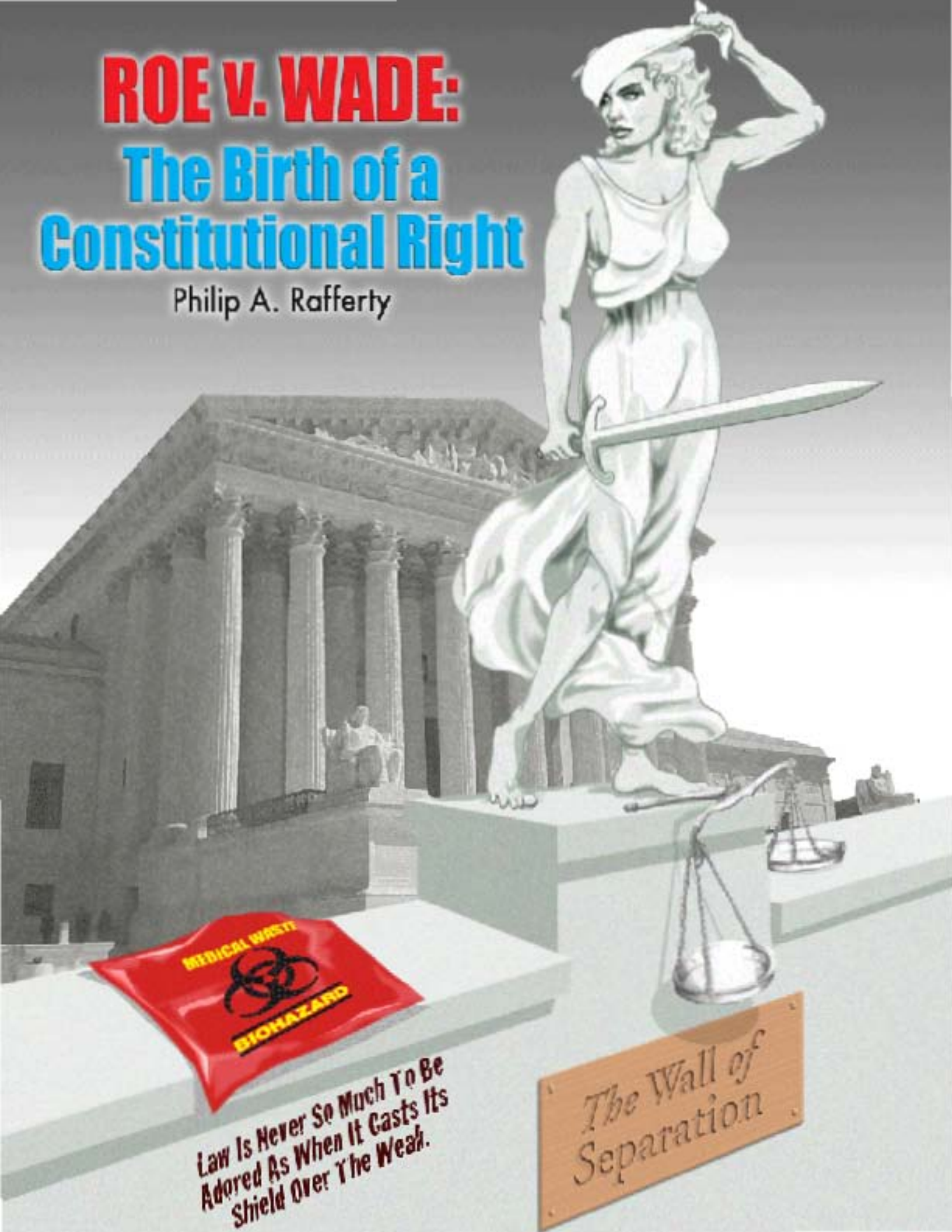
ROE v. WADE:
The Birth of a Constitutional Right

Philip A. Rafferty



FRONT COVER:

BLIND LADY JUSTICE – THE PERSONIFICATION OF THE MORAL FORCE THAT UNDERLIES THE RULE OF LAW, GAZING, FROM ATOP THE WALL OF SEPARATION, AT THE REALITY THAT SHE HAS BEEN MISGUIDED BY THE UNITED STATES SUPREME COURT INTO BRINGING ABOUT THE OPPOSITE OF THE ULTIMATE PRINCIPLE FOR WHICH SHE STANDS

FRONT COVER: by Daniel Thomas Williams

The quote in graffiti on the Front Cover: the great 19th century, American legal commentator and compiler, Joel Prentiss Bishop (1814-1901)

ROE v. WADE

The Birth of a Constitutional Right

By Philip A Rafferty

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To my parents,
my brothers and sisters,
Sherilyn Patrick,
and
Harry C. Flynn

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[This is a lesson in the proper resolution of argument or controversy]: It is no good...[, for example,] to charge a denier of immortality with the infamy of denying it; [or] to imagine that one can force an opponent to admit he is wrong, by proving that he is wrong on somebody else's principles, but not on his own. After the great example of St. Thomas [of Aquinas], the principle stands, or ought always to have stood established; that we must either not argue with a man at all, or we must argue on his grounds and not ours. We may do other things *instead* of arguing, according to our views of what actions are morally permissible; but if we argue we must argue 'on the reasons and statements' of...[our opponents in argument]; (freely quoting, in part, King Louis of France).

C. K. Chesterton

If the opponents of Roe expect to see it overruled, they had better learn to speak the language of the Court. They must exchange their impassioned moral rhetoric for the rather more sterile language of Constitutionalism.

Gary L. McDowell

It would take a book to set straight a paragraph of falsehoods, half-truths, facts, and innuendos.

C.K. Chesterton

Many controversies depend for their life on prejudice and lack of clear judgment.

F. Copleston

A full understanding of truth is to understand the errors it corrects.

Mortimer Adler

People do things for reasons..., and people give reasons for things they do. But the reasons they do them and the reasons they give frequently are not the same.

Jon Franklin

Law counts for little against the cause of the moment.

Unknown British Historian

Life in this day and age [1980s-1990s] is cheaper than a piece of meat in the meat market. People will haggle over the cost of steak more than they will consider the worth of a human life.

Judge Earl Strayhorn

If a human life has to be consciously wanted to be protected - as the present abortion law makes the value of a fetus contingent on the will of the mother - then we can never progress to a society in which all men, women and children are intrinsically valued as morally equal.

Sidney Callahan

When we can really see the image of God in the lives of all [persons already born]..., maybe then we will see God in the lives of the unborn.

Brian Spach

When a woman is in labor, she is in anguish because her hour has arrived; but when she has given birth to a child, she no longer remembers the pain because of her joy that a child has been born into the world.

John 16:21

I came so that they might have life and have it more abundantly.

John 10:10

INTRODUCTION

A court's written opinion is primarily a statement of the reasons for the court's decision. It is an explanation of why and how the court arrived at its decision. It is "a reasoned elaboration, publicly stated, that justifies a...[court] decision." This book presents a critical analysis of the opinion in Roe v. Wade, and an argument against the constitutional validity of the Roe decision.

This book is not about popular or non-legal arguments for or against Roe v. Wade, such as those presented in the following exchange between the persons "A" and "B". "A": "I disagree with Roe v. Wade because abortion destroys innocent, unborn human beings. That an unborn child is unwanted is itself an injustice to that child. Our Judeo-Christian moral tradition does not seek to cure injustice by destroying the victims of injustice. I hope that some day the Court will come to believe as I believe. Your argument that I have no right to impose my anti-abortion morality on another person is a strawman's argument. I could not do that even if I wanted to. All that I can do is relate my views on the subject of abortion, and perhaps, in some instances cast my vote on whether or not certain proposed abortion legislation should or should not be enacted. Would you deprive me of my right to vote? Your argument that the State has no legitimate authority to enact laws dealing with morality is contradicted by the laws of every state or society that has ever existed. A person can say that in his or her opinion the fetus is not a human being. However, every honest person must admit that for all he or she knows, every time a doctor, etc., performs an abortion, a human being is, thereby, killed." "B" responds: "I agree with Roe. Abortion must remain a matter of private conscience. The State has no business controlling women's bodies. Being forced to bear an

unwanted child forces the mother to live her life not as she chooses, but as dictated to her by the State. The contention that abortion destroys innocent human life is not true. Furthermore, it implicitly incorporates a doctrine of the Roman Catholic faith. I would urge the Supreme Court to affirm Roe."

"A" and "B" in several instances are mistaking presuppositions for arguments. "A" is presupposing that the human fetus is a human being, and "B" is presupposing that it is not. They are presupposing also that the legality of abortion depends, or stands or falls, on a determination of whether or not the human fetus is a human being. "B" is implicitly presupposing further that in order for a legislature to enact constitutionally an anti-Roe abortion statute based on a factual finding that the human fetus is a human being, the factual finding would require empirical evidence, if not empirical certitude. Further still, "B" is presupposing that there is no basis in reason, science, or human tradition that would support such a factual finding. "B" is also appealing to anti-religious prejudice; for no Christian denomination has ever "decreed as a matter of faith or morals" that a human being exists in the womb.[1]

One theme of this book is that the invalidity or validity of the Roe decision should not be, and logically cannot be, measured by the arguments of "A" or "B" or any similar arguments, as such. "A" and "B" believe or are presupposing that the issue in Roe was simply whether or not the State should be permitted to outlaw physician-performed abortion. However, from a constitutional perspective, what the State can or cannot do is not determined by such an abstract or subjective criterion as what the State "should or should not be permitted to do." The United States Supreme Court (the Court) in Parratt v. Taylor (1981) acknowledged as much:

> For better or for worse our [constitutional decision-making] traditions arise from the common law of case-by-case reasoning and the establishment of precedent....Therefore, in order properly to decide this case we must deal not simply with a single, general principle, however just that principle may be in the abstract, but with the complex interplay of the Constitution, statutes, and the facts which form the basis for this litigation.[2]

The Connecticut Supreme Court, in Swentusky v. Prudential Insurance Company (1933), stressed that the common law decision-making process rests upon the interdependent principles of "reasoned justice" and "the impartiality of the adjudicator":

> We cannot be unmindful of the limitations upon our proper function in declaring the unwritten law of this State. That law can never be static; ...it must be everlastingly developing to meet the changing needs of a changing civilization. But if our system of law is to have stability ...and [some] certainty, its development must be an orderly process, an accretion to the body of principles which are the outgrowth of past precedents, reasoned out in pursuance of that method of thinking which is the essence of the common law. Merely because it seems to us unjust that a plaintiff, situated as is the one before us, should not recover, or that "social desirability" dictates that she should, affords no sufficient basis upon which we may find liability. Unless the application and reasonable development of accepted principles of law justify that recovery, the remedy, if any, rests with the legislature and not with the courts.[3]

When "A" or "B" says that he or she disagrees or agrees with the Roe decision on the basis of particular premises, but without reference to whether those premises possess a constitutional foundation, he or she is actually saying the following: "My thoughts on the

non-constitutional law question of whether or not the State should be permitted to outlaw physician-performed abortion is a valid criterion for determining whether or not Roe is constitutionally sound simply because I have such thoughts." To judge the validity of the Roe decision according to the righteousness of one's pro-choice or pro-life cause or one's personal or private views on whether or not physician-performed abortion should be legalized is literally the equivalent of judging the validity of a disputed football play according to the rules of baseball. The question of the constitutional validity of the Roe decision, as distinguished from the question of the morality of the consequences of the Roe decision, should be approached and resolved only by the rules that govern the constitutional decision-making process. "A" and "B" have no working knowledge of those rules. Hence, they are no more in a position to argue whether or not Roe is constitutionally unsound or sound than they are in a position to argue on the proper way to perform a complicated medical procedure. In this book I will provide the reader with a working knowledge of the constitutional rules by which to judge the validity of the Roe decision. Hence, the unbiased reader will be able to judge for himself or herself whether or not the Roe decision is constitutionally legitimate.

The argument presented here against Roe begins, then, with the principle that popular arguments in support of or against the legalization of physician-performed abortion should not be confused with arguments proper to the constitutional decision-making process. This is not, however, to say that a popular argument and a constitutional argument cannot rest on the same premise. It is to say only that such a premise must possess a legitimate constitutional foundation, and that the current popularity of the premise cannot supply this foundation.

It is largely because the information media has confused popular arguments with constitutional arguments for or against Roe v. Wade that our nation's Roe v. Wade abortion debate has never risen above a shouting match. The information media's pro-choice bias and lack of knowledge of constitutional law is probably what has caused this confusion.[4] Unless the reader is able to, and does set aside the popular arguments for or against Roe, he or she will understand little of this book. The book is about constitutional law, and how on occasion it is severely twisted.

The Supreme Court of the United States does not sit above the Federal Government. It sits simply at the highest level of one branch of the Federal Government. The judicial acts of Supreme Court justices are, therefore, subject to the Fifth Amendment's due process clause. A fundamental principle of this due process is the "impartiality of the adjudicator". Hence, if a Supreme Court justice knowingly interjects his or her private or personal views into the constitutional decision-making process, then he or she compromises judicial impartiality and, thereby, violates the Fifth Amendment's due process clause.[5]

Justice Kennedy, at an ABA dinner honoring the judiciary shortly after he voted to uphold Roe v. Wade in Planned Parenthood of Southeastern Pennsylvania v. Casey (1992), stated:

> We, of course, are bound by the facts, the law, the rules of logic, legal reasoning and precedent...But we are also bound by our own sense of morality and decency...We must never lose sight of the fact that the law has a moral foundation, and we must never fail to ask ourselves not only what the law is, but what the law should be.

Whether or not Justice Kennedy realizes this, in making the above statements, he conveyed to an informed and unbiased legal world that

he rejects "the principle of the impartiality of the adjudicator."[6] A justice of the Court, in the course of deciding a case before the Court, is duty-bound by his oath of office and "the principle of the impartiality of the judiciary" to do his or her utmost to keep his or her personal sense of morality, of decency, of justice and of "what the law should be" out of the decision-making process. A justice should not "presume to be wiser than the law." Also, a justice should not forget that while a party, in making his or her case before the Court, can argue the facts, apply logic, cite precedent, and present a reasoned legal argument, he or she cannot possibly divine, let alone argue such items as the various justices' private or personal views on morality, decency, justice, and "what the law should be". What is more, obviously there cannot exist a rule or principle of constitutional interpretation for connecting those items to either the express or implied text of the Constitution.

The Court in Roe addressed a Fourteenth Amendment, substantive due process challenge to a Texas statute that outlawed deliberately performed abortion, including physician-performed abortion, except when necessary to preserve the mother's life. Generally speaking, the Court ruled on this challenge as follows: The human fetus in the womb is not a due process clause person. The legitimate interest of the State in safeguarding the fetus or unborn product of human conception does not outweigh the adult, unmarried, pregnant woman's "fundamental right" to obtain a "physician-performed" abortion unless or until "fetal viability" is present. Even here the State's interest is outweighed when an abortion of a viable fetus is necessary to preserve the woman's life, or physical health, or broadly-defined psychological health. The Texas abortion statute is therefore unconstitutional to the extent that it forbids a physician-performed abortion on a pregnant woman who either is not carrying a

viable fetus or is carrying a viable fetus but needs an abortion in order to preserve her life, or physical health, or broadly-defined psychological health.[7]

The Fourteenth Amendment's due process clause provides that no "State [shall] deprive any person of life, liberty, or property without due process of law." The holding in Roe derives from a combined application of the doctrines of "strict scrutiny analysis" and "substantive due process analysis". The latter, in pertinent part, refers to the determination of the existence of certain "fundamental rights" implicit in the concepts of "due process" and "liberty" contained in the Fourteenth Amendment's due process clause. "Strict scrutiny analysis" provides, in pertinent part, that when a state statute infringes on an individual's fundamental right, there exists an almost conclusive presumption that the statute violates the Fourteenth Amendment's due process clause. This presumption can be rebutted only if the State demonstrates that the statute is "necessary" to safeguard or realize a "compelling" or "overriding" state interest.[8] Five of the nine justices sitting on the Supreme Court during the Court's 1992 term went on record as stating that the interest of the State in safeguarding the unborn product of human conception becomes compelling at conception. Reasonable persons would have thought therefore that our states now have a green light to enact criminal abortion statutes in direct contradiction to Roe v. Wade. However, in light of Planned Parenthood of Southeastern Pennsylvania v. Casey (1992), the light here remains red.[9]

More often than not, and largely because the constitutional decision-making process is not an exact science, the validity of a Supreme Court decision on constitutional law can be fairly judged only by considering the opinion accompanying the decision. Justice Marshall observed: "'The validity and moral authority of a conclu-

sion largely depend on the mode by which it was reached.'"[10] More specifically, Justice Brennan observed:

> In our legal system judges have no power to declare law....That, of course, is the province of the legislature. Courts derive legal principles, and have a duty to explain why and how a given rule has come to be. This requirement... restrains judges and keeps them accountable to the law and to the principles that are the source of judicial authority. The integrity of the process through which a rule is forged and fashioned is as important as the result itself; if it were not, the legitimacy of the rule would be doubtful....[11]

The Roe decision rests on seven premises, with premises one through three supporting the fifth, sixth, and seventh premises:

1. At common law women possessed the right to rid themselves of unwanted pregnancies.[12]

2. In the English North American colonies and in the states and territories of the United States from their respective inceptions to approximately the mid-19th century, women possessed, by virtue of the received common law, the right to rid themselves of unwanted pregnancies.[13]

3. The purpose of each of the criminal abortion statutes, which were enacted in our states and territories during the 19th century, was not to safeguard unborn human life (whether actual or potential), but to protect pregnant women from the dangers of induced abortion.[14]

4. Fourteenth Amendment liberty includes a right to privacy; however, in order for a claimed right to qualify as a privacy right, it must qualify as a fundamental right.[15]

5. An unmarried woman's interest in undergoing a physician-performed abortion qualifies as a fundamental right.[16]

6. The State's "legitimate" and "important" interest in safeguarding the human fetus or unborn product of human conception "throughout" the gestational process is "non-compelling" relative to its mother's interest in having it destroyed, except when that product is a viable fetus and neither its postnatal survival nor the continuation of pregnancy would pose a threat to either the mother's life or health, including her broadly defined, present and future psychological health.[17]

7. The human fetus, without reference to the question of whether it is a human being, is not a Fourteenth Amendment, due process clause person.[18]

This book aims, on constitutional grounds, not only to disprove the foregoing premises, but to prove their virtual opposites. It will be demonstrated, for example, that the Roe opinion qualified the so-called constitutional right to privacy out of constitutional existence. It will be demonstrated also that the Roe opinion is self-contradictory or overrules itself. The Roe opinion at one point actually, implicitly states that the Fourteenth Amendment does not guarantee a Roe-defined abortion right.[19]

The judicial policy of stare decisis, i.e., adherence to established and factually applicable legal principles, vis-a-vis the Court's constitutional decision-making process, "merely provides the background for judicial development of the law."[20] It does not "shield court-created error from correction." This is particularly true when an erroneous decision involves a "matter of continuing concern to the community at large."[21] The Court in Smith v. Allwright (1944) stated: "When convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment, and not upon legislative action, this Court throughout its history has freely exercised its

power to reexamine the basis of its constitutional decisions."[22] More specifically, Justice Stevens, in his concurring opinion in Thornburg (1986), stated:

> Turning to Justice White's comments on stare decisis [in his dissenting opinion in Thornburg], he is of course correct in pointing out that the Court "has not hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship and reflection demonstrated that their fundamental premises were not to be found in the Constitution". But Justice White has not...[discredited] the "fundamental premises" on which the decision in Roe v. Wade rests.[23]

So, if it can be demonstrated that Roe's fundamental premises lack a constitutional foundation, then the reconsideration and overruling of Roe would actually further one of the principles underlying the policy of stare decisis: "preserving a jurisprudential system that is not based upon...'the proclivities of individuals.'"[24]

Constitutional law professor Michael Perry believes that the Court should overrule Harris v. McRae (1980) because the decision is "indisputably not taken 'according to the law.'" He elaborates: "I propose to show that the Supreme Court's decision in Harris..., upholding the Hyde Amendment - which prohibits federal funding of abortion, is...radically inconsistent with what the Court...deems to be...constitutional doctrine. In particular, the decision is inconsistent with Roe v. Wade."[25] This book takes Perry's method of argument a step or so further than Perry would want it to go. The book will demonstrate that Roe is inconsistent with constitutional doctrine, and even contradicts itself.

A court decision is not necessarily invalid if the articulated reasoning or opinion supporting it is unsound, for it is possible

that sound reasons exist here. Nevertheless, the Court is morally obligated to reconsider one of its more far-reaching and controversial, constitutional law decisions if the rationale for the decision is flawed. If, on the reconsideration of the decision, sound reasons cannot be found to support it, then the Court also is obligated morally to reverse it. Otherwise, reasoned justice is pushed out the constitutional window, and the people of each state of the United States become a people ruled not by self-government and the rule of law, but by the private views of no more than five Supreme Court justices.

It cannot be legitimately stated that in Planned Parenthood v. Casey (1992), the Court, in affirming Roe, reconsidered Roe, if only for the reason the Casey Court refused to acknowledge that any of Roe's "fundamental premises" lack a legitimate constitutional foundation. This remains true even though the Casey Court did not rely upon all of Roe's "fundamental premises" in affirming Roe.

It would be misleading to tell the people of an anti-abortion state, as law professor Michael Perry and New York Governor Mario Cuomo did in effect, that a majority of Americans agree with what the decision in Roe brought about: the compulsory legalization of physician-performed abortion except in extremely narrow circumstances.[26] This is so not because such a majority probably does not exist,[27] but rather because of the Tenth Amendment's principle of the qualified right of the people of each state to enjoy self-government, and the principle that constitutional adjudication is not "the mere reflex of the popular opinion or passion of the day."[28] The Court in Addington v. Texas (1979) observed: "The essence of federalism is that, [in the absence of a constitutional prohibition], states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold."[29] Notwithstanding the Roe

Court's opposing belief, the Court should not serve as our nation's roving problem-solver in the sky.[30]

Nearly every Roe legal commentator has concluded that the Roe opinion is unsound.[31] Philip Bobbitt, an anti-Roe opinion, pro-Roe decision legal commentator referred to the Roe opinion as "a doctrinal fiasco" and questioned whether the Roe Court believed in its own opinion.[32] Nevertheless, neither he nor any of the other pro-Roe legal commentators have called on the Court to reconsider Roe.[33] What these pro-Roe legal commentators are saying, in effect, is that the Court need not reconsider Roe because they have come to the Court's aid by developing sound constitutional supports for Roe. These commentators have conveniently overlooked a crucial fact: it is the Court, and not them who should decide whether or not those supports are sound. However, the Court cannot make such a decision without reconsidering Roe.

Hence, it may be fairly concluded that such commentators either do not have confidence in the soundness of their pro-Roe arguments or they do not trust the Court to consider impartially their pro-Roe arguments. Furthermore, these commentators, in not calling on the Court to reconsider Roe, undermine the principle that "the authority of the Court's construction of the Constitution ultimately 'depend[s] altogether on the force of the reasoning by which it is supported.'"[34]

Hence, until such commentators call on the Court to reconsider Roe, their pro-Roe arguments are not fit to be addressed. Their arguments serve merely as pro-choice propaganda. Also, even when their arguments are refuted, there is reason to believe they still would not call upon the Court to reconsider Roe. They would simply cook up another batch of pro-Roe arguments, as constitutional law professor Laurence Tribe is so fond of doing. Bopp and Coleson observed: "Tribe is the embodiment of the confusion created by Roe's

poor reasoning. He has developed and discarded several alternative justifications for Roe in the past thirteen years."[35]

A word of caution is offered to these pro-Roe legal commentators: Lest they would in effect compose an essay in support of Roe entitled "Fifty or so Places in the Constitution Where Abortion Is Guaranteed," they should settle on one pro-Roe argument, and discard the rest. One such argument, if sound, necessarily cancels the rest. If it were otherwise, then the unwritten part of our Constitution would be rendered superfluous forty-nine times over.[36]

The complementary fundamental rights to marry, to procreate and to rear children stand on their own as aspects of Fourteenth Amendment liberty.[37] The pro-Roe legal commentators, however, have not argued that a woman's interest in abortion can stand so. They have felt compelled to link that interest to some other aspect of such liberty. The Roe Court felt the same, as is demonstrated by its impoverished attempt to link the abortion interest to a right to privacy.[38] It does not matter to what aspect of Fourteenth Amendment liberty a person would link the abortion interest. The Court or a person can say it is implicit in the right to be independent, or the Casey Court's "right to define one's concept of existence, of meaning, of the universe, and of the mystery of human life", or a common law-based right to control over one's person or body, or the right not to be bound by public or private morality, or the right to follow one's conscience, or the "Thoreauvian 'you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else's-beau ideal" (which ideal presupposes here that the fetus is not a "someone else").[39] A person can say that it is implicit in the right "not to be forced to remain pregnant", or the right to decide whether or not to have a child, or the right to make important or intimate decisions,[40] or "the right not to have the course of one's life dictated by the State".[41] He or she

can say that state-prohibition of abortion violates the Thirteenth Amendment's prohibition of involuntary servitude.[42] He or she can say that it is implicit in the right not to have an intimate association, or in the so-called common law right to be a bad samaritan. He can say that the abortion decision is the moral equivalent of a religious decision, and is therefore guaranteed by the First Amendment.[43] The only legitimate question here is whether the purpose or the historical application of that right demonstrates that a woman's interest in abortion is properly recognized as an aspect or extension of that right. The Court in West Coast Hotel Company v. Parrish (1936) stated: "Liberty in each of its phases has its history and connotation."[44] When one considers that until approximately 1965, the history of English and American abortion law speaks uniformly of induced abortion as being a grave crime - one of the worst known to the law,[45] then such a demonstration cannot be made. This is because that constitutional right would have to be severed from its "historic [purposes and] roots."[46]

Constitutional law professor Laurence Tribe put forth the following as an argument of sorts in support of Roe:

> What may surprise some, given the certitude with which Judge Bork and...others pronounce that Roe v. Wade was constitutionally illegitimate, is how many lawyers and law professors throughout the country believe the Supreme Court's decision in that case was entirely correct as a legal matter. For example, a friend of the court brief was filed in the Webster case "on behalf of 885 American law professors...who believe that the right of a woman to choose whether or not to bear a child, as delineated... in Roe v. Wade, is an essential component of constitutional liberty and privacy commanding reaffirmation by [the Supreme] Court."
>
> Now, of course, nearly a thousand law professors...could certainly be wrong on a matter of law. But how plausible is it that all of them would fail to recognize as blatant a legal blunder as some say the Court made in Roe?[47]

Preliminarily, a legal error is no less a legal error simply because it may not qualify as a "blatant legal blunder".

Pro-life organizations probably could produce a thousand or so American law professors who believe that the Roe decision is constitutionally unsound. Is it plausible that all such professors could erroneously believe so? The point is that belief in a proposition, even assuming the absence of bias on the believer's part, has no tendency in reason to prove the validity of the believed proposition. Under the common law and constitutional law decision-making processes, an advocate's or a party's belief in the worthiness or correctness of his or her position is simply not relevant to the issue of whether or not that position is legally sound.[48] There is no logical or common sense connection between the two.

The argument presented here against the Roe decision does not challenge the following proposition: since the framers of the Fourteenth Amendment understood United States society to be developing or evolving, they intended or understood that the Amendment's concept of liberty would not be construed to have a fixed meaning or extension. The Court in Wolf v. Colorado (1949) observed: "It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right."[49] However, that proposition carries with it this corollary proposition: the Court lacks a legitimate power or authority to tinker with the process by which constitutionally guaranteed liberty evolves. The Court in Stanford v. Kentucky (1980) inferred as much: The Court's "job is to identify...the 'evolving standards of...[liberty]'; to determine, not what they should be, but what they are."[50]

One does not have to rely on the doctrine of "original intent" to prove that Roe is constitutionally illegitimate. All that one needs is the principle of "the impartiality of the adjudicator".

This principle would preclude, for example, Justice Blackmun from injecting into the constitutional decision-making process his personal or private belief that the compulsory legalization of abortion "is necessary for the emancipation of women".[51]

Pro-choice or pro-Roe journalists are fond of quoting the following statement of Justice Brennan:

> We current justices read the Constitution in the only way that we can: as 20th-century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.[52]

With all due respect to Justice Brennan, one could reasonably conclude all that Justice Brennan is doing in the above is: (1) using his personal view of justice as a tool of constitutional interpretation, (2) being inconsistent, and (3) rejecting the constitutional rule of the "impartiality of the adjudicator" and thereby giving to himself a license to fashion constitutional rights out of his private views on justice. Regarding item one, and to a lesser extent item three, consider the following observation of John Denvir:

> I once heard a student ask...Justice Brennan how he could decide a case in which the Constitution and his sense of justice pointed to different conclusions. Justice Brennan scoffed at the question, stating that in his more than 20 years on the bench, he had never seen a case where his understanding of the Constitution conflicted with his sense of justice.[53]

Regarding item two, consider the following observation made by Justice Brennan in Oregon v. Mitchell (1970): "In our view, ... Brother Harlan's historical analysis [of the purpose of the Fourteenth Amendment's Equal Protection Clause] is flawed by his ascription of 20th-century meanings to the words of 19th-century [constitutional] legislators."[54]

Item three, the implied rejection of the principle of the "impartiality of the adjudicator," is easily demonstrated. The Constitution says nothing about "current needs." However, since the Court is the ultimate interpreter of the Constitution, it follows that the Court necessarily would be the ultimate interpreter of the meaning of "current needs." And since the Constitution is silent on "current needs," it necessarily follows that the Constitution can provide no guidelines for establishing the criteria of a "current need." So, the conclusion seems inescapable that these guidelines must ultimately derive from nothing more than the private views of current Supreme Court justices on whether or not justice demands that such and such be deemed as a "current need."

The "current needs" approach to constitutional interpretation is, almost by definition, a "result-oriented" decision-making process. In this process, how a justice casts his or her vote in a particular case is determined not by the applicable rules of constitutional interpretation, but by private justice, i.e., by the justice's private desire to produce a particular outcome or result. Since the "current needs" approach contradicts the principle of the "impartiality adjudicator", it necessarily violates due process of law. Also, when the "current needs" approach is superimposed on the common law decision-making process (as the latter operates in the context of written court opinions), it necessarily plays havoc with the rules that govern the common law decision-making process. In the

common law decision-making process, on which the constitutional decision-making process is founded,[55] the rules that govern this process "direct" the Court to a decision. However, in the "current needs" or result-oriented, decision-making process, the rules that are supposed to govern the Court's constitutional decision-making process can be manipulated by the Court to point to the desired decision. (Other tricks of the trade here include: manipulation of the historical facts of the case before the court, drawing a factual distinction among related cases or precedents without demonstrating how and why the distinction makes a real difference, and failing to note a factual distinction that makes a real difference.) In the result-oriented, decision-making process, the written opinion of the Court can serve only these alternative purposes: as an after-thought, or for disguising an act of judicial fiat.[56]

For what it might be worth here, it would appear that even constitutional law professor Laurence Tribe has rejected Justice Brennan's "current needs" approach to constitutional interpretation. Tribe stated: the Court "is without [constitutional] authority to redraw the Constitution's structural boundaries in order to fit the document to its sense of what the times demand, just as it is without power to invent entirely new rights to meet its sense of what an ideal constitution would require in contemporary circumstances."[57]

The Roe Court stated that its abortion holding "is consistent with...the demands of the profound problems [needs] of the present day."[58] It may be, then, that the Roe decision really rests on what is stated in my next three sentences. The Roe majority justices determined that, while in their opinion there is not a "current need" to prevent pregnant women from doing away with their unwanted, unborn children, there is indeed a "current need" to institute an orderly process for doing away with such children. Those justices, although

they knew full well that this fetal-killing process is an extremely ugly and inhuman practice,[59] also knew full well that physicians would offer their services here. Therefore, those justices could euphemistically refer to this killing process as the constitutionally guaranteed right of a pregnant woman to decide privately, through her physician, to terminate her pregnancy. Indeed, this book aims to prove that this is precisely how Roe came to be.

PART I

On The Nonexistence of a Constitutional Right to Privacy

This is not an essay against the constitutional right of privacy, for a person cannot be against that which does not exist.

The reader will better understand PART I and PART II if he or she keeps in mind the following three propositions: 1) The existence of a constitutional right to privacy does not by itself dictate that a woman has a constitutionally guaranteed right of access to physician-performed abortion; 2) The nonexistence of a constitutional right to privacy does not dictate that a woman does not have a constitutionally guaranteed right of access to physician-performed abortion; 3) The nonexistence of a constitutional right to privacy does dictate that the constitutional source or basis, if any, of a woman's Roe-defined abortion right cannot be a constitutional right to privacy.

PART II, in a wide ranging review of possible sources, and PARTS III & IV, in a review of specific sources (PART III looks at colonial American law, and PART IV looks at the English common law), take up the question of whether there is some other constitutional source for a woman's Roe-defined abortion right.

The constitutional right to privacy, which to this day the Court has left as undefined, has been described as "the most comprehensive of rights and the right most valued by civilized men."[1] This description is, at best, inaccurate. Even if a constitutional right to privacy exists, it remains as but one of many rights encompassed by the Fourteenth Amendment right to liberty. Thus, the latter right is necessarily more comprehensive than a right to privacy. Furthermore, to date, the constitutional

right to privacy includes "only" two interests: access to abortion and artificial contraception.[2] Hence, this privacy right hardly can be described as comprehensive. This is my description or definition of the constitutional right to privacy: an attractive and versatile piece of luggage used by certain Supreme Court justices for transporting their particular brands of individual rights philosophies over certain constitutional barriers.

Justice Blackmun, in the course of partially dissenting in Webster v. Health Reproductive Services (1989), remarked that the Webster plurality neither joins nor mentions "the true jurisprudential debate underlying this case: whether the Constitution includes an unenumerated general right to privacy."[3] What Justice Blackmun failed to realize here is that he closed off that debate in his Roe opinion.[4]

To date, three theories have been advanced in support of a Fourteenth Amendment right to privacy: (1) the Griswold v. Connecticut or penumbras of Bill of Rights theory; (2) Griswold's fraternal twin privacy theory or the theory that certain rights implicit in the concept of Fourteenth Amendment liberty, such as the rights to marry, to procreate and to raise a family, give rise to a general right to privacy; and (3) the common law or Ninth Amendment theory. All three theories hold that the right to privacy is "independent"; i.e., that it protects or can constitutionally guarantee an interest or right that is not explicitly or implicitly included in one of the original Bill of Rights guarantees (with the implicit exception of Fifth Amendment guaranteed liberty). Each of these three privacy theories will be explained, and then each one of them will be exploded.

The Court in Roe did not specify its relied-on privacy theory. In Whalen v. Roe (1977), the Court stated that Roe's privacy

holding is based on Griswold's fraternal twin privacy theory. In Paul v. Davis (1976), the Court stated that Roe's privacy holding is based on the Griswold privacy theory. In Maher v. Roe (1977), the Court stated that Roe's privacy holding derives from all three privacy theories.[5]

Five arguments are offered to demonstrate that Fourteenth Amendment liberty does not include an independent or general or composite right to privacy. Arguments two through five take aim at the right to privacy theories. Argument one takes aim directly at that right itself. An argument will not be made that the Constitution does not protect certain areas of personal privacy. What will be argued is that the constitutional right to privacy is not an operating right; i.e., it is not a constitutional vehicle that can serve to establish, define or protect areas of personal privacy. For example, the Fourth Amendment protects various areas of personal privacy from unreasonable, governmental searches and seizures. However, it is the Fourth Amendment's prohibition of unreasonable searches and seizures, and not a constitutional right to privacy that protects these privacy interests.

First Argument

The Fourteenth Amendment's due process clause does not explicitly mention a right to privacy. The question remains whether such a right can be legitimately derived from or found to implicitly exist in the concept of liberty that is explicit in that clause. What follows in this paragraph and the proceeding paragraph is a capsulized version of the first argument. Almost by definition, an implied or unenumerated constitutional right cannot be constitutionally superfluous or without some constitutional effect. Therefore, if it can be demonstrated that the implicit constitu-

tional right to privacy is superfluous or without effect in every instance in which it would be applicable, then it follows necessarily that there is not an implicit constitutional right to privacy.

Now, according to Roe v. Wade, no right or interest can be found within the right to privacy implicit in the Fourteenth Amendment right to liberty unless the right or interest is also contained in the Fourteenth Amendment right to liberty independently of the right to privacy.[6] Roe says in effect that it would be an incorrect statement of constitutional law to state the following: But for the Fourteenth Amendment right to privacy, right "X" or rights "X", "Y" and "Z" would not be found within the Fourteenth Amendment concept of liberty. Roe v. Wade states the opposite. Roe states that right "X" or rights "X", "Y" and "Z" cannot be found within the Fourteenth Amendment right to privacy unless they "preexist" in the Fourteenth Amendment's concept of liberty. By Roe-definition, then, the right to privacy does not, and cannot constitutionally guarantee or protect any right that is not already constitutionally guaranteed or protected. This means that the implicit constitutional right to privacy can be only superfluous. (This is because a constitutional right can generate or guarantee to itself whatever is necessary to its legitimate exercise.) And since it is superfluous it is also necessarily nonexistent.

The criteria of the existence of an implied or implicit constitutional right are: (1) the right is necessary to effectuate one or more of the explicit guarantees; (2) the right flows from the structure or design of or is a corollary of one or more of the explicit guarantees; and (3) the right is fundamental to the stability of the Union. The Court in Faretta v. California (1975) stated: "The inference of [constitutional] rights is not, of course, a

mechanical exercise....An implied right must arise independently from the design and history of the constitutional text...."[7]

Common sense dictates that neither constitutional rights nor the design or structure of the constitutional text can generate an implied right that is without effect. It follows that if the constitutional right to privacy does not constitutionally establish, effectuate or better-secure one or more rights, then a right to privacy cannot be implicit in the Constitution.

Roe v. Wade expressly stands for the proposition that the constitutional right to privacy, rather than conferring "constitutional status" or the status of "fundamental right" on an interest it is said to include, in fact presupposes that interest's status as a fundamental constitutional right. Justice Blackmun, in Roe v. Wade, stated for the Court: "[The Court's privacy] decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' [within the meaning of] Palko v. Connecticut (1937), are included in this guarantee of personal privacy."[8] That explicit Roe holding has been repeatedly affirmed by the Court. The Court in Paul v. Davis (1976) stated: "our...'right of privacy' cases...deal...with substantive aspects of the Fourteenth Amendment. In Roe, the Court pointed out that the...rights found in this guarantee of...privacy must be limited to those which are 'fundamental' or 'implicit in the concept of ordered liberty' as described in Palko v. Connecticut."[9] (Roe author Justice Blackmun joined in the majority opinion in Paul v. Davis.) Similarly, in Paris Adult Theatre I v. Slaton (1973), the Court stated: "Our...decisions recognizing a right of privacy guaranteed by the Fourteenth Amendment included 'only personal rights that can be deemed "fundamental" or "implicit in the concept

of ordered liberty.'"[10] (Justice Blackmun joined in the majority opinion in Paris.)

A plethora of Court decisions stand for the proposition that any right that can be deemed as "fundamental" or as "implicit in the concept of ordered liberty" is, thereby, deemed also as being implicit in the Fourteenth Amendment's concepts of due process or liberty, as the case may be.[11] The Court in Loving v. Virginia (1967) stated: "These [anti-interracial marriage] statutes...deprive the Lovings of liberty without due process of law....The freedom to marry has long been recognized as one of the vital [i.e., fundamental] personal rights essential to the orderly pursuit of happiness by free men."[12] Similarly, in Wolf v. Colorado (1949), the Court stated: "The security of one's privacy against arbitrary intrusion [i.e., unreasonable search or seizure] by the police - which is at the core of the Fourth Amendment - is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and, as such, enforceable against the states through the Due Process Clause."[13]

Can the constitutional right to privacy give to a fundamental right something that the latter right would not otherwise possess? It cannot. By virtue of its fundamentality, a fundamental right possesses a lien on "strict scrutiny analysis". This is the highest form of constitutional protection any constitutional right can possess. Furthermore, by virtue of its fundamentality or status as a constitutional right, a fundamental right could simply generate any needed zone of privacy.[14] Hence, on the Roe Court's own grounds, the implicit constitutional right to privacy is superfluous. The Roe Court qualified the constitutional right to privacy out of existence. It is an empty and useless concept, and therefore should be banished from the vocabulary of the constitu-

tional decision-making process. David O'Brien observed: "the necessity [in Roe] of invalidating the abortion statutes on the basis of a constitutional right of privacy remains imperceptible. Justice Blackmun surveyed constitutionally protected privacy interests in order to conclude that 'only...rights that can be deemed fundamental...are included in this guarantee of personal privacy.'"[15] In Bowers v. Hardwick (1986), the Court ignored the constitutional right to privacy and addressed the issue presented there in these simple terms: Does the practice of sodomy by homosexuals qualify as a Fourteenth Amendment fundamental right?[16]

The Court, in San Antonio School District v. Rodriguez (1973), stated: "Skinner applied the standard of close scrutiny ["strict scrutiny analysis"] to a state law permitting forced sterilization of habitual criminals. Implicit in the Court's opinion is the recognition that the right of procreation is among the rights of... privacy protected under the Constitution. See Roe v. Wade." That statement was offered in support of Rodriguez's dubious holding that the criterion of a fundamental right for "strict scrutiny" purposes is whether the claimed right is explicitly or implicitly guaranteed by the Constitution.[17] Rodriguez is in effect stating here that procreation and abortion are fundamental rights precisely because they are part of the constitutional right to privacy. This particular interpretation of Roe's right to privacy holding squarely contradicts the Paris and Paul Courts' interpretations of the same.[18] It is double-talk for the Court to state expressly that the right to privacy can embrace only "given" fundamental rights (Roe v. Wade), and then to mutter under its next breath that access to physician-performed abortion is a woman's fundamental right because it is an aspect of the constitutional right to privacy (Rodriguez, as well as the dissenting opinions in Bowers v. Hardwick (1986)).[19]

Insofar as Rodriguez states that fundamental rights are implicit in the constitutional text, it is undoubtedly correct. However, insofar as Rodriguez states that the criterion of a fundamental right is whether the claimed right is somehow constitutionally guaranteed, it is undoubtedly incorrect. The Rodriguez majority reasoned that because fundamental rights are constitutionally guaranteed, the criterion of whether a claimed right is fundamental is therefore whether it is constitutionally guaranteed. That is the equivalent of arguing that because human beings are animals, the criterion of humanity is therefore animality. The Rodriguez fundamental rights criterion derives not from an exercise in constitutional interpretation, but rather from one more blatant judicial exercise in predilection. Justice Blackmun necessarily implied as much in his concurring opinion in Plyler v. Doe (1982).[20]

The Fifth Amendment provides in part that a person cannot be held to answer for certain felonies except upon a presentment or indictment of a grand jury. Yet, in Hurtado v. California (1884), the Court held that this particular Fifth Amendment right is not implicit in the due process clause of the Fourteenth Amendment for the reason that the right, although constitutionally guaranteed against federal infringement, is not fundamental.[21] The fact of the matter is: the traditional criterion for determining whether a claimed right is implicit in the concepts of Fourteenth Amendment due process or liberty is precisely whether the claimed right can be deemed fundamental.[22]

Neither the Griswold Court nor the Roe Court cited Skinner in support of the proposition that the Constitution implicitly guarantees a right to privacy.[23] The Rodriguez Court simply rewrote the Skinner opinion in order to manufacture precedent or support for Rodriguez's dubious fundamental rights criterion. The Skinner

Court could not have implicitly held that procreation is a fundamental right by virtue of a connection to a constitutional right to privacy, if only for the reason that the Skinner Court was unaware of the existence of such a right. Skinner was decided in 1942, twenty-three years before Griswold (1965).

Given that the Roe Court knew that a fundamental right is necessarily a constitutionally guaranteed right of the highest order, then why did the Roe Court feel compelled to use the proposition that the right to privacy can include only "established" fundamental constitutional rights as its lead weapon in making its so poorly disguised assault on our states' criminal abortion laws?[24] There are several reasons.

First, the Court knew that the American people could not be made to accept the inhuman practice of abortion unless it could be beautifully packaged. Therefore, the Court conjured up the right to privacy and all that it suggests: protection against "Big Brother" and respectable doctors in their white coats. Even pro-choice doctors admit that abortion is a horrible practice. Dr. Khalil Tabsh, Chief of Obstetrics at the U.C.L.A. School of Medicine (as of 1989), stated: "When you do a [second-trimester] D and E [i.e., a dilation of the cervix, and elimination of the fetus], it's a gross procedure....You grab the baby and pull the baby out. You're pulling arms and legs; the baby comes out in pieces. It's a sickening procedure." Similarly, D and E specialist, Dr. James McMahon, stated: in D and E "the fetus is dismembered...and removed with forceps....The fetus...[is arranged] so that...[I] can remove its feet first. Before the skull emerges, ...[I collapse] it by [an] instrument...[and by] extracting its fluid." It is strange indeed that while the Constitution guarantees such an inhuman practice, it evidently does not guarantee the

inhumane or malicious destruction of animals. In 1991 in Bakersfield, California, a man was given a two-year prison sentence for inhumanely killing his ex-girlfriend's puppy by twisting off its head. In February of 1993, in Vista, California, a man was given a one-year county jail sentence for felony animal abuse. He stomped on his neighbor's ktiten in a fit of anger. The kitten lost the use of her hind legs. In 1991 in Miami, Florida, two men were sent to federal prison for maliciously killing an endangered Key Deer.[25]

Secondly, the Court knew that it could not even begin to find the Texas criminal abortion statute unconstitutional without employing the doctrine of fundamental rights - strict scrutiny analysis.[26] Prior to Roe v. Wade this doctrine had been employed only in the context of equal protection analysis. Roe v. Wade marks the first time the Court applied that doctrine in the context of substantive due process analysis.

Thirdly, the Court knew that it had to set some limits on the scope of the right to privacy because, as observed by the Court in Katz v. United States (1967): "Virtually every governmental action interferes with personal privacy to some extent."[27]

Fourthly, the Court did not want to be accused of employing the then discredited (but not "justly" discredited) doctrine of substantive due process analysis. (In Planned Parenthood v. Casey (1992), the Court affirmed Roe v. Wade expressly on substantive due process grounds.) This doctrine, in its widest application, holds that the concepts of due process and liberty, as contained in the Fifth and Fourteenth Amendment due process clauses, implicitly include fundamental rights, including those that are neither explicitly nor implicitly contained in any of the other Amendments of the Bill of Rights.[28] The doctrine is considered discredited,

not because of any defect inherent in the doctrine itself, but because of the abuse it has so often received at the hands of a particular Court majority. (However, the abuse of doctrinal application can no more negate its valid application than can the use of factual misrepresentation negate the use of accurate factual representation.) The essence of this abuse has been that the justices have used the relatively broad and undefined concepts of due process and liberty as vessels into which they have injected their personal views on how certain legal, political or social issues should be resolved.

Contrary to what Justice Douglas believed, Roe v. Wade represents nothing more than a very grave misapplication of the valid doctrine of substantive due process analysis.[29] In fact, it is substantive due process analysis compounded. Substantive due process, after all, involves nothing more than the recognition that the Fifth and Fourteenth Amendments' concepts of due process and liberty include certain fundamental rights.[30] Roe v. Wade extended that recognition to the concept of privacy implicit in the concept of liberty.

Second Argument

If Fifth Amendment liberty does not include a right to privacy, then it should follow that Fourteenth Amendment liberty does not include a right to privacy. This is because the content of liberty in each of these amendments is identical. The Court in Ingraham v. Wright (1977) and Paul v. Davis (1976), stated, respectively: "The Due Process Clause of the Fifth Amendment...[was] incorporated into the Fourteenth [Amendment]";[31] and: "The Fourteenth Amendment['s] [due process clause] imposes no more stringent

requirements upon state officials than does the Fifth upon their federal counterparts."[32]

The Fifth Amendment is a specific constitutional guarantee. However, in Paul v. Davis (1976), the Court stated: "There is no 'right of privacy' found in any specific [Bill of Rights] guarantee."[33] Paul v. Davis, then, stands for this proposition: Fifth Amendment liberty does not include a right to privacy. The Court in Griswold v. Connecticut (1965) implied as much: "The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment."[34] Had the Griswold Court thought that Fifth Amendment liberty includes a right to privacy, then that Court would not have strained to look to the Fifth Amendment right against self-incrimination as a source of the right to privacy. The right against self-incrimination obviously does not protect what an individual may know, or an individual's inner feelings or thoughts, such as malice and specific intent. It only prevents proof of them through non-immunized, incriminating, testimonial compulsion. That, and not privacy, is its real concern.[35]

Third Argument

This argument is directed at Griswold's privacy theory. Preliminarily, legal commentators have never been impressed with the Griswold privacy theory. Law professor Russell W. Galloway observed: "Justice Douglas in Griswold claimed that the right of privacy was an emanation from the First Amendment...[and from] several other constitutional provisions. But Douglas' reasoning has been written off by most scholars as a blue-smoke-and-mirrors effort to avoid the appearance of inventing constitutional rights."[36]

In Katz v. United States (1967), Katz argued that governmental eavesdropping on his telephone conversation in a public telephone booth violated his right to privacy as guaranteed by the Fourth Amendment. Although the Katz Court held that such eavesdropping violated the Fourth Amendment, that Court, nevertheless, flatly rejected the argument that the Fourth Amendment, or any of the other Bill of Rights amendments or combination of such amendments, can give rise to an operating, independent or composite constitutional right to privacy:

> The Fourth Amendment cannot be translated into a general constitutional 'right to privacy'. That amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. [Court's footnote]: Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution.[37]

Justice Stewart, the author of the Katz opinion, stated the following in his concurring opinion in Roe v. Wade: "There is no constitutional right of privacy, as such [citing Katz]."[38]

The Third Amendment may express a concern for domestic tranquility or privacy.[39] However, such privacy is protected from only a very specific form of governmental action: quartering of soldiers in a person's home (1) when the nation is not at war, and the person has not consented to the quartering, and (2) when the nation is at war, but a federal law has not been enacted that authorizes the particular quartering. Given the absence of any

real connection between governmental quartering of soldiers in a person's home and governmental prohibition of physician-performed abortion, it is clear that the Third Amendment lends no support to a composite or independent right to privacy, let alone to a right to privacy that is broad enough to include physician-performed abortion.

The Fifth Amendment, unlike the Fourth Amendment, is not concerned with privacy at all. The Court, in United States v. Nobles (1975), stated: "'The purpose of the relevant part of the Fifth Amendment is to prevent compelled self-incrimination, not to protect private information. Testimony demanded of a witness may be ...private..., but unless it is...protected by the Amendment, [or by some other rule of evidence],...it must be disclosed.'"[40]

The fatal flaw in the Griswold privacy theory is that zones or penumbras of privacy are systematically severed from their constitutional qualifiers and then patched together to form a composite or independent constitutional right to privacy. The Griswold approach to the inference of a constitutional right is mechanical to say the least; but as expounded by the Court in Faretta v. California (1975): "The inference of [constitutional] rights is not, of course, a mechanical exercise....An implied right must arise independently from the design and history of the constitutional text."[41]

It is no more legitimate to infer a composite right to privacy from the fact that the Bill of Rights protects certain aspects of privacy from specific forms of governmental intrusion than it is to infer a composite right to civil liberty from the fact that the Bill of Rights protects specific civil liberties.

The purpose of each penumbra of privacy is to give life and substance to the particular right in the Bill of Rights that gener-

ated the particular penumbra of privacy.[42] Since each penumbra does its job here, there is no necessity for these privacy penumbras to unite. Also, the inclusion of physician-performed abortion under this unification-of-penumbras-of-privacy process does not add "life and substance" to the rights of free speech, freedom from unreasonable searches and seizures, and freedom from compelled self-incrimination. Hence, any attempt to establish a nexus or natural relationship between the Griswold privacy theory and a woman's interest in physician-performed abortion must fail.

Roe made no real attempt to demonstrate the existence of a natural connection between the right to privacy and a woman's claimed interest in undergoing a physician-performed abortion. All that Roe says on this subject is that state-prohibition of physician-performed abortion may or might impose detriment on some women.[43] Being drafted inflicts detriment on draftees. After all, they could get killed in war. Yet freedom from being drafted is not protected by the right to privacy. Furthermore, Roe holds that a woman's right to an abortion is not even contingent upon a showing of detriment.

Fourth Argument

This argument is directed at Griswold's, fraternal twin privacy theory.[44]

If the First, Third, Fourth and Fifth Amendment penumbras or zones of privacy, whether considered severally or jointly, cannot form a composite right to privacy, then neither can the zones of privacy generated by the complementary constitutional rights to marry, procreate and rear children. The proper exercise of these complementary rights certainly requires a zone of privacy or freedom from governmental intrusion. However, such privacy does not,

and need not, have its source in a composite right to privacy. The Court, in Zablocki v. Redhail (1978) implicitly conceded as much when it pointed out that several Court decisions state that the complementary rights to marry, to procreate and to rear children are fundamental liberties, and therefore are part of the very essence of the scheme of ordered liberty. However, the Zablocki Court stated also the following: "More recent decisions have established that the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."[45] Is the Zablocki Court implying here that, but for the constitutional right to privacy, there would be no constitutionally guaranteed rights to marry, to procreate and to rear children? The Zablocki Court is not implying so unless the Zablocki Court is impliedly rejecting the prior Court decisions that state that these complementary rights stand on their own as fundamental rights. (And if the Zablocki Court is implying so, then obviously these rights cannot be the source of a constitutional right to privacy!) Regardless of how the Zablocki Court would want to rewrite the Court's extant decisions dealing with these complementary rights, this fact remains: None of those decisions relied upon a right to privacy.

An attribute, almost by definition, has no existence independent of the entity in which it exists. (Size, weight, shape and texture, for example, are attributes of material objects.) Constitutional privacy is simply an attribute of a given constitutional right. The Zablocki Court would, in effect, take an attribute of certain rights and convert it into the very source of those rights.

It degrades the complementary rights to marry, to procreate and to rear children if one argues that those rights depend upon a

right to privacy for their full or proper exercise. Since these rights are fundamental, they can, if need be, simply generate a zone of privacy. They can do this for precisely the same reason that the First Amendment rights of free speech and peaceful assembly are able to generate a right of free-speech association, which includes the right to associate in private or not to be compelled to disclose one's free-speech associations to the government. The reason this free-speech right is able to do this is because a constitutionally guaranteed right appropriates to itself whatever means are essential to effectuate the full extent of its constitutional status.[46]

Fifth Argument

The Ninth Amendment, which operates only against "federal action", states: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

The idea that the Ninth Amendment implicitly guarantees the "unenumerated, retained rights" referred to, but not set forth or even identified in that Amendment, is currently popular in some legal circles.[47] There is, however, no getting around the simple fact that it does not follow that, because the Ninth Amendment "refers" to "unenumerated, retained rights", therefore, either the Ninth Amendment or some other Bill of Rights amendment guarantees these unenumerated, retained rights against infringement by the Federal Government. Justice Douglas, in his concurring opinion in Roe's companion case Doe v. Bolton (1973), stated: "The Ninth Amendment obviously does not create [guarantee] federally enforceable rights."[48]

The Court, in Richmond Newspapers, Inc. v. Virginia (1980), implied (1) that Ninth Amendment unenumerated retained rights are limited to those rights that are necessary to effectuate rights enumerated in the Bill of Rights, and (2) that the purpose of the Ninth Amendment is to refute the contention that the sole criterion of whether a claimed right is constitutionally guaranteed is whether it is explicitly set forth in the Constitution or Bill of Rights.[49] Neither the text of the Ninth Amendment, nor its legislative history supports either of these Richmond contentions.[50]

The Ninth Amendment neither serves to acknowledge the existence of certain rights implicit in the rights enumerated in the Bill of Rights, nor serves as an independent source of constitutionally guaranteed rights. The amendment serves simply to inform the federal government that the rights explicitly and implicitly set forth in the preceding eight amendments of the Bill of Rights do not necessarily set forth all of the rights "retained by the people".

It may be that many of the rights to which the Ninth Amendment refers (probably: (1) inalienable rights as defined by 18th-century natural law principles, (2) rights "long recognized at the English common law as essential to the orderly pursuit of happiness by free men", and (3) certain rights guaranteed in the original constitutions of the states that ratified the Constitution)[51] are implicit in some of the Bill of Rights guarantees. It may be also the case that all of these "unenumerated, retained rights" are implicitly guaranteed by Fifth and Fourteenth Amendment due process clauses. However, if these rights are so guaranteed, it is not because the Ninth Amendment refers to them.

Our constitutional scheme of government certainly forbids the federal government from infringing upon Ninth Amendment "unenumer-

ated retained rights". However, as the Tenth Amendment implicitly affirms, the reason is because the federal government can operate only within the means of its constitutionally delegated powers.[52] The Ninth Amendment clearly implies that a power to infringe on the exercise of these "unenumerated retained rights" has not been delegated to the federal government. Hence, it would be an unconstitutional act (which the Court would have the legitimate power to strike down as being unconstitutional) for the federal government to infringe upon these "unenumerated retained rights". The reason, however, is not because the Ninth Amendment "guarantees" them against federal infringement, but is precisely because the Constitution does not delegate to the federal government the power to infringe upon them.[53] An additional or independent reason would come into operation here if the particular right infringed upon is also implicit in a particular Bill of Rights provision, such as the Fifth Amendment's due process clause.

Even assuming that the Ninth Amendment "guarantees" certain rights, including a right to privacy, it would not follow from that fact alone that the Fourteenth Amendment guarantees those same rights. Although the rights protected by the Fourteenth Amendment due process clause are not necessarily limited to, or defined by, those rights explicitly or implicitly contained in the Bill of Rights amendments; they are, nevertheless, limited to those rights that can be deemed "fundamental or implicit in the concept of ordered liberty".[54]

Did the English common law recognize a right to privacy? Viewed from the perspective of the English common law, the answer is an unqualified "no". A privacy right, if it existed there, must have been very private indeed. To date, no legal scholar, in searching there, has been able to locate a right to privacy.[55]

Consider the following picture of 17th century, English family and social life:

> The adult male was head of the household with, in theory, near absolute power over his wife, children and servants. This hierarchical concept, which emphasized obedience to the male master, was supported by the state, who saw it as a microcosm of the nation's obedience to the King, and by the Church as a manifestation of the Fifth Commandment [i.e., "Honor your father and your mother."]. In practice this authority was supervised, and often curbed, by the active interference of the community in almost every aspect of family and economic life. There was no privacy. This was an alien concept. Every aspect of family life was subject to public scrutiny and amelioration, either informally through popular pressure, or through the formal channels of the secular and ecclesiastical jurisdictions activated through local tithingmen, constables, or church-wardens. The community intervened when its concept of social harmony was endangered.[56]

One could, of course, sift through the English common law and find isolated instances of rights that show a concern for what, in modern terms, could be described as privacy.[57] However, if one were to claim that these isolated privacy findings add up to a composite or general common law right to privacy, then such a claim would suffer from essentially the same flaws inherent in the Griswold privacy theory. Yet, even if some very imaginative constitutional scholar discovers a general common law right to privacy, there is no way such a scholar will be able to argue credibly that at common law this right to privacy extended to induced abortion.[58]

Conclusion to PART I

The State of Texas argued in Roe that Texas has a "compelling interest" in outlawing induced abortion from the moment of conception, because a human being begins his or her existence as the same at conception. The Court responded in part: "We do not agree that by adopting one theory of life Texas may override the rights of the pregnant woman that are at stake."[59] That statement is not only highly misleading[60] but also hypocritical. The Roe Court overrode the State's concededly legitimate and important interest in protecting prenatal human life simply by adopting one or more privacy theories.

The Court, in Eisenstadt v. Baird (1972), in what may have been an attempt to manufacture constitutional support for the Roe decision,[61] issued this dictum: "If the right of privacy means anything, it is the right of an individual, married or single, to be free from unwarranted, governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[62] Well, in Roe the Court proved that the constitutional right to privacy is meaningless.

The conclusion is inescapable that the Roe Court, in its passion to add a new star (a woman's right to undergo a physician-performed abortion) to our constitutional constellation, unknowingly established the nonexistence of the very constitutional right (the right to privacy) to which the Court sought to link this claimed abortion right. Many persons will find this unintended consequence of Roe difficult to accept. Thomas Huxley insightfully observed: "There is no sadder sight in the world than to see a beautiful theory killed by a brutal fact."

PART II

The Status of the Fetus and the Status of Abortion Under the English Common Law as Criteria of Due Process Clause Persons and of Fundamental Rights

The Roe Court, in the course of arriving at its decision, formed the following conclusions regarding the status of induced abortion under (1) the English common law, (2) colonial American law, and (3) the laws of the states and territories of the United States up to approximately the mid-nineteenth century (and note here that the Court, in arriving at these conclusions, is implicitly adopting the following "untrue" proposition):

> At common law, a person enjoyed the right to engage in any act that was not recognized there as an indictable offense.
>
> At common law, abortion performed before "quickening"- the...[pregnant woman's initial perception of the] movement of [her] fetus *in utero*...was not an indictable offense....
>
> ....A recent review of the common-law [abortion] precedents [by Cyril Means]...makes it now appear doubtful that [post-quickening, induced abortion] was...a common-law crime....
>
> ....
>
> The American law: In this country, the law...[on induced abortion] in all but a few states until mid-19th century was the preexisting English common law....
>
> ....
>
> It is thus apparent that at common law, [in colonial America, and in this country, from the time] of the adoption of our Constitution [to]...throughout the major portion of the 19th century,...a woman enjoyed a substantially broader right to terminate a preg-

> nancy than she does in most states today. At least with respect to the early stage of pregnancy [the pre-quickening stage], and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century.[1]

It was in light of the above conclusions that the Court, in the course of concluding its Roe opinion, remarked that its "holding...is consistent with the...[status of the fetus and of induced abortion at]...common law."[2]

Never in the history of American jurisprudence, which in large measure is derived from the common law, has a part of the common law been more misrepresented than in Roe v. Wade.[3] Hannah Arendt observed that "'the power of the modern state makes it possible for it to turn lies into truth by destroying the facts which existed before and by making new realities to conform to what until then had been ideological fiction.'"[4] The Roe Court, in drawing the foregoing conclusions, imitated "the power of the modern state". The Roe Court knew that the principle of the sacredness and inviolability of innocent human life has always been recognized as the cardinal principle and centerpiece of English-American law.[5] However, that Court knew also that if it acknowledged that the history and tradition of English-American law demonstrates the repeated application of that principle to the conceived unborn, then the Court, in withdrawing the application of that principle to the conceived unborn, would be undermining the very foundation of English-American law.[6]

It is bad enough when the Court ignores legal history relevant to a particular constitutional issue because that history will not provide a way to where the Court is bound and determined to go with the issue.[7] It is worse yet when the Court, or some of its members,

when not in a position to get away safely with ignoring such history, or with rewriting it without an informed legal world laughing at the rewrite, attempt to denigrate such history.[8] But it is unpardonable when the Court rewrites that history so that it provides the way to where the Court is determined to go. The Roe Court's employment of such a tactic proves that the Court felt a need to have history on its side in order to forestall the accusation that Roe is a lawless decision, because it is wrought from nothing more than the injection into the Constitution of the private or personal view that the compulsory legalization of abortion "is necessary for the emancipation of women".[9]

The Roe Court would have a person believe that it was simply restoring to women of the United States their fundamental, common law liberty to rid themselves of unwanted pregnancies, which had been reluctantly abolished by our various state and territorial legislative bodies through the enactment of criminal abortion statutes during the course of the 19th century. According to the Roe Court, those 19th-century statutes were designed not to safeguard prenatal life (whether actual or potential), but rather only to protect women from the then perceived dangers of abortion, and particularly, surgically performed abortion. The Court in Roe and in Roe's companion case, Doe v. Bolton, stated, respectively: "Parties challenging state abortion laws...claim that most state [criminal abortion] laws were designed solely to protect the woman. There is some scholarly support for this view [citing Means' abortion articles]...The few state, [appellate court decisions that have discussed this question also support this view]"; and: "a century ago...any abortion procedure was dangerous for the woman. To restrict the legality of...abortion to [when]...necessary...[to preserve] the woman's life was only a natural conclusion in the exercise of the legislative judgment of that time."[10]

The idea the Court was desperately attempting to plant here is that the existence of those 19th-century, state and territorial criminal abortion statutes does not, in principle, undermine the claim that a woman's interest in having access to physician-performed abortion is her fundamental right. According to the Court, during the course of the 19th century, a relatively safe and effective abortion procedure would have been developed and made available to women in the United States, then our 19th-century, state and territorial legislative bodies would not have felt morally obligated to abolish or severely restrict a woman's theretofore recognized, common law right to obtain a "pre-quickening", if not also, a "post-quickening" abortion.[11]

The idea is rootless on no less than four grounds. The first is: given the traditional definition of medicine as "'the practice of studying derangements of health, the means of preserving and restoring the latter, and of curing the former,'"[12] then implicit in such an idea is the idea that our 19th-century legislative bodies viewed pregnancy (whether wanted or unwanted) as some sort of illness or disease. However, they did not. Jennifer Tachera observed: "For thousands of years, babies were delivered at home with the help of midwives. Pregnancy was not considered an illness or disease, and physicians were not called unless there were complications."[13] More specifically, the American physician Samuel Bard, in his A Compendium of the Theory and Practice of Midwifery (1808), stated:

> Provident nature is wonderfully kind to pregnant women, and when she is properly consulted, attended to, and obeyed from the beginning; not weakened by excess of any kind; nor thwarted and put out of her course by preposterous mismanagement in her progress, will, nine hundred and ninety-nine times out of a

> thousand, carry her votary safely through all the wonderful changes of this eventful period.[14]

Similarly, the English physician William Montgomery, in his An Exposition of the Signs and Symptoms of Pregnancy (1837), stated:

> Pregnancy...[is not] a state of disease, but ...one in which a great temporary alteration takes place in the condition of particular functions, not however of such a kind or to such a degree, as could with propriety be considered as constituting disease. On the contrary,...several of the functional derangements naturally accompanying that condition are subservient to new but healthy actions necessarily associated with its favorable progress....Indeed, I think we have sufficient evidence to justify the belief that pregnancy acts in a great degree as a protection against the reception of disease.[15]

The second ground is: the idea conveniently overlooks the fact that several of these same 19th-century legislative bodies enacted statutes that made it a criminal offense to use, sell, or advertise for sale artificial contraceptive devices. In the Connecticut case of State v. Nelson (1940), the following was noted: "Since 1873 when Congress passed...[The Comstock Act], which included prohibition of the mailing or importation or furnishing of contraceptives, at least twenty-six states have passed laws related to birth control. Of these, eight, including Connecticut and Massachusetts, attempt complete suppression."[16]

The third ground is: The idea implicitly contains the false presupposition that America's 19th-century medical profession would not have hesitated to abandon a tenet of the Hippocratic Oath: "I will neither give a deadly drug to anybody if asked for it, nor

will I make a suggestion to this effect. Similarly, I will not give a woman an abortive remedy." The truth of the matter is, and the Roe Court expressly acknowledged as much: it was largely in response to the 19th-century, American physicians' campaign to outlaw induced abortion, that each of our 19th-century, state and territorial, legislative bodies either originally enacted a criminal abortion statute, or amended, revised or supplemented one or more of its extant, criminal abortion statutes. The central theme of this physicians' campaign was not that deliberately performed abortion often poses a serious threat to the life and health of pregnant women, but rather that actual human life begins at conception; and, therefore, induced abortion, at whatever stage of gestation it is done, involves the destruction of innocent human life.[17]

Furthermore, and this is the fourth ground, there is good reason to believe that 19th-century medical communities held the opinion that surgical abortion, when performed by a competent surgeon, was not necessarily life-threatening to the pregnant woman. Paris and Fonblanque in their Medical Jurisprudence (1823), stated: "It is hardly necessary to remark that...[a surgical abortion] operation, unless performed by a skillful surgeon, will...endanger the life of the female."[18]

If it is true that a century ago virtually every invasive surgical procedure was medically recognized as dangerous to the patient, then why did not any of our state's or territorial legislative bodies refrain from outlawing every form of body-cavity surgery not medically recognized as necessary to save the patient's life? Those bodies outlawed only surgical abortion; why? The common sense answer is that those bodies did not regard the human fetus as some kind of disease in a woman's womb, but regarded it as

an actual or potential human life, and therefore as worthy of the law's protection.

Some persons may want to argue that those legislative bodies realized that unmarried, pregnant women and married women who became pregnant in the course of committing adultery, have incentives or pressures to undergo life-threatening surgical abortions that are not presented to patients considering other forms of life-threatening, body cavity surgery. Therefore, or so the argument continues, these pressures "would justify isolating the abortion decision and prohibiting it except when strictly necessary" to save the pregnant woman's life. The problem with this argument is that it overlooks the fact that these pressures would have been exerted upon the pregnant woman, and not upon the person or doctor who would have been asked to perform or induce the abortion. However, under many of our states' 19th-century, criminal abortion statutes, the pregnant woman who submitted to a criminal abortion was exempted from prosecution. The rationale behind this exemption was not consideration for the woman's plight, but rather to facilitate successful abortion prosecutions.[19]

Reasonable minds cannot differ with the conclusion that one of the main purposes of virtually each of the criminal abortion statutes (or statutory, criminal abortion schemes) that were enacted by the states and territories of the United States during the nineteenth century was the safeguarding of the human embryo and fetus. The only matter over which reasonable minds might differ here is which of the following two groups of observations is more irresponsible: (1) the Roe-Bolton observations that these 19th-century, criminal abortion statutes were designed for the protection of women, and not for the protection of prenatal human life (whether actual or potential), or (2) these shoot-from-the-hip, appeal-to-

prejudice observations of constitutional law professor Laurence Tribe:

> The dozens of abortion laws rendered invalid by Roe v. Wade were enacted in the...nineteenth century largely to keep women in their place. The first recorded convention [in America] on women's rights was held in 1848, and the following two decades were the most active period in the struggle for women's rights until modern times....In the final decades of the last century, abortions were no longer merely a solution to illegitimate or adulterous pregnancies; they were sought by "respectable" women as a means of limiting family size - an obvious rebellion against the homemaker role industrial society sought to impose upon them....Finally, the medical profession took the lead in lobbying to outlaw abortion, but apparently not primarily because the procedure was dangerous....The major motivation of Victorian physicians seems to have been the desire to suppress competition by midwives and the other irregular practitioners ["backstreet abortionists", "quacks" and those who engaged in unethical or unlicensed practices of medicine] who performed most abortions and who were predominantly female.[20]

Tribe conveniently fails to mention several pertinent facts here. One fact is that throughout the history of humankind, "respectable women" have committed virtually every serious crime known to law. Another fact is (and Tribe has recently conceded as much): the legalization of abortion was not on the agenda of the 19th-century women's movement in the United States. Neither respectable, nor disrespectable, women in 19th-century United States sought to make abortion legal.[21]

Assume for the moment that Tribe could somehow prove the validity of the dubious (if not self-contradictory) premise that

19th-century, United States physicians lobbied then-existing state and territorial legislatures for more stringent laws against abortion with the secret or ulterior motive of securing their own economic well-being by discouraging or monopolizing the practice of abortion. The fact would remain: Tribe could not, short of examining the diaries of the members of those legislatures, demonstrate that what motivated those legislatures was a desire to help physicians realize their secret goal here. Even if Tribe could make such a demonstration, it would be irrelevant. What matters is: legislative "purpose", not legislative motive. For example, the Court, in Westside Community Schools v. Mergens (1990), stated: "Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the act, because what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law."[22] What motivates a particular legislator to vote for a particular law is no more relevant to determining the purpose of that law than is what motivated voters to elect that legislator.

Recently, Tribe has conceded that "protection of prenatal life" was the primary motivation behind the 19th-century, American physicians' campaign to eradicate abortion. However, he still refuses to acknowledge that "protection of prenatal life" (whether actual or potential) was a purpose of any of the 19th-century, state and territorial, criminal abortion statutes. This is not surprising. If Tribe acknowledged as much, then he would be forced to acknowledge also that the Roe Court erred in holding that a woman has a "fundamental right" to undergo a physician-performed abortion.[23]

Tribe has not attempted, and the Roe Court did not attempt, to set forth and document a reason or reasons why our 19th-century,

state and territorial, legislative bodies would not have been concerned with safeguarding the conceived, unborn product of human conception because of what that product will soon become, if it is not already: an existing or actual human being. In fact, the Roe Court substantially documented the opposite here:

> Logically, of course, a legitimate state interest in...[the safeguarding of the unborn product of human conception] need not stand or fall on acceptance of the belief that life begins at conception [i.e., that a human being begins his or her existence as the same at conception] or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert [legitimate and important] interests beyond the protection of the pregnant woman alone.[24]

The only attempt at such documentation is the following appeal to anti-Catholic bigotry offered by Cyril Means:

> [Who could believe that] a passel of Protestants in nineteenth Century [English] Parliament and [the 19th-century] Legislatures [of the states and territories of the United States] were eagerly embracing the latest metaphysical speculations concerning immediate animation then becoming current in the schools of moral theology of contemporary Rome....
>
> Our Protestant forbears, of course, did not intend to enact anybody's metaphysics (not even their own) into their penal codes. They did intend - and this was all they intended - to protect the health and lives of women with unwanted pregnancies from damage and destruction by abortion....[25]

Means conveniently neglected to point out here that this 19th-century, Catholic, theological movement towards acceptance of the idea of immediate animation (i.e., the idea that the human soul is infused not at fetal formation [mediate animation], but rather at, or during, the process of conception) was spearheaded by the late 18th-century and 19th-century position of medical science: that existing or actual human life begins at conception. It was the advancement of that position by medical men and medical associations that was largely responsible for the original enactment and subsequent revision of criminal abortion legislation in 19th-century England and in the United States.[26]

It will be demonstrated conclusively that one of the main purposes of virtually each of the original abortion statutes enacted in the states and territories of the United States in the nineteenth century was the safeguarding of the human embryo or fetus. Now, given that purpose here, then the same is highly relevant to establishing that: (1) a woman's interest in undergoing a physician-performed abortion does not qualify as a fundamental right; (2) the human fetus (probably also the human embryo) qualifies as a due process clause person; and (3) the State's interest in safeguarding the human embryo and the human fetus is "compelling" independent of whether or not the human embryo and human fetus qualify as Fourteenth Amendment persons.[27]

The status of deliberately performed abortion and the status of the embryo and the human fetus in the womb under the English common law, in addition to being relevant to determining the purposes of our state's, 19th-century, criminal abortion statutes,[28] were highly relevant to the proper resolution of the following two pivotal issues in Roe: (1) are the human embryo and human fetus properly deemed persons within the meaning of the word "person" contained in the due process clause of the Fourteenth Amendment;

and (2) is a pregnant woman's interest in undergoing a physician-performed abortion properly deemed a fundamental right?

The Roe Court answered "no" to the first question, and answered "yes" to the second question. Had the Roe Court answered "yes" to the first question, or "no" to the second question, then the Roe Court would have held that a woman's interest in undergoing a physician-performed abortion is not guaranteed by the due process clause of the Fourteenth Amendment. Why would that have been the case? The answer is that the Roe Court expressly so stated in reference to the first question,[29] and implicitly so stated in reference to the second question. Regarding the second question, there are two forms of substantive due process analysis: "rational basis analysis" and "strict scrutiny analysis".[30] The latter comes into operation only when governmental action more than incidentally infringes on the exercise of an individual's, non-economic based, fundamental right. There exists here an almost conclusive presumption, which the government bears the burden of rebutting, that the governmental action complained of is unconstitutional.[31] However, under "rational basis analysis", the challenged governmental action is presumptively constitutional. To overcome this presumption the challenger must demonstrate that the governmental action complained of is not "'rationally related to furthering a legitimate governmental interest.'"[32] Since the Court in Roe expressly acknowledged that the State's interest in safeguarding the unborn product of human conception is legitimate beginning at conception,[33] and since State-prohibition of induced abortion obviously serves that legitimate interest; it follows that State-prohibition of induced abortion would pass muster under rational basis, substantive due process analysis.

The English common law has been called a "wellspring of constitutional interpretation".[34] The Court in Smith v. Alabama (1888)

stated: "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."[35] In the case of Plyler v. Doe (1982), the Court quoted with approval the following observation of Justice Field: "'The term person, [as] used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic."[36] Now given (1) the validity of these Smith Courts' and the Plyler Courts' observations, and (2) that whatever or whoever can qualify as a Fifth Amendment, due process person, qualifies also as a Fourteenth Amendment, due process clause person,[37] then, if it could be demonstrated that at common law, it was received opinion that the "formed human fetus" is an existing human being that is protected by the common law, it should follow that the formed human fetus is legitimately recognized as a Fourteenth Amendment, due process clause person.[38]

According to the Court, fundamental rights represent that class of rights that the English-American system of jurisprudence has traditionally regarded as of the very essence of the concepts of justice and ordered liberty.[39] They are part of the very structure of society, and represent those principles of justice and liberty "'which lie at the base of all our civil and political institutions.'"[40] They inhere "in the very idea of free government and...[are] the inalienable right[s] of a citizen of such a government." They are "'those rights...for the establishment and protection of which organized government is instituted,...[for] which the state governments were created to...secure,'"[41] and of which governmental "interference with,...would frustrate the purposes of the formation of the Union."[42] They occupy "a position fundamental to the concept of our Federal Union [and are] a necessary concomitant of the stronger Union the Constitution created".[43] They "'have at

all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign.'"[44] They are "those intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'"[45] They are "enshrined in the history and the basic constitutional documents of English-speaking peoples," and they include those rights "long recognized at common law as essential to the orderly pursuit of happiness by free men."[46]

How, then, does the Court determine if a claimed right qualifies as fundamental under the foregoing definitions or criteria of a fundamental right? The Court decides if the following question can be answered in the affirmative: Does an examination or review of the "traditions and collective conscience of the English-American peoples" reveal that these people have regarded the claimed right as basic to their concepts of justice or ordered liberty? Justice Goldberg, in his concurring opinion in Griswold v. Connecticut (1965), stated: "In determining which rights are fundamental, judges...must look to the 'traditions and [collective] conscience of our people' to determine whether a principle [or a claimed right or rule] is 'so rooted [there]...as to be ranked as fundamental.'"[47]

What source or sources does the Court look to in order to ascertain the "collective conscience" of the English-American people concerning the claimed right? The chief source has always been the laws under which the English-American people have chosen to conduct the way they live in society. The Court, in Snyder v. Massachusetts (1934), stated: "The Constitution and statues and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwealth expresses itself in law."[48] Similarly, the Court in Stanford v. Kentucky (1989) stated: "'First' among the '"objec-

tive indicia that reflects the public attitude toward"'...[recognition of the claimed right] are statutes [on the subject] passed by society's elected representatives."[49]

The Court in Bowers v. Hardwick (1986), in the course of holding that the practice of homosexual sodomy is not a fundamental right, observed:

> Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 states when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 states in the union had criminal sodomy laws. In fact, until 1961, all 50 states outlawed sodomy, and today, 24 states and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" [so as to be ranked as "fundamental"] or "implicit in the concept of ordered liberty" is, at best, facetious.[50]

The fundamental rights methodology employed by the Court in Bowers is now, and was then, well established; and the dissenters in Bowers (Justices Blackmun, Marshall, Brennan, and Stevens) have not hesitated to employ it. For example, Roe author Justice Blackmun in his concurring opinion in McKeiver v. Pennsylvania (1971) (which holds that Fourteenth Amendment due process does not guarantee trial by jury in juvenile delinquency proceedings), observed:

> "The fact that a practice is followed by a large number of states...is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our

> people as to be ranked as fundamental.'" It is therefore of more than passing interest that at least 28 states and the District of Columbia by statute deny the juvenile a right to a jury trial in cases such as these. The same result is achieved in...[five additional] states by judicial decision.[51]

Justice Blackmun's foregoing McKeiver observations, when juxtaposed with his statement in Roe v Wade that the right to privacy can include a particular right only if that right can be deemed fundamental (independently of the right to privacy), will cause reasonable and unbiased persons to utter sighs of disbelief in considering the following remarks made by Justice Blackmun in his dissenting opinion in Bowers:

> This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, than Stanley v. Georgia (1969) was about a fundamental right to watch obscene movies, or Katz v. United States (1967) was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right [to privacy or] to be let alone". I believe we must analyze respondent Hardwick's claim in light of the values that underlie the constitutional right to privacy.[52]

Justice Blackmun is the very justice who proclaimed for the Court in Roe v. Wade that the Court's privacy decisions make it clear that the values or rights that underlie the right to privacy are limited to those that can be independently deemed as "fundamental" or "implicit in the concept of ordered liberty".[53] Recently, (May 7, 1991) in California, in a Claremont College Graduate School forum on the Bills of Rights, Justice Blackmun stated that "he be-

lieved the [Bower] Court 'decided on the result they wanted and then went after it.'" One could reasonably conclude here not only that Justice Blackmun mistook the Roe majority for the Bowers majority, but also that Justice Blackmun's public announcement in the late 1970's, stating that henceforth he will reject result-oriented, constitutional analysis, was short-lived.[54]

The fundamental rights methodology employed by the Court in Bowers was utilized by the Court in Duncan v. Louisiana (1968), in the course of holding that a defendant's right to a jury trial in the context of a state prosecution involving a non-petty offense is fundamental to the American scheme of justice.[55] That fundamental rights methodology was employed in Ford v. Wainwright (1986), where the Court, in keeping "faith with our common law heritage," held that an insane person, under sentence of death, has a fundamental right not to be executed while he or she remains insane.[56] It was employed by the Court, in Reynolds v. United States (1878), in the course of holding that the practice of polygamy by Mormons is not guaranteed by the First Amendment right to the free exercise of religion.[57] It was employed by the Court, in Michael J. and Victoria D. v. Gerald D. (1989), in the course of holding that a man, who can prove that he is the biological father of a child conceived while the child's mother was married to and living with her husband, does not have a fundamental right either to be legally recognized as one of the child's parents, or to establish or maintain a relationship with that child. Also, in Michael J, it was noted by Justice Scalia that in Roe v. Wade (1973) the Court "spent about a fifth of...[its] opinion negating the proposition that there was a long-standing [English-American] tradition of laws proscribing abortion [and establishing the virtual opposite of that proposition]."[58]

Justice O'Connor, in her concurring opinion in Michael H. and Victoria D. v. Gerald D. (1989), stated that the fundamental rights methodology employed by the Court in such cases as Bowers, Duncan, Ford and Reynolds has not been adhered to by the Court in all fundamental rights cases:

> This...[fundamental rights methodology] may be somewhat inconsistent with our past decisions in this area. See Griswold v. Connecticut (1965) [and] Eisenstadt v. Baird (1972). On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be "the most specific level" available. See Loving v. Virginia (1967); Turner v. Safley (1987); [and] United States v. Stanley (1987). I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.[59]

A concern for the possibility of some future, unanticipated case is not a relevant consideration to deciding the case at hand. It is not a rule of legal interpretation; and therefore, it ought to be dismissed from the thought-processes of justices in the course of deciding actual cases. It amounts in a real sense to anticipating, and perhaps even pre-deciding some unanticipated question of constitutional law. But as Justice O'Connor noted in her dissenting opinion in Rust v. Sullivan (1991), the "Court 'has rigidly adhered' to the rule 'never to anticipate a question of constitutional law in advance of the necessity of deciding it.'"[60]

More importantly, constitutional questions are never (or should never be) resolved by reliance upon some type of "generality", no matter how narrowly the generality is defined. They are resolved by an analysis of such items as: relevant legal precedent, analogy, and the historical application of a specific legal

principle or concept. If the rule were otherwise, then such a generality could be informed by judicial predilection. That also would be the case if justices could pick and choose among these "various modes" of historical analysis.[61]

In truth, the Court explicitly or implicitly applied a fundamental rights analysis in only three (Griswold, Loving, and Turner) of the five cases cited here by Justice O'Connor. In Griswold the Court could not even muster the courage to forthrightly acknowledge that its holding may very well be inconsistent with the Court's traditional fundamental rights methodology.[62] Furthermore, the Griswold Court did not bother to articulate the fundamental rights methodology it implicitly applied. To this day, the Griswold opinion continues to be recognized by most constitutional law scholars as one of the most poorly reasoned opinions of the Court. To suggest, then, as Justice O'Connor does, that Griswold somehow represents a valid exception to the Court's traditional fundamental rights methodology assumes, in effect, the validity of a patently unsound premise that: Griswold represents a sound fundamental rights methodology simply because the Griswold Court implicitly, or without explanation, rejected the then existing traditional, fundamental rights methodology. In truth, Griswold represents a highly suspect statement of constitutional law precisely because it failed to apply the traditional, fundamental rights methodology.

Notwithstanding Justice Stevens' glib counter-argument,[63] it is questionable whether the dictum in Loving that a person's fundamental right to marry includes the right of a person to marry a person not of his or her race, implicitly rejects the traditional fundamental rights methodology. When Loving was decided, only sixteen states (mainly the southern states), including Virginia, had anti-miscegenation laws on their books.[64] While such laws existed in at least several of the English colonies in North

America, and largely as an incident to slavery, they did not exist in England. Then existing English law sanctioned interracial marriages and forbade slavery (but not the trading of slaves) in England. The rise of these anti-miscegenation statutes in effect created a contrived exception to what, practically speaking, was then universally recognized as a person's inalienable or fundamental right. The same cannot be said for induced abortion. For centuries prior to, and for well over a century after the rise of anti-miscegenation laws, induced abortion was viewed in English-American thought as the virtual opposite of an inalienable right.

In Turner v. Safley (1987), the Court simply held that the fundamental right to marry cannot be denied outright to prison inmates. The basis for that holding is the established constitutional principle that a convict retains those fundamental rights that are not inconsistent with his or her status as a convict.[65]

How has the "collective conscience" of the English-American people expressed itself on the subject of induced or deliberately performed abortion? It has condemned it as being the virtual opposite of a woman's fundamental right or cherished common law liberty. It has deemed it as one of the worst crimes known to law.

The English common law on induced abortion. Available evidence indicates that at the English common law, induced or deliberately performed abortion (deliberated abortion), as well as virtually all acts relating to the same (e.g., attempted abortion, or a violent assault on a pregnant woman), were indictable offenses. More specifically: (1) Quick with child and pre-quick with child, induced abortion were indictable offenses, and the former was a capital offense if a live child (whether or not it was viable, and whether or not the mother had quickened) was aborted alive, and subsequently died in connection with being aborted; (2) if a woman died from self-induced abortion, she was deemed guilty

of a felony, namely suicide; and (3) if a woman died as a result of an abortion deliberately brought on by another person, her death was treated as murder, or perhaps in certain rare circumstances, as manslaughter.[66]

Colonial American law on induced abortion. The cultures and traditions of the original thirteen colonies were steeped in the Christian religion, Judeo-Christian morals, and Judeo-Christian natural law principles. Therefore, those colonies no more sanctioned the practice of induced abortion than they sanctioned such practices as fornication, adultery, bigamy, incest, sodomy, bestiality, prostitution, drunkenness, rape, arson, burglary, robbery, theft, and murder (including infanticide).[67]

It is an extremely difficult task to supply more than a fairly accurate statement on the criminal status of induced abortion in colonial America. One reason why this is so is because each colony had its own criminal code, each of which was substantially amended or replaced several times.[68] With that said, available evidence indicates that pre-quick with child and quick with child induced abortion were indictable offenses in probably all of the original thirteen colonies. The available evidence here, and which is set forth in detail in PART III, includes the following: (1) the known criminal abortion prosecutions that occurred in 17th-century Maryland and Rhode Island,[69] as well as those that possibly occurred in 17th-century Maryland, Virginia and Delaware;[70] (2) the fact that virtually all of the colonies eventually received the English common law on indictable offenses;[71] (3) the fact that several of the colonial American penal codes contained a provision to the effect that, in the absence of a recognized criminal law covering an act thought to be criminal, then the "Word of God" or the Bible shall be controlling on whether the act is indictable,[72]; and (4) the existence of certain colonial penal statutes, including those

covering homicide and those designed to prevent abuses regarding the practice of the "healing arts" and midwifery.[73]

The law on induced abortion in the states and territories of the United States from approximately the later part of the eighteenth century to approximately the mid-nineteenth century, or more properly, to the respective time each state or territory initially enacted a criminal abortion statute as did, for example, Connecticut in 1821, Delaware in 1883, and Kentucky in 1910. During this period or periods, nearly every state and territory, through the enactment of a statute or through the state's or territory's judiciary, received the English common law on indictable offenses.[74] This means that throughout the United States during this period or these periods, induced abortion (and acts related to the same) were, or at least should have been indictable offenses.[75]

The law on induced abortion in the states and territories of the United States from approximately the mid-nineteenth century (or more properly, from the time each state or territory enacted a criminal abortion statute) to the advent of Roe v. Wade in 1973. Initially, it is important to note here that the enactment of a criminal abortion statute by a state or territory that had received the common law on indictable offenses would not have had the effect of repealing in that state or territory those parts of the received common law on induced abortion that were not explicitly or implicitly covered by the criminal abortion statute. For example, if the abortion statute in question did not apply to a woman who either performed an abortion on herself or willingly submitted to being aborted by another person, then such a woman remained liable to being prosecuted for criminal abortion under the state's received common law on indictable offenses.[76]

In the United States, from approximately the mid-19th century to January 22, 1973 (on which date virtually every criminal abor-

tion law in the United States was substantially, if not totally obliterated by Roe v. Wade), there never was a period when a vast majority of the American states and territories did not, by statute, outlaw both pre- and post-quick with child, induced abortion, except when necessary to preserve the mother's life. As late as approximately 1965, nearly every state and territory of the United States had such a statute on its books. In McKenney's Consolidated Laws of New York (1975), the following is stated:

> Dating well back into the nineteenth century, fifty-two American jurisdictions (the fifty states plus the District of Columbia and Puerto Rico) possessed laws establishing abortion as a crime. As of 1965, forty-nine of these jurisdictions limited its [sic] legal justifications for performance of an abortion to virtually a single ground, namely necessity of preserving the life of the female. In the other three jurisdictions (Alabama, Massachusetts and the District of Columbia), preservation of the female's health was also a ground of justification.[77]

It is virtually impossible for an unbiased and informed person to conclude that these 19th-century, criminal abortion statutes or statutory schemes were not designed in substantial part to safeguard unborn human life. To conclude otherwise, a person would have to cast aside common sense, logic, the background against which these statutes were enacted, the known legislative history of some of these statutes, the many state court appellate decisions articulating the purposes of these statutes, the plain meaning of the words and elements contained in these statues, as well as virtually every other rule of statutory interpretation known to English-American law. Our 19th-century, state and territorial, criminal abortion statutes, as originally enacted and as subse-

quently amended or revised or supplemented, were designed for essentially three or possibly four purposes. These were: (1) The protection of unborn human life; (2) the protection of the lives and health of women (which is demonstrated, for example, by the fact that several of these statutes made induced abortion murder or manslaughter, or enhanced the punishment, if the woman died in connection with an induced abortion);[78] (3) the prevention of the corruption of public morals because induced abortion served to hide the commission of such crimes as fornication, adultery and incest; and (4) a lack of societal concern for the safeguarding of the most innocent and helpless of human creatures would speak ill of the idea of a civilized society. The Ohio Supreme Court, in State v. Tippie (1913), stated:

> We remark, first, that the evolution of this [criminal abortion] statute of Ohio seems to show that...[t]he reason and policy of the statute is to protect women and unborn babies from dangerous criminal practice, and to discourage secret immorality between the sexes and a vicious and craven custom amongst married pairs who wish to evade the responsibilities and burdens of rearing offspring.[79]

A close examination of these 19th-century, criminal abortion statutes,[80] when coupled, as it ought to be,[81] with an examination of their English models[82] and the English common law on criminal abortion, reveals that several of these statutes or statutory schemes combined into one penal subject what the common law, for the most part, treated as two distinct subjects of criminal law. The first such subject is induced abortion per se, which at common law was not considered a distinct area of criminal law, inasmuch as its "continuing" criminal status, with the exception of the occasion when an aborted child was aborted alive, and then died in

connection with being aborted, derived from the common law methodology on non-capital or non-felonious indictable offenses. It did not derive from the common law rules on criminal homicide. The second subject is the common law rules on criminal homicide. These rules considered a woman who died in connection with an induced abortion as a victim of murder, or in certain rare circumstances, as a victim of manslaughter.[83] The chief objective of the first subject was the protection of conceived, unborn human life, both actual and potential. The chief objective of the second subject was the protection of women.

No less than twenty-nine of our 19th-century, state and territorial, criminal abortion statutes or statutory schemes, as originally enacted, explicitly or implicitly (through judicial construction of a statute) incorporated the term quick with child (pregnant with a live child) or its equivalent.[84] Approximately twenty-two of these twenty-nine statutes penalized pre-quick with child abortion less severely than they penalized quick with child abortion. The remaining seven did not penalize pre-quick with child abortion, but they were subsequently amended to penalize the same.[85] Also, no less than seven of these original twenty-nine statutes were subsequently amended to abolish the quick with child-not quick with child distinction, indicating that being quick with child served neither as an element of the statutory offence nor as a penalty-enhancement provision.[86]

The following may also be said of our 19th-century, state and territorial, criminal abortion statutes or statutory schemes as originally enacted: Approximately twenty-four of them did not incorporate the quick with child-not quick with child distinction.[87]

Despite what the Roe Court so desperately wanted to believe, the incorporation of the quick with child-not quick with child distinction into the foregoing twenty-nine, 19th-century, criminal

abortion statutes did not reflect legislative recognition of a received medical opinion that an abortion performed in an advanced stage of pregnancy posed "greater health hazards to the woman than did an early abortion".[88] In 19th-century medical thought, it seems to have been a generally received opinion that surgical abortion, when performed early in pregnancy, posed "more" danger to the life and health of the pregnant woman than when performed late in pregnancy. The American physician Amos Dean, in his Principles of Medical Jurisprudence (1850), stated:

> The other local and violent means consist in the introduction into the uterus of an instrument for the purpose of rupturing the membranes, and thus bringing on premature action of the womb.
>
> In some cases, where this villainous practice has been resorted to, abortion has been produced by means of it, while in others, the child has been born alive; and in all of them, the mother's life has been either sacrificed or greatly endangered. The object has generally been to rupture the membranes, and thereby induce a premature action of the uterus, by means of which its contents would be expelled. This is of more difficult accomplishment the earlier it is undertaken. It is in such cases, that the uterus has generally been seriously, and often fatally injured.[89]

This quick with child-not quick with child distinction represented nothing less than an express acceptance by some twenty-nine of our 19th-century, state and territorial, legislative bodies of the common law-received opinion that there comes a time in the course of human gestation when the unborn product of human conception ceases its existence as only a potential human being, and begins its existence as a human being.[90] The very meaning of the terms quick with child or pregnant with a quick child is pregnant

with a live child.[91] Common sense dictates that, to the extent these twenty-nine, 19th-century, state and territorial, criminal abortion statutes used the terms with a quick child or quick with child (or their substantial equivalent), it can be said that the plain meaning of these terms here display a purpose to safeguard the child existing in the womb no less than do the words "person" or "human being" in a murder statute demonstrate a purpose to safeguard the lives of human beings already born. The Roe Court unknowingly conceded as much. The Roe Court, in the course of rejecting the argument of Texas that, inasmuch as a human being comes into existence as the same at conception, Texas' statutory criminal abortion scheme serves that state's "compelling interest" in safeguarding the lives of unborn human beings, observed: "In areas other than criminal abortion, the law has been reluctant to endorse any theory that [actual human] life, as we recognize it, begins before live birth."[92]

To the above facts may be added the following: Many of these 19th-century, criminal abortion statutes contained the elements of specific intent to destroy the unborn quick child, and that the child be killed, or provided for an enhanced punishment or made the offense criminal homicide (eighteen jurisdictions did so) if the unborn child was killed in connection with being deliberately aborted.[93]

It is a rule of statutory construction that the background or "the events and passions of the time" against which particular legislation is enacted, is relevant in determining the purpose of such legislation.[94] The Court, in United States v. Ark (1899), stated:

> In construing any act of legislation, whether a statute enacted by the legislature,

> or a Constitution established by the people as the supreme law of the land, regard is to be had not only to all parts of the act itself, and of any former act of the same lawmaking power, of which the act in question is an amendment, but also to the condition, and to the history of the law as previously existing, and in the light of which the new act must be read and interpreted.[95]

The twenty-four or so 19th-century, American state and territorial, statutory criminal abortion schemes which, as originally enacted, did not incorporate the quick with child-not quick with child distinction, and the seven or so such schemes which, as originally enacted, did incorporate this distinction (but were subsequently amended to remove the distinction), were so enacted or amended at least in part against the background of an effort by physicians to remove the concept of quickening from existing state and territorial criminal abortion law.[96] The fundamental premise underlying this effort was that actual human life is present at conception.[97] The Roe Court expressly acknowledged this background here:

> The attitude of the [American Medical] profession may have played a significant role in the enactment of stringent criminal abortion legislation [in 19th-century America]...
>
> An AMA Committee on Criminal Abortion... presented its report...[in] 1859....The report ...deplored abortion and its frequency and it listed three causes of "this general demoralization": "The first of these causes is a widespread popular ignorance of the true character of the crime - a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening...." The third ...is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These er-

> rors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas....The Committee...offered, and the Association adopted, resolutions...calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies "in pressing the subject."
> -In 1871 a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation, "We had to deal with human life....[W]e could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less.[98]

An examination of the leading 19th-century, English and American works on medical ethics, medical jurisprudence, and midwifery, in which the subject of intentional abortion is discussed, reveals that the following theme is persistently set forth: inasmuch as actual human life begins not at quickening, but rather at conception, the quickening distinction should be abolished in the context of criminal abortion law.[99]

The legislative history behind Ohio's criminal abortion statute of 1867 confirms that it had been enacted in recognition of the position of physicians that human life begins at conception. This statute removed the quickening distinction from an Ohio criminal abortion statute enacted in 1834, and retained the provision in the 1834 statute that carried identical punishments in the following two circumstances: when the pregnant woman dies or when her unborn child dies in connection with an induced abortion. The legislative history for this 1867 Ohio statute contains such statements as: "'Physicians have now arrived at the unanimous opinion that the foetus in utero is alive from the very moment of

conception.'"[100] The same can be said of a New York criminal abortion statute enacted in 1869.[101]

England's original criminal statute covering deliberated abortion was enacted in 1803. The statute incorporated the quick with child-not quick with child distinction. Practically speaking, the statute made it (1) a capital felony to attempt to bring about an abortion on any woman "then being quick with child", and (2) a non-capital felony to attempt the same on any woman "not being, or not being proved to be, quick with child."[102] That distinction and its accompanying sentencing ramifications were retained in the 1828 revision of the 1803 statute.[103] However, both of those items were removed in the 1837 revision of the 1828 statute.[104] This removal occurred against the background of the position of English physicians that actual human life begins at conception, and not at quickening. The English physician William Cummin in 1836 and 1837 stated, respectively:

> The phenomenon of quickening was supposed by the older physiologists to arise from the accession of life (as the term implies) to the foetus at that period. But when we know that what is understood in general by quickening does not take place till between the fourth or fifth month after conception, we are prepared to reject that hypothesis, for we know that the communication of life is the immediate consequence, if not the very essence of the act of conception.[105]
>
> - - -
>
> The absurd distinction here preserved [in 9 Geo. IV., c. 31, sec. 13 (1828)] in accordance with the old ideas about quickening, is disgraceful to our legislators; but I have it from good authority [and this authority proved to be good], that this is to be one of the very first points amended in the criminal code now in preparation: one punishment, and that not capital, is to be awarded for the crime, at whatever period of pregnancy it may be committed.[106]

Similarly, the English barrister Joseph Chitty, in his Practical Treatise on Medical Jurisprudence (1834), stated:

> Would Members of the Legislature tolerate the many absurd existing regulations, especially that of making the crime of causing miscarriage capital, or a mere transportable felony, to depend on the question whether the foetus were four or five months old, or rather quick or not quick, if they sufficiently considered that the child is equally alive and equally in progress towards maturity at all times after conception?[107]

It never was a generally received opinion among ancient and early-modern, physiologists, physicians, philosophers, or among the Church Fathers and theologians, that a human being comes into existence at quickening. The received opinion (and the English common law received this opinion, and not the quickening opinion),[108] was the fetal formation opinion. This opinion stated that the unborn product of human conception becomes a human being just as soon as it develops into a fetus. The thought here was that: at this stage in prenatal development, the unborn product of human conception is equipped to be ensouled with a rational or human soul.[109] Most such philosophers, physicians, and theologians, etc., accepted the Aristotelian opinion that, while the unborn product of human conception is alive from the moment of its conception, its pre-fetal life is only a vegetative form of life that subsequently develops into animal life.[110] Hence, to have argued that life is present at human conception (when the fetus is not yet formed or organized), as did 19th-century, English and American medical writers, did not logically tend to refute the opinion that the unborn product of human conception does not become a human being (traditionally understood as an organized or formed human body

endowed with life or a rational or human soul) until it develops into a fetus. This very well may serve to partially explain why the 19th-century, American physicians' campaign to convince our then existing, state and territorial legislatures to do away with the quickening (or quick with child-not quick with child) distinction, in the context of criminal abortion law, was not completely successful.[111]

Many, if not virtually every one of our 19th-century, state and territorial, criminal abortion statutes as originally enacted or as amended, were derived from their English counterparts.[112] It is a rule of statutory construction that a statute derived from or modeled after one of a sister state or another country is presumed to have been enacted to serve the same purpose as the latter.[113] The question then becomes: Can it be demonstrated that England's 19th-century, criminal abortion statutes were designed in substantial part to protect conceived, unborn human life (whether actual or potential)? The answer is yes.

An examination of England's original or 1803 criminal abortion statute, when coupled with an understanding of certain difficulties of proof that might have hampered English common law abortion prosecutions, reveals that this 1803 statute was designed to remedy certain defects in the common law on criminal abortion. These defects were essentially the following: (1) insufficient punishment for deliberately destroying an unborn quick (live) child, and also one not yet quick;[114] and (2) the difficulty in proving that the unborn quick child was alive at the time of being aborted, and that the unborn quick child and the unborn non-quick child were destroyed in connection with the abortional act.[115] In the 1803 criminal abortion statute, the destruction of the quick fetus (child) or non-quick fetus or product of human conception was not an element of the offense, and so destruction did not have to be

proved here.[116] It can be said that Section I of the 1803 abortion statute failed to remedy even partially the difficulty in proving that the pregnant woman was "then carrying" a quick or live child (I am referring to the situation when there was a successful abortion of a "formed fetus") only if that section's phrase "then being quick with child" was intended to refer to quickening, and not to fetal formation. The 19th-century English judiciary construed that phrase (but I argue, mistakenly so) to refer to quickening.[117] The problems that this quickening or quick with child requirement posed to successful prosecutions under Section I of the 1803 abortion statute (and there is no known instance of a successful prosecution under that section)[118] were solved by England's 1837 abortion statute, which abolished the statutory elements of quickening (or quick with child) and pregnancy.[119]

The intentional killing of an unborn, existing child was not a capital offense at the later common law unless the child was brought forth alive (an element which also plagued the successful prosecution of infanticide cases), and then died in connection with being aborted. When the aborted child was aborted dead, or if it was not proved that the aborted child had been born alive, then the offence was deemed a serious misdemeanor. It was also an indictable offense at common law to perform, or to attempt to perform, an abortion on a woman who was pregnant but not yet quick with child or with a quick child.[120] Section 1 of England's 1803 abortion statute made it a capital felony to even so much as attempt an abortion on a woman "then being quick with child". A conviction required proof that the child was "then quick" (the criterion of which mistakenly came to be the mother's quickening)[121], but it did not require proof that the child had been born alive, or had died in connection with being aborted. Section 2 of the statute made it a non-capital felony to attempt an abortion on a woman then

pregnant but not yet quick with child, or not proved to be so. Section 2 not only protected the child not yet quick, but also indirectly protected the unborn, quick child in the event a Section 1 prosecution failed to establish that the quick child was indeed quick.[122] That this Section 2 offense was designed more for the protection of both the child not yet quick and the quick child-not proved to have been quick than for the mother of the child is demonstrated by the apparent fact that pregnancy was an element of the Section 2 offense.[123] Attempted abortion remained dangerous to a woman notwithstanding she had not been pregnant when the abortion was attempted on her, or when she had been pregnant but it was not proved that she had been pregnant. Yet, even if pregnancy would not have been a required element here, such a fact would not tend to support the proposition that this Section 2 offense was not designed for the protection of the child-not yet quick. "Recent" pregnancy was a fact more often than not highly difficult to prove when the abortion occurred early in the pregnancy.[124]

There is no question that the common law on criminal abortion per se was designed to safeguard the child existing in the mother's womb, as well as the child coming-to-be in the mother's womb. Common sense dictates that a remedial statute adopts or incorporates the purpose of the law that contains the defect sought to be cured by the remedial statute. The 1803, English abortion statute was designed to cure defects in the common law on criminal abortion per se. The English criminal abortion statutes of 1828, 1837, and 1861 (and particularly the 1837 act in removing the quick with child-not quick with child distinction) were also remedial in nature.[125]

When a 19th-century, American state or territorial, legislative body originally enacted a criminal abortion statute or amended such a statute, it did so with the aim of curing one or more defects in existing criminal abortion law. Then-existing, criminal

abortion law was with few, if any, real exceptions, the English common law on the same.[126] In Hurtado v. California (1884), the Court observed: "'The great offices of statutes is to remedy defects in the common law as they are developed and to adopt it to the changes of time and circumstances.'"[127] More specifically, Hawley and McGregor, in their Criminal Law, stated: "Many, if not all the states have remedied the defects in the common law [on criminal abortion] by statutes which define and punish abortion."[128]

One "perceived" defect here (but I will show in Part IV that this perception was erroneous), was the failure of the common law to make pre-quick with child, induced abortion an indictable offence.[129] For example, the Massachusetts Supreme Court, in Commonwealth v. Wood (1858), stated the following in response to a defense argument that an indictment under Massachusetts' original or 1845 abortion statute must allege that the fetus was quick, so that at common law it would constitute an indictable offense: The argument "misconceives the purpose of the statute, which was intended to supply the defects of the common law, and to apply to all cases of pregnancy."[130] Similarly, the Maine Supreme Court, in Smith v. State (1851), stated the following in commenting on Maine's original or 1840 criminal abortion statute: "There is a removal of the unsubstantial distinction that [at common law] it is no offence to procure an abortion before the mother becomes sensible of the motion of the child...It is now equally criminal to produce abortion before and after quickening."[131]

The New Jersey Supreme Court, in State v. Cooper (1849), held that, inasmuch as New Jersey criminal abortion law is the English common law on the same, and inasmuch as pre-quick with child, induced abortion is not an indictable offense at the English common law, it is, likewise, not indictable under New Jersey law.[132] In direct response to this Cooper holding, the New Jersey Legislature

in 1849 enacted its first criminal abortion statute.[133] This statute did not incorporate the quick with child-not quick with child distinction.[134] The New Jersey Supreme Court in State v. Murphy (1858), stated the following in the course of commenting on the purpose of this 1849 abortion statute:

> An examination of its provisions will show clearly that the mischief designed to be remedied by the statute was the supposed defect in the common law developed in the case of State v. Cooper that the procuring of...[a pre-quick with child] abortion...was not indictable. The design of the statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts. The guilt of the defendant is not graduated by...whether the foetus is destroyed, or whether it has quickened or not....The only graduation recognized by the statute in the defendant's guilt, is made to depend upon the effect of the act upon the mother, viz, whether she died in consequence of it.
>
> ....The offence...under the statute is mainly against her life and health.[135]

State v. Murphy was the only case cited by the Roe Court in support of the proposition that every criminal abortion statute enacted in 19th-century United States was designed solely to protect pregnant women.[136] The Roe Court, in an obvious display of bias, failed to point out that no less than forty-four, appellate court decisions, representing some thirty-two states, including Texas, stated in one form or another that protection of conceived, unborn human life was one purpose of the state's statutory criminal abortion scheme.[137]

Furthermore, State v. Murphy cannot be reasonably understood to stand for the proposition that the protection of the lives and health of women, and not the protection of conceived, unborn human life, is the purpose of New Jersey's 1849 abortion statute. The

most that can be said is that Murphy stands for the proposition that the former purpose is the main purpose of that statute. Germain Grisez stated: "The State v. Murphy phrase 'not so much as' means 'both this and that, but more the one than the other."[138] The New Jersey Supreme Court, in State v. Siciliano (1956), observed: "the object [of New Jersey's 1849 criminal abortion statute was]..., according to State v. Murphy, not only the protection of the unborn child, but to protect the life and health of the mother as well."[139] The 1849 statute could not be violated unless it was proved that the woman was pregnant. This virtually proves that the 1849 statute was designed in substantial part to protect unborn human life.[140]

When a law covers a particular subject, that law can be considered defective in its coverage of the subject only if for some reason the actual coverage fails to substantially achieve the purpose of the coverage. For example, suppose a state enacted a statute making it a criminal offense to torture a human being. No one could seriously argue that such a statute is defective because it fails to prohibit the torturing of any animal. One could, of course, argue that the state's penal code, taken as a whole, is defective in failing to make it a criminal offense to torture any animal. Therefore, if the common law on criminal abortion per se was designed solely to safeguard conceived, unborn human life, then contrary to State v. Murphy, it cannot be reasonably maintained that the common law coverage on this subject is defective because it fails to protect the lives and health of pregnant women. However, it can be reasonably maintained that such a law is defective in failing to protect the pre-quick product of human conception. The 1849 New Jersey criminal abortion statute simply combined under one penal statute what at the English common law were recognized as two distinct subjects of criminal law.[141] Also, in 1872, New

Jersey's 1849 abortion statute was amended to provide for a uniform punishment in situations when either the mother or her child died in connection with an induced abortion.[142]

Under several of our states' 19th-century, criminal abortion statutes, a pregnant woman who willingly submitted to an abortion could not be prosecuted for violating the abortion statute. Indeed this is a fact that supports the proposition that those several statutes were designed for the protection of women.[143] However, contrary to the Roe Court's view,[144] the existence of this fact equally supports the proposition that those several statutes were designed also to protect unborn human life. "One of the most formidable obstacles to effective enforcement of abortion laws lies in the...nature of the crime. Everyone connected with the operation is...interested in suppressing knowledge from the police; and there is no injured party in the usual sense of the word to file a complaint."[145] Now, add to those facts the fact that when a woman sets out to obtain an abortion, she often seeks outside assistance. In such instances, and by virtue of the fact that such a woman has not been made a principal or accessory to the statutory abortion offense, she remains as the only available witness to the offence who, legally speaking, is not an accomplice. This would have been extremely important to the successful prosecution of abortion in 19th-century United States because of the then-existing, standard, jury instruction that stated that no defendant can be (or should be, as the case may be) found guilty solely upon the testimony of an accomplice or accomplices. If one examines the court decisions in which it was held that the woman on whom the statutory abortion offense was committed is not an accomplice (because she is not liable to prosecution as a principal or accessory), one will see that the accomplice issue is uniformly presented in the context of whether the trial court erred in failing to instruct the jury to

the following effect: "If you find that the woman on whom the abortion was performed is an accomplice, then you should be reluctant to (or cannot, as the case may be) find the defendant guilty solely upon her testimony.[146]

The existence of this exemption from statutory abortion prosecution did not necessarily mean that a pregnant woman could not have been prosecuted by her state for intentional abortion. Her criminal abortion liability would have remained according to her state's received common law. Additionally, she may have remained liable to prosecution for conspiracy to violate her state's criminal abortion statute. The majority view on the law on conspiracy did not then, and does not now, require that in order for a person to be liable to prosecution for conspiracy to commit a crime, he or she also must be liable to prosecution (as a principal or accessory) for committing the crime itself.[147]

The following, then, has been fairly demonstrated: When considered from the perspective of the traditional, constitutional methodology of fundamental rights, and the purposes and traditions behind both the common law rules on criminal abortion and our colonial, 19th-century, and pre-Roe, 20th-century, criminal abortion laws, the claim that a woman's interest in undergoing a physician-performed abortion qualifies as a fundamental right cannot get off the ground.[148]

It may be argued that a close reading of the Roe opinion reveals that the Roe Court rejected the traditional, fundamental rights methodology, and implicitly announced a new fundamental rights methodology: The importance of the claimed right to the individual from the perspective of the severe detriment that the state would, or might cause to the individual by prohibiting him or her from exercising the claimed right. That this is the case, or so this argument goes, is demonstrated by the fact that, in Roe,

the Court stated the following almost immediately after stating that the constitutional right to privacy can include only certain fundamental rights:

> This right of privacy...is broad enough to encompass a woman's decision...to terminate her pregnancy. The detriment...the State would impose upon the pregnant woman by denying this choice...[except when necessary to save the pregnant woman's life] is apparent.
>
> ....Harm medically diagnosable...may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[149]

Assuming, without conceding, that the foregoing argument is valid, then the following question demands to be answered fairly: What rule of the common law or constitutional decision-making processes dictates that the Court can arbitrarily adopt or reject any particular methodology of fundamental rights?[150] Justice Marshall, in his dissenting opinion in San Antonio Independent School District v. Rodriguez (1973), stated: "I certainly do not accept the view that the [methodology of fundamental rights]...need necessarily degenerate into an unprincipled, subjective "picking-and-choosing" between various interests or that it must involve this Court in creating [fundamental]...constitutional rights".[151] If it is true, as reiterated by the Court in Bigelow v. Virginia (1975), that the "'State cannot foreclose the exercise of constitutional rights by mere labels'" (as, for example, by labeling as

"compelling" a certain state interest),[152] then it is equally true that the Court cannot deny to a state the power to outlaw abortion simply by labeling as fundamental a woman's claimed interest in undergoing a physician-performed abortion.

The Roe Court, by appealing to a popular notion, instead of the constitutional notion of the criterion of a fundamental right, disguised the fact that it simply labeled as fundamental a woman's claimed right to undergo a physician-performed abortion. Archibald Cox, despite his opinion that Roe was wrongly decided, is equally guilty of substituting, without discussion or explanation, a popular notion, in place of the constitutional notion of the criterion of a fundamental right. He stated:

> If Roe v. Wade were before us as independent judges, we would have to decide whether these precedents [the Court's so-called right to privacy cases] were so analogous as to show that values previously recognized by the law lead to the conclusion that terminating a pregnancy is a fundamental right. Seven of the nine [Roe] Justices thought the precedents sufficient. My own view is that all except the two birth control cases [Griswold and Eisenstadt] are quite different and that even the birth control cases are distinguishable.
>
> Even if one rejects the analogies and misleading use of "privacy," still, it is hard to think of a more fundamental invasion of personal liberty than to tell a woman that she ...[cannot have an abortion]. Her whole life - physical, psychological, spiritual, familial, and economic - will be profoundly affected. Would not just about everyone agree that this aspect of personal liberty is fundamental?[153]

The Court has repeatedly rejected the notion that the importance of a claimed interest to an individual or individuals is a valid fundamental rights criterion or methodology. David Chambers

observed the following: "A liberty is fundamental in the Court's view, not because of its subjective importance to the individual, but rather because it finds a place in the provisions of the Constitution or in the scheme of social organization the Constitution is believed to have sought to protect."[154] The Court, in Ingraham v. Wright (1977), observed:

> We have repeatedly rejected "the notion that any grievous loss visited upon a person by the State is sufficient to invoke...the Due Process Clause." Due Process is required only when a decision of the State implicates an interest within the protections of the Fourteenth Amendment. And "to determine whether due process requirements apply in the first place, we must look not to the weight but to the nature of the interest at stake."[155]

Similarly, the Court, in Amback v. Norwick (1979), stated: "As San Antonio Independent School Dist. v. Rodriguez recognized, there is no inconsistency between our recognition of the vital significance of public education and our holding that access to [public] education is not guaranteed by the Constitution."[156] The Court, in Leis v. Flynt (1979), stated: "As important as this interest is, the suggestion that the Constitution assures the right of a lawyer to practice in the courts of every State..., flies in the face of the traditional authority of...[the states] to control who may be admitted to practice in the courts before them."[157] One could easily add here: The Roe decision "flies in the face of the traditional authority of the states" to regulate or prohibit abortion.

No one could seriously dispute that a person has an important interest in retaining his or her driving privilege. Just as in the earlier days of the history of our nation, travel by horseback was recognized as important to the fundamental right to individual

mobility, so in our nation today, access to automobile travel is recognized as important to individual mobility or to the fundamental rights to intrastate and interstate travel. The Court, in Delaware v. Prouse (1979), stated: "Automobile travel is...often [a] necessary mode of transportation to and from one's home, workplace, and leisure activities....Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel".[158] Yet, in several decisions, the Court, in not having subjected to "strict scrutiny analysis" certain state laws that mandated the suspension of a person's privilege to drive an automobile within the state, implicitly rejected the claim that a person's extremely important interest in retaining his or her driving privilege qualifies as a fundamental right.[159]

The detriment that a state would cause to a mother of a postnatal child by preventing her from disowning that child is, in some instances, just as severe as that detriment which, according to the Roe Court, a state would bring to bear on a pregnant woman by denying to her the opportunity to rid herself of her unwanted, unborn child. Yet, no one would seriously argue that a mother of a postnatal child has a fundamental right to refuse to raise, to care and to provide for that child, or to give the child up for adoption.

The Roe Court would have a person believe that pregnancy and childbirth are more an illness than a natural process. However, just as one individual cannot make himself or herself a better individual simply by finding fault with another individual; so also, abortion cannot be converted into a right simply by denigrating pregnancy and childbirth.

Medically induced abortion is rarely indicated to preserve the mother's life or physical health. The following is stated in Principles of Medical Therapy in Pregnancy (1985):

> The expertise available at most major medical centers allows the relatively safe handling of most major medical problems during pregnancy. Exceptions are relatively rare and far between and are restricted to such conditions as primary pulmonary hypertension, Eisenmenger's syndrome [pulmonary hypertension with reversal of shunt], active systemic lupus erythematosus with cardiac or renal involvement, and rapidly progressing diabetic retinopathy.[160]

What can be said of the Roe proposition that pregnancy and unwanted motherhood "may" cause (i.e., can cause, in the sense that this has been sufficiently proven, and as distinguished from being only theoretical or within the realm of possibility) psychological harm to the mother? The Court in Roe did not indicate that the trial court record in Roe contained sufficient evidence of the existence of data upon which psychologists or psychiatrists reasonably may rely in rendering an opinion that a woman can or will suffer psychological harm if denied an abortion. The Court also did not indicate that this record contained sufficient evidence that proved that there exists within the disciplines of psychiatry or psychology generally accepted criteria by which it can be determined to a reasonable probability or certainty (1) that a woman who is denied a desired abortion will suffer psychological harm, and (2) that the woman would not suffer psychological harm if she were to have an abortion, or that the harm she would suffer would be less than that caused by the denial of an abortion.[161] Former Surgeon General of the United States, C. Everett Koop, stated the following in a January 9, 1989 letter to President Ronald Reagan describing Koop's findings regarding a presidential directive to the Surgeon General "to prepare a report on the health effects of abortion":

> There are almost 250 studies reported in the scientific literature which deal with the psychological aspects of abortion. All of these studies were reviewed and the more significant studies were evaluated by staff in... agencies of the Public Health Service against appropriate criteria and were found to be flawed methodologically. In their view and mine, the data do not support the premise that abortion does or does not cause or contribute to psychological problems. Anecdotal reports abound on both sides. However, individual cases cannot be used to reach scientifically sound conclusions. It is to be noted that when pregnancy, whether wanted or unwanted, comes to full term and delivery, there is a well-documented, low incidence of adverse mental health effects.[162]

The Roe Court conveniently ignored one of the most elementary principles in English-American law. This principle was articulated by the Court in Hammond v. Schappi Bus Line (1927): "Before any of the questions suggested, which are both novel and of far reaching importance, are passed upon by this Court, the facts essential to their decisions should be definitely found by the lower courts upon adequate evidence."[163] A court cannot take judicial notice of a disputed proposition or fact (i.e., a court cannot find that what is being advanced or contended is true or that a disputed fact is undeniably fact, without requiring that the contention or disputed fact be established by legally sufficient evidence) that is "reasonably" subject to dispute. The whole world knows that psychiatric or psychological diagnosis is steeped in uncertainties. The conclusion seems inescapable that the Roe Court, through an erroneous application of the doctrine of judicial notice, converted highly disputed contentions or facts into indisputable truths. That, of course, helped to provide the way to where the Court in Roe was determined to go.

Regarding the Roe contention that maternity or additional offspring may force upon the woman a "distressful life and future", it is noted that the fact that a child will pose an obstacle to his or her mother's future plans does not mean that, therefore, those plans are forever beyond the mother's reach. Taxes and future death are distressful to human beings. Yet, no one could reasonably argue that a person has a fundamental, natural, or alienable right not to die or to pay just taxes.

Regarding the Roe Court's concern for the effect of the unwanted child on the "all concerned" (presumably, the members of the mother's immediate family): It is noted that the Court showed no concrete concern for the husband in Planned Parenthood of Central Missouri v. Danforth (1976), which gave to a wife a unilateral right to abort her and her husband's child. Furthermore, these "all concerned" were not parties, and were not granted "standing" in Roe v. Wade.[164] Also, Jane Roe was not granted standing to represent the interest of these "all concerned".

Regarding the Roe Court's concern for the effect of the unwanted child on "a family already unable, psychologically and otherwise, to care for it," consider that there are no known sociological or psychological criteria for predicting that a new family member will adversely affect a family, or that a family is psychologically and otherwise unable to care for a new family member.

If having what one wants is a valid criterion of good mental health, then, and for example, parents are well-advised to spoil their kids rotten. It may be that over one-half of the population of the United States have "unwanted" jobs. Yet, no one could reasonably argue that, therefore, over one-half of our nation's working population is psychologically ill.

Regarding the concern for the stigma of unwed motherhood, consider this:

> Evansville, Ind. (AP) [1984]: Vanderburgh Christian Home, for 114 years a discreet haven for girls "in trouble", is closing its doors, forced out of business by the growing acceptability of unwed motherhood....
>
> Directors of the home, believed to be the nation's oldest facility of its kind, say illegitimate births have increased to the point that few young women find sufficient shame in unwed pregnancy to go into hiding from their friends and families.
>
> It no longer has the stigma it once did, said Dorothy Winter, the home's 73-year-old director.[165]

It is, therefore, no wonder that Roe holds that a woman's right to a physician-performed abortion is not even contingent upon a showing of detriment.

What can be said of the following fundamental rights methodology employed by Justice Stewart in his concurring opinion in Roe:

> Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to a private school protected in Pierce v. Society of Sisters (1925), or the right to teach a foreign language protected in Meyer v. Nebraska (1923).
>
> Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is [fundamental and, therefore, is] embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.[166]

Justice Stewart's fundamental rights methodology, if adopted by the Court, would greatly simplify the Court's difficult task in determining which claimed individual interests can be deemed fundamental

rights. The Court, in deciding whether or not a claimed fundamental interest qualifies as a fundamental right, would not have to bother with interpreting constitutional law. The Court would only have to somehow determine which of the established fundamental rights is the least significant, and then somehow determine if the claimed fundamental interest compares in significance with the least significant fundamental right. If the claimed fundamental interest is found to be as significant as the least significant fundamental right, then the former becomes no less a fundamental right than the latter.

The most insignificant, established, fundamental right is, of course, the right to watch legally obscene or pornographic movies in the privacy of one's home. This is because, by constitutional definition, pornography has no human value.[167] It follows, therefore, that under Justice Stewart's fundamental rights methodology, virtually every claimed individual interest under the sun qualifies as a fundamental right.

Fortunately, a Court majority in San Antonio School District v. Rodriguez (1973) (of which Justice Stewart was a member), implicitly rejected Justice Stewart's unprincipled approach to constitutional interpretation. The Rodriguez Court stated: "The key of discovering whether education is fundamental is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the [fundamental] right to travel."[168]

The foregoing aspect of the Rodriguez fundamental rights methodology seems sound. (I do not mean to imply here that the Rodriguez Court's conclusion that a person's unquestioned, fundamental right to pursue an education ceases to be fundamental simply because it is pursued in the context of a state's public school

system.)[169] However, the Rodriguez Court appended the following to its fundamental rights methodology: The criterion of whether a claimed right qualifies as a fundamental right for purposes of "strict scrutiny analysis" is whether the claimed right somehow can qualify as a constitutionally guaranteed right.[170] The Rodriguez Court simply pulled this aspect of its fundamental rights methodology out of an empty hat.[171] Yet, even assuming that this latter aspect of the Rodriguez fundamental rights methodology represents sound constitutional law, the fact remains, that it cannot help establish the proposition that a woman's claimed right to undergo a physician-performed abortion is validly deemed a fundamental right by virtue of its connection to the constitutionally guaranteed right to privacy. This is so for the simple reason that, in Roe, the Court expressly held that in order for a claimed right to qualify as a privacy right, the claimed right must independently qualify as a fundamental right. The right to privacy does not confer the status of "fundamentality" upon a privacy right; rather the right to privacy requires a demonstration that the claimed privacy right can be independently deemed a fundamental right before it can be embraced by the right to privacy.[172]

It may be argued that a woman's claimed right to undergo a physician-performed abortion qualifies as a fundamental privacy right under Justice Marshall's "sliding scale" fundamental rights methodology as set forth in that justice's dissenting opinion in Rodriguez:

> The determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the spe-

> cific constitutional guarantee and the non-constitutional interest draws closer, the non-constitutional interest becomes more fundamental.[173]

In the course of illustrating his fundamental rights methodology here, Justice Marshall clearly implied that a woman's interest in undergoing a physician-performed abortion is properly deemed a fundamental right, because it is necessary to effectuate a woman's constitutional right to privacy. He stated: "Recently, in Roe v. Wade the importance of procreation [and of a woman's interest in undergoing a physician-performed abortion have]...been explained on the basis of [their]...intimate relationship with the constitutional right of privacy."[174] However, the Court in Roe v. Wade unequivocally stated that the right to privacy does not confer the status of "fundamentality" on the rights which it embraces, but rather presupposes the "fundamentality" of those rights. Justice Marshall was a member of the Roe majority. The manipulation of a Court holding is simply an unacceptable principle or rule of constitutional interpretation.

The Rodriguez majority's fundamental rights methodology involves nothing more than a determination of whether the claimed interest is itself somehow constitutionally guaranteed. The Marshall fundamental rights methodology would deem the claimed interest a fundamental right if either the claimed interest itself could be found to be somehow constitutionally guaranteed, or if it could be found to be necessary to the full and proper exercise of an explicit or implicit constitutional guarantee. However, almost by definition, a constitutionally guaranteed right guarantees to itself every interest that is necessary to effectuate itself to the full extent of its constitutional status (and, in which case, these effectuating interests are themselves "implicitly" constitutionally

guaranteed rights).[175] Consequently, there is no real difference between the Rodriguez majority's fundamental rights methodology and Justice Marshall's fundamental rights methodology. This means that the latter contains the same fatal flaws that exist in the former. To reiterate: that a right is constitutionally guaranteed does not confirm its status as a "fundamental right", but that a right is validly deemed a "fundamental right" does confirm its status as being constitutionally guaranteed.

Almost by definition, fundamental, inalienable, or basic human rights are recognized as complementary. In any event, they are not recognized as being in contradiction to one another.[176] So, while it may be that neither procreation nor abortion is a fundamental right; and while it may be also true that one of those two rights is fundamental, it, nevertheless, cannot be true that both of them are fundamental rights. The Court, in Skinner v. Oklahoma (1942), stated: "Marriage and procreation are one [which implies they are complementary] of the basic civil rights of man. They...are fundamental to the very existence and survival of the race."[177]

It is argued by Heymann and Barzelay, and also by the Court in Planned Parenthood v. Casey (June 20, 1992), that the fundamental right to conceive and raise a child is in reality but one prong of the indivisible, two-pronged right of an individual or couple to decide whether or not to have a child; and therefore, if a person maintains that a woman does not have a fundamental right to undergo a physician-performed abortion, he or she necessarily maintains also that a person does not have such a right to conceive and raise a child. Also, see Carey v. Population Services International (1977), wherein the Court implied that the right to have a child and the right not to have a child are in reality two prongs of a single right: "The decision whether or not to beget or bear a

child...holds a particularly important place in the history of the right of privacy."[178]

Neither Heymann and Barzelay nor the Casey Court made an attempt to demonstrate the soundness of their conclusion that the nonexistence of a right to an abortion necessarily implies the nonexistence of a right to have a child. This is not surprising. Suppose a person were to maintain that no person possesses a fundamental right to commit suicide, or to obtain a divorce, or to view legally obscene materials. Does that person, in so maintaining, necessarily maintain also that no person has a fundamental right to live his life, or to marry, or to view material that is not legally obscene? Of course he or she does not. The mere existence of a fundamental or constitutionally guaranteed right does not give rise to its substantial opposite. For example, the Court has held that the mere existence of the constitutionally guaranteed rights of a person charged with a serious offense to a public trial by jury and to the assistance of counsel at trial do not give rise to constitutionally guaranteed rights to a private trial, to a court or nonjury trial, and to be tried without the assistance of counsel.[179]

Just as a person retains the fundamental rights to live out his or her life, to marry, and to view material that is not legally obscene, notwithstanding that a person is without the rights to commit suicide, to obtain a divorce, and to view legally obscene material, a woman also retains her fundamental right to procreate (at least in the context of marriage), notwithstanding she is without a fundamental right to have an abortion. Also, assuming that an unmarried woman does not have a fundamental right to conceive a child, by virtue of the Eighth Amendment's prohibition of the imposition of "cruel and unusual punishment", a state could no more force her to abort her child than could a state cut off the hand of a pickpocket.

It is argued that, granted the fundamental right to conceive and raise a child and the right not to have a child are not indivisible, the fact remains, an individual has a fundamental right not to have a child. The argument continues: Since physician-performed abortion is a substantial means of effectuating the fundamental right not to have a child, and since a constitutionally guaranteed right guarantees to itself whatever is necessary to effectuate itself to the full extent of its constitutional status, it follows that the right of a woman to undergo a physician-performed abortion is implicit in a woman's fundamental right not to have a child. The argument then concludes with the following statement of the Court in Carey v. Population Services International (1977):

> The same test ["strict scrutiny analysis"] must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely....This is so not because there is an independent "fundamental right to access to contraceptives," but because such access is essential to the exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in Griswold, Eisenstadt v. Baird, and Roe v. Wade.[180]

The above argument is logically sound. However, logic is not the criterion of the truth of premises. The argument is sophistic, and is simply one more confirmation of the truth that "falsehood is never so false as when it is very nearly true".

The Constitution guarantees the right of an individual to marry; yet incestuous, homosexual, and bigamous marriages are not constitutionally guaranteed. The Constitution guarantees the right of an individual to seek employment; yet prostitution is not constitutionally guaranteed. The Constitution guarantees free

speech; yet it does not guarantee the right unconditionally to use obscene language or falsely to yell "fire" in a crowded nightclub.

While it is no doubt true that a woman has a fundamental right not to be compelled by the State to conceive and raise children for the benefit of the State, this fact remains: If a woman's claimed right to undergo a physician-performed abortion is not included within the "definition or scope" of the right not to bear a child, then it is pure sophistry to state that a woman's claimed right to undergo a physician-performed abortion is a substantial means for effectuating her fundamental right not to bear a child.

A fundamental right is not defined or applied in the abstract. The Court, in West Coast Hotel Company v. Parrish (1936), stated: "Liberty in each of its phases has its history and connotations."[181] More specifically, the Court, in Smith v. Organization of Foster Families (1977), stated: "the liberty interest in family privacy has its source, and its contours are ordinarily to be sought...in intrinsic human rights, as they have been understood in this 'Nation's history and tradition.'"[182] A review of English-American legal history does not reveal that intentional abortion has been recognized there as essential to the orderly pursuit of liberty. However, it does reveal that abortion has been recognized there as a serious threat to the orderly pursuit of liberty.[183] It follows that to include the claimed right of a woman to undergo a physician-performed abortion within the definition or scope of a fundamental right not to bear a child, would be to sever that right from its historic roots and purposes. This the Court cannot do. The Court, in Faretta v. California (1975), stated: "Such a result ['to thrust counsel upon an accused, against his considered wish'] would sever the concept of [the right to the assistance of] counsel from its historic roots."[184]

It is argued that a woman's claimed right to undergo a physician-performed abortion is validly deemed a fundamental right, because it is intimately related to the purposes of the complementary fundamental rights to marry, to procreate, and to rear children. Heymann and Barzelay stated: "If...[the Roe critics] have missed the forest of [abortion precedent] in the area of marriage, procreation, and child rearing, in part it may be because the Court itself has sometimes approached the cases in this area as if they were isolated trees."[185] In Moore v. City of East Cleveland, Ohio

(1977), the Court addressed, and sustained a substantive due process challenge to a city zoning ordinance that limited occupancy of certain dwelling units to members of the nuclear family, as distinguished from members of the "extended family" (members of the nuclear family plus aunts, uncles, and cousins, etc.). The lead opinion in Moore stated in part: "Unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case."[186] Justice Harlan, in his dissenting opinion in Poe v. Ullman (1961), stated: "Each new claim to constitutional protection must be considered against a background of constitutional purposes, as they have been rationally perceived and historically developed."[187]

The question, then, is precisely this: Does abortion further the purposes of the complementary fundamental rights to marry, to procreate, and to raise children, as those purposes have been rationally perceived and developed in the context of English-American social history? In Maynard v. Hill (1888), the Court observed that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress."[188] In Skinner v. Oklahoma (1942), the Court described the rights to marry and procreate as being "fundamental to the very existence and survival of the human race".[189] In the lead opinion in Moore v. City of East Cleveland, Ohio (1977), it is stated that "[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[190] Richard O'Sullivan, in his Christian Philosophy in the Common Law, observed: "The spouses who give life and being to the community are the chief agents of social welfare and of the common good." St. John Stevas, in his Law and Morals (1964), observed: "English judges in the nineteenth century were united in laying down procreation of children as the primary purpose of marriage."[191] Secondary purposes here were, of course, intimate companionship with the opposite sex, and the channeling of the sexual drive so as to avoid the consequences of sexual anarchy or promiscuity. These secondary purposes were never advanced to the exclusion of the primary purpose of marriage. They were considered simply as being complementary to that primary purpose.[192] In an anonymous commen-

tary on the English case of R v. Russell (1832), which involved a pre-quickening, induced abortion, the following was stated:

> The act [of induced abortion] itself has a tendency to deprave the mind; and we scruple not to assert, that if sexual pleasures could be indulged with impunity, the bonds which hold society together would be broken asunder, and the most sacred and important of all human relations [mother and child] could be treated with contempt. Supposing then, that abortion though feasible without any physical injury, be an act from which a delicate mind will shrink with disgust, which has a tendency in itself to corrupt the morals, which will frustrate, if not totally dispense with the institution of marriage, is it not a matter fit for the cognizance of the legislature.[193]

Intentional abortion simply frustrates and contradicts the purposes of the complementary fundamental rights to marry, to procreate, and to raise a family, as those purposes have been rationally perceived and developed in the context of English-American social history. Those complementary fundamental rights no more constitute precedent for deeming as fundamental a woman's claimed right to undergo a physician-performed abortion, than does the fundamental right of an individual to live out his or her life constitute precedent for a fundamental right to commit suicide.

It is argued that the complementary fundamental rights to marry, to procreate, and to raise children, when coupled with the right of married and unmarried persons to prevent conception by the use of artificial contraceptives, constitute sound precedent for deeming as fundamental a woman's claimed right to undergo a physician-performed abortion.[194] Yes, and the fundamental right of a married couple to raise their children as they see fit, when coupled with the right of a married couple to view obscene movies in the privacy of their home,[195] constitutes sound precedent for

deeming as fundamental a married couple's interest in raising their children under the influence of pornographic movies! By willy-nilly coupling constitutional rights, one can come up with an enormous bag of new constitutional rights to throw at the great enemy of liberty: the State.

It is, therefore, not surprising that in Griswold the Court did not suggest that the complementary fundamental rights to marry, to procreate, and to raise children constitute sound precedent for the proposition that a married couple has a fundamental right to use contraceptive devices.[196]

The Roe Court decided the question of whether a woman has a fundamental right to undergo a physician-performed abortion without reference to the question of whether or not abortion results in the destruction of a human being. Practically speaking, since Western civilization originally became Christian, no Western society has ever recognized in its members a fundamental right to take the life of another human being other than in individual or national self-defense. Given the foregoing, then does not a person, who would claim that a woman has a fundamental right to destroy the conceived unborn product of her conception, have the burden of proving that such a product is not a human being? A person, who would claim a right, must prove the right. Yet, according to the Roe Court, the propositions that a fertilized human ovum, embryo, or fetus is not a human being can be neither proved nor disproved.[197] If the Roe Court is correct here, then this is yet another reason why the claim that a pregnant woman's interest in undergoing a physician-performed abortion is her fundamental right must fail.

Even if it could be proved that the unborn product of human conception is not a human being, it would no more follow that, therefore, a woman has a right to abort that product, than would it follow that a person has a right to kill a snail darter or to burn

down a redwood tree, since neither a snail darter nor a redwood tree is a human being.[198]

The Court, in Crowley v. Christensen (1890), observed that constitutionally guaranteed liberty "is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others."[199] Therefore, if there is no substantial male equivalent or counterpart to a female's claimed right to undergo an abortion, then it should follow that a woman's claimed right to undergo an abortion cannot be considered an aspect of "ordered liberty". Fundamental or inalienable human rights, almost by definition, are particular to human beings, and not to the particular sex of human beings.

It is argued, however, that there is a male counterpart to a female's claimed right to obtain a physician-performed abortion: the fundamental right of a male to "reproductive autonomy". Laurence Tribe has argued: "To deny her [a female] the reproductive autonomy given men is to turn biology into destiny, to deny all women the very possibility of equality."[200] This is a unique fundamental right. Who conferred upon a male a so-called right to reproductive autonomy, i.e., a right not to become or remain pregnant? (What other meaning can a right to "reproductive autonomy" possibly have in the context of Tribe's foregoing argument? Surely Tribe does not mean in the case of the man, a right to have sex without the possibility of procreating; for in that case, the man would necessarily possess a right to force a woman, who became pregnant through him, to undergo an abortion.) The fact of the matter is, a man no more has a right not to become pregnant than does he have a right to become pregnant. It is impossible to confer upon a person something he or she is incapable of possessing. Biology functions, in part, to make living things "different from" as distinguished from, "unequal to" each other. Inequality does not even qualify as

a biological term. It is nonsense to maintain that the Constitution serves to correct nonexistent, biological flaws. What Tribe conveniently fails to mention here is: Implicit in the argument stating that a woman's right to reproductive autonomy includes access to physician-performed abortion is that a man does not have a fundamental right to procreate, because the woman has a fundamental right to monopolize procreation.[201]

Finally, given (1) that as observed by the Court in Wisconsin v. Yoder (1972), "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests," and (2) that as the Court in Roe expressly conceded, a state has an important interest in protecting the unborn product of human conception throughout the gestational process;[202] then it should follow that a woman's claimed right to undergo a physician-performed abortion cannot be logically considered as an aspect of ordered liberty. It is simply a contradiction in terms to maintain that fundamental rights exist in opposition to the common good or to important state interests. A determination of the existence of a fundamental right should not be made without reference to whether the existence of such a right undermines the common good.[203]

It may be that Fourteenth Amendment liberty is a "rational continuum" and that, as noted by the Court in Harper v. Virginia Bd. of Elections (1966), Fourteenth Amendment liberty is not limited to a "fixed catalogue...of fundamental rights."[204] However, that does not even begin to establish that a woman's claimed interest in undergoing a physician-performed abortion qualifies as a fundamental right.

Tribe and Dorf have observed correctly that "whether to designate a right as fundamental poses the central substantive question of modern constitutional law."[205] In Roe, the Court designated a

woman's interest in abortion as a fundamental right. Yet the Roe opinion is more than extremely vague regarding just how that Court arrived at that designation.[206] The same can be said of the dissenting opinions in Bowers regarding the claim that the practice of homosexual sodomy is fundamental.[207] These opinions conveniently overlook what James J. Kilpatrick insightfully referred to as the "first commandment for an appellate opinion: that it be clear."

PART III

The Law on Abortion Under the Criminal Justice Systems of the English North American Colonies

Assume that in the late seventeenth century, in the relatively liberal Colony of Rhode Island and Providence Plantations, a certain Deborah Allen was indicted for having attempted to destroy the unquickened child in her womb. Assume further that Allen challenged the indictment on the grounds that it does not allege an indictable offense under Rhode Island law. Finally, assume that the Allen court ruled on this challenge as follows:

> (1) The General Attorney's position that the offense is indictable at the English common law is sound. Indeed, not so many years ago in Maryland, one Jacob Lumbrozo was so prosecuted.[1] (2) However, according to our penal code, the common law on indictable offenses is in effect in this colony only to the extent that particular common law offenses have been explicitly or implicitly incorporated into the code. (3) This code provides also that no person can be prosecuted for an offense not found there. (4) The offence described in the Allen indictment is not found there. It is true that this code implicitly provides for attempted murder. Yet, even assuming that "legal impossibility" would be no defense here, the indictment does not allege another element of attempted murder: the "intent" to kill a human being (in this case, one as yet unborn). The indictment does not allege that Allen believed that her fetus had quickened. (5) It is, therefore, the judgment of the Court that the challenge be sustained, and that the accused be discharged.

If the Allen court's decision was correct, then it is certain that the then existing governing bodies for the Christian Colony of Rhode Island and Providence Plantations and the other then existing English North American colonies, on hearing of the decision in Allen's Case, and in consideration of their duty to outlaw sin or acts contrary to the Word of God or the Natural Law, would have enacted a statute making it a criminal offense for any person to attempt to destroy the unquickened child in the womb.[2] The Massachusetts colonist Cotton Mather (1663-1728), in his Elizabeth in Her Holy Retirement (1710), stated: "It is a Child of God that you have now within you. What a Consolation [for your pains of childbirth]....It is a Member of His Mystical Body which is now Shaping in Secret and Curiously to be wrought."[3] The following brings home the point here:

> This Court [the late 17th-century Massachusetts General Court], accounting it their duty...to prevent appearance of sinn & wickedness in any kind, doe order, that henceforth it shall not be lawfull for any singlewoman or wife in the absence of hir husband to enterteine or lodge any inmate or sojourner with the dislike of the selectmen..., or magistrate, or comissioners who may haue cognizance thereof, on penalty of fiue pounds [of tobacco] per weeke, on conviction..., or be corporally punished, not exceeding ten stripes; and all constables are to take cognizance hereof for information of such cases.[4]

Given that the Allen court's initial four rulings were correct, and that the Rhode Island governing body of that time was of the opinion that intentional abortion should not go unchecked,[5] then was the Allen court's decision correct? Carefully consider the second ruling. All that the Allen court did here was to interpret a provision in Rhode Island's penal code. What the Allen

Court neglected to rule on was whether or not, by virtue of English law, the "Laws of England" are in effect in the Colony of Rhode Island and override Rhode Island's penal code. The correct answer to that question depends upon correctly determining the answer to the following question. Did then-existing English law consider that the English North American territories were acquired by England through discovery, occupation and settlement, or rather through conquest or cession? Regarding the former, English law provided that English law was automatically in operation in the territory, except to the extent particular English laws were deemed unsuitable to the conditions there. Regarding the latter, English law provided that only the laws of the conquered or ceded territory were in effect there.[6] Blackstone took the position that the English North American territories were acquired through conquest, or perhaps by cession, and therefore, the common law was not in operation there.[7] Blackstone's position here seems erroneous. David Walker observed: "The first lord proprietors of North American colonies had, by their charters, to govern by English law, and the settlers had the liberties of Englishmen."[8]

On September 4, 1683, in the Colony of Rhode Island and Providence Plantations, a certain Deborah Allen pled guilty to an indictment charging her with the misdemeanor offense of attempting to destroy the child (presumably: the quick child, as distinguished from the child unquickened) in her womb. A record of this case reads as follows:

> On Indictment by the Gen. Attorney against Deborah Allen, Daughter of Mather Allen of the Towne of Dartmouth in the Colony of New Plymouth for fornication [in this case, for giving birth to a bastard child(?)], and for Indeavour-inge the Dithuction [destruction] of the Child in her womb: being brought into the Court, her Charge Read, and asked whithyer Guilty or not, Ownes Guilty. The Court doe Sentence Deborah Allen for her Transgression forthwith to

be severly whipped in the Towne of Newport with fifteen Stripes on the naked back and pay officer's fees.[9]

Some may want to argue that the Allen abortion allegation was added only to put Allen in an even more unfavorable light. More specifically, it is argued that, because in colonial America a whipping was the common punishment that was or could be imposed on a woman who committed fornication, or on a woman who gave birth to a bastard child; then it hardly can be said that the attempted abortion charge in Allen's Case is set forth there as separate from the charge of fornication.

In Rhode Island in 1683 the mother and the father of a bastard child could be whipped for their fornication. The Rhode Island Code of 1647, which was in force in 1683, provided that the punishment for fornication or for producing a bastard child shall be the punishment that the English law proscribes for the same.[10] The 1682 edition of Dalton's The Country Justice sets forth this punishment:

> By the Statute 7 Jac. [1, c.iv, sec.7 (1609)] it appeareth that the Justice of Peace shall now commit such leud Woman to the House of Correction, there to be punished, etc. And quaere if the Justices of Peace may not punish (by corporal punishment [i.e., by whipping]) the Mother by force of this Statute of 18 Eliz., [I, c.3 (1576)], and then send them to the House of Correction....
>
> But such corporal punishment or commitment to the House of Correction is not to be until after the Woman is delivered of her child; neither are the Justices of Peace to meddle with the Woman until that Child be born (and she strong again), lest the Woman, being weak, the Child wherewith she is [pregnant] happen to miscarry: For you shall find that about 31 Eliz. [1589] a Woman great with child, and suspected of incontinency, was commanded (by the Masters of Bridewell in London) to be whipped there, by reason whereof she travelled, and was delivered of her Child before her time, etc. And for this, said Masters of Bridewell were in the said case fined to the Queen at a great Sum, and were farther ordered to pay a sum of money to the said woman.[11]

18 Eliz. 1, c.3 (1576) made it discretionary, not mandatory, that a woman be whipped for giving birth to a bastard child. Also, it appears to have been a well-established judicial custom, if not, for the most part, the law throughout the English North American colonies to permit a convicted fornicator to pay a fine in lieu of being whipped. Indeed, in 1683 in Rhode Island, the same Court that sentenced Deborah Allen to be whipped permitted each of three other female fornicators to pay a fine in lieu of being whipped ("one pound, Six Shillings, Eight pence..., or [else]...fifteen stripes on the Naked back").[12] Deborah Allen was not permitted to pay a fine in lieu of being whipped.

By virtue of what law was Deborah Allen prosecuted for having attempted to destroy her unborn child? So far as is known, Rhode Island did not then have on its books a criminal abortion statute. The Rhode Island Code of 1647 expressly adopted the English common law on indictable offenses, but apparently, or at least arguably, it did so only to the extent that those indictable offenses were expressly or implicitly set forth there.[13] An example of the latter would be an attempt to commit one of the express offenses. While the offense of murder was set forth in that code,[14] deliberated abortion was not. The last paragraph of this code provided as follows:

> These are the Lawes that concern all men, and these are the Penalties for the transgression thereof, which by common consent are Ratified and Established throwout this whole Colonie; and otherwise than thus what is herein forbidden, all men may walk as their consciences perswade them, every one in the name of his God. And lett the Saints of the Most High walk in this Colonie without Molestation in the name of Jehovah, their God, for Ever and Ever....[15]

In the absence of evidence to the contrary, it should be presumed that the Allen court understood and abided by its own laws. It would seem that the Allen charge of attempted abortion had been brought on a theory of attempted murder, which at common law was indictable only as a misdemeanor. Such a theory would not be necessarily contrary to the English common law on murder, because at the common law an aborted child was considered a victim of murder, provided the child had died in connection with being aborted after the child had been born alive. Hence, at least when such a child had survived being aborted, then the attempted destruction of the child in the womb could be considered as attempted murder.[16]

Allen gave birth to the child she had attempted to abort before she was sentenced; for, and in light of the Dalton's foregoing Country Justice observation, if Allen were pregnant when she was sentenced to be whipped, then the sentencing order would have recited that the whipping be stayed until after Allen gave birth, and was restored to full strength. Nevertheless, it cannot be positively stated that Allen's child was born alive. In Maryland in 1652, and evidently on a Maryland-received-common law-theory, one Mitchell, a militia captain, was charged with, and convicted of the attempted abortion-murder of an unborn child that had been born dead. Evidently, the only reason why the Mitchell prosecutor did not file a murder charge against Mitchell was because the prosecutor formed the opinion that he could not sufficiently prove that the stillborn child had died in connection with the attempted abortion.[17] Also, in Maryland in 1656, a court indicated a willingness to have a certain Francis Brooke tried for the murder of his wife's three-months-old stillborn child.[18]

It may be argued that Allen's relatively light sentence tends to prove that the Allen judge did not equate Allen's act of

attempted abortion with the common law misdemeanor offense of attempted murder. The argument is fatally flawed. It will be seen, for example, in England in 1592, Richard George, on being convicted of the attempted murders by poisoning of a mother and two of her children, received a sentence to be whipped. In 1670 in Essex County, Massachusetts, John Clearke was ordered to be whipped for his conviction of attempted murder by stabbing. In New London, Connecticut in 1712, Daniel Gard, on being convicted of manslaughter (a reprievable, capital felony), was sentenced to be whipped (thirty-nine stripes), to stand for one hour on the gallows with a halter about his neck, and to remain in prison until he paid the costs of his prosecution. Gard had challenged a man to fight; and then had killed the man in the fight.[19]

Evidently, none of the English North American colonies enacted a statute that expressly outlawed attempted abortion. However, in spite of the absence of the existence of a criminal law covering induced abortion, in each of these colonies, it would be a mistake to conclude that the law in the colony was the same as the English common law on this subject. Paul Reinsch stated:

> Some of the colonies declared the English common law subsidiary in cases not governed by colonial legislation at a comparatively early date. We have this in the case of Maryland, Virginia and the Carolinas. But other colonies very early made unequivocal declarations of looking upon the law contained in Scripture as subsidiary law in their system. This is true of Massachusetts, Connecticut, and New Haven and to a certain extent of New Jersey.[20]

A good example of a colonial law making the Bible the governing law on a subject on which colonial code law was silent is contained in the Massachusetts Body of Liberties of 1641:

> No mans life shall be taken away,...no mans person shall be arested, restrayned, banished, dismembred, nor any wayes punished,...unlesse it be by vertue or equitie of some expresse law of the Country waranting the same, established by a generall Court and sufficiently published, or in case of the defect of a law in any parteculer case [,then] by the word of god. And in Capitall cases, or in cases concerning dismembring or banishment, according to that word to be judged by the Generall Court.[21]

The English translation of the Septuagint or Greek version of Exodus 21:22-23 reads as follows:

> And if two men strive and smite a woman with child, and her child be born imperfectly formed [not yet formed into a recognizable human body and, therefore, not yet informed with a human or rational soul], he shall be forced to pay a penalty: as the woman's husband may lay upon him, he shall pay with a valuation. But if he be perfectly formed [i.e., organized into a human body and, therefore, also informed with a human or rational soul], he shall give life for life.[22]

The Geneva Bible (1560), which the puritans preferred, and which was in extensive use in the Colony of Virginia and throughout the New England colonies, and in exclusive use in Plymouth Colony,[23] included the Hebrew version of Exodus 21:22-23. This version reads: "If when people, brawling, hurt a pregnant woman and she suffers a miscarriage, but no further harm is done, the person responsible will pay compensation as fixed by the woman's master, paying as much as the judges decide. If further harm is done, however, you will award life for life...."[24] The Geneva Bible interpreted this Hebrew version of Exodus 21:22-23 in light of the

Septuagint version of Exodus 21:22-23, so that the Geneva version or interpretation of Exodus 21:22-23 reads as follows:

> If men strive and hurt a woman with child, so that her child departs from her and death [marginal note: "of the mother, or child"] follow not, he shall be surely punished according as the woman's husband shall appoint him, or he shall pay as the judges [marginal note: "or, arbiters"] determine. But if death [of the mother, or the child] follow, thou shalt pay life for life.[25]

Also of relevance here is a portion of a statement made by the protestant minister and Harvard College president (1654-72), Charles Chauncy. It was given in 1642 in response to an inquiry by Massachusetts Governor Richard Bellingham to the local governing body of Plymouth Plantation. That body directed the inquiry to Chauncy. The inquiry had to do with how the General Court and local courts of Massachusetts Colony should proceed against the practice of certain unnatural vices. The statement, in pertinent part, reads as follows:

> In concluding punishments from the judicial law of Moses that is perpetual, we must often proceed by analogical proportion and interpretation, as a paribus similibus, minore ad majus etc. [roughly: "by analogical comparisons, proof of a lesser necessarily proves the greater of the lesser"; for example: "B" (negligently or accidentally caused miscarriage) is "C" (is against the Word of God). Since "A" (deliberately caused abortion) is more culpable than "B"; it follows that "A" also is "C".], for there will still fall out some cases, in every commonwealth, which are not in so many words extant in Holy Writ, yet the substance of the matter in every kind (I conceive under correction) may be drawn and concluded out of the Scripture by good conse-

> quence of an equivalent nature. As, for example, there is no express law against destroying conception in the womb by potions, yet by analogy with Exodus xxi.22, 23 [which deals with accidentally caused abortion], we may reason that life is to be given for life.[26]

There is no known, colonial American abortion case in which a judicial body applied, or refused to apply, the Hebrew or the Septuagint version of Exodus 21:22-23. However, a good analogy does exist here. In 1672, in Hartford, Connecticut, Thomas and Sarah Rood, father and daughter, pled guilty in the Court of Assistants to indictments charging them with incest. When the Roods committed incest, Connecticut Colony did not have on its books a statute outlawing incest. The Roods Court, after consulting with certain ministers who referred the Court to Leviticus 20:11-12, 14, 17, 19-21 (none of which expressly mentions father-daughter incest), sentenced Thomas to death and Sarah to be severely whipped.[27]

The foregoing, then, tends to prove that the intentional destruction of the child existing in the womb very well may have been recognized in several of the New England colonies in the seventeenth century as a capital offense, and the intentional destruction of the unquickened child in the womb very well may have been recognized as a non-capital offense.

A cursory review of colonial American legal records indicates that the following statute was originally enacted in the Colony of Massachusetts in 1649, and was subsequently incorporated into the Duke of York Laws (1665) which, for some period, were in effect in New York, Pennsylvania, the Jerseys and Delaware:

> For as much as the law of God (Exod. 10:13) [sic: 20:13 ("you shall not kill")]

> allows no man to touch the life, or limbs of any person, except in a judicial way:
>
> Be it hereby ordered and decreed, that no person or persons whatsoever that are employed about the bodies of men, women or children, for preservation of life or health, as physicians, chirurgions, midwives, or others [such as druggists or apothecaries, shall] presume to exercise or put forth any act contrary to the known [or approved] rules of art [in each mystery and occupation], nor exercise any force, violence or cruelty upon, or towards the bodies of any, whether young or old (no, not in the most difficult and desperate cases), without the advice and consent of such as are skillful in the same art if such may be had, or at least of the wisest and gravest then present, and consent of the patient or patients, if they be mentis compotes, much less contrary to such advice and consent, upon such severe punishment as the nature of the fact may deserve; which law is not intended to discourage any from a lawful use of their skill, but rather to encourage and direct them in the right use thereof, and to inhibit and restrain the presumptuous arrogance of such as through precedence of their own skill or any other sinister respects, dare be bold to attempt to exercise any violence upon or towards the bodies of young or old, to the prejudice or hazard of the life or limb of man, woman, or children.[28]

There is no known case involving a prosecution under this statute.[29] With that said, a question to be considered is whether the formed human fetus in receipt of his or her human or rational soul would have been viewed by colonial American judicial authorities as a person or child within the meaning of the words "person" or "children" as contained in the underscored portion of the foregoing statute. There is good reason to believe that this question would have been answered in the affirmative. The English controversialist, Chas Leslie, in the early part of the eighteenth century, stated: "The personality of a man is essential to the

Man, that is, he is a person by the Union of his soul and body.... This is the acceptance of a person among men, in all common sense, and as generally understood."[30]

Irrespective of how the foregoing question would have been resolved by colonial American courts, there is no question those courts would have viewed every form of abortion (with the possible exception of one done to save the pregnant woman's life)[31] as a violent and cruel act on a woman, and one contrary to the approved rules relating to the practices of medicine, surgery, pharmacy, and midwifery.[32]

The only way one could rationally argue that the foregoing statute would not have been construed by colonial American courts to cover acts of abortion would be to argue the following: Inasmuch as this statute was obviously designed to discourage the unskillful from practicing the healing arts,[33] and inasmuch as a colonial American court would no more have viewed abortion as a healing or life-preserving act than such an authority would have viewed an act of murder by a physician on his patient as a life-preserving act, it hardly can be said that the statute would have been construed to cover an act of intentional abortion.[34] The argument overlooks the fact that the statute was expressly based on Exodus 20:13: "You shall not kill".

In New York City in 1716, a municipal ordinance was enacted that forbade midwives to, among other things, "'[g]ive any Counsel or Administer any Herb, Medicine or Potion, or any other thing to any Women being with Child whereby She Should Destroy or Miscarry of that she goeth withal before here time.'"[35] It has been said that in Virginia, in the eighteenth century, a similar ordinance was enacted.[36]

It seems reasonable to conclude that the following law (enacted in 1642, and contained in a Colony of Connecticut statutory

scheme of capital offenses) would have been construed to cover acts involving intentional abortion:

> And whereas frequent experience giues in sad evidence of seuerall other wayes of uncleanes and lasiuious caridges practised among us whereunto, in regard of the variety of Circumstances, particular and expresse lawes and orders cannot suddenly be suted; This Court cannot but looke uppon evells in that kind as very pernitious and distructiue to the welfare of the Comonweale, and doe judge that seuere and sharpe punishement should be inflicted uppon such delinquents, and as they doe approue of what hath bine alreddy done by the particuler Court, as agreeing with the generall power formerly graunted, so they do hereby confirme the same power to the particular Court who may proceed wither by fyne, comitting to the howse of correction or other corporall punishement, according to their discretion, desiering such seasonable, exemplary executions may be done uppon offondors in that kynd, that others may heare and feare.[37]

PART IV

A Revisionist History of the Status of Abortion as a Criminal Offense at the English Common Law

1. Introductory Remarks

The Court in Roe placed its imprimatur on Cyril Means' vandalization of the historical record of the status of deliberately induced or performed abortion (intentional abortion) at the English common law. This record is, therefore, in some danger of becoming lost to English-American law. In English law: "Persuasive value attaches to decisions of the Supreme Court" of the United States.[1]

Several persons have refuted some aspects of the Roe-Means position that at common law intentional abortion was not a crime, and was a right.[2] However, in doing so, they have in some instances confused this historical record. For example, they have accepted as fact that at common law the pregnant woman's initial feeling or perception of the stirrings of her fetus (quickening), and not fetal formation, was the dividing line between criminal and non-criminal abortion. It will be demonstrated in this Part IV that in the development of the common law on criminal abortion, and irrespective of whether quickening or fetal formation was the criterion of when a pregnant woman becomes quick with child (pregnant with a live child), pre-quick with child abortion became an indictable offense.

It will be demonstrated also that the legal presumption, based upon currently available evidence, should be that at the English common law on criminal abortion, fetal formation, and not quickening, was the criterion of when a pregnant woman becomes quick with child. It will be demonstrated that one can conclude

that quickening was this criterion only by reading the history of abortion at common law backwards.

It is true that virtually every post-18th-century, English and American court decision, legal treatise, criminal textbook, law journal article, treatise on medical jurisprudence or forensic medicine, and work on the social history of women, that contains a discussion of criminal abortion at common law, states or assumes that quickening was the common law abortion criterion of when a pregnant woman becomes quick with child.[3] However, it will be demonstrated that it cannot be reliably stated that there is any known pre-19th-century, English case or English book of legal authority that explicitly or implicitly incorporates quickening as the common law abortion criterion of when a woman is or becomes quick with child.

It will be demonstrated further that: it was received opinion among learned persons in England, before, during, and after (to about 1850) the reign of common law offenses, that the product of human conception begins its existence as a human being just as soon as it develops into a fetus or acquires a recognizable human shape. There is nothing in the then and there existing disciplines of philosophy (particularly, that branch of philosophy known as the psychology of man), medicine, and science (natural philosophy), or such areas of study as human anatomy and human embryology, that called into question the Aristotelian opinion that the newly formed human fetus is properly recognized as a human being. The only thing that seems to have been questioned here is whether the pre-fetal product of human conception is properly not recognized as a human being.

It should not be overlooked that the judiciary, in the English-American legal tradition, is not vested with the jurisdiction to resolve scientific or philosophical questions, as such.

These are "nonjusticiable" questions. Some examples of such questions are: does life exist on Mars; can a polio vaccination, in some instances, cause the vaccinate to contract polio; and, when does a human being come into existence? The Court, in Jacobson v. Massachusetts (1905), in the course of rejecting a Fourteenth Amendment, due process clause challenge to a compulsory smallpox vaccination statute, stated: "'While we do not decide, and cannot decide, that vaccination is a preventive of smallpox, we hold that the compulsory smallpox vaccination statute in question is a health law, enacted in a reasonable and proper exercise of the police power.'"[4]

Furthermore, no person has even begun to demonstrate the validity of the third prong of the following three-pronged proposition: (1) It may be that it was received opinion among the learned in England throughout the reign of the English common law, that a human being comes into existence when the human embryo develops into a fetus. (2) It may be also true that in the common law decision-making process the judiciary, in approaching justiciable questions that, for their proper resolution, depend in part upon an opinion on a philosophical or scientific question, almost always adopts the opinion on the question that is generally accepted as reliable or true among the members of the appropriate scientific or philosophical community.[5] (3) However, the fact remains that the English judiciary eventually came to reject fetal formation as the common law abortion criterion of when a woman becomes pregnant with a live child, and came to adopt or to make the legal fiction that quickening should be the criterion here, because that judiciary came to believe that the interests of justice demanded as much. Specifically, that judiciary came to believe that the fetal formation criterion might more often fail to curb what the quickening criterion would more often curb: errone-

ous convictions (because of weak evidence of fetal life, or of the destruction of such life) of the killing of an unborn human being through abortion. I intend to demonstrate the invalidity of the foregoing third prong.

There is sufficient evidence to indicate that the English judiciary, during the period between approximately 1808 and 1832, came to recognize quickening as the common law abortion criterion of when a pregnant woman becomes quick with child. So, this may be asked: How, then, in the early nineteenth century, did the English judiciary come to recognize quickening, and reject fetal formation, as this criterion? The question contains a false premise. This judiciary, in recognizing the quickening criterion, did not do so in the course of consciously rejecting the fetal formation criterion. This judiciary simply mistakenly thought that quickening always had been the applicable criterion. Thus, quickening became this criterion by nothing more than a legal accident.

How, then, between approximately 1808 and 1832, did the English judiciary mistakenly come to recognize quickening as the criterion of when a pregnant woman became "quick with child"? Available evidence indicates that this came about through a subtle error in judicial interpretation. In several abortion cases prosecuted during the period 1808-1832, English judges mistook quickening for the definition of the term quick with child, which in its primary sense, as does the term with quick child, means "to be pregnant with a live child."[6] They did this because in England before, during, and after the reign of common law offenses, it was a common expression among pregnant women to refer to themselves as being with quick child or quick with child (i.e., as being pregnant with a live child) once they had experienced quickening. These judges mistook a vulgar opinion on the subject of "when" a pregnant woman becomes quick with child for the definition of that term.

They mistook a "when," and a wrong one at that, for the definition of the "what". Furthermore, Coke, in his Institutes III (1641) abortion passage, used the term quick with child without explicit reference to fetal formation, and he undoubtedly intended this term to be synonymous with Bracton's De Legibus (1220s-1250/57) abortion passage phrase "formed or animated". The former passage cites the latter passage. Also, Blackstone, in his Commentaries (1765-70) stated that a pregnant woman becomes quick with child, within the meaning of Coke's Institutes III abortion passage, when her fetus initially stirs in her womb (which is not synonymous with - but could be easily confused with - quickening, since quickening refers to the pregnant woman's "initial" perception of this stirring). Thus, it stands to reason that the early 19th-century English judiciary thought that quickening always had been the common law abortion criterion of when a woman becomes quick with child.

It is certainly possible that long before the period between approximately 1808 and 1832, the English judiciary mistakenly came to recognize quickening as the common law abortion criterion of when a pregnant woman becomes quick with child. However, to date, no one has produced good evidence to prove that the same is more than a mere possibility or theory. A theory cannot, of course, prove itself. In any event, once it is shown that a particular rule (in this instance, that fetal formation was the criterion of when a human being comes into existence in the context of abortion) was a part of the common law at a particular period in the English common law, then interpreters of the common law are bound to presume that the rule remained as the common law rule in the subsequent development of the common law. The presumption remains unrebutted until it is shown that at a subsequent period in the common law the rule was explicitly or implicitly rejected. An

example of the latter would be a demonstration that the reason for the rule ceased to exist during such a subsequent period.

It may be that the common law adopted the maxim communis error facit jus (literally: common error makes law). This maxim holds "that an erroneous view of what the law is, if long persisted in and accepted as the basis of practice and ruling, may be held to have established the law in the erroneous sense even when the error has been established." However, this maxim cannot be invoked to fix quickening as the criterion as the common law abortion criterion of when a woman becomes "quick with child", if only for the reason that no one has even begun to demonstrate that the English judiciary, long before the period between approximately 1808-1832, had come to recognize the quickening criterion.

It is no easy task to relate an accurate history of the status of abortion as a criminal offense at the English common law. One reason is that, beginning in approximately the early 1960s, and largely in connection with Roe v. Wade and the preceding movements to repeal long-standing criminal abortion laws in England and the United States, many untrue, misleading, and unresolved, conflicting statements have been made regarding various aspects of this history.

Another reason is that there are so few known criminal abortion prosecutions at the English common law. Also, neither these few abortion prosecutions nor the brief passages on abortion in the common law books are self-explanatory. Professor John Baker has observed:

> The [English] criminal law has hardly received generous attention from the English legal historian....More records of criminal sessions are...finding their way to the presses. A certain amount of law is to be learned from

> [this]...material....[However],...[such] record [material]...tells little or nothing about the interpretation of the terms used in the indictment, the nature of the evidence given, the rules of evidence (if any), the considerations which weighed with the jury, the influence of the judge, or the extent to which strict law might be softened by discretion. Such questions are notoriously difficult to answer; but until the answers are found there can be no history of English criminal law.[7]

When Roe v. Wade was decided in 1973, only six pre-19th century, English common law abortion or abortion related prosecutions were known to English and American law. These six are the following: (1) R v. Richard de Bourton (1327/28), also known as The Twins-slayer's Case, and which as it is known in its hitherto incomplete form was grossly misconstrued by Cyril Means, if not also the Roe Court, to stand for the proposition that at the English common law it is not an indictable offense (neither felony nor misdemeanor and, therefore, it is a woman's common law liberty) to destroy through abortion, the child existing in her womb; (2) R v. Anonymous (1348), also known as the Abortionist's Case, and understood to stand for the proposition that at common law a child or human being that is killed before being born alive is not considered a victim of criminal homicide; (3) Sims' Case (1601), which evidently was a civil prosecution, but which in dictum restates the proposition set forth in R v. Anonymous (1348), and then adds that a live-born child that dies in connection with being aborted is recognized as a victim of criminal homicide; (4) R v. Fry (1801), also known as Chitty's Abortion Precedent, which contains a common law misdemeanor indictment alleging, among other offenses, two counts of attempted murder (on the theory that the aborted children were aborted alive and survived being aborted) and an abortion that

resulted in a stillbirth; and (5) and (6) R v. Anonymous (1670, per M. Hale) and Tinkler's Case (1781), which stand for the proposition that at common law it is murder for a person to unintentionally kill a pregnant woman in connection with a intentional abortion. New information will be presented on three or four of these six cases. For example, it will be demonstrated that The Twins-slayer's Case, as it was known to such common law writers as Coke, Hale, Blackstone, Hawkins and Staunford, was incompletely reported, and was misinterpreted by these great common law authors. When correctly interpreted (and particularly in light of its more complete form), this case actually supports the virtual opposites of the propositions mistakenly thought to be set forth there. It will be shown also that it very well may be the case that R v. Anonymous (1348) was not even a case.

There is no question that of the serious offenses prosecuted at the pre-19th-century English common law, induced abortion was the most rarely prosecuted. The English common law abortion cases that appear in the appendices to this book are apparently the only such cases that have been discovered to date. The immediate explanation for this paucity of abortion prosecutions is undoubtedly because the commission of this offense very seldom came to the attention of the secular, English criminal courts. However, the reason why these courts heard so few abortion prosecutions is not, as some persons have speculated, because these courts considered the offense to be, for the most part, under the criminal jurisdiction of the pre-Reformation, Catholic Church courts or the post-Reformation, English Church courts.[8] (This is not to say that some - a relative few - abortion cases, if not also some infanticide cases, were not prosecuted in these Church courts at least into the sixteenth century.)[9] The reason why those criminal courts heard so few abortion cases is not that abortion was very rarely attempted.

There is every reason to believe that more than a few unmarried, pregnant women and their sexual partners or other associates attempted it by one method or another.[10]

Available evidence indicates that one of the reasons why the English secular courts heard so few abortion cases is that the abortion methods (such as: the ingestion of various obnoxious potions, drugs and herbs, the administration of certain douches, the insertion of certain suppositories, the application of severe force to the lower abdomen, the application of certain plasters to the lower abdomen, bloodletting, the employment of one or more of the then-recognized means for initiating or restoring menstruation, and the performance of some form of rough sport or exercise) that were then most utilized, were not, for the most part, even capable of inducing abortion.[11] Operative or instrumental methods of performing abortion seem to have been very rarely employed. William Defoe, in his satirical attack on the "diabolical practice" of abortion in his A Treatise Concerning the Use and Abuse of the Marriage Bed (1727), did not include operative or instrumental abortion in his list of abortion methods used by a suspected female abortionist: "Drugs and Physicians [i.e., "physics" or medicines], whether Astringents, Diureticks, Emeticks, or of whatever kind, nay, even to Purgations, Potions, Poisons, or any thing that Apothecaries or Druggists can supply..., [and]...Devil Spells, Filtres, Charms [and] Witchcraft..."[12] One reason why operative or instrumental methods of performing abortion were evidently rarely employed may have been due in part to "the relatively inaccessible position of the uterus", coupled with a general ignorance of the female reproductive anatomy. Another reason may have been the then-common belief that when a woman conceives (i.e., when the male's seed is deposited in, and retained by the womb or "matrix"), the cervix or "mouth of the womb" closes so firmly and tightly that

not even the point of a needle can penetrate it without doing much violence.[13]

Several modern writers have concluded that then-existing, covertly popular methods for inducing abortion were often successful.[14] However, old case histories of attempted abortion, modern medical science, and a comparative history of abortion and infanticide in pre-20th-century England, contradict this conclusion. The 19th-century, English physician William Cummin observed:

> To what extent, however, personal violence may be employed without procuring abortion, is well exemplified by a case that occurred not long ago...in Dr. Wagner's practice at Berlin. "Among the remarkable cases which came before us", says the Professor, in his half-yearly report, "was one of attempted abortion. A young woman, seven months with child, had employed savine and other drugs, with a view to produce miscarriage. As these had not the desired effect, a strong leather strap (the thong of a skate) was tightly bound round her body. This, too, availing nothing, her paramour (according to his own confession) knelt upon her, and compressed the abdomen with all his strength: yet neither did this effect the desired object. The man now trampled on the girl's person while she lay on her back; and as this also failed, he took a sharp-pointed pair of scissors and proceeded to perforate the uterus through the vagina. Much pain and hemorrhage ensued, but did not last long. The woman's health did not suffer in the least, and pretty much about the regular time a living child was brought into the world without any marks of external injury upon it."[15]

Lester Adelson, in his The Pathology of Homicide (1974), observed:

> Eternal Physical Methods [of Attempting Abortion]....include...horseback riding..., and applying direct force to the lower abdomen.

These crude measures are notoriously ineffective in creating the desired result unless the mother's visceral injuries are sufficiently severe to endanger her life....

Drugs and Chemicals....Even at toxic levels none of these "traditional" drugs is truly abortifacient in the first two trimesters of pregnancy. When administered in amounts far in excess of their therapeutic dosage, they may stimulate uterine evacuation. This effect is unpredictable and represents a response to toxic overdosage....

One of the more common fallacious bases for using a specific drug (or combination of drugs) as an abortifacient is the "experience" of some woman who "aborted" successfully and uneventfully after using it. The truth of the matter is that she was not pregnant to begin with but was suffering from a combination of a delayed menstrual period and apprehension about an unwanted pregnancy. Sequence and consequence become confused, and a "new", "safe" and "effective" abortifacient is born.
....

Volatile Oils and Cathartics. On rare occasions, [they] may stimulate the uterus to contract. Included in this group are oil of savin...and oil of pennyroyal....
....

Oxytocic Drugs. [Practically speaking,] ergot preparations...can cause premature labor [only] when administered in large doses near term....

Systemic Poisons. This group of compounds includes...arsenic and mercury,...and a host of weird concoctions....These substances rarely empty a pregnant uterus unless they have been taken in doses so large that the mother's health or life is endangered....

Intravaginal Introduction of Chemicals. Intravaginal introduction of chemicals to produce abortion..., [such as] douches and insertion of suppositories..., [lack] the capacity to enter the cervical canal whose external is occluded by a plug of tenacious mucus....[16]

Now, add to the foregoing observations the fact that at the English common law infanticide prosecutions exceeded abortion prosecutions by many hundreds, if not thousands or more to one.[17] By the late sixteenth century, abortion was not a capital offence at common law unless the aborted child was born alive and subsequently died in connection with being aborted. However, infanticide was a capital offense. So, if effective abortion techniques were available in pre-19th-century England, then women bent on getting rid of an unwanted child would have employed these techniques, and would not have risked being "launched into eternity" at the end of a rope for having committed infanticide.[18]

A person may argue that for all any person really knows, many of the common law infanticide cases that were prosecuted with the aid of 21 Jas. (Jac.) 1, c.27 (1623/24)[19] involved abortion, and not infanticide. It is possible that this argument is valid. However, if one examines the reports of the infanticide cases that were tried in London at the Old Bailey during the late seventeenth century and the eighteenth century, one will discover that what initially gave rise to many of these prosecutions was the recovery - often from the bottom of a privy after the afterbirth was discovered - of an apparently mature or fullterm dead infant.[20] So, if abortions were successfully being performed in England during this same period, then why is there little, if any, evidence of discarded, premature, or less-than-fullterm, aborted fetuses having been found? Also, it would be highly unlikely that an attempted abortion which had not brought about the death or near death of the pregnant woman would have come to light. Any such attempted abortion would have been performed in utter secrecy; and the participants in the crime, not to mention the fetal victim, could not have been expected to come forth.[21]

David Hume (1757-1838), the nephew of the British empiricist philosopher by the same name, in his Commentaries on the Law of Scotland Respecting Crimes (1797-1800), stated that the newborn bastard child is the most common victim of murder.[22] Elizabeth Collier, in her A Scheme for the Foundation of a Royal Hospital (1687), observed: "There are a great number of [newborns] which are overlaid and willfully murdered by their wicked and cruel mothers, for want of fit ways to conceal their shame and provide for their children, as...[is shown by] the many executions on their offenders."[23] L.A. Perry, in his Criminal Abortion (1932), observed:

> At the commencement of the Stuart period [about 1603], it seems to have been a very usual custom for women who were going to have illegitimate children to wait and allow delivery to take place naturally, rather than to procure abortion. When the child was born it was at once killed, and the mother usually declared that it had been born dead. So frequent was this crime of infanticide of illegitimate children that an Act of Parliament was passed in 1623 (21 Jas. 1, c.27) with the object of lessening the evil.[24]

English secular laws concerning the protection of the unborn, existing child and the conceived, unborn potential child predate the initial development of the English common law under Henry II (1154-1189). This is also true, for example, of pre-common-law Welsh law, and probably also of pre-common-law Irish law.[25] During the reign (871-900) of Alfred the Great, when in English law there did not yet exist a clear distinction between tort and crime, the following law was codified (c. 890):

> If anyone slays a woman with child (mid bearne), while the child is in her womb, he shall pay the full wergeld [a monetary com-

> pensation paid to the relations of the victim in lieu of revenge] for the woman, and half the wergeld for the child in accordance with the wergeld of the father's kindred.[26]

The Leges Henrici Primi (compiled probably between 1100 and 1118), a compilation of various legal sources on Anglo-Saxon law as modified by Henry I the Fowler (c.919-936) and William I the Conqueror (1028-87), contains the following:

> If a pregnant woman (pregnans) is slain, and the child is living (vivat: lives), each shall be compensated for by the full wergeld. If the child is not yet living [i.e., if the fetus is not yet formed and ensouled?], half the wergeld shall be paid to the relatives [on the father's side]. With regard to the manbot [a fine payable to the lord for the death of one of his men] of both, or either one, the amount shall lawfully be determined by the standing of the lord.[27]

Another compilation of old English laws, known as Les Leis Williame (about 1100-1120), included the following law:

> If a woman, who is pregnant [enceintee in FR., pregnans in L., and, therefore, would include a woman who is young with child or not yet quick with child or with quick child], is sentenced to death or to mutilation, the sentence shall not be carried out until she is delivered.[28]

The common law did not view intentional abortion and its common law equivalents (e.g., unintentional abortion brought on by a violent assault or battery on a pregnant woman) as a distinct species of crime. The common law looked at the unborn product of human conception and asked, for example, the following questions:

(1) Was this product a child or human being when it was aborted? (2) If so, is the destruction of the child governed by the common law rules on homicide? (3) If it was a child, but the child's destruction is not governed by those rules, does the destruction of the child, nevertheless, meet the common law criteria of an indictable offense? (4) If it had not yet become a human being when it was aborted, does its destruction, nevertheless, meet the common law criteria of an indictable offense?

2. The English Common Law Rules on Criminal Abortion

First Rule (which, by the way, remained intact until approximately the later part of the sixteenth century, and not, as is universally believed, until approximately the earlier part of the fourteenth century): Intentional abortion constituted murder if it resulted in either the prenatal or postnatal destruction of an existing child (human being).[29] Human being, as used in this and the following rules, refers to the product of human conception as organized into a human body or formed fetus and in receipt of its human or rational soul. Human ensoulment is understood to coincide with the completion of the process of fetal formation, which was thought to occur at about forty or so days after conception.[30] For reasons which do not even begin to explain why or how this modification came about (if in truth, these reasons were the accepted reasons for modifying this first rule),[31] during approximately the later part of the sixteenth century, the common law ceased to recognize the unborn child as a potential victim of criminal homicide unless the child had died in connection with the abortional act after having been expelled from the mother's body.[32] If the child had died in the mother's womb, or in the course of being expelled from the mother's womb, the destruction of the child was treated as a grave crime;[33] but it was not governed by the common

law rules on homicide, and it was not considered a felony in the sense that it was not punishable by death.[34] However, a newborn dead child who, according to the mother had been aborted stillborn, would have been a bastard had the child been born alive, the mother could be convicted of the murder of that child under 21 Jac. (Jas.) 1, c. 27, enacted in 1623 (effective 1624), and repealed in 1802 (effective 1803). In essence, this statute provided that: If, in a trial for the murder of a bastard child, it was proved that the dead child had reached a stage of maturity when the child potentially could have been born alive, and that the mother had intentionally given birth secretly so as to conceal or to attempt to conceal the death or dead body of her bastard child (with the result that medical authorities, or perhaps midwives, could not categorically rule out that the child was born alive); then there was a rebuttable presumption that the mother murdered her bastard child. The mother could rebut this presumption by presenting evidence from at least one witness (other than herself) that her aborted child had come into the world dead.[35]

Second Rule. The abortion destruction of the pre-human being product of human conception eventually became an indictable offense: in this instance, a misdemeanor.[36]

Third Rule. Attempted abortion was a misdemeanor; and at least when the aborted child was aborted alive and survived being aborted, attempted abortion could be prosecuted on a theory of attempted murder.[37]

Fourth Rule. Maliciously disturbing or frightening a pregnant woman whereby she miscarried constituted a form of malicious mischief - a misdemeanor.[38]

Fifth Rule. If a woman died from self-induced abortion, or from an attempt at the same, she was deemed guilty of a felony, namely: implied or constructive self-murder - a form of felony suicide.[39]

Sixth Rule. If a woman died as a result of an abortion brought on by another person, or died from another's attempt to cause her to abort, her death was treated as murder. However, by the nineteenth century, it would appear that the mother's abortion-related death at the hands of another could be ruled as manslaughter (which at common law did not mandate death if it was a first such offence) if the particular aborting method that had led to the mother's death had not been one that had been likely to bring about the death of a pregnant woman.[40]

Seventh Rule. Failure to report to law enforcement authorities one's knowledge of the undetected commission of a felony that involved abortion was indictable as a "misprision of felony".[41]

Eighth Rule. To state falsely to another that a named person killed or offered to kill an unborn child, constituted defamation. Defamation constituted an indictable offense (libel) if the medium or means of publication was a writing or other non-transitory means.[42]

Ninth Rule. Maintaining a house for performing abortions constituted a misdemeanor: in this instance - a public nuisance.[43]

3. Did the English Common Law Permit Abortion When Necessary to Save the Life of the Mother?

Was it indictable at the pre-19th-century, English common law for a person to have deliberately destroyed a child in the womb, or a child-to-be existing in the womb, when both mother and child, or potential child, as the case may be, would have perished if the child had not been destroyed in order to save, or to attempt to save, the life of the mother?

The 18th-century, Scottish physician and male midwife, William Smellie (1697-1763), who later in his life practiced in London, wrote:

> Midwifery is now so much improved that the necessity of destroying the child does not occur so often as formerly. Indeed it never should be done, except when...the Pelvis is too narrow, or the head too large to pass.... In these two cases, there is no room for hesitation....The best practice is undoubtedly to have recourse to that method which alone can be used for her preservation, namely: to diminish [by crushing or perforating] the bulk of the head [i.e., to perform a craniotomy on the unborn child].[44]

The 17th-century, Church of England Bishop, Joseph Hall, wrote:

> Your question ["Whether may it be lawful, in case of extremity, to procure the abortion of the child, for the preservation of the mother"] supposes an extremity; and surely, such it need to be, that may warrant the intention of such an event.
>
> For the deciding whereof, our Casuists [moral theologians] are wont to distinguish double: both of the state of the conception, and of the nature of [i.e., the reason for giving] the [medicinal] receipt.
>
> In the former, they consider of the Conception, either as it is before it receive life, or after that it is animated [or ensouled]. Before it receive life, they are wont to determine, that howsoever it were no less than mortal sin in a physician, to prescribe a medicinal receipt to cause abortion, for the hiding of a sin, or any outward secular occasion; yet, for the preservation of the life of the mother, in an extreme danger, (I say, before animation) it might be lawful. But, after life once received, it were a heinous sin to administer any such mortal remedy. The later Casuists are better advised; and justly hold, that to give any such expelling or destructive medicine, with a direct intention to work an aborsement, whether before or after animation, is utterly unlawful and highly sinful. And with them I cannot but concur in opinion; for, after conception we know that naturally follows animation: there is only the time, that makes the difference; which, in this case, is not so considerable as

> to take off a sin; that of Tertullian comes home to the point, which both Covarruvias and Lessius urge to this purpose. [Latin quotation omitted]: "It is but a hastening of murder, to injure that which would be born. [Latin quotation omitted]: "It is a man, that would be so...."Upon this ground, we know that, in a further degree of remoteness, a voluntary self-pollution [suicide?] hath ever been held to have so much guilt in it, as that Angelus Politianus reports it as the high praise of Michael Verrinus, that he would rather die than yield to it [i.e., he would rather be killed by another rather than commit suicide(?)] How much more, when there is a further progress made towards the perfection of human life! And, if you tell me, that the life of the mother might thus be preserved, whereas otherwise both she and all the possibilities of further conceptions are utterly lost, I must answer you with that sure and universal rule of the Apostle [Paul], That we may not do evil, that good may come thereon; Rom.iii.8.[45]

The trial judge in the English case of R v. Bourne (1938) answered "no" to both parts of the above question.[46] The same answer is given in dictum in a few 19th-century, English cases.[47] Neither Bourne nor these 19th-century cases explains these answers. In effect they assume the very proposition to be proved, particularly regarding the first part of the above question. If the unborn human being is innocent, and if the State does not have the power to put an innocent human being to death, then, by virtue of what legal principle, can the State give to a third person, or recognize in that person, a right to kill an innocent person?[48] Or, by virtue of what moral principle may one person deny to another innocent person what one claims for oneself?

There is no known, pre-19th-century, English case that addressed either part of the above question. Regarding the first part of the question, the following observation of Hale (1609-76)

seems to dictate that the answer can be in the negative or in the affirmative, depending on whether or not in a particular case the facts establish that the unborn child was an inculpable or quasi-assailant, so that the mother, or a third party on the mother's behalf, was acting in self-defense:

> Again, if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent; but if he cannot otherwise save his own life, the law permits him in his own defense to kill the assailant; for by the violence of the assault, and the offense committed upon him by the assailant himself, the law of nature and necessity has made him his own protector cum debito moderamine inculpate tulelae [with the moderation that is required for a faultless defense].[49]

A person may argue that since Hale is discussing criminal homicide at common law, and since Hale took the position that at common law a child existing in the womb is not recognized as a victim of criminal homicide (even if the child is aborted alive and then dies in connection with being aborted), then it hardly can be said that the foregoing observation of Hale might, on certain facts, dictate an answer in the affirmative to the first part of the above question. The problem with such an argument is that it falsely assumes that the reason behind the common law rule that the child existing in the womb is not recognized as a victim of criminal homicide was that the common law, for some unknown reason, deemed such a human being less worthy of the common law's protection than a human being already born. The reason here, if indeed

there was one, was that it could not be sufficiently proved that the child died in connection with the act alleged to have brought about his or her death. Hale so said.[50]

A person may argue also that at common law the unborn child could qualify as an inculpable assailant. However, what act or positive force would the common law have attributed to such a child? Since it was then and there understood that the unborn child could move about in the womb, then arguably a transverse or non-correctable malpresentation might have been considered a positive act. However, certainly the situation of the mother's abnormal or too narrow pelvis would not have been so considered, unless perhaps it was then generally believed that the unborn child participated in the birth process. The 17th-century, English physician-philosopher Thomas Brown, in the course of refuting the vulgar belief that female bears give birth before their young have acquired shape and limbs, stated: "The total action of delivery [is not] to be imputed unto the Mother: but the first attempt beginneth from the Infant, which at the accomplished period attempts to change his mansion, and struggling to come forth, dilacerates and breaks those parts which restrained him before."[51] It may have been also then generally believed that a malpresentation could be caused by some activity of the mother. J. Pechey, in his A General Treatise of the Maids, Big-Bellied Women, Child-bed Women, and Widows (1696), stated: "'The unseasonable motion of the Woman much retards the Delivery, as when she...flings herself about unadvisedly so that the Child cannot be Born the right way, being turned preposterously by the restlessness of the Mother.'"[52]

There is no reason to conclude that the pre-19th-century, English judiciary would have looked outside the common law of self-defense for a source that would support an answer in the

negative to the first part of the above question. Blackstone, in the course of discussing the rights of a person, stated:

> This natural life [the life of a human being, which "begins in contemplation of law as soon as an infant is able to stir in the mother's womb"][53] being, as was before observed, the immediate donation of the great creator, cannot legally be disposed of or destroyed by any individual...merely upon their own authority. Yet nevertheless, it may, by the divine permission, be frequently forfeited for the breach of those laws of society which are enforced by the sanction of capital punishment....Whenever the Constitution of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical....[54]

Regarding the second part of the above question, all that can be said is that if the pre-19th-century English judiciary would have concluded that the harm sought to be avoided (the death of the pregnant woman) is greater than the twofold harm that would be brought about (specifically: (1) the "destruction" of the pre-human being product of human conception, as (2) "deliberately" brought about), then there is reason to believe that the answer here would be in the negative by virtue of the common law "defense of necessity".[55] However, since the common law had as one of its basic tenets that the common law is never contrary to God's Law, then there is reason to believe that the pre-19th-century English judiciary would have consulted English Church authorities on this question. In any event, it is doubtful that the pre-19th-century English common law would have been faced with such a question, if only for the reason that then-existing physicians probably did not think that they could reasonably conclude that a particular woman

in an early stage of pregnancy would not be able to survive the eventual birth process.

An answer in the negative here would not, however, dictate the conclusion that in pre-19th-century England it was lawful for a woman to procure an abortion of the pre-human being product of her conception when necessary to preserve her life. Such a conclusion would require a further demonstration that then-existing English secular law forbade the then-state-recognized ecclesiastical courts from exercising jurisdiction over a matter which the common law had exercised jurisdiction. Alternatively, and in the event the then-existing English secular law did not forbid the ecclesiastical courts from exercising jurisdiction on a matter over which the common law courts had exercised jurisdiction, then it would have to be shown that the then-recognized canon law did not prohibit abortion under such circumstances.[56]

4. "Fetal Formation", and Not "Quickening", Was the Common Law Criterion of When a Pregnant Woman Becomes "Quick with Child" (Pregnant with a Live Child)

The validity of the above premise can be established by providing sufficient proof of the validity of the following four premises: (1) In England, throughout the reign of common law offenses, it was received opinion that a human being is properly defined as a rational animal or creature, and more specifically, as an organized or formed human body, united or informed with its rational soul. (2) In England, throughout the reign of the common law offenses, it was received opinion that God infuses a human or rational soul into the unborn product of human conception as soon as it develops into a fetus or organized human body. (3) The known English common law abortion precedents and the abortion passages in the English common law books of authority do not mention quicken-

ing, and say nothing that is inconsistent with the proposition that fetal formation is the common law-accepted abortion criterion of when a human being comes into existence. (4) From the perspective of the then-existing common law, there was no reason to believe that acceptance of fetal formation as the criterion here would not sufficiently establish what adoption of a quickening criterion would sufficiently establish: that a particular act going to the destruction of an unborn child actually destroyed the child.

Regarding establishing the above first premise, the essence of the following observation of Walter Charleton (1619-1707), a fellow of the Royal College of Physicians in London, will be found in a host of pre-19th-century English works on theology, philosophy, medicine, and law:

> That the Life of Man doth both originally spring, and perpetually depend from the intimate conjunction and union of his Reasonable Soul with his Body, is one of those few Assertions in which all Divines [theologians] and natural Philosophers Unanimously agree.[57]

Regarding the second premise, one can begin to substantiate it with the following statement from Bartholomaeus Anglicus' De Proprietatibus Rerum (between 1230 and 1250), which was, during the later middle ages and possibly into the seventeenth century, the most read book after the Bible.[58] Bartholomaeus undoubtedly borrowed the substance of this statement from other sources. It is certain that the portion of the statement setting forth the four stages of fetal formation and their respective time spans derives from St. Augustine (354-430).[59] The statement or its substantial equivalent is affirmed in a host of English works on philosophy, medicine, and midwifery.[60] It reads as follows:

> The child is bred forth...in four degrees. The first is when the seed has a milk-like appearance. The second is when the seed is worked into a lump of blood (with the liver, heart and brain as yet having no distinct shape). The third is when the heart, brain and liver are shaped, and the other or external members [head, face, arms, hands, fingers, legs, feet and toes] are yet to be shaped and distinguished. The last degree is when all the external members are completely shaped.
>
> And when the body is thus made and shaped with members and limbs, and disposed to receive the soul, then it receives soul and life, and begins to move itself and sprawl with its feet and hands....In the degree of milk it remains seven (7) days; in the degree of blood it remains nine (9) days; in the degree of a lump of blood or unformed flesh it remains twelve (12) days; and in the fourth degree, when all its members are fully formed, it remains eighteen (18) days....So from the day of conception to the day of complete disposition or formation and first life of the child is forty-six (46) days.[61]

Several other English works, with or without setting forth a time span for complete fetal formation to occur, affirm the opinion that a human being comes into existence at fetal formation. Walter Charleton, in his Natural History of the Passions (1674), stated: "Nothing can remain to divorce me from that common opinion which holds, that she [the human soul] is created immediately by God, and infused into the body of a human Embryon, so soon as that is organized, formed and prepared to receive her."[62] Guy Holland, in his The Prerogative of Human Nature (1653), observed: "We know God did not inspire Adam with a living spirit while he was a lump of clay, but when he had a face and body that was organicall [organized or formed into a human body], and not before...."[63] The English

physician, Thomas Willis, in his De Anima Brutorum (1672), observed:

> As to the first yoaking of the one Soul with the other [i.e., the rational soul with the animal soul, as Willis believed that a human being possesses simultaneously two distinct souls: (1) animal or brute, and (2) tho the Rational Soul itself...is altogether ignorant of its Birth, we may affirm notwithstanding, what is Consonant to Holy Faith [i.e., the Septuagint version of Exodus 21:22-23, and probably also Genesis 2:7: "Yahweh God shaped man from the soil of the ground and blew the breath of life into his nostrils, and man became a living being."]64, right Reason, and to the Authority of Divines, who were of chiefest note: That this immaterial Soul, for as much as it cannot be born, as soon as all things are rightly disposed for its Reception, in the Human formation of the Child in the Womb, it is Created immediately of God, and poured into it.65

There were also then in use in England several works by non-English authors wherein the opinion is affirmed that a human being comes into existence at the completion of the process of fetal formation. One notable example is the following passage from one of the medical works (c.1550) of the French physician, Ambroise Paré (1510-1590):

> Into this excellent work or Microcosmos so perfected, God, the author of nature and all things, infuses...a soul or life, which St. Augustine proves by this sentence of Moses ...[quoting the Septuagint version of Exodus 21:22-23]. Therefore...we must believe...the human soul is immediately created of God, even at the very instant time when the child is absolutely perfected in the lineaments of his body....
>
> ....
>
> But even as the infant in the womb obtains not perfect conformation before the

> thirtieth day [probably relying upon Hippocrates], so likewise it does not move before the sixtieth day, at which time it is most commonly not perceived by women, by reason of the smallness of the motion....
>
> The soul enters into the body, as soon as it [the body] has obtained a perfect and absolute distinction and conformation of the members in the womb, which in male children, by reason of the more strong and forming heat which is engrafted in them, is about the fortieth day, and in females about the forty-fifth day, in some sooner and in some later. ...Neither does the life or soul being thus inspired into the body presently execute or perform all his functions, because the instruments that are placed about it cannot obtain a firm and hard consistence necessary for the lively, but especially for the more divine ministries of the life or soul, but in a long process of age or time.[66]

Audrey Eccles, relying chiefly on the 1637 English translation (entitled The Expert Midwife) of Rueff's De Conceptu et Generatione Hominis (1554), implied that in 16th- and 17th-century England it was not a generally received opinion that the human soul is infused into the product of human conception just as soon as it achieves fetal formation:

> Rueff['s] [theory or description of human generation] may be taken as typical of the sixteenth century theory as it persisted in the seventeenty century also. According to him, on conception male and female seed curdled together in a mass, membranes promptly enclosed the mass and little fibres formed throughout, then three specks formed the future brain, liver and heart....The foetus was a milky blob for six days, then a blood-mass, then flesh, and by 18 days a fully-formed, [but as yet unanimated,] tiny human being [sic: human body].
> ....[omitting several paragraphs]

> ....Although the general belief was that the child was fully formed at 18 days, it was still not fully alive; it did not move, and its heart did not beat. At 45 days it "obtained life," whatever that involved, but it did not...[begin to move or stir] until 90 days.[67]

There is in Rueff's The Expert Midwife (1637) a portion of a passage which, if considered without reference to the rest of the passage in which it is contained, does seem to state that the entire process of fetal formation takes only eighteen (18) days:

> All which things are distinctly and orderly caused and brought to pass from the conception even unto the eighteenth day of the first month...; which thing[s]...some ancient Writers have comprehended in these Latin verses: [These verses, which I have omitted, appear to have been written by St. Thomas Aquinas (1227-74) and by Albert the Great (1206-1280), respectively. In these verses Aquinas and Albert set forth the Augustinian opinion on the stages of fetal formation and their respective time spans].[68] Which verses, for the benefit of the unskillfull in the Latin tongue, may thus be Englished: "Six days to milk by proof, thrice three [i.e., in 9 more days] to blood convert the seed. Twice six [in 12 more days] soft flesh does form, thrice six [in 18 more days] do massive members breed." Or otherwise: "The first six days, like milk, the fruitful seed injected in the womb remains still. Then other nine, of milk red blood do breed. Twelve days turn blood to flesh by Nature's skill. Twice nine firm parts, the rest ripe birth do make. And so foregoing time [45 days] does form such shape."[69]

Regarding the underscored portion of the above passage, Rueff did not mean to state that the entire process of fetal formation takes eighteen days. He meant to say that the final stage of the

process of fetal formation takes eighteen days, and the entire process, from conception to completed formation, takes forty-five days. This is confirmed in two other passages in Rueff's The Expert Midwife:

> [First passage.] The seed conceived even unto the forty and fifth day, is changed into the ...perfect form and shape of the Infant; and then by the judgment of some learned men, it receives life, and therefore afterward ought ...to be called...an Infant, although as yet, by reason of his tender and feeble condition and state, he wants motion.[70]
>
> - - -
>
> [Second passage.] After the forty and fifth day, by the advertisement of [pseudo-] Hippocrates, he takes life, and with it the soul infused into him from Heaven, by the judgment of many, so that then he begins to have sense and feeling. But at this time, although he be able to have sense and feeling, yet he wants motion, to wit, being as yet very tender and feeble; but concerning the time of his moving, Hippocrates does excellently instruct us in this wise. If you double the number of days from the conception, you shall find out the time of motion; and the number of the time being tripled and accompted thrice, will declare the day of birth. For example sake: If the infant should be formed in forty-five days, he will move and stir himself the ninetieth day....[71]

One would think that if Rueff were expressing an opinion that fetal animation follows fetal formation by some twenty-seven (27) days (45 less 18), he would have articulated some rationale for rejecting the then almost universal belief that fetal animation coincides with fetal formation, as well as have offered some explanation as to why God evidently would wait some twenty-seven (27) days after the fetus is formed before infusing a human soul into it. The 17th-century French surgeon, Dionis, in his A General

Treatise of Midwifery (1719), stated: "In vain would Nature have made the Body, which is composed of so many Organs and Parts, if the Soul did not enter it to give it Life and Motion."[72]

There are at least a couple of English works that mistakenly understood the foregoing, underscored portion of the passage from Rueff's The Expert Midwife to be a statement that the entire process of fetal formation takes eighteen (18) days. One such work is The Complete Midwife's Practice Enlarged (1656/59).[73] Here, this misreading is contained in a chapter that, practically speaking, was lifted from the chapter in Rueff's The Expert Midwife that contains the so-called eighteen (18) day fetal formation rule. The Complete Midwife work states also that a human being comes into existence forty-five (45) days after conception.[74] To add to this confusion, in another part of The Complete Midwife, the Augustinian, forty-five (or forty-six) day fetal formation rule is set forth.[75]

I have found only a couple of English works in which it is stated that fetal ensoulment or animation occurs not at fetal formation, but rather at quickening. One is John Maubray's The Female Physician (1724). Maubray, in the course of stating that the human embryo develops into an organized or formed human body no later than fifty days after conception, stated:

> But now, as to the Time of this great Work of Animation, Naturalists agree, that it requires double the space that Formation had from conception: which seems so far probable because at that time, and no sooner, the Infant may be sensibly perceived to move; and that by the influence of calid and ficcid Mars, who (according to astrologers) now takes charge of it. For by virtue of his [Mars'] hot quality, he perfects the three principal Members, separating the Legs, Arms, and Head (in due proportion) from the rest. Wherefore

> this auspicious Planet is called the author of the infant's motion. So that, in fine, conformable to what is laid down in the preceding Chapter, the Work of Animation is perfected, at soonest, about the 70th, and at latest, about the 100th day from conception.[76]

Maubray erroneously understood the then pseudo- or quasi-Hippocratic, opinion on the respective time spans for the occurrences of fetal formation, fetal animation, and initial fetal movement (or perhaps its initial detection) to be stating that the fetus receives life and motion in double the time it takes for it to be formed. What this quasi-Hippocratic opinion was then understood to be actually stating was the following: Although the human embryo receives its human soul just as soon as it is formed into a fetus, the fetus does not begin to move or stir until double the time it takes for it to be formed.[77]

The then recognized authority on the question of when a human being begins its existence as the same, held or accepted the opinion that the product of human conception becomes an existing human being at fetal formation. John Connery, in his Abortion: The Development of the Roman Catholic Perspective (1977), stated:

> The time of infusion of the human soul has been under discussion during the whole Christian era. For many centuries, however, the opinion that the soul was infused at the time of formation was generally accepted....In 1620, Thomas Feinus (De Feynes) (1567-1631), a Belgian physician, wrote a book entitled De formatrice fetus liber in which he challenged the idea of delaying the infusion of the rational soul until the fetus was formed. Fienus held that the soul is infused on or about the third day after conception....
>
> Fienus realizes that in taking this position he is opposing what is practically a universal tradition, namely, that the human

> soul is infused only after [i.e., when] the fetus is formed....The authority [supporting this tradition] is both sacred and profane. The sacred authority...is that of scripture [the Septuagint version of Exodus 21: 22-23, and perhaps Genesis 2:7], the [Church] Fathers, and the canons; the profane authority, Hippocrates [(460?-377 B.C.), 30 and 42 days, respectively, for male and female fetal formation], Galenus [(131?-200 A.D.), following Aristotle, 40 days for male fetal formation], and Aristotle [(384-322 B.C.), 40 and 90 (80) days, respectively, for male and female fetal formation].[78]

The then theological (or more properly, "philosophical") dispute over when fetal animation occurs involved fetal formation versus at or near conception, and not fetal formation versus quickening. Also, Catholic theologians were not the only persons who were arguing in support of the opinion that the human soul is infused at conception, and not at fetal formation. The French physician Francois Mauriceau (1637-1709), who, along with the Dutchman Hendrik von Deventer (1651-1724), is recognized as a founder of modern obstetrics and gynecology, stated:

> September 20, 1682: I attended a woman, whom I found five or six weeks gone with child, though she had done all that lay in her power, for twenty days past, to make herself miscarry, with the assistance of a wicked midwife, who deserved the gallows. This wretch had given her several pernicious medicines for that purpose, and had handled her very roughly, in order to open the Womb, without being able to accomplish her wicked intention....She [the pregnant woman] told me that she would not have done it, if she had not thought, that the child, being neither shaped nor quickened, there could be no great harm in procuring a Miscarriage. [Note: this woman was probably playing Mauriceau for a fool. She would have learned from attending church or from the

> confessional that the use of means to prevent conception, particularly when used to cover up the sins of adultery and fornication, constitutes a grave sin.] But I convinced her that such a sentiment was very ill founded, and that it was as pernicious as the action she had endeavored to commit was wicked. This false persuasion, though for a long time standing, that the Foetus is not Animated till a considerable time after Conception, has encouraged [an] abundance of profligate women to procure themselves a discharge of the Embryo after Conception, and an Abortion in the first months of their pregnancy. Wherefore, I think it would be very convenient, for avoiding so pernicious an abuse, to oblige everyone to believe, what to me seems very true, that from the first day, and immediately after Conception, the Soul is actually introduced into the little speck of matter....[79]

Charles Morton, a former president of Harvard College, in his Compendium Physicae (1680), which was the science textbook used by Harvard College students from 1687 to 1728, stated:

> Here a question may be moved: at what time the soul is infused? It has been formerly thought not to be till the complete organization of the body - about the fourth or fifth month after conception....And here the law of England ...condemns not the whore who destroys her child for murther [under 21 Jas.1, c.27 (1623/24)] unless it appears that the child was perfectly formed, as having hair and nails, etc: Upon this supposall: that till then there is no union, and therefore no separation of soul and body;[80] but indeed it seems more agreeable to reason that the soul is infused [at]...conception....[81]

The then-existing works that discuss fetal formation do not say that the fetus must possess hair and nails before it is deemed fully formed. In none of those works is it contended, for example, that a child born with a bald head cannot be born alive or is not

recognized as a human being. They talk simply in terms of a recognizable human shape or a formed human body.[82]

I have come across several 18th-century English or Scottish works that state that the process of fetal formation takes three months. However, I have found no pre-19th-century English works, and only one English text, Thomas Raynalde's translation (1545) of Rosslin's Rosengarten (1513), that possibly can be construed as stating that the process of fetal formation can take up to four or five months:

> Aborcement or untymelye birth is when the woman is delivered before due season, and before the fruite be rype, as in the iii, iv, or v month, before the byrth have lyfe, and sometimes after it hath lyfe it is delivered before it stirre, being by some chance dead in the mother's womb.[83]

Quickening generally occurs during the fourth or fifth month after conception. Thus, it may be that Morton, in remarking in his Compendium Physicae that it was formerly thought that human animation does not occur until the complete organization of the body, "about the fourth or fifth month after conception," is implicitly stating (but erroneously so) that it was formerly thought that quickening signaled not only the infusion of the human soul into the unborn product of human conception, but also that the process of fetal formation had run its course. The French surgeon Dionis, in his A General Treatise on Midwifery (1719), stated: "Hence we infer that the Foetus is form'd sooner than a great many Authors thought, who maintained that it is neither perfect, nor has life before the Mother feels it stir in the Womb."[84] If a great many such authors did exist, their names will remain forever as a mystery.[85]

5. The Common Law Books of Authority Do Not Support the Proposition That "Quickening" is the Abortion Criterion of When a Woman Becomes Quick With Child

Some common law abortion commentators (hereinafter: some) say that by Bracton's day (d.1268), as demonstrated by Bracton's De Legibus abortion passage, the common law had come to accept quickening and to reject fetal formation, as the abortion criterion of when a human being comes into existence. Some say that while in Bracton's day the fetal formation criterion was the common law rule, nevertheless, as is demonstrated by the abortion passage in Fleta (about 1290), by the late thirteenth century quickening had replaced fetal formation as this common law criterion. Some say that by Coke's day (1552-1634), as demonstrated by the phrase "if a woman be quick with child" in Coke's Institutes III (1641) abortion passage, the common law had come to accept quickening, and reject fetal formation, as this criterion. Some say that by Blackstone's day (1723-79), as demonstrated by the two abortion passages in Blackstone's Commentaries on the Laws of England (1765-69), quickening had replaced fetal formation as this criterion. Some say or argue that although this quickening criterion cannot be fairly read into either of the Blackstone abortion passages, the fact remains that the late-18th-century English judiciary, with a view to Blackstone's Commentaries abortion passage that human life "begins in contemplation of law when the infant is able to stir in the mother's womb", came to adopt the legal fiction that quickening is the criterion. The argument continues: That judiciary did this because it was then and there believed that in the absence of quickening there was no way to establish sufficiently that an aborted fetus had acquired the capacity to stir or to move itself when it was aborted. Some, such as Laurence Tribe, have argued

essentially as follows: "Under common law, abortion was permitted until quickening....This rule was supported by a number of rationales....Before quickening, no one could know for sure if a woman was pregnant....[Thus], it could not be proved that an abortion had been [intentionally] performed."[86]

The last argument is easily refuted. Certainly, for example, proof that an aborted embryo or fetus came from the body of a particular woman at or around a particular date would constitute sufficient proof that she was "then" pregnant; notwithstanding that, for whatever the reason, it could not be proved that she had experienced quickening prior to her abortion. Assuming, without conceding, that at common law it was settled law that nearly every English woman believed that until she had experienced quickening she could not be confident that she were pregnant, the fact remains: it cannot be demonstrated that it was also settled law there that no such woman would have attempted to procure an abortion on less than what she thought constituted good evidence of pregnancy.[87] In the absence of such a demonstration, the presumption should be that at the English common law the question of pre-quickening abortional intent remained as a question of fact for criminal juries.

Bracton, in the course of discussing murder at common law, stated: "Si sit aliquis qui mulierem praegnantem percusserit vel ei venenum dederit, per quod fecerit abortivum, si puerperium iam formatum vel animatum fuerit, et maxime si animatum, facit homicidium."[88] This passage was translated into English by Twiss in 1879, and by Thorne in 1968, respectively as follows: "If one strikes a pregnant woman or gives her poison [or uses other means, or if she takes poison or other means] in order to procure an abortion, if the foetus be already formed and animated, and particularly if it be animated, he [or she] commits homicide";[89] "If one

strikes a pregnant woman..., if the foetus is already formed or quickened, especially if it is quickened, he commits homicide."[90] In England in Bracton's day, it was received opinion that a human being is defined as an organized human body informed with its human or rational soul. It is fair to say also that, only an existing human being could be recognized as a victim of criminal homicide at the common law of Bracton's day. It can, therefore, hardly be disputed that Bracton is stating that induced abortion constitutes murder at common law only when it involves the destruction of an existing or live child or human being.

Thirteenth-century Catholic canon law on criminal homicide accepted fetal formation as the criterion of fetal ensoulment.[91] Available evidence indicates that Bracton's abortion passage is derived from a work consisting of a commentary on canon law.[92] Thus: (1) given in England in Bracton's day, it was a received opinion that a new human being comes into existence just as soon as the product of human conception achieves fetal formation, at which stage in its development it receives its human or rational soul; and (2) given that Bracton's abortion passage clearly states that the human embryo that has developed into a "formed" fetus is recognized as a victim of homicide; then the presumption should be that implicit in Bracton's abortion passage is the understanding that fetal formation, and not quickening, is the criterion of when the product of human conception becomes a human being.

Bracton's abortion passage probably derived from the following passage contained in the Summa de Penitentia (1220s) of the Spanish Dominican canonist Raymond of Penaforte (1175-1240):

> What if someone strikes a pregnant woman, or gives her poison (or she herself takes it), in order to cause an abortion or prevent conception: shall he [or the woman who deliber-

> ately causes herself to miscarry] be adjudged a homicide or lawbreaker? I answer that if the foetus is already formed or quickened (animatus: [informed with a human or rational soul]), he [or she] is properly a homicide if the woman aborts by reason of the striking or drinking, because he [or she] has killed a man. If, however, it is not yet quickened, he [or she] shall not be called a homicide with respect to the breach of law (irregularitas) but shall have the penance of a homicide.[93]

Some common law abortion commentators may argue that it cannot be said with certainty that Bracton was setting forth the then current practice of the English courts relative to abortion as being a species of common law criminal homicide as Bracton's abortion passage was derived from a work related to canon law. That argument is valid as far as it goes, which is not very far.[94] Also, it can be equally maintained that the then existing English judiciary considered canon law a valid source of the common law. It has been said that the common law drew "'its inspiration from every fountain of justice,'" including Scripture. The common law books of authority on criminal law often cite passages from Scripture in support of particular rules.[95]

Here is a question: Given (1) that in England in Bracton's day fetal formation was the accepted criterion of human ensoulment, and (2) that the common law of Bracton's day accepted fetal formation as this criterion, then why did Bracton add here (i.e., immediately after remarking that abortion constitutes homicide if what was aborted had a human body) that abortion "particularly" constitutes homicide if the fetus had been quick or ensouled? Is Bracton implicitly taking the position that human ensoulment does not coincide with fetal formation, but occurs before, or perhaps at some point after fetal formation, e.g., at quickening? It seems doubtful; for if that were the case, then obviously it would not

constitute murder to destroy an unanimated, formed fetus. However, Bracton clearly stated that it is murder to destroy a "formed" human fetus. It seems probable that all Bracton meant to say is that the reason why the product of human conception can be recognized as a victim of homicide, provided it is formed into a human body, is because it receives its rational or human soul when it is so formed. Roger Bacon (1214?-1294) stated: "'Thus the embryo in the mother's womb is not called man, especially [particularly] before it receives the rational soul.'"[96]

What is not clear is whether Bracton thought that the infusion of the rational soul gives only rational life to the fetus because, the fetus, in accordance with Aristotelian thinking, is considered to be already in possession of sentient life or an animal soul when it receives its rational or human soul,[97] or because (and perhaps in accordance with Augustinian thinking), he thought the infusion of the human soul gives rational, as well as animal life to the fetus.[98] This is, however, a moot question, for there is no reason to think that Bracton and his fellow justices would have questioned the opinion that the product of human conception becomes a human being when it becomes a formed fetus, at which stage in its development God informs it with its human or rational soul.

Those persons who have argued or assumed that Bracton's abortion passage incorporates the quickening criterion do not specify in what way (i.e., explicitly, or implicitly) the quickening criterion is set forth there. In Roe v. Wade, the Court stated:

> Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40-80 [(90)] day view, and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening

> was echoed by later common-law scholars and found its way into the received common law in this country.[99]

Similarly, Glanville Williams stated:

> The hesitations of the canonists as to the time of animation gave Englishmen the opportunity to settle the question in their own special way. St. Thomas Aquinas defined the soul as the first principle of life in those things that live, and he added that life is shown principally by two actions, knowledge [awareness] and movement. [Citing in a footnote, Aquinas' Summa Theologica, Part I, Question 75, Art. I; Question 76, Art. III, ad 3; and Question 118, Art. II, ad 2.] It was easy to imagine that the animus, life or soul, entered the body of the unborn infant when it turned or moved in the womb. Hence the rule of the common law, dating from the time of Bracton (a contemporary of St. Thomas [1226-74]) that life is taken to start not at a fixed time after conception [i.e., and in accordance with Aristotelian thinking, at 40 days after conception in the case of the male fetus, and 90 (80) days in the case of the female fetus], but at the moment of quickening, which usually takes place about midterm. Life, said Blackstone, "begins, in contemplation of law, as soon as the infant is able to stir in the mother's womb."[100]

The argument that this quickening criterion is explicitly set forth in Bracton's De Legibus abortion passage is fatally flawed for several reasons. First: the argument falsely assumes that the term quickened (animatus) is synonymous with the modern understanding of the term quickening. Animatus is the past participle of the verb animare (from anima, soul), which in ancient and medieval Latin meant "to infuse with a soul," and hence, with life. This is the old or original sense of quicken/quickening (from quick,

alive).[101] Quickening, in its modern sense, refers to the initial perception by a pregnant woman of the movements or stirrings of her fetus. John Connery, in his Abortion: The Development of the Roman Catholic Perspective (1977), stated: "In English law the term animatus was translated by the word quickened, and somehow became identified...with the woman's first sensations of fetal movements within her. This was certainly a departure from the ordinary understanding of the term animatus."[102]

Second: the argument necessarily adopts the false assumption that, it was understood at the then existing common law that the product of human conception did not achieve fetal formation until quickening, which generally occurs at about midway through pregnancy. Implicit in that assumption is the assumption that it was thought there that quickening, in addition to signaling the infusion of the human soul, signaled the advent of the completion of the process of fetal formation, since it was then understood that not until the advent of fetal formation is the product of human conception properly disposed to receive its human or rational soul. The reason why the argument must make these assumptions is because there is simply no way of getting around the fact that Bracton's De Legibus abortion passage explicitly states that the aborted product of human conception is properly recognized as a potential victim of criminal homicide just as soon as it develops into an organized fetus or human body. Only an existing human being (then defined as an organized or formed human body informed with a rational or human soul) can be properly so recognized. The reason why these assumptions should be deemed false is because virtually all the authorities (Aristotle, Hippocrates, Galenus, the Church Fathers, such as Augustine and Jerome, and the Church canons) to which the then-existing English judiciary would have looked in determining what is

the accepted opinion as to the approximate time it takes for the product of human conception to achieve fetal formation from time of conception (and so to be informed with a human soul), stated that fetal formation occurred not at quickening, but rather at about the middle of the second month of gestation (forty (40) or so days from conception).[103]

Glanville Williams and the Roe Court in effect presupposed that the then-existing English judiciary was of the opinion that the common law somehow conferred upon that judiciary the jurisdiction to resolve more than just questions of law, such as: Under what circumstances, if any, does abortion constitute criminal homicide at common law. Williams and the Roe Court, in effect, presupposed that this judiciary thought that possessed the jurisdiction also to decide philosophical questions, such as: When does a human being come into existence. However, there is no more reason to think that the then-existing English judiciary was of the opinion that the common law somehow conferred upon that judiciary the jurisdiction to decide such a question, than is there reason to think that this judiciary thought that it might possess the common law jurisdiction to decide such questions as: whether or not life exists on Mars, or whether or not witches exist, or whether or not man possesses an incorporeal rational soul, or whether he possesses a free will.

Contrary to what Glanville Williams implied, and irrespective of whether or not there was disagreement about the precise number of days it took for fetal formation to occur, the Church fathers, canonists, theologians and philosophers did not hesitate to accept the Aristotelian opinion that the unborn product of human conception is properly recognized as a human being just as soon as it develops into a fetus. What some of these theologians, etc.,

hesitated to accept was the opinion that the rational or human soul is not infused into the product of human conception in advance of fetal formation.[104]

St. Thomas Aquinas' Summa Theologica is not the source of Bracton's De Legibus abortion passage. Bracton's De Legibus was written between the 1220s and 1256/57.[105] St. Thomas' Summa Theologica was "composed between 1265 (at the earliest) and 1273."[106] Furthermore, St. Thomas did not form or accept the opinion that a human being comes into existence at quickening. He accepted the Aristotelian opinion that a human being comes into existence at fetal formation. John Connery observed:

> Much more important for the future discussion of abortion is another part of St. Thomas' commentary on the Sentences [by Peter Lombard (1095-1160)], where he [St. Thomas] takes up the question of the time of animation of the fetus. Here he clearly accepts the theory of delayed animation [i.e., the Aristotelian theory that the product of human conception is informed with its human soul not at conception, but rather at fetal formation] and the Aristotelian distinction regarding the time of male and female animation. But besides the Aristotelian computation (40 days [for male, fetal formation] and 90 (80) days [for female, fetal formation]), he also gives that of Augustine for the male fetus [46 days].[107]

There is nothing in any of the writings of St. Thomas from which a person might reasonably infer that St. Thomas was of the opinion that quickening signaled the infusion of the human or rational soul into the unborn product of human conception. It is true, as Glanville Williams stated, that at one point in the Summa Theologia (as cited by Glanville Williams: Part I, Question 75, Art.1), St. Thomas stated that "all" living things (e.g., plants,

trees, animals, and human beings), possess life by virtue of a soul; and such life is chiefly manifested by the two activities of knowledge or awareness, and movement. In the above passage, St. Thomas is discussing how living things can be distinguished from non-living things. He is not discussing either the generation of man or the human soul per se.[108] More importantly, by the term "movement," St. Thomas is not referring to animal motor movement or locomotion. (St. Thomas knew that plants and trees are living things, yet they lack the ability to engage in motor movement.) He is referring to any activity or operation that originates, and has its end or term, in a particular substance or thing itself. Such activities would include, for example: growth, nutrition, reproduction, sensation, animal motor motion, and (in the case of man), thinking and willing.[109] At Part I, Question 118, Art. 2, ad 2, as cited by Williams, St. Thomas is simply remarking that the vegetative soul and the sentient or animal soul, which exist non-simultaneously in the human embryo or fetus prior to the time it is rationally animated, are educed from the matter from which the embryo or fetus is made.[110] At Part I, Question 76, Art. III, ad 3, as cited by Williams, St. Thomas is simply pointing out that the rational or human soul, when infused into the fetus, takes over the powers or activities of the animal or sentient soul, which then ceases to exist.[111]

What can be said of the Roe Court's contention that Bracton and the then-existing English judiciary rejected the Aristotelian 40/90 (80) day rule (or if one prefers, the Augustinian 45/46 day rule) in part because it was then and there believed that the theory that the human soul was infused into the product of human conception at a certain number of days after conception could not be empirically verified? In the first place, the 40/90 (80) day

rule was considered to represent the approximate time of fetal animation "only" to the extent that it represented the time for fetal formation to occur. What was considered crucial to human ensoulment was whether the product of human conception had achieved fetal formation, and not whether it was forty or so days old. If what was aborted could be shown to possess or have possessed a human body, then that would have been all that was considered necessary to prove that it had been ensouled or rationally animated and, therefore, was a human being.

If empirical verification was the then and there only accepted criterion of a legally recognized truth or fact, then the English common law would not have recognized a newly born child as a human being. This is because it could not be empirically verified that such a child possesses a rational soul.

It should not be overlooked that when modern science, which in its initial stages was called "experimental science", took hold in England in the seventeenth century, it did not dispute the existence of the incorporeal rational or human soul. Seventeenth century, English experimental scientists simply took the position that questions relating to the incorporeal human soul (such as the time when it is infused by God into the unborn product of human conception) were the subject matter of theology. Francis Bacon (1561-1626), who was an English judge and Lord Chancellor of England from 1618-1621, and whose scientific writings gave great impetus to the "experimental science" movement, expressly so stated, as did Thomas Sprat (1635-1713) in his History of the Royal Society (1667).[112]

Furthermore, Aristotle's 40/90 (80) day, male/female, fetal formation rule was then understood to have an empirical foundation.

John Connery, in his Abortion: The Development of the Roman Catholic Perspective (1977), stated:

> Aristotle's computation was supposedly based on experience with aborted fetuses....He [stated]...that if a male embryo is aborted on the fortieth day and placed in water it holds together in a sort of membrane....If the membrane is ruptured, an embryo will be revealed, as big as one of the large kinds of ants, and all of the members will be plain to see. But the female embryo, if aborted during the first three months, is as a rule found to be undifferentiated. In the fourth month, however, it will be differentiated quickly.
>
> Albert [the Great (1206-1280)]..., in speaking of the abortion of the male fetus on the fortieth day,...follows Aristotle quite closely, but adds that if it is recent the aborted conceptus will contract and expand when pricked with a needle, a clear sign that it is already animated.[113]

The foregoing observations of Aristotle and Albert the Great were incorporated into the Anatomia Infantis of Gabriel de Zerbi (1458-1505), professor of anatomy at Padua and Rome. Dryander (d.1560) incorporated the Anatomia Infantis into the second edition of his Anatomiae Corporis Humani (Marburg, 1537). It is said that Dryander's "selection of de Zerbi's Anatomia Infantis stamps Zerbi's Anatomia Infantis as representing the best knowledge of the period."[114] The Anatomia Infantis reads in pertinent part as follows:

> If the fetus is to be male and by abortion comes out within forty days, the womb being open, coming out from the orifice, together with moisture on to the earth, it will be dissolved because of its tenderness, and will not be found because of its smallness. If, however, the abortion takes place over cold

> water which is smooth and clear, a creature will be found by straining, and it will have the appearance of a large ant. And this substance will be found in a kind of a web or membrane, and its head and all its limbs are formed and distinct. And sometimes, when it has recently been emitted, it will be found to have motion of dilation and constriction when it is pricked with a needle, on account of which it is clearly known that this creature is animate; and it is found that its generative organs and eyes are large in respect to its size, for this reason, because as yet, they are not complete and united, but in the fluid matter there comes out the appearance and form of members: and a similar thing happens in the case of other animals, as to the eyes and generative organs, before their full growth; for these members always have great size compared with the rest.
>
> But if what has been conceived is to be female, and through abortion has come out from the womb before three months, that is ninety days, the thing that has come immaturely will be found to have no form; but if it has entered the fourth month, or completed the third, then there will be found a female form; moreover, when it is complete, it is quickly filled out to the final form in which it is born, since a compact thing that is moist, will, after it begins to remain fixed, be formed and completed more quickly than one that is dry.[115]

Fleta, i.e., the anonymous author of the book called Fleta (circa 1290), in the course of discussing homicide at common law, stated:

> He, too, in strictness is a homicide who has pressed upon a pregnant woman or has given her poison or has struck her in order to procure an abortion or to prevent conception, if the foetus was already formed and quickened [animatus: ensouled]; and similarly, he who has given or accepted poison with the intention of preventing procreation or conception.

> A woman also commits homicide if, by a potion or the like, she destroys a quickened child (puerum animatum) in her womb.[116]

The precise source of Fleta's abortion passage is unknown. It might have ultimately derived from St. Jerome, or perhaps from Regino's Si aliquis.[117] In any event, it is certainly reasonable to conclude that the source resembles that type of source (canonical or theological) from which Bracton derived his De Legibus abortion passage. With that said, and with the exception that Fleta was less skillful than Bracton in extracting from the then-existing canon law the pertinent common law rule, all that has been said regarding the Williams-Roe argument that Bracton's De Legibus abortion passage incorporated the quickening criterion, and not the fetal formation criterion, applies equally to the argument that Fleta's abortion passage incorporated the quickening criterion.[118]

Coke's (1552-1634) Institutes III (1641) abortion passage reads as follows:

> If a woman be quick with childe, and by a Potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision [i.e., a non-capital offense, but bordering thereon], and no murder [citing R v. Richard de Bourton (1327) (aka., The Twins-slayer's Case) in its incomplete yearbook form]; R v. Anonymous (1348?) (aka., The Abortionist's Case); and Staunford's Les Plees del Coron (1557) abortion passage (which cites only The Twins-slayer's Case and The Abortionist's Case)]; but if the childe be borne alive, and dieth of the Potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, in rerum natura [in existence], when it is born alive. And the Book in 1 E.3 [The Twins-slayer's Case (1327)] was never

> holden for law. And 3 Ass. p.2 [another version of The Twins-slayer's Case (1327)] is but a repetition of that case. And so horrible an offence should not go unpunished. And so was the law holden in Bracton's time....[Coke quotes Bracton's De Legibus abortion passage in its original Latin.] And herewith agreeth Fleta [Coke quotes Fleta's abortion passage in its original Latin.]; and herein the law is grounded upon the law of God...[Gen. 9:6: "If anyone sheds the blood of man, by man shall his blood be shed: For in the image of God has man been made."]. If a man counsell a woman to kill the child within her wombe, when it shall be borne, and after she is delivered of the childe, she killeth it, the counsellor is an accessory to murder, and yet at the time of the commandement or counsell, no murder could be committed of the childe in utero matris [citing R v. Parker (1560), 73 Eng. Rep 410, 2 Dyer 186(a)]: The reason of which case [Parker] proveth well the other case [i.e., the case in which the aborted child is brought forth alive and then dies in connection with being aborted].[119]

Cyril Means assumed that Coke's Institutes III abortion passage phrase "if a woman be quick with child" refers to a pregnant woman who has experienced quickening. He assumed also that the English judiciary prior to Coke's day formed the opinion that the common law conferred upon that judiciary the jurisdiction to decide the non-justiciable question, when does a human being come into existence. He assumed further that this judiciary decided here on quickening. Means wrote:

> At some point between the thirteenth and seventeenth centuries, English common law developed along the line suggested by Bracton's distinction between formation and animation. In so doing, it postulated the latter event as occurring at the time of quickening (i.e., toward the end of the fourth or the beginning

> of the fifth month of pregnancy), as witnessed by the statement of Sir Edward Coke: "If a woman be quick with childe...."[120]

That Coke's Institutes III abortion passage phrase "if a woman be quick with child" literally means no more than "if a woman be pregnant with a live child" is easily demonstrated. The words immediately following this phrase refer to a living child: "and by a potion...killeth it [i.e., the child alive in her womb], or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe...." Also, the authorities that Coke cites (R v. Bourton, R v. Anonymous, Bracton's De Legibus abortion passage, Fleta's abortion passage, and Staunford's Les Plees del Coron abortion passage) refer simply to a live child in the womb.

If the passage in question had read "if a woman has perceived herself to be quick with child", or if it could be demonstrated that in England in Coke's day the term "quick with child" was understood to be synonymous with quickening (i.e., it was used exclusively to describe that stage of pregnancy when a pregnant woman is able to perceive the stirrings of her fetus), or, if it could be demonstrated that it was received opinion among learned Englishmen of Coke's day that a human being comes into existence at quickening, or that the then-existing English judiciary had adopted quickening as the exclusive criterion of whether the process of fetal formation had run its course, then Means' foregoing conclusion could be taken as correct. As it is, however, the legal presumption should be that the quick with child criterion that should be read into Coke's Institutes III abortion passage is fetal formation. This is so for several reasons.

First: In England, before, during, and after Coke's day, the term quick with child meant simply to be pregnant with a live

child, and was not then and there exclusively used to describe a pregnant woman who had reached that stage in her pregnancy when she is able to perceive the movements or stirrings of her fetus. Elisha Coles (1640?-1680), in his A Dictionary, English-Latin, and Latin-English (1677), gave the following Latin definitions for the English terms "quick with child", "to quicken", and "to be quick with child", respectively: "Foeta pregnans" (pregnant with a fetus or young child), "Foetum vivum gestare" (pregnant with a live child), and "Concipere utero" (to conceive a child).[121] Samuel Johnson, in his A Dictionary of the English Language (1755), defined quick (as in, "a woman quickens with child") as: "The Child in the womb after it is perfectly formed."[122] George Mason, in his A Supplement to Johnson's English Dictionary (1801), defined "quick" (as in, "a woman quick with child") as: "Pregnant with a live child: 'Then shall Hector be whip'd for Jaquenetta that is quick by him.' (S.l.l.l.)."[123] Robert Ainsworth, in his A Compendious Dictionary of the Latin Tongue (1736), translated into the Latin the English terms "to be quick with child" and "to quicken" (as a woman who is with child does), respectively, as follows: "Foetum vivum utero gestare" (to carry a live child in the womb), and "Foetum vivum in utero sentire" (to feel a live child in the womb).[124]

Second: While Coke acknowledges that at the common law of his day the degree of the crime of the intentional, in-womb killing of an unborn child is significantly different from what it was during Bracton's day (capital during the latter's day and non-capital during the former's day), he does not acknowledge that at the common law of his own day a human being is considered to come into existence at a stage in gestation (in this case, at quickening) different from what it was during Bracton's day (which, as has been

previously explained, should be presumed to be at fetal formation). However, this latter difference (quickening versus fetal formation), if in fact it did exist at the common law of Coke's day, would have called for acknowledgment by Coke no less than the former difference (i.e., the capital versus the non-capital). This is because this latter difference, no less than the former difference, would have represented a significant change in this area of law. Also, the presumption should be that Coke properly understood Bracton's abortion-passage term "animatum fuerit" (ensouled), which Coke translated as "quick with child". John Johnson, in a related context in his A Collection of Ecclesiastical Laws (1720), also translated the Latin term animatum fuerit as "quick with child."[125]

Third: As has been already shown, in England before, during, and after Coke's day, it was received opinion among the learned that the product of human conception begins its existence as a human being at fetal formation.

Fourth: If the concept of quickening is read into Coke's Institutes III abortion passage, then, the passage becomes partially contradictory or produces a legally absurd result. Assume that "X", with "Y's" consent, performs an abortion on "Y", which results in the live birth, but subsequent death of "Y's" three-months-old, perfectly-formed fetus ("Z"). Assume also that "Y" never experienced quickening relative to "Z". In such a case, and notwithstanding that "Z" was live-born and perfectly-formed, and died as a proximate result of being aborted, neither "X" nor "Y" (as "X's" accessory) could be convicted of the murder of "Z", because the element of quickening cannot be proved. However, as observed by Coke in his Commentary on Littleton (1628): "If the wife be delivered of a monster, which hath not the shape of mankinde, this is no issue in the law..., if he hath humane shape this

sufficeth....As the crying is but a proofe that the childe was born alive,...so is motion, stirring, and the like."[126]

Fifth: If the concept of quickening is read into Coke's Institutes III abortion passage, then, as can be seen in the following hypothetical case, the female criminal defendant ("Y") in effect, and in violation of the spirit of the common law rule that "no man can be the judge in his own case", becomes her own judge: "Y" is charged with having killed her stillborn child through self-abortion. At the English common law a criminal defendant was not even permitted to testify (i.e., to give a statement under oath) at his or her own trial. The defendant could give only an unsworn statement that could not be elicited through direct examination, and could not be challenged through cross-examination. However, prior to the nineteenth century, a defendant could be convicted on his or her extrajudicial confession.[127]

The Oxford English Dictionary (OED) identifies the term quick with child with the phenomenon of quickening:

> [Quick,] Constr. with.
> a. quick with child, said of a female in the stage of pregnancy at which the motion of the foetus is felt. Now rare or Obs.
> (This use has app. arisen by the inversion of the phr. with quick child exemplified in the following quots.: c1450 Merlin 12: "She was grete with quyk childe"; 1752 J. Louthian Form of Process (ed. 2) 217: "You of the Jury of Matrons...say, that E.L. is not pregnant with quick Child".)
> c1450 Lonelich Merlin 826 (Kölbing): "This good man sawh, that sche Qwyk with childe was." 1493 Festivall (W. de W. 1515) 106: "Thenne conceyued Elyzabeth and whan she was quycke wt chylde" [etc]. 1616 R.C. Times' Whistle iii. 1163: "His vnckles wife surviues, purchance Left quick with childe." 1678 Lady Chaworth in 12th Rep. Hist. MSS. Comm. App. V. 51: "Sister Salisbery and sister

> Ansley [are] both quicke with child." 1774 Goldsm. Nat. Hist. (1776) II. 43: "Women ['perceive themselves to be'] quick with child, as their expression is, at the end of two months."
>
> ....
>
> b. absol. in same sense. Obs.
> 1588 Shaks. L.L.L. v.ii. 687: "Then shall Hector be whipt for Iaquenetta that is quicke by him." 1647 Trapp Comm. Rom. ix. 11: "Acknowledging...her issue for their Prince, before she as yet had felt her self quick."
>
> c. Alive, instinct with (life, soul, feeling, etc.).[128]

The OED editors are not implying that to say that a woman is quick with child is not to say also that a woman is pregnant with a live child. However, the OED does seem to be stating that, historically speaking, the term quick with child was used exclusively to refer to that period during pregnancy when the pregnant woman is able to perceive the motions or stirrings of her unborn child. If such, historically speaking, is the case, then a person could reasonably conclude that Coke's Institutes III abortion passage phrase "if a woman be quick with childe" implies that, at common law, a woman is not considered to be pregnant with a live child until she has reached the quickening stage in her pregnancy. However, not one of the above OED quick with child citations supports such a conclusion, and several of them flatly contradict it.

The citation to John Trapp's A Commentary or Exposition Upon all the Epistles and the Revelation of John the Devine (London, 1647) reads: "Sapores, son of Misdates King of Persia, began his reign before his life. For his father, dying, left his mother with child, and the Persian Nobility set the crown on his mother's belly, acknowledging thereby her issue for their Prince, before she as yet had felt herself quick [with child]."[129] Obviously, Trapp was not of the opinion that the term quick with child was used

"exclusively" to refer to quickening, if only for the reason that he invokes the quickening experience as the means by which the mother is now able to perceive that she is quick with child. If the phrase quick with child is synonymous with quickening, then the foregoing emphasized portion of Trapp's passage becomes nonsensical. It would read, in effect: "before she as yet had felt herself feel the motion of her unborn living child." If Trapp considered quickening and quick with child as synonymous terms, then the passage would have read simply: before she was quick with child.

What has just been said regarding Trapp's quick with child-passage applies equally to the emphasized portion of the following passage from Oliver Goldsmith's History of the Earth and Animated Nature (1763):

> In three months, the [human] embryo is above three inches long...Hippocrates observes, that not till then the mother perceives the child's motion....However, this is no general rule, as there are women who assert, that they perceived themselves to be quick with child, as their expression is, at the end of two months ....At all times, however, the child is equally alive; and consequently, those juries of matrons that are to determine upon the pregnancy of criminals, should not inquire whether the woman be quick, but whether she be with child; if the latter be perceivable, the former follows of course.[130]

If Goldsmith thought that the term quick with child refers exclusively to quickening, then the underscored portion of the foregoing passage becomes nonsensical. It would read in effect: There are pregnant women who assert that they perceived themselves perceiving the stirrings of their fetuses at the end of two months.

When Goldsmith used the term quick [with child] in the phrase "those juries of matrons...should not inquire whether the woman be

quick [with child], but whether she be with child; if the latter be perceivable, the former follows of course," he appears to have used this term in two different senses: the first, in reference to the external detection of fetal movements (which would confirm that the woman is pregnant with a live child); and the second, in reference to being pregnant with a live child.

The two Merlin citations read as follows: "This good man saw that she quick with child was,"[131] and: "The good man saw that she was great with quick child."[132] In these quotations "she" refers to Merlin's unwed, pregnant mother. She is pregnant or "quick" with Merlin. The "good man" is her priest, and Merlin's mother is on her way to see him. It has been only two months since she confessed to the priest that she evidently engaged in sexual intercourse while asleep, or perhaps while awake, but in that case, then with an invisible being. She is seeking the priest's advice on how to deal with the situation of her townspeople being aware of her pregnancy. As she approaches the priest, he notices that she is quick with child or great with quick child. Now, that it cannot be said that these two Merlin writers are necessarily equating quickening with quick with child or with quick child is easily demonstrated. Obviously, the priest, unless he had extraordinary eyes, would not have been able to see that Merlin's mother had already felt or was feeling the stirrings of her unborn child. Also, a pregnant woman is simply unable to feel the movements of her fetus at two months into her pregnancy. I realize, of course, that it is difficult, if not impossible, to perceive with one's eyes that a fully clothed woman, who is only two months gone with child, is even pregnant.

The citation to Louthian's, The Form of Process Before the Court of Justiciary in Scotland (1732), reads: "You of the Jury of Matrons...say that E.L. is not pregnant with quick child."[133] Louthian is discussing the legal procedure to be followed when a

woman, who has been sentenced on a capital offense, pleads for a stay of execution on the ground that she is pregnant with a live child. Louthian uses the terms with quick child, quick with child, great with child, and with child interchangeably. That he is referring to no more than a woman who is pregnant with a live child is demonstrated by his following observation, which is found on the same page as the foregoing quote: "You say that E.L. is 'pregnant with a quick child', and so you say 'all,' Upon which the Court (for the Reverence of God, and lest the Child in the Belly of said E.L. should suffer Death for the Crime of the Mother) does order her to be committed to the Goal [jail]."[134]

The citation to R.G. Gent's The Times Whistle (1616), reads: "But then his uncle's wife survives, perchance left quick with child."[135] The uncle's nephew is plotting to inherit his uncle's vast land holdings. He realizes that to become the heir first in line he has to murder not only his uncle and his uncle's son, but his uncle's wife as well. The reason why he has to murder his uncle's wife (who, upon the death of her husband, would receive a life estate in one-third of her husband's land holdings as her dower) is because if the uncle were to die while his wife was pregnant, and if the wife were to give birth to a live child found not to be a bastard and born alive within approximately forty (40) weeks of the death of the wife's husband,[136] then this posthumous child would become his father's heir. Now, given that it cannot be presumed that Gent incorrectly understood English law on this point, then the inescapable conclusion is that quick with child in this case means no more than pregnant. This term was so used by Charles Kemey in his The Office of the Clerk of Assize (1660): "You as Forematron of this Jury shall swear that you shall search and try the Prisoner at the Bar, whether she be quick with Child [in this case: conceived or pregnant] of a quick child."[137] It was

so used also by Robert Kelham in his The Laws of William The Conqueror (1779) when, in the context of a woman who had been sentenced to death, Kelham translated the term foemina impraegnata (a woman who is pregnant) as "a woman quick with child."[138]

The citation to Shakespeare's Love's Labor's Lost (1538), reads: "Then shall Hector be whipt for Jaquenetta that is quick by him."[139] The most that can be said here is that quick refers to one of the following: pregnant, pregnant with a live child, or pregnant with a child that has made his or her existence known to the mother by moving or stirring in the womb. The lines that immediately precede this passage read: "She [Jaquenetta] is two months on her way...,the child brags [i.e., is stirring] in her belly already."[140] It undoubtedly was generally accepted in Shakespeare's day that pregnant women very rarely feel the movements of their fetuses at two months into pregnancy.[141] Furthermore, in Shakespeare's day it may have been generally accepted by the members of the medical science community that the fetus begins to stir two months after its conception, notwithstanding that this early stirring is rarely perceivable.[142] Hence, for all it may be known, Shakespeare's basis for saying that Jaquenetta's child was stirring when Jaquenetta was only two months into her pregnancy may have been based on a medical or quasi-medical source.

The citation to John Mirk's Festivall (1515) reads: "Then conceived Elizabeth, and when she was quick with child our lady [Mary] came with child also to speak with Elizabeth, and anone [as soon] as she spoke to Elizabeth, John [the Baptist] played in his mother's womb for joy of Christ's presence."[143] Mirk is relating certain events contained in the first chapter of Luke's Gospel. Mirk's description of Elizabeth as being "quick with child" marks the occasion when the Angel Gabriel appeared to Mary and told her that she would give birth to the "Son of God" and that her "rela-

tive [Elizabeth] has also conceived a son [concepit filium] in her old age; and this is the sixth month for her who was called barren."[144] Mirk's term quick with child, then, refers to Luke's phrase "has conceived a son" (i.e., has an existing male infant in her womb). Hence, Mirk's term quick with child means no more than pregnant with an existing or live child.

The final OED quick with child citation is a letter written in 1678 by Lady Chaworth to her brother, Lord Roos: "Sister Salisbery and Sister Ansley [are] both quicke with child."[145] There is nothing in this letter that reveals the sense in which Lady Chaworth used the term quick with child. For all it may be known, Lady Chaworth was simply relating that both of her sisters are pregnant.

Here is what the editors of the OED related to this author regarding his foregoing criticism of the OED's, quick with child entry:

> From the discussion you present, it would seem reasonable to infer that the entry in the Oxford English Dictionary for "quick with child", while adequately representing the meaning that had come to be current in the 19th century, does not reflect the earlier history of the phrase, and its changing relationship with the term "quickening". A revised entry might read something like:
>
> > Constr. with.
> > a. quick with child, orig., pregnant with a live foetus [or child]; later, at the stage of pregnancy at which the motion of the foetus is felt (infl. by QUICKENING vbl. sb.). Now rare or Obs.
>
> We shall review your documentation more fully when we come to revise quick itself.[146]

Hale (1609-1676), in his The History of the Pleas of the Crown (written probably during the 1650s, and published in 1736), observed: "Enseinture [pregnancy] is no cause to stay execution, unless she be enseint with a quick child, or which is all of one intendment, if she be quick with child."[147] It might be the case that Hale is implicitly acknowledging that the terms with quick child and quick with child are not altogether synonymous because, while both refer to a woman who is pregnant with a live child, the latter, nevertheless, includes the method (probing for fetal movements) by which it is determined that a woman is pregnant with a live child. This does not, however, tend to prove that Coke's Institutes III quick with child abortion passage implicitly incorporates quickening as the criterion of whether or not a woman who had an abortion was then quick with child.

Hale's pregnancy-reprieve passage relates to the situation in which a jury of matrons is trying to determine whether a woman is "presently" pregnant with a live child. It can be reasonably argued that in the absence of the detection of fetal movement, and except when a woman is obviously pregnant (e.g., her breasts contain milk and her lower abdomen greatly protrudes) a jury of matrons had no real way of determining if what was growing or developing in the woman's womb possessed a human shape or form. This probing for fetal stirrings probably involved the placement of warm water or a warm towel on the condemned woman's belly, and then the placement of hands on the woman's belly with the belief that an unborn child will respond to heat.[148] If successful, this test or "probing" would confirm not only that fetal formation had occurred, but also that the fetus is alive and, therefore, also necessarily fully formed.

Coke's abortion passage, on the other hand, presupposes that the woman is not presently pregnant for the simple reason that her

unborn child was aborted. Did the physical examination or visual inspection of what the woman had aborted disclose that it had had a human shape? If so, then at one time it had received its human soul and, therefore, once had been an existing child. Hence, in this context, fetal formation can be the method for determining if the woman was then, or at about that time, quick with child. Furthermore, and as will be explained shortly, in those situations presupposed in Coke's abortion passage, with the exception of the situation in which the mother of the aborted child had felt the child moving inside her moments or so before the child was aborted or killed, fetal formation would not have been less reliable then quickening as a proof that the child was living at the time of the abortion.

The most that can be said, then, is that in England before, during, and after Coke's day, the term quick with child could refer to or be descriptive of any of the following: (1) a pregnant woman, (2) a woman who is pregnant with a live child, and (3) a pregnant woman who, because she has experienced quickening, knows that she is, or is known to be, pregnant with a live child.

All that has been offered in support of the proposition that the fetal formation criterion, and not a quickening criterion, should be read into Coke's Institutes III abortion passage, applies equally to the following quick with child abortion passage in Hale's The History of The Pleas of the Crown (written probably during the 1650s, and published in 1736):

> If a woman be quick or great with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is killed, it is not murder nor manslaughter by the law of England, because it is not yet in rerum natura [i.e., because at common law live birth marks

> the beginning of a human being's existence in the context of criminal homicide], tho it be a great crime, and by the judicial law of Moses [citing: Exodus 21:22-23] was punishable with death; nor can it legally be made known, whether it were killed or not [citing the Abortionist's Case (1348?)], so it is, if after such child were born alive, and baptized, and after die of the stroke given to the mother, this is not homicide [citing the Twins-slayer's Case (1327)].[149]

It will be recalled that the Septuagint version of Exodus 21:22-23 was understood to imply that a human being comes into existence at fetal formation. Thus, if Hale, in citing Exodus 21:22-23, had in mind the Septuagint version (or felt that this version was relevant to interpreting the Hebrew version, or the Vulgate version or the English Bible version, etc.), then that would constitute further support for the proposition that fetal formation is the quick with child criterion that should be read into Hale's History of the Pleas of the Crown abortion passages.[150]

All that has been said regarding Hale's History of The Pleas of the Crown abortion passage applies equally to Hawkins' (1673-1746) Pleas of the Crown (1716) abortion passage:

> And it was anciently holden that the causing of an abortion by giving a Potion to, or striking a woman big with child, was murder. But at this day it is said [citing Coke's Institutes III abortion passage] to be a great misprision only, and not murder, unless the child be born alive, and die thereof, in which case it seems clearly to be murder, notwithstanding some opinions to the contrary. And in this respect also, the common law seems to be agreeable to the Mosaical [citing the Hebrew version of Exodus 21:22-23], which as to this purpose is thus expressed: "If men strive and hurt a woman with child, so that her fruit depart from her, and yet no mis-

> chief follow, he shall be surely punished, according as the woman's husband will lay upon him, and he shall pay as the judges determine; and if any mischief follow, then thou shalt give life for life."[151]

Obviously, Hawkins was of the opinion that the above word "mischief" included "the death of the unborn child". Some persons may want to argue that it cannot be certainly stated that Hawkins was implicitly superimposing a Septuagint version of Exodus 21:22-23 on the Hebrew version. This is no doubt true, but they argue further that "big with child" means "noticeably pregnant". This is not so, if only for the reason that Hawkins must have known that unmarried, pregnant women could be very adept at concealing their pregnancy. A person who reviews, for example, the 18th- and early 19th-century infanticide prosecutions that occurred at the Old Bailey will see that such was the case.[152]

Blackstone, in his Commentaries 4 (1770), and in the course of discussing homicide in the context of English criminal law, observed:

> To kill a child in its mother's womb is now no murder, but a great misprision; but if the child be born alive, and dies by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them [citing Coke's Institutes III abortion passage and Hawkins' Pleas of the Crown abortion passage].[153]

In his Commentaries I (1765), and in the course of discussing the rights of persons at common law, Blackstone observed:

> Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon

> as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child, this, though not murder, was by the antient law homicide, or manslaughter. [citing Bracton's De Legibus abortion passage]. But at present it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemeanor [citing Coke's Institutes III abortion passage].[154]

There is nothing that is contained in Blackstone's Commentaries I & IV abortion passages that is inconsistent with the following proposition: Fetal formation proves fetal animation, and the latter establishes the ability of the human fetus in the womb to stir.

Quickening refers to the initial perception by the pregnant woman of the stirrings of her fetus. In the absence of a demonstration that in England in Blackstone's day it was received opinion among informed persons that the fetus in the womb begins to exercise its motor functions when its mother initially perceives its movements, it can hardly be said, therefore, that quickening is the quick with child criterion that should be read into Blackstone's Commentaries I & IV abortion passages.

Chambers, in his Cyclopaedia: Or a Universal Dictionary of Arts and Sciences (1728), observed that the motions of the human fetus become perceivable to the mother generally about the third month after conception, and sometimes as early as between the second and third month after conception.[155] On the subject of the human soul, Chambers observed: "The Soul is a spiritual Substance proper to inform or animate a human Body, and by its Union with this Body, to constitute a reasonable Animal or Man. This is its Essence, and this its Definition."[156] On Animation, Chambers

observed: "Animation signifies the informing of an animal Body with a Soul. Thus, the Foetus in the Womb is said to come its Animation when it begins to act as a true Animal [i.e., begins to stir or exercise its motor functions], or after the Female that bears it is quick [with child], as the common way of Expression is...The Common Opinion is that this happens about 40 days after Conception."[157] On the subject of the human embryo, Chambers observed: "Embryo, in Medicine, Foetus; the first Beginning or Rudiments of the Body of an Animal, in its Mother's Womb, before it have received all the Dispositions of Parts, necessary to become animated: Which is supposed to happen to a Man on the 42nd day, at which Time, the Embryo commences a perfect Foetus."[158] Chambers is relating both of the following here: (1) A pregnant woman becomes quick with child, or pregnant with a live child or ensouled fetus, just as soon as her embryo develops into a fetus, which occurs about 40 or 42 days after conception; and (2) The newly formed fetus, by virtue of its human soul, is able to stir or exercise its motor functions, although generally its mother is unable to perceive these early stirrings. The 17th-century English Bishop Joseph Hall conveyed the substance of the foregoing opinions. He stated: "The body was made of Earth..., the soul inspired immediately from God. The body lay senseless upon the earth...: the breath of life [quickening breath] gave it what it is; and that breath was from thee. Sense, motion, reason, are infused into it at once."[159]

Blackstone must have known that the formed or organized human fetus in the womb is recognized as an existing human being, not because the fetus can exercise its motor functions (for so does a brute animal defined as an "organized Body endowed with Life and spontaneous Motion"),[160] but rather because the fetus is endowed with a human or rational soul. Hence, Blackstone seems to be

implicitly stating that the fetus becomes able to move itself or exercise its motor functions just as soon as the fetus receives a human soul, at which time the fetus becomes a human being.

Thomas Wood (1661-1722), citing Coke's Institutes III abortion passage in his An Institute of the Laws of England (1720), observed: "[Human] life begins when an infant [initially] stirs in the life-womb."[161] That author, in his A New Institute of the Imperial or Civil Law (1704), observed: "Life is of such value, that the Law pardons everything done for the preservation of it. It begins from the first infusion of the Soul...." In this latter work, Wood also stated the following regarding the Civil or Roman law (yet citing the Septuagint version of Exodus 21:22-23): "Besides Theft, Rapine, Damage, Injury..., there are crimes to which no certain punishment is annexed, and therefore are called Crimes extraordinary, as...the crime of procuring Abortion either by Medicines, or blows, upon an Infant conceived, but not formed into human shape."[162]

It probably was received opinion in the England of Blackstone's day that virtually every instance of human motor movement originates from or is initiated by a command from an individual's, incorporeal rational soul to the corporeal animal spirits that passed from the brain to the nerves.[163] That being the case, then in Blackstone's day one could know that the human soul is present in the fetus in the womb if fetal stirrings could be detected.[164] However, this would not exclude fetal formation as an acceptable criterion of fetal ensoulment or animation.[165]

What of the argument that states that in the context of abortion, the common law eventually came to reject fetal formation, and to adopt, through legal fiction,[166] quickening as the criterion of whether a woman was pregnant with a live child, because it came to be accepted that in the absence of proof of quickening, it could

not be sufficiently proved that the stillborn, aborted child was alive when the abortional act was committed, or, if the child was alive, that it was killed as a proximate result of the abortional act. This argument or unproved theory, which originally was articulated in the nineteenth century in certain American appellate opinions, has been advanced by several modern commentators on the history of the status of abortion as a criminal offense at the English common law.[167]

One element of the common law crime of the in-womb destruction of an existing child was that the stillborn, aborted product of human conception was an existing human being when it was destroyed. Now, given that in 18th-century England it was received opinion among informed persons that a human being consists of an organized or formed human body informed with or united to its human or rational soul, then it hardly can be said that Blackstone, or the English judiciary of Blackstone's day, considered a human fetus to be a human being simply because it possessed life or had stirred. It was the infusion of the human soul into the fetus that made the latter into a human being. This being the case, then one can rationally argue that at the 18th-century English common law, proof that a particular fetus was alive would have constituted sufficient proof that it was a human being only if it was presupposed that the human soul is what made that fetus alive or caused it to begin its existence as a human being. However, it has been already shown that in 18th-century England it was received opinion that the product of human conception received its human soul just as soon as it developed into a human body, or achieved fetal formation.

The conclusion, then, seems inescapable that, at the 18th-century English common law, proof that a particular product of human conception had achieved fetal formation would have constituted sufficient proof both that the aborted product of human

conception was once a human being, and that it had acquired the capacity to stir or move by itself by virtue of having been animated or ensouled. Proof of fetal formation could have been obtained by testimony relating that a visual inspection of that product confirmed that it was a formed fetus. Consider this hypothetical example: "X" states in her deposition that just before her father's pigs devoured the product of her abortion, she inspected it, and found that it resembled a tiny human being.

No one has shown that it was received opinion among informed persons in 18th-century England, that quickening was the criterion of whether or not the process of fetal formation had run its course, or that the ability of the human fetus to stir coincided with quickening. Therefore, it should be presumed that at the 18th-century English common law, testimony relating that a visual inspection of what had been aborted confirmed fetal formation would have constituted sufficient proof that the stillborn, aborted product of human conception was once a human being.

Some may argue that at the then-existing common law, proof of fetal formation would not have constituted sufficient proof that the aborted fetus was alive at the very instant when the abortional act was committed on the fetus. That may be true. However, that argument proves too much; for the same can be said of quickening, except when the mother of the fetus gave testimony to the effect that she continued to perceive the movements of her fetus up to the very moment of the commission of the abortional act.

It is not disputed here that in common law civil and criminal actions in which a question arose as to whether or not a newborn child was born alive, the rule was that when a newborn child was found dead, there was a rebuttable presumption that it had been born dead. However, such a presumption obviously would not come into play when it was alleged that the child had been killed

"before" it was born. The applicable presumption in this latter case seems to have been that an unborn child proved to have been alive at a particular time (and this would be conclusively proved by proof of fetal formation - which signaled the advent of fetal animation or ensoulment) was presumed to have remained alive in the womb unless the contrary was proven. The trial judge in the Pennsylvania, criminal abortion case of Commonwealth v. Reid (1871), stated:

> I said to the jury that there was no evidence that the fetus was dead prior to the operation, and that in the absence of any such evidence they would have no right to presume its death....The foetus is a living, not a dead thing, and where life has once been shown to exist it is presumed to continue until the contrary is made to appear.[168]

The Pennsylvania trial court's thinking almost certainly represented a specific application of the common law principal "that things once proven to exist in a particular condition are presumed to continue in that condition until the contrary is proven."[169] (Why the "birth process" would dispel a presumption that a fetus "alive" in the womb remained alive at its birth is not known. The answer might be that it was received opinion at common law that unborn children often are unable to survive the birth process.)

Thus, if fetal formation was the common law criterion of fetal animation in the context of criminal abortion, then proof of fetal formation would have sufficed to prove that the stillborn aborted fetus was once alive in its mother's womb. That would have given rise to a rebuttable presumption that the fetus was living when the abortional act was committed. Hence, the failure to prove quickening would not have constituted a failure of proof as to an element

of the common law offense of quick with child intentional abortion. Furthermore, as will now be demonstrated, the absence of such a rebuttable presumption would not cry out for proof of quickening.

It is difficult to determine with certainty if it was received opinion in 18th-century, English medical thought that an unborn, dead fetus is generally expelled from the womb within a few days of its death. If this was received opinion,[170] and if in a particular case a pregnant woman had given birth to a stillborn fetus within a few days of the act alleged to have killed her fetus, and if it had been proved that the pregnant woman for some period prior to the commission of that act had been in good health, and had suffered no injury or accident which might have destroyed her fetus, then these facts probably would have sufficed to prove legally that her fetus had been destroyed by the abortional act.

Several works on pregnancy and midwifery in use in England in the seventeenth and eighteenth centuries provide a list of signs or symptoms for determining whether a pregnant woman is carrying a dead child or fetus, a condition which was then believed by many persons to place the pregnant woman in some danger of death. Thus, a pregnant woman, who had reason to suspect she was carrying a dead child, could be expected to consult a physician or midwife. Her failure to do so would have constituted some evidence that her fetus had been living at the time of the abortional act. This is so, just as the failure of a woman to have made preparations for the birth and care of her expected child, could be used as evidence to prove that she murdered her bastard child.[171]

The 16th-century, French physician Ambroise Paré, in one of his medical works, lists the following signs by which medical men may make a reasonable judgment that the unborn child is dead: absence of fetal movement; discharge of the waters or amniotic fluid; presentation of the secundine; a dead child feels heavier to the

mother (because the child lost the animal spirits and the soul that sustained him or her); when the mother inclines her body a certain way the infant falls that way as if it were a stone or dead weight; the mother experiences sharp pain extending from her genital area to her navel; there is frequent urination and stooling (nature getting rid of what is dead, because what is alive will expel the dead so far as it can from itself); genitals cold to the touch; the mother feels a coldness in her womb (due to loss of the infant's heat); she expels many filthy excrements (usually within three days of the infant's death); she has foul breath; she swoons often; she has a livid and ghastly facial appearance (because vapors from the dead fetus enter her heart and brain); she has slackened breasts that hang loose and lank; and she has a hard and swollen belly (because the vapors from the dead fetus make the stomach puff up, as though full of gas, so to speak).[172] Aristotle's Experienced Midwife (1700?), sets forth the foregoing signs and adds the following: "She longs for unnatural foods..., dreams of dead men, and...has filthy urine." It then remarks: by "these things carefully observed, the midwife may make a judgment whether the child be alive or dead."[173]

Whether the 18th-century English judiciary recognized the foregoing signs, or some of them, as legally reliable, is not known, and might never be known. Audrey Eccles, in her Obstetrics and Gynaecology in Tudor and Stuart England (1982), stated:

> Especially on the subjects of conception, sexuality, pregnancy and menstruation during this time [approximately 1540-1740], it is often impossible to tell whether a scientific "fact" has passed into common knowledge and become a generally received opinion, or an existing popular belief or practice has been rationalized and authenticated by giving it a "scientific" explanation.

> But as a rule of thumb, however implausible an idea may seem now to us, if it was believed to have a rational and factual basis it was a scientific fact to contemporaries. If on the other hand it was denied, or doubted and said to be held by the common people, it was not. Thus it was a fact...that a child born at seven months could survive, but not at eight months...It was only a common belief however that "well hung Men are the greatest Blockheads." But there was certainly a large area of overlap between scientific fact and common knowledge, and a marked tendency for the scientific facts of one generation to become the old wives' tales of later generations.[174]

There is reason to believe that at the 18th-century English common law, proof that an aborted fetus had not yet begun to macerate or putrefy would have constituted some proof that the fetus was living at the time of the abortional act. In the Old Bailey case of R v. Margaret Fox (1773), the defendant was tried for, and acquitted of, the non-abortion-related murder of Mary Brown, who died while in a very advanced state of pregnancy, on February 24, 1773, five days after her tragic fight with Fox. A midwife, Hookham, and a physician, Dr. Cooper, testified in part, respectively, as follows:

> Crown Counsel: By the appearance of the child how long might it have been dead? [Counsel is referring to Mary Brown's dead male child, which was surgically removed from her on the day following her death, and which, according to Hookham, had blackened skin around the area of the belly, as well as a broken left shoulder.]
>
> Hookham: It might have been dead ten or twelve days before, being putrefied; I can not be positive to a few days how long it might have been dead.
>
> Crown Counsel: This dead child would have killed the woman then if there had not been bruises [i.e.,

if the injuries Brown had received from Fox had not killed her]?

Hookham: No, no, a great many women live after a dead child.[175]

- - -

Dr. Cooper:...The child was quite in a putrid state.

Crown Counsel: Do you [Dr. Cooper] apprehend the putrid state of the child was occasioned by these blows [i.e., those of Fox upon Margaret Brown on February 19, 1773]?

Dr. Cooper: I apprehend [from the child's putrid state that] the child had been dead for at least three weeks, consequently before the fray [of February 19, 1773].[176]

6. How, at the Early 19th-Century English Common Law, "Quickening" Came to Replace "Fetal Formation" as the Abortion Criterion of When a Woman Is Pregnant with a Live Child"

There never was a period in England when the terms quick with child and with quick child did not mean "to be pregnant with a live child". Nevertheless, these two terms were also commonly used to refer also to that stage of pregnancy that commences at quickening. Consider, for example, the following excerpt from an October 22, 1688 deposition:

> Now for the Time of the Queen's [Mary II's] Conception, she often told the Deponent...that she had two Reckonings:...the 6th of September [1687]...and the 6th of October...; but for some reasons the Queen rather reckoned from the latter; tho afterward it proved just to agree with the former. Moreover, her Majesty, when, according to her reckoning, she was gone with Child 12 weeks, said That she was quick [with child], and perceived the Child to move; the Deponent returned no Answer to the Queen, but privately told those about her, that in truth it could not be in so short a Time. Yet the Queen was in the right, only mistook her Reckoning; for she was

> then full Sixteen Weeks gone with Child, about which time she usually quickened with her former Children, and accordingly was brought to Bed on the 10th day of July, 1688, and within Three or Four Days of full Forty Weeks.[177]

In the case of R v. Phillips (1811), which involved abortion prosecutions under sections 1 and 2 of England's original criminal abortion statute (1803),[178] the trial court in effect equated the terms quickening and quick with child:

> The prisoner had been previously tried [and acquitted] on the first section of the statute for the capital charge, in administering savin to Miss Goldsmith to procure abortion, she being [allegedly] "then quick with child." In point of fact, she was in the fourth month of her pregnancy. She swore, however, that she had not felt the child move within her before taking the medicine, and that she was not then quick with child. The medical men in their examinations, differed as to the time when the foetus may be stated to be quick,[179] and to have a distinct existence, but they all agreed that in common understanding, a woman is not considered to be quick with child till she has herself felt the child alive and quick within her, which happens with different women in different stages of pregnancy, although most usually about the fifteenth or sixteenth week after conception.
>
> Lawrence, J. said this was the interpretation that must be put upon the words quick with child in the statute [The phrase in the statute in which these words are found reads: "then being quick with child."]; and as the woman in this case had not felt the child alive within her before taking the medicine, he directed an acquittal.[180]

The Phillips trial judge did not interpret the term quick with child. What he actually interpreted were the words "then being" in the statutory phrase "then being quick with child". To identify "when" an occurrence or event comes about obviously does not define and, therefore, is not an interpretation of, what that occurrence

is or means. If the term quick with child means or refers to quickening, and not to "pregnant with a live child," then the foregoing statement, "a woman is not considered to be quick with child till she has herself felt the child alive...[or] quick within her," does not make sense; for it would really read: A woman is not considered to have felt the child alive or quick within her until she has felt the child alive or quick within her. Consider how much better that same statement reads if the term quick with child is given to mean simply "pregnant with a live child": A woman is not considered to be pregnant with a live child until she has felt the child alive (quick) within her.

The foregoing is one reason why there should be no real doubt that the Phillips trial judge knew that the statutory term quick with child meant simply pregnant with a live child. The error he made was in thinking that "when" a woman becomes quick with child is necessarily included in the definition of that term. It is certainly true that it is a rule of statutory construction that words or phrases in a statute are ordinarily construed as they are commonly used or understood. However, the issue in Phillips did not involve the question of what construction should be put upon the term quick with child. The obvious issue was: "When" is a woman considered to be quick with child or pregnant with a live child within the meaning of the 43 Geo. 3 c.58, sec. 1-statutory phrase "then being quick with child?" The answer to that question in Phillips should no more have been resolved by resort to then-popular or vulgar conceptions of when a pregnant woman is considered to be pregnant with a live child than, for example, is the question of whether defendant "X" was under the influence of alcohol, while driving his vehicle, should be resolved by resorting to popular notions (e.g., in a drunken state) of when a person is "legally" considered to be under the influence of alcohol. The

Phillips trial judge, in seeking to resolve the question: When is a woman considered to be pregnant with a live child, should have attempted to resolve the following two questions: (1) At common law, when is a pregnant woman considered to be quick with child? (In Arkansas v. Pierson (1884), the following was observed: The common law in force at the time a statute is passed is to be taken into account in construing the statute. Coke said: "'To know what the common law was before the making of the statute is the...key to set open the windows of the statute.'")[181]; and (2): What is the generally received opinion among the contemporary learned (or perhaps, among the members of the relevant discipline(s) and identification of which disciplines would itself have been a large question in Phillips) on the question: When does the unborn product of human conception begin its existence as a human being? The Phillips trial judge should have called in some English divines and philosophers and posed this philosophical, and "non"-religious, non-scientific question to them: What is the generally received opinion on when God infuses a human soul into the unborn product of human conception?

In such English criminal abortion cases as R v. Pizzy and Codd (1808)[182] and R v. Russell (1832),[183] it was not decided, but was simply assumed, that the term quick with child was synonymous with quickening. This assumption undoubtedly derived from the then-existing fact that the term quick with child was a popular or common way of referring to that stage in pregnancy that commences with quickening. That fact probably came about because of one or both of the following: (1) In popular or vulgar thinking quickening always had been understood to signal the infusion of the human soul into the fetus. (2): Quickening was the only way the pregnant woman could perceive that her fetus had received its human soul or had become alive. It is said that in 1638, the mother of the then-

unborn Louis XIV ordered a large fireworks display when she quickened with the future king.[184]

In Russell the defendant was tried for the abortion-related murder of Sarah Wormsley on a theory of accessory before the fact to self-murder.[185] Wormsley, in the course of giving a dying declaration on the day of her death, February 1, 1832, stated: "I am with child [since] just before Michaelmas [September 29]..., [but] I have not felt the child move."[186] The Russell Court, in the course of reciting the facts of the case, stated: "Sarah Wormsley died about seven o'clock on...the 1st day of February; she was about four months advanced in her pregnancy, but not quick with child."[187] In the report of R v. Pizzy and Codd (1808), which involved a capital prosecution under the first section of England's, original criminal abortion statute (1803), the following passages appear:

> Mr. Alderson [Crown Counsel], in his examination of Mr. Creed, said: "You are a surgeon and midwife. After what period of gestation is a woman supposed quick with child?" He replied: "In about eighteen weeks--sometimes fourteen and sometimes it is twenty weeks--but mostly eighteen." Mr. Alderson said: "Then after twenty weeks she would be sensible of the child moving." He replied: "Yes, in general about eighteen weeks."
>
> . . .
>
> [Some of the Trial Court's questions to Cheney, the mother of the aborted fetus]:...."You said that you continued to take pills, and that you felt the child move within you during that time? [Cheney:] "Yes". [Trial Court:] Are you sure you continued to take the pills after you felt the child move within you? Cheney: "[Yes], I used to take them every day till I was miscarried."[188]

It may be the case that prior to the early nineteenth century the English judiciary came to recognize quickening as the common

law abortion criterion of when an unborn child comes into existence. However, to date, no one has produced sufficient evidence to prove that such is the case. This is not to say, however, that there is no evidence on this point. In Abraham Rees's supplemented edition of Chamber's Cyclopaedia: Or an Universal Dictionary of Arts and Sciences (1788), the following appears:

> Animation: signifies the informing of an animal body with a soul. Thus the foetus of the womb is said to come to its animation when it begins to act as a true animal, or after the female that bears it is quick, as the common way of expression is. The learned are not agreed about the time when the female becomes quick; some compute it at forty days after conception; others fix it at about the middle of the term of gestation.[189]

Rees does not identify those "learned" persons who supposedly expressed or accepted the opinion that the unborn product of human conception does not receive its human soul until approximately halfway through gestation. I know of none with the possible exception of the 16th-century French physician and philosopher Jean Fernel (1497-1588).[190]

George Lewis Scott, who practiced law, and Dr. Hill, in their A Supplement to Mr. Chamber's Cyclopaedia: Or, Universal Dictionary of Arts and Sciences (1753), stated:

> The different hypothesis of physicians and philosophers concerning the time of animation have had their influences on the penal laws made against artificial abortions, it having been made capital to procure miscarriage in the one state while in the other it was only a venial crime [omitting a cross-reference to a non-legal source]....The [German] Emperor, Charles V, by a constitution [i.e., by Art. 133 of the Constitutio

> Criminalis Carolina 1532/33]..., put the matter on another footing; instead of the distinction of an animated or unanimated foetus, he introduced that of a vital [vivificatus] and non-vital foetus, as a thing of more obvious and easy decision, and not depending on any system either of creation, traduction, or infusion [citing Burggrave, Lex. Med. T.I. p.821]. Accordingly, a foetus is said, in a legal sense, to be animated, when it is perceived to stir in the womb; which usually happens about the middle of the term of gestation [citing the 18th-century German work by H.F. Teichmeyer, Institutes of Medical Jurisprudence at c. 8, c. 9 & c. 21 (which cites Constit. Crimin Caroli Art. 133)].[191]

Scott and Hill's Supplement to Chamber's Cyclopaedia is not a legal source. Furthermore, the English common law did not derive its rules from German law. What is more, the then-existing concepts "fetus vivificatus" (a fetus endowed with human life by virtue of being in receipt of its human soul) and "fetus animatus" or "fetus animatus fuerit" then were, and still are synonymous.[192]

A person may point out that it was a generally received medical opinion in 18th-century England that the product of human conception develops into a formed fetus approximately three months after conception. The person would add that the fetal victim in the Beare abortion case of 1732 was approximately thirteen weeks old, and that the Beare indictment did not allege either that the fetus was alive or was an existing human being when it was destroyed. Thus, the person would argue that the Beare case inferentially stands for the proposition that at the early 18th-century English common law, quickening had become the accepted criterion of when a human being comes into existence in the context of criminal abortion. It is possible that such an argument is valid. However, it may be the case that the prosecutor in Beare

did not allege that the aborted fetus was then living, because he did not feel that he could sufficiently prove that what was aborted possessed a human shape. The historical facts in Beare's Case, at least to the extent that those facts are related in the Gentleman's Magazine's report of Beare's Case, do not reveal whether the aborted fetus was recovered, or whether it possessed a human body or shape. Furthermore, no physician, midwife or embryologist testified in Beare.[193]

7. How, at the Later English Common Law, the Destruction Abortion of the Child in the Womb Ceased to Be Recognized as Murder if the Child Was Born or Aborted Stillborn

It is said that common law rules adapt to changing circumstances, and that when the reason behind a common law rule ceases to exist, so does the rule.[194] It is said that the reason behind the common law rule that a live child who is aborted dead is not considered a victim of criminal homicide, was the accepted opinion that, in the absence of live birth, it cannot be determined that the aborted child was then alive, let alone died in connection with being aborted.[195] It is said that in the states of the United States, notwithstanding that it came to be accepted legally in those states that it could be proved that an aborted stillborn child died in the mother's womb in connection with the abortional act, virtually every state appellate decision on this subject has held that a child killed in the mother's womb is not a human being within the meaning of the state's criminal homicide statutes. The chief rationale is that the statute is to be interpreted in light of the common law rules on criminal homicide, and at common law an aborted child had to be aborted alive, and had to then die in connection with being aborted, in order to be recognized as a victim

of criminal homicide.[196] It is said or argued that this rationale is highly defective. More specifically: given (1) that a common law rule ceases to exist when the reason for the rule ceases to exist, and that common law rules adapt to changing conditions, (2) that the rationale behind the common law born-alive rule had ceased to exist when the states' homicide statutes were enacted or amended, and (3) that the born-alive rule was in reality a rule of evidence, or of legal fiction, and not a rule relating substantive law; then the common law itself dictates that the stillborn aborted child is recognizable as a victim of criminal homicide.[197]

The chief reason why such an argument should be rejected is because the common law itself rejects it. At common law a known-to-be-living child that is in the process of being born (e.g., the child's head is protruding from the birth canal), and who is deliberately decapitated before being fully born, is not recognized as a victim of criminal homicide. The reason is that such a child, although clearly alive when he or she was killed, had yet to be born.[198] One "element" of criminal homicide at the common law is that the victim be not only a human being, but one born alive. (This common law rule still holds in England.)[199] Furthermore, at common law the judiciary lacked the jurisdiction to create felonies.[200] Thus, the conclusion is inescapable that for the later English judiciary to have held that a child, that is proved to have been killed in the mother's womb, can now be deemed a victim of common law criminal homicide would have amounted to the judicial creation of a common law felony.

The English judiciary also lacked the jurisdiction to decide that what is an established felony shall no longer be deemed so. However, and as shown previously, whereas up to approximately the late sixteenth century, it was a felony or criminal homicide at common law to kill a child in the womb or to cause the child to be

born stillborn, the same, nevertheless, ceased to be a felony after that time. So, here is a question: Is that not an instance in which the English judiciary ruled that what is presently a felony at common law shall no longer be deemed so? The answer is "not really". The late 16th-century, and 17th- and 18th-century English judiciaries seem to have been unaware of the recently uncovered, pre/late-16th-century precedents that support the proposition that at common law it is indeed a felony or criminal homicide to destroy a child in the womb or to cause the child to be aborted stillborn. These judiciaries evidently were aware only of The Twins-Slayer's Case (1327/28) (in its incompletely reported form) and The Abortionist's Case (1348).[201] It seems that these judiciaries, following Staunford's (1509-58) or Coke's (1552- 1634) lead,[202] came to accept the reports of those two cases as authority for the post-Bracton-Fleta era proposition that the in-womb destruction of a child is not governed by the common law rules on criminal homicide. Hence, this proposition became a common law rule through nothing more than a legal accident. This is confirmed further by the fact that the supposed rationale(s) behind this proposition or rule were never accepted by the foregoing English judiciaries.[203] This rule became a common law rule without a reason behind it. Indeed the rule was illogical, if only for the reason that it encouraged more radical or dangerous means of inducing abortion so as to make sure the unborn child would not be aborted alive, and then die. However, the foregoing judiciaries could not very well change this rule without creating, in effect, a common law felony.

8. A Criticism of the Roe Court's and Cyril Means' Understanding of the Status of Abortion at the English Common Law

The Roe Court, in concluding that it is undisputed that at common law it was not an indictable offense to bring on an abortion deliberately as long as the pregnant woman had not quickened or was not quick with child (or with quick child), cited criminal abortion passages from the following four works which, almost from their inception, have been regarded as primary authority on the English common law: Coke's (1552-1634) Institutes III (1641), Hale's (1609-76) The History of the Pleas of the Crown (written probably during the 1650s, and published in 1736), Hawkins' (1673-1746) Pleas of the Crown (1716), and Blackstone's (1723-80) Commentaries I (1765).[204] If one examines these passages in context, one will see that the question implicitly being addressed is: Under what circumstances, if any, does the intentional abortion (and its substantial equivalent, e.g., a violent assault or battery on a woman quick with child resulting in a miscarriage) of the child in the womb constitute murder at common law? A question that is not being addressed in those passages is whether the intentional abortion of the "pre-human being" product of human conception is an indictable offense at common law. Hence, these authorities, in saying that the intentional abortion of the child existing in the mother's womb is murder at common law, or that it is not murder but borders thereon, as the case may be, were not saying so in connection with implicitly stating that the abortion of the "pre-human being" product of human conception is not an indictable offense at common law. Joel Prentiss Bishop (1814-1901) expressed this view in his Commentaries on the Law of Statutory Crimes (1873):

> Some have denied that...[deliberated abortion] ...is indictable at the common law, unless... [the pregnant woman] has arrived at the stage of pregnancy termed quick with child. And Hale has on this subject the expression "quick

> or great with child," and Coke, "quick with child"; but not in connections denying that the offense may be committed at an earlier stage of pregnancy.[205]

The authority cited by the Roe Court in support of the proposition that the induced abortion of the pre-human being product of human conception is not indictable at common law is authority for the proposition that the induced abortion of the child or human being existing in the womb is indictable at common law. Yet, the Roe Court cited this authority for a proposition it does not even remotely support, and then rejected this authority for the very proposition it supports.[206] The science of legal interpretation can hardly sink lower than this.

Most, if not all, modern commentators on status of intentional abortion as a criminal offense at the English common law state that it is undisputed that at the common law pre-quick with child abortion was not an indictable offense. However, not so long ago, legal commentators thought otherwise. In Ruling Case Law (1929) the following is stated: "It is a disputed question whether it was a crime at common law to procure a miscarriage if the woman was not quick with child. It is said that in England this question was never authoritatively decided by the Courts."[207] In Corpus Juris (1914) it is stated: On the question of "whether a common law offense is committed by causing or procuring...an abortion before ...quickening, there is a conflict of authority."[208] Joel Prentiss Bishop observed: "Whether, before the foetus has quickened, an abortion is an offense at common law, the English books do not distinctly tell us, and the question for England has long been settled by statute in the affirmative."[209]

When one examines the American cases and the English and American works that have addressed, and have answered "no" to the

question whether pre-quick with child abortion was indictable at the English common law, one will see that these cases and works offer one or both of the following reasons in support of such an answer: (1) that what was destroyed was not yet a human being, and (2) a lack of common law precedent.[210]

If at the English common law the criterion of whether a particular act was an indictable offense was whether it destroyed, or was calculated to destroy, a human being, then such offenses as burglary, theft, trespass, malicious mischief, rape, indecent exposure, cruelty to animals and many other offenses would not have been indictable there. It is nonsense to contend that the rationale behind the English common law's supposed refusal to deem the intentional abortion of the potential child in the womb as an indictable offense is that the act did not result in the destruction of, or was not calculated to destroy, an existing human being. Even the Roe Court conceded that the State has a legitimate and important interest in protecting conceived unborn, potential human beings.[211]

Neither Cyril Means and the Roe Court, nor any of the foregoing described American cases and English and American works, show an awareness of the English common law precedents that support the proposition that the intentional destruction of the pre-human being product of human conception is indictable at the English common law. No one is to be faulted here for this lack of awareness. However, the Roe Court should be severely faulted for its uncritical acceptance of the contention that at common law "lack of precedent" is a criterion for establishing that a particular act is not indictable.

The English, Scottish and American common law traditions are replete with instances in which a court has ruled that a particular

act is indictable as a misdemeanor offence, notwithstanding the real or apparent absence of precedent. Some examples are: maiming oneself in order to be permitted to beg, committing blasphemy, pretending in a marriage ceremony to be a member of one's opposite sex in order to marry a person of one's own sex, attempting to pass as female for a mischievous purpose, assigning a girl's apprenticeship for immoral purposes, removing a body from a grave for purposes of dissection or exhibition, disposing of a dead body indecently, attempting to suborn of perjury, wantonly discharging a firearm near a sick woman whereby the woman was thrown into fits, exercising a trade on Sunday, abandoning a child, endangering a child, fraudulently seeking to undermine public elections, embezzling state funds, soliciting murder, soliciting larceny, soliciting a breach of the peace, soliciting a battery, challenging to fight, operating a gambling house, exposing oneself indecently, exhibiting condoms publicly, and maliciously destroying certain animals. Also, there must have been an instance at common law when, for the first time, an attempt to commit a felony was held to be an indictable offense. The same can be said of an attempt to commit a misdemeanor.[212]

At common law legal precedent or its absence is not dispositive regarding a particular question of law.[213] If at common law the criterion of whether a particular act is indictable as a misdemeanor is whether a precedent for so treating it can be found in some common law case, then the common law criminal justice system could have never established misdemeanor offenses, if only for the reason there would have been no existing precedent for deeming a particular act as a misdemeanor offense. Professor Baker stated:

> The mere absence of a decision in point is not logically relevant in a case-law system because the point may never have been brought before a court, or, if it has, it may not have been reported. Indeed, one of the chief arguments put forward by those who wish to codify the criminal law is that it is wrong to have to wait until a case arises before one can find out what is punishable. Nowadays the maxim nulla poena sine lege (no penalty without a [preexisting] law) is generally observed by the courts in criminal cases because there is a reasonably available legislative system to declare new crimes. But if our ancestors had thought the same way in medieval and early-modern times, there would be no common law [misdemeanor] offenses at all.[214]

The Scottish justice, Sir James Moncreiff, in Greenhuff's Case (1838), observed:

> We [the members of the Court] are all agreed that the present case is the first example of an offence of this nature [operating a gambling house] having been made the subject of an Indictment in this Court. But that will go but a very little way to settle the question, unless we were also agreed that that circumstance must be sufficient to render it incompetent for the public prosecutor so to proceed against it. Now it cannot, in my apprehension, be maintained that nothing is an indictable offence by the common law of Scotland, which has not been indicted before. Indeed, to hold this to be the law, seems to me to be impossible, without running the whole theory of the criminal system into absurdity. For the common law itself must have had a beginning.[215]

Chief Justice Mansfield, in the English case of Jones v. Randall (1774), observed:

> The law would be a strange science if it rested solely upon cases; and if after so large an increase of commerce, arts and circumstances accruing, we must go to the time of Rich. 1 [1189-1199) to find a case, and see what is law. Precedent indeed may serve to fix principles, which for certainty's sake are not suffered to be shaken, whatever might be the weight of the principle, independent of precedent. But precedent, though it be evidence of law, is not law in itself, much less the whole of the law. Whatever is contrary, bonos mores est decorum [literally: whatever is against good manners (or customs) and seemliness (or propriety); freely: whatever is against public morals], the principles of our law prohibit, and the King's Court as the general censor and guardian of the public manners, is bound to restrain and punish.[216]

The Pennsylvania Supreme Court in Commonwealth v. McHale (1881), in the course of holding that the acts of the defendants committed against the public election process are indictable at common law, stated:

> It was assumed by the learned counsel for the defendants that an indictment will not lie at common law for such acts. In their printed argument they dismiss the subject with this brief remark: "Offenses against the election laws are unknown to the common law; they are purely and exclusively of statutory origin." It may safely be admitted that if the question depends upon the fact whether a precise definition of this offense can be found in the text books, or perhaps in the adjudged English cases, the law is with the defendants. This, however, would be a narrow view, and we must look beyond the cases and examine the principles upon which common law offenses rest. It is not so much a question whether such offenses have been so punished as whether they might have been.[217]

It is erroneous to think that when, for the first time, a court rules that a particular act constitutes a misdemeanor offense at common law, the court is thereby inventing a new common law misdemeanor. "To speak of a new offense at common law is a solecism."[218] All that a court is doing in such a case is deciding that a particular act meets the definition or criteria of a misdemeanor offense at common law. The Supreme Court of Connecticut in State v. Schleifer (1923), in the course of holding that the solicitation of the commission of certain crimes constitutes a misdemeanor offense at common law, stated:

> It is said our court has no right to invent new crimes, and that is true, but it has the right to ascertain and declare the common law, no less the criminal than the civil law...."The underlying theory of the Connecticut law and of the English law, was the same: acts in violation of the public peace, and of the rules prescribing the duties of individuals to the State and to each other, as settled by universal acceptance, are offenses. Where these rules are not formulated by statute, they may be declared by courts; and a common law is developed in the process of so regulating the application of this theory through legislation and judicial decisions, as to produce a reasonable and defined system of jurisprudence."[219]

What, then, at the English common law are the criteria of whether a particular act or practice is indictable as a misdemeanor? These criteria are: whether the particular act or practice outrages common decency; if it corrupts, undermines, or otherwise injurs public morals, or health and safety; or if it tends to evil example. Coke stated: The keeping of a brothel or bawdy house "is against the law of God, on which the common law...in that case is grounded....[It] is...[indictable, notwithstanding that] adultery

and fornication be punishable [only] by the ecclesiastical law.... [It is] a...nuisance..., [as it] is the cause of...the overthrow of the bodies and wasting of their livelihoods...."[220]

Given the foregoing criteria of a misdemeanor offense at the English common law, then there is no question that the abortion of the pre-human being product of human conception constituted a common law misdemeanor offense. Certainly the English common law would have perceived such an act or practice as being injurious to public morals and as tending to evil example. Andrew Knapp and William Baldwin, in the course of relating the Beare pre-quick with child, abortion case of 1732 in their The Newgate Calendar (1824-1825), remarked:

> In our dreadful catalogue of crimes, committed by man upon his fellow-creatures, none is attended with more pernicious consequences to society than that which we now, with much reluctance [i.e., for fear other women may do what Beare did], are about to describe. The hope that this relation will cause every female to reflect with detestation on a wretch who could make such murderous practices a kind of business, alone determines us to give a place to the case of this abandoned woman.[221]

Certainly the common law would have perceived such an act as an inducement to, and a cover-up of such crimes as fornication, adultery, and incest, as well as an assault upon the institution of marriage and family. In an anonymous commentary on the case of R v. Russell (1832),[222] which involved a pre-quick with child abortion, the following is stated:

> The act [of deliberated abortion] itself has a tendency to deprave the mind; and we scruple

> not to assert, that if sexual pleasures could be indulged with impunity, the bonds which hold society together would be broken asunder, and the most sacred and important of all human relations [mother and child] be treated with contempt. Supposing then, that abortion though feasible without any physical injury, be an act from which a delicate mind will shrink with disgust, which has a tendency in itself to corrupt the morals, which will frustrate, if not totally dispense with the institution of marriage, is it not a matter fit for the cognizance of the legislature.[223]

Certainly the common law would have perceived such a practice as being against God's natural law, as well as against Scripture,[224] and canon law (which viewed it as anticipated murder),[225] and therefore as "malum in se" or indictable or criminal by its very nature. Hawkins in his Pleas of Crown (1716), stated: "A offense is malum in se...or unlawful in itself...[when it is] against the law of nature, or so far against the public good as to be indictable at common law."[226] In the pre-quick with child abortion case of R v. Beare (1732), the trial judge remarked to the jury that he "never met with a case so barbarous and unnatural."[227]

It should not be overlooked that in pre-20th-century England, a Christian moral order was deemed no less essential to the preservation and well-being of English society than is economic order so viewed in the United States today. Christian moral philosophy, as then and there perceived, viewed the induced abortion of the pre-human being product of human conception as nothing less than anticipated murder. This moral philosophy applied the "principle of the sanctity of human life" not only to existing human beings (including children in the wombs of their mothers), but also to those who were being shaped in the womb by God. John Connery stated:

> That the...question [at what stage in human gestation, if any, does a human being come into existence] was never really relevant to the basic [question of the] morality of abortion is quite clear from the fact that the Roman Catholic Church, and probably other Christian Churches, has never defined the beginning of human life....
>
> The basic [Christian moral] argument against abortion has always been that the conception has a human destiny and this is what makes it sacred....As Tertullian said: "He is a man who will be a man."[228]

The English parliament, as it existed in 1802-1803, almost certainly was of the opinion that pre-quick with child, induced abortion constituted an indictable offense at common law. The 1803 "Offenses Against the Person Act" made it a non-capital felony for any person to "administer to, or cause to be administered to, or taken by any woman, any medicines...or...instrument or other means whatsoever, with intent thereby to cause or procure the miscarriage of any woman not being, or not being proved to be, quick with child at the time of administering such things...or means...."[229] The preamble to this 1803 act contains in part the following: "Certain other heinous offenses, committed with intent to destroy the lives of his Majesty's subjects by poison, or with intent to procure the miscarriage of women...have been of late also frequently committed, but no adequate means have been hitherto provided for the prevention and punishment of such offenses...."[230]

The word offence "in its legal signification, means the transgression of a law."[231] Now, given that the English Parliament, as it existed in 1802-1803, understood the term "offence" to mean a transgression of some law then binding in England, the question then becomes: What English law did this English Parliament think was transgressed by a person who deliberately destroyed or

attempted to destroy the pre-human being product of human conception? There are three possibilities, only one of which is likely: (1) a statute, (2) an operable canon of the Church of England, or (3) the common law.

The first possibility is easily eliminated because, as far as is known, the 1803 Offenses Against The Person Act represented the first time that conduct involving abortion was specifically made a statutory offence in England.[232] The second possibility is unlikely for no less than two reasons: (1) None of the other offenses set forth in the 1803 Offenses Against The Person Act fell within the criminal jurisdiction of the Church of England;[233] and (2) By approximately the mid-seventeenth century, if not well before that date, it evidently became settled law in England that if the secular or common law courts exercised jurisdiction over a particular offense, then the Church courts were expected to defer to the common law courts relative to trying and punishing the particular offense.[234] There is no known evidence that shows that the English Church courts exercised criminal jurisdiction over abortion into the seventeenth century. There is, however, evidence to show that the common law courts exercised criminal jurisdiction over pre-quick with child abortion at least by the mid-eighteenth century, if not by the mid-sixteenth century.[235] Hence, there is good reason to conclude that the English Parliament of 1802-1803 was of the opinion that the abortion of the pre-human being product of human conception is a misdemeanor offense at common law.

What is it in Means II that enabled the Roe Court to confidently state that it is very probable that the English common law conferred on the pregnant woman under its jurisdiction the right to rid herself of the child existing in her womb?[236] It is nothing more than Means' following exercise in sophistry:

At the English common law, if a particular act or practice is not indictable as either a felony or a misdemeanor, it automatically becomes a common law liberty.

The Abortionist's Case (1348) and The Twins-Slayer's Case (1327) established that the deliberated destruction (or its legal equivalent, e.g., a violent assault or battery on a woman quick with child) of the child or human being existing in the womb (including the live-born child that dies as a proximate result of intrauterine injuries or the abortogenic act) is not a felony at common law.[237]

At the English common law the terms "misprision offense" and "misdemeanor offense" were essentially synonymous, i.e., whatever punishments and penalties attached or did not attach to a conviction on the former, attached or did not attach to a conviction on the latter.[238]

The English jurist, William Staunford (1509-58), in his Les Plees del Coron (1557), stated that at common law no person who commits such acts as those alleged in The Abortionist's Case and The Twins-Slayer's Case shall suffer a criminal forfeiture (loss of one's personal and, or, real property).[239]

According to Staunford, at the English common law the sentence on a conviction for misprision included a criminal forfeiture.[240]

It follows necessarily, therefore, that the deliberated destruction of the child in the womb (including the live-born child that dies as a proximate result of intrauterine injuries or the abortogenic act) was not a common law misprision offence.

Since at common law whatever does not amount to a misprision necessarily also does not amount to a misdemeanor, it follows that the deliberated destruction of the child in the womb (including the live-born child that dies as a proximate result of intrauterine injuries or the abortogenic act) was not a common law misdemeanor.

> Therefore, the conclusion is inescapable that at the English common law, from approximately 1327 to 1803, a pregnant woman enjoyed the right to destroy her unborn child.[241]

It was more or less a common law rule that no English law can guarantee what is against Divine Law, or Natural Law, or reason.[242] Also, it is an insult to the English common law (and to those people who lived under, and continue to live under its jurisdiction) to even suggest that it conferred upon a pregnant woman the right to destroy what that law considered to be the most innocent and helpless of all human beings.[243] Not even Roe v. Wade stands for the proposition that a pregnant woman has a constitutionally guaranteed right to destroy a child or human being existing in her womb.[244]

Shelly Gavigan came close to articulating precisely the fundamental flaws in Means foregoing argument. Gavigan stated:

> Leaving aside the contradiction inherent in attempting to defend women's right to abortion at any stage of pregnancy by relying on a fourteenth century case in which a woman was beaten and her unborn infants killed as a result [The Twins-Slayer's Case (1327/28)], Means has made a fundamental error in interpretation. His article suggests a lack of understanding of the implications of the felony/misdemeanor (misprision) categories within the old criminal law. He ascribes to misprision the penalty of forfeiture, and ignores the historical relationship between felony and forfeiture: "In short, the true criterion of felony is forfeiture; for as Sir Edward Coke justly observes, in all felonies which are punishable with death, the offender loses all his lands in fee-simple, and also his goods and chattels; in such as are not so punishable, his goods and chattels only."
>
> Means might not accept Blackstone's above statement of the law of felony and reliance

> upon Coke; nevertheless, his own misunderstanding of felony and forfeiture quite simply flaws his argument, no matter how earnest his defence of women's right to abortion.[245]

Means' argument proves too much. Carried out to its logical extensions, it says that all common law misdemeanor offenses (such as the deliberate killing of a child in the process of being born, attempted murder, child molestation, assault, battery, trespass, riot, and conspiracy) were, in truth, common law liberties. This would be so because at common law the sentence or permissible range of punishment on a misdemeanor conviction did not extend to a forfeiture. The punishments that could attach to a misdemeanor conviction were imprisonment, a fine, a whipping, placement in the stocks, and consignment to the pillory.[246] At common law a criminal forfeiture could attach to nearly every felony conviction, as well as to a conviction of an offense that comes within the class of crimes (those akin to treason) described in the Misprision chapter of Staunford's Les Plees del Coron.[247]

To the extent that those offenses that Staunford identified as misprisions were not deemed as capital felonies at common law, they may be defined today as common law misdemeanors. However, Staunford's definition or description of misprisions is synonymous neither with the definition or description of those offenses that in Staunford's (1509-58), Coke's (1552-1634), Hale's (1609-76), Hawkins' (1673-1746) and Blackstone's (1723-80) day were called misdemeanor offenses, nor with the complete definition of the term "misprision offense" as understood in Coke's day. William Holdsworth, in his History of English Law (1903-73), stated: "In Coke's day an element of confusion had arisen in that the term misprision had got an extended meaning; to use Coke's words, it was not merely a crimen commissionis, consisting in the concealment of

treason or felony [which is basically Staunford's definition of a misprision offense], it was also crimen commissionis, as in committing some heinous offense under the degree of [capital] felony; in this latter sense it was a vague offense which covered many various contempts."[248]

This is an English translation of Staunford's Les Plees del Coron chapter on misprision offenses:

Misprision

> Misprision is properly [found] when someone knows or was aware that another has committed treason or felony and he will not expose him to the King or to his council or to any magistrate, rather conceal his offense: that is misprision. Bracton places this offense among treasonable offenses, since it would seem to him that sometimes concealment would be closer to treason than misprision, and for that reason these are his words: [Latin quotation omitted]....But such concealment is only misprision to this day. And so it is declared by [the] statute...[enacted] in the year 1 & 2 Philip and Mary, c.10,...And note that every treason or felony includes misprision so that when someone has committed treason or felony the King can, if he so chooses, have him indicted and arraigned for misprision alone, as appears from the [year book] 2 Ric.3, fo.10. And it was there agreed that when a person is attainted [i.e., convicted and sentenced] of misprision or trespass, the judges before whom that person is attainted shall take surety and pledges for his fine, and then assess it according to their discretion and not [at the discretion of the] king himself. It was also there agreed that if a justice of the peace enrolls a bill of indictment, not found by the country [i.e., by a grand jury], among other indictments which are [so] found, that is a great misprision and subject to fine, and he will lose his office. Also, if counterfeit money is made within the kingdom or kingdom's dominion and a foreigner puts it in circulation, that is not treason on the part of the foreigner because the statute of An.25 E.3 De Prodicionibus does not extend thereunto, for the statute is, if someone brings counterfeit money in this kingdom, and not where counterfeit money is made in the kingdom. But in such case, even though it is not treason on the part of the foreigner, it is still misprision, as clearly seen in 3 Hen.7, fo.10.

> If a lord of Parliament leaves Parliament without the permission of the King, it is neither treason nor felony, rather it is trespass (see Fitzherbert's Abridgement, tit. Corone, pl.161). And in all these cases of misprision he will forfeit only his goods, and as for his lands he will forfeit them only during his life. And according to some: [He will forfeit] only the profit of his lands and he will be imprisoned for life. But I find in books a misprision that has greater forfeiture than this. For that, see M.22 Edw.3, fo. 13, where someone merely drew his sword to strike an assigned judge sitting in court; and being found guilty he, thereupon, received judgment to forfeit his land and chattels, and to have his right hand cut off. And note that the same law and the same penalty applied to someone who struck a juror in the presence of the justices; and he came and put himself on the king's grace; and by advice of the entire Council, Thorp [i.e., Chief Justice, Sir William de Thorp] awarded [i.e., adjudged] that his right hand be cut off and that his lands and chattels be forfeited, and that he be imprisoned for life (see Fitz. Abr., tit. Judgment, pl. 174); same law where a man struck another in Westminster Hall, as appears under the heading in Fitz. Abr. pl. 280. And see Britt. f.49; if a ribald should strike a knight or other honorable man, he will lose the hand with which he trespassed. Note also that in the statutes made in the year 1 Edw.6, c.10, and 5 & 6 of the same king, c.11, there is a punishment [laid down] for those who offend against the king [not to be taken to mean: offending him in person] once or twice in using seditious words expressed in the above-mentioned statutes. Such offense is a kind of misprision offense against the king, although it is not there expressed in so many words, and for that reason, according to the statute made in the 1st year [of Queen Mary], c.1, it seems to have been repealed under the word misprision. See the wording of the said statute of 1 Mar. above, under the heading of Treason.[249]

It is obvious that when Staunford wrote in his Les Plees del Coron that "in all these cases of misprision he shall forfeit only these chattels and as to them he shall forfeit them only during his life" (meaning his heirs could receive them after his death), he was referring to specific criminal offenses. He lists them, and abortion is not included in the list.

There can be no doubt that when Means quoted Staunford's Les Plees del Coron statement "And in all these cases of misprision he shall forfeit them only during his life," Means intended that his readers take it that Staunford, in saying "and in all these cases of misprision," was referring to all offenses "below the degree of felony" that the common law recognized at the time.[250] Given this intent of Means, then the reader should wonder why Means did not advance the following, much simpler argument in support of his proposition that the intentional abortion-destruction of an unborn child was not a crime at common law: "At common law a misprision or misdemeanor offence referred to any crime below the degree of felony. Staunford, in his chapter on misprisions, sets forth all offenses below the degree of felony that the common law recognized at the time. He does not mention abortion there. Therefore, at common law, abortion was not a crime." Means used just such a method of argument to support his corrupt contention that Coke "intentionally" misstated the common law on abortion when he wrote in his Institutes III that at common law the killing of an unborn child is a great misprision, and is murder if the child had been born alive, and then had died in connection with the abortional act. Means stated:

> In saying that abortion after quickening is 'no murder,' Coke is perfectly correct. It is only his calling it a misprision, let alone a great one, which is pure invention. The reader who wishes further evidence that this is so may turn with profit to Coke's chapter 65 in the same book, devoted to 'Misprisions divers and severall.' Here Coke enumerates the miscellaneous offenses below the degree of felony which the common law recognized at the time. His treatment is exhaustive, yet there is not a single reference to abortion after quickening.[251]

The reason why Means did not go with the foregoing, much simpler argument is because in a footnote to that argument he would have had to set forth the complete translation of Staunford's Les Plees del Coron chapter on misprisions. Means' readers, in examining that footnote, would have concluded: "If anyone is misrepresenting the law, it is Means, and not Coke, for no way in the world does Staunford's chapter on misprisions list all offenses below the degree of felony."

Coke, in his Institutes III chapter on misprisions, did not intend to set forth a complete list of all non-felony, common law crimes. This chapter does not, for example, set forth the common law misdemeanor offense of assault with intent to commit murder. Furthermore, assuming without conceding, that in this chapter Coke intended to set forth a complete list of criminal offenses that in his day were recognized as common law misprisions, it still could be reasonably argued that Coke "implicitly" listed here the crime of quick with child abortion, when in this chapter he explicitly included in his definition or description of the crime of misprision "some heinous offence under the degree of felony."[252]

What, then, did Staunford mean to say when he stated that a person who kills an unborn child is not guilty of a felony, and will not suffer a forfeiture?[253] It seems he was saying simply that such a killing or offence is not governed by the common law on homicide, and therefore does not subject the killer to a forfeiture (which, with certain exceptions, came into operation whenever a person killed a person),[254] because the common law rule is that an unborn human being or child is not legally recognized as a person. In other words, Staunford is saying simply that at common law one who kills an unborn human being is not recognized as a "manslayer". William Lambarde (1536-1601), in his Eirenarcha (1581), stated:

> If the mother destroy hir childe newely borne, this is Felonie of the death of a man, though the childe have no name, nor be baptized.... [citing an infanticide case of 1314/15.] And the Justice of Peace may deale accordingly. But if a childe be destroyed in the mothers belly, is no manslayer nor Felone....[255]

Coke stated that the destruction of the child or human being in the womb constituted a heinous misprision offense at common law.[256] Means would have one believe that Coke "intentionally" misrepresented the common law. Specifically, Coke classified as a heinous common law offense that which he knew was a common law liberty. Coke may have "unintentionally" misrepresented the common law here. However, if he did, his misrepresentation amounted to nothing less than an understatement. That is to say, that which Coke said constituted a misprision offense, and not murder at common law, in fact constituted murder there.[257]

It is inconceivable that Roe author Justice Blackmun was of the belief that at common law the penalty of forfeiture attached to a misdemeanor conviction. One can only conclude from this that Justice Blackmun did not objectively or critically read - if he read it at all - Means II before he finalized his Roe opinion. This is not surprising; for Means II provided a way to where the Court in Roe was determined to go.

What is the ultimate basis for the Roe Court's conclusions that the English common law unquestionably conferred on the pregnant woman under its jurisdiction a right to abort the pre-human being product of her conception[258], and very probably, in light of Means II, a right to do the same regarding the child or human being existing in her womb?[259] The basis is nothing more than that Court's conveniently inarticulated assumption that at the English common law if a particular act was not indictable under

either the common law or some secular English statute, then the act was, thereby, recognized as a common law right. Did the Roe Court get this idea from the common law itself? No: The Court obtained it from Cyril Means. From where did Means obtain the idea? He obtained it from nowhere; he simply made it up.

Assuming, without conceding, that in pre-19th-century England, abortion per se was not indictable either by the common law or English statutory law, it still can be easily demonstrated that it would not follow from such a fact that at the English common law pregnant women possessed the right to rid themselves of unwanted pregnancies. If at the English common law the criterion of whether a particular act could be deemed a common law right was a demonstration that the act was neither a common law offense nor a statutory offense, then such acts and practices, for example, as witchcraft, sodomy (including bestiality), incest, bigamy and polygamy, solicitation to commit prostitution, adultery, and fornication, at one time or another qualified as rights at the English common law. Of course, such acts and practices were never recognized in England as rights. They were, however, recognized there as criminal offenses (as much as any acts or practices indictable under the common or statutory law), notwithstanding that they were not indictable under either the common law or statutory law. The only distinction between the foregoing acts and practices and those acts and practices that were indictable at common law or under statutory law - a distinction without a difference relative to their criminality - is that the former remained under the criminal jurisdiction of the then and there recognized ecclesiastical courts until when, and if, the English Parliament made them statutory crimes. In England, sodomy, witchcraft, bigamy and polygamy were made statutory felonies, and incest was made a non-

capital offence in 1533, 1541, 1601 and 1908, respectively.[260] Also, it may have been the case that the English judiciary possessed the jurisdiction to take over the jurisdiction of the ecclesiastical court to prosecute a canon law offense if the canon law offense adversely affected the public peace.[261]

English law did not divide crimes into secular crimes and ecclesiastical or canon law crimes. What was divided (into the temporal and ecclesiastical) was the jurisdiction to try and punish crimes. The Court, in Reynolds v. Sims (1878), acknowledged as much.[262] Sir Matthew Hale (1609-1676), in his The History of the Common Law of England (1713), stated:

> Now the Matters of Ecclesiastical Jurisdiction Are of Two Kinds, Criminal and Civil. The Criminal Proceedings extend to such Crimes, as by the Laws of this Kingdom are of Ecclesiastical Cognizance; as Fornication, Adultery...; and the Reason why they have cognizance of those and the like offenses, and not of others, as Murder, Theft, Burglary..., is not so much from the Nature of the Offense (for surely the one is as much a Sin as the other....) But the True Reason is, because the Law of the Land has indulged unto that Jurisdiction the Cognizance of some crimes and not of others.[263]

Hence, even assuming that abortion per se was not indictable at common law, the fact would remain that in England until 1803 (at which time acts relating to abortion were made felonies by statute), intentional abortion would not have been recognized as a common law right, if only for the reason that it would have been triable as a criminal offense under the binding criminal jurisdiction of the ecclesiastical courts.

Means' statement that persons convicted in English ecclesiastical courts could simply "thumb their noses" at the spiritual judges upon receiving sentence to perform some form of penance is hilarious. If such persons could have successfully done that, then they could have successfully done the same regarding ecclesiastical summonses. However, such contempt of court and refusal to do penance could have led to excommunication, which carried severe temporal ramifications, including loss of rights to marry, to testify in a court of law, and to sue in a court of law. Furthermore, the performance of public penance, such as parading around in a white sheet, was no less humiliating than being set on the pillory.[264]

It is simply absurd to contend that the English common law guaranteed what the English ecclesiastical law outlawed. Who, besides Cyril Means, the Roe Court, and to a lesser extent, Angus McLaren, would be so biased as to contend (in effect) that the common law guaranteed, for example, the right of the individual to practice incest, adultery, and fornication?[265]

For Cyril Means and the Roe Court to argue that abortion was a right at common law because it was acknowledged as an offense exclusively within the "binding" State-recognized, criminal jurisdiction of the Roman-English Catholic Church (or in post-Reformation England, that arm of the State referred to as the criminal jurisdiction of the Church of England), is the equivalent of arguing that Californians have a state-recognized right to steal the mail because the prosecution and punishment for that offense is within the exclusive jurisdiction of the Federal Government. The former argument not only creates a false dichotomy between the then English State and the pre- and post-Reformation, English Christian

Church, but falsely ascribes to the then existing English, criminal justice system the equivalent of a split personality.

A good argument in support of the propositions that our English ancestors did not consider abortion to be a right, and did in fact consider it to be a crime, is the apparent fact that in England, during a substantial period of the common law, the ecclesiastical courts enjoyed a nonexclusive, criminal jurisdiction to prosecute abortion whenever and however committed.[266]

If, as Means argues, it is true that the English common law recognized that "abortion had always been an offense within the exclusive jurisdiction of the canonical courts,"[267] then it is illogical for Means to argue that access to abortion was a right guaranteed by the common law. The common law cannot be said to have conferred a right regarding an act over which it possessed no jurisdiction.

Even if it could be demonstrated that abortion per se was not recognized as a criminal offense under either the English common law or English ecclesiastical law, it still could not be said that abortion per se was a woman's right at common law. David Walker stated: "In English law, certainly until the nineteenth century, the law was dominated by procedural considerations and remedies preceded rights; a man could be said to have a right only if there existed a recognized procedure which allowed him a remedy in the circumstances."[268] In Robinson v. Bland (1760) Justice Wilmot stated the following regarding the issue of whether English courts can honor a suit for enforcement of a foreign gambling debt made payable in England:

> I see no difference, whether the contract be void by the common or statute law. Both are established by the consent of the supreme

> legislative power, and numbers of contracts would be void by the common law which are good in foreign countries. For instance, in many parts abroad, a courtesan may maintain an action for the price of her prostitution. But, surely, that would never be maintainable here, though forbidden by no positive statute.[269]

No one has produced even a scintilla of evidence that the English common law provided a pregnant woman with a judicial procedure (for example, a petition for a writ of prohibition) to obtain an appropriate remedy in cases akin to the following five hypothetical cases: (1) "X," a married pregnant woman, tells "Y," her husband: "I know a local midwife who performs abortions. Today, I think I'll visit her." "Y" to "X": "Try it, and I'll break both of your necks! I won't let you leave the house under such circumstances." (2) "Z," a mature, unmarried pregnant minor, who is the daughter of "X" and "Y," tells "Y" that she intends to pay a visit to the same midwife. "Y" to "Z": "Try it, and I'll break all three of your necks! You not are leaving the house under such circumstances." (3) Same situations as 1 and 2, with the exception that "Y" is not opposed to the abortion plans of "X" and "Z," and with the addition that a local churchwarden hears of the women's abortion plans and, by continually blocking entry to the midwife's house, thwarts their abortion plans. (4) "A," an unmarried, pregnant adult is continually thwarted by a local constable and a churchwarden from ingesting an obnoxious abortion potion that she just purchased from an apothecary. (5) "X," the wife of "Y," tells "Y": "I just discovered that I am six weeks gone with our first child. The local midwife ran a sample of my urine and informed me that we can expect a boy. Under the common law of tenancy by courtesy, if the child is born alive, and I subsequently

die, and you survive me, then you inherit a life estate in my real property. You are a cold, conniving and cruel man, and I don't want you to set foot on my property when I'm gone. So to make sure you don't step so, I'm going now to our local physician-surgeon to procure a pre-quick with child abortion." "Y," thereupon, physically restrains "X" from visiting the physician-surgeon.

There is no evidence and no reason to think that the common law courts provided a pregnant woman with a process to restrain either the State or a lay person from preventing her from procuring an abortion in circumstances akin to the foregoing hypothetical cases.

One reason why there is no English common law case that specifically deals with the issue of whether a pregnant woman has a common law right to procure an abortion is because no woman who lived under the jurisdiction of the English common law, and who did not have a Cyril Means as her attorney, would have been foolish enough to have asked a common law court to back her efforts to commit a common law crime.

If abortion was a pregnant woman's right at common law, then why did the common law (1) deem a pregnant woman guilty of felony-suicide in the event she died from such an act, and (2) deem her abortionist guilty of murder in the same event?[270]

If abortion was a pregnant woman's right at common law, then why did so many unmarried pregnant women (particularly servant girls), who lived under the jurisdiction of the common law, opt for public humiliation, a "ruined life" (as a fallen woman),[271] possible termination of employment (either legally, because of inability to perform chores, or illegally, for creating a scandal on the house of her employment),[272] as well as a public whipping and consignment to a house of correction,[273] for having gotten a child out of

wedlock, instead of resorting to abortion? The English Quarter Sessions records overflow with bastardy cases. More to the point: Why did so many unmarried women run the risk of being "launched into eternity" at the end of a rope for committing infanticide, rather than simply availing themselves of abortion?[274] One may be inclined to respond that these women undoubtedly attempted an abortion many times over before they resorted to infanticide, but back then no one really knew how to bring on an abortion, let alone one that would not jeopardize the pregnant woman's life.[275] To which, one could reasonably respond: The common law would not have conferred on an individual the right to seek to effectuate what, practically speaking, could not be effectuated, let alone what could be effectuated without risking the individual's life, for no good reason.

If abortion was a woman's right at common law, then why did local parish authorities not encourage unmarried, pregnant women who resided in, or who happened to be within their parish, to get an abortion? English law required the parish to pay for the care and upbringing of a bastard child born within the parish if the child's parent or parents could not provide for the child.[276] England's Quarter Sessions records reveal that parishes had many such children. These parish authorities, on more than one occasion, went to obnoxious measures to remove a nonresidential, unmarried pregnant woman from their parish before she could give birth. There is on record more than one instance in which local parish authorities put an unmarried woman, who was in an advanced stage of pregnancy, onto a stretcher and carried her to just inside the bounds of a neighboring parish.[277]

If abortion was a woman's right at common law, then why were physicians, who lived under the jurisdiction of the common law,

unaware of such a right? Consider, for example, the following observation of the English physician William Hunter (1718-1783), in his The Uncertainty of The Signs of Murder in the Case of Bastard Children (1784):

> What is commonly understood to be the murder of a bastard child by the mother, if the real circumstances were fully known, would be allowed to be a very different crime in different circumstances.
>
> In some (it is to be hoped rare) instances, it is a crime of the very deepest die: it is a premeditated contrivance for taking away the life of the most inoffensive and most helpless of all human creatures, in opposition not only to the most universal dictates of humanity, but of that powerful instinctive passion which, for a wise and important purpose, the Author of our nature has planted in the breast of every female creature, a wonderful eagerness about the preservation of its young. The most charitable construction that could be put upon so savage an action, and it is to be hoped the fairest often, would be to reckon it the work of frenzy, or temporary insanity.
>
> But, as well as I can judge, the greatest number of what are called murders of bastard children, are of a very different kind. The mother has an unconquerable sense of shame, and pants after the preservation of character: so far she is virtuous and amiable. She has not the resolution to meet and avow infamy. In proportion as she loses the hope either of having been mistaken with regard to pregnancy, of being relieved from her terrors by a fortunate miscarriage [as distinguished from a "deliberately" induced abortion], she every day sees her danger greater and nearer, and her mind more overwhelmed with terror and despair.
>
> In this situation many of these women, who are afterwards accused of murder, would destroy themselves, if they did not know that such an action would infallibly lead to an inquiry [i.e., an autopsy], which would pro-

> claim what they are so anxious to conceal. In this perplexity, and meaning nothing less than the murder of the infant, they are meditating different schemes for concealing the birth of the child; but are wavering between difficulties on all sides, putting the evil hour off, and trusting too much to chance and fortune [as distinguished from a deliberately induced abortion]. In that state often they are overtaken sooner than they expected; their schemes are frustrated; their distress of body and mind deprives them of all judgment and rational conduct; they are delivered by themselves, wherever they happened to retire in their fright and confusion.[278]

If abortion was a woman's right at common law, then how is it that a favorite expression among criminal defendants who were tried at the Old Bailey (London's Central Criminal Court) in the eighteenth century was "I am as innocent as the unborn child in the womb."[279]

If abortion was a woman's right at common law, then why did all those persons in England who became licensed to practice medicine, pharmacy, and midwifery (which remained almost exclusively a women's field until the eighteenth century, and which was then defined in part as the "art of assisting nature in bringing forth a perfect foetus or child from the womb of the mother"),[280] take an oath not to do abortions?[281]

If abortion was a woman's right at common law, then how is it that every informed person who lived under the jurisdiction of the common law and who wrote on the subject of abortion understood abortion to be an unspeakable crime, and virtually indistinguishable from murder or infanticide? I am referring to judges, legal commentators, medical-legal writers, physicians, philosophers, natural scientists, social commentators, and authors of midwifery books.[282] No one, including Cyril Means, Angus McLaren, and Sylvia

A. Law, has uncovered even so much as one published or unpublished pre-19th - or perhaps even pre-20th-century English work wherein it is stated or argued that a woman has a right to obtain an abortion even when it is not necessary to preserve her life.[283]

If abortion was a woman's right at common law, then why is it that the midwifery, and medical works that were in circulation in England during the reign of the common law and that discussed miscarriage, provided instruction on how to prevent miscarriage, but not on how to induce or procure it? For example, Andrew Boorde, in his The Breuiary of Healthe (1547), stated:

> Abborsion doth come many wayes....It may come by recepts of medicines, as by extreme purgacyons, pocions, and other laxatyive drynkes, of the whiche I dare not so speak of at this tyme, lest any lyght woman wulde have knowledge, by whiche wylfull abborsion may come of the multitudenes of the flowers of a woman.[284]

If abortion was a woman's right at common law, then how is it that there was no public outcry in England in 1802-1803, when the English Parliament made acts related to abortion statutory felonies, and in some instances, capital felonies?[285]

As long as it was thought or supposed by pro-Roe justices and pro-Roe legal commentators that the common law on abortion provided a way to where the Roe Court went with the issue presented in Roe, the common law on abortion was considered as being highly relevant to a correct resolution of that issue. However, now that it has been demonstrated that the common law on abortion totally contradicts Roe, one can only wonder what reasons pro-Roe justices and pro-Roe legal commentators will conjure up in support of the following proposition: Notwithstanding the Roe Court's opinions to the contrary, in truth, the common law on abortion was not really

relevant to any of the issues presented in Roe.[286] In Planned Parenthood v. Casey (1992), the Court simply ignored the fact that the common law on abortion undermined the legitimacy of the Roe decision.[287]

PART V

The Human Fetus and the Pre-Fetal Product of Human Conception as Due Process Clause Persons

According to Roe v. Wade, two inexorable consequences of a determination that the unborn product of human conception is a Fourteenth Amendment, due process clause person would be: (1) A woman does not have a Fourteenth Amendment liberty to obtain a physician-performed abortion; and (2) Due process considerations would require the states to take "affirmative measures" to safeguard the unborn product of human conception from being deliberately aborted.[1] The Court in Roe stated, respectively:

> The appellee and certain amici argue that the fetus [in this case, the unborn product of human conception from its initial conception] is a "person" within the...meaning of the Fourteenth Amendment....If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment.
>
> - - -
>
> When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited....An exception [such as one necessary to save the mother's life] always exists....But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the...exception appear to be out of line with the Amendment's command?[2]

The answer to the Roe Court's foregoing rhetorical question is two-fold: not if the Fourteenth Amendment's command itself recognizes such an exception,[3] and, even then, not unless due process considerations require the State to take "affirmative measures" to safeguard the fetus-person from being so aborted. The failure of a state to take action to prohibit a particular act, such as a physician-performed abortion necessary to save the mother's life, would not constitute "state action," and therefore would not be violative of due process principles, unless a state has a due process-dictated duty to take affirmative steps to prohibit the particular act.

Justice Stevens, in his concurring opinion in Thornburg v. American College of Obstetricians and Gynecologists (1986), made explicit what is implicit in the latter of the two foregoing Roe statements: "The permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures [if] a fetus is a person within the meaning of the Fourteenth Amendment."[4] Justice Stevens did not explain this statement.

The Roe Court did not explain how a holding that the human fetus is a Fourteenth Amendment, due process clause person would dictate the two above "inexorable consequences". While the existence of the first consequence is easily explained, the existence of the second one is not so easily explained.

The explanation for the first consequence does not depend on either the presupposition that there is a hierarchy among constitutional rights or the presupposition that two constitutional rights, on occasion, can collide, in which event, the lesser of the two rights must give way. Almost by definition, constitutional rights cannot collide on a constitutional plane.[5] The fundamental rights of an individual to his or her life, liberty, and property are not

in themselves constitutional rights. The constitutional rights are that the individual, vis-a-vis a state, or in the case of Fifth Amendment due process, vis-a-vis the Federal Government, cannot be deprived of those fundamental rights in the absence of due process of law.[6]

It would be a contradiction to hold both that a woman has a fundamental right to have her fetus destroyed through deliberated abortion and that the woman's fetus has a fundamental right to life and, therefore, the right not to be so aborted. The framers of the Fifth and Fourteenth Amendments knew that natural law principles dictated that fundamental or inalienable rights, almost by definition, cannot collide with each other. In their way of thinking, the very fact that two claimed fundamental rights have collided with each other in a particular instance is conclusive proof that at least one of the two claimed rights is not fundamental in that instance. The Roe Court resolved the issue of whether the fetus is a Fourteenth Amendment, due process clause person without reference to its holding that a woman's interest in undergoing a physician-performed abortion is her fundamental right. The latter holding, if constitutionally sound (which it is not), alone dictated the conclusion that the fetus in the womb is not a Fourteenth Amendment person.

On the foregoing second, inexorable consequence, one may argue that the Court was thinking along the following lines: Although Fourteenth Amendment due process protects persons only against unconstitutional "state action", and although privately performed or non-state connected, abortion does not amount to "state action", the fact remains that, inasmuch as the State has a duty to protect children[7], the failure of the State to protect the human fetus from being deliberately aborted would constitute "state action". The

problem with such an argument is that it presupposes what the Court in Roe refused to presuppose or decide: that the human fetus is a child or human being.[8]

Could it be that the Roe Court's thinking was that, irrespective of whether or not the fetus is a human being, the fetus, as a Fourteenth Amendment, due process clause person, would enjoy a due process-based, fundamental right to protection by the government in the sense that due process requirements dictate that the government enact and enforce some type of statute prohibiting abortion? The Court in Maxwell v. Dow (1900) stated: fundamental rights "may...all [be] comprehended under the following general heads: Protection by the government...."[9] If this was the Roe Court's thinking, then the following observations of the Court in DeShaney v. Winnebago County Department of Social Services (1989) do not necessarily contradict such thinking:

> Petitioners contend that the State, [without due process of law], deprived Joshua of his liberty interest in "free[dom] from... unjustified intrusions on personal security," by failing to provide him with adequate protection against his father's violence.... [Note: Joshua's father was convicted of the statutory crime of child abuse.]
>
> But nothing in the language of the Due Process Clause...requires the State to protect the...liberty...of its citizens against invasion by private actors....It forbids the State ...to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means....Its purpose was to protect the people from the State, not to ensure that the State protected them from each other....
>
> Consistent with these principles, our cases have recognized that the Due Process

> Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.[10]

It seems incredible that the people of a state do not enjoy a fundamental right to protection by their state in the sense that their state has a due process mandate to enact and enforce statutes outlawing such acts by individuals as unjustified homicide, child abuse, rape, robbery, violent assaults, burglary, and arson. If it were otherwise, the social order of that state would soon collapse. So, it may be that what the DeShaney opinion is really relating is that the Fourteenth Amendment's due process clause, under no circumstances, requires a state to intervene or take appropriate action to prevent an individual who is not "acting under color of state law" from unlawfully seriously injuring, or even killing, another individual. Indeed, the facts in DeShaney preclude a broader holding. Joshua's father was convicted of statutory child abuse in connection with the injuries that served as the basis for Joshua's civil action against Winnebago County.[11] Hence, it cannot be reasonably argued that the DeShaney phrase "no right to governmental aid" includes the idea that due process considerations do not require government to enact and enforce criminal laws necessary to protect its citizenry.

Whether or not a conclusion that the fetus is a Fourteenth Amendment, due process clause person would dictate the further conclusion that due process principles would require a state to enact and enforce a statute outlawing deliberated abortion, there is no question that, practically speaking, a conclusion that the fetus is a Fourteenth Amendment, equal protection clause person would require as much. The DeShaney Court implied as much. It is,

therefore, somewhat strange that the Court in Roe did not see fit to address the issue of whether the fetus qualifies as an equal protection clause person.[12]

What if the sole issue in Roe had been whether a Texas statute, which forbids a pregnancy reprieve to any woman convicted of a capital offense, violates the Fourteenth Amendment on the theory that the condemned woman's formed fetus qualifies as a due process clause person, and the Texas statute deprives this fetal-person of life without due process of law? An informed application of the constitutional decision-making process would have arrived at these conclusions: The fetus is such a person; and the Texas anti-pregnancy reprieve statute violates due process of law.

Preliminarily, due process of law obviously forbids the State to execute the innocent along with the guilty. Also, irrespective of whether the State has a compelling interest in legally executing human beings, that interest would not be frustrated or defeated by delaying such executions for several months. In the United States the average time between a capital conviction and the execution of the defendant is seven or eight years.

In England during the reign of the common law, the received opinion on what constitutes a human being or person was the following: "The Personality of a Man is Essential to the Man, that is, he is a Person by the Union of his Soul and Body...This is the acceptance of a person among men, in all common sense, and as generally understood." Just as the Court has concluded that the Eighth Amendment, at a minimum, "prohibits punishment considered cruel and unusual at the time the Bill of Rights was adopted [or]...[those] practices condemned by the common law in 1789," so also the Court should conclude that due process clause persons include, at a minimum, common law-recognized persons.[13]

It was received opinion at the English common law that the unborn product of human conception becomes a human being just as soon as it acquires a human shape or develops into a fetus, at which stage in its development God informs it with its human soul. John Ash, in his Dictionary of the English Language (1775), defined the human fetus in the womb as "a child in the womb perfectly formed." The American physician, Benjamin Rush (1745-1813), observed: "No sooner is the female ovum thus set in motion, and the fetus formed, than its capacity of life is supported."[14]

Now couple the foregoing observations with the following observations:

> Justice Stevens: In interpreting the text of the Constitution "we must, of course, try to read...[the] words [used by the framers of the Constitution] in the context of the beliefs that were widely held in the late Eighteenth Century." (And to which can be added here: in England and the United States in the Eighteenth Century, it was virtually undisputed that "formed" human fetuses "are [persons and are] not non-persons. They are human, live, and have their being".)[15];
>
> William Paley in his Moral and Political Philosophy (1785), and Justice Stevens in Cruzan v. Missouri (1990), respectively: "Rights, when applied to persons, are Natural or adventurous....Natural rights are such as could belong to a man, although there subsisted in the world no civil government whatever. ...Natural rights are:...a man's right to his life, limb, and liberty;" Justice Stevens: "Our Constitution is born of the proposition that...legitimate governments must secure the equal right of every person to 'Life, Liberty, and the pursuit of Happiness.' In the ordinary case we...naturally assume that these three ends are...mutually enhancing...unalienable rights...."[16]

The Court in Smith v. Alabama (1888): "The interpretation of the Constitution...is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in light of its history."[17]

The Court in Plyler v. Doe (1982), Ingraham v. Wright (1977), Paul v. Davis (1976), and Gertz v. Robert Welch, Inc. (1974), respectively: "'The [Fifth Amendment (1791)] term person... is broad enough to include any and every human being within the jurisdiction of the republic.'"; Whoever qualifies as a Fifth Amendment person qualifies also as a Fourteenth Amendment person. Implicit in the concept of ordered liberty is the principle that every human being has "essential dignity and worth."[18]

Congressman John Bingham, author and primary sponsor of Section I of the Fourteenth Amendment in the House of Representatives, and the Court in United States v. Verdugo-Urquidez (1990), respectively: The rights guaranteed by the Fourteenth Amendment apply to "'every human being'"; and: "The Fifth Amendment... speaks in the relatively universal term of person".[19]

Williams Obstetrics: "Our knowledge of fetal development, function and environment has increased remarkably. As an important consequence, the status of the fetus has been elevated to that of a patient who should be given the same meticulous care by the physician that we long have given the pregnant woman."[20]

Dr. Goldenring: "The presence of a functioning human brain means that a patient, a person if you will, is alive. This is the medical definition of human life. We use it daily. Historically, physicians have approached the fetus in the same way as any other patient, seeking vital signs to determine the patient's status...If we consider the fetus with the more sophisticated, modern definition in mind, we find that brain function, as measured by an electroencephalograph, appears to be reliably

> present in the fetus at about 8 weeks gestation. Coincidentally, all other major organ systems are also present at that time in development.
>
> Therefore, there is a logical, medical equivalence between an 8-week-old fetus whose respiratory function is maintained extracorporeally by a placenta and an 80-year-old with a positive electroencephalogram whose oxygenation is facilitated by a mechanical ventilator. No physician would doubt that the 80-year-old...[is] a living human being, even if comatose. I contend that the fetus cannot be shown to be anything but a living human being at 8 weeks if our definitions are applied consistently."[21]

A person may argue that certain passages in Blackstone's Commentaries do not implicitly support the entire proposition that a formed fetus is properly recognized as a due process clause person. He or she may argue that at the English common law the product of human conception is legally understood to become a person or human being not at fetal formation, but rather when the formed fetus initially becomes "able to stir in its mother's womb." For sure, Blackstone's Commentaries "greatly influenced the generation that adopted the Constitution." Blackstone stated there: "Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb." Assuming, without conceding, that Blackstone was implicitly acknowledging that the ability of a fetus to stir or move does not coincide with fetal formation (but rather, say, at quickening),[22] such a fact presents no problem here. It is known that the unborn product of human conception is stirring even before it develops into a fetus, which occurs at approximately the beginning of the ninth week after conception. In Progress in Obstetrics and

Gynaecology (1984), the following is stated: "With most conventional real-time, ultra-sound equipment, movement of the human embryo may be recognized as early as the seventh post-menstrual week [or fifth post-fertilization week], approximately one week after fetal heart pulsations first become apparent."[23]

Now, add to the foregoing observations the following facts:

> At the English common law the human fetus in the womb was recognized as a victim of murder if the fetus had died in connection with being aborted after being aborted alive.[24]
>
> At the English common law, it was a near capital offense to deliberately cause the in-womb destruction of the human fetus.[25]
>
> The only reason why at the later English common law the stillborn fetus that was deliberately killed ceased to be recognized as a victim of murder was because the then existing English judiciary and leading commentators on the common law relied on misrepresented or incompletely reported abortion precedents, and were unaware of the precedents that supported the proposition that such a fetus is indeed recognized as a victim of murder.[26]
>
> When the Fifth and Fourteenth Amendments were enacted, virtually every state and territory in the United States, through either, or both, criminal abortion statutes and reception of the English common law on criminal abortion, sought to protect the fetus or child in the womb from being deliberated aborted.[27]
>
> At the English common law the unborn product of human conception is generally considered to be "in being, from conception to the time of its birth, in all cases where it will be for the benefit of such child to be so considered."[28]
>
> The Massachusetts governing body that presided over Mrs. Spooner's execution for the murder

> of her husband in 1778 was itself looked upon as a child-murderer by its own citizenry when a post-mortem examination on the body of Mrs. Spooner revealed that she was then five months pregnant with a "perfectly formed child".[29]
>
> In England during the reign of the English common law, it was a custom, if not also a binding ecclesiastical law, that on the death of a pregnant woman an attempt be made to preserve the life of her unborn child.[30]

A fraction of the foregoing facts, when coupled with the fact that at common law, in colonial America, and in virtually every state and territory of the United States from their respective inceptions to the present day, a woman who is under sentence of death and who is found to be pregnant with a live fetus or child is given a reprieve (so that the child will not be destroyed for the mother's crime),[31] would have convinced the Court in the foregoing hypothetical Roe case to remain faithful to "our common law heritage",[32] and to conclude that the fetus in the womb of a condemned woman is a Fourteenth Amendment, due process clause person.

Now, using the foregoing hypothetical Roe case, substitute the pre-fetal product of human conception for the formed human fetus in the womb. Is the concept of person, as contained in the Fourteenth Amendment's due process clause, "broad enough" to include the pre-fetal product of human conception?

It is true that the common law books of authority state that at common law a condemned woman who is pregnant but not yet pregnant with an existing human being (then defined as an organized human body in receipt of its human soul) cannot receive a pregnancy reprieve.[33] However, there is only one known "possible" instance

of the English judiciary actually denying a pregnancy reprieve to a condemned woman who was known to be pregnant, but who was not, or was not proven to be, quick with child (i.e., pregnant with a live or existing child). Furthermore, there are on record several instances in which the English judiciary granted such a woman a pregnancy reprieve.[34] Also, in 1843 the "British Medical Association unanimously passed a resolution condemning the law under which the sentence of death could be delayed if a pregnant woman had quickened but offered no mercy if she had not, 'thus making a distinction where there is no difference.'"[35]

It may be fairly stated that during the times of the adoption of the Fifth Amendment (1791) and of the Fourteenth Amendment (1868), it was generally received opinion among the members of the English and United States medical communities that the unborn product of human conception acquires life at conception, and this product, therefore, should be recognized as a being in possession of human life.[36] Nevertheless, it cannot be stated as fact that the framers of the Fifth and Fourteenth Amendments viewed the living, pre-fetal product of human conception as a human being. This is so particularly given that the then generally accepted definition of a human being included the requirement of an "organized human body", and that even subsequent to the adoption of the Fourteenth Amendment in 1868, many states continued to recognize the quick with child/with child-but not quick with child distinction in their statutory criminal abortion schemes.[37] However, if it is true, as reiterated by Justice Stewart in his concurring opinion in Roe v. Wade, that Fourteenth Amendment "liberty is not a series of isolated points..., [rather it]...is a rational continuum,"[38] then there is no logical or scientific basis for disputing that the development of the living product of human conception from

conception to birth also represents a rational continuum. The following is stated in Van Nostrand's Scientific Encyclopedia (1976) (the Preface of which reads in pertinent part: "The editors...have attempted to stress the proven, generally accepted descriptions of both new and old...concepts. In soundly controversial areas, however, where two well-grounded schools of thought may be arguing while awaiting the results of further investigations and experimentation, both sides of such questions are given.")[39]:

> The creation of an embryo and development of a fetus and finally the birth of an infant is a continuous physiological process commencing with conception and ending with the cutting of the umbilical cord. It is not in any way a digital, step-wise process with distinct periods....
>
> Only for convenience in studying and teaching are certain rather fuzzily defined phases or stages of embryo and fetus development identified and given names....The embryo and later the fetus is an individual entity, imbued with individualistic qualities which affects its rate of progress, much as later the progress of the infant to a mature adult will be determined by individualistic qualities....
>
> ....
>
> From a purely scientific standpoint, there is no question but that abortion represents the cessation of a human life.[40]

Now add to the foregoing observations the following: (1) At common law the unborn product of human conception is, generally speaking, considered to be "in being from its conception in all cases to its benefit."[41]; (2): At common law it was a criminal offense to deliberately destroy the pre-fetal product of human conception.[42]

There can be little question that the foregoing facts and observations, when coupled with the probable fact that virtually every state and territory in the United States that has a death penalty statute also has a statute that prohibits the execution of any woman found to be pregnant,[43] would have convinced the Court in the foregoing hypothetical Roe case that the pre-fetal product of human conception in the womb of its condemned mother is a Fourteenth Amendment, due process clause person.

The Roe Court was so blinded by its preoccupation with establishing physician-performed abortion as a woman's constitutional right that it failed not only to appoint counsel to represent human embryos and fetuses before the Roe Court (which failure, in and of itself should be deemed sufficient to invalidate the Roe decision), but also to acknowledge any of the foregoing facts and considerations in the course of deciding that neither the human embryo nor the human fetus is a Fourteenth Amendment, due process clause person.

One basis on which the Court did rely in this matter is the fact that wherever else in the Constitution (e.g., in the Fourteenth Amendment's citizenship clause) the word "person" appears, "the word is such that it has application only postnatally."[44] (Implicit in this basis is the legal principle that, generally speaking, wherever a particular word is found in a statute or legal document, the word is presumed to have the same meaning throughout.)[45] The Court added in a footnote that unborn children have never figured into Apportionment Clause census-taking.[46] Under Article I, sec. 2 of the Constitution, illegal aliens do not have to figure into such census taking; yet they are recognized as Fourteenth Amendment due process clause persons.[47] Corporations are not postnatal human beings, and they are not included in census-

taking; yet they are considered Fourteenth Amendment, due process clause persons.[48]

It is true that the Fourteenth Amendment's definition of citizenship refers to persons born or naturalized in the United States. Obviously, so the argument goes, an unborn child is not yet born, and therefore, he or she is not yet in a position to be naturalized. This definition of citizenship reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[49] The argument proves too much. Aliens are not persons within the meaning of the word "person" as contained in the Fourteenth Amendment's definition of citizenship. Yet, notwithstanding that fact, aliens are considered persons within the meaning of the word person as contained in the Fourteenth Amendment's due process and equal protection clauses.

Another item the Roe Court relied on is the contention that prevailing legal abortion practices in the several states from their respective colonial or territorial beginnings to throughout the major portion of the nineteenth century "were far freer than they are today."[50] It has been shown already that such is not the case.[51] James Witherspoon observed:

> At the end of 1868, the year in which the Fourteenth Amendment was ratified, thirty of the thirty-seven states had [criminal] abortion statutes, including twenty-five of the thirty ratifying states, along with six territories....
>
> ....
>
> ....At the end of 1868, twenty-seven of the thirty states with anti-abortion statutes prohibited...[pre-quickening, attempted] abortion.[52]

Another item which the Roe Court relied on is the Court's Vuitch decision. The Roe Court stated: "Indeed, our decision in United States v. Vuitch (1971) inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of [fetal] life entitled to Fourteenth Amendment protection." The Court is saying that it is Court policy not to give a statute an interpretation that would save it from a particular constitutional challenge if the statute, even as favorably so interpreted or construed, would still be unconstitutional. Or, if a Court can, without undermining the purpose of a federal statute, construe that statute so as to safeguard it from constitutional attack, then a court ought to so construe it. The latter is what occurred in Vuitch.[53] As judged by the Roe decision, the criminal abortion statute in Vuitch, as favorably construed by the Court, and as upheld against a vagueness challenge, clearly would have infringed on a woman's Roe-defined constitutional right to an abortion. This is because the criminal abortion statute in Vuitch, even as favorably construed by the Court, outlawed what Roe v. Wade held to be constitutionally guaranteed: a woman's right to obtain a "pre-fetal viability" abortion not necessary to preserve her life or physical or psychological health.[54] By parity of reasoning to Roe's reasoning from Vuitch, had the Vuitch Court thought that the criminal abortion statute in question infringed upon any constitutional right of a woman to obtain an abortion, then the Vuitch Court would not have indulged in statutory construction favorable to upholding that statute. For the Vuitch Court to have done so, would have had the consequence of leaving on the books a criminal statute that infringes on an individual's fundamental constitutional right, in

this case - a woman's Roe-defined constitutional right to an abortion. Hence, by Roe inference, the Court in Vuitch held that a woman does not have a constitutional right to an abortion within the meaning of Roe v. Wade! Former Chief Justice Warren Burger, who joined in the Roe majority opinion, implied as much at oral argument in Roe v. Wade. He asked appellant's counsel Sarah Weddington whether the issues in Roe v. Wade had not already been implicitly decided in Vuitch.[55]

The remaining items relied on by the Court in Roe were the following:

> When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in [Texas Penal Code] Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?
>
> There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out...that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?[56]

Preliminarily, legal questions, and particularly profound constitutional law questions, should never be decided by resorting to rhetorical questions.

Assuming, without conceding, the existence of the above described inconsistencies, that is a patently irrelevant consideration relative to establishing that the fetus is not a Fourteenth Amendment person. The mere existence of such inconsistencies at best presupposes that the fetus is not a Fourteenth Amendment person. If anything, the constitutional validity of such inconsistencies in part may depend on the determination that the fetus is not a Fourteenth Amendment person.

The Roe Court simply assumed that the exception-clause in the Texas abortion statute was inconsistent with Texas' contention that the fetus is a Fourteenth Amendment, due process clause person. There is no inconsistency if such an exception can be said to fall within the common law defense of self-defense, or necessity, as the case may be.[57] However, the Roe Court did not address that issue. Yet, suppose that it cannot be said that such an exception falls within the common law rule of self-defense; what does that prove? It tends to prove that a fetus, as a Fourteenth Amendment person, is deprived of life without due process of law when the State sanctions its destruction in order to save the mother's life.

The facts that the Texas abortion statute exempted the mother from prosecution and that the Texas rules of evidence excluded the woman as an accomplice did not undermine the argument of Texas that the fetus is a Fourteenth Amendment person. The main reason why such a woman was so exempted, and was not legally considered as an accomplice, was to facilitate successful abortion prosecutions.[58]

The fact that the maximum sentence prescribed by Texas' criminal abortion statute was less than that prescribed by its

existing murder statute did not undermine the argument of Texas that the fetus is a Fourteenth Amendment person. Under the statutory, criminal homicide schemes of some states, such as California, some persons who are prosecuted for first degree murder do not face the death penalty, or do not even face life without possibility of parole. Yet, no one would seriously argue that the would-be victims of such murderers, even if they somehow could acquire standing, are denied due process or equal protection of law simply because their would-be first degree murderers, would not face the death penalty or life without possibility of parole, unlike some of the state's other would-be first degree murderers. If a state legislature makes a reasonable determination that the punishment for a particular type of non-capital murder fits the crime in terms of punishment and deterrence (i.e., if it cannot be said that the punishment is "grossly disproportionate" to the particular crime), and if the punishment is not excessively disproportionate in comparison to how other states punish that type of murder, then potential victims of such murder and their would-be murderers are denied neither equal protection of law nor due process of law.[59]

While a conclusion that the unborn product of human conception is not a human being would not even begin to establish that such a product is not a Fourteenth Amendment, due process clause person, the conclusion that such a product is a human being would dictate the conclusion that such a product is a Fourteenth Amendment person (except, perhaps, when the life of the mother depends upon the destruction of the product of her conception).[60]

Contrary to what is generally, if not almost universally believed, the Court in Roe, in arriving at the conclusion that the unborn product of human conception is not a Fourteenth Amendment

due process person, neither explicitly nor implicitly held, or judicially noticed that such a product is not a human being. Whether or not the Roe Court implicitly assumed that such a product is not a human being is debatable. The Roe Court did, however, refuse to judicially notice that such a product is a human being.

The Court in Roe supplied nothing but unsound and misleading reasons in support of its refusal to decide the question: At what point, if any, during the human gestational period or process, does a human being come into existence? Nevertheless, the Court was unquestionably correct in refusing to decide that "non-justiciable" question.[61] Whether that Court was correct in failing to judicially notice that the unborn product of human conception is a human being once it achieves fetal formation is quite another question. In Brown v. Board of Education of Topeka (1954), the Court did not decide (because it was a non-justiciable question) but did judicially notice that the application of the doctrine of "separate but equal public school educational facilities" inherently deprives Afro-American children of equal educational opportunities. It was on this basis that the Brown Court was able to conclude that the application of this doctrine deprives Afro-American, public school children equal protection of the law.[62] The available evidence in support of a conclusion that an organized or formed human fetus is a human being supports that conclusion no less than did the evidence available in Brown support the conclusion that "segregated, public but equal educational facilities" are inherently unequal.

The traditional Western civilization definition of a human being is: an organized human body endowed with life or a human soul. Many so-called modern intellectuals smile at the concept of a human soul, and particularly at the concept of an incorporeal

human soul. They simply dismiss it as a religious belief or as an item not fit for real thought, since it cannot be empirically verified. They conveniently confuse philosophy with religion, and then also conveniently forget that the Aristotelian concept of the human or rational soul had nothing to do with religious beliefs, Christian or pagan. They also conveniently neglect to try and empirically prove their philosophical premise that empirical verification is the only valid criterion for establishing a claimed fact as an actual fact or truth. Nevertheless, for the sake of argument, it will be assumed that in defining a human being, the law must do so without reference to whether the concept of a human or rational soul has a real place in properly defining a human being. The law is then left with this definition of a human being: an organized human body endowed with biological or animal life. An organized human fetus, by definition, fits this definition of a human being.

To argue, for example, that the unborn fetus is not a human being because its organs (particularly its brain) are not yet fully developed, or because the fetus is non-viable, or because it has not yet developed the capacity to reason, is like arguing, respectively, that: a newborn is not a human being because its brain is not yet fully developed; a young girl is not a human being because her breasts are not yet developed; no living creature can be deemed the creature that it is unless it can live independently of its currently essential environment; and a newborn is not a human being because it has not yet realized its capacity to reason.

Justice Stevens, in his concurring opinion in Thornburg v. American College of Obstetricians (1986), stated:

> Unless the religious view that a fetus is a person [or human being] is adopted...,

> there is a fundamental and well-recognized difference between a fetus and a human being; indeed, if there is not such a difference between a fetus and a human being, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures.[63]

Note that Justice Stevens neither articulated the so-called "fundamental difference" between a formed human fetus and a live-born human being nor identified the persons or bodies of thought that recognize this difference as a "fundamental" difference. Furthermore, the so-called religious view or opinion that Justice Stevens has in mind is not a religious view or opinion. It is a "philosophical" opinion, and it states that the human soul is infused into the product of human conception at conception ("immediate animation") or at the completion of the process of fetal formation ("mediate or delayed animation"), depending on the particular opinion.[64] But what is more, Justice Stevens is presupposing here (and also in his Webster opinion where he makes an impoverished attempt to elaborate on his above Thornburg statements)[65] a certain definition of what constitutes a human being. Then, without articulating that definition (which means that all a person can infer from this unarticulated definition is that both the formed and unformed human fetus would not fall within the definition), he commences to argue that the Constitution dictates that this unarticulated definition of a human being is the only definition that can pass constitutional muster. Any definition of a human being that would be broad enough to include the human fetus would be, to that extent, "only" religiously based, and therefore would run afoul of the First Amendment's Establishment Clause.

Contrary to what Justice Stevens, the Roe Court, Laurence Tribe, Ronald Dworkin, and many others evidently believe,[66] no Christian denomination, including the Roman Catholic faith, has ever had as one of its doctrines of faith and morals the opinion or belief that the human fetus, or the pre-fetal product of human conception, as the case may be, is a human being. The late Jesuit, theologian John Connery stated, respectively:

> There is no truth in the [Roe] Court's statement that the Aristotelian theory of mediate animation continued to be "official Roman Catholic dogma" until the middle of the nineteenth century and that immediate animation is now the "official belief of the Catholic Church." The Church has never declared such a dogma or belief. Her consistent condemnation of abortion has always been independent of the question of the beginning of human life.
>
> - - -
>
> Distinctions the Church makes, or does not make, in regard to [canon law crimes, such as distinguishing between the "unformed fetus" and the "formed fetus" as a victim of homicide] [and to the] penalties [set forth for the commission of canon law offenses] a distinction which, by the way, is no longer recognized in canon law], do not constitute Church teaching. So, while it is true that the Church today penalizes abortion at any stage, it would be wrong to conclude from this that it teaches immediate animation or infusion of a rational soul....This it has never done.[67]

According to the Court's own decisions, the Court "must" accept as true the statement of the Roman Catholic Church to the effect that the Church has not decreed as a matter of faith or morals, or does not have as one of its religious or moral tenets, that a human being comes into existence at conception or fetal formation or at any other point in the gestational process. The

Church is the ultimate or final interpreter of its own law or faith.[68]

Whether or not abortion should be legalized may involve a religious question, or a moral question, or a political question, or a social question, or a health question, or all of those questions. However, the question when does a human being come into existence involves none of those questions. This question is simply and "only" a philosophical question. Philosophy, in an attempt to answer that question, can of course rely on such items as the discoveries and findings of the life science communities. Given the foregoing definition of what constitutes a human being, it seems quite reasonable (i.e., without having to resort to religious belief) to conclude that there is "no" fundamental difference between a formed human fetus and a newborn child. Indeed, for two thousand or so years, in Western civilization, the Aristotelian opinion that the "formed fetus" is a human being was virtually undisputed. All that was disputed was whether the "unformed fetus" is properly not recognized as a human being.

PART VI

An Analysis "Strict Scrutiny Analysis" as Applied in Roe v. Wade

The State of Texas offered the following argument in support of its position in Roe that Texas' criminal abortion statute serves a "compelling state interest":

> Texas has a compelling interest in safeguarding the lives of all innocent human beings within its jurisdiction. The opinion that a human being comes into existence at conception has a rational and scientific foundation. Therefore, Texas' criminal abortion scheme serves Texas' compelling interest in safeguarding the lives of innocent human beings, in this case, unborn human beings.

The Court responded to this argument in part as follows:

> We need not resolve the difficult question of when life begins [i.e., the question, when does a human being come into existence].
>
> When those trained in the...disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[1]

There is no rational connection between the Court's legitimate jurisdiction and duty to decide a material justiciable question and the existence or nonexistence of a consensus on an answer to such a question. The Court's legitimate jurisdiction here is not dependent on the presence or absence of any such consensus. The Court can decide only justiciable questions. However, the

question, when does a human being come into existence, is a "non-justiciable" question.[2] What, then, is the Roe Court relating here? The Court is relating nonsense, and not judicial humility.

Texas was not even asking the Court to decide such a question. Texas was simply requesting the Court to judicially notice that a human being comes into existence at conception.

Contrary to what so many persons, and to what even some state appellate courts persist in believing, the Court in Roe neither explicitly nor implicitly decided the question, when does a human being come into existence.[3] The Roe Court did not decide that the viable fetus is a human being, and it did not decide that the fertilized human ovum, the human embryo, and the pre-viable human fetus are not human beings. However, a strong argument can be made that the Roe Court, in the course of implicitly ensuing certain dictum, may have assumed improperly and unfairly that a legislative finding to the effect that the non-viable product of human conception is a human being would lack a basis in reason, science, and human experience or tradition.[4]

The Roe Court was correct in refusing to decide the question, when does a human being come into existence. However, the manner in which the Court articulated that refusal is highly misleading. The Court gave the distinct impression that on some future day, or under different circumstances (such as a substantial development in "human knowledge"), the Court may have the jurisdiction to decide such a question. Furthermore, the reasons given by the Court in support of this refusal are not only nonsensical and irresponsible, but they in truth covered up a material or legitimate issue that the Roe Court was duty-bound to decide. The result of this unartful issue-dodging was that this legitimate issue was in effect decided against the State of Texas. The legitimate issue was the

following: whether Texas, in seeking to demonstrate the existence of a "compelling interest" in the context of "strict scrutiny analysis", made, or on a remand to the trial court, could possibly make a sufficient factual showing that the fertilized human ovum, or the human embryo, or the human fetus, as the case may be, is a human being.[5]

When a court states that it "need not" decide a particular justiciable question, it is saying that the resolution of the question is not material or necessary to arriving at a correct decision in the case at hand. It does not in any sense imply that the court lacks the jurisdiction or competence to decide the question if it is properly raised, and if it is otherwise material to the case at hand. Yet, the Roe Court gave as its reason for refusing to decide the question, when does a human being come into existence, not that the question poses a "non-justiciable" question (which was the only valid reason for refusing to decide the question), but rather that the Court is not in a position to resolve the question when the medical, philosophical, and theological authorities have yet to arrive at a consensus on an answer to the question. However, as every competent lawyer and judge knows, in law there is no such animal as a material legal or justiciable question that is too difficult for a court to competently decide. The reader should be relieved to know that our courts lack the jurisdiction to duck deciding a material, justiciable question or issue, no matter how complex the issue really is. Our courts can "never" claim judicial incompetence here, not even in the guise of humility, and particularly not because of a need for more knowledge or for some kind of a consensus on how such an issue should be resolved. Our courts, as well as all other rational bodies that have ever existed, have

always resolved questions put before them on the basis of "currently available knowledge".

The Roe Court no more possessed the jurisdiction to decide the question, when does a human being come into existence, than possessed the jurisdiction to decide the question of whether or not life exists or once existed on Mars. Our courts, almost by definition, lack the jurisdiction to resolve philosophical or scientific questions, as such. These questions are simply "non-justiciable" questions.[6]

The following dictum in Paris Adult Theater I v. Slaton (1973) is contrary to what has just been asserted: "It is not for...[the Court] to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon [fundamental] rights protected by the Constitution itself."[7] Through what mysterious expertise could the Court hope to truthfully resolve empirical or scientific uncertainties that science itself has been unable to resolve? Even the Roe Court acknowledged that any judicial attempt to resolve such questions would amount to no more than a judicial exercise in speculation.[8] What is more, the Roe Court expressly refused to resolve what it simply assumed to be empirical, philosophical, and theological uncertainties underlying the argument of Texas that a human being comes into existence at conception. Yet, according to the Roe Court, the Texas criminal abortion statute infringed on a fundamental constitutional right. Why then, in accordance with the foregoing quote from Paris, did not the Roe Court resolve the so-called scientific, philosophical, and theological uncertainties underlying the assertion of Texas that a human being comes into existence at conception? There are two answers, and they may be related. The first is that such resolution does not involve a justiciable ques-

tion, and is, therefore, outside the Court's jurisdiction. The second is, since the Court cannot go in search of evidence outside of the record of the case before the Court, the Court necessarily lacks the tools to even begin to competently resolve such questions or scientific, or philosophical or theological uncertainties. Justice Brennan in Oregon v. Mitchell (1970) stated:

> The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as "arbitrary," "irrational", or "unreasonable."[9]

The reader should consider this point from a somewhat different perspective. California's murder statute contains a pre-Roe clause that provides that the human fetus is a recognized or potential victim of murder except under three circumstances: (1) physician-performed, therapeutic abortion, (2) consent by the mother of the fetus to the destruction of the fetus by another, and (3), the killing of a fetus by its mother (which is implicit in the second circumstance).[10] Now assume that a defendant, charged with the murder of a pre-viable fetus pursuant to this statute,[11] was not clever enough to challenge the statute on equal protection grounds. (Surely the mother's consent to the destruction of her fetus when not authorized by Roe, or when in a context other than physician-performed abortion, would not serve as a "rational basis" for a legislative judgment that only a person who destroys a fetus without the mother's consent can be charged with the murder of a fetus.) Assume, also, that this defendant challenged the constitutionality of the statute "only" on the due process grounds that

there is widespread disagreement among the members of the medical-science and philosophical communities as to whether or not a pre-viable fetus is a human being. How would a California appellate court answer the challenge? It cannot be certainly stated, which is not meant to imply that it cannot be certainly known, how such a court should answer that challenge. It may be fairly said that such a court would preliminarily remark that the question before the Court is not whether the California Legislature was correct in judging a pre-viable fetus to be a human being, but is whether or not the California Legislature's judgment that a pre-viable fetus is a human being has some basis in reason, science, or human experience or tradition. The Court, in Village of Belle Terre V. Borass (1974), stated: "'When it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.'"[12] Similarly, the Court, in Marshall v. United States (1974), stated: "When Congress undertakes to act in areas fraught with medical or scientific uncertainties, legislative options must be especially broad."[13] The Court, in Paris Adult Theater I v. Slaton (1973), observed: "'We do not demand of Legislatures "scientifically certain criteria of legislation"'";[14] and: "Nothing in the Constitution prohibits a state from reaching...[the] conclusion [that obscene materials have a tendency to debase society and to produce anti-social behavior], and acting on it legislatively, simply because there is no conclusive evidence or empirical data."[15] The Court, in Jacobson v. Massachusetts (1905), in the course of rejecting a personal liberty, due process challenge to a state statute making smallpox vaccination compulsory, remarked:

> We must assume, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories [i.e., the then theory that smallpox vaccination will help prevent smallpox, and will not cause other diseases to occur in the body, and the then theory that smallpox vaccination does not prevent the spread of smallpox, and may even cause smallpox or other diseases to occur in the body], and was compelled, of necessity, to choose between them....It is no part of the function of a court or a jury to determine which one of two modes was likely to be most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain.
>
> ....The state legislature proceeded upon the theory which recognized vaccination as at least as effective, if not the best known way in which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population. Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.[16]

There is then, nothing in the Constitution that mandates that the State must relegate to private conscience an answer to, and a resulting course of action on, a question that profoundly bears on the State's very reason for even existing. Justice Frankfurter

stated: "That a conclusion satisfies one's private conscience does not attest to its reliability."[17]

It may be argued that the use of Jacobson as an analogy here proves too much; for in Roe the Court held that a woman's interest in obtaining a physician-performed abortion is, in the words of the Jacobson Court, a right "secured by the fundamental law". The Jacobson Court was unaware of the doctrine of strict scrutiny analysis, which first surfaced - and only in equal protection cases - long after Jacobson.[18] If, however, a statute that infringes on a woman's fundamental right to obtain a physician-performed abortion can withstand strict scrutiny, substantive due process analysis, then obviously it cannot be said that such a statute violates due process.

Suppose that the State of Missouri placed on its books the following amendment to its murder statute:

> Effective January 1, 1994, the unborn, post-embryonic human fetus, whether viable or non-viable, is a human being within the meaning of the term human being as contained in Missouri's murder and manslaughter statutes. It shall be no defense to a charge of the murder or manslaughter of such a fetus that the destruction of the fetus falls within the ambit of Roe v. Wade. This amendment does not apply to the situation in which a physician performs an abortion on the good faith belief that the same is necessary to prevent the death of the mother. In the event of a prosecution pursuant to this amendment wherein the physician-defendant moves that the amendment is unconstitutional under Roe v. Wade, the Missouri Legislature trusts that the trial court and the appellate courts that address such a challenge to this amendment will acknowledge the following: Unlike the statute declared unconstitutional in Roe v. Wade, this amendment is based in substantial part on a "specific factual finding" by the Missouri

> Legislature that the post-embryonic product of human conception is a human being, i.e., it is an organized animal conceived by the human species and endowed with the potentiality to reason. Nothing in this amendment is meant to imply that the People of Missouri are of the opinion that the pre-fetal product of human conception is not a human being. If this amendment withstands constitutional attacks, then the statute will be amended again to include the pre-fetal product of human conception.

No doubt many constitutional law scholars, judges, and lawyers would laugh off such an amendment as an attempt to make an end-run around Roe v. Wade. They know that a state cannot do indirectly that which the Constitution directly forbids a state from doing. They know that in Roe the Court stated: "We do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant women that are at stake."[19] However, when all the laughter has subsided, this fact remains: Notwithstanding the foregoing Roe Court dictum, if the Missouri amendment can pass muster under strict scrutiny analysis, then it complies with due process and does not in any sense violate what Roe would otherwise command.

The doctrine of strict-scrutiny analysis, as superimposed on the Fourteenth Amendment concept of substantive due process, holds as follows: State action (in this case, a state statute) that more than "incidentally" infringes on the exercise of a non-economic-based fundamental right, is presumptively unconstitutional. To overcome this presumption, the State must demonstrate that the law in question not only "furthers" a state interest that is both "legitimate" and "compelling" or "overriding", but also that the law is not "over-broad", and is "necessary" to further or to achieve that interest. The term "absence of over-broadness" means that the law, as drawn or as construed, infringes on the fundamen-

tal right at stake only to the extent necessary to achieve fully the "compelling interest" of that law. The term "necessary" refers to the unavailability of another reasonable, "less drastic means" for achieving that purpose; in other words, were it not for that specific law, the full purpose of that law could not be realistically served or attained. The term "furthers" means, or at least its criterion is, that the law must be shown to bear a fair or substantial connection or nexus to its purpose. The term "legitimate state interest" refers simply to any interest proper to the existence or founding of the State, such as securing and facilitating the exercise of fundamental rights, and the safeguarding of public safety, health, and morals.[20] The Court has never really defined "compelling state interest". In Wisconsin v. Yoder (1972) the Court described such an interest as one of the "highest order".[21] However, in Roe the Court implicitly described such an interest as one that is legitimate and important in its own right, and also more important than the exercise of the fundamental right with which it is in irreconcilable conflict. This much, however, cannot be rationally disputed: If the State's interest in protecting the life of each innocent human being within its jurisdiction does not qualify as a "compelling state interest", then no state interest under the sun can qualify as "compelling".

It is easy to see that, while it is true that strict scrutiny analysis demands more of a statute than does the doctrine of rational basis analysis,[22] it is not true that the more that is required refers to the degree of support in reason or experience for a particular legislative judgment or factual finding underlying a statute. There is nothing in the doctrine of strict scrutiny analysis that states that a legislative factual finding underlying a statute must be supported by more than a basis in reason or

experience. Furthermore, constitutional law has never required more of legislative factual findings than that they be supported by a basis in reason or experience.[23] (If it is now to be otherwise, then twenty-five or so percent of existing constitutional law will have to be overruled.) What this means in the context of the foregoing hypothetical Missouri amendment is that if it could be shown that the Missouri legislative factual finding that the human fetus is a human being has a basis in reason or science or human experience, which it obviously would,[24] then a court, in subjecting that amendment to "strict scrutiny analysis", should assume or accept as true the Missouri Legislature's factual finding that a human being comes into existence at fetal formation. Inasmuch as there can be no real question either that Missouri would have a "compelling interest" in safeguarding the life of each innocent human being within its jurisdiction,[25] or that the amendment to the murder statute is necessary to serve that interest (no less than the statute that was amended here is necessary to serve that same interest), it would follow that this Missouri statutory amendment would pass muster under strict scrutiny, substantive due process analysis.

There was no demonstration in Roe that the Texas criminal abortion statute in issue there represented a Texas Legislature's factual finding that a human being comes into existence at any point during the gestational process. However, as the Court in Roe implicitly acknowledged, that alone would not preclude Texas from arguing or trying to prove in Roe that conceived unborns are no less human beings than newborns. The Court in Roe simply predecided or assumed that Texas could not succeed in such an effort.

Whether or not a particular legitimate state interest is "compelling" is a question of law, which means that such a question is resolved by the application of pertinent legal principles and

not, as is the case with questions of fact, by the presentation of evidence. The determination of the correct burden of proof (e.g., by a preponderance of the evidence, or by clear and convincing evidence, or by concluding beyond a reasonable doubt) that the State must meet in order to sufficiently prove a disputed fact, the existence of which would establish a "compelling state interest" is, also, a question of law, as is the question of whether or not the State has met its burden of proof on such a fact. However, the existence of such a fact itself is not a question of law, but is, almost by definition, simply a disputed issue of fact. By way of analogy, the Court, in Bernal v. Fainter (1984), stated the following in the course of rejecting the argument of Texas that its statute forbidding a resident alien from being a notary public serves the State's "compelling interest" in insuring the availability of a notary's testimony:

> This justification fails because the State fails to advance a factual showing that the unavailability of notaries' testimony presents a real, as opposed to a merely speculative, problem to the State. Without a factual underpinning, the State's asserted interest lacks the weight we have required of interests properly denominated as compelling.[26]

The Roe Court did not decide, but simply assumed (without valid reason) that Texas could not make a sufficient factual showing that a human being comes into existence at any point in the gestational process prior to fetal viability.[27] The Court, in making this assumption, denied to Texas the equivalent of due process of law. The assumption itself is based upon nothing more than two other assumptions. The first assumption is that a state can constitutionally establish that a human being comes into existence at

a particular point in the gestational process only by establishing that, among the members of the medical science, philosophical, and theological communities, there is a consensus that a human being comes into existence at a specific point in the gestational process. The second assumption is that the members of these three communities possess a monopoly on supplying an answer to the question, "when does a human being come into existence".[28]

One state's failure to prove a disputed fact can no more preclude another state from attempting to prove that same disputed fact, than can one plaintiff's failure to prove that corporation "X" acted with malice in situation "B" preclude a plaintiff in a separate suit from attempting to prove that corporation "X" acted with malice in situation "B".

This means, for example, that it would not be in violation of Roe for Missouri or some other state to enact a criminal abortion statute of the type voided by the Court in Roe, and then prosecute a physician under that statute for aborting a "non-viable" fetus, provided that the State could satisfactorily prove the disputed fact that a non-viable fetus is a human being.

It should not be overlooked that in Roe the Court implicitly conceded that the Texas criminal abortion statute met every requirement of strict scrutiny analysis except the "compelling state interest" requirement. Obviously, that statute could be said to have been over-broad only if it was initially determined by the Court that the State's interest in safeguarding the pre-viable product of human conception is "non-compelling". The Roe Court expressly acknowledged that the State's interest in protecting human prenatal life is certainly legitimate and important throughout the entire period of gestation.[29] However, that Court held also that this concededly important interest is, nevertheless, "non-compell-

ing" relative to the mother's interest in having her fetus destroyed, except when her fetus is viable and would not pose a threat to her life or health if not destroyed.

An argument can be made that the Court in Roe in effect declared unconstitutional virtually every criminal abortion statute then in existence in the United States by simply drawing a theretofore, non-operating distinction between such strict scrutiny concepts as: "compelling state interest", "important state interest", "substantial state interest", "strong state interest", and for that matter, "legitimate state interest". Another way of stating this argument is that the Roe Court in effect declared those criminal abortion statutes unconstitutional by simply redefining a "compelling state interest" to mean a state interest that is real and important in its own right (the pre-Roe definition), and is, also, more important (according to the Court's subjective value system) relative to the fundamental right with which it is in irreconcilable conflict.

The Roe Court expressly conceded that the State's interest in safeguarding the conceived unborn product of human conception is "important" throughout the entire gestational period.[30] Hence, if it could be shown that the concepts "important state interest", "substantial state interest", "strong state interest" and "compelling state interest", when used by the Court in the context of strict scrutiny analysis, are meant to express synonymous concepts, then it would necessarily follow that the Texas criminal abortion statute, voided by the Court in Roe, met every requirement of pre-Roe strict scrutiny analysis.

In Dunn v. Blumstein (1972), the Court used the terms "compelling state interest", "substantial state interest", and "important state interest" interchangeably:

> In sum, durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are "necessary to promote a compelling governmental interest." ...The key words emphasize a matter of degree. ...It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that "important" interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity.[31]

Similarly, Justice Marshall, in his dissenting opinion in San Antonio School District v. Rodriguez (1973), stated:

> In terms of the asserted state interests, the Court has indicated that it will require, for instance, a "compelling", or a "substantial" or "important", state interest....Whatever the differences, if any, in these descriptions of the character of the state interest..., basic to each is, I believe, a concern with the legitimacy and the reality of the asserted state interests....[What is required] is a clear showing that there are legitimate state interests to be served.[32]

Justice Marshall was a member of the Roe majority. This majority expressly conceded that the State's legitimate interest in safeguarding "non-viable", prenatal human life is "important". Therefore, how would Justice Marshall explain his double-standard approach to compelling-interest analysis? He would say that a "compelling state interest" means a "strong" state interest, but that to construe Roe as holding that the State's interest in protecting non-viable, prenatal human life is a "strong" state interest simply because in Roe that interest was held to be an "important" state interest, is to misread Roe. Lest there be any

doubt that Justice Marshall would engage in such double-talk, then consider the following observation of that Justice in his dissenting opinion in Beal v. Doe (1977):

> To no one's surprise, application of that test [the rational basis test as applied to a state statute that funded, through Medicaid, childbirths, but not non-therapeutic abortions] - combined with a misreading of Roe v. Wade to generate a "strong" state interest in...[the protection of prenatal life beginning at conception] - "leaves little doubt about the outcome; the challenged legislation is [as] always upheld."[33]

Because the Court in Roe presupposed that an interest proper to the State and a valid exercise of an individual's fundamental right can on occasion unavoidably collide along a constitutional plane, the Roe Court concluded that, in the context of strict scrutiny analysis, these irreconcilable, conflicting interests must somehow be "balanced" against each other. That is to say, they must have their relative importance weighed by the Court on some sort of Solomonian scale in order to determine which one shall receive the only available right of passage along that plane. That presupposition is false. The Court, in Cox v. Louisiana (1965), and in Cockran v. Louisiana St. Bd. of Education (1930), stated, respectively: "Freedom and viable government are...indivisible concepts,"[34] and: "Individual interests are aided only as the common interest is safeguarded."[35]

The pre-Roe version of strict scrutiny analysis did not authorize the Court to engage in any such balancing act. The Court, in United States v. Robel (1967), stated:

> It has been suggested that this case should be decided by "balancing" the governmental interests...against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important...than the other.[36]

Given that the State's interests in protecting wild animals within its borders,[37] in protecting its citizens from disruptive noise and from abusive practices in the monetary solicitations for charity,[38] in maintaining the integrity of its utility rates,[39] and in maintaining an uninterrupted school session,[40] are "compelling", then there is no question that under pre-Roe compelling interest analysis, the State's concededly important interest in safeguarding human prenatal life throughout the gestational period is also "compelling".

The foregoing argument demonstrates that the Texas criminal abortion statute, voided by the Court in Roe, may be described as precision-perfect legislation. Unfortunately for the State of Texas, and other states, not to mention for conceived unborns, the Roe Court, in a less-than-perfect manner, succeeded in declaring unconstitutional, constitutionally-perfect legislation.

A person who would begin rationally to dispute the foregoing argument, should be prepared to do what the Roe Court so conveniently failed to do: (1) define the criteria of a "compelling state interest"; (2) cite the authority that supports that definition; (3) set forth the constitutional basis for drawing an objective distinction between an "important" state interest and a "compelling" state interest; (4) show why, from a constitutional perspective, the State's concededly legitimate and important interest in protecting non-viable, prenatal human life does not fit

within the definition of a "compelling" state interest"; and (5) demonstrate that the application of compelling interest analysis in Roe v. Wade was really something more than a judicial exercise in arbitrariness. That is to say, a person would have to demonstrate that in Roe the Court did not do what it repeatedly has said it lacks the jurisdiction to do: "To choose one set of values over the other."[41] Or, he would have to rebut the presumption that in Roe the Court decided that the State's legitimate and important interest in safeguarding pre-viable human life is "non-compelling" because the Roe majority justices consciously or unconsciously injected into the constitutional decision-making process their private beliefs that the compulsory legalization of physician-performed abortion is, in the words of Roe author Justice Blackmun, "necessary for the emancipation of women."[42]

Here follows a criticism of the Roe Court's stated grounds for concluding that the State's interest in safeguarding the pre-viable product of human conception from physician-performed abortion is "non-compelling" relative to the mother's interest in having this product destroyed. This criticism is in some sense an academic exercise because, for the following three reasons, there is no real question that these "stated grounds" were contrived: (1) Roe author Justice Blackmun, in admitting that a conclusion would be arbitrary [43] that the State is without a "compelling interest" here, impliedly conceded that these "stated grounds" were contrived; (2) Assuming without conceding, that the exercise of an individual's fundamental right and an important state interest can on occasion unavoidably collide,[44] this fact remains: There are no known constitutionally recognized criteria by which the Court can objectively decide which of these two conflicting interests must receive the only available right of passage along a constitutional

plane. The fact that a justice articulates all the reasons why he or she chose a fundamental right over a competing or conflicting state interest does not make that choice any the less subjective. The justice must demonstrate further that the Constitution implicitly adopts or incorporates his or her articulated reasons. The whole, informed legal world knows that the pre-fetal-viability, non-compelling-state-interest holding in Roe was purely subjective. That world knows also that the Roe majority justices could not very well admit as much without admitting, also, that in being subjective, they are violating their oaths of office and Fifth Amendment due process;[45] (3) The informed legal world knows, also, that if the Roe Court would have deemed as "compelling" the State's interest in safeguarding pre-viable human life, then that Court would have destroyed the very constitutional right it created by making an end-run around the Constitution.

The Roe Court, in the course of holding that the State lacks a "compelling interest" in safeguarding the pre-viable product of human conception in the context of physician-performed abortion, observed that our laws have never recognized this product as a person in the whole sense, i.e., as a person entitled to a full panoply of legal rights. The Court observed, also, that whatever rights our laws have conferred on such a product (such as the rights to be recognized as a legal heir, to sue for prenatal injuries, and to sue for wrongful death of a parent), have been conditioned on live birth.[46] Those observations could be made of a viable fetus.

The Roe Court seems conveniently to have forgotten that almost every positive right conferred on an individual is contingent on the individual's survival. Being born alive means nothing more than

surviving life in the womb. Hence, it may be truly said that live birth merely confirms those rights acquired at an earlier date.

Furthermore, aliens, minors, and legally incompetent persons do not enjoy a full panoply of legal rights. Yet, no reasonable person would argue that, therefore, the State's interest in safeguarding the lives of such persons is not of vital importance to the State.

The reason why our laws have never accorded the unborn child full legal rights is that there is hardly a situation (other than the situation of exercising life inside the womb)[47] in which such a child is even capable of exercising any particular right. For example, the conceived unborn certainly are not capable of marrying. The Roe Court may as well have argued that the failure of the law to deem conceived unborns as being capable of committing crimes is further evidence that the law has never recognized them as persons in the whole sense.

The Roe Court's contention that the parents', unborn-child, wrongful-death action is consistent with the theory that the conceived unborn child represents only potential life (inasmuch as such an action is designed to vindicate only parental interests)[48] is just more Roe Court nonsense. No reasonable person would argue, for example, that inasmuch as a surviving spouse's wrongful death action is designed to vindicate only the surviving spouse's interest in his or her deceased spouse that, therefore, such an action is consistent with the theory that the deceased spouse represents only potential human life.

Furthermore, in several cases in which appellate courts have denied the statutory or common law-based existence of such a wrongful-death action, the rationale behind such a denial has not been that the unborn child represents only potential life, but

rather that parental damages for the loss of their unborn child are highly speculative, or are, practically speaking, recoverable in the mother's or parents' personal injury action.[49]

The only other ground offered by the Roe Court in support of its conclusion that the State's concededly legitimate and important interest in safeguarding the non-viable product of human conception in the context of physician-performed abortion is "non-compelling" is the following:

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably [not presumably, but by definition] has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability it may go so far as to prescribe abortion during that period, except when it is necessary to preserve the life or health of the mother.[50]

It is no less illogical to maintain that the State's legitimate and important interest in safeguarding a particular item is "non-compelling" because the item has not realized its further or full potential than it is to maintain that a rough or uncut diamond is not very valuable because it has yet to be cut and polished, or that crude oil is not very valuable because it has yet to be refined.

There are no such animals as "logical justifications" and "biological justifications". Therefore, it is nonsense to argue that their absence in the case of a non-viable fetus establishes that the State's interest here is "non-compelling". Neither logic

nor biology is in any sense concerned with justifying or placing value on any type of governmental or human action. Could one imagine any person making, for example, the following statement: The State is logically and biologically justified in protecting the lives of its citizens?[51]

Yet, even assuming that the concepts "logical justifications" and "biological justifications" reflect or relate to some real things, the fact remains that the Roe Court gave no hint of the logical and biological justifications it had in mind. It would, of course, constitute a logical absurdity to state that, biologically speaking, a non-viable fetus is less alive than a viable fetus.

One may want to argue that it is a question of semantics, and that what the Roe Court is saying in a very garbled manner is the following: Except in the case of viable fetuses, the theory that unborn human lives are human beings lacks a foundation in reason, science, and human experience or tradition. The problem with this argument is two-fold: The argument is saying (1) that the Roe Court decided that a human being does not come into existence until fetal viability is achieved, and (2) that the Roe Court decided that the question of the existence of a "compelling state interest" in the safeguarding of the lives of the conceived unborn stands or falls on a determination of whether such lives are human beings. However, the Roe Court expressly stated (1) that it would not decide the question, when does a human being come into existence,[52] and (2) that the existence of a "compelling state interest" in the safeguarding of the lives of the conceived unborn need not stand or fall on the answer to the question, when does a human being come into existence.[53]

Justice Blackmun, in Webster v. Reproductive Health Services (1989), remarked:

> In answering the plurality's claim that the State's interest in the fetus is uniform and compelling throughout pregnancy, I cannot improve upon what Justice Stevens has written: "I should think it obvious that the State's interest in the protection of an embryo... increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure (thumb-sucking?), to survive, and to react to its surroundings increases day by day. The development of a fetus - and pregnancy itself - are not static conditions, and the assertion that the government's interest is static simply ignores this reality...Unless the religious view that a fetus is a 'person' is adopted..., there is a fundamental and well-recognized difference between a fetus and a human being. Indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures. And if distinctions may be drawn between a fetus and a human being in terms of the state interest in their protection..., it seems to me quite odd to argue that distinctions may not also be drawn between the state interest in protecting the freshly fertilized egg and the state interest in protecting the 9-month-gestated, fully sentient fetus on the eve of birth. Recognition of this distinction is supported not only by logic, but also by history and by our shared experiences."
>
> ....Although I have stated previously for a majority of this Court that "constitutional rights do not always have easily ascertainable boundaries," to seek and establish those boundaries remains the special responsibility of this Court. In Roe, we discharged that responsibility as logic and science compelled. The plurality today advances not one reasonable argument as to why our judgment in that case was wrong and should be abandoned.[54]

Neither in Roe nor in Webster or Casey did Justice Blackmun explain or provide a reason why science and logic dictate the conclusion that the State's legitimate and important interest in safe-

guarding the life of the non-viable product of human conception is "non-compelling" relative to its mother's interest in having it destroyed. This is not surprising, given that Justice Blackmun stated elsewhere that the selection of fetal viability as the point when the State's interest becomes compelling is "arbitrary".[55] I repeat: It no more follows that the State's legitimate and important interest in safeguarding the non-viable product of human conception is "non-compelling" because that interest may not be as important as the State's interest in safeguarding the viable product of human conception, than does it follow that an uncut or rough diamond is not valuable because it has yet to be cut and polished, or that crude oil is not very valuable because it is not yet as valuable as refined oil. The whole unbiased and informed legal world knows that the pre-fetal viability, non-compelling, state-interest holding in Roe was founded on, remains founded on, and can never be founded on more than the personal or private views of a majority of justices that such an interest is non-compelling. Any attempt by a justice or legal commentator to articulate support for that holding can serve only to mask what remains here as a fundamental abuse of judicial power: the injection of private or personal opinion into the constitutional decision-making process.

It was demonstrated in Parts II, III, and IV that the history of the status of the human fetus and of abortion in English-American law supports the opposite of the conclusion that, from a historical perspective, English-American legislatures have shown no real interest in safeguarding conceived, unborn human life from abortion. Archibald Cox observed:

> [The Roe] opinion fails even to consider what I would suppose to be the most compelling interest of the state in prohibiting abortion:

> the interest in maintaining that respect for the paramount sanctity of human life which has always been at the centre of western civilization, not merely by guarding 'life' itself, however defined, but by safeguarding the penumbra, whether at the beginning, through some overwhelming disability of mind or body, or at death.[56]

The idea of balancing fundamental rights against legitimate and important state interests does not make sense. Given that the State's primary reason for even existing is to secure and facilitate the exercise of the individual's fundamental rights,[57] then it simply cannot be rationally maintained that the State can have a legitimate interest in defeating its very reason for even existing. An argument can be made that the very constitutional definition of a fundamental right includes the fact that such a right outweighs any supposed countervailing state interest. Justice Harlan, in his dissenting opinion in Duncan v. Louisiana (1968), stated: "The Court seeks to define fundamental aspects of Fourteenth Amendment '_liberty_' by isolating freedoms that Americans of the past and of the present considered more important than any suggested countervailing public objective!"[58] On the other hand, it would seem that, from a constitutional perspective, the determination of the existence of a fundamental right cannot be made without reference to whether, if such a right is found to exist, it would conflict with or infringe on an interest proper to the State. To acknowledge the existence of an interest proper to the State necessarily implies that there must be available to the State a means by which it can fully achieve or preserve that interest. More specifically, given that the protection of human prenatal life throughout gestation is part of the public order or common good (the Court in Roe conceded as much),[59] then it must follow that the State can treat its

destruction as an evil or peril to society. That being the case, then the State cannot be legitimately denied the authority to curb that evil through the enactment of a criminal abortion statute of the type that was voided by the Court in Roe. The Court, in Truax v. Raich (1915), stated: "If the state is at liberty to treat the employment of aliens as in itself a peril, requiring restraint regardless of kind or class of work, [then] it cannot be denied that the authority exists to make its measures to that end effective."[60]

It should not be overlooked that the word "ordered" in the constitutional concept of "ordered liberty" relates to the promotion and preservation of the common good. When an individual or private interest is given constitutional status at the expense of the common good, then "ordered liberty" must necessarily degenerate into disordered liberty. The Court, in Cox v. Louisiana (1965), stated: "Liberty can only be exercised in a system of law which safeguards order."[61] That aborted, prenatal lives will never appear can only give to disordered liberty an appearance of being ordered. If it is true that one must not be misled by appearance, then it is equally true that one must not be misled by its absence.

It cannot be disputed that Roe v. Wade stands for the proposition that the constitutional right of privacy mandates that a pregnant woman can privately decide to destroy an important state interest. However, the Court, in Wisconsin v. Yoder (1972), in the course of defining what "ordered liberty" is not, stated: "The very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."[62]

No rationally-oriented, free society would ever form a system of government whereby private or individual interests could be exercised at the expense of destroying one of society's basic

interests and values.[63] Yet Roe, by its own terms, stands for the irrational and anarchical proposition that the private interest in physician-performed abortion may be exercised at the expense of one of our society's basic values and interests: the protection of conceived, unborn human life. Roe marks the first time in the history of United States Constitutional Law when a private interest has been given the right to be exercised at the expense of a basic interest or value of the common good.

It is to no avail to argue that, although Roe says that the State may not safeguard its important interest in non-viable, prenatal human life from physician-performed abortion, Roe, nevertheless, does not completely undercut the State's interest in safeguarding unborn human life. This is so, or so this argument goes, because Roe allows the State, in certain circumstances, to safeguard viable, prenatal human life against physician-performed abortion (which, by the way, is no longer the case)[64]. The fact remains that Roe still stands for the anarchial proposition that the common good may be compromised in the name of guaranteeing a private interest. That one thing might be, or even is, more important than another thing, does not in the least detract from the importance of that other thing. Just as it is true that the State cannot infringe on constitutionally guaranteed liberty even though "the infraction assailed is unimportant when compared with similar, but more serious infractions which might be conceived,"[65] so, also, is it true that the duty of the State to protect one of its legitimate and important interests cannot be frustrated even though that interest is not as important as one of its other interests.

CONCLUSION

Justice Blackmun, in his dissenting opinion in Webster, remarked:

> The doctrine of stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." Today's decision involves the most politically divisive domestic legal issue of our time. By refusing to explain or to justify its proposed revolutionary revision in the law of abortion, and by refusing to abide not only by our precedents, but also by our canons for reconsidering those precedents, the plurality invites charges of cowardice and illegitimacy to our door. I cannot say that these would be undeserved.[1]

Justice Blackmun has been blinded by his personal view that the compulsory legalization of physician-performed abortion "is necessary for the emancipation of women."[2] Just as in "all" death penalty cases Justices Brennan and Marshall could see only those signs that read "this way to find cruel and unusual punishment, etc.", so, also, in abortion cases Justice Blackmun can see only those signs that read: "this way to the emancipation of women." Justice Blackmun has failed to perceive what every informed and unbiased legal mind easily perceives: The Roe Court itself failed even to begin "to explain or justify its...revolutionary revision in the law of abortion." It is Roe that is founded on nothing more than the "proclivities of individuals." Justice Robert H. Bork stated: "In Roe v. Wade Justice Blackmun "employed the right of

privacy to strike down the abortion laws of most states, [yet he did not] in the entire opinion [offer] one line of explanation [that can be legitimately considered] as legal argument."[3] Even Roe's scholarly supporters agree with Bork.[4]

The pro-Roe justices have had at least twenty years to articulate a reasoned defense of Roe. Yet, all they have articulated borders on the irrational. For example, Justice Brennan, in his dissenting opinion in Beal v. Doe (1977), stated: "'Abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy.'"[5] When stripped of morality, killing by murder and killing in self-defense are simply two different methods of dealing with killing or life. When stripped of morality, working for a living and stealing for a living are simply two different methods of dealing with the acquisition of money. Bias is impervious to reason.

If the Constitution divides our nation, then so be it - absent a constitutional amendment or amendments. The rule of law can know no compromise. It fears nothing but to be compromised. The Court, in Thornburgh v. American College of Obstetricians and Gynecologists (1986), stated: Controversy over the meaning of our nation's most majestic guarantees frequently has been turbulent. As Judges, however, we are sworn to uphold the law even when its content gives rise to bitter dispute."[6]

The Roe majority and concurring justices superimposed on the Constitution their private views on abortion in order to try and solve what they viewed as "one of the profound problems of the modern day." They presumed to be wiser than the Law. They succeeded only in dividing the nation, and breeding contradiction into our legal structures and into the constitutional decision-

making process. In mixing their social policies with constitutional law, they further opened the Court to political attacks that threaten judicial independence.[7] They not only humiliated the individual states of the United States, but also forfeited their credibility as impartial adjudicators, and made a mockery of the science of constitutional interpretation.

As long as Roe stands, it may be truly said that we are a nation governed by men, and not by laws or the "rule of law". As Roe came about through judicial fiat, it in truth threatens constitutionally guaranteed liberty. The Court, in Morrison v. Olson (1988), stated: "'The Constitution diffuses power the better to secure liberty'".[8] Roe v. Wade infringes upon the implicit Constitutional freedom of a person to live in a society that is not ruled by judicial fiat or the illegitimate use of judicial power.

The Roe opinion served only to mask an exercise in judicial fiat. That is why the following observation of constitutional law professor Erwin Chemerinsky cannot get off the ground: "The obligation to write an opinion justifying its conclusion as being principled, not arbitrary, and consistent with precedent, substantially limited the [Roe] Court in deciding [the]...issue presented in Roe v. Wade."[9] The Roe Court simply discarded its moral obligation to produce or write a principled opinion. Legal commentators are nearly unanimous in stating that the Roe opinion is unprincipled.

The premises of Roe v. Wade have not only been disproved, but their virtual opposites have been proved. Nothing the Court said about Roe in Planned Parenthood v. Casey substantiates Roe's premises. The Casey Court did not, for example, articulate the methodology of fundamental rights it implicitly employed or

adopted, and it did not attempt to demonstrate why and how the Constitution recognizes that methodology.

In truth, it would be in keeping with the doctrine of stare decisis for the Court to reconsider Roe.[10] On such reconsideration, it would be in keeping with the Constitution for the Court to overrule Roe v. Wade in its entirety, and to establish the fetus as a Fourteenth Amendment person.

Justice Stevens, in his concurring opinion in Thornburgh, stated: If the human fetus is in truth a Fourteenth Amendment person or a human being, then "the permissibility of terminating the life of the fetus could scarcely be left to the will of the state legislature."[11] There is no "if" here. The question is not whether Roe was wrongly decided. The only question is whether the potential, if not actual adverse consequences of that erroneous decision are too enormous as to admit that the decision is wrong.

In Roe the human fetus implored the Court to keep faith with "the principle of the impartiality of the adjudicator". For all its imploration, the fetus received a death sentence.

Make no mistake about this: The kindest thing that can be said about the Roe decision is that it serves as one more monument to man's infinite capacity to deceive himself, in the name of humanity, as always, of course.

Notes to the Introduction

1. On the presuppositions relating to the human fetus, see infra, text (of Part II) accompanying note 24; infra, text (of Part V) accompanying notes 13-43 & 61-65; and infra, text (of Part VI) accompanying notes 1-28. On "B"'s appeal to anti-religious prejudice, see infra text (of Part II) accompanying notes 23-26; infra, text (of Part V) accompanying notes 60-68; and infra, text (of Part IV) accompanying note 228. See also L. Tribe, Abortion: The Clash of Absolutes 116 (1990); and John T. Noonan, A Private Choice: Abortion in America in the Seventies 53-59 (1979). In Harris v. McRae, 448 U.S. 297, 318-319 (1980), it was argued that the Hyde Amendment (see infra, text accompanying note 25) violates the First Amendment because "it incorporates into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences". The Harris Court responded: "it does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions' [citations]. That the Judeo-Christian religions oppose stealing does not mean that a State...[cannot constitutionally] enact laws prohibiting larceny'". See also Engel v. Vitale, 370 U.S. 421, 434 (1962) ("the history of man is inseparable from the history of religion"); Meachum v. Fano, 427 U.S. 215, 230 (1976) (Justice Stevens dissenting) ("I had thought it self-evident that all men were endowed by their Creator with Liberty as one of the cardinal inalienable rights. It is that basic freedom which the Due Process Clause protects..."); infra, text (of Part V) accompanying note 16; In re Gault, 387 U.S. 1, 47 (1967) ("The roots of the privilege [against self-incrimination]...tap the basic stream of religious and political principle [see Talmud Sanhedrin 25a: 'No man can incriminate himself'] because the privilege reflects the limits of the individual's attornment to the State and - in a philosophical sense - insists upon the equality of the individual and the State."); Coffin v. United States, 156 U.S. 432, 435 (1895) ("The rule [presumption of innocence] thus found in the Roman law was, along with many other fundamental and humane maxims of that system, preserved for mankind by the canon law."); Theodore Plucknett, A Concise History of the Common Law 8-9 (5th ed., 1956); ("[T]he Church['s]... moral ideas revolutionize[d] English law. Christianity...inherited from Judaism an outlook upon moral questions which was ...individualistic....[R]esponsibility for actions...shifted

from the...[tribe] to the...individual who did the act; and the Church (and later the [common] law) will judge the act... [according to the actor's] intention".); F.M. Gedicks & R. Hendrix, Essay: Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America, 60 Cal. L. Rev. 1579, 1618-1619 (1987) ("Virtually all of the conceptual pillars of liberal democracy - impartial adjudication, judicial review, liability for negligence, the presumption of innocence, habeas corpus, equal protection of the laws, good faith - have an origin or justification in the Judeo-Christian tradition as reflected in the Bible."); and infra, text (of Part IV) accompanying note 95, as well as the references set forth in that note.

2. 451 U.S. 527, 531. And see infra, text of Part II accompanying note 61 & 181-82. Robert Goldstein, in his Mother-Love and Abortion: A Legal Interpretation (1988), remarked: "Critics maintain that the [Roe] Court failed to offer proper constitutional support - textual, structural, or historical - for...[its decision]. Such criticism and the appropriate rules of constitutional interpretations...are outside the scope of this essay..." That statement, of course, necessarily reduces Goldstein's book to a "non-legal" interpretation of Roe v. Wade. In law, any interpretation of a court decision that does not qualify as a "legal interpretation" does not qualify period as an interpretation.

3. 116 Conn. 526, 531. See infra, text accompanying note 5, as well as that note itself. See also Gray v. Mississippi, 481 U.S. 648, 668 (1987) ("the impartiality of the adjudicator goes to the very integrity of the legal system"); Gomez v. U.S., 490 U.S. 858, 876 (1989); Schweiker v. McClure, 456 U.S. 188, 195 (1982) ("due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities"); Withrow v. Larkin, 421 U.S. 35, 46-47 (1975); Patterson v. Colorado, 205 U.S. 454, 462 (1907); and In re Murchison, 349 U.S. 133, 136 (1955). Socrates stated that '"[f]our things belong to a judge: ...and to decide impartially."' (People v. Hefner (1981), 127 C.A.3d 88, 92).

The right of a state (as a party to an action or an appeal) to an impartial adjudicator or due process of law is no less implicit in our constitutional scheme than is the right to interstate travel. See Zobel v. Williams, 457 U.S. 55, 66-67 (1982) (Justice Brennan concurring).

4. See, generally, David Shaw's four-part series on Abortion and the Media, in The Los Angeles Times, Sunday-Wednesday, July 1-4, 1990, p. A-1 (on each of those four days). Justice Scalia, in his speech to the Los Angeles World Affairs Council and Pepperdine University School of Law in August of 1990 (reproduced in part in Justice Scalia, A Subject Too Complex: The Law is so Specialized that the General Media Cannot Cover It Properly, The Los Angeles Daily Journal, Thurs., Sept. 6, 1990, p.6), stated:

> "The general-circulation press will ordinarily report the outcome of the case and its practical consequences. That is fair enough. But the public should understand [that this limited information is]...not sufficient, [and] not necessarily even relevant data for deciding whether the [case was correctly decided]....
>
> You have to know the reasons given [in support of the decision in the case, and you] must understand enough about the area of law [that is involved in the case]....You must also know whether those reasons are reconcilable with reasons given in prior cases, so that the law has not been thrown into a turmoil. [Finally], you must know whether [the reasons given in support of the decision in the case] are really true. You [do not]...get...that information out of a newspaper account [of the case]."

5. See, e.g., Roe v. Wade, 410 U.S. 113, 116 ("Our task...is to resolve the issue [of whether the Fourteenth Amendment's due process clause guarantees to an unmarried woman a right to undergo a physician-performed abortion], by constitutional measurement, free of emotion and predilection. We seek earnestly to do this."); Stanford v. Kentucky, 492 U.S. 361, 369 (1989) ("'Eighth [and Fourteenth] Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices'"); Id. at 379 ("'[T]hose institutions which the Constitution is supposed to limit' include the Court itself. To say... [that the justices can legitimately decide questions of constitutional law] on the basis of personal value judgments is to replace judges of the law with a committee of philosopher kings"); Oregon v. Mitchell, 400 U.S. 112, 246 (1970) (courts, no less than legislatures, "are bound by the provisions of the Fourteenth Amendment"); Turner v. United States, 396 U.S. 398, 426

(1970) (Justice Douglas dissenting) ("I wholly...and permanently reject the so-called 'activist' philosophy of some judges which leads them to construe our Constitution as meaning what they now think it should mean in the interest of 'fairness and decency' as they see fit."); Poe v. Ullman, 367 U.S. 497, 544 (1961) (J. Harlan dissenting) ("Each new claim to Constitutional protection must be considered against a background of constitutional purposes as they have been rationally perceived and historically developed....'We may not draw on our merely personal...notions and disregard the limits that bind judges in the judicial function.'"); 1 Coke's Institutes 976 (1628) ("no man out of his own private reason ought to be wiser than the law, which is the perfection of reason"); and 1 Blackstone, infra note 154 (of Part IV) at 69 (the judge "is sworn to decide, not according to his own private judgment, but according to the known laws and customs of the land"). See also supra, note 3; infra, note 50; and infra, note 47 (of Part II) (Barkus quote).

6. (The Justice Kennedy quote is cited as follows: Quoted in Richard C. Reuben, Man in the Middle, in California Lawyer, October 1992, p. 35). See infra, text accompanying notes 15 & 57; and supra, text accompanying notes 3 & 5, as well as the authorities set forth in those two notes.

7. See Roe v. Wade, 410 U.S. 113, 153-54, 156-58 & 162-164; and Roe's companion case, Doe v. Bolton, 410 U.S. 179 (1973). (But see infra, note 64 [of Part VI].) See also Connecticut v. Menillo, 423 U.S. 9, 10-11 (1975) ("The rationale of our decision [in Roe] supports continued enforcement of criminal abortion statutes against non-physicians."). The constitutional right to an abortion, as defined in Roe, has been extended to married women, and to a somewhat lesser extent, to women less than 18 years old. See, e.g., Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Planned Parenthood v. Casey, 505 U.S. ____, 120 L.Ed 2d 674 (1992); and Colautti v. Franklin, 439 U.S. 379 (1979). But see Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (a state statute, which prohibits the use of public employees and facilities to do abortions not necessary to preserve the pregnant woman's life, is not unconstitutional under Roe v. Wade); and Rust v. Sullivan, 500 U.S. ___, 114 L.Ed 2d 233 (1991) (Congress can constitutionally make the federal funding for state family planning services conditional on family planning counselors, nurses, and physicians, agreeing not to inform their clients or patients of the

availability of the abortion option). On the Courts' abortion decisions in general, see K. Hall (ed.), The Oxford Companion to the Supreme Court of the United States 3 (Abortion) (1992).

8. On substantive due process, see, e.g., United States v. Salerno, 481 U.S. 739, 746 (1987); Planned Parenthood v. Casey, 505 U.S. __, 120 L.Ed 2d 674, 695 (1992); and infra, text (of Part I) accompanying notes 28-30 & 54. On strict scrutiny analysis, see Roe, 410 U.S. at 155; infra, text (of Part II) accompanying notes 30-31; infra, text (of Part VI) accompanying notes 19-23; infra, note 62 (of Part II) (the Eisenstadt quote); and Tribe & Dorf, infra note 48 (of Part I) at 72-73.

9. 505 U.S. ____, 120 L.Ed 2d 674. The five justices are Chief Justice Rehnquist and Justices White, Scalia, Kennedy (per the lead opinion in Webster), and Justice O'Connor (per her dissents in Thornburgh and Akron). See Webster v. Reproductive Health Services, 492 U.S. 490, 519 (1989) ("[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability....'[T]he State's interest, if compelling after viability, is equally compelling before viability.'"); and Thornburgh v. American College of Obstetrics and Gynecologists, 476 U.S. 747, 828 (1986) (Justice O'Connor dissenting) ("I do...remain of the views expressed in my dissent in Akron, 462 U.S., at 459-466. The State has compelling interests...in protecting potential human life, and these interests exist 'throughout pregnancy.'"). See also Goldman v. Weinberger, 475 U.S. 503, 530 (1986) (J. O'Connor dissenting) (in the context of strict scrutiny analysis, the State "must show that an unusually important interest is at stake whether that interest is denominated compelling, of the highest order or overriding"). Since the terms "compelling state interest" and "overriding state interest" are synonymous, and since a "compelling state interest", by definition, overrides a fundamental right (see supra, text accompanying note 8, as well as the authorities cited in that note), then it would appear from Justice O'Connor's foregoing "compelling interest" statements that she necessarily committed herself to the opinion that Roe v. Wade is constitutionally unsound, notwithstanding that she is of the opinion that a woman's interest in undergoing a physician-performed abortion is her fundamental right. (In Guam Society of Obstetricians and Gynecologists v. Ada, 962 F.2d 1366, 1372-74 (9th Cir., 1992), the 9th Circuit Court of Appeals, in the course of commenting on Justice O'Connor's fore-

going Thornburg and Akron "compelling interest" observations, failed to understand that by definition a compelling state interest overrides a fundamental right in all instances.) In Planned Parenthood v. Casey, 505 U.S. ____, 120 L.Ed 2d 674 (1992), Justice O'Connor failed to acknowledge that her foregoing Thornburgh and Akron statements contradict her position in Casey. (And see, infra, text (of Part II) accompanying note 60, as well as that note 60). Justice Kennedy, without explanation, simply abandoned his Webster position in Casey.

Neither in Roe nor in Planned Parenthood v. Casey (1992), 505 U.S. ___, 120 L.Ed 2d 674 (1992) did the Court explain why the Constitution dictates that the State's legitimate and important interest in safeguarding the unborn product of human conception is "non-compelling" or non-overriding until fetal viability is achieved. (See infra, text (of Part VI) accompanying notes 43-56.) See also Perry (The Constitution), infra, note 33; Tribe (American Constitutional Law), infra, note 33; and Dworkin, infra note 12 (of Part V) at 52 (Col. 2). Roe author Justice Blackmun expressly admitted that this aspect of the holding in Roe is arbitrary. In a confidential Memorandum to the Conference of Supreme Court Justices (November 21, 1972) regarding Roe v. Wade, he wrote: "'You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.'" (Quoted from the Blackmun memorandum as reproduced in Bob Woodward, The Abortion Papers, in The Washington Post, Sunday, January 22, 1989, D1 at D3). That does not say much for the central purpose of the due process clauses: to prohibit "arbitrary governmental actions", including those performed by justices in the course of legal proceedings. (See supra, note 5.) What is even worse, it may be that Roe's fetal viability-abortion cut-off point holding ultimately derived from no more than a memo by one of Justice Marshall's law clerks. See Jeffrey Rosen, Inside the High Court: Justices Spend Little Time Debating the Constitution, in the Los Angeles Daily Journal, Wednesday, June 23, 1993, p. 6:

> [Justice] Marshall's clerks wrote detailed recommendations about every case, on which Marshall usually scrawled his assent. The Roe v. Wade [Marshall] file, for example, includes a memo from a Marshall clerk urging the justice to ask Harry Blackmun to draw the line for abortions at fetal viability,

rather than at the end of the first trimester. Marshall obliged, and after further urging from Brennan, Blackmun extended the deadline.

10. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 34 (1979) (Justice Marshall dissenting in part) (quoting from Justice Frankfurter's concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath (1951), 341 U.S. 123, 171).

11. Justice W.J. Brennan, Jr., In Defense of Dissents, 37 Hastings L.J. 427, 435 (1986). See also Justice Scalia, supra note 4 (the concept of "process" in the constitutional decision-making process is a value unto itself and not...a means to achieving a desirable end. The result is validated by the process, not the process by the result); and Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971) ("it is procedure that marks much of the difference between rule by law and rule by fiat").

12. See infra, text (of Part II) accompanying notes 1-2.

13. This is implicit in the Roe observation set forth infra, in text (of Part II) accompanying note 1.

14. See infra, text (of Part II) accompanying note 10.

15. See infra, text (of Part I) accompanying notes 8-10, and the authorities in the last note (10).

16. See Roe v. Wade, 410 U.S. at 153 & 155.

17. See Roe v. Wade, 410 U.S. at 162-64 (see infra, text (of Part VI) accompanying note 50); and Doe v. Bolton, 410 U.S. at 192. See also Beal v. Doe, 432 U.S. 438, 445-46 (1977) ("We expressly recognized in Roe the 'important...[state] interest...in protecting the potentiality of human life.' That interest...is a significant state interest existing throughout the course of the woman's pregnancy."); Maher v. Roe, 432 U.S. 464, 478 (1977); and infra, text (of Part II) accompanying note 24.

18. 410 U.S. at 156-158. See infra: Part V; Part VI accompanying notes 1-17; Part IV accompanying note 4 (and that note); and Part II between notes 196 & 197.

19. See infra, text (of Part I) accompanying notes 6-16, and infra, text (of Part V) accompanying notes 53-55, respectively.

20. See Brennan, supra note 11; and Boys Markets, Inc. v. Clerks Union, 398 U.S. 235, 240-41 (1970).

21. See US. v. Reliable Transfer Co., 421 U.S. 397, 409 n.15 (1975).

22. 321 U.S. 649, 665. See also Payne v. Tennessee, 501 U.S. ___, 115 L.Ed 2d 720, 737, (including n. 31) (1991); Raoul Berger, The Name of the 'Game Is Two Can Play', Los Angeles Times, Tues., Aug. 27, 1991, p.B7 (quoting Professor Philip Kurland: "'The list of opinions destroyed by the Warren Court"...reads like a table of contents from an old constitutional law casebook."); and Library of Congress Congressional Research Service, The Constitution of the United States, Analysis and Interpretation, 2115-2127 & Supp. (1987) (identifies nearly 200 instances in which the Court has overruled its own decisions).

23. Thornburgh v. American Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 779 (1986) (concurring opinion). See also Webster v. Reproductive Health Services, 492 U.S. 490, 518 (1989).

24. See infra, text (of Conclusion) accompanying note 1; Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (and 485 U.S. 617, 618-619 (1988)). See also Coke, and Blackstone, infra note 119 (of Part IV).

25. Michael Perry, Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on "Harris v. McRae", 32 Stan. L. Rev. 1113, 1114 (1980) (footnotes omitted). Assuming, without conceding, that Roe represents legitimate constitutional law (particularly Roe's holding that access to physician-performed abortion is a woman's fundamental right), then it is fair to conclude that the decisions in such cases as Harris v. McRae 448 U.S. 297 (1980), Maher v. Roe, 432 U.S. 464 (1974), Beal v. Doe, 432 U.S. 438 (1977), Webster (see supra, note 7); and Rust v. Sullivan, 500 U.S. ___, 114 L.Ed 2d, 233 (1991) (see supra, note 7) are erroneous. See infra, text (of Part II) accompanying note 169 (as well as that note).

26. See Perry (The Constitution), infra note 33 at 144-145; and Mario M. Cuomo, Religious Belief and Public Morality, "The New York Review of Books" 32, 32-33 (October 25, 1984).

27. See Glendon, Abortion and Divorce in Western Law 41-45 (1987).

28. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 426 (1857). The Tenth Amendment is reproduced infra, in note 52 (of Part I).

29. 441 U.S. 418, 431. See also Martin v. Ohio, 480 U.S. 228, 236 (1987); and Stanford v. Kentucky, 492 U.S. 361, 377-78.

30. See infra, text accompanying note 58.

31. See infra, note 33; Bopp & Coleson, infra note 35 at 186-191; and Glendon, supra note 27 at 44 ("[T]he opinions of leading constitutional law writers have been marshaled against [Roe]... Cox,...Bickel,...Ely...Wellington,...Epstein, and...Freund have ...been...critical...[A]t least two [Tribe and Perry] of Roe's ...defenders would...be opposed to [Roe] if they consistently applied their own...theories of constitutional hermeneutics...."). Alan Dershowitz stated that Roe v. Wade is illegitimate constitutional law and should be overturned. See G.M. Bush, Dershowitz Big Draw At Temple, Los Angeles Daily Journal, Thursday, January 30, 1992, Section II, p. 1 at p. 16.

32. See Bobbitt, infra note 33 at 152.

33. See, e.g., P. Bobbitt, Constitutional Fate: Theory of the Constitution 157 (1982) ("I think the universal disillusionment with Roe v. Wade can be traced to the unpersuasive opinion in the case, and I will propose an ethical rationale that may be more satisfying than the doctrinal and textual approaches taken by Justice Blackmun."); Wertheimer, infra note 51 (of Part VI) at 105 ("Though...Roe has many [scholarly] friends, virtually all of them seem embarrassed by...[some of its] reasoning"); D. Regan, Rewriting Roe v. Wade, 77 Mich. L. Rev. 1569, 1569 (1979) ("[E]ven people who approve of the...[Roe decision] have been dissatisfied with the Court's opinion. Others before me have attempted to explain how a better opinion could have been written."); Koppleman, infra note 42 at 3 ("Roe v. Wade is an unpersuasive opinion, and the root of its unpersuasiveness is the...[Roe]] Court's failure to ground its decision...in the text of the Constitution....[T]he Court ignored its 'obligation to trace its premises to the Charter from which...[the Court] derives its authority'..."); M. Perry, Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process, 23 U.C.L.A. L. Rev. 689, 692 (1976) ("The

gravamen of this criticism is that Roe lacks any methodological justification...My...aim is to help resolve the methodological crisis foreshadowed by Griswold..., and brought to a head by Roe"); M. Perry, The Constitution, the Courts, and Human Rights 144 (1982) (The Court's decision in the Abortion Cases...remains problematic...in major part...because the Court failed to articulate [an]...argument in support of its bare assertion that, in the pre-viability period of pregnancy, a woman's interest in terminating her pregnancy is weightier than governments' in preventing the taking of fetal life"); L. Tribe, The Supreme Court 1972 Term., 87 Harv. L. Rev. 1, 7 (1973) ("One 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."); and L. Tribe, American Constitutional Law 1349 (2nd ed., 1988) ("nothing in the [Roe]...opinion provides a satisfactory explanation of why the fetal interest should not be deemed overriding prior to fetal viability"). See also Bopp & Coleson, infra note 35 at 188-191. But see Heymann & Barzelay, The Forest and the Trees: Roe v. Wade and Its Critics 53 B.U.L. Rev. 765 (1973) (see infra, text [of Part II] accompanying notes 177-196); Comments, 34 Ark. L. Rev. 276 (1980); and Dworkin, infra note 12 (of Part V).

34. Brennan, supra note 11. And see supra, text accompanying n. 11.

35. Bopp & Coleson, The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal, 3 BYU J. Pub. Law. 181, 189 (1989). See, e.g., Tribe (The Supreme Court 1972 Term), supra note 33; Tribe (American Constitutional Law), supra note 33 at 1349-1350 (including notes 87-88); and id. at 1351-1358. And see Glendon, supra note 27 at 44 (including note 176); and Bork, infra note 3 (of Conclusion) at 201 & 203.

36. See infra, text accompanying notes 38-43 (as well as works cited therein); and infra, text of (Part I) accompanying note 6-16.

37. See infra, text (of Part I) accompanying notes 45-46.

38. See infra, Part I; and infra, text (of Part II) accompanying notes 149-165. See also, e.g., Lillian BeVier, What Privacy Is Not, 12 Harv. J. Law & Pub. Policy 99, 99 & 103 (1989).

39. See, e.g., Cruzman v. Director, Missouri Department of Health, 497 U.S. 261, 269 (1990); Planned Parenthood v. Casey, 505 U.S.

__, 120 L.Ed 2d 674, 698; Schneider, The Dialectic of Rights and Politics: Perspectives from the Women's Movement, 61 N.Y.U.L. Rev. 589, 638 (1988); Dworkin, infra note 12 (of Part V) at 51 & 52; Fuqua, supra note 33; and Barnes v. Glen Theatre, Inc., 501 U.S.___, 115 L.Ed 2d 504, 517 (Justice Scalia Concurring) (1991).

40. See Tribe, supra note 1 at 98 & 94; Whalen v. Roe, 429 U.S. 589, 599-600 (1977); and E. Chemerinsky, Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy, 31 Buffalo L. Rev. 107, 126-26 & 142-145 (1982).

41. See Jed Rubenfeld, The Right of Privacy, 102 Har. L. Rev. 737, 788-791 & 807 (1989).

42. See N. Vieira, "Hardwick" and the Right of Privacy, 55 U. Chi. L. Rev. 1181, 1189-1191 (1988); A. Koppelman, Forced Labor: A Thirteenth Amendment Defense of Abortion, in Report: A Supplement to the Los Angeles Daily Journal, May 31, 1991, p. 3.

43. See, respectively, Kenneth L. Karst, The Freedom of Intimate Association, 89 Yale L.J. 624, 640-41 (1980); Regan, supra note 33; and Ronald Dworkin, Life's Dominion 155, 160-168 & 175 (1993).

44. 300 U.S. 379, 391. See the Justice Harlan-Poe v. Ullman quote, supra note 5. See also infra, text (of Part II) accompanying notes 39-77 & 177-196; and infra, note 184 (of Part II).

45. See infra, Parts II, III, & IV. And see, e.g., State v. Alcorn, 7 Ida. 599, 613-614 (1901) ("The crime [criminal abortion] for which appellant has been convicted is one of the worst known to the law."); the State v. Moore quote, infra note 79 (of Part II); and infra, note 97 (of Part II).

46. See, e.g., Faretta v. California, 422 U.S. 806, 820 n.16 (1975); and Ingraham v. Wright, 430 U.S. 651, 669 (1977). See also infra, note 184 (of Part II).

47. Tribe, supra note 1 at 82-83 (deletions in original). (Reprinted with permission of W.W. Norton Co., Inc., Publisher.)

48. See supra, text (of Introduction) accompanying notes 2-3.

49. 338 U.S. 25, 27. See also Harper v. Virginia, 383 U.S. 663, 669 (1966) ("we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed...the limits of fundamental rights"); and Nat'l Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (J. Frankfurter, dissenting) ("Great concepts like...[Fourteenth Amendment] 'liberty' ...were purposely left to gather meaning from experience").

50. 492 U.S. 361, 369. See also Thompson v. Oklahoma, 487 U.S. 815, 874 (1989) (Justice Scalia, dissenting) ("we have been appointed to discern, rather than decree", "'evolving...[strains] of... [liberty]'"); and Oregon v. Mitchell, 400 U.S. 112, 202-203 (1970) (J. Harlan, dissenting in part, concurring in part) (the Court "has no inherent general authority to establish the norms for...[our] society. It is limited to elaboration and application of the precepts ordained in the Constitution by the political representatives of the people."). As to the process by which the Court identifies fundamental rights or evolving strains of liberty, see infra, text (of Part II) accompanying notes 39-77. See also Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. _, 113 L.Ed 2d 1, 33 (1991) (Justice Scalia, concurring) (In recent years several state legislatures have abolished or restricted the practice of awarding punitive damages. "Perhaps, when the operation of that [legislative] process has purged a historically approved practice from our national life, the Due Process Clause would permit this Court to announce that...[the practice is no longer in accord with...[due process of law].")

51. Blackmun, infra note 9 (of Part II). See supra, text accompanying notes 3 & 5, as well as those notes.

52. Justice William Brennan, Jr., The Constitution of the United States: Contemporary Ratification, presented at the Text and Teaching Symposium, at Georgetown University, Washington, D.C., on October 12, 1985. (I am grateful to the staff of Justice Brennan for sending to me a copy of this presentation.)

53. Quoted in The Los Angeles Times, Sunday, October 12, 1986, (The Book Review), p. 11.

54. 400 U.S. 112, 251 (Justice Brennan concurring in part and dissenting in part).

55. See supra, text accompanying notes 2 & 3.

56. See Justice Scalia, supra note 4 (in a result-oriented approach to constitutional interpretation "text, tradition and precedent are not the determinants of the decision, but rather obstacles to be overcome en route"); supra, text accompanying note 11, as well as that note; supra, note 5; infra note 54 (of Part II); and Gideon Kanner, Who Needs More Judges? Too Many Jurists Producing too Many Conflicting and Erroneous Rulings Is the Real Cause of Court Congestion, in The Los Angeles Daily Journal, Fri., Oct. 5, 1990, p. 6 ("Recent decades has seen an alarming decline in judicial intellectual self-discipline, and a growing trend toward result-orientation....The temptation to govern or play King Solomon rather than to judge...leads...the judiciary [into]...bitter political battles over public policy....").

57. Tribe (American Constitutional Law), supra note 33 at 399 (footnote omitted). See also Tribe, infra note 23 (of Part II) at 1101.

58. 410 U.S. at 165.

59. See infra, text (of Part I) accompanying note 25.

Notes to Part I

1. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Justice Brandeis dissenting).

2. See infra, text (of Part II) accompanying note 149; and infra, note 7 (of Part II).

3. 492 U.S. 490, 546-47.

4. See infra, text accompanying notes 6-16. Neither the majority opinion in Bowers (no fundamental right to engage in homosexual sodomy [see infra, text (of Part II) accompanying notes 50-54] nor the majority opinion in Washington v. Harper, 494 U.S. 210, 221-222 & 2288 (1990) (mentally ill prisoner has a fundamental right "in avoiding the unwanted administration of anti-psychotic drugs") relied on or even mentioned a constitutional right to privacy. See also Zinerman v. Burch, 494 U.S. 113, 131 (1990) (mentally ill person, except under certain circumstances, has a fundamental right not to be committed involuntarily); and Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 279 n.7 (1990) ("Although many state courts have held that the common law-based right to refuse [medical] treatment is encompassed by a generalized constitutional right to privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest. See Bowers v. Hardwick (1986), 478 U.S. 186, 194-195."). And see Planned Parenthood v. Casey, 505 U.S. ____, 120 L.Ed 2d 674, 695-698 (1992) (the Casey Court affirmed Roe v. Wade on liberty grounds, and not on privacy grounds).

5. Whalen, 429 U.S. 589, 598 n. 23; Davis, 424 U.S. 693, 712-13; Maher, 432 U.S. 464, 471-72.

6. See infra, text accompanying notes 8-10 (as well as the authorities and works in the latter note (10)); and infra, text (of Part II) accompanying note 172.

7. 422 U.S. 806, 819 n.15. See also, e.g., id. at 819-820; NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462-63 (1958); Griswold v. Connecticut, 381 U.S. 479, 483-84 (1965); Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984); Runyon v. McCrary, 427 U.S. 160, 175 (1976); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579-80 (1980) (lead opinion); Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974); Carey v. Population Services International, 431 U.S. 678, 688-89 (1977); and Zobel v. Williams, 457 U.S. 55, 66-67 (1982) (Justice Brennan concurring). And see infra, text (of Part II) accompanying note 180.

8. 410 U.S. at 152. It is unclear whether the Court in Roe applied the fundamental rights analysis employed by the Court in Palko v. Connecticut, 325 U.S. 319. Compare the fundamental rights analysis discussed infra, at text (of Part II) accompanying notes 39-65 to the one discussed at infra, text (of Part II) accompanying notes 149-165. See also supra, text accompanying notes 1-2, 59 & 61. And see Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503 n.12 (1977).

9. 424 U.S. 693, 713 (citations omitted).

10. 413 U.S. 49, 65. See also Whalen v. Roe, 429 U.S. 589, 598 n.23 (1977); Maher v. Roe, 432 U.S. 464, 472 n.7 (1977); Paul G. Kauper, Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case, 64 Mich. L. Rev. 235, 253 (1965) ("Indeed, in order to command the support of a majority of the Court, it is still essential to find that the right embraced within penumbras of the specifics of the Bill of Rights is a fundamental right"); Rubenfeld, supra, note 41 (of Introduction) at 751 note 83 ("The Court has repeatedly made clear that [the status of]...fundamentality must be present in the conduct at issue before the right of privacy will apply"); and O'Brien, infra text accompanying note 15. See also, infra, text (of Part II) accompanying note 172.

11. See, e.g., Patterson v. New York, 432 U.S. 197, 201-202 (1977); Moore v. City of East Cleveland, 431 U.S. 494, 503 n.12 (1977); Ingraham v. Wright, 430 U.S. 651, 673-674 (1977); Benton v. Maryland, 395 U.S. 784, 794-95 (1969); Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968); Malloy v. Hogan, 378 U.S. 1, 9-10

(1964); Griswold v. Connecticut, 381 U.S. 479, 486-88 (1965) (Justice Goldberg concurring); id. at 500 (Justice Harlan concurring); Grosjean v. American Press Co. Inc., 297 U.S. 233, 245 (1936); Powell v. Alabama, 287 U.S. 45, 67-68 (1932); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); and Hurtado v. California, 110 U.S. 516, 536 (1884). See also infra, text (of Part II) accompanying nn. 39-46, as well as the cases cited in those notes.

12. 388 U.S. 1, 12.

13. 338 U.S. 25, 27-28 (overruled on different grounds in Mapp v. Ohio, 367 U.S. 643 (1961)).

14. See supra, text (of Introduction) accompanying notes 7-8; infra, text (of Part II) accompanying notes 30-32; infra, text (of Part VI) accompanying notes 19-23; infra, text accompanying note 46 (as well as the cross-references set forth in that note); and infra, text (of Part II) accompanying notes 175 & 180-184.

15. David O'Brien, Privacy, Law, and Public Policy 189 (1979). See also Peter Westen, On Confusing Ideas: Reply, 91 Yale L.J. 1153, 1153 (1982) ("Any concept in law...that is...empty...should be banished as an explanatory norm.").

16. On Bowers, and similar such examples here, see supra, note 4. And see infra, text (of Part II) accompanying notes 50-54; and infra, text accompanying note 62-63.

17. The Rodriguez quote is cited as 411 U.S. 1, 34 n.76. Rodriguez unequivocally stands for the proposition that the criterion of a fundamental right for purposes of strict scrutiny analysis is whether or not the claimed right is constitutionally guaranteed. See id. at 33. See also City of Dallas v. Stanglin, 490 U.S. 19, 23-24 (1989). However, in Maher v. Roe, 432 U.S. 464, 471 (1977), the Court stated that in order for a claimed right to receive the benefit of strict scrutiny analysis the claimed right must qualify not only as a constitutional right, but also as a fundamental right: "Accordingly, the central question...is whether the regulation 'impinges upon a fundamental right explicitly or implicitly protected by the Constitution.'". To the same effect is Harrah Independent School District v. Martin, 440

U.S. 194, 199 (1979), as well as the lead opinion in Clements v. Fashing, 457 U.S. 957, 963 (1982). Maher, Harrah and Clements forgot here that all fundamental rights are constitutionally guaranteed. (See supra, text accompanying notes 11-13, as well as the authorities set forth in those notes. And see Planned Parenthood v. Casey, 500 U.S. ___, 120 L.Ed 2d 674, 695 (1992).) To add to this confusion, these three cases cite here Rodriguez.

18. See supra, text accompanying notes 8-10, as well as the additional authorities and works set forth in the latter note (10).

19. See infra, text (of Part II) accompanying notes 52-54.

20. See Plyler v. Doe, 457 U.S. 202, 231-32 (Justice Blackmun concurring). Justice Blackmun thinks that the Rodriguez fundamental rights criterion will preclude justices from adding rights to the Constitution through judicial predilection. Yet there is nothing to stop the justices from resorting to judicial predilection in order to conclude that a right is "implicit" in the Constitution. See Griswold v. Connecticut, 381 U.S. 479, 500-501 (1965) (Justice Harlan concurring).

21. See Hurtado v. California, 110 U.S. 516, 537-38; and United States v. Miller, 471 U.S. 130, 134-35 (1985). See also Tribe (American Constitutional Law), supra note 33 (of Introduction) at 773 n.25; and Tribe, supra note 1 (of Introduction) at 87.

22. See the authorities cited supra, in notes 11-13.

23. See Roe v. Wade, 410 U.S. at 152; and Griswold v. Connecticut, 381 U.S. 479, 482-485.

24. See Woodward, supra, note 9 (of Introduction) (Justice Blackmun: "'I would dislike to have to undergo another assault on...[the Vuitch-type] statute [see infra, text of (Part V) accompanying notes 53-55] based, this time, on privacy grounds. I...am willing to continue the approval of the Vuitch-type statute on privacy as well as on vagueness.'") See also Bernard Schwartz The Unpublished Opinions of the Burger Court 89-90 (1988).

25. See, respectively, Joy Horowitz, Dr. Amnio, in Los Angeles Times Magazine (a magazine insert in the Sunday edition of the Los Angeles Times), April 23, 1989, p.12 at p.25 (first insertion mine); Karen Tumultz, The Abortions of Last Resort, Los Angeles Times Magazine, January 7, 1990, p.10 at p.35 (insertions & deletions mine); Los Angeles Times, July 9, 1991, p.A19; and Los Angeles Times, Thurs., August 27, 1991, p.A18. See also BeVier, supra note 38 (of Introduction) at 99 & 101-103.

26. See supra, text (of Introduction) accompanying notes 7-8; infra, text (of Part II) accompanying notes 30-32; and infra, text (of Part VI) accompanying notes 19-23.

27. 389 U.S. 347, 350 n.5.

28. See Griswold v. Connecticut, 381 U.S. 479, 500-502 (1965) (Justice Harlan, concurring); and Tribe, infra note 54.

29. See Roe's companion case, Doe v. Bolton, 410 U.S. 179, 212 n.4 (1973) (Justice Douglas concurring). Compare Justice Douglas' Bolton statement to the one he made in his dissenting opinion in Poe v. Ullman, 367 U.S. 497, 516-517 (1961).

30. See United States v. Salerno, 481 U.S. 739, 746 (1987).

31. 430 U.S. 651, 672.

32. 424 U.S. 693, 702 n.3. Twining v. New Jersey, 211 U.S. 78, 101 (1908); Buckley v. Valeo, 424 U.S. 1, 93 (1976); infra, text (of Part V) accompanying note 18; and infra, note 17 (of Part V).

33. 424 U.S. 693, 712.

34. 381 U.S. 479, 484 (1965).

35. See infra, text accompanying note 40, (and that note).

36. R.W. Galloway, A First Amendment Right to Privacy, California Lawyer, June, 1988, p. 52, at p. 52. See also, e.g., Berger, supra note 22 (of Introduction) (Justice Douglas "located it [the right to privacy] in 'penumbras formed by emanations' from

other [Bill of Rights] provisions, a vaporous base upon which to rest a takeover of the states' "police power", a power over the health and welfare of its citizens."); and H.W. Chase & C.R. Ducat (eds. & revs.), Edward S. Corwin's The Constitution and What It Means Today 466 (14th ed., 1978).

37. 389 U.S. 347, 349-50 (including note 5, and omitting note 4). See also Whalen v. Roe, 429 U.S. 589, 604 n. 32.

38. 410 U.S. 113, 167 n.2. See also Griswold v. Connecticut, 381 U.S. 479, 508-509 (1965) (Justice Black dissenting).

39. See R.H. Clark, Constitutional Sources of the Penumbral Right to Privacy, 19 Vill. L. Rev. 833, 835 n.15 (1974).

40. 422 U.S. 225, 233 n.7 (quoting Maness v. Meyers, 419 U.S. 449, 473-74 (1975) (Justice White concurring). See also, Colorado v. Connelly, 479 U.S. 157, 170 (1986) ("The sole concern of the Fifth Amendment, on which Miranda was based, is governmental coercion"); Pennsylvania v. Muniz, 496 U.S. 582, 589 (1990); Illinois v. Perkins, 496 U.S. 292, 297-98 (1990); Baltimore City Dept. of Social Services v. Bouknight, 493 U.S. 549, 554 (1990); Doe v. United States, 487 U.S. 201, 207, 210-213 (1988); Ullman v. United States, 350 U.S. 422, 438-39 (1956); and Gardner v. Broderick, 392 U.S. 273, 276 (1968).

41. 422 U.S. 806, 819 n.15. See also Dronenburg, 741 F.2d 1388, 1392 (D.C. Cir., 1984), reh'g en banc denied, 746 F.2d 1579 (1984).

42. See Griswold v. Connecticut, 381 U.S. 479, 484 ("specific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance").

43. See infra, text (of Part II) accompanying notes 149-165.

44. See, e.g., Tribe, supra note 1 (of Introduction) at 92-94.

45. 434 U.S. 374, 383-384 & 384, respectively. The decisions to which the Zablocki Court was referring are Skinner v. Oklahoma, 316 U.S. 535 (1942); Loving v. Virginia, 388 U.S. 535 (1967);

Meyer v. Nebraska, 262 U.S. 390 (1923); and Maynard v. Hill, 125 U.S. 190 (1888). And see U.S. v Orito, 413 U.S. 139, 142 (1973).

46. See the cases cited supra, in note 7. See also infra, text (of Part II) accompanying notes 175 & 180-184.

47. See e.g., the works cited in T. McAffe, The Original Meaning of the Ninth Amendment, 90 Columbia L. Rev. 1215, 1217 (incl. note 12); R. Caplan, The History and Meaning of the Ninth Amendment, 69 Va. L. Rev. 223, 226 note 18 (1983); and Krason & Hollberg, infra 17 (of Part II) at 221 note 69. See also L. Mitchell, The Ninth Amendment and the Jurisprudence of Original Intention, 74 Geo. L.J. 1719 (1986); Calvin Massey, Federalism and Fundamental Rights: The Ninth Amendment, 38 Hastings L.J. 305 (1987); N. Redlich, The Ninth Amendment as a Constitutional Prism, 12 Harv. J. Law & Pub. Policy 23 (1989); and S. Rohde, Origins of the Right to Privacy, Los Angeles Lawyer, March 1988, p.45.

48. 410 U.S. 179, 210. See also L. Tribe & M. Dorf, On Reading the Constitution 54 (1991).

49. 448 U.S. 555, 579-580.

50. See Grey, infra note 53; McAffe, supra note 47 at 1225-27; Caplan, supra note 47; Massey, supra note 47; Mitchell, supra note 47; and Bork, infra note 3 (of Conclusion) at 183-85.

51. See Caplan, supra note 47 at 260 & 264-65; Massey, supra note 47 at 319-327; McAffe, supra note 47 at 1304-1305; Randy Barnett, Two Conceptions of the Ninth Amendment, 12 Harv. J. of Law & Pub. Policy 29, 27-28 (1989); and the works cited in Laurence Tribe, American Constitutional Law 1309 note 13 (2nd ed., 1988). The quote is from Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

52. The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." See In Ex Parte, Commonwealth of Virginia, 100 U.S. 339, 357 (1880) (Justice Field, dissenting); Ex Parte, Commonwealth of Virginia, 100 U.S. 313, 337 (1880) (Justice Field, concurring); Reid v. Covert, 354 U.S. 1, 5-6 (1957) ("The United

States is entirely a creature of the Constitution. Its powers and authority have no other source."); and United States v. Verdugo-Urquidez, 494 U.S. 259, 270 (1990).

53. See United States v. Munoz-Flores, 495 U.S. 385, 396 97 (1990) ("None of the Constitution's commands explicitly sets out a remedy for its violations. Nevertheless, the principle that the courts will strike down a law when Congress has passed it in violation of such a command has been well-settled for almost two centuries."). And see McAffe, supra note 47 at 1221; T.C. Grey, The Original Understanding and the Unwritten Constitution, in N.L. York (ed.), Toward a More Perfect Union: Six Essays on the Constitution 145, 164-67 (1987); and Bork, infra note 3 (of Conclusion) at 52 & 184-85.

54. As to the first proposition, see, e.g., Planned Parenthood v. Casey, 505 U.S. ____, 120 L.Ed 2d 674, 695 (1992); Powell v. Alabama, 287 U.S. 45, 67-68 (1932); Griswold v. Connecticut, 381 U.S. 479, 486 & 493 (Justice Goldberg concurring); Poe v. Ullman, 367 U.S. 497, 541-42 (1961) (Justice Harlan dissenting); and id. at 516 (Justice Douglas dissenting). See also Caplan, supra note 47 at 261-62. As to the second proposition, see, e.g., Griswold v. Connecticut, 381 U.S. 479, 500-502 (1965) (Justice Harlan concurring); Planned Parenthood v. Casey, 505 U.S. ___, 120 L.Ed 2d 674, 695 (1992); Tribe, supra note 1 (of Introduction) at 88-90; and supra, text accompanying note 21.

55. See Caplan, supra note 47 at 266-67. See also Samuel Hofstadter and George Horowitz, The Right of Privacy, 11-13 (1964).

56. G.R. Quaife, Wanton Wenches and Wayward Wives: Peasants and Illicit Sex in Early Seventeenth Century England 15-16 (1979). (Reprinted with permission of Rutgers University Press.) See also, e.g., III (New Series) County of Middlesex Calendar to the Sessions Records 1615-1616 xx-xxi (Wm. LeHardy, ed., London, 1937) ("The powers of search allowed to the parish constable... were of so wide a nature that cases of unseemly conduct even in private houses were brought to the notice of the Court. Thomas Welcher was found by the watch 'in a room alone in the nighttime with a common whore, after a very lewd manner'...").

57. See L. Tribe, American Constitutional Law 1310 (2nd ed., 1988). See also United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 763 (including note 14) (1989); and R. Wacks, Personal Information Privacy and the Law 32-33 (1989). And see David Flaherty, Privacy in Colonial New England 1-3, 184, 219-241, 245-46, & 248-49 (Colonial American interests in family intimacy, the home, solitude, anonymity in public, reserve, and against self-incrimination support the Griswold privacy theory).

58. See infra, text (of Part II) accompanying note 66, as well as the references set forth in that note 66.

59. 410 U.S. at 182.

60. See infra, text (of Part VI) accompanying note 1-29.

61. See B. Woodward & S. Armstrong, The Brethren 175-176 (1979); and John T. Noonan, Jr., A Private Choice: Abortion in America in the Seventies 21 (1979).

62. 405 U.S. 438, 453.

Notes to Part II

1. 410 U.S. at 132-141. The Court's source here is C. Means, Jr., The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Legislative Ashes of a Fourteenth-Century Common-Law Liberty?, 17 N.Y.L.F. 335 (1971) (Means II); and C. Means, Jr., The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality, 14 N.Y.L.F. 411 (1968) (Means I). See Roe v. Wade, 410 U.S. at 132 n.21 & 135 n.26; and infra, Section 8 (of Part IV) (particularly at text accompanying notes 258-285). Means source is essentially Bourton's Case (1327) and R v. Anonymous (1327) (reproduced infra, in Case No. 7 of Appendix 7, and Reference No. 3 of Appendix 11, respectively), and Staunford (see infra, Appendix 8). See infra, text (of Part IV) immediately following note 7; infra, the second paragraph of note 29 (of Part IV); and infra, Section 8 (of Part IV).

2. Roe v. Wade, 410 U.S. at 165. See infra, Sec. 8 (of Part IV).

3. See infra, text accompanying note 66; and infra, Part IV.

4. Quoted in W. Pfaff, Refugees: the Beast of Unreason Stirs Again, in The Los Angeles Times, Sunday, July 8, 1979, Part V (Opinion), p.3.

5. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

6. See R. Drinan, The Inviolability of the Right to Be Born, 17 Case Western Res. L. Rev., 465, 478-79 (1965); and Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western Civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children").

7. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965). On the history Griswold conveniently ignored, see infra, text accompanying note 16, as well the works cited in that note; M. Grossberg, Governing the Hearth: Law and Family in Nineteenth-Century America 157-59 & 175-195 (1985); Given-Wilson & Curteis,

infra note 16 (of Part IV); P. Johnson, A History of Christianity 511-512 (Atheneum paperback, 1979).); and Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989). The Griswold majority, unable to find any support in English-American history for its decision to the effect that implicit in the right to marital privacy is the right to practice artificial contraception, sought to deflect attention to this historical void by appealing to emotion: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." Griswold, 381 U.S. at 485-86. In Roe v. Wade, the Court wisely refrained from asking this question: Would we allow the police to search hospitals, medical clinics, and doctor's offices for telltale signs of the performance of illegal abortions? See infra, note 196, as well as that note itself. See also Carey v. Population Services International, 431 U.S. 678, 694 (1977). Carey (specifically, Part IV of the four-justice lead opinion, as coupled with Justice Stevens' concurring opinion there) stands for the strange proposition that the 14th Amendment's due process clause prohibits the states from denying to unmarried, unemancipated minors access to artificial birth control. Such minors do not even enjoy a constitutionally guaranteed right to fornicate. Five or more of the Carey justices have stated so. See Michael M. v. Sonoma County Court, 450 U.S. 464, 472-73 (incl. n.8) (1981). And see Weber v. Aetna Casualty, 406 U.S. 164, 175 (1972); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 (incl. n.15) (1973); Barnes v. Glen Theatre, Inc., 501 U.S. ___, 115 L.Ed 2d 504, 513 (1991); and id. (L. Ed.2d.) at 515-517 (J. Scalia concurring).

8. See, e.g., Bowers v. Hardwick (1986), 478 U.S. 186, 216 (including note 9) (Justice Stevens dissenting).

9. Justice Blackmun in PBS, This Honorable Court (a two-hour, two-part television documentary shown on American television in May of 1988). See also Bernard Schwartz, The Unpublished Opinions of the Burger Court 83 (1988) ("Justice Blackmun himself recently termed Roe v. Wade 'a landmark in the progress of the emancipation of women.'") (citing New York Times, March 8, 1976, p.7);

and Rust v. Sullivan, 500 U.S. ____, 114 L. Ed.2d. 233, 270 (Justice Blackmun dissenting) (1991).

10. 410 U.S. at 151 & 190, respectively. See also id. at 148-49. In 19th-century America, physicians were probably of the opinion that drug-induced (attempted) abortion posed more danger to a woman than did surgical abortion. See E. Van De Warker, The Detection of Criminal Abortion and a Study of Foeticidal Drugs (1872), in Abortion in 19th-Century America, infra note 98 at 44. However, it may be the case here that drug-induced methods of attempting abortion were far more covertly available or popular than was surgical abortion.

11. See also, e.g., People v. Belous (1969), 71 Cal.2d 954, 964; 458 P.2d 194.

12. D.C. McMurtrie, A Louisiana Decree of 1770 Relative to the Practice of Medicine and Surgery 3 (Chicago, n.d.) (reprint from 86 (no.1) New Orleans Medical & Surgical Journal 7-11 (July 1933)).

13. J. Tachera, A "Birth Right": Home Births, Midwives, and the Right to Privacy, 12 Pac. L.J. 97, 97 (1980) (footnote omitted).

14. S. Bard, Compendium of the Theory and Practice of Midwifery 212. For some statistics on maternal-childbirth mortality in Maine for the period 1785-1812, in New Hampshire for the period 1824-1859, and in London, England and Dublin, Ireland for various periods in the second half of the 18th century, see L.T. Ulrich, A Midwife's Tale: The Life of Martha Ballard Based on Her Diary, 1785-1812 170-173 (1990). And see Graunt, infra note 15.

15. Wm. F. Montgomery, An Exposition of the Signs and Symptoms of Pregnancy, the Period of Human Gestation, and the Signs of Delivery 24 (London, 1837). See also 1 J. Chitty, A Practical Treatise on Medical Jurisprudence 407 (1834); and J. Graunt, Natural and Political Observations Made upon the Bills of Mortality 59-60 (London, 1665) (only 1 in 1200 women die in childbirth). And see Donald H. Merkin, Pregnancy as a Disease: The Pill in Society 4-5 (1976).

16. 126 Conn. 412, 420 (1940). See also Note, 45 Harv. L. Rev. 723, 723-26 (1932). Massachusetts originally enacted a criminal statute relating to the use or sale of artificial contraceptives in 1847; and Michigan and Pennsylvania did so in 1869 and 1870, respectively. See Quay, infra note 77 at 480-81, 484 & 507-508.

17. See infra, text accompanying notes 96-107, and the works cited infra, in note 97. The Hippocratic Oath quote is from the Edelstein version of the same (6th century B.C. - 1st century A.D.?), as reproduced in 3 & 4 Encyclopedia of Bioethics 1731 (1978). The World Medical Association affirmed the Hippocratic-anti-abortion tenet in its Geneva Declaration (1948; amended 1968): "'I will maintain the utmost respect for human life from the time of conception.'" Id. (3 & 4 Encyclopedia) at 1749. For criticisms of the Roe Court's result-oriented commentary on the history of the Hippocratic-anti-abortion tenet (see Roe v. Wade, 410 U.S. at 130-32), see M. Arbagi, Roe and the Hippocratic Oath, in Horan, et al, infra note 28 (of Part V) at 159; and Krason & Hollberg, The Law and History of Abortion: The Supreme Court Refuted, in D. Burter, et al, (eds.), Abortion, Medicine, and the Law 201-202 (1986).

What is the great and mysterious medical discovery that has caused the current medical community to virtually disown the Hippocratic-Geneva Declaration anti-abortion tenet? Did medical science discover that the human embryo or fetus is not an actual human being after all? No, it did not. In Van Nostrand's Scientific Encyclopedia 3 (5th ed., 1976) the following is stated: "From a purely scientific standpoint, there is no question but that abortion represents the cessation of a human life." See also Williams Obstetrics, 139 (17th ed., 1985) (see infra, text (of Part V) accompanying note 20); and id. at 267. As can be seen in the following passages from the World Medical Association's 1970 Declaration of Oslo Statement on Therapeutic Abortion, what the current medical community discovered here was nothing more than its remarkable capacity to accept its own doubletalk:

> "The first moral principle imposed upon the doctor is respect for human life as expressed in a clause of the Declaration of

> Geneva: "I will maintain the utmost respect for human life from the time of conception".
>
> Circumstances which bring the vital interests of a mother into conflict with the vital interests of her unborn child creates [sic] a dilemma and raise the question whether or not the pregnancy should be deliberately terminated. Diversity of response to this situation results from the diversity of attitudes towards the life of the unborn child. This is a matter of individual... conscience which must be respected.
>
> It is not the role of the medical profession to determine the attitudes and rules of any particular state...in this matter, but it is our duty to attempt both to assure the protection of our patients and to safeguard the rights of the doctor within society.
>
> Therefore, where the law allows therapeutic abortion to be performed, or legislation to that effect is contemplated, and this is not against the policy of the national medical association, and where the legislature desires or will accept the guidance of the medical profession, the following principles are approved: Abortion should be performed only as a therapeutic measure..."

Quoted as reproduced in Ronald R. Macdonald (ed.), Scientific Basis of Obstetrics and Gynecology 508 (3rd ed., 1985). By now, the whole world knows that the term "therapeutic abortion" is fast becoming, if it has not already become, a euphemism for "elective abortion". The Oslo Statement falsely assumes the truth of the fundamental premises to be proved: that the fetus is not a patient (see infra, text (of Part V) accompanying note 20), and that the private conscience of a pregnant woman enjoys a monopoly on who should be allowed or not allowed to be born. The Court in Wisconsin v. Yoder, 406 U.S. 205, 215-216 (1972) stated: "the very concept of ordered liberty precludes allowing every man to make his own standards on matters of conduct in which society as a whole has important interests." Justice Frankfurter observed: "That a conclusion satisfies one's private conscience does not attest to its reliability." Joint

Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171 (1951) (concurring opinion). And see, infra text accompanying notes 97-107 (as well as those notes).

18. 3 Paris & Fonblanque, Medical Jurisprudence 96 (1823).

19. See infra, text accompanying notes 143-46. And see Joseph Dellapenna, The History of Abortion: Technology, Morality, and Law, 40 U. Pitt. L. Rev. 359, 401 (1979).

20. Tribe, American Constitutional Law 1355-56 (2nd ed., 1988). See also, e.g., Dworkin, infra note 12 (of Part V) at 50; Dworkin, supra note 43 (of Introduction) at 112; and Lader, infra note 1 (of Part IV) at 2-3. On the meaning of "irregular physician", see Adelson, infra note 16 (of Part IV) at 687.

21. See Mohr, infra note 97 at 111-114; E.A. Bartlett (ed.), Sarah Grimke: Letters on the Equality of the Sexes and Other Essays 24 (1988); D'Emilio, infra note 192 at 154; D. Rhode, Justice Gender: Sex Discrimination and the Law 204 (1989); and Olasky, infra note 13 (of Part IV) at 289. On Tribe's concession, see Tribe, supra note 1 (of Introduction) at 33-34.

22. 495 U.S. 226, 249. See, also, e.g., United States v. O'Brien, 391 U.S. 367, 382-85 (1968); and Michael M. v. Sonoma Superior Court, 450 U.S. 464, 472 n.8 (1981). And see Tribe & Dorf, supra note 48 (of Part I) at 11.

23. See L. Tribe and M. Dorf, Levels of Generality in the Definition of [Fundamental] Rights, 57 U. of Chi. L.Rev. 1057, 1068, 1086-87, 1101-1103, & 1108 (1990); and Tribe & Dorf, supra note 48 (of Part I) at 72-76. See also infra, text accompanying nn. 180-193; supra, text accompanying notes 1-11; and infra, text accompanying notes 27-33, 39-77 & 148. And see supra, text (of Introduction) accompanying note 44. As to Tribe's concession here, see Tribe, supra note 1 (of Introduction) at 29-34.

24. 410 U.S. at 150. See also supra, note 17 (of Introduction); and infra, text (of Part VI) accompanying note 50.

25. Means I, supra note 1 at 511. See Means II, supra note 1 at 336.

26. See Connery, infra, note 5 (of Part IV) at 211 & 307, respectively (18th and 19th century Catholic, moral theologians, "under the leadership of medical science", continued the move away from "theories of delayed animation and in the direction of immediate animation"; the theory of immediate animation "met with great favor from the medical profession [during the course of the 18th, 19th and 20th centuries], although the issue was more one of philosophy than of medicine"). And see infra, text accompanying notes 96-107, as well as the works cited infra, in notes 97 & 99.

27. See infra, text accompanying notes 39-59; infra text (of Part V) accompanying notes 27 & 50-52; and infra, text (of Part VI) accompanying note 56.

28. See infra, text (of Part IV) accompanying note 181; and infra, text accompanying notes 95 & 126-142.

29. See infra, text (of Part V) accompanying note 2.

30. Equal protection analysis employs both of these, and adds a third: "intermediate analysis". See, e.g., Plyler v. Doe, 457 U.S. 202, 217-218 (including n.16) (1982).

31. See, e.g., Speiser v. Randall, 357 U.S. 513, 529 (1958); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Justice Marshall dissenting) ("If a statute is subject to strict scrutiny, the statute always, or nearly always, is struck down. Quite obviously the only critical decision is whether strict scrutiny should be invoked at all."); and Tribe & Dorf, supra n. 48 (of Part I) at 72-73. See also infra, text (of Part VI) accompanying nn. 19-23; supra, text (of Introduction) accompanying n. 8; and infra, n. 62 (of Part II) (Eisenstadt quote).

32. See Vance v. Bradley, 440 U.S. 93, 97 & 111 (1979). See also, e.g., Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

33. See supra, text accompanying note 24; supra, text (of Introduction) accompanying notes 17 & 9, (as well as those two notes); and infra, text (of Part VI) accompanying note 50.

34. Williams v. Florida 399 U.S. 78,124 (1970) J. Harlan concurring.

35. 124 U.S. 465, 478. See the authorities cited infra, in note 17 (of Part V). See also Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 260 & 264-273 (1989); Graninanciera, S.A. v. Nordberg, 492 U.S. 33, 41-42 (1989); Barnes v. Glen Theatre, 501 U.S. ___, 115 L.Ed 2d 504, 512 (1991); id. (L. Ed.2d) at 516 (Justice Scalia concurring); Griffin v. U.S., 502 U.S. ___, 116 L.Ed 2d 371, 376-377 (1992); U.S. v. Wong Kim Ark, 169 U.S. 649, 655 (1898); U.S. v. Stanley, 483 U.S. 669, 698 (Justice Brennan dissenting) ("It is well accepted that...the Court's decision is informed by the common law"); Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 269; id. at 305 (Justice Brennan, dissenting) ("The right to...determine what shall be done with one's own body..., is securely grounded in the earliest common law."); id. at 342 (including note 14) (Justice Stevens dissenting) (the right of an individual to make choices affecting his private life is founded upon the common law); Ingraham v. Wright, 430 U.S. 651, 659 (1977); Mullaney v. Wilbur, 421 U.S. 684, 692-696 (1975); Patterson v. New York, 432 U.S. 197, 226 (1977); and infra, note 17 (of Part V). But see, e.g., Michael H. and Gerald D., 491 U.S. 110, 138 (1989) (J. Brennan dissenting) ("common-law notions no longer...circumscribe [Fourteenth Amendment] liberty"); and Grady v. Corbin, 495 U.S. 508, 516 n.[7b] (1990).

36. 457 U.S. 202, 212 n.11 (quoting Wong Wing v. U.S., 163 U.S. 228, 242 (1896) (J. Field concurring in part & dissenting in part)).

37. See supra, text (of Part I) accompanying notes 31-32, as well as the cases cited in the latter note (32); and infra, text (of Part V) accompanying notes 18-19.

38. See infra, Part IV & Part V.

39. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 148 n.14 (1968); Patterson v. New York, 432 U.S. 197, 226 (1977); Moore v. City

of East Cleveland, Ohio, 431 U.S. 494, 503 nn. 10-12 (1977); Green v. United States, 355 U.S. 184, 187-188 (1957); Benton v. Maryland, 395 U.S. 784, 796 (1969); and Aptheker v. Secretary of State, 378 U.S. 500, 505-506 (1964).

40. See Ginsberg v. New York, 390 U.S. 629, 639 (1968); Gideon v. Wainwright, 372 U.S. 335, 341 (1963); Skelton v. Tucker, 364 U.S. 479, 489 (1960); Powell v. Alabama, 287 U.S. 45, 67 (1932); Maynard v. Hill, 125 U.S. 190, 205 & 211 (1888); Hebert v. Louisiana, 272 U.S. 312, 316-17 (1926); and Schneider v. Irvington, 308 U.S. 147, 161 (1939).

41. Twining v. New Jersey, 211 U.S. 78, 94, 106 & 109 (1908).

42. Baldwin v. Fish and Game Comm. of Montana, 436 U.S. 371, 387 (1978).

43. United States v. Guest, 383 U.S. 745, 758 (1966).

44. Maxwell v. Dow, 176 U.S. 581, 588-89 (1900).

45. Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977) (quoting Moore v. East Cleveland, 431 U.S. 494, 503).

46. See Ingraham v. Wright, 430 U.S. 651, 673 n.42 (1977); and Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

47. 381 U.S. 479, 493 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). See also Barkus v. Illinois, 359 U.S. 121, 128 (1959) ("The Anglo-American system of law is based...upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment."); Betts v. Brady, 316 U. S. 455, 464-65 (1942) (overruled on different grounds in Gideon v. Wainwright, 372 U.S. 335, 339 (1963)) ("Is the furnishing of counsel in all cases...dictated by...fundamental principles of fairness? The answer to the question may be found in the common understanding of those who have lived under the Anglo-American system of law."); and Twining v. New Jersey, 211 U.S. 78, 106-108 (1908) (overruled on different grounds in Malloy v. Hogan (1964), 378 U.S.1 (1964)). And see Malloy v. Hogan, 378 U.S. 1,

27 (1964) (J. Harlan dissenting) ("Although Gideon overruled Betts, the constitutional approach in both cases was the same").

48. 291 U.S. 97, 122.

49. 492 U.S. 361, 369. See also id. at 377. And see infra, text accompanying note 51, as well as the authorities cited in that note. See also Penry v. Lynaugh, Director of Texas Dept. of Corrections, 492 U.S. 302, 331 (1989); District of Columbia v. Clawans, 300 U.S. 617, 628 (1937); Blanton v. North Las Vegas, 489 U.S. 538, 541 (1989); and Thompson v. Oklahoma, 487 U.S. 815, 865 (1988) (J. Scalia dissenting). And see In re Kaurish, 52 Cal. 3d 648, 701 (1990) ("the fact that certain conduct is characterized as felonious by another state of this Union... represents the considered judgment of the people of that state that the conduct is so far below the norms of civilized behavior and morality that it deserves...significant punishment").

Law professor Sylvia Law stated: "The [281] historians [see infra, note 1 (of Part IV)]...advances the view that [in the context of fundamental rights analysis] 'our history and traditions' are not simply rules [laws] laid down, but also the social practice and beliefs of ordinary people." (Sylvia A. Law, "Conversations Between Historians and the Constitution", in 12 (no. 3) The Public Historian: A Journal of Public History, 11, 14 (1990).) Carried out to its logical extensions such a view would mandate, for example, that a woman has a fundamental right to commit infanticide! (See infra, text (of Part IV) accompanying notes 17-24, as well as the references set forth in those notes.) It would mandate also, for example, that an individual has a fundamental right to use the drugs of his or her choice.

50. 478 U.S. 186, 191-94 (1986). See also Medina v. California 505 U.S. ___, 120 L.Ed 353, 363-364 (1992); and Herrera v. Collins, 506 U.S. ___, 122 L.Ed 2d 203, 221 (1993).

51. 403 U.S. 528, 548-49 (quoting Leland v. Oregon, 343 U.S. 790, 798 (1952)). See also Justice Blackmun's opinion (in which Justices Marshall and Stevens joined) for the Court in Pacific Mutual Life Ins. Co., v. Haslip, 499 U.S. __, 113 L.Ed 2d 1, 19 (1991) ("'"If a thing has been practiced for two hundred years

by common consent, it will need a strong case for the Fourteenth Amendment to affect it."'"); Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 305 (1990) (Justice Brennan, joined by Justices Marshall and Blackmun, dissenting); id. at 342 (Justice Stevens dissenting); Schall v. Martin, 467 U.S. 253, 266-268 (1984) (Justice Blackmun joined in majority opinion); Richardson v. Ramirez, 418 U.S. 24, 48-49 (1974) (Justice Blackmun joined in the majority opinion); Furman v. Georgia, 408 U.S. 238, 385 (1972) (Justice Burger dissenting, with Justice Blackmun joining) ("There are no...indications that capital punishment offends the conscience of society....Capital punishment is authorized by statute in 40 states...In looking for reliable indicia of contemporary attitude, none more trustworthy has been advanced."); Murray v. Giarratano, 492 U.S. 1, 30-32 (1989) (Justice Stevens dissenting, joined by Justices Brennan, Marshall, and Blackmun); Pernell v. Southall Realty, 416 U.S. 363, 384 (1974) (opinion by Justice Marshall, with Justice Brennan joining opinion); Ford v. Wainwright, 477 U.S. 335, 1 (1986) (opinion by Justice Marshall, with Justices Brennan, Blackmun, and Stevens joining); Duncan v. Louisiana, 391 U.S. 145, 149-54 (1968) (Justices Brennan and Marshall joining in the majority opinion); Schad v. Arizona, 501 U.S. ___, 115 L.Ed 2d 555, 572 (1991); Reynolds v. United States, 98 U.S. 145, 164-65 (1878); Moore v. East Cleveland, 431 U.S. 494, 503 n.12 (1977) (lead opinion); and Johnson v. Louisiana, 406 U.S. 356, 370 n.6 & 372 n.9 (Justice Powell concurring).

52. 478 U.S. 186, 199.

53. See supra, text (of Part I) accompanying notes 8-10, as well as the cases, etc., cited in the last note (10).

54. See Illinois Elections Bd. v. Socialist Workers Party 440 U.S. 173, 188-89 (1979) (Justice Blackmun concurring) ("I have never been able...to appreciate just what a compelling state interest is....I feel, therefore, and have always felt that these phrases are...not...helpful for constitutional analysis. They are too convenient and result-oriented, and I must endeavor to disassociate myself from them."). The Justice Blackmun quote is reproduced from The Los Angeles Times, Saturday, May 18, 1991, Section B (Metro), p. B-1.

55. 391 U.S. 145, 149-154.

56. 477 U.S. 335, 341 & 406-409.

57. 98 U.S. 145, 164-65.

58. The Michael J. quote is cited as 491 U.S. 110, 127 n.6. See also the authorities cited supra, in note 51.

59. 491 U.S. 110, 132.

60. 500 U.S. ____, 114 L.Ed 2d 233, 275-76. See also Webster v. Health Reproductive Services, 492 U.S. 490, 525-26 (Justice O'Connor dissenting); and id. at 506-507. This rule was, of course, ignored by Justice O'Connor in affirming Roe v. Wade in her opinion for the Court in Planned Parenthood v. Casey, 505 U.S. ___, 120 L.Ed 2d 674 (1992).

61. See supra, text (of Introduction) accompanying notes 2-3 & 44-46; infra, note 184; infra, text accompanying notes 150-152 & 180-184; and supra, text (of Part I) accompanying note 8 as well as that note itself. See generally, Tribe & Dorf, supra note 23.

62. On Griswold, see supra, note 7; and supra, text accompanying note 16. United States v. Stanley, 483 U.S. 669 (1987) did not involve the interpretation of the scope of a particular fundamental right. It had to do with whether, under certain circumstances, a military person could bring a personal injury action against United States officers and their agents for violating his constitutional rights. In Eisenstadt, 405 U.S. 438 at 447 n.7, the Court expressly stated that it was not engaging in "fundamental rights analysis": if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under Griswold, the statutory classification would have to be... necessary to the achievement of a compelling state interest. But...we do not have to address the statute's validity under that test....

63. See Bowers v. Hardwick, 478 U.S. 186, 216 (including note 9) (Justice Stevens dissenting). See also Planned Parenthood v. Casey, 505 U.S. ___, 120 L.Ed 2d 674, 695-696 (1992).

64. See Loving v. Virginia, 388 U.S. 1, 6 (including n.5).

65. 482 U.S. 78, 94. See also Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989).

66. See infra, text (of Part IV) accompanying notes 29-43, as well as the authorities cited in those notes.

67. See, e.g., the 3-volume work entitled Records of the Court of Assistants of the Colony of the Massachusetts Bay (Vol. 1: 1673-1692) (Vol. 2: 1630-1644) (Vol. 3: 1642-1673) at the index of each under the word crimes (1901, 1904, 1928, respectively); and the 2-volume work entitled Records of the Suffolk County Court 1671-1680, in 29 & 30 Publications of the Colonial Society of Massachusetts at index to Vol. 30 under the word crimes (1933). See also, e.g., the works cited infra, in note 2 (of Part III).

68. See, generally, D. Walker, The Oxford Companion to Law 1255-1258 (1980).

69. See infra, text (of Part III) accompanying notes 9-19; and infra, Cases 1-3 (of Appendix 2). Roger Thompson noted four (4) convictions for attempted abortion in Middlesex County, Massachusetts in the second half of the 17th century. See Thompson, infra note 10 (of Part IV) at 10 (Table 1) & 26 (incl. n.47). Thompson kindly reviewed his notes on those four abortion cases. He informed me that in fact the cases did "not" involve criminal abortion prosecutions, but rather involved civil cases containing evidence or allegations of abortion or attempted abortion. (R. Thompson in a letter to Philip A. Rafferty, March 9, 1990.) My analysis of these four cases confirms Thompson's review here.

70. See infra, note 18 (of Part III); and infra, Case Nos. 4 & 5 (of Appendix 2).

71. See, generally, Walker, supra note 68; and the applicable works cited infra, in note 74. And see Coke and Blackstone, infra text (of Part IV) accompanying notes 119 & 153-154, respectively, as considered in conjunction with Payton v. New York, 445 U.S. 573, 593-594 (1980) (Coke was "widely recognized by American colonists 'as the greatest authority of his time on the laws of England'") and with Green v. United States, 355 U.S. 184, 187

(1957) (Blackstone's Commentaries "greatly influenced the generation that adopted the Constitution").

72. See infra, text (of Part III) accompanying notes 20-27, as well as notes 25 & 26 (of Part III); and infra, text (of Part IV) accompanying notes 149-151 & 162.

73. See infra, text (of Part III) accompanying notes 9-19; infra, Case Nos. 1 & 3 (of Appendix 2); infra, Statute No. 5 (of Appendix 1) (and note 1 of that Statute No. 5); and infra, text (of Part III) accompanying notes 28-37, as well as the work in the last note (37).

74. See supra, text accompanying note 1; infra, text accompanying notes 126-134; Bowers v. Hardwick, 478 U.S. 186, 192 n.5 (1986) (Georgia formally adopted the common law of England in 1784). Maryland's Declaration of Rights of 1776 proclaimed that "'the inhabitants of Maryland are entitled to the common law of England...'" Virginia formally adopted the common law in 1776); L. Friedman, A History of American Law 110 (2nd paperback ed., N.Y. 1985) ("The Northwest Ordinance [1787] imposed common law on the...American frontier [i.e., present-day Ohio, Indiana, Illinois, Michigan, Wisconsin and eastern Minnesota]....A Virginia law of 1776 declared...'the common law...[to be] in...force.' The Delaware constitution of 1776...provided that 'The common law...shall remain in force'...[A] New York...law of 1786 declared the common law in force."); Furth v. Furth, 97 Ark. 272, 275 (1911) (mentions an 1816 statute that incorporated English common law into the law of the Missouri Territory, which included Arkansas); 2 Earliest Printed Laws of North Carolina 1669--1751 39 (Wilmington, Delaware, 1977) (The following was enacted in North Carolina in 1715: "whereas this Province is...a member of the Crown...and [whereas]...the Powers granted [in the Charter] of making laws are limited [such that they]...'be...[practically]...agreeable to the Laws...of...England...',[then], the Laws of England...are [established in North Carolina so far as] ...compatible with our Way of Living..."); Acts and Laws of the English Colony of Rhode Island and Providence Plantations in New England in America 56 (Newport, 1767) (if no existing statute covers subject in question, then the law of England controls); and Connecticut v. Danforth, 3 Day (2nd ed., 1848) 112, 119

(1819) (although Connecticut never formally adopted the English common law on indictable offenses, it informally did so in the course of developing its own common law on indictable offenses through its judicial tribunals).

Two possible, partial exceptions here are Ohio and Louisiana. By an Act of 1805 the Legislature of the Territory of Orleans adopted the English common law of crimes. This act, which enumerated common law offenses, but which failed to enumerate deliberated abortion, may have been limited to the enumerated offenses. See 1 A. Voorhies, A Treatise on the Criminal Jurisprudence of Louisiana 3-5 & 9 (New Orleans, 1860); and M. Robinson, A Digest of the Penal Law of the State of Louisiana, Analytically Arranged by Authority 4-6 (New Orleans, 1841). But see Rosen v. Louisiana State Board of Medical Examiners, 318 F. Supp. 1217, 1227 (1970). In any event, inasmuch as murder was enumerated, and inasmuch as at common law it was murder if either a deliberately aborted child was brought forth alive and subsequently died in connection with being aborted (and if the child survived, then it was attempted murder) or the woman died in connection with the abortion, Louisiana can be considered at best here as only a partial exception. (See infra, text [of Part IV] accompanying notes 32-34, 37 & 40, as well as the authorities cited in those notes.) Louisiana originally enacted a criminal abortion statute in 1856. The statute is reproduced in Quay, infra note 77 at 477.

In 1806 Ohio repealed the common law on indictable offenses that had been in effect in Ohio since at least 1787 by virtue of the Northwest Ordinance. See, e.g., Mitchell v. State, 42 Ohio St. 383 (1884); Key v. Vattier, 1 Ohio Rep. 132 (1823); and Smith v. Ohio, 12 Ohio St. 466 (1861). Ohio originally enacted a criminal abortion statute in 1834. The statute is reproduced in Quay, infra note 77 at 504.

75. See infra, text (of Part IV) accompanying notes 29-43, as well as the authorities cited in those notes. Several of our state, appellate courts erroneously concluded that pre-quick with child, deliberated abortion is not an indictable offence at the English common law. See the cases cited infra, in note 210 (of Part IV). That note also cites some state appellate court de-

cisions that held or stated in dictum that pre-quick with child, deliberated abortion is an indictable offense at common law.

76. See, e.g., Edw. Williams, Precedents of Warrants, Convictions and Other Proceedings, Before Justices of the Peace Chiefly Original 611 (London, 1801); and the authorities set forth infra, in note 147.

77. 39 McKenney's Consolidated Laws of New York Annotated: Penal Laws Secs. 1.00 to 139.end 373 (1975). See also James S. Witherspoon, Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment, 17 St. Mary's L.J. 29, 32-40 (including notes 32-40) (1985); E. Quay, Justifiable Abortion - Medical and Legal Foundations, 49 Geo. L.J. 395, 447-520 (1961); Note, Abortion: The Five-Year Revolution and Its Impact, 3 Ecol. L.Q. 311, 311 (including note 2) & 313 (1973); Hall, Abortion Laws: A Call for Reform, 18 De Paul L. Rev. 584, 584 (1969); and B. George, Jr., Current Abortion Laws: Proposals and Movements for Reform, 17 Cas. W. Res. L. Rev., 371, 371-376 (1965).

78. See, e.g., the statutes cited in Witherspoon, supra note 77 at 40 n.28. Several of these statutes are reproduced in Quay, supra, note 77.

79. 89 O.S. 35, 40. See also, e.g., Foster v. State (1923), 182 Wis. 298, 300, 196 N.W. 233, 234 ("So we have a statute covering the offense of destroying...embryonic life. This offense is one ...against morality because it is against good morals to destroy that which otherwise presumably would develop into a human being".); State v. Atwood, 54 Ore. 526, 534-35, 102 Pac. 295 (affirmed 54 Ore. 542 (1909)) (if the crime of deliberated abortion was decriminalized, then "the restraints upon illicit intercourse are...removed, the inducements to marriage are...diminished, [and] the delicacy of the woman is...destroyed, no matter what may be the period [of gestation] chosen for the operation); John Ormond (compiler), The Code of Alabama 582-83 (1852) (Art. V.: "Of offenses against public morality and decency": Sec 3230. Administering drugs or using instruments to produce abortion; 3231: Living in adultery or fornication; 3232...bigamy...."); 8 Collections of the Massachusetts Historical Society 1166 (3rd

Series, Boston, 1843) (similar to the preceding Code of Alabama entry); State v. Mandevile, 89 N.J.L. 228, 231-32 (1916) ("the view...that...[New Jersey's, original criminal abortion] statute was [designed] to guard the...life of the pregnant female, while true as far as it goes, ignores the salutary effect of the statute as a preventive of a crime against public morals,...which is equally within its...purview."); and State v. Moore, 25 Iowa 128, 136 (1868) ("The willful and unnecessary procurement of an abortion is an act highly dangerous to the mother, and...design-ed[ly]...fatal to the child. It is abhorrent to all our notions of sound morality"). See also supra, note 45 (of Introduction).

80. Several of these statutes are reproduced in Quay, supra, note 77, and are discussed in Witherspoon, supra, note 77.

81. See infra, text (of Part IV) accompanying n. 181; LaRue, infra n. 181 (of Part IV); and infra, text accompanying notes 112-131.

82. These statutes are reproduced infra, in Statutes Nos. 1-4 (of Appendix 1). See also infra, text accompanying notes 99 & 102-107; and Keown, infra note 99 at 26-48.

83. See the authorities cited infra, in note 40 (of Part IV).

84. The twenty-nine statutes in question, as derived almost entirely from the statutes reproduced in Quay, supra note 77, are the following: 1) Conn., originally enacted in 1821 (quick with child) (hereinafter, and for example, Conn., 1821 (qwc); 2) N.Y., 1828 (quick child - hereinafter: qc); 3) Ohio, 1834 (qc); 4) Mo., 1835 (qc); 5) Ark., 1838 (qc); 6) Miss., 1839 (qc); 7) Iowa (Terr.), 1843 (qc) (as an amendment to an 1838-39 Iowa statute that did not incorporate the quick with child distinction); 8) Mich., 1846 (qc); 9) N.H., 1848 (qc); 10) Va., 1848-49 (qc); 11) Wis., 1849 (qc); 12) Ha. (Kingdom), 1850 (qwc); 13) Minn. (Terr.), 1851 (infant child/qc); 14) Ore., 1853-54/1864 (qc/pregnant with a child (per State v. Atwood, 54 Ore. 526, 530-31 (1909) (affirmed 54 Ore. 542 (1909)), the statutory term "pregnant with a child" was construed to apply to the unborn product of human conception beginning at conception); 15) Wash., 1854 (qc); 16) N.M. (Terr.), 1854 (qc) (see Witherspoon, supra note 77 at 42, including n.35); 17) Kan. (Terr.), 1855 (qc); 18)

Pa., 1860 (qwc); 19) W. Va. (pre-1863 statehood), 1860 (unborn [quick] child) (see John Warth, The Amended Code of West Virginia, Containing All the Chapters of the Code of 1868, As Amended by Subsequent Legislation to and Including the Acts of 1883 788 (sec. 8) (Charleston, 1884)); 20) Florida, 1868 (qc); 21) D.C., 1872 (qc) (see Witherspoon, supra note 77 at 44 (including note 47)); 22) Ga., 1876 (qc); 23) N.D. 1877 (qc) (see id. (Witherspoon)); 24) S.D., 1877 (qc) (see id. Witherspoon); 25) N.C., 1881 (qwc); 26) S.C., 1883 ("woman with child [of a quick child]", per State v. Steadman, 214 S.C. 1, 8; 51 S.E. 2d 91, 93 (1948)); 27) N.D., Dak. Pen.C., sec. 338, 1887 (qc); 28) Okla., 1890 (qc) (see Witherspoon, supra note 77 at 44 n.47); 29) Alas., 1899 (pregnant with a child) (emphasis mine) (see Quay, supra note 77 at 448, 462 & 505-506).

85. As derived mainly from Quay, supra note 77, the seven criminal abortion statutes that, as originally enacted, did not penalize pre-quick with child deliberated abortion, were 1) the Conn. statute of 1821; 2) the Ark. statute of 1838; 3) the Miss. statute of 1839; 4) the Wis. statute of 1849; 5) the Minn. terr. statute of 1851; 6) the Ore. statute of 1853-54; and 7) the N.M. Terr. statute of 1854. The 1821 Conn. criminal abortion statute was amended in 1860 to outlaw pre-quick with child deliberated abortion. The 1838 Ark. statute was so amended in 1875. The 1839 Miss. statute was so amended no later than 1942. The 1849 Wis. statute was so amended in 1858. The 1851 Minn. terr. statute was so amended in 1873. The 1853-54 Ore. statute was so amended in 1864. The N.M. Terr. statute was so amended no later than 1953.

86. As derived mainly from Quay, supra note 77, these seven were 1) the 1821 Conn. statute (qwc distinction removed in 1860); 2) the 1834 Ohio statute (qc distinction removed in 1867) (see Witherspoon, supra note 77 at 61-64); 3) the 1838 Ark. statute (qc distinction removed in 1875); 4) the 1843 Iowa statute (qc distinction removed in 1858); 5) the 1848-49 Va. statute (qc dis-tinction removed in 1873); 6) the 1851 Minn. terr. statute ("unborn infant child" distinction removed in 1873); and 7) the 1828 N.Y. statute (qc distinction removed in 1869, but reinstated in 1881).

An 1846 New York abortion statute made it manslaughter to destroy a child quick in the womb ("woman pregnant with a quick child") through induced abortion. The 1869 amendment to the 1846 statute substituted the term "woman with child" (which simply means pregnant) for the term "woman pregnant with a quick child". In Evans v. The People, 49 N.Y. 86 (1872), it was in effect held that, inasmuch as at common law the unborn product of human conception is not recognized as an existing human being until quickening, and inasmuch as only a human being can be considered a victim of manslaughter, the term "woman with child," as contained in the 1869 statute, must be construed to implicitly incorporate quickening. The Evans Court did not bother to examine the legislative history for the 1869 statute. Had it done so, it would have discovered that the New York Legislature, in enacting the 1869 statute, was in effect recognizing the medical opinion that a human being comes into existence at conception. (See Witherspoon supra, note 77 at 65 n.125; Mohr, infra note 97 at 217; Grisez, infra note 138 at 385-86. And compare Evans here to the State v. Emerich quote, infra note 3 (of Part IV).) The Evans decision is flawed also (1) because the Evans Court did not see fit to prove its unarticulated premise that New York law or the United States Constitution somehow required that the English common law enjoys a monopoly on supplying an answer to the question, "when does a human being come into existence", and (2) because it erroneously determined that quickening is the criterion of whether a pregnant woman is quick with child or pregnant with a live child. See infra, text (of Part VI) accompanying notes 11-17; and infra, secs. 4-6 (of Part IV).

87. As derived mainly from Quay, supra note 77, these twenty-four statutes are 1) Ill. (1827); 2) Ind. (1838); 3) Me. (1840); 4) Ala. (1840-1841); 5) Mass. (1845); 6) Vt. (1846); 7) N.J. (1849); 8) Ca. (1850); 9) Texas (1854); 10) La. (1856); 11) Col. (1861); 12) Nev. (Terr.) (1861); 13) Ida. (Terr.) (1863-64); 14) Mont. (Terr.) (1864); 15) Ariz. (1865); 16) Md. (1868); 17) Wyo. (Terr.) (1869); 18) Utah (1876); 19) Tenn. (1883); 20) Del. (1883); 21) R.I. (1896) Utah; 22) Ky. (1910); 23) Puerto Rico (1913); 24) United States Virgin Islands (1921). See also Witherspoon, supra note 77 at 35-36 (including note 22) ("at the end of 1868, twenty of the thirty states with anti-abortion statutes punished abortions equally whether or not quickening

had occurred. At the end of 1883, twenty-seven of the thirty-six states with anti-abortion statutes did so.").

88. See Roe v. Wade, 410 U.S. at 151-52; and Roe's companion case, Doe v. Bolton, 410 U.S. 179, 190 (see supra, text accompanying note 10).

89. Amos Dean, Principles of Medical Jurisprudence 136 (1850) (emphasis in original). See also Witherspoon, supra n. 77 at 35 n. 20; James, infra, n.79 (of Part IV) sub tit. Abortion; Hamilton, infra, note 44 (of Part IV) at 138-39; and Wm. Salmon, Medicina Practica: Or, Practical Physick 29-30 (London 1692) (just as the picking of unripe fruit causes more damage to a fruit tree than does the picking of ripe fruit, so does early abortion cause more damage to the pregnant female than does late abortion).

90. See infra, text (of Part IV) accompanying note 30, and the references set forth in that note.

91. See infra, text (of Part IV) accompanying notes 6, 101, and 119-145. And see Taylor v. U.S. 495, U.S. 575, 592 (1990) and Morrissette v. U.S. 342, U.S. 246, 263 (1952) (statutory terms are presumed to have their common law meaning).

92. Roe v. Wade, 410 U.S. at 161 (emphasis mine).

93. See Witherspoon, supra note 77 at 34-38 (including nn. 19-21 & 23-24), 40 (including nn. 28-30), 42-44 (including nn. 34-48), and 57-58 (including n. 83).

94. See, e.g., Ngiraingas v. Sanchez, 495 U.S. 182, 187-188; id. at 193-94 (Justice Brennan dissenting); U.S. v. Price, 383 U.S. 787, 803 (1966); Will v. Michigan Dept. of State Police, 491 U.S. 58, 65-66 (1989); id. at 66-67 (Justice Brennan dissenting); and Pierson v. Ray, 386 U.S. 547, 560 (1967) (Justice Douglas, dissenting) ("It was against this background that the section [of the statute] was passed, and it is against this background that it should be interpreted.").

95. 169 U.S. 649, 653-54.

96. See infra, text accompanying notes 98-111, as well as the works cited in those notes.

97. See, Witherspoon, supra note 77 at 38-39; Carl Degler, At Odds: Women and the Family in America from the Revolution to the Present 239-41 (N.Y., 1980); James Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800-1900 165 & 200-201 (N.Y., 1978); and the works set forth infra, in note 99. See also, e.g., F. Draper, A Text-Book of Legal Medicine 164 (Phil., 1905) ("A few years ago the subject [of deliberated abortion] received unusual attention...Medical writers could not find language strong enough to express their denunciation."); id at 167 (The crime [of deliberately induced abortion] is recognized as an infamous one in almost every code of medical ethics."); State v. Moore, 28 Iowa 128, 136-37 (1868) ("By none has the guilt of the offense [of deliberated abortion] been more earnestly...portrayed...than by eminent medical writers and teachers."); Hodge, infra note 98; Munk v. Frink, 81 Neb. 631, 636 (1908) ("If 'the procuring or aiding or abetting in procuring a criminal abortion' is not 'unprofessional or dishonorable conduct' in...[a physician], then we are unable to conceive of any conduct of which such a person might be guilty which could be called unprofessional or dishonorable...'It is a crime...which obstructs the fountain of life.'"); and E. Quay, Justifiable Abortion - Medical and Legal Foundations 49 Geo. L.J. 173, 180 (1960).

The 19th century physicians' campaign against abortion and the quickening distinction was not limited to American physicians. The British Medical Association also sought to abolish the quickening distinction. See infra, text accompanying note 35 (of Part V). See also, e.g., Orfila, infra note 99; and Ambrose Tardieu, Etude Medico-Legale sur L'Avortement at the Avertissement, p.1 (Paris, 1881) ("The crime of abortion is perhaps, among all crimes, the one which doctors should most readily help bring to justice since it is the one crime which most often taints and degrades the medical profession.") (translation kindly supplied by Josette Bryson). And see Constance B. Backhouse, Involuntary Motherhood: Abortion, Birth Control and the Law in Nineteenth Century Canada, 1983(3) in Windsor Yearbook of Access to Justice 61, 77-82. As is the case with Tribe concerning his interpretation of the motive behind the American physicians' campaign against abortion (see supra, text accompanying notes 20-23), Backhouse seems incapable of recognizing that the 19th-century, Canadian physicians' campaign against abortion was substantially motivated by a concern for the safeguarding of unborn human life.

98. 410 U.S. at 141-42. And see, e.g., H.L. Hodge, Foeticide or Criminal Abortion (1839/1869), in Abortion in Nineteenth Century America 5 (Arno Press Rep. Sex, Marriage and Society, 1974) (If ...the [medical] profession in former times from the imperfect state of their physiological knowledge, had in any degree undervalued the importance of foetal life, they have fully redeemed their error, and they now call upon the legislators of our land ...to stay the progress of this destructive evil of criminal abortion..."); id. at 15 ("Imperfect in that first instance, yea, even invisible to the naked eye, the embryo is nevertheless endowed at once with the principle of vitality and although retained within the system of the mother, it has, in a strict sense, an independent existence".); and id. at 21-22, 27-29 & 43 (condemns the quickening distinction and states unequivocally that a human being comes into existence at conception). But see Olasky, infra note 13 (of Part IV) at 109-130.

99. See J. Keown, Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982 31-33 & 38-42 (1988); and Brookes, Abortion in England 1900-1967 24-26 & 51-52 (1988). See also e.g., Hodge, supra note 98; Nebinger, Criminal Abortion: Its Extent and Prevention (1870), in Abortion in Nineteenth Century America, supra note 98 at 19; John Gordon Smith, The Principles of Forensic Medicine 290-294 (1821); T.S. Traill, Outlines of a Course on Medical Jurisprudence 28 (Edinburgh, 1836); Amos Dean, Principles of Medical Jurisprudence 9 & 10 (1850); 2 Beck & Beck, Elements of Medical Jurisprudence 276 (11th ed. Phil., 1860) (1st ed. 1823); John Burns Popular Directions for the Treatment of the Diseases of Women and Children 15 (N.Y., 1811); J. Burns, Observations on Abortion, in Burns' Obstetrical Works 34 (N.Y., 1809); Thomas Denman, An Introduction to the Practice of Midwifery 129 & 133-34 (1807); M. Ryan, A Manual of Medical Jurisprudence 128 (1st Amer. ed., 1832); A. Taylor, Medical Jurisprudence 430 (2nd Amer. ed., 1850) (1st ed., 1844); G. Male, An Epitome of Juridical or Forensic Medicine (1816), as reproduced in T. Cooper, Tracts on Medical Jurisprudence 206 (Phil., 1819); Farr, infra note 111; John Jones, Medical, Philosophical and Vulgar Errors 65-66 (London, 1797) ("Is not an embrio of the size of a bee, whose blood circulates through its heart, as much a living animal as when, by its enlarged size and restlessness, it becomes troublesome to its mother?"); Goldsmith, infra text (of Part IV)

accompanying n.130; Montgomery, supra n.15 at 75-77; 1 Paris & Fonblanque, supra, note 18 at 239-240; and id. (Vol. 3) at 90 (see infra, note 111). See also infra, text accompanying notes 105-107; infra, text (of Part IV), accompanying notes 79 & 81 (as well as that note 81); F. Wharton, A Treatise on the Criminal Law of the United States 537 (4th ed., 1857); and the works cited in McLaren, infra note 8 (of Part IV) 109-110 & 138-143; in R. Siegel, Reasoning from the Body 44 Stan L. Rev. 287-291 (1992); and in 1 M. Orfila, Traite de Medicine Legale 226 (Paris, 1848).

100. See Witherspoon, supra note 77 at 62 (including n.109).

101. See Witherspoon, supra note 77 at 65 n.125, and supra note 86.

102. See infra, Statute No. 1 (of Appendix 1).

103. See infra, Statute No. 2 (of Appendix 1).

104. See id. at Statute No. 3 (of Appendix 1).

105. William Cummin, Lectures on Forensic Medicine, in Syllabus of a Course of Lectures on Forensic Medicine, as reproduced in The London Medical Gazette, Saturday, December 24, 1836, p. 438 (lec. no. XIII).

106. Cummin (London Medical Gazette), supra note 105 at Saturday, February 4, 1837, p. 678 (lec. no. XIX).

107. 1 J. Chitty, A Practical Treatise on Medical Jurisprudence p.IX (of Preface) (London, 1834).

108. See infra, text (of Part IV) accompanying notes 6 & 30 (and the references set forth in the latter note); and infra, secs. 4-6 (of Part IV).

109. See John Connery, Abortion: The Development of Roman Catholic Perspective 17-18, 57, 168-69 & 305-307 (1977); and infra, text (of Part IV) accompanying note 30; and sec. 4 (of Part IV).

110. See the references set forth in 1) supra, note 109, and 2) infra, note 97 (of Part IV). The Roe Court's understanding of

the Aristotelian opinion on when a human being comes into existence is in error. See Roe v. Wade, 410 U.S. at 133 n. 22.

111. See, e.g., Foster v. State (1927), 182 Wis. 298, 302; 196 N.W. 233, 235 (the deliberated destruction of the human embrio is not as serious an offence as the deliberated destruction of the unborn human being). See also, infra note 3 (of Part IV). Samuel Farr, in his Elements of Medical Jurisprudence (1788), stated:

> At what time may a foetus [in the broad sense of the term human fetus] be supposed to begin to live?...[I]t may be said, that life begins...immediately after conception. Hence those seem to err...[w]ho would persuade us that the foetus acquires life when ...the mother becomes sensible of its motions....If generation be the cause of animating the rudiments of the future being, and if that animation be construed to be understood by what is meant by life, then it must certainly begin immediately after conception, and nothing but the arbitrary forms of human institutions can make it otherwise.
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> The next thing to be considered...is with respect to abortions or the destruction of ...unborn embryos...[I]ndeed, as such beings ...may be supposed from the time...of conception to be living animated beings, there is no doubt but the destruction of them ought to be considered as a grievous crime.
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> The first rudiments or german of the human body is not a human creature, if it be even a living one; it is a foundation only upon which the human superstructure is raised. This is evident to anatomical observation were a child to be born of the shape which it presents in the first stages of pregnancy, it would be a monster indeed, as great as any which was ever brought to light. How easy, then, is it for disorder to prevent the exertion of that plastic force, which is necessary to form a complete animal [i.e., an organized or formed human fetus].

Samuel Farr, Elements of Medical Jurisprudence 14-15, 40 & 12, respectively (London, 1788), as reproduced in T. Cooper, Tracts on Medical Jurisprudence (1819). Farr's Elements is, in large

part, an abridged translation of J.F. Faselius' Elements Medicine Forensis (Geneva, 1767). The third observation seems to conflict with the two preceding it; I do not know which, if any, of the three can be traced to Farr. (See Farr's Preface to his Elements). I suspect the first and second observations belong to Farr and the third belongs to Faselius. By the late 18th century, most embryologists had discarded the "plastic force theory".

There are at least two additional reasons that may serve to explain why the 19th century, United States physicians' campaign to convince our then existing state and territorial legislative bodies to do away with the quickening (or quick with child-not quick with child) distinction in the context of criminal abortion was not completely successful. The first is the highly misleading opinion in the case of Evans v. People (1872) (see supra, note 86 for a criticism of the Evans opinion). The second is contained in 3 Paris & Fonblanque (1823), supra note 18 at 90:

> It cannot be necessary here to repeat that the popular idea of quick or not quick with child is founded in error; yet as Acts of Parliament are not often drawn, and seldom even reviewed previous to their passing, by those whose profession, science, trade, or business, would best enable them to convey [or reflect the particular reality]..., we must be content to recognize a distinction in law which does not exist in nature.

112. See Roe v. Wade, 410 U.S. at 138 (Connecticut's 1821 abortion statute was founded upon England's 1803 statute); L. Lader, Abortion 87 (1966) (New York's 1828 statute was founded upon England's 1803 statute; Means I, supra note 1 at 445 (mentions seven states that modeled their abortion statutes after New York's 1828 act.); State v. Vawter (1845), 2 Ind. 618, 618, 7 Blackf. Rep 592, 592 (Indiana's original abortion statute was modeled after sec. 2 of 43 Geo. 3, c.58 [reproduced infra, in Statute No. 1 (of Appendix 1)]); State v. Gedicke, 43 N.J.L. 86, 90 (1881) (New Jersey's 1849 and 1872 abortion statutes derived in part from England's 1828 and 1861 criminal abortion statutes); and John F. Kelly (compiler), The Revised Statutes of West Virginia in Force December, 1878, Alphabetically Arranged

388 (sec. 8) (St. Louis, 1878) (West Virginia's abortion statues were derived from the English abortion statutes). The 19th-century, English criminal abortion statutes are reproduced, infra in Statutes Nos. 1-4 (of Appendix 1). Several of their American counterparts are reproduced in Quay, supra note 77 at 447-520.

113. See, e.g., Holmes v. McColgan, 17 C.2d 426, 430; 110 P.2d 428, 430 (1941) (cert. den., 314 U.S. 636 (no. 147) (1941)).

114. See, e.g., M. Dickens and R. Cook, Development of Commonwealth Abortion Law, 28 Int'l. & Comp. L. Q 424, 433 (including n.63) (1979); and Glanville Williams, The Sanctity of Life and the Criminal Law 149 (1968).

115. See, e.g., His Lordship's Charge to the Jury, in The Case of Pizzy and Codd (1808), reproduced in an abstracted form, infra, in Appendix 22.

116. The statute is reproduced infra, in Statute No. 1 (Appendix 1).

117. See infra, sec. 6 of Part IV; and infra text (of Part IV) accompanying notes 5-6.

118. See, e.g., R v. Pizzy & Codd (1808), reproduced in an abstracted form, infra, in Appendix 22; R v. Phillips (aka., R v. Anonymous), 170 Eng. Rpts. 1310, 1311-12; 3 Camp. 73 (Monmouth summer Assi., 1811, Cor. Lawrence, J.) (reproduced in pertinent part, infra, text (of Part IV) accompanying notes 178-180). For an example of a successful, English prosecution for non-quick with child (or not proved to be quick with child) statutory abortion, see Coe's Case (1834), 6 C&P 403. See also Robert Hughes, The Fatal Shore: The Epic of Australia's Founding 259 (1984) (mentions three women who were convicted of violating the second section of England's original or 1803 criminal abortion statute); and R v. Russell (1832), 168 Eng. Rpts. 1302; 1 Mood 356 (see infra Case No. 2 (of Appendix 17)).

119. The statute is reproduced infra, in Statute No. 3 (Appendix 1). See Q v. Goodhall (1846), 169 Eng. Rpts. 205, 205, 1 Den. C.C. 187, 2 Cor. & Kir. 293 (sub nomine R v. Goodchild).

120. See the authorities set forth infra, in note 36 (of Part IV).

121. See infra, sec. 6 (of Part IV); and infra, text (of Part IV) accompanying notes 6 & 30 as well as the references set forth in those notes.

122. The statute is reproduced infra, in Statute No. 1 (of Appendix 1). See, e.g., R v. Phillips (1811), infra, text (of Part IV) accompanying notes 178-180 (Phillips, after being acquitted of violating sec. 1 of England's 1803 criminal abortion statute, was prosecuted under sec. 2 of that statute. The sec. 2 prosecution alleged only the abortional act set forth in the sec. 1 prosecution.

123. See R v. Scudder (1828), 172 Eng. Rpts. 565, 566; 1 C & P 605, 605-606 (rejecting the dictum to the contrary in R v. Phillips, 170 Eng. Rpts, 1310, 1311, 3 Camp. 73 [Monmouth summer Assi., 1811, Cor. Lawrence, J.]). But see R v. Gaylor (1857), 169 Eng. Rpts. 1011, 7 Cox C.C. 253; (1857) Dears & Bell 288 (stands for the proposition that pregnancy is not an element of a common law-based, abortion-related-murder-of-a-woman prosecution) (see infra, note 37 (of Part IV) at the last paragraph there).

124. See, e.g., Taylor, supra note 99 at 432-433: "[T]he signs of delivery are indistinct in proportion to the immaturity of the ovum...[W]hen it takes place at the...third month, there are scarcely any proofs which can be derived from an examination of the female. All the ordinary signs of delivery at full period will be absent.") See also id. at 437 (if the uterus has "expelled its contents in the first months of pregnancy, the traces of this expulsion will have generally disappeared in the course of a few days"). See also Notes: The Law of Criminal Abortion: An Analysis of Proposed Reforms, 32 Ind. L.J. 193, 199 n.34 (1956) (see infra, text accompanying note 145); and infra, note 21 (of Part IV).

125. These statutes are reproduced infra, in Statutes Nos. 1-4 (of Appendix 1). And see the trial court's charge to the jury in Pizzy's and Codd's Case (1808), reproduced in an abstracted form, infra, in Appendix 22 (in common law abortion prosecutions "it was very difficult to prove that the child was killed by the

medicine. It was [,therefore,] thought proper to make this Act of Parliament" [i.e., 43 Geo. 3, Ch. 58, 1803]).

126. See supra, text accompanying note 74, as well as the authorities cited in that note.

127. 110 U.S. 516, 533 (quoting Munn v. Illinois (1877), 94 U.S. 113, 134).

128. Hawley & McGregor, Criminal Law 290 (5th ed. Chicago, 1915). And see particularly, infra, text (of Part IV) accompanying n. 209.

129. See infra, text (of Part IV) accompanying note 36, as well as the authorities, etc., set forth in that note. For a list of state court appellate decisions holding or stating in dictum that pre-quick with child or pre-quickening deliberated abortion is not an indictable offence at the English common law, see infra, note 210 (of Part IV). And see Means I, supra note 1 at 426-27 (including notes 34 & 36).

130. 77 Mass. (11 Gray) 85, 92.

131. 33 Maine 48, 57.

132. 22 N.J.L.R. 52, 58.

133. See 22 N.J.L.R. 52, 58 (ed's. footnote a); State v. Siciliano, 21 N.J. 249, 257-58 (1956); and infra, text accompanying n. 135.

134. The statute is reproduced in Quay, supra note 77 at 496.

135. 27 N.J.L.R. 112, 114.

136. See Roe v. Wade, 410 U.S. at 151 (including note 48).

137. See Thompson v. State, 493 S.W. 2d 913, 918-919 (1971) (judgment vacated and remanded for further consideration in light of Roe v. Wade, sub nom. Thompson v. Texas (1973), 410 U.S. 950) (see Roe v. Wade, 410 U.S. at 113 n. 3). As Texas' 1960 criminal abortion statute was so construed by Texas' highest court of criminal appeals, the Court in Roe was bound to accept this Thompson interpretation. See, e.g., Hebert v. Louisiana, 272 U.S. 312, 316 (1926) ("whether state statutes shall be construed

one way or another is a state question, the final decision of which rests with the Courts of that state...The supreme court of the State having held that the two statutes must be taken together...we must accept that conclusion as if written into the statutes themselves."); and Eisenstadt v. Baird, 405 U.S. 438, 442 (1972). And see West v. AT&T Company, 311 U.S. 223, 287-88 (1940) (intermediate state court Appellate decisions on statutory interpretation serve as a valuable guide for the Court in understanding the purpose of a state statute). It is true that the Thompson court was construing a 1960-enacted Texas criminal abortion statute. It is also true that the Thompson court did not mention Texas' original or 1854 criminal abortion statute. However, it is equally true that it is a rule of statutory construction that when the legislature enacts a statute framed in identical or substantially similar language of a previous statute on the same subject, it is presumed that the new statute has the same fundamental meaning as the old one. See, e.g., Holmes v. McColgan (1941), 17 Cal.2d.426, 430; 110 P.2d 428, 430; and R. Epstein, The Abortion Cases 1973 Sup. Ct. Rev. 159, 168 n.34.

The remaining forty-three decisions here are: 2) Smith v. State, 33 Me. 48, 57-59 (1851) (see supra, text accompanying note 131); 3) State v. Rudman, 126 Me. 177, 180 (1927); 4) Abrams v. Foshee, 3 Iowa 274, 278 (1856); 5) State v. Moore, 25 Iowa 128, 131-32 & 135-36 (1866); 6) Commonwealth v. Wood, 77 Mass. (11 Gray) 85, 92 (1858) (see supra, text accompanying note 130); 7) State v. Howard, 32 Vt. 380, 399 (1859); 8) Doughtery v. People, 1 Colo. 514, 522 (1872); 9) State v. Gedicke, 43 N.J.L. 86, 90 (1881); 10) State v. Siciliano, 21 N.J. 249, 257-58, 121 A.2d 490, 495 (1956); 11) Evans v. The People, 49 N.Y. 86 (1872) (see supra, note 86); 12) People v. Sessions, 58 Mich. 594, 595-96, 26 N.W. 291, 292-93 (1886); 13) Montgomery v. State, 80 Ind. 338, 339 (1881); 14) State v. Watson, 30 Kan. 281, 284, 1 P.2d 770, 771-72 (1883); 15) Joy v. Brown, 173 Kan. 833, 839-840, 252 P.2d 889, 893 (1953); 16) State v. Miller, 90 Kan. 230, 233, 133 Pac. 878, 879 (1913); 17) Lamb v. State, 67 Md. 524, 532-33, 10 A. 208 (1887); 18) Worthington v. State, 92 Md. 222, 237-38, 48 A. 355, 356-57 (1901); 19) State v. Crook, 16 Utah 212, 217, 51 P. 1091, 1093 (1898); 20) Taylor v. State, 105 Ga. 846, 33 S.E. 190 (1899); 21) Passley v. State, 194 Ga. 327, 329 21 S.E. 2d 230, 232 (1942); 22) State v. Alcorn, 7

Idaho 599, 613-614, 64 P. 1014, 1019 (1901) (see supra, note 45 [of Introduction]); 23) Nash v. Meyer, 54 Idaho 283, 301, 31 P. 2d 273, 280 (1934); 24) State v. Magnell, 19 Delaware 307, 309, 51 Atl. 606, 607 (1901); 25) Edwards v. State, 79 Neb. 251, 254-55, 112 N. W. 611, 612-13 (1907); 26) Munk v. Frink, 81 Neb. 631, 636-637 (1908) (see supra, note 97); 27) State v. Tippie, 89 Ohio 35, 39-40, 105 N.E. 75, 77 (1913) (see supra, text accompanying note 79); 28) State v. Atwood, 54 Ore. 526, 530-531, 102 Pac. 295, 296-97 (1909) (aff'd. 54 Ore. 542, 104 Pac. 195 (1909)) (see supra, note 79); 29) State v. Ausplund, 86 Ore. 121, 131-32, 167 P. 1019, 1022-23 (1917); 30) Trent v. State, 15 Ala. App. 485, 486, 73 So. 1002 (1917); 31) Tonnahill v. State, 84 Tex. Crim. 517, 208 S.W. 516 (1919); 32) State v. Powell, 181 N.C. 515, 106 S.E. 133 (1921); 33) State v. Hoover, 252 N.C. 113, 133 & 135, 113 S.E. 281, 283 (1960); 34) Foster v. State, 182 Wis. 298, 299-302, 196 N.W. 233, 234-35 (1923); 35) Bowlan v. Lunsford, 176 Okla. 115, 117, 54 P.2d 666, 668 (1936); 36) State v. Cox, 197 Wash. 67, 77, 84 P.2d 357, 361 (1938); 37) McClure v. State, 214 Ark. 159, 170, 215 S.W.2d 524, 530 (1949); 38) Miller v. Bennett, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949); 39) Anderson v. Commonwealth, 190 Va. 665, 673, 58 S.E. 2d 72, 75 (1950); 40) Bennett v. Hymers, 101 N.H. 483, 484-85, 147 A.2d 108, 109-110 (1958); 41) Sasaki v. Commonwealth, 485 S.W. 2d 897, 900-904 (Ky., 1972) (judgment vacated and cause remanded for further consideration in light of Roe v. Wade, sub nom. Sasaki v. Kentucky, 410 U.S. 951 (1973)); 42) Rogers v. Danforth, 486 S.W.2d 258, 259 (Mo., 1972); 43) State v. Munson, 86 S.D. 663, 201 N.W.2d 123 (1972) (judgment vacated and cause remanded for further consideration in light of Roe v. Wade, sub nom. Munson v. South Dakota, 410 U.S. 950 (1973)); and 44) Nelson v. Planned Parenthood Center of Tucson, Inc., 19 Ariz. pp. 142, 505 P.2d 580 (1973) (modified on rehearing pursuant to Roe v. Wade).

Several of the foregoing cases are discussed in the following works: John Gorby, The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement (1979) S.Ill.L.J. 1, 16-17 nn.84-85; Robert M. Byrn, An American Tragedy: The Supreme Court on Abortion, 41 Fordham L. Rev. 807, 828-29 nn.136-146; Notes: The Law of Criminal Abortion: An Analysis of Proposed Reforms 32 Ind.L.J. 1, 196 nn. 19-

20 (1956); Joseph Dellapenna, The History of Abortion: Technology, Morality and Law 40 U. Pitt. L. Rev. 401 n.258 (1979); and R. Destro, Abortion and the Constitution: The Need for a Life-Protective Amendment, 63 Cal. L. Rev. 1273-1281 (1975).

138. G. Grisez, Abortion: the Myths, the Realities, and the Arguments 384 (paperback ed., 1970).

139. 21 N.J. 249, 258 (1956). See also the quote from State v. Mandevile, 89 N.J.L. 128 (1916), as set forth supra, in note 79.

140. See supra, text accompanying notes 121-124. The 1849, New Jersey, criminal abortion statute is reproduced in Quay, supra note 77 at 96.

141. See supra, text accompanying notes 80-83.

142. See Quay, supra note 77 at 497.

143. See Smith & Hogan, Criminal Law 144 (5th ed., paperback, London, 1983).

144. See Roe v. Wade, 410 U.S. at 151.

145. Notes, 32 Ind. L.J. 193, 199 (1956). See, e.g., R v. Pizzy & Codd (1808), reproduced in an abstracted form, infra, in Appendix 22. See also infra, note 21 (of Part IV); and supra, text accompanying note 124, as well as that note.

146. See the authorities cited in 139 A.L.R. 993; H.C. Underhill, A Treatise on the Law of Criminal Evidence 236 nn.15-18 (4th ed., 1935); and Backhouse, supra note 97 at 90 n. 97. And see R v. Pizzy & Codd (1808), reproduced in an abstracted form infra, in Appendix 22. See also Byrn, supra note 137 at 854-55 nn.282-283; and Witherspoon, supra note 77 at 59 (including n.90). But see King v. Scokett, 72 J.P. 428; 24 T.L.R. 893 (1908) (woman upon whom an abortion was performed properly convicted on an aiding and abetting theory, notwithstanding she was not subject to prosecution under the limb of the abortion statute under which the principal was convicted).

147. As to common law liability, see, e.g., Smith v. Gifford, 31 Ala. 45, 51 (1857); State v. Murphy, 27 N.J.L. 112, 114 (1858); In re Vince, 2 N.J. 443, 450, 67 A.2d 141, 144 (1949); Commonwealth v. Kelsea, 103 Pa. Superior Ct. 399, 400 (1931); and Williams, supra note 76. As to liability under a state's aiding and abetting law, see, e.g., 139 A.L.R. 993, 1001-1002. As to liability under statutory criminal statutes, see the statutes cited in Witherspoon, supra note 77 at 59-60 n.91. Several of these statutes are reproduced in Quay, supra note 77. England enacted such a statute in 1861 (reproduced infra, in Statute No. 4 (of Appendix 1). As to the woman's liability on a theory of conspiracy, see the cases cited in 5 A.L.R. 782, 788-89. See also Smith & Hogan, supra note 143 at 343-44 & 250-51.

148. See supra, text accompanying notes 1-11, 27-33, 39-77 & 148; and supra, text (of Part I) accompanying note 44. See also Tribe & Dorf, supra note 23.

149. 410 U.S. at 153. See also Planned Parenthood v. Casey, 505 U.S. ___, 120 L.Ed 2d 674, 698-699 (1992).

150. See supra, text (of Introduction) accompanying notes 2-3 & 5, as well as the authorities set forth in the last note (5). And see supra, text accompanying note 61.

151. 411 U.S. 1, 102.

152. 421 U.S. 809, 826. See also Granfinonciera v. Nordberg, 492 U.S. 33, 61 (1989).

153. A. Cox, The Court and the Constitution 329 (1987). See also, e.g., Karst, supra note 43 (of Introduction) at 641 n.90; infra, text accompanying note 166; and to a lesser extent, Rubenfeld, supra note 41 (of Introduction) at 751 n.83.

154. David Chambers, Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives, 70 Mich. L. Rev. 1107, 1155 (1972).

155. 430 U.S. 651, 672.

156. 441 U.S. 68, 77 n.7. See infra, note 169.

157. 439 U.S. 438, 444 n.5.

158. 440 U.S. 648, 662 (1979). On the right to interstate travel, see Shapiro v. Thompson, 394 U.S. 618, 627-630 (1969); and Zobel v. Williams, 457 U.S. 55 (1982). See also e.g., Raper v. Lucey, 488 F.2d 748, 752 (1973); and Wall v. King 206 F.2d 878, 882 (1953) ("freedom to make use of one's...motor vehicle, as a means of getting about from place to place, whether in pursuit of business or pleasure, is a "liberty" which under the Fourteenth Amendment cannot be denied or curtailed by a state without due process of law"). And see infra, text accompanying note 180.

159. See Mackey v. Montrym, 443 U.S. 1, 10 (1979); Dixon v. Love, 431 U.S. 105, 112-13 (1977); and Bell v. Burson, 402 U.S. 535, 539 (1971). See also, e.g., Hernandez v. California Department of Motor Vehicles (1981), 30 Cal. 3d 70; 177 Cal. Rptr. 566.

160. N. Gleicher (ed.), Principles of Medical Therapy in Pregnancy 9 (1985). See id. at 5-8; id. (2nd ed., 1992) at 13 ("improved medical management [of pregnancy] almost guarantees maternal... survival"); Williams Obstetrics 3 (Table 1-1) (19th ed., 1993) (in the U.S. during the period 1976-1986, there were only 9.1 maternal deaths per 100,000 live births); J. Queenan (ed.), A New Life: Pregnancy, Birth 24-25, 62 (1979); and M. Lindheimer, et al, Renal Disorders, in W.M. Barron, et al, Medical Disorder During Pregnancy, 42 (1991) ("most women who have minimal renal dysfunction can conceive with the knowledge that over 90% of their gestations will succeed, and that pregnancy will not have adverse effects on the maternal history of the disease").

161. See, e.g., U.S. v. Christophe, 833 F.2d 1296, 1299-1300 (9th Cir., 1987); Richardson v. Merrell, 857 F.2d 823, 829 (D.C. Cir., 1988); People v. Shirley (1982), 31 Cal.3d 18, 53; and People v. Stoll (1989), 49 Cal.3d 1136, 1154-1155.

162. Taken from Koop's letter to President Reagan, as reproduced in Documents: A Measured Response: Koop on Abortion, 21 (No. 1) Family Planning Perspective 31, 31 (January/February, 1989). For an analysis of Koop's Report on Abortion, see James R.

Kelly, The Koop Report and a Better Politics of Abortion, 162 (no. 21) America 542-546 (June 2, 1990). (America is a weekly magazine published by the Jesuits of the United States and Canada (American Press, Inc., N.Y., N.Y.).)

163. 275 U.S. 164, 171-72.

164. On "standing", see, e.g., Valley Forge Christian College v. American United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982); and Singleton v. Wulff, 428 U.S. 106, 112 (1976). The Danforth proposition is cited as 428 U.S. 52, 70 (1976). The Danforth proposition rested upon two premises: (1) the State cannot give to a husband a power the State itself does not possess (which is a silly proposition, since the State cannot constitutionally delegate its legitimate powers to persons not acting under color of state law (see infra, note 48 (of Part IV)), and (2) the wife's interest here outweighs the husband's interest. As to the first premise, it simply does not follow that because the State cannot prohibit a married woman from obtaining an abortion that therefore the State cannot protect or recognize the fundamental right (if it exists) of a husband to have his and his wife's conceived, unborn child. The reason for the State's very existence is, after all, to facilitate the exercise of individual fundamental rights. (See supra, text accompanying notes 39-46 (as well as the authorities cited in those notes); and infra, text (of Part VI) accompanying note 57, as well as the authorities set forth in that note.) Surely the individual's fundamental or inalienable rights do not derive from the State. (See Justice Stevens, supra note 1 (of Introduction.) Also, the Court has held that procreation is a fundamental right. See Skinner v. Oklahoma (1942), 316 U.S. 535, 541 (see infra, text accompanying note 177). As to the second premise, it erroneously presupposes that the valid exercise of one person's fundamental or inalienable right can collide with a valid exercise of another person's fundamental right. (See infra, text (of Part V) accompanying notes 5-6, as well as the former note (5). More importantly, this second premise rests upon nothing more than the private views of a majority of Justices that the wife's interest here outweighs the husband's interest. See Caban v. Mohammed, 441 U.S. 380, 389 (1979) ("an

unwed father may have a relationship with his children fully comparable to that of the mother").

165. Los Angeles Herald Examiner, Thursday, October 18, 1984, Part A., p.11. See also Los Angeles Times, Thursday, June 22, 1989, p.2, col.5, ("Two of every five American women giving birth to their first children were not married when they became pregnant, a rise over the last two decades, the Census Bureau said.")

166. 410 U.S. at 170 (citations omitted).

167. See Osborne v. Ohio, 495 U.S. 103, 108 (1990); Pope v. Illinois, 481 U.S. 497, 503, (1987); and Stanley v. Georgia, 394 U.S. 557 (1969).

168. 411 U.S. 1, 33.

169. A person's fundamental right to pursue an education no more ceases to be fundamental because it is exercised in the context of a state's public school system than does the exercise of free speech cease to be fundamental simply because it is exercised in that same context. See Widmar v. Vincent, 454 U.S. 263 (1981) (although the constitution does not require a state university to create a forum generally open for use by student groups, once it has done so, it may not discriminate against forms of speech protected by the first amendment); and Westside Community Schools v. Mergens, 497 U.S.__, 110 L.Ed 2d 191 (1990).

170. 411 U.S. at 33-34.

171. See supra, text (of Part I) accompanying notes 17-23.

172. See supra, text (of Part I) accompanying notes 6 & 8-10, as well as the authorities, etc., set forth in the last note (10).

173. 411 U.S. at 102-103.

174. 411 U.S. at 100-101.

175. See supra, text (of Part I) accompanying notes 7 & 46, as well as the authorities cited in these notes); and infra, text accompanying notes 180-184.

176. See also Cruzan v. Director, Missouri Department of Health, 497 U.S. 260 (1990) (Justice Stevens dissenting) (In the ordinary case we quite naturally assume that...[the rights of 'Life, Liberty and the pursuit of Happiness'] are compatible, mutually enhancing, and perhaps even coincident").

177. 316 U.S. 535, 541.

178. 431 U.S. 678, 685; Heymann & Barzelay, supra note 33 (of Introduction) at 775; Planned Parenthood v. Casey, 505 U.S.___, 120 L.Ed 2d 674, 698 & 703 (1992).

179. See Singer v. United States, 380 U.S. 24, 34-35 (1965); and Faretta v. California, 422 U.S. 806, 819 n.5.

180. 431 U.S. 678, 688-89.

181. 300 U.S. 379, 391.

182. 431 U.S. 816, 845. See also Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503 n.12.

183. See supra, text accompanying notes 66-77, and infra, Parts III & IV of text.

184. 422 U.S. 806, 820 n.16. See also, e.g., Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 33, 260 (1989) (footnote omitted):

> Whatever the outer confines of the [8th Amendment's prohibition against excessive fines]...may be, we now decide...that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor...[can] receive a share of the damages awarded. To hold otherwise, we believe, would be to ignore the purposes and concerns of the Amendment, as illuminated by its history.

185. Heymann & Barzelay, supra note 178 at 766.

186. 431 U.S. 494, 501.

187. 367 U.S. 497, 544.

188. 125 U.S. 190, 211.

189. 316 U.S. 535, 541.

190. 431 U.S. 494, 503-504.

191. R. O'Sullivan, Christian Philosophy in the Common Law, in The Aquinas Society of London Aquinas Papers, 3 & 36 (Westminster, Maryland: The Newman Bookshop, 1942); St. John Stevas, Law and Morals 67 (1964). See also I. Breword (ed.), The Works of William Perkins 419-420 & 425 (1970); M.W. Perkins, Christian Oeconomie 13 (1609); Mather, infra note 3 (of Part III) at 4 (the conception of children is the "One principal End of Marriage"); Oliver, infra note 3 (of Part III) at 2 ("'Tis one end of Marriage...: that the race of mankind...may continue in a legitimate line, and that God might have holy seed."); 1 Madan, infra note 26 (of Part III) at 18 & 45-46; T. Wood, Seventeenth-Century Moralists and the Marital Relationship, 1 Trivium 67 (St. David's College, 1966); Given-Wilson, et al, infra, note 16 (of Part IV); Johnson, supra note 7; and M.P. Saxton, Being Good: Moral Standards for Puritan Women, Boston: 1630-1730 144-46 (unpub. Ph.D. dissertation, Columbia U., 1989).

192. See, e.g., J. D'Emilio & E. Freedman, Intimate Matters: A History of Sexuality in America vxii, 4-6, 15-32, & 37-38.

193. Gavigan, infra note 2 (of Part IV). And see the references infra, in note 223 (of Part IV); and State v. Atwood, 54 Ore. 526, 534-35 (see supra, note 79).

194. See Heymann & Barzelay, supra note 178 at 775.

195. See Stanley v. Georgia, 394 U.S. 557 (1969).

196. See Griswold v. Connecticut, 381 U.S. 479 (1965). When one considers that one of the premises of the movement to legalize access to artificial contraception was that such access would serve as a preventative of abortion and infanticide, it seems strange to argue that the right to have access to artificial

contraception constitutes precedent or support for a right to have access to abortion.

197. See Roe v. Wade, 410 U.S. 159-160 (see infra, note 8 (of Part V)); infra, text (of Part VI) accompanying notes 1-17; and infra, text (of Part IV) accompanying notes 4 & 5, as well as those two notes.

198. See supra, text accompanying notes 24 & 38-65; supra, text (of Introduction) accompanying notes 9 & 17, as well as those two notes; and infra text (of Part VI) accompanying notes 50 & 56.

199. 137 U.S. 86, 89-90.

200. Laurence Tribe, [Abortion] Issue Offers Little Room for Compromise, "The Los Angeles Daily Journal", July 13, 1990, p.6. See also Tribe, supra note 1 (of Introduction) at 105.

201. See supra, text accompanying note 164, as well as that note itself.

202. See supra, text accompanying note 24; supra, text (of Introduction) accompanying notes 9 & 17 (as well as those two notes), and infra, text (of Part VI) accompanying note 17. The Yoder citation is 406 U.S. 205, 215-16.

203. See, e.g., Jacobson v. Massachusetts, 197 U.S. 11, 26-29 (1905) (see infra, text (of Part VI) accompanying note 16); and Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 885 & 888-89 (1990). See also, infra, text (of Part VI) accompanying notes 34-36 & 57-65.

204. 383 U.S. 663, 669. See also, e.g., Wolf v. Colorado, 338 U.S. 25, 27 (1949).

205. Tribe & Dorf, supra note 48 (of Part I) at 73.

206. See supra, text (of Part I) accompanying notes 8-10 (as well as note 8 of Part I); and supra, text accompanying notes 148-153.

207. See supra, text accompanying notes 52 & 63-64.

Notes to Part III

1. Lumbrozo's Case is reproduced infra, Case No. 2 (of Appendix 2).

2. See, infra, text (of Part IV) accompanying notes 220-228; and infra, text accompanying note 37. See also, e.g., The Colonial Laws of Massachusetts, infra n. 21 at 47 (sec. 65) ("No custome or prescription shall ever prevaile amongst us in any morall cause...that can be proved to be morrallie sinfull by the word of god."); David Flaherty, Law and the Enforcement of Morals in Early America, in L.M. Friedman & H.N. Scheiber, American Law and the Constitutional Order: Historical Perspectives 53-66 (1978); Shurtleff, infra note 4; D'Amilio & Friedman, supra, note 192 (of Part II) at 11-12; Spindell, infra, note 17 (of Part IV) at 50-52, 63, 82-86 & 116-119; Thompson, infra note 10 (of Part IV) at 10-11 (Table 1); Koehler, infra, note 9 at 82-83; Paul S. Reinsch, The English Common Law in the Early American Colonies, 2 (no.31) Bull. U. Wis. 5, 56 (1899) (reprinted in 1 Select Essays in Anglo-American Legal History 367,413 (1968)); William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830 36-39 (1975); Joseph H. Smith (ed.), Colonial Justice in Western Massachusetts 1639-1702: The Pynchon Court Record 103-107 (1961); David T. Konig, Law and Society in Puritan Massachusetts: Essex County, 1629-1692 13 (1979); Arthur Scott, Criminal Law in Colonial Virginia 278 (1930); Bradley Chapin, Criminal Justice in Colonial America 1606-1660 9-13 & 125-130; Fischer, infra note 17 (of Part IV) at 91-93 & 194; Edsall, infra note 3 (of Statute No. 5 of Appendix 1) at 113-125; M. Hindus, Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767-1878 67-70 (1980); and L.A. Knafla, Sin of All Sorts Swarmeth: Criminal Litigation in an English County in the Early Seventeenth-Century, in Ives, infra note 17 (of Part IV) p.50 at 62-63.

3. Cotton Mather, Elizabeth in Her Holy Retirement: An Essay to Prepare a Pious Woman for Her Lying-in 5 (Boston, 1710). See also John Oliver, A Present to be Given to Teeming Women 83-89 (1669).

4. 5 N. Shurtleff (ed.), Records of the Governor and Company of the Massachusetts Bay in New England 1679-1686 4 (1854). See also, e.g., M. Pennypacker, The Duke's Laws: Their Antecedents, Implications, and Importance, in Anglo-Amer. Leg. Hs., series 1, no.9, pp. 2-3 (NYU School of Law, 1944) (In 1635 "the settlers of Connecticut discovered that neither...[Biblical] Laws nor... [English] Laws were sufficient...[A person] traded a fowling piece with the Indians...[N]o law prohibit[ed] it, yet it was considered...dangerous to entrust the savages with any weapon. To correct the matter, a court was organized....").

5. As to the latter proposition, see supra, text (of Part II) accompanying note 67, as well as this Part III. As to ruling no. 1, see the authorities cited infra, in note 36 (of Part IV). As to rulings 2-4, see infra, text accompanying notes 13-15, and the references set forth in those notes.

6. See, e.g., R v. Vaughan (1769), [1558-1774] All Eng. Rpts. Reprint 311, 312; 98 Eng. Rpt. 308; and Blackstone, infra note 7.

7. 1 Blackstone, Commentaries 108 (sec. 4) (1765).

8. D. Walker, The Oxford Companion to Law 1255 (1980). See also 2 Thomas M. Curley (ed.), Sir Robert Chambers: A Course of Lectures on the English Law 1767-1773 286 & 290 (1986); 1 Courts and Lawyers of Pennsylvania: A History, 1623-1923 157 (N.Y., 1922); Greg, supra note 53 (of Part I) at 154 ("English charters and English Law generally had a legal superiority over legislation of colonial assemblies that litigants could enforce by appeal to Privy Council"); and Earliest Printed Laws of North Carolina, supra note 74 (of Part II).

9. Colony of Rhode Island and Providence Plantations v. Deborah Allen (September 4, 1683), as reproduced from General Court of Trials: Newport County 1671-1724.A. n.p. (4 Sept. 1683 Session). As of 1987, this volume is housed in the Providence, Rhode Island College, Phillips Memorial Library Archives sub nom. Rhode Island Court Records Collection. The staff of Phillips Memorial Library Archives, per my request, searched their Rhode Island Court Records Collection in an attempt to locate the Allen indictment and any depositions, etc., that may have been

taken in connection with the Allen case. The search proved fruitless: "The search turned out to be a wild goose chase; there is nothing further on the [Deborah Allen] case in our Records. As I am sure you can imagine, the records going back 300+ years are rather incomplete." Jane M. Jackson, Assistant Archivist for Phillips Memorial Library Archives, in a letter to Philip A. Rafferty (February 18, 1987). I am grateful to the staff of the Phillips Memorial Library Archives for conducting this search on my behalf. My original source for Allen's Case is Lyle Koehler, A Search for Power: The "Weaker Sex" in Seventeenth-Century New England 329 & 336 n. 132 (1980).

10. The Rhode Island Code of 1647, in expressly outlawing fornication, stated that the punishment for fornication shall be "what penaltie the Wisdome of the State of England have or shall appoint touching these transgressions [adultery and fornication]..." 1 Records of the Colony of Rhode Island and Providence Plantations in New England: 1636-1663 173 (Providence, R.I., 1856).

11. M. Dalton, The Countrey Justice 41 (London, 1682). (On the influence of Dalton's Countrey Justice on Colonial American judicial officers, see Flaherty, supra note 57 (of Part I) at 236-37.) See also, e.g., King, infra note 273 (of Part IV); P. Hoffer and N. Hull, Murdering Mothers Infanticide in England and New England 1558-1803 13-17 (1981); R. Chamberlain, The Compleat Justice Enlarged 37-42 (London, 1681); A Manuall or Analecta Formerly Called the Compleat Justice 31-32 (6th ed., London, 1648); and W. Nelson The Office and Authority of a Justice of Peace 92 (9th ed., 1726). The Bridewell Whipping-of-Pregnant-Woman Case is set forth infra, in Case No. 3 (of Appendix 11). 18 Eliz. I, c. 3 (1576) is reproduced in 6 Statutes at Large (I Mary. 35 Eliza.) 311 (Cambridge, 1763) It reads in pertinent part: "justices of the peace...may, by their discretion, take order...for the punishment of the mother...of such bastard child". 7 James 1, c. IV, sec. 7 (1609) is reproduced in 7 Statutes at Large (39 Eliza. 12 Chas. 2), 225 (Cambridge, 1763). It provides for one year in house of correction, "there to be punished and set on work", for first a offence of bastardy. See also id. at 327, sec. 15.

12. See General Court of Trials, supra note 9. The three were Hannah Archer, Rebechah Hobson and Sarah Dye. See also, e.g., The Earliest Printed Laws of Delaware 1704-1741 62 (Wilmington, Delaware, 1978) (twenty-one lashes or three pounds, at the election of the fornicator); 1 The Earliest Printed Laws of South Carolina: 1692-1734 164 (Wilmington, Delaware, 1977) (fornicator to pay a 5 to 10 pounds fine, and if not paid within 20 days after judgment of conviction, then thirty-one lashes on the bare back); and Acts and Laws of His Majesty's Province of New Hampshire in New England with Sundry Acts of Parliament 12 (Portsmouth, 1761).

13. See 1 Records of Rhode Island and Providence Plantations, supra note 10 at 158-160; and Wm. R. Staples, The Proceedings of the First General Assembly of the Incorporation of Providence Plantations and the Code of Laws Adopted by that Assembly in 1647 V (of Preface) & 50 (Providence, R. I., 1847).

14. See 1 Records of Rhode Island and Providence Plantations, supra note 10 at 163-64.

15. Ibid. at 190.

16. See infra, text (of Part IV) accompanying notes 32 & 37, as well as the authorities, etc., cited in those notes.

17. See infra, text (of Case No. 1 of Appendix 2) accompanying note 6, as well as the commentary accompanying that case.

18. The Francis Brooke Case is reproduced infra, in Case No. 3 (of Appendix 2). There is another "possible" abortion prosecution that occurred in Maryland in 1658. The case is Province of Maryland v. Elizabeth Robins:

[marginal note in Maryland Archives: Proprietary v. Robins]

> We whose Names are underwritten according to our oathes taken by mr. Lawson, and by an order of the last Court to Search the body of Elizabeth Robins do return our opinand Answer...: We found the Said Elizabeth in a very Sad Condition and in a Condition not like to other women, & [she] Confessed that She had twice taken Savin; once boyled

in milk and the other time Strayned through a Cloath, and at the taking thereof not Supposing her self with Child as She Sayeth, takeing it for wormes not knowing the Vertue thereof any other wayes, farther Confessed that She Supposeth her Self to have a dead Child within her, and if a Child, that the true begetter of it was her husband Robert Robins.

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[marginal note in Maryland Archives: Robins v. Robins] Christopher Goodwicker aged 30 yeares.... sworne & examined..., sayth how he heard Margarett Bassett, & Sara Yowng say, That the sd. Robt. Robins Wife had taken Sauen two seuerall times. Pretending to the woemen tht. it was for the wormes, & further sayeth not.

41 Maryland Archives (1658-1662) 20 & 85, respectively (1922). This case is referred to as a "possible" abortion prosecution because it has not been determined whether the order to search the body or physical condition of Elizabeth Robins was made in connection with an abortion prosecution against Robins (or perhaps an adultery prosecution), or whether the order to search was given in connection with a pending petition for divorce by Robins' husband on the grounds of adultery. See id. at 50-51, 79, & 83.

19. R v. George (1592) is reproduced in abstracted form in Cockburn (Kent Indictments, Elizabeth I), infra note 17 (of Part IV) at 342 (no.2058). Clearke is in 4 Records and Files of the Quarterly Courts of Essex County Massachusetts, 1667-1671 271 (1914). Gard is discussed in 5 The Public Records of the Colony of Connecticut from October, 1706 to October, 1716 350-351 (including footnote *) (1870). And see infra, text (of Part IV) accompanying note 246, as well as the references set forth in that note.

20. See Reinsch, supra note 2 at 54. See also W. Lloyd, The Early Courts of Pennsylvania 14 (Boston, 1910).

21. The Colonial Laws of Massachusetts; Reprinted from the Edition of 1660, with the Supplements to 1672; Containing also, The Body of Liberties of 1641 33 (sec. 1) (Boston, 1889) (underscoring mine). Section I was reenacted in the Massachusetts codes of

1649 and 1660. See id. at 86. See also, 1 Records of the Governor and Company of the Massachusetts Bay in New England 1628-1641 174 (N.B. Shurtleff, ed., Boston, 1853). On the legal and political histories of the Body of Liberties of 1641 and 1648, see M. Cahn, Punishment Discretion, and the Codification of Prescribed Penalties in Colonial Massachusetts, 33 American J. of Legal Hs. 107 (1989). Practically speaking, Connecticut and New Haven adopted the contents of The Body of Liberties in 1650 and 1656, respectively. See The Colonial Laws of Massachusetts supra, this note at 86; Brown's Appeal, 72 Conn. 148, 151 (1899); and Rookey v. Connecticut, 70 Conn. 104, 109-110 (1897). Although The Body of Liberties of 1641 was not formally enacted into law, it nevertheless had the force of law. Section 96 of The Body of Liberties reads as follows:

> Howsoever these above specified rites, freedomes, Immunities, Authorities and priveledges, both Civill and Ecclesiastical are expressed onely under the name and title of Liberties, and not in the exact form of Laws or Statutes, yet we do...Authorise, and earnestly intreate all that are and shall be in Authoritie to consider them as laws, and not to faile to inflict condigne and proportionable punishments upon every man impartiallie, that shall...violate any of them.

22. The Septuagint Version of the Old Testament and Apocrypha 98 (Zondervan Publishing House Ed., Grand Rapids, Michigan, 1972).

23. See The Geneva Bible, infra note 25 at 13-14, 19 & 22; P. Collinson, Archbishop Grindal, 1519-1588: The Struggle for a Reformed Church 231 (1979) (the English Bible in the Geneva version was the most important vehicle of the Protestant revolution); P. Marion Simms, The Bible in America 89-90 (N.Y., 1936); and E. Newgrass, An Outline of Anglo-American Bible History 27-28 (London, 1958).

24. The New Jerusalem Bible 108 (Doubleday, 1985). For some commentaries on these two versions of Exodus 21:22-23, see e.g., John Connery, Abortion: The Development of the Roman Catholic Perspective 7-20 (Loyola U. Press, Chicago, 1987); Rachel Biale,

Women and Jewish Law: An Exploration of Women's Issues in Halakhic Sources 219-221 (1984); and Hoffmeier, infra note 25.

25. The Geneva Bible: A Facsimile of the 1560 Edition 33 (verso) (U. of Wis. Press, 1969) (last insertion mine). See also, e.g., 3 C.W. Bingham, Commentaries on the Last Four Books of Moses, Arranged in the Form of Harmony by John Calvin 41-42 (Edinburgh, 1854); Henry Woolnor, The True Originall of the Soule 60-62 (London, 1642); John Weemse, An Exposition of the Second Table of the Morall Law, in 1 Works 95-98 (London, 1632); Wood, infra text (of Part IV) accompanying 162; John Trapp, A Clavis to the Bible or a New Comment Upon the Pentateuch or Five Books of Moses 81 (London, 1650); Annotations Upon All the Books of the Old and New Testament; the Text is Explained, Doubt Resolved, Scriptures Parallelled, and Various Readings Observed at Exodus 21:22-23 (London, 1645); 1 Matthew Poole, Annotations Upon The Holy Bible at Exodus 21:22-23 (3rd ed., London, 1696) (1st ed., London, 1683); Henry Ainsworth, Annotations Upon the Second Book of Moses, Called Exodus at Exodus 21:22-23 (London, 1617); and Anonymous, infra note 171 (of Part IV) at 28. And see James K. Hoffmeier, Abortion and Old Testament Law, in J. Hoffmeier (ed.), Abortion: A Christian Understanding and Response 57-62 (1987). See also, Hale, and Hawkins, infra text (of Part IV) accompanying notes 149-150 & 151, respectively; infra, text (of Part IV) accompanying note 66; and infra, note 26.

A person may want to argue that the Septuagint version of Exodus 21:22-23 represents an incorrect interpretation of Exodus 21:22-23, and that the Exodus 21:22-23 phrase "and no further harm is done" refers only to the pregnant woman. The issue here is not what is the correct interpretation of Exodus 21:22-23. The only issue is whether the colonial governing bodies were of the opinion or belief that the Septuagint version of Exodus 21:22-23 may be fairly relied upon in determining whether or not the unborn child is an object of the harm referred to in Exodus 21:22-23.

26. Of Plymouth Plantation 1620-1647, by William Bradford Sometime Governor Thereof: A New Edition: the Complete Text, with Notes and an Introduction by Samuel Eliot Morison 411 (N.Y., 1952). See also id. at 317-319. And see 2 M. Madan, Thelypthora 319

n.* (1780). Madan, in the course of referring to deliberately performed abortion as a "species of murder in a moral sense", and citing Exodus 21:22-23, stated:

> There indeed the case is put of injury arising from only accidental violence to the woman; yet even there, if it occasioned the death either of the mother or the child, if quick, it was a capital offence. Life was to go for life.
>
> ...In the translation of the LXX [the Septuagint], or rather their paraphrase on their place of exodus, they distinguish...the child not formed...and [one]...formed, or, as we may say, between the embryo, which is inanimate, and the foetus which, being full formed and animated, may be said to be capable of losing life.

Madan added that if the mother kills herself and her fetus in the course of attempting abortion, then she is guilty of a double murder: herself and her fetus.

27. See 2 Public Records Colony of Connecticut from 1675 to 1678 with the Journal of the Council of War 184 (and fn.) (Hartford, 1852).

28. 2 Records of the Governor and Company of the Massachusetts Bay in New England: 1642-49 278-279 (Boston, 1853) (underscoring of person & children mine; insertions mine; spelling modernized). See also id. (vol. 3) at 153 (same, except Exod. 20:13 instead of Exod. 10:13). And see 1 The Colonial Laws of New York from the Year 1664 to the Revolution 27 & 146 (Albany, 1894); Charter to William Penn and Laws of the Province of Pennsylvania, Passed Between the Years 1682 and 1700 20 (Harrisburg, 1879); R. Fitz, The Rise and Fall of the Licensed Physicians in Massachusetts, 1781-1860, 9 Trans. Assoc. Amer. Physicians 1-18 (1894); The Earliest Printed Laws of New Jersey vii (Wilmington, Delaware, 1977); and Gordon, infra note 35 at 152.

29. The source or inspiration for the statute may have been one or more of the then existing Christian directories. See, e.g.,

Baxter, infra note 264 (of Part IV) at pt.4, p.42. In the Colony of Maine in 1675, Captain Francis Raynes was found guilty of "presuming to act the part of a midwife" on his pregnant daughter. He was fined 50 shillings. Just what Captain Raynes did remains unclear, but it resulted in the death of his pregnant daughter and probably the unborn child as well. See 2 Maine Province and Court Records of Maine 308 (1931).

30. Chas Leslie, A Supplement in Answer to Mr. Clendon His Tractatus Philosophico-Theologius: Or a Treatise of the Word Person 14 (London, 1710). See also id. at 9; infra, text (of Part IV) accompanying nn. 30 & 57-85, as well as the cross-references and works cited in those notes; and Thomas Blount, Glossographia 487 (5th ed., 1689) ("Personality: the being in person").

31. See, infra, sec. 4 (of Part IV).

32. See infra, text (of Part IV) accompanying notes 280-283, as well as the works cited in those notes.

33. See Medicine in the American Colonies: An Historical Sketch of the State of Medicine in the American Colonies, from Their First Settlement to the Period of the Revolution by Dr. John Beck 8 & 20-21 (1966) (1st Beck ed., N.Y., 1850).

34. In 1766, The New Jersey Medical Society published an extensive table of medical fees (including midwifery fees). The table does not mention deliberated abortion. See Gordon, infra, note 35 at 346-352.

35. See D. Horan and T. Marzen, Abortion and Midwifery: A Footnote in Legal History, in T.W. Hilgers, et al, (eds.), New Perspectives on Human Abortion 199 (1981). Horan and Marzen give the following citation: Minutes of the Common Council of the City of New York 3 (1712-1729) at 122. The ordinance (or a variation of it) is reproduced in M.B. Gordon, Aesculapius Comes to the Colonies: The Story of the Early Days of Medicine in the Thirteen Original Colonies 174-175 (1949); and in H. W. Haggard, Devils, Drugs, and Doctors: The Story of the Science of Healing from Medicine-Man to Doctor 69-70 (1929). See also Exodus 1:21.

36. See Samuel E. Massengill, A Sketch of Medicine and Pharmacy 294 (2nd ed., 1942). I have been unable to locate this supposed ordinance. Massengill did not (at least not in this second edition of his work) give a citation to this ordinance. If the ordinance never existed, then it might be the case here that Massengill confused Virginia with New York.

37. Reproduced from 1 Pub. Recs. Colony of Connecticut Prior to the Union with New Haven Colony, May, 1665 78 (1850). A similar law or directive was put into effect in the Colony of Virginia in 1606. See 7 (Amer. Leg. Recs.), County Court Records of Accomack-Northampton, Virginia 1632-1640 X (of Preface) (Amer. Hist. Assoc., 1954).

Notes to Part IV

1. D. Walker, The Oxford Companion to Law 979 (1980). As to Roe-Means on abortion at common law, see supra, text accompanying notes 1-2 (of Part II); and infra, sec. 8 (of Part IV). See also Statement of Professor Cyril Means, Jr., in "Hearing on Proposed Constitutional Amendments on Abortion", Wednesday, February 4, 1976, before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary of the House of Representatives. For some examples of works that have uncritically accepted in whole or in part the Roe-Means position that abortion was a woman's right at common law, see U.S. Commission on Civil Rights, Constitutional Aspects of the Right to Limit Childbearing 38-39, 41-42, 45-52 & 99 (Washington, D.C., April 1975); M. Faux, Roe v. Wade: The Untold Story 52-53 (1989); Williams Obstetrics 679 (19th ed., 1993); E. Rubin, Abortion, Politics, and the Courts 10 (1982); Tribe, supra note 1 (of Introduction) at 28 (see infra, text accompanying 86); L. Lader, RU486 1, 8 & 124 (1991); Siegel, supra note 99 (of Part II) at 281-82 (including n.72) & 287 n.94; Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 281-282 (including n.72) & 287 n. 94 (1992); and the 281 irresponsible historians, in Sylvia A. Law, Brief of 281 American Historians as Amici Curiae Supporting Appellees in Webster v. Reproductive Services, 492 U.S. 490 (1989). The Brief of 281 American Historians is reproduced in 12 (no. 3) The Public Historian: A Journal of Public History 57 (1990).

2. See, e.g., Shelley Gavigan, The Criminal Sanction as It Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion, 5 (no. 1) J. Legal Hist. 20, 22-23 (1984) (see infra, text accompanying note 245); Keown, supra note 99 (of Part II) at 3-12; R. Byrn, An American Tragedy: The Supreme Court on Abortion, 41 Fordham L. Rev. 807, 815-827 (1973); J. Dellapenna, The History of Abortion: Technology, Morality, and Law, 40 U. Pitt. L. Rev. 359, 363-389 (1979); J. Dellapenna, Abortion and the Law: Blackmun's Distortion of the Historical Record, in D. Horan, et al (eds.), Abortion and the Constitution: Reversing Roe v. Wade Through the Courts 137-158 (1987);

and R. Destro, Abortion and the Constitution: The Need for a Life-Protective Amendment, 63 Cal.L.Rev. 1250, 1267-1273 (1975).

3. See, e.g., R. Rosenblatt, Life Itself: Abortion in the American Mind 69-70 (1992); C. Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 Val. U. L. Rev. 563, 573 (1987); and State v. Emerich, 13 Mo. Appeal Rpts. 492, 495 (1883):

> Though it is true that...science shows that the term "quickening", as indicating the beginning of life in the foetus, has no foundation in physiology, yet the common-law writers held, that life began only when the woman became quick with child....
>
> The framers of our statutory provisions in regard to abortion,...used the words "quick with child" in the old common-law meaning of the phrase, when they speak of the woman being "pregnant of a quick child." The statute recognizes a period of pregnancy previous to quickening. As the child is, in truth, alive from the moment of conception, this quickening must be taken to mean when the woman feels...the movement of the foetus.

But see J. Smith, Legal Notes, in E. Kennedy, Observations on Obstetric Auscultation Appendix p. 285 at 285-301 (2nd ed., 1843) (1st ed., 1833). Smith correctly noted that the early common law authorities, such as Bracton and Fleta, did not state that quickening was the legal criterion of whether a fetus had been living when it was aborted. However, because Smith mistakenly thought that Coke's term "quick with child" (by which Coke meant "pregnant with a live child" - see infra, text accompanying notes 119-148) referred to quickening, he concluded that Coke misrepresented quickening as the legal criterion of when a woman became pregnant with a live child. See also Commonwealth v. Parker, 50 Mass. (9 met.) 263, 267 (1845) ("It is not necessary to decide in the present case, what degree of advancement in a state of gestation would justify the application of [the]... description ["quick with child"] to a pregnant woman.").

4. 197 U.S. 11, 35. See also, e.g., Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 520 (1990) (Justice Scalia concurring) (the question, when does a human being come into existence as the same, is a "nonjusticiable question"); Traynor v. Turnage, 485 U.S. 535, 552 (1988) (The Court cannot decide whether "alcoholism is a disease whose course its victims cannot control." That is a "medical issue on which the authorities remain sharply divided."); Yeonberg v. Romeo, 457 U.S. 307, 321 (1982) (judges should not pretend to make psychiatric judgments); Powell v. Pennsylvania, 127 U.S. 678, 685-86 (1888); People v. Lepine (1989), 215 C.A.3d 91, 100; 263 Cal. Rptr. 543, 547 ("we will not, and cannot, arbitrate scientific disputes"); United States v. Williams, 583 F.2d, 1194, 1198, (2nd Cir., 1978) ("We deal here with the admissibility or inadmissibility of a particular type of scientific evidence, not with the truth or falsity of an alleged scientific fact or truth."); and People v. Shirley (1982), 31 Cal.3d 18, 55; 181 Cal. Rptr. 243; 641 P.2d 775:

> The Attorney General complains...that it would be improper for this court to "pick and choose among...[scientific articles] to decide issues of scientific fact." The remark betrays a fundamental misunderstanding of the task before us: our duty is not to decide whether hypnotically induced recall of witnesses is reliable as a matter of "scientific fact," but simply whether it is generally accepted as reliable by the relevant scientific community.

5. See, e.g., Brown v. Board of Education of Topeka, 347 U.S. 483, 494-495 (1954) (footnote omitted):

> Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson [1896], this finding [that the application of the concept of "separate but equal public educational facilities" deprives Afro-American children of equal educational opportunities] is amply supported by modern authority....

> ....Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

See also United States v. Williams, 583 F.2d 1194, 1198 n.7 (2nd Cir., 1978); and John Connery, Abortion: The Development of the Roman Catholic Perspective 207 (Chicago, 1977) ("when dealing with philosophical or medical matters, the law tends to follow the common opinion of the time").

6. See infra, text accompanying notes 101 & 119-159, as well as the references set forth in note 101, infra. See also Sarah Baynton's Case (1702), 14 Howell St. Trials, 598, 634. Baynton, upon being sentenced to death, asked for a stay of execution:

> Baynton: "I am with child."
> Court: "Let a jury of matrons be sent for."
> ....
> Clerk (to the matrons): "enquire...whether ...Baynton be with child, quick with child, or not".
> ....
> Court (to the matrons): "enquire whether this woman be quick with child: if she be with child, but not quick,...give your verdict so; and if she be not quick with child, then she is to undergo the execution..."
> ....
> Court (to the matrons): "Do you find the prisoner to be with child, with quick child, or not?"
> Forewoman (to the Court): "Yes..., she is quick with child."

7. J.H. Baker, The Legal Profession and the Common Law: Historical Essays, 325 (1986).

8. See, e.g., D.S. Davies, The Law of Abortion and Necessity, 2 Mod. L.Rev. 126, 133 (1938) ("It is probably do to the fact that the offence [of abortion] was one of ecclesiastical cognisance which accounts for the extreme paucity of references to abortion in the authorities on English criminal law."); Keown, supra note

99 (of Part II) at 5; Lader, Abortion 78-79 (1966); 1 Stephen, infra note 127 at 54; and Agnus McLaren, Reproductive Rituals: The Perception of Fertility in England from the Sixteenth Century to the Nineteenth Century 122-128 & 137-138 (1984).

9. See the English ecclesiastical abortion prosecutions set forth infra, in Appendix 21. For some instances of English ecclesiastical prosecutions for infanticide and negligent child destruction in the sixteenth century, see R. Houlbrooke, Church Courts and the People During the English Reformation 1520-1570 78 n.76 (1979): CB3, fo.110r: husband and wife (hereinafter: H.& W.) examined for negligently suffocating (by rolling on top of?) their four months old child while the child slept with them (outcome unknown); CB3, fo.123r: H.& W. ordered to prove their infant child was not suffocated (probably acquitted, as they produced a witness who testified that the child did not suffocate); CB3, fo.172r: H.& W. examined for suffocating their child (outcome unknown); CB3, fo.192r: J.H. examined upon articles for counselling the destruction of two children (outcome unknown); CB4, fo.46v: H.&W. for suffocating their child (both acquitted); CB4, fo.105v: Agnes D. for suspected child destruction, or perhaps abortion, for while pregnant she went away for two weeks, and then returned not pregnant, and without the child (outcome unknown). See also Helmholz, infra note 1 (of Case No. 1 of Appendix 21) at 387; and Richard Wunderli, London Church Courts and Society on the Eve of the Reformation 78 & 128-29 (1981).

10. See the depositions and cases, etc., set forth infra, in Appendix 23. See also The Extraordinary Life and Character of Mary Bateman, the Yorkshire Witch 10-11 (2nd ed., 1809) (Mary Bateman gave an unmarried, pregnant woman certain drugs to cause abortion. The drugs evidently destroyed the unborn child and the mother. The mother, sometime before her death, stated: "'Had I never known Mary Bateman, my child would now have been in my arms, and I should have been a healthy woman; but it is in eternity, and I am going after it as fast as time and a ruined constitution can carry me.'" It is unclear why Bateman was not prosecuted for these offenses. However, it may be that they remained hidden until when, in 1809, Bateman was tried, convicted, and executed for another murder.); Douglas Hay, Crime, Authority and the Criminal Law: Staffordshire 1750-1800 441 (unpub. Ph.D

dissertation, U. of Warwick, 1975) (P. Huckle, in 1792, was sentenced to death - later commuted to transportation - for maliciously destroying a mare belonging to Mr. Cook. Cook, a married man, kept Huckle's sister as his mistress. This created bad blood between Huckle and Cook. Cook unsuccessfully sought to persuade his mistress to abort their third child (citing P.R.O. HO/44/14); Hoffer & Hull, infra note 17 at 155 (Munn's Case and Lyveston's Case); R v. Cowley (1781), infra note 20 at case no. 17; infra, text accompanying note 79; County Court Records of Accomack-Northampton, Virginia 1632-1640 25 (1 American Legal Records Series, 1954) (a certain Wm. Payne told a married woman who was pregnant that he could make her stomach as flat as a pancake); G.R. Quaife, Wanton Wenches and Wayward Wives 55 & 118-120 (1979) (see infra, Case Nos. 6-12 (of Appendix 23)); J.A. Sharpe, Early Modern England: A Social History 1550-1760 45 (1987); Lyle Koehler, A Search for Power: The "Weaker Sex" in Seventeenth-Century England 204-205 (1980); Audrey Eccles, Obstetrics and Gynaecology in Tudor and Stuart England 69-70 (1982); P. Laslet, et al, (eds.), Bastardy and its Comparative History 76-77 (1980); Roger Thompson, Sex in Middlesex: Popular Mores in a Massachusetts County, 1649-1699 26 (1986) (see supra, note 69 (of Part II)); Angus McLaren, supra note 8 at 89-112; Keown, supra note 99 (of Part II) at 21; D'Emilio & Freedman, supra note 192 (of Part II) at 26; C.F. Karlsen, The Devil in the Shape of a Woman: Witchcraft in Colonial New England 141 (1987); and 1 James, infra note 79 sub tit. Abortus (at Mauriceau's Observations LV-LVIII). And see, generally, E. Shorter, A History of Women's Bodies 177-91 (1982); K. Campbell Hurd-Mead, A History of Women in Medicine 359 & 496 (1938) (states that during one year near the end of the eighteenth century in Paris, some six hundred women confessed to "destroying their fruit"). Hurd-Mead's source is probably F.R. Packard, Guy Paten and the Medical Profession in Paris in the Seventeenth Century, in 4 Annals of Medical Science 357, 375-76 (1922).

11. See infra, text accompanying notes 15-16 & 79, as well as the works cited infra, in notes 15-16; infra, Case No. 5 (of Appendix 23); and infra, Appendix 22. See also Dellapenna (History of Abortion), supra note 2 at 372-73; and Koehler, supra note 10.

12. D. Defoe, A Treatise Concerning the Use and Abuse of the Marriage Bed: Shewing...the Diabolical Practice of Attempting to Prevent Child-bearing by Physical Preparations 152 (London, 1777). And see id. at 154-55. See also Shorter, supra note 10; and Anderson & Zinson, infra note 17 at 244-45. For some rare examples here of the use of invasive or instrumental abortion methods, see R v. Beare (1732), reproduced infra, in Appendix 15; R v. Anonymous (1750?), reproduced infra, in Case No. 3 (of Appendix 18); R v. Tinkler (1781), reproduced infra, in Case No. 4 (of Appendix 18); R v. Pizzy and Codd (1808), reproduced infra, in Appendix 22; R v. Fry (1801), reproduced infra, in Case No. 1 (of Appendix 11) (count 4 of the Fry indictment alleges the use of an instrument referred to as a "rule"); Q v. West (1848), as discussed, infra, in note 12 (of Case No. 3 of Appendix 10) and at text accompanying note 13 (of Case No. 3 of Appendix 10); and R v. Ashmall & Tay (1840), 9 C.&P. 236; and R v. Ipsley & Rickets, infra Case No. 8 (of Appendix 18).

13. See Clark Bell (ed.), A Manual of Medical Jurisprudence by Alfred Swaine Taylor as Revised and Edited by Thomas Stevenson 515 (11th American ed., 1892) (1st ed. of Taylor, 1836) (as instrumental abortion is performed on an invisible plane, it "demands a most accurate knowledge of the anatomy of the ovum and the maternal structures, as well as of the state of development which the neck of the womb assumes at different periods of pregnancy....Unless the inner membrane or amnion be opened, gestation may still proceed, and abortion will not take place."); M. Potts, Abortion 179 (1977) ("the relatively inaccessible position of the uterus and the extremely soft wall of the pregnant organ make perforation a distinct possibility, unless particular care is taken"); and M. Olasky, Abortion Rites 27 (Crossway Books, Wheaton Il., 1992).

As to the belief that the point of a needle cannot penetrate a pregnant uterus, see Eccles, supra note 10 at 28 ("The cervix was believed to be sensitive to stimuli, it also 'opens naturally in Copulation, in voiding menstruous blood and in childbirth; but at other times, especially when a woman is with Child, it shuts so Close, that the smallest needle cannot get in but by force.'"; quoting J. Sharp, The Midwives Book 38 (1671)). See also, e.g., Crooke, infra note 60 at 262 ("Moreover, least

the geniture [seed] thus layd up should issue forth again, the mouth or orifice of the womb is so exquisitely shut and locked up that it will not admit the point of a needle."); Hugh Chamberlin (trs.), The Diseases of Women with Child and in Childbed by Francis Mauriceau 23 (London, 1672) (akas.: The Accomplisht Midwife (1673) and The Diseases of Women (1683)) (1st French ed., Paris, 1668: F. Mauriceau, Traité des Maladies des Femmes Grosses et de Celles qui sont Accouchées) ("As soon as the Woman has conceived, that is, has received and retained in her Womb the two prolifick seeds, it is every way compressed to embrace them closely, and is so exactly closed, that the Point of a Needle (as saith Hippocrates) cannot enter it without Violence."); Thomas Raynalde, The Birth of Mankynde, Otherwyse Named the Womans Booke bk.1, c.6, fol.11; bk.2, c.2, fol.55; and bk.4, c.4, fol.124 (London, 1565) (1st Raynalde trans., 1545; 1st English ed., R. Jonas, 1540; the German original: E. Rosslin (Roesslin), Der Swangern Frauwen und Hebammen (1513)) (aka., Rosengarten) (compiled mainly from the works of Soranus of Ephesus)) ("if the seed be retained...in the matrix, then does the womb...close itself so fast and so firmly that the point of a needle cannot enter in there...without violence"; if a woman aborts during the 4th or 5th month she suffers much pain as the womb is "so firmly and strongly closed that the point of a needle cannot penetrate its opening"; when the matrix retains the male seed the woman "feels her Matrix very fastly and closely shut, inasmuch that, as Hippocrates sayth, the point of a needle may...[not] enter"); N. Culpeper and A. Cole (trs.), Bartholimus' Anatomy 72 (London, 1668) (whores and physicians, in using various invasive techniques to attempt abortion, do so in vain, because upon conception, the cervix or womb closes so firmly and tightly that the point of a needle cannot penetrate it); N. Culpeper, A Directory for Midwives (First Part) 26 (London, 1675/1676) (1st ed., 1651) ("for although in the act of Copulation...[the cervix] be big enough to receive...the Yard [penis], yet after Conception it is so close shut, that it will not admit the point of a Bodkin to enter"); and Guillemeau, infra note 66 at 7 & 85. And see James S. Scanlan (trs.), Albert the Great: Man and the Beast: "De Anamalibus" (Books 22-26) 62 n. 5.3 (47 Medieval and Renaissance Text and Studies, 1987) (Scanlan, in a commentary on the belief that the point of a needle cannot penetrate the womb of a pregnant woman, observed:

"the facts are essentially true: A thick, tenacious, mucous plug forms in the cervical os ("interior orifice") of the uterus during pregnancy, effectively sealing the contents of the womb from ascending bacterial contamination").

Audrey Eccles remarked that in England during the 16th, 17th, and 18th centuries "it seems quite likely that...[instrumental abortion] was in successful use." Eccles, supra note 10 at 70. Eccles made no attempt to support that statement, and available evidence would seem to establish its opposite. See, e.g., Shorter, supra note 10 at 188-91.

14. See, e.g., Shorter, supra note 10 at 177-91; McLaren, supra note 8 at 107; and J. Weeks, Sex, Politics and Society 72 (1981).

15. W. Cummin, Lectures on Forensic Medicine, in Syllabus of a Course of Lectures on Forensic Medicine, as reproduced in the London Medical Gazette, Saturday, February 4, 1837, pp. 679-80 (lecture no. XIX). See also, e.g., infra, text accompanying note 79; infra, Case No. 5 (of Appendix 23); and infra, Appendix 22.

16. Lester Adelson, The Pathology of Homicide 693-95 (1974) (reprinted with permission of Charles C. Thomas, Publisher, Springfield, Illinois). See also, e.g., I. Gordon, et al (eds.), Forensic Medicine: A Guide to Principles 369-70 (3rd ed., 1988); Taylor's Principles and Practice of Medical Jurisprudence 328-29 (13th ed., 1984); Williams Obstetrics 505-506 (18th ed., 1989); Dean, supra note 89 (of Part II) at 136; and Backhouse, supra note 97 (of Part II) at 85-86. But see Van De Warker, supra note 10 (of Part II). Contraceptive methods were equally ineffective. See C. Given-Wilson & A. Curtis, The Royal Bastards of Medieval England 41-42 (Routledge paperback, 1984/88); and Rose, infra note 17 at 6.

17. See, e.g., the 18th century, Old Bailey infanticide prosecutions cited infra, in note 20. The Old Bailey Session Papers (OBSP) contain 9 infanticide prosecutions during the period January 16, 1685-January 13, 1688, 6 in 1718, and 17 during the period 1714-1722. See Hoffer and Hull, Murdering Mothers: Infanticide in England and New England 1558-1803 67-71 (1981). (Murdering Mothers contains much additional statistical evidence on infan-

ticide prosecutions that occurred in England and New England in the 17th and 18th centuries. However, Hoffer and Hull's infanticidal victims include children under the age of nine.) Some 61 infanticide cases were prosecuted at the Old Bailey during the period 1730-1774; approximately that same number of infanticide cases were prosecuted in Staffordshire during the period 1743-1802; and Surrey averaged 3 or 4 infanticide prosecutions per decade during the eighteenth century. See R.W. Malcolmson, Infanticide in the Eighteenth Century, in J.S. Cockburn (ed.), Crime in England: 1550-1800 191 (1977). See also S.A. Barbour-Mercer, Crime and the Criminal Law in Late Seventeenth-Century Yorkshire 114-15 (unpub. Ph.D dissertation, U. of York, 1988) (89 infanticide prosecutions occurred in Yorkshire during the period 1650-1700, resulting in 35 known convictions - 25 of which resulted in execution); K. Wrightson, Infanticide in Seventeenth Century England, 15 Local Population Studies 10, 11-12 (1975) (In Essex County during the period 1601-1665, there were 60 infanticide prosecutions involving 62 infants, including 2 sets of twins. 53 of these 62 children were bastards. 59 of 60 defendants were the mothers of the deceased infants.); F.G. Emmison, Elizabethan Life: Disorder 156 (1970) (29 infanticide prosecutions occurred in Essex during the period 1558-1603); J. Samaha, Law and Order in Historical Perspective: The Case of Elizabethan Essex 20 (1974) (40 infanticide prosecutions occurred in Essex during the period 1559-1603); J.M. Beattie, Crime and the Courts in England, 1660-1800 114-15 (1986) (Surrey assizes dealt with 62 infanticide indictments during a 95 year sample of the years 1660-1802); J.A. Sharpe, Crime in Seventeenth Century England: A County Study 135 (1983) (Infanticide is "a crime as yet little studied, but which will probably emerge as one of the most characteristic offenses of the early modern period. It was certainly one of the most frequently prosecuted offenses at the Essex assizes between 1620 and 1680; a total of 83 were accused of killing their newborn children at that court during this period. It was also an offence marked by a high capital conviction rate, thirty of those accused, and one female accomplice, being hanged".); J.A. Sharpe, Crime in Early Modern England 1550-1750 61 (1984) (33 women were hung for infanticide in Cheshire during the period 1580-1709); id. at 60-62, 109-110, 170 & 220 n.8 (in 17th- and 18th-century England infanticide probably was the most prosecuted species of murder);

R.F. Hunnisett (ed.), Wiltshire Coroner's Bills 1752-1796, (36 Wiltshire Record Society, 1981)); R.F. Hunnisett, The Importance of Eighteenth Century Coroner's Bills, in E.W. Ives et al (eds.), Law, Litigants, and the Legal Profession 126, 127 & 131 (Royal Hs. Soc. Studies in History Series, no. 36, 1983) (Wiltshire Coroner's Bills for the Period 1752-1796 record 44 suspected infanticides); Cynthia B. Herrup, The Common Peace: Legal Structure and Legal Substance in East Sussex 1594-1640 258 & 412 (unpub. Ph.D dissertation, Northwestern U., 1982) (15 infanticide prosecutions, resulting in 6 convictions and 5 executions, occurred in East Sussex during the period 1594-1640); C. Herrup, The Common Peace: Participation and the Criminal Law in Seventeenth-Century England 40 n. 38 (1987) (in East Sussex "[i]nfanticides as a proportion of violent deaths increased from 14 percent in the 1590s to 18 percent in the 1610s, 21 percent in the 1620s and 32 percent in the 1630s."); S. Pole, Crime, Society and Law Enforcement in Hanoverian Somerset 174 (unpub. Ph.D. dissertation, Cambridge U., 1983) (in 18th-century Somerset a total of 98 infanticide prosecutions resulted in 18 convictions. Women were defendants in 97 of these 98 cases, and 89 of them the defendant was the mother. In Somerset, between 1803 and 1820, there were 19 infanticide prosecutions resulting in 11 convictions.); T.C. Curtis, Some Aspects of the History of Crime in Seventeenth Century England with Special Reference to Cheshire and Middlesex 72 (Table 7a) (unpub. Ph.D. dissertation, U. of Manchester, 1973) (9 infanticide prosecutions occurred in Middlesex during the period 1613-1617); Valerie C. Edwards, Criminal Equity in Restoration England and Middlesex, in A. Kiralfy, et al (eds.), Custom, Courts and Counsel: Selected Papers of the Sixth British Legal History Conference, Norwich, 1983 81, 87 & 95 n. 39 (1985) (in London in the years 1662, 1667, 1675, 1682, and 1688 there were 15 infanticide prosecutions under 21 Jac.1, c.27 [reproduced infra, in Statute No. 5 (of Appendix I)] resulting in 5 convictions); J.S. Cockburn's following eleven volumes (and three more such volumes are in the works, and all fourteen volumes share a common introduction in a separate volume - see infra, note 31 (of Part V)) at the index of each volume under the word infanticide: 1) Calendar of Assize Records: Surrey I's, Jas. I (London, 1982); 2) CAR: Essex I's, Jas. I (1982); 3) CAR: Surrey I's, Eliz. I (1980); 4) CAR: Kent I's, Jas .I (1980); 5) CAR: Kent I's, Eliz. I (1979); 6) CAR:

Essex I's, Eliz. I (1978); 7) CAR: Sussex I's, Jas. I, (1975); 8) CAR: Sussex I's, Eliz. I (1975); 9) CAR: Hertfordshire I's, Jas. I (1975); 10) CAR: Hertfordshire I's, Eliz. I (1975); and 11) CAR: Kent I's, 1649-1659 (1989). (The 3 future volumes are CAR: Kent I's, Charles I (late 1991?); CAR: Kent Indictments, 1660-1675 (1992?); and CAR: Kent I's, 1676-1688 (1994?).) (Two relatively gross examples here are the following: 1) "Agnes Barns, servant..., indicted for infanticide. On 31 Aug. 1559 in her master's house she gave birth to a child which she immediately killed by throwing it into the swine-yard, there to be eaten by the pigs. Guilty; remanded because pregnant and sentenced to death in July, 1561." [Cockburn, Kent I's, Eliz. I 11 (no. 53)]; and 2) "Elizabeth Mounslowe...Spinster, indicted for infanticide. On Dec. 1561...she gave birth to a child which she threw in the fire...where it burned to death. Guilty; pregnant". [Id. at 27 (no. 41)]); Koehler, supra note 10 at Appendix 14 (identifies 35 suspected child-killings ("mostly infants") that occurred in New England during the period 1620-1700); G.S. Rowe, Women's Crime and Criminal Administration in Pennsylvania, 1763-1790, 95 Penn. Magazine of History and Biography 336, 343-345 & 359-360 (1985) (In Pennsylvania during the period 1763-1790, 48 women were charged with murder; 34 of these were for infanticide, and 7 of these 34 resulted in convictions. In 5 of these 7 convictions the defendants were hanged); D.H. Fischer, Albion's Seed: Four British Folkways in America 194 n.18 (1989) (in Massachusetts during the period 1693-1769, 15 women were hanged for committing infanticide; citing D. Flaherty, The Punishment of Crime at the Massachusetts Assizes: An Overview, 1692-1750 (unpub. paper 1978-79)); M.P. Saxton, Being Good: Moral Standards for Puritan Women, Boston: 1630-1730 305-320 (unpub. Ph.D. dissertation, Columbia U., 1989); J. Cameron, Prisoners and Punishment in Scotland from the Middle Ages to the Present 24 (Edinburgh, 1983) ("There are recorded convictions before the Court of Justiciary at Edinburgh of 21 women for child-murder from 1700 to 1706"); 2 R. Chambers, Domestic Annals of Scotland 244 (1861) (4 unmarried women were hung for infanticide in January of 1681 in Edinburgh. Another unwed woman was hung there in April of 1681 for infanticide. She gave the following as her reason for killing her newborn child: "to shun the ignominy of the church pillory".); H.G. Graham, Social Life in Scotland in the Eighteenth Century 323 (1906); P. Linebaugh,

Tyburn: A Study of Crime and the Labouring Poor in London During the First Half of the Eighteenth Century 354, 619 & 704 (Unpub. Ph.D. dissertation, U. of Warwick, 1975) (3 women hung in 1734, 1739, & 1743, respectively, for infanticide); D'Amilio, supra note 192 (of Part II) at 34 (mentions 32, 17th-century, New England infanticide prosecutions); Walker, infra note 33 at 125-29; and D.J. Spindel, Crime and Society in North Carolina: 1663-1776 49, 88-89, 108 (1989). And see also, P.E.H. Hair, Homicide, Infanticide and Child Assault in Late Tudor England, 9 Local Population Studies 44 (1972); B. Kellum, Infanticide in England in the Later Middle Ages, 2 Hist. of Childhood Q. 367 (1974); R. Helmholz, Infanticide in the Providence of Canterbury During the Fifteenth Century, 2 Hist. of Childhood Q. 384 (1975); B.A. Hanawalt, Female Offenders and Crime in Fourteenth-Century England 253-68 (1975); J.B. Given, The Medieval Murderer: Society and Homicide in Thirteenth Century England 61-62 (1977); M. Greenwald & G. Greenwald, Coroners' Inquests: A Source of Vital Statistics: Westminster, 1761-1866, J. of Leg. Med. (1983), vol. 4 (no. 3) 58-60 & 65; L. Rose, Massacre of the Innocents: Infanticide in Great Britain 1800-1839 (London, RKP, 1986); C.S. Monholland, Infanticide in Victorian England, 1856-1878: Thirty Legal Cases (unpub. M.A. dissertation, Rice U., 1989) ("Georgia Behlmer puts the figures even higher: 'From the 5,314 cases of homicide listed by the Registrar, General for the period 1863-87, a grim 3,355 cases - or 63 present - involved infants.'"); A.S. Wohl, Endangered Lives: Public Health in Victorian Britain 33-34 (Cambridge, Mass., 1983); R. Sauer, Infanticide and Abortion in Nineteenth-Century Britain, 32 Local Population Studies 81 (1978); G. Rude, Criminal and Victim: Crime and Society in Early Nineteenth-Century England 62-63 (1985); D. Jones, Crime, Protest, Community and Police in Nineteenth Century Britain 122 & 153 (1982); D.S. Davies, Child-Killing in English Law, 1 Mod. L. Rev. 203, 216-18 (1937); C. Damme, Infanticide: The Worth of an Infant Under Law, 22 Med. Hist. 1, 1-4 (1978); D. Philips, Crime and Authority in Victorian England: The Black Country 1835-1860 261 (1977); Backhouse, infra note 271; O'Donovan, infra note 271; and McLaren, supra note 8 at 129-135. And see, generally, S.X. Radbill, Children in a World of Violence: A History of Child Abuse, in R.E. Helfer & R.S. Kempe, The Battered Child 3-22 (4th ed., Chicago & London, 1987); W.B. Ryan, Infanticide, Its Law, Prevalence and History

17 & 61-64 (London, 1862); W. Langer, Europe's Initial Population Explosion, 69 Amer. Hs. Rev. 8-10 (1963); K. Wrightson, Infanticide in European History, 3 Crim. Jus. His. 1-20 (1982); 2 B.S. Anderson & J.P. Zinson, A History of Their Own: Women in Europe from Pre-history to the Present 245-247 (paperback, 1988) (in 1870, 276 dead babies were found in London streets); id. (vol. 1) at 138-140 & 30-31; Rolf, A Backward Glance at the Age of 'Obscenity', 32 Encounter 23 (June 1969); Heinemann, infra note 235 at 66-69; D. Bakar, The Slaughter of the Innocents (1971); Taylor, supra note 99 (of Part II) at 431 (276 cases of infanticide occurred in France in the combined years of 1838 & 1841); M. Tooley, Abortion and Infanticide 315-319 (1983); M.S. Hartman, Victorian Murderesses 5 (1977); and M.W. Piers, Infanticide 75 (N.Y., 1978) (from the Middle Ages to about 1800 Europeans considered infanticide as the form of criminal homicide most often committed).

18. See supra, note 17; infra note 20; and infra, text accompanying notes 22-24 & 271-275.

19. This statute is reproduced and discussed, infra in Statute No. 5 (of Appendix 1). And see infra, Case No. 1 (of Appendix 10).

20. My examination of the Old Bailey Session Proceedings (London's Guildhall Library's collection for the periods 1684-1713 (the collection for this period is very incomplete) and 1744-1803 (and the Harvester Press Microform Collection (1984) for the period 1714-1743) indicates there were approximately 122 prosecutions for infanticide at the Central Court of London (the Old Bailey) during the period 1714-1803. The defendant in nearly every one of these cases was an unmarried woman. A few of the defendants were married women who became pregnant long after they had lost contact with their husbands. A majority of those prosecutions ended in an acquittal (30 convictions), in most instances because the prosecution was unable to rule out death by a noncriminal agency, or to prove that the child was born alive. (See, e.g., R v. Jarvis, infra, case no. 7 of this note.) Many of the dead infants were found at the bottom of the vault of a privy. The defendants in those cases often testified along the following lines: "I was feeling ill and did not know I was so near my full time. I went to the privy to ease myself and some-

thing dropped from me there." The defendants almost certainly learned of this defense while being "clapped up" in Newgate Prison pending trial. These infanticide prosecutions are cited as follows: 1) R v. Bunn, OBSP vol. for the year 1803, no.379, at p. 296, not guilty (hereinafter, and for example: Bunn (1803, #379 at 296; n/g, or g (guilty)); 2) Casson (1802, #847 at 540, n/g); 3) M'Carthy (1802, #719 at 460, n/g); 4) Lucas (1802, #223 at 166, n/g); 5) Harvey (1801, #767 at 559, n/g); 6) Shehan (1801, #290 at 217, g) (of manslaughter: received one year in prison); 7) Jarvis (1800, #90 at 77, n/g) (In Jarvis, a surgeon testified that the most learned in the medical profession have difficulty in determining the cause of death in cases involving newborns and that in many such cases medical men simply cannot supply a reliable opinion as to cause of death); 8) Perry (1800, #91 at 82, n/g); 9) Champion (1798, #246 at 286, n/g); 10) Arbor (1794, #31 at 74, n/g); 11) Greenwood (1793, #232 at 370, n/g); 12) Fowle (1792, #121 at 181, n/g); 12.1) Miller (#1790 at 984, n/g); 13) Brean (1788, #582 at 732, n/g); 14) Harmer (1788, #583 at 735, n/g); 15) Curtis (1784, #925 at 1221, n/g); 16) Harris (1781, #284 at 266, n/g); 17) Cowley (1781, #339 at 306, n/g) (In this case a witness testified that the female defendant had asked the witness for some savoign root [a then covertly popular drug for attempting abortion], and that the witness refused the request because she suspected that the defendant was pregnant. Id. at 308.); 18) Foster (1781, #460 at 380, n/g); 19) Taylor (1778, #59 at 56, n/g); 20) Henichose (1779, #182 at 200, n/g); 21) Gwatkin (1778, #470 at 490, n/g); 22) Reynold & Vale (mother/daughter, the latter being the mother of the deceased) (1775, #105 & #106 at 91, g and n/g, respectively); 23) Cornforth (1774, #386 at 206, g); 24) Powell (1773, #720 at 471, n/g); 25) Parkings (1771, #275 at 200, n/g); 26) Warner (1770, #687 at 383, n/g); 27) Hunter (1769, #366 at 310, n/g); 28) Robinson (1768, #206 at 106, n/g); 29) Field (husband charged with killing the newborn child of his wife, who died giving birth) (1766, #67 at 45, n/g); 30) Hopkins (1767, #250 at 166, n/g); 31) Jenkins (1765, #459 at 285, g); 32) Wood (1766, #372 at 243, n/g); 33) Haywood (1762, #28 at 24, n/g); 34) Samuel (1762, #29 at 26, n/g); 35) Church (1762, #141 at 99, n/g); 36) Whaley (1761, #307 at 404, n/g); 37) Rowden (1761, #311 at 408, g); 38) Warner (1760, #65 at 68, n/g); 39) Clapton (1760, #82 at 88, n/g); 40) Hullock (1760, #190 at 195, g); 41) Mussen (1757, #235 at 221, g); 42) Buckham (1756, #33 at 15, n/g); 43) Burket (1756, #306 at 250, n/g); 44) Palser (1755, #275

at 237, n/g); 45) Maddox & Jenkins (1755, #37 at 37, n/g); 46) G.H. (1754, #108 at 112, n/g); 47) Dunkin (1752, #483 at 268, n/g); 48) Gates (1752, #480 at 268, n/g); 49) Spires (1751, #159 at 69, n/g); 50) Page (1749, #634 at 164, n/g); 51) Trigg (1749, #600 at 148, n/g); 52) Drake (1749, #168 at 42, n/g); 53) Fletcher (1747, #323 at 224, n/g); 54) Hope (1746, #357 at 293, n/g); 55) Tarras (1745, #383 at 245, n/g); 56) Pye (1744, #158 at 76, n/g); 57) Shackleton (1743, #43 at 16, n/g); 58) Scroghan (1743, #491 at 282, n/g); 59) Shudzick (1743, #482 at 276, n/g); 60) Stuart (1743, #246 at 158, n/g); 61) Wilmshurst (1743, #224 at 149, g); 62) Davis (1742, #4 at 4, n/g); 63) Bennet (1741, #7 at 4, g); 64) Barns (1740, #215 at 115, n/g); 65) Herrard (1739, #437 at 135, g); 66) C____ E__ (1738, #39 at 118, n/g); 67) Witson (1737, #20 at 89, n/g); 68) Allen (1737, #3 at 202, g); 69) Cooper (1736, #10 at 8, g); 70) Shrewsbury (1736, #23 at 67, g); 71) Ambrook (1735, #11 at 24, g); 72) Tea (1735, #75 at 79, g); 73) Hornby (1734, #22 at 108, g); 74) Turner (1734, #21 at 136, n/g); 75) Deacon (1733, #7 at 207, n/g); 76) Smith (1730 at 8, n/g); 77) Boltoce (1729, March of, at 8, n/g); 78) Hardwood (1729 at 9, g); 79) Ridoubt) (1728, August of, n/g); 80) Hunt (1727, December of, n/g); 81) Dickenson (1727, January of, n/g); 82) George (1726, October of, at 3, n/g); 83) Mozgan (1723, March-April of, at 7, g); 84) Batemant (1722, February of, at 3, n/g); 85) Prince (1722, February of, at 1, n/g); 86) Leah (1722, January of, at 6, n/g); 87) Redford (1722, January of, at 6, g); 88) Morris (1722, September of, at 1, g); 89) Roberts (1721, September of, at 1, n/g); 90) Danestep (1721, September of, at 3, n/g); 91) Inman (1721, July of, at 4, g); 92) Wilson (1721, May of, at 7, n/g); 93) Taylor (1720, January of, at 2, n/g); 94) Jones (1720, July of, at 5, n/g); 95) Hunter (1719, October of, at 3, n/g); 96) Bough (1719, September of, at 4, n/g); 97) Buncher (1718, December of, at 1, n/g); 98) Robinson (1718, October of, at 3, n/g); 99) Plintoff (1718, July of, at 4, n/g); 100) Lucas (1718, July of, at 5, n/g); 101) Bristown, et al (1717, January of, at 6, n/g); 102) Arthur (1717, September of, at 7, n/g); 103) Rake (?) (1717, July of, at 4, n/g); 104) Mabe (1717, February of, at 3, n/g); 105) Halle (1717, July of, at 4, n/g); 106) Simpson (1715, September of, at 3, n/g); 107) Nichols (1711/12, January of, at 2, n/g); 108) Stevens (1711, May of, at 1, n/g); 109) Wheeler (1710/11, January of, at 2, n/g); 110) Forrest (1710, September of, at 2, g); 111) Ashbrook (1708, October of, at 3, g); 112) Ellenor (1708, October of, at 1, g); 113) Howard & Davis (1708/8, January

of, at 3, n/g); 114) Gardner (1707/8, January of, at 1, g); 115) Jones (1697/8, January of, at 1, g); 116) S--- (1687, May of, at 3, n/g); 117) Wood (1687, May of, at 1, n/g); 118) Trahern (1687, April of, at 3, g); 119) Brown (1685, October of, at 3, g); 120) Stooks (1684/5, January of, at 2, g); 121) Langworth (1684/5, January of, at 2, g).

21. See, supra text (of Part II) accompanying notes 145 & 124 (as well as the latter note); and Adelson, supra note 16 at 688-690. See also, e.g., Commonwealth v. Smalansky, 64 Dauphin County Reports 310, 316 (1953) ('"The act of [intentional abortion] of course is always shrouded in mystery and consummated in utter secrecy. Again, since a criminal miscarriage and a natural miscarriage are practically synonymous in external appearance and after-effects, it is extremely difficult to distinguish the one from the other."').

English law required that a person in whose house a bastard child was delivered to notify law enforcement authorities (e.g., church wardens) of the delivery. See, e.g., 1 Geo. II, c. 7, sec. 8, (1727); Copnall, infra note 35; Curtis, infra note 35; and Curtis, supra note 17 at 81 (Table 7e) & 83 (under "administrative crimes during the period 1613-17: secretly permitting the birth of a bastard child in one's house; secretly burying a newborn bastard child; "receiving a pregnant stranger").

22. 1 D. Hume, Commentaries on the Law of Scotland, Respecting Crimes 291 (B.R. Bell, ed., 1844) (1st ed., 1797-1800).

23. E. Collier, A Scheme for the Foundation of a Royal Hospital 1 (1687). See also MacLaren, supra note 8 at 131 ("William Walsh in A Dialogue Concerning Women (1699) [in Curll (ed.), Works 156 (London, 1736)] had a character declare: 'Go but one Curcuit with the Judges here in England; observe how many women are condemned for killing their Bastard Children...'"); and id. (McLaren) at 61 ("'There is scarce an Assizes where some unhappy wretch is not Executed for the Murder of a Child;'" quoting J. Addison, Guardian, no. 105, July 11, 1713).

24. L. Parry, Criminal Abortion 95-96 (1932). 21 Jas.1, c. 27 is reproduced infra, in Statute No. 5 (of Appendix 1). See also

Maria Piers, Infanticide 62-63 & 95-96 (1978); Dellapenna (Abortion and the Law), supra note 2 at 145; T.E. Cone, Jr., History of the Care and Feeding of the Premature Infant 16 (1985); and M. Kenny, Abortion: The Whole Story 181 (1986).

25. As to pre-common law Welsh law, see, e.g., D. Jenkins and M.E. Owen (eds.), The Welsh Law of Women 148-49 (including n.12 at pp. 204-205) (Cardiff, 1980); D. Jenkins (ed. & trans.), The Law of Hywel Dda 129-130 (Gomer Press, 1986); H.D. Emanuel, The Latin Texts of the Welsh Laws 142 (A text), 471 (E text), 223 (B text), 342 (D text); A.R. William (ed.), Llyfr Ioswerth s.97/3 (q.v.) (1960); 2 A. Owen, Ancient Laws and Institutes of Wales 201, 792 & 841 (London, 1841); and J. Cule, The Court Mediciner and Medicine in the Law of Wales, in C. Burns (ed.), Legacies in Law and Medicine 47-48 (Sc. Hs. Publs., N.Y., 1977). The Welsh medieval textual passages on negligently or deliberately caused abortion usually refer to three stages of prenatal development or existence. These stages, which are not always defined in terms of days or months, are as follows: 1) the first month or before fetal formation, when the embryo yet appears as a white (milky) or red (bloody) mass, 2) the second through the third or fourth month, when the fetus is being shaped in body and limbs, and 3) from the fourth or fifth month on, when human ensoulment has occurred. It cannot be reliably stated that implicit in these passages is the opinion or belief that quickening signals fetal ensoulment or the completion of fetal formation. See infra, text accompanying note 61.

As to pre-common law Irish law, see, e.g., Connery, supra note 5 at 69 (in an Irish canon (c. 675) the penalty for the destruction of 1) the pre-fetal product of human conception, and 2) the pregnant woman, is twelve female slaves). On payment by slaves as a criminal sanction here, see Fergus Kelly (gen. ed.), 3 A Guide to Early Irish Law 131, 217 & 221 (Dublin Inst. for Advanced Studies, (1988). See also id. at 75 & 84 (husband can divorce his wife if she deliberately aborts her unborn child).

26. 1 B. Thorp (ed.), Ancient Laws and Institutes of England 67 (1840). The modern edition is F.L. Attenborough (ed.), The Laws of the Earliest English Kings 68 (1922). (Corrected translations supplied by John H. Baker, Professor of English Legal History at

the University of Cambridge and Fellow of St. Catharine's College (hereinafter: Professor Baker.) For an example of similar but non-English-such laws, see K.F. Drew (trans.), The Law of the Salian Franks 84, 86, 127, 147-48, 161, & 197 (1991).

27. 1 Thorp, supra note 26 at 573 (c. LXX.14). The modern edition is L.J. Downer (ed.), Leges Henrici Primi 223 (1972). (Corrected translation supplied by Professor Baker) (first bracketed insertion mine). In support of my bracketed insertion, see, e.g., id. (Thorpe) at LXX.16, as translated in a corrected form by Professor Baker (bracketed insertions mine):

> Women who commit fornication and destroy their embryos (partus), and those who are accessories with them, so that they abort the foetus in the womb (ut utero conceptum excutiant), are by an ancient ordinance excommunicated from the church until death. [The ordinance is Elviran Canon no. 63, enacted in 305. See Connery, supra note 5 at 46-47.] A milder provision [i.e., Ancyran Canon no. 21, enacted in 314 - see Connery, supra note 5 at 47-49] has now been introduced: they shall do penance for ten years. [The preceding statement is inconsistent with the following statement, so some words may have been left out here.] A woman shall do penance for three years if she intentionally brings about the loss of her embryo before 40 days; if she does it after it is quick [i.e., ensouled: animatus fuerit], she shall do penance for seven years as if she were a murderess (quasi homicida).

Canon 7 of the Irish canonical document, Canones Hibernenses (c. 675), sets forth a 7-year homicide penance for the destruction of an unborn, quick child. See Connery, supra note 5 at 68-69 & 71. The three penitentials of Theodore (668-690) (in the course of acknowledging the 40-day fetal formation/ensoulment opinion) and Egbert's Confessional set forth the 3-year homicide penance for the destruction of an unborn child. See Connery, supra note 5 at 72-74. See also J. McNeill & H. Gamer, Medieval Handbooks of Penance 197 (nos. 24 & 27) (1938); and 2 Thorp, supra note 26 at 23 n.2 & 155. And see William Couper, The Anatomy of Human Bodies sub tit. 57th Table (at fig.1) (London,

1698) (illustration of a fully-formed human fetus at 40 days after conception); infra, note 65; and infra, text accompanying notes 113-115.

There is a suggestion that some of the penitential or confessional and canonical statements on abortion in use in pre-common law England did not adopt fetal formation as the criterion of fetal ensoulment, and in fact recognized three stages of prenatal existence: (1) pre-fetal formation, or before forty days, (2) after forty days and before fetal ensoulment (but without considering whether fetal formation has occurred), and (3) fetal ensoulment or animation, as signaled by the pregnant woman's quickening. In 1 John Johnson, A Collection of all the Ecclesiastical Laws, Canons, Answers, or Rescripts 740 (MS. 94) (London, 1720), the following will be found:

> Let the Woman that destroys her Conception designedly, before forty Days do Penance for one year; if after forty Days, three years; if she were quick with Child [i.e., if she was pregnant with a child or fetus that is informed with a human soul: animatus fuerit] as a Murderer. But the difference is great between a poor Woman, that does it by reason of the Difficulty of nursing it, and a Whore who does it to conceal her wickedness.

Johnson related that this canon is contained in a manuscript that cites Egbert of York (d.766) as its source. It is doubtful that Egbert is the sole source here. See McNeill & Gamer, supra this note at 225; and Connery, supra note 5 at 73-74:

> There are two other Anglo-Saxon penitentials, one attributed to Bede and the other to Egbert, Archbishop of York, but only the Bedae prescribes for abortion. The penance it prescribes is the one- or three-year penance of the [pseudo-] Theodore penitentials based on the forty-day dividing line. But Bedae allows for some variation of this depending on the situation of the woman. As he says, it makes a big difference whether the woman commits the sin because she is poor and cannot support the child or whether she is trying to conceal a sin of fornication.

Egbert's Confessional sets forth a distinction between an abortion that is performed before the product of human conception is informed with a human soul and one that is done forty or more days after conception. He said that only the latter constitutes homicide. See 2 Thorp, supra note 26 at 155. I strongly suspect that the Johnson material on abortion represents a confused combination of two penitential or confessional or canonical statements on abortion. I suspect that one of these two explicitly refers to abortions done before or after the fortieth day from conception (but without at the same time explicitly stating that the process of fetal formation takes forty days to complete and that fetal animation coincides with fetal formation). I suspect that the other one explicitly refers (1) to abortions done before the fortieth day after conception (but without at the same time explicitly stating that the forty day rule actually refers to the completion of the process of fetal formation) and (2) to those done after fetal ensoulment or animation. In other words, the two terms, (1) "before forty days and after forty days" and (2) "before forty days and after fetal ensoulment", which simply and together imply only two stages of prenatal existence (the pre-fetal formation or ensoulment stage, and the fetal formation or ensoulment stage), if juxtaposed, might be thought of as relating three stages of prenatal existence: (1) before forty days, (2) after forty days, and (3) after fetal ensoulment. The Old Irish Penitential (c. 800) refers to three stages of prenatal existence: liquid, carnal, and animated. However, it is doubtful that Johnson's canon derives from this penitential because this penitential does not mention the forty-day fetal formation rule.

28. 1 Thorp, supra note 26 at 480-81. The modern edition is F.L. Attenborough (ed.), The Laws of the Kings of England from Edmund to Henry I 263 (1925). Corrected translation supplied by Professor Baker. See infra, text accompanying note 138.

29. See Bracton and Fleta, infra text accompanying notes 88-90 and 116, respectively. See also Harold N. Schneebeck, Jr., The Law of Felony in Medieval England from the Accession of Edward I Until the Mid-Fourteenth Century 232-243 (unpub. Ph.D dissertation, U. of Iowa, 1973; pub. by University Microfilms International, Ann Arbor, Michigan); Naomi D. Hurnard, The King's

Pardon for Homicide Before A.D. 1307 93, 101, 106-107 (London, 1965); and J.M. Kaye (ed. & trs.), Placita Corone xxix, 9 & 29 n.19 (Selden Soc., 1966). The cases set forth infra, in Appendices 4 & 6, as well as infra, Reference No. 6 (of Appendix 7), support Bracton and Fleta on this rule. The cases set forth infra, in Appendix 5 probably support this rule. (Appendix 6 sets forth some Scottish common law abortion cases that tend to demonstrate that the deliberated destruction of the child in the womb was a capital offence at the Scottish common law. See also Forbes, infra note 179. But see Hume, infra text (of Case No. 2 of Appendix 6) accompanying notes 6-8.) Contra: See the references set forth infra, in Appendix 7. Note that Reference Nos. 7 & 8 (of Appendix 7) support the proposition that deliberated abortion constitutes murder if the aborted child is born alive, and then dies in connection with being aborted. Note also that Reference No. 5 (of Appendix 7) states that although to slay a child in the mother's womb is not a capital offence, it is, nevertheless, punishable as a "heinous trespass" (misdemeanor offence). Reference Nos. 5, 7 & 8 predate Coke's Institutes III (1641), common law abortion passage (reproduced infra, at text accompanying note 119). Appendix 9, infra, sets forth some pre-16th-century abortion cases that neither reject nor affirm the Bracton (De Legibus) and Fleta passages on criminal abortion.

R v. Bourton (1327-28), aka., The Twins-Slayer's Case, and R v. Anonymous (1348?), aka., The Abortionist's Case, are the only known, pre-16th-century cases that are understood to stand for the proposition that at common law the deliberated destruction (and its then legal equivalents, e.g., a violent assault or battery upon a pregnant woman resulting in a miscarriage) of the child lying within the mother's womb is not indictable as criminal homicide or as a capital felony. The Bourton case is also understood to stand for the proposition that deliberated abortion is not murder at common law even when the abortion-killed child is aborted alive. Bourton and Anonymous are set forth infra, in Case No. 7 (of Appendix 4) and Case No. 3 (of Appendix 7), respectively. Bourton's Case is reproduced in its (1) incomplete, uncorrected, year book form, (2) corrected, incomplete, year book form, and (3) its heretofore nearly complete form (the entries in the King's Bench rolls minus the indictment). As is explained in the commentary that accompanies the reproduction of

Bourton's Case, this case actually stands for the opposites of the propositions universally thought to be set forth in this case. Furthermore, as is explained in the commentary accompanying the reproduction of the report of Anonymous, this report of Anonymous should not be accepted as reliable, and is probably relating not a court case, but rather private opinion on a legal point or issue in the then existing law of criminal homicide.

If one examines the unborn child, homicide prosecutions (and particularly, the 13th- and 14th-century prosecutions) set forth infra, in Appendix 4, one will notice that there are only a few convictions (see infra, Appendix 4 at Case Nos. 8, 17, and 35). One may want to infer from this that then existing English jurors were reluctant to conclude that the destruction of an unborn child should be treated as homicide. See, e.g., Schneebeck, supra this note at 233-234, 239 & 242-243. It is possible that such an inference is valid. (Of course, even if this inference could be shown to be valid, it remains as irrelevant relative to documenting the status of deliberated abortion as a criminal offense at the English common law.) However, as this is only a possibility or a speculation, it would be irresponsible to adopt this inference. Most of these cases clearly involved only non-felonious or non-malicious or accidental or excusable abortion-homicides. So, the defendants in these cases were probably acquitted because the jurors in each such case felt that the killing or abortion was non-felonious, i.e., was accidental or unintentional or without malice or felony aforethought or did not occur in the commission or attempted commission of a dangerous felony or unprovoked, violent assault or battery on a pregnant woman. See T.A. Green, Societal Concepts of Criminal Liability for Homicide in Mediaeval England 47 Speculum 669, 670-671, 674, 683, & 687-688 (1972) (practically speaking, 13th- and 14th-century, English jurors distinguished murder from what today is denominated as manslaughter, and acquitted when they found manslaughter i.e., when they did not find malice or "felony aforethought", notwithstanding that the then existing law on criminal homicide, outside the law on or the king's custom on pardoning in cases of non-malicious or non-felonious killing and killing in self-defense or through misadventure, drew no such distinction); and Green (Pardonable Homicide), infra this note at 242. And see particularly, infra, Case No. 42

(of Appendix 4); and Schneebeck, supra this note at 414 & 322-421 & 431-32. The English crime of manslaughter (or unlawful, non-felonious or non-malicious homicide) did not formally come into existence until the 16th century. See Schneebeck, supra this note at 229-230, 239, 322-323 & 352; Naomi D. Hurnard, The King's Pardon for Homicide Before A.D. 1307 (1969); W.H. Coldiron, Historical Development of Manslaughter, 38 Kentucky L.J. 527, 527-532 (1949-1950); T.A. Green, Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800 (1985); Brown, infra note 254 at 313; and J.M. Kaye, The Early History of Murder and Manslaughter, 83 Law Quarterly Review 365 (1967).

During the early part of the English common law, conviction rates were notoriously low for most crimes, including homicide. See, e.g., E. Powell, Jury Trial at Gaol Delivery in the Late Middle Ages: The Midland Circuit, 1400-1429, in J.S. Cockburn & T.A. Green, Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800 101 (1988) (in the three counties of Derbyshire, Leicestershire and Warwickshire during the period 1400-1429, 280 rape prosecutions or investigations did not produce a single conviction); T.A. Green, Pardonable Homicide in Medieval England, 1250-1400: A Study of Legal and Societal Concepts of Criminal Liability 196-97 (unpub. Ph.D. dissertation, Harvard U., 1969) (a plea roll containing 160 homicide prosecutions during the period 1346-1351 reflects only 15 convictions); id, at 236-38, & 243; Green (Societal Concepts), supra this note at 671 ("Throughout the entire mediaeval period for which written records are extant, the great majority of defendants who stood trial [in England] were acquitted."); id. at 672-673; Schneebeck, supra this note at 219-220 (during the period 1275-1285, 37 rape prosecutions resulted in 7 convictions: 1 conviction in 21 rape appeals and 6 convictions in 16 rape indictments); id. at 463-464 & 474-486; B.W. McLane, Jurors' Attitude Toward Local Disorder: The Evidence of the 1328 Lincolnshire Trailbaston Proceedings, in Cockburn & Green, supra this note at 234, 238-39 & 242; E. Powell, Kingship, Law and Society: Crime and Justice in the Reign of Henry V 82-83 & 186-187 (1989); and B.H. Putnam, Shire Officials: Keepers of the Peace and Justices of the Peace, in 3 J.F. Willard et al (eds.), The English Government at Work, 1327-1369 215 (1950). And see supra, note 20 (during the

period 1744-1803, excluding 1790, approximately 56 Old Bailey infanticide prosecutions resulted in 6 murder convictions).

30. See infra, sec. 4-5 of this Part IV; and infra, note 126. And see infra, Case Nos 35 & 27 (of Appendix 4).

31. See infra, sec. 7 of this Part IV. And see particularly, the cross-references set forth infra, in note 203.

32. There is at least one post-late-16th-century English precedent that supports the proposition that the in-womb destruction of a child is governed by the common law rules on homicide. See infra, Appendix 3. In support of the proposition that an abortion-killed, live-born child continued to be recognized as a victim of homicide at the common law (notwithstanding the year book report of The Twins-Slayer Case (Bourton's Case (1327/28)), reproduced infra, in Case No. 7 of (Appendix 4)), see Coke, Hawkins, and Blackstone, infra text accompanying notes 119, 151, and 153, respectively. See also infra, Case Nos. 1-6 (of Appendix 4); M. Hale, Pleas of the Crown 53 (1682) (but see, Hale, infra text accompanying note 149); Jacob, infra note 127 at 159; Bullingbrooke, infra note 254 at 397; 15 Chas. Viner's Abridgment 503 (2nd ed., 1791-1794/5); 2 Cunningham, infra note 230 at sub tit. Homicide (sub Of Murder); Wood, infra note 161; 1 East, A Treatise of the Pleas of the Crown 228 (1803); 1 W. Russell, A Treatise on Crimes and Misdemeanors 617-618 & 796 (1819); Richard Burn, The Justice of the Peace and Parish Officer 380 (sec. 16) (3rd ed., 1756); Anon., Conductor Generalis: Or the Office, Duty and Authority of Justices of the Peace 161 (Phila., 1722); and the cases, etc., reproduced, infra in 1) Appendix 10, 2) Case No. 1 of (Appendix 11) (count 1, and apparently also count 2, alleges the attempted abortion-murder of a child who was aborted or born alive), and 3) Reference No. 4, 7 & 8 (of Appendix 7). See also Sims' Case (1601), reproduced infra, in Case No. 1 (of Appendix 14); Q v. West (1848), 175 Eng. Rep. 329, 2 Cox C.C. 500; 2 Car. & K 784 (and reproduced in pertinent part, infra in 1) note 12 (of Case No. 3 of Appendix 10), and 2) at text accompanying note 13 (of that same Case No. 3)); R v. Senior (1832), 168 Eng. Rep. 1298, 1 Mood. C.C. 346 (reproduced in pertinent part, infra, Case No. 4 (of Appendix 10)); Pizzy and Codd (1808), reproduced infra, in Appendix 22

n.p. (at His Lordship's Address to the Jury); Beale v. Beale (1713), 1 W.P. Wms. 244, 246; Burdet v. Hopegood (1718), 1 W.P. Wms. 486, 487; Millar v. Turner (1747/48); 3 Vesey 63, 63. And see the 20th-century cases cited in P.D.G. Skegg, Law, Ethics, and Medicine: Studies in Medical Law 21 n. 60 (Oxford, England, 1984). For recent cases here, see U.S. v. Spencer, 839 F.2d 1231, 1343 (9th cir., 1988); and Kwok Chak Ming v. The Queen (1963), 1963 H.K.L.R. 349 (and discussed in Jennifer Temkin, Pre-natal Injury, Homicide and the Draft Criminal Code 414, 420-421 (1986). Contra: Staunford, infra Appendix 8 (Staunford cites only Bourton's Case and The Abortionist's Case); Hale, infra text accompanying note 149 (citing Staunford) (but see Hale, Pleas of Crown: or a Methodical Summary of the Principal Matters Relating to the Subject 53 (1682)); Dalton, supra note 11 (of Part III) at 348 (sec. 7) (citing Staunford); F. Pulton, De Pace Regis et Regni 122-123 (1623) (citing Staunford); H. Finch, Law or Discourse Thereof in Four Books 212 (1627) (citing Staunford); Lombard, Eirenarcha 235 (4th ed., 1588) (citing Bourton's Case) (see infra, Case No. 7 (of Appendix 4) and Means II, supra note 1 of Part II at 342-343); and H. Finch, A Description of the Common Laws of England 63 (1759) (citing Staunford).

In the case of R v. Knights, 2 F. & F. 46 (1860, per Cockburn, C.J.), it was held (with no articulated rationale) that at common law it is not manslaughter on the part of the mother when her newborn child dies as a proximate result of her culpable, prenatal neglect. See Davies, supra note 17 at 209-210. Given that culpable prenatal neglect would meet the common law criteria of a misdemeanor offense (see infra, text accompanying notes 216-220, as well as the authorities, etc., set forth in those notes), then it may be that Knights was wrongly decided. See infra, text (of Case No. 2 of Appendix 18) accompanying note 5, as well as the authorities cited in that note. But see infra, note 5 (of Case No. 2 of Appendix 18) after the Wilner citation. And note also here that if the mother's negligent "omission" does not constitute an "intentional act", then there is no "joint operation of act and intent".

33. See e.g., Coke, Hale, Hawkins, and Blackstone, infra text accompanying notes 119, 149, 151, and 153-54, respectively; and East, supra note 32 at 230. The cases set forth infra, in Appendix 11

support this rule, as does infra, Reference No. 5 (of Appendix 7). The cases set forth infra, in Appendix 12, and the case set forth infra, in Case No. 7 (of Appendix 18) possibly support this rule. The cases set forth infra, in Appendix 13, with the exception of Case No. 5, neither support nor reject this rule.

It has been suggested that, inasmuch as at common law to deliberately kill a child that is in the process of being born constitutes neither murder nor abortion, then the same is not an indictable offence at common law. See, e.g., 1 N. Walker, Crime and Insanity in England 128 (1968); Skegg, supra note 32 at 4-5, and Davies, supra note 17 at 209-210. This suggestion is fatally flawed for the reason that it overlooks the common law criteria of an indictable offence. See supra, text immediately following note 28; and infra, text accompanying notes 210-227, as well as the cases, etc., set forth in those notes. Also, the authorities cited in the beginning of this note 33 would constitute legitimate a fortiori authorities or precedents in support of the proposition that to deliberately kill a child that is in the process of being born is an indictable offence at common law.

34. See Coke, Hale, Hawkins and Blackstone, infra text accompanying notes 119, 149, 151 and 153-54, respectively. See also the cases reproduced infra, in Appendices 14, 11, 12 & 13 (Case Nos. 1-4 only (not Case No. 5), see infra, this note); Cockaine v. Witnam (1577), reproduced infra, in Appendix 20; and possibly Dane's Case (1565) discussed briefly in Adams' Case (1585), as the latter case is reported in Helmholz, infra note 42 at 79-80 (no. 87). And see the cases cited in Skegg, supra note 32 at 20 (n. 57); and in Smith & Hogan, Criminal Law, 274 (n.11) (5th ed., paperback, 1983). (Note that Case No. 5 of Appendix 13, infra, either supports this proposition or supports its virtual opposite. However, neither alternative can be reasonably excluded here.)

35. 21 Jac. (Jas.), c. 27 is reproduced infra, in Statute No. 5 (of Appendix 1). For an example of a 21 Jac.1, c.27 abortion-murder prosecution, see infra, Case No. 1 (of Appendix 10). See also, infra Case No. 5 (of Appendix 10.) And see Copnall, infra note 272 at 124 (1688. T.H. charged with begetting M.H.'s stillborn bastard child and "advising her to conceale ye same, though

still-borne"; 1638. Spinster "indicted for being delivered of a bastard absque obstetrix anglice - without a midwife"); and Curtis, supra note 17 at 58 ("Immorality" charges: "Aiding Immorality" by harbouring a bastard child).

36. See R v. Beare (1732), reproduced infra, of Appendix 15. See also R v. Russell (1832), 168 Eng. Rpts. 1302, 1 Mood. 356, (see infra, Case No. 2 (of Appendix 17)); Q v. Fretwell (1862), 9 Cox. C.C. 152, 154; 31 L.J.M.C. 145; 26 J.P. 499; 6 L.T. 333; R v. Anonymous (per M. Hale, 1670), reproduced infra, of Case No. 2 (of Appendix 18); and Proprietary of Maryland v. Lumbrozo, reproduced infra, in Case No. 2 (of Appendix 2). See also infra, sec. 8 of Part IV (up to text accompanying 236). And see the 19th-century, North American state cases cited infra, note 210. Contra: see the 19th-century, North American state cases cited infra, in note 210. On the development of the English common law on misdemeanor offenses, see, e.g., Putnam & Plucknet, infra note 4 (of Case No. 1 of Appendix 9) at CLIV-CLXI; and Sayre, infra, note 37.

37. With certain exceptions (e.g., involuntary manslaughter) not pertinent here, at common law an attempt to commit an indictable offense (i.e., a common law or statutory felony or misdemeanor) is itself a misdemeanor offense. See Francis B. Sayre, Criminal Attempts, 41 Harv. L. Rev. 821, 821-837 (1928). See, also, e.g., Q v. Ransford (1874), 13 Cox C.C. 9, 16 (attempt to commit a common law misdemeanor offence is itself a common law misdemeanor); R v. Meredith (n.d.), 173 Eng. Rpt. 630, 630-31 (an attempt to commit a common law misdemeanor offence is a misdemeanor offense whether the misdemeanor offense is created by statute or is a misdemeanor offense at common law); R v. Butler (1834), 172 Eng. Rpt. 1280, 6 C & P 368 (attempt to commit a statutory misdemeanor is a common law misdemeanor); and R v. Roderick (1837), 173 Eng. Rpt. 347, 7 C & P 795 (attempt to commit a statutory misdemeanor is a common law misdemeanor).

Counts 1 & 2 of Case No. 1 (of Appendix 11), infra, allege, on a common law theory, the attempted abortion-murder of an unborn child who was aborted alive. Case No. 1 (of Appendix 2) infra, sets forth a 17th-century, colonial American case of attempted abortion prosecuted on a common law theory of attempted

murder. The indictment in this case did not allege that the child was born alive. For a similar colonial American case, see supra, text (of Part III) accompanying note 9-19. Case No. 1 (of Appendix 16), infra, sets forth an 18th century, English case of attempted abortion in which the defendant was found not guilty; and Case No. 2 (of Appendix 16), infra, refers to attempted abortion as attempted murder.

What was the common law rule if the woman was not pregnant (or if it was not proved that she was pregnant) at the time of the attempted abortion, or if the means employed in such an attempt on a pregnant woman were recognized or proved as not being capable of causing an abortion? At common law would those factual or physical impossibilities have constituted a defense to a charge of attempted abortion? The answer is probably "no", although there is dictum to the contrary by Justice Pollock in R v. Gaylor (1857), 169 Eng. Rpts. 1011, 1012; (1857) Dears. & Bell 288, 290; 7 Cox C.C. 253. See Sayre, supra this note at 821-828 & 848-856; Smith and Hogan, Criminal Law 152-53 (London, 1965); and KL Koh, et al, Criminal Law in Singapore and Malaysia: Text and Materials 282-286 (Malayan Journal Law Pte Ltd., 1989). If such factual or physical impossibilities would have been recognized as a defense, then by logical inference they would have constituted a defense to a murder or manslaughter indictment charging defendant with killing a woman (erroneously thought to be pregnant) in the course of attempting to perform an abortion on her. The reason would be, the defendant did not kill the woman in the course of committing a criminal offense. See infra, text (of Case No. 2 of Appendix 18), accompanying note 5, as well as the authorities set forth in that note). However, such a killing did constitute criminal homicide at common law. See R v. Gaylor (1857), 169 Eng. Rpts. 1011, 7 Cox C.C. 253; (1857) Dears & Bell 288.

38. See Comm. v. Taylor, 5 Bin. 277, 278 (1812); and R v. Hood (1754), Sayers Rpts. (Dublin, 1790) 161.

39. See the cases set forth infra, in Appendix 17. See also Count 2 of the indictment in R v. Tinkler (1781), reproduced infra, in Case No. 4 (of Appendix 18). And see Smith & Hogan, supra note 37 at 72-73; and Keown, supra note 99 (of Part II) at 174 note

56; 2 Hale, infra note 149 at 411; 4 Blackstone, infra note 153 at 189; and Madan, supra note 26 (of Part III).

40. Abortion-Related Death of a Pregnant Woman as Constituting Murder. See the cases set forth infra, in Appendix 18. See also R v. Gaylor (1857), 169 Eng. Rpts. 1011; 7 Cox C.C. 253; (1857) Dears & Bell 288; and Henry Welbourn's Case (per Asshurst J., Lincolnshire Sum. Ass., 1792), as discussed in 1 East, supra note 32 at 358-360. (According to Professor Baker, "Lincolnshire was on the Midland Circuit. But the surviving Assize records for this circuit do not go back to 1792. East's source for Welbourn is MSS. of J. Buller. Inner Temple MS. Misc. 96-97 contains cases by Buller and East down to 1792. A review of this source adds nothing [to East on Welbourn]." Professor Baker in a letter to Philip A. Rafferty (August 8, 1988)). And see also, 1 East, supra this note at 264; 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 659-660 (1819); Dalton, supra note 11 (of Part III) at 342 & 348 (sec. 7); R v. Angus (Lancaster Assizes, Sept. 2, 1801), as discussed in Forbes, infra note 8 (of Case No. 5 of Appendix 18) at 298 (Angus was indicted for murdering a woman. The prosecution tried to prove that Angus gave the deceased a substance to induce an abortion, and that the substance brought about the death of the deceased); R v. Stadtmuhler (Liverpool Winter Assizes, 1858, per Baron Bramwell), as discussed in Woodman & Tidy, infra this note 40 (see infra, this note 40); R v. Collins (London Central Court, 1898), discussed in 2 Brit. Med. J. 59 & 122, and in L.A. Parry, Some Famous Medical Trials 40-53 (London, 1927); and the cases cited in Smith and Hogan, supra note 37 at 195 note 3 (citing R v. Whitmarsh (1898), 62 J.P. 711; R v. Bottomley (1903), 115 L.T. Jo. 88; and R v. Lumley (1911), 22 Cox C.C. 635); and in Keown, supra note 99 (of Part II) at 45 (mentions an 1861 case). And see also, e.g., R v. A. Addison and M. Boyce (1879), 90 (1878-79) Cent. Crim. Ct. Cases 1963 (no.561) (reporter's entry: details of evidence unfit for publication), R v. M.A. Baker (1894), 119 Cent. Crim. Ct. Cases 239 (no.190) (reporter's entry: details of evidence unfit for publication). And see L. Radzinowicz and J.W.C. Turner (eds.), The Modern Approach to Criminal Law 252-54 (1948); and Madan, supra note 26 (of Part III).

This was also the rule at the Scottish Common Law. As is stated in 1 Hume, supra, note 22 at 263-64:

> If a man administer a potion to a woman, without her knowledge, to procure an abortion, and if the dose be of so powerful a nature, as plainly to be attended with a risk of the woman's life, especially when she takes it in this unguarded way; and if the woman die in consequence, this seems to be nothing less than murder. Because, though in a different way, the man shews the same disregard of her life and safety, and exposes her to the same risk, as by doing outward violence to her person. A case of this sort was tried at Aberdeen, on the 10th May 1785, - the case of Robert Dalrymple a flaxdresser, and Robert Joyner, a druggist. The charge in the libel [indictment] was to this effect; that these two men, having each of them a young woman with child to him, had administered some violent drug to them without their knowledge (as was supposed to procure abortion); and that the women died in consequence, in the course of the same night. The libel was laid, without any mention of the supposed object of the potion, as for murder by poison, with an alternative of culpable homicide. The Court found it relevant to infer the pains of law. Joyner was outlawed; and the libel was found not proven against Dalrymple.

Abortion-Related Death of a Pregnant Woman as Constituting Manslaughter. See R v. Stadtmuhler (Liverpool Winter Assizes, 1858, per Baron Bramwell), as discussed in Woodman and Tidy, Forensic Medicine and Toxicology 662 (London, 1877):

> As regards criminal abortion..., [i]f a woman dies after the attempt, the crime is usually considered as murder, although the accused may not have meant to destroy life. The law was thus laid down by Baron Bramwell in Stadtmuhler's case, Liverpool Winter Assizes, 1858: "If a man, for an unlawful purpose, used a dangerous instrument, or medicine, or other means, and thereby death

> ensued, that was murder, although he might not have intended to cause death, although the person dead might have consented to the act which terminated in death, and although possibly he might very much regret the termination that had taken place contrary to his hopes and expectations. This was wilful murder. The learned counsel for the defence had thrown on the judge the task of saying whether the case could be reduced to manslaughter. There was such a possibility, but to adopt it, he thought, would be to run counter to the evidence given. If the jury be of opinion that the prisoner used the instrument not with any intention to destroy life, and that the instrument was not a dangerous one, though he used it for an unlawful purpose, that would reduce the crime to manslaughter. He really did not think that they could come to any other conclusion than that the instrument was a dangerous one, if at all used. Then, if it were so used by the prisoner, the case was one of murder; and there was nothing for the case but a verdict either of murder or acquittal."

See also R v. Collins (London Central Court, June 27, 1898), as discussed in Parry, supra this note 40 at 49-50. And see Brookes, supra note 99 (of Part II) at 26; and Hogan and Smith, supra note 37 at 195 & 189-190; But see R v. Buck (1960), 44 CR. AppR. 213.

41. See infra, text accompanying notes 248-249; and Adelson, supra note 16 at 688 ("Under common law, anyone who, having knowledge of...a serious crime..., takes no steps to bring the responsible person to justice...,[commits]...'misprision of...felony'." Thus ...a physician, who knows that a criminal abortion was committed and who does not inform the police..., has committed "misprision of...felony.").

42. See Cockaine v. Witnam (1577), reproduced infra, in Appendix 20. With certain exceptions (not pertinent here), an element of a cause of action for common law defamation was that the defendant stated that the plaintiff had committed an offense punishable in the secular courts. See R.H. Helmholz, Select Cases on Defama-

tion to 1600, in C1 Selden Society XLIII-XLV & LXXXVIII-XCII (1985); Rodes (Lay Authority), infra note 264 at 204-205; Wunderli, supra note 9 at 66; and Jacob, infra text (of Case No. 1 of Appendix 20) accompanying note 4. But see Dane's Case (1565), discussed briefly in Adam's Case (1585), as the latter case is reported in Helmholz, supra this note 42 at 79 (no. 87). On Dane's Case, Professor Baker related that he could not find it.

43. See State v. Atwood, 54 Ore. 526, 532-37; 102 Pac. 295, 297-99 (1909) (aff'd., 54 Ore. 542, 104 Pac. 195 (1909)); and People v. Hoffman, 118 N.Y. App. Div. Rpts. 862 (1907) (aff'd., 189 N.Y. 561 (1907)). See also, by way of analogy, 1 Hawkins, infra note 151 at 693 and Coke, infra text accompanying note 220 (maintaining a whorehouse is indictable as a public nuisance); and R v. Clap (1726) (Harvester Press OBSP, supra note 20, 1726 at 6 & 8) (Clap received the following sentence on her misdemeanor conviction of maintaining a house for the practice of homosexual sodomy: the pillory, a fine of 20 marks, and 2 years imprisonment).

44. 1 William Smellie, A Treatise on the Theory and Practice of Midwifery 184 (8th ed. corrected, London, 1774) (1st ed., 1732). See also Alexander Hamilton, Outlines of the Theory and Practice of Midwifery 206 (1794) (1st ed., 1775?); 3 Encyclopaedia Britannica: Or a New Dictionary of Arts and Sciences 220 (1771); A. Wilson, William Hunter and the Varieties of Man-Midwifery, in W. Bynam & R. Porter (eds.), William Hunter and the 18th Century Medical World 368-69 (1985) (citing Willoughby, Observs. 112-14); Eccles, supra note 10 at 112-13; Wood, infra note 162 at 282; Woodman & Tidy, supra note 40 at 655-56; Male, supra note 99 (of Part II) at 207; Thomas Percival, Medical Ethics 79 (Manchester, 1803); Cummin, supra, note 106 (of Part II) at 680; Beryl Rowland, Medieval Women's Guide to Health: The First English Gynecological Handbook 35-37, 97 & 135 (1981); and Keown, supra note 99 (of Part II) at 52-79.

45. J. Hall, Resolutions and Decisions of Divers Practical Cases of Conscience, in Use Amongst Men (1650), in 7 The Works of Joseph Hall, 401-402 (Dec.II, Case iii, 1839) (See Hall, infra text accompanying note 159.) See also 2 T. Denman, Introduction to the Practice of Midwifery 73 (1802) (1st ed., 1795); and N. Culpeper, A Directory for Midwives (Second Part), supra note 13 at

161 (abortion not permitted to save mother's life; citing Rom. 3:8); Crooke, infra note 60 (permissible to do C-section since it is rarely mortal to the mother and often saves the child); Dunton, infra note 57 at Vol.16, no.13, quest.1 (1/29/1695) (under no circumstances is it permitted to do evil in order to achieve a good); and The Works of William Paley 269-270 (1825).

46. R v. Bourne is cited as 1 K.B. 687; [1938] 3 All E.R. 615 (see Skegg, supra note 32 at 13-17). See also R v. D. Edgal, O. Idike and D. Ojogwu, 4 W.A.C.A. 133 (Nigeria, 1938) (follows R v. Bourne). And see Davies, supra note 8 at 137; and Backhouse, supra note 97 (of Part II) at 114.

47. See, e.g., Simpson v. Davey (n.d.), as discussed in Woodman and Tidy, supra note 40 at 655 ("We ourselves [Woodman & Tidy] in the case of Simpson v. Davey heard...[Lord Chief Justice Cockburn] explain to the jury that medical men were morally, if not legally, justified in inducing premature labor with the object of saving the life of the mother, or child, or both); and R v. Collins (1898), as discussed in Parry, supra note 40 at 50 ("Mr. Justice Grantham, in summing up, said...: "It could be well understood that there were cases where it was necessary, in order to save the life of a woman, that there should be a forcible miscarriage, and a properly qualified doctor had to say when that time had arrived. That was not unlawful.").

48. See B. Spector, The Growth of Medicine and the Letter of the Law, in C. Burns (ed.), Legacies in Law and Medicine 278 (Sc. His. Publics., 1977). And see Blackstone, infra text accompanying note 54; supra, note 164 (of Part II); and Edmonson v. Teesville Concrete Co., Inc., 500 U.S. ___, 114 L.Ed 2d 660, 676 (1991) ("If a government confers on a private body the power to..., the private body will be bound by the constitutional mandate of....").

49. 1 Hale, infra note 149 at 51. See also Dudley v. Stephens (1884) 14 Q.B.D. 273. And see Smith & Hogan, supra note 34 at 204-205.

50. See Hale, infra note 149 at 433; and Sims' Case (1601), reproduced infra, in Case No. 2 of (Appendix 14). And see infra,

sec. 7 of Part IV, as well as the cross-references set forth infra, in note 203.

51. Thomas Brown, Pseudodoxia Epidemica: Or Enquiries into Very Many Received Tenents and Commonly Presumed Truths 149 (4th ed., 1658). See also The Birth of Mankynde quote, infra note 171; Crooke, infra note 60 at 269; and Paré, infra note 66 at 899.

52. Eccles, supra note 10 at 104 (quoting 2 J. Pechey, A General Treatise of the Diseases of Maids, Big-Bellied Women, Child-bed Women, and Widows 144-45 (1696). See also, P. Barrough, The Method of Phisick 204 (bk.3, c.63) (Lon., 1596) (1st ed. 1590?).

53. See Blackstone, infra text accompanying note 154.

54. 1 Blackstone, infra note 154 at 129.

55. See generally, Smith and Hogan, supra note 34 at 201-209; and D. Levin, Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic, 48 Cin. L. Rev. 501, 502-504 (1979). It is true that the common law books of authority state that a pregnant woman who has been sentenced to death is not allowed a pregnancy reprieve if the unborn product of her conception has not yet become an existing human being (see, e.g., supra note 6). The fact remains, however, that available evidence discloses not even one common law instance of a pregnant woman, who was known by the trial judge to be pregnant but not yet pregnant with a live child, being executed. See infra, text (of Part V) accompanying notes 33-35, as well as the references set forth in those notes.

56. See infra, text accompanying notes 258-267, as well as the references cited infra, in notes 261 & 266. And see Hall, supra text accompanying note 45; Connery, supra note 5 at 115-116, 120-141, 174-175, 180, 189-201, & 209-210; and Walker, supra note 8 (of Part III) at 180 & 390.

57. W. Charleton, Enquires into Human Nature 378 (1697). See also, e.g., Leslie, supra text (of Part III) accompanying note 30; 2 E. Chambers, Cyclopaedia: Or, An Universal Dictionary of Arts and Sciences 98 (at Soul) (London, 1728) (see infra, text accom-

panying note 156); John Dunton, et al (eds.), The Athenian Gazette or Casiustical Mercury (20 vols.), vol.1, no.6, quest.1, (Sat., April 11, 1691); id. at vol.2, no.7, quest.9 (Tues., June 16, 1691); Mowbray, infra note 76 at 93; Charles Morton, The Compendium Physicae (1687), in 33 Publics. Col. Soc. Mass. 145 (Boston, 1940) (Morton was of the opinion that the human soul is infused not at fetal formation, but rather at conception. See infra, text accompanying note 81.); John Sergeant, Transnatural Philosophy or Metaphysicks 68-92 (London, 1700) (Sergeant also stated that the rational soul is infused into the human embryo just as soon as its brain is formed. Id. at 96 & 82-83.); W. West, The First Part of Simboleography 88 (sec. 37) (London, 1622); Kersey, infra note 13 (of Part V); Pecock Donet 8/20 (c1475/1445) ("A man is a quick body, y-made of a reasonable Soule and a fleischly body."); and Vaux, infra note 282 at c.1 (at opening paragraph). And see Diemberbroeck, infra note 66 at bk.1, c.1, fol.5 ("A Man cannot be said to live without a rational soul, and to be a perfect and entire Man; yet every one knows that the Soul is not to be reckoned among the parts of the corruptible Body; as being incorruptible...[I]t derives it self from a divine and heavenly Original.")

58. See J.J. Walsh, Medicine in a Popular Medieval Encyclopedia, in 4 Annals of Medical History 273 (1932); and R. James Long (ed.), Bartholomaeus Anglicus On the Properties of Soul and Body: De Proprietatibus Rerum Libri III ET IV 1-2 (Pontifical Institute of Mediaeval Studies, Toronto, 1979).

59. Bartholomaeus acknowledged as much. See Bartholomaeus, infra note 61 at 297. See also John Connery, supra, n.5 at 58-59, 107-108 (in conjunction with 325-26 n.3) and 110; and Hewson, Giles of Rome and the Medieval Theory of Conception: A Study of the "De Formative Corporis Humani in Utero" 166-69 (London, 1975).

60. See, e.g., Thomas Geminus, Compendiosa Totius Anatomie Delineatio cxlii (3rd(?) ed., London, 1559) (1st ed., 1553?) (The Compendiosa is a plagiarism of Vesalius' (1514-1564) De Humani Corpis Fabrica (Basle, 1543)); F.J. Furnivall and P. Furnivall (eds.), The Anatomie of the Bodie of Man by Thomas Vicary: The Edition of 1548 as Re-Issued by the Surgeons of St. Bartholomew's in 1577 80 (London, 1888) (1st ed. of the Anatomie [aka:

A Treatise for Englishmen Containing the Anatomie of Man's Body] 1548) (Vicary's Anatomie is a plagiarism of a 14th-century work on surgery by Henri de Mondeville (d.1320). See G.W. Corner, Anatomists in Search of the Soul, in 2 Annals of Medical Science, 3-4 (1919); and R.T. Beck, The Cutting Edge: Early History of the Surgeons of London 180-81, 192-93 (1974).); H. Crooke, Mikpokoemotpaia: A Description of the Body of Man 263-65 & 306-307 (2nd ed., 1631) (1st ed., 1616); Robert Turner, Mikpokowmow: A Description of the Little-World 35 & 42 (London, 1654); Aristotle's Complete Masterpiece, as reproduced in The Works of Aristotle in Four Parts 28-29 (London, 1846) (The earliest known edition of Aristotle's Masterpiece, which, by the way, was neither written by nor derived from Aristotle, is 1694. The work is based in part upon Albert the Great's (1206-1280) De Secretis Mulierum. See J. Needham, A History of Embryology 91-92 (N.Y., 1959). And see also Roy Porter, The Secrets of Generation Display'd: "Aristotle's Masterpiece in Eighteenth Century England 10-11, in R. Maccubin (ed.), 'Tis Nature's Fault: Unauthorized Sexuality During the Enlightenment (1987).); Aristotle's Experienced Midwife, as reproduced in The Works of Aristotle in Four Parts 106-107 (London, 1846) (The earliest known edition of Aristotle's Experienced Midwife, which, by the way, was neither written by nor derived from Aristotle, is 1700); N. Culpepper (or R.C.), The Complete Midwife's Practice Enlarged 268-269 (4th ed., London, 1680) (1st ed., 1656/59) (The work is a plagiarized version of Louis Bourgesis' (Bourgeois) Observations sur la Sterilite', Perte de Fruit, Secondite, Accouchements et Maladies des Femmes et Engants Nouveauea (Paris, 1609).); Anonymous, The English Midwife Enlarged 302 (London, 1659); J. Wolveridge, Speculum Matricis 12-13 (London, 1671) (The Speculum was plagiarized from The Complete Midwives Practice Enlarged.).

It has been said that Isbrand Van Diemerbroeck's Anatomie Corporis Humani (1672) (see Salmon-Diemberbroeck, infra note 66 & 115) was the last textbook on human anatomy to include a discussion on the infusing of the human soul into the child in the womb as part of a general description of the human body. See Corner, supra this note at 6; and H. Brown, The Anatomical Habitat of the Soul, in 5 Annals of Medical Science, 1, 22 (1923).

61. 1 On the Properties of Things: John Treviso's Translation of "Bartholomaeus Anglicus De Proprietatibus Rerum": A Critical Text 296 (Oxford, England 1975). See also id. at 297. Treviso's (c.1340-1402) translation was completed at Berkeley, Gloucestershire, in February 1398/9. Id. at xi. See also, e.g., Thom. East (printer), Batman uppon Bartholome, His Booke as Proprietatibus Rerum 71-72 (lib.6, c.4) (London, 1582).

62. W. Charleton, Natural History of the Passions 60 (London, 1674).

63. Guy Holland, The Prerogative of Human Nature 105-106 (London, 1653). See also id. at 95-96. And see Hall, infra, text accompanying note 159.

64. See supra, text (of Part III) accompanying notes 22 & 25-26 (as well as works cited in the latter two notes); infra, text accompanying note 78; and Hall, infra text accompanying note 159.

65. Thomas Willis, Two Discourses Concerning the Soul of Brutes, Which Is that of the Vital and Sensitive of Man 42 (Scholars' 1971, facsimile reproduction of the translation by S. Pordage, 1683) (1st ed. (De Anima Brutorum), 1672). See also, e.g., Madan, supra note 26 (of Part III); Early English Metrical Lives of Saints (c. 1275), in Thomas Wright, Popular Treatises on Science Written During the Middle Ages, in Anglo-Saxon, Anglo-Norman, and English 139-140 (1841) (the child in the womb is perfect in every limb 40 days after its conception, which is when it receives its master or rational soul); Wm. Pemble (1592?-1623), De Formarum Origine, 71 (object. 5) (1629) (all the doctors and physiologists say that the human soul is not infused into the product of human conception until the 40th day); Dunton, supra note 57 at vol. 1, no. 1, quest. 2 (Tuesday, March 17, 1690) (fetal animation occurs at fetal formation); id. at vol. 1, no. 12, quest. 3 (Saturday, May 2, 1691) (same as id.); id. at vol.6, no.23, quest.1 (same as id.); J. Tanner, The Hidden Treasure of the Art of Physick Fully Discovered in Four Books c.3 at 3 (1659) (the child in the womb is formed and animated 37-40 days after conception, and begins to stir 90 days after conception); Jane Sharp, The Midwives Book 145 (London, 1671) (the child in the womb is formed and animated 45 days after it is conceived; but it does not begin to stir until 90 days

after its conception.); Pechey, infra note 192 at 101-102 (same as Sharp, supra this note); McLaren, supra note 8 at 108 & 186 n.90, and citing Nicolas Venette, Conjugal Love Reveal'd 62 (London, 1720) (the male fetus is formed and animated 45 days after conception, and begins to move 90 days after its conception; the female fetus is formed and animated 50 days after conception, and begins to move four months after conception); John Weemse, An Exposition of the Second Table of the Morall Law, 1 Works 95-98 (London, 1632) (the child in the womb is formed and animated in 45-50 days after its conception and begins to stir at 90-100 days after conception); Defoe, supra note 12 at 140 (one lady to another: "Why, as I said before, I say again, your taking physic before-hand to prevent your being with child is wilful Murther, as essentially and as effectually, as your destroying the Child after it was formed in your Womb."); Lord Bryskett, A Discourse on Civil Life 44 (1606) (implies that the human embryo is animated at fetal formation); J. Donne, An Anatomy of the World (1611-12), in H. Fausset (ed.), John Donn's Poems 1881 at li. 451-53 (1931/58) ("the soul of man be got when man is made"); Jenner, A Work for None but Angels and Men that Is to Be Able to Look into, and to Ourselves, or a Book Shewing What the Soal Is 8 (1650) ("God gives soales,...which himself forms in new bodies"); Chambers, infra text accompanying notes 155-58; Hall, infra text accompanying note 159; J. Flavell, A Treatise of the Soul of Man 4-7 (1698) (God infuses the human soul when the body is formed, citing Gen. 2:7); Harold Fisch (ed.), Richard Overton's "Man's Mortalitie" (1644) cap. 1 (English Reprint Series, 1968) (the soul is infused when the body is formed; citing Gen. 2:7); Nemesius, The Nature of Man 149 & 265 (G. Wither, trs.) (London, 1636) (the body is the instrument of the soul and the soul is infused when the body is made); and Wood, infra text accompanying notes 161-62. And see R. Hooper, The Anatomists Vade-Mecum: Containing the Anatomy and Physiology of the Human Body 228 (2nd American ed., from the 3rd London ed., 1809) (during the first month of pregnancy, when the fetus is about the size of a pigeon's egg, it "swims in the middle of the liquor amnii"); John Jones, A Briefe, Excellent, and Profitable Discourse of the Naturall Beginning of All Growing and Living Things Diii '(r&v) (1574) (fetal animation coincides with fetal brain formation); Sergeant, supra note 57; K. Digby, Of Bodies and of Mans Soul. To Discover the Immortality of Reason-

able Souls. With Two Discourses of the Power of Sympathy, and of the Vegetation of Plants 95-96, 114, & 127-28 (of Second Treatise: Declaring the Nature and Operations of Mans Soul) (London, 1669) (the soul arrives just as soon as the embryo acquires sensation to impress it upon the soul); Henry More, The Immortality of the Soul 52 (London, 1659) ("If we adde [Reason] to Vegetation and Sensation,...we have then a settled notion of the Soule of Man:...A Created Spirit induced with Sense and Reason, and a power of organizing terrestrial matter into human shape by union therewith"); id. at 264, 396 & 457; Alexander Ross, The Philosophical Touchstone 96 (London, 1645) ("After the bodie is articulated, the new created soul is infused,...and so that rude mass of flesh in the matrix becomes a man."; id. at 101-102 (all souls are of equal excellency and perfection, that of an Embryon as of Aristotle"; that of a "fool and Embryon"); and Samuel Boulton, Medicina Magica Tamen Physica 5 (1656). And see John Woolton, A Treatise of the Immortality of the Soul fols. 18-20 (1576) (discusses the Aristotelian opinion that the human soul is infused into the male fetus 40 days after its conception and the female fetus 90 days after its conception); John Woolton, A New Anatomy of Whole Man fol. 14 (1576) (discusses the Gen. 2:7-breath of life statement); and Gilberti Anglici, Compendium Medicina ff. cxxxii et seq. (ed. of 1510).

The traducianists, who maintained that the human soul is transmitted through the process of generation (and in the case of some traducianists, that the soul is the architect of the human body), were necessarily committed to the proposition that a newly formed human fetus is a human being. This follows from the then definition of a human being as an organized or formed human body informed with its human or rational soul. See, e.g., John Milton, A Treatise on Christian Doctrine 189-198 (1825); Salmon-Diemerbroeck, infra note 66 at bk.1, c. xxxix, fol.226; and Connery, supra note 5 at 40-41 & 53-54. The same can be said of the preformationists. See Cheselden, Tuana, etc., infra note 83; and Olasky, supra note 13 at 35-36.

66. Thomas Johnson (trs.), The Workes of that Famous Chirurgion Ambrose Paré, Translated out of Latine and Compared with the French 894-95 (London, 1634) (1st French ed. (Oeuvres), 1575). See also id. at 979 (42 days for fetal formation); id. at 899

(the male and female fetus begin to stir, respectively, within, and after, three and one-half months from conception); id. [Reports in Court (1575)] at 1130 (when a pregnant woman has been murdered, her womb should be cut open. If it contains a formed fetus then there is a double murder, for a human being comes into existence at fetal formation.) See, also, e.g., W. Salmon, (trs.), The Anatomy of Human Bodies by Isbrand de Diemerbroeck bk. 1, cxxxix, fols. 226-227 (London, 1694); James Guillemeau, Child-birth: Or the Happy Deliverie of Women 69-70 (London, 1612) (fetal formation occurs 40 days after conception); Rueff, infra text accompanying notes 69-71 (fetal formation and animation occur 45 days after conception); H. Chamberlin (trs.), The Diseases of Women with Child, and in Child-Bed by Francis Mauriceau 28-30 (London, 1672) (1st French ed., 1668) (fetal formation occurs 30 and 42 days after conception, respectively, for the male and female fetus, "which is about the time the Foetus begins to be animated, though as yet there is no sensible motion" [but see Mauriceau, infra note 79.]); Etienne (or Stephani) Chauvin, Lexicon Rationale sive Thesarurus Philosuphicus sub tit. Generatio Hominis (Rotterdam, 1692); Mark Muss (trs.), Dante Alighieri: The Divine Comedy Volume II: Purgatory at 270-71 (canto xxv, lines 68-75) (Penguin paperback ed., 1985) ("when [i.e., at the instant] the articulation of the brain has been perfected in the embryo [foetus], then the First Mover turns to it, with joy over such art in Nature, and He breathes a spirit into it, new, and with power to assimilate what it finds [already] active there [i.e., the animal soul], so that one single soul is formed and complete, that lives and feels and contemplates itself"); S.B. Boas, The Earthly Venus by Pierre-Louis Moreau de Maupertuis [1698-1759] Translated from Venus Physique 4 (Johnson Reprint Corp., 1966) ("Seven or eight months before birth the embryo has been found to have a human face, and attentive mothers have already felt some movement. Before this it is only formless matter."); and 2 Buffon Histoire Naturelle, Générale et Particuliére 472 (1749) (the human fetus is pretty well formed 30 days after conception).

67. Eccles, supra note 10 at 43-45 (footnotes mine). (Reprinted with permission of Kent State University Press.)

68. They can be seen in Connery, supra note 5 at 110, and 107-108 & 325-326 note 3, respectively.

69. Jacob Rueff, The Expert Midwife 37 (London, 1637) (underscoring mine) (modernized spelling). This work was originally written in Latin under the title, De Conceptu et Generatione (Zurich, 1554). See Eccles, supra note 10 at 12-13. And see supra, text accompanying note 61.

70. Id. at 58 (modernized spelling).

71. Id. at 40-42 (modernized spelling). And see supra, text accompanying note 61.

72. A General Treatise of Midwifery Faithfully Translated from the French of Monsieur "Dionis" 88 (London, 1719). See also id. at 87. And see Dante, supra note 66; and Hall, infra text accompanying note 159.

73. N. Culpeper (or R.C.), The Complete Midwife's Practice Enlarged 92 (4th ed., 1680) (1st ed., 1656/59). See also id. at 268.

74. Id. at 93.

75. Id. at 269. See also Pechey, infra, note 192 at 101-102.

76. John Mowbray, The Female Physician 28 (London, 1730) (1st ed., 1724). See also id. at 29, 92-93, 24 & 21-22. And see W. Bonser, The Medical Background of Anglo-Saxon England: A Study in History, Psychology, and Folklore 265 (London, 1963) (quoting a mid-11th century manuscript from Christ Church, Canterbury, England):

> "Here beginneth to tell of a man's nature, how in his mother's womb he grows to be a man...In the third month, he is a man [i.e., has a recognizable human form] without a soul. In the fourth month, he is stable in his limbs. In the fifth month he quickens and grows....In the sixth month, he is provided with a skin....In the seventh month, the toes and fingers are growing. In the

> eighth month, his breast organs are growing..., and he is all firmly put together. In the ninth month, the woman knows for certain whether she may conceive. In the tenth month, the woman will not escape with her life if the child is not born, since it becomes a fatal disease in her belly - most often on a Tuesday night".

See also McLaren, supra note 8 at 81 & 186, note 81 (citing Rev. Thomas Cockayne, Leechdoms, Wortcunning and Starcraft of Early England III, 147 [London, 1961]); and E. Mason-Hohl (trans.), The Diseases of Women by Trotula of Salerno: A Translation of Passionibus Mulierum Curandorum 19-20 (1940). Alexander Ross, in his Arcana Microcosmi (London, 1651), stated that the reasonable soul is infused into the child in the womb during the fourth month of pregnancy, when the heart and brain of the child are formed. Id. at 93. However, he also stated that the process of male and female fetal formation takes 30 and 40 days, respectively (id. at 90), and that God infuses the reasonable soul into the unborn product of human conception "after" (i.e., when or as soon as) the child's body is articulate or formed. Id. at 9. See Ross, supra note 65.

77. See, supra text accompanying note 71; Tanner, supra note 65; Sharp, supra note 65; Venette, supra note 65; Weemse, supra note 65 at 86-98; and Crooke, supra note 60 at 268. Hippocratic writings actually set forth a thirty (30) and forty-two (42) rule, respectively, for male and female fetal formation. See Connery, supra note 5 at 155; and Williams, infra note 100 at 149 (including n.9). See also infra, text accompanying note 130.

78. Connery, supra note 5 at 168-69. (Reprinted with permission of Loyola University Press.) See also Heineman, infra note 225 at 74-75. On reliance here upon Gen. 2:7, see, e.g., Hall, infra text accompanying note 159; Salmon-Diemerbroeck, supra note 66; Flavell, supra note 65; Overton, supra note 65; and Dante, supra note 66.

79. Quoted in 1 R. James, A Medicinal Dictionary sub tit. Abortus (at Observation LV) (London, 1743). But see Chamberlin (Mauriceau), supra note 66.

80. 21 Jas. 1, c. 27 (1623) is reproduced, and discussed in some detail, infra, in Statute No. 5 of Appendix I. In the infanticide case of R v. Buckham (1756), supra note 20 at case no. 42, a midwife testified that the newborn child was fully developed or formed - had nails on his fingers and hair on his head. See also infra, text (of Case No. 1 of Appendix 2) accompanying note 11 (the child "came into the world dead...not having any imperfection, Likewise with hair upon its head and nails upon its fingers and toes..."); and infra, Case No. 11 (of Appendix 21).

81. Morton, supra note 57 at 146. See infra, commentary accompanying Case No. 5 (of Statute No. 1). See also Ranke-Heinemann, infra note 225 at 305 ("By the beginning of the eighteenth century... [the opinion that the human soul is infused into the product of human conception at conception] was the prevailing opinion among doctors."); supra note 26 (of Part II); and Hodge, supra note 98 (of Part II).

82. See Coke, infra text accompanying note 126; and Hunter, infra note 126. And see Goldsmith, infra note 130 at 299 (nails on toes and fingers begin to appear on the child in the womb 4 & 1/2 months after conception); and Keith L. Moore, The Developing Human: Clinically Oriented Embryology 89, 91, 102, 423, 425 & 434 (4th ed., 1988) (fetal hairs on the head, eyebrows, upper lip and chin become visible at about the twentieth week after fertilization, and toenails and fingernails, which begin to form at about ten weeks, reach the fingertips by about thirty-two and thirty-six weeks, respectively, after fertilization.

83. Thomas Raynalde, supra note 13 at 2nd. bk., fol. 82. As to the 3-month fetal formation rule, see, e.g., Smellie, supra note 44 at 74 & 110 ("The conception is called Embryo until all the parts are distinctly formed, generally in the third month; and from that period to delivery is distinguished by the appellation Foetus."); T.H. Gibson, The Anatomy of Humane Bodies Epitomized 211-213 (London, 1697) (the human embryo develops into a fetus at about 10 weeks after conception); W. Hunter, Anatomia Uteri Humani Gravidi Tabulis Illustrata: The Anatomy of the Human Gravid Uterus Exhibited in Figures pl. 32. (figs. 1 & 2) & pl. 33 (figs. 5 & 6) (London, 1774) (pl. 32, figs. 1 & 2: illustration of a three-months old human fetus with a perfect human

shape, which Hunter refers to as a child [see Hunter, infra note 126: the human fetus can be born alive as early as three months after his conception.]; pl. 33, figs. 5 & 6: refers to an eight-weeks old abortus as an embryo; but see pl. 34, fig. 2: refers to a five weeks-old abortus as a foetus.); Goldsmith, infra note 130; Hamilton, supra note 44 at 58 (The human fetus is approximately three inches in length 12 weeks after conception, and his formation is fairly distinct by that time. [Note: Hamilton evidently subscribed to one of the theories of preformation, i.e., that the formed or organized human fetus exists in miniature in the semen, or ovum, at or prior to conception. See id. at 56]); G. Whitteridge (trs.), Disputations Touching the Generation of Animals by William Harvey 287 (1981) (Harvey stated that at 3 months the human fetus is perfectly formed); Encyclopaedia Britanica, supra note 44 at 207 & 210; and Chitty, infra, text accompanying note 5 (of Case No. 1 of Appendix 15). See also Boyd, infra, text (of Case No. 1 of Appendix 15) accompanying note 3.

Cheselden stated that the idea of "preformation" was generally accepted by early 18th century embryologists: "But the Moderns, assisted with Glasses, have discover'd, That all the Parts exist in Miniature, from the first Formation of the Foetus, and that their increase, is only the extension and thickning of their Vessels, and that no Part can owe its Existence to another". (W. Cheselden, The Anatomy of the Humane Body xix (London, 1713).) See also, Nancy Tuana, The Weaker Seed: The Sex Bias of Reproductive Theory, in Nancy Tuana (ed.), Seminism and Science 163-168 (Indiana Press Paperback Edition, 1989); W.M. Smallwood, Natural History and the American Mind 55-56 (1941); James Keill, The Anatomy of the Humane Body Abridged 93-94 (London, 1698); and 2 James, supra note 79 sub tit. Generatio. And see Connery, supra, note 5 at 204 & 208-209; J.H. Needham, A History of Embryology 162-63 (1959); and McLaren, supra note 8 at 22-25.

84. Dionis, supra note 72 at 87. See Connery, supra note 5 at 171. Connery notes that Paolo Zacchia (1584-1659), physician general of the Vatican State, observed that some philosophers argued that the onset of fetal motion signaled that the fetus is rationally animated. (See e.g., infra, text accompanying notes 113 & 115.) However, there is no indication that these philosophers

thought that quickening signaled the onset of fetal motion. Aristotle stated that initial fetal movement coincides with the completion of the process of fetal formation, which occurs 40 days after conception in the case of the male fetus and 90 days after conception in the case of the female fetus. He stated also that rational animation coincides with fetal formation, but the former is not what causes initial fetal movement. See infra, text accompanying notes 97 & 113, as well as the references set forth in those notes. And see Dante, supra note 66.

85. One "possible" such author is Fernel. See infra, text accompanying note 190, as well as that note 190.

86. Tribe, supra note 1 (of Introduction) at 28. See also B. Milbauer, The Law Giveth: Legal Aspects of the Abortion Controversy 120 (1983).

87. See, e.g., Mauriceau, supra text accompanying note 79; R v. Beare (1732), reproduced infra, in Case No. 1 (of Appendix 15) (Beare is an English common law, pre-quick with child, abortion prosecution); Oldham, infra note 34 (of Part V) (in a 1714, Old Bailey Case, a jury of matrons determined that a condemned woman was "with child but not quick"); Ed. Edwards, A Rich Closet of Physical Secrets 1-2 (London, 1652) ("So soon as the woman shall begin to be with child, which she shall early know, by stopping of her monthly flux without disease, or ancientness of years"); Chambers, supra note 57 at 293 (Conception); The Examination of Denise Presland, infra note 126 (Presland testified that the reason why she suspected she was pregnant was because her appetite increased greatly. She added that she curbed her food intake so no one would suspect her condition.); and R. Schnucker, The English Puritans and Pregnancy, Delivery and Breast Feeding, 1 History of Childhood Quarterly 637, 638 (1973/74). And see infra, text accompanying note 148.

88. Bracton, infra note 90.

89. 2 Twiss (ed.), Bracton De Legibus et Consuetudinibus Angliae 279 (1879) (insertions mine). It is inconceivable that Bracton could be implying here that a sane woman who deliberately kills her unborn child is exempted from prosecution for criminal homicide.

See infra, text accompanying note 116. If Pennaforte's abortion passage-phrase "or she herself takes it" (see infra, text accompanying note 93) had been omitted from that passage, the thought expressed in that phrase would have been implicitly read into that passage.

90. G. Woodbine (ed.), S. Thorne (rev. & trs.), Bracton De Legibus et Consuetudinibus Angliae 341 (1968). De Legibus was printed in 1569.

91. See Connery, supra note 5 at 96-97. See also John Connery, The Ancients and the Medievals on Abortion: The Consensus the Court Ignored, in D. Horan et al (eds.), Abortion and the Constitution: Reversing Roe v. Wade Through the Courts 129-30 (1987).

92. See infra, text accompanying note 93.

93. Raymond of Pennaforte, Summa de Penitentia et Matriomonio II, i, 6. (Rome, 1603). Reference and translation from the Latin supplied by Professor Baker. (Bracketed insertions mine.) See also Schultz, Bracton and Raymond de Penafort, 61 L.Q.R. 286-92 (1945); H.G. Richardson, Bracton, the Problem of His Text 130-31 (London, 1965); and Hurnard, supra note 29 at 69-71. And see supra, note 89.

94. See infra, 13th & 14th century cases set forth in Appendix 4.

95. See, e.g., Coke, Hale, and Hawkins, infra, notes 119, 149 & 151, respectively. And see infra, text accompanying note 220. The quote is from Hurtado v. California, 110 U.S. 516, 530 (1884). The canon law source (or sources) derived mainly from Aristotle, a non-religious source. See Connery, supra note 5 at 306. The fetal formation criterion as set forth in the Septuagint or Greek version of Exodus 21:22-23 (reproduced supra, at text [of Part III] accompanying note 22) probably derived from Aristotle. See Connery, supra note 5 at 17-18.

96. De Multiplicatione Specierum, pt. 1, cap. 1, as translated from the Latin in David C. Lindberg, Roger Bacon's Philosophy of Nature 11 (1983). And see Connery, supra note 5 at 102-103.

97. See Connery, supra note 5 at 17-18 (including notes 27 & 29 at p. 317), 57, & 12; supra note 84; Jacques Roger, The Mechanistic Conception of Life, in D.C. Lindberg, & R.L. Numbers (eds.), God and Nature 277-78 (1986); Salmon-Diemerbroeck, supra note 66; and Dante, supra note 66.

98. See Connery, supra note 5 at 57-58; James McEvory, The Philosophy of Robert Griosseteste 313-314 (1982); Hall, infra text accompanying 159; and Maubray, supra note 76.

99. 410 U.S. at 134.

100. G. Williams, The Sanctity of Life and the Criminal Law 151-52 (1968). (Reprinted with the permission of the Trustees of Columbia University, Columbia University, N.Y., N.Y..) See also, e.g., Lader, supra note 8 at 78; McLaren, supra note 8 at 107-108 & 121-123; Keown, supra note 99 (of Part II) at 3-4; and Grossberg, supra note 7 (of Part II) at 159-160; and Backhouse, supra note 97 (of Part II) at 5.

101. See, e.g., J. Kersey, Dictionarium Anglo-Britanicum, or a General English Dictionary sub tit. Animate/Animation (1708) ("to give Life, Enliven, or Quicken/the supplying of an Animal Body with a soul"); J. Edwards, A Demonstration of the Existence and Providence of God 110 (1696) (Animation: "by infusing the Soul"); Sir Thomas Elylot, Dictionarie sub tit. Animari (1548) ("Animari: to quicken or take life, as the child does in the mother's womb"); id. sub tit. Animatus ("that has a soul or life"); R.W., A Dictionary in Latine and English Heretofore Set Forth by Master John Vernon, and Now Newly Corrected and Enlarged sub tit. Animatum (1575) (animatum [verbal adjective from the verb animo]: "which has a soul"); 1 J. Ash, Dictionary of the English Language sub tit. Animate (1775) ("To make alive, to give life, to quicken"); id. sub tit. Quicken ("to make alive"); id. sub tit. Quickening ("making alive"); and id. sub tit. Soul ("a human being"). See also Dunton, supra note 57 at Vol. 2, no. 4, quest. 5 (Sat., June 6, 1691) ("Whether we may safely conclude or not, that a Child quickened in the Womb, and yet dying before its Birth, as capable of the Rewards or Punishments of a Future State?"); id. at Vol. 3, no. 8, quest. 6 (Sat., August 22, 1691) ("Whether the Soul of a Child quick in the Womb

shall enjoy Heaven or Hell."); G. Black (compiler), A Calendar of Cases of Witchcraft in Scotland 1510-1727 30 (N.Y., 1938) ("Burntisland, 1598. Jane Allane, convict[ed] of witchcraft, was condemned to be 'quick burnt to the death'"); R. Pitcairn (compiler), Ancient Criminal Trials in Scotland 371 (Edinburgh, 1883) ("1595. Isabel Pratt for infanticide: 'the child was quick born'"); id. (Vol. 3) at 269-70 ("16 Hen. Joan Brown, for infanticide: 'was delivered of a quick female child'"). And see 8 R.E. Lewis (ed.), Middle English Dictionary 76 (at quick) (1984); Bosworth & Toller, An Anglo-Saxon Dictionary 179 (at cwic) (1898); and 13 The Oxford English Dictionary 13 (sub tit. quick) (2nd ed., 1989).

102. Connery, supra note 5 at 213.

103. See Aristotle, Historia Animalium lib. 7, c.3, in 4 W.D. Ross, The Works of Aristotle 583a (Oxford ed., 1908-53) (see Connery, supra note 5 at 17-18 & 317 nn. 27 & 29); Augustine, De Diversis Quaestionibus Octaginta Tribus Liber Unus, 56, PL 40:39; and De Trinitate, 4, 5, PL 44:819 (see Connery, supra note 5 at 58-59); Hippocrates, De Natura Pureri, in C. Kuhn, M. Hippocratis Opera Omina, Tom. 1, p. 392 (1825) (see Williams, supra note 100 at 149, including note 9); and Galenus, Opera, de Usu Partium xv.5 (see Williams, supra note 100 at 149, including note 2).

104. See Connery, supra note 5 at 205-206.

105. See 3 Thorne (1977), supra note 90 at v-vi & xiii-Lii.

106. See F. Copleston, A History of Philosophy Volume 2: Mediaeval Philosophy Part II: Albert the Great to Duns Scotus 23 (paperback ed., 1962); T. McDermott (ed.), St. Thomas Aquinas: Summa Theologicae: A Concise Translation (Christian Classics, Inc., Westminster, Maryland, 1989) xiii & xxii.

107. Connery, supra n. 5 at 110. (Reprinted with permission of Loyola Univ. Press.) See also McDermott, supra note 106 at 163 ("And so at the end of the process of human generation, God creates an intelligent soul...."); and Needham, supra note 60 at 93-94.

108. See 11 St. Thomas Aquinas Summa Theologica: Man 5-9 (Blackfriars ed., 1970). See also id. (Vol. 4) at 115-121. And see also McDermott, supra note 106 at 108-109.

109. See St. Thomas, supra note 108 at 6 (n.a). See also McDermott, supra note 106 at 48-49. And see J. Cooke, The Restless Kingdom: An Exploration of Animal Movement 2 (1991) ("All animals, at some stage in their life history, possess the ability to move from place to place under their own power, a capability conspiculously absent among plants.").

110. St. Thomas (Vol. 15), supra note 108 at 153. See also McDermott, supra note 106 at 162-63.

111. St. Thomas (Vol. 11), supra note 108 at 65. See also McDermott, supra note 106 at 103 & 115.

112. See 9 J. Spedding (ed.), The Works of Francis Bacon 49-50 (De Aug. IV, 3) (1864) (or Karl Wallace, The Works of Francis Bacon 17 (De. Aug. IV, 3) (1967)); and J. Cope and H. Jones (eds.), History of the Royal Society of London, for the Improving of Natural Knowledge by Thomas Sprat 81-83 (1958). See also 1 W. Hooper, A Treatise on Man, His Intellectual Faculties and His Education 95-97 (London, 1777). It is said that the term soul did not disappear from the vocabulary of physicians until about the mid-nineteenth century. See W. Riese, A History of Neurology 90 (N.Y., 1959).

113. Connery, supra note 5 at 108 (citing Aristotle, On the History of Animals, bk.7, 3, Works of Aristotle, 4:583(a); and Albert the Great, De Animalibus Lib.9, t.1, c.3, Opera Omnia (Paris, 1890-) t.11. See also Connery, supra note 5 at 317 n.29. (Reprinted with permission of Loyola Univ. Press.) And see Salmon-Diemerbroeck, supra note 66 at bk.1, c.xxix, fols.216-218.

114. See Le Roy Crummer, The "Anatomia Infantis" of Gabriel de Zerbi 2 (Huntington Library reprint from 24 (no. 3) The American Journal of Obstetrics and Gynecology 352 (1927)); and L. Lind (ed.), Studies in Pre-Vesalian Anatomy: Biography, Translations, Documents 154 & 156 (Amer. Philos. Soc., 1975). See also Needham, supra note 60 at 94 (from the 14th century "the further course

of embryological theology...runs in every century parallel with true scientific embryology").

115. Crummer (Zerbi), supra note 114 at 2-3. Diemerbroeck, while affirming the opinion that the human or rational soul is infused at fetal formation, seriously questioned whether it could be certainly said that the product of human conception is completely formed 40 days after conception. See Salmon-Diemerbroeck, supra note 66 at bk. 1, c. xxix, fols. 216 & 226-227.

116. 2 H.G. Richardson (ed.) and G. Sayles (trs.), Fleta, in 72 Selden Soc. 60-61 (Fleta, I, c. 23) (1955).

117. See Connery, supra note 5 at 146, 87, and 80-82.

118. See, e.g., A.N. Cabot, History of Abortion Law, in Special Project: Survey of Abortion Law, 67 Ariz. St. L.J. 70, 87-89 (1980).

119. 3 Coke, Institutes 50-51, (2nd ed., 1648) (some spelling modernized). And see Coke's First Institute (Commentary Upon Littleton)* 379a (1628) (precedents containing "inconvenient results", i.e., results contrary to true law or reason, can be rejected); and 1 Blackstone, infra note 154 at 69-70 (precedents that produce absurd results can be rejected). Bourton and Anonymous are reproduced, respectively, infra, in Case No. 7 (of Appendix 4) and Reference No. 3 (of Appendix 7). Staunford's Les Plees del Coron abortion passage is reproduced infra, in Appendix 8. For an example of the use of the term in rerum natura in a non-legal context, see, e.g., Henry More, supra note 65 at 107 (though the sun and the stars "had Sense, yet they do not so much as know whether this Earth we live on be in rerum Natura or no").

120. Means I, supra note 1 (of Part II) at 420.

121. Elisha Coles, A Dictionary, English-Latin, and Latin-English sub tit. "Quick with Child, To Quicken, To be Quick with Child", respectively. (2nd ed., London, 1679) (1st ed., 1677).

122. 2 Samuel Johnson, A Dictionary of the English Language sub tit. quick (London, 1755).

123. G. Mason, A Supplement to Johnson's English Dictionary sub tit. quick (1801). See infra, text accompanying notes 139-142.

124. Robert Ainsworth, Thesaurus Linguae Latinae Compendiarius: Or A Compendious Dictionary of the Latin Tongue sub tit. To be quick with child, To quicken, respectively (2nd ed. London 1746). See also Bailey, Dictionarium Britannicum sub tit. To Quicken (London, 1736) ("To Quicken: to become alive, as a child in the womb"); and 13 OED, supra note 101 at 18-19 sub tit. quicken (v. intrns. sense) (citing e.g., Wilson, Rhetorical 29: "'Hym that Kills the Child as soone as it begins to quicken'"). And see supra, text accompanying note 101 (and the works cited in that note).

125. See Johnson, supra note 27. Even Cyril Means conceded that the Latin term animatum fuerit means ensouled. See Means I, supra note 1 (of Part II) at 342-343.

126. 1 Hargrave & Butler (eds. & revs.), The First Part of the Institutes of the Laws of England: or a Commentary Upon Littleton n.p. (L.1, c.4, sec.35 [29b.] (1853) (1st ed., 1628). And see infra, Case No. 56 (of Appendix 4) (five-inch, male fetus recognized as a human being); and infra, Case Nos. 27 & 35 (of Appendix 4) (fetuses that had not yet developed to the extent their genders could be determined by visual examination recognized as human beings). See also J.S. Cockburn (ed.), Calendar of Assize Records: Essex Indictments, Elizabeth I 197 (no. 1129) (1978) (female defendant hung for infanticide, notwithstanding "yt was not directly proved the child was in lyff" [compare to infra, Case No. 21 (of Appendix 4)]); and R v. Denise Presland (Assize held at Chelmsford on Tuesday, 5 March 1650/51 [Assi 35/92/H/5]). The Presland indictment charged that on 1 Dec. 1645, Denise Presland gave birth to a bastard, female child and threw it into the fire where it was burnt to death. The child was evidently a 3-months-old fetus. She was found not guilty. Presland's deposition and the depositions of three trial witnesses (which were kindly supplied to me by the staff of the E.R.O. in Chelmsford, England), read, respectively, as follows:

The Examination of Denise Presland Taken 22 December 1645, Before Timothy Mydelton JP (ERO, Q/S Ba 2/59)

The examinant says that about a fortnight before Bartolomewtide last past [i.e., about two weeks before St. Bartholomew's Day, August 24th], Thos. Chapell, servant unto Mr. Barley of Elsenham Hall with whom she herself was also servant, had the carnal knowledge of her body and that between that time and Thursday next before Michaelmas [September 29th] following he had not the knowledge of her body, but upon that same Thursday he had carnal knowledge of her again and that he had never knowledge of her body but those 2 times. She further says that she verily believes that she conceived with child the first time which was a fortnight before Bartholomewtide as above said. And further says that about 3 weeks after Michaelmas last she did find herself to long for divers kind of meal (as women in that case use to do) and about a week after not satisfying her appetite (for fear it should be discovered that she was with child) she here fell sick and upon Saturday 3 weeks before hereof she had a miscarrie and was delivered of a child but what became of it she does not know, nor whether she was delivered [crossed out: upon the stool] in the bed or in the house or office (where she went to ease herself). She does not know not yet of what bigness or perfection the child was, but she is induced to believe that she had a child by what is told her by divers good women who had the view of some matter or burthen which came from her body. Being further examined whether this Thos. Chapell did promise her marriage she says that he did before ever he had the use of her body else she would never have yielded unto him.

The mark of Denise Presland

The said Dennis further says that no other man ever had carnal knowledge of her body but the said Thos. Chapell.

The Information of Bridgett Horne, Marry Wood and Johana Corbett Taken 22 December 1645 (ERO, Q/S Ba 2/59, 2/60)

These informants say that upon Saturday last was 3 weeks hence, Denise Presland was very sick at Elsenham Hall and they do verily believe that she was delivered of a child which they are induced unto for that they did see some matter or burthen which came from her body and wrapped in a sheet where she lay the which

did signify so much unto them and they do judge that she was gone with child about a quarter of a year and no more. And Johanna Corbett further says that the said Dennise the Saturday night above mentioned wished her to go down into the kitchen and look what she could find upon the hearth before the plough boys came down which she did accordingly and there she found a heap of hot ashes (to the quantity of a pint) raised together on a heap which she stirred and removed and under the same she found some blood as near as she could guess about a porringer full [i.e., about enough to fill a relatively small bowl of soup or porridge].

The marks of the 3 examinees

The 18th century English physician, William Hunter stated that the child in the womb "may be born alive at any time after three months". Butler and Hargrave, supra this note at c. 11, sec. 188 ([123.b] at note 2). See also 1 Paris & Fonblanque, supra note 19 (of Part II) at 224-225 n.d.; and Best, infra note 169 at 113 [173-74 (sec. 125)].

127. See 1 J. Stephen, History of the Criminal Law of England 440 (1883); Rock v. Arkansas, 483 U.S. 44, 49 (1987); Ferguson v. Georgia, 365 U.S. 570, 573-587 (1961); Nix v. Whiteside, 475 U.S. 157-164 (1986); and U.S. v. R. Martinez, 883 F.2d 750, 753 (9th Cir., 1989). And see also, e.g., 3 The Staffordshire Quarter Sessions Rolls: 1594-1597 xxvii (Wm. Salt Arch. Soc., 1932); and Giles Jacob, A Treatise of Laws: Or a General Introduction to the Common, Civil, and Canon Law in Three Parts 9-11 (London, 1721). And see Note, Proof of the Corpus Delicti Aluinde: The Defendant's Confession, 103 U. Pa. L. Rev. 638, 638 (1955).

128. 13 Oxford English Dictionary 14 (sub verbo quick a.4) (2nd ed., 1989). (Reprinted with permission of Oxford University Press.)

129. J. Trapp, Commentary or Exposition upon All the Epistles and the Revelation of John the Divine 32 (London, 1647) (emphasis mine).

130. 1 Oliver Goldsmith, History of the Earth and Animated Nature 298-99 (London, 1808) (1st ed., 1763) (emphasis mine).

131. H. Lonelich, Merlin 23 (li. 825-26) (E. Kock ed., London, 1904).

132. 2 Merlin 12 (H.B. Wheatley ed., London, 1899).

133. 1 J. Louthian, The Form of Process Before the Court of Justiciary in Scotland 217 (2nd ed., 1752) (1st ed., 1732).

134. Ibid.

135. R.C. Gent, The Times Whistle 39 (lines 1162-64) (J.M. Cowper ed., London, 1871).

136. See, Means I, supra note 1 (of Part II) at 421. See also e.g., Foster v. Cook (1791), 29 Eng. Rpt. 575, 3 Bro. C.C. 347; Alsop v. Bowtrell (1619), 79 Eng. Rpt. 464, 1 Croke 541; and Ex parte Aiscough (1731), 2 Wm. P. Williams (3rd ed., 1768) 591.

137. C. Kemey, The Office of the Clerk of Assize Containing the Form and Method of the Proceedings at the Assizes...Together with the Office of the Clerk of the Peace 61 (London, 1682) (1st ed., 1676) See also id. at 62-63.

138. A Dictionary of the Norman or Old French Language...to Which Are Added the Laws of William The Conqueror, with Notes and References by Robert Kelham 58-59 (as republished in 1975 by Tabard Press Limited) (1st ed., E. Brooke, London, 1779). See also Black's Law Dictionary 1247 (6th ed., 1990) ("Quick with child: having conceived"; "Quick child: One that has developed so that it moves within the mother's womb"; "Quickening: The first motion of the fetus in the womb felt by the mother....").

139. 1 The Annotated Shakespeare 225 (li. 686-87) (Rowse ed., 1978).

140. Ibid. (lines 679-683).

141. See, e.g., Paré, supra text accompanying 66; Chambers, infra text accompanying note 155; Goldsmith, supra text accompanying note 130; Rueff, supra text accompanying notes 70-71; Sharp, supra note 65; Tanner, supra note 65; Venette, supra note 65; Pechey, supra note 65; and Weemse, supra note 65.

142. See, Paré, supra text accompanying 66.

143. John Mirk, Festivall Pt. 2, p. 92 (Westminster, 1491).

144. The New American Bible p.98 of NT. (Luke 1:36) (1987).

145. 2 Hist. Mss. Comm., 12th Rep., App., Part V 51 (London, 1889).

146. Letter from J.A. Simpson, Co-Editor of the Oxford English Dictionary, to Philip A. Rafferty (November 23, 1990). The Middle English Dictionary, relying on some of the same sources as the OED "quick with child"/"with quick child" definition sources, defined "quick with child" to mean "in late pregnancy". (See 8 Robert E. Lewis (ed.), Middle English Dictionary 77 (1984). In a letter to Philip A. Rafferty (14 September 1992) Mr. Robert E. Lewis told me that my opinion on the meaning of "quick with child"/"with quick child" appears "persuasive".

147. 2 Hale, infra note 149 at 413.

148. See, e.g., Salmon-Diemerbroeck, supra note 66 at bk. 1, c. xxix, fol. 222 ("by pouring cold water upon the Belly of the Mother... the Infant will be forc'd to move in the womb; by that means he [Cardanus] tries whether women with Child are quick or no"); 1 Hist. Mss. Comm., 12 Rep., App., Part IV 310 (1888) (Queen Anne convinced a woman that the queen was with child by having the woman place a warm towel on the queen's belly and then the woman's hand so as to induce, and then detect fetal stirrings); Scott and Hall, infra note 191 sub tit. Pregnancy ("If the mother has a mind to hide the symptoms [of pregnancy], the thing may, however, usually be found out at this period [i.e., after the 20th week of pregnancy], for if a cold hand be laid upon the belly when warm, or a warm hand when it is cold, the foetus usually soon stirs"); John Sadler, The Sick Woman's Private Looking Glasse 146 (1636); and Culpepper, (A Dictionary for Midwives), supra note 13 at 124. The jury matrons probably examined also the woman's breasts for signs of swelling or milk. See, e.g., Jones, supra note 99 (of Part II) at 62-63; Guillemeau, supra note 66 at 16; Forbes, infra note 31 (of Part V) at 24; 1 Chambers, supra note 57 at 293 (conception); and Aryliffe, infra note 264 at 446 (milk in breasts confirms pregnancy).

149. 1 M. Hale, Historia Placitorum Corone 433 (1736). But see Hale (Pleas of the Crown (1682)), supra note 32. The Abortionist's Case and The Twin-Slayers Case are reproduced, respectively, infra, Reference No. 3 (of Appendix 7) and Case No. 7 (of Appendix 4). See also 1 Hale, supra this note at 432 (it is not a felony or unlawful homicide to negligently inflict another person with the plague so that he dies, "tho it be a great misdemeanor").

150. See supra text (of Part III) accompanying notes 22-26, as well as the works cited in those notes. See also Connery, supra note 5 at 7, 144 & 170.

151. 1 W. Hawkins, Pleas of the Crown, 121 (c. 31, sec. 16) (6th ed., Dublin, 1788).

152. See the OBSP infanticide cases cited supra, in note 20, and particularly Haywood (case no. 33, supra n.20, p.24, at p.26) (Haywood, while being hospitalized for swollen legs and a bowel disorder, gave birth to a fullterm child while she was on the necessary. Her physician testified: "I had not the least suspicion of her being with child."); and Maddox and Jenkins (case no. 45, supra note 20 at p.37) (A witness testified that Jenkins told the witness that Jenkins was eight months gone with child. The witness did not believe her; so Jenkins removed her busk ["a thin rigid strip of...metal, whalebone, or wood inserted in the front of a bodice or corset for stiffening and support"], and the witness then believed Jenkins). On "busks", see, e.g., Paré, supra note 66 at 921:

> whatsoever presses or girdes in the mother's belly, and therewith also the womb..., as are those Ivory or Whalebone busks, which women wear on their bodies, thereby to keep down their bellies, by these and such like things the child is letted or hindered from growing to his full strength, as that by expression [sic: compression(?)], or as it were by compulsion, he is often forced to come forth before the legitimate and lawful time.

153. 4 Blackstone, Commentaries 198 (1769).

154. Ibid. (Vol. 1) at 125-26 (1765).

155. 1 Chambers, supra note 57 at 293 (Conception).

156. Id. (Vol. 2) at 98 (Soul).

157. 1 Id. (Vol. 1) at 102 (Animation). See also 1 John Harris, Lexicon Technicum sub tit. "Animation" (London, 1704) ("Animation is the informing of an Animal Body with a Soul; thus the Foetus in the Womb is said to come to its Animation when it begins to act like a true Animal, or after the Female that bears it is Quick, as the Common way of Expression is").

158. 1 Chambers, supra 57 at 298 (Embryo).

159. Hall (Vol. 1), supra note 45 at 10. Hall is referring to Gen. 2:7. See also supra, note 78.

160. 1 James, supra note 79 sub tit. Animal. See also id. sub tit. Animus.

161. 1 T. Wood, An Institute of the Laws of England 17 (London, 1720).

162. T. Wood, A New Institute of the Imperial or Civil Law 14 & 282-83, respectively (London, 1704). (The Septuagint version of Exodus 21:22-23 is reproduced, supra text (of Part III) accompanying note 22.) This work by Wood deals with the influence of Roman or Civil law on English law and the differences between English, Roman and canon law. It is, therefore, fair to argue that it cannot be said that the latter quoted passage from this work refers also to the English common law. Furthermore, in this latter work Wood provides parallels with the common law. However, these parallels all almost always signaled by different typesetting (e.g., italics or indentation). There are no such signals relative to the latter quoted passage. Also, in the margin of this latter passage Wood cites third century Cornelian law, and more specifically, passages from Justinian's Digest (or the Corpus Iuris Civilis Sentential Iuli Pauli) at D.47,11,4; D.48,8,8; and D.48,19,38,5. These passages set forth the punishment that can be imposed on a woman for procuring an abortion, for defrauding her husband of children, and for giving or administering an abortifacient drink even if it had no effect. With that said, it nevertheless does not follow, therefore, that

the latter quoted passage from Wood's A New Institute of the Imperial or Civil Law is not relevant to determining the common law abortion criterion of when a woman is quick with child. Wood cited here Exodus 21:22-23. It will be recalled that Hale and Hawkins cited Exodus 21:22-23 in their statements on criminal abortion at common law. See supra, text accompanying notes 149-51. See also supra, text accompanying notes 94-95.

Sir Thomas Ridley, in his View of the Civile and Ecclesiastical Law 19 (2nd ed., Oxford, 1634) (1st ed., 1607), observed:

> Extraordinary crimes are those which have no ordinary punishment appointed them, but arbitrarie at the Judges appointment; such as are Sollicitors of other folkes wedlockes [adultery], and Maids Chastities [fornication], although they miss their purpose; such as of purpose cast myre, durt, or any like filth upon another, to the intent to disgrace him [defamation - see supra, text accompanying note 42, as well as the references set forth in that note]; such as, being with child [but not with quick child or quick with child?], of purpose cause themselves to miscarry; [s]uch as keeps brothell and baudy-houses [which, at common law, was indictable as a public nuiscance - see Hawkins & Coke, supra note 43], or other unlawfull company.

See Caudrey's Case (1591), infra note 234. On Ridley's above work, see R.J. Terrill, The Application of the Comparative Method by English Civilians: The Case of William Fulbecke and Thomas Ridley, 2 (no. 2) J. of Leg. Hs. 169, 178-183 (1981).

163. See e.g., Salmon-Diemerbroeck, supra note 66 at bk. 1, c. xxix, fol. 222 ("the stronger the Brain grown, and the more need of Spirits there is, the stronger...the Spirits it makes. As is apparent by the time a woman has gone half her time, when the Child begins to stir, which Motion cannot be perform'd without those more plentiful Spirits."); Dunton, supra note 57 at vol.6, no.1, quest.2 (Sat., Feb. 2, 1692); id. at vol.1, no.15, quest.1 (1691); 19 Gentlemens Magazine 26 (1739); More, supra note 65 at 205, 207 & 298-99; 1 James, supra note 79 sub tit. Anatome (sub Life); and Kersey, supra note 101 sub tit. Animal Spirits.

164. See, e.g., Dunton, supra note 57 at vol. 2, no. 4, quest. 5 (Sat., June 6, 1691). And see supra, text accompanying note 147.

165. See supra, text accompanying note 148; and infra, text accompanying notes 166-176.

166. See, e.g., Mostyn v. Fabrigar, Cow. Reps. 175, 177 (1774) ("fictions of law shall never be contradicted so as to defeat the end for which they were invented; but for every other purpose they may be contradicted").

167. See Evans v. People, 49 N.Y. 86, 90 (1872); and Byrn, supra note 2 at 815-16 & 823-24.

168. 8 Phila. 385, 400.

169. Throop v. Hatch, 3 Abbotts' Rpts. 23, 26 (N.Y. Supreme Court, 1856) (citing W.M. Best, A Treatise on Presumptions of Law and Fact with the Theory and Rules of Presumptive or Circumstantial Proof in Criminal Cases 119 [186 (sec. 113)] (Philadelphia, 1845)). And see also, e.g., Estate of Fosselman, 48 Cal.2d 179, 186 (1957); and People v. Berry, 44 Cal.2d 426, 433 (1955).

170. See, e.g., Cummin, supra note 106 (of Part II) at 725 ("When a child dies in the womb, and is expelled, as it generally is, after some days, it is found to have undergone changes as striking and as of characteristic as if it had been exposed to open air."); Smellie, supra note 44 at 78 (a dead three-month-old fetus in the womb usually dissolves within 15 days); Hunter, infra note 278 at 53; and James, infra note 171.

171. See the cases supra, in note 20; Anonymous, The Life, History, and Tryal of Harry Smythee 26 (London, 1741); Rowe, supra note 17 at 360; and 1 East, supra note 32 at 228. See N. Culpepper, The Practice of Physick...in Twenty and Four Books 520 (London, 1661) ("A Child dead in the Womb is a very...dangerous thing, and if it be not timely voided forth it is wont to cause...death itself."); Aristotle's Experienced Midwife, supra note 60 at 125-26; 1 Scott and Hill, infra note 191 sub tit. Foetus; The Birth of Mankynde, supra note 13 at bk.2, c.2, fol.55 ("if the child be dead in the mother's belly, it is a very perilious thing..., as it cannot be easily turned, neither can it...help

itself to come forth"); id. bk.2, c.9, fol.91-95; and G. Markham, Country Contentments: Or the English Housewife 36-37 (1623) (gives recipes for delivery of a dead child). But see infra, text accompanying 175 (testimony of midwife, Hookham); and James, supra note 79 sub tit. Abortion ("There is no reason in general to fear the ill consequences to the mother that may attend the putrefaction of the Foetus in the Womb, because so long as the Membranes remain intire [intact], the Foetus will not easily putrefy: and as soon as they break the Waters are excluded, and the Foetus is commonly expelled very soon after").

172. Paré, supra note 66 at 913-14. See also James, supra note 79 sub tit. Abortion; and Culpeper, supra note 171 at 520.

173. Aristotle's Experienced Midwife, supra note 60 at 126. See also, e.g., The Birth of Mankynde, supra note 13 at bk.2, c.9, fols. 90-91.

174. Eccles, supra note 10 at 33. Smellie considered many of these signs as unreliable. See Smellie, supra note 44 at 183-84.

175. R v. M. Fox, OBSP (London's Guildhall Collection) Vol. for July, 1773, case no. 463, p. 334 at p. 335.

176. Ibid. See also R v. W. Diddle, OBSP (London's Guildhall Collection) Vol. for December, 1794, p.74 at pp.76-78 (Three persons, a female workhouse nurse, a female midwife, and a physician, Dr. Cooper, in a non-deliberated abortion context, rendered an opinion, "about a forthnight", "about a forthnight", and "for some time", respectively, as to how long the five or six-months-old, stillborn child [of the alleged murder victim, who allegedly was beaten by the defendant on October 27, delivered of her stillborn child on November 17, and came to her death on November 24] had been dead prior to its delivery.) See also 2 Medical Essays and Observations Relating to the Practice of Physic and Surgery: Abridg'd from the Philosophical Transactions 37 (London, 1745) (midwife rendered an opinion that a certain infant died in the womb approximately five or six days before it was born); and Smellie, supra note 44 at 103.

177. The Several Declarations Together with the Several Depositions Made in Council On Monday, the 22d of October 1688 Concerning

the Birth of the Prince of Wales 25 (Clarendon Hist. Soc. Reprints, Series II, Edinburgh, 1884-86). See also, e.g., Chelmsford Essex Record Office (ERO) Q/S 423/72 (1670) (XXIII Cal. of Q.S. Recs. 254, no.72) ("March 3: Examination of Sarah Levins of Witham, singlewoman, who saith that she is "with quick child" and hath been for the space of eight or nine weeks past"); R v. Skeete (1638), infra, Case No. 5 (of Appendix 23) (deposition of Lidia Downes: "after she proved with child, and upon the quickening, she told Skeete..., and about six weeks after she was quick Skeete told her to take some physic but it did not prevail..."); infra, Case No. 18 (of Appendix 23); and Defoe, supra note 12 at 154-155 ("'If the...Woman be young with Child, not above three Months gone...If she is quick with Child....'"). And see infra, text accompanying note 184.

178. This statute is reproduced infra, in Statute No. 1 (Appendix 1).

179. See 2 W. Forbes, The Institutes of the Law of Scotland 99-100 (Edinburgh, 1722-1730) ("It is Murder...to destroy...a living child in the Mother's Belly...But the Time when a Child unborn is understood in law to be quick, is determined by the Discretion of the Judge; there being no fixed Rule about it and the Doctors very much divided in their Opinions.").

180. R v. Phillips (aka., R v. Anonymous), 170 Eng. Rpts. 1310, 1311-12 (Monmouth Summer Assi., 1811, cor. Lawrence, J.); 3 Camp. 73. 43 Geo.3, c.58, secs. 1 & 2 are reproduced infra, in Statute No. 1 (of Appendix 1).

181. 44 Ark. 265, 266. See also L.H. LaRue, Statutory Interpretation: Lord Coke Revisited, 48 U. of Pitt. L. Rev. 733, 745-49 (1987). And see the commentary accompanying the reproduction of Q v. Turnour (1581), infra Case No. 5 (of Appendix 13).

182. Pizzy and Codd is reproduced in an abstracted form infra, in Appendix 22.

183. 168 Eng. Rpts. 1302; 1 Mood. 356. See infra, Case No. 2 (of Appendix 17).

184. See Jeremy Baker, Tolstoy's Bicycle 4 (paperback ed., 1982).

185. See infra, the commentary to Case No. 2 (of Appendix 17).

186. 168 Eng. Rpts. 1302, 1303; 1 Mood. 356, 358.

187. Ibid. at 1303; and 360, respectively.

188. Pizzy and Codd is reproduced in an abstracted form infra, in Appendix 22.

189. 1 Abraham Rees, Cyclopaedia: Or an Universal Dictionary of Arts and Sciences...by E. Chambers...with the Supplement and Modern Improvements Incorporated in One Alphabet sub tit. Animation (London, 1788). See also 1 R. Burton, The Anatomy of Melancholy 187 (A.R. Shilleto ed., London, 1896) (1st ed., 1621) (Burton erroneously states [see Connery, supra text accompanying note 78, and Connery, supra note 5 at 52-61] that St. Jerome, St. Augustine and other Fathers of the Church held that the human soul is "infused into the child or embryo in his mother's womb six months after the conception." In a footnote Burton adds: "Some [specifically, Feinus - see supra, text accompanying note 78] at three days, some six weeks [i.e., 40, 42, or 45/46 days], others otherwise.").

190. See Sir Charles Sherrington, The Endeavour of Jean Fernel 90-91 (Cambridge, 1946) ("At the beginning of the fourth month of prenatal life, when the heart and brain are sufficiently advanced, there enters suddenly into the prenatal child 'in a moment of time' the immortal soul - but which is not fully human at the first." [citing Fernel's Physiologia, vii, c.13]). See also supra, text accompanying note 83.

191. 1 G.L. Scott & Dr. Hill, A Supplement to Mr. Chamber's Cyclopaedia: Or, an Universal Dictionary of Arts and Sciences sub tit. Animation (London, 1753). See H.F. Teichmeyeri, Institutiones Medicinae Legalis Vel Forensis c.8 (Florence, Italy 1771) ("Foetus animatus apud Ictos dicitur cum motus eius in utero percipitur; id quod fieri folet circa medium gestationis. Vid. D. Ludovici in not. ad. Caroli v. Constit. Crimin [art.] 133.") See also Woolnor, infra note 282.

192. See R.J. Huser, The Crime of Abortion in Canon Law 50 (including n.1) (Catholic Univ. of America, Canon Law Studies No. 162,

Washington, D.C., 1942). See also Henry Cockeram, The English Dictionarie or an Interpreter of Hard English Words (Part II) (1639) ("Quickning: Vivification; to Quicken: Vivifie"); Williams, supra note 100 at 151; Brown, supra note 60 at 11; and supra, text accompanying note 101, as well as the references set forth in that note.

It is true, as noted by McLaren, that John Pechey in his The Complete Midwife's Practice Enlarged 299 (5th ed., 1698), stated: "in the fourth month, the child being alive moves and stirs." (Angus McLaren, "Barrenness Against Nature": Recourse to Abortion in Pre-Industrial England, 17 (no.3) J. of Sex Research, 224, 232 (1981)). However, Pechey did not say this in connection with denying that the fetus is fully human or alive before the fourth month after conception. In this same work Pechey stated that the fetus is formed and animated forty-five days after conception. See Pechey, supra this note at 101-102.

193. The Beare Case is reproduced infra, in Appendix 15.

194. See, e.g., Funk v. United States, 290 U.S. 371, 382 & 384-85 (1933); and Patton v. United States, 281 U.S. 276, 306-307 (1930).

195. See, e.g., Sims' Case (1601) reproduced infra, in Case No. 1 (of Appendix 14); and Hale, supra text accompanying note 149. But see supra, text accompanying note 31, as well as the cross-references set forth in that note.

196. See the cases cited in Forsythe, supra note 3 at 563 nn. 2 & 4, & 595-596 nn. 157-161. And see Commonwealth v. Cass, 467 N.E.2d 1324, 1328 (1984) ("Since...the fourteenth century, the common law has been that the destruction of a fetus in utero is not a homicide....The rule has been accepted...in every American jurisdiction that has considered the question"). See also supra, text accompanying note 181.

197. See, generally, Forsythe, supra note 3. And see infra, text accompanying note 203 (as well as the references set forth in that note); and supra note 166.

198. See, e.g., R v. Sellis, 7 C. & P. 850, 851 (1832). See also the cases cited in Skegg, supra note 32 at 20 (n.57); and in 65 A.L.R. 3d 413. But see People v. Chavez (1947), 77 C.A.2d 621, 626; 176 P.2d. 92.

199. See Smith and Hogan, supra note 34 at 274.

200. See, e.g., R v. Burridge (1735), 3 Wm. P. Wms. 439, 484-85. See also OBSP (London's Guildhall Collection) Vol. for Dec. 1790-Oct. 1791 at p. 92 (between case nos. 53 & 55); 3 Blackstone, Commentaries 327 (1769); F. Bacon, Essay on Judicature 316 (1625); R v. Pedley (1782, per Mansfield), Caldecott Rpts. (1786) 218; and 1 Coke's Institutes* 282(b) (1628).

201. These two cases are set forth infra, respectively, in Case No. 7 (of Appendix 4), and Reference No. 3 (of Appendix 7). See infra, the commentary accompanying Case No. 1 (of Appendix 14). And see the references set forth supra, in note 32 beginning at the word Contra.

202. See Coke, supra text accompanying note 119; and Staunford, infra Appendix 8 (see supra, note 32 beginning at the word "Contra").

203. See the commentaries accompanying Bourton's Case, The Abortionist's Case (1348), and Sims' Case (1601), infra, respectively, Case No. 7 (of Appendix 4), Reference No. 3 (of Appendix 7), and Case No. 1 (of Appendix 14).

204. Roe v. Wade, 410 U.S. at 132 (including note 21). The Roe-cited, common law abortion passages are reproduced supra, text accompanying notes 119, 149, 151, and 154 (153), respectively.

205. J.P. Bishop, Commentaries on the Law of Statutory Crimes 512 (sec. 744) (3rd ed., 1901) (1st ed., 1873) (citations omitted).

206. See supra, text accompanying notes 32-34, as well as the authorities set forth in those notes. See Roe v. Wade, 410 U.S. at 135 (n.27) & 140-141 (see supra, text (of Part II) accompanying notes 1-2.

207. 1 Ruling Case Law 9 (sec. 9) (1929). See the cases cited infra, in note 210.

208. 1 Corpus Juris 312-13 (sec. 10) (1914). See the cases cited infra, in note 210.

209. 2 J.P. Bishop, Commentaries on the Criminal Law 4 (sec. 6) (4th ed., 1868). See also, e.g., 16 A.L.R. 2d 949, 949 (sec. 1); 21 The American and English Annotated Cases 518 (1911) (citing Oregon v. Atwood (1909), 54 Ore. 526, 529-530, 104 Pac. 195 (aff'd 54 Ore. 542; 104 Pac. 195)) (see infra, note 210). And see the cases cited infra, in note 210.

210. See, e.g., Com. v. Bangs, 9 Mas. 387, 387-88 (1812); Com. v. Parker, 50 Mass. (9 Met.) 263, 265-68 (1845); State v. Cooper, 22 N.J.L. 52, 58 (1849); and Lamb v. State, 67 Md. 524, 533 (1887). See also Roe v. Wade, 410 U.S. at 132-133 & 135 n. 27.

The following cases hold or state that pre-"quick with child" abortion is indictable at common law: Mills v. Com., 13 Pa. 631, 633 (1850); State v. Slagle, 83 N.C. 630, 632 (1880); State v. Reed, 45 Ark. 333, 334-36 (1885); Com. v. Reid, 8 Pa. 385, 399-400 (1871); and Munk v. Frink (1908), 81 Neb. 631, 636-37 (dictum). See also Lamb v. State, 67 Md. 524, 537 (1887) (Justice Alvey dissenting); and Connecticut v. Rogers (1820), as discussed in Olasky, supra note 13 at 91-94. And see State v. Atwood (1909), 54 Ore. 526, 529-537 (states that pre-"quick with child" abortion would constitute an instance of the common law offense of breach of the peace).

211. See supra, text (of Introduction) accompanying note 17, as well as that note itself. See also supra, text (of Part II) accompanying note 24; and supra note 9 (of Introduction).

212. See Wright's Case (1603/1628), 1 Hargrave, supra note 126 at L.2, c.11, sec.195 [127b.] (self-mayhem); Taylor's Case (1676, per M. Hale), 86 Eng. Rpt. 189 (blasphemy); R v. Mary Hamilton (1746), as abstracted in A. Knapp, The Newgate Calendar 377-78 (N.Y., 1932) (a female defendant, upon being convicted of marrying one of her own sex, received a sentence of six months in jail and a whipping). (For a similar case in 1777, see L. Faderman, Scotch Verdict 125 (N.Y., 1983).); R v. Delaval (1763), 97 Eng. Rpts. 913, 915; 3 Burr. 1435, 1438 (see Davis, infra note 263 at 132-33) (assigning a girl's apprenticeship for

immoral purposes, and also conspiring to do the same); R v. Lynn (1788), 100 Eng. Rpts. 394, 394-95; 1 Leach (4th ed., 1815), 497-498 (removing a body from a grave for the purpose of dissection) (For similar cases, see infra, note 216; and R v. Abram Evans (1765), Lond. Corp. Rec. Office (on deposit in), London Numerical List of Prisoners from January 1756-1792, Sessions Index, September 25, 1765.); Kanavan's Case (Me., 1826), 1 Greenl. 226 (throwing the dead body of a child into a river) (For a similar case, see R v. Stewart (1840), 12 A & E, 773; 113 Eng. Rep. 1007.); R v. Young (app. 1785), 2 Durnford & Easts' Rpts. (4th ed., 1794) 733, 734 (conspiracy to prevent the burial of a dead person); R v. Anonymous (n.d.), Caldecott Rpts. (1786) 400 (attempted suborning of perjury); Commonwealth v. Wing (Mass., 1829), 9 Pick. 1, 4 (wantonly discharging a firearm near a sick woman, with the result that the woman was thrown into fits); R v. Anonymous (The Butchers) (1744/45/46/47), Lond. Corp. Rec. Office (on deposit in), Cal. Sess. Bks., nos. 1017-1048, and Orders of Court (Midd., January 1744-45 to December 1747, with Index 63-65 (ff. 100-102) (Court Committee: It is a common law misdemeanor for butchers to exercise their trade on a Sunday because it is malum in se, i.e., it is contrary to law of God, endangers public welfare, and causes a disservice to religion because it distracts both buyer and seller from attending Sunday services); R v. Anonymous (Hicks-Hall, 1743), 13 Gentlemen's Magazine 387 (July, 1743) (child-abandonment) (And see Curtis, supra note 17 at 204-205: mentions a 1683 Chester County case in which a woman was sentenced to hard labour in the House of Correction for "refusing to support her Children" and for threatening them); R v. John and Anne Friend (1802), in Russell & Ryan's Crown Cases 20-22 (1825) (failure to provide necessaries for a child of tender years); Comm. v. McHale (1881), 97 Pa. 397 (fraudulently seeking to undermine public elections - see infra, text accompanying note 217); Comm. v. Wade (1785/86), 1 Dall. (4th ed.) 337 (embezzling state funds); Comm. v. Randolph (1892), 146 Pa. 83 (solicitation to commit murder); R v. Higgins (1801), 2 East 5, 21 (solicitation to commit larceny); State v. Schiefer (1923), 99 Conn. 432, 433 (solicitation to breach the peace - see infra, text accompanying note 219); Geo. Webb, The Office and Authority of a Justice of Peace 229 (Williamsburg, 1736) (challenging to fight, and solicitation to commit a battery); Greenhuff's Case (1838), 2 Swinton (Edinburgh, 1842) 236 (operating a gambling house - see infra, text

accompanying note 215); R v. Sidley (1664), 82 Eng. Rpt. 1036, 1 Keb. 620, 1 Sid. 168 (indecent exposure) (see Baker, supra note 7 at 305); R v. Crunden (1809), 170 Eng. Rpt. 1091; 2 Camp. 89 (indecent exposure without an immoral purpose); Penn. Com. v. Payne (1948), 66 D & C 462, 468 (public exhibition of condoms); and Respublica v. Teischer (Penn., 1788), 1 Dall. (4th ed.) 335 (maliciously destroying a horse). On the origin of common law criminal attempts, see Sayre, supra note 37.

213. See infra, text accompanying note 216; and G.J. Postema, Bentham and the Common Law Tradition 194 (1986).

214. Professor Baker in a letter to Philip A. Rafferty (December 12, 1986). As to the argument that a person would not necessarily know he is committing a misdemeanor offence, consider that the common law criterion of legal insanity was whether the defendant was "incapable of judging between right and wrong, and did not then know that he was committing an offence against the law of God and nature". See Walker, supra note 33 at 56, 62, 95 & 101; Sayre, supra note 37 at 1006; and Lambarde, infra note 254. The common law presupposed that man, as a moral agent, possesed an intrinsic knowledge of natural law, moral principles. See, e.g., Jeremy Taylor, Ductor Dubitantuim, bk.4, cap.1, p.793 (4th ed., London, 1696) (God implants in the intellect of every man a working knowledge of what is against the law of God and nature).

215. 2 Swinton (Edinburgh, 1842) 236, 264-65.

216. 98 Eng. Rep. 706, 707; Lofft 383, 385. See also, e.g., R v. Sidley (1664) 82 Eng. Rpt. 1036, 1 Keb. 620, 1 Sid. 168; R v. Delaval (1763), 73 Eng. Rpts. 913, 915; 3 Burr. 1435, 1438; and R v. Lynn (1788), 2 Durnford & Easts' Rpts. (4th ed., 1794) 733, 734 (removing a dead body from its grave is an offense "cognizable in a criminal court, as being highly indecent, and contra bonos mores; at the bare idea alone of which nature revolted").

217. 97 Pa. 397, 408.

218. Knowles v. Connecticut, 3 Day 103, 106 (1808).

219. 99 Conn. 432, 445-46 (1923).

220. 3 Coke's Institutes* cap. 98. See also, e.g., the cases cited supra, in note 212; R v. Williams (1711), 1 Salkeld (6th ed., 1791) 384; Sayre, supra note 37 at 835-836 (and the cases, etc., cited therein); R v. Southerton (Hil., 1805), 6 East's Rpts. (1834) 126; 2 Hawkins, supra note 151 at 301 (c.25, sec.4); 1 Blackstone, supra, note 154 at 41-42; 1 East, supra note 32 at 3; 1 J. Gabbett, A Treatise on the Criminal Law 17 (Dublin, 1843); Z. Swift, A System of Laws of the State of Connecticut 365 (1795); 2 J.C. Cox, Three Centuries of Derbyshire Annals 62 (London, 1890); Knowles v. Connecticut (1808), 3 Day 103; Comm. v. Flaherty, 25 Pa. (Superior Court) 490, 493-94 (1804); and State v. Bradbury (1939), 136 Me. 347, 349, 9 A.2d 657.

221. 2 A. Knapp & W. Baldwin, The Newgate Calendar 315 (London, 1824-25). The Beare case is reproduced infra, in Appendix 15. And see infra, text accompanying note 283.

222. 168 Eng. Rpts. 1302; 1 Mood. 356. See the commentary on Russell, infra, in Case No. 2 (of Appendix 17). And see supra, note 79 (of Part II).

223. Gavigan, supra note 2 at 29 (quoting Anonymous, The Trial of William Russell at the Huntingdon Assizes, March, 1832, in 2 The Legal Examiner 10 at p. 12). See also Connery, supra note 5 at 176. And see Abortion: An Ethical Discussion 19-20 (published by the Church Information Office for the Church Assembly Board for Social Responsibility, Church House, Westminster, 1965):

> A third interest protected in the tradition of law has been a moral one - the interest of society in maintaining its witness that some acts are morally reprobate within that society. The point here is not simply that the prohibition, with its attendant penalty, was a witness to the view that abortion itself was a wrong: it is that abortion has always been used as a means of concealing other wrongs - to hide the fact of fornication or adultery by the clandestine disposal of its fruit - and for this reason also abortion has been traditionally condemned.

224. See supra, text (of Part III) accompanying notes 22-26; supra text accompanying note 162; and Jacob, infra note 242. And see, e.g., John Ray, The Wisdom of God Manifested in the Works of the Creation in Two Parts 434 (5th ed., Corrected, Enlarged, London 1709) (the whole process of the formation of the body of the child in the womb is the work of God; citing Psalms 139:13-15: "you knit me in my mother's womb....").

225. See, e.g., W. Fulbecke, A Parallele or Conference of the Civil Law, the Canon Law, and the Common Law of this Realm of England 100 (1618); Connery, infra text accompanying note 228; supra, text accompanying notes 45 & 93 & 116; Connery, supra note 5 at 306 & 93-95; T.L. Bouscaren, Ethics of Ectopic Operations 39-40 (2nd ed., 1944) (1st ed., 1933); Uta Ranke-Heinemann (tra. Peter Heinegg), Eunuchs for the Kingdom of God: Women, Sexuality and the Catholic Church 66-70, 73-75, 148, 213 & 249 (Doubleday, 1990); Defoe, supra note 65; and Cox, supra, text (of Part VI) accompanying note 56.

226. 2 Hawkins, Pleas of Crown 540 (c.77, sec.28) (8th ed., London, 1824).

227. The Beare case is reproduced infra, in Appendix 15.

228. Connery (The Ancients and Medievals), supra note 91 at 126-27.

229. See infra, Statute No. 1 (of Appendix 1).

230. Ibid. And see, e.g., 2 T. Cunningham, A New and Complete Law Dictionary sub tit. Preamble (London, 1765) ("The preamble [of a statute or act]...is a key to open the intent of the makers of the act and the mischiefs which they would remedy by the same").

231. Moore v. Illinois, 14 How. 13, 19 (1852). See also Grady v. Corbin, 495 U.S. 508, 569 (1990) (Justice Scalia dissenting) ("'Offence' was commonly understood in 1791 to mean '...the Violation or Breaking of a law.'" And see R v. Judd (1788), 2 Durnford & Easts' Rpts. (4th ed., 1794) 255, 256 ("Whatever words the Legislature used, we [i.e., the judiciary] must suppose that they knew the meaning of them").

232. See infra, Statute No. 1 (of Appendix 1).

233. The act is set forth in 44 The Statutes at Large 203-205 (Cambridge, 1804). The listed offenses are: attempted murder (by means of stabbing, a firearm, or by poisoning), attempted robbery, felonious assault, mayhem, arson-related insurance fraud, and malicious destruction of another person's property.

234. Holdsworth observed:

> It was a principle laid down by Coke as an established maxim in law, "that where the common or statute law giveth remedy in foro seculari [in a secular forum or court] (whether the matter be temporal or spiritual), the conusance of that cause belongeth to the king's temporal courts only; unless the jurisdiction of the spiritual courts be saved or allowed by the same statute to proceed according to the ecclesiastical laws". [Citing in a footnote: Co. Litt. 96b; cp. Phillimore v. Machon (1876) L.R.1 P.D. 481].

1 W.S. Holdsworth, A History of English Law 621 (3rd ed., 1922) (1st ed., 1903). See also, e.g., Bishop of St. Davids' v. Lucy (1699), [1558-1774] All Eng. Rpt. 349; and Caudrey's Case (1591), 77 Eng. Rpt. 1, 11, 5 Coke Rep. 1a, 8b-9a ("as in temporal causes...the judges...determine by the temporal laws, so in causes ecclesiastical..., as...incests, fornications, adulteries, solicitation of chastity...(the conusance whereof belongs not to the common laws of England), the same are to be determined...by Ecclesiastical Judges, according to the King's Ecclesiastical Laws..."). See also infra, note 261, as well as that note itself.

When there was a dispute between the English temporal courts and the English ecclesiastical courts over which court had jurisdiction to prosecute a certain offence, the common law courts would decide the jurisdictional question. See, e.g., Nicholas Fuller's Case, 6 J. Thomas and J. Fraser, The Reports of Sir Edward Coke 250, 251 (London, 1826) (citing 12 Co. Rpts. 41, 42). But see Richard Grey, A System of English Ecclesiastical Law 389 (London, 1735) (temporal courts and ecclesiastical courts have concurrent jurisdiction over criminal offenses except when the offence is capital); and Gibson, infra note 261.

235. See supra, text accompanying note 36, and the authorities cited in that note. For some pre- and post-Reformation, English-based, ecclesiastical, abortion prosecutions, see infra, Appendix 21.
236. See supra, text (of Part II) accompanying notes 1 & 2.

237. See Means II, supra note 1 (of Part II) at 336-340.

238. Ibid. at 341.

239. Ibid. Staunford's Les Plees del Coron abortion passage is reproduced infra, in Appendix 8.

240. Staunford's Les Plees del Coron chapter on Misprisions is reproduced, infra at text accompanying note 249.

241. See Means II, supra note 1 (of Part II) at 336.

242. See, e.g., Jacob, supra note 127 at 101 & 114 ("What Things are prohibited by Nature, are confirmed by no Law"; "What is contrary to Reason is unlawful").

243. See, e.g., infra text accompanying note 279.

244. See Roe v. Wade, 410 U.S. at 159 ("We need not resolve the difficult question, when life begins" [i.e., the question, when does a human being come into existence as the same]). See infra, text (of Part VI) accompanying notes 1-4.

245. Gavigan, supra note 2 at 23 (quoting 4 Blackstone 97 (1st ed., 1769)). (Reprinted with permission of F. Cass & Co. LTD, Pub.).

246. See, e.g., E.F. DuCane, The Punishment and Prevention of Crime 11-15 (London, 1885). And see, generally, A Babington, The Power to Silence: A History of Punishment in Britain (London, 1968).

247. See infra, text following note 248.

248. 3 Holdsworth, supra note 234 at 389 n.1. (citing 3 Coke, supra note 119 at 139 (c.65).

249. W. Staunford, Les Plees del Coron bk.1, c.39, ff 37v-38v (edition of 1574) (underscoring mine). Translation (as corrected by

Professor Baker) from the Law-French supplied by Dr. Josette Bryson of the University of California at Los Angeles.

250. See supra, text accompanying notes 238-240.

251. Means II, supra note 1 at 346.

252. Coke, supra note 119 at 139 (c.65). And see supra, text accompanying notes 119 & 248.

253. See infra, Appendix 8.

254. See, e.g., Pulton, supra note 32 at ff.226 (sec.9) & 120 (secs. 12 & 15); 1 Hale, supra note 149 at 492; 2 Hale, supra note 149 at 411-412; Finkelstein, The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty, 46 Temp. L.Q. 169, 186 & 196 (1973); B.J. Brown, The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law 7 Amer. J. of Leg. Hs. 310, 310-311 (1963); W. Lambarde, Eirenarcha, or the Office of the Justices of the Peace 218 (bk.1, c.21) (London, 1581) ("If a mad man or a naturall fool...or a child...[which] apparently hath no knowledge of good nor evil, do kill a ma[n], this is no felonious acte, nor anything forfeited by it,...for they cannot be said to have any understanding wil[l]".); Patrick Colquhown, A Treatise on the Police of Metropolis 252 (3rd ed., London, 1796); and Ed. Bullingbrooke, The Duty and Authority of the Justices of the Peace and Parish-Officers for Ireland 391 (Dublin, 1756).

255. Lambarde, supra note 254 at 217-18 (bk.1, c.18).

256. See supra, text accompanying note 119.

257. See supra, sec. 7 of Part IV. See also supra, note 32 beginning at the word "contra".

258. See supra, text (of Part II) accompanying notes 1-2.

259. See ibid.

260. See 1 Holdsworth, supra note 234 at 620. Sodomy (including bestiality) was made a capital felony by virtue of 25 Hen. 8, c.6 (1533). See Notes, 26 Wm. & Mary L. Rev. 645, 649 (including n. 30) (1985). Witchcraft was made a capital felony by virtue of 33 Hen. 8, c.8 (1541). See Ewen, infra note 1 (of Case No. 5 of Appendix 13). Bigamy was made a statutory felony by virtue of 2 Jac. 1., c.11 (1604). See Reynolds v. Sims, 98 U.S. 145, 164-165 (1878); and Moore, Bigamy, a Crime Though Unwittingly Committed, 30 U. of Cinn. L. Rev. 35, 35-36 (1961). Incest was made a statutory offence by virtue of the Punishment of Incest Act (1908). See 5 Halsbury's Statutes 949 (2nd ed.); The Marriage with a Deceased Wife's Sister Bill Controversy: Incest Anxiety and the Defense of Family Purity in Victorian England 21 J. Brit. Studies 67, 69 (1982); and V. Barley and S. Blackburn, The Punishment of Incest Act 1908: A Case Study of Law Creation, 1979 Crim. Law Rev. 708, 708-710.

Except for the relatively short period during and between the two interregnums (1649-1653 & 1659-1660), prosecutions for incest, adultery and simple fornication (i.e., fornication not resulting in the birth of a bastard) took place in the English ecclesiastical courts. Those courts were abolished in 1641, and were restored in 1661. (See Caudrey's Case, supra note 234.) During and between the two interregnums (1649-1653 & 1659-1660), prosecutions for incest, adultery and simple fornication (i.e., fornication not resulting in the production of a bastard) took place in the English ecclesiastical courts (which were abolished in 1641 and restored in 1661). (See Caudrey's Case, supra note 234.) During and between the two interregnums the foregoing offenses were made statutory offenses and were prosecuted in the common law courts. See 2 C. Firth & R. Rait (eds.), Acts and Ordinances of the Interregnum 1642-1660 387-389 (1911); and Davis, infra note 263 at 96-97. See also Emmison infra note 273 at 36-44; Brownsword v. Edwards (1751), [1558-1774] All E.R. 369, 370; and Michael Foster, An Examination of the Scheme of Church Power 17-18 (2nd ed., London, 1735).

In 1595, a temporal court sentenced John Walen to be whipped for committing bigamy (which was not made a statutory offence in England until 1604). See Cockburn (Kent Indictments, Elizabeth I), supra note 17 at 374 (no. 2251). For a 1605 case of adultery prosecuted in a common law court, see 1 J. Atkinson

(ed.), [York] Quarter Sessions Records 19 (North Riding Record Society, 1884). For a 1588, adultery prosecution occurring in a common law court, see Cockburn (Kent Indictments, Elizabeth I), supra note 17 at 288 (#1742). (And see Tait, infra note 273.) See also A. Cleveland, Indictments for Adultery and Incest Before 1650, 29 L.Q.R. 59 (1913); and J. Goldolphin, Repertorium Canonicum 474 (3rd ed., 1687).

261. See, supra text accompanying note 220. See also, e.g., Duchess of Kingston's Case, [1775-1802] All Eng. Rpts. 623, 628 (1776) (per De Grey, C.J.: "one great object of temporal jurisdiction is the public peace; and crimes against the public peace are wholly...of temporal cognisance alone."); Goldolphin, supra n. 260 at 520-521 & 526. Gibson said that under English common law there can be concurrent temporal and ecclesiastical jurisdiction over any crime that is not a felony. See 1 Gibson, infra note 264 at 1032 (but see id. at 966). And see J.H. Baker & S.F.C. Milsom, Sources of English Legal History: Private Law to 1750 626-27 (1986) (citing Anon. (1535), Y.B. trin. 27 Hen. VIII, fo. 14, pl. 4; LC MS. Acc. LL 52960, fo. 30 (c.p.): some crimes or defamations can be prosecuted in the ecclesiastical courts and in the temporal courts).

262. See Reynolds v. Sims, 98 U.S. 145, 164-165.

263. Sir Matthew Hale: The History of the Common Law of England 21-22 (paperback ed.) (C.M. Gray, ed., 1971). See also, e.g., James Davis, Prize Essay on the Laws for the Protection of Women 50-52 (1854); and 6 Warwick County Records: Quarter Sessions Indictment Book: Easter, 1631, to Epiphany, 1674 XXVIII (1941).

264. See Means II, supra note 1 (of Part II) at 347; and Godolphin, supra note 261 at 518. See also the English ecclesiastical abortion prosecutions set forth infra, in Appendix 21. On English ecclesiastical prosecutions in general, see Hale's Precedents and Proceedings in Criminal Cases, 1475-1640 Extracted from Act-Books of Ecclesiastical Courts in the Diocese of London (1847). And see 1 E. Gibson's Codex xix, xiv & xxvii-viii (Oxford, 1761) (Ecclesiastical law is the king's law; and pre-Reformation received canon law remains the king's law to the extent it is not inconsistent with or contrary to the laws of the Land; citing 25 Hen. viii cap. 19); John Ayliffe, Paregon

Juris Canonici Anglicani xxxiii (London, 1734); R. Rodes, Jr., Lay Authority and Reformation in the English Church: Edward I to the Civil War 163-164 (1982); and David Walker, The Oxford Companion to Law 180 & 390 (1980). On excommunication, see R. Baxter, A Christian Directory pt. 3, p. 861, quest. 94 (1673) (excommunication requires a heinous sin and impenitence); id. pt. 4, pp. 51-52 (abortion is a species of murder); Rodes, supra this note at 212-213; R. Rodes Jr., Ecclesiastical Administration in Medieval England: The Anglo-Saxons to the Reformation 90-91 & 146-147 (1977); B.L. Woodstock, Medieval Ecclesiastical Courts in the Diocese of Canterbury 93-102 (1952); and Dod, infra note 282.

265. See Means II, supra note 1 (of Part II) at 352; and McLaren, supra note 8 at 107-110.

266. See the English ecclesiastical abortion prosecutions set forth infra, in Appendix 21.

267. Means II, supra note 1 (of Part II) at 347.

268. Walker, supra note 264 at 1057.

269. [1558-1774] All Eng. Rpts. 177, 181.

270. See the authorities cited supra, in notes 39-40.

271. See Lambarde, infra note 273; Hunter, infra text accompanying note 278; Chambers, supra note 17; and the trial court's charge to the jury in the Pizzy & Codd Case (1808), infra Appendix 22. See also Miriam Slater, Family Life in the Seventeenth Century: The Verneys of Claydon House 78-79 & 84-107 (London, 1984) (high premium placed on female virginity); C.B. Backhouse, Desparate Women and Compassionate Courts: Infanticide in Nineteenth Century Canada, 34 U. Toronto L.J. 447, 448, 457-458 (1984); K. O'Donovan, The Medicalization of Infanticide 1984 Crim. L.R. 259, 259-260; and Anonymous, supra note 171 at 19-24.

272. See, e.g., Beattie, supra note 17 at 114-15; Sharpe (Crime in Early Modern England), supra note 17 at 109-110; J.S. Cockburn, West Circuit Assize Orders: 1629 to 1648: A Calendar 24 (no. 100) & 30 (no. 129) (Camden 4th Series, Vol. 17, 1976); and H.

Hampton Copnall (compiler), Nottinghamshire County Records: Notes and Extracts from the Nottinghamshire County Records of the 17th Century 68 (Nottingham, 1915). See also, e.g., infra, Case No. 13 (of Appendix 21); (Chelmsford) Essex Record Office (ERO) Q/S 232/52 (1621) (XIXB Cal of Q.S. Recs 421, no. 52) ("Weely to answer for turning away his servant Bridget Purkes without due order of law knowing her to be with child whereby she had liked to have perished. Defaulted; entreated"); and (Chelmsford) ERO Q/S Ba60:

> To the constables, churchwardens and overseers of the poor of the parish of South Weald:
>
> I send you herewithall Katherine Henley single-woman being now quick with child; and as she has confessed before me upon her oath that she being out of service at Michaelmas last was hired by one Mrs. Bates of your town for 1 year for the wages of 46 shillings and served her for the space of 6 weeks in the house of Mr. [Piggus] in the same parish and was then turned away being sickly and came into the house of one Goodwife Grump in Brooke St. and was there going and coming for the space of 6 weeks longer attending her whilst she lay in. And of her own accord afterwards about Newyearstide last did come into the Ward of Nooke Hill [today, the London Borough of Havering] within the Liberty of Havering and has been there going and coming guestwise in the house of Wm. Hayward out of charity in respect of the cold weather without any lawful settlement.
>
> These are therefore in his Majesty's name straightly to charge and command you to receive the said Katherine Henley as a person that has her legal settlement with you and that you provide relief to her by setting her to work and giving her other relief as by the laws of this Realm is provided for poor persons until you shall have further order to the contrary and hereof fail not at your perils Given under my hand and seal etc. 19 February 1645. William Compere.

273. See Walter J. King, Punishment for Bastardy in Early Seventeenth-Century England, 10 Albion 130-151 (1978). See also supra, text (of Part III) accompanying note 11, as well as the authorities cited in that note. See also Hoffer and Hull, supra note 17 at 13-19 & 85; J.H. Gleason, The Justices of the Peace in England 1558 to 1640 12-13 (1969); F.G. Emmison, Elizabeathen

Life: Morals and Church Courts 31 (1973); and Conyers Read (ed.), William Lambarde and Local Government: His "Ephemeris" and Twenty-nine Charges to Juries and Commissions 18 & 30, (Ithaca, New York, 1962); and 1 James Tait (ed.), Lancashire Quarter Sessions Records 1590-1606 98 (Chetham Society, 1917):

> [1601]: James Meyall of Bolton, reputed father of Ellen, bastard child of Isabel Crompton of Bolton, is to be flogged, together with the mother, on two market days at Bolton, and to be set in the stocks with papers on them inscribed, "These persons are punished for adultery." Isabel is to keep the child for two years, James paying her 20S. a year. James and Isabel are bound to perform this order. (No sureties).

Several of the original thirteen English colonies in North America enacted laws by which 1) an indentured maid-servant could be fined (e.g., 1,000 lbs. tobacco) or could have time (e.g., 1 yr.) added to her period of servitude for having a bastard child, provided her master was not the father of the bastard, and 2) a married woman, who produced a child when her husband was away, could be whipped and fined. See, e.g., A Collection of All the Acts of Assembly, Now in Force in the Colony of Virginia 222 (Williamsburg, 1727) (indentured maid-servant who gives birth to a bastard can be punished by adding one year to her service, or by a fine of 1,000 lbs. tobacco); and Charter of William Penn, and Laws of the Province of Pennsylvania Passed Between the Years 1682 and 1700 267 (Harrisburg, 1879) (a married woman who has a child while her husband is away is "to be corporally or pecuniarily punished as in the case of fornication"). And see also 1 Records of the Court of Assistants of the Colony of the Massachusetts Bay 1630-1692 138 (Boston, 1901) ("1678: Ellinor [M]ay, being...Convicted of...hauing a Bastard child in hir husbands absence, is sentenced to be tyed to a Carts Tayle & whipt...and also to depart out of...Boston wth.in tenn dayes...after hir Correction and not to returne...wthout. licence from the Gounor....")

274. See supra, text accompanying notes 17-24, as well as the references set forth in notes 17 & 20, supra.

275. See supra, text accompanying notes 10-16.

276. See, e.g., E.G. Dawdell, A Hundred Years of Quarter Sessions: The Government of Middlesex From 1660 to 1760 53 (1932) (first duty of the parish was to provide for its destitute children); H. Jenkinson & D. Powell, Surrey Quarter Sessions: The Order Book for 1659-1661 and the Sessions Rolls for Easter and Midsummer 1661 9 & 86 (1934); and Thomas G. Barnes (ed.), Somerset Assize Orders 37 (no. 124) & 67 (Somerset Record Society Vol. LXV, 1959).

277. See infra, Case No. 7 (of Appendix 12). See also 3 Warwick County Records: Quarter Sessions Order Book Easter, 1650, to Epiphany, 1657 96 & 153-54, respectively (Warwick, 1937):

> Diana Stanley to be sent from Curdworth to Lea Marston. Whereas upon hearing of counsel as well on the behalf of the inhabitants of Curdworth as of the inhabitants of Lea Marston in this county, it appeareth unto this court that Diana Stanley, being a vagrant and being great with child and ready to travail of a bastard child, was barbarously carried by the inhabitants of Lea Marston in a chair to a tree supposed to be the bounds of the two parishes of Curdworth and Leamarston thinking thereby to avoid the keeping of the child and to lay it upon the inhabitants of Curdworth; it is therefore ordered that the overseers of the poor of Leamarston shall forthwith provide for the said Diana and her child both houseroom and maintenance to preserve them from famine and starving this winter and also shall make and agree upon a levy whereby to raise thirty three shillings and fourpence towards the payment of the overseers of the poor of Curdworth for money by them disbursed in maintaining the said child and to pay the same to the said overseers accordingly, and hereof they are not to fail.
>
> \- - -
>
> Inhabitants of Fillongley and Allesley, about a bastard child. Upon hearing of the matter of difference between the inhabitants of Fillongley and the inhabitants of Allesley concerning a bastard child born of the body of Grace Fisher: now in the presence of the parties concerned on both sides it appeared to the court that the said Grace Fisher being great with child and ready to travail at Fillongley where she then dwelt was uncivilly and unmercifully driven from Fillongley unto Allesley when the pains were upon her

> insomuch that the same day after her coming to Allesley she was delivered of the said bastard, whereupon the inhabitants of Fillongley pressed the court that the child might be kept and provided for at Allesley where it was born, but this court taking the matter into consideration did declare that the manner of bringing the mother from Fillongley was not justifiable [and]...therefore...order that the said bastard child shall be sent by the overseers of the poor of Allesley unto Fillongley...and, the overseers...of Fillongley...are required...to provide for it according to law.

And see Jenny Teichman, Illegitimacy: An Examination of Bastardy 61-62 (1982).

278. Wm. Hunter, The Uncertainty of the Signs of Murder, in Wm. Cummin, The Proofs of Infanticide Considered Including Dr. Hunter's Tract on Child Murder 271-73 (London, 1836).

279. See, e.g., the spousal-murder case of R v. Rearden, Guildhall Library OBSP Vol. for the year 1780, case no. 299 at p.373 ("I [Rearden] have nothing to say for myself, but that I was out of my senses. God knows, I know no more of it than the child unborn"; R v. Smith & Godfrey, OBSP Vol. for 1778, case nos. 167-69 at p.76 ("I know no more of it than the child unborn"); R v. Robinson, OBSP, Vol. for 1774, case no. 184 at p.96 ("I know no more of it than the child unborn"); R v. Brown, OBSP, Vol. for 1769, case no. 25 at p.16 ("I know no more of it than the child unborn".); and R v. Fredrick & Lloyd, OBSP, Vol. for 1776, case no. 458 at p.304 ("I am as innocent as the child unborn"); R v. Gibbons, OBSP Vol. for 1735, case no. 49 at p. 165 ("I know no more of the money than the child unborn"); and R v. Kemp, OBSP Vol. for 1748, case no. 105, at p. 24 ("I am as innocent of the affair as the child unborn").

280. 3 Encyclopedia Britannica, supra note 44 at 205.

281. English physicians took the Hippocratic Oath, which included the following: "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give a woman an abortive remedy." Edelstein, supra note 17 (of Part II). See also H.J. Cook, The Decline of the Old Medical Regine in Stuart London 144-45 (1986)

(members of the Royal College of Physicians took oath not to administer abortifacients.)

The oath taken by women, upon being licensed (by the bishop?) to practice midwifery in England, included the following:

> You shall not suffer any woman's child to be "murdered, maimed, or otherwise hurt, as "much as you may: and so often as you shall "perceive any peril or jeopardy, either in "the woman, or in the child, in any such "wise as you shall be in doubt what shall "chance thereof, you shall thenceforth in "due time send for other midwives and expert "women in that faculty, and use their advice "and counsel in that behalf.
>
> ....
>
> "Item. You shall not give any counsel or "minister any herb, medicine, or potion, or "any other thing to any woman being with "child, whereby she should destroy or cast "out that she goeth withal before her time.

Reproduced from 2 Burn, Ecclesiastical Law 469 (1760). See also The Book of Oaths 192-93 (London, 1689) (1st ed., 1649) (midwives swear 1) not to induce abortion and 2) to inform on those persons who attempt to or do the same); and Hoffer and Hull, supra note 17 at 156-57. On the jurisdiction over, examination and licensing of, and oath taken by midwives in pre-19th century England, see, e.g., F. Fincham, Notes from the Ecclesiastical Court Records at Somerset House, in 4 Trans. Roy. Hist. Soc. 138 (4th Series, London, 1921); Forbes, infra note 1 (of Case No. 14 of Appendix 21); Ayliffe, supra note 264 at 445 (bishops control licensing of midwives because it is sometimes necessary that a newborn child be immediately baptized); Rodes (Lay Authority), supra 264 at 151-52 & 168-69; 2 H. Rolle, Abridgement des Plusieurs Cases et Resolutions del Commun Ley 286 (1668) (ecclesiastical authorities cannot exercise jurisdiction over the practice of midwifery because it is not a spiritual function); Godolphin, supra note 260 at 126 (no.36) (same as Rolle, supra this note); 1 George Clark, A History of the Royal College of Physicians of London 66-67 (1964); Harvey Graham, Eternal Eve: The Mysteries of Birth and the Customs that Surround It 146 & 131-32 (1960); Emmison, supra note 273 at 319-20; E.R.C. Brinkworth (ed.), Episcopal Visitation Book for the Archdeaconry of

Buckingham, 1662 21 (fol.21) (7 Bucks. Rec. Soc., 1943); Hurd-Mead, supra note 10 at 466 & 523; and Hall, supra note 45 at 421-22.

The oath taken by English apothecaries included the following: "'You shall not give to anyone, or exhibit, any poison that is improperly used, or any drug for the purpose of producing abortion or preventing conception.'" C. Wall, J.C. Cameron, and E.A. Underwood (eds. & annots.), A History of Apothecaries of London, Volume One: 1617-1815 353 (London, 1960-63). See also id. at 14 (Apothecaries took oath not to supply abortifacients (i.e., drugs designed not for bringing on an abortion of a live fetus, but rather drugs recognized as being capable of bringing on an abortion [see Sadler, infra note 284]) without a prescription; and Christopher Merret, The Accomplisht Physician, the Honest Apothecary, and the Skilful Chysurgeon, Detecting Their Necesiary Connexion, and Dependance on each Other. Withall a Discovery of the Frauds of the Quacking Empirick, the Prescribing Surgeon, and the Practicing Apothecary. Whereunto Is Added the Physicians Circuit, the History of Physick; and a Last for Lex Talionis 87-88 (London, 1670) (Merret's proposed Apothecarie's Oath included the following: "That they shall not publickly or privately advise or sell any Medicine that may occasion Women to miscarriages, or kill their Conception." He proposed also that a violation of the oath require "eternal expulsion" from the Society). See also id. at 46-47; and Bullein's Bulwarke of Defence between fols. 48 & 49 (of Book of Compounds) sub rule ii of Apothecary Rules (1562) ("Must not be suborned for money to hurte mankinde").

282. See, e.g., 4 W.W. Skeat (ed.), The Complete Works of Geoffrey Chaucer 604-605, lines 575-580 (of the Parson's (Persone's Tale)) (1894) (refers to deliberated abortion as murder); Madan, supra note 26 (of Part III); Defoe, supra note 12 at 135-165; 1 Defoe's Review (January 9, 1705 to February 24, 1705) 14-15 (Columbia University Press Facsimile, N.Y., 1938); Dunton, supra note 57 at vol. 11, no. 4, quest. 2 (Saturday, July 22, 1693); id. at vol. 5 (Supp.) quest. 12, p.15; id. at vol. 8, no. 4, quest. 1 (Saturday, July 23, 1692); id. at vol. 16, no. 13, quest. 1 (Tuesday, January 29, 1695); Hall, supra n. 45; William Nicholson, A Plain but Full Exposition of the Catechism, Pt. 2, at 121 (ed. of 1663) (1st ed., 1655); John Dod, A Plain and

Familiar Exposition of the Ten Commandments 258-59 (19th ed.) (1st ed., London, 1635); John Mirb, Instructions for Parish Priests 22-23 (E. Peacock ed., London, 1868) (composed around 1450) (excommunication for deliberated abortion); Lawrence Vaux, The Catechisme or Christian Doctrine Necessary for Children and Ignorant People c.III, p.39 (Th. Graves Law reprint of the 1583 ed.) (Chetham Soc. Vol. 4, Manchester, 1885) (1st ed., 1574?); Baxter, supra note 264; Noonan, supra note 1 (of Introduction) at 598-60 (quoting the American colonist Benjamin Wadsworth); M. Withals, A Dictionary in English and Latine, Devised for the Capacitie of Children and Young Beginners 364 (4th ed., London, 1634) (1st ed., 1556?) ("medicines which cause abortion and prevent conception [atocium medicamentum] are confections from the motion and instigation of the Devil"), Weemse, supra note 65 at 96-97; Henry Woolner, The True Originall of the Soul 60-62 (London, 1642); Culpepper, supra note 45; Andrew Boorde, The Breuiory of Healthe c.3, fol. viii (1552) (1st ed., 1547); John Burns, Observations on Abortion 75 (1808) (refers to deliberated abortion as murder); William Buchan, Domestic Medicine 423 (fn.) (9th ed., Dublin, 1784) (1st ed., 1769); Percival, supra note 44 at 78-79; Jones, supra note 99 (of Part II); and Cotton Mather, The Angel of Bethesada 239-40 (G.W. Jones, ed., Barre, Mass., 1972) (completed around 1724). See also, Eccles, supra note 10 at 69-70; and the numerous works cited in McLaren, supra note 8 at 61, 90-107, 110, 116-119, 128-129, & 133-143; and in McLaren, supra note 192 at 225-234.

283. See Law, supra note 1; Means I & II, supra note 1 (of Part II); and McLaren, supra note 81 at 107-110. McLaren argued that 16th-19th century, English women saw nothing immoral in aborting a fetus so long as it had not yet received its human soul or had not quickened. The argument cannot get off the ground, if only for the reason that it erroneously presupposes that all these women rejected basic tenets of their moral and religious culture, such as the sinfulness of fornication and adultery, and the conceiving and rearing children as being the primary purpose of marriage. See, e.g., infra, text (of Case No. 1 of Appendix 2) accompanying note 9.

284. Boorde, supra note 282 at c.3, fol. viii. See also Eccles, supra note 10 at 67-73; and McLaren, supra note 8 at 111-112. And see e.g., Mather, supra note 282 at 247; John Sadler, The Sick

Womans Private Looking-Glasse 142-43 (London, 1636) (gives instructions on signs of pregnancy so women will not, per adventure, take some cure and thereby destroy or murder their unborn children); Wm. Williams, Occult Physick 85-99 (1660); Bullein, supra note 282 at Book of Compounds at 53, 59, & 81; J. Wesley, Primitive Physic 36 (London, 1791) (1st ed., 1747); Paré, supra note 66 at 921-922; J. Quincy, The New Dispensatory 587 (London, 1753); W. Salmon, Practical Physick 29-33 (London, 1692); John Pechey, Some Observations Made upon the Root Called Serapeas, or Sales Imported from Turkey Showing its Admirable Virtues in Preventing Women's Miscarriages 3-5 (1694); John Pechey, The Whole Works of that Excellent Practical Physician, Dr. Thomas Sydenham 477 (London, 1696); Culpepper, supra note 171 at 34 & 512-517 (London, 1661); and The Birth of Mankynde, supra note 13 at bk. 2, c. vii, fol. 82.

285. See infra, Statute No. 1 (of Appendix 1).

286. See Bowers v. Hardwick (1986), 478 U.S. 186, 216 (including note 9) (Justice Stevens dissenting).

287. See Joseph W. Dellapenna, Brief of the American Academy of Medical Ethics as "Amicus Curiae" in Support of Respondents and Cross-Petitioners Robert P. Casey et al, in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. ___, 120 L.Ed 2d 674 (1992).

Notes to Part V

1. See David P. Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864, 876-77 (including n.78) (1986).

2. 410 U.S. at 156-157 & 157 n. 4, respectively.

3. See infra, text accompanying note 56 & 57, as well as the references set forth in the latter note 57.

4. 476 U.S. 747, 779 (including note 8). See also infra, text (of Part VI) accompanying note 54.

5. See Federated Publications, Inc. v. Kurtz, 94 Wn.2d 51, 68 (1980) (Justice Dolliver dissenting) ("The Constitutional rights of one person are not to be tested and accommodated against the Constitutional rights of another; neither are [they]...to be arranged in some hierarchy...Constitutional rights are the separate rights of individuals - alone or collectively - against the State. Interests may conflict; rights do not."). See also Caplin and Drysdale, Chartered v. United States, 491 U.S. 617, 628 (1989) ("there is no...hierarchy among constitutional rights").

6. See, e.g., Zinermon v. Burch 494 U.S. 113, 125-126 (1990).

7. See, e.g., Palmore v. Sidati, 466 U.S. 429, 433 (1984); Stanley v. Illinois, 405 U.S. 645, 649 (1972); In re William L. (1978), 477 Pa. 322; 383 A.2d 1228, 1235-1236; In re Terry D. (1978), 83 C.A.3d 890, 896; 148 Cal. Rptr. 221; and In re Philip B. (1979), 92 C.A.3d 796, 801; 156 Cal. Rptr. 48. And see infra, note 11.

8. See Roe v. Wade, 410 U.S. at 160: "We need not resolve the difficult question of when life begins [i.e., when a human being comes into existence]...[T]he judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."

9. 176 U.S. 581, 589 (1900). And see L. Tribe, American Constitutional Law 1688 n.3 (1988).

10. 489 U.S. 189, 195-96 (citations omitted). See also, e.g., Edmonson v. Leesville Concrete Co., Inc., 500 U.S. ___, 114 L. Ed.2d 660, 672-73 (1991); Martinez v. California, 444 U.S. 277, 284-85 (1980); NCAA v. Tarkanian, 488 U.S.179, 191 (1988); Colorado v. Connelly, 479 U.S. 157, 165 (1986); Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 614 (1989); and Norwood v. Harrison, 413 U.S. 455, 469 (1973).

11. See DeShaney, 489 U.S. at 193. DeShaney talks in terms of "adequate protective services"; not in terms of adequate anti-crime statutes. See id. at 194. And see id. at 200. ("The [State's] affirmative duty to protect arises not from the State's knowledge of the individual's predicament..., but from the limitation which it has imposed on his freedom to act on his own behalf.")

12. See DeShaney, 489 U.S. at 197 n.3. See also Brown v. Board of Education of Topeka, 347 U.S. 483, 495 (1954); San Francisco Arts & Athletics v. U.S. Olympic Committee 1483 U.S. 522, 542 n.21 (1987); Weinberger v. Wisenfeld, 420 U.S. 636, 638 n.2 (1975); Buckley v. Valeo, 424 U.S. 1, 93 (1976); Edmonson v. Leesville Concrete Co., Inc., 500 U.S. ___, 114 L. Ed.2d 660, 670 (1991); and R. Dworkin, The Great Abortion Debate, 36 (no.1) "The New York Review of Books" 49, 50 (6/29/89).

An argument can be made that in Roe the Court implicitly concluded that the human fetus is not a 14th Amendment, equal protection clause person. The argument runs as follows. Fifth Amendment due process incorporates Fourteenth Amendment, equal protection principles. Fifth and Fourteenth Amendment due process principles are identical. Just as the human fetus is not entitled to Fourteenth Amendment due process, so also the human fetus is not entitled to Fifth Amendment due process. Since Fifth Amendment due process incorporates Fourteenth Amendment, equal protection principles, it follows that the fetus is not entitled to the protections of Fourteenth Amendment, equal protection principles. See High Tech Gays, et al, v. Defense Industrial Security Clearance, et al, 895 F.2d 563, 570-571 (9th Cir., 1990). See also Roe v. Wade, 410 U.S. at 157 n.4 (see supra, text accompanying note 2).

13. On the first quote, see Leslie, supra note 30 (of Part III) (and see the references set forth in that note 30; and Kersey, supra note 101 (of Part IV) sub tit. Man ("a Creature endowed with Reason"). On the second quote, see Penry v. Lynaugh, 492 U.S. 302, 330 (1989).

14. Respectively: Ash, supra note 101 (of Part IV) sub tit. Foetus; and 1 B. Rush, Medical Inquiries and Observations 42 (3rd ed., 1809) (1st ed. [Observation on the Duties of a Physician and the Methods of Improving Medicine, Accommodated to the Present State of Society and Manners in the United States], 1789). See also, id. at 13-14); and Samuel Johnson, supra text (of Part IV) accompanying note 122. And see supra, text (of Part IV) accompanying notes 57-78 (and the works cited in those notes), as well as supra, sec. 5 of Part IV.

15. On formed fetuses as persons, see the references set forth supra, in note 30 (of Part III). The Justice Stevens' quote is taken from Addresses: Construing the Constitution, 19 U.C. Davis L. Rev. 1 (15), 20 (1985). The quote immediately following the Justice Stevens' quote is from Levey v. Louisiana, 391 U.S. 68, 70 (1968). See also, by way of analogy, Oregon v. Mitchell, 400 U.S. 112, 251 (1970) (Justice Brennan, concurring in part and dissenting in part) ("in our view,...Brother Harlan's historical analysis [of the purpose of the Fourteenth Amendment's Equal Protection Clause] is flawed by his ascription of 20th-century meanings to the words of 19th-century legislators"). And see Christopher Wolfe, The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law 18 (1986) ("Before there was a United States, American lawyers were necessarily English lawyers. The rules of legal interpretation prevalent in the United States at the time of the Constitution's framing and ratification were therefore derived from English law."); and The Unborn Child and the Constitutional Concept of Life, 56 Iowa L. Rev. 994, 1003 n. 81 (1971).

16. Respectively: The Works of William Paley 195 (London, 1825); and 497 U.S. 261, 330-331 (Justice Stevens dissenting). See also Meachum v. Fano, 427 U.S. 215, 230 (1976) (J. Stevens dissenting) (see Stevens, supra note 1 (of Introduction)).

17. 124 U.S. 465, 478. See also the authorities cited supra, in note 35 (of Part II). And see, e.g., Martin v. Ohio, 480 U.S. 228, 235 (1987); Astoria Federal v. Solimino, 501 U.S. ___, 115 L.Ed 2d 96, 104 (1991) ("Congress is understood to legislate against a background of common law adjudicatory principles"); Griffin v. U.S., 502 U.S. ____, 116 L.Ed 2d 371, 376-77 (1991); Burns v. Reed, 500 U.S. ____, 114 L.Ed 2d 547, 557 & 563 (1991); id. at 565-68, (Justice Scalia, concurring); McNally v. U.S., 483 U.S. 350, 358 n.8 (1987); and County of Riverside v. McLaughlin, 500 U.S.____, 114 L.Ed 2d 49, 65-69 (1991) (Justice Scalia dissenting).

18. Plyler, 457 U.S. 202, 212, n.11 (quoting Wong Wing v. United States (1896), 163 U.S. 228, 242 (Justice Field concurring and dissenting); Ingraham, 430 U.S. 651, 692; Paul, 424 U.S. 693, 702 n.3; Gertz, 418 U.S. 323, 341 (1974). (As to the second proposition, see supra, text (of Part I) accompanying notes 31-32, as well as the authorities cited in latter note.)

19. The Bingham citation is in John P. East and Steven R. Valentine, Reconciling "Santa Clara" and "Roe v. Wade": A Route to Supreme Court Recognition of Unborn Children as Constitutional Persons, in D. Horan, et al (eds.), Abortion and the Constitution: Reversing Roe v. Wade Through the Courts 99 (1987) (quoting Cong. Globe, 39th Cong. 1st. Sess. 1089 (1866)). The Verdugo-Urquidez citation is 494 U.S. 259, 269.

20. Williams Obstetrics 139 (17th ed. 1985). See also id. at 267; & id. (18th ed. 1989) at 277. And see also M. Harrison, The Unborn Patient: Prenatal Diagnosis and Treatment 7 (2nd ed. 1990); and E.A. Reece, et al, Medicine of the Fetus and Mother Preface & 1-3 (1992) ("the fetus is a bonafide patient").

21. Goldenring, infra note 23. See also Walters, infra note 23.

22. See supra, text (of Part IV) accompanying notes 154-165. The Blackstone passage that contains the above quote is reproduced

infra, at text (of Part IV) accompanying note 154. The quote in the parenthesis is from Green v. U.S., 355 U.S. 184, 187 (1957).

23. Progress in Obstetrics and Gynaecology vol.4, p.92 (J. Studd ed. 1984). See also, Creasy & Resnick, Maternal-Fetal Medicine: Principles and Practice 203 (2nd ed., 1989) (fetal heart motion has been detected on the 24th day after fertilization); 1 Van Nostrand's Scientific Encyclopaedia 1059 (7th ed. 1989) (spontaneous fetal motion is reliably present at about the beginning of the 9th week after fertilization, at which time the embryo has developed into a fetus and the placenta and umbilical cord have been formed); Hill & Volpe (eds.), Fetal Neurology 5 (1989) (discernible fetal movements appear at about seven and one-half weeks post-menstrual age. These...consist of slow flexion and extension of the vertebral column...A few days later these movements are replaced by the first complex movements, e.g., general movements and startles, involving trunk, head and limbs. Again only a few days later isolated limb movements are observed."); R.R. Macdonald (ed.) Scientific Basis of Obstetrics and Gynaecology 340-41 (3rd ed., 1985) ("fetal movements....become apparent at 7 weeks' gestation."); Shari Richard, Opening a Window to the Womb, in Catholic Twin Circle, Vol. 27, No. 40, Sunday, Oct. 6, 1991 ("A few years ago, a 7-to-8-week [gestational age] fetus resembled a glob of tissue. Now, with transvaginal sonography, we can observe fingers, toes and organs. We can watch the child kick, jump and wave his arms and legs."); and Beischer and Mackay, Obstetrics and the Newborn: An Illustrative Textbook 31 (Tab. 4.1) (2nd ed., 1986). Early embryonic movement probably does not derive from brain function, which arguably begins at about 8 weeks after conception. See Goldenring, Development of the Human Brain, N. Eng. J. Med. vol.307 (no.9) 564, 564 (26 AUG 82) (Fetal "brain function as measured by an electroencephalograph, appears to be reliably present in the fetus at about 8 weeks...Coincidentally, all other major organ systems are also present at that point in development."); and J. Walters, As an Abortive Remedy, New Pill [RU-486] Is No Easy Choice, Los Angeles Times, Sun., 11/13/88, Part V (Opinion) p.5 (citing the German bioethicist, Hans-Martin Sass: by the 54th day from conception "identifiable stationary neurons form the cortical plate. At this point there is primitive 'brain life', a development inversely analogous to the widely accepted idea of 'brain death'.").

On when the human embryo becomes a fetus, see supra, text accompanying note 21; K. Moore, The Developing Human: Clinically Oriented Embryology 6 (4th ed., 1988) ("The embryonic period extends until the end of the eighth week [after fertilization], by which time the beginnings of all major structures are present ....Fetus: After the embryonic period, the developing human is called a fetus. During the fetal period (ninth week to birth), many systems develop further".); M.A. England, A Color Atlas of Life Before Birth 19 (1983); T.W. Sadler, Langman's Medical Embryology 85 (6th ed., 1990) (fetal period begins at the beginning of the third month from conception); Reece, supra note 20 at 44 (same as Sadler, i.d.); Williams Obstetrics 90 (18th ed., 1989); 1 Van Nostrand, supra this note at 1057 & 1059.

24. See the authorities cited supra, in note 32 (of Part IV).

25. See the authorities cited supra, in note 33 (of Part IV).

26. See supra, sec. 7 of Part IV, as well as the references set forth, supra in note 203 (of Part IV).

27. See infra, text accompanying note 52; and supra, text and footnotes of Parts II & III.

28. Hall v. Hancock, 32 Mass. (15 Pick.) 255, 257-58 (1834). This principle probably derives from Roman law. See Connery (The Ancients), supra note 91 (of Part IV) at 129. See also The Unborn Child, supra note 15 at 999; The Unborn Child: Consistency in the Law, 2 Suffolk L. Rev. 228, 229 (1968); California Civil Code sec. 29 ("A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of the subsequent birth"); 1 Blackstone, Commentaries 126 (Dublin, 1765) ("An infant in ventre sa mere... [in the mother's womb] is supposed in law to be born for many purposes. It is capable of having a legacy...It may have a guardian assigned to it..."); Commonwealth v. Demain, 1 Brightly 441 (Pa., 1851) ("At every period of gestation, the rights of an infant en ventre sa mere are equally respected."); Smith v. Duffield, 5 Sarg.& Rawle 38 (1819) ("A child in the womb of the mother is under the protection of the law and possesses all of

the privileges of a living [human] being."); and Prosser (and Prosser and Keeton), infra note 46 (of Part VI). And see the discussion and cases cited in 2 J.J. Alexander, British Statutes in Force in Maryland 873-79 (2nd ed., 1912); and in Krason & Hollberg, supra note 17 (of Part II) at 210-212.

29. See 2 Peleg Chandler, American Criminal Trials 53, 49-50 & 379-383 (1844). Mrs. Spooner petitioned for a reprieve on the grounds of being pregnant with a live child. The court ordered that she be examined by a jury of matrons and by several (one female and two male) midwives. The jury of matrons and midwives returned that Mrs. Spooner is not quick with child. Mrs. Spooner was again examined for pregnancy by the midwives, and was again found not to be quick with child. See also 4 Blackstone, Commentaries 388 (Dublin, 1770) (Blackstone mentions with profound disgust an instance when a pregnant woman, while being burned at the stake, aborted a live child who was immediately thrown by others into the flames that were consuming the mother). A repeat of the Spooner incident was narrowly averted in R v. Mary Wright (Norwich, March 22, 1832). See 1 J. Chitty, A Practical Treatise on Medical Jurisprudence 402 (including n.m) (London, 1834). The jury of matrons in Wright returned a finding of not pregnant. Several surgeons were subsequently allowed to examine Wright, and they returned a finding that Wright was in her sixth month of pregnancy. Wright was respited, and less than four months later she gave birth to a live child. On Wright's Case, see also W. Cummin, Lectures on Forensic Medicine, in The London Medical Gazette, Saturday, December 24, 1836, p. 434 (lec. XIII); and Forbes, infra note 31 at 29.

30. In 1 E. Gibson, Codex Juris Ecclesiastical Anglicani 372 (Oxford, 1761) (1st ed., 1713), the following Church edict, which Gibson dates as 1236, is quoted as it is set forth in W. Lyndwood's Provinciale (c.1470-80) (see J.V. Bullard and H.C. Bell (ed.), Lyndwood's Provinciale: the Text of the Canons Therein Contained, Reprinted from the Translation Made in 1534 134 (London, 1929)):

> "Si mulier mortua fuerit in partu, & hoc bene Constiterit, scindatur, si infans vivere credatur, procurato tamen, quod os

mulieris[a] apertum teneatur.[a]: Apertum: Cum baculo, clavi, vel instrumento alio, sic videlicit, quod Aer passit intrare, ne ob defectum Respirationis suffocetur Partus".

The substance of the above Latin will be found in H.W. Haggard, Devils, Drugs, and Doctors: The Story of Healing from Medicine-Man to Doctor 27 (1929) ("[T]he Church Council of Cologne in 1280 decreed that on the sudden death of a woman in labor her mouth was to be kept open with a gag so that her child would not suffocate while it was being removed by operations." Haggard added here: "The intention involved was better than the physiology."). This Church law appears to have derived from 8th-century (B.C.) Roman law. See Germain Grisez, Abortion: the Myths, the Realities, and the Arguments 185 (1966). And see 17 Gentlemen's Magazine 342 (August, 1747) (reports an incident in England of a live male child being removed from his mother's womb by cesarean after his mother was killed by lightning). See also Paré (Reports), supra note 66 (of Part IV) at 923; and 2 Johnson, supra note 27 (of Part IV) at 1236 (secs. 14&15); and The Birth of Mankynde, supra note 13 (of Part IV) at bk. 2, c. 9, fol. 95.

31. See J. Oldham, On Pleading the Belly: A History of the Jury of Matrons, 6 Criminal Justice History 1, 1-3, 6, 10-38; T.R. Forbes, A Jury of Matrons 32 (no. 1) J. Med. Hs. 23 (1988); J.S. Cockburn, Calendar of Assize Records: Home Circuit Indictments, Elizabeth I and James I: Introduction 121-123 (London, 1985); Baker, supra note 7 (of Part IV) 332-333; and Ewen, infra note 31 (Case No. 5 of Appendix 13) at 33. See also Sarah Baynton's Case (1702), supra note 6 (of Part IV); Sarah Mitchell's Case (1657-58), in 6 Rev. J.C. Atkinson (ed.), [York] Quarter Sessions Records 1 (no.134) (North Riding Rec. Soc., London, 1888); Catherine Llewelan's Case (1748), in 2 J.H. Matthews (ed.), Cardiff Records 203 (Cardiff, 1900); 2 J.W.W. Bund (compiler), Calendar of the Quarter Session Papers 1591-1643 xcv-xcvi (Worcestershire Hs. Soc., 1900); Hale, supra text (of Part IV) accompanying note 147; Louthian, supra text (of Part IV) accompanying notes 133-134; State v. Arden (South Carolina, 1795), 1 S.C. 196, 197, 1 Bay 487, 489-490; In re Anonymous (Chester Co., Pa., 1689), as reported in S. Pennypacker, Pennsylvania Colonial Cases 53 (1892) (and reported also in 1 F.M. Eastman, Courts and

Lawyers of Pennsylvania: A History, 1623-1923 119 (1922); Dunn v. Commonwealth, 6 Pa. 382 (1847); and Hatcher's Case (1633), as discussed in 1 W.H. Hening, The Statutes at Large: Being a Collection of all the Laws of Virginia, from the First Session of the Legislature, in the Year 1619 209 (1823).

32. See supra, text (of Part II) accompanying note 56.

33. Several of these authorities are cited in Oldham, supra note 31 at 44. See also id. at 29-30; Hale, supra text (of Part IV) accompanying note 147. And see Sarah Baynton's Case, as reproduced in pertinent part, supra note 6 (of Part IV); and Forbes, supra note 31 at 32.

34. See Oldham supra, note 31 at 25-28 & 57 (n.135) ("OBSP, April 1714: The jury of matrons examined three prisoners - one was found not with quick child, one with quick child and one with child but not quick." Oldham does not state whether or not the last mentioned woman was executed.) And see R.F. Hunnisett (ed.), Wiltshire Coroners' Bills 1752-1796 26-27 (no.447) (Devizes, 1981) ("At Salisbury assizes, 8 Mar. 1766,...Susannah [Cecil]...[was] convicted of...murder...and sentenced to be hanged...Susannah's execution was respited for 2 months, after she had pleaded pregnancy, although a jury of matrons found that she was not pregnant with quick child."); R v. Wycherley (1838), 173 Eng. Rpts. 486-487; 8 Car & P. 262, 263; and supra, text (of Part IV) accompanying note 28. In several, if not most instances, the English trial clerk's notes simply reflect that the condemned woman was remanded to prison because the jury of matrons returned that she is "pregnant". It is virtually impossible to tell here if a finding of being pregnant is clerk-shorthand for found to be "quick with child" or "with quick child". See, e.g., B. Hanawalt, Crime in East Anglia in the Fourteenth Century: Norfolk Gaol Delivery Rolls, 1307-1316 92 (no. 571), 93 (nos. 581 & 583), & 99 (no. 623) (44 Norfolk Rec. Soc., 1976). See also the numerous such examples in Cockburn's multi-volume work, Calendar of Assize Records, supra note 17 (of Part IV).

35. Forbes, supra note 31 at 30 (citing Historical Sketch of the British Medical Association, in Brit. Med. J. 847-885 (1882)).

36. See supra, text (of Part II) accompanying notes 96-99 & 105-107, as well as the works cited supra, in note 99 (of Part II).

37. See supra, text (of Part IV) accompanying note 57 (as well as the works cited in that note); supra, text (of Part II) accompanying notes 108-111 (as well as the last note (111)); supra, text (of Part II) accompanying notes 84-86; and Witherspoon, supra note 77 (of Part II) at 34 (including note 19).

38. 410 U.S. at 169 (quoting Poe v. Ullman (1961), 367 U.S. 497, 543 (Justice Harlan dissenting)).

39. Van Nostrand's Scientific Encyclopedia, Preface (5th ed., 1976).

40. Ibid. at 3-4. See also Van Nostrand's Scientific Encyclopedia 1056 (7th ed., 1989) ("At the moment the sperm cell of the human male meets the ovum of the female and the union results in a fertilized ovum (zygote), a new [human] life has begun.").

41. See the authorities cited supra, in note 28.

42. See the English cases, etc., cited supra, note 36 (of Part IV).

43. See, e.g., Dearing's Ca. P.C. Ann.: Secs. 1539-10999 secs. 3705-3706 (1980).

44. 410 U.S. at 157.

45. See, e.g., People v. Crowson (1983), 33 Cal.3rd 623, 633; 190 Cal. Rptr. 165; 550 P.2d 389.

46. 410 U.S. at 157, n.53.

47. See, e.g., Plyler v. Doe, 457 U.S. 202, 210 (1982); Galvan v. Press, 347 U.S. 522, 530 (1954); Kwong Hai Chew v. Colding, 344 U.S. 590, 596-97 n.5 (1953); and Yick Wo v. Hopkins, 118 U.S. 356 (1886).

48. See, e.g., Grosjean v. American Press Co., 297 U.S. 233, 244 (1936); Santa Clara County v. So. Pac. Railroad Company, 118 U.S. 394 (1886) (a corporation is a person under the Fourteenth

Amendment's Equal Protection Clause); Louisville, C.& R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844) ("a corporation, created by and doing business in a particular state, is to be deemed for all intents and purposes as a person [due process clause]..."); Monall v. Department of Social Services, 436 U.S. 658, 683 (1978); and Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 284-85 (1989) (Justice O'Connor concurring in part and dissenting in part).

49. U.S. Const., Fourteenth Amendment, sec. 1.

50. 410 U.S. at 158. See supra, text (of Part II) accompanying notes 1-2.

51. See supra, text (of Part II) accompanying notes 66-77; and supra, Parts III, and IV of text.

52. James S. Witherspoon, supra note 77 (of Part II) at 33-34.

53. See Roe v. Wade, 410 U.S. at 159. See also, e.g., Rust v. Sullivan, 500 U.S. ____, 114 L. Ed.2d 233, 254; id. at 262-63 (Justice Blackmun dissenting); and Chapman v. United States, 500 U.S. ___, 114 L. Ed.2d 524, 537 (1991).

54. See United States v. Vuitch, 402 U.S. 62, 67-68 & 71-72 (1971).

55. See David O'Brien, Storm Center: The Supreme Court in American Politics 26 (1986). See also supra, note 24 (of Part I).

56. 410 U.S. at 157, n.54.

57. See supra, sec. 3 of Part IV. And see, e.g., supra, text (of Part II) accompanying note 77; and David Granfield, The Abortion Decision 79 (1969).

58. See supra, text (of Part II) accompanying notes 143-147.

59. See, e.g., Coker v. Georgia, 433 U.S. 584, 592 (1977); Rummel v. Estelle, 445 U.S. 263, 274 (1980); Solem v. Helm, 463 U.S. 227 (1983); Chapman v. United States, 500 U.S. ____, 114 L. Ed.2d 524, 538-540 (1991); Harmelin v. Michigan, 501 U.S. ___, 115 L.

Ed 2d 836 (1991); and Payne v. Tennessee, 501 U.S. ___, 115 L. Ed 2d 720, 735 (1991).

60. See Wertheimer, infra note 51 (of Part VI) at 108 ("within the bounds of our legal tradition no court could rule that an unborn child is not legally a person while recognizing it as a living human being...."); supra, text accompanying notes 18-19; infra, text accompanying note 63; supra, text accompanying note 57 (and the references set forth in that note); and supra, text (of Part II) accompanying note 77.

61. See infra, text (of Part VI) accompanying notes 1-16; and supra, text (of Part IV) accompanying notes 4 & 5, and those two notes.

62. See Brown v. Board of Education of Topeka, 347 U.S. 483, 494-495 (see supra, note 5 (of Part IV)).

63. 476 U.S. 747, 778-79.

64. See Connery, supra note 5 (of Part IV) at 306-307 & 17-18; and supra, text (of Part IV) accompanying notes 78-81.

65. See Webster v. Reproductive Health Services, 492 U.S. 490, 566-69 (1989) (Justice Stevens concurring in part and dissenting in part). (And see Cruzan v. Missouri, 497 U.S. ___, 111 L. Ed.2d 224, 284-85 (1990) (Justice Stevens dissenting). Justice Stevens argued in Webster that St. Thomas Aquinas, on behalf of the Roman Catholic Church, originated the opinion that the rational soul is infused into the male and female fetus forty and 90 (80) days, respectively, after conception. Justice Stevens has confused Aquinas for the great pagan philosopher, Aristotle. See supra, text (of Part IV) accompanying notes 107 & 113 & 78.

66. See Webster v. Reproductive Health Services, 492 U.S. 490, 566 & 567-69 (Justice Stevens concurring in part and dissenting in part) (see supra, note 65); Roe v. Wade, 410 U.S. at 161; Tribe, supra note 11 (of Introduction) at 31-32; Lader, supra note 1 (of Part IV) at 2; R. Dworkin, Unenumerated Rights, 59 U. Chicago L. Rev. 381, 403 n.36 (1992); and R.A. Posner, Sex and Reason 226 (1992); and R.E. Jones, Human Reproductive Biology 344 (1991).

67. Connery (Ancients and Medievals on Abortion), supra note 91 (of Part IV) at 126 and Connery, supra note 5 (of Part IV) at 212, respectively. See also id. at 304-306; Karl Rahner (ed.), Encyclopedia of Theology: The Concise Sacramentum Mundi ("The question as to the exact moment of the animation of the human embryo has not been decided by the magisterium of the Church [citation omitted]."); J.A. Coriden, et al, (eds.) The Code of Canon Law: A Text and Commentary 930, c.1397 & 1398 (1985) (Canon 1397 discusses homicide and Canon 1398 discusses abortion, referring to a non-viable fetus. See also Rev. P.M.J. Stravinskas (ed.), Our Sunday's Visitor's Catholic Encyclopedia 27 (1991) (On Dec. 5, 1989, the Pontifical Commission for the Authentic Interpretation of the Code of Canon Law "broadened the definition of abortion [in c.1398] to include any killing of an immature fetus.")); Heinemann, supra note 225 (of Part IV) at 305-306; and supra text (of Part IV) accompanying note 228.

The Catholic Church, in including abortion as a species of homicide under its canon law of criminal homicide, is not thereby explicitly or implicitly teaching, stating, or adopting as a doctrine of faith or morals the opinion or belief, that the unborn product of human conception or human fetus is a human being. (See Connery, supra note 5 (of Part IV) at 307-308.) The Church is simply thereby recognizing for criminal law purposes the opinion that the fetus is a human being, as being a generally received or sound opinion. See, by way of analogy, supra text (of Part IV) accompanying notes 4&5, as well as those two notes.

68. See, e.g., Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-709 & 713-716 (1976); Employment Division v. Smith, 494 U.S. 872, 886-887 (1990); Presbyterian Church v. Hull Church, 393 U.S. 440, 449 (1969); and Jones v. Wolf, 443 U.S. 595, 602 (1979). James Madison, in his Memorial and Remonstrance Against Religious Assessments, stated that the idea that "the Civil Magistrate is a competent Judge of Religious truth" is an "arrogant pretension falsified by the contradictory opinion of Rulers in all ages, and throughout the world." 2 G. Hunt (ed.), The Writings of James Madison 183-91 (1901).

Notes to Part VI

1. 410 U.S. at 159.

2. See supra, text accompanying note 4 (of Part IV) (as well as that note itself); and infra, text accompanying note 3-16.

3. See, e.g., the cases cited in Forsythe, supra note 3 (of Part IV) at 614 n. 287 & 618 n.327. See also, e.g., People v. Smith (1987), 188 C.A.3d 1495, 1514; 234 Cal. Rptr. 142, 154: "Viability of a fetus is a constitutional prerequisite for murder of a fetus by logical extension of Roe v. Wade." The Smith Court mistook an "illogical" extension for a logical extension. See Forsythe, supra note 3 (of Part IV) at 616-618; infra text accompanying notes 6-16; and People v. Merrill, 450 N.W.2nd 318, 322 (Minn. Sup. Ct., 1990).

California, in 1970, amended its murder statute to include the human fetus as a potential murder victim except in three situations. (These three situations are set forth infra, at text accompanying note 10.) In People v. Hamilton, 48 Cal.3d 1142, 1171 n.18 (1990), the California Supreme Court implicitly stated that it was not necessary in Hamilton to decide whether or not the intermediate, California Courts of Appeal erred in stating that the word fetus in California's murder statute must be construed to mean a "viable" fetus. This 1970 amendment did not define "fetus." It is a rule of statutory interpretation that when a statute uses a technical or scientific term, the term is used there in its technical or scientific sense. It is also a rule of statutory interpretation that nontechnical or nonscientific, statutory words are used in their usual or common sense. See, e.g., Rich v. St. Bd. of Optometry (1965), 235 C.A.2d 591, 604; and Terminal Plaza Corp. v. City and County of San Francisco (1986), 186 C.A.3d 814, 826. See also, e.g., In re Lance W. (1985), 37 Cal. 3d 873, 886: If statutory language is "'clear and unambiguous there is no need for construction, and courts should not indulge in it.'" Neither in its scientific or technical sense nor in its usual or common sense does the term "[human] fetus" mean or refer to a "viable fetus." "Human fetus" primarily refers to the post-embryonic product of human

conception, although in its scientific and nonscientific senses it is often used to refer to the product of human conception from conception to birth. But it does not in either such sense exclusively refer to the post-embryonic, viable fetus. (See, supra, note 23 (of Part V); supra, text (of Part IV) accompanying note 158; and infra, text (of Case No. 1 of Appendix 15) accompanying notes 3-6, as well as the references in those notes.) There is, therefore, a presumption that the word "fetus" as contained in California's murder statute includes the post-embryonic, non-viable fetus. See, by way of analogy, John Doe Agency v. John Doe Corp., 493 U.S. 146, 154 (1989): "The Court of Appeals...would have the [statutory] word "compiled" mean "originally compiled". We disagree..., for...the plain meaning of..."compile"...does not permit such refinement.") Such a presumption can be rebutted, but only under one or two circumstances. (See, e.g., People v. Beleci (1979), 24 Cal.3d 879, 884: Our Courts have declined to apply the plain meaning of a statute "when it would inevitably have frustrated the manifest purposes of the legislation as a whole or led to absurd results.") The only possibly relevant circumstance here is the following one articulated by the California Supreme Court in People v. Davenport (1985), 41 Cal.3d 247, 264 & 266, respectively:

> [I]t is established that where "'the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution.'" [citations] This follows from the presumption that the legislative body intended to enact a valid statute...
>
> - - -
>
> If...questions about the constitutional validity of the statute may be avoided by adopting an alternate construction which is consistent with the statutory language and purpose, it is our duty to adopt the alternate construction.

Obviously the California Legislature in 1969 or 1970 did not know about Roe v. Wade, which was decided in 1973. More impor-

tantly, nothing in Roe suggests that, outside of Roe's ambit, it would be unconstitutional for a state to enact legislation declaring a non-viable fetus as a human being or potential murder victim. (See infra, text accompanying notes 6-16.) Recently, in People v. Davis (5/4/93), 15 C.A. 3d 690, a California Court of Appeal held that fetal viability is not an element of fetal murder in California.

4. See infra, text accompanying notes 5-28; and 50-55.

5. See infra, text accompanying notes 20-28.

6. See supra, text (of Part IV) accompanying note 4, as well as that note itself.

7. 413 U.S. 49, 60.

8. See supra, text accompanying note 1. See also infra, text accompanying note 9.

9. 400 U.S. 112, 247-248 (dissenting in part, concurring in part).

10. See Deering's California Codes: Penal Code Annotated 187 to 269 3 (sec. 187) (1985).

11. See supra, note 3.

12. 416 U.S. 1, 8 n.5 (1974) (quoting Louisville Gas Co. v. Coleman, 277 U.S. 32, 41 (1928) (Justice Holmes dissenting).

13. 414 U.S. 417, 427.

14. 413 U.S. 49, 60.

15. 413 U.S. at 63. See also, e.g., Zemel v. Rusk, 381 U.S. 1, 14-15 (1965).

16. 197 U.S. 11, 30-31.

17. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171, (1951) (concurring opinion).

18. See, supra, text (of Introduction) accompanying notes 7-8; and infra, text accompanying notes 19-22. And see supra, text (of Part II) at 203, as well as the references set forth in that note. In Cruzan v. Director, Missouri Dept. of Health 497 U.S. 261, 278 (1990), the Court observed: "In Jacobson v. Massachusetts..., the Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease". The Jacobson Court did no such thing. There was nothing to balance here as the Jacobson Court held that the 14th Amendment's concept of liberty does not include the claimed right of an individual to refuse a smallpox vaccine. See the cross-references set forth infra, in note 44.

19. 410 U.S. at 162.

20. See, e.g., Berman v. Parker, 348 U.S. 26, 32 (1954).

21. 406 U.S. 205, 215.

22. See supra, text (of Part II) accompanying notes 30-32.

23. See supra, text accompanying notes 9 & 12-16.

24. See supra, text (of Part V) accompanying notes 20-27, 29-30, 39-40, & 62-68; and supra, text (of Part IV) accompanying note 30, as well as the references set forth in that note.

25. Justice Stevens implicitly conceded as much in his concurring opinion in Thornburg v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 779 (1986). See supra, text (of Part V) accompanying note 63.

26. 467 U.S. 216, 227-28 (1984).

27. See supra, text accompanying notes 1-5.

28. See supra, text accompanying note 1.

29. See infra, text accompanying note 50; and supra, text (of Introduction) accompanying note 17 (as well as that note), and supra

text (of Part II) accompanying note 24. See also supra, text (of Introduction) accompanying note 9, as well as that note (9).

30. See the references set forth supra, in note 29.

31. 405 U.S. 330, 342-343. See also, e.g., Justice O'Connor's Goldman opinion, supra note 9 (of Introduction).

32. 411 U.S. 1, 124-25.

33. 432 U.S. 438, 457-58.

34. 379 U.S. 536, 574-75.

35. 281 U.S. 370, 375.

36. 389 U.S. 258, 268 n.20.

37. Hughes v. Oklahoma, 441 U.S. 322, 335-336 (1979).

38. See Larson v. Valente, 456 U.S. 228, 248 (1982); and Ward et al v. Rock Against Racism, 491 U.S. 781, 796 (1989).

39. See Central Hudson Gas & Electric Corp. v. Public Services Commission, 447 U.S. 557, 569 (1980).

40. Police Department of Chicago v. Mosely, 408 U.S. 82, 99 (1972).

41. See, e.g., Richardson v. Ramirez, 418 U.S. 24, 55 (1974); and Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980). See also supra, text (of Introduction) accompanying notes 2-3, 5 & 11, as well as those notes.

42. See supra, text (of Part II) accompanying note 9, as well as that note (9).

43. See supra, note 9 (of Introduction); and supra, note 54 (of Part II).

44. See supra, text accompanying notes 34-36; infra, text accompanying notes 57-65; supra text (of Part II) accompanying notes 200-203.

45. See the references set forth supra, in note 41.

46. See Roe v. Wade, 410 U.S. 161-62. On the rights, etc., of the conceived unborn, see e.g., Krason & Hollberg, supra 17 (of Part II) 210-212; W. Prosser, Handbook on The Laws of Torts 337 (4th ed., 1971) (when actually faced with the issue of whether the right of a child to sue for his prenatal injuries is contingent upon a showing that he was a viable fetus when he was injured, almost all of the jurisdictions have allowed recovery even though injury occurred prior to fetal viability); Prosser & Keeton, The Law of Torts sec. 55, p. 368 (5th ed., 1984); and supra, text (of Part V) accompanying note 28, as well as the references set forth in that note. See also 84 A.L.R. 3rd 411 (right of parents to sue for the wrongful death of the unborn child); and infra, note 47.

47. See Raleigh Fitkin-Paul Morgan Mem. Hospital v. Anderson (1964), 42 N.J. 421; 201 A.2d 537 (certd. denied, 377 U.S. 985) (an unborn child is entitled to the law's protection, and a pregnant woman can be compelled to undergo blood transfusions necessary to protect the life of the unborn child regardless of the woman's religious objections). See also J.A. Friedman, Taking the Camel by the Nose: The Anencephalic as a Source for Pediatric Organ Transplants, 90 Columbia L.R. 917, 942-43 (1990).

48. See Roe v. Wade, 410 U.S. 162.

49. See the cases cited in 84 A.L.R. 411, 418 n.37.

50. 410 U.S. at 163.

51. See R. Wertheimer, Understanding Blackmun's Argument: The Reasoning of Roe v. Wade, in J.L. Garfield & P. Hennessey (eds.), Abortion: Moral and Legal Perspectives 104, 120 (1984) ("[T]he mind boggles when [Justice] Blackmun tells us that the [Roe's] holding has multiple justifications, one logical and one biolog-

ical. Neither the principles of logic nor the facts of biology could individually yield a justification...").

52. See supra, text accompanying note 1.

53. See supra, text (of Part II) accompanying note 24.

54. 492 U.S. 490, 552-53 (quoting respectively, Thornburgh v. American College of Obstetricians, 476 U.S. 747, 778-79 (1986) (J. Stevens concurring) and id. (Thornburg majority opinion) at 771.

55. See supra, text accompanying note 43, as well as the references set forth in that note.

56. A. Cox, The Role of the Supreme Court in American Government 53 (1977). See also supra, text of Part II accompanying notes 5-6.

57. The Declaration of Independence says as much. See supra, text (of Part V) accompanying note 16; and Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 330 n.1 & 343 (1990) (Justice Stevens dissenting). See also supra, text (of Part II) accompanying notes 39-46.

58. 391 U.S. 145, 177. See also Mincey v. Arizona, 437 U.S. 385, 393 (1978).

59. See supra, text accompanying note 50; and supra the references in note 29.

60. 239 U.S. 33, 42. And see Michael H. v. Gerald D., 491 U.S. 110, 124 n.4 (1989), and supra, text accompanying notes 34-35.

61. 379 U.S. 559, 574 (1965). See also supra, text accompanying notes 34-35.

62. 406 U.S. 205, 215-216. See also, supra, text accompanying note 17.

63. See Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 885-886 & 888-89 (1990).

64. In medicine a viable fetus refers to a fetus which, if it is removed from its mother's womb, stands a "reasonable chance or potential" of surviving with or without the aid of neonatal services. See, e.g., Williams Obstetrics 505 (18th ed., 1989). In Roe v. Wade the Court adopted the foregoing definition of fetal viability: "the fetus becomes viable, that is, potentially able to live outside the mother's womb, albeit with artificial aid... at about..." 410 U.S. at 160 (citing Williams Obstetrics 493 (14th ed., 1971)). Given this definition of fetal viability, then the following observation of the Court in Planned Parenthood v. Danforth, 428 U.S. 52, 64 (1976) is, in pertinent part, unintelligible:

> It is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the...attending physician.

The above was affirmed in Colautti v. Franklin (1989), 439 U.S. 379, 388-89 & 396 (including note 15). The Danforth and Colautti Courts overlooked the fact that the Roe-adopted, medical definition of potential fetal viability takes into consideration that particular or actual fetal viability varies from pregnancy to pregnancy. (See Andera v. Floyd (1979), 440 U.S. 445, 445; and Colautti v. Franklin, 439 U.S. at 392). In any event, given the foregoing Danforth proposition that the physician, who performs the abortion, must be the "sole" judge of whether or not the fetus he aborted was then potentially viable, then such a physician, in the absence of his guilty plea, could not be convicted of violating a statute that makes it a criminal offence for a physician to perform a non-therapeutic abortion on a woman who he knows, or upon a reasonable and diligent investigation, would have good grounds for knowing, is pregnant with a viable fetus. If the physician-defendant has a monopoly on fetal viability evidence, then the prosecution can never prove its case, even when the fetus survives being aborted, because the prosecution will forever lack the only evidence that can be "constitutional-

ly" used to prove the element of fetal viability. Such a physician could always assert his privilege against self-incrimination. Also, even if he waived the privilege and confessed that he aborted a viable fetus, the fact remains, at his criminal trial he could assert the corpus delecti rule. This rule states that in order for a defendant's confession or admission to an element or elements of the charged offense to be considered as evidence, the prosecution must prove by a "reasonable probability" or produce evidence that permits "the reasonable inference" that some person committed the charged offense. (See, e.g., Wong Sun v. U.S. 371 U.S. 471, 489, n.15 (1963); Opper v. U.S., 348 U.S. 84, 89-93 (1954); People v. Alcala (1984), 36 C.3d 604, 624-25; and Maria Crisera, Reevaluation of the California Corpus Delicti Rule, Los Angeles Daily Journal Report 18 (26 July 91).) Since the physician-abortionist has a monopoly on fetal viability evidence, the prosecution would be unable to present any evidence that could raise a "reasonable probability" of fetal viability. It would appear, then, that in Danforth and Colautti the Court in effect overruled the following statement in Roe v. Wade: "If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." 410 U.S. at 163-64. So much for Justice Blackmun's observation in his dissenting opinion in Webster v. Reproductive Health Services (1989), 492 U.S. 490, 553-554, that the viability standard "establishes an easily applicable standard for regulating abortion". So much also for the legal principles that the "elements of a crime cannot vary depending upon the players", and that "[c]riminal law does not enforce itself,...[but] demands the assistance of...evidence".

It is generally accepted by physicians that potential fetal viability is achieved at 23-24 weeks fertilization age or 25-26 weeks gestational or LMP (LNMP) age. (See, e.g., F.P. Zuspan & Douglas-Stromme (eds.), Operative Obstetrics 179 (1988); Goldstein, supra note 2 (of Introduction) at 24-25 & 129-138; and Webster v. Reproductive Health Services (1989), 492 U.S. 490, 554 n.9 (Justice Blackmun dissenting)). Hence, it seems doubtful there would be a constitutional defect in a statute that (1) makes it criminal offence for a physician to abort a potentially viable fetus when he knows, or upon a called-for, diligent in-

vestigation, would have reason to know (a) that the fetus is potentially viable and (b) that the abortion is not necessary to preserve either the life or the health of the mother, and (2) creates a "permissible inference"fact-finder instruction (similar to the .08% or .10%-blood-alcohol, driving under the influence, permissible inference-fact-finder instruction) to the effect that a fetus, whose estimated fertilization age is 24 weeks (or 23 or 25 weeks, as the case may be) is viable. See, e.g., Francis v. Franklin, 471 U.S. 307, 314-315 (1985) (permissive inference going to an element of an offence does not violate due process of law unless "the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury"); and Ginsberg v. New York, 390 U.S. 629, 643-44 (1968) (rejected a First Amendment-Fourteenth Amendment, due process challenge to a statute prohibiting the sale of obscene materials to minors if the seller has "reason to know" that the materials are obscene).

65. Patton v. United States 281 U.S. 276, 292 (1930).

Notes to the Conclusion

1. 492 U.S. at 490, 559-560 (1989).

2. Blackmun, supra note 9 (of Part II).

3. See Robert H. Bork, The Tempting of America: The Political Seduction of the Law 115 (1989). Bork described Roe v. Wade "as the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century". Id. at 116.

4. See supra, note 33 (of Introduction). See also Glendon, supra note 31 (of Introduction).

5. 432 U.S. 438, 449 (Justice Brennan dissenting) (quoting Roe v. Norton (1975), 408 F. Supp. 660, 663 n.3).

6. 476 U.S. 747, 771.

7. See generally, W.F. Rylaarsdam, "Politics and Justice Are a Poor Mix", in The Los Angeles Times, Wednesday, May 2, 1990, pt. 2 (Metro), p. B7.

8. 487 U.S. 654, 694.

9. Chemerinsky, supra note 40 (of Introduction) at 108. See supra, note 33 (of Part I); and supra, note 20 (of Part II).

10. See supra, text (of Introduction) accompanying notes 20-24.

11. 476 U.S. 747, 779. See supra, text (of Part V) accompanying note 63.

Note to the Reader Concerning the Materials Set Forth in the Appendices (1-23)

Almost all of the abortion cases reproduced in these appendices have been heretofore unpublished, and with few exceptions (see supra, text at pp. 120-121), were almost certainly unknown to English-American law. The Roe Court unquestionably was unaware of the existence of these cases.

Appendix 1 reproduces England's 19th century, criminal abortion statutes (Statute Nos. 1-4). They are keyed, for the most part, to text (of Part II) accompanying notes 102-104, 112, 116, 119, 122, 125, and the text (of Part IV) accompanying note 178. **Appendix 1** reproduces also England's 17th century, presumptive-murder-of-a-newly-born-bastard statute (Statute No. 5). The statute is keyed, for the most part, to the text (of Part IV) accompanying note 35.

Appendix 2 contains some colonial American, criminal abortion cases. They are keyed, for the most part, to Part III.

Appendices 3-20 (with the exceptions of 6-8 & 20) contain, for the most part, English common law, criminal abortion cases. They are individually keyed, for the most part, to the text (of Part IV) accompanying notes 29, & 32-43. **Appendix 6** contains some Scottish common law, criminal abortion cases. They are keyed to note 29 (of Part IV). **Appendix 20** contains a 16th century, English defamation case based on an abortion allegation. It is keyed, for the most part, to text (of Part IV) accompanying note 42. **Appendix 7** contains, for the most part, some 13th, 14th, 15th, and 16th century commentaries on the question of whether or not the child in the womb qualifies as a victim of criminal homicide at common law. They are keyed, for the most part, to notes 29 & 32 (of Part IV).

Appendix 8 reproduces Staunford's Les Plees del Coron (1557) abortion passage. It is keyed, for the most part, to note 32 (of Part IV) and to text (of Part IV) accompanying notes 239-240.

Appendix 21 contains, for the most part, English ecclesiastical, abortion prosecutions. They are keyed, for the most part, to text (of Part IV) accompanying notes 9, 234-35, 264, & 266.

Appendix 22 contains an unreported, early 19th century (1808), abortion prosecution based on section 1 of England's original or 1803 criminal abortion statute. It is keyed, for the most part, to text (of Part II) accompanying notes 115, 118, & 145, and to the text (of Part IV) accompanying notes 182 & 188.

Appendix 23 contains, for the most part, a variety of 17th century, English cases which do not involve abortion prosecutions but do relate a deliberately performed abortion or an attempted abortion as one of the historical facts of the case. They are keyed, for the most part, to text (of Part IV) accompanying note 10.

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APPENDIX 1

Statute No. 1: 43 Geo. 3, Ch. 58, secs. 1 & 2 (1803)[1]

I. Preamble:...and whereas certain other heinous offences, committed with intent to destroy the lives of his Majesty's subjects by poison, or with intent to procure the miscarriage of women, or with intent, by burning, to destroy or injure the buildings...of his Majesty's subjects,...have been of late...frequently committed, but no adequate means have been hitherto provided for the prevention and punishment of such offences; be it therefore enacted..: if any person... from and after...July [1, 1803],...shall, either in England or Ireland...wilfully, maliciously, and unlawfully administer to, or cause to be administered to or taken by any of his Majesty's subjects any deadly poison, or other noxious and destructive substance or thing, with intent...to cause and procure the miscarriage of any woman, then being quick with child,...the person or persons so offending,...their counsellors, aiders, and abettors...shall suffer death...without benefit of clergy....

II. And whereas it may sometimes happen that poison or some other noxious and destructive substance or thing may be given, or other means used, with intent to procure miscarriage or abortion where the woman may not be quick with child at the time, or it may not be proved that she was quick with child, be it therefore further enacted, That if any person or persons, from and after...July [1, 1803],...shall wilfully and maliciously administer to, or cause to be administered to, or taken by any woman, any medicines, drug, or other substance or thing whatsoever, or shall use or employ, or cause or procure to be used or employed any instrument or other means whatsoever, with intent thereby to cause or procure the miscarriage of any woman not being, or not being proved to be, quick with child at the time of administering such things or using such means,...the person or persons so offending, their counsellors, aiders, and abettors...shall be, and are hereby declared to be, guilty of felony, and shall be liable to be fined, imprisoned, set in and upon the pillory, publickly or privately whipped, or to suffer one or more of the said punishments or to be transported beyond

the seas for any term not exceeding fourteen years, at the discretion of the court before which such offender shall be tried and convicted.

1. Reproduced from 44 The Statutes at Large 203-205 (1804).

Statute No. 2: 9 Geo. 4, c. 31, sec. 13 (1828)[1]

And be it enacted, That if any Person with Intent to procure the Miscarriage of any Woman then being quick with Child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any Poison or other noxious Thing, or shall use any Instrument or other Means whatever with the like Intent, every such Offender, and every Person counselling, aiding, or abetting such Offender, shall be guilty of Felony, and being convicted thereof, shall suffer Death as a Felon; and if any Person with Intent to procure the Miscarriage of any Woman not being or not being proved to be, then quick with Child, unlawfully and maliciously shall administer to her, or cause to be taken by her any Medicine or other Thing, or shall use any Instrument or other Means whatever with the like Intent, every such Offender, and every Person counselling, aiding, or abetting such Offender, shall be guilty of Felony, and being convicted thereof, shall be liable at the Discretion of the Court, to be transported beyond the seas for any Term not exceeding Fourteen Years nor less than Seven Years, or to be imprisoned, with or without hard Labour, in the Common Gaol or House of Correction, for any Term not exceeding Three Years, and, if a Male, to be once, twice, or thrice...whipped (if the Court shall so think fit) in addition to such Imprisonment.

Section II, but not Section I of the 1803 Offenses Against the Person Act, included within its provisions the use of an instrument. The 1828 Offenses Against the Person Act corrected this Section I oversight. Also, the 1803 abortion statute did not specify either a maximum or minimum term of imprisonment that could be imposed for a violation of its Section 2 provisions. The 1828 act specified here a minimum and a maximum of three years and seven years.

1. Reproduced from The Statutes of the United Kingdom of Great Britain and Ireland, 9 George IV, 1828 104 (London, 1828).

Statute No. 3: 7 Will. 4 & 1 Vict., c. 85 sec. 6 (1837)[1]

> And be it enacted, That whosoever, with intent to procure the Miscarriage of any Woman, shall unlawfully administer to her or cause to be taken by her any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be transported beyond the Seas for the Term of his or her natural Life, or for any Term not less than Fifteen Years, or to be imprisoned for any Term not exceeding Three Years.

The 1837 abortion act deleted from the 1828 abortion act (1) the death penalty, (2) the quick with child-not quick with child distinction, and (3) the element of pregnancy (although it may be the case here that the 1828 abortion act phrase "any woman not being or not being proved to be then quick with child" was not meant to include proof of pregnancy).[2]

1. Reproduced from The Statutes of the United Kingdom of Great Britain and Ireland, 7 Will. IV. & 1 Vict. 360 (London, 1837).

2. Regarding item 3, see Q v. Mary Goodhall (1846), 169 Eng. Rpts 205, 205; 1 Den. C.C. 187; 2 C. & K 293 (sub nomine R v. Goodchild) (see supra, text (of Part II) accompanying note 119). And see, infra Statute No. 4 (of this Appendix 1).

Statute No. 4: 24 & 25 Vict., c. 100, sec. 58 & 59 (1861)[1]

> 58: Every Woman, being with Child, who, with Intent to procure her own Miscarriage, shall unlawfully administer to herself any Poison or other noxious

Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, and whosoever, with Intent to procure the Miscarriage of any Woman, whether she be or be not with Child, shall unlawfully administer to her or cause to be taken by her any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Three Years, to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour, and with or without Solitary confinement.

59: Whosoever shall unlawfully supply or procure any Poison or other noxious Thing, or any Instrument or Thing whatsoever, knowing that the same is intended to be unlawfully used or employed with Intent to procure the Miscarriage of any Woman, whether she be or be not with Child, shall be guilty of a Misdemeanor, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for the Term of Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.

Section 58 of the 1861 act made it a felony for a "pregnant" woman to attempt to make herself miscarry.[2]

1. Reproduced from The Statutes of the United Kingdom and Ireland, 24 & 25 Victoria 438-39 (London, 1861). For subsequent amendments to this statute, see Keown, supra note 99 (of Part II) at 167 nn.1-3 & 168-170.

2. See infra, text (of Case No. 2 of Appendix 17) accompanying notes 10-18.

Statute No. 5: 21 Jac. (Jas.) 1, c. 27 (1623/24)[1]

Whereas many lewd Women that have been delivered of Bastard Children, to avoyd their shame and to escape punishment, doe secretlie bury, or conceale the Death

> of their Children, and after if the child be found dead the said Women doe alleadge that the said Children were borne dead; whereas it falleth out sometymes (although hardlie it is to be proved) that the said Child or Children were murthered by the said Women their lewd Mothers, or by their assent or procurement: For the preventing therefore of this great Mischiefe, be it enacted by the Authoritie of this present Parliament, That if any Woman...be delivered of any issue of the Body, Male or Female, which being born alive, should by the Lawes of this Realm be a bastard, and that she endeavour privatlie either by drowning or secrett burying thereof, or any other way, either by herselfe or the procuring of others, soe to conceale the Death thereof, as that it may not come to light, whether it be borne alive or not, but be concealed, in every such Case the Mother soe offending shall suffer Death as in the case of Murther except such Mother can make proffe by one Witnesse at the least that the Child (whose Death was by her soe intended to be concealed) was borne dead.

This statute could be, and was used to prosecute for murder unmarried women who killed their unborn children by aborting them.[2]

The statute almost certainly derived from a German statute enacted in 1532/33 and a French statute enacted in 1556, both of which were designed to curb infanticide and abortion.[3]

The statute did not create a statutory offense of murder. It simply made a mother's intentional concealment of the death or body of her newborn, bastard child (with the result that, practically speaking, could not be determined whether the child was born alive or dead) presumptive evidence that the child was born alive, and was deliberately or feloniously killed by the mother. A conviction here represented a conviction of common law murder.[4]

The statute evidently, substantially facilitated the successful prosecution of infanticide.[5] However, during most of its existence the statute was attacked for being so confusing, and so contrary to the presumption of innocence. It was repealed in 1802/1803 by 43 Geo.

3, c.58, sec. III. (Sections I and II of 43 Geo. 3, c.58 (1802/1803) contained England's original criminal abortion statute.) Section IV of 43 Geo. 3, c.58 made it an offense, punishable with two years imprisonment, for the mother of a newborn bastard child to conceal the birth or death or corpse of her bastard child. A Section IV charge could be brought only in the course of prosecuting the mother for the murder of her bastard child. She could be convicted only when her jury, in the course of acquitting her of the murder charge, found that she concealed the birth or death or corpse of her newborn bastard child. 9 Geo. IV, c.31, sec. XIV (1828) (substantially reenacted in 24 & 25 Vict. c.100, sec. 60 (1861)) removed the 43 Geo. 3, c.58, sec. IV requirement that the newborn child must qualify as a bastard child, and provided also that the offense could be prosecuted independently of an infanticidal prosecution involving the concealed infant.

In the context of a Geo. IV, c.31, sec. XIV (1828), concealment prosecution in R v. Berriman (per Erle J., 1854), the trial court advised the jury that a concealed child, within the meaning of the statute, should be taken as a child that had reached the stage of development (about seven months in the womb) at which the child is viable or capable of being born alive and surviving after birth.[6] However, in the context of a 24 & 25 Vict., c.100, sec. 60 (1861), concealment prosecution in R v. Colner (per Martin B., 1864), the trial court advised the jury that a fetus of about four or five months old or no longer than a man's finger qualifies as a child within the meaning of the statute.[7]

It seems highly doubtful that the word "child" (or the phrase "issue of the body"), as contained in 21 Jac. 1, c.27 (1623/24), would have been interpreted to mean a viable fetus. This is mainly because at the English common law a nonviable fetus that is born

alive is recognized as a potential victim of criminal homicide.[8] So, if a "child" within the meaning of 21 Jac. 1, c.27 is understood to refer only to a viable fetus, then the statute defeated a substantial portion of its very purpose. The statute did not create a statutory form of murder, but rather created a presumption of common law murder. The pertinent statutory words are: "the Mother soe offending shall suffer Death as in the case of Murther [at common law]." Furthermore, the 21 Jac. 1, c.27 phrase "which being born alive" (in: "issue of the body...which, being born alive,...[would]...be a bastard") appears to mean simply "if the bastard had been born alive", if only for the reason that the then definition of "bastard" included being born alive. There is no bastard child when the would-be bastard child is not born alive. But 21 Jac. 1, c. 27 obviously did not presuppose that every unborn, would-be bastard child would be born alive.

Notwithstanding the foregoing, the following argument can be reasonably advanced: Granted that a nonviable fetus that is capable of being born alive qualifies as a child within the meaning of the word "child" in 21 Jac. 1, c.27, yet, what of a nonviable fetus that has not developed to a state in which it is capable of being born alive? Surely, or so this argument goes, common sense dictates that a mother cannot be said to have murdered her newly-born, bastard child if the child was necessarily born dead. Obviously, therefore, 21 Jac. 1, c.27 does not include a child that has yet to reach that stage of development at which the child is capable of being born alive. To hold otherwise is to contradict the common law rule that only a live-born human being is recognized as a potential victim of criminal homicide.

Such an argument contains irrefutable logic. However, it presupposes as a historical fact that in 17th-century England it was a gen-

erally received opinion (which the law acknowledges as such) that a human being (i.e., an organized or formed human fetus united to its human or rational soul) was not understood to be capable of being born alive simply because it is alive in the mother's womb. Can this presupposition be demonstrated to be a historical fact? The available evidence bearing on this question is conflicting, so a definite answer cannot be given.

In Hale's The Pleas of the Crown (written probably during the 1650's, and published in 1736), Hale related the following regarding part of his personal(?) approach in presiding over 21 Jac. 1, c. 27-based prosecutions:

> If upon the view of the child it be testified by one witness by apparent probabilities, that the child was not come to its debitum partus tempus [literally: due time of birth, but here it probably refers to fetal viability (or a fetus that is approximately seven months conceptual age)], as if it have no hair or nails, or other circumstances.[9] I [and my fellow justices(?)] have always taken [this] to be proof by one witness, that the child was born dead [as distinguished from: was never alive in the womb], so as to [take away 21 Jac. 1, c.27 from the jury's consideration, and] leave ...[the case] nevertheless to the jury, as upon a common law evidence, whether she were guilty of death of it or not.[10]

It is difficult, if not impossible for the modern mind to understand how fetal nonviability (or the absence of hair and nails on a newly-born dead child) by itself, has any tendency in reason or human experience to prove that a nonviable fetus was born dead. It is also difficult for the modern mind to understand how Hale perceived a con-

nection here. Perhaps in England in Hale's day midwives reported that premature deliveries usually involve stillbirths.

It will be recalled that Dryander (d.1560) incorporated into his Anatomie Corporis Humani (1537) the Anatomia Infantis of Gabriel de Zerbi (1458-1505). Zerbi implicitly stated in his Anatomia Infantis that an unborn human being is capable of being born alive at forty days from his or her conception, which also represented the required period of time for the unborn product of human conception to develop into a fetus and, hence, to receive its human soul and become a human being.[11] It will be recalled also that William Hunter (1718-1783) stated that the human fetus in the womb is capable of being born alive as early as three months after conception, which period of time corresponded with Hunter's opinion on the period of time required for a human embryo to develop into a fetus.[12] And consider this rather remarkable observation of the French physician, Francois Mauriceau (1637-1709):

> "I attended a woman gone with child no more than two months and a half, who miscarried in my presence of a living child, that plainly moved its Legs and Arms, and even opened its Mouth for the space of half an hour....It is remarkable that this Abort, which I saw living half an hour, had strength enough to move its Arms and Legs, but had not the power to put forth a cry, though I plainly saw it open its Mouth several times."[13]

Mauriceau also reported he observed a thirty-day old human fetus that was born alive.[14]

1. Reproduced from 7 Statutes at Large 298 (Cambridge, 1763). The statute has been reproduced in several works. See, e.g., D.S.

Davies, Child-Killing in English Law, 1 Mod. L. Rev. 203, 213 (1937).

2. See infra, Case No. 1 (of Appendix 10).

3. See Articles 35 & 36 of the Constitutio Criminalis Carolina promulgated by the German Emperor, Charles II, in 1532/33. See also Hoffer and Hull, supra note 17 (of Part IV) at 191 n.26; and Julius R. Ruff, Crime, Justice and Public Order in Old Regime France 70 & 169-170 (1984) (citing Isambert, et al, (eds.)), Recueil Général des Anciennes lois Francaises Depues l'an Jusqu'a la Révolution de 1789 471-73 (Paris, Le Prieur 1821-1833)). An act similar to 21 Jac. 1, c.27 (1623/24) was enacted in Ireland in 1707 (see 44 The Statues at Large 205 (Cambridge, 1804)) and in Scotland in 1690 (see Hume, supra, note 22 (of Part IV)). It was enacted in some of the Canadian provinces in the late 18th century (see Backhouse, supra note 271 (of Part IV) at 449. It was employed in New Jersey in the 17th century. (See P. Edsall, Journal of the Courts of East New Jersey, 1683-1702 117 (1937)) (but see H.C. Reed & G.J. Miller (eds.), The Burlington Court Book: A Record of Quaker Jurisprudence in West New Jersey, 1680-1709 XLV & 166-167 (5 American Legal Recs., 1975)). Massachusetts Colony enacted 21 Jac. 1, c.27 in 1692/96. Connecticut Colony did so in 1699; Delaware in 1704, Virginia in 1710; New Hampshire in 1714; Pennsylvania in 1718; and North Carolina and South Carolina did so in the eighteenth century. See, e.g., 1 Acts and Resolves of...Massachusetts 55 (1692) & 255 (1696) (Boston, 1896); 4 J.C. Hoadly (ed.), The Public Records of the Colony of Connecticut from August, 1689, to May, 1706 285 (Hartford, 1868); The Earliest Printed Laws of Delaware 1704-1741 19 (Wilmington, 1978); the editor's footnote to the case of Pennsylvania v. Susanna McKee (1791), in A. Addison, Reports of Cases in the County Courts of the Fifth Circuit and in the High Court of Errors and Appeals of the State of Pennsylvania and Charges to Grand Juries 2 (at footnote) (1883); 2 Statutes of South Carolina 1682-1716 513 (1836); A Collection of all the Acts of Assembly, Now in Force, in the Colony of Virginia 256 (1727) (see Olasky, infra note 13 (of Part IV) at 86-87); E. Quay, Justifiable Abortion - Medical and Legal Foundations, 49 Geo. L. J. 395, 494-95 (1961); State v. Joiner, 11 N.C. (4 Hawks) 350, 352 (1826); P.C. Hoffer and N.E.H. Hull, Murdering Mothers: Infanticide in England and New England 1558-1803 45 & 59-63 (1981); and Wm. Loyd (Lloyd), The Early Courts of Pennsylvania 13-14 (1910).

4. See e.g., R v. Hood (1642) J. Kelyng, A Report of Divers Cases in Pleas of the Crown 32-33 (London, 1708); 2 Hawkins, supra

note 151 (of Part IV) at 438; 2 Hale, supra note 149 (of Part II) at 9; 4 Blackstone, supra note 153 (of Part IV) at 198; and infra, text (of Case No. 1 of Appendix 10) accompanying note 3.

5. See Hoffer and Hull, supra note 3 at 20-31; Backhouse, supra note 271 (of Part IV) at 453; and O'Donovan, supra note 271 (of Part IV) at 260-261.

6. 6 Cox C.C. 388, 390. See also State v. Joiner, 11 N.C. (4 Hawks) 350, 352-54 (1826).

7. 9 Cox C.C. 506. And see R.v. Hewitt (per Smith, J., 1866), 4 F.&F. 1101 (trial judge permitted the jury to decide what constituted a child within the meaning of 24 & 25 Vict., c.100, sec. 60 (1861)). Juries are not supposed to supply their own legal definitions, or decide questions of law.

8. See the authorities (particularly, R v. West (1848)) cited supra, in note 32 (of Part IV). And see infra, Case Nos. 8 & 35, 27, & 56 (of Appendix 4). See also the authorities cited in Skegg, supra note 32 (of Part IV) at 8 n.21. And see supra, text (of Part IV) accompanying note 181.

9. See supra, text (of Part IV) accompanying notes 174 & 80-83.

10. 2 Hale, supra note 149 (of Part IV) at 289. See also Morton, supra text (of Part IV) accompanying notes 80-82. And see 1 East, supra note 32 (of Part IV) at 228-29.

11. See supra, text (of Part IV) accompanying notes 113-115.

12. See Hunter, supra notes 83 & 126 (of Part IV).

13. Quoted in 1 James, supra note 79 (of Part IV) at sub tit. Abortus (at Mauriceau's Observation LXXIII).

14. Ibid. (at Mauriceau's Observation VII).

APPENDIX 2

Case No. 1: Province of Maryland v. William Mitchell (1651/1652)[1]

....

The Court this day took into Consideration a Peticon exhibited by Capt. William Mitchell [a Captain in the militia] who intended (as it Seems) to have preferred the Same to the Assembly had it gone on; The Peticon being as followeth vizt.:

> To the Honble the Assembly for regulateing the affairs of the Province of Maryland:

The humble Peticon of Capt. Wm. Mitchell Humbly Shewing That your Peticoner was on Saturday last comitted prisoner to the Common Goal upon a Warrant...In which your Peticoner Stands charged in general words with Murther, Atheisme, and Blasphemy, Crimes never in the least acted or within the Intention of your Peticoner. Your Peticoner therefore humbly prays he may be Speedily called to his Answer, and have his liberty restored in Case noe crime in Law be proved against him that warrants his Imprisonment upon the warrant before menconed, And that his Natural filing for which God hath pleased to afflict and humble your Peticoner, may not be pressed against your Peticoner in Cases wherein the Laws of England are Silent, And your Peticoner Shall ever pray.

[Signature of] Wm. Mitchell.

Upon reading of which Peticon the Court gave direction for a Speedy tryall whereupon his Lordships. Attorney, Mr. Hatton, brought in his Charge as followeth viz.:

May it please this Honble Court: It is fallen to my Lott upon the late alteracon in the Government[2] as Attorney to the Lord-Propriary to be prosecutor against Capt. William Mitchell now prisoner here upon Mr. Brookes Warrant, I could have wished there had been no Such occasion, The Crimes for which I am to charge him being Soe many and Soe haynous, that I have not known or heard of the like, It troubles me the rather in regard the Lord Baltemore hath been formerly Soe far deceived in him as to place him here

in the Seat of Judicature, which by his Scandalous course of life and gross heinous offences, he hath extreamly abused, Whereas he ought (especially Soe placed) to have given good example to others and to imploy that Talent and those abilities of witt and understanding (which almighty God hath indeed in a large measure bestowed on him) to his glory and the publick good, But by Common experience it is apparent, that the chiefest use he hath made thereof hath been to colour over his Villanous Courses, and to mock and deride all Religion and Civil Government, As the Court may (in part) take notice by the particulars of his Charge being as followeth Vizt.:

The Charge of the Lord Proprietary's Attorney by way of Indictment against Capt. William Mitchell in the name of the Keepers of the Liberties of England[3] by Authority of Parliamt. ffirst: That by his expressions as well as practice (as will as I conceive appear by proofe) he hath not only professed himself to be an Atheist, but hath also endeavoured to draw others to believe there is noe God, Makeing a Common practice by blasphemous expressions and otherwise to mock and deride God's Ordinances, and all Religion, thereby to open a way to all wicked listfull licentious and prophane Courses.[4] Secondly: That he hath Comitted Adultery with one Susan Warren.[5] Thirdly: That he hath Murtherously endeavoured to destroy or Murther the Child by him begotten in the Womb of the Said Susan Warren.[6] And is much Suspected (if not known) to have brought his late wife to an untimely end in her late Voyage hitherward by Sea.[7] ffourthly: That (as I conceive will appear by proofe) he hath Since his late wife's death lived in fornication with his now pretended wife Joane.[8]

And for these and other grosse Crimes and Misdemeanors (sufficiently I conceive) appearing by proofe, My humble request is that the prisoner may be brought to his Answer, and upon a Speedy tryall may receive punishment according to Justice to God's glory and discharge of the Government in that particular.

To which Charge the Said Capt. Mitchell the prisoner by his Answer pleading not Guilty, made Choice to be tryed by a Jury Whereupon these persons following were warned to be of the Grand Jury for the

tryall vizt:..., who being all particularly called by name and attending the Court, The prisoner being demanded whether he could take any personal excepcon against any of them, expressed that he could not but was well Satisfied therein. Whereupon the Jurors were Sworn and their charge given them to bring in a Just and true verdict upon every branch of the Attorneys Charge aforesaid according to evidence to the best of their Skill who after much time Spend therein brought in their Joynt verdict in the words following vizt.: [Billa] Vera [i.e., True Bill or a good indictment] to the first Soe far as one Deposition with Sundry Circumstances thereunto agreeing Shall be thought valid in Law.

To the Second, third, and fourth: Billa Vera. After the bringing of which verdict the Court discharged the Jurors and the day being far Spent and by reason of other Occasions, the Governor adjourned the Court till the day following.

....

Capt. William Mitchell this day referred himself wholly to the determinacon and Judgement of the Court for all matters charged against him upon which the Grand Jury had given in their verdict the day before not desiring that the Court Should be troubled with impannelling another Jury for the further tryall thereof.

This Court therefore takeing the matter into Serious Consideracon upon the perusal of the proofs and in pursuance of the verdict of the Grand Jury for his Several Offences of Adultery, ffornication and Murtherous intention [i.e., the attempted murder of Susan Warren's unborn child], and in respect of his lewd and Scandalous Course of life Sufficiently appearing upon the proofs doth Order that the Said Capt. Mitchell Shall forthwith pay ffive thousand pounds of Tobacco and Cask or the value thereof as a ffine to the Lord Propriary, And to enter into bond for his good behavior. And that he and his now pretended wife Joan be Seperated till they be Joyned together in Matrimony in the usual allowed Manner, And that paying the Court Charges and Other ffees and Charges of imprisonment he is to be discharged of his Imprisonment in this particular.

The abortion charge (count 3: "Murtherous intention" or attempted murder) in the Mitchell indictment evidently was based, at least in part, upon the following four depositions:

> The Deposition of Susan Warren widdow aged 21 Sworn & examined 24th Aprill [1652(?)] Saith: That when Capt. Mitchell he perceived She bred Child by him he prepared a potion of Phisick over night unknown [i.e., the deponet not knowing] that it was for herself; in the Morning [Captain Mitchell] calls Martha Webb & bids her poach an Egg and bring it to him presently, which She did Soe; he put this Phisick into that Egg and came to her [Warren] as She was in bed, and bid her take this, and She requesting to know for what, he Said if She would not take it he would thrust it down her throat, Soe being in bed could not withstand it, Soe Shutting all out of the room but himself for all that day but only Martha Webb knew and none of the house else, but they all told her afterwards, that they knew it was her that tooke the Phisick, for all Capt. Mitchell Soe dissembled that when any body came to knock, he would take a towell and put it about his neck and Soe lie down as if it had been himself that had taken Phisick, Soe Some two or three days after he told her that if She was with Child, he would warrant that he had frighted it away, Soe when She heard him Say Soe She answered him again if She had thought that She would not have took it for a world, for it was a great Sin to get it, but a greater to make it away and further Saith not at present.
>
> Susanna Warren
>
> Jurat coram Robert Brooke.[9]

\- - -

> Martha Webb aged 22 years examined & Sworn Aprill 27th 1652 Saith: That this Depont. being then in the dwelling house of Capt. Mitchell a little before his goeing for England upon a very Cold morning, and when neither Capt. Mitchell or Susan Warren were Sick he commanded this Depont. to poach him an Egg, and to bring him a box of Pills Saying that he was to take Phisick, when this Deponent opened the box She found the Smell of the [sulfur?]

Pills Soe Strong that it had almost overcome her and told him plainly that She could not take them out, thereupon he bad her goe out and Shutt the doors, when She came in again She found Susan Warren wonderfully Sick and the Capt. well, and did Several times See this Susan Warren upon the Close Stool purgeing very Strongly, but Capt. Mitchell pretended and Said that it was he that took the Phisick but that it wrought not well with him, and to make a Shew he put a Napkin or Towell about his neck and laid a Pillow upon a Stoole, and when any came in he would lye down upon the pillow as though it had been he that took the Phisick, afterwards when the heat and Spring of the year came this Susanna Warren break forth all into boyles and Blaynes her whole body being Scurfie, and the hair of her head almost all fallen off, this is all the Depont. Saith to that particular of Phisick, ffurther this Depont. maketh oath, that She heard Capt. Mitchell Say often to Susan Warren that if she then were or hereafter Should be with Child in the Countrey he would hire an Old Maid in Chichester and bring her into this Countrey along with him, which maid as he Said could help her on Such occasion and noe body Should know it ffurther this Depont. Saith not for the present

Jurat coram Robert Brooke[10]

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The Deposition of Mary the wife of Danll. Clocker being sworn and examd. the 23 June 1652 in open Court Saith: That in August 1651, the day this Depont. doth not well remember that Mrs. Susanna Warren was delivered a Child which came into the world dead, and was dead in the Mother's womb, the Said Child not having any imperfection, Likewise with hair upon it head and nails upon it fingers and toes, this Deponent doth further Say that Doctor Waldron being in the house where the Said Warren was brought to bed, Mrs. ffenwick called the Said Warren in to know his advice in the business, whome replyed that the Mother had gone out her full time, and that the Child had been dead as he did Suppose three weeks in it's Mother's womb, further this Deponent Saith that about a fort-night before her delivery She the Said Mrs. Warrines came to the house of this Deponent and Said, that her Child was dead within her, and that She did believe It was by the means of a ffright taken by Mr. ffenwick's Negroes, ffurther this

> Deponent Saith that the Said Child was free from any boyles or botches, or any disease, Saving only that a little of the Skinn was broken to the bredth of betwixt two or 3 fingers, and about 4 inches long comeing from under the Arm upon the Stomach which this Depontt. doth Suppose It being Soe long in her Womb & further Saith not[11]
>
> - - -
>
> Mary the wife of Daniel Clocker being examd. & Sworn by vertue of her former Oath taken in open Court testifieth as followeth: That She was the Mid-wife to Susan Warren and in the time of her delivery charged the Said Susan Warren to Speak the truth and to give Such an Answer as She would give an accompt of to God and man, and whether those things that She had Spoken of Concerning Capt. Mitchell that he was ffather of the Child, and had given her Phisick to destroy it were true or noe, and She answered that they were all true. This Testimony was given to me Robert Brooke in the presence of Mrs. ffox June 28 1652.[12]

The third count of the Mitchell indictment reads in part: "he hath Murtherously endeavoured to destroy or Murther the Child by him begotten in the Womb of the Said Susan Warren." "Murtherous intention" means here attempted murder. So, it can be reasonably argued that, notwithstanding the then common law rule that a stillborn aborted child is not recognized as a victim of common law homicide, Captain Mitchell escaped a Maryland murder prosecution only because the Mitchell prosecutor felt that he could not rule out that Susan Warren's stillborn child (which was free of its mother's boyles or botches) died in the womb in connection with some fright Warren received from Mr. Fenwick's slaves.[13]

How far along was Susan Warren when Captain Mitchell administered the abortion substance to her? The available evidence here is that some time during August of 1651 Susan Warren gave birth to a

full term stillborn child who had been dead in the womb for three weeks. This means Warren probably conceived some time between mid-October and mid-November of 1650. Martha Webb deposed that Mitchell administered the abortion substance to Warren just before Mitchell sailed for England and Holland. But when did Mitchell begin that journey? It is not known. However, as Martha Webb deposed that Warren did not break out in boils (which occurred some time after Mitchell administered the abortion substance) until the Spring of 1650, it seems fair to conclude that Mitchell probably administered the abortion substance to Warren some time during the month of February 1650, which would mean that Warren was some three (3) to four (4) months into her pregnancy when Mitchell administered the abortion substance to her.

Captain Mitchell dabbled also in fraud.[14]

1. Reproduced from 10 Maryland Archives 182-85 (1891).

2. This probably refers to the political struggle in Maryland between the Roman Catholics and Puritans which led to "the assumption of power by English [or Protestant] representatives ...in 1652..." See Worldmark Encyclopedia of the States 242 (1981).

3. See supra, note 2.

4. See 10 Maryland Archives, supra note 1 at 173.

5. Mitchell lived in adultery with Susan Warren from approximately the latter part of 1650 through the early part of 1651. See 10 Maryland Archives 148-49 (Clocker and Hoskins depositions) as read in conjunction with id at 174-75 (William Smith's deposition). See also id. at 80.

6. This charge of the attempted murder of Susan Warren's unborn child is discussed infra, in the commentary on Mitchell's Case.

7. This accusation, which is not laid as one of the counts in the Mitchell indictment, and which was probally inserted in order

to make Mitchell look even more despicable, is based on a series of depositions. See 10 Maryland Archives at 175-177.

8. See 10 Maryland Archives 173.

9. Ibid. at 176.

10. Ibid. at 177-78. See also id. at 149.

11. Ibid. at 171.

12. Ibid. at 177. See also id. at 148-49.

13. See infra, Case No. 3 (of this Appendix 2). But see infra, text (of Case No. 2 of this Appendix 2) accompanying note 2.

14. See 10 Maryland Archives, supra note 1 at 178-182 & 185-86.

Case No. 2: Province of Maryland v. John Lumbrozo and Elizabeth Wild (1663)[1]

John (Alias Jacob) Lumbrozo beeing Claped up in prison by Mr. James Lendsey to answer unto this Court such objections as shoold heare bee objected against him which wear the deposition of the hearafter named Persons.

The deposition of Joseph Dorrosell about forty years of Age declare that the 15th of June 1663 hee went to Mr. Adams and told him that the doctor John Lumbrozo and his maed [Elizabeth Wild] did Lee [i.e., lie] together and when I cam to the toteur hous the sayd mayde went to Richard Trew and when shi came backe againe shy fell a scolin at my [me] and told my befor the doctur and sayd that I had bin abroud and had releited that the sayd doctur and she did lee together and that shee was with Child whearupon the sayd Lumbroso called her in and told her that shee must take a strong purge to tacke away her swelling that shee had for if [i.e., and if] it woold not doe shee must tacke an other, whearupon shee did reply unto him and told him that shee woold not tacke it if shee shoold dy and shee sayd you shall tacke it afterwards within seauen days after the sayd mayd told mee that the Phisick that the doctur did giue her did kill the Child within and that the doctur had

got the sayd Child and when hee had the use of her bodie that hee woold stope her mouth with Cloath and sumtimes of his hands and shee told mee that when the Phisick did worke that the doctur did hold her backe for shee was in such payne and misery that shee thaught that shee shoold dy after that it was ouer shee tould me that the sayd Lumbroso Looked into the Chamber pot and tould her that her bodie was Cleare and hee tooke the pot and Caried it out of the ways and shee told mee that hee told her that shee shoold bee merry and tacke no notice for feare of the old man for hee was very Cuning I doe declare heare that the doctur and the sayd mayd did ly togeather except if thear was any stranger in the hows I doe declare heare that the sayd Mayd told mee that shee had tooke sum Ratsbeane whearupon I gaue her sum oyle and Cleare herself from it and Cast it out and the sayd Lumbroso was not at the hows but when hee cam home hee did giue her phisick but it had dun her no wrong for it was the last phisick shee tooke that shee told mee that hee did kill the Child

[mark or signature]: Josaphat Derosell

The deposition of Richard Trew aged 58 years or thear abouts sworne Examined before mee the 29th of June Ao 1663.

Saturday last the doctor came home shee sent Joseph to mee hows to bid mee and George harris cum downe to the doctors hows for to declare befor us how the doctor did abuse her to lay at her long time befor she did ild when hee did see that shee woold not yeald quiatly her [sic: he] tooke her in his armes and threw her upon the bed she went to Cry out hee plucked out his hankerchif of his pocket and stope her mouth and forch her whether shee will or noe when hee know that shee was with Child hee gaue her fickes to destroy it and for any thing shee know hee woold distroy her to this she declare befor mee and John Mune and George harris and the doctor himself further sayeth not

Richard Trew
his mark

Sworne befor me James Lendsey

The deposition of Anne trew aged 26 years or thereabouts sworne and examined befor mee the 29th of June 1663.

Sayeth the next day shee came for a bottell of milke shee [Elizabeth Wild] told me the last phisick the doctor gaue her came sumthing downe as bige as her hand from her bodie shee thought her backe broake asunder the doctor looking in the pot shee asked him what hee looked for hee maed her answer your bodie is Clinge I did aske her what shee did with that came from her shee could not tell what hee did with it shee told mee the shift that lay upon the bed that was in that Condition shee had on in that time and further saueth not:

Sworne befor me the day and year aboue written — Anne Trew her mark

James Lendsey

John Browne aged 26 years or thear abouts sworne and examined affore mee sath that hee heard doctor Lumbrozo mad Elisabeth wild say that the doctor lay with her and had the use of her bodie and that shee was with Child and that the doctor gaue her fisick to distroy it and told her that if won purge woold not doe an other shoold and when shee had taken the last purge hee tould her that it had done hur busines for sath hee it hath brought you swelling dound and further sath not

[mark or signature of] John Browne

Sworne befor me the day and year aboue written — James Lendsey

John Munes aged 19 years or thearabouts sworne and examined affor mee sath that hee heard Doctor Lumbroso mad Elisabeth wilds say that the doctor forst her to ly with him and that hee woold hould to bead and stope her breath and sath that hee gaue her drinke to make much of her self and tooke it upon her death that if shee did that hee had maed away with her and that the doctor told this deponant that shee told him that after that fisick as sheee tooke that thear Come a Clod of blood from her as big as his fist and further sayeth not

Sworne the day and yeare aboue written befor mee — John Muns his mark

James Lendsey

The depositions of Elisabeth Charman aged 32 years or thearabouts sworne and examined befor mee upon the 29th of June 1663.

Sayeth that I hear her sayeth that shee herd her sayth that shee had a thing com from her in the Chamber pot which the doctor her master trew it out of doure which was to woman and I mee self standing by axe her why the doctor her master did not beried which shee sed hee did not whearupon wee sed it was fitting to be beared for fear the hogges did eath it which shee make answer see thay did not further sayeth not

[mark or signature] Elisabeth Charman

an Trew doth sware the same Elisabeth Riuers doath sware the same oath aboue written as witnes

Elisa Riuers
her mark
An Trew
her mark

George harris aged 30 years or thearabouts sworne and examined befor Mr. James Lendsey June the 29th, 1663 in a Case Concerning John Lumbrozo and his saruant named Elisabeth Wiles sayeth as followeth that hee coming by the doctors hows the twentith of this Presant June Joseph was a beating at the morter and hee asked mee if I woold not pip it and so with his desir I put in and lighted my pipe and Came my ways and befor I came to the Cowpen the woman Called mee to or three times and so I came backe and asked her what shee woold haue shee told mee shee woold very faine speake with mee and so I came into the hows and shee up and told mee that the doctor tooke her to bed and had layne with her whether shee woold or no whearof hee hath braught mee to shame which I neuer did befor and withall gaue mee phisick twice and the first did not doe her buisnes but the second time that hee forced her to tacke it hee tould her that her swelling was now downe but before shee tooke that last phisick shee did not know that shee was with Child but hee woold force her to tacke it and shee asked mee whether it was not best for her to runaway for hee woold neuer com after her but I tould her that her Case was now bad enough and her runing away woold make it wors and further sayeth not:

Sworne befor mee the day and year aboue written
James Lendsey

George Harris
[his marke]

The deposition of Elisabeth Weales aged 22 years or thearabouts sworne and examined befor mee this 29th of June 1663 sayeth what I haue sayd Concerning John LumBroso it is fals for hee left mee no such things which I reported and for the Phisick I thaught it was sak whearupon I dranke a drame of it and gaue the others a dram apeece and so I desir hee may bee Cleare from the scandall and what was spoaken I did rays [raise] of my one [own] head one night I went to goodman Trews and so thear was goodie riuers and whearupon she asked mee how the blacke man did whearupon this deponant asked what blacke man wast the black man that lys by your sid euery night I went home and scoled with Joseph and axe him why did hee reported that I was with Child by the doctor and lay with him euery night whearupon I went into the Roome and then I Complayned of my stomake and about my hart whearupon this deponant desired sum thing of him and after I saw it I was not willing to tacke it whearupon hee replyed it will doe you sum good for it will Cleare the poyson from you whearupon I desire that hee my bee Cleare from the scandall that I rise upon him for what it was spoken I did Rise of mee owne head and further sayeth not:

Sworne the day and year aboue written — Elisabeth Weales [her marke]

Ja: Lendsey

The deposition of Margeret Bouls aged thirty years or thear abouts sworne and examined befor mee this 30th of June Ao 1663 sayeth Elisabeth wiles asked of this deponant margeret boules whether it wear best for her to Cleare him or no this deponant maed answer to her againe god hee knows wheather you wear best or no for I doe not know what belongs unto such things and further sayeth not:

Sworne the day and yeare aboue mentioned befor mee

James Lendsey

Whearupon the Court put it to a Jury whose name are as followeth...[names omitted]

Daniell Johnson beeing Chosen thear forman hee and the Rest of the Jury beeing sworne had the precedent oaths deliuered unto them with thees instructions from the board: Gentlemen of the Jury: You shall in the behalfe of the Right honorable Lord

> Proprietarie trew presentment make of the buisnes to you presented either against doctor Lumbroso and his wife or wheather thear bee cause of Presentment of Either of them yea or nay; who braught in thear verdit and deliuered it by thear foarman (they all unanimously Consenting) in writing as followeth:
>
> It is the verdit of the Jury and find by her owne publick Confession that shee was with Child by John Lumbroso and that hee did giue her phisick to distroy it and for thees Reason wee doe present them.

It is not entirely clear whether Elizabeth Wild was charged only with fornication. What is clear, however, is that the abortion presentment against Lumbrozo did not allege that Lumbrozo destroyed a child or human being existing or alive in the womb of his maid servant Elizabeth Wild. The deposition evidence was that Wild brought forth a "[c]lod of blood from her [womb] as big as...[a man's] fist", and that Wild had not perceived that she was with child (to which can be added: let alone "quick with child") when she took an abortion substance for the second time. In Maryland in 1662, a statute was enacted that declared that "'failing provision in the laws of the Colony, justice was to be administered according to the laws and statutes of England.'"[2] Now given that in 1663, neither England nor Maryland had a statute that made it a criminal offence to deliberately destroy or attempt to destroy the pre-human being product of human conception, then, it can be fairly stated that the Lumbrozo abortion indictment stands for the proposition that at the English common law, pre-quick with child (or pre-fetal formation, or pre-quickening, as the case may be) deliberated abortion is an indictable offense.

The outcome of the Lumbrozo abortion case is unknown. However, the editors of the Maryland Archives volume from which I have reproduced the Lumbrozo abortion case stated the following:

> At the July 1663 Charles County Court, Jacob Lumbrozo...was charged...with having brought on a criminal abortion upon...Elizebeth Wild, who, subsequent to the time the alleged abortion occurred, but before he was brought into Court, had married him. He was presented...and the case was ordered up to the Provincial Court for trial [omitting citation]. As it did not come up in the higher court [i.e., as there is no known record showing that the Lumbrozo abortion case did come up to the higher court], it probably was dropped because he [Lumbrozo] had disqualified the principal witness against by marrying her.[3]

In Delaware colony in 1699, John Wood was indicted for feloniously stealing from Sarah Prigg. Sarah Prigg subsequently appeared in court and informed the Court that "she cannot prosecute, by reason of her intermarriage since had with the said John Wood." The grand Jury then returned the following to the Court: "Wee of the grand Jury doe find ignoramus" [against John Wood; i.e., we find insufficient evidence to present him]...Whereupon the said John Wood being brought to the Barr, is discharged, payinge the fees."[4]

1. Reproduced from 53 Maryland Archives 387-91. See also id. at xxii and L-Li.

2. Quoting David Walker, The Oxford Companion to Law 1257 (1980). See also Compleat Collection of the Laws of Maryland c.36 (1727).

3. 53 Maryland Archives xxii. See also id. at Li.

4. 8 Court Records of Kent County, Delaware 1680-1705 145 (American Legal Records series, 1959).

Case No. 3: Province of Maryland v. Francis Brooks (1656)

> Elizabeth Claxton Sworne & Examined Saith, that when mr. ffrancis Brooke brought his wife to your

Deponents house he did beat her with a Cane while he brake it all to pieces because She would not give the dog the paile to lick before She fetcht water in it, and another time he had a Loyne of Veale Roasted & She was going to take a rib of the Said Veale, and he took an oaken board & broke it in two pieces on her & afterwards yor Deponents husband gave him two Sheeps heads and She Stewed them, and She had a mind to one of the heads and She going for water Said, if he had any thing She would not Eat it from him, and he riseing up with a bloody oath Said you whore do you Long and yor Depont Said mr Brooke doe not Eat it for She hath a mind to it, and he followed her forth with a pair of Tongues & did beat her with the great end, & your Depont followed him and asked him if he Long'd to be hanged, and he Said he did not Care if She did Miscarry, if She were with Child it was none of his, and She fell Sick Suddenly, and he gave her wormwood to drink, and She fell in Labour one night and your depont asked him what She aild, and he Said either the pox or the Devil he did not know So your depont did rise out of her bed and went to her and asked her what She ailed and She was in Labor and I bid him Send for women, and he pray'd Your Deponents husband to goe for the midwife, and the Midwife Came, and when the Child was born it was all bruises and the bloud black in it and further Saith not

Signum
Elizabeth Claxton

Rose Smith Sworne and Examined Saith, That yor Depont. was Sent to deliver the wife of ffrancis Brooke of a Child and when your Deponent received it into the world it was a man Child about three months old it was all bruised one Side of it, and yor Depont asked her how the Child Came So bruised and She Said he did it with a pair of Tongues, and yor Deponent hearing that they Lived discontentedly, brought the Child to the Said ffrancis Brooke, and yor Depont. told him that it Came Soe through his Misusage, and your Deponent told him he would dearly Answer it although he Scaped in this world, yet in the world to Come he Should Answer for it before a Judge that useth no partiality and he made me Answer that She fell out of the peach tree, And he asked her if She did not fall out of the Peach Tree and She Said yes, And further Saith not.

Rose Smith

Whereas ffrancis Brooke was brought before this Court upon Suspition of Murther, and being Conceived that there is Cause of Suspition of Murther, The Court doth therefore Order that the Said ffrancis Brooke Shall Stand Committed in the Sheriffes Custody untill he give Sufficient Securitie for his personall apearance at the next Provinciall Court to be held at Putuxent the 20th of march next to Answer the premisses

(At a Provinciall Court held at Putuxent the 21th of March 1656 Commissioners Present as the day before)

Order to mr Francis Brooks

Whereas by former order bearing date the 25th of September last It was ordered that ffrancis Brookes Should enter into Bond with Securitie for his 'psonall appearance at this Court, and he having given Bond of ten thousand pounds of Tobacco for his appearance and he the Said Brookes having appeared & peticon'd this Court to be dismissed, and to have in his Bond And the Court Considering that the Sd. Brookes by his appearing hath fulfilled the Said order, Hath thought fitt, and doth therefore order that the Said Brooks have in his Bond and be discharged of that order.

All that can be reasonably said here regarding the reasons why Francis Brookes was not prosecuted for the death of his wife's unborn child is that the evidence was lacking. Mrs. Brookes could not testify against her husband, and Rose Smith's testimony would be suspect since she evidently had knowingly related a false version of how the child died. She stated that Mrs. Brookes fell out of a peach tree.

1. 10 Maryland Archives 464-65 & 486 & 488. The Brookes case is also discussed in Bradley Chapin, Criminal Justice in Colonial America 1606-1660 114 (1983) (my initial source).

Case No. 4: Colony of Rhode Island and Providence Plantations v. Deborah Allen (1683)

This case is reproduced and discussed at supra, text (of Part III) accompanying notes 9-19.

Case No. 5: Evens v. Powell (Accomack-Northampton, Virginia, 1634)[1]

> wealthy Evens the wife of Thomas Evens at our court at Acchawmack the 13th of Aprill complayned that when she was with child Elizabeth Powell did beate her, in soe much that she did miscarry, and also that Thomas Powell brake open her house, and beate one Regnold Kingsman and mate of the said Thomas Evens and upon this complainte this court have ordered that the said Thomas Powell and Elizabeth his wife should enter into recogniscence to answeere the said facte and that the said wealthy [and Thomas?] Evens should enter into recogniscence to prosecute their complainte befor the governor and counsell at James Citty.

1. Reproduced from 7 (American Legal Records) County Courts Records of Accomack-northhampton, Virginia, 1632-1640 43 (Amer. Hist. Assoc., 1954). I was unable to uncover the outcome of this case.

Case No. 6: In re the Stillbirth of Agnita Hendricks' Bastard Child (New Castle on Delaware, 1679)[1]

> Itt being Represented to the Court that Agnita hendricks is brought to bed of hur bastard chyld wch came dead into the world etc. The court thought fitt to examin the p[e]rsons yt [that] were prsent att hur delivery.
>
> Mistriss Mary Blocq, Elizabeth the wyfe of John Darby, Barbara the wyfe of Peter Maesland and Carie the wyfe of hendrik Jansen whoe has acted as midwyfe apearing in court and being sworne declare that they were prsent on the fourth of this Instant month of Jannuary, wth Agnita Hendricks in hur Travell and yt before they would help hur or that shee the said

> Agnita was delivered of hur chyld, They the deponants strictly examined & demanded of hur the sd Agnita to divulge & declare unto them whoe was the father of the sd Child, upon wch the sd Agnieta did protest that Sybrant Jansen & none else was the father, and wished that shee might neuer bee delivered of hur child if any prson Else but only Sybrant Jansen has had to doe with hur sence shee had hur Laest chyld, and the deponants declare further that the said Chyld came dead into the world wth itts Leggs and armes bruised & broaken and that the boddy otherwaize was sore maimed and bruised of wch the deponants demanding the Reason Agnieta hendriks declared that Sybrant Jansen about seuen weeks before had Sorely abused beaten and bruised her the said Agnieta, sence wch shee neuer felt the chyld Live in hur boddy.

It is not known if Jansen was prosecuted for the alleged killing of Hendricks' unborn child. Hendricks was given twenty-seven lashes "for having had three Bastard Children one after another."[2]

1. Records of the Court of New Castle on Delaware 1676-1681 274-75 (Lancaster, Maryland, 1904).

2. See Ibid. at 320.

APPENDIX 3

R v. M. C. of E (1672)[1]

The jurors for the lord king, upon their oath, present that, whereas a certain A. wife of a certain R.P. of E. in the aforesaid county, yeoman, on the fourth day of May in the twenty-fourth year [1672] of the reign of the lord Charles the second by the grace of God king of England, Scotland, France and Ireland, defender of the faith etc., at E. aforesaid in the said county of G., was then and there pregnant and in the peace of God and of the said present lord king: nevertheless, a certain M.C. of E. aforesaid in the said county of G., knowing the aforesaid A. to be then and there great with child (gravida), afterwards, namely the above mentioned day and year, at E. aforesaid, assaulted [the aforesaid A.] and then and there against her will so improperly 'examined'(enormiter lustravit) the same A., and ill treated her the said A. in order to have carnal knowledge of her, that he then and there slew a certain male child which the same A., then being great, carried alive (vivum) in her womb, by reason whereof the aforesaid A. afterwards, namely the above mentioned day and year, at E. aforesaid in the aforesaid county of G., aborted the same male child, so that the aforesaid M. in manner and form aforesaid feloniously slew the aforesaid male child, against the peace of the said present lord king, etc.

Here are Professor Baker's comments on this indictment:

> "This indictment was first printed in Officium Clerici Pacis (1675), pp. 240-241, and reprinted in [the] second edition (1686), p. 240, [and in the] third edition (1726), p. 281...
>
> In the third edition the date of the offence has been updated to 10 of the present king (i.e., 1724); but the wording is otherwise the same as the earlier editions, in which the date is 4 May 24 Car. II (i.e., 1672). The county is given as G.,

which...evidently represents Gloucestershire [since the name of no other county in England begins with the letter G.].

The author, J.W., says in the preface that most of the contents are extracted from the Sessions Records (remaining with the Clerks of the Peace of several counties) which have been extant since the year 1662. The likelihood is, therefore, that this was a case in the Gloucestershire Quarter Sessions records.

I have consulted I.E. Gray and A.T. Gaydon, Gloucestershire Quarter Sessions Archives 1689-1889 (1958), from which it seems that no files or rolls survive. The only records surviving from 1672 are the Order Books (1672-), and these do not include criminal cases. There is an Indictment Book (1660-69), but the next few are missing. So there seems, alas, no prospect of finding the original case.

Perhaps more significant than any decision by the Gloucestershire justices is the fact the precedent was printed in three successive editions of the standard precedent book of indictments for use at sessions.

I am puzzled by the exact means whereby the abortion was produced; the coy language indicates some kind of unwanted sexual attentions short of intercourse. Was it thought that this could bring about an abortion? The indictment is for manslaughter, not murder, because no intention to kill the child is laid, [and perhaps also because defendant's acts did not amount to an independent felony, and were not such as ordinarily would result in death or serious injury to another].[2] Presumably, if the causation was proved, the impropriety of the activity (an assault) was enough to make this manslaughter.

> The indictment is clearly for feloniously killing the child, not simply for assaulting the mother. It would surely follow that, had there been malice in the form of an intention to kill the child, it would have been murder."[3]

1. Reproduced (as translated from the Latin by Professor Baker) from J.W. Officium Clerici Pacis 240-241 (1675).

2. See infra, text accompanying note 5 (of Case No. 2 of Appendix 18).

3. Professor Baker in a letter to Philip A. Rafferty (August 8, 1988).

APPENDIX 4

Case No. 1: R v. Wodlake (Middlesex, 1530)[1]
Indictments: Rape, and Murder of an Unborn Child

Middlesex. The jurors present that William Wodlake of the parish of St. Clement Danes in the county of Middlesex, net-maker, on the twentieth day of May in the seventeenth year [1525] of the reign of King Henry VIII, with force and arms (namely knives etc.) at the aforesaid parish of St. Clement, assaulted Katherine Alaund, then a girl of fourteen years of age, and then and there violently and against her will feloniously raped her and carnally knew her, against the peace of the lord king etc.

Middlesex. The jurors present that William Wodlake of the parish of St. Clement Danes in the county of Middlesex, net-maker, on the tenth day of November in the eighteenth year [1526] of the reign of King Henry VIII, by the instigation of the devil, knowing that a certain Katharine Alaund was pregnant with a child [cum puero esse pregnatam (sic)], with dissembling words gave the same Katharine to drink a certain drink in order to destroy the child then being in the said Katharine's body [dictum puerum in corpore dicte Katerine existentum], and desired and caused her the said Katharine to drink the selfsame drink, by reason of which drink the same Katharine was afterwards delivered of that child [puero] dead: so that the same William Wodlake feloniously killed and murdered the child [puerum] with the drink in manner and form aforesaid, against the peace of the lord king etc.

Endorsement of the Indictments[2]

TRUE BILL taken at St. John's Street in the county of Middlesex before Sir John More, knight, Robert Wroth, Robert Cheseman, John Brown, Richard Hawkes and John Palmer, keepers of the peace of the lord king and the same king's justices assigned to hear and determine various felonies, trespasses and misdeeds in the county of Middlesex, on the Thursday next after the feast of the Conception of the Blessed Virgin Mary [December 9] in the twenty-first year [1529] of the

reign of King Henry VIII, by the oath etc. of... jurors [of the grand jury] delivered before the lord king on the Saturday [July 9, 1530] next after the quindene of St. John this same term, by the hand of the aforesaid John More, one of the aforesaid justices, in order to be determined.

Mandamus for removal into the King's Bench

[Sewn to the bill, in the King's Bench file, is a writ dated 29 April 22 Hen. VIII [1530], ordering the justices of the peace for Middlesex to send before the lord king in the octave of Trinity all indictments concerning William Wodlake. The writ, tested by Chief Justice FitzJames, is endorsed by Sir John More to the effect that he has sent in all the indictments wherein William Wodelake is indicted, according to the tenor of the writ.][3]

Record in the Controlment Roll of the Clerk of the Crown[4]

Middlesex. William Wodlake (dead) of the parish of St Clement Danes in the county aforesaid, net-maker, is to be taken [and brought here] in the octave of Michaelmas [to answer] for various felonies, murders and misdemeanours of which he is indicted, [as appears] by the Baga de Secretis. Afterwards, in Hilary term 22 Hen. VIII [1531] he is to be taken [and brought here] in the quindene of Easter: at which day [the sheriff returns that] he is dead. Therefore let the process against him here totally cease.[5]

The Wodlake chronology is as follows: (1) the indictments were found true on December 9, 1529; (2) on April 29, 1530 the King's Bench issued a writ to remove the Wodlake indictments from the Middlesex Justices to the King's Bench in Westminster; (3) on July 9, 1530, the indictments were delivered to the King's Bench. The Controlment Roll remembrance indicates that Wodlake died before the end of April, 1531.

I asked Professor Baker about his following comment on the Wodlake abortion indictment: "since the defendant was also indicted for raping the mother, we can infer from the dates that the foetus was eight months old at the time of the alleged abortion."[6] Professor Baker responded to my inquiry as follows:

> I was wrong in my Selden Society volume to ...[infer] that the pregnancy was a result of the rape for which Wodlake was also indicted. Henry VIII's regnal year changed on 22 April, and so the interval between the rape and the abortion was 18 months. I did not have a full transcript at the time of writing.[7]

1. KB 9/513/m.23. Translation from the Latin supplied by Professor Baker.

2. KB 9/513/m.23d.

3. Per Professor Baker in a letter to Philip A. Rafferty (24 Apr 1984). In this same letter, Professor Baker remarked that it is unclear why the writ was issued to remove the Wodlake indictments from Middlesex to the King's Bench in Westminster. He suggested that one possible reason is that the Wodlake abortion indictment may have been technically defective for failing to state the place of the murder. However, he added: "that would not explain the removal of the rape indictment". Professor Baker also stated that the reason may have been simply routine: "many Middlesex cases were tried at bar in Westminster Hall".

4. KB 29/162/m.11d. (Trin. 22 Hen. VIII).

5. Per Professor Baker in a letter to Philip A. Rafferty (April 24, 1984):

> [This roll] is not strictly a record, but rather a remembrance made by the clerk of the Crown. This explains the note form, which is extended here to give the sense. The "Baga" is the file in which the indictment still remains (KB 9/513). The remem-

brance indicates that a capias was issued for Wodlake's arrest in Trinity term, and another was issued in Hilary term 1531, but that Wodlake died before Easter term 1531 (which began at the end of April) and before his appearance in the King's Bench.

6. The Reports of Sir John Spelman, 94 Selden Soc., Vol.2, 306 (1978).

7. Letter from Professor Baker to Philip A. Rafferty (April 24, 1984).

Case No. 2: R v. Lichefeld (Nottinghamshire, 1505)[1]
Indictment

Nottinghamshire. Heretofore, namely on the vigil of the Epiphany of [our] Lord [Jan. 5] in the nineteenth year [1504] of the reign of the present lord king, at Basford in the aforesaid county, before Richard Parker one of the said lord king's coroners in the aforesaid county upon the view of the body of Jane Wynspere of Basford aforesaid, it was presented by the oath of twelve jurors that the said Jane Wynspere of Basford in the county of Nottingham, single woman, being pregnant [puerpera: perhaps in labour], on the twelfth day of December in the year above mentioned at Basford aforesaid, being inspired by the devil [ex spiritu diabolico] drank various bad [corupta] and polluted [inmaculata][2] potions in order to kill and destroy the child in her body [infantem in corpore suo], and took them into her body, as a result of which the said Jane then and there died, and thus the same Jane in manner and form aforesaid feloniously and as a felo de se slew and poisoned herself and the child in her body [infantem in corpore suo]; and that Thomas Lichefeld of Basford in the county aforesaid, cleric, knowing that the said Jane had committed the said felony in form aforesaid, then and there feloniously harboured the said Jane....

On the Thursday after the quindene of Hilary [Jan. 30, 1505], Lichefeld comes in custody and demurs to the indictment on the ground that the principal is dead and that he cannot answer without her. The court adjudges that he is discharged sine die.[3]

In this indictment Lichefeld is charged with being an accessory after the fact to one of two felonies[4] committed by the deceased principal Jane Wynspere. But which of the two felonies is the indictment alleging here? It is logically impossible for Lichefeld to have been an accessory after the fact to Wynspere's crime of felony-suicide. Wynspere's crime of self-murder was not committed or completed until she died. At common law one cannot receive or harbor a dead person. See by way of analogy, Cooper v. The Hundred of Basingstoke (1702):

> [I]f the murder be indicted, and the indictment shows that the stroke was upon one day, and the death upon another, and it concludes, that so he murdered him upon the former day; it is ill, because no felony was committed till the death. [B]ut if it concludes that so he murdered him the day of death, it is good. 4 Co. 42. So if a mortal wound be given, and the party languish for a month, and A knowing thereof receives the murderer, or if constables arrest him, and permit him to escape, and then the person wounded dies; the receivers are not accessory [after the fact] to felony, nor are the constables felons. II Hen. 4.12.b.[5]

The only other crime mentioned in the Lichefeld indictment is Wynspere's abortion-destruction of her unborn child. However, at the English common law it was not an indictable offence to be an accessory after the fact unless the principal's offence was a capital felony. Hale stated, respectively:

> This kind of accessory after the fact is where a person knowing the felony to be committed by another receives, relieves, comforts, or assists the felon.

> This, as has been said, holds place only in felonies, and in those felonies, where by the law judgment of death regularly out to ensue...
>
> ....
>
> If A has his goods stolen by B, and C, knowing they were stolen, receives them, this simply of itself makes not an accessory, because it imports not felony, but only a trespass or misdemeanor punishable by fine and imprisonment....[6]

Hence, it may be reasonably argued that the Lichefeld indictment implicitly stands for the proposition that at the early 16th-century, English common law, it was a capital felony to deliberately destroy an unborn child. However, this argument is not certainly sound. It may be the case, for example, that the person or persons who framed the Lichefeld indictment thought that at common law a person can be an accessory after the fact to felony-suicide.

1. KB 27/974, Rex m.4 (Hilary term, 1505). Reference and translation from the Latin supplied by Professor Baker.

2. Professor Baker made the following comment upon his translation of the word immaculata: "This word really means the reverse, and I am not happy with it, but I cannot make it read anything else: there are six minims before the a. Perhaps the in- is not used as a negative here, but connotes a putting in, i.e., in the potion." Professor Baker in a letter to the author (July 6, 1985).

3. See, e.g., infra, Case No. 3 (of this Appendix 4). The case of R v. Wynspere (1504) is reproduced and discussed infra, in Case No. 1 (of Appendix 17). It is discussed also infra, in Case No. 3 (of this Appendix 4).

4. See infra, text accompanying notes 5 & 6.

5. 2 Ray. Rptr. (3rd ed., London 1775), 826, 827.

6. 1 Sir Matthew Hale, Historia Placitorum: The History of the Pleas of the Crown (London, 1736) 618 & 619-620, respectively.

(citations omitted). See also Vaughan's Case (1617), 2 Rolle Abr.75, Popham 134; and 2 Hawkins Pleas of the Crown, c.29, secs. 2-3 (1716).

Case No. 3: R v. Jane Wynspere (Nottinghamshire, 1501)

This case is reproduced infra, in Case No. 1 (of Appendix 17). Wynspere unintentionally killed herself in the course of intentionally killing her unborn child by consuming a poisonous drink. Although the Wynspere presentment or indictment did not charge Wynspere with murdering her unborn child (because at common law a dead person cannot be indicted except for self-murder), it did allege that she "feloniously as a felo de se killed and poisoned herself and the child in her body." If this felony suicide presentment proceeded on a theory of transferred intent (which would imply that an unborn child constituted a potential victim of homicide at common law), or if at this period in the common law one who unintentionally killed himself or herself could be convicted of felony suicide only in the commission or attempted commission of a (life-endangering?) felony,[1] then this case, for either or both of these reasons, implicitly can be said to stand for the proposition that it is felonious homicide at common law to deliberately destroy an unborn child. However, as long as these two "ifs" remain as "ifs", it cannot be certainly so stated. This remains true even when Wynspere is read in conjunction with its companion case, R v. Lichefeld (1505).[2] Also, it simply cannot be ruled out that the Wynspere presentment proceeded on a theory that Wynspere's act of knowingly ingesting a life-endangerous substance for a malicious or evil or criminal purpose (which act would not have constituted the common law misdemeanor offence of attempted self-murder, since this required a "specific intent" to kill oneself) constituted implied malice.[3]

1. See infra, text accompanying note 5 (of Case No. 2 of Appendix 18) and Schneebeck, supra note 29 (of Part IV) at 267-273.

2. See my commentary accompanying Lichefeld, reproduced supra, Case No. 2 (of this Appendix 4).

3. See infra, text accompanying notes 4 & 5 (of Case No. 2 of Appendix 18).

Case No. 4: R v. Mondson (Lincolnshire Gaol Delivery, 1361-1362)[1]

> Lincolnshire. The jurors...present that William... feloniously stole...from Joan de Scotter twelve silver spoons...They [also] present that John Mondson of Alkborough in the twenty-sixth year [1352] of the reign of the present king [Edward III], at 'Gerlethorp' Marsh feloniously raped a certain Elizabeth de Alkborough of 'Gerlethorp' and lay with her and committed such violence against her that the quick child (infans vivus) in her womb died; and she herself within half a year died on account of the aforesaid violence. Therefore the sheriff was commanded to take them etc. And now, before the said justices here, come the aforesaid William and John, led by the keeper of the gaol; and, being severally asked by the justices how they would acquit themselves of the aforesaid felonies, they put themselves upon the country on this for good and ill. The jurors, being chosen, tried and sworn for this purpose, say upon their oath that the aforesaid William and John are in no way guilty of the aforesaid felonies, and never ran away for the aforesaid causes. Therefore let them go quit.

1. JUST 1/527, m. 11d. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 240-41 (including note 57).

Case No. 5: R v. Skotard (Eyre of Derbyshire, 1330)[1]

> Item, in the 30th year [1301] of the same king grandfather [Edward I], a certain Alan Skotard of Chesterfield beat Eudusa his wife with a stick, whereby she gave birth to a certain dead male child, and the self-same Eudusa afterwards thereof died confessed. And he was arrested and delivered to Nottingham gaol, and from that gaol he was delivered and acquitted of that death. And afterwards he was slain on Whittington Moor by unknown thieves.[2]

1. JUST 1/169, m.25. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 239 n. 54.

2. Compare Skotard with infra, Case Nos. 16, 20, 22, 26, 28 & 37 (of this Appendix 4) and infra, Case Nos. 2&3 (of Appendix 5).

Case No. 6: R v. Hansard (Eyre of London, 1329)[1]

> Robert Hansard was attached to answer the lord king as to why he, together with other wrongdoers who were bound to him by an oath [vinculo sacri confederati] in the...year of the reign of the present king after his coronation, with force and arms and against the peace etc., came to the house of Henry le Pulter in London and beat Agnes his wife, who was then pregnant, so that she aborted a dead child [mortuum fecit abortum] and by threats of death and by other oppressive means took from the aforesaid Henry ten shillings. He comes and says that he is not guilty thereof, and of this puts himself upon the country etc. The jurors say upon their oath that the aforesaid Robert by threats and oppressive means took ten shillings from the aforesaid Henry as it above charged against him. Therefore let the aforesaid Robert be committed to the gaol etc.

Evidently, the jurors impliedly acquitted Hansard of the alleged homicide.

1. JUST 1/548, m. 4. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 238 (including note 50).

Case No. 7: R v. Richard de Bourton, also known as The Twins-Slayer's Case (1327-1328)

Uncorrected, Incomplete Year Book Report of R v. Richard de Bourton[1]

> A writ issued to the sheriff of Gloucestershire to apprehend one D. who, according to the testimony of

Sir G[eoffrey] Scrop[e] is supposed to have beaten a woman in an advanced stage of pregnancy who was carrying twins, whereupon directly afterwards one twin died, and she was delivered of the other, who was baptized John by name, and two days afterwards, through the injury he had sustained, the child died: and the indictment was returned before Sir G. Scrop[e], and D. came, and pled Not guilty, and for the reason that the Justices were unwilling to adjudge this thing as felony [almost certainly meaning: it appeared to the Justices from a relation or examination of the facts or circumstances of the homicides that they were not committed "feloniously" or with "felony or malice aforethought" (and therefore the defendant would almost certainly be pardoned); and almost certainly not meaning: that the factual allegations in the indictment do not amount to capital felonies or that the alleged victims were not persons under the common law of felonious homicide],[2] the accused was released [by the sheriff on the recommendation of the Bourton justices?][3] to mainpernors [a form of pre-trial release or bail], and then the argument was adjourned sine die [i.e., the case remained unresolved]. [T]hus the writ issued, as before stated, and Sir G. Scrop[e] rehearsed the entire case, and how he [D.] came and pled.

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

Corrected, Incomplete Year Book Report of R v. Richard de Bourton[4]

A writ issued to the sheriff of Gloucestershire to take one D., who, by the testimony of Sir Geoffrey Scrop, is supposed to have beaten a woman great with two children, so that immediately afterwards one of the children died, and she was delivered of the other, which was baptised by the name of Joan,[5] but died two days later from the injury which the child had; and the indictment was returned before Sir

> Geoffrey Scrop; and D. came and pleaded Not guilty; and because the justices were not minded to treat[6] this thing as felony, the indictee was released on mainprise and then the matter remained without day, and so the writ was issued as above, and it said that [by testimony of][7] Sir Geoffrey Scrop [etc., and][8] recited the whole case [as above],[9] and how he came and pleaded etc., [and that the sheriff should have caused his body to come etc.][10] And the sheriff returned the writ to the bailiffs of the franchise of such and such a place, who said that the person in question had been taken by the mayor of Bristol, but they were wholly unaware of the reason for the taking etc. [Therefore, a writ issued to the mayor of Bristol to cause the body to come, together with the cause etc.][11]

The year book report of Bourton's Case discloses in one form or another the following. Bourton was indicted on two counts of felonious homicide: the felonious destruction of an unborn child and the felonious destruction of a live born child, who died almost immediately after birth from prenatal injuries. Bourton was arraigned on, and pleaded not guilty to the two counts of felonious homicide. The matter was set for trial, but Bourton failed to show, so the Bourton court issued a writ for his arrest. Bourton, at some time after his arraignment, successfully applied for release on mainprise.

The year book report of Bourton's Case represents the form in which this case was known to such common law commentators as Staunford, Coke, Hale, Blackstone, and Hawkins. It represents also the form in which it is known to all modern common law abortion and homicide commentators. All of these persons apparently have assumed or formed the opinion that this case, as it is set forth in the year book or in manuscripts, stands for essentially the following: Since the Bourton justices expressly held that the facts as alleged in the Bourton indictment do not constitute felonies at common law, and

since at common law all unlawful homicides constituted felonies, it follows that an unborn child (including one that is born alive and then dies in connection with being aborted or injured while in the mother's womb) is not recognized as a potential victim of common law criminal homicide. To put this a slightly different way, it has been believed or understood universally that the Bourton year book report clause, "and for the reason that the Justices were unwilling [not minded], to adjudge [treat] this thing as felony, the accused was released to mainpernors", represents a determination by the Bourton justices that the destruction of an unborn child (including one that is aborted or born alive and subsequently dies as a proximate result of intrauterine injuries or an abortogenic act inflicted by another person) is not governed by the common law rules on unlawful or criminal homicide, and is not a capital felony at common law.

However, as will be demonstrated shortly, this universal understanding represents a universal misunderstanding. When correctly interpreted, the year book report (or manuscript forms) of Bourton's Case relate or affirm that the case stands for the proposition that both of the killings alleged in the Bourton indictment were indeed governed by the then existing common law rules on unlawful or criminal homicide. It will be demonstrated that the Bourton phrase, "and for the reason that the Justices were unwilling [not minded], to adjudge [treat] this thing as felony," almost certainly means in essence the following: and because the justices reasonably doubted that the alleged, unlawful homicides were committed "feloniously" or were committed with "felony or malice aforethought", they recommended to the sheriff that Bourton be released on mainprise. More specifically, it will be explained that the Bourton justices were deciding and relating here substantially the following: Since there are grounds to believe or conclude that the alleged killings were not

committed "feloniously" or with "felony or malice aforethought", then, and in accordance with our customs and laws on bail in homicide cases, Bourton can be bailed (released to mainpernors) pending the outcome of his trial on the two charges of felonious homicide. It would be as if today in a hypothetical murder case the trial court related the following: "Murder is ordinarily a no-bail offense. However, our bail laws, which in this respect are unique, provide that in a murder case a defendant may be granted bail pending his or her trial on the charge of murder if the trial court in a bail hearing makes a non-final or preliminary finding that the evidentiary facts will disclose that defendant is probably guilty of no more than one of our forms of unlawful manslaughter."

Translation of the Plea Roll Record for Mich. (1327)[12]

> Gloucestershire. The lord king has sent his writ to the sheriff of Gloucestershire in these words: Edward by the grace of God king of England, lord of Ireland and duke of Acquitaine, to the sheriff of Gloucestershire, greeting! Because we have learned by the certificate of our beloved and faithful Geoffrey le Scrop, our chief justice, that Richard de Bourton has been indicted for that he entered the house of William Carles, tailor, at Bristol, and assaulted Alice, wife of the same William, being there greatly pregnant with two children (grossam doubus pueris pregnantem), and with his hands beat and ill treated her, and violently knocked her to the ground, and with his feet so trampled upon the ground [sic] that he feloniously killed one of the aforesaid children in the belly of the same Alice its mother, and broke the head and arm of the other of the same children so that it was forthwith born and baptised by the name of Joan, and immediately after receiving her baptism died from the injury (de malo) aforesaid; and that the foregoing matters still remain undetermined before ourself; and that this Richard had a day before us at a certain day now past for hearing the jury of the country on which, for good and ill, he put himself concerning the felony aforesaid, by mainprise of

John le Taverner of Bristol and others named in the said certificate, who mainprised to have him before us at the said term; and on behalf of the selfsame Richard we are given to understand that by reason of the foregoing he has been taken, since that mainprise, and detained in our prison of Bristol, on account of which he could not come before us on the aforesaid day to stand to right upon the foregoing according to the law and custom of our realm: We, willing what is just to be done upon the foregoing, command you (as we commanded before) that if the same Richard is detained in the aforesaid prison by reason of the foregoing and not otherwise, and if he finds you sufficient mainpernors who mainprise to have him before us in a fortnight from Michaelmas day wheresoever we should then be in England, to do and receive what our court should decide in the foregoing, then cause the selfsame Richard to be meanwhile delivered from prison by the mainprise aforesaid. And have you there the names of those mainpernors, and this writ. And if the same Richard is indicted for any other felonies or trespasses in your county, then without delay send us distinctly and openly under your seal the tenor of the aforesaid indictment at the aforesaid day, that we may do further therein what by the law and custom aforesaid should be done, or else signify unto us the reason why you will not or cannot carry out our command heretofore directed unto you. Witness my self at Northallerton, the 14th day of July in the first year of our reign [1327].

By virtue of which writ, the sheriff (namely, Thomas de Rodbergh) returns that he commanded Everard Fraunceys and Robert Grene, bailiffs of the liberty of the vill of Bristol, who answered him that Richard de Bourton, lately indicted for the death of Joan, daughter of William Carles, tailor, at Bristol, as is contained in the writ, has not been taken by them the said bailiffs nor is for that reason detained in prison, but that he has been taken and detained by Roger Rurtele the mayor of the aforesaid vill for certain reasons which are unknown to them the said bailiffs etc.

And, after inspection of the aforesaid writ and return etc., the mayor and bailiffs of the vill of Bristol are commanded that if the same Richard finds sufficient mainpernors to be before the king in a

fortnight from St. Hilary wheresoever etc. to hear the aforesaid jury and to do further and receive what the king's court should decide for him, then they should cause the selfsame Richard to be meanwhile delivered from the aforesaid prison by the above-mentioned mainprise. And if he is indicted for any other felonies or trespasses before them in the vill aforesaid, then they should distinctly and openly under their seals send that indictment (if any there be) or else the cause for which he was taken, to the king at the day aforesaid upon the incumbent peril, so that the lord king further etc. what is to be done etc.

At which day the mayor and bailiffs of the vill of Bristol return that the aforesaid Richard de Bourton did not or would not find sufficient mainpernors for being before the lord king at this day, namely in the quindene of St. Hilary etc., and to do and receive what is commanded in the writ, as a result of which they did nothing further in executing the writ etc. And because the same mayor and bailiffs have not returned here before the king the names of themselves according to the form of the statute etc., and also have not answered etc. for what reason the aforesaid Richard de Bourton has been taken, as in the lord king's writ directed to them therein was commanded, nor whether or not the aforesaid Richard is indicted for any other felonies or trespasses before them in the vill aforesaid, the same mayor and bailiffs (namely, John de Romeseie, mayor, and Hugh de Langebrigge and Stephan Lespicer, bailiffs etc.) are in mercy. And they are assessed by the justices at 40s. And the sheriff is commanded that he should not omit by reason of the liberty of the aforesaid vill to enter the same etc., and if the same Richard should find him sufficient mainpernors to mainprise to have him before the king in a fortnight from Easter day wheresoever etc. to hear the jury aforesaid etc. and further to do etc., then he should cause the selfsame Richard to be meanwhile delivered from the aforesaid prison by the mainprise aforesaid etc. The sheriff is also commanded that he should not omit on account of the liberty to cause the aforesaid mayor and bailiffs to come before the king at the said term to answer the king for the return etc. Also, the mayor and bailiffs are commanded that if the aforesaid Richard is indicted for any felonies and trespasses

before them in the aforesaid vill, then they should distinctly and openly under their seals send that indictment (if any there be) or else the cause for which he was taken, to the king at the day aforesaid etc. so that further etc.

Translation of the record for Easter term, 1328[13]

Gloucestershire. The jury at the suit of the lord king to make recognition etc. whether Richard de Bourton of Bristol is guilty of the death of Joan, daughter of William Carles, tailor of Bristol, feloniously slain in the suburbs of Bristol, whereof he has been indicted (as appears to the king by a certain indictment lately made thereof before the coroners of the vill of Bristol, and which the king caused to come before him [in connection with Bourton's petition for a pardon?; insertion mine]) is put in respite until the octaves of St. John the Baptist wheresoever etc., for want of jurors, because none [came] etc. Therefore, let the sheriff have the bodies of all the jurors before the king at the said term, etc. And let the aforesaid Richard meanwhile be released by the mainprise which he heretofore found, from day to day until etc. And the sheriff is commanded that except for them etc. he should put in as many and such etc. and have them before the king at the said term etc.

Translation of the record of Octave of St. John, 1328[14]

Glouscestershire. The jury at the suit of the lord king to make recognition whether or not Richard de Bourton of Bristol is guilty of the death of Joan, daughter of William Cares, tailor of Bristol, feloniously slain in the suburbs of Bristol, whereof he is indicted - as appears to the king by a certain indictment lately made thereof before the coroners of the vill of Bristol, and which the king has caused to come before [himself] etc. - is put in respite until one month from Michaelmas day, wheresoever etc., for want of jurors, because none [came] etc. Therefore let the sheriff have the bodies of all the jurors before the king at the said date etc. And let the aforesaid Richard meanwhile be released by the mainprise which he previously found, from day to day etc.

> Afterwards, the same term, the aforesaid Richard came and proffered a charter of the present lord king for pardon of the aforesaid felony, which is enrolled in Hilary term in the first year of the reign of the present king. Therefore, he [is to go] thereof without day etc [i.e., the indictment against Bourton is dismissed, and the defendant is discharged].

Here follows some comments by Professor Baker on Bourton's Case:

> [I]t appears from the patent roll (Cal. Patent Rolls 1327-30, p.113: Pat. 1 Edw. III, pt. 2, m. 17) that Bourton was included in the general pardon of 29 May 1327, but with the special proviso that, unlike the other persons pardoned with him, he was to be excused from serving against the Scots. The others were evidently ordinary felons conscripted into the army.
>
> The pardon is not to be found in the roll for Hil. 1 Edw.III, which is defective. The following fragmentary entry alone remains:

"...verba. Edwardus dei gracia rex Anglie dominus...
...is justic' ad placita coram nobis tenenda assign...
...Glouc' de Richardo de Burton et Lucia...
...nuper rex Anglie pater noster per breve suum...
...nto predicto ulterius inde quod justum...
--M..."[15]

> This looks more like a writ for removing the indictment than a preliminary to entering a pardon, though perhaps the pardon was tacked on. (The lower two-thirds or so of the roll is missing).[16]
>
> \- - -
>
> Richard de Bourton was indicted before the coroners of Bristol (1) for feloniously killing a child which died in the womb, [and] (2) for causing the death of the other (christened Joan). We do not...have the indictment, though as summarised...[in the year book report and in the plea roll record for Mich., 1327] it does seem that the words of felony applied to both children. In [some of] the later [plea roll]

entries, the offence is described only as the killing of Joan, but that may have been clerical shorthand.

The indictment was removed into the King's Bench some time in the reign of Edward II. The indictment files do not survive. I discovered that the King's Bench held two gaol deliveries in Gloucestershire in the 1320s, but the indictment is not recorded there (KB 27/ 247, Rex m. KB 27/255, Rex m.24).

Bourton pleaded not guilty, and was released on mainprise to appear at some time before Michaelmas term 1327, but before his appearance he was arrested by the mayor and bailiffs of Bristol for some undisclosed cause. Apparently [Bourton was released on mainprise] because, according to the year book, the judges were not minded to treat it as felony. It seems to me that this was not a final determination of that question - indeed the record says that the issue of felony was still pending in 1328 - but related only to the bail application.[17]

Scrop C.J. reopened the case in the time of Edward III, and the new king sent a writ on 14 July 1327 to the sheriff of Gloucestershire to take mainprise from Bourton to appear in the quindene of Michaelmas (October next). At that day the sheriff returned that the bailiffs of Bristol informed him that B. had been arrested by the mayor. So the King's Bench sent a writ to the mayor, to take mainprise &c. to appear in the quindene of Hilary [1328]. At that day the mayor returned that B. would not find mainprise and so they had done nothing. He was amerced 40s. for not returning the cause of B.'s detention in Bristol etc., and the sheriff was now ordered to enter the liberty and take the mainprise himself, for an appearance in the quindene of Easter. The next plea roll shows that in Easter term (April 1328) the jury was respited till the octave of St. John (July)

because no jurors showed up, the defendant being released on the same mainprise....[18]

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I have searched for [the Bourton indictment]...without success in the King's Bench rolls for Michaelmas term 1326 (KB 27/266), Trinity term 1326 (KB 27/265), Easter term 1326 (KB 27/264), Hilary term 1326 (KB 27/263),...Michaelmas term 1325 (KB 27/262), [and Easter term 1324 (KB 27/256). There is no obvious stopping point, since we do not know the date of the offence]. I am not sure how much further it is worth going, though it would indeed be helpful to find the indictment.

- - -

As I now see the case, the record shows that Bourton was indicted for feloniously killing a child which died in the womb and another (Joan) which died after birth and baptism; that he pleaded not guilty, but was never tried; and that in Trinity term 1328 he was discharged on the strength of a pardon granted a year earlier. There is therefore nothing of record to show whether the court considered the facts alleged to amount to felony or not, except insofar as the case was continued through several terms on the basis that it was felony....It is therefore the year book report which remains crucial, and this appears to say (in the middle) that Bourton was granted bail because the judges were not minded to treat it as felony. The status and meaning of this pronouncement still seem to me less than clear. For one thing, it seems contrary to the [plea roll] record, which shows that the case was continued on the basis that a jury had been summoned to try whether Bourton was guilty of felonious killing...That issue arose from Bourton's plea of not guilty, which the court had recorded. [T]here is therefore no question of the indictment having been quashed on the ground that it did not disclose a felony. Secondly, although it is probable that bail was not thought to be grantable for [a charge of] murder [or felonious

> homicide] in medieval times (YB 25 Edw.III, fo.85; Coke, Treatise on Bail & Mainprise; Staunford P.C. 72a), it seems to have been allowable for felony. It could hardly be argued that the release of Bourton on bail shows that if the facts were true he would not have been guilty of felony, because that again would be contrary to the [plea roll] record. I therefore do not really understand the year book in this respect, and suspect it may be a defective report.[19]

I do not suspect that the following year book entry is defective: "and for the reason that the [Bourton] Justices were unwilling [not minded] to adjudge [treat] this thing as felony, the accused was released to mainpernors."[20] I think that it probably represents a correct entry. More to the point, it can be demonstrated that this Bourton year book entry is not at all in conflict with the following three Bourton plea roll entries: (1) "the foregoing matters [i.e., the alleged felonious homicides] still remain undetermined before ourself"; "and...[Bourton] had...[an assigned] day before us...for hearing the jury of the country...on the felony aforesaid [but he failed to appear]";[21] (2) "The jury...to make recognition...whether ...Bourton...is guilty of the death of Joan..., feloniously slain..., whereof he has been indicted";[22] and (3) "Richard [Bourton] came and proffered a...pardon of the aforesaid felony".[23] To put this another way, it can be demonstrated that the foregoing year book entry really means in essence simply the following: because the Bourton justices were of the opinion that there is reason to believe that the two alleged felonious homicides were not in fact committed "feloniously" or with "felony or malice aforethought", they decided that Bourton could be recommended to the sheriff for consideration of release on mainprise pending his jury trial, or perhaps the outcome of his petition for a pardon.

To maintain that the Bourton justices, in using in effect the words "[no] felony" (in "unwilling [not minded] to adjudge [treat] this thing as felony") meant "nonfelonious" or "without felony or malice aforethought" is not to maintain also that this was a highly unusual employment of the word "felony". It will be seen, for example, that in the unborn child homicide case of R v. Cheney and Clerk (Eyre of Hertfordshire, 1278), Cheney was acquitted because the jury found that Cheney did not kill "by felony aforethought".[24] Chapter 9 of the Statute of Gloucester (1278) distinguished homicides in terms of homicide by self-defense, misadventure, and by felony.[25] Hurnard stated that the word felony was used so in deciding whether defendants, who were indicted for felonious homicide, should be granted bail pursuant to bail applications brought through writs for special inquisitions.[26] Bracton, in the course of describing unlawful homicide, stated: it is committed "in premeditated assault and felony."[27] Pollack and Maitland observed: "In the thirteenth century the chancery is beginning to contrast a homicide by misadventure, which deserves a pardon, with homicide which has been committed in felonia et per malitiam praecogitatam."[28]

What the Bourton justices said or did relative to the year book entry phrase, "and because the justices were not minded to treat this thing as felony", was evidently said or done by those justices in the context of Bourton's application for bail.[29] The legal procedure or machinery employed by Bourton in his bail application is not certainly known, but it might have involved a petition for a writ of special inquisition. Thomas Green observed: "Because of the infrequency of the eyres..., homicide defendants frequently obtained orders for special inquisitions into the circumstances of the alleged slaying. Upon a finding of excusable [or nonfelonious] homicide, the defendant might be either pardoned or bailed until the next eyre." The issue

in these special inquisitions for bail or pardon was whether or not the homicide was committed feloniously.[30] In any event, no matter what legal procedure or machinery Bourton actually employed in his bail application, the issue would have remained the same: were the alleged killings committed feloniously or with malice or felony aforethought, or rather through misadventure or in self-defense.

The then existing English laws and legal customs concerning bail authorized bail in nearly all felonies or capital offences. The major exceptions were "felonious house-burning", "counterfeiting the King's seal", making counterfeit money", "Treason touching the King", and unlawful homicide - except when preliminarily judged to be based on "light suspicion" or as "nonfelonious" or through misadventure (i.e., excusable, accidental, non-malicious, in self-defence, or not done in the course of committing a serious or dangerous felony).[31] Now the foregoing Bourton year book entry clearly implies that the Bourton justices would "not" have allowed Bourton to be bailed if they had found "felony", which they did not find. So, if the absence of "felony" means here the absence of a capital offence or the absence of a form of common law criminal homicide, then the Bourton justices betrayed a fundamental misunderstanding of then existing English laws and customs on bail in felony cases. The misunderstanding would be the notion that such laws and customs forbid bail in felony cases.

Furthermore, if the "absence of felony" means here the absence of a capital offence or the absence of a form of common law criminal homicide, then the Bourton justices also betrayed a misunderstanding of the then existing common law on criminal homicide. The cases in this Appendix 4 clearly show that there is no question that for well over a hundred years before, and for at least some thirty years (if not for more than two hundred and twenty-five years) after Bourton's

Case (1327/28), fetal victims were recognized by the English judiciary as potential victims of common law criminal homicide.

So, a person, who would continue to maintain that Bourton's Case stands for the proposition that the fetal victims described in the Bourton indictment are not potential victims of common law criminal homicide, must implicitly adopt each of the following three premises: (1) The three foregoing Bourton "felony" plea roll entries represent defective entries; (2) The Bourton justices did not understand the then existing common law on bail in felony cases; (3) The Bourton justices did not understand (or what is far more cupable: they simply, unlawfully refused to apply) the then existing common law on criminal homicide.[32] (Judges are, of course, presumed to know and to follow the law.) What is more, such a person would also have to invent a 14th-century, common law legal procedure by which a defendant at a post-arraignment, pre-trial hearing could bring a facial challenge to a felony indictment. This is so, because so far as is known, no such procedural tool existed at the 14th-century common law.[33] It simply cannot be overlooked that Bourton did not demurrer to the felony indictment. He pled not guilty to it.

Bourton's Case, then, when correctly interpreted, actually supports the proposition that both of the fetal victims described in the Bourton indictment are potential victims of common law criminal homicide. Bourton's Case, since at least the time of Staunford's (1509-1558) Pleas of Crown (1557), has been recognized as the leading case in support of the proposition that at common law a child that is destroyed in the mother's womb is not a potential victim of criminal homicide.[34] Hence, but for the fact that Bourton was so fundamentally misinterpreted, there is every reason to believe that at the English common law such a child would have been continuously recognized as a potential victim of criminal homicide.[35]

1. Y.B. Mich. 1 Edw. 3., f. 23 pl. 18 (1327) (bracketed insertions at text accompanying notes 2 & 3 mine).

2. See infra, text accompanying notes 20-34.

3. See W.A. Morris, The Medieval English Sheriff 232-233 (1927); and 97 Selden Society (vol. 1) 181 (R v. Richard Abbot of Pisford (1329)) & 218 (including note 1) (1981/83). In R v. Pisford the defendant-prisoner was indicted for felonious homicide. One justice was of the opinion that the deceased was the cause of his own death. Another justice, Scrope, C.J., felt the case was one of self-defense. The report of the case contains the following entry:

> [Scrope] told the prisoner to have the record sent to Chancery, for in such a case the Chancellor could grant a charter of pardon without consulting the king. Later a friend of the prisoner's appeared and asked that he might be released by mainprise. Scrope, C.J.: "We cannot do that. But ask the sheriff to do it." He did so, and obtained his release.

4. Notes and corrected translation from the French supplied by Professor Baker. Professor Baker in a letter to Philip A. Rafferty (December 12, 1985) remarked:

> I was greatly puzzled by the appearance of Herle C.J. (of the Common Pleas) in this text, and by some of the wording, and so I compared the printed text with four MSS. These all agree with each other and make better sense, especially in omitting the name of Herle (which must have resulted from some misreading). [This corrected]... translation is from the MS. text, indicating the chief variations from the printed editions: Lincoln's Inn MS. Hale 72, at fo. 86v; Lincoln's Inn MS. Hale 116, at fo. 3; Lincoln's Inn MS. Hale 137(2), at fo. 11; Bodleian Library Oxford MS. Bodl. 363, at fo. 9v.

5. John in print, and some MSS. The record shows Joan to be correct.

6. d'agarder (i.e., to award) in MSS. adjudge only in print.

7. Ommitted in print.

8. Ommitted in print.

9. Ommitted in print.

10. Garbled in print, with mention of Herle C.J.

11. Omitted in print.

12. KB 27/270, Rex m.9 (Mich. term, 1327). Reference and translation from the Latin supplied by Professor Baker.

13. KB 27/242, Rex m.9 (Easter term, 1328). Reference and translation from the Latin supplied by Professor Baker.

14. KB 27/273, Rex m.12d (Octave of St. John, 2 Edw. III). Reference and translation from the Latin supplied by Prof. Baker.

15. Citing KB 27/267, m.4a (or perhaps 4d.).

16. Professor Baker in a letter to P.A. Rafferty (Dec. 12, 1985).

17. It certainly was not a final determination. See Hurnard, supra note 29 (of Part IV) at 110.

18. Professor Baker in a letter to Philip Rafferty (06 Nov. 1985).

19. Professor Baker in letters to P.A. Rafferty (Dec. 12, 1985, and Dec. 12, 1986). See infra, text accompanying note 31, (and that note itself). There was a chance that the Bourton indictment could be in surviving Chancery files. (Part of the procedure for applying for a pardon involved sending the court record into Chancery.) See R v. Richard Abbot of Pisford (1329), supra note 3; Hurnard, supra note 29 (of Part IV) at 42, 46-47 & 353-56; Green (Verdict According Conscience), supra note 29 (of Part IV) at 72; and Green, infra note 30 at 426 (n.52). On my behalf, Ella Bubb kindly searched the Chancery files, and certain other files, for the Bourton indictment, petition for pardon, and possible writ for special inquisition. She was unable to locate any of those items (Ella Bubb in a letter to Philip A. Rafferty (Nov. 15, 1991)).

20. See supra, text accompanying note 1-3.

21. See supra, text accompanying note 12.

22. See supra, text accompanying notes 13 & 14.

23. See supra, text accompanying note 14. See also supra, text accompanying note 12 ("and if he is indicted for any other felonies...") (underscoring mine).

24. See infra, Case No. 42 (of this Appendix 4). For similar such cases, see, e.g., R v. Luvet (1329), 97 Selden Society (vol. 1) 181-82 (1981/83); and R v. Bodekesham (1260), 58 Selden Society cxiii (1939).

25. See 1 Statutes of the Realm, pt. 1, p. 44 at 49 (1810). And see Hurnard, supra note 29 (of Part IV) at 281.

26. See Hurnard, supra note 29 (of Part IV) at 281 n. 2. See also id. at 50, 78-84, 109-110, 265, & 341-352.

27. See Bracton, supra note 90 (of Part IV) at 438 (f. 155).

28. 2 Pollack and Maitland, infra note 2 (of Case No. 31 of this Appendix 4) at 468.

29. See infra, text accompanying note 32. And see Hurnard, supra note 29 (of Part IV) at 50.

30. See Green (The Jury and the English Law of Homicide 1200-1600), supra note 29 (of Part IV) at 422 n.34 (citing Hurnard, supra note 29 (of Part IV) at 37-42. See also R. Hunnisett, The Medieval Coroner 77-78 (1961)); and Hurnard, supra note 29 (of Part IV) at 50. But see The Statute of Gloucester (1278), I Statutes of the Realm, supra note 25. And see supra, note 3 (R v. Pisford).

31. See cap. 15 of the Statute of Westminster I (1275), in 1 Statutes of the Realm pt. 1, 26, at 30 (1810) (see infra, note 4 [of Case No. 46 of this Appendix 4]); Hurnard, supra note 29 (of Part IV) at 80 & 351; Green, supra note 30 at 425 n. 50; and supra, text accompanying note 19. For some cases in which a defendant was facing an unborn child-homicide prosecution and was granted bail pending trial, see Case Nos. 46, 6, 13, 14, 15, 37, 41, 44, 45 & 51 (of this Appendix 4). (But see 57 Selden Society Lxxxiii (1938) (ordinarily no bail in an appeal of homicide)). And note that if in Bourton's day pre-trial release in non-capital or non-felony cases could not be conditioned on mainprise, then the fact that Bourton was mainprised would constitute one more proof that Bourton was facing felony charges.

32. See supra, text (of Part IV) accompanying note 200-201.

33. The bail application described supra, at text accompanying notes 29-30 almost certainly did "not" involve a facial challenge to the facts alleged in the indictment. In any event, the challenge was not that no common law homicides occurred, but rather that the alleged common law homicides were committed "non-feloniously" (as shown by the special inquisition?). See also, infra text (of Reference No. 3 of Appendix 7) accompanying notes 14-15.

34. See supra, note 196 (of Part IV). And see infra, Appendix 8; and supra, note 32 (of Part IV).

35. See, supra sec. 7 (of Part IV). R v. Anonymous (1348), reproduced infra, in Reference No. 3 (of Appendix 7), is cited in a law book or work at least as early as 1490 (see infra, text accompanying note 1 (of Reference No. 3 of Appendix 7). However, so far as is known, the Twins-Slayer's Case (Bourton's Case) is explicitly cited for the first time in a law book or work in Staunford's Pleas of Crown (1557). And see Coldiron, supra note 29 (of Part IV) at 530-531 & 533 ("Between Bracton and Staunford there was no commentator [or in-depth commentary] on the law of homicide"). But see 94 Selden Society 302-303.

For some cases somewhat similar to Bourton's Case, see infra, Case Nos. 12 & 22 (of this Appendix 4) and Case No. 4 (of Appendix 5).

Case No. 8: R v. Haule (Eyre of London, 1321)[1]

> In the twelfth year [1318] of the aforesaid reign of King Edward [II] John of Gisors being coroner, Stephen of Cornhill and Robert de Rokesle then being sheriffs, a certain Maud de Haule [Matillis de Hanle] and Agnes the Convert were fighting together in this ward [Queenhithe], and a certain Joan of Hallynghurst came along and separated them from each other, by reason of which the aforesaid Maud threw the aforesaid Joan out of the house where she dwelt and she fell on the step of a solar of the same house so that on the fourth day following she gave birth to a certain child of the female sex ten weeks before the due time [per decem septimanas ante tempus pariendi], which same child died immediately after birth. And the aforesaid Maud was taken immediately after the deed and led to Newgate prison in the time of the aforesaid sheriffs. Therefore [let them answer for

what happened].[2] And Robert Gobba, John Braaz and Richard atte Vyngne, three neighbours, did not come; but they are not suspected of wrong. The aforesaid Robert was attached by Walter le Kent; therefore [he is] in mercy. The other mainpernor has died. The aforesaid John was attached by Hugh Trigge and John de Haleford; therefore [they are] in mercy. The aforesaid Richard was attached by John Bardewyne and John le Kent; therefore [they are] in mercy. Afterwards William le Leyre and Henry atte More, tenants of part of the lands which were the aforesaid sheriffs', come and fully admit that the aforesaid Maud de Haule was in the aforesaid prison in the time of the aforesaid sheriffs; and they say that the aforesaid Maud was hanged before Hamon Hauteyn and his fellows, justices assigned to deliver the gaol aforesaid etc. And that appears from the rolls of the same Jamon etc. She had no chattels etc.

This record does not say explicitly that Maud was hanged for the death of Joan's child. However, since Maud was imprisoned "immediately after the deed", it seems very reasonable to conclude that she was hanged on her conviction for the felonious killing of Joan's child.

1. JUST 1/547A, m. 20d. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 241 (including note 59).

2. "Translation uncertain" per Professor Baker.

Case No. 9: R v. Hokkestere (Eyre of London, 1321)[1]

In the twenty-sixth year [1297] of the aforesaid King Edward [I], the aforesaid John the clerk being coroner, and John de Storteford and William de Storteford being then sheriffs, a certain child of the female sex was found dead, thrown into the ditch of Houndsditch. It is not known who threw it[2] there. Afterwards it is testified by twelve [jurors] from Farringdon Ward and by twelve from this ward [Aldersgate]

that the aforesaid child, after it was born, was cast and thrown there, and by whom cannot be found out; but they say that a certain Agnes, the wife of William of Bassishaw, and Emma the Huchster of Pentecost Lane[3] were quarrelling together in the aforesaid ward of Farringdon and the aforesaid Emma threw the aforesaid Agnes upon the pavement and beat her while she was thus prostrated so that within three days following she gave birth to the aforesaid dead child. And immediately after the deed the aforesaid Emma fled. And the jurors think ill of her for the aforesaid death; therefore let her be exacted and waived.[4] She had no chattels. And because twelve[5] jurors made no mention of the finder [of the dead body], [they are] in mercy. The four neighbours have died.

1. JUST 1/547A, m. 3. Translation from the Latin supplied by Professor Baker. Footnotes 2-5 infra, are by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 241 (including note 60).

2. The word eum and the adjectives mortuus, projectus are masculine.

3. I suppose this is Petticoat Lane, which is still full of hucksters.

4. Waiver is the female equivalent of outlawry. On outlawry, see infra, Case No. 55 (of this Appendix 4); infra, text accompanying notes 4 & 5 (of Case No. 43 of this Appendix 4), as well as those two notes.

5. Perhaps a slip!

Case No. 10: R v. Ragoun (Eyre of London, 1321)[1]

In the aforesaid [third year (1309)] of the reign of the above mentioned King Edward [II], the aforesaid then being coroner and sheriffs, a certian Alice, the wife of John de Farny, and a certain Agatha Ragoun were fighting in the high street of West Cheap at the top of Soper Lane on Sunday next before the feast of St. Andrew in the year aforesaid, and by reason of an old grudge previously existing between them the

aforesaid Agatha beat the said Alice, who was then pregnant, and trampled on her with her feet and knees. And the aforesaid Alice, on the Friday next before the feast of Easter then following, gave birth to the infant with which she was then pregnant; which same infant was baptised and was called Alice, on whose back a certain black mark [nigredo] appeared; and this Alice, the infant, lived languishing until Thursday next before the feast of St. James then following, and then died from the beating and hurting aforesaid. The aforesaid Agatha remains in the countryside; therefore let her be taken. Adam the Coiner, William de Marchale and John de la Marche, three neighbours who are not suspected of wrong, do not come; therefore [they are] in mercy. Afterwards the sheriffs testify that the aforesaid Agatha is not to be found but has run away. And the jurors suspect her of wrong in respect of the death of Alice the daughter of John de Farny. Therefore let her be exacted and waived.[2] She had no chattels.

1. JUST 1/547A, m. 55d. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 241 (including note 60).

2. See supra, note 4 (of Case No. 9 of this Appendix 4).

Case No. 11: R v. Eppinge (Eyre of London, 1321)[1]

In the thirty-second year [1303] of the aforesaid King Edward [I], the aforesaid [John the clerk] being coroner, William de Cumbemartyn and John de Boreford then being sheriffs, Juliana of Epping pushed over a certain Lettice, the wife of John Scot, being pregnant, so that on the third day afterwards she gave birth to a certain male child baptised by the name of Richard, which infant died immediately after baptism by reason of the pushing over aforesaid. And the aforesaid Juliana fled immediately after the deed. And she is suspected of wrong. Therefore let her be exacted and waived.[2] She had no chattels. Afterwards the jurors testify that the aforesaid Juliana came back and died in this city. Therefore no more is to be done about exacting her. She had no chattels.

1. JUST 1/547A, m. 46. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 241 (including note 60).

2. See supra, note 4 (of Case No. 9 of this Appendix 4).

Case No. 12: R v. Scot (Eyre of London, 1321)[1]

In the 19th year [1290] of the aforesaid reign of King Edward [I], John de Vinite, clerk, then being coroner, and Thomas Romayn and William de Layre then being sheriffs, Alice the wife of Roger the Spicer, perceiving a certain John the Scot to be pursuing the aforesaid Roger her husband with a certain stick in order to beat him, wanted to close the door of her house so that the same John should not get in, and she went so quickly to close the said door and closed it, and the aforesaid John pushed the said door with such force that the aforesaid Alice fell on a certian mortar, with the result that she gave birth to Margery and Emma, certain daughters of hers, before the [due] time of birth [Tempus pariendi], who immediately after birth and baptism died. And the aforesaid John fled immediately after the deed; he is suspected of wrong. Therefore let him be exacted and outlawed.[2] He had no chattels, and was not in any ward because he was a vagrant. The four neighbours have died.

1. JUST 1/547A, m.22. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 238 (including note 51).

2. See supra, note 4 (of Case No. 9 of this Appendix 4).

Case No. 13: R v. Dada (Eyre of London, 1321)[1]

In the 18th year [1289] of the reign of King Edward [I] son of King Henry [III], when William le Mazerer was coroner and Fulk of St Edmunds and Solomon de Laufare were sheriffs, Richard Dada, cook, beat his wife Alice in a certain shop in a certain upper room of the same shop where he lived in this ward [Bill-

ingsgate] so that a certain Alice, wife of William of Barnes, came along and put herself between them in a certain upper room in order to pacify the dispute; and the aforesaid Richard, being thereby moved to anger, struck the aforesaid Alice, wife of William, being pregnant, so that she fell to the ground, and afterwards pushed her from the highest step of the said upper room down to the lowest step of the same; from which beating and pushing the same Alice gave birth to a certain child before the due time [Ante tempus suum pariendi], which child was baptised by the name John; and the child's limbs and body were broken by reason of the aforesaid beating and pushing so that on the second day after his baptism he died. And the aforesaid Richard immediately fled. And he is suspected of wrong. Therefore let him be exacted and out lawed.[2] His chattels 3s., for which the same sheriffs shall answer. And Roger of Waltham, one of the neighbours, who is not thought badly of, did not come. Therefore he is in mercy. And his mainpernors have died. And [the other] three neighbours have died. And the jurors in no way think ill of the aforesaid Alice, wife of the aforesaid Richard; therefore nothing concerning her.

1. JUST 1/547A, m. 19d. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 238 (including note 51).

2. See supra, note 4 (of Case No. 9 of this Appendix 4).

Case No. 14: R v. Cobbeham (Eyre of London, 1321)[1]

In the 13th year [1319] of the reign of King Edward[II] the aforesaid then being coroner, and Stephen of Abingdon and John of Preston then being sheriffs, Thomas de Cobbeham, woodmonger, and Agnes, wife of Thomas Aleyn, being pregnant, were quarrelling together over some money which the same Agnes refused to pay him until finally the same Thomas pushed the same Agnes out of his house in this ward

[Billingsgate], and while being pushed out the same Agnes fell over a certain stone in the door of the same house, and on getting up she went to the house of the aforesaid Thomas her husband, and on the fourth day following by reason of the fall and push aforesaid she gave birth to her certain son called John fifteen weeks before the [due] time of birth [tempus pariendi], which same John died a short while after birth. And the aforesaid Thomas de Cobbeham was immediately arrested, and was acquitted before the justices here, as appears in the rolls of the deliveries....

1. JUST 1/547A, m. 19d. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 237-238 (including note 49).

Case No. 15: R v. Hervy (Eyre of London, 1321)[1]

In the 28th year [1299] of the reign of the aforesaid King Edward [I], the aforesaid then being coroner, and John de Armenters and Henry de Fyngerie then being sheriffs, Joan the wife of Richard the Shoemaker, being pregnant, and Hugh the son of John Hervy of Wormley were fighting together outside the tavern of John le Botonner in this ward [Cheap], and the aforesaid Hugh struck her the said Joan with his elbow in the belly so that she gave birth the same day to a certain abortive male child [i.e., to a male child born dead?][2]. And the aforesaid Hugh immediately after the deed fled. And he is suspected of wrong. Therefore let him be exacted and outlawed.[3] He had no chattels and was not in any ward because he was vagrant....

1. JUST 1/547A, m. 40d. Translation from the Latin supplied by Professor Baker. (3rd bracketed insertion, and its accompanying note, mine.) My initial source: Schneebeck, supra note 29 (of Part IV) at 238 (including note 51).

2. Compare with/to as the case may be; and for example infra, Case Nos. 16, 19-24, and particularly 25 & 49 (of this Appendix 4).

3. See supra, note 4 (of Case No. 9 of this Appendix 4).

Case No. 16: R v. Godesman (Eyre of Kent, 1313)[1]

(as recorded in the crown pleas division of the eyre roll)

The jurors present that Golditha, the daughter of Goddard Godesman, struck a certain Alice, the woman friend of William the chaplain, and pushed her against the post of a house so that she gave birth before her time and the child instantly died. And the said Alice died thereof three weeks later. And because the aforesaid Golditha remains in the countryside, let her be taken. Afterwards the aforesaid Golditha comes; and, being asked how she will acquit herself, she says that she is in no way guilty and for good and ill puts herself upon the country. And the jurors of this hundred [Kaleshull] say upon their oath that the aforesaid Golditha is not guilty of the aforesaid misdeeds charged against her. Therefore [let her go] quit thereof etc.

(as recorded in the jail delivery division of the eyre roll)

Golditha, the daughter of Goddard Godesman, taken by reason of a puch which she gave a certain Alice, who was the woman friend of William the chaplain, while she was pregnant, so that she gave birth to an abortive child, and afterwards the same Alice within three weeks next following [herself] died. And, being asked how she will acquit herself thereof, she says that she is in no way guilty thereof, and for good and ill puts herself upon the country. And the jurors of this hundred say upon their oath that the aforesaid Golditha is not guilty of the aforesaid misdeeds charged against her. Therefore [let her go] quit thereof etc. She did not run away etc.

1. JUST 1/383, mm. 18d, 96. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 241 (including note 58).

Case No. 17: R v. John Kyltavenan (Cork, Ireland, 1311)[1]

> [Against] John Kyltavenan [it is] charged that he burglariously entered the house of Maurice Tancard and robbed him of divers goods to the value of 4s., and that he beat Johanna de Rupe, Maurice's wife, who was with child and maltreated her, whereby he killed a boy in the womb of the said Johanna. [John Kyltavenan] comes and defends, etc....[names of jurors omitted]. [The] jurors say that John Kyltevenan is guilty of the said charges and of several other misdeeds. Therefore let him be hanged. Chattels, none; he has no free land.

The English common law was in effect in Ireland in the fourteenth century.[2] However, and as the following case (R v. Richard Stakepoll (1311)) would seem to indicate, Kyltavenan's burglary conviction did not carry a mandatory sentence of death:

> [Against] Richard Stakepoll [it is] charged that he burglariously by night entered the house of John Seys and robbed therefrom four hams worth 4s. [Richard Stakepoll comes and defends, etc,....[names of jurors omitted]. [The] jurors say that Richard is guilty of the charges, and that he stole the hams from exessive want and poverty, and they do not suspect him of any other misdeeds. Therefore, of grace, Richard is admitted to make fine, etc., by 20s., by pledge of John Stakepoll, so that he stand, etc. And John Stakepoll mainprised for Richard that he would for the future always bear himself well and faithfully to the King's peace, and if he do not, he will restore him to the King's prison dead or alive within fifteen days of notice of the repetition of his misdeeds, and also make good their losses to those that suffer by Richard....[3]

1. Reproduced from Calendar of the Justiciary Rolls or Proceedings in the Court of the Justiciar of Ireland I to VII Years of Edward II 193 (Dublin, Stationery Office, n.d.).

2. See G.J. Hand, English Law in Ireland, 1290-1324 (1967).

3. Reproduced from Calendar of the Justiciary Rolls, supra, note 1 at 193.

Case No. 18: R v. Thomas le Raggede (Dublin, Ireland, 1311)[1]

> Thomas le Raggede, charged with receiving Donewyth McTani, a common robber, in the liberty of Kilkenny, and that he receives John le Serjaunt, called the cook, who stole from John Belcok a pig in the said liberty, and that he waylaid John Payn on the highway near Coulfobyl and forcibly took from him two horses worth one mark and brought them to the cross at Taschollyn, and that he robbed the wife of Thomas son of Robert in the said county of three pennyworth of butter and beat her so that an infant in her womb died, [Thomas le Raggede] comes and defends, etc.
>
> ....[names of jurors omitted] [The] jurors say that as to the receiving he is not guilty. Therefore he is quit thereof. And as to the horses, they say [not guilty]...and as to the butter, they say [guilty]... Therefore let him be committed to gaol. Asked if he beat the woman, they say no. Afterwards Thomas made fine, etc., by 20s., by pledge....

1. Reproduced from Calendar of the Justiciary Rolls or Proceedings in the Court of the Justiciar of Ireland I to VII Years of Edward II 216 (Dublin, Stationery Office, n.d.). See supra, note 2 of (Case No. 17 of this Appendix 4).

Case No. 19: Rokaf v. Gyle (Eyre of Middlesex, 1294)[1]

> Isabel Rokaf appealed[2] Edmund Gyle in the county forasmuch as the same Edmund beat her during the night in the vill of Newington so that she there gave birth to a certain abortive child. And the aforesaid Isabel and Edmund come. And Isabel has withdrawn from her appeal; therefore let her be taken, and her pledges for prosecuting in mercy, namely Nicholas the clerk of Holborn and John son of Robert of Newington. And the aforesaid Edmund, being asked at the king's suit how he would acquit himself, denies the beating,

the felony, and whatever is against the peace, and for good and ill puts himself upon the country. And the jurors say upon their oath that the aforesaid Edmund is not guilty of the aforesaid wounding and felony. Therefore he is quit thereof. Afterwards the aforesaid Isabel comes and makes a fine of half a mark for herself and her pledges, by the pledge of Roger of Appleby and Richard the Spicer.

1. JUST 1/544, m. 55d. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 234 (including note 44).

2. An appeal of felony was not a crown plea (although it could be converted into a crown plea). It was a civil or private prosecution brought by a person who claimed harm to himself or herself. The appealed defendant, if convicted (which almost never occurred), received the same judgment he or she would have received if he or she had been found guilty on an indictment charging the same felony. Since an appeal of felony was not a crown plea, it was not pardonable. See, e.g., 2 Pollack & Maitland, infra note 2 (of Case No. 31 of this Appendix 4) at 466-67. See also, e.g., Russell, infra note 2 (of Case No. 65 of this Appendix 4); and Green (Pardonable Homicide), supra note 29 (of Part IV) at 159-161 & 167-169.

Case No. 20: R v. Skel (Eyre of Yorkshire, 1293)[1]

Gilling. Robert of the Skell, arrested...beating... Matilda the wife of William son of Matilda, whereby she gave birth to an abortive son and afterwards [she] died thereof,[2] etc. And William Paget [and various others were arrested for unrelated offences]. [They] come and all [except one, who pleads clergy][3] deny everything etc. and for good and ill put themselves upon the country...And the jurors, with respect to Robert of the Skell [and others], say that they are not guilty. Therefore they are quit thereof.

1. JUST 1/1098, pt. 2, m. 79. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 239 (including note 54).

2. Words interlined, per Professor Baker.

3. See infra, text accompanying Case No. 45 (of this Appendix 4), as well as the references set forth there.

Case No. 21: R v. Wyntercote (Eyre of Hereford, 1292)[1]

> The jurors present that John of Wyntercote, accused of beating Christine, the wife of William Treweman, whereby she gave birth to a certain abortive child, was taken by Hugh Carpenter the underbailiff of William Shereman, then farmer of the vill of Leominster, and he escaped from the custody of the same Hugh. Therefore to judgment upon the aforesaid William Shereman, the farmer, concerning the aforesaid escape. And the jurors, being asked whether the aforesaid abortive child ever had life (vitam) in his mother's womb before she gave birth,[2] or whether he broke any other prison, say no and that he was in no way suspected of wrong; but because he previously ran away for it let his chattels be confiscated for fleeing; and let him come back if he wishes.

It cannot be determined with reasonable certainty upon what the Wyntercote jurors based their conclusion that Christine's fetus had not acquired life. It might be that they were thinking in terms of the modern concept of quickening (the initial perception by the mother of the stirrings of her unborn child). On the other hand, it might be that they physically viewed the abortive child and concluded that, since it had not yet acquired a full or perfect human shape or body, then there is reason to believe it had yet to receive the soul of life.[3] The use of the adjective "his" in the phrase "in his mother's womb" may have reflected no more than the Court Clerk's preference for the masculine form if the sex of Christine's fetus was not apparent.

1. JUST 1/303, m. 69d. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 239 (including note 54).

2. "Et Juratores requisiti si predictus puer abortivus umquam vitam haberet in utero matris sue antequam peperisset."

3. See infra, Case Nos. 35 & 27 (of this Appendix 4). And see supra, text accompanying note 30 (of Part IV), and the references set forth in that note; and supra, Secs. 4-6 (of Part IV).

Case No. 22: R v. Boleye "et al" (Eyre of Shropshire, 1292)[1]

> The same jurors present that William Petit, who has died, Robert Boleye and Brother William of Sherborne, novice [conversus], servants of the abbot of Hailes, took Roger Ketel of Illey and imprisoned him and put him in stocks and detained him for one day and one night in such a way that he died thereof within the following month. Therefore the sheriff is commanded that he arrest the aforesaid Robert and Brother William. And likewise the same Robert and William beat and ill treated Alice the wife of John Yedrich of Cakemore in the house in Cakemoor, who was pregnant with two male children, so that the aforesaid Alice gave birth; and immediately after birth the afore two children died; and within a month the aforesaid Alice died. Therefore let them be arrested, as above. Afterwards the aforesaid abbot, and William of Sherborne the novice, come; and the aforesaid Brother William is a novice brother and professed in the same house of Hailes, and a member of the Church; and saving the estate of the Holy Church, he denies whatever is against the peace etc. and for good and ill puts himself upon the country. And the jurors aforesaid say upon their oath that it is true that the aforesaid William Petit, Robert le Boleye and Brother William of Sherborne took the aforesaid Roger Ketel and two others [as] villeins of the same abbot belonging to his manor of Hailes, and because they were disobedient and rebillious they put them in stocks, as was lawful for the abbot to do. But they say that the aforesaid Roger Ketel died a natural death and not through any duress which the aforesaid Robert Boleye and Brother William of Sherborne and William le Petit, who has died, applied to him. And with respect to the beating of the aforesaid Alice they say upon their oath that the aforesaid Robert and William never beat the same Alice, or molested her, whereby she or her aforesaid children

became nearer to death or further from life.[2] Therefore the aforesaid Robert and Brother William are quit thereof.

1. JUST 1/303, m. 69d. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 239 (including note 54).

2. See infra, note 2 (of Caes No. 48 of this Appendix 4).

Case No. 23: Wenlok v. Walle (Eyre of Shropshire, 1292[1]

Mabel the daughter of Warin of Wenlock appeals Hugh of Wall for that he wickedly and feloniously, and of his premeditated assault, on the Friday next after the feast of St. Luke the Evangelist in the eighteenth year [1289] of the reign of the present king, beat the said Mabel, in the hosue of the said Mabel which she rented from the said Hugh of Wall, with a certain stick across the back, so that he killed a certain child in her womb, in such a way that she gave birth to the aforesaid infant abortively; and that he did this wickedly and feloniously she offers [to prove] as a woman etc. And the aforesaid Hugh now comes and denies all the felony and whatever is against the peace etc. and prays judgment of her appeal inasmuch as the aforesaid Mabel makes no mention in her appeal of the hour or day when or in what vill or place the aforesaid deed was done. And, these things being allowed to him with respect to the suit of the aforesaid Mabel, with respect to the lord king's suit he says that he is a clerk and cannot answer here.[2] And thereupon comes the Dean of Shrewsbury bearing the bishop's authority...[3]

1. JUST 1/741, m. 33. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 234 (including note 44).

2. See infra, text accompanying Case No. 45 (of this Appendix 4), as well as the references set forth there.

3. Per Professor Baker: "Remainder of roll badly damaged."

Case No. 24: R v. Hore (Eyre of Wiltshire, 1289)[1]

Edith de Sunburu and Emma the wife of William le Hore were fighting together in the vill of Netheravon, so that the aforesaid Emma pushed the aforesaid Edith so that she gave birth to a certain male child one month later, who immediately after birth was baptised and died. And Philip Strug the coroner is present and records that he saw the aforesaid male child, having a head as if crushed [quasi quassatum]. Therefore let her the said Emma be arrested. And the vills of Fifehead and Littlecote did not come fully to the inquest. Therefore they are in mercy. Afterwards the aforesaid Emma comes; and, being asked how she would acquit herself of the death of the aforesaid child, she denies the death and everything and whatever is against the peace etc. and for good and ill puts herself upon the country. And the jurors, together with the neighbouring vills, say upon their oath that she is in no way guilty of the death of the aforesaid child. Therefore she is quit thereof.

1. JUST 1/1011, m. 56. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 241 (including note 58).

Case No. 25: Querdelynn v. Laurence (Eyre of Wiltshire, 1289)[1]

Agnes the wife of Richard Querdelynn appealed in the county Beatrice the wife of John Laurence for the death of her female child aborted and slain in her womb. And agnes and Beatrice come. And the aforesaid Agnes, being asked by the justices whether she gave birth to her infant by way of abortion, says that she gave birth to the aforesaid infant alive, and she lived for eight days, but she gave birth eight weeks before the right time of birth by reason of the violence committed against her by the aforesaid Beatrice. And because no woman may have an action to appeal anyone for the death of man except for the death of her husband slain between her arms and her abortive infant, and the same Agnes now admits that she gave birth to a live infant who lived for eight days after she gave birth, it is decided that her appeal is a nullity [for the purpose of putting any-

one to the law].[2] And the aforesaid Beatrice, with respect to the appeal of her the said Agnes, is quit. And [Agnes] is committed to the gaol for her false appeal. And, with respect to keeping the lord king's peace, the aforesaid Beatrice, being asked how she would acquit herself, denies the death and whatever is against the peace etc. and for good and ill puts herself upon the country. And the jurors say upon their oath that the aforesaid Beatrice is in no way guilty of the death of the aforesaid infant, but they say that the aforesaid Agnes gave birth at the right time [recta hora pariendi]. Therefore [Beatrice] is quit thereof.

1. JUST 1/1011, m. 59d. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 234 (including note 44).

2. See infra, Case Nos 49 & 63-66 (of this Appendix 4).

Case No. 26: R v. Cliston (Eyre of Wiltshire, 1288)[1]

John de Cliston, clerk, in the 14th year, in the time when Gilbert Chynne was coroner, beat and wounded Agnes of Scotland, being pregnant, whereby she gave birth to her male child abortively the same night following; and the aforesaid Agnes on the third day following likewise died thereof. And the aforesaid John immediately fled. And he is suspected of wrong. Therefore let him be exacted and outlawed.[2] His chattels 15d., wherefor Mancol de Harley keeper etc. shall answer. He was not in any aldermanry because he was a stranger and a clerk. The four neighbours come and are not suspected of wrong. And the aldermanry which before etc.[3]

1. JUST 1/1011, m. 62. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 239 (including note 23).

2. See supra, note 4 (of Case No. 9 of this Appendix 4).

3. Per Professor Baker: "Meaning unclear".

Case No. 27: R v. Neubyr' (Eyre of Sussex, 1288)[1]

Felice the wife of Walter de Hurst gave birth to a certain abortive child in the vill of Chichester, the sex of which is unknown.[2] And Peter de Neubyr', arrested for the same forasmuch as he was indicted that he beat the aforesaid Felice so that she gave birth to the aforesaid abortive child, comes; and, being asked how he would acquit himself, denies whatever is against the peace etc. and for good and ill puts himself upon the country. And the jurors say upon their oath that the aforesaid Peter is in no way guilty of the aforesaid beating. Therefore he is quit thereof.

1. JUST 1/924, m. 73. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 239 (including note 54).

2. See infra, text accompanying note 4 (of Case No. 35 of this Appendix 4).

Case No. 28: R v. Reeve et al (Eyre of Sussex, 1288)[1]

The jurors present that a certain Adam Basset, steward of John de Camoys, held the court of Broadwater in the 10th year [1281] of the present king, and because a certain Matilda, who was the wife of Walter le Mouner, brewed contrary to the assize [of bread and ale] the same Adam ordered Sewall the Reeve, William the Hog and Ralph le Webel to put her on the tumbrel [a cucking stool or defecating chair - used as an instrument of punishment], she being pregnant; and [they present] that the same Sewall, William and Ralph in leading her the said Matilda to the tumbrel so beat and ill treated her that the following night she gave birth to an abortive son, and afterwards in [...?] following the same Matilda died. And the aforesaid Sewall, William and Ralph immediately fled. And the aforesaid Sewell, being now solemnly called, does not come but has gone away. And he is suspected of wrong. Therefore let him be exacted and outlawed.[2] He had no chattels, but was in the [...?] of Roger le Pulthere in Broadwater; therefore he is in mercy. And the aforesaid William and Ralph are now in

prison. And the aforesaid Adam Basset was previously arrested for the aforesaid death, and was imprisoned at Arundel, and there before John Peche and his fellows, justices of gaol delivery, he was acquitted; and this appears by the rolls of the same. The first finder and four neighbours come. And the vills of 'Hyer' and 'Ottyngton' did not come to the inquest before the coroner; therefore they are in mercy. And Thomas atte Church of Findon falsely presented himself as a neighbour; therefore he is in mercy. Afterwards the aforesaid William the Hog and Ralph le Webbel come, and, being asked how they will acquit themselves, deny the death and whatever is against the peace etc. and for good and ill put themselves upon the country. And the jurors together with the hearest [vills] say upon their oath that the aforesaid William and Ralph are in no way guilty of the aforesaid death. Therefore they are quit thereof. And because the aforesaid twelve [jurors] previously indicted them of the aforesaid death and now acquit them, to judgment on them.

1. JUST 1/924, m. 60. Translation from the Latin supplied by Professsor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 238 (including note 50).

2. See supra, note 4 (of Case No. 9 of this Appendix 4).

Case No. 29: Haudeys v. Runhal (Eyre of Norfolk 1286)[1]

Beatrix the wife of Ralph Haudeys of Reynerston appealed in the county Walter of Runhall for felony and for the death of a certain abortive child slain in her womb, and [she appealed] Jordon son of William de Monte of Runhall for the force and aid [i.e. as accessory] with respect to the aforesaid death. And she does not now come; therefore let her be arrested, and her pledges for prosecuting in mercy, namely Ralph Haudeys of Reymerston and Richard son of John of Thurston. And Walter and Jordan do not come; nor were they attached, because the aforesaid Beatrix withdrew from her appeal before they were attached. Therefore, as to keeping the king's peace, let the truth of the matter be enquired into by the country. And the jurors say upon their oath that they are in

no way guilty and that the aforesaid Beatrix appealed them maliciously.

1. JUST 1/579, m. 10d. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 234 (including note 44).

Case No. 30: Mill v. Scot (Eyre of Norfolk, 1286)[1]

Matilda, who wasy the wife of Roger Mill, who has died, appealed in the county Robert the Scot of Norwich, who has died, Gregory of ILlington and Reynold the Scot for the death of her abortive son; and [she appealed] Henry of Norwich and Roger of Swardeston of force and aid [i.e. as accessories] in respect of the aforesaid death. And Robert and the others come and, as to keeping the peace of the lord king, being asked how they would acquit themselves, both the aforesaid Gregory and Reynold, who are appealed in respect of the deed, and Henry and the others who are appealed of force etc., deny the death and whatever is against the peace etc. And the jurors say upon their oath that none of them is guilty of the aforesaid death. Therefore they are quit thereof. And the twelve jurors of this city [Norwich] concealed the aforesaid appeal; therefore they are in mercy.

1. JUST 1/579, m. 72. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 234 (including note 44).

Case No. 31: Smale v. Hyrnam (Eyre of Suffolk, 1286)[1]

Alexandra the wife of Henry the Small appealed in the county John the son of William Hyrnam of Worlingworth for the death of her abortive child slain in her womb, and for mayhem committed against the same Alexandra; and [she appealed] Robert the son of William Hyrman, and William Hyrman, for force and aid [i.e. as accessories]. And Alexandra does not come; therefore let her be arrested and her pledges for prosecuting in mercy, namely Henry Small and Henry the son

of John of Worlingworth. And John and the others come and, being asked, in respect of the [king's] peace, how they would acquit themselves, the aforesaid John denies whatever is against the peace etc. and for good and ill puts himself upon the country. And Robert and William pray judgment whether they ought to answer before the fact is proved.[2] And the jurors say upon their oath that the aforesaid John is in no way guilty. Therefore both he and the aforesaid Robert and William are quit thereof.

1. JUST 1/833, m. 23d. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 234 (including note 44).

2. They are asserting in their demurrer the common law principle that an accessory before the fact cannot be arraigned and tried until the principal has been convicted. See supra, Case No. 2 (of this Appendix 4); and 2 Pollack & Maitland, The History of English Law 509 (paperback, 2nd ed., 1968).

Case No. 32: Neweman v. Rundel (Eyre of Suffolk, 1286)[1]

Lenota la Neweman appealed in the county Richard Rundel of Brome, who has died, for the death of her abortive child slain in her womb. And she now does not come. Therefore let her be arrested, and let her pledges for prosecuting be in mercy, manely Walter of Winterworth and Philip Porche of Mendlesham.

1. JUST 1/833, m. 7. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 234 (including note 44).

Case No. 33: R v. Mercer (Eyre of Oxford, 1285)[1]

Emma the wife of Reynold the Mercer, and Alice the daughter of Thomas of Northleigh, being pregnant, were fighting together in the field of Northleigh in such a way that the aforesaid Emma struck [Alice] with a certain stone on the side, by which blow the same Alice on the second day following gave birth to

a certain living male child having on its head a wound from the blow of the same stone; which child died immediately after it was baptised. And the aforesaid Emma immediately fled. And the jurors say upon their oath that the aforesaid Alice gave birth one month before the [due] time of birth [tempus pariendi], and that the child died from the aforesaid blow, in respect of which they suspect her of wrong. Therefore let her be outlawed and waived.[2]

1. JUST 1/710, m. 45. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 241 (including note 60).

2. See supra, note 4 (of Case No. 9 of this Appendix 4).

Case No. 34: Boleheved v. Hobbe (Eyre of Cornwall, 1284)[1]

John Boleheved appealed John Hobbe, the groom of Master John de Wolrynton, official of Master John de Esse archdeacon of Cornwall, in the county court, because the same John beat and ill-treated Mabel de Trethyas on Saturday next before the feast of St Katharine in the first year [1272] of the reign of King Edward I, so that she gave birth to a certain abortive male child, and likewise of robbery committed against the same Mabel; so that the same John sued his appeal against him as far as three counties, and before the fourth county[2] the appeal was removed from the county to the King's Bench at Westminster by the lord king's writ; and because it was there ignored by default,[3] let the fact be inquired into. And the jurors say upon their oath that the aforesaid Mabel was accused of adultery and came to the chapter before Master John de Wolryngton, so that a penance was awarded her that she be put in a certain pillory, Master John de Esse being unaware thereof; and the same John Hobbe caused her to undergo the aforesaid judgment, as a result of which she gave birth to an abortive child. And because the county has admitted the appeal at the suit of the aforesaid John, whereas such an appeal ought not to be admitted except at the suit of a woman, therefore to judgment of the whole county; and let the remainder be spoken to. After-

wards it is testified that the appeal was removed before the justices of the Bench and determined there.[4]

1. JUST 1/112, m. 9d. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 236-37 (including note 48).

2. See infra, text accompanying note 2 & 3 (of Case No. 55 of this Appendix 4).

3. Per Professor Baker: "Reading unclear".

4. The outcome of this case is unknown; but it might be recorded in some unknown, existing record.

Case No. 35: R v. Code et al (Eyre of Hampshire, 1281)[1]

...Alice, the wife of Adam Prest, coming from the city of Winchester out of the vill of Upham, met Walter Code, Richard the Potter and Stephen his brother, and Herbert the Carpenter, who knocked her over and beat her and would have lain with her by force, so that by the violence which they committed against her she gave birth to a certian abortive child as if [quasi] of the age of one month [quasi etatis unius mensis). Therefore let them be taken. William de Stratton, the coroner, did not [come?], therefore to judgment of him. Afterwards the aforesaid Walter and the others come and deny the death, the felony and all...[and thereof] they put themselves upon the country. And twelve jurors say upon their oath that the aforesaid Walter, Richard and Stephen with force knocked over and beat the aforesaid Alice, as a result of which she gave birth to a certain abortive child of such an age that it was unknown whether it was male or female;[2] which child was eight inches long. And they say that the aforesaid Herbert is not guilty thereof. Therefore [let him be] quit thereof. And the aforesaid Walter, Richard and Stephen are committed to prison [to await pardoning(?)][3]

The external genitalia of a fetus often become recognizable as male or female at about twelve (12) weeks fertilization age.[4] An eight-inch (crown-heel length) fetus is probably, approximately eighteen (18) weeks old (fertilization age).[5] And a thirty (30) days old (fertilization age) human embryo has a length of approximately one-half of an inch. Notwithstanding these apparent contradictions, it is clear that the Code jurors were of the opinion that Alice's fetus was very young. Also, it is reasonable to infer that the Code jurors were aware that a pregnant woman does not have her "quickening" as early as one month into her pregnancy.[6]

1. JUST 1/789, m.1. Translation from the Latin supplied by Professor Baker. (Professor Baker noted here the following: "Badly worn, with loss of words at both sides of the roll. Missing words supplied as far as possible by conjecture.") My initial source: Schneebeck, supra note 29 (of Part IV) at 240 (including note 56).

2. See supra, Case No. 27 (of this Appendix 4).

3. All three received a pardon in the death of man (de perdon, mortis hominis). See Hurnard, supra note 29 (of Part IV), 106-107 (including note 1, p.107). The three were pardoned almost certainly because it was determined that the killing was committed without malice or felony aforethought. See e.g., infra, Case No. 42 (of this Appendix 4); Schneebeck, supra note 29 (of Part IV); Green (The Jury) supra note 29 (of Part IV), 425 ("A finding of excusable homicide resulted in the defendant's remand to gaol until he obtained a pardon from the king"); Green (Pardonable Homicide), supra note 29 (of Part IV) at 70, 98-119; and Coldiron, supra note 29 (of Part IV) at 531.

4. See infra, text accompanying notes 2 & 3 (of Case No. 56 of this Appendix 4), as well as the references set forth in those two notes.

5. See Benson, infra, note 2 (of Case No. 56 of this Appendix 4).

6. See Benson, supra note 5.

Case No. 36: Hervest v. Pek (Eyre of Hampshire, 1281)[1]

Gilbert Hervest and Isot his wife appeal John le Pek because the same John, on the Sunday in the feast of the Close of Easter, wickedly and feloniously beat the same Isot in the vill of Romsey, by which beating she gave birth to a certian male abortive child. And John came and denied that he ever beat her or did her any harm, and prayed that this might be inquired into by the country. And twelve jurors say upon their oath that the aforesaid John never did beat the aforesaid Isot or do her any harm. Therefore the aforesaid John [is to go] quit thereof. And Gilbert and Isot are committed to prison for the false appeal. They are pardoned by the justices because they are poor.

1. JUST 1/789, m.26d. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 240 (including note 56).

Case No. 37: R v. Brente (Eyre of Devon, 1281)[1]

Richard de Brente, clerk, struck Ellen his wife, being pregnant, on the ribs with a certain staff whereby she gave birth to a dead female child before her time, as a result of which the aforesaid Ellen languished from the same wound and died from it a month later. And Richard was heretofore taken and imprisoned in Exeter castle, and was afterwards bailed by the lord king's writ, namely to...[names of twelve (12) mainpernors omitted], to have him here on the first day [of the eyre]. And they did not have him; therefore in mercy. And Richard remains in the countryside. Afterwards the sheriff testifies that he ran away. And he is suspected of wrong;[2] therefore let him be exacted and outlawed.[3] His chattels [are valued at] 4s. 4d., for which the sheriff shall answer. The same [Richard] had land, whereof the year and waste [is valued at] 12d., for which the same sheriff shall answer.

1. JUST 1/186, m.30. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 239 (including note 53).

2. Professor Baker: "I have so translated malecredere throughout; it is difficult to render literally".

3. See supra, note 4 (of Case No. 9 of this Appendix 4).

Case No. 38: R v. Surgeon (Eyre of Kent, 1279)[1]

It appears by the coroner's rolls that Master Thomas the Surgeon beat Agnes le Deyster so that she gave birth to her son abortively [filium suum abortivum: her abortive son]. And Master Thomas comes and denies the beating, and everything and whatever is against the peace of the lord king etc., and for good and ill puts himself upon the country. And the jurors say upon their oath that they in no way mistrust the aforesaid Master Thomas. Therefore he is quit thereof.

1. JUST 1/369, m.37d. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 238 (including note 52).

2. Per Professor Baker: "Dr. Schneebeck interprets the 'in nullo malecreditur' to indicate a refusal to indict. But it seems that the defendant had already put himself upon the country. The form of the verdict, if such it is, nevertheless seems irregular."

Case No. 39: Reeve v. Cook et al (Eyre of Sussex, 1279)[1]

Joan the wife of Thomas the Reeve of 'Donegeshon'[2] appeals Geoffrey the Cook and Thomas the Carter that they, on the Monday next before the Nativity of the Blessed Mary in the 7th year [1278] of the reign of King Edward [I] came from 'Manewode' towards 'Oces...' and met the same Joan, and beat her the said Joan and trampled on her, whereby she gave birth to a certain abortive child; and they did this against the peace of the lord king and feloniously as felons, and this she will deraign against them as a woman against men. And geoffrey and Thomas come and deny the beating and the abortive child and whatever is against the peace of the lord king and for good and ill put themselves upon the country. And the

jurors say upon their oath that they are not guilty of the beating or of the abortive child. Therefore they are quit thereof. But they say that they struck the aforesaid Thomas her husband. Therefore they are in mercy for the trespass.

1. JUST 1/921, m.23. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 234 (including note 44).

2. Per Professor Baker: "The places in this appeal have not been identified".

Case No. 40: R v. Le Gaoeler (Eyre of Kent, 1279)[1]

It appears by the coroners' rolls that Adam the Gaoler beat Idonea, the daughter of Gilbert the Tailor, so that she gave birth to her son abortively. And the aforesaid Adam comes and denies the beating and whatever is against the peace etc. And twelve jurors say upon their oath that the aforesaid Adam is not guilty. Therefore [let him go] quit thereof.

1. JUST 1/369, m. 37d. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 239 (including note 54).

Case No. 41: Pekering v. Swynestone (Eyre of Kent, 1279)[1]

William de Pekering appeals Adam de Swynestone, Henry de Feuntone, Peter Bayli, Richard de Bodenham, Geoffrey de Tewden, Anselm of Devon et John Bayli of beating [and] robbery. And they do not come. And [he also appeals them] because they beat Agnes his wife so that she lost her abortive child. And they do not come. And the aforesaid Adam was mainprised by...[list of mainpernors omitted] to have him before the justices. And they do not have him; therefore [they are] in mercy. And the jurors say upon their oath that they are not agreed; but they say that he is not[2] guilty of the aforesaid abortion [but only?]

of the aforesaid beating. Therefore as to that [let him be] quit thereof; and in mercy for the trespass.[3]

1. JUST 1/369, m. 36. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 236 (including note 47).

2. Underlined in roll.

3. Per Professor Baker: "this being an appeal, the abortion is presumably relevant to the rule about appeals of felony brought by women. However, the entry does not state that the appeal was brought by the husband and wife, but only by the husband." See supra, note 2 (of Case No. 19 of this Appendix 4); and infra, Cases Nos. 63-66 (of this Appendix 4).

Case No. 42: R v. Cheney and Clerk (Eyre of Hertfordshire, 1278)[1]

It is found by the jury on which Nicholas de Cheney and Pernel, the wife of Peter le Clerk, put themselves that the aforesaid Nicholas [coming] to take a certain [court?] at Wye found the aforesaid Pernel standing in the middle of the gateway of the same [court?] of the same vill and trampled her beneath the feet of his horse, whereby the next day she gave birth to a certain male son, which was baptised and called John and died on the third day. And because it is found that the aforesaid Nicholas did not do this by felony aforethought,[2] therefore [let him go] quit with respect to life and limb; but let him be in mercy for the trespass.[3]

This case might appear somewhat unusual from the perspective of the modern, general understanding of 13th century, English homicide law. According to that understanding, the murder-manslaughter distinction in terms of the elements of the offence of criminal or felonious homicide did not exist. (See supra, note 29 [of Part IV]). Lack of malice (or "felony aforethought") technically was not even a partial defense to a charge of criminal homicide. Accidental homi-

cide, when unconnected with any of the modern forms of implied malice, was a capital offence no less than express malice homicide. The only difference between accidental or excusable homicide and murder was that the former was pardonable.[3]

1. JUST 1/323, m. 47d. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 234 (including note 1).

2. See Hurnard, supra note 29 (of Part IV) at 78-79 & 281.

3. See the works by Green, Hurnard, Coldiron, Kaye, and Schneebeck set forth supra, in the last paragraph of note 29 (of Part IV. But see, e.g., Schneebeck, supra note 29 (of Part IV) at 355-362.

Case No. 43: R v. Cordwaner (Eyre of London, 1276)[1]

> In the same year John Gisors being chamberlain, Matthew Bokerel, for whom his son William answers, and John le Minur, for whom no one answers, being sheriffs; on Sunday before the feast of St. Martin [7 Nov. 1255],[2] in the ward of Wolmar de Essex [Billingsgate ward] towards Billynggesgate, Robert le Cordwaner beat Sarah wife of Henry the Tailor so that she gave birth to a female child. He at once fled and is suspected, so let him be exacted and outlawed according to the form of the City. He was harboured in the ward for a long time outside frankpledge,[3] so to judgment on the whole ward. Asked if he had any chattels, they say he did not. All the neighbours have died. Because the chamberlain and sheriffs did not enrol the names of the neighbours, to judgment on them.

Since outlawry[4] applied only to felonies or capital offences,[5] it is reasonable to conclude that Cordwaner was charged with the unlawful homicide of Sarah's child.

1. Reproduced from The London Eyre of 1276 18 (no. 63) (London Rec. Soc., 1976) (additions in original) (footnotes mine).

2. "During the reigns of Henry III and Edward I [London] eyres were held in 1221, 1226, 1244, 1251, 1276. Thus the "new" pleas of crown reviewed by the justices in 1276 were presentments of death by felony and misadventure and appeals since the previous eyre in 1251 together with a number of indictments." The London Eyre, supra note 1 at xiv (Introduction).

3. This is a form of bail. See, generally, David M. Walker, The Oxford Companion to Law 48 (Oxford, England, 1980).

4. See 2 Pollack and Maitland supra, note 2 of (Case No. 31 of this Appendix 4) at 580-81.

5. See 5 Seld. Soc., Year Books of Edward II The Eyre of Kent 6 & 7 Edward II. A.D. 1313-1314 94 (1910) ("If one be indicted of some matter to small to bring him in danger of judgment of life and limb, even though he come not, yet shall he not be outlawed"). See also 1 Hale, supra note 149 (of Part IV) at 703. For the procedure for having a person outlawed, see infra, Case No. 55 and the commentary accompanying that case.

Case No. 44: R v. Scharp (Eyre of London), 1276)[1]

Richard Scharp, wool-merchant, beat his wife, Emma, so that she gave birth to a stillborn boy. Because Richard has died, nothing from the outlawry. The mayor and aldermen testify that Richard was arrested and handed over to Richard de Ewell, sheriff, who released him on the pledges of six men. Because according to the law of the City no one accused of a man's death should be released on bail except on the pledges of twelve men, any of whom should be able to answer to the king for 100s. as amercement[2] if he should fail, to judgment on Richard de Ewelle.

1. Reproduced from The London Eyre of 1276 23 (no. 76) (London Rec. Soc., 1976) (footnote omitted).

2. Pecuniary penalty.

Case No. 45: Philippa v. Henry, Son of Stephen the Clerk (Eyre of London, 1276)[1]

Philippa maid-servant of Mabel Louman appealed, in the husting [the highest City of London Court] Henry son of Stephen the Clerk for the death of her son by abortion. She has now died; but Henry comes and, asked how he wishes to clear himself of the death, says that he is a clerk [i.e., a clergyman] and [therefore] is not bound to answer here. Thereupon Richard de Berwes, minor canon of the church of St. Paul's London, comes and claims him as a clerk and proffers letters of the bishop of London testifying that the bishop gave in turn to him and to William, rector of the church of St. Christopher London, his authority [for claiming clergy]. That it may be known for what he is to be handed over, let the truth be ascer-tained by the mayor and aldermen; they say on their oath that he is not guilty of the death, so he is quit and as such let him be handed over to the bishop. The bishop is forbidden to subject him to any [canonical] purgation [i.e., to an ecclesiastical trial by oath].[2]

1. Reproduced from The London Eyre of 1276 51 (no. 187) (London Rec. Soc., 1976) (footnotes and all insertions, except the fourth one, mine).

2. See Russell, infra Case No. 65 (of this Appendix 4) at 141; and Rodes (Ecclesiastical Administration), supra note 264 (of Part IV) at 138-39. It seems that "benefit of clergy" could not be granted except in cases involving crimes that were punishable by death. See J.G. Bellamy, Common Law and Society in Late Medieval and Tudor England 116 (1984).

Case No. 46: Sorel v. Hakeney (Eyre of London, 1276)[1]

William Sorel appealed in the husting Robert de Hakeney that he beat his wife Alice so that she gave birth to a stillborn boy. He does not come to prosecute his appeal,[2] so let him be arrested and his pledges to prosecute are in mercy, viz: John Hog and Thomas the Carpenter. Thereupon it is found in the rolls of the coroner that William did proceed against him and he was attached by...to have him here on the

first day of the eyre and they did not have him. So they are in mercy. Robert comes and, asked how he wishes to clear himself of the death, says that for good or ill he puts himself upon the verdict of the mayor and citizens [, he asks for a summary trial, or not to be required to wage his law].[3] Because the suspicion is slight, although he is of the liberty of the City, it is allowed by grace of the justices.[4] The jury say on their oath that he is not guilty of the death and the parties have not agreed, so he is quit [acquitted].

1. Reproduced from The London Eyre of 1276 61 (no. 222) (London Rec. Soc., 1976) (footnotes and insertions mine).

2. This means he commenced the appeal in the County Court, but failed to appear before the justices in eyre.

3. See infra, Case No. 48 (of this Appendix 4).

4. The Statute of Westminster (1275) (3 Edw. 1, c. 15) provided that a person indicted for the "Death of Man" is not entitled to bail (mainpernable or replevisable) except when there is only "light suspicion" that he is liable. See supra, text (of Case No. 7 of this Appendix 4), accompanying note 31.

Case No. 47: Gras and Gras v. Taillehaste (Eyre of London, 1276)[1]

Robert le Gras and his wife Isabel, and John de Benteley and his wife Isabel appealed Richard Taillehaste that on Saturday before Christmas 2 Edward I [23 Dec. 1273] he went to Robert and Isabel's house in Wodestrate, broke down the door and entered; he beat and ill-treated the two Isabels, whom he found inside, so that as a result of the beating they both afterwards gave birth to stillborn boys, and stole a silver brooch worth 1/2 mark from Isabel wife of John; that he did this wickedly and feloniously they offer [to prove]. Richard comes and denies the death, robbery and everything. He says that previously when they were at the husting [the highest City of London Court] the appellors made no mention of the robbery and did not appeal him in the proper form, but only made a simple plaint; so he seeks judgment

whether he is bound to answer their appeal. This having been allowed, it is adjudged that the appeal be null. Robert and all the others are to be committed to gaol for a false appeal. To preserve the king's peace let the truth be ascertained by jury. Richard, asked how he wished to clear himself, says that he is a clerk. Thereupon Richard de Berwes, minor canon of St. Paul's London, and by letters of the bishop of London, etc., comes and claims him as a clerk;[2] but that it may be known for what he is to be handed over, let the truth be ascertained by the neighbourhood. Forty-two men from the three nearest aldermanries, sworn before the justices, say on their oath that he is not guilty of death, robbery or any other crime, so he is quit.

1. Reproduced from The London Eyre of 1276 73-74 (no. 261) (London Rec. Soc., 1976).

2. See supra, text accompanying note 2 (of Case No. 45 of this Appendix 4), as well as that note itself.

Case No. 48: Serlo v. Bertone (Eyre of London, 1244)[1]

Isabel, wife of Serlo, appeals William Bertone of having beaten and ill-treated her in her own house, on Saturday before the close of Easter [26 April 1242], so that she gave birth prematurely to a stillborn male child; and that he did this wickedly and against the king's peace she offers to prove by whatever means the court shall appoint. William comes and denies the beating and the felony and whatever is against the king's peace and declares that he is not guilty thereof, and puts himself upon the verdict of the mayor and citizens of London that she appealed him out of hatred and malice. Asked by the justices if they saw the aforesaid stillborn child, the sheriffs say that they did not, but the chamberlain says that he saw it with its head crushed and its left arm broken in two places and its whole body blackened by that beating. And because the chamberlain has the record and testifies thus, it does not seem to the justices that the accused can clear himself by the verdict of the mayor and citizens, but rather that, particularly in a case of

homicide, where someone prosecutes, or where grave suspicion exists, no one ought to be allowed to put himself upon their verdict. Afterwards William came and put himself upon the great law, and the justice took pledges from him accordingly. Therefore he was to wage his law and defend himself thirty-six-handed, eighteen compurgators being chosen from one side of the Walbrook and eighteen from the other side, the election to be made next day before the mayor and aldermen, the chamber lain and sheriffs being absent and the parties present, in the folkmoot at St. Paul's. And he was to appear with his law eight days after the morrow of the election, by special permission of the justices on petition of the barons. Otherwise he would have had to come on the morrow, because such was found to have been the procedure at the last eyre, in the case of John Herlizun.

Pledges of the law: [...names of pledges omitted]. On the morrow there were chosen in the folkmoot thirty-six [compurgators] according to the form aforesaid, viz:... [names of compurgators omitted].

He (William) was to come with his law on the octave of the election, and the woman was to be committed to the sheriffs, who were to produce her on that day. On that day William came with his law and waged it before the justices as follows. First he swore to the following effect--viz: that he had never beaten Isabel so that the child of which she had been prematurely delivered was nearer to death and further from life.[2] After that, six of the compurgators swore in this wise, viz: that to the best of their knowledge his oath was a true one. After they had sworn, William swore as before, repeating his oath, and after him another six compurgators; and thus he swore six times and so waged his law. It was therefore adjudged that he should be quit in perpetuity, and that Isabel should be committed to gaol.

1. Reproduced from The London Eyre of 1244 62-64 (nos. 157-58) (Lon. Rec. Soc., 1970) (footnotes omitted).

2. See 2 Pollack & Maitland, supra note 2 (of Case No. 31 of this Appendix 4):

> "I have slain a man if but for some act of mine he might perhaps be yet alive. Very instructive is a formula which was still in use in England of the thirteenth century: one who was accused of homicide and was going to...[trial] was expected to swear that he had done nothing whereby the dead man was "further from life or nearer to death."

See also, supra, Case No. 22 (of this Appendix 4).

Case No. 49: Portour v. Buk et al (Eyre of London, 1244)[1]

> Sarah, wife of Aubyn le Portour, appeals Maud, wife of Walter Buk' and Stanota her daughter, for that on Friday after Trinity Sunday, 21 Henry III [4 June 1238], they came to her house and beat and ill-treated her, so that afterwards on the feast of the Decollation of St. John the Baptist [29 Aug.] in the same year, she gave birth prematurely to a male child, as a result of that beating. And that they did this wickedly and feloniously, she offers etc. as the court etc. Maud and Stanota come and wholly deny the felony and whatever is against the king's peace, and strongly deny that they ever beat her. They say that if she was beaten on the day on which she says she was beaten, and afterwards, fifteen weeks after that day, gave birth to a living child [filium vivum], which was baptized and lived for three days, it seems to them that her appeal does not lie.[2] Furthermore, they freely put themselves upon the verdict of the mayor and citizens[3] that they never beat her (Sarah) nor did she give birth to a son. Thereupon, the mayor and citizens say upon their oath and on faith in which they are bound to the king, that Maud and Stanota never beat her, nor did she give premature birth to a son. Therefore it is adjudged that they go quit thereof, and that Sarah be taken into custody for a false appeal.

1. Reproduced from The London Eyre of 1244 50-51 (no. 124) (London Rec. Soc., 1970).

2. See supra, Case No. 25 (of this Appendix 4).

3. See supra, Case Nos. 48 & 46 (of this Appendix 4).

Case No. 50: R v. Petiprestre et al (Eyre of London, 1244)[1]

In the same year etc. John le Petiprestre and Richard the Deacon and Thomas, brother of the parson of St. Giles, on Wednesday after the feast of St. Bartholomew the Apostle [26 Aug. 1237] beat a pregnant woman named Maud so that she gave birth prematurely to a male child [filium peperit abortum]. They fled and are suspected. Therefore let them be put in exigent and outlawed according to the form etc.[2]

1. Reproduced from The London Eyre of 1244 48 (no. 116) (London Rec. Soc., 1970).

2. See supra, note 4 (of Case No. 9 of this Appendix 4).

Case No. 51: St. Albans v. Tulbuche (Eyre of London, 1244)[1]

In the same year, Simon fitz-Mary being chamberlain and sheriff, and Roger le Blund his fellow-sheriff, on the first Monday in Lent [3 March 1234], Stephen Tulbuche beat Alice, wife of Geoffrey of St. Albans, so that she miscarried [fecit aborsum]. Geoffrey, her husband, found pledges to prosecute the same Stephen, viz: William of the Change, avener, and Martin of St. Paul's, tailor, who have died, and now he does not come, and is therefore in mercy. Afterwards he comes. And because his wife is still living and takes no action, and moreover Geoffrey her husband says nothing in his appeal by reason of which he (Stephen) could be made to wage his law [Geoffrey does not say that the killing was felonious? Or perhaps: Geoffrey does not allege that a felony was committed upon him?[2]], it is adjudged that the appeal does not lie, and he (Geoffrey) is to be in mercy for a false appeal. Let him be taken into custody; and for the safeguarding of the king's peace, enquiry is to be made of the mayor and citizens concerning the deed; whether Stephen so beat her that she miscarried or not. They say upon their oath, and in the faith in which they are bound to the king, that Stephen did beat and ill-treat her, but that it was not from that cause that she miscarried. Therefore, it is adjudged that she be in mercy, and committed to custody and imprisoned. Afterwards Stephen came and made fine in

1/2 mark, with Peter of Basing as surety. The amercement of Geoffrey le Avener [of St. Albans] is pardoned because he is poor.

1. Reproduced from The London Eyre of 1244 36 (no. 84) (London Rec. Soc., 1970).

2. See supra, note 2 (of Case No. 19 of this Appendix 4). See also e.g., infra, Case Nos. 57 & 59 (of this Appendix 4).

Case No. 52: Carpenter v. Hurri (1240's)[1]

Phina, the wife of Robert le Carpenter, appealed Roger Hurri in the county for beating [her] so that she gave birth to a certain aborted child (quendam puerum abortivum) and for the peace of the lord king broken, etc. And Phina now does not come.[2] And it is testified by twelve that she lies in labour: therefore nothing[3] from her or [her] pledges. And Roger does now come; and it is testified to the jurors that he has not settled the suit [conc'], and is not guilty. Therefore [he is] acquitted thereof.[4]

1. Just 1/778, m.57 (footnotes and translation from the Latin supplied by Professor Baker). The membrane relates to the pleas for the hundred of West Medina (the western part of the Isle of Wight, which is in Hampshire). This case is summarized in C.A.F. Meekings, Studies in 13th Century Justice and Administration 267 (London, 1981).

2. I.e., she fails to appear before the justices in eyre.

3. I.e., no fine.

4. At Just. 1/778, m.56d, it is related that Robert le Carpenter is in mercy for a trespass (transgressione).

Case No. 53: Paiard v. Dunkerigge (1230's-1240's)[1]

Margaret, the wife of Stephen Paiard, appeals Laurence de Dunkerigge, Wyot de Greneton and Alan de Yeldeland that they were in force and aid together

with Ralph Heir [?], namely when Lucas Paiard so beat her that she aborted [abortivit];...[and Lucas] has abjured the realm because he forged the lord king's seal. And Laurence and the others come and deny everything etc. And the jurors bear witness that they are not guilty. Therefore [they are] acquitted. And Stephen and Margaret his wife are to be kept in custody. And Richard of the Old Bridge is in mercy for the trespass. Afterwards, Stephen came and made fine for himself and his wife in the amount of one mark, by the pledge of Guy de Bretteville.

1. Just. 1/174, m.40d (1st case). Translation from the Latin supplied by Professor Baker. This case and Case Nos. 54-58, infra this Appendix 4, are cited in C.A.F. Meekings (ed.), Crown Pleas of the Wiltshire Eyre, 1249 at 89 (including note 7 at p.121, under Appeals by Women) and 90 (including notes 21-23 at p.122, under Appeals by Women) (16 Wiltshire Arch. Nat. Hs. Soc., 1961).

Case No. 54: Orscherd v. Trenchard et al (1230's-1240's)[1]

John le Orscherd, who has died, appealed William Trenchard and Michael and Robert his sons that they beat his wife Christine so that she aborted. And William and the others come and deny everything and put themselves upon the country. The same [John] appealed the same William for the death of his wife Christine, who [i.e. William] comes and denies everything and puts himself upon the country as before. And the jurors bear witness that they were not guilty of the aforesaid abortion; nor was the same William guilty of the aforesaid death. Therefore [they are] acquitted.

Since the appellor died, and yet the prosecution continued, it is reasonable to conclude that this appeal was converted into a crown plea on the death of the appellor. It is not entirely clear that the abortion and the death of Christine arose from the same act.

1. JUST 1/174, m.40d (2nd case). Translation from the Latin supplied by Professor Baker. See supra, note 1 (of Case No. 53 of this Appendix 4).

Case No. 55: Porte v. Smith (1230's-1240's)[1]

> Erneburga, who was the wife of Hugh de la Porte, appeals Philip the son of Roger Smith that he beat and ill-treated her so that she aborted her child [puerum]. And now she comes and sues against him. And Philip does not come. And the jurors say that she sued her appeal at three counties, and at the fourth she did not sue, and thus the outlawry remains to be pronounced upon him. And because she did not sue at the fourth county, she and her pledges of prosecution [are] in mercy, namely Walter Kempe and Walter Carter. And Erneburga is a pauper. And Philip is exacted and outlawed.[2] And the twelve jurors bear witness that she did perfectly well sue her appeal at the fourth county. Therefore in mercy for the false presentment. He had no chattels because he was a stranger.

Professor Baker, in commentary on this case, stated:

> "The procedure here referred to is that of outlawry for nonappearance. The appellee had to be exacted, or solemnly called to come forth, at separate sessions of the county court, and was only outlawed after four failures. The appellor was liable to amercement for not pursuing the appeal through to that stage, though here the jurors seem to have changed their mind. I rather think the jurors first mentioned are what we would call the grand jury, and the 'twelve' were a trial jury, though at this date the composition may have overlapped. The net result, anyway, is outlawry of the appellee [Philip, the son of Roger Smith] for not appearing".[3]

1. JUST 1/175, m.38. Translation from the Latin supplied by Professor Baker. See supra, note 1 (of Case No. 53 of this Appendix 4).

2. See supra, note 4 (of Case No. 9 of this Appendix 4).

3. Professor Baker in a letter to Philip A. Rafferty (July 31, 1984).

Case No. 56: Gundewine v. Warner et al (1247)[1]

> Amice, who was the wife of Ralph Gundewine, appeals Adam Warner, William Warner and Henry Warner that they came to the house of her the said Amice and broke her house, and took her the said Amice and beat her severly (male) so that, by reason of that beating, she the said Amice lost her child which was then in her belly. And that they did this to her wickedly and feloniously against the peace etc., she offers etc.
>
> And the aforesaid Adam and others come and deny the [breach of the peace], the beating, and the whole etc. and put themselves upon a jury of the township. And they offer the lord king 50 pounds for having the jury therein, by pledge of [twelve names].
>
> And the jurors say upon their oath that in truth the aforesaid Adam and others beat the aforesaid Amice; but they say that she immediately went off, and walked about hither and thither, and afterwards when eight days had elapsed she aborted a certain child having the form of a male (puerum habentem formam hominis masculi) five inches long; but they believe that this was rather due to the labour and foolish behaviour (stultum gestum) of the selfsame Amice than to the aforesaid beating.

Given that the five-inch fetal length represents crown-heel length, and not crown-rump length, then Gundewine's fetus was probably approximately three and one-half months old.[2] The external genitalia of a three month old (fertilization age) human fetus may be visually recognizable as male or female.[3]

1. JUST 1/274, m.14d. Translation from the Latin supplied by Professor Baker. See supra, note 1 (of Case No. 53 of this Appendix 4).

2. See R. Benson (ed.), Current Obstetric & Gynecologic Diagnosis & Treatment 90 (4th ed., Los Altos, CA, 1982).

3. See, e.g., Benson, supra note 2 at 91 & 150; Keith Moore, The Developing Human: Clinically Oriented Embryology 271-73 (4th ed., 1988); and Creassy & Resnik, supra note 23 (of Part V) at 240 (visual recognition of the sex of a fetus can initially occur at the com-pletion of the 14th week after conception). And see supra, Case Nos. 27 & 35 (of this Appendix 4).

Case No. 57: Swayn v. Fuatard (1230's-1240's)[1]

William Swayn appealed Henry Fuatard for this: that the same Henry struck Matilda, wife of the selfsame William, in the mouth (in ore), so that she aborted his[2] child. And William comes and now sues against him. And Henry neither comes nor is attached, because he was not found. And the jurors say that they have settled (concordati) and that the aforesaid Henry is not guilty thereof. Therefore William is to be detained. And because the same Henry fled after that deed, and was in the aldermanry of Henry Jay in Westgate, therefore he is in mercy...Henry is amerced 42d., for having fled, and William is fined half a mark for his false claim.

1. JUST 1/359, m.36. Translation from the Latin supplied by Professor Baker.

2. According to Professor Baker, "suum could mean his or her, but in this sentence perhaps the natural meaning is "his". Professor Baker in a letter to Philip A. Rafferty (July 31, 1984).

Case No. 58: Merchant v. Andevere (1249)[1]

Cecily wife of Robert the merchant who appealed Philip of Andevere in that wickedly and in felony in the King's highway in Salisbury city he beat her and maltreated her so that she miscarried, comes now and

withdraws her plea. So let her be taken into custody, and her pledges for prosecution are in mercy. Later it is testified that she did not find pledges but only her good faith being poor. Philip comes and denies the death and [says] that he never beat her so that she miscarried and on this he puts himself on a jury of the town. The jurors say Philip struck her with a small rod but they say by their oaths that she did not miscarry through the blow. So he is acquitted. However, because he struck her let him be taken into custody.

1. Reproduced from Meekings, supra note 1 of Case No. 53 (of this Appendix 4) 257 (no. 562).

Case No. 59: Sauter v. Ferur (Gloucester, 1221)[1]

Andrew le Ferur beat Wymark, the wife of William le Sauter, being pregnant; and William (her husband) charged him that the child was dead in the womb as a result of this, because she gave birth to a dead child; and therefore let Andrew be kept in custody.[2]

1. Reproduced (as translated from the Latin by Professor Baker) from F.W. Maitland (ed.), Pleas of the Crown for the County of Gloucester: 1221 (London, 1884) 16 (no. 69).

2. The outcome of this case is unknown.

Case No. 60: Maynard v. Rechich (1250's)[1]

John de Rechich' beat one Juliana daughter of Maynard, so that he killed her boy in her womb, and fled. Therefore let him be exacted and outlawed.[2] He was received at Stoke Curcy. Therefore [that township] is in mercy. The jurors concealed that matter; therefore they are in mercy. He had no chattels.

1. Reproduced from C. Chadwyck-Healey (ed.), Somersetshire Pleas (Civil and Criminal) from the Rolls of the Itinerant Justices (Close of 12th Century - 41 Henry III) 321 (no.1243) (XI Somerset Rec. Soc., London, 1897).

2. See supra, note 4 (of Case No. 9 of this Appendix 4).

Case No. 61: Saxi v. Paris (1200)[1]

> Lincolnshire. Agnes, the daughter of Saxi, appeals John of Paris that, whereas she was in labour, he came to her house and dragged her out by the feet and struck her with a certain pole in such a way that she lost her child. And the citizens of Lincoln came and showed a charter of the lord king which witnesses that they should not be impleaded outside the walls of Lincoln (except for their moneyers and officials), and that they ought not to make battle concerning any appeal but to deraign themselves [i.e., to vindicate themselves or to prove their innocence] according to the liberties and laws of the city of London; and they prayed this liberty. A day is given to them before the lord king wheresoever he should then be in England on the morrow of St. Edmund to hear their judgment.[2]

1. Reproduced (as translated from the Latin by Professor Baker) from Curia Regis Rolls of the Reigns of Richard I and John, Preserved in the Public Record Office 293 (London, 1922).

2. The outcome of this case is unknown.

Case No. 62: R. v. Hugh F. of H (n.d. but pre-1506, and probably post-14th century)[1]

> The jurors present that Hugh F., of H., on the [date omitted], at S. in the county aforesaid,[2] with force and arms, namely etc., by night broke and entered the house of S.C. at S. aforesaid and then and there [assaulted][3] the said [S.][4] and Jane his wife, being pregnant and near to delivery,[5] and beat them, and feloniously slew a certain boy then being in the womb of her the said Jane, and inflicted other outrages upon them so that their lives were despaired of, against the peace of the present lord king etc.

Professor Baker made the following comments on this case:

> As to S. and his wife Jane, this is an indictment for trespass (battery); but the

> word "feloniously" shows that the killing of the foetus was here treated as manslaughter [i.e., as criminal or felonious homicide]. The outcome of the case is not known, and there is no hope of finding the original, since we do not have any dates to go on.[6]

1. Per Professor Baker in a letter to Philip A. Rafferty (December 12, 1986):

> "Translation [from the Latin] of the precedent in A Boke of justyces of peas (1515 ed.), sig. F3, [as] [c]ollated with the first known edition (1506?), sig. Giii, at fo. v of the indictments. (This [latter] volume has now been reprinted both by Professional Books Ltd and by Theatrum Orbis Terrarum.) The texts are substantially the same, but I now think they are both in error in printing "interfecit" instead of "insultum fecit". This misled me into saying [in 94 Selden Soc. 306, n.4 (1978)] that there were two felonies. The only felony laid in this indictment is the killing of the foetus."

2. Per Professor Baker: "The county would have been in the margin of the roll, but is not in the precedent".

3. Per Professor Baker: "All texts have "interfecit" (killed), which makes no sense. I think it is a slip for "insultum fecit", an easy enough mistake for a careless copyist. It must be "assaulted", because it is followed by "beat them", and they were always in that order, the more serious offence last."

4. Per Professor Baker: "It obviously must be S., but is misprinted as T. in all four editions that I have seen."

5. Per Professor Baker: "Latin "vicinem partui" (correct in 1515 ed.); the second word misprinted as "perpetui" in the first edition."

6. Professor Baker in a letter to Philip A. Rafferty (December 12, 1986).

Case No. 63: Alice et al v. Osmund (1261)[1]

> John Osmund for feloniously striking Alice with an axe and robbing the other two. Osmund prayed judgment whether they should be allowed an appeal except for the death of their husbands killed in their arms, their virginity raped, or for a childbortively killed in their wombs (de puero abortivo occiso in ventrorum ipsarum). The appeal was quashed. The jurors were then charged to inquire into the breach of the king's peace, and found that he committed no trespass, but that it was done by his three sons. The defendant was discharged.

Although neither this case nor the following three cases (Case Nos. 64-66), involved abortion, they are relevant here for the following reason: They, along with other cases and references,[2] tend to confirm that the plea offered by the defendants in these cases was a "standard or form" plea. Since this standard or form plea concedes that a woman may bring an appeal for the death of her child killed in her womb, it follows that this plea would not have been made by a defendant in an abortion appeal. This tends to confirm that women could bring abortion appeals notwithstanding Magna Carta[3]. However, there is some evidence that seems to indicate that the woman's abortion appeal did "not" lie when her aborted child was born alive and then died in connection with being aborted.[4] I am at a loss to explain these apparent inconsistencies.

1. JUST 1/82 (roll of the Cambridgeshire eyre of 1261 (45 Hen. III), Sayles, mm.22), as summarily translated from the Latin by Professor Baker. My initial source: 58 Seld. Soc. LXXII (including n.6); and Maitland, supra note 1 (of Case No. 59 of this Appendix 4) at 140 n. 69.

2. At JUST. 1/998A, m.29 (Wiltshire eyre, 1268), the following entry appears: defendants say that "a woman has no appeal except for raping her virginity, killing her husband in her arms, and aborting her child in her belly." At 33d, 40, this

same statement appears in different Latin words. Translation from the Latin supplied by Professor Baker. My initial source: Meekings, supra this note at 90 & 122 n. 21. And see also, Year Books of Edward II: The Eyre of Kent 6 & 7 Edward II. A.D. 1313-1314 Vol. 1, LXXX (1910).

3. See infra, text accompanying note 2 (of Case No. 65 of this Appendix 4); and Meekings, supra note 1 (of Case No. 53 of this Appendix 4) at 87-90.

4. See supra, Case Nos. 25 & 49 (of this Appendix 4). But see, e.g., infra, Reference Nos. 7 & 8 (of Appendix 7).

Case No. 64: Dere v. Osberne et al (1261)[1]

Grecia, the widow of Maurice Dere, appeals against Thomas Osberne and others for the death of her son. Osberne and others prayed judgment whether she could have any writ of appeal against them except for her husband killed in her arms, her virginity raped, or for a child killed in her womb (de puero in utero suo occiso). The appeal was quashed.[2]

1. JUST 1/82, supra note 1 (of Case No. 63 of this Appendix 4) at m. 32d., as summarily translated from the Latin by Professor Baker.

2. See supra text (of Case No. 63 of this Appendix 4) accompanying note 3.

Case No. 65: St. Edmunds v. Skathur (Eyre of Huntingdon, 1285)[1]

[Luch of St Edmunds appeals Geoffrey le Skathur, monk of St Albans, for the death of her son Richard, who fell off St Neots Bridge and drowned...]

...[A]nd because the county admitted this appeal for the death of her son at the suit of his mother, contrary to the form and tenor of Magna Carta, in which it is contained that no one should be taken or imprisoned by the appeal of a woman unless the appeal was for the death of her husband or for her virginity raped with force or for her child aborted, whereas

this appeal is manifestly against the form of the aforesaid charter, it is decided that the whole county be in mercy.

Magna Carta c. 54 (1215) (repeated in Magna Carta c. 34 (1225)) says that 'No one shall be taken or imprisoned upon the appeal of a woman for the death of anyone other than her husband'.[2]

1. JUST 1/351A. m.2. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 235-236 (including note 46).

2. The Latin original reads: "Nullus capiatur nec imprisonetur propter appellum femine de morte alterius quam viri sui". In M.J. Russel, Trial by Battle, and the Apeal of Felony, 1 (no. 2) J. of Legal Hs. 135, 137 (1980), the following is stated: "Because a woman was barred from fighting [in trial by battle], Magna Carta [c. 54] provided..." See also Year Book of Edw. II, supra note 2 (of Case No. 63 of this Appendix 4).

Case No. 66: Carter v. Stephen the servant et al Eyre of Wiltshire, 1281)[1]

Juliana the wife of Henry the Carter of Winterbourne Earls appealed in the county Stephen the servant of Roger le Forther, Luke of Upton [and 27 others] for a beating committed against the aforesaid Henry her husband and robbery and breach of the king's peace etc. And she now comes and pursues her appeal against all the aforesaid. And all [except 5] come. And the aforesaid Juliana does not appeal them by way of appeal inasmuch as she says that all the aforesaid beat the aforesaid Henry her husband and robbed him of a certain surcoat. And Luke and all the others deny the beating, robbery and whatever is against the peace etc. And they pray it may be allowed to them that she has previously appealed them in the county by way of appeal, making mention of the year, day and hour when the aforesaid battery and robbery were committed, and likewise forasmuch as a woman should not have an appeal except for the death of her husband slain within her arms, for the rape of her virginity,

and for her child aborted, and this appeal is not in any of these categories of appeal, wherefor they pray judgment of this appeal. And, these things being allowed to them, they put themselves for good and ill upon the country. And because it appears by the coroner's roll that when she appealed them in the county she made mention of the year, day and hour, and she now makes no mention thereof, and because this appeal is not in one of three aforesaid categories, it is decided that her appeal is a nullity for the purpose of putting anyone to the law; and the aforesaid Luke and all the others, with respect to this appeal, [are to go] without day. And let Juliana be committed to the gaol for a false appeal. And, with respect to keeping the lord king's peace, let the truth of the matter be enquired into by the country....

1. JUST 1/1005, pt. 2, m.155 & 155d. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 235 (including note 45).

APPENDIX 5

Case No. 1: R v. Clouet (1304)[1]

> The King sends a petition enclosed by which it can be seen that Jordan Clouet has abjured the island of Gerneseye for the death of a child in the womb of Maud Bonami its mother, of which he is indicted. Mandate to command Otes de Crantzon, who holds the island, or his lieutenant to certify whether he abjured the island for that or for another reason, [and] whether he killed the child of malice prepense or not, and how it died.

Hurnard related the following concerning this case:

> There is an instance of pardon both for death and trespasses, for which Jordan Cloyet had abjured the Channel Islands. There was a plea of matrimony in the ecclesiastical court between him and Matilda Bonamy, whereby she "obtained letters of excommunication against the said Jordan, and he, meeting her as she was carrying them, snatched them from her and threw her to the ground, and took away her purse containing the said letters and 16 pence..., by reason of which throwing, the child whereof she was pregnant died and was born abortive".[2]

Guernsey is one of the Channel Islands. The King's Council exercised jurisdiction over these islands, and English judges were sent on eyre there. However, Guernsey has never been subject to the English common law. Guernsey law is based upon the customs of Normandy. Nevertheless, the language ("malice prepense") used in this case, as well as the pardon, suggests that English law was applied in this case. Also, abjuration applied only to felonies.[3]

1. Reproduced from Calendar of Chancery Warrants in the Public Record Office Prepared Under the Superintendence of the Deputy Keeper of the Records. A.D. 1244-1326) 232 (London, 1927).

2. Hurnard, supra note 29 (of Part IV) at 106 n. 4 (citing Cal. Pat. Rolls, 1301-1307 at 303).

3. See 94 Seldon Soc. 338 (1978).

Case No. 2: R v. Garton (1348)[1]

> William de Garton of Newsham in Rydal indicted before the lord king in Michaelmas term in the 22nd year [1348] of the present king of England for that he on the Tuesday next after the feast of St. George in the 22nd year of the reign of the present lord king of England feloniously killed Ellen his wife with the quick child (cum infante vivo) in her belly, at Newsham....
>
> [Found not guilty and discharged]

It is unclear here if the destruction of the child is laid as a separate felony.[2]

1. KB 27/354, Rex m. 66. Reference and translation from the Latin supplied by Professor Baker. This case is reproduced also, infra at text (of Reference No. 3 of Appendix 7) accompanying note 7.

2. See supra, Case No 5, 16, 20, 22, 26, 28 & 37 (of Appendix 4).

Case No. 3: R v. Houdydoudy (1326)[1]

> Saturday after the Feast of St. Peter ad Vincula [1 Aug.], 20 Edward II. [A.D. 1326], information given to the aforesaid Coroner and Sheriffs that Lucy wife of Richard de Barstaple lay dead of a death other than her rightful death in the rent of the Hospital of St. Katherine in the parish of St. Botulph Without Alegate in the Ward of Portsokne. Thereupon, they proceeded thither, and having sum-

moned good men of that Ward and of the three nearest Wards, viz.: Alegate, Tower and Bisshopesgate, they diligently enquired how it happened. The jurors... [names omitted] say that on Monday after the Feast of St. Peter and Paul [29 June 19 Edward II. A.D. 1326], Agnes "Houdydoudy" met the aforesaid Lucy, who was enceinte, in the High Street near the Tower, and a quarrel arising, the said Agnes knocked the said Lucy and struck her on the belly with fist and knees, and fled leaving her half dead in the street. The said Agnes was immediately caught and taken to Neugate, whilst the said Lucy was carried by friends to the rent aforesaid where she had her ecclesiastical rights and within three weeks gave birth to an abortive child, and died on Friday the Feast of St. Peter ad Vincula of the blows, at the third hour. The corpse viewed,&c. Precepts to the Sheriffs,&c.

The outcome of this case is unknown.[2]

1. Reproduced from Reginald R. Sharpe (ed.), Calendar of Coroner's Rolls of the City of London A.D. 1300-1378 166 (London, 1913) (footnote omitted).

2. See supra, Case Nos. 5, 9, 16, 20, 22, 26, 28, & 37 (of Appendix 4).

Case No. 4: R v. Cokkes (Somerset, 1415?)[1]

Commission to Robert Hull of Spaxton, John Seymour and John Werre, sheriff of co. Somerset, to inquire concerning all matters contained in certain petitions severally exhibited to the king in Chancery by John White, Robert Thorne of Winsford, Thomas Morlee of Milverton and Elizabeth his wife against John Cokkes, attorney in law, which the king sends to them under the foot of his seal. Westminster.II May 3 Henry V [1415].[2]

Inquisition before the said Robert and sheriff. Tuesday after Trinity: John Cokkes is guilty of all the matters contained in the said petitions hereto annexed (now missing), except that the jurors in no

wise know whether or not he beat and wounded the said Elizabeth and ill-treated her by her legs so that she was delivered of 2 children then in her womb 5 weeks before her time, to the great dispair of her life, by which assault the back of one child and the legs or limbs of the other were broken so that they died immediately after their birth.[3]

The outcome of this case is unknown.

1. Reproduced from 7 Calendar of Inquisitions Miscellaneous (Chancery) Preserved in the Public Record Office 1399-1422 296 (no. 523) (London, 1968).

2. Citing Calendar of Patent Rolls, 1413-1416, p. 345.

3. Citing C. Inq. Misc. File 294 (11).

APPENDIX 6

Case No. 1: John Broune's Case (Scotland, 1605)[1]

June 18 - John Broune, goldsmith, burgess of Edinburgh, delated [indicted] for ambushing Katherine Rae, wife of Edward Johnnestoune, the younger, merchant burgess of Edinburgh, and attempting to rape her, and causing her to miscarry ["pairt with barne"].[2]

Pursuer [Prosecutor] Edward Johnnestoune, the younger, merchant burgess of Edinburgh.

Prolocutors [Advocates or Spokemen] of the panel [defendant] - the Laird of Phillorth, Mr. John Russell, Mr. James Donaldoune.

The Justice continues this matter to the 17th [sic 27th] of June instant.

Indictment against John Broune:

(June 27) Forasmuch as, upon the 17th day of May last past, the said Katharine and Edward her husband, having supped in their father's house, and being returning after supper at about ten o'clock at night from their said father's house to their own lodging, in peaceable and quiet manner and not expecting any harm, injury or pursuit of any persons, but [expecting] to have passed in peaceable manner through the High Street of the said burgh of Edinburgh to their said lodging, under God's peace and our sovereign lord's, it is of verity that the said John Broune, goldsmith, accompanied by Patrick Robertsoune, burgess of Aberdeen, perceiving [i.e., supposing] the said Katharine to be by herself, alone, and accompanied only by a serving woman, and finding the street to be quiet (so that no one was on it to observe their doings or to stay their intended shameful and villainous enterprise) the said John Broun and Patrick Robertsoune resolved violently to have raped the said Katharine and her serving woman' and for this purpose the said John came to the said Katharine and broke forth in sundry uncomely and unhonest speeches to her, believing [i.e., hoping] to have persuaded her to have yielded to his filthy lust and beastly appetite; and, finding himself disappointed

of that means, he, in his beastly rage and fury, as one possessed with a wicked spirit, most shamesfully and cruelly grabbed the said Katharine Rae by the throat, and violently pulled her off the High Street to a close-heid [alley-way] under a stair, and their cruelly with his clenched fists struck and hit her in the face, and caused her to bleed at mouth and nose in great quantity, tore her kerchief and the other ornaments of her head, and cast the same under his feet, and with his knees punched the said Katharine in the belly (she being great with child), and would not have failed to abuse her chastity if the said Edward, her husband, and other neighbours (hearing her and her said servant give the hue and cry) had not come with diligence and rescued her from his cruel grips: by occasion whereof the said Katharine was led home to her own house, where she has lain continually bedridden ever since, in great pain and suffering, under the care of doctors and surgeons; so that, upon the 21st day of May last past, or thereabouts, she gave birth to a dead bairn [child], and she herself has been and still is in great hazard and danger of her life: [the accused] committing thereby manifest villainy at night time within the said burgh of Edinburgh, in the High Street thereof, which should be a [place of] safety and a refuge for all honest men and women, especially the honest neighbours who are inhabitants there; and the said John Broune is art and part [i.e., accessory and principal or involved from the start] of the same villainy and barbarous crime, and is also art and part of the slaughter and destruction of the said Katharine's infant bairn, wherewith she has aborted by reason of the aforesaid; and for this the said John ought and should be punished in accordance with the laws of this realm, as a brigand and murderer by night, to the terror and example of others to commit the like in time to come.

It is alleged that the summons is not relevant, by reason that the fact libelled is only a naked intention. It is answered by the pursuer that he joins together the whole crimes libelled, to be tried by the assize.

The Justice finds the summons relevant, in respect of the answer.

It is further alleged that this matter cannot pass to an assize by reason that it has already been tried before the Secret Council and a sentence given therein already. It is answered by the pursuer that the Secret Council are not criminal judges, and that no precognition taken by them can be in prejudice of the Justice's decision to put crimes to an assize: as was lately decided between Johnnestoune of Newbie against William Maxwall.

The Justice remits this matter to the trial of an assize.

Verdict: the assize, by the mouth of David Fairlie, merchant burgess of Edinburgh, found, pronounced and declared the said John Broune to be guilty, culpable and convict of the invading [assaulting] and molesting of the said Katharine Rae by night, committed at the aforesaid time contained in the said indictment; and declared the said John to be clean, innocent and acquit of the murder and destruction of the said infant bairn committed at the aforesaid time, in respect that there was nothing [i.e., no evidence was] produced for verifying thereof. Whereupon both the said parties asked instruments.

[No sentences are recorded.]

1. Reproduced (as translated from the Scottish by Professor Baker) from 2 R. Pitcairn (ed.), Ancient Criminal Trials in Scotland. Part Second 463-64 (Edinburgh, 1833).

2. See 5 A Dictionary of the Older Scottish Tongue 320 (1983).

Case No. 2: The Case of Patrick Robiesoun and Marion Kempt (Scotland, 1627)[1]

[Margin:] Adultery and poisoning of an unborn child; convicted and hanged.

Delated [indicted] of contravening the acts of parliament made [in 1563 and 1581]against those committing the detestable crime of adultery - namely the 74th act of the ninth parliament of Queen Mary[2] and the 105th act of the seventh parliament of King James VI[3] - by the said Patrick diverting the use of his

body from Margaret Zorkstoun his lawful spouse and committing the said filthy crime of adultery with the said Marion Kempt, who has borne for him in the said filthy sin of adultery three several children, namely one of them in her own house in Duncanlaw ten days before Christmas in the year 1626 and the other two [, twins, together at Hallowmas [November 1, All Saints Day] last, thereby committing the said heinous crime of adultery and contravening the tenor of the said acts of parliament; and also in respect of the said Marion Kempt drinking a composite poisonous drink, the said Patrick Robiesoun being made aware thereof and in no way diverting the said Marion therefrom or from poisoning and destroying the first child conceived by her within her belly, by the drinking of which poisonous drink the said first child was mercilessly slain and destroyed in the said Marion's belly; committed in one month or other of the years 1626 and 1627.

Pursuer [i.e., prosecutor] Mr. Thomas Hope of Craighall, King's [or Lord] Advocate.

The panel [defendants] confess the crimes above written and crave God's pardon for the same. Whereupon my Lord Advocate asked for instruments [i.e., that their confessions be written into or incorporated into the record of the proceedings].

The assize:...[names of 15 jurors omitted].

Which persons of the assize, being chosen, sworn and admitted, after accusation of the said persons on panel of the crimes of adultery and taking the said poisonous drink by the said Marion of destruction of the first of the said children in her belly which was begotten by her in the said adulterous copulation (in the manner specified in the above-specified indictment), and after verification of the said indictment by our sovereign lord's Advocate by production of their depositions and confessions of the said crimes (which after reading thereof judicially in the hearing of the said assize were confessed by the panel to be true), whereupon instruments were taken by H.M. Advocate, conforming to their own depositions and ratification thereof in judgment in their presence and in the presence of the judge, of the aforesaid crimes mentioned in their said indictment. Whereupon

> my Lord Advocate asked for instruments. For which reason the justice continues [i.e., defers] the pronouncing of judgment upon the former conviction until such time as he should be advised with the lords of the Privy Council thereupon, and orders the panel to be taken back into custody and kept in strict security and captivity in the Tolbooth of Wardhouse of Edinburgh in the mean time etc.
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> - - - - - -
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> (20 Dec. 1627, before Alexander Colville, J. Dep.) On which day Patrick Robiesoun of Duncanlaw and Marion Kemp, the widow of the late William Paxtoun, there being presented upon panel 'to their doom' [for judgment and sentencing] pronounced against them as they who were duly and lawfully convicted by an assize in a court of justiciary held in the Tolbooth in Edinburgh by Mr. Alexander Colville of Blair, Justice Depute, on the eighteenth day of December instant, of the filthy and abominable crime of adultery committed by both the said Patrick and Marion with others, and of the said Marion's taking and drinking a poisonous drink with the knowledge and consent of the said Patrick in order to destroy the infant bairn in her belly (gotten between them in the said sin of adultery) as is contained at length in their conviction: therefore the justice, at the command of the lords of His Majesty's Secret [Privy] Council, according to an act dated the eighteenth day of December instant, subscribed by Robert M'Cairtour, dempster of the court, ordered and adjudged the said Patrick Robiesoune and Marion Kemp to be taken to the castle hill of the burgh of Edinburgh, and there to be hanged until they be dead, and all their moveable goods to be escheated and forfeited to his highness's use as convict of the said crimes. Which was pronounced for judgment ('doom').[4]

It cannot be certainly stated that Robiesoun and Kempt were executed for destroying Kempt's unborn child. The report of this case reflects that "the filthy and abominable crime of adultery [was] committed by both" defendants. The 1563 adultery statute made it a capital offence to be a notorious and manifest committer of adultery, "alswell the woman as the man doer and committor of the samin", after

due admonition to abstain. The 1581 adultery statute was passed to clarify the 1563 statute. It authorized a sentence of death for three separate categories of "notorious and manifest" adulteries: 1) where children were born of the adulterous union, 2) where the parties openly or notoriously kept bed together, and 3) where the parties refused to abstain after due admonition and excommunication. Robiesoun and Kempt were probably prosecuted under the first limb (children born) of the 1581 statute. Kempt was unmarried. So, and for example here, under Roman Catholic canon law, she was not an adultress, but rather was a fornicator. It seems, however, she qualified as an adultress under the 1581 and 1563 Scottish adultery statutes ("als-well the woman as the man doer and committor of the samin").[5]

David Hume (1757-1838), nephew of the British, empiricist philosopher by the same name, in the homicide section of his Commentaries on the Law of Scotland Respecting Crimes (1797-1800), and in the course of disputing the proposition that at the Scottish common law an unborn child is properly recognized as a victim of homicide, stated that the reason why Robiesoun and Kempt received sentences of death was because of their convictions of open and notorious adultery (a then capital felony in Scotland), and not because of their abortion convictions. However, in his discussion on the crime of adultery in the same work, Hume implied that the reason why Robiesoun and Kempt received sentences of death was because of their abortion convictions, and not because of their adultery convictions! He stated, here, respectively:

> The slaughter must be of a person, or existing human creature. Wherein is excluded all procuring of abortion, or destruction of a future birth, whether quick or not; because, though it be quick, still it is only pars viscerum matris [part

> of the mother, which reflects Roman law], and not a separate being; nor can it be said with certainty, whether it would have become a quick birth or not. It is true, that on the 10th November 1606, Patrick Deanes had sentence of death, for the slaughter of his wife and a child in her womb.[6] As also, on the 12th February 1631, Thomas Davidson and Effie Gibb had the like sentence, for the murder of Elizabeth White, Davidson's wife, "and the bairn in her belly being near to the "full time." And again, there is the trial of Patrick Robertson and Marion Kempt, for notour adultery and the administering and taking of a poisonable draught (as the record calls it), wherewith she destroyed her child in the womb. But in all these instances another and capital crime concurred with the destruction of the child and it cannot be certainly known from the short and general oppression of the record, that the latter was found separtime [separately] relevant as murder.[7]
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> - - -
>
> I have observed only the following instances of capital sentence pronounced, and executed, for adultery. The case of John Guthrie, who had married and cohabited with a second wife during the lifetime of the first. The case of Marion Kempt and Patrick Robertson, where the adultery was notour by procreation of children; but there was also a charge of destroying a conception by a poisonous draught....It appears that the rigour of the law was often avoided, even in cases of repeated guilt, and of the highest kind.[8]

It can be fairly stated that the abortion convictions played a significant role in establishing the sentence that was meted out to these two unfortunate persons. In Scotland in 1694, Daniel Nicolson, a married man, and Mrs. Pringle, a widow were hung for committing adultery aggravated by their conspiracy to have Nicolson's wife charged with plotting to poison him.[9]

1. Reproduced (as translated from the Scottish by Professor Baker) from 1 Selected Justiciary Cases 1624-1650 81-82 (Stair Society ed., Stair Gillon, Edinburgh, 1953).

2. See the Record Commission edition of 2 Acts of the Parliament of Scotland 539 (1563, c.10).

3. See ibid. (vol. 3) at 213 (1581, c.7).

4. For the Privy Council order, see R.P.C.II, 162.

5. See 1 Hume, infra note 7 at 451.

6. This case is reproduced infra, in Case No. 6 (of this Appendix 6).

7. 1 David Hume, Commentaries on the Law of Scotland Respecting Crimes with a Supplement by Benjamin Robert Bell 186-87 (2nd ed., Edinburgh, 1844) (1st ed., 1797-1800).

8. Ibid. at 458.

9. See 3 Robert Chambers, Domestic Annals of Scotland 60 (1861).

Case No. 3: Harrott's Case (Scotland, 1564)[1]

> November 29 - William Harrott of the Cannongate delated of striking and hitting ('dinging') with his hands and feet Katharine Hay, being great with child, of which strokes she took to bed and, continuing in the pain and suffering thereof, miscarried ("pairted with bairn"),[2] and so was cruelly slain by him in her womb. Repledged[3] to the regality of Holyrood House.

The outcome of this case is not known.

1. Reproduced (as translated from the Scottish by Professor Baker) from 1 R. Pitcairn (ed.), Ancient Criminal Trials in Scotland. Part Second 456 (Edinburgh, 1833) (notes by Dr. Baker).

2. See 5 A Dictionary of the Older Scottish Tongue 320 (1983).

3. Sent to the other jurisdiction on surety being given.

Case No. 4: Bruce's and Wilson's Case (Scotland, 1562)[1]

April 23 - Helen Bruce, and John Wilsoun her son, found caution to undergo the law at the next air [a superior royal Court, or the English equivalent for eyre] of Edinburgh for the cruel hurting of Janet McNech and hitting ('dinging') her by the hair and pushing her with their feet, whereby she "pairted with bairn" [miscarried].

The outcome of this case is unknown.

1. Reproduced from 1 R. Pitcairn (ed.), Ancient Criminal Trials in Scotland.Part Second 421 (Edinburgh, 1833).

Case No. 5: Dowglass's Case (Scotland, 1561)[1]

Robert Dowglass of Dowchry, under the laird of Bass, and Margaret his daughter, delated of coming with their accomplices on the first day next after the feast of lambs [August 6] in the year 1561, under silence of night, by way of hamesucken,[2] to the dwelling-house of Henry Carfra in Ridinghill, he himself being then away accompanying some friends who had that day been with him in company, and there searched and sought for the said Henry for his slaughter; and the said Thomas, then standing in sober manner, 'doublet alone' [unarmed or defenceless], without armour or weapons, accompanied by his wife and Bessy Litster only, in front of the said Henry's door, expecting no harm etc., the said Robert Dowglass alighted from his horse and without any occasion assaulted the said Thomas for his slaughter, and hurt and wounded him in his left arm and face, to the effusion of his blood in great quantity; and [at] that same time cruelly struck the said Thomas's spouse with sundry strokes with foot and hand, she being great with bairn, through which strokes she pairted with the bairn [miscarried][3] at her homecoming.

They offered to put themselves on an assize and desired no continuation, but the case was continued, the laird of Quhittinghame standing surety for them.

The outcome of this case is not known.

1. Reproduced (as translated from the Scottish by Professor Baker) from 1 R. Pitcairn (ed.), Ancient Criminal Trials in Scotland. Part Second 412 (Edinburgh, 1833) (notes by Professor Baker).

2. In Scots law this meant attacking a man in his own home, though hamesucken in old English law seems to have been more akin to burglary. In either sense, it was an unlawful invasion of a man's home.

3. See 5 A Dictionary of the Older Scottish Tongue 320 (1983).

Case No. 6: Deanis' Case (Scotland, 1606)[1]

(Court of Justiciary before Mr. William Hairt, Justice-Depute)

November 10 - Patrick Deanis [of] Gilcherstoune, delated of the cruel and unnatural murder and slaughter of the late Katharine Burler his spouse, and of an infant bairn [child] in her womb, by striking her with his feet upon the womb, and with a swingle-tree [a stick used in beating flax] shoulders and divers other parts of her body, she being with quick bairn at the time: by occasion whereof, she immediately thereafter (with the said bairn in her womb) departed this life. Committed the seventh of November instant, at his own house door in Gilcherstoune, between eight and nine o'clock at night, according to his own confession.

Verdict: the assize, by the mouth of John Harlaw of Laistoune, chancellor, found, pronounced and declared the said Patrick (according to his own confession, made judicially in their presence) to be guilty, culpable and convict of the said cruel and detestable murder.

Sentence: and therefore the said Justice-depute, by the mouth of John Hammiltoun, dempster of the court, determined and ordered the said Patrick to be taken to the ground where the said fact was committed and there to be hanged upon a gibbet until he be dead; and all his moveable goods to be escheated etc.[2]

1. Reproduced (as translated from the Scottish by Professor Baker) from 2 R. Pitcairn (ed.), Ancient Criminal Trials in Scotland. Part Second 517 (Edinburgh, 1833).

2. See supra, text accompanying note 6 (Case No. 2 of this Appendix 6).

APPENDIX 7

Reference No. 1: The Abortion Passage in Horn's "Mirror of Justices" (1285-90)

> Of infants killed ye are to distinguish, whether they be killed in their mothers womb or after their births; in the first case it is not adjudged murder; for that none can judge whether it be a child [i.e., whether it has a human shape] before it be seen, and known whether it be a monster or not.[1]

Once the product of human conception is expelled or removed from its mother's womb it can be certainly determined whether or not that product has a human shape. The French physician and surgeon Ambroise Paré (1510-90), in the course of discussing how to properly make forensic reports, remarked:

> Being to make report of...[an unborn] child killed with the mother, have a care that you make a discriete report, whether the childe were perfect in all parts and members thereof, that the judge may equally punish the author thereof. For he meriteth farre greater punishment, who has killed a child perfectly shaped and made in all members, that is, he which hath killed a live childe, then he which has killed an Embryon, that is a certain concreation of the spermaticke body. For Moses [the Septuagint version of Exodus 21:22-23][2] punishes the form er with death, as that he should give life for life, but the other with a pecuniary mulcte.[3]

The Mirror of Justices has not been recognized as a book of authority on the early common law. Pollack and Maitland stated: "of the Mirror of Justices we shall take no notice. Its account of

criminal law is so full of fables and falsehoods that as an authority it is worthless![4]"

1. Andrew Horn, The Mirror of Justice 209 (Rothman Reprint of the 1903 ed., 1968).

2. Reproduced supra, at text (of Part III) accompanying note 22.

3. The Apoligie and Treatise of Ambroise Paré 219 (Geoffrey Keynes ed., London, 1951).

4. 2 Pollack and Maitland, supra note 2 of (Case No. 31 of Appendix 4) at 478 n.1.

Reference No. 2: Britton's Abortion Passage (c. 1290)[1]

> As to women, our will is, that no woman shall bring an appeal of felony for the death of any man, except for the death of her husband killed within her arms within...[a] year and [a] day.[2] For an infant killed within her womb, she may not bring any appeal, no one being bound to answer an appeal of felony, where the plaintiff cannot set forth the name of the person against whom the felony was committed.

Assuming, without conceding, as fact that no appeal would lie here,[3] it would not follow from such a fact that an indictment for the same death also would not lie.[4]

The rationale offered here, if applied to homicide indictments, would have dictated that infanticide and the killing of a stranger or unknown person could not be tried as homicide at common law. However, and as can be seen, for example, in the following case (R v. W. de Byndalle (1324?), the opposite was the case:

> William, son of Thomas de Byndalle, chaplain, indicted before the said sheriff for that he feloniously killed a certain unknown boy (puerum ignotum) at Tunstall, on the Sunday next before the feast of St.

Bartholomew the Apostle in the 18th year [1324] of the reign of King Edward [II] father of the present lord king, and the aforesaid William after the felony was committed buried the aforesaid boy at the Grenedyk ende next [to] Sonnyngcros...[Found not guilty and discharged.][5]

1. Reproduced from F.M. Nichols, Britton: An English Translation and Notes 95-96 (Lib.1, c.24, sec.7) (Washington, D.C., 1901).

2. See supra, text (of Case No. 65 of Appendix 4) accompanying note 2, as well as that note.

3. See the numerous such appeals (Case Nos. 19, 23, 25, 29, 30, 31, 32, 36, 39, 45, 47, 48, 49, 52, 53, 55, 56, 58, 61, and 63-66) set forth supra, in Appendix 4.

4. See, e.g., infra, Reference No. 6 (of this Appendix 7); and Schneebeck, supra note 29 (of Part IV) at 233. See also supra, text (of Case No. 63 of Appendix 4) accompanying note 4, as well as the references set forth in that note.

5. KB 27/354, Rex m.3d. Reference and translation from the Latin, supplied by Professor Baker. See also KB 9/15/79 (a woman was indicted for feloniously killing her one month old, unnamed boy; outcome not recorded); infra, text (of Reference No. 3 of this Appendix 7) accompanying notes 5, 7 & 8; Staunford, infra Appendix 8; and supra notes 10 & 20 (of Part IV).

Reference No. 3: R v. Anonymous, also known as The Abortionist's Case (1348)[1]

One was indicted for that he killed a child in its mother's belly, and the opinion [was] that he shall not be arraigned (arraigne) on this since no name of baptism was in the indictment, and also it is hard to know whether he killed it or not etc.

This report of R v. Anonymous, as translated from the French by Professor Baker, is taken from Fitzherbert's Abridgment (1514/ 1516), where the case is dated Mich. 22 (1348) Edw. III. According to Professor Baker, this case is not to be found in the vulgate edition of

the year book 22 (1348) Edw. III, and there do not appear to be any surviving manuscript texts of this year. This "text is, therefore, probably the best we shall ever have."[2] Professor Baker added that the source of Fitzherbert's Abridgment report of R v. Anonymous is Statham's Abridgment (c.1490).[3]

An argument can be made that the source of Statham's report of R v. Anonymous (1348) is the underscored portion of the following passage in 22 (1348) Liber Assisarum (Book of Assizes):[4]

> Note that no one is bound to answer to an appeal of felony where the plaintiff does not mention the name of the dead man, though a man shall answer an indictment for the death of an unknown man (as happened concerning W. Chamble, [and] K. Burgeis, who were indicted for the death of an unknown man killed at "Lok", for which they were arraigned in the King's Bench and put to answer and found not guilty etc). Query, if a man kills a child in its mother's belly, whether he shall suffer death for this? I believe not, because the deceased is not named and was never "in rerum natura" [literally: in existence; but here: born alive or brought forth alive into the world].[5]

The underscored portion of the above quote is obviously a commentary on a legal point or issue, and is not a report of an actual case. Could it be, however, that it is a commentary on an actual English abortion case that occurred in 1348 or in some other year? It seems doubtful. Professor Baker noted that no abortion case is contained in either the vulgate edition of the year book 22 (1348) Edw. III or the surviving manuscript texts of the year book 22 (1348) Edw. III.[6] He noted also the following:

> In 1348 the King's Bench held a very thorough session of gaol delivery at York. Most of the indictments are in a very short form, some even in French. I have been

through the surviving indictment file (KB 9/156) and the entries on the Rex roll (KB 27/354), and found only two possibly relevant cases, neither of them exactly in point:

> KB 27/354, Rex m. 3d: William, son of Thomas de Byndalle, chaplain, indicted before the said sheriff for that he feloniously killed a certain unknown boy (puerum ignotum) at Tunstall, on the Sunday next before the feast of St Bartholomew the Apostle in the 18th year [1324] of the reign of King Edward [II], father of the present lord king and the aforesaid William after the felony was committed buried the aforesaid boy at the Grenedyk ende next Sonnyngcros...[Found not guilty and discharged.]
>
> KB 27,354, Rex m. 66: William de Garton of Newsham in Rydal indicted before the lord king in Michaelmas term in the 22nd year [1348] of the present king of England for that he on the Tuesday next after the feast of St George in the 22nd year of the reign of the present lord king of England feloniously killed Ellen his wife with the quick child (cum infante vivo) in her belly, at Newsham...[Found not guilty and discharged.]
>
> [Cf. also KB 9/156/79, a woman indicted for feloniously killing her (unnamed) boy aged one month. Outcome not recorded on the file.][7]

A person may want to argue that the fact, that the second rationale ("it is hard to know whether he killed it or not") in R v. Anonymous is different from the second rationale (the child "was never in rerum natura [born alive]") in the 22 (1348) Liber Assisarum abortion passage, supports the proposition that R v. Anonymous is not a confused version of the 22 Liber Assisarum abortion passage. However, the

precise rationale behind the supposed requirement that the unborn child must be born alive (in order to be recognized as a potential victim of homicide) was that when the child was born dead it was considered too hard to determine whether or not the defendant killed the child. John Baldwin in approximately 1460, observed:

> It is also a good indictment before the coroner, if the dead person cannot be identified, to say 'he killed a certain unknown person'; and for this he shall suffer death. It is otherwise if a man strikes a pregnant woman, and then she is delivered of one who is dead; there it is not felony, for it cannot be known (en notice) whether it was through the striking or for another cause, because it was not at such time in rerum natura etc., and so it cannot be tried.[8]

The rationales in R v. Anonymous and the 22 Liber Assisarum abortion passages are, then, virtully identical. That, of course, supports the proposition that R v. Anonymous (1348) is but a confused version of the 22 (1348) Liber Assisarum abortion passage. Also, in addition to the fact that R v. Anonymous and the 22 Liber Assisarum abortion passage have the same date (1348), is the fact that they are equally brief or short.

A person may want to argue that it cannot be reasonably argued that the real source of Statham's report of R v. Anonymous is the 22 Liber Assisarum abortion passage, inasmuch as the former purports to recite a ruling or decision on an actual abortion indictment, whereas as the latter simply recites a commentator's or recorder's "opinion" on a hypothetical abortion case. Such an argument might prove too much. The report of R v. Anonymous recites an answer to the question ("query") posed in the 22 Liber Assisarum abortion passage. Yet this

same report does not recite that this same question was posed in R v. Anonymous. And note the R v. Anonymous phrasing "and the opinion was...". Such a phrasing correctly describes what was done in the 22 Liber Assisarum abortion passage. However, and technically speaking, it would incorrectly describe what was supposedly done in R v. Anonymous. When a Court rules on a legal question, the Court is rendering a "decision", and not an opinion, although the latter serves as the basis of the former.[9]

Statham was certainly aware of the fact that a Liber Assisarum consists largely of reports of cases or reports of debates or arguments on legal issues in actual cases. That awareness may have caused Statham to represent R v. Anonymous as an actual case instead of as a hypothetical case.

Perhaps the greatest reason for concluding that R v. Anonymous was not an actual case is that its supposed holding would have been contrary to then existing law. The cases set forth in Appendix 4 clearly demonstrate that at the 14th century common law, a child killed in the mother's womb was indeed recognized as a victim of criminal homicide. Judges are, of course, presumed to know applicable law, and to apply the same.[10]

Furthermore, neither of the rationales set forth in R v. Anonymous found their way into the received common law. The first rationale would dictate that infanticide would not have been governed by the common law rules on homicide.[11] The second rationale, if carried out to its logical extensions, would mandate that it would not be even a common law misdemeanor or misprision to commit such a killing because, in the context of such a misdemeanor prosecution, the fact would remain that it cannot be legally proved that the abortional act brought about the death of the child in the womb. However, and as has been shown already, it was indeed an indictable

misdemeanor to slay the unborn child in the womb.[12] It will be recalled that Coke was not the first common law commentator to acknowledge this proposition.[13]

Finally, so far as is known, at the 14th century common law there was not available to a defendant a procedural tool for presenting a prearraignment, evidentiary challenge to an indictment for felony.[14]

But it is argued that, for all it may be known, the defendant in R v. Anonymous challenged the indictment on the grounds that at common law an unborn child is not recognized as a victim of criminal homicide because it is settled law or a universal rule that it never can be sufficiently proved that an unborn child died in connection with a defendant's abortional act or battery on the child's mother. The problem with such an argument is that it seems highly doubtful that at this period in the development of the common law (or for that matter, at any subsequent period of the common law) there existed such a settled rule. There is no known "accretion of cases" that would support such a rule. Available case evidence indicates that at the then existing common law, it was indeed recognized that it can be legally proved (or is a question of fact) whether a particular abortional act brought about the in-womb destruction of a child.[15]

Even assuming that the report of R v. Anonymous represents an actual case, still, there is nothing in that brief report that unequivocally relates that the clause "and also it is hard to know whether he killed it or not" reflected or represented the thinking of the Anonymous justices. For all it may be known, the foregoing clause is but a commentary on the R v. Anonymous facts by either the unknown person who originally reported R v. Anonymous or some other person who copied the original (and now lost) record or report of that case.

1. Fitzherbert, Abridgment, Corone (1514/16) pl. 263 ("Un fuit endit de ceo que il tua enfant en le venter sa mere, et lopinion que il ne serra arraigne sur ceo eo que nul nosme de baptisme fuit en lenditement, et auxi est dure de conustre sil luy occist ou non etc."). Translation supplied by Professor Baker. Per Professor Baker in a letter to Philip A. Rafferty (December 12, 1985): "Fitzherbert's source was Statham's Abridgment fo. [58v], Corone case [91] (printed without title c. 1490): 'Un fuist endite de ceo qil tua une enfaunt deinz le ventre sa mier. Et loppinion qil ne sera arraigne surceo eo que nulle noune de baptisme fuist en lenditement, et auxint il est dure de conustre sil le occist etc.' (same translation)."

2. Professor Baker, supra note 1.

3. See supra, note 1.

4. 22 Lib. Ass. pl. 94 (1348). Reference and translation from the French supplied by Prof. Baker. There follows in the 1679 edition of the 22 Lib. Ass. at p.4 & 106, respectively, a reference to the Twins-Slayer's Case (1327/28) (reproduced supra, in Case No. 7 of Appendix 4), and a reference to R v. Anonymous as it is set forth in Fitzherbert's Abridgment. The same conclusion and rationale (no legal name and not in rerum natura) will be found in Robert Brooke Abridgement, Corone pl. 91 (1568).

5. See infra, Reference No. 5 (of this Appendix 7); and infra, text accompanying note 8.

6. See supra, text accompanying note 2. On the yearbooks, see J.H. Baker (ed.), Judicial Records, Law Reports, and the Growth of Case Law 17-42 (1989).

7. Professor Baker, supra note 1.

8. John Baldwin, Reading (Lecture) in Gray's Inn, c. 1460, on the Statute of Marlborough, cap. 25 (Murdrum), Cambridge Univ. Lib. MS. Hh. 2. 6, fo. 92v. (Reference and translation from the French supplied by Professor Baker.) See also, e.g., infra, Reference Nos. 5, 7, & 8 (of this Appendix 7); infra, Case No. 1 (of Appendix 14); and infra, Appendix 8.

9. But see infra, Reference No. 6 (of this Appendix 7) ("according to their better opinions, they held..."); and infra, Appendix 8 ("the opinion was..."). And see Peter Goodrich, Language of Law: From Logics of Memory to Nomadic Masks 227 n. 2 (London, 1990) (quoting J.H. Baker, supra note 6 (of Case No. 1 of Appendix 4) at 159 ("'In those cases where judges were declar-

ing law, it was a transient, oral, informal process, and only those present at the arguments could hope to achieve a wholly accurate impression of what had been decided, and then only when the judges spoke loudly enough.'").

10. See, e.g., People v. Lewis (1987), 191 C.A.3d 1288, 1296. See also infra, text (of Part IV) accompanying notes 200-201.

11. See supra, text (of Reference No. 2 of this Appendix 7) accompanying note 5, as well as that note itself.

12. See the authorities cited supra, in note 33 (of Part IV). See also infra, the commentary to Case No. 1 (of Appendix 14).

13. See infra, Reference No. 5 (of this Appendix 7).

14. See, e.g., John March, Some New Cases of the Years and Time of King Hen. 8., Edw. 6, and Qu: Mary; Written out of the Great Abridgment, Composed by Sir Robert Brook...15 (London, 1615); and 2 Hale, supra note 149 (of Part IV) at 258.

15. See the cases set forth supra, in Appendix 4. And see particularly, supra, note 2 (of Case No. 48 of Appendix 4).

Reference No. 4: The Abortion Passage in the Reading of John Hutton in the Inner Temple, c. 1490, on Westminster II, c. 13 (1285) (Quia multi per maliciam &c.)[1]

> If a man kills a child within its mother's belly the sheriff may not attach [him]; but if it is born and before the baptism it is killed [or dies in connection with the abortional act?] the sheriff may attach, for he killed [satheonum?][2]

1. Camb. U.L. MS. Hh. 3. 10, fo. 32v. Reference and translation from the French, supplied by Professor Baker.

2. Professor Baker was unable to understand what this word was meant to convey.

References 5 & 6: The Abortion Passages in Anonymous 15th Century Readings on the Statute of Gloucester, c. 11 (1278)[1]

Reference 5

Again, if a man kills a child in its mother's womb, where it was never brought into the world, he is not a felon; and if a man is indicted for this, it is said that the indictment is void because he was not in rerum natura. (The last passage deleted.) Query, however. [Added:] Nevertheless, he shall be heavily fined, because the trespass is so heinous etc.

Reference 6

It was said also that if a woman is great with child and a man beats her so that by reason of this beating the child is born dead, this is felony, and he who did it (if he be indicted for it and attainted) shall have judgment of life and limb. Nevertheless, no one can have an appeal of death for this in this case, since it had no name and the appeal must be certain in every point. This was held by all the justices as law in the term last past. It was also held by the same justices to be a great ambiguity and doubt if a woman is slain whether anyone may have an appeal of her death, or not: and according to their better opinions they held that no one should have the appeal of her death, which seems to me amazing, so find out the reason.[2]

1. Cambridge Univ. Lib. MS. Ee. 5. 22, ff. 212, 213, respectively. References and translations from the French supplied by Professor Baker.

2. "The case referred to may be YB 18 Edw. IV, fo. 1; but the YB says the decision was that where a man killed his wife the son could have an appeal". Dr. Baker in a letter to Philip A. Rafferty (December 12, 1985).

Reference No. 7: The Abortion Passage in the Reading of William Wadham in Lincoln's Inn at Lent in 1501, on the Statute of Westminster II (1285)[1]

> If a man beats a woman so that she is delivered of a dead child, it is not felony. It is otherwise if the child is born and baptised, and then dies from the blow which he received in his mother's womb: that is felony.

1. Reproduced (as translated from the Latin by Professor Baker) from the 94 Selden Soc. 306 n.7 extract from BL. MS. Hargrave 87, fo. 324v.

Reference No. 8: The Abortion Passage in the Anonymous Reading ("W")[1]

> If he is born dead the appeal does not lie, because he was never a Christian [baptized?] man; but where he is born alive and then dies from the same battery committed against the mother, in this case the appeal well lies.[2]

The common law accepted, of course, the proposition that a pagan or unbaptized person is properly recognized as a victim of criminal homicide.

1. Reproduced from the 94 Selden Soc. 306 n.7 extract of BL. MS. Harley 1332 fo. 87. Reference and translation supplied by Professor Baker.

2. See supra, text (of Case No. 63 of Appendix 4) accompanying note 4, as well as the references set forth in that note.

Reference No. 9: The Abortion Passage in the Reading of Thomas Marow in the Inner Temple, Lent 1503, on Westminster I, c. 1 (1275) (of the peace)[1]

> Item, if a child is killed in its mother's womb, this is not felony. But if a man kills another man who is unknown in England, it is nevertheless felony, even though he might be an alien enemy, [for] it is adjudged more strictly against him who did it etc.

1. B.H. Putnam, Early Treatises on Justice of the Peace in the Fifteenth and Sixteenth Centuries 379 (7 Oxford Studies in Soc. & Leg. Hs., 1924). Reference and translation from the French supplied by Professor Baker.

APPENDIX 8

Staunford's "Les Plees del Coron" Abortion Passage (1557)[1]

> It is required that the thing killed be in rerum natura [brought forth alive into the world].[2] And for this reason if a man killed a child in the womb of its mother: this is not a felony, neither shall he forfeit anything, and this is so for two reasons: First, because the thing killed has no baptismal name: Second, because it is difficult to judge whether he killed it or not, that is, whether the child died of this battery of its mother or through another cause. Thus it appears in the [Abortionist's Case (1348). And see The Twin-slayer's Case (1327)][3] a stronger case: if a man beats a woman in an advanced stage of pregnancy who was carrying twins, so that afterwards one of the children died at once and the other was born and given a name in baptism, and two days afterward through the injury he had received he died; and the opinion was, as previously stated, that this was not a felony, etc. [Staunford gives here an alternative citation to The Twin-slayer's Case, and then reverts to The Abortionist's Case.] But it seems that this reason, that he had no baptismal name, is of no force, for you shall see [here, Staunford cites an infanticide case decided in 1314/15] that there was a presentment 'That a certain woman whilst walking opposite a chapel gave birth to a son, and immediately she cut his throat and threw him in a pond of stagnant water and fled: on that account she shall be summoned by writ of exigent and shall be outlawed'; for this was homicide inasmuch as the thing was in rerum natura before being killed: thus this [infanticide] case is in no wise like those above mentioned where the child is killed in the womb of its mother, etc. Which case Bracton affirmed as law in his division of homicide...[4] But the contrary of this seems to be the law as above stated.

1. Reproduced from Means II, supra n. 1 (of Part II) at 340-341 (footnote omitted) (first and last bracketed insertions mine).

2. See supra, text (of Reference No. 3) accompanying note 5, as well as that note itself.

3. These two cases are reproduced and discussed in detail, respectively, supra, Reference No. 3 (of this Appendix 7), and supra, Case No. 7 (of Appendix 4). As is explained there, respectively, The Abortionist's Case cannot be considered as reliable even assuming it represents an actual case; and The Twins-slayer's Case actually supports the exact opposites of its generally or commonly understood propositions.

4. See supra, text (of Part IV) accompanying notes 88-90.

APPENDIX 9

Case No. 1: R v. John Portere (1400)[1]

> And that John Portere on the Sunday next before Christmas in the first year [1399] of the reign of King Henry IV, around the hour of curfew, at the stone cross, with force and arms (namely with a sword, targe and staff), waylaid William Pounfret and Agnes his wife and there wrongfully imprisoned them, and on the same day and in the same place so squashed the aforesaid Agnes (being pregnant) that after she had given birth to a son named Walter, he died soon after birth.
>
> [Marginal note:] Trespass, but pardoned.

According to Professor Baker, this marginal note indicates that the Portere indictment alleged a trespass, and not felonious homicide. He went on to say that this "is confirmed by the facts that the indictment omits the crucial words feloniously and killed".[2] He then added the following:

> But, of course, the [Portere] case does not decide that...[the killing of the Pounfret infant, named Walter] could not be [charged as] felony [at common law]....In YB Trin. 18 Edw. IV, fo. 10, pl. 28 (1478), it is held that if the word "feloniously" is omitted in an indictment for theft, the defendant can be convicted of trespass. In YB Trin. 6 Hen. VII, fo. 5, pl. 4 (1491), it is said [that] rape could be presented in a court leet as trespass, even though it had been made felony by statute. (The court leet had jurisdiction over trespass, but not over the statutory offence of rape.)[3]

Similarly, Theodore Plucknett observed:

The question is raised by several indictments for trespass, whose language suggests that they might equally have been laid as felonies. Thus, William le Webbe, we are told, "Julianam...cepit et abduxit et cum ea concubuit contra voluntatem suam et contra pacem". It only needs the addition of "felonice" to make this an indictment of rape. Again, Richard Mustard, with force and arms entered the house of Simon Lord at night and against his will, with intent to kill him. In spite of the close resemblance to burglary, Mustard settled with the crown (on the basis of trespass) with a promise of 5s. And again, various people assaulted and beat a husbandman, gave him a serious wound with a sword, left him for dead, and made off with over seven pounds worth of property. But this is not laid as robbery or larceny, but simply as trespass. It is difficult to resist the conclusion that there was little distinction even in theory between a felonious and a trespassory taking of chattels, and that injured persons often had the choice between (1) an appeal of larceny, (2) an indictment of larceny, (3) an indictment of trespass, and finally (4) a civil action of trespass....[As stated by] Marowe [15th century]: "The wrongful taking of goods by itself does not constitute a felony, for it is the felonious intent which makes felony, for a man can take my goods wrongfully as a trespasser and not as a felon. Nevertheless, although a man has taken my goods feloniously, I can if I please treat that felony as a mere trespass, and so can the king if he pleases. For one wrong shall not be excused by another wrong." This statement seems abundantly illustrated in our rolls; indeed, they suggest that it applies not only to larceny..., but also to rape and possibly to other offences as well. We have here, then, another factor in the growth of the law of misdemeanours, namely, the possibility that some felonies could be reduced to the category of trespasses at the choice of the crown or the prosecutor.[4]

1. Reproduced (as translated from the Latin by Professor Baker) from Elizabeth B. Kimball (ed.), The Shropshire Peace Roll 1400-1414 57-58 (no. 24) (1959).

2. Professor Baker in a letter to Philip A. Rafferty (December 12, 1985). See also Shropshire Peace Roll 1400-1414, supra note 1 at 36 (at homicide) and 38 (at unjust imprisonment).

3. Professor Baker in a letter to Philip A. Rafferty (December 12, 1985).

4. Dr. Putnam (ed.), T. Plucknett (commentator), Proceedings Before the Justices of the Peace in the Fourteenth and Fifteenth Centuries, Edward III to Richard III CLiX-CLX (London, 1938). See also Sims' Case, infra Appendix 14; 15 Viner, supra note 32 (of Part IV) at 522; and Kelyng, supra note 4 (of Statute No. 5 of Appendix 1) 29.

Case No. 2: R v. Botevylayn (or Beauvyleyn) (1305)

> Indicted for Trespass. W. Botevylayn, for beating Isabel daughter of Wm. le Taylour at Slepellavyntor' so that she brought forth a dead child.[1]

Botevylayn evidently was fined 10d.[2]

1. R. B. Pugh, Wiltshire Gaol Delivery and Trailbaston Trials 1275-1306, 105 (no. 576) (1978). (See also id. at 131 (no. 854)). See supra, the commentary accompanying Case No. 1 (of this Appendix 9).

2. Ibid. at 126 (no. 800).

Case No. 3: Alice's Plaint Against Jordan (1249)[1]

> Alice the wife of Adam, son of Ivo, complains that Jordan the servant, on the Thursday next after the Purification of the Blessed Mary in the 32nd year [of Edward I], came to her house late at night and beat her, and trod on her with his feet (pedibus suis

calcavit), so that within a fortnight she aborted a certain child of hers (puerum suum); and prays that justice be done.

And Jordan comes and denies the [breach of the] peace, the beating, and the whole etc. and puts himself upon a jury of the township. And the jurors say upon their oath that the aforesaid Jordan is not guilty in any way of the aforesaid beating. Therefore he is acquitted thereof. And she is poor and pregnant, and near to giving birth: therefore nothing [by way of fine].

According to Professor Baker, this case "is not an appeal of felony, but a plaint of trespass".[2]

1. Just. 1/176, m.27d. Translation from the Latin supplied by Professor Baker. This case is also mentioned in C.A.E. Meekings, Crown Pleas of the Wiltshire Eyre, 1249 8 n.7 & 121 n.7 (Appeals by Women) (16 Wilts. Arch. & Hs. Soc., 1961).

2. Professor Baker in a letter to Philip A. Rafferty (December 12, 1986). See supra, the commentary accompanying Case No. 1 of this Appendix 9).

Case No. 4: R v. Bentley (Eyre of Hampshire, 1281)[1]

Philip de Hoynil the sheriff was commanded to take John the son of Walter of Bentley, who was indicted for the death of a certain abortive infant of Emma, the daughter of A...; and [the sheriff] did nothing [but returned] that he was not found. And it is testified by the jurors that [John] is staying at Bentley and was seen in that vill after the sheriff had the aforesaid precept. Therefore [the sheriff] is in mercy and is amerced at £10. And John comes and denies the death and all etc. and puts himself for good and ill upon the country. And twelve jurors say upon their oath that he is not guilty. Therefore [let him go] quit.

According to Professor Baker: "The defendant is here clearly indicted for the death of an abortive child. But no words of felony are used, and the plea does not deny felony. So it seems...[the child's death] was here treated as a trespass or misdemeanour."[2]

1. JUST 1/789, n.3. Translation from the Latin supplied by Professor Baker. My initial source: Schneebeck, supra note 29 (of Part IV) at 239 (including note 54).

2. Professor Baker in a letter to Philip A. Rafferty (March 30, 1990). See supra, the commentary accompanying Case No. 1 (of this Appendix 9).

APPENDIX 10

Case No. 1: R v. S.G. and R.T. (1731/1761(?))

That S.G., late of the parish and county aforesaid, single woman, not having the fear of God before her eyes, but moved and seduced by the instigation of the devil, and of her malice forethought, contriving and intending feloniously to poison, kill and murder a certain child with which she the said S.G. was then quick and pregnant, on the 22nd day of August in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously, wilfully and of her malice forethought did take, drink and swallow down a certain liquid, in which was boiled a great quantity of Coloquintida, otherwise called bitter apple, being a deadly poison, (she the said S. G. at the time she so took, drank and swallowed down the said liquid in which the said coloquintida otherwise called bitter apple was boiled then and there knowing that the said liquid was a deadly poison) by reason whereof a great quantity of the same liquid (in which was boiled the said coloquintida or bitter apple, so taken, drank and swallowed down by the said S.G. as aforesaid) did pass into and was received in the body of the said S.G. and the said child then and there by the liquid aforesaid became sick and distempered in its body. And the jurors aforesaid, upon their oath aforesaid, do say that the said S.G. afterwards, to wit on the 24th day of August in the year aforesaid, about the hour of eleven in the forenoon of the same day, at the parish aforesaid, in the county aforesaid, the said child with which she the said S.G. was then pregnant as aforesaid did bring forth alive; which said child so born alive was a male child, and by the laws and customs of this kingdom was a bastard; and that the said male bastard child so born alive as aforesaid on the said 24th day of August in the year aforesaid, at the parish aforesaid, in the county aforesaid, of the liquid aforesaid so passed into and received in his body in the womb of his said mother as aforesaid, being a deadly poison, and of the sickness and distemper occasioned thereby, did languish, and languishing did live for the space of three hours next after his birth, and that the said male bastard child, at the expiration of the said three hours, of the liquid aforesaid, be-

ing a deadly poison as aforesaid, and of the sickness and distemper occasioned thereby, on the day and year aforesaid, at the parish and in the county aforesaid, did die. And so the jurors aforesaid, upon their oath aforesaid, do say that the said S.G. him the said male bastard child in manner and by the means aforesaid, feloniously, wilfully, and of her malice forethought, did poison, kill and murder, against the peace of our said lord the King, his crown and dignity. And the jurors aforesaid, upon their oath aforesaid, do say that R.T. late of the parish and county aforesaid, labourer, not having the fear of God before his eyes, but moved and seduced by the instigation of the devil, before the felony and murder aforesaid by the said S.G. in manner and by the means aforesaid done and committed, to wit on the said 22nd day of August in the year aforesaid, with force and arms, at the parish and in the county aforesaid, feloniously, wilfully and of his malice forethought did incite, move, instigate, stir up, council, advise and procure the said S.G. to do and commit the felony and murder aforesaid, in manner and by the means aforesaid, against the peace of our said lord the King, his crown and dignity.- [or was present aiding, abetting, comforting, assisting, and maintaining - as the case may be, and so conclude that all did commit the murder, &c.]- Flight - Forfeiture - in both or either as before. In witness, &c. as before.

Here are some of Professor Baker's comments on this case:

> This is...[a common law] indictment for murder, against the mother as principal and against a man as accessory before the fact. The wording at the end is an alternative for a principal in the second degree ...The mention in the woman's indictment that the child was male and a bastard seems clearly to be intended to bring the case within...21 Jac. I, c.27. [1623/24][2] This [statute] did not create a new offence [,i.e., it did not create a statutory form of murder], but made [common law] murder easier to prove, in that concealment (which did not have to be laid in the indictment) could be treated as conclusive proof of murder. This is made clear by the passage in Vol. I of Umfreville, pp. 44-45:

> "s.2. The indictment to put the prisoner to prove [through at least one witness that] the child was born dead, according to this statute, must contain this special matter, viz. that the prisoner was delivered of issue, male or female, which by the laws and customs of this realm was a bastard, and that it was born alive, and then show how she killed it. 2 Hale [History of the Pleas of the Crown] 190, 288.
>
> s.3. But the indictment need not allege that she concealed it, or be drawn specially, or conclude contra formam statuti; for the statute makes no new offence, or creates a new crime; it only directs the evidence, and makes this concealment undeniable evidence of murder."[3]

In my opinion, 21 Jac. 1, c.27 implicitly dispensed with the usual requirement that a common law murder indictment must allege the manner or means of death. The statutory presumption implicitly presupposes that the manner or means of effectuating the murder may not be knowable, if only for the reason that the actual murder itself may not be knowable.

It is not known if it can be certainly stated that the allegation in this indictment to the effect that the aborted male child was "born alive" and "did live for the space of three hours" derived from evidence obtained from the coroner's investigation or some other source, or simply represented the pleading of a sort of legal fiction. I have come across one other case in which it was stated that the child was born alive and continued to live for three hours. But in that case evidence was offered that the child lived for three hours.[4] Since 21 Jac.1, c.27 was expressly designed in part to cure the difficulty in proving that the bastard child was born alive by implicitly creating a presumption that the bastard child was born alive, then it can be hardly said that the indictment in this case could not have been legally put forth in the absence of an evidentiary

basis that the alleged murder victim was born alive. If it was essential to every common law murder indictment that it be explicitly or implicitly alleged that the murder victim was a live-born human being, or if the same was not essential to 21 Jac.1, c.27-based indictments but the coroner who framed the indictment in R v. S.G. was somehow thought or was advised that the same was essential here,[5] then it might be the case that the allegation in the indictment that the child was born alive and "did live for the space of three hours" was inserted only as a legal fiction to comply with the legal essentials for putting forth a valid, common law murder indictment.

If the foregoing allegation was based upon an evidentiary basis, and was intended to reflect only that evidentiary basis, it still may be the case that the indictment was framed in terms of alternative murder theories: (1) the evidentiary basis theory and (2) the 21 Jac. 1, c.27 presumption-theory.

According to Professor Baker, because Umfreville did not supply either the names of the defendants in this case or the place where it was prosecuted, "there is no [real] hope of finding the [original]".[6]

It probably would not be unreasonable to conclude that the indictment in this case was handed down sometime between 1731 and 1761. The indictment, which appears to have been originally composed in English, appears in the first edition of Umfreville's Lex Coronatoria (1761). For a very substantial period in England prior to 1732, indictments were composed in Latin. In 1732 in England it became law that legal proceedings and court documents must be in English.

1. Reproduced, from 2 Edward Umfreville, Lex Coronatoria: or the Law and Practice of the Office of Coroners 390-393 <10 (1761) [words in brackets in original]. Reproduction supplied by Professor Baker. My initial source: Keown, supra note 99 (of Part II).

2. 21 Jac. 1, c.27 (1623/1624) is reproduced and discussed, supra in Statute No. 5 (of Appendix I).

3. Professor Baker in a letter to Philip Rafferty (May 23, 1989).

4. See, infra, text (of Case No. 3 of this Appendix 10) accompanying note 5. Perhaps this could be certainly known through an examination of numerous 21 Jac. 1, c.27-based indictments.

5. See supra, text accompanying note 3.

6. Professor Baker in a letter to Philip Rafferty (May 23, 1989).

Case No. 2: R v. A.B. (1624/1761(?))

That the said A.B., late of the parish aforesaid, in the county aforesaid, labourer, not having the fear of God before his eyes, but moved and seduced by the instigation of the devil, on the 15th day of July in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said M. then the wife of the said A.B. and then pregnant with a certain male child, then and there being in the peace of God and of our said lord the king, feloniously, wilfully and of his malice forethought did make an assault. And that the said A.B. with his right foot her the said M. in and upon the belly of her the said M. then and there divers times, feloniously, wilfully and of his malice forethought, did strike and kick. And that the said A.B. did then and there give unto her the said M. by such striking and kicking as aforesaid, with his right foot aforesaid, in and upon the said belly of her the said M. so pregnant as aforesaid, divers violent bruises, whereby the said male child with which she the said M. was then and there pregnant, as aforesaid, received divers mortal bruises in and upon his arms, belly, legs and thighs, in the womb of her the said M. his said mother. And the said M. the wife of the said A.B. afterwards, to wit on the 20th day of July in the year aforesaid, at the parish and in the county aforesaid, brought forth the said male child alive; and that the said male child so born alive as aforesaid from the said 20th day of July in the year aforesaid to the 21st day of the same month in the same year, at the parish aforesaid, in the county aforesaid, of the mortal bruises aforesaid, received

by the said male child in his mother's womb as aforesaid, did languish, and languishing did live, on which said 21st day of July in the year aforesaid, the said male child, of the mortal bruises aforesaid received as aforesaid, die. And so the jurors aforesaid, upon their oath aforesaid, do say that the said A.B. him the said male child, in manner and form aforesaid and by the means aforesaid, feloniously, wilfully and of his malice forethought did kill and murder, against the peace of our said lord the King, his crown and dignity. - Flight - Forfeiture[2] - in both or either as before. In witness, &c. as before.

1. Umfreville, supra note 1 (of Case No. 1 of this Appendix 10) at 388-390. Reproduction, with corrected punctuation and without capital letters, supplied by Professor Baker. My initial source: Keown, supra note 99 (of Part II).

2. On forfeiture, see supra, text (of Part IV) accompanying notes 245-254.

Case No. 3: R v. Frances Lewis (London, 1786)

Frances Lewis underwent two trials, and evidently the jury that set on the first trial set also on the second trial. However, it might have been the case that there was a single presentation of evidence that applied to both trials. In the first trial Lewis was tried on 1) a grand jury indictment for the murder of Ann Rose, and 2), and in the alternative to the murder charge, a coroner's indictment for the manslaughter of Ann Rose. Lewis was convicted of manslaughter. In the second trial Lewis was tried on 1) a grand jury indictment alleging the murder of Ann Rose's, live-born male child, who died in connection with injuries he received while in his mother's womb, and 2), and in the alternative to the murder charge, on a coroner's indictment for the manslaughter of Rose's live-born child. Lewis was acquitted on both counts.[1]

For her conviction of the manslaughter of Ann Rose, Lewis was branded on one of her hands and discharged - after having been saved

from the gallows through "benefit of clergy". Benefit of clergy required that the convicted defendant quote a certain passage from the Old Testament. English law in Lewis' day provided that a person could have benefit of clergy only one time in his or her life. Branding served to identify defendants who had previously received benefit of clergy.[2]

Both of the killings in Lewis' Case derived from the same acts or incident. Lewis and Rose, who was then "six months gone with child," had an argument. The argument escalated into a fight. The fight ended, but evidently erupted again shortly thereafter. The fights occurred on a Saturday night. On the following Tuesday Rose gave birth prematurely to a nonviable or "six-months-old male fetus", who expired from immaturity three hours after being born. Rose died two days later (Thursday) from a fever that was brought on in part from giving birth prematurely.[3]

I have reproduced here 1) the manslaughter indictment in the second trial, and 2 & 3) the Old Bailey Session Papers (OBSP) summary of the murder indictment in the second trial, and an excerpt (as set forth in the OBSP) from the trial court's charge to the jury in the second Lewis trial. A commentary on this charge to the jury follows the above reproductions.

Manslaughter Indictment in the Second Lewis Case[4]

> Middlesex: An Inquisition indented, taken for our sovereign Lord the King, at the Dwelling House of Elizabeth Colly[?] known by the Sign of the Baker Arms in the Parish of Saint Luke Old Street in the County of Middlesex, the Fifteenth Day of April in the Twenty sixth year [1786] of the Reign of our sovereign Lord George the Third..., before Thomas Phillips Esquire, one of the Coroners (of our said Lord the King) for the said County, on View of the Body of a New Born Male Child then and there lying dead, upon the Oath of...[names of seventeen male

jurors omitted], good and lawful Men of the said County, duly chosen, and who being then and there duly sworn and charged to inquire, for our said Lord the King, when, how, and by what Means the said New-born Male Child came to his death, do, upon their Oath, say That Frances Lewis..., Singlewoman, on the Ninth Day of April in...[1786], with Force and Arms, at the parish aforesaid in the County aforesaid, in and upon one Ann Rose, with a Certain male Child, and then and there being in the peace of God and aforesaid Lord the King, Violently and Feloniously did make an Assault And that the said Frances Lewis with both her Hands her the said Ann Rose in and upon the Head, Face, Back, Belly, Arms and Waists of her the said Ann Rose did then and there divers times Violently and Feloniously Strike and beat and that the said ffrances Lewis did also then and there With both her Hands Violently and Feloniously Cast and throw the said Ann Rose down to, and against the Ground there and that the said Frances Lewis did then and there as well by such Striking and beating of the said Ann Rose with both her Hands as aforesaid as by such Casting and throwing of the said Ann Rose to and against the ground as aforesaid give unto the said Ann Rose so being Pregnant with the said Male Child as aforesaid divers Violent Bruises upon the Head, Face, Back, Belly, Arms, and Waists of her the said Ann Rose so being pregnant as aforesaid whereby the said Male Child with which she the said Ann Rose was then and there Pregnant as aforesaid Received divers Mortal Wounds and Bruises in and upon his Head, Face, Back, Belly, Arms and Waists in the Womb of her the said Ann Rose And that the said Ann Rose afterward, to wit, the eleventh Day of...April [1786] [at] about Eight of the Clock in the Forenoon of the same day in the year aforesaid brought forth the said Male Child Alive And that the said Male Child so born alive as aforesaid of the Mortal Bruises so received by the said Male Child in the Womb of his said Mother, the said Ann Rose, did Languish and Languishing and Languishing did live for three hours next after his Birth to wit at the parish aforesaid in the County aforesaid And that the said Male Child at the Expiration of the said three hours of the Mortal Wounds and Bruises aforesaid so Received in the Womb of his said Mother the said Ann Rose as aforesaid on the same Day and in the same Year last aforesaid at the Parish and in the County aforesaid did die. And so

the Jurors aforesaid upon their Oath...do say that... Frances Lewis him the Male Child in Manner and by the Means aforesaid Feloniously did Kill and Slay against the Peace for said Lord the King his Crown and Dignity And that the said Frances Lewis at the time of the Committing the Felony aforesaid or at any time since had not any Goods or Chattels, Lands or Tenements within the said County, or else where to the Knowledge or Notice of the said Jurors.

In Witness whereof, as well the said Coroner as the said Joseph Banks, the Foreman of the said Jurors, on the Behalf of himself and the Rest of his said Fellows, in their Presence, have, to this Inquisition, set their Hands and Seals, the Day and Year first above written.

[signature and seal of Thomas Phillips]: Coroner
[signature and seal of Joseph Banks]: Foreman

1) Summary of the Grand Jury's Murder Indictment in the Second Lewis Case, and 2) an Excerpt from the Trial Court's Charge to the Jury in the Second Lewis Trial[5]

The said Frances Lewis was again indicted for that she not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, on the 9th day of April, in and upon Ann Rose then being pregnant with a male child, and also in and upon the said male child, did make an assault, and her the said Ann Rose and also the said male child, did strike, and beat, and throw the said Ann Rose on the ground, whereby the said male child received divers mortal wounds and bruises in the womb of her the said Ann Rose, the said Ann Rose brought forth the said male child alive, which of the said bruises, did languish three hours, and on the same day did die; she was also charged, with the Coroner's inquisition with killing, and slaying this male child.

Court to Jury. Gentlemen, this is, you easily perceive, another method of bringing the case before you [i.e., of once again attempting to prove that Lewis acted "with malice"(?)]; I shall recommend to you in this case, to find a general verdict of not guilty; it is a great deal too much to charge, in the circum-

> stance of the child being alive, the death of the child to the prisoner at the bar, in any shape at all; to be sure the child perished merely in consequence of a premature birth; therefore publick justice is satisfied with what you have done already, and it would be an improper verdict to find her guilty.
>
> NOT GUILTY [on the indictment for murder].
>
> Not Guilty on the Coroner's inquisition.
>
> Tried by the first Middlesex Jury before Mr. Baron EYRE.

It would indeed have been "an improper verdict" (i.e., an illogical verdict - one inconsistent with the verdict of not guilty of murder in the first Lewis trial), but in no event would it have been an "illegal" verdict (under common law "auterfoits acquit" principles), for the jury to have convicted Lewis of the murder of Rose's live-born child.[6] However, nothing relating to the first trial would have made it "improper", "illogical", or "illegal" for the jury in the second Lewis case to have convicted Lewis of the manslaughter of Rose's live-born child. "If" the Lewis trial court intended that his use of the word "improper" be understood by the Lewis jury to extend to the jury's decision on the manslaughter charge, then it may be the case that the trial court misdirected the Lewis jury here in order to ensure that Lewis would not hang. Had Lewis been convicted of the manslaughter of Rose's child, then she could not have received benefit of clergy, since she had already received it on her conviction of the manslaughter of Ann Rose.[7] It may have been the case that the Lewis prosecutor decided against prosecuting Lewis on the four indictments in a single trial because he thought that the one-time, benefit of clergy rule applied only to "successive" convictions. So, the Lewis trial judge may have misdirected the jury to counter the Lewis prosecutor's move of successive trials or prosecutions. Lewis could not have successfully pleaded "auterfoits convict" (a narrower

version of our constitutional concept of Double Jeopardy), if only for the reason her cases involved different victims.[8]

The pertinent facts (aside from the fact of a different victim in each case) in both of the Lewis cases were identical. In neither case did the prosecution attempt to prove that Lewis intended to cause Rose to miscarry.[9] So, the fact that Lewis was acquitted of the murder of Rose demonstrates that the Lewis jury concluded that the facts or circumstances surrounding this killing (and therefore also the killing of Rose's child) were insufficient to prove the murder element of malice. At common law murder and manslaughter "vary in degree, not in kind." At common law the only thing that distinguishes manslaughter from murder is the absence of malice. Common law manslaughter always is defined negatively in relation to murder as the unlawful killing of a human being "without malice". So, this would explain why the trial court in the second Lewis trial urged the jury to acquit defendant of the murder charge.

Some may want to argue that the trial court's comments to the jury implicitly stand for the proposition that at the then English common law a live-born child, who dies in connection with injuries that were inflicted by another while the child was still in the mother's womb, does not qualify as a victim of criminal homicide unless the child was viable when the injurious acts were committed on the child. Such an argument could not get off the ground. At the then common law, a murder or manslaughter indictment had to allege the manner of the killing. If in the prosecution of a common law-based murder or manslaughter indictment, the prosecutor proved that the defendant killed the deceased in a manner substantially different from the manner of the killing as described or alleged in the indictment, then the indictment could not be maintained. For example, if a common law murder indictment alleged a killing by poisoning, and

evidence in the trial proved that the killing was by stabbing or by strangulation, the indictment could not be maintained.[10] The foregoing Lewis indictment alleged only that the child was beaten to death. It failed to allege that the child died from being prematurely expelled from his mother's womb in connection with Lewis' assault on his mother. Also, the medical evidence produced at the trial indicated that the child died not from being beaten or wounded, but rather from being prematurely expelled from his mother's womb.[11] So, the Lewis trial court's comments to the Lewis jury are consistent with the common law rule that a homicide indictment cannot be maintained when the evidence of the manner of the killing is substantially different from that set forth in the indictment.[12]

The trial court judge in the abortion-murder-of-a-live-born-child case of Q v. West (1848), in the course of his charge to the jury, stated:

> The prisoner is charged with murder; and the means stated are that the prisoner caused the premature delivery of the witness Henson, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died. This, no doubt, is an unusual mode of committing murder: and some doubt has been suggested by the prisoner's counsel whether the prisoner's conduct amounts to that offence; but I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder. The evidence seems to show clearly that the death of the child was occasioned by its premature birth; and if that premature delivery was brought on by the felonious act of the prisoner, then the offence is complete....If the child, by

the felonious act of the prisoner, was brought into the world in a state in which it was more likely to die than it would have been if born in due time, and did die in consequence, the offence is murder; and the mere existence of a possibility that something might have been done to prevent the death, would not render it less murder. If therefore, you are satisfied, to the exclusion of any reasonable doubt, that the prisoner, by a felonious attempt to procure abortion, caused the child to be brought into the world, for which it was not then fitted, and that the child did die in consequence of its exposure to the external world, you will find her guilty: if you entertain a reasonable doubt as to the facts, you will, of course, find her not guilty.[13]

1. Professor Baker in a letter to Philip A. Rafferty (March 25, 1986) related the following:

[Re: R v. Frances Lewis (1786)]

I have located the records relating to this case [or these two cases] in the Greater London Record Office.

The examinations of the witnesses are in OB/SP/April 1786/nos. 67, 86. They correspond with the facts in the indictments and [printed] report [i.e., the Guildhall Library OBSP volume for Apr., 1786, pp. 627-636 (nos. 402-403)], and show how the quarrel arose in the early hours of the morning. The medical evidence here was that the child, which lived for three hours and bore bruise-marks, did not die from the bruises but from premature delivery.

Lewis was indicted both by the coroner's jury and by the grand jury. In each case there were two indictments, one in respect of Anne Rose, one in respect of the unnamed child. The only difference between the 2 sets of indictments is that the coroner's indictments were for manslaughter only, the others for murder.

The coroner's indictments are in MJ/SPC/E497-8. I have ordered a photocopy of the one relating to the child (E497). E498 also includes a copy of some of the examinations and a draft of the indictment relating to A. Rose.

> The murder indictments are in OB/SR/243, nos. 43 (Anne Rose) & 44 (the child). Both are indorsed "True bill". No. 43 (Anne Rose) is marked: "Puts herself. Jury say guilty of manslaughter but not of murder, no goods. To be branded in the hand and delivered" (i.e., she had benefit of clergy). No. 44 (the child) is marked: "Puts herself. Jury say not guilty nor fled". So there was an acquittal, as stated in the printed report (case 403) [i.e., as stated in the Guildhall Library OBSP volume for April, 1786, p. 636 (403)].
>
> These two [murder] indictments are sewn in a file and cannot be xeroxed. I was pressed for time when I eventually laid hands on them, and have not transcribed them; but they are so close to the printed version that I do not think the exact wording would help very much.

2. See, e.g., J.M. Beattie, Crime and the Courts in England, 1660-1800 79-80 & 142-43 (Oxford, 1986); and Kelyng, supra note 4 (of Statute No. 5) of Appendix 1) at 28.

3. See (Guildhall Library Collection) OBSP volume for April, 1786, pp. 627-636 (nos. 402-403).

4. This indictment is in the Greater London Record Office (G.L.R.O.) and is cited as follows: 1 MJ/SPC/E497. See supra, note 1.

5. Reproduced from (Guildhall Library Collection) OBSP volume for April, 1786, no. 403, p. 636. This reproduction constitutes the entire OBSP printed report of the second Lewis trial.

6. See the discussion of the common law pleas of "auterfoits acquit" and "auterfoits convict" in Grady v. Corbin, 495, U.S. 508, 530-533 (1990) (Justice Scalia, dissenting) ("the Double Jeopardy Clause...was based on the English common law pleas of auterfoits acquit and auterfoits convict, which pleas were valid only 'upon a prosecution for the same identical act and crime'"; citing 4 Blackstone, Commentaries 330 (1769)); and supra, text (of Part IV) accompanying notes 178-180. While in Lewis a single or same act caused both killings, the fact remains, the act resulted in two distinct crimes of homicide: the homicide of Rose, and the homicide of Rose's live-born child. So, while the act is the same in both Lewis cases, each case, nevertheless, involves a different crime because of different or separate victims.

7. See supra, text accompanying note 2.

8. See supra, note 6, as well as that note itself.

9. See infra, text (of Case No. 6 [R v. Lewis] of Appendix 18) accompanying note 2.

10. See, e.g., 2 Hale, supra note 149 (of Part IV) at 185 and 291. See also, e.g., Kelyng Rpts. 32; R v. Hazel (1785), 1 Leach 368, 380; and R v. Clark (?), 1 Brod. & Bing 473, 9 Co. Rep. 67, a.

11. See supra, note 1.

12. Compare this Lewis indictment to the following indictment in the case of Q v. West (1848), Cox's C.C. 500, 500-501; 2 Cor. & K. 784, 175 Eng. Rpt. 329:

> The indictment charged that before and at the time of the committing of the felony and murder hereinafter stated, one Sarah Henson was then quick with a certain male child; and that Ann, the wife of Joseph West, late of, &c., well knowing the said Sarah Henson to be quick with the said male child as aforesaid, and feloniously, wilfully, and of her malice aforethought, devising, contriving, and intending, feloniously, unlawfully, wickedly, and wilfully to cause and procure the said Sarah Henson to bring forth from and out of her womb the said male child with which she was so quick as aforesaid, and to cause and procure the said male child to be prematurely brought forth from and out of the womb of the said Sarah Henson, and thereby, and by means thereof, the said male child feloniously, wilfully, and of her malice aforethought to kill and murder, on, &c., with force and arms, at &c., in and upon the said male child so quick in the womb of the said Sarah Henson as aforesaid, then and there being, feloniously, wilfully, and of her malice aforethought, did make an assault; and that the said Ann West then and there feloniously, wilfully, and of her malice aforethought, did put, place, and force the right hand of her the said Ann West into the private parts of her the said Sarah Hensen, and upward into the womb of her the said Sarah Henson, and a certain pin which she the said Ann West in her right hand then and there had and held, the said pin into the private parts, and up and into the womb of the said Sarah Henson, then and there feloniously, wilfully, and of her malice aforethought, did put, place, and

force, and the said Ann West, by such putting, placing and forcing the right hand of the said Ann West into the private parts of the said Sarah Henson as aforesaid, and up and into the womb of her the said Sarah Henson as aforesaid, and by such putting, placing, and forcing the said pin into the private parts, and up and into the womb of the said Sarah Henson as aforesaid, she the said Ann West, afterwards, to wit, on, &c., with force and arms, at, &c., feloniously, wilfully and of her malice aforethought, did cause and procure the said Sarah Henson to bring forth the said male child from and out of the womb of the said Sarah Henson as aforesaid, and did then and there feloniously, wilfully, and of her malice aforethought, cause and procure the said male child to be prematurely born and brought alive from and out of the womb of the said Sarah Henson as aforesaid; and that the said male child, by means of being so prematurely born and brought forth alive from and out of the womb of the said Sarah Henson as aforesaid, then and there became and was mortally weakened, debilitated, and emaciated in his body, of which said mortal weakness, debility, and emaciation of the body of the said male child, the said male child for the space of five hours, on, &c., at, &c., did languish, and languishing did live, and then, to wit, on the said last-mentioned day, in the year aforesaid, the said male child, at &c., of the said mortal weakness, debility, and emaciation of his body aforesaid, did die; and so the jurors aforesaid, upon their oath aforesaid, do say that the said Ann West, the said male child, in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder, against the peace of our Sovereign Lady the Queen, her crown and dignity.

13. Cox's C.C. 500, 503, 2 Car & K. 784, 175 Eng. Rep. 329. West was found not guilty.

Case No. 4: R v. Senior (1832)[1]

The prisoner was tried and convicted before Mr. Baron Bolland, at the Spring Assizes for the county of Chester, in the year 1832, uppon an indictment which charged him with the manslaughter of the male infant child of Allen Hewitt and Alice his wife, at

Stockport, on the 24th of March 1832, by mortally wounding the said child upon the head with a knife.

The prisoner practised midwifery in the town of Stockport, and was called in, at about five in the morning of the 24th of March, to attend Alice Hewitt, who was taken in labour. At about seven in the evening of that day the head of the child became visible; and the prisoner, being grossly ignorant of the art which he professed, and unable to deliver the woman with safety to herself and the child, as might have been done by a person of ordinary skill, broke and compressed the skull of the infant, and thereby occasioned its death immediately after it was born.

It was submitted to the learned Judge by the counsel for the prisoner that the indictment was misconceived, though the facts would warrant an indictment in another form; and that the child being in ventre sa mere at the time the wound was given, the prisoner could not be guilty of manslaughter; and quoted 1 Russ. 424.

The learned Judge, [citing 3 Coke Institutes 50-51],[2] did not consider the objections valid; and sentenced the prisoner to imprisonment for one year.

All the Judges (except Lord Lyndhurst C.B. and Taunton J.) considered this case at a meeting in Easter term, 1832; and held unanimously that the conviction was right.

1. Reproduced from 168 Eng. Rep. 1298, 1 Moody 346, 346-47.

2. See supra, text accompanying note 119 (of Part IV).

Case No. 5: R v. Squire (London, 1687)[1]

Middlesex. The jurors [on their oath present] that William Squire, late of etc., not having God before his eyes, but being moved and seduced by the instigation of the devil, on 12 December [1686] in the second year of the reign of King James II at the parish aforesaid in the county aforesaid, knowing a certain Hannah Holman, spinster, to be pregnant

[gravida] (in English 'with quick child'),[2] and he the aforesaid William Squire feloniously, wilfully and maliciously scheming and intending to kill and murder the aforesaid child with which she the said Hannah was then (as aforementioned) pregnant, the same William Squire afterwards, namely on the same 12 December in the above mentioned year, with force and arms etc., at the parish aforesaid in the county aforesaid, feloniously, wilfully and of his malice aforethought obtained and acquired a certain poison called 'white mercury' in his hands and possession, he the same William Squire then and there well knowing the aforesaid poison to be deadly, and that the aforesaid William Squire afterwards, manely on the said 12 December in the above mentioned year, with force and arms etc., at the parish aforesaid in the county aforesaid, feloniously, wilfully and of his malice aforethought placed and mixed the aforesaid poison called 'white mercury' in a certain medicine (in English 'a potion of physic'), and feloniously, wilfully and of his malice aforethought offered and gave the aforesaid poison so placed and mixed in the aforesaid medicine as is aforementioned to the same Hannah Holman to drink and consume (she the said Hannah Holman then and there thinking the aforesaid medicine to be wholesome medicine), whereupon the aforesaid Hannah Holman, thus being pregnant (as is aforementioned) with the same child (as is aforementioned) and thinking the aforesaid medicine to be wholesome, then and there drank and consumed the said medicine thus with the aforesaid medicine called 'white mercury' placed and mixed in the same medicine by him the said William Squire (as is aforementioned), by reason of which drinking and consumption of the aforesaid medicine thus (as aforementioned) mixed with the aforesaid poison by the aforesaid William Squire (as is aforementioned), and by the said William Squire feloniously, wilfully and of his malice aforethought given to the same Hannah Holman, the child aforesaid in the womb of her the said Hannah Holman then and there became in various ways diseased [distemperatus]. And the aforesaid jurors further say upon their oath that the aforesaid Hannah Holman afterwards, namely on 14 March [1687] in the third year of the reign of the said James Ii now king of England etc., at the parish aforesaid in the county aforesaid, thus (as aforementioned) with the aforesaid poison mixed in the aforesaid medicine by

the aforesaid William Squire (as is aforementioned) and by the said Hannah Holman drunk and consumed, gave birth to the aforesaid child (being a male child) alive, seriously diseased [maxime distemperatum] with the aforesaid poison; which same child, thus (as is aforementioned) born alive, was by the laws of this realm of England illegitimate (in English 'was a bastard'); and that the aforesaid illegitimate male child, after the birth of the same, namely on the aforesaid 14 March [1687] in the above mentioned third year, at the parish aforesaid in the county aforesaid, languished from the aforesaid poison mixed in the aforesaid medicine by him the said William Squire (as is aforementioned) and [given] by him the said William Squire to the same Hannah Holman (as is aforementioned) when she was pregnant with the aforesaid child, [and by the same Hannah Holman drunk and consumed and when she was thus as is aforementioned) pregnant with the aforesaid child,[3] lived so languishing [until] 1 July [1687] in the above mentioned third year, on which day the said illegitimate male child, at the parish aforesaid in the county aforesaid, died from the aforesaid poison mixed in the aforesaid medicine by the aforesaid William Squire (as is aforementioned) and given by him the said William Squire to the same Hannah Holman when she was thus (as is aforementioned) pregnant with the aforesaid child, and drunk and consumed by her the said Hannah Holman when she was thus (as is aforementioned) pregnant with the aforesaid child. And thus the aforesaid jurors say upon their aforesaid oath that the aforesaid William Squire feloniously, wilfully and of his malice aforethought poisoned killed and murdered the said illegitimate male child, with the poison aforesaid, in the manner and form aforesaid, at the parish aforesaid in the county aforesaid, against the peace etc.

Here is what Peter Ferguson uncovered in Squire's Case:

> A search of the Indexes & Calendars of Indictments of the Middlesex Sessions Records, on microfilm at the GLRO, revealed that a WILLIAM SQUIRE was indicted in January 1687 (January 1688 by our calendar) for murder. I was then able to "call up" the relevant bundle of Middlesex Sessions Rolls (13 Jan 1687/88, Gaol Delivery, Ref:

> MJ/SR 1720), and in due course I located the document from which the Harvard Law School translation and transcription had been made. An archivist confirmed that, at the very top of the document were written the words "po se non cul nec se retraxit" [i.e., defendant puts himself on jury trial; found not guilty; defendant did not evade prosecution, and therefore he did not incur the fine imposed on defendants who are acquitted but who had tried to evade prosecution...][4]
>
> Further searches of the relevant Sessions Roll revealed no other documents relating to the trial. The archivist assured me that this was all that I would be likely to find, That there would be no separate depositions for the Middlesex Rolls, and that no records of coroners' inquests had survived. The one surviving document, in fact, had probably been based on the coroner's evidence....[5]

A brief report of this case appears in the Old Bailey Session Papers. The report reads as follows:

> William Squire, of St. Andrews Holbourn, was Indicted, for that he on the 12th of December last, gave White Mercury to Hannah Holman, being great with Child, with a design to Poyson the said Child; and that the Child being Born Alive, continued Languishing for some time, and Died of the said Poyson. But there being no Evidence against the Prisoner, but the said Hannah Holman, who had the Child by him, [6] and no Midwife or Chirurgeon appearing to give in Evidence, he was Acquitted.[7]

1. Reproduced from Harvard Law School MS. AKL7962 (precedents of Old Bailey indictments). Reference and translation from the Latin supplied by Professor Baker.

2. gravida insertion mine. Per Professor Baker (in a letter to Philip A. Rafferty, September 21, 1991): "You will...note that [in the indictment] the woman is described as with "quick child" in English, explaining the Latin word gravida..."

3. Per Professor Baker: "Evidently omitted by kaolography; supplied from the repetition below."

4. See John C. Jeaffreson (ed.) (Old Series) Middlesex County Records xxx (1974). Jeaffreson mistranslated "nec se retraxit". See Cockburn, supra note 31 (of Part V) at 113 n.2.

5. Peter B. Ferguson in a letter to Philip A. Rafferty (November 8, 1991) (bracketed insertion mine).

6. See infra, text accompanying note 9 of Appendix 15.

7. Guildhall Library OBSP 13, 14, 16 January 1687/88 (p.4, Col.1).

APPENDIX 11

Case No. 1: R v. Edward Fry (1801)[1]

First Count

That E.F....being a wicked, malicious, and evil disposed person, and not having the fear of God before his eyes but being moved and seduced by the instigation of the devil, on the twenty-eighth day of February, in the thirty-ninth year [1799] of the reign of our sovereign lord George the third, then king of Great Britain, at the time of taking this inquisition, by the grace of God of the united kingdom of Great Britain and Ireland, king, defender of the faith, with force and arms, at, &c. aforesaid, in and upon one A.E. the wife of F.E. in the peace of God and our said lord the king, then and there being, and also then and there being big and pregnant with child, did make a violent assault, and that he the said E.F., then and on divers other days and times, between that day and the day of the taking of this inquisition, with force and arms, at, &c. aforesaid, knowingly, unlawfully, wilfully, wickedly, maliciously, and injuriously, did give and administer, and cause and procure to be given and administered to the said A.E., so being big and pregnant with child as aforesaid, divers deadly, dangerous, unwholesome, and pernicious pills, herbs, drugs, potions, and mixtures, with intent feloniously, wilfully, and of his the said E.F.'s malice aforethought, to kill and murder the said child, with which the said A.E. was so then big and pregnant as aforesaid, by reason and means whereof, not only the said child, whereof she the said A.E., was afterwards delivered, and which by the providence of God was born alive, became and was rendered weak, sick, diseased, and distempered in body, but also the said A.E. as well before as at the time of her said delivery, and for a long time, (to wit,) for the space of six months then next following, became and was rendered weak, sick, diseased, and distempered in body, and during all that time, underwent and suffered great and excruciating pains, anguish and torture both of body and mind, and other wrongs to the said Anne, he the said E.F. then and there unlawfully, wilfully, wickedly, maliciously, and injuriously did, to the grievous damage of the said A.E., and against the peace of, &c.

Second Count

And the jurors, &c. do further present that the said E.F. afterwards, (to wit,) on the said, &c. with force and arms at, &c. aforesaid, in and upon the said A.E. in the peace of God and our said lord the king then and there being, and also then and there being big and pregnant with a certain other child, did make another violent assault, and that he the said E.F. then and on divers other days and times, between that day and the day of the taking of this inquisition, with force and arms, at, &c. aforesaid, knowingly, unlawfully, wi fully, wickedly, maliciously, and injuriously, did give and administer, and cause and procure to be given and administered to the said A.E., so being big and pregnant with child as last aforesaid, divers other deadly, dangerous, unwholesome, and pernicious pills, herbs, drugs, potions, and mixtures, by reason and means whereof, &c. (as before).

Third Count

And the jurors, &c. do further present that the said E.F. afterwards, (to wit,) on the said, &c. with force and arms at, &c. aforesaid, in and upon the said A.E. in the peace of God and our said lord the king then and there being, and also then and there being big and pregnant with a certain other child, did make another violent assault; and that he the said E.F. then and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at &c. aforesaid, knowingly, unlawfully, wilfully, wickedly, maliciously, and injuriously, did give and administer, and cause and procure to be given and administered to the said A.E. so being big and pregnant with child as last aforesaid, divers other deadly, dangerous, unwholesome, and pernicious pills, herbs, drugs, potions, and mixtures with a wicked intent to cause and procure the said A.E. to miscarry and to bring forth the said last mentioned child, with which she was so big and pregnant as last aforesaid, dead, by reason and means whereof, she the said A.E. became and was rendered weak, sick, diseased, and distempered in body, and remained and continued so weak, sick, diseased, and distempered in body for a long time, (to wit,) for the space of six months then next following, and during all the time last mentioned underwent

and suffered great and excruciating pains, anguish and torture, both of body and mind, and other wrongs to the said A.E., he the said E.F. then and there unlawfully, wilfully, wickedly, maliciously, and injuriously did, to the grievous damage of the said A.E., and against the peace, &c.

Fourth Count

And the jurors, &c. do further present that the said E.F. afterwards, (to wit,) on, &c. at, &c. in and upon the said A.E. in the peace of God and our said lord the king, then and there being, and also then and there being big and pregnant with a certain other child, did make another violent assault, and her the said A.E. then and there did violently beat, bruise, wound, and ill treat, so that her life was thereby greatly despaired of, and then and there violently, wickedly, and unhumanly, pinched and bruised the belly and private parts of the said A.E., and a certain instrument called a rule, which he the said E.F. in his right hand then and there had and held, up and into the womb and body of the said Anne, then and there violently, wickedly, and inhumanly, did force and thrust with a wicked intent to cause and procure the said A.E. to miscarry and to bring forth the said child, of which she was so big and pregnant, as last aforesaid, dead, by reason and means of which last mentioned premises, she the said Anne became and was rendered weak, sick, sore, lame, diseased and disordered in body, and remained and continued so weak, sick, sore, lame, diseased, and disordered in body, as last aforesaid, for a long time, (to wit,) for the space of six months then next following, and during all the time last aforesaid, underwent and suffered great and excruciating pains, anguish, and torture, both of body and mind, and other wrongs to the said A.E. he the said E.F. then and there unlawfully, wilfully, wickedly, maliciously, and injuriously did, to the grievous damage of the said Anne, and against the peace of, &c.

Count 1, and perhaps Count 2 of the Fry indictment, each allege the attempted abortion-murder on an unborn child who was born alive. It is unclear (at least in Chitty) whether these counts involve separate pregnancies or one pregnancy involving twins. Counts 3 and 4 each allege an attempted abortion on a woman who was then pregnant with an existing child. It is unclear (at least in Chitty) if Counts 2, 3 & 4 involve 1, 2 or 3 child-victims. If Count 2 did not in fact allege that the child was born alive, then it may be the case that Counts 2-4 involved the same unborn child.

I have not seen the Fry indictments. But they are in existence, as Professor Baker makes clear in the following statement:

> The principal record [of Fry's Case 1801] is on the Crown Roll of the King's Bench for the Michaelmas term of 1801 (KB 28/399. m.18). It occupies five skins of parchment...The text in Chitty is perfectly accurate. I can add that the defendant was Edward Fry of the parish of St. Luke, Middlesex, yeoman, and the woman concerned was Ann, wife of Francis Edwin. The indictment was found at the Middlesex sessions on 29 June 41 Geo. III [1801], but was removed into the King's Bench. The King's Bench record shows that on Friday [July 3] after the morrow of All Souls, Fry came and pleaded Not guilty. A jury was summoned for later in the term, but did not come, and another venire facias issued for a trial in the vacation. The case came on for trial before Kenyon C.J., but after proclamation made the defendant was discharged "without day". This "discharge by proclamation" meant that no one came forward to give evidence for the Crown. The validity of the indictment was therefore not judicially considered. Nevertheless, it is clear that Fry was arraigned on the indictment without any challenge being taken to its legal validity.

There is also a record of the case in the Controlment Roll (KB 29/461, London & Middlesex, no. 13). This notes the venire facias only, to answer "for certain misdemeanours". Later in the roll (unnumbered membranes) there is a note of the entry of appearance and the plea of Not guilty "to an indictment for misdemeanour".[2]

1. Reproduced from 3 Joseph Chitty, A Practical Treatise On The Criminal Law Containing Precedents of Indictments 798-801 (London, 1816).

2. Professor Baker in a letter to Philip A. Rafferty (December 12, 1986).

Case No. 2: R v. T.H. (1781)[1]

Middlesex. The jurors for our lord the king late of the parish of St. Sepulchre, in the county of Middlesex, yeoman, on the fourth day of April, in the twenty-first year [1781] of the reign of our sovereign lord George the third, king of Great-Britain, &c. with force and arms, at the parish aforesaid, in the county aforesaid, in and upon M. the wife of one W.E. in the peace of God and our said lord the king then and there being, and also then and there being big with a quick child, did make an assault; and her the said M. then and there did beat, wound, and ill-treat, so that her life was greatly despaired of, by reason whereof she the said M. afterwards, to wit, on the twenty-ninth day of the same month of April, in the year aforesaid, at the parish of St. Sepulchre aforesaid, in the county aforesaid, did bring forth the said child dead; and other wrongs to the said M. then and there did, to the great damage of the said W.E. and M. his wife, and against the peace, &c. And the jurors, &c. (Another count for a common assault).

Professor Baker, after an exhaustive search, was unable to locate this case.[2] So its outcome remains unknown.

1. Reproduced from The Crown Circuit Companion; Containing the Practice of the Assizes on the Crown Side, and of the Courts of General and General Quarter Sessions of the Peace: Including a Collection of Useful and Modern Precedents of Indictments and Informations in Criminal Cases, as well at Common Law as those Created by Statute..., to which Are Added, "The Clerk of Assize's Circuit Companion...By W. Stubbs and G. Talmash 138 (6th ed., London, 1790) (1st ed., 1738). This case is also set forth in 2 T. Starkie, A Treatise on Criminal Pleading 409 (no. 45) (2nd ed., 1822). Starkie's source is Stubbs and Talmash. Chitty cited Starkie. See Chitty, supra note 1 (of Case No. 1 of this Appendix 11).

2. Professor Baker, in a letter to Philip Rafferty (December 12, 1986) stated:

> "The precedent in Stubbs & Talmash: I have spent a lot of time on this to no avail. Since the fact is alleged on 4 April 1781, the prosecution was almost certainly that year, probably in April or May. I began at the GLRO, looking at the Old Bailey records for 1781. I found nothing, but thought it best to go to the Guildhall Library and check through the printed Sessions Papers. This I did on another day. I read right through 1781, and then checked every defendant with the initials J.H. from the indexes for 1782 to 1784. At the end of all that, I concluded that this was not an Old Bailey case!"
>
> I then went back on another day to the GLRO and started on the Middlesex Sessions Records. The most likely sessions were 23-24 April 1781, May 1781 and July 1781, the three next after the fact. (By the July session there were no April cases left that I saw.) The rolls (MJ/SR) are the best source, because when complete they contain the indictments. Alas, the indictments for the April 1781 session are missing! I checked the roll for the next two sessions and did not find the case. This seemed to strengthen the notion that it was indeed dealt with in April. The two other classes of record for that session are the Sessions Book (MJ/SBB/1335/47) and the Calendar of

Indictments (MJ/CJ/7/174). Unfortunately, these do not specify the offences and are therefore little use without the names. Nevertheless, they establish that there were only two male defendants with the initials J.H.: John Holt (indictment no. 46) and John Hudson (indictment no. 78). I could not find Hudson in the Sessions Book, but I did find a note (on p. 341) that Holt's indictment was removed on 30 May by certiorari. So presumably that will be in the King's Bench records. This is our last hope, I think. But the Holt note also says 'ind. 3 last', and if that means on 3 April it is too early.

I am quite exasperated by this, since I was determined to find the case and have failed.

Case No. 3: The Bridewell Whipping Case (1589)[1]

A woman great with child, which [sic: who] was suspected in incontinency without cause, was commanded to be whipped in Bridewell, London, by the Masters there, and because she fell to travell before her time, &c. they were for this fined in this Court at a great Summ: And by order of the Court it was awarded that they should pay a certain sum to the said woman, about the 31 of Eliz. [1589]. See the proceedings there concerning this matter in the yeare aforesaid, set downe more at large.

1. Reproduced from Richard Crompton, Star-Chamber Cases 19-20 (London, 1630) (1975 Theatrum Orbis Terrarum, Ltd. & Walter J. Johnson, Inc., Reprint: Number 723: The English Experience: Its Record in Early Printed Books Published in Facsimile). This case is mentioned in M. Dalton, The Countrey Justice 41 (London, 1682). See supra, text (of Part III) accompanying note 11.

Case No. 4: Q v. Webb (Southward Assizes, 1602)[1]

> Surrey. The Jurors for our lady the Queen present that Margaret Webb, late of Godalming in the county aforesaid, spinster, on the tenth day of August in the forty-first year (1599) of the reign of our lady Elizabeth, by the grace of faith, with force and arms at Godalming aforesaid in the county aforesaid, not having the fear of God before her eyes but being seduced by the instigation of the devil, ate a certain [2] poison called ratsbane with the intention of getting rid of[3] and destroying the child in the womb of her the said Margaret: and thus the aforesaid Margaret, by reason of eating the poison aforesaid, then and there got rid of and destroyed the same child[4] in her womb, to the most pernicious example of all other wrongdoers offending in similar cases, against the peace of the said lady the Queen, her crown and dignity.
>
> Church[5]
>
> Pardoned by the general pardon.

This indictment, as it clearly does not allege a felony, must be taken to be charging a misdemeanor.

Keown has reported that Dr. Hunnisett and J.S. Cockburn are of the opinion that Webb was pardoned after conviction. What is really frustrating is that Keown did not set forth Hunnisett's and Cockburn's reason or reasons for arriving at this opinion.[6] In my opinion, the presumption should be that Webb was never convicted, and probably was never even tried. One basis for this presumption is that the clerk for the Webb trial court would have had a duty to enter on the Webb record any verdict a Webb jury would have returned. But no verdict is entered on the Webb record. Since it is fair to presume that the Webb clerk properly performed his duties, then it seems fair to conclude that no verdict was recorded for the simple

reason there was no verdict to record. Furthermore, sec. V of the statute under which Webb was pardoned expressly forbade the clerk of any court to issue, "after the last daie (i.e., after December 19, 1601) of this present Session of Parliament", an order for a defendant to appear in Court on an offence made pardonable by the statute.[7]

I asked Professor James Cockburn to comment on my opinion that Webb was never convicted on the abortion indictment. Here are his comments:

> Margaret Webb. In general, your assessment of the evidence for/against conviction seems to be judicious, and in the light of it I would be inclined to reverse what was apparently my original position (I do not recall the conversation or correspondence with Keown) and say, guardedly, that Webb probably was pardoned before conviction. I say "guardedly" because (1) most assize pardons were granted after conviction, and (2) it is by no means unusual for assize clerks to omit details of a conviction &/or sentence. In the light of that fact, you might wish to amend your account to read: "The basis for this presumption is that the clerk of the court normally entered details of the verdict and sentence on an indictment tried at assizes. No such details are entered on the indictment of Margaret Webb. Although the evidence is not conclusive, it is probably fair to conclude that no verdict was recorded for the simple reason that Webb was not tried". You might also add that there is no trace of a jury empanelled to try the case. That too is suggestive though, again, not conclusive. I should also make it clear that these are my own thoughts, and do not necessarily concur with those of Dr. Roy Hunnisett.
>
> One detail slightly troubles me. Why, I wonder, was there a two-year delay between the (alleged) date of the offence and

> the drafting, or at least the entering, of an indictment? Such a delay normally occurred when the suspect had evaded apprehension, but there is no suggestion of that here. It is just possible, therefore, that the charge was malicious and that that was a factor in the decision to include her in the pardon. In any event, the circumstances are clearly too unusual to sustain any general thesis.[8]

After I received the above response from Dr. Cockburn, I discovered two Star Chamber cases that apparently held that a person, who is indicted for an offence that is pardonable under the general pardoning statute that was invoked in the Webb case, cannot be saved from trial and possible conviction (and judgment?) unless he or she pleads the pardoning statute before trial.[9] I mentioned this to Professor Cockburn in a telephone conversation, and he stated that if I have correctly interpreted those two Star Chamber cases, then those two cases constitute additional support to the opinion that Webb was never tried on the abortion indictment.

The general pardon referred to in Webb represents an application of 43 Eliz., c.19, enacted near the end of 1601, and entitled "An Acte for the Queenes Majesties moste gracious generall and free Pardon". The pardon extended to offences (with certain exceptions, such as murder)[10] committed before August 7, 1601. The act was enacted during a parliamentary session that began on October 27, 1601. The act states that it shall extend to offences committed "before and unto [up to] the seaventh Daie of August last past."[11]

1. Assi. 34/44/7 m.18 (per Keown, supra note 99 (of Part II) at 173 n.22). Translation from the Latin (as reproduced in Keown, id.) supplied by Professor Baker. See also Keown, supra this note at 7-8 (my initial source): and Cockburn (Surrey Indictments, Elizabeth 1) supra note 17 (of Part IV) at 512 (n.3146).

2. "Reading Quendam: it actually looks like quondam (once), and Keown so takes it, but this is a scribal error." Professor Baker in a letter to Philip A. Rafferty (April 22, 1989).

3. "This seems to be the sense of spoliare here. Keown plays safe with 'spoil'". Ibid.

4. "The adjective eandem is female, indicating a female child, though the sex is not expressed directly." Ibid.

5. "Clerk of assize". Ibid.

6. See Keown, supra note 99 (of Part II) at 7 & 173 n. 23.

7. See 4 The Statutes of the Realm (Part. 2) 1010-1011 (sec. 5) (London, 1819); and id. at 958.

8. Professor Cockburn in a letter to Philip A. Rafferty (U. of Maryland at College Park (May 18, 1990)).

9. See W.P. Baildon (ed.), Les Reportes del Cases in Camera Stellata 1593-1609 118 & 334 (1894).

10. 4 Statutes, supra note 7 at sec. 6.

11. Ibid. (at sec. 1). See also id. at sec. 2; and id. at 958.

APPENDIX 12

Case No. 1: R v. Robynson (Essex, 1589)[1]

Essex. The indented inquisition taken at Little Bardfield in the aforesaid county, on the thirty first day of October in the thirty first year [1589] of the reign of the Lady Elizabeth, by the grace of God of England, France and Ireland, queen, defender of the faith, and so forth, before Thomas Drywood, gentleman, one of the lady queen's coroners in the aforesaid county, upon the view of the body of a certain female infant there found lying dead, by the oath of...[names of thirteen jurors omitted] who, having been sworn and charged SAY UPON THEIR OATH THAT Eleanor Robynson, late of Bardfield aforesaid, widow, on the twenty ninth day of October in the above mentioned thirty first year of the reign of the said present lady the queen, at Lindsell in the aforesaid county, by procuring an abortion gave birth to a certain female infant, born dead (abortive procuriens peperit quandam infantem femininam mortuam natam); and the said Eleanor carried the same infant from thence to Bardfield aforesaid, and contemptuously and without Christian respect put and hid the infant in a certain heap of hay called in English "a hay mow", belonging to a certain Captain William Chapman, at Bardfield aforesaid, and there left it; and she immediately fled and withdrew herself; and that the said William Chapman, one of the aforesaid jurors, was the first finder of the said infant there; which William is, and from the time of his birth until now has been, of good name and reputation. In witness whereof both the said coroner and the aforesaid jurors have put their seals to this inquisition on the day and in the year first above mentioned.

The outcome of this case is unknown. A search by Professor Baker failed to uncover any depositions or other documents bearing on this case.

Professor Baker is of the opinion that in this coroner's inquisition the words "by procuring an abortion" can be reasonably

said to extend to the whole of the phrase "gave birth to a certain female infant born dead, so that this phrase reads in effect as follows: by procuring an abortion caused the female infant to be born dead.[2] Professor Baker would compare this rendition with the following phrasing in a 15th century reading on the Statute of Gloucester: "It was said that if a woman is great with child and a man beats her so that by reason of this beating the child is born dead, this is...felony"[3]

It is unclear if the Robynson jurors intended to charge Robynson with a felony. If they did, then this inquisition represents a defective pleading since it omits the phrase "feloniously slew".

Here are Professor Cockburn's comments on this case:

> As it stands,...[Robyson's Case] is simply a coroner's inquest - unless it was endorsed by the grand jury, and there is no evidence of that. Inquests were used at assizes as indictments, but inconsistently. I have summed up what we know, and can infer about the practice in the Introduction to the assize calendars: I enclose a copy of the relevant section. This was almost certainly not an assize case.[4]

The pertinent portion of Cockburn's Introduction (1985), reads as follows:

> Throughout our period those charged at assizes with unlawful killings were normally indicted not upon a freshly drawn indictment, but upon the written record of the coroner's inquest upon the body of the victim. Inquests were drafted by the coroner's clerk or by the coroner himself, who was obliged by statute to return them at assizes and to bind over witnesses to appear there....According to an 18th century source, a coroner's inquest was

> equivalent to an indictment returned by the grand jury and, in itself, an adequate basis for criminal prosecution. That, presumably, explains why in a majority of homicide trials at assizes only the inquest, annotated with the plea, verdict and sentence of the court, appears on the file. In a minority of cases, however, the accused was arraigned not upon the coroner's inquest, but upon a separate indictment drafted by the assize clerk and returned "billa vera" by the assize grand jury.[5]

1. Q/SR 110/68 (Coroner's inquest, 31 October 1589, returned at the Essex Quarter Sessions, Michaelmas 1589). Translation from the Latin supplied by Professor Baker. This case is mentioned in F.G. Emmison, Elizabethan Life: Disorder 157 (1970) (my initial source).

2. Professor Baker in a letter to the Philip A. Rafferty (March 21, 1986).

3. See supra, Reference No. 6 (of Appendix 7).

4. Professor Cockburn in a letter to Philip A. Rafferty (June 4, 1990). Robyson's Case is not recorded in Cockburn (Essex Indictments, Elizabeth I), supra note 17 (of Part IV). It might have been a quarter sessions case; or it might be that for some unknown reason Robyson was never prosecuted.

5. James S. Cockburn, Calendar of Assizes Records: Home Circuit Indictments, Elizabeth I and James I: Introduction 74 (footnotes omitted) (London, 1985).

Case No. 2: R v. Phyllida Hodges (Middlesex Sessions of the Peace and Goal Delivery, August 1-2, 1615)[1]

> [Middlesex. Came and discharged...Phyllida, wife of Thomas Hodges of Rosemary Lane, yeoman, "Charged to have [given] Margaret Chapman a drink to have killed her child within her.

It is not known why Phyllida was discharged.

1. Reproduced from 2 (New Series) County of Middlesex Calendar to the Sessions Records 1614-1615 345 (London, 1936). See also id. at X. Hodge's Case probably is the abortion case mentioned in Curtis, supra note 17 (of Part IV) at p.81 (Table 7e).

Case No. 3: R v. John Simpson (North Riding, 1659)[1]

> The Court being informed that John Simpson of Whitby had the carnal knowledge of his servant, and after she had conceived with child did cause her to take phisicke for to destroy the said child; the said John Simpson to be carried before the next J.P. to become bound, etc.

The outcome of this case is unknown.

In the view of Professor Baker, this Simpson record can be said to certainly indicate no more than that the Simpson Court made an order binding Simpson to keep the peace. According to Professor Baker, 17th century justices of the peace possessed the jurisdiction to bind a person to good behavior even if his or her conduct did not constitute an indictable offence.[2]

1. Reproduced from 6 North Riding Quarter Sessions Records 23 (J.C. Atkinson, ed.) (London, 1888).

2. Professor Baker in a letter to Philip A. Rafferty (July 5, 1984). And see, infra text accompanying note 3 (of Case No. 1 of Appendix 20); and infra, note 1 of Case No. 5 (of this Appendix 12).

Case No. 4: R v. Fookes (Essex, August 19, 1618)[1]

> John Fookes of Great Coggeshall, husbandman,...to answer one Marshall of Great Coggeshall, husbandman, and his wife for "spurninge and kickinge ye sayd Marshall's wyffe on the syde, of which kicke the said Marshall's wyfee affirmed that she miscarried of a childe".

The outcome of this case is unknown.

1. Essex Record Office (ERO) (Chelmsford) Q/S/R 222/73 (XIX B Cal. of Co. Recs. 328 (no.73)).

Case No. 5: Flicher v. Genifer (Worcestershire, 1601?)[1]

> Articles exhibited by Richard Flicher against John Genifer sworn before the Bishop of Worcester. State Mrs. Flicher being with child Genifer put her and two more of her neighbours also with child into fear and she being on Severn Bridge he told one of her neighbours to have her in [i.e., to throw her into the river].[2] Whereupon she fell into labour and continued in extremity till it pleased God she lost the burden which time of her travail was a week's space.

Evidently Flicher intended to prosecute Genifer under the ecclesiastical jurisdiction. The outcome or this case is unknown. There is no indication here that Mrs. Flicher's child died.

1. Reproduced from 1 Worcestershire County Records. Division I, Documents Relating To Quarter Sessions. Calendar of the Quarter Records 1591-1643 44 (no. 111) (Worcester, 1900). See also id. at 77-78 (no. 57) ("1605. Parkes procured the Constable to arrest...Elizabeth...[Parkes and the constable] laide violent hands upon her, notwithstanding they were entreated not to deal rigorously with her, they knowing her to be with child who is in danger of losing her burden...Ordered that Parkes be bound over to his good behaviour").

2. See, id. at cxxvii.

Case No. 6: R v. Thomas Hallibred (Essex, 1622)[1]

> PETITION of Tho. Fuller that "this lewd fellow" Thomas Hallibred be sent to the House of Correction and "severely punished" for many misdemeanours in his parish, that he is a common drunkard and when he is so he is raging mad and will threaten to kill his wife, cast stools or anything he meets with. He did lately kick her on the body, being great with child

and she was shortly delivered of a child with all the forepart of the skull beaten into the head, a most pitiful sight to be seen, dead. He saw it before the burial. Since that, often drunk and so unruly as his neighbours fear the firing of their houses or some desperate murder to ensue. He cannot be reclaimed by any counsel. He hath a wife and three children. He threatens all. He will pay no house rent nor make any provision for his family, but gets her earnings and drinks it all away. He threatens to run away and lately did till he heard his wife had got her an abiding with another man and now this Friday so misused his wife that she was enforced to crave aid of Mr. Collin to rescue her from killing. The petitioner beseeches their lordships that he may remain [in the House of Correction] a quarter of a year at least and that he may be severly whipped, for his neighbours say some come out unwhipped. [Signatures of: Tho. Fuller and Kellam Collins.]

[Added in a different hand]: "Delivered by my Lord of Warwick to make an order and an order is made and delivered to Mr. Collyn according to the contents hereof."

1. Reproduced from ERO (Chelmsford) O/S/R 236/102 (XIX B Cal. of Co. Recs. 1611-1624 474 (no. 102).

Case No. 7: R v. J. Robinson "et al" (Middlesex, 1615)[1]

John Robinson of St. Andrew's, Holborn, whitebaker, Thomas Hulme, scrivener, Amos Browne, cutler, and Richard Cooxe [Coxe], innholder, all of the same, to answer concerning the death of a young infant born of the body of Dorothy Mowbrow who was removed in a chair out of their parish of St. Andrew's, Holborn, in the time of her travail, into the parish of St. Giles'-in-the-Fields, whereby it is supposed that the child miscarried and received a hurt in the head whereof it died; and...[names of witnesses omitted] to give such evidence as they can concerning the said death; and of Richard Leirwood of St. Giles'-in-the-Fields, locksmith, to answer the complaint of John Robinson, high constable, and others of the inhabitants of the parish of St. Andrew's, Holborn.

An inquest was held, and the coroner's jury returned a verdict that the child's death was due to "Divine" visitation.[2]

Evidently Dorothy Mowbrow was unmarried, and was not from St. Andrew's, Holborn. If Mowbrow had given birth in the parish of St. Andrew's, Holborn, and if Mowbrow would have been unable to support the child, then it would have fallen on that parish to maintain the child. Hence, the attempt to get Mowbrow out of that parish before she gave birth.[3]

1. 3 (New Series) County of Middlesex Calendar to the Sessions Records 1615-1616 175 (London, 1937).

2. Ibid. at XV (Preface).

3. For a similar case, see supra, text accompanying note 277 (of Part IV), as well as that note 277.

Case No. 8: R v. Rastone (Middlesex, 1616)[1]

> Middlesex. The jurors for our lord the king present upon their oath that Roger Rastone late of Stratford atte Bowe in the aforesaid County, yeoman, on the fourth day of June [1616]...with force and arms, etc., at Stratford atte Bowe...,made assault in and upon a certain Constance Taylor, the wife of Charles Taylor, then and there being in the peace of God and the said lord king, and beat, wounded and ill-treated her so that her life was completely despaired of and so that also the afsd Constance within one week then next following she gave birth prematurely (partum edidit immaturum), and offered other outrages against the same Constance then and there, to the grave damage of her the said [Constance] and against the peace of the said present lord king, his crown and dignity. [Indorsed true Bill.]

This is an indictment for a misdemeanor (an assault or trespass)[2]. The allegation relating Taylor's miscarriage or premature

delivery appears to have been added in aggravation of the assault. Rastone pled guilty, and was fined 2s.6d.[3]

1. f. MSR III. 277. Translation and partial reference supplied by Professor Baker. This case is mentioned in 3 (New Series), County of Middlesex Calendar to the Sessions Records 1615-1618 277 (London, 1937).

2. MJ/SR/552/135 (record of the indictment: marked "tnsgr" (trespass)). Reference supplied by Professor Baker.

3. MJ/SBP/1, fo.75. Reference supplied by Professor Baker. MJ/SBR/2, p. 338, relates that Rastone made bail.

Case No. 9: R v. Whalley (Middlesex, 1616)[1]

The Whalley indictment (endorsed: true Bill) is virtually identical in form to the preceeding indictment (R v. Rastone), with the exception that the words for miscarriage are "Anglice was untimely delivered". Whalley pled guilty, and was fined 2s.6d.[2]

1. MJ/SR/552/136 (marked "tnsgr", i.e., trespass).

2. See 3 (New Series) County of Middlesex Callendar to the Sessions Records 1615-1618 277 (London, 1937). Compare the fine here and in supra, Case No. 8 (of this Appendix 12) to the fine imposed infra, in Case No. 2 (of Appendix 13).

Case No. 10: Lagotts' and Salaway's Case (Somerset, 1629)[1]

Information of Frances Ham, taken before a JP. Amy Laggott went to her [Ham's?] FH's [father's] house and told her [Ham] she took her daughter from Elizabeth Salaway (who taught her to make bonelace) because Elizabeth was sick; and ES. owed her [Amy] money for physic which she [Amy] fetched from an apothecary; and Amy told her [Ham] that if she [Amy] had not been a friend to ES., the latter "might have gone as other whores did, but shee [Amy] would warrant her [ES] free for this tyme, but if the pot went

to water againe [i.e., if ES got pregnant again], it would be crackt" [i.e., she would have to give birth]; later she [Amy] saw ES. up and about and sd. she shd. be in bed and tolde her "it was enough to cost her her life to sit upp soe soone after her phisicke"; and said "if any thinge came from her shee should have a care to burye it in the garden."

Info. of Anne Adams: Amy L. told her she had fetched a medicine from the apothecary for ES etc.

Info. of Grace Adams: reports Amy L.'s suspicion that ES. is with child.

Info. of Robert Banton, apothecary: John and Amy Laggot came to him and 'intreated him that they might have a vomitt for a daughter of theirs, who was payned in her stomacke and in her heade', and he gave them something and asked them to report back within a week; but heard no more from them, and was told they had given it to ES. to destroy her child: whereupon he reported the matter to the JP.

The outcome of this case is unknown. Evidently, Salway's unborn child was born alive, and survived.[2]

1. Somerset County Record Office (Somerset), Q/S 62 (28 Sept. 1629). Reference supplied by Professor Baker. See also Quaife, supra note 10 (of Part IV) at 119-120 & 258 n.48 (my initial source).

2. See Quarter Sessions Records for the County of Somerset, Volume II. Charles I, 1625-1639 228 (no. 16) (24 Somerset Rec. Soc., 1908).

Case No. 11: Willson's Case (Essex, 1688)[1]

Recognizances,[2] 9 [10?] July [1688]...Ingry to prosecute Edward Willson of Epping, husbandman, for misusing and beating his wife 'in soe much so that several children received hurt in her body'.

The outcome of this case is unknown.

1. Reproduced from ERO (Chelmsford) QSR/459/1 (XXV Cal. of Co. QSR 30).

2. See infra, Case No. 1 (of Appendix 13).

APPENDIX 13

Case No. 1: R v. Turner (Middlesex, 1615)

> Middlesex. Recognizance [i.e., a secured obligation, in this case for appearing at the Middlesex sessions]: Anthony Turner of Whitechapel, chandler, for an assault and battery on Alice, wife of Thomas Porter, at East Smithfield, who accuses the said Anthony that he abused her and made her lose her child which was then in her body when he did beat her.
>
> Sureties: [names omitted.][1]

Misdemeanour Indictment (endorsed: true bill)[2]

> Middlesex: The jurors...present...that Anthony Turner...on September 29, 1615, made assault in and upon a certain Alice Porter, wife of Thomas Porter then and there being in the peace of God and of the said lord king, and then and there beat, wounded and ill-treated her the said Alice Porter so that her life was despaired of, and offered other outrages against the same Alice Porter then and there [etc].[4]

Turner pled not guilty, obtained bail, and was ordered to appear at the next sessions.[3] The outcome of this case, however, remains unknown.

If the Turner prosecutor felt that he could prove that Turner's assault and battery caused the miscarriage, then it is unclear why Turner was indicted only for simple assault and battery. Perhaps the Turner prosecutor thought along the following lines: 'Since Alice's child was aborted stillborn, Turner cannot be prosectued for criminal homicide.[4] And since there is no evidence he beat Alice with the intention of causing her to miscarry, he cannot be prosecuted for deliberated abortion.' Such thinking would not, however, explain why Turner was not indicted for unlawfully causing a miscarriage (or

killing a child in the womb),[5] or why the miscarriage was not alleged in aggravation of the assault.[6] If the Turner prosecutor felt that he could not prove that the assault and battery caused the miscarriage or child's death, then that would explain why Turner was not indicted for causing Alice to miscarry.[7]

1. Reproduced from 3 (New Series) County of Middlesex Calendar to the Sessions Records 1615-1616 51 (London, 1937). The recognizance is cited as MJ/SR/543/143 (f. MSR 111.51).

2. MJ/SR/544/44 (marked "tnsgr", i.e., trespass). Reference and translation from the Latin supplied by Professor Baker.

3. MJ/SBR/2, p.252. Id. at p.239 contains a note of the recognizance.

4. See supra, text (of Part IV) accompanying note 34, as well as that note itself.

5. See, e.g., supra, Case Nos. 2 & 3 (of Appendix 11); supra, text (of Part IV) accompanying notes 119, 149, 151, 153-54; and supra, Reference No. 5 (of Appendix 7).

6. See supra, Case Nos. 8 & 9 (of Appendix 12).

7. See infra, Case No. 1 (of Appendix 14).

Case No. 2: R v. W. Berry (Middlesex, 1617)[1]

William Berry of East Smithfield, vintner, "for killing of a child in the body of Elizabeth Goldsborough"; indicted in London.

Indictment[2]

London: The jurors for the Lord King on their oath present William Berrye...that on [June 30, 1617], in the parish of St. Olave in Hart St. in the Ward of Tower, by force and arms on and upon a certain Elizabeth Goldsborough...in the Peace of God and of the said Lord King [James I] then and there made

a grave assault on the same Elizabeth and then and there assaulted, wounded and maltreated her so that her life was dispaired of and then and there inflicted other outrages on her to the grave injury of [the] same Elizabeth and against the Peace of the said Lord King and against his dignity....

[Pled not guilty; found guilty; fined 20 schillings, and ordered to find security for good behavior for two years].[3]

1. 4 (New Series) County of Middlesex Calendar to the Sessions Records 1616-1618 292 (London, 1941).

2. (Corporation of London Record Office) MJ/GSR/SF79 (or 74?). I am not sure that this is the correct citation. Nevertheless, I found this case in the CLRO, and it reads there as I have reproduced it here. I believed it can be found in the records of the Sessions of the Peace for 1 October 1617, or the Sessions of Oyer and Terminer for 15 October 1617.

3. See supra, the commentary accompanying Case No. 1 (of this Appendix 13).

Case No. 3: R v. William Rolfe of Littlebury (Essex, 1665)

Calendar of Prisoners (July, 1665)[1]

Wm. Rolfe, committed by Sir John Turner, being charged for assaulting and beating a woman quick with child, which child is now dead and the woman likely to die. (Traverse)

Examination of Witnesses (17 April 1665)[2]

Information of Mary Chapman, "Gillion" Smith, Susan Standly and Eliz. Colt, taken before John Turner, who all say that Wm. Rolfe did take Tho. Brumley's wife by the arms and violently pull and "rung" her arms that were all black and blue, and they did bid him take heed what he did for she was big with child and that she had told them a week before she was quick with child.

Eliz. Duke further saith that presently after, coming into the house, she did see Rolfe punch her on her side with his knees. And ever since the woman is very weak and ill, and they think the child is dead within her and in great danger of her own life.
[Marks of all the women.]

Indictment[3]

Essex. The jurors...say...that William Rolfe...of Littlebury..., labourer, on the tenth day of April [1665]..., with force and arms..., made assault and affray in and upon Grace Bromley, the wife of Thomas Bromley...and then and there at Littlebury...wounded and ill-treated her the said Grace so that her life was completely despaired of, and then and there offered other outrages (alia enormia) against the same Grace, to the grave damage of them the said Thomas and Grace, and against the peace of the present lord king, his crown and dignity.

(Puts himself; [i.e., pleads not guilty])[4]

The outcome of this case is unknown.

1. ERO (Chelmsford), QSR 405/184 (XXIII Cal. QSR 76 (no.184)). Id. at QSR/405/98 (68, no.98) mentions a memorandum to T. Bromley regarding his intention to indict Wm. Rolfe for assaulting his wife Grace. It is dated May 20, 1665.

2. ERO (Chelmsford), QSR/405/160 (XXIII Cal. QSR 74 (no. 160)).

3. ERO (Chelmsford), QSR/405/64 (XXIII Cal. QSR 65 (no. 64)).

4. See supra, the commentary accompanying Case No. 1 (of this Appendix 13). ERO (Chelmsford), QSR/406/112-13 (Michaelmas, 1665) contains, respectively, 1) a writ "venire facias juratore", dated 20 July 1665, summoning a jury for the case of R v. Wm. Rolfe, and 2) a list of the members of the jury to hear the case.

Case No. 4: William Rolphe of Debden (Essex, 1665)[1]
An Examination[2]

The Examination of Ellen Greene of Brockstead in Essex, spinster, taken upon oath (31 July 1665): She says that Wm. Rolfe of Debden, glazier did come into her house on Tuesday the 10th July at about 5 o'clock in the afternoon and took her by the throat she being then sweeping her house and under the table and pulled her from under the table with much violence, dragged to the door and threw her over the threshold. And 'shugged' her and smote her with his foot or knee upon the thigh so that she fainted and the company had much to do to keep life of her she then being with child, and upon this affrightment and abuse she miscarried. And that the said Rolfe swore at some women that would have come to help her that he would arrest them if they came, to the hazard of her life.

[The mark of Ellen Greene]

The outcome of this case is unknown.

1. ERO (Chelmsford), QSR/406/43. Memorandum, dated 1 August, 1665, to Wm. Rolfe glasier of "Debden" to keep the peace. Rolfe is bound over in the sum of 20 pounds and his goods and chattels are liable to distraint in lieu of money.

2. Summary of ERO (Chelmsford), QSR/406/110 (XXIII Cal. QSR 86 (no. 110)).

Case No. 5: Q. v. Joan Turnour
(Essex, Lent Sessions and General Gaol Delivery held at Brentwood on March 13, 1581)

First Indictment[1]

Joan Turnour of Stysted, spinster, on 1 July, 21 Eliz. [1579], at S., bewitched Anne Feast, wife of Richard F., who did despair of her life [i.e., came close or nearer to her death]. (Endorsed:) Billa vera [true Bill]. Po se cul Judic. [guilty, judgment].

Second Indictment[2]

[Joan Turnour of Stysted, spinster], on 1 May, 22 Eliz. [1580], at S., bewitched George Sparrowe, aged 7 yrs., who languished for half a year. (Endorsed:) Billa vera. Po se cul Judic. [guilty, judgment].

Third Indictment[3]

Essex: The jurors for [our] lady the queen present that Jane [or Joan] Turnour of Stisted in the aforesaid county, spinster, being a common witch and enchantress, not having God before her eyes, but being seduced by the instigation of the devil, on the eighth day of January in the twenty-second year [1580] of the reign of the Lady Elizabeth, Queen of England, France and Ireland, defender of the faith, devilishly and maliciously at Stisted aforesaid, [and] on various days and occasions both before and since, maliciously and devilishly bewitched and enchanted a certain Helen Sparrowe, wife of John Sparrowe, in the body of the same Helen, being then great with a certain living child [infante vivo], by reason whereof not only was the same Helen then and there on various occasions gravely vexed and in her body horribly troubled, to the greatest danger of her life, but also the aforesaid child (of which the same Helen was then and there great) then and there came to [his] death. And thus the aforesaid jurors say upon their oath that the aforesaid Jane Turnour, in manner and form aforesaid, on the day and in the year aforesaid, at Stisted aforesaid, maliciously and devilishly bewitched and enchanted the aforesaid Helen Sparrowe, and deprived the living child [infantum vivum] (of which the aforesaid Helen was then pregnant) of his life by reason of these enchantments and bewitchings, contrary to the form of the statute made and provided for such cases, and to the bad and pernicious example of all others offending in such cases, and against the peace of the said present lady the queen.

[note by clerk on the face of the indictment:] Puts herself [on the country; i.e., accepts trial by jury]; guilty judgment [to be hanged?]

Entry in the Gaol Delivery Roll of the Essex Summer Sessions and general gaol delivery held at Braintree on July 17, 1581[4]

> Joan Turner: Convicted (found guilty) at the last assizes for witchcraft and reprieved (or remanded) for one year. ("Johanna Turner cul ad vltiam p fascinacone & rep. p. anno.")[5]

Entry in the Essex Lent Sessions and general gaol delivery held at Chelmsfold on March 22, 1582[6]

> Joan Turner: sentenced [to be hanged?] for witchcraft, and reprieved (or remanded) for one year ("Johanna Turner p fascinacone Judn & rep. p. anno.")[7]

This last entry almost certainly relates or means at least the following: Joan Turner, who was convicted and sentenced to be hanged for witchcraft (a year or so ago), was subsequently permanently reprieved, and then given a one year sentence. As shall be explained, and without reference to whether or not Turnour could have received consecutive, one-year sentences for her convictions on the first and second indictments, Turnour could have received only one of two sentences on her three convictions: 1) to be hanged, or 2) imprisoned for one year (which included "four periods of six hours duration in the pillory").[8]

If Turnour was not orignally sentenced to be hanged, then the foregoing last entry does not make sense. A reprieve relates only to a death sentence. So, one who has not been sentenced to death is not in need of a reprieve. Furthermore, as this entry does not indicate any of the following three items ((1) Turnour was still in the gaol, (2) her sentence remained to be determined [even though the one-year remand (sentence) had run], (3) she was hanged), it is reasonable to conclude that Turnour was not hanged for any (or any combination) of her three convictions.

It cannot be certainly determined from the Turnour record whether or not Turnour was sentenced to death for being twice convicted (first and second indictments) of violating sec. 2 of 5 Eliz., c.16. (A second, lawful conviction for violating this sec. 2 carried a mandatory sentence of death.)[9] This is so for two independent reasons. The first is, it cannot be reasonably ruled out that one or both of these convictions were set aside because of "weak evidence" (insufficiency of evidence).[10] The second is, it cannot be reasonably ruled out that Turnour was tried in a single hearing on these two (or three) indictments, and that the 5 Eliz., c.16, sec. 2 phrase "second, lawful conviction" applied only to "successive" convictions. (Alternatively, it cannot be reasonably ruled out that the application of the death penalty for a "second, lawful conviction" required that in the second prosecution it must be alleged and proved that the defendant suffered a prior conviction for violating sec. 2 of 5 Eliz. 1, c.16.[11] Neither the first nor second Turnour indictment alleged a prior conviction.)

Even assuming as fact that Turnour was initially sentenced to death for a "second, lawful conviction" of violating sec. 2 of 5 Eliz. 1, c. 16, such a fact would have no tendency in reason to prove that Turnour was not initially, independently sentenced to death for her conviction on the third indictment. It simply does not follow that because a person can die only once that therefore while he or she is still in life he or she can receive only one sentence of death. Also, at common law it seems to have been a usual practice to prosecute a person for committing several offenses, each of which, on conviction, carried a mandatory sentence of death.[12]

The third Turnour indictment does not allege that Helen Sparrow's unborn child was born alive. However, it also does not allege either common law or statutory murder. It alleges that

Turnour violated sec. 1 of 5 Eliz. 1, c.16. (1562). This Sec. 1 mandated death for any person to "use, practice or exercise any witchcraft, enchantment, charm or sorcery whereby any person shall happen to be killed or destroyed".[13] The conviction on this third indictment does not, then, represent an express application of the proposition that at common law the in-womb destruction of an unborn child is governed by the common law rules on criminal homicide. However, it can be reasonably stated that this conviction indirectly stands for such a proposition. The Turnour trial judge initially construed the word "person" in 5 Eliz. 1, c.16 (1562) to include an unborn child almost certainly because he understood that such a human being was a person under the then common law on criminal homicide. The following is stated in Arkansas v. Pierson (1884): "the common law in force at the time a statute is passed is to be taken into account in construing the statute. Coke says, 'to know what the common law was before the making of the statute is the...key to set open the windows of the statute'"[14]

It might be argued that, as the vague witchcraft injury inflicted on Helen Sparrowe would probably meet the injury requirements of sec. 2 of 5 Eliz. 1, c.16, then it cannot be stated with virtual certainty that this indictment is charging a sec. 1-5 Eliz. 1, c.16 violation, and not a sec. 2 violation. The argument cannot get off the ground. All that can be reasonably required here is reasonable certainty. If this indictment is simply alleging a sec. 2 violation, then all the references in the indictment to the unborn child and the manner of the child's death must be deemed superfluous. On the other hand, the references in the indictment to the injuries inflicted on Helen Sparrowe would not be rendered superfluous if the indictment is taken to be charging a sec. 1 violation. A mother and her unborn child, although separate persons, are nevertheless closely connected.

The witchcraft injuries suffered by the mother would tend to establish a link in the chain of causation connecting the witchcraft act to the death of the unborn child.

It seems highly reasonable to conclude that Turnour was not executed for her conviction on the third indictment. Since a conviction here mandated death, and since none of the three Turnour records (or three separate record entries) relate that Turnour was reprieved on account of pregnancy, it is reasonable to conclude that her conviction on this third indictment was set aside. However, in order for it to be reasonably maintained that R v. Turnour implicitly contains a ruling or holding that is relevant to documenting an aspect of the history of the status of the fetus at the common law on criminal homicide, it must be reasonably determined precisely why Turnour's conviction on the third indictment was implicitly set aside. So far as is known, the Turnour judge (or judges - if the Turnour trial court took Turnour's case to, say, one of the "inns of court" in order to discuss it with his brethern)[15] had but two legal means for setting aside the conviction. One was insufficiency or "weakness of evidence".[16] The other was a determination that Sparrow's unborn child does not qualify as a person within the meaning of the word "person" as contained in sec. 1 of 5 Eliz. I., c.16. If it cannot be reasonably ruled out that Turnour's conviction on the third indictment was set aside for insufficieny of evidence, then it cannot be reasonably stated that Turnour's conviction here was "probably" set aside because the Turnour judge (or judges) decided that Sparrow's unborn child did not qualify as a 5 Eliz. I, c.16-sec. 1 person (with the rationale being, for example, that at the common law of criminal homicide, as demonstrated by Staunford's reports of the Twins-slayer (1327/28) and Anonymous (1348) cases,[17] such a human being is not recognized as a potential murder victim).[18]

One may want to argue that it can be reasonably inferred from the fact that the Turnour record does not indicate that the Turnour court found "weak evidence"[19] that, therefore, Turnour's conviction on the third indictment was not set aside because of "weak evidence". Such an argument is no less sophistic than is the following argument: One can reasonably infer from the fact that the Turnour record does not indicate that Turnour's conviction on the third indictment was set aside because it was decided by the Turnour trial court that Sparrow's unborn child is not a sec. 1 person that, therefore, the conviction was not set aside on that ground.

It simply cannot be reasonably ruled out here that Turnour's conviction on the third indictment was set aside only because of "weakness of evidence". For example, the Turnour trial court might have ruled as follows: "Notwithstanding that the deceased child in this case is a person at common law, the fact remains, the connection between the witchcraft act and the child's death was tenuous at best."[20]

1. Reproduced from C. L'Estrange Ewen, Witch Hunting and Witch Trials: The Indictments for Witchcraft from the Records of 1373 Assizes Held for the Home Circuit A.D. 1559-1736 141 (n. 143) (London, 1929). See also Cockburn (CAR: Essex Indicts., Eliz. I), supra note 17 (of Part IV) at 212 (no. 1225).

2. Ewen, supra note 1 at 142 (no.144). See also Cockburn, supra note 1.

3. Brentwood, Essex:ASSI. 35/23/29 (March 13, 1581). (Translation from the Latin supplied by Professor Baker.) See also Ewen, supra note 1 at 142 (no. 145). The indictment reads in its original Latin, as follows:

> Essex: Juratores pro domina regina present-
> ant quod Johanna Turnour de Stysted in
> comitatu predicto, spinster, existens com-
> munis fascinatrix et incantatrix, deum pre
> oculis non habens, sed instigatione diabol-

> ica seducta, viii die Januarii anno regni Domine Elizabeth, di gracia Anglie, Francie et Hibernie Regine, fidei defensoris, vicesimo secundo, diabolice et maliciose quandam Elenam Sparrowe, uxorem Johannis Sparrowe, apud Stysted predictam, [et] diversis diebus et vicibus tam antea quam postea, maliciose et diabolice in corpore ejusdem Elene adtunc et ibidem gravida existente cum quodam infante vivo fascinavit et incantavit, ratione cujus eadem Elena non solum adtunc et ibidem diversis vicibus graviter vexata et in corpore suo horribiliter conturbata fuit ad maximum discrimen vite sue sed etiam infantem predictum unde eadem Elena adtunc et ibidem gravida fuit adtunc et ibidem ad mortem devenit. Et sic juratores predicti dicunt super sacramentum suum quod predicta Johanna Turnour predictam Elenam Sparrowe modo et forma predictis, die et anno predictis, apud Stysted predictam, maliciose et diabolice fascinavit et incantavit, et infantum vivum de quo predicta Elena adtunc impregnata fuit ratione incantationum et fascinationum illarum vita sua spoliavit, contra formam statuti in hujusmodi casu editi et provisi, ac in malum et perniciosum exemplum omnium aliorum in hujusmodi casu delinquentium, ac contra pacem dicte domine regine nunc. [added on face:] po[nit] se cul[pabilis] Judic[ium].

Professor Cockburn misread the above indictment in that he reported that Helen Sparrow, and not her unborn child, was alleged to have been murdered by Turnour's witchcraft. He has acknowledged as much: "Joan Turner:...my reading of the third indictment was incorrect. [See Cockburn, supra note 1.] [I]t clearly alleges the killing of the unborn child rather than of Helen Sparrow herself." Professor Cockburn in a letter to Philip A. Rafferty (May 18, 1990).

4. Ewen, supra note 1 at 143.

5. Translation supplied by Professor Cockburn. See Ewen, supra note 1 at 22 (Fascinatio), 95 (cul), 96 (rep p anno) & 32-33.

6. Ewen, supra note 1 at 146.

7. Translation supplied by Professor Cockburn. See Ewen, supra note 1 at 22 (Fascinatio), 95 (cul, judic), 96 (rep, p anno) & 32-33.

8. See Ewen, supra note 1 at 24-25.

9. See ibid. See also 4 Statutes of the Realm pt.1, 446-47 (1819).

10. See Ewen, supra note 1 at 34; and infra text accompanying note 19; and Jeoffreson, supra note 4 (of Case No. 5 of Appendix 10) at xxx-xxxi.

11. In a letter to Philip A. Rafferty (June 30, 1987), here is what Professor Baker had to say on the question of whether or not this sec. 2, mandatory, death sentence provision required successive convictions (or required the second indictment to allege a prior conviction):

> [T]he earliest authority I can find is Coke, who cites no earlier authority. In 3 Co. Inst. 172 he refers to the forgery statute of 5 Eliz. I, c.14 [1562] (which specifically refers to a second offence after a prior or first conviction). [B]ut there is a more general proposition in 3 Co. Inst. 46 and 2 Co. Inst. 468, which is evidently the direct source of Burn's statement: ["Where degrees of punishment are inflicted by a statute, for the first, second or third offence, there must be several convictions and judgments" (Edward Williams, Precedents of Warrants, Convictions, and Other Proceedings, Before Justices of the Peace Chiefly Original; and Containing None that are to Be Met within Dr. Burn's Justice 619 (London, 1801))]. In both these passages...[Coke] asserts that the principle applies to the...1 Jac. I, c.12 [(1603) witchcraft statute]. This does not take us back as far as 1581 [/1562], and it is therefore a matter of conjecture whether Coke was stating the practice as he understood it or was trying

> to innovate. In any case, the practice of the criminal courts at that time [1581] (in the absence of printed reports) was not always very consistent...The earliest reported decision I have found is Anon.(1631/32), 2 Buls. 349, concerning the punishment for having bastard children. There is, however, an apparently inconclusive discussion (of the question whether the indictment for the second offence must recite a conviction of the first) in R v. Flemming (1584), 1 Leon. 295, a case concerning religious uniformity.

My opinion is that this sec. 2, mandatory death sentence provision almost certainly was not applied to Turnour if she was tried either concurrently or back to back on her first and second indictments. This sec. 2, mandatory death sentence provision implicitly gives this warning to a first offender: "Do this again and you will be 'launched into eternity at the end of a rope.'" Turnour would not have had the benefit of such a warning if she was tried concurrently or back to back here.

Also, "if" the question of whether or not this sec. 2, mandatory death sentence provision required "successive convictions" (or required the second indictment to allege a prior conviction) was at issue in Turnour, and if Turnour was not executed (and it seems almost certain that she was not), then Turnour implicitly stands for the proposition that "successive convictions" are required here.

12. See, e.g., Cockburn, supra note 1 at 407 (no.2464) (in 1593, Margaret Mynnet was tried concurrently on four indictments, three of which (killing by witchcraft pursuant to section 1 of the 1562 witchcraft statute) carried a mandatory sentence of death upon conviction); Cockburn (CAR: James I supra note 17 (of Part IV)) at 16 (no. 84) (in 1607, Blanche Worman was tried concurrently on six witchcraft indictments pursuant to 1 Jac. 1, c.12 (1603), each of which carried a sentence of death); and

R v. Lewis (supra, Case No. 3 of Appendix 10, and infra, Case No. 6 of Appendix 18).

13. See supra, note 9.

14. 44 Ark. 265, 266. And see LaRue, supra note 181 (of Part IV).

15. On the inns of court, see, e.g., Baker, supra note 7 (of Part IV) at 313-318, infra, text accompanying note 4 (of Case No. 4 of Appendix 18); and Robbins, infra note 10 (of Case No. 1 of Appendix 15) at 64-77.

16. See Ewen, supra note 1 at 34. See also Baker, supra note 7 (of Part IV) at 308.

17. See Staunford, supra Appendix 8; supra Case No. 7 (of Appendix 4); and supra, Reference No. 3 (of Appendix 7).

18. See supra, text accompanying note 14.

19. See Ewen, supra note 1 at 34.

20. And see Goodrich-Baker, supra note 9 (of Reference No. 3 of Appendix 7).

APPENDIX 14

Case No. 1: Sims' Case (England, 1601)[1]

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

Sims could have been charged with criminal homicide.[2]

The rationale offered here in support of the proposition, that at common law a child that is killed in the mother's womb is not recognized as a victim of homicide, was never accepted by the English common law. This is demonstrated by the simple fact that such a killing remained an indictable offence (a "heinous misdemeanor") at the post-16th-century English common law.[3] Had this rationale been accepted, then it would have dictated equally a common law rule to the effect that such a killing is not even a misdemeanor offence. The elements making up this offense are the same whether the offence be classified as a felony or a misdemeanor. Therefore, if the offence, as a felony, cannot be deemed a felony because death in connection with the abortional act cannot be legally proved, then it

should follow that the offense, as a misdemeanor, cannot be deemed a misdemeanor for the identical reason that death in connection with the abortional act cannot be legally proved. The English common law did not vary the required standard of proof (beyond a reasonable doubt) relative to each element of an offence according to whether the offence was laid as a felony or misdemeanor.[4]

1. 75 Eng. Rpts. 1075, 1075-76 (Goldsborough, 176).

2. See supra, Case No. 1 (of Appendix 9), and accompanying commentary.

3. See the authorities set forth supra, in note 33 (of Part IV). And see also, e.g., F. Wharton, The Law of Homicide 589 n.2 (3rd ed., 1097) (the difficulty of ascertaining the fact of what caused a child to die in the womb cannot be considered as a satisfactory reason for deciding that no such death can be recognized as criminal homicide unless it is supposed that such a fact never can be clearly established); and 1 East, supra note 32 (of Part IV) at 227-28. And see R v. Hallam (1732), infra note 1 of Case No. 2 (of this Appendix 14) (surgeon testified as to cause of death of unborn child).

4. Germain Grisez in his Abortion: the Myths, the Realities, and the Arguments 376 (paperback, 1970), and in the course of discussing the definition of murder at the English common law and why the in-womb destruction of a live child was not criminal homicide there, suggested that the murder term "living under the king's peace" implied that the king could not acquire jurisdiction over a human being until the human being was born alive. However, the term "living under the king's peace" means simply "not an alien enemy on the field of battle". See Baker, supra note 7 (of Part IV) at 309.

Case No. 2: R v. Evans (London, 1724)[1]

> Flemming Evans, of S. Katharine's, was indicted for the murder of a male infant (unborn) on the 6th of May last [1724], by striking and kicking on the belly, Susan, the Wife of John Davis, then quick with the said infant. The Child was stillborn, very much bruised, and one of its Arms [had been] broken. But the Law supposing it impossible for a Child to be murdered before it is born, the Court directed the Jury to acquit the Prisoner of this Indictment, but ordered the Prosecutor to bring another against him for the assault.[2]

The Evans indictment reads, in pertinent part, as follows:

> The jurors...present that Fleming Evans...on the 6th day of May in the eleventh year of the reign of Lord George..., King of Great Britain, by force and arms ...in and on a certain Susanna..., then pregnant...of a certain male infant..., made an assault on them, and...Evans there and then feloniously...pressed..., hit and bruised...Susanna...in and of the stomach with both the hands and feet, and there and then he feloniously,...and of his malice aforethought... murdered the same male infant...[3]

The Evans record [4] discloses also that Evans and another man were indicted for breaking and entering the Davis home and then and there stealing from, or robbing Mr. Davis. This is alleged to have occurred on May 7, 1723. It is probable, however, that the assault on Davis' wife and the breaking and entering occurred in the same or one incident.

1. OBSP, December 4-9, 1725 (Harvester Press Microform Collection (see supra, note 20 (of Part IV), December of 1725 at p.10). See also, e.g., R v. Hallam (1732) (Harvester Press OBSP, supra this note, no. 10 at 34). Hallam threw his full-term wife out a window. A surgeon testified that the cause of death of the mother and the child was the fall to the ground from the window. The impact with the ground also caused the child to be expelled from the womb and almost entirely from the birth canal. Evidently, the child died on impact. Hallam was not indicted for killing the child. He was indicted for and convicted of murdering his wife. For a case similar to Hallam (the defendant was indicted for the murder of his pregnant wife, but not for killing her stillborn child), see R. v Townsend (September 10-12, 1718), Harvester Press OBSP, supra this note at p.7.

2. I was unable to determine whether Evans was subsequently prosecuted for assault.

3. Middlesex Gaol Delivery Roll for October, 1724. Reference and translation from the Latin supplied by anonymous.

4. See supra, note 3.

APPENDIX 15

R v. E. Beare (aka., E. Merriman) (Derby, England, August 15, 1732)[1]

Eleanor Merriman, now the wife of Ebenezer Beare, indicted for a misdemeanor, in endeavoring to persuade Nich. Wilson to poison his wife, and for giving him poison for that end.

Indicted a second time by the name of Eleanor Beare, for a misdemeanor, in destroying the foetus in the womb of Grace Belfort [Belford], by putting an iron instrument up into her body, and thereby causing her to miscarry.

Indicted a third time, for destroying the foetus in the womb of a certain woman, to the jury unknown, by putting an iron instrument up her body, or by giving her something to make her miscarry. Pleaded not guilty.

[Evidence on the First Indictment]

COUNSEL FOR THE KING. Gentlemen of the jury, you have heard the indictment read, and I must observe to you, that the crime for which the prisoner stands indicted, is an offence of the highest nature, next to murder itself; it is the instigation of a man to kill his wife, in the most secret manner, in order to keep it from the eyes of the world, and thereby to escape the punishment due to such a crime, by giving her poison in drink, of such a nature as should not work suddenly but by degrees, and thereby to kill her without any suspicion of murder; and it is owing to the good providence of God that the man did not give his wife the poison, for if he had, and she had died, the prisoner would have been tryed for the murder.

Call Nicholas Wilson.

COURT: Do you know the prisoner?

WILSON: Yes.

COURT: How long?

WILSON: It is about 3 years since I unfortunately met with the prisoner at a publick house at Wirksworth; after some conversation, she told me I was young, and could not take my liberty for fear of having uneasiness with my wife, but if I would be ruled by her, she would put me in a way to be rid of it. I asked her how? She said she would give me something to give my wife in her drink which would do her job. I told her that we would both be hanged. She said I need not fear that, for it would not kill her suddenly but by degrees, and that it would never be inspected. In a few days I met with the prisoner again, and she gave me something in a paper to give my wife in her drink, and told me it would quickly do her job. I took the paper and buried it, and went home and told my wife what had passed between me and the prisoner, and she desired me to keep out of her company; and I have never seen her since, till I now see her at the bar.

PRISONER. Did not you hire one Mary Yeomans to poison your wife, and did not you receive some poison (if it was poison) from her, and afterwards send for me, and tell me the stuff you had from Mary Yeomans would do no good?

EVIDENCE [i.e., N. Wilson]: No, I had the stuff from you and no other, and I buried it as above.

Call John Wilson.

COURT: What have you to say to the prisoner?

J. WILSON: Since she was in prison, she sent for me, and told me she had something against my brother which would touch his life, and desired he would keep out of the way at the Assizes.

COUNSEL: Your Lordship will observe, that the prisoner, fearing N. Wilson might be an Evidence against her, had that contrivance to send him out of the way.

Call Hannah Wilson.

H. WILSON: My husband told me he had received something from the prisoner, which she bid him give me in some drink, and it would shut me quickly.

To the Second indictment.

COUNSEL: Gentlemen, you have heard the indictment read, and may observe, that the misdemeanor for which the prisoner stands indicted, is of a most shocking nature; to destroy the fruit in the womb carries something in it so contrary to the natural tenderness of the female sex, that I am amazed how ever any woman should arrive at such a degree of impiety and cruelty, as to attempt it in such a manner as the prisoner has done, it has really something so shocking in it, that I cannot well display the nature of the crime to you, but must leave it to the evidence: It is cruel and barbarous to the last degree.

Call Grace Belfort [Belford].

GRACE BELFORD: I lived with the prisoner as a servant about ten days, but was not hired, and I was off and on with her about fourteen weeks: When I had been with her a few days there came company into the house, and [the company] made me drink ale and brandy (which I was not used to drink) and it overcame me; my mistress sent me into the stable to give hay to some horses, but I was not capable of doing it, so [I] laid me down in the stable; and there came to me one Ch____r, a young man that was drinking in the house, and after some time I feared I was with child, I told her [Beare] I thought I was; then she said if I could get 30 shilling from Ch___r, she would clear me from the child without giving me physick. A little time after, some company gave me cyder and brandy, my mistress and I were both full of liquor, and when the company was gone, we could scarce get up stairs; but we did get up; then I laid me on the bed, and my mistress brought a kind of an instrument, I took it to be like an iron skewer, and she put it up into my body a great way, and hurt me.

COURT: What followed upon that?

EVIDENCE: Some blood came from me.

COURT: Did you miscarry after that?

EVIDENCE: The next day after I went to Allesiree, where I had a miscarriage.

COURT: What did the prisoner do after that?

EVIDENCE: She told me the job was done. I then lodged two or three nights with one Ann Moseley (now Ann Oldknowles); and [I] coming one morning to see the prisoner, I called for a mug of ale and drank it, and told her I was going home; then came in John Clark, and on the prisoner's saying I was going home, he said he would give me a glass of wine, to help me forward, which accordingly he did, out of a bottle he had in his pocket; then I took my leave of him; and when I was a little way out of town, I fell down at a style, and was not well, I lay a little while, then got up, and went to Nottingham that night.

Call Ann Oldknowles.

COURT: Do you know any thing of Grace Belford having a miscarriage?

EVIDENCE: I know nothing, but that when she lay with me, I saw all the symptoms of miscarriage on the bed where she lay.

Call John Clark.

COURT: Do you know the prisoner?

CLARK: Yes, I have frequented her house.

COURT: Did you ever hear her say anything that she had used means to make a woman with child miscarry, by putting any kind of instrument up their bodies, or by giving them any thing to take inwardly?

CLARK: Yes, I have.

COURT: Have you seen her instrument for that purpose, or have you seen her use any means to make any woman with child miscarry?

CLARK: No, but I have heard her say she had done it, and that she then had under her one Hannah, whose other name [Hewit?][2] I know not.

COURT: Have you heard her say she had been sent for these wicked practices, or had any reward for causing any one to miscarry?

CLARK: I heard her say she had been once sent for to Nottingham, and, as I remember, she said she had five pounds for the journey.

PRISONER: Did you not say you never heard me say any thing of using any means to cause miscarriage in any person, or saw me use any means for that end?

CLARK: No, I said I never saw you do any thing that way, but had heard you say you had done it. Would you have me forswear myself?

PRISONER: No, but I would have you speak the truth.

CLARK: I do.

Then the prisoner called several persons to speak in her behalf, but only two appeared, and they only gave her friends a reputable character, and said the prisoner had had a good education, but they knew nothing of the latter part of her life.

MR. MAYOR: The prisoner at the bar has a very bad character, and I have had frequent complaints against her for keeping a disorderly house.

Many evidences were ready in Court to have proved the facts she stood charged with in the third indictment; but his Lordship, observing that the second indictment was proved so plainly, he thought there was no necessity for going upon the third.

His Lordship summed up the evidence in a very moving speech to the jury, wherein he said, he never met with a case so barbarous and unnatural. The jury, after a short consultation, brought the prisoner in guilty of both indictments, and she received sentence to stand on the pillory, the two next market-days, and to suffer close imprisonment for three years.

Derby, August 18, 1732. This day Eleanor Beare, pursuant to her sentence, stood for the first time in the pillory in the marketplace; to which place she was attended by several of the Sheriff's officers; notwithstanding which, the populace, to show their resentment of the horrible crimes wherewith she had been charged, and the little remorse she has shown since her commitments, gave her no quarter, but threw

> such quantities of eggs, turnips, etc. that it was thought she would hardly have escaped with her life: she disengaged herself from the pillory before the time of her standing was expired, jumped among the crowd, whence she was with difficulty carried back to prison.

Unlike every one of the other known, English common law abortion presentments or indictments, neither of the Beare common law, misdemeanor abortion indictments allege that the pregnant woman was quick with child or with quick child or big or great with child or pregnant with a live child. This means that Beare was indicted for destroying, through deliberated abortion, the pre-human being product of human conception. The prosecutor referred to the product of Belford's miscarriage, not as a living child, but rather as the "fruit in the womb". The terms "kill" and "destroy" are not necessarily synonymous, for while both a living and a non-living thing can be destroyed, only the former can be killed. No evidence appears to have been offered to show that Belford's fetus had acquired life, and was still in life when it was aborted. Belford simply stated that she miscarried soon after the abortion was performed. She did not say that she had "quickened".

It is difficult to certainly understand what the word "foetus" was meant to convey as it was employed in the Beare abortion indictments. The common law rule is that technical or scientific words are to be understood in their technical or scientific sense, and not in their popular sense. Edith Boyd, in her Origins of the Study of Human Growth (1980), observed:

> In the early eighteenth century, physicians had begun to distinguish between embryo and fetus, using the Greek term embryo...to designate the organism in the early stages of prenatal growth and the

> Latin term fetus...to designate the developing organism after it had acquired all its members, including digits (for example, see Ruysch, 1724, p.54). This is still the usual but not universal custom. In a Treatise on Midwifery [1752], William Smellie (1697-1763), a leading obstetrician of London and teacher of William Hunter, recognizing this distinction, set the time for the dividing line at the [end of the] third month.[3]

John Quincy, in his Lexicon Physico-Medicum Or, A New Physical Dictionary (1719), defined fetus as "[t]he child in the womb... after it is perfectly formed, before that, it being called Embryo.[4] Chitty, in his Treatise on Medical Jurisprudence (1834), observed: "From the commencement of the impregnation or conception, until the end of the third month, the embryo is termed an ovum, afterwards it is to be called foetus until the termination of gestation. But the most accurate physiologists use the term foetus indiscriminately during the time of gestation."[5] E. Chambers, in his Cyclopaedia: Or An Universal Dictionary of Arts and Sciences (London, 1728), gave the following definitions of foetus and embryo, respectively: "Foetus: in medicine, denotes the child while yet contained in the mother's womb; but particularly after it is perfectly formed - till which time it is properly called embryo;" "Embryo: in medicine, foetus; the first beginning or rudiments of the body of an animal, in its mother's womb, before it...[has] received all the dispositions of parts necessary to become animated - which is supposed to happen to a man on the 42nd day, at which time the embryo commences [to be] a perfect foetus."[6]

It seems, then, that in England in the eighteenth century, the term fetus, in its popular, as well as in its technical or scientific sense, could refer either to the product of human conception when it

is in a state of fetal formation or to the product of human conception from the moment of its conception. It therefore cannot be reasonably stated that the term foetus, as used in the Beare abortion indictments, was meant to refer only to the product of human conception when it is in a state of fetal formation.

It is probably true that in England in the eighteenth century, it was a generally received medical or scientific opinion that the product of human conception achieved fetal formation at about the end of the third month after conception.[7] It is also true that according to Belford's unchallenged statement, she was approximately thirteen and one-half weeks into her pregnancy when Beare performed the abortion on her. Belford stated the following: (1) she worked for Beare for about fourteen weeks; (2) she had sexual intercourse with Ch__r a few days after she began to work for Beare; and (3) she miscarried the day after she left her employment with Beare (which means that the abortion was performed the day before Belford left her employment with Beare). However, the fact remains, it does not appear in the Beare abortion case that any evidence was offered to show that Belford miscarried of a "formed fetus". It may be that the product of Belford's miscarriage appeared to Belford as nothing more than a lump of blood or flesh.[8]

Why was not Belford indicted as an accessory? The reason seems to be that it was a then and there legal custom (but not a binding legal rule) not to charge or not to prosecute an accomplice who agreed to fully cooperate in the prosecution of the principal. Justice Gould in R v. Rudd (1775) stated:

> All the judges were of opinion, that in cases not within any statute, an accomplice, who fully and truly discloses the joint guilt of himself and of his companions, and truly answers all questions that

> are put to him, and is admitted by justices of the peace as a witness against his companions, and who, when called upon, does give evidence accordingly, and appears under all the circumstances of the case to have acted a fair and ingenuous part, and to have made a full and true information, ought not to be prosecuted for his own guilt so disclosed by him.[9]

Regarding the punishments Beare received for her two misdemeanor convictions, they might be explained in Regina v. Wright (1705). It is stated there that if a person is convicted on two misdemeanors, and has no goods to forfeit, then the authorized sentence or punishment can include a jail sentence on one of the convictions and to be placed in the pillory on the other.[10]

I am at a loss to offer an explanation as to why the Beare trial court recommended to the Beare prosecutor not to bother proceeding on the second abortion indictment. A wild guess is that in common law misdemeanor cases, a defendant could not be sentenced on more than two misdemeanor convictions because there existed only two types of punishment (not counting a monetary punishment) in such cases: imprisonment and corporal punishment. The foregoing assumption itself assumes that consignment to the pillory falls under corporal punishment (which included whipping), and that consecutive same-punishments were illegal here.

A person may want to argue that R. v. Beare is not to be given much weight as it represents the judgment of but one judge. But from the American perspective, the same can be said of the pro-therapeutic abortion case of R v. Bourne (1939).[11] Yet, the Court in Roe v. Wade spoke approvingly of the decision in Bourne.[12] In any event, the California Court of Appeal in Gardner v. Superior Court (1986) observed: "in the development of the common law, the analysis of

printed decisions of appellate courts is only part of the show. Development of the law begins in the trial courts..."[13]

Some may want to argue also that in England, R v. Beare (on abortion) was never followed. That argument presupposes that the post-Beare, English judiciary was presented with an opportunity to follow or reject Beare (on abortion). However, no one knows if such an opportunity ever existed. Available evidence suggests that the post-Beare, English judiciary would have accepted Beare on abortion.[14] Furthermore, in 1803 the English Parliament implicitly accepted Beare on abortion.[15]

1. Reproduced from 2 Gentleman's Magazine 931-32 (August 1732). This case is also mentioned in Eccles, supra note 10 (of Part IV) at 70 (my initial source); and 2 J.C. Cox, Three Centuries of Derbyshire Annals 48 (London, 1890) (mentions only the first indictment). This case came under the jurisdiction of the Midland Circuit; but according to Professor Baker, the 1732 Midland Circuit records evidently have not survived.

2. See 2 Gentleman's Magazine 722 (April, 1732), in which the following appears:

> March 29. Were executed at Derby: John Hewet, a butcher, and Rosamond Oherenshaw, widow, and servant to Mrs. Eleanor Beare at the Crown on Nans-green Derby, for poisoning the said Hewet's wife [Hanah]. They walked to the tree in shrowds and died very penitent, confessing their guilt, and that Hewet had criminal familiarity not only with his fellow sufferer, but her mistress [Beare], who was the principal promoter of this murder; for which she will be tried next Assizes. Hewet said he had been married to the deceased seven years, but in short time differing, they parted, and that he, being persuaded by Beare, sent the poison to her by her servant.
>
> Oherenshaw said, her wicked mistress fixed up the poison in a pancake, and or-

> dered her (while her self was ironing in the parlour) to give it [to] Hannah Hewit to eat, she being sick after [eating] it [and] cast some of it up on the yard, which a pig eat of and died, as did the woman in great agony at the end of three hours. She confessed they had given her poison before in broth; and that since her widowhood she had a child by one H.S. before she came to live at the Crown at Nan's-Green. Tis added, that the bones of a child about 7 months growth were found buried in the garden of the said house; and a great deal of Mrs. Beare's wicked practices were discovered.
>
> This account not being come to hand before our last was published, we took a false relation of the Assizes at Derby, from the Lond. Evening Post March 21, which we hope our readers will take as a sufficient excuse, it being as far from our intentions to insert a false fact, as impossible for us to know the exact truth of what we are obliged to take in a hurry from the news papers.

3. p. 273. On Smellie, see supra, note 83 (of Part IV).

4. p.158. See also, e.g., J. Kersey, Dictionarium Anglo-Britanicum, or A General English Dictionary sub tits. Embryo & Foetus (1708); and S. Blanchard, The Physical Dictionary 96 (Foetus) (London, 1697).

5. 2 Chitty, A Practical Treatise on Medical Jurisprudence 400 (London, 1834). See also id. at 401. And see, e.g., Hunter, supra note 83 (of Part IV).

6. 1 Chambers, supra note 57 (of Part IV) sub tits. Foetus & Embryo. See also Farr, supra note 111 (of Part II); and 2 James, supra note 79 (of Part IV) sub. tits Embryo and Foetus, respectively. But see John Quincy, The New Dispensatory sub. tit Foetus/Embryo (London, 1753) (embryo becomes a fetus after the completion of the fourth month after conception). Some 19th century works state that the human embryo does not develop into a fetus until after the fourth or fifth month from conception. See, e.g., 4 Pantologia: A New Cabinet Cyclopaedia sub. tit Embryo (1819); The American Medical Dictionary sub. tit Foetus

& Embryo (1811); and Midwife's Practical Directory 56 (1834) (embryo ceases and fetus commences at the middle of the fourth month from conception). But see 3 Paris & Fonblanque, Medical Jurisprudence 224 (fn.) (1823) (a foetus can be born alive as early as 3 months after its conception); Chitty, supra note 5 at 400-401 (human embryo becomes a fetus three months after conception); and Michael Ryan, A Manual of Jurisprudence 128 (1832) (the foetus is about four inches long at three months).

7. See supra, note 83 (of Part IV). See also supra, note 6.

8. See supra, text (of Part IV) accompanying notes 193.

9. 1 Cowper's Rpts. (Boston, 1809) 331, 339. See also, e.g., Best, surpa note 169 (of Part IV) at 135 [196 (sec. 156)]; infra, text accompanying note 8 (of Case No. 4 of Appendix 18); the Pizzy & Codd Case, infra Appendix 22 (the woman, who had the abortion and who became a witness for the prosecution, was not indicted); and R v. Lord Gray, 3 State Trials 519.

10. 2 Ray. 1189, 1195-96. An illustration of a pillory appears in S. Robbins, Law: A Treasury of Art and Literature 144 (1990).

11. [1938] 3 All E.R. 615, 1 K.B. 687. See supra, text (of Part IV) accompanying notes 44-46.

12. See Roe v. Wade, 410 U.S. at 137.

13. 182 C.A. 3d 335, 339; 227 Cal. Rptr. 78. See also supra, text (of Part IV) accompanying notes 210-219.

14. See infra, Case No. 2 (of Appendix 17). See also supra, text (of Part IV) accompanying notes 204-228.

15. See infra, Statute No. 1 (of Appendix 1); and supra text (of Part IV) accompanying notes 229-235.

APPENDIX 16

Case No. 1: R v. Turner (Nottinghamshire, 1755)

> Against Thomas Turner of Warsop, weaver, for a misdemeanour in persuading and procuring Elizabeth Mason to take and swallow a certain quantity of arsenick mix'd with treacle in order to kill and destroy a male bastard child by him begotten on her body and which she was then quick with.[2] To which indictment he appear'd and pleaded Not Guilty, and upon his trial was acquitted by the jury and discharged.[3]

1. Notts. Archives Office, QSM 1/27, Quarter Sessions Order Book. Transcription supplied by Professor Baker. This case is reproduced also in Keown, supra note 99 (of Part II) at 9-10 (my initial source).

2. As to the probable reason why E. Mason was not prosecuted (if in fact she was not prosecuted), see supra, text (of Case No. 1 of Appendix 15) accompanying note 9, as well as that note itself.

3. "Note: this appears to be the entire record. It speaks for itself. The indictment as paraphrased here does not appear to be specific as to whether the foetus was born alive or dead, and so it may be permissible to regard this as simply abetting an attempt to kill an unborn child." (Professor Baker in a letter to Philip A. Rafferty (May 6, 1989). At common law, an accessory before the fact to a misdemeanor can be tried as if he or she is a principal. See 1 Hale, infra, note 1 (of Case No. 2 of Appendix 18) at 613.

Case No. 2: R v. Anne Foxall (Warwick, 1651)[1]

> Anne Foxall. It appearing to this court (by the affidavit of Allen Cotton, gentleman, now sworn in court) that Anne Foxall of Bockenhull in this county is with child and that upon pretence of having a tympany[2] she hath attempted to take physic which may tend to the destruction of the child, this court doth therefore think fit and order that the constable and headborough of Bickenhull aforesaid shall forth-

with upon receipt hereof apprehend the said Anne Foxall and carry her before such Justice of the Peace as inhabits next to the place who is desired by this court upon examination of the matter to do therein according to the law and as the case shall appear to require to the end that especial care may be taken for prevention of so heinous a sin as infant-murder which (as is feared) hath been intended.

The outcome of this case is unknown.

1. Reproduced from 3 S.C. Ratcliff (ed.), Warwick County Records Quarter Sessions Order Book Easter, 1650, to Epiphany, 1657 50 (Warwick, 1937).

2. See 3 James' Medicinal Dictionary sub tit. Tympanites (London, 1745) ("a permanent and continual inflation of the abdomen... is called a Tympanites...A tumor and vehement distension of the abdomen, accompanied with frequent rumblings produced by the motion of the flatulences [gases]"); Dryden, The Anagram: Elegy 2 li. 49-50 ("And though in childbed's labour she did lie, midwives would swear, t'were but a tympany"); and J.S. Burn, The High Commission 45 (1865) (in 1632 in the Court of High Commission Joan Lane was accused of being "Great with Child" by the Bishop. She replied: "It is a timpanie"; to which the Bishop replied: "a timpanie with two Heeles"). See also infra, Case Nos. 4 & 16 of Appendix 23.

APPENDIX 17

Case No. 1: R v. Jane Wynspere (Nottingham, 1503)[1]

An inquisition taken at Basford in the county of Nottingham in the vigil of the Epiphany in the nineteenth year [1503] of the reign of King Henry the seventh after the conquest, before Richard Parker one of the said lord king's coroners in the aforesaid county, concerning and upon the view of the body of Jane[2] Wynspere of Basford aforesaid, by the oath of...[names of fourteen jurors omitted], who say upon their oath that the said Jane Wynspere of Basford in the county of Nottingham, single woman, being pregnant, on the twelfth day of December in the above mentioned year at Basford aforesaid, [being moved] by the spirit of the devil, drank and received into her body various unwholesome and tainted poisons (pocula corupta et imaculata) in order to kill and destroy the child in her body; from which the said Jane then and there died. And thus the same Jane in manner and form aforesaid feloniously as a felo de se killed and poisoned herself and the child in her body. And they say that she was possessed on the day she died of a certain gown (price 12d.) and a tunic (price 6d.) and a little box (price 6d). And they further say that a certain Thomas Lichefeld of Basford in the county aforesaid, cleric, knowing the said Jane to have committed the said felony in form aforesaid, then and there feloniously harboured (hospitavit) the said Jane.[3] In witness of which premisses both the aforesaid coroner and the said jurors have put their seals to this inquisition on the day and in the year aforesaid.

ENDORSEMENT:

This inquisition was delivered before John Fostar[4] knight, one of the lord king's justices assigned to deliver the gaol of Nottingham of the prisoners therein, at Nottingham on Wednesday next after the feast of St. Edward the King in the nineteenth year of the reign of the present king.

Although the outcome of this case is unknown, it constitutes a coroner's presentment or indictment for constructive self-murder

(felony suicide) or implied malice self-murder. The facts constituting the implied malice are the intentional taking of poison with the intent of destroying the child in the womb.[5] At common law, felony suicide is described as being a heinous offense against God and the king, and contrary to nature.[6] It's punishment consisted of "ignominious [or non-Christian] burial in the night at a cross-roads with a stake driven through the torso and a stone on the face of the deceased", and forfeiture of all goods and chattels.[7]

Attempted suicide was a misdemeanor at common law.[8] However, it does not follow from R v. Wynspere that an attempted self-abortion was punishable as attempted suicide at common law. This is because at common law attempted suicide required the "specific or subjective intent" to kill oneself, just as attempted murder required the specific or subjective intent to kill another.[9]

1. KB 9/434/12. Reproduction and translation from the Latin supplied by Professor Baker. This case appears in R.F. Hunnisett (ed.), Calendar of Nottinghamshire Coroner's Inquests 1485-1558 8 (no. 10) (25 Thoroton Soc. Rec. Series, 1966) (my initial source).

2. Or Joan: "Johnanna in Latin." Professor Baker.

3. See supra, Case No. 2 (of Appendix 4).

4. "Reading unclear: document very worn". Professor Baker.

5. See infra, Case No. 2 (of Appendix 18), as well as the commentary accompanying that case.

6. See, e.g., Hales v. Petit (Q.B., 1562), 75 Eng. Rpts. 387, 400; 1 Plowden 253, 261; and Brenner, Undue Influence in the Criminal Offense of "Causing Suicide", 47 Alb. L. Rev. 62, 64 (1982).

7. See Notes, 39 Stan. L. Rev. 929, 930-31 (1987); and Notes, 86 Col. L. Rev. 348, 349 (1986).

8. See e.g., Q v. Burgess (1862), 169 Eng. Rpts.1387, Le.&Ca. 258.

9. See Smith & Hogan, Criminal Law 252 (4th ed., London 1965).

Case No. 2: R v. Russell (Huntingdon, 1832)[1]

In pertinent part the indictment in this case charged Russell (R) with the capital offence of being an accessory before the fact to Sarah Wormsley's (S.W.) self-murder. The jury returned a verdict of guilty. The trial court imposed a sentence of death on R, and then stayed R's execution in order that an appeal could be taken on certain points of law in the case. The relevant facts, as found by the Russell jury, were the following. R. delivered arsenic to S. W., who was then pregnant but not quick with child (meaning here: S.W. had not yet experienced quickening),[2] so that S.W. would consume it in order to make herself miscarry. S.W., while outside of R's presence, consumed the arsenic with the intent of making herself miscarry. S.W. then died from ingesting the arsenic.[3]

In the course of charging or addressing the jury, the Russell trial court stated in effect the following: if you are satisfied that S.W. took the arsenic with the intention of making herself miscarry, she would be, in judgment of the common law, a felo de se (i.e., a self-murderer), even though, in taking the arsenic, she did not then harbor the intent to take her own life.[4]

At common law there was no offence of accessory before the fact to the offence of felony suicide. This was due to the common law rule that an accessory before the fact could not be tried and convicted unless the principal felon was first tried and convicted. And this was impossible in the case of a felony-suicide because the principal (the felo de se) was dead and, therefore, could not be tried.[5] However, in England at the time of S.W.'s felony suicide there existed a statute, 7 Geo. IV, c. 64, s. 9 (1826), that enabled an accessory before the fact to be tried and convicted, notwithstanding

that the principal had yet to be tried and convicted. This statute read in pertinent part as follows:

> And for the more effectual Prosecution of Accessories before the Fact to Felony; Be it enacted, That if any Person shall counsel, procure or command any other Person to commit any Felony, whether the same be a Felony at Common Law, or by virtue of any Statute or Statutes made or to be made, the Person so counselling, procuring or commanding shall be deemed guilty of Felony, and may be indicted and convicted, either as an Accessory before the Fact to the principal Felony, together with the principal Felon, or after the Conviction of the principal Felon, or may be indicted and convicted of a substantive Felony, whether the principal Felon shall or shall not have been previously convicted, or shall or shall not be amenable to Justice, and may be punished in the same Manner as any Accessory before the Fact to the same Felony, if convicted as an Accessory, may be punished.[6]

The question in Russell was whether 7 Geo. IV. c.64, s.9 authorized R. to be prosecuted pursuant to an indictment charging him with the common law, capital offence of being an accessory before the fact to felony-suicide. The appellate court in Russell voted eight (8) to four (4) that S.W. was a felo de se. They also voted twelve (12) to zero (0) that R. was an accessory before the fact to the felony-suicide. However, by a vote of nine (9) to three (3), they construed 7 Geo. IV. c. 64, s.9 to be applicable only to accessories who could have been tried at common law "together with or after the principal felon". To put this another way, nine Russell justices ruled that the 7 Geo. IV. c. 64, s. 9 term, "Accessories before the Fact to Felony", does not include an accessory to felony suicide because at

common law it was not an indictable offence to be an accessory to felony suicide, and the statute was not designed to create any new felonies.[7] To put this still another way, they held that 7 Geo. IV. c.64, s.9 was not intended to apply to cases in which the principal cannot from the nature of the case ever be tried. Since self-murder is such a case, the Russell appellate court set aside R's conviction of accessory before the fact to S.W.'s self-murder. (I would add the following. At common law an accessory before the fact to a felony was liable to the same punishment as the principal felon. But since an accessory before the fact to felony suicide can still be living after the suicide, it would be impossible for such an accessory to receive the same punishment as the felo de se.)[8]

R., at his own request, was transported for fourteen years, instead of being tried on another indictment for the statutory, felony offence of furnishing to a woman, who was not then quick with child, a substance in order to cause her to miscarry.[9]

It is fair to conclude that the Russell proposition that S.W. was a felo de se at common law is in a sense dictum. This is so because the Russell Court could have answered the question concerning the construction of 7 Geo. IV. c.64, s.9 on the assumption that S.W. was a felo de se at common law. Be that as it may, eight of the twelve Russell justices were clearly of the opinion that S.W. was a felo de se at common law.

Now S.W., who was pregnant but not quick with child when she killed herself in the course of attempting an abortion on herself, could not be considered a felo de se at common law unless she killed herself in connection with the commission of a criminal offense that posed more than a remote risk of death.[10] Hence, eight of the Russell justices implicitly concluded that S.W.'s act of attempted self-abortion was an indictable offence, notwithstanding that S.W.

was not then quick with child. This could have been an offence only by virtue of a statute or by virtue of the common law. The Russell appellate prosecutor argued both grounds.[11] The only criminal abortion statute in effect in England when S.W. killed herself was 9 Geo. IV. c.31, s.13 (1828). So far as pertinent here, this statute read as follows: "if any person, with intent to procure the miscarriage of any woman not being, or not being proved to be, then quick with child, unlawfully and maliciously shall...cause to be taken by her, any medicine or other thing..., every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable...to be transported...for any term not exceeding Fourteen years nor less than seven years..."[12] It seems almost certain, however, that the eight Russell justices, who concluded that S.W. was a felo de se were of the opinion that the word "person" (as it "initially" appears in the foregoing quoted portion of 9 Geo. IV. c.31, s.13) does not include the woman who administers to herself a substance in order to induce her own miscarriage. This is so, if only for the reason that the common law rule that criminal statutes are strictly construed in favor of the defendant would have dictated just such an opinion.[13] This rule (and the Russell court invoked this rule in the course of construing 7 Geo. IV. c.64, s.9 in Russell's favor)[14] stands for the following rules of statutory construction: if an act does not fall within the express prohibition of the penal statute, then the act is not considered to come within the statute; and if a criminal statute is susceptible of two reasonable interpretations, one of which favors the defendant and the other of which disfavors him or her, then the court should adopt that interpretation which favors the defendant and should reject that interpretation that disfavors him or her.[15] Now, it seems evident that at the very least, it is just as reasonable to

conclude that S.W. is not a person within the meaning of the word "person" (as it initially appears in the foregoing quoted portion of 9 Geo. IV. c.31, s.13) as it is reasonable to conclude that S.W. is such a person. Furthermore, a strong argument can be made that it would be unreasonable to conclude that S.W. qualified as such a person. The statute, in exempting such a person, lessened the great difficulty in successfully prosecuting criminal abortion cases.[16] Also, it was not until 1861 that the English Parliament, by express words, made it a statutory offence for a woman to attempt self-abortion.[17] Hence, it would seem that the eight Russell justices, who concluded that S.W. was a felo de se, based that conclusion on their opinion that pre-quick with child-deliberated abortion and its attempt were indictable offenses (misdemeanors) at the English common law. Russell was so construed in Reg. v. Fretwell (1862).[18]

1. 168 Eng. Rpts. 1302; 1 Mood. 356. This case should be compared to R v. Gaylor (1857), 169 Eng. Rpts. 1011, 7 Cox C.C. 253, Dears & B.C.C. 288.

2. See supra, text (of Part IV) accompanying notes 199-201.

3. 168 Eng. Rpts. at 1304.

4. Ibid.

5. See, e.g., supra, Case No. 3 (of Appendix 4). But see R v. Tinkler (2nd count of indictment), infra, Case No. 4 (of Appendix 18).

6. Reproduced from The Statutes of The United Kingdom of Great Britain And Ireland 7 Geo. IV 1826 277 (London, 1826).

7. 168 Eng. Rpts. at 1306. See also Reg. v. Ashmall and Tay (1840), 9 Carr & P. 236; and supra text accompanying note 5.

8. See supra, text (of Case No. 1 of this Appendix 17) accompanying notes 6 & 7.

9. 168 Eng. Rpts. at 1306. The statute in question is reproduced in pertinent part supra, Statute No. 2 (of Appendix 1).

10. See infra, the commentary to Case No. 2 (of Appendix 18).

11. See 168 Eng. Rpts. at 1305.

12. See supra, Statute No. 2 (of Appendix 1).

13. This would appear not to be the case relative to the word "person" as it appears for the second time in the foregoing quoted portion of 9 Geo. IV, c.31, s.13. The woman who is plotting to have an abortion might "counsel" or "aid and abet" a 9 Geo. IV, c.31, s.13 offender. See, by way of analogy, R v. Sockett, 72 J.P. 428 (1909).

14. See 168 Eng. Rpts. at 1306.

15. See, e.g., 1 Blackstone's Commentaries 87 (1765).

16. See supra, text (of Part II) accompanying notes 143-148, as well as the references and authorities set forth in those notes.

17. This statute reproduced supra, Statute No. 4 (of Appendix 1).

18. 9 Cox C.C. 152, 154; 31 L.J.M.C. 145; 26 J.P. 499, 6 L.T. 333.

APPENDIX 18

Case No. 1: R v. Adkyns (Essex, 1600)[1]

An indented inquest taken at the town of Maldon in the county of Essex before Thomas Wells and Henry Harte coroners of the lady the queen within the aforesaid town according to the liberties and privileges of the same town, on Saturday 5 July 42 Eliz. [1600], upon the view of the body of a certain Ann Webb then and there lying dead, by the oath of...[names of coroner's jurors omitted], good and lawful men of the aforesaid town: who say upon their oath that Thomas Adkyns of Maldon aforesaid in the county afsd, tailor, on 30 March in the above mentioned 42nd year [1600] about the hour of 8 p.m. of the same day, with force and arms etc. at the town of Maldon afsd in the county afsd and within the liberties and jurisdiction of the same town, of his malice aforethought feloniously assaulted the selfsame Ann Webbe, then and there in the peace of God and of the said lady the queen, and being gravida cum quodam fetu [in English: "beinge great with childe"] in her womb as a result of unlawful carnal copulation previously had by the same Thomas Adkyns with the same Anne Webbe, and with the intention of making the afsd fetus abort [in English: "to make the said childe to be untymelie borne"], then and there feloniously pressed (contrusit) the front part of the belly of the same Ann with his knees and then and there knelt upon the chest of the said Ann and then and there with his feet feloniously percussit [in English: "did spurne"] the afsd Ann, and then and there so seriously (contrude bat et quassabat) [in English: "did crush and bruise") the body of the same Ann that the same Ann from the crushing and bruising aforesaid languished from the afsd 30th day of March in the above-mentioned year until the 4th day of July then next following at Maldon afsd, and then and there around the hour of 4p.m. of the same 4th day of July at Maldon afsd she died. And so the jurors afsd say upon their oath afsd that the afsd Thomas Adkyns on the 4th day of July in the 42nd year afsd at Maldon afsd in the county afsd and within the jurisdiction of the same town feloniously and wilfully and of her

> [sic: his] malice aforethought in manner and form afsd killed and murdered the afsd Ann Webb against the peace of the said lady the present queen, her crown and dignity. In witness whereof both the afsd coroner and the afsd jurors have one by one set their seals to this inquisition on the day and year above mentioned.
>
> [Annotated in margin:] cul. ca. null. s' [i.e., guilty - no chattels - to be hanged:] Thomas Adkins.

It is difficult to certainly pinpoint the theory or theories of common law murder upon which this prosecution proceeded. It may have proceeded upon the general theory of implied malice.[2] However, if at the English common law in 1600, a child in the womb was still recognized as a victim of criminal homicide (which seems doubtful),[3] then the prosecution may have proceeded upon a theory of transferred malice.[4] It is not known if Ann Webb died in the course of giving birth, or if her unborn child survived.

1. ASS. 35/43/1. m.1 (Translation from the Latin supplied by Professor Baker. An abstract of this case will be found in J.S. Cockburn, (ed.), Calendar of Assize Records Essex Indictments Elizabeth 1 510 (no. 3054) (London, 1978) (my initial source).

2. See infra, the commentary to Case No. 2 (of this Appendix 18).

3. See supra, text (of Part IV) accompanying notes 29-34; and supra, the cases set forth in Appendices 14, 11, 12 & 13.

4. See, e.g., 1 Hale, infra note 1 (of Case No. 2 of this Appendix 18) at 431; and 2 E. East, A Treatise of the Pleas of Crown 250 (London, 1803). In any event, if Ann Webb's unborn child was born alive, then this theory would have been certainly applicable. See supra, text (of Part IV) accompanying notes 32 & 37, as well as those two notes.

Case No. 2: R v. Anonymous (before M. Hale at the Bury Assizes, Suffolk, 1670)[1]

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

In England, before, during and after Hale's day the term "with child", in common understanding, could refer both to a woman who is pregnant but not yet quick with child (or with quick child) and to a woman who is quick with child or with quick child. However, the common law authorities, in the context of discussing criminal abortion and pregnancy reprieves, almost always employed the term quick with child or its equivalent in refering to a woman who is not only pregnant but also is pregnant with a live or existing child. Yet, Hale himself, in the context of discussing pregnancy reprieves, used to term with child the refer to a woman who is quick with child or with quick child.[2] It cannot, then, be certainly stated that the term with child, as used by Hale in his report of R v. Anonymous (1670), referred to a woman who was pregnant but not yet pregnant (or proven to be pregnant) with an existing child. "If" in R v. Anonymous (1670) Hale used that term to refer to such a woman, then the case not only supports the proposition that at common law it is murder for a person to kill a pregnant woman in connection with the performance of an abortion upon her even though she was not then quick with child,[3] but also supports the proposition that pre-quick with child deliberated abortion is an indictable offense at common law.

R v. Anonymous (1670) was based on a theory of implied malice murder. It seems that such malice could be established only in two ways: (1) the killing occurred in the course of committing or attempting any capital felony, or (2) the killing occurred in the course of committing or attempting any non-capital felony or misdemeanor offense that more than remotely endangered human life. If the unlawful act was only remotely dangerous to human life, or if the act was not unlawful in the criminal sense, but was unlawful in the civil sense (civil negligence) then the crime was manslaughter. (It should be noted here that from a relatively modern perspective, a great deal of confusion exists regarding the question of whether the concept of implied malice in the context of implied malice murder has as one of its essential requirements the commission of an indictable act or offense.) Sir Michael Foster (1689-1763) in his Crown Cases (1762) stated:

> In order to bring the case within this description [i.e., within the case of accidental homicide involving neither an act of negligence nor an act constituting an indictable offence], the act upon which death ensues must be lawful. For if the act be unlawful, I mean if it be malum in se, the case will amount to felony, either murder or manslaughter, as circumstances may vary the nature of it. If it be done in prosecution of a felonious intention [i.e., with the intention of committing a felony, or alternatively, with a wicked, murderous or mischievous motive[4]] it will be murder; but if the intent went no further than to commit a bare trespass [it will be] manslaughter. Though I confess Lord Coke seems to think...[even the latter amounts to murder.][5]

Means would have one believe that Hale, in using the term "unlawfully" (in "unlawfully to destroy the child within her") in his

report of R v. Anonymous (1670), was implicitly acknowledging, not that pre-quick with child deliberated abortion is an indictable offense at common law, but rather that it is a criminal offence under English ecclesiastical law.[6] Assuming, without conceding, that Means' is correct here, what is proved by it? More than Means would like. Given that at common law the commission of an ecclesiastical offense (in this case, pre-quick with child, deliberated abortion) could be worked into the common law of murder, then a fortiori, the same could be worked into the common law of misdemeanor offences.

Furthermore, Hale, in the Proemium to his Historia Placitorum (which contains Hale's report of R v. Anonymous, (1670)), stated that he would not "meddle" here with ecclesiastical offenses:

> Crimes that are punishable by the laws of England are for their matter of two kinds: 1) Ecclesiastical, 2) Temporal. The former of these, namely such crimes as I call ecclesiastical are of ecclesiastical cognizance, and tho all external jurisdiction as well ecclesiastical as temporal, is derived from the crown of England and all criminal proceedings in the ecclesiastical courts are in some kinds Placita Coronae, [i.e.,] suits for the king, and such he may pardon or discharge, as being his own suits, yet these I shall not meddle with at this time.[7]

1. 1 Sir Matthew Hale, Historia Placitorum: The History of the Pleas of the Crown 429-430 (London, 1736). The Suffolk assizes at Bury was on the Norfolk circuit. Professor Baker has informed me that the surviving files for the Suffolk assizes at Bury for the period in question (around 1670) are incomplete. He informed me also that these surviving files do not contain R v. Anonymous (1670). These surviving files are the following: ASSI. 16/17/5 (Lent 1669) (contents: only indictments for misdemeanors, such as not attending church); ASSI. 16/18/6 (Summer 1669) (contents: same as ASSI. 16/17/5); ASSI. 16/19/5 (Lent 1670) (contents: same as ASSI. 16/17/5, plus "Examina-

tions of witnesses upon oath...upon the view of the dead body of an infant childe born of the body of Sarah Pygeon" -no mention of abortion); ASSI. 16/20/5 (Summer 1670) (contents: felony indictments and a complete calendar); ASSI. 16/21/4 (Lent 1671) (contents: only misdemeanor indictments), ASSI. 16/40/5 (Summer 1670) (contents: stray material); ASSI. 16/29/4 (Lent 1671, or old style 1670(?)) (contents: stray material.) Prof. Baker in a letter to Philip Rafferty (n.d.).

2. See supra, text (of Part IV) accompanying notes 146 & 149.

3. See 1 East, supra note 4 (of Case No. 1 of this Appendix 18) at 445; R v. Gaylor (1857) as discussed supra, in 37 (of Part IV); and infra, Case Nos. 4, 5 & 7 (of this Appendix 18).

4. See, e.g., R. Judd (1788), 2 D & E (4th ed., 1794) 255; R v. Scofield (1784), Caldecott Rpts. (1786), 397, 401; R v. Burridge (1735), 3 Wm. P. Williams (3rd ed., 1768) 439, 464-65; Ed. Bullingbrooke, The Duty and Authority of Justices of the Peace and Parish Officers for Ireland 39 (Dublin, 1766); and 1 Joel P. Bishop, Criminal Law 452 (sec. 622) (9th ed., 1923) ("the word felonious may be applied to the disposition of the mind of the offender as aggravating a misdemeanor, and not as descriptive of the offence [as being a felony]").

5. Sir Michael Foster, A Report of Some Proceedings on the Commission of Oyer and Terminer and Goal Delivery for the Trial of the Rebels in the Year 1746 in the County of Surry, and of Other Crown Cases. To Which Are Added Discourses upon a Few Branches of the Crown Law 258 (c.1, sec.1) (Dublin, 1767). See also, e.g., Roy Moreland, The Law of Homicide 42 (1952); 2 T.M. Cureley (ed.), Sir R. Chamber's: A Course of Lectures on the English Law 1763-1767 397 (1986); R. Burridge (1735), 3 Wm. P. Williams (3rd ed., 1768) 439, 467-68; 2 East, supra note 4 (of Case No. 1 of this Appendix 18) at 354-56; Pulton, supra note 32 (of Part IV) at 120 (sec. 19); R v. Brampton (1664), Kelyng, 41; R v. Wm. Cooper (1790), Guildhall OBSP vol. for Dec. 1789-Oct. 1790, p. 944 (no. 720); R v. Stubbes (1786), Guildhall OBSP vol. for July 1786, pp. 954-955 (no. 645); People v. Aaron, 299 N.W. 2d 304, 308-312 & 323 n. 109 (Mich. Supreme Ct., 1980); Q v. Bruce (1847), 2 Cox C.C. 262; R v. Hodgson (1730), 1 Leach (1815) 6, 6-7; J.F. Stephens, A History of the Criminal Law of England 57 (1883); and I. Wilner, Unintentional Homicide in the Commission of an Unlawful Act, 87 U. of Pitt. L. Rev. 811, 821 (1938-39). It may be that in 19th and 20th century England and the states of the United States, an act that amounted only to civil negligence, and not to high or gross or criminal negligence, would not have sufficed here to

establish manslaughter. See, e.g., Andrews v. Director of Public Prosecutions (1937), A.C. 576; and R v. Doherty (1887), 16 Cox C.C. 309. But see, e.g., R v. Fenton (1830), 1 Lew C.C. 179.

6. See Means II, supra note 1 (of Part II) at 362-63. See also id. at 369-370 & 350 in conjunction with the Hale quote supra, note 149 (of Part IV).

7. 1 Hale, supra note 1 at n.p. (Proemium).

Case No. 3: R v. Anonymous (c. 1750)[1]

> The most fatal method [of causing abortion] is by punctures of the uterus, with a pointed instrument for the purpose; too often used among us [in England], and not unknown to the ancients. Patin [a leading, 18th century, French physician] mentions a midwife hanged at Paris, for killing a foetus in the womb, by running a stilletto or kind of bodkin up the vagina through the orifices of the uterus by which a miscarriage was procured, but with such ill success that the mother was seized with convulsions, and died miserably (Patin, T. 1. Lett. 191, An. 1660). The criminal confessed she had treated many before in the same manner, with good effect. Our own age and country [England] afford a parallel instance, a woman having been a few years ago executed among us for the like fact.[2]

1. 1 G.L. Scott & Dr. Hill, A Supplement to Mr. Chamber's Cyclopaedia: Or a Universal Dictionary of Arts and Sciences sub tit. Abortion (London, 1753).

2. Scott and Hill (see supra, note 1) did not give a citation to this Anonymous abortion case, and I have been unable to locate it, although I did not engage in a systematic search for it. This Anonymous abortion case is not mentioned in the 1728-1750 editions of Chamber's Cyclopaedia. However, this does not mean that this case did not take place during the period 1728-1750. Hill, who was an attorney, was not connected with the editions of Chambers' Cyclopaedia that were published during the period 1728-1750.

Case No. 4: R v. M. Tinkler (Durham, 1781)

Abstract of Indictment[1]

(1st Count) The jurors present that on 1 July 21 Geo. III [1781] she [M. Tinkler] feloniously, wilfully and of her malice aforethought assaulted Jane the wife of Matthew Parkinson and did feloniously, wilfully and of her malice aforethought thrust and insert two pieces of wood of no value into and against the private parts and womb of the said Jane and wound, bruise, perforate and lacerate the private parts and womb of the said Jane, then and there giving the said Jane divers mortal wounds etc. of which she languished until 23 July and then died: and so the jurors say she feloniously, wilfully and of her malice aforethought did kill and murder the said Jane;

(2nd Count.) [lays the same assault], and Jane feloniously, wilfully and of her malice aforethought kept the pieces of wood in her private parts during the time aforesaid and died as aforesaid, and that Margaret Tinkler before the said felony and self-murder committed by Jane viz. of 1 July, feloniously, wilfully and of malice aforethought did counsel, incite, move, procure, and and abet the said Jane to do the said felony and murder.

[Annotation:] puts. Guilty. To be hanged on Monday the 13th [of] August and afterwards dissected and anatomized.

Abstract of (1) Depositions Taken Before Sir John Eden, J.P., and (2) the Surgeon's Report as Taken by the Coroner[2]

Ralph Graham says on 13 July [he] visited Jane Parkinson at her house and found her very ill. She said she had applied to Margaret Tinkler who inserted something hard like a stick into her privy parts which she believed caused her to miscarry and brought on her illness, of which she expected to die. She died on 23rd.

Margaret Tinkler denies the charge put to her.

Ann Ingleden says she visited Jane, wife of Matthew Parkinson of the Durham Militia. She said she had

applied to Margaret T. who had inserted a stick into her privy parts to make her miscarry, and by order of Margaret T. she wore the stick in her privy parts for three weeks, though with great pain and torment, and that she believed it occasioned her to miscarry.

Mary Trohitt says she visited Jane, who said she owed her death to Margaret T. who had used forcible means to make her miscarry.

Isabel Robinson says she lives opposite Tinklers and on 7 July about 8 o'clock she saw Margaret T. lifting up and violently shaking Jane P.

Isabel White says she visited Jane on 23rd, who complained of being very ill and said she had applied to Margaret T. who inserted one or more sticks or skewers she kept them there two or three weeks, being intended to break her water.

Anne Parkinson, Jane's mother in law, similar: used 'violent means' to make her miscarry.

Jane Clark - sim. declaration to White's.

Surgeons' report: they found near a quart of purulent matter in the abdomen; 'omentum' and bowels inflamed or rather gangrenous; womb perforated, and vagina lacerated, and if this was caused by an instrument it must have been done from within outwards.

John Dixon bound in recognisance of 40 pounds to prosecute at the assizes.

Transcript of the Gaol Delivery Book[3]

Fryday morning 8 o'clock [August 10]--present Mr. Justice Nares. Jury...

Margaret the wife of Thomas Tinkler for the wilful murder of Jane the wife of Matthew Parkinson at the parish of Saint Andrew Auckland in the County of Durham the 1st July 1781 by thrusting and inserting two pieces of wood into and against the private parts and womb of the said Jane, giving the said Jane divers mortal wounds, punctures and bruises of which she languished from the 1st to the 23rd day of July

and then died. - Another count for feloniously counselling inciting moving procuring aiding and abetting the said Jane to do and commit the said felony and [self-] murder.

[Annotation at head:] puts. Guilty. to be hanged on Monday the 13th day of this instant August and her body to be dissected and anatomized.

[Annotation in margin:] Hanged.

[Note: on next folio the prosecutor and witnesses were allowed 21 pounds for their expenses and loss of time.]

Entry in "Newcastle Courant" (17 Nov. 1781)[4]

Tuesday se'nnight the Judges, who met at Earl Mansfield's chamber, to take into consideration the verdict of John Shepherd, gave their opinion upon another verdict, of Margaret Tinkler, who had been capitally convicted of murder at the last Durham Assizes; after taking a short time to consider of the evidence given at her trial, they were clearly of opinion she was guilty of the murder whereof she had been convicted. An order has since been received by the Sheriff for that county, for her execution on the 20th instant.

Entry in Newcastle Chronicle (24 Nov. 1781)[5]

Tuesday last Margaret Tinkler, midwife, was executed near Durham, for a crime in acting or recommending certain means to destroy an infant, which was effected; and finally with the death of the mother. Before she left the jail for execution, she confessed to a worthy Clergyman, and Mr. Smith, surgeon in Newcastle, then present, that she only recommended the means, but that the act itself was done by the deceased woman...

[Her plea of pregnancy failed]

Entry in Richardson's Table Book[6]

November 20 [1781]: Margaret Tinkler, midwife, was executed near Durham, for the crime of using or recommending certain means to destroy an infant, which was effected, and finally with the death of Jane Parkinson, the mother. Before she left the gaol for execution, she confessed to a worthy Clergyman, and Mr. Smith, surgeon, in Newcastle, then present, that she only recommended the means, but that the act itself was done by the deceased woman. On the dissection of Margaret Tinkler, at a place called Whitesmocks, near Durham, by Mr. Smith and Mr. Ward, surgeons, in Durham, two long black double wire pins, as used at that time in women's hair, were found in her belly, which it was supposed she had swallowed to destroy her life [Local Papers].

Sir Edwards Easts' Report of Tinkler's Case[7]

Margaret Tinkler was indicted for the murder of Jane Parkinson, by inserting pieces of wood into her womb. A second count charged her as accessary before the fact [to felony suicide]. It was proved by several witnesses, that from the first time of the deceased taking to her bed, which was on the 12th of July, she thought that she must die, making use of different expressions, as, that she was going; that she was working out her last; and exclaiming, Oh! that Peggy Tinkler has killed me. She lingered till the 23d, when she died. She never was up but once during that time, when on telling a friend who attended her that she thought herself better, she advised her to get up, which the deceased did, and walked as far as the passage going out of the room, but was forced to return and go to bed again. It appeared by the testimony of several witnesses, that from the moment of her taking to her bed till the time of her death she had declared, that Tinkler had killed her and dear child, (stating the particular means used, which agreed with the charge in the indictment.) And during the same period she had declared more particularly, 'that she was with child by one P. a married man, who, being fearful lest his wife should hear of it if she were brought to bed, advised her to go to the prisoner, a midwife, to take her advice how she should get rid of the child, being then five or six

months gone.' 'That the prisoner gave her the advice' in question, which she followed accordingly. It was proved by the testimony of a witness, that three days before the delivery, which was on the 10th July, she saw the de-ceased in the prisoner's bed-chamber, when the prisoner took her round the waist and shook her in a very violent manner six different times, and tossed her up and down: and that she was afterwards delivered at the prisoner's house. The deceased also declared during her illness, that after her delivery the prisoner gave her the child to take home; and bid her to go to bed that night and sleep, and get up in the morning and go about her business, and nobody would know anything of the matter; but that appearing very ill the next day at a relation's house, they had ordered her to go home and go to bed, which she did. The child was born alive, but died instantly; and the surgeons, who were examined, proved that it was perfect. There was no doubt but that the deceased had died by the acceleration of the birth of the child: and upon opening her womb it appeared that there were two holes caused by the skewers, one of which was mortified, and the other only inflamed; and other symp toms of injury appeared. A short time before her death she was asked whether the account she had from time to time given of the occasion of her death, and the prisoner's treatment of her were true; and she declared it was. It was objected that the above evidence of the deceased's declarations ought not to be admitted, as she herself was particeps criminis, and likewise as it appeared at the time of her declarations she was better, or thought herself so. But Nares J. was of opinion, that however this objection might hold with respect to the second count, in which the prisoner was charged as an accessary with the deceased, yet the deceased was not willingly or knowingly an accessary to her own death; and therefore it was like the common case of any other murder. And as to the objection that she once thought herself better, and tried to get up, yet the same declarations she then made had been made repeatedly before to persons whom in confidence she told that she never should survive, when she first took to her bed; and she had repeated the same declarations the day before she died, and within a few hours of her death. And as to the fact itself, he was clearly of opin-ion it was murder, on the authority of Lord Hale. [Marginal citation: 1 [sic. 2] Hale 429 i.e.,

> R v. Anonymous, per M. Hale, 1670.] The jury found the prisoner guilty on the first count, charging her as a principal in the murder, and execution being respited to take the opinion of the judges on the whole case, they all met to consider of it [marginal note: [on the] First day of Mich. term 1781, at Serjeant's Inn], and were unanimously of opinion that these declarations of the deceased were legal evidence: for though at one time the deceased thought herself better, yet the declarations before and after and home to her death were uniform and to the same effect. And as to her being particeps criminis, they answered that if two persons be guilty of murder, and one be indicted and the other not, the party not indicted is a witness for the crown.[8] And though the practice be not to convict on such proof uncorroborated, yet the evidence is admissible; and here it was supported by the proof of the prisoner tossing the deceased in her arms in the manner stated. Most of the judges indeed held that the declarations of the deceased were alone sufficient evidence to convict the prisoner; for they were not to be considered in the light of evidence coming from a particeps criminis; as she considered herself to be dying at the time, and had no view or intent to serve in excusing herself, or fixing the charge unjustly on others. But other judges thought that her declarations were to be so considered; and therefore required the aid of the confirmatory evidence.

It will be seen here that in Count I, Tinkler was tried on a general, common law murder indictment.[9]

It is not known why Tinkler was not indicted for the murder of Jane Parkinson's aborted child, who was born alive. Perhaps the prosecutor felt that the precise cause of death (immaturity?) could not be certainly attributed to a specific act of Tinkler. Perhaps the reason was that Tinkler could be hanged only once. Had Tinkler been acquitted of the murder of Jane Parkinson, that acquittal would not have barred a subsequent prosecution of Tinkler for the murder of Jane Parkinson's child.[10]

There were probably at least two reasons why "P.," the supposed father of Jane Parkinson's aborted child, was not indicted as an accessory to Parkinson's murder of her own child. The first would be the death of the principal (Parkinson)[11]; and the second would be the lack of evidence to corroborate Parkinson's statement that "P." counseled or moved her to abort her child. This second reason might explain also why "P." was not indicted as an accessory before the fact to Parkinson's self-murder.

1. DUR. 17/21. Abstracted Indictment supplied by Professor Baker. Tinkler was tried in the second week of August, 1781. See "Newcastle Courant," August, 1781, p. 4.

2. DUR. 17/21. Reference supplied by Professor Baker.

3. DUR. 16/2, unfoliated (Assizes beginning 7 August 1781). Reference supplied by Professor Baker. See supra, note 1.

4. p. 4.

5. p. 2.

6. Richardson, infra note 1 (of Case No. 5 of this Appendix 18) at 270.

7. Reproduced from Means II, supra note 1 (of Part II) at 363-65 (as reproduced by Means from 2 E. East, A Treatise of the Pleas of Crown (London, 1803) 354-56.

8. See supra, text (of Case No. 1 of Appendix 15) accompanying note 9, as well as the authorities cited in that note.

9. See Hume, supra note 40 (of Part IV); and infra, text (of Case No. 5 of this Appendix 18) accompanying notes 9-11.

10. See supra, the commentary to Case No. 3 (of Appendix 10).

11. See supra, Case No. 3 (of Appendix 4); and supra, text (of Case No. 2 of Appendix 17) accompanying note 5.

Case No. 5: R. v. Winship (Durham, 1785)
Richardson's Table Book Entry[1]

July 25 [1785]. John Winship, a farmer, in the neighbourhood of Monkweasmouth, was executed at Durham, having been convicted of poisoning his maid-servant by administering certain drugs to produce abortion. His body was given to the surgeons for dissection, and was opened by Mr. Wilkinson, of Sunderland, who in the presence of many gentlemen of the faculty, delivered a lecture on the contents of the cranium, thorax and abdomen.- Local Papers.

Indictment[2]

Durham, to wit. The jurors for our lord the King upon their oath present that John Winship late of the parish of Bishop Wearmouth in the County of Durham, yeoman, not having the fear of God before his eyes but being moved and seduced by the instigation of the Devil, and of his malice aforethought, contriving and intending one Grace Smith with poison feloniously to kill and murder, on the twelfth day of March in the twenty-fifth [1785] year of the reign of our sovereign lord George the third now King of Great Britain and so forth, with force and arms at the parish aforesaid in the county aforesaid, wilfully, wickedly, knowingly and feloniously did mix a deadly poison, to wit, corrosive mercury sublimate, with water and the said water so mixed with the same poison as aforesaid afterwards, to wit the same day and year above mentioned, with force and arms at the parish aforesaid in the county aforesaid, unlawfully, wilfully, knowingly and feloniously did give to the said Grace Smith to drink, and the said Grace Smith not knowing the said water to have been mixed with the said poison as aforesaid she the said Grace Smith did then and there drink and swallow the said water so mixed with the said poison as aforesaid, by means whereof the said Grace Smith of the poison aforesaid then and there became sick and distempered in her body, and of such sickness and distemper occasioned by the poison aforesaid from the said twelfth day of March in the year aforesaid until the sixteenth day of March in the same year at the parish of Bishop Wearmouth aforesaid in the county aforesaid did languish and languishing did live, on which said six-

teenth day of March in the year aforesaid the said Grace Smith at the parish of Bishop Wearmouth aforesaid in the county aforesaid of the poison aforesaid and of the sickness and distemper thereby occasioned died. And so the jurors aforesaid upon their oath aforesaid do say that the said John Winship the said Grace Smith in manner and by the means aforesaid feloniously, wilfully and of his malice aforethought did poison, kill and murder, against the peace of our said lord the King, his crown and dignity.

Radcliffe.[3]

[annotated in left margin:] A True Bill.

[annotated at head:] po: se: Guilty. To be hanged on Monday the 25th July instant and his body to be anatomized.

[endorsed:] Witnesses[4]
Isabella Smith. sworne.
John Smith. sworne.
John Harvey. sworne.
Robert Cheesment. sworne.

The Gaol Delivery Book (First Entry)[5]

Friday morning 7 o'clock - Present Mr. Justice Nares. Same jury.

John Winship for feloniously mixing and administering a deadly poison, to wit, corrosive mercury sublimate, with water and giving to one Grace Smith to drink and swallow the 12th March 1785 at the parish of Bishop Wearmouth in the County of Durham, of which poison the said Grace Smith did die on the 16th of the same month of March at the parish aforesaid.

[annotated:] puts - Guilty. To be executed on Monday the 25th instant and his body to be delivered to the surgeons to be anatomized.

The Gaol Delivery Book (Second Entry)[6]

sentences passed on Saturday morning by Nares J. and the unnamed prosecutor allowed 13.16s. for expenses.

Newcastle Courant, 30 July 1785[7]

> Yesterday...the Assizes ended at Durham, when John Winship, for murder,...[names of several other condemned felons omitted] received sentence of death....
> ....
> Monday, John Winship was executed at Durham, pursuant to his sentence at the last assizes, for the wilful murder of Grace Smith, his servant maid. He died a sincere penitent, acknowledging the justness of his sentence. His body was afterwards opened by Mr. Wilkinson, of Sunderland, who, in the presence of many Gentlemen of the Faculty, delivered a lecture on the contents of the Cranium, Thorax and Abdomen; on which occasion two worms were extracted from the Intestines, and the doctrine of the late Mr. Hewson, F.R.S. was demonstrated, that, in executions of this kind, death is not produced, as has been generally supposed, by an extravasation of blood, occasioned by the rupture of the vessels of the brain, but by suffocation: as in the case of drowning, etc. The whole of the internal parts were found in a very sound state, and exhibited great marks of longevity.

Given the validity of Richardson's Table Book version of the facts in Winship, (specifically, that Winship did not harbor the intent to kill his maid-servant when he gave her water secretly mixed with corrosive mercury sublimate[8] but rather harbored only the intent to cause her to miscarry, then the Winship case can be reasonably said to stand for the proposition that at common law it is murder for a person to kill a woman in connection with an attempt to make her miscarry, irrespective of actual pregnancy. To put this another way, an unintentional killing coupled with an intent to cause an abortion will not negate malice. To put this still another way, if, in the course of a prosecution on a general, common law murder indictment, it is specially proved that the victim died in connection with the defendant's attempt to only make her safely abort, then proof of such a fact suffices to establish the element of malice as generally al-

leged in the indictment.[9] By way of an analogy here, in Mackalley's Case (1611) the following appears:

> I moved all the judges and barons, if in this case of killing a minister of justice in the execution of his office the indictment might have been general, without alleging any special matter, and I conceived that it might well be, for the evidence would well maintain the indictment forasmuch as in this case the law implies malice prepense. As if a thief, who offers to rob a true man, kills him in resisting the thief, it is murder of malice prepense, or if one kills another without provocation and without any malice prepense which can be proved, the law adjudges it murder and implies malice, for by the law of God everyone ought to be in love and charity with all men and, therefore, when he kills one without provocation the law implies malice. In both these cases they may be indicted generally, that they killed of malice prepense, for malice implied by law, given in evidence, is sufficient to maintain the general indictment. So in the case at Bar, in this case of the serjeant, the indictment might have been general, that the defendant feloniously and of his malice prepense killed the said Fells, and the special matter might well have been given in evidence, quod fuit concessum by all the other judges and barons of the Exchequer.[10]

It will be recalled that the Tinkler indictment neither alleged that the murder victim was pregnant nor that the defendant intended to cause the victim to miscarry.[11]

I strongly suspect that the following case, R v. Henry Mylles (1598), is almost a carbon copy of Winship:

> Mylles, Henry, of Lewisham, husbandman, indicted for murder. By an inquisition held at Lewisham, 18 Jan. 1598, before John Walker, coroner, on the body of Joan Allyn of Lewisham, spinster, a jury...[names of 14 male jurors omitted] found that on 14. Jan., in his house at Lewisham, Mylles gave Joan ratsbane[12] in a dish of milk pottage, intending to murder her. She

became ill, and died from the effects of the poison later that night.

Guilty; to hang.[13]

1. Reproduced from 2 M.A. Richardson, The Local Historian's Table Book: Historical Division 299 (Newcastle-on-Tyne, 1841-43). This case is mentioned in John Smith, The Punishment of Capital Felonies in County Durham, 1707-1819, 20 Dur. Co. Loc. Hs. Soc. 19, 22 (including n. 20) (Oct. 1977) (my initial source).

2. DUR. 17/25. This reproduction of the original Winship indictment was supplied by Professor Baker. Professor Baker informed me that there is on file here a Winship indictment by a Coroner's jury that does not appear to have been proceeded upon. He indicated that these two Winship murder indictments are identical in substance, but vary slightly in their respective wording. Professor Baker in a letter to Philip A. Rafferty (March 14, 1985).

3. Clerk of assize.

4. "No depositions found on file." Professor Baker in a letter to Philip A. Rafferty (March 14, 1985).

5. DUR 16/2, unfoliated (Assize beginning Tuesday, 19 July 1785 at Durham). Reference supplied by Professor Baker.

6. Ibid. (at proceeding fo.).

7. P. 4.

8. See R v. Charles Angus (2 September 1808, at the assizes in Lancaster, Lancashire), as reviewed in Thomas R. Forbes, Early Forensic Medicine in England: The Angus Murder Trial, 36 J. Hs. Med. & Allied Scs. 296, 298-99 (1981) ("The coroner's jury indicted him [Angus] for murder: At the subsequent trial the prosecution charged that he had given Miss Burns [the alleged murder victim] a substance ["arsenic...[and] corrosive sublimate, bichloride of mercury"] to procure an abortion, and that she died as a result". Corrosive sublimate was also used in the abortion-murder-of-a-pregnant-woman case of R v. Fretwell, 9 Cox C.C. 152, 152 (1862). See also Scott & Hill, supra note 191 (of Part IV) at sub tits. Mercury & Abortion.

9. See supra, Case No. 4 (of this Appendix 18). And see Hume, supra note 40 (of Part IV). See also Bullingbroke, supra note

4 (of Case No. 2 of this Appendix 18) at 39b ("Poisoning implies malice, because it is an act of deliberation".)

10. [1558-1774] All E.R. Rep. 542, 545.

11. See supra, text (of Case No. 4 of this Appendix 18) accompanying note 1.

12. See supra, Case No. 4 (of Appendix 11); and infra, Case No. 5 (of Appendix 23).

13. Reproduced from J.S. Cockburn (ed.), Calendar of Assize Records: Kent Indictments: Elizabeth I 407 (no. 2470) (1979). According to Professor Baker, the record of this case contains no more than that reported by Cockburn. Professor Baker in a letter to Philip A. Rafferty (May 23, 1989).

Case No. 6: R v. Frances Lewis (London, 1786)

Abstract of Indictment[1]

Frances Lewis was indicted for that she, not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, on the 9th day of April last, with force and arms, at the parish of St. Luke, feloniously, wilfully, and of her malice aforethought, did make an assault on one Ann Rose, and did then and there, feloniously, wilfully, and of her malice aforethought, strike, beat, and kick the said Ann Rose, in and upon the head, breast, back, and sides, and did cast, and throw her down, unto, and upon the ground with great force and violence, giving her then and there, as well by the beating and kicking, as by the casting her down aforesaid, several mortal strokes, wounds, and bruises, of which she languished till the 13th of April, on which said 13th day of April, the said Ann Rose, of the several mortal wounds and bruises, did die; and so the Jurors aforesaid say, that she the said Frances Lewis, her the said Ann Rose did kill and murder. She was also charged on the Coroner's inquisition, with [manslaughter in unlawfully] killing and slaying the said Ann Rose.

Trial Court to the Lewis Jury[2]

Gentlemen, the prisoner stands indicted for the wilful murder of Ann Rose, and on the Coroner's in-

quisition, she stands charged not with the murder, but with manslaughter....[The trial court sums up and comments on the evidence]. If you should be of the opinion...that the prisoner did nothing more than defend herself, then you will be disposed to acquit the prisoner entirely; but supposing that was not the case, then what is the nature of the crime she is guilty of; with respect to that, I think there cannot be two opinions'; there certainly was no such precedent malice, or ill will between the deceased and the prisoner as to lead you to think that the prisoner did what she did with any serious and formed intention to injure a woman in the circumstances in which she was [i.e., in an advanced stage of pregnancy][3]; to be sure, if in deliberate malice, the woman was to attack another, who was known to be six months gone with child, and was to beat her and abuse her for the purpose of forcing miscarriage, of which she should die, that would unquestionably be as much murder as if she stabbed her to the heart; but if this affray was such an one, as plainly arose from a sudden quarrel, in consequence of the deceased being the aggressor, and the prisoner being provoked; if this woman used more force that she should have used, it is impossible to carry it any further than manslaughter, which is a homicide, though committed under circumstances which screen it from that crime of murder; if any blame is imputable to this woman, it is, that this misfortune has been brought on in consequence of some act of violence on the person of the deceased; but still, I think it can go no further that what the Coroner's inquest have made it, supposing they are right in attributing any crime to the deceased, namely the crime of manslaughter.

Lewis was acquitted of murder, and found guilty of manslaughter. She was burnt on the hand and discharged, having received benefit of clergy.[4]

1. Reproduced from the Guildhall Library OBSP vol. for May 1786 - Oct 1786, p. 627 (no. 402). The Frances Lewis Grand Jury murder indictment is in OB/SR 243, no. 43. The Frances Lewis Coroner's manslaughter indictment is in MJ/SPC/E498. See supra, Case No. 3 (of Appendix 10).

2. Reproduced from OBSP, supra, note 1 at 634-36.

3. See supra, Case No. 3 of (Appendix 10).

4. OBSP, supra note 1 at 636.

Case No. 7: R v. John Gould (the Lent Assizes held at Stafford in 1811)[1]

> A case illustrative of this law [i.e., illustrative of quick with child, deliberated abortion as being a criminal offence at common law] occurred at Stafford in the year 1811, when a man was executed for the murder of his wife, whose death he occasioned by inducing abortion, through extreme violence, as by elbowing her in bed, rolling over her, etc.

Here are Professor Baker's comments on this case:

> The case referred to in Paris & Fonblanque, Medical Jurisprudence (1823) as having "occurred at Stafford in the year 1811" is to be identified as R v. John Gould, tried at the Lent assizes at Stafford in 1811. The records of Stafford assizes for Lent 1811 are preserved in the Public Record Office, ASSI 5/131, box IV.
>
> There are four depositions from women friends of the deceased (Mrs. Elizabeth Gould), all much to the same effect. One night she had told her husband that she was pregnant, and he had angrily asked her "Where hast been, for it is not my child?" He had thereafter nightly elbowed and struck her in bed, bringing on (within a fortnight) a miscarriage which the deponents considered to be the cause of her death soon afterwards. One deponent added that he had also denied her sufficient food and drink.
>
> The coroner's inquest sealed a presentment for murder, in which the deceased

is stated to have been big with child, and particulars are given of the offence, including the starvation.

However, the indictment on which Gould was tried is considerably simplified. It contains no mention of the pregnant condition of the deceased, and lays no specific intent. It charges that the accused feloniously, wilfully and of his malice aforethought with both hands and elbows did strike and beat Elizabeth his wife in and upon the sides, belly and groin giving her mortal bruises whereof she died....[2]

1. 3 Paris & Fonblanque, Medical Jurisprudence 84 n.c. (1823).

2. Professor Baker in a letter to P. Rafferty (May 6, 1989). See supra, text (of Case No. 2 of this Appendix 18) accompanying note 5; and the commentary accompanying Case No. 5 (of this Appendix 18).

Case No. 8: R v. Mary Ipsley and Elizabeth Rickets (London, 1718)[1]

The defendants in this case were acquitted of the murder of an unknown woman ("X"). Neither the indictment (to the extent it is legible: it is in Latin and is illegible in spots in the first part of the text and is completely illegible towards the end of the text) nor the report of this case mentions the words abortion or miscarriage. Nevertheless, the case was prosecuted almost certainly on a theory of death caused by criminal abortion. Ipsley called many witnesses in her defense.

Ipsley ran a lodging house. Rickets was a nurse, or at least Ipsley called her Nurse. "X" had been a lodger at Ipsley's house for a day or so, before her death. Elizabeth Stephens deposed that she was a servant to Ipsley and that one night she heard "X" cry out for help. Stephens proceeded to go upstairs to see "X" but was stopped by Ipsley who told Stephens that she would "knock out her brains" if she tried to see "X". Stephens deposed further that she did not see "X" until four days later when she saw "X" lying on a bed in Ipsley's house. (It is unclear here if Stephens thought that "X" was then dead). On the fifth day she saw X's naked body, along with a

full-term dead infant, in a coffin in Ipsley's house. Ipsley hired some persons to take the "closed coffin" to a cemetery for burial. Ipsley accompanied the coffin to the cemetery. The Curate of the cemetery testified that he quizzed Ipsley on the contents of the closed coffin and that he caught her in numerous lies as to its contents and to the causes of the deaths. The Curate testified further that she lied in telling him that she had informed the Church Warden or Overseer of the deaths. Another witness testified that the damage to "X"'s vaginal area was more than is usually caused in giving birth, that it was not ragged but appeared "to have been cut for the length of an inch or more." A midwife testified that there was a "vacancy" in X's vaginal area "that no child ever made in a woman by its birth;" and that the nose of the full-term infant had been cut or torn off. She testified further that "upon the whole she did not believe the Life of the Woman and Child went out by the Common Course of nature." Another witness testified that in her opinion "X" had been cut, for ...no Woman ever received so much damage, or could, by the Birth of a Child; and that the Child had no Nose, only Nostrils, and was [i.e., its face was] as flat as the back of the Hand." Another witness related the following: "I told her [Ipsley] I did believe that somebody deserved to be hang'd [for committing such a barbarity on "X"]...She [Ipsley] made answer, she knew nothing of the matter; that there being a Woman...at some distance from her, whom she called Nurse, she said what was done she [Nurse, i.e., Elizabeth Rickets] did. The Woman [Nurse] made answer: 'Ay, Landlady, but you said I should come to no Trouble.' To that Mary Ipsley replied, 'Ay, Girl, so I did; no more shall you.'"

The free-lance reporter in this case ended his report with the following: "Upon the whole, there being no Evidence that attached Eliz. Rickets, and the Evidence against Mary Ipsley, though strong, being but presumptive [i.e., circumstantial?], they were both acquitted."[2]

1. Harvester Press OBSP, supra note 20 (of Part IV) 1718, April of, at 5.

2. Id. at 6.

APPENDIX 19

Case No. 1: R v. R. Poope (Kent, 1589)
Abstract of Indictment[1]

> [Richard] Poope...of Bobbing, yeoman, indicted for murder. By an inquisition held at Bobbing, 24 Feb. 1589, before Humphrey Kybbett, coroner, on the body of Margaret Fraunces of Bobbing, spinster, a jury ...[names of twelve male jurors omitted] found that on 6 Feb. in the house of Robert Adams in Key Street at Bobbing, Margaret was attacked by Poope and an unknown man. Poope struck her violently with his fist, so that she fell to the ground; they then shaved her head and burned both her thighs from top to bottom. As a result of this maltreatment, she gave birth to a dead, aborted child on 7 Feb. in the house of Robert Adams. Margaret herself lingered until 23 Feb. and then died from her injuries. [damaged] Guilty; to hang.

It is difficult to certainly determine what motivated Poope and his accomplice to perform such cruel acts on Margaret. The motivation probably represented one or more of the following, none of which can be certainly or conclusively eliminated, and only one (no. 3) of which can be probably eliminated. (1) Poope and his accomplice were inspecting Margaret's body for items indicating that she is a witch; (2) they were trying to make Margaret abort;[2] (3) they were trying to make her abort because they believed she was carrying a "changeling"; (4) they were engaging in some form of vigilante punishment because they determined she was a lewd woman; and (5) they were subjecting Margaret to some form of sexual purification.

If either no. 2 or no. 3 represents Poope's and his accomplice's motive, then they probably departed the crime site without knowing whether they had accomplished their work or motive. But it might be that they departed because they were about to be detected. No. 3

seems doubtful because "changelings" were evidently suspected of changing places only with newborns. Barbara Kellum in Infanticide in England in the Later Middle Ages (1974) observed:

> As will be remembered, the unbaptized infant was thought to be a "captive in the devil's power," and in folklore the infant - especially the unbaptized one - was surrounded by a large and sinister tradition. The new-born was in great danger of being carried off by fairies and replaced by a changeling - who in a fairy-like manner craved and demanded human milk: the imagination's embodiment, one might guess, of a petulant and hungry, but very real child. At any rate, to rid oneself of a changeling one was to place it close to the fire and it would disappear up the chimney vent; or, if that didn't work, one was to take the suspected changeling, put it in a basket, and hang the basket over the fire; if the child screamed--as naturally it would--it was a changeling and was to be dealt with accordingly. Of course all the concentration on placing the child near the fire seems reminiscent of Bartholomew of Exeter's and the coroners' rolls' descriptions of infanticide by scalding; and seemingly, the mishaps involving infants and fire were numerous enough that the diocesan synod of Canterbury in 1236 advised local priests to admonish the women of the parish weekly not to place their babies too close to the fire.[3]

As to motive no. 1, Poope's criminal activity occurred during the height of the witchcraft scare in England. Montague Summers, in his A Popular History of Witchcraft (1937), observed:

> "The witches' mark was regarded as perhaps the chief point in the identification of a witch, it was the very sign and seal of

> Satan upon the actual flesh of his servant and any person who bore such a mark was considered to have been convicted and proven beyond all manner of doubt of being in league with and devoted to the service of the fiend."[4]

My thinking here is that perhaps Poope and his accomplice shaved the hair from Margaret's head and burned her thighs (i.e., burned off the hair on her thighs(?)) in order to more closely inspect her body for signs (e.g., a witch's teat or supernumerary proturberance or perhaps some tiny devil's servant) indicating that she is a witch.[5]

Perhaps the depositions (if they survive) taken in the following case would provide a clue to Poope's and his accomplice's motive or motives:

> Inquisition taken at Ballingdon, 23 June 1654, before Tho. Talcott, Coroner, upon the view of the body of Margt. Makyn spr. aged 15. The jurors say that Anne wife of Ralph Campyn of Ballingdon wheelwright, 13 May, kindled a fire "with brymstone sulphur and other combustible things" with which she burnt the said Margt. on the "thighs, sides, belly and breast", of which she died on 17 June following. And Ralph Campyn ordered the said Anne to do it. Plead not guilty; both not guilty, acquitted. Witnesses: Anne Worrell, Ellen Collins, Ralph Prigg, Anne Grouce, Jane Goldinge, Margt. Nightingale, Helen Collen, Mich. Francklyn, Sara Avery Smyth.[6]

1. Reproduced from J.S. Cockburn (ed.), Calendar of Assize Records: Kent Indictments Elizabeth I 289 (no. 1751) (London, 1979). (Reprinted with permission of the Controller of Her Britannic Majesty's Stationery Office.

2. See infra, Case No. 5 (of Appendix 23).

3. Barbara A. Kellum, Infanticide in England in the Later Middle Ages 1 (no. 3) Hs. C. Q: J. Psy.-Hs. 367, 379 (1974). See also Heinemann supra note 325 (of Part IV) at 240-41.

4. Montague Summers, A Popular History of Witchcraft 67 (London, 1937) (as quoted in James C. Oldham, On Pleading the Belly: A History of The Jury of Matrons, 6 Crim. Jus. Hs. 1, 9 (1985)).

5. See, e.g., Oldham, supra note 4 at 8. See also, e.g., Arthur Scott, Criminal Law in Colonial Virginia 242-43 (1930) (a jury of matrons was ordered to examine a woman's body for witch marks).

6. Lord Protector v. Campyn (1654), as reproduced from 22 (Chelmsford) E.R.O., Cal. Co. Sess. Recs. 361/64: 1654-1664 102 (Ass. 35/95/2/13, 19 July 1654). See also R v. J. Gardner, as abstracted in J.S. Cockburn (ed.), Calendar of Assize Records: Kent Indictments Elizabeth 1 154 (no. 894) (London, 1979) (in 1576 Gardener was convicted of murder for holding his six years-old "daughter above the fire so that her private parts were burned, then poured on them scalding-hot water").

Case No. 2: R v. Meddowe & Gower (Sussex, 1591)
Abstract of Indictment[1]

> Presented by coroner's inquest on view of body of Alice Smyth, spinster, that Rowland Meddowe, labourer, and Nicholas Gower, labourer, on 30 Dec. 32 Eliz. [1590] of their malice aforethought assaulted the deceased; and Rowland struck her on the neck with a knife and cut her throat 'and then and there feloniously cut and opened the belly of the said Alice Smyth and took out a certain infant then and there being in the womb of the same Alice Smyth' (ac ventrem ejusdem Alicie Smyth adtunc et ibidem felonice secuit et apperuit et quendam infantem in utero ejusdem Alicie Smyth adtunc et ibidem abstulit'),[2] then and there giving her various mortal blows on the body whereof she instantly died; and that Nicholas was present at the time of the murder assisting, abetting, procuring and comforting etc. And so the jurors say that Rowland and Nicholas of their malice aforethought feloniously killed and murdered Alice.
> [annotated:] po. se. cul. ca. null. judm. [i.e., puts herself [sic: himself (themselves?)] on the country - guilty - no chattels - judgment.]

Abstract of Gaol Calendar[3]

> Gaol delivery at East Grinsted, Sussex, on 27 Feb. 32 Eliz. [1591] before Clerke B. and Puckering Q. Sjt: Meddowe and Gower (amongst others) 'adjudged and hanged by the neck' (judicati et sus. per coll.).

What motivated Meddowe and Gower here? Was this an attempted abortion that went awry? It is not beyond the realm of possibility that a physician or surgeon or teacher of anatomy had offered to pay Meddowe and Gower if they could supply him with the body of an infant child, and that they, being unable to locate such a corpse, decided that the child in the body of Alice Smith, if removed from the womb and killed, would make a good substitute for a discarded or buried corpse of an infant child.[4]

1. Ass. 35/32/8, m.34 (P.R.O.) Translation from the Latin supplied by Professor Baker. This case is reported in J.S. Cockburn (ed.), Calendar of Assize Records Sussex Indictments Elizabeth 1 233 (no. 1212) (London, 1975) (my initial source).

2. The indictment does not say whether the infant was extracted alive.

3. Ass. 35/32/8, m.41v. (P.R.O.)

4. See, e.g., C.W. Burr, Burke and Hare and the Psychology of Murder, in 1 Annals of Medical History 75, 75 (1917) (Burke and Hare were hired by some teachers of anatomy to obtain some dead bodies. They obtained the dead bodies by murdering the persons who belonged to those bodies).

Case No. 3: Commonwealth and Protectorate v. Carter (Maidstone Assizes, Kent, 1652)[1]

> Kent. The jurors for the Keepers of the Liberty of England by authority of Parliament uppon their oathes doe present that John Carter late of London laborer, not having God before his eyes but being

moved and seduced by the instigation of the divell, the sixeteeneth day of November in the yeare of our Lord one thowsand sixe hundred fifty and one with force and armes etc. att London, that is to say in the parish of Sepulchres in the ward of Farringdon without London aforesaid, in and uppon one Mary Carter the wife of him the said John Carter, in the peace of God and in the publike peace then and there being, feloniously, willfully and of his malice beforethought did make an assault, and that the said John Carter the right hand of him the said John in and through the bearing place of her the said Mary upp and into the body and belly of her the said Mary Carter then and there most violently, cruelly, unnaturally, feloniously, willfully and of his malice beforethought did force and thrust, and with the said right hand of him the said John a great quantity of the inward partes of her the said Mary most cruelly, unnaturally, violently, feloniously, willfully and of his malice beforethought out of and from the body and belly of her the said Mary then and there did teare, rend and pull away, of which said cruell, unnaturall, violent, felonious, willfull and malicious tearing, rending and pulling away of the said great quantity of the inward partes of the said Mary Carter out of and from her body and belly aforesaid by him the said John Carter with his said right hand, in manner and forme aforesaid done, shee the said Mary Carter from the said sixteeneth day of November in the yeare aforesaid untill the seaventh day of December in the yeare aforesaid att the said parish of Sepulchers in the ward of Farringdon without London aforesaid, and att Kingsland in the county of Middlesex and att Eastgreenewich in the county of Kent aforesaid languished and lived languishing, on which said seaventh day of December in the yeare aforesaid the said Mary Carter att Eastgreenewich aforesaid in the county of Kent aforesaid by reason and on occasion of the said cruell, unnaturall, violent, felonious, willfull and malicious tearing, rending and pulling away of the said great quantity of the inward partes of the said Mary Carter out of and from her body and belly aforesaid, by him the said John Carter with his right hand aforesaid in manner and forme aforesaid done, dyed. And soe the jurors aforesaid uppon their oathes aforesaid doe say that the said John Carter the aforesaid Mary Carter in manner and forme aforesaid feloniously, wilfully and of his malice beforethought

did kill and murder, against the publike peace etc.
[endorsed]: Thomas Harvey, Elizabeth Symmes, Mary Holt
True Bill. Not guilty.

Assuming that Carter's wife was pregnant and was in the midst of a difficult labor (or that Carter sincerely believed as much), then it may be the case that Carter simply took it upon himself to try and safely deliver his wife and child, but then botched the job. If that was the case, then it may be also the case that Carter was prosecuted on a theory of implied malice,[2] with the unlawful act being the unlawful practice of midwifery or practicing the same without being licensed.[3]

1. P.R.O., ASSI 35/93/4. (Reference supplied by Professor Baker.) (My initial source J.S. Cockburn, Calendar of Assize Records: Kent Indictments, 1649-1659 96 (nos. 535 & 534) (1989).) (Reprinted with permission of the Controller of Her Majesty's Stationary Office.)

2. See supra, text (of Case No. 2 of Appendix 18) accompanying note 5.

3. But see 1 Hale, supra, note 1 (of Case No. 2 of Appendix 18) at 429-430.

APPENDIX 20

Case No. 1: Cockaine v. Witnam (England, 1577)[1]

'The Lady Cockeyn offered A.B. her maid a drink in order to murder her child, because her butler had gotten it'. And although this was not murder, for the infant was en ventre sa mère [i.e., in the mother's womb], the action nevertheless lay.

- - -

...The words were 'My Lady Cockaine did offer two shillings to a woman with child to get her a drink to kill her child, because it was gotten by J.S., Sir Thomas Cockaine's butler'. And it was moved the action did not lie for these words; [meaning probably: the defendant demurred to the action or moved to arrest judgment on the grounds that a mere offer or intent to commit a crime is not an indictable offence in a temporal court]; but it was adjudged for the plaintiff, for by them the lady's credit is impaired; and, if true, there was cause to bind her to good behaviour, although it was not said she did give money, or any hurt was done, but that she offered etc....[2]

- - -

For this he vouched a case in Michaelmas 17 & 18 Eliz., roll 483, between Sir John Cockin and his wife and one Wyman, because Wyman spoke these words, "My Lady Cockin did offer one Bash 10 pounds to get her a drink to destroy the child she went withall, because Mr. Cockin's butler had begotten it"; and it was ruled that an action lay, and yet he did not say that a drink was got, but only an offer to get...[3]

See also Giles Jacob, A Treatise of Laws: Or a General Introduction to the Common, Civil, and Canon Law in Three Parts (1721):

> An action for defamation lies where "a man reproach another with a heinous crime, as that he went about to get poison to kill the child that such a woman goeth with, or lay in wait to rob another, or procured a person to murder him."[4]

1. Brit. Lib., MS. Lansdowne 1067, fo. 97. Reference and translation supplied by Professor Baker. This case is cited in Eaton v. Allen (1598), 2 J.H. Thomas & J.F. Fraser, The Reports of Sir Edward Coke 301 (4 Co. Rep. 16b) (London, 1826), and is reported in Helmholz, supra note 42 (of Part IV) at 85 (including note 6). For a similar case tried in the ecclesiastical court, see infra, Case No. 15 (of Appendix 21). See also infra, note 1 (of Case No. 15 of Appendix 21). In Adams' Case (1585), it was argued, but not decided, that inasmuch as to kill a child in the mother's womb is not a felony or murder, it is not defamation to state that the plaintiff killed a child in the womb. See Helmholz, supra note 42 (of Part IV) at 79-80.

2. Cro. Eliz. 49, pl.4 (1586, copied from Chamberlains Reports), 4 Co. Rep.16v. (where it is dated Mich. 32 & 33 Eliz. (1590)). Croke cites the record as Mich. 17 & 18 Eliz., rot. 183. Reference supplied by Professor Baker, who added here: "I have located the original, probably in Croke's hand, in Hertfordshire Record Office, Verulam MS. XII. A.6A(1), fo.45, of which I have a copy. It is the same as the printed version, except that it is in law French. The date is Hil. 19 Eliz. I (1577), and the reference to the record is as above." Professor Baker in a letter to Philip Rafferty, April 24, 1984.

3. Harvard Law School MS. 1180(1), fo. 387, per Tanfield (in Tybot v. Heynes). Reference and translation supplied by Professor Baker.

APPENDIX 21

Case No. 1: John Wren's Case (Commissary Court, London Diocese, 1487)[1]

> [C]harged with having "wounded his wife during the time she was pregnant so that he killed the child in her belly".

The outcome of this ecclesiastical, abortion prosecution is unknown. A sentence on a conviction would have probably included some form of public penance. Helmholz reported the following sentences, respectively, for a man who was convicted of some form of criminal child destruction (either intentional or through negligence) in a Richester Consistory Court in 1453, and a woman who was convicted of the same in the Canterbury Consistory Court in 1470: to do penance by submitting to being whipped in public;[2] to "dress in penitential garb [probably a white sheet] and 'go before the procession in the parish Church of Hythe on three Sundays with a wax candle of half a pound in her right hand and the knife with which she killed the boy, or a similar knife, in her left.' She was also ordered to go twice around the markets of Canterbury, Faversham, and Ashford in a similar fashion".[3] In commenting on such punishments, Helmholz observed:

> The punishment of both negligent and intentional killing is a matter of more than strictly legal interest. It shows that the Church courts were not concerned solely with the sin of the parent. The safety of the child was also important. Were the sin of the parent alone important, it would have made no sense to punish those who had done nothing <u>intentional</u> to harm the infant. Punishment of unintentional killing was meant to indicate to the parents that unless they took enough care

> with their children to keep them alive, they risked prosecution in the Church courts and consequent public penance.[4]

1. Reproduced from R.H. Helmholz, Infanticide in the Province of Canterbury During the Fifteenth Century, 2 (no.3) Hs. C. Q: J. Psy.- Hs. 379, 380-81 (including n.10 at 387) (1975) (citing [Guildhall Library, London] Act Book Ms. 9064/2, f. 179 r).

2. See Helmholz, supra note 1 at 382.

3. Ibid. at 383. See also, e.g., Andrew Knapp, The New Calendar or Malefactor's Bloody Register 604 (1932).

4. Helmholz, supra note 1 at 382 (footnotes omitted).

Case No. 2: Anonymous' Case (Canterbury, 1416)[1]

> Helmholz stated that this case is similar to the preceeding case (Wren's Case). He reported further that the defendant was tried through canonical purgation and acquitted.

"Compurgation required the accused to affirm his innocence by oath. Also, the accussed "had to find a specified number of neighbors as compurgators or oath helpers, who would swear...to their belief in the word of the accused, not to the truth of the underlying facts..."[2]

1. Helmholz, supra note 1 (of Case No. 1 of this Appendix 21) at 387 n. 10 (citing Canterbury Act Book Y.1.3, f.12v (1416)).

2. Ibid. at 382.

Case No. 3: Thomas Deneham's Case (Canterbury, 1471)[1]

> [Charged] that, although he knew his wife to be pregnant, he "imposed such inordinate labors [on her] that she aborted."

The outcome of this case is unknown.

1. Helmholz, supra note 1 (of Case No. 1 of this Appendix 21) at 381 (citing, at 388 n. 11, Canterbury Act Book Y.1.11, f. 1268.).

Case No. 4: George Hemery's Case (Rochester, 1493)[1]

> [Rochester]: [C]harged...with placing medicines in a drink given to a woman "in order to destroy the boy he had created."

Helmholz reported that Hemery fled the Court's jurisdiction.[2]

1. Helmholz, supra note 1 (of Case No. 1 of this Appendix 21) at 381 (citing, at 388 n. 12, Rochester Act Book DRb Pa 4, f. 232v).

2. Ibid. at 388 n. 12.

Case No. 5: The Servant of Joan Gibbes' Case (Canterbury, 1469)[1]

> [Canterbury]: [A]ccused...of having "killed the infant lately in her womb by means of herbs and medicines."

The outcome of this case is unknown.

1. Helmholz, supra note 1 (of Case No. 1 of this Appendix 21) at 381 (citing, at 388 n. 13, Canterbury Act Book Y.1.11, f.57r).

Case No. 6: Anonymous' Case (Canterbury, 1521)[1]

Helmholz reported that a case similar to the preceeding case (Gibbes' Case) occurred in Canterbury in 1521. Its outcome is unknown.

1. Helmholz, supra note 1 (of Case No. 1 of this Appendix 21) at 388 (n. 13) (citing [Canterbury] Act Book Y.2.10, f.100r (1521)).

Case No. 7: John Russell's Case (Diocese of London, 1493)[1]

John Russell struck Alice Wanten and by reason of the blow of the aforesaid Robert [sic], the said Alice had been delivered of a dead existing child (puero existente mortuo). On February 15 [1493] he appeared and denied the article, purging himself by oath.[2]

1. Reproduced from Means I, supra note 1 (of Part II) at 439 n.63 (citing Hale's Precedents 34 (no. 128) (London, 1847). This case is reproduced also in Davies, supra note 8 (of Part IV) at 133 n. 25. Means was my initial source.

2. See supra, text (of Case No. 2 of this Appendix 21) accompanying note 2.

Case No. 8: Margaret Sawnders' Case (Diocese of London, 1527)[1]

Margaret Sawnders was cited for killing with potions a little infant (infantulum) in the womb of Joan Byrde: she appeared and the Lord Commissary put her and Joan Byrde under oath faithfully to answer the articles to be charged against them by him, and Joan Byrde denied the article charged.[2]

1. Reproduced from Means I, supra note 1 (of Part IV) at 439 n.63 (citing Hales Precedents 105 (no. 331) (London, 1847). This case is reproduced also in Davies, supra note 8 (of Part IV) at 132-33 n. 25.

2. See supra, text (of Case No. 2 of this Appendix 21) accompanying note 2.

Case No. 9: John Hunt's Case (Hertfordshire, 1530)[1]

Harpenden, Hertfordshire, 1530. John Hunt lives incontinently with Joan Willys, his servant...; he appears...and denies. His lordship orders him to appear next Wednesday with four testifiers to his innocence. But afterwards they appear at the priory and claim that they [Hunt and Joan Willys] have become betrothed. Item, "we charge you that you have advised this woman and persuaded her to obtain and drink certayn drynkes to distroy the childe that she is with." His Lordship warned him to appear, and he admitted that he had known her carnally, at which his lordship ordered that on Sunday to be fixed he should perform a public penance before Harpenden cross in the normal way, and that they should be married as soon as convenient, until which time, under pain of excommunication, they should not live incontinently.

1. Reproduced from Paul Hair (ed.), Before the Bawdy Court: Selections from Church Court and Other Records Relating to the Correction of Moral Offences in England, Scotland and New England, 1300-1800 81 (no. 150) (London, 1972) (deletions in original).

Case No. 10: Joan Schower's Case (Buckinghamshire, 1530)[1]

Stokenchurch, Buckinghamshire, 1530. Joan Schower says she is pregnant by William Hewes and the midwives examine her to see whether she is or not and conclude that she is not. However, Joan tells the midwives that she has been carnelly known by William and impregnated but took a medicine to bring about abortion. And she has had two children before for which lesser crime she was punished.

The outcome of this case is unknown.

1. Reproduced from Before the Bawdy Court, supra note 1 (of Case No. 9 of this Appendix 21) at 204 (no. 531).

Case No. 11: Rector of Leaden Rothing's Case (Essex, 1574)[1]

> The rector of Leaden Roding in Essex was presented at court because he had sexual intercourse with his maid, and thinking that she might be pregnant, he "brought her from London a roughe herbe, which he called saven willing her to use yt in a drincke for hindering the childe". The result was a premature baby which died not having either hair nor nayles.

The outcome of this case is unknown.

1. Reproduced from A.D.J. Macfarlane, The Regulation of Marital and Sexual Relationships in Seventeenth Century England, with Special Reference to the County of Essex 155 n.3 (unpub. 1968 Masters thesis, on deposit in the Essex Record Office, Chelmsford, England). According to Macfarlane, this abortion case is in an unfoliated Detection or Correction Book of the London Consistory Court, starting on 19 July 1574, which is temporarily deposited at the Public Record Office in London. Id. The Detection Book in question, as of 1984, is on deposit in the London County Record Office (Greater London Record Office). I believe the Detection Book can be cited as follows: [Greater London Record Office Consistory Court of London Office] Act Book (Secretary of Office against Clergy and Laity [Detections, etc.], July 1574 - March 1575 (DL/C/615) (microfilm X 19/55). This case is also mentioned in P. Laslett et al, (eds.), Bastardy and its Comparative History 76 (including n.29) (Cambridge, Mass., 1980).

Case No. 12: Thomas Love's Case (Winchester, 1534)[1]

> Thomas Love and his wife of Worneford [being accused on some entry that she was a common defamer and sower of discord] informed against because they collected

herbs for a certain woman to destroy her child; and the same Thomas brought the woman into Sussex; he appeared, and my lord told him to bring his wife and Juliana Bicher (his wife's mother) on the Saturday after Epiphany; then, he denying the article, my lord assigned him to purge himself three-bonded [i.e., through three oath-helpers] in the cathedral church of Winchester on the same Saturday.[2]

The outcome of this case is unknown.

1. HRO (CB4, fo. 117 v) (as freely translated from the Latin by Professor Baker.) This case is cited in R. Houlbrooke, Church Courts and the People During the English Reformation 1520-1570 78 (n.76) Oxford, England, 1979) (my source).

2. See supra, text (of Case No. 2 of this Appendix 21) accompanying note 2.

Case No. 13: Thomas Tyry's Case (Winchester, 15--)[1]

[Beginning of entry missing]; being examined upon articles concerning the health of his soul he confessed that he had in his service a certain Margaret whom he believed to be pregnant by Thomas Tyry, his son; but he denied that he advised her to destroy the child in her womb by a certain drink; he further answered that he never had notice that his son had carnal copulation with the said Margaret his servant before he expelled her from his house; which done, my lord assigned him to acknowledge his words in the Cathedral Church of Winchester on 11 April etc.; and my lord dismissed Thomas Tyrie with an oath to undergo penance if in future he should permit bawdery in his house.

1. HRO CB2, fo. 59v (This case was freely translated from the Latin by Professor Baker). This case is also cited in Houlbrooke, supra note 1 (of Case No. 12 of this Appendix 21) at 78 (n.76) (my initial source).

Case No. 14: Agnes Hobsen's Case (York, 1550?)[1]

> [Presented]: Agnes Hobsen of Alne administers love potions or apothecaries' potions of her own preparation, wherewith she destroys the foetus in the womb and even the mother and she has given the said potions to very many women. She has made expiation 2 July.[2]

1. Reproduced from T.R. Forbes, The Midwife and the Witch 149 (1966) (citing: The Fabric Rolls of York Minster for the Period Between 1362 and 1550 (Raine, 1859)).

2. See supra, text (of Case No. 2 of this Appendix 21) accompanying note 2. See also Eccles, supra note 10 (of Part IV) at 70.

Case No. 15: Elizabeth Johnson v. Agnes Cutter (Durham, 1534)[1]

> Durham, 1534. Elizabeth Johnson against Agnes Cutter, for defamation, viz. that this plaintiff should give her daughter suche drinkes as did slee [slay] the childe that she was with.

1. Reproduced from Before the Bawdy Court, supra note 1 (Case No. 9 of this Appendix 21) at 172 (no. 427). This case is also reported in the Surtees Society's, Depositions and Other Ecclesiastical Proceedings from the Courts of Durham, Extending from 1311 to the Reign of Elizabeth 49-50 (London and Edinburgh, 1845). See also J.A. Sharpe, Early Modern England: A Social History, 1550-1760 45 (1987) (in 1560 a defamation in Yorkshire involved an allegation that a woman "for fear she had been with child did drynke white lavendar and reave"). On defamation as tried in church courts in England, see Helmholz, supra note 42 (of Part IV) at xiv-xxx, xLv-xLvi & xLvii.

APPENDIX 22

The Trial of William Pizzy and Mary Codd in Suffolk on Saturday, August 13th 1808: Before Sir James Mansfield, Knt., Lord Chief Justice [of the Common Pleas][1]

FOR THE PROSECUTOR	FOR THE PRISONERS
Counsel:	Counsel:
Mr. Alderson	Sergeant Sellon *
Mr. Storks	Mr. Frere
Solicitor:	Solicitor:
Mr. Marriott	Messrs. Pearson and Bunn

* Sergaent Sellon being engaged at the Nisi Prius Bar could not attend till the trial was nearly finished.

First Count

Suffolk, to wit: The Jurors for our Lord the King upon their oath, present that William Pizzy..., farrier, and Mary...Codd...on the first day of January in the forty-sixth year (1806) of the reign of our sovereign Lord George III..., with force and arms,...feloniously, wilfully, maliciously and unlawfully did administer and cause to be administered to and taken by one Ann Cheney then and there being one of his said Majesty's subjects and then and there being quick of child a certain noxious and destructive substance with intent thereby to cause and procure the miscarriage of the said Ann Cheney against the form of the statute in that case made and provided, and against the peace of our said Lord the King, his crown and dignity.

Second Count

And the Jurors aforesaid, upon their oath aforesaid, do further present, that William Pizzy, afterwards, to wit, on the same day and year aforesaid, with force and arms,...feloniously...did administer and cause to be administered to, and taken by, the said Ann Cheney, [she]...being...then and there quick with child..., a certain noxious and destructive substance with intent thereby to cause and procure the miscarriage of the said Ann Cheney; and that the said

Mary Codd before the said felony was done and committed by the said William Pizzy in manner and form aforesaid..., with force and arms...feloniously...did excite, move, procure and abet the said William Pizzy the felony aforesaid in manner and form aforesaid to do, commit and perpetrate against the form of the statute in that case made and provided and against the peace of our said Lord the King, his crown and dignity.

Third Count

And the Jurors...do further present that the said Mary Codd,...on the same day and year aforesaid, with force and arms..., feloniously...did administer to and cause to be administered to and taken by the said Ann Cheney, [she]...being...then and there quick with child,...a certain noxious and destructive substance with intent thereby to cause and procure the miscarriage of the said Ann Cheney; and that the said William Pizzy before the said felony was done and committed by the said Mary Codd in manner and form aforesaid..., feloniously...did excite, move, procure and abet the said Mary Codd the felony aforesaid in manner and form aforesaid to do, commit and perpetrate against the form of the statute in that case made and provided and against the peace of our said Lord the King, his crown and dignity.

The indictment being read the prisoners were arraigned in the usual form and the following persons were sworn on the jury...[names of twelve jurors omitted].

Mr. Alderson [crown counsel]: My Lord and Gentlemen of the Jury I am extremely sorry that the opening of this case has fallen to my lot, but there is one thing I will assure you: that I will be careful to abstain from making any observation that may excite a prejudice in your minds against the unfortunate prisoners at the bar, but on the contrary would use my utmost endeavours if any such has entered your minds to remove it that they may have a fair trial unfettered by any kind of prejudice that may have been excited by reports circulated against them.

Gentlemen, I will now read to you the Act itself on which this indictment is framed: by [section I of] ...43 George 3d (1803) it is enacted....[2]

Gentlemen, there will be several things which you will have to decide upon. First, whether the prisoners or either of them did administer any deadly poison or any noxious substance. The second thing to which you will have to turn your attention [is] whether these two unfortunate persons did it with an intent to cause or procure a miscarriage. [The third is whether the woman, for whom the substance or poison was intended, was then quick with child]. These are the two [three] material things which you will have to determine.

Gentlemen. The first and principal evidence will be the woman, to whom the noxious things if they were administered were given, but it is my duty to tell you that she comes into court as an accomplice. However, though she is not a legal accomplice, [because she is not liable to a 43 Geo.3d abortion prosecution],[3] yet I am ready to admit to you that in point of moral guilt she participates with the prisoners at the bar. Having, gentlemen, made these observations I will now state to you the evidence that will be brought forward in support of this charge. The first witness that I shall procure to you is Ann Cheney, to whom these noxious things were administered if any were administered. She will tell you that she is about 27 years of age, that about twelve years ago she went to live with Mrs. Codd; she lived there up to the year 1805. In that year she was with child by some person. She continued with child till February 1806, when she was delivered of a dead child under peculiar circumstances. When she was pregnant she communicated the matter to Mrs. Codd, who notwithstanding she was fully acquainted with it continued to let her live with her as usual. When she had acquainted her mistress you will have in evidence the reply that Mrs. Codd made to it; that if she would take what she would give her she could order it better than letting anybody know of it. Cheney knew likewise the other prisoner at the bar, Pizzy. He is a respectable farrier at Mendlesham and is a man of great repute in his profession as a farrier and cow-leech, and he sometimes prescribed medicines for other animals besides horses. Cheney will tell you

that she had applied to this man for some medicine, not because she was with child, but because she was in bad health. When she told her mistress of her situation, her mistress mentioned Pizzy to her and some short time after he called at Mrs. Codd's house and Cheney saw him. She then told this Mr. Pizzy what her situation was. He gave her some medicines and expressly told her that they were for the purpose of making her miscarry. This was a confession out of the man's own mouth.

Now, gentlemen: From this period she continued to take these medicines given by this man, but she will tell you that she likewise took some from Mrs. Codd. There again, you will bear in mind after you have heard her evidence that her mistress knew her situation, and if you give credit to her words the charge will be fully proved against the other unfortunate prisoner at the bar, for she will tell you that Mrs. Codd, knowing her situation, and these circumstances which I have mentioned, did give her medicine to take for the purpose of causing her to miscarry. If you believe this witness there is complete evidence against the unfortunate woman at the bar. The witness will tell you that she continued to take these medicines till within a few days of her being delivered. She will tell you that they were sometimes black and yellow preparations, but they occasioned pain within and pain in her back, and that a few days after she had taken these medicines he [Pizzy] came to enquire of her and asked her if she had not miscarried, and some time after that on making the same enquiry he said: "You must have the strength of a horse not to have miscarried yet", and he continued his visits to her till she was brought to bed of a dead child. A few days before this, he called to inquire whether the medicine had occasioned a miscarriage, and he said: "If these do not do, I must try some other method". You will take notice that Mrs. Codd was present and heard all this, and knew what he meant and the girl went upstairs with Pizzy. He laid her down on her back on the floor and covered her face with a coat....[Here, the counsel for the prisoner objected to Mr. Alderson's stating this circumstance as not being relevant to the administration of the medicines which alone constitutes the capital crime. The objection was overruled on the ground that it would be relevant to prove the necessary intent].

Mr. Alderson then went on: One principal thing for you to consider is the intent. I am not going to state to you any new circumstance of felony, but what I am telling you is to prove with what intent these medicines were given. I have stated to you that this man Pizzy and this woman had for a long time given medicines to Cheney, and it is evident for what purpose they were given. The witness will tell you that he said: "Oh! If I cannot procure a miscarriage by these things I must take some other method." This is a proof of the intent. It is for that reason I am going to state these facts. He desired her to go upstairs with him. This was in the presence of Mrs. Codd. He laid her down on the floor on her back, and covered her face with a coat. She will tell you that she felt some cold substance in her body, that it felt like cold iron and that it gave her very great pain, and afterwards there was an effusion of blood. She will tell you that at this time she found the child quick within her. After this he went away. This was about ten days before she was delivered. The day before she was delivered he came again, and found to his great surprise that what he had done had not had the effect of producing a miscarriage. He then said: "I must try another method", this woman, Mrs. Codd, being at the same time present. He told her to go upstairs again. He then followed her upstairs. She at the time felt the child alive within her. He laid her down as before, pulled off his coat and stripped his arm bare. He then put his hands half way into her body and continued it for some time and gave her very great pain. This he repeated once or twice. When she got up there was an effusion of blood as before. From that time she was not sensible that the child stirred in her womb. The next day she was delivered of a dead child. She still resided under the roof of Mrs. Codd's house, she knowing the medicines that were administered and these horrid transactions.

The very next day...Ann Harvey, a niece of Mrs. Codd, came to her house. She had been accustomed to see Ann Cheney when she came thither, but did not see her that time. She knew, I suppose, the state she was in, and soon after she heard her scream out very much. She told her relation of the circumstance, and said she thought she was delivered. Though she was told of it, she did not go up, but Ann Harvey went

up. When she opened the door she saw Cheney lying on the bed, and the child was lying across her. She was terribly shocked and went down and told Mrs. Codd of it and asked her to go upstairs to her, but for some reason or other Mrs. Codd did not chuse [choose] to go up till an hour and a half after. She then carried up a box made of pasteboard and made use of it for a coffin. After the infant was put into it, it was given out of a window to the reputed father for him to take and carry away in order to bury it privately that it might not be known. I trust it will not rest entirely on the evidence of Cheney, as she was in a moral sense an accomplice, and I am perfectly aware that they may endeavour to bring some evidence to invalidate what she may say, but I think that the evidence which will be produced will be such as to leave no doubt on your minds of the guilt of the unfortunate prisoners of the bar.

I shall next call this Ann Harvey. I shall state to you only that part of her evidence which goes to corroborate the testimony of Ann Cheney. This witness Ann Harvey will tell you she asked Cheney how she did, that she saw the medicines that were given to her by Pizzy and Mrs. Codd, and the girl will tell you what these medicines were.

Another witness that I shall call is a Mr. Jeffrey, the reputed father of this child. He will tell you these circumstances:...that he went to Mrs. Codd's house, that Mrs. Codd said: "What a pretty job you have done, what will your wife say to this business, and what will be done with the girl." Then he went away, but soon after he came thither again, and Mrs. Codd introduced the same subject again. After conversing some time, she said it may be better for you than you suspect, and he will likewise tell you that he was sent by Mrs. Codd to izz [Pizzy] for medicines, and that Mrs. Codd desired him to tell Pizzy that the heifer was doing sadly - that he would know what she meant.

But Gentlemen, over and above this, a most material evidence is that of Mrs. Arnold. She will tell you that when Pizzy was apprehended, and was carried before the Magistrates who were sitting at the House of Industry, this woman, who is Matron of the house, had some conversation with him on the subject. Mrs.

Arnold seemed to be acquainted with what was reported to have been done by the prisoner. She will tell you that after having some conversation with Pizzy he swore it was very bad for the person at whose instance he had done this, to swear against him. Mrs. Arnold replied: "It matters not at whose request you do it, for it was a bad thing for you to do". He said: "I know that, and I suppose I shall - putting his hand up to his neck". [Y]ou will infer from the evidence what he meant by it. With regard to Mrs. Codd, there are other circumstances that may perhaps be worthy of your attention and guide you in forming your opinion respecting her. It will appear by the evidence that for some reason or other she seemed desirous to keep this thing a secret, and she insisted upon it for some time that Cheney was not with child and you will hear that Mrs. Codd said to a person that she thought the girl was going to groan [?] and after that Mrs. Codd denied again that she was with child. The only circumstance that I will trouble you with stating is the evidence of the girl herself who will tell you that she was brought to bed and that she believes she had not gone her full time when she was delivered and the manner in which the child was buried. After all this she continued this unfortunate girl to live at her house to this present year, that is, till this discovery (which came to light by some family quarrels) took place, and then for the first time she thought proper to dismiss her from her service. When she let the girl go she gave her a 2-pound note and desired her to get out of the way, for if she was taken it would be bad for them both. There is one circumstance that I ought to state to you: that Pizzy did say to some person that he thought he should be hanged. You will hear the evidence, and you will have the direction of the learned Judge on the bench....

Evidence by:-

Ann Cheney:	Examined by Mr. Storks.
	Cross-examined by Mr. Frere.
	Re-examined by Mr. Storks.
Mr. Creed:	Examined by Mr. Alderson.
	Cross-examined by Mr. Frere.
Ann Harvey:	Examined by Mr. Storks.
	Cross-examined by Mr. Frere.
Jeremiah Jeffrey:	Examined by Mr. Alderson.
	Cross-examined by Mr. Frere.

Elizabeth Paxman: Examined by Mr. Storks.
Cross-examined by Mr. Frere.
Susan Arnold: Examined by Mr. Alderson.
Cross-examined by Mr. Frere.
Henry Cheney (Brother of Ann Cheney):
Examined by Mr. Storks.
William Paxman: Examined by Mr. Alderson.

Mr. Alderson, in his examination of Mr. Creed, said "You are a surgeon and a midwife. After what period of gestation is a woman supposed quick with child?" He replied: "In about eighteen weeks - sometimes fourteen and sometimes it is twenty weeks, but mostly eighteen". Mr. Alderson said: "Then, after twenty weeks she would be sensible of the child moving". He replied: "Yes, in general about eighteen weeks".

Ann Cheney and Ann Harvey called again. FROM THE JUDGE TO CHENEY:- Mind what I say to you. You told the Court that in conversation with Ann Harvey you told her that you was sick of taking pills, that they did you no good and that you said [sic: and that Harvey said to you:] "Why don't you ask Pizzy to take it away?".

CHENEY: "Yes, I did."
JUDGE: "This Ann Harvey denies."
HARVEY: "Yes, I do. I never said such a thing."
CHENEY: "You said: 'Why don't you ask him to take it away?'"
HARVEY: "I can positively swear I never said such words."
CHENEY: "Oh, Harvey, how can you say so? Don't you recollect that we were in the necessary when you spoke to me?"
HARVEY: "I never said any such thing."
JUDGE TO CHENEY: "You said that you continued to take pills, and that you felt the child move within you during that time."
"Yes."
FROM THE JUDGE TO CHENEY: "But you said that you felt it only three days before he used his hand, and at another time it was a fortnight before. Which do you mean?"
She replied: "I felt it move about three days before he served me so."
JUDGE: "Did you feel it frequently before that time?"
She replied: "I felt it almost every day."

JUDGE: "Are you sure you continued to take the pills after you felt the child move within you?"

CHENEY: "I used to take them every day till I was miscarried."

FOR THE PRISONERS. Nathaniel Woolnough: Examined by Mr. Frere. Cross-examined by Mr. Alderson. To the prisoner's character: Rev. Mr. Chilton, Rev. Mr. Simpson, Mr. Simpson Senior, Jeremiah White, Mr. Edwards, Mr. Edwards of Brockford, Examined by Mr. Frere.

THE EVIDENCE BEING CLOSED, HIS LORDSHIP SUMMED IT UP IN THE FOLLOWING ADDRESS TO THE JURY:

This is an indictment against the prisoners at the bar...for administering or causing to be administered some drugs to Ann Cheney in order to procure a miscarriage. Though both the prisoners are charged in the same manner in the indictment, the case may be very different with regard to each, and you are to decide whether either of them be guilty, or whether both are so. Before this act, the offence did not amount to a capital crime, but if a child was alive in the womb and it could be proved to be so and it was killed in the womb, it would be murder in the woman that took the medicines that produced this effect. [Note: unless the judge's remarks here were misreported, the judge contradicted himself, for murder was a capital crime at common law. Also, since Cheney's child was born dead, Pizzy was not liable to being prosecuted for common law murder.[4] The judge, as will be seen, repeated this dictum.] [B]ut it was very difficult to prove that the child was alive and that it was killed by the medicine. It was, [therefore], thought proper to make this Act of Parliament.

The Act is this...[T]o constitute this offence it is necessary that the person should either administer and give the medicines or cause them to be administered with an intent to procure a miscarriage; without which intent the person who gives them cannot be guilty....You will apply these observations as they affect the prisoners at the bar. As to one of the prisoners, Pizzy, if you are convinced of the truth of one of the evidences [that] he is the person who made up and administered the medicines, for whether

he put them himself into the girl's hand or delivered them to Mrs. Codd, in either case he would be the person who administered them. With respect to the other prisoner there is a difference. She did not compose the medicines, but she might be conversant with them, and might know the intent of them. It will be important to consider whether the girl took these medicines by her directions. With that consideration in view, you will attend the evidence as far as it affects her, that is, whether the girl acted under her influence or whether she took them without any interposition of her mistress. The material witness is Ann Cheney. She appears under particular circumstances, for she, by her own account, took for a long time medicines in order to produce a miscarriage. If she took these medicines while the child was alive within her, and it could be proved that it was so, and that the child was killed within her, she would be guilty of murder, but some allowance is to be made for an unfortunate girl like her - disorder coming on her, and the shame that attends a young woman in such a situation, in some degree extenuate the improper and dangerous steps she took to conceal her crime. She tells you she lived with Mrs. Codd and that she was delivered of her child in the month of February 1806. She told her mistress's father that she was with child and that afterwards her mistress told her of it. In conversation with Mrs. Codd, Mrs. Codd said to her: "If you will take the medicines I will provide for you, I will order things better than letting anybody know of it". This is what the girl says, and this may be an excuse for her who did not object to taking these medicines. She says she saw Pizzy, who gave her, or her mistress gave her, a box of pills. She told him they gave her great pain in the back and inside. He said he thought they would have made her miscarry. He used to call to enquire of her what effect the medicines had on her, and whether they made her miscarry. He saw her nine or ten days before she was delivered. She did not leave off taking the pills till within a few days of her delivery. When he came again, he asked her whether the stuff he had given to throw up into her body when Mrs. Codd was present and that she (the girl) went upstairs with them and that [when] she laid down on the floor he put something cold into her body for about half an hour, that it gave her no pain but some blood came from her. He came a few

days after and asked her whether she had miscarried. She said to him: "Can't you take it away?". He said, "Can you bear my hand?". She said she thought she could, went upstairs with him and he put his hand in three times which caused her great pain. She desired him to call her mistress. She said he did not serve her any more, that she never after that felt the child move within her. The next day she was deliv-ered. She tells you that it neither cried nor stirred. The child was buried on the Wednesday. She thinks she wanted six or seven weeks of her time.

She never was connected with any man besides Jeffrey, that Pizzy had given her something to take before she was with child. She began to take the stuff seven-teen weeks before she was delivered. She is positive that she felt the child two or three days before he used his hand. That when Ann Harvey came to her she told her that she had taken the pills till she was sick of them, and that Ann Harvey said: "Why don't you get him to take it away?". She told Jeffrey that she was with child, but never told him that she had taken anything, and that she would never say her mis-tress was innocent. She told Sherman that she was forced to run away, that Mrs. Codd told her that she had better go to Brundish, that her mistress gave her a one-pound note. Mrs. Codd said that if they catched her she would be hanged. It would be worse for both of them. She continued to take the pills till within a few days of her delivery. You will observe her evidence that she positively swears that she did tell Ann Harvey that she was quite sick of taking the pills, and that Ann Harvey said to her: "Why don't you ask him to take it away?", and that she never said to Woolnough that her mistress was innocent. The only thing in her evidence that affects Mrs. Codd is when she says her mistress told her if she would take the medicines she would order things better.

This is the evidence from which you are to form your judgment. It is evident that the girl did take medi-cines to produce a miscarriage, and that the effect produced either by the medicines or the operations is not in doubt. The prisoners are the persons suspect-ed and you will consider [whether ?] this story of the girl's be wholly an invention of her own. If it be, then Pizzy cannot be guilty; but if you believe

the evidence of the girl [, then?] there is no doubt but that they were administered by Pizzy, and that he administered the medicines for the purpose of producing a miscarriage, for if you believe the girl after the medicines failed of the effect intended, he tried those operations she told you of.

If you don't credit the girl you will acquit both the prisoners, but if you believe the girl you are to consider whether one or both of them be guilty.

With respect to Mrs. Codd, there are only three or four circumstances that tend to bring this charge home to her, and the girl, after the conversation with Harvey, said that she herself asked him if he could take it away. Hence it is clear the girl wanted no advice from her mistress to adopt any means to procure a miscarriage. The crime imputed to the mistress is that she administered medicines, or caused them to be so administered and assisted this Pizzy in administering them to the girl, and that the latter took these medicines under her mistress's influence. In that case, the mistress is guilty, but if the girl took these things of her own accord, even though Mrs. Codd knew of it, and though she is highly reprehensible, she cannot be guilty of this capital offence, but if the girl took them by the persuasion and under the influence of her mistress, then Mrs. Codd is guilty.

However, by the evidence the girl gave, it appears she took these things of her own accord and wanted no person to influence her. You will take these things into your consideration and by your verdict say whether both the prisoners are guilty or not, or only one of them.

THE JURY RETIRED FOR ABOUT TWENTY MINUTES AND ACQUITTED BOTH PRISONERS EXPRESSING THEMSELVES NOT FULLY SATISFIED WITH THE SUFFICIENCY OF THE EVIDENCE TO CONVICT.

1. As abstracted from the Ipswich Record Office's copy of The Remarkable Trial at Large of William Pizzy and Mary Codd at the Assizes Holden at Bury St. Edmunds on Thursday August 11th 1808 for Feloniously Administering a Certain Noxious and Destructive Substance to Ann Cheney with Intent to Produce a Miscarriage.

With an Appendix Containing Several Depositions Made Before the Magistrates Previous to Their Commitment: Taken in Shorthand by William Norcutt. (Printed and sold by J. Bransby, Ipswich, 1808). Pizzy and Codd is discussed in 3 Paris and Fonblanque, Medical Jurisprudence 91 n.a (1823) (my initial source).

2. See supra, Statute No. 1 (of Appendix 1).

3. See supra, the commentary to Case No. 2 (of Appendix 17); Smith & Hogan, supra note 143 (of Part II); and supra text (of Part II) accompanying notes 143-148. For an explanation as to the probable reason why Ann Cheney was not prosecuted on a common law charge of deliberated abortion, see id.; and supra, text (of Case No. 1 of Appendix 15) accompanying note 9.

4. See supra text (of Part IV) accompanying notes 29-34, as well as those notes themselves.

APPENDIX 23

Case No. 1: Elizabeth Searle's Case (Somerset, 1658) A Bastardy Proceeding[1]

Info. of Eliz. Searle before JP: her master, William Gunnam, had the knowledge of her on Bridgwater Lent Fair day and also about a week later; and he is father of the child conceived in her body; and when she told him, he 'did advise and presse her to take beares foote and saven boyled and drinke it in milke and likewise hay mayden chopt and boyled in beare and drinke it to distroy the child...and did likwise buye raisons of the sun for her to eate after, in regarde the sayd drink was very stronge; but she refused to do it; and he threatened to kill her, and attempted it with a 'spard' and later a hatchet.

1. Somerset Record Office (Somerset) Q/S 96 (1 Nov. 1658). Reference supplied by Professor Baker. This case also appears in 38 Somerset Rec. Soc., Quarter Sessions Records for the County of Somerset Vol. III. Commonwealth: 1646-1660 353 (no. 22) (1912) (my initial source); and in Quaife, surpa note 10 (of Part IV) at 118 & 258 n.47.

Case No. 2: Elizabeth Frances Case (England, 1556): A Non-Abortion-Related Witchcraft Prosecution[1] From a Deposition

Item, when...[her husband] Andrew was dead she [Elizabeth Fraunces]..., [suspecting] her selfe with childe, willed Sathan, [her cat familiar, who was an agent of the devil], to destroy it, and he had her take a certayne herbe and drinke it, whych she did, and destroyed the child forthwyth.

1. Reproduced from Ewen, supra note 1 (of Case No. 5 of Appendix 13) at 318. This case is also mentioned in Laslet, supra note 10 (of Part IV) at 77.

Case No. 3: The Matter of John Banson (Essex, 1609)[1]

> Frances Barker [aka., Lacey of Black Notley]...saith that about three weeks before Michaelmas last, being great with child by John Banson of Widdington, tailor, she was conveyed from Widdington to...St. Neots where...she was brought in bed of a boy, and the next day the child was baptized...[and died that] night. And further saith that [when]...Banson...came to her...she [told him that] she was great with child by him..., [to which he replied] that if he had known that he would have taken such order with her that she would never have come unto that, and therewithal gave her a pinch upon her belly after which she was never well until she was brought in bed which was seven weeks before her time.

I was unable to determine the nature of the case (e.g., a homicide investigation, or a fornication or bastardy investigation) for which this examination or deposition was taken.

1. (Chelmsford) E.R.O., QSR/187/53 (E.R.O., Cal. QSR, Vol. 18 (1603-1640), p. 281 (no. 187/53). See id. at 187/52 (p. 280).

Case No. 4: Margaret Royden v. John Bowry (Cheshire, 1667): An Action in an Ecclesiastical Court to Enforce a Contract of Matrimony[1]

> [Deposition of Frances Appleton, mother of Thomas and Anne Appleton]:...says that after...[Margaret was] suspected by some women in the town to be with child, but before it was publicly known, she came several times to deponent's garden and other gardens in the town to look for some herbs which she wanted, pretending that she had a pain in her belly, and was troubled with wind,[2] and she did get lurkydish [Cheshire dialect word for pennyroyal, menthe pulegium, a species of mint meant for medicinal purposes] in this deponent's garden and germander [a herb which, if ingested by a pregnant mare, was then believed to cause the mare to cast out her foal] at dep's bro.in law's garden, both [of] which women do account to be very dangerous for a woman to take that is with child; but what she did with it, this dept.

knoweth not...; her da. in law told plf. to have a care how she took such things, to whom the sd. Margaret answered: "Why should she take more care than other young women in the town did...."

[Deposition of Ellenor Appleton, wife of Thomas Appleton:...[Margaret Royden] told this dept. that she took...[lurky-dish and germander] in posset dri[nk] for a disease that troubled other young women...

[Deposition of Anne Appleton]: says...she... asked...[Margaret Royden] what she would do with... [the germander] and [Margaret], winking at the deponent because Robert Dod was by, answered it was to bring down her flowers [i.e., to make her menstruate]....

1. EDC 5/1667/13 (Cheshire Record Office). Abstracted depositions supplied by Professor Baker. The depositions abstracted here were from the defendant's side. The depositions on the plaintiff's side related that defendant gave the plaintiff savin to destroy the child in her womb. Plaintiff stated that she refused to use the savin.

2. See supra, text accompanying note 2 (of Case No. 2 of Appendix 16), as well as that note itself.

Case No. 5: R v. Richard Skeete and Lidia Downes (Essex, 1638): Charged and Convicted on Four Counts of Murder[1]

Examin. taken 12 Nov. 1638 before the mayor and one J.P. Lidia Downes age 24: abt. 6 or 7 yrs ago her bro-in-law Wm. Hardye (now dead) came to Ric. Skeete and told him "in what condition shee this examinant was" and that she was to go to Chelmsford to a woman there for cure; and Skeete told WH. that it was in vain, for the woman cd. not cure her, but if WH. would bring LD. to him he wd. cure her for 20s. WH. said she cd. not come, and so Skeete sent her (via WH.) a paper with crosses to hang round her neck that night and the next day it was to be burned (she to be held over it); and this was done; and then she might come to him without danger; and then she came to Skeete with her brother about 2 p.m. and that night (after Skeete caused her to take an oath not to reveal her secrets) Skeete let her blood; but she bled

a little and because, she was so frightened with what she then saw and heard (for that night Skeete crossed papers and burned them and cut off some hair from her head and burned it, and Skeete told her to say some words she did not understand, and after a great noise and tempest of wind the candle and fire went out, and there appeared something in the likeness of a man which she thought was the devil or some evil spirit)..., she rose up to wake her brother, who was asleep on Skeete's bed, but Skeete beat her down and said "Cannot you sit still and be quiet?" and carried her into the yard, where she fell down with fear, and Skeete left her and went back to awaken her brother and those that were in his house and sent them away, and then Skeete threw her on his bed and had carnal knowledge of her, and afterwards gave her physic and sent her hom. And the Saturday following she came with her bro. to Skeete's house, where he gave her a 2nd. oath of secrecy, and let her blood, and took her blood and burned it with pins and needles, and after that had carnal knowledge and kept her in his house till Monday (and had use of her body several times); and afterwards she had a child by one Tunbridge. After she was pregnant again and was warned to appear in the spiritual court, and Skeete sent for her and took her and her mother out to supper, and the next Saturday she lay with Skeete all night and he had use &c. and soon after she proved with child and upon the quickening she told Skeete, and he bade her take savin, which she did, but it did no good; and about 6 weeks after she was quick Skeete told her to take some physic, but it did not prevail; and then she told Skeete she wd. never come to shame again, and thereupon took ratsbane (unbeknown to Skeete) and after she had taken it, being fearful of death, she told Skeete and he gave her "sallett oyle and the carnell of hasell nutts" which expelled the poison, "but yet the child was not killed within her" but she was delivered of a child born alive, and only Skeete and one Coker's maid were about at the time; and the maid asked what to do with the child, and the examinant sd. she was not so hard hearted as to make it away, but the maid said "Tush, it is not the first that she had made away"; and they wrapped the child in examt's. apron and (as she thinks) put it into the ground in Coker's yard. And afterwards she was with child by Skeete and was delivered at Skeete's house, and Skeete gave the child something on a spoon which he told her was water and sugar, but presently the child swelled and died; and Skeete and another took

it away. And while she was with child Skeete often tried to destroy it within her by physic. Skeete gave her poison and told her to poison his wife, and he wd. marry her, but she wd. not do it. She eloped with him for 6 days, but then became afraid that he wd. make away with her, and they came back. After Skeete's wife died, he told examt. he had given her a draught that was the last she drank. And he invited examt. to burial, and sd. he wd. marry her.

Ric. Skeete, age 50 or thereabouts, admits having carnal knowl. of Lidia D. but everything else she [sic: he] says is untrue.

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Lidia Downes, examined again on 7 Dec. 1638, confesses that about 3 yrs. ago she was with child (but whether by Skeete or Richard Briant she knows not) and as the 3 of them were passing Crankes' house (who was later executed for felony) she fell in labour, and she was delivered of a female child in Crankes' house; and Skeete sd. he wd. make away with the child, and she sd. she wd. not consent to have it murdered, and Skeete sd. that if she did not she wd. not go home again to tell tales; and Skeete put the child's hand in its mouth and strangled it; Briant consented and promised never to reveal it; and the next day S & B showed her the place where they had buried the child. And she confesses that on an earlier occasion she was with child by Skeete and on the way to London at an alehouse she was delivered of a child, which lived 4 days and then died and was buried in the churchyard; and she stayed in the alehouse a fortnight, and Skeete told the folks she was his wife; she did not see Briant again till 28 Nov. 1638, when he came to her and she agreed to go away with him, which she did not intend to do but was desirous that he might be taken. When Keeler's wife lay sick and wanted some wine with sugar, Skeete put some white powder into the wine; and he wd. not let examt. drink it; and examt. saw white floating on top etc. and the wife died within an hour of drinking it; and after he washed the glass, a cat lapped some of the water he washed it in and lost some of its hair; and after Skeete told examt. he had been afraid of Mrs. Keeler but had given her mercury and she would tell no tales.

Elizabeth Coker heard Skeete say that when his old wife was dead he wd. marry Lidia.

....[3 more pages of other depositions, adding little]

1. The four murder indictments can be cited as E. R. O. (Chelmsford), T/A 465/27, pp. 14, 15, 22, 23: (i) murder of Mary his wife by poison; Lidia accessory; Guilty; (ii) murder of Anne Keeler by poison; Lidia accessory; Guilty; (iii) murder of an illegitimate child of the body of Lidia D., by poison, immed. after birth; Lidia acc.; Guilty; (iv) murder of male child after birth; Lidia acc.; Guilty. References supplied by Professor Baker. This case is also mentioned in Laslett, supra note 10 (of Part IV) at 76.

Case No. 6: Thomas Andrewe's Case (Somerset, 1620)[1] Report by JPs Entitled "Perticuler Instances of the Leude Liffe of Thomas Andrewes of Winscombe"

Evidence was taken at Ilchester sessions 1618 that he had one or more bastards by his wife's sister, and had attempted the honesty of another sister; and was bound to good behavior, his punishment being deferred for further consideration; since then he laid a plaster to the navel of Sara Williams to bring down the child before his time to have destroyed it; he has been sentenced for incest in bishop's court, appealed to Court of Arches, and now to the Delegates; he boasted how many women he had abused to the sum of four score; reviled the vicar's daughter, calling her "priest bastard, filthy toad" etc.; went absent without leave from muster; suspected of living with his maid, who has a child by him, and confessed it and sd. he had promised to marry her; escaped from arrest by the officers (who had a JP's warrant), which is a breach of his good behaviour.

1. Somerset County Record Office (Somerset), Q/S 37 (1620). Reference supplied by Professor Baker. This case is cited also in Quaife, supra note 10 (of Part IV) at 118 & 258 n.47 (my initial source).

Case No. 7: John Cade's Case (Somerset, 1609)[1] Report by two JPs

John Cade, a married man, is father of 3 bastards; he confessed it, and had royal pardon in 1604 to avoid

whipping; proved by the oath of 3 others, and that he promised to marry the girl "to have his luste"; he promised in writing to pay the girl 5 li. a year during the child's life for nursing; when she was with child he took her to his house and sent her away till she was delivered, all at his costs; he bound himself in 10 li. to discharge her of her penance [in the church court]; within a fortnight of [i.e., before] her delivery "he brought her a boxe of powder and woulde have had her to have used the same". Sim. evidence as to others.

They recommend in view of his "filthie lyfe and his audacious boldenes herein" that he should be whipped; should find sureties to perform his promises to keep the first 2 bastards; should be rated at 12d. a week at least for the 3rd.

1. Somerset County Record Office (Somerset), Q/S 6 (19 April 1609). Reference supplied by Professor Baker. This case is cited also in Quaife, supra note 10 (of Part IV) at 118 & 258 n.46 (my initial source).

Case No. 8: Elizabeth Perfect v. Thomas Ruddlocke (Somerset, 1649)[1]
A Bastardy Proceeding, or Perhaps An Action on a Marriage Contract

Info. of John Batt: in his presence Eliz. P. asked TR when he wd. marry her, and he sd. he had not promised etc.

Info. of Eliz. Perfect: Thos. promised to marry her upon the words of Malachi 2.15, and lay with her; when she thought she was with child Thos. promised her money to go away until it was more certain; and desired her to be let blood and to take some herbs "as may be very convenient to distroy the child that was conceived within her"; to which she assented; and because this lately destroyed a sister of Thos's, she sd.: "Why then, by this I see that you would willingly have me to be destroyed too", and Thos. said, "No, it wilbe noe way prejudiciall to you, it will but onely destroy the child".

1. Somerset County Record Office (Somerset), Q/S 81 (28 May 1649). Reference supplied by Professor Baker. This case appears also in Quaife, supra note 10 (of Part IV) at 118 & 258 n.7 (my initial source).

Case No. 9: Elizabeth Westlake's Case (Somerset, 1654/55)[1]
A Bastardy Proceeding(?)

Info. of Anne Burde before JP: early one morning she found George Witherly, a mariner, in bed with Eliz. Westlake her kinswoman, who is since discovered to be with child and has charged GW; but she does not know whether GW then had the knowledge of her body; but GW persuaded the informant "to buy something at the apothecaries and give it to Eliz. to destroy her conception", which she refused; and then he promised her 20 li. if she wd. marry Wm Hawkins, a Bristol blacksmith, which she did, and 5 li. paid.

Info. of Geo. Witherly: denies the charges.

Info. of Eliz. Hawkins: confesses she is great with child; by Geo. W., who persuaded her "to take something to make away her child within her", which she refused; and she has since married WH, to whom GW promised 20 li. with her.

1. Somerset County Record Office (Somerset), Q/S 90 (3 Jan. 1654/55). Reference supplied by Professor Baker. This case appears also in Quaife, surpa note 10 (of Part IV) at 118 & 258 n.46 (my initial source).

Case No. 10: Thomazines Lockyer's Case (Somerset, 1657)[1]

Info. of John Owen before JP: Thomazine Lockyer 'did usually drinke rew and other medecines to rid herselfe from being with childe' and confessed she had been in that condition several times; about a fortnight ago she lay in bed with Roger Farmer.

1. Somerset County Record Office (Somerset), Q/S 95 (7 Aug. 1657). Reference supplied by Professor Baker. This case appears also in Quaife, supra note 10 (of Part IV) at 118 & 258 n.47 (my initial source).

Case No. 11: Mary Hooper's Case (Somerset, 1654)[1]
A Bastardy Proceeding(?)

Info. of Mary Hooper before JP: she told her master she was with child, whereupon he promised to give her 20s. to destroy the child.

1. Somerset County Record Office (Somerset), Q/S 90 (3 Nov. 1654). Reference supplied by Professor Baker. This case appears also in Quaife, supra note 10 (of Part IV) at 118 & 258 n.46 (my initial source).

Case No. 12: Mary Fisher's Case (1658/59)[1]
A Bastardy Proceeding

Examination of Mary Fisher before JP: Thomas Bayley gent. had carnal knowledge of her body twice, and she is with child by him; he told her if she was with child he "could give her something that should drive it away againe, or wordes to that effect".

1. Somerset County Record Office (Somerset), Q/S 98 (15 Jan. 1658/59). Reference supplied by Professor Baker. This case appears also in Quaife, supra note 10 (of Part IV) at 118 & 258 n.47 (my initial source).

Case No. 13: Susan Adams Case (Wiltshire, 1628)[1]
A Church Court Fornication Proceeding

Before the dean of Salisbury at Hungerford, 7 June 1628. Ex officio suit against Susan Adams. This is her confession on oath. She entered into service with Anthony Young, whose son Edward, pretending love and promising marriage, "procured her to yield to his desire". He is the father of her child. Edward's mother tried to persuade her to go away with ╖5. Edward's father "often told her that she might have taken some thinge to have freed her selfe if she had done yt in tyme, as many others doe", but she would not. She left the Young household, and Edward also went away, taking a keepsake from her. No other man had had carnal knowledge of her.

1. Wiltshire Record Office, D5/28/28. Abstracted reference supplied by Professor Baker. This case is cited also in Ingram, supra note 10 (of Part IV) at 159 n. 126 (D/Pres. 1628/25) (my initial source).

Case No. 14: Audrey Turner's Case (Wiltshire, 16--)[1]
A Church Court Fornication Proceeding

Ex officio proceedings against audrey ('Adrye') Turner (qu. date). Deposition of Elizabeth Gilson of Hindon, Wilte, widow, aged about 80: about two years since there was a rumour that Audrey was with child before she was married; and later she complained toemmander[?] taken in drinck or porrage, it did help my belly", quoth the said Adry clapping her hand upon her belly, "Looke my belly is slack nowe".

1. Wilshire Record Office, D1/42/36, fo. 142. Abstracted reference supplied by Professor Baker. This case is cited also in Ingram, supra note 10 (of Part IV) at 159 n. 126 (B/OB 36, fol. 142) (my initial source).

Case No. 15: Anne Phillimore's Case (Wiltshire, 1614)[1]
A Bastardy Proceeding

The examination of Anne. Phillimore of Grytten-ham in the said countie, spinster, taken uppon oath the xviijth daie of Februarie by John Ayliffe and Edmund Longe, esquiers, two of his majesties justices etc. Anno Domini 1613.

This examinante saith that Edward Wayte onelie [only] hath had carnall knowledge of her bodie and did begett that childe upon her whereof shee is latelie delivered and that she hath not lyved incontinentlie with anie other man since the said Edward Wayte had first her companie but onely with himself. And shee allso saith that the said Edward Wayte hath had her carnall companie as aforesaid manie and diverse tymes within these two yeares last past. And further she saith that the said Edward Wayte did give her fyve shillinges about the feast of All Saites last past to goe to Jenninges the surgeon and gett phisick of him to take to the end to destroy the childe, and allso the said Edward Wayte did bringe her savyne at three severall tymes since harvest last for her to take, of which three tymes the last tyme was the Fridaie before Christmas last.

John Ayliffe
Edm: Long

1. Wiltshire Record Office, A1/110/1614, Trinity, fo. 166. Reference supplied by Professor Baker. This case is cited also in Ingram, supra note 10 (of Part IV) at 159 n.126 (QS/GR Trin. 1614/166) (my initial source).

Case No. 16: Margaret Hillier's Case (Wiltshire, 1608)[1]
A Bastardy Proceeding

The examination of Margaret Hillier of Maningford in the countie of Wilt' and others, taken at the Bell in Charman [?] Strete the 26 of July 1608 before Sir Alexander Tate and Sir Anthony Hungerford, knightes, Henry Sadleir and Henry Martyn, esquires etc.

The said Margaret saieth that one Richard Benger of Manningford is the only father of hir childe, and that he was a longe sutor unto hir for marriadge, and fynally about Michaellmas she saieth he begatt hir with childe, and being furder asked whether she hadd spoken to any man to gett hir some saven she utterly denyeth the same and affirmeth constantly that she never spake to any man lyving to gett hir saven or any such lyke thinge.

John Scory of Mannyngford of the age of lx yeres or thereaboutes, sworne and examined, saieth that the said Margarett made piteous mone unto him of a payne and a greate grypinge that she hadd about hir stomake[2] and about new yeres tyde spake to him very earnestly and prayed him to help hir to some saven, which he did and brought hir some and delivered the same to hir owne handes on the Sonday before Shrovetyde, which she received and thanked him. And he saieth furder that it was deere saven unto him, for whereas before Mr. Stokes was his good moister and frend, he could never abyde him since the bringinge of the said saven, and his reason was as this examinante saieth becaus he revealid it to others and not to him aloane, for no man should have knowen of it.

1. Wiltshire Record Office, A1/110/1608, Michaelmas, fo. 115. Reference supplied by Professor Baker. This case is cited also in Ingram, supra note 10 (of Part IV) at 159 n. 126 (QS/GR Mich. 1608/115) (my initial source).

2. See supra, text accompanying note 2 (of Case No. 2 of Appendix 16), as well as that note itself.

Case No. 17: Edward Starky's Case (Wiltshire, 1625)[1]

To the right worshipfull the kinge's majesties justices of the peace at the generall session of peace holden at the Devizes in the county of Wiltes the 20th day of Aprill Anno Domini 1625

Sheweth unto your worshipps your dayly orratour Elizabeth Martyn of Wootton Bassett in the county of Wiltes spinster, that whereas your orratour about Michaelmas last went into covenant service with one Edward Starky of Pirton in the aforesaid county, gentleman, and continued with the said Edward by the space o almost halfe a yeere, duringe the which time he the said Edward divers and sundry times sowght to have carnall knowledge of your orratour's body, attemptinge your said orratour thereunto with many faire promises, as that yf his wife did die he would marry with your orratour and also yf that your said orratour did feare conceavinge to be with child he would give your orratour somwhat to kill the child, yf that did not prevayle he would send your orratour away from his friendes and that they should not knowe what was become of your said orratour, and would give unto your orratour for mayntenance as women of that profession did require, but your orratour callinge to mind howe offensive such a foule act would be both to God and the world utterly refused to performe his insatiable request, Thus seeinge he could not performe his ymportunate suite he called your orratour upp into a chamber and fell a beatinge of your orratour with the shafte of a bull in such a pityfull manner as that your orratour's mistres who then lay in childbed was forced to forsake his [sic: her] bed and fell upon hir knees unto hir husband humbly desiringe him to spare beating of your orratour any longer, the which stripes are yet appearinge in the body of your said orratour, to his great greefe, upon which your orratour was forced to lye one month without doinge any manner of worke chargeable unto his frindes, And thereupon your orratour was forced to complayne unto Sir John St John, knight, barronett, and one of his majesties justices of the peace of this county, whoe tooke the examination of your orratour and thereupon bound the said Edward Starky and your orratour over unto this Sessions, wherby the matter may more manifest appeare, and your orratour thinketh that by reason of his greatnes and such frindes as he will make your orratour may be over-

borne unles it please your worshipes to consider this your orratours tender case, whoe is ready to make oath before this worshipfull bench of all the severall abuses from tyme to tyme offered by the said Edward Starky unto your said orratour. Wherefore your orratour humbly desireth that your worships would be pleased to render unto the said Edward Starky such punishment as the lawe and in your wisdoms shall thinke fitt and your oratour shalbe bound to pray for your worships longe lyfe with much increase of honour.

Memorandum that these examinantes or the most part of them were brought before us by Mr Stokes and examined at his request.

1. Wiltshire Record Office, A1/110/1625 Easter, fo. 142. Reference supplied by Professor Baker. This case is cited also in Ingram, supra note 10 (of Part IV) at 159 n. 126 (QS/GR East. 1625/142) (my initial source).

Case No. 18: R v. Mary Browne (Yorkshire, 1670)

Beverly N. The Examination of MARY BROWNE wife of ROBERT BROWNE of Beverley aforesaid Mercer taken the sixthday of March 1669.[1]

This Examinant sayth that aboute a Moneth before Christmas last shee was delivered of a Male Child [that] was still borne. And none [were] present when shee was delivered (itt being aboute two of the Clock in the morning) but one of her Children, who was in bedd asleep. And ben [being] Examinned how shee did dispose of the aforesaid Childe, [she] confesseth that the next day second(?) after her delivery shee roused one of her Children to make a hole in her garth [a small yard or enclosure] and afterwards, without the knowledge of her childe who digd the hole or of any other person, [she] buryed the Child of which shee was soe deliverd as aforesaid in the same hole in her Garthe. And further being examind who begott the saide child of wh___ [which] shee was last deliverd, shee sayth that itt was one ROBERT BROWNE of Beverley aforesaid, Taylor [Note: this Browne, who was a taylor by trade, was not M.B.'s husband. M.B.'s husband was a mercer.] and that shortly af____[after

she?] had buryed the same child, [she] acquainted him therewith _____after what answer RB gave her when she told____of this sad business, [i.e., being asked by the examiner what R.B. said when she (M.B.) informed R.B. of "this business",], hee [R.B.] asked her if noe body saw her wh__ did itt [i.e., he asked her if any person saw her with the child or saw how she disposed of the child's body?] and baed her bee of good Cheere & not trouble____[herself?] aboute itt. Being yet further demanded whether or no___[she was then quick with child, and if so, if she?] had not, after shee perseived(?) her selfe to be with Child, ___[of a quick child?] & taken something to kill itt in her wombe, & if then, of [the name of?] whome. [S]hee confesseth that shee did acquainte one JANE WORDRSLEY of Beverley aforesaid widdow that shee th [thought?] [she] was with Childe and did desire her to adminis...[administer] to her something for destroying the same who attend[in]g did and which shee this Examinant received & made of....for that End, being asked after if heretofore upon the like o[cc]asion shee had not made use of the aforesaid JW, [s]hee sayth that aboute three yeares since thinking herselfe to be beg [big?]_____ with Childe by the aforesaid RB Taylor and about a moneth after she was conseivd, shee did acquainte the said JW therewith and that the said JW w(ith) the knowledge & consent of this Examinant did give her a things w[hi]ch then causd her_____[to] Miscarry. Being after further asked whether shee were with quick Childe all the tyme shee last receivd the things of JW for destroying the same and if whether shee did not acquainte as well the said JW as allsoe the said RB Taylor that shee was with quick Childe, This Examinant sayth that shee believes shee was with quick Childe att the same time and that shee acquainted both the said RB & JW therewith.

This Examination taken the day & yeare_____written before

EDM HOWSON
  Maior
EDWD GREY

MARY BROWNE

- - -

Beverly N. The Examination of ROBERT BROWNE of Beverley aforesaid Taylor att Beverley the 6th day of March Anno Dm Ibi
___2

This Examinant upon the Confession of Mrs. MARY BROWNE being chargd with the begetting of the Childe whereof shee was lately deliverd w[hi]ch was since found buryed & supposed to be murtherd, hee sayth hee did not begett the said Child nor ever had the Carnall knowledge of her nor ever privy either to the birth or buryall of the said Childe.
[Same examinants] ROBERT BROWNE

Beverley N. The Information of FRANCES WARCOPP of Beverley of__ widdow taken upon oath the sixthday of March A____ _1669.[3]

This Informant sayth on Satturday was sennitt (?) shee, this inform[an]t, having occasion to digg a hole in the garth belonging to a house wherein shee & one Mrs MARY BROWNE now liveth for buring of Excrements, shee found there a Man Childe buryed aboute three quarters of a yarde deep; And that acquainting the said Mrs B therewi[th]____, confesse that itt was her Childe, and that shee herselfe buryd itt, there and desird this Inform[an]t to conceale itt.
[Same Examinants] FRANCES WARCOPP (X)

Indictment[4]

The Jurors for the lord King present on their oath that Mary Browne_____[, wife of Robert Browne, mercer,"] being pregnant with a certain male infant, on the first day of December_____[in the 21st year of King Charles II by the grace of God King of England], France and Ireland, Defender of the Faith, at Beverley_____[gave birth, by abortion, to a live male child?] _____

_____

Browne _____

__ not having _____[God before her eyes?][5] but by evil incitement set aside and injured after the abovementioned at Beverley aforesaid in the aforesaid county the claim to life and feloniously, wilfully and _____ then and there in the peace of the lord and the lord King, being

alive attacked himn there. And that _____ _____ male. Then at Beverley aforesaid in the county aforesaid, being alive in her hands__ _____ Then and there in a certain dung-pit with her hands aforesaid she feloniously and willfully _____ strangled and suffocated him. By reason of which certain strangulation and suffocation the male infant _____ __ was strangled and suffocated and then and there instantly died. _____ _____ _____ upon their oath they say _____ and there noted in aforesaid form _____ Demand for her appearance in court.

Gaol Book Entry[7]
7 March 1669/70 (22 Charles II)

Delivery from the King's County Gaol at York 7 March 1669/70 (22 Charles II)

Georgius Elwis	
Adam Tessiman	
"Maria [Mary ?] Browne"	
Georgi Gayle	Not Guilty & Delivered
Willus Scott	
Jana Winterburne	
Johes Avison	

A person may want to argue that the fact that the M.B. infanticidal murder indictment did not, in the alternative to the murder count, charge M.B. with the heinous misprision or misdemeanor offense of deliberately destroying, or attempting to destroy, the live male child in her womb by ingesting a potion, tends to prove that the same was not indictable at common law. The argument is spurious. M.B. was not indicted for secretly disposing of a dead human body. Yet no one could rationally argue that such a fact tends to prove that in England in M.B.'s day, the secret disposal of a dead body was not indictable.[7] For all any person knows, the M.B. prosecutor elected not to so prosecute M.B. in the alternative because he felt the alternative charge would suggest to the M.B. jury that even

the prosecutor had some doubt whether it could be sufficiently proved that M.B.'s aborted child was aborted alive. The prosecutor evidently was already on thin ice regarding being able to prove that M.B.'s child was born alive - so as to prove a necessary element of murder.[8] Also, for all any person knows, on one of the lost portions of the M.B. indictment, M.B. was indicted for the attempted abortion-murder of her child.[9]

It is doubtful that Jane Wordsley was prosecuted as an accessory before the fact to M.B.'s deliberated abortion. It does not appear that M.B. was indicted for deliberated abortion. And at common law an accessory before the fact could not be tried until the principal was convicted.[10] Also, it is doubtful that J.W. could have been convicted on only M.B.'s testimony, for M.B. would be J.W.'s accomplice.[11]

1. N-E Circuit Depositions, 1670; ASSI. 45/9/3/17. Reference and transcription supplied by P.B. Ferguson, B.A., B.Ed.. Bracketed insertions, except interletters, mine. The blank lines signify that the original text is not legible.

   In England, until 1752, the calendar year ended on March 24th; which means that March 6, 1669 back then would today be March 6, 1970.

   My initial source for this case is Sarah Anne Barbour-Mercer, Crime and the Criminal Law in Late Seventeenth Century Yorkshire 118-19 (unpub. Ph.d. dissertation, U. of York, 1988).

2. N-E Circuit Depositions, supra note 1. Transcription by Ferguson, supra note 1. The blank line signifies that the text is not legible.

3. Same as supra, note 2.

4. N & N-E. Circuit Indictment Files, 1669; ASSI. 44/17. Reference supplied by Ferguson, supra note 1. Translation from the Latin supplied by Ella Bubb. Second insertion mine. The blank lines signify that the text has been either destroyed or

is not legible. An examination of the indictment reveals that the right half of it is no longer in existence.

5. See, e.g., Commonwealth v. Carter, supra Case No. 3 (of Appendix 19).

6. N-Circuit Gaol Books, 1658-1673, Yorkshire, ASSI. 42/1. Reference supplied by Ferguson, supra note 1.

7. See Copnall, supra note 35 (of Part IV); and supra, note 212 (of Part IV) (Kanavan's Case, R v. Stewart, and R v. Young).

8. See supra, text (of Part IV) accompanying note 34; and supra, Section 7 (of Part IV).

9. See the authorities cited supra, in note 37 (of Part IV).

10. See supra, Case No. 2 (of Appendix 4); and supra, text (of Case No. 2 of Appendix 17) accompanying note 5.

11. See supra, text (of Appendix 22) accompanying note 3; and supra text (of Part II) accompanying notes 143-146.

ANALYTIC INDEX

This index is an analysis of the important ideas and facts in this book. An important idea or fact means one that substantially bears on one or more of the author's arguments or themes. Only the main entries or topics are in alphabetical order. The subdivisions appear somewhat randomly.

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