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The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood," and The Supreme Court's Birth Requirement

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The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement

John D. Gorby*

I. Introduction

The one theme which permeates the United States Supreme Court's 1977 abortion pronouncements[1] is that the United States Constitution does not and the federal judiciary should not preclude legislative regulation of some aspects of the abortion problem. Indeed, the decisions almost suggest that the essential nature of American society is democratic. The Supreme Court's 1979 decision holding unconstitutional a Pennsylvania statute requiring physicians performing abortion to attempt to preserve the life of the aborted fetus, if the fetus "may be viable," does not suggest the contrary, since it appears to be based on the due process concept of vagueness as applied in criminal cases and not upon any substantive expansion of the right to abort.[2] In *Maher v.*

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1. The decisions in Beal v. Doe, 432 U.S. 438, Maher v. Roe, 432 U.S. 464, and Poelker v. Doe, 432 U.S. 519, were announced by the Supreme Court on June 20, 1977. In *Beal*, the Court held that a state participating in the Medicaid Program is not required by Title XIX of the Social Security Act to fund the costs of nontherapeutic abortions; in *Maher*, the Court held, *inter alia*, that the Constitution imposes no obligation on the states to pay pregnancy related expenses and that a state does not violate equal protection by funding the costs of prenatal expenses but not nontherapeutic abortions because of the State's strong and legitimate interest in encouraging normal childbirth; in *Poelker*, the Court held that a city does not violate equal protection by excluding nontherapeutic abortions from public hospitals since the Constitution does not forbid a state or city from expressing a preference for normal childbirth.

2. Colautti v. Franklin, 99 S. Ct. 675 (1979), decided January 9, 1979. Arguably *Colautti* does limit legislative authority in the abortion area in spite of the Court's claim that it reaffirms the principles of Roe v. Wade, 410 U.S. 113 (1973), Doe v. Bolton, 410 U.S. 179 (1973), and Planned Parenthood v. Danforth, 428 U.S. 52 (1976). 99 S. Ct. at 682. In *Roe* the Court had observed that, in the medical and scientific communities, the fetus is considered viable if it is "potentially able to live outside the mother's womb, albeit by artificial aid," *Roe*, 410 U.S. at 160, whereas in *Colautti* the Court wrote that "[v]iability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support." 99 S. Ct. at 682.

Roe,[3] the Court noted: "We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' "[4] One paragraph later, the Court held that "the Constitution does not require a judicially imposed resolution of these difficult issues."[5] Similar language was used in *Poelker v. Doe*:[6]

> Although the Mayor's personal position [opposition] on abortion is irrelevant to our decision, we note that he is an elected official responsible to the people of St. Louis. His policy of denying city funds for abortions such as that desired by Doe is subject to public debate and approval or disapproval at the polls. We merely hold, for reasons stated in *Maher*, that the Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth as St. Louis has done.[7]

In spite of Mr. Justice Powell's suggestion in *Maher* that "[o]ur conclusion signals no retreat from *Roe* or the cases applying it,"[8] one wonders if those words of reassurance are to be taken with the same degree of seriousness as the assurance of Mr. Justice Blackmun in *Roe v. Wade*[9] that the Supreme Court was not reviving substantive due process.[10] Indeed, the dominant democratic theme of *Maher v. Roe*,[11]

The change, if any, in the substantive law is in the degree of probability of survival required and in the focus on the particular fetus as opposed to the fetus in the abstract.

3. 432 U.S. 464 (1977).
4. *Id.* at 479-80.
5. *Id.* at 480.
6. 432 U.S. 519 (1977).
7. *Id.* at 521. In the *Beal* decision Justice Powell, writing for the Court, expressed a similar view: "But we leave entirely free both the Federal Government and the States, through the normal processes of democracy, to provide the desired funding. The issues present policy decisions of the widest concern. They should be resolved by the representatives of the people, not by this Court." 432 U.S. at 448 n.16.
8. 432 U.S. at 475 (1977).
9. 410 U.S. 113 (1973). Mr. Justice Blackmun's assurance was:

> Our task, of course, is to resolve the issue by constitutional measurement free of emotion and of predilection. . . . We bear in mind, too, Mr. Justice Holmes' admonition in his now vindicated dissent in Lochner v. New York, 198 U.S. 45, 76 (1905): [The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

410 U.S. at 117.

10. A major criticism directed against Justice Blackmun's opinion in Roe v. Wade is that *Lochner* was in fact revived. *See, e.g.*, Mr. Justice Rehnquist's dissent in *Roe*, 410 U.S. at 174; Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Tribe, *The Supreme Court, 1972 Term - Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 11-15 (1973); *see* text accompanying notes 119-26, *infra*, for further discussion of *Lochner* and substantive due process.
11. 432 U.S. 464 (1977).

Poelker v. Doe[12] and *Beal v. Doe*,[13] the bitterness expressed by the dissenters[14] (all previous members of the *Roe* majority),[15] the compulsion of the author of *Roe* to dissent,[16] and the continuing efforts to change *Roe* with a constitutional amendment cause one to wonder if the majority in *Colautti* would not have preferred to have followed the spirit of the dissenting opinions in *Roe* and left the entire abortion problem in the hands of the state legislatures. This approach, at least on the surface, would be consistent with recent suggestions that the judiciary return to the fourteenth amendment its intended "procedural" as opposed to "substantive" significance, defer to the "spirit of our democracy" in matters not controlled by the fourteenth amendment as originally intended, and not "govern" under the guise of interpreting the Constitution.[17]

A legislative solution to the abortion problem is necessarily based upon the premise that the Constitution is neutral about abortion and does not impose a solution, one way or another.

In this article, the existence of such a premise is denied. More specifically, this author concludes (1) that the Constitution is not neutral about abortion and does indeed impose a solution on the abortion question; (2) that, as Justice Blackmun conceded in *Roe*, if the fetus is a person under the fourteenth amendment, "the [plaintiff's] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [fourteenth] [a]mendment;"[18] and (3) that the concept of "person" in the fifth and fourteenth amendments includes unborn human life.[19] It thus follows that the solution to the abortion

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12. 432 U.S. 519 (1977).
13. 432 U.S. 438 (1977).
14. Particularly that of Mr. Justice Marshall in Beal v. Doe, 432 U.S. at 454-62.
15. Dissenting Justices Marshall, Brennan and Blackmun voted with the majority in *Roe*.
16. Mr. Justice Blackmun, author of the *Roe* majority opinion, in his *Beal* dissent, applicable also to *Maher* and *Poelker*, wrote:

> The Court today, by its decisions in these cases, allows the States, and such municipalities as choose to do so, to accomplish indirectly what the Court in Roe v. Wade and Doe v. Bolton—by a substantial majority and with some emphasis, I had thought—said they could not do directly.

Beal v. Doe, 432 U.S. at 462 (1977) (citations omitted).

17. *See, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY (1977).
18. 410 U.S. at 156-57.
19. The Supreme Court in *Maher v. Roe* held that the state could assert an interest in what it termed "potential human life." The term "potential human life" appears to have been carefully chosen, because, by concluding that the state has an interest in potential human life, the Supreme Court hoped to avoid the necessity of deciding at least in the context of the *Maher* case when human life begins, a problem the solution to which, according to Mr. Justice Blackmun in *Roe*, has evaded philosophers, theologians and unfortunately also physicians throughout the centuries. *See* Roe v. Wade, 410 U.S. at 159. Since this paper is concerned with the scope of the "person" concept in the Constitution as opposed to those matters in which the states may assert an inter-

problem set forth in *Roe*[20] as well as that suggested by Justices White and Rehnquist in dissent[21] are constitutionally unsound, both solutions permitting the violation of the fetus' constitutionally protected right to life without due process of law. More positively, there is substantial historical support for the notion that the due process clause was designed to guarantee access of all persons to the courts for the protection of fundamental rights,[22] that those fundamental rights refer to "life, liberty and property,"[23] and that the unborn human being, as an individual living human being, is a person under the Constitution and is entitled to access to the courts to protect his fundamental right to life.

Since *Roe v. Wade* is the only case in which the Supreme Court has considered the scope of constitutional "personhood" in the context of pre-birth stages of human development and is the only Supreme Court pronouncement on the subject,[24] a criticism of *Roe* will serve as

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est—and since the proofs are replete that embryoes and fetuses of human beings are, at least from the biological perspective, human and living—the term "unborn human life" is used. For an excellent and detailed discussion of the biological proofs, *see* Krimmel and Foley, *Abortion: An Inspection into the Nature of Human Life and Potential Consequences of Legalizing Its Destruction*, 46 U. CIN. L. REV. 725 (1977).

20. *Roe* permits the pregnant woman, as an aspect of her constitutional right to privacy, to decide whether or not to abort.

21. Justices White and Rehnquist suggested in their dissent in *Bolton* which was also applied to *Roe* that the resolution of the abortion problem should be left to legislative decision. 410 U.S. at 222.

22. *See* R. BERGER, GOVERNMENT BY JUDICIARY 18-19 (1977).

23. *Id.* at 20. Professor Berger writes:

> The "privileges or immunities" clause was the central provision of the Amendment's § 1, and the key to its meaning is furnished by the immediately preceding Civil Rights Act of 1866 . . . which, all are agreed, it was the purpose of the Amendment to embody and protect. The objectives of the Act were quite limited. The framers intended to confer on the freedmen the auxiliary rights that would protect their "life, liberty, and property,"—no more. For the framers those words did not have the sprawling connotations later given them by the Court but, instead, restricted aims that were expressed in the Act. The legislative history of the Amendment frequently refers to "fundamental rights," "life, liberty, and property," and a few historical comments will show the ties between the two.

24. *Cf.* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). *Dred Scott* was decided prior to the adoption of the fourteenth amendment and involved a construction of the notion of "citizen" in the Constitution, not "person." Although the case had the effect of excluding a human group from enjoyment of constitutional privileges and immunities, a decision which resulted in profound tragedy, it did not deal with the scope of the "person" concept. In this context it is interesting to note that, despite the Court's holding in *Dred Scott*, slaves were considered to be persons under the criminal law and were held responsible under the criminal law as well as entitled to its protections. *See, e.g.*, J. KENT, COMMENTARIES ON AMERICAN LAW 253-55 (12th ed. 1973). *See also* State v. Jones, 2 Miss. (1 Walker) 39 (1820). It thus follows that the concept of "person" in general legal usage was somewhat broader than the concept of "citizen," both terms being used in section one of the fourteenth amendment. It is also noteworthy that the Supreme Court has held that the phrase in the first section of the fourteenth amendment ("All persons born within the United States . . . are citizens of the United States") was designed to overturn *Dred Scott* and establish citizenship in the Negro. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

a departure point for this discussion as to whether or not the fetus falls within the scope of the constitutional personhood concept.[25]

II. THE SCOPE OF CONSTITUTIONAL PERSONHOOD: THE PRIMARY ISSUE IN THE ABORTION CONTROVERSY

That the Supreme Court accepted the scope of constitutional personhood as the primary issue in *Roe* is reflected in its statement 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 would then be guaranteed specifically by the [Fourteenth] Amendment."[26] No one has openly quarreled with the *Roe* Court on this point, and with good reason. The right to life represents a fundamental value in the constitutional order. Not only do both the fifth and fourteenth amendments explicitly mention "life" in their respective due process clauses,[27] 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' "absolute" first amendment rights;[28] it is the necessary foundation upon which all other human rights are built.[29] 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. Mr. Justice Brennan expressed the idea simply in *Furman v. Georgia*:[30] "An executed person has indeed 'lost the right to have rights.' "[31] And as a general rule, only those who feel that their "right to life" is secured will dare exercise any other fundamental rights.

Historically, an important purpose of American civil government

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25. *See* text accompanying notes 101-06, *infra*.

26. 410 U.S. at 156 (1973).

27. It is interesting to note in this connection the contention that due process of law is the constitutional protection of the right to life. *Cf.* Bedau, *The Right to Life*, 52 THE MONIST 562 (1968). However, at the time of the adoption of the fourteenth amendment, due process was probably understood to provide both a procedure to protect such rights as "life, liberty, or property" and the only legally proper method of limiting those rights. *See* note 23, *supra*.

28. *See* statements of Mr. Justice Douglas in Doe v. Bolton, 410 U.S. 179, 211 (1973) (Douglas, J., concurring).

29. Compare the following statement from the Federal Constitutional Court of Western Germany in its abortion case: "Human life represents within the order of the Basic Law, an ultimate value; it is the living foundation of human dignity and the prerequisite for all other fundamental rights." Jonas and Gorby, *Translation of the German Federal Constitutional Court Abortion Decision*, 9 J. MAR. J. PROC. & PROC. 605, 642 (1976) [hereinafter cited as Jonas and Gorby, *Translation*].

30. 408 U.S. 238 (1972).

31. *Id.* at 290 (Brennan, J., concurring).

has been to protect fundamental rights. Thus, history also supports the *Roe* majority reasoning that if the fetus is a person, and thus entitled to the right of life, the Court has an obligation to protect that right. John Locke, whose influence on the thinking of the founders of this nation is well known, wrote of the natural rights to life and property and that "civil government is the proper remedy for the inconveniences of the state of nature, which must certainly be great where men may be judges in their own case."[32] This principle, applied to the abortion problem, suggests that, if the unborn does enjoy a natural right to life,[33] the protection of that right should not be completely entrusted to the pregnant woman since her self-conceived interests may conflict with those of the unborn and since she could not be expected to be a fair "judge in [her] own case."[34] The solution to this problem, according to Locke, would be civil government as is the case for all conflicts between the rights of one and the interests of another. These basic ideas found their way into the Declaration of Independence in the clause to which the people of this nation so frequently rededicated themselves during the recent 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. . . .[34a]

Just fifteen years later, on December 15, 1791, at a time when natural rights theories were still dominant in American legal thought, "life" was explicitly included in the fifth amendment's due process clause.[35]

Although natural law fell out of vogue during the nineteenth century,[36] the importance of the right to life in modern political and social theory has remained nearly unscathed as evidenced by the Third Article of the Universal Declaration of Human Rights, which states: "Everyone has the right to life,"[37] the Second Article of the European Human Rights Convention[38] and the arguments to abolish capital punishment expressed by Mr. Justice Brennan in *Furman v. Georgia*:[39] "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."[40] He also wrote that "[d]eath 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 the ultimate sanction."[41]

Since the Court in *Roe* recognized the right to life issue as crucial and was fully aware of the rank of this right in the hierarchy of fundamental legal values, one would certainly expect the Court to have carefully and thoroughly studied and analyzed the scope of constitutional personhood as well as the nature of the unborn[42] to determine on the most rational basis possible whether the unborn falls within that scope. As the next section shows, the Court did no such thing.

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32. J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT ch. 2 (T. Peardon ed. 1952).

33. In an interesting study of John Locke's attitude toward children and particularly the unborn child, Joseph Witherspoon concludes that Locke must have considered the unborn human a "person" and entitled to enjoy the natural right to life. *See* J. Witherspoon, John Locke's Concept of the Child as a Person (scheduled for publication in 1979).

34. J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT ch. 2 (T. Peardon ed. 1952).

34a. E. DUMBAULD, THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY 157 (1950).

35. As indicated earlier, due process, rather than creating the rights explicitly mentioned in the fifth amendment and later in the fourteenth amendment, actually provided a constitutionally acceptable means of limiting the rights. According to the prevailing political theories, the rights mentioned were natural rights which preexisted the Constitution.

36. Nevertheless, the ideas of Blackstone, who reiterated the ideas of Locke, were cited by the supporters of both the Civil Rights Act of 1866 and the fourteenth amendment. *See* notes 86-91, *infra*, and accompanying text; *see also* R. BERGER, GOVERNMENT BY JUDICIARY 20-22 (1977).

37. G.A. Res. 217A(111), U.N. Doc. A/810, at 71-77 (1948).

38. "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 of a court following his conviction of a crime for which this penalty is provided by law." European Convention on Human Rights, signed Nov. 4, 1950 (entered into force on Sept. 3, 1973). *See also* the American Declaration on the Rights and Duties of Man, Resolution XXX, adopted by the Ninth International Conference of American States, May 2, 1948, Article I of which provides: "Every human being has the right to life, liberty and security of his person." *See also* the American Convention on Human Rights, signed Nov. 22, 1969, OAS Treaty Series, Article 4(1) of which provides: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

39. 408 U.S. 238 (1972).

40. *Id.* at 296 (Brennan, J., concurring).

41. *Id.* at 286 (Brennan, J., concurring).

42. The possibility exists 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." 410 U.S. at 165. Although he did not specifically identify these "profound problems," Mr. Justice Blackmun provided 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." 410 U.S. at 116. 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 have said so and allowed the matter to be debated on the merits of that issue rather than presenting the problem of *Roe* in terms of construing several potentially conflicting clauses of the Federal constitution which guarantee individual rights. Although such an underlying concern could perhaps explain a poorly reasoned decision by a court on the stated issues, this commentary accepts the Court's statement of issues and proceeds accordingly.

III. The Primary Issue in the Hands of the Supreme Court

A. *Procedural Background of Roe v. Wade: The Unborn's "Day in Court"*

In 1970 and in early 1971, a number of abortion cases had been appealed to the United States Supreme Court from Wisconsin,[43] Texas,[44] Georgia,[45] Louisiana,[46] Illinois[47] and North Carolina.[48]

The Illinois case was unique in that Dr. Bart Heffernan of Chicago had been appointed guardian ad litem to represent the interests of the unborn. As a result, only in the Illinois case, where standing had been recognized, was the unborn permitted to directly participate through his representative in a series of lawsuits which were to have a profound impact on his legal and constitutional rights.[49] The Supreme Court, however, set the Texas (*Roe v. Wade*) and Georgia (*Doe v. Bolton*) cases, but not the Illinois case, which was also pending before the Court, for oral arguments on December 13, 1971. Since the parties to the *Roe* and *Doe* cases were, on the one side, physicians and women challenging the constitutionality of the respective state anti-abortion statutes and, on the other side, the attorneys general defending their states' statutes, the fetus was not directly represented in the December 13, 1971, hearings. Because only seven justices heard the oral arguments, Justices Black and Harlan having left the Court one month earlier, no decisions were handed down and the cases were set for rehearing in October, 1972. In the meantime, the attorneys for the fetus, whose guardian was an actual party only in the Illinois case and had filed an amicus brief[50] one year earlier in both the Texas and Georgia cases, filed in the Supreme Court a motion for oral argument, which was denied in the summer of 1972. Shortly thereafter, they moved to consolidate for oral arguments at the rehearing the Illinois

43. Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970), *appeal dismissed*, 400 U.S. 1 (1970) (dismissal for want of denial of injunction).

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

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

46. Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970).

47. Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971).

48. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

49. Following the intervention by Dr. Heffernan in *Doe v. Scott* (the Illinois case) a similar motion for intervention on behalf of the fetus was filed in the district court and allowed in *Doe v. Bolton*. Upon a finding by the federal district court in the *Doe v. Bolton* case that the fetus was not a "person," the district court noted in a footnote that it "does not postulate the existence of a new being with federal constitutional rights at any time during gestation." 319 F. Supp. at 1055 n.3. The guardian was thus dismissed from the lawsuit. For reasons unknown, this dismissal was not appealed by the guardian ad litem and consequently the fetus' interests were not represented before the Supreme Court in either the *Roe* or *Bolton* cases.

50. Briefs Amici Curiae, 3 L. Reprints, Crim. L. Series 479 (No. 37B, 1971-72).

case (*Doe v. Scott*)[51] with the Texas (*Roe*) and Georgia (*Doe*) cases. This motion was also denied.[52] As a result, the fetus, not having been represented in the crucial hearings before the justices, never enjoyed his "day in court."[53]

The Supreme Court had every opportunity to hear arguments presented by the representative of the fetus that it was a "constitutional person." However, the Court chose not to take advantage of this occasion.

Before the Supreme Court on October 11, 1972, Texas argued that a fetus is a person, but quickly backed away from the logic of this position, arguing instead that the abortion problem can "be best decided by a legislature."[54] A legislative solution is in the best interests of the state since it maximizes state authority. The legislature, however, has never been permitted in Supreme Court jurisprudence to determine who is and who is not entitled to enjoy fundamental constitutional rights. Thus, in the end, Texas argued to enhance its authority and interests, not fetal rights.

One should not lightly conclude from the Supreme Court's holding in *Roe* that the concept of "person" has no prenatal significance, that the unborn was not, after all, entitled to a "day in court." Such a conclusion assumes the outcome. Furthermore, it would be sound only if one is willing to assume that the adversary process is not essential to sound judicial decision-making—an assumption hardly compatible with the common law tradition. To a great degree, judicial decisions are made legitimately only if there is an opportunity for vigorous advocacy, an opportunity not allowed the fetus in the cases thus far in which his right to personhood or, expressed differently, its right to even have rights, has been adjudicated.

B. *The Supreme Court's Opinion on the Merits: The Unborn, Birth and Constitutional Personhood*

(1) The Initial Constitutional Issue Is the Scope of Constitutional Personhood, Not "When Life Begins"

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philoso-

51. 321 F. Supp. 1385 (N.D. Ill. 1971).

52. 409 U.S. 817 (1972).

53. A month after the *Roe v. Wade* and *Doe v. Bolton* decisions were announced in January, 1973, the Supreme Court remanded the Illinois case "for further consideration in light of *Roe v. Wade*." 410 U.S. at 950.

54. *See generally* Oral Arguments in the Supreme Court Abortion Decisions (Sanctity of Life Publications, Ltd. 1976); *Id.* at 59.

> phy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[55]

Although the Supreme Court in *Roe* expressed concern about its ability to "resolve the difficult question of when life begins,"[56] the initial constitutional dilemma the Court faced was not the factual question of when life begins but rather the legal question of the scope and meaning of the concept of "person" in the fourteenth amendment, i.e., whether the concept means living humans, individual humans, born humans, rational humans, wanted humans, humans capable of "meaningful life,"[57] any combination thereof or something else. In other words, what does the term "person" as used in the fourteenth amendment mean? What values was it designed to protect? If, for example, it means all individual, living human beings, which is this writer's position,[58] the factual issue whether the fetus is an individual, living human being is presented for decision. If "life" in the biological sense is irrelevant to membership in the class of constitutional persons or if birth is an essential criterion to membership in this constitutional class, the Court in *Roe* was correct, for then it need not "speculate as to the answer [of when life begins]."[59] On the other hand, if the real problem facing the Court was a "proof problem," i.e., how to prove that a fetus has "life," simple judicial restraint should require the Court not to exclude the fetus from constitutional protection as a matter of law by creating a birth requirement as it did in *Roe* but rather to leave the ultimate question of constitutional personhood in the fetus unanswered, remand the case and ask for more "proof" on the factual question.[60]

55. Roe v. Wade, 410 U.S. at 159 (1973).

56. Although Mr. Justice Blackmun emphasized his uncertainty about "when life begins," it is difficult to determine from his opinion in *Roe* exactly what role this uncertainty played in the Court's conclusion that the fetus is not a constitutional person. Clearly, his uncertainty was a major factor in the Court's conclusion that the state's interest in unborn human life prior to viability was not compelling enough to overcome the woman's right to privacy. 410 U.S. at 162-64. As the text at notes 117-18, *infra*, suggests, an attempt to avoid deciding this factual question may explain at least in part the Court's birth requirement.

57. This was used by the Supreme Court in Roe v. Wade, 410 U.S. at 163, to determine when viability begins. More recently it was used in Colautti v. Franklin, 99 S. Ct. 675, 681 (1979), impliedly in contradistinction to "momentary survival."

58. The reasons for this belief are suggested throughout this paper. In general, the Bill of Rights as well as subsequent amendments to the United States Constitution are to be understood as setting forth as fundamental values of state certain fundamental human rights in a positive form or as a statement of an American declaration of the rights of man, at least against the state. The idea of human rights is based upon the notion that certain rights obtain by virtue of being human and may be conditioned upon no other requirement. An attempt to restrict entitlement to those rights by the creation of criteria other than mere humanness is incompatible with the idea of "human rights;" an attempt to restrict entitlement to those rights by definition is jurisprudentially permissible only if such definitions are totally rational and non-arbitrary. The fundamental issues, as suggested in the text accompanying this footnote, are: (1) Is the unborn human? (2) Is the unborn living? and (3) Is the unborn an individual entity? Since the purpose of this article is much more to expose the Supreme Court's arbitrariness in resolving the "person" issue than to develop the writer's personal views, these views have been reduced to a footnote.

59. 410 U.S. at 159.

(2) How the Supreme Court Approached the Interpretation of "Person" as Used in the Fourteenth Amendment

As stated by the Supreme Court and conceded by all parties, no prior case had been found in which the United States Supreme Court had addressed itself to the question of whether the term "person" as used in the fourteenth amendment has prenatal application.[61] Thus, for all practical purposes, the question was being presented for the first time. In absence of precedent, the only legal materials with which the Court had to work were the constitutional provisions themselves.

In *Roe* the Court, in interpreting the scope of "person" in the fourteenth amendment, applied in a very general sense only two of the several possible methods of construction.[62] The Court first considered the term "person" as used in other contexts in the Constitution and then considered the history of abortion legislation throughout the nineteenth century.

(a) *The Supreme Court's consideration of the use of the term "person" in other contexts in the Constitution*

In approximately 500 words Mr. Justice Blackmun discussed the use of the term "person" in other clauses in the Constitution and concluded that the term "has application only postnatally."[63] With this short essay he attempted to resolve the most important issue raised in the case. A brief look at these other clauses reveals that they do not provide an answer to the question of the scope of constitutional personhood. In the clauses mentioned by the Court, the concept of "person" was broad and undefined and the function of the specific

60. A limited discussion of proofs presently available is included in the text accompanying notes 137-53, *infra*. *See also* Krimmel and Foley, *Abortion: An Inspection into the Nature of Human Life and Potential Consequences of Legalizing its Destruction*, 46 U. CIN. L. REV. 725 (1977).

61. Roe v. Wade, 410 U.S. at 157.

62. The commonly accepted approaches to the construction of legal documents very generally include interpreting the term at issue in good faith according to (1) the natural and ordinary meaning of the term; (2) the context of the whole document in which the term is found; (3) the historical background, including preparatory work; and (4) the function to be attributed to the term.

63. 410 U.S. at 157.

constitutional clause was to limit the broader class of persons for a particular purpose. For example, for a person to be qualified to be a representative, a senator or the President, he must be twenty-five, thirty and thirty-five years of age, respectively. Quite obviously there are some who are persons but do not meet these special qualifications for a particular office. The fact that a 24-year-old is not qualified for these offices suggests only that there are "persons" who are not qualified for the House, Senate or the Presidency. The clause suggests that 24-year-olds are persons; it does not suggest when the 24-year-old became a "person," or that he became a person at birth or at any other particular stage of his development. An identical criticism can be made of Mr. Justice Blackmun's apportionment clause[64] and extradition clause[65] arguments.[66] Whatever significance the use of "person" in other contexts in the Constitution has for the resolution of this problem, it seems to

64. U.S. CONST. art. I, § 2, cl. 3. The apportionment clause restricted those to be counted in the census to "free persons," "exclud[ed] Indians not taxed" and included "three fifths of all other persons." In *Roe* Justice Blackmun asked whether a fetus had ever been counted in a census. 410 U.S. at 157 n.53. This quip appears to have been inspired by Professor Means' law review article entitled *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?* 17 N.Y.L.F. 335, 402-03 (1971) [hereinafter cited as Means]. In this article, published on the eve of the first oral arguments in *Roe* and with the obvious intent to influence the outcome of the abortion cases before the Supreme Court, Professor Means attempted to deal not only with the briefs and written arguments of the parties but with those of the amici as well. It is important to note that constitutional personhood in other contexts in the Constitution is not considered to be restricted by the use of the term "person" in the apportionment clause or by the political compromises made at the time of formulating the Constitution in the late eighteenth century. Whatever the clause's value, it offers no guidance in construing the word "person" in the fifth or fourteenth amendments.

It is interesting that the apportionment clause uses the term "free persons," which suggests that there are "persons" who are not "free." The *Dred Scott* decision dealt with the question of citizenship, not personhood; *see* note 24, *supra*.

65. U.S. CONST. art. IV, § 2, cl. 2. The extradition clause provides that a "person charged . . . with Treason, Felony, or other crime . . . shall . . . be delivered up." This clause also restricts a broad and general class of "persons" for a particular purpose, in this case, those subject to extradition. It does imply that there are "persons" who do not qualify for extradition; it does not imply that those who do not qualify for extraditions are non-persons nor does it imply when this personhood began.

66. Mr. Justice Blackmun's primary point is, to an extent, valid. Regarding most constitutional references to "persons," the concern is with postnatal matters. But does it follow that blacks or "Indians not taxed" under seven years of age are not "persons?" A member of that class would be given three-fifths of a count in the census (or none, in the case of the untaxed Indian); would be too young to run for Congress, the Senate or the Presidency; and under the common law of crimes would be incapable of committing treason, a felony, or "other crime" and thus would not be subject to extradition. This, of course, does not reflect the present state of the law. Young blacks and Indians, whether taxed or not, are clearly "persons" under the Constitution. The scope of "person" in the fourteenth amendment has never been held to be limited by eighteenth century political compromises. Nevertheless, the Supreme Court's examples certainly suggest that possibility.

argue against the Court's conclusion, since all clauses mentioned restrict for particular purposes a broad class of persons. These clauses do not define "person." In any case, this approach offers nothing to support the Court's conclusion that "person" has only postnatal meaning.[67]

(b) *The Supreme Court's use of history*

i) The Supreme Court's argument concerning criminality of abortions during the nineteenth century

Mr. Justice Blackmun observed in *Roe* that "throughout the major portion of the nineteenth century prevailing legal abortion practices were freer than they are today"[68] and was thus "persuade[d] . . . that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[69]

There is reason to believe that Mr. Justice Blackmun's premise concerning nineteenth century abortion practices is not valid. Briefly, the following quotes should provide some insight into the accuracy of the Supreme Court's statements about the legal status of abortion during the seventeenth, eighteenth and nineteenth centuries. Sir Edward Coke wrote in 1628:

> If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision and no murder; but if the childe be born alive, and dieth of the potion, battery or other cause, this is murder.[70]

The Supreme Court was fully aware of this passage[71] as well as a similar one by Blackstone,[72] but concluded that "[a] recent review of

67. In fact, a glance at section one of the fourteenth amendment itself could arguably suggest that "person" has prenatal significance. The phrase in section one is "persons born or naturalized in the United States . . . are citizens of the United States." Obviously, there are persons who are not naturalized, for "naturalized" functions as an adjective which restricts the class of persons to those who qualify for citizenship. By the same reasoning, "born" functions as an adjective, limiting the class of persons to those who qualify for citizenship. Although this argument may appear superficial and, of course, does not preclude the possibility that the term "born" must be read "born . . . in the United States" as opposed to being born elsewhere, it does involve the use of person in section one of the fourteenth amendment—the very provision being construed—and it surely offers as much support for a "prenatal" construction as the *Roe* Court's analysis of the use of person does for its birth requirement.

68. 410 U.S. at 158.

69. *Id.*

70. 3 E. COKE, INSTITUTES 50 (1628). Coke defined "misprision" in his INSTITUTES as a word used to describe a misdemeanor which does not possess a specific name. *Id.* at 36. *See also Roe*, 410 U.S. at 136.

71. *See* 410 U.S. 113, 134-36 (1973).

72. Roe v. Wade, 410 U.S. at 135 n.25, *citing* 1 W. BLACKSTONE, COMMENTARIES 129-30.

the common-law precedents argues, however, that those precedents contradict Coke and that even post-quickening abortion was never established as a common law crime."[73] The Supreme Court supported this conclusion by citing with apparent approval a 1971 law review article by abortion proponent Cyril Means who, according to Justice Blackmun, suggested that Coke "may have intentionally mistated the law" possibly because he had "participated as an advocate in an abortion case in 1601"[74] and because of his desire to assert common law jurisdiction over an offense traditionally an ecclesiastical crime.[75]

Although it is possible that Coke was still zealously advocating his client's case twenty-seven years later when he published his *Institutes* in 1628, or was attempting to play politics, this cynical explanation hardly pinpoints why Sir William Blackstone, over a century later, repeated in substance the views of Sir Edward Coke in his *Commentaries of the*

73. 410 U.S. at 135. Mr. Justice Blackmun appears again to have relied on the study of Cyril Means, discussed at note 64, *supra*. Means argued that abortion during the fourteenth century was a "liberty" and cited two cases (The Twinslayer's Case and The Abortionist's Case) in support. Means at 335-50. Even if these two cases do reflect the state of the common law during the fourteenth century (and there is good reason to believe they do not, *see* Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250, 1267-73 (1975)), it is difficult to understand how abortion could be considered a "liberty" when it was clearly a crime and punishable as such by the ecclesiastical courts. *See* Means at 346-48 and note 64, *supra*. To draw a rough analogy, if possession of cannabis were not a federal offense, would it follow that possession of cannabis is a "liberty?" Would possession also be a liberty if possession were punished by our state courts? It is significant to remember that during the fourteenth century it was commonly claimed that the law applied by the ecclesiastical courts had been "received" by the state and thus obtained its authority by being essentially a part of the law of England. *See generally* F. MAITLAND, ROMAN CANON LAW IN THE CHURCH OF ENGLAND (1898). Maitland himself was not convinced that there had really been a "reception" of canon law. *See* F. MAITLAND, *Essay on William Lyndwood*, in ROMAN CANON LAW IN THE CHURCH OF ENGLAND (1898). Nevertheless, to the extent that everyone was subject to the canon law, that punishment of considerable severity for its violation was inflicted, that canon law was generally considered to be a "part" of English law, and that abortion was a "crime," it is very difficult to understand the "liberty" argument advanced by Means. Moreover, even if abortion were not a common law offense during the fourteenth century, the writings of Bracton (thirteenth century), Coke (seventeenth century), Hale (seventeenth century), Blackstone (eighteenth century), and Kent (nineteenth century), all of whom believed that abortion of a quickened fetus was a crime, were instrumental in formulating the attitudes of the drafters of the fourteenth amendment toward unborn human life. There is no indication that eighteenth and nineteenth century America believed that the abortion of a quickened fetus was a "liberty." Both the cases and the commentaries suggest the contrary. With respect to the issue of whether the word "person" includes the "unborn," the ideas of eighteenth and nineteenth century America are crucial, not those of fourteenth century England. As the accompanying text points out, nineteenth century America clearly believed that an abortion of a quickened fetus was a crime. And, as the nineteenth century courts pointed out, the purpose of the common law offense was to protect unborn human life. *See* notes 78-80, 82-85, *infra*, and accompanying text.

74. Roe v. Wade, 410 U.S. at 136 n.26.

75. *Id.*

Laws of England.[76] It also does not explain the following comment by Professor Perkins, a foremost authority on the common law of crimes and uninvolved—as far as this writer is aware—in abortion polemics:

> [I]t was a common law misdemeanor to administer any drug or medicine or to perform an operation on a woman pregnant with a quick child for the purpose of causing a miscarriage, and thereby causing the child to be born dead, unless such operation was necessary to save the life of the woman.[77]

This explanation also does not indicate why a Pennsylvania court in 1850 wrote: "The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated. . . . There was therefore a crime at common law sufficiently set forth and charged in the indictment."[78] It likewise fails to explain why at least four other states reached identical conclusions with respect to a quickened fetus.[79] It also is not supported by the fact that, at the time when the fourteenth amendment was ratified in 1868, nearly every state had criminal legislation proscribing abortion.[80] Exactly what Mr. Justice Blackmun meant with his statement that "abortion practices were freer (in the nineteenth century) than today" is unclear. If he meant that abortion was neither criminal nor subject to penal sanction—either by statute or at common law—he was wrong.

ii) The Supreme Court's argument concerning the purpose of nineteenth century abortion legislation

Justice Blackmun implied that the purpose of the anti-abortion legislation of the nineteenth century was in protecting "the woman's health rather than in preserving the embryo and fetus."[81] The Court cited a New Jersey statute, construed by an 1858 New Jersey Supreme Court case, to support this idea.[82] The history of anti-abortion legisla-

76. *See* 1 W. BLACKSTONE, COMMENTARIES 129-30.

77. R. PERKINS, CRIMINAL LAW 140 (2d ed. 1969), citing cases from Massachusetts (1845), Iowa (1856) and New Jersey (1849). These cases reflected the state of the law in these states at the time of the adoption of the fourteenth amendment in 1868.

78. Mills v. Commonwealth, 13 Pa. 630, 633-34 (1850); *see also* State v. Slagle, 83 N.C. 630, 632 (1880).

79. Abrams v. Foshee, 3 Iowa 274 (1856); Mitchell v. Commonwealth, 78 Ky. 204 (1879); Commonwealth v. Parker, 50 Mass. 263 (1845); State v. Cooper, 22 N.J.L. 52 (1849).

80. *See* Roe v. Wade, 410 U.S. at 175-76 n.1 (Rehnquist, J., dissenting).

81. 410 U.S. at 151.

82. The case cited by the United States Supreme Court is State v. Murphy, 27 N.J.L. 112 (1858); however, the history of the law on abortion in New Jersey during the nineteenth century actually argues against Mr. Justice Blackmun's conclusions in this regard. In State v. Cooper, 22 N.J.L. 52 (1849), the Supreme Court of New Jersey formulated the issues to be whether an attempt to procure an abortion of an unquickened fetus with the mother's consent "be at all an offense or not, and whether the child be *in esse*, so that any crime can be committed against its person." *Id.*

tion in New Jersey indicates that the United States Supreme Court misunderstood the statute.[83] Beyond that, however, the evidence to the contrary is quite overwhelming; this evidence clearly shows that there was considerable concern during the nineteenth century in protecting the fetus. The Supreme Court neglected to mention eleven decisions expressly stating that the protection of the life of the unborn was at least one of the purposes for the nineteenth century abortion statutes[84]

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at 54. The Court emphasized that an abortion of a quick child, even with the mother's consent, was an offense at common law. In support of this, the Court cited Blackstone's comment that "[l]ife begins in contemplation of law as soon as an infant is able to stir in the mother's womb." *Id.* The Court then noted that "[i]t is not material whether, speaking with physiological accuracy, life may be said to commence at the moment of quickening, or at the moment of conception, or at some intervening periods. *In contemplation of law* life commences at the moment of quickening, at the moment when the embryo gives the *first physical proof of life*, no matter when it first received it." *Id.* (second emphasis added). The Court then concluded that the "offense of procuring an abortion seems, by the ancient common law writers, to be treated only as an offense against life." *Id.* As a result, the *Cooper* Court held that, under the common law, if the woman consented and the child had not quickened, there was no common law offense. The entire discussion of the Court, it must be emphasized, centered around the question of whether the abortion of an unquickened fetus could be a crime. (There was no mention made of the health of the mother by the *Cooper* Court.) The Court then invited the legislature, "if the good of society requires that the evil [meaning, this writer belives, no legal protection for the unquickened fetus] should be suppressed by penal inflictions," to enact legislation. *Id.* at 58. "This decision," it is noted in the official reporter, "induced the legislature to amend the criminal code, so as to make the offense in question a crime." *Id.*

83. The statute required that the offender intend "to cause and procure the miscarriage of the woman *then pregnant with child*." State v. Murphy, 27 N.J.L. at 113 (emphasis added). What this statute accomplished was to protect the unquickened child. Were the purpose merely to protect the woman's health, the legislature would not have required that actual pregnancy be established as a material element of the offense. It is true, as Mr. Justice Blackmun wrote in *Roe*, that the New Jersey Supreme Court in *Murphy* stated that the purpose of the statute was "to guard the health and life of the mother against the consequences of [attempts to procure abortions.]" 27 N.J.L. at 114. However, Mr. Justice Blackmun failed to mention (1) that an abortion of a quickened child was already a crime at common law in New Jersey; (2) that at least one effect of the statute was to make an abortion of an unquickened child a crime in New Jersey; (3) that before the crime could be committed, the woman must be actually pregnant with either an unquickened or quickened child; and (4) that the inducement for enacting the statute was the holding in *Cooper* in which the only "evil" discussed was the failure of the common law to provide protection of an unquickened fetus.

84. Cases expressly holding that protection of the life of the fetus is one of the purposes of the nineteenth century abortion statutes are: Trent v. State, 15 Ala. App. 485, 73 So. 834 (1916), *cert. denied*, 198 Ala. 695, 73 So. 1002 (1917). The Alabama Court of Appeals wrote:

> [The statute's] manifest purpose is to restrain after conception an unwarranted interference with the course of nature in the propagation and reproduction of human kind . . . . We are forced to concede that when in the red-hot furnace of vitality two germs, male and female, are brought together, that fuse themselves into one, a new being, crowned with humanity and mentality, comes into life. If this be true, does not the new being, from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extrauterine life . . . ?

Id. at 486, 73 So. at 836.

According to the Kansas Comp. Laws of 1879, abortion of a quick fetus was manslaughter (Comp. Laws 1879, c. 31, p. 329) whereas an abortion of a non-quick fetus was a misdemeanor

and that nine others implied the same notion.[85]

The Court also failed to mention Blackstone's famous statement that "Life is . . . 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.[86] Blackstone's first American editions appeared in 1771 and have helped explain the attitude of nineteenth century America towards unborn life. According to Harvard Law Professor Charles Haar:

> Blackstone supplied a real need in this country. Without a trained bar, lacking a tradition of learning and of legal education, America found his exposition overwhelming in force. It is powerful and direct. Its emphasis on natural law fitted in with the peculiar environment of law in America. Because of the *Commentaries* English common law became also the common law of the United States. To the link of the common language was added that of the common legal principles. The *Commentaries* were a conduit of the ideas of Locke and Montesquieu to the framers of the Federal and state constitutions. They attained the position of an oracle of law on which lawyers for generations cut their teeth; mastery of Blackstone was deemed an adequate preparation for the practice of law.[87]

(Comp. Laws 1879, c. 31, p. 332). In State v. Miller, 90 Kan. 230, 133 P. 878 (1913), the Supreme Court of Kansas commented on the purpose of the latter statute by writing that the statute "carries the facial evidence of the legislative intent to cover the criminal machinations and devices of the abortionist in order to protect the pregnant woman and the unborn child." *See* Dougherty v. People, 1 Colo. 514 (1872); Nash v. Meyer, 54 Idaho 283, 31 P.2d 273 (1934); State v. Alcorn, 7 Idaho 599, 64 P. 1014 (1901); State v. Watson, 30 Kan. 281, 1 P. 770 (1883); Joy v. Brown, 173 Kan. 833, 252 P.2d 889 (1933); State v. Gedlicke, 43 N.J.L. 86 (1881); State v. Siciliano, 21 N.J. 249, 121 A.2d 490, 494 (1956); State v. Tippie, 89 Ohio St. 35, 105 N.E. 75 (1913); Bowlan v. Lunsford, 176 Okla. 115, 54 P.2d 666 (1936); State v. Ausplund, 86 Ore. 121, 167 P. 1019 (1917); State v. Howard, 32 Vt. 380 (1859); Anderson v. Commonwealth, 190 Va. 665, 58 S.E.2d 72 (1950); State v. Cox, 197 Wash. 67, 84 P.2d 357 (1938).

85. Abrams v. Forbee, 3 Iowa 273 (1856); State v. Moore, 25 Iowa 128 (1866); Smith v. State, 33 Me. 48 (1851); Worthington v. State, 92 Md. 222, 48 Atl. 355 (1901); People v. Sessions, 58 Mich. 594, 26 N.W. 291 (1886); Montgomery v. State, 80 Ind. 338 (1881); Edwards v. State, 79 Neb. 251, 112 N.W. 611 (1907); Bennet v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Mills v. Commonwealth, 13 Pa. St. 630 (1850); State v. Crook, 16 Utah 212, 51 P. 1091 (1898). *See generally* Horan, Gorby & Hilgers, *Abortion and The Supreme Court: Death Becomes a Way of Life*, in ABORTION AND SOCIAL JUSTICE (1972).

86. 1 W. BLACKSTONE, COMMENTARIES 129. *See* State v. Cooper, 22 N.J.L. 52 (1849) for an example of how the New Jersey Supreme Court used this passage by Blackstone to determine the scope of the common law crime of abortion.

87. Haar, *Preface* to W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1962) at xxii-xxiii. An example of the influence of Blackstone on the thinking of Americans just prior to the enactment of the fourteenth amendment in 1868 can be found in the following statement by Abraham Lincoln: "The more I read [of Blackstone's Commentaries], the more intensely interested I became. Never in my whole life was my mind so thoroughly absorbed. I read until I devoured them." *Id. Cf.* Bedau, *The Right to Life*, 52 THE MONIST 550 (1968). An example of Blackstone's influence on the attitude of the judiciary to unborn human life is also reflected in an 1820 Mississippi case in which the court held that a slave was a person under the criminal law and

A brief look at the law books used by nineteenth century law students testifies to the influence of Blackstone on nineteenth century thought. It was common for a law professor to make at least one of his contributions to legal education, and to the development of the law, by editing and commenting upon Blackstone.[88] Furthermore, Blackstone and Kent, who echoed Blackstone's words,[89] were cited as authority by those who sponsored the Civil Rights Act of 1866 as well as the fourteenth amendment.[90] The Civil Rights Act of 1866 is of considerable importance to this study since, as Professor Berger points out in his *Government by Judiciary*, the "key to [the] meaning [of the privileges or immunities clause of the fourteenth amendment] is furnished by the immediately preceding Civil Rights Act of 1866, which, all are agreed, it was the purpose of the [fourteenth] [a]mendment to embody and protect."[91]

The development of nineteenth century medical ethics seems to parallel the legal principles of Blackstone. Very influential during the early nineteenth century was Thomas Percival's *Medical Ethics* in which the following was written: "To extinguish the first spark of life is a crime of the same nature, both against our maker and society, as to destroy an infant, a child, or a man."[92] These views explain in part the condemnation of abortion as the destruction of "human life" by the American Medical Association at its 1859 annual meeting.[93]

Further support for the idea that nineteenth century America was concerned with preserving the life of the fetus is ironically found in *Botsford v. Union Pacific Railroad*,[94] the very case which the Supreme

entitled to its protections and that a slave owner could be prosecuted for the murder of his slave. The court wrote:

> The taking away of the life of a reasonable creature under the King's peace, with malice aforethought, express or implied, is murder at common law. Is not the slave a reasonable creature, is he not a human being, and the meaning of this phrase reasonable creature is a human being, for the killing a lunatic, an idiot, or even a child unborn, is murder, as much as the killing a philosopher, and has not the slave as much reason as a lunatic, an idiot or an *unborn child*.

State v. Jones, 2 Miss. (1 Walker) 39 (1820) (emphasis added).

88. *See, e.g.*, Professor Tucker's Blackstone; Wendell's Blackstone; Professor Cooley's Blackstone; Dean Ewell's Blackstone; Blickensdorfer's Blackstone; Dean Hammond's Blackstone; Dean Gavit's Blackstone; Dean Chase's Blackstone.

89. Kent wrote, in his COMMENTARIES ON AMERICAN LAW (12th ed. 1973), as follows: "The absolute rights of individuals may be resolved into the right of personal security, the right of personal property, the right to enjoy and acquire property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable."

90. *See* R. BERGER, GOVERNMENT BY JUDICIARY 20-22 (1977).

91. *Id.* at 20.

92. T. PERCIVAL, MEDICAL ETHICS 134-35 (Leake ed. 1827).

93. *Minutes of the Annual Meeting 1859*, THE AMERICAN MEDICAL GAZETTE 409 (1859).

94. 141 U.S. 250 (1891).

Court cited in *Roe* as its landmark right to privacy case. Although the *Botsford* Court acknowledged a common law right to privacy which precluded a court without statutory authority from ordering a medical examination of a female plaintiff in a personal injury case,[95] it pointed out that one of two exceptions to this common law right of privacy was the writ *de ventre inspiciendo*. With this writ, the state was empowered to examine whether a woman convicted of a capital crime and sentenced to be executed was quick with child, thus overcoming her right to privacy. If she was, execution would be stayed until after the birth of the child. Here, the common law not only acknowledged a right to life in the fetus but also recognized precedence of this right over the common law right of privacy.

In light of the above it seems hard to suggest—as did the majority in *Roe*—that the concerns of the nineteenth century were exclusively about the pregnant woman and not the unborn, and difficult to argue—as did the majority in *Roe*—that the purpose of nineteenth century abortion legislation was in protecting "the woman's health rather than in preserving the embryo and fetus." Indeed, the preservation of the fetus appears to have been a major purpose. Moreover, even those courts which have indicated that preservation of maternal health was a purpose for enacting the anti-abortion statute did so against a background in which abortion of at least a quickened fetus was considered a common law crime.[96]

If Justice Blackmun meant that an unquickened fetus may not have enjoyed protection under the common law, he should have said that. The correlation, however, would be that the quickened fetus did enjoy criminal law protection, a fact which argues against the Court's conclusion that constitutional personhood has no prenatal application.[97]

95. Elevating a common law right to a constitutional right, as did the Supreme Court in *Roe* with the right to privacy, raises an additional point. In *Botsford* the Supreme Court simply asked whether it had the *authority* to order an examination of the woman without statutory authority and concluded it did not. The implication, of course, is that with statutory authority, the Court would be so empowered. In short, the Court recognized the predominance of statutory law over common law. Indeed, subsequent to *Botsford*, nearly every state, either by statute or court rule, had permitted a court to order physical examinations of injured plaintiffs in personal injury cases. Thus, the right to privacy in this context has given way to a legislatively determined greater need. By elevating the right to a constitutional level, the legislature loses, except under compelling circumstances, the power to limit the right. *Botsford* thus may stand for the notion that there is a common law right to privacy. It does not, however, stand for the notion that this right prevails over any legislative determinations that the right must yield to what it considers to be more important values, such as was the case with the criminal abortion laws.

96. *See, e.g.*, State v. Murphy, 27 N.J.L. 112, 114 (1858). The Supreme Court of New Jersey noted that the common law "offense [of abortion] was only against the life of the child."

97. Quickening refers to the mother's awareness of the movement of the fetus in the womb; it

In oral argument before the *Roe* court[98] as well as in the *Roe* majority opinion,[99] the Supreme Court seemed impressed by the historical fact that no case had been found in which the pregnant woman was prosecuted for allowing an abortion to be performed on herself and by the fact that the punishment for conviction under the abortion statutes was much milder than the punishment for homicide. The Court found this to suggest that the fetus was not considered a person, as was the victim in a homicide. Such a conclusion is simply not warranted since there are other valid explanations. For example, if a 12-year-old intentionally kills a born individual in Illinois, no crime has been committed since the child is not legally responsible. No one could suggest that the victim of the act was not a person because the killer was not or could not be prosecuted. If a 15-year-old intentionally kills another, but is proceeded against under the Juvenile Court Act, one could hardly argue that the victim is not a person. The explanation for this legal phenomenon is that there are special circumstances surrounding the commitment of an act, circumstances which the lawmaker may properly and reasonably consider in formulating means to protect state interests and values—in the examples given, the age and assumed immaturity of the actor; in the abortion situation, the assumed stresses on the woman burdened by an unwanted pregnancy. These factors may justify and explain different treatment of the woman or even the physician in the abortion context, just as they justify or explain different treatment of the child of tender years or even of one who kills another under severe provocation.

Although in modern jurisprudence constitutional history alone has not been allowed to dispose of every question of constitutional interpretation, this brief historical background casts doubt on the soundness of two of the Supreme Court's critical conclusions in *Roe v. Wade*: (1) that abortion was not considered a crime by most of those who supported the fourteenth amendment in 1868;[100] and (2) that the purpose

thus reflects maternal sensitivity, not fetal competence, and thus also tends to be an arbitrary point at which to commence constitutional personhood. One possible reason why "quickening" may have been important in criminal law is because at that point it would be possible through the mother's testimony or by reports of a mother's statements to determine if the fetus were in fact alive at the time of the infliction of the criminal act. With such testimony, one could establish the *corpus delecti* of the crime. *See* note 82, *supra*, for a discussion of State v. Cooper, 22 N.J.L. 52 (1849). As the New Jersey Supreme Court in *Cooper* points out, quickening is important in law because "at that moment the embryo gives the first proof of life." 22 N.J.L. at 54.

98. ORAL ARGUMENTS IN THE SUPREME COURT ABORTION DECISIONS (Sanctity of Life Publications, Ltd. 1976) at 20, 28, 54, 61-62.

99. 410 U.S. at 138, 151.

100. It should be noted that the legislatures which ratified the fourteenth amendment also, within the same general time frame, enacted the abortion statutes of the nineteenth century.

of the anti-abortion laws was solely to protect the woman's health and not the life of the fetus. In addition, it casts doubt on the Court's holding that the concept of "person" does not embrace the unborn. The effect of this doubt surely is to augment the obligations of the Supreme Court to account for a requirement of birth as a condition precedent for membership in the class of constitutional persons.

(3) The Supreme Court Concluded that Constitutional Personhood Begins at Birth

Based upon the Court's conclusions concerning the postnatal use of "person" in the fourteenth amendment and upon its understanding of the history of the criminality of abortions, the Court implied, although did not explicitly state,[101] that birth is the point at which constitutional personhood begins. This conclusion becomes apparent from several other statements made in the opinion. Only one of these statements, however, will be discussed. According to the *Roe* opinion, the legal value of the unborn is, prior to viability, insignificant—if it exists at all—when it conflicts with a woman's right to privacy, which the Supreme Court in *Roe* found "includes the abortion decision."[102] Nevertheless, after viability, the state has an "important and legitimate interest in potential life."[103] This pronouncement means that any legal protection for the life of the unborn after viability depends upon whether the state "chooses" to assert its interest in protecting fetal

101. Was the Court's failure to explicitly state that constitutional personhood begins at birth intentional? Although this paper proceeds on the assumption that constitutional personhood begins at birth, is it possible that in the minds of the justices there are perhaps additional conditions precedent to obtaining constitutional personhood? Can some indication of this be found in the Court's statement that the state's compelling interest in protecting the unborn begins at viability because then the fetus "has the capability of meaningful life outside the mother's womb?" 410 U.S. at 163. What does "meaningful life" mean? That life is possible outside the mother's womb? That there is potential for survival? Or does it suggest something entirely different, something related, for example, to intellectual ability, financial ability, physical ability, to the capability of being happy, normal, loyal, healthy, or perhaps to the state of being wanted or loved or to whether a "meaningful" contribution to society can be made? Interestingly enough, since *Roe*, and likely as a consequence of *Roe*, serious suggestions have been made to postpone legal protections until even beyond birth. *See, e.g.*, Nobel Prize Winner James Watson's statement that "most birth defects are not discovered until birth. . . . [If] a child were not declared alive until three days after birth, all parents could be allowed the choice [to preserve the child's life] that only a few are given under the present system." Watson, *Children from the Laboratory*, PRISM, May 1973, at 12-13. *See also* Tooley, *Abortion and Infanticide*, 2 PHIL. & PUB. AFFAIRS 37, 44 (1972), where the author suggests that an "organism possesses a serious right to life only if it possesses the concept of a self as a continuing subject of experiences and other mental states, and belives that it is itself such a continuing entity;" Horan, *Euthanasia as Medical Management*, in DEATH, DYING AND EUTHANASIA 198-99 (D. Horan & D. Mall ed. 1977) for a discussion of several other similar suggestions.

102. 410 U.S. at 154.

103. *Id.* at 163.

life.[104] In other words, the existence of legal protection for the fetus at this stage of human development depends upon the mercy or interests of the state, not upon any notion of an inherent, inalienable right to life or upon a corresponding duty incumbent upon the state to protect such rights.[105] Thus, unless the Court had assumed that constitutional personhood begins at birth, this decision marks a radical departure from the liberal political philosophy of which the Constitution is a manifestation.[106] Surely the Court did not intend to suggest that the right to life of a person depends upon whether the state finds it worthwhile or expedient to allow that person to live. Assuming no far-reaching disavowal of the fundamental liberal tradition, one must conclude that the Court decided for all practical purposes that birth is a constitutional requirement for membership in the class of constitutional "persons."

(4) Two Approaches the Supreme Court Did Not Use in Interpreting "Person:" The Plain Meaning of the Term and the Function of the Term

A primary and certainly a very common method of construing a document is to give the words their natural and ordinary meaning.[107] A study of two of the most complete and authoritative dictionaries in the English language, *The Oxford English Dictionary of 1970* and *Webster's Third New International Dictionary*, as well as the 1828 and 1865 editions of Daniel Webster's *An American Dictionary of the English Language*, are illuminating. All relevant definitions define "person" in

104. *Id.*

105. Professor Verdross suggests that the state has a duty to create courts to protect fundamental human rights. *See* A. Verdross, The Idea of Fundamental Human Rights (translated by this author and set for publication in 1979).

106. *See, e.g.*, Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928).

107. Although the history of constitutional decision-making suggests that the "plain meaning" approach is only one of numerous methods of interpretation, this principle of interpreting according to the literal meaning has been frequently applied by constitutional courts. In Beal v. Doe, 432 U.S. 438, 444 (1977), the Court wrote: "The starting point in every case involving construction of a statute is the language itself." *See also* E. CRAWFORD, STATUTORY CONSTRUCTION 315 (1940), where he wrote: "[T]he intention of the legislature is to be primarily ascertained from the language used in the statute, and if the language is plain and unambiguous, it must be given a literal meaning." *See also* Lake County v. Rollins, 130 U.S. 662, 670 (1889), where the Court wrote:

> If the words convey a definite meaning, which involves no absurdity, nor any contradiction of the other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it.

Even though scholars look upon the "plain meaning" approach as a relatively unsophisticated one and as one which distracts a person from the more important analysis of function and history, the Court has not hesitated to use "plain meaning" as an approach to construction, particularly when it serves its purposes. *See, e.g.*, Beal v. Doe, 432 U.S. at 444.

terms of humanness, individual humanness, and the state of being a human being.[108] "Human" is defined in these dictionaries in terms of "man."[109] And "man" is defined in terms of "humanness" or in terms of individual membership in the human race.[110] Thus, the circle of definitions is complete. Neither the word "birth" nor anything relating to birth is mentioned, either directly or indirectly, in any of the numerous and varying definitions of "person," "human" or "human being," or "man." It is therefore understandable why the Court did not pursue the "ordinary usage" or "plain meaning" path to interpretation; nothing in these definitions state, mention, suggest or even imply that birth

108. THE OXFORD ENGLISH DICTIONARY (1970) provides the following relevant definitions of "person:" "II. An individual human being; a man, woman, or child. IV. *Law.* A human being (*natural person*)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY provides these relevant definitions: "1. a) an individual human being; c) a human being as distinguished from an animal or thing; 8. a being characterized by conscious apprehension, rationality, and a moral sense; 9. a living individual unit. . . ." Noah Webster's AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) provided the following pertinent definitions of "person:" "1. An individual human being consisting of body and soul. We apply the word to living beings only, possessed of a rational value; the body when dead is not called a *person*. It is applied alike to a man, woman or child. 'A person is a thinking intelligent being' - Locke; 2. A man, woman or child, considered as opposed to things, or distinct from them; 3. A human being, indefinitely; one; a man." The 1865 version of Noah Webster's AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE defined "person" as follows: "3. The corporeal manifestation of a soul; the outward appearance, expression, & c., body. 4. A living soul; a self-conscious being; a moral agent; especially a living human being; a man, woman, or child; an individual of the human race. 'We must consider what *person* stands for; which, I think, is a thinking, intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing in different times and places.' - Locke 5. A human being spoken of indefinitely; one; a man."

109. Since most of the definitions use the term "human" or "human being" to define "person," the possibly relevant definitions of "human" are given. THE OXFORD ENGLISH DICTIONARY (1970) defines "human" as "1. Of, belonging to, or characteristic of man; 2. Of the nature of man. . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defines "human" as "1. a) of or relating to man: characteristic of man 3. characteristic of or relating to man in his essential nature. . . ." N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) defined "human being" as follows: "1. Belonging to man or mankind; pertaining or relating to the race of man; 2. Having the qualities of a man." The 1865 version defined "human" as follows: "1. Belonging to man or mankind; having the qualities or attributes of a man; pertaining or relating to the race of man; 2. A human being; one of the race of man."

110. Since "human" is often defined in terms of "man," relevant definitions of "man" are provided. THE OXFORD ENGLISH DICTIONARY (1970): "I. 1. A human being (irrespective of sex or age). . . ." WEBSTER'S THIRD INTERNATIONAL DICTIONARY: "1. a) A member of the human race; a human being; 2. b) a bipedal primate mammal (homo sapiens) . . . distinguished by notable development of the brain with a resultant capacity of articulate speech and abstract reasoning, marked erectness of body carriage . . . 2. c) Individual; one." N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) defined "man" as follows: "1. Mankind; the human race; the whole species of human beings; beings distinguished from all other animals by the powers of reason and speech, as well as by their shape and dignified aspect. 7. An individual of the human species." The 1865 version defined "man" as follows: "1. An individual of the human race; a human being; a person. 3. The human race; mankind; the totality of man."

is part of, related to, or a condition precedent to personhood. In short, it offers no support for its birth requirement for personhood.

Concerning the function of the fourteenth amendment and the role of the word "person" in the amendment, it can be said that the immediate political concern of the second half of the 1860s was to secure rights and freedoms and to ensure equal protection for former slaves.[111] More generally, however, the amendment was designed to secure to all persons the fundamental rights of man, which generally include life, liberty or property by providing the adjective right of access to the courts.[112] There is nothing in the function of the fourteenth amendment to suggest that its scope or purpose is to protect only the born. And to the extent that an unborn can be the owner of property[113] and is living,[114] a fourteenth amendment purpose exists in the case of the unborn just as surely as it does with a born person who owns property and possesses "life."[115]

IV. The Birth Requirement, Avoidance of the "Life" Issue, Judicial Science and Arbitrariness

There is nothing in the Constitution itself or in its history which even suggests—to say nothing about requires—that constitutional personhood begins at birth. If anything, the contrary is true. Most probably the term indicates and was understood to mean an individual human being[116]—a classification for which birth does not appear to be a criterion. Are there perhaps other rational factors not directly related to the Constitution or its history which would justify the Court's reaching beyond the strict realm of positive jurisprudence and creating a birth requirement as an essential requisite for membership in the class of constitutional persons?

111. *See* Strauder v. W. Va., 100 U.S. 303 (1880); *see also* R. Berger, Government by Judiciary (1977).

112. R. Berger, Government by Judiciary 20 (1977).

113. *See* notes 100 and 101, *supra*.

114. *See* text accompanying notes 127-36 and 137-53, *infra*.

115. Since there are no judicial decisions on the matter, one can only speculate about how the Supreme Court would deal with an attempt by a state to deprive the unborn of his property without due process of law or just compensation.

116. *See* notes 108-10, *supra*, and accompanying text; *see also* L. Tribe, American Constitutional Law 893 (1977). He writes: "Human beings are of course the intended beneficiaries of our constitutional scheme." *See also* Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250 (1975).

A. *By Selecting Birth as an Essential Requisite of Constitutional Personhood the Supreme Court Evaded the "Life" Issue*

Quoted earlier was a statement by Mr. Justice Blackmun to the effect that the judiciary should not speculate as to "when life begins" when philosophers, theologians and physicians themselves cannot, he claims, arrive at a consensus.[117] By grafting a birth requirement upon the concept of constitutional personhood, the Supreme Court hoped to avoid the necessity of making a judicial determination of "when life begins."[118] Is a Court justified in selecting an essentially arbitrary factor as a requisite to constitutional personhood to avoid the dilemma of deciding "when life begins," a quandry which, according to Mr. Justice Blackmun, philosophers, theologians and even physicians cannot resolve?

B. *The Principles of Legal Science Do Not Require the Supreme Court to Avoid the "Life" Issue*

(1) Justice Holmes' Dissent in *Lochner* and the "Life" Issue

Perhaps the Court's reluctance to "speculate" about "when life begins" results from its expressed desire to follow "Mr. Justice Holmes' admonition in his now-vindicated dissent in *Lochner v. New York*"[119] that the individual opinions of the justices "ought not to conclude [the Court's] judgment upon the question whether statutes embodying them conflict with the Constitution."[120] What Justice Holmes seems to have said is that the justices should not sit as superlegislators and declare statutes unconstitutional which they do not like. He was not suggesting

117. Quoted in text accompanying note 55, *supra*.

118. It is interesting to note in this regard that in Maher v. Roe, 432 U.S. 464 (1977), the Supreme Court in discussing the existence and legitimacy of a state interest in encouraging birth, as opposed to abortion, once again avoided decision on the "life" issue. In *Maher* the Court finessed the issue by concluding that the state had an interest in "potential human life," thus making a decision about the existence of life at a particular stage unnecessary in the context of asserting state interests. 432 U.S. at 478-80.

119. Roe v. Wade, 410 U.S. at 117; *see* note 9, *supra*, for the full text of the quotation.

120. *Id.* Justice Holmes' argument is applicable to a similar argument made by proponents of abortion in the numerous debates on the topic. For example, at the 1975 Pierce Debates at the University of Chicago, Sybella Fritzsche, for the pro-abortion side, said:

> I do not believe that nine wisemen in Washington hold the truth. In our society, there is not necessarily one common binding standard for all of us, and I think the Court paid attention to that fact. They admitted that there was no absolute Truth that they could find.

The Chicago Maroon, Apr. 29, 1975. The weakness of this argument is that "in our society there . . . is one common binding standard for all of us," and that standard is the Constitution. Otherwise, our society would face the problem of the tyranny of the majority. Moreover, the "nine wisemen in Washington," not theologians, physicians or even the majority of the American people, are charged with its interpretation or the responsibility of determining its meaning and scope.

that judges should hesitate to discharge their responsibility as judges, even if this involves making difficult, and often unpopular, legal and factual determinations. After all, constitutional provisions have a legal meaning and scope regardless of what the various schools of philosophy and theology may think or even what the majority of people in a democracy thinks. Indeed, a primary purpose of a catalogue of fundamental human rights, such as the Bill of Rights, in a constitutional document is to protect those fundamental rights from the whims, predispositions or excesses of those who administer the state—and from a possible tyranny of the majority. And it is certainly the judges' responsibility to conscientiously construe those constitutional provisions. Were this not so, the predispositions or whims of administrators of state, whether executive or judicial, or the building of a majority consensus that, for example, "blacks" were not "citizens" as in *Dred Scott*,[121] or that non-Aryans were not full persons as in Nazi Germany, would be dispositive of the question of whether individual members of these minority groups are entitled to protection under the "person" concept of the Constitution. Such a solution would rub against the grain of the entire human rights movement—a movement based on the idea that there are certain fundamental rights which ought to exist by virtue of being a living human being and for no other reason[122]—as well as against the purpose of the fourteenth amendment.[123] Mr. Justice Holmes did not express a contrary idea in *Lochner*. In fact, in the paragraph following the one in *Lochner* quoted by Mr. Justice Blackmun, Mr. Justice Holmes wrote:

> I think that the word "liberty," in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[124]

In spite of its promise to bear Holmes' famous dissent in mind, the *Roe* Court struck down a statute which was the "natural outcome of a

121. *See* note 24, *supra*.

122. *See* A. Verdross, The Idea of Fundamental Human Rights (translated by this author and set for publication in 1979), particularly his discussion of the contribution of Samual Pufendorf.

123. Appellants in *Roe* argued that "whether the fetus is or is not a human being is a matter of definition, not fact, and we can define it in any way we wish." Brief for Appellant at 119, Roe v. Wade, 410 U.S. 113 (1972). If appellants are correct in their claim, the existence of human rights would be dependent upon the whims of the entity empowered to define "human." Moreover, the pro-abortionist claim that abortional freedom is a victory for human rights accordingly rests on a most fickle basis.

124. Lochner v. N.Y., 198 U.S. 45, 78 (1905) (Holmes, J., dissenting).

dominant opinion,"[125] that is, the product of the democratic process. But what is more important, the Texas abortion statute actually implemented, rather than infringed, "fundamental principles as they have been understood by the traditions of our people and our law."[126] Mr. Justice Holmes' admonition in *Lochner*, unheeded in *Roe*, simply means that the Constitution should be construed according to fundamental legal principles, not the personal predilection of judges.

(2) The Judiciary and the "Life" Issue in Non-Abortion Cases

The Court implied in the statement "when life begins"[127] that it would be improper for the judiciary to speculate as to the answer to such an inquiry. It is noteworthy that the Federal Constitutional Court

125. *Id.*

126. *Id. See generally* text accompanying notes 55-115, *supra*. The fact that the *Roe* case has had ramifications beyond its direct impact on criminal abortion statutes into such areas as a father's interests in his unborn child and parents' authority to control the moral development of their minor children (*see, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52 (1975); Baird v. Bellotti, 428 U.S. 132 (1975); Wynn v. Scott, 449 F. Supp. 1302 (N.D. Ill. 1978), *appeal dismissed, direct appeal improper*, 99 S. Ct. 49 (1978), *appeal docketed*, No. 78-1262 (7th Cir. 1978)) suggests again, although indirectly, that the decision was contrary to the "fundamental principles as they have been understood by the traditions of our people and our law." At the time of the enactment of the fourteenth amendment, fathers were generally entitled to a custody of children following divorce. J. KENT, COMMENTARIES ON AMERICAN LAW (pt. IV) 205 (12th ed. 1973). Yet *Roe* and *Danforth* state that the father cannot even prevent the destruction of his unborn child. Nevertheless, parents have both the duty and the right to maintain and educate their children. To support this idea Kent noted the following:

> (c) In the case of *The Commonwealth v. Armstrong*, in the session of the peace of Lycoming county, Pennsylvania, in 1842, Mr. Justice Lewis, the president judge, decided, after a learned examination of the subject, that a minister of the gospel had no right, contrary to the express commands of the father, to receive an infant daughter, under the immediate guardianship of the father, from the church to which the father belonged, and in which the child was baptized and instructed, and initiate it, by baptism, into another church of a different denomination. It was held to be the right and the duty of the father, not only to maintain his infant children, but to instruct their minds in moral and religious principles, and to regulate their consciences by a course of education and discipline. All interference with the parental power and duty, except by the courts of justice, when that power is abused, is injurious to domestic subordination, and to the public peace, morals, and security. Parents, says a distinguished jurist on natural law, have the right by the law of nature to direct the actions of their children, as being a power necessary to their proper education. It is the will of God, therefore, that parents should have and exercise that power. Nay, he observes, parents have the right to direct their children to embrace the religion which they themselves approve.

J. KENT, COMMENTARIES ON AMERICAN LAW (pt. IV) 203 (12th ed. 1973).

Roe, *Danforth* and perhaps *Bellotti* suggest that the exercise of such control over a minor child's decision to abort is unconstitutional. Does the child's right to privacy also include a right to engage in sexual relations without interference of the parents or the state? To marry at a tender age without consent of parents or court? Does it suggest, for example, that all statutory rape laws are unconstitutional? (Statutory rape laws certainly have a "chilling effect" on the minor's access to the adult population for sexual gratification.) Such possibilities for the right of privacy certainly suggest an inconsistency with fundamentals long "understood by the traditions of our people and our law."

127. *See* text accompanying note 55, *supra*, for the full text of the quotation.

of Western Germany, a court which enjoys the power of judicial review of the constitutionality of statutory enactments[128] and which occupies in the German political structure a position comparable to the United States Supreme Court, did not feel so inadequate when faced with the question whether the constitutional provision "Jeder hat das Recht auf Leben" (Everyone has the right to life) includes the unborn. In striking down a statute which allowed abortion on demand during the first trimester of pregnancy after the mother had undergone counseling, the German Constitutional Court wrote:

> In construing Article 2, Paragraph 2, Sentence 1, of the Basic Law, one should begin with its language: "Everyone has the right to life. . . ." Life, in the sense of historical existence of a human individual, exists according to definite biological-physiological knowledge, in any case, from the 14th day after conception (nidation, individuation). . . . The process of development which has begun at that point is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of the human life. The process does not end even with birth; the phenomena of consciousness which are specific to the human personality, for example, appear for the first time a rather long time after birth. Therefore the protection of Article 2, Paragraph 2, Sentence 1, of the Basic Law cannot be limited either to the "completed" human being after birth or to the child about to be born which is independently capable of living. 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, Paragraph 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.[129]

The sense of judicial humbleness expressed by the United States Supreme Court in *Roe* has prevented neither the English courts from deciding in a will construction case that "an infant *en ventre sa mere* [in its mother's womb], who by the course and order of nature is then living, comes clearly within the description of 'children living at the time of his decease' "[130] nor the American courts from reaching similar conclusions.[131] It has not prevented the courts from allowing recoveries in

128. Under Article 93 of the Basic Law, which is the West German Constitution, and under Sections 13, 31 and 95 of the Statute of the Federal Constitutional Court, the Federal Constitutional Court has the power to rule on the constitutionality of statutes and declare unconstitutional statutes null and void.

129. Jonas and Gorby, *Translation* at 638.

130. Doe v. Clarke, 2 H.Bl. 399, 400, 126 Eng. Rep. 617, 618 (1795).

131. *See, e.g.*, Tomlin v. Laws, 30 Ill. 616, 134 N.E. 24 (1922).

tort for prenatal injuries as did the California District Court of Appeal when it noted:

> The respondent asserts that the provisions of Section 29 of the Civil Code are based on a fiction of law to the effect that an unborn child is a human being separate and distinct from its mother. We think that assumption of our statute is not a fiction, but on the contrary that it is an established and recognized fact by science and by everyone of understanding.[132]

It did not discourage the Illinois Supreme Court in a wrongful death case in which the fetus was born dead from quoting with approval the following from a New York case:

> To hold, as a matter of law, that no viable fetus has any separate existence which the law will recognize is for the law to deny a simple and easily demonstrable fact. This child, when injured, was in fact, alive and capable of being delivered and of remaining alive, separate from its mother.[133]

Nor did it discourage the Illinois Supreme Court in that case from allowing a wrongful death recovery, as have the majority of state supreme courts which have ruled upon the question of the scope of "person" in wrongful death statutes.[134] It also did not discourage the State's Attorney of Cook County, Illinois, or the State's Attorney of Will County, Illinois, from requesting that the Grand Jury return a murder indictment for the killing of a viable but unborn child.[135] In fact, the Grand Jury in the Cook County case was instructed by the State's Attorney to return a true bill only if it made a finding that the fetus was alive at the time it was shot, and died as a result of the shooting. Based upon the testimony of a pathologist, a true bill for murder was returned.[136]

In short, in areas not so politically volatile as abortion, the judiciary has not hesitated to take notice of, to consider and to hold that "life" exists before birth. In fact, *Roe* is actually unique, representing

132. Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (1939).

133. Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 372-73, 304 N.E.2d 88, 91 (1973), *quoting* Woods v. Loncet, 303 N.Y. 349, 357, 102 N.E.2d 691, 695 (1951).

134. *See* cases cited in Chrisafogeorgis v. Brandenberg, 55 Ill. 2d at 370-71, 304 N.E.2d at 89-90.

135. In the Cook County case of People v. Melvin Morgan (1975), as well as in a more recent Will County, Illinois, case (1978), the defendant was found not guilty because of the failure of the state to prove that the defendant caused the killing. Statement of Mr. Ralph Berkowitz, First Assistant State's Attorney of Cook County, Illinois, Spring 1975. *But cf.* Mr. Justice Douglas' concurring opinion in *Doe v. Bolton* in which he quoted from Mr. Justice Clark as follows: "No prosecutor has ever returned a murder indictment charging the taking of the life of a fetus." 410 U.S. at 218.

136. Statement of Mr. Ralph Berkowitz, First Assistant State's Attorney of Cook County, Illinois, Spring 1975.

one of the few instances in which a court has refused to take cognizance of established scientific data concerning the nature of the unborn human being.

C. *One of the Consequences of the Birth Requirement Is That the Nature of the Fetus as Viewed by Science Becomes Irrelevant*

Regarding the nature of the unborn as viewed by science and his qualifications for constitutional personhood, the Supreme Court in *Roe* merely acknowledged its awareness of the "well-known facts of fetal development."[137] Under the dictates of the logic of the Court's birth requirement, the Supreme Court apparently felt that mere acknowlegment sufficed, and this was perhaps mentioned only to resolve any doubt one might entertain concerning the Court's awareness of these facts. The problem is, however, that the essential characteristics of man as viewed by science, characteristics which may show that the fetus is not, in any important aspect, essentially different from an infant, have become constitutionally irrelevant. Some of the more striking of these characteristics are reviewed below.

(1) Individuality[138]

The "individuality" of corporations played a primary role in the Supreme Court's holding that corporations were "persons" within the meaning of the fourteenth amendment[139] and was specifically emphasized in the West German Constitutional Court's decision that "everyone" in the Basic Law means "every life possessing human individuality."[140] Accordingly, one would think that the United States Supreme Court, presumably desirous of basing its decisions on the results and logic of scientific inquiry and rational assessment of those results, would be interested in the scientific facts that the unborn is a genetically unique individual from the moment conception is com-

137. 410 U.S. at 156.

138. Professor Richard Stith develops a similar idea in his article entitled *The World as Reality, as Resource and as a Pretense*, 20 AM. J. JURIS. 141 (1975). He notes that "all individual life (not just human life) is distinguishable from inanimate matter (and from other nearby life) primarily in having separate systemic autonomy, a capacity to regulate and direct its own equilibrium rather than being entirely subject to external forces. Since conception is the point at which that autonomous system begins which we are until our deaths, our conceptional origin seems obvious." *Id.* at 142. Stith then cites Finnis and his article on *The Rights and Wrongs of Abortion*, 2 PHIL. & PUB. AFFAIRS 117, 144-45 (1973) for an "excellent rendition of approximately this argument."

139. Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1889).

140. Jonas and Gorby, *Translation* at 638.

pleted,[141] has an individual circulatory system,[142] is psychologically individual,[143] and is very largely in charge of the pregnancy while the mother is merely a passive carrier.[144] However, the Supreme Court's birth requirement attempts to render these facts, universally accepted as such by the scientific community, legally irrelevant.

(2) "*Cogito, ergo sum*"[145]

If this classic idea of the rational nature of man were the key to fourteenth amendment personhood,[146] the Court should be interested to know that electroencephalographic waves have been detected from the brains of 43- to 45-day old fetuses and that conscious experience is possible soon after that date;[147] that the human fetus develops consciousness and self-awareness at approximately the twenty-eighth week of pregnancy;[148] and that the unborn hears and recognizes his mother's voice before birth.[149] One might also wonder why the American Bar Association's carefully worked out definition of death ("irreversible

141. Theodosins Dobzhansky wrote the following about the "genotype" of each individual:

> Every human being has, then, his own nature, individual and nonrepeatable. The nature of man as a species resolves itself into a great multitude of human natures. Everyone is born with a nature that is absolutely new in the universe, that will never appear again (identical twins and other identical multiple births, of course, excepted).

T. DOBZHANSKY, HEREDITY AND NATURE OF MAN 37 (1966).

142. Heffernan, *The Early Biography of Everyman*, in ABORTION AND SOCIAL JUSTICE 5 (Horan & Hilgers ed. 1972).

143. A. GESELL, THE EMBRYOLOGY OF BEHAVIOR 172 (1945).

144. Liley, *The Fetus in Control of His Environment* in ABORTION AND SOCIAL JUSTICE 27 (Horan & Hilgers ed. 1972).

145. "I think, therefore I am." R. DESCARTES, DISCOURS DE LA METHODE (2d ed. 1962). Rene Descartes' (1596-1650) self-evident proposition or axiom upon which he develops his philosophy is to a large extent a classical formula, derived in part from St. Augustine, (*See* M. WEBER, HISTORY OF PHILOSOPHY 309 (1899)), but also reflective of the notion of man as a "rational animal." Glanville Williams was possibly thinking along these lines when he suggested the "seventh month as the beginning of legal protection for the fetus," since "until the brain is formed there can be no mind" and since "electric potential (brain waves) are discernible in the seventh month." G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 231 (1970). He even suggested that this solution would "practically eliminate the present social problem of abortion." *Id.* at 232. As the accompanying text points out, "brain waves" are now discernible at six weeks, before most abortions are performed. Thus, the "brain wave" approach would not appeal to the pro-abortionists.

146. It is interesting to note that the Supreme Court of Mississippi in State v. Jones, 2 Miss. (1 Walker) 39 (1820), utilized the notion of man as a reasonable creature in determining that a slave is a person under Mississippi criminal law. This factor was also emphasized by John Locke. *See* note 108, *supra*.

147. MEDICAL WORLD NEWS, May 30, 1969, at 18.

148. *See* the results of recent experiments of Dr. Dominick Purpura of the Albert Einstein Medical School, Yeshiva University, reported in the N.Y. Times, May 9, 1975, at 36, col. 1.

149. Wood, *Weightlessness: Its Implications for the Human Fetus*, 77 OBSTETRICS & GYNECOLOGY OF THE BRITISH COMMONWEALTH 333, 333-36 (1970).

cessation of total brain function")[150] applies to only one end of the life spectrum. Here again, the Court's birth requirement attempts to render these factors irrelevant.

(3) Ability to Live Outside the Mother's Womb

For reasons which are not completely clear, the Supreme Court decided that, although not important for constitutional personhood, viability is an important criterion for the state's assertion of a compelling interest. In other words, the state can assert its interest in keeping the fetus alive at "viability," which the Court defined as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."[151] The Court then noted that "[v]iability is usually placed at about seven months (twenty-eight weeks) but may occur earlier, even at twenty-four weeks."[152] Here, the Supreme Court, for reasons neither apparent nor offered, utilized scientific data in determining when a state's interest in the unborn becomes compelling enough to preclude the abortion but, because of its creation of the birth requirement, rendered the same or similar data irrelevant in its determination when the right to have constitutional rights begins. Considering that the Court placed such emphasis on the viability concept, it perhaps should be of interest that in a study of 650,000 live births in New York City, over twenty percent of the children born at less than twenty weeks gestational age survived the neonatal period.[153] The Court's figures accordingly appear to be unsound. Beyond the soundness of the data, however, the Court's decision means that prematurely born children are entitled to all the constitutional protections whereas their counterparts, who are equally individual, older, more competent and better able to survive outside a mother's womb but not fortunate enough to have been prematurely born, are without constitutional protection.

D. *The Birth Requirement Is Arbitrary*

It appears that the Supreme Court simply created the birth requirement, a requirement which appears to find no support in either the Constitution itself or in its history. Nor is support for the birth requirement found in any original reasoning by the Court. The failure of the Supreme Court to offer an explanation for its birth requirement causes one to wonder what it is about the nature of birth that makes other factors, such as those relating to the biological, intellectual and psychological nature of the fetus, of no constitutional significance. As a consequence of the Court's birth requirement, such scientific data, assuming it could be proved, as the fact that the fetus "lives," is an "individual," is a "human being" and is essentially identical to a born infant in all scientifically provable aspects have been rendered irrelevant.

This result is surprising, especially since the Supreme Court has, at least in recent years, been rather receptive in its decision-making to the methods, principles and findings of scientifically respectable disciplines other than law. *Brown v. Board of Education*[154] provides perhaps the best known example. There, the Supreme Court in its desire to "look . . . to the effect of segregation itself on public education"[155] felt no hesitation in using the behavioral sciences to determine the scope and application of the equal protection clause of the fourteenth amendment.

Brown, of course, is not unique. Since Louis Brandeis established the tradition by filing his now famous brief,[156] attorneys have attempted with considerable success to persuade judges by means of materials and data from disciplines other than the law. If, for example, members of a newly found tribe were intentionally and arbitrarily killed and their killers, upon being tried for homicide, raised the defense that the victims of the killing were not "persons" under the homicide statute, one would certainly expect the court to consider such nonlegal data as whether the members of the tribe were genetically human, biologically human, and possessed of human rationality (physiological and psychological) when it determined whether the members were entitled to protection under the criminal homicide provisions.[157]

150. American Bar Association Resolution, voted and approved by the House of Delegates on Feb. 24, 1975, cited in 61 A.B.A. J. 463, 464 (1975).

151. 410 U.S. at 160. The *Roe* Court also failed to consider the significance of an "artificial womb" which the Court recognized as a "new medical technique." *Id.* at 161. Will the development of the so-called "artificial womb" push the point of "viability" automatically back several months, perhaps to a point shortly after conception, thus allowing the state to prohibit abortions except to preserve the life and health of the mother? In other words, does the protection which the state can afford the fetus depend upon the "shifting tides of scientific opinion" after all, to use Mr. Justice Burger's phrase from Eisenstadt v. Baird, 405 U.S. 438, 470 (1972)?

152. 410 U.S. at 160.

153. *See* abstract of statistics contained in Horan, Gorby & Hilgers, *Abortion and the Supreme Court: Death Becomes a Way of Life*, in ABORTION AND SOCIAL JUSTICE (1972).

154. 347 U.S. 483 (1954).

155. *Id.* at 492. The Supreme Court then supported its holding with studies from the behavioral sciences in its famous footnote eleven.

156. In Muller v. Oregon, 208 U.S. 412 (1908), Louis Brandeis, then the attorney for the state of Oregon, filed a 113-page brief supporting Oregon's maximum-hour legislation for women. A great part of the brief consisted of economic and sociological data: materials not a part of the heart of the case. The Supreme Court in *Muller* explicitly made reference to this brief. Since then, briefs of this sort have come to be called "Brandeis briefs" and are frequently submitted in many different kinds of cases. *Roe v. Wade* is an example of such a case. *See* P. BREST, PROCESS OF CONSTITUTIONAL DECISION MAKING: CASES AND MATERIALS 939 (1975).

157. *Cf.* the approach of the Mississippi Supreme Court in State v. Jones, 2 Miss. (1 Walker) 39 (1820), for a discussion of how the Court could utilize scientific evidence to determine if the

It is precisely this tradition, a tradition of keeping judicial decisions compatible with the logic of rational assessment and scientific inquiry, which makes the Supreme Court's reluctance to give recent scientific and medical data concerning the unborn careful consideration in its decision very difficult to accept. Obviously the *Roe* Court was simply following Chief Justice Burger's admonition in *Eisenstadt v. Baird*[158] that the "commands of the Constitution cannot fluctuate with the shifting tides of scientific opinion"[159] because the Court in *Roe* did place considerable emphasis on scientific opinion in its determinations that abortion during the first trimester is safer than childbirth[160] and that viability occurs at a particular moment (twenty-four to twenty-eight weeks).[161] Whatever may have been the Court's reasoning, the effect of its birth requirement has been to render irrelevant a rational assessment of scientific data about pre-birth stages of human development as well as a scientific inquiry into the nature of pre-born human life.

V. Unwanted Pregnancy in Perspective

In light of the indications of the *Maher*, *Poelker* and *Beal* cases that the Court may well be retreating from *Roe* and of the temptation which must surely face the judiciary at this point to allow the abortion problem to be resolved legislatively, a careful study of the protections which the Constitution provides the fetus is required. The purpose of this article has been not only to explore the soundness of the birth requirement created by the Supreme Court in *Roe* as a requisite to membership in the class of constitutional "persons" but also to call for a reexamination of the whole issue. In brief, there is considerable evidence which suggests that the unborn is and should be considered a constitutional person, thus entitled to fourteenth amendment protections. If this be true, both the *Roe* holding as well as a legislative solution permitting abortions for reasons other than a threat to the life of the mother would have the effect of violating the unborn's right to due process of law. It would thus follow that both the judicial solution set forth in *Roe* and the legislative solution are constitutionally unsound.

A holding that the fetus is a constitutional person would have the

fetus is a living human being. *See* Krimmel and Foley, *Abortion: An Inspection into the Nature of Human Life and Potential Consequences of Legalizing its Destruction*, 46 U. Cin. L. Rev. 725 (1977).

158. 405 U.S. 438 (1972).
159. *Id.* at 470 (Burger, J., dissenting).
160. 410 U.S. at 163.
161. 410 U.S. at 160.

effect of overruling *Roe v. Wade* and its progeny. The legal consequences would not, however, be as far-reaching as *Roe* itself, which had the effect of declaring century-old criminal abortion statutes invalid, cutting deeply into assumed rights of husbands[162] and parents,[163] and creating the possibility of required, at least via legislation, public financing of abortion.[164] On the other hand, the consequence of the *Roe* decision to the aborted fetus is severe and final. This result, 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 because of 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, the avowed purpose of the drafters of the fourteenth amendment. 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 obviously had a point when he wrote that "having an unwanted child can go a long way toward ruining a woman's life."[165] No one is denying the personal tragedy or the hardships involved in an unwanted pregnancy. The solution, however, should turn on what is being sacrificed to avert the tragedy and hardships. These are hard decisions.

To put these hard decisions in their proper perspective, it must be borne in mind that constitutional protection of fundamental rights never takes place in a social vacuum. Rather, the protection of the fundamental rights of one necessarily requires personal sacrifices of some significance by those against whom the right is enforced. For example, when the Illinois Supreme Court and the United States federal district court enforced the first amendment right of the American Nazi Party to march in Skokie, a sacrifice on the part of the Jewish population in Skokie was necessarily involved. Similarly, an order requiring desegregation in certain neighborhoods may have the effect of substantially reducing the market value of the property holdings of those already in the neighborhood, and the privilege against self-incrimination may, and occasionally does in the instance of a killer set free, later result in the sacrifice of the life of an innocent person. To be emphasized here is that the fundamental human rights theory necessarily implies sacrifices.

162. *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1975), discussed at note 127, *supra*.
163. *Id. See also* cases cited in note 127, *supra*.
164. Maher v. Roe, 432 U.S. 464 (1977).
165. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 923 (1973).

All the great judicial decisions in this area have thus been hard decisions. And the problem of the right to life of the fetus must be viewed in this context.

But 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 case of *United States v. Holmes*,[166] where, following a shipwreck, the sailors threw fourteen passengers overboard to lighten a sinking lifeboat, and *Regina v. Dudley & Stephens*,[167] where two seamen starving after twenty days in an open boat, killed a youthful companion and fed on his flesh until they were rescued. In both of these cases the doctrine of necessity was raised as a defense to the men's actions. And "necessity" there was—nothing less than the lives of those later accused of homicide were at stake. These were hard decisions for the courts, harder than the abortion decision because rarely is "necessity" in the abortion situation of the magnitude of that facing Holmes and 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 that it was[168] and sought 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.[169]

Would not such an approach be much more compatible with the deepest values and the authoritative ideals of this society?

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166. 26 F. Cas. 360 (1842).

167. 14 Q.B.D. 273 (1884).

168. The Federal Constitutional Court of West Germany wrote, in this regard, as follows:

> The interruption of pregnancy irrevocably destroys an existing human life. Abortion is an act of killing; this is most clearly shown by the fact that the relevant penal sanction . . . is contained in the section "Felonies and Misdemeanors against Life" and, in the previous penal law, was designated the "Killing of the Child *en ventre sa mere*." The description now common, "interruption of pregnancy," cannot camouflage this fact.

Jonas and Gorby, *Translation* at 645.

169. Jonas and Gorby, *Translation* at 660.