of 10¢ per issue, in a quantity of 100,000 run, would be the "break point". Postage for the newspaper at nonprofit rate 3rd class could range from 1.7¢ to as low as .3¢ if a certain IRS class can be achieved for postal ratings.

A discussion of compiling the necessary 100,000 names from available pro-life mailing lists; the task of staffing, editing, and writing the newspaper; the selection of a printing house; editorial policy; insert sheet policy; mailing list distribution procedure, etc. resulted in a

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MOTION by John Willke, SECONDED by Prof. Witherspoon, that NRLC proceed immediately and vigorously in the direction of publishing a national newspaper.

CARRIED unanimously.

MOTION by John Willke, SECONDED by Marjory Mecklenburg, that the first issue of the newsletter be distributed as broadly as possible through all channels of distribution open to it.

CARRIED unanimously.

MOTION by John Willke, SECONDED by Marjory Mecklenburg, to delegate to the chairman of the public relations committee the task of selecting the publisher and the location of publication, and to secure the staff to produce the first issue of the newspaper.

CARRIED unanimously.

Ed Golden reported on the progress made to date in opening and staffing the Washington, D. C. office. Furniture and office equipment are purchased and installed, including equipment for document duplication, which has been obtained on a rental basis.

A secretary has been employed, to be salaried at $7,500 yearly, and a job description has been written for her. Her name is Diane Ward, and she is at this date working for the Corporation. The telephone number for the Washington office is (202) 872-0324. The secretary has been instructed to make no press statements of any kind.

A job description for Rev. Warren Schaller, the interim Director, was reviewed. Rev. Schaller and Ed Golden have conferred several times regarding the initial thrust of the office activities, and have mapped a careful and extensive format of ground-breaking activity for Rev. Schaller to enact.

Mr. Golden affirmed his intention to back Rev. Schaller's association with NRLC to the fullest, and pledged his assistance in any way possible. Rev. Schaller will refrain from press releases or conferences until a later date, at Mr. Golden's request.

Major directives to Rev. Schaller will be funneled through Mr. Golden. However, Rev. Schaller can be approached directly by the Executive Committee people regarding the work of their respective Committees.

Rev. Schaller stated that it was his clear understanding that he was to issue no unauthorized press releases, but could issue those authorized by the proper Executive Committee persons. Also, he was to make no unauthorized contacts to Congressional figures but could do so if authorized.

The Executive Committee by consensus informed Judy Fink that she could now mail out the minutes of the previous meetings and Conference calls held to date. It was reported by Gloria Klein that the full transcript of the Board of Directors meeting would cost over $1,000 and she urged that the minutes of the meeting be prepared without it, stating that if there was a question that arose regarding any part of the meeting that a partial transcript could be obtained. This was agreed to by concensus.

Ed Golden reported on the continuing search for an Executive Director, stating that he had contacted several employment agencies. Professor Witherspoon re-opened the question of hiring a previously interviewed individual, namely, Michael Batten. Following discussion, the Committee by concensus agreed that Mr. Batten should be contacted and further explorations made regarding possible employment as Executive Director. A telephone contact was made, and Mr. Batten will send a letter stating definitive points regarding his availability, and other matters of concern to him, to the Executive Committee immediately.

Gloria Klein presented a Finance Committee Report. Such a report will be submitted monthly. On this date, the balance on hand was approximately $49,000. A full listing of outstanding bills was not available, although Mrs. Klein reviewed many with the Committee. It was decided by concensus that the Treasurer will invest all but $5,000 in a savings account for the purpose of drawing interest. Those persons empowered to sign checks for the Corporation (Gloria Klein and Michael Taylor or Edward Golden and Judy Fink) will be bonded for $100,000. All Executive Committee members are now presently bonded for $25,000. A request was made for as careful record keeping of expenses incurred in NRLC work as can be made. By concensus it was agreed that Executive Committee members could spend up to $25.00 on a single purchase for necessary working materials or other legitimate expenses without first receiving approval from the President.

MOTION by Albert Fortman, SECONDED by Marjory Macklenburg, that credit card numbers be issued for Executive Committee members and Rev. Warren Schaller for telephone expenses.

CARRIED unanimously.

The sum of $200.00 will be set aside for petty cash for the Washington, D. C. office.

The question of the assessment for each state arose in regard to the 78¢ from the sale of each Circle of Life bracelet which goes to NRLC.

MOTION by Gloria Klein, SECONDED by Robert Greene, that the 78¢ profit from the sale of the Circle of Life Bracelets sold in each state be credited to that state's assessment for NRLC.

CARRIED unanimously.

Gloria Klein reported that she has informed the States in her Finance Committee report that proceeds from the garage sale would be split 50-50 with the organization holding the sale.

MOTION by John Willke, SECONDED by Judy Fink to approve the policy set by Gloria Klein that a 50-50 split of the profits from the garage sale be allowed.

CARRIED unanimously.

Robert Greene presented the Legal Advisory Committee report by summarizing a memorandum he has sent to the Legal Advisory Committee members. He reported that Prof. Robert Byrn, Prof. David Louisell, and Prof. James Smith cannot serve on the Committee at this time. He requested funding for a Legal Advisory Committee meeting.

MOTION by John Willke, SECONDED by Judy Fink, to fund a Legal Advisory Committee meeting, each attorney to incur his own expenses for the moment, to be reimbursed by NRLC within 60 days following the meeting.

CARRIED unanimously.

Professor Witherspoon reported on the work of the Public Policy Committee. He reviewed in depth with the Executive Committee a working paper he has drawn up regarding the complexities of the language in the Hogan and Buckley Amendments. He asked that the Working paper be presented to other pro-life attorneys for review and comment, and to stimulate dialogue.

Prof. Witherspoon discussed euthanasia's coverage in the Buckley Amendment. Several questions were raised regarding the effect of the amendment on true negative euthanasia. No definitive answers are possible at this time, Prof. Witherspoon stated, and stressed that careful study by the Public Policy Committee is necessary for this aspect of the euthanasia problem. He put forth the opinion that Congress could enact a law dealing definitively with euthanasia in every aspect under Section V of the 14th Amendment.

The question of the effect of the Buckley Amendment and Hogan Amendment on the potential prohibition of the IUD and other possibly anti-nidatory agents arose. The Committee discussed this matter in detail, and John Willke, M.D. offered to do a study regarding the effect the enactment of a Human Life Amendment would have on the legal prohibition of the IUD, the contraceptive pill, DES, and prostaglandin therapy. Dr. Willke will present the study in the form of a paper to be submitted to the Public Policy Committee for its use.

Michael Taylor reported that the State's Organization Committee had held a conference call and that there had been an exchange of memoranda. The Committee is researching current state action, and a questionnaire is in preparation to send to each state. He reported that organizations are mushrooming in every state. The responsibility for reaction to the questionnaire will be from the state Directors, who will investigate their own state for the detailed answers, but that the mailing of the questionnaire will go to a

broad range of organizations in each state. Identification of key contact persons and cross-indexing of contacts will be done.

The assembling of organizational teams to travel and assist states in their structural work was discussed. The purpose would be solely to develop effective organizations. No specific method has yet been developed for the progress of this work. Some persons with special expertise in organizational work and group motivation could be sent by NRLC to state conventions and workshops, if invited to attend for the purpose of assisting and offering advice.

The Executive Committee members were urged by Mr. Taylor to attempt to attend as many pro-life conventions, workshops, and other gatherings as possible, in any manner they could. Funding for travel at this time is a problem, and he suggested that they offer to present a talk or lead a workshop in return for travel expenses.

The regionalization concept, of each state fitting into a larger region for the purpose of improving communication was explored. Mr. Taylor emphasized the importance of identifying Congressional Districts and organizing within those districts.

Dealing effectively with Congress and learning political processes was defined as a primary goal for state effectiveness by Mr. Taylor. He also posed questions regarding membership criteria, and organizational image.

He discussed the compiling of a state's organizational manual, and stated that several good manuals existed already and were available for use as a foundation.

Discussion of the Organization Committee report centered around the concept of a flexible, loose type of organization vs. one that is tightly structured and controlled. Means of affiliation, qualification for affiliation, and types of membership were discussed. Prof. Witherspoon suggested that we work toward two types of memberships; a full C4 membership, and an affiliate membership that a C3 group should join with no danger of losing their IRS status.

Dr. Willke proposed the drawing up of a broad charter to which organizations wishing affiliation with NRLC could subscribe. Prof. Witherspoon stated that support of NRLC from affiliate groups should include both financial commitment and active involvement.

MOTION by Marjory Mecklenburg, SECONDED by Prof. Witherspoon that $75 be authorized for a membership in the American Society of Association Executives.

CARRIED unanimously.

A procedural question arose regarding the need for the existence of a States Organization Committee and a States Program Committee. Whether there was a certain amount of dove-tailing of activities was questioned. Communication between the two Chairmen was discussed. It was felt that the work of both the States Organization and States Program Committee were in many ways complementary, and that both would benefit by a closer association and awareness of the activities of each.

Marjory Mecklenburg reported on the progress of the States Program Committee. All proposed members have accepted membership, and Pat Goodson of Kansas has been added to the original group. The States Program Committee has prepared and sent a mailing outlining action for contacting legislators while they are in August recess, and including a questionnaire and other pertinent data. Each Committee member has a specific task to perform and is actively working.

The States Program Committee plans to divide up into several subcommittees to cover 1) office assistance; 2) research regarding the pro-life sentiments of state Governors; 3) research regarding pro-life sentiments of state legislators; 4) developing a kit for distribution to political activists to teach political effectiveness and assist in implementing same; 5) preparation of a manual for volunteer lobbyists' use.

Marjory Mecklenburg stated that she felt it was essential that both the States Organization and States Program Committees exist as separate entities, but that the political realm should influence the organizational structure.

Robert Greene said that teaching effectiveness and generating response are two different functions, and that he felt that a three-step process, 1) An Organization Committee to develop troop strength; 2) An Executive Committee Policy Program; and 3) the States Program Committee to develop programs to implement the policies was the most effective approach to take.

Dr. Fortman felt that mailings from any Committee to the Board of Directors must first come through the office structure, with proper approval. Professor Witherspoon stated that in his opinion the mailing of the States Program Committee usurped the prerogatives of the president, and took on the function of operating for the Corporation. He said that in his opinion the mailing had been conducted with too much autonomy, that a program for a state must first be identified and the Executive Committee then make a decision for that state before the program is submitted for implementation.

An extended discussion of the responsibilities of Committees, their relationship to each other and to the Executive Committee, the President, and the full Board of Directors then took place. Concerns centered around the possibility of individual Committees enacting policy before approval by the Executive Committee if procedures were not firmly established for mailing of directive-type information. Vigorous give-and-take discussion pointed up some Executive Committee members' concern that too tight a distinction between discisions of major policy and matters of day-to-day work was being drawn, countered by other Committee members feeling that unless each Committee submitted its work to the Executive Committee and, in some cases, to the Public Policy Committee for approval or review that decisions would be made and work implemented that was unauthorized by the full Committee.

It was pointed out that all Committees should be subjected to the same set of disciplines, and that if mailings must be authorized by the Executive Committee that all Committees should abide by the directive.

Mrs. Mecklenburg asked for a clarification from Michael Taylor as to what he wants the States Program Committee to do in the political sphere. She felt that communication from him regarding precise proposals and suggestions would be helpful.

Ed Golden asked that Michael Taylor and Marjory Mecklenburg compile outlines of the broad sketch for political action that their respective Committees are working up, and contact each other for comparison within the next few weeks.

Dr. Willke suggested prefacing full length Committee reports with a cover sheet that presents a synopsis of the context. He asked the Chairman to more closely "stop-watch" the meetings and limit verbosity, if required.

Dr. Willke then presented the report of the Education Committee. The members of his Committee are primarily specialists in their respective fields, and he has added William Cox, who will serve as Chairman, to coordinate the various specialties. A meeting has not yet been held, and he requested that the Committee be funded for a Conference Call, and be given authority to schedule a full meeting during the month of September.

Ed Golden requested the Education Committee to review available educational materials, compile a library of same, and prepare a listing of available pro-life resources including such items as bumper stickers, billboards, pamphlets, etc.

MOTION by Albert Fortman, SECONDED by Judy Fink, that the Conference Call and meeting of the Education Committee be financed by NRLC.

CARRIED unanimously.

Judy Fink reported regarding the Intergroup Liaison Committee. She has held a meeting, at no cost to NRLC, with two other Committee members to begin to review the Committee's charge and to develop initial steps for identifying procedures necessary to begin the work needed to broaden the R to L base. She stated that the central goal was to turn those groups that were now passive sympathizers into active participants. There is at present no groundwork laid for tying together the many-faceted pro-life movement into one unified group, but suggested that studying the methods used by other social movements that have led to successful action would be helpful. She told the Committee that the goal of the Intergroup Committee, though specific in semantics, was of necessity amorphous at this time but felt that specific early projects, such as encouraging church denominations to produce their own pro-life literature for use in their own congregations; establishing friendly contacts with key individuals; and exploring ways to further ecumenical relationships where possible should be initial steps. She asked for funding for a full Committee meeting in September, and for several

proposed trips for individual Committee members to meet with highly placed Synodical or Denomination officials who have already given their invitation for such meetings, as well as staff backup on research work.

Prof. Witherspoon stated that he felt that the basic question was "How does one energize and galvanize groups into social action programs" and encouraged the concept of studying the development of a model program to do so for the pro-life movement.

MOTION by Robert Greene, SECONDED by John Willke that between now and the November Executive Committee meeting $2000 be allocated to produce a program report for the Intergroup Liaison Committee.

CARRIED unanimously.

Ed Golden asked that each Committee prepare an initial budget, and keep close track of expenses.

Marjory Mecklenburg pointed out that the States Program Committee had not received funding, and asked how it could be expected to work without funds, especially if other Committees are being funded.

Gloria Klein expressed concern that the Finance Committee had made certain recommendations, and that the Executive Committee had usurped and overruled its recommendations. Robert Greene rebutted, saying that the Finance Committee's function was to raise funds and that the Executive Committee was to decide how the money was to be spent. Marjory Mecklenburg said that the Finance Committee's recommendations must be coincident with new developments in the work of NRLC.

MOTION by Robert Greene, SECONDED by Albert Fortman, to revise the budget to include the funding of ALL Committees.

CARRIED 7-1.

Gloria Klein reported that she, as Treasurer, had received many proposals from groups or persons who wished NRLC to sell their pro-life product, and split the profits from such sale with them. She pointed out that a firm policy should be established regarding this matter, in order to prevent accusations of favoritism that might arise.

MOTION by Robert Greene, SECONDED by Albert Fortman, that the policy of NRLC be that any fundraising venture submitted to NRLC must be given freely with no expectation of remuneration to the party recommending it.

CARRIED unanimously.

The Denver organization has prepared a memo, requesting that the June NRLC convention be held in Colorado. A review of the proposal was made, with discussion concerning the proper city for June Convention in light of possible political action in Washington regarding the Constitutional Amendment.

MOTION by Robert Greene, SECONDED by Judy Fink, that the NRLC accept the proposal to hold the annual Convention in Denver, Colorado in June 1974.

DEFEATED 5-2.

MOTION by Gloria Klein, SECONDED by John Willke that the annual Convention be held in Washington, D.C., the date to be set in the immediate future; and that the weekend immediately preceding the January 22, 1974 anniversary of the Supreme Court Decision that an open Board of Directors meeting be held in Denver, with a concurrent information and education seminar to be held.

CARRIED 6-1.

The meeting was adjourned.

August 28, 1973

The Most Rev. James Rausch, D.D.
General Secretary
U. S. Catholic Conference
1312 Massachusetts Ave. N. W.
Washington, D. C. 20005

Dear Bishop Rausch:

We are writing to you on behalf of the National Right to Life Committee which will soon be making an appeal to the Campaign for Human Development.

The abortion issue is a very timely one and the problems which we face in this and related issues will take concerted and organized effort to overcome. The National Right to Life Committee exists as a broad based organization to coordinate such an effort outside the auspices of any church body.

We have been enouraged in pursuing the Campaign for Human Development as a possible source of funding by the support for the pro-life monement expressed in Cardinal Cody's letter to the Bishops of August 6, 1973. Would you please advise us on how to proceed and where to direct the proposal?

If there is any reason that an appeal to the Campaign for Human Development by National Right to Life Committee is not appropriate would you please advise us to whom such an appeal should be directed?

We would be most happy to meet with you, Cardinal Cody, or anyone else to discuss the desirability and possibility of a cooperative effort by the National Right to Life Committee and the Catholic Bishops on these life issues which are of deep concern to both groups.

It would seem desirable that official channels of communication between these two structures be developed.

Sincerely,

Edward Golden

Marjory Mecklenburg