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# Haunting Shadows from the Rubble of Roe's Right of Privacy

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# HAUNTING SHADOWS FROM THE RUBBLE OF ROE'S RIGHT OF PRIVACY

*Two years ago seven Supreme Court Justices decided that the right of privacy included the right to abort. Abortion is still debated, but legally, it is no longer a debatable issue. The post-Roe debate centers upon the legal, medical and ethical implications of what lies beyond that decision. If the right of privacy includes the right to abort, does it also include the right to experiment upon fetuses before and after abortion? Does it include the right to decide whether the fetus will be killed during the abortion? What happens when the fetus is born alive after an abortion? This Note addresses itself to these issues and concludes with a recommendation that Roe's right of privacy remain limited to the abortion decision.*

## I. INTRODUCTION

On January 22, 1973, the United States Supreme Court, in *Roe v. Wade*,<sup>1</sup> extended the right of personal privacy to include a woman's decision to terminate her pregnancy by abortion.<sup>2</sup> The Court, however, did not address itself to the corollary question of whether this right of personal privacy also encompasses a woman's decision to terminate or impair life *in* or *ex utero*.<sup>3</sup> Although *Roe* attempted to resolve one constitutional dilemma, it has proven to be a harbinger of others—fetal experimentation *in* and *ex utero* and the phenomenon of live birth following abortion. The crucial question upon which this Note focuses is whether the Court's explicit acknowledgment of a qualified right to abort<sup>4</sup> was implicitly coupled with a total abrogation of (a) the rights of the aborted fetus<sup>5</sup> and (b) the state's interest in the fetus both before and after its removal from the uterus. The basic proposition throughout this Note will be that the right which *Roe* bestowed upon pregnant women is specific and limited to removal of the fetus from the uterus.

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<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> *Id.* at 153. The Court inferred this right of privacy from the fourteenth amendment but recognized that it could also be founded in the ninth amendment. *Id.*

<sup>3</sup> The term *in utero* refers to the state of being inside the uterus. The term *ex utero* means outside and removed from the uterus. *TABER'S CYCLOPEDIA MEDICAL DICTIONARY* I-43 (12th ed. 1973).

<sup>4</sup> Mr. Justice Blackmun stated "that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." 410 U.S. at 154.

<sup>5</sup> "Fetus: . . . 2. In humans, the child *in utero* from the third month to birth." *TABER'S CYCLOPEDIA MEDICAL DICTIONARY* F-16 (12th ed. 1973). Prior to the third month of pregnancy the fetus is categorized as an embryo. *Id.* However, throughout this Note, the term fetus will be used to describe the unborn child from conception until birth.

## II. INITIAL OBSERVATIONS—ROE v. WADE

The gravamen of the appellant's complaint in *Roe* was that the Texas criminal abortion statutes<sup>6</sup> were constitutionally invalid because they violated a pregnant woman's right to choose to terminate her pregnancy.<sup>7</sup> Though the Court's decision carried the doctrine of substantive due process "to lengths few observers had expected"<sup>8</sup> the net result was not surprising. Speaking for the majority, Mr. Justice Blackmun asserted that the right to privacy which heretofore related to marriage,<sup>9</sup> procreation,<sup>10</sup> contraception,<sup>11</sup> education<sup>12</sup> and child-

<sup>6</sup> 410 U.S. at 129. The statutes under attack were TEX. PENAL CODE tit. 15, ch. 9, arts. 1191-94, 1196 (1961), which read as follows:

Art. 1191. Abortion

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

Art. 1192. Furnishing the means

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Art. 1193. Attempt at abortion

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

Art. 1194. Murder in producing abortion

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

Art. 1196. By medical advice

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

<sup>7</sup> 410 U.S. at 129.

<sup>8</sup> Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 2 (1973). Tribe approves of the principle established by *Roe* but disapproves of its *Lochner*-type direction and maintains that "[o]ne of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found." *Id.* at 7.

In *Lochner v. New York*, 198 U.S. 45, 53 (1905), the Court held that the state's power to remedy social or economic inequities could not interfere with an individual's fourteenth amendment due process rights, in this case, the right to freedom of contract. *Id.* at 57-59. However, in *Ferguson v. Skrupa*, 372 U.S. 726 (1963), the Court formally disavowed the *Lochner* doctrine, stating that "[w]e have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws." *Id.* at 729-30.

<sup>9</sup> *Loving v. Virginia*, 388 U.S. 1 (1967). In *Loving*, the Court considered the constitutionality of a Virginia statute which prohibited miscegenation. Recognizing that marriage is a fundamental freedom, the Court held that a statutory scheme which proscribed interracial marriage was violative of the equal protection and due process clauses of the fourteenth amendment. *Id.* at 10-12.

<sup>10</sup> In *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), the Court invali-

rearing<sup>13</sup> was now "broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"<sup>14</sup> and that regulation limiting this right of personal privacy may only be justified by a compelling state interest.<sup>15</sup>

The Court acknowledged that with regard to the abortion decision the state has two separate and distinct, "important and legitimate" interests (1) in protecting maternal health and (2) in protecting the fetus.<sup>16</sup> With a precision that one commentator has associated with "commissioner's regulations,"<sup>17</sup> the Court determined at what point

dated a state statute which provided for the sterilization of habitual criminals. Although the invalidation of the statute turned on the issue of equal protection, *i.e.*, "white collar" crimes were excluded, there was very strong dicta to the effect that the right to procreate is a fundamental liberty. *Id.* at 536. *See also id.* at 546 (Jackson, J., concurring). Although privacy is not mentioned in *Loving* and *Skinner*, *Roe* interpreted these decisions as extensions of the right of personal privacy. 410 U.S. at 152.

<sup>11</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972). In *Eisenstadt*, the Supreme Court held that a Massachusetts statute which permitted married persons to obtain contraceptives, but prohibited single persons from receiving them, was violative of the equal protection clause of the fourteenth amendment. Speaking for the majority, Justice Brennan opined that the right of privacy must include the right of all persons to be free from unjustified state intrusion into such fundamental matters as the decision to bear children. *Id.* at 453.

<sup>12</sup> *See Meyer v. Nebraska*, 262 U.S. 390 (1923), wherein the Court invalidated a statute which prohibited the teaching of a foreign language in private and public schools because the statute arbitrarily interfered with the parents' right to educate their children as they saw fit. The Court recognized that the state had a legitimate interest in regulating schools and compelling attendance, but held that the regulations could not be abusive or interfere with the parents' rights without some reasonable relation to the state. *Id.* at 399-400.

<sup>13</sup> *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925), wherein the Court overturned a state statute which required compulsory attendance at public schools. The Court held that the act "unreasonably [interfered] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35.

Although both *Meyer* and *Pierce* deal with statutes which were invalidated because they interfered with personal liberty, both decisions may be viewed as presaging the broad development of a right of privacy in matters dealing with the rearing and educating of children.

<sup>14</sup> 410 U.S. at 153-54.

<sup>15</sup> *Id.* at 155. The state's interest in protecting maternal health becomes compelling during the second trimester of pregnancy. *See* text accompanying note 19 *infra*. At the point of viability, *see* note 39 *infra*, the state has a compelling interest in protecting the fetus. *See* text accompanying notes 20-21 *infra*.

<sup>16</sup> 410 U.S. at 162. The Court carefully avoided recognizing a state interest in protecting the *life* of the fetus, but rather spoke of the state's "interest in protecting the potentiality of human life." *Id.*

<sup>17</sup> Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 922 (1973) [hereinafter cited as Ely]. However, as noted by Professor Ely, "[o]n closer examination . . . the precision proves largely illusory." *Id.* He states that the Court failed to deal with the specific responsibility of physicians and failed to adequately define the "permissible scope of health regulations after the first trimester." *Id.*

in pregnancy each interest becomes compelling. During the first trimester neither state interest is sufficiently compelling to outweigh the woman's decision to abort.<sup>18</sup> When the risks of abortion begin to exceed those of childbirth in the second trimester, the state may only impose abortion regulations which have a reasonable relationship to safeguarding maternal health.<sup>19</sup> However, the interest in protecting the fetus is not sufficiently compelling to prohibit abortion until at least the twenty-fourth week of pregnancy. At some point between the twenty-fourth and twenty-eighth week of pregnancy the state's interest in protecting the fetus becomes compelling,<sup>20</sup> and the state can then proscribe abortion except when it is necessary to preserve maternal life or health.<sup>21</sup>

In order to distinguish the concept of abortion from the concept of killing, which still remains socially repugnant, the Supreme Court

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<sup>18</sup> 410 U.S. at 163-65. Under the Court's definition, viability (the stage at which the fetus can live outside the uterus, DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1713 (25th ed. 1974)) occurs some six to twelve weeks after "quickening," "the first recognizable movement of the fetus *in utero*." 410 U.S. at 132. The Court concluded that the state's interest in protecting *nonviable* fetal life is not sufficiently compelling to outweigh a woman's decision to abort in the first trimester. *See id.* at 163-64.

The rationale behind the Court's selection of viability as the constitutionally critical issue is unclear, and Professor Ely suggests that on this point "the Court's defense seems to mistake a definition for a syllogism." Ely, *supra* note 18, at 924. Additionally, William J. Curran, Professor of Legal Medicine at Harvard University suggests that the Court may have erred in assuming that viability can be precisely defined "'as a scientifically and philosophically accepted point of demarcation in fetal development.'" Washington Post, Apr. 15, 1974, § A, at 14, col. 3.

<sup>19</sup> 410 U.S. at 163.

<sup>20</sup> *Id.* at 160.

<sup>21</sup> *Id.* at 163-64. The Court never explained why maternal health takes precedence over viable fetal life. Recognizing that there exists neither a statutory nor constitutional privilege to take one person's life in order to save one's own, Professor Ely finds this aspect of the Court's decision as controversial as its viability holding. Ely, *supra* note 18, at 921 n.19.

The Court's opinion that during the first trimester the state's interest in protecting maternal health is not sufficiently compelling to outweigh the woman's decision to abort is based upon national and international medical data indicating that mortality rates for women undergoing first trimester abortions are less than mortality rates in normal childbirth. 410 U.S. at 149, 163. *But see* Brief for Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology as Amicus Curiae at 32-59, *Roe v. Wade*, 410 U.S. 113 (1973); Hilgers, *The Medical Hazards of Legally Induced Abortion in ABORTION AND SOCIAL JUSTICE* 57-78 (T. Hilgers & D. Horan eds. 1972); Comment, *Expansion of the Right to Privacy Through the Fourteenth Amendment*, 19 CATHOLIC LAW. 36, 45 n.80 (1973).

Why the Court could find no state interest in protecting the fetus during the first trimester is unclear. Though the Court stated that it "need not resolve the difficult question of when life begins," 410 U.S. at 159, it proceeded to determine when it does *not* begin and held that only *after* the point of viability does the state's interest in protecting the fetus become compelling. The concept of viability is discussed at note 39 *infra*.

was forced to employ a "schizophrenic sort of subterfuge."<sup>22</sup> By the simple expedient of classifying the fetus as a nonperson, representing only the potentiality of human life, the Court determined that no rights are violated by its removal from the uterus.<sup>23</sup> If death results during removal, it is merely the termination of a potential life which is undeserving of fourteenth amendment protection.<sup>24</sup> One result of such delphic, albeit necessary rationalization, is what the *California Medical Journal* labels "a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra or extrauterine until death."<sup>25</sup>

The Court could have labeled abortion (as it did voting<sup>26</sup> and interstate travel<sup>27</sup>), a fundamental right. Instead, it preferred to rely on privacy as a right which, while not unqualified, is broad enough to encompass the abortion decision.<sup>28</sup> When couched in terms of privacy, abortion somehow becomes constitutionally permissible.<sup>29</sup> Although

<sup>22</sup> *A New Ethic For Medicine and Society*, 113 CAL. MED. No. 3 at 67, 68 (1970) [hereinafter cited as *A New Ethic*].

<sup>23</sup> 410 U.S. at 162. The *Roe* Court recognized the danger inherent in accepting the appellee's argument that the fetus is a person within the meaning of the fourteenth amendment. The appellant's case would have failed "for the fetus' right to life is then guaranteed specifically by the Amendment." *Id.* at 157. The Court's conclusion "that the word 'person' as used in the Fourteenth Amendment, does not include the unborn," *id.* at 158, resulted from three considerations. First, the appellees failed to cite a case in support of their proposition. *Id.* at 157. Second, the Court examined fifteen references to the word person in the Constitution and was not convinced that this word applied to prenatal beings. *Id.* Finally, the Court noted that legal abortion practices throughout the nineteenth century were more liberal than they are at present. *Id.* at 158.

<sup>24</sup> *See id.* at 159.

<sup>25</sup> *A New Ethic*, *supra* note 22, at 68. Obviously, the Court did not agree that such a consensus exists. Mr. Justice Blackmun opined that the Stoics supported the proposition that life did not begin before birth, and that a great number of persons in the Jewish and Protestant communities share the same opinion. 410 U.S. at 160.

<sup>26</sup> *Reynolds v. Sims*, 377 U.S. 533, 544 (1964).

<sup>27</sup> *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969).

<sup>28</sup> 410 U.S. at 154.

<sup>29</sup> Though a right of privacy is not directly mentioned in the Constitution, *id.* at 152, this right has emerged through judicial interpretation. The first major discussion of the need for a right of privacy appeared in Warren & Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890), and since that time there has been increasing acknowledgement both by judicial decision and legislative enactment that a citizen has certain rights regarding his or her privacy. *See Prosser, Privacy*, 48 CALIF. L. REV. 383, 389-407 (1960).

Beginning with the right to educate one's child, established in *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923), a growing number of marital, familial and sexual decisions have extended the parameters of the right of privacy. *See, e.g., Eisenstadt v. Baird*, 408 U.S. 438, 453 (1972) (right of unmarried persons to use contraceptives); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (right to interracial marriage); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (right of married persons to use contraceptives); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (right to procreate). *But cf.*

Justice Blackmun never explained *why* the right of privacy encompassed the decision to abort, he enumerated various conditions which would inure to the detriment of pregnant women if they were denied the opportunity to make this decision.

Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases . . . the additional difficulties and continuing stigma of unwed motherhood may be involved.<sup>30</sup>

While *Roe* succeeded in extending the right of personal privacy, it failed in its initial task of constitutionally resolving without predilection that which it recognized as a controversial issue.<sup>31</sup> Unlike the reasoning in *Griswold v. Connecticut*,<sup>32</sup> where the Court linked married persons' interests in contraception to specific Bill of Rights guarantees, no such effort was attempted in *Roe*.<sup>33</sup> However, since the right recognized in *Roe* was extended beyond the marital relationship, it is improbable that resort to the Bill of Rights could have maintained the elasticity of the Court's holding.<sup>34</sup>

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*Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding sterilization of insane persons). In view of this development it is not surprising that the right to abort has been recognized via the privacy route. See also *Hathaway v. Worcester City Hosp.*, 475 F.2d 701, 706 (1st Cir. 1973) (right to consensual sterilization), noted in 8 SUFFOLK U.L. REV. 390 (1974).

<sup>30</sup> 410 U.S. at 153. See also *id.* at 214 (Douglas, J., concurring), where Mr. Justice Douglas maintained that giving birth to a child may deprive a woman of her desired life style. For that matter a cruel and abusive spouse could produce the same effect. But it is unlikely that the Court would extend the parameters of the right of privacy to include the killing of one's husband or wife. See Ely, *supra* note 17, at 932, wherein the author acknowledges the seriousness of these detriments but opines that they have "nothing to do with privacy in the Bill of Rights sense or any other the Constitution suggests." *Id.* at 932. Additionally, Professor Ely correctly observes that these same detriments inhere with having an unwanted born child or aged parent around. *Id.* at 932 n.81.

<sup>31</sup> 410 U.S. at 116.

<sup>32</sup> 381 U.S. 479 (1965).

<sup>33</sup> See *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 75, 82 (1973). See also Ely, *supra* note 17, at 932, who suggests that the right recognized in *Roe* bears no relation to privacy in the Bill of Rights context; 410 U.S. at 221 (White, J., dissenting), where Mr. Justice White maintained, "I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant women . . . ."

<sup>34</sup> In *Griswold*, Justice Douglas related the marital relationship to political associations which are guarded by the penumbrae of the first amendment. *Id.* at 483. Additionally, he linked the intimacy of the marital boudoir to those interests protected by the third, fourth, fifth and ninth amendments. *Id.* at 482-86.

The result in *Roe* was necessarily achieved by a "marshaling of values"<sup>35</sup> and embodied a preference it sought to avoid. Its balancing of selected interests resulted in a value judgment in which a woman's interest in life and health unequivocally outweighed any interest the state might have in the continued existence of the fetus *in utero* and any interest the fetus might have in its own existence *in* or *ex utero*. This initial value judgment provided a firm basis for the Court's subsequent "role-allocation".<sup>36</sup> Women, not the state, were given ultimate authority to make the abortion decision.

### A. *Dispelling the Roe Myth*

While it may seem that the balance between benefits and harms differs from trimester to trimester during pregnancy,<sup>37</sup> it must be recognized that *Roe* is not a trimester-based decision and that the neatly-carved constitutional triptych is misleading.<sup>38</sup> Pregnancy was divided into two trimesters and "viability" (the stage at which the fetus is capable of living outside the womb).<sup>39</sup> If viability occurs be-

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<sup>35</sup> 410 U.S. at 222 (White, J., dissenting). Mr. Justice White labelled as a "marshaling of values" the Court's decision to value "the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries." *Id.* Mr. Justice White did not indicate whether or not he agreed with such "marshaling." However, the essence of his dissent is that he found nothing in the Constitution to support the Court's decision. *Id.* at 221. He would have preferred that the legislature, not the Court, resolve the abortion issue. *Id.* at 222.

<sup>36</sup> See Tribe, *supra* note 8, at 10.

<sup>37</sup> See 410 U.S. at 164, which reads as follows:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

<sup>38</sup> But see Tribe, *supra* note 8, at 10, wherein the author observes that *Roe* is a trimester-based decision.

<sup>39</sup> 410 U.S. at 160, 163. The problem encountered with the concept of viability is not what that term connotes but when it occurs. *Roe* first defined viability as that stage at which the fetus "is, potentially able to live outside the mother's womb, albeit with artificial aid." *Id.* at 160. Later in its opinion, the Court suggested that viability is that stage where the fetus "has the capability of *meaningful* life outside the mother's womb." *Id.* at 163 (emphasis added). Clearly, the second definition leaves much to be desired in terms of clarity, for we are left to ponder the epistemological question of what constitutes "meaningful life"?

Relying on J.W. WILLIAMS, *OBSTETRICS* 493 (14th ed. L. Hellman & J. Pritchard 1971) [hereinafter cited as WILLIAMS], Mr. Justice Blackmun placed viability at twenty-four



fore twenty-four weeks, it seems that the state has the authority to proscribe and regulate abortion in the second as well as the third trimester. However, for all practical purposes this authority is apocryphal.

Under *Roe*, abortion<sup>40</sup> is always permissible when a woman's life or health is at stake.<sup>41</sup> The Court never clearly articulated what it meant

to twenty-eight weeks. 410 U.S. at 160 n.60. However, WILLIAMS states that viability varies from twenty to twenty-eight weeks. WILLIAMS, *supra* at 493. See D. REID, K. RYAN, & K. BENIRSCHKE, PRINCIPLES AND MANAGEMENT OF HUMAN REPRODUCTION 255 (1972) [hereinafter cited as REID] (through medical advancement a fetus of 20 weeks gestation may soon have a greater chance of survival); STEDMAN'S MEDICAL DICTIONARY 1388 (22d ed. 1972) (fetus of 500 grams and 20 gestational weeks usually considered viable); TABER'S CYCLOPEDIA MEDICAL DICTIONARY A-6 (12th ed. 1973) (fetal weight of 500 grams connotes viability).

In Schlesinger & Alloway, *The Combined Effect of Birth Weight and Length of Gestation on Neonatal Mortality Among Single Premature Births*, 15 PEDIATRICS 698 (1955), a statistical analysis conducted by the authors in New York state, exclusive of New York City, for the years 1949-51, showed 622 live births with a gestational age of between twenty and twenty-three weeks and an 8.2% survival rate for these births.

In another study of 650,000 live births in New York City, where the gestational age was calculated from the initial date of the last menstrual period, the following data was compiled: 20.7% white and 21.7% nonwhite children survived the neonatal period when born between twenty to twenty-five weeks gestation. Horan, Gorby & Hilgers, *Abortion and the Supreme Court: Death Becomes a Way of Life*, in ABORTION AND SOCIAL JUSTICE 315 (T. Hilgers & D. Horan eds. 1972). In 1968 there were nationwide 968 live births reported under twenty weeks gestation and 18,414 live births reported between twenty and twenty-seven weeks gestation. Brief for Appellants at 22, *Markle v. Abele*, 411 U.S. 940 (1973), citing 1 VITAL STATISTICS OF THE UNITED STATES, U.S. Dept. of HEW, Pub. Health Service, Nat'l Center for Health Statistics, Table 1-43, § 1 — Natality, at 1-41 (1968). See also 1972 THE LANCET 1222-23; WILLIAMS, *supra* at 680.

<sup>40</sup> Abortion has been variously defined and, as will become evident, it is inappropriate to label the termination of pregnancy after viability an abortion. See, e.g., D. CAVERNAUGH & M. TALISMAN, *PREMATURITY AND THE OBSTETRICIAN* 4 (1969), where abortion is defined as "the expulsion or extraction of all (complete) or any part (incomplete) of the product of conception that weighs less than 500 g, alive or dead." See also J. GREENHILL, *OBSTETRICS* 265 (13th ed. 1965) ("interruption of pregnancy before the fetus is viable"); REID, *supra* note 39, at 254 ("termination of pregnancy before 20 weeks of gestation"); WILLIAMS, *supra* note 39, at 493 (termination of pregnancy when fetus weighs less than 500 grams); *A Statement on Abortion by One Hundred Professors of Obstetrics*, 112 AM. J. OB. & GYN. 992 (1972), where it is stated:

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

*Id.* at 993.

<sup>41</sup> 410 U.S. at 164. This is true despite the state's power to proscribe post-viability abortions. *Id.* at 163-64.

Notwithstanding its recognition that after viability the fetus "has the capability of meaningful life outside the mother's womb," *id.* at 163, and that after viability there is both "logical and biological justification" for state regulation protecting fetal life,

by "health,"<sup>42</sup> but it is a word which effectively transcends any authority which might have been given to the state to proscribe post-viability abortions. Though improbable, it is possible that the psychological and socio-economic conditions which affect health will not mature until the 280th day of gestation.<sup>43</sup> Thus, even at full term, women may choose abortion over regular delivery.<sup>44</sup> For this reason, it is imperative to understand the exact nature and limitations of the right which *Roe* bestowed upon pregnant women.

### B. *The Limits of Roe v. Wade*

*Roe v. Wade* extended a woman's right of personal privacy to include the right to make the abortion decision—a decision consistently referred to by Justices Blackmun and Stewart as one to "terminate pregnancy."<sup>45</sup> Because of the various "detriments" created by pregnancy, *Roe* now allows women to decide whether the alleged cause of those detriments will be removed from their wombs. That, however, is the extent of the power granted to women by *Roe*.

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*id.*, *Roe* placed a higher value on maternal life and health. For a discussion of the rationale behind this aspect of the Court's decision, see note 21 *supra*.

<sup>42</sup> In a concurring opinion, Mr. Chief Justice Burger implied that the term "health" should be employed in its broadest context. 410 U.S. at 207-08 (Burger, C.J., concurring). Indeed, the list of detriments affecting health stated in the majority opinion, see text accompanying note 30 *supra*, coupled with Mr. Justice Douglas' list of detriments affecting lifestyle, *e.g.*, "to abandon educational plans; to sustain loss of income; to forego the satisfaction of careers," 410 U.S. at 215 (Douglas, J., concurring), reinforces Mr. Chief Justice Burger's opinion.

<sup>43</sup> The duration of a normal pregnancy is generally about 280 days from the beginning of the last menstrual period. However, if the date of conception is known, and depending on the length of the menstrual cycle, the usual range of gestation is 266 to 270 days. D. CAVENAUGH & M. TALISMAN, *PREMATURITY AND THE OBSTETRICIAN* 6 (1969).

<sup>44</sup> Delivery is defined as the "[e]xpulsion of the child with placenta and membranes from the mother at birth." *TABER'S CYCLOPEDIA MEDICAL DICTIONARY* D-12 (12th ed. 1973). For all practical purposes the procedures for removal of a viable fetus during abortion are the same as the procedures used in natural childbirth. For example, the abortion procedure of hysterotomy is nothing more than a Caesarean section operation. *Id.* at H-88. A Caesarean section is defined as "delivery of the infant through incisions in the abdominal and uterine walls. Incision of the uterus (hysterotomy) is the essence of the operation . . ." *WILLIAMS, supra* note 39, at 1163.

Additionally, "the procedures for removal of a viable fetus typically present the same risks to the woman whether the fetus is saved or destroyed." Tribe, *supra* note 8, at 4 n.24. *But see* Boston Globe, July 25, 1974, at 5, cols. 2-3, wherein Dr. Philip Stubblefield, an obstetrician at Boston Hospital for Women and a Harvard faculty member, maintains that there is a procedural difference between a Caesarian section and an abortion by hysterotomy. The former operation involves saving a fetus presumed to be viable while the latter involves the removal of a fetus presumed not to be viable. Under Dr. Stubblefield's definition, a physician performing a hysterotomy abortion on a viable fetus would presume that it was not viable in order to differentiate between a Caesarian section and hysterotomy.

<sup>45</sup> *E.g.*, 410 U.S. at 129, 153, 170.

In *Roe* the Court conceded the legitimacy of the state's important interest in protecting potential human life,<sup>46</sup> but because the competing interest of the pregnant woman's right of personal privacy was involved,<sup>47</sup> the state's interest was subjected to a balancing test.<sup>48</sup> When a pregnant woman's decision to terminate pregnancy is juxtaposed with the state's legitimate interest in potential life, the latter interest does not become compelling until viability is reached.<sup>49</sup>

*Roe* did not mandate similar results where pregnant women have made a collateral decision, and the Court's holding thus becomes significant for what it did *not* say. It did not say that the right of privacy was broad enough to encompass a woman's decision to deliberately destroy or impair the fetus.

This observation may seem to create a distinction without a difference, but its significance becomes readily apparent if the fetus can be separated from the womb by a process which enables it to survive.<sup>50</sup> Though separation may be inextricably linked with destruction in the first trimester, statistics on live births following abortion disprove any theory that separation *always* causes destruction.<sup>51</sup> Thus, if this distinction is not made, *Roe* stands for the proposition that the right to privacy includes an absolute right to make the feticide decision. Certainly, such an interpretation is not mandated by the Court's holding.<sup>52</sup>

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<sup>46</sup> *Id.* at 162.

<sup>47</sup> *Id.* at 153.

<sup>48</sup> See notes 16-21 *supra* and accompanying text.

<sup>49</sup> See note 39 *supra*.

<sup>50</sup> For example, by a hysterotomy method. See note 44 *supra*.

<sup>51</sup> See Kerenyi, *Outpatient Intra-amniotic Injection of Hypertonic Saline*, 14 CLIN. OB. & GYN. 124, 137 (1971) (detailing accounts of two live births following abortion); Pakter, Harris, & Nelson, *Surveillance of the Abortion Program in New York City: Preliminary Report*, 14 CLIN. OB. & GYN. 267, 289-90 (1971) [hereinafter cited as Pakter] (26 live births after abortion reported). For additional reports of live births following saline and prostaglandin abortions, see *Symposium — A Report On Prostaglandins For Abortion*, CONTEMPORARY OB. & GYN. 83, 102 (Dec. 1973). Prostaglandin drugs induce abortion by provoking progesterone withdrawal which in turn converts a normal pregnant uterus into a reactive organ. *Id.* at 84. In a saline abortion, fluid is removed from the amniotic cavity and a hypertonic saline solution is injected transabdominally. The patient may subsequently be in labor up to seventy-two hours before the fetus is delivered. It is recommended that this method not be used before the sixteenth week of pregnancy. 14 CLIN. OB. & GYN. 23, 24 (1971). See also Brief for Appellants at 28, *Markle v. Abele*, 411 U.S. 940 (1973), citing BULLETIN ON ABORTION PROGRAM (Sept. 1972), New York City Dept. of Health, Health Services Admin. at 10.

<sup>52</sup> *But see* Tribe, *supra* note 8, at 4 & n.24. Although Tribe doubts that the Court intended to stamp its imprimatur on a feticide decision, he sees a possible justification for such decision if the mother's mental health requires it.

### III. ABORTION AND DESTRUCTION

#### A. *The Abortion Procedure Decision*

That the state's legitimate interest in potential life is affected by fetal destruction<sup>53</sup> admits of no question. When the fetus is destroyed during the abortion procedure, "potential life" never reaches its potential.<sup>54</sup> Yet, any discussion of the state's power to proscribe *in utero* destruction is entirely dependent upon the progress of birth technology.<sup>55</sup> Statistics on live births following abortion demonstrate that *some* fetuses can be removed from wombs by procedures which enable them to survive.<sup>56</sup> If birth technology is perfected to such a degree that *all* fetuses can be removed from wombs without being destroyed, a question now only speculative will become frighteningly real: Does the right of privacy established in *Roe* confer upon a pregnant woman the right to select which procedure will be employed in her abortion?<sup>57</sup>

*Roe* fashioned a right of privacy which exists beyond the penumbral grasp of the Bill of Rights. It broadened the right to *prevent*

<sup>53</sup> For the purposes of this Note, fetal destruction occurs when the fetus is killed during the abortion procedure.

<sup>54</sup> According to the *Roe* Court, "potential life" reaches its "potential" when it is capable of "meaningful life outside the mother's womb." 410 U.S. at 163.

<sup>55</sup> See *Human Fetuses Maintained by Artificial Placenta*, 7 OB.-GYN. OBSERVER 6 (Sept.-Oct. 1968).

<sup>56</sup> See R.F.R. GARDNER, ABORTION: THE PERSONAL DILEMMA 215-16 (1972), wherein the author, a British gynecologist discusses the procedure of abdominal hysterotomy and a Japanese method using rivanol in which the fetus is *always* born alive. Of the 195,823 abortions performed in New York during July 1971 through July 1972, approximately 0.4% (821) were done by the hysterotomy method. Horan, Gorby & Hilgers, *Abortion and the Supreme Court: Death Becomes a Way of Life*, in ABORTION AND SOCIAL JUSTICE 316 (T. Hilgers & D. Horan eds. 1972). See also note 51 *supra* for figures on live births following the saline and prostaglandin methods of abortion.

Two methods of abortion with practically no possibility of resulting in live birth are dilatation and curettage (scraping the fetus out of the uterus), and suction curettage (vacuum aspiration of the uterus). See Nathanson, *Suction Curettage for Early Abortion*, 14 CLIN. OB. & GYN. 99 (1971); Schaefer, *Technique of Dilatation and Curettage for Abortion*, 14 CLIN. OB. & GYN. 85 (1971).

<sup>57</sup> Some states have enacted legislation which effectively precludes women from asserting such a right. See, e.g., IND. ANN. STAT. § 10-108(3) (Burns Supp. 1973), providing that "[t]he saline method of abortion shall not be used"; NEB. REV. STAT. § 28-4148 (Supp. 1973), stating that the viability of the unborn child may not be terminated prior to, during, or following the abortion; UTAH CODE ANN. § 76-7-309 (Supp. 1973), which provides:

If an abortion is performed when the fetus is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, the medical procedure used must be that procedure which in the medical judgment of the physician will give such fetus the best chance of survival, and no medical procedure designed to kill or injure such fetus may be used.

See also LA. REV. STAT. § 14:87.1 (Supp. 1974), by which the act of killing a child during delivery is punishable by imprisonment at hard labor in the penitentiary for life.

pregnancy, which was recognized in *Griswold v. Connecticut*<sup>58</sup> and *Eisenstadt v. Baird*<sup>59</sup> to include the right to *terminate* pregnancy. The question then arises whether the abortion procedure decision is a logical extension of *Roe*, as that case was a logical extension of *Griswold* and *Eisenstadt*.

Essential to a response to this question is an understanding of why *Roe* granted women the right to decide whether or not to terminate pregnancy. Justice Blackmun opined that if the state denied women this choice, carrying a fetus might involve "medically diagnosable" harm and in other cases, the "stigma of unwed motherhood."<sup>60</sup> In addition, carrying an unwanted fetus might involve "distress" and "psychological harm."<sup>61</sup> However, this underlying rationale which supports a woman's right to make the *removal* decision, fails to support a right to decide about *destruction*, unless, of course, psychological harm is imposed upon the pregnant woman if she does not have the right to destroy.<sup>62</sup> Once the fetus is removed, pregnancy is terminated and the "harms," "stigmas," and "distresses," recognized in *Roe* are nonexistent. So long as the abortion is performed, it should logically make no difference how it is performed. Unless abortion procedure regulations would be unduly oppressive upon women by threatening their physical health, they should be considered no less a legitimate exercise of state police power than are regulations for the protection of fisheries, forests and wildlife.<sup>63</sup> The same principle that

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<sup>58</sup> 381 U.S. 479 (1965). In *Griswold* the petitioner, the Director of the Planned Parenthood League, was convicted under a Connecticut statute which prohibited one from aiding others in using contraceptives. Her conviction was reversed when the Supreme Court ruled that the criminal statute involved was unconstitutional. Writing for the majority, Justice Douglas based his opinion on the penumbral rights theory. He recognized that the Bill of Rights creates certain protected "zones of privacy" which include, *inter alia*, privacy in one's home. *Id.* at 484. Moreover, the enumerated rights of the Constitution have penumbras, *e.g.*, freedom of association, freedom of inquiry and those rights peripheral to the fourteenth amendment as exemplified by *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (parents' freedom of choice in educating children upheld), and its progeny. 381 U.S. at 482-85. Since the enumerated rights have "zones of privacy," then the nonenumerated penumbral rights are also entitled to this protective zone. *Id.* at 481-82. Justice Douglas recognized the marital association as a penumbral right, which was entitled to privacy. He concluded that the Connecticut statute which proscribed the use of contraceptives violated this right of marital privacy. *Id.* at 485-86.

<sup>59</sup> 405 U.S. 438 (1972). In *Eisenstadt* the Court extended the *Griswold* right of privacy to include unmarried persons.

<sup>60</sup> 410 U.S. at 153.

<sup>61</sup> *Id.*

<sup>62</sup> *Cf. Tribe, supra* note 8, at 4 n.24.

<sup>63</sup> *See, e.g., Lawton v. Steele*, 152 U.S. 133, 136, 138 (1893) (police power extends to everything essential to public health and welfare); *Ghenovich v. Noerenberg*, 346 F. Supp. 1286, 1291 (D. Alaska 1972) (state exercise of police power over fishing was its duty); *Le Clair v. Swift*, 76 F. Supp. 729, 733 (E.D. Wis. 1948) (state as trustee of

has sustained compulsory vaccination of adult citizens and sterilization of imbeciles<sup>64</sup> should at least be broad enough to cover prevention of fetal destruction.

### B. *State as Parens Patriae*

If and when birth technology is perfected to such a degree that all fetuses can be removed during abortion by procedures which enable them to survive, and they do survive, it will become necessary to determine who has a right to their custody and who has responsibility for their care. As a general rule parents have the right to custody of their children and the corresponding obligation to provide their children with basic necessities.<sup>65</sup> However, parental right to custody is not without limitation.<sup>66</sup> By virtue of its *parens patriae* jurisdiction, which imposes a duty on the state to protect disabled persons who have no guardian,<sup>67</sup> the state may curtail parental freedom if the child's welfare is at stake.<sup>68</sup> Formerly, *parens patriae* jurisdiction in-

people has duty and right to conserve fish and wildlife). See also *Nebbia v. New York*, 291 U.S. 502, 524 (1933), for a discussion of the state's inherent police power.

<sup>64</sup> In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Court upheld compulsory vaccination for smallpox, and in *Buck v. Bell*, 274 U.S. 200 (1927), it upheld the sterilization of imbeciles. In each instance, the practices were deemed necessary for the public welfare.

<sup>65</sup> These basic necessities include food, clothing, shelter, medical care and education. *Commonwealth v. Brasher*, 359 Mass. 550, 556-57, 270 N.E.2d 389, 394 (1971); *Ex parte Crouse*, 4 Pa. 9, 11 (1838); *Commonwealth v. Gilmore*, 97 Pa. Super. 303, 308-10 (1929). In short, parents have an absolute duty to provide for their offspring. Since this duty is a public obligation to which criminal and civil sanctions attach, it can be avoided only under extraordinary circumstances. S. KATZ, *WHEN PARENTS FAIL* 10 (1972).

<sup>66</sup> The origin of parental right to custody is discussed fully in S. KATZ, *WHEN PARENTS FAIL* 3-13 (1972).

<sup>67</sup> *Hoener v. Bertinato*, 67 N.J. Super. 517, 522, 171 A.2d 140, 142 (1961). In this case the court awarded custody of the defendants' unborn child to the welfare department in order to insure that the child would receive a necessary blood transfusion after birth. The parents, who were members of the Jehovah Witness sect, had refused to consent to the necessary blood transfusion on religious grounds. Although the court acknowledged the defendants' first amendment right to practice religion freely, it also recognized the importance of protecting the lives and health of children and held that the word, "child" in New Jersey's Neglect Statute, included the unborn child of the defendants. *Id.* at 524, 171 A.2d at 144. The court further held that the unborn child is entitled to legal protection even if it has not achieved the state of viability. *Id.*

Early recognition of the doctrine of *parens patriae* is found in *Eyre v. Shaftsbury*, 2 P. Wms. 103, 24 Eng. Rep. 659 (1722).

<sup>68</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). Traditionally, the courts have exercised *parens patriae* jurisdiction over the following categories of children: 1) children who are accused of violating any federal, state or municipal law; 2) children who are considered so far beyond parental control that their well-being or that of others is endangered; 3) children whose parents have abandoned them or who have allegedly neglected to provide them with support, education or medical care necessary to their

cluded unborn children.<sup>69</sup> However, the holding in *Roe* necessarily renders the viability of this proposition somewhat nebulous.

A pregnant woman's decision to abort involves, *inter alia*, one desideratum—she does not want to become the parent of the fetus within her.<sup>70</sup> It is more probable than not, therefore, that the abortion decision is coupled with an at least implicit renunciation of parental rights and relinquishment of parental responsibilities. Despite the awesome duties imposed upon parents by the state,<sup>71</sup> it should be emphasized that a child who survives abortion need not force a woman into parenthood. The same considerations that support woman's right to decide whether to terminate an *unwanted pregnancy* are broad enough to support her decision to terminate *unwanted parenthood*.<sup>72</sup>

Unless a woman decides that she wants parenthood,<sup>73</sup> the living, aborted, unwanted child is without protection and should properly come within the *parens patriae* jurisdiction of the state.<sup>74</sup> At the very least it would be grossly inequitable for any state to arbitrarily exclude aborted children merely because of the manner in which they were born. Thus, if there is any vitality to the doctrine of *parens patriae*, it should at least stand for the proposition that all children come under its protection.<sup>75</sup>

### III. FETAL RESEARCH

The growing use of fetal life in medical and scientific experimentation has precipitated legal, medical and ethical dilemmas which are

welfare; 4) children whose welfare is endangered by their environment. Campbell, *The Neglected Child*, 4 SUFFOLK U.L. REV. 631, 633-34 n.9 (1970).

<sup>69</sup> See, e.g., *Hoener v. Bertinato*, 67 N.J. Super. 517, 171 A.2d 140 (1961); *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964).

<sup>70</sup> *But cf.* 38 Fed. Reg. 31742 (1973), HEW Draft Working Document regarding the protection of human subjects, wherein the draftsmen recognize that the pregnant woman who consents to abortion may still have an interest in the fetus she carries.

<sup>71</sup> See text accompanying note 65 *supra*.

<sup>72</sup> See text accompanying note 30 *supra*.

<sup>73</sup> This decision should be open to pregnant women before and after abortion. *But see, e.g.*, UTAH CODE ANN. § 76-7-311 (Supp. 1973), which mandates that children surviving abortions become wards of the state; the mother and the father who consented to the abortion have no parental rights. See also S.D. CODE ANN. § 34-23A-18 (Supp. 1974), which makes the circumstances of an abortion resulting in a live birth material evidence in a proceeding to terminate parental rights.

<sup>74</sup> See note 68 *supra* and accompanying text; IND. ANN. STAT. § 10-133(C) (Burns Supp. 1973), providing that if the mother and father have denied in writing any desire to keep the child born live from an abortion, such child shall become a ward of the welfare department of the county. See also *id.* § 113(b) (children born live automatically issued birth certificate).

<sup>75</sup> See text accompanying notes 144-48 *infra*.

yet to be resolved.<sup>76</sup> Fetal research was instrumental in producing polio vaccine and could prove useful in conquering viral disease, cancer, birth defects and mental retardation.<sup>77</sup> Proponents charge that attempts to prohibit such research jeopardize the health and well-being of future generations.<sup>78</sup> Opponents reject the utility theory, the salient point of their objection being that medical progress should not come at the expense of the living human fetus, whether it is inside or outside the uterus.<sup>79</sup>

Though fetal research is not a *Roe* phenomenon, controversy surrounding it has surfaced in the wake of that decision. Abortion is not at issue, but it is abortion which produces the embryos and fetuses who are the *sine qua non* of fetal research. Since the decision in *Roe v. Wade*, intrauterine and extrauterine life each enjoy a different status under the law.<sup>80</sup> Thus, in any discussion of fetal research a distinction must be made between *in utero* and *ex utero* experimentation. Both concepts will be discussed *seriatim*.

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<sup>76</sup> See, e.g., Goldstein, *Fetal Research in the Balance*, 10 TRIAL 153 (July-Aug. 1974) [hereinafter cited as Goldstein]; Randall, *Fetal Studies Challenged*, Washington Star News, July 19, 1974, § A, at 1, col. 1; 15 MED. WORLD NEWS, Feb. 8, 1974, at 57; 14 MED. WORLD NEWS, Oct. 5, 1973, at 32; NEWSWEEK, June 24, 1974, at 74.

<sup>77</sup> Behrman, *The Importance of Fetal Research*, N.Y. Times, June 9, 1974, § IV, at 17 col. 2; Dukes & Czapek, *Regulations and Legislation Concerning Abortus Research*, 229 J.A.M.A. 1303 (1974); Goldstein, *supra* note 76; NEWSWEEK, June 24, 1974, at 74.

<sup>78</sup> Behrman, *The Importance of Fetal Research*, N.Y. Times, June 9, 1974, § E, at 17, col. 2. The author lists two medical achievements made possible by research on the human fetus and the newborn: amniocentesis (*see* notes 95-97 *infra*) and the development of the Rh-blood group incompatibility test. He predicts that progress in the following areas will be hindered if fetal research is restricted: prevention of premature birth and brain injury from asphyxia occurring during labor; the prevention and treatment of coronary adult heart disease; and the prevention and treatment of certain disorders of the central system.

It has also been charged that a ban on fetal research will threaten the supply of polio vaccine which is prepared from human fetal diploid cells or monkey kidney cells. Day, *Pediatricians Fear Ban on Fetal Research*, 15 Med. Tribune, June 5, 1974, at 1, col. 2.

<sup>79</sup> See remarks of Dr. Andre Hellegers, a professor of obstetrics at Georgetown University and director of its Kennedy Institute for the Study of Human Reproduction and Bioethics. Cohn, *Scientists and Fetus Research*, Washington Post, Apr. 15, 1973, § A, at 6, col. 5.

Dr. Mildred F. Jefferson fears the abuses of utilitarianism which will result from adherence to the premise that what is useful is good. Additionally, she believes that it is medically unethical to experiment on the live fetus because it cannot give informed consent, and a mother is then deprived of her right to change her mind about abortion at the last minute. Interview with Dr. Mildred F. Jefferson, Assistant Clinical Professor of Surgery at Boston University Medical School, in Boston, Aug. 9, 1974.

<sup>80</sup> A fetus *in utero* is not considered a person under the fourteenth amendment, and thus is not entitled to fourteenth amendment protection. 410 U.S. at 158-59. However, when the fetus is born, he or she becomes a citizen and is then entitled to all the corresponding rights and privileges. *See* note 141 *infra*.



### A. In Utero *Experimentation*

Unlike postnatal experimentation, prenatal experimentation is neither legitimized through the ritual of obtaining informed consent from the participant, nor generally governed by any code of ethics.<sup>81</sup> For obvious reasons the fetus cannot consent to experimentation on itself, and so it is the pregnant woman who gives consent. If it is recognized that some type of coercion is influential in any investigator-subject transaction, a complicated epistemological question inheres—how educated, how voluntary, how informed is informed consent?<sup>82</sup> Moreover, in view of the state's legitimate interest in potential human life, recognized in *Roe*,<sup>83</sup> and the state's interest in the health of future generations, recognized in *Buck v. Bell*,<sup>84</sup> it is

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<sup>81</sup> See Ayd, *Fetology: Medical and Ethical Implications of Intervention In The Prenatal Period*, 169 ANNALS OF THE NEW YORK ACADEMY OF SCIENCES 376, 377 (1970). The Department of Health, Education and Welfare, in conjunction with the National Institute of Health, has appointed a special study group to review policies and procedures for the protection of human subjects involved in human experimentation, in particular, children, prisoners and the institutionalized mentally infirm. This study group has completed a draft working document which includes a comprehensive definition of informed consent:

K. *Informed consent* has two elements: comprehension of adequate information and autonomy of consent. Consent is a continuing process. The person giving consent must be informed fully of the nature and purpose of the research and of the procedures to be used, including identification of those procedures which are experimental, the possible attendant short or long term risks and discomforts, the anticipated benefits to himself and/or others, any alternative methods of treatment, expected duration of the study, and of his or her freedom to ask any questions and to withdraw at any time, should the person wish to do so. There must also be written evidence of the process used for obtaining informed consent, including grounds for belief that the subject has understood the information given and has sufficient maturity and mental capacity to make such choices and formulate the requisite judgment to consent. In addition, the person must have sufficient autonomy to choose, without duress, whether or not to participate. Both the comprehension of information and the autonomy of consent are necessary elements; to the extent that either of these is in doubt, the adequacy of informed consent may be in doubt.

38 Fed. Reg. 31740 (1973). See also notes 149-55 *infra* and accompanying text.

<sup>82</sup> See Ingelfinger, *Informed But Uneducated Consent*, 287 N.E.J. OF MED. 465 (1972), wherein the author states that coercion inheres when volunteers are induced to participate in experiments "by hopes of obtaining better grades, earlier parole, more substantial egos, or just mundane cash." *Id.* at 466.

Ingelfinger charges that under present research conditions, informed consent is not educated consent. "When a man or woman agrees to act as an experimental subject . . . his or her consent is marked by neither adequate understanding nor total freedom of choice." *Id.* at 466.

<sup>83</sup> 410 U.S. at 159, 163.

<sup>84</sup> 274 U.S. 200 (1927). In *Buck*, the Court ruled that the state could forcibly sterilize individuals who were found to be genetically mentally defective and probably capable of passing this mental defect on to another generation. *Id.* at 205-06. Despite

questionable whether a pregnant woman's consent sufficiently legitimizes nontherapeutic prenatal experimentation on the fetus.

### 1. *Drugs*

When experimentation involves injecting new drugs into the fetus via the pregnant woman,<sup>85</sup> both the investigator and the woman may be informed as to the nature of the proceeding, but no one knows with certainty how the drug will affect the fetus. Thus the possibility remains that because of the harmful effects of the drug, *Roe's* "potential life" will never achieve "meaningful" life outside the womb.<sup>86</sup> Because of this possibility, it is highly unlikely that any life-endangering experiments would be conducted upon a wanted fetus. Attitudes differ, however, when pregnant women have made the abortion decision.<sup>87</sup> According to one researcher, Dr. Leonard Berman of Boston City Hospital, "[i]f an abortion is the termination of pregnancy to the detriment of the fetus, then what does it matter what is done to it before abortion?"<sup>88</sup> Dr. Andre Hellegers, Director of the Kennedy Institute for Study of Human Reproduction and Ethics, has analogized this attitude to the Nazi approach: "[I]f it's going to die you might as well use it."<sup>89</sup>

Assuming the validity of Berman's premise, it makes no practical difference what happens to a fetus before an abortion. Under *Roe*, the fetus is a nonperson, representing only potential human life.<sup>90</sup> It has

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the seemingly oppressive nature of the sterilization statute, the Court held that the statute was a legitimate exercise of state police power and was reasonably necessary to protect the mental health of future generations. *Id.* at 203, 207. However, the oppressive nature of the sterilization procedure was perhaps ameliorated because of the procedural safeguard of a hearing requirement. *Id.* at 206-07.

For an enlightening discussion of where *Buck* may ultimately lead, see Kindregan, *State Power Over Human Fertility And Individual Liberty*, 23 HASTINGS L.J. 1401 (1972).

<sup>85</sup> See, e.g., Nyhan, *The Influence of Drugs*, in PREMATURETY AND THE OBSTETRICIAN, 312-27 (D. Cavenagh & M. Talisman eds. 1969); Vaheri, *Isolation of Attenuated Rubella-Vaccine From Human Products of Conception and Uterine Cervix*, 286 N.E.J. MED. 1071 (1972); 14 MED. WORLD NEWS, Oct. 5, 1973, at 36.

<sup>86</sup> Cf. Eriksson, Catz & Yaffe, *Drugs and Pregnancy*, 16 CLIN. OB. & GYN. 199, 213-23 (1973).

<sup>87</sup> E.g., Philipson, Sabath & Charles, *Transplacental Passage of Erythromycin and Clindamycin*, in 288 N.E.J. MED. 1219 (1973) [hereinafter cited as Philipson]. The authors report on their experimentation with aborted fetuses before and after abortion. One of the drugs administered to the mothers for the purpose of seeing how much would be absorbed by the fetus was erythromycin. *Id.* at 1219. The Food and Drug Administration has now issued a warning to all physicians regarding the toxicity of this drug. Use of erythromycin involves a definite risk of liver toxicity and jaundice. See also Goldstein, *supra* note 76.

<sup>88</sup> Harvard Crimson, May 8, 1974, at 1, col. 2.

<sup>89</sup> Boston Phoenix, Apr. 24, 1973, at 12, col. 1.

<sup>90</sup> 410 U.S. at 158, 162.

no legal personality and thus is not entitled to fourteenth amendment protection.<sup>91</sup> Any property, tort or miscellaneous rights it might possess are contingent upon livebirth.<sup>92</sup> However, Berman's premise is faulty. Abortion is the termination of pregnancy, but if it is performed after viability, it does not necessarily have to be detrimental to the fetus.<sup>93</sup> Moreover, it would be a non sequitur to conclude that because the fetus has no right to legal life, it therefore has no right to be free from experimentation.

Because the state has a legitimate interest in the fetus *qua* potential life, it does make a difference that harmful drugs are injected into about-to-be-aborted fetuses, particularly viable fetuses. When viability occurs, the distinction between actual human life and potential human life depends solely upon whether the fetus remains *in utero*.

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<sup>91</sup> *Id.* at 158-59. For the rationale as to why fetuses have no legal personality, see note 23 *supra*. However, it is interesting to note that Mr. Justice Douglas, who agreed with the majority in denying legal personality to the unborn fetus, has a different opinion regarding inanimate objects. In his dissent in *Sierra Club v. Morton*, 405 U.S. 727 (1972), while addressing himself to the issue of standing, he argued that since ships and corporations have legal personalities, so too should valleys, rivers, beaches, and even air, through people with meaningful relations thereto. *Id.* at 742 (Douglas, J., dissenting).

<sup>92</sup> 410 U.S. at 162. *But see* *Chrisafogeoris v. Brandenburg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973), a post-*Roe* case in which the Supreme Court of Illinois held that a viable unborn fetus is a person within the meaning of that state's Wrongful Death Act, notwithstanding the fact that the baby boy in question was born dead. The plaintiff in this case, while in her thirty-sixth week of pregnancy, was struck by an automobile driven by the defendant. It was determined that her unborn infant died from injuries sustained by the plaintiff when she was hit. Since the court found that the unborn eight month old fetus was viable at the time of the injury, *id.* at 372, 304 N.E.2d at 90, the plaintiff-mother was allowed to recover for the wrongful death of her child born dead as a result of injuries negligently inflicted upon him while *in utero*. *Id.* at 374, 304 N.E.2d at 91; *accord*, *Libbee v. Permanente Clinic*, \_\_\_ Ore. \_\_\_, 518 P.2d 636, 637, 640 (1974), *rehearing denied*, \_\_\_ Ore. \_\_\_, 520 P.2d 361 (1974). For a collection of pre-*Roe* cases which allowed an action for damages for the wrongful death of a viable fetus born dead, see Annot., 15 A.L.R.3d 992 (1967). See generally Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 354-360 (1971). Since the decision in *Roe*, seven district courts have held that the word, "child" in the context of the Social Security Act, 42 U.S.C. § 606(a) (1970) includes the unborn child, and thus a state policy which withholds Aid to Families with Dependent Children benefits from pregnant women until the birth of their children is invalid under the supremacy clause. *Wisdom v. Norton*, 372 F. Supp. 1190, 1192 (D. Conn. 1974); *Carver v. Hooker*, 369 F. Supp. 204, 215 (D.N.H. 1973); *Stuart v. Canary*, 367 F. Supp. 1343, 1347 (W.D. Ohio 1973); *Green v. Stanton*, 364 F. Supp. 123, 126 (W.D. Ind. 1973); *Harris v. Mississippi State Dept. of Pub. Welfare*, 363 F. Supp. 1243, 1296-97 (N.D. Miss. 1973); *Doe v. Lukhard*, 363 F. Supp. 823, 828-29 (E.D. Va. 1973); *Alcala v. Burns*, 362 F. Supp. 180, 184 (S.D. Iowa 1973). *But see* *Mixon v. Keller*, 372 F. Supp. 51, 54 (N.D. Fla. 1974) and *Parks v. Harden*, 354 F. Supp. 620, 623-24 (N.D. Ga. 1973), wherein state policy decisions which excluded unborn children from such benefits were sustained.

<sup>93</sup> See *Tribe*, *supra* note 8, at 4 n.24.

Therefore, whether the state has the power to prohibit *in utero* experimentation does not or should not depend upon whether the fetus has any constitutionally protected rights. As aptly noted by John Hart Ely:

It has never been held or even asserted that the state interest needed to justify forcing a person to refrain from an activity, *whether or not that activity is constitutionally protected*, must implicate either the life or the constitutional rights of another person. Dogs are not "persons in the whole sense," nor have they constitutional rights, but that does not mean that the state cannot prohibit killing them . . . .<sup>94</sup>

## 2. Amniocentesis

Another form of experimentation, of particular significance in light of *Roe*, is the procedure of amniocentesis, which even when performed under ideal conditions can be hazardous to both mother and fetus.<sup>95</sup> In this procedure the amniotic sac surrounding the fetus is punctured and amniotic fluid is withdrawn.<sup>96</sup> By cytological and biochemical examination of this fluid, prenatal diagnosis of certain inherited disorders is possible.<sup>97</sup> If diagnosis is available, physicians have time to prepare the necessary therapy for the fetus. However, when accurate diagnosis is in doubt or when no therapy exists, abortion is the suggested alternative to a "defective" child.<sup>98</sup>

The growing use of amniocentesis as a procedure, the results of which will determine whether or not abortion should be performed, mandates the need for a clear and precise definition from the Supreme Court on what "health" really means.<sup>99</sup> If amniocentesis, followed by abortion, is performed prior to viability, *Roe* acknowledges the woman's desire not to bear a defective child as a value outweighing any interest the state might have in the continued *in utero* existence of this potential, albeit defective, life. Difficulty arises, however, when amniocentesis is performed subsequent to viability, that is,

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<sup>94</sup> Ely, *supra* note 17, at 926 (emphasis original).

<sup>95</sup> Ayd, *supra* note 81, at 378.

<sup>96</sup> TABER'S CYCLOPEDIA MEDICAL DICTIONARY A-64 (12th ed. 1973).

<sup>97</sup> Fuchs, *Genetic Information From Amniotic Fluid Constituents*, 9 CLIN. OB. & GYN. 565, 571-72 (1966); Jacobson & Barter, *Intrauterine Diagnosis and Management of Genetic Defects*, 99 AMER. J. OB. & GYN. 796, 804 (1967); Nadler, *Role of Amniocentesis in the Intrauterine Detection of Genetic Disorders*, 282 N.E.J. MED. 596 (1970). For a discussion of the complications and possible dangers to mother and fetus arising out of this procedure, see Queenan, *Role of Rho (D) Immune Globulin in Induced Abortion*, 14 CLIN. OB. & GYN. 235, 240 (1971); Rajan, *Amniotic Fluid Assays In High Risk Pregnancy*, 16 CLIN OB. & GYN. 313, 324 (1973).

<sup>98</sup> See Levin, Oxman, Moore, Daniels & Scher, *Diagnosis of Congenital Rubella In Utero*, 290 N.E.J. MED. 1187, 1188 (1974); Randall, *Fetal Studies Challenged*, Washington Star News, July 19, 1974, § F, at 1, col. 1.

<sup>99</sup> See note 42 *supra*.

when the state's interest in potential life has reached the compelling point.<sup>100</sup> At that point *Roe* permits the state to proscribe abortion "except when it is necessary to preserve the life or health of the mother."<sup>101</sup> Not wanting a child is insufficient justification for a *Roe* post-viability abortion.<sup>102</sup> Unless the knowledge that the fetus will be born in some way defective creates a *Roe* "health" reason, the state can prohibit post-viability abortions of defective children. Thus, the logical and simple course for women desirous of removing viable, defective fetuses from their wombs, is to transform the unwanted, defective child into a health problem.<sup>103</sup> For example, women could argue that the very thought of carrying a genetically defective child causes them mental distress.

## B. Ex Utero Experimentation

### 1. Dead Aborted Fetuses

*Ex utero* experimentation with dead fetuses is somewhat analogous to ante mortum donation of body tissue or organs which is now governed by the *Uniform Anatomical Gift Act*, which has been enacted in forty-eight states and the District of Columbia.<sup>104</sup> Though much

<sup>100</sup> 410 U.S. at 163.

<sup>101</sup> *Id.* at 164.

<sup>102</sup> *See id.* at 163-65. However, as a practical matter both pre- and post-viability abortions are performed precisely because the mother does not want the child. The medical indications which formerly might warrant abortion, *i.e.*, toxemia of pregnancy, diabetes, high blood pressure, pulmonary tuberculosis, acute rheumatic fever and congenital heart defects, have greatly decreased with modern methods of treatment. Decker, *Medical Indications for Therapeutic Abortion: An Obstetricians View*, 50 MINN. MED. 29, 30 (1967). *See also* Mecklenburg, *The Indications for Induced Abortion: A Physician's Perspective*, in ABORTION AND SOCIAL JUSTICE 37-48 (T. Hilgers & D. Horan eds. 1972).

<sup>103</sup> At this point it seems that post-viability abortion becomes indistinguishable from homicide, infanticide or feticide. Unless "quality-of-life" jurisprudence fully displaces the traditional western ethic of "value-of-life" jurisprudence, it may well be a nonjustifiable homicide, infanticide or feticide action. *See* note 161 *infra* for a discussion of the difference between a quality-of-life and value-of-life ethic.

<sup>104</sup> ALA. CODE tit. 22, § 184(4) (Cum. Supp. 1973); ALASKA STAT. § 13.50.010 (1972); ARIZ. REV. STAT. ANN. § 36-841 (Supp. 1973); ARK. STAT. ANN. § 82-410.4 (Cum. Supp. 1974); CAL. HEALTH & SAFETY CODE § 7150 (Deering Cum. Supp. 1973); COLO. REV. STAT. ANN. § 91-9-1 (Supp. 1969); CONN. GEN. STAT. ANN. § 19-139a (1969); DEL. CODE ANN. tit. 24, § 1780 (Cum. Supp. 1970); D.C. CODE ANN. § 2-271 (1973); FLA. STAT. ANN. § 736.20 (Cum. Supp. 1973); GA. CODE ANN. § 48-401 (1974); HAWAII REV. STAT. § 327-1 (Supp. 1973); IDAHO CODE § 39-3401 (Supp. 1973); ILL. REV. STAT. ch. 3, § 551 (1973); IND. ANN. STAT. 1 29-2-16-1 (Burns 1972); IOWA CODE ANN. § 142A.1 (Supp. 1974); KAN. STAT. ANN. § 65-3209 (1972); KY. REV. STAT. ANN. § 311.185 (1972); ME. REV. STAT. ANN. tit. 22, § 2901 (Cum. Supp. 1974); MD. ANN. CODE art. 43, § 140 (1971); MASS. GEN. LAWS ANN. ch. 113, § 7 (Cum. Supp. 1974); MICH. COMP. LAWS ANN. § 328.261 (Supp. 1974); MINN. STAT. ANN. § 525.921 (Cum. Supp. 1974); MISS. CODE ANN. § 49-39-1 (1973); MO. ANN. STAT. § 194.210 (Vernon 1972); MONT. REV. CODES ANN. §

could be done to render the Act more lucid,<sup>105</sup> it is arguable that *ex utero* experimentation with dead fetuses comes within its purview. Fetuses are precluded from donating but not from being donated.<sup>106</sup> Only "actual notice of contrary indications by the decedent," will prevent execution of the gift.<sup>107</sup> Clearly, fetuses are incapable of giving notice, actual, apparent, express or implied. Thus, it would appear at first blush that the Act is one solution to whatever legal questions inhere with *ex utero* experimentation.

Closer analysis, however, suggests the contrary conclusion. The primary purpose of the Act was to facilitate transplantation, not experimentation.<sup>108</sup> Additionally, since *ex utero* experimentation is

69-2315 (1970); NEB. REV. STAT. § 71-4801 (1971); NEV. REV. STAT. § 451.500 (1973); N.H. REV. STAT. ANN. § 291-A:1 (Supp. 1973); N.J. STAT. ANN. § 26:6-57 (Supp. 1974); N.M. STAT. ANN. § 12-11-6 (Supp. 1973); N.Y. PUB. HEALTH LAW § 4300 (McKinney 1971); N.C. GEN. STAT. § 90-220.1 (Supp. 1973); N.D. CENT. CODE § 23-06.1-01 (1970); OHIO REV. CODE ANN. § 2108.01 (Baldwin 1971); OKLA. STAT. ANN. tit. 63, § 2201 (1971); ORE. REV. STAT. § 97.250 (1974); PA. STAT. ANN. tit. 20, § 8601 (Spec. Pamphlet 1972); R.I. GEN. LAWS ANN. § 23-47-1 (Supp. 1973); S.C. CODE ANN. § 32-711 (Cum. Supp. 1973); S.D. COMPILED LAWS ANN. § 34-26-20 (1972); TENN. CODE ANN. § 53-4201 (Cum. Supp. 1974); TEX. REV. CIV. STAT. art. 4590-2 (Cum. Supp. 1974); UTAH CODE ANN. § 26-26-1 (Supp. 1973); VT. STAT. ANN. tit. 18, § 5231 (Cum. Supp. 1974); VA. CODE ANN. § 32.364.3 (1973); WASH. REV. CODE ANN. 1 § 68-08.500 (Supp. 1972); W. VA. CODE ANN. § 16-19-1 (1972); WIS. STAT. ANN. § 155.06 (Supp. 1974); WYO. STAT. ANN. § 35-221.1 (Cum. Supp. 1973).

<sup>105</sup> See Groll & Kerwin, *The Uniform Anatomical Gift Act: Is the Right to a Decent Burial Obsolete?*, 2 LOYOLA U.L.J. 275, 290-300 (1971) [hereinafter cited as Groll & Kerwin], for an enlightening discussion of the problems caused by lack of clarity in the Act, e.g., failure to provide a standard by which the donor's soundness of mind can be established, *id.* at 292; conflict with Mortmain Statutes, *id.* at 293; failure to require that donors other than the decedent possess sound mind, *id.* at 295; difficulty in preventing an anatomical gift, *id.* at 295-97.

<sup>106</sup> Section 2(a) of the Act states who may execute an anatomical gift.

Any individual of sound mind and 18 years of age or more may give all or any part of his body for any purposes specified in Section 3, the gift to take effect upon death.

However Section 2(b) provides that when "persons in prior classes are not available at the time of death," either the spouse, an adult son or daughter, either parent, an adult brother or sister, a guardian of the person of the decedent at the time of his death, or any other person authorized or under obligation to dispose of the body may give all or any part of the decedent's body for medical use. The word "decedent" includes a stillborn infant or fetus. *Id.* § 1(b).

<sup>107</sup> *Id.* § 2(b).

<sup>108</sup> See Groll & Kerwin, *supra* note 105, at 290-91; Richards, *Medical-Legal Problems of Organ Transplantation*, 21 HASTINGS L.J. 77, 95 (1969). There is indeed a difference between experimentation and transplantation. Hellegers, *Using Fetus After Abortion*, Ob. Gyn. News, May 15, 1974, at 38, col. 1. Dr. Hellegers distinguishes between abortion, experimentation and transplantation ethics. In response to those who would oppose transplanting thymus from an aborted fetus to a newborn on the grounds that no systematic profit should be derived from a systematic, albeit, justified evil, Dr. Hellegers maintains that the situation is analogous to using a murder victim's kidneys for transplantation. Certainly such action is in no way an approval of the murder. *Id.*

often performed in conjunction with *in utero* experimentation and is adjunctive to abortion, it is really *sui generis*.<sup>109</sup> Five jurisdictions which have enacted the Act treat *ex utero* experimentation with dead aborted fetuses as outside the purview of the Act: Two specifically prohibit it and three allow it with maternal consent.<sup>110</sup>

However, consent is the critical issue where aborted fetuses are concerned. Under the Act, next of kin are permitted to consent to the ante mortum donation of their relatives' bodies,<sup>111</sup> presumably because they would have the interests and best known wishes of the deceased at heart.<sup>112</sup> But the more complicated question, debated in the United States Senate, is—who has the interests of the dead aborted fetus at heart?<sup>113</sup> Even more important is the question of whether the dead aborted fetus has any legitimate interests at all.

Logically, the proper party to consent to the donation of the aborted fetus should be the person or authority who has custody of it.<sup>114</sup> However, the question of custody poses a dimensionless inquiry. Does the aborted dead fetus belong to the state, thereby vesting the state with authority to consent to experimentation upon it? In Massachusetts, the courts have the statutory authority to order that the bodies of executed murderers be delivered to medical schools for dissection.<sup>115</sup> Query whether such authority should be extended to include the bodies of aborted fetuses? Should the natural mother who has exercised her legal right to consent to abortion be granted the additional right to donate to medicine that which is removed from her body after an abortion? When this question was raised in the United States Senate, Senator James Buckley of New York maintained:

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<sup>109</sup> One type of reported experimentation involves injection of drugs into the fetus before an elective abortion. After being aborted the fetus is dissected, its tissue is homogenized and scientists are then able to study the effects of the drug. *See, e.g.,* Philipson, *supra* note 87.

<sup>110</sup> For statutes which completely prohibit *ex utero* experimentation, *see* ILL. REV. STAT. ch. 38, § 81-11 (Supp. 1974) (pathological examination permitted); IND. ANN. STAT. § 10-112 (Burns Supp. 1973) (also permits pathological examination). Massachusetts, South Dakota and Vermont allow *ex utero* experimentation with dead fetuses. MASS. GEN. LAWS ANN. ch. 112, § 12J (Supp. 1974) (need mother's consent); S.D. COMPILED LAWS ANN. § 34-23A-17 (Supp. 1974) (need mother's consent); VT. STAT. ANN. tit. 18, § 5224(a) (Supp. 1974) (consent of one parent required).

<sup>111</sup> UNIFORM ANATOMICAL GIFT ACT § 2(b).

<sup>112</sup> *See Hellegers, supra* note 108, at 39.

<sup>113</sup> *See* 119 CONG. REC. 16,347-48 (daily ed. Sept. 11, 1973) (remarks of Senators Kennedy and Buckley).

<sup>114</sup> As a general rule, there is no property right in a dead body. The right of possession of a decedent's remains devolves upon next of kin. *Leno v. St. Joseph Hosp.*, 55 Ill. 2d 114, 117, 302 N.E.2d 58, 59 (1973); *O'Dea v. Mitchell*, 350 Mass. 163, 164, 213 N.E.2d 870, 872 (1965); *Sheehan v. Commercial Travelers' Mut. Accident Ass'n.*, 283 Mass. 543, 553, 186 N.E. 627, 631 (1933). *See generally* Note, *The Nature of the Right in a Dead Body*, 24 HARV. L. REV. 315 (1911).

<sup>115</sup> MASS. GEN. LAWS ANN. ch. 113, § 6 (Supp. 1974).

However problematic may be the case of maternal consent in the case of natural abortion, the one case that is clear is that the mother who is willing to kill her child in abortion is not the proper party to consent to any experimentation.<sup>116</sup>

Perhaps no one can properly give consent, and death with dignity is the only alternative.<sup>117</sup> However, in light of the provisions of the Act, death with dignity for anyone, including dead aborted fetuses, may well be an antiquated right.

## 2. *Living Fetuses*

In September 1971, an advisory council to the National Institute of Health (NIH) urged the use of fetal life for research because "planned scientific studies of the human fetus must be encouraged if the outlook for maternal and fetal patients is to be improved."<sup>118</sup> In March 1972, the National Child Health and Human Development Council issued guidelines for studies involving the human fetus and reaffirmed approval because "scientific studies of the human fetus are an integral and necessary part of the research concerned with the health of women and children."<sup>119</sup> Under the aegis of NIH, live fetal research continued without interruption until it became public knowledge in April 1973.<sup>120</sup> Controversy ensued over the use of live fetuses in federally financed medical research, and on April 12, 1973, NIH withdrew its support because it could not scientifically justify research on living human fetuses when identical studies could be performed on animals.<sup>121</sup>

<sup>116</sup> 119 CONG. REC. 16,348 (daily ed. Sept. 11, 1973) (remarks of Senator Buckley).

<sup>117</sup> *Id.* (remarks of Senator Kennedy). However, death with dignity seems like an anomalous right for aborted fetuses.

<sup>118</sup> 1 REPORTER ON HUMAN REPRODUCTION AND THE LAW A-47 (1973). This group recommended that the living fetus be artificially sustained for research only if it met two of the following criteria: The fetus must not be beyond twenty weeks gestation, nor weigh more than five hundred grams body weight nor be more than twenty-five centimeters in length measured from crown to heel. *Id.* at A-48.

<sup>119</sup> *Id.* The proposed guidelines are as follows:

1. In all cases, applicable state and/or national laws shall be binding.
2. Guidelines for human investigation used to protect the rights of minors and other helpless subjects are applicable.
3. The study protocol must be reviewed and approved by the appropriate national review committee to insure that the rights of the mother and fetus are fully considered.

(a) It is the duty of these committees to insure that the investigators shall not be involved in the decision to terminate pregnancy, the product of which is used for study within his own research grant or authority.

(b) Continuing review by the institutional committee must be undertaken in all projects.

4. Informed consent must be obtained from the appropriate party (ies).

*Id.* at A-47 to A-48.

<sup>120</sup> See Washington Post, Apr. 13, 1973, § A, at 1, col. 5.

<sup>121</sup> Washington Post, Apr. 15, 1973, § A, at 6, col. 7.



On August 16, 1973, President Nixon signed into law a bill barring the use of National Science Foundation funds for research on "a human fetus which is outside the womb of its mother and which has a beating heart."<sup>122</sup> The bill, limited in time,<sup>123</sup> met with severe disapproval from the fetal research community.<sup>124</sup> A special study group appointed by the Department of Health, Education and Welfare through NIH has published a draft working document which effectively precludes HEW approval of substantial risk research upon abortuses who have the capacity to sustain heartbeat and respiration.<sup>125</sup>

<sup>122</sup> Pub. L. No. 93-96, § 10(2) (Aug. 16, 1973).

<sup>123</sup> The law applied to the fiscal year ending June 30, 1974. *Id.* § 1.

<sup>124</sup> See, e.g., 14 MED. WORLD NEWS, Oct. 5, 1973, at 32, 36. One fetal researcher, Dr. John Morris, Professor of Obstetrics and Gynecology at the Charles R. Drew Postgraduate Medical School in Los Angeles describes fetal research legislation as reflecting an odd mixture of religious prejudice, unrealistic politics and a failure to understand the necessity of such studies. *Id.*

<sup>125</sup> 38 Fed. Reg. 31,738 (1973). In the document, an abortus is defined as a fetus when it is expelled whole . . . prior to viability. This definition, for the purpose of this policy, excludes . . . fetal material which is macerated at the time of expulsion, a dead fetus, and isolated fetal tissue or organs excised from a dead fetus.

*Id.* at 31,739-40. It also provides for regulations governing research on the abortus and the fetus *in utero*:

2. *Special categories.* — (a) *The Abortus*

No research, development, or demonstration activity involving the non-viable abortus shall be conducted which:

1. Will prolong heart beat and respiration artificially solely for the purpose of research;
2. Will of itself terminate heart beat and respiration;
3. Has not been reviewed by the agency Ethical Review Board; and
4. Has not been consented to by the pregnant women with participation of a Protection Committee.

. . . .  
(b) *The fetus in utero*

No research involving pregnant women shall be conducted unless:

1. Primary Review Groups assure that the activity is not likely to harm the fetus;
2. the agency Ethical Review Board has reviewed the activity;
3. a Protection Committee is operating in a manner approved by the agency and
4. the consent of both prospective legal parents has been obtained, when reasonably possible.

*Id.* at 31,738. Compare *id.* at 31,738 which provides:

An abortus having the capacity to sustain heart beat and respiration is in fact a premature infant, and all regulations governing research on children apply,

with *id.* at 31,741:

An investigator proposing research activities which expose children to risk must document as part of the application for support, that the information to be gained can be obtained in no other way. The investigator must also stipulate either that the risk to the subjects will be insignificant, or that although some risk exists, the potential benefit is significant and far outweighs that risk. In no case will research

Prior to the public publication of this draft working document, Senator Buckley introduced an amendment to the National Research Service Awards and Protection of Human Subjects Act<sup>126</sup> which would prohibit HEW from funding any experimentation on a living human fetus prior to, during or after an induced abortion.<sup>127</sup> Although he emphasized that his amendment was divorced from the abortion controversy,<sup>128</sup> it was limited in application to the induced abortion situation. The limitation seems arbitrary, yet Buckley's rationale is based on what he considers the extreme vulnerability of induced aborted fetuses:

It is the children who are aborted in the elective abortion situation who constitute the largest class of human guinea pigs now given over to the practitioners of the black arts of a perverted science. Condemned to death by their mothers, removed by physicians from their life support systems, such children are now being subjected to the inhuman indignity of becoming grist for the experimenter's mill.<sup>129</sup>

Concerned with the restrictive nature of Buckley's amendment, Senator Edward M. Kennedy of Massachusetts introduced an amendment which would ban the use of HEW funds for live fetal research until regulations governing the conduct of such research could be established.<sup>130</sup> On September 11, 1973, the Senate voted in favor of Kennedy's amendment to Buckley's amendment<sup>131</sup> and the bill is now law.<sup>132</sup>

### 3. *The Living Aborted Fetus—Organ or Human Being*

The source of the medical dilemma surrounding live fetal research

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activities be approved which entail substantial risk, except in the case of clearly therapeutic procedures in which the benefit to the patient significantly outweighs the possible harm.

<sup>126</sup> H.R. 7724, 93d Cong., 1st Sess. (1973), now Pub. L. No. 93-348 (July 12, 1974).

<sup>127</sup> See 119 CONG. REC. 16,344-45 (daily ed. Sept. 11, 1973). The proposed Buckley amendment to H.R. 7724 read as follows:

Sec. 1205. The Secretary may not conduct or support research or experimentation in the United States or abroad on a living human fetus or infant, whether before or after induced abortion, unless such research or experimentation is done for the purpose of insuring the survival of that fetus or infant.

*Id.* at 16,345.

<sup>128</sup> *Id.* at 16,344-45.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 16,348.

<sup>131</sup> *Id.* at 16,350 (yeas-53; nays-35; not voting-12). The bill was then sent to conference and the conference report provided for a four month ban on the conduct or support of research on a living fetus or infant before or after an induced abortion. H.R. REP. No. 1148, 93d Cong., 2d Sess. (1974).

<sup>132</sup> Act of July 12, 1974, Pub. L. No. 93-348, 188 Stat. 342.

is the status of the living aborted fetus<sup>133</sup> and the doctrine of informed consent.<sup>134</sup> The situation may be viewed as a confrontation between the ethics of utilitarianism and humanitarianism.<sup>135</sup>

Fetal researcher Dr. Jerald Gaul maintains that it is better to obtain useful information from fetuses than dispose of them in incinerators.<sup>136</sup> With similar reasoning, Dr. Kurt Hirschhorn of Mount Sinai Hospital in New York argues that since aborted fetuses are like removed organs it is only logical to make use of them.<sup>137</sup> However, Dr. Andre Hellegers does not share Dr. Hirschhorn's opinion. He considers the living aborted fetus as representative of human life and rejects the proposition that it is proper to experiment on human beings who are about to die.<sup>138</sup>

Experience suggests what can occur when medical science is divorced from ethical obligations towards persons approaching death.<sup>139</sup> The author suggests that notwithstanding the medical dilemma about whether living aborted fetuses are human beings, persons or organs, live fetal research is too much like the Nazi experimental situation for anyone to feel comfortable about it.<sup>140</sup>

#### 4. *The Living Aborted Fetus and the Law*

There should be no question regarding the legal status of the living aborted fetus. Simply stated, the genesis of constitutional personality is birth per se.<sup>141</sup> To establish a "wanted" birth as the criteria for

<sup>133</sup> *But see* 38 Fed. Reg. 31,738 (1973) (the abortus who is able to sustain heartbeat and respiration should be considered a premature infant).

<sup>134</sup> *See* notes 81-82 *supra* and note 149 *infra* and accompanying text for a discussion of the doctrine of informed consent and its applicability to premature infants.

<sup>135</sup> *Cf.* notes 78-79 *supra*.

<sup>136</sup> Gaul's experimentation involves removing the brain, liver, lung and kidneys from aborted fetuses while their hearts are still beating. *Washington Post*, Apr. 15, 1973, § A, at 1, col. 3.

<sup>137</sup> *National Observer*, Apr. 21, 1973, at 4, col. 1.

<sup>138</sup> *Id.*

<sup>139</sup> *See* *United States v. Greifelt*, 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNSEL LAW NO. 10 (U.S. Government Printing Office).

<sup>140</sup> *See, e.g.,* Alexander, *Medical Science Under Dictatorship*, 241 N.E.J. MED. 39 (1949) [hereinafter cited as Alexander], for a vivid account of experimentation performed upon Nazi prisoners who were about to die. *See also* W. SHIRER, *RISE AND FALL OF THE THIRD REICH* 979-91 (1960).

<sup>141</sup> U.S. CONST. amend. XIV. The first clause of the fourteenth amendment is self-explanatory: "All persons born . . . in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Therefore, once born, a person is endowed with constitutional personality and is thus entitled to the full gamut of constitutional protection. Furthermore, it has never been disputed that birth per se is the sole prerequisite for United States citizenship, provided that birth occurs within this country's jurisdiction. *Slaughter House Cases*, 83 U.S. (16 Wall.) 37, 73 (1873) (purpose of first clause of the fourteenth amendment was to confer

determining what is tissue and what is a premature infant is irrational. Whether the fetus is aborted in the first or third trimester is not determinative of any rights it might possess. Under present law, if there is evidence of independent circulation or breathing, livebirth has occurred and the living aborted fetus is a "person born" under the fourteenth amendment.<sup>142</sup> Quality of life is not a fourteenth

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citizenship on members of the Negro race), *overruling* *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 411 (1857) (persons of African descent held not to be citizens of the United States or any state); *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898) (child born in the United States of parents of Chinese descent becomes a citizen of United States at the time of his birth, despite fact that parents are subjects of the Chinese Emperor). See *Terada v. Dulles*, 121 F. Supp. 6, 10 (D.C. Hawaii 1954) (Congress is without power to unilaterally expatriate a citizen or to restrict the effect of birth which alone is sufficient to acquire citizenship under the fourteenth amendment); *Ex parte Hing*, 22 F.2d 554, 556 (D.C. Wash. 1927) (native born citizen who married an alien ineligible for citizenship cannot be deprived of citizenship unless substantial evidence exists to prove the fact of marriage to an alien).

<sup>142</sup> See, e.g., *People v. Hayner*, 300 N.Y. 171, 90 N.E.2d 23 (1949), and *State v. Osmus*, 73 Wyo. 183, 276 P.2d 469 (1954), which support the majority view that independent circulation is a prerequisite to live birth and thus part of the corpus delicti for infanticide. In *Hayner* the court of appeals found that the corpus delicti had not been established,

[f]or the People were bound to establish . . . that the child was born alive in the legal sense, that is, had been wholly expelled from its mother's body and possessed or was capable of an existence by means of a circulation independent of her own . . . .

*People v. Hayner*, *supra* at 174, 90 N.E.2d at 24. In *Osmus*, the defendant was convicted of manslaughter for killing her newborn infant. Since the court was unable to determine whether her child had independent circulation, it was unable to find that live birth had occurred and the Wyoming Supreme Court reversed her conviction. *State v. Osmus*, *supra* at 218-21, 276 P.2d at 483-84.

But see *Bennet v. State*, 377 P.2d 634, 635-36 (Wyo. 1963) (breathing was sufficient evidence of livebirth); *People v. Chavez*, 77 Cal. App. 2d 621, 626, 176 P.2d 92, 94 (1947) (viable child, even if still in process of birth, is human being). See generally Atkinson, *Life, Birth and Live-Birth*, 20 L.Q. REV. 134, 141-56 (1904); Note, *Proving Live-Birth in Infanticide Cases*, 17 WYO. L.J. 237, 242 (1965).

Heretofore, the question of live birth has arisen only in infanticide cases. However, since *Roe*, several states have liberally construed the definition of live birth as it arises in the abortion situation. See, e.g., ME. REV. STAT. ANN. tit. 22, § 1576 (Supp. 1973) which provides in pertinent part:

"[L]ive birth," . . . shall mean a product of conception after complete expulsion or extraction from its mother, irrespective of the duration of the pregnancy, which breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached . . . .

*Accord*, LA. REV. STAT. ANN. § 40.254.1 (Supp. 1974). See also MASS. GEN. LAWS ANN. ch. 112, § 12J (Supp. 1974) (life in fetus to be determined by same standards, whether *in utero* or *ex utero*); MINN. STAT. § 145.421(3) (Supp. 1974) (slightest evidence of vital signs sufficient for classification as "living").

In six other jurisdictions, statutes have been enacted which provide that live born fetuses are to be treated as persons: IND. ANN. STAT. § 10-113(b) (Burns Supp. 1973) (birth certificate required; failure to take reasonable steps to preserve fetus' life results

amendment criterion. *Vita* is still *vita* even if it is not *la dolce vita!*<sup>143</sup>

Since deformed, mentally retarded and prematurely born infants have never been considered less than "persons," it is, at the very least, logically inconsistent to deny similar status to the living aborted child. Classifications which deny this status are based on suspect criteria and can only result in denial of the most fundamental of rights without due process.<sup>144</sup> Additionally, denying aborted premature infants the medical care given premature infants<sup>145</sup> raises serious equal protection problems, particularly invidious discrimination in *Skinner v. Oklahoma ex rel. Williamson*<sup>146</sup> and *Shapiro v.*

in civil and criminal liability); LA. REV. STAT. ANN. § 40.254.1 (Supp. 1974) (birth certificate required); ME. REV. STAT. ANN. tit. 22, §§ 1575-76 (Supp. 1973) (civil and criminal liability imposed for failure to take reasonable steps to preserve fetus' life); N.Y. PUB. HEALTH LAW § 4164 (McKinney Supp. 1974) (birth certificate and medical records required; aborted child is entitled to legal protection under the penal code); S.D. CODE § 34-23A-16 (Supp. 1974) (birth certificate required); UTAH CODE ANN. § 76-7-311 (Supp. 1973) (child surviving abortion becomes a ward of the state).

<sup>143</sup> *But see* Byrn, *Abortion-on-Demand: Whose Morality?*, 46 NOTRE DAME LAW. 1, 25 (1970) [hereinafter cited as Byrn], wherein the author maintains that under a quality-of-life ethic results would differ. Professor Byrn views abortion as a valuable instrument for preserving quality machines because it destroys the least functional members of society whose existence threatens the efficient operation of the machine. *Id.*

<sup>144</sup> Recent judicial affirmation that persons may not be deprived of their property without due process of law, *see, e.g.*, *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342 (1968), should support the conclusion that aborted children cannot be deprived of their lives without due process of law, since, most arguably, on the scale of rights life would take precedence over property.

<sup>145</sup> Standard care for nonaborted premature infants includes being placed in a warm incubator and then being transported from the delivery room to a premature nursery where all essential therapeutic and diagnostic equipment are available. D. MARLOW, *TEXTBOOK OF PEDIATRIC NURSING* (1969). However, in many instances the aborted premature infant rests in a quagmire. The sensitivity of attending medical persons determines whether the aborted infant goes to incinerator or incubator. Byrn, *supra* note 143, at 32; *see* Wilson, *Who Will Live, Who Will Die?*, Boston Globe, Nov. 5, 1973, at 17, col. 6. *But see* IND. ANN. STAT. § 10-113(a) (Burns Supp. 1973), which provides that: all abortions performed after a fetus is viable shall be . . . performed in a hospital having premature birth intensive care units available during the abortion, and all viable fetuses shall be given full medical treatment for the protection and maintenance of their life.

*See also* NEB. REV. STAT. § 28-4149 (Supp. 1973) (commonly accepted means of care to be employed if aborted child alive with any chance of survival); UTAH CODE ANN. § 76-7-310 (Supp. 1973) (physician performing abortion to use all skills in maintaining life of fetus sufficiently developed to have any reasonable chance of survival). *See generally* Chan & McDermott, *Abortion and Acute Identity Crisis in Nurses*, 128 AM. J. PSYCHIATRY 952, 953-55 (1972).

<sup>146</sup> 316 U.S. 535 (1942). In *Skinner* the Court considered the constitutionality of an Oklahoma statute which prescribed compulsory sterilization for persons who had thrice been convicted of felonies involving moral turpitude. Since the fundamental right to procreate was involved, the Court subjected this statutory classification to strict scrutiny and found that it resulted in invidious discrimination. *Id.* at 541. Clearly, when aborted children are classified differently than nonaborted children and

*Thompson*<sup>147</sup> form. However, an extensive equal protection discussion is beyond the purview of this Note. In view of the Court's benevolence towards illegitimate children,<sup>148</sup> it would no doubt be as particularly solicitous if presented with a case involving the rights of aborted children.

### 5. *Informed Consent and the Death Decision*

Under present law an individual can qualify as a test subject only when, having been clearly informed of the intent, nature and inherent risks of the procedure, he or she voluntarily agrees to participate.<sup>149</sup> When the minors are involved, courts have generally adhered to the common law rule that parental consent is a necessary prerequisite for medical treatment.<sup>150</sup> Although the common law rule is not without statutory exceptions,<sup>151</sup> the basic consideration, in all cases, is

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thus deprived of basic medical care necessary to their survival, their fundamental right to life is adversely affected. Such discrimination is equally, if not more, invidious than that involved in the Oklahoma Habitual Criminal Sterilization Act. See Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A.L. REV. 716, 735 (1969).

Perhaps a state could justify classifying aborted children as nonpersons and thus not entitled to the right to life and necessary medical care by adverting to the financial burden such children would cause as wards of the state. Another possible justification is that the mothers of aborted children do not want them to receive any medical care. Yet, these can hardly be labeled as substantial justifications for depriving aborted children of the right to live.

<sup>147</sup> 394 U.S. 618, 633 (1969) (state objectives may not be accomplished by means which result in invidious discrimination and denial of fundamental rights).

<sup>148</sup> See, e.g., *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175-76 (1972) (illegitimate children must share equally with other children in recovery of workmen's compensation benefits for death of their parent); *Levy v. Louisiana*, 391 U.S. 68, 70-72 (1968) (fourteenth amendment does not permit a state to deny illegitimate children right of action for wrongful death of parent).

<sup>149</sup> C. KRAMER, *MEDICAL MALPRACTICE* 14-19 (1972). Any unauthorized procedure is considered a battery, and if the subject is conscious, an assault. *Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941). Personal immunity and not the nature of the procedure is controlling. Conceding that many procedures are in fact harmless, one court has stated, "if we admit such an encroachment upon the personal immunity of an individual, where in principle do we stop?" *Bednarik v. Bednarik*, 18 N.J. Misc. 633, 652, 16 A.2d 80, 90 (Ct. Cl. 1940).

The doctrine of informed consent is not peculiar to American courts. It was articulated by the AMA in 1946, reaffirmed at Nuremberg in 1947, by the FDA in 1962, by the Helsinki Declaration in 1966 and by the HEW in 1972. Mitford, *Experiments Behind Bars*, ATLANTIC, Jan., 1973, at 64, 67. Though practice falls short of the ideal, this doctrine has never been contradicted in principle. See Annot., 76 A.L.R. 562 (1932); *Medical Ethics and Human Subjects*, 104 SCI. NEWS 20 (1973).

<sup>150</sup> See, e.g., *Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941) (parental consent needed for surgical operation).

<sup>151</sup> One criticism of the common law rule is that it has the effect of denying medical

whether the proposed treatment is for the benefit of the minor and performed for the purpose of saving his or her life or limb.<sup>152</sup> With the advent of organ transplantation, however, the courts were forced to reexamine the common law rule, which seemed to lose its *raison d'être* once minors were excluded from participating in a decision which would ultimately deprive them of vital organs.<sup>153</sup> Thus, in situations where minors have been potential organ donors, courts have been particularly cautious in protecting their rights and have made detailed findings on the issue of informed consent of the minor.<sup>154</sup> While none of the organ transplant cases thus far have involved infant minors, a question once speculated as purely academic is now real — who can consent to nonbeneficial procedures upon infants,<sup>155</sup> particularly, premature infants, born via abortion?

That experimentation on living aborted fetuses provides no benefit to them admits of no question. Death is not merely a risk but a result.<sup>156</sup> Thus, unemancipated, unable to understand the nature and consequences of experimentation, unable to give any form of consent, the aborted child does not fall under the conventional mosaic of the informed consent analysis. Since experimentation is generally legitimized through the consent of the natural mother, it becomes imper-

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treatment to minors who are most in need of it. Thus, most of the statutory exceptions to the common law rule deal with pregnancy-related and venereal disease treatment. See, e.g., HAWAII REV. STAT. §§ 577 A-1, A-2 (Supp. 1973) (except for abortion, minors between ages of 14-17 years do not need parental consent for medical care relating to pregnancy or venereal diseases); MONT. REV. CODE ANN. §§ 69-6101 to 6104 (Supp. 1974) (except for abortion and sterilization, minors' self-consent is sufficient to authorize treatment for pregnancy, communicable diseases and drug problems). See generally 7 SUFFOLK U.L. REV. 1157, 1167-68 (1973).

<sup>152</sup> Bonner v. Moran, 126 F.2d 121, 123 (D.C. Cir. 1941); see Younts v. St. Francis Hosp. & School of Nursing, Inc., 205 Kan. 292, 301, 469 P.2d 330, 337 (1970).

<sup>153</sup> See generally Curren, *A Problem of Consent: Kidney Transplantation In Minors*, 34 N.Y.U.L. Rev. 891, 892 (1959).

<sup>154</sup> *Id.* See also Camitta v. Fager, Equity No. 73-171 (Mass., Sept. 5, 1973), which involved a bone marrow transplant from a thirteen year old donor to his fifteen year old brother who had severe aplastic anemia. The donor was considered by some physicians to be mentally retarded and/or schizophrenic. Both the donor and his father consented to the operation. However, the doctors and the hospital were unwilling to proceed for two reasons: first, the proposed transplant was not being performed for the donor's benefit; second, the quality of the donor's consent was questionable. *Id.* at 2. The parents, hospital and physicians petitioned the court for a declaratory judgment. A guardian ad litem, psychiatrist, psychologist and neurologist submitted reports to the court indicating that the donor would suffer no serious harm from the procedure. Based on the medical reports and the consent of both parent and donor, the court authorized the bone marrow transplant. *Id.*

<sup>155</sup> Curren, *supra* note 153, at 895.

<sup>156</sup> Although it can be argued that experimentation merely hastened what would be inevitable death, there is always the possibility that if live aborted fetuses were given the same medical care afforded premature nonaborted fetuses, note 145 *supra*, the living aborted fetus would survive. See note 192 *infra*.

ative to consider whether her right to consent is a logical extension of the right, granted to her in *Roe*, to terminate pregnancy<sup>157</sup> or whether this right exists at all.<sup>158</sup> The dispositive question is whether parents may exercise over their children the awesome *jus vitae necisque* [right over life and death] *vel non*.<sup>159</sup>

For all practical purposes the Supreme Court has already decided this issue as far as the unborn child is concerned. Although *Roe* never gave women the right to destroy, it did give women the right to abort, and under current birth technology, particularly in the first two trimesters, abortion usually results in destruction.<sup>160</sup> Analysis is not so simplistic when the issue is the born child because some observers consider "quality-of-life" as determinative of a parent's right to make the death decision.<sup>161</sup> While recognition of such a right seems prepos-

<sup>157</sup> 410 U.S. at 153-54, as *Roe* was a logical extension of *Eisenstadt* and *Griswold*. See notes 58-59 *supra* and accompanying text.

<sup>158</sup> Dr. Andre Hellegers maintains that:

[t]o ask a mother who is seeking abortion to consent to an experiment on the abortus is meaningless. It would be like asking consent from a parent who had abandoned or battered a child. To me, it's like a Nazi saying "Since we're going to put all those Jews in the gas chamber anyway, let's get some good out of them by doing medical experiments first."

14 MED. WORLD NEWS, Oct. 5, 1973, at 32, 36. *But see* remarks of Dr. Joshua Lederberg, professor of genetics and human biology at Stanford University, who considers Dr. Hellegers' argument as "logically consistent but wrong." *Id.* According to Dr. Lederberg, "[i]nformed consent is not an ethical doctrine in itself, but a means to an end — a way a person can be subjected to an experiment, consistent with his humanity and individuality." *Id.*

<sup>159</sup> In *Maine Medical Center v. Houle*, Civil No. 74-145 (Cumberland Co. Sup. Ct., Me., Feb. 14, 1974), parents of a severely handicapped child asked the hospital to halt life-saving support and forego corrective surgery. An injunction was granted to the hospital by the superior court judge who held that parents had no right to withhold life-saving support from their defective child. See *Boston Sunday Globe*, Feb. 17, 1974, at 4, col. 2. *But see* Campbell & Duff, *Moral and Ethical Dilemmas in the Special-Care Nursery*, 289 N.E.J. MED. 890 (1973), wherein it is reported that forty-three parents agreed to withdraw medical support from their defective children, resulting in the death of the infants in each instance. To date, no criminal action has been commenced against either the parents or the hospital.

<sup>160</sup> *But see* Pakter, *supra* note 51, at 290, wherein it is reported that in New York during the period from July 1 to December 31, 1970, eighteen second trimester live births occurred after saline abortions.

<sup>161</sup> See Shaw, *Doctor, Do We Have A Choice?*, N.Y. Times, Jan. 30, 1972, § 6 (Magazine), at 44. Quality-of-life may be defined as an ethic which places relative value on human life. *A New Ethic For Medicine and Society*, *supra* note 21, at 67. Life is considered to have quality only when certain criteria are met, e.g., "minimal intelligence, self-awareness, self-control, . . . the capability to relate to others, concern for others, communication, control of existence, curiosity, change and changeability, balance of rationality and feeling . . ." Byrn, *An American Tragedy: The Supreme Court On Abortion*, 41 *FORDHAM L. REV.* 807, 860 (1973). Quality-of-life is diametrically opposed to traditional western ethic which places absolute value on every human life, and it has been suggested that it is "something which becomes possible for the first time in human history because of scientific and technologic development." *A New*



terous to this author, proponents find it a *modus vivendi*. It has been suggested that since the present system allows some parents to exercise the *jus vitae necisque*, legal status should be withheld from infants until three days after birth so that all parents could have this right.<sup>162</sup> It has been further suggested that parents of mongoloid children not only have the right but the responsibility of exercising the *jus vitae necisque*.<sup>163</sup> British author Glanville Williams, who analogizes an eugenic killing by a mother to a bitch's killing of deformed puppies, maintains that since no one can definitely label the former act immoral, freedom of choice should prevail.<sup>164</sup>

Certainly, if "quality-of-life" is determinative of parental rights, the response to the original inquiry would be that parents have the right to decide whether their children (mongoloid, deaf, dumb, blind) will live or die. The breadth of such a mandate would necessarily encompass a woman's right to consent to nontherapeutic experimentation upon her living aborted children.

However, the right of privacy, recognized in *Roe*, which may result in the termination of the unborn child's life, is simply not broad enough to mandate similar results when that child is born alive. By reason of its livebirth, that child becomes a citizen and therefore cannot be deprived of life without due process of law.<sup>165</sup> If parents may decide whether their children will live or die, then parental consent becomes the equivalent of due process, and, at the very least, the underlying rationale of the common law rule is perverted.<sup>166</sup> However desirable such a right would be for some parents, the sentiments expressed in *Prince v. Massachusetts*<sup>167</sup> negate its possible existence under present law:

Parents may be free to be martyrs for themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion

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*Ethic For Medicine and Society*, *supra* note 21, at 67. *But see* Byrn, *Abortion-on-Demand: Whose Morality?*, 46 NOTRE DAME LAW. 5, 38, *citing* F. WERTHAM, *A SIGN FOR CAIN: AN EXPLORATION OF HUMAN VIOLENCE* 160 (1966), for the proposition that quality-of-life ethic derives from K. BUNDING & A. HOCHÉ, *THE RELEASE OF THE DESTRUCTION OF LIFE DEVOID OF VALUE* (1920), a book written by two prominent German scientists who proposed the killing of worthless people. The book was reportedly very influential in the formation of Nationalist Socialist policy.

<sup>162</sup> National Right to Life News, Nov. 1973, at 10, col. 2 (remarks of Nobel Prize winner Dr. James Watson).

<sup>163</sup> Shaw, *Doctor, Do We Have A Choice?*, N.Y. Times, Jan. 30, 1972, § 6 (Magazine), at 44.

<sup>164</sup> G. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 20 (1957).

<sup>165</sup> U.S. CONST. amend. XIV. *See* note 141 *supra*.

<sup>166</sup> *See* *Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941), for a discussion of the rationale behind the common law rule.

<sup>167</sup> 321 U.S. 158 (1944).

when they can make that choice for themselves.<sup>168</sup>

Arguably then, the response to our initial inquiry would be that women do not have the right to consent to nontherapeutic experimentation upon their living, aborted children simply because, under present law, parents do not have the right to decide whether their children will live or die.

#### IV. ETHICAL CONSIDERATIONS

The ultima ratio of communal life is and has always been the compulsory, vicarious sacrifice of individual lives.<sup>169</sup>

In what has been labeled "technologic totalitarianism,"<sup>170</sup> human beings steadily continue to replace guinea pigs, rats and chimpanzees in experiments ranging from simple drug tests to hazardous mind control surgery.<sup>171</sup> The situation has led one physician to charge that "an incredible orgy of human experimentation . . . has engulfed the American medical community."<sup>172</sup> Thus public concern has intensified as the thumbscrews of pressure are applied to persons, who because of their condition, are unable to resist.<sup>173</sup> In the wake of *Roe*, fetuses have been added to the list of subjects, and fetal research is now a controversial spectacle in the arena of human experimentation.

If, according to one trend of thought, "[a] fetus is no more a human being than an acorn is an oak,"<sup>174</sup> there is no ethical problem with nontherapeutic experimentation upon living fetuses, whether intra- or extrauterine. Therefore, absent any antivivisection sentiments, there would be no more objection to dissecting a live fetus than to dissecting a frog.

<sup>168</sup> *Id.* at 170.

<sup>169</sup> Jonas, *Philosophical Reflections On Experimenting with Human Subjects*, 98 *DAEDALUS* 219, 223 (1969).

<sup>170</sup> *A Clockwork Orange in a California Prison*, 101 *SCI. NEWS* 174 (1972).

<sup>171</sup> Mitford, *Experiments Behind Bars*, *ATLANTIC*, Jan., 1973, at 64.

<sup>172</sup> M. GROSS, *THE DOCTORS* 287 (1966). The author urges that the Nuremberg rules governing human experimentation be revised in order to meet "the current experimental orgy." *Id.* at 308.

<sup>173</sup> See *Cons As Guinea Pigs*, *TIME*, March 19, 1973, at 45 (prisoners); *Medical Ethics and Human Subjects*, 104 *SCI. NEWS* 20 (1973) (sick patients); *Human Experimentation*, 14 *MED. WORLD NEWS*, June 8, 1973, at 37 (children).

<sup>174</sup> Roberts, *Anti-Abortionists Try To Deny Women A Fundamental Civil Right*, *Boston Globe*, June 24, 1974, at 21, col. 6. However, Dr. Roberts argues that even if the fetus is human, it was proper to legalize abortion because anti-abortion laws allowed fetuses to enjoy more rights than any other human beings. *Id.* She reaches this conclusion without explanation or discussion of what rights fetuses did enjoy. Nonetheless, the logic in Dr. Robert's argument seems somewhat suspect considering that the only right bestowed upon fetuses by anti-abortion laws was the nebulous right to be born.

However, fetuses should not be so automatically excluded from the human race. Without trying to resolve *Roe's* difficult question of deciding when human life begins,<sup>175</sup> or attempting to define life itself, it is difficult to deny that the fetus is a being and that it "is human if only because it may not be characterized as not human. . . ."<sup>176</sup> Labeling the fetus a human being is not inconsistent with the Court's decision in *Roe* to refuse to grant it legal personality.<sup>177</sup> Therefore, fetal research does present a serious ethical dilemma for those who do include the fetus in the human race. Where research involves using one human being for the benefit of another it is necessary to ask whether potential, beneficial medical discoveries should take precedence over the principle of protecting human dignity and human rights.<sup>178</sup>

The purpose of fetal research has been variously articulated: to help the unborn who will not be aborted;<sup>179</sup> to preserve the right to life by curing disease;<sup>180</sup> to guarantee mothers the right to have normal children; and to assure living children the right to be free of birth defects.<sup>181</sup> Utopia is an admirable goal. A society without disease is as desirable as a society without war; but cutting up live aborted fetuses to improve the health of wanted fetuses smacks of the same illogic as that which justified dropping napalm on Vietnamese children so that Southeast Asia would enjoy peace, or dissecting live prisoners by the Nazis so that their own military forces would be benefited.<sup>182</sup> In the final analysis, how we treat those who are about

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<sup>175</sup> See 410 U.S. at 159. *Roe* stated that it need not resolve this question since medical, philosophical and theological experts were unable to reach any consensus. *Id.* However, *Roe* did engage in speculation by determining when life did *not* begin. See note 21 *supra*.

<sup>176</sup> *Byrn v. N.Y.C. Health & Hosp. Corp.*, 31 N.Y.2d 194, 199, 286 N.E.2d 887, 888, 335 N.Y.S.2d 390, 392 (1972), *appeal dismissed*, 410 U.S. 949 (1973). In *Byrn*, the New York court of appeals upheld a law permitting abortion but stated:

It is not effectively contradicted, if it is contradicted at all, that modern biological disciplines accept that upon conception a fetus has an independent genetic "package" with potential to become a full-fledged human being and that it has autonomy of development and character although it is for the period of gestation dependent upon the mother . . . and it is unquestionably alive.

*Id.* Thus, the least that can be said with certainty is that the fetus is genotypically human.

<sup>177</sup> See notes 23-24 *supra* and accompanying text.

<sup>178</sup> See *Human Experimentation*, 14 MED. WORLD NEWS, June 8, 1973, at 37 *passim*.

<sup>179</sup> Washington Post, Apr. 15, 1973, § A, at 1, col. 3 (remarks of fetal researcher Dr. Jerald Gaull).

<sup>180</sup> Behrman, *The Importance of Fetal Research*, N.Y. Times, June 9, 1974, § 4, at 17, col. 2.

<sup>181</sup> Hay, *The Right of Mothers To Have Normal Children*, Boston Globe, June 21, 1974, at 19, col. 2.

<sup>182</sup> Alexander, *supra* note 140. The author herein relates the details of an experiment designed to show the effects of explosive decompression on Nazi military forces. After

to die—the terminally ill, the prisoners on Death Row, the fetuses who will be aborted and the fetuses who survive abortion—may well be a measure of our humanity.<sup>183</sup>

## V. NEED FOR LEGISLATION

### A. In Utero *Experimentation*

The seriousness of the situation created by *in utero* experimentation should not be minimized. One writer has predicted that experiments on prenatal life will greatly increase in the future.<sup>184</sup> Additionally, if equating correlation with causation is a legitimate method of interpreting data, it is submitted that the Court's sanction of abortion, which for all practical purposes sanctions abortion-on-demand,<sup>185</sup> should logically result in an increased number of potential experimental subjects. However, the right to abort should not be construed as a license to expose developing fetuses to unnecessary harm.<sup>186</sup> Nevertheless, absent state regulations through prohibiting legislation, *in utero* experimentation will continue.

Apart from the question of whether the unborn fetus is a human being, and notwithstanding *Roe's* decision that it is not a legal person, the unborn fetus is legally recognized as representing at least

subjecting the victims to such decompression, S.S. Doctor Sigmund Rascher dissected them while their hearts were still beating. *Id.* at 42-43. At first blush it may seem that this analogy is an overreaction to live fetal experimentation. However, living aborted fetuses are genotypically human. They differ only phenotypically from the Nazi prisoners. Homogenizing and dissecting bodies, severing heads (*see note 208 infra*) and removing brains, livers, lungs and kidneys of live aborted fetuses (*see note 136 supra*) should affect the sensitivity of at least those observers who consider the dissection of live Nazi prisoners shocking.

<sup>183</sup> See text accompanying notes 139-40 *supra*.

<sup>184</sup> Ayd, *supra* note 81, at 380.

<sup>185</sup> Despite Mr. Chief Justice Burger's assertion that the Court rejects "any claim that the Constitution requires abortion-on-demand," 410 U.S. at 208, abortion-on-demand is the logical result of the Court's holding. During the first trimester, abortion is clearly an on-demand situation and during the second trimester abortion may also be obtained upon demand. At the point when the fetus becomes viable and during the third trimester, a woman need only assert a "health" reason, and abortion must then be performed upon her "demand." See notes 41-43 and accompanying text.

<sup>186</sup> See 38 Fed. Reg. 31,742 (1973):

Respect for the dignity of human life must not be compromised whatever the age, circumstances, or expectation of life of the individual. Therefore, all appropriate procedures providing protection for children as subjects in biomedical research must be applied with equal rigor and with additional safeguards to the fetus.

The recent decision of the Supreme Court on abortion does not nullify the ethical obligation to protect the developing fetus from avoidable harm. This obligation . . . requires that no experimental procedures entailing risk to the fetus be undertaken in anticipation of abortion.

*Accord, Report of the Advisory Group on The Use of Fetuses and Fetal Material For Research, 1972 THE LANCET 1223.*

potential human life.<sup>187</sup> Recognizing the state's interest in potential human life<sup>188</sup> and in the health of future generations,<sup>189</sup> this Note suggests that there is a serious need for legislation prohibiting all forms of *in utero* experimentation which may adversely affect this interest.

Despite the efforts of some physicians to insure that the viable aborted fetus is not born alive,<sup>190</sup> livebirth often results from abortion.<sup>191</sup> Thus, if a post-viability abortion is performed, the fetus may be born alive with at least a theoretical chance of survival.<sup>192</sup> Additionally, it is possible, although improbable, that after making the abortion decision and after harmful drugs have been injected into the fetus, a woman may change her mind and decide against the abortion.<sup>193</sup> At this point the damage already may have been done.

Apart from the question of whether prohibiting legislation would be a valid exercise of state police power<sup>194</sup> and would satisfy the requirements of due process,<sup>195</sup> it is necessary to consider whether such legislation would infringe upon a "fundamental" right.<sup>196</sup> Assuming

<sup>187</sup> 410 U.S. at 163.

<sup>188</sup> *Id.*

<sup>189</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927).

<sup>190</sup> *Symposium: A Report on Prostaglandins for Abortion*, 2 CONTEMPORARY OB. & GYN., Dec. 1973, at 83, 101. Dr. Gerald Anderson, Associate Professor of Obstetrics and Gynecology at Yale University School of Medicine, fears that dealing with "live aborted fetuses can lead to a rebellion by the nurses that could ruin the program." *Id.* He is trying to find a compound which could be administered intra-amniotically which would decrease the possibility of a live birth. To date, he has found only one, methotrexate, which he believes would not be approved by the F.D.A. *Id.*

<sup>191</sup> *Id.* See also notes 51 & 56 *supra*.

<sup>192</sup> The probability of survival depends upon whether the aborted fetus is disposed of or given the same medical care as nonaborted fetuses. Routine care for premature infants is discussed in note 147 *supra*. Usually, aborted fetuses who survive are placed for adoption. See, e.g., N.Y. Times, Oct. 26, 1973, at 29, col. 6 (saline abortion of 33 week male fetus, weighing 4 pounds 8 ounces at birth now being placed for adoption); 2 CONTEMPORARY OB. & GYN., Dec. 1973, at 83, 102.

<sup>193</sup> The draft working document of HEW regarding the protection of human subjects provides that since women have the right to change their mind about abortion, "no experimental procedures entailing risk to the fetus [shall be] undertaken in anticipation of abortion." 38 Fed. Reg. 31,742 (1973).

<sup>194</sup> Under the two-pronged test of *Lawton v. Steele*, 152 U.S. 133 (1893), such legislation would be a legitimate exercise of police power if "[t]he interests of the public generally . . . require [it] and . . . the means are reasonably necessary for the accomplishment of the purpose and are not unduly oppressive upon individuals." *Id.* at 137.

<sup>195</sup> See, e.g., *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536-37 (1949), wherein the Court stated that legislation satisfies the requirements of due process if it does "not run afoul of some specific federal constitutional prohibition, or of some valid federal law . . ." *Id.*

<sup>196</sup> Fundamental rights are those which are either explicitly guaranteed by the Constitution, such as voting, *Reynolds v. Sims*, 377 U.S. 533, 544 (1964), or those which the Court has gleaned from the wording of the Constitution, such as interstate travel,

*arguendo* that the right of personal privacy granted in *Roe v. Wade* is broad enough to allow a pregnant woman to consent to experimentation upon the fetus she has conceived and carries, it will become necessary to balance this right against the state's interest in potential life and the health of future generations. Unlike the abortion situation, no serious economic, psychological or physical hardships are imposed upon women themselves by favoring the latter interest.<sup>197</sup> The only possible "detriment" which would be imposed upon pregnant women if they could not exercise such a right, would be a denial of a right to have unlimited control of one's body. This argument lacks merit, however, if one accepts the biological reality that two bodies are involved in pregnancy. Furthermore, relying on *Buck v. Bell*<sup>198</sup> and *Jacobson v. Massachusetts*,<sup>199</sup> the *Roe* Court rejected the assertion that "one has an unlimited right to do with one's body as one pleases. . . ." <sup>200</sup>

In any event, legislation prohibiting *in utero* experimentation does not have to be justified by a compelling state interest, simply because a woman's right to make the decision to consent to experimentation is neither fundamental nor within the ambit of the *Roe* right of personal privacy. *Roe* recognized that pregnant women "carry an embryo and later a fetus . . ." and thus "cannot be isolated in . . . privacy."<sup>201</sup> Towards that end, *Roe* bestowed upon pregnant women a right which was not unqualified but rather was limited to merely removing the fetus from her uterus.<sup>202</sup> The right to consent to removal has no relation to the right to consent to experimentation, and the underlying rationale which supported the Court's justification for granting the former fails to support the latter.<sup>203</sup>

The right to consent to *in utero* experimentation is not susceptible to analysis under a *Roe*-type balancing test. Additionally, it is not necessary to "resolve the difficult question of when life begins,"<sup>204</sup> in order to determine at what point the state has the authority to pro-

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*Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969). Thus, in determining whether a particular activity is fundamental, resort must be had to the Constitution. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 34 (1973). Governmental classifications which infringe upon fundamental rights will be subjected to strict scrutiny, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), and will be held constitutionally infirm absent a showing of a compelling state interest. *Shapiro v. Thompson*, *supra* at 627.

<sup>197</sup> But results may differ where the research scientist is concerned. Hardships may be imposed upon them if they are prohibited from engaging in fetal experimentation.

<sup>198</sup> 274 U.S. 200, 207 (1927) (upholding sterilization of insane persons).

<sup>199</sup> 197 U.S. 11, 26 (1905) (upholding compulsory smallpox vaccination for adults).

<sup>200</sup> 410 U.S. at 154.

<sup>201</sup> *Id.* at 159.

<sup>202</sup> See text accompanying notes 45-52 *supra*.

<sup>203</sup> See note 30 *supra* and accompanying text.

<sup>204</sup> 410 U.S. at 159.

scribe *in utero* experimentation. For whether the fetus is a mass of disorganized cells<sup>205</sup> or a "living human individual,"<sup>206</sup> no one would deny that it represents at least the potentiality of life.<sup>207</sup> Thus, the state's legitimate and important interest in potential life with regard to its authority to proscribe *in utero* experimentation must begin from the moment of conception.

### B. Ex Utero Experimentation

Though *ex utero* experimentation is conducted in antiseptic surroundings, it bears the gruesome indicia of reported infanticide cases.<sup>208</sup> In addition, the live aborted fetus personifies the ultimate "discrete and insular" minority.<sup>209</sup> This Note suggests that there is an urgent need for legislation prohibiting substantial risk experimentation upon the living aborted fetus unless such experimentation is conducted to benefit the experimental subject.<sup>210</sup> If this is a restriction upon the freedom of scientific inquiry, it is a necessary restriction

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<sup>205</sup> Alan F. Guttmacher, former head of Planned Parenthood World Population has opined that the fetus "is simply a group of specialized cells . . ." *Symposium — Law, Morality and Abortion*, 22 *RUTGERS L. REV.* 415, 436 (1968).

<sup>206</sup> Brief for Appellants at 9, *Markle v. Abele*, 411 U.S. 940 (1973), quoting Affidavit of Dr. Micheline Mathews-Roth of the Department of Microbiology and Molecular Genetics at Harvard University.

<sup>207</sup> In *Roe* the Court stated that the fetus represents only the potentiality of life. 410 U.S. at 163.

<sup>208</sup> In Britain some aborted fetuses are sold to research labs and kept alive indefinitely. *Boston Phoenix*, April 24, 1973, at 1, col. 3. Some are homogenized and centrifuged. 223 *J.A.M. A.* 143 (1973). See also 14 *MED. WORLD NEWS*, June 8, 1973, at 21 (heads of aborted living fetuses severed); 14 *MED. WORLD NEWS*, May 11, 1973, at 41 (liver and thymus glands removed); 173 *SCIENCE* 829 (1971) (cerebral cortex removed in dissection). If "the unborn knows perfectly well when he has been hurt, and he will protest it just as violently as would a baby lying in a crib," H. LILEY, *MODERN MOTHERHOOD* 50 (rev. ed. 1969), the pain experienced by aborted (born) children makes Goethe's comment apposite: "Opfer fallen heir,/ Weder Lamm noch Stier,/ Aber Menschenopfer unerhoert." ("Victims do fall here,/ Neither lamb nor steer,/ Nay, but human offerings untold."), quoted in Jonas, *Philosophical Reflections on Experimenting with Human Subjects*, 98 *DAEDALUS* 219, 223 n.4 (1969).

<sup>209</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (upholding congressional power to prohibit interstate shipment of adulterated milk). In a footnote, Mr. Justice Stone opined that the Court may give extraordinary protection not only to those interests expressed in the Constitution, but also those interests which are unlikely to receive sufficient consideration in the political process, particularly the interests of "discrete and insular minorities" who cannot form viable political organizations. *Id.* at 153 n.4.

<sup>210</sup> The following jurisdictions prohibit all experimentation on live fetuses: California, Louisiana, Maine, Massachusetts, Minnesota, Nebraska and Utah. See *CAL. HEALTH AND SAFETY CODE* § 25956 (a) (West Supp. 1974); *LA. REV. STAT.* § 14:87.2 (Supp. 1974); *ME. REV. STAT. ANN.* tit. 22, § 1574 (Supp. 1974); *MASS. GEN. LAWS ANN.* ch. 112, § 12J (Supp. 1974); *MINN. STAT.* § 145.422(1) (1973); *NEB. REV. STAT.* § 28-4, 161 (Supp. 1973); *UTAH CODE ANN.* § 76-7-312 (Supp. 1973).

and is based upon the same ethic which precludes nontherapeutic, substantial risk experimentation upon all children.<sup>211</sup> The fetus who survives abortion is a citizen under the fourteenth amendment.<sup>212</sup> That he or she may live only a few days, hours or even minutes is irrelevant. Civil rights are not bestowed in proportion to one's life span.

Let it not be underestimated what is at stake. Those who successfully protest live fetal research must live with the consequences and may perhaps even die from diseases which such research might have eradicated. Legislation prohibiting live fetal research may stifle medical progress which could improve the health of future generations. However, if we indulge in the assumption that future generations can only be improved by the compulsory sacrifice of lives-in-being, there is little cause for complacency among those who find themselves between infancy and senility.

## VI. CONCLUSION

*Roe v. Wade* removed the stigma of illegality from abortion, making that act a private matter.<sup>213</sup> However, the Court's rationale for making abortion a private matter becomes less apodictic when the issues are fetal destruction and experimentation. There is really nothing *private* about the latter two.

By not stating how far the right to privacy extends, the Supreme Court has left open avenues for both advance and retreat. With regard to fetal destruction, the Court can rationally pull back and refuse to extend privacy coverage, it can remain mute or it can significantly expand privacy to include that decision. A choice of the latter alternative would necessitate resolution of the question of when life begins, a question which by the Court's own admission is a difficult one. Until the Court can answer this question with medical, moral and legal certainty, it is most appropriate for it to pull back and apply its privacy brakes.

Fetal experimentation is another matter. It has little to do with privacy and even less to do with the considerations confronting the Court in *Roe*. However, it seems that *Roe* catalyzed the issue, precipitating dimensionless inquiries. Reduced to simple terms, the problem is one of whether fetuses *in utero* and *ex utero* ought to be treated as human and thus protected by codes of ethics governing human experimentation in general. The problem is compounded by the fact that fetal experimentation is adjunctive to abortion, and the controversy surrounding it is therefore like old wine in a new bottle. *Roe* gave

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<sup>211</sup> 38 Fed. Reg. 31,740-41 (1973).

<sup>212</sup> See note 143 *supra*.

<sup>213</sup> 410 U.S. at 154.



pregnant women a specific and limited right—to remove unwanted fetuses from their uteri. The *Roe* decision does not nullify the ethical obligation to protect living fetuses, *in utero* and *ex utero*, from avoidable harm. It is time for all legislatures to fulfill that obligation.

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