Mr. Justice Holmes:

> "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[1]

As a result of this decision, the interpretation of the Rules of Decision Act of 1789 established by Swift v. Tyson, 16 Pet. 1, to the contrary was overruled and the constitutional required interpretation substituted for it. While Erie did not involve a plaintiff who was an unborn child or who was representing an unborn child at the time of the injury which occasioned the suit, it set the stage for application by federal courts of the extensive state tort law, property law, and other law protecting the rights of unborn children. This law, as will be seen in Point one, provides extensive protection for the rights of unborn children. Thus, Article III of the Constitution of the United States, the Rules of Decision Act of 1789, and the decision in Erie, supra, now operate together to provide the unborn child with the constitutional status of a person in trials at common law in federal courts in cases where state law in applicable because state law accords that status to that child and that law, whether common law or statute law, is constitutionally required to be applied by these courts.

It would be a strange and bizarre constitutional doctrine that would provide protection for the unborn child as a person for the purpose of applying state law in its behalf in diversity of citizenship cases in federal courts under Article III of the Constitution but would deny protection for that same child in the same courts for the purpose of applying the Fifth, Fourteenth, and Ninth Amendments of the same document in a case in which a state asserted the constitutional validity of a statute under those Amendments designed as a reasonable protection of the constitutional right of that child, as a person,

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[1] Id. at 79.

to its life vis-a-vis its mother or parents. This Court should avoid an interpretation of the concept of person which would create such a violent conflict within the Constitution between Article III and the consitutional safeguards of the person contained in the federal Bill of Rights, particularly the Fifth and Ninth Amendments, and in the Fourteenth Amendment. It has refused to reach interepretations. As indicated in the McCulloch, Monia, and Duncan cases, supra, this Court has avoided such results and read the provisions of the Constitution as constituting one harmonious whole, with the purpose and meaning of one part being treated as providing illumination for the construction of its other parts.

Indeed, once this Court reached its decision in the Erie case, it became clear that one of the essential provisions of the federal Bill of Rights, the Seventh Amendment, must be construed to accord the unborn child or its representative an important procedural right at common law. This Amendment provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Yet, in Erie, this Court decided that there was no federal general common law but that in diversity of citizenship cases the rules for decision were constitutionally required to be the law of the state in which its sits, including both the statutory law and the decisional law of state courts. Thus, where, as is universally the case, the unborn child is given various substantive rights under the common law or statutes of a state and that child invokes the diversity of citizenship jurisdiction of a federal court, it would seem eminently clear that not only must that court apply the state common or statute law in question under Article III, but also where the protection of state common law is

invoked, it must accord the right of trial by jury to that child or its representatives under the Seventh Amendment. Both that Amendment as a matter of explicit requirement and Article III as construed by this Court in Erie make "the rule of the common law" the rule for decision-making purposes by federal courts, where the suit is at common law. Thus, the decision in Erie necessarily implies, in light of state common law according substantive rights to unborn children, that these unborn children must be recognized to be persons within the meaning of the constitutional safeguard of the person contained in the Seventh Amendment guaranty of a jury trial in suits at common law.

In view of this Court's decisions in the Duncan case, supra, and like cases, the fact that the unborn child must be recognized to be a person within the meaning of the Article III guaranty of the application of state common law in diversity of citizenship cases and within the meaning of the Seventh Amendment guaranty of a jury trial in such cases must surely mean that this Court will give the same scope to the concept of person, as including the unborn child, in administration of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Moreover, since the unborn child must be treated as a person within the meaning of the Seventh of the ten Amendments contained in the federal Bill of Rights as well as within the meaning of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, it seems clear that this Court must also hold that the unborn child must be treated as a person within the meaning of any other Amendment of the Bill of Rights in which the protection provided is relevant to the protection of the interests of the unborn child. This would obviously include the Due Process Clause of the Fifth Amendment, the Ninth Amendment, and probably also, the Fourth Amendment protection of "persons against unreasonable . . . seizures." Construction of the concept of person in all of these Amendments must be the same since the federal Bill of Rights was adopted, as previously indicated, as an integral package proposed by the Federalists for the better protection of many fundamental rights of the person after the framers recognized that adoption of the Constitution had become doubtful due to its lack of any guarantees of these rights.

In light of the above considerations it must be concluded that the Fourth, Fifth, Ninth, and Fourteenth Amendments must be construed to provide guarantees for the protection of the unborn child as a person. Any other holding would be so to sever them from their environment in the whole Constitution and from historical development of the concept of the person at the time of its adoption as to mutilate their "significance and sustenance."

3. The Citizenship Clause of the Fourteenth Amendment recognizes the unborn child as a person, who, when born, obtains the further status of a citizen. The unborn child has the right to protection of its prospective status as a citizen under the Citizenship Clause of the Fourteenth Amendment.

The first sentence of Section 1 of the Fourteenth Amendment provides:

> "All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Section 1 of the Fourteenth Amendment was drafted by Representative John A. Bingham of Ohio.[1] The debates concerning the adoption of the Fourteenth Amendment demonstrates the continuity in the conception of the person as between the times of the American Revolution and those of the post-Civil War period. The view of the person as an act of creation by God when he infuses a soul into the unborn child or foetus upon its being conceived is expressed by the draftsman of Section 1:

> "By that great law of ours it is not to be inquired whether a man is 'free' by the laws of England; it is only to be inquired is he

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[1] The Reconstruction Amendments' Debates. Alfred Avins, Ed. Virginia, Richmond: Virginia Commission on Constitutional Government, 1967. 760.

a man, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty. . . . Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal ".[1]

Representative Andrew J. Rogers of New Jersey emphasized the two types of right being spoken to by the Civil Rights Bill under discussion in March 1966:

> "There are only two kinds of right: one is that which a man acquires from the municipal laws. There is another right which God gives us, the right of self-defense, the right to protect our lives from invasion by others. There are no other rights but the rights of nature and the great civil rights. . . ."[2]

One of the central purposes of the Citizenship Clause of Section 1 of the Fourteenth Amendment was to make it certain that members of the Negro ethnic group as well as every other class of person obtained the political right of citizenship when born in the United States to add to their natural rights that they were considered to have received at conception from God. A common view of the members of Congress in 1866 was expressed by Representative William Lawrence of Ohio:

> "This clause is unnecessary, but nevertheless proper, since it is only declaratory

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[1] Id. at 274.

[2] Id. at 166.

of what is the law without it."[1]

The most significant aspect of Section 1 of the
--Leenth Amendment was to reinforce the rights of the
-rson by conferring upon the "person born . . . in the
·ited States" the political right of citizenship and by
·king it incumbent upon the states to respect the natural
·ghts of the person. In reinforcing the natural rights
: the person vis-a-vis the states, the overriding purpose
s to give the concept of person the widest possible
·verage. As stated by Senator Arthur I. Boreman of West
.rginia:

> "This, you will see, sir, is not confined to citizens of the United States, but it includes every person that is found within these States, and guarantees to all life, liberty, and property, and equal protection of the laws." . . . So that while, before this amendment, any class of persons in this country over whom the protection of the Constitution of the United States was not extended, there cannot now be any longer any question on that subject."[2]

The above extracts from the debates concerning the
·rteenth Amendment and Civil Rights legislation in the
:t-Civil War period, which are typical, demonstrate not
ly the continuity of those times with the times of the
:rican Revolution so far as the concept of the person as
:luding the unborn child is concerned, but also manifest
)urpose to confer citizenship upon any person upon his
:th and to give the concept of person the widest possible
)lication in the event there "was any question whether
:re were any class of person in this country over whom
: protection of the Constitution of the United States was
· extended . . ." particularly, in applying to the states
·ill of rights comparable to that applicable to the
:eral government.

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[1] Id. at 205.

[2] Id. at 558.

Due to its origin and purpose, the Citizenship Clause of Section 1 of the Fourteenth Amendment must be viewed as referring to unborn children, among others, when it speaks of "[A]ll persons born . . . in the United State: and subject to the jurisdiction thereof. . . ." The unborn child is the "person" before birth who, by virtue of being "born" in the United States, becomes a citizen of the Unit. States. In what sense could an unborn child be in any substantial sense less a "person" 8 minutes, 8 weeks, or 8 months before birth than at the moment of birth or some equivalent time thereafter? The child was, in the view of the person generally accepted at the time of the adoption of the Constitution and of the Fourteenth Amendment, as much a person before birth as after. Its natural right to life came to it, as again expressed by the draftsman of Section 1, by virtue of the fact of creation of its soul b, God.

But if the unborn child is a person included withi: the concept of the person utilized in the Citizenship Clau. of the Fourteenth Amendment, surely the unborn child must be recognized under this clause to have the right to claim protection from the federal courts for its prospective status when born, of citizenship. Surely, also, the state in which it is present must have the right to enact statut. law designed to protect that prospective status of the unborn child also. The Citizenship Clause speaks of two forms of citizenship: a citizenship of the United States and a citizenship of the State where the person resides. The State wherein an unborn child resides has a very specia reason, aside from its general interest in protecting persons in the enjoyment of their fundamental rights, for protecting the life of the unborn child. That child is a prospective citizen of that State. It is greatly needed by the State and the child greatly needs the State.

If the unborn child cannot obtain the protection of its prospective status as a citizen under the Fourteenth Amendment from federal and state courts and the state legislatures, citizenship of the United States and of a sta is a very precarious right. Next to the right to life, the right to citizenship ranks very high in the hierarchy of

rights of the person. That was the judgment of the common law and it was the judgment of those who drafted and adopted the Fourteenth Amendment. In general, there can be no citizenship attained by birth unless the right to life of the unborn child is protected. No unborn child can attain its citizenship unless its life is protected from and after the moment of its conception until the moment of birth against action that will certainly destroy it. Thus, protection of the right of the "person born" in the United States to be a citizen of the United States surely cannot be confined only to the period beginning with birth. If that right is to be effectively protected, the unborn child must be recognized to possess a prospective right to citizenship, a right contingent only upon successful completion of the process of birth from a mother living in the United States.

The matter may be viewed in another light. We are accustomed to speaking of the prospective jurisdiction of courts and the necessity they are sometimes under of acting to preserve that jurisdiction. We also speak of the prospective jurisdiction of administrative agencies and the necessity for seeking the aid of courts to preserve the status quo or rights pending the completion of an administrative action. See, e.g., Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); Board of Governors of Federal Reserve System v. Transamerica Corp., 184 F.2d 311 (C.A. 9, 1950) cert. denied, 340 U.S. 883 (1940); West India Fruit and Steamship Co. v. Seatrain Lines, 170 F.2d 775 (C.A., 1948); Public Utilities Commission of District of Columbia v. Capital Transit Co., 214 F. 2d 242 (D.C. Cir. 1954). If courts can act to preserve their prospective jurisdiction over such matters as proceedings before administrative agencies and to preserve the jurisdiction of administrative agencies over the subject matters committed to their care, they can and should act to protect their own prospective jurisdiction over unborn children who, when born, are entitled to ask the courts to vindicate their rights to citizenship, e.g., their privileges or immunities as citizens of the United States against state

laws that abridge them as protected by the Fourteenth amendment and their entitlement to all privileges and immunities of citizens of the several states as protected by Section 2 of Article IV.

> 4. The concept of property utilized in the Due Process Clauses of the Fifth and Fourteenth Amendments has reference primarily to the concept of property in state law. Thus, to the extent that state law of property recognizes that the unborn child has property rights, the Due Process Clause of these Amendments protects the unborn child as a person. Similar protection for the life and liberty of the unborn child cannot rationally be denied under these Amendments.

As demonstrated in Sterling v. Constantin, 287 U.S. 378 (1932), the concept of property contained in the Due Process Clause of the Fourteenth Amendment has primary reference to the law of states under which rights to property are created. The Court observed in this case:

> "The existence and nature of the complainants' rights are not open to question. Their ownership of the oil properties is undisputed." Id. at 396.

The complainants in this case were owners of interests in oil and gas leaseholds in the State of Texas, interests that had been acquired pursuant to the law of property of this state. The same principle must necessarily govern administration of the Due Process Clause of the Fifth Amendment with respect to property rights arising under state law.

The common law in England and in this country has long since recognized the right of an unborn child or foetus to take by inheritance, subject to the event of subsequent birth:

"An intestate's posthumous child is considered in being and will inherit just as if he had been born in the intestate's lifetime ...(T)his was the common law rule with respect to both realty and personalty...(A) posthumous child may recover his share of the father's land from a bona fide purchaser obtaining title through a judicial partition sale."[1]

In Texas a child en ventre sa mere is held included among those children in being at the death of the testatrix who are to take under her will. See James v. James, 174 S.W. 47 (Tex. Civ. App., 1914.) By statute in Texas, when a posthumous child is unprovided for by settlement and pretermitted by his father's last will and testament, he succeeds to the same portion of the father's estate as he would have been entitled if the parent had died intestate.[2]

As early as 1795, English courts recognized the rights of the unborn child in property law. In Doe v. Clarke, 2 H.Bl. 399, 126 Engl Rep. 617 (1795), the court held that the description in a devise to "children living at the time of his (the life tenant's) decease" included unborn children. American courts utilized the same approach. In Hall v. Hancock, 15 Pick, 255 (Mass., 1834, Chief Justice Shaw held that an unborn child fell within the meaning of a bequest to grandchildren "living at my decease." In the case of La Blue v. Specker, 358 Mich. 558, 100 N. W. 2d 445 (1960), an unborn illegitimate child was held to be a child or "other person" having standing to bring suit under a dram shop act, for the death of his father, which had occurred before the child's birth. The Court stated:

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[1]Atkinson on Wills (2nd ed. 1953) 75

[2]See, Vernon's Annotated Texas Statutes, Probate Code, Section 66.

"For certain purposes, indeed for all beneficial purposes, a child en ventre sa mere is to be considered as born.... It is regarded as in esse for all purposes beneficial to itself, but not to another....Formerly, this rule would not be applied if the child's interests would be injured thereby, ...but, for purpose of the rule against perpetuities such a child is now regarded as a life in being, even though it is prejudiced by being considered as born.... Its civil rights are equally respected at every period of gestation."[1]

It is important in considering the concept of property at this point to remember the admonition Justice Gray addressed to other members of the New York Court of Appeals in his dissent filed in the case of Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (Ct. App. N.Y., 1902). He stated:

> "Property is not, necessarily, the thing itself, which is owned; it is the right of the owner in relation to it. The right to be protected in one' possession of a thing, or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it; and, so, it is called forth for the protection of the right to that which is one's exclusive possession, as a property right."[2]

The majority's forgetting of this fundamental concept of the person as being at the center of even the concept of

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[1] 1 Bouvier, Law Dictionary, p. 1038

[2] Id.

property led to the rejection of its decision shortly thereafter by the people and the Legislature of the State of New York. (New York Laws, 1903, c. 132, N. Y. Civil Rights Law ss 50, 51.)

Thus, when the state recognizes that the unborn child may take real or personal property under a will or a statute of descent and distribution, it is not only declaring what is "property" that is within the meaning of the Due Process Clause of the Fourteenth Amendment. It is also declaring that the unborn child is a person to be protected with respect to its property right. The very concept of property, as Justice Gray long ago pointed out, is a concept of the person and of the right of the person. It is the state's definition of the person and of the rights of the person relative to property that is referred to by the term "property" in the Due Process Clause of the Fourteenth Amendment.

If the unborn child is a person protected as to its property under the Due Process Clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States, the child must also be a person under the same clauses for the purpose of the protection of its life and liberty. It would be a strange and bizarre doctrine that protected the property of the unborn child under these Amendments, as is clearly the case, but not its life and liberty. As to life, we are dealing with a matter that is less dependent upon the state for its being than property is. Life is the product of natural processes, although with the Founding Fathers many of us may affirm that it is not wholly so, whereas property is wholly the product, as a concept, of legal processes. The life of the person does not depend for its being so much upon the state as the state depends upon the life of the persons composing it. It is for this reason that the Founding Fathers recognized it to be the foundational right to all other rights. It was perhaps not without significance that they mentioned it before "liberty" and property" in the Fifth Amendment. Thus, if any lesser

right of the unborn child is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, the foundational right to life of the unborn child must also necessarily be protected by them.

In determining upon the propriety of protecting the unborn child as a person, with respect to its life and liberty, under the Due Process Clauses of the Fifth and Fourteenth Amendments and under other constitutional safeguards of the person, this Court should be as guided by decisions of state courts at common law with respect to the protection of the unborn child's life and liberty as it is necessarily controlled by their decisions with respect to the unborn child being a person who may own property when administering the protection of property contained in Due Process Clauses. The Constitution, after the decision in the Erie case, supra, and as applied in the actual administration of the Due Process Clauses, must be taken as at least establishing a principle requiring this Court to give strong consideration, if not a prima facie effect, to state decisional law and statute law in determining who is a person for purposes of the constitutional safeguards of the person. A regard for state decisional and statute law indicates that states have long since determined that the unborn child's liberty and life are to be as much protected at common law and by statutes as the unborn child's property is.

In the area of tort law, the unborn child has come into his own as a person since World War II. In Scott v. McPheeters, 33 Cal.App.2d 629, 92 P. 2d 678 (1939), rehearing denied, 93 P.2d 562 (1939), the court held that a child might sue for injury to her in delivery before birth. The District of Columbia courts reached the same result. Bonbrest v. Kotz, 65 F.Supp 138 (D.D.C. 1946). Since 1946, this result has been generally reached:

"...(A) series of more than thirty cases, many of them espressly overruling prior holdings, have brought about the most spectacular abrupt reversal of a well-settled rule in the whole history of the

law of torts." [1]

The Supreme Court of Texas in 1967, in overruling a prior holding, likewise held that the parents of a viable child who had been injured in the sixth or seventh month of its mother's pregnancy as a result of the defendant's negligence could recover damages for its death after birth due to these injuries. Leal v. C. C. Pitts Sand and Gravel, Inc. Tex. , 419 S.W.2d 820 (1967). On October 6, 1971, the same court extended the new principle of protection to an unborn child injured prior to its having become viable. Delgado v. Yandell, Tex. , (1971) The majority of jurisdictions now recognize that a wrongful death action may be brought for negligently inflicted injury to the unborn child resulting in its death, whether or not it was viable at the time of the injury, and whether born alive or still born. Torigian v. Watertown News Co., 352 Mass. 446, 225 N.E. 2d 926, 927 (1967).[2]

In the area of family law, the courts have recognized the right of the unborn child as a person to support by his parents. Kyne v. Kyne, 38 Cal.App2d 122, 100 P.2d 806 (1940), involved a suit for support brought by the guardian ad litem of a six month's old unborn child against the natural father. The court held that under Section 29 of the Civil Code the father of an unborn child could be compelled by that child, acting through a guardian ad litem, to support it. This section provided that an unborn child "is to be deemed an existing person", so far as may be necessary for its interests..." The court also

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[1] Prosser on Torts, (3rd ed.,1964) p. 355, 356. Also see, Gordon, The Unborn Plaintiff, 63 Mich. L. Rev. 579 at 627 (1965).

[2] Harper and James, Torts, Sec. 18.3 (1956); David J. Louisell and John T. Noonan, Jr., "Constitutional Balance" in The Morality of Abortion (Harvard Press, 1970) 20 at 226-230.

referred to a provision of the California criminal law having an even broader reach in protecting the unborn child as "an existing person." Section 270 of the California Penal Code, as amended in 1925, St. 1925, p. 544. The Supreme Court of Colorado has recently held that an unborn child is within the concept of "child" utilized in a paternity statute and that a juvenile court may issue temporary orders for support of that child pending adjudication or disposition of the child's case. People v. Estergard, Colo. , 457 P.2d 698 (1969). Otherwise, said the Court, "the father of an unborn child ... (could) evade his responsibility for support by leaving the state at any time prior to the birth of the child."[1]

The unborn child has been recognized as a person to have a right to life that is superior to his mother's right to free exercise of her religion. In Application of the President and Directors of Georgetown College, Inc. 331 F.2d 1000 (C.A. D.C., 1964), cert. den., 377 U.S. 978 (1964), Judge J. Skelly Wright issued, after the District Court for the District of Columbia had refused to do so, an order to a hospital to administer blood transfusions to a mother carrying a seven-month unborn child so far as necessary to save the mother's life, the mother and her husband having refused to permit the transfusions on religious grounds. The Court based his authority for the order upon the lack of right of the parent to forbid the saving of his child's life by action of the state, citing such cases as People ex rel Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, cert. denied, 344 U.S. 824, 73 S.Ct. 24. It also suggested that the state, in this instance the United States, may also be under a corresponding duty to act in behalf of the mother and child:

> "Under the circumstances, it may well be the duty of a court of general jurisdiction, such as the United States District Court for the District of

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[1] Id. at 699.

Columbia, to assume the responsibility of guardianship for her, as for a child, at least to the extent of authorizing treatment to save her life.

"The state, as parens patriae, will not allow a parent to abandon a child, and so it should not allow this most untimate of voluntary abandonments. The patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother."[1]

In Raleigh Pitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964) cert. den., 377 U.S. 985 (1964), the Court held that an unborn child was entitled to the Law's protection and thus to obtain a court order directing a blood transfusion for his mother if necessary to save her life or the life of the child. The Court referred to its earlier decision in State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962), in which it had held that the concern of the state for the welfare of an infant justified the ordering of blood transfusions for the child notwithstanding the objections of its parents on religious grounds. In that case, it cited the opinion of the Supreme Court of the United States in Prince v. Massachusetts, 321 U.S. 158, 166-167, 64 S.Ct. 438-432.

> "Neither rights of religion nor rights of parenthood are beyond limitation. ...The right to practice religion freely does not include liberty to expose...the child...to ill health or death."

The New Jersey Court pointed out that the facts of the case before it:

> "clearly evidence a more compelling necessity for the protection of a child's welfare than those in

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[1] Id. at 1008.

Prince." 181 A.2d at 757.

These decisions should be persuasive to this Court that the unborn child should be considered a person for the purpose of administering the protection of the life and liberty of the person provided by the Fifth and Fourteenth Amendments just as other decisions by state courts are controlling upon this Court for the purpose of administering the protection of property of the person provided by these same Amendments.

The result of the argument in subpoint C is that there are numerous parts of the Constitution which protect the unborn child as a person. That the unborn child is so protected in these parts of the Constitution should be persuasive to this Court that the unborn child should be held to be a person within the meaning of any constitutional safeguard of the person that is relevant to protecting its interests.

D. The concept of person must be held as much beyond the power of the state or nation to define, in the sense of determining whether or not some child of human beings is entitled to be treated before the law as a person, as it is beyond the power of the state or nation to define the concept of religion, in the sense of determining whether or not some group is pursuing a religious cause and entitled to solicit support for it, and for the same reasons

This Court held in Cantwell v. State of Connecticut, 310 U.S. 296 (1940) that the Due Process Clause of the Fourteenth Amendment was violated by a state statute that required a person to obtain a permit as a condition of soliciting support for the perpetuation of his religious views where the official passing upon the permit application was empowered to determine whether the cause for which the solicitation was sought to be done was for a religious cause and to deny the permit if he found the cause was not a religious one.

Speaking for the Court, Justice Roberts stated:

"His (the official's) decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of the liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth." 310 U.S. at 305. [parentheses added]

By the Cantwell case, this Court put it completely beyond the authority of the state to define what a religious cause is and to determine in light of that state definition whether the activities of a given group of persons constituted the pursuit of religion or of a religious cause and thus whether that group would enjoy the right to survive or live through the efforts of its members in soliciting support for perpetuation of its views. The concept of religion was by this decision held a concept not subject to definition by the state but rather as a concept having an integrity and meaning independent of the state and to be respected by it. In effect, the Court held that the Fourteenth Amendment insofar as it contained the protection of the person set out in the First Amendment against any "law respecting the establishment of religion, or prohibiting the free exercise thereof..." took the definition of the concept of religion out of the hands of the state or nation and elevated it to the level of a constitutional concept. The Court was not called upon in that case to state what the constitutional concept means.

The recognition of the constitutional immunity and independence of the concept of religion by this Court was held to be necessary for the protection of the free exercise of the chosen form of religion by way of giving the freedom to act "appropriate definition to preserve the enforcement of that protection." 310 U.S. at 304. The

"appropriate definition" of the freedom to act in the exercise of one's chosen religion was achieved by preventing the state from determining what a religion or a religious cause is and conditioning one's exercise of his religion thereby.

Similarly, if the concept of the "person" contained explicitly or implicitly in numerous safeguards of the person in the Constitution of the United States is one the state or the nation is permitted to define according to majority vote, the state can readily control by the whim of a capricious majority that looks askance upon various types of person, who is entitled to be treated as a "person" within the state or nation. The concept of person utilized in the Constitution is an even more fundamental concept than the Constitutional concepts of "religion", "freedom of speech", "freedom of the press", "right...peacably to assemble, "petition..for a redress of grievances", "citizen", "right to a speedy and public trial", and many others. It is more fundamental as a concept simply because where a being or person is in a position of claiming that he or she is a "person" within the meaning of the constitutional safeguards of the person, the decision upon this claim can conclude that being's or person's right to life and to all the other rights guaranteed to the person.

The argument just made does not tell us what the definition is of the constitutional concept of the person any more than the decision of this Court in the Cantwell case revealed what the definition is of the constitutional concept of "religion". It does tell us that if that definition is necessary, as it seems to be in order to dispose of this case, it must be made in accordance with the constitutional interpretation criteria that this Court has applied in previous cases. It also tells us that no federal court can rationally dispose of the issues in this case without confronting and resolving the issue of whether an unborn child is a person under the constitutional concept of the person. It also tells that if the unborn child is a person within the meaning of the

Constitution then a state has the right to enact a statute seeking to protect the constitutional right to life of the unborn child providing it has done so in a reasonable way.

E. The long continued construction of the Constitution by the Congress and by the Chief Executive as comprehending the unborn child within its concept of the person bind this Court in administering the Constitutional safeguards of the person, particularly the Fourth, Fifth, Seventh, Eighth, Ninth, and Fourteenth Amendments.

This Court has long since recognized that a Congressional construction of the Constitution of the United States through the enactment of statutes or resolutions which is either contemporaneous or long continued is "entitled to the greatest respect."[1] Indeed, the respect accorded a contemporaneous or long continued construction of the Constitution by Congress and followed by the executive department over a period of 73 years was so great that it has been held that construction "fixes the construction to be given its provisions" by this Court so that Congress may not thereafter depart from the construction it has, as an institution, been responsible for creating. Myers v. United States, 272 U. S. 52, 175 (1926).

The Congress of the United States enacted a statute in 1825 which adopting, among others, state criminal laws prohibiting abortion for application within federal enclaves located in the different states. 4 Stat. 115 (March 3, 1825). This statute was modeled upon a section of bill drawn by Mr. Justice Story. Of the latter bill, its distinguished author stated:

"The state courts have not jurisdiction of crimes committed on the high seas, or in places ceded to

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[1] Ex Parte Quirin, 317 U. S., 42 (1942)

> the United States. Rapes, arsons, batteries, and a host of other crimes may in these places be now committed with impunity."[1]

The formula proposed and later adopted for dealing with this problem was the following:

> "where the punishment of which offense is not specially provided for by any law of the United States, such offense shall, upon a conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the state in which such ...placed, ceded as aforesaid, is situated, provide for the like offense when committed within the body of any county of such state."

The statute came to be called the "Assimilative Crimes Statute." At the time this comprehensive formula was adopted, Congress did not have any law providing specially for the punishment of abortion. However, Connecticut had four years previously enacted an abortion law based upon the English Statute of 1803 (43 Geo. 3, c. 58.) which penalized all forms of abortion whether or not the abortion occurred before the "quickening" of the unborn child. Conn. Stat. Tit. 22 ss14, at 152 (1821). New York added an abortion statute in 1828 (N. Y. Rev. S. Vol. 2, ps 578-579 21 (1836) of the type that became traditional in this country, as was true of Maine in 1840, Ohio in 1841, as well as of Massachusetts and Illinois in 1845 (Mass. St. 1845, c. 27; I11. R. S., 1845, p. 158, s. 46); of California in 1850 (Stats. 1850, ch. 99, s. 45, p. 233); of Texas in 1854 (Tex. Pen. Code, Arts. 531-536; Texas L. 1854, ch. 49, 58, Texas Penal Code, 1857), Pennsylvania in 1860 (1860, M.L. 382, s. 88), and Colorado in 1861 (L. 1861, p. 296, s. 42), and Virginia in 1848 (L 1847-8, p. 96, ch. 3 §9).[2]

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[1] W.W.Story, The Life and Letters of Joseph Story, Boston, Little & Brown, 1851. Vol. 1, 297.

[2] David Granfield, The Abortion Decision.Garden Cit, Doubleday & Co., 1969. 79.

Since the 1825 Federal Act had been held to apply only to places that had been ceded to the United States, prior to its enactment, United States v. Barney, 5 Blatchf. 294, Fed. Cas. No. 14,524, its coverage was much less than the extent of the problem to which Justice Story had sought to direct it. Thus, in 1866, when congress substantially reenacted the 1825 statute it made the law applicable to "any place which has been or shall hereafter be ceded." (14 Stat. 13, April 5, 1866). The effect of this statute was to extend its coverage to all of the states previously mentioned as well as to all others that theretofore or thereafter enacted the traditional form of abortion statutes. All fifty states eventually proscribed abortion. In all of them abortion was permitted to save the life of the mother. In Colorado and New Mexico only was abortion to prevent serious and permanent bodily injury to the mother permitted, and only in Alabama, Oregon, and Massachusetts was abortion to protect the health of the mother permitted.

The policy of The Assimilative Crimes statute has been continuously in effect in this country since 1825 through various reenactments, see United States v. Sharpnack, 355 U.S. 286 at 291 (1958), and is now codified in the Revised Criminal Code as 18 U.S.C. s 13. The effect of the 1825 statute and its subsequent reenactments was, prior to 1967, to adopt a substantially uniform state law against abortion for application in federal enclaves. All fifty states had proscribed abortion. In all of them abortion was permitted in order to save the life of the mother. Only in Colorado and New Mexico was abortion permitted to prevent serious and permanent injury to the mother, and only in Alabama, Oregon, and Massachusetts was it permitted to protect the health of the mother.[1]

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[1] See David Granfield, Id. at 79.

Thus, through the Assimilative Crimes Statute of 1825, the United States initiated a policy that made enforceable a substantially uniform policy directed against abortion in federal enclaves located within the fifty states of the nation. That policy by 1967 had been in existence for a total of 142 years. It was a policy, like that of the state criminal law for whose application it proveded in federal enclaves, that involved.

> "recognition of the human dignity of the unborn and the protection of unborn life by criminal sanctions." [1]

This congressional protection of the life of the unborn extending over a period of 142 years without variation under the Assimilative Crimes Statute constitutes one of the clearest legislative constructions of the appropriate use of its powers to protect federal interests within federal enclaves under the Constitution of the United States. It is a recognition that the unborn child is a human person, under the constitution, and that Congress has the authority under the 17th clause of Article I, Section 8 to provide for the protection of its right to life. The reenactment of the original Assimilative Crimes Statute on April 5, 1866, during the period of Congressional consideration of various civil rights measures and of the proposed Fourteenth Amendment, in light of the substantial number of statutes directed against abortion that had been enacted since 1825 suggests that the Congress saw this statute as, in part, a civil rights statute for the protection of the security of the person. In any event, this legislative construction of the Constitution was continued for a period of nearly double the 73 years of another legislative construction which this Court held, as previously noted, "fixes the construction" to be given its provisions."

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[1] David Granfield, Id. at 81.

Surely, if Congress and the Court are not free after 73 years of a consistent Congressional construction of the Constitution to change that Construction, several state governments are not free by enactment of unlimited or substantially unlimited abortion laws to change a congressional construction of 142 years standing that the unborn child is a human person deserving protection of its right to life in the exercise of the power to provide exclusive legislation for places ceded by the states to the United States. The 142 year old construction should surely "fix the construction" by Congress for the Congress, the State Legislatures, and this Court that the unborn child is a person within the meaning of the Constitution of the United States.

Congress and the Chief Executive have given numerous long standing as well as recent constructions of the Constitution recognizing the unborn child to be a person deserving protection by the United States for its life and health.

Prior to the enactment of the Uniformed Services Dependents' Medical Care Act of 1956 (70 Stat. 250, Title 10, U.S.C. ss 1071-1085), the dependent wives and children, both born and unborn, had been receiving medical care from the uniformed services for over 100 or more years despite the fact that there was no specific statutory authority for rendering this care until 1884 in the case of the United States Army and 1943 in the case of the United States Navy. Congressional Record Statement of Representative P. Kilday of Texas, Congressional Record, Vol. 102, 3847 (March 2, 1956). Medical care was provided dependents of the U.S. Navy and U.S. Marine Corps by the Navy, of members of the Coast Guard, Public Health Service, and Coast and Geordetic Survey by the Public Health Service, and of the U.S. Army and Air Force Personnel by the Army. These statutes gave virtually unlimited discretion to the Secretaries of the Army, Navy, Air Force, and the Secretary of Health, Education, and Welfare in providing medical care to members of these services and their wives and children.

The Uniformed Services Dependents' Medical Care Act of 1956 was designed to continue the long standing policy of providing medical care to dependent wives and children, both born and unborn, of members of the Uniformed services, but also to improve greatly the quality of medical care available, to make it more uniform in nature, and to make more readily available to the more than 40 per cent of all dependents who had not been able to take advantage of it due to the "shortage of military doctors, overcrowding of military medical facilities, (and the fact that)...so many of the military dependents are located where they cannot take advantage of existing military care." Congressional Record. Vol. 102, 3851-3853 (March 2, 1956).In its section 1072 (Title 10, USC) the term dependent was defined to include:

> "an unmarried legitimate child who has not passed his twenty-first birthday ...(or) is incapable of self-support because of mental or physical incapacity."

Section 1077 of Title 10 U.S.C. provided that only the kinds of health care specified in that section were authorized to be provided dependents of a member of a uniformed service. One of the authorized kinds of health care was "maternity and infant care." This phrase was further defined in joint regulations issued by the Secretaries of Defense and Health, Education, and Welfare who were required under Section 1076 to issue these regulations in order to prescribe in greater detain the medical care available under Section 1077. Joint regulations issued under the Act provided, by way of further definition of the statutory phrase "maternity and infant care", that the phrase include:

> "prenatal and postnatal care, and routine care and examination of the newborn infant." Title 32, Section 577.64 (e) (7).

Neither the Act nor the joint regulations issued under them referred to or authorized the latter but rather referred to the following health benefits, among others

"Drugs: Prescriptions written by either uniformed services or civilian physicians will be filled at uniformed services facilities...."

Family planning services and supplies, including counseling and guidance. These services and supplies will be provided in accordance with sound medical practice to any eligible dependent upon request. Title 32, Section 577.64(e)(3),(9).

The Congress that enacted this Act obviously was concerned with the welfare of mothers and unborn children. Congressman Paul Kilday, Chairman of the House Committee on Armed Forces Subcommittee No. 2 which conducted hearings on H.R. 9429 which became the new Act, made statements that typify the congressional mind in 1956 in discussing the right of dependent wives and their unborn children to obtain medical care under the statute from private physicians in private hospitals:

> "A woman (military member's wife) expecting a baby has a number of friends who have recently had babies who knew the doctor who took care of them, and they knew everything came out all right and they naturally want to go to that doctor in the community...If they (military personnel) do not have quarters on the base, they are out in the civilian community where they meet the people and hear these things talked about.
>
> "...the woman expecting her baby might go home in the sixth month of pregnancy. Most Texans do that. They want their kids born in Texas and they go home." Hearings before Committee on Armed Services, U.S. House of Representatives, Comm. Rep. 53, 84th Cong., 2nd Sess. 1956 6029, 6034.

Clearly, at this point, Congressman Kilday had reference to a new feature of the bill that would permit a serviceman's dependent wife to obtain medical care for herself and her child in a private hospital under the cognizance of state law. His statement not only reflects the concern of the legislators for providing medical care for the wife and the unborn child but also for the provision of this care in the context of a private hospital by a private physician subject to and controlled by the state law of abortion. In the particular example he gave, that law was the one now being challenged in this case. Congress at the time it enacted the Uniformed Services Dependents' Medical Care Act in 1956 was reaffirming its 100 year commitment to respect for the unborn child as a human person and seeking to provide for improved health care to be made available to it and to its mother. Having indicated this concern with the unborn child as a dependent entitled to medical or health care, Congress drove home the point by providing that no dependent should be denied equal opportunity for that care through requiring the Secretaries of Defense and Health, Education, and Welfare to issue joint regulations;

> "to assure that dependents entitled to medical or dental care under this section will not be denied equal opportunity for that care because the facility concerned is that of a uniformed service other than that of the member."[1]

Throughout the history of the administration of the 1956 Act the Uniformed Services continued to give effect to the Assimilative Crimes Statute policy of respecting the state law on abortion in federal enclaves. In July 22, 1970, the Surgeons General of the Departments of the Army, Navy, and Air Force joined in a memorandum addressed to the Assistant Secretary of Defense (Health and Environment) taking the position that

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[1]Title 10, S 1076(d), U.S.C.

"Abortions will be performed within the limits of local state laws."

On July 31, 1970 the Assistant Secretary of Defense, Louis M. Rousselot, M.D., F.A.C.S. issued a memorandum by way of reply to the joint memorandum of the Surgeons General of the Armed Forces stating, without citation of authority for his directive, disapproval of the above limitation on performance of abortions. He referred to his Memorandum of July 16, 1970, which also was without citation of authority, directing that

"Pregnancies may be terminated in military medical facilities when medically indicated or for reasons involving mental health and subject to the availability of space and facilities and the capabilities of the medical staff."

There was no authorization for this action either in the 1956 Act or any joint regulation issued by the Secretaries of Defense and Health, Education, and Welfare as required by that Act with respect to forms of health care to be available to dependents.

After the implementation of this new "memorandum" policy on abortion by the Secretary of the Air Force by Air Force Regulation 160-13 and its application in Texas at the Willford Hall Air Force Base Medical Center, Lackland Air Force Base located in San Antonio, Texas, and the destruction of more than 100 unborn children without compliance with the Texas law of abortion, the case of Paul B. Haring v. Commander Willford Hall Air Force Base, No. SA 71 CA 11 was instituted on January 15, 1971, before the United States District Court for the Western District of Texas. This case challenged the validity of these abortions and of the regulation under which they were being performed by virtue of Fifth, Eighth,

and Ninth Amendments to the Constitution of the United States.[1] A temporary restraining order against further abortion under the challenged regulation by the Court was, on Defendants' Motion to Dismiss, permitted to expire without extension as requested by the Plaintiff and the Defendants' Motion was granted on the ground that the plaintiff had not satisfied the Court on the legal question of having sufficient standing to bring the suit. The case is now on appeal before the Fifth Circuit Court of Appeals, docketed as No. 71-1404.

On April 3, 1971, following institution of and the decision in the Haring case, supra, the President of the United States, Richard M. Nixon, issued a directive overturning the "memorandum policy" of the Assistant Secretary for Defense (Health and Environment) and the Air Force Regulation 160-12. He stated:

> "I have directed that the policy on abortions at American military bases in the United States be made to correspond with the laws of the states where those bases are located. If the laws in a particular state restrict abortions, the rule at the military base hospitals are to correspond to that law."...
>
> "From personal and religious beliefs I consider abortions an unacceptable form of population control. Further, unrestricted abortion policies, or abortion on demand, I cannot square with my personal belief in the sanctity of human life-including the life of the yet unborn. For, surely, the unborn have rights also, recognized in law, recognized even in principles expounded by the United Nations.

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[1] U.S.C. Title 42, Secs. 1981 and 1988; USC., Title 10, Section 1077; and Title 18, Sec. 13.

> "Ours is a nation with a Judeo-Christian heritage. It is also a nation with serious social problems- problems of malnutrition, of broken homes, of poverty and of delinquency. But none of these problems justifies such a solution.
>
> "A good and generous people will not opt, in my view, for this kind of alternative to its social dilemmas. Rather, it will open its hearts and homes to the unwanted children of its own, as it has done for the unwanted millions of other lands."[1]

The action of the President caused the health policy of the Department of the Air Force to be returned after a brief, unauthorized departure therefrom, to the traditional administration of health care by the armed forces of the United States in behalf of unborn children, a policy that had been unbroken in its administration between approximately 1856 and 1970, a total of 114 years. This, too, constitutes a long-continued Congressional and Executive construction of the Constitution of the United States as authorizing the exercise of federal power to protect the unborn child as a person in its right to life.

Congress has consistently between 1873 and 1971 maintained a vigorous policy against abortion by statutes specifically directed at the practice. One of these statutes, the District of Columbia Code provision section 22-201, was recently examined by this Court in United States v. Vuitch, 402 U. S. 62 (1971). The Court held the statute, originally enacted in 1901, was not unconstitutionally vague insofar as it excepted from its coverage an abortion "for the preservation of the mother's life or health".

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[1]The New York Times, Sunday, April 4, 1971, p. 1.

Congress has since 1873 prohibited the importation of any drug, medicine, or article for causing unlawful abortion. 17 Stat. 598-599 (March 3, 1873). It has also since 1876 prohibited the use of the mails for the support of operations to effectuate an abortion through the mailing of information concerning these operations. 19 Stat. 90 (July 12, 1876). These two laws are now contained in the United States Code, Title 18, sec. 1461 and Title 19, sec. 1305, respectively. When these laws were modified on January 8, 1971, so as to strike their coverage of the same matter relative to "the prevention of conception", Congress continued intact their policy relative to "unlawful abortion". Pub. Law 91-662. Thus, for nearly a hundred years Congress has directed two major statutes against vital avenues for effectuating "unlawful abortions" in areas subject to exclusive federal regulation. The Court of Appeals for the Seventh Circuit in Bours v. United States, 22 Fed. 960 (C.A. 7, 1915) held that the word "abortion", as used in the predecessor to Title 19, section 1305, U.S.C.,

> "must be taken in its general medical sense. ... Therefore a physician may lawfully use the mails to say that if an examination shows the necessity of an operation to save life he will operate, if such in truth is his real position. If he uses the mails to give information that he elects, intends, is willing to perform abortions for destroying life, he is guilty, irrespective of whether he has expressly or impliedly bound himself to operate."[1]

Thus, for nearly a hundred years, Congress has directed two major statutes against vital avenues for effectuating "unlawful abortions", the latter being construed to mean any abortion not performed due to the necessity of an operation to save life. This action in regulating the use of the mails and the importation of goods into this

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[1] Id. at 964.

country constitutes a third long-continued construction by Congress that the unborn child is a person within the meaning of the Constitution having a right to life which Congress has the authority to act to protect.

A more recent construction of the Constitution by Congress is represented by the Federal Tort Claims Act, Title 28, Sections 2671 et seq., U.S.C., which was enacted in 1948. This act gives the unborn child the right to recover for injuries inflicted upon them as a result of the negligent acts of federal officers and employees generally and of the uniformed services, including physicians when the latter are rendering medical care to them and to their mothers. In Sox v. United States, 187 F.Supp. 465 (D.C.S.C., 1960) the Government stipulated that it was liable for any injuries sustained as a result of the negligence of a military policeman by an unborn child during the sixth month of its mother's pregnancy and the child recovered the sum of $260,000 for those injuries which left her "completely helpless and entirely dependent upon others". In Rewis v. United States, 369 F. (C.A. 5, 1966) the Court held that in a tort action brought by the parents of a child for causing her wrongful death as a dependent treated by an Air Force Medical Officer that it was not necessary for the plaintiffs to adduce specific testimony, as the trial court had rules was necessary, that "to a reasonable degree of medical certainty" the child's life could have been saved. This child was fifteen months old. These cases indicate that Congress is as concerned with protecting the unborn child as a person as it is with protecting other children from injuries inflicted by the negligent action of its own officers and employees.

Even more recently, Congress has show its concern with the efforts of some states to promote family planning by abortion. Section 1008 of the Family Planning Services and Population Research Act of 1870, signed by the President on December 24, 1970, provided:

"None of the funds appropriated under this title

shall be used in programs where abortion is a method of family planning." Pub. Law 91-572, 84 Stat. 1504.

Thus, from 1825 to the present Congress has created not less than six major statutory policies all of which are directed toward treating the unborn child as a person and protecting its right to life and to freedom from invasion of its bodily integrity or privacy. All of these policies are still in force today. Some of the oldest of these have been reaffirmed as late as 1971. Others are newer policies that widen the area of protection for the unborn child such as those concerned with health care and redress for tortious invasions of its interests. One of these policies, that of health care for dependents of uniformed services' personnel originated in the Executive Branch of government and was later codified by an act of Congress. Taken together, this long-continued Congressional and Executive construction of the Constitution as contemplating the unborn child as a person and as authorizing these branches of government to provide protection of the life and other interests of the unborn child would seem to foreclose this Court from taking any other view in construing the constitutional safeguards of the person.

The fact that since 1967 several states have enacted abortion laws in basic conflict with this long-standing federal policy against abortion except for the necessity of preserving the life or avoiding a grave peril to the health of the mother does not, by operation of the federal Assimilative Crimes Statute, supra, undercut that policy.

This Court in United States v. Sharpnack, specifically reserved decision upon the point of the effect of the Assimilative Crimes Act

"where an assimilated state law conflicts with a specific federal criminal statute, cf. Williams

v. United States, 327 U.S. 711, or with a federal policy. Cf. Johnson v. Yellow Cab., 321 U.S. 383; Stewart & Co. v. Sadrakula, 309 U.S. 94; Hunt v. United States, 278 U.S. 96; Air Terminal Services, Inc. v. Rentzel, 81 F. Supp. 611; Oklahoma City v. Sanders, 94 F. 2d 323."[1]

The position of amicus is that because of the long-standing and current pervasive federal policy against abortion as evidence in six major federal statutory areas and in the Constitution itself the Assimilative Crimes Statute does not operate to assimilate a state statute going beyond the grounds for abortion approved in federal statutes and policy.

F. Judged from the standpoint of what it is in itself, the unborn child is a person and justice demands that government recognize this fact and treat the unborn child for what it is.

Up to this point, the argumentation of amicus has been directed to application of the well-established criteria for interpretation of the Constitution. The final argument that the unborn child is a person focuses upon what the unborn child is in itself. The relevance of this argumentation is that all law, and especially constitutional law, is a method of accomplishing "justice according to the law". For this reason, it is important to determine what the child is itself. If the unborn child must be acknowledged to be a person, the justice demands that this Court construe the Constitution, especially with regard to the constitutional safeguards of the person, so that all government, both state and federal, is required to treat the unborn child for what it is. Justice has always been recognized to involve action, whether by an individual or private or public group, that accords to

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[1] Id. at note 9, p. 296.

an other or others what is their due, what is due is what respects the dignity and needs of the person upon whom the action bears.

The classic definition of the person is that provided by St. Thomas Aquinas in his Summa Theologica. He defined the person as being "the individual substance of a rational nature."[1] By the notion of "individual substance" Aquinas meant that the person has an existence that is peculiar to itself and different and distinct from the existence of anything else, an existence that is not a part of the existence of another but an existence which belongs to it alone: e.g. we refer to "this particular man". By "rational nature" Aquinas had in mind "a reality of human nature. With reference to human being, the reality of human nature is the nature or principle within man that moves us to recognize man as being a different kind of being from other animals. Aquinas had in mind by this principle the cognitive and appetitive rational powers of man, which he discusses in the first part of the second part of his principal work.[2]

The unborn child at every stage of its development satisfies sufficiently the concept of the person. The unborn child is an individual substance, differing from its mother and having a life that is remarkably separate from, although obviously dependent upon, its environment even as the child who has just been born and

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[1]Basic Writings of St. Thomas Aquinas. New York: Random House, 1945. Vol. 1, p. 291 (Part I, Question XXIX, Article I).

[2]Part II-I, Questions VI-XVII, Summa Theologica: Basic Writings of St. Thomas Aquinas Id. Vol. II. pp. 225-316.

man in all his stages is dependent upon his physical and social environment. The unborn child also possesses a rational nature in the sense that all that is to be present in him when born is already formed at an early period in the womb. Professor R. Ashley Montagu of Columbia University has referred to this latter in saying:

> "The basic fact is simple: Life begins, not at birth, but at conception.
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> "This means that a developing child is alive, not only in the sense that he is composed of living tissue, but also in the sense that from the moment of conception, things happen to him, even though he may be only two weeks old, and he looks more like a creature from another world than a human being--he reacts. In spite of his newness and his appearance, he is a living striving human being from the very beginning. 1

It is undisputed that the conceptus, or new fetus, possesses at the moment of its formation the so-called genetic code, the transmitter of all the potentialities that make men human, something that is not present in either their spermatoozoon or ovum. 2

> "Thus it might be said that in all essential respects the individual is whoever he is going to become from the moment of impregnation. He already is this while not knowing this or anything else. Thereafter, his subsequent development cannot be described as his becoming someone he now is not. It can only be described as

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[1]R. Ashley Montagu, Life Before Birth, New York: New American Library, 1964, P. 2

[2]Frederick J. Gottleib, Developmental Genetics (1966) p. 17.

> a process of achieving, a process of becoming the one he already is. Genetics teaches that we were from the beginning what we essentially still are in every cell and in every generally human attribute and in every individual attribute." 1

With respect to the separateness of the unborn child from its mother, it has been observed:

> "The child may be parasitic and dependent, but it is a functioning unit, an independent life... However visceral may be its temporary residence, however dependent it may be before birth--and for some years after birth--it is a living being, with its separate growth and development, with its separate nervous system and blood circulation, with its own skeleton and musculature, its brain and hearing and vital organs." 2

Following the implantation of the fertilized egg in the uterus seven or eight days after ovulation, the development into the human fetus and embryo is extraordinarily rapid. This development has been described by Dr. Andre Hellegers as follows:

> "After this second week of pregnancy the zygote rapidly becomes more complex and is now called the embryo. Somewhere between the third and fourth week the differentiation of the embryo will have been sufficient for heart pumping to occur, although the heart will by no means yet have reached its final configuration. At the

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[1]Paul Ramsey, "Reference Points in Deciding About Abortion" in The Morality of Abortion: Legal and Historical Perspectives, John T. Noonan, Jr., Ed (Harvard Press, 1970) p. 66.

[2]David Granfield, The Abortion Decision, Garden City, Doubleday & Co., 1969, p.25.

end of six weeks all of the internal organs of the fetus will be present, but as yet in a rudimentary stage. The blood vessels leading from the heart will have been fully deployed, although they too will continue to grow in size with growth of the fetus. By the end of seven weeks tickling of the mouth and nose of the developing embryo with a hair will cause it to flex its neck, while at the end of eight weeks there will be readable electrical activity coming from the brain. The meaning of the activity cannot be interpreted. By now also the fingers and toes will be fully recognizable. Sometime between the ninth and tenth week local reflexes appear such as swallowing, squinting, and tongue retraction. By the tenth week spontaneous movement is seen, independent of stimulation. By the eleventh week thumb-sucking has been observed and X rays of the fetus at this time show clear details of the skeleton. After twelve weeks the fetus, now 3-1/2 inches in size, will have completed its brain structure, although growth of course will continue. By this time also it has become possible to pick up the fetal heart by modern electrocardiographic techniques, via the mother."[1]

Dr. H.M.I. Liley, the pioneer of the medical science concerning the human fetus, which is called Fetology, has recently written concerning his observations of the unborn child through closed circuit ex-ray television:

> "The fluid that surrounds the human fetus at 3, 4, 5 and 6 months is essential to both its growth and its grace. The unborn's structure at this

[1]Dr. Andre Hellegers, "Fetal Development," Theological Studies, Vol. 31, No. 1 (March, 1970)

early stage is highly liquid, and although his organs have developed...(t)he head, housing the miraculous brain, is quite large in proportion to the remainder of the body and the limbs are still relatively small. ...(H)e is quite beautiful and perfect in his fashion, active and graceful. He is neither an acquiescent vegetable nor a witless tadpole as some have conceived him to be in the past, but rather a tiny human being as independent as though he were lying in a crib with a blanket wrapped around him instead of his mother."[1]

An eminent child psychologist concluded as early as thirty years ago that the development of the human fetus reflects a mental growth as early as the fourth week.[2] In the sixth to seventh weeks, the nerves and muscles of the unborn child work together for the first time.[3] By eight and a half weeks the child's eyelids and palms of the hands become sensitive to touch.[4] By the end of the twelfth week, each unborn child shows a distinct individuality in his behavior due to the difference in inherited muscle structure from one child to the next. His facial expressions for this reason are already similar to the facial expressions of his parents.[5] By the end of

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[1]H.M.I. Liley and B.F. Day, Modern Motherhood: Pregnancy, Childbirth, and the Newborn Baby, New York: Random House (1967) pp. 26-27.

[2]Arnold Gesell, The First Five Years of Life, New York: Harper Bros. (1940) 11.

[3]Leslie B. Arey, Development Anatomy, Philadelphia: W.B. Saunders Co. (1954) II, VI.

[4]G.L. Flannagan, The First Nine Months of Life, Simon and Shuster (1962).

[5]Arnold Gesell, Embryology of Behavior, Harper Bros. (1945) Ch. IV-VI, X.

the twelfth week, the child can also kick his legs, turn his feet, curl and fan his toes, make a fist, move his thumb, bend his wrist, turn his head, squint, frown, open his mouth, press his lips tightly together.[1] At this point also "we may assert that the organization of his psycho-somatic self is now well under way."[2] From the twelfth to the sixteenth week, the child grows very rapidly, his weight increasing six times and his height to eight or ten inches as a result of his consumption of oxygen and food received from his mother through the placental attachment which is part of the child.[3]

In the fifth month, the baby's weight increases to one pound and his height to one foot. Hair begins to grow on his head, eyebrows, and eyes, his skeleton hardens, and his muscles become much stronger.[4] The baby sleeps and wakes just as it does after birth.[5] The child

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[1]Davenport Hooker, The Prenatal Origin of Behavior, University of Kansas Press (1952).

[2]Arnold Gesell, The First Five Years of Life, New York: Harper Bros. (1940) 65.

[3]L.M. Hellman, et al: "Growth and Development of the Human Fetus Prior to the 20th Week of Gestation," Amer. J. Obstetrics and Gynecology, Vol. 103, No. 6 (Mar. 15, 1969) pp. 789-800 and Bradley M. Patten, Human Embryology, 3d ed. New York: McGraw-Hill (1968), Ch. VII.

[4]Arey, Supra, Ch. II, VI.

[5]Petre-Quadens, O. et al.: "Sleep in Pregnancy: Evidence of Fetal Sleep Characteristics," J. Neurologic Science, Vol. 4, (May-June, 1967), pp. 600-605.

hears and recognizes his mother's voice.[1]

In the sixth month, the child develops a strong muscular grip with his hands, starts to breathe regularly, and can maintain respiratory response for twenty-four hours if born prematurely.[2] He has about a 10 per cent chance of surviving at this point.[3]

The human fetus or unborn child is just as much a patient of the physician as is the mother.[4] With new optical equipment, a physician can look at the amniotic fluid through the cervical canal and predict life-threatening problems that are reflected by a change in the fluid's color and turbidity.[5] The blood of an RH unborn baby can now be exchanged through use of a new image intensifier X-ray equipment and the placement of a needle through the abdominal wall of the mother into the abdominal cavity of the child. This not only makes it possible to save the life of the child but it also reveals that the child experiences pain and protests it just as violently as a baby in a crib and for this reason must be given sedation and pain relieving medication.[6] Recent

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[1]Wood, Carl. "Weightlessness: Its Implications for the Human Fetus," Obstetrics and Gynecology of the British Commonwealth. Vol. 77 (1970) pp. 333-336; Albert W. Liley, "Aukland MD to Measure Light and Sound Inside Uterus," Medical Tribune Report, May 26, 1969.

[2]Flannagan, Supra.

[3]Andre Helligers, National Symposium on Abortion, May 15, 1970, Prudential Plaza Auditorium, Chicago, Ill.

[4]Henry, G. R. "The Role of Amnioscopy in the Prevention of Ante Partum Hypoxia of the Fetus," J. of Obstetrics and Gynecology of the British Commonwealth, Vol. 76 (1969 pp. 790-794.

[5]Liley and Day, Supra, p. 50.

work indicates that the unborn child who is diagnosed as failing to get adequate nutrition may be fed by the physician through introducing nutrients into the amniotic fluid being swallowed by the child.[1] The amniotic fluid surrounding the unborn child offers the physician a convenient and assessable fluid that he can now test in order to diagnose a long list of diseases, just as he tests the urine and blood of his adult patients.[2] Some of these diseases can be treated before birth.[3] The new science has now developed to the point that the fetus can now be partially delivered and, after giving it an exchange blood transfusion, the surgeon can return the unborn child to the amniotic cavity so that it can continue its intrauterine growth. This development during the past eight years indicates that "surgery on the fetus *in utero* is quite feasible, even in early pregnancy" and that "(p)renatal surgery may soon be tried against a variety of crippling or fatal ills that defy postnatal treatment."[4]

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[1]Sevilla, Rafael M., "Oral Feeding of Human Fetus, a Possibility," JAMA, May 4, 1970, pp. 713-717.

[2]O'Doherty, N., "Prenatal Treatment of Adrenal Insufficiency," The Lancet, No. 29 (1969) pp. 1194-1195

[3]E.O. Horger, II and A.L. Hutchinson, Diagnostic Use of Amniotic Fluid," J. Pediatrics, Vol. 75, No. 3, pp. 503-508.

[4]"Fetology: The Smallest Patients," The Sciences (The New York Academy of Sciences, October, 1968) pp. 159-163.

The scientific data just reviewed concerning the unborn child of human beings from the moment of and after its conception emphasizes its individuality; its functional unity; its independent life; its striving, developing nature; its containment of all that it will ever be essentially in every cell, in every generally human attribute, and in every individual attribute; its mental growth from as early as the fourth week after conception; its ability to move its legs, feet, toes, fists, thumbs, head, and lips by the twelfth week of its existence; its ability to hear and recognize its mother's voice in the fifth month of its existence; and its 10 per cent chance of surviving if it is born prematurely in the sixth month. Other scientific data shows the growing ability of medicine to diagnose and to treat successfully the diseases of the unborn child even to the extent of removing the child for the purpose of surgery and then placing it back into its mother's womb.

Surely the above scientific data warrants this Court in taking the position that the unborn child is "an individual substance of a rational nature." The characteristics of the unborn child which this data reveals amply supports the judgment long since universally made by our Founding Fathers and their citizen peers by the Common Law, by the philosophers of natural rights, by adherents to religious beliefs at the time the Constitution was adopted that the unborn child is a human person, a judgment since concurred in by long continued construction of the Constitution by the Congress and by the Chief Executive over a period of 146 years.

Certainly, at a minimun, the above scientific data plus the argumentation set forth previously in this point should move this Court to say that a prima facie case has been made that the unborn child is a human person. This Court has previously known when to construct rules of substantive law that employ the prima facie concept, as in United States v. Philadelphia National Bank, 374 U.S. 321 (1963). In that case, this Court was concerned with lightening the burden of proving under Section 7 of the Clayton Antitrust Act (15 U.S.C. s. 18) that the effect

of a merger "may be substantially to lessen competition" in a relevant market. It created a test that if satisfied by the facts surrounding the particular merger would operate to establish that the merger was prima facie one the effect of which may be substantially lessened competition in the relevant market. The test was developed by this Court in light of what it characterizes as an "intense congressional concern with the trend toward concentration." Id. at 363. This Court selected certain percentages relative to market share resulting from a merger from which it would conclude that the merger was prima facie one that might produce the prohibited economic effect. It justified its selection of these percentages in light of prior adjudications under other phases of antitrust law. Applying these prima facie substantive rules in the Philadelphia Bank case, this Court observed:

> "There is nothing in the record of this case to rebut the inherently anticompetitive tendency manifested by these percentages." Id. at 366.

What this Court did in the Philadelphia Bank case is entirely instructive for what it should do in this case. Amicus has clearly demonstrated the considerations that warrant this Court in concluding that the unborn child is or at least prima facie is a human person within the meaning of the Constitution of the United States entitled to invoke or have invoked in its behalf by the state the constitutional safeguards of the person. If this Court is unwilling to hold that the unborn child is a human person, it should at least hold that prima facie it is a human person and that the burden should shift, for constitutional purposes, to those who assert the unborn child is not a human person to demonstrate that proposition. In record of this case and in the briefs of appellants there is nothing to rebut many considerations that argue so strongly in favor of treating the unborn child as a human person within the meaning of the Constitution. In fact, the appellants never addressed themselves to this point in any substantial way.

If this Court found it advisable to construct substantive rules employing the "prima facie" concept so as to put the burden upon those who have merged elements of an industry to demonstrate that they are not what these substantive rules indicate they are, surely it is advisable for this Court to construct substantive rules employing the "prima facie" concept so as to put the burden upon those who challenge the existence of the quality of person in the unborn child to show that that child is not a person. It must surely be advisable for this Court to do at least this much in view of the consequences for the unborn child of invalidating the state law of abortion that protects its life. Surely, the views of the Founding Fathers and their citizen peers, the Common Law, the philosophers of natural rights, and adherents to religious beliefs at the time the Constitution was founded plus the long continued construction of the Constitution by the Congress and the Chief Executive concerning the unborn child as a person within the meaning of the Constitution manifest a very "intense...concern" with preventing destruction of the unborn child and promoting its interests. Surely, the prior decisions of this Court concerning the law that is applicable as the rule for decision by federal courts in diversity cases alone warrants such an approach.

We need not and should not confine our analysis to the view of Americans or Englishmen, either historically or currently, concerning whether the unborn child should be viewed as a human person. In 1959 the United Nations adopted a "Declaration of the Rights of the Child" which constituted a supplement to its "Universal Declaration of Human Rights." Its preamble stated the reason for the supplementary declaration as being that

> "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." G.A. Res. 1836, 14 U.N. GAOR Supp. 16 at 19, U.N. Doc. A/4354 (1959).

In elaborating the rights of the child, the United Nations took the position that it should be protected against all forms of neglect cruelty and exploitation, enabled to grow and develop in health, and have provided both to

him and to his mother,...adequate prenatal and postnatal care." General Assembly of the United Nations, "Declaration of the Rights of the Child."[1]

The result of the argument in subpoint F is that there is extraordinarily sound ground for holding that the unborn child is, when considered from the standpoint of what he is, in himself, a person and, in justice, entitled to be treated for what he is by this Court in administering the constitutional safeguards of that person. A consideration of modern scientific data concerning the unborn child confirms that he possesses the qualities or characteristics that philosophy has long since established as the hallmarks of the human person: "an individual substance of rational nature." This data in relation to the classic philosophic definition of the person serve to confirm the view taken by various significant sources at the time of the adoption of the Constitution; by the Congress and The Chief Executive in their long-continued construction of the Constitution; by the definition given to the concept of property in the Fifth and Fourteenth Amendments by this Court; by the construction given to Article III by this Court with respect to the rule for decision in diversity cases; by this Court's recognition of the reasonable authority of the State to protect the life and health of children; by this Court's placing of fundamental concepts, such as religion, beyond the authority of the State or Nation to define; by the State's common and statute law recognition of the unborn child as a person; and by the United Nations in its "Declaration of the Rights of the Child.

The argument under Point I would seem overwhelmingly to require this Court to hold the unborn child is a person within the protection of the Constitution. But, if amicus is wrong in this, that argument at the minimum would seem to require this Court to note that it establishes a prima facie case for holding the unborn child to be a person and is sufficient to put the burden upon the appellents which they have in no respect discharged either before the lower court or this Court, of demonstrating that the unborn child is not a person.

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[1] Official Records, pp. 19-20.

POINT TWO

THE UNBORN CHILD BEING A PERSON AND HAVING THE RIGHT TO LIFE WITHIN THE MEANING OF THE CONSTITUTIONAL SAFEGUARDS OF THE PERSON, THE STATE HAS THE DUTY OR THE RIGHT UNDER THE CONSTITUTION TO PROTECT THE LIFE OF THAT CHILD REASONABLY VIS-A-VIS ITS SINGLE MOTHER OR MARRIED PARENTS WHO DESIRE TO TERMINATE ITS LIFE. THE STATE OF TEXAS IN PROVIDING THAT ALL ABORTIONS PERFORMED OR PROCURED BY A PERSON FOR A PREGNANT WOMAN WITH HER CONSENT THROUGH ADMINISTRATION OF ANY MEANS WHATEVER IS A FELONY EXCEPT SUCH AN ABORTION PROCURED OR ATTEMPTED BY MEDICAL ADVICE FOR THE PURPOSE OF SAVING THE LIFE OF THE MOTHER HAS REASONABLY ACTED TO PROTECT THE RIGHT TO LIFE OF THE UNBORN CHILD WITHOUT UNREASONABLY AFFECTING THE RIGHTS OF ITS SINGLE MOTHER OR MARRIED PARENTS.

A. The state is faced with a difficult decision-making problem in resolving the correlative rights of the unborn child as a person and of its single mother or married parents, and its decision to protect the life of the unborn child through an abortion statute should be allowed to stand if it is a reasonable decision.

Once it is determined that the unborn child is a person within the meaning of the constitutional safeguards of the person, the state is no longer capable of standing neutrally by with respect to the treatment of the unborn child by its single mother, its married parents, or by a physician employed by them to destroy its life. This proposition is even more obviously true once the state has acted, as all states have long since done and all still do in one or more respects, to protect the life and other interests of the unborn child either in the civil law or the criminal law or, as is usually the case, in both areas Because the unborn child is a person, the state is faced with the question of the extent to which it is required to protect the life and other interests of that person with reference to the due process and equal protection concepts as well as other constitutional safeguards of the person.

It must consider that, apart from giving permission to others to take the life of the unborn child being considered as state action in view of its prior action which may be tested as to its constitutional validity, such a permission will extend to agents and employees of the state in many circumstances so that state action will be involved directly with the carrying out of such a policy. The state must also consider what it may or should reasonably do to give effect to the desires of its citizens relative to the protection of the life and other interests of the unborn child and of the interests of the state in that child.

This Court has had occasion to consider the rights of parents vis-a-vis their children in a challenge to the constitutional validity of state statutes limiting those rights. For example, in Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944), this Court was faced with the contention that a state statute precluding labor by a child of tender years in distributing religious tracts was a violation of its parent's constitutional rights to freedom of conscience and religious practice and to freedom to bring up its child in a religion. Recognizing that the rights asserted by the parent have a "preferred position in our basic scheme," Mr. Justice Rutledge in the opinion for the Court, spoke of the appropriate approach to be used in evaluating the constitutional validity of the state statute in question:

> "To make accommodation between these freedoms and an exercise of state authority always is delicate. It hardly could be more so than in such a clash as this case presents. On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters. Against these sacred private interests, basic in a democracy, stand the interests of society to protect the

> welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved. The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent, well-developed men and citizens. Between contrary pulls of such weight the safest and most objective recourse is to the lines already marked out, not precisely but for guides, in narrowing the no man's land where this battle has gone on."

Rejecting the position of Justice Murphy that any restriction of First Amendment freedoms must be treated by the Cout as "prima facie invalid" and as placing the burden on the state "to prove the reasonableness and necessity" of its regulation, 321 U.S. at 166, Mr. Justice Rutledge stated for the Court:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. Pierce v. Society of Sisters, supra (268 U.S. 510). And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.
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> "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. Reynolds v. United States, 98 U.S. 145; Davis v. Beason, 133 U.S. 333. And Neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's

course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

"A democratic society rests, for its continuance, upon the health, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. ...

"The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at time does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated of emotional excitement and psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves. Massachusetts has determined that an absolute prohibition, though one limited to streets and public places and to the incidental