No. 74-1151 AND 74-1419

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, A Missouri Corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D., *Appellants,*

vs.

JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, *Appellees.*

No. 74-1419

JOHN C. DANFORTH, Attorney General of the State of Missouri, *Appellant,*

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, A Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, *Appellees.*

On Appeals from the United States District Court for the Eastern District of Missouri, Eastern Division.

MOTION AND BRIEF, AMICUS CURIAE OF DR. EUGENE DIAMOND AND AMERICANS UNITED FOR LIFE, INC., IN SUPPORT OF APPELLEES IN 74-1151 AND APPELLANTS IN 74-1419

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MOTION OF DR. EUGENE DIAMOND AND AMERICANS UNITED FOR LIFE, INC. FOR LEAVE TO FILE BRIEF, AMICUS CURIAE, IN SUPPORT OF APPELLEES IN 74-1151 AND APPELLANTS IN 74-1419

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

PURPOSE OF THIS MOTION

John C. Danforth, the Attorney General of Missouri has given consent for the filing of this amicus brief.[1] The attorneys for Planned Parenthood of Central Missouri, David Hall, M.D., and Michael Freiman, M.D. do not object to the filing of this amicus brief.[2]

INTEREST OF THE AMICI

1. Identification of the Amici. Dr. Eugene Diamond, M.D. is an intervening defendant in the litigation pending in the Seventh Circuit involving the constitutionality of the 1975 Abortion Act of the State of Illinois.[3] The Three Judge Federal Court which is hearing those consolidated cases on December 2, 1975 appointed Dr. Diamond guardian ad litem for unborn children and other classes affected by the statute.[4]

Americans United for Life (AUL) is a national educational foundation organized to educate and promote better understanding of the humanity of the unborn and the

[1] Written consent has been filed with the Clerk of this Court.

[2] Response of these parties so stating has been filed with the Clerk of this Court.

[3] *Wynn, et al.* v. *Scott, et al.* (N.D. Ill. No. 75 C 3975) and *Long, et al.* v. *Scott, et al.* (N.D. Ill. No. 75 C 3981).

[4] See Draft Order—Appendix A. The order was not signed by Circuit Justice John Paul Stevens since he was in Washington for hearings on his appointment to this honorable court.

value of human life. Its national office is located in Chicago, Illinois, and its membership includes approximately 20,000 persons located in every state of the union. Dr. Diamond is a member of the Board of Directors of AUL.[5]

The 1975 Abortion Act of the State of Illinois was passed over the Governor's veto on November 19, 1965 when the Illinois Senate voted 36 to 15 to override, the Illinois House having previously voted 109 to 44 to override. The provisions of the Illinois Abortion Act of 1975 legislate in areas which will be substantially affected by this Court's decision in this case, and which will profoundly affect Dr. Diamond's wards and the classes he represents.

For example, the Illinois Abortion Act of 1975 contains provisions relating to parental consent, spousal consent, informed consent, viability and protections for viable and live born children amongst others.[6] This court's decision will profoundly affect the validity or invalidity of those provisions and may thus have an immediate, profound and irreparable affect on the classes of unborn children, parents and spouses, all of which classes are represented by Dr. Diamond.

2. The Legal Position of these Amici. These amici support the Attorney General of Missouri and the constitutionality of the statute.

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[5] A list of the Board of Directors and Officers of AUL can be found in Appendix B. AUL had previously filed a brief amicus curiae in *Roe* v. *Wade* and *Doe* v. *Bolton.*

[6] The 1975 Illinois Abortion Act can be found in Appendix C. On 12/2/75 the three Judge Court entered a preliminary Injunction against enforcement of the Act pending the outcome on the merits and this honorable Court's ruling herein.

3. Justification for Participation as Amici. As previously stated, the issues in this case, as well as the issues in the litigation pending in the Northern District of Illinois wherein Dr. Diamond has been appointed guardian ad litem for the class of Unborn Children are substantially similar and in some respects identical. Any adverse decision in this case will profoundly affect Dr. Diamond's wards as well as the other classes he represents.

The arguments which Dr. Diamond and AUL will present on behalf of the unborn which class is not *per se* represented by any other party in this case is a reasonable justification for participation by these Amici.

CONCLUSION

For the reasons stated and for additional reasons as contained in and expanded upon in the Brief itself, these amici respectfully request this Court to grant this Motion and grant leave for the filing of this Brief which is attached and served herewith.

Respectfully submitted,

By: .....

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NOTE

The Statement of Jurisdictional Grounds, The Constitutional Provisions Involved, The Questions Presented and The Statement of the Case are omitted from this amicus curiae Brief since they are amply stated and argued in the Brief of John C. Danforth, Attorney General of the State of Missouri.

THE STATUTE INVOLVED: THE MISSOURI ABORTION LAW

House Committee Substitute for House Bill No. 1211

Section 1. It is the intention of the general assembly of the state of Missouri to reasonably regulate abortion in conformance with the decisions of the supreme court of the United States.

Section 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this act shall be given the meaning ascribed to them:

(1) 'Abortion', the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child;

(2) 'Viability', that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;

(3) 'Physician', any person licensed to practice medicine in this state by the state board of registration of the healing arts.

Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment;

(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion.

(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.

(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

Section 4. No abortion performed subsequent to the first twelve weeks of pregnancy shall be performed except where the provisions of section 3 of this act are satisfied and in a hospital.

Section 5. No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable.

Section 6. (1) No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child,

and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo.

(2) Whoever, with intent to do so, shall take the life of a premature infant aborted alive, shall be guilty of murder of the second degree.

(3) No person shall use any fetus or premature infant aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive.

Section 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411, RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.

Section 8. Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 7 of this act by the attending physician and the woman shall certify in writing that she had been so informed.

Section 9. The general assembly finds that the method or technique of abortion known as saline amniocenteis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy.

Section 10. 1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

2. The forms shall be provided by the state division of health.

3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

Section 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years.

Section 12. Any practitioner of medicine, surgery, or nursing, or other health personnel who shall willfully and knowingly do or assist any action made unlawful by this

act shall be subject to having his license, application for license, or authority to practice his profession as a physician, surgeon, or nurse in the state of Missouri rejected or revoked by the appropriate state licensing board.

Section 13. Any physician or other person who fails to maintain the confidentiality of any records or reports required under this act is guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

Section 14. Any person who contrary to the provisions of this act knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action required by this act shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

Section 15. Any person who is not a licensed physician as defined in section 2 of this act who performs or attempts to perform an abortion on another as defined in subdivision (1) of section 2 of this act, is guilty of a felony, and upon conviction, shall be imprisoned by the department of corrections for a term of not less than two years nor more than seventeen years.

Section 16. Nothing in this act shall be construed to exempt any person, firm, or corporation from civil liability for medical malpractice for negligent acts or certification under this act.

Section A. Because of the necessity for immediate state action to regulate abortions to protect the lives and health of citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

Section B. If any provision of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity does not effect the provisions or application of this Act which can be given effect without the invalid provision or application, and to this end the provisions of the Act are declared to be severable.

SUMMARY OF ARGUMENT

Section 2(2)—The Definition of Viability

The definition of viability is a proper standard under *Roe* v. *Wade* and is not a vague "standard of possible evanescent survival." The trial testimony and the medical literature indicate conclusively that a determination of viability is a matter of medical judgment to be exercised by the physician "with reasonable medical certainty" which is the "judgment that physicians are obviously called upon to make routinely whenever surgery is considered" *U.S.* v. *Vuitch,* 402 U.S. 62, (1971). The word "indefinitely" does not alter or impinge the physician's use of his judgment but is, on the contrary, a valid statutory guide under *Roe* v. *Wade* to assist him in the use of his medical judgment. The current status of neonatal medicine clearly indicates that no specific statutory time definition of viability, such as at 24 weeks, is warranted since viability occurs at different times in different races and individuals. Live births with normal survival have been recorded as early as 22 gestational weeks (Appendix E) and 21 gestational weeks (*Planned Parenthood* v. *Fitzgerald,* ..... F. Supp. ..... (E.D.Pa. 1975)). Even Dr. Hall, a plaintiff herein, testified that viability was possible as early as 20 weeks (Tr. p. 369). As Plaintiffs admit in their brief (p. 26) at 19 weeks maternal mortality for abortion *exceeds* maternal mortality for live birth.

Section 6(1)—The Physician's Standard of Care

This section is constitutional when correctly interpreted in the light of the legislative history. As thus interpreted, it applies only after an abortion and mandates that medical care for the live born fetus which would be given to any infant born alive. Thus, this section seeks only to codify the physician's obligation to his other patient: the live born infant. That such codification is necessary is amply born out by the many reported instances of children born alive after legal abortion who are not given such care. The word "fetus" is not constitutionally infirm since it clearly refers only to live born fetus' after the abortion procedure who are thus viable which conforms to the legislative history of the act. As so interpreted, it is a proper exercise of a valid state interest in born life.

Section 3(2)—The Patient's Written Consent

Requiring the written and informed consent of the patient is a proper exercise in the state's interest in maternal health which may be exercised at any time during pregnancy. This is so because the requirement in no way infringes on her right to have an abortion and does not regulate the procedure itself. It merely requires proof that the physician has done what he must by law do in all medical procedures: obtain an informed consent. That such consents are not being obtained is clear from the evidence in this case. The physicians themselves are not obtaining informed consents but are leaving the job to non medical "counselors" whose economic interest in the outcome may be a conflict of interest with the woman's right to a freely given informed and uncoerced consent.

Section 3(3)—Spousal Consent

The Court in *Roe* stated that it would not determine whatever rights the father or husband might have in relation to the woman's decision to terminate her pregnancy. There is nothing in *Roe* which precludes the possibility that the state may raise separate "compelling" interests beyond the two raised by the statutes of Georgia and Texas of *Roe* and *Doe*—here, the state's interest in the "relation integrity", "bilateral loyalty", "mutuality", and "harmony in living" of the marriage relation through balancing the procreative and parental rights of husband and wife.

But *Roe* and *Doe,* unlike previous decisions, caused an imbalance in the procreative and parental rights of males and females. *Roe* acknowledged the difference between contraception and abortion. The "woman cannot be isolated in her privacy" because she carries an embryo, later a fetus. With the recognition of the fact that an embryo/fetus is not a mere "statistical" person—that barring disaster or human intervention a live child will be born—the Court must also recognize that no pregnancy and no occasion for abortion could ever arise without the biological contribution of the father i.e. the father's contribution to the initiation of a potential human life is equal to the mother's. Fully human or not, it follows that the father ought to have some power in the disposition of this potential human life, at least where he is willing to share or assume the burden (which he must by law in marriage) the birth of a new child presents.

In contraception, both parties are able to employ methods which would prevent fertilization—there is a balance of power. In abortion, both parties have initiated the process by which a child will be born; both parties (esp. if

married) must assume the legal responsibilities a child entails if born; either party or both parties may suffer the medical, emotional, social or economic disadvantages of a new birth; either or both parties may suffer emotional or physical disabilities if the pregnancy is terminated—but only one party may decide if the child is to be born or not.

Surely the father's procreative and parental rights cannot be said to be satisfied by mere fertilization followed by abortion: by the court's own standards he has accomplished only a potential human life. His interest is in the live birth of a child. Without such a statute, the father's procreative capacity is always subject to the condition subsequent of the mother's decision of whether or not *she* wants a child and the father's theoretical role in procreative decision-making is reduced to a mere "fertilizer" who must await later decision of the mother as to whether she shall bestow parenthood upon him or not; and no matter how poor her reasons, he has no power to impress his interests upon the reproductive process.

Section 3(4)—Parental Consent

The Parental Consent provision of the Missouri statute represents a legitimate exercise by the State of Missouri of its compelling state interest in the family. Many other state laws have similar requirements such as the necessity for parental consent before a minor can marry, which evidence a similar concern by the state. The testimony showed that present counseling is inadequate to protect the minor, especially one of very tender years, who is in most need of such help. The remote possibility of a parental veto can be cured through the statutory provision for the consent of a person in loco parentis.

Section 7—Termination of Parental Rights

Parental rights are properly terminated and fully protected by the statute. A rational interpretation of Sections 7 and 8 of the statute is that a constructive abandonment of the infant born alive after abortion has occurred. The state as *parens patria* has power to provide for the health and well-being of its live born children who have been abandoned by their parents. In the rare instance where aborting parents change their mind, the statute incorporates by specific reference the full panolopy of parental due process rights before permanent termination.

Section 9—The Prohibition of Saline

The statute properly prohibits saline abortions after the first trimester as a valid exercise of its compelling interest in maternal health. Saline abortions have been abandoned in Japan because of the catastrophic consequences to maternal health. There always are certain medical side effects with saline such as bleeding coagulopathies. Prostaglandins are considerably safer; *e.g.* the maternal mortality for saline equals or exceeds the maternal mortality for live birth whereas it is negligible or non-existent for prostaglandins. Plaintiffs argue that saline is the most widely used form of mid-trimester abortion and therefore the statute interferes with the physician's right to practice medicine which he has a right to do no matter what the risk is for his patient. However, it is clear that the state may regulate abortions for purposes of maternal health and, in the words of Judge Learned Hand, "a whole calling may have unduly lagged in the adoption of new and available devices". Prostaglandins are available now for mid-trimester abortions and, as Judge Hand said, "there are precautions so imperative that even their universal disregard will not excuse their omission".

Sections 10 and 11—Record Keeping and Reporting

Roe and *Doe* do not prohibit record keeping and reporting which is reasonable. This Court in *Doe* v. *Bolton* specifically maintained as constitutional the statutory provision that a physician's judgment be reduced to writing. Maintenance of certain reasonable records relating to abortion is no different than the maintenance of birth, death or marriage certificates by statute. Confidentiality is preserved and the physician's practice is not infringed. Sections 10 and 11 are merely enabling legislation and no regulations currently exist to be considered by this Court. No presumption of unconstitutionality for non-existent regulations seems warranted.

ARGUMENT

I.

INTRODUCTION

The sole purpose and intention of this Brief amicus curiae is to present legal arguments in support of the constitutionality of the Missouri abortion statute being challenged in this appeal and to demonstrate that the statute conforms to the standards previously enunciated in decisions of the Supreme Court of the United States. Nonetheless, it is the position of these amici that the basic abortion decision handed down by this Court in *Roe* v. *Wade* is not constitutionally sound, should be carefully reconsidered and should be narrowed rather than broadened in its implications.

The Missouri legislature did not, however, intend to enact a statute inconsistent with this Court's 1973 abortion decision with the aim of asking this Court for a general reconsideration of *Roe* v. *Wade*. Quite the contrary is shown by the first provision of the Missouri abortion statute, which unequivocally expresses the intention of the Missouri legislature "to reasonably regulate abortion in conformance with the decisions of the Supreme Court of the United States".

The introductory part of this Brief, although clearly critical of the basic Supreme Court abortion decisions, is offered for four purposes directly related to this litigation: first, to emphasize the constitutional unsoundness of *Roe* v. *Wade* as a primary reason for asking this Court in the context of this appeal not to extend *Roe* v. *Wade* beyond its narrowest perimeters; second, assuming arguendo

that this Court is inclined to question the constitutionality of certain provisions of the Missouri statute, to provide the essential background for a request of this Court to reconsider *Roe* v. *Wade* to the extent necessary to uphold the statutory provisions challenged in this litigation; third, to present the basic due process theories which underlie the enactment of both the Missouri abortion statute as well as the similar Illinois abortion statute of 1975, which these amici presently defend as intervenors; and fourth, to achieve a balance in the context of this litigation by responding to certain introductory statements of Plaintiff in their brief which go far beyond the various issues presented in this case, as, for example, the religious divisiveness argument found on pages 33-36 of Plaintiff's brief.

Our purpose, in this regard, is to explain to this Honorable Court that those who oppose the legalization of abortion do so for sound *legal reasons:* the protection of the civil right to life, an humane endeavor consistent with the great civil rights traditions of this Nation and no different than the protest, recorded in the honorable history of this Nation, which followed the former decision of this Court in *Dred Scott* v. *Sanford,* 19 How. 493 (1857). If the legal theory advanced by these amici in support of the civil right to life of the unborn is shared by others, for, *inter alia,* religious reasons, then that is their right. That certain persons, applying the principles of their theology, conclude that fetal life is human life and thus of inherent value does not detract from the significance of our argument, which is based on a rational and legal analysis of the United States Constitution and the legal history of this Nation—the first and greatest Nation in the protection of civil and political rights of the individual human being.

If the above is not sufficient reason for Part I of this Brief or if it is considered irrelevant to the issues in this case as understood by this Court, this Court is invited to proceed directly to Parts II et seq. which discuss certain specific narrow issues in this case as raised in both Plaintiffs' and Defendants' Jurisdictional Statements and Briefs on the Merits.

Abortion Is a Human Rights Issue

Abortion is a human rights issue. Abortion involves the most fundamental of all human rights—the right to life—without which no other human right could exist unless in mockery. As Justice Brennan wrote, in speaking for the abolition of the death penalty for convicted felons:

> "The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death.[1]
>
> Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is not the ultimate sanction."[2]

In the abortion issue we have been debating the most fundamental human rights issue: when does each individual's civil right to life commence? Not unlike the *Dred Scott*[3] decision, *Roe* v. *Wade*[4] has answered that question

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[1] *Furman* v. *Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 382 (1972).

[2] Ibid. 408 U.S. 238, 33 L.Ed. 2d 346, 376.

[3] *Dred Scott* v. *Sanford,* 19 How. 493, 15 L.Ed. 691 (1857).

[4] *Roe* v. *Wade,* 410 U.S. 113 (1973) hereafter referred to simply as *Roe.*

in a fashion that will breed debate as long as it remains on the books. *Roe* v. *Wade* decreed that the developing human in the womb is not entitled to constitutional personhood.[5] Corporations, supposedly because they enjoy individuality, are persons under the constitution,[6] but actual, individually existing human beings are not, merely because their development at this stage of life occurs en utero![7] What can one say about such a decision?

In the Yale Law Journal, Professor John Hart Ely, who states that the result meet with his idea of progress, writes nonetheless as follows:

> "Nevertheless it is a very bad decision. Not because it will perceptibly weaken the court—it won't; and not because it conflicts with either my idea of progress or what the evidence suggests is society's—it doesn't. It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[8]

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[5] See dissent of Justice White *Roe* v. *Wade,* 410 U.S. 113, 221-223 where at page 222 he uses that now famous expression characterizing the majority opinion as "an exercise of raw judicial power."

[6] *Santa Clara County* v. *Southern Pacific Railroad Co.,* 118 U.S. 394 (1886) where at page 396 the court said: "The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

[7] *Roe* v. *Wade,* 410 U.S. 113, 158.

[8] Ely, John Hart "The Wages of Crying Wold: A Comment on *Roe* v. *Wade*" The Yale Law Journal, Vol. 82, 1973 pp. 920-949 at p. 947.

He concludes his criticism by pointing out that the court has "an obligation to trace its premises to the charter from which it derives its authority".

"But", he says, "if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the court has no business imposing it. I hope that will seem obvious to the point of banality. Yet those of us to whom it does seem obvious have seldom troubled to say so. And because we have not, we must share in the blame for this decision".[9]

What can one say of the fact that lower Federal Courts see in *Roe* v. *Wade* a mandate to impose the new order of ethics [10] on an unwilling society by mandating public and private hospitals to perform abortions,[11] by declaring conscience clauses void,[12] by mandating the use of public funds to pay for abortions? [13] Perhaps Mr. Justice White

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[9] Ibid. at p. 949. Prof. Ely also remarks: "Abortion ends (or if it makes a difference, prevents) the life of a human being other than the one making the choice". Ibid. at p. 924.

[10] "A New Ethic for Medicine and Society", *California Medicine,* official Journal of the California Medical Association, 113, pp. 67-68, Sept. 1970.

[11] Public Hospital: *Nyberg* v. *City of Virginia,* 495 F. 2d 1342 (8th Cir. 1974).
Private Hospital: *Doe* v. *Charleston Area Medical Center Inc.,* ..... F. 2d ..... (4th Cir. 1975) decided Nov. 6, 1975 #75-1161.

[12] *Wolf* v. *Schoering,* 388 F. Supp. 631 (W.D. Ky. 1975).

[13] *Klein* v. *Nassau County Medical Center,* 347 F. Supp. 496 (E.D. N.Y. 1972).

directed himself to this question when he wrote in his dissent in the *Greco* case:

> "The task of policing this Court's decision in *Roe* v. *Wade,* 410 U.S. 113, and *Doe* v. *Bolton,* 410 U.S. 179, is a difficult one; but having exercised its power as it did, the Court has a responsibility to resolve the problems arising in the wake of those decisions."[14]

Was that statement a reference to the extent to which lower Federal Courts are completely ignoring the clear limitations to the right to privacy explicitly expressed in *Roe* v. *Wade* in order to create an absolute constitutional right to abortion in a woman? The extent to which proponents of abortion are seeking to push *Roe* v. *Wade* is clear from the concerted attack on private hospitals and conscience clauses in spite of the fact that both are directly protected by *Roe* v. *Wade* and *Doe* v. *Bolton.*[15]

Perhaps Justice White also had in mind cases such as the instant case where a fair reading of Plaintiff-Appellants' brief and the record supports the inference that Plaintiffs contend that *Roe* v. *Wade* stands for the proposition that the woman has a constitutional right to a dead fetus.[15a]

Perhaps it is the harsh realities of abortion that finally will bring home to this Honorable Court the true nature of this debate. Those harsh realities are causing even the

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[14] *Greco* v. *Orange Memorial Hospital Association Corporation,* ..... U.S. ..... 12-1-75, No. 75-432. Slip Opinion p. 6.

[15] *Doe* v. *Bolton,* 410 U.S. 179 (1973).

[15a] See Appellant's Brief pp. 108 and 111 and see Trial Record where Plaintiff's direct and cross examination sought to elicit such "admissions" from witnesses. See e.g. Plaintiff attorney's cross examination of Dr. Anderson.

most avid proponents of legal abortion to reconsider their position in this debate and to ask anew what effect legalized killing will have on our society. Dr. Bernard N. Nathanson, M.D. in the New England Journal of Medicine [16] recently called attention to this dilemma. Nathanson, a founder of the National Association for Repeal of Abortion Laws (NARAL) and previously very active in the movement to legalize abortion, recently resigned his position as Director of the Center for Reproductive and Sexual Health where 60,000 abortions had been performed. While still claiming that abortion should be legal he, nonetheless, had the courage to say:

> "Sometime ago—after a tenure of a year and a half —I resigned as director of the Center for Reproductive and Sexual Health. The Center had performed 60,000 abortions with no maternal deaths—an outstanding record of which we are proud. However, I am deeply troubled by my own increasing certainty that I had in fact presided over 60,000 deaths.
>
> "There is no longer serious doubt in my mind that human life exists within the womb from the very onset of pregnancy, despite the fact that the nature of the intrauterine life has been the subject of considerable dispute in the past. Electrocardiographic evidence of heart function has been established in embryos as early as six weeks. Electroencephalographic recordings of human brain activity have been noted in embryos at eight weeks. Our capacity to measure signs of life is daily becoming more sophisticated, and as time goes by, we will doubtless be able to isolate life signs at earlier and earlier stages in fetal development.
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> "The Harvard Criteria for the pronouncement of death assert that if the subject is unresponsive to external stimuli (e.g., pain), if the deep reflexes are

[16] Vol. 291, No. 22 (11-28-74) p. 1189.

absent, if there are no spontaneous movements or respiratory efforts, if the electroencephalogram reveals no activity of the brain, one may conclude that the patient is dead. If any or all of these criteria are absent—and the fetus does respond to pain, makes respiratory efforts, moves spontaneously, and has electroencephalographic activity—life must be present.

"To those who cry that nothing can be human life that cannot exist independently, I ask if the patient totally dependent for his life on treatments by the artificial kidney twice weekly is alive? Is the person with chronic cardiac disease, solely dependent for his life on the tiny batteries on his pacemaker, alive? Would my life be safe in the city without my eyeglasses?

"Life is an interdependent phenomenon for us all. It is a continuous spectrum that begins in utero and ends at death—the bands of the spectrum are designated by words such as fetus, infant, child, adolescent, and adult.

"We must courageously face the fact—finally—that human life of a special order is being taken. And since the vast majority of pregnancies are carried successfully to term, abortion must be seen as the interruption of a process that would otherwise have produced a citizen of the world. Denial of this reality is the crassest kind of moral evasiveness."

Such is the point of view of the sophisticated physician who has suddenly and realistically viewed the issue after participation in thousands of abortions. How the average juror views the related issue of viability after experiencing it first hand was well described by an interview of a juror in the Boston trial of Dr. Edelin which appeared in Harper's Weekly:[17]

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[17] Harper's Weekly, Vol. 64, No. 3116 (3-14-75).

"Only a few juries in recent memory have excited as much curiosity—and antagonism—as the one that delivered the surprise manslaughter conviction of Boston obstetrician Dr. Kenneth Edelin. For Anthony Alessi, a 30-year-old supervisor at the New England Telephone Company and a part-time student at Northeastern University, the Edelin trial provided his first jury experience. A Baptist (despite reports that all the jurors were Catholic) and the father of three, Alessi has lived in the predominantly black Roxbury section of Boston for the past 16 years.

"Alessi agreed to talk to *Harper's Weekly* because of what he considers unfair and untrue allegations about the group's racism by one of the alternate jurors. He was interviewed by Alan Geismer.

"Since the guilty verdict, it's been repeatedly argued that the real issue was not manslaughter but abortion. How do you feel about that?

"I completely disagree. Even after everything I've been able to read, I still think manslaughter was the only issue. . . .

"From the time we started deliberating I don't think the word 'abortion' came up twice. When it did, we all agreed that yes, there had been a legal abortion and that once the baby was detached from the mother the doctor's obligation to the mother was completed. But then we asked ourselves; did the doctor owe this baby an obligation although, granted, he was doing an abortion? And the answer we came to was, yes, that under his oath as a doctor, he owed it to the baby to do more to preserve its life, since he had in his hand an individual human life separate from the mother.

"Q. How did you decide the question of viability?

"A. We had to decide if the baby had taken a breath outside the womb. I think that we really believed Dr. J. F. Ward [a Pennsylvania pathologist called by the prosecution] that the lungs showed the baby had taken a breath. For many of us he was the decisive witness.

Of course, only one person could prove viability and that was the baby itself. We felt the doctor [Edelin] didn't give the baby enough of an opportunity. He said he placed his hand on the baby's chest for 3 to 5 seconds. We didn't weight this as a real attempt to see if the baby was alive. We also took under consideration that the mother was under heavy sedation and that therefore the baby was too. With all this, well, we felt Dr. Edelin just didn't give it enough of a chance and that he should have.

"Q. What about the controversial picture of the fetus that was admitted into evidence?

"A. When it was first introduced and passed among us, the picture did have a traumatic effect on some of the girls, who didn't even want to look at it. But it was very important in our final deliberations. We passed all the evidence around the table and everyone looked at each piece, but we paid a lot of attention to that picture. None of us had ever seen a fetus before. For all we knew a fetus looked like a kidney. The picture was obviously of a well-formed baby, over 13 inches long. It didn't carry undue weight, but it helped us see what a baby looks like at that weight.

"Q. What is your reaction to the charges by one of the alternate jurors and others that racism motivated the verdict?

"A. I was shocked. Nothing like that ever came out in our discussions. There was no discrimination or racist talk that I heard. Those charges are simply ludicrous. We all knew the aborted baby was black—it was in the indictment—but, my God, I never realized Dr. Edelin was black until after the trial. . . ."

It was apparent to these jurors that the issue was human life—in this instance viable human life—and the obligation of society through its physicians to protect that life.

American College of Obstetrics and Gynecology Recognizes Physician's Duty to Viable Fetus

The sophisticated medical mind and the common sense of the juror once more meet in the resolution of an important legal issue. Just as the juror felt that Dr. Edelin had not done enough to preserve the life of the viable fetus, so too, the American College of Obstetrics and Gynecology (ACOG) in response to a request to file an amicus brief in support of Dr. Edelin, replied with a statement of policy which clearly enunciates concern for the viable fetus and states that "the physician does not view the destruction of the fetus as the primary purpose of abortion." The ACOG policy statement, as reported in Ob. Gyn. News December 15, 1975 p. 1, 18, reads in part:

> the College affirms that [resolution of a conflict between a pregnant woman's health interests and fetal welfare] . . . in no way implies that the physician has an adversary relationship toward the fetus and, therefore, the physician does not view the destruction of the fetus as the primary purpose of abortion. The College consequently recognizes a continuing obligation on the part of the physician toward the survival of a possibly viable fetus where this obligation can be discharged without additional hazard to the health of the mother.

The German Opinion[18]

On February 25, 1975, the Federal Constitutional Court of West Germany announced its final judgment holding unconstitutional Section 218A of the Fifth Statute for the

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[18] Translated by John Gorby and Robert Jonas directly from the slip opinion. Consequently no citations will be given to pages since the slip opinion is generally unavailable in this country. The complete translation of Mr. Gorby and Mr. Jonas of this historic opinion will soon be published in the John Marshall Law Journal, Vol. 9, No. 3, 315 Plymouth Ct., Chicago, Ill. 60604 or Americans United For Life Inc., 230 N. Michigan, Chicago, Ill. 60601.

Reform of the Penal Law which had depenalized abortion in the first trimester. On June 21, 1974, the Court, upon the application of the State of Baden Wurttemberg, issued a provisional order staying the effect of 218A until this final judgment. The case was ultimately heard on application of 193 members of the German Federal Parliament and five States: Baden-Wurttemberg, Bavaria, Rhineland-Pfalz, Saarland, and Schleswig-Holstein. The Court was divided 6-2 on the final judgment, Justices Rupp-von Brunneck and Simon, dissenting.

The dissenting opinion neither questioned the constitutional personhood ("legal value") of the unborn nor did it quarrel with the legal necessity for protecting unborn life; the issue over which the Constitutional Court split was the manner in which the state fulfills its constitutional obligation to protect unborn human life. The dissenting opinion begins with these words:

> "The life of each individual human being is self-evidently a central value of the order of justice. It is uncontested that the constitutional duty to the protection of life includes also its steps before birth. The explanations in Parliament and before the Federal Constitutional Court concern not the *whether,* but on the contrary only the *how* of this protection." (Emphasis in original)

In the Court's opinion, the following was written: "The express incorporation into the basic law of the self-evident right to life, in contrast to the Weimer Constitution, may be explained principally as a reaction to the 'destruction of life unworthy of value' to the 'final solution' and 'liquidations' which were carried out by the National Socialist Regime as measures of State."

The Court construed the word "everyone" in the constitutional language "everyone has the right to life . . ." to

mean life in the sense of historical existence of a human individual as it exists according to definite biological and physiological knowledge.

"The process of development which has begun at that point", the Court said, "is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of human life." The Court stated:

> "The right to life is guaranteed to everyone who lives; no distinction can be made here between various stages of the life developing itself before birth or between unborn and born life. Everyone in the sense of Article 2, Para. 2, Sentence 1, of the Basic Law is 'everyone living'; expressed in another way: every life possessing human individuality; 'everyone' also includes the yet unborn human being."

In opposition to the argument that the word "everyone" commonly denotes only a born or completed person, the Court argued:

> "The security of human existence against encroachments by the State would be incomplete if it did not also embrace the prior step of 'completed' life, that is unborn life."

In substantiating its position, the Federal Constitutional Court reviewed the legislative history and concluded that it was clearly intended, although not without some dissent, that the word "everyone" would include unborn life.

The Court found a duty on the State to protect every human life and deduced this duty directly from Article 2, Para. 2, Sent. 1, of the Basic Law. It also deduced it from other sections of the constitution which give basic guarantees to human dignity: "Where human life exists, human dignity is present in it; it is not decisive that the bearer of this dignity himself be conscious of it and knows per-

sonally how to preserve it. The potential faculties present in a human being from the beginning suffice to establish human dignity,'' noted the German Constitutional Court.

No obligation can rest more highly on the State than its obligation to protect life. The Court stated:

> ''The degree of seriousness with which the State must take its obligation to protect increases as the rank of the legal value in question increases in importance within the order of values of the Basic Law. Human life represents, within the order of the Basic Law, an ultimate value, the particulars of which need not be established; it is the living foundation of human dignity and the prerequisite for all other fundamental rights.''

This obligation exists ''even against the mother''.

In considering the arguments, the Court indicated that if the embryo were considered only a part of the material organism, the interruption of pregnancy would then belong in the private area of one's life where the legislature is forbidden to encroach. ''Since, however, the one about to be born is an independent human being who stands under the protection of the constitution, there is a social dimension to the termination of pregnancy which makes it amenable to and in need of regulation by the State.''

The Court recognized the right of the woman to the free development of her personality, or, as we say, her right of privacy. But the Court noted that this right, however, is limited, as are all such rights, by the rights of others, the constitutional order, and the moral law. ''A compromise which guarantees the protection of the life of the one about to be born and permits the pregnant woman the freedom of abortion is not possible, since the termination of pregnancy always means the destruction of the unborn life.''

The Court discussed the traditional method of handling the clash of constitutional rights, namely, balancing conflicting rights, and concluded that "precedence must be given to the protection of the life of the child about to be born. This precedence exists as a matter of principle for the entire duration of pregnancy and may not be placed in question for any particular time." The Court found a duty to carry a pregnancy to term and therefore viewed its interruption as an injustice as a matter of principle, indicating that the condemnation of abortion must be clearly expressed in the legal order. The failure of the statute involved to clearly express this condemnation was the majority's primary reason for holding it unconstitutional. The State may not abstain from the value judgment that human life is a value to be protected by the State. It may not abandon this judgment to the decision of the individual to be made on the basis of that individual's own sense of responsibility.

The dissent argued that the responsibility lay with the legislature, and it had adequately discharged that responsibility in the law which it had drafted. There was also no constitutional mandate, the dissent said, requiring penal sanctions.

The majority, it should be noted, did not really say that penal sanctions are required. It did state, however, that it is the task of the State to affirmatively employ social, political and welfare means for securing developing life. How these means are carried out is the prerogative of the legislature as long as the fundamental legal norms contained in the constitution are complied with. The Court found a duty in the State to "strengthen readiness of the expectant mother to accept the pregnancy as her own responsibility and to bring the child *en ventre sa mere* to full life". Why is this so? Because "it should not be

forgotten that developing life itself is entrusted by nature in the first place to the protection of the mother''. The Court distinguished between the State's obligation to employ the same penal measures for the protection of unborn life as is necessary and expedient for born life, taking pains to point out, however, that: ''The interruption of pregnancy irrevocably destroys an existing human life. Abortion is an act of killing; . . .''.

In discussing the penal sanctions the Court determined that punishment is not an end in itself. The employment of punishment is subject to the decision of the legislature and the standard to be used by the Court is to decide whether or not the totality of measures serving the protection of unborn life correspond to the importance of the legal value to be secured.

Consequently, ''the seriousness of the sanction threatened for the destruction is to correspond to the worth of the legal value threatened for destruction. The elementary value of human life requires criminal law punishment for its destruction''.

However, because of the unique situation of the pregnant woman, employment of the penal law or punishment may give rise to special problems. This leads to the difficult question of ''exactability'', or whether the State ''may compel the bearing of the child to term within means of the penal law''.

Here the Court found a conflict between respect for the unborn life and the right of the woman not to be compelled to sacrifice the values in her own life in excess of an exactable measure. The majority agreed that a decision for an interruption of pregnancy can attain the rank of a decision of conscience worthy of consideration, but here the legislature is obligated to exercise special restraint. ''If in

these cases it views the conduct of the pregnant woman as not deserving of punishment and foregoes the use of penal sanctions, the result is to be constitutionally accepted as a balancing encumbent upon the legislature." What are such circumstances?

The first and obvious is when termination of the pregnancy is necessary to prevent the death of the woman. Beyond that the Court indicated the legislature has a free hand in other cases of extraordinary burdens. The Court included eugenic cases in this category.

It was the aspect of the law as teacher which seems to have had a most profound influence on the manner in which the decision was written. For example, the Court argues that if abortion is allowed on request during the first trimester, all sense of the law's teaching concerning the sanctity of human life will be obliterated. Therefore, the legislature violates its duty under the constitution to protect human life if it were to allow abortion on request. However, if the legislature in its wisdom selects those particularly hard cases in which the woman cannot be compelled to complete the pregnancy because of serious threats to life and health, then the legislature does not abandon its obligation under the constitution. In fact, it strengthens that obligation because, knowing that these difficult cases are cases in which carrying the pregnancy to term cannot be exacted from the woman, it develops a system of counselling and aid to help her through the pregnancy so that the State can fulfill its obligation to all human life.

The Right to Life Is The Necessary Foundation for All Other Rights

That Mr. Justice Blackmun appears to accept the scope of constitutional personhood as the primary issue is re-

flected in his comment in *Roe* that "(t)he appellee (Texas) and certain amici argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment . . . If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment." (410 U.S. at 156, 157). No one has openly quarreled with Mr. Justice Blackmun on this point, and there is good reason for this. Not only do both the Fifth and Fourteenth Amendments explicitly mention "life" in their respective "due process' clauses,[19] but common sense dictates that the right to life is a condition precedent to the enjoyment and exercise of all other fundamental rights, including Mr. Justice Douglas's "absolute" First Amendment rights,[20] and is the necessary foundation upon which all other human rights are built. After all, only the living can enjoy the "freedom of speech", the "right peaceably to assemble", the "right of Assistance of Counsel", the "right of privacy", or even the "right to decide to have an abortion". And as a general principle only those who feel that their "right to life" is secured will dare exercise any of the above fundamental rights. Mr. Justice Brennan expressed the idea simply in *Furman* v. *Georgia*: "An executed person has indeed 'lost the right to have rights.' "[21]

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[19] It is interesting to note in this connection that "due process of law" is the constitutional protection of the Right to Life. Cf. H. Bedau, "The Right to Life", in *The Monist,* Vol. 52, No. 4 (Oct. 1968) at p. 562.

[20] See the concurring opinion of Mr. Justice Douglas, in *Roe,* 410 U.S. at p. 211.

[21] 408 U.S. 238 at p. 290.

The Right to Life Is Guaranteed by The Constitution

John Locke, whose influence on the thinking of the founders of this nation is well known, wrote in his Second Treatise of Civil Government of the natural rights to life and property.[22] These basic ideas found their way into the Declaration of Independence of July 4, 1776, in the clause to which the people of this nation are so frequently rededicating themselves this bicentennial year:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, . . . That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles . . ."

Just fifteen years later, on Dec. 15, 1791, a time when the natural rights theories were still dominant, the "right to life" was explicitly included in the U.S. Constitution via the Fifth Amendment's due process clause.[23]

In speaking of the first official action of this nation, which declared the foundation of our government in those words, the United States Supreme Court has said that ". . . it is always safe to read the letter of the constitution in the spirit of the Declaration of Independence."[24] Then,

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[22] Locke, John *The Second Treatise of Civil Government,* Chapter II "Of the State of Nature".

[23] Bedau, H. Op. cit., Note 19 Supra.

[24] *Gulf, Colorado and Santa Fe R.R. Co.* v. *Ellis,* 165 U.S. 150, 160 (1897).

commenting upon the basic function of government, the court said:

> "No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." [25]

The concern here is with the attempt to secure that equality of civil rights on behalf of the unborn child in a society which, if it has not abolished the child's civil right to life altogether, has made such inroads on its exercise as to make mention of it a mockery. For what difference does it really make to protect human life in the third trimester, since every individual human being must first pass through the unprotected first and second trimesters?

Although natural law thinking underwent hard times in intellectual circles during the nineteenth century, the importance of the right to life in modern political and social theory has remained nearly unscathed as is evidenced not only by the Fourth Article of The Universal Declaration of Human Rights, according to which "Everyone has the right to life . . .", but also by the Second Article of the European Human Rights Convention, [26] and the movement to abolish capital punishment.

Considering the Court in *Roe* clearly recognized the right to life issue as crucial and was fully aware of the

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[25] Ibid. at p. 160.

[26] "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence by a court following his conviction of a crime for which this penalty is provided by law". Article Two, European Human Rights Convention.

rank of this right in the hierarchy of fundamental legal values, a careful and through study of the scope of constitutional personhood as well as the nature of the unborn was certainly to be expected. After all, the last time the Court excluded a human group from the enjoyment of constitutional privileges and immunities, profound tragedy resulted. (See Mr. Justice Taney's decision in *Dred Scott* v. *Sanford,*[27] that slaves were property and that "free persons of color" were not citizens of the United States within the meaning of the Constitution.)

Does the possiblility exist that in the Court's eyes the major issue was not the scope of constitutional personhood as stated but rather other far reaching problems? Some indication of this is given in the *Roe* opinion itself. At the end of the opinion, Mr. Justice Blackmun wrote: "this holding, we feel, is consistent . . . (inter alia) . . . with the demands of the profound problems of the present day".[28] Although he does not specifically state what these problems are, Mr. Justice Blackmun provides at least a hint by mentioning at the beginning of the opinion that: "population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem".[29] If the Court's concern was to resolve or alleviate these "profound problems" by allowing population reduction via the sacrifice of unborn humans, the Court should say so and allow the matter to be debated on the merits rather than presenting the problem of *Roe* in terms of construing several potentially conflicting clauses of the Federal Constitution which guarantee individual rights.

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[27] 19 How. 393, 15 L.Ed. 691 (1857).

[28] 410 U.S. at p. 165.

[29] 410 U.S. at p. 116.

The consequence of the *Roe* decision to the unborn is as severe and final as one can imagine. This, of course, is of no great concern to the rule of law, unless the unborn does meet the criteria of constitutional personhood and the Court either because of poor reasoning or some unstated reason arbitrarily denied the unborn the constitutional protections due it or unless the Fourteenth Amendment is inadequate as a legal device to protect the fundamental rights of all members of the human family. In either case, there is reason for concern, for the legal order has failed. Perhaps society has failed as well by not providing other solutions which were acceptable to women facing unwanted pregnancies. Professor John Ely of Yale obviously had a point when he wrote "having an unwanted child can go a long way toward ruining a woman's life."[30] No one is denying the personal tragedy or the hardships involved in an unwanted pregnancy. The issue, however, is what is being sacrificed to avert the tragedy and hardships. These are hard decisions.

Courts as well as people have faced difficult problems before and have resolved them with dignity and intellectual honesty. Such was the problem in the famous cases of *U.S.* v. *Holmes,*[31] where, following a shipwreck, the sailors threw fourteen passengers overboard to lighten a sinking life boat, and *Regina* v. *Dudley and Stephens,*[32] where two seamen, after 14 days in an open boat and starving, killed a youthful companion and fed on his flesh until they were rescued. In both of these cases the doctrine of "necessity"

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[30] Op. cit. Note 8 Supra at p. 923.

[31] 26 F. Cas. 36 (1842).

[32] 14 Q.B.D. 273 (1884).

was raised; and "necessity" there was—no less than the lives of those later accused of homicide were at stake. These were hard decisions, harder than the abortion decision because rarely is the "necessity" in the abortion situation of the magnitude of that facing Holmes, Dudley and Stephens. Nonetheless, the courts held that "necessity cannot justify killing".

Is that what is involved in the abortion controversy? Is abortion an act of killing? The West German Federal Constitutional Court concluded it was and attempted to resolve the abortion problem in a manner consistent with its understanding of the values involved and their authoritative legal principles. In its concluding paragraphs, the West German Federal Constitutional Court wrote:

> The parliamentary discussions about the reform of the abortion law have indeed deepened the insight that it is the principal task of the state to prevent the killing of unborn life through enlightenment about the prevention of pregnancy on the one hand as well as through effective promotional measures in society and through a general alteration of social concepts on the other. [33]

Such an approach would be much more compatible with the deepest values and the authoritative ideals of this society.

To those who see abortion as dangerously close to infanticide, the Court owed a sound distinction. To those who believe the rule of law entails the element of reason, the Court owed more than an arbitrary command. To both of these, the Court failed.

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[33] Op. cit. Note 18 Supra.

As Philip Selznick has pointed out, "judicial conclusions gain in legal authority as they are based on good reasoning, including sound knowledge of human personality, human groups, human institutions".[34] Accepting this, *Roe* may be the command of the sovereign; but it certainly is lacking in legal authority. To this extent, a woman's right to an abortion is hollow indeed.

The Unborn Child Has A Constitutional Right to Life Which Exists En Utero

As Dr. Nathanson has said: "There is no longer serious doubt in my mind that human life exists within the womb from the very onset of pregnancy, despite the fact that the nature of intrauterine life has been the subject of considerable dispute in the past."[35]

In September, 1948, the World Medical Association (to which the United States is a founding member), "after a lengthy discussion of war crimes based on information from the United Nations War Crimes Commission"[36] adopted the Declaration of Geneva which said, "I will maintain the utmost respect for human life, from the time of conception; even under threat, I will not use my medical knowledge contrary to the laws of humanity".[37]

This was followed in October, 1949, by the International code of Medical Ethics which stated, "A doctor must always bear in mind the importance of preserving human life

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[34] Selznick, Philip Natural Law in Golding, The Nature of Law.

[35] Op. cit. Note 16. Supra.

[36] World Medical Assoc. Bulletin, Vol. 1, p. 22, April 1949.

[37] Ibid.

from the time of conception until death".[38] At that time, Dr. Paul Cibrie, Chairman of the Committee which had drawn up the International Code, stated that the abortionists were in fact condemned in the Declaration of Geneva.[39] This was reaffirmed by the World Medical Association in 1970 with the Declaration of Oslo, "the first moral imposed upon the doctor is respect for human life as expressed in the clause of the Declaration of Geneva: 'I will maintain the utmost respect for human life from the time of conception' ".[40]

Furthermore, on November 20, 1959, the General Assembly of the United Nations *unanimously* adopted the Declaration of the Rights of the Child. The Preamble to the declaration stated that the child, by reason of his physical and mental immaturity, needs "special safeguards and care, including appropriate legal protection, before as well as after birth".[41] Governments were called upon to recognize the rights and freedoms set forth in the Declaration

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[38] World Medical Association Bulletin, Vol. 2, pp. 5-34, January 1950.

[39] Ibid.

[40] Ibid.

[41] *Everyman's United Nations,* a complete handbook of the activities and evolution of the United Nations during its first twenty years, 1945-1965, 8th ed. United Nations, N.Y. at p. 360. It should be remembered that these are not just pious statements uttered only to be forgotten. At the War Crimes trial of the abortionists at Nuremberg the prosecutor argued that denial of legal protection to unborn children of Russian and Polish women was a crime against humanity. See closing Brief of Prosecution at 1077, *U.S.* v. *Griefelt,* 4 Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10 (1946).

and to strive for their observance by legislative and other measures.

In addition, the avidly pro-abortion California Medical Association wrote in September, 1970 that "human life begins at conception and is continuous whether intra- or extra-uterine, until death".[42] Dr. Alan Guttmacher, pro-abortionist head of Planned Parenthood-World Population, has written that at the exact moment of conception a new baby is created and that "at the exact moment when a new life is initiated (fertilization), a great deal is determined which is forever irrevocable—its sex, coloring, body-build, blood group, and in large measure its mental capacity of emotional stability".[43]

It is clear that human life, human life developing in the womb, commences its individual existence at conception or shortly thereafter. If individual human life is of intrinsic legal value in this Nation, a Nation dedicated to the protection of the rights of man, this value ought by logic and constitutional history, be protected by the Constitution, the very document which purports to put in positive form these fundamental rights. When this civil right commences as a constitutional right is the heart of the abortion controversy. The proponents of legalized abortion argue that it commences at "meaningful live birth". These amici argue that it commences en utero when individual human existence commences. These ideas are recurrent in this litigation. In determining the scope of *Roe* v. *Wade* as it applies in the context of this case, these amici ask this Court to consider these arguments.

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[42] Op. cit. Note 10 Supra.

[43] Guttmacher, Alan, *Having a Baby,* Signet Books, New York, New American Library, 1950 at p. 15.

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[42] Op. cit. Note 10 Supra.

[43] Guttmacher, Alan, *Having a Baby,* Signet Books, New York, New American Library, 1950 at p. 15.

II.

APPLICABLE LEGAL PRINCIPLES

Neither the Right of Privacy Nor Its Extension, the Right to Decide to Have an Abortion, Are Absolute

This Honorable Court in *Roe* v. *Wade* concluded that the "right of privacy, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy".[44] A considerable effort, however, was made by both the majority and the concurring justices to indicate that this extension of the right of privacy is subject to limitation. In short, this Court never intended to create an absolute right to an abortion. This is clearly shown by several passages in the *Roe* and *Doe* decisions, several of which are quoted below:

> "We, therefore, conclude that the right of personal privacy includes the abortion decision, *but that this right is not unqualified and must be considered against important state interests in regulation.*" (Emphasis added) (Roe v. Wade, 410 U.S. at 154)

> "Although the results are divided, most of these courts have argued that the right of privacy, however based, is broad enough to cover the abortion decision; *that right, nonetheless, is subject to some limitations;* and that at some point the state's interests as to protection of health, medical standards, and prenatal life, become dominant. *We agree with this approach.* (Emphasis added.) (410 U.S. at 155)

> "The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical

[44] 410 U.S. at 153.

> standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulations of the factors governing the abortion decision. *The privacy right involved, therefore, cannot be said to be absolute.* In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. *The Court has refused to recognize an unlimited right of this kind in the past.*" (Citations) (Roe v. Wade, 410 U.S. at 154) (Emphasis added).

and in *Doe* v. *Bolton,* this Court wrote:

> "Roe v. Wade, supra, sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand." (410 U.S. at 189).

The primary thrust of Mr. Chief Justice Burger's concurring opinion in *Roe* v. *Wade* and *Doe* v. *Bolton*[45] was that the "right to decide to have an abortion" extension of the right to privacy is not absolute. He wrote:

> Of course, states must have broad power, within the limits indicated in the opinions, to regulate the subject of abortions, but where the consequences of state intervention are so severe, uncertainty must be avoided as much as possible. (410 U.S. at 208).

and:

> Plainly, the Court today rejects any claim that the Constitution requires abortion on demand. (410 U.S. at 208).

Mr. Justice Douglas, in his concurring opinions to *Roe* and *Doe,* classified the "right to decide to have an abortion" in his "third group" of constitutionally protected

[45] 410 U.S. at 208.

rights. This group involves "the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf."[46] Mr. Justice Douglas, however, also emphasized that "(t)hese rights, though fundamental, are likewise subject to regulation on a showing of compelling state interest."[47] Later in his concurring opinion, Mr. Justice Douglas, after concluding a "woman is free to make the basic decision whether to bear an unwanted child",[48] also noted that "such reasoning is only the beginning of the problem. The state has interests to protect".[49]

Mr. Justice Stewart, in his concurring opinion, also recognized that certain state interests are "legitimate objectives, amply sufficient to permit a state to regulate abortions more stringently or even to prohibit them in the late stages of pregnancy".[50]

Briefly stated, each justice who joined in this Honorable Court's opinion in *Roe* v. *Wade,* and each concurring justice explicitly recognized that the right of privacy, which, according to this Court, includes the abortion decision, is not absolute, but rather is subject to limitation. Furthermore, it is exceedingly clear that this Court and the concurring justices made considerable effort to emphasize this point.

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[46] 410 U. S. at 213.

[47] 410 U.S. at 213.

[48] 410 U.S. at 214.

[49] 410 U.S. at 215.

[50] 410 U.S. at 170.

The issue before this Honorable Court, then, is whether the statutory provisions being challenged are protective of an important or "compelling" state interest and whether they are "narrowly drawn to express only the legitimate state interests at stake." [51]

The Important or Compelling State Interests Involved

In *Roe* v. *Wade* this Court explicitly recognized three state interests which would justify a limitation of the fundamental "right to decide to have an abortion": maternal health, medical standards and prenatal life. The Court made reference to these important state interests numerous times in the *Roe* decision. For example:

> .... the right (of privacy), nonetheless is not absolute and is subject to some limitations; and at some point the state interests as to protection of health, medical standards and prenatal life become dominate. (Roe v. Wade, 410 U.S. at 155)
>
> As we have intimated above, it is reasonable and appropriate for a state to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. (Roe v. Wade, 410 U.S. at 159)
>
> We repeat, however, that the state does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, . . ., and that it has still *another* important and legitimate interest in protecting the potentiality of human life. (Roe v. Wade, 410 U.S. at 162)

Although in the *Roe* decision this Court explicitly mentioned only three state interests, *i.e.,* maternal health, medical standards, and prenatal life, which could justify regulating the right of privacy in the context of the abortion

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[51] *Roe* v. *Wade,* 410 U.S. at 155.

decision, there are persuasive reasons to believe that those interests mentioned were never envisaged as exclusive. This becomes obvious when one considers the cases cited by this Court in *Roe* to support legitimate limitations on fundamental rights, the nature of the arguments made by the parties in *Roe,* several statements made by the Court in *Roe* and prior holdings of the Supreme Court concerning limitations on fundamental rights. For example, in support of the notion that fundamental rights may be limited by important state interests, the Court cited *Buck* v. *Bell,* 274 U.S. 200, *Kramer* v. *Union Free School District,* 395 U.S. 621, *Shapiro* v. *Thompson,* 394 U.S. 618, *Sherbert* v. *Verner,* 374 U.S. 398. In those cases, this Court recognized the following state interests as possibly justifying the regulation and limitation of fundamental rights: *Buck:* sterilization of feeble-minded persons in institutions, *Kramer:* possibility of restricting the franchise in school matters to those "primarily interested" (this Court did not resolve this issue), *Shapiro:* interest in preserving the fiscal integrity of its programs, *Sherbert:* possibility of controlling abuses of state unemployment compensation.

In *Roe,* the arguments made by the State of Texas were that the fetus is a "person" under the Fourteenth Amendment [52], that the State has recognized a compelling state interest in protecting prenatal life [53] and impliedly that the State has recognized a compelling interest in protecting maternal health. This latter argument was more particularly made by the State of Georgia in *Doe* v. *Bolton.* [54] The

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[52] 410 U.S. at 156.

[53] 410 U.S. at 156, 159.

[54] See e.g. 410 U.S. at 187.

parties did not argue the existence of any other important state interests and, considering the nature of the criminal abortion statutes before this Court, no other state interests were apparently involved. In short, this Court was neither called upon nor did it consider any other possible state interests in its ruling in *Roe* and *Doe*.

The language of the Court's opinion in *Roe* further supports this. To again quote from *Roe*, "where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by *a 'compelling state interest.'* "[55] (Emphasis added).

This Court has recognized on numerous occasions the state's important interest in protecting the integrity of the family. For example, this Honorable Court has noted:

> Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. (Reynolds v. United States, 98 U.S. 145, at 165 (1878)).
>
> Marriage, as creating the most important relation in life, as having more to do with morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effect upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution. (Maynard v. Hill, 125 U.S. 190, at 205 (1888)).

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[55] 410 U.S. at 155.

In *Estin* v. *Estin,* Mr. Justice Douglas, writing for this Court, noted:

> Marital status involves the regularity and integrity of the marriage relation. It affects the legitimacy of the offspring of marriage. It is the basis of criminal laws, as the bigamy proscution in Williams v. North Carolina dramatically illustrates. The state has a considerable interest in preventing bigamous marriages and in protecting the offspring of marriages from being bastardized. (Estin v. Estin, 334 U.S. 541 at 546 (1947)).

Although the context in which *Griswold* v. *Connecticut* arose was dissimilar to this case, this Court recently reemphasized the importance of the family relationship in *Griswold,* where it noted:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. (381 U.S. at 486).

The Point at which the State's Important Interests in Maternal Health, Prenatal Life and in the Family Become Compelling and Justify a Limitation on the Fundamental Right to Privacy.

Maternal Health

Concerning this Court's determination in *Roe* v. *Wade* that the "compelling" point with respect to the state's important and legitimate interest in the health of the mother "is at approximately the end of the first trimester"[56] it is

[56] *Roe* v. *Wade,* 410 U.S. at 163.

of considerable significance that this Court made this determination "because of the now-established medical fact, . . ., that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth"[57] What this court in effect concluded was that the State has a continual interest in maternal health, but because of "present medical knowledge", as viewed by this Court, concerning the above mentioned mortality rates in first trimester abortions and in natural childbirth, an anti-abortion statute which proscribes first trimester abortions in the name of maternal health is not reasonable. This results from what the court must have considered to have been a statistically unsound factual basis for an anti-abortion statute which precludes abortions in the first trimester. To be emphasized however is that this court reached its determination on the basis of its understanding "present medical knowledge" and its acceptance of a "now-established medical fact", not on the basis of any inherent or abstract aspect of the constitutional right of privacy. Therefore, in determining whether any of the constitutional provisions now under attack are constitutional, this Court, if it is to follow the method of analysis of *Roe,* must look carefully at the present state of medical knowledge concerning abortion and maternal health. The narrow issue is thus whether the statutory provision challenged is reasonably designed to protect the already acknowledged important state interest of maternal health.

Prenatal Life or Potential Life

"With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at via-

[57] *Roe* v. *Wade,* 410 U.S. at 163.

bility,'' concluded this Court in *Roe* v. *Wade.*[58] ''This is so,'' explained this Court, ''because the fetus then presumably has the capability of meaningful life outside the mother's womb.''[59] (410 U.S. at 163). Several pages earlier in the *Roe* opinion, this Court wrote:

> Physicians and their scientific colleagues have regarded (quickening) with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes ''viable'', that is, potentially able to live outside the mother's womb, albeit with artificial aid (citing Hellman & Pritchard, Williams Obstetrics 493, 14th ed. 1971) (Roe v. Wade, 410 U.S. at 160).

Here again, this Court determined the ''compelling'' point, not on the basis of any inherent or abstract aspect of the right to privacy, but rather on the basis of this Court's understanding of the state of present medical and scientific knowledge, the ultimate issue being the ''capability of meaningful life outside the mother's womb''[60] or ''potentially able to live outside the mother's womb, albeit with artificial aid''[61]. To be emphasized is that in *Roe,* the Court's methodology was to focus on the state of scientific knowledge in its determination of the ''compelling'' point. Thus, as scientific knowledge and medical technology advances, the point during gestation at which viability occurs may also change. If so, it necessarily fol-

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[58] 410 U.S. at 163.

[59] 410 U.S. at 163.

[60] *Roe* v. *Wade,* 410 U.S. at 163.

[61] *Roe* v. *Wade,* 410 U.S. at 160.

lows that the "compelling" point for the state's protection of fetal life changes accordingly. This Court has thus construed the constitution in such a manner that the "compelling" point depends on a changing standard, upon the present state of scientific knowledge and medical technology. The issue, then, is whether the State of Missouri in protecting its important state interest in prenatal life has tailored its regulation in such a manner that it is not unreasonably related to its important state interests.

The Family

The state's important interest in regulating and protecting the family, long recognized by this Court, exists as long as the family entity exists. The narrow issue, then, is whether allowing a wife to make a unilateral decision of the magnitude of the abortion decision could be destructive of the family entity.

III.

THE STATUTORY DEFINITION OF VIABILITY IS AN APPROPRIATE STANDARD

The challenged Section 2(2) of the Missouri Statute defines viability as:

> "(T)hat stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems."

Appellant contends that this definition is constitutionally infirm under *Roe* and *Doe* because it contains a vague "standard of possible evanescent survival."[62] In addition,

[62] Appellant's Brief at p. 68.

they contend that *Roe* and *Doe* "must be interpreted to restrict the state's prohibition of abortion to that period of gestation, when by reasonable medical judgment, the fetus, if then born, has the probability of meaningful survival."[63] This is so, they argue, since the physician must first certify that the fetus is not viable or be subject to criminal penalties.

The court below held the definition constitutional and wisely concluded:

> "We do not think it is properly the function of the legislature or the courts to fix viability at an inflexible point in gestation. The time when viability is achieved will vary with each pregnancy, and the determination of whether a fetus is viable in a particular case must be left to the attending physician. Section 2(2) has precisely this effect."[64]

In short, the court below concluded that since viability was a question of fact dependent on the physician's use of his medical judgment, the state should wisely refrain from making statutorily precise that which was, in fact, not so. Such a conclusion is similar to the conclusion made by this Court in *U. S.* v. *Vuitch*[65] when it concluded that the standard "unless necessary for the preservation of the woman's life or health" was not unconstitutionally infirm for vagueness even though it was a statutory standard for criminal prosecution.

This Court's reasoning in *Vuitch* is appropriate here:

> "Indeed Webster's Dictionary, in accord with that common usage, properly defines health as 'the state

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[63] Ibid.

[64] Slip Opinion at p. 8.

[65] 402 U.S. 62 (1971).

> of being sound in body or mind.' Viewed in this light, the term 'health' presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.
>
> We therefore hold that properly construed the District of Columbia abortion law is not unconstitutionally vague, and that the trial court erred in dismissing the indictments on that ground.''[66]

Like the statute in *Vuitch,* the Missouri statute merely requires that the physician use his medical judgment to ascertain whether or not the fetus is viable. The use of his judgment is prescribed in terms familiar to any practitioner of the healing arts. He must so certify "with reasonable medical certainty." This is presumably the standard he exercises any time he makes any medical judgment. What then could make the use of that same judgment constitutionally infirm here?

Obviously nothing! So said the plaintiff-appellant, David Hall, M.D., in his testimony when he stated (Tr. 369) that he agreed with the statutory definition of viability even though it must be understood that it is a difficult state to assess. Because it is difficult, must the state be estopped from legislating? That would be a curious result. How could the state then legislate against driving while intoxicated since the state of intoxication has always been a difficult standard to apply? Indeed, how would the state regulate any activity which relied on judgment if appellant is correct?

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[66] Ibid. at p. 72.

Plaintiffs'-Appellants cite *Hodgson* v. *Anderson,*[67] *Doe* v. *Rampton* [68] and *Planned Parenthood* v. *Fitzpatrick,*[69] in support of their position. Such reliance is misplaced. In fact, *Hodgson* v. *Anderson* is contra to appellants position.

In *Hodgson* the statute under consideration was the Minnesota statute which defined viability as commencing at 20 weeks (which is not mentioned in appellants brief) and, in addition, created an area labeled "potentially viable" which seemed to the court to create a state interest in the fetus prior to actual viability. True, in discussing viability the *Hodgson* court did suggest that the lower statutory limit *if the statute contained such a limit* (which the Missouri statute does not) should not be below 24 weeks. This is so because the *Hodgson* court incorrectly assumed that under present technology it does not arise prior to 24 weeks.

But the *Hodgson* court itself agreed that the Missouri legislature's handling of the issue comported with *Roe* v. *Wade*:

> "It appears to this court that after reviewing the historical, medical, and legal attitude on abortions, the Supreme Court concluded that as between cases the point of viability will vary, and whether or not the fetus is in fact viable must be left to the medical judgment of the physician."[70]

When the *Hodgson* court complains about the legislative definition of viability, it is complaining about a statutory

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[67] 378 F. Supp. 1008 (D. Minn. 1974) appeal dismissed sub. nom. *Spannaus* v. *Hodgsson,* 420 U.S. 903 (1975).

[68] *Doe* v. *Rampton,* 366 F. Supp. 189. (D. Utah 1973).

[69] ..... F. Supp. ..... (E.D. Pa. 1975).

[70] Op. cit. Note 67 at p. 1016.

viability of 20 weeks which it incorrectly assumed was beyond the ability of modern medical technology (as we show later, even Dr. Hall, a plaintiff in this case agreed that 20 weeks was reasonable), and the creation of a highly ambiguous zone labeled "potentially viable" for which zone, it appeared to the court, the statute was seeking life saving potential.

Clearly *Hodgson* does not help appellants and is, in fact, contrary authority to their position.

Reliance on *Doe* v. *Rampton* is equally misplaced. There is no way that the Missouri definition of viability can be construed to be applicable in "any trimester." In addition, the *Doe* v. *Rampton* court's complaint was of an overall regulative scheme invading the first trimester also. Such is not a problem with the Missouri statute.

For some unknown reason appellants cites *Wolfe* v. *Schoering*[71] which is directly contrary to their position. The *Wolfe* court agrees that the decision as to when viability occurs "must be left to the professional medical judgment of the woman's physician just as in any other medical procedure."[72] Obviously there is no quarrel with what constitutes viability in its legal definition but only with a standard that would impose on the physician's judgment some determination as to when the *event* (of viability) occurs. This the Missouri statute does not do.

The Pennsylvania case is even more interesting.[73] There

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[71] *Wolfe* v. *Schoering*, 388 F. Supp. 631 (W.D. Ky. 1974).

[72] Ibid. at p. 637.

[73] Op. cit. Note 69 Supra.

the court held that the standard set by *this court* in *Roe* v. *Wade* is constitutionally infirm for reason of vagueness. Again, as in *Hodgson* the court focused on certain words ("may be") in the statute which it felt attempted to create a state interest in fetal life prior to viability.[74] This the Missouri legislature did not do.

Indeed, as the court pointed out below, the use of the word "indefinitely" in the Missouri statute is a more restrictive definition of viability, not less restrictive as appellants seem to argue.[75]

Obviously the word "indefinitely" can be used in two senses neither of which create constitutional infirmity. On the one hand, it can refer to infinity which is clearly not applicable as even plaintiffs concede.[76] On the other hand, it can be interpreted to mean, as plaintiffs do, a measurement in breaths or heart beats.

This second usage is not constitutionally infirm, either. The statute requires merely that the physician use his best medical judgment to ascertain that the fetus is viable. He makes this clinical judgment based on the existence of a fetus en utero who is alive at *that time.* The length of time the fetus lives or will live ex utero is irrelevant if he has judged that the fetus is, in fact, while en utero and before

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[74] Ibid. at p. 70 of the Slip Opinion as reproduced in the Jurisdictional Statement of Appellants which is on file before this court under the name *Beal* v. *Franklin.* The Pennsylvania 3 Judge Court labeled its section of the opinion concerning viability "Viability and Potential Viability", to indicate the nature of the problem as they saw it.

[75] Slip Opinion at p. 7.

[76] Appellant's Brief at p. 63.

the abortion is performed, viable. Thus "indefinite" merely means that the fetus he has judged to be viable is capable of indefinite life or life for some indeterminable period ex utero. By definition the fetus must be capable of life for some period or it is not viable to begin with. Rather than legislating in an area where it does not belong, (medical judgment) the Missouri Legislature has wisely, through the use of the word "indefinitely," left the matter to the judgment of the physician.

A common thread running through *Hodgson, Wolf,* the Pennsylvania case and appellant's brief is the complaint that the various state legislatures are not mandating a specific minimal age for viability at 24 weeks.[77] The answer to this is simple: the medical literature and, indeed, the opinions and evidence in the trial court below *do not support the idea that viability begins only at a minimum of 24 weeks.* In point of fact, as we will show hereafter viability commences prior to even 24 weeks.

The word "viability" can be understood in three ways:

1. Meaning alive;
2. Meaning capable of living outside of the womb with or without artificial aid;
3. Meaning able to survive the neo-natal period (28 days after birth).

There are several references to viability in *Roe* v. *Wade* decision. The two primarily concerning us appear at 410 U.S. p. 160 and 140 U.S. p. 164. We quote in full first the reference at 410 U.S. 164 for the reason that some courts have misread the case thinking that the pregnancy has been di-

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[77] For example, in the Pennsylvania case, *Planned Parenthood* v. *Fitzpatrick,* ..... F.Supp. ..... (E.D. Pa. 1975) the court stated: "Indeed, if the statute had even limited viability to 24 weeks gestation, it would be in conformity with the pronouncement of Roe and not subject to a successful challenge."

vided into neat categories of trimesters, and that consequently some significant point of legal demarcation has been made at the end of the second trimester or at 24 weeks of gestation:

> "(a) For the stage prior to approximately the end of the *first* trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the *first* trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) *For the stage subsequent to viability,* the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." (Emphasis Added)

It is clear that the court has *not* indicated when viability occurs, but only that something important does occur at viability in terms of the State's right and interest in protecting fetal life. We should remember that, until it became a possible standard for the commencement of the civil right to life or at least the State's interest in protecting "potential life," the concept of viability had legal significance in the personal injury cases only, and that only since the tort action for prenatal injuries, conditioned on birth alive, was created by the Courts.[78]

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[78] See cases listed in Annot, 15 A.L.R. 3d 992 (1967); Wrongful Death and the Stillborn Fetus—A Current Analysis, 7 Houst. L. Rev. 449 (1970); *Libbee* v. *Permanente Clinic,* (Or. Sup Ct) 518 P2d 636, 638 (1974).

Viability has been influenced by, and to some extent confused with, the concept of quickening, which was the point of origin for legal rights as far as Blackstone and most common law commentators were concerned.[79] In point of fact, to many judges there is no difference.[80] Quickening is a concept of maternal sensitivity indicating when the mother perceives, through physical activity such as movement or kicking, the presence of the developing child in her womb.

Quickening was an important evidentiary concept, especially after 1803 in England since after quickening abor-

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[79] At the common law the unquickened fetus was not considered alive. In *4 Blackstone, Commentaries on the Laws of England* (concerning reprieves) 394-95 (1769) it is said: . . . "and if they bring in their verdict "quick with child" (for barely, "with child," unless it be alive in the womb is not sufficient)." In other words, "with child" was not sufficient to stay execution of a pregnant felon because the fetus was not considered to be alive; whereas "quick with child" was sufficient to stay execution since the fetus was alive and the law would not take the lives of two people where only one had committed the crime. Blackstone also said: "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." 1 Blackstone 124 (1769).

[80] See concurring opinion of Justice Douglas where he seems to be equating the concepts of viability and quickening *Roe* v. *Wade* 410 U.S. at p. 220: "The protection of the fetus when it has acquired life is a legitimate concern of the state". At p. 215 he had stated: "While childbirth endangers the lives of some women, voluntary abortion at any time and place regardless of medical standards would impinge on a rightful concern of society. The woman's health is part of that concern; as is the life of the fetus after quickening." The difference is rather important since quickening can occur as early as 12-15 weeks.

tion was punishable by death, whereas prior to that the punishment was less severe.[81]

The factual question as to when the child en ventre sa mere becomes viable is unanswered in either *Roe* v. *Wade* or *Doe* v. *Bolton,* as well it should be since the record in those cases contained no evidence on that point, and viability can depend on a multitude of factual issues, including even race. Justice Blackmun, in dicta, did refer to viability as ". . . usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."[82] He supported this statement by reference to a medical text at Footnote 59 and Dorland's Medical Dictionary.[83] Dorland's does not refer to age and the exact quotation from the medical text places the lower end of the viability scale at 20 weeks (not 24 weeks) based on a single case:

> "Abortion is the termination of a pregnancy at any time before the fetus has attained a stage of viability. *Interpretations of the word 'viability' have varied between fetal weights of 400 g (about 20 weeks of gestation) and 1,000 g (about 28 weeks of gestation).* Since an infant reported by Monro that was said to weigh only 397 g survived, on the basis of this single precedent an infant weighing 400 g or more may be regarded as capable of living. Although our smallest surviving infant weighed 540 g at birth, survival even at 700 or 800 g is unusual. Attainment of a weight of 1,000 g is therefore widely used as the criterion of viability. Infants below this weight over 1,000 g have a substantial chance, which increases greatly with each

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[81] See Byrne, Robert, "The Supreme Court on Abortion: An American Tragedy" Fordham L. Rev. 803 (1973).

[82] 410 U.S. at p. 160.

[83] Dorland's Illustrated Medical Dictionary 1689 (24th ed. 1965).

100 g increment. *Expert neonatal care, furthermore, has permitted survival of increasingly small infants.*" (Emphasis Added)[84]

Another standard medical dictionary defines viability as usually "... connotes a fetus that has reached 500 grams in weight or 20 gestational weeks".[85]

Returning again to the text cited by Justice Blackmun, we find:

> "This lower limit might logically be set at 400 g, because no fetus weighing less at birth has ever been known to survive. One fetus weighing 397 g on the second day of life, but doubtless slightly more than 400 g at birth, has survived, however, as reported by Monro. As shown in Figurel, a fetus weighing approximately 400 g has a gestational age of about 20 weeks. Convenience is another reason for adopting this figure, since nearly all state departments of vital statistics require the reporting of all births in which the period of gestation is in excess of 20 weeks. Twenty weeks, of course, marks the midpoint of the normal duration of human pregnancy, counting from the last menstrual period. A premature infant might therefore be defined as weighing between 400 and 2,500 g at birth. The round figure of 500—, however, has certain advantages as the definition of the limit between abortion and prematurity and is so employed elsewhere in this text."[86]

Another standard reference is the study by Schlesinger and Alloway of 436,254 live births in the New York De-

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[84] L. Hellman & J. Pritchard, *Williams Obstetrics,* 493 (14th ed. 1971).

[85] Stedman's Medical Dictionary 22nd ed. Williams & Wilkins Co.

[86] Op. cit. Note 84 at p. 1027.

partment of Health Records.[87] They reported 622 live births between *20 and 23 weeks gestation:*

436,254 Live Births in N.Y.
Surviving Neonatal Period, 28 days

Length of Gestation			
20-23 weeks,	8.2% of these	(622 babies)	survived the neonatal period
24-27 weeks,	19.1% of these	(1403 babies)	survived the neonatal period
28-31 weeks,	58.8% of these	(2953 babies)	survived the neonatal period
32-35 weeks,	86.7% of these	(7365 babies)	survived the neonatal period
35 weeks or older	99.2% of these	(423,991 babies)	survived the neonatal period

Plaintiff-Appellants have cited[88] studies on viability which cleverly manipulate the statistics and even contradict their own testimony. Dr. Hall testified that beginning at 20 weeks a fetus has a chance for survival.[89] What plaintiffs want this court to do is determine as a matter of law that since only a few children born at 20-23 weeks have survived[90] then the law should exclude this period from its consideration—that, in fact, this court should declare as a matter of constitutional law that no state interest may exist in protecting fetal life before 24 weeks of gestation.

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[87] Pediatrics, Vol. 18, (1955); See also the study by Erhardt, C.L. et al "Influence of Weight and Gestation on Perinatal and Neonatal Mortality by Ethnic Group" Am. J. Pub. Health Vol. 54, pp. 1841-1855 (1964). This study shows conclusively that viability arrives earlier in the non-white races and their survival rate is greater.

[88] Appellants Brief p. 67.

[89] Transcript p. 369.

[90] Meaning survived 28 days after birth and went home from the hospital. 8.2% in the Schlesinger study so survived. The figures are higher in Erhardt's study.

The simple fact is that plenty of babies under 24 weeks have survived in the past as the above studies show and more will survive in the future. The state has an interest in protecting *each* of their lives and that interest cannot be vitiated because some or even a majority of children born before 24 weeks of gestation cannot survive. It would indeed be a cruel twist of fate for this court, the avowed protector of minority rights, to decree that the law may not protect the minority who can survive if born before 24 weeks merely because the majority cannot survive.

These reports of significant survival of tiny birthweight babies are not *unusual.* Reid, Ryan and Behirschke are authors of "Principles and Management of Human Reproduction.[91] The preface states, "This book which is dedicated to those who work toward the achievement of the initial right of man to be born without handicap and privilege of women to bear without injury", and the authors state:

> "At this age the normal fetus weighs approximately 500 grams, has a crown-to-rump (CR) length of 16.5 cm., and, at least occasionally, is capable of extra-uterine survival—it is then said to be 'viable'. Viability, though, is a changing concept. Medical advances in the treatment of the premature make it possible to anticipate that even these very small abortuses of 20 weeks' gestation may soon have a greater chance of survival and one surely does not then wish to describe a surviving fetus as an abortus."[92]

It should be pointed out that the word "viability" implies some inherent capability on the part of the child, but it equally applies to the present state of the medical art of keeping small babies alive. Immature and premature babies,

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[91] W. B. Saunders Co. (1972).

[92] Ibid. at p. 255.

if cared for, do better than ever before in history. For example, in their study Lubcheno, et al show that more and more children under 500 grams are being admitted to neonatal and perinatal hospital centers for the purpose of life-giving treatment.[93]

Viability can also mean alive even if only at these few moments under consideration. In their study, Pakter, et al report live births after abortions in 27 cases, 14 of which were between 17 to 20 weeks of gestation, 6 were between 21 to 24 weeks of gestation, and the remaining were older. These children were born alive after abortions and died later as a result of the abortion.[94] (See Appendex D)

Even considering the most severe definition, that of surviving the neonatal period, certain studies have shown survival at remarkably early ages with apparently little or no sequalae. One such study reports a case of a fetus born at a gestational age of 21 weeks *which survived and is still living,* and another of 22 weeks.[95] (See Appendix E) The literature contains numerous other reports of children born alive during the very early weeks of the second half of the gestation period who have survived and are living today.[96]

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[93] Lubchenko, et al "Neonatal Mortality Rates: Relations to Birth, Weight and Gestational Age", *Journal of Pediatrics,* Vol. 81, pp. 814-822 (1972).

[94] Pakter, et al, Clinical Ob. Gyn. Vol. 14 (1971) at p. 290. Their chart is reproduced in Appendix D.

[95] Alden et al "Morbidity and Mortality of Infants Weighing Less Than 1,000 Grams in an Intensive Care Nursery" *Journal of Pediatrics,* Vol. 50, No. 1 July 1972 pp. 40-48.

[96] Erhardt et al Op. cit. Note 87 Supra.

In *Planned Parenthood* v. *Fitzgerald,* Dr. Meklenburg, a Planned Parenthood Physician, testified as follows:

> "I would agree with that definition of viability. (Viability means capability of a fetus to live outside the woman's womb albeit with artificial aid . . .) I think that it has been current. I think it is a definition that takes into account medical progress, the fact that it is constantly changing. My perusal of the medical literature would lead me to believe that potential or continued life exists as early as 20 weeks—not in the current edition of Eastman's Obstetrics Book, but in the previous edition, the earliest report a survivor was reported as a delivery at 20 weeks gestation. In my own experience I have—the earliest survival that I have had is a patient who was 21 weeks from the time of conception or 23 weeks from the first day of her last menstrual period. The child is a year and a half old and normal."[97]

In the trial court below even one of the plaintiffs, Dr. David Hall, M.D., agreed (Tr. p. 369):

> "Q. Then in connection with the second trimester of pregnancy, is there a point at which it is possible that a fetus could survive?
>
> A. I think that after twenty (20) weeks, and, of course, I am getting back to my original point that has to do with viability; I think that after twenty (20) weeks of interuterine existence, then there is a possibility that the pregnancy could survive outside of the uterine environment prior to that point it is not."

In their study, Potter and Davis, using a weight of 400 grams ("this figure was selected because it appeared to be the average weight attained by a fetus at 20 weeks") as the low end of the viability spectrum, said:

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[97] Op. cit. Notes 69 and 74 at p. 67 of Jurisdictional Statement. The lower federal court reproduced Dr. Meklenberg's testimony in its opinion. Dr. Meklenberg's testimony is found on pp. 82, 83 of Trial Record.

"Born alive were 101,398 over 2,500 grams with a survival of 99.5 per cent, 6,617—1,000 to 2,500 grams with a survival of 86.3 per cent and 463—400 to 1,000 grams with a survival of 6.4 per cent, a total of 98.4 per cent survival of all live-born infants over 400 grams."[98]

It is apparent from a review of this material that the medical literature accepts 20 weeks, or at almost exactly mid-term in the pregnancy, as the lower end of the viability spectrum speaking conservatively. By viability under these circumstances, and for these studies, means survival of the neonatal period, or 28 days after birth.

Further, it is also apparent that research in the area of neonatal intensive care will push viability further and further back in the years to come. The whole area of neonatal medicine is only 10 years old.[99] Research on the artificial placenta is in its embryonic state, and research into the chronic killer of the premature (underdevelopment of the lung structure) has had significant results in recent

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[98] Potter and Davis, "Perinatal Mortality at the Chicago Lying-In Hospital 1931-1966," American Journal of Obstetrics and Gynecology, Vol. 105, No. 3 Oct. 1, 1969 pp. 335-348 at p. 339.

[99] See: "Fetology: The Smallest Patients" *The Sciences,* The New York Academy of Sciences, Oct. 1968, Reprinted in Child and Family Quarterly, Vol. 8, No. 2, pp. 159-164, Box 508, Oak Park, IL 60303, where it was said:

"Only a few years ago it was unthinkable that a human being might benefit from study and treatment before birth. The protective wall of pregnancy was inviolable, the pregnant uterus sacrosanct. But the unborn infant became a patient with the dawn of the new science of fetology, and his problems during intrauterine life are now a prime target of medical and surgical interest. Normal life before birth has also begun to yield its secrets to an impressive array of techniques for seeing, hearing, testing and monitoring the unborn child."

years.[100] We can expect that development of the artificial placenta will radically change our notions of the meaning of viability.[101] Medical research on the unborn has only just begun.[102]

In *Roe* v. *Wade* this Court was profoundly influenced by maternal mortality rates to the extent of invalidating all state legislation intruding into the first trimester because of the alleged safety of abortion.[103] We have argued above that viability should be considered a good possibility at 20 weeks. The argument from maternal mortality rates supports 20 weeks as a natural cut off point for viability since as Plaintiff-Appellants point out in their brief at that point maternal mortality for abortion *exceeds* maternal mortality for birth:

> "It should be noted that the mortality rate for abortions does not equal the rate for childbirth (using a conservatively low rate for the latter) until the 19th week of pregnancy gestation."[104]

One Court decision on the question clearly holds that 20 weeks can be established as the point of viability. In *Peo-*

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[100] White, et al "Prolonged Respiratory Support in Newborn Infants With a Membrane Oxygenator" *Surgery,* Vol. 70, No. 2, pp. 288-296, August 1971.

[101] Alexander et al "Maintenance of Sheep Fetuses by an Extracorporeal Circuit for Periods up to 24 Hours" in Am. J. Obst. & Gyn. Vol. 102, No. 7 December 1, 1968, pp. 969-975.

[102] Hodari and Thomas "Experimental Surgical Procedures Upon the Fetus in Obstetric Research" *Obstetrics and Gynecology, Vol.* 34, No. 2 August 1969, pp. 204-211.

[103] 410 U.S. at p. 163.

[104] Appellant's Brief p. 26.

ple v. *Barksdale,*[105] the Supreme Court of California was squarely confronted with the question. In its opinion handed down late in 1972, approximately two months before *Roe* v. *Wade,* the Court said:

> "We have no doubt that the legislative intent was to require abortions to be performed within 20 weeks of the time of conception. We find further support for this analysis from the evidence before the Legislature that after 20 weeks there is a possibility that the fetus is viable and that an attempt to induce a premature delivery is a possible alternative to abortion when termination of pregnancy is a necessary medical concern . . .
>
> "Although we have refrained from determining whether the Legislature may establish any criteria limiting the decision to terminate a pregnancy during its earlier stages, we think it is unquestionable that such power exists, though nothing mandates its exercise, when the fetus is capable of life independent of the body of the woman. California law appears to be unique in establishing the twentieth week as the time for a changed legal relationship, but the present record in no way undermines the legislative determination that 20 weeks is an appropriate time for such a change."

Note that the California Supreme Court was unanimous in its decision on this point and that it declared several other sections of the statute unconstitutional. Note also that this Court is not known as a "conservative" court or one reluctant to establish new principles or make hard decisions.

In addition to sources already cited herein, other medical literature is consistent in stating the conclusion that twenty weeks is an appropriate time, at least for the present, at which to establish viability.

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[105] 105 Cal. Rep. 20, 503 P 2d 276 (1972).

A statement on abortion by one hundred professors of obstetrics, strongly pro abortion in general, nevertheless says:

> "It should be emphasized that abortion is medically defined as the termination of pregnancy *before the end of the twentieth* week. Regardless of the wording of a particular state law, therefore, abortions should not be performed for purely social reasons beyond this gestational age. Every effort should be made, of course, to perform abortions before the end of the first trimester."

As can be determined in medical treatises an "abortion" and an "abortus" as used above are words used to describe the non-viable fetus.

In a paper printed on February 26, 1970 at the Symposium on the Functional Physiopathology of the Fetus and Neonate, by the Special Committee on Infant Mortality, Medical Society of the County of New York, there is presented at page 23 a table of "Fetal Dimensions at the Most Significant Periods of Fetal Development." The table describes by weeks four classes of gestational age and gives weight and dimensional criteria for judging such age. The four classes are:

"Less than 20 nonviable,"
"21 to 28 immature,"
"24 to 36 premature,"
"37 to 40 or more full term."

It also lists 500 grams as a weight indication of early viability.

Principles and Management of Human Reproduction contains the following statement:

> "For the purposes of this discussion an abortion is considered the termination of pregnancy before 20 weeks of gestation counting from the first day of the

last menstrual period. It may be spontaneous or induced, the latter category being composed of what might be considered legal medical (therapeutic), and also criminal or illegal. As has been indicated, this is arbitrary but it does coincide with the definitions of many legislatures and has the merit of at least some medical justification. At this age the normal fetus weighs approximately 500 grams, has a crown-to-rump (CR) length of 16.5 cm., and, at least occasionally, is capable of extrauterine survival—it is then said to be "viable'. Viability, though, is a changing concept. Medical advances in the treatment of the premature make it possible to anticipate that even these very small abortuses of 20 weeks gestation may soon have a greater chance of survival and one surely does not then wish to describe a surviving fetus as an abortus."[106]

In "Resuscitation of the New Born Infant" (Third Edition, 1973) edited by Harold Abramson, M.D., emeritus professor of pediatrics of New York Medical College, Appendix I at page 384 is a guide for the study of perinatal mortality and morbidity. "Perinatal" means the first 28 days after birth. The Appendix instructs that, in order to get a proper statistical analysis "all deaths of fetuses weighing 501 grams or more (approximately 20 weeks gestation)" should be added to the deaths of new born infants to obtain proper mortality rates. This clearly implies that 20 weeks is the point of viability since infant deaths at that age should be included in infant mortality rates.

Twenty weeks is the line drawn for viability by the Advisory Group on the Use of Fetuses and Fetal Material for Research in its report to the Social Services Secretary of Great Britain in May of 1972. The report states: ". . . for ethical, medical and social reasons we recommend that for

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[106] Reid, Duncan E., M.D., Ryan, Kenneth J., M.D., Benurschke, Kurt, M.D. *Principles of Management of Human Reproduction,* W. B. Saunders Co., 1972 at pp. 254-255.

human fetuses, evidence of a period of gestation of 20 weeks should be regarded as prima facie proof of viability at the present time''. The now controversial guidelines of the Human Embryology and Study Section of the National Institutes of Health, relating to the use of human fetuses for experimental purposes, also has urged that the line be drawn at 20 weeks. For years state legislatures have used 20 weeks as the point at which death certificates must be filed in the case of neonatal deaths.[107]

Finally we turn to some additional statistical analysis supporting these conclusions. The most thorough study is now probably outdated by medical advances since it was based on live births and deaths, recorded in the Office of Vital Statistics of the New York Department of Health, for New York State exclusive of New York City in the years 1949, 1950 and 1951. It was made by Schelsinger and Alloway and published in Volume 15 of Pediatrics, the official publication of the American Academy of Pediatrics. It showed 622 live births with a gestational age of between 20 and 23 weeks and an 8.2% survival rate for these births.

Another study by S. G. Kohl summarized on p. 680 of Williams Obstetrics, shows a survival rate of 4.1% of fe-

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[107] E.G. see Ill. Rev. Stats. Ch 111½ Sec. 73-20. In fact, U.S. Public Health Service guidelines state:

> "Important: If a child breathes or shows any other evidence of life after complete birth, *even though it be only momentary,* the birth should be registered as a live birth and a death certificate also should be filed." (emphasis added) U.S. Dept. of H.E.W., Public Service Bulletin No. 593, 1958.

This is consistent with the typical state statute such as Illinois which defines a "live birth" as "the complete expulsion or extraction from its mother of a product of human conception, irrespective of duration of pregnancy, which after such separation breathes, or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles. . ."

tuses born weighing 401 to 1,000 grams (something less than 20 weeks to about 27 weeks).

A review of the testimony in the case and the medical literature on the subject shows rather clearly that viability cannot be defined as a static concept in term of weeks. Indeed, in each case the judgment of when viability occurs is a medical judgment which the physician determines on the same basis on which he makes any medical judgment—a reasonable medical certainty. Appropriately, the Missouri statute has left the matter to the judgment of the physician. And, as this court indicated in the *Vuitch* case, this standard is not only not constitutionally infirm for vagueness, it is uniquely appropriate to the "judgment that physicians are obviously called upon to make routinely whenever surgery is considered."[108]

Developing tort law also teaches us much about the significance of viability. As to the action for wrongful death resulting from negligent injuries to the unborn, the situation on a national basis was complicated by the varying provisions of the states' wrongful death statutes. However, at the time that the *Roe* v. *Wade* case was decided there was a distinct majority in favor of allowing such an action.[109] The Supreme Court in *Roe* v. *Wade* paid scant attention to these authorities and dismissed them with the statement that they represented only a vindication of the parents' rights. As Professor Ely says:

> "To the extent that they are not entirely inconclusive, the bodies of doctrine to which the court adverts respecting the protection of fetuses under general legal

[108] 402 U.S. at p. 72.

[109] 15 A.L.R. 3rd 992 (1967); "Wrongful Death and the Stillborn Fetus—A current analysis" 7 Houst. L. Rev. 449 (1970).

> doctrine tend to undercut rather than support its conclusion.''[110]

As though in agreement with Professor Ely's conclusion, since *Roe* v. *Wade* four State Supreme Courts have specifically created a cause of action for the wrongful death of a viable unborn child in their respective jurisdiction.[111]

The Supreme Court of Oregon, in the case of *Libbee* v. *Permanente Clinic,* held that the word ''person'' in its constitution included a viable but unborn child for purposes of maintaining a wrongful death action. The Court pointed out that since 1949 the Courts of 19 jurisdictions expressly permit an action for the death of a viable unborn child, whereas only 12 jurisdictions expressly prohibit such actions. As to the argument that an unborn child has no judicial existence apart from its mother, the Court stated:

> ''It is now recognized that there is no medical or scientific basis for such a proposition and it was expressly rejected by this Court in *Mallison,* at least with respect to a viable unborn child.''[112]

The Court pointed out that the decision in *Roe* v. *Wade* was consistent with its previous decision in *Mallison* to the effect that a viable child is a ''person'' entitled to the protection of Article 1, Section 10 of the Constitution of Oregon.

In *Mone* v. *Greyhound,* the Massachusetts Supreme Court reversed its own 1972 decision of *Leccese* v. *McDonough,* and held that ''a fetus is a person for purposes of our wrongful death statute''. The Court stated:

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[110] Ely, Op, cit., Note 8 Supra at p. 925.

[111] *Chrisofogeorgis* v. *Brandenberg,* 55 Ill. 2d 368, 304 N.E. 2d 88 (1973); *Libbee* v. *Permanente Clinic,* (Or.), 518 P.2d 636 (1974); *Eich* v. *The Town of Gulf Shores,* (Ala.), 300 S.2d 354 (1974); *Mone* v. *Greyhound,* (Mass.), ... N.E.2d ..... (1975).

[112] 518 P.2d at 640.

> "It can no longer be said with any degree of accuracy that the majority view allows a right of action only where injury is followed by live birth. In fact, a clear majority of jurisdictions having considered the question have chosen viability over live birth as the determinative factor for deciding whether a right of action for wrongful death will be allowed. A careful examination of the cases from other jurisdictions reveals that substantial precedent exists to support the viability rule."[113]

The majority concluded:

> "In view of our present analysis of *Leccese,* we can find neither reason nor logic in choosing live birth over viability for the purposes of interpreting our wrongful death statute. We agree with the majority of jurisdictions that conditioning a right of action on whether a fatally injured child is born dead or alive is not only an artificial and unreasonable demarcation, but is unjust as well."[114]

It is frequently argued that these cases do not represent a legal right in the child itself, but only vindication of the right of the parents or of the survivor. This argument is clearly erroneous since in order for the action to exist the unborn child must be found to be a "person" within the meaning of that word as used in the wrongful death statute. Once the Court has so found, then the right which accrues to the unborn child is identical to the right which accrues to any adult for whom the same cause of action might exist. Whether one labels that cause of action as vindication of the rights of survivors merely indicates the side which the viewer is taking of the abortion issue. The conclusion is inescapable: The unborn viable child is a bearer

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[113] ..... Mass. ....., N.E.2d (1975).

[114] Ibid.

in its own right of legal personhood for purposes of the wrongful death cause of action. This proposition, clearly the majority point of view in America, indicates that legal personhood and probably, someday again, constitutional personhood will begin en ventre sa mere, as it does in Oregon.

The argument is additionally erroneous because viability is a concept which concerns the developmental qualities of the unborn child itself in terms of its capacity to sustain its own life outside the womb. It would be totally unnecessary to consider viability at all if the action was merely to vindicate the parent. Indeed, it would be contradictory to do so, since the parent presumably wants the child, indeed loves the child, one week before viability as much as one week after.

IV.

SECTION 6(1) IS A REASONABLE REGULATION OF PHYSICIAN'S AND A REASONABLE EXERCISE OF STATE'S INTEREST IN FETAL LIFE. IT IS NEITHER VAGUE NOR OVERBROAD.

Section 6(1) of the Missouri statute was held unconstitutional by the court below and its enforcement enjoined. This section reads in part:

> "No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted."

The attorney general of Missouri argued that Section 6(1) of House Bill 1211, if correctly interpreted, would refer only to a time *after* the pregnancy had been terminated. Representative O'Toole, the sponsor of House Bill

No. 1211 in the Missouri General Assembly, testified that Section 6(1) was intended to preserve fetal health *after* the abortion was completed. Materials were distributed to various committees and members of the Missouri General Assembly describing the things that had been done to fetuses born alive as the result of an abortion. In order to prevent such occurrences in Missouri, it was the intent of the General Assembly to adopt a standard of care applicable to preservation of a fetus after its abortion. Such an interpretation would not contravene or infringe upon any right afforded by the state or U.S. Constitution to any pregnant woman desiring to have an abortion.

Once the fetus is aborted alive, the physician must then exercise the standard of care set out in Sec. 6(1). If Missouri can regulate abortion in the interest of maternal health beginning at approximately the end of the first trimester; and if it may proscribe abortion after viability except when abortion is necessary to preserve the health or life of the mother; it is only logical that the state has an interest in the protection of a fetus born alive.

A fetus born alive is a postnatal being and thus must certainly fall within the scope of Fourteenth Amendment "personhood".[115]

> "Born alive as ordinarily understood, and in fact, means 'brought forth' into life or existence, and a child is completely born when delivered or expelled from and becomes external of the mother."[116]

Since a born alive fetus is surely considered a "constitutional person", the statutory provision in effect exacts standards of medical care which are already existent.

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[115] Cf. *Roe* v. *Wade,* 410 U.S. at pp. 156-157.

[116] *State of Missouri* v. *Phason,* 406 S.W.2d 671, 690 (1966); *Goff* v. *Anderson,* 91 Ky. 303, 15 S.W. 866 (1891).

Plaintiffs argue that Section 6(1) prescribes the standard of care which a person performing any abortion must exercise for the protection of the "fetus", without reference to any particular stage of pregnancy and without reference to birth alive. Defendants argue that the proper construction to be given this section is that it requires attending medical personnel to take positive action only subsequent to an abortion in the event the fetus is alive. In addition to the legislative history, the statute as a whole supports this interpretation. Section 6(1) appears directly after that section of the statute (Section 5) dealing with viability. The following section (6(2)) concerns birth alive as does 6(3).

It is apparent that in its proper context Section 6(1) deals with a live born fetus. One cannot argue against the logic of Plaintiff's position that abortions "are intended to produce the death of the fetus." (Brief p. 108).

The issue here is, however, what is the applicable standard of care for the physician when the "purpose" of the abortion fails and the fetus lives? That such unforseen events are not altogether rare is clear from the Boston trial of Dr. Edelin and from the medical literature on the subject. (See Appendix D). Indeed, the problem is a recurrent one with every mid-trimester abortion.

One might argue that the physician's duty to a live born fetus is clear: he must treat the infant as his oath as a physician directs him to do with all his patients. That the standard is not clear is evident from the trial of Dr. Edelin as well as from the argument in Plaintiff's brief that since the purpose of abortion is the death of the fetus, the physician has no duty towards a live born infant who may not be viable in the strictest use of that word: able to survive the neonatal period (28 days) and go home from the hospital. (Appellant's Brief p. 68).

The Missouri legislature intended by Section 6(1) that every live born infant be considered viable in the sense that that word also means living. Any other interpretation would mean that infants live born as a result of abortion could be deliberately killed. There is no question that a grey area exists in the law. On the one hand, the state's interest in potential life according to *Roe* v. *Wade* begins at viability. On the other hand, infants are surviving abortions who are well under 24 weeks of gestational age.

In Appendix D we have supplied the court with a list of live births after saline as reported by Pakter et al. in *Clinical Ob. Gyn.* Twenty-seven cases are listed in a 6 month period shortly after abortion was legalized in New York. The gestational ages vary from a low of 16 weeks to a high of 30 weeks. Fourteen of the fetus' were 21 weeks in gestation *or under*. One of the infants survived (#5) and according to press reports was adopted. It should be emphasized that all but 3 of the infants in this study survived *after* undergoing the rigors of saline abortion.

The length of survival varies from five minutes (#14) to 53 hours (#12) to still alive (#5). Can the state assert an interest in these live born fetuses (infants)? *Roe* v. *Wade* did not consider this issue. There the court only spoke of viability in terms of the state's interest before the abortion procedure was commenced. The court has yet to face this extremely difficult and sensitive issue. May the state assert an interest in a live born fetus? Surely common sense says yes otherwise the court would be legalizing infanticide.

The United States District Court below concluded that the language of the first sentence of Section 6(1) was unconstitutionally overbroad for failure to exclude the stage of pregnancy prior to viability.

It is anomalous that the District Court should have reached such a decision in light of the evidence of legislative intent introduced in the evidentiary hearings by Representative O'Toole, the Sponsor of House Bill No. 1211. Mr. O'Toole testified that the purpose of Section 6(1) was to preserve fetal life after the abortion was completed. Once the fetus becomes viable or is born alive the state has a "compelling" interest in the protection of human life.[117] Section 6(1) read as a whole as it ought to be, strives to do just that—"protection of human life".

The problem as seen by the United States District Court is to a large degree semantical. The first sentence of 6(1) uses the terms "life" and "fetus" while the second sentence uses the terms "life of the child" and "child". The District Court interpreted "fetus" in Section 6(1) to mean a non-viable fetus. It is clear that the court did not understand nor face the issue which now faces this court.

The second sentence merely uses the word "child" for the obvious reason that once the fetus is live born it is now a child not a fetus. Far from creating confusion the use of the word "child" in the second sentence clarifies the intent of the first by showing for whose benefit the physician must exercise his care and skill: the live born fetus now a child. The United States District court for the Eastern Division erred in narrowly interpreting the word "fetus" in the first sentence of Section 6(1) and by failing to consider the specific nature of the problem in order to preserve the statute. Construing the first sentence in such a manner that it refers to a period prior to live birth is

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[117] 410 U.S. at pp. 156-157.

[118-123] These footnotes have been omitted.

not consonant with the legislative desire behind Section 6(1). Section 6(1) was intended to effectuate a legitimate state interest—protection of live born infants, specifically those who have survived abortions. Section 6(1) does not in any way affect a woman's right to an abortion or a physician's right to practice medicine; the aim of the statute is to protect children who have survived an abortion procedure.

V.

REQUIRING THE PATIENT'S WRITTEN, INFORMED CONSENT IS NECESSARY AND PROPER

Plaintiff-appellants argue that the informed consent requirement of the Missouri statute, in addition to being an unconstitutional intrusion on their First Amendment right to practice medicine, is unconstitutionally vague through its use of "informed" as describing the required consent. Plaintiffs complain that the section 3(2) fails to specify the nature of the information required to be given by a patient before her consent may be considered informed (Pl. Br. 72).

The word "inform" is defined in Webster's New Twentieth Century Dictionary (1950) as "to instruct, to communicate knowledge to, to make known to." "Consent" has been legally defined as a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice to do something proposed by another.[124] In the case of *Heine* v. *Wright*[125], it was said that "consent is implied in every agreement. It is an act unclouded by fraud, duress, or sometimes even mistake."

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[124] *People* v. *Kangiesser,* 44 Cal.App. 345, 186 P. 388, 389.

[125] 76 Cal.App. 338, 244 P. 955, 956.

Thus it is clear that the word "informed" in section 3(2) of the Missouri statute, as well as the words "freely given" and "not the result of coercion" are all elements of the legal definitions of consent. As such, the words "informed", "freely given" and "not the result of coercion" in the statute may be considered as mere surplusage.

Concerning what specific information is required to be imported by the doctor to the woman considering an abortion the Supreme Court in *Roe* v. *Wade* is a specific guide, and obviates plaintiffs objections of vagueness as to what information is to be imparted, namely:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician *necessarily* will consider in consultation. [126]

In deciding that a woman had a right to privacy within the Fourteenth Amendment's concept of personal liberty broad enough to encompass a woman's decision whether or not to terminate her pregnancy, the court specifically rejected the argument that the right to an abortion is absolute:

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[126] 410 U.S. at p. 153.

> We therefore conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation. [127]

Since the right to an abortion is a fundamental albeit limited right, state regulations limiting it may be justified only by a "compelling state interest". Legislative enactments concerning it must be narrowly drawn to express only the legitimate state interest at stake. The only compelling state interests considered by the United States Supreme Court in *Roe* v. *Wade* were relative maternal mortality rates as between abortion and childbirth in the first trimester, the woman's health and safety when an abortion is proposed at a later stage in pregnancy, and the state's interest in protecting prenatal life: "it is these interests, and the weight to be attached to them, that this case is concerned." [128]

The question then as to the informed consent provision of the Missouri statute is whether the state has a compelling interest sufficient to justify a regulation to assure that the decision is informed, and if it does, whether this enactment is drawn narrowly enough to express only the legitimate state interests at stake.

Testimony was offered by witnesses for both the plaintiffs and defendants in the court below which showed that the state indeed had compelling interests sufficient to support legislation requiring informed consent at all stages of pregnancy since the physicians are deliberately ignoring their duty to do so.

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[127] 410 U.S. at p. 154.

[128] 410 U.S. at p. 152.

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[127] 410 U.S. at p. 154.

[128] 410 U.S. at p. 152.

The evidence showed that there was little or no consultation by the doctor with the woman prior to her decision to abort concerning the factors the Supreme Court held should be necessarily considered, such as "specific and direct harm medically diagnosable even in early pregnancy," or "psychological harm." These factors, the evidence established, were not discussed at all, much less in a context, as the court's ruling suggests, of the doctor giving the woman reasons why the woman should or should not have an abortion.

It was clear from the cross-examination of one of the defendant's witnesses, Dr. Gerald Anderson who had performed approximately 2050 first trimester and 200 second trimester abortions at the Yale-New Haven Hospital in the past year (Tr. 306), that he considered himself a technician primarily. Dr. Anderson testified that he saw about 500 of the 2050 patients he had aborted personally prior to performing an abortion of them (Tr. 350). He obtained a written consent for the sole reason of protecting himself from civil liability (Tr. 353), and not to assure himself, as the Supreme Court contemplated, that the woman's consent was informed.

Dr. James C. Warren, an obstrician and gynecologist on the staff of Barnes Hospital testified for the plaintiffs that he too required written consent of his patients for surgical procedures. They certified their consent was informed. This was the case even prior to June 15th, the effective date of the Missouri statute. He testified that he generally talked first with the women upon whom he performed abortions and that abortion is "a stressful decision".

On cross-examination Dr. Warren testified that morbidity rates were insignificant to him as compared to mortality rates (Tr. 48). This attitude on the part of Dr. Warren

suggests that subsequent sterility or subsequent premature births his patients risk incurring as a result of abortion are inconsequential to him, too, so that he wouldn't advise them of such possible "specific harm medically diagnosable."

Mr. Peter Davis, president of the board of directors of the plaintiff organization, Planned Parenthood of Central Missouri, testified for the plaintiff on direct that if a woman who comes to their facility is certified to be pregnant, she is seen by a counsellor. The counsellor may or may not be a professionally trained counsellor, she may be only a volunteer. None of the counsellors are physicians. Most of their training is "experience" (Tr. 148).

Mr. Davis testified that the counselling aspect of the entire procedure is performed by somebody other than Dr. Pearman, the physician performing the abortions (Tr. 139).

Judith Widdecomb, executive director of Reproductive Health Services, Inc., an organization that had provided five thousand six hundred and twenty first trimester abortions in the preceding twelve months, testified for plaintiffs that their service provides counselling for women with problem pregnancies "as to the options and services available."

Dr. Matthias Backer an obstetrician and gynecologist practicing in St. Louis, Missouri testified for defendants that in his practice he treats infertility problems frequently. He has concluded that women who have had a previous induced abortion are at much greater risk of developing infertility subsequent to the abortion and as a result of the abortion. In these cases, the abortion created infection resulting in tubal occlusion or blocked tubes. He had also noted cervical incompetency in the case of pregnant women

who had previous induced abortions. The cervical incompetency resulted in delivery of immature and premature infants in subsequent pregnancies. Early delivery affects the central nervous system of the child. It may cause epilepsy, cerebral palsy, spasticity and mental retardation.

Dr. Backer testified that the observations he had made concerning the relation between a prior induced abortion and subsequent sterility or delivery of premature possibly handicapped infants in a subsequent pregnancy were confirmed by his readings of medical literature.

One report, the green journal of October 1972, was that the incidence of premature labor and still births occurred in pregnant women who had previous induced abortions twice as frequently as it did in pregnant women who had not had prior induced abortions.

There is also a higher incidence of other obstetrical complications including placenta praevia, abruptio placentae, premature separation of normally implanted placenta and of prolonged labor in addition to the less common but also serious problems such as iso-immunization of the mother to the ABO factor, for which there exists no preventative today (Tr. 219-223). Dr. Backer related cervical incompetency to abortion procedures involving vigorous dilatation of the cervix which would include procedures used within the first trimester of pregnancy.

In upholding the informed consent section (3(2)) of the Missouri statute, the court below relied on the holding in *Roe* v. *Wade,* in which the Supreme Court enumerated some of the factors, medical and psychological, concerning which the woman and her physician would necessarily consider in consultation prior to making the abortion deci-

sion. The court below also relied on the evidence, offered by both the plaintiffs' and defendants' witnesses, that the abortion decision is a stressful one at best, which requires consultation. Requiring written consent, the court below noted, is a common practice of physicians and requiring it for the abortion procedure simply includes it within the category of medical operations for which consent is required.

Plaintiffs, two physicians and an abortion facility, attack the consent requirements of the statute not only on their own behalf. They purport to attack the consent requirements on behalf of their absent women patients too. This they do even though the typical case where a person or a woman was alleging a lack of informed consent, the action would be against such a physician, i.e. the consent provisions are clearly devised as a protection for the woman or girl as against her physician or abortion facility. A preliminary consideration for this Honorable Court's ruling should be the propriety of a class action in which the interests a class asserts on behalf of a member of another class are possibly adverse.

Plaintiffs assert as to the consent provisions of the statute challenged by them, that state can show no compelling interest that would possibly intrude on their First Amendment rights to practice medicine according to their best medical judgments. Plaintiffs are offended by the criminal sanctions that might befall them if they should violate this criminal statute.

But such assertions of absolute First Amendment protection ignore the regulations imposed by the United States Supreme Court in *Roe* v. *Wade* and allowed there as permissible state criminal regulations imposed on their right to practice medicine. Under *Roe* for instance, a state

may constitutionally require, under penalty of criminal law that the physician-abortionist be licensed. The state may require under criminal penalty that the physician be licensed within the state in which he is performing abortions. It may require, possibly contrary to the individual physician's best medical judgment, that for the period just subsequent to the end of the first trimester, that abortions be performed in a hospital or clinic, and that the facility be licensed or regulated in ways that are reasonably regulated to maternal health.

The state may also require, under sanction of criminal law, that for the stage subsequent to viability, no abortion may be performed except where it is necessary to preserve the life or health of the mother. [129]

In addition to the above regulations which the Supreme Court held may be criminally proscribed, the court addressed itself to specific items about which the doctor would necessarily consult with a woman contemplating abortion, prior to her decision to abort or not and prior to the physician's independent decision as to whether he should abort her or not in his best clinical judgment.

In enunciating some of the factors *the doctor* will *necessarily* consider in consultation with the woman contemplating an abortion, the court further regulated the physician's right to practice medicine in a way he might see fit. Thus it may be seen that *Roe* v. *Wade* teaches that right to practice medicine, just as any other right, is a limited one at best.

The testimony in this case makes it abundantly clear that the statutory requirement for an informed consent is both

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[129] 410 U.S. at pp. 164-165.

necessary and proper. The standards are not vague nor do they unconstitutionally intrude into the physician's right to practice medicine.

VI.

THE PARENTAL CONSENT REQUIREMENT IS PROPER

The requirement of parental consent in the Missouri statute not only protects the minor daughter from the effects of her immaturity, but it safeguards the right and duty of a parent to protect the daughter from her immaturity, and safeguards the concepts of parental authority and its basis, parental responsibility for the daughter's nurture, care and education.

The parent's duty is spelled out in a recent Arizona Supreme Court juvenile action, *In re Appeal in Maricopa County,*[130] where the court reasoned, ". . . children are not property of their parents . . . on the contrary . . . children as persons have special needs and rights which are protected by law. One of those rights is the right of proper and effective parental control and care." The parent's right and duty to control the child is based on, and is therefore limited by, the child's need, so that in *Prince* v. *Massachusetts,*[131] even the precious First Amendment right of the parent to free exercise of her religion yields to the state statute protecting the minor's welfare. This court links the child's well-being with the interest of the state to justify intrusion into the family relationship: "It is the interest of youth itself, and of the whole community, that

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[130] 111 Ariz. 588, 536 P.2d 197 (1975).

[131] 321 U.S. 158, 64 S.Ct. 438 (1944).

children be both safeguarded from abuses and given opportunities for growth . . .''[132] Other parents' rights cases hold that the parents prevail over state interests where the state fails to show a sufficiently weighty justification to upset the autonomy of the family. For example, *Pierce* v. *Society of Sisters,*[133] announces that ''those who nurture [the child] and direct his destiny have the right coupled with the high duty, to recognize and prepare him for additional obligations,'' such obligations being in this case those presented in the course of the exercise of religious belief. Finally the Court in *Ginsberg* v. *New York,*[134] not only shields the family from unwarranted interference but holds that ''the legislature could properly conclude that parents . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.''[135] Throughout these cases, whatever the specific outcome, the pivotal consideration is the welfare of the minor.

Plaintiff-appellants cite the study showing that teenage pregnancies have a greater risk of death and medical complications than pregnancies of older women. The study also shows that the medical risk to minors is greater than it is for older women for abortions sought at any stage of pregnancy.[136] In view of the greater medical risk whatever

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[132] 321 U.S. at 165.

[133] 268 U.S. 510, 535 (1925).

[134] 390 U.S. 629 (1968).

[135] Justice Stewart concurring, 390 U.S. at 639.

[136] Legalized Abortion and the Public Health Institute of Medicine: National Academy of Sciences, Washington, D.C.: 1975 at p. 62.

the minor's choice ultimately is, parental responsibility for the consequences of the daughter's choice requires, in the interests of parental due process, a right of the parent to participate in the difficult decision.

The testimony at trial indicated that counselling provided at an abortion referral agency might take one or two hours. The decision was described as a "crisis" situation. Whatever the responsibility felt by the counselor, who may be a volunteer and whose training may only be "experience", one or even two hours of counselling falls far short of the parental duty and responsibility for the physical and psychological care of the child extending over a period of years until majority.

There is no doubt that legal rights of children have been extended recently, particularly in the area of due process for delinquency proceedings. The cornerstone case, *In re Gault,*[137] assures safeguards to the minor substantially equivalent to those given adult defendants. *Gault* severely criticizes the working out of the juvenile correction concept as eroding due process rights of minors under the guise of removing minors from the harsh imputation of criminal responsibility in adult criminal process. Even *Gault,* though, in its provision that notice be made to "a child *and his parents*",[138] and that the competency of a parent could supplement a child's deficiency in, e.g., waiver of the right of self incrimination, assumes the identity of interest between parent and child, and the parental responsibility to substitute his judgment for that of the child. This is consonant with *McKiever* v. *Pennsylvania,*[139] which

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[137] 387 U.S. 1, 87 S.Ct. 1428 (1967).

[138] Ibid. at p. .....

[139] 403 U.S. 528, 545, 91 S.Ct. 1976, 1986 (1971).

refrains from "a flat holding that all rights constitutionally assured for the adult accused are to be imposed upon the state juvenile proceeding," using "fundamental fairness" as the standard. Such fairness under the juvenile court concept involves providing the child support and guidance, and not in leaving him to his own resources. Justice Stewart, concurring in *Ginsberg, supra,* argues that

> in some precisely delineated areas a child . . . is not possessed of that full capacity for individual choice which is the presumption of First Amendment guarantees. It is only on such a premise, I should suppose, that a state may deprive children of other rights—the right to marry, for example, or to vote—deprivations that would be constitutionally intolerable for adults.[140]

Justice Goldberg, concurring in *Griswold* v. *Connecticut,*[141] recognizes the right to marital privacy and to marry and raise a family as being "of similar order and magnitude as the fundamental rights specifically protected" in the Bill of Rights. He goes on to state that the Government has no right to disrupt "the traditional relation of the family—a relation as old and as fundamental as our entire civilization." The *Griswold*-based right of privacy was extended in *Eisenstadt* v. *Baird,*[142] to apply to individuals irrespective of the family relation, and as such was applied in *Roe* v. *Wade.* However, these extensions in no way diminish the vitality of the family privacy and autonomy protected in *Griswold,* where Justice Goldberg called it a liberty "so rooted in the tra-

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[140] 390 U.S. at 649.

[141] 381 U.S. 479, 496, 85 S.Ct. 1678, 1688 (1965).

[142] 405 U.S. 438, 92 S.Ct. 1029 (1972).

ditions and conscience of our people as to be ranked as fundamental'' [citing *Snyder* v. *Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 333 (1934)]. The right to choose abortion, though ''fundamental'' according to *Roe,* is not so rooted in tradition and conscience, but rather is, as formulated by Justice Douglas in the majority opinion in *Griswold,*[143] a ''penumbra, formed by emanations from the [specific Bill of Rights] guarantees . . . '' Whether this distinction is of consequence in weighing the merits of the two basic rights is unclear. At any rate, *Roe* v. *Wade,* holds, following the standard of *Griswold* and *Kramer* v. *Union School District,*[144] the latter concerned with voter qualifications, that a ''compelling state interest'' must exist in order to limit the fundamental right to an abortion.[145] The very right at issue in *Kramer, supra,* and that upheld in *Tinker* v. *Des Moines,*[146] have in other circumstances been curtailed because of minority. *Ginsberg* affirmed the ''right of parents to deal with the morals of their children as they see fit'',[147] as this right bore on the child's First Amendment right to buy and use obscene literature. Every state has age qualifications restricting the fundamental right to vote, as noted in *Ginsberg, supra,* and even the right to marry, ''one of the vital personal rights essential to the orderly pursuit of happiness by free men'' *Loving* v. *Vir-*

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[143] 381 U.S. at 484.

[144] 395 U.S. 621 (1969).

[145] 410 U.S. at 155.

[146] 393 U.S. 503, 89 S.Ct. 733 (1969).

[147] 390 U.S. at 639.

gina,[148] is denied to minors in all states, subject to parental consent. It is respectfully submitted for the court's consideration that if it holds that an unmarried minor has the right to consent to an abortion without parental consent, that most if not all of the other legislation passed, supposedly for the welfare of the minor, to protect the minor from the possible effects of her immaturity will become constitutionally suspect, including the state's right to require parental consent for the marriage of a minor, to legislate against the distribution or exhibition of obscene materials or literature to minors, or to prohibit the sale of liquor or tobacco to minors. Legislation making contracts voidable when a minor is a contracting party will also be of questionable constitutionality. These fundamental rights, which have been conditioned as they apply to minors, are to be distinguished from the rights to fairness and due process protected in *In re Gault, supra,* and *In re Winship,*[149] which are accorded a minor regardless of his level of competence. The rights subject to parental consent or otherwise conditioned in their application to a minor have this in common, that they require exercise of judgment and personal decision-making on the part of the person exercising the right. It is precisely here, in relation to the abortion option, that the parents' duty and the minor daughter's need coincide, in the requirement for parental consent. Judge Julian, dissenting in *Baird* v. *Bellotti,*[150] considers the "possibility that the abortion might have been adverse to [the minor's] best interests . . ." and con-

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[148] 388 U.S. 1, 87 S.Ct. 1817 (1967).

[149] 397 U.S. 358, 90 S.Ct. 1068 (1970).

[150] 393 F.Supp. 847, 860, 862 (1975).

cludes that a state statute providing for parental consent

> protects the right of the parents to the liberty guaranteen them by the Fifth and Fourtenth Amendments. The statute protects the family relationship, the right and duty of parents to bring up their child, the right and duty of parents to inculcate moral standards; the statute provides protection for the parents' right and duty to make reasonable decisions . . . for the control and proper functioning of the family as a harmonious unit . . . The state has a compelling interest in protecting the parental rights and duties against unauthorized intrusion . . . Id.

The testimony at trial also clearly indicated the compelling need for a state regulation requiring parental consent in the case of an unmarried minor. It was the testimony of Dr. Warren, a physician who performed abortions, Mr. Peter Davis of Planned Parenthood, and Mrs. Judith Widdecombe of an abortion referral agency all testifying for the plaintiffs that written parental consent was required by them even prior to June 15, the effective date of the Missouri statute. But Dr. Warren's and Mrs. Widdecombe's testimony was that abortions would be performed on unmarried minors if consent were not legally required.

It was Dr. Warren's testimony also that the women, including minors, were "stressed to some degree whether or not to undergo an abortion. It's a stressful decision" (tr. 30). Mrs. Widdecombe described the abortion decision as a "crisis" situation.

Dr. Warren testified on cross-examination that even though he would perform abortions on minors without parental consent if it were legal, he preferred having the parent or guardian's consent because it gives evidence of family harmony. That family harmony was important to him as a physician (Tr. 71). The youngest woman who

had ever received an abortion from Dr. Warren was thirteen years old (Tr. 74). The youngest patient Mrs. Widdecombe's service had aborted was aged eleven, and the youngest they had ever counselled was age ten (Tr. 164).

Mrs. Widdecombe testified on cross-examination that the woman or girl "is encouraged to bring her husband or her boy friend or her family (because) those are the collaterals she needs, the support that they can give her and it needs to be a decision that can be made by everyone involved." (Tr. 155). After one to two hours of counselling, the *crisis* situation is evaluated and at that point she is given the options available to her.

Dr. Hanna Klaus testified for the defense that it was her practice and the practice of the institutions where she had worked, to require parental consent for surgery on an unmarried minor. Plaintiffs' counsel elicited Dr. Klaus' testimony on cross-examination that any abortion procedure in the first or second trimester has its inherent dangers no matter how well performed (Tr. 279).

Dr. William F. Kenkel, a sociologist specializing in marriage and the family, testified for the defense that in his opinion, a regulation such as 3(4) of the Missouri statute would strengthen the family as an institution in Missouri because it would promote both parental responsibility and the welfare of the child, too (Tr. 240).

Plaintiffs object to the parental consent provision of the Missouri statute as an "extra layer of regulation" on the abortion procedure even though the testimony at trial indicated that the requirement of parental consent was considered necessary to be obtained even before this statutory provision was passed.

The testimony also indicated, however, the strong desire on the part of plaintiff's witness to perform abortions on minors without parental consent. In this case, the state has

a compelling interest in passing such a regulation which *codifies existing practices* to leave no doubt as to the existence of such a requirement. It is not then an "extra layer of regulation."

As a further standard, *Roe,* at 155, provides that regulatory statutes be "narrowly drawn to express only the legitimate state interests at stake." The notion of consent requires that both the daughter and the parent share in the decision to abort; neither can give effect the decision without the other, for consent implies that there is something to consent to, in this instance, the minor's decision to abort. A parent could not be given a statutory right to determine unilaterally that a daughter should undergo an abortion, *In re Smith,*[151] and this statute has not been so broadly drawn as to attempt to give that power to a parent. On the other hand, the provision for parental consent assures that the minor daughter will not be left alone to undertake this decision which is awesome from any point of view.

Plaintiffs additionally oppose the requirement of parental consent because of the possibility of a parental veto being exercised over the minor's supposed right to an abortion. The remote problem of a parental veto, however, could be resolved by invocation of court in equity by the minor's best friend. This possibility is contained in the statute itself which provides for the consent of "one parent or a person in loco parentis."

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[151] 16 Md.App. ....., 295 A.2d 238 (1972).

VII.

THE NECESSITY FOR SPOUSAL CONSENT PROTECTS THE STATE'S COMPELLING INTEREST IN MARRIAGE

The statute before this Honorable Court provides for spousal consent prior to the termination of pregnancy. Consensual power is based on the legal relation of marriage, not on biological paternity or maternity. The state thus purports to find a sufficient compelling interest in the integrity of marriage and family life to preclude unconsented abortion where the life of the wife is not endangered. To protect this interest, the state acknowledges a joint interest and power of disposition of the married parties in their unborn child. That is, the unborn child is classified as a portion of the marital community and, as such, neither party may unilaterally terminate the other's interest. The power of the state to regulate abortion in this manner must necessarily flow from the state's power over and interest in the institution of marriage.

Marriage is both a basic civil right of man[152] and an institution upon which "society may said to be built".[153] Thus, the state may not unnecessarily impede the right to marry[154] nor procreate within marriage[55] but, nevertheless, re-

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[152] *Skinner* v. *State of Oklahoma,* 316 U.S. 535, 541 (1942).

[153] *Reynolds* v. *United States,* 98 U.S. 145, 165 (1878).

[154] *Loving* v. *Virginia,* 388 U.S. 1 (1967).

[155] *Skinner* v. *Oklahoma, supra* at note 152; *Loving* v. *Virginia, supra* at note 155, where state miscegination statute purported to protect against racially mixed children.

tains an extremely broad power over its incidents and formalities, extending even to limitations on the practice of First Amendment Rights. [156]

> When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties and obligations . . . The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and none other.[157]

The state, moreover, maintains an interest in the "regularity and integrity of the marriage relation"[158] and may classify persons[159] and properties [160] in relation to marriage to protect and strengthen family life. Thus, states frequently recognize and codify joint spousal interest in tax obligations, properties, contracts, tort causes and decedent's estates. Such mutual interests are not subject to partition, rescission or termination without the application of statutory criterion, usually through termination of the marriage itself. The joint interest of husband and wife in their *child* is such that, even where their marriage has been terminated and the wife awarded custody of the child, she may not precipitously terminate the parental interests

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[156] *Reynolds* v. *United States, supra* at note 153.

[157] *Maynard* v. *Hill,* 125 U.S. 190, 205 (1888).

[158] *Estin* v. *Estin,* 134 U.S. 541, 546 (1948).

[159] *Lavine* v. *Vincent,* 401 U.S. 522 (1971).

[160] *Id.*

of her former husband through adoption by a third party.[161] The state's regulatory entanglement in marriage and adoption requires it to recognize the interests of the husband as parent in the custody and care of his child.

It is therefore asserted that the state may recognize the joint and mutual interest of both parties to the marital relation in their unborn child where unconsented abortion presents a threat to compelling state interests in the integrity of marriage, demonstrated by the following considerations:

1. There is a direct relation between induced abortion and the incidence of infertility, subsequent spontaneous abortion, still birth and prematurity.[162] Besides affecting maternal health, the decision to abort may affect the procreative capacity of the entire marriage and thus affect the purpose and meaning of the marital relation.

2. States have the power[163] to refuse either spouse permission to marry while the other spouse lives and to penalize or prohibit procreative acts outside of marriage. By successively terminating her pregnancies, the wife would deprive her marriage of procreative capacity and her husband of a child. This power to block all marital procreation is likewise inconsistent with the purposes and meaning of the marital relation. Furthermore, the state retains the authority to determine the grounds for divorce. Thus, if the state should not choose to recognize a unilateral de-

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[161] *Armstrong* v. *Manzo,* 380 U.S. 545 (1965).

[162] Dr. Backer, Tr. 219, 223, Defts. Exs. V. O. S. and T.

[163] *Estin* v. *Estin, supra* at note 7; *Maynard* v. *Hill, supra* at note 6; *Crouch* v. *Crouch,* 28 Cal. 2d 243, 169 P.2d 897 (1946).

cision by the wife to abort contrary to her husband's wish as a legitimate ground for a divorce, the husband could be trapped in a marriage in which the procreative capacity of the woman is being destroyed, thus, in a marriage incapable of realizing one of its major purposes: the procreation and raising of children.

3. The relational integrity of marriage is protected by the mutual knowledge, consent and consultation of the parties in the important matter of child-bearing and procreation. Marriage has been defined as a "coming together for better or worse . . . an association that promotes a way of life . . . harmony in living . . . a bilateral loyalty."[164] The state here seeks to protect these aspects of the marital relation through the mutual consent of the parties to the disposition of their unborn child, much as this Court has determined that, through its interest in maternal health, the state might require the woman to procure and consult a physician will to perform the abortion at all stages of pregnancy.[165]

The Imbalance of the Rights and Obligations in Marriage in Relation to Unconsented Abortion

Unconsented abortion threatens the general purposes and integrity of the marital relation as well as the fundamental procreative, parental and marital rights of the husband in the specific unborn child his wife bears and thereby creates an imbalance in the rights and obligations of the parties to marriage. The state's power over, interest and entanglement in marriage permit it to recognize the hus-

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[164] *Griswold* v. *Connecticut,* 381 U.S. 479, 483 (1965).

[165] *Roe* v. *Wade,* 410 U.S. at 163.

band's rights and remedy the imbalance in the interests of the relational integrity of the institution.

> The Supreme Court has stated in essence that the woman has a fundamental right of private decision to terminate the pregnancy. No right of the fetus is recognized by that court, at least during the first two trimesters.
>
> But the father has rights. They are familial. They antedate the Constitution; they are about as old as civilization itself. They center in a main potentiality of his marriage: the birth and raising of children. Few human experiences have meaning comparable to parenthood. The father's rights asserted here are surely among the fundamental rights protected by the Constitution. [166]

The husband is an indispensable party to the marital relation and to the ideal exercise of procreative and parental rights and duties, as our law conceives of them. In no case is the husband foreign to the "zones of privacy" which protect fundamental parental,[167] marital[169] and procreative [169] rights.

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[166] Dissenting opinion of Hennessey, J., *Doe* v. *Doe,* Mass., 314 N.E.2d 128 at 134 (1974).

[167] *Meyer* v. *Nebraska,* 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Prince* v. *Massachusetts,* 321 U.S. 158 (1944); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972).

[168] *Griswold* v. *Connecticut, supra* at note 164; *Loving* v. *Virginia, supra* at note 154; *Bodie* v. *Connecticut,* 401 U.S. 392 (1971).

[169] *Skinner* v. *Oklahoma, supra* at note 1; *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972).

> In each case the right of privacy was but the correlative of the duty of the State to refrain from activity to which, by virtue of the limited nature of our constitutional government, it is obliged to remain a stranger. But who will assert that the husband here is, or could ever be, a stranger to the destruction of the fetus which he begot or to the possible future birth of his child? At base it was respect for the intimacy of certain sectors of human life which compelled the decisions of the Supreme Court insisting that government refrain from interfering in these private determinations. It is that same respect which informs us that a potential father's rights in the birth of a child cannot be dissolved by unreasoned reference to the Fourteenth Amendment. [170]

The husband cannot be reasonably said to be alien to the "zone of privacy" which protects the decision to abort: procreative capacity is by nature exercised by male and female together; under law, it ought to also be exercised by husband and wife together. Marriage, procreative and parental rights secured for the husband are not so separable, fragmented and unrelated that they cannot bear upon a wife's decision to terminate a pregnancy. The husband's procreative rights, once manifest, are not satisfied by the mere existence of embryonic life followed by its termination; parental and marital rights cannot be separated in a wholly artificial manner from the procreative capacity that brings them into being and renders them meaningful in the larger context of familial relations. The *affirmative* right of the male, "married or unmarried", [171] to decide to

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[170] Dissenting opinion of Reardon, J., *Doe* v. *Doe,* Mass., 314 N.E.2d 128 at 136 (1974).

[171] *Eisenstadt* v. *Baird,* 405 U.S. 438, 453 (1972).

beget and raise children is hollow indeed if the state may not, in some circumstance, act to secure his interests. Otherwise, even the husband is reduced to a mere "fertilizer" or "facilitator" of his wife's procreative decisions—forever dependent on his wife's decision to realize his procreative and parental rights and interests. To deny the husband an interest in his unborn child is to grant that the mere reproductive reflex of the female body renders the wife immune from all human claims—claims based on fundamental human rights—which the husband has upon the child she bears. We submit that such a concept of marital procreation, a doctrine of intra-uterine *materfamilias,* has no place in our concept of marriage, cannot be reconciled with the modern principle of equality of marital partners and is completely unreasonable in light of the responsibilities the husband must bear if the child is brought to term.

Either or both marriage partners may suffer the legal, economic, social or psychological "detriments" which, as this Court has observed, [172] may result from pregnancy and subsequent parenthood; either or both may suffer social, economic, legal or psychological detriments as the result of an abortion. Legally enforceable duties are incurred by the husband if the child is brought to term; legally enforceable duties may be incurred if the wife chooses to abort—for example, economic liability for the medical procedure and whatever complications which result in the woman or subsequent children of the marriage. Here, the joint interests and responsibilities of the parties to marriage create obligations and liabilities in the husband. Yet, if he is denied a joint interest in the disposition of unborn children to his marriage, he is burdened with all

[172] 410 U.S. at 153.

the liabilities and none of the prerogatives of decisions to bring children to term or not.

Thus, from both theoretical and practical perspectives, obvious imbalances and inequities are created in the marital relation where the wife may procure abortion without reference to the interests of her husband. Such imbalances threaten the integrity of marriage. The State of Missouri here hopes to remedy them through a statutory recognition of the interests of both parties in the disposition of unborn children which are products of their marriage.

Parental Rights and Interests of the Husband in an Unborn Child of His Marriage

Thus far we have urged this Court to recognize the compelling state interests served through a statute requiring spousal consent to abortion through protecting the meaning and purpose of marriage, promoting the mutuality of its parties and fostering the integrity of the institution by balancing the rights and duties of husband and wife. Finally, we argue that it provides a mechanism to secure the fundamental parental rights of the husband. In other words, the statutory provision implements already existing parental rights of the husband. We assert that the same parental expectations and interests which would protect the mother from coercive abortion [173] according to our Constitution accrue to husband and wife alike.

This Court intended neither to institute "abortion on demand" [174] nor to affirm the concept that "one has an unlimited right to do with one's body as one pleases." [175]

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[173] Surely this Court meant in *Roe* that the right to decide to abort includes the right to carry a child to term.

[174] *Doe* v. *Bolton,* 410 U.S. at 189.

[175] 410 U.S. at 154.

In *Roe* it explicitly declined consideration of the husband's or father's interests in the abortion decision. The nature and extent of the limitation to "right to privacy . . . broad enough to encompass a woman's decision whether or not to terminate her pregnancy" [176] were decided solely on the basis of the state interests, i.e. maternal health and potential human life, which were presented by the Georgia and Texas statutes then before this court. (See Supra, Section II). Although the state retains an interest in potential human life *throughout* pregnancy, this interest alone is insufficient to prevent the mother from terminating her unique relationship with the unborn child until it is capable of "meaningful life outside the womb". [177] However, given the situation in which the wife wishes to reject parenthood by terminating her pregnancy but her husband does not, the combination of state's interest in potential human life, its important interest in the regulation of marriage and abortion, and the already existing private rights of the husband, allows the state to recognize and implement the husband's parental interest in the live birth of his unborn child to be superior to his wife's private interest in its destruction and to implement this recognition via a statutory enactment of the type before this Court.

The right to terminate a pregnancy, to remove a fetus or embryo from the womb, does not imply superior possessory or quasi-parental rights of the mother in her unborn child. Clearly, the nature of the abortion decision implies the rejection of any interest she might have in the child after birth. (See Infra, Section VIII.) But from this perspective, when the wife terminates her pregnancy, she rejects parenthood not only for herself but also her husband.

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[176] 410 U.S. at 153.

[177] 410 U.S. at 163.

Furthermore, by deciding to abort, the woman may avoid the temporary problems of pregnancy whereas her decision does permanent injury to a father who desires the affection and companionship of his child. Where the husband is allowed no decision making authority in the disposition of an unborn child which is a product of his marriage, his private legal interests in his unborn child totally lack the protection of law.

> The private interest here . . . undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." [178]

If the "rights to conceive and raise one's family have been deemed 'essential', [179] such rights must surely extend to protection, care, custody and management of a husband's child to be born of his marriage sufficient to preclude an arbitrary decision of his wife to deprive him of his child's companionship.

This Court has recognized that tort and inheritance law "vindicate the parents' interest" [180] (emphasis added) in potential human life. The theory which would grant parental recovery for the wrongful death or injury to their child only if the child lives is grounded upon joinder of parental interests with those of the child: the parent may recover only if the child could have recovered if it had sur-

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[178] *Kovacs* v. *Cooper,* 336 U.S. 77, 95 (1949), quoted in *Stanley* v. *Illinois,* 405 U.S. 645, 651.

[179] *Stanley* v. *Illinois,* 405 U.S. 645, 651.

[180] 410 U.S. at 162.

vived.[181] But the interest asserted here on behalf of the husband is not dependent upon recognition of the full humanity of the unborn or the ability of the parent to maintain an action for wrongful death or injury to a previable child: the interest asserted here is *separate and apart* from the interests which the unborn might assert on its own behalf and, as such, does not require joinder of parental interests with the interests of the unborn. Recognition of a *parental* interest in the unborn depends upon the fact that, absent accident or human intervention, the *relationship* of parent and child would inevitably arise.

The interest the law recognizes between parent and child is "relational",[182] as are the other interests that accrue to family members by virtue of the familial relationship; such interests are cognizable at law when the expectations that arise from present circumstances are denied fruition.[183] Constitutional protection has been ac-

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[181] Note, *Law and the Unborn Child,* 46 Notre Dame Law 349 (1971).

[182] See generally Green, *Relational Interest,* 29 Ill. L. Rev. 460 (1934); Pound, *Individual Interest in Domestic Relationships,* 14 Mich. L. Rev. 177 (1916).

[183] Seen generally W. Prosser, Handbook of the Law of Torts 873-888 (4th ed. 1971). Alienation of affections, criminal conversation, loss of consortium of husband and wife or parent and child may form the basis of a tort of interference in family relations. Unconsented abortion could form the basis of a tort where alienation of the procreative facility is thought an offense against marriage, as alienation of affections or criminal conversation constitute an offense against the sexual aspect of marriage. Adultery, fornication and bigamy are crimes against the relational integrity of marriage. See 13 Journ. Fam. Law 311 (1973-74) for inadequacies of tort remedies. Unless an interest of the husband or father is recognized in his unborn child, the development of a tort seems unlikely.

knowledged on behalf of the integrity of family relations on numerous occasions. [184]

Likewise, the "relational" interests of the parties to marriage and family, in situations in which one party would attempt to terminate the interests of the other, have been given constitutional protection. As before noted, the state must recognize the interests of even a divorced husband where his former wife, who had been awarded custody of the child of their marriage, attempts to dispose of his interest through adoption by a third party. [185] Disestablishing a sexual stereotype enshrined in state law and recognizing the "private" relational interests of even putative fathers, this Court has ruled that an unmarried father may not be conclusively presumed an unfit parent, [186] citing the same precedents in support of his parental interests as employed by this Court, to support the woman's right to terminate her pregnancy. The state may not conclusively presume that custody and care of children be granted to unmarried mothers in derogation of the parental interests of unmarried fathers. [187] If this Court has seen fit to recognize the parental rights of putative fathers whose children might be disposed to the custody and care of the state or even their natural mother and has seen fit to recognize the parental rights of divorced husbands whose former

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[184] See note 167 *infra.*

[185] *Armstrong* v. *Manzo, supra* at note 161.

[186] *Stanley* v. *Illinois,* 405 U.S. 645 (1972). The rights of the father were recognized as fundamental. 405 U.S. at 651.

[187] *Rothstein* v. *Lutheran Social Services,* 405 U.S. 1051 (1972); *Vanderlaan* v. *Vanderlaan,* 405 U.S. 1051 (1972).

wives release the custody of the children of their marriage to third parties, how can one reasonably assert that the husband of an intact marriage has no rights in situations where his wife would permanently dispose of his child through the abortion decision?

The state interest in children and entanglement in the regulation of custody procedures allowed, *required* it to recognize the "private" parental interests of husband and father in *Stanley, Vanderlaan, Lewis* and *Armstrong.* Likewise, we urge this Court to recognize that the state's residual interest in potential human life throughout pregnancy, its entanglement and interest in marriage and abortion permits it to recognize these same parental interests of the husband when abortion threatens to deprive him of legitimate fatherhood in a manner far more effective, permanent and unappealable than through adoption or relinquishment of custody and care to the state. The parental expectations of a husband whose wife bears a child are as strong, as tangible and as cognizable at law as those of putative fathers and divorced husbands.

The superficial analysis of the Fifth Court of Appeals in *Poe* v. *Gerstein,*[188] that under *Roe* v. *Wade* the fetus is not a person, therefore it is not a child, does not answer this argument. What this Court had the authority to decide and what this Court did decide in *Roe* v. *Wade* was whether an unborn human being enjoyed the protections of "persons" under the U.S. Constitution. This Court concluded that the fetus was not a constitutional person. This Court did not decide that the fetus was not a "person" under other theories of law or an object subject to the relational or common law parental interests of a father.

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[188] *Poe* v. *Gerstein,* CA 5, 8/18/75, 1 FLR 2743.

The parental interest of the husband cannot be reasonably attached to the trimester criterion previously established by this Court for state regulation in relation to its interests in maternal health and potential human life. One reason for this is that the trimester division determined by this Court in *Roe* for the allowance of state intervention to protect maternal health was based on medical statistics concerning the relative mortality rates in first trimester abortions versus natural childbirth (See Supra, part ....). These statistics obviously have no relation to any parental interests in the husband which have always existed at common law. The fruition of parental interests are most pointedly threatened in the early stages of pregnancy when abortion will most certainly prevent the live birth of a healthy child and the husband's rational interest is, in any case, violated at any time abortion threatens to defeat his tangible parental expectations.

The existence of state and parental interests in potential human life distinguishes abortion from contraception—this Court has recognized that consideration of abortion involves interests that caused the case before it to be "inherently different than . . . *Eisenstadt.*" [189] Individual decisions whether to contracept or not do not involve existent potential human life to which state interests and parental expectations may be attached.

Finally, we urge this Court to further consider scientific advances which emphasize the urgency of recognizing a husband's parental interest in his unborn child.[190] It is

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[189] 410 U.S. at 159.

[190] This Court recognized such advances in *Roe* v. *Wade,* 410 U.S. at 161.

clear that such techniques as artificial insemination,[191] *in vitrio* fertilization, embryo transfer and transplantation [192] and fetal experimentation,[193] as well as the techniques used in abortion,[193a] raise serious issues as to the rights and interests of father and husband before the viability of the unborn child.

We strongly urge this Honorable Court to find that unconsented abortion may threaten the purposes and integrity of the marital relation. The compelling interest of the state in marriage should permit it to classify the unborn child of a marriage as a portion of the marital community, subject to disposition, where the life of the mother is not endangered, only by the mutual consent of the parties to marriage.

We further urge this Court, in the course of deciding the constitutionality of the statute now before it, to acknowledge that fundamental rights of the husband bear upon an

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[191] See Comment, *Artificial Insemination and the Law,* 1968 Ill. L.F. 203 (1968); Guttmacher, *Artificial Insemination,* 18 DePaul L. Rev. 566 (1969).

[192] See Oakley, Test Tube Babies: *Proposals for Legal Regulation of New Methods of Human Conception and Prenatal Development,* 8 Fam. Law Q. 385 (1974).

[193] Proposed regulations governing fetal experimentation require the natural father's consent, if known. *Federal Register,* Proposed H.E.W. Reg. 46, 306, 39 Fed. Reg. 30654 (Aug. 23, 1975).

[193a] Though not related to the needs of the mother, physician and wife may choose methods of abortion which insure the death of the fetus even if other methods were employed, the child might survive. Likewise, methods which cause the fetus great pain (or make no effort to alleviate pain)—surely of concern to the unconsenting father or husband.

unborn child to be born of his marriage which the state may protect through regulation of the marital relation. We trust that this Court is sensitive to the important consequences to the legal nature of marriage and parenthood its decision will here effect.

VIII.

PARENTAL RIGHTS ARE PROPERLY TERMINATED AND PROTECTED

Section 7 of the statute provides that in the event a live-born infant results from an abortion not performed to save the life or health of the mother, the child shall be an abandoned ward of the state and the mother and father, if he consented to the abortion, shall have their parental rights terminated.

Section 8, intended to be read and construed with section 7, provides that any woman seeking an abortion shall be verbally informed of the provisions of section 7 by her physician, and that the woman shall certify in writing that she has been so informed.

The issues are: 1) whether such statutory provision violates the due process rights of the biological mother and father; and 2) whether such statutory provision is in conflict with previous decisions of this court.

The rational interpretation of these sections is that where an abortion consent has been signed by the parents and the mother has been informed that her parental rights will be terminated if a live birth results from the abortion, and she then proceeds to have an abortion despite this knowledge, a constructive abandonment of the live infant is effectuated.

The state as parens patriae has a wide range of power for limiting parental freedom in matters affecting the child's welfare.[194] Almost all the states have statutes making abandonment of children a crime and providing that the child may then become a ward of the state. This power is based on the state's duty as parens patriae to protect its citizens who are unable because of infancy to take care of themselves,[195] and on the right of the child to the protection of the state, as well as the state's interest in its own perpetuation.[196]

A parent may voluntarily relinquish his right to custody by abandoning the child.[197] Generally, this abandonment must be of a positive kind. To constitute such abandonment or desertion of a child within the meaning of statutes making it an offense, there must be an actual, voluntary, or willful *desertion* of the child with an *intent* to sever the parental relation entirely, so far as it is possible to do so, and to throw off all obligations growing out of such relation.[198]

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[194] *Prince* v. *Massachusetts,* 321 U.S. 158, 167, 88 L.Ed. 645, 64 S.Ct. 438 (1943).

[195] *Oakes* v. *Oakes,* 45 Ill. App. 2nd 387, 195 N.E.2nd 840, 99 ALR 2nd 949 (1964).

[196] *Wilson* v. *Mitchell,* 48 Colo. 454, 111 P. 21 (1910); *Finlay* v. *Finlay,* 240 NY 429, 148 NE 624, 40 ALR 937 (1925).

[197] *Lally* v. *FitzHenry,* 85 Iowa 49, 51 NW 1155 (1892); *De Witt* v. *Brooks,* 143 Tex. 122, 182 SW2nd 687 (1944).

[198] *Brooke* v. *State,* 99 Fla. 1275, 128 So. 814, 69 ALR 1173 (1930); *People* v. *Dunston,* 173 Mich. 368, 138 NW 1047 (1912).

When the parents sign the abortion consent and then the mother, in writing, certifies that she knows that her parental rights will be terminated, and finally she undergoes the abortion, the two requirements of abandonment are fulfilled. The desertion is the physical abortion: the effort to prematurely and at risk to the fetus rid herself of the fetus. The intent to entirely sever the parental relation is fulfilled by the abortion itself, as well as by the fact that the abortion is done with full knowledge by the mother that her parental rights will be terminated if a live birth results.

A parent cannot be deprived of his parental rights without due process of law.[199] Before parental rights are terminated, it must be made to appear in some manner that the parents have legally surrendered or forfeited such rights.[200] These requirements of due process and a legal surrender of parental rights are fulfilled by the signed consent to the abortion of the product of conception and the acknowledgement that any parental rights will be terminated if a live birth results.

In *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923), this Court addressed itself to the 14th Amendment and stated that ". . . it denotes . . . the right of the individual . . . to marry, establish a home and bring up children." The Missouri statutory provisions under consideration do not diminish these rights: they merely provide for the due process procedures of written consent to the abortion and written acknowledgement of the termination of parental

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[199] *Stanley* v. *Illinois,* 405 U.S. 645, 31 L.Ed.2nd 551, 92 S.Ct. 1208 (1972).

[200] *Sherry* v. *Doyle,* 68 Utah 74, 249 P. 250, 48 ALR 131 (1926).

rights in order that the desire of parents not to raise a child may be knowingly and constitutionally effectuated. The signed consent and informed acknowledgement conclusively demonstrate the deliberate, willful, intentional desire of the parents to close off forever their duties and responsibilities to a liveborn child.

As Dr. Warren testified at the trial of this case, the abortion decision is a "stressful" one. (R. 30). By signing the consent and the certification of knowledge of loss of parental rights, the abortion decision and its consequences become even more real and concrete to the mother: only after this does she have the abortion. These sections are not, as appellant argues, a threat to dissuade women from electing abortion: rather they operate as a safeguard against impulsive action by bringing home to the woman the seriousness and the consequences of the abortion decision. The sections have the effect of easing the already burdened mind of the mother. By virtue of sections 7 and 8 the mother is aware of the fact that the fetus she does not want will, if born alive, be provided for.

Sections 7 and 8 are controlling only in the event of a live birth. During the first trimester, when the abortion decision belongs exclusively to the mother and her physician, there is no medical possibility of a live birth. Thus these sections will take effect only after the first trimester, when it is reasonable and appropriate for a State to decide that the interest of potential human life becomes significantly involved.[201]

If sections 7 and 8 are held invalid, the situation may well present itself of parents who, for whatever reason, be it monetary, psychological, or otherwise, have made the

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[201] *Roe* v. *Wade,* 410 U.S. 113, 159, 93 S.Ct. 705, 35 L.Ed.2nd 147 (1973).

stressful decision to have an abortion fully expecting it to be conclusive; that is, the delivery of a dead fetus. Subsequently they will be handed a live, viable child which probably requires medical attention because of its prematurity: a child they had not planned for, had not wanted, and towards whom they had sought to avoid all parental responsibilities.

The statute is not punitive in nature—its intent is not to punish parents by having their live-born children declared wards of the state. The provisions are rather remedial in nature, recognizing that some parents do not want to have a child: that this desire is so strong that they carry out an abortion attempt which results in an unwanted child. The provisions attempt to remedy the situation of both the parents and the child. The parent is relieved of his obligations and duties towards the child, as he desired, and the live-born fetus will be cared for as a ward of the state. This is a much more practical and desirable result than having an unwanted child living with parents who have already decided that they are unable or unwilling or both, to assume parental responsibilities towards that child.

The exact nature of parental rights has never been closely determined in a legal sense. Some courts say the relationship is one of "personal trust".[202] Some courts state that the parent-child relationship is a status, not a property right, and thus upon adoption a different status is created. Juvenile courts often take custody of a "neglected" child. The term "neglect" is one whose meaning has not been absolutely defined, but it generally contemplates

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[202] *Moreau* v. *Buchholz,* 124 Colo. 302, 236 P2nd 540 (1951); *Re Tom,* 37 Hawaii 532.

the failure of the parents to exercise the care that circumstances justly demand and includes willful as well as unintentional disregard of duty.[203] A denial to a child of affection, guidance and consideration, amounting to a rejection of the child . . . is as neglectful as a failure to provide for the ordinary physical needs of the child.[204]

Applying the above theories and rules of neglect, it is evident that by signing an abortion consent, acknowledging the termination of parental rights, and then having the abortion, the parents have rejected the "personal trust" that is implied between parent and child, and they have voluntarily relinquished their "status" as parents. Further, these acts of the biological parents amount to a constructive neglect situation with the liveborn infant because desiring and carrying out an abortion is tantamount to a denial of affection and consideration and is indeed failure to provide for the ordinary physical needs of the viable fetus. At the very least, these acts imply a conscious rejection of parental responsibilities and resulting neglect. A recent decision involving similar reasoning buttresses this fact. In the case of *In re Orzo,* NY FamCt Ny City (11-18-75) the court held, pursuant to a New York statute, that because a mother "failed substantially to plan for the future of her children for a period of more than four years" her parental rights could be terminated (2 Family Law Review 2072, 12-9-75). If parents who do not plan more than four years in advance for their children may have their rights terminated, it is clear that those parents who do not plan at all for their children's future, who in-

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[203] 47 Am.Jur.2nd., Juvenile Courts, Etc. § 25 p. 1005 (1969).

[204] Ibid., *Re Carl,* 174 Misc. 985, 22 NYS2nd 782 (1940).

deed strongly desire and have taken positive action in order not to be burdened or blessed with children, should also have their rights terminated, as they have manifested a desire to do, in the best interests of those children.

The above discussion has demonstrated the power of the state to take custody of a child when it is deemed abandoned or neglected and that the requirements of abandonment and neglect are fulfilled by the consent of the parents to the abortion, the acknowledgement by them of their termination of parental rights, and the abortion attempt.

By virtue of the live birth, the requirement of "personhood" is fulfilled [205] and the infant is thus entitled to the protection of the 14th Amendment. The clear intent of sections 7 and 8 of the Missouri statute is to entitle the infant who is unwanted by his biological parents to the protection of the state. The ultimate test is what is in the best interests of the infant who survives the abortion. That best interest is not satisfied by exiling such infant to the custody of parents who have taken steps to thwart his or her very existence.

The appellant argues that these provisions are directly contrary to explicit holdings on the identical question in *Doe, et al.* v. *Rampton, et al.,* 366 F. Supp. 189 (D. Utah, 1973), *Stanley* v. *State of Illinois,* 405 U.S. 645 (1972), *Roe, et al.* v. *Wade,* 410 U.S. 113 (1973), *Doe et al.* v. *Bolton, et al.,* 410 U.S. 179 (1973) and *Jones* v. *Smith, et al.,* 278 So. 2nd 339 (Fla. Ct.App., 1973), cert. denied, 415 U.S. 958 (1974). Each of these cases involves completely different statutes, facts and issues than those in sections 7 and 8 of the Missouri statute.

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[205] Cf. *Roe* v. *Wade,* supra.

Doe v. *Rampton* was a 1973 opinion rendered by a three judge Federal court with Judge Lewis specially concurring and Judge Anderson concurring in part and dissenting in part. The Utah statute had a similar provision to section 7 of the statute now under consideration. The Utah statute stated that any child surviving an abortion shall be a ward of the state and that the parents who consented shall have no parental rights. (Chapter 7, Title 76, section 311, Utah Code Annotated 1953). This section was declared invalid because:

> ". . . it threatens every woman who has an abortion, at any stage of pregnancy and for any reason, with termination of parental rights without due process of law." *Doe* v. *Rampton,* supra, p. 193.

The crucial distinction between the Utah and Missouri statutes is that the former has no provision comparable to section 8 of the latter, and thus the former is not controlling.

Section 8 provides that a woman be verbally informed of the fact that she and the father, if he consented, shall have no parental rights in the case of a live-born infant. When she certifies in writing that she is so informed and then voluntarily has the abortion, the requirements of due process are fulfilled and she has voluntarily and knowingly waived and forfeited the parental rights.

The right to conceive and raise a family is, of course, "essential",[206] yet this right may be surrendered. This court has stated that:

> ". . . the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

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[206] *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923).

However, if the parents choose to abort thus choosing not to accept the custody, care and nurture of the child, the requirements of due process are met and the state must assert its power in the child's best interest. Section 8 provides for an implied consent to the terms of section 7 of which the parents have been advised. When, after being informed of their possible loss of parental rights, the parents proceed to have an abortion, it is clear that the parents have waived their rights consistent with due process.

Because sections 7 and 8 together fulfill due process requirements, *Doe* v. *Rampton* should not be considered by this court on the issue of termination of parental rights.

Stanley v. *Illinois,* supra, held that under the due process clause of the 14th Amendment an unwed father of two children was entitled to a hearing on his fitness as a parent before his children were taken from him upon the death of their mother. That case is totally opposite from the one before the court. The Missouri statute involves live-born infants whose parents had attempted to abort them and had further shown a conclusive desire not to exercise any parental rights nor accept parental obligations towards them. *Stanley,* on the other hand, involved a parent who actively sought to exercise his rights and obligations to his children, who were beyond infancy.

This statute expresses no presumption of unfitness on the part of parents who choose to abort. It merely provides that if parents do make this decision after full realization that all parental rights will be terminated, the resulting live birth, if any, shall be a ward of the state, since the parents have clearly chosen not to accept it.

Thus *Stanley,* on its facts and the reasoning involved, is not relevant in a consideration of sections 7 and 8.

Roe, supra and *Doe,* supra, likewise should not be regarded as controlling here because the issue of termination of parental rights was not before this honorable court in those cases. The Texas abortion statute considered in *Roe* and the Georgia statute considered in *Doe* contained no provisions similar to sections 7 and 8.

In the *Jones* case, firstly, the cause of action was brought by a putative father who was attempting to restrain the mother from having an abortion. They were unmarried. In the second place, the issue in that case is very different from the one presented here. In *Jones,* the court phrased the question as being 'does a potential putative father have the right to restrain the natural mother from terminating a pregnancy resulting from their cohabitation?' The issue here is whether sections 7 and 8 providing for termination of parental rights if a live birth results from an abortion violates due process rights. As in *Roe* and *Doe,* supra, the issue presented here was not addressed in *Jones,* either; thus *Jones* is not controlling.

It is clear, then, that none of the cases appellant has cited in opposition to sections 7 and 8 are controlling in the issue.

Appellant also attacks the Missouri provisions on the ground that putative fathers are not required to consent to an abortion, thus granting to putative fathers greater rights than to spouses of the pregnant woman. The reasons why such fathers are not required to consent is stated well by Chief Justice Burger in his dissenting opinion in *Stanley* v. *Illinois:*

> "Unwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare; and, of course, many unwed fathers are simply not aware of their parenthood." (*Stanley,* supra, p. 665)

It is a well known fact that in many cases the putative father cannot be found or cannot be identified or would like to avoid any dealings with the woman who is carrying the child. To require his consent to the abortion would place impossible burdens on the mother who desires the abortion—she would have to find the father, and possibly even bargain with him for his consent, not because he wants the child, but because he wants some benefit, monetary or otherwise, for himself. This situation would be intolerable and would lead to great abuse of persons involved, especially the mother and child. For these reasons, the Missouri legislature has allowed the unwed mother to secure an abortion without the consent of the putative father. This is a rational, practical distinction which eases the burden on the single woman seeking an abortion.

The provision in the statute requiring the spouse to consent is a recognition by the legislature that the spouse generally has much more interest and concern in the abortion decision than the unmarried male. In the interests of family harmony and the marital relationship, the abortion decision should be arrived at by husband and wife together, at least after the first trimester.

In conclusion, with respect to the state's important and legitimate interest in potential life, the "compelling point" is at viability.[207] When the infant is born alive, it is obviously viable and in sections 7 and 8 the state of Missouri has asserted its legitimate interest. The subject matter of these sections is not maternal health or even potential life, but rather an existing infant. "The State's power to protect children is a well-established Constitutional maxim." [208]

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[207] *Roe* v. *Wade,* supra, p. 163.

[208] *Shelton* v. *Tucker,* 364 U.S. 479, 485 (1960).

Because the live-born infant is unwanted by its parents; because they have chosen and consented to an abortion; because the mother has certified in writing that she knows that if a live-birth results, her parental rights may be terminated, and because the parents have chosen not to accept their parental rights and responsibilities, the child is "abandoned" and "neglected" and may be declared a ward of the state.

A mother who is the victim of an unwanted pregnancy, who desires an abortion, should not then be forced to keep an unwanted child with the attendant responsibilities, or to go through lengthy adoption or custody proceedings. She has made an extremely difficult decision and knows that, if born alive, her child will be protected. If these sections are held unconstitutional she will be forced to keep the unwanted infant. As this honorable court stated so eloquently in *Roe:*

> "Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved." [209]

Our previous argument was based on the statute itself without reference to other Missouri statutes. However, as to the argument of Plaintiffs that this section of the statute lacks due process standards protecting the parents, the majority opinion of the court below correctly stated:

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[209] 410 U.S. at 153.

> "In the rare instance in which a live birth would result from an attempted abortion the state would be justified in assuming immediate temporary custody of the unwanted child. It is a simple matter for the juvenile court to insure that parents of such a child be given an adequate opportunity to be heard before parental rights are permanently terminated. Section 7 specifically provides that the parents of a child aborted alive shall have no parental rights as if their "rights had been terminated pursuant to section 211.411" (sic) of the Missouri Revised Statutes. RSMo. 211.411 sets forth the circumstances under which parental rights may be terminated. These circumstances include abandonment of the child, which is exactly the situation Section 7 is designed to protect. Chapter 211 of the Missouri statutes provides for notice, an opportunity for the parents to be heard and present testimony on their behalf, right to counsel and right to a jury trial of the issues. House Bill 1211 thus incorporates by reference statutory due process guarantees which provide adequate protection to the parents of a live aborted child who might desire to regain custody of such a child."

Thus it is clear either from a consideration of the statute itself or in conjunction with other applicable Missouri statutes that the due process rights of the parents are fully protected before permanent termination. In the rare and hardly foreseeable instance where parents change their mind after the abortion, the full panoply of due process rights are guaranteed them under RSMo. 211.411 which provides for notice, an opportunity to be heard, right to counsel and even a right to a jury trial, if it should be desired.

IX.

THE PROHIBITION OF SALINE AFTER THE FIRST TRIMESTER IS A REASONABLE REGULATION FOR PURPOSES OF MATERNAL HEALTH

The court below upheld Section 9 of the Missouri statute which forbids the method of saline abortions. Section 9 reads as follows:

> "The general assembly finds that the method or technique of abortion known as saline amniocentis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy."

The court below upheld this section as a reasonable state regulation in the interest of maternal health. Much testimony was elicited on this issue and discussed by the court in its opinion. The testimony of Dr. Anderson, Chairman of the Department of Obstetrics and Gynecology at Yale University School of Medicine is replete with the dangers to maternal health from saline abortions. As he indicates, the major complications such as sudden death syndrome that occur from hypernatremia, tissue destruction in uterine cavity, (Tr. 308) and bleeding coagulopathies (which occur in all saline abortions) (Tr. 306) do not occur with the use of prostaglandins. Whereas maternal mortality for saline abortions was 25 deaths in 100,000 abortions (Tr. 330) there were no deaths associated with prostaglandin abortions done intra-amniotically. (Tr. 323)

Saline abortions were banned in Japan by the government because of a very high mortality rate. (Tr. 323). Dr. Anderson who has participated in thousands of abortions, stated that a physician who used saline after being pre-

sented all the facts on prostaglandins, if a bad result occurred, would be subject to "good grounds for suit." (Tr. 336). He said:

> "In my opinion, a physician, given all the facts on both methods (saline and prostaglandin) I would feel that he would be practicing bad medicine if he chose saline over prostaglandins." (Tr. 336).

Prostaglandins, although initially limited in distribution are now available on a much wider and adequate scale. (Tr. 335). And are, in fact, used widely in small hospitals. (Tr. 341). The saline method is not used at Yale-New Haven Hospital because of the dangers to maternal health. (Tr. 359).

The mortality and morbidity of saline abortions are well documented in the medical literature as even Plaintiff-Appellants admit in their brief.[210] This is concurred in by the Statement of the National Academy of Sciences in its Institute of Medicine Report on "Legalized Abortion and the Public Health" (Washington, D.C., May, 1975) where, in discussing saline abortions, the complications of which "are considerably higher than those performed by D & C or suction"[211] it states "methods are needed to reduce these complication rates."[212]

Plaintiff-Appellants argue that in spite of all the adverse effects of saline on maternal health, they should be allowed to practice medicine without interference from the law and that the control of their conduct is best regulated by "professional censure and deprivation of his license." (p. 126).

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[210] Plaintiff's Brief, p. 124.

[211] Op. Cit., note 136 at p. 54.

[212] Idem.

The real question facing this court, however, is whether the state in the exercise of its police powers, after the first trimester, can prohibit a procedure (saline abortions) so dangerous to maternal health that other nations (Japan) have voluntarily abondoned it? The answer is obviously yes.

As Justice Douglas said in his concurring opinion in *Doe* v. *Bolton:*

> "While childbirth endangers the lives of some women, voluntary abortion at any time and place regardless of medical standards would impinge on a rightful concern of society. The woman's health is part of that concern; as is the life of the fetus after quickening. These concerns justify the State in treating the procedure as a medical one." [213]

This court has previously held that the police power of a State may embrace authority to enact quarantine and health laws of every description. As long as the method used does not contravene the Constitution or infringe any right granted by it, the State is free to use its own discretion as to how best to safeguard public health.[214]

To this end statutes ordering the destruction of unsafe and unwholesome food have been upheld.[215] The practice of medicine has long been the subject of regulation.[216] This court has upheld a New York law authorizing suspension of the physician's license for conviction of a crime.[217]

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[213] 410 U.S. 179, 215.

[214] *Jacobson* v. *Massachusetts,* 197 U.S. 11 (1905); *Lieberman* v. *Van De Carr,* 199 U.S. 552 (1905).

[215] *North American Storage Co.* v. *Chicago,* 211 U.S. 306 (1908).

[216] *McNaughton* v. *Johnson,* 242 U.S. 344, 349 (1917)

[217] *Barsky* v. *Board of Regents,* 347 U.S. 442 (1954).

Certainly the power to revoke a physician's license altogether includes the very limited power of merely prohibiting him the right to use a single medical procedure especially where that medical procedure has the grave adverse effects on maternal health as does saline abortion. Such a prohibition is no different than state regulations pertaining to the administration, sale, prescription, and use of dangerous drugs.[218]

Plaintiff argues that Section 9 should fall because saline is the most frequently used method of 2nd trimester abortions. The answer to that was given by Justice Holmes:

> "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." [219]

Is it reasonably prudent for this court to overrule a legislative finding backed by expert testimony and overwhelmingly supported by the medical literature of the catastrophic danger to maternal health which saline abortion poses? Japan, a nation which has far more experience in this matter, has voluntarily abandoned saline abortions for reasons of maternal health.

Plaintiffs argue that these compelling reasons for the State to act are overridden by the physician's right to practice his profession even if he is wrong for in that case he may be sued or subject to licensure restrictions. Little good that will do for the woman who in the meantime has been permanently injured.

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[218] *Whipple* v. *Martinson,* 256 U.S. 41, 45 (1921).

[219] *Texas and Pacific Ry.* v. *Behymer,* 189 U.S. 468, 470, 23 S.Ct. 622, 623, 47 L.Ed. 905 (1903).

Justice Learned Hand forever put that concept to rest:

> "In most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." [220]

So too, there are precautions for maternal health so imperative that even their universal disregard by the current medical profession would not excuse their omission. That in essence was what Dr. Anderson was saying in his testimony. That is precisely what the Missouri legislature said when it prohibited saline abortions. In spite of all this empirical data, this court has on other occasions upheld state legislation in the area of public health, welfare and morals with even far less or no data available. For example, in *Paris Adult Theatre* v. *Slayton,* 93 S.Ct. 2628 (1973) this court said at pp. 2637-38:

> *From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions.* . . . On the basis of these assumptions both Congress and state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing "coupons" and "trading stamps," commanding what they must and may not publish and announce. . . .
>
> *The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional.* If we accept the unprovable assumption that

[220] The T. J. Hooper, 60 F.ed. 737, 740 (2nd C. 1932).

> a complete education requires the reading of certain books . . . and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? . . . The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality can be debased and distorted by crass commercial exploitation of sex. *Nothing in the Constitution prohibits a state from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.* (Emphasis supplied.)

So too, here, where less than perfect data is available yet where also it is clear that saline abortions have catastrophic effects on maternal health, this court should hold the abolition of saline after the first trimester a reasonable regulation for purposes of maternal health.

X.

RECORD KEEPING AND REPORTING ARE PROPERLY REQUIRED

Sections 10 and 11 require the maintenance of certain forms to be promulgated by the division of health for the purpose of preparing reports to the division of health for the express purpose of "preservation of maternal health and life."

The statute is enabling legislation only authorizing the department of health to issue such forms as are necessary.

Since the forms are not yet in existence no issue exists about the nature of the information sought, but only about the power of the state to authorize the department of health to issue such regulations and provide for such forms.

The court below went directly to the heart of the issue finding such provisions constitutional:

> "Sections 10 and 11 pertain to the maintenance of abortion records. The acquisition of data is essential to the advancement of medical knowledge. These provisions establish reporting procedures for statistical purposes only, and require that the division of health ensure the confidentiality of all information. Nothing in these sections would serve to restrict either the abortion decision itself or the exercise of medical judgment in performing an abortion."

The Three Judge Federal Court in Pennsylvania recently faced the same issue and held the enabling legislation constitutional while cautioning that the regulations should not violate this Court's mandate in *Roe* v. *Wade:*

> From the record in this case and the statements of counsel in their post-trial brief, it is indeed open to question or not there is a real challenge by plaintiffs to this particular provision of the Act, and accordingly, whether there is a justiciable controversy presently before the Court in this regard. However, we consider plaintiffs' challenge to be that an act which authorizes the future adoption of regulations in this area is unconstitutional on its face, if it does not also provide that the regulations only apply to abortions performed after the first trimester. We do not believe that the provision in question is unconstitutional on its face, nor do we believe that it is inconsistent with

> either *Roe* or *Doe* in merely authorizing regulations. Of course, any regulations promulgated in the future must be consistent with the requirements of the Supreme Court. Accordingly, we declare Section 6(c) not to be unconstitutional on its face and deny plaintiffs' request for injunctive relief.

The cases cited in Plaintiffs' brief are totally inapposite since they do not involve enabling legislation but rather do involve health department regulations which violated *Roe* and *Doe* by a massive invasion of the first trimester. No case yet has held unconstitutional the state's power to merely authorize the issuance of regulations.

In addition, the Court in *Doe* v. *Bolton* specifically maintained as constitutional the statutory provision that a physician's judgment may be required to be reduced to writing. The Court said:

> "Specifically, the following portions of Section 26-1202(b) remaining after the District Court's judgment, are invalid:
>
> (1) Subsections (1) and (2).
>
> (2) That portion of Subsection (3) *following the words "(s)uch physician's judgment is reduced to writing."* (emphasis added.)

No one contests the validity of the state's power to authorize the health department to issue regulations in other areas which do not involve abortion.

This Court should not presume that the Missouri Health Department will issue regulations not in conformity with *Roe* and *Doe*. Since such regulations are not now in existence it is assuredly premature for this Court to even consider this issue and the constitutionality of the present enabling legislation should be upheld.

CONCLUSION

Dr. Eugene Diamond is Guardian ad Litem for the class of unborn children and unborn viable children. A holding that the State of Missouri is powerless to protect the lives of its viable children would have dire precedential consequences for those this amicus represents.

In addition, Dr. Diamond has been appointed to represent the classes of parents and spouses affected by the abortion decision in litigation pending in the Federal court for the Northern District of Illinois. A decision by this court that parents and spouses have no voice in or part of the abortion decision would immeasurably weaken the structure of the family.

Both amici, Dr. Eugene Diamond and Americans United for Life Inc. urge this court to affirm the court below as to Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11 and declare the same constitutional; these amici urge the court to reverse the court below as to Section 6(1) and declare said section constitutional.

Respectfully submitted,
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Law Students Who Assisted in the Preparation of This Brief:

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CERTIFICATE OF SERVICE

I, the undersigned attorney for the Amici, Eugene Diamond and Americans United for Life, and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33, I have caused to be served true and correct copies of the foregoing Motion, Brief and Appendices of Amici Eugene Diamond and Americans United for Life Inc., upon each party required to be so served, by causing said copies to be deposited in a United States Postal Service mail box, with first class postage prepaid and affixed, addressed to The Honorable John C. Danforth, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, MO 65101; Frank Sussman, 7733 Forsyth Blvd., Suite 1100, St. Louis, MO 63105; Judith Mears, Yale University Law School, 127 Wall Street, New Haven, Conn. 06520 and J. Brendan Ryan, Circuit Attorney of the City of St. Louis, 1320 Market Street, St. Louis, MO 63103.

DENNIS J. HORAN
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Chicago, IL 60602
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APPENDIX

ORDER

This matter having come on to be heard on the Petition of Eugene F. Diamond, M.D. to intervene and for his appointment as guardian ad litem, the Court having heard argument of counsel, having reviewed the affidavits and briefs;

It Is Hereby Ordered that the Motion of Eugene F. Diamond, M.D. to intervene in this cause is granted;

It Is Further Ordered that Eugene F. Diamond, M.D. is herewith appointed guardian ad litem (1) for the class of unborn viable children; (2) for the class of unborn children whether viable or not; and (3) for the class of children born alive as a result of legal abortions; for the purpose of representing these classes in this litigation;

It Is Further Ordered that Dr. Diamond's Motion to intervene on behalf of himself as a parent and for the class of parents who will be affected by the statute is granted;

It Is Further Ordered that Dr. Diamond's Motion for leave to intervene on behalf of himself as husband and spouse and for the class of husbands and spouses affected by the statute is granted;

It Is Further Ordered that Dr. Diamond is granted leave to file within ten (10) days a pleading on behalf of each of the classes he represents.

Ordered:

/s/ *Prentice Marshall*
/s/ *Alfred Kirkland*

12-2-75

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

CIVIL ACTION
No. 75 C 3975

RALPH M. WYNN, M.D.; JERZY JOZEF (George) BIEZENSKI, M.D., and MARVIN ROSNER, M.D.,
Plaintiffs,

vs

WILLIAM J. SCOTT, Attorney General of the State of Illinois; BERNARD CAREY, State's Attorney for County of Cook, Illinois; and JOYCE C. LASHOF, M.D., Director of the Department of Public Health of the State of Illinois,
Defendants,

and

CIVIL ACTION
No. 75 C 3981
(Related Case)

JOHN S. LONG, M.D., on behalf of himself and all others similarly situated; ILLINOIS ABORTION SERVICES COUNCIL, an Illinois not-for-profit corporation, and MIDWEST POPULATION CENTER, an Illinois not-for-profit corporation, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs

WILLIAM J. SCOTT, Attorney General of the State of Illinois; BERNARD CAREY, State's Attorney for County of Cook, Illinois; and JOYCE C. LASHOF, M.D., Director of the Department of Public Health of the State of Illinois,
Defendants.

APPENDIX B

LIST OF OFFICERS AND DIRECTORS
OF
AMERICANS UNITED FOR LIFE, INC.

OFFICERS

Chairman
PROF. GEORGE WILLIAMS

Vice Chairmen
MARJORY MECKLENBERG
PROF. VICTOR G. ROSENBLUM

Secretary-Treasurer
JOSEPH R. STANTON, M.D.

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APPENDIX C

ILLINOIS HOUSE BILL 1851
ILLINOIS ABORTION LAW OF 1975

"Section 1. It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decision of the United States Supreme Court of January 22, 1973. Without in any way restricting right of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds and declares that long-standing policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.

Section 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this Act shall be given the meaning ascribed to them:

(1) "First trimester" means the first twelve weeks of gestation commencing with ovulation rather than computed on the basis of the menstrual cycle.

(2) "Viability," that stage of fetal development when the life of the unborn child may be maintained outside the womb by natural or artificial life-supportive systems.

(3) "Physician," any person licensed to practice medicine in all its branches under the Illinois "Medical Practice Act."

(4) "Hospital" means a hospital licensed pursuant to the "Hospital Licensing Act" or specifically exempted from licensure under subsections (2), (3), or (4) of Section 3 of this Act.

(5) "Department" means the Department of Public Health, State of Illinois.

(6) "Criminal Abortion" means the use of any instrument, medicine, drug or other substance, whatever, with the intent to procure a miscarriage of any woman except when done by a physician in conformity with this Act. It shall not be necessary in order to commit a criminal abortion that the woman be pregnant, or if pregnant, that a miscarriage be accomplished.

Section 3. No abortion shall be performed prior to the end of the first trimester of pregnancy except:

(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment;

(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given

and is not the result of coercion. The informed consent shall state that the woman has been informed of the following:

(a) The physical competency of the fetus at the time the abortion is to be performed, such as, but not limited to, what the fetus looks like, fetus ability to move, swallow, and its physical characteristics;

(b) The general dangers of abortion, including, but not limited to, the possibility of subsequent sterility, premature birth, live-born fetus, and other dangers; and

(c) The particular dangers of the procedure to be used.

Any physician who intentionally fails to inform the woman about to be aborted or who fails to secure a written informed consent as indicated herein, violates the provisions of this Act and commits a Class B misdemeanor.

Any violation of this Section shall be admissible in a civil suit as prima facie evidence of the physician's failure to obtain an informed consent:

(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life or health of the mother.

(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of 18 years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life or health of the mother.

Section 4. No abortion performed subsequent to the first trimester of pregnancy shall be performed except where the provisions of Section 3 of this Act are satisfied

and the abortion is performed in a hospital, on an inpatient basis, with measures for life support for the fetus which must be available and utilized, if there is any clearly visible evidence of viability.

Section 5.

(1) No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable.

(2) When the fetus is viable no abortion shall be performed unless medically necessary to preserve the life or health of the mother and only after consultation with at least two other physicians not related to or engaged in practice with the attending physician.

Section 6.

(1) No person who performs or induces an abortion after the fetus is viable shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall intentionally fail to take such measures to encourage or to sustain the life of viable fetus or child, and the death of the viable fetus or the child results, shall be deemed guilty of a Class 2 felony.

(2) Whoever, with intent to do so, shall take the life of a premature infant aborted alive, shall be guilty of a Class 1 felony.

(3) No person shall use any fetus or premature infant aborted alive for any type of scientific, research, laboratory or other kind of experimentation either

prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive.

Section 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the State under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.

Section 8. Any woman seeking an abortion in the State of Illinois, after viability, shall be verbally informed of the provisions of Section 7 of this Act by attending physician and the woman shall certify in writing that she has been so informed.

Section 9. The General Assembly finds that the method or technique of abortion known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first trimester of pregnancy.

Section 10. A report of each abortion performed shall be made to the Department on forms prescribed by it. Such report forms shall not identify the patient by name, but shall include, but not limited to, information concerning:

(a) Identification of facility where abortion was performed and date performed;

(b) The political subdivision in which the patient resides;

(c) Patient's date of birth, race and marital status;

(d) Number of prior pregnancies;

(e) Date of last menstrual period;

(f) Type of abortion procedure performed; and

(g) Complications.

Such form shall be completed by the hospital or other licensed facility, signed by the attending physician, and transmitted to the Department not later than 10 days following the end of the month in which the abortion was performed.

Abortions performed after a gestation period of 20 completed weeks shall be registered as provided in Sections 20 through 24 of the Vital Records Act.

The Department may prescribe rules and regulations regarding the administration of this Act including regulations relating to the information to be provided under Section 20 of the Vital Records Act.

All information obtained by a physician, hospital or ambulatory health facility from a patient for the purpose of preparing reports to the Department under this Section or reports received by the Department shall be confidential and shall be used for statistical purposes except where otherwise provided by law.

Section 11.

(a) A person who commits a criminal abortion is guilty of a Class 2 felony.

(b) Any person who advertised, prints, publishes, distributes or circulates any communication through print, radio or television media advocating, advising

or suggesting any act which would be a violation of this Act is guilty of a Class B misdemeanor.

(c) Any hospital, licensed facility or physician who fails to submit a report to the Department under the provisions of Section 5 of the Act and any person who fails to maintain the confidentiality of any records or reports required under this Act is guilty of a Class B misdemeanor.

(d) Any person who sells any drug, medicine, instrument or other substance which he knows to be an abortifacient and which is in fact an abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor.

Section 12. All tissue removed at the time of abortion shall be submitted for analysis and tissue report to a board eligible or certified pathologist as a matter of record in all cases. There shall be no exploitation of or experimentation with the aborted tissue.

Section 13. No physician, hospital, ambulatory surgical center, nor employee thereof, shall be required against his or its conscience declared in writing to perform, permit or participate in any abortion, and the failure or refusal to do so shall not be the basis for any civil, criminal, administrative or disciplinary action, proceeding, penalty or punishment. If any request for an abortion is denied, the patient shall be promptly notified.

Section 14. If any provision of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions or application, and to this end the provisions of this Act are declared to be severable.

Section 15. This Act shall be known and may be cited as the 'Illinois Abortion Law of 1975.'

APPENDIX D

TABLE TWO: Live Births After Saline Instillation, or Other (July 1–December 31, 1970)

	Date	Initial	Method	Weight	Gestation (weeks)	Lived
1	July 22	P	Saline	1 lb, 8 oz	22	2 hr
2	August 20	L	Hysterotomy	15 oz	22	30 min
3	August 21	B	Saline	2 lb, 14 oz	25	6 hr, 35 min
4	August 23	C	Saline	1 lb, 9 oz	24	2 hr
5	August 23	W	Saline	2 lb, 8 oz	28	Alive
6	August 23	L	Saline	3 lb, 1 oz	20	4 hr, 55 min
7	September 1	R	Ethodine	1 lb, 13 oz	18	5 min
8	September 4	M	Saline	3 lb	20	1 hr, 5 min
9	September 9	V (1 of twins)	Saline	1 lb, 13 oz	20	15 hr
10	September 17	A	Saline	2 lb, 1 oz	24	47 hr, 40 min
11	September 24	V	Catheter	1 lb	17	2 hr 20 min
12	September 30	L	Saline	3 lb, 5½ oz	30	53 hrs, 15 min
13	October 3	N	Saline	2 lb	26	7 hr, 15 min
14	October 8	W	Saline	8½ oz	16	5 min
15	October 9	S	Saline	1 lb, 10 oz	19	1 hr 35 min
16	October 11	G	Saline	1 lb, 7½ oz	21	5 min
17	October 17	D	Saline	2 lb, 3 oz	20	5 hr
18	October 18	G	Saline	1 lb, 4 oz	19	3 hr, 30 min
19	October 21	L	Saline	14 oz	19	1½ hr
20	October 26	S	Saline	3 lb, 6 oz	24	24 hr
21	November 9	G	Saline	1 lb 14 oz	26	17 hr
22	November 20	R	Saline	1 lb, 14 oz	18	6½ hr
23	November 23	F	Saline	1 lb	21	30 min
24	November 25	M	Saline	1 lb, 8¾ oz	21	1 hr, 30 min
25	December 2	S	Saline	1 lb	20	55 min
26	December 7	P	Saline	1 lb, 5½ oz	20	2 hr, 40 min
27	December 16	R	Saline	1 lb, 11½ oz	20	2½ hr

From: Pakter, et al., *Clinical Ob. Gyn.* Vol. 14, 1971 at page 290.

APPENDIX E

TABLE VII

SURVIVORS

	Weight	Gestational Age	Apgar	Initial Temp >35.5°C	PROM	HMD	RESP	APNEA	DQ*	ABN	Height %	Weight %
001	879	21	8	No	No	Yes	No	12 hr	B	Difficult exam§	25	10
009	740	25	7	No	Unknown dur	Yes	No	50 hr	A	Cong heart dis	10	10
012	850	24	5	Yes	6 days	No	No	15 hr	N	Spasticity low extrem	50	50
014	950	24	3	Yes	No	Yes	Yes	9 hr	N	Hydrocephalic RLF blind	50	50
017	740	24	4	Yes	2 days	No	Yes	96 hr	B	Difficult exam§ 0 blood sugar at birth	<3	<3
023	920	24	2	No	No	Yes	Yes	264 hr	N	RLF blind	50	50
027	908	26	7	Yes	10 days	No	No	No	N	Speech prob	10	10
028	999	29	Unknown	Yes	No	No	No	60 hr	B	Normal	10	10
029	999	22	6	Yes	No	Yes	No	10 hr	N	Normal	50	50
030	910	30	5	Yes	Unknown dur	No	No	30 hr	B	Normal	10	10
039	850	32	4	Yes	No	No	Yes	48 hr	B	Difficult exam§	3	3
066	999	30	6	Yes	Leaking 4 wks	No	No	No	N	Normal	3	3
081†	1000	32	4	Yes	3 days	No	No	No	N	Normal	—	—
087	840	31	7	No	Unknown dur	No	Yes	12 hr	A	TE fistula RLF blind	<3	<3
095†	840	29	8	Yes	30 hrs	No	No	48 hr	N	Hearing loss Hyperactive	—	—
096	940	28	7	Yes	No	No	No	No	N	Normal	3	3
100	680	28	Unknown	Yes	3 days	No	No	No		RLF Crib death	Dead 6 months	
124‡	980	32	1	No	No	No	No	58 hr	Dead		Dead 4½ months	
139	990	25	2	No	5 days	No	No	48 hr	N	Normal	50	50
146	865	25	6	Unknown	10 days	No	Yes	40 hr	B	RLF Poor vision	<3	<3
150	870	26	Unknown	No	No	No	No	72 hr	N	Normal	<3	<3
161	960	26	3	Yes	4 days	No	No	49 hr	N	Normal	10	10

* DQ corrected for prematurity at 10 months
‡ Discordant twin
† Exam at 10 months only for developmental exam
§ Difficult exam—difficulty in getting child's attention
N = *90-above*—Normal (N)
B = *70-89*—High abnormal to Borderline (B)
A = *69-below*—Abnormal (A)
‖ Height and weight not corrected for prematurity but represent last recorded figure after age 15 months

From: Alden et al. "Morbidity and Mortality of Infants Weighing Less Than 1,000 Grams in an Intensive Care Nursery" *Journal of Pediatrics* Vol. 50, No. 1 July 1972 pp. 40-48 at p. 46. Note that Baby #1 is listed at 21 gestational weeks, and Baby #9 is listed at 22 gestational weeks. Both survived; one had a difficult exam and one was normal.