

in and out of his lungs with inhaling and exhaling respiratory movements.⁹⁵ [See Fig. 5.]

The movement of the child has been recorded at this early stage by placing delicate shock recording devices on the mother's abdomen and direct observations have been made by the famous embryologist, Davenport Hooker, M.D. Over the last thirty years, Dr. Hooker has recorded the movement of the child on film, some as early as six weeks of age. His films show that prenatal behavior develops in an orderly progression.⁹⁶

The prerequisites for motion are muscles and nerves. In the sixth to seventh weeks, nerves and muscles work together for the first time.⁹⁷ If the area of the lips, the first to become sensitive to touch, is gently stroked, the child responds by bending the upper body to one side and making a quick backward motion with his arms. This is called a total pattern response because it involves most of the body, rather than a local part. Localized and more appropriate reactions such as swallowing follow in the third month. By the beginning of the ninth week, the baby moves spontaneously without being touched. Sometimes his whole body swings back and forth for a few moments. By eight and a half weeks the eyelids and the palms of the hands become sensitive to touch. If the eyelid is

⁹⁵Flannagan, G.L.: *The First Nine Months Of Life*, supra.

Hooker, Davenport: *The Prenatal Origin Of Behavior*, supra.

⁹⁶Hooker, Davenport: *The Prenatal Origin Of Behavior*, supra.

Hooker, Davenport: *Early Human Fetal Behavior With A Preliminary Note On Double Simultaneous Fetal Stimulation*, Proceedings of the Association for Research in Nervous and Mental Disease, Baltimore, The Williams & Wilkins Co., 1954.

Gesell, Arnold, M.D., Amatruda, C.S., M.D.: *Developmental Diagnosis*, P. S. Hober, 1958 pp. 8-9.

⁹⁷Arey, Leslie M.: *Developmental Anatomy*, supra.



Fig. 5-12. weeks

stroked, the child squints. On stroking the palm, the fingers close into a small fist.⁹⁸

In the ninth and tenth weeks, the child's activity leaps ahead. Now if the forehead is touched, he may turn his head away and pucked up his brow and frown. He now has full use of his arms and can bend the elbow and wrist independently. In the same week, the entire body becomes sensitive to touch.⁹⁹ [See Fig. 6.]

The twelfth week brings a whole new range of responses. The baby can now move his thumb in opposition to his fingers. He now swallows regularly. He can pull up his upper lip; the initial step in the development of the sucking reflex.¹⁰⁰ By the end of the twelfth week, the quality of muscular response is altered. It is no longer marionette-like or mechanical—the movements are now graceful and fluid, as they are in the newborn. The child is active and the reflexes are becoming more vigorous. All this is before the mother feels any movement.¹⁰¹ [See Figs. 5 and 7.]

Every child shows a distinct individuality in his behavior by the end of the third month. This is because the actual structure of the muscles varies from baby to baby. The alignment of the muscles of the face, for example, follow an inherited pattern. The facial expressions of the

⁹⁸Hooker, Davenport: *Early Human Fetal Behavior With A Preliminary Note On Double Simultaneous Fetal Stimulation*, supra.

Hooker, Davenport: *The Prenatal Origin Of Behavior*, supra.

Flannagan, G.L.: *The First Nine Months Of Life*, supra.

Hooker, Davenport: *The Origin Of Overt Behavior*, Ann Arbor, Univ. of Michigan Press, 1944.

⁹⁹Hooker, Davenport: *The Prenatal Origin Of Behavior*, supra.

¹⁰⁰Gairdner, Douglas: *Fetal Medicine: Who Is To Practice It*, supra.

¹⁰¹Gairdner, Douglas: *Fetal Medicine: Who Is To Practice It*, supra.

Hooker, Davenport: *The Origin Of Overt Behavior*, supra.



Fig. 6-10 weeks

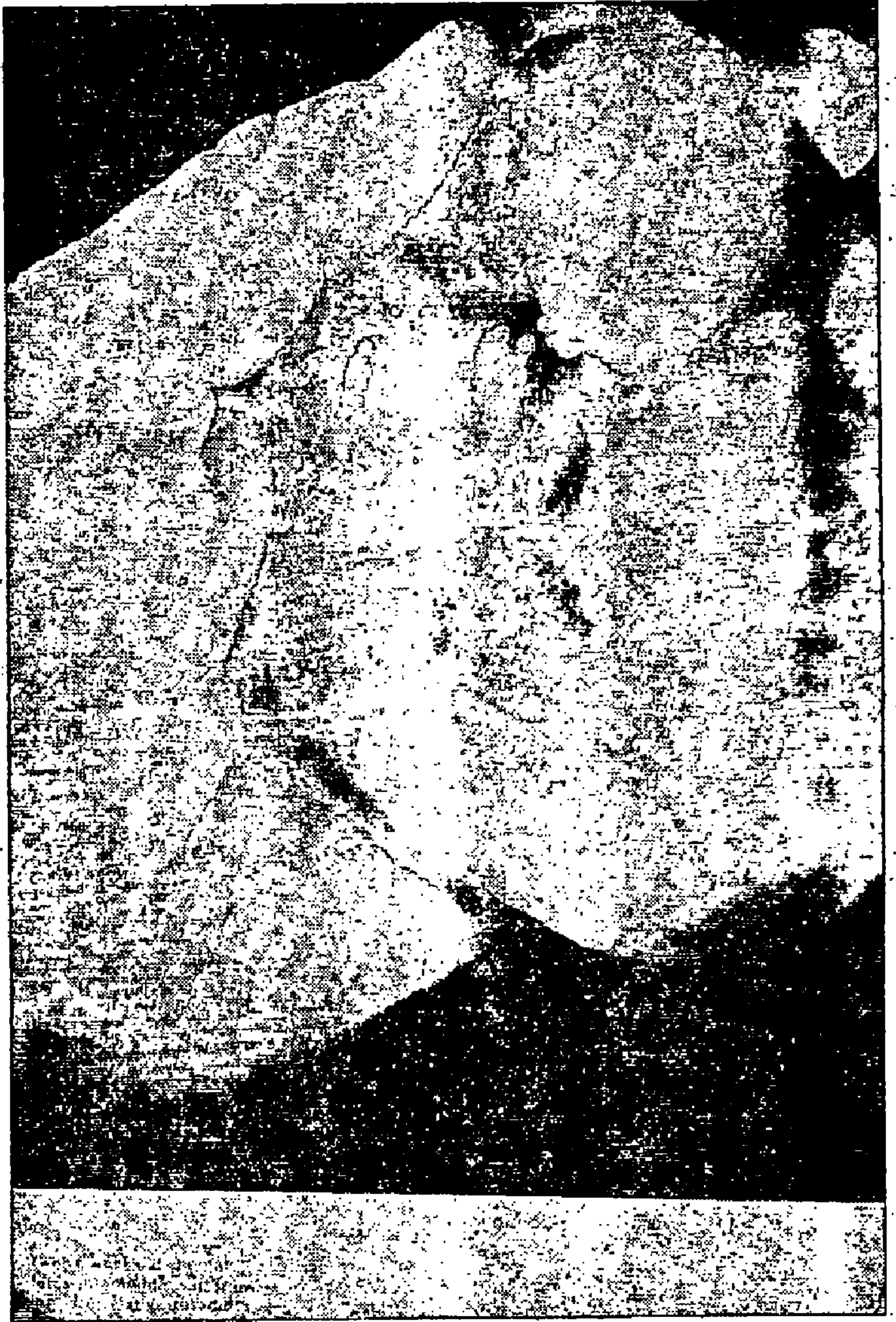


Fig. 7-12 weeks

baby in his third month are already similar to the facial expressions of his parents.¹⁰² [See Figs. 5 and 7.]

Further refinements are noted in the third month. The fingernails appear. The child's face becomes much prettier. His eyes, previously far apart, now move closer together. The eyelids close over the eyes. Sexual differentiation is apparent in both internal and external sex organs, and primitive eggs and sperm are formed. The vocal cords are completed. In the absence of air they cannot produce sound; the child cannot cry aloud until birth, although he is capable of crying long before.¹⁰³

From the twelfth to the sixteenth week, the child grows very rapidly.¹⁰⁴ His weight increases six times, and he grows to eight to ten inches in height. For this incredible growth spurt the child needs oxygen and food. This he receives from his mother through the placental attachment—much like he receives food from her after he is born. His dependence does not end with expulsion into the external environment.¹⁰⁵ We now know that the placenta belongs to the baby, not the mother, as was long thought.¹⁰⁶ [See Fig. 8.]

¹⁰²Flannagan, G.L.: *The First Nine Months Of Life*, supra.
Still, J.W.: *J. Washington Acad. Sci.*, supra.
Gesell, Arnold: *The Embryology Of Behavior*, supra.

¹⁰³Arey, Leslie B.: *Developmental Anatomy*, supra.
Flannagan, G.L.: *The First Nine Months Of Life*, supra.
Patten, Bradley M.: *Human Embryology*, supra.
Gairdner, Douglas: *Fetal Medicine: Who Is To Practice It*, supra.

¹⁰⁴Hellman, L.M., et al: *Growth And Development Of The Human Fetus Prior To The 20th Week of Gestation*, *Am. J. Obstet. and Gynec.* Vol. 103, No. 6, March 15, 1969, pp. 789-800.

¹⁰⁵Arey, Leslie B.: *Developmental Anatomy*, supra.
Patten, Bradley M.: *Human Embryology*, supra.

¹⁰⁶Gairdner, Douglas: *Fetal Medicine: Who Is To Practice It*, supra.



Fig. 8-16 weeks

In the fifth month, the baby gains two inches in height and ten ounces in weight. By the end of the month he will be about one foot tall and will weigh one pound. Fine baby hair begins to grow on his eyebrows and on his head and a fringe of eyelashes appear. Most of the skeleton hardens. The baby's muscles become much stronger, and as the child becomes larger his mother finally perceives his many activities.¹⁰⁷ The child's mother comes to recognize the movement and can feel the baby's head, arms and legs. She may even perceive a rhythmic jolting movement—fifteen to thirty per minute. This is due to the child hiccupping.¹⁰⁸ The doctor can now hear the heartbeat with his stethoscope.¹⁰⁹ [See Figs. 9 and 10.]

The baby sleeps and wakes just as it will after birth.¹¹⁰ When he sleeps he invariably settles into his favorite position called his "lie". Each baby has a characteristic lie.¹¹¹ When he awakens he moves about freely in the bouyant fluid turning from side to side, and frequently head over heel. Sometimes his head will be up and sometimes it will be down. He may sometimes be aroused from sleep by external vibrations. He may wake up from a loud tap on the tub when his mother is taking a bath. A loud concert or the vibrations of a washing machine may also stir him into activity.¹¹² The child hears and recognizes his

¹⁰⁷Arey, Leslie B.: *Developmental Anatomy*, supra.

¹⁰⁸Flannagan, G.L.: *The First Nine Months Of Life*, supra.

Gairdner, Douglas: *Fetal Medicine: Who Is To Practice It*, supra.

¹⁰⁹Arey, Leslie B.: *Developmental Anatomy*, supra.

Flannagan, G.L.: *The First Nine Months Of Life*, supra.

¹¹⁰Petre-Quadens, O., et al: *Sleep In Pregnancy: Evidence Of Fetal Sleep Characteristics*, J. Neurologic Science, 4:600-605, May, June, 1967.

¹¹¹Gairdner, Douglas: *Fetal Medicine: Who Is To Practice It*, supra.

¹¹²Flannagan, G.L.: *The First Nine Months Of Life*, supra.



Fig. 9-17 weeks



Fig. 10—18 weeks

mother's voice before birth.¹¹³ Movements of the mother, whether locomotive, cardiac or respiratory, are communicated to the child.¹¹⁴

In the sixth month, the baby will grow about two more inches, to become fourteen inches tall. He will also begin to accumulate a little fat under his skin and will increase his weight to a pound and three-quarters. This month the permanent teeth buds come in high in the gums behind the milk teeth. Now his closed eyelids will open and close, and his eyes look up, down and sideways. Dr. Liley of New Zealand feels that the child may perceive light through the abdominal wall.¹¹⁵ Dr. Still has noted that electroencephalographic waves have been obtained in forty-three to forty-five day old fetuses, and so conscious experience is possible after this date.¹¹⁶

In the sixth month, the child develops a strong muscular grip with his hands. He also starts to breathe regularly and can maintain respiratory response for twenty-four hours if born prematurely. He may even have a slim chance of surviving in an incubator. The youngest children known to survive were between twenty to twenty-five weeks old.¹¹⁷ The concept of *viability* is not a static one. Dr. Andre Hellegers of Georgetown University states that 10% of children born between twenty weeks and twenty-four

¹¹³Wood, Carl: *Weightlessness: Its Implications For The Human Fetus*, J. Obstetrics & Gynecology of the British Commonwealth, 1970 Vol. 77, pp. 333-336.

Liley, Albert W.: *Auckland MD To Measure Light And Sound Inside Uterus*, Medical Tribune Report, May 26, 1969.

¹¹⁴Wood, Carl: *Weightlessness: Its Implications For The Human Fetus*, supra.

¹¹⁵Liley, Albert W.: *Auckland MD To Measure Light And Sound Inside Uterus*, supra.

¹¹⁶Still, J.W.: Washington Acad. Sci., supra.

¹¹⁷Flannagan, G.L.: *The First Nine Months Of Life*, supra.

weeks gestation will survive.¹¹⁸ Modern Medical intensive therapy has salvaged many children that would have been considered non-viable only a few years ago. The concept of an artificial placenta may be a reality in the near future and will push the date of viability back even further, and perhaps to the earliest stages of gestation.¹¹⁹ After twenty-four to twenty-eight weeks the child's chances of survival are much greater.

This review has covered the first six months of life. By this time the individuality of this human being should be clear to all unbiased observers. When one views the present state of medical science, we find that the artificial distinction between born and unborn has vanished. The whole thrust of medicine is in support of the motion that the child in its mother is a distinct individual in need of the most diligent study and care, and that he is also a patient whom science and medicine treats just as it does any other person.¹²⁰

This review of the current medical status of the unborn serves us several purposes. Firstly, it shows conclusively the humanity of the fetus by showing that human life is a continuum which commences in the womb. There is no magic in birth. The child is as much a child in those

¹¹⁸Monroe, *Canadian Medical Association's Journal*, 1939.

Hellegers, Andre, M.D.: *National Symposium On Abortion*, May 15, 1970, Prudential Plaza, Chicago, Illinois.

¹¹⁹Zapol, Warren, and Kolobow, Theodore: *Medical World News*, May 30, 1969.

Alexander, D.P.; Britton, H.G.; Nixon, D.A.; *Maintenance Of Sheep Fetuses By An Extra Cororeal Circuit For Periods Up To 24 Hours*, *Am. J. Obstet. and Gynec.*, Vol. 102, No. 7, Dec. 1968, pp. 969-975.

¹²⁰*Fetology: The Smallest Patients. The Sciences*, published by the New York Academy of Sciences, Vol. 8 No. 10, Oct. 1968, pp. 11-15.

Gairdner, Douglas: *Fetal Medicine: Who Is To Practice It*, *supra*.

several days before birth as he is those several days after. The maturation process, commenced in the womb, continues through the post-natal period, infancy, adolescence, maturity and old age. Dr. Arnold Gesell points out in his work that no king ever had any other beginning than have had all of us in our mother's womb.¹²¹ Quickening is only a relative concept which depends upon the sensitivity of the mother, the position of the placenta, and the size of the child. °

VII. THE STATE OF TEXAS HAS A LEGITIMATE INTEREST IN PROHIBITING ABORTION EXCEPT BY MEDICAL ADVICE FOR THE PURPOSE OF "SAVING THE LIFE OF THE MOTHER".

There seems little argument necessary if one can conclude the unborn child is a human being with birth but a convenient landmark in a continuing process—a bridge between two stages of life. The basic postulates from which the Appellees' arguments proceed are: (1) the pregnant woman has a right of control over her own body as a matter of privacy guaranteed to her by the Constitution of the United States; and (2) this right cannot be interfered with by the state since the state cannot demon-

¹²¹Gesell, Arnold: *The Embryology Of Behavior*, supra.

*If the court is interested in the actual medical history on nineteenth century legislative opposition to abortion, it may consult the American Medical Association, 1846-1951 *Digest of Official Actions* (edited F.J.L. Blasingame 1959), p. 66, where a list of the repeated American Medical Association attacks on abortion are compiled. It will be seen that the great medical battle of the nineteenth century was to persuade legislatures to eliminate the requirement of quickening and to condemn abortion from conception, see Isaac M. Quimby *Introduction to Medical Jurisprudence*, Journal of American Medical Association, August 6, 1887, Vol. 9, p. 164 and H. C. Markham *Foeticide and Its Prevention*, *ibid.* Dec. 8, 1888, Vol. 11, p. 805. It will be seen that the Association unanimously condemned abortion as the destruction of "human life", American Medical Association, *Minutes of the Annual Meeting 1859*, The American Medical Gazette 1859, Vol. 10, p. 409.

strate any compelling interest to justify its intrusion. The contrary position is the state's interest in preventing the arbitrary and unjustified destruction of an unborn child—a living human being in the very earliest stages of its development. Whatever personal right of privacy a pregnant woman may have with respect to the disposition and use of her body must be balanced against the personal right of the unborn child to life.

Whatever the metaphysical view of it is, or may have been, it is beyond argument that legal concepts as to the nature and rights of the unborn child have drastically changed, based on expanded medical knowledge, over the last 2,500 years.

In addition to the provisions of 22 D C Code 201,¹²² the Congress of the United States has clearly indicated a firm general policy of the Federal government against abortion. 18 U.S.C. 1461 provides in part as follows:

“Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

Every article or thing designed, adapted, or intended for preventing conception or producing *abortion*, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing *abortion*, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made or where or by whom any act or operation of any kind for the procuring or producing of *abortion* will be done or performed, or how or by what means conception may

¹²²The District of Columbia abortion statute in issue in *United States v. Vuitch*.

be prevented or *abortion* produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing *abortion*, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

...” (Emphasis added).

It is most seriously argued that the “life” protected by the Due Process of Law Clause of the Fifth Amendment includes the life of the unborn child. Further, it would be a denial of equal protection of law not to accord protection of the life of a person who had not yet been born but still in the womb of its mother. If it is a denial of equal protection for a statute to distinguish between a thief and an embezzler under a statute providing for the sterilization of the one and not the other,¹²³ then it is surely a denial of equal protection for either the state or federal government to distinguish between a person who has been born and one living in the womb of its mother.

In *Katz v. United States*, supra, this Court, after concluding that the Fourth Amendment cannot be translated into a general constitutional “right to privacy” and after making reference to other provisions of the Constitution of the United States protecting personal privacy from other forms of governmental intrusion,¹²⁴ stated that “. . . the protection of a person’s *general* right to privacy—his right to be let alone by other people—is, like the protection of

¹²³*Skinner v. Oklahoma*, 316 U.S. 535 (1942)

¹²⁴Note 5 at page 510.

his property and of his very life, left largely to the law of the individual States". 389 U.S. at 352. Compare *Kovacs v. Cooper*, 336 U.S. 77 (1949).

If it be true that the compelling state interest in prohibiting or regulating abortion did not exist at one time in the stage of history, under the result of the findings and research of modern medicine, a different legal conclusion can now be reached. The fact that a statute or law may originally have been enacted to serve one purpose does not serve to condemn it when the same statute, with the passage of time, serves a different but equally valid public purpose. See *McGowan v. Maryland*, 366 U.S. 420 (1961).

CONCLUSION

For the reasons above stated Appellee submits that the appeal from the judgment of the lower court denying injunctive relief to the Appellants should be affirmed; that this Court consider plenary review of this entire case and reverse the judgment of the court below declaring Articles 1191, 1192, 1193, 1194 and 1196 of the Texas Penal Code unconstitutional and enter its order accordingly.

Respectfully submitted,

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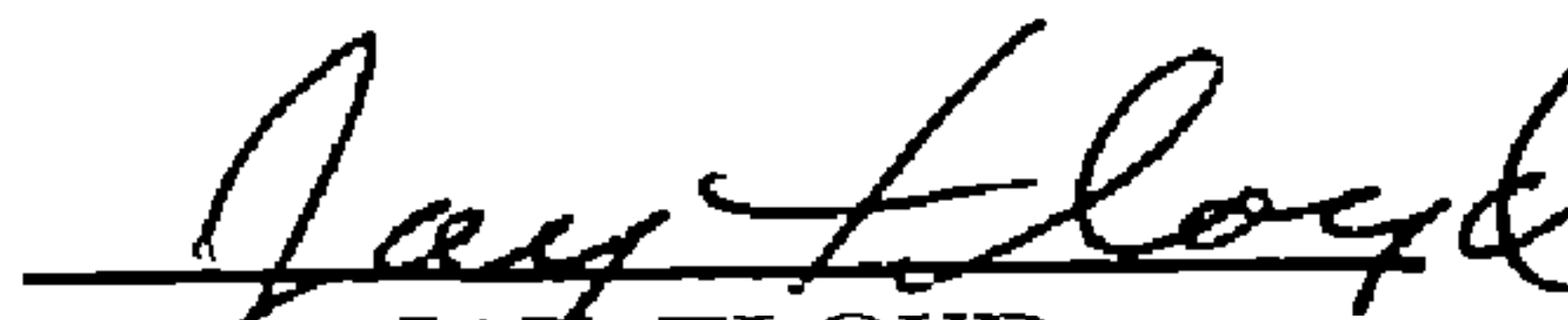
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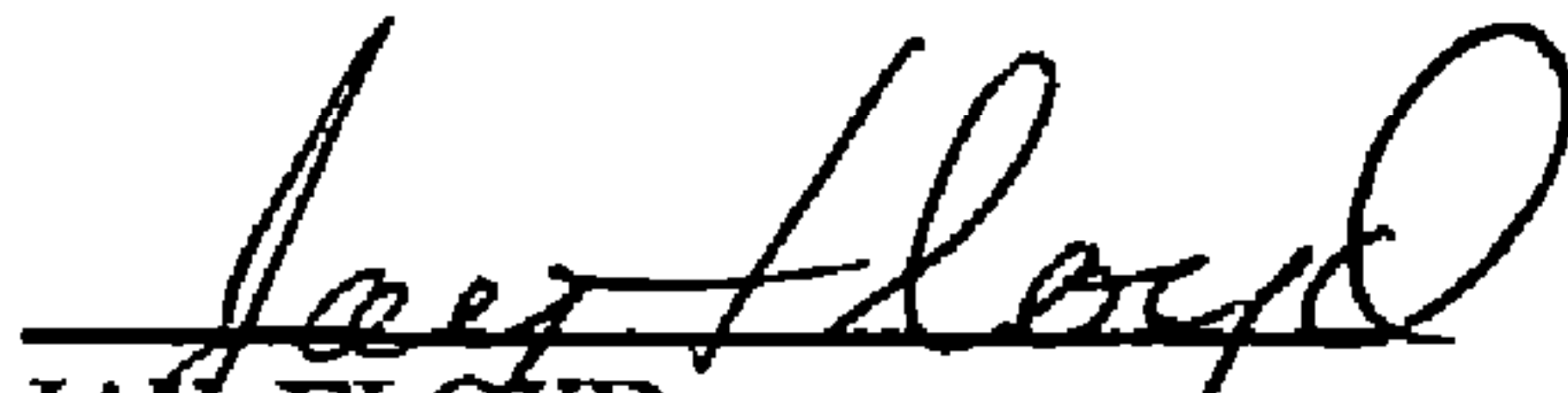

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CERTIFICATE OF SERVICE

I, Jay Floyd, Assistant Attorney General of Texas, Attorney for Appellee, do hereby certify that a copy of the above and foregoing Brief of Appellee has been deposited in the United States Mail, postage prepaid, on this the 18TH day of October, 1971, to the following addresses: Roy Lucas, James Madison Constitutional Law Institute, Four Patchin Place, New York, New York, 10011; Sarah Weddington and James R. Weddington, 709 West 14th Street, Austin, Texas 78701; Linda N. Coffee, 2130 First National Bank Building, Dallas, Texas 75202; Fred Bruner and Roy L. Merrill, Jr., Daugherty, Bruner, Lastelick & Anderson, 1130 Mercantile Bank Building, Dallas, Texas 75201; and Norman Dorsen, School of Law, New York University, Washington Square, New York, New York 10003.


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