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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?

CYRIL C. MEANS, JR.* **

In ancient Eastern folklore, the phoenix was a fabulous bird, said to live for five hundred years in the Arabian desert, then to build its own funeral pyre, on which it would burn itself to ashes, out of which it would then arise young again. Is it the destiny of elective abortion to recapitulate the career of the phoenix?

Readers of this journal will recall an article published three years ago,¹ in which I described the nineteenth-century legislative funeral

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** For invaluable aid in the task of historical research which had to be done to prepare this article, I make grateful acknowledgment to Dr. Edith Henderson, Curator of the Rare Book Room of the Library of the Harvard Law School (and Secretary for the United States of America of The Selden Society), and to Mr. Anthony Grech, Librarian of The Association of the Bar of the City of New York. For first editions, I normally had to go to Cambridge, but Mr. Grech's library contains nearly everything I needed in second and later editions, including a magnificent "vulgate" edition of the Year Books that was once owned by President Martin Van Buren. I also wish to express gratitude to Professor Samuel Thorne, of the Harvard Law School faculty, for time he has generously spent with me discussing the various problems presented by this paper, and to my colleague, Professor Joel Lee, of the New York Law School faculty, for some invaluable leads in clearing up the long-mooted question as to how soon after the accession of Edward III Sir Geoffrey Scrope resumed his place as Chief Justice of the King's Bench. For any errors of emphasis or content, however, I take full responsibility.

¹ Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968).

pyre on which English and American women's common-law liberty of abortion at will was reduced to ashes. The original contribution of that article was the revelation of a truth that had been long forgotten: that the sole historically demonstrable legislative purpose behind these statutes was the protection of pregnant women from the danger to their lives imposed by surgical or potional abortion, under medical conditions then obtaining, that was several times as great as the risk to their lives posed by childbirth at term, and that concern for the life of the conceptus was foreign to the secular thinking of the Protestant legislators who passed these laws. Novel as this thesis was at the time, it has since received approbation by distinguished judges, and is no longer seriously challenged.

The present article makes a different contribution to the history of this subject, probing the true position of abortion at common law, prior to the nineteenth century. It reveals the story, untold now for nearly a century, of the long period during which English and American women enjoyed a common-law liberty to terminate at will an unwanted pregnancy, from the reign of Edward III to that of George III. This common-law liberty endured, in England, from 1327 to 1803; in America, from 1607 to 1830. Thus its life-span closely approximated the semimillennium of the phoenix.

The United States Supreme Court will soon hear argument, both on jurisdiction and on the merits, of two cases² in which the constitutionality of state abortion laws is drawn in question. Should the merits be reached in either case, counsel and the Court may find the present conspectus of the Anglo-American legal history of abortion of assistance; for, only if in 1791 elective abortion was a common-law liberty, can it be a ninth-amendment right today.

I. DID AN EXPECTANT MOTHER AND HER ABORTIONIST HAVE A COMMON-LAW LIBERTY OF ABORTION AT EVERY STAGE OF GESTATION?

Surprisingly enough, the correct answer to this question is

² *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970), *jurisdiction postponed to argument on the merits*, 402 U.S. 941 (1971); *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *jurisdiction postponed to argument on the merits*, 402 U.S. 941 (1971).

These are both direct appeals from decisions of three-judge courts. In *Roe v. Wade*, the Texas statute (Penal Code of Tex. Ann. tit. 15, ch. 9, art. 1191 (Vernon 1961)) is being challenged. In *Doe v. Bolton*, the attack is upon Georgia's new statute (Code of Ga. Ann. tit. 26, § 1201 (rev. 1970)), based on the American Law Institute's Model Penal Code.

"Yes." The primary case which establishes this liberty was decided in the Court of King's Bench at the very beginning of the long reign of Edward III (1327-77). Like most Year Book cases it is anonymous; so, for convenience of reference I have given it a name, *The Twinslayer's Case*:³

Writ issued to the Sheriff of Gloucestershire to apprehend one D. who, according to the testimony of Sir G[eoffrey] Scrop[e] [the Chief Justice of the King's Bench], is supposed to have beaten a woman in an advanced stage of pregnancy who was carrying twins, whereupon directly afterwards one twin died, and she was delivered of the other, who was baptized John by name, and two days afterwards, through the injury he had sustained, the child died: and the indictment was returned before Sir G. Scrop[e], and D. came, and pled Not Guilty, and for the reason that the Justices were unwilling to adjudge this thing a felony, the accused was released to mainpernors, and then the argument was adjourned sine die.⁴

³ Y.B. Mich. 1 Edw. 3, f. 23, pl. 18 (1327); also reported in, *Livre des Assises*, 3 Edw. 3, f. 4, pl. 2 (1679) and in Fitzherbert, *Graunde Abridgement*, tit. *Enditement*, f. 327, pl. 4, & tit. *Corone*, f. 264, pl. 146 (1st ed. 1516) f. 251, pl. 146 (3d ed. 1565). I cite folio numbers to both the first and the third editions of the *Graunde Abridgement*, but have copied the text from the third edition, which has fewer contractions.

⁴ The full text of *The Twinslayer's Case*, *id.*, as reported in the Year Book, is as follows:

Brief issint al viç de Glouc de prendr un D. q̄ p' tesmoign de Sir G. Scrop, duist aver batu un feme grosse enseint de deux enfâs, issint q̄ maintenant apres, lun enfant morust, & fuit del alter deliver, q̄ fuit baptise John p' nosme, & deux jours apres, p' le male, q̄ lenfât avoit, il morust; & le indictmēt fuit returne devāt Sir G. Scrop, & D. veign, & pled' de rien culp, & p̄ ceo q̄ les Justices ne fuerent my en volūte de ajudge cest chose felonie, lendictee fuit lesse a mainprise, & puis la parol demurra sans jour, issint q̄ brief issint come devāt, & dit q̄ Sir G. Scrop rehersa tout le case, & coment il venit & pled'.

Herle, au viç, faits venger son corps &c. & le viç returne le bře al bailie de la franchise de tiel lieu, q̄ disoyent, q̄ mesme celui fuist pris p' le Major de Brist. mes la cause de la prisel penitus ignoramus &c.

I have taken this quotation from the Tottell edition of 1562, the Yetsweirt edition of 1596 and the "vulgate" edition of 1679. Most American lawyers today will find readier access to it as reprinted in a footnote to *Rex v. Enoch*, 5 Carrington & Payne 539, 541, 172 Eng. Rep. 1089, 1090 (Worcester Assizes 1833), just as their forebears after 1834 found it easier to read it reprinted in the same footnote to the same case in 24 Eng. Common L. Rep. 446, 447 (T. Sergeant ed. 1834).

The fact that American lawyers after 1834 had ready access to the law French text of *The Twinslayer's Case* in 24 Eng. Common L. Rep. at 447, however, does not mean that all of them could read and interpret it accurately. Thus, the Massachusetts Criminal Law Commissioners

The singular importance of this case is obvious. It establishes beyond all cavil that an abortion, whether resulting in the intrauterine death of the twin who died at once, or in the death after birth alive of the other, was not a felony at all at common law.

In the middle of the same reign another case was decided which is not in the Year Books, but which Sir Anthony Fitzherbert (1470-1538) reported in his *Graunde Abridgement*⁵ as having been decided

in their Report of the Penal Code of Massachusetts in their chapter on *Homicide* at 20 n. (y) (1844) paraphrased this case as follows:

There the defendant had beaten a woman pregnant with two children. One of them was dead born; the other was born alive and baptized, but died two days after the injury, in consequence (as was charged) of the beating of its mother before its birth. The judges held that the defendant was not guilty of a felony, (murder or any homicide,) but of a misdemeanor only.

Now the entire paraphrase is quite accurate down to the last five words ("but of a misdemeanor only"), which are pure nonsense. There is not one word in any of the reports of *The Twinslayer's Case* hinting that any act of defendant, either in respect of the stillborn foetus, or of the liveborn infant, was even a misdemeanor. That lawyers of the eminence of Willard Phillips and Samuel B. Walcott (the two commissioners who signed this report) thought they discerned such a holding in *The Twinslayer's Case* is not so much proof of their own imagination as of the mesmeric hold which Sir Edward Coke had at that time on the thinking of Anglo-American lawyers.

In Michaelmas Term, 1327, the Chief Justice of the Court of King's Bench was Sir Geoffrey Scrope, and the Puisne Justices were Robert of Mablethorp, Walter of Friskney, and Robert Baynard. In that term the Court met at York, whither the King had gone because of an impending threat of invasion by the Scots. The Common Bench, whose Chief Justice was William Herle, also was transferred to York, much to the indignation of the citizens of London, whose deputation and protest were rebuffed by the King on the ground that the more people had to come to York, the more there would be to defend the north. See 74 Selden Society, *Select Cases in the Court of King's Bench under Edward II*, vol. 4, at xlii n. 2, lxxxvii, xci, cii (G.O. Sayles ed. 1957).

The unconstitutional presence of the Common Bench in York at Michaelmas Term, 1327 explains how the intervention of the Chief Justice of that Court (Herle) in this King's Bench case, as reported in the second paragraph of the Year Book report (but it is not mentioned in the *Liber Assisarum* or in Fitzherbert), was physically possible, but it does not explain what business Herle had in doing this. I have consulted Professor Samuel Thorne, of the Harvard Law School, about this, and he is as mystified as I am.

In order to leave the text of this article uncomplicated by this tangential mystery, I omitted the last few lines of the first paragraph, and the whole of the second paragraph, from the translation printed above, but translate them here for completeness:

[T]hus the writ issued, as before stated, and Sir G. Scrop[e] rehearsed the entire case, and how he [D.] came and pled.

Herle: to the sheriff: Produce the body, etc. And the sheriff returned the writ to the bailiff of the franchise of such place, who said, that the same fellow was taken by the Mayor of Bristol, but of the cause of this arrest we are wholly ignorant.

⁵ Fitzherbert, *Graunde Abridgement*, tit. *Corone*, f. 268, pl. 263 (1st ed. 1516), f. 255, pl. 263 (3d ed. 1565) (Y.B. Mich. 22 Edw. 3 (1348)). While the court is not specified, doubtless it was the King's Bench.

in 1348. For convenience I have named it simply *The Abortionist's Case*:

One was indicted for killing a child in the womb of its mother, and the opinion was that he shall not be arrested on this indictment since no baptismal name was in the indictment, and also it is difficult to know whether he killed the child or not, etc.⁶

The definitive analysis of these two cases is given by Sir William Stanford (1509-58), whose work, *Les Plees del Coron*⁷ is the first systematic treatise on English criminal law. Here follows my transla-

⁶ The following is a copy of the original text:

Un fuit endite de ce que il tua enf. en le ventr sa mer, & l'opinion que il ne serf arr sur ce eo que nul nosm de baptisme fuit en l'enditement, et auxi est duif de conustf sil luy occist ou non &c.

Fitzherbert, *id.*

At Michaelmas Term 1348, the Chief Justice of the King's Bench was William Thorp, and there were but two Puisne Justices, Roger of Bakewell and William Basset; thus there had been a complete change of judicial personnel of this tribunal between 1327 and 1348. See 82 Selden Society, *Select Cases in the Court of King's Bench under Edward III*, vol. 6, at lii (G.O. Sayles ed. 1965).

Curiously, the Massachusetts Criminal Law Commissioners in 1844 seem to have been unaware of *The Abortionist's Case*; for they wrote: "There are no cases in the American, and but two have been found in the English books upon this subject." Report of the Penal Code of Massachusetts, ch. *Homicide*, at 20 n. (y) (1844). The two English cases they proceed to discuss are *The Twinslayer's Case* (K.B. 1327) and *Sims's Case*, Gouldsborough 176, pl. 110, 75 Eng. Rep. 1075 (K.B. 1601). However, both those cases involve at least one liveborn infant who afterwards died of prenatal blows, which was the subject-matter of § 33 of the commissioners' proposed chapter on homicide, whereas *The Abortionist's Case* (K.B. 1348) dealt only with a stillborn foetus; so perhaps the 1844 commissioners knew of it but did not mention it for that reason.

⁷ W. Stanford, *Les Plees del Coron* (1557). In 5 E. Foss, *The Judges of England* 390-91 (1857), we learn that:

[O]n October 19, 1553, three months after the accession of Mary [Tudor], whose [Roman Catholic] religion he professed, he [Stanford] was made one of the queen's serjeants . . . [In] 1554, Staunford was raised to the [common] bench. . . . The new judge was knighted by King Philip on January 27, 1555, and retained his seat in the Common Pleas during the rest of his life, which terminated on August 28, 1558, three months before the demise of Queen Mary. . . . He was a great and learned lawyer . . . the author of . . . a Treatise on the Pleas of the Crown . . . which is still [*i.e.*, in 1857] of great authority. . . .

Since Stanford is the primary authority for the proposition that, at common law, abortion after quickening is not even a misprision, it is well to note that he professed what he would have called the 'Old Religion', what its contemporary opponents would have called Popery, and what today would be called Roman Catholicism; thus this proposition cannot be suspected of being

tion of Book I, c. 13 (What Things are Required to Constitute Homicide)⁸ of Serjeant Stanford's treatise:

It is required that the thing killed be *in rerum natura*. And for this reason if a man killed a child in the womb of its mother: this is not a felony, neither shall he forfeit anything, and this is so for two reasons: First, because the thing killed has no baptismal name; Second, because it is difficult to judge whether he killed it or not, that is, whether the child died of this battery of its mother or through another cause. Thus it appears in the [*Abortionist's Case* (1348). And see *The Twinslayer's Case* (1327)] a stronger case: if a man beats a woman in an advanced stage of pregnancy who was carrying twins, so that afterwards one of the children died at once and the other was born and given a name in baptism, and two days afterward through the injury he had received he died, and the opinion was, as previously stated, that this was not a felony, etc. [Stanford here gives an alternative citation to *The Twinslayer's Case*, and then reverts to *The Abortionist's Case*.] But it seems that this reason, that he had no baptismal name, is of no force, for you shall see [here, Stanford cites an infanticide case decided in 1314-15]⁹ that there was a presentment 'That a certain woman whilst walking opposite a chapel gave birth to a son, and immediately she cut his throat and threw him in a pond of stagnant water and fled: on that account she shall be summoned by writ of *exigent* and shall be outlawed'; for this was homicide inasmuch as the thing was *in rerum natura* before being killed: thus this [infanticide] case is in no wise like those above mentioned where the child is killed in the womb of its mother, etc. Which case Bracton affirmed as law in his division of homicide, above mentioned [in a previous

an invention of the Reformation.

King Philip (the husband of Queen Mary I) was not a king regnant, but only a king consort, in England; thus he could not have conferred an English peerage. But, as Coke explained in another place, the honour of knighthood is universal throughout Christendom, and can be conferred by any Christian prince, and Philip was, after all, a king regnant of Spain. Thus Stanford's knighthood was valid as an English knighthood, though conferred, in England, by a King of Spain, who was merely husband of the Queen of England.

⁸ The original title of this chapter is *Queux choses sont requises a faire homicide*.

⁹ Fitzherbert, *Graunde Abridgement*, tit. *Corone*, f. 237, pl. 418 (1st ed. 1516), f. 259, pl. 418 (3d ed. 1565) (writ found in the Chancery dated 8 Edw. II [1314-15]).

chapter in Stanford's treatise] saying as follows: 'If there be anyone who strikes a pregnant woman or gives her a poison whereby he causes an abortion, if the foetus be already formed or animated, and especially if it be animated, he commits homicide.' But the contrary of this seems to be the law as above stated.¹⁰

Stanford's masterly analysis of the mediaeval texts and cases has never been improved upon. He clarifies one point that they left obscure, at least to a modern reader. *The Twinslayer's Case* and *The Abortionist's Case* made it crystal clear that abortion was not a felony of any kind, even when committed late in pregnancy, but one asks whether it may not have been what we now call a misdemeanor, and was then called a misprision. In effect Stanford says that it was not even a misprision, for he not only declares that "this is not a felony" but, he immediately adds, "neither shall he forfeit anything." Now, in the same treatise, Book I, c. 39 (Misprisions), Stanford wrote:

And in all these cases of misprision he shall forfeit only these chattels and as to them he shall forfeit them only during his life.¹¹

¹⁰ The following is a copy (from the 1568 edition, which has fewer contractions than the first edition of 1557) of W. Stanford's original text:

Est requisit que le chose occise: soit *in rerum natura*. Et pur c si home tua enfant in le venter sa mier: c nest felonye, ne il forfeitera ascū chose, & ceo pur deux causes. Lū: pur c q la chos occise nauer nosme de baptisme, lauter q il est difficil daiuger sil luy occist ou non. s. si lenfaunt murrust de cel baterie de sa mier ou p' auter encheson. Vt patet titulo coron in fits P. 263. Et vide la P. 146. plus fort cas. s. home batist auter fēe groseffm enseint de deux infants, issint que aḡs maintenant vn de les enfants murrust, & lauter fuist nee et baptise p' nosme, et ii. ioures aḡs pur le male que el auer resceu: el murrust, et loppinion cōe deuāt q c ne fuist feloñ &c. Et vide m le cas in fits titulo inditemēt: P. 4. Sed sēble q cel reason q il nad asc nosme de baptisme nest dascun force, car veires titulo coron deuant P. 418. que p̄sent fuist. *Quod quedam mulier eundo versus capellam, peperit filium, et statim abscidit gulam, et proiecit in stagnum, et fugit, ideo exigatur & vtilagetur*, car ceo fuist homicide eo que le chos fuist *in rerum natura* auāt le tuer, issint nient semble a les cases deuāt s. ou lenfant est tue in le venter sa mier &c. Le q̄l cas Bracton affirma pur ley in sa diuisiō dhomicide deuāt disant in cē māñ. *Si sit aliquis qui mulierem p̄gnantē p'cusserit, vel ei venenū dederit, p' quod fecerit abortiuū, si puerperiū iā formatum vel animatū fuerit, & maxime si animatum, facit homicidiū*. Mes le contrarie de ceo semble ley cōe deuāt.

Id. f. 21c.

¹¹ The following is the original text from W. Stanford, *supra* note 7, at Book I, c. 39 (Misprisions), f.38a:

Stanford thus negatives not only the felonious, but even the criminal, character of abortion at common law. It simply was not an offense of any kind, no matter at what stage of gestation it was performed.

In 1581, William Lambarde (1536-1601) published the first edition of his *Eirenarcha, or of The Office of the Justices of Peace*. In that edition, he wrote:

If the mother destroy hir childe newly borne, this is Felonie of the death of a man, though the childe have no name, nor be baptized. [Citing the infanticide case of 1314-15.] And the Justice of Peace may deale accordingly. But if a childe be destroyed in the mothers belly, is no manslayer nor Felone to be imprisoned upon this Statute [*i.e.*, the statute empowering J.P.s to bind over persons accused of crime].¹²

In the second edition (1582), Lambarde modernized the English of the final sentence to make it read:

But if the child be destroyed in the mothers belly, the destroyer is no manslayer, nor Felone.¹³

Thus the text remained in the third edition (1583).¹⁴ In the fourth edition (1588), Lambarde expands the passage to read as follows:

Moreover, to hurt a woman great with child, whereby the child either dieth within her body, or shortly after that she is delivered of it: or to strike any person so, as he dieth not thereof, till the yeare and day be fully past: will not wrap a man within the daunger of these Felonious manslaughterers . . . For in the former case, the child is not reckoned to be *In rerum natura*, untill it bee borne, though M. Bracton (Fol. 121) taketh it to be Homicide if the blow be given *Postquam*

Et in tous ceux cases de misprisiō, il ne forfetera forsqu' ces bñs & c quāt a cestres il eux forfetera forsqu' durāt sa vie.

¹² W. Lambarde, *Eirenarcha, or Of the Office of the Justices of Peace*, at 217-18 (1st ed. 1581).

¹³ W. Lambarde, *Eirenarcha, or Of the Office of the Justices of Peace*, at 217-18 (2d ed. 1582).

¹⁴ W. Lambarde, *Eirnarcha, or Of the Office of the Justices of Peace*, at 217-18 (3d ed. 1583).

puerperium animatum fuerit [i.e., after the foetus shall have been ensouled] And in the latter case, it cannot reasonably be alleaged, that the man died of that blow, which he received a whole yeare before.¹⁵

This final revised version then persisted through six succeeding editions,¹⁶ Lambarde gives the same citations of *The Twinslayer's Case* and *The Abortionist's Case* in this revised version as he had in his earlier versions, but he does add the note that Master Bracton "taketh" the law to have been different in his day.

The third case which treats of this question is *Sims's Case*, mooted in the Queen's Bench in 1601. The following is the report in Gouldsbrough:

Trespasse and assault was brought against one *Sims* by the Husband and the Wife for beating of the woman, *Cook*, the case is such, as appears by examination, A man beats a woman which is great with child, and after the child is born living, but hath signes, and bruises in his body, received by the said batterie, and after dyed thereof, I say that this is murder. *Fenner & Popham, absentibus caeteris*, clearly of the same opinion, and the difference is where the child is born dead, and where it is born living, for if it be dead born it is no murder, for *non constat*, whether the child were living at the time of the batterie or not, or if the batterie was the cause of the death, but when it is born living, and the wounds appear in his body, and then he dye, the Batteror shall be arraigned of murder, for now it may be proved whether these wounds were the cause of the death or not, and for that if it be found, he shall be condemned.¹⁷

It is difficult to ascertain whether this was a decision or not. Coke was Attorney General at the time, and was expressing his opinion from the Bar, not from the Bench. The Court consisted of four justi-

¹⁵ W. Lambarde, *Eirenarcha*, or Of the Office of the Justices of Peace, at 235 (4th ed. 1588).

¹⁶ W. Lambarde, *Eirenarcha*, or Of the Office of the Justices of Peace, at 235 (5th ed. 1591), 226-27 (6th ed. 1592), 229 (7th ed. 1594), 229 (8th ed. 1599), 236 (9th ed. 1602), 227 (10th ed. 1614).

¹⁷ *Sims's Case*, *supra* note 6 (full text).

ces—Sir John Popham, Chief Justice, and three Puisne Justices, Edward Fenner, Francis Gawdy, and John Clench. Only half the justices were present. Furthermore, the case appears to be a civil action for trespass, not an indictment for murder; so what the two justices said appears to be dictum. To add to the ambiguity, it is not clear whether the woman consented to the beating or not. If she consented to it, it is hard to see how either she or her husband could bring a civil trespass suit against the batteror. If she did not consent, then there was early mediaeval authority, though by no means unanimous, that she might have an appeal of homicide for the destruction of her foetus.¹⁸

If one assumes that this was a case of voluntary abortion, then the opinion of the justices shows that their understanding of *The Twinslayer's Case* and *The Abortionist's Case* was that the difficulty-of-proof reason given in the latter of those two cases was the only rationale that explained both of them. The difficulty-of-proof reason is sufficient to explain the result in *The Abortionist's Case*, where there was only one foetus, and it was stillborn. It would have been sufficient to explain the result in respect of the stillborn twin in *The Twinslayer's Case* also, but, of course, it could not explain the result in that case in regard to the liveborn, but afterwards dying twin. So, were Popham and Fenner undertaking to overrule, by their dictum in *Sims's Case*, so much of *The Twinslayer's Case* as held nonfelonious the death of the liveborn twin? If so, they were not very explicit about it.

Even if that was the intention of Popham and Fenner, they carefully left intact the portion of *The Twinslayer's Case* that related to the stillborn twin, and the whole of *The Abortionist's Case*, by pointing out that "*non constat*"—it cannot be established—whether a stillborn foetus "were living at the time of the batterie or not." In penning his *Third Institute*, in retirement some three decades later,

¹⁸ In an opinion written early in his career as a Justice of the Supreme Judicial Court of Massachusetts, Oliver Wendell Holmes, Jr., surely the most distinguished legal historian ever to grace an American bench, collected these early but discordant authorities. *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 15 (1884) (following the sentence: "Some ancient books seem to have allowed the mother an appeal for the loss of her child by a trespass upon her person . . . Which again others denied.") The very discordance of these early mediaeval cases where the abortion was against the expectant mother's will suggests how impossible it was for the common law to see any crime at all when the abortion had been performed at the expectant mother's own behest.

Coke was to forget this salutary wisdom of Chief Justice Popham and Justice Fenner.

As Gouldsborough's Reports were not published until 1653, this case, for whatever it is worth, was not citable until after the publication of Coke's *Third Institute* in 1644. Coke's own motive for not citing it is obvious, and it has rarely been cited by others.¹⁹

Stanford's total negation of the criminal character of abortion was repeated in virtually the same words by Michael Dalton (*ob. ca.* 1648) in *The Countrey Justice, Conteyning the Practice of the Justices of the Peace*:²⁰

Note also in murder, or other homicide, the party killed must be in *Esse, sc. in rerum natura*, For if a man kill an infant in his mothers wombe, by our law, this is no felony: neither shall he forfeit anything for such offence: and whether (upon a blow or hurt given to a woman with child) the child die within her body, or shortly after her deliverie, it maketh no difference.²¹

Thus the common law stood in 1618, after the first colonization of this country, and thus the common law would have remained, but for—and actually did remain, in spite of—a tendentious passage written by Sir Edward Coke (1552-1634), in his posthumously published *Third Institute*:²²

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: for in law it is accounted a reasonable creature, in *rerum natura*, when it is born alive. And the Book in 1 E. 3 was never holden for law. And 3 Ass. p. 2. is

¹⁹ The Massachusetts Criminal Law Commissioners quoted from *Sims's Case* in their Report of the Penal Code of Massachusetts, ch. *Homicide*, at 20 n.(y) (1844). I do not recall seeing it cited elsewhere.

²⁰ M. Dalton, *The Countrey Justice, Conteyning the Practice of the Justices of the Peace* (1618).

²¹ M. Dalton, *id.* at 213.

²² E. Coke, *Third Institute* (1644).

but a repetition of that case. And so horrible an offence should not go unpunished. And so was the law holden in Bractons time, Si aliquis qui mulierem praegnantem percusserit, vel ei venenum dederit, per quod fecerit abortivum, si puerperium jam formatum fuerit; & maxime si fuerit animatum, facit homicidium. And herewith agreeth Fleta: and herein the law is grounded upon the law of God, which saith, Quicumque effuderit humanum sanguinem, fundetur sanguis illius, ad imaginem quippe Dei creatus est homo. If a man counsell a woman to kill the childe within her wombe, when it shall be born, and after she is delivered of the childe, she killeth it; the counsellor is an accessory to the murder, and yet at the time of the commandement, or counsell, no murder could be committed of the childe in utero matris: the reason of which case proveth well the other case.²³

Coke thus resurrects Bracton's dictum, which Serjeant Stanford had so thoroughly discredited, quotes Genesis ix. 6, and cites a distinguishable precedent from the Cambridge gaol delivery of 1560,²⁴ all in an effort to show that the nonsense he has written is correct. In the margin he cites both *The Twinslayer's Case* and *The Abortionist's Case*, and Stanford into the bargain! Such candor—or was it simply gall?—enables the reader who looks up the marginal citations to evaluate this impassioned outburst at its true worth.

In saying that abortion after quickening is “no murder”, Coke is perfectly correct. It is only his calling it a “misprision”, let alone a great one, which is pure invention. The reader who wishes further evidence that this is so may turn with profit to Coke's chapter 65 in the same book, devoted to “Misprisions divers and severall.”²⁵ Here Coke enumerates the miscellaneous offenses below the degree of felony which the common law recognized at the time. His treatment is exhaustive, yet there is not a single reference to abortion after quickening.

Coke had a politico-religious motive for this outrageous attempt to create a new common-law misprision. One of the reasons for his dismissal from the bench had been his steadfast opposition to the

²³ E. Coke, *id.* at *50-51.

²⁴ Parker's Case, 2 Dyer 186a, 73 Eng. Rep. 410 (Cambridge Gaol Delivery 1560).

²⁵ E. Coke, *supra* note 22, at *139-142.

jurisdiction, claimed by the Court of High Commission, a new tribunal among the ecclesiastical courts, to fine and imprison laymen for offenses cognizable at canon law. Abortion had always been an offense within the exclusive jurisdiction of the canonical courts.²⁶ Coke obviously felt strongly about abortion after quickening ("so horrible an offence should not go unpunished"), and in the privacy of his study he faced a painful dilemma.

If he acknowledged the ancient and exclusive ecclesiastical jurisdiction to try and punish laymen for this offense, then, according to his well-known view, those courts could impose only spiritual penalties (*pro salute animae*) for such offense, such as penances and the ultimate threat of excommunication. Coke knew perfectly well that the laypeople of his time, who had seen so much religious upheaval, were no longer cowed, as their mediaeval ancestors had been, by the threat of purely spiritual penalties. Those who were bent on having abortions after quickening would go ahead and procure them, and thumb their noses at such threats. For Coke to affirm the traditional ecclesiastical jurisdiction, within its traditional bounds, over this offense, would, in effect, be to let it "go unpunished."

If Coke had held that the ecclesiastical courts retained jurisdiction of the offense, but that they could impose really effective punishment for it (fine and imprisonment), his concession would have contradicted those numerous writs of prohibition he had issued, whilst still a sitting judge, to ecclesiastical courts where they had tried to fine and imprison laypeople.

If, on the other hand, he denied the existence of the ecclesiastical jurisdiction over abortion after quickening, such as had always existed, he either had to let it go unpunished, even by spiritual penalties, or assert a common-law jurisdiction over this offense. He chose the latter expedient.²⁷

While most Americans will sympathize with Coke's objective, to exempt laypeople from the innovative compulsory jurisdiction of ec-

²⁶ Even before the Conquest; as Sir James Fitzjames Stephen remarked, "Procuring abortion seems to have been regarded as an ecclesiastical offence only" among the Anglo-Saxons. I J. Stephen, *History of the Criminal Law of England* 54 (1883). See I Commissioners on the Public Records of the Kingdom, *Ancient Laws and Institutes of England* 574 (1840). At the Conquest, as is well known, the Norman Kings divided the ecclesiastical from the secular jurisdiction much more sharply than had been the case in Anglo-Saxon times.

²⁷ For full treatment of this fascinating struggle between Coke and the High Commission, in English politico-religious history, see the magisterial work, R. Usher, *The Rise and Fall of the High Commission* (1913).

clesiastical courts to fine and imprison them, in this country we have achieved that goal by a better expedient than the only one that was available to Coke as an author, namely, the clause in the first amendment prohibiting an establishment of religion. The expedient he resorted to, while understandable in a country with a Church established by law, is for that very reason not appropriate to our country.

In this connection, it is instructive to note that the Plantagenet justices who had consistently affirmed the noncriminality of abortion at every stage of pregnancy in the reign of Edward III were each and every one of them in full communion with the See of Rome, as was their sovereign, and as were all other Christian Englishmen of their time. They knew perfectly well that the mediaeval Church, through its ecclesiastical courts, punished abortion, whenever committed during pregnancy, as a purely spiritual offense, by purely spiritual penalties. They had no jurisdiction over that; that was the Church's business, not theirs. Theirs was the task of defining secular crimes at common law. In performing that task, they maintained a practical separation of Church from State, from which Coke, for the special reasons above rehearsed, departed, but to which American judges in the twentieth century could do no better than to return. Those king's justices of six and a half centuries ago had no establishment clause, nor even a written constitution, to guide them in their work, but with unerring instinct they pointed the way toward those great achievements then still in the womb of time.

Had our early bench and bar known why Coke wrote this inventive passage, they would have rejected it as wholly unsuited to our conditions. But they did not. By 1716, when Serjeant Hawkins (1673-1746) published his *Treatise of the Pleas of the Crown*, he treated this subject as follows:

And it was anciently holden, That the causing of an Abortion by giving a Potion to, or striking, a Woman big with Child, was Murder: But at this Day, it is said to be a great Misprision only, and not Murder²⁸

Hawkins cites all the authorities, but it is Coke who mesmerizes him into repeating the discredited dictum of Bracton, and adopting Coke's brand new misprision.

²⁸ W. Hawkins, *Treatise of the Pleas of the Crown*, Book 1, ch. 31, § 16, at 80 (1716).

By the time of Sir William Blackstone (1723-80), uncritical acceptance of Coke was at its apogee. In his *Commentaries*, Blackstone faithfully resurrects Bracton, and then says: "But [Sir Edward Coke] doth not look upon this offence [abortion after quickening] in quite so atrocious a light [as Bracton], but merely as a heinous misdemeanor."²⁹ We are now in a position to appreciate the irony of this statement. Coke, the archrestrictor of the real common-law liberty of abortion, is now paraded as the liberalizer of a rigorous Bractonian common law that had never existed! Blackstone repeats the same thought in another passage: "To kill a child in its mother's womb is now no murder, but a great misprision. . . ."³⁰ After Blackstone, the course of judicial dicta was predictable. The earliest American case to deal with abortion, and the only one decided before the New York Legislature of 1828 enacted this state's first statute on the subject, was *Commonwealth v. Bangs*.³¹ There, defendant had got a girl with child and gave her a potion to abort it. The indictment did not aver that she was "quick with child at the time" she drank the potion; this defect the Massachusetts Supreme Judicial Court held fatal.

The only remaining English legal commentator whose thinking on this subject remains to be considered is Sir Matthew Hale (1609-76). In his posthumously published *History of the Pleas of the Crown*, he wrote:

If a woman be quick or great with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is kild, it is not murder nor manslaughter by the law of *England*, because it is not yet *in rerum natura*, tho it be a great crime, and by the judicial law of Moses [Exodus xxi. 22] was punishable with death, nor can it legally be known, whether it were kild or not, 22 E. 3. Coron. 263 [*The Abortionist's Case*]. [S]o it is, if after such child were born alive, and baptized, and after die of the stroke given to the mother, this is not homicide. 1 E. 3. 23.b. Coron. 146 [*The Twinslayer's Case*].

But if a man procure a woman with child to destroy her

²⁹ 1 W. Blackstone, *Commentaries* *129-130 (1765).

³⁰ 4 W. Blackstone, *Commentaries* *198 (1769).

³¹ 9 Mass. 387 (1812). This decision is summarized in 6 N. Dane, *General Abridgment and Digest of American Law* 734 (1823).

infant, when born, and the child is born, and the woman in pursuance of that procurement kill the infant, this is murder in the mother, and the procurer is accessory to murder, if absent, and this whether the child were baptized or not. 7 Co. Rep. 9. Dyer 186 [*Parker's Case*].³²

The modern reader, who is used to employing the word "crime" to mean an offense exclusively against the secular state, may easily be misled by Hale's clause, "tho it be a great crime," into thinking that here, a generation after Coke, is confirmation of his nonsense about abortion after quickening being a great misprision. But one need only turn to the very first page of the author's *Proemium* to this book, to see what Hale himself meant by the word "crime":

Crimes that are punishable by the laws of *England* are for their matter of two kinds.

1. *Ecclesiastical*.
2. *Temporal*.³³

Now, in Hale's day, and from time immemorial until 1803, abortion was and always had been, in England, a crime at canon law, of purely ecclesiastical cognizance. So Hale's calling it a great crime merely meant that it was a great ecclesiastical crime. Coke's calling it a great misprision was a very different matter, for "misprision" was a term used only at the secular law, like "felony", and such a statement asserted that the secular courts in England had jurisdiction of it. Hale never said that.

The remainder of Hale's passage shows how completely he understood and accepted the authority of the mediaeval decisions, and thus how baseless was Coke's assertion that *The Twinslayer's Case* "was never holden for law." It was never holden for anything else but law, both before and after Coke, and this passage in Sir Matthew Hale, surely one of the most scholarly judges who has ever graced the English bench, proves it.

In looking back over this tortuous path of the English law on abortion, one is struck with the fact that the justices in 1327 were content merely to hold that abortion was not felony. They felt it

³² M. Hale, *History of the Pleas of the Crown* 433 (1736).

³³ M. Hale, *id.* at *Proemium* (unnumbered first page) (1736).

unnecessary to give reasons. This must be because the reason was so obvious that it did not need to be mentioned. It was not a felony because it was a purely ecclesiastical offense, and always had been, even in Anglo-Saxon times.

In 1348, on the other hand, the justices began to speculate as to reasons for their reluctance to hold abortion a crime. The baptismal-name argument was pure make-weight; after all, Turks and Jews were perfectly proper victims of murder, and they were never baptized.³⁴ The difficulty-of-proof argument, on the other hand, had and has about it the solid ring of truth.

In fairness to Coke, perhaps it should be acknowledged that his criticism of that part of *The Twinslayer's Case* which let D. off in respect of the twin who was born alive and then died, insofar as that acquittal may be thought to have been based on the difficulty-of-proof argument, is plausible. So far as the intrauterinely killed twin was concerned, however, how can anyone ever know that it did not die shortly before the blows were struck? The difficulty-of-proof ground stands firm against convicting D. of killing the stillborn twin. But the twin who was born alive obviously had not died just before the abortifacient blows. In regard to his death, therefore, the difficulty-of-proof argument is not really available. Interestingly enough, in the nineteenth century, the English courts finally decided, at common law, that Coke had been right about the twin who was born alive and then died.³⁵ They never reached such a decision about the stillborn twin.

But the true reason for the decision in *The Twinslayer's Case* is not the difficulty-of-proof argument of the justices in *The Abortionist's Case* in 1348, but the simple negation of secular criminality (and hence the implied recognition of purely ecclesiastical criminality) which the justices of the King's Bench had made 21 years earlier in *The Twinslayer's Case* itself. Coke's attack never damaged that ground, and it is as sound in 1971 as it was in 1327.

Of course, quite apart from abortion, there were various heads of jurisdiction over which the ecclesiastical courts had exclusive cognizance in the middle ages which American legislatures have under-

³⁴ In his Third Institute, Coke tells us that "Reasonable creature, in rerum natura" includes "Christian, Jew, Heathen, Turk, or other Infidell, being under the Kings peace." E. Coke, *supra* note 22, at *50. In the margin he cites mediaeval authorities that so held.

³⁵ *Rex v. Senior*, 1 Moody 346, 168 Eng. Rep. 1298 (Cr. Cas. Res. 1832). See also *Regina v. West*, 2 Cox's Cases in Crim. L. 500 (Nottingham Spring Assizes 1848) (Maule, J.).

taken to vest in secular tribunals. One thinks of such matters as matrimonial causes, probate of wills, the crime of incest, and the like. In these instances, however, American states have been exerting their police power in pursuit of strong secular objectives, which are still as compelling as they were when they first passed those secularizing laws. In the case of statutes against abortion, there was such a compelling secular state interest when these laws were first passed, and it lasted for some decades, but then passed into medical history. Abortion at will is not a woman's ninth-amendment right today simply because it was her ancestress's common-law liberty in fourteenth-century England, but the fact that it was, helps. Common-law liberties may be abridged, though protected by the ninth amendment, but only when the state in abridging them originally had, and still continues to have, a compelling secular state interest. It is this hurdle which no American state today can surmount if it tries to go on enforcing the nineteenth-century abortion laws.

I have covered the English common law history thoroughly for several reasons:

1. No modern American scholar has shown any awareness of it.³⁶
2. It has been presented only to two of the many courts that recently have considered the constitutionality of abortion statutes.³⁷

³⁶ Justice Holmes seems to have been the last American legal historian to mention these mediaeval authorities:

We shall not consider how far Lord Coke's authority should be followed in this Commonwealth [Massachusetts], if the matter were left to the common law, beyond observing that it was opposed to [The Twinslayer's Case]; which seems not to have been doubted by Fitzherbert or Brooke, and which was afterwards cited as law by Lord Hale.

Dietrich v. Inhabitants of Northampton, *supra* note 18, at 15.

It is worth remembering, as a needed antidote to the hyperdulia of Coke, that Sir Heneage Finch called Chief Justice Hale:

[S]o absolutely a master of the science of the law, and even of the most abstruse and hidden parts of it, that one may truly say of his [Hale's] knowledge in the law, what St. Austin [Augustine] said of St. Hierome [Jerome]'s knowledge in divinity—"Quod Hieronymus nescivit, nullus mortalium unquam scivit" [What Jerome did not know, no mortal ever knew]."

³⁷ On June 1, 1971, I argued much of this material before the United States Court of Appeals for the Second Circuit, in *United States ex rel. Williams v. Zelker*, 445 F.2d 451 (2d Cir. 1971) (panel consisting of retired Justice Tom C. Clark, Circuit Judge Smith, and Senior District Judge Zavatt). On October 15, 1971, I again used most of this material in arguing a motion for new trial in DeLand, Florida, before the Felony Court of Record of Volusia County, in *State v. Wheeler*, No. 1400 (Uriel Blount, Jr., J.).

3. In my 1968 article, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cession of Constitutionality*,³⁸ I gave it only cursory attention, and therefore made the same error that all other modern authors have made in this field, *i.e.*, I assumed that Bracton and Fleta described the real common law of their century, and that Coke described the real common law of his. The bulk of my 1968 article, which dealt with the history of the New York statutes from 1828 onward, remains perfectly sound. It is only the preface treating the English common-law background that I now perceive to have been inadequate. As the legal historian on Governor Rockefeller's Commission to Review New York State's Abortion Law (1968), I wrote the original version of that paper as a monograph on New York's legislative history of abortion, simply for the information of my fellow commissioners.³⁹ So immersed did I become in what New York revisers of 1828 believed the common law to be, that I took their evidence at face value as representing what the common law was. For example, I quoted⁴⁰ the following two revisers' notes:

The killing of an unborn quick child, by striking the mother is now only a misdemeanor. . . .

A child not born, is considered as not being *in rerum natura*, and therefore not the subject of murder, so that the killing such a child is not murder or manslaughter.⁴¹

The second of these revisers' notes is correct. The first states Coke correctly, but Coke, as we have seen, did not state the common law correctly. As Stanford and Dalton had made perfectly clear, at common law, abortion, even after quickening, was not even a misprision.

4. The 1830-1970 New York abortion legislation, and that of the forty or more other states which copied it, as I maintained in my article and maintain herein, was constitutional when first passed and so remained for many years, because of medical conditions then

³⁸ Means, *supra* note 1.

³⁹ The Commission decided so submit my monograph as an annexure to its Report to the Governor. At the suggestion of the Chairman, the Honorable Charles W. Froessel, an enlarged and revised version was published in the New York Law Forum. See Means, *supra* note 1.

⁴⁰ Means, *supra* note 1, at 443, 444.

⁴¹ 6 Revisers' Notes 12, 13 (1828) to N.Y. Rev. Stat. pt. IV, ch. 1, tit. 2, §§ 8, 10 (1829).

prevailing. But, with the change in those medical conditions, it became unconstitutional and has been unconstitutional now for many years. The question thus arises as to what is the scope of the common-law liberty in respect of abortion to which the cessation of constitutionality of the former statutes restored the women and physicians of New York and other states? Was it the restrictive liberty allowed by Coke (abortion before quickening), or the unlimited liberty allowed by the justices of Edward III and by Serjeant Stanford? If historically valid content is to be given to the "fundamental right to an abortion" that so many federal judges have perceived, through the constitutional lenses of the penumbral zone and the ninth amendment, it is important to know.

Prior to the present article, all historical treatments of the English law of abortion had mentioned the *loci classici* in Bracton (and his pupil, Fleta) and in Coke, leaving the 400 years of legal history between Bracton and Coke a giant void. I plead guilty to having done this myself in my 1968 article.⁴² I have here tried to make amends for following the other authors down this false path. Curiously, a distinguished member of the Supreme Court of California was not deceived by Bracton. Writing for the court in *Keeler v. Superior Court of Amador County*,⁴³ Mr. Justice Mosk observed: "There seem to be no reported cases supporting Bracton's view, and it need not further detain us."⁴⁴ The sagacity of this insight was confirmed for me by the leading living authority on Bracton, Professor Samuel Thorne, of the

⁴² Means, *supra* note 1, at 419-20 (1968).

In 1939 the British Ministry of Health and Home Office published the report of the [ir] Inter-Departmental Committee on Abortion, which contains the following:

The great authorities on the history of English criminal law are remarkably silent upon the matter [of abortion]. From Bracton, who wrote in the early part of the thirteenth century, and was the first of the writers to attempt a general survey of the existing criminal law, down to the 'Institutes' of Coke some 350 years later, the specific references to abortion are few in number. The reason for this comparative silence seems to be that the offence of procuring abortion was regarded as an offence to be dealt with by the ecclesiastical courts, and the writers on criminal law were only concerned to deal with it as it affected [the secular] criminal law, as in the case of homicide.

British Ministry of Health and Home Office, Report of the Inter-Departmental Committee on Abortion ¶ 66, at 26-27 (1939). Of the fifteen members of that Inter-Departmental Committee on Abortion, several were lawyers, of whom the most distinguished was W. Norman Birkett, K.C., but it is clear from the foregoing that all had lost touch with the mediaeval authorities on this subject.

⁴³ 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).

⁴⁴ *Id.* at 625 n.4, 470 P.2d at 620 n.4, 87 Cal. Rptr. at 484 n.4.

Harvard Law School, who remarked, when I drew Justice Mosk's statement to his attention: "When Bracton had cases to support his view, he cited them."

It now occurs to me that Justice Mosk's remark about Bracton applies with equal force to Coke's passage. There are plenty of dicta supporting Coke's statement that abortion after quickening is a common-law misdemeanor (misprision), but no decisions, certainly none holding the abortee herself guilty of such an offense.⁴⁵ Faced with the treatises of Stanford, Lambarde, and Dalton, justices of the peace were not about to bind women, or their abortionists, over for an offense which those authors had held not to exist, whatever the opinions of the far more eminent commentator, Sir Edward Coke, may have been. Coke has never been taken all that seriously on his own side of the Atlantic.

Bernard M. Dickens, a barrister of the Inner Temple, has written a recent treatise on *Abortion and the Law*, in which he concludes his section dealing with "The Position at Common Law" by pointing out a single instance of an indictment,⁴⁶ of an abortionist who had given a pregnant woman pills to cause an abortion. This is the same indictment that was discussed in 1845 in *Commonwealth v. Parker*,⁴⁷ by Chief Justice Lemuel Shaw, one of the greatest common-law judges Massachusetts ever produced. That was a prosecution at common law for an abortion with no averment or proof of quickening. In ruling the indictment invalid, Chief Justice Shaw wrote:

The only authority, adduced in support of the prosecution, was a precedent in 3 Chit. Crim. Law, 798, which is an indictment at common law, in which it is not alleged that the woman was quick with child. It does not appear that any judgment was rendered on this indictment, which was found shortly before the passing of the act of 43 Geo. 3; but as it is inserted, as a precedent, in a work of good authority, it was probably deemed good evidence of the law. But, upon a careful consideration of this precedent, it will not be found incon-

⁴⁵ See the dicta discussed in Means, *supra* note 1, at 428 n.37.

⁴⁶ This indictment is printed in 3 J. Chitty, Criminal Law 798-801 (1816). Taken from the Crown Office, Mich. 42 Geo. 3 (1802)—*i.e.*, just before the passage of Lord Ellenborough's Act, 43 Geo. 3, c. 58 (1803), since which abortion has been an exclusively statutory offense in England.

⁴⁷ 50 Mass. (9 Met.) 263 (1845).

sistent with what we take to be the rule of the common law. The indictment contains several counts, and they all charge an assault upon the woman; and there is no intimation that the applications were made with her consent, but the conclusion, from the averments, is otherwise. It is then the case of an assault at common law, with aggravations. But what is more material is, that, although the woman was not alleged to be quick with child, yet it is averred that she was pregnant and big with child, and that the act was done by the defendant wilfully, and with intent feloniously, wilfully, and of his malice aforethought, to kill and murder the child with which she was so big and pregnant. And in other counts, it is laid that drugs were administered to her, she being pregnant with another child, and with intent to cause and procure her to miscarry and bring forth said child dead, &c. The whole proceeds on the averment, that she was then pregnant with a child, then so far advanced as to be regarded in law as having a separate existence, a life capable of being destroyed; which is equivalent to the averment that she was quick with child.⁴⁸

When one reads the whole of the indictment as set forth in Chitty,⁴⁹ one discovers that there were five counts, of which the fifth need not detain us, as it was only for common assault. Counts I, II, and III all refer to one pregnancy, which defendant terminated by a combination of blows and pills, in 1799. Count IV refers to a second pregnancy, apparently at a later date, which Chitty conceals under an "on, etc.", which defendant attempted to terminate by a combination of blows and the insertion of "a certain instrument called a rule . . . into the womb and body of the said Anne." Count IV does not aver that defendant succeeded in terminating the second pregnancy. Count I does aver that he succeeded in terminating the first pregnancy, the child being "born alive." Counts II and III merely offer varying dates and types of pills administered in successive efforts to terminate the first pregnancy.

Count I states that both mother and the live-born child "became and w[ere] rendered weak, sick, diseased, and distempered in body" as a result of the prenatal abortifacient acts, and further that the

⁴⁸ *Id.* at 267.

⁴⁹ 3 J. Chitty, *supra* note 46.

mother "underwent and suffered great and excruciating pains, anguish and torture both of body and mind", and that this lasted for "the space of six months then next following." Similar averments occur in Counts II, III, and IV in regard to the mother's suffering.

In view of these allegations in Count I, the only count which, as quoted by Chitty, tells us whether the child was stillborn or born alive, we see that this abortus not only survived the operation, but, in the interval of time between February 1799, when the first abortion was accomplished and his live birth resulted, and September or October (Michaelmas Term) 1802, when the grand jury found the indictment, this child remained alive—a period of over three years, since, if the child had died, the indictment would surely have recounted that macabre fact. What Count I is charging, therefore, is the performance of an abortifacient act, after quickening, which resulted in the birth alive of an infant which, had it died within a year and a day after birth, would have been the victim, according to Coke, of murder, but which survived though "rendered weak, sick, diseased, and distempered in body." Count I (and the variant Counts II and III) is thus charging, so far as the infant is concerned, an offense short of murder that would, according to Coke, have been murder, had the infant died after birth within the year and a day. It is thus evidence that the law officers in the Crown Office thought—in seeking such an indictment from a grand jury—that Coke was right about abortion after quickening being murder if the foetus were live-born and then died. They were merely extending this principle to the lesser offense of assault with intent to murder.

Although as we know, Oliver Wendell Holmes, Jr., in speaking for a unanimous Supreme Judicial Court in 1884, doubted that even this half of Coke's text (calling abortion after quickening murder if the abortus is born alive and then dies) had ever become the common law of Massachusetts,⁵⁰ the English courts did accept this half of Coke's passage in a later nineteenth-century case.⁵¹

What Counts I-III do not establish is that the law officers in the Crown Office in 1802 believed that abortion after quickening resulting in a stillbirth was a crime at common law. True, they did include Count IV, but apparently they felt it necessary to strengthen it by adding the averment that the procedure had caused the said Anne to

⁵⁰ See *supra* note 36.

⁵¹ See cases, *supra* note 35.

become, continue and remain "weak, sick, sore, lame, diseased and disordered in body . . . for the space of six months then next following", and they do not tell us whether the abortion was a success or not. This indicates a belief on the part of the law officers in the Crown Office in 1802 that an abortion after quickening which resulted in severe illness or morbidity in the abortee was some kind of offense, but it falls far short of indicating that they were confident that an abortion after quickening, resulting in a stillbirth, which did not make the patient seriously unwell, was an offense at common law.

Thus the various counts in the 1802 indictment set forth in *Chitty*, even if, notwithstanding Chief Justice Shaw's words, any judgment was rendered on this indictment, would not establish a precedent that abortion after quickening resulting in a stillbirth was an offense of any kind at common law, unless serious morbidity to the abortee herself resulted. The endemic, inveterate concern of the common law with the life and health of the expectant mother, rather than with those of the foetus, is once again underscored.

In fact, however, there is nothing to show that there ever was any prosecution under any of the counts of this indictment. In view of the fact that Lord Ellenborough's bill was introduced into Parliament a very short time after the return of this indictment, one would probably be closer to the truth in assuming that the law officers in the Crown Office decided that Coke was just plain wrong, in the face of the mediaeval authorities, and that nothing but a statute could change them. What we are probably looking at in this 1802 indictment in *Chitty* is the reason for the passage of Lord Ellenborough's Act.

While I have never been able to find strictly contemporaneous evidence (apart from this indictment) for the passage of Lord Ellenborough's Act, it is a fact that an unsigned article in an 1832 issue of the *London Legal Examiner* states flatly: "The reason assigned for the punishment of abortion is not that, thereby an embryo human being is destroyed, but that it rarely or never can be affected by drugs without the sacrifice of the mother's life."⁵² The writer also mentions a certain claim made in his day to the effect that there had become available by 1832 "an operation by which, even in an advanced stage

⁵² 2 *Legal Examiner* 10-11 (1832) (unsigned article on trial of William Russell at the Huntingdon Assizes, March 1832). The new and relatively safe operation which the writer goes on to mention is undoubtedly induction of premature labor in the third trimester, a technique now little employed.

of gestation, abortion may be effected with trifling danger", and recorded his "doubts of the assertion", as well he might, since Lister's regime of antiseptic surgery was still 35 years in the future as to its discovery, and half a century in the future as to its adoption, in 1832. The 1802 indictment and the 1832 *Legal Examiner* piece thus unite in pointing to the life of the mother, as the reason for the passage of Lord Ellenborough's Act, from which all American statutes on the subject are derived.

In view of the probable reluctance of the law officers in the Crown Office to prosecute the 1802 indictment (or its probable dismissal by the English court if they did prosecute), one can understand why Mr. Dickens concludes his passage thus: "However, references to the procuring of abortion as a crime at Common Law before it became a statutory offense in 1803 are not numerous, and are fairly late in date."⁵³ The references are, of course, found in works of authors, not in decisions, or even dicta, of courts.

It is thus no accident that the Attorneys General of Texas and Georgia have not produced a single English common-law decision, prior to 1776 or 1840, the dates as of which Georgia and Texas, respectively, adopted the English common law, or prior to 1791—the date on which the ninth amendment became a part of the Constitution, nor any American colonial or early state decision holding that abortion either before or after quickening was any offense at all at common law. The earliest such dictum is in *Commonwealth v. Bangs*,⁵⁴ and that case was decided in 1812.

There remains only an ironic footnote to Coke's masterpiece of perversion of the common law of abortion. In 1970 the Harvard University Press published a book, under the general editorship of Professor John T. Noonan, Jr., of the Boalt Hall Faculty of Law, called *The Morality of Abortion*. The chapters are by different authors, but the final one, captioned "Constitutional Balance", is a joint production of Professor David W. Louisell, also of Boalt Hall, and Noonan. The section of this chapter titled, "The Fetus in the Criminal Law", purports to give the history of the subject at common law, in which these eminent authors quote the *locus classicus* in Coke's *Third Institute* about abortion after quickening, but misquote Coke as calling it "a great misprision and so murder." For Coke's

⁵³ B. Dickens, *Abortion and the Law* 23 (1966).

⁵⁴ 9 Mass. 387 (1812). See also *supra* note 31.

“no” Louisell and Noonan have substituted “so”. Since a misprision is always under the grade of felony, and murder is always a felony, the sentence as altered by Louisell and Noonan makes no sense to anyone who knows the meaning of the word *misprision*. Nevertheless, at the argument before the Supreme Court of the United States on January 12, 1971, of *United States v. Vuitch*,⁵⁵ I saw and heard Assistant Solicitor General Samuel Huntington (in all innocence, of course) cite this very page of the Noonan book, containing this very corruption of Coke’s text, as the Government’s idea of the true history of the common law on abortion! Fortunately, the Court was not misled, as in that case it did not reach the constitutional issue which would have required it to review this history.

One can only say that, after Coke’s savaging of the truth about the common law on this subject in his *Third Institute*, in the interest of punishing “so horrible an offence” as abortion after quickening, he has now, more than three centuries later, received poetic justice at the hands of two law professors who, wittingly or unwittingly, have corrupted his text as violently as he, clearly knowingly, misstated the mediaeval decisions. One is reminded of the lines sung by the Mikado in the Gilbert and Sullivan operetta of that name:

My object all sublime
I shall achieve in time—
To let the punishment fit the crime—
The punishment fit the crime . . .

This punishment must be all the more odious to the shade of the doughty Sir Edward, seeing that it has been administered by the two most distinguished legal spokesmen in this country on this question of that very Papacy which he so strongly opposed throughout his career.

But the tale does not end here. There is a footnote to the footnote. A group of three Washington, D.C., lawyers, and one Washington, D.C., law firm, one New Jersey lawyer, and Professor Robert M. Bryn, of the Fordham University Law School (a colleague of mine on Governor Rockefeller’s 1968 New York State Abortion Law Review Commission), filed an *amicus curiae* brief dated October 8,

⁵⁵ 402 U.S. 62 (1971).

1971, in the United States Supreme Court, for The National Right to Life Committee. A passage appears on page 25 of that brief which makes interesting comparative reading when set beside the passage on page 223 of the 1970 Louisell-Noonan effort:

Louisell-Noonan:

Ryan-Gartlan-Scanlan-Flynn-Byrn-Shea & Gardner:

This [Bracton's] language was repeated early in the seventeenth century by Coke in a passage which begins, "If a woman be quick with child . . . this a great misprision and so murder."⁵⁶

Early in the 17th Century, Lord Coke repeats what Bracton said in a passage which begins "If a woman be quick with child . . . this is a great misprision and so murder."⁵⁷

I must congratulate these seven attorneys for The National Right to Life Committee for correcting the Louisell-Noonan misquotation of Coke by inserting the word "is", which is in Coke, but is missing from Louisell-Noonan. This must have required somebody to look up the original. What a pity that he did not look five words further on and see Coke's "no" and substitute it for Louisell-Noonan's "so", at the same time!

After such persistence in misquoting Coke as having said "so" where he did say "no", I am beginning to wonder whether these gentlemen really believe that Coke and Bracton said the same thing. Quite evidently they intend others to believe it. After all, how else can one explain that they say that Coke "repeated" (Louisell-Noonan) or "repeats" (Byrn et al.) Bracton's dictum? Repetition implies that Coke accepted and adopted Bracton's dictum, whereas in fact, of course, he merely quoted it. Yet, by changing Coke's "no" to "so", both these groups of lawyers for the foetus have made Coke adopt Bracton the whole way, while all that Coke did was to quote him, and to attempt to pervert the English law halfway toward Bracton, by calling abortion after quickening a misprision, but not the homicide which Bracton had dubbed it.

⁵⁶ D.W. Louisell & J.T. Noonan, *Constitutional Balance*, in *The Morality of Abortion: Legal and Historical Perspectives* 223 (Noonan ed. 1970).

⁵⁷ Brief for The National Right to Life Committee as Amicus Curiae at 25, *Roe v. Wade* and *Doe v. Bolton*, *supra* note 2.

After all this, one can only conclude that Clio has many clients, and some of them are clowns.⁵⁸

II. THE TWILIGHT OF THE COMMON LAW AND THE DAWN OF THE NINTH AMENDMENT

There remains a significant strand of the tangled skein of the common law of abortion prior to 1791 still to be unravelled. What if the abortionist's act resulted in his patient's death—an event that must have occurred in three cases out of eight.⁵⁹

The mediaeval law was silent on this question. One can surmise from this that it was content to let the risk fall where nature had laid it: on the woman. She had gambled, and lost. That was all.

In 1670, however, Sir Matthew Hale, sitting at the Assizes at Bury St. Edmunds, decided such a case, which is reported only in his *Treatise of the History of Pleas of the Crown*,⁶⁰ where he wrote:

But if a woman be with child, and any gives her a potion to destroy the child within her, and she take it, and it works so strongly, that it kills her, this is murder, for it was not given to cure her of a disease, but unlawfully to destroy the child within her, and therefore he, that gives a potion to this end, must take the hazard, and if it kill the mother, it is murder, and so ruled before me at the assizes at *Bury* in the year 1670.⁶¹

Advocates of Coke's *Third Institute* position would doubtless pray in aid Hale's adverb "unlawfully" in this passage, but Hale

⁵⁸ If this judgment seems hard on these latter-day zealots, let them take comfort in the company of that giant of time gone by, Sir Edward Coke. Was it not he who had obtained the agreement of the other Chief Justice, and of the Chief Baron of the Exchequer, "that the King by his proclamation cannot create any offence which was not an offence before, for then he may alter the law of the land by his proclamation in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment." *Proclamations*, 12 Co. Rep. 74, 76, 77 Eng. Rep. 1352, 1354 (1610). Yet twenty years later we find him in his study at Stoke Pogis, devoting the final quinquennium of his life to the preparation of his *Institutes* for publication, and, in the course of this labor, doing the very thing by stealth that he had denied King James I the power to do by open proclamation. Of such ironies is history woven. See also Cope, *Sir Edward Coke and Proclamations*, 1610, 15 Am. J. of Legal Hist. 215 (1971).

⁵⁹ See text pp. 384-86, *infra*.

⁶⁰ M. Hale, *supra* note 32.

⁶¹ M. Hale, *supra* note 36, at 429-30.

himself doubtless meant no more by it than that such a purpose contravened the King's ecclesiastical law. Hale cites no earlier precedent for his *nisi prius* decision in 1670; had any existed, he surely would have known of it, and cited it. One thus perceives the nature of the innovation the Lord Chief Justice made at Bury three centuries ago. Theretofore the common law, following nature, had let the *woman* "take the hazard." With Restoration gallantry, Sir Matthew imposed a new legal risk upon her abortionist. He did not merely shift a legal risk from her shoulders to the abortionist; for there is no evidence that the common law had ever treated an abortee who died as *felo de se*. It had simply closed its eyes to her fate. Sir Matthew Hale opened its eyes, but even he did not call her *felo de se*, though he did condemn her abortionist as a murderer, if she died.

I have found only one other case prior to 1791 in which an abortee died, and her abortionist was held guilty of her murder. This was *Margaret Tinckler's Case*, tried to a jury at the Durham Assizes (Crown Side) in 1781, before Sir George Nares (1716-86), a Puisne Justice of the Common Pleas. Like Hale's case in 1670, this one also is reported only in a treatise, written, however, not by the justice who decided it, but by Sir Edward Hyde East 22 years after the decision.⁶² East's report of the case follows:

Margaret Tinckler was indicted for the murder of Jane Parkinson, by inserting pieces of wood into her womb. A second count charged her as accessory before the fact. It was proved by several witnesses, that from the first time of the deceased taking to her bed, which was on the 12th of July, she thought that she must die, making use of different expressions, as, *that she was going; that she was working out her last*; and exclaiming, *Oh! that Peggy Tinckler has killed me*. She lin-

⁶² 2 E. East, *A Treatise of the Pleas of the Crown* (1803). This work was published in the same year in which Lord Ellenborough's Act, 43 Geo. 3, c. 58 (1803), was passed. East's preface is dated May, 1803. Lord Ellenborough's Act received the royal assent on June 24, 1803, though its first reading in Commons had occurred on March 28, 1803. 36 Parl. Hist. cols. 1245-47 (1803). In any event, East makes no reference to the bill or the statute. His discussion is based entirely on the position at common law. He treats *Margaret Tinckler's Case* twice in the first volume of his treatise: in a comment of his own at 230, and in a full report at 354-56. The report, according to marginal notes, is based principally on a manuscript of Henry Gould (cir. 1700-94), a Puisne Justice of the Common Pleas, and on the Manuscripts of Crown Cases Reserved, but also in part on a manuscript of Francis Buller (1746-1800), a Puisne Justice of the King's Bench.

gered till the 23d, when she died. She never was up but once during that time, when on telling a friend who attended, her that she thought herself better, she advised her to get up, which the deceased did, and walked as far as the passage going out of the room, but was forced to return and go to bed again. It appeared by the testimony of several witnesses, that from the moment of her taking to her bed till the time of her death she had declared, *that Tinckler had killed her and dear child*, (stating the particular means used, which agreed with the charge in the indictment.) And during the same period she had declared more particularly, 'that she was with child by one P. a married man, who, being fearful lest his wife should hear of it if she were brought to bed, advised her to go to the prisoner, a midwife, to take her advice how she should get rid of the child, being then five or six months gone.' 'That the prisoner gave her the advice' in question, which she followed accordingly. It was proved by the testimony of a witness, that three days before the delivery, which was on the 10th July, she saw the deceased in the prisoner's bed-chamber, when the prisoner took her round the waist and shook her in a very violent manner six different times, and tossed her up and down: and that she was afterwards delivered at the prisoner's house. The deceased also declared during her illness, that after her delivery the prisoner gave her the child to take home; and bid her go to bed that night and sleep, and get up in the morning and go about her business, and nobody would know anything of the matter; but that appearing very ill the next day at a relation's house, they had ordered her to go home and go to bed, which she did. The child was born alive, but died instantly; and the surgeons, who were examined, proved that it was perfect. There was no doubt but that the deceased had died by the acceleration of the birth of the child: and upon opening her womb it appeared that there were two holes caused by the skewers, one of which was mortified, and the other only enflamed; and other symptoms of injury appeared. A short time before her death she was asked whether the account she had from time to time given of the occasion of her death, and the prisoner's treatment of her were true; and she declared it was. It was objected that the above evidence of the deceased's declarations ought not to be admitted, as she

herself was *particeps criminis*, and likewise as it appeared at the time of her declarations she was better, or thought herself so. But Nares J. was of opinion, that however this objection might hold with respect to the second count, in which the prisoner was charged as an accessory with the deceased, yet the deceased was not willingly or knowingly an accessory to her own death; and therefore it was like the common case of any other murder. And as to the objection that she once thought herself better, and tried to get up, yet the same declarations she then made had been made repeatedly before to persons whom in confidence she told that she never should survive, when she first took to her bed; and she had repeated the same declarations the day before she died, and within a few hours of her death. And as to the fact itself, he was clearly of opinion it was murder, on the authority of Lord Hale. [Marginal citation: 1 Hale, 429.] The jury found the prisoner guilty on the first count, charging her as a principal in the murder, and execution being respited to take the opinion of the judges on the whole case, they all met to consider of it [Marginal note: First day of Mich. term 1781, at Serjeant's Inn.]: and were unanimously of opinion that these declarations of the deceased were legal evidence: for though at one time the deceased thought herself better, yet the declarations before and after and home to her death were uniform and to the same effect. And as to her being *particeps criminis*, they answered, that if two persons be guilty of murder, and one be indicted and the other not, the party not indicted is a witness for the crown. And though the practice be not to convict on such proof uncorroborated, yet the evidence is admissible; and here it was supported by the proof of the prisoner tossing the deceased in her arms in the manner stated. Most of the judges indeed held that the declarations of the deceased were alone sufficient evidence to convict the prisoner; for they were not to be considered in the light of evidence coming from a *particeps criminis*; as she considered herself to be dying at the time, and had no view or intent to serve in excusing herself, or fixing the charge unjustly on others. But others of the judges thought that her declarations were to be so considered; and therefore required the aid of the confirmatory evidence.⁶³

⁶³ 1 E. East, *id.* at 354-56.

Though not officially reported, this case is of high authority, having commanded the concurrence of the Twelve Judges of England. It is of great interest, not only for the authority it does cite (Hale), but for the authority it ignores (Coke). After all, since Jane Parkinson's bastard "was born alive, but died instantly", this was the very case which Coke had held murder of the infant, but which *The Twinslayer's Case* in 1327, and Hale writing his treatise between 1670 and 1676, had held was not murder of the infant. If the law officers of the Crown in 1781 had thought that Coke was a more satisfactory authority on this point than *The Twinslayer's Case* and Sir Matthew Hale, why was Margaret Tinckler not also indicted for the murder of Jane Parkinson's live-born child? The very same evidence that was held competent and sufficient to convict her of the murder of Jane Parkinson would equally have served to convict her of the murder of the child. Also, it must have been psychologically much easier, in 1781 as in more recent times, to persuade a jury to send a midwife to the gallows for the murder of a nonconsenting babe than for that of the woman who has asked to be aborted.

In the light of these reflections, one perceives how far astray Sir Edward Hyde East, writing 22 years later, went when, in commenting on *Margaret Tinckler's Case*, he declared:

Homicide from a particular Malice to one, which falls by Mistake or Accident upon another.

In these cases the act done follows the nature of the act intended to be done. Therefore if the latter were founded in malice, and the stroke from whence death ensued fell by mistake or accident upon a person for whom it was not intended, yet the motive being malicious, the act amounts to murder. . . .

Thus A. having malice against B., strikes at and misses him, but kills C.; this is murder in A.: and if it had been without malice, but with an instrument or in a manner calculated to create danger, though not likely to kill, it would have been manslaughter. Again, A. having malice against B., assaults him, and kills C. the servant of B., who had come to the aid of his master; this is murder in A.; for C. was justified in attacking A. in defence of his master, who was thus assaulted. So if A. give a poisoned apple to B., intending to poison her, and B. ignorant of it give it to a child, who takes

it and dies; this is murder in A., but no offence in B.; and this, though A. who was present at the time endeavored to dissuade B. from giving it to the child.

Hither also may be referred the case of one who gives medicine to a woman; and that of another who put skewers in her womb, with a view in each case to procure an abortion; whereby the women were killed. Such acts are clearly murder; though the original intent, had it succeeded, would not have been so, but only a great misdemeanor: for the acts were in their nature malicious and deliberate, and necessarily attended with great danger to the person on whom they were practiced.⁶⁴

East's words, "the original intent, had it succeeded, would not have been [murder], but only a great misdemeanor", present an exegetic dilemma so ambiguous as almost to defy solution. Two mutually inconsistent solutions may be considered, but each is beset with perplexity.

First Solution: East is referring to Coke's "great misprision and no murder." If so, why does East cite in the margin not Coke but Hale?⁶⁵ Nor does East explain why, if indeed he was accepting the authority of Coke's *Third Institute* passage for the proposition that an abortion followed by stillbirth is a great misprision, he did not also accept the other teaching in the same passage that abortion followed by live birth and then the infant's death is murder. That East did not accept the latter teaching seems clear enough; for, if he had, he would have had a shorter leap to transfer the malice toward the murdered infant to the infant's mother, than from the misdemeanor aimed at producing a stillbirth to the mother's death. It would have been a simpler case of two murders, as where A shoots B, killing him, and the bullet passes through B's body into that of C, whom A did not intend to harm, killing C: here, A is clearly guilty of the murders of both B and C. Yet, East does not discuss *Margaret Tinckler's Case* as one of two murders, as Coke surely would have done. East discusses it on the footing of a failed but intended abortion followed by stillbirth, and a consummated but unintended murder of the expectant mother.

⁶⁴ 1 E. East, *id.* at 230.

⁶⁵ 1 E. East, *id.* at 355. His marginal citation is precise: "(1 Hale, 429.)."

Second Solution: East is relying on Hale, and not at all upon Coke, but East misunderstood Hale's "great crime" and "unlawfully" as meaning, in the one case, a common-law misdemeanor (abortion resulting in stillbirth), and, in the other, as done contrary to the common law. This solution has the obvious advantage over the one previously considered of explaining why East did not perceive two murders—the infant's as well as Jane Parkinson's—but only one (Jane's). Coke would have perceived two murders, but Hale would have discerned only one; for Hale had expressly held that "if after such child were born alive, and baptized, and after die of the stroke given to the mother, this is not homicide [citing *The Twinslayer's Case*]." ⁶⁶ If, therefore, East consciously rejected Coke but endeavored to follow Hale (which seems to be what in 1781 the law officers of the Crown and the Twelve Judges of England did) then he perceived but one murder (Jane Parkinson's), and that not intended, and one misdemeanor (*i.e.*, Hale's "a great crime", as interpreted by East), and that intended. If East interpreted Hale's "a great crime" to mean "a great misdemeanor", then it must be committed by producing the abortion, whether the abortion results in a stillbirth or in a live birth followed by the infant's death.

There are, however, two difficulties with such an interpretation of Hale's "a great crime" as equivalent to East's "a great misdemeanor."

The first difficulty is linguistic. On the page of his treatise preceding the one on which Hale calls abortion "not murder nor manslaughter by the law of England . . . tho it be a great crime", ⁶⁷ Hale discusses another case in almost, but not quite, the same language (the difference being nice, but significant), *viz.*:

A man infected with the plague, having a plague sore running upon him, goes abroad. '[W]hat if such person goes abroad to the intent to infect another, and another is thereby infected and dies? whether this be not murder by the common law might be a question, but if no such intention evidently appear, tho *de facto* by his conversation another be infected, it is no felony by the common law, tho it be a great misdemeanor. . . .'

⁶⁶ M. Hale, *supra* note 32, at 433.

⁶⁷ M. Hale, *supra* note 32, at 433.

⁶⁸ M. Hale, *supra* note 32, at 432.

Now, this case of the nonintending infectant Hale characterizes as “a great misdemeanor”—a precise common-law expression which excludes ecclesiastical, and affirms an exclusively common-law jurisdiction of the offense. In the case of the abortionist, a page later, Hale alludes to his offense as “a great crime”, which neither excludes ecclesiastical nor necessarily affirms a common-law jurisdiction, on its face, and, against the historic background that abortion had immemorially, in England, belonged exclusively to the ecclesiastical jurisdiction, Hale’s ambivalent “a great crime” must be referred to canon law.

The second difficulty inheres in the varying extents of the two reasons given by Hale for his conclusions in regard to abortion. Hale gives one reason which is common to both the case where abortion produces a stillbirth and the case where it produces a live birth followed by the infant’s death. This reason is that the foetus is, at the moment the stroke is given, “not yet *in rerum natura*”—an expression which sounds philosophical and even metaphysical but which, as used by the mediaeval common-law lawyers might best be translated: “in the world of secular reality.” Hale gives another reason that applies to a stillborn abortus, but not to one that is born alive and then dies. That reason is: “nor can it legally be known, whether it were kild or not [citing *The Abortionist’s Case*].”⁶⁹ Since the reason that the foetus “is not yet *in rerum natura*” applies to both cases, it is more significant in coming at the real *reationale* which compels Hale to reach the same result in both cases.

In regard to an abortus that is born alive but dies soon afterward, the “not yet *in rerum natura*” ground suggests two similar cases which Hale describes five pages earlier in his treatise:

If a mortal stroke be given on the high sea, and the party comes to land in England and die, the admiral shall not have jurisdiction in this case to try the felon, because the death, that consummated the felony, happened upon the land, nor the common law shall not try him, because the stroke, that made the offense, was not *infra corpus comitatus* [within the body of the county] [citing several cases].

⁶⁹ M. Hale, *supra* note 32, at 433.

At common law, if a man had been stricken in one county and died in another, it was doubtful whether he were indictable or triable in either, but the more common opinion was, that he might be indicted where the stroke was given, for the death is but a consequent, and might be found tho in another county.⁷⁰

The modern mind has no difficulty in approving the greater common sense exhibited by "the more common opinion" in the two-counties case, in contrast to the fiasco of falling between two stools in the high sea-dry land case. The solution achieved in the two-counties case parallels the one which Hale (if one interprets his "a great crime" correctly, *i.e.*, as referring to a canonical crime) arrives at in the case of an abortion resulting in a live birth followed by the neonate's death. In this case, too, the stroke is given while the victim is in one jurisdiction ("not yet *in rerum natura*", *i.e.*, in the ecclesiastical jurisdiction), while the death occurs after the victim has crossed into another jurisdiction (through live birth, *in rerum natura*, *i.e.*, in the common-law jurisdiction). Yet the courts that had exclusive jurisdiction of the stroke (the abortifacient act)—the ecclesiastical courts—remain exclusively competent to try the postnatal death as well. The analogy to the jurisdiction of the courts of the first county in the two-counties case is perfect.

From an American constitutional point of view, of course, the proper line of demarcation between the jurisdiction of secular courts and ecclesiastical courts is of far greater significance than it was for Hale in Restoration England. To Hale, both the common law and the ecclesiastical law were emanations of the same sovereign. To us, with the first amendment's disestablishment clause, the sphere of jurisdiction properly belonging to the English ecclesiastical courts is relegated to the domain of private conscience.

The full report of *Tinckler's Case* in East contains not one word inconsistent with this understanding of Hale, the only authority relied on by the trial justice and, one assumes, the Twelve Judges of England. Only East's effort to analyze the case, and to fit it into a theoretical pattern along with other cases, made in a different part of his (East's) treatise nearly a quarter of a century after the decision, created perplexities. In his report of the case, East merely copied and

⁷⁰ M. Hale, *supra* note 32, at 426.

collated the manuscripts left by the judges who decided the case; in his analysis, East tried his own hand at explanation.

In his treatise, Sir William Oldnall Russell, writing 16 years after East, and 38 years after the decision, did considerably greater justice to Hale—and to the judges of 1781—than East had done. Russell wrote that, “though the death of the women was not intended, the acts were of a nature deliberate and malicious, and necessarily attended with great danger to the persons on whom they were practiced.”⁷¹

This is the reasoning followed by the Supreme Judicial Courts of Massachusetts and of Maine, in 1845 and 1851, respectively, in the first two American cases to adhere to Sir Matthew Hale’s 1670 decision at Bury St. Edmunds:

The use of violence upon a woman, with an intent to procure her miscarriage, without her consent, is an assault highly aggravated by such wicked purpose, and would be indictable at common law. So where, upon a similar attempt by drugs or instruments, the death of the mother ensues, the party making such an attempt, with or without the consent of

⁷¹ 1 W.O. Russell, *A Treatise on Crimes and Misdemeanors* 659-60 (1819).

Russell is less successful, however, in dealing with Coke’s second invention in this *Third Institute* passage. Russell says:

Where a child, having been born alive, afterwards died by reason of any potions or bruises it received in the womb, it seems always to have been the better opinion that it was murder in such as administered or gave them.

Id. at 618. Russell then cites Coke, Hawkins, Blackstone, and East, in favor of this view, and cites as holding the contrary view Stanford and Hale, explaining:

[B]ut the reasons on which the opinions of the two last writers seem to be founded, namely, the difficulty of ascertaining the fact, cannot be considered as satisfactory, unless it be supposed that such fact never can be clearly established.

Id. at n.(b). Russell here misreads Stanford and Hale, who urged the difficulty-of-proof argument only in regard to a stillborn abortus, never in regard to a live-born but afterward dying abortus. In regard to a stillborn abortus “such fact never can be clearly established” (to borrow Russell’s phrase), if the fact sought to be proved is that the foetus was alive just before the abortifacient act.

Stanford and Hale held both the live-born but afterwards dying abortus, and the stillborn abortus, nonvictims of murder or manslaughter, on the very different ground that, at the moment of the stroke—the abortifacient act—neither was “yet in *rerum natura*”.

That is what in effect the Justices of the King’s Bench had done in 1327 in deciding *The Twinslayer’s Case*, which involved both a stillborn and a live-born but afterwards dying abortus. In 1348, in *The Abortionist’s Case*, different justices of the same court had been confronted with only one abortus, and that stillborn. In that case, they originated the difficulty-of-proof argument, which is applicable, of course, only to a stillborn abortus. Stanford and Hale followed the 1327 and 1348 precedents faithfully. Russell seems not to have been aware of them.

the woman, is guilty of murder of the mother, on the ground that it is an act done without lawful purpose, dangerous to life, and that the consent of the woman cannot take away the imputation of malice, any more than in the case of a duel, where, in like manner, there is the consent of the parties.⁷²

If medicine is given to a female to procure an abortion, which kills her, the party administering will be guilty of her murder. . . . This is upon the ground that the party making such an attempt with or without the consent of the female, is guilty of murder, the act being done without lawful purpose and dangerous to life, and malice will be imputed.⁷³

There is a slight but significant change made in Hale's language by Chief Justice Shaw of Massachusetts in the 1845 case (which was followed by the 1851 Maine case). Whereas Hale had said "unlawfully", Shaw said "without lawful purpose." Hale was writing (in 1670-76) in a country with an established Church, canon law, and ecclesiastical courts. An abortifacient act and purpose contravened the canon law publicly recognized by the English secular state, though it did not contravene the same country's common law. Shaw, on the other hand, was writing in 1845 in Massachusetts, a Commonwealth that had no established Church, canon law, or ecclesiastical courts, but only a secular common law (and, as yet, not even a statute on abortion). In Massachusetts when Shaw wrote, therefore, it would have been false to say that an abortifacient act was done "unlawfully"; it merely lacked "lawful purpose." In its own way, this seemingly slight change of wording by Chief Justice Shaw shows that he was perfectly well aware that Hale's "a great crime" meant a great crime at canon law.

Unlike her foetus, the expectant mother met Hale's "*in rerum natura*" test both at the moment of the stroke (the abortifacient act) and at the hour of her death; so, in asserting a common-law jurisdiction over her death as murder, Hale, although he was innovating, nevertheless, was not trespassing on the already established and exclusive jurisdiction of the ecclesiastical courts, which had never concerned themselves with the fate of abortees who died.

In 1661—only nine years before Hale's decision at Bury—the

⁷² Commonwealth v. Parker, *supra* note 47, at 265-66.

⁷³ Smith v. State, 33 Me. 48, 54-55 (1851).

Restoration Parliament, in re-establishing all the traditional ecclesiastical courts (but not the High Commission), at last abolished forever the *ex officio* oath in ecclesiastical trials, thereby extending to the canonical tribunals the common-law privilege against self-incrimination.⁷⁴ From 1661 to the present day, therefore, it has been impossible for any tribunal of the Church of England to compel even a religiously observant woman to testify against herself by giving evidence of foetal life prior to an abortifacient act, and, without such evidence, conviction of such a canonical crime, though still theoretically possible, has become a practical impossibility. The statutory abolition of the *ex officio* oath in ecclesiastical trials thus appears to have been the beginning of the right of privacy in regard to abortion thenceforward enjoyed by English and American women—in England for 140 years (1661-1803) and in America for a quarter of a century more. During the late seventeenth, the whole of the eighteenth, and early nineteenth centuries, English and American women were totally free from all restraints, ecclesiastical as well as secular, in regard to the termination of unwanted pregnancies, at any time during gestation. During virtually the same period (*i.e.*, starting with Hale's decision in 1670), however, the common law had imposed a new risk on the woman's abortionist: he became the insurer of her survival. What the common law said to the woman was: If you undergo an abortion, you may die or you may survive. Whichever your fate, you will have committed no crime. To the woman's abortionist, the same law said: If your patient die, you will hang for her murder. If she survive, you will have committed no offense.

During the oral argument in the United States Supreme Court of *United States v. Vuitch*,⁷⁵ Mr. Justice Blackmun asked one of defendant's counsel, Professor Norman Dorsen, a noted constitutional law expert and a general counsel of the American Civil Liberties Union, whether, if the Court were to accept the principle he was asserting—that a woman has the right to control her own body and that this right includes elective abortion—it would then have to hold unconstitutional state laws against (1) suicide, and (2) auto-mayhem (*i.e.*, either inflicted on oneself, or consentingly undergone at the hands of another). Professor Dorsen stated that he had given considerable thought to (1), albeit not to (2), and had been unable to reach

⁷⁴ 13 Car. 2, Stat. 1, c. 12, § 4 (1661).

⁷⁵ 402 U.S. 62 (1971). This case was argued on January 12, 1971.

a conclusion. Chief Justice Burger pursued the question as to auto-mayhem. He asked whether a patient, man or woman, who wanted his arm lopped off, under sanitary conditions, without risk of infection and with anaesthesia, did not have a constitutional right to the aid of a physician in performing such an operation. Again Professor Dorsen stated that he had not yet made up his mind as to the answer to such a question.

The shrewdness of this question is obvious. It accepts the premise of the vast majority of advocates of abortion liberalization—that the foetus is simply a “part” of the woman’s body which she has a right to discard under a more general right to control her body—and then asks if this asserted right applies to other parts of the body as well. What both the Chief Justice and Justice Blackmun were searching for were the outer limits, if any, which could be put on such an asserted right to control one’s body.

This is one of those questions in regard to which Holmes’s wise saying, that a page of history is worth a volume of logic, is especially helpful. Throughout its long history the common law has always set its face against suicide; its doctrine of *felo de se* is too well known to require supporting citations. Less well known, perhaps, but equally certain, is the common law’s antagonism to auto-mayhem. There appear to have been only two decisions holding auto-mayhem a crime in the course of Anglo-American legal history. One was decided by Sir Edward Coke on circuit in Leicestershire in 1613-14,⁷⁶ the other by the Supreme Court of North Carolina in 1961.⁷⁷ Both held that at common law the crime existed and that the maimed’s consent was nugatory. So, in 1791, when the ninth amendment was adopted, there existed no common-law liberty of suicide, and there also existed no common-law liberty of auto-mayhem. Consequently, no such liberties were among the nonenumerated rights “retained by the people” under that amendment, or under the penumbral zone surrounding it and various other amendments in the Bill of Rights.

E contrario, in 1791 English and American women did enjoy a common-law liberty to undergo abortion at any stage of pregnancy, whether fatal or not to themselves, and their abortionists enjoyed a common-law liberty to perform nonfatal abortions on their patients. What more is being sought today? If one limits the constitutional

⁷⁶ *Rex v. Wright*, reported in Co. Litt. § 194, at 127-28 (1628).

⁷⁷ *State v. Bass*, 255 N.C. 42, 120 S.E.2d 580 (1961).

claim in 1971 to the common-law liberty enjoyed in 1791, one has no difficulty in answering close questions put by shrewd justices.

III. THE ADOPTION BY GEORGIA AND TEXAS OF THE ENGLISH COMMON LAW

In his brief for appellees⁷⁸ in *Doe v. Bolton*, the Attorney General of Georgia has gone to considerable pains to establish that, since the passage of an Act of February 25, 1784, the common law of England which was in force and binding on the inhabitants of Georgia on May 14, 1776, has been incorporated into the law of Georgia. He did this excellent piece of historical research, of course, because he believed that the common law of England on May 14, 1776 prohibited abortion after quickening as a misdemeanor; his belief is based, as his citations show, on Coke, Hale, Hawkins and Blackstone. As we have seen, Hale does not support his belief at all, and insofar as Hawkins and Blackstone do, their statements are based on Coke, whose witness as to what the common law was on this point is self-demonstrably false.

The Attorney General of Georgia has, in fact, though unwittingly, established that Georgia women, prior to the earliest Georgia abortion statute (passed in 1876), had an unfettered liberty of abortion, at every stage of pregnancy, since that is what, in reality, the English common law accorded them on May 14, 1776.

The Attorney General of Texas, in his brief for appellees in *Roe v. Wade*, has not gone into this question in regard to his state. It appears, however, that an Act of Congress of the Republic of Texas of January 20, 1840, adopted, as of that date, the common law of England as the rule of decision in the courts of Texas.⁷⁹

In 1913 the Supreme Court of Texas had to construe the 1840 Texas common-law adoption statute in a case raising the question whether common-law marriage was valid in Texas. The court noted that, in 1823, Parliament had abrogated common-law marriage in England, so that, in 1840, it no longer existed in that country. The Texas Supreme Court held that it was the prestatutory (*i.e.*, prior to 1823) common law of England, as it still existed in the several states

⁷⁸ Brief for Appellees at 43-53, *Doe v. Bolton*, *supra* note 2.

⁷⁹ *Great S. Life Ins. Co. v. City of Austin*, 112 Tex. 1, 9, 243 S.W. 778, 780 (1922).

of the Union in 1840, which the Texan Congress had adopted in 1840; so that common-law marriage was valid in Texas.⁸⁰

Similarly, though in 1803 Lord Ellenborough's Act had abrogated, in England, the pre-existing common-law liberty of abortion at will, the overwhelming majority (all but eight) of the American states still enjoyed this common-law liberty in 1840; so it was adopted in that year by the Texan Act of Congress. The only judicial decision by an American state court prior to 1840 expounding the common law as to abortion was *Commonwealth v. Bangs*,⁸¹ in 1812. It had *held* only that abortion before quickening was not a common-law crime, but in dictum it had *said* that abortion after quickening would be one. It would thus appear that the common-law of England, as still existing in the states of the Union which had not abrogated it by statute on January 20, 1840, continued to vouchsafe pregnant women and their abortionists the liberty they had had since the fourteenth century; so that in Texas, until that state's first abortion statute was passed in 1859, this common-law liberty remained, just as in Georgia it had lasted until that State's first abortion statute in 1876.

This is not only of historic interest; it is of constitutional significance. If every Georgia woman before 1876, and every Texas woman before 1859, who desired an abortion was at liberty to undergo, and her abortionist at liberty to perform, such a procedure according to the English and American common law, and if all American women (and their abortionists) enjoyed such liberty on September 25, 1789, when the ninth amendment was proposed by the First Congress (in New York City), and on December 15, 1791, when it was adopted, then there is sound ground for holding that such liberty is preserved by that amendment today (subject to abridgment only to promote a compelling secular state interest). Such is the clear implication of *Griswold v. Connecticut*.⁸² It is a nonenumerated right among the "others retained by the people" which the ninth amendment protects.

IV. HAVE AMERICAN STATE LEGISLATURES EVER PROTECTED AN UNQUICKENED FOETUS FOR ITS OWN SAKE?

The short answer to this question is "Never," at least by means

⁸⁰ *Grigsby v. Reib*, 105 Tex. 597, 153 S.W. 1124 (1913).

⁸¹ *Supra* note 31.

⁸² 381 U.S. 479 (1965).

of abortion laws. In New York, for example; the legislatures of 1828, 1881, and 1910 authorized the killing, by public authority, of certain unquickened foetūs.⁸³ The 1910 Act, presently in effect, was approved by Governor Charles Evans Hughes. The legislature of 1970 directed that these provisions be transferred, as of September 1, 1971, from the Code of Criminal Procedure to the Correction Law, where they now appear without change.⁸⁴

Georgia, in her Penal Code of 1833,⁸⁵ followed these provisions of the New York Revised Statutes of 1829, and these statutory rules remain in force in Georgia.⁸⁶

The statutory provisions just mentioned merely re-enact, with procedural improvements in the method of ascertaining the facts, an ancient rule of the common law, according to which an expectant mother under sentence of death was examined by a jury of matrons. If their verdict was that her foetus was not yet quick, she was hanged forthwith; if they found that quickening had already taken place, she was reprieved until after delivery, and then hanged. Until the passage of the Sentence of Death (Expectant Mothers) Act,⁸⁷ this had been the rule in England from at least as early as 1349.⁸⁸

⁸³ Ch. 442, [1881] N.Y. Laws 76; ch. 338, §§ 5-7, [1910] N.Y. Laws 601.

⁸⁴ N.Y. Correction Law §§ 658-60 (McKinney 1972).

⁸⁵ O.H. Prince, Digest of the Laws of the State of Georgia 663, 664 (2d ed. 1837) (§§ 38, 40 of Ga. Penal Code of 1833).

⁸⁶ Ga. Code Ann. ch. 26, § 26-9920a (1970).

⁸⁷ 21 & 22 Geo. 5, c. 24 (1931).

⁸⁸ In the *Livre des Assises* Pasch. 22 Edw. 3, f. 101a, pl. 71 (K.B. 1349) Chief Justice Thorp "commanda a's Marschals de metř la feme en un chambre, & faire veñ femes a prov' & examiñ, si el' fuit enseint oue vife enfant ou nient . . ." commanded the marshal to place the [sentenced] woman in a room and cause matrons to come and prove and examine her, whether she was pregnant of a quick child or not. Their verdict was negative, and she was hanged. This case is also reported by Fitzherbert, *Graunde Abridgment*, tit. *Corone* f. 226, pl. 180 (1st ed. 1516), f. 252, pl. 180 (3d ed. 1565). Serjeant Staford informs us:

Si feme soit arraigne de felonie, nest ple pur luy adire que el est enseint, eins doit pleder al felonie, et quāt el est troue culpable, el peut dire que el est enseint, et sur ceo il serra commande al Marshal ou viscont de mitter la feme in vn chambre, & a faire venir femes a trier & examiner si el soit enseint de viue enfant ou nient, et si troue soit que cy: donsques el demurrera donec peperit, &c. & si non: donsque serra el pendus maintenant. Mes le quel el soit enseint ou nient enseint, vnquore iugement ne serra per ceo delay, mes solement lexecucion del iugement. Auxi si apres tiel respiter de luy, el soit deliure de enfant &c puis nouvelment enseint, quel el objecta auterfoitz pur sa vie prolonger: le luge sauns inquerer de ceo, doet commander lexecucion maintenant destre fait, eo que el nauera le benefit de son venter forsque vn

foitz. Mes si le luge inquina de ceo, il serra a nul auter intent forsque amitter fine sur le Marshal ou viscont, qui auer luy garde cy remissement: que el ad ewe le companie dhome. Et de ceux matters, vide titulo Coron in fitz. P. 180. P. 240. P. 130. P. 188. & P. 168. Issint per ceux liures, apieroit que priuement enseint: ne doit seruir pur obiection, eo que les liures sont, que el doit estre enseint de viue enfant.

W. Stanford, *supra* note 7, at ff. 197-98.

Which, being translated, reads:

If a woman be arraigned for felony, it is no plea for her to say that she is pregnant, but she must plead to the felony, and if she be found guilty, she can say that she is pregnant, and thereupon the marshal or sheriff will be ordered to place the woman in a room, and cause matrons to come to try and examine whether she be pregnant of a quick child or not, and if it be found that she is: then she shall remain until she shall have given birth, etc. and if not then she shall be hanged forthwith. But whether she be pregnant or not pregnant still judgement shall not be delayed thereby, but only the execution of the judgement. Also if after such respiting of her, she be delivered of child and then [become] pregnant afresh which [new pregnancy] she again objects in order to prolong her life: the judge without inquiring thereof, must order that execution proceed forthwith and that she shall not have the benefit of her womb except one time. But if the judge inquire thereof he shall do so for no other purpose than to impose a fine upon the marshal or the sheriff who had with such laxity imprisoned her that she had had the company of a man. And concerning these matters, see Fitz[herbert, Graunde Abridgement, citing the Liber Assisarum case of 1349 and others]. Thus from these books it appears that *privily pregnant* may not serve as objection, in that the books are that she must be *pregnant with a quick child*.

Coke informs us:

And when a woman commits High Treason and is quick with childe, she cannot upon her arraignment plead it, but she must either pleade not guilty or confesse it: and if upon her plea she be found guilty, or confesse it, she cannot alleage it in arrest of judgement, but judgement shall be given against her: and if it be found by an inquest of matrons that she is quick with childe, (for *priviment ensent* will not serve) it shall arrest, and respite execution till she be delivered, but she shall have the benefit of that but once, though she be again quick with childe: so as this respite of execution for this cause is not to be granted, only in case of felony, whereof Justice Stanford speaketh, but in case of High Treason, and Petit Treason also.

E. Coke, *supra* note 22, n.16, at *17-18.

Blackstone echoes the earlier authorities, declaring that the matrons' verdict must be "*quick with child* (for barely, *with child*, unless it be alive in the womb, is not sufficient)". 4 W. Blackstone, *supra* note 30, n.24, at *395.

The only instance I have been able to discover of the hanging of an American feloness whom the jury of matrons had found pregnant but not quick occurred in Massachusetts in 1778. Commonwealth v. Bathsheba Spooner, 2 Am. Crim. Trials 1 (1844). Mrs. Spooner's trial, for the murder of her husband, was presided over by Chief Justice Cushing of the Supreme Judicial Court of the Commonwealth. See also the following notes of the jury of matrons: 48 Am. L. Rev. 280 (1914); 9 Cent. L.J. 94 (1879); 3 Harv. L. Rev. 44 (1889).

It is worthy of note that the earliest *Jury of Matrons Case* in the Liber Assisarum in 1349, before the Court of King's Bench, was decided by the same Court before which *The Abortionist's Case* had been decided the year before. In both years, the Chief Justice was William Thorp, and William Basset was a Puisne Justice. Roger of Bakewell was a Puisne Justice in 1348, but he had left the Court before the decision of the earliest *Jury of Matrons Case* in 1349, so that at the latter time there were only two sitting justices. See 82 Selden Society, *supra* note 6, at li, lii. Chief Justice Thorp and Justice Basset obviously perceived a difference between the act of a

In his *Travels Over England*⁸⁹ M. Misson described the way the rule really worked:

The Women or Wenches that are condemn'd to Death, never fail to plead they are with Child, (if they are old enough) in order to stop Execution till they are delivered. Upon this they are order'd to be visited by Matrons; if the Matrons do not find them Quick, they are sure to swing next Execution-Day; but very often they declare they are with Child, and often too the poor Criminals are so indeed; for tho' they came never so good Virgins into the Prison, they are a Sett of Wags there that take Care of these Matters. No Doubt they are diligent to inform them the very Moment they come in, that if they are not with Child already, they must go to work immediately to be so; that in case they have the Misfortune to be condemn'd, they may get Time, and so perhaps save their Lives. Who would not hearken to such wholesome Advice?⁹⁰

Nor is this a rule of which the New York Legislature has not been reminded in recent times. Assemblyman Blumenthal, after reading about these statutes in my 1968 article,⁹¹ quoted those sections to his colleagues during the floor debate on the abortion liberalization bill which failed to pass in 1969.

Massachusetts, whose 1845 statute prohibiting abortion is still on the books, has also enacted into statute the common-law reprieve rule in regard to expectant mothers sentenced to death.⁹²

private subject causing an abortion, and the act of the King in authorizing execution of a feloness; for they applied the quickening distinction in the latter case but not in the former.

In the entire history of Anglo-American law there appears to be only one reported case in which the judge misunderstood the meaning of the expression "quick with child" in the verdict the jury of matrons were required to render. This is *Regina v. Wycherly*, 8 Carrington & Payne, 262, 263, 173 Eng. Rep. 486, 487 (Stafford Assizes Crown Side 1838) (Baron Gurney). By the time this case was decided, the execution of felonesses had doubtless become a rarity in England, and Baron Gurney's error was doubtless due to his unfamiliarity with the older practice. As could have been expected, the mistaken definition of Baron Gurney in this isolated case is quoted as representing the entire tradition of English law on this question in the *amicus* brief filed by The National Right to Life Committee, *supra* note 57, at 26.

⁸⁹ It appears that this book was written in 1698, but was translated from the French by Ozell and published in 1719.

⁹⁰ Quoted in L. Radzinowicz, *A History of English Criminal Law and Its Administration from 1750: The Movement for Reform 1750-1833*, at 12 n.35 (1948).

⁹¹ Means, *supra* note 1, at 441-42 & nn.66-68 (1968).

⁹² Ch. 166, [1876] Mass. Sess. Laws; Mass. Gen. Laws Ann. ch. 279, § 47 (1959).

It may legitimately be asked why the justices of Edward III were not guilty of inconsistency in, on the one hand, holding noncriminal the private foeticide of even a quickened foetus, whilst, on the other, staying the execution of a condemned feloness if her foetus had quickened. Was not Coke merely harmonizing the two rules, by applying the quickening distinction both to private and to State conduct?

Of course, Coke was harmonizing the two rules, but the Edwardine justices had good reason for keeping them distinct and different. In the one case, the conduct of private subjects was drawn in question, whereas, in the other, the conscience of a Christian King (by whose authority the feloness would be hanged) was implicated. Even today, we expect the State to abide by stricter norms than are imposed upon the populace, particularly by the sanctions of criminal law.

On a deeper analysis, however, the supposed inconsistency between the two rules disappears. The sound ground given in 1348 for the noncriminality of abortion by blows was that it could not be known whether the batterer had killed the foetus or not. On reflection, a twentieth-century reader will discover how profound an insight this was. We know now, and evidently the justices suspected then, that a very large fraction of all foetūs conceived die *in utero*, and are aborted spontaneously. In regard to any particular foetus which is intentionally aborted, it is simply impossible to know whether or not it died *in utero* a short time before the abortifacient intervention, whatever its form, took place. Even the most skilled pathologist could not exclude this possibility, even today. The only way one could be sure would be if the testimony of the woman herself were forthcoming, and it were to the effect that she had perceived a foetal movement just before the abortifacient act. Only rarely would this be the fact; rarer still would be the abortion-seeking woman who would admit it.

In disclaiming jurisdiction of such an unprovable offense on behalf of the common-law courts, the King's justices relegated such cases to the ecclesiastical courts, which had never felt deterred by such difficulties of proof, and anyway, through the *ex officio* oath, could force a religiously observant woman to testify against herself, there being no privilege against self-incrimination at canon law. This was contrary to the genius of the common-law courts in many ways. How could it ever be said that it had been proved beyond a reasonable doubt—or at all—that the foetus aborted (if stillborn) had been still alive just before the allegedly fatal blow was struck? How could the requirements of *corpus delicti* be satisfied? True, these two rules, so

familiar to us now, had not been crystallized in the fourteenth-century, but these cases are, I submit, harbingers of both of them.

In disregarding the wisdom that lay behind the decisions in *The Twinslayer's Case* and *The Abortionist's Case*, Coke allowed his visceral hatred of abortion after quickening to darken his otherwise luminous perception of the true genius of the common law.

In regard to the reprieve rule, on the other hand, the Edwardine justices were not faced with any such insoluble question of proof. Once the jury of matrons find that the condemned woman's foetus has quickened, she is spared until it is born. So no risk is run. If the matrons find her merely pregnant, she is hanged, but then, every Mediaeval knew that an early foetus was not a "man", or as we should now say, a "person."⁹³

The vice which the justices in 1348 would have found in statutes punishing abortion "in case the death of such child or of such mother be thereby produced", would have inhered in this very phrase. Of this they would have said, "The cases of the mother and the foetus are different. The mother herself has already been born; so she is visible, right up to the moment of her death. Witnesses can observe her living before the abortifacient act, languishing after and dying because of it. With the foetus, it is invisible. Even after quickening, it often does not move. So, often the mother, herself, will not know if it was still alive when the abortive act was done. If she does know, she is not likely to tell us that it was, if she procured the doing of the abortion." Such an analysis was unassailable in 1348, and is still unassailable today, 623 years later.

V. WERE THE NINETEENTH-CENTURY ABORTION LAWS PASSED TO DISCOURAGE SEXUAL PROMISCUITY?

Many think they were, but they were not. Note the judicial disclaimer in 1881 of nineteenth-century "morals and decency" as a

⁹³ As I pointed out in my 1968 article, the Council of Trent had summed up the philosophy of the Middle Ages on this question in the following passage in its Catechism:

[N]o [human] body, when the order of nature is followed, can be informed by the soul of man except after the prescribed interval of time (*servato naturae ordine nullum corpus, nisi intra praescriptum temporis spatium, hominis anima informari queat*).

Means, *supra* note 1, at 412. To this day, the Roman Catholic Church has never dogmatically repudiated this passage in the Tridentine Catechism.

reason for the passage of the New Jersey abortion act of 1849 in *State v. Geddicke*.⁹⁴

A woman who becomes pregnant through marital intercourse, or because of rape, has transgressed no norm of Judaeo-Christian morality. Yet all the nineteenth-century abortion statutes forbade her recourse to abortion just as stringently as they did her erring sister whose pregnancy resulted from fornication, adultery, or incest. If the legislators' sole purpose in passing the old abortion laws had been to discourage sexual promiscuity, they would have exempted married women and rape victims. If such moral zeal had been only one of their purposes, they would have made the penalties lighter for married women and rape victims. They never did. No legislature has ever treated the termination of pregnancy differently according to the moral quality of the act that caused it.

Neither, for that matter, did the common law, which allowed all women, married or unmarried, moral or immoral, to terminate their pregnancies at will.

The most recent reiteration of the obvious answer to this perennial question is found in the specially concurring opinion of Justices Ervin and Adkins in *Walsingham v. State*:

The [Florida] statute also does not show a compelling state interest in prohibiting premarital sexual intercourse (the prelude to unwed mothers) since it draws no distinction between married and unmarried women.⁹⁵

VI. THE REAL, PURELY MEDICAL, AND PERFECTLY CONSTITUTIONAL REASON FOR THE PASSAGE OF THE NINETEENTH-CENTURY ABORTION LAWS

Having disposed of the contentions that our nineteenth-century abortion laws were passed either to protect unquickened foetūs for their own sake or to discourage sexual promiscuity, we now reach the true reason for their enactment. This reason was wholly secular and, at the time, admirable. As late as 1884 in New York, as we shall see, an abortion, even when performed early in pregnancy by a physician, was from ten to fifteen times as dangerous to the patient's life as was

⁹⁴ 43 N.J.L. 86, 89 (Sup. Ct. 1881).

⁹⁵ 250 So. 2d 857, 863 (Fla. 1971).

childbirth at full term. This remained true until the last decade-and-a-half of the nineteenth century, when New York surgeons began to adopt the antiseptic techniques first published by Lister in *The Lancet* in 1867. Their adoption elsewhere in the country followed gradually.

Thereupon two notable phenomena occurred. Hitherto the curves representing patient mortality in the two procedures (physician-performed abortion and childbirth) had been parallel, horizontal straight lines. Now both began to plunge sharply, and ended at levels minuscule by comparison with their former heights. Second, the physician-performed-abortion mortality curve, for the first time in medical history, ended up well below the childbirth morality curve. This happened because the physician-performed-abortion mortality curve plunged more rapidly than, and therefore intersected, afterwards falling and remaining below, the childbirth mortality curve.

This intersection of the two curves is not only of medico-historical importance. It is also of constitutionally critical significance. Before this intersection, the legislature's command, *Thou shalt not abort*, if obeyed, compelled a woman to adopt the *less* dangerous of the two procedures (at that time, childbirth). Once this point of intersection has been passed, however, continued enforcement of the same legislative command, even when obeyed, compels a woman to adopt the *more* dangerous of the two procedures (now, childbirth). Thus the nineteenth-century abortion laws, in recent decades, have not only no longer effectuated their original purpose, they have positively frustrated it. And they have done this, not because they are disobeyed, but even when they are obeyed. These laws have always been massively disobeyed, but massive disobedience does not make a law unconstitutional. But where a law abridges an immemorial common-law liberty for a reason within the police power of the state (the protection of pregnant women's lives), and then the facts of surgery so change that continued enforcement of the law as written not only no longer protects the lives of pregnant women, even when they obey the law, but affirmatively endangers them, the law then ceases to be constitutional, on the age-old principle, *cessante ratione legis cessat et ipsa lex*. In many cases the United States Supreme Court has recognized and applied this principle to the constitutionality of statutes.⁹⁶ The

⁹⁶ See cases collected in Means, *supra* note 1, at 514-15 n.264. A more recent example than any I there cited is, of course, *Baker v. Carr*, 369 U.S. 186 (1962), where the Court held that a Tennessee statute which had obviously been constitutional when enacted in 1901, had, because of intervening shifts of population, become unconstitutional by 1961.

relevant data and conclusions in support of the statements made on the two preceding pages, so far as I had explored them through 1968, are set forth in my 1968 article.⁹⁷

During my oral argument on a motion for a three-judge court in *Lyons v. Lefkowitz*,⁹⁸ Judge Weinfeld asked me to specify the year in which the two curves, representing parturitional and (physician-performed) abortional patient mortality and identified in a diagram in my 1968 article⁹⁹ as AA' and PP', had intersected. In my 1968 article I had designated this year as 19xy. After the three-judge court was convened, I took the deposition of Christopher Tietze, M.D., Associate Director, Bio-Medical Division, The Population Council, who had been my colleague on Governor Rockefeller's 1968 Commission to Review New York State's Abortion Law. Dr. Tietze is both a distinguished gynaecologist and the leading bio-medical statistician in the demographic field. He testified "emphatically" that the cross-over point of AA' and PP' must have occurred prior to the year 1933 and may have occurred as early as 1900.¹⁰⁰ Thus:

1900 < 19xy < 1933,

is the best answer I was able to obtain to Judge Weinfeld's question.

In *Lyons v. Lefkowitz* I also took the deposition of William B. Ober, M.D., pathologist and historian, who had studied the New York Hospital's registers (1) of surgery performed during 1808-33 and (2) of the lying-in ward during 1809-25. He testified that in the operations which today would be classified as "major peripheral surgery", 37 1/2 per cent of the patients died, 31 per cent of them from sepsis.¹⁰¹ During this period no case of surgical abortion is recorded in the surgical register of the New York Hospital, 1808-33;¹⁰² if any had been, Dr. Ober testified that it would have been classified as

⁹⁷ Means, *supra* note 1, at 434-39 (especially 436 n.59), 450-54, 502-04, 506-09, 511-15 (especially the diagram on 512 and accompanying n.260).

⁹⁸ 305 F. Supp. 1030 (S.D.N.Y. 1969). The motion was granted and a three-judge court convened, consisting of Circuit Judge Friendly and District Judges Weinfeld and Tyler, but the case became moot on July 1, 1970, upon the entry into force of ch. 127, [1970] N.Y. Sess. Laws 852, which substantially repealed New York's 1830-1970 abortion legislation.

⁹⁹ Means, *supra* note 1, at 512. AA' stands for patient mortality in physician-performed abortion; PP' for patient mortality in parturition.

¹⁰⁰ Deposition of Christopher Tietze, M.D., Dec. 22, 1969, at 42-44, *Lyons v. Lefkowitz*, *supra* note 98.

¹⁰¹ Deposition of William B. Ober, M.D., Dec. 22, 1969, at 12, 17, 18, *Lyons v. Lefkowitz*, *supra* note 98.

¹⁰² *Id.* at 13.

"major surgery", and would be so designated now.¹⁰³ He testified that "then as now every surgical abortion would require the introduction of an instrument into the womb."¹⁰⁴ When asked whether, if such instrument "were not sterilized, the danger from sepsis would be similar to that of an incusive instrument in another form of operation," Dr. Ober replied:

Possibly even more so, because of the poor drainage from an infected uterus.

The uterus essentially is a semi-closed organ, with a very, very narrow canal.

Under ordinary circumstances, if you introduce an unsterilized instrument into the uterus and create a small infection, which might heal were it an exposed surface, the swelling of the uterus would effectively close—might effectively close up the cervical canal and create a large pocket of pus.

The risk might even be higher than from just an ordinary superficial wound which could be dressed, because, after all, this is internal.¹⁰⁵

From this Dr. Ober drew the obvious inference that the death rate due to sepsis from abortional surgery, even when performed in hospital, was at least as high as 31 ¼ per cent when New York's first abortion statute was passed in 1828.¹⁰⁶

Turning to the register of the lying-in ward patients at the New York Hospital, 1809-25, Dr. Ober computed a maternal mortality rate of 2.82 per cent.¹⁰⁷

When asked whether "the rate of mortality that a woman could anticipate as a result of subjecting herself to an abortion under hospital conditions at this period would be of the order of magnitude of at least ten to fifteen times as high as the rate of mortality to which she would subject herself by bringing the child to term", Dr. Ober thought that "that would be a fair approximation."¹⁰⁸

I have been unable to find any such statistics compiled and pub-

¹⁰³ *Id.* at 17.

¹⁰⁴ *Id.* at 19.

¹⁰⁵ *Id.* at 20.

¹⁰⁶ *Id.* at 23.

¹⁰⁷ *Id.* at 22.

¹⁰⁸ *Id.* at 23.

lished during the nineteenth century, but the facts which the foregoing statistics quantify were common knowledge, not only among doctors, but of laymen as well, during that century.

In a work entitled *Why Not? A Book for Every Woman*, for which he was awarded a gold medal by the American Medical Association, Horatio Robinson Storer, M.D., of Boston, warned:

A larger proportion of women die during or in consequence of an abortion, than during or in consequence of childbed at the full term of pregnancy.¹⁰⁹

Dr. Storer made it clear that he was referring not merely to criminal abortions not performed by physicians, but to legal, physician-performed abortions as well, in the following passage:

The results of abortion from natural causes . . . are much worse than those of the average of labors at the full period. If the abortion be from accident, from external violence, mental shock, great constitutional disturbance from disease or poison, *or even necessarily induced by the skilful physician in early pregnancy*, the risks are worse.¹¹⁰

Let us now contrast these sombre nineteenth-century facts with data from the present day. The First fourteen months (July 1, 1970-August 31, 1971) since the entering into effect of the new New York State abortion law,¹¹¹ have seen 205,614 legal abortions performed in New York City.¹¹² During the same period there have been nine deaths of patients who have undergone legal abortions in New York City.¹¹³ This works out at a patient mortality rate of 4.4 per 100,000. Legal abortions in New York may be done through the 24th week of pregnancy. Comparing 4.4 per 100,000, the 1970-71 mortality rate for physician-performed abortions in New York City, with Dr. Ober's figure of 31 ¼ per cent (or 31,250 per 100,000, to use today's denomi-

¹⁰⁹ H.R. Storer, *Why Not? A Book For Every Woman*, at 36-37 (1865).

¹¹⁰ *Id.* at 46-47 (emphasis added).

¹¹¹ Ch. 127, [1970] N.Y. Sess. Laws 852.

¹¹² New York City Department of Health, Health Services Administration, Bulletin on Abortion Program, at 5.1 (Aug. 31, 1971).

¹¹³ New York City Department of Health, Health Services Administration, Bulletin on Abortion Program, End of First Year Report, at 8 (June 30, 1971); Bulletin on Abortion Program, *supra* note 112, at 8.

nator) from sepsis alone in comparable surgery performed at the New York Hospital in 1808-33, one sees that physician-performed abortions in New York City are now only 1/7102 as dangerous to patients' lives as they were a century and a half ago. Put the other way round, legal physician-performed abortions today are more than 7000 times as safe as when the pre-Lister abortion laws were enacted.

Not only is that true, but the relative safety of physician-performed abortion and childbirth has been reversed. From Dr. Tietze I have obtained the following:

Maternal Mortality in New York City
(Excluding Death Due to Abortion)
Per 100,000 Live Births¹¹⁴

1951-53	47
1954-56	39
1957-59	35
1960-62	42
1963-65	36
1966-67	35

Using 35 per 100,000—which is not only the most recent (1966-67) available but is also the lowest (1957-59 and 1966-67) New York City maternal mortality (excluding abortion) rate ever obtained—as undoubtedly close to the 1970-71 rate, which is not yet available, and comparing it with the 4.4 per 100,000 legal physician-performed abortifacient mortality rate actually achieved by New York City during the first fourteen months in 1970-71 under the new New York law, we must conclude that, in 1970-71, physician-performed legal abortion was only $\frac{1}{8}$ or 12 per cent as dangerous to a pregnant woman's life (if performed at any time within the first 24 weeks of pregnancy) as childbirth. Put the other way, any American state which, in 1970-71, obstinately continued to enforce the prohibition of abortion laid down by a nineteenth-century statute thereby endeavored to compel women with unwanted pregnancies to put their lives at eight times the risk they would have run had legal abortion been available to them and they had chosen that procedure.

¹¹⁴ These figures are taken from An Unpublished Table Prepared by the New York City Department of Health, Bureau of Records and Statistics, Maternal Mortality in New York City (excluding death due to abortion) per 100,000 live births (mimeographed June 1969), and from J. Pakter & F. Nelson, *Abortion in New York City: The First Nine Months*, 3 Family Planning No. 3, at 5-12 (July 1971).

There is here an unbelievable historical irony. A statute was passed more than a century ago for the purpose of imposing on women the duty of protecting their lives from destruction through wanted but dangerous abortifacient surgery. Now that the danger has all but disappeared, the State's obstinate persistence in enforcing the law's letter, but not its purpose, denies its intended beneficiaries (pregnant women) the very right to protect their lives from death which the law originally imposed on them as a duty! Compare the famous statement of Mr. Justice Johnson, on circuit, in *Elkison v. Delisseline*:

"[C]ertainly that law cannot be pronounced necessary which may defeat its own ends; much less when other provisions of unexceptionable legality [*i.e.*, constitutionality] might be resorted to, which would operate solely to the end proposed. . . ." ¹¹⁵

A woman's right to protect her life is fundamental, in the abortion context as well as in any other. The Supreme Court of California has reminded us that "[t]he woman's right to life is involved because childbirth involves risks of death."¹¹⁶ As Mr. Justice Holmes observed, "We have seen more than once that the public welfare may call upon the best citizens for their lives"¹¹⁷ in military service, but only the country's compelling interest in its own security and defense suffices to subordinate the male conscript's right to life. Likewise, a state must show some compelling interest of comparable magnitude to require a woman to risk her life by continuing an unwanted pregnancy. No American state has shown such an interest; the only secular one that could be put forward—a need for a larger population—would be so absurd under present conditions as to be laughed out of court.¹¹⁸

The clue to the true reason both for the passage of the 1828 New

¹¹⁵ 8 F. Cas. 493, 496 (No. 4,366) (C.C.D.S.C. 1823).

¹¹⁶ *People v. Belous*, 71 Cal. 2d 954, 963, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969), *cert. denied*, 397 U.S. 915 (1970).

¹¹⁷ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

¹¹⁸ The Attorney General of Georgia cites an 1892 edition of Bishop's *New Criminal Law* for the proposition that, at common law, abortion was "one of the leading offenses against population", but he does not suggest that this is a currently valid reason for such laws. Brief for Appellees at 52, *Doe v. Bolton*, *supra* note 2.

York statutes against abortion and to the meaning of the therapeutic exception included in those statutes is provided by another section which the revisers proposed, but which the legislature did not enact, which contained virtually the same therapeutic exception. The proposed but unenacted section would, if passed, have forbidden:

any surgical operation, *by which human life shall be destroyed or endangered*, such as the amputation of a limb, or of the breast, trepanning, cutting for the stone, or for hernia, *unless it appear that the same was necessary for the preservation of life . . .*¹¹⁹ (emphasis added)

In their note accompanying this proposed section, the revisers stated that "the loss of life occasioned by" the performance of such operations "is alarming."¹²⁰ Just as only necessity for the preservation of life would, in 1828, have justified performance of any of the operations enumerated in this proposed but unenacted section; so only the very same necessity would, at that time, have justified the performance of an abortion.

The legislature accepted the revisers' recommendation and enacted their proposed section against nontherapeutic abortion before quickening, but rejected this section forbidding the performance of these other operations when not "necessary for the preservation of life." This difference in treatment of the two proposed sections doubtless reflects a legislative judgment that only in the case of abortion were both patient and surgeon under strong extramedical pressures to undergo the risks of the operation. In other types of surgery, professional conscience and patients' caution could be relied upon to prevent unnecessary operations¹²¹ without the aid of a new penal law. It can scarcely be said that such a legislative differentiation between abortion and other equally dangerous types of surgery was, in 1828, unreasonable.

The only contemporaneous judicial explanation for the enactment of any of the pre-Lister abortion statutes—a decision of 1858 construing New Jersey's first such statute passed in 1849—contains the following:

¹¹⁹ The full text of this section is quoted in Means, *supra* note 1, at 451.

¹²⁰ The full text of this revisers' note is quoted in Means, *supra* note 1, at 451.

¹²¹ See Means, *supra* note 1, at 506.

The design of the statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts.¹²²

The author of that unanimous opinion was Chief Justice Henry Woodhull Green, afterwards Chancellor of New Jersey, to whom, after the death in 1864 of Roger Brooke Taney, President Lincoln offered the Chief Justiceship of the United States, which Chancellor Green declined for reasons of health. One of the Associate Justices joining in the opinion was the man who as Governor of New Jersey had approved the act of 1849.¹²³

In none of the various re-enactments of the 1828 New York legislation, prior to 1965, was there ever any manifestation of a legislative purpose different from the one revealed by the 1828 revisers' notes. The New York Revised Penal Law was enacted in 1965, but it did not take effect until September 1, 1967. Nevertheless, the Commission Staff Notes to the 1965 law's sections reveal a contemporary purpose which, significantly enough, was identical with the purpose of the revisers and legislators of 1828. Thus, the Commission Staff Note to Revised Penal Law § 125.45 adverts to the new dividing line at 24 weeks of pregnancy (in substitution for the former dividing line at quickening) between first and second degree abortion and explains the choice of this new dividing line as follows:

"The aggravating factor is the pregnancy of more than 24 weeks duration, rendering the operation more dangerous than at an earlier stage."¹²⁴

A Commission Staff Note of similar tenor accompanies another section, § 125.20(3), of the New York Revised Penal Law of 1965. Now a termination of pregnancy after 24 weeks is *less* dangerous to the foetus than one before, because more and more foetūs become viable as and after that point is passed. So when the Commission Staff Note characterizes the late operation as "more dangerous" than the earlier, it obviously means more dangerous to the *pregnant woman*. Thus it is beyond cavil that the New York Legislature of 1965, like that of

¹²² *State v. Murphy*, 27 N.J.L. 112, 114 (Sup. Ct. 1858).

¹²³ See Means, *supra* note 1, at 507-08.

¹²⁴ Means, *supra* note 1, at 502.

1828, was thinking solely in terms of danger to the expectant mother.¹²⁵

The protection of the life of the pregnant woman is therefore the only reason ever advanced for the passage of the New York statutes in 1828 or for their reënactment in revised form in 1965. In all the long history of the New York legislation of 1830-1970, no other reason was ever put forward. It was a valid and validating reason so long as it lasted. The intervening change in the relative safety of physician-performed abortion and childbirth rendered continued enforcement of that body of legislation according to its letter frustrative of its original purpose; before that change a woman who obeyed the law was rewarded by less risk to her life than one who disobeyed it; since that change the reward of obedience has been greater risk to the woman's life. The one reason ever put forward for its passage was sufficient to sustain its constitutionality so long as it lasted. When that reason disappeared, the 1830-1970 New York legislation became unconstitutional.

Since the abortion laws of so many other states were copied from the New York legislation of 1830-1970, the New York legislative intent came to those other states with the statutory texts they borrowed.

VII. WHEN DID NEW YORK SURGEONS FINALLY ADOPT THE ANTISEPTIC METHODS FIRST RECOMMENDED BY LISTER IN 1867?

Not until 1884. Throughout the world, surgeons were very slow to accept new antiseptic surgical techniques, although Lister had first published them in *The Lancet* in 1867. Not until a memorable debate at the New-York Academy of Medicine in 1884 did the majority of physicians and surgeons in New York City accept them.¹²⁶

In 1895 Dr. Howard A. Kelly, professor of gynaecology and obstetrics at Johns Hopkins, in his introduction to Dr. Hunter Robb's *Aseptic Surgical Techniques with Especial Reference to Gynaecological Operations* described "the past ten years" as the decade which had seen "changes wrought in our surgical techniques . . . unparalleled [in] any previous century of medical or surgical progress."¹²⁷

¹²⁵ Means, *supra* note 1, at 502 & nn.227, 228.

¹²⁶ C. Haagensen & W. Lloyd, *A Hundred Years of Medicine* 291-93 (1943) [hereinafter cited as Haagensen & Lloyd].

¹²⁷ H. Robb, *Aseptic Surgical Techniques with Especial Reference to Gynaecological Operations*, at xv-xvi (1895).

The pre-antiseptic surgeons "dared not invade the great cavities of the body" lest they infect their patients. "Operation therefore was generally only undertaken with the object of saving life. . . . Many of the greatest [of the pre-antiseptic] surgeons were fully of the opinion that the knife should be used only as a last resort."¹²⁸ Drs. Eugene H. Pool and Frank J. McGowan in their book, *Surgery at the New York Hospital One Hundred Years Ago*, disclose a rule adopted by the board of governors "that *no* operation should be undertaken except after consultation by *all* the physicians and surgeons. We find evidence in the notebook that this rule was scrupulously observed."¹²⁹

Though the pre-antiseptic surgeons knew the danger of sepsis, they did not know its cause:

None realized that, in general, it was they themselves who were unconsciously poisoning their patients every time they used the probe or the knife. The probe . . . was never sterilized Who could devise a better means of carrying infection? And these conditions continued until late in the 19th century.¹³⁰

Is it any wonder that today the medical profession is so forgetful of this unhappy phase of its long history? Men dedicated to curing the ills of their fellow man unconsciously shrink from the realization that less than a hundred years ago the best of their surgical predecessors killed almost as many patients as they cured.

The earliest Texas and former Georgia abortion statutes, like those of nearly all their sister states, were enacted prior to the 1884 debate at the New-York Academy of Medicine. It was only after that debate that the acceptance of Lister's surgical techniques spread throughout the country.

VIII. THE REALTIVE SAFETY TEST

In recent decades surgeons have commonly complained that they cannot understand what is meant by words such as "necessary to preserve [her] life" in the text of *abortion* statutes. They understand

¹²⁸ Haagensen & Lloyd, at 19.

¹²⁹ H. Pool & F. McGowan, *Surgery at the New York Hospital One Hundred Years Ago*, at 4 (1930).

¹³⁰ Haagensen & Lloyd, at 24.

perfectly well what those words mean in other operations of a dangerous character, but, of course, those words do not appear in any statute in regard to other operations, but only in the common understanding of the profession as to when to resort to dangerous surgery. Since abortion now is not dangerous, surgeons cannot make head or tail of these words in a statute relating to abortions.

The doctors' dilemma reminds one of the words of Judge Waterman, speaking for the United States Court of Appeals for the Second Circuit, in *Eck v. United Arab Airlines, Inc.*:

[I]nquiry may lead the court to conclude . . . that when the words were first chosen the language accurately reflected the provision's purpose but that today the same words imperfectly reflect this purpose because conditions have changed in the area to which the words of the provision refer¹³¹

In *People v. Belous*,¹³² the Supreme Court of California discussed the relative safety test that had first been suggested in my 1968 article¹³³ as follows:

There is one suggested test which is based on a policy underlying the statute and which would serve to make the statute certain. The test is probably in accord with the legislative intent at the time the statute was adopted. The Legislature may have intended in adopting the statute that abortion was permitted when the risk of death due to the abortion was less than the risk of death in childbirth and that otherwise abortion should be denied. As we have seen, at the time of the adoption of the statute [1850 in California] abortion was a highly dangerous procedure, and under the relative safety test abortion would be permissible only where childbirth would be even more dangerous. In the light of the test and the then existing medical practice, the question whether abortion should be limited to protect the embryo or fetus may have been immaterial because any such interest would be effectuated by limiting abortions to the rare cases where they were

¹³¹ 360 F.2d 804, 812 (2d Cir. 1966).

¹³² *Supra* note 116.

¹³³ Means, *supra* note 1, at 513-14 n.261.

safer than childbirth.

. . . .

Although the suggested construction . . . making abortion lawful where it is safer than childbirth and unlawful where abortion is more dangerous, may have been in accord with legislative intent, the statute may not be upheld against a claim of vagueness on the basis of such a construction. The language of the statute, 'unless the same is necessary to preserve her life,' does not suggest a relative safety test, and no case interpreting the statute has suggested that the statute be so construed. . . . In the circumstances, we are satisfied that the statute may not be construed to adopt the relative safety test as against a claim of vagueness, because the language does not suggest that test and because of the practical evidence before us that men of 'common' intelligence, indeed of uncommon intelligence, have not guessed at this meaning.¹³⁴

It is, of course, true that in recent decades no one had guessed at this meaning until the publication of my 1968 article. But the real inquiry is not whether men of common or uncommon intelligence today are able, under today's conditions, to guess at this meaning, but whether men of common intelligence at the time the statute was first passed understood perfectly well what its words meant. That they did understand it, and understood it to mean a relative safety test, can be historically demonstrated.

Alfred Swaine Taylor, M.D., F.R.S. (1806-80), was the most respected author on medical jurisprudence writing in English during the nineteenth century. His treatise on this subject was published in a shorter version, called the *Manual of Medical Jurisprudence* (which went through ten editions in London and eight in Philadelphia during the author's lifetime), and in a longer version, called *Principles and Practice of Medical Jurisprudence* (which went through two editions during the author's lifetime, in 1865 and 1873, and has gone through six more since his death). An extensive chapter on criminal abortion, containing a significant passage on the relative safety test, appeared in every edition of both books, commencing with the earliest of the

¹³⁴ *People v. Belous*, *supra* note 116, at 970-72, 458 P.2d at 204, 205, 80 Cal. Rptr. at 364, 365.

Manual (London 1844).¹³⁵ The passage on the relative safety test as it appeared in the last edition of *Principles and Practice* to be published in Dr. Taylor's lifetime reads as follows:

Hence a cautious selection should be made, because the operation is necessarily attended with some risk All that we can say is, that, according to general professional experience, it places her in a better position than she would be in if the case were left to itself. It appears to me that before a practitioner resolves upon performing an operation of this kind he should hold a consultation with others; and, before it is performed, he should feel assured that *natural delivery cannot take place without greater risk to the life of the woman than the operation would itself create.*¹³⁶

While at this particular point Dr. Taylor was discussing the relative safety test as applied to the induction of labor in the seventh or eighth month (a technique now almost totally abandoned), and while he preferred that technique to abortion early in gestation, it is quite obvious that, if he had confronted a case where early abortion was indicated rather than a late induction of labor, he would have applied the same relative safety test to early abortion. Indeed, the relative safety test is one which surgeons resort to even today in regard to operations that still are dangerous to the patient's life. They weigh the danger to be apprehended from the operation itself against the danger of doing nothing. It is simple common sense.

In speaking of abortion early in gestation, Dr. Taylor notes that "the life of the woman would be seriously endangered", but adds that abortion, especially in the United States, "is resorted to by medical men in the interest of the mother alone at the expense of the life of the child."¹³⁷

It is very interesting to note that in the second posthumous edition of Taylor's *Principles and Practice*¹³⁸ the new editor made only one change in Taylor's text of this passage. Whereas Taylor had said,

¹³⁵ A. Taylor, *Manual of Medical Jurisprudence*, 595 (1844).

¹³⁶ 2 A. Taylor, *Principles and Practice of Medical Jurisprudence*, 202 (2d ed. 1873).

¹³⁷ *Id.* at 201.

¹³⁸ 2 A. Taylor, *Principles and Practice of Medical Jurisprudence*, 209 (4th ed., T. Stevenson 1894).

in 1873, that "the life of the woman would be seriously endangered" by an abortion early in pregnancy, Stevenson, in 1894, deleted the adverb "seriously." The adoption of Lister's technique of antiseptic surgery, in England, took place between these two dates.

If the *Belous* court had had before it this passage in Taylor, it might very well have concluded that the relative safety test not merely "probably", but certainly, was "in accord with the legislative intent at the time the statute was adopted."

The same may be said of the following passage in the opinion of Mr. Justice Adkins, speaking for a majority of five of the seven justices of the Supreme Court of Florida in *Walsingham v. State*:

Protection of the mother from unsafe surgical procedures may well have been in the legislators' minds when they enacted the [Florida] abortion statutes in 1868. Modern-day medicine, whoever [sic] makes induced miscarriage in the first trimester of pregnancy a safer procedure than delivery at full term. See *People v. Belous*, 71 Cal. 2d 954, 80 Cal. Rptr. 354, 360, 458 P.2d 194, 200. At the time of the adoption of these statutes, the State, to protect the interest of its citizens, could reasonably restrict the availability of abortion to those women who faced an equally serious risk of death if the operation were not performed.¹³⁹

The difficulty remains, however, that the administrators of these laws—physicians and surgeons—have, in recent decades, forgotten why they were passed, and therefore are no longer able to guess at their meaning. The laws have become vague through obsolescence; the profession has lost touch with their meaning through obliviscence.

Were the American medical profession now suddenly to remember the reason for the passage of these laws, they would grant an abortion to every woman in the first or second trimester who requested one; for, today, abortion is always safer than childbirth, as the New York figures now show, not only during the first trimester, but during the first 24 weeks of pregnancy.

¹³⁹ 250 So. 2d 857, 861 (Fla. 1971).

IX. RECENT DECISIONS ON THE CHALLENGED CONSTITUTIONALITY OF STATE ABORTION LAWS

The earliest and still the best of this line of cases is *People v. Belous*.¹⁴⁰ Since that decision, ten federal district courts have considered the constitutionality of state abortion statutes, at the challenge of women and/or physicians. Eight of the ten have reached the merits, whereas two abstained out of federal deference to state courts.¹⁴¹

Of the eight federal district courts which have ruled on the merits of the constitutional challenge to the abortion statutes based on a woman's fundamental right to terminate an unwanted pregnancy, and to the aid of a physician in doing so, four have held them unconstitutional,¹⁴² while four have upheld them.¹⁴³ These eight courts were all three-judge courts. Thus, a total of fourteen federal judges have ruled in favor of this fundamental right and so have held the abortion statutes unconstitutional. Ten have upheld them. The circuit judges were evenly divided on this constitutional question, 4:4, while the district judges voted in favor of the right and against the statutes, 10:6.

The successive judicial formulations of the woman's fundamental right to an abortion are of interest:

(1) *People v. Belous*:

The fundamental right of the woman to choose whether to bear children follows from the [United States] Supreme Court's and this court's repeated acknowledgement of a 'right

¹⁴⁰ *Supra* note 116.

¹⁴¹ *Doe v. Randall*, 314 F. Supp. 32 (D. Minn. 1970), *aff'd sub nom.*, *Hodgson v. Randall*, 402 U.S. 967 (1971); *Rodgers v. Danforth*, Civil No. 18360-2 (W.D. Mo., filed Sept. 10, 1970), *appeal filed*, 39 U.S.L.W. 3390 (U.S. Feb. 8, 1971) (No. 70-89).

¹⁴² *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill. 1970) (2:1), *appeals filed sub nom.*, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (Nos. 70-105, 70-106); *Doe v. Bolton*, *supra* note 2; *Roe v. Wade*, *supra* note 2; *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), *appeal dismissed for want of grant or denial of injunction*, 400 U.S. 1 (1970), *injunction granted by three-judge court*, 320 F. Supp. 219 (E.D. Wis. 1970), *writ of prohibition to three-judge court denied sub nom.* *McCann v. Kerner*, 436 F.2d 1342 (7th Cir. 1971), *injunction (but not the declaratory judgment) vacated sub nom.* *McCann v. Babbitz*, 402 U.S. 903 (1971).

¹⁴³ *Doe v. Rampton*, No. C-234-70 (D. Utah, filed Sept. 8, 1971) (2:1); *Corkey v. Edwards*, 322 F. Supp. 1248 (W.D.N.C. 1971), *appeal filed*, 40 U.S.L.W. 3098 (U.S. July 17, 1971) (No. 71-92); *Rosen v. Louisiana State Bd. of Med. Examiners*, 318 F. Supp. 1217 (E.D. La. 1970) (2:1), *appeal filed*, 39 U.S.L.W. 3302 (U.S. Nov. 27, 1970) (No. 70-42); *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970) (2:1).

of privacy' in matters related to marriage, family, and sex. . . . That such a right is not enumerated in either the United States or California Constitution is no impediment to the existence of the right. . . . It is not surprising that none of the parties who have filed briefs in this case have disputed the existence of this fundamental right.¹⁴⁴

(2) *United States v. Vuitich*:

[A]s a secular matter a woman's liberty . . . may well include the right to remove an unwanted child at least in the early stages of pregnancy. . . .¹⁴⁵

(3) *Babbitz v. McCann*:

The police power of the state does not entitle . . . it to deny to a woman the basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which has not yet quickened. . . .¹⁴⁶

(4) *Roe v. Wade*:

[The court recognized a woman's] Ninth Amendment right to choose to have an abortion. . . .¹⁴⁷

¹⁴⁴ *Supra* note 116, at 963-64, 458 P.2d at 199-200, 80 Cal. Rptr. at 359-60.

¹⁴⁵ 305 F. Supp. 1032, 1035 (D.D.C. 1969). In this case, District Judge Gesell held the District of Columbia abortion statute unconstitutionally vague, but included this half-hearted dictum about a woman's fundamental right in his opinion. The Supreme Court reversed on the vagueness point, but held that:

Although there was some reference to [the claim that a woman has a fundamental right to an abortion] in the opinion of the court below, we read it as holding simply that the statute was void for vagueness Since that question of vagueness was the only issue passed upon by the District Court it is the only issue we reach here.

United States v. Vuitich, *supra* note 49, at 55.

Two state courts, in recent decisions, seem to have over-interpreted this refusal of the United States Supreme Court to reach the question of the woman's fundamental right. One characterized it as "judicial reticence." *People v. Pettigrew*, 18 Cal. App. 3d 677, 680, 96 Cal. Rptr. 189, 190 (2d Dist. 1971). Another stated that the Supreme Court had "noted that the arguments based on *Griswold v. Connecticut* . . . did not control." *Thompson v. State*, No. 44,071 (Tex. Crim. App., Nov. 2, 1971). They did not control the decision in the *Vuitich* case only because the district court had not squarely ruled on them; in another case, in which the lower court had done so, they might well control.

¹⁴⁶ *Supra* note 142, at 302 (Kerner, Reynolds & Gordon, JJ.).

¹⁴⁷ *Supra* note 2, at 1223 (Goldberg, Hughes & Taylor, JJ.).

(5) *Doe v. Bolton*:

For whichever reason [penumbral zone or ninth amendment] personal liberty . . . is . . . broad enough to include the decision to abort a pregnancy. . . .

[T]he Court does not postulate the existence of a new being with federal constitutional rights at any time during gestation. . . .¹⁴⁸

(6) *Doe v. Scott*:

[W]omen have a fundamental interest in choosing whether to terminate pregnancies [hence, the state may not prohibit] the performance of abortions during the first trimester of pregnancy by licensed physicians in a licensed hospital or other licensed medical facility.¹⁴⁹

(7) *Rosen v. Louisiana State Board of Medical Examiners* (dissenting opinion):

[I]n some ways the right to have an abortion is more compelling than the rights involved in *Griswold* At least two fundamental human rights are . . . involved: The mother's autonomy over her own body, and her right to choose whether to bring a child into the world.¹⁵⁰

(8) *Steinberg v. Brown dissenting opinion*):

[A] woman has . . . the fundamental right to choose whether to bear children.¹⁵¹

(9) *Doe v. Rampton* (dissenting opinion):

The flaw in the Utah abortion statute is that it . . . invades

¹⁴⁸ *Supra* note 2, at 1055 & n.3 (Morgan, Smith & Henderson, JJ.).

¹⁴⁹ *Supra* note 142, at 1390 (Swygert & Robson, JJ.).

¹⁵⁰ *Supra* note 143, at 1235 (Cassibry, J., dissenting).

¹⁵¹ *Supra* note 143, at 759 (Green, J., dissenting).

the plaintiff's right of privacy with no showing of a *compelling* state interest.¹⁵²

(10) *People v. Barksdale*:

[A] woman has a constitutional right to terminate her pregnancy, subject only to reasonably imposed state restrictions designed to safeguard the health of the woman, and to protect the advanced fetus.¹⁵³

The shrewdest historical insight, among all these federal court opinions, occurs in the following excerpts from the dissenting opinion of District Judge Ben C. Green, in *Steinberg v. Brown*:

[W]hen the abortion statutes were enacted the surgical procedure required in an abortion presented a substantial risk of death to the woman involved. [T]his situation no longer exists with today's medical advances. Protection of the mother from unsafe surgical procedures may well have been in the legislators' minds when they enacted the Ohio statute in 1834. Modern day medicine, however, makes induced miscarriage in the first trimester of pregnancy a safer procedure than delivery at full term. See, *People v. Belous, supra*, [71 Cal. 2d 964-65,] 80 Cal. Rptr. 360-361, 458 P. 2d 200-201. In many areas the mortality rate from therapeutic abortion is less than that occasioned by childbirth. . . .

Viewed in its historical perspective, the Ohio statute could well have been considered as a reasonable measure when it was adopted 136 years ago. At that time the risk of death on the operating table for any surgical procedure was extremely serious, and the state, to protect the interests of its citizens, could reasonably restrict the availability of abortion

¹⁵² *Supra* note 143 (Ritter, J., dissenting) (emphasis in original).

¹⁵³ 18 Cal. App. 3d 813, 825, 96 Cal. Rptr. 265, 272 (1st Dist. 1971). In another recent state court case, the Texas Court of Criminal Appeals stated: "Without determining whether or not seeking an abortion is operating within a constitutionally protected zone of privacy, we do hold that the State of Texas has a compelling interest to protect fetal life." *Thompson v. State, supra* note 6. This is, of course, a formula which enables the Texas court to say that it is not necessarily denying the woman's fundamental right while actually denying it. It is interesting that even a court bent on denying the woman's fundamental right, as this one was, feels it necessary to conceal what it is doing under such a disclaimer.

to those women who faced an equally serious risk of death if the operation was not performed.¹⁵⁴

Since the memorable delineation of the comparative safety test in *People v. Belous*,¹⁵⁵ this has been the second articulate judicial recognition of the true original meaning of the words "necessary to preserve [the patient's] life."

On July 12, 1971, the Supreme Court of Florida handed down its decision in *Walsingham v. State* which contains the third express recognition of the relative safety test.¹⁵⁶ The statement in this and other judicial opinions rendered since the *Belous* case was decided on September 5, 1969, rely on the opinion in that case for the statement that abortion is safer than childbirth if performed in the first trimester by a physician. At the time the *Belous* case was argued and decided, there were not yet available any massive statistics on legal abortions from any American state; so the limitation of the comparison of safety as between childbirth and abortion was expressed, in those days, by cautious medical writers, as limited to abortion performed in the first trimester. So the *Belous* court similarly limited the comparison in its opinion, and, following it, so has Florida's Supreme Court in the *Walsingham* case. Today, however, massive statistics concerning legal abortion are available from New York, for more than an entire year under the new New York law, which permits unfettered abortion till the end of the twenty-fourth week—or for eleven of the thirteen weeks of the second trimester of pregnancy. These data show that abortion performed by a physician during the first twenty-four weeks of pregnancy is now safer than childbirth. The limitation of this comparison to the first trimester is therefore already obsolete.

X. DOES A FOETUS POSSESS FEDERAL CONSTITUTIONAL RIGHTS?

The only one of the cases which have recently passed on the question of the constitutionality of the state abortion laws which has had a direct statement in it on this question is *Doe v. Bolton*. A footnote in that opinion declares that "the Court does not postulate the existence of a new being with federal constitutional rights at any time

¹⁵⁴ *Supra* note 143, at 750-51 (dissenting opinion).

¹⁵⁵ *Supra* note 116, at 970-72, 458 P.2d at 204-05, 80 Cal. Rptr. at 364-65.

¹⁵⁶ 250 So. 2d 857, 861 (Fla. 1971). *See text supra*, p. 396.

during gestation"¹⁵⁷ This cautious but quite correct statement was made in response to one of the persistent attempts to intervene in these litigations by religiously interested parties who apply for appointment as guardians *ad litem* for unborn children.

When such a person presents himself to a court and in effect says, "The unborn children I wish to represent are entitled to life and I am here to represent them since, obviously, their expectant mothers are bent on murdering them," the court then must face the preliminary question whether or not such foetūs are or are not *persons* entitled to a right to life. Though the three-judge court in Georgia decided they were not, a single judge in the federal court in the northern district of Illinois granted one Dr. Bart Heffernan the guardianship *ad litem* of all unborn children in Illinois.¹⁵⁸ What is the problem, legally speaking, a court must face when it has to consider the merits of a contention of this kind? I think the wording of the Georgia federal court significant: Is this a being that has federal constitutional rights?

In order to determine that, a court must ascertain what the word "person" means in the Federal Constitution, in which this word is used many times both in the original instrument and in the Bill of Rights in the fourth, and the fifth, amendments. The word "persons" is also quite significantly used in the enumeration clause in the original Constitution.¹⁵⁹ That is the clause which commands the taking of a census every ten years. There, the mandate is laid down that once every decade the "whole Number of . . . Persons" in each state must be counted.

From the first census of 1790 to the latest one in 1970, no census-taker has ever counted a foetus. A sufficient reason why no foetus has ever been counted is that from the 1790 census onward, Congress has by statute prescribed a certain form that the census-taker must fill out. This is divided into columns, and there is a sexual breakdown. He is required to list all male persons and all female

¹⁵⁷ *Supra* note 2, at 1055 n.3.

¹⁵⁸ Senior District Judge Campbell, a Roman Catholic, signed such an order on April 10, 1970, *non pro tunc* [sic: *nunc pro tunc*] as of March 11, 1970." Afterwards a three-judge court was convened. Judge Campbell, as initiating judge, was a member of the panel. The three-judge court held (2:1) that the Illinois abortion statute is unconstitutional, with Judge Campbell dissenting. Curiously, however, the majority did not revoke the order appointing Dr. Heffernan. *Doe v. Scott*, *supra* note 142.

¹⁵⁹ U.S. Const. art. I, § 2, cl.3.

persons.¹⁶⁰ A census-taker confronted with a foetus whose expectant parents asked him to count it would find it impossible to decide in which column to put it, unarmed with the very recent and still expensive technique by which a doctor now can antenatally determine foetal sex.

One derives from this the obvious intention of the very First Congress, which met in New York City, and in which many members sat who had served in the Philadelphia Convention which had framed the original Constitution, and all of whose members—that is to say, of the First Congress—helped to frame the Bill of Rights, that they did not think that a foetus was a person. Since a foetus is not a person within the meaning of the enumeration clause of the Constitution, one would have to have affirmative evidence that those passing the amendments forming the Bill of Rights intended to give it any other meaning. There is no such evidence.

If one goes beyond the constitutional text to determine what may well have been the intention of the framers of the original Constitution and of the Bill of Rights on this subject, one could do no better than to consult the first treatise on medical jurisprudence that was ever published in the English language. It was a work by Samuel Farr called *Elements of Jurisprudence*, published in London in 1787, the year in which the Philadelphia Convention sat, and it contains the following passage:

The first rudiments or germen of the human body is not a human creature, if it be even a living one; it is a foundation only upon which the human superstructure is raised. This is evident to anatomical observation. Were a child to be born in the shape which it presents in the first stages of pregnancy, it would be a monster indeed, as great as any which was ever brought to light.¹⁶¹

The refreshing simplicity of this eighteenth-century text encourages one to hope that when this question finally is argued before the Supreme Court of the United States, this clear echo of the Age of

¹⁶⁰ The act of the First Congress which mandated the taking of the first census expressly enjoined "distinguishing the sexes" of the persons counted. Act of March 1, 1790, ch. 2, 1 Stat. 101.

¹⁶¹ I have had access to this work only as reprinted in T. Cooper, *Tracts on Medical Jurisprudence* (1819), where the passage quoted appears at 12.

Reason will outweigh the sentimental romanticism that has been spawned in recent years about little human beings in the early stages of pregnancy.

Whatever one or more of the several states of the United States may choose to do, either with their legal rules or with their legal nomenclature, is of no federal constitutional significance, because the word "person" in the Federal Constitution must, of course, have a nationwide uniform federal interpretation.

There is an interesting precedent on this subject. It is the famous case of *Dred Scott v. Sanford*,¹⁶² the case decided by the United States Supreme Court in 1857 in which the question that the Court preliminarily had to reach was whether or not the words "Citizens of different States" in the diversity of citizenship clause¹⁶³ in Article III of the original Constitution did or did not include a Negro who originally had been a slave, but who had moved to free soil and under the law there enforced became free.

One of the points decided by the Court in that case was that the word "Citizens" in Article III had to have a uniform nationwide federal meaning which an individual state could not vary. That part of the decision (although not the rest of it, obviously, for the remainder has been reversed by history) is still good law. So no matter what a state could elect to do on the subject, by way of declaring a foetus to be a "person" for some state law purposes, it could not bind either federal or state courts in interpreting the word "person" in the Federal Constitution.

In New York, the 1967 State Constitutional Convention, alas, proved abortive, since the voters decided to reject the Convention's efforts. Nevertheless, at the Constitutional Convention in 1967, a specific proposal was made by Professor Charles Rice of the Fordham University Law School to add to the State Constitution's equal protection clause, after the word "person", the words "from the moment of conception." His obvious purpose, which he supported in a debate covering about three printed pages, was to prevent all abortions. He felt that even the law that was in force in New York from 1830 to 1970 was too liberal and that abortion should be prohibited in every instance. The committee of the Constitutional Convention to which this proposal was referred recommended unanimously against

¹⁶² 60 U.S. (19 How.) 393 (1857).

¹⁶³ U.S. Const. art. III, § 2, cl. 1.

its adoption, and it was defeated by an overwhelming voice vote on August 30, 1967, on the floor of the convention.¹⁶⁴

Suppose, however, that Professor Rice's proposal had passed. Could that have made any difference from the federal constitutional point of view? Of course not. The only instance that I can cite by way of precedent for that is Wisconsin. Wisconsin is the only state in the Union which, albeit not in its state constitution, but in one of its statutes relating to abortion, has put the very words after the word "person" Professor Rice wanted to insert—"from the moment of conception."¹⁶⁵ Notwithstanding this text, the federal three-judge court in Wisconsin in the case of *Dr. Babbitz* gave it absolutely no effect and did not recognize it as conferring any federal constitutional rights on the foetus.¹⁶⁶

The Attorney General of Texas, in his brief in *Roe v. Wade*, has:

most seriously argued that the "life" protected by the Due Process of Law Clause of the Fifth Amendment includes the life of the unborn child. Further, it would be a denial of equal protection of the law not to accord protection of the life of a person who had not yet been born but still in the womb of its mother. If it is a denial of equal protection for a statute to distinguish between a thief and an embezzler under a statute providing for the sterilization of the one and not the other, then it is surely a denial of equal protection for either the state or federal government to distinguish between a person who has been born and one living in the womb of its mother.¹⁶⁷

Of course, the Attorney General of Texas is here alluding not to the fifth amendment, but to the fourteenth. What he says is astonishing. Unwittingly, it seems, he has just condemned as unconstitutional all the abortion laws of Texas throughout its history, since none of them has punished the killing of "one living in the womb of its moth-

¹⁶⁴ 3 Proceedings of the Constitutional Convention of the State of New York, April fourth to September twenty-sixth 1967, at 400-03 (1967).

¹⁶⁵ This unique Wisconsin statute speaks of the "time" of conception rather than of Professor Rice's "moment", which sets the stage for a nice metaphysical debate about how much time there is in a moment. The statute reads: "In this section 'unborn child' means a human being from the time of conception until it is born alive." Wis. Stat. Ann. tit. XLV, ch. 940, § 940.04(6) (1958) (added by ch. 696, § 1, [1955] Wis. Laws).

¹⁶⁶ *Babbitz v. McCann*, *supra* note 142, at 301.

¹⁶⁷ Brief for Appellee at 56, *Roe v. Wade*, *supra* note 2.

er" as severely as the killing of "a person who has been born." Does not the equal protection clause demand that this inequity be levelled, either by making all abortionists guilty of murder, or reducing the penalty for murder to that which is imposed on abortionists? Furthermore, the law against murder in Texas does not, presumably, contain a therapeutic exception, permitting the act to be done to preserve somebody else's life simply because that somebody else requests it. Does not that deny equal protection? As astounding as these consequences of the Texas Attorney General's *ipse dixit* are, it will surprise nobody who has read the preceding two dozen pages of his brief, which he has copied nearly *verbatim* from the *amici curiae* brief of Certain Physicians, Professors, and Fellows of the American College of Obstetrics and Gynecology¹⁶⁸ (*i.e.*, those who dissent from the pro-abortion stand taken by ACOG as an organization, in the *amicus curiae* brief it filed in these cases). That brief devotes six pages to argument that the word "person" in the due process clauses of the fifth and fourteenth amendments and in the equal protection clause of the fourteenth includes a foetus. Needless to say, this argument also cites no single authority for this proposition, and rests fairly and squarely on the *ipsi dixerunt* of the Certain Physicians, Professors, and Fellows, and their counsel, who apparently have not yet discovered the enumeration clause in the Constitution of 1787.

The Attorney General of Georgia, in *Doe v. Bolton*, did not embark upon the slippery slope down which the Attorney General of Texas has so awkwardly slid. In his case, the 1968 Georgia statute, which he is defending, being an American Law Institute Model-Penal-Code-patterned statute, not only differentiates between foetus and persons already born, but even between various classes of foetus. If that is equal protection, some foetus must be more equal than others.

In his brief for appellee in *Roe v. Wade*, the Attorney General of Texas filled many pages with a verbatim copy of the embryological section of the *amicus* brief filed in both cases on behalf of certain dissenting Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology (ACOG). In the embryological section of the ACOG dissenters' *amicus* brief, an earnest effort is

¹⁶⁸ Brief for Certain Physicians, Professors and Fellows of the American College of Obstetricians and Gynaecologists as Amicus Curiae at 58-63, *Roe v. Wade* and *Doe v. Bolton*, *supra* note 2. A similar assertion appears in Brief for The National Right to Life Committee as Amicus Curiae at 44, *Roe v. Wade*, *supra* note 2.

made to recount in week-by-week detail the progressive intrauterine evolution of the human foetus. Virtually all these details have been known to embryologists for some time, and no criticism of the data as data could be made. It is only the philosophical inferences that the ACOG dissenters endeavor to draw from the data that are not a little suspect. For example, at one point appears the following sentence in *italics*, the only sentence chosen for that degree of emphasis in the entire two dozen printed pages of this embryological extravaganza:

Dr. Still has noted that electroencephalographic waves have been obtained in forty-three to forty-five day old fetuses, and so conscious experience is possible after this date.¹⁶⁹

Such an assertion is meant to imply, if it does not quite say, that after the forty-fifth day of gestation the foetus already has a type of consciousness similar to that which adult human beings possess. Such an idea is sheer nonsense. It is common knowledge among embryologists that cortical tissue has been removed from the brain and kept alive for days, during which period such tissue continues to emit waves which are picked up on an electroencephalograph. That this indicates the presence of consciousness is scarcely to be affirmed, unless one defines consciousness much more broadly than the rational human consciousness of adult life.

What the ACOG dissenters are trying to establish, by their electroencephalograms-at-45-days-of-gestation argument, is that what theologians call a human soul is already present in the foetus. They eschew using the word "soul", because they are afraid of the first amendment; so they substitute the word "consciousness." Changing labels does not alter substance, however; so I shall use both words, with an equality sign between them. The mediaeval theologians felt that a foetus had not just one soul (= consciousness), but, successively, three souls (= consciousnesses): first, a vegetable soul (= vegetable consciousness), second, an (irrational) animal soul (= animal consciousness), and third, a human or rational soul (= human consciousness). In other words, the Mediaevals were aware, as the ACOG dissenters are not, that consciousness itself undergoes intrauterine

¹⁶⁹ Brief for Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology as Amicus Curiae at 23, *Roe v. Wade and Doe v. Bolton*, *supra* note 2, repeated verbatim (but without italics), in Brief for Appellee at 52, *Roe v. Wade*, *supra* note 2.

evolution, from an extremely primitive, pre-human form, to one which became (in the mediaeval belief) fully human. The ACOG dissenters are trying to prove that fully human consciousness occurs as early as the forty-fifth day of gestation, but the scientific data on which they rely simply do not demonstrate this.

All philosophers and theologians agree that man is a rational animal, but the "reason" to which they refer must be either a form or a function. For our purposes (the question as to what the law should protect from destruction at the whim of another) we must necessarily be concerned with form, rather than function; otherwise, the law would not protect persons asleep, or madmen, or the unconscious. In biology, form always precedes function, sometimes by many years. Thus the gonads appear at the foetal stage, but are not used until puberty. Likewise, the human cerebral cortex appears at the foetal stage, but the function of human reason, which is its distinctive role, is not exercised until about the third year of postnatal life—at the time when, in the words of my friend Joseph Donceel, S.J., a professor of philosophy at Fordham—the child first uses such words as "true" or "false."

If, therefore, we are to resort to embryological data to determine the "moment" when a human foetus acquires the form of reason, we shall find that the organization of the human cerebral cortex is not finished before birth. In the words of Percival Bailey, Professor of Neurology and Neurosurgery at the University of Illinois Medical School, "The greater part of the cortex . . . completes its structural organization some time after birth."¹⁷⁰

Two articles in the recently published *Evolution of the Forebrain: Phylogenesis and Ontogenesis of the Forebrain*,¹⁷¹ make it quite clear that the formation of the human cerebral cortex is not completed until after birth. Thus, Th. Rabinowicz declares:

In the cerebral cortex of the premature infant of the 8th month, a great number of nerve cells are still not quite clearly differentiated.¹⁷²

¹⁷⁰ P. Bailey, *Cortex and Mind*, in *Mid-Century Psychiatry: An Overview* 11 (R. Grinker ed. 1953).

¹⁷¹ *Evolution of the Forebrain: Phylogenesis and Ontogenesis of the Forebrain* (R. Hassler & H. Stephan eds. 1967).

¹⁷² Th. Rabinowicz, *The Cerebral Cortex of the Premature Infant of the 8th Month*, in *Evolution of the Forebrain: Phylogenesis and Ontogenesis of the Forebrain* 40 (R. Hassler & H. Stephan eds. 1967).

And, speaking of certain synapses which he designated “‘counter’ contact structures in the shape of appendages (‘thorns’)”, G.I. Poliakov states:

In the human cerebral cortex such appendages on the dendrites begin to develop in the seventh month of intrauterine life. Before birth they are observed only in the biggest neurons . . . after birth they greatly spread and densely cover the dendrite ramifications of many efferent neurons of the cortex. . . .

Main elements of the cortical organization, typical of the brain of an adult, reach definite degree of development at the time of birth. . . .¹⁷³

Thus the scorn affected by the ACOG dissenters in their assertion, “There is no magic in birth”,¹⁷⁴ appears unwarranted. Birth does, according to *relevant* embryological data, mark approximately the stage at which the human cerebral cortex—the form of reason, and therefore the defining note of man—reaches its “definite degree of development.” So, perhaps our ancestors, including those who wrote the enumeration clause and the ninth amendment, were not such fools after all, when they thought that “person” does not include a foetus, but does include the newborn babe.

The question is not, as the ACOG dissenters put it, whether or not “The Unborn Offspring of Human Parents is an Autonomous Human Being.” Of course it is. It is “human”, since it was produced by human parents, and it is a “being”, since it exists. And it is “autonomous”, if nothing more is meant by that adjective than that it possesses a unique genetic organization. The question is whether, prior to birth, the offspring of human parents is a human *person*. Only *persons* are the subjects of legal rights, whether constitutional or other.¹⁷⁵

¹⁷³ G.I. Poliakov, *Embryonal and Postembryonal Development of Neurons of the Human Cerebral Cortex*, in *Evolution of the Forebrain: Phylogenesis and Ontogenesis of the Forebrain* 254, 257 (R. Hassler & H. Stephan eds. 1967).

¹⁷⁴ Brief for Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology as Amicus Curiae at 30, *Roe v. Wade and Doe v. Bolton*, *supra* note 2, repeated verbatim in Brief for Appellee at 53, *Roe v. Wade*, *supra* note 2.

¹⁷⁵ Thus Sir Frederick Pollock declared: “The person is the legal subject or substance of which rights and duties are attributes. An individual human being, considered as having such attributes, is what lawyers call a *natural person*.” F. Pollock, *A First Book of Jurisprudence*

A useful analogy can be drawn from the other end of the life-span, from the agreed ethical norms governing heart transplants. It is now universally agreed that the donor of a heart must have suffered such massive brain damage that it can be stated categorically by the attending physicians that mental activity will never again be possible. A flat electroencephalogram for a stated period is required. Only then can the donor's heart be removed and transplanted into the cardiac cavity of the donee. But the heart at removal is not dead. If it were, it would not do the donee any good. The life that is still in the heart is the same as the life that is still in the rest of the donor's body, and has been there all along. It is not because human life has departed, that the donor's body can be used for the benefit of the donee. It is because there is no longer present in that still living body the human *person* who has been present in it since birth. Since that human person is no longer present, his consent can no longer be asked. Whose consent is asked? The next of kin of the departed, just as if this still living body were already a cadaver. In other words, it is possible for a human body to be alive but no longer to contain a human person.

If that can happen at the *terminus ad quem* of the life span, why can it not happen at the *terminus a quo*? Prior to birth, human life is of course present in the foetus, but a human person is not. For the removal of the foetus, whose consent must be asked? As there is as yet no human person in the foetus, then by the analogy of the heart transplant cases, we must ask the consent of the next of kin. It is harder to imagine a nearer kin than the pregnant woman who is carrying the foetus. That is what the common law required for abortion at will—the will or consent of the expectant mother. Why should more be required now?

111 (3d ed. 1911) (emphasis in original). One need only read the words of the Federal Constitution, including its amendments, to realize that their framers penned these texts with this same notion in mind. The fifth and fourteenth amendments do not confer rights upon human life; they treat life as the object, not as the subject, of rights. They forbid governments to deprive a *person* of his life, without due process of law. If the phenomenon of human life can exist apart from a human person, it is not protected by the fifth or fourteenth amendment. The crucial question, therefore, is whether a human person is present in the life which is asserted to be inviolable. It is not human life, as such, but the human person, as such, that is sacred.